Church Autonomy in Austria

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I. Introduction

Autonomy respectively the right to self-determination of churches and religious societies is expressly embodied in Art 15 of the Constitutional Act on the Fundamental Rights of Citizens 1867 (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger - StGG) which reads as follows: „“Every legally recognized church or religious society has the right to communal public worship, to order and manage independently its internal affairs, to remain in possession of and continue to enjoy the fruits of its institutions, foundations and funds intended for the purpose of worship, education and welfare, they are, however, subject to the general laws of the state“.

With that Basic Act on Fundamental Rights an important initial step towards a denominationally neutral system in ecclesiastical matters has been done. In this context one has to stress that as an Austrian specificity the emancipation of religious minorities has been a question of multi-confessionality. Alongside the predominant Catholic Church and the Protestant Church there were a number of Orthodox and Jewish Communities.

Since the StGG 1867 the Austrian legal order has been characterized by a strict differentiation between the position of the legally recognized churches and religious societies on the one hand and those which do not enjoy public-law status on the other hand. Likewise, as far as the individual element of religious freedom is concerned, the right to manifest one’s religi-

on in public was only conferred - indirectly - upon the members of the first mentioned group, whereas the followers of other religious communities were restricted to domestic respectively private practice of their convictions.

The Treaty of St. Germain did expand the right to freely exercise faiths, religions or denomonations of every kind in public as well as in private to every inhabitant in Austria, thus to the adherents of not-recognized religious communities insofar as their exercise is not incompatible with public order or morality. However, on the corporative level, corresponding provisions were not implemented, and that is why a considerable unbalance has been established between these two categories of religious communities. Though this deficiency has been diminished by the Federal Law concerning the Legal Personality of Registered Religious Communities (RRBG) enacted in January 1998 (BGBl I 1998/19), in some respects problems with which we will deal below (VI.) persist up to now.

For a long time the constitutional guarantee embodied in Art 15 StGG has been considered the *lex regia (J. Heckel)* of the Austrian law on religion (*Staatskirchenrech*t). Though the historical legislator already stated in 1874 (*Motivenbericht* to the Act on Recognition) that the purpose of this Act was to realize the freedom of religion and conscience as well as the principle of parity of the confessions and thus accentuated the unity of both elements of religious freedom, the corporative one has been predominant in the Middle-European law. It was, however, combined with the state’s right of supervision within the system of the so-called „*Staatskirchenhoheit*“.

Since the Second World War the idea of human rights has been generally emphasized, and that is why religious freedom as a right of an individual became increasingly prominent. Such a

development is reflected in the ECHR and the other instruments on human rights, for instance the UN-Pacts and the CSCE-documents. As an inevitable consequence of this development the significance of Art 15 StGG has been put into question (for more details see below).

II. Religious Freedom as an „Aggregated Law on Fundamental Rights“

The „catalogue“ of Austrian fundamental rights is characterized by the fact that they are embodied in Constitutional Acts and Treaties under International Law (Art 14, Art 15 StGG, Treaty of St. Germain, Art 9 ECHR) that date from several historical epochs with a different state-church-relationship and a different apprehension of fundamental rights. That is an Austrian specificity in comparison with other European countries. The most comprehensive protection of religious freedom became part of the constitutional system in 1958 by means of the ECHR. As a result of this gradual development the single constitutional provisions are overlaying and overlapping each other. That is why they have to be summarized by means of a synopsis of all relevant guarantees amounting to one „aggregated law on religious freedom“.

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

tioned above can be victims of an alleged violation of Art 9 ECHR themselves.

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

III. Traditional interpretation of Art 15 StGG

As a consequence of the fundamental basis in Art 15 StGG the law on religion traditionally has been characterized by a strict distinction between the individual and corporative field. The main point of reference for constructing this fundamental guarantee is the term „*internal affairs*“. In Austria for a long time two main positions - with differentiations in details - were held concerning church autonomy that need not be described in detail within this report, but should shortly be mentioned.

1 - a traditional prevailing view accentuating the continuity of the Austrian law on religion since 1867 (with various modifications)

2 - the so-called *Einbauthese* which considers the churches to be genuine self-governing bodies (autonomous corporations)

The last mentioned theory has not been accepted by the courts.

These positions are rather different, the fact, however, that the self-understanding of the community concerned is of central significance is common to all, though not to the same degree. From the point of view of the state it is accepted that the religious communities are representing prepositive factors.

IV. Actual construction of Art 15 StGG

To an increasing degree the traditional apprehension is going to subside and will be replaced by another approach. It has to be stressed that the individual and corporative element of religious freedom are closely linked. Thereby the institutional guarantee appears as a necessary emanation of the human right of religious freedom, essentially a fundamental status in a democratic secular state ruled by law. The corporative field, however, has a complementary (instrumentary) function, that means the fundamental rights of churches and religious societies are warranted primarily for the individuals' sake, in order to protect their religious interests effectively.

Consequently - not at least with regard to the new legal situation on account of the RRBG - there arises the crucial issue, whether Art 15 StGG still has an own significance, though with another systematical foundation or if it has been deprived of its subject matter.

Thereby one also has to take into consideration that Art 15 StGG represents a specific guarantee of the general principle of equality, in both of its forms, as formal and substantial parity, being expressed in the wording, „*every* (jede) recognised church or religious community" orders and manages independently *its* internal affairs.

Trying to find out the **actual meaning of Art 15 StGG** one has to take into account four main factors that are of great influence.

- The StGG dates from an epoch with a completely different state and church relationship.
- The constitutional reality has changed significantly.
- Concerning the legal theoretical respectively dogmatical approach the way how to construct fundamental rights has been modified essentially.
- In recent time ordinary law - implementing the basic law directives - has been amended as well, especially owing to the RRBG.

Due to these factors an actual definition of the ecclesiastical right of self-determination has to be done taking into account the pluralistic-democratic state ruled by law.

The main point of reference for the legal and social status of religious communities, for their **right to self-determination** is its **self-understanding** which is to be derived from the characteristic features, the special functions of each church or religious society. These criteria must be defined by the holders of the fundamental right themselves according to their genuine mandate in pursuance of the principle of substantial parity. Thus the self-understanding of the religious community co-determines the scope of the fundamantal right for the secular sphere. This concept has been worked out by the doctrine and has been accepted by the Constitutional Court as well as by the Supreme Court.

Beyond a certain unalterable core the self-identity is to be understood in a dynamic way und insofar it is variable. It is the business of the competent church authority to define

this self-understanding. If the ambit of the fundamental right depends on it the courts or the administrative bodies have to lodge an inquiry with the competent authority.

The self-understanding refers to all activities carried out in accordance with the true mandate, the central tenets, and the special tasks of a certain community. These actions have to be denominationally indicated and they must be - in any way - recognizable as such, which is to be understood in a broad sense.

Regarding the individual religious freedom the ECHR has argued that the right mentioned in Art 9 ECHR protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of a religion or belief in a generally recognized form. In an other case the court states that the attitude must actually express the believe.

Though one might criticize this line of jurisdiction to be too narrow, we can use it as an indication for applying it to the corporative element.

The term „**internal affairs**“ has undergone a considerable development since 1867. It is historically rooted, based on the *„iura in sacra“* of the absolustic „*Staatskirchentum*“. Like the other constitutional terms, however, it is not determined once and for all but to a certain extent undecided in order to be capable of solving contemporary problems. Fundamental rights are representing responses to actual experiences of injustice and thus they have to take into account the needs of the time. Therefore constitutional terms in general, but especially fundamental rights are characterized by unconcise, vague wordings, that is why interpretation plays a most important role.

The term „ to order“ refers to acts of legislation, the term „to manage“ indicates measures of organisation and administration. According to the doctrine and the courts’ decisions (for more details see below VII.) the right of self-determination usually covers things as dogma, teaching, religious service, own legislation and jurisdiction, disciplinary measures, appointment to and dismissal from a church office, conditions which are be be complied with by employees, administration of church property.

Drawing a fairly bright line between „internal affairs“ and „external affairs“ seems to be impossible. That is why a taxative enumeration of internal affairs cannot be given, neither in general nor regarding a single community.

The self-understanding of the religious communities, however, is not the only decisive factor. The state itself has to formulate its self-understanding deduced from its obligation to take care of the public weal.

The next step, therefore, is to establishing a relation to the reservation clause reading as follows, „ .... but, like any association, is subject to the **general laws of the state**“. The legal reservation in Art. 15 StGG represents a restriction clause *sui generis*. Contrary to the other constitutional requirements of a specific enactment (formelle Gesetzesvorbehalte)it has to be understood as a material one implying, therefore, a **process of weighing the legal merits**.

Due to the fact that the ecclestiastical law of self-determination is ensuing directly from the human right of religious freedom a comprehensive view of all religious guarantees is to be done in pursuance of the above mentioned approach. With the help of a harmonizing synopsis an „aggregated norm“ on

church autonomy respectively ecclesiastical self-determination is to be found. Even the different reservation clauses in Art 9 ECHR respectively Art 15 StGG are no hindrance for such a procedure. Though the wording of both reservation clauses are rather different, their subject matter seems to be quite similar. Both legal reservations might amount to the same barriers. That is the way how to attain a genuine concordance, not only a conclusion free of contradictions in consequence of the most favoured principle (Art 60 ECHR). Thus there is no need for actualizing it.

In the innermost core of church affairs restrictions can only occur on account of inherent limitations or as a result of wheighing up concurring legal positions based on fundamental rights. The more these central fields are left and the church activities are coming into touch with the secular sphere, in addition to constitutional provisions, ordinary law is representing potential barriers as well, with other words, the general laws of the state are coming into effect. In some way we can speak of an „open system“ within that one even must not deter from a circular determination. Limitations ensueing from the „general laws of the state“ are to be actualized in a concrete case if an object of the legal protection in conflict with the right of self-determination is of equal or higher value than church autonomy. In that case an ordinary law creates impermissible barriers to a church’s right of self-determination. By means of a reciprocal action, church autonomy and the other legal position involved are determinating and confining each other taking into account the interdependence of the fundamental rights and the unity of the legal order.

The procedure of wheighing the legal merits is characteristic for the differentiated, substantial legal reservations embodied in the ECHR (Art 8-11). The most important instrumentarium available to such an approach is the principle of proportionality which implies wheighing the legal and factual merits in every single case. Thereby the means applied are to be put into relation with the aims pursued.

This **new type of restriction** clause requires a reasonable contemplation test according to the criteria of aptitude, necessity and proportionality in a narrower sense. In pursuance of the ultima-ratio-principle the least oppressive consequence has to be taken in order to pursue the aim intended („ pressing social need“).

The **principle of proportionality** can be considered to be the most important instrument constructing fundamental rights as well as an unchallenged principle of the Law of the European Union. It constitutes an elementary principle of justice permeating the legal order as a comprehensive unity. The idea of subsidiarity is also encompassed in this principle, whereby the protection of the individual’s fundamental rights is assessed to be of special value in comparison to public interests.

That is the way how **to establish a reasonable appropriate coordination between the freedom which is to be protected - in our context the church autonomy - and the legal provision restricting it in a concrete case**. In accordance with the principle of proportionality a fair balance between the conflicting legal positions concerned is to be found. That is how the extent of the fundamental right is to be determined and an ordinary law can be qualified as a „general law of the state“.

Primarily it is incumbent upon the legislator to fulfil this task, but to a lower degree upon the judicial and administrative bodies as well. Insofar Art 15 StGG can be considered to be a constitutional provision immediately applicable by executive organs.

One has to stress hat this discretion is neither an uncontrolled or an unqualified one. A detailed argumentation is required and the decisions are subject to the sequence of courts as well as to the control of the Constitutional Court and the High Administrative Court.

Of course, within such procedures certain assessments are made whereby a scope of discretion for acting is left to the legislator and - on a third level - to a lower degree to the judicial and administrative bodies. The less concrete and tangible the formulation of the provision is, the greater the legislator’s discretion for realizing his ideas within the constitutionally given standards. Consequently there is no only solution consistent with the constitution.

In several cases the legislator has used his margin of appreciation expressly by implementing a „consideration-clause“, for instance in § 132 Abs 4 ArbVG (see below V.), wherein he has made clear that certain regulations are not be be qualified as „general laws of the state“.

To sum it up the term „**internal affairs**“ represents a formula of variable contents primarily depending on the self-understanding of the community concerned and finally resulting from a process of wheighing the legal merits between the legal positions involved according to the principle of proportionality. Thereby the „democracy clause“ and the other barriers men-

tioned in Art 9 para 2 ECHR serve as important indicating measures.

The result of the procedure described will be similar to the formula of the BVfGH referring to the legal reservation in Art 137 sect 3 WRV „ ... within the boundaries of the laws that are valid for all“. The Court stated that a barrier is raised when the law represents a provision of a particular importance to the common weal.

V. Holders of the right of self-determination

The right of self-determination is not only attributed to a church or religious society itself or its institutions which are in any way connected with it independently of the legal frame of this link. Beholders of that right are, therefore, also institutions with legal entity under private law, for instance associations with partly religious functions according to the Act on Associations or even institutions which are public or private church associations but without obtaining an own secular status.

This view is confirmed by the wording of § 132 Abs 4 ArbVG, which is to be seen as a realization of the fundamental guarantee of self-determination on the level of ordinary law in the fields of labour law. In pursuance of § 132 sect 4 ArbVG the provisions on the organisation of industrial relations are not applicable to businesses and enterprises which serve the denominational purpuses of a recognized church or religious societies insofar as these regulations are in conflict with the specific nature of the business or enterprise emanating from the true mandate of the community concerned. This formulation induces that the legal frame of the connection does not matter.

The right of self-determination is, therefore, comprising every activity carried out in pursuance of the true mandate, the fundamental tasks of the community concerned, thus primarily organisations serving welfare or charitable purposes.

VI. Consequences of the RRBG for the Interpretation of Art 15 StGG

The putting into force of the RRBG (1998) represents a turning point in the Austrian law on religion. Creating the possibility of enjoying legal personality without public law status is considered to be a reasonable concept. There are, however, several points of criticism, especially concerning the supplementary preconditions for recognition according to the legal Act on Recognition(Compare Kalb/Potz/Schinkele, Religionsgemeinschaftenrecht. Anerkennung und Eintragung, Wien 1998).

In our context the following question arises with the RRBG's enactment especially with respect to church autonomy.

It is an unchallenged doctrine that the institutional guarantee is directly emanating from the fundamental right of religious freedom in a comprehensive sense. Provided that Art 15 StGG is including a guarantee with an own meaning, consequently it had to be conferred upon both categories of religious communities. Otherwise that would amount to an undermining of certain elements of a fundamental guarantee. Such differentiations could not be justified, for there is no objective and reasonable criterion for distinguishing these groups regarding the right of self-determination: that would be uncompatible with the state neutrality towards religions and beliefs, recognized to be a constitutional principle.

The non-recognized religious communities in the sense of Art 15 StGG are primarily the state-registered denominational communities. But even religious communities which have gained legal personality according to the Act on Associations - this possibility is not refused any longer contrary to the former practice - could not be excluded a priori. (Another problem - we cannot discuss within this paper - is the fact that the RRBG does not find application on non-religious beliefs.)

As the Constitutional Court has stated since the early eighties, the differentiation between recognized and non-recognized communities, constitutionally laid down in Art 15 StGG is reasonably justified as far as it takes into account factual differences (Unterschiede im Tatsächlichen“). Legal consequences of the public law status provided for in the ordinary law are, however, only legitimated if there are reasonable prerequisites for recognition and if there is an enforceable claim to gain recognization for those who comply with the legal preconditions.

Pursuantly, as far as legal positions are concerned that are directly derived from the fundamental right of religious freedom a differentiation between both categories of religious communities is not justified. Legal consequences that are provided for by the ordinary law just for legally recognized communities are to be scrutinized with regard to that aspect. According to the character of the law on religion as a cross-section of the law almost every legal field must be examined. For the future we can proceed from assumption that the Constitutional Court as well as of the legislator will have to deal with such questions and that several provisions will have to be abolished for representing non objective infringements of fundamental rights.

To give examples for regulations which obviously seem to be unjustified from that point of view: differentiations concerning exemptions of military or civil service, subsidies towards the costs of personnel for the denominational private schools, religious education classes as compulsory subject, differentiations in the fields of collective labour law and concerning personal registration certificates and revenue laws.

The constitutional inconsistences concerning legal consequences ensuing from the fact of being recognized have been enhanced with regard to § 11 para 2 RRBG, that requires a continued existence as a religious community for at least 20 years, 10 of which must have been spent as a religious denominational community with legal personality in the sense of this federal law, and a number of followers equal at least to 2/1000 of the population of Austria according to the most recent census.

These additional prerequisites almost amount to a de facto-abolishment of the legal institute of recognition. This situation is aggravated with regard to the retroactive force of the RRGB (§ 11 para 2).

That the legislator’s position is far apart from this view just elaborated is proved by the explanatory commentary to the Law on the Establishment of a public law institution for documentation and information on sects’ problems which has been put into force 1998 (BGBl I 1998/150). According to § 1 leg cit it is the task of this institution to show the endangerings that can be caused by sects or similar movements or the risks somebody runs when establishing contact with such groups. Sect 2 of this paragraph expressly states that this federal law does not find application on legally recognized churches and religious communities.

The explanatory commentary gives a reason for this exemption: The right of recognized churches and religious societies to manage and to administer their affairs independently according to Art 15 StGG is encompassing the organisation of their institutions. That is - so the explanations - why it is to be supposed that they will get aware of comparable abuses within their institutions and that they will take appropriate measures for remedying. According to the report of the parliamentary committee (Ausschußbericht) it is just admitted that the minister for environment, youth and family will inform the churches and religious societies about abuses within their communities the sects' bureau gets to know in the course of its activities.

There are two lines of development - the actual understanding of a comprehensive fundamental right to religious freedom and the modified legal system with regard to the RRBG - that seem to deprive Art 15 StGG of its substantial contents. This development does not render this guarantee quite useless, its remaining meaning seems to subsist primarily in a clarification and accentuation of an institutional guarantee which is, however, already included in the right of religious freedom as such. Religious convictions imply, according to their nature, a manifestation in community with others and thus a corporative and institutional guarantee.

VII. Courts' Decisions

There are just a few decisions referring to Church autonomy respectively defining the term „internal affairs", most of them concerning the sphere of labour law pertaining to the partial exemptions from co-determination by Church employees and their obligations of loyality.

I want to draw attention just to some leading decisions, which are quoted in many cases and beyond that to a generally changed approach of the Constitutional Court concerning fundamental rights.

The Supreme Court has defined the internal affairs as those concerning the inner core of church activity and those in which a lack of independence of the churches or religious communities would limit the proclamation of the religious truth and the practical exercise of the commandments of the faith; however the churches are restricted by certain provisions on interdenominational matters as well as by certain constitutional provisions. The matters resulting from this definition can of course not be enumerated (OGH SZ 47/135/1974, SZ 60/80/1987, SZ 60/138/1987).

This formula represents a quite useful description, one has to reproach, however, that the Supreme Court fails to establish a relation to the „general states of the law“ (see above IV.).

Another leading decision, often quoted in other decisions, was issued by the Constitutional Court concerning the self-understanding of religious communities (VfSlg 11.575/1987) respectively the differentiation between legally recognized churches and religious societies and other religious communities (VfSlg 9.185/1981, VfSlg 11.931/1988). They have been mentioned above and need not be repeated here.

In cases the Constitutional Court deals with fundamental rights’ violations it is generally inclined to invoke the general principle of equality instead of referring to the fundamental right directly concerned. According to this tendency the Constitutional Court has, for instance, declared § 2 sect 2 IsraelitenG to be unconstitutional owing to its incompatibility

with the general principle of equality without referring to Art 14 or 15 StGG.

There is another reason why the principle of equality has an exceptional position among the fundamental rights. The perception of the Court's own role has changed significantly and this modified attitude has been expressed mainly in connection with its decision-making concerning the principle of equality. Thereby the Court has overcome its prevailingly positivistic and static position, which has been deviated and replaced by a more evolutive and progressive approach („judicial activism" instead of „judicial self-restraint"). The fundamental rights are not any longer understood just as rights with a merely defensive effect towards the state (*status negativus*). They are understood as well as objective principles and that is why they might impose certain positive obligations on the state, even in order to protect an individual's right against infringements by private parties (so-called *Drittwirkung*).

These changes were, not at least, influenced by the dynamic evolutive concept of the Convention as laid down in its preamble and represented in the case-law of the European instances.

VIII. The right to have justice administered and the right of self-determination

Problems concerning the state legal protection are rather complex and, therefore, they can only be shortly mentioned within this paper.

The internal legal system of the churches as well as their courts of law and their own system of judicature are operating parallel to the state law. Though the churches principally act independently within these spheres and their decisions are not

subject to the state sequences of courts, that does not mean a total exemption from state jurisdiction. The state has to comply with its duty to protect the requirement to seek judicial relief towards church employees to a certain extent as well. The access to the courts concerning remunerations or other proprietary interests are even warranted to cergymen, other ministers and members of religious orders. The state courts are, however, bound to the preliminary questions which are to be resolved by the church and excluded from a re-examination. A certain right to supervision can just be deduced from the prohibition of arbitrary decision-making, public morality and the ordre public. This results from the state's obligation to take care of the common weal, including the right to have justice administered.

The question to what extent the self-understanding of religious communities can become effective in the state fields is generally closely linked to the question if or in how far they are obliged to observe the fundamental rights or if these rights are effecting their internal sphere. Though the churches have the status of public law corporations, as institutions *sui generis* they don't share the sovereign power of the state. For that reason they are not directly obliged to observe the fundamental rights, but to a certain degree the so-called *Drittwirkung* is to be taken into consideration. Generally excepted thereby are, however, the religious freedom itself and other fundamental rights structurally similar to it, especially the right of free expression. These guarantees are protected insofar as the person concerned has the right to withdraw or to retire from an office.

IX. Conclusion

A definitive report cannot be given for the time being as the Austrian law on religion is in suspense, especially with regard to the significance of Art 15 StGG, mentioning expressly church autonomy. There is no doubt that it has already lost its position as *„lex regia“* of the law on religion. There are several circumstances and indications that by and by it will be deprived from its substantial contents. For the next near future we can proceed from the assumption that it will be the task of the Constitutional Court as well as the legislator to give an actual construction to that fundamental guarantee.