CHURCH AND STATE LAW'S COLLABORATION IN LATVIA (2004)

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The Latvian state is characterised by religious tolerance, which is an important factor in the enforcement of human rights and should be explained by the historical situation within which Latvia has developed as a multi-confessional country.

Before the German expansion in the 12th century, the territory of Latvia was inhabited by many kindred Baltic tribes (*zemgļli, kurši, latgaļi*). The most widespread religion among these tribes was kind of paganism *"Dievturība"*. Taking into account that Latvia is neighbouring with the orthodox Russia, there have been some unsuccessful attempts to convert Latgali tribes to the orthodox faith. According to historical records, Russian priests started to preach the orthodox religion in Latvia already in the 9th and 10th centuries. [1] In 1180 German Monk *Meinhardt* who had a special approval from the *Knyaz of Polozk* (as part of the Latvia fell in the Russia's sphere of interest) started to preach in Latvia. When he failed to convert the pagan tribes to Christianity, he approached the Roman Pope with the request to open a crusade in the Baltic. The aim of this war was to introduce Christianity in the Baltic. The request was approved, following which the German invasion in Latvia began. Despite some isolated freedom fights, Latvia was under the German control in the 13th century. Afterwards, under the influence of German landowners the Lutheran doctrine spread out, which later served as a good soil for other branches of Protestantism. The year 1524 is therefore considered as the year of the foundation of the Latvian Evangelic Lutheran Church. After Sweden lost the Nordic War Latvia was included in the Russian Empire in the 18th century. Russia tried to convert the newly acquired lands to the "Tsar's faith". Orthodox religion did not become popular among Latvians; however, a certain part of Latvians adhered to it. Since the second half of the 17th century Old Believers became active in Latvia. Notwithstanding Latvia being part of the Russian Empire, the Old Orthodox believers in Latvia had found their haven due to special and more liberal religious policy implemented in this region comparing to others. Latvian Old Orthodox believers are the world's biggest group of Old Believer Orthodox denomination in the world and in the Riga Grebenschikov church being the largest worship building of this belief in the world, the quantitatively largest congregation (5000 adherents) is functioning. It should be noted also about the Jews. Currently in Latvia are residing about 5.000 adherents to the Jewish people, while before the Second World War there were 100.000 of them in Latvia. The reason for decrease of the number of adherents to the Jewish denomination, is the holocaust practised by Nazis. Seventh Day's Adventists and Baptists in Latvia are active since the end of 19th century, Methodists, Jehovah's Witnesses, Muslims, Christian Science - since the beginning of 20th century.

The first Republic of Latvia was established on November 18, 1918 and existed till the Soviet's occupation in 1940. The second Republic of Latvia was established in 1991.[*] The independent democratic Republic of Latvia was proclaimed in 1918, which largely became possible due to the promise of the state founders, representatives of the Catholic region, to sign an agreement with the Holy See on the legal status of Roman Catholics in the country. Thus, the territorial unity of the Latvian State depended on the religious tolerance towards the Catholics. The Republic of Latvia was formed by uniting the Catholic region of Latgale and Lutheran Vidzeme, Kurzeme and Zemgale. These extremely diverse eastern and western regions could be brought together only thanks to tolerance of the state founders. At the time of their uniting these regions each were in a different Russian territorial division. Apart from the different language

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[1] *Balodis R.*, History of State and Church Relationships in Latvia/ European Journal for Church and State Research//European Consortium for Church-State research Belgium 2001.-Volume 8 295-317.

[*] Actually from Latvian constitutional point of view the Latvian State in 1991 was renewed, and not established. The Republic of Latvia restored in 1991 is a legitimate and internationally recognised successor of rights and obligations to the country invaded in 1940.

and history, Latgale at that time had an entirely different regulatory mechanism. The welfare level of the region was really low compared to other regions of Latvia. There was a possibility that religious disagreements and the concern of Latgale Catholics about possible religious discrimination on the part of Lutherans could result in a refusal to join Latgale to the State of Latvia.

One of the recent trends is "penetration" of the Roman Catholic Church into traditional Lutheran areas, while the new religious movements have already gained foothold in the largest cities of Latvia and starting to expand also into remote districts.

Nowadays, in the beginning of the 21st century, Latvia is a multi-confessional country, where the 3 largest denominations are the Catholics, the Lutherans and the Orthodox Church. In general, there are about 170 different denominations and religious groups. The largest include: Pentecostal's Congregation, Baptists, Methodists, Seventh Day Adventists, Muslims, Buddhists, Mormons, Jehovah's Witnesses, Scientologists, Christian Science, Moonists etc. Up to the October 2003 the Justice Ministry has registered 1098 congregations. This total includes: Lutheran (307), Roman Catholic (252), Orthodox (117), Baptist (90), Old Believer Orthodox (67), Seventh Day's Adventist (47), Jehovah's Witnesses (12), Methodists (12), Jewish (13), Buddhist (5), Muslim (5), Hare Krishna (10), Church of Jesus Christ of Latter-Day Saints (Mormons) (3), and more than 100 others.[**]

According to a survey made by Latvian public opinion research centre in 2003, 49.3% inhabitants of Latvia do not read the Bible, 4% - are reading the Bible almost every day, and more than a half of inhabitants of Latvia from time to time are reading the Holy Scripture. According to the survey data, 25% of population indicate themselves being Orthodox, 25% - being Lutherans, 21% - Roman Catholics, 2,7% - Old Believer Orthodox, 0,4% - Adventists and 0,1% - Jews. Under this survey 9% consider themselves to be believers, however they cannot reckon themselves in particular denomination, while 12% has specified as being non-believers.[3] There are significant numbers of atheists. Orthodox Christians, many of them Russian-speaking, non-citizen, permanent residents, are concentrated in the major cities, while many Catholics live in the east.

Data at disposal of the Board of Religious Affairs seem to be more reliable since these are data from denominations themselves. According to these data Roman Catholics have 433 480 members, Ev. Lutherans – about 400 300, Orthodox - 350 000, Old Believers - 60 000, Baptists - 6 788, Evangelical Religion Christians and New Generation - 6 589, the Seventh Day's Adventists - 3 869, Trinity (Pentecost) – 3 721, Muslims – 1000, New Apostolic – 973, Methodists – 750, the Last Day Saints (Mormons) – 605, neopagans ''Dievturi'' - 603, Jews – 550, Augsburg Religion Lutherans - 392, Armenian Orthodox Apostolic Church – 275, Jehovah's Witnesses– 115, Krishna followers – 135 (in 1995 - 2 400!), Buddhists – 75, Reformats – 95, Bahai' – 48, followers of *Vissarion* – 23, Presbyterians - 14. Others religions totally have 1253 members. With regard to Ev. Lutherans it must be noted that in 2000 the Church indicated the figure of 400 3000, while in 2001 and subsequent years, objecting to exaggerated, to their mind, number of Catholics and Orthodox believers (appearing through application of different numeration methods) it is indicating a figure of 37 000 in reports to the Board of Religious Affairs. Taking into account data about number of believers provided by other churches, it seems that to Ev. Lutherans the number of believers in 2001 being 400 300 would have matched better. In regard to Muslims it should be said that the number is rather approximate.

Statistics on Religious Confession Congregations Registered in Latvian Republic by 1 October, 2003

[**] Latvia is a country of 2.3 million people, living in the area of size 64,589 sq. km near the Baltic Sea. Ethnic composition of Latvia in 2000 was as follows: Latvians 57.6%, Russians 29.6%, Byelorussians 4.1%, Ukrainians 2.7%, Poles 2.5%, Lithuanians 1.4%, Jews 0.4%, Germans 0.1% and others 1.6%. (*Results of the 2000 population and housing census in Latvia - collection of statistical data.- Central Statistical Bureau of Latvia. Riga, 2002.*)

[3] Information of the Latvian news agency LETA, year 2003.

No	Confession	Dynamics of communities number in confession			
		1980	1990	2000	2003
1.	Roman Catholics	178	187	247	252
2.	Evangelical Lutherans	206	252	302	307
3.	Augsburg Religion Lutherans	—	—	9	10
4.	Orthodox	88	89	112	117
5.	Old Believers	68	65	66	67
6.	Baptists	62	61	87	90
7.	The Seventh Day's Adventists	23	28	46	47
8.	Methodists	—	—	10	12
9.	Jews	4	4	8	13
10.	Muslims	—	—	6	5
11.	Vaishna followers (Krishna followers)	—	—	10	10
12.	New Apostolic	—	—	11	11
13.	Trinity (Pentecost)	2	7	77	57
14.	Evangelical Religion Christians and New Generation	—	—	16	43
15.	Buddhists	—	—	3	5
16.	*God Supporters*	—	—	13	13
17.	Jehovah's Witnesses	—	—	10	12
18.	The Last Day Saints (Mormons)	—	—	3	3
19.	Others religions/sects	—	3	22	24
20.	Total	631	693	1058	1098

In 2003 875 clericals were serving in the religious organisations registered in Latvia. From them 149 are Lutheran, 121 - Catholic, 80 - Baptist, 77 - Evangelical Religion Christians,

75 - Orthodox, 76 - Pentecostal, 35 – Seventh Day's Adventist, 35- Old Believer Orthodox, 26 - Jehovah's Witnesses clericals.

Accordingly the Article 1 of the Law on Religious Organisations officials of religious organisations are members of elected bodies (councils, boards and audit committees), including the ecclesiastics. Ecclesiastics of religious organisations are *archbishop*, bishop, pastor, minister, priest, dean, rabbi etc.

Under the legislation currently in force in the Republic of Latvia, no privileges shall be deriven from taking spiritual or administrative offices of the religious organisations. The only exception is a military service. Pursuant to clause 7 of Part one of the Article 21 of the Compulsory Military Service Law, to the compulsory active military service are not levied ordained clericals affiliated with any religious organisations approved in Latvia and persons studying in educational establishments for theological personnel of the said religious organisations. Derogation from discharging military service due to religious reasons, as well as pulling rank for imposition of religious conviction is prohibited in Latvia. According to amendments of June 28, 2002 to the named Law, for the persons subjugated to the military service being incapable to exercise the military service by reasons of their opinions, conscience or religious conviction, compulsory active military service may be replaced by the alternative service.

SEPARATION AND RELIGIOUS FREEDOM IN LATVIA

In the Constitution of the Republic of Latvia religion/church is mentioned only in the Article 99, where state declares that: "Everyone has the right to freedom of thought, conscience and religion.[4] The Church shall be separate from the State." This provision was included in the Constitution in 1998, when the Constitution was supplemented with a new section on human rights. The principle of the freedom of religion is settled as purpose of the Law on Religious Organisations[*] from September 7, 1995.

Purpose of the Law in accordance with the Article 2 shall be to grant the inhabitants of Latvia the right to freedom of religion, including the right to freely state one's attitude towards religion, to adhere to some religion, individually or in community with others, or not to adhere to any religion, to change freely one's religion in conformity with the existing legislative acts. The Law on Religious Organisations, in compliance with the Constitution, as well as international agreements concerning human rights in the sphere of religion, shall regulate social relations established through exercising the right to freedom of consciousness and through engaging in the activities of the religious organisations. The state shall protect the legal rights of religious organisations as prescribed by the law. The state, municipalities and their institutions, non-governmental and other organisations shall not be authorised to interfere with the religious activities of religious organisations.

In practice Latvia is a partial separation state, where constitutionally declared separation of church and state does not work in practice. Latvia does not associate itself with any specific religion, and question is not about religious tolerance, but about interpretation of the article about church and state separation in the Constitution, because there is no clear opinion about where the borderline between the state and church should be strictly marked. The state and the Church are separate; however, if we speak about main conditions that ensure the Church separation from the state, then practically none of these conditions exists in Latvia. It is understandable, taking into account that the Republic of Latvia is a new attempt. It is not possible to achieve a perfect

[4] Latvijas Republikas Satversme (*The Constitution of the Republic of Latvia*) //Latvijas Vēstnesis, 01.07.1993., Nr.43

[*] This is the second law on religion since the restoration of Latvia's independence in 1991. The first law was adopted in 1992, but was found unsatisfactory. Therefore, in 1995 the Parliament of Latvia issued a new law. However, this law is also admitted to have its flaws, and since its adoption is has been amended 5 times already, and most likely there will be successive amendments in the future. Religious organisations in Latvia are not obliged to register with the Board of Religious Affairs, however, they obtain rights and relieves available to religious organisations only upon the receipt of a registration certificate.

balance of theory and practice at once. It requires time to appropriate legislative norms in certain social environment. The state practises are often in contradiction with the principles declared in the Article 99 of the Constitution (for sample, one religious association may be registered for one denomination).

It should be noted that the state-church relationship in the Republic of Latvia is based on the following principles:

1) Separation. Separation of church and state has never implied segregation of religion from society or the complete exclusion of the Church from social life. This would not be possible in a democratic country, as religion and religious associations form one of the structural elements of society. The state and the church are in Latvia separate, which implies that state institutions have a secular nature and religious organisations can fulfil the functions of the state only in special cases provided by law. State institutions shall supervise and control the conformity of activities of religious organisations to legislative acts. The Board of Religious Affairs shall be in charge of handling relations between the state and religious organisations and, if religious organisations so request, shall provide the required assistance in solving organisational, legal and other issues.

2) Religious freedom. According to the International Religious Freedom Report 2002 released by the Bureau of Democracy, Human Rights, and Labour, the Constitution of the Republic of Latvia provides for freedom of religion, and the government generally respects this right in practice. The Republic of Latvia guarantees the right to freedom of religion, including the right to adhere to a particular religion individually or in association with others or to have no religious affiliation, to freely change one's religion or conviction as well as to freely express one's religious opinions in accordance with the existing laws. According to the Article 4 of the Law on Religious Organisations, the explicit or implicit restrictions of the right of inhabitants or the creation of privileges to inhabitants, as well as the infringement of their feelings or the instigation of hatred due to their attitude to religion shall be prohibited. Persons guilty of violating this provision shall be held liable in accordance with the procedure prescribed by law. No reference shall be made to a person's attitude to religion or his/her religious affiliation in the identification documents issued by the state. However, it is determined in part 4 of the Article 4 of the Law on Religious Organisations that it is prohibited to state and municipal institutions, public organisations as well as enterprises and entrepreneurial companies to require from their personnel and other persons information concerning their attitude to religion or their religious affiliation.

3)''Traditionality''. There is no state religion. The Constitution of the Republic of Latvia (*Satversme*) does not mention any specific religion. The Latvian legislative norms (unlike Lithuanian) have no such concept as "traditional" denominations. "Traditional" and "non-traditional" organisations are not regulated by the Law on Religious Organisations and the Law does not list religions or religious denominations that are regarded as traditional. For all that confessions, included in the Article 51 of the Civil Law as having the right to-be-married persons, are called "traditional". These are Lutheran, Catholic, Orthodox, Old Believer, Methodist, Baptist, Seventh Day's Adventist and Jewish religious communities (churches).

4) Respectful neutrality. Relations between the various religious communities are generally amicable. Ecumenism still is a new concept in the country, and traditional religions have adopted a distinctly reserved attitude towards the concept. Mutual relations of the state and religious organisations are managed by the Board of Religious Affairs, which upon the request of religious organisations provides them with the necessary assistance in addressing organisational, legal and other issues. State recognises the right of parents and legal guardians to educate their children according to their religious conviction. According to the part three of the Article 5 of the Law on Religious Organisations the state shall recognise the right of parents and guardians to bring up their children in accordance with their religious creed.

5) Delegation of some peculiar powers. The Government has delegated the right to

register marriages only to some denominations, the ecclesiastics of which perform the responsibilities of state officials, but are not provided with fees or social guarantees of the state.

REGISTRATION PRINCIPLES AND LEGAL STATUS OF RELIGIOUS BODIES IN LATVIA

The legal status of legal entities in Latvia is defined by the Civil Law, but the status and the registration principles of religious organisations are regulated by the Law on Religious Organisations issued on September 7, 1995. Other public organisations (except trade unions, firms which are subject to a different law) are regulated by the Law "On Public Organisations and their Associations". Although the Latvian government does not require the registration of religious groups, the Law accords religious organizations certain rights and privileges when they register, such as status as a separate legal entity for owning property or other financial transactions, as well as tax benefits for donors. Registration also eases the rules for public gatherings.

According to the Law on Religious Organisations, twenty lawful-aged individuals registered in Latvian Citizens Register, having one confessional affiliation, can establish religious organisation. Ten or more congregations of the same denomination and with permanent registration status may form a religious association. As provided by the Law on Religious Organisations, religious organisations (church congregations, religious communities (Churches) and dioceses) as well as educational establishment for priesthood, monasteries and diaconates are to be registered. Only churches with religious association status may establish theological schools or monasteries.

A decision to register a church is made by the Board of Religious Affairs which was formed in the end of 2000. The Board of Religious Affairs is a state authority supervised by the Ministry of Justice, which acts pursuant the regulations by the Cabinet of Ministers. The Board of Religious Affairs is a legal entity. Within the limits of its competence it ensures the implementation of the state policy and co-ordination of religious affairs, manages issues related to state-church relationship and follows the efficiency of the effective regulations in the area of religious practices within the state. It also submits proposals on undertakings aimed at preventing the human rights violations related to religion in accordance with the Latvian Constitution and international agreements. The Head of the Board of Religious Affairs is appointed and dismissed by the Cabinet of Ministers. The Head of the Board of Religious Affairs is responsible for the work of the Board and performance of its functions. The Board of Religious Affairs has the following rights:[5] (1) to issue recommendations and methodical instructions pertaining to the procedure of issuing and submitting of documents required for registration of religious organisations and those institutions; (2) to apply for and receive from the religious organisations and those institutions information and documents stated in the normative acts; (3)if necessary, to apply for additional information so as to be sure that information given by registered and not registered religious organisations and those institutions is true and loyal towards the Latvian state; (4) to apply for and get free of charge from state and self-governmental institutions information necessary for work of the Board and apply and receive information from other states in accordance with international agreements concluded; (5) to check the compliance of documents connected with establishment and activity of religious organisations and those institutions with laws, other normative acts and actual situation; (6) on a constant basis and in co-operation with other state institutions to prepare and submit to the Minister of Justice information on infringements of clause 99 of the of Constitution, infringements of other normative acts regulating human rights and analysis of circumstances preceding the appropriate violations of law; (7) to provide effective activity in the religious aspect legally regulated by state, to develop and submit to the Ministry of Justice proposals and normative acts drafts pertaining to religion;

[5] Latvijas Republikas Ministru kabineta 2000.gada 19.septembra noteikumi Nr.321 "Reliģisko lietu pārvaldes nolikums" (*Regulations of Cabinet of Ministers of the Republic of Latvia of 19th September 2000 "Rule of the Board of Religious Affairs"*)//Latvijas Vēstnesis, 22.09.2000., Nr.331/333;

(8) to participate in development of normative acts drafts connected with regulation of activity of religious organisations; (9) if necessary, to invite experts and specialists to perform tasks pertaining to activity of the Board and conclude with them appropriate agreements and to analyse and gain foreign experience for solution of matters connected with religion and cooperate with appropriate foreign institutions as well.

According to the Law on Religious Organisations, the statutes (regulations) of religious organisations should provide: (1) name and denomination of the religious organisation, besides, this name should be distinctive from names of companies, institutions and organisations already registered in Latvia; (2) obligation of the religious organisation to comply with Latvian laws; (3) teaching (holy books, dogmatics and confessional peculiarities), forms of religious ceremonies, aims and objectives of their religious activities; (5) structure of the religious organisation, procedure of management and internal audit committee election and the limits of its competence; (6) territory of activities of the religious organisation, address of the management; (7) procedure of entering and leaving the religious organisation, rights and duties of the congregation members; (8) rights and obligations of the religious organisation, its property and finances; (9) procedure of the liquidation of the religious organisation, provisions regarding the management of the property after liquidation.

The statutes of the religious organisation can encompass other by-laws regulating the internal matters of the organisation. The Board of Religious Affairs has to process applications within one month.[6]

Having been registered at the Board of Religious Affairs, religious organisations are given the status of a legal person. It is not provided by Legislation of the Republic of Latvia that registration is obligatory to express freedom of belief. Therefore, every religious group not registered has right for divine services, religious rituals and ceremonies as well as charity acts, unless those break the law.[7]

Activity of religious organisation is based on statutes (regulations) filed with the Board of Religious Affairs, canonical rules, Constitution and legislation of the Republic of Latvia. In accordance with Article 14 of the Law on Religious Organisations the activities of these organisations are based on their canonical laws on statutes (regulations). In conformity with the Article 1 of the Law on Religious Organisations, religious activities include manifestation of a religion, faith or cult, performing of religious ceremonies or rituals and preaching religious teaching. After it has obtained the status of a legal entity, the religious organisation can: (1) organise public services; (2) create monasteries and educational establishments for its ecclesiastics (only registered religious communities (Churches) have such right); (3) perform religious activities in hospitals, boarding houses, custody institutions and the National Armed Forces; (4) use religious symbols according to the regulations providing that "only religious organisations or institutions established by such have the right to use the name and symbols of religious organisations in their official forms and seals."

Activity of religious organisations is restricted in accordance with the Article 116 of the Latvian Constitution. Activity of religious organisations announcing the ideas of religious intolerance and hate, breaking the law and inciting others to do that, violating or failing to execute statutes (regulations) of religious organisations, threatening state security, public order and piece as well as other persons' health and morals (sermon) can be ceased in accordance with court ruling. Article 14 of the Law on Religious Organisations also provides tat the state has the right to restrict activities of religious organisation and their followers, if they: preach religious intolerance and hatred, does not obey or call on disobedience of law, violate the statutes of the religious organisation and impose threat to public security, peace and order, as well as health and

[6] Kościół i państwo w krajach bałtyckih. Rejestracja I podstawowe zasady kształtowania się organizcji religijnych (Registrtation principles) / ROCZNIK TEOLOGICZNY.- CHRZEŚCIJAŃSKA AKADEMIA TEOLOGICZNA Warszawa Rok XLIV ZESZYT 2, 2002. 147-163

[7] State and Church in the Baltic States: 2001. (*ed. Balodis R.)* - R.: Latvian Association for Freedom of Religion, 2001.

morals of other people. The government should follow that citizens can freely practise their religion; however, the religious freedom does not release anybody from the obligation to observe laws. If necessary, the state can restrict (basing on law) manifestations of religion in order to protect: rights of other people, democratic state establishment, public security, public order, public welfare, morals and health of other people. The religious organisation has the right to submit a repeated application after it is declined, if it has eliminated the reasons mentioned in the decision on the rejection of the registration. The decision of the Board of Religious Affairs chairman on the registration of a religious organisation or the refusal to register can be appealed against within 10 days from its receipt.

Re-registration of religious organisations stipulated by part 4 of the Article 8 of the Law on Religious Organisations is related only to congregations of denominations starting their activity in the Republic of Latvia for the first time and not belonging to religious communities (Churches) already registered in Latvian state. The aim of re-registration is to ascertain the loyalty of a certain congregations towards Latvian state and compliance of its activity with legislation. It should be added that after the 10^{th} re-registration religious organisation obtains the status of permanently registered. At the present 1160 religious organisations and their establishments are registered at the Board of Religious Affairs. 81 congregations of those have to be re-registered annually. Speaking about new religious organisation should be menshioned that the United State Department in the report of 1997 on religious freedom criticises Latvia for violation of religious freedom basing on Latvia's refusal to register Jehovah's Witnesses. This problem was resolved, and in the fall of 1998 the Latvian Ministry of Justice registered two first Jehovah's Witnesses congregations. At present there are 12 congregations of this movement registered in Latvia, and Latvian law enforcement agencies have no information on violations with respect to the freedom of this movement. Before the Christian Science congregation was registered in 2002, the Ministry of Justice has six times declined the application of this congregation, while, according to the opinion of the Latvian Medics Association the main activity of this organisation, i.e. treatment of people with non-medical means, contradicted the Latvian law and the Medical Ethics Code.

The most active and dangerous religious sects and worships operating in Latvia have either failed to register at all (e.g., Satanists) or are acting under the veil of nongovernmental organisations and even commercial structures. In the spring of 2003 several persons have submitted applications to the Security Police of Latvia, asking for screening of activities by the Satan worship adherents – the Satanists - in Latvia. In both cases the information providers have mentioned useage of drugs, human blood in rites, profanity of cemeteries and graveyards and even unauthorised wire-tapping. The police has carried out inspections yet without getting confirmation.

Currently effective part 3 of Article 7 of the Law on Religious Organisations regulates that **one denomination congregations can create only one religious community (Church).** Before coming into effect of the above regulation, Trinity Confession had already two registered religious communities (Churches), namely, Latvian Trinity Community Centre and International Divine Community Latvian Trinity Parish Association. Nevertheless, there are various centres of different denominations not registered, which fight for the Latvian Law on Religious Organisations to provide opportunity to register unlimited number of religious communities (Churches) within one denomination, for example, Confessional Lutheran Church, Free Orthodox Church.

Evaluating effective legal norms related to congregation registration, one can state that they are in accordance with principles of human rights: under the Law on Religious Organisations twenty lawful-aged individuals registered in Latvian Citizens Register, having one denominational affiliation, can establish religious organisation provided that all registration documents (statutes (regulations) of congregation, Minutes of Meeting, etc.) are executed and submitted to the appropriate state institutions in a proper way. When considering the conditions

of registration of a religious community (Church) excessive interest of state in registration process, contradicting freedom of religion, is obvious. Religious community (Church) can be registered on condition that ten congregations of the denomination are united and religious community (Church) has not been registered in the appropriate denomination before that. This state restriction is not motivated. Restriction should be motivated by threaten to public order, state security and citizens' health.

According to the historical interpretation of part 3 of the Article 7 of the Law on Religious Organisations, the legal norm was issued to restrict Church division and establishment of sectarian groups. This restriction connected with freedom of uniting should be cancelled, as its purpose was, having adopted the Law on Religious Organisations, to do away with division of religious denominations as well as to eliminate obscurity in connection with denationalised property in 1940. Taking into account that:

-At present religious organisations obtained back the larger part of denationalised property;

-Restrictions do not meet principles of religious freedom approved by the international documents;

-Restriction of biding only one religious community (Church) within one denomination was not able to protect confession from division. At the same time, amendments to the Law on Religious Organisations of September 12, 2002 (addition of part 7 to the Article 5), providing regulation of relationship between the state and religious communities (Churches) with the help of special law, could make the basis for the new stage in protection of interests of denominations, principle **"one religious community (Church)** can be registered within one denomination" should be cancelled.

Therefore, the Board of Religious Affairs has submitted to the Justice Ministry the proposal to change the Law on Religious Organisations by deleting part 3 of the Article 7.

The objective of the state is to monitor that its citizens' manifestations freedom does not collide with the interests of society and the core principles of democracy, ensuring at the same time that every individual can freely express his/her opinion in accordance with his/her religious or atheistic conviction. Public activities of religious organisations are regulated in a peculiar way in Latvia. First of all a declined registration application does not ban physical persons from implementing their freedom of religion and freedom to associate. The freedom to gather in peaceful groups is provided by the law "On Meetings, Demonstrations and Pickets". Article 3 states that pursuant the law everyone has the right organise peaceful meetings, demonstrations and pickets or participate in the same. However, this does not refer to events organised by religious organisations.

In accordance with the part 3of the Article 14 of the Law on Religious Organisations religious organisations may engage in religious activities in public places only if they have received such permission from the relevant municipality. Rules of public order shall not be violated when engaging in religious activities.

According to information being at disposal of the Board of Religious Affairs in 2002 in the administrative territories of local governments, public activities of 189 religious organisations were held including 104 held by the Evangelical Religion Christians, and 29 were held by the Lutheran autonomous congregations. Record is still missing activities of religious organisations in schools, hospitals, rest-homes, prisons, as well as within estates of religious organisations.

CHAPLAINCY

Religious organisations may engage in religious activities in hospitals, homes for the elderly and the disabled, places of detention and in the National Armed Forces, if the persons

finding themselves in these institutions wish so. The place and time of such activities shall be co-ordinated with the management of the institution concerned. Religious organisations may engage in religious activities in the National Armed Forces in compliance with the regulations adopted by the Ministry of Defence.

The work of religious organisations at public institutions is mainly performed through the mediation of the chaplain service. According to paragraph 8 of the Article 1 of the Law on Religious Organisations chaplains are the spiritual personnel who perform their duties at penal institutions, units of the National Armed Forces and elsewhere, where the regular clergy services (the ordinary pastoral care) are not available. In accordance with the part five of the Article 14 of the Law on Religious Organisations chaplains in Latvia shall function according to the Regulations of the Cabinet of Ministers on the Chaplain Service. The Cabinet of Ministers the Chaplain Service Regulations pass on July 2, 2002.

Chaplains' activity is provided financially, materially and technically by the appropriate state or self-governmental institution within framework of budgetary means, or by religious organisation. Chaplains act in accordance with the present Regulations and other normative acts. Rules and regulations of appropriate institutions are binding upon chaplains. Accordingly to Paragraph 2 of the Chaplain Service Regulations chaplains provide individual right to freedom of religion established by the Constitution of the Republic of Latvia, the Law on Religious Organisations and International Agreements pertaining to human rights in the field of religion. According to the Paragraph 4 of the Chaplain Service Regulations chaplain is a citizen of the Republic of Latvia or a person registered in Latvian Citizens Register obtaining theological education in the appropriate religion association (church) ecclesiastic educational establishment.

Chaplain appointment is confirmed by National Armed Forces commander or board of places of imprisonment, or administration of airports, sea ports or land transport stations, or administration of institutions providing medical services or social services (further in text - appropriate institutions) upon agreeing upon with the Board of Religious Affairs. Decision on chaplain service is taken by administration of appropriate institutions. Administration of appropriate institutions concludes with religious community (church) ecclesiastical service agreement and informs of that the Board of Religious Affairs.

Regulations stipulate chaplain service activity in the Republic of Latvia and provide that:[8]

- "Chaplains of custody institutions" give ecclesiastical service to personnel of places of imprisonment, conviction or confinement, morally support and consult on religious and ethical questions, make arrangements for moral upbringing. The structure of chaplain service at places of confinement is determined by the Board of the Places of Confinement upon agreeing that with the Board of Religious Affairs. The chaplain services are regulated by the bylaws of the institutions supervised by the Prison Administration. All prisoners may see a clergyman tête-à-tête once in a month.

- "National Armed Forces Chaplain" provides ecclesiastical service for personnel of National Armed Forces. National Armed Forces Chaplains are given service ranks. Chaplains do not carry guns. These chaplains, being military persons, start professional military service in National Armed Forces and carry it out under their free will according to procedure provided by legislative acts. National Armed Forces Chaplains' activity is supervised by the Chief Chaplain of National Armed Forces, who administratively is directly subordinated to the Commander of National Armed Forces. In accordance with the Paragraph 14 of the Chaplain Service Regulations National Armed Forces chaplains in administrative questions are subordinated to the Head of military structural unit (unit commander), in questions connected with chaplain activity - to

[8] Latvijas Republikas Ministru kabineta 2002.gada 2.jūlija noteikumi Nr.277 "Noteikumi par kapelānu dienestu" (*Regulations of Cabinet of Ministers of the Republic of Latvia of 2th July 2002 "Regulations on the Chaplaincy Service"*)//Latvijas Vēstnesis, 05.07.2002, Nr.101

National Armed Forces Chief Chaplain, in questions connected with religion - to appropriate religious organisation Higher Holiness.

- "**chaplains of airports, sea ports and land transport terminals"** render ecclesiastical service to personnel of airports, sea ports and land transport stations, giving moral support and necessary consultations on religious questions within its competence.

- **"chaplains of institutions of medical and social services"** render ecclesiastical service to personnel and clients of institutions of medical and social services, giving them moral support and necessary consultations connected with religious questions within its competence.

Only following religious organizations can propose persons as Chaplains: Board of Latvian Evangelical Lutheran Churches, Riga Methropolyte Rome Catholic Curias, Latvian Orthodox Churches, Latvian Old Believers Church Central Counsel, Latvian Associated Methodist Churches, Latvian Baptist Community Association, Seventh Day's Adventist Latvian Community Association, Riga Jewish Religion Community and International God Community Latvian Trinity Community Association.

In accordance with Article 23 to 29 of the part III "Religious assistance to the Catholic in the National Armed Forces of the Republic of Latvia" of the Agreement between the Republic of Latvia and the Holy See "The Holy See shall establish within the Catholic Church in the Republic of Latvia a Military Ordinarate which, according to a special memorandum of understanding between the Ministry of Defence and the Bishops' Conference of Latvia, shall offer religious assistance to the Catholics within the National Armed Forces of the Republic of Latvia. This Military Ordinariate, which is, according to the Apostolic Constitution "Spiritualis militum curae", canonically equivalent to a diocese, will be headed by a Bishop Military Ordinary. The Military Ordinary, who shall be a Latvian citizen, may at the same time hold the office of a diocesan or auxiliary Bishop. The Military Ordinary will be freely nominated by the Supreme Pontiff, and the President of the Republic of Latvia will be given prior notification of the appointment. The Republic of Latvia shall guarantee to the Catholic members of the National Armed Forces the possibility of receiving adequate catechetical instruction and of participating in Eucharistic Celebrations on Sundays and on Holidays of obligation, provided these do not conflict with urgent official military duties. In conformity with canonical norms, the Military Ordinary will nominate a Vicar General and, in consultation with the competent authority within the National Armed Forces, will designate an appropriate number of Military Chaplains of Latvian citizenship, who may be incardinated in the Military Ordinariate. They will be considered equivalent to a parish priest or an assistant parish priest. Students of the Major Seminary of Riga and novices of Religious Congregations shall be exempted from military service and may be assigned to a community service equivalent to obligatory military service. In times of general mobilization, such students and novices will be assigned to operations which do not involve the use of weapons." The Republic of Latvia and the Holy See stipulate in the concordat that according to canonical norms, those falling under the jurisdiction of the Military Ordinariate are the following: Catholic military and civilian personnel of the National Armed Forces of the Republic of Latvia and the members of their families (spouses and children, including adult children, if they are Catholic and form part of the same household). Chaplains and their assistants, subject to the canonical authority of the Military Ordinary, shall exercise their pastoral service in accordance with the regulations concerning the times and places for pastoral activities and other general conditions issued by the authorities of the National Armed Forces. The Military Ordinariate shall co-ordinate its activities with the Ministry of Defence. The Ministry of Defence will provide material assistance to the personnel of the Military Ordinariate, in accordance with the legislation of the Republic of Latvia, as well as the necessary logistical arrangements for pastoral activities.

Aforementioned causes contradictions with the Chaplain Service Regulations.

In 2002 in Latvia acted 17 Lutheran, 10 Baptist, 7 Pentecostal, 4 Seventh Day's Adventist chaplains and 1 Old Believer Orthodox chaplain. Chaplain is the only approved profession in Latvia where ecclesiastic status and recognition from the church is required.

AGREEMENTS BETWEEN STATE AND CHURCH

In 1996 there was a working group formed, which was assigned with the development of an agreement on the legal status of the traditional churches in the Republic of Latvia, to be signed between the Government and these churches. The draft was turned down in 1997 as insufficiently developed, as many Latvian lawyers found this standard agreement unnecessary. Indeed, this agreement did not provide for much more that general phrases. Only on October 9, 2000, when the agreement with the Holy See on the Roman Catholics status was reviewed in the Cabinet of Ministers, the issue came back on agenda. Cabinet members indicated that it is necessary to provide balance and equal rights for religions in accordance with the agreement with the Holy See. Government elaborated amendments to the Law on Religious Organisations providing that "the Cabinet of Ministers shall be entitled to enter into agreement with religious community (church) regarding matters being related to religious community (church) and affecting interests of adherents thereto and the relevant denomination. Special laws can regulate the relations of the state and religious community (church).". Latvian Parliament for two years (2000 – 2002) revised these amendments until shortly before the Parliament elections conformed to the pressure from churches and on September 12, 2002 ratified agreement with the Holy See and a new part 5 of the Article 7 was added to the Law on Religious Organisations prescribing that "Special laws can regulate the relations of the State and Religious community (church)."[9]

Obviously in the amendments no more agreements with churches can be seen since parliamentary Human Rights and Public Affairs Committee decided that providing the outcome being legal coverage, the agreement would only perplex relations between the state and the church. On the basis of mentioned part 5 of the Article 7 of the Law on Religious Organisations both the Latvian Evangelical Lutheran Church and the Latvian Orthodox Church in the fall of 2003 elaborated eventual draft laws and submitted for examination to the Board of Religious Affairs. On performance of analysis to both these drafts it was found that large part of rules in these draft laws is taken over from the concordat agreement and the draft laws themselves by content are more resembling agreements. Especially the issue on probable public juridical personality of the churches has become aggravated and the Board of Religious Affairs propagated the opinion that it would be better to sign agreements with churches and afterwards to adopt special laws on the ground thereof.

THE SEAL OF THE SACRAMENT OF DENOMINATION.

In accordance with Article 7 of the Agreement between the Republic of Latvia and the Holy See the seal of the sacrament of confession is recognised as inviolable. Nobody may ever question a Catholic priest on matters connected with a confessional secret, even if that priest should appear as a witness or party before a civil tribunal. Though the said right of the priests is not secured by the existing Criminal Procedure Law of the Republic of Latvia. While the Criminal Procedure Code of Latvia has been amended for innumerable times, it has been adopted in the soviet era. At present a new code has been developed where the seal of the sacrament of confession has been recognised to the highest extent. In the new draft of Criminal Procedure Law of the Republic of Latvia, which in Parliament has been approved just in the first reading, Article 121 named "Professional secrets protected under criminal procedure" is included. Clause one of part one of the said Article provides that there shall be no restrictions imposed on the right of clericals to avoid from bearing testimony in regard of what is heard during confession, as well as personal notes regarding thereupon shall not be bereaved of. Still there are no leading cases occurred in the courts of Latvia and there were no disputes yet being so high-sounding in the west

[9] 2000.gada 8.novembra "Latvijas Republikas un Svētā Krēsla līgums" (*"Agreement between the Republic of Latvia and the Holy See" of 8th November 2000*)// Latvijas Vēstnesis

on whether a conversation between the clerical and the accused has been as confession as well as whether a sacrament of confession is inherent for particular denomination.

RELIGION AND POLITICAL LIFE

Pursuant to the Law of the Republic of Latvia from 1992 "On Nongovernmental Organisations and Associations" a political organisation may be established by 200 natural persons, therefore churches in Latvia have not established their own party. Existing legislation of the Republic of Latvia lacks prohibition for religious organisations to participate in the election campaign. There is no penalty prescribed for that. During parliamentary elections of 2002 the major churches (Lutherans, Catholics and Orthodox) have taken active part in the election campaign of the political organisation "First Party". Though the churches are not sponsors of the parties. The said party, called "clerical party", has got into the Parliament and is making up the governmetal coalition. The party tries to support traditional and other religious organisations utmost by virtue. In 2002-2003 one of the members to this party – the Baptist clerical has held office of the State Minister for Children and Family Affairs.

As concerns activities of religious organisations at public institutions, then it should be pointed out that the most significant Latvian state and church co-operation takes place in the framework of the Advisory Council of the Traditional Confessions formed pursuant the order by the Minister of Justice in 1996. This body aims at facilitating greater ecumenical communication, discussing matters of common concern, and improving dialog between the traditional faiths and the Government. The aim of establishing this Advisory Council was to facilitate consensus and understanding among representatives of different churches and followers of different religious convictions. The council is not a legal entity; therefore its resolutions and recommendations have no legal force. The members of the council are six churches or the leaders of more then one hundred religious organisations registered in Latvia. It includes persons invited by the Ministry of Justice: leaders and representatives of Lutheran, Catholic, Orthodox, Old Believer, Baptist and Judaist churches and authorised persons of the Ministry of Justice. Since 2000 the council also includes representatives of the Methodist and the Seventh Day's Adventist Churches. The objectives of the council are to express opinions to the Ministry of Justice and other state institutions in respect to issues related to activities of religious organisations within the state and promote and improve co-operation of the Latvian state and religious organisations. The Board of Religious Affairs ensures the work of the council.

On September 18, 2001 by Ordinance No 322 of Andris Bērziņš, Prime Minister of the Republic of Latvia, a Council of Spiritual Affairs was established.[10] Also this Council lacks status of a legal person. Under Article 2 of the Bylaws approved in appendix to the Ordinance, the Council is composed by leaders or representatives of the Evangelical Lutheran, Roman Catholic, Orthodox, Old Believer Orthodox, Methodist, Baptist, Seventh Day's Adventist, Judaist denominations, Latvian Old Believer Orthodox Pomora church invited by Prime Minister and representatives of political parties deputising in the Saeima (Parliament). The principal aim of the Council shall be to "co-ordinate a co-operation between the state and the church". Meetings of the Council of Spiritual Affairs are chaired by Prime Minister and they are held at least once per quarter. The said Council in common with opinion from the Ministry of Justice shall be adopted by taking into consideration the principle of unanimity (consensus). Task of the Council is also to co-ordinate elaboration and implementation of the state and the church projects and to express opinion for improvement of legislative acts concerning religious organisations and issues related therewith in Latvia.

There is also New Religions Consultative Council established by the Board of Religious

[10] Latvijas Republikas Ministru prezidenta 2001.gada 18.septembra rīkojums Nr.322 "Par Garīgo lietu padomes izveidi" (*Ordinance of Prime Minister of the Republic of Latvia of 18th September 2001 "On Establishment of the Board of Religious Affairs"*)//Latvijas Vēstnesis, 25.09.2001., Nr.135

Affairs whose membership consists of doctors, academics, and the independent human rights ombudsman. The Council, which meets on an "ad hoc" basis, can research and write opinions on specific issues, but has no decision-making authority.

CHURCHES AND EDUCATION

The University of Latvia's Theological faculty is nondenominational. The Faculty of Theology at the University of Latvia was established in 1920, however in 1940 in consequence of occupation by the Soviet Union it was abolished. During the collapse of the Soviet regime in the end of the 80s the Faculty of Theology of the LU was renovated. Nowadays the Faculty of Theology pursuant to the 1998 Faculty Regulations approved by the University Senate, is a Christian-ecumenical, academic and research structural unit of the University of Latvia grooming theologians, religion researchers of academic education and professional teachers of religion and ethics, as well as specialists in the ethic issues. The Faculty is subordinate to neither church, it co-operates with all churches. Students and lecturers are from various denominations. For such non-denominational line there are rather specific consequences: separation of the state and the church here manifests itself as separation of the Theology and the Church. Tasks of the Faculty are reflecting the direction of Theology more to the social needs, which really should be within the sphere of church activities under the classical model, instead of training of clergymen.

Although governing body of the University of Latvia in 1999 has declined resumption of the denominational (church) course in the Faculty of Theology, According to the Article 21 of the Concordat, Roman Catholic Church have taken promise from state: "The Reinstatement of the Faculty of Catholic Theology within the University of Latvia will be negotiated in the future between the Holy See and the Government of the Republic of Latvia.'' Under Article 6 of the Law on Religious Organizations in state and municipal schools Christian religion may be taught to persons who have expressed such wish in a written application. Applications by minors to be taught Christian religion shall be approved of by parents or guardians. If the minor is under 14 years of age, the minor's parents or guardians submit the application. The concept of the Christian religious instruction does not include and it cannot include the Jewish Faith or Islam. Christian religion in accordance with the curriculum approved by the Ministry of Education and Science may be taught by teachers of Evangelic Lutheran, Roman Catholic, Orthodox, Old Believers or Baptist denominations, if not less than 10 students of the same school have expressed their wish to study the religious teaching of the relevant denomination. The teachers shall be selected by the denomination leaders and shall be approved by the Ministry of Education and Science. Since 1998 the Law is supplemented by part 5 of the Article 6, which provides that religious teaching and ethics classes are financed from the state budget. In 1998 the Government provides funds for this education 100 000 Ls (i.e. 210 000 USD). Ethics is offered as an alternative to the religious instruction.[*]

Students at state-supported national minority schools also may receive education on the religion "characteristic of the national minority" on a voluntary basis. Other denominations may provide religious education in private schools only.

[*] However, the above approach has many opponents. One of the arguments is the statistics. In 1996/1997 the religious instruction was given only in 202 schools, in 39 out of 376 secondary schools students could have the history of religion as an optional subject. In 1997/1998 the religious instruction was given in 194 schools. Optionally, religious teaching was acquired by 13 766 students. Denominational religious instruction in 1997/1998 comprised only 4% of all students. Primary school children accounted for the major part of this group. The religious instruction was taught by teachers and clergy of the traditional churches. Despite of the constitutional provision on separation of state and church in practice one of the denominational doctrines is financed by the government. It would be acceptable if the constitution instead of "separation" provided that establishment of the National Church is not permissible (Estonia, Finland). In a situation where the Church is separated from the state by the Article 99 of the Constitution, the state has no right to help any denominations to disseminate their doctrines by providing budget financing and legal access to state and municipal schools. Therefore it is clear that the provision of the Law on Religious Organisations on religious teaching contradicts the true nature of the Latvian Constitution.

In accordance with the agreement between the Republic of Latvia and The Holy See Article 15 the teaching of the Catholic religion shall be conducted exclusively on the basis of a programme approved by the Bishops' Conference of Latvia, in agreement with the Ministry of Education and Science, and shall be undertaken only by qualified teachers who possess a certificate of competence issued by the Bishops' Conference of Latvia; the revocation of which signifies the immediate loss of the right to teach the Catholic religion.

According to the Law,[11] everyone individually or in groups, has the right to religious instruction in the educational establishments of religious organisations. In national minority schools supervised by the state or municipalities, if such is the wish of the students and their parents or guardians, it is allowed to teach typical religion to the particular national minority in compliance with the procedure set by the Ministry of Education and Science. Thus for example, the orthodox, whose religion is not mentioned in the Law on Religious Organisations, can ensure religious classes for their children.

Religious education affairs are not separated from the common educational system of the Republic of Latvia, and that is why this sphere is under supervision of the Ministry of Education and Science. Educational institutions for ecclesiastics can be mentioned as exception, which are to be registered with the Board of Religious Affairs according to the Law on Religious Organizations. The Latvian Lutheran Church in 1998 established its own clergy education centre - the Luther Academy in Riga. The Roman Catholic Church also has its own seminary. By the Board of Religious Affairs also the Baptist and the Orthodox seminaries are registered.

Although the Catholics, Baptist, Orthodox Churches ad Lutherans have their own highest educational establishments and seminars, they are not state accredited and their diplomas are not recognized by the state.

Currently there are Christian educational establishments of 7 religious communities (churches) (5 interdenominational and 2 Catholic), 12 private educational establishments (6 interdenominational, 5 Catholic) and one private educational establishment (the Habad Lubavich prived secundary school).

Many denominations have developed comprehensive system of Sunday Schools. For example the Baptist congregations in Latvia, embracing more than 6 200 members have Sunday Schools attended by approximately 5 000 children.

In accordance with the agreement between the Republic of Latvia and The Holy See Article 9 (a) "With respect to the laws of the Republic of Latvia and in view of its legitimate pastoral undertakings, to the Catholic Church shall be guaranteed freedom of access to the media and freedom of speech, including the establishment of its own means of social communication and access to those of the State, in accordance with the legislation of the Republic of Latvia." According to the Concordat Articles 16, 18 and 19 in conformity with the legislation of the Republic of Latvia, the Catholic Church has the right to found institutions of higher formation for teachers of religion which will grant civilly recognized diplomas. The Catholic Church has the right to establish and manage schools at every level, in conformity with the laws of the Republic of Latvia and the norms of Canon Law. The foundation of Catholic Schools shall be requested by the Bishops' Conference of Latvia the latter acting on behalf of the local Ordinary. Catholic Schools, as well as institutions of higher formation, shall observe the laws of the Republic of Latvia concerning the general norms relating to the national curriculum, to their management and the granting of civilly recognised diplomas. Catholic Schools are entitled to financial support, in accordance with the laws of the Republic of Latvia. Teachers and other employees in officially recognised Catholic Schools, as well as students and their parents, shall enjoy the same rights and have the same obligations as their counterparts in State and local government schools.

[11] 25.09.2002., Nr.137 3.1995.gada 7.septembra Reliģisko organizāciju likums (*Law on Religious Organisations of 7th September 1995*) //Latvijas Vēstnesis, 26.09.1995., Nr.146

SHRINES BEING OFFICIALLY RECOGNISED BY THE REPUBLIC OF LATVIA

In Latvia 881 temples and cult buildings in all are owned by religious organisations, including: 300 by Lutherans, 216 by Catholics, 122 by Orthodox, 66 by Old Believer Orthodox, 66 by Baptists, by Seventh Day's Adventists, 24 by Pentecostals, 8 by Salvation Army. Large part of the churches are distinguished as historic monuments of Latvian scale. The most famous and known churches are Riga Dome owned by the Lutherans and the Aglona Basilica of the Roman Catholics.

CATHOLIC CHURCH

The Aglona Basilica of the Roman Catholics currently is the only officially recognised shrine of the Republic of Latvia. The Basilica in 1800 was constructed by the Dominican monks. The Aglona Basilica in 1993 was visited and consecrated by the pontiff John Paul II. Believers are going on pilgrimages to Aglona. Every year on 14 and 15 August the celebratory arrangement of Catholics in honour of the Mary's Assumption Day is held. In the arrangement high numbers of visitors are taking part, for example, on 15 August 2003 in Aglona celebration about 100,000 pilgrims were participating.

The Shrine has a serious legal regulation. According to the Article 1 of the law of 1995 "On the International Shrine in Aglona", Aglona is the international shrine being also a part of culture and historical heritage of Latvia – cultural monument and place for religious pilgrimages. The Shrine of Aglona shall be used exclusively for arrangements of religious and spiritual content designated by the management of Latvian Catholic Church. On the ground of the said law in 1999 the government of Latvia has promulgated regulations "Order of Natural and Legal Persons Stationing in the Protected Area of Aglona Shrine". In the regulations it was prescribed that timber felling and changing of the river and lake elements, any construction or installation of premises and buildings, resting and entertainment places may be performed only by written permission from the congregation. In the Shrine area without congregation's permission nobody shall be entitled to sell and to advertise spirituous liquids and amusement products. Without written congregation's permission also hunting and fishing in the said area are prohibited.

In accordance to the Article 11 of the Concordat the Shrine of Aglona is part of the cultural and historical heritage of the Republic of Latvia, and as such is protected under existing legal provisions of Latvia. Besides the building of the Basilica itself, the sacred square in front of the Basilica and the cemetery, the spring area, the territory protected within the Shrine shall include all other buildings, structures and lands belonging to the Catholic Church. Under Article 12 of the Concordat in consideration of the international character of shrine of Aglona as a place for prayer, pilgrimage and various pastoral activities, and keeping in mind the existing legislation, the Republic of Latvia assumes the duty:

-to recognise and respect the religious and historical character of the Shrine;
-to guarantee public order during the gatherings as agreed either with the local Bishop himself or with the other members of the Bishops' Conference of Latvia;
-to contribute towards the maintenance costs of the Shrine in relation to events of national significance;
-to grant exemption from or the reductions of taxes in the circumstances foreseen by the laws.

According to the Article 13 of the Concordat each year, before the Latvian budget is drawn up, the Catholic Church shall provide the government with a plan of the events scheduled for the following year which could be of national significance. So government payments are:

in 2000 - Ls 13 900 (EUR 21 584);
in 2001 - Ls 40 100 (EUR 62 267);
in 2002 - Ls 65 200 (EUR 101 242);
in 2003 - Ls 12 900 (EUR 20 031).

In the field of cultural heritage, the Article 22 of the Concordat declares the cultural and artistic heritage of the Catholic Church to be considered as an important part of the national heritage of the Republic of Latvia. The Republic of Latvia and the Catholic Church assume, by common

accord, the duty to ensure its maintenance and care, and to make it accessible to the public, within the limits required for its safe custody and by international law.

LUTHERAN CHURCH

The Latvian Evangelical Lutheran Church negotiations with the government concerning the Riga Dome draft law commenced immediately after independence was regained. The Parliament of Latvia in 1992 adopted a conceptual decision to pass a law in regard of the Riga Dome, however such was not elaborated as far as the year 2003. The issue is complicated from the governmental point of view, since it is related to the property rights, renovation of the church and maintenance costs. Taking into account inactivity of government, the Lutheran Church by itself elaborated a draft law on the Riga Dome and submitted it to the government consideration in the fall of 2003. In the named draft law, several principles from legal regulation for the Aglona Basilica were included. Lutherans required the Riga Dome church to be recognised as the Latvian church bearing significance of a national symbol and essential part of the state heritage value. The wish of the Lutheran Church expressed in the draft law is the aknowledgment from the state of a positive contribution of the church in development of the national morality and promotion of the religious and intellectual level of people of Latvia.

RELIGION AND THE MASS MEDIA

In Latvia religious literature can be obtained only in religious organisations. Missionaries of some new religious organisations (like Jehovah's Witnesses, Mormons, Christians Sciences and Krishnaits) sell or give out their religious literature for free on the streets. There are four specialised bookstores in Riga, the capital of Latvia, which are specialised in selling religious books. One of such stores is owned by the Baptist church, two – by Lutheran, and one is inter-confessional. There are 12 regular periodicals – newspapers and magazines with religious contents. In accordance with the Latvian Enterprise Register, there are 40 periodicals registered at the moments in Latvia, the name or contents of which bear implication of religious nature. [12]

Religious Freedom Association, which has been operating since 1999, also publishes religious literature. Its aim is to explain issues related to state-church relationship to religious organisations. For example, the association has published "Handbook for Clergy on Marriage Procedures" in 2000 both in Latvian and in Russian. One of the most active inter-confessional religious organisations is the "Bible Society", which not only tries to popularise the Bible, but also translates and prints inter-confessional religious literature. The religious organisation Jehovah's Witnesses are translating and distribute ''Watchtower''. Scientologists and other new religious movements can also freely disseminate their religious literature. The Orthodox Church, Old Believers, Baptists and Evangelic Lutherans publish their calendars and other publications, which are being distributed to members of certain churches.

Taking into account the poor economic situation, the state financing for the Christian radio and Christian education on TV programmes is low in Latvia, although there is a number of state financed TV programmes broadcasting on the Latvian state television which often invite representatives of different religious. The Latvian state television regularly broadcasts ecumenical (Catholic, Lutheran, Orthodox and Baptist) services on Christmas and the Easter. The independent TV broadcasts missionary programs paid by Pentecostal's (for example, ''New Generation Church''). Besides, there is an independent Christian radio in Latvia, which mainly broadcasts speeches of the Pentecostal, Baptist, and Seventh Day's Adventist preachers.

The Law does not regulate or describe the procedure of registration of media of religious organisations. The religious organisations can create their magazines, newspapers and periodicals according to the general procedure. This liberal attitude has sometimes created problems. An example is the religious paper "Latvian Lutheran" published by ''Augsburg's Institute'', company registered in Latvia. The opinions of this newspaper differs from the official stand of

[12] *Balodis R.* Valsts un Baznīca (*State and Church*). –R: Nordik, 2000.

the Latvian Evangelic Lutheran Church, therefore in 1999 pursuant the Church protests the Board of Religious Affairs had to request an explanation from the said company, requiring why it engaged in religious activities which only religious organisation are permitted to do according to the Law.

LABOUR LAW WITHIN THE RELIGIOUS COMMUNITIES

The employment relationship is mentioned only twice in the Law on Religious Organisations. First, Article 19 of the Law provides that in case of termination of the religious organisation's activity, this organisation terminates work relationship with all its employees according to the Latvian Labour Law. Secondly, Article 14 provides that the religious organisation can appoint or elect and dismiss their ecclesiastics in accordance with the statutes (regulations), and employ and dismiss other employees in accordance with the effective labour legislation. The effective Latvian Labour Law does not address the most essential problems of religious organisation, which means that religious organisations are subject to the same legislative norms as any other public of entrepreneurial companies.

Part two of the Article 7 of the 20th June 2001 Labour Law prescribes a prohibition on any direct or indirect discrimination irrespective of a person's race, skin colour, gender, age, religious, political or other conviction. The Article 29 of the Labour Law provides for "Prohibition of Differential Treatment" barring differential treatment from an employer towards an employee based on race, skin colour, age, disability, political or other conviction, national or social origin, property or marital and religious conviction. In the said Article it is provided yet that differential treatment based on religion of employee is permitted only in cases where adherence to particular religion is an objective and substantiated precondition for performance of the relevant work or for the relevant employment. Likewise the said law prescribes (Clause 4 of part 2 of the Article 33), that a job interview may not include questions which do not apply to performance of the intended work or are not related to the suitability of the employee for such work, as well as directly or indirectly discriminatory questions. In discriminatory questions are included the questions concerning "religious conviction or belonging to a religious denomination". Part one of the Article 34 of the Labour Law prescribes that if when establishing employment legal relationships an employer has violated the prohibition of differential treatment, an applicant has the right to request appropriate compensation. In case of a dispute, the amount of compensation shall be determined by the court at its discretion.

FINANCES OF THE CHURCHES

The Communist regime in Latvia is marked by many sad cases. One of such events is the liquidation of the Methodist Congregation after World War II. All the Methodists' properties were transferred to the Lutheran Church. The official reason for this action was not typical for the Stalin's time, i.e. "the Methodist organisation is liquidated and deprived of its properties because of co-operation with US special service CIA". The followers of the Pentecostal movement were also told to join Baptists and deprived of their properties. When the leaders of the movement refused to comply, they were arrested and exiled to Siberia. After Stalin's death they were released and allowed to return to Latvia, where the congregation continued its activities underground. The communist regime was not lenient to Jews as well. Thus, the Jewish Synagogue in Jekabpils city was remade into a workers' dormitory pursuant the "request" of this Jewish congregation. At the same time one of the Orthodox Church buildings was adapted to a returnable containers' reception with the "permission" of the Pope.

Property restitution has been completed substantially. The status of the remaining properties is unclear and it is a subject of complicated legal and bureaucratic processes.

According to Article 99 of the Constitution of the Republic of Latvia the state and church are separate. Consequently, the state funds should be separate from church financing. There is no uniform law in Latvia stipulating the procedure of paying church taxes. The financial and tax

issues of the church are discussed in the following regulations: 7 September 1995 Law on Religious Organisations, 9 March 1995 Law on Value Added Tax, 26 September 1990 Law on Entrepreneurship, 9 February 1995 Law on Corporate Income Tax, 11 May 1993 Law on Individual Income Tax, 4 June 1997 Law on Real Estate Tax, 10 August 1995 Law On Humanitarian Aid, 24 September 1996 Cabinet of Ministers' Regulations No 367 "On Procedure of Issuing or Cancelling Permissions to Public Organisations (foundations), Religious Organisations and Budget Institutions for Receiving Donations entitled to Tax Relieves", 19 May 1998 Cabinet of Ministers' Regulations No 187 "On Procedure of Application of Law on Value Added Tax", 12 March 1996 Cabinet of Ministers' Regulations No 57 "on Contents of Humanitarian Aid Cargoes", 1 August 2000 Cabinet of Ministers' Regulations No 252 "On Annual Reports of Religious Organisations".

The above laws address a number of issues related to the financial activities of religious organisations. They are as follows:

- pursuant Article 15 of the Law on Religious Organisations, these organisations are entitled to engage in business activities. If their revenues exceed 500 minimal monthly salaries within a calendar year, the religious organisation has to establish a company and perform its activities in accordance with the Law "On Entrepreneurship";

- the Law on Entrepreneurship provides that religious organisations are entitled to engage in business activities, establish companies (enterprises), and acquire shares in companies (enterprises);

- pursuant Article 16 of the Law on Religious Organisations, religious organisation may own movable and real property, however, they are banned to mortgage church buildings or ritual attributes, and creditors may not foreclose on the same.

The next important issue is related to tax relieves for religious organisations:

-according to the Law on Real Estate Tax, real property owned by a religious organisation and used for performing religious activities is not taxable stating from 1 January 2001;

-the Law on Value Added tax envisages that religious, ceremonial and other not-for-profit services of religious organisations are Value Added Tax exempt. Money contributions and donations to religious originations are also Value Added Tax exempt;

-companies that donate to religious organisations in accordance with permissions issued by the Ministry of Finance may use tax relieves in the amount of 85% provided under Article 20 of the Law on Corporate Income Tax. These tax relieves are not applied to companies that have a debt for the previous year as of the 1st date of the second months of the taxation period. In accordance with the Law, the total tax relief may not exceed 20% of the total accounted tax amount of the company;

-pursuant the Law on Individual Income Tax a physical person who has donated to a public or religious organisation (which has a licence issued by the Ministry of Finance) can deduct this amount from the taxable income before accounting individual income tax. This amount should not exceed 20% of the taxable income. It should be pointed out that religious organisations do not pay the corporate or individual income tax. If religious organisations receive foreign technical assistance, they are granted customs tax and Value Added Tax relieves.

-religious organisations have right to receive humanitarian aid. Cargoes of humanitarian aid are tax and duty exempt according to the procedure provided under the law. Religious organisations that are entitled to be beneficiaries of humanitarian aid are listed on annual basis according to special regulations issued by the Cabinet of Ministers.

It should be noted that the Board of Religious Affairs exercises economic sanctions instead of the court against such religious organisations that violate regulations (for example, by prohibiting them to receive humanitarian aid). Because, even though religious originations are granted tax relieves according to the law, the Government may deny this privilege if the respective organisation violates law or does not obey the general principles of democracy.

Annual Reports can be mentioned as the third issue. Since 2001 there is a new procedure in Latvia (before religious organisations submitted their annual reports in the same way as other legal entities):

-pursuant the Regulations of the Cabinet of Ministers on Annual Reports of Religious Organisations, by 1 March each year the religious organisation has to hand in (mail or send by currier) to the Board of Religious Affairs and territorial office of the State Revenue Service a copy of its annual report approved by the management of this religious organisation;

-religious organisations, if their income from business activities in the reporting year exceeds 25 000 Ls, prepare the annual report consisting of the balance sheet, income and cost statement, donation and gift statement and an appendix. If income from business activities does not exceed 25 000 Ls in the reporting year, the religious organisation prepares an income and cost statement and a donation and gift statement;

-in accordance with the above regulations, the religious organisations have to list under "received donations and gifts" all money contributions and donations as well as the value of the property gifts, basing on amounts presented in the receipt documents. Religious organisations should also indicate "income from religious activities", or funds obtained from the provision of religious services. Costs related to religious activities should also be shown in the annual report. This item can include purchase of assets or expenses related to production or installation works. Religious organisations should also list all materials, supplies and other stocks consumed, purchases or received donations for the internal needs of this organisation, as well as salaries, remunerations or other related fees before deducting taxes or other payments provided by law (gross);

-the report submitted by the religious organisation to the Board of Religious Affairs and the State Revenue Service should reflect all donations and gifts providing information about the benefactors (if they are known). The information on donators should include the tax payer's registration number for legal entities registered in Latvia or the name, registered office address and registration number for a foreign legal entity, or if it is a physical person, then the name and personal identification number for a resident – local tax payer, and name, personal identification number and country for a non-resident, i.e., foreign taxpayer.

CHURCHES AND INTERNAL ORGANISATION

According to the Law on Religious Organisations, the religious organisations, indicating as their management authority a religious organisation registered abroad, may be registered as "autonomous religious organisations" in the Republic of Latvia, which actually means that Latvia is taking into account the linkage of congregation with the foreign centre, however responsibility for compliance with the law pertains to the registered congregation itself.

A large number of religious organisations incorporated in Latvia has indicated that their centres are located abroad. The Latvian Orthodox Church is canonicaly subjected to the Moscow Patriarchy. The Roman Catholic curia of Riga Metropoly is a religious organisation by assistance whereof the authority of Roman Catholic Church in the Riga Archdiocese is exercised in compliance with the teaching and discipline of the Roman Catholic Church and all the Latvian dioceses are controlled. The theological management (centre) of the Buddhist congregation "Drinkung Kagyu Dharmachakra Centre" is situated in India. The centre of the Church of Jesus Christ of Latter-Day Saints (Mormons) is Salt Lake City (USA). The Seventh Day's Adventist church is involved in the Baltic Union, which for its part is involved into the Adventist Church Worldwide (General Conference). In the same way it is for the "SALVATION ARMY", registered in Latvia as a congregation, which is involved in the international body under analogous name, being regionally subordinated to the Swedish corps. The Latvian Methodist Church is a canonical subject of the United Nordic and Baltic Methodists, furthermore appointing leader of the Latvian church (superintendent). From twelve Muslim parishes incorporated in Latvia, as a theological centre for seven is indicated the Muslim Spiritual Board registered in

Russia. These congregations in their standing rules have acknowledged that are subjected to their centre in religious, administrative and financial activities. Other Muslim congregations have presented an "autonomous" status, however it is certain that four of them are subjected to the theological centre in Saudi Arabia, and one to Tatarstan. Sukyo Mahikari Latvian congregation is a constituent part of the organisation with similar name registered in Japan. The congregation indicates that its curator is Luxemburg-based regional centre for Europe and Africa. The highest management body of the Latvian Bahai' congregation is situated in Haifa (Israel). Riga congregation of Saint Gregory the Illuminator (Armenian) Church is included into Centralised religious organisation of the Eparchy for New-Nahichevan and Russia of the Armenian Apostolic Church. "Parent church" of the Christian Science Riga congregation is "The First Church of Christ Scientist".

According to part four of the Article 14 of the Law on Religious Organisations only religious organisations shall be allowed to invite foreign clergymen or missionaries to engage in religious activities in the Republic of Latvia, upon having arranged permits of residence for them in the procedure set by the law. Visa regulations effective since 1999 require religious workers to present either an ordination certificate or evidence of religious education that corresponds to a Latvian bachelor's degree of theology. The visa application process still is cumbersome. While the government generally was cooperative in assisting to resolve difficult visa cases in favour of missionary workers, problems still persist. In June 2002, some American religious worker successfully appealed a visa denial; however, that decision later was overturned through a government appeal. Foreign evangelists and missionaries, including from the United States, are permitted to hold meetings and to proselytize, but the law stipulates that only domestic religious organizations may invite them to conduct such activities. Foreign religious denominations have criticized this provision. In 2002 religious organisations have invited 176 foreign clericals from Japan, England, United Kingdom, the United States, Australia, Israel, Sweden, Russia, Byelorussia, India, Denmark, Finland, Norway, Poland, Armenia, Netherlands, Estonia, Ukraine, Canada and Germany, from them 53 were invited by the Church of Jesus Christ of Latter-Day Saints, 31 – by Pentecostals, 20 – by Baptists, 13 – by Evangelical Religion Christians, 12 – by Jehovah's Witnesses, 9 – by Salvation Army, 8 – by New Apostles, 5 – by Apostles, 4 – by Catholics, 4 - by Bahai'sts, 3 - by Buddhists, 3 – by Sukyo Mahikari, 3 – by Methodists, 3 - by Orthodox, 2 – by Latvian neopagans "dievturi", 2 – by Jews, 1 – by the Reformats.

ADMINISTRATIVE AND CRIMINAL LEGISLATION AND RELIGION

In 2000 the Parliament of Latvia passed the Law "On Physical Person Data Protection". According to the law, personal data are any information that relates to an identified or non-identified physical person. Personal information on religious adherence is "sensitive information". The Board of Religious Affairs can be considered as the "supervisor of personal data" under the law, because as provided by law, religious organisations are registered as legal persons and they provide state organisations with personal data of the founders of the particular religious organisation, including their addresses, and naturally, information on their religious conviction. If this sensitive information is not properly protected, it may happen that the availability of its causes a hidden discrimination. For example, there is a possibility that an employer who is a Catholic, when he obtains information that the interviewed individual is a Krishna follower, finds another excuse to refuse employment to this person. It should be noted that this happens at a time when religious conviction is not indicated in the person's identification documents and the Latvian Labour Law strictly prohibits inquiring about the religious conviction of the candidate.

Article 227 of the Criminal Law of the Republic of Latvia envisages penalty for unlawful activities of religious organisations and their members. For organising or managing a group which teaches or performs religious rituals imposing threat to the public security and order, or persons' health, rights or interests protected by law, or for participation in such activities, the penalty can be custody for the period up to 5 years or a fine in the amount of up to 100 minimal

monthly salaries. Article 150 of the Criminal Law for committing direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion (excepting activities in the institutions of a religious denomination), as well as for committing violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, provides the penalty – custody for the period up to 2 years or a fine in the amount of up to 40 minimal monthly salaries.

For intentional interference with religious rituals (if such are not in violation of law and are not associated with violation of personal rights), Article 151 of Criminal Law provides for a penalty - community service, or a fine in the amount of up to 100 minimal monthly salaries.[*]

In accordance with the Latvian Civil Law (Article 1415) blasphemy is equal to misbehaviour. "Unsanctioned and indecent activities if their aim is converse to religion, law or good morals, or they are aimed at avoiding law, cannot the subject matter of a legal transaction and such transaction is not valid." Article 4 of the Law on Religious Organisations also prohibits direct or indirect infringement of religious sensibilities of people.

Under Article 2 of the Law "On Trademarks and Geographical Indications", religious symbols cannot be registered as trademarks. The religious symbols fall into the group called "non-registered marks". It is noteworthy that the legislator has included the religious symbols in the group of non-registered marks also embracing state emblems.

Part 3 of Artcle 13 of the Law on Religious Organisations is barring non-registered religious organisations from seizure of names and symbolism of religious organisations. From the listed the interest of state is clearly defined – to preclude hatred caused by religious blasphemy.

In Article 7 of the Law "On the Press and Other Public Means of Information" is imposed a prohibition on publishing and dissemination of information advocating religious intolerance in Latvia. Equally there is a ban on commercials using elements committing infringement of religious sensibilities. Whereas Article 4 of the Advertising Law prohibits in advertising to express discrimination against a person due to his or her race, skin colour, gender, age, religious, political or other convictions, national or social origin, financial status or other circumstances. Moreover it is prohibited in advertising "to exploit the effect created by fear or superstition" to a certain extent being applicable also to religious conviction. Sanctions in respect of violation of these principles are of no criminal, but of administrative and civil nature, however serious enough for preclude a producer or a disseminator of advertising from publication of information being of religious abuse. Also the Article 20 of the Radio and Television Law prescribes that commercials may not injure human dignity and religious feelings.

MATRIMONIAL AND FAMILY LAW

The registration of marriages delegated to churches in Latvia has established basing on certain legal, historical and cultural conditions. During the Russian Empire period (Latvia was a Russian province) marriage registration was not centralised and state registries and statistics on the new-born, baptised, dead and buried, as well as married, was entrusted to the Russian Orthodox Church, but in the Baltic states – also to Lutheran and Catholic centres. In the last century 20's the Latvian Constitution Founding Meeting issued the Law on Marriage, based on the Swiss example that stipulated that registration of civil status transactions of individuals is the responsibility of the Government. Marriage delegation to Churches has developed based on certain legislative, cultural and historical circumstances In 1917 the Russian Temporary Government adopted a law providing liberty of freedom and right to have no specific affiliation. The law defined that persons who did not belong to any denomination could execute civil status transactions in their local governments. This meant the replacement of the old system by an alternative (either Church or Registry Office). Although in Russia the

[*] From 1 January 2004, the minimal salary stipulated by the government is LVL 80 or EUR 124.

Bolsheviks deprived Churches of their right to execute civil status transactions and introduced civil status registry offices, in the newly independent Republic of Latvia the law of Russian Temporary Government regarding the freedom of religion along with other Russian laws related to civil status registration remained in force till 1920. In the 1922 the Constitutional meeting basing on the Swiss example issued the Matrimonial Law stipulating the duty of the state to execute civil status acts of its citizens.[13] However, it allowed for a possibility that a certain range of Churches has the right to register civil status acts. Clergy could be called to criminal liability for failing to promptly report to government institutions. The Civil Law of 1937 indicated 10 confessions that were allowed to register marriages of their members on behalf of the state. The member had right to choose whether to register their marriage in the state marriage registry office or with the Church of their confession.

After Latvia became independent second time, when it restored the Civil Law of 1937 in the 1993 (actually Family Law section of the Civil Law) the Church marriage institute was renewed as well. In accordance with the Civil Law of the Republic of Latvia 8 confessions have the right to execute marriages. The renewed Civil Law provides that persons can register their marriage in the Marriage Registry Office or with a clergyman. According to Article 51 of the Civil Law, if the to-be-married persons belong to the Lutheran, Catholic, Orthodox, Old Believer, Methodist, Baptist, Seventh Day's Adventist of Jewish religion and they want to marry in their respective churches with the clergyman authorised by the respective church, the clergyman can register their marriage providing a prior notification of the fact according to the regulations of certain church. Article 58 of the Civil Law provides that the clergy should inform the Marriage Registry Office about the concluded marriage within 14 days. The Law on Civil Status Acts of 1993 (Article 13.2) provides that the clergyman needs to be authorised by the respective church to perform the marriage registration on behalf of the state.

The marriage validity problem is also mentioned in the concordat. In accordance with Article 8 of the Agreement between the Republic of Latvia and the Holy See canonical marriage from the moment of its celebration produces the civil effects determined by the legislation of the Republic of Latvia, provided no civil impediments exist between the contracting parties and the requisites foreseen by the laws of the Republic of Latvia have been fulfilled. The way and the time within which a canonical marriage is to be registered with the competent civil authority are determined by the laws of the Republic of Latvia.

At the moment approximately 1/3 of all marriages are concluded (registered) in churches. In 2002 permissions to marry have been issued to 339 clericals. These clericals in 2002 with legal consequences have accomplished 2276 weddings. From the said weddings 1018 were concluded by Lutherans, 679 by Catholics, 522 by Orthodox, 36 by Baptists, 12 by Seventh Day's Adventists, 7 by Methodists and 2 by Judaists.[14]

[13] *Balodis R.* Baznīcu tiesības (*The Church Law*). – R: RBA, 2002.

[14] Item to mass media from the Board of Religious Affairs of the Ministry of Justice of the Republic of Latvia of June 2003 "On the activity reports of Religious associations (churches), dioceses and religious organisations in 2002".

THE FUNDAMENTAL RIGHT TO EQUALITY IN THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT

By Dr. Tilk, Péter*

The examination of the form the right of equality takes in the practice of the Hungarian Constitutional Court has been made especially up to date owing to the absurdity occurring as an everyday routine, the passing of Act CXXV of 2003 on the promotion of equal treatment and equal chances, and its promulgation on 27 of January 2004. Due to reasons of extent, this study will be restricted to cover the constitutional regulation of the fundamental right scrutinized and to reveal the practice of the Constitutional Court.

The provisions related to the prohibition of discrimination are involved in Article 70/A of the Constitution, nevertheless special cases concerning the principle of equality may be found in some other provisions of the fundamental law. The prohibition of discrimination thus appears on the level of highest legal source: in the Constitution[1]. The rules of the Constitution bearing upon the prohibition of discrimination are intended to be filled up with content and expounded by the provisions of the Act on equal treatment, passed recently. Up to the present, the practice of the Constitutional Court has provided a detailed and far-reaching content to the rather brief and concerning its content, quite laconic constitutional regulation of the prohibition of discrimination. In the future, the Body will keep their significant role in the judgement of the prohibition of discrimination – but the legal measures in this respect will expand. It must be also noted that there was no comprehensive anti-discrimination act in Hungarian jurisdiction until 2004. In connection with this, the Constitutional Court stated there was no express authorization for the creation of such a provision and in this respect, no legislative obligation could be derived from the fundamental law either[2]. According to the Constitutional Court, *the possibility of detrimental discrimination should be excluded by the legal system as a whole*, and it should create the means and guarantees of defence against detrimental discrimination. Because of this, "sectoral articulation" of the anti-discrimination regulation will not in itself call forth unconstitutionality[3]. The realization of anti-

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[1] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 347

[2] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 346, 351

[3] The reason for this is that according to the permanent practice of the Constitutional Court" the requirement of legal security in itself is not infringed if not only one but a number of provisions contain dispositions on a subject matter". (1103/B/1990 Const. Court resolution, ABH 1993, 539, 542). Consequently, it is not in itself unconstitutional if the regulation related to the same life-relation group is involved in a number of distinct acts and subordinate provisions and not in one legal source. Cf. 725/B/1991 Const. Court resolution (ABH 1992, 663, 664) and 518/B/1996 Const. Court resolution (ABH 1996, 624, 625)

discrimination regulation *broken down into larger legal spheres and branches of law in a multi-level system, connected to the general constitutional rule is suitable means to provide an effective anti-discriminative action*[4]. The basic anti-discrimination regulations are involved in the Constitution itself, their details and guarantees in the legal source hierarchy are included in provisions subordinate to the Constitution, and among them in comprehensive codes of certain branches of law. The "particular rules" – namely the particular rules of the "right to equality" (previously – T., P) – thus are in different codes and other subordinate level provisions. The Constitution and further provisions closely connected to it involve the decrees that are competent to provide the overall organisation of the prohibition of discrimination[5]. Notwithstanding the Body have recognised the regulation might bear some deficiencies; consequently the articulated regulation may not involve decrees on certain cases which realise detrimental discrimination. According to the Constitutional Court "from the repudiation of the motion will not follow that the legislative possibilities required for the fulfilment of the Constitutional provisions prohibiting discrimination have been exhausted. It is however the duty of the legislator to decide what further means may be used and what sort of regulation is required for the sake of prevention of detrimental discrimination through the creation of social equality and by the provisions of intervention against discrimination". [6]

I. The appearance of the prohibition of discrimination in the fundamental law and in some international treaties

1. The provisions of the Constitution

a) By virtue of *Article 70/A* of the Constitution of the Republic of Hungary the Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination[7] on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or any other grounds whatsoever. The law shall provide for strict punishment of discrimination based on

[4] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 347
[5] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 348
[6] Const. Court resolution 2000, 344, 351. In connection with the latter opinion Halmai, Gábor expresses his criticism in his work Szükség van-e antidiszkriminációs törvényre Magyarországon? ['Is the anti-discrimination act needed in Hungary?']. In: Emlékkönyv Bihari Ottó egyetemi tanár születésnapjának 80. évfordulójára. [Book published in honour of Bihari, Ottó professor on the 80th anniversary of his birth.] (Ed. Petrétei, József). Pécs, 2001. pp.179-190
[7] On the ground of the Constitutional Court practice the discrimination may be detrimental or positive. Article 70/A of the Constitution prohibits detrimental discrimination. ABH 2000, 344, 348

the Paragraph[8]. Furthermore, the fundamental law expresses the possibility of positive discrimination, namely that the Republic of Hungary promotes the realization of equality before the law with arrangements aiming at the elimination of unequal chances.

b) The *equality of men and women is particularly emphasized under Article 66* of the Constitution. Accordingly, the Republic of Hungary shall ensure the equality of men and women in all civil, political, economic, social, and cultural rights. In the Republic of Hungary, mothers shall receive support and protection before and after the birth of the child, in accordance with separate regulations. The protection of women and youth in the workplace is ensured by separate regulations as well.

c) Further relevant rules of the fundamental law will be reviewed in part II/6.

2. International treaties constituting the part of effective law

Besides Constitutional rules, a great number of international treaties and documents include provisions related to the right of equality. There is a vast number of concerning legal sources thus this study will survey only the most significant *general expectations and stipulations* drafted in documents, those which have a binding force on our country as well, without the detailed analysis of the content of international treaties. Nevertheless, these treaties need to be mentioned since the Constitutional Court regards them as keystones during the constitutional examination of a certain provision. It must be emphasized - with regard to our accession – and to the acceptance of the law of the Union - "*international law and the Union development elaborated different content for the prohibition of discrimination*"[9] which Hungary should also respect[10]. Nevertheless, the formation of a uniform market concerns mainly economic rights and the market provides the outlines of the scope of legitimacy as well. International treaties playing a key role in the Hungarian legal system are the following.

a) A determining document of the European system of human rights is the *Treaty* and its supplementing protocols of Rome (hereinafter Treaty) *on the protection of human rights and fundamental liberties* of 4th November 1950, which was promulgated by Act XXXI of 1993, thus it has become the part of our internal law. In connection with the interpretation of the provisions of the Treaty, the resolutions of the *European Court of Human Rights in Strasbourg* (hereinafter the Court) are of great significance. Since the Treaty – as an act – has

[8] The subjective sphere of the prohibition of discrimination is restricted seemingly to natural persons and the prohibition of discrimination is related to detrimental discriminations only.
[9] 28/2000 (08. 12) Const. Court resolution. ABH 2000, 174, 178
[10] This practice is made a summary of in 28/2000 (08. 12) Const. Court resolution. ABH 2000, 174, 178

become part of Hungarian law, its provisions may directly be referred to, even before the organs of legal defence. (The treaty itself however does not oblige Member states to apply its provisions in national law directly.)[11] Provisions on the prohibition of discrimination are made in Article 14 of the Treaty and in Article 5 of the supplementing protocol No. 7.

b) The Convention on Civil and Political Rights, promulgated by Provision No. 8 of 1976 also falls within Hungarian law. Article 2, Paragraph 1 of the above document involves the regulation on the prohibition of discrimination, and it is emphasized by Article 26.

c) Article 2, Paragraph 2 of the Convention on Economic, Social, and Cultural Rights promulgated in Provision No. 9 of 1976 also records the prohibition of discrimination.

d) The Treaty adopted in New York in 1979 (promulgated by Provision No. 10 of 1982) on the elimination of all sorts of discrimination related to women, which obliges Member States to eliminate discrimination against women in all fields especially in politics, economy, education employment and healthcare is also a document of great importance.

e) Article 1, Paragraph 3 of the United Nations Charter aims to promote "the respect of human rights and fundamental liberties of all persons without discrimination based on race, sex, language, or religion". The Uniform declaration of Human Rights of the UNO, in Article 2 provides alike and in Article 7 states equality before the law[12].

f) The treaty on the elimination of all forms of racial discrimination promulgated by Provision 8 of 1969 may be mentioned among the relevant treaties too.

g) Beyond the international documents surveyed above several international treaties, having become part of our national law deal with the enforcement of the prohibition of discrimination. One of them is Treaty 111 of 1958 on detrimental discrimination deriving from a job or employment, adopted at the International Conference of Labour Affairs, and promulgated by Act LX of 2000.

II. The notional elements and interpretational possibilities of the prohibition of discrimination

1. The notion and content of the principle of equality

[11] Kovács, Krisztina: Emberi jogaink – magánjogi viszonyainkban [Our human rights – in our relations of private law]. Fundamentum, 1998/4 p. 89
[12] Cf. 28/2000 (08. 12) Const. Court resolution. ABH 2000, 174, 177

a) Democratic constitutions generally name the right to equality separately – or in a negative way, the prohibition of discrimination –, notwithstanding the organs protecting the constitution think it can be derived from different aspects of the right to human dignity or explicitly regard it as part of that right. The right to human dignity and equality appears in the legal literature as sources of rights,[13] and also as a democratic legal principle[14] that provides one of the fundamental pillars of the constitutional state. The "prohibition of discrimination as a right of special status … from a theoretical aspect *derives from the equality function of the right to human dignity*[15], thus the entirety of the system safeguarding the constitution may be traced back to one common source."[16] The right of equality *cannot be regarded as a right prevailing independently*, but it is of additional character: it appears *in connection with the infringement of another right*. This view is represented in the interpretation given by the Court: the prohibition of discrimination should be denoted as one that *forms part of the provision of the Treaty defining all the human rights*.[17]

b) The Constitutional Court in their resolutions have not yet provided a uniform notion of equality before the law, but in their resolutions have represented its content elements. Based on them thus the notion can more or less be determined. *Article 70/A of the Constitution verifies the requirement of equality before the law*. It means the state, as a public authority – as a legislator and law enforcer – in the course of establishing rights and duties is obliged to deal with subjects of the same situation as equal citizens, without any reasonable discrimination[18]. Namely Article 70/A, Paragraph. 1 of the Constitution prescribes the constitutional requirement of equal distribution of rights.[19] The constitutional requirement of equality before the law and the prohibition of discrimination[20] are *constitutional provisions related to subjective rights*.[21] By virtue of the essence of equality before the law, the *state* as a public authority and legislator is *obliged to ensure equal treatment to everyone residing in its*

[13] Cf. 23/1990 (31. 10) Const. Court resolution. Parallel opinion of Dr. Lábady, Tamás and Tersztyánszky, Ödön Constitutional Court judges. ABH 1990, 88, 95
[14] Cf. Kiss, László: A közjog és közigazgatás – átalakulóban [Public law and public administration – on the move]. In: Studies in honour of Földvári, József. Pécs, 1996. p. 113
[15] In connection with the equality function of the right to human dignity, see the parallel reasoning of Sólyom, László, attached to 23/1990 (31. 10) Const. Court resolution.
[16] Balogh, Zsolt: Az Alkotmány fogalmi kultúrája és az alkotmánybíráskodás [The notional culture of the Constitution and constitutionalizing]. Fundamentum, 1999/2. p. 31
[17] Cf. Bán, Tamás: A diszkrimináció tilalma az Európai Emberi Jogi Egyezményben [The prohibition of discrimination in the European Convention of Human Rights]. Acta Humana. 1991/5. p. 40
[18] 30/1997 (29. 04) Const. Court resolution. ABH 1997, 130, 136
[19] 26/1992 (30. 04) Const. Court resolution. ABH 1992, 135, 146
[20] The drafting does not make clear if the Constitutional Court intend to make a difference between the two notions or just use different wording for the positive and negative side of the phenomenon.
[21] 1097/B/1993 Const. Court resolution. ABH 1996, 456, 462

territory.[22] According to a different drafting, equality before the law denotes, the qualities of legal subjects which have no significance as regards the enforcement of the fundamental law, do not play a role in decisions concerning fundamental law.[23]

2. Relevant aspects that provide the ground for the prohibition of discrimination

Based on the drafting of the Constitutional Court the verification of discrimination *necessarily requires some sort of comparison*, since it is *under the particular treatment* of certain well-defined *persons or phenomena regarded as equal*. *This particular treatment must be tangible in the external world*. Discrimination in a legal sense may be interpreted always as *being referred to a certain right or obligation*: it must be embodied in the deprival of a certain right or in the ascertainment of an obligation not burdening others. Only *in this way will it become legally relevant*[24]. By considering these stipulations may the further precedent law of the Constitutional Court be reviewed.

a) On the ground of the interpretation of the prohibition of discrimination laid down in Article 70/a, Paragraph 1 of the Constitution, *the prohibition of discrimination does not denote that every discrimination*, even those intending to provide a greater social equality are *prohibited*. The prohibition of discrimination covers, *under the law everyone should be treated as equal (persons of equal dignity)*, namely the fundamental right to human dignity should not be infringed. The aspects of legitimacy and the distribution of advantages should be determined by equal respect and foresight and by considering individual respects into the same extent.[25]

b) According to the drafting of the Constitutional Court equality before the court *does not denote* the equality of natural persons *according to viewpoints beyond the law* as well. Human beings as members of the society, owing to their profession, education and income relations etc. may differ and actually differ from other people. The right– and in a certain sphere the duty - of the state is to take the actual differences among people into account in the course of legislation. Namely Article 70/A, Paragraph 1 of the Constitution *prohibits not any*

[22] 61/1992 (20. 11) Const. Court resolution. ABH 1992, 280, 281
[23] Palásti, Sándor: Szükség van-e antidiszkriminációs törvényre? [Is there need for an anti-discrimination act?] Fundamentum. 1998/3. p. .56
[24] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 348
[25] 9/1990 (25. 04) Const. Court resolution. ABH 1990, 46, 48. Sólyom, László states the Constitutional Court in this resolution turned the evaluation of discrimination from the result to the method. Cf. Sólyom, László: Az alkotmánybíráskodás kezdetei Magyarországon. [The beginnings of Constitutional Court jurisdiction in Hungary.] Osiris, 2001. p. 754

sort of discrimination[26] – such a general prohibition would be incompatible with the essence and designation of law[27] -, but *merely discriminations infringing the right to human dignity*.[28] The Constitutional Court pointed out in connection with the indefensibility of the viewpoint requiring a mechanic equalisation (equal treatment) that the law would actually be opposed to its social designation if it neglected the actual differences among persons all the time and in every respect.[29] That is the reason why the Constitutional Court did not find inequalities deriving from natural differences, such as financial inequalities unconstitutional either.[30] According to the opinion of the Constitutional Court, material inequality is not constitutionally prohibited. [31] It ensues neither from the constitutional requirement of equality before the law nor from the prohibition of discrimination that the state should not make differences between people on respects of obedience, economy, legal techniques, dignity, or different social situation, if otherwise the constitutional requirements are not infringed. For instance on the examination of the constitutionality of the prohibition of marriage between people of the same sex the Constitutional Court arrived at the conclusion that the equal rights of men and women make sense while *the natural difference between men and women is recognized, and equality is realized in that regard*.[32] Notwithstanding the justification and mainly the constitutionality of differentiation may be judged just in view of the concrete regulation; differentiation on the ground of age for instance, concerning the legal subjectivity of common law may be unconstitutional but not it is not, concerning the regulation of criminal responsibility or the verification the right to suffrage.[33]

c) The prohibition of discrimination *is not an obligatory rule that must exclusively be taken into account in the sphere of* "*human and civic rights*". For rights not falling within this

[26] The practice of the Court complies with this, according to which only discriminations that cannot be proved objectively and reasonably are prohibited. Cf. Bán, Tamás: op. cit. p.40. The author mentions the case of Schmidt v. Dahlström as an example.
[27] 521/B/1991 Const. Court resolution. ABH 1993, 555, 556
[28] 61/1992 (20. 11) Const. Court decision. ABH 1992, 280, 282
[29] It would lead to the fact however that social aid or any other state support would be a subjective right of persons effectively suffering from a need, and others who e.g.: have an income of half a million HUF per month. Cf. 30/ 1997 (29. 04) Const. Court resolution, the disserting opinion of Kilényi, Géza Constitutional Court judge ABH 1997, 130, 147
[30] The requirement of equality is a Constitutional principle for the equal treatment by the law, within which the financial equality of persons cannot be interpreted. Nevertheless, there is no connection between economic equality and Article 70/A, Paragraph 1 of the Constitution. The fact people of worse financial situation compared to those in more advantageous positions are within more detrimental circumstances derives not only from the anti-constitutional discrimination but also from social-economic inequalities. 32/1991 (06. 06) Const. Court resolution. ABH 1991, 129, 141
[31] I. e.
[32] 14/1995 (13. 03) Const. Court resolution. ABH 1995,82, 84
[33] 30/1997 (29. 04) Const. Court resolution. The disserting opinion of Kilényi, Géza Constitutional Court judge ABH 1997, 130, 147 and 61/1992 (20. 11) Const. Court resolution. ABH 1992, 280, 282

sphere, the prohibition drafted in Article 70/A, Paragraph 1 of the Constitution *through the intervention of the right to human dignity is normative on the whole legal system, because of the prohibition of arbitrariness* [34]. *Besides fundamental rights* (human or civic rights), *in the case of other rights* the Constitutional Court will verify unconstitutional discrimination if they have no reasonable motivation by virtue of objective deliberation, namely they are *arbitrary*[35] and unmotivated. Deliberate discrimination without any reasonable motivation infringes the fundamental right of human dignity[36], because in that case the legislator has not treated the given persons as people of identical dignity, and has not evaluated their aspects with the same circumspection, care, and fairness. Such a regulation *even within positive discrimination is unconstitutional* [37].

If however the prohibition of discrimination referred to rights, or living conditions not belonging to human or civic rights – as it has been referred to in the disserting opinion of a Constitutional Court judge – the declaration of constitutionality of segregation may be easily realised by stating since the right to parking by a car or to alcohol consumption do not fall within the sphere of fundamental rights, it is not contestable from a constitutional point of view if persons belonging to certain ethnic minorities will be allocated separate parking places or these people are prohibited from certain places of amusement[38]. Because of this, through the fundamental right of human dignity, detrimental discrimination is prohibited even in the respect of situations not belonging to human and civic rights. According to the Constitutional Court, thus the constitutional prohibition covers *primarily* discriminations regarding constitutional rights. *The unconstitutionality of a different regulation may be verified if the right to human dignity is infringed*. During the recent practice of the Constitutional Court in the latter sphere, the discrimination between legal subjects has been judged unconstitutional when the legislator discriminated between legal subjects falling within the same regulatory

[34] 30/1997 (29. 04) Const. Court resolution. ABH 1992, 280. Previously the Constitutional Court had a different opinion. Cf. 20/1990 (04. 10) Const. Court resolution. ABH 1990, 73, 77; 13/1991 (13. 04) Const. Court resolution. ABH 1991, 36, 37) and 18/1992 (30. 03) Const. Court resolution. ABH 1992, 110, 113. In resolution 34/1992 (01. 06) during the examination of the rules of non-pecuniary damages the Constitutional Court stated Article 70/A prohibits discrimination concerning human and civic rights, but it does not mean, any different regulation lacking significant importance has a constitutional ground. Thus, Article 70/A ABH 1992, 192, 200 is infringed.

[35] 35/1994 (24. 06) Const. Court resolution. ABH 1994, 197

[36] The genuine difference between discrimination infringing human and civic rights and arbitrary discrimination having no effect on these rights is that while the other fundamental rights are directly infringed, the right to human dignity will only indirectly suffer harm just within the discrimination of other respects (which actually do not belong to human and civic rights).

[37] 1/1995 (08. 02) Const. Court resolution. ABH 1995, 333, 343

[38] 30/1997 (29. 04) Const. Court resolution. Disserting opinion of Kilényi, Géza Constitutional Court judge. ABH 1997, 130, 147

sphere arbitrarily[39], without reasonable motives[40]. This system of requirement is effective in case the discrimination is made *between persons not automatically entitled*.[41]

d) Under the practice of the Constitutional Court the prohibition of discrimination is normative not only on detrimental discrimination but also if the deviation points to a preferential direction from the general rule. Namely, legislators may not act with full powers even if within those, belonging to the effect of a general rule, a more restricted group should be provided preferential judgement. The provision of the fundamental law referred to above – and the authority of the Constitutional Court for constitutional review – covers both discrimination and so-called "positive discrimination"[42].

Notwithstanding the Constitutional Court have developed two very different tests concerning the judgement of the constitutionality of discrimination and positive discrimination, to take the characteristics of positive discrimination into consideration[43], in a way that the test concerning the judgement of discrimination will set up stricter expectations than the version utilized during the application of positive discrimination.

e) According to the practice of the Constitutional Court *the constitutional reason for the application of positive discrimination* may be not only if the preferential treatment is directed to the elimination of unequal chances. The Body have recognized the constitutional grounds of positive discrimination in cases in which there was not even trace of unequal chances but the state, through the above-mentioned regulation intended to promote or ease economic or social political aims – regarded, from a constitutional point of view, as important and not objectionable[44].

However, the circumstances relevant in the given case must be examined with exhaustive accuracy and thoroughness. In the course of verification that the discrimination of

[39] In connection with this cf. BVerfGE (Entscheidungssammlung des Bundesverfassungsgerichts – the collection of the resolutions of the Constitutional Court of the German Federal Republic) 10,234, 246

[40] 9/1990 (05. 04) Const. Court resolution. ABH 1990, 46, 48; 21/1990 (04. 10) Const. Court resolution. ABH 1990, 77-78; 61/1992 (20. 11 Const. Court resolution, ABH 1992, 280-282; 35/1994 (24. 06) Const. Court resolution, ABH 1994, 203 and BverfGE 78, 104, 121

[41] If the state discriminate persons not automatically entitled, the limit of discrimination is the bourne of principle of positive discrimination: treating people as persons of equal dignity and the respect of fundamental rights expressed in the Constitution. Within this it may be required that the non-equal treatment should have a reasonable motive, namely it should not qualify arbitrary. In the case of ex gratia allotments the facts in Article 70/A of the Constitution are normative. The disserting opinion of Kilényi Géza, Constitutional Court judge. 16/1991 (20. 04) Const. Court resolution. ABH 1991, 54, 57

[42] 30/1997 (29. 04) Const. Court resolution. The disserting opinion of Kilényi Géza, Constitutional Court judge. ABH 1997, 130, 148

[43] 30/1997 (29. 04) Const. Court resolution. The disserting opinion of Kilényi Géza, Constitutional Court judge. ABH 1997, 130, 148; 26/1991 (20. 05) Const. Court resolution. ABH 1991, 70, 71; 9/1990 (25. 04) Const. Court resolution. ABH 1990, 46, 48; 56/1995 (15. 09) Const. Court resolution. ABH 1995, 260, 270

[44] 30/1997 (29. 04) Const. Court resolution. The disserting opinion of Kilényi, Géza Constitutional Court judge. ABH 1997, 130, 148

certain persons or groups is the condition for a more perfect social equality, the Constitutional Court must not accept reasons concerning preferred groups, which are prevalent not exclusively on the given group (for instance the creation of entrepreneurial economy, the remedy of injustices). On the other hand, the verification of equal treatment requires the total introduction together with the way of evaluation of the viewpoints of both the preferred group and the group put into a detrimental situation.[45]

f) The examination in connection with equal treatment has to pass a number of phases. First of all, unequal treatment of "the essentially equal" is a relevant and justifiable issue under Constitutional law[46]. The analysis if a provision treats *the essentially equal unequally or the essentially unequal equally* may take three phases. In the first place, however it must be stated that unequal treatment should derive from the "bearer of an identical authority", while the bearers of this authority should consider the principle of equality merely in their own territory[47]. The criterion of essentially equal denotes that persons, groups of persons or situations may be compared on the base of a certain point of reference. In this respect, a point of reference is the common superior notion, which allows comparison[48].

fa) Firstly it must be verified if a person, group of persons or situation is legally treated in a determined way, it is involved or bear(s) the promise of a certain state service.

fb) Secondly it should be stated if a certain other person, group of persons or situation is legally treated in another sense or way, or it is not treated legally at all, perchance a state service is provided to him/them to a minor extent or not at all.

fc) Finally it must be examined if these two persons, groups, or situations *may be compared under a common superior notion or point of reference*. If the situation is such, they can be treated as "essentially equal". In that case, however the motive for discrimination must be obviously examined and justified[49].

g) Equal or unequal treatment may be justified upon the following points of view.

ga) First it must be examined if the given provision has been created properly according to the rules of authority and procedure.

gb) After this, the fulfilment of general expectations must be justified by the existence of a subjective reason.

[45] Cf. with 21/1990 (04.10) Const. Court resolution
[46] BVerfGE 98,365, 385 (Anwartschaften
[47] BVerfGE NVwZ 1998, 52, 53
[48] Rolf Schmidt: Grundrechte. Rolf Schmidt Verlag, 2001. p. 140
[49] Rolf Schmidt: op. cit. p.139

gba) In the case of *unequal treatment of minor intensity* the examination of judicial justification is restricted merely to a so-called *control of evidence*. According to this, the Court will accept a given unequal treatment as not arbitrary and constitutionally justified if the unequal treatment may be attributed to only a reason of fact. In that instant legislators have a comprehensive freedom of formation[50].

gbb) If the unequal treatment is of higher intensity, the Court must perform an examination of proportionateness, and will accept unequal treatment lying on a subjective base only if

- the unequal treatment follows a legal aim or
- it is appropriate and necessary to reach this aim
- if it is proportionate with the value of the aim set[51].

3. The predominance sphere of the prohibition of discrimination

The Constitutional Court made statements on the personal force of the prohibition of discrimination. These are the following.

a) Since Article 70/A, Paragraph 1 of the Constitution prohibits discrimination between persons, it is obvious that prohibition should prevail between legal personalities as well. "The principle involved in Article 70/ of the Constitution refers not only to natural but legal personalities too"[52].

b) Notwithstanding, the prohibition of discrimination refers not only to persons generally but to the different levels and dimensions of the personality. By virtue of the Constitutional Court within the constitutional correlation of general personal right, the law (thus also civil law) should regard and treat not only individual persons as persons of equal dignity but *differentiation should not be made concerning the different levels and content relations of the personality itself.* The distribution of rights thus, not even in the case of well-defined dimensions of the person protected by personality rights, should rely on points of view, which treat persons unequal as proprietors, as the subjects of financial rights, or as persons bearing no name, outlook, personal data, and not expressed personal rights. The fundamental right of equal dignity is infringed, consequently it is unconstitutional if the law (here Civil law) favours a layer or content relation of the personality (structured in a legal

[50] Op. cit.
[51] Op. cit.
[52] 21/1990 (04. 10) Const. Court resolution. ABH 1991, 73, 82

sense), *places it above another* or if concerning rights connected to certain persons applies *contently restricting* regulations[53].

c) *Discrimination between legal objects* in itself should not automatically violate the prohibition of discrimination between persons, except if certain legal objects are employed only by a certain personal sphere, and the discrimination of legal objects is directly correlated to discrimination between persons[54], this is however the case of indirect discrimination.

4. The issue of "belonging to the same sphere"[55]

As it has already been referred to before, Article 70/A of the Constitution *verifies the requirement of equality before the law*. It means the state, as a public authority – as legislator and enforcer of law – in the course of establishing rights and duties, is obliged to treat legal *subjects of the same situation* as equal without any unjustified discrimination[56].

a) According to the Constitutional Court's practice thus the examination whether there has been unconstitutional discrimination or not, may be administered only in there is a different regulation related to comparable persons or groups. The opinion of the Body reflects discrimination may be examined just within a sphere constructed by persons of equal status, and only in respect of a regulation concerning the correlation of the situation in that sphere.[57] *Unconstitutionality may be the result exclusively of discrimination of persons belonging to the same group*, since the appropriate comparison may be administered only between them. *Therefore, the different regulation of the legal status of groups bearing different status is not prohibited discrimination, because this difference is due to their different status.*[58] Because of this, prohibited discrimination between persons not belonging to the same group concerning the subject of regulation is notionally excluded.[59]

b) Equality must exist in relation to the essential element of the given facts of the case. If *within the given regulatory concept, different regulation refers to a certain group*, it

[53] 34/1992 (01. 06) Const. Court resolution. ABH 1992, 192, 197
[54] 31/B/1990/8 Const. Court decree. The disserting opinion of Zlinszky, János Constitutional Court judge. ABH 1991, 581, 583
[55] From among Constitutional Court resolutions connected to the issue of belonging to the same sphere cf. with e.g.: 22/1996(25. 06) Const. Court resolution (ABH 1996, 89, 96), 1/1995 (08. 02) Const. Court resolution (ABH 1995, 31, 59), 1814/B/1991 Const. Court resolution (ABH 1994, 513, 516), 108/B/1992 Const. Court resolution (ABH 1994, 523, 525), 24/1991 (18. 05) Const. Court decree, the disserting opinion of Kilényi, Géza, Szabó, András, Vörös, Imre and Zlinszky, János Constitutional Court judges. (ABH 1991, 313, 315
[56] ABH 1997, 130, 136
[57] 1181/B1990 Const. Court resolution. ABH 1991, 477, 478
[58] 1181/B1990 Const. Court resolution. ABH 1991, 477, 478
[59] 551/B/1993 Const. Court resolution. ABH 1995, 840. 843

collides to the prohibition of discrimination, *except if the deviation has a proper constitutional reason.*[60] If differentiation remains between constitutional limits *may be examined in the objective and subjective correspondence of current regulation*. In this way, differences rooting from different living conditions may be taken into consideration.[61] During the course of proving however, that the discrimination of certain persons or groups is a the condition of a more perfect social equality, the Constitutional Court should not accept arguments referring to preferred groups which are note exclusively valid on these groups[62], because even in that case the prohibition of discrimination in the course of group formation is infringed.

c) When enforcing the requirement of belonging to the same group, the biggest dilemma is, who belong to the same sphere and which level should the Constitutional Court take into account to decide the question. There is no general answer to this question valid in all the cases, thus the Body must decide the problem from case to case. Unconstitutionality may arise not only if within the given regulatory concept different regulation is referred to a group (being in an identical situation)– without any constitutional reason. *It is also detrimental discrimination if the given regulatory concept refers identically to groups bearing essentially different situations from a constitutional point of view*, thus this circumstance is neglected. If such a drawback has no reasonable motive on the ground of objective deliberation –it is arbitrary – unconstitutionality may be verified.[63] Discrimination may be stated only if comparable situations are differently judged or if different statements of fact are judged equally.

5. Positive discrimination[64]

a) The definition of positive discrimination

[60] 21/1990 (04. 10) Const. Court resolution. ABH 1990, 73, 78
[61] 204/B/1995 Const. Court resolution. ABH 1996, 686, 687
[62] 21/1990 (04. 10) Const. Court resolution. ABH 1990, 73, 79
[63] 6/1997 (07. 02) Const. Court resolution. ABH 1997, 67, 69
[64] In connection with certain forms of positive discrimination some typical examples are reflected in several resolutions of the Constitutional Court among others the following: 442/B/1991 Const. Court resolution (ABH 1992, 471, 472), 1292/B/1990/4 Const. Court resolution (ABH 1991, 490, 491), 60/1995 (06. 10) Const. Court resolution (ABH 1995, 304, 311), 115/B/1990 Const. Court resolution (ABH 1990, 286, 287), 7/1998 (18. 03) Const. Court resolution (ABH 1998, 417, 419), 25/1997 (25. 04) Const. Court resolution (ABH 1997, 478, 480), 1067/B/1993 Const. Court resolution (ABH 1996, 446, 4447), 30/1997 (29. 04) Const. Court resolution, the disserting opinion of Kilényi, Géza (ABH 1997, 130, 147), 444/B/1990 Const. Court resolution (ABH 1990, 231, 232), 46/1994 (21. 10) Const. Court resolution(ABH 1994, 260, 272), 657/B/1990/6 Const. Court resolution (ABH 1990, 333, 336)

aa) Pursuant to Article 70/A, Paragraph 3 of the Constitution the Republic of Hungary promotes the realization of equality before the law through measures aiming at the elimination of unequal chances. This is the drafting of *positive discrimination*. There is no general principle to delimitate positive discrimination from prohibited differentiation. According to the Constitutional Court it may be decided only in connection with a concrete constitutional problem if it is a detrimental discrimination, violating Article 70/A, Paragraph 2 or positive discrimination provided for the members of a certain social group for an aim determined in the Constitution[65]. The Constitution itself provides further proofs to the judgement of positive discrimination: Article 66 of the fundamental law drafts the constitutional variant of the option of discrimination considering women.

ab) In connection with positive discrimination the Constitutional Court stated with a significance of principle that this constitutional provision (Article 70/A, Paragraph 3) denotes *an intention for a rule to promote the prevalence of equality before the law and not measures eliminating the unequal chances of persons in an unfavourable, detrimental financial situation*.[66] From the right of equal personal dignity sometimes may ensue the right that goods and chances should be distributed (even quantitatively) equally to everyone. But *if a social aim[67] – not violating the Constitution – or a constitutional right may be enforced in a way that the equality, taken in a narrower sense, can not be fulfilled, this sort of positive discrimination should not be qualified unconstitutional*. Equal treatment however does not definitely mean regulation of equal content upon all legal subjects. Legislators are entitled to an expansive deliberation in verifying immunities and advantages, and in the course of this, they may enforce objectives, not derived from the Constitution. The objective and political revision of the latter deliberation does not fall within the authority of the Constitutional Court, the Body may control if legislators, during their practice of the right to deliberation had clashed with a provision of the Constitution.[68] Positive discrimination thus denotes that more advantageous conditions are provided to some members within a group, in order to enforce certain constitutional aims.

ac) The reason for the application of positive discrimination *may not only be the elimination of equal chances*, because *the elimination of unequal chances is merely a device*

[65] 2002/B/1991 Const. Court resolution. ABH 1992, 702, 703-704

[66] ABH 1991, 129, 142. Nevertheless, equal chances may be provided not with separate provisions but through provisions and the system of state measures, or the state can contribute to the creation of equal chances in this way, or at least to the decrease of unequal chances. Cf. with 725/B/1992 Const. Court resolution. ABH 1992, 663, 664

[67] Such social aim may be for instance a trade union membership. Cf. with 24/1990 (08. 11) Const. Court resolution. ABH 1990, 115, 118

[68] 30/1997 (29. 04) Const. Court resolution. ABH 1997, 130, 139

to the aim of equality before the law. This device character is referred to by the word "too" in Article 70/A, Paragraph 3 of the Constitution, which refers to the fact that *unequal chances as a device is not exclusive*.

ad) The Constitutional Court in a number of their resolutions have stated there is a wide range of statutory measures aiming at the elimination of unequal chances and legislators are entitled to choose from among the different sort of regulations – by having respect for the provisions of the Constitution – at their free discretion[69]. Besides *the equality of chances for different social groups may be provided not by separate provisions or state measures but through the system of provisions and state measures*, or else the state may contribute to the creation of equal chances or at least to the decrease of inequalities in this way.[70]

ae) Pursuant to the opinion of the Constitutional Court, positive discrimination is merely an option and not an obligation.[71] From the option of discriminating regulations which aim at the ceasing or reduction of unequal chances does not follow its constitutional obligation as well, thus no one is entitled to have a constitutional right to positive discrimination; its application is within the freedom of legislators.[72] *A different opinion states*, it is the constitutional obligation of the state to apply positive discrimination within a well-defined sphere. Article 70/A of the Constitution prohibits detrimental discrimination. From this follows, positive discrimination is admissible, but this "freedom" may also comprise a constitutional requirement. This is the case for instance in connection with the institution of marriage and family, which is protected under Article 15 of the Constitution. In this sphere, positive discrimination is not the freedom of legislators but an obligation ensuing from the Constitution.[73]

b) The significance and role of the special constitutional rule related to women

By virtue of Article 66 of the Constitution, the Republic of Hungary shall ensure the *equality of men and women* in all civil, political, economic, social, and cultural rights[74]. In the

[69] Cf. for instance with 652/G/1994 Const. Court resolution (ABH 1992, 471, 472), 2100/B/1991 Const. Court resolution (ABH 1992, 554, 557), 581/B/1990 Const. Court resolution (ABH 1992, 645, 646) and 1588/B/1991 Const. Court resolution (ABH 1994, 510, 512)
[70] Cf. for instance with 725/B/1991 Const. Court resolution (ABH 1992, 663, 664) or 553/B/1994 Const. Court resolution (ABH 1997, 773, 783)
[71] 9/1990 (25. 04) Const. Court resolution. ABH 1990, 46, 48-49
[72] 1067/B/1993 Const. Court resolution. ABH 1996, 446, 448
[73] 1067/B/1993 Const. Court resolution. Parallel reasoning of Zlinszky, János Constitutional Court judge. ABH 1996, 446, 451. Cf. with Sári, János: Alapjogok. Alkotmánytan II [Fundamental rights. Principles of Constitutional law II], 2nd revised edition, Osiris, 2001. p. 48
[74] Cf. further with 160/B/1993 Const. Court resolution. ABH 1993, 775, 776

Republic of Hungary, *mothers shall receive support and protection before and after the birth of the child, in accordance with separate regulations. Separate regulations shall ensure the protection of women and youth in the workplace.*

ba) These provisions intend to ensure the right of equality with different solutions. The equality rule between men and women may be derived also from Article 70/A of the Constitution, thus this statement may be regarded as the stressing and concretisation of the provision. The Constitutional Court in 7/1998 (18. 03) resolution emphasized that *in the stipulation "In the workplace the protection of women and youth are ensured with particular rules*" the Constitution "gives the authorization to the creation of rules involving positive discrimination in favour of women's protection. This authorization is based obviously on the recognition of natural, biological, and physical differences between men and women. Women due to their biological characteristics, mainly because of the biological and psychical dimensions of motherhood and, due to their minor physical strength react on certain environmental damages sooner and with more serious aftermaths. The activity, which causes no harm to men's health, may harm women's health"[75]. When these problems arise, the Constitutional Court must take a stand primarily on the question if differentiation referring to biological reasons between men and women is based on reasonable and objective motives, or qualify as discrimination on the ground of sex. The Body consider this question even more complicated if legislators *discriminate on the ground of such reasons not on actual equal chances but within the sphere of formal equality*[76].

bb) Nevertheless the option to apply positive discrimination does not denote the significance of the rule prohibiting discrimination between sexes would be forced back. There are several examples for this in the practice of the Court of Strasbourg[77] and Luxemburg. Related to the latter for instance in connection with the world of labour, more precisely concerning contracts intended to create a labour relation "it can be observed that *recently more and more people have raised their voice against the detrimental discrimination of men"*[78]. From among the cases cited by the Constitutional Court, mention may be of *Barber v. Guardian Royal Exchange Assurance Group* (C-262/88) in which the Court revoked discrimination against men; in connection *with the grant of positive discrimination however, the Court is increasingly negative*. It was especially striking in the *Kalanke v. Freie*

[75] ABH 1998, 417, 419
[76] 28/2000 (08. 09) Const. Court resolution. ABH 2000, 174, 179
[77] The case of Karlheinz Schmidt v. Bundesrepublic Deutschland (13580/88) before the Strasbourg Court connected to the issue of the equality of sexes. Cited by 28/2000 (08. 09) Const. Court resolution. ABH 2000, 174, 177-178
[78] 28/2000 (08. 09) Const. Court resolution. ABH 2000, 174, 179

Hansestadt Bremen (C-450.93) and the *Marshall v. Nordrhein-Westfahlen* (C-409/95) cases: the ruling in the latter case mitigated the previous opinion of the Court, in favour of men. It can be thus ascertained that after all *positive discrimination slipped from the level of an obligatory rule to the level of an option*[79].

bc) According to the Constitutional Court the annulment or non-existence of women's compulsory military service does not qualify as an unconstitutional discrimination between men and women, because the Body considered compulsory military service as *partial obligation* of national defence[80], thus this positive discrimination was stated to be constitutional. In connection with the opinion – taking the previous decisions of the Body into account – several misgivings arise.

bca) On the one hand, something that amounts almost 100% of major obligations, may be regarded as partial obligation with all reserves. The limited compulsory military service of women, mentioned by the Constitutional Court as well, involves among others the duty of appearance and registration, and in times of war the obligation of military service, but even this latter is "within specified special services". This ever so much shorter and almost never demanded (existing only in times of war) obligation may hardly be compared to a constant military service. In my opinion, this discrimination thus calls forth disproportionateness.

bcb) The other criticisable element of the resolution is that the Body states, it causes no discrimination if legislators take into account "the *historically developed tradition* according to which warfare is the duty of men". Therefore, anything that has been operating long and is customary, and because of this it may be considered a historical circumstance, is not discriminative. Nevertheless, it is not an unchangeable difference deriving from nature, but a long prevailing tradition, based on provisions, the unconstitutionality of which may be verified in the given case. Reference to tradition in itself thus cannot be accepted as a relevant argument, however the Body have expressed their argument similarly later on for instance in 14/1995 (13. 03) Const. Court resolution, or in 14/2000 (12. 05) Const. Court resolution. Since the differentiation, appearing in the resolution does not derive from "social, economic inequality" but from statutory regulation, the verification of discrimination notionally would have been acceptable.

bcc) Although this provision could be justified as positive discrimination provided for women, this is what the Constitutional Court have done, but in that case a reply should be given to the question: how and why this provision promotes the realization of equality before

[79] 28/2000 (08. 09) Const. Court resolution. ABH 2000, 174, 179
[80] 46/1994 (21. 10) Const. Court resolution. ABH 1994, 260, 267

the law. I have not managed to find the answer to this question, probably because there is no answer at all. A foreign critic of the Constitutional Court also remarks the Body have not given reasons in what way the provision constitutes positive discrimination and how it will lead to greater equality.[81]

bcd) In addition to this, the resolution makes no sense in practice either. According to the Constitutional Court practice, the only reason for positive discrimination may not be that the preferential treatment should be directed to the elimination of a certain unequal chance[82]. It is quite clear: the elimination of unequal chances is merely a *means* to reach the *aim* of the realization of equality before the law. This means character is referred to by the word "too" in Article 70/A, Paragraph 3 of the Constitution, which denotes inequality as a means is not exclusive. In our case however not even the aim is clear: *it is not comprehensible how the provision will provide greater equality before the law*.

bce) The argumentation of the resolution refers to the characteristics of females, but what the characteristics cover is not mentioned. In most cases the reason referring to the "weakness of women", concerning physique, and bringing up of children – as a second possible reason – would be logical as a reason for *exoneration* but not for *disqualification*, since it is neither continuous nor referring to everyone.

bcf) Hence I think – in this instance - the Body have decided on the ground of ethical, and moral reasons in order to maintain status quo. To avoid misunderstandings: I agree with the provision on the ground of practical considerations, but from a constitutional point of view, I consider it discriminative. The only right solution to preserve the present situation could have been the drafting of the rule in the Constitution, because in this legal and constitutional environment, the unconstitutionality of the provisions seems to be probable.

In the foreign practice this problem frequently appears with an opposed sign, namely with cases in which women – opposed to their expressed will – are not allowed to take up certain positions in the military profession. In the case of *Sirdar v. The Army Board, Secretary of State for Defence* (C-273/97) the European Court took up the position that *special service conditions may allow the exclusion of women from naval corps*. In the case of *Kreil v. Bundesrepublic Deutschland* (C-285/98) however the Court decided *the German regulation violated the prohibition of discrimination*, since in the army, women are *entitled to sanitary or musical positions only* and it leads to such a *considerable exclusion of women* (sic!) that it

[81] Cf. with Kim Lane Scheppele: Women's rights in Eastern Europe. EECR Vol. 4 No. 1 (Winter 1995), p.69
[82] Kilényi, Géza ex –judge of the Constitutional Court regards this as the fourth "typical delusion". Cf. with ABH 1997, 130, 148

covers almost all fighting units of the German army[83]. In the latter case, thus the excessive *disproportionateness* character was decisive.

c) The limits of positive discrimination

ca) Since during the realization of positive discrimination legislators - in order to realize a constitutional aim - provide more favourable conditions for a sub-group than established for the whole group, actually the circumstances for other members of the group will be more unfavourable than for the favourable group. This situation may be regarded as compatible with the Constitution as long as it can be supported by a constitutional reason. The Constitutional Court emphasized it later on that in the case of *the rule allowing exceptions, the stress is on functionality*[84]. Notwithstanding, negative discrimination should not serve as a means for positive discrimination, namely surplus rights for some people cannot be provided by the deprivation of the civil rights of others.[85] The provision of equal chances cannot be realised through the eclipsing of equality before the law, because equality before the law is a basic category of constitutionality, which all the state organs are obliged to provide.[86] Whether discrimination remains within constitutional limits may be examined in the objective and subjective correlations of prevailing regulation.[87]

cb) A further limit of positive discrimination is the respect of the fundamental right to equal dignity and the protection of basic rights positively drafted in the Constitution. Although social equality as an aim and as social interest may precede individual interests, but it cannot be placed before the constitutional rights of the individual.[88] The application of positive discrimination does not denote an unconditional freedom for legislators: its application should not infringe the constitutional requirement of treating someone as a person of equal dignity, and should not violate positively drafted fundamental rights drawn up in the Constitution[89].

6. The special rules of the prohibition of discrimination in the Constitution

[83] 28/2000 (08. 09) Const, Court resolution. ABH 2000, 174, 179
[84] 33/1993 (28. 05) Const. Court resolution. ABH 1993, 247, 253
[85] 26/1993 (29. 04) Const. Court resolution, disserting opinion of Kilényi, Géza Const. Court judge. ABH 1993, 196, 208
[86] Palásti: op. cit. p.58
[87] 21/1990 (04. 10) Const. Court resolution. ABH 1990, 73, 77
[88] 9/1990 (25. 04) Const. Court resolution. ABH 1990, 46, 48-49
[89] 9/1990 (25. 04) Const. Court resolution. ABH 1990, 46, 49

a) Related to the right to work

Not only Article 70/A, Paragraph 1 of the Constitution involves the drafting of the requirement of equality. Pursuant to Article 70/B, Paragraph 2 of the Constitution everyone has the right to equal compensation for equal work, without any discrimination. All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

aa) In connection with this decree the Constitutional Court took up the position that Article 70/B of the Constitution by virtue of its proper interpretation is the concretisation of Article 70/A, drafting the prohibition of discrimination related to the world of labour.[90] On the other hand from Article 70/B, Paragraph 2 of the Constitution *it does not follow that the expression "for equal work" involves activities of work character* for which *in every case equal consideration (wage)* would be due, apart from the personal and objective circumstances of the legal relation[91]. The meaning of Article 70/B however is not that all employees employed by all employers should get equal wages for equal work, because in that case an enterprise showing a deficit, being under bankruptcy proceeding or liquidation bore the constitutional obligation to pay the same wage as to profitable, successful enterprises. If the principle " equal wage for equal work" would automatically mean that employers have the right to equal wage for work of equal nature, regardless of the economic situation and market position of the enterprise, *it would infringe the constitutional thesis of the freedom of economic competition*, and concerning its result *would make market economy incapable to operate*. Different wages paid by different enterprises is an important factor of economic competition.[92] It must be mentioned here that not every right connected to labour relations enjoys the protection of this provision. The right to indemnification for instance does not fall within fundamental rights, thus discrimination in that respect may be unconstitutional just in extreme cases; only if it violates Article 70/A.[93]

ab) The Constitutional Court touched upon other connections of the prohibition of discrimination of the constitutional rule too. According to this, the stipulation "without any discrimination" in Article 70/B, Paragraph 2 of the Constitution drafts the requirement that in case of equal work equal wage is due, without deliberation. *It is not adequate however to deliberate exclusively the final result of work as a single viewpoint in the evaluation of the*

[90] 137/B/1991 Const. Court resolution. ABH 1992, 456, 459
[91] 1060/B/1991 Const. Court resolution 1997, 770, 771
[92] 137/B/1991 Const. Court resolution. ABH 1992, 456, 459
[93] Cf. with 397/B/1994 Const. Court resolution

notion of equal work. The preceding phases of work should also be examined, namely it must be thoroughly revealed if there were equal conditions for the production of the result of work, and if there is a circumstance, which distracts the standard of equality[94].

b) Ownership forms

By virtue of Article 9, Paragraph 1 of the Constitution the economy of Hungary is market economy in which public property and private property are equal and are under equal protection. In connection with ownership forms, the opinion of the Constitutional Court stated the Constitution makes no differences between ownership forms but prohibits discrimination concerning all forms of property. In compliance with this Article 9 of the Constitution is the expounding of Article 70/A, Paragraph 1 of the Constitution related to the right of property.[95]

c) The appearance of the principle of equality in connection with the right to vote

Under Article 71, Paragraph 1 of the Constitution, members of Parliament, members of representative bodies of local governments, Mayors and the Mayor of the Capital are elected by direct, secret ballot by voting citizens, *based on their universal and equal right to vote*. The equality of the right to vote provides "every person entitled to vote should possess votes of equal number and value and should take part in the ballot with equal rights"[96]. (It can be seen that the equality of the given right here is related to a narrow group of persons, those having right to vote.) According to the Constitutional *Court the constitutional principle of the equality of the right to vote sets two requirements* for creators of the electoral law: partly the *right to vote concerning electors should be of equal value,* partly *votes for the election of representatives should be of equal weight*[97]. Because of the different size of constituencies (electoral geography) and the number of concrete votes required to the acquisition of a mandate (electoral mathematics), after the ballot, *with full knowledge of the election results in the weight of votes there can be no equality taken in an absolute sense*[98].

The Constitutional Court do not regard the way of the acquisition of mandates regulated in the Act of suffrage – and its limits (5% threshold) specified –as detrimental

[94] 823/B/1991 Const. Court resolution. ABH 1992, 665, 666
[95] 21/1990 (04. 10) Const. Court resolution. ABH 1990, 73, 81
[96] Petrétei, József: Magyar Alkotmányjog I [Hungarian Constitutional Law I] Dialóg Campus Publ. Budapest-Pécs, 2002. p. .237
[97] 809/B/1998 Const. Court resolution. ABH 2000, 783, 784
[98] I. e.

discrimination in compliance with political opinion. The provisions of the Act of Suffrage related to the verification of electoral results make no detrimental discrimination between electors according to the political content of their votes but legal consequences are commented to the numerical proportion of votes. *The equality of the right to vote will not and cannot mean the equal prevalence of political wills, expressed in the ballot. Although the Constitution declares the equality of the right to vote,* the direct prevalence of civic political will through representatives naturally brings about disproportionateness. Citizens undertake the precisely unforeseeable consequences of the ballot with the acceptance and support of a party's political orientation. *The obligation to eliminate equal chances,* however from the point of view of the Suffrage Act *denotes the state is obliged to provide equal conditions to those who intend to run for the election. Thus, chances must be equal prior to the elections.*[99]

d) The equality of local governmental rights

Local governmental fundamental rights in relation to the prohibition of discrimination form a distinct category from civic basic rights. According to the Constitution, *local governments have equal fundamental rights* but may have different duties. Pursuant to the Constitutional Court since local governmental fundamental rights regulated in the Constitution (actually groups of authority) qualify as constitutional rights, they also fall within the prohibition of discrimination.[100] Article 43, Paragraph 1 of the Constitution states the fundamental rights of local governments are equal, but their duties may differ. This provision of the Constitution ensures the equality of local governments as regards local governmental fundamental rights. Article 44/A, Paragraph 1/c – by stating that the right to state support commensurate to the scope of such duties is qualified as a local governmental fundamental rights – presumes in advance the differentiation between local governments. Thus, in this respect the equality of local governments denotes, every local government on the ground of the Constitution may claim for the provision of sources of revenue of their own and for state support commensurate to the scope of such duties if a duty is imposed on them by an Act.[101]

In connection with the equality of local governmental fundamental rights the Constitutional Court expressively drafted, the requirement for the equality of fundamental rights denotes *the law is obliged to ensure the practice of fundamental rights regulated under*

[99] 3/1991 (17. 02) Const. Court resolution. ABH 1991, 15, 17. The issue appears in 19/1994 (01. 04) Const. Court resolution too. ABH 1994, 99, 103
[100] 679/B/1992 Const. Court resolution. ABH 1992, 617, 620
[101] 273/B/1993. Const. Court resolution. ABH, 1993, 651, 652

Article 44/A, Paragraph 1 for all types of local government. They cover the right that all local governments under individual liability may decide in cases falling within fundamental rights. The requirement of equal rights is not violated if the practice of certain authorities, within the spheres of authority that provides the content of fundamental rights, is restricted by laws, unless this restriction leads to the idleness of local governmental fundamental rights and makes local governments incapable of making decisions with individual responsibility upon authorities, which denote the material content of the fundamental right.[102]

e) Equality before the court

The Constitution puts special emphasis on equality before the law. Not by chance, equality before the court is one of the most significant aspects of the right to equality. Equality before the law first of all, *means equal law enforcement*, namely the principle of equality must be taken into account when an act is applied[103]. (It will by no means exclude the equality of legislation either, so the given principle must be regarded during the creation of provisions too.)

By virtue of Article 57, Paragraph 1 of the Constitution in the Republic of Hungary *everyone is equal before the law* and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law. According to the determination of the Constitutional Court the constitutional thesis of equality before the court is derived from the general principle of equality before the law and requires equal possibilities and limits concerning the access to the courts and the way of evidence should be equal for everyone[104].

The body verified, "during law enforcement equality before the law declared in Article 57 of the Constitution is a principle of general force"[105], which is "the reference of general equality before the law of persons concerning court procedure"[106]. The Constitutional Court also drew the attention to the fact that Article 57, Paragraph 1 of the Constitution "declares equality before the law from the point of view of law enforcement, thus it is a *procedural guarantee to ensure that everyone concerning his law enforcement, should have legal chances*

[102] 1336/B/1996 Const. Court resolution. ABH 1998, 656, 659
[103] Rolf Schmidt: op. cit. p. 138
[104] 53/1992 (29. 10) Const. Court resolution. ABH 1992, 261, 264 and 44/1991 (28. 08) Const. Court resolution. ABH 1991, 370, 373
[105] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 349
[106] 18/B/1994 Const. Court resolution. ABH 1998, 570, 572

before the court (law)"[107]. *Legal remedy against the rulings and procedures of different courts and authorities however are available if any sort of law (or interest) is injured, even if it is based on the infringement of the prohibition of discrimination*[108].

[107] 1991/B/1996 Const. Court resolution. ABH 1997, 629, 631
[108] 45/2000 (08. 12) Const. Court resolution. ABH 2000, 344, 349-350

Alternatív vitamegoldás

Kalán Eszter Hajnalka*

A viták megoldása a jog alapvető feladatai közé tartozik, ahogy a jogbiztonság és a kiszámíthatóság, valamint az alkotmányos rend védelme is.

A felek a vita megoldására választhatják a bírósági peres és nem eljárásokat, ez utóbbiak közül közismerten a fizetési meghagyásos eljárás a követelés leghatékonyabb igényérvényesítési módszere. Mégis, ha nem pénzkövetelésről van szó, ill. ez meghaladja a törvényben előírt felső összeghatárt, az eljárások hosszadalmasak, aránytalanul költségesek-itt elsősorban az illetékekre gondolok- és az eljárás pernyertesként való befejezése esetén sem garantált az eredetileg kitűzött cél elérése.

„A pereskedés nem háború és nem is játék. Arra szánták, hogy a szemben álló felek között valóban igazságot tegyen, de ha a bíróság nem rendelkezik az ehhez szükséges információkkal, akkor nem tudja megvalósítani ezt a célt. ”[1]

Ezért a Pp[2]. maga is lehetőséget ad a feleknek a per előtt és a per alatt ügyük egyéb módon történő lezárásához, pl.: az egyezségi kísérletre idézés, pert megelőző egyeztetés.

„Zeiler az 1811-es Allgemeines Bürgerliches Gesetzbuch megalkotója fogalmazta meg először azt, hogy a polgári per egy szükséges rossz, amelyet a bölcs törvényhozónak lehetőség szerint meg kell akadályoznia; ha pedig nem sikerül, akkor egy „ jó perrendtartással” kell enyhítenie, amelynek ismérvei közül a méltányosságot, a nyilvánosságot és a jogvita gyors elintézését tartotta a legfontosabbnak.”[3]

A gyorsaság és a méltányosság maradéktalan érvényesülése érdekében jelentek meg és terjedtek el különböző újabb eljárási típusok. A felek biztosak akarnak lenni abban, hogy nemcsak valószínűleg járnak jól az általuk jogosnak vélt igény valamely fórum előtti megvitatásával, hanem az általuk elfogadott személyek és szabályok alapján igényeiket teljeskörűen figyelembe veszik. Ezen igény felmerülése idézte elő az ún. alternatív vitarendezési módok megjelenését.

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[1] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett DONALDSON-tól 81. oldal

[2] 1952. évi III. törvény a Polgári Perrendtartásról

[3] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett SPRUNG-tól 103. oldal Osiris Könyvtár 2003

Emellett új irányzatként és célkitűzésként jelent meg az Acess to Justice (jog elérhetővé tétele). Ez az irányzat Maurolo Capelletti nevéhez fűződik, aki Franz Klein gondolatait élesztette fel. Felismerte, hogy a polgári pernek jólléti intézményként kell funkcionálnia. Az idő- és költségtényezőkön kívül az esélyegyenlőtlenséget vizsgálják az irányzat képviselői. Ezt a törvény előtti egyenlőség, az ügyvédkényszer és a szegényjog, a bírói aktivitás és a kitanítási kötelezettség alapján a polgári eljárásjog-tudomány hosszú időn keresztül adottnak tekintette. Ahhoz, hogy a joghoz jutás biztosított legyen, az alábbiaknak megfelelő eljárás szükséges:

- eredményeit tekintve igazságos legyen
- a peres feleket tisztességesen kezelje
- észszerű költség
- észszerű gyorsaság
- érthető legyen a felek számára
- alkalmazkodjon az igényiknek
- előrelátható
- hatékony[4]

A tagállamok állampolgárai, kis és közepes vállalatai egyre inkább felismerik, hogy az igazságszolgáltatási rendszerük nem felel meg az igényeiknek. A legtöbb túl költséges, túl lassú, és túl nehéz élni vele. Kisebb követelések esetén az akadályok, mint a költségek, a késedelem, és a bosszúság nem csökkennek arányosan a követelés nagyságához igazodva. Ezen problémák megoldására a legtöbb tagállam *egyszerűsített eljárást vezetett be a kis pertárgyértékű ügyekre*.

Közeljövőben a határon átnyúló viták száma emelkedni fog, az EU garantálja a négy alapszabadság érvényesülését. A gyors és költséghatékony eljárás igénye nemzetközi viszonylatban felerősödik: pl. gyakran két ügyvéd szükséges, ehhez még fordítási és értelmezési költségek járulnak és különböző egyéb tényezők: külföldi utazás a pereskedő felek, a tanuk, stb. Ez többféleképpen létrejöhet: pl. külföldön szenvednek balesetet, bevásárló körúton vannak külföldön, a vett áruról később derül ki, hogy hibás, vagy veszélyes, ill. rendelhet Internetről. Mivel a pereskedés költsége nem arányos az igényével, a legtöbben letesznek követelésük érvényesítéséről.

[4] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett 303-306. oldal

Az Amszterdami szerződés életbelépése után az ET a tényleges European Area of Justice megvalósítása érdekében az egyének és a vállalkozások számára biztosítani kívánja, hogy ne legyen az igényérvényesítés akadálya az egymással összeegyeztethetetlen vagy összetett tagállami jogi és bírósági rendszerek. Ez a probléma a kis pertárgyértékű ügyek esetében különösen sürgősen megoldásra vár.

Az EU bíróság EU alapszerződés 12 cikkének értelmezésével kifejtette, hogy a nemzeti jog alkalmazása egyes esetekben *a nemzeti alapon való megkülönböztetéshez* vezethet.

A tagállam a polgári eljárásban biztosítékot követel meg a költségek biztosítására, ha másik tagállam polgára, v. ott van székhelye, ez a szerződés 6. cikkének első § alá esik, ami a diszkrimináció általános tilalma alá esik. A nemzeti jogok közelítése jobb joghoz jutást kell, hogy nyújtson a az állampolgárok és vállalatok számára.

Ezért a Bizottság. 1990-ben felkérte szakértők egy csoportját, hogy készítsenek egy tanulmányt a polgári peres eljárások tagállami szabályainak közelítéséről. Ez az un. *Storme - jelentés*, amely 1994-ben jelent meg. 1993-ban zöld könyv, majd 1996-ban akció terv készült a belső piacon a fogyasztói vitákról és a jobb joghoz jutás biztosítására.

Bécsi akcióterv és a Tamperei Európa Tanács 1999-ben szintén ennek fontosságát annak emelte ki, hogy a kis pertárgyértékű perekben szükséges az eljárás egyszerűsítése és gyorsítása, mint például tartási igények esetén, ill. nem vitatott követelések esetén alternatív, bíróságon kívüli eljárásokat a tagállamoknak be kell vezetniük.

Minden tagállam a kis pertárgyértékű ügyekben különbözőképpen határozzák meg a mértékét.

- Németország 600[Eur]
- Skócia 1235-2470[Eur] (1235 alatt két más elnevezésű külön eljárás létezik, ami lényegében megegyezik a kis pertárgyértékű perekben folytatott eljárással)
- Írország 1270[Eur]
- Spanyol 3005 [Eur][5]

Az alternatív, tehát a hagyományos bírói utat felváltó, vitarendezésnek közismerten két fő formája van: az arbitrációs és a mediációs. Munkajogi területen nevesített megoldási forma

[5] COM (2002) 746Az egységes európai fizetési meghagyásról és a kis pertárgyértékű ügyekben az eljárások gyorsításáró lIII. rész : Lépések a kis pertárgyértékű ügyekben az eljárások gyorsítására és egyszerűsítése érdekében (Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation) www.europa.eu.int

még a közvetítés és a döntőbíráskodás. A méltányosságot és a valódi esélyegyenlőséget teremtik meg mindkét, ill. az összes fél számára.

Egyre nagyobb érdeklődés mutatkozik ezért az alternatív vitamegoldások iránt az EU-ban és így persze hazánkban is. A COM (2002)196-os számú Zöld Könyv[6], amely,, az *alternatív vitarendezés polgári és kereskedelmi ügyekben*" címet viseli három fő szempontot emel ki:

1. *elő kell segíteni, hogy a mindennapi életben általánosan elérhetővé váljon az igazságszolgáltatás*
2. *EU feladata, hogy segítse ezeket az alternatív technikákat, kedvező környezetet biztosítson és garantálja ennek minőségét*
3. *erre összpontosult a tagállamok figyelme, többségük törvényhozása elfogadja és támogatja*

Különösen az információs társadalommal összefüggésben, ahol felismerték az ODR (on-line dispute resolution) szolgáltatás lehetőségét, mint a határokon átnyúló viták egyik megoldási formáját.

Az Európai Unió az alternatív vitarendezésen következetesen mediációt ért, amelyet, mint az alternatív vitarendezés legújabb változatát, részesíti előnyben.

Az emberi jogok és az alapvető szabadságjogok európai egyezményének 6. cikkében deklarált jogokat feltétlenül tiszteletben kell tartani. Ezek megsértése esetén az Európai Bírósághoz lehet fordulni a közösségi jog általános jogelve alapján.

Az igazságszolgáltatás elérhetőségével kapcsolatban a tagállamok kötelessége, hogy gyors és költséghatékony jogi eljárásokat biztosítson. Sőt, biztosítsa azt is, hogy jogi aktusokat elektronikusan is lehessen tenni.(Németországban, Dániában, Finnországban és Angliában van rá lehetőség.)

Az ADR segít a feleknek, hogy párbeszédet folytassanak, amelyre eddig nem volt lehetőség, és hogy ők maguk becsüljék meg annak értékét, hogy bírósághoz fordulnak.(elsődleges az ADR, másodsorban bíróság)

Az ADR szerepe a *társadalmi harmónia elérése*. Nem harmadik fél hozza a döntést, a felek maguk választják meg a vita megoldását és az eljárásban aktív szerepet játszanak.

[6] Green Paper on alternative dispute resolution in civil and commercial law COM (2002)196 www.europa.eu.int

A harmadik fél feladata segíteni őket a számukra legmegfelelőbb döntés meghozatalában. A felek személyesen vagy képviselőjük útján vesznek részt az eljárásban, és dönthetnek úgy is, hogy kiszállnak az eljárásból.

Az ADR költsége is fontos szempont. Az általános szabály szerint a költséget a felek viselik. De lehet, hogy nem kell fizetniük, például Franciaországban a bírósági ún. egyeztetőknek (conciliators) vagy olyan szervezeteknek, amelyek állami támogatással működnek pl. Írországban a családjogi mediátori szolgálatnak.

Jogi segítség biztosított ezekben az esetekben, ha vannak ilyen eljárások, vagy a bíróság utasítja a feleket, hogy vegyék igénybe az alternatív megoldást.

Ennek fontosságáról 1998. decemberében Bécsben és 1999. októberében Tamperében volt egy találkozó a határokon átnyúló viták alternatív megoldásáról és a ,,szabadság, biztonság és igazságszolgáltatás területe az EU-ban" létrehozataláról.

A Bizottság és a Tanács elhatározta, hogy növeli a fogyasztók bizalmát az e-kereskedelemben, különösen az ADR-en (az alternatív vitarendezésen) keresztül. 2000. júniusában az e-kereskedelemről szóló irányelv 17. cikke előírja, hogy a tagállamoknak biztosítaniuk kell, hogy a bíróságon kívüli eljárásokat a nemzeti jog tegye elérhetővé, beleértve az e-formáját is.

2000. szeptemberében a Brüsszel I. tervezetében szerepelt az, hogy a fogyasztói szerződések záradékaként a továbbiakban szerepelnie kell annak a kikötésnek, hogy amennyiben a fogyasztó és az eladó közt vita merülne fel a szerződéssel kapcsolatban a Bizottság tervének megfelelően ADR-t fognak alkalmazni.

A klauzula értelmében, aki először bírósághoz fordul, az az ADR elutasítását jelenti, amiért a szerződésszegés szabályai szerint felelősségre vonható. 2000 decemberében a Tanács elfogadta a Brüsszel I-t, de a Parlament ezen javaslatát kihagyták. Pedig a Tanács és a Bizottság ekkor már kiemelte az ADR fontos kiegészítő szerepét, különösen az e-kereskedelemben.

Az e-kereskedelem területén az ADR-rel kapcsolatban számos nemzetközi nem kormányzati szerv jelent meg, amelyek a Bizottsággal együttműködnek:

GBDe (Global Business Dialogue on e-commerce)
TABD (Transatlantic Business Dialogue)
TACD (Transatlantic Consumer Dialogue)

Több tagállamban az ADR a bírósági eljárásokkal kapcsolatban jelenik meg. Írországban kis pertárgyértékű ügyek esetén békéltetési lehetőségekkel, mediációval és informális megbeszélésekkel segítik elő a megállapodás létrejöttét. Skóciában a jelenlegi szabályok nem nyújtanak a Sheriffnek mediációs, békéltetési lehetőséget a megállapodás létrehozatala érdekében. Mindamellett törekednie kell rá, hogy az első tárgyaláson tanú meghallgatása nélkül létrejöjjön a megállapodás. Ez az eljárásmód új szabályok meghozatalát követeli. Egy államilag finanszírozott bíróságon belüli tanácsadót (segítségnyújtást) terveznek, amelyeket jelenleg a Sheriff bíróságok vezetnek, mediációs lehetőséget biztosítanak. Egyes ügyekben a mediátor igénybevételére a feleket akár a tanácsadó, akár a bíróság utasíthatja. Ennek a szolgálatnak a sikerét jelenleg értékelik.

Az ADR lehetőségét a kis pertárgyértékű ügyektől függetlenül vizsgálják a tagállamok. Ezek az intézkedések függhetnek a tagállam engedélyezésétől (pl. Belgium), támogatástól (Spo., Olaszo., Svédo., Anglia, Wales), az ADR elsődlegességét jogszabályi vagy bírói döntés írja elő (Németo., Belgium, Görögo.)

Cost of Judicial Barriers for Consumers in the Single Market 1995-ben készült tanulmány a következőket emeli i a kis pertárgyértékű perekkel kapcsolatban:

24% az állampolgároknak csak néha vásárol árukat, ill. vesz igénybe szolgáltatásokat 2000 euró felett más tagállamban. 10%-uk elégedetlen 2/3-uk képtelen vagy nem hajlandó érvényesíteni igényét. A felmérés szerint a közös piac a tartós fogyasztási cikkek esetén alig létezik. Nem vásárolnak külföldön, mert nem kockáztatják, hogy sikerül e megjavítatni az árut, vagy visszakapja-e a pénzét.

Egy 2000 eurós követelés érvényesítése határokon átnyúló vita esetén 980-6600 euróig terjedhet tagállamoktól függően és átlagosan az alperes székhelye szerinti államban 2489 euró. A minimális és átlagos költség a felperes székhelye szerinti államban kb. 3% alacsonyabb, a maximum költség 11% alacsonyabb az alperes székhelye szerinti államban. Az eljárási költségek egy részét a pernyertes felperesnek viselnie kell, és a bukás lehetősége ráadásul mindig fennáll, így egy megfontolt vásárló nem fogja kockáztatni a pénzét.

Ezek az adatok jelzik, hogy nem kielégítő a jogi szabályzás a közös piacon a fogyasztók számára. Ennek következtében az informált fogyasztók kerülni fogják a névtelen piacokat, és a nem informált vásárlók kénytelenek kockáztatni külföldi vásárlás esetén.

Megbízható, elérhető és hatékony polgári eljárási szabály szükséges határon átnyúló vita esetére. A vásárló közvetlen költségeinek számításakor a határon túli jogi eljárás bizonytalansága is hozzájárul. A különböző költségkategóriák 7230-73790 millió Euróig

terjedhet. Ezek a körülmények akadályozzák a gyors és hatékony döntéshozatalt, amelyek különösen határon átnyúló viták esetén erősödnek fel.[7]

A már korábban említett célok megvalósítása érdekében 2002. évi LV. Törvényt alkotta meg az Országgyűlés a közvetítői tevékenységről.

Az, hogy a mediáció a jövőben nagy lehetőségeket rejt magában mindenki előtt nyilvánvaló. Különösen családjogi, munkajogi és üzleti területen kívánatos ennek az eljárásnak széleskörű elterjedése.

Az elterjedését különböző okok gátolják. Egyik oka, hogy a törvény nem elég részletesen szabályozza az eljárást. Ilyen hiányossága a törvénynek többek közt az, hogy:

- a *polgári jogvitát* nem definiálja,
- az eljárást lezáró megállapodás *nem látható el végrehajtási záradékkal*,
- bírósági és mediációs eljárás egyidejű lefolytatása esetén a törvényjavaslat szerint a felek kötelesek lettek volna a szünetelés iránti kérelmet benyújtani
- *más harmadik személy részvétele* (aki a tanú, de így nevezve sem igazmondási kötelezettség, sem összeférhetetlenségi szabály nem vonatkozik rá)[8]

Véleményem szerint a legnagyobb akadálya a mediáció, mint vitarendező, konfliktuskezelő eljárás elterjedésének a megfelelő bizalom hiánya.

A képesítési követelmény ugyanis: felsőfokú végzettség és ennek megfelelő 5 éves szakmai gyakorlat, büntetlen előélet, cselekvőképesség.

Ez azt jelenti, hogy jelenleg egy rajztanár 5 évi munkaviszony után minden egyéb képesítés nélkül bejelentkezhet közvetítőnek.

Szükséges tehát a közvetítői tanfolyam bevezetése, hiszen enélkül nem tudja teljesíteni a törvény 30. §-ban foglalt tájékoztatási kötelezettségét (közvetítés alapelvei, szakaszai, megegyezési lehetőségek, csak az ügyhöz kapcsolódó joganyagot ismertetheti). Tanfolyam hiányában a kapcsolódó joganyagot –ha nem jogi végzettségű- nem is ismerheti. Bár fordítva is igaz, hogy hiába jogi végzettségű valaki, ha ezt az eljárást, elveit, módszereit nem ismeri.

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[7] COM (2002) 746Az egységes európai fizetési meghagyásról és a kis pertárgyértékű ügyekben az eljárások gyorsításáró lIII. rész : Lépések a kis pertárgyértékű ügyekben az eljárások gyorsítására és egyszerűsítése érdekében (Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation) www.europa.eu.int

[8] Dr. Rácz Zoltán: Ügyvédek új lehetőség előtt: hatályba lépett a közvetítői tevékenységről szóló törvény ADVOCAT 2003/1-2. (3-5. oldal)

Ugyanakkor szerintem, nem lenne helyes kizárólag jogi végzettséghez kötni. A pszichológusok, szociológusok, orvosok, mérnökök és azok, akik a rájuk és szakterületükre vonatkozó jogszabályok ismeretében munkájuk során jogi vonatkozású vitákkal szembesülnek indokolt a közvetítővé válás lehetőségének fenntartása.

Speciális szakismeret egyes vitákban előnyös, például mérnökök közt egy harmadik mérnök, mint mediátor vesz részt. Tisztában van a vita jelentőségével és kellő előismerete van az adott területen.

A tanfolyam kötelezővé tételével az 5 éves gyakorlatot indokolatlannak tartom. Egyrészt az idejét-a javaslat csak 3 éves végzettségnek megfelelő gyakorlatot írt elő-, másrészt magát a gyakorlatot. A diploma megszerzésével a leendő mediátorok vagy ,,dolgozni" mennek, -ami nem mozdítja elő a mediátori fejlődésüket- vagy jogi végzettség esetén ügyvédjelöltek, közjegyzőjelöltek, fogalmazók, stb. lesznek –az említettek önálló, hagyományos szakmák betöltéséhez szükségesek, ehhez előírt kötelező gyakorlati idővel.

A törvény természetesen lehetővé teszik ezen szakmák és a mediációs tevékenység egyidejű gyakorlását. De a mediáció tényleges elsajátítására a tanfolyam ad lehetőséget, és így megfelelő szakmai színvonalat biztosítana a vitában álló felek számára.

Ugyancsak fontos lenne a bizalom és megbízhatóság garantálása érdekében szakmai testületi tagság és etikai kódex bevezetése.

A közvetítői működés ellenőrzése kapcsán ugyanis csak annyi a végső szankció, hogy a közvetítőt törlik a nyilvántartásból. Ez önmagában a vitában álló feleknek nem nyújt semmiféle biztosítékot.

Manapság egyre több cikk jelenik meg a mediációval kapcsolatban. Ezek a perelhárító jellegen és az üzleti terület kiemelkedő jelentőségén kívül –hiszen a feleknek előnyös, ha vitájuk lezárása után is fenn tudják tartani kapcsolataikat-az eljárás költségét emelik ki. Példaként átlagosan 25-50 ezer Ft-os óradíjakról számolnak be[9]. Ez jelentős költség óradíjban és még az sem kizárt, hogy ha a közvetítés sikertelen, bírósághoz kell a feleknek fordulniuk.

Nyílván függ az óradíj mértéke attól, hogy milyen ügyről van szó (családjogi, üzleti, stb.), milyen értékű a vita tárgya és sajnos, attól is, hogy az ország mely területén veszik igénybe. Az átlagok önmagukban a háttéradatok nélkül nem mutatnak valós képet.

Kereslet ennek ellenére van a közvetítői eljárásokra. Az Országos Mediációs Egyesület tájékoztatása szerint a Kapcsolat Alapítvány Kapcsolat Ügyelete 2003. áprilisig

[9] Kende Katalin: Permegelőzés közvetítővel Világgazdaság 2004. febr. 23. Irántyű melléklet kis- és középvállalkozásoknak 9. oldal

193 ügyben járt el, 80%-os sikerrel. Partners Hungary 6 eljárást bonyolított le, mindet sikeresen zárta le.[10]

A 2003. évi LXXX. Törvény a jogi segítségnyújtásról a szociálisan hátrányos helyzetben lévők számára kíván jogi segítséget biztosítani. A 3. § kiemeli a peren kívüli lehetőséget, tájékoztatást lehet adni a közvetítés igénybevételéről, és ha már jogvita lezárását szolgáló peren kívüli közvetítésben vesz részt, ennek lezárása előtt a létrejött megállapodással kapcsolatban szükségessé válhat a jogi tanácsadás.

Ez is bizonyítja, hogy a mediációs eljárásra Magyarországon is szükség és igény van, de a megfelelő szabályzás létrehozatala szükséges a gyors és széleskörű elterjedéséhez. Elsősorban az üzleti életben, a fogyasztóvédelem és e-kereskedelem, családi és munkajogi ügyekben várható az eljárás alkalmazása. Olyan területeken, ahol a vitázó felek az ügyük lezárása után is szoros kapcsolatban szeretnének maradni.

Hiszen a választottbírósághoz és a bírósághoz képest a mediáció során a felek az ügy urai minden tekintetben, csak számukra teljesen elfogadható megállapodás hozható létre. Nem korlátozza őket, hogy csak a releváns tényeket adhatják elő (a bíróságok kénytelenek a erre szorítkozni, már csak az ügyek száma miatt is), ebben az eljárásban az érdekek és az érzelmi hozzáállás is szerepet kap. Nagyon sok jogvita pedig éppen ilyen természetű okok alapján keletkezik, például a családi jogviták, munkajogi viták, szomszédjogi perek, stb.

Miskolc, 2004. március 9.

Kalán Eszter Hajnalka

[10] Dr. Kutacs Mária: Törvény a mediációról (2)Cég és Jog 2003. április(16-19. oldal)

Felhasznált Irodalom

[1] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett DONALDSON-tól

[2] 1952. évi III. törvény a Polgári Perrendtartásról

[3] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett SPRUNG-tól 103. oldal Osiris Könyvtár 2003

[4] Kengyel Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben idézett 303-306. oldal

[5] Green Paper on alternative dispute resolution in civil and commercial law COM (2002)196 **www.europa.eu.int**

[6] COM (2002) 746Az egységes európai fizetési meghagyásról és a kis pertárgyértékű ügyekben az eljárások gyorsításáró lIII. rész : Lépések a kis pertárgyértékű ügyekben az eljárások gyorsítására és egyszerűsítése érdekében (Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation) **www.europa.eu.int**

[7] Dr. Rácz Zoltán: Ügyvédek új lehetőség előtt: hatályba lépett a közvetítői tevékenységről szóló törvény ADVOCAT 2003/1-2

[8] Kende Katalin: Permegelőzés közvetítővel Világgazdaság 2004. febr. 23. Iránytű melléklet kis- és középvállalkozásoknak

[9] Dr. Kutacs Mária: Törvény a mediációról (2)Cég és Jog 2003. április

The year 2004 promises to be one of accomplishment and challenges for the European Union. On the May 1st, 2004 10 new Countries of Central and Eastern Europe will join the Union with promises of more to join 2007. Despite not having adopted a Constitution in 2003, the Union can look forward to adopting a *Charter of Fundamental Rights* and possibly even reconsidering the adoption of the Constitution. Nevertheless, whatever happens to the Union in 2004, it will have accomplished an idea promulgated centuries ago to bring Europe together.

However, the modalities of that Union remain somewhat unclear. Pr. Zoltán Horváth's *Handbook of the European Union*[1] makes for a punctual instrument of understanding of the European Union as an entity and as to its challenges.This book is a reference to the construction blocs of the European Union and not a precise work of all the inner workings of the EU and of each of its particular pieces. As such, it fulfills the aim of introducing the reader to the various parts of the EU.

As such, it possess qualities that have proved its success, since this English edition is based upon five previous Hungarian editions, and some small areas of improvements. There is no thesis made in this work ; the only aim is to educate the reader to the working of a very large supranational structure. Nonetheless, that is not to say that ideas are not expressed in this book alongside opinions. While this subtle approach might have been deemed arguable in other works, it remains perfectly within the realm of acceptable behaviour and certainly conveys logical and sensible conclusions.

The first point to consider with regards to this book is its package. It is not presented as a large textbook for the student. Instead, it is in a compact format which makes it very handy to carry around as a reference book. Its use of the 12 yellow stars on a blue background signals its subject and makes it easy to notice in a book collection, thereby rendering it easy to locate.

In the same manner, the inner contents are well designed and organised. Its Part I first adresses the development of the Union and its structure. It then moves on in its Part II to expose the frameworks

[1] Horváth, Zoltán, Handbook of the European Union, 1st ed., Reference Press, 2002, 515 pages.

of the Union, notably its treaty-based Community Law, the Single Market and the Economic and Monetary Union. Part III then presents the various common policies of the Union, whether they be in the field of agriculture, fisheries, industry, environment or regions. It then moves on to Part IV, which concerns itself solely with inter-governmental cooperation with regards to Common Foreign and Security Policy and with Police and Judicial Cooperation. It finishes, aptly, on the theme of the enlargement.

What makes this book a success is its approach to explain in layman's term the inner workings of each subject. Evidently, many details are left aside but their absence does not make the book suffer. On the contrary, concentrating on the macro aspect of each chapter, its permits an easy assimilation of the important principles on which the Union is build and allows very dry and technical material to be absorbed in a pleasant and easily referenced manner.

Its building of the historical development of the Union in Part I touches upon all the important milestone and addresses the underlying fears of its over-extention. Particularly, its proposition that enlargement does not contractict the deepening of the Union. This seems of special importance as one of the main point observers of the Union interrogate themselves about is the effects of the enlargement of the Union on the efficiency of its instititions. The author presents on page 58 the opinion that historical precedents in the last half-century have demonstrated that enlargement and reform have had a strenghtening effect on the Union. This is not substantiated, but the progress of the EU toward the realisation of the present enlargement could be accepted as a demonstration *prima facie*.

Part II adresses the components of the structural and functional Union. It explain the role and the powers of the main components, such as the Council, the Commission, the Presidency and the European Parliament. It presents the name and the compostion of these organs and adresses also the debate of the number of votes on the Comission for each country under the Nice Treaty. The details of

the voting power and the presentation of the threshold of vetoing minority (set at 91 votes) presents a very interesting factor in the determination of the contemporary debate between Poland and Germany and reestablish a perspective that is lacking in the public debate.

With this explained, the author moves into the legal framework of the Union by explaining its structure of pillars and differentiating between the 'communal' aspect of the Communities, the Common Foreign and Security Policy and Polica and Judicial Cooperation in Criminal Matters.

Whithin this, the author presents the problem of some relics of historical development of the EU, notably the debate surrounding the Common Agricultural Policy (CAP). Explaining the matters of the budget, the author presents extraordinary figures on the subject : while agriculture represents 3% of the EU's GDP, it CAP represents 50% of its capital expenditure. He also presents on page 132 a relative measure of the diminiton of this expenditure from 75% in the 1980s since he argues that the main factor in this diminition is not factual changes to the system, but the augmentation of the overall budget in other area, which makes for a smaller relative percentage. The author appears critical of this system because of the "distorting nature of guaranteed prices". This argument is indeed supported by many economist and its chief supporter may well be the journal The Economist, which adresses the subject in most critical terms since the failure of the Doha rounds in almost every single issue since September 2003.

These comments from the author obviously support a position, but he remains intellectual honest and does not try to convey more than statements of fact to present sectors where the Union may benefits from improvements.

But in this Part II, the most interesting portion for jurist would be its Chapter 5, which is concerned with Community decision-making and legislation. In particular, the author takes the time to indicate the difference in areas of legislation regarding the need for majority decision and those

requiring unanimous decisions within the framework of the Nice Treaty. On pages 159 to 161, he enumerates all these areas and indicate the source (by article) justifying the use of unanimous decisions. This is presented as a core of the legal decision-making process and is reinforced by the enhanced cooperation mechanisms (pages 162-163). The author then takes the opportunity to address the concept of a “two-speed” Europe and the potential it has for weakening social and economic cohesion with the EU if permitted in some sphere of activities, such as the Single Market or social measures. He also adresses here the potential for the application of enhanced cooperation in the areas of the second, excluding defence policy and military matters, and thrid pillars, following the Nice Treaty. This underlines the intrinsic tensions within the EU between euro-federalists and those of a inter-governmental inclinaison and indicates potential sources of trouble for the functionning of the Union in the future. These functions are adressed in the followgin chapter concerning decision processes.

For jurists, section 6.2 is paramount as it concerns the sources of Community Law and list the hierarchy of sources, from treaties to legislations (including regulations, directives and decisions) to international agreements and case-law as established by the European Court of Justice.

For jurists, therein lies the lack of depth of this work. While the European Court of Justice is presented, there is no indication of its jurisdiction nor is there any examples of the key areas where is has provided important decisions. Evidently, this book is not a law textbook, nonetheless, instead of a grasing of the subject, the provision of more depth within such a critical section would have given even more weight to the whole concept of the book as a reference guide. This would be even more desirable as the author pursues in that exact vein by explaining the notion of acquis communautaire and its legal impacts as well as the relation between international, community and national law presenting there some keystone decisions (pages 201-204). This lack of depth here is even more regrettable as the approach to the Single Market and the Four Freedoms of Chapter 7 addresses four particular rights

within the forst pillar and are supported by cases and the explanation of fundamental principles of the Union (page 212-213).

From Chapter 9 to 18, all the policies concerning the first pillar are adressed. While good references, they provided a limited background of information. However, Chapter 19 takes on the very difficult Second pillar and explain from the start a fundamental difference with the First pillar ; that of being of an inter-governmental nature and not of a communal one. As a result, the Common Foreign and Security Policy remains a desire for harmonisation but by no means an alignment of a political nature within the Union. While noting the hopes raised by the *Amsterdam Treaty* and the progress made with the Petersburg Missions, the author underlines the differences in national policy and especially the case of the recognition of Croatia by Germany in 1991, which exarcerbated the Yugoslav conflicts. Without saying as much, the author subtly reminds the reader that the concept of the Union in the foreign policy sphere is still one of '*rapprochement*' and not of alignment. While the legal bases of the first pillar are compulsery, these are of a truly inter-governmental nature and rest on the choices of national government, creating a fundamental disfunction to the common voice of the Union when dealing with nations external to its own entity.

In a legalistic approach, the author's approach to the Third pillar makes for an interesting read as it adresses the issues of justice and home affairs and the concept of cooperation in criminal justice, especially against terrorism and organised crime. The presentation of the development of formerly inter-governmental fields of jurisdiction into one of '*communitarised*' competences is truly apt. Its presentation of *Europol* is also very useful to understanding the closer cooperation in criminal justice. However, the absence of a presentation of *Eurojust* is truly missed. The simple mention of it at page 414 barely acknowledges its existence. This would be an aspect of the book that would make it even more profitable to read for all jurists in general, by also for Hungarian jurists in particular with the

entry into the Union now being weeks away and the Eastern borders of the European Union being the point of transit of many organised criminal activities. Hungary would definitely be concerned about this with its borders being that of the Union with Romania, Bulgaria, Croatia, Ukraine and Serbia.

This leads the book into its last Chapters concerning the process of the EU's expansion in the East and the problems and solution of enlargement that he proposes. This is an interestig choice as to the order of the Chapter. To be honest, it is to be argued that this might not be the wisest choice. Indeed, having placed those Chapter at the beginning of the book would have contextualised the importance of knowing the inner workings of the Union and would have presented to the reader many important issues from that start which could then be related to while going through the very dry and technical parts concerning each sector of policy. It finishes on the optimist note of the Inter-Governmental Conference scheduled for 2004 concerning the adoption of institutional reforms .

It is definitely a very apt and clear introduction that is proposed in *The Handbook of the European Union*. There is no doubt that readers comes out of his reading much more informed about the structure of the EU than he would otherwise be by simply reading newspapers. The historical perspective and the use of diagrams and charts also permits a solid perspective of the points illustrated by the author when referring to budgets and political weight within the Union.

The only area of concern remains the introductory approach of the book. A second edition should refocus its energy to giving it more depth, especially concerning the legal bases of the Union as it remains very much a treaty-based entity. This would not only increase the weight of the work as a permanent contribution to European Union knowledge, but would increase its contribution to the general knowledge of jurists, economists and politicans readers as well. And this, could be invaluable as a general source of reference for the future of the Union.