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National Report: Hungary

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NATIONAL REPORT: HUNGARY

ZSOLT KÖRTVÉLYESI* & ANDRÁS L. PAP†

1. Legal framework: Please briefly explain the legal system used in your country. Include information about the type of Constitution (written; unwritten; modifiable by a Constitutional Tribunal, by Supreme Court decisions, by Congress only; etc.) Please do not use more than one page to provide your legal framework.

The Republic of Hungary is a multiparty, parliamentary democracy with a population of approximately 10 million. Legislative authority is vested in the unicameral National Assembly. The president assigns the prime ministerial candidate from the party that won the elections or is able to form a majority coalition. The president is head of state and is elected by the National Assembly.

The Hungarian legal system is a continental legal system following primarily German legal traditions. It is governed by a strict statutory hierarchy, in which lower level statutes shall not be in contradiction with higher ranking statutes.

The most important principles are laid down by the Constitution; the constitutional rules are expounded by laws, and detailed regulation is provided by government and ministerial decrees. The coherence of the system is guarded by the Constitutional Court, which may annul any statute that is in contradiction with the Constitution.

The written constitution can only be modified by a two-thirds majority of the Parliament.

2. Constitutional regulations applicable to same-sex partnerships. Please be specific about the constitutional guarantees in your country that conflict/support same-sex marriage and those that can conflict/support same-sex unions in a format different than marriage. Explain each case.

Under Article 15 of the Constitution “Republic of Hungary shall protect

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the institutions of marriage and the family.”

Civil union (“élettársak”) exists following a decision of the Constitutional Court that found it discriminatory to exclude same-sex couples from the possibility of being recognized under this formula (Article 685/A. of the Act No. 4 of 1959 on the Civil Code).

Registered civil union (“bejegyzett élettársi kapcsolat”): There were two recent attempts by the left-wing majority in the Parliament to give higher recognition to same-sex relationships, adopting a model close to the regulations on marriage. (Act No. 29 of 2009 on the registered civil unions. For details, see parts 3–4.)

Marriage (“házasság”): Not available for same-sex couples.

3. Legal statutes: Does your country have a specific law allowing same-sex marriage? If yes, please give exact information about such law, its place among the authoritative sources of law and relevant information about its history.

a) Parliament adopted the Act No. 184 of 2007 on registered civil unions that created a new formula to assure same-sex couples equal rights with the exception of the name changes (e.g. using the family name of the partner) and adoption. The Act was highly contested—among others by the Catholic Church and right wing parties and organizations—and following their motion to the Constitutional Court, the Court found it unconstitutional in December 2008, and consequently annulled; before it could have entered into force (in January 1, 2009). (See part 12.b below for the motivation of the decision).

b) Parliament, following the decision of the Constitutional Court, adopted Act No. 29 of 2009 on the registered civil unions. This Act tried to preserve the principles of the first Act (of 2007) while including the suggestions of the Constitutional Court. All norms applying to marriages also apply to registered civil unions, except for adoption, artificial insemination, other medical support, and the possibility of holding the name of the partner. The Act entered into force on July 1, 2009.

4. If your country regulates same sex marriage, is there any formal difference in the treatment between different sex and same-sex marriages? In other words, does the law that regulates same-sex marriage provide grounds for any differential treatment? What are those formal differences?

The 2009 legislation (just as the 2007 bill) clearly states that the legal framework applicable on adoption and state funded medical support for artificial insemination, etc., as well as taking up the partner’s name — which are all rights married couples have—should not apply to registered

civil union partners. Thus, these options are legally not available to them. According to critics, the ban on adoption forces same-sex couples to hide their sexual orientation, but does not prevent them from actually adopting children, as individuals, too, have this right. Two unrelated individuals cannot adopt the same child. (“Second parent adoption” is not possible under the 2009 Act, so the biological parent’s registered partner cannot adopt the child. However, the New Civil Code—entry into force blocked by the Constitutional Court, see part 13 below—provided for this possibility.) Also, same-sex partners can bypass the rules for family names by changing their names under the regular rules for name changes, the rules specific for marriages not being available for them. (In Hungary, name change is not mandatory, and, in case of a name change, it is usually the wife who either uses the family name of her husband or uses it together with her family name.)

5. If your country does not have a same-sex marriage regulation. Please specify if your country has some sort of civil union regulation. If so, please specify the statute, its place among the authoritative sources of law, and the conditions for entering into a civil union.

See part 4 above.

6. If your country has a civil union regulation, please specify if this is open to heterosexual couples or only to same-sex couples.

The “traditional” civil union (with no registration requirement, but with less rights) is available for both same-sex and heterosexual couples. The registered civil union (a completely different legal regime), following a decision of the Constitutional Court, is only available for same-sex couples (see part 4 above). Under Hungarian law, there is a third, intermediate possibility, the registration of the civil union before a public notary without actually creating a registered civil union status. While, in the case of same-sex couples, this might be of symbolical importance, in the case of heterosexual couples, this creates a presumption of legitimacy just like in the case of marriage.

7. If the civil union statute is open to heterosexual and same-sex couples, please specify if there is any formal differential treatment between both types of couples within such legal framework.

For the “traditional” (not registered) civil union status, in general, there is no formal differential treatment between the two types of couples. However, artificial insemination is only available for heterosexual couples under the Health Care Act. For the formal differences between marriage (available only for heterosexual couples) and registered civil union

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(available only for homosexual couples) see part 4 above.

8. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.

Hungary has specific regulation, see part 3 above.

9. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and when.

Although LGBT activists and NGOs call for further liberalization, further legislation is not on the agenda of any of the influential political actors.

10. Is your country discussing future regulation on same-sex unions in a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the chances of being passed, and when.

See part 9 above.

11. Non-legislative regulations: does your country provide specific benefits/rights to same-sex couples via administrative acts? i.e.: death pension for the surviving partner; hospital visitations or the right to make decisions when one of the partners is incapacitated to make them. Please provide details.

The 2009 Act and the Act No. 123 of 2005 on equal treatment and on promoting equal opportunities assure—legally—that no discrimination (others than those described in 4 above) whatsoever is allowed in regards of same-sex couples. On the other hand, no specific compensatory (positive action) measures apply to same-sex couples.

Under the 2009 law, the measures on widows should equally apply to the surviving partner in a registered civil union [3. § (1)(c)], and the duty to support apply equally as well [5. § (5)]. Other administrative regulations, on a general level, follow the same track as the measures applying to marriages, via the Civil Code rule of (close) relatives [685. § b), Act No. 4 of 1959].

12. Judicial construction of the law: Are there any relevant decisions in your country that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships? Please provide the date and name of the case, and briefly explain the case and its relevancy for this topic.

a) 14/1995. (III. 13.) AB hat. [Const. Court decision]

The Constitutional Court found the exclusion of same-sex couples from the regulation of civil unions unconstitutional (discriminatory based on human dignity). Since then, civil unions include same-sex couples as well as heterosexual couples. The decision begins by stating that marriage “traditionally” means heterosexual couples, and this is argued with international and comparative legal references (it cites the Danish example of 1989). The decision refers to Art. 15 of the Constitution that creates a state duty to protect marriage and family.

b) 154/2008. (XII. 17.) AB hat. [Const. Court decision]

The Constitutional Court examined the Act No. 184 of 2007 on registered civil unions (see part 3 above) and—while it stated that the idea of registered civil unions for same-sex couples is in conformity with the Constitution—the chosen method made the Act unconstitutional, and, thus, the law was struck down by the Court. (The Act was later adopted in an amended form—reflecting the Court’s decision—and it is in force. See part 3 above.)

The argument referred to the state’s duty to protect the “institution of marriage” (Art. 15 of the Constitution), and found the Act incompatible with this constitutional obligation. The fact that the Act created the registered civil union as an institution “too close” to marriage (with a general reference to the measures on marriage, making a few exceptions), and made this option available for heterosexual couples, was seen as an unconstitutional “concurrence” to marriage, going against the duty to protect the latter under Article 15.

c) 32/2010. (III. 25.) AB hat. [Const. Court decision]

The Constitutional Court examined the (new) Act No. 29 of 2009 on registered civil unions (see part 3 above) and found the piece of legislation constitutional, and went on to say that a registrar cannot deny the participation even if (s)he opposes the registration of same-sex civil unions on grounds of conscience. The decision also made a modest reference to the possible unconstitutionality of applying distinct rules to marriages and to registered civil unions.

13. Additional comments: Please feel free to include additional comments on the topic that you consider relevant to the specific situation of your country.

The actual legislation went beyond what the public opinion and the majority of the electorate would allow for. A survey in 2008 showed a growing tendency to oppose official recognition of homosexual relationships.¹ While 29% considered it necessary to “limit and regulate” homosexual people’s life with administrative and legal acts, the percentage of people supporting the imposition of limits on same sex couples increased to 34% in 2007 and to 42% in 2008. Generally, polls indicate strong homophobic sentiments.

Also, the question of same sex partnerships and marriage raises important issues concerning the freedom of movement within the EU as well as asylum and subsidiary protection, and family unification.

(i) Even though Hungary had transposed relevant community law legislation concerning the right to free movement (since July 2007, EU citizens have the right to legally stay in Hungary for a maximum period of ninety days without prior notice or administrative measures), lesbian, gay, bisexual and transgender (LGBT) people face discrimination in this field. Under Act 1 of 2007 on the right to free movement, residence and entry of EU and EEA Member States’ citizens, the right to free movement and residence is provided to all EU Member State citizens and their accompanying or joining family members in compliance with the rights equally granted by the Treaty on the European Union. However, the law uses the term “family member” in a restrictive way, stating that a family member can only be “1) the spouse of a Hungarian, EU or EEA citizen; 2) their dependent descendant or descendant under 21 years of age; [or] 3) their dependent ancestors.” The Act does not mention same-sex couples, same-sex cohabitation or registered partners amongst family members. Thus, registered partners can only become beneficiaries of the freedom of movement provided by Hungarian law if they prove that before entering Hungary they had been living together in a household for at least one year.² Also, according to the terminology of relevant Hungarian law, same-sex couples from a third country are automatically excluded from the benefits of the freedom of movement.

1. Medián, „Zéró tolerancia?,” July 14, 2008, <http://www.median.hu/object.6354972c-4ff0-4f3c-9d0d-bfb57792963e.ivy>. The survey is based on representative sample of 1000 persons, corrected by mathematical methods, with an accuracy of +/- 3–4%. Medián is one of the largest pollster companies in Hungary.

2. It needs to be added, that sharing a common household and having a durable relationship are two separate grounds, which, under EU legislation Member States can and should consider for the purpose of facilitating entry and residence of the partner.

It needs to be noted that the wording of the Act (Article 47) on free movement is also controversial, since the text does not explicitly mention same-sex unions or registered partnerships but only uses the words “accompanying” a Hungarian or EU/EEA citizen. The law-makers did not add any further interpretation concerning the scope of persons falling under the provision imposing that “a person who accompanies an EEA or Hungarian citizen” has the right to free movement and residence. An implication of the non-discrimination requirement is that, if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners, this should not only benefit opposite-sex partners.

Also, Hungary does not provide for the extension of family reunification rights to unmarried partners. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (“Family Reunification Directive”) seeks to contribute to the harmonization of the conditions for entry and residence of third country nationals in EU Member States. It ensures that the spouse will benefit from family reunification (Art. 4/1/a). It is for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor individual (i.e., the person who seeks to be reunited on the territory of a Member State with members of his family, or with whom the latter seeks to be reunited); each State may grant a right to family reunification to

the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or to a third country national who is bound to the sponsor by a registered partnership [. . .], and to the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health of such persons

(Art. 4/3). As the European Union Agency for Fundamental Rights 2008 Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Report (Part I—Legal Analysis, by Olivier De Schutter) points out, it is questionable whether the same-sex married person (whose marriage with another person of the same-sex is valid under, for example, the laws of Belgium, the Netherlands, or Spain) should be considered a ‘spouse’ of the citizen of the Union having moved to another EU Member State for the purposes of this Directive, by the host Member State, thus imposing on this State to grant the spouse an automatic and unconditional right of entry and residence. One could argue that any refusal to grant such benefit would constitute a direct discrimination on grounds of sexual orientation, in violation of Article 26 of the International Covenant on Civil and Political Rights and of the general principle of equality, as reiterated in Article 21 of the Charter of Fundamental Rights of the EU. Altogether

though, and despite this requirement of non-discrimination on grounds of sexual orientation, at least eleven Member States appear hostile to the recognition of same-sex marriage celebrated abroad, and might refuse to consider as “spouses,” for the purposes of family reunification, the same-sex married partner of a citizen of the Union having exercised his/her free movement rights in the forum State.³

In sum there is discrimination: not between heterosexual and same-sex couples in general, but Hungarian same-sex couples and non-Hungarian married couples vis-à-vis non-Hungarian same-sex couples. Even though European legal measures are existent and community jurisdiction is applicable in the matter, lacking proper regulations, this appears to be an overall EU law-discrepancy.

(ii) Asylum-related controversies

Similarly to legislative framework on the freedom of movement, Act 80 of 2007 on asylum does not explicitly recognize LGBT persons’ officially registered partnerships as family relationships. According to Article 2: “(j): family member is: a foreigner’s (j.a) spouse, (j.b) minor child (including adopted and foster child), (j.c) parent(s) if the person seeking recognition is a minor.” Thus, if an asylum seeker is granted refugee status, his/her family members are automatically recognized as refugees; under the law this provision only applies to heterosexual couples.

One may argue that provisions defining family members are contrary to Article 2/h of 2004/83/EC, stating that unmarried partners in a stable relationship should also be recognized as family members if the Member State’s legislation or practice treats unmarried couples in a way comparable to married couples under its law related to aliens. (According to Art 2/h of Council Directive 2004/83/EC of 29 April 2004, family members in the context of asylum and/or subsidiary protection include both spouses and unmarried partners in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens.)

Also, the Hungarian legislator has not incorporated the provisions set out in Recital 5, Article 4 (3) and Article 5 (2) of the aforementioned Family Reunification Directive. The way Section 2 of the Asylum Act defines family memberships, same-sex unions are not recognized in family reunification procedures. Family reunification procedure is only available for married couples or their family members—minor sisters or brothers, their descendants or ascendants—trying to join together the family in the country of asylum. Under Hungarian law, only heterosexual couples recognized by the country of origin can be considered as spouses (married

3. De Schutter, p. 16.

couples). It is unclear whether, in Hungary, a same-sex spouse could be allowed to join a spouse who was granted international protection, or would he be granted a right to residence. Thus, registered partnership or same-sex cohabitation is automatically excluded from family reunification procedures.⁴

As above, the disparate treatment affects people in partnerships that do not fall under the Hungarian legislative framework.

Furthermore, it needs to be noted that the situation concerning transgender status seems to raise overwhelming challenges to Hungarian civil law. The Hungarian legal system lacks specific procedural rules regarding the modification of a birth certificate entry for reasons of having changed sexual identity. Under the Birth Certificate Decree (Regulation “tvr” No 72 of 1982) the registrar of birth certificates amends or corrects a closed entry in the birth certificate if a) it does not correspond to the relevant rules, b) it contains false or defective data, or c) name changing was requested. However, there are no legal provisions regulating what evidence can be accepted in proving the change of sexual identity. According to a fundamental principle of administrative proceedings, authorities are free to judge the value of evidence and enjoy a certain degree of discretion in this regard. In practice, once a request to changing one’s name and sex is submitted to the Birth Certificate Department of Central Data Processing, Registry and Election Office’s Authority and Supervision Department operating under the Ministry of Interior, the request needs to be accompanied by an expert opinion from a forensic psychologist or psychiatrist and a medical record from a urologist or gynaecologist. On the basis of these documents, an expert’s opinion is prepared, which is then evaluated by the Ministry of Health as a quasi-expert authority and it adopts a resolution on whether or not the request is well founded. The Office then would send the resolution to the registrar of birth certificates who amends the birth certificate. Thus, currently, an actual sex changing operation is not required as a prerequisite to modify name or sex in birth certificates. Even if the practice of the Hungarian authorities can be considered progressive and corresponds to the right of self-determination, since marriage is defined as an exclusively heterosexual relationship this raises the question of what happens if, due to a sex change operation, two people with identical sexes appear as married. It is unclear how this affects the legal status of the marriage. Clearly, the marriage cannot cease to exist without some kind of legal procedure, yet the law is silent on the matter.

4. It needs to be noted that the Office of Immigration and Nationality [Bevándorlási és Állampolgársági Hivatal] does not have statistics that contain the sexual orientation of its clients.

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Furthermore, the current Code of Family Law (Article 23 of Act 4 of 1952) does not recognize sex change as a reason for terminating marriage. The new concept of the Civil Code that is currently under preparation explicitly mentions this reason of terminating marriages; a rule that would apply to registered partnerships as well. (Raising self-determination concerns, LGBT NGO Háttér Society expressed its concerns in connection with the provision which would automatically terminate registered partnerships in case of sex change.) It is also unclear how parents' rights would change after termination of a marriage for this reason. The Constitutional Court [in its decision No. 51/2010. (IV. 28.) AB hat.] prevented the entry into force of the new Civil Code, it found the law putting the Code into force unconstitutional, due to the short period of transition and the consequent violation of the rule of law. The new government that gained power in the elections of April 2010 is determined to adopt changes to the actual text Code (that is, as noted, still not in force).

It also needs to be added at this point that the Act 125 of 2003 on Equal Treatment includes sexual identity as one of the grounds of discrimination.