

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **Focus: Freedom of Religion in Austria**

#### **I. INTRODUCTION**

In Austria, freedom of religion is guaranteed. On the one hand, the individual sphere, where the right to religious and philosophical beliefs is settled, has to be considered. On the other hand, the Austrian law with regard to religion is based on a denominationally neutral system, which prohibits the existence of any established church (cf. VfSlg 1430/1932). Although there is a separation between state and religious communities at the institutional level, the state accepts and supports the activity of religious communities in the public area. These principles are among others based on constitutional regulations which originate from the 19<sup>th</sup> century. But only at first sight is the Austrian law on religion a time-honored matter. Of course there are also younger constitutional regulations which have to be examined.

Recently the European Court of Human Rights has taken decisions which are suitable to open a transition period in the Austrian law on religion and mainly concern the corporative aspect of freedom of religion. But before dealing with necessary changing's of statutory provisions against the background of the judgments of this Court, there should be granted a view on the actual legal situation.

#### **II. RESPECTIVE CONSTITUTIONAL LAW**

Freedom of religion in Austria is guaranteed by the following provisions of constitutional status:

Under Article 14 of the 1867 "Basic Law on the Fundamental Rights of Citizens" (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*, in the following StGG), everybody is granted freedom of conscience and belief. It is also established that the enjoyment of civil and political rights is independent from religious belief. The manifestation of religious belief may not derogate from civic obligations.

Under Article 15 StGG legally recognized churches and societies have the right to manifest their faith collectively in public. They are also able to organize and administer their internal affairs independently and to remain in possession of acquired institutions, foundations and funds dedicated to cultural, educational

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and charitable purposes. But they are, like all other societies, subordinated to the law. Art 15 is rightly considered as "lex regia" of the Austrian law on religion. Although under some aspects overlaid by other constitutional regulations it is mainly this article from which the aforementioned principle of religious neutrality is derived. Also remarkable is the reference to the subordination to the law: Here we see a material legal reservation, which largely results in the legal reservation contained in Article 9 § 2 of the European Convention on Human Rights which will be noted below.

Article 63 § 1 of the Treaty of St Germain of 10 September 1919 between the Allied Powers and the Republic of Austria (in the following StV St. Germain) states that Austria undertakes to ensure full and complete protection of life and liberty to all inhabitants without distinction in particular on the basis of religion. Article 63 § 2 guarantees to all inhabitants of Austria the right to manifest publicly and privately their thoughts, religion, and religious beliefs, insofar as these are not incompatible with the protection of public order or morals.

Article 9 § 1 of the European Convention on Human Rights guarantees to everyone "the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." Under Article 9 § 2, freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." In contrast to the aforementioned provisions, Article 9 also protects the freedom of non religion-related worldview explicitly.

In distinguishing between individual religious and corporate guarantees, it must be emphasized that Article 14 StGG and Article 63 StVStGerm contain guarantees of individual religious rights whereas article 15 StGG provides for institutional guarantees. Article 9 of the Convention must be seen from an individual and also a corporate point of view. Corporate aspects of religious communities and associations, which stand for a non religious worldview, are protected by article 9 which suggests a right of self-determination of religious communities.

All aforementioned provisions are basically for the configuration of Austrian law on religion, but there are also some other relevant constitutional norms. The most important of which have to be mentioned additionally, and are: Article 2 StGG and Article 7 of the Austrian Constitution of 1920 (*Bundes-Verfassungsgesetz*). These articles contain the rule of equality relating to Austrian citizens. In principle, they also apply to legal entities. Article 12 StGG and Article 11 of the Convention refer to the freedom of assembly and association. Under Article 17 (4) StGG a legally recognized church or religious society is responsible for the religious instruction at school. Article 9a of the *Bundes-Verfassungsgesetz* allows persons liable for military service to attend their respective duties by rendering alternative social service for reasons of conscience. Article 14 of the Convention prohibits "discrimination on any ground" and mentions specifically discrimination on the ground of sex, race, religion and "political or other opinion." Article 2 of the First Protocol to the Convention obligates the signatories to respect the right

of parents to ensure an "education and teaching in conformity with their own religious and philosophical convictions."

The relationship between the European Convention of Human Rights and other fundamental guarantees is basically determined by the safeguard-clause of Article 53 of the Convention. In a similar manner one can argue that Article 9 of the Convention "overlays the older specific guarantees [...] and summarizes them in one 'aggregated law on human rights' in which the separate guarantees come together" (*Richard Potz* with reference to *Walter Berka*; cf. also *Kalb/Potz/Schinkele*, *Religionsrecht*). This view can also be brought into connection with the jurisdiction of the Constitutional Court (cf. e.g. VfSlg 10547/1985; 15394/1998).

Additionally, freedom of religion does not only contain defensive rights against the state but can also contain the obligation of the state to protect this fundamental right (cf. VfSlg 16054/2000). Actions interfering gravely with the peaceful coexistence in a state are not compatible with the "public order" expressed in Art 63 StV St. Germain and Art 9 ECHR (VfSlg 15394/1998). "Morals" in the meaning of these articles, are defined as conceptions about a "right" conduct of life, based in the population, which are protected by law in an explicit way (VfSlg 15394/1998).

### III. INDIVIDUAL ASPECTS OF FREEDOM OF RELIGION

Looking at those regulations which primarily concern the individual religious sphere, Article 6 of the 1868 Interdenominational Act (*Interkonfessionellen-gesetz*) must be mentioned. Under this provision, the secession of a legally recognized church or religious society from the view of state law is only valid if it is declared before the competent state authority. Freedom of religion also encompasses the right to change one's religion or to have no religion. Therefore, this regulation is a prominent example for the implementation of this fundamental right.

Section 1 of the 1986 Civilian Service Act (*Zivildienstgesetz*), which is in line with the aforementioned Article 9a of the *Bundes-Verfassungsgesetz*, also provides for the possibility to render alternative social service. Freedom of conscience is also important in the context of the legally granted possibility to opt out of religious instruction in school. This alternative is provided in the 1949 Religious Instruction Act (*Religionsunterrichtsgesetz*). Under section 20 of the 1962 Private School Act (*Privatschulgesetz*), teachers must be approved before being assigned to a denominational private school. Under section 105 of the 2002 University Act (*Universitätsgesetz*), neither members of the staff nor students of any university are allowed to be forced to contribute to scientific or artistic tasks if they assert reasons of conscience. Section 97 of the 1974 Penal Code (*Strafgesetzbuch*) forbids discrimination in the context of participating in performing an abortion if this abortion is not punishable. On the other hand it is forbidden to discriminate against persons who refuse to take part at such a procedure, unless it is urgently necessary to save the life of the pregnant woman.

This provision of the 1974 Penal Code also protects the freedom of conscience as section 6 of the 1992 Reproductive Medicine Act (*Fortpflanzungsmedizin-*

gesetz), which concerns participation and non-participation in medically assisted reproduction.

#### IV. CORPORATE ASPECTS OF FREEDOM OF RELIGION

Religious communities can be formed as legal associations under the 2002 Associations Act (*Vereinsgesetz 2002*). This legal form is also appropriate to associations, which stand for a non religious worldview. The opportunity to form so-called "registered religious communities" has existed (*eingetragene religiöse Bekenntnisgemeinschaften*) since the introduction of the 1998 Religious Communities Act (*Religiöses Bekenntnisgemeinschaftengesetz*). This type of legal entity was constructed as a preliminary stage for the most important category of religious communities. They are the so called "legally recognized churches," respectively, "legally recognized religious societies." The proceeding of recognition is regulated in the 1874 Recognition Act (*Anerkennungsgesetz 1874*) in conjunction with § 11 of the 1998 Religious Communities Act. The religious community is recognized as a church or a religious society by a decree based on these laws. But the recognition can also be pronounced in a special law.

With regard to the registration of a publicly registered religious community, section 3 of the 1998 Religious Communities Act presupposes a number of at least 300 members (for comparison: the minimum number of members of an association represents two). Section 4 applies to the necessary contents of the statutes of a registered religious community. Under section 5, which partly copies Article 9 of the Convention, the competent Federal Secretary must refuse to register a religious community if, in view of its teachings or practice, this is necessary in a democratic society in the interests of public safety for the protection of public order, health, morals, or for the protection of the rights and freedom of others. This is particularly the case if its activities involve incitement to commit criminal offences, obstruction of the psychological development of adolescents, undermining of people's mental integrity, or if the statutes do not comply with the legal conditions.

The regulations of the 1874 Recognition Act postulate in particular following conditions for the legal recognition of a church or religious society. Under section 1, teaching, services, internal organization, and the name must not contain anything unlawful or morally offensive. Beyond that, the setting up and existence of at least one community of worship (*Kultusgemeinde*) must be ensured. The competent political body negated a legal claim of the regarding religious community to be a legally recognized as a church or religious society even in the case of the compliance with these legal conditions. Often requests for recognition remained disregarded. After the Constitutional Court had pronounced that the applicants had a right to have their case decided by an administrative authority (VfSlg 11931/1988), it took almost ten years for the Administrative Court to accept such a claim in the case of the compliance with the requirements of the 1874 Recognition Act (VwGH 28.4.1997, 96/10/00049). In answer to this decision, the aforementioned 1998 Religious Communities Act was enacted which not only introduced the legal form of the publicly registered religious community, but also

made the conditions for legal recognition of churches and religious societies far more difficult. Section 11 (1) has the following requirements: Existence of the religious community for at least twenty years, and for at least ten years as a publicly registered religious community in Austria (the Constitutional Court considered those additive preconditions for legal recognition as constitutional: cf. VfSlg 16202/2001; 16131/2001); a minimum number of two adherents per thousand members of the Austrian population (between 16.000 and 17.000 persons); the use of income and other assets for religious purposes and charity activities respectively; a positive attitude towards society and the State; and no illegal interference with regard to the community's relationship with recognized churches or religious societies or religious communities.

The latter condition is linked to the status of legally recognized churches and religious societies as public law bodies. At first sight it seems to be clear what this status means in context of legally recognized churches and religious societies. But otherwise it is not clear to what extent the respective community has to cooperate with the state. Maybe this will be a point of law, which will be discussed within the coming years.

As mentioned, in Austria there are some churches and religious societies which are recognized by a special law. This phenomenon derives from reasons which are often overlapping. They include: decisive historical reasons, the special structure of the religious community, the significance of this community, or the disability to fulfill all legal preconditions of the 1874 Recognition Act and section 11 of the 1998 Religious Communities Act. Looking at some examples we will see that the Catholic Church is "historically recognized". Now the legal position of this Church is mainly regulated in the Concordat 1933/34, which has statutory character. In a way, one can also say that the Protestant Church and the Orthodox Church are "historically recognized." Now, the status of the first mentioned church is regulated in the Protestant Act of 1961 and that of the Orthodox Church in the 1967 Orthodox Act. The legal position of the Israelite Religious Society is regulated in the Israelite Act of 1890. When followers of Islam were legally recognized in 1912 by the Islam Act (*Islamgesetz 1912*), they did not meet with all legal conditions mandated by the 1874 Recognition Act, because there wasn't any Islamic community of worship within the meaning of the 1874 Recognition Act at that time. In 2003, the Coptic Orthodox Church was legally recognized by the Oriental Orthodox Act (*Orientalisch-orthodoxes Kirchengesetz 2003*). Because of the low number of members, which does not fulfill the condition of section 11 (1) of the 1998 Religious Communities Act, this was the only way to recognize this church.

Legally recognized churches and religious societies enjoy significant privileges, the most important of which now discussed. In principle, the scope of protection for internal affairs, mentioned in Article 15 StGG, which is only applied to legally recognized churches, can be seen as more extensive than the right of self-determination contained in Article 9 ECHR, which is applicable to every religious community (cf. VfSlg 16102/2001). Regarding Article 15 StGG, the Constitutional Court has stated that the protected internal affairs have to be deduced from the self-conception of this community (VfSlg 3657/1959; 11574/1987). In this context, the Supreme Court has stated in regard to the quintessence of the activity of the respective recognized community that without autonomy the

community would be restrained in the proclamation of its doctrines and the practice of them (OGH SZ 47/135/1974). Beside the doctrines, the following are examples for internal affairs: the administering of sacraments, the community's constitution, obtaining of functions, pastoral care, religious customs, and collecting donations. Relating to sacraments as part of the internal affairs, the Constitutional Court has expressed the inadmissibility of regulating the duty to marry at the state registrar before marrying in a church (VfSlg 2944/1955).

The aforementioned right to give classes in religious instruction (cf. Article 17 StGG) is mainly regulated in the 1949 Act on Religious Instruction (*Religionsunterrichtsgesetz*). Beyond that, under the School Supervisions Acts (*Schulaufsichtsgesetze*) of the Federation and the Federal States representatives of legally recognized churches or religious societies are entitled to sit on regional education boards in order to administrate advisory functions. In the case of the establishing of a private school with granted public law status (*Privatschule mit Öffentlichkeitsrecht*) by a legally recognized church or religious society, it is not necessary to prove the existence of all legal qualifications to operate such schools. Under section 14 (3) of the 1962 Private Schools Act (*Privatschulgesetz*), legally recognized churches or religious societies have to be treated as public territorial entities. Under sections 17-19 of this law the costs of personnel for such schools have to be borne by the responsible public territorial entity.

Some regulations of the 1983 Civil Status Act (*Personenstandsgesetz*) require the recordation of the denomination in personal status-registers if the respective person belongs to a legally recognized church or religious society.

Under section 24 (3) of the 2001 Military Service Act (*Wehrgesetz*), ordained priests, persons involved in spiritual welfare, persons in religious teaching after graduation from theological studies, members of a religious order who have made a solemn vow, and students of theology who are preparing to assume a pastoral function and who belong to a recognized church or religious society are exempt from military service. Under section 13a of the 1986 aforementioned Civilian Service Act these persons are also exempt from alternative civilian service.

Under section 3 of the 1990 Act on Lay Judges at Criminal Courts (*Geschworenen- und Schöffengesetz*), clerics and members of religious orders of legally recognized churches and religious societies are exempt from the duty to act as lay judges at such courts.

Under section 1 of the Act on the Employment of Foreigners (*Ausländerbeschäftigungsgesetz*), this act is not applicable to foreigners with regard to their pastoral activity for the aims of recognized churches or religious societies.

The Austrian revenue law contains important provisions. In section 34 of the 1961 Federal Fiscal Code (*Bundesabgabenordnung*), the fulfillment of "churchly" aims of a corporate body is tax-advantaged. Under section 38 the word "churchly" is legally defined. The fulfilling of these aims promotes legally recognized churches or religious societies. With regard to these contents there are the following regulations: Under section 8 (3) of the 1955 Inheritance and Gift Act (*Erbschafts- und Schenkungssteuergesetz*), which is no more in force, donations to domestic institutions of legally recognized churches or religious societies were subject to a reduced tax rate of 2.5%; pursuant to section 18 of the 1988 Income Tax Act (*Einkommensteuergesetz*), contributions to recognized churches or religious societies are deductible from income Tax up to an amount of 100

Euros per year; under section 2 of the 1955 Land Tax Act (*Grundsteuergesetz*), real property owned by legally recognized churches or religious societies, which is used for religious purposes, is exempt from real-estate tax.

Regarding the status of a recognized church or religious society, there has to be mentioned the 1998 Act on the Establishment of a Public-law Institute for information about Sects and Similar Institutions (*Bundesgesetz über die Einrichtung einer Dokumentations- und Informationsstelle für Sektenfragen*): Under section 1 (2), this law cannot be applied to recognized churches and religious societies.

Beyond all these items there must be mentioned important contact points between state and recognized churches. In Austria there are existing four faculties of catholic theology and one faculty of protestant theology which are incorporated to state-run universities. These faculties are financed by the state, but there are meaningful rights of the respective churches which concern, for instance, the appointment of teachers at such faculties. Though in a way the regarding regulations can be seen as an issue of corporative religious freedom prima facie they are in a tension not only to the individual religious freedom of the concerned teachers but also their academic freedom which is safeguarded by Article 17 of the 1867 Basic Law.

Regarding regulations referring to legally recognized churches and religious societies, it must be considered that in many cases they were enacted before the establishment of the legal type of a registered religious community. One can assume that in some cases there could be argued that in a factual context the legislator would have subsumed such communities under the respective provision, if this type of legal person would have existed at that time. But the decision-making of the Constitutional Court seems to generalize without any differentiation. In general, every regulation must be analyzed in context of the rule of equality and therefore interpreted in the light of constitutional law (*verfassungskonforme Interpretation*). But dealing with the 1983 Civil Status Act (*Personenstandsgesetz*), which provides for the registration of the belonging of a person to a legally recognized church or religious society, but not for the belonging of a person to a publicly registered community, the Constitutional Court reiterated its view of the admissibility of the distinction between recognized churches and religious societies on the one hand, and other religious communities on the other hand, without going into further details (VfSlg 16998/2003). This decision-making was affirmed by a decision concerning section 1 of the 1994 Act on the Employment of Foreigners (*Ausländerbeschäftigungsgesetz*; cf. VfSlg 17021/2003). In legal discussions it was argued that there should be a distinction made if a regulation concerns the religious community's manifesting faith or their position as a public law body. From this point of view one would have wished, at least for the second mentioned case, a more differentiated substantiation of the Constitutional Court. In this the community's manifestation of faith is affected. It is also not justified to privilege legally recognized churches and religious societies in issues concerning, for instance, the 1955 Land Tax Act. The distinction between these communities in regard to the law concerning the employment of foreigners must be also challenged. Also in this case the aspect of a community's manifesting the faith is primarily affected.

## V. REVOLUTIONIZING AUSTRIAN LAW ON RELIGION?

As mentioned at the beginning, the European Court of Human Rights has taken decisions which are expected to have far-reaching consequences. The judgments of 31 July 2008, appl. 40826/98 (*Zeugen Jehovas and others v. Austria*), 26 February 2009, appl. 76581/01 (*Freunde der Christengemeinschaft and others v. Austria*), 12 March 2009, appl. 49686/99 (*Gütl v. Austria*) and appl. 42967/98 (*Löffelmann v. Austria*), and of 19 March 2009, appl. 28648/03 (*Lang v. Austria*) force the Austrian federal legislator to reconsider the law on recognition.

In a decision on July 2, 2009, the Constitutional Court had to deal with the European Court's newest decision-making (VfGH B 1397/08-11).

In the judgment of 31 July 2008, the European Court of Human Rights held that there has been a violation of Article 9 in conjunction with Article 14 of the European Convention on Human Rights. The European Court confirmed the applicants in their view of the dubiousness of the requirement of Section 11 of the 1998 Religious Communities Act, regarding the existence as a registered religious community for a minimum of ten years as a precondition for legal recognition as church or religious society. The Court stated "that such a period might be necessary in exceptional circumstances such as would be the case of newly established and unknown religious groups. But it hardly appears justified in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities, as is the case with the Jehovah's Witnesses." The applicants had pointed out that the Coptic Orthodox Church was recognized without fulfilling this requirement by a special law. The Court picked up this argument by stating that this "shows that the Austrian State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field." In consequence of this judgment the freedom of the Austrian legislator to recognize a religious community without considering the requirements for recognition laid down in the 1874 Recognition Act and section 11 of the 1998 Religious Communities Act has to be seen as far more limited than before.

In the judgment of 26 February 2009 the European Court of Human Rights also criticized the ten-year period of section 11 of the 1998 Religious Communities Act.

In the judgment of 12 March 2009 (*Gütl v. Austria*), the European Court of Human Rights had to give his opinion with regard to section 13a of the Civilian Service Act. The applicant was a preacher of the Jehovah's Witnesses. Under reference to the Judgment *Hasan and Chaush v. Bulgaria*, no. 30985/96, the Court stated that "the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies comes within the scope of that provision. It follows that Article 14 read in conjunction with Article 9 is applicable in the instant case. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'. The Contracting

States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." But in this case the Court stated under reference to the judgment of 31 July 2008 that § 13a of the 1986 Civilian Service Act "is discriminatory and the applicant has been discriminated against on the ground of his religion as a result of the application of this provision."

In the judgments of 12 March 2009 (*Löffelmann v. Austria*) and of 19 March 2009 (*Lang v. Austria*) the applicants had also assumed the function of a preacher of the Jehovah's Witnesses. The Court had to give his opinion on section 24(3) of the 2001 Military Service Act and unsurprisingly this provision was also seen as a violation of Article 14 taken in conjunction with Article 9 of the Convention.

This leads to the question whether there are consequences of the judgments of the European Court of Human Rights.

On 7 May 2009 the Jehovah's Witnesses became a legally recognized religious society by the way of a decree by the competent Federal Secretary. It finished a practice of a long lasting delay, but, of course, it does not entail the change of the Austrian legal system which the European Court of Human Rights had demanded.

In a decision on 2 July 2009, the Constitutional Court had to deal with the aforementioned regulations of the 1961 Federal Fiscal Code and the 1955 Inheritance and Gift Act. Though the Constitutional Court refers to the judgment of the European Court of Human Rights of 31 July 2008, it does not pronounce a principal decision: The Court attested tax discrimination in regard to the Jehovah's Witnesses, because they were disadvantaged by preconditions laid down in section 11 of the 1998 Religious Communities Act. Therefore, the Court granted the appeal. But it neither abrogated the brought up preconditions of section 11 nor the respective regulations of the fiscal law.

In Austria, according to a common proverb, announced revolutions never take place. But there is a proverb which says that an exception proves the rule. The chance to change Austrian law on religion in a way which fulfills the requests of the European Convention on Human Rights in extenso is anyway not lost. This chance is greater than ever.

## **VI. AN IMPORTANT ASPECT OF FREEDOM OF RELIGION IN AUSTRIA: THE BUILDING OF MOSQUES AND THE CALL OF THE MUEZZIN**

According to the last census of 2001 4, 22 % of the Austrian resident population are Muslims. The rising need of new mosques is an item of political discussions and sometimes one can have the impression that legislators of Austrian Federal States intend to impede the building of new mosques by legal provisions in which mosques are not mentioned in an explicit way.

At any case, a general prohibition of building mosques would be unconstitutional. This also is true for adding minarets and a general prohibition of the call of the muezzin from the minaret. In principle all these activities are protected by constitutional guarantees of religious freedom. But here, the question that must be raised is if the respective legal reservations can justify an encroachment into this fundamental right.

The following legal aspects must be considered in the context of the establishment of mosques, specifically Islamic prayer rooms: The building is concerned by regional planning laws and also by building regulation laws; and the call of the muezzin is also remarkably affected by air pollution laws.

Regarding the building of mosques, there must be mentioned acts of Austrian Federal States which are enacted in order to protect the view of a place (*Ortsbildschutzgesetze*). Typically interference with the traditional character of a village should be avoided. But the principle of proportionality has to be considered. It would be also unacceptable to prohibit such building on the grounds that Christianity is the religion of the majority of the Austrian population. The public authorities are retained to decide respective cases in a flexible way.

This also has to be considered in connection with the call of the muezzin.

In Austria there were shown ways of compromise, which are very remarkable: The muezzin of the mosque in the Viennese "Donaupark" raises his voice within the mosque and not from the minaret. In Bad Vöslau (Lower Austria) a minaret was built, which mainly consists of glass.

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