

## Religious Freedom and the Concept of Law and Religion in Austria\*

Richard Potz, Vienna

### 1. The Specific Austrian Historical Background

The oldest elements of the socio-cultural and psychological factors determining Austrian law on religion<sup>1</sup> go back to the Habsburg counter-reformation and the Josephinian system with the establishment of the Catholic Church and tolerated minorities. The emancipation of religious minorities was a question of multi-confessionality from the very beginning. Besides the Protestants there were considerable Orthodox and Jewish minorities – until the end of the monarchy Protestants were demographically only on the fifth rank among confessional denominations. So the *Toleranzpatent* of Joseph II. came into force not only for Protestants but also for the Orthodox minority. At the same time patents for the Jewish communities (*Judenpatente*) and special *Handschriften* for the Armenians and for other groups like Mennonites and Russian Raskolniki in Galicia and Bukovina were enacted. In the Josephinian Age we can therefore find beside the dominant Catholic Church various "tolerated" communities, which had different legal foundations.

After 1848 the installation of a new system of state-church relations developed step by step. The Constitutional Act on the Fundamental Rights of Citizens of 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* – StGG) introduced a denominationally neutral system in ecclesiastical matters.<sup>2</sup> Though Art. 15 StGG conferred upon all legally recognized churches and religious societies certain rights for the first time, it did not give details of the way in which the adherents of a certain denomination may obtain legal recognition. These provisions are contained in the Law concerning the Legal Recognition of Religious Communities (*Anerkennungsgesetz* – AnerkG) which is still in force. In the time of the monarchy a recognition according to the AnerkG took place only for the Old Catholic Church (1877) and the *Herrnhuter-Brüderkirche* (1880).

The AnerkG came into force only for new religious communities and was in principle not directly applicable to already recognized churches and religious communities. So the development of the ecclesiastical law concerning the churches and religious societies which were "historically recognized" in 1874 took place by way of special legislation. However, the Austrian Constitutional Court (*Verfassungsgerichtshof* –

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<sup>1</sup> For more information cf. H. Kalb, R. Potz & B. Schinkele, Religionsrecht, Wien 2003.

<sup>2</sup> Cf. I. Gampl, R. Potz & B. Schinkele, Österreichisches Staatskirchenrecht, vol. I, Wien 1990, 30 seqq.

VfGH) declared, that the standards of the AnerkG are applicable for those historically recognized religious communities in an analogous way<sup>3</sup>.

Of special interest is the background of the Law of 15 July 1912 concerning the Recognition of the Adherents of Islam as a Religious Community (IslamG)<sup>4</sup>. The institutional recognition of Islam by the procedure delineated by the AnerkG was not possible, mainly because of the lack of a juridical organization comparable to Christian Churches, a concept which was the basis of the AnerkG. Giving the individual Muslim the position of an adherent of a recognized religious community though there was no corresponding institution the IslamG 1912 built a bridge between corporate and individual status<sup>5</sup>.

After the fall of the Habsburg Monarchy there was a significant constitutional change, but the system of state-church relations remained. The small republic was more catholic than the great empire, but there were two important minorities, the protestant and the Jewish.

The first renewal by a special law for a single church was done by the Concordat between the Holy See and the Austrian Republic, dated 5 June 1933.<sup>6</sup> The Concordat was brought in connection with the establishment of a Christian authoritarian system 1934, which caused a political discussion on the validity of the Concordat after 1945.

After the Second World War the confessional structure of Austria changed significantly. The catholic majority was constantly decreasing (73,7 % in 2001). As a result of the expulsion and extermination in the Shoah the important Jewish minority was reduced from 2,8 % to approximately 0,1 % today, the protestant minority was increasing after 1945 with the stream of German refugees (from 4,3 % to 6,5 % after 1945, going back to 4,7 % in 2001) and since the sixties there has been a growing number of Muslims (4,3 % in 2001).

The development of Austrian law on religion after the Second World War was determined by the overcoming of the last remainders of a confessional state in Austria. The necessary corrections were enacted in the sixties. The most important new law is

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<sup>3</sup> Gampl, Potz & Schinkele (fn. 2) 145, E 2.

<sup>4</sup> Gampl, Potz & Schinkele (fn. 2) 458 seqq.

<sup>5</sup> Cf. R. Potz, Rechtsstellung der islamischen Glaubensgemeinschaft in Österreich, in Koury & Vanoni, eds., *Geglaubt habe ich, deshalb habe ich geredet. Festschrift für Andreas Bsteh*, Religionswissenschaftliche Studien 47, Würzburg-Altenberge 1998, 394 seqq.

<sup>6</sup> The special ecclesiastical law of the Catholic Church is traditionally governed by treaties with the Holy See which are recognized as bilateral international treaties *sui generis* and so are subject to the process of transformation according to Art. 50 Austrian Federal Constitution. A consequence of the Concordat as an international treaty is, that in the case of difficulties in the interpretation of the Concordat or the occurrence of problems not yet treated which affect state and church, an amicable solution (Clause of Amicability) is reached or a ruling is arrived at by mutual consent. According to Austrian constitutional law there is no other legal basis for treaties on ecclesiastical law. Prima vista we have therefore a formal difference in special ecclesiastical law between the Catholic Church and the other communities with possible consequences for the situation of the single believer. This problem, however, is diminished because nowadays the special laws for churches and religious communities are enacted in accordance with the corresponding religious community, so that the formulation of the legal text in all cases is the result of negotiations.

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the Federal Law of 6 July 1961 on “External Legal Positions of the Protestant Church in Austria” (*ProtestantenG*)<sup>7</sup>, which represents the conclusion of a process which led to the equal treatment of the Protestant and the Catholic Church. In comparison with the Concordat this more recent law guarantees even greater religious freedom.

For the Greek Orthodox Church the Federal Law of 23 June 1967 on the External Legal Positions of the Greek Oriental Church in Austria (*OrthodoxenG*)<sup>8</sup> was enacted. The *OrthodoxenG* for the first time recognized the Greek Orthodox Church in Austria as such in addition to the already existing communities<sup>9</sup>. Since that time we have had a two-fold membership in Orthodox Church and it is possible to be an adherent of the Orthodox Church without being at the same time member of a certain established community, a legal position comparable to the content of the *IslamG* mentioned above.

From the beginning of the seventies the Islamic Community rapidly increased in number and the question was raised, if an institutional establishment according to the *IslamG* 1912 would be possible. The governmental body was faced with several problems regarding the operation of the *IslamG*, some of them rather ridiculous like the institution of polygamy in Islamic law. This difficulty could be settled after calling for a *fatwa* from Al Azhar-University in Cairo, which stated, that there is no absolute right for a Muslim to marry more than one woman.

The correction of the Law of 21 March 1890 on the External Legal Positions of the Israelite Religious Society (*IsraelitenG*) is also an interesting example in our context. In a decision from 1981<sup>10</sup> sect. 2 *IsraelitenG* was partially declared unconstitutional owing to a violation of the principle of equality. The Constitutional Court states, that it is incompatible with this principle to prevent a group of Jewish people founding another legally recognized religious community besides the only one existing on a certain territory. In this decision for the first time one of the High Courts stated in such a significant way that the individual element of religious freedom is prevailing its corporative sphere, the individual guarantee of the fundamental right must not be violated by overvaluing the corporative right.

Since 2003 there has been a special law for the churches of the oriental-orthodox tradition, including not only the already legally recognized churches (Armenian-Apostolic Church since Joseph II or 1773 respectively and the Syrian Orthodox Church since 1988), but also the Coptic Orthodox Church, which has been a registered denominational religious community since 1998.

Since 1951 another six churches and religious communities have been recognized by statutory instrument according to the *AnerkG* (Methodist Church, Mormons, New

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<sup>7</sup> Gampl, Potz & Schinkele (fn. 2) 331 seqq.

<sup>8</sup> Gampl, Potz & Schinkele (fn. 2) 292 seqq.

<sup>9</sup> After World War I the system of autocephalous/autonomous churches was changed according to the new political order, so that only three communities (*Kirchengemeinden*) – two Greek and one Serbian – remained within the borders of the Austrian republic. Meanwhile there is also a Rumanian, Russian and a Bulgarian community.

<sup>10</sup> VfGH 7. 2. 1981, G 31/79, VfSlg. 9185/1981.

Apostolic Church, Buddhist Community).<sup>11</sup> The process of establishing more and more religious denominations was brought to an end with the emerging of new religious movements. On the one hand the conception on which the legal recognition is based did not seem suitable to be transferred on some of these groups owing to different structures. On the other hand in several cases the administrative body hesitated to confer public law-status on some of these groups for reasons pertaining to socio-political considerations.

## **2. The Two Spheres of Religious Freedom**

The aim of all the legislative measures since 1867 has been first of all equalization by emancipation and not by the reduction of the privileges of the established church. There was no equalization by separation between state and church, it was rather a system of "establishing" more and more churches and religious communities, which were entrusted with public tasks.

So the traditional clear distinction between individual and corporative *Staatskirchenrecht* for a long time was maintained in Austrian legal literature. Only in recent times the unity of both fields of religious fundamental rights – the individual and the corporative sphere – is to be emphasized; both spheres are closely linked emanations of freedom of religion, which is necessarily a fundamental status in a democratic secular state<sup>12</sup>. Nowadays it is accentuated that it is the primary task of the state to promote religious communities in order to protect the religious interests of the individual adherents.

The „catalogue“ of Austrian fundamental rights is characterized by the fact that they are embodied in Constitutional Acts or Treaties under International Law respectively (Art 14<sup>13</sup>, Art 15<sup>14</sup> StGG, Treaty of St. Germain<sup>15</sup>, Art 9 ECHR) that date from

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<sup>11</sup> The list of the legally recognized churches and religious societies actually comprises the following communities: Roman Catholic Church, Protestant Church (Lutheran and Reformed), Orthodox Church (*in concreto* the Greek, Serbian, Rumanian, Russian, Bulgarian communities), Jewish Religious Society, Old Catholic Church, Islamic Religious Community, Oriental-Orthodox Church (Including Armenian, Syrian and Coptic Church), Methodist Church, Mormons, New Apostolic Church, Buddhist Community.

<sup>12</sup> Cf. R. Potz, "Die inneren Angelegenheiten der anerkannten Kirchen und Religionsgesellschaften", in *Ex aequo et bono* (In honour of Willibald Plöchl), Innsbruck 1977, 410; H. Kalb & R. Potz, "Zur Konzeption des Verhältnisses von Staat und Kirche im weltanschaulich neutralen Verfassungsstaat", in Austrian Bishops' Conference ed., *Kirche in der Gesellschaft – Wege in das 3. Jahrtausend*, Wien 1997, 69 seqq.

<sup>13</sup> Note especially Art. 14 StGG 1867: (1) Everybody is guaranteed complete freedom of religion and conscience. (2) The enjoyment of civil and political rights is independent of religious denomination; however the duties of the citizen may not be infringed upon by religious beliefs. (3) Nobody can be compelled to acts of worship or to participate in church ceremonies or events, insofar as he is not subject to the legally justified power of a third person in this respect.

<sup>14</sup> Art. 15 StGG guarantees "every legally recognized church or religious community" the right to communal public worship; to order and manage "independently its internal affairs", to "remain in possession of and continue to enjoy the fruits of its institutions, foundations and funds intended for the purpose of worship, education and welfare", but they are, "like any association, subject to the general laws of the state".

<sup>15</sup> See especially Art. 63 of the Treaty of St. Germain:

Austria commits itself to guaranteeing every inhabitant of Austria full and comprehensive protection of life and liberty without respect to differences in birth, nationality, language, race or religion.

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several historical epochs with a different state-church relationship and a different understanding of fundamental rights. That is an Austrian specificity in comparison to other European countries. The most comprehensive protection of religious freedom became part of the constitutional system 1958 by means of the ECHR. As a result of this gradual development the single constitutional provisions are overlaying and overlapping each other. That's why they have to be summarized by means of a synopsis of all relevant guarantees amounting to one „aggregated law on religious freedom“.

In our context one has to stress that according to the European case-law churches or other religious communities as well as philosophical organisations have a right as such to manifest their religion or belief, though Art 9 leg cit has been drafted as an individual right. Therefore, initially the Commission held that a church, being a legal and not a natural person, was not capable of having or exercising the rights mentioned in Art 9 ECHR. After changing its position (1978) the communities mentioned above can be victims of an alleged violation of Art 9 ECHR themselves.

Due to the fact that the ecclesiastical right to self-determination is emanating directly from the human right to religious freedom and the institutional guarantee, therefore, understood as a conclusive completion, a teleological synopsis of all guarantees concerning religion and belief has to be done and the different reservation clauses in Art 15 StGG and Art 9 Abs 2 ECHR are to be harmonized. That's the way to create a comprehensive right of religious freedom encompassing its individual and its corporative element as well.

Recognized churches and religious societies have a public-law status, non-recognized religious communities obtain juridical personality only on the basis of private law. Since 1998 there has been a special private-law-status for non-recognized religious communities, which is called “officially registered religious denominational community” (*staatlich eingetragene religiöse Bekenntnisgemeinschaft*)<sup>16</sup>.

Of course the system of different legal status for religious communities has certain consequences for the individual adherent of a religious community. Therefore this system is only justified if there is no difference between the legal status of religious communities as far as legal positions are concerned which derive directly from the fundamental law of religious freedom. That's why the whole legal system has to be examined if the consequences ensuing from the fact of being legally recognized are legitimated from that point of view, whereby the principle of equality serves as a special measure. All differentiations provided by legal acts have to be legitimated by objective and reasonable criteria, otherwise they represent unobjective infringements of the fundamental rights' guarantees and have to be abolished. In the future these

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All inhabitants of Austria have the right to freely exercise faiths, religions or denominations of every kind in public and in private, insofar as their exercise is not incompatible with public order or morality.

<sup>16</sup>H. Kalb, R. Potz & B. Schinkele, Religionsgemeinschaftenrecht. Anerkennung und Eintragung, Wien 1998.

procedures are going to involve considerable challenges for the legislator as well as for the courts.<sup>17</sup>

### 3. The Principle of Neutrality

As a result of the fundamental right of religion and belief, the state is bound to denominational neutrality, which is described to be a constitutional principle. In Austria this fundamental principle is to be carried into practice in different ways. Consequently one has to make a clear distinction between two different forms of religious neutrality: the “distancing” neutrality (*distanzierende Neutralität*) and the including neutrality (*hereinnehmende Neutralität*). As far as the state acts within its central sovereign sphere – that means genuine non-exchangeable state tasks are concerned (for instance jurisdiction) – religious neutrality has to be realised in its “distancing” form, any possible identification with religious or philosophical beliefs has to be avoided.

In this context, however, one has to stress that this does not mean that the state – though neutral towards religious and philosophical beliefs – were not allowed to set measures of promotions in favor of churches and religious societies as socially relevant factors. The distinguishing characteristics, however, have to be of secular and not of religious nature. The life circumstances of the communities on the whole are to be taken into consideration, for instance the number of members, the social significance, or the activities in charitable and general welfare matters.

Such deliberations are to be consistent with a modern substantial comprehension of fundamental rights. These rights don’t establish only a right to defense towards the state but they also impose positive obligations the state has to comply with in order to render possible an effective exercise of the fundamental rights. Of course, such interpretations involve difficulties of delimitation which have to be solved in an actual case.

Generally in connection with such questions the relationship between the positive and negative aspects of religious freedom is concerned. Both elements are of equal status and though the protection of minorities is a special function of fundamental rights, the negative aspect, however, is not prevailing, otherwise it would prevent an effective exercise of fundamental rights. The crucial point is to find a fair balance between the positions being in conflict and both guaranteed by basic rights. This establishes a “practical concordance” by means of careful weighing procedures and with it an effective protection of fundamental rights.

Recently such a differentiation was discussed with regard to the presence of crosses in class-rooms and court-rooms. In the context of school education the cross can be interpreted as an offer of exercising the fundamental right of religious freedom or the paternal right. Within the Courts’ decision making, however, the cross does not indicate to take into consideration religious interests as such, in the contrary, religious

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<sup>17</sup> See below.

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feelings might be abused in the interest of a (real or supposed) more effective administration of justice. Consequently, the cross can be justified in the class-room, but it should be removed in the court-rooms.<sup>18</sup>

#### **4. The single believer and the system of recognized religious communities as a concept of “Multi-Establishment”**

The system of special laws for several recognized churches and religious communities of course causes the danger of distortions. But already in the *Motivenbericht* to the AnerkG 1874 was stated that the purpose of this act was to realize the freedom of religion and conscience as well as the principle of parity of the confessions. Especially important for this form of substantive parity is sect. 1 para. 2 no. III *ProtestantenG* 1961, which states: ”All acts of legislative and of executive power, which concern the Protestant Church, have to observe the principle of equality before law in relation to the legal and factual position of the other legally recognized churches and religious communities”.

These formulations mean much more than a mere declaration of the legislator’s intention, they indicate the meaning of a most favoured (religion) clause with reciprocal effect. The administrative practice interpreted this regulation in the same way.<sup>19</sup>

Nevertheless there seem to be some disparities, which mainly have the historical reasons mentioned above. It is, therefore, to examine in every single case if a different regulation is in accordance with the principle of substantive parity – a necessity to a high degree intensified in view of the new Law concernig the legal personality of religious communities from 1998.

This law marked a decisive point in the development of the Austrian law on religion. Registered religious communities obtain juridical personality on the basis of private law, whereas recognized churches and religious societies enjoy a position as corporations of public law. It has brought some important corrections urgently demanded since a long time. Especially the deficiencies of the traditional law regarding Art 9 in connection with Art 14 ECHR are settled with it to a large extent.

Though the registered religious communities are also “recognized” by a state act in a larger sense – they receive somehow a “certificate of non-objection” – the legal consequences of that status for the individual adherent is rather insignificant. That depends on the above mentioned fact, which the Austrian law on religion has been and still is characterized by a clear differentiation between legally recognized religious communities (in a strict sense) and not legally recognized communities. At the moment it cannot be foreseen how the process of adjustment will run exactly, but there

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<sup>18</sup> Cf. H. Kalb, R. Potz & B. Schinkele, *Das Kreuz in Klassenzimmer und Gerichtssaal*, Religionsrechtliche Studien Bd. 1, Wien 1996.

<sup>19</sup> A Protestant agricultural private school was granted a subsidy with reference to the paragraph concerned in connection with Art 2 para 2 of the Supplementary Treaty to the Concordat 1962 which provides a subsidy for Catholic private schools of the same type.

can be no doubt that considerable changes are to be carried out – for example in the fields of personal status, military service or civilian service respectively, religious education, revenue law, religious assistance in the armed forces and other institutions, or collective labour law.<sup>20</sup>

## **5. Religion in Public Law – Some Aspects**

### **5.1. Non-military Service**

According to Art 9a of the Austrian Federal Constitution a non-military service for conscientious objectors is provided. A person liable for military service needs to declare expressly that he objects for reason of conscience – except in cases of self-defense or defense of another from imminent attack – to using force of arms against other human beings. In this case he has to serve in alternative civilian services. For several years there was the practice, that adherents of Jehovah's witnesses, who rejected even civilian service, were neither called to arms nor to non-military civilian service. Since a short time the leading body of the community has declared that it is left up to the individual adherent whether he is willing to render civilian service or he refuses it for grounds of conscience. Now nearly all of them render civilian service.

### **5.2. Data Protection**

By implementing the EU-Directive on Data protection 95/46/EG, the Austrian Parliament passed a new data protection law (Datenschutzgesetz 2000<sup>21</sup>), which came into force on January 1st 2000 and replaced the DSG 1978. The processing of sensitive data like religious belief and non-religious convictions therefore needs a special reasoning concerning its importance in public interest. The laws have to contain corresponding guarantees for the protection of data subjects. Even in the case of admissible restrictions the encroaching on the fundamental law has to be done in the slightest manner.

As a result of this regulation § 9 DSG contains an enumeration of 13 issues which constitute admissible restrictions regarding the prohibition of the processing of sensitive data. Most of them lay down the exceptions of Art 8 sect. 2 and 3 of the Directive. A few of the issues (nr 3, 4, 5, 10) contain concrete exceptions referring to Art 8 sect. 4, which authorises the Member States, to lay down more exemptions „for reasons of substantial public interest“. Issue 10 to 13 contain admissible infringements by private thirds. Issue 13 is interesting in the context of religious communities: Non-profit-Organisations with political, philosophical, religious or unionised purposes are permitted to process data, which allow conclusions to the political opinion or convictions of natural persons, if it is in the context of their permitted activity and the data subjects are members, promoters or other persons, who stated regularly their interest in the activity purpose of the corporation. The disclosure of these data to a

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<sup>20</sup> See below.

<sup>21</sup> *DatenschutzG* of 17. 8. 1999, BGBl I 1999/165.



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third party is only possible according to a legal regulation. Otherwise the controller needs the data subject's consent.<sup>22</sup>

### 5.3. Festive Days

In all countries most of the public holidays are traditionally religious feasts, in Austria therefore they are mainly of catholic origin, with the exception of May 1 and National Day. But there are some special regulations for adherents of religious minorities: Good Friday is a recognized holiday according to the laws regulating public holidays for the members of the Protestant Church, Augsburgian and Helvetian Confession, the Old Catholic Church, and the Methodist-Church. Furthermore religious holidays are taken into account for the purposes of School Acts, for instance the Sabbath for pupils of the Jewish Community and the Seventh-Day-Adventists and the last days of Ramadan for Muslim pupils.

### 5.4. Denominational Private Schools

State schools are financed by those charged with this duty by the law (Federal Republic, Federal States, local authorities). They are open to everyone, regardless, among other things, of denomination. All other schools are private schools. The legally recognized churches and religious societies are among those authorised to operate, i.e. to found and to ensure the continued existence of private schools. Where schools are operated either by churches or religious societies or by their institutions or by institutions, trusts or funds recognized by them, those schools are known as denominational schools and certain special regulations apply to them. Private schools are granted public status if their operators, heads and teachers can guarantee proper and regular instruction in accordance with the aims of Austrian schooling.

In the case of legally prescribed types of school the results achieved in class must be equivalent to those at a State school of the same type. The fulfilment of these conditions is legally presumed in the case of recognized churches and religious communities. If a private school is operated by a non-recognized religious community the conditions for the achievement of public status have to be approved in every single case.

Only recognized churches and religious societies are to be granted subsidies towards the costs of teaching personnel for the denominational private schools which have public status.<sup>23</sup> Because of its public-law status the Islamic Community also enjoys the "privileges" for denominational private schools. Therefore there is an Islamic gymnasium organized as a denominational private school according to Austrian Private School Law.

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<sup>22</sup>This passing on prohibition for religious communities and corporations regarding the data of members, promoters etc has a certain importance for the activity of the „Bundesstelle für Sektensfragen“, cf. R. Potz, Church and State in Austria 1999, European Journal for Church and State Research 6/1999, 167 s.

<sup>23</sup>Sect. 17 *PrivatschulG* BGBl. 1962/244, as amended by BGBl. 1972/290.

#### 5.5. Religious Instruction

Religious education is guaranteed by Art 17 para. 4 StGG, which provides that the respective churches or religious communities are charged with the classes in religious education in the schools. Like the regulation of denominational private schools seen systematically the article forms an elaboration of the parents' right to religious or philosophical education respectively of their children according to Art 2 Supplementary Protocol.

According to Sect. 2 para. 1 Organization of Schools Act, it is the aim of Austrian schooling to cooperate in the development of the youth's aptitudes according – amongst other things – to religious values by way of appropriate instruction. The inclusion of religious values in the article describing the aims of education is due to the aim of a comprehensive education, which naturally applies only to persons open to religious education and development.

This wording makes it clear that the concept of church-run classes in school is accepted in Austria and that is the way the denominational character of the classes is especially emphasised. The religious communities, not the state, organise the religious education classes, despite the fact that as a compulsory subject religious education enjoys equal standing with other subjects.

For all pupils who are members of a legally recognized church or religious community, religious education of their denomination is a compulsory subject at the compulsory schools, secondary schools, teaching colleges, agricultural colleges and colleges of forestry. At other schools religious education is an optional subject.

Religious education has been strongly criticised for granting privileges to the recognized churches and religious societies and some have even called for its abolition. In this context the introduction of ethic classes in Austria has been discussed and in several Austrian countries some experimental classes have already been started. A solution most compatible with the Constitution would appear to be the introduction of ethic classes for those pupils who have withdrawn from religious education classes and as an obligatory subject for those for whom no religious education classes exist because of belonging to no religious denomination or to a non-recognized religious community respectively.<sup>24</sup>

In school law there is one example where conscientious objection by an adherent of a non-recognized church is accepted: According to the Law on Schooltime the possibility is granted to keep away from school instructions for religious reasons on Saturday. In decrees of the education authorities this possibility is explicitly regulated not only for the recognized Israelite Community but also for the Seventh-Day Adventists, although they do not belong to the recognized churches, even though since 1998 to the registered religious denominational communities.

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<sup>24</sup> B. Schinkele, "Staatskirchenrechtliche Überlegungen zur aktuellen Diskussion um Religions- und Ethikunterricht", ÖAKR 1993, 220 seqq.

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According to the regulation in sect. 2 para. 1 of the Law on Religious Instruction (*Religionsunterrichtsgesetz*)<sup>25</sup> in all public schools and those schools granted equality of that status, as far as religious education is a compulsory subject, the school operators are charged with the duty to hang up a cross in each class room presupposed the majority of the pupils belong to a Christian denomination. This provision might be improved insofar as there should be a legal possibility for the school operators to render a decision deviating from the principal taking into consideration all facts and circumstances of an actual case.

Since the introduction of Islamic religious instruction in Austrian public schools in 1983 the school administration has been faced with several problems, although the system went well on the whole. The foundation of the Islamic Religious Pedagogical Academy, which was established according to the regulations for pedagogical academies in the Austrian Law on private schools was in the interest of the Islamic community as well as of the Austrian school administration. In the meantime the legal foundation of this Academy has changed.<sup>26</sup>

#### 5.6. Protection of Monuments

According to the Law on Protection of Monuments the destruction as well as every alteration of monuments is in need of the consent of the federal office for protection of monuments, excepted in cases of danger in delay (§ 2 sect. 2). The application for alteration (together with pertinent adjacent objects) is to be granted if the monument is used for worship of a legally recognized church or religious society and the alteration is necessary for the exercise of worship on the basis of compelling or at least generally applied liturgical instructions (§ 5). As necessary in the meaning of this provision are to be considered, at any case, liturgical instructions that must be observed in order to permit regular practice of worship as well as those circumstances which enable the faithful to attend church to a sufficient degree and in a reasonable and dignified way. The kind and extension of this necessity is to be proved with a certificate of the competent supreme authority of the church or religious society concerned on demand of the federal office for protection of monuments. This certificate has to include the consequences that are to be expected if the application for the alteration would not be granted in the way or extension that has been asked for in the application. Thus the above mentioned office gets the basis for making an alternative proposal. If the office has already made some suggestions the church authority has to give its comment on them (§ 5 sect. 4).

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<sup>25</sup> BGBl. 1949/190 as amended.

<sup>26</sup> See below.

## **6. Believers in Private Law**

### **6.1. Matrimonial Law**

In Austria there is the system of compulsory civil marriage. Religious marriages are without any civil consequences. On the other hand it is in principle possible to be married only in church law without legal consequences in state law<sup>27</sup>. This alternative often was chosen for economic reasons, for instance because of the higher maternity grant for single mothers<sup>28</sup>.

### **6.2. Religious Upbringing of Children**

The parents of children who have not yet attained majority in religious matters, may for as long as the marriage continues freely agree on the denomination or philosophy according to which they wish to bring up their children. The agreement ends with the death of either spouse. If one person has sole custody of the child, he or she may decide on the nature of the religious upbringing. Guardians and trustees, however, require the authorisation of the guardianship court. After divorce the parent not entrusted with the child's upbringing merely has a right of comment in the case of a change of religion.

Regarding the protection of welfare of minors there were some spectacular cases of Jehova's witnesses concerning the refusal of blood transfusion in the last years, so that this problem was of nationwide interest. The persons having care and custody of a child carry the obligation for the "protection of the physical well-being and health of the child" (sect. 146 Austrian Civil Law Code [*Allgemeines Bürgerliches Gesetzbuch – ABGB*]), regardless of their religious commandments. These persons cannot refer to their constitutionally guaranteed right of religious freedom and of freedom of conscience in this matter of obligation. In the case of the parents' refusal, their consent has to be replaced by the consent of a legal representative who is to be appointed after a partial withdrawal of the parents' custody of the child<sup>29</sup>.

In a decision on granting parental custody, the Austrian Supreme Court (OGH) decided 1986<sup>30</sup> that if a child is forced into the role of an outsider in society because of its upbringing according to the beliefs of Jehovah's Witnesses or runs health risks (prohibition of blood transfusions), this must be considered as a relevant factor. The matter was taken to the ECHR in Strasbourg which found that there had been a violation of the right to family life according to Art 8 ECHR in connection with Art.

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<sup>27</sup> The provision of sect. 67 *PersonenstandsG* 1939, according to which a church wedding before the state wedding was punishable, was quashed by the Constitutional Court in 1955 as being incompatible with the Constitution, as marriage by an organ of a religious community, including the time of such a ceremony, forms part of the internal affairs of the churches or religious communities because the church ceremony has no consequences in state law.

<sup>28</sup> The church is here faced with the dilemma of insuring the continued significance of its concept of marriage in society by encouraging the adoption of the appropriate laws. On one hand it demands the support of marriage and the family, on the other hand it risks participating in the exploitation of social welfare institutions by allowing a church wedding without a state marriage.

<sup>29</sup> Sect. 8 para. 3 *KrankenanstaltenG* BGBl. 1957/1 as amended in connection with § 176 ABGB.

<sup>30</sup> OGH 9. 3. 1986, 1 Ob 586/86, SZ 59/144, ÖAKR 1987/88, 104 seqq.

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14<sup>31</sup>. In the last years, therefore, the Austrian Supreme Court has decided twice – one case referred to a Jehova's witness<sup>32</sup>, one case to an adherent of Scientology<sup>33</sup> – that membership to these groups could not be the only reason for denying parental custody in case of divorce. In one case the lower instance ordered the child's mother being a member of Scientology who was granted parental custody to keep away Scientology's ideas from the child. In the case of a 13-year old boy who was sent by his mother for 7 months to a school of Sahaja Yoga in Dharamsala (India), the grandparents asked for a transfer of custody or at least visitation rights. Although the Austrian Supreme Court refused the grandparents' request arguing that staying at a boarding school as such brings damage to the child's welfare, because of the special circumstances in the concrete case (contact with the parents was forbidden) the custody was partly handed over to the competent court<sup>34</sup>.

### 6.3. Labour Law

Regarding collective labour law the exemption from the co-determination by employees is granted businesses and enterprises of legally recognized churches and religious societies to a greater extent compared to such institutions within other religious communities. A fact, that will have to be examined especially since the new Law concerning the Legal Personality of Religious Communities has been put into force.

That distinction might have significant consequences for the individual case of employed persons insofar as the law concerning dismissals is part of the collective labour law, primarily in connection with keeping loyalty-obligations. As a result from participation in the pursuit of denominational aims acceptance of doctrine as well as an appropriate way of life may be demanded to a certain degree.

Employees who have to do their work on legal holidays have the right to spare-time in order to fulfil their religious duties provided it's compatible with the enterprise's requirements. This right is granted independent of whether the employee concerned is a member of a legally recognized community or not.

1994 the Supreme Court was dealing with the case of a muslim employee who had been dismissed owing to his daily worship using a carpet for praying and other religious objects in the presence of other employees. He was also charged with having left the business before closing time in order to go to the mosque on Friday evening, without taking into consideration working instructions. The Supreme Court stated that such a behavior was disturbing the planned distribution of labour working and irritating the co-workers who were holders of the fundamental right to religious freedom in the same way.

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<sup>31</sup> Europ. Court H.R. 22. 6. 1993, 15/1992/360/434, ÖAKR 1993, 527 seqq.

<sup>32</sup> OGH 4. 6. 1996, 1 Ob 601/95, JBl. 1996, 714 seqq.

<sup>33</sup> OGH 13. 8. 1996, 2 Ob 2192/96, EvBl. 1997/1 seqq. = ecolex 1996, 858.

<sup>34</sup> OGH 30. 1. 1996, 1 Ob 623/95, SZ 69/20.

Though the Supreme Court, as it should be, spoke about the positive and the negative aspect of religious freedom, it is not comprehensible that being confronted with the described forms of worship would be an unreasonable demand for the other employees.

Another legal field that is to be mentioned in the labour law context is employment of foreigners. According to sect. 2 para. 1 of the Act concerning the Employment of Foreigners within the Federal Territory it is not to be applied to foreigners as far as their pastoral work within a legally recognized church or religious society is concerned. As it is set forth in the explanations there doesn't exist a reason for giving working permission to that group of persons in the view of the labour market. While the explanations mention among others also teachers of religious education and advisers in religious affairs the administrative practice is preferring a narrower interpretation. That's why there exist real actual problems concerning Islamic women who want to work as religious instructors.