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## The Rights to Religious Freedom and Beliefs — Development, Legal Foundations, and Recent Trends in Austria

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## The Rights to Religious Freedom and Beliefs — Development, Legal Foundations, and Recent Trends in Austria

**Keywords:** right to religious freedom, recognition of churches and religious communities, relationship between state and churches/religious communities, religious/ecclesiastical law, Muslims, religious symbols

### Introduction

A minute of silence to commemorate the crucifixion of Jesus Christ, that was announced on public television on Good Friday at 3 pm, caused a turmoil in the Republic of Austria in 2012. People feel disturbed by the nocturnal striking of a church tower clock. The former resulted in a complaint to the Austrian Constitutional Court, the latter in a civil action taken in Linz. Today especially, the question of religious freedom gains importance in the Austrian society and state institutions, both in its individual as well as in its corporate form, that is, the rights of religious-ideological associations. The term religious freedom “includes the freedom of belief, freedom of conscience and freedom of religion on the one hand, and freedom of worship on the other hand. Freedom of religion includes the right to adopt a religion or belief freely and without legal disadvantages, to change or give up, to exercise the chosen religion freely and in a undisturbed manner, as an individual or in community (individual and collective freedom of religion) as well as the corporate religious freedom of churches and religious communities. The right also includes their cor-

porate and institutional manifestations and the guarantee of autonomy in their own affairs.”<sup>1</sup>

Religious freedom is a modern phenomenon, which features prominently in various catalogues of fundamental human rights.

Freedom of religion is also recognized by the Catholic Church. The term religious freedom includes, in accordance with the declaration of the Second Vatican Council on Religious Freedom *Dignitatis Humanae* from 7 December 1965,<sup>2</sup> as Joseph Listl indicates, “not only the individual religious freedom with the inclusion of the common public exercise of religion in all forms of actualizing confession and freedom of worship, but also the corporate religious freedom, that is, the institutional church freedom.”<sup>3</sup> In this respect, the council agrees with Art. 9 of the European Convention on Human Rights of 4 November 1950 (European Convention on Human Rights — hereinafter ECHR),<sup>4</sup> which has constitutional status in Austria, as well as with Art. 10, section 1 of the Charter of Fundamental Rights of the European Union (CFR)<sup>5</sup> that was signed by the Nice European Council on 9 December 2000 and has been made legally binding by the Lisbon Treaty,<sup>6</sup> which came into force on 1 December 2009. Only the guarantee of religious freedom, which the Vatican Council demands for all churches and religious communities, warrants the free operation of churches and religious communities. Besides the demand for religious freedom the Vatican Council speaks of, without using the expression verbatim, “a reverberating yes to the religious neu-

<sup>1</sup> H. J. F. REINHARDT: “Religionsfreiheit. III. Kirchenrechtlich u. staatskirchenrechtlich.” In: LThK<sup>3</sup>, Vol. 8 (1999), columns 1051—1052, column 1051.

<sup>2</sup> Full text: *Declaration on Religious Freedom “Dignitatis Humanae”*. Available from: [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html) (accessed 26.01.2016).

<sup>3</sup> J. LISTL: *Kirche und Staat in der neueren katholischen Kirchenrechtswissenschaft*. Staatskirchenrechtliche Abhandlungen. Vol. 7. Berlin 1978, p. 214; cf. further IDEM: “Staat und Kirche in den Aussagen des Zweiten Vatikanischen Konzils.” In: *Menschenwürde und freiheitliche Rechtsordnung. Festschrift für Willi Geiger zum 65. Geburtstag*. Eds. G. LEIBHOLZ, H. J. FALLER, P. MIKAT, H. REIS. Tübingen 1974, pp. 521—542; reprinted in: J. LISTL: *Kirche im freiheitlichen Staat. Schriften zum Staatskirchenrecht und Kirchenrecht*. Eds. J. ISENSEE, W. RÜFNER, W. REES. Staatskirchenrechtliche Abhandlungen. Vol. 25. Berlin 1996, pp. 968—988, pp. 972—974.

<sup>4</sup> Full text: European Convention of Human Rights. Available from: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed 26.01.2016).

<sup>5</sup> Full text: Charter of the Fundamental Rights of the European Union. Available from: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (accessed 26.01.2016).

<sup>6</sup> Full text: Treaty of Lisbon. Amending the Treaty on European Union and the Treaty establishing the European Community. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12007L%2FTXT> (accessed 26.01.2016).

trality of the modern democratic state.”<sup>7</sup> Basically, the fundamental right to religious freedom warrants the development of the individual person and of individuals and communities. It is therefore essential for diversity and plurality within a society and for the freedom of work and operation of churches and religious communities in a state. The prerequisite for the warranty of religious freedom by a state is that the state itself is religiously and ideologically neutral and does not identify itself with any church or religious community.

## 1. Social facts and constitutional foundations of the church-state relation in the Republic of Austria

Based on the census dated 15 May 2001 approximately 8 million (8,032,926) people live in Austria, with almost six million belonging to the Roman Catholic Church (5,915,274), 376,150 to the Church of Augsburg Confession and the Church of Helvetic Confession (Church AB and HB), and 338,988 people to different denominations of Islam. The number of Muslims is increasing (cf. 1971: 22,267; 2014: 573,876). The remaining residents of Austria belong — in contrast to the Federal Republic of Germany where the two major Christian churches have approximately the same number of members — to a variety of small churches and religious communities.<sup>8</sup> More precisely, in 2010, 74.0% of the Austrian population were Catholic, 5.0% Protestant, 4.0% Muslim, 3.3% did not identify themselves to any religious community, 2.0% were Orthodox Christians, and 3.3% other religious communities inherent. In general, it can be predicted that the religious landscape in the coming years will change due to migration flows, the increase in the number of Muslim citizens, secularization (and therefore less people without faith or belief), and the decrease of the Catholic population.<sup>9</sup>

<sup>7</sup> J. LISTL: *Aussagen* (fn. 3), p. 974; see further J. LISTL: *Kirchenrechtswissenschaft* (fn. 3), pp. 216—221.

<sup>8</sup> Cf. “Bevölkerung 2001 nach ausgewählten Merkmalen und Bundesländern.” In: *Statistisches Jahrbuch Österreichs* 2013. Ed. Statistik Austria. Wien 2012, pp. 56—59, p. 57; A. RINNERTHALER: “Kirche und Staat in Österreich.” In: *Handbuch des katholischen Kirchenrechts*. Eds. S. HAERING, W. REES, H. SCHMITZ. Regensburg <sup>3</sup>2015, pp. 1866—1887, pp. 1866—1872.

<sup>9</sup> Cf. “Demographien erwarten Umwälzungen in religiöser Landschaft. Internationale Experten bei Konferenz in Wien — Forscher-Prognosen zur Religionsverteilung im Wien des Jahres 2046 sehen Wachstum bei Muslimen und Orthodoxen, Schwund bei Katholiken.” *KATHYPRESS-Tagesdienst*, 21 November 2014, no. 278, pp. 4—5, p. 4.

## 2. Development of the fundamental right to religious freedom in Austria

The contemporary Austria has been, historically speaking, largely shaped by the Catholic Habsburgs. Nevertheless, Austria was — despite the prevalence of the Roman-Catholic denomination — a multi-ethnic state, which was faced earlier with a variety of people of different religious denominations. Various tolerance patents (tolerance edicts) given by Joseph II granted religious minorities a freer exercise of their religion. Particularly, the said minorities represented the Protestant churches, that is, the Lutherans and the Reformed, the Orthodox Church, and the Jews.<sup>10</sup> However, the warranty of tolerance is something other than the guarantee of religious freedom, which was carried out later as a consequence of the revolution during the year 1848. There was tolerance but not equivalence and equality. However, tolerance, understood “as a toleration of other faiths,” was the “antecedent to the religious freedom.”<sup>11</sup>

The Constitutional Act on the Fundamental Rights of Citizens (*Staatsgrundgesetz*; hereinafter StGG) of 21 December 1867 (RGBl. 1867/142), which was declared a constitutional law of the Federal State of Austria by Art. 149 (1) in the Federal Constitution of the Austrian Republic of 1920 (*Bundes-Verfassungsgesetz*; hereinafter B-VG), contains the most important fundamental rights. Article 14 of StGG guarantees the individual freedom of religion in the form of a guarantee of freedom, belief, and conscience,<sup>12</sup> Art. 15 of StGG the corporate religious freedom for legally recognized churches and religious communities.<sup>13</sup> Article 15 of StGG grants that every

<sup>10</sup> Cf. H. SCHWENDENWEIN: *Österreichisches Staatskirchenrecht*. Beihefte zum Münsterischen Kommentar. Vol. 6. Essen 1992, pp. 22—25.

<sup>11</sup> H. M. HEINIG: “Religiöser Pluralismus, Religionsfreiheit und Toleranz.” *Policy. Politische Akademie*, no. 38, November 2010, pp. 4—6, p. 6. Available from: <http://library.fes.de/pdf-files/akademie/07572.pdf> (accessed 18.12.2014); see further W. REES: “Die Entwicklung der Beziehungen zwischen Kirche und Staat in Deutschland und Österreich im Licht des Zweiten Vatikanischen Konzils. Vortrag beim Dies academicus der Pontificia Universitas Antonianum Facultas Iuris Canonici am 7. März 2005.” *Antonianum* 81 (2006), pp. 339—379, pp. 348—350; W. REES: “Grundlagen und neuere Entwicklungen in der Verhältnisbeziehung von Staat und Religionsgemeinschaften in der Republik Österreich.” In: *Ein Leben für Recht und Gerechtigkeit. Festschrift für Hans R. Klecatsky zum 90. Geburtstag*. Eds. F. MATSCHER, P. PERNTHALER, A. RAFFEINER. Graz 2010, pp. 585—611, pp. 588—592.

<sup>12</sup> Article 14 of StGG: “(1) Full freedom of belief and conscience is guaranteed for everybody.” Only a natural person can practice the fundamental right.

<sup>13</sup> Full Text: *Staatsgrundgesetz*, December 21, 1867, über die allgemeinen Rechte der Staatsbürger. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from:

legally recognized religious community “has the right to common public religious practice.” Further, each church or religious community has the right “to arrange and administer its internal affairs autonomously, and to retain possessions and enjoyment of its institutions, endowments, and funds devoted to worship, instruction, and welfare, but as in every society, is subject to the general laws of the land.” Otherwise, in unrecognized religious communities only private worship was permitted (see Art. 16 of StGG). With this regulation, the distinction between legally recognized and legally unrecognized churches and religious communities was introduced. Since Art. 15 of StGG does not contain any criteria and detailed guidelines for the recognition, these had to be established. The reason was the splitting of the Roman Catholic Church and the Old Catholic Church. Franz Joseph I issued these criteria by way of introducing a law to Art. 15 of StGG on 20 May 1874, the Recognition Act (*Anerkennungsgesetz*; hereinafter *AnerkennungsG*). This law was made with a view of multi-religiousness in Austria, making the recognition of previously not legally recognized religious communities possible.<sup>14</sup>

The European Convention on Human Rights, which was adopted in the Republic of Austria in 1958 into the legal system and has constitutional status since 1964, guarantees freedom to religion in a comprehensive sense.<sup>15</sup> In the period before this the individual freedom of religion

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<http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000006> (accessed 7.01.2016); Art. 15 of StGG: “Every Church and religious society recognised by the law has the right to joint public religious practice, to arrange and administer its internal affairs autonomously, and to retain possessions and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare, but is like every society subject to the general laws of the land.” See further W. REES: “Religions- und Meinungsfreiheit in Österreich mit einem Blick auf die Rechtsprechung.” In: *Recht, Religion, Kultur. Festschrift für Richard Potz zum 70. Geburtstag*. Eds. B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER. Wien 2014, pp. 705–731, pp. 705–710; J. BAIR: “Religionsfreiheit im Licht der Arbeit der Österreichischen Grundrechtskommission.” In: *In mandatis meditari. Festschrift für Hans Paarhammer zum 65. Geburtstag*. Eds. S. HAERING, J. HIRNSPERGER, G. KATZINGER, W. REES: *Kanonistische Studien und Texte*. Vol. 58. Berlin 2012, pp. 853–866.

<sup>14</sup> Cf. H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht*. Wien 2003, pp. 95–112. *Ibidem*, p. 93 noted that at this time in addition to the Catholic Church “those churches and religious communities were recognized as religious communities that have been tolerated by the previous legislation, i.e. by the tolerance patent (*Toleranzpatent*) of Joseph II, i.e. the Protestant Church and the Greek Orthodox Church, further by the Jews patent the Jewish Religious Association.”

<sup>15</sup> Article 9 § 1 of ECHR: “1. Everyone has 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.”

was guaranteed by Art. 14 of StGG and Art. 63 of the State Treaty of Saint-Germain-en-Laye of 10 September 1919 (*Staatsvertrag von Saint-Germain-en-Laye*; hereinafter StVStGermain), which received constitutional status in 1920 (B-VG, Art. 149).<sup>16</sup> Article 63 of StVStGermain also guaranteed the followers of not legally recognized religious communities the right to public worship so that Art. 16 of StGG was derogated from this point.<sup>17</sup> Specifically, in accordance with Art. 2 of the First supplementary protocol of the ECHR, the state has to respect the religious and ideological right of parents with regard to upbringing: “The state has the right of parents to respect and by exercising this right in the field of education and teaching, it ensures such education and teaching in conformity with their own religious and philosophical convictions.”

Although Art. 9 of ECHR addresses explicitly only the individual freedom of religion, it is today undisputed that Art. 9 of ECHR also includes “corporate religious freedom.”<sup>18</sup> As the jurisprudence of the European Court of Human Rights points out, “the autonomous existence of religious communities is a centerpiece of Protection [...], the Article 9 of the European Convention on Human Rights guarantees,” and therefore it remains “indispensable for pluralism in a democratic society.”<sup>19</sup> Nonetheless, the state must be interested, if “religious instruction is carried out in a spirit of tolerance or violent sermons [...] and under what conditions, for example, traditional rites such as circumcision or slaughter of an animal” are performed.<sup>20</sup>

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<sup>16</sup> Article 63 of StVStGermain: “All inhabitants of Austria have the right to exercise in public or private every kind of belief, religion or confession freely, insofar as their exercise is not incompatible with public order or good morals.” See also: “Treaty of Saint Germain.” *Encyclopædia Britannica*. Available from: <http://www.britannica.com/event/Treaty-of-Saint-Germain> (accessed 26.01.2016).

<sup>17</sup> Cf. H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), p. 50.

<sup>18</sup> C. GRABENWARTER: “Die korporative Religionsfreiheit nach der Menschenrechtskonvention.” In: *Kirche und Religion im sozialen Rechtsstaat. Festschrift für Wolfgang Rüfner zum 70. Geburtstag*. Ed. S. MUCKEL. Staatskirchenrechtliche Abhandlungen. Vol. 42. Berlin 2003, pp. 147–157, p. 148 together with fn. 6; see further B. J. BERKMANN: *Katholische Kirche und Europäische Union im Dialog für die Menschen. Eine Annäherung aus Kirchenrecht und Europarecht*. Kanonistische Studien und Texte. Vol. 54. Berlin 2008, pp. 130–139; K. PABEL: “Die Religionsfreiheit im Lichte der EMRK und der Rechtsprechung des EGMR.” In: *Staat und Religion. 9. Fakultätstag der Rechtswissenschaftlichen Fakultät der Karl-Franzens-Universität Graz. 16. Mai 2014*. Eds. J. MARKO, W. SCHLEIFER. Graz 2014, pp. 231–238.

<sup>19</sup> R. POTZ: “Staat, Kirche, Religion oder: Die bewährte österreichische Praxis der Kooperation”: <http://www.proreligion.at/proreligion/kooperationvonstaatundkir> (accessed 18.12.2014), pp. 2–5, p. 4.

<sup>20</sup> H. BOBERSKI: “Religion im Blick. Die mühsame Trennung von Staat und Religion.” *Wiener Zeitung.at*, April 5, 2013, pp. 1–3, p. 2. Available from: <http://www.wienerzei>



### 3. Recognition of churches and religious communities

The recognition of churches and religious communities and their concrete practices are not without controversies in the Republic of Austria. One of the prerequisites to obtain the status of a recognized church or religious community<sup>21</sup> is, among others, that a religious community has existed for at least 20 years (including 10 years as a state-registered religious community), and at least 0.2% of the Austrian population belongs to it, which is currently around 16,000 people. The community must also show “a positive attitude towards society and the state.” Not without controversy, Jehovah’s Witnesses as a recognized religious community, was recognized on 7 May 2009 (BGBl. II 2009/139).<sup>22</sup> On 16 December 2010, the Alevis<sup>23</sup> were recognized by the specific office, called *Kultusamt* in the Ministry of Education, Arts and Culture as a recognized religious community with the label Islamic Alevi Faith Community in Austria (IAGÖ).<sup>24</sup> In August 2013, the recognition of the Free Churches in Austria took place, to which five free churches have joined forces (Anhänger des Bundes der Baptistengemeinden, des Bundes Evangelikaler Gemeinden, der ELAIA Christengemeinde (ECG), der Freien Christengemeinde — Pfingstgemeinde and der Mennonitischen Freikirche in Österreich). Recognition requirements can be found in § 2 of *AnerkennG* and § 11 of the Act on the legal Status of Religious Communities (*Bekennnisgemeinschaften-Gesetz*; BGBl. I Nr. 1998/19; hereinafter *BekGG*). The required positive basic attitude

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tung.at/meinungen/blogs/religion\_im\_blick/537128\_Die-muehsame-Trennung-von-Staat-und-Religion.html (accessed 18.12.2014); see further H. BOBERSKI, J. BRUCKMOSER: *Weltmacht oder Auslaufmodell — Religionen im 21. Jahrhundert*. Innsbruck—Wien 2013.

<sup>21</sup> For the currently 16 legally recognized churches and religious communities see: “Gesetzlich anerkannte Kirchen und Religionsgesellschaften.” *HELP.GV.AT*. Available from: <https://www.help.gv.at/Portal.Node/hlpd/public/content/82/Seite.820015.html> (accessed 7.01.2016); further: W. REES, K. BREITSCHING: “Gesetzlich anerkannte Kirchen und Religionsgemeinschaften.” Available from: <http://www.uibk.ac.at/praktheol/kirchenrecht/ru-recht/texte/originaltexte/religionsgesellschaften.html> (accessed 8.08.2010).

<sup>22</sup> Cf. Verordnung der Bundesministerin für Unterricht, Kunst und Kultur betreffend die Anerkennung der Anhänger von Jehovas Zeugen als Religionsgesellschaft. BGBl., May 7, 2009, part II. Available from: [http://www.jehovas-zeugen.at/fileadmin/user\\_upload/02-Anerkennung/Anerkennung-link-file/20090507\\_BGBLA\\_2009\\_II\\_139.pdf](http://www.jehovas-zeugen.at/fileadmin/user_upload/02-Anerkennung/Anerkennung-link-file/20090507_BGBLA_2009_II_139.pdf) (accessed 18.12.2014); see further W. REES: *Grundlagen* (fn. 11), pp. 593—594; R. KOHLHOFER: “Jehovas Zeugen in Österreich als Körperschaft des öffentlichen Rechts.” *österreichisches Archiv für recht und religion* 56 (2009), pp. 319—320. The Jehovah’s Witnesses in Austria have currently approximately 23,000 members.

<sup>23</sup> Currently, about 60,000 Alevis are living in Austria.

<sup>24</sup> Cf. “Aleviten als muslimische Glaubensrichtung in Österreich anerkannt.” *KATH-PRESS-Tagesdienst*, 21 December 2010, no. 297, pp. 3—4.



towards society and the state does not just mean that “a religious community is neither subversive nor antisocial,” but must find its expression “in a commitment to active dialogue and support of the state in the realization of public duties.”<sup>25</sup>

Apart from the recognized churches and religious communities the Republic of Austria has created another legal form for religious communities as “registered confessional communities.”<sup>26</sup> In this form of registration, however, essential areas of corporate religious freedom are excluded, such as, among others, the right to give religious instruction in public schools or in schools with public status.<sup>27</sup> The BekGG, which entered into force on 1 January 1998, was ultimately enacted to make the recognition more difficult for a religious community, especially in that a certain number of members and a waiting period was required.<sup>28</sup> For the first time, in an amendment to the Act on Confessional Communities, which has been adopted in August 2011, there is a possibility for the annulment of recognition of religious communities.<sup>29</sup>

In addition to recognition and registration as a confessional community, the Federal Law on Associations (*Vereinsgesetz*; BGBl. I 2002/66; hereinafter *VereinsG* 2002), which entered into force on 1 July 2002, provided the possibility that religious communities can acquire legal personality as associations (cf. § 1 (3) of *VereinsG* 2002).<sup>30</sup> Since philosophical communities are not subject to acts under the legal status of religious Confessional Communities (see § 1 of BekGG), it remains to them “only a possibility of

<sup>25</sup> H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), p. 101.

<sup>26</sup> Cf. Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010098> (accessed 7.01.2016); see further J. HIRNSPERGER: “Das neue Gesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften. Bemerkungen zu Anlaß, Zielen und Inhalten.” In: *Wege zum Heil? Religiöse Bekenntnisgemeinschaften in Österreich. Selbstdarstellung und theologische Reflexion*. Eds. J. HIRNSPERGER, C. WESSELY, A. BERNHARD. *Theologie im kulturellen Dialog*. Vol. 7. Graz, Wien, Köln 2011, pp. 153—171.

<sup>27</sup> For the state-registered confessional communities see: Staatlich eingetragene religiöse Bekenntnisgemeinschaften. Bundeskanzleramt — Österreich. Available from: <https://www.bka.gv.at/site/3405/default.aspx> (accessed 7.01.2016).

<sup>28</sup> S. HAMMER: “Zur Ungleichbehandlung von Religionsgemeinschaften in der neueren Rechtsprechung.” *österreichisches Archiv für recht und religion* 52 (2005), pp. 209—226.

<sup>29</sup> Cf. S. SCHIMA: “Die Aufhebung der Anerkennung von Religionsgemeinschaften. Anmerkungen zum neu erlassenen § 11a des Bekenntnisgemeinschaftengesetzes.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 745—773.

<sup>30</sup> Cf. H. TICHY: “Religiöse Gemeinschaften nach dem Vereinsgesetz 2002.” *österreichisches Archiv für recht und religion* 51 (2004), pp. 379—397.

being established as a registered association.”<sup>31</sup> The former Law on Associations from 1951 (*VereinsG* 1951) has been interpreted to mean “that it was not applicable to religious communities.”<sup>32</sup> This has been clarified by § 1 (2) of *VereinsG* 2002, when religious communities can constitute themselves as organizations and as such acquire legal personality.

The Austrian government has difficulties with the so-called New Religious Movements, which in recent years acquired an importance in Austria, such as the Church of Scientology, the Osho movement, the Hare Krishna movement or the Moonies.<sup>33</sup> Since there are “privileged and discriminated religions” in Austria, “the Austrian legal recognition requires a comprehensive review”; “an action by the legislator is to be urgent,” as Brigitte Schinkele stresses.<sup>34</sup> Last but not least, the applicable system of recognition in Austria discriminates religious minorities and non-denominational persons and limits the exercise of their fundamental right to freedom of religion.

#### 4. Individual freedom of religion

According to Art. 14 § 1 of StGG full freedom of belief and freedom of conscience is guaranteed to every-man.<sup>35</sup> This is true for the positive and the negative form of freedom of religion, that is, to reveal the personal religious or ideological convictions or not. Freedom of religion in the case of parents includes the right to religious and ideological education.<sup>36</sup> As

<sup>31</sup> L. WALLNER: *Die staatliche Anerkennung von Religionsgemeinschaften*. Wissenschaft und Religion. Vol. 18. Frankfurt am Main 2007, p. 288.

<sup>32</sup> HIRNSPERGER: Gesetz (fn. 26), p. 155; see further L. WALLNER: *Anerkennung* (fn. 31), pp. 313—319.

<sup>33</sup> Cf. B. SCHINKELE: “Religionsrecht und neue religiöse Bewegungen in Österreich.” In: *Mit welchem Recht? Europäisches Religionsrecht im Umgang mit neuen religiösen Bewegungen*. Ed. K. FUNKSCHMIDT. EZW-Texte. Vol. 234. Berlin 2014, pp. 139—145.

<sup>34</sup> B. SCHINKELE: “Privilegierte und diskriminierte Religionen — korporative Religionsfreiheit in europäischer Perspektive.” *österreichisches Archiv für recht und religion* 57 (2010), pp. 180—197, p. 194; see further K. W. SCHWARZ: “Historia docet: Freikirchen als Kläger über kultusrechtliche Beschränkungen der Religionsfreiheit.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 817—833.

<sup>35</sup> See H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), pp. 52—61; H. SCHWENDENWEIN: *Staatskirchenrecht* (fn. 10), pp. 67—92.

<sup>36</sup> Cf. H. MAYER: *Das österreichische Bundes-Verfassungsrecht. B-VG, F-VG, Grundrechte, Verfassungsgerichtsbarkeit, Verwaltungsgerichtsbarkeit. Kurzkommentar*. Manzsche Kurzkommentare. Wien <sup>2</sup>1997, Comment on Art. 14, II., p. 505.

long as children cannot comprehend the fundamental right to religious freedom, the religious education of children is covered by the fundamental right to freedom of conscience by parents.

The right to religious upbringing of children was regulated by the Law on the Religious Education of Children of 15 July 1921 (*Reichsgesetz über die religiöse Kindererziehung*; DRGBl I S. 393), which entered into force in Austria on 1 March 1939 (again announced by BGBl. 1985/155; *Bundesgesetz über die religiöse Kindererziehung*; hereinafter RelKEG). The law offers a phased religious freedom. At the age of 14, children can determine their religious affiliation for themselves. They can decide on the leaving a church or religious community from that moment on. Until the age of 10 years the decision on the religious affiliation of the child, or to change religion or belief is a right of parents. From the age of 10 the child must be consulted regarding this decision (§ 2 (3) RelKEG). From the age of 12, a change of religion can only be made with the expressed consent of the child.

In the context of parental education rights, private schools receive importance (cf. Art. 17 (2) StGG; Art. 14 (7) B-VG). Private schools are granted public status if they coincide in their teaching with the curriculum of the Austrian public schools. The declaration of the Second Vatican Council on Christian Education (cf. VatII GE), states that the Catholic Church “does not see the state comprehensive school system, but rather a pluralistic school system, as desirable and in accordance with a free and constituted society, in which the private schools are in coexistence and competition with the public schools.”<sup>37</sup> “The right of parents is violated,” as the Vatican Council explained, “if their children are forced to attend lessons which are not in agreement with their religious beliefs, or if a single system of education, from which all religious formation is excluded, is imposed upon all” (cf. VatII DH, Art. 5). The Republic of Austria satisfies this concern of the Second Vatican Council, which can be extended to all religious communities, by the private school system, which is ordered by the Federal Act of 25 July 1962 on the private school system (Private School Act; *Privatschulgesetz*; BGBl. 1962/244), and by the possibility of confessional religious instruction in public schools and schools with public status (cf. Art. 17 (4) of StGG).

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<sup>37</sup> J. LISTL: “Die Aussagen des Codex Iuris Canonici vom 25. Januar 1983 zum Verhältnis von Kirche und Staat.” *Essener Gespräche zum Thema Staat und Kirche* 19 (1985), pp. 9–37, p. 23; reprinted in: IDEM: *Schriften* (fn. 3), pp. 1032–1058, p. 1048; see further W. REES: “Katholische Schule und Religionsunterricht als Verwirklichung von Religionsfreiheit. Kirchenrechtlicher Anspruch und staatliche Normierung.” In: *Dem Staate, was des Staates — der Kirche, was der Kirche ist. Festschrift für Joseph Listl zum 70. Geburtstag*. Eds. J. ISENSEE, W. REES, W. RÜFNER. *Staatskirchenrechtliche Abhandlungen*. Vol. 33. Berlin 1999, pp. 367–390, pp. 375–378.

Nevertheless, confessional religious instruction in public schools and in schools with public status is a compulsory subject for pupils who belong to a legally recognized church or religious community (see § 1(1) of the Religious Education Act; *Religionsunterrichtsgesetz*; BGBl. 1949/190; hereinafter RelUG). Paragraph 1 (2) of RelUG grants the possibility to unregister from this lesson.<sup>38</sup> Pupils under 14 years may be withdrawn from religious instruction by their parents. The fundamental right to religious freedom in its negative form and the above-mentioned way of religious maturity are the basis for this. According to § 2 (1) of RelUG, attendance at church services that are held by the legally recognized churches and religious communities on special occasions in academic or political life, especially at the beginning and at the end of the school year, and the participation in religious exercises or events, are optional for the teachers and pupils. The students must be given permission for absence from ordinary classes (§ 2a (2) of RelUG). The possibility of a school prayer stems from § 2 of the School Organisation Act of 1962 (*Schulorganisationsgesetz*; BGBl. 1962/242; SchOG 1962), the so-called target-paragraph (*Zielparagraph*), which determines that the teaching of religious values to young people and religious exercises belong to the area of responsibility of the school. It is the onus of the pupils in a class to pay attention regarding interdenominational or interreligious prayers. Any coercion towards the student to participate in the practices is excluded.

In accordance with § 3 of AnerkennungsG, “for the public sector the belonging to a church or religious community depends on the Church’s own law and the corresponding regulations.” The requirements of membership and the nature of joining a recognized church are determined by its constitution. State regulations exist with respect to the withdrawal from a legally recognized church or religious community, which the state must warrant due to its ideological and religious neutrality and the fundamental right to religious freedom. According to Art. 5 of the law of 25 May 1868 whereby the interdenominational relations of citizens in relations stated therein are regulated (RGBl. 1868/49; Act on Interconfessional Relations; *Interkonfessionsgesetz*, hereinafter InterkonfG) all rights of the abandoned church or religious community to the person who has left this church or religious community will be lost, as well as the demands on this person from the church, that is, there is no obligation to pay the church tax (outstanding obligations remain existent) or to participate in a confessional religious education in public schools or schools with public status.

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<sup>38</sup> “Students who have not attained the age of 14, [...] are withdrawn in writing by their parents at the beginning of each school year from participating in religious instruction; Students over the age of 14 can make such a written notification themselves.” Vgl. § 1(2) of RelUG.

Although a change of religious belief according to law is unproblematic, Muslims, in accordance with their self-image, have no right to convert to another religion. According to sharia law, religious freedom means the freedom of Muslims to practice their beliefs, and the freedom of all people to convert to Islam.<sup>39</sup> Religious freedom in its negative expression is not accepted, not even the right not to belong to a religious community. However, due to the right to religious freedom warranted by the Law of the Republic of Austria likewise Muslims have a right to change religion, although the conversion from Islam to Christianity for Muslims “may be associated with some risks.”<sup>40</sup>

With regard to the prayer duty of Muslims employers in Austria have a duty to give workers the necessary time for the exercise of religious duties, provided that the time off work is compatible with the requirements of the company. An obligation by the employers to provide prayer rooms or to enable the exercise of religion during working hours is not incurred.<sup>41</sup> When workers take their religious duties during a time in which they are obliged by contract to perform work, there is a collision of interests. So the Supreme Court in Austria had recognized in its decision 9 ObA 18/96 of 27 March 1996 that the perception of religious duties of a Muslim worker during the regular working hours is a reason for dismissal if the exercise of prayer is not in accordance with the requirement of the company.<sup>42</sup>

<sup>39</sup> Cf. “Glaubensfreiheit im Islam.” Available from: [http://de.wikipedia.org/wiki/Glaubensfreiheit\\_im\\_Islam](http://de.wikipedia.org/wiki/Glaubensfreiheit_im_Islam) (accessed 29.03.2015).

<sup>40</sup> Cf. DEUTSCHE BISCHÖFE: “Muslime haben Recht auf Religionswechsel. Neue Arbeitshilfe der Deutschen Bischofskonferenz zur Begleitung von Taufbewerbern mit muslimischem Hintergrund.” *KATHPRESS-Tagesdienst*, September 16, 2009, no. 216, pp. 11–12, p. 11; *Christus aus Liebe verkündigen. Zur Begleitung von Taufbewerbern mit muslimischem Hintergrund*, 24 August 2009. Ed. SEKRETARIAT DER DEUTSCHEN BISCHOFSKONFERENZ. Arbeitshilfen. No. 236. Bonn 2009.

<sup>41</sup> Cf. “Interkultureller Dialog im Unternehmen.” Available from: [http://www.integrationsfonds.at/news/aktuelle\\_news/interkulturelledialog/](http://www.integrationsfonds.at/news/aktuelle_news/interkulturelledialog/). Accessed 29.03.2015; “Anregungen für den interkulturellen Dialog im Unternehmen. Der Islam.” Ed. INDUSTRIELLENVEREINIGUNG NIEDERÖSTERREICH. Wien 2011. Available from: [http://www.iv-net.at/iv-all/publikationen/file\\_556.pdf](http://www.iv-net.at/iv-all/publikationen/file_556.pdf) (accessed 29.03.2015).

<sup>42</sup> Cf. the Judgement of the Austrian Supreme Court of Justice of 27 March 1996, 9ObA18/96. Available from: [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_19960327\\_OGH0002\\_009OBA00018\\_9600000\\_000](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_19960327_OGH0002_009OBA00018_9600000_000) (accessed 29.03.2015); A. POTZ: “Dienstverhinderung aus religiösen Gründen.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 639–661; on the different view between Germany and France see W. REES: “Religionsfreiheit und religiös-weltanschauliche Neutralität des Staates in der Republik Frankreich und in der Republik Österreich.” In: *PluralismusKonflikte — Le pluralisme en conflits. Österreichisch-Französische Begegnungen*. Eds. M.-L. FRICK, P. MBONGO, F. SCHALLHART. Austria: Forschung und Wissenschaft: Philosophie. Vol. 13. Wien—Berlin 2010, pp. 189–220.

## 5. Corporate Religious Freedom

Article 15 of StGG warrants the legally recognized churches and religious communities the right to public worship, the right to self-determination and a specific guarantee of their capital and property. Richard Potz reminds that the significance of public legal status of a church or religious community “has become less visible in the legal delegation of authority, but is instead expressed in the recognition of public activity of religious communities and the clarification, not wanting to push back the religious-ideological field in the private.”<sup>43</sup> In Austria the state accepts and supports the work and activity of churches and religious communities in the public sphere. Thus, in Austria today there is no radical separation between the church and the state, which eliminates any influence by the churches and religious communities on public life, as it was demanded in the 19th century by the liberal and socialist side. Today, friendly cooperation between the church and the state takes place in many areas.

Article 15 of StGG guarantees the self-determination of internal affairs. This means “that it must not be interfered in the internal affairs of a church or religious community either by the legislature or by the executive.”<sup>44</sup> Following the doctrine and the jurisprudence, the areas of faith and morals, the organization, religious statutes, membership, sacraments and ritual, religious education and employment law, asset management, collections, church contributions and tax count amongst the mentioned internal affairs. In intra-ecclesiastical matters the jurisdiction of state courts is limited or not applicable.

Expressly Art. 17 (4) of StGG guarantees to recognized churches and religious communities the right “to provide for religious instruction in public schools or in schools with public status.” Details are governed by the RelUG that is valid for the religious education by recognized churches and religious communities in public schools and schools with public status.<sup>45</sup> By underscoring the “validity for all religious communi-

<sup>43</sup> R. POTZ: “Zur öffentlich-rechtlichen Stellung der Kirchen und Religionsgesellschaften.” In: *Die „Anerkennung“ von Religionsgemeinschaften*. Ed. R. KOHLHOFER. Schriftenreihe Colloquium. Vol. 6. Wien 2002, pp. 25–37, p. 31; see further K. SCHWARZ: “Überlegungen zum rechtlichen Status der Kirchen und Religionsgesellschaften in Österreich.” In: *Bürgerliche Freiheit und Christliche Verantwortung. Festschrift für Christoph Link zum 70. Geburtstag*. Eds. H. DE WALL, M. GERMANN. Tübingen 2003, pp. 445–463.

<sup>44</sup> SCHWENDENWEIN: Staatskirchenrecht (fn. 10), 196–217, p. 197.

<sup>45</sup> Cf. K. PABEL: “Verfassungsrechtliche Rahmenbedingungen des Religionsunterrichts in Österreich.” *österreichisches Archiv für recht und religion* 59 (2012), pp. 64–86; W. REES: “Neuere Fragen um Schule und Religionsunterricht in Österreich.” In:



ties and consideration for minorities,” this law takes into account “the multi-religious development in society.”<sup>46</sup> More specifically, the religious instruction by the Roman Catholic Church is governed by Art. VI of the Concordat between the Holy See and the Republic of Austria of 5 June 1933 (BGBl. II 1934/2; ÖK) as well as by the Treaty between the Holy See and the Republic of Austria of 9 July 1962 concerning the regulation of questions relating to the school system (Schulvertrag; BGBl. 1985/77; SchulV).<sup>47</sup> Muslim religious instruction was set up in public schools since the school year 2003—2004; among the European Union member states, currently only in Austria it is so, although other countries in Europe seem to be following suit. This instruction provides, as Richard Potz et al. determine in their study entitled “Islamic religious education in Austria and Germany,” “an important achievement for the integration by helping the pupils to reconcile their Muslim and Austrian identity with each other.”<sup>48</sup> The training of Muslim teachers takes place at the Pedagogical Academy of the Islamic Religious Community in Austria (IRPA)<sup>49</sup> and at the Universities of Vienna and Innsbruck.<sup>50</sup> In Art. 17 § 4 of StGG the Austrian state

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*Neuere Entwicklungen im Religionsrecht europäischer Staaten.* Eds. W. REES, M. ROCA, B. SCHANDA. Kanonistische Studien und Texte. Vol. 61. Berlin 2013, pp. 499—534, pp. 506—509.

<sup>46</sup> “Vor 60 Jahren wurde Religionsunterrichtsgesetz beschlossen. Schulamtsleiterin Mann: „Gesetz hat große Bedeutung für alle gesetzlich anerkannten Kirchen und Religionsgesellschaften“ — In Österreich besuchen 95 Prozent aller katholischer Schüler den katholischen Religionsunterricht.” *KATHPRESS-Tagesdienst*, 13 July 2009, no. 160, pp. 3—4, p. 3.

<sup>47</sup> Cf. W. REES: “Religionsunterricht in österreichischen Schulen. Rechtliche Grundlagen und aktuelle Anfragen.” In: H. DE WALL, M. GERMAN: *FS Link* (70) (fn. 43), pp. 387—407; W. REES: *Fragen* (fn. 45).

<sup>48</sup> R. POTZ et al.: *Islamischer Religionsunterricht in Österreich und Deutschland. Executive Summary zu einem Forschungsprojekt des Instituts für Rechtsphilosophie, Religions- und Kulturrecht zusammen mit dem abif / analyse beratung interdisziplinäre Forschung.* Wien 2005. Available from: [http://spl.univie.ac.at/fileadmin/user\\_upload/inst\\_rechtsphilo/IslamRU\\_ExSumPub2005.pdf](http://spl.univie.ac.at/fileadmin/user_upload/inst_rechtsphilo/IslamRU_ExSumPub2005.pdf) (accessed 18.12.2014); see further W. REES: *Fragen* (fn. 45), pp. 518—520.

<sup>49</sup> Cf. E. ASLAN: “Religiöse Erziehung der Muslime in Österreich.” *österreichisches Archiv für recht und religion* 55 (2008), pp. 1—13, pp. 7—13; M. SCHMIED: “Die Islamische Religionspädagogische Akademie (IRPA).” *österreichisches Archiv für recht und religion* 46 (1999), pp. 434—443; see further M. OTT: *Ausbildung islamischer Religionslehrer und staatliches Recht.* Münsterische Beiträge zur Rechtswissenschaft. Vol. 189. Berlin 2009.

<sup>50</sup> For Vienna see: Student Point. Universität Wien: Islamische Religionspädagogik. Available from: [https://studentpoint.univie.ac.at/vor-dem-studium/detailansicht/studium/066-874/?tx\\_univiestudentpoint\\_pi1%5Bbackpid%5D=96352&cHash=edbdb5d8acdb6af82bf25a111547629b](https://studentpoint.univie.ac.at/vor-dem-studium/detailansicht/studium/066-874/?tx_univiestudentpoint_pi1%5Bbackpid%5D=96352&cHash=edbdb5d8acdb6af82bf25a111547629b) (accessed 07.01.2016); for Innsbruck: Universität Innsbruck: Bachelor’s Programme Islamic Religious Education. Available from: <http://www>



recognizes not only a right for churches and religious communities to give religious instruction in public schools and schools with public status, but also a duty which it formulated for the first time in the Israelite Act 2012 (see § 9 (1) *Israelitengesetz*; IsraelitenG 2012).<sup>51</sup> The question is: Do the state guidelines allow a religious instruction which is managed jointly by different churches and religious communities in the face of secularization and pluralism of society in public schools? Here, the project “Cooperative Denominational Religious Education” (KoKoRu) should be mentioned, in operation since the school year 2008—2009 in Vienna and aiming at making “a common teaching of the Christian churches on key areas of common liturgical year.”<sup>52</sup> The state cannot force such an instruction on the recognized churches and religious communities, as it guarantees teaching according to their own religious principles. Such teaching will meet the StGG guaranteeing religious instruction, if the Roman Catholic, Protestant Church AB and HB, and the Greek Orthodox Church as participating churches see this instruction as teaching in the sense of Art. 15 of StGG. By and large, there are demands for multi-religious learning or accessible religious instruction for all the pupils, regardless of their own faith and religious affiliation. Such lessons would reflect the pluralism and diversity of churches and religious communities living in Austria. However, such instruction seems not to be covered by the Austrian constitution. With a view to religious instruction in public schools and schools with public status, changes are necessary in the future. But they require careful consideration. They must not restrict the exercise of fundamental rights, more specifically the right to freedom of religion for the pupils, their parents, and the churches and religious communities.

According to § 2 (3) of the Federal Act on the Austrian Broadcasting Corporation (*ORF-Gesetz*; BGBl. 1984/379; hereinafter ORF-G), “the importance of the legally recognized churches and religious communi-

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.uibk.ac.at/studium/angebot/ba-islamische-religionspaedagogik/index.html.en (accessed 29.03.2015); cf. further E. MEDENI: “Neuere Entwicklungen um den islamischen Religionsunterricht und die islamische LehrerInnenausbildung in Österreich.” In: W. REES, M. ROCA, B. SCHANDA: *Entwicklungen* (fn. 45), pp. 373—386.

<sup>51</sup> Cf. B. GARTNER: “Das neue österreichische Israelitengesetz. Eine historische Annäherung.” In: W. REES, M. ROCA, B. SCHANDA: *Entwicklungen* (fn. 45), pp. 183—211, p. 199; R. F. KNEUCKER: “Das neue Israelitengesetz: Neuerungen im Staatskirchenrecht?” In: J. MARKO, W. SCHLEIFER: *Staat und Religion* (fn. 18), pp. 167—174.

<sup>52</sup> Cf. *Das Gemeinsame entdecken — Das Unterscheidende anerkennen. Projekt eines konfessionell-kooperativen Religionsunterrichts. Einblicke — Hintergründe — Ansätze — Forschungsergebnisse*. Eds. H. BASTEL, M. GÖLLNER, M. JÄGGLE, H. MIKLAS. Austria: Forschung und Wissenschaft: Religionspädagogik. Vol. 1. Wien 2006; see further W. REES: “Die kirchenrechtlichen Rahmenbedingungen für den katholischen Religionsunterricht.” *Essener Gespräche zum Thema Staat und Kirche* 49 (2016), pp. 75—106.

ties” is to be considered to the satisfactory degree when planning the programme (§ 4 (1) number 12 ORF-G).<sup>53</sup>

Since the exercise of their religion for individuals in some cases is difficult or impossible, the categorical pastoral care enables the exercise of one’s religion, even under these special circumstances. This applies to the pastoral care in prisons and hospitals, but also in the military, the police,<sup>54</sup> or in emergencies, which is guaranteed in Austria. Churches and religious communities are active in the field of charity and social work. “The social-charitable operation as a characteristic manifestation of religious communities,” is, as noticed by H. Kalb, R. Potz and B. Schinkele, “independent of their legal form — included within the right to self-determination of the churches and religious communities”; this also applies to “every action which is taken in exercise of the basic Christian mission.”<sup>55</sup>

## 6. Issues facing Muslims

### 6.1. Legal status of Muslims in the Republic of Austria

Since 1912 the followers of Islam (particularly, the Hanafi school) have already been acknowledged by a separate law<sup>56</sup> as a recognized religious community in Austria. This recognition brought Islam equality with the other recognized churches and religious communities, such as the Roman Catholic Church, the Protestant Church etc.

<sup>53</sup> Cf. H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), pp. 182—185.

<sup>54</sup> Cf. K. W. SCHWARZ: “Polizeiseelsorge — berufsfeldbezogene Supervision vor dem Hintergrund der Religionsfreiheit. Kultusrechtliche Anmerkungen aus österreichischer Perspektive.” *österreichische Archiv für recht und religion* 55 (2008), pp. 30—46.

<sup>55</sup> H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), p. 303.

<sup>56</sup> Cf. *Gesetz*, July 15, 1912, betreffend die Anerkennung der Anhänger des Islam nach hanefitischem Ritus als Religionsgesellschaft, RGBl. 1912/159 (IslamG). The rite was the most abundant of the Ottoman Empire and mainly in Bosnia and Herzegovina area. In 1987, the Constitutional Court raised the phrase “according to hanefit rite.” By this way the applicability of the law was extended to all Muslims. Cf. W. REES: “Islam und Christentum in Österreich und in Europa. Kirchenrechtliche und religionsrechtliche Anmerkungen aus römisch-katholischer Perspektive.” In: *Heilig — Tabu. Christen und Muslime wagen Begegnungen*. Eds. D. KÄSTLE, M. KRAML, H. MOHAGHEGHI. Kommunikative Theologie. Vol. 13. Ostfildern 2009, pp. 55—65; J. BAIR: *Das Islamgesetz. An den Schnittstellen zwischen österreichischer Rechtsgeschichte und österreichischem Staatsrecht*. Wien—New York 2002.

## 6.2. New issues and problems

The question whether it is allowed for a Muslim teacher to wear a headscarf or not during class does not really stir any discussion in Austria, unlike in other European countries.<sup>57</sup> The same can be said about Muslim pupils wearing headscarves.<sup>58</sup> “A government ban on headscarves is an illegitimate restriction of religious freedom and complicates the integration of Muslims into secular society.”<sup>59</sup> As Joachim Kahl noted, “the dropping off of the headscarf would make sense only as a voluntary act, as a result of an emancipatory learning process, that takes time.”<sup>60</sup> Regarding burqa ban there has been no greater controversy in Austria, although minister Gabriele Heinisch-Hosek (SPÖ) had opened a public debate in December 2009 on it.<sup>61</sup> At the same time, the trial against Mohammed M. and Mona S. took place in March 2008 at the Vienna Criminal Court, during which the defendant Mona S. was excluded by the presiding judge from the proceedings for the reason of wearing the full-face veil (niqab)<sup>62</sup> and the refusal to remove it.<sup>63</sup> In present time the discussion about headscarf and full veil has become a reality again.

The issue of male circumcision for religious reasons, as it is performed by Jews and Muslims, has instigated no major public disputes in Austria, unlike in Germany.<sup>64</sup> Self-assured Muslims are using their right to

<sup>57</sup> Cf. W. REES: “Religionsfreiheit” (fn. 42).

<sup>58</sup> Cf. B. GARTNER: *Der Islam im religionsneutralen Staat. Die Problematik des muslimischen Kopftuchs in der Schule, des koedukativen Sport- und Schwimmunterrichts, des Gebetsrufs des Muezzins, des Schächtens nach islamischem Ritus, des islamischen Religionsunterrichts und des muslimischen Bestattungswesens in Österreich und Deutschland*. Islam und Recht. Vol. 4. Frankfurt am Main et al. 2006, pp. 115–170.

<sup>59</sup> J. KAHL: “Inhalt und Grenzen von Religionsfreiheit — erörtert an Kopftuch, Muezzinruf, Kirchenglockenläuten.” *Aufklärung und Kritik* 11/2 (2004), pp. 159–163, p. 162. Available from: [http://www.gkpn.de/kahl\\_religion.pdf](http://www.gkpn.de/kahl_religion.pdf) (accessed 29.03.2015).

<sup>60</sup> J. KAHL: “Inhalt” (fn. 59), p. 162.

<sup>61</sup> Cf. REES: *Grundlagen* (fn. 11), pp. 598–600.

<sup>62</sup> § 162 of the Code of Criminal Procedure prohibits a witness, “to conceal their faces in such a way that their facial expressions cannot be perceived, as this is essential for assessing the credibility of his testimony.”

<sup>63</sup> Cf. B. SCHINKELE: “Verschleierung einer Angeklagten im Gerichtssaal? Überlegungen aus grundrechtlicher Sicht.” In: *Islamophobie in Österreich*. Eds. J. BUNZL, F. HAFEZ. Innsbruck, Wien, Bozen 2009, pp. 157–168.

<sup>64</sup> Cf. T. SCHODITSCH: “Die Beschneidung männlicher Kinder in Österreich — Handlungsbedarf für den Gesetzgeber?” In: J. MARKO, W. SCHLEIFER: *Staat und Religion* (fn. 18), pp. 110–119; H. KALB: “Beschneidung. Eine europa- und völkerrechtliche Perspektive.” *Ibidem*, pp. 213–220; K. PABEL: “Die religiöse Beschneidung von Jungen im Lichte der Grundrechte in Österreich.” In: W. REES, M. ROCA, B. SCHANDA: *Entwicklungs-*

build prayer rooms and mosques, which means going from the previously used backyards into the public.<sup>65</sup> The consideration by some to prevent the erecting of mosques or minarets by modification of the existing building code could impact detrimentally on the construction of Christian churches as well.<sup>66</sup> A ban on mosques and minarets is in the words of former Federal President Heinz Fischer at the same level as a ban on Jewish synagogues and Christian churches and church towers.<sup>67</sup> The debate about minarets and the discussion about the affixing of crosses in kindergartens and public schools have something in common in the sense that people try to ban religion and its symbols from public places. In this context more tolerance is still required in the Austrian society.

A desirable balance in the sense of tolerance has been achieved between animal protection law and religious freedom in the area of ritual slaughter.<sup>68</sup> Specifically, the Austrian Constitutional Court had ruled in 1998 that the kosher butchering (shechita) of animals is protected by the fundamental right to religious freedom.<sup>69</sup>

Until the new Islam Act of 2015, the funeral of Muslims in cemeteries<sup>70</sup> as well as a professional organization for pastoral care in hospitals, prisons, or the military was widely still an unsettled question in Austria. The new Islam Act has granted these rights. The question is whether it is appropriate

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gen (fn. 45), pp. 467—487; M. E. HERGHELEGIU: “Perspektiven der Religionsfreiheit aus Anlass der Beschneidungsdebatte in Deutschland.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 149—166.

<sup>65</sup> Currently, there are four mosques with a minaret in Austria (Vienna/21. District, Telfs/Tirol, Bad Vöslau/Lower Austria and Saalfelden/Salzburg) and about 200 prayer rooms. Cf. F. HAFEZ: “Eine Moschee mit Minarett pro Bundesland! Zum Umgang mit der muslimischen Religion im öffentlichen Raum in Österreich am Beispiel von Moscheen und muslimischen Gebetsräumen.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 103—115.

<sup>66</sup> Cf. W. REES: *Grundlagen* (fn. 11), pp. 597—598.

<sup>67</sup> Cf. H. FISCHER: “Minarett-Verbot wäre verfassungswidrig. Bundespräsident Fischer will mit allen Möglichkeiten darauf achten, dass die Glaubensfreiheit respektiert wird. Ein Minarettverbot in Österreich wäre seiner Ansicht nach ebenso rechtswidrig wie ein Kirchturmverbot.” *diepresse.com*, 3 December 2009. Available from: [http://diepresse.com/home/politik/innenpolitik/525752/Fischer\\_MinarettVerbot-waere-verfassungswidrig](http://diepresse.com/home/politik/innenpolitik/525752/Fischer_MinarettVerbot-waere-verfassungswidrig) (accessed 29.03.2015).

<sup>68</sup> Cf. B. GARTNER: *Islam* (fn. 58), pp. 211—230; *Schächten. Religionsfreiheit und Tierschutz*. Eds. R. POTZ, B. SCHINKELE, W. WIESHAIDER. Religionsrechtliche Studien. Vol. 2. Freistadt, Egling 2001.

<sup>69</sup> Cf. “Die Höchstgerichte zum muslimischen Schächten.” Available from: <http://www.islamheute.ch/vgh.html> (accessed 29.03.2015); see further W. WIESHAIDER: “Iterum: Schächten. Rund ums neue österreichische Tierschutzgesetz.” *österreichisches Archiv für recht und religion* 52 (2005), pp. 227—262.

<sup>70</sup> Cf. W. REES: “Islam” (fn. 56), pp. 62 f. The first Islamic cemetery was founded on 3 October 2008 in Vienna.

that the regulation of state holidays is made only according to the majority religion or should other religious communities be considered.

### 6.3. The new Islam Act

In early October 2014, a new Islam Act was being drafted. In the period of wide and fierce criticism of the drafted law, the unequal treatment of Islam in comparison to other religions was raised. Criticism mainly concerned the ban on the financing of religious communities from abroad, because it is an inadmissible interference constitutionally with Art. 15 of StGG protecting so-called internal matters. Compared to other churches and religious communities, this ban was also seen as “negatively discriminatory and by violating the equality [...] as unconstitutional.”<sup>71</sup> The intended determination of the priority of state law against religious precepts by law was also questioned. As the chairman of the Islamic Community in Austria, Fuat Sanac, noticed: “such special determination in Islam Law [is both] unnecessary and negative discriminatory.” Even Art. 15 of StGG, and thus valid constitutional law, “standardizes that the legally recognized churches and religious communities, like all other entities, are subject to the general state laws. We cannot accept that such additional distrust concerning the loyalty of the Muslims to the constitution is suggested and thus could fuel populist enemies of Islam.”<sup>72</sup> Quite vague were the plans to establish the Islamic theological studies at the University of Vienna as well as the establishment of an Islamic theological institute.<sup>73</sup> In the drafted law, there were no rules for official secrecy relating to officially confirmed imams compared with the provisions for the protection of the confessional seal for priests in the Roman Catholic Church by § 155 (1) no. 1 of the Austrian Code of Criminal Procedure (*Strafprozessordnung*; hereinafter StPO).<sup>74</sup> This disparity is incompatible with the principle of equality and parity.

<sup>71</sup> F. SANAC: “Die Novellierung des Islamgesetzes aus der Sicht der Islamischen Glaubensgemeinschaft.” March 23, 2014. Available from: <http://www.derislam.at/?f=news&shownews=1843> (accessed 18.12.2014).

<sup>72</sup> F. SANAC: “Novellierung” (fn. 71); see further H. MOHAGHEGI: “Neue Aspekte in der Beziehung zwischen Muslime und Staat in Deutschland.” In: W. REES, M. ROCA, B. SCHANDA: *Entwicklungen* (fn. 45), pp. 401—416.

<sup>73</sup> Cf. R. POTZ: “Islamische Theologie an der Universität.” In: S. HAERING, J. HIRNSPERGER, G. KATZINGER, W. REES: *FS Paarhammer 65* (fn. 13), pp. 929—949.

<sup>74</sup> Cf. B. SCHINKELE; “Beichtgeheimnis und geistliche Amtsverschwiegenheit aus kirchen-, straf- und religionsrechtlicher Sicht.” In: B. SCHINKELE, R. KUPPE, S. SCHIMA, E. M. SYNEK, J. WALLNER, W. WIESHAIDER: *FS Potz 70* (fn. 13), pp. 775—804.

After a revision of the draft a new federal law on the external legal status of Islamic religious communities was published on 30 March 2015 in the *Federal Law Gazette* (Islamgesetz 2015; BGBl. I 2015/39; hereinafter *IslamG*).<sup>75</sup> This law became valid for the Islamic religious community (Islamische Glaubensgemeinschaft in Österreich; IGGiÖ) and also for the Alevi religious community (Islamische Alevitische Glaubensgemeinschaft in Österreich; hereinafter IAGÖ), but it clearly exposed that they are two separate religious communities. The new Islam Act includes, among others, claims to pastoral care in the army,<sup>76</sup> in prisons, and hospitals (see § 11 and § 18 of IslamG 2015), theological studies at the State University of Vienna (§ 24 of IslamG 2015), national public holidays (§ 13 and § 20 of IslamG 2015), which, along with the Friday prayer, guarantees the protection of the state. Furthermore, regulations on cemeteries (§ 15 and § 22 of IslamG 2015) and dietary restrictions (§ 12 and § 19 of IslamG 2015), and the protection of official or pastoral secrecy (§ 26 of IslamG 2015). The law requires that the allocation of funds for activities by the religious communities must be carried out domestically by themselves, the religious communities (*Kultusgemeinden*) or their members (see § 6 (2) of IslamG 2015). Religious officials from abroad may practice in Austria only up to one year after entry into the force of the law. Organized events posing a risk to the public security, order or public health, or to national security, or to the rights of others, are prohibited (§ 27 of IslamG 2015). Further, there must be neither unlawful interference relating to the existing legally recognized churches and religious communities nor to other religious communities (§ 4 (4) of IslamG 2015). Since the Austrian Government seeks an Austria- or an Europe-influenced version of Islam, the demand already

<sup>75</sup> There was no amendment to the Act of 1912, but a new law was created. Cf. Bundesgesetz über die äußeren Rechtsverhältnisse islamischer Religionsgesellschaften — Islamgesetz 2015. BGBl., March 30, 2015, part I. Available from: [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2015\\_I\\_39/BGBLA\\_2015\\_I\\_39.pdf](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_39/BGBLA_2015_I_39.pdf) (accessed 7.01.2016).

<sup>76</sup> Cf. M. KHOUJA: “Europäische Militärseelsorge zwischen Christentum, Islam und Säkularisierung aus der Sicht der Islamischen Glaubensgemeinschaft in Österreich.” Available from: [http://www.bmlv.gv.at/pdf\\_pool/publikationen/ms\\_23\\_5.pdf](http://www.bmlv.gv.at/pdf_pool/publikationen/ms_23_5.pdf) (accessed 18.12.2014); W. REES: “‘Übt an niemand Gewalt noch Erpressung und seid zufrieden mit eurem Sold’ (Lk 3,14). Militärseelsorge in Österreich mit einem Ausblick auf die Mitgliedstaaten der Europäischen Union.” In: *Im Dienst von Kirche und Wissenschaft. Festschrift für Alfred E. Hierold zur Vollendung des 65. Lebensjahres*. Eds. W. REES, S. DEMEL, L. MÜLLER: *Kanonistische Studien und Texte*. Vol. 53. Berlin 2007, pp. 831—879; W. REES: “Die katholische Militärseelsorge in Österreich als kirchliche und staatliche Einrichtung.” In: *Kirchen und Staat am Scheideweg? 1700 Jahre Mailänder Vereinbarung. Beiträge zu einer Veranstaltung der Evangelischen, Katholischen und Orthodoxen Militärseelsorge am 19. November 2013*. Eds. C. WAGNSONNER, K.-R. TRAUNER, A. LAPIN. *Ethica Themen*. Institut für Religion und Frieden. Wien 2015, pp. 173—210.



made in the draft states that state laws take precedence over religious laws (§ 2 (2) of IslamG 2015). A similar demand already existed in the Act of 1912 (see § 5 of IslamG 1912).<sup>77</sup> The Director of the Centre for Islamic Theology at the University of Münster (Germany), Mouhanad Khorchide, spoke positively about the new Islam Act (IslamG 2015). He supported the ban on foreign funding of Muslim organizations and defended the Austrian Government against the accusation that the law discriminates against Muslims. More precisely, he sees the “influence of foreign governments and other groups on Muslims” in many European countries as “a problem.” About 60 of the 300 Islamic preachers in Austria came from Turkey. The Turkish government practices “a supervision on migrants” in this way. Khorchide referred to a “religious fundamentalist threat,” which currently exists in Europe and is caused by the activities of Islamists. He recalls that “without financing from Saudi Arabia [...] militant Salafist associations in Austria and Germany can hardly survive.”<sup>78</sup> The new law also brings advantages for Ednan Aslan, who is Professor for Islamic Religious Education and Director of the Institute of Islamic Studies at the University of Vienna, especially with regard to the theological training of future imams and pastors in Austria.<sup>79</sup> In the spirit of equality and parity an Islamic theological faculty at a state university in Austria would also be desirable, analogous to the four Catholic Theological Faculties at the state universities of Vienna, Graz, Salzburg, and Innsbruck, and the Protestant Theological Faculty in Vienna.<sup>80</sup>

<sup>77</sup> Cf. C. NEUHOLD: “Muslime in Österreich. Regierung zieht Gesetz gegen Kritiker durch.” *Wiener Zeitung.at*, 12 December 2014. Available from: [http://www.wienerzeitung.at/nachrichten/oesterreich/politik/722045\\_Regierung-zieht-Islamgesetz-gegen-Kritiker-durch.html](http://www.wienerzeitung.at/nachrichten/oesterreich/politik/722045_Regierung-zieht-Islamgesetz-gegen-Kritiker-durch.html) (accessed 18.12.2014); S. SCHIMA: “Das IslamG im Kontext des österreichischen Religionsrechts.” *österreichisches Archiv für recht und religion* 59 (2012), pp. 225—250, pp. 235 f.; see further B. GARTNER-MÜLLER: “Die Islamische Glaubensgemeinschaft und das Ausschließlichkeitsrecht der gesetzlich anerkannten Kirchen und Religionsgesellschaften.”, *ibidem*, pp. 251—283.

<sup>78</sup> Quote after Khorchide, see: “Islam-Theologe Khorchide bezeichnet Österreichisches Islamgesetz als Vorbild für Deutschland.” *Spiegel online*, February 27, 2015. Available from: <http://www.spiegel.de/spiegel/vorab/islam-theologe-oesterreichisches-islamgesetz-als-vorbild-a-1020957.html> (accessed 29.03.2015).

<sup>79</sup> Cf. E. ASLAN: “Der Islam wird heimisch. Österreichs neues Islamgesetz wird von allen Seiten bekämpft. Das ist bedauerlich. Die großen Vorteile verschweigen die Kritiker beharrlich. Oft aus egoistischen Motiven. Ein Gastbeitrag.” *Zeit Online*, March 3, 2015. Available from: <http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/islamgesetz-oessterreich> (accessed 29.03.2015).

<sup>80</sup> Cf. W. REES: “Katholisch-Theologische Fakultäten und Studium der Katholischen Theologie in der Bundesrepublik Deutschland und der Republik Österreich.” In: *Dienst an Glaube und Recht. Festschrift für Georg May zum 80. Geburtstag*. Eds. A. EGLER, W. REES: *Kanonistische Studien und Texte*. Vol. 52. Berlin 2006, pp. 723—789.



## 7. Individual areas under discussion: Balance between positive and negative religious freedom

### 7.1. Crosses in public spaces

In recent years, intensive discussions took place in Europe about the affixation of crosses in public schools and other public buildings, such as courts, hospitals, or kindergartens. It was noted that the affixing of crosses was carried out on the orders of the state and this order could harm the religious and ideological neutrality of the state. An example of the latter is the decision of the European Court of Human Rights (ECHR) of 3 November 2009, whose responsibility it is to take care of European Convention on Human Rights, regarding the actions of an atheist father in Upper Austria (*Oberösterreich*) against a fixed cross in the kindergarten of his daughter. He challenged the purpose of the cross in the kindergarten of his daughter as unconstitutional since it would endanger the growth of his daughter without religion and a particular religious denomination.<sup>81</sup> Although the court ruling of the European Court of Human Rights has no legal effect in Austria and the legal requirement for affixing of crosses in schools or classrooms is clear in the Republic of Austria (see § 2b (1) of RelUG),<sup>82</sup> it caused a discussion on the understanding of the religious and ideological neutrality of the state regarding the primacy of negative or positive freedom of religion. As Roman Siebenrock noticed, “the development of the so-called ideological neutrality of the state in Europe seems to steer in the direction of a more secular or laical

<sup>81</sup> According to the Upper Austrian Childcare Act, the affixing of crosses is regulated by law, as in all Austrian provinces (except for the Vienna daily home-Regulation). Cf. R. POTZ, B. SCHINKELE: “Gutachten zu den religionsrechtlichen Aspekten Niederösterreichischen Kindergartengesetzes.” *österreichisches Archiv für recht und religion* 57 (2010), pp. 395—412.

<sup>82</sup> According to § 2 (b) (1) of RelUG public schools and schools with public status in which religious instruction is a compulsory subject have to affix a cross in classrooms if the majority of the pupils belong to a Christian denomination. Cf. H. KALB, R. POTZ, B. SCHINKELE: *Das Kreuz in Klassenzimmer und Gerichtssaal*. Religionsrechtliche Studien. Vol. 1. Freistadt 1996, pp. 23—30; see further W. REES: “‘Den Juden ein Ärgernis und den Griechen eine Torheit’ — und den Menschen von heute? Schulkreuze, religiöse Übungen und Schulgebet in Geschichte und Gegenwart.” In: *Historische und rechtliche Aspekte des Religionsunterrichts*. Ed. A. RINNERTHALER. Wissenschaft und Religion. Veröffentlichungen des Internationalen Forschungszentrums für Grundfragen der Wissenschaften Salzburg. Vol. 8. Frankfurt am Main and other 2004, pp. 259—295.

system based on the model of France, in which religious symbols may not be present in public.”<sup>83</sup> The affixation of crosses in public schools corresponds to the neutrality, which is practiced by the Austrian state. This is because the understanding of neutrality must not be equated with agnosticism and hostility towards religion. Rather, the Austrian understanding of neutrality recognizes the presence of religion in society and its importance to the public and promotes it.<sup>84</sup> Religious and ideological neutrality does not call for a completely religion-free public space. In this sense, the Austrian Constitutional Court had decided in March 2011 that the mandatory affixing of crosses in schools and kindergartens should not be regarded as a “preference of the state for a particular religion.”<sup>85</sup> A few days later, the European Court of Human Rights ruled that crosses in Italian schools are not a violation of human rights.<sup>86</sup> However, there remains the questions of how to proceed with the placement of symbols of other recognized churches and religious communities in schools and other public buildings in Austria and whether these churches and religious communities could raise a legal claim to affixing them.

## 7.2. The issue of church bell ringing

The ringing of church bells, the muezzin call, or church services and other religious events outdoors interfere with the life of many people and are often seen today as a violation of the freedom of religion of other religions followers and non-believers. In addition, it must be questioned whether and to what extent noise protection regulations (emission protection) may be used in this subject area. At the hearing before the Regional Court of Linz concerning the nocturnal striking of the clock of the cathedral in Linz it was discovered by the lawyer of a man living near the

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<sup>83</sup> R.A. SIEBENROCK: “Die römisch-katholische Kirche und das Recht auf Religionsfreiheit. Die verfassungsrechtliche Gestalt der Gewissens- und Glaubensfreiheit als wesentliches Moment gesellschaftlicher Pluralität.” In: M.-L. FRICK, P. MBONGO, F. SCHALLHART: *PluralismusKonflikte* (fn. 42), pp. 225–239, p. 235.

<sup>84</sup> Cf. R. POTZ: *Staat* (fn. 19), p. 3.

<sup>85</sup> Cf. The Judgement of the Austrian Constitutional Court of 9 March 2011, G287/09. Available from: [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR\\_09889691\\_09G00287\\_01/JFR\\_09889691\\_09G00287\\_01.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09889691_09G00287_01/JFR_09889691_09G00287_01.pdf) (accessed 29.03.2015).

<sup>86</sup> Cf. The Judgement of the ECHR of 18 March 2011, Bsw 30814/06. Available from: [http://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20110318\\_AUSL000\\_000BSW30814\\_0600000\\_000/JJT\\_20110318\\_AUSL000\\_000BSW30814\\_0600000\\_000.html](http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20110318_AUSL000_000BSW30814_0600000_000/JJT_20110318_AUSL000_000BSW30814_0600000_000.html) (accessed 18.12.2014).

church that the health of the client was at risk due to a volume of up to 77 decibels.<sup>87</sup> To avoid the interference, Muslims in Austria abstain from the muezzin call.

### 7.3. Minute of silence on Good Friday in television

The minute of silence in public television on Good Friday commemorating the crucifixion of Jesus is legally admissible in Austria.<sup>88</sup> Specifically, the Austrian Constitutional Court has dismissed a case by the pressure group “Religion Is a Private Matter” as being unfounded in November 2014. The Constitutional Court has confirmed with this ruling the decisions by the Media Authority (*KommAustria*) and the Federal Communications Board (*Bundeskommunikationssenat*; BKS) from 2012 that the minute of silence does not violate the principle of neutrality and objectivity of the ORF.<sup>89</sup> In general it was noted that specifically religious programmes do not automatically discriminate groups of people with other or no religious belief. According to § 14 of the ORF-G no advertising is allowed on Good Friday, All Saints Day and on 24 December in television.

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<sup>87</sup> Cf. “Rechtsstreit um Linzer Kirchenglocken geht weiter.” *derstandard.at*, 30 November 2015. Available from: <http://derstandard.at/2000026689342/Rechtsstreit-um-Linzer-Kirchenglocken-geht-weiter> (accessed 7.01.2015); “Laute Glocken: Diözese Linz sieht sich im Recht.” *derstandard.at*, 17 November 2014. Available from: <http://derstandard.at/2000008209584/Anrainer-des-Linzer-Mariendoms-klagt-Pfarre-wegen-zu-lauter-Glocken> (accessed 29.03.2015); “Klage gegen Kirchenglocken in Linz: Verhandlung vertagt.” *derstandard.at*, February 6, 2015. Available from: <http://derstandard.at/2000011375175/Klage-gegen-Linzer-Kirchenglocken-Verhandlung-vertagt> (accessed 29.03.2015); “Einigung: Glocken schlagen nun leiser und seltener.” *krone.at*, 25 February 2015. Available from: [http://www.krone.at/Oesterreich/Einigung\\_Glocken\\_schlagen\\_nun\\_leiser\\_und\\_seltener-Causa\\_Linzer\\_Dom-Story-440806](http://www.krone.at/Oesterreich/Einigung_Glocken_schlagen_nun_leiser_und_seltener-Causa_Linzer_Dom-Story-440806) (accessed 29.03.2015).

<sup>88</sup> Also in the ORF radio (except FM4) there are a few seconds of silence on Good Friday.

<sup>89</sup> Cf. “ORF-Schweigeminute am Karfreitag rechtlich zulässig. Die Initiative „Religion ist Privatsache“ hatte eine Beschwerde beim Bundesverfassungsgerichtshof gegen die Schweigeminute eingebracht.” *diepresse.com*, January 28, 2015. Available from: <http://diepresse.com/home/kultur/medien/4649507/ORFSchweigeminute-am-Karfreitag-rechtlich-zulaessig> (accessed 29.03.2015); see further The Judgement of the Austrian Constitutional Court of 29 November 2014, B 150/2013. Available from: [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT\\_20141129\\_13B00150\\_00&ShowPrintPreview=True](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20141129_13B00150_00&ShowPrintPreview=True) (accessed 29.03.2015).

## 7.4. Religious education

Due to the guarantee of freedom of religion, the state must permit the withdrawing of pupils from a confessional religious instruction in public schools and schools with public status. Today, the aim of the educational mission of the school in Austria is at risk because of the withdrawing of numerous pupils from denominational religious instruction by the Roman Catholic Church, and an increasing number of pupils who are not obliged to attend these classes. Therefore, the Austrian state, after a ten-year experiment of “Ethics” classes which began in autumn 1997, wishes to introduce such a teaching curriculum, but this request has not yet been realized. There are no problems here from the perspective of religion rights. The state can introduce ethics teaching. However, it is a question of the status of such teaching. Is it introduced as mandatory for all pupils or as an alternative subject for pupils who do not receive denominational religious instruction by the churches and religious communities. Religious education does justice to the exercise of religious freedom and is a fundamental right of parents as well as young people who have attained majority in religious matters and also of the churches and religious communities. Ethical education in which participation is mandatory for all pupils, instead of a confessional religious education, would limit these fundamental rights.

## 8. Limits to religious freedom

The right to freedom of religion and beliefs guaranteed by the Republic of Austria is not without its limits. Barriers could arise in the field of civic duties (cf. Art. 14 (2) of the Criminal Code; *Strafgesetzbuch*; hereinafter StGB), public order and safety, the general state laws (cf. Art. 15 of StGG), and the health and violation of fundamental rights of other persons. At this point the exclusion of women from public life and any illegal religious influence by teachers at school should be taken into consideration. Fundamental rights can contradict each other. In certain circumstances the circumcision of underage boys can stand against child welfare protection. The freedom of religion “cannot justify the exonerated of so-called honor killings in circles of fundamental Muslims.”<sup>90</sup> A infringement of

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<sup>90</sup> R. MICHELS: “Religionsfreiheit hat ihre Grenzen.” *RP Online*, January 22, 2015. Available from: <http://www.rp-online.de/panorama/deutschland/religionsfreiheit-hat-ihre>

fundamental rights is apparent if the Austrian Assembly Act provides that processions, pilgrimages etc. are to be registered and must be approved as religious events (§ 5 *Versammlungsgesetz*; hereinafter VslgG).

A survey conducted among Muslim teachers in 2009 attracted considerable media attention, in addition to causing concern and consternation amongst the general public. According to this study, 21.9% of the questioned teachers rejected democracy. As many as 28.4% of them saw “being Muslim” and “being European” as irreconcilable contradiction.<sup>91</sup> Even though churches and religious communities determine their own affairs, the state must be granted the right to intervene if its understanding of democracy is endangered and anti-constitutional contents are taught. So the RelUG expressly allows the related review of textbooks for religious instruction. It limits legitimately self-determination of churches and religious communities.<sup>92</sup>

In order to meet the challenge of newly established religious communities, a government agency for sect issues (Federal Office for Sect Issues) has been created by the force of federal act with the establishment of a documentation and information centre (*Bundesgesetz über die Einrichtung einer Dokumentations- und Informationsstelle für Sektenfragen*; BGBl. I 1998/150; hereinafter EDISG). This Office has to document “the dangers that could be caused by sects or cult-like activities and to inform about them” (§ 1 EDISG).<sup>93</sup> It applies when exploring the limits of state information activity. On the one hand, the state must protect its citizens, and on the other hand it must respect the fundamental rights of these communities.<sup>94</sup>

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-grenzen-aid-1.4816409 (accessed 29.03.2015); to the barriers see SCHWENDENWEIN: Staatskirchenrecht (fn. 10), pp. 92—111; H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), pp. 81—86.

<sup>91</sup> Cf. “Großer Wirbel um Islam-Studie.” *wien.orf.at*, January 27, 2009. Available from: <http://oesterreich.orf.at/wien/stories/338121/> (accessed 18.12.2014).

<sup>92</sup> According to § 2 (3) of RelUG textbooks and teaching aids “must not be in conflict with state principles.” According to Art. I § 5 (2) of SchulV textbooks and teaching aids have to be “conducive to the public education.” Cf. REES: “Religionsunterricht in österreichischen Schulen” (fn. 47), p. 403; cf. further “Vereinbarung zwischen Unterrichtsministerin Schmied und der Islamischen Glaubensgemeinschaft”: Islamischer Religionsunterricht in Tirol. Available from: [http://islam-tirol.at/aktuell\\_3.htm](http://islam-tirol.at/aktuell_3.htm) (accessed 18.12.2014).

<sup>93</sup> Full Text: Bundesgesetz über die Einrichtung einer Dokumentations- und Informationsstelle für Sektenfragen. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010108> (accessed 29.03.2015); cf. H. KALB, R. POTZ, B. SCHINKELE: *Religionsrecht* (fn. 14), pp. 147—154.

<sup>94</sup> Cf. *ibidem*, p. 148.

## 9. Conclusion

The right to freedom of religion is given in the Republic of Austria as an individual fundamental right and also as a fundamental right of churches and religious communities. Regardless of their historical-legal genesis, fundamental rights exist because of their positive exercise. In the present it indicates that the negative form of the right to religious freedom comes more to the fore. By granting a status of officially recognized church or religious community, the Austrian government expresses a given religion's importance for the common people and the public good. The special position enjoyed by the Roman Catholic Church alongside other recognized churches and religious communities, is expressed in the Concordat between the Holy See and the Republic of Austria of 5 June 1933 and the amendments made by later treaties between the Roman Catholic Church and the state concerning the regulation of questions relating to the school system and concerning the regulation of property. The Republic of Austria does have the possibility to sign a Concordat with the Roman Catholic Church, but it does not have — in contrast to the Federal Republic of Germany — the constitutional basis for a contract law with other churches and religious communities. To ensure the equal treatment of all legally recognized churches and religious communities, the Austrian state has moved towards negotiating the relevant regulations similar to the concordat with the Roman Catholic Church.<sup>95</sup> Today the Concordat and the amicable arrangements between church and state contained therein are widely questioned, not least by the failed referendum against church privileges.<sup>96</sup> The special protection of churches and religious communities and religious and philosophical freedom is also reflected in the fact that interference with, or hindering from religious practice, in accordance with § 189 (1) of the StGB, are punishable. Questions arise regarding the so-called right to freedom of communication, which includes the right to freedom of expression, freedom of information, and freedom of the press. Questions also arise with regard to the right to freedom of art, as shown by the dispute over the Mohammed caricatures, or the attack on 7 Janu-

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<sup>95</sup> R. POTZ: *Staat* (fn. 19), recalling Protestant Act 1961, Orthodox Act 1967, Oriental-Orthodox Act 2003 and Jewish Act 2012.

<sup>96</sup> Cf. Initiative gegen Kirchenprivilegien. Available from: <http://www.kirchen-privilegien.at/> (accessed 18.12.2014); see further [http://www.bmi.gv.at/cms/BMI\\_wahlen/volksbegehren/vb\\_xx\\_periode/anti\\_kirchepriv/start.aspx](http://www.bmi.gv.at/cms/BMI_wahlen/volksbegehren/vb_xx_periode/anti_kirchepriv/start.aspx) (accessed 18.12.2014); critical R. POTZ: *State* (fn. 19), p. 1, holding the premises of the referendum for “not applicable” and the talk of the privileges of the legally recognized religious communities for “misleading”.

ary 2015 against the satirical magazine *Charlie Hebdo*.<sup>97</sup> Questions also arise from the autonomy of the churches and religious communities or religious freedom, and the ban on discrimination based on sex.

<sup>97</sup> Cf. W. REES: “Religions- und Meinungsfreiheit” (fn. 13), pp. 715–730; Z. COMBALÍA: “The Right to Freedom of Expression in Islam. A Comparative Perspective.” In: W. REES, M. ROCA, B. SCHANDA: *Entwicklungen* (fn. 45), pp. 101–132.

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WILHELM REES

## The Rights to Religious Freedom and Beliefs — Development, Legal Foundations, and Recent Trends in Austria

### Summary

In Austria, there is a variety of churches and religious communities. By recognizing them, the Austrian State gives some of them a special significance. In recent years, the issue of religious freedom has gathered momentum in the aspect of individual freedom of religion as well as the corporate religious freedom, that is, the rights of religious-ideological associations. The essay shows the development of the fundamental right to religious freedom and the legal foundations thereof in Austria. It throws light on the problem of recognition of churches and religious communities and issues of the individual and corporate freedom of religion, such as affixing crosses and religious education in public schools, church bell ringing and the limits of religious freedom. Special attention is directed to issues facing Muslims, such as whether to wear headscarf or not during class, circumcision, mosques and the new Islam Act in Austria. Against the backdrop of the history and the legal provisions, brand new questions are conspicuous.

WILHELM REES

## Le droit à la liberté religieuse et celle de convictions : développement, bases juridiques et tendances actuelles en Autriche

### Résumé

Beaucoup d'Églises et d'organisations religieuses fonctionnent en Autriche. Tout en acceptant les Églises et organisations religieuses, l'État autrichien attribue à certaines d'entre elles une importance particulière. Dans les dernières années, la question de liberté religieuse est devenue exceptionnellement actuelle aussi bien dans le contexte de la liberté de confession individuelle que la liberté religieuse collective. L'article présente le développement du droit fondamental à la liberté religieuse en Autriche en jetant par là la lumière sur le problème lié à l'acceptation des Églises et organisations religieuses par l'État. L'auteur décrit aussi les cas précis de la liberté de confession individuelle et collective, tels que les croix dans les lieux publics et l'enseignement de la religion dans les écoles publiques, la sonnerie des cloches, etc. L'auteur dirige une attention particulière sur les défis liés au fonctionnement des musulmans dans la société autrichienne, tels que les éléments vestimentaires portés durant les cours, la circoncision, les mosquées et la nouvelle Loi sur l'islam en Autriche. Le fond historique présenté dans l'article ainsi que les réglementations juridiques y décrites ont pour objectif d'inciter à poser d'autres questions et à entamer d'autres discussions.

**Mots clés:** droit à la liberté religieuse, reconnaissance des Églises et des organisation religieuses, relations entre l'État et les Églises/les communautés, droit ecclésiastique, musulmans, symboles religieux

WILHELM REES

## Il diritto alla libertà religiosa ed alla libertà delle convinzioni — sviluppo, fondamenti giuridici e tendenze attuali in Austria

### Sommario

In Austria funzionano molte chiese e comunità religiose. Attraverso il riconoscimento delle chiese e delle comunità religiose lo stato austriaco conferisce ad alcune di loro una particolare importanza. Negli ultimi anni la questione della libertà religiosa è divenuta eccezionalmente attuale nel contesto sia della libertà individuale di professione della fede, sia della libertà religiosa collettiva. Lo studio presenta lo sviluppo del diritto fondamentale alla libertà religiosa in Austria facendo luce in tal modo sul problema del riconoscimento delle chiese e delle organizzazioni religiose da parte dello stato. L'autore tratta anche i casi dettagliati della libertà individuale e collettiva di professione della fede come quello delle croci nei luoghi pubblici e dell'insegnamento della religione nelle scuole pubbliche, l'uso delle campane della chiesa, ecc. L'autore fa notare, in particolare, le sfide legate al funzionamento dei musulmani nella società austriaca, quali la questione del velo indossato oppure no durante le lezioni, la circoncisione, le moschee e la nuova Legge Islamica in Austria. Lo sfondo storico tracciato e le norme di legge discusse costituiscono qui un contributo per porsi nuove domande ed intraprendere discussioni.

**Parole chiave:** diritto alla libertà religiosa, riconoscimento delle chiese e delle organizzazioni religiose, rapporto tra lo stato e le chiese/le comunità religiose, diritto ecclesiastico, musulmani; simboli religiosi