

## Executive Summary

### Country Report Austria 2010 on measures to combat discrimination

By Dieter Schindlauer

#### 1. Introduction

Austria is a wealthy modern welfare state with a population of about 8 million people. The majority of the population is white and German speaking. Autochthonous and recognised minorities are the Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma. Starting in the late 1960s Austria became a country of immigration, predominantly attracting younger workers from former Yugoslavia and Turkey. These groups still form the majority of immigrants in Austria. During political crisis in neighbouring countries Austria traditionally accepted a considerable number of refugees. Hungary 1956, CSSR 1968, Poland during 1980s, Balkan Crisis early 1990s marked peaks of influx to Austrian territory. During the Balkan Crisis approximately 150,000 Bosnian de-facto refugees found protection in Austria. At that time the acceptance of these refugees in the overall population was remarkably high. The humanitarian duty to assist and protect those fleeing from ethnic cleansing and civil war was commonly accepted and perceived natural. At that time it was not a public concern or even reason for discussion that most of the Bosnian refugees were Muslims.

In the beginning and the middle of the 1990s the situation and perception of “foreigners” started to change. The political rise of the FPÖ (Freedom Party) started to dominate the political discourse and changed the political culture. The FPÖ’s success was originally based on attacking grievances in public administration but also introduced populist agitation against migrants and asylum seekers. “Austria First” became the political mantra for the FPÖ. Civil society reacted in 1993 with the “Lichtermeer” (Ocean of Light) – a demonstration involving more than 300,000 people carrying candles. Nevertheless, new restrictive immigration and alien legislation was passed and immigration issues started to be in the focus of populist political parties. The involvement of the FPÖ in the Federal government from 1999 to 2006 and the BZÖ<sup>1</sup> from 2005 to 2006 gave rise to severe concern from the part of the – then – other fourteen EU-member states.

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<sup>1</sup> BZÖ (Bündnis Zukunft Österreich) is a split-off political party from the FPÖ. The secession was organized and lead by Jörg Haider in 2005. Although most FPÖ-members of the national government changed to this BZÖ in 2005 it is nowadays developing into a phenomenon of predominantly provincial importance in the province of Carinthia only, where in the 2009 provincial elections the BZÖ won more than 45,5% of the votes. On national level they won unexpectedly 10,7% of the votes in 2008 (using the name BZÖ-Liste Jörg Haider). FPÖ and BZÖ together hold 55 of the 183 seats in Parliament (30%). The death of their leading figure Jörg Haider in October 2008 was shaking the BZÖ while the FPÖ was almost unaffected. Regarding their programs, FPÖ and BZÖ differ in approaches to economy and taxation but are similarly clear anti-immigrant and anti-Muslim in their attitudes. Under the new leader H.C. Strache, the FPÖ also started to express homophobic attitudes, while both parties are quite constructive and benevolent regarding the situation of persons with disabilities.

Since that period the public discourse about immigration and integration has been dominated by the populist FPÖ (and BZÖ) which have openly communicated ideas of “natural” dominance by “true-born” Austrians and open hostility towards immigrants of Islamic faith.

Although Austria is a predominantly Catholic country, other religious communities were well accepted for many years. It has been only in the last nine years that this general situation of tolerance is shifting, especially with the Muslim community, which is facing a new atmosphere of increasing hostility. After a period of longstanding acceptance and legal standing as a recognised religious community since 1912 the Islamic Faith Community was suddenly confronted with hostile agitation against them.

Anti-Islamic activities reached a first peak during the Provincial electoral campaigns in Vienna in 2005. In this campaign Muslims were explicitly presented as being dangerous unwanted immigrants. The FPÖ managed to position especially immigrants of Turkish origin as scapegoats and the new main target of hostility and repression and continues to increase the pressure on this group.

Although public Anti-Semitism remains a taboo, research still finds a high degree of it in the population.

There are 14 different faith communities legally recognised by Austria – the latest being Jehovahs Witnesses, which is only legally recognised since May 7<sup>th</sup> 2009.

The situation of the lesbian, gay and transsexual community in Austria is ambivalent.

On the one hand, during the last decade, the community has reached a high level of visibility and acceptance in public events like Pride Parades (Regenbogenparade) and the Life Ball as well as in the media. On the other hand Austria remains to be a very conservative, predominantly Catholic country where homophobic statements by politicians and high-ranking church officials are still quite common.

As a result of several attempts resulting in fruitful negotiations in 2008 and 2009, legally recognised partnership was introduced by January 1<sup>st</sup> 2010. The concept and assessment of this new partnership model – which is only open to same-sex couples - is seen quite differently among NGOs. While some celebrate it as an important step into the right direction, others deplore that “Austria adopted [the] worst partnership law in Europe”<sup>2</sup> and put emphasis on the “at least 72 differences to marriage”<sup>3</sup> - unequal treatment which extends to almost every area of law. E.g.: Adoption [even of step-children] as well as medical-technically supported reproduction are forbidden and the couple does not share a “family name” but keep their “surnames” – a term used by law for the first time.

<sup>2</sup> Rechtskommittee Lambda 10.12.2009; [http://www.rklambda.at/dokumente/news\\_2009/News-en\\_PA-091210-E-E-Partnerschaftsgesetz.pdf](http://www.rklambda.at/dokumente/news_2009/News-en_PA-091210-E-E-Partnerschaftsgesetz.pdf).

<sup>3</sup> Rechtskommittee Lambda 23.11.2009; <http://www.rklambda.at/e/231109differencetomarrriage.htm>.

In legal terms this partnership clearly was meant as creating a legal “aliud” in relation to marriage, but it generally gives more rights to “partnered” same-sex spouses than to unmarried hetero-sexual couples.

Age discrimination in the workplace remains a common experience while public awareness that this is unlawful is very low.

The political will to counteract discrimination on the ground of disability appears to be relatively high. The legal standard of protection against discrimination on this ground is considerably higher than the minimum requirements of the Directive 2000/78/EC. Nevertheless, disabled people still face a much higher unemployment rate and especially those with mental disabilities experience a high degree of exclusion. In 2010 the Federal Government (ministries) and most important federal institutions were allowed to delay all their efforts to implement measures concerning accessibility (physical barriers) until 2019.

The dialogue with NGOs about anti-discrimination issues is not continuous and has not produced any measurable output, while the involvement of social partners in the political decision-making remained high compared to other European countries. It seems that the underlying meaning and intended purpose of an NGO dialogue is not clear enough to those in charge of it.

## 2. Main legislation

The Republic of Austria is a federal state. According to the Austrian Constitution, first enacted in 1920, legal powers are exercised either by the Bund (Federation) or the Länder (provinces namely: Burgenland, Kärnten, Oberösterreich, Niederösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, and Wien). Legislative powers are divided between the federal parliament called Nationalrat (acting together with the Bundesrat (2<sup>nd</sup> chamber) and provincial parliaments called Landtage.

Under the Constitution, neither the Federation nor the provinces have the exclusive power to regulate “anti-discrimination”. This leads to a very scattered legal framework with more than 20 Provincial pieces of legislation and five main acts at the Federal level.

The most important Federal acts, implementing the Directives, are:

Equal Treatment Act (Gleichbehandlungsgesetz)

The Equal Treatment Act covers the private sector and protects against discrimination in employment on the following grounds: gender, ethnic affiliation (ethnische Zugehörigkeit), religion and belief, sexual orientation and age.

Protection against discrimination on the ground of ethnic affiliation also extends to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, which are available to the public, including housing.

Federal-Equal Treatment Act (Bundes-Gleichbehandlungsgesetz)

It covers (Federal) public employment and protects against discrimination on the following grounds: gender, ethnic affiliation (ethnische Zugehörigkeit), religion and belief, sexual orientation and age and installs a Federal-Equal Treatment Commission, Officers for Equal Treatment and Contact Women.

Act on the Equal Treatment Commission and the National Equality Body (Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft)

It installs and regulates the functions of the Equal Treatment Commission and the National Equality Body.

Act on the Employment of People with Disabilities (Behinderteneinstellungsgesetz)

The Act inter alia protects against discrimination on the ground of disability in employment and occupation including the concept of reasonable accommodation.

Federal Disability Equality Act (Behindertengleichstellungsgesetz)

It protects against discrimination on the ground of disability in access to and supply of goods and services, which are available to the public, including housing. This means that the level of protection goes beyond the minimum requirements of the Directive 2000/78/EC. Nevertheless, there is a gradual approach on the interpretation of "disproportioned burden" for reasonable accommodation. This means that for a range of circumstances, there are increasing nominal limits for costs of accommodation which are considered proportionate. This gradual development ends in 2015.

Provincial level protection most importantly concerns (Provincial) public employment. All the provinces with the exception of Lower Austria expand their protection to all grounds covering not only the employment sphere but also access to and supply of goods and services, housing, social security and benefits and health and thereby exceed the minimum requirements of the Directives.

### **3. Main principles and definitions**

In general, all major principles of the Directives have been incorporated into the Austrian legal framework.

The definitions of direct and indirect discrimination have been quoted literally from the Directives. Harassment and victimisation are also covered.

Instruction to discriminate is deemed discrimination and outlawed. Discrimination by association is not explicitly mentioned in relation to most grounds, while it seems to be limited to those family members who have caring responsibilities for the ground of disability. So there is room for improvement.

All grounds mentioned in the Directives are covered, but the scope of protection differs between the grounds.

The notion of “race” was taken out of the text in the federal legislation and “race and ethnic origin” are now both represented by the term “ethnic affiliation” (ethnische Zugehörigkeit). This does not change the scope but is an expression of sensitivity regarding language.

The exemption of genuine occupational requirements is also incorporated and it is made clear that it has to be interpreted in a very narrow way.

The concept of reasonable accommodation for people with disabilities has also found its way into the legislation. Employers are obliged to take the appropriate and necessary measures to enable persons with disabilities to enjoy access to employment or occupation, to promotion and to participate in vocational training as well as in-service training, unless such measures would pose a disproportionate burden on the employer. Such a burden shall not be deemed disproportionate if it can sufficiently be compensated by public aid funds according to federal or provincial regulations.

Multiple discrimination or intersectional discrimination is becoming a more and more important issue as the developing practice shows that it is a very widespread phenomenon. The legislation so far recognises the phenomenon and gives rather general guidelines as how to deal with it. Basically courts are obliged to an “overall assessment” when taking into account multiple grounds based discrimination.

#### **4. Material scope**

The Austrian Federal legislator has implemented legislation covering the complete scope of the Directives. In the area of employment (public and private) all the grounds are protected. Ethnic affiliation and disability are further protected grounds in the area of access to and supply with goods and services, while the broadest scope of protection (including education, health and social protection/security) is in place for the ground of ethnic affiliation only.

Most provincial legislations (except Lower Austria) have, within the limit of their competences, broadened the scope of protection beyond the workplace for all grounds. So employment, access to and supply with goods and services, education, health and social protection/security are protected for all grounds there. The provincial competences are especially important in regard to housing, social benefits, health and education.

## 5. Enforcing the law

Despite the quite comprehensive legal framework, the enforcement of it is still deficient. There are a couple of reasons for this finding: Firstly, there is still an enormous lack of awareness in the overall population – even about the mere existence of the legislation. The government has launched quite impressive campaigns in regard to the new regulations on disability, including frequent spots in TV and cinema but kept rather silent on all the other “new grounds”.

Another reason is the very complex and scattered legal framework; - more than 40 legal acts could be relevant. Furthermore the Equality Bodies are also not able to bundle their efforts. More than nine provincial offices, separate structures for the public service – and a completely separate system for disability are operating instead of a strong single body with strong visibility and powers.

The resources for the Federal Equality Bodies are far too limited. The National Equality Body is totally understaffed. The members of the Equal Treatment Commission are not being paid for this task but perform their functions in addition to their jobs on a voluntary basis. This allows for meeting of the senates in intervals of about six weeks and delays decisions.

NGOs are not sufficiently integrated into the system and many do not receive extra funding for their new tasks.

The enforcement procedures of cases on ground of disability are regulated differently from all the other grounds. Neither the National Equality Body nor the Equal Treatment Commission are responsible for such cases, but there is a compulsory conciliation process before the Federal Social Service, which functions comparably well. The sessions are well organised and held very quickly and in the majority of cases a settlement is reached in due time. This tool has been used about more than 15 times per month on average (in 2009).

Another problem in this phase of implementation is the persisting lack of relevant case law (very few cases). Victims of discrimination cannot be sure of the outcome of their proceedings. In case they bring a lawsuit, they have to bear the full risk and cost of the proceedings. Although NGOs try to accommodate victims in this respect, limited resources and the fear of victims to suffer another setback during court proceedings, make them shy away from judicial redress. NGO standing in court is limited to the possibility of intervention and this is only granted to the umbrella organisations “Litigation Association of NGOs against Discrimination” for all grounds<sup>4</sup>, while the “Austrian National Council of Disabled Persons” is entitled to intervene in disability cases and has a limited (and so far unused) possibility to file a class action.

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<sup>4</sup> Disability is not explicitly within the mandate given to the Litigation Association by law, but in practice the association has intervened in cases concerning disability without facing questions of admissibility.

One relieving factor for victims of discrimination is the shifted burden of proof provision, which allows them to gain at least some confidence.

The sanctions in principle comprise compensation of material and immaterial damages. In regard to harassment, the law fixed minimum levels of compensation (Euro 720 for harassment).

It will be a very difficult task for the courts to decide on the immaterial damages in an effective and dissuasive but still proportionate way, given the lack of legal tradition in this respect. In order to function as a dissuasive sanction, the existing practice of awarding only very low amounts for compensation for immaterial damage will have to be adjusted and changed by the courts. The case-law so far (400 and 1000 Euros in cases of severe harassment) is not convincing. The sanction for discriminatory job-advertisements is not at all dissuasive, effective and proportionate (maximum administrative fine of as low as EUR 360, and exclusion of punishment for first-time-offenders [admonition only]).

To ensure proper enforcement of the provisions it will be important to have good case law in the near future.

At the moment, the majority of victims tend to initiate a proceeding before the Equal Treatment Commission before or instead of addressing the courts.

Looking at the existing case law so far, it can be doubted, whether the sanctions applied can be regarded as being proportionate, effective and dissuasive and there is no experience on how the courts will handle evidence in respect to statistical data and the results of situation testing as the plaintiffs have not used such data. The legislation in principle allows the use of such evidence but there is no such practice so far.

## **6. Equality bodies**

The Act on the Equal Treatment Commission and the National Equality Body establishes an Equal Treatment Commission and the National Equality Body. In transposing Art. 13 of the Race Equality Directive, Austria extended the functions of the existing Equal Treatment Commission and the National Equality Body to deal with discrimination on the ground of gender and on all other grounds mentioned in Art 13 ECT except disability.

### Equal Treatment Commission

The Equal Treatment Commission at the Federal Ministry for Women and Public Service is divided into three senates, dealing with

1. Equal treatment of men and women in the workplace.
2. Equal treatment within the scope of directive 2000/78/EC excluding disability, including race and ethnic origin.

3. Equal treatment within the scope of directive 2000/43/EC for race and ethnic origin outside employment and directive 2004/113 /EC.

The functions of the chairpersons, who are part of the respective senates, are held by federal civil servants appointed by the Minister for Women and Public Service. The other members of the commission are performing their functions on an unsalaried voluntary basis. The new structures started to work in May 2005.

Upon request of the National Equality Body, of one of the interest groups represented in the given senates or on its own initiative, the responsible senate of the Commission has to give an expert opinion on questions related to the breach of the principle of equal treatment.

These expert opinions on whether a violation of the obligation to equal treatment had occurred have to be made public. The sessions of the senates are confidential and not open to the public.

The senate has to act in individual cases upon request of an employer or an employee, a member of a works council, of a representative of those social partners represented in the relevant senate or the National Equality Body.

Victims of discrimination can decide to be represented before the Commission by a representative of one of the interest groups represented in the responsible senate or by a NGO or by any other person he/ she trusts in.

If the senate comes to the conclusion that a violation of the principle of equal treatment has occurred, 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 National Equality Body can file a civil action for a declaratory judgment concerning the violation of the obligation to equal treatment. The commission has the right to demand from the alleged discriminator a written report concerning the assumed discrimination. The Commission can also order expert opinions on any company concerned.

The experiences with the Commission show that the structure is quite slow (average procedures last longer than one year).

For employment in the public sector an analogous structure, called the **Federal-Equal Treatment Commission** (Bundes-Gleichbehandlungskommission) has been set up.

### National Equality Body (Anwaltschaft für Gleichbehandlungsfragen)

The National Equality Body, which has been set up at the Federal Ministry of Women and Public Service, is structured similarly to the Commissions' senates. The already existing institution, called "Gleichbehandlungsanwältin" (Office of the Ombud for Equal Employment Opportunities) will remain responsible for equal treatment of women and men at the workplace.

Each of the two other so called "Gleichbehandlungsanwälte (Ombuds for Equal Treatment) are responsible for discrimination on the basis of race, ethnic origin, religion, age and sexual orientation in relation to employment on the one hand and for discrimination based on ethnic affiliation outside the working environment on the other hand. The National Equality Body is responsible for counselling and supporting victims of discrimination. To fulfil these functions, the Ombuds can hold consultation-hours and consultation days in the whole federal territory. Most importantly, they can conduct independent inquiries and surveys and publish independent reports and recommendations concerning all questions related to discrimination. The Body has (almost) no role before the courts and practice shows that they quite often manage to arbitrate between the conflicting parties so that they reach an agreement. This function is not explicitly mentioned in the legislation but often used successfully. Being heavily understaffed the Body has so far not made full use of its powers to conduct independent inquiries and surveys and publish independent reports as only very few of those exist so far.

For the ground of disability a separate structure has been set up since 1.1.2006. The **Ombud for Disabled Persons** (Behindertenanwalt) has been appointed by the (then) Minister of Social Security, Generations and Consumer Protection and is responsible for advice and support of people with disabilities. The Ombud can conduct surveys on the situation of people with disabilities and give and publish statements and opinions on this issue.