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*Religion and Discrimination Law in the European Union***

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Religion and Discrimination Law Hungary

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I. Historical, Cultural and Social Background

Hungary has promulgated the ECHR in 1993, and joined the European Union in 2004. Constitutional provisions relating to religious discrimination were not changed. The Constitution provides for religious freedom and for non-discrimination on religious basis since the collapse of the communist system (1989).

Generally the societal attitude to religious diversity has been characterized by a tolerant tradition accommodating different denominations. It has to be noted that Hungary is still not strongly effected by migration, consequently non-traditional minorities are hardly visible.

Equality has not only come up on the level of the individual but the equal legal status of denominations has been on the agenda since 1848 too.

As a clear consequence of the historical legacy of the 20th century religious affiliation is often considered as a private matter. No data on religious belief can appear on public records (Jews suffered discrimination from 1938 and 3/4th of the Hungarian Jewry was deported and killed in 1944) and the right no to manifest beliefs is expressly protected by the Constitution (reflecting experiences of the communist regime).

There was no significant political debate on religious discrimination issues in Hungary.

Parliament passed a general law to fight discrimination and ensure equal treatment in December 2003 (ETA)¹ – a few month before Hungary has joined the EU, aiming to be compatible with the directives on the implementation of equal treatment in the Union.² The law focused on

¹ Act CXXV/2003. on equal treatment and the promotion of equal opportunities

² Article 65 This Act contains regulation in harmony with the provisions concerning law approximation of the Europe Agreement establishing an association between the European Communities and their Member States on the one part and the Republic of Hungary on the other part, signed in Brussels on 16 December

employment, social security and health care, housing, training and education as well as trade and services. The main target of the law was ethnic discrimination (the integration of the Gipsy/Roma minority) and gender discrimination (especially in relation to employment).

The law was not applicable on religious communities,³ however, it applied to church run institutions, like schools, hospitals, institutions of social care etc. It was also challenging that state authorities – finally courts – were to determine what qualifies to be “directly linked to the religious life” of a church. Probably the most sensitive field was employment. In this regard the Act stated that:

- Article 22 (1) The principle of equal treatment shall not be considered violated if
- a) the discrimination is proportional, justified by the characteristics or nature of the work and is based on all relevant and legitimate terms and conditions considered during the hiring, or
 - b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.

This would mean that the nature of the organization itself was not sufficient, but the very nature of the employment activity had to be scrutinized. Hungary seemingly did not make use of a widest possible exemption from the equal treatment in the field of employment what the relevant EU norms had provided.

As in Hungary an abstract norm control procedure with the Constitutional Court was possible (there had to be no case or controversy behind the petition) mainstream religious communities

1991 and promulgated by Act I of 1994, compatible with the following legal acts of the European Communities:

- a) Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions and Council Directive 2002/73/EC amending the above Directive,
- b) Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security,
- c) Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes,
- d) Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity and on the protection of self-employed women during pregnancy and motherhood,
- e) Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex,
- f) Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
- g) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

³ Article 6 (1) The scope of this Act does not extend to

- a) family law relationships;
- b) relationships between relatives;
- c) relationships of ecclesiastical entities directly connected with the activities of the religious life of churches; (...)

(the Catholic Church, the Reformed Church, the Lutheran Church and the Alliance of Jewish Communities) filed an unprecedented joint initiative to the Constitutional Court in 2004 claiming that the new law on equal treatment passed by Parliament late 2003 was unconstitutional. Religious communities considered the church autonomy endangered by the new law, especially concerning employment, as religious affiliation could only be taken into consideration with genuine religious ministries (determined by state authorities what qualifies as such). The case is still pending and it is not likely that the Constitutional Court would decide on it by the end of 2011 when the present Constitution will be replaced by the new Basic Law of Hungary and pending petitions will be stricken from the list. At the same date, however, the new Religion Law will enter into force that provides for a wide-scale autonomy for church run institutions.

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

(1) The Equal Treatment Authority

The ETA provided for an Equal Treatment Authority as a remedy competent in equal treatment cases. The Authority has the power of stating the breach of the equal treatment principle, to fine the institution that has violated the principle and to require changing its policies. Decisions of the Equal Treatment Authority can be challenged at the Municipal Court of Budapest.

The Authority started its work on the 1st of February 2005. It is an independent organization, which was set up by the Hungarian Government to receive and deal with individual and public complaints about unequal treatment and to implement the principles of equality and non discrimination. The Authority works under the direction of the competent member of Government, however neither the government nor the Ministry may instruct the Authority when it performs its tasks under the Equal Treatment Act. This provision intends to guarantee the Authority's independence from the Government. The Authority is led by the President appointed by the Prime Minister.

The Equal Treatment Authority is assisted by an Advisory Body in issues of strategic importance. The Board consists of six experts with outstanding experience in asserting the right of equal treatment. The 6-member Board was appointed by the Prime Minister after an extensive consultation process, in the course of which NGOs nominated the 24 candidates. The Board has co-decision powers with the Authority on the adoption of proposals for Government decisions and draft legislation relating to equal treatment and on reporting in general (national reports to international bodies). At present no member of the Advisory Board could be qualified as an expert on religious issues (expertises focus on labour law, social security and the rights of homosexuals).

The Equal Treatment Authority reviews the complaints it receives to see if the principle of equal treatment has been violated on the following grounds:

- sex
- racial origin
- color
- nationality

- national or ethnic origin
- mother tongue
- disability
- state of health
- religious or ideological conviction
- political or other opinion
- family status
- motherhood (pregnancy) or fatherhood
- sexual orientation
- sexual identity
- age
- social origin
- financial status
- the part- time nature or definite term of the employment relationship or other relationship related to employment
- the membership of an organization representing employees interests
- other status, attribute or characteristic (hereinafter collectively: characteristics)

The Authority also reviews the complaints it receives to see if those budgetary organs and legal entities in state majority ownership employing more than fifty employees obliged to adopt an equal opportunities plan have done so.

The Authority deals with direct discrimination based on the above mentioned grounds (when one person or a group is treated less favourably than another is, has been or would be treated in a comparable situation), indirect discrimination occurs (when provisions that are not considered direct negative discrimination and so apparently comply with the principle of equal treatment put or would put any persons or groups having the characteristics mentioned above at a considerably larger disadvantage compared with other people or groups in a similar situation), harassment (a conduct violating human dignity related to the relevant person's characteristic defined above with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around a particular person), unlawful segregation (a conduct that separates individuals or groups of individuals from others on the basis of their characteristics mentioned above without the explicit permission of a legal act), sexual harassment (an offensive verbal or physical conduct of sexual nature, towards a person with whom there are work, business or other relations of subordination), and retribution (a conduct that causes infringement, is aimed at infringement, or threatens with infringement, against the person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to the Equal Treatment Act).⁴

As mentioned above the ETA shall not apply to family and private life and relationships directly connected with the activities of the religious life of the Churches, relationships of parties except for the political or other opinion, relationships between the members of legal entities and organizations without a legal entity, relationship related to membership, except for the establishment of membership.

⁴ A description of the Equal Treatment Authority is available at its website: www.egyenlobanasmod.hu

(2) Sources of law on religious discrimination

It is the Constitution that expressly prohibits discrimination based on religious belonging or equally on the basis of any other opinion or conviction. Discriminative acts could lead to a criminal procedure but they are more likely to end up either as a labor dispute (as this field is the most sensitive) or in an administrative procedure of the Equal Treatment Authority. Eventually damages caused by discrimination could be invoked in a civil procedure.

(3) Fields in which the prohibition of discrimination is operative

Prohibition of discrimination applies to public authorities (in all respects) and to employment, the provision of goods and services. Probably the most sensitive field is employment.

(4) The scope of the prohibition, defences or other justifications

As mentioned above prohibition covers both direct or indirect discrimination, incitement to discriminate, victimization and harassment. Positive discrimination serving equal opportunities is accepted. If this Act does not provide differently, the principle of equal treatment is not violated by such conduct, measure, condition, omission, instruction or practice „which limits a basic right of the entity brought into a disadvantageous position in order to enforce another basic right in an unavoidable situation, assuming that such a limitation is suitable for this purpose and is also in proportion to it”; or „which is found by objective consideration to have a reasonable explanation”. (Art. 7)

In a normal procedure before the Equal Treatment Authority the remedy is the Municipal Court of Budapest.

(5) The case-law of the Equal Treatment Authority

The Equal Treatment Authority has handled over 800 cases since its establishment, but did not handle many cases concerning discrimination based on religion. Some of the few cases, however are of interest – as well as the fact that in the given cases the Authority rejected complaints.

In an interesting case a mission of a religious community was challenged by a person who was rejected for a position opened for a webmaster. The job description did not mention that any kind of religiosity had been required, nor the nature of the work to be done required any kind of such commitment. Prior to the oral interview he was asked to make a statement about his religious affiliation in his CV. After stating that he was not religious he was interviewed successfully: his professional profile was in line with the employer, and he stated his readiness to take part in religious events and to report on them on the website of the community. His agnosticism was also mentioned in the discussion. During the procedure the mission stated that from its 15 employees

3-4 had had no religious affiliation when they were hired. For the position of the webmaster there were eight candidates, but finally the position was not filled for financial reasons. The mission stated that an understating of religious issues had been useful for the job, but not inevitable. The Authority accepted the defence of the mission as the connection between the (lack of the religious) conviction and the treatment could not be established. Religious affiliation was only taken into account by the mission insofar this was necessary for the nature of the job – the sphere where the requirement of equal treatment did not apply at all. The interview was carried out notwithstanding the agnosticism of the applicant, what shows that they have provided him a chance to demonstrate his abilities. It was also considered that finally no one was hired, and in this way there was no one to be discriminated against.⁵

In a case an employee dismissed from a foundation providing assistance to mentally ill carrying out its activities based on the Catholic faith complained that the reason of her dismissal was her motherhood as well as her conviction. The foundation managed to provide evidence in the procedure for the fact that its activities are partly based on religious grounds, what means that employees have to have some kind of knowledge about religion but do not have to be in fact religious. The procedure found no evidence for the claim that there has been a connection between the conviction of the employee and her dismissal – testimonies in the procedure stated other reasons of the dismissal.⁶

In another employment case a person not hired as a social worker by an NGO complained claiming that he was ridiculed and finally tuned down at the job interview because of being vegetarianism and because he did not belong to any denomination. The Authority could not establish a violation in the case as the circumstances of the case suggested that the applicant did not really wanted to get the position (the employment agency has sent him to the interview) and he showed improper behaviour in many ways.⁷

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

(1) Different treatment permitted

The law expressly provides for the possibility running non-coeducated schools.(Art 28 (1))
The principle of equal treatment is not violated if, in public education, at the initiation and by the voluntary choice of the parents (in institutions of higher education by the students' voluntary participation) education is based on religious or other ideological conviction whose objective or programme justifies the creation of segregated classes or groups. This shall not result in any disadvantage for those participating in such an education, and the education has comply with the requirements approved, laid down and subsidised by the State.

(2) Religious organizations and individuals vs. equal treatment

⁵ Case 213/2007.

⁶ Case 1434/2008.

⁷ Case 324/2009.

The ETA is binding to all public authorities and institutions but in private affairs it only applies to labor relations and any kind of contracts where the offer to conclude a contract was available to the general public (like at a shop or a pub). The ETA does not apply to legal relations of relatives and to the religious activities of church entities.

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

According to the ETA the exemption of churches only applies to legal relations of churches that are directly linked to their religious activities. A tender to renovate a church building would not fall within the exemption. Any religious service (baptism, confirmation, wedding, funeral) would be definitely part of the core religious activities where equal treatment could become an issue. The delicate issue would be (so far not tested) who and how could circumscribe the “religious” character of an activity. For any state body this would raise the question about separation of church and state, whereas leaving the issue for the religious communities would enable a full exemption.

- (4) Case-law in the area of exceptions

A sensitive field is employment, including the employment of clergy. The Constitutional Court has put an end to a remarkable dispute between a professor of theology in the service of the Reformed Church and his Church as well as his University. The professor – a pastor of the Reformed Church – was sent into retirement by the Faculty of Theology. He later challenged this decision and first initiated an internal church procedure. After having lost his case within the Church, he sued the Church as well as the University at a labour court, as well as for compensation. Courts in various instances remained uncertain if they had jurisdiction over a dispute between a church and its pastor, as section 15 (2) of the Act IV/1990 on the Freedom of Conscience and Religion, and the Churches states as a consequence of the constitutional separation between church and state that “No state pressure may be applied in the interest of enforcing the internal laws and regulations of a church.” The applicant considered this refusal of court as a lack of remedy in his case, what he considered to be a labour law case between an employer and a dismissed employee. The Constitutional Court – while dismissing the application – stated, that the separation of church and state cannot be interpreted in way that it left those getting into a legal relation with a church without remedy. The remedies, however, can only consider the aspects regulated by state law. Aspects regulated by internal church law (canon law, or the statute of the religious community) cannot be subject of disputes at public remedies.⁸

As mentioned above, labor law uses the term “ecclesiastical persons” that have a special “ecclesiastical working relationship” with their respective church. Discrimination on the basis of religion has been prohibited by the Labor Code⁹ even before the Act on Equal Treatment. Distinctions given by the nature of requirements of the job do not consider as discriminative. That is an exemption concerning the nature of work and not that of the employer. This could suggest that different standards were to be applied on teachers of church schools than on the

⁸ Decision 32/2003. (VI. 4.) AB

⁹ Act No. XXII of the year 1992 § 5.

cleaners for example. There is no court practice established yet how far can ecclesiastical employers go in requiring belief, membership or loyalty in the selection of their employees.

Work for churches can be carried out under four different legal regimes:

- Ecclesiastical persons can be employed in ecclesiastical service that is not employment in the sense of state law but a relation exclusively determined by internal church law. A priest or a pastor would usually work in ecclesiastical service, but churches also have to possibility to employ him in another legal regime.
- Employees of church institutions in genuine religious offices would be usually lay persons, like cantors or catechist. They stay in a regular work relation with a church legal entity and in their case the requirement of a special loyalty is out of question.
- Employees of church institutions in secular offices would be a third category. This is the category that in theory and in practice raises challenges. The intention of the lawmaker was probably not grant exemption from the principle of equal treatment for employees like teachers of secular subjects at church run schools, staff of church run institutions of social care etc. Positions of churches and of public authorities / equal rights advocates seem to be way apart in this regard. With two positions that are not reconcilable one has to get a better understanding starting out from the reality of the given institutions. Many church run institutions today are very much alike secular ones: formally the institution is maintained by a church, practically it is like any other public institution. When we have a look at the origin of these institutions it becomes obvious that originally there were no secular institutions at all. Originally in Europe religious orders started activities and institutions such as schools, hospitals, universities. For them it was obvious that the institution as such is expressing the commitment of the community from the doormen to the abbot. Though numerically overwhelmingly lay persons in work relations carry out most activities in most institutions nowadays, but we still cannot forget the origins of these institutions. In the understanding of the churches it is the institution as such that carries the identity and the message of the community. At the moment when the institution is compelled to employ persons who do not share the commitment of the institution, the very identity and the reason of the institution are at stake. Church jobs are usually not especially well paid – what prevents many conflicts – but churches have become quite careful in formulating the terms of employment in the contracts. A statement on the loyalty – the respect towards the identity of the employer – would generally be required in the contract.
- other types of contracts may also engage people in the service of religious organizations, mainly contracts under civil law. For example at a construction or reconstruction project it is a contractor who is employing a number of workers to carry out the actual work. The painter painting the church does not enter into any kind of contract with the church in this case. In the contract, however, that church may insist on respecting of its special character. Even in these relations it should not be tolerated that workers use swear-words or behave blasphemously.

Church autonomy is a constitutionally protected fundament and consequence of religious freedom in Hungary. Its borders however, have hardly been tested so far. As the general societal attitude is characterized – despite good will – by the lack of understanding of the reality of

religion and religious communities, churches do not regard the challenge of broad interpretation of equal treatment as a merely theoretical threat to religious autonomy but have begun to take steps to defend their identity.