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## The Meaning of 'Religion' in Austrian Case Law

**SUMMARY:** 1. Introduction - 2. The Austrian Case - 3. The Meaning of "Religion" in Austrian Case Law - 4. Conclusions.

### 1 - Introduction

In Austria, like in other countries, the need to define "religion" was not an issue for a long time, because this term "was largely associated with the idea of belief in and worship of God"<sup>88</sup>. The emergence of new religious movements has challenged this interpretative category and has posed great challenges to legal systems like the Austrian one, where traditional religions enjoy a privileged status.

This paper aims to examine recent Austrian case law concerning the meaning of "religion" in a two-fold perspective<sup>89</sup>. In the first place, it focuses upon judgments determining the legitimacy (or the illegitimacy) of specific legal rules and administrative practices, grounded on a differentiation between religious groups (for example, between "religious denominations" on the one side, and "sects" or "cults" on the other side). In the second place, it examines decisions concerning the relationship between a religious worldview and the religious groups established on the Austrian territory and claiming to represent that "religion".

### 2 - The Austrian Case

According to Austrian scholars, the "Austrian specificity in comparison to other European countries" lies in the fact that the country's catalogue of

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<sup>88</sup> **S. FERRARI**, *New Religious Movements in Western Europe*, in <http://religion.info>, October 2006, p. 4.

<sup>89</sup> For older case law (1920s-1970s) see **L. MUSSELLI**, *La libertà religiosa nell'esperienza costituzionale austriaca: primi materiali per un'analisi comparativa*, in *Studi in onore di Pietro Agostino d'Avack*, Giuffrè, Milano, 1976, vol. III, pp. 361 ff.



fundamental rights is

“embodied in Constitutional Acts or Treaties under International Law [...] that date from several historical epochs with a different state-church relationship and a different understanding of fundamental rights”<sup>90</sup>.

The origins of the Republic of Austria date back to 1918, when it was established as one of the successor states to Austria-Hungary. The 1920 Constitution recognizes the equality of all citizens before the law and excludes privileges based inter alia upon religion (Art. 7 § 1), but it does not contain any provisions on either religious freedoms or religious denominations. In fact,

“[t]he main political groups could not agree on a new catalogue of fundamental rights, basically because the Social Democrats demanded the incorporation of social rights that were emphatically rejected by the Conservatives. As a consequence, the 1867 Basic Law on the General Rights of Nationals [...] remained in force”<sup>91</sup>.

The 1867 law, inherited by Austria-Hungary and still legally binding, guarantees the right to freedom of conscience and creed (Art. 14 § 1) and introduces a distinction between recognized Churches and religious societies (Art. 15) and legally not recognized confessions (Art. 16). Fundamental freedoms (including the right to freedom of thought, conscience and religion) are further protected by the 1919 Treaty of Peace signed in St. Germain-en-Laye<sup>92</sup>; the 1955 Treaty for the Re-establishment of an Independent and Democratic Austria<sup>93</sup>; the European Convention on

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<sup>90</sup> **R. POTZ**, *Religious Freedom and the Concept of Law and Religion in Austria*, in <http://www.osce.org/odihr>, 10 July 2009, p. 4; **B. SHINKELE**, *Church Autonomy in Austria*, in *Church Autonomy. A Comparative Survey*, ed. by G. Robbers, Peter Lang, Frankfurt am Mein, 2001, p. 563. See also **A. GAMPER**, *Introduction to the Study of the Law of the Austrian Federal Constitution*, in *ICL Journal*, 2008, II/2, p. 94: “Fragmentation instead of incorporation was and to a smaller extent still is one of the key features of Austrian constitutionalism”.

<sup>91</sup> **M. STELZER**, *The Constitution of the Republic of Austria. A Contextual Analysis*, Hart Publishing, Portland, 2011, p. 9.

<sup>92</sup> In particular, under Art. 63, “Austria undertakes to assure full and complete protection of life and liberty to all inhabitants of Austria without distinction of birth, nationality, language, race or religion. All inhabitants of Austria shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals”.

<sup>93</sup> According to Art. 6 on human rights, “1. Austria shall take all measures necessary to secure to all persons under Austrian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting. 2. Austria further undertakes that the laws in force in Austria shall not, either in their content or in their application, discriminate or entail any



Human Rights, which Austria signed in 1957 and ratified in 1958<sup>94</sup>, and which has a constitutional status<sup>95</sup>.

Austria's ecclesiastical law system<sup>96</sup> fits in what Silvio Ferrari has described as the European model of State-religions relations. Contemporary European countries are characterized by three common principles: the individuals' religious freedom and equality, the religious denominations' doctrinal and organizational autonomy, and the State's selective cooperation with religious denominations<sup>97</sup>. The latter principle deserves special attention because of its relevance in Austrian case law on the meaning of "religion".

As early as 1972 the Constitutional Court stated that "differentiation between religious communities which are recognized by statute and other religions does not infringe the principle of equality"<sup>98</sup>. Potz has stressed the distinction "between two different forms of religious neutrality: the 'distancing' neutrality (*distanzierende Neutralität*) and the including neutrality (*hereinnehmende Neutralität*)". The former requires the State to avoid "any possible identification with religious or philosophical beliefs", but the latter does not prevent it from promoting religious denominations "as socially relevant factors". This assessment must be based on secular, and not religious characteristics: for example, the number of members<sup>99</sup>.

The differentiation between religious communities has further deepened after the approval of the Law Concerning the Legal Status of Registered Religious Communities in 1998, which has amended the 1874 Law concerning the Legal Recognition of Religious Communities, and which has in fact created a three-tier system<sup>100</sup>. At the top, there are

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discrimination between persons of Austrian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter".

<sup>94</sup> See **L. MUSSELLI**, *La libertà religiosa nell'esperienza costituzionale austriaca...*, cit., pp. 339 ff.

<sup>95</sup> **C. MAYER, H. WUTSCHER**, *Are Austrian Courts Obligated to Consider the Jurisprudence of the European Court of Human Rights when Interpreting the ECHR?*, in *ICL Journal*, 2014, VIII/2, p. 202.

<sup>96</sup> An exhaustive description goes beyond the purposes of the present article. For more information, see **R. POTZ**, *État et Églises en Autriche*, in *État et Églises dans l'Union européenne*, ed. by G. Robbers, Nomos, Baden-Baden, 2008, pp. 417-448.

<sup>97</sup> **S. FERRARI**, *Dalla tolleranza ai diritti: le religioni nel processo di unificazione*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)), January 2005.

<sup>98</sup> Quoted by **L.L. GARLICKI**, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, in *BYU Law Review*, 2001/ 2, pp. 492-493.

<sup>99</sup> **R. POTZ**, *Religious Freedom*, cit., p. 6.

<sup>100</sup> **B. SHINKELE**, *Religious Entities as Legal Persons - Austria*, in *Churches and Other Religious Organisations as Legal Persons*, ed. by L. Friedner, Lueven, Peeters, 2007, p. 37.



(currently 16) religious societies (*Religionsgesellschaften*)<sup>101</sup>, which have a public-corporation status<sup>102</sup> and enjoy a number of rights and benefits. Each

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<sup>101</sup> This status has been recognised by virtue of different legal provisions. The Catholic Church was “historically recognized”, but had its status renewed through the Concordat signed in 1933 and entered into force in 1934. A group of religious societies has obtained this recognition through *ad hoc* laws: the Jewish Religious Association through the Jewish Act of 1890; the Islamic Religious Community through the Islam Act of 1912, as amended in 2015; the Protestant Churches of Augsburg and Helvetic Confession (that is, Lutheran and Reformed respectively) through the Protestant Act of 1961; the Eastern Orthodox Church (including not only the Greek Orthodox Church, but also the Russian, Serbian, Romanian, and Bulgarian Orthodox Churches) through the Orthodox Act of 1967; the Syrian Orthodox Church, the Coptic Orthodox Church, and the Armenian Apostolic Church through the Oriental Orthodox Churches Act of 2003. Another group has been recognized by a ministerial ordinance under the 1874 Law concerning the Legal Recognition of Religious Communities, as amended in 1998: the Old Catholic Church in 1877; the Methodist Church in 1951; the Church of Jesus Christ of Latter-day Saints (Mormons) in 1955; the New Apostolic Church in 1975; the Buddhist Religious Association in 1983; the Jehovah’s Witnesses in 2009; the Islamic Alevi Congregation in 2013; the Free Christian Churches (a federation of the Baptist Union, the Evangelical Alliance, the ELAIA Christian Community, the Mennonite Free Church, and the Free Christian Pentecostal Church) also in 2013. See **R. POTZ**, *Religious Freedom*, cit., pp. 1-4; *Austria 2013 International Religious Freedom Report*, in <https://www.state.gov/documents/organization/222401.pdf>; **G. CATALANO**, *Osservazioni sulla situazione concordataria della Repubblica Austriaca*, in *Il diritto ecclesiastico*, 1963, I, pp. 390-406; **A. TALAMANCA**, *Politica e legislazione ecclesiastica in Austria, Germania e Italia negli anni tra le due guerre mondiali; parallelismi, differenziazioni e prospettive di studio emersi in un recente colloquio italo-austro-tedesco*, in *Il diritto ecclesiastico*, 1974, I, pp. 349-354; **R. BOTTA**, *Ispirazione pluralista e residui di giuseppinismo nei rapporti tra Stato e confessioni nella Repubblica austriaca. (Note in margine ad un recente incontro di studio italo-austriaco)*, in *Il diritto ecclesiastico*, 1982, I, pp. 132-137; **P. CIPROTTI, E. ZAMPETTI**, *I Concordati di Giovanni XXIII e dei primi anni di Paolo VI. 1958-1974. (Austria, Germania, Jugoslavia, Spagna, Svizzera, Argentina, Bolivia, Colombia, Paraguay, El Salvador, Tunisia, Venezuela)*, Giuffrè. Milano, 1976, pp. 1-30; **S. TESTA BAPPENHEIM**, *Brevi cenni introduttivi sull’istituzionalizzazione dell’Islam nella felix Austria*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)), May 2007; **H.C. SCHEU**, *The emergence of new minorities in Austria and current issues concerning their legal protection*, in *Acta Humana*, 2015/4, pp. 55-58; **J. MOURÃO PERMOSER, S. ROSENBERGER, K. STOECKL**, *Religious Organisations as Political Actors in the Context of Migration. Islam and Orthodoxy in Austria*, in *Religious Actors in the Public Sphere. Means, Objectives and Effects*, ed. by J. Haynes, A. Henning, Routledge, New York, 2011, pp. 77-95; **D. HEINZ**, *Church, Sect, and Governmental Control: Seventh-Day Adventists in the Habsburg Monarchy*, in *Eastern European Quarterly*, 1989, XXIII/1, pp. 109-115.

<sup>102</sup> “Their legal status as public corporations includes the relative compulsory membership. All those belonging to a particular confession who are resident in Austria are members of it” (**R. PUZA**, *Legal Position of Churches, Church Autonomy and Tendencies in Jurisprudence. Report of Austria*, in *Legal Position of Churches and Church Autonomy*, ed. by Hildegard Warnik, Peeters, Leuven, 2001, pp. 57-58).



of them

“has the right to joint public religious practice, arranges and administers its internal affairs autonomously, and retains possession and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare”<sup>103</sup>.

Religious societies *inter alia* receive subsidies, and are granted tax exemption and State-funded religious instruction in public schools. They are also “entitled to give an opinion to law drafts as long as they are of relevance for them and their religious and social activities”<sup>104</sup>.

The 1874 Law recognized a religious denomination as a *Religionsgesellschaft*

“if their teachings, services, internal order and chosen name [do] not contain anything unlawful or morally offensive, and if the setting up and continued existence of at least one community of worship (*Cultusgemeinde*) is ensured”<sup>105</sup>.

The 1998 Law has envisaged further conditions, which have been criticized by scholars<sup>106</sup>:

- existence of the religious association for at least twenty years in Austria, for at least ten years as a registered religious community;
- a minimum number of two out of a thousand of the Austrian population;
- the use of income and other assets for religious purposes, including charitable activities;
- a positive attitude toward society and the state;
- no illegal interference with recognized or other religious communities”<sup>107</sup>.

The demographic requirement, which is currently estimated at

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<sup>103</sup> Art. 15 of the 1867 Basic Law on the General Rights of Nationals. On its traditional and actual interpretation, see **B. SHINKELE**, *Church Autonomy in Austria*, cit., pp. 564 ff.

<sup>104</sup> **R. POTZ**, *State and Religion in Austria*, in *State, Law and Religion in Pluralistic Societies - Austrian and Indonesian Perspectives*, ed. by R. Potz, S. Kroissenbrunner, A. Hafner, Vienna University Press, Vienna, 2010, p. 20.

<sup>105</sup> **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities in Europe: Institutional Change and Reproduction*, in *Journal of Church and State*, 2013, LVII/1, p. 93.

<sup>106</sup> See *inter alia* **C.J. MINER**, *Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom*, in *BYU Law Review*, 1998/2, pp. 607-647.

<sup>107</sup> **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities*, cit., pp. 93-94.





approximately 17,400 members<sup>108</sup>, is especially “prohibitive”<sup>109</sup>.

The middle tier is occupied by (currently 8) registered religious communities (*religiösen Bekenntnisgemeinschaften*)<sup>110</sup>. This is a new status introduced by the 1998 Law, which can be applied for by a religious group having at least 300 members. As legal persons, they can purchase property in their own name and contract for goods and services, but they are not entitled to the financial and educational benefits granted to religious societies<sup>111</sup>.

At the bottom, there are all other religious communities, who do not qualify for neither of the abovementioned statuses<sup>112</sup>, and whose members “may practice their religion at home, in so far as this practice is neither unlawful, nor offends common decency”<sup>113</sup>. Many are organized as non-profit associations, like Scientology. According to Art. 3 a) of the Association Law of 1951, this law does not apply to orders, congregations and religious groups, on the grounds that they are subject to laws and regulations approved specifically for them. In other words, in Austria, unlike other European countries, religious groups may not be organized as private associations. In fact, until the beginning of the 1980s, only associations with a partly religious function were registered. However, now - in the light of Arts. 11 and 14 ECHR which guarantee the right to freedom of association without discrimination - any religious groups of at least three people are allowed to register as associations<sup>114</sup>.

Between 1983 and 2003 no religious denomination was recognized as a *Religionsgesellschaft*, and in the meantime the 1998 Law was approved to make requirements stricter. One of the reasons has been the reaction to the

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<sup>108</sup> *Austria 2016 International Religious Freedom Report*, in <https://www.state.gov/documents/organization/269032.pdf>, p. 4.

<sup>109</sup> **R. POTZ**, *State and Religion in Austria*, cit., p. 18.

<sup>110</sup> They are the Bahai Faith, the Christian Community-Movement for Religious Renewal, the Pentecostal Community of God, the Seventh-Day Adventist Church, the Hindu Mandir Community, the Islamic-Shia Community, the Old-Faith Alevis, and the Family Federation for World Peace and Unification (Unification Church). See *Austria 2016 International Religious Freedom Report*, cit., p. 4.

<sup>111</sup> *Austria 2016 International Religious Freedom Report*, cit., p. 4.

<sup>112</sup> See *Austria 2016 International Religious Freedom Report*, cit., p. 5.

<sup>113</sup> Art. 16 of the 1867 Basic Law on the General Rights of Nationals.

<sup>114</sup> **R. POTZ**, *New Religious Movements in Austria*, in *New Religious Movements and the Law in the European Union - Les nouveaux mouvements religieux et le droit dans l'Union européenne*, Giuffrè, Milano, 1999, p. 78; **B. SCHINKELE**, **W. WIESHAIDER**, *Le statut juridique des communautés religieuses en Autriche*, in *Revue de droit canonique*, 2004, LIV/1-2, pp. 135-136; **R. PUZA**, *Legal Position of Churches*, cit., p. 73; **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities*, cit., p. 99.



emergence of new religious movements<sup>115</sup> - or, alternatively, to the claims of religious denominations which are not new, but revolve around a notion of “religion” different from the traditional one. The “explanations” (*Erläuternde Bemerkungen*) to the 1998 Law

«for the purpose of differentiation to “Weltanschauung” define “Religion” as “a historically developed concept of convictions explaining man and world with a transcendent reference, including specific rites and symbols giving precepts for acting according to its fundamental doctrines, and which is presentable regarding its contents”»<sup>116</sup>.

Miner has reported that in the 1980s and 1990s more than twenty religious groups applied to be recognized as religious societies<sup>117</sup>.

“This increase in applications may have stemmed from the fact that in the late 1980s and early 1990s, more Austrians than ever before were leaving traditional churches and joining nontraditional churches. However, a rising antiforeigner movement soon began to turn the tide of Austrians leaving traditional churches for beliefs that often came from other countries”<sup>118</sup>.

Thus, the process of recognizing new *Religionsgesellschaften*

“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”<sup>119</sup>.

The emergence of new religious movements is also the context framing the approval, in 1998, of the Law for the Establishment of a Documentation and Information Office for Matters Concerning Sects<sup>120</sup>. Its

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<sup>115</sup> A very recent case has involved a request by a member of the “Church of Flying Spaghetti Monster” (CFSM): “[i]n 2011, Austrian citizen Niko Alm requested and received the right to sport a colander on his head on the passport picture he used on his driver’s license. This “hat” is one of the pastafarians’ signs of allegiance, along with the pirate costume. Not satisfied with this relative victory, Alm went further by applying for official recognition of the CFSM as religion by the Austrian government” (L. OBADIA, *When Virtuality Shapes Social Reality. Fake Cults and the Church of the Flying Spaghetti Monster*, in *Online. Heidelberg Journal of Religions on the Internet*, 2015, VIII, p. 125).

<sup>116</sup> Quoted by R. POTZ, *New Religious Movements in Austria*, cit., p. 75.

<sup>117</sup> C. J. MINER, *Losing My Religion*, cit., p. 613.

<sup>118</sup> C. J. MINER, *Losing My Religion*, cit., p. 614.

<sup>119</sup> R. POTZ, *Religious Freedom*, cit., p. 4.

<sup>120</sup> See R. POTZ, *État et Églises en Autriche*, cit., p. 446.



purpose is “to show the endangerings that can be caused by sects or similar movements or the risks somebody runs when establishing contact with such groups”<sup>121</sup>. These developments have been sharply criticized *inter alia* by the NGO Foref (Forum for Religious Freedom): “Austria, with a population of 8, 2 Million has no less than 34 Anti-Sect offices operating in the country. Proportionally, this marks an unmatched record in Europe and even on a global scale”<sup>122</sup>.

### 3 - The Meaning of “Religion” in Austrian Case Law

If we understand “religion” as a worldview, Austrian case law, like the jurisprudence of other European countries, has not given a definition of this term. As stressed by scholars, “religion” is an undetermined legal notion and the State’s competence to define this concept is controversial<sup>123</sup>. However, like elsewhere in Europe, courts have been called to decide whether a specific legal status guaranteed to “religions” (here to be understood as self-defined religious groups) could be conferred or not. This status “may not be granted to an organization that, for example, represents national socialist ideology or is based on a particular language or ethnic identity”<sup>124</sup>. As stated by the Constitutional Court in the 1950s with regard to the movement “Gotteserkenntnis Ludendorff, characterised by a Nazi and racist ideology, “the practice of an at least primitive and rudimentary cult is a necessary precondition for being protected as manifestation of religion”<sup>125</sup>.

In more recent times, as noted above, this issue has not concerned so much revived Nazi or racist movements, as groups whose self-identification with a religion is contested by Austrian authorities. As regards specifically case law, only rarely may the term “sect” be found. In the judgment of 29 March 1995, the Supreme Court quoted the scholar Gerhard Schimdtchen’s statement that «it is part of the nature of a sect that

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<sup>121</sup> B. SHINKELE, *Church Autonomy in Austria*, cit., p. 573.

<sup>122</sup> FOREF, *Statement and Recommendations to the 2007 Human Dimension Implementation Meeting*, in <http://www.osce.org/odihr/27023?download=true>, 25 September 2007, p. 1. In this sense, see also C. BRÜNNER, T. NEGER, *FECRI and Its Affiliates in Austria. State and Mainline Religions Against Religious Diversity*, in *Religion-Staat-Gesellschaft*, 2012, XIII/2, pp. 307-339; C.J. MINER, *Losing My Religion*, cit., pp. 620-621.

<sup>123</sup> B. SCHINKELE, W. WIESHAIDER, *Le statut juridique*, cit., p. 131.

<sup>124</sup> L.L. GARLICKI, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, in *BYU Law review*, vol. 2001, Issue 2, p. 487.

<sup>125</sup> R. POTZ, *New Religious Movements in Austria*, cit., pp. 75-76.





“the border of the group becomes for the members the border of the reality of their life”»<sup>126</sup>. In other instances, the Supreme Court had to decide whether the use of the term “sect” was defamatory and thus could be deemed as a legal ground to demand compensation<sup>127</sup>.

Beyond terminological issues, Austrian courts have examined more frequently substantive problems, such as the question of the extent to which a new religious movement - or a not-so-new group whose characteristics are negatively connoted in public perception - could be offered legal protection.

Under the 1874 Law concerning the Legal Recognition of Religious Communities, religious groups were recognized by an administrative act, against which they were not entitled to appeal. In a case originated in an application by Scientology<sup>128</sup>, the Constitutional Court has stated that the differentiation between *Religionsgesellschaften* and other religious denominations is constitutionally justified, only if - inter alia - there is an enforceable legal right to recognition. In application of the principles of equality and rule of law, the Ministry of Education must formally issue a negative decision when it denies recognition, it, and the concerned religious group has the right to apply to the court (judgment no. 11931 of 12 December 1988)<sup>129</sup>.

Whereas, in the aftermath of this decision, the Association Law started being applied to religious groups, the Administrative Court only subscribed to the Constitutional Court’s reasoning nine years later (judgment no. 96/10/00049 of 28 April 1997). This decision was issued in the context of the twenty-year long judiciary saga, which concerned the recognition of the Jehovah’s Witnesses, and which was also subject to a ruling by the European Court of Human Rights. By virtue of the

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<sup>126</sup> Quoted by **R. POTZ**, *New Religious Movements in Austria*, cit., p. 76. See also **L. MUSSELLI**, *La libertà religiosa nell’esperienza costituzionale austriaca*, cit., pp. 364-366.

<sup>127</sup> **R. POTZ**, *New Religious Movements in Austria*, cit., p. 76.

<sup>128</sup> According to Art. 144 § 1 of the Constitution, “[t]he Constitutional Court pronounces on rulings by an Administrative Court in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or on the score of an illegal ordinance, an illegal pronouncement on the republication of a law (treaty), an unconstitutional law, or an unlawful treaty”. For a brief outline, see **R. FABER**, *The Austrian Constitutional Court - An Overview*, in *ICL Journal*, 2008, II/1, pp. 49-53.

<sup>129</sup> **R. PUZA**, *Legal Position of Churches*, cit., p. 73; **B. SHINKELE**, *Church Autonomy in Austria*, cit., p. 572; **R. POTZ**, *New Religious Movements in Austria*, cit., p. 70; **B. SHINKELE**, **W. WIESHAIDER**, *Le statut juridique*, cit., p. 124; **S. SCHIMA**, *Focus: Freedom of Religion in Austria*, in *ICL Journal*, 2009, III/3, p. 202; **C. HOFHANSEL**, *Recognition Regimes for Religious Minorities in Europe*, cit., p. 105.



abovementioned decision, the Administrative Court for the first time

“issued a binding decision (*Erkenntnis*) to the effect that the Minister had a duty to decide on the request for recognition within eight weeks and set out the principles which the Minister had to take into account when taking this decision”<sup>130</sup>.

The Minister’s subsequent negative decision was grounded on reasons indicating well the public perception of what may be legitimately encompassed by the notion of “religion” and what may not.

«The Minister of Education, Elisabeth Gehrler, [...] stated that she “could not be responsible for the possible influence of the Witnesses on the youth through state-supported religious instruction”. The Minister gave three reasons for the rejection: the intolerant attitude of the Jehovah’s Witnesses toward the government, their refusal of blood transfusions (especially for children), and the fact that the church would be led from Brooklyn, New York»<sup>131</sup>.

A further conservative reaction was the approval of the 1998 Law Concerning the Legal Status of Registered Religious Communities. As mentioned, this act contains restrictive conditions, among which is the requirement of existence as a registered religious community for at least ten years. When the Jehovah’s Witnesses were found unable to meet this condition, they lodged a complaint with the Constitution Court, which nonetheless dismissed it. According to its case law (judgments nos. 16102/2001 and 16131/2001), the concerned requirement was consistent with the Constitution<sup>132</sup>.

These judgments should be placed in the context of Austrian case law concerning the right to internal autonomy, which is affirmed, as mentioned, by Art. 15 of the 1867 Law on the General Rights of Nationals.

“All Austria’s three highest courts, the Constitutional Court, the Administrative High Court and the Supreme Court were involved [...] in clarifying the interpretation and the development of what constitutes internal affairs and the distinction between these and

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<sup>130</sup> ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, application no. 40825/98, judgment of 31 July 1998, para. 25. See also B. OHMS, *Recognizing Jehovah’s Witnesses as a Religious Society: A Case Winding its Way Through the Courts*, in *ICL Journal*, 2009, III/3, pp. 201-217.

<sup>131</sup> C.J. MINER, *Losing My Religion*, cit., p. 615. The reference to an allegedly undue foreign influence is especially interesting, as it bears a resemblance to the argument which led Locke to exclude Catholics from the regime of toleration.

<sup>132</sup> S. SCHIMA, *Focus: Freedom of Religion in Austria*, cit., p. 202; R. POTZ, *État et Églises en Autriche*, cit., p. 424; B. SCHINKELE, W. WIESHAIDER, *Le statut juridique*, cit., p. 124; C. HOFHANSEL, *Recognition Regimes for Religious Minorities in Europe*, cit., p. 105.



external affairs. In 1974 and 1987 the Supreme Court defined internal affairs as those which affect the inner core of ecclesiastical activity, and in which, in the absence of autonomy, religious societies would be restricted in the promulgation of the salvific truths which they teach and in the practical exercise of their faith<sup>133</sup>.

Despite this acknowledgment, which correctly identifies autonomy as something that is at the very core of the contemporary notion of religious freedom, only *Religionsgesellschaften* are recognized the right to arrange and administer their internal affairs autonomously<sup>134</sup>, as confirmed by the Constitutional Court's case law (see for example the abovementioned judgment no. 16102/2001). It should be agreed with Potz that this position est à critiquer dans la mesure où ce droit est à concevoir comme une conséquence du droit fondamental à la liberté de religion et est ainsi en général à garantir indépendamment du statut juridique en cause<sup>135</sup>.

In fact, this opinion is consistent with the position of the European Court of Human Rights, which

“reiterated that the right of a religious community to an autonomous existence was indispensable for pluralism in a democratic society and thus it is at the very heart of the protection which Article 9 affords. Even the creation of auxiliary associations with legal personality could not compensate for the authorities' prolonged failure to grant legal personality”<sup>136</sup>.

In the aftermath of the Strasbourg judges' ruling, the clause “as a religious association for at least twenty years, of which at least ten years”, contained in the 1998 Law, was declared illegitimate by the Constitutional Court (judgments nos. G 58/10 and G 59/10). This legal provision was thus repealed with effect from 30 September 2011<sup>137</sup>. By contrast, when

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<sup>133</sup> R. PUZA, *Legal Position of Churches*, cit., p. 70. See also S. SCHIMA, *Focus: Freedom of Religion in Austria*, cit., pp. 203-204. A detailed exam of this issue goes beyond the purposes of this paper. Suffice it to mention an example. In the judgment no. 2944 of 19 December 1955 the Constitutional Court declared the illegitimacy of the legal provision punishing the celebration of a religious marriage before the civil marriage. The celebration of a marriage by a religious society was regarded as a part of its internal affairs, because this act had no consequences and produced no effects in the State legal system. See R. POTZ, *Religious Freedom*, cit., p. 11, fn. 27; L. MUSSELLI, *La libertà religiosa nell'esperienza costituzionale austriaca*, cit., pp. 367-368.

<sup>134</sup> R. PUZA, *Legal Position of Churches*, cit., p. 63.

<sup>135</sup> R. POTZ, *État et Églises en Autriche*, cit., p. 429.

<sup>136</sup> F. TULKENS, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)), February 2011, p. 9.

<sup>137</sup> T. MANTANIKA, *Legal recognition of religious communities*, in *ICL Journal*, 2010, IV /4, 49



examining a complaint lodged by the Seventh-Day Adventist Church, which only has 5,770 members in Austria, concerning the requirement of a minimum number of 2% of the Austrian population, the Constitutional Court had regarded this condition as legitimate and consistent with Art. 9 ECHR (judgment no. B 516/09 of 16 December 2009). This decision was not adopted unanimously, though, and dissenting judge Steiner referred to the European Court of Human Rights' judgment concerning the Jehovah's Witnesses<sup>138</sup>.

Austrian case law has investigated the meaning of "religion" not only as regards the issue of recognition, but also with respect to the problem of representation: can a religion be represented by more than one religious denomination? This question has been addressed in a set of judgements concerning Judaism and Islam.

The *Israelitische Kultusgemeinde Wien* (IKG) is the largest Jewish community, it accounts for 98% of the Austrian Jewish population, and it is spread in five out of nine provinces of the country. Its representatives constitute the leadership of the IRG (the *Israelitische Religionsgesellschaft*, that is, the Jewish society recognized by the Jewish Act of 1890). In the 1950s some Jewish groups started complaining about the IKG and demanding recognition as a separate community. In the 1970s a group called *Agudas Israel* applied to the Constitutional Court to have the provision concerning the compulsory *Einheitsgemeinde* repealed. The *Einheitsgemeinde* (unity community) refers to the centralization, at the local level, of the community structure, which encompasses all streams of Judaism. In the judgment no. G 31/79 of 2 July 1981, the Constitutional Court ruled that the *Einheitsgemeinde*-related provisions were unconstitutional, insofar as the principle of equality was breached. According to the judges, any person self-defining as a Jew according to his or her own conception had to be regarded as a Jew (it is interesting to note that this interpretation is inconsistent with the *halakhic* definition); any group of Jews had the right to form a Jewish community (legally recognized), besides the one already existing on a given territory. The importance of this decision lies in the circumstance that the Court was called to intervene in Jewish internal affairs. However, in doing so, Austrian case law affirmed for the first time the prevalence of the individual dimension of the right to religious freedom over the collective sphere<sup>139</sup>.

The Islam Act was enacted in 1912, but only in 1979 was a religious

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p. 707.

<sup>138</sup> B. MOSER, *Freedom of religion and legal recognition as a church or religious community: VfGH 16.12.2009, B 516/09*, in *ICL Journal*, 2010, IV/2, pp. 232-234.

<sup>139</sup> S. COHEN-WEISZ, *Joining the Jewish Fold: The Changing Conversion Policies in Austria*



society recognized: the Islamic Religious Authority of Austria (*Islamische Glaubensgemeinschaft in Österreich*, henceforth IGGiÖ)<sup>140</sup>. In the judgment no. 11574/1987, the Constitutional Court interpreted the Islam Act of 1912, which formerly applied only to the adherents of the Hanafi school, as applying to the other Sunni schools as well as to other streams of Islam, like Shi'ism. According to the judges, this limitation breached Art. 15 of the 1867 Law<sup>141</sup>. However, this decision did not solve the problems of representation within Islam in Austria. Alevis, whom the IGGiÖ refused to consider as Muslims, tried for years to obtain a recognition but, according to the competent Ministry, only one Islamic community could be recognised. In the judgment no. B 1214/09-35 of 1 December 2010 the Constitutional Court declared the Ministry's decision illegitimate. In the same month, the Islamic Alevi Congregation (*Islamische Alevitische Glaubensgemeinschaft*, henceforth IAGÖ), one the Alevi groups seeking recognition, succeeded in being registered as a religious community (the new legal status introduced by the 1998 Law) and, in 2013, it was upgraded to the status of *Religionsgesellschaft*<sup>142</sup>. The 2015 amendment to the Islam Law has inter alia strengthened the status of both the IGGiÖ and the IAGÖ<sup>143</sup>, but problems of representation have not been solved yet. A dissenting Alevi group

“has contested IAGÖ's claim to represent all Alevis. Considering that

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and Germany since 1945, in *Becoming Jewish. New Jews and Emerging Jewish Communities in a Globalized World*, ed. by T. Parfitt, N. Fisher, Cambridge Scholars Publishing, Newcastle upon Tyne, 2016, p. 139-143; **R. POTZ**, *Religious Freedom*, cit., p. 3.

<sup>140</sup> **C. SCHEU**, *The emergence of new minorities in Austria*, cit., p. 55.

<sup>141</sup> **P. OBERNDORFER, B. WAGNER**, *Legislative Omission as a Problem of Constitutional Review. Report of the Austrian Constitutional Court XIV. Congress of the Conference of European Constitutional Courts Vilnius, Lithuania, June 2-7, 2008*, in [http://www.confconstco.org/reports/rep-xiv/report\\_Austria\\_en.pdf](http://www.confconstco.org/reports/rep-xiv/report_Austria_en.pdf), p. 10; **L. MUSSELLI**, *Edilizia religiosa, Islam e neogiurisdizionalismo in Europa. Alcune note sul nuovo «Islamgesetz» austriaco e sul divieto di edificare minareti in Svizzera*, in *Quaderni di diritto e politica ecclesiastica*, 2015/2, p. 451; **L.J. ABID**, *Muslims in Austria: Integration through Participation in Austrian Society*, in *Journal of Muslim Minority Affairs*, 2006, XXVI/2, p. 268; **A. SKOWRON-NALBORCZYK**, *A Century of the Official Legal Status of Islam in Austria: Between the Law on Islam of 1912 and the Law on Islam of 2015*, in *Muslim Minorities-State Relations. Violence, Integration and Policy*, ed. by R. Mason, Palgrave Macmillan, New York, 2016, p. 66.

<sup>142</sup> **A. ÇAKIR**, *The Struggle of the Alevi Religious Community for Recognition: Formatting of Alevism into Liberal Islamic Alevism*, in *Migration und Integration - wissenschaftliche Perspektiven aus Österreich*, Vienna University Press, Vienna, 2016, p. 230; **T. SCHMIDINGER**, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J.S. Nielsen, Brill, Leiden, 2011, vol. III, p. 34; **F. HAFEZ**, *Institutionalised Austrian Islam: One institution representing the many*, in *Debating Islam. Negotiating Religion, Europe, and the Self*, ed. by S.-M. Behloul et al., Transcript Verlag, Bielefeld, 2012, p. 236; **A. SKOWRON-NALBORCZYK**, *A Century of the Official Legal Status of Islam in Austria*, cit., p. 68.

<sup>143</sup> **C. SCHEU**, *The emergence of new minorities in Austria*, cit., p. 57.





Alevism as a distinct religious community that stands outside Islam, the Federation of Alevi Communities in Austria (*Föderation der Aleviten Gemeinden in Österreich*, AABF) also applied for registration. Another such application is expected from the Islamic Shi'i Religious Community in Austria"<sup>144</sup>.

The last, but not least Muslim organization unhappy with the current legal regulation is the *Österreich Türkisch-Islamische Union* (Austrian Turkish Islamic Union, henceforth ATIB), an umbrella association financed and staffed by Turkey's Presidency of Religious Affairs, and one of the IGGiÖ's largest constituent members. The 2015 amendment to the Islam Law prohibits the funding of religious services by entities outside Austria - a limitation that does not apply to any other religion in Austria. In June 2015, ATIB applied to the Constitutional Court. Legal experts doubt that this clause may hold up to its scrutiny - or that by the European Court of Human Rights - because it breaches both the principle of equality and religious denominations' right to internal autonomy<sup>145</sup>. It will be interesting to see how the Constitutional Court will assess the lawmakers' notion of "religion" and attempt to establish an Austrian Islam.

#### 4 - Conclusions

The Republic of Austria has inherited and - despite changes and adjustments made in the course of time - basically confirmed the ecclesiastical law system inherited from Austria-Hungary. This system, defined by Austrian scholars as a "denominationally neutral system in ecclesiastical matters"<sup>146</sup>, aimed to overcome the previous situation, characterized by a confessionist regime privileging the Catholic Church. This aim - like in other European countries - was not attained through the repeal of the privileges and benefits formerly guaranteed to the Catholic Church, but through their extension to denominational groups, whose worldview inter alia could be encompassed in the notion of "religion" commonly held by Austrian authorities and the public at large. As seen, this conformity was attested by the recognition of a specific legal status.

The increasing religious diversity of Austrian society has started challenging the pattern of *Religionsgesellschaften* from both "outside" and

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<sup>144</sup> K. ÖKTEM, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J. S. Nielsen, Brill, Leiden, 2015, vol. VII, p. 47.

<sup>145</sup> K. ÖKTEM, *Austria*, in *Yearbook of Muslims in Europe*, ed. by J. S. Nielsen, Brill, Leiden, 2016, vol. VIII, p. 52.

<sup>146</sup> See inter alia R. POTZ, *Religious Freedom*, cit., p. 1.



“within”. From “outside”, new religious movements or not-so-new movements whose religion is negatively connoted in public perception have tried to accede to the privileged legal status offered to religious denominations. From “within” dissenting religious groups have complained about the traditional institutional architecture of religious societies. In this process, Austrian courts have played and are playing a very important role, which has an impact on the definition of the meaning of “religion”. Despite the variety of situations examined in Austrian case law, it seems possible to conclude that they all revolve around the same essential issue: that is, the striking of a fair balance between the individual and the collective dimensions of religious freedom, in order to prevent the infringement of an individual’s fundamental right based only on the legal status of the religious group he or she belongs to.

#### **Abstract**

This paper aims to examine recent Austrian case law concerning the meaning of “religion” in a two-fold perspective. In the first place, it focuses upon judgments determining the legitimacy (or the illegitimacy) of specific legal rules and administrative practices, grounded on a differentiation between religious groups (for example, between “religious denominations” on the one side, and “sects” or “cults” on the other side). In the second place, it examines decisions concerning the relationship between a religious worldview and the religious groups established on the Austrian territory and claiming to represent that “religion”.