

## AUSTRIA

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### I. Historical, Cultural and Social Background

#### (1) *How historically has your national law dealt with religious discrimination?*

##### (a) *How did your law deal with it prior to entry into the European Community and prior to ratification/incorporation of the ECHR?*

Whereas the equal treatment of women and men in matters of employment has already been established in the Law on Equal Treatment of 1979 and the Federal-Law on Equal Treatment of 1993 and special Acts have been enacted with regard to disability,<sup>1</sup> religious discrimination was at issue mainly in context with the labour relations law (§ 132 sect 4 *ArbVG*), the so-called *Tendenzschutz*.

##### (b) *What was the rationale for this approach? Was it 'equality' or 'religious freedom' or both or some other foundation*

Primarily, the rationale for this approach was religious freedom in its corporative dimension in connection with the principle of parity, however, just including the legally recognized churches and religious societies (*Tendenzschutz*). The regulation mentioned above is to be seen as a realization of the fundamental guarantee of self-determination (Art 15 *StGG*) on the level of under-constitutional law (*einfaches Gesetz*) in the fields of labour law. Accordingly, the provisions on the organisation of industrial relations are not applicable to businesses and enterprises which serve the denominational purposes of a recognized church or religious society insofar as these regulations are in conflict with the specific nature of the business or enterprise emanating from the true mandate of the community concerned. On this basis, a concept of grading loyalties owed by employees to ecclesiastical employers according to their self-understanding has been established. With regard to the relevant Supreme Court's decisions, the right to self-determination has been constructed in quite a broad sense.

##### (c) *What political debate took place on this? What was the role of religion and/or religions in debate?*

Altogether no political debate worthy to be mentioned took place on this topic. The debate in the field of religious discrimination was focussed on the differentiation between legally recognized churches and religious societies on the one side and other religious communities on the other.

#### (2) *What effect, if any, have UN instruments on religious discrimination and Article 14 ECHR had on you national law both before and after their ratification and/or incorporation? What if any political debate accompanied these developments? What was the contribution of religions to this debate?*

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<sup>1</sup> *Behinderteneinstellungsgesetz*, BGBl 1973/329 as amended, and *Bundes-Behindertengleichstellungsgesetz*, BGBl I 2005/82 as amended, implementing the European Directive 2000/78/EC.

As far as international instruments are concerned, the ECHR had an enormous impact on the legal system in Austria in general. Essentially, this has to do with the fact that the Convention is incorporated into the Constitution (with retroactive force since 1958), with significant consequences for the fundamental rights' comprehension as well. Article 14 ECHR is to be seen in connection with the general principle of equality enshrined in the Constitution, especially Article 7 B-VG, explicitly excluding privileges for the reason of (inter alia) confession. However, the legislation of 1979 only was the initial turning point on the level of under-constitutional law concretizing the constitutional discrimination prohibitions (cf. the doctrine of the indirect horizontal effect of fundamental rights). Since then this process has been successively intensified, mainly under the influence of the European law.

**(3) *What was your government's view on the EU Directives 2000/43/EC and 2000/78/EC when they were in draft form? What national debate (including debate in your national legislature) was there prior to implementation of the Directives in your law? What role did religions play in this debate?***

As far as we can see, the relevant debate took place within the European Union, including churches and religious communities, to a great extent anticipating the debate in the national legislature. This might also be reflected in the fact that the national laws in large parts take up the European Directives nearly word for word. It has to be mentioned, however, that an intensive debate takes place within the scientific literature taking different and partly very opposite positions.

## **II. The Duty not to Discriminate: The Prohibition against Discrimination**

**(1) *What discrimination authority (eg an Equality Commission) is charged in your state with oversight of religious discrimination? How is it appointed? What is its membership? What are its functions? What roles if any do religions have in its work?***

The Federal Law on the Equal Treatment Commission and the Ombud for Equal Treatment, BGBl 1979/108 as amended BGBl I 2004/66 and BGBl I 2011/7, has established the Equal Treatment Commission and the Ombud for Equal Treatment Advocacy.

The Equal Treatment Commission at the Federal-Chancellery consists of three senates, dealing with

- Equal treatment of women and men in employment and occupation
- Equal treatment without distinction on the grounds of ethnic origin, religion or belief, age, or sexual orientation as regards employment and occupation
- Equal treatment without distinction of ethnic origin or women and men in other areas

The Equal Treatment Commission is set aside the Labour and Social Courts and the Civil Courts as well. The senates have to deal with all questions concerning discrimination on grounds of their respective area of responsibility in general and in individual cases. Essentially, the proceedings are supposed to mediate between employers and employees in advance of jurisdiction. On demand of the Equality Treatment Advocacy or of one of the interest groups represented in a senate or on its own initiative, the responsible senate has to give an expert opinion on questions concerning the violation of the principle of equal treatment.

Members of the Federal staff are entrusted with the chairmanship by the Federal Chancellor. The other members are delegated by the Trade Unions and other interest groups or appointed

by several Federal Ministers, depending on the responsibility of the senate. There are no representatives of the churches and religious communities.

The main task of the Equal Treatment Ombud is to advise and support persons who feel discriminated against in the sense of the Equal Treaty Law. They can carry out surveys on discrimination independently and publish reports and recommendations. Representatives of the Ombud have a non-voting capacity to participate in the sessions of Equal Treatment Commission.

The Federal-Equal Treatment Commission at the Federal Chancellery is a special Federal administrative facility. Any matter concerning discrimination in connection with a Federal employment can be brought before this Commission.

**(2) What are the key instruments or sources of law on religious discrimination in your country? What are the key elements of this law? Are the prohibitions civil or criminal? How is religion defined? Are non-religious beliefs protected?**

The enactments concerning the new antidiscrimination law – the Equal Treatment Act (*GIBG*) and the Federal-Equal Treatment Act (*B-GIBG*)<sup>2</sup> – have been rendered or amended respectively 2004, implementing the European Directives 2000/43/EC and 2000/78/EC of 27 November 2000. Since then, both Acts have been amended for several times, inter alia for implementing the European Directive 2004/113/EC.<sup>3</sup> In compliance with the Directives, the scope of protection differs depending on the ground for discrimination.

The obligation to equal treatment according to the *GIBG* includes essentially all types of employments that are based on a civil contract, while the *B-GIBG* applies to employments within the public-law sphere on the Federal level (*Bund*) both under public and private law. The Federal States of the Republic (*Bundesländer*) have either issued separate anti-discrimination-laws for their jurisdiction or implemented provisions prohibiting discrimination in their Equal Treatment Acts.

The Equal Treatment Laws in large part take up the European Directives nearly word for word, especially with regard to the legal definitions of direct and indirect discrimination, and the regulations providing for admissible exceptions pursuant to § 20 *GIBG*, in far-reaching compliance with Article 2 and Article 4 of the Directive. Those text passages of the last mentioned Article, which have not been implemented into the *GIBG*<sup>4</sup> are of significance for a directive-compliant interpreting. Likewise, the “opening clause” in Article 2 sect. 5 of the Council Directive constitutes an important indication for interpretation. Accordingly, the Directive should be without prejudice to measures laid down by national law, necessary in the interest of objects of legal protection similar to the reservation clause embodied in Article 9, sect. 2 ECHR.

On the whole, the *GIBG* advances to a high degree the principle of equal treatment, thus going beyond the essential content as it has been developed by the case law regarding labour law affairs. As a result, it amounts to a remarkable reduction of private autonomy on the part of the employers. This might be justified with regard to the protection of employees, being an

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<sup>2</sup> *Bundesgesetz über die Gleichbehandlung – Gleichbehandlungsgesetz (GIBG)*, BGBl I 2004/66 (*GIBG*); *Bundesgesetz über die Gleichbehandlung im Bereich des Bundes (B-GIBG)*, BGBl I. 2004/65, as amended.

<sup>3</sup> BGBl I 2005/82; BGBl I 2008/98; BGBl I 2011/7.

<sup>4</sup> It is held essentially that a difference of treatment shall take into account the Member States' constitutional provisions as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

important basis of labour law. However, other experts argue that the allowed measure of restricting private autonomy has been exceeded.

The European Directives themselves as well as the Austrian Equal Treatment Acts give rise to a numerous awkward legal questions. This situation has already been reflected in quite diverging points of view.

In Austria a civil liability has been introduced in connection with special burdens of proof. A person who refers to a factual discrimination has to substantiate the alleged discrimination by prima facie evidence (“*Glaubhaftmachung*”<sup>5</sup>). Under weighing all facts and merits of the case, the respondent has to prove that it is more likely, that another credible motif has been decisive for the unequal treatment, or the unequal treatment can be legally justified (§ 26 sect. 12 *GLBG*).

An obligation to enter into a contract is not provided, but a claim for compensatory damages to property loss as well as compensation for personal encroachment. The claim for damages is at least 2 months’ salary, if the employment relationship has not been established. With regard to other forms of discrimination respective consequences are provided. In case of an intersectional discrimination, this aspect has to be taken into account in calculating the compensation for personal encroachment.

Advertising a job in a discriminatory manner is sanctioned with a fine in the amount of Euro 3000,--, imposed by the district administrative body.

### **(3) How is religion defined? Are non-religious beliefs protected?**

There is no explicit legal definition of religion, but the Explanatory Notes are describing belief as follows<sup>6</sup>: “The term belief serves as a collective name for all religious, ideological, political and other conceptions of life and the world as a meaningful entirety, being the basis for constructing the personal and common position for the individual idea of life”. Furthermore, the Explanatory Notes refer to “world views, conception of man, and attitudes to morality”.

Such a substantial comprehension is by no means necessarily characteristic of political opinions; in fact it is not even typically connected with convictions of that kind, though it might be the case. Altogether, no reasonable ground can be found for neglecting this aspect and, on the part of the national legislator, for giving no clarification of this outstanding question. This issue is seen differently in the scientific literature, though one can make out a certain tendency to including political opinions into the scope of application. However, attention should be paid to the fact that such a broad understanding of the term “belief” implies a certain risk of losing the distinctiveness of this fundamental right in its substance.<sup>7</sup>

The Supreme Court has discussed this problem in one case, however, due to the concrete facts there was not need to decide fundamentally on it. The Court merely stated that critical views on the asylum legislation and the case law of the Asylum Senate are not covered by the term “belief” (*Weltanschauung*) (OGH 24. 2. 2009, 9 ObA 122/07t).

### **(4) What are the fields in which the prohibition is operative (eg employment, the provision of goods and services, education, housing, and public authorities)?**

As regards the equal treatment irrespective of ethnic origin<sup>8</sup> (implementing the Antiracism Directive) as well as of women and men (implementing the European Directive

<sup>5</sup> It has to be emphasized that there are some differences regarding the law of evidence in the English and German terminology.

<sup>6</sup> RV 307 BlgNR 22. GP; AB 499 BlgNR 22. GP, 61.

<sup>7</sup> Cf. R. Potz and B. Schinkele, Religionsrecht im Überblick, Wien <sup>2</sup>2007, 95 s.

<sup>8</sup> In the course of the parliamentary proceedings the notion of “race” was taken out of the text and replaced by the term *ethnische Zugehörigkeit*, representing “race” and “ethnic origin” in the Directives’ text. This should not imply a

2004/113/EC), the scope of the Law's application extends beyond labour law to other fields, comprising mainly social and educational matters as well as the supply of goods and other services such as housing accommodation (§§ 30 ff *GIBG*).<sup>9</sup>

For that reason dogmatically complex questions may especially arise, if more than one criterion of discrimination coincide inseparably within the facts of one and the same case, a so-called "multiple or intersectional discrimination". One has to take into consideration that especially a religious ground might happen to coincide with an ethnic ground, as it could be the case with Jews, Muslims or – to give another example – with a Sikh wearing a turban. A clear delimitation between an ethnic and a religious discrimination can hardly be drawn. Generally, there will be an intangible interaction of grounds.

Pursuant to § 41 sect. 1 *B-GIBG* it also applies to the members of a University as well as to applicants for employment, or any other legal relationship with the University, or for registration as student (irrespective of certain exceptions). As far as studies are concerned, a direct and indirect anti-discrimination rule is provided for students and university applicants. Consequences which might derive with regard to theological faculties cannot be dealt with in this contribution.<sup>10</sup>

**(4) What does the prohibition cover (eg direct or indirect discrimination, incitement to discriminate, victimisation, harassment)? What defences or other justifications are available? What remedies are available and how have these been used in practice?**

Pursuant to § 17 *GIBG* any direct or indirect discrimination on grounds of ethnic origin, religion or belief, age or sexual orientation in the context of an employment is prohibited. The legal definitions of direct and indirect discrimination, the concept of discrimination (§ 19) as well as the exemption clauses or the occupational requirements respectively (§ 20) in their essential parts strictly adhere to the European Council Directives.

A discrimination also exists in an instruction to discriminate against a person (§ 19 sect. 3 *GIBG*). Moreover, the protection against discrimination includes discriminatory behaviour against a person because of a close relationship with another person, based on their ethnic origin, religion or belief, age or sexual orientation (§ 19 sect. 4 *GIBG*). A discrimination shall also be considered to occur when a person is subject to harassment by the employer or any other person (§ 21 *GIBG*).

The decisive criterion is the effect of a provision and not the discriminatory intent. The potential discrimination has to be examined by objective criteria. However, the prohibition of discrimination is not supposed to amount to a rule of preferential treatment.

If a senate of the Commission comes to the conclusion that the principle of equal treatment has been violated, it has to issue a written proposal to the employer or to the person responsible for the non-employment related discrimination on how the obligation under the act can rightly be fulfilled. The senate has to call upon the person responsible to end the discrimination. In case the addressee does not follow the instructions of the Commission, the institutions represented in the senate or the Ombud for Equal Treatment can file a civil action for a declaratory judgement concerning the violation of the obligation to equal treatment. The

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limitation of the scope, it is the result of the sensitivity regarding the notion "race" in German language (AB 499 BlgNR XXII.GP).

<sup>9</sup> In the antidiscrimination legislation of the Federal States (*Bundesländer*) the scope of protection was regularly extended to all grounds regarding their competences in the fields of social benefits, health, education, goods and services that are available to the public.

<sup>10</sup> For more see *R. Potz and J. Wallner*, Antidiskriminierung und theologische Lehranstalten, *öarr* 2008, 304-326.

Commission has the right to request a written report from the alleged discriminator concerning the assumed discrimination.<sup>11</sup>

**(5) What case-law has developed on these matters? Giving examples, are the decisions of the discrimination authority binding or otherwise important?**

Cf above II. (4) and below III. (4)

**III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition**

**(1) On what grounds does the law permit different treatment (eg religion, gender or sexual orientation)? The Right to Distinguish or Differentiate: Exceptions to the General Prohibition**

The exemption clauses or the occupational requirements respectively (§ 20 GIBG) in their essential parts strictly adhere to the European Council Directives.

**(2) Who may discriminate (eg religious organizations, individuals)? And**

**(3) What conditions must be satisfied (eg to avoid violation of religious doctrine, alienating followers)?**

A difference of treatment which is based on a characteristic related to ethnic origin, religion or belief, age or sexual orientation shall not constitute discrimination where, by reason of the nature of the particular occupational activity or of the context in which it is carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (§ 20 sect. 1 GIBG).

According to § 20 sect. 2 GIBG, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on a person's religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

One can assume that the present special concept of grading loyalties owed by employees to ecclesiastical employers according to their self-understanding will continuously endure with its essential features – primarily with regard to church activities within the inner core of “internal affairs” such as pastoral care. As far as charity and social welfare activities are concerned – likewise regularly also covered by the specific ecclesiastical *proprium* – the new anti-discrimination law could involve certain modifications. Anyway, depending on the particular facts and circumstances of the case, there will be a need of a more thoroughly weighing the legal merits and of more detailed arguing in a decision's reasoning.

The main points of conflict supposed to arise will be homosexual orientation and membership or withdrawal from church membership respectively, how it is already reflected in the scientific discourse.<sup>12</sup> As far as practising homosexuality is concerned, the dogmatic difficulty in particular lies in the fact that the church employer demands a certain attitude corresponding to the religious and ethic doctrine – be it with regard to a refusal of an application or a dismissal – while simultaneously another explicitly mentioned anti-discrimination criterion is referred to. However, the application of the exemption clause according to § 20 sect. 2 GIBG (*lex specialis*) seems to be restricted to the criteria of religion and belief. Therefore, in case of

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<sup>11</sup> Cf. the summary by D. Schindlauer, Report on Austria (<http://www.non-discrimination.net/en/home>).

<sup>12</sup> For more see B. Schinkele, Religionsfreiheit und Antidiskriminierungsrecht – einige grundsätzliche Überlegungen, öarr 2003, 179-211.

referring to the homosexual orientation, the *lex generalis* included in § 20 sect 1 should be applied. That might be the way how to meet the Council Directive's requirement that "its provisions are otherwise complied with"<sup>13</sup>. Though the *lex generalis* provides for a different evaluation standard regarding justification of unequal treatment in comparison with § 20 sect. 2 implying a more thoroughly weighing the legal and factual merits of the case, possible inconsistencies seem to be avoided by following such an approach.

Another matter of dispute is supposed to emerge in case of a church employee leaving the church, however engaged with tasks not exclusively reserved for members of the church concerned. The question arises, whether a dismissal on the ground of withdrawal from church membership can be justified as a reason for dismissal in any case, while a membership as a pro-condition for being employed is only required for persons with pastoral, catechistical and usually educational tasks, in certain cases for persons in leading positions. Questions of that kind particularly will apply to the fields of social welfare activities, for instance within the personal staff in a hospital with a denominational holder.

#### **(4) What case-law has developed in the area of exceptions?**

So far, hardly any courts' case law has been developed. Some conflicts, especially concerning wearing the Islamic scarf (e.g. as apprentice in a shop, physician in a sanatorium with a conservative clientele) have been solved by recommendations of the Commission for Equal Treatment or compensation payments respectively. A rejection of a muslima's application as seamstress, arguing the scarf might become entangled with the machine, is pending before the court.

The exclusion of a Sikh participating in a training Course for long-term unemployed for security reasons because of wearing a *Kirpan* (a 20 cm-long dagger) was considered to be justified by the Equal Treatment Commission, despite the impending loss of social assurance. Likewise another Sikh had to leave his *Kirpan* when entering the courthouse.

According to the established case law regarding an occupational disability pension, the insufficient knowledge of German language shall not prevent the reference to another job within the Austrian labour market. This adjudication has been endorsed by Supreme Court decision after the enactment of the new equal treatment law (OGH 25. 4. 2006, 10 Obs 34/06g).

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<sup>13</sup> Cf. above fn. 4.