

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **Recognizing Jehovah's Witnesses as a Religious Society: A Case Winding its Way Through the Courts**

Considerations on the judgment  
of the European Court of Human Rights  
of 31 July 2008

The freedom of religion and conscience has been the subject of public debate in Austria in the past twenty years in discussions about construction of mosques and minarets, crucifixes in schools, wearing headscarves and, more recently, hate speeches/hate preaching against "foreign" religions. The row about caricatures of Prophet Muhammad in Northern Europe and the lawsuit filed against the Austrian cartoonist Haderer in Greece for his book "The Life of Jesus" are recent instances that have sparked debate.<sup>1</sup>

This debate has been paralleled by a legal dispute over which religious communities should be recognised among churches and religious societies that enjoy specific privileges. Additionally, the debate includes which recognition criteria should be applied. This debate has gone mostly unnoticed by the general public. However, Austria's legal experts have given intense thought to these questions that are highly important to the law governing state-church relations on one hand and to a democratic society on the other hand.<sup>2</sup>

The efforts of Jehovah's Witnesses for recognition in Austria as a religious society are very closely linked to clarifying the organisational aspects of the freedom of religion, not only in Austria but also in Europe. The long path of Jehovah's Witnesses toward recognition mirrors the principle of the rule of law

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1 These discussions gave rise to the studies by *Malcolm D. Evans*, *Manual on the wearing of religious symbols in public areas*, 2009, and *Anne Weber*, *Manuel sur le discours de haine*, 2009; both studies were commissioned by the Council of Europe. The aim of the studies was to provide guidelines and aid in reacting adequately to these burning issues.

2 See, for example, the compilation of case law and literature in *Brünner*, *Christengemeinschaft und Zeugen Jehovas – Religionsgemeinschaften zweiter Klasse!* in *Essays in Honour of Ludwig Adamovich*, 2002, 61 et seq.; *Grabenwarter*, *Europäische Menschenrechtskonvention*, 4<sup>th</sup> ed., 2009, Section 22 IV.; *idem*, in *Korinek/Holoubek* (eds.), *Österreichisches Bundesverfassungsrecht* (Loose-Leaf Compilation), Art. 14 of the Basic Law (StGG), Art. 63(2) of the Treaty of Saint Germain and Art. 9 of the ECHR; *Klecatsky*, *Die Glaubens- und Gewissensfreiheit und die Rechtsstellung der gesetzlich anerkannten Kirchen und Religionsgemeinschaften*, in *Machacek/Pahr/Stadler* (eds.), *Grund- und Menschenrechte in Österreich*, Volume II, 489 (491 et seq.); *Limonis*, *Religions- und Weltanschauungsfreiheit*, in *Heißl* (ed.), *Handbuch Menschenrechte*, 2009, 334; and *Walter/Mayer/Kucko-Stadlmayr*, *Bundesverfassungsrecht*, 10<sup>th</sup> ed., 2007, 714.

enshrined in the Austrian Constitution. Furthermore, it illustrates how the rights guaranteed in the Austrian Constitution are supplemented by the European Convention on Human Rights (ECHR, Federal Law Gazette No. 210/1958), which also enjoys the status of constitutional law in Austria. It also illustrates the Constitution's development through the case law of the European Court of Human Rights (ECtHR). Finally, the persistence of Jehovah's Witnesses led to an improvement in the scope of protection of Article 9 of the ECHR, as reflected in the judgment of the ECtHR of 31 July 2008. According to this judgment, twenty-year waiting period for granting a petitioning religious community the legal personality of a registered religious community constituted a violation of the freedom of religion within the meaning of Article 9 of the ECHR. In addition, the ECtHR explicitly qualified the rigid ten-year waiting period as discriminatory (Art. 14 of the ECHR in conjunction with Art. 9 of the ECHR).<sup>3</sup> The waiting period was and still is a condition for recognition as a religious society pursuant to Section 11 of the Act on the Legal Status of Registered Religious Communities (hereinafter referred to as "Religious Communities Act" {*Bekenntnisgemeinschaftengesetz*}, Federal Law Gazette I No. 19/1998).

The ECtHR more strongly emphasized its views in its judgments *Gütl, Lang and Löffelmann v. Austria* issued in early 2009. The ECtHR held quite succinctly that the provisions (!) of Section 13a (1) of the Civilian Service Act (*Zivildienstgesetz*) and Section 24 (3) of the Military Act (*Wehrgesetz*) violated Article 9 of the ECHR in conjunction with Article 14 of the ECHR. These regulations refer to the status of a recognised church or religious society. However, the rules for obtaining this status were discriminatory due to the mandatory ten-year waiting period. The applicants, members of Jehovah's Witnesses, were, therefore, deprived of privileged positions in a discriminatory way.<sup>4</sup>

The Austrian Constitutional Court has recently mitigated these three judgments. It provided an interpretation of the tax exemptions under Section 15 (1)(14) of the Inheritance and Gift Tax Act 1955 (*Erbschafts- und Schenkungssteuergesetz*) that conforms to the ECHR. Referring to the judgment of the ECtHR of 31 July 2008, the Court stated that Jehovah's Witnesses should have been treated in the same way as a recognised church or religious society even before their formal recognition.<sup>5</sup> Against the background of this judgment of the Constitutional Court, all Austrian authorities will be required to interpret all laws granting specific privileges to recognised churches and religious societies as well as to their members in accordance with the ECHR. However, by doing so the Constitutional Court implicitly opposed the interpretation of the ECtHR of the aforementioned provisions of the Civilian Service Act and the Military Act.

This development, which is important in democratic terms, is described in the following.

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3 Judgment of the ECHR of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, Appl. 40.825/98; see also the judgment of 26 February 2009, *Verein der Freunde der Christengemeinschaft and others v. Austria*, Appl. 76581/01, that had taken similar procedural steps in Austria; essentially, it contains the same statements as the aforementioned judgment.

4 Judgments of 12 and 19 March 2009, respectively; Appl. 49.686/99, 28648/03 and 42.967/98.

5 Constitutional Court of 2 July 2009, B 1397/08.

## I. BRIEF CONSTITUTIONAL BACKGROUND

1. "Everyone is guaranteed complete freedom of conscience and creed." The *individual* aspect of the freedom of religion is laid down in Article 14 of the Basic Law 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger – Law Gazette of the Reich No. 142/1867*)<sup>6</sup>. The *organisational* aspect of the freedom of religion, to which this review refers, is governed by Articles 15 and 16 of the Basic Law 1867. These articles distinguish between recognised churches and religious communities on one hand and the "supporters of non-recognised religious confessions" on the other. While the right to manifest their faith collectively in public as well as administer "their internal affairs" independently<sup>7</sup> have essentially been guaranteed to the first group since 1867, the second group was granted these rights only in connection with Article 63(2) of the Treaty of Saint-Germain-en-Laye 1919 (Treaty of Saint-Germain, State Law Gazette No. 303/1920).<sup>8</sup> However, Article 63 of the Treaty did not eliminate all differences between recognised and non-recognised religious societies.<sup>9</sup>

Against this constitutional background, the Constitutional Court concluded that all types of "state churches" are forbidden in Austria.<sup>10</sup> Therefore, the state may not identify with a specific church or religious society (*principle of religious neutrality*). Moreover, the *principle of parity* is inherent in the Austrian constitutional law, which is that all recognised religious societies are granted analogous rights.<sup>11</sup>

These guarantees are supplemented by the freedom of thought, conscience, and religion of Article 9 of the ECHR as well as by the freedom of assembly and association of Article 11 of the ECHR.

2. Based on the Act concerning the Legal Recognition of Religious Communities (hereinafter referred to as "Recognition Act" {*Anerkennungsgesetz*} – Law Gazette of the Reich No. 68/1874), religious groups may be recognised as religious societies. Some religious societies are governed by specific federal acts, like the Evangelical Church, Federal Law Gazette No. 182/1961, the Jewish Religious

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6 This Act took effect as a constitutional law through Article 149 of the Austrian Constitution (B-VG).

7 Regarding this term, compare Collection of Decisions of the Constitutional Court (VfSlg.) 11.931/1988, 16.998/2003 and Supreme Court (OGH) 6 May 1987, 14 Ob A 29/87; 17 March 2005, 8 Ob A 117/04w. Compare also with further references *Klecatsky* (footnote 2) 500 et seq.; *Walter/Mayer/Kucsko-Stadlmayr* (footnote 2) reference number 1454.

8 Some authors assume that Art. 16 of the Basic Law was replaced by Art. 63 (2) of the Treaty of Saint-Germain, e.g. *Walter/Mayer/Kucsko-Stadlmayr* (footnote 2) reference number 1448.

9 Cf. VfSlg. 6919/1972; furthermore VfSlg. 9185/1985, 11.931/1988, 16.998/2003 and 17.021/2003.

10 Cf. VfSlg. 1430/1932.

11 Cf. *Thienel*, Religionsfreiheit in Österreich, in Manssen/Banaszak (eds.), Religionsfreiheit in Mittel- und Osteuropa zwischen Tradition und Modernisierung, 2006, 35 (42 et seq.). Regarding the neutrality requirement according to Art. 9 ECHR, see the respective jurisprudence of the ECtHR starting with judgment of 26 October 2000, *Hasan and Chaush v. Bulgaria*, Appl. 30985/96, and recently of 22 January 2009, *Holy Synod of the Bulgarian Orthodox Church and others v. Bulgaria*, Appl. 412/03 and 35677/04; as organisational aspects are concerned cf. judgments *Religionsgemeinschaft der Zeugen Jehovas and others* (footnote 3) § 92; and *Gütl, Lang and Löffelmann* (footnote 4). Against this background it is uncertain whether there are "state churches" allowed any longer in Europe.

Society, Law Gazette of the Reich No. 57/1890, and Islam, Law Gazette of the Reich No. 159/1912.<sup>12</sup>

Due to the *lex fugitiva* of Section 11 of the Religious Communities Act (Federal Law Gazette I No. 19/1998), some criteria were added for a successful application under the Recognition Act. The Religious Communities Act introduced the legal status of the registered religious community to grant a special legal personality to non-recognised religious societies.<sup>13</sup> At the same time, the Act introduced a ten-year waiting period for registered religious communities as a condition for recognition as a religious society.<sup>14</sup> Thus, the legislature interfered in the efforts of religious groups to win recognition as a religious society delaying the already lengthy legal dispute.

3. In addition, it is of course possible to establish associations with a religious objective pursuant to the Act on Associations 2002 (*Vereinsgesetz* – Federal Law Gazette I No. 66).<sup>15</sup>

In sum, there are four groups of religious communities with legal personality in Austria:

- religious societies with legal personality enjoying a special status for historical reasons, e.g. the Catholic Church;
- recognised religious societies pursuant to the Recognition Act 1874 in conjunction with Section 11 of the Religious Communities Act;
- registered religious communities pursuant to the Religious Communities Act, and;
- associations with a religious objective.

Assignment to one of the four groups has different legal consequences. The "recognised religious societies" enjoy privileges under tax law, criminal law, school law, labour and social law, military law, etc. For this reason alone, recognition has to be granted based on the principle of equality (*Gleichheitsgrundsatz*).

4. In the past few decades, recognition was granted only very rarely, e.g. the Armenian Apostolic Church in 1973, the New Apostolic Church in 1975, Buddhism in 1983, Syrian-Orthodox Church in 1988, and the Oriental Orthodox Church in 2003. Most recently, recognition was given to Jehovah's Witnesses as a religious society by the Ordinance of the Federal Ministry of Education, Art and Culture of May 2009, Federal Law Gazette II No. 139/2009.

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12 See enumeration in *Lanner*, *Kodex Verfassungsrecht*, 29th edition, footnotes 2 and 5 on the Recognition Act; cf. *Klecatsky* (footnote 2) 497; *Walter/Mayer/Kucsko-Stadlmayr* (footnote 2) reference number 1453.

13 Cf. RV 938 BlgNR XX. GP; AB 1013 BlgNR XX. GP.

14 Cf. the compilation of the criticism expressed about this provision from the very beginning in *Brünner* (footnote 2) 61 et seq. (footnote 7).

15 Cf. VfSlg. 16.395/2001; *Tichy*, *Religiöse Gemeinschaften nach dem Vereinsgesetz 2002*, öarr 2004, 379; *Lienbacher*, *Vereinsfreiheit und innere Angelegenheiten gesetzlich anerkannter Kirchen und Religionsgesellschaften*, ZfV 2002, 647; 16 Cf. VfSlg. 9185/1981, 11.931/1988; cf. also recent judgment of Constitutional Court of 2 July 2009, B 1397/08.

## II. THE PATH TOWARD RECOGNIZING JEHOVAH'S WITNESSES AS A RELIGIOUS SOCIETY

1. For several decades, the established practice of the Office for Religious Affairs (*Kultusamt*) within the Federal Ministry of Education, Art and Culture has been to decide neither in favour of nor against applications for recognition pursuant to the Recognition Act. This practice affected *inter alia* Jehovah's Witnesses. Their efforts to obtain recognition started in September 1978 with an application based on the Recognition Act. Subsequently, they persistently took all legal measures available to them in the Austrian legal system.<sup>16</sup>

They have contributed to clarifying a question that had remained unanswered for a long time, which was whether recognition requires the legal form of a decree.<sup>17</sup> Further, existence of an *individual right* to recognition (to be granted by ordinance) if all conditions are met became clear.<sup>18</sup> If recognition is refused, the rule of law requires a sufficiently substantiated written decision (*Bescheid*). This decision is in turn subject to review by the Austrian courts. If the obligation of issuing a decision or a decree is violated, as was the case in the practice of the Office for Religious Affairs, the Constitutional Court confirms the admissibility of a *complaint about the authority's failure to take a decision within due time* (*Säumnisbeschwerde*) pursuant to Article 132 of the Austrian Constitution (*Bundesverfassungsgesetz*).<sup>19</sup>

The Administrative Court shared the interpretation of the Constitutional Court only in 1997, inviting the Federal Minister to make a decision on the application of Jehovah's Witnesses for recognition within eight weeks.<sup>20</sup> These proceedings *inter alia* gave rise to the adoption of the aforementioned Religious Communities Act. The Constitutional Court revoked the negative decision which had been issued on invitation by the Administrative Court for violating the principle of equality. Under the new Federal Act, the Federal Minister decided that Jehovah's Witnesses should be granted legal personality as a *registered religious community*. Since this legal form did not meet the request of Jehovah's Witnesses to be given recognition as a *religious society*, they submitted a new application for recognition as a religious society pursuant to the Recognition Act in July 1998. However, this application was unsuccessful since the Constitutional Court finally rejected the objections about the constitutionality of Section 11 of the Religious Communities Act and in particular the 10-year waiting period stipulated in this Act in March 2001.<sup>21</sup> This view was upheld by the Administrative Court in 2004.

2. In Austria, the opinion prevailed for a long time that the right to practice a religion guaranteed in Articles 14 to 16 of the Basic Law 1867 and 63 (2) of the Treaty of Saint-Germain was in line with Article 9 of the ECHR, especially since

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16 The several procedural steps are illustrated clearly in the judgment of the ECtHR *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria* (footnote 3) paras. 8 to 36.

17 VfSlg. 11.624/1988 and 13.134/1992.

18 VfSlg. 11.931/1988; see also VfSlg. 14.295/1995; originally rejected by the Administrative Court, Collection of Decisions of the Administrative Court (VwSlgNF) 2965A/1953 and 10.833A/1982.

19 VfSlg. 13.134/1992; see also VfSlg. 14.295/1995 and 14.383/1995.

20 Judgment of 28 April 1997, file number Zl. 96/10/0049.

21 VfSlg. 16.102/2001 and 16.131/2001.

the latter referred to an individual fundamental right.<sup>22</sup> According to this view, the only explicitly new element supplementing the existing constitutional provisions was the reference to "belief."<sup>23</sup>

Recently, this view has been thoroughly rebutted through the dynamic case law of the ECtHR, interpreting the ECHR as a "living instrument" in line with present challenges. The ECtHR added the organisational aspect to the personal and substantive scope of protection of the freedom of religion. Furthermore, Article 9 (2) of the ECHR requires an assessment of the proportionality of interferences ("as are necessary in a democratic society"). The ECtHR gave up its general self-restraint to oppose the value judgments of the supreme national instance in assessing the "necessity" of restrictions on the rights under Article 8 – 11 ECHR.<sup>24</sup>

Recent ECtHR case law has affirmed not only religious groups' freedom of religion, their right to constitute themselves as a religious community, and their right to obtain legal capacity<sup>25</sup> but also the right to control its internal affairs.<sup>26</sup> In the judgment of 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, issued shortly before the end of the ten-year waiting period, the ECtHR took one step further. It affirmed not only the right of a religious group to obtain legal personality (and consequentially the right to legal protection) but also the right to be granted a *specific* legal personality if several legal forms are available in a state:

"... given the number of these privileges and their nature, in particular in the field of taxation, the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society's pursuance of its religious aims. In view of these substantive privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the

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22 Cf. RV 938 BlgNR XX. GP; *Grabenwarter*, Europäische Menschenrechtskonvention (footnote 2) Section 22 Reference number 84.

23 Cf. only *Klecatsky* (footnote 2) 495 and 503.

24 Cf. in the recent past the judgment of the Constitutional Court on the right of assembly in the context of freedom of religion, for which detailed reasons have been given in VfSlg. 16.054/2000, in comparison to the value judgment of the ECtHR in its judgment *Öllinger v. Austria*, Appl. 76900/01.

In this context, mention should be made of the fact that Article 63 of the Treaty of Saint Germain permits interference in the freedom of religion only in the interest of public order and morality. The limitation clause of Article 9 (2) of the ECHR recedes due to the principle of Article 53 of the ECHR. In Austria, limitations are, therefore, only admissible if they are prescribed by law and if they are indispensable for public order and morality. Cf. VfSlg. 15.394/1998 and 17.021/2003; but see also *Walter/Mayer/Kucsko-Stadlmayer* (footnote 2) reference number 1455; *Grabenwarter* in Korinek/Holoubek (eds.) (footnote 2) Art. 63 (2) of the Treaty of Saint-Germain, reference number 12; *Thienel* (footnote 11) 42.

25 Judgment of the ECtHR of 16 December 1997, *Canea Catholic Church v. Greece*, Appl. 25528/94, and above all of 13 December 2001, *Metropolitan Church of Bessarabia and others v. Moldavia*, Appl. 45701/99, paras. 105 et seq.; 5 October 2006, *The Moscow Branch of the Salvation Army v. Russia*, Appl. 71881/01, para. 75.

26 Judgment of the ECtHR of 26 September 1996, *Manoussakis v. Greece*, Appl. 18748/91; *Hasan and Chaush* (footnote 11) and *Holy Synod of the Bulgarian Orthodox Church and others* (footnote 11). For further references cf. *Grabenwarter*, Europäische Menschenrechtskonvention (footnote 2) Section 22, reference number 94.

State's authorities to remain neutral in the exercise of their powers in this domain requires therefore that if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner" (para. 92).

The ECtHR considers it immaterial that Jehovah's Witnesses could previously have obtained a legal personality different from the legal personality applied for and that they were not hindered from practising their religion (para. 66 et seq. as well as para. 79). The ECtHR focused exclusively on the fact that the path chosen by Jehovah's Witnesses toward legal personality was successful only after twenty years. This did not meet the criterion of limitations "as necessary in a democratic society" because the "*right to legal personality is at the very heart of the guarantees in Article 9.*" In addition, the ECtHR held that the ten-year waiting period to which a religious community was subject before recognition as a privileged religious society was discriminatory (Article 14 in conjunction with Article 9 of the ECHR). Even though the ECtHR did not raise objections regarding the recognition procedures, it underlined that these procedures should be designed in a way so as to grant all religious communities a fair opportunity of achieving the status desired (para. 92). However, a ten-year waiting period did not meet this requirement in the case of a religious community such as Jehovah's Witnesses that had existed and been known to authorities for a long time both at international and national level (para. 97 et seq.). For the sake of completeness, mention should be made that the ECtHR also held that Article 6 (1) of the ECHR had been violated due to the length of proceedings (para. 108 and 114 et seq.) but that there had been no violation of Article 13 of the ECHR (para. 123).<sup>27</sup>

In reaction to this judgment Jehovah's Witnesses were recognised as a religious *society* in May 2009 (apart from payment of the compensation awarded to them by the ECtHR).<sup>28</sup>

### III. DEVELOPMENT OF CASE LAW AFTER THE JUDGMENT OF 31 JULY 2008

The ECtHR underlined its view regarding Section 11 of the Religious Communities Act in the aforementioned judgments *Gütl, Lang and Löffelmann v. Austria*. In those cases the Court held that provisions referring to the recognition of a church or religious society violate the ECHR. Hence, the ECtHR increased the pressure to execute the judgment of the ECtHR of 31 July 2008 pursuant to Article 46 of the ECHR.

However, the Austrian Constitutional Court did *not* comply with the ECtHR's view that referring provisions were violating the Convention per se. Rather, the Constitutional Court interpreted them in line with the ECHR's 2 July 2009 judgment. Although this judgment of the Constitutional Court contradicts the

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27 See also the aforementioned judgment of 26 February 2009, *Verein der Freunde der Christengemeinschaft and others* (footnote 3).

28 Decree of 7 May 2009, Federal Law Gazette II No. 139/2009.

view of the ECHR, it acts in the spirit of the ECHR; it has a more favourable attitude towards the freedom of religion than the ECtHR insofar as it does not require a legislative act to establish a status corresponding to the ECHR. The correct interpretation of provisions granting privileges to religious societies may be invoked vis-à-vis the Austrian authorities already. However, the authorities may differ considerably in their view on the preliminary question which is whether a religious community has to be treated as a religious society in the individual case.

Moreover, how the ECtHR will react to the interpretation of the Constitutional Court and what margin of appreciation it gives to the Austrian courts remains to be seen. The ECtHR has already had an opportunity to do so since the Agents of the Austrian Government were given the application of Jehovah's Witnesses of 20 July 2005, Appl. 27540/05, in January 2009. This new application does not only address a provision of the Act on the Employment of Foreign Nationals (*Ausländerbeschäftigungsgesetz*) but also the tax exemption under Section 15 (1) (14) of the Inheritance and Gift Tax Act 1955 (*Erbschafts- und Schenkungssteuergesetz*).

How the Committee of Ministers of the Council of Europe as the supervisory body pursuant to Article 46 (2) of the ECHR will react also remains to be seen. This Committee has to decide if the legal position resulting from the recognition of Jehovah's Witnesses in May 2009 and the judgment of the Constitutional Court is in line with the ECHR. If not, the Committee must decide whether, and if so which, Austria has to take "general measures" to implement the judgments of the ECHR relating to recognizing Jehovah's Witnesses as a religious society in Austria.

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