

Political Culture and Freedom of Conscience: A Case Study of Austria¹

Since the end of the Second World War, the speed, breadth and long-term consequences of world events have put human rights high on the international political and legal agenda. The Holocaust, genocides in the former Yugoslavia, Rwanda and Sudan, and too many acts of mass terrorism are some of the events that have placed them there. Some nations—usually inveterate abusers—would just as soon human rights were not prominent. Others—usually rights respecters—have taken a proactive approach to protecting individual fundamental freedoms by incorporating into their own legal systems all or many of the traditional rights found in the Universal Declaration of Human Rights and other international protective instruments. In fact, protecting human rights has gained sufficient momentum in the international arena that even most countries which do not support such rights at least pay lip service to them and include them—though often with qualifications—in their constitutional laws and charters.

Among the rights at the heart of the debate, rights fundamental to democracy and its institutions, are those of conscience, religion and belief. Touching at the core of what it means to be human, at the very essence of the significance men and women give to their lives and the lives of others, protection of rights of conscience can be found in virtually every human rights charter, bill, and comprehensive code. The importance of these rights permits analysis of their protection as models for the protection of fundamental rights in general. But as nations wrestle with the best ways to protect, preserve and perpetuate these and other fundamental rights, the legal approach is limited: a people can embed them in the constitutional law of the land or protect them through the course of ordinary legislation. Bills of rights, charters, routine legislation—each approach offers something to gain and something to lose to the nations who undertake them.

Australia and the United Kingdom are two nations with good human rights reputations who are currently debating means by which they can further ensure the fundamental liberties of people within their borders. One of the means being considered in both countries is the adoption

¹ By David M. Kirkham, Ph.D., J.D., Senior Fellow for Comparative Law and International Policy, Brigham Young University Law School.

of a bill of rights (in the UK's case a "new" bill of rights²). Part of the debate has centered on the optimal language and best type of instrument to be adopted.

In the case of freedom of conscience, it is generally assumed that laws having constitutional force will strengthen the hands of an independent judiciary and protect religious minorities against the possible tempting tyranny of a parliamentary majority. On the other hand, the argument for a legislative charter or its equivalent states that such a charter will prevent the opposite abuse: legislation "from the bench," as is thought by some to occur too often by judges in the United States. Regardless the language used or instrument adopted, the debate must be examined in light of the practices of sovereign violators of freedom of religion or belief, who nonetheless have constitutionally embedded, very clear provisions for religious freedom. What really accounts for the differences between those countries where freedom of conscience is respected and those where it is not? Do religious guarantees in practice depend on whether they are written in a bill as opposed to a charter or a constitutional basic law or are simply scattered throughout various legislative provisions? Henry Kissinger once reportedly said, tongue-in-cheek, "the illegal we do immediately. The unconstitutional takes a little longer."³ Do some countries have genius draftsmen and women who simply "know the magic words" to guarantee civil liberties? The arguments can be made absurd.

The debates over specific language and types of legal instruments sometimes become so volatile as to obfuscate a more fundamental determinant of how well the free conscience of a people are protected: the political culture of a nation. This article posits that, when it comes to protections of freedom of religion or belief, political culture is as important, if not more so, than whether those protections find themselves in a charter, a bill, or whether they are somehow constitutionally embedded in a basic law. This does not mean that the words and instruments are not important. They may themselves, however, be reflections of the political culture. More important than the words or type of instrument is the perceived legitimacy conveyed to the words and documents through the drafting and enforcement processes of the country, through the perceived authority of the drafters and enforcers, and the attitudes towards the documents, words,

² Wills, Michael. "A Bill of Rights for the UK? Papers and Written Evidence, Memorandum, December 18, 2008," <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/15/1506.htm#a12> (all electronic sources accessed December 11, 2009)

³ Henry Kissinger, quoted in DuPre Jones, "The sayings of Secretary Henry," New York Times, October 28, 1973.

processes and persons held by both the political elites and political masses. To begin to test the waters of these assertions, this chapter will look at Austria as a case study. It will ask how the nation's underlying political culture reflects the realities of its constitutional protections for freedom of conscience and other fundamental rights and suggest that, in Austria's case, cultural safeguards could be stronger.

Freedom of Religion and Illiberal Republics

Virtually every national constitution in the world guarantees some kind of freedom of conscience and religious belief. One will find protective provisions in the constitutions of Iran, North Korea, Belarus and Tajikistan, to name only a few countries with less than liberal regimes and reputations. These provisions may differ in their wording, or they may resemble provisions in international human rights documents and the liberal constitutions of others, but the words are there, regardless. In each case they give innocent citizens grounds to think their rights are protected—rights to believe or not to believe and to pursue their beliefs on their own or with others within institutional structures. Yet of course every country, regardless of its constitutional provisions, does not really guarantee religious freedom in practice. Violations are documented near daily by such organizations as Human Rights Without Frontiers (HRWF) or Forum 18.⁴

Although the Iranian Constitution specifically guarantees freedom of worship only to Muslims and, as “the only recognized religious minorities,” to Zoroastrian, Jewish and Christian Iranians, it nonetheless assures for everyone that “the investigation of individuals' beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief.” It also asserts that “the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights”—this despite numerous well-documented official Iranian persecutions of members of the Bahá'í faith.⁵

North Korean citizens have constitutionally guaranteed “freedom of religious beliefs.” “This right,” notes the North Korean Constitution, “is granted by approving the construction of

⁴ See Human Rights Without Frontiers at <http://www.hrwf.net/> and Forum 18 at <http://www.forum18.org/>

⁵ Iran. "Constitution of the Islamic Republic of Iran, Articles 13, 14 and 23, under Rights of the People," <http://www.iranonline.com/iran/iran-info/Government/constitution-3.html>; Iran Press Watch, <http://www.iranpresswatch.org/>

religious buildings and the holding of religious ceremonies.” If that seems potentially restrictive, that religious freedom is further qualified by the provision that “religion must not be used as a pretext for drawing in foreign forces or for harming the State and social order,” which must presumably have been the case when, if Associated Press reports are correct, a North Korean woman was executed in June 2009 for distributing the Bible.⁶

In Belarus, where the government’s approach to freedom of conscience issues is not so draconian, but still far from liberal, the constitution provides that “all religions and faiths shall be equal before the law” and that “the establishment of any privileges or restrictions with regard to a particular religion or faith in relation to others shall not be permitted.” On the individual level, supposedly “everyone shall have the right independently to determine his attitude towards religion, to profess any religion individually or jointly with others, or to profess none at all, to express and spread beliefs connected with his attitude towards religion, and to participate in the performance of acts of worship and religious rituals and rites.”⁷ And yet HRWF and Forum 18 continue to note abuses in Belarus.

The Constitution of the likewise restrictive Tajikistan is similar. It instructively explains that “in Tajikistan, social life develops on the basis of political and ideological pluralism,” and hence, “no state ideology or religion may be established.” The implication of that, however, is that “religious organizations are separate from the state and may not interfere in governmental affairs.” However, here too “each person has the right independently to determine her or his religious preference, to practice any religion alone or in association with others or to practice no religion, and to participate in the performance of religious cults, rituals, and ceremonies.”⁸

It is clear that protective words regarding freedom of religion or belief in a constitution are no guarantee that this freedom will be respected in practice. Of course, careful framers will argue that words do make a difference—and they do. It can be argued that the constitutions of Belarus and Tajikistan, for example, have somewhat less obtrusive qualifications to their protection of religious rights than do the constitutions of North Korea and Iran, and that the

⁶ North Korea. "Constitution of North Korea , Article 68, 1972," Wikisource. http://en.wikisource.org/wiki/Constitution_of_North_Korea_%281972%29; Kwang-Tae Kim, “Activists claim Christian executed in NKorea,” *Associated Press*, July 24 2009, http://www.breitbart.com/article.php?id=D99KNBDO0&show_article=1

⁷ Belarus, "Constitution of Belarus, Articles 16 and 31", http://www.servat.unibe.ch/icl/bo00000_.html

⁸ Tajikistan, "Constitution of the Republic of Tajikistan, Articles 8 and 26, 1994," <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan003670.htm>

abuses are slightly less egregious in the former two as well. But one finds sometimes the same protective words in the constitutional documents of abuser nations as in those of countries who do a good job at protecting freedom of belief. For example, all forty-seven members of the Council of Europe are held to the same constitutional standards for religious protection laid out in the European Convention on Human Rights and yet some of those countries do a much better job at actually protecting religious rights than others. A review of the eleven Article 9 cases dealing with freedom of religion or belief communicated to the European Court of Human Rights during May and June 2009 reveals five cases from Russia and four from Turkey.⁹

It is easy to recognize that some constitutions are completely ineffective in protecting freedom of religion or belief and other fundamental rights. Thus, for modern nations conducting a dialogue on the value of written constitutional provisions, especially a bill of rights, in protecting rights of conscience, it makes little sense to spend too much time analyzing the extreme cases. Australia is not Iran. The United Kingdom is not the Democratic People's Republic of North Korea. It makes more sense for countries serious about the protection of human rights to look at nations more closely resembling themselves. A key as to why this is so lies in their political cultures.

Political Culture

At least since the 1980's political scientists have recognized political culture as a useful concept for examination. Definitions vary but find much in common. Lucian Pye states:

Involving both the ideals and the operating norms of a political system, political culture includes subjective attitudes and sentiments as well as objective symbols and creeds that together govern political behavior and give structure and order to the political process. Nations generally have both elite and mass political

⁹ Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, 1998," at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. Article 9 reads as follows:

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 the protection of the rights and freedoms of others.

Find communicated cases at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-cc-en>.

cultures, along with further subcultures that are rooted in regional, occupational, class, ethnic, and other differences.¹⁰

Almond and Verba originally described political culture as societally shared:

cognitions, perceptions, evaluations, attitudes and behavioral predispositions that permit the members of that polity to order and interpret political institutions and processes and their own relationships with such institutions and processes.¹¹

A Canadian definition states that political culture is:

1. The sum of attitudes, beliefs, and expectations that constitute particular orientations toward society in general and politics in particular [or] 2. The specifically political orientations—attitudes towards the political system and its various parts, and attitudes toward the role of the self in the system.¹²

In other words, in each of these definitions political culture transcends law to the extent that law emanates from the polity and society. Legal institutions will generally reflect the attitudes, beliefs and expectations of the polity. This is clearly so in a democracy, but when a citizenry accepts passively the will of authoritarian leaders or even actively the pronouncements of theocratic rulers in which it had no say, that too is a reflection of political culture.

When it comes to freedom of religion or belief and other fundamental freedoms, when the political culture reinforces their preservation, these freedoms tend to take root and are sustainable over long periods of time. The actual words used to preserve those freedoms are not so important if it is widely and insistently understood that such is their intent. On the other hand, where the words seem just right from the standpoint of draftsmanship, but widespread cultural agreement as to the meaning and importance of those words is lacking, fundamental freedoms are less likely to be maintained.

Post-Second World War Austria presents a recent example of a country in which the language of fundamental rights became part of its legal and political institutions before that language reflected some of the realities of the political life of the nation. Austria is a useful case

¹⁰ Lucian W. Pye, "Political Culture," *The Oxford Companion to Politics of the World* (New York: Oxford University Press, 1993), 712. For Australia, see the discussion at Bede Harris, *A New Constitution for Australia*, Chapter 2.

¹¹ Craig, Ann L. and Wayne A. Cornelius, "Political Culture in Mexico: Continuities and Revisionist Interpretations," in *The Civic Culture Revisited*, eds. Gabriel A. Almond and Sydney Verba, (Newbury Park, CA: Sage Publications, 1989), 340.

¹² "Canadian Political Culture: The Problem of Americanization" Definitions at <http://www.markville.ss.yrdsb.edu.on.ca/politics/exemplars/meg2.html>

study because the apparent level of its commitment to fundamental rights as reflected by its post-war political controversies was far from apparent at a time when most of Austria's western contemporaries had made significant steps in adopting the realities of democratic governments and it was presumed that Austria had as well. Many observers were surprised when controversies broke out in the mid-1980s with the election to the presidency of Kurt Waldheim, and again in 1999 when the right wing Freedom Party, deemed extremist by many observers, came to power in coalition under the leadership of Jörg Haider. Waldheim was a former National Socialist Wehrmacht officer whose service during the war has been subjected to serious criticism; the recently deceased Haider was the son of National Socialists. His statements seemed at times to defend Nazi policies and practices. The elevation to power of Waldheim and Haider called into question for some whether Austria would in fact protect the individual rights guaranteed in its basic law.

Austria: a Bit of Post-War History

Though democratic principles are acknowledged to have existed in societies ranging from Iroquois Amerindians to African ethnic communities, few would argue that their conceptual development has been largely Western European and American. Western Europe has seemed to be largely immune from the phenomenon dubbed by Fareed Zakaria as the post-Cold War rise of the illiberal democracies, i.e., governments democratically elected but nonetheless oppressive to a considerable segment of their population.¹³

The European Union has embraced democracy as a guiding principle and as a condition for membership. Although it almost went without saying that its founding members were established democracies, each potential new member, especially those clamoring for entry from the former soviet bloc, has been screened and scrutinized for its commitment to the rule of law, protection of human rights, and other "European" and democratic values.¹⁴

Nestled in the heart of Europe, Austria is a highly developed, functioning democracy with a market economy. Its citizens on the whole enjoy a high standard of living. It is known

¹³ Fareed Zakaria, "The Rise of Illiberal Democracy." *Foreign Affairs*, vol. 76, no. 6 (Nov.-Dec., 1997) 22-43.

¹⁴ Heather Grabbe, "European Union Conditionality and the "Acquis Communautaire," *International Political Science Review: Enlarging the European Union: Challenges to and from Central and Eastern Europe* 23 (July 2002), : 249-268. See also, Skuhra, Anselm. 2005, *The Eastern Enlargement of the European Union: Efforts and Obstacles on the Way to Membership*, Studienverlag Ges.m.b.H., Innsbruck.

for cleanliness, quaintness, natural beauty, winter sports and other tourist magnets. As a member of the European Union since 1995, it has only rarely drawn attention to itself in the international media in any but positive ways.

Since the end of World War II, however, two events, both surrounding controversial political figures, have given rise in some circles to questions regarding Austria's political culture and its commitment to liberal constitutional values. The first was the election to the Austrian Presidency in 1986 of former UN General Secretary Kurt Waldheim. Facts unknown to most during his tenure at the United Nations, Waldheim had served as a Wehrmacht intelligence officer during the war in Yugoslavia at a location where it was later proven that war crimes had been committed while he was there. These facts came out following his election, with allegations that he at least knew and lied about the commission of these crimes, if he was not more directly complicit in them. He denied wrongdoing and many reputable Austrians came to his defense. In protecting Waldheim, however, it has been suggested that Austrians were in fact at least deceiving themselves about their own responsibilities for their past experiment with National Socialism.

Austria's political neutrality following the war became a fundamental component of its political culture. Its courtship by both sides in the Cold War allowed Austrians to move forward after the war without ever accounting for their own contribution to Nazi atrocities—something the division of Germany never allowed the Germans:

In distinguishing Austria from Germany, neutrality... helped foster Austria's amnesia vis-à-vis its role in the Third Reich. Accepting history's verdict as Nazi Germany's first victim, Austrians could blame the Holocaust's horrors on the "evil" Germans and avoid the painful process of coming to terms with their own complicitous past. Paradoxically, it was the international controversy surrounding the election of Kurt Waldheim to the Austrian Presidency in 1986 that for the first time led to broad-based debates in Austria about the country's role under National Socialism.¹⁵

According to historian Gordon Brook-Shepherd, the Waldheim affair forced Austria

to shed some carefully nurtured delusions and illusions. The Austrians, like Waldheim, had got used to thinking of themselves purely as victims of Nazism, with no regard for the part they had played in its regime of evil, the Holocaust

¹⁵ Andrei S. Markovits, "Austria," *The Oxford Companion to Politics of the World*, New York: Oxford University Press, 1993, 60.

included. Both felt that Hitler's war was safely behind them, shut away in unvisited archives, yellowed newspaper files, and even behind the locked doors of their own memories. Both believed that the outside world felt respect and even affection for them, and it must be said that the outside world had given them every reason for that belief. For four decades after achieving independence, Austria had again become, to most foreign eyes, the sweet land of *The Sound of Music*; of Strauss and Mozart; of Danube steamers and alpine ski-runs.¹⁶

Austria had made some limited restitution to the victims of the Nazi regime at the end of the war, but in light of Austrians quickly taking up the status of Nazi victimhood, this restitution did not go far materially for those who suffered, or more importantly, it did not go far psychologically in transforming the political culture to one firmly planted on liberal values.

According to US Department of State reports, many observers were disturbed over time by

the continuation of the view that prevailed since 1943 that Austria was the "first free country to fall a victim" to Nazi aggression. This "first victim" view was in fact fostered by the Allied Powers themselves in the Moscow Declaration of 1943, in which the Allies declared as null and void the Anschluss and called for the restoration of the country's independence. The Allied Powers did not ignore Austria's responsibility for the war, but nothing was said explicitly about Austria's responsibility for Nazi crimes on its territory.¹⁷

Although the embarrassment caused by the Waldheim affair was the beginning of much public and private introspection among Austrians as to their national identity, it was not sufficient to quell the even greater controversy that would arise in 1999 with the coming to power of the Austrian Freedom Party in the country's ruling coalition.

Beyond the Rhetoric – The Rise of Austria's Freedom Party

Austria's entrance into the EU in 1995 was largely uncontroversial. Austria was viewed as a liberal democracy which, at the time of its entry, was governed by a coalition of moderately left-wing Social Democrats (SPÖ) and the moderately conservative People's Party (ÖVP). The

¹⁶ Gordon Brook-Shepherd, *The Austrians: A Thousand-Year Odyssey* (New York: Carroll & Graff, 1996), 439. (Shepherd's discussion of Waldheim incident found on pp. 429-440.) Says Shepherd,

That outside vision had now been shattered, at least temporarily, and the Austrians themselves had been brought up once more against the challenge which had always threatened their sense of identity—the German complication in race, in allegiance and in ideology. They finally emerged from the Waldheim years not so much transformed as strengthened in some of their less admirable qualities. They tended to be more anti-Semitic than ever and—ironically for a people who flourished on tourism—more enclosed.

¹⁷ U.S. Department of State, "Background Note: Austria, 2009" <http://www.state.gov/r/pa/ei/bgn/3165.htm>

profile of its government was not therefore remarkably different than that of other EU members. The Austrian Freedom Party (FPÖ) did exist and, in fact, had joined in an earlier partnership with the Social Democrats, but in 1995 its representation in Parliament was limited to forty-one members (about 21 per cent) and it was deemed marginalized. The EU clearly did not feel threatened by the existence of a right-wing party in Austria. No added conditions were placed on the new member, no warnings issued, no outcries raised, no fears expressed of a potential upsetting of the EU apple cart by the FPÖ. Indeed, had the thought even occurred, most, if not all EU members had their own extreme right-wing parties to contend with and the scent of hypocrisy would simply have been too strong to restrict Austria's membership on that basis.

Five years later, when the SPÖ and the ÖVP failed to establish their traditional coalition, the rumblings began. EU members menaced younger partner Austria that an ÖVP/FPÖ coalition would bring down the Union's wrath. Indeed the country's subsequent inclusion of the FPÖ in its government was criticized as a threat to human rights, security and democratic institutions. In the midst of initial protests and concern voiced in the international community, the loudest and most potentially damaging voice came from EU nations, who promptly cut off bilateral contacts with the new government and proceeded on a campaign of embarrassing snubs and boycotts of official Austrian persons and programs.

Concerns centered primarily on Haider, governor of the Austrian province of Carinthia and the Freedom Party's strong man and de facto leader. Haider's comments on a number of occasions had been interpreted as sympathetic to the national socialist policies of Adolf Hitler and, given Austria's historical links with the Third Reich, as a threat to Austrian and European democracy. The main contention was that the FPÖ's fiercely anti-immigration platform reflected the kind of ethnocentrism at the heart of Hitler's National Socialism which history showed to have relatively quickly spun out of control.

Jörg Haider and Freedom Party Politics: Serious Threat or Mere Opportunism?

Despite all the rhetoric against Jörg Haider in 1999, there were many seeming responsible persons outside of Europe, even on the political left, who doubted that Haider was a full-blown neo-Nazi. He made no attempt to hide his Third Reich connections, however. He was born in 1950 to parents with National Socialist ties. His father, a member of the Hitler Youth and the Nazi storm troopers, included among his cohorts, Adolf Eichmann. His mother belonged to the

Nazi Party's League of German Girls. Jörg studied law in Vienna and became active in Freedom-Party politics in his early twenties. He served in Parliament from 1979-1983 and again beginning in March 1992, and also as Governor of the Austrian state of Carinthia from 1989-91 and from 1999-2008. In 1986 he became Freedom Party leader, only to resign after formation of the ÖVP-FPÖ coalition in March 2000.¹⁸

Although under Haider the FPÖ saw remarkable growth and electoral success, he was nevertheless a grand contributor to the Freedom Party's troubled and troubling history. He outraged the international community with his provocative comments and challenges. "Our soldiers were not criminals; at most they were victims," he declared in October 1990 to an audience that likely included former members of the Waffen SS. "In the Third Reich they had an 'orderly' employment policy," he stated on another occasion. Still on other occasions he referred to concentration camps as "punishment camps" or said to groups which included ex-SS members that "there are still decent people of good character who also stick to their convictions, despite the greatest opposition, and have remained true to their convictions until today" and that "the Waffen SS was a part of the Wehrmacht and hence it deserves all the honor and respect of the army in public life."¹⁹

For his part, however, Haider provided convenient if not plausible explanations for each of the few comments on which the media focused its attention: he didn't know his audience included former SS members when he praised Second World War veterans; his reference to Nazi concentration camps as "punishment" camps is not unusual in Germany and is subject to various interpretations in the German language, and his brief but positive reference to Third Reich labor policies, which he regretted having made, was part of an awkward attempt to criticize the disorganization of current Austrian labor politics.²⁰

Haider's apologies and explanations went little distance in satisfying his critics, however, and the question remained of the nature of the FPÖ threat and the commitment of a substantial number of Austrians to the less than liberal human rights values the party proclaimed. As with most opposition parties, once in power the FPÖ began to adapt to the practical necessities of rule. Haider himself formally stepped down from party leadership, but continued to pull the strings

¹⁸ Max Riedlsperger, "Heil Haider! The Resurgence of the Austrian Freedom Party since 1986," *Politics and Society in Germany, Austria and Switzerland* 4 (Summer, 1992), 18-47, available online at <http://cla.calpoly.edu/~mriedlsp/Publications/gsa91.html> .

¹⁹ Riedlsperger, "Heil Haider!"

²⁰ Riedlsperger, "Heil Haider!"

from behind the scenes until he left the FPÖ in 2003 to form a new right-wing opposition party (the BPÖ) with similar platforms. By 2005 the traditional ÖVP-SPÖ was back in power. Haider's influence remained significant until his death in an auto accident in 2008, however.

Haider and the FPÖ without a doubt reflected an important aspect of Austrian political culture at the turn of the century. The FPÖ and the BPÖ are still important and their platform remains one of anti-immigration. Though the "extremist" parties have never been in a majority by themselves, the failure of Austrians to wrestle with National Socialism until *after* the Cold War has allowed for Austria to slide into the 21st century never having entirely reconciled the contradictory aspects of its political culture. It is worth examining here whether the Austrian constitutional structure has the stuff to ward off an extremist threat.

Safeguards for Democracy and Human Rights: The Austrian Constitution.

Constitutionally and institutionally Austria is as much a democratic republic as any of its European neighbors. Its form of government is a federal parliamentary republic. Elections are periodic, free, multi-party and deemed fair by human rights organizations. Governmental institutions are replete with checks and balances. The Austrian Constitution is based on the principles of a republican, democratic and federal state, the principle of the rule of law, and the principle of the separation of legislative and executive powers and the separation of jurisdiction and administration.²¹

In word, if not deed, protective provisions within the Austrian system are longstanding. Although the present republican constitution originated in 1920 in the aftermath of the First World War and the dissolution of the Austro-Hungarian Empire and was revised in 1929, the empire itself had not been without some legacy of basic rights protection. These provisions, particularly the "Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Laender" and the "Law of 27 October 1862 on Protection of the Rights of the Home" still nominally guarantee fundamental rights should the current constitution or international human rights treaties fail.²²

²¹ Austria, "Constitution," <http://aceproject.org/ero-n/regions/europe/AT/Austria%20Consttution.pdf/view>

²² Austria, "Basic Law on General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm, 1867," http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1867_142/ERV_1867_142.pdf; Austria, "Law on Protection of the Rights of the Home, 1862," http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1862_88/ERV_1862_88.pdf

The republican constitution was suspended from 1938-1945 during Austria's membership in Hitler's Third Reich, then reinstated after the war. Although the realities of post-war occupation by the "Big Four" Allies obscured the essence of Austrian commitments to democracy and human rights protection, in 1955 the "State Treaty for the Re-establishment of an Independent and Democratic Austria" provided recognition by the Allied and Associated Powers of Austria as a "sovereign, independent and democratic state." This treaty required that Austria protect the human rights of "all persons under Austrian jurisdiction, without distinction as to race, sex, language or religion," that Austria "have a democratic government based on elections by secret ballot" and that it "guarantee to all citizens free, equal and universal suffrage as well as the right to be elected to public office without discrimination as to race, sex, language, religion or political opinion."²³

These principles were enshrined in the post-war, post-occupation revival of the 1920/1929 constitution and its subsequent modifications (e.g., the "Federal Constitutional Law of 29 November 1988 on the Protection of Personal Liberty.") Furthermore Austria has adopted the "European Convention for the Protection of Human Rights and Fundamental Freedoms" and given it the status of constitutional law.²⁴ Although the United States "Country Reports on Human Rights Reports" and Amnesty International's "Annual Reports" do not give Austria a clean bill of health with regard to human rights protections, neither do they blame their few cited violations on the FPÖ, nor portray Austria as any worse than its most critical EU partners.²⁵

Religious Freedom in Austria

"On paper" Austria has a longstanding tradition of protecting religious freedom and, for the most part, does so in practice. Overall human rights groups, including the U.S. State Department Office [of International Religious Freedom] which does an annual international

²³ Austria, "State Treaty for the Reestablishment of an Independent and Democratic Austria, 1955," http://www.ena.lu/state_treaty_reestablishment_independent_democratic_austria_vienna_15_1955-020302233.html

²⁴ Austria, "Federal Constitutional Law on the Protection of Personal Liberty", 1988," http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1988_684/ERV_1988_684.pdf; Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, 1990," <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/coeprot.htm>

²⁵ US Department of State, "1999 Country Reports on Human Rights Practices: Austria," released by the Bureau of Democracy, Human Rights, and Labor, US Dept of State, Feb 25, 2000, http://www.state.gov/www/global/human_rights/1999_hrp_report/austria.html. That is, if Austria is even as bad; see the reports for France, Belgium and Germany, for example. Austrian reports are at "Austria," *Amnesty International Annual Report 2000* <http://www.amnesty.org/en/library/info/POL10/001/2000/en>. 2009 report at <http://thereport.amnesty.org/>

assessment of religious freedom, rate Austria as doing a reasonably good job at protecting the free practice of religion and conscientious beliefs. The Austrian Freedom Party, as part of its party platform, has declared itself a strong proponent of religious freedom. Although, as in many developed countries, Austria sees its share of anti-Semitic and anti-Islamic incidents and abuses of religious minorities, the FPÖ offers a specific declaration on its main Website homepage in favor of protecting the rights of Muslims.²⁶

It is not uncommon, however, for religious minorities, known in Austria as “sects,” to complain of official “second-class” treatment. The core of that complaint centers on Austria’s practice of conferring differing legal status on different religious groups according to established criteria. The law provides for the classification of religious organizations into three categories: 1) religious societies, 2) religious confessional communities, and 3) associations. The effect of these classifications can be significant when it comes to rights, privileges and societal duties.

According to the 2008 US State Department Report on International Religious Freedom:

Recognition as a religious society under the 1874 law [on Recognition of Churches] has wide-ranging implications, such as the authority to participate in the mandatory church contributions program, provide religious instruction in public schools, and bring religious workers into the country to act as ministers, missionaries, or teachers. Under the 1874 law, religious societies have “public corporation” status. This status permits them to engage in a number of public or quasi-public activities that are denied to confessional communities and associations. The Government provides financial support for religious teachers at both public and private schools to religious societies but not to other religious organizations. The Government provides financial support to private schools run by any of the 13 officially recognized religious societies.²⁷

Religious communities do not receive these same financial and educational privileges. They do have the right to apply for religious society status but under stringent criteria which include “a 20-year period of existence (at least 10 of which must be as a group organized as a confessional community under the 1998 law) and membership equaling at least 0.2 percent of the country's population (approximately 16,000 persons).”²⁸

The 1998 “Law on the Status of Religious Confessional Communities” allows religious groups to apply for the secondary status of a religious community. This confers the privileges,

²⁶ See FPÖ: Die Soziale Heimatpartei, <http://www.fpoe.at/>

²⁷ U.S. Department of State, “Austria, International Religious Freedom Report, 2008,” <http://www.state.gov/g/drl/rls/irf/2008/108434.htm>

²⁸ U.S. Department of State, “Austria, International Religious Freedom Report, 2008.”

among others, of being able to buy and own real property assets and enter into contracts in the name of the group.

Groups not eligible for status as societies or communities are left with the option of forming associations. Although this confers some limited protective legal status, associations experience more restrictions in what they can do in their own name as well as in their rights to bring foreign representatives into the country. Religious communities and associations do not receive government funding for religious education, nor do they receive the extremely generous tax benefits afforded religious societies.²⁹

One recent case study illustrates particularly well the challenges created by this differential treatment of religious bodies. The ECHR is Austria's transcendent human rights protective instrument. A July 2008 case before the European Court of Human Rights documents some of Austria's struggles for perspective on religious freedom issues. The case of *Relionsgemeinschaft der Zeugen Jehovas and Others v. Austria* illustrates the long-term frustrations of the Jehovah's Witnesses in their quest for full recognition Austria well beyond their general acceptance in most western nations.

Relionsgemeinschaft der Zeugen Jehovas and Others v. Austria

Beginning in 1978, the Jehovah's Witnesses in Austria tried for nearly 30 years to achieve status as a religious society. The Federal Minister for Education and Arts, which had power to grant this recognition, refused to act on the 1978 request, stating not that the Jehovah's Witnesses had no legal right to such recognition but that they did not even have a right to a decision on the matter one way or the other. A similar scenario took place again in 1987, again with the Minister failing to grant such recognition and refusing to provide a formal decision. Shortly thereafter the Jehovah's Witnesses launched a series of judicial complaints and proceedings, some of which were decided against them on technical grounds, until finally in June of 1995 the Austrian Constitutional Court held that the Jehovah's Witnesses were entitled to either recognition as a religious society or a written decision by the Minister denying them such. In subsequent proceedings on remand, an Austrian Administrative Court ordered the Ministry to

²⁹ U.S. Department of State, "Austria, International Religious Freedom Report, 2008."

issue a decision one way or the other and in 1997, the Ministry denied Jehovah's Witnesses standing as a religious society,

because of their unclear internal organisation and their negative attitude towards the State and its institutions. Reference was further made to their refusal to perform military service or any form of alternative service for conscientious objectors, to participate in local community life and elections and to undergo certain types of medical treatment such as blood transfusions.

Following further bureaucratic delay by the Minister, the Constitutional Court, citing the Minister's failure to properly investigate the facts of the Jehovah's Witnesses situation in Austria, quashed the Minister's decision in March of 1998 and handed the case back to the Minister. "The Constitutional Court ... concluded that the Minister's decision was arbitrary and violated the principle of equality."

In January of 1998 the Religious Communities Act had become law and the Minister granted the Jehovah's Witnesses recognition as a religious community but not as a society pursuant to their original request. In July, now in this community status, they applied again for recognition as a religious society. In December the Minister denied the application, stating that under the new law a religious organization had to exist in Austria as a registered religious community for at least ten years before it could be named a religious society. Since the Jehovah's Witnesses had only been a recognized community since July, they failed to meet this requirement. The Austrian Constitutional Court upheld the Minister's decision in 2001 and, upon referral of the case back to the Administrative Court, the Administrative Court held likewise.

The Jehovah's Witnesses filed a complaint with the European Court of Human Rights under, among other provisions, Articles 9 (Freedom of thought, conscience and religion) and 11 (Freedom of assembly and association) of the European Convention on Human Rights.

Issuing its decision in 2008, the Court held that there had been an interference with the applicants' right to freedom of religion and that that interference was prescribed by law pursuant to the legitimate aims of protecting public order and safety. However, under the circumstances, the restrictions placed on granting recognition to the Jehovah's Witnesses were not necessary in a democratic society. The Court found

that such a prolonged period [of bureaucratic machinations] raises concerns under Article 9 of the Convention. In this connection the Court reiterates that the

autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords... and, given the importance of this right, the Court considers that there is an obligation on all of the State's authorities to keep the time during which an applicant waits for conferment of legal personality for the purposes of Article 9 of the Convention reasonably short.

Thirty years clearly was not reasonably short. (It might be noted in passing however that by the time the European Court had issued its decision, the Jehovah's Witnesses would have existed in Austria as a religious community for the requisite ten years to become a society.)

Austria's treatment of Jehovah's Witnesses cannot be explained by the country's law or constitution. These, especially the European Convention, clearly hold Austria to a higher standard than was manifest by the bureaucratic mistreatment of this religious body. The Jehovah's Witnesses attitudes towards government and other societal institutions have brought official persecution on them in less developed democracies or non-democracies and made them less than favorites of a number of even more liberal regimes. Nevertheless, by the end of the 20th century, they were an established religion recognized in most nations, having already proven themselves before the European Court on more than one occasion as meriting better treatment.

The point is that Austria's constitutional mandates and political culture were not in harmony. The harsh discriminatory realities of the latter continued to smolder beneath those constitutional mandates and has had for an effect the denial of fundamental rights to some of the nation's citizens and residents.

In addition to its own constitutional requirements for equality and fair treatment, Austria has been a member of the Council of Europe since 1956, the 15th member state in fact, and as such has been subject since that time to the provisions of the ECHR. It clearly takes time in many countries for the realities of human rights protection to catch up with proclaimed constitutional values and ideals. As evidenced in a case like Austria's where real attitudes concerning the political environment were obfuscated by the demands and pressures of the Cold War, a country's political culture can go far in determining how quickly those ideals catch up.

Having said as much, despite the continued influence of the far-right parties, Austria's transition since World War II and especially since the end of the Cold War from a democratic

country in name, with a strong smoldering anti-liberal component to its political culture, to a full-fledged democracy in practice as well as precept, has been nearly complete. It is difficult to prove that this transition has not been the result of the demands of the law as imposed by Austrian and European constitutional instruments. Once again, however, the likes of North Korea, Iran, Belarus and others are clear evidence that liberal-sounding constitutional provisions do not a liberal democracy or republic make. Such documents serve as a guide to law and ideals in a nation where the political culture supports adaptation to the ideals.

Austria's political culture historically included the Third Reich as an important component. Coming out as neutrals from under the Third Reich at the end of the war arguably allowed Austrians ashamed of their complicity the chance to transform that culture to match the liberal values of their western neighbors, while allowing those nostalgic for the policies of national and ethnic superiority to continue on their way for sometime behind the scenes. Pressures from Europe have contributed to Austria's full compliance and transition to a more liberal state and in turn to Austria's present political culture. Again, the parties may look to constitutional instruments as their guide, but the underlying compatibility of the political culture has been essential to the transformation.

A different story but with similar results could be told of Germany. Countries of the former Eastern Bloc, now members of the EU and Council of Europe, are currently writing their own stories of transition as their cultural practices and beliefs race to catch up with the constitutional instruments they have adopted in the last twenty years.

What are the implications of these stories for nations, like Australia and the UK, debating the best ways to go forward in the preservation of human rights? Does Austria's story argue for a bill of rights with constitutional status or for a charter or other instrument on the level of ordinary legislation? The answer at this stage of the argument of this article is obviously "not necessarily the one or the other." The implications are that, more important than the instrument adopted is the reassurance that a society has in place the cultural mechanisms to sustain its commitment to human rights. To this extent it is true the instrument adopted may reflect the political culture. The elevation of a bill of rights to constitutional status may suggest the commitment of a people to making those rights prominent and difficult to amend or abandon. Fears that the judiciary may become too strong in such a case could also reflect liberal values, however, keeping the law in the

hands of the citizens as represented in Parliament. However, it may also inadvertently communicate less of a commitment of a people to human rights because if ordinary legislation establishes rights, then ordinary legislation can repeal them.

In the end each nation must decide, hopefully in a lively, informed public debate, whether its particular history calls for stronger legal instruments, and hence stronger cultural symbols, to assure that human rights protection remains central to its way of life. Americans, Austrians, Iranians or North Koreans will not be able to tell Australians and Britons what to do.