


5-1-1998

Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom

Christopher J. Miner

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Constitutional Law Commons](#), [European Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Christopher J. Miner, *Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom*, 1998 BYU L. Rev. 607 (1998).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1998/iss2/11>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom

I. INTRODUCTION

On December 10, 1997, Austria passed a new law creating a second class of religions that are not entitled to the full benefits and protections afforded traditional religions.¹ Under this law, nontraditional religions are not recognized as religions, but as "Confessional Communities,"² which may attain government recognition only if they meet stringent requirements. Specifically, religions will be recognized only if they have at least 16,000 members,³ if their teachings are not considered dangerous by the government,⁴ and then only after they spend ten years as a "Confessional Community."⁵ If a religious group has not yet applied for recognition in Austria, it must now wait twenty years before it can become a recognized religion under the new law.⁶

These requirements violate international and European religious freedom standards. If the law is not changed, the effects of this new "Confessional Communities" law could be broad and far-ranging. Similar laws have recently emerged in some former Eastern bloc countries.⁷ Restrictive legislation of

1. See BUNDES GESETZBLATT [BGBl] 19/1988 "Bundesgesetz über die Rechtsper sönlichkeit von religiösen Bekenntnisgemeinschaften" [Federal Law Concerning the Legal Status of Religious Confessional Communities][hereinafter Confessional Communities Law].

2. See *id.* § 1.

3. The new law requires two members for every 1,000 Austrians as of the last official census. See *id.* § 11(1)(2). According to the 1994 census, Austria has a population of 8,000,000. See *Austria, General Country Information* (visited Feb. 9, 1998) <<http://www.austria.org/ausgen.htm>>. Thus, a membership of at least 16,000 members is required. See also Larry Witham, *Austrian Parliament Puts Faiths in Limbo: Strict Law Sets Up Second-Class Religions*, WASH. TIMES, Dec. 11, 1997, at A1 (reporting that official religions must now have 16,000 members).

4. See Confessional Communities Law, *supra* note 1, § 5 (1)(1).

5. See *id.* § 11 (1)(1).

6. See *id.*

7. See, e.g., W. Cole Durham et al., *The Future of Religious Liberty in Russia:*

608 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

this nature is particularly surprising and distressing in Austria, a nation that is the seat of many human rights institutions and that is generally thought of as having a strong commitment to human rights. The harsh new law is aimed at regulating so-called "sects" or religious minorities that may or may not enjoy a long history in the country.⁸

Currently, Austria officially recognizes only twelve religions.⁹ The twelve recognized religions enjoy many privileges and benefits that unrecognized religions do not.¹⁰ Besides the twelve recognized religions, there are twenty other religious groups that have filed for recognition.¹¹ However,

Report of the De Burght Conference on Pending Russian Legislation Restricting Religious Liberty, 8 EMORY INT'L L. REV. 1 (1994) (discussing Russia's 1993 religion law); Andrei Oskarovich Protopopv, *Church-State Relations in the Russian Federation*, 1996 BYU L. REV. 853 (discussing the religion laws of the Russian Federation); Ralph Ruebner et al., *Religion and the Law in the Commonwealth of Independent States and the Baltic Nations*, 4 TOURO J. TRANSNAT'L L. 103 (1993) (describing religion laws in the countries of the former Soviet Union and Baltic States); Editorial, *Russia and Religion*, CHRISTIAN SCI. MONITOR, Oct. 7, 1997, at 20; cf. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109 (1997) (comparing similarly restrictive religion laws in Iran and Israel).

8. Although unrecognized religions are often referred to as "religious minorities," this distinction does not necessarily imply that they have fewer numbers than other religions. The Jehovah's Witnesses, for example, have more members than most of the recognized religions in Austria. See Heinz Mayer, *Zur Debatte um Scientology und das neue Religionsgesetz; Erleuchtung besonderer Art [The Debate of Scientology and the New Religion Law; Enlightenment of a Particular Kind]*, DER STANDARD, Dec. 10, 1997, at 29 (stating that only four or five of the twelve currently recognized religions have over 16,000 members); Witham, *supra* note 3, at A1 (stating that there are 34,000 Jehovah's Witnesses in Austria).

9. The twelve recognized religions in Austria are: The Catholic Church, The Protestant [Lutheran] Church, The Greek Oriental Church, The Old Catholic Church, The Armenian Apostolic Church, The Syrian Orthodox Church, The Methodist Church, The Church of Jesus Christ of Latter-Day Saints (Mormon), The Jewish Religious Community, Islam, and the Austrian Buddhist Religious Society. See section one, "Rechtsstellung von Religionsgemeinschaften" [Legal Status of Religious Communities] of the "Erläuterungen" [Explanations] portion of the Confessional Communities Law for a list of the recognized religions. The twelve recognized religions are exempt from meeting the new requirements. See *id.*

10. These benefits are set forth *infra*, Part II.C.

11. See Josef Bruckmoser, *Religionen, Sekten, Geschäfte [Religions, Sects, Businesses]*, SALZBURGER NACHRICHTEN, Dec. 6, 1997, Innenpolitik [Domestic Affairs Section] (reporting that there are more than 20 applications for recognition with the Office of Culture in the Ministry of Education); Martina Salomon, *20 Religionsgemeinschaften warten auf Anerkennung: Neues Gesetz schafft Rechtspersönlichkeit als Zwischenschritt zur Legalisierung [20 Religious Communities Wait for Recognition: New Law Creates In-between Step Towards Legalization]*, DER STANDARD, Nov. 11, 1997, at 6.

because of the new waiting period, it will be at least another ten years before groups like the Baptist church,¹² the Seventh-Day Adventists,¹³ and the Jehovah's Witnesses¹⁴ are even considered for recognition as a religion by the Austrian government.¹⁵

This Comment examines Austria's new law and demonstrates that the government's new requirements for recognition create a significant burden that is not proportional to a legitimate state aim.¹⁶ These restrictions violate international agreements and should therefore be repealed. This Comment also identifies areas of Austrian religion law, besides the new recognition law, that probably violate these same international agreements.

Part II.A analyzes the 1997 Confessional Communities Law by examining the cultural and political history of religious freedom in Austria. Part II.B examines the legislative history of the 1997 law as well as the political and cultural pressure that produced the current law. Part II.C examines the specific provisions of the 1997 law and contains a translation of the section in the new law containing the new registration requirements.¹⁷ Part II.D sets forth five international and European documents that govern Austria's religion laws.

12. See *Glaubenskreis um staatliche Anerkennung: Während zwölf Kirchen und . . .* [Religious War Over State Recognition: While Twelve Churches and . . .], KURIER, Nov. 28, 1997, at 3 (listing the Baptist church as among those that have applied) [hereinafter *Religious War*].

13. See Witham, *supra* note 3, at A1 (reporting that the Seventh-day Adventists have over 10,000 members and have been trying for years to gain legal recognition).

14. See Josef Bruckmoser, *Zeugen Jehovas gegen "Verhinderungsgesetz": Regierungsvorlage würde Religionen "Zweiter Klasse" schaffen—LIF sieht den "Geist der Inquisition" am Werk* [Jehovah's Witnesses Against "Hindrance Law": Government's Proposition Would Create a "Second Class"—LIF Sees the "Spirit of the Inquisition"], SALZBURGER NACHRICHTEN, Nov. 28, 1997, Innenpolitik [Domestic Affairs Section] (reporting that the Jehovah's Witnesses believe that the new law is unconstitutional).

15. It is important to note that these groups may still assemble and believe as they wish. However, they are only guaranteed a private right of religious expression, rather than a public one. This distinction is the basis for many of the benefits that only recognized religions enjoy. See Part II.C for a discussion of these benefits.

16. This Comment does not attempt to analyze the constitutionality of the new law in light of the Austrian Constitution. Instead, the focus is the international agreements concerning religious liberty to which Austria is a party. The question of constitutionality is still a focus of the debate between unrecognized religions and the government. See Bruckmoser, *supra* note 14.

17. All translations from German into English have been made by this author and are noted by the designation "translation by this author."

Part III.A analyzes and explains how the new law violates international agreements to which Austria is a party. Part III.B proposes changes to the Confessional Communities Law as well as to other areas of Austria's religion laws. Part III.C looks to the past actions of the Austrian government to predict the future impact of the new law if no changes are made to it.

II. BACKGROUND

Discussing the religious history of Austria lays a foundation necessary to analyze the current law and its future implications. This foundation will also include a discussion of the political and legislative history of the new Confessional Communities law, the specific provisions of the new law, and the international agreements to which Austria is a party.

A. *The History of Religious Freedom in Austria*

Austria has always been a country with one dominant religion. Currently, Austria's population is approximately seventy-eight percent Catholic.¹⁸ Up until the 16th century, Austria had been predominantly Catholic for centuries.¹⁹ However, due to the impact of Martin Luther and the Reformation, large parts of Austria became predominantly Protestant at the turn of the 17th Century.²⁰ After the Thirty Year War, and as a result of the Habsburg counter-reformation, Austria once again became predominantly Catholic.²¹ Since that time, Catholicism has remained the dominant faith in Austria.²² This history of one-religion domination helps explain the cultural attitude of Austrians toward religious minorities.

Before 1848, and during the reign of Emperor Joseph II, religions other than Catholicism were merely tolerated.²³ "It was only after 1848 that an . . . attitude of [religious] tolerance and equality began to gain ground."²⁴ Austria's "Pillersdorf" Constitution of 1848 contains the first reference to "lawfully

18. See *Austria, General Country Information*, *supra* note 3.

19. See FEDERAL PRESS SERVICE, RELIGIONS IN AUSTRIA 5 (1993).

20. See *id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. *Id.*

recognized religions.”²⁵ That constitution contained a reference to both “Christian confessions recognized by law” and to Jewish groups.²⁶ A year later, a second constitution contained a section guaranteeing specific rights to recognized religions.²⁷ Virtually this same language was adopted into section 15 of the 1867 constitution (entitled “Basic Law of the General Rights of Citizens”). This enumeration of religious rights reads:

Every lawfully recognized church and religious society has the right to group public practice of religion, to arrange and administer its own internal affairs autonomously, and retains the possession and enjoyment of its institutions, donations, and funds devoted to its worship, instruction and welfare purposes, but is, like every society, subject to the general laws of the land.²⁸

The 1867 Constitution guaranteed a freedom of private religious expression to all Austrians,²⁹ which was later incorporated into Austria's 1920 Constitution.³⁰ However, public freedom to exercise religion and freedom to control the internal affairs of a church, including, for example, control over its own funds, was guaranteed only to “lawfully recognized religions.”³¹

After the passage of the 1867 constitution, some religions received recognition by passage of special laws. The Lutheran Church was recognized this way in 1861,³² as was the Greek Orthodox Church in 1864.³³ The Jewish community already had been recognized before the 1867 constitution.³⁴

25. INGE GAMPL, *ÖSTERREICHISCHES STAATSKIRCHENRECHT* [AUSTRIAN CHURCH-STATE LAW] 127 (1971) (citing REICHSGESETZBLATT [RGI] 142/1867 “Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger” [Basic Law of the General Rights of Citizens] [STGG]).

26. *Id.* (translation by this author).

27. *See id.* at 128.

28. *Id.* at 129 n.8 (quoting the original German) (translation by this author).

29. *See* GAMPL, *supra* note 25, at 129 (explaining the difference between a public and private right of religious expression).

30. *See* BUNDESVERFASSUNG [CONSTITUTION] art. 149 (Austria), *reprinted in* *English in GLOBAL LAW ASSOCIATION, GLOBAL CONSTITUTIONAL LAW COLLECTION* 123 (1996); INGE GAMPL, *DAS STAATSKIRCHENRECHT DER REPUBLIK ÖSTERREICH* [Church-State Law in the Republic of Austria] 11-12 (1973).

31. GAMPL, *supra* note 30, at 129 n.8 (translation by this author).

32. *See id.* at 129.

33. *See id.*

34. *See id.*

612 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Analyzing the 1867 constitution, one Austrian religion and law expert pointed out an important distinction between recognized and unrecognized religions. Professor Inge Gampl writes:

[O]nly members of lawfully recognized religions or religious societies came (totally) within the enjoyment of the right of public religious practice, while members of unrecognized confessions, through Article 16 of the StGG [Bill of Rights of 1867], had the guaranteed right of private religious practice. If someone left one lawfully recognized religion without joining another lawfully recognized Church or religious society, then the right to public religious practice was totally and completely denied.³⁵

Austria attempted to remedy this situation by a statute that provided for the official recognition of other religions. This recognition law was passed in 1874.³⁶ Until the new Confessional Communities Law was passed in December 1997, the fairly enlightened recognition law of 1874 controlled the recognition of religions in Austria.³⁷ Under the 1874 recognition statute:

The members of a heretofore unrecognized religion will receive recognition as a religious society if the following requirements are met:

1. That its religious teachings, services, constitution, and name contain nothing illegal or morally offensive;
2. That the establishment and duration of at least one congregation established according to this law is assured.³⁸

Under the 1874 statute, those religions that wished to be recognized would petition the government and attempt to demonstrate that they met the statutory requirements. Under

35. *Id.* at 130 (translation by this author).

36. *See id.* at 129-30 (discussing the recognition law of 1874).

37. *See id.* at 129 (stating that until the 1874 law, there were no statutory requirements).

38. *Id.* at 132 (translation by this author). Some have argued that the use of the language "will receive recognition" should be construed to mean that once the few requirements spelled out in the statute were met, a religion should have automatically been recognized under the 1874 statute. *See* Mayer, *supra* note 8, at 8 (arguing that the Jehovah Witnesses must be recognized because of the use of the word "will") (translation by this author). Because the new Confessional Communities Law amends the 1874 statute, that argument is now moot.

this recognition scheme, the Old Catholic Church was recognized in 1877,³⁹ the Methodists in 1951,⁴⁰ and the Church of Jesus Christ of Latter-day Saints (Mormon) in 1955.⁴¹ The Jewish Community was re-recognized (but under a different name) in 1890.⁴² Those persons professing a faith in Islam were given a form of recognition in 1912, although this law was not a recognition within the meaning of the 1874 law because of their lack of formal congregations.⁴³ Two more forms of the Lutheran Church were recognized in 1961 as a part of the previously recognized Lutheran Church.⁴⁴ More recently, the Armenian Apostolic Community was recognized in 1972,⁴⁵ the New Apostolic Church in 1975,⁴⁶ and the Austrian Buddhist Religious Society in 1983.⁴⁷

B. The Recent Cultural, Political, and Legislative History of the New Law

In the last twenty years, the number of applications for recognition under the 1874 statute increased to the point that by the early 1990s, there were over twenty churches requesting recognition.⁴⁸ Some of these groups included the Baptists,⁴⁹ Seventh-day Adventists,⁵⁰ Jehovah's Witnesses,⁵¹ Church of Scientology,⁵² Reverend Moon's Unification Church,⁵³ and

39. See GAMPL, *supra* note 25, at 130. The Old Catholic Church is separate from Roman Catholicism, the dominant religion in Austria.

40. *See id.*

41. *See id.*

42. *See id.* at 129 n.11. Before 1890, Jewish congregations were known as "Followers of the Israelite Culture," while after 1890 they were referred to as the "Israelite Religious Society." *See id.*

43. *See id.* at 131. This so-called "Islam Law" merely extended a right to public expression of their religion to members of Islam. They previously were not allowed to have public religious services. *See id.*

44. *See id.*

45. See FEDERAL PRESS SERVICE, *supra* note 19, at 46.

46. *See id.* at 47.

47. *See id.* at 50.

48. *See supra* notes 11-15 and accompanying text.

49. *See Religious War, supra* note 12, at 3 (reporting that Baptists have applied for recognition).

50. *See Witham, supra* note 3, at A1 (reporting that the Seventh-day Adventists have been trying for years to gain legal recognition).

51. *See id.*

52. *See Bru ckmoser, supra* note 14 (discussing recognition applications).

53. *See Sekten: Das jüngste Gericht [Sects: The Last Judgment]*, KURIER, Apr.

614 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Yoga.⁵⁴ 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.⁵⁵

However, a rising antforeigner movement soon began to turn the tide of Austrians leaving traditional churches for beliefs that often came from other countries. In 1991, Austrians became attracted to a politician named Jorg Haider and his Austrian Freedom Party's antforeigner and anti-immigrant messages.⁵⁶ His party garnered twenty-three percent of the votes in the Parliament elections that year and twenty-two percent of the votes in 1996.⁵⁷

Along with the pressure from an increasing number of religions requesting recognition and rising antforeigner sentiment, developments regarding the Jehovah's Witnesses combined to bring religious matters to a boil in Austria. The Jehovah's Witnesses have been in Austria since the 1920s and are 34,000 members strong.⁵⁸ They have been trying for over twenty years to become recognized in Austria.⁵⁹ During this time, Austria had not given the Jehovah's Witnesses a formal

3, 1997, at 3 [hereinafter *Sects*].

54. *See id.*

55. *See Gesetze und Sekten-Info im Widerstreit [Laws and Sect Information in Controversy]*, SALZBURGER NACHRICHTEN, Dec. 6, 1997, Innpolitik [Domestic Affairs Section] (reporting that since 1990, membership in "sects" has quadrupled) [hereinafter *Laws and Sect*].

56. *See* George J. Church, *Surge to the Right (Nationalism and Racism in Europe)*, TIME, Jan. 13, 1992, at 22, available in 1992 WL 3073646 (discussing political trends in European countries).

57. *See id.* The Austrian Freedom Party (FPÖ) garnered 22% of the votes in the 1996 election, and thus received 41 of 183 seats in Parliament, or 22%. *See Die Provisorische Nationalversammlung, die Konstituierende Nationalversammlung und der Nationalrat seit 1920 [The Provisional National Assembly, the Constituent National Assembly, and the National Council Since 1920]* (last visited Mar. 9, 1998) <<http://www.parlinkom.gv.at/pd/doep/a2.htm>> (listing election returns by party since 1920). It should also be noted that the Austrian Freedom Party voted for the new Confessional Community Law. *See Drei Parteien segnen neues Religionsgesetz ab [Three Parties Bless New Religious Law]*, KURIER, Dec. 4, 1997, at 2 [hereinafter *Three Parties Bless*].

58. *See* Witham, *supra* note 3, at A1.

59. *See Zeugen Jehovas nicht als Religion anerkannt-Scientology attackiert ÖVP: "Einfluss auf die Jugend nicht zu verantworten" [Jehovah Witnesses Not Recognized as Religion—Scientology Attacks ÖVP: "Can't Be Responsible for Influence on Youth"]*, DER STANDARD, July 24, 1997, at 6 (reporting the rejection of the Jehovah's Witness application and the government's reasons) [hereinafter *Jehovah Witnesses Not Recognized*].

answer to their application.⁶⁰ The question of whether or not they should be recognized bounced between the government and the Austrian courts for some years.⁶¹ During this time, some scholars questioned the constitutionality of Austria's "all-or-nothing" approach to religious recognition.⁶²

Finally, on April 28, 1997, Austria's Supreme Court ruled that the government had to give the Jehovah's Witnesses an answer to their application.⁶³ Faced with the prospect of having their hand forced by the high court, Austria's government formally took up the issue of whether to recognize the Jehovah's Witnesses. On July 23, 1997, the Austrian government rejected the Jehovah's Witnesses' application.⁶⁴ The Minister of Education, Elisabeth Gehrler, who was responsible for accepting or rejecting the application, stated that she "could not be responsible for the possible influence of the Witnesses on the youth through state-supported religious instruction."⁶⁵ 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.⁶⁶

This decision was immediately greeted with enthusiasm by all five of Austria's major political parties.⁶⁷ However, some political leaders also expressed doubts about the legal grounds for the decision. Typical is the statement by Karl Öllinger, a leader of the Green party, one of the five major political parties

60. See Norbert Stanzel, "Zeugen Jehovas" keine anerkannte Religion ["Jehovah Witnesses" Not a Recognized Religion], KURIER, July 24, 1997, at 2 (reporting the rejection of the Jehovah Witness application and the preceding court battles).

61. See *id.*

62. See *Jehovah Witnesses Not Recognized*, *supra* note 59, at 6 (reporting that some scholars believe the scheme of either total recognition or no recognition may be unconstitutional).

63. See the Austrian Supreme Court case ZL 96/10/0049/15 for the ruling (cited in the "Problems" section of the "Forward" to BGBl 19/1988 [the Confessional Communities Law]). This "Forward" explains that the impact of that court case was one of the "problems" that led to the law. See Confessional Communities Law, *supra* note 1.

64. See Stanzel, *supra* note 60, at 2.

65. *Jehovah Witnesses Not Recognized*, *supra* note 59, at 6 (translation by this author).

66. See *id.*

67. See *id.* (quoting leaders of each party supporting the decision).

616 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

in Austria: "The nonrecognition of the Jehovah's Witnesses is correct politically, but because of the legal situation, it stands on questionable legal legs."⁶⁸

At the same time that the Austrian government was considering what to do with the Jehovah's Witnesses' application, some politicians began to call for a new recognition law. One lawyer, from the Austrian People's Party (ÖVP), suggested that there should be a new legal status, "[o]nly without the current benefits and with a long observation time. The state must get a full overview—from the religious practices to the finances to the member lists."⁶⁹

The day after the government rejected the Jehovah's Witnesses' application, one political leader had her mind on another nontraditional religion, the Church of Scientology. She stated that it was important to find out more about the "sects," particularly "behind which kindergartens, groups, private establishments, and private employment agencies the Scientologists are standing."⁷⁰ During the summer of 1997, Scientologists (and all other "sect" members) were banned from being members of the ÖVP (one of Austria's leading parties),⁷¹ and there has been a law proposed by the ÖVP to ban all Scientologists from holding any political office.⁷² By the fall of 1997, all five parties were united: "measures against sects are necessary."⁷³

68. *Id.* (translation by this author).

69. *Sects*, *supra* note 53, at 3 (translation by this author). This is extremely troublesome—confidentiality of finances should be protected against government intrusion. This party leader's statement may also indicate the intended breadth of the new recognition requirements.

70. *Scientology wehrt sich gegen "Rüfschädigung": Grüne fordern Offenlegung aller Beteiligungen der Sekte* [*Scientology Defends Itself Against Reputation Damage: The Green Party Demands Disclosure of All Sect Involvement*], DER STANDARD, July 25, 1997, at 6 (translation by this author).

71. See Salomon, *supra* note 11, at 6; see also Daniel Windisch, *Scientology, ÖVP, ein Beschluß und die Folgen* [*Scientology, ÖVP, One Decision and the Consequences*], DER STANDARD, Aug. 29, 1997, at 36 (reporting the forced resignation of a government leader because he is a Scientologist).

72. See *Sektenverbot für Beamte: ÖVP bringt Entschließungsantrag im Nationalrat ein* [*Sects Forbidden for Officials: ÖVP Proposes Resolution in National Assembly*], DER STANDARD, Oct. 4/5, 1997, at 6.

73. Stanzel, *supra* note 60, at 2 (translation by this author).

On November 12, the Austrian government⁷⁴ introduced the new Confessional Communities Law into the National Council, the lower house of parliament.⁷⁵ In this initial incarnation, the government proposed different requirements than those eventually approved. At first, the government wanted to limit recognition to those religions with at least 24,000 members.⁷⁶ This point seemed to be particularly controversial, especially in light of the fact that the government had previously required only 2,000 members.⁷⁷ In fact, only five of the twelve already recognized religions would have qualified under the numerical requirements contained in the new law.⁷⁸ The government originally proposed only a fifteen-year wait for Confessional Communities before they could apply for recognition,⁷⁹ but the bill was eventually passed with a longer twenty-year waiting period.⁸⁰ On December 3, 1997, the proposed bill was sent to a sub-committee.⁸¹ The report of the subcommittee included a

74. See "Grenzwerte" für Religionen strittig: Enormer Zeitdruck-Klubchefs fanden wegen Pensions-Marathon noch keinen Termin [*Threshold Value of Religions Controversial: Enormous Time Pressure—Caucus Leaders Can't Set a Date Due to Pension Marathon*], SALZBURGER NACHRICHTEN, Nov. 5, 1997, Innenpolitik [Domestic Affairs Section] (reporting the government proposal for recognition) [hereinafter *Threshold Value*].

75. Austria's Parliament is bicameral and made up of an upper house called the *Bundesrat* (Federal Council) and a lower house called the *Nationalrat* (National Council). The lower house, the National Council, is where most bills originate. A bill that passes by a simple majority in the National Council is then sent to the Federal Council. If no action is taken within eight weeks, or if the bill is approved by a majority in the Federal Council, then the bill becomes law. See ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 16 (1995).

76. See *Threshold Value*, *supra* note 74. The proposed requirement mandated three members for every 1,000 Austrians, rather than the adopted two members for every 1,000 Austrians.

77. See *Religionsgesetz umstritten: Heute würden von 12 Religionen nur mehr fünf anerkannt* [*Religion Law Debated: Today Only Five of the Twelve Religions Would Be Recognized*], DER STANDARD, Dec. 10, 1997, at 8 (reporting the passage of the bill and reaction from opponents) [hereinafter *Religion Law Debated*].

78. It appears that only the Catholic, Lutheran, Islam, and Old Catholic religions would meet the 16,000-member requirement. It is unclear whether the Greek Oriental Church would also have enough members. See FEDERAL PRESS SERVICE, *supra* note 19, at 14, 17, 35, 38 (listing membership amounts for each religion).

79. See *Threshold Value*, *supra* note 74.

80. See Confessional Communities Law, *supra* note 1, § 11 (1)(1).

81. The legislative history of the law is available on the Internet from the Austrian Parliament's website. See *Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften* [*Legal Status of Religious Confessional Communities*] (visited Mar. 9, 1998) <http://www1.parlinkom.gv.at/pd/pm/XX/I/his/009/I00938_h.html> [hereinafter *Legislative History*].

618 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

statement that one of the goals of the new law was “to create a new legal status without giving rights identical to recognized religions.”⁸² The bill was passed by the subcommittee the same day with the support of the three largest parties.⁸³ The bill proceeded immediately to the full body of the National Council, where it was debated for more than five hours.⁸⁴ When the final votes were cast on December 12, 1997, a narrow majority consisting of the two largest parties voted for the bill while the three smaller parties in the National Council voted against it.⁸⁵ It was then sent to the upper house of Parliament, the Federal Council, for approval. On December 16, 1997, six days after the National Council passed the new statute, it became law when the Federal Council approved the law without objection or amendment.⁸⁶

C. The Specific Provisions of the New Law

The 1997 Confessional Communities Law incorporates changes that are new to Austrian religion law. Previously, there were only unrecognized religious groups and recognized religions. Now, there are unrecognized religious groups and two types of recognized religions: the new Confessional Communities under the 1997 law and groups recognized as religions through the 1874 recognition statute. The new law defines this new status, Confessional Community, as “a religion which is not recognized.”⁸⁷ The full legal title by which this new

82. *Parlamentarische Materialien [Parliamentary Materials]* (visited Mar. 9, 1998) <http://www1.parlinkom.gv.at/pd/pm/XXI/texte/010/I01013_.html>.

83. The history of the sub-committee is available on the Internet from the Austrian Parliament's website. See *Rechtspersönlichkeit von religiösen Bekenntnismgemeinschaften [Legal Status of Religious Confessional Communities]* (visited Mar. 9, 1998) <http://www1.parlinkom.gv.at/pd/pm/XXI/his/010/I01013_.html> (listing the Social Democratic Party of Austria, the Austrian People's Party, and the Austrian Freedom Party as voting for, while the Liberal Forum and the Green Party voted against the bill).

84. See Witham, *supra* note 3, at A1.

85. See Legislative History, *supra* note 81 (listing the speakers in the debate and the final vote); Witham, *supra* note 3, at A1 (reporting that the bill passed with the support of the Socialists and the People's Party).

86. See Legislative History, *supra* note 81.

87. Confessional Communities Law, *supra* note 1, § 1 (translation by this author).

creation is known is “state-registered religious Confessional Community.”⁸⁸

In order to be recognized as a Confessional Community, a group of at least 300 residents of Austria must apply with the Minister of Education and Arts.⁸⁹ After six months, unless rejected earlier, the group becomes a “Confessional Community” provided they meet certain standards.⁹⁰ These standards include requirements that the application include a description of their religious beliefs; these beliefs must be different from other lawfully recognized religions.⁹¹ Additionally, section 5 states that the Federal Minister of Education and Arts may deny the application for legal status if “the teachings or their application are against the given public safety interests of a democratic society, the public order, health and morals, or infringes on the protection of the rights and freedoms of another.”⁹² If the group meets these requirements, then they are an official Confessional Community.

If a Confessional Community wishes to be recognized as a religion within the meaning of the 1874 statute, the group must meet the requirements set forth in section 11 of the new law. Section 11 states that in order to be recognized as a religion, a religious group must:

- (1) be organized for at least 20 years, 10 of which must be as a “confessional community” within the meaning of the new law.
- (2) have a total number of members that is at least 2 members for every 1000 Austrians, according to the last census.
- (4) have a positive attitude toward society and the State.
- (5) lead to no illegal disturbance of the relationships of the current lawfully recognized Churches and religious societies as well as other religious communities.⁹³

All of these requirements are new to Austrian law. Particularly striking is the requirement that a recognized religion have a membership equal to two thousandths of the population, or

88. *Id.* § 2 (7) (translation by this author).

89. *See id.* § 3(3).

90. *See id.* § 2(1).

91. *See id.* § 4(1)(2).

92. *Id.* § 5 (translation by this author).

93. *Id.* § 11 (translation by this author). For a definition of “number of members must be at least 2 for every 1000 Austrians according to the last census,” see Witham, *supra* note 3, at A1.

620 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

16,000 members, and that groups must wait ten to twenty years in order to become recognized. Groups that had previously applied will only have to wait ten years, while new applicants will have to wait twenty years.

While the 1874 statute required that the religious group not be “illegal or morally offensive,”⁹⁴ the new requirement in section 11 that the religion have a “positive attitude toward . . . the State”⁹⁵ is also new to Austrian religion law. Provided the government feels the group has fulfilled the requirements of section 11, that group becomes a recognized religion, not merely a Confessional Community, and will receive all the benefits enjoyed by recognized religions.

The benefits of being a recognized religion are significant and important. The Austrian government considers that one important part of being a recognized religion is the right to be considered nondangerous. A political leader stated that one purpose of the recognition law was to give recognized religions the ability to defend against the accusation of being a “dangerous sect,” a label associated with unrecognized religions in Austria.⁹⁶ Leaders of the ÖVP argued that this ability to defend against being labeled dangerous was a “state approved ‘nondangerous certification,’” in exchange for which it was only natural for the government to expect strict requirements.⁹⁷

In Austria, those religions not recognized by the government are considered by Austrians to be “sects.” To be a “sect” in Austria is to be seen by the Austrian public as an automatic danger and risk to society. In a recent opinion poll, ninety percent of Austrians stated that sects are inherently dangerous.⁹⁸ Sects are seen as antifamily and even anti-Christian.⁹⁹ The practical effect of such public opinion is that members of religious minorities (“sects”) often feel discriminated against, which can bring problems ranging from

94. See GAMPL, *supra* note 25, at 132.

95. Confessional Communities Law, *supra* note 1, § 11(1)(4).

96. See *Threshold Value*, *supra* note 74 (reporting that recognized religions can fight the label of being dangerous) (translation by this author).

97. See *id.* (reporting the position of the ÖVP) (translation by this author).

98. See *Geheimnisse des Glaubens* [*Secrets of the Faith*], KURIER, Dec. 23, 1997, at 3 [hereinafter *Secrets*].

99. See *Sekten zerstören Familie und Partnerschaft*, KURIER, Oct. 5, 1997, at 12 (reporting that sects are against the family and that they are anti-Christian).

simple embarrassment to difficulties finding places to meet.¹⁰⁰ This discrimination by the public is being shaped, at least partially, by the Austrian government itself. The government has established in every "Bundesland," or state, a family counseling center that specializes in "sect problems."¹⁰¹ Through the centers, the government distributes a brochure listing the dangerous sects in Austria.¹⁰² Those religions identified by the government as dangerous sects are: Jehovah's Witnesses, Scientology, Reverend Moon's Unification church, Transcendental Meditation, Yoga, Hare Krishna, Sai Baba, Universal Life, Brahma Kumaris, Fiat Lux and Sri Chinmoy.¹⁰³ The last of these groups, the Sri Chinmoy, is a Hindu meditation group and is the only group, so far, that has sued the government to be removed from the brochure.¹⁰⁴ It is not clear whether all of the religions that attain Confessional Community status will continue to be considered dangerous, but as long as these groups are singled out by the government as dangerous, the Austrian public will consider them dangerous, regardless of their official status.

In addition to being accepted by the government as "nondangerous," recognized religions enjoy additional advantages that unrecognized religions do not. This list includes tax advantages,¹⁰⁵ protection of public freedom of religious expression,¹⁰⁶ legal protection of its name,¹⁰⁷ the right to receive religious instruction in public schools from members of one's own faith,¹⁰⁸ the right to government support of a religious private school,¹⁰⁹ free weekly television time,¹¹⁰ the

100. See Bruckmoser, *supra* note 11.

101. See *Secrets*, *supra* note 98, at 3 (reporting that it is an information and document center).

102. See *id.*

103. See *id.*

104. The case is still pending. See *id.*

105. See *Three Parties Bless*, *supra* note 57, at 3 (listing many of the benefits of being a recognized religion); Witham, *supra* note 3, at A1.

106. See FEDERAL PRESS SERVICE, *supra* note 19, at 8 (listing rights guaranteed to recognized religions).

107. See *id.* This is the ability to protect a church's name by copyrighting it.

108. See *id.* Recognized religions are entitled to a religion class taught in the school by a representative of the religion who is paid by the government.

109. See *id.* This right creates a subsidy for a private religious school, which is then operated independently by the religion.

110. See Witham, *supra* note 3, at A1. Each recognized religion is entitled to five

622 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

right to have one's religion on a birth certificate,¹¹¹ the right to have a military chaplain from one's own religion,¹¹² status as a public law corporation,¹¹³ protection of church funds against "secularization" (confiscation),¹¹⁴ and visa and work permits for foreign missionaries or church leaders.¹¹⁵ One of the more controversial rights of a recognized religion is the right to garnish Austrian workers' wages for the donations or tithing that each religion deems to be part of church membership.¹¹⁶

Additionally, there are specific benefits and protections given to recognized religions by the criminal code. Professor Inge Gampl describes these benefits:

A person who disparages a religious doctrine, disturbs an act of worship [sic] or insults a priest is committing a criminal offence. Moreover, premises (as place of the offence) and objects (as objects of the offence) devoted to divine worship [sic] receive special protection in connection with theft and property damage. Proceeding from the principles of pluralism, freedom and democracy, the state guarantees both individual and corporate [sic] religious freedom.¹¹⁷

Thus, recognized religions are protected by civil, criminal, copyright, and immigration laws in ways that unrecognized religions are not.

minutes per week on state-owned television stations.

111. See Bruckmoser, *supra* note 11, at 6.

112. See Witham, *supra* note 3, at A1. This becomes important since every male must serve in the Austrian Military as a young adult.

113. See FEDERAL PRESS SERVICE, *supra* note 19, at 8. This right enables a religion to have status to sue in civil courts.

114. See *id.* Although it is not clear that the government actually has ever confiscated the funds of an unrecognized religion, it is clear that an unrecognized religion is not protected against this possibility.

115. See 1997 U.S. DEPARTMENT OF STATE AUSTRIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (1998) (describing the religious freedoms of Austria).

116. Members of an individual religion are "taxed" a certain amount by each religion, which the religion can then collect from its members by garnishing their wages. See Alexandra Förderl-Schmid, *Regierung und SPD gegen Rentenfiasko: Hoffnung auf eine Einigung wächst* [Government and SPD Against Rent Fiasco: Hope Grows for Unity], DER STANDARD, Nov. 8/9, 1997, at 2 (reporting the different taxes employees face).

117. FEDERAL PRESS SERVICE, *supra* note 19, at 8; see also GAMPL, *supra* note 25, at 377-80 (listing protections given to recognized religions given by the criminal code).

*D. Applicable International and European Religious
Freedom Standards*

Along with its religious history, Austria has also committed itself to several international human rights documents that set standards of religious freedom. Because Austria has signed these documents, it is bound by their language, as well as by decisions from international courts, like the European Court of Human Rights, that interpret those documents.¹¹⁸ There are five particular documents that govern international standards of religious liberty: (1) the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention);¹¹⁹ (2) the International Covenant on Civil and Political Rights (International Covenant);¹²⁰ (3) the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration);¹²¹ (4) the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (Concluding Document);¹²² (5) and the Framework Convention for the Protection of National Minorities (Framework Convention).¹²³

118. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms created a European Commission of Human Rights and a European Court of Human Rights to “ensure the observance of the engagements undertaken by [the countries that signed the document].” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 19 (entered into force Sept. 3, 1953), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 500.1 (Richard B. Lillich ed., 2d ed. 1990) [hereinafter *European Convention*].

119. *See id.*

120. *See* International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 170.1 (Ian Brownlie ed., 3d ed. 1993) [hereinafter *International Covenant*].

121. *See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *adopted* Nov. 25, 1981, G.A. Res. 36/55, 36 GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1982), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* note 118, at 490.1 [hereinafter *1981 Declaration*].

122. *See Conference on Security and Co-operation in Europe: Concluding Document of the Vienna Meeting*, 28 I.L.M. 527 (1989) [hereinafter *Concluding Document*].

123. *See Council of Europe: Framework Convention for the Protection of National Minorities*, 34 I.L.M. 351 (1995) [hereinafter *Framework Convention*].

624 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

In order to establish the importance of each of these instruments, a short description of each agreement and its relevant statement concerning religious liberty is helpful. The analysis in Part III will show how the new Confessional Communities law violates the following agreements.

1. *European Convention for the Protection of Human Rights and Fundamental Freedoms*

The European Convention was signed in Rome, Italy, on November 4, 1950, and since then twenty-two countries, including Austria, have ratified it.¹²⁴ This document created the European Commission of Human Rights and European Court of Human Rights.¹²⁵ The European Convention has been, and continues to be, subject to interpretation and enforcement by the European Court of Human Rights.¹²⁶ Austria is bound by the decisions of the court and, if is found in violation of the Convention, "is under an obligation to put an end to the violation, to make reparation for its consequences and to prevent similar violations in the future."¹²⁷ The key provision of the European Convention regarding religious freedom is article 9, which provides:

1. Everyone has the right to freedom of thought, conscience

and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹²⁸

124. See BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 120, at 326. Additionally, there have been ten Protocols that have modified portions of the document. See *id.* None of the modified sections are relevant to this discussion.

125. See European Convention, *supra* note 118, art. 19.

126. See *id.*

127. Eva Brems, *Kremzow*, 3 COLUM. J. EUR. L. 474 (1997).

128. European Convention, *supra* note 118, art. 9.

Although seemingly straightforward, the interpretation and application of article 9 has been the topic of some scholarly discussion.¹²⁹

In *Kokkinakas v. Greece*,¹³⁰ the European Court of Human Rights was presented with its first chance to interpret the reach of article 9. Mr. Kokkinakas was a Greek Jehovah's Witness who was convicted in Greece under a law that restricted proselyting by Jehovah's Witnesses. On review, the European Court of Human Rights held that the Greek law violated article 9 because the constraints on proselyting efforts by Jehovah's Witnesses were not "proportionate to the legitimate aim pursued or, consequently, necessary in a democratic society. . . for the protection of the rights and freedoms of others."¹³¹ The court also stated that:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but *it is also a precious asset for atheists, agnostics, sceptics and the unconcerned*. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.¹³²

The court recognized that implicit in article 9 is a right to both "public" and "private" practice of religion.¹³³ The court did not enumerate when and how a country may or may not regulate religious activities, but it did hold that laws against traditional proselytizing methods violate the European Convention because they were not necessary in a democratic society.¹³⁴

The court has also interpreted subsection 2 of article 9 by stating that in order to meet its burden with regard to any

129. See, e.g., MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 262-341 (1997) (discussing article 9 and subsequent court rulings); Malcolm N. Shaw, *Freedom of Thought, Conscience and Religion*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 445 (R. St. F. Macdonald et al. eds., 1993); Durham et al., *supra* note 7.

130. 260 Eur. Ct. H.R. (ser. A) (1993).

131. *Id.* at 21 (quoting the European Convention, *supra* note 118, article 9(2)).

132. *Id.* at 17 (emphasis added).

133. See *id.*

134. See *id.* at 21.

626 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

interference with religious rights, a country must be motivated by "a pressing social need."¹³⁵

In another case, *Hoffman v. Austria*,¹³⁶ the court stated that the European Convention affords "protection against different treatment, without an objective and reasonable justification, of persons in similar situations."¹³⁷ In *Hoffman*, an Austrian woman fought for custody of her two children. They had been raised Roman Catholic, but after divorcing her husband Mrs. Hoffman became a Jehovah's Witness.¹³⁸ While the Austrian lower courts gave her custody, the Austrian Supreme Court reversed, awarding custody of the children to the father.¹³⁹ The court cited Mrs. Hoffman's beliefs as a Jehovah's Witness, stating that her religious beliefs would make the children social outcasts and that there was a danger that the mother would refuse the children blood transfusions on religious grounds.¹⁴⁰

The European Court of Human Rights, however, found that Austria had violated the European Convention.¹⁴¹ The court held that while Austria could consider the practical implications of Mrs. Hoffman's particular beliefs, Austria had violated international law when it treated her differently because of her membership in the Jehovah's Witnesses.¹⁴² Such treatment on the ground of religion is discriminatory "if it is not justified by a 'legitimate aim' and if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'"¹⁴³ Thus, the court held that while the aim was legitimate (protection of health and welfare

135. Case of Silver and Others, 61 Eur. Ct. H.R. (ser. A) at 38 (1983) (quoting Handyside Case, Eur. Ct. H.R. (ser. A) at 22 (1976)). In *Silver*, the court interpreted article 10 of the European Convention.

136. 255 Eur. Ct. H.R. (ser. A) at 45 (1993).

137. *Id.* at 58.

138. *See id.* at 50.

139. *See id.* at 53-54.

140. *See id.*

141. Before the court heard the case, the European Commission on Human Rights decided that there had been a violation of the Convention. The matter was then referred to the European Court of Human Rights. See the press release issued by the Registrar of the European Court of Human Rights at Strasbourg dated Jan. 26-28, 1993, at 5, for a summary of the Commission's findings.

142. *See Hoffman v. Austria*, 255 Eur. Ct. H.R. (ser. A) at 45. The court ultimately decided the case on articles 8 and 14 of the European Convention, and thus did not reach the article 9 challenge. *See id.* at 60.

143. *Id.* at 59 (quoting the European Convention).

607] AUSTRIA'S 1997 RELIGION LAW 627

of children), the means were not proportionate because the distinction was based solely on religion.¹⁴⁴

As interpreted by the European Court of Human Rights in *Kokkinakas* and *Hoffman*, the European Covenant may not always protect particular religious beliefs, but it does protect religions from distinctions and unequal protection based solely on membership in that religion.

2. *The International Covenant on Civil and Political Rights*

The International Covenant was signed by Austria and entered into effect on March 23, 1976. At least ninety-five other countries have become parties to it.¹⁴⁵ It guarantees both a right to freedom of religion and freedom of expression. These are found in articles 18 and 19, respectively. Article 18 provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁴⁶

The plain language of article 18 suggests that the right to freedom of religion, including the freedom to have, alter, or adopt a religion of one's choice, is an absolute right which may not be restricted. Article 18(3) states that any limits on religious liberty must be both prescribed by law and necessary to protect public safety, order, health, or morals or the

144. *See id.* at 60.

145. *See* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 120, at 125.

146. International Covenant, *supra* note 120, art. 18.

628 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

fundamental rights and freedoms of others. This language suggests that those are the only grounds upon which a country may limit religious expression. Additionally, articles 2 and 26 provide that each country must ensure the rights in the International Covenant regardless of religion¹⁴⁷ and “prohibit any discrimination” on the grounds of religion because all persons are equal before the law.¹⁴⁸

A group of international religion experts, who analyzed a 1993 Russian religion law in light of the International Covenant, stated that:

Articles 2 and 26 of the Covenant require equal treatment of all persons before the law and prohibit discrimination based, among other things, on religion. According to international case law, unequal treatment of equal cases is allowed only if that treatment serves an objective and reasonable purpose and the inequality is proportionate to that purpose.

The Human Rights Committee, established under the Covenant, has made it explicit in its General Comment No. 22(48) concerning Article 18 that:

The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, *including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.*¹⁴⁹

Thus, the International Covenant guarantees that every person has a right to both public and private freedoms of belief and expression. There may be a tendency to believe that the language allowing limits on religion to protect “public order, health, or morals” is broad enough to allow a country to carefully word its discrimination. However, those limits on religious freedom must still serve an objective and reasonable

147. *See id.* art. 2.

148. *Id.* art. 26.

149. Durham et al., *supra* note 7, at 15 (emphasis added) (footnote omitted) (quoting Human Rights Committee, General Comment No. 22(48) concerning article 18 (CCPR/C/21/Rev.1/Add. 4, Sept. 27, 1993)).

purpose and the inequality must be proportionate to that purpose.¹⁵⁰ These restrictions serve to eliminate any unjustified broad limitation on freedom of religious expression. Further, the International Covenant, much like the European Convention, prohibits discrimination based on religion and views with concern any tendency to discriminate against any belief, particularly if they are a newly established or a religious minority.

3. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

The 1981 Declaration was adopted by consensus of the General Assembly of the United Nations on November 25, 1981.¹⁵¹ Although it lacks the stature of the European Convention and the International Covenant because it is not a binding treaty obligation, the 1981 Declaration is generally regarded throughout the world as enumerating the fundamental rights of freedom of religion and belief that belong to all persons.¹⁵²

One of the most important aspects of the 1981 Declaration is its enumeration of specific religious rights that are guaranteed all persons. Article 6 provides that the freedom of religion shall include the right:

- a. To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- b. To establish and maintain appropriate charitable or humanitarian institutions;
- c. To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- d. To write, issue and disseminate relevant publications in these areas;
- e. To teach a religion or belief in places suitable for these purposes;
- f. To solicit and receive voluntary financial and other contributions from individuals and institutions;

150. *See id.*

151. *See* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 120, at 109.

152. *See* Donna Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

630 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

g. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

h. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

i. To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹⁵³

These specific rights may only be subject to limitations that are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights . . . of others."¹⁵⁴

Unique to this international instrument is that it defines religious discrimination. Under the 1981 Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.¹⁵⁵

Any such discrimination is prohibited if done by "any State, institution, group of persons or person."¹⁵⁶

The 1981 Declaration provides not only general statements of protection, it creates a duty on the part of countries to actively protect rights and eradicate religious discrimination. Article 4 provides:

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat

153. *1981 Declaration*, *supra* note 121, art. 6.

154. *Id.* art. 1(3).

155. *Id.* art. 2(2).

156. *Id.* art. 2(1).

607] AUSTRIA'S 1997 RELIGION LAW 631

intolerance on the grounds of religion or other beliefs in this matter.¹⁵⁷

The 1981 Declaration is unique because it provides an enumeration of individual rights and it creates a duty on the part of countries to enact or rescind laws in order to prohibit discrimination. As one writer noted:

The phrase 'discrimination by any State, institution, group of persons, or person' in Article 2(1), taken together with Article 4, which obliges states to prevent and eliminate discrimination through legislative and other measures, clearly requires states to regulate nongovernmental conduct irrespective of whether national law authorizes such regulation

In contrast, the obligation to take positive measures against religious discrimination, stated in Article 4, extends only to states and not to individuals.¹⁵⁸

The impact of this duty cannot be overstated. This duty requires governments to identify and eliminate discrimination, even if that discrimination is perpetrated by an institution, groups of persons, or a private individual.

4. *Concluding Document of the Vienna Meeting of the Representatives of the Participating States of the Conference on Security and Co-operation in Europe*

The Concluding Document is the product of a series of meetings in Vienna from November 4, 1986, to January 17, 1989.¹⁵⁹ Thirty-five countries, including the United States and Austria have signed the Concluding Document.¹⁶⁰

The most important sections of the Concluding Document enumerate the specific actions that each country should take to ensure religious freedom. Article 16 provides:

16. In order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*,
16a • take effective measures to prevent and eliminate discrimination against individuals or communities, on the

157. *Id.* art. 4.

158. Sullivan, *supra* note 152, at 503.

159. See BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 120, at 450.

160. See *Concluding Document*, *supra* note 122, at 531.

632 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, economic, social and cultural life, and ensure the effective equality between believers and non-believers;

16b • foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;

16c • grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;

16d • respect the right of religious communities to

- establish and maintain freely accessible places of worship or assembly,

- organize themselves according to their own hierarchical and institutional structure,

- select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,

- solicit and receive voluntary financial and other contributions;

16e • engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;

16f • respect the right of everyone to give and receive religious education in the language of his choice, individually or in association with others;

16g • in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;

16h • allow the training of religious personnel in appropriate institutions;

16i • respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;

16j • allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;

16k • favorably consider the interest of religious communities in participating in public dialogue, inter alia, through mass media.¹⁶¹

Additionally, article 17 provides that countries will “ensure in their laws and regulations” the application of freedom of religion.¹⁶² Notable among these provisions is the statement in article 16(a) that extends religious protection to all individuals in political and economic fields. This protection may become important to smaller denominations that may not otherwise have any political or economic say compared to larger denominations.¹⁶³

Another important provision is the requirement in article 16(c) that countries grant recognition to religions “upon their request.”¹⁶⁴ This provision is unique because statements concerning compulsory recognition do not appear in other international documents. While it probably does not mean that all religious groups are entitled to automatic recognition, at the very least, this provision may mean that “legislation governing the acquisition of entity status . . . should be designed to facilitate and not to obstruct” recognition.¹⁶⁵

The impact of the Concluding Document as a whole is to provide countries with a specific catalogue of government actions that each should take in order to ensure religious freedom.

5. *Framework Convention for the Protection of National Minorities*

The Framework Convention was opened for signature on February 1, 1995.¹⁶⁶ Although it has not yet entered into force, twenty-two countries have signed it, including Austria.¹⁶⁷ Thus,

161. *Id.* at 534, principle 16.

162. *See id.* principle 17.

163. *See* Durham et al., *supra* note 7, at 22 (arguing that 16(a) is particularly important to smaller denominations).

164. *Concluding Document*, *supra* note 122, at 534.

165. Durham et al., *supra* note 7, at 24.

166. *See Framework Convention*, *supra* note 123, at 351. For a brief description of the history of the Framework Convention, see Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L L. 45, 61-62 (1994).

167. *See Framework Convention*, *supra* note 123, at 351.

634 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

while not technically enforceable, because Austria has signed the document, Austria should abide by the principles contained therein. The Framework Convention specifically protects the right of freedom of religion belonging to national minorities. Articles 7 and 8 provide that the countries shall “ensure” freedom of religion and freedom of religious manifestation for national minorities.¹⁶⁸

The link that this document makes between national minorities and religious rights recognizes the modern reality that national minorities usually belong to religious minorities. Both of these groups need protection, and it is important to note that this European document recognizes that there is a need to specifically protect national minorities beyond the existing international documents.

III. ANALYSIS OF THE NEW RECOGNITION LAW

As discussed previously in Part II.C, there are two sets of requirements under the 1997 law: those to become a Confessional Community and the additional requirements to become an officially recognized religion. Both sets of requirements violate international laws and standards.

A. How Austria's Religion Laws Violate International Agreements

Austria's new religion law violates many of the international documents to which Austria is a party. These violations of international law arise from the section 11 requirements, the other new requirements of law, and other Austrian religion laws.

1. How the Section 11 Requirements Violate International Law

The requirements for official recognition listed in section 11 of the new law violate international agreements. The first requirement under this section is that a Confessional Community must wait at least ten years before it can be evaluated for official recognition.¹⁶⁹ This time requirement is discriminatory against newly established religions, a violation

168. *See id.* arts. 7-8.

169. *See Confessional Communities Law, supra* note 1, § 11(1)(1).

of international law. The Human Rights Committee, created by the International Covenant, explained in a Comment to the Convention that they were concerned about the "tendency to discriminate against any religion [because] they are newly established, or represent religious minorities."¹⁷⁰ The waiting requirements may stem from a legitimate aim. Austria could argue that there is a public interest in recognizing only stable religions. However, the European Convention requires more. As was illustrated in *Hoffman v. Austria*,¹⁷¹ not only must there be a legitimate State aim necessary in a democratic society, there must also be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."¹⁷² Thus, while the aim might be legitimate (ensure the stability of state-recognized religions), the means (forcing groups to wait ten to twenty years as a Confessional Community) are not proportionate because the distinction is based solely on religion.¹⁷³

The second requirement under section 11 of the new law, that there be 16,000 members, also violates international law. The problems identified in the previous discussion of the 300 member threshold for Confessional Communities are also problems with the requirement of 16,000 members for recognition. An examination of the currently recognized religions shows that this requirement is in violation of the proportionality and necessity requirements of the European Convention. Only four or five of the twelve currently recognized religions meet this numerical requirement.¹⁷⁴ In fact, the Buddhists were recently recognized although they have only a few hundred members.¹⁷⁵ This belies Austria's current emphasis on numbers. Because the number of members was not important to the Austrian government before the 1997 law, the new numerical requirement can have little to do with a

170. Human Rights Committee, General Comment No. 22(48) concerning article 18 (CCPR/C/21/Rev.1/Add. 4, 27 Sept. 1993), *quoted in* Durham et al., *supra* note 7, at 15.

171. 255 Eur. Ct. H.R. (ser. A) at 45 (1993).

172. *Id.* at 59.

173. *Cf. id.* at 60 (stating that because a distinction was based solely on religion, the means could not be proportionate).

174. *See supra* note 78 for a list of the four religions.

175. *See* FEDERAL PRESS SERVICE, *supra* note 19, at 50.

636 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

legitimate state aim. The ten-to-twenty-year waiting period is a significant burden and is not proportional to any state aim. Thus, the numerical requirement violates the European Convention, as well as article 18(3) of the International Covenant, which states that any limits on religious liberty must be "prescribed by law and . . . necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁷⁶ Austria has identified no public safety, order, health or moral interests that this 16,000-member threshold protects. The International Covenant, through articles 2 and 26, also provides that each country must ensure the rights in the International Covenant regardless of religion¹⁷⁷ and "prohibit any discrimination" on the grounds of religion because all persons are equal before the law.¹⁷⁸ The current requirement of 16,000 members is an overly burdensome restriction on religions in violation of international law. Additionally, this requirement protects no identified "public safety, order, health" or moral interests that justifies the unequal treatment of large and small religious groups.

The third requirement of section 11 of the new recognition law likewise violates international law. Section 11(3) provides that in order to receive recognition, a religion must have a "positive attitude" toward society and the state.¹⁷⁹ In effect, this requirement will operate as a bar to any religion with which the government does not agree. However, article 2(2) of the 1981 Declaration prohibits, in strong terms, "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."¹⁸⁰ The distinction that will be made between groups that agree with the government and those that do not interferes with the fundamental right to individual religious beliefs. If recognition of a religion hinges on its attitude toward the state, that attitude toward the state necessarily implicates political as well

176. International Covenant, *supra* note 120, art. 18(3).

177. *See id.* art. 2.

178. *Id.* art. 26.

179. *See* Confessional Community Law, *supra* note 1, § 11(3).

180. 1981 Declaration, *supra* note 121, art. 2(2).

as religious views. Principle 16(a) of the Vienna Concluding Document creates a duty on the part of countries to “prevent and eliminate discrimination . . . in all fields of civil, political, economic, social and cultural life.”¹⁸¹ The requirement that a religion agree with the State not only fails to eliminate discrimination, it creates discrimination.¹⁸² The fact that a particular religious group may not have a positive attitude toward the state should not be detrimental to its adherents.

2. *How the Other Portions of the New Law Violate International Law*

Under the new law, before a religious group can become a Confessional Community, the first step of recognition, the group must have at least 300 members residing in Austria.¹⁸³ Although this numerical requirement is much lower than the 16,000 members required for official recognition, even this lower requirement of 300 members may violate international standards. The Concluding Document, which was signed, ironically, in Vienna, clearly provides that all persons are entitled to protection from religious discrimination.¹⁸⁴ That document states that governments shall “grant upon their request to communities of believers . . . recognition of the status provided for them in their respective countries.”¹⁸⁵ In Austria, recognition as a Confessional Community brings a religious group few, if any, identifiable benefits. Unrecognized religions and Confessional Communities share the same legal protection under the current law. It is only the fully recognized religions that enjoy the benefits set forth in Part II.C. Thus, recognition as a Confessional Community is not really a “recognition” in the sense of the Concluding Document, and the government has failed to recognize religions as required by Principle 16(c). As a group of religion law scholars has noted:

181. *Concluding Document*, *supra* note 122, principle 16(a).

182. This is not to say that a government could not regulate an overt, constant threat to legal order and public safety. To place restrictions on a religious group, a government must show that it is necessary and that the means employed are proportional to the aim of legal order and safety. Presumably, this would not be too difficult if a group was truly a danger to members of society.

183. *See* Confessional Communities Law, *supra* note 1, § 3(3).

184. *See* *Concluding Document*, *supra* note 122, principle 16(a).

185. *Id.* principle 16(c).

638 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

Bluntly stated, *denial of the entity status of a religious organization is denial of religious liberty*. Without entity status, religious organizations cannot acquire property or other physical materials required for public manifestation of religion or belief. Thus, denial of entity status to a religious group may be permitted only where this is necessary to protect some overriding state interest that can be attained in no less restrictive way.¹⁸⁶

The requirement that a religion have 300 resident members in order to achieve Confessional Community status violates the principles of the Concluding Document.

The new law also requires that the beliefs of the applicants be different from those held by other lawfully recognized religions.¹⁸⁷ This vague language does not define how different the beliefs must be. What if they have the same leadership structure? What if they share only some of the same central beliefs? Presumably the final judgement as to closeness of beliefs would be made by the Minister of Education and Cultural Affairs, who reviews and accepts or rejects the applications. This process puts a government official in the position of judging and evaluating the differences between religions. This sort of intrusion cannot be harmonized with the language of the European Convention that any regulation or restriction religion must be "necessary in a democratic society" and proportionate to the nature of the state interests involved.¹⁸⁸

Another major problem with this requirement becomes apparent if the beliefs of an applicant religious group *are* similar enough or the same as another religion. The prohibition on recognizing such a group violates the applicant group's right to individual and personal belief. Such a prohibition would be withholding recognition status on the basis of the individuals' beliefs. This stands in clear contradiction to article 2 of the 1981 Declaration, which states that "[n]o one shall be subject to discrimination by any State . . . on grounds of religion or other beliefs."¹⁸⁹ This same principle will be violated any time a

186. Durham et al., *supra* note 7, at 24.

187. See Confessional Communities Law, *supra* note 1, § 4(1)(2).

188. See European Convention, *supra* note 118, art. 9.

189. 1981 Declaration, *supra* note 121, art. 2(1).

government is asked to make judgments based solely on the particular beliefs of an individual.

Besides the particular language of the new law that violates international religious freedom standards, the law is notable for what it lacks: a remedy. Without providing a remedy for religions that may be discriminated against in the recognition process, the Austrian government has failed to protect the smaller religious groups that have little chance of gaining recognition through the new law. In general, the new recognition scheme violates the requirement of international agreements that all individuals be treated equally, regardless of their religion, unless there is some legitimate state aim and the means used to restrict those religions are objective, reasonable and proportional to the state aim.

3. How Austria's Other Actions Toward Religion Violate International Law

An analysis of Austria's new religion law would be incomplete without a brief discussion of other portions of Austria's religion laws. The most disturbing action of the Austrian government outside of the new law is its brochure that identifies "dangerous sects," listing among others, groups like the Jehovah's Witnesses, Scientology, Yoga, and Hare Krishna.¹⁹⁰

The language of the Vienna Concluding Document creates a duty on the part of countries to "foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and nonbelievers."¹⁹¹ Not only does the sect brochure fails to foster a climate of mutual tolerance, it creates the tension between the different religious communities that the international agreements intended to eliminate.

Likewise, the 1981 Declaration "urges states to remove local laws that perpetrate or allow religious discrimination, and to enact local criminal and civil laws to combat religious discrimination and intolerance."¹⁹² The Austrian government

190. *See Secrets*, *supra* note 98, at 3 (describing the brochure and listing the identified religious groups).

191. *Concluding Document*, *supra* note 122, principle 16(b).

192. Durham et al., *supra* note 7, at 19.

cannot fulfill its duty to “foster a climate of mutual tolerance”¹⁹³ and continue to be the source of intolerance through a brochure that labels certain religions as dangerous sects. Thus, Austria’s continued effort to identify and publish lists of dangerous religious groups violates international law.

B. Proposed Changes in Austria’s Religion Laws

Austria’s current recognition process leaves the government in the position to grant recognition to religious groups based partially on an approval of that religion’s beliefs. Perhaps Austria should not have a recognition process at all. There is a danger to both recognized and unrecognized religions when a government is left to approve or disapprove of a group’s teachings. While not binding on Austria, the underlying rationale of Justice Souter in a dissenting opinion in *Agostini v. Felton*,¹⁹⁴ shows the danger of a government judging and supporting religions it approves of:

The rule [a ban on government subsidization of religion]

expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. “When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being ‘taint[ed] . . . with corrosive secularism.’ The favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation.”¹⁹⁵

There is little chance, however, that Austria will do away with its recognition process. Regardless, Austria must still administer that process in accordance with the international agreements to which it is a party. In order to comply with these international agreements, Austria must change portions of the new recognition law as well as aspects of its other religion laws.

193. *Concluding Document*, *supra* note 122, principle 16(b).

194. 117 S.Ct. 1997, 2020 (1997).

195. *Id.* at 2020 (Souter, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring)).

Perhaps the most disappointing aspect of the new law is the apparent regressive, rather than progressive, nature of the new law. Under the previous recognition statute, religious groups did not have the burden of showing that they had a positive attitude toward the State, nor did they have to have a certain percentage of the population as members of the religion.¹⁹⁶ Instead of making it easier for religious groups of all sizes to enjoy the benefits of full recognition as a religion, Austria has acted to slow recognition for some, cut it off altogether for others, and place a moratorium on recognition for all religions for at least the next ten years. This step backwards is a troubling step in a Western country. Austria should be opening, rather than closing, the government's doors to new religions.

Toward that end, the numerical requirements of the new law (namely that there be 300 members to gain Confessional Community status, 16,000 members to gain full recognition) and the ten-year waiting period should be repealed. The language of the Vienna Concluding Document states that Countries shall "grant upon their request" recognition status.¹⁹⁷ As one group of scholars noted in regard to this admonition:

Of course, such guarantees of entity status do not automatically allow religious groups to evade legitimate requirements and laws necessary in any democratic society. The preferred approach that has emerged in the West is to establish procedures that facilitate recognition of religious groups at the stage of acquiring entity status In effect, at that stage, a religious organization is presumed innocent and deserving of religious liberty protections until the contrary is proven. Problems of abuse or unlawful conduct by the religious organization, when and if they occur, can be dealt with better and more justly later [T]he guarantee of entity status is critical as a practical matter for actualizing freedom of worship and for carrying out other religiously-motivated activities.¹⁹⁸

The numerical requirements are a heavy burden on smaller religious groups, are not necessary in a democratic society, and are not proportional to any legitimate state aim. Such

196. See Part II.A for a discussion of the history of the development of the recognition statutes.

197. See *Concluding Document*, *supra* note 122, principle 16(c).

198. Durham et al., *supra* note 7, at 23.

642 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

requirements therefore violate the language of the European Convention as interpreted by the European Court of Human Rights. Limitations, such as the numerical one promulgated by the new law, must be motivated by "a 'pressing social need.'"¹⁹⁹ Austria has not identified any such pressing need. Additionally, the court has stated that the European Convention affords "protection against different treatment, without an objective and reasonable justification, of persons in similar situations."²⁰⁰ Because Austria treats large and small religious groups differently without identifying an objective and reasonable justification, these numerical requirements violate international law and should be repealed.

The requirement in section 11 of the new law requiring a "positive attitude toward society and the State"²⁰¹ should likewise be repealed. The government's evaluation of a religion's attitude toward the State will necessarily implicate political beliefs. Article 2(2) of the 1981 Declaration prohibits distinctions, exclusions, or restrictions based on religion or belief,²⁰² and Principle 16(a) of the Vienna Concluding Document creates a duty on the part of countries to prevent discrimination in many areas, including the political and cultural.²⁰³ In order to comply with that duty, Austria should remove the requirement of a positive attitude toward the government.

This "positive attitude" requirement creates an approval process of individual religious beliefs. Of course the government does not consider the recognition process as an approval process. One Austrian official in the United States has argued

199. Case of Silver and Others, 61 Eur. Ct. H.R. (ser. A) at 38 (1983) (quoting Case of Handyside, 24 Eur. Ct. H.R. (ser. A) at 22-23 (1976).

200. Hoffman v. Austria, 255 Eur. Ct. H.R. (ser. A) at 58 (1993).

201. Confessional Communities Law, *supra* note 1, § 11(3).

202. See 1981 Declaration, *supra* note 121, art. 2(2).

203. See Concluding Document, *supra* note 122, principle 16(a).

that all Austrians enjoy total “freedom of religion,”²⁰⁴ while another political party official in Austria stated:

It's about the elimination of a gray area. Authentic religious confessional communities should have a legal status. It's not about the State judging religious teachings, either. But the State can look and see if a religion that wants to be recognized by the State has a positive attitude toward the State.²⁰⁵

These statements notwithstanding, when a government declares a religion “dangerous to the youth” or “against the state,” as Austria did in the case of the Jehovah's Witnesses²⁰⁶ and continues to do with Scientology,²⁰⁷ the government is judging religions. When coupled with the prevailing Austrian view that members of sects are dangerous,²⁰⁸ the Austrian government has the power to relegate certain groups, namely unrecognized religions, to a second-class status based on the approval process created by section 11 of the new law.

Beyond the new law, Austria should do away with the government office responsible for tracking religious groups and for issuing the “sect brochure.”²⁰⁹ The 1981 Declaration requires a country to take “effective measures to prevent” discrimination,²¹⁰ while the Vienna Concluding Document creates a duty on the part of countries to “foster a climate of mutual tolerance and respect” among believers of different religions.²¹¹ Austria's sect brochure and its effort to identify “dangerous” teachings should be eliminated in order to take all

204. In a letter to the editor appearing in the *Washington Times*, Martin Eichtinger, Director of the Austrian Press & Information Service in Washington, D.C., argued that “Austria has . . . complied with the highest standard of human rights protection in this field” and that the new conditions are necessary “for reasons of public order and for the prevention of abuse.” Martin Eichtinger, Letter to the Editor, *Austria's Law on the Recognition of Religions isn't Unconstitutional*, WASH. TIMES, Dec. 18, 1997, at A20.

205. *Mit dem Segen des Staates* [With the Blessing of the State], KURIER, Dec. 28, 1997, at 3 (quoting Werner Anon, the sect-spokesperson for the ÖVP) (translation by the author).

206. See *supra* notes 58-66 and accompanying text.

207. See *supra* notes 70-73 and accompanying text.

208. See *supra* notes 98-100 and accompanying text.

209. See *Secrets*, *supra* note 98, at 3 (describing the brochure and listing the identified religious groups).

210. *1981 Declaration*, *supra* note 121, art. 4.

211. *Concluding Document*, *supra* note 122, principle 16(b).

644 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

effective measures to prevent discrimination and to foster a climate of mutual tolerance and respect.

C. The Likely Impact of the New Law if No Changes are Made

If Austria does not change the 1997 law, many smaller religions will feel the negative impact. One important factor in predicting the likely impact of the 1997 law is to examine the past history of the government's interaction with religious minorities, such as the Jehovah's Witnesses. In their fight for approval, the Jehovah's Witnesses were not scrutinized for approval under the then existing requirement of merely professing nonillegal beliefs.²¹² Rather, the government rejected their application for recognition on the grounds that they had an intolerant attitude toward the government, refused of blood transfusions (especially for children), and would be led from Brooklyn, New York.²¹³ The requirement in the 1997 law that a group have a positive attitude toward the government seems to be a codification of the government's complaint that the Jehovah's Witnesses are intolerant toward the government.

These reasons were arguably pretexts advanced to reject the Jehovah's Witnesses. The first reason, that the Jehovah Witnesses have a negative attitude toward the government, is arguably incorrect. The Jehovah's Witnesses profess to be "neutral" in political matters.²¹⁴ They do not participate in politics, thus they neither vote nor hold office.²¹⁵ Although they do not participate in the political process, this is because of religious beliefs. However, Austria considers this neutrality to be "against the state."²¹⁶ The Austrian government's characterization of the Jehovah's Witnesses' noninvolvement in the political process as being anti-State seems more like a convenient excuse to restrict the rights of the Jehovah's Witnesses.

212. See the requirements for approval under the 1874 statute given in GAMPL, *supra* note 25, at 132.

213. See *Jehovah Witnesses Not Recognized*, *supra* note 59, at 6.

214. See Stanzel, *supra* note 60, at 2 (stating that Jehovah's Witnesses are politically neutral and inactive because they believe the devil influences government and politics).

215. See *id.*

216. *Id.* (quoting Minister Gehrler) (translation by this author).

The second reason given by the government, that the Jehovah's Witnesses are dangerous because of their refusal of blood transfusions, especially for children, does not hold up under scrutiny. Austrian courts can order that a medically necessary blood transfusion be given to a child in the absence of parental permission.²¹⁷

The third reason given by the government, that the church will be run from New York, is a hypocritical reason for rejecting the application. The Catholic Church, like other churches in Austria, has its center of leadership outside of Austria. Common sense dictates that Rome, not Vienna, ultimately controls the Catholic Church in Austria.

The weakness of the reasons given for the denial of the Jehovah's Witnesses application also shows the weakness in the tacit approval process set up by the 1997 law. Although the Jehovah's Witnesses have now acquired the official status of a "Confessional Community," they must still wait ten years before being considered again for recognition as a religion. They had already waited twenty years to find out that the government considers them dangerous to the youth of Austria. There can be little doubt that ten years from now the Jehovah's Witnesses will face the same rejection when their application is once again considered unless the law is changed.

The history discussed in Part II.B suggests that it will be longer than ten years before there is another recognized religion. After all, the Jehovah's Witnesses already meet the numerical standards.²¹⁸ They were rejected before this new regulatory scheme, because they were declared "dangerous" by the government. The only thing that can get them closer to the requirements for recognition is to somehow change the government's perception of them. Considering the length of time that the Jehovah's Witnesses have been waiting for recognition,²¹⁹ the government would have to significantly change its position if they were to be recognized in ten years. Likewise, the Scientologists should not expect recognition any

217. See *Hoffman v. Austria*, 255 Eur. Ct. H.R. (ser. A) at 51-53, 55 (1993).

218. See Mayer, *supra* note 8, at 29 (arguing that the Jehovah's Witnesses meet all requirements).

219. See Witham, *supra* note 3, at A1 (stating that the Jehovah's Witnesses have been trying for 20 years to be approved).

646 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1998

time soon. Along with the Jehovah's Witnesses, the Scientologists have been the target of government action.²²⁰ This is because the government has branded them a dangerous sect.²²¹

Even unrecognized groups that are seen as being in the American mainstream, like the Seventh-day Adventists, will have to wait another ten years. Although they have over 10,000 members in Austria, they were not previously recognized.²²² Obviously they met the previous threshold of 2,000 members,²²³ and so one is left with the conclusion that their previous application was not approved because the government did not agree with their beliefs.

This conclusion is supported by the fact that although there are new strict numerical requirements, size cannot really be an important issue for the Austrian government. This is because only four or five of the twelve recognized religions would meet the new 16,000-member requirement,²²⁴ and because the Buddhists were recognized in 1983 despite their size of only a few hundred members.²²⁵ Although the numerical size of recognized religions may be a key factor, the small but recognized religions were recognized in spite of their small size, for some other reason. Since they were not recognized for numerical reasons, the only other ground for recognition, government approval of their beliefs, must have been the deciding factor in their recognition.

For unrecognized religions, the numerical requirements will now bar them from even being considered for recognition. In this way, the new numerical requirements may actually be a way for the government to keep some groups at bay by citing their size, rather than having to publicly disagree with their religious beliefs.

220. See *Laws and Sect*, *supra* note 55, Innenpolitik [Domestic Affairs Section] (reporting that Scientology is a "psycho-cult" and that there is a proposal for an "Office for Sect Problems").

221. See *Secrets*, *supra* note 98, at 3 (reporting that a government pamphlet has been distributed, listing the Scientologists, among others, as a dangerous sect or cult).

222. See *Witham*, *supra* note 3, at A1.

223. See *Religion Law Debated*, *supra* note 77, at 8.

224. See *supra* note 78 (listing the four religions).

225. See *FEDERAL PRESS SERVICE*, *supra* note 19, at 50.

IV. CONCLUSION

Austria's 1997 Confessional Communities Law creates a second class of religions and codifies Austria's ability to withhold religious protections from those groups with which it does not agree. The numerical requirements and the requirement that a religious group have a positive attitude toward the government violate international law. The international agreements to which Austria is a party make clear that Austria may not discriminate against religious adherents based upon their beliefs without a showing of a pressing social need and a legitimate state aim. Additionally, any restrictions must be proportional to the legitimate state aim. Austria has made no showing of pressing social need, nor of a legitimate state aim. Even if there was a legitimate state aim, the highly burdensome restrictions would not be proportional to that legitimate state aim.

The 1997 law is particularly troubling in a Western country like Austria where the impact of the law will create a step backward, rather than forward for religious minorities. Apart from violating international law, the new law is discriminatory because of the additional roadblocks it puts in the path of religious minority groups as they seek the benefits and protections of recognition. This alone should give Austria pause to reconsider the impact of the 1997 law. Additionally, the 1997 recognition law also violates international standards of religious freedom, and Austria should change the law as identified in this Comment in order to ensure freedom of religion for all residents of Austria, regardless of religious affiliation.

Christopher J. Miner