

# RELIGION IN PUBLIC EDUCATION – REPORT ON AUSTRIA

STEFAN HAMMER / JOHANNES FRANCK

## I. GENERAL BACKGROUND

### *1. Facts and Figures*<sup>1</sup>

According to the last census taken in Austria in which the religious conviction of the people was asked, namely in 2001, the religious composition of the population in Austria was the following: 73.66% Roman Catholic, 4.68% Protestant, 4.3% Islamic, 2.17% Orthodox, 0.29% Jehovah's Witnesses, 0.18% Old Catholic, 0.13% Buddhist, 0.1% Jewish, 0.09% Pentecostal, 0.06% Oriental-Orthodox. 11.99% of the population did not belong to any denomination. Since the year 2001, the numbers have changed significantly. Whereas the number of Catholics has decreased, so that today under 70% of the 8 million citizens of Austria are Catholics, the number of Muslims has increased to about 400,000 people, which makes Islam the second largest religious community in Austria. Furthermore, the portion without confession has also increased.

In the school year 2008/09, 1,189,586 pupils went to school, 1,077,283 to public schools and 112,303 to private schools. For approximately 1,020,000 pupils, religious instruction was a compulsory subject.

604,017 pupils attended the "Volksschule", 332,210 the "Hauptschule", 13,170 schools for mentally handicapped children, and 20,648 "Polytechnische Lehrgänge". 204,787 attended a "Gymnasium", 50,767 a secondary vocational school, and 135,750 a higher vocational school. 140,373 pupils attended "Berufsschule" (for those different school types see below).

There are in total 6,221 schools in Austria, of which 5,560 are public schools and 661 private schools; this means that approximately 10% of all schools are private schools. Out of a total of 317 denominational schools (these are 5% of all schools and nearly 50% of all private schools), 285 are Catholic (which is 4.6% of all schools and 43% of all private schools), 21 Protestant, 6 Jewish, and 5 Islamic.

Religious instruction is a compulsory subject at approximately 6,000 schools, and at 160 schools it is an optional subject. Most of the pupils are of course Roman Catholics. In the school year 2009/10, 75.14% of all pupils attending religious instruction were Catholics. 93.32% of Roman Catholic children did attend Catholic Religious Instruction, only 50,041 (that is 6.68%) took the possibility of opting out. 194,620 pupils (that is 19.52% of all pupils attending religious instruction) were members of other denominations, and 53,240 (5.34%) did not belong to any confession. 26.19% of those without any religious confession attended Catholic religious instruction (for this possibility see below).

---

<sup>1</sup> All data for the school year 2008/09 is provided by Statistik Austria.

At Catholic or Protestant private schools 3,194 pupils (4.52%) have no religious confession, 66.66% of them attend Religious Instruction, and 7,751 (10.97%) are members of other denominations.

## 2. Description of the general school system

### a) Constitutional and legal framework

Education became a public matter in Austria in the 19<sup>th</sup> century. Although schooling had already been made compulsory by the state in 1774, the (Catholic) church retained responsibility for public education until the end of the (neo-)absolutist period in the 1860s. Then the state, by assuming full responsibility for the public educational system, secularized it at the same time.<sup>2</sup> According to Article 17 para 5 of the Basic Law on the Fundamental Rights of Citizens (StGG), enacted in 1867<sup>3</sup> and still in force as constitutional law, the “entire educational and schooling system” is subject to the “supreme control and supervision” of the state. However, as a corollary to the freedom of religion guaranteed in Arts 14 and 15 StGG,<sup>4</sup> art. 17 para 4 StGG provides for confessional religious instruction by the respective churches or religious communities in public schools. Also, the right to private schooling including home-schooling is guaranteed by Art 17 para 2 and 3, but the state’s control extends to this form of private education as well.

The constitutional situation is complemented by Article 2 of the first protocol to the European Convention on Human Rights, as the whole Convention has constitutional status in Austria. The obligation of the state to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions extends into the public school system beyond confessional religious instruction, but it does not mean that the state has the obligation to offer an education fully consistent with the religious and philosophical views of the parents.<sup>5</sup> Art 2 of the 1<sup>st</sup> protocol only requires a neutral and pluralistic educational system, free from indoctrination, and obliges the state to tolerance towards religious and philosophical views. Thus, the state’s responsibility for education and the parents’ right to an education of their children in conformity with their religious and philosophical views have to be balanced against each other.<sup>6</sup>

Structural and substantive precepts for the public educational system have always been the subject of ideological dispute between the main political camps. This is reflected in the complex constitutional division of the relevant competences in Austria’s federal system and by a sophisticated structure for the administration of public education.<sup>7</sup> The main powers are

---

<sup>2</sup> For more detail see, e.g., A. Rinnerthaler, Vom Entstehen des kirchlichen Privatschulwesens bis zu dessen Beseitigung in der NS-Zeit, in: *id.* (ed.), *Das kirchliche Privatschulwesen – historische, pastorale, rechtliche und ökonomische Aspekte*, Frankfurt 2007, p. 95 (pp. 98-108).

<sup>3</sup> Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder, RGBl. Nr. 142/1867.

<sup>4</sup> The fundamental right of religious freedom is derived from three different regulations, Art 14 StGG (1867), Art 63 of the treaty of St. Germain after the first World War (1919), and Art 9 ECHR (1948), which got constitutional status in 1958.

<sup>5</sup> See ECtHR, *Kjeldsen and Others v. Denmark*, judgment of 7 December 1976, appl. no. 5920/71.

<sup>6</sup> H. Kalb/R. Potz/B. Schinkele, *Religionsrecht*, Vienna 2003, p. 346.

<sup>7</sup> For more detail, see H. Kalb, *Arten von Privatschulen, deren Öffentlichkeitsrecht und die Rechtsstellung von Lehrern und Schülern*, in: Rinnerthaler (ed.) (footnote 2), p. 315 (at pp. 315-318).

with the federation, but federal legislation on schooling has been made subject to a two-thirds majority requirement in both houses of parliament. Hence, until recently, any change in legislation on school matters had to be agreed between the main political parties. In 2005, this peculiarity has been limited to questions of compulsory schooling and to state-church relations.

In 2005, the paramount objectives of state schooling have been incorporated in the constitution. Under Article 14 para 5a B-VG, democracy, humanity, solidarity, peace and justice, as well as broadmindedness and tolerance towards all people are fundamental values for schools. Under these precepts, the state has to offer the highest possible standard of education to the population, regardless of birth, social or financial background. Schools are described as institutions where young people should learn to take responsibility, based on social, religious and moral values, for themselves, others, the environment and following generations. It is explicitly highlighted that each pupil should be led to tolerance and broadmindedness towards political, religious and philosophical convictions of others. § 2 of the federal law on school organization (Schulorganisationsgesetz, SchOG),<sup>8</sup> which also highlights the education of the young with respect of moral, religious and social values as objectives of public schooling, has to be interpreted in the light of the aforementioned constitutional guarantees regarding pluralism, including the parents' rights under the Convention.

#### *b) The Make-up of the School System*

In general, Austrian children from the age of 3 to 5 attend a kindergarten, but there is no legal duty to do so. Regulations on kindergartens do not fall under the jurisdiction of the federation, so that each federated entity (Land) has its own law concerning kindergartens or childcare. Nevertheless, the goals of the kindergartens are very similar in each Land,<sup>9</sup> and the respective laws provide for religious confessional education as well.

The Austrian school system has to be seen as a unity (§ 3 para 1 SchOG).<sup>10</sup> At the age of 6, every child has to attend primary school, the so called "Volksschule", for 4 years. With the start of secondary education, a choice has to be made between (junior) high school ("Gymnasium") and secondary elementary school ("Hauptschule"). As the separation of pupils at this early age is increasingly being questioned, the government has decided that, starting with school year 2008/09, common secondary education for pupils at the age of 10 to 14 may be offered as a "school pilot project" ("Schulversuch") under § 7 of the SchOG. At the moment, 320 schools in Austria make use of this new option.<sup>11</sup>

After the age of 14, another separation takes place: The choice is between (secondary) high school ("Gymnasium"), secondary vocational school, or one year of "polytechnical

---

<sup>8</sup> Bundesgesetz über die Schulorganisation, BGBl. Nr. 242/1962.

<sup>9</sup> See, e.g., § 4 para 3 subpara 1 Kinderbetreuungsgesetz of Upper Austria (LGBL. no. 39/2007), which declares the respect for ethical and religious values as a function of kindergartens. Similar regulations are found in the laws concerning kindergartens in other federated states.

<sup>10</sup> The SchOG regulates the Austrian school system, except agricultural and forestry schools which fall under the jurisdiction of the federated states.

<sup>11</sup> Data by the Ministry of Education (Bundesministerium für Unterricht, Kunst und Kultur).

training” (“polytechnischer Lehrgang”) followed by a vocational apprenticeship. The Gymnasium takes another 4 years (so 8 years in total), whereas vocational schools usually take 5 years. Both end with a final exam (“Reifeprüfung”) which entitles admission to university. During a vocational apprenticeship, the apprentices have to attend the so-called “Berufsschule” for a specific amount of weeks.

The state has the duty to operate public schools of all the aforementioned types, but also private legal persons or entities may operate those schools.<sup>12</sup> According to the constitutional allocation of competences, state-run schools are financed either by the federation, the Länder, or by local authorities, respectively, and they are open to all children. Private schools are generally not financed by the state, and they may set certain restrictions for attendance (e.g. limiting it to members of a certain confession). If prescribed legal requirements are fulfilled, private schools can acquire public status which allows them to issue school reports legally equivalent to those of state schools of the same type.<sup>13</sup> If private schools are operated by legally recognized churches and religious communities (konfessionelle Privatschulen – “denominational private schools”), the law presumes that they fulfil the legal requirements concerning their sustainable operation in conformity with the tasks of the public school system.<sup>14</sup> This legal presumption does not apply to private schools run by other religious communities or any other private entities.<sup>15</sup>

The operation of private schools obviously unburdens the public budget for education, but the state may subsidise them under certain conditions. However, only denominational private schools are legally entitled to so-called “living subsidies”. This means that the teachers necessary for denominational schools to implement the legal curriculum are not employed and paid by the relevant religious community, but by the federation or the Länder, respectively. Both the teacher concerned and the governing body of the relevant church or religious community have to agree to the teacher’s appointment at the denominational school. Thus, a teacher cannot be appointed to a denominational school contrary to his or her religious or philosophical conviction, and the state cannot appoint teachers to such schools if they are not approved by the relevant religious authority. The teacher as well as the relevant religious community can revoke the appointment of the teacher. If it is not possible for the state to fill a required post by a “living subsidy”, an equivalent financial subsidy is to be granted.<sup>16</sup>

Any legal entity other than a legally recognized church or religious community is not legally entitled to state subsidies. In particular, this is true also for registered religious communities.<sup>17</sup> They may apply for financial support, but the state is free to deny it, although

---

<sup>12</sup> Cf. § 4 para. 1 and § 11 of the federal law on private schools (“Privatschulgesetz”), BGBl. Nr. 244/1962.

<sup>13</sup> §§ 13 and 14 Privatschulgesetz.

<sup>14</sup> §§ 11 para. 2 and § 14 para. 3 Privatschulgesetz.

<sup>15</sup> In Austria, there are three legal categories of religious communities: 1. legally recognised churches and religious communities with public law status (this is the most privileged status); 2. religious communities with private legal personality registered as such under a special law; and 3. religious communities with private legal personality under the general law on private associations (see *B. Schinkele*, *Religious Entities as Legal Persons – Austria*, in: *L. Friedner* [ed.]: *Churches and Other Religious Organisations as Legal Persons*, Leuven 2007, p. 37.)

<sup>16</sup> For more detail on these regulations contained in §§ 17 to 20 Privatschulgesetz, see *Kalb* (footnote 7), pp. 333-339. Costs other than those for personnel, especially costs for buildings, are borne by the relevant entity which runs the school.

<sup>17</sup> See above, footnote 15.

such private schools disburden the state's budget as well. This amounts to a violation of the right to non-discrimination under Art. 14 of the ECHR, read in conjunction with Art. 9 as well as Art. 2 of the 1<sup>st</sup> protocol to the Convention.<sup>18</sup> Although a right to public subsidies for denominational schools as such cannot be deduced from the ECHR,<sup>19</sup> the differential treatment of legally recognized churches and religious communities and other religious communities does not seem justified, especially since for the latter, a "fair opportunity" to acquire the legal status of the former is not guaranteed under Austrian law.<sup>20</sup>

## II. RELIGION AS SUBJECT OF INSTRUCTION AND ITS SUBSTITUTES

### 1. Confessional Religious Instruction

#### a) Conception and Structure

Despite the separation between state and church in Austria, religious communities are not banned from the public sphere. Rather, the state accepts religious plurality and the public activity of churches and religious communities as long as core matters of the state's sovereignty are not touched.<sup>21</sup> This opens various areas of cooperation between church and state, yet any identification of the state with a certain confession must be avoided. Such a concept of "inclusive" neutrality is also relevant for the educational system, as schooling is not part of the state's core sovereignty.<sup>22</sup> Following this point of view, the principle of separation between state and church is not violated by denominational religious instruction in public schools.

An interconfessional school system was first established in 1868, when the law concerning the relationship between church and schools (*Schule-Kirche Gesetz*<sup>23</sup>) and a law on primary schools were enacted. As opposed to the previous predominance of the Roman Catholic Church in the educational system, each church or religious community was now allowed to organise religious instruction at public schools.<sup>24</sup> Currently, religious instruction in public schools is governed by the relevant law of 1949 (*Religionsunterrichtsgesetz – RelUG*).<sup>25</sup>

According to § 1 RelUG, Religious Instruction is a compulsory subject for all pupils who are members of a legally recognized church or religious community in all primary schools, "Hauptschulen" and schools for mentally handicapped people, "Polytechnische Lehrgänge", secondary and higher vocational schools (including agricultural and forestry schools),

---

<sup>18</sup> Cf. also *H. Kalb* (footnote 7), pp. 328-330, and *B. Schinkele*, *Das kirchliche Privatschulwesen im österreichischen Schulsystem*, in: *Rinnerthaler* (ed.) (footnote 2), p. 287 (at pp. 309-313).

<sup>19</sup> See ECtHR, *Verein Gemeinsam Lernen vs. Austria*, 6 Sept. 1995, appl. no. 23419/94.

<sup>20</sup> Cf. ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, 31 July 2008, appl. no. 40825/98, para 92 of the judgement.

<sup>21</sup> See *R. Potz*, *State and Church in Austria*, in: *G. Robbers*, *State and Church in the European Union*, Baden-Baden 1996, p. 235; *G. Luf*, *Religionsunterricht – ein Privileg der Kirchen?*, in: *P. Leisching/F. Pototschnig/R. Potz* (ed.): *Ex aequo et bono*, Innsbruck 1977, p. 471. Cf. *E.-W. Böckenförde*, *Kreuze (Kruzifixe) in Gerichtssälen? Zum Verständnis von staatlicher Selbstdarstellung und religiös weltanschaulicher Neutralität des Staates*, in: *ZevKR* 20 (1975), pp. 119-147.

<sup>22</sup> Cf. in particular art. 17 para. 2 and 3 StGG on private schools and homeschooling.

<sup>23</sup> *Gesetz, wodurch grundsätzliche Bestimmungen zum Verhältniß der Schule zur Kirche erlassen werden*, RGBL. 48/1868.

<sup>24</sup> *Kalb/Potz/Schinkele* (footnote 6) p. 341.

<sup>25</sup> *Bundesgesetz betreffend den Religionsunterricht in der Schule*, BGBl. Nr. 190/1949.

“Berufsschulen” in the federal states Tyrol and Vorarlberg as well as “Berufsschulen” concerning agriculture and forestry in the whole Republic of Austria, academies for social work, and institutions for training of teachers. Except for the federal states Tyrol and Vorarlberg, religious instruction at “Berufsschulen” is just an optional subject (§ 1 para 3 RelUG). This means that pupils have to declare at the beginning of the school year, if they want to attend religious instruction. Marks of optional subjects have no influence on the school report.

These regulations apply to public schools and private schools with public status. Thus, religious instruction has to be provided for all legally recognized churches or religious communities also at private schools with public status, even if the relevant school has a religious or philosophical orientation which runs contrary to that. This becomes particularly striking if the school is operated by a registered religious community which is itself not a “legally recognized” one. This curious effect is alleviated by the freedom of the school operator to set up certain conditions for pupils to attend the school (e.g. adhering to a certain confession).

Religious instruction is related to the fundamental right of both individual and collective religious freedom and to the parents’ right to education in Art. 2 1<sup>st</sup> protocol ECHR. However, under Art. 17 para 4 StGG and § 1 RelUG, religious instruction in public schools is limited to legally recognized churches and religious communities. In particular, the fact that the newly created group of registered religious communities are thus excluded once again raises doubts as to the justification of this differential treatment.<sup>26</sup> For pupils adhering to the relevant recognized church or religious community, the relevant religious instruction is compulsory, but opting out is possible. The annual school reports must contain a note on whether or not the pupil in question adheres to a religious denomination and if yes, to which one.<sup>27</sup>

The relevant legally recognized church or religious community is responsible for the organisation, implementation and control of religious education in schools, but the state has the right to supervise it by public control institutions (school inspectors) in organisational and school disciplinary matters. According to § 2 RelUG, the state may determine and change the amount of weekly lessons in religious instruction only after hearing the affected confessions. The churches and religious communities have to formulate a curriculum for each level of education considering the amount of weekly lessons. The curriculum has to be sent to the minister for education who has to publish it. This has only declaratory significance, as state approval is not required.<sup>28</sup> Material used in religious instruction is selected by the relevant church or religious community, the only restriction they have to obey is that the contents of school books must not be contrary to the principles of civic education. As such the material does not require approval by the State, a refusal by the relevant religious community to abide by these precepts could ultimately entail as a consequence that its privileged status as a legally recognized religious community is put into question.<sup>29</sup> Recent problems with some of

---

<sup>26</sup> Cf. *Kalb/Potz/Schinkele* (footnote ) pp. 352 sq; *B. Schinkele*, Religionsunterricht – Privileg der Kirchen und Religionsgesellschaften?, in: *A. Rinnerthaler* (ed.), *Historische und rechtliche Aspekte des Religionsunterrichts*, Frankfurt 2004, p. 191.

<sup>27</sup> § 3 para 2 of the Decree on School Reports (Zeugnisformularverordnung) BGBl. 415/1989.

<sup>28</sup> *Potz* (footnote 21), p. 244.

<sup>29</sup> Cf. *Schinkele* (footnote 26), pp. 204-205.

the material used in Islamic religious instruction could be settled, as the Islamic Religious Community undertook a thorough revision of the material and eliminated the problematic contents. School books for religious education are included in the federal school book programme and are thus financed by the state.

As the substance of confessional religious instruction as such is an internal matter of the relevant church or religious community, the state cannot demand to include information on other religions in religious instruction. On the other hand, it cannot prohibit cooperation between different churches on interconfessional religious instruction. The state must not constrain ecumenical activities of churches. Three Protestant churches<sup>30</sup> – the Lutheran Church, the Reformed Church, and the Methodist Church – as well as the different Orthodox churches cooperate to offer a common religious instruction to pupils of their confession. In principle, however, the State does not allow members of one legally recognised church or religious community to attend religious instruction of another confession.<sup>31</sup> Yet in case the two religious communities involved would agree to such a switch, this prohibition raises doubts with regard to the constitutional guarantees of religious freedom.

Pupils without confession or those who are members of registered religious communities are allowed to attend confessional religious instruction of a legally recognized church or religious community. They have to apply for this, and the relevant teacher for religious instruction has to agree to that. For these pupils, religious instruction is an optional subject, which is listed as such in the school reports. Under certain conditions it is also possible for pupils who are not members of the relevant confession to choose religious instruction as a subject at the final exams.<sup>32</sup>

With regard to the Roman Catholic Church, the general regime for confessional religious instruction is complemented by specific regulations. In 1933, in the times of “political catholicism”, the Austrian government and the Holy See signed a concordat which remained in force after the Second World War and is still partly relevant today. The part on schooling, however, was replaced in 1962, when a new treaty between the Republic of Austria and the Holy See concerning school education<sup>33</sup> was concluded. § 1 of the treaty provides that the Catholic Church has the right to give religious instruction to all Catholic pupils at public schools. The amount of lessons, generally two hours per week, should stay the same as in 1962. If the state wants to reduce the number of lessons, it has to negotiate with the Holy See to find an amicable solution. The treaty defines religious instruction as a compulsory subject for all Catholic pupils at all public schools, but opting out is not longer excluded as it had been under the 1933 concordat. Although the church is responsible for religious instruction, it is controlled by the public school authorities, but the church has the right to appoint persons (school supervisors) who control religious education in schools and are paid by the state.

---

<sup>30</sup> Übereinkommen zum Religionsunterricht zwischen der Methodistenkirche und den Evangelischen Kirchen A.u.H.B. in Österreich, GZ 11.690/13-KAc/03.

<sup>31</sup> Cf. GZ BMBWK-10.014/2-III/3/2007, Rundschreiben Nr. 9/2006.

<sup>32</sup> Durchführungserlass BMUKK GZ 10.014/2-III/3/2007.

<sup>33</sup> Vertrag vom 9. Juli 1962, BGBl. Nr. 273, zwischen dem Heiligen Stuhl und der Republik Österreich zur Regelung von mit dem Schulwesen zusammenhängenden Fragen (School Treaty).

Compared with the general power of the state to change weekly lessons for confessional instruction, the respective guarantee for the Catholic Church could be seen as an unjustified privilege. Under the principle of equal treatment, the amount of weekly lessons offered by the state should be the same for all legally recognized churches and religious communities. Thus, the Catholic Church would have to agree to a reduction of weekly lessons before it may become effective for other churches and religious communities under § 2 para 2 RelUG. This understanding is also consistent with § 1 para 2 III Protestantengesetz (law on the Protestant Church),<sup>34</sup> which is understood in the sense that all acts of legislation and administration concerning the Protestant churches must not be less favourable than those regarding any other legally recognized churches and religious communities (“Most favourable” principle).

If less than half of the pupils of a class attend religious instruction of one confession, it is possible to put them together with pupils of the same confession of other classes or schools, as long as this is justifiable in terms of school organisation and confessional education (§ 7a para 1 RelUG) in order to avoid a reduction of weekly lessons. The law stipulates reductions of the amount of weekly lessons depending on the number of pupils who attend religious instruction of the relevant confession. If the number of pupils is less than three, the State does not provide for religious instruction at all. However, the relevant religious community can make up for these reductions by substituting the expenses for the teachers, so that religious instruction can be offered to the extent normally provided for.

#### *b) Teachers of Confessional Education*

Teachers for confessional instruction at public schools are either employed by the state or appointed by a legally recognized church or religious community (§ 3 RelUG). Upon application by the latter, the relevant authority (federation or Land) determines the number of posts for state employed teachers. Although teachers employed by the confessions have no employment relation to a public entity, they are also paid by the federation or the Länder, respectively (§ 6 RelUG).

Teachers of either category have to follow the curriculum designed by the relevant church or religious community as well as the precepts and directives of the confession in question, as far as the substance of their teaching is concerned. Apart from that, all teachers for confessional instruction are subject to the general regulations of school law. The church or religious community appoints inspectors for the direct control of religious instruction. A certain number of these inspectors are paid by the state, although there is no relationship of employment to any public administration entity. The number of relevant posts is determined by the government on application by the relevant religious community (§ 7c RelUG).

Teachers employed by a legally recognized church or religious community are subject to the disciplinary power of their church or religious community only. The public school administration cannot inflict disciplinary measures on them. The Constitutional Court has ruled that such teachers are subject to the substantive disciplinary rules of the school laws, but public school administration can only report violations of those duties to the confessional

---

<sup>34</sup> Bundesgesetz vom 6. Juli 1961 über äußere Rechtsverhältnisse der evangelischen Kirche, BGBl. Nr. 182/1961.



school authorities.<sup>35</sup> Disciplinary sanctions are at the discretion of the relevant church or religious community and follow their internal law. Public school authorities could only ban a teacher from classes, if the general order at school cannot be maintained otherwise.

According to § 4 para 2 RelUG, persons may be employed by the state as teachers for confessional education only if they have been declared competent and authorized by the relevant church or religious community (“*missio canonica*” with respect to the Catholic Church). Withholding or withdrawing confessional authorization is a matter of self-determination of the relevant religious community which is covered by the fundamental right to (collective) freedom of religion. Only if a withdrawal of authorization by the confessional authority is arbitrary or *contra bonos mores* may the labour courts exert control. In case of a (valid) withdrawal, the person concerned may not serve as confessional teacher any more.<sup>36</sup> According to § 7b RelUG, these rules on the requirement of confessional authorization also apply to teachers of religious instruction in private schools (whether they have public status or not).

## 2. Ethics

Confessional religious instruction is compulsory for all pupils adhering to a legally recognized church or religious community. If they opt out, there is no compulsory substitute. However, since the school year 1997/98 a pilot project at some schools provides for ethics as an alternative subject which is compulsory for pupils who do not attend confessional religious instruction. At the moment, 194 schools in Austria take part in this pilot project, and about 15,000 pupils attend ethics.<sup>37</sup> The response is predominantly positive; initial fears, that the alternative subject could harm traditional religious instruction by increasing the number of pupils choosing to opt out, have not proved justified.<sup>38</sup> However, due to restraints on public budgets, it is not planned to expand the pilot project to more schools. Hence, it is not very likely that in the near future, ethics will be established as a compulsory substitute for religious instruction in every school.

At present, teachers for religious instruction are also teachers for ethics, as they are regarded as qualified because of their theological studies. This might appear to be problematic because of the allegiance of those teachers to their own church or religious community. If ethics were to be established as a compulsory substitute to religious education in the whole country, the training for ethics teachers would have to be made independent from a particular church or religious community.

---

<sup>35</sup> VfSlg. 2507/1953.

<sup>36</sup> Cf. G. Huber, *Der Religionslehrer im Spannungsfeld zwischen kirchlichem und staatlichem Recht*, Linz 1994.

<sup>37</sup> Datas by the Ministry of Education (Bundesministerium für Unterricht, Kunst und Kultur).

<sup>38</sup> See A. Bucher, *Ethikunterricht in Österreich: noch einiges unklar*, in: Rinnerthaler (ed.) (footnote 26), p. 297 (at pp. 306; *id.*, *Ethikunterricht in Österreich. Bericht der wissenschaftlichen Evaluation der Schulversuche “Ethikunterricht”*, Innsbruck 2001, pp. 171-174.

### 3. *Instruction about Religions; Religion within the Framework of Classes*

Education about religions besides or instead of confessional religious instruction is not explicitly envisaged under Austrian law. Yet it may figure among the topics of other subjects, such as history or geography. The relevant materials may be in contrast with the religious and philosophical views of pupils. Of course, teachers also have their own religious and philosophical convictions, and in principle, they are free to express them on the basis of their respective fundamental rights, as long as the objectives of public education are not affected. This can also lead to a tension between the fundamental freedoms of teachers on the one side and the states' neutrality towards religions as well as the parents' right according to Art. 2 1<sup>st</sup> protocol ECHR on the other side.

As the European Court of Human Rights has ruled in the *Kjeldsen Case*,<sup>39</sup> subjects in public schools may include direct or indirect religious aspects as long as they are taught in an objective, critical and pluralistic way. This is in accordance with the aims of schooling mentioned in Art. 14 para 5a B-VG. It allows, e.g., for lessons about the history of religions or philosophical models in history or philosophy classes. Parents do not have the right to change the curriculum so that it fits their convictions. It can be inferred from another judgement concerning the freedom of expression of a teacher that this freedom may be restricted if the teacher seeks to indoctrinate pupils.<sup>40</sup> Consequently, confessional religious topics pertain to the subject of confessional religious instruction, and if a teacher of another subject abuses his position by imposing his or her religious or philosophical views, measures can be taken.

## III. RELIGIOUSLY MOTIVATED BEHAVIOUR IN PUBLIC SCHOOLS

### 1. *Religious Symbols at Schools*

Under § 2b para 1 RelUG, a cross has to be installed in all classrooms of public schools or private schools with public status where the majority of pupils are Christians. According to point 2.b) of the Protocol the School Treaty, any changes of this regulation require the consent of the Holy See. Similar provisions apply to public kindergartens.

In Austria, the judgement of the ECtHR in the case of *Lautsi v. Italy* (3.11.2009, appl. No. 30814/06) has triggered an intense discussion on the constitutionality of these regulations. Some parents and private institutions have brought the issue before the courts, the cases are still pending. Although the *Lautsi* judgement does not take into consideration the concept of inclusive neutrality relevant for some central European countries including Austria, it gives rise to reflection on some problematic aspects.

Following the concept of inclusive neutrality, religious symbols in schools seem admissible as long as they do not amount to an indoctrination of pupils. With respect to the right of freedom of religion, however, a tension between the positive and negative dimension of this fundamental right can be perceived. From the perspective of positive religious freedom, religious symbols at schools can be interpreted as beneficial for pupils adhering to

---

<sup>39</sup> See above footnote 5.

<sup>40</sup> ECtHR, *Vogt v. Germany*, judgment of 29 September 1995, appl. No. 17851/91.

the relevant religion, as well as recognition of their parents' right under Art. 2 1<sup>st</sup> Protocol ECHR, that their religious convictions be respected in the public education of their children.<sup>41</sup> For pupils not adhering to the relevant religion, the mere presence of a religious symbol in the classroom generally represents only a very marginal interference into their negative freedom of religion. In specific cases which might occur, a solution balancing positive and negative freedom of religion would have to be found.<sup>42</sup>

However, from the fundamental rights perspective just outlined, the legal privilege for the Christian cross is hard to justify. The frequent claim, according to which the cross is a cultural symbol, cannot take away its religious meaning which calls for equal treatment under Article 14 in conjunction with Art 9 of the ECHR. Thus, regarding the positive dimension of religious freedom, there are no reasons why adherents of other religions should not equally enjoy the benefit from symbols of their own religion in the classroom. On the contrary: The acceptance of other religious symbols in classrooms would support tolerance which figures among the main constitutional objectives for public education. Moreover, a plurality of religious symbols in the classroom would also reduce their susceptibility of interfering with the negative religious freedom of pupils who do not adhere to any of the religions represented, as none of these symbols would be in a dominant position. As a token of "inclusive neutrality", a religious symbol at public schools must nevertheless remain within the limits of religious neutrality as such, and any exclusivity is hard to distinguish from an identification of the state with the religion in question.<sup>43</sup>

The majority criterion adopted by Austrian legislation seems problematic as well. First of all, it seems generally inappropriate in matters of fundamental rights, and with respect to religious symbols, it is not suitable to relieve tensions between the positive and negative dimensions of religious freedom. In addition, the majority criterion applies to the number of Christian pupils at the whole school and not in the particular classes. Even if only a minority or none of the pupils of a class are Christians, a cross has to be fixed in the classroom, as long as the majority of pupils at the school are Christians. If there are no Christian pupils in the class, a cross cannot be seen as a benefit for any of them, and it becomes more likely that the latent interference with the negative religious freedom of non-Christians materializes, as it cannot be outweighed any more against any of the pupils' positive religious freedom.

Opening the existing regulations to other religious symbols would not require the consent of the Holy See, as the guarantee for the Christian cross would remain untouched.

## 2. *Religious Garments*

Encouraged by the legislation against religious garments in some European countries, right wing parties have recently tried to start a discussion about headscarfs in public places in Austria. Yet this has not become a big issue. There is a rather broad consensus that

---

<sup>41</sup> *H. Kalb/R. Potz/B. Schinkele*, *Das Kreuz in Klassenzimmer und Gerichtssaal*, Freistadt 1992, p. 67.

<sup>42</sup> *Kalb/Potz/Schinkele* (footnote 6), p. 374.

<sup>43</sup> It is revealing that § 19 para 3 of the Burgenland law on kindergartens (*Kinderbildungs - und -betreuungsgesetz*, LGBl. no. 7/2009) counts the cross among the "state symbols" which have to be mounted in the educational workspace, along with the federal and provincial coats of arms and the portrait of the Federal President.

headscarves and other religious garments fall within the ambit of the fundamental right of religious freedom and are therefore protected by Art 14 StGG and Art 9 ECHR.

Thus, in principle, teachers may wear an Islamic headscarf in school, but it is also possible for the school authority to forbid this, if it is used in an indoctrinating or provocative way. So far, there has not been any case in which a teacher was reprimanded because of his or her religious garment. As to the pupils, the headmaster forbade a Muslim girl to wear a headscarf at a secondary school in Linz, Upper Austria. However, the educational authority regarded that as a violation of religious freedom and lifted the ban. The minister of education clarified in a general order,<sup>44</sup> that wearing headscarfs by Muslim women and girls is based on a religious precept and is therefore part of the individual's religious freedom, which is protected by Art 14 StGG and Art 9 ECHR. The laws on school education do not in any way restrict these constitutional guarantees, so that any ban of headscarfs from schools would be contrary to the law.

### *3. The Possibility of a Benediction of School Buildings*

As public schools are operated by the state, the principle of neutrality towards all churches and religious communities as well as philosophical views must be respected. A benediction of public buildings would be a violation of this principle, as the state would thereby identify with one specific religion. Private schools are not bound by this neutrality principle. Therefore, a benediction of private school buildings poses no problem.

### *4. Religious Activities*

According to § 2a RelUG, teachers and pupils are free to attend religious school services organized by legally recognized churches or religious communities for special occasions such as the beginning and the end of the school year. The same goes for religious exercises or other religious events organized in connection with religious instruction.<sup>45</sup> Neither pupils nor teachers have the obligation to join these religious activities, but § 2a para 2 RelUG states that children who want to participate in religious exercises or events are released from classes “to the extent granted so far.” This wording reflects a similar provision in the School Treaty with the Holy See and intends to extend this “privilege” to all legally recognized churches and communities for reasons of equal treatment. Thus, in the end, any cutback of this generalized regulation would again presuppose the consent of the Catholic Church.

Religious occasions which do not relate to the activities of legally recognized churches or religious communities at school may count as significant reasons for which individual pupils can apply for authorization to take leave (cf. § 45 para 4 SchUG).

---

<sup>44</sup> Decree of 23.6.2004, ZI. 20.501/3-III/3/2004.

<sup>45</sup> See also the last sentence in § 46 para 2 of the Law on School Instruction (Schulunterrichtsgesetz), BGBl. Nr. 472/1986.

For many years, prayers at school were mandatory according to a ministerial order dating from 1946.<sup>46</sup> Since it has been repealed in 1993, there seems to be no more room for school prayers beyond § 2a RelUG.

#### IV. OPTING OUT OF SCHOOL OBLIGATIONS FOR RELIGIOUS REASONS

##### *1. Religious Holidays*

The federal law on schooling time (“Schulzeitgesetz”)<sup>47</sup> provides for a number of religious holidays for different confessions in public schools and private schools with public status. According to § 2 para 4 SchZG, schools are closed on Sundays and public holidays. Most public holidays mentioned in the law about holidays (Feiertagsruhegesetz)<sup>48</sup> are Catholic feast days, e.g. All Saints’ Day, Ascension Day, Corpus Christi. In addition to these days, All Souls’ Day and the feast of the patron of the particular Land are days off school. Likewise, the days around Christmas (from Dec. 24<sup>th</sup> until Jan. 6<sup>th</sup>), around Easter (from Saturday before Palm Sunday until Tuesday after Easter Sunday) and around Pentecost (from Saturday until Tuesday) are holidays.

Besides these general regulations related to Catholic feasts, there are some extensions for pupils of other confessions in § 13 para 1 and 2 SchZG. Only pupils who are members of the Lutheran and Reformed protestant church do not have to attend school on Reformation Day (Oct. 31<sup>st</sup>). Jewish children can stay at home on the two first and the two last days of Pesah, on the two days of Schavuot, on the two days of the New Year’s feast, on Yom Kippur as well as the two first and the two last days of the Feast of Tabernacles.

For children whose religion does not allow them to go to school or to do certain activities on Saturdays, § 13 para 3 SchZG provides an exception. The headmaster has to release them from school on these days. However, the degree to which this release has to be granted is determined by the ministry of education on application by the legally recognized churches and religious communities, or, with respect to other religious communities, by the pupils’ parents. In the latter case, the parents have to substantiate that this corresponds to a general requirement of their religion.

Based on this regulation, an order of the ministry of education provides that parents of Jewish pupils and Seventh-Day-Adventists can demand from the headmaster to release their children from school attendance on Saturdays.<sup>49</sup> Likewise, such release has to be granted to Muslim pupils with regard to Id-al-Fitr at the end of Ramadan and to Id-al-Adha,<sup>50</sup> as well as to Orthodox pupils with regard to Christian feasts according to the Orthodox calendar.<sup>51</sup>

---

<sup>46</sup> ZI. 21054/III-10/46.

<sup>47</sup> Bundesgesetz über die Unterrichtszeit an den im Schulorganisationsgesetz geregelten Schularten, BGBl. Nr. 77/1985.

<sup>48</sup> Feiertagsruhegesetz, BGBl. Nr. 153/1957.

<sup>49</sup> Durchführungserlass zum Religionsunterricht (Decree on Implementation of Religious Instruction) BMUKK-10.014/2-III/3/2007.

<sup>50</sup> BMUKK-21.001/001-III/3/2009.

<sup>51</sup> BMUKK-21.001/0004-III/3/2010.

Pupils who did not participate in classes because of religious holidays have to catch up with what has been missed on their own. Teachers do not have to consider missing knowledge caused by school absence at religious holidays in their grading (§ 13 para 5 SchZG).

## 2. *Opting Out of Religious Instruction*

Although § 1 RelUG defines confessional religious instruction as a compulsory subject during the whole school career, opting out is guaranteed. It would be a violation of religious freedom, if pupils had no opportunity to opt out of a denominational subject.<sup>52</sup> Therefore § 1 para 2 RelUG allows pupils over the age of 14 to declare in written form that they do not want to attend confessional instruction. For pupils under 14 years, parents can do this for their children. As long as the parents are married, both of them have to agree that the child shall no longer attend religious education in school (§ 2 para. 2 of the law on religious education of children<sup>53</sup>).

The written declaration has to be sent to the headmaster of the school during the first five days of the school year.<sup>54</sup> The headmaster has to inform the relevant teacher. The declaration can only be made for the entire school year. If a pupil does not start school at the beginning of the school year, the deadline ends ten days after the start. In case of a change of school during a school year, a declaration applies automatically to the new school, but opting out just for the remaining school year at the new school is not allowed<sup>55</sup>. The only case in which it is possible to stop attending religious instruction during the school year is when the pupil leaves the church.<sup>56</sup>

As there is no alternative subject for pupils who do not attend religious instruction, pupils who are not members of a legally recognized church or religious community as well as pupils who opted out of confessional instruction have more spare time than others. Of course this is a reason for many pupils to opt out of confessional instruction. However, if ethics is offered as an alternative compulsory subject, this effect decreases significantly.<sup>57</sup>

## 3. *Opting Out of other Subjects*

Apart from confessional instruction, no subject may be opted out. Neither biology nor other natural science subjects nor instruction in gymnastics can be avoided by pupils because of a conflicting religious or philosophical conviction. This does not violate Art 2 1<sup>st</sup> protocol ECHR as long as no religious or philosophical indoctrination takes place. Parents do not have the right to demand changes in the curriculum according to their religious or philosophical views. In the last resort, they can opt for home-schooling.

---

<sup>52</sup> See ECtHR, *Bernard vs. Luxembourg*, judgement of 8 September 1993, appl. no. 17187/90.

<sup>53</sup> Bundesgesetz über die religiöse Kindererziehung 1985, BGBl Nr. 155/1985.

<sup>54</sup> Rundschreiben 2006/9, GZ 10.014/0001-III/3/200612.

<sup>55</sup> See Durchführungserlass zum Religionsunterricht BMUKK-10.014/2-III/3/2004.

<sup>56</sup> Cf. S. Schima, Die wichtigsten religionsrechtlichen Regelungen des Bundesrechts und des Landesrechts, Jahrgang 2006, in: öarr 2008, 127.

<sup>57</sup> See above footnote 38.

The only legitimate reason not to attend instruction in gymnastics is that of health problems. In Vienna, however, Muslim girls have the possibility to attend swimming lessons in a certain indoor swimming pool (“Jörgerbad”) which is closed for male visitors once a week. This swimming lesson is accepted as a swimming lesson of the school.

#### *4. Religiously Motivated Home-schooling*

The school laws in Austria offer the possibility for parents to educate their children by themselves at home without attending school (home-schooling). This is laid down basically in Art. 17 para 3 StGG and in detail in § 11 SchPflG para 2-4 Schulpflichtgesetz (SchPflG – Law on Compulsory Schooling).<sup>58</sup>

Art.17 para 3 StGG excludes any kind of governmental influence on private, non-school-organized, instruction at home. The freedom of home-schooling is granted at every theoretical field of knowledge.<sup>59</sup> Likewise, any qualification requirements by the state are excluded.<sup>60</sup> But this does not mean that compulsory education can be avoided by homeschooling. Only the framework of home instruction is free of public influence. According to § 11 SchPflG, the requirement of compulsory schooling can be fulfilled by home-schooling only if the latter has the same quality as the instruction offered at public schools.

Before the beginning of the school year parents have to announce to the district school board (“Bezirksschulrat”) that they want to educate their child by themselves. Within four weeks, the Bezirksschulrat is authorized to forbid instruction at home if it is most likely that the required equality of home-schooling to public schooling is not given. The success of home schooling has to be proven annually by taking an examination at a corresponding public school, to see if the goals of compulsory schooling have been reached.

It is not possible to indicate the extent of religious motivation within the total amount of home-schooling cases, because parents do not have to give any reasons for their decision to instruct their child at home.

The number of pupils who do not attend public schools is not registered nationwide. According to a survey<sup>61</sup> conducted by the federal ministry of education among the federal education authorities for the school year 2008/09, 1,415 children were instructed at home, which is approximately 0.17 per cent of all children between the age of 6 and 14.<sup>62</sup>

---

<sup>58</sup> Bundesgesetz über die Schulpflicht, BGBl. Nr. 76/1985.

<sup>59</sup> Decision of the Constitutional Court VfSlg. 4990/1965.

<sup>60</sup> VfSlg. 2670/1954.

<sup>61</sup> Report by the minister of education to Parliament (Anfragebeantwortung, 2995/AB XXIV.GP).

<sup>62</sup> All data by Statistik Austria.