

# Linguistic Rights in Education – Austria (2012)

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## 1. BACKGROUND

### A. THE IMPORTANCE OF LANGUAGE IN NATION-BUILDING IN AUSTRIA

Antecessor of present-day Austria was the Austrian-Hungarian Monarchy, which was a multinational and multilingual empire with German as the language of the dominating social and ethnic group. Equality of ethnic entities and languages was constitutionally granted since 1867, although not always realized in practice and all parts of the Empire. After the collapse of the Empire at the end of World War I and, again after World War II, small ethnic minorities remained within the borders of the smaller, German speaking Austria. Their language rights were closely connected with the question of citizenship. As a result of history, language rights of ethnic minorities are, therefore, exclusively granted to Austrian citizens. The emergence of ‘new minorities’ as result of the immigration movements of the last decades has created a quite new challenge.

In the Holy Roman Empire of German Nations (the political centre of which Vienna had been since the middle of the 15<sup>th</sup> century) political measures with linguistic implications had been taken ever since. Nevertheless, the beginning of an explicit Austrian linguistic policy with relevant social impact is generally connected with Empress Maria Theresia (1717-1780).<sup>3</sup> The first decades of her reign were characterized by an expressively decentralized and multilingual approach. In an Empire with several languages, ‘Equity of languages’ seemed to be the guiding principle for public authorities and a declared aim in education.<sup>4</sup> Quite the opposite should, however, happen in the second part of her reign. In a time in which compulsory school education had been implemented for the first time, the German language was to play an increasing role. It was seen as a motor of centralisation, fostering people’s loyalty towards the crown.<sup>5</sup> Maria Theresia’s son Joseph II (who had already been co-regent since 1756) accentuated the strive towards a modern centralistic unitary state following the model of France.<sup>6</sup>

Starting in 1784 Joseph II. issued several decrees which laid down German as official language in all different parts of the empire.<sup>7</sup> Especially in Hungary this unifying policy was rejected. But also in other parts of the Empire a collective awareness of the different nations’ own language and literature was growing and more and more often the recognition of linguistic autonomy was demanded.

Before the installation of the Austro-Hungarian Empire the principle of ‘equality of ethnic entities’ was mentioned in a proposal for a constitution in 1848 (*Pillersdorf’sche Verfassung*), but never came into force because of the political conditions during and of course after the Revolution of 1848.<sup>8</sup> A real milestone in the development of Austrian Minority protection was set with Article 19 of the Basic Law of 21 December 1867 (StGG 1867). Article 19 StGG stated:

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<sup>3</sup> See Krumm, H.-J. (2007), ‘Der Umgang mit sprachlicher Vielfalt unter besonderer Berücksichtigung der sprachlichen Förderung von Kindern mit Migrationshintergrund in Österreich’, in: Bundesministerium für Bildung und Forschung, *Bildungsforschung Band 11: Anforderungen an Verfahren der regelmäßigen Sprachstandsfeststellung als Grundlage für die frühe und individuelle Förderung von Kindern mit und ohne Migrationshintergrund*, Bonn Berlin, pp. 193-216 ( pp. 196-7).

<sup>4</sup> See Eder, U. (2006), „Auf die mehrere Ausbreitung der deutschen Sprache soll für gedacht werden“: *Deutsch als Fremd- und Zweitsprache im Unterrichtssystem der Donaumonarchie zur Regierungszeit Maria Theresias und Josephs II.*, Studienverlag, Innsbruck, p. 34 and pp. 44ff.

<sup>5</sup> Cf. *ibid* p. 34ff.

<sup>6</sup> See Krumm, H.-J., *Op cit*, p. 197.

<sup>7</sup> See Eder, U., *Op cit*, pp.144-148.

<sup>8</sup> For more detailed information see Stourzh, G. (1985), *Die Gleichberechtigung der Nationalitäten in der Verfassung und der Verwaltung Österreichs 1848-1918*, Verlag der Österreichischen Akademie der Wissenschaften, Wien, pp. 17-52.

- (1) *All the ethnic entities of the empire enjoy equal rights, and each ethnic entity has an inviolable right to the preservation and fostering of its nationality and language.*
- (2) *The state recognizes the equal rights of all current languages in schools, administration and public life.*
- (3) *In countries populated by more than one ethnic entity, public places of learning should be so organised that, without making the learning of a second national language compulsory, each ethnic entity should have adequate opportunity to receive education in its own language.*

Although equality of all ethnic entities and languages was constitutionally granted by Article 19, the implementation of minority language instruction remained a highly disputed topic. Due to the prohibition of compulsory minority language instruction, bilingual education for all pupils was rejected by German-speaking nationalists. Furthermore, especially in Bohemia, these groups wanted to prevent the non-German speaking population from establishing their own minority schools, which led to several decisions of the Administrative Court.<sup>9</sup> In other regions such as the Tirol and Moravia, linguistic equity was promoted by implementing compulsory bilingual education despite of the wording of Article 19 StGG.<sup>10</sup>

When the multinational Empire (*Vielvölkerreich*) collapsed the so-called Republic of German-Austria was proclaimed. German-Austria as well as the other successor states was now considered per definitionem as nation state. During the negotiations of the Treaty of St. Germain en Laye the main conditions of people's assignment to the successor states were determined. This led to political tensions, because on the German-Austrian territory did not only live a considerable amount of established non-German speaking minorities (e.g. Bohemians, Moravians, Polish, Italians, Croats, Slovenes), but also a great number of refugees and displaced people, among them Jews, Polish and Ruthenes from Bukowina and Galicia, but also Italians, Croats and Bosnians.<sup>11</sup>

Many of them spoke German, but the different political parties were reluctant to accept members of these groups – especially the Jews from Bukowina, Galizia and Hungary – as German-Austrian citizens.<sup>12</sup> Finally, the representatives of German-Austria managed to introduce the right of 'belonging' (*Heimatrecht*) to a municipality within its borders as the main criteria.<sup>13</sup> According to the final version of the Treaty of St. Germain en Laye, which entered into force in July 1920, persons who already had a 'Heimatrecht' in a by now German-Austrian municipality automatically became Austrian citizens.

The not (exclusively) German speaking persons who became citizens and constituent parts of the Republic of Austria were guaranteed certain linguistic rights in Articles 66-68 of the Treaty of St. Germain. Articles 66-68 still hold constitutional rank and read as follows:

*Article 67 Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Austrian nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.*

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<sup>9</sup> See *ibid* pp. 166-89.

<sup>10</sup> See *ibid*.

<sup>11</sup> See Menzel, W. (1995), 'Weltkriegsflüchtlinge in Cisleithanien 1914-1918', in: Heiss G. and Rathkolb O.(eds), *Asylland wider Willen-Flüchtlinge in Österreich im europäischen Kontext seit 1914* (Veröffentlichungen des Ludwig-Boltzmann-Instituts für Geschichte und Gesellschaft, Band 25), J&V Dachs-Verlag, Wien, pp. 17-44.

<sup>12</sup> See Grandner, M. (1995), 'Staatsbürger und Ausländer. Zum Umgang Österreichs mit den jüdischen Flüchtlingen nach 1918', in Heiss G. and Rathkolb O.(eds), *Op cit*, pp. 60-85.

<sup>13</sup> See *ibid* and Thienel, R., (1989), *Österreichische Staatsbürgerschaft 1: Historische Entwicklung und völkerrechtliche Grundlagen*, Österreichische Staatsdruckerei, Wien, pp. 49-60.

*Article 68 Austria will provide the public educational system in towns and districts in which a considerable proportion of Austrian nationals of other than German speech are resident through adequate facilities to ensure that in primary schools the instruction shall be given to children of such Austrian nationals through the medium of their own language. This provision shall not prevent the Austrian Government from making the teaching of the German language obligatory in the said schools. In towns and districts where there is a considerable proportion of Austrians belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sum which may be provided out of public funds under the State, municipal or other budgets for educational, religious or charitable funds.*

After pro-Austrian plebiscites in Burgenland, i.e. former ‘Western Hungary’, and in Carinthia the linguistic map of Austria was changed again.

In the Austrian constitution of 1920 only the German language as the official language of the state was mentioned (see below). Although the political climate became more radical in the 30s of the past century, in 1936 the Primary School Act of Burgenland (*Burgenländisches Volksschulgesetz* BGBl 1936/136) implemented the mentioned provisions of the Treaty of St. Germain with regard to the Croatian and Hungarian speaking minorities in this Land.<sup>14</sup>

After World War II roughly one million refugees and displaced people from Eastern Europe were stranded in Austria. Nearly one third of this group were so-called Ethnic Germans, who had fled from the war.<sup>15</sup> The implementation of the Federal Act concerning the Citizenship Acquisition of Ethnic-Germans (*Bundesgesetz betreffend den Erwerb der Staatsbürgerschaft durch Volksdeutsche* BGBl 1954/142) facilitated that by 1958 about 230.000 persons of ‘German descent’ had opted for the Austrian citizenship, whereas other refugees and displaced people had to apply for it in a discretionary procedure.<sup>16</sup> This provision was controversial as parts of the Austrian population were reluctant to receive this enormous migration influx right after the war.<sup>17</sup> Besides, some Austrian politicians were willing to position Austria as being the ‘first victim of the War’ and therefore not responsible for the Ethnic Germans and other displaced Persons.<sup>18</sup> Another indicator for the official remoteness towards the Third Reich was an Order of the Ministry of Education in 1951, which explicitly avoided mentioning the German language by stating that school reports should be expedited in the ‘language of instruction’ (*Unterrichtssprache*). It was not by chance that in the same year the first Austrian dictionary was published, which has served as a guideline for Austrian Standard German since then.

In 1955 the allied powers and Austria accorded the Treaty of Vienna. Article 7 of this treaty holds constitutional rank and contains relevant provisions as to the Slovene and Croat minorities. It reads as follows:

*Article 7 Rights of the Slovene and Croat Minorities.*

*(1) Austrian nationals of the Slovene and Croat minorities in Carinthia, Burgenland and Styria shall enjoy the same right on equal terms as all other Austrian nationals, including the right to their own organizations, meetings and press in their own language.*

*(2) They are entitled to elementary instruction in the Slovene or Croat language and to a proportional number of their own secondary schools; in this connection school curricula shall*

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<sup>14</sup> See Kolonovits, D. (1996), *Minderheitenschulrecht im Burgenland*, Österreichische Rechtswissenschaftliche Studien-ÖRSt, Wien, pp. 10-2.

<sup>15</sup> See Fassman, H. and Münz, R. (1995), *Einwanderungsland Österreich?*, J&V-Dachs Verlag, Wien, p. 34 quoted in Çinar, D., (2009), ‘Country report Austria’, in: *EUDO Citizenship Observatory*, Robert Schumann Centre for Advanced Studies EUDO, Florence, p. 4 available at <http://eudo-citizenship.eu/docs/CountryReports/Austria.pdf>.

<sup>16</sup> See Stieber G., (1995), ‘Volksdeutsche and Displaced Persons’, in: Heiss G. and Rathkolb O., Op cit, pp. 140-56 (pp. 151).

<sup>17</sup> See *ibid* pp. 151-3.

<sup>18</sup> See *ibid* pp. 151-2.

*be reviewed and a section of the Inspectorate of Education shall be established for Slovene and Croat schools.*

*(3) In the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German.*

*(4) Austrian nationals of the Slovene or Croat minorities in Carinthia, Burgenland and Styria shall participate in the cultural, administrative and judicial systems in these territories on equal terms with other Austrian nationals.*

*(5) The activity of organizations whose aim is to deprive the Croat or Slovene population of their minority character or rights shall be prohibited.*

Austria remained showing a negative migration balance until the 60s of the last century, when the growing economic expansion made additional manpower necessary. To answer this purpose Austria accorded bilateral recruitment agreements with Turkey (1964) and Yugoslavia (1966). Consequently mainly male Turkish and Yugoslav workers came to Austria, which raised the number of resident non-citizens. From that moment until the middle of the 90s of the last century the number of non-(exclusively) German speaking persons in Austria increased drastically. This had different reasons. First of all, with the fall of the Iron Curtain people from the former communist middle and eastern European states had again the possibility to immigrate to Austria. Secondly, the wars in Croatia (1991-1995) and Bosnia (1992-1995) forced millions of people to leave their countries and a considerable part of them was given asylum in Austria. Besides, immigration of guest workers and family reunifications persisted.<sup>19</sup> At the same time naturalisation, too, had expanded. This led to controversial discussions within Austrian society and the legislator reacted with a restrictive policy and established additional requirements for citizenship and legal residence. In 1998 knowledge of German was introduced as a requirement of citizenship acquisition for the first time and in 2002 this was extended to migrants by means of the so-called Integration Agreement (*Integrationsvereinbarung*), which contained the obligation for migrants to attend language courses to acquire the relevant language level.

#### B. THE FORMAL RECOGNITION OF THE VARIOUS LANGUAGES AND THEIR STATUS

According to Article 8 of the Federal Constitution 1920 (see above) German is the official language of the Republic. This article reads as follows:

*Article 8 (1) German is the official language of the Republic without prejudice to the rights provided by Federal law for linguistic minorities.*

*(2) The Republic (the Federation, Laender and municipalities) is committed to its linguistic and cultural diversity which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted.*

*(3) The Austrian Sign Language shall be recognized as a language in its own right. This shall be regulated by the statutes in detail.*

As ‘official language of the Republic’ German is used in the official relations between state organs and the citizens and in the communication among state organs. This comprises legislation, judiciary and administration.<sup>20</sup> This does not mean, however, that German necessarily has to be the (only) language of instruction in schools (see above). The reference to the rights of linguistic minorities in this article refers to Articles 66-68 of the Treaty of St. Germain and Article 7 of the Treaty of Vienna

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<sup>19</sup> See Fassmann, H. and Reeger, U. (2008), ‘Austria: From guest worker immigration to a country of immigration (IDEA Work Nr 6) available at [www.idea6fp.uw.edu.pl/.../WP13\\_Europe\\_continent\\_of\\_immigration.pdf](http://www.idea6fp.uw.edu.pl/.../WP13_Europe_continent_of_immigration.pdf).

<sup>20</sup> See Kolonovits, Op cit, p. 27.

(see above), which are implemented by the Ethnic Groups Act (*Volksgruppengesetz* BGBl 1976/369, last amendment BGBl I 2011/46). With respect to the use of the minority language in schools of the Slovene minority in Carinthia and the Croatian minority in Burgenland Article 7 of the Treaty of Vienna is implemented by the Minority School Act for Carinthia (*Minderheiten-Schulgesetz für Kärnten* BGBl 1959/101, last amendment BGBl I 2012/36) and the Minority School Act for Burgenland (*Minderheiten-Schulgesetz für das Burgenland* BGBl 1994/641, last amendment BGBl I 2012/36). Section 1 of the Minority School Act for Burgenland holds constitutional rank and entitles also nationals being members of the Hungarian minority to receive instruction in their mother tongue in primary schools. The said Minority School Acts will be discussed in detail in the course of this report. Finally, also the Austrian sign Language is recognized by Article 8 of the Federal Constitution.

### C. CURRENT DEBATES

‘Linguistic integration’ has been one of the main focuses in Austrian media and politics in the last years. It is widely stated that the command of the German language is a fundamental key for the socio-cultural integration of migrants, asylum seekers and refugees in Austrian society. A broad awareness, however, concerning the importance of these persons’ respective first languages within integration has not yet been developed.

The issue is closely associated with the Austrian Education System, as the number of pupils who speak a language other than German is increasing. This can especially be observed in Vienna, where this group amounts to 43,3 % of all pupils in the school year 2010/2011. In other regions the average proportion amounts to less than 15%. In Vorarlberg 19,2% of the pupils have another vernacular language than German.<sup>21</sup>

In international rankings such as the OECD’s PISA tests, Austrian pupils show considerable deficits in speaking and understanding the German language, which is especially notable in classes with a high amount of non-native German speakers. This has provoked discussions about educational strategies to gain adequate language proficiency but also about the position of schools within the process of integration. Structural i.e. legal dimensions of the educational system are supposed to play a decisive role and will therefore be presented and analyzed in the following chapters.

## 2. LANGUAGE RIGHTS IN COMPULSORY EDUCATION

### A. GENERAL LEGAL PRINCIPLES

#### Relevant International Standards

Austria is party to several international documents containing standards for citizens’ but also non-citizens’ linguistic educational needs. Within the system of the United Nations Austria is bound by the International Covenant on the Elimination of All Forms of Racial Discrimination 1966 (BGBl 1972/377). Austria has also ratified the International Covenant on Civil and Political Rights 1966 (ratified via BGBl 1972/377), whose Article 27 grants the right of ethnic minorities, religious and also linguistic minorities to have their own cultural life. Furthermore, Austria has also ratified the Covenant of Economic, Social and Cultural Rights 1966 (BGBl 1978/590) and the respective Facultative Protocol (BGBl 1988/105). Austria is also party to the International Convention on the Rights of the Child 1989 (BGBl 1993/7) and some of the rights enlisted in this convention have been given constitutional rank (see above). Austria is as well bound by all relevant UN-declarations and resolutions, such as the UN Declaration on Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (UN-DOC E/CN/4/1992/48).

#### Equal Protection Clause

According to the equal protection clause of the Austrian constitution law (Article 2 of the Basic Law and Article 7 of the Federal Constitution) every citizen is protected against arbitrary acts of the state.

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<sup>21</sup> Source: Statistik Austria, Schülerinnen und Schüler mit nicht-deutscher Umgangssprache 2010/11 available at [http://www.statistik.at/web\\_de/statistiken/bildung\\_und\\_kultur/formales\\_bildungswesen/schulen\\_schulbesuch/index.html](http://www.statistik.at/web_de/statistiken/bildung_und_kultur/formales_bildungswesen/schulen_schulbesuch/index.html).

This clause also places an obligation upon the legislator, who must treat identical facts in the same way and is not allowed to make unreasonable distinctions in similar matters. With respect to Austrian nationals who belong to an ethnic minority, equal protection is furthermore granted by Article 67 and 68 of the Treaty of St. Germain and Article 7 of the Treaty of Vienna (see above). Both provisions hold the rank of constitutional law. Therefore, Austrian nationals who belong to a recognized minority have an enforceable constitutional right to be treated equally in legislation and administration especially with respect to the use of their own language.

Non-nationals can refer to the general equal protection clause, although there are no cases where this provision was invoked with respect to language issues.

#### Fundamental freedoms and rights concerning education

The Right to Education is constitutionally guaranteed by two different provisions which have a similar but not an identical scope. First of all, Article 2 of protocol 1 ECHR has to be mentioned, which is part of the internal constitutional law since 1958. Everybody can invoke it as an individual constitutional right and complain about alleged violations to the Austrian Constitutional Court. Due to its constitutional rank the said court can declare education law of lower rank such as ordinary statutes or curricula as unconstitutional, if they infringe Article 2 of protocol 1 ECHR. Besides granting everybody the right to education this provision guarantees the so-called 'right of parents'. Despite of its high rank the practical impact of this provision has remained rather limited until now.

In a recent decision the Austrian Constitutional Court stated that the rights enlisted in the EU-Fundamental Rights Charter hold constitutional rank too and can be invoked as individual constitutional rights (Decision of the Constitutional Court, 14 March 2012, U 466/11). This means that Article 14 (Right to Education) of this Charter is part of the internal constitutional law and grants a constitutional right. There are notable differences between this provision and Article 2 of protocol 1 ECHR. First of all, it states the right to have access to vocational and continued training, which will be especially highlighted in the case of asylum seekers and refugees (see below). Secondly, it contains the right to free compulsory education. Last but not least, the right of parents is more extensive since it also includes the respect for their 'pedagogical convictions'. It can be argued that especially this new legal term contains a linguistic dimension. However, one has to wait until the national courts have the opportunity to deal with this provision for the first time. A priori it seems rather improbable that it will be applied with regard to compulsory education.

According to Article 17 (2) of the already mentioned Basic Law every citizen has the constitutional right to establish a private school under the supervision of the public school authorities. Article 17 (2) Basic Law reads as follows:

*Every national who has furnished in legally accepted manner proof of his qualifications has the right to found establishments for instruction and education.*

The establishment of private schools is implemented by a federal statute, the Private School Act (*Privatschulgesetz* BGBl 1962/244, last amendment BGBl I Nr. 36/2012). According to this statute private schools can be recognized and attain a public status (*Öffentlichkeitsrecht*) if, besides other requirements (esp. qualified teachers), their curricula correspond in essential parts with the respective curricula of public schools. The crucial point within the private school system is their financing. Only private schools of legally recognized religious communities are entitled to public subsidies covering all of their personnel. The other private schools have no corresponding right. Whether they receive financial aid or not lies within the discretion of the Ministry of Education. In fact, they have to bear most of the costs themselves. The constitutionality of this situation is questioned under the equal protection clause. Until now, however, the Austrian Constitutional Court and the ECtHR (or the former EComHR) have accepted complaints (Decisions of the Constitutional Court VfGH 17 June 1991, G 216/90; 24 September 1990, B 1008/90; Decisions of the European Commission of Human

Rights 6 September 1995, App. 23419/94, App. 19315/92). Furthermore, it has to be noted that home schooling is a constitutionally guaranteed right of Austrian citizens.<sup>22</sup>

Other fundamental rights such as Article 8 (see below) and 9 ECHR, but also the freedom to choose an occupation and the right to engage in work as stated by Article 15 (1) EU-Fundamental Rights Charta may influence the legal position of every child in education. Finally, it has to be mentioned that the recently adopted Constitutional Act on the Rights of Children (*Bundesverfassungsgesetz über die Rechte von Kindern* BGBl I 2011/4) has implemented some rights of the International Convention on the Rights of the Child 1989 (ratified by BGBl 1993/7) by giving them constitutional rank. However, this was not the case with regard to the Right to Education granted by Article 28 of this Convention.

#### Other relevant constitutional provisions

Since 2005 the Austrian Federal Constitution includes extensive provisions concerning the Austrian school system. They comprise, inter alia, a rather long list of values and goals the education system has to pursue (Article 14 para 5a of the Federal Constitution). Among them there are e.g. ‘humanity, solidarity, peace and justice as well as openness and tolerance’. Schools have to secure the ‘highest possible level of education’ and the ‘optimal intellectual, mental and physical development’ for each child and juvenile. Whether these ambitious provisions will have any practical impact is still open, although it could be argued that these obligations entail certain consequences for the promotion of language skills for pupils with another vernacular language than German.

According to the same Article of the Federal Constitution admission to public school is open to all without distinction of birth, sex, race, estate, class, language and religion, and in other respects within the limits of the statutory requirements. Furthermore, according to the generally accepted understanding of this provision, primary education is free.

Article 14 para 7a of the Federal Constitution states that compulsory school has to last at least for nine years. In case of apprenticeship vocational school instruction is compulsory, too. In the Federal Republic of Austria competences in legislation and implementation concerning school education are shared between the Federation and the *Länder*. The *Länder* and their municipalities are in charge of compulsory school. The organisational framework of the Austrian compulsory school system, however, is implemented by federal statutes, i.e. the School Organisation Act (*SchOG-Schulorganisationsgesetz* BGBl 1962/242, last amendment BGBl I 2012/36) and the Compulsory School Act (*SchPflG- Schulpflichtgesetz* BGBl 1985/76, last amendment BGBl I 2012/36).

#### **B. ACCESS TO COMPULSORY SCHOOL, LANGUAGE OF INSTRUCTION AND EDUCATIONAL MEASURES AS TO PUPILS WITH FIRST LANGUAGE(S) OTHER FROM GERMAN**

##### Access to School

In Austria the last pre-scholar year (from five to six) is compulsory. At the moment, though, the Constitutional Court is concerned with the question whether this is to be seen as an infringement of parents’ rights guaranteed in Article 2 Protocol 1 ECHR.

It has been already mentioned that compulsory school education lasts nine years, which are (usually) accomplished between the ages of six and 15.

Implementing the right to compulsory school education the mentioned Compulsory School Act (Section 17 leg.cit.) entitles each child staying in Austria to attend compulsory schools. According to Section 1 leg.cit. each child who has his or her residence in Austria is also bound to attend compulsory school. The Austrian Administrative Court held that this duty is independent from the child’s citizenship (Decision of the Austrian Administrative Court VwGH 1 October 1997, 97/09/0131).

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<sup>22</sup> This right is granted according to Art. 17 (3) Basic Law but has de facto played a rather inferior role (during the school year 2010/2011 just 2216 pupils were educated that way). Only lately it has been rediscovered by academia. See in particular Palmstorfer, R. (2012), ‘Häuslicher Unterricht in Österreich: Das Grundrecht auf „Homeschooling“’, *Recht der Jugend und des Bildungswesens*, 1, pp. 115-22.

Section 3 of the School Instruction Act states that a sufficient command of the language of instruction is a necessary requirement to be admitted to school as a regular pupil (*Ordentlicher Schüler*). Furthermore this provision holds that the parents of the child are responsible for the fulfilment of this requirement. Section 16 of the School Instruction Act (*SchUG-Schulunterrichtsgesetz* BGBl 1986/472, last amendment BGBl I 2012/136) clarifies that German is in principle the language of instruction. Nevertheless the provisions also refers to the constitutionally granted minority language instruction and furthermore enables the competent school authority to establish a foreign language as language of instruction in schools, classes, departments or single subject if this is applied for by the headmaster. Concerning the mother tongues of the biggest immigrant groups no use of this option has been reported until now.<sup>23</sup>

Pupils whose command of German is not sufficient to follow the instruction can be admitted as irregular pupils for 12 months, which can be prorogued for another year (Section 4 leg.cit.). Afterwards these pupils have to be accepted as regular pupils regardless of their language skills. Section 18 leg.cit. implements another possibility for pupils whose first language is not German. According to this provision they can apply that the German language is treated as foreign language with respect to grading (*Sprachentausch*). Nevertheless the decision about the implementation of these two options lies within the discretion of the school or the respective school authority. In practise there must be a partly restrictive use of these options, especially in primary schools (*Volkschule*). Otherwise it can hardly be explained why in Special schools (*Sonderschule* – meant for children with mental and physical impairment [Section 22 School Organisation Act]) – there is a disproportionately high number of children with first language(s) other than German.<sup>24</sup>

#### German support classes

Section 8e of the mentioned School Organisation Act holds that there can be special language support classes for pupils that have been admitted to enroll in school as irregular pupils (see above). These courses aim at providing them with sufficient command of German in order to be able to follow the teaching. Support teaching in German is part of the relevant curricula since 1992. Considering the first two years of primary school there is the ‘Curriculum Amendment German for pupils with first language other than German’ (*Lehrplan-Zusatz Deutsch für Schüler mit nicht-deutscher Muttersprache* BGBl 1992/528). With regard to the last two years in primary school and the lower level of secondary school, ‘special didactic principles as to German as second language’ (*besondere didaktische Grundsätze, wenn Deutsch Zweitsprache ist*) have been implemented to all relevant curricula.<sup>25</sup> According to the curriculum amendment German support teaching expressively aims at developing a positive attitude towards the pupils’ second language i.e. German by following an intercultural approach:

*[...] developing enthusiasm for the second language in listening, repeating as well as in reading and writing [...] to become member of a new linguistic and cultural community by preserving the pupils’ linguistic and cultural identity.*

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<sup>23</sup> In the early nineties of the past century a project of the Austrian Ministry of Education initiated the so-called Content and Language Integrated Learning (hereinafter CLIL). This broad concept already contains teaching aspects of a foreign language (especially vocabulary) outside of the regular foreign language but ranges to the mere establishment of a second language of instruction. Compared with other foreign languages English has gained a clearly predominant presence within CLIL.

There is a considerable amount of schools which offer entire bilingual branches having parallel instruction in English and German in nearly every subject at the same time. Other foreign languages (French, Italian, Spanish or Russian) are only scarcely represented. (See Federal Ministry for Education, Arts and Culture (BMUKK), Federal Ministry for Science and Research (BMWF) and Austrian Centre for Language Competence (ÖSZ), (2007), *Language education Policy Profile: Country Report Austria*, Graz Wien, pp. 74-5 available at [www.oesz.at/oesko/dat/LEPP\\_ENGLISH\\_endversion070403.pdf](http://www.oesz.at/oesko/dat/LEPP_ENGLISH_endversion070403.pdf); Austrian Centre for Languages (ÖSZ) (2009), *Language and Language Education Policy in Austria – Country Profile*, pp. 110-1 available at [www.oesz.at/download/publikationen/Themenreihe\\_4.pdf](http://www.oesz.at/download/publikationen/Themenreihe_4.pdf).

<sup>24</sup> Source: Statistik Austria (n 20).

[http://www.statistik.at/web\\_de/statistiken/bildung\\_und\\_kultur/formales\\_bildungswesen/schulen\\_schulbesuch/index.html](http://www.statistik.at/web_de/statistiken/bildung_und_kultur/formales_bildungswesen/schulen_schulbesuch/index.html).

<sup>25</sup> *Lehrpläne – Volkschule und Sonderschule des Bundesministers* BGBl 1963/134, last amendment BGBl II 2012 /242 *Lehrpläne - Hauptschulen* BGBl II 2000/134, last amendment BGBl 2008/290; *Lehrpläne – Allgemein bildende höhere Schulen* BGBl 1985/88, last amendment BGBl II 2006/321; *Lehrplan – Polytechnische Schule* BGBl II 1997/236, last amendment BGBl II 2006/308.

The mentioned Section 8e of the School Organisation Act further states that these courses last for 11 lessons per week and that they are either held parallel or integrated within other subjects' lessons. There has to be a demand of at least 8 pupils but the courses can be held for pupils of different classes, ages and schools. Finally, it has to be mentioned that there is no enforceable legal right to support teaching. The decision about the actual establishment lies within the discretion of the competent school authority. Also regular pupils can have the possibility to attend German support classes, when the number of dedicated lessons does not amount to more than five hours in primary and more than six hours in compulsory secondary school.<sup>26</sup>

Besides that there are numerous regional and municipal programs to foster the command of German among pupils with first language(s) other than German. There are normally subsidized. A holistic approach is pursued in Vienna, where also mothers are integrated in the support classes.<sup>27</sup>

In order to prepare non-German native speakers already before compulsory school the *Länder* and the Federal have committed themselves to promote the early language learning (*frühe sprachliche Förderung*) in a so-called Article 15a agreement (*Vereinbarung zwischen dem Bund und den Ländern gemäß Artikel 15a B-VG über die verpflichtende frühe sprachliche Förderung in institutionellen Kinderbetreuungseinrichtungen* BGBl II 2012/206).

### Mother Tongue Teaching

In the 70s of the last century the Ministry for Education began to offer special language and cultural courses for migrant children in their mother tongue which were bilaterally coordinated with Turkey and the SFRY. The main pursuit of this policy back then was not the integration of the children in Austrian society but moreover the preparation for their reintegration in their mother states.<sup>28</sup> The content and the formal conditions of the courses had been negotiated with the mother states, which had provided for books and teachers, too.

Due to the increasing number of migrant children and the understanding that the majority of these children would not return to their home country a process of reorientation towards integration by intercultural learning was initialized and an exclusively internal regulation of this issue was fostered.<sup>29</sup> It was since that moment that it has been tried to coordinate mother tongue teaching as much as possible with support teaching in German (see above).

Today, there exist specific provisions concerning Mother Tongue Teaching in all relevant curricula.<sup>30</sup> They prescribe the scopes and the didactical guidelines for mother tongue teaching on the one hand for primary and on the other hand for secondary school. According to these provisions mother tongue teaching aims at strengthening and broadening the written and oral competences in the mother tongue. This is important to gather for a solid basis of personal identity development on the one hand and on the other hand for the acquisition of further languages such as German.

The list of languages that are taught is quite considerable (in the school year 2010/2011 the following languages were taught: Albanian, Arabic, Bosnian/Croatian/Serbian [B/K/S], Bulgarian, Chechen, Chinese, Czech, Kurdish (Kurmanji and Zazaki), Pashto, Persian (Farsi and Dari), Polish, Portuguese, Romani, Romanian, Russian, Slovakian, Spanish, Turkish and Hungarian) but only Turkish and B/K/S are covered at a country wide geographical range. Still a large majority of the relevant pupils (roughly

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<sup>26</sup> See Referat für Migration und Schule (2011), *Informationsblätter Nr. 1: Gesetzliche Grundlagen schulischer Maßnahmen für SchülerInnen mit anderer Erstsprache als Deutsch - Gesetze und Verordnungen*, (15th Edition), BMUKK, Wien, p. 19 available at [http://www.bmukk.gv.at/schulen/unterricht/ba/andere\\_erstsprachen.xml](http://www.bmukk.gv.at/schulen/unterricht/ba/andere_erstsprachen.xml).

<sup>27</sup> <http://www.wien.gv.at/menschen/integration/deutsch-lernen/mama-lernt-deutsch/>.

<sup>28</sup> See Çinar, D. and Davy, U. (1998), 'Von der Rückforderung zum Interkulturellen Lernen: Rahmenbedingungen des muttersprachlichen Unterrichts', in: Çinar (ed), *Gleichwertige Sprachen? Muttersprachlicher Unterricht für die Kinder von Einwanderern*, Europäisches Zentrum für Wohlfahrtspolitik und Sozialforschung, Innsbruck, pp. 23-80 (pp. 25-38).

<sup>29</sup> See *ibid.*

<sup>30</sup> See curricula (n 24).

80% in the school year 2010/2011) do not yet receive mother tongue teaching.<sup>31</sup> This is either because they have not been registered by their parents (to foster the diffusion of mother tongue teaching the teaching materials are now available in the said languages on <http://muttersprachlicher-unterricht>) or because the demand of the relevant language is not considered high enough by the respective school authorities. In order to tackle this problem, and also considering the linguistic heterogeneity within some classrooms – especially in Vienna, children with up to ten mother tongues may occasionally be present in one class-room – there are attempts to teach pupils in a multilingual teaching situation.<sup>32</sup>

### c. The special situation of the Croatian, Slovenian and Hungarian minorities<sup>33</sup>

As already pointed out, citizens belonging to the Croat, Slovene and Hungarian minorities in certain parts of Austria are constitutionally entitled to receive elementary instruction in their respective mother tongue. Furthermore Croatians and Slovenes have the right to set up a proportional number of their own secondary schools. The implementation of these provisions has been a highly political matter in Austria for many years.

#### The situation of the Slovene ethnic group in Carinthia

During the first half of the last century and especially during the Third Reich the use of the Slovene language in schools was restricted in the bilingual area of Carinthia. After World War II a school system favouring the Slovene minority was established, and every child living in this area was compulsorily taught German and Slovene. In highly controversial and emotional disputes this system was opposed to and partly boycotted by nationalist groups who claimed that German-speaking children should not to be forced to participate in bilingual instruction. Finally, the principle of enrolment was introduced, i.e. only pupils explicitly enrolled for Slovene instruction would receive lessons in both languages (Section 13 leg.cit.). For the Slovene minority this meant and still means a kind of discrimination by forcing them to profess their affiliation to the Slovene group. Therefore, the rate of bilingually educated children dropped considerably.

The legal basis of the present Slovene school system is the already mentioned Minority School Act for Carinthia, which is a federal statute implemented by a statute of the *Land* Carinthia. According to this statute the school authorities must provide for Slovene elementary, modern secondary and the New Middle Schools. Bilingual school lessons are held on an equal basis in German and Slovene during the first four school years, i.e. throughout elementary school. This is a consequence of a decision of the Austrian Constitutional Court. Originally the pupils were taught in Slovene and German only during the first three years; afterwards German was the only language of instruction. The Constitutional Court judged this rule to be an unfounded restriction of the constitutional right of minority members to receive elementary education in their mother tongue. (Decision of the Constitutional Court VfGH 9 March 2000, G 2/00 ua, VfSlg 15.759).

After this decision, it was decreed (BGBl 2001/76) that in the further school years, i.e. during lower level secondary school, German should be language of instruction, but Slovene should be studied compulsorily four hours per week. If the number of pupils enrolled for bilingual instruction or those not enrolled exceeds a certain number, the class is separated. Otherwise there will be other teachers (*Teamllehrer*) to support the bilingual education. To guarantee bilingual education, bilingual elementary, lower secondary and New Middle Schools or schools with bilingual classes or bilingual departments have to be set up. According to Section 26 leg.cit. one Slovene academic secondary school has been established. In the traditionally bilingual municipalities these schools have to be run independently from the actual demand (Section 10 leg.cit.). On the contrary, outside this area the

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<sup>31</sup> See Referat für Migration und Schule (2012), *Informationsblätter Nr. 5: Der Muttersprachliche Unterricht in Österreich: Statistische Auswertung für das Jahr 2010/2011*, (13th Edition, written by Garnitschnig, I.), BMUKK, Wien, pp. 10ff available at [http://www.bmukk.gv.at/schulen/unterricht/ba/andere\\_erstsprachen.xml](http://www.bmukk.gv.at/schulen/unterricht/ba/andere_erstsprachen.xml).

<sup>32</sup> See <http://orf.at/stories/2125694/>.

<sup>33</sup> This chapter is based on an actualized version of Berka, W. and Geistlinger, M. (1996), 'The Position of Minorities in Education in the European Union: Austrian Report', in: De Groof J. and Fiers J.(eds), *The Legal Status of Minorities in Education*, Acco, Leuven/Amersfoort, pp. 261-71.

establishment of bilingual instruction depends on the number of pupils who have enrolled. The requirements vary from 5 to 9 pupils within a school.

Originally, bilingual elementary education was only provided in the so-called 'autochthonous' (hereditary) settlement area of the Slovene minority. But in 1989 the Austrian Constitutional Court decided that this restriction was unconstitutional according to the relevant provisions of the Treaty of Vienna. This provision entitles every member of the Slovene minority in Carinthia to bilingual elementary education, wherever he or she lives (Decisions of the Constitutional Court VfGH 15 December 1989, G 233/1989 and G 234/1989, VfSlg 12.245). According to this decision bilingual education has to be provided when required. This was implemented in Section 12 leg.cit., which states that such a demand will be considered if there are more than seven pupils enrolled for bilingual classes in primary schools respectively five pupils for bilingual departments in modern secondary schools. There are specific curricula for teaching in bilingual schools.

This present situation in the field of elementary education for the Slovene minority may be considered quite a reasonable compromise and a fair fulfillment of the rights and needs of the minority compared to international standards. One might regret that the law favours a trend towards separate education in smaller classes, if the relevant numbers are matched.

A stronger support for joint education of German and Slovene-speaking children has partly promoted better mutual tolerance. There are currently 70 bilingual primary schools (two of them are outside the hereditary settlement area). The number of pupils (in the year 2010/2011 there were 1928), who are enrolled for bilingual instruction, has increased during the last years. Nevertheless, the enrolment for Slovene instruction in lower secondary schools has decreased. 2010/2011 364 pupils who received instruction in their mother tongue were enrolled in overall 16 lower secondary schools.<sup>34</sup> Schools where only Slovene is taught do not exist, because they are disapproved of by the minority members themselves. Higher education using Slovene as language of instruction is available in one academic secondary school (*BG und BRG für Slovenen Klagenfurt*).

#### The situation of the Croatian and Hungarian ethnic groups in Burgenland

In Burgenland, where Croatian and Hungarian minorities live, education in the language of the minorities was not organized in a satisfactory way for many years, especially with regard to the Hungarian ethnic group. In 1994 the already mentioned Minority School Act for Burgenland was enacted. It provides for primary schools with Croatian or Hungarian teaching language and for bilingual primary schools or bilingual classes. To receive instruction in the language of the minorities the pupils have to be enrolled (in bilingual schools that already exist an enrolment is not necessary). A demand for bilingual instruction is considered, if at least seven pupils are enrolled. In bilingual instruction a demand is shown, if at least nine pupils (for a class) or five (for a department) are enrolled.

There are 35 primary schools with bilingual Croatian instruction (+ 3 modern secondary schools) and 15 primary schools with bilingual Hungarian instruction and two respectively one bilingual academic secondary school, where Croatian and Hungarian is taught. Some members of the minority reject the new Minority School Act because it eases the possibilities for German speaking parents to withdraw their children from bilingual education in connection with a reduction of the sizes of classes. It is interesting to mention that also a Provincial Kindergarten Act (LGBI 1993/30, last amendment LGBI 2011/74) has been enacted, which fosters the comprehension of Hungarian and Croatian as early as in nursery school.

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<sup>34</sup> See Abteilung für Minderheitenschulwesen (2011), *Jahresbericht für das Schuljahr 2010/2011*, Landesschulrat für Kärnten, Klagenfurt, pp. 41-3 available at [www.2sprachigebildung.at/jahresbericht2011.pdf](http://www.2sprachigebildung.at/jahresbericht2011.pdf).

## D. SPECIAL CATEGORIES

### 1) CITIZENS

#### The situation of other ethnic groups and other non-German speaking citizens

There are no specific school laws for other recognized ethnic groups i.e. the Czech, the Slovaks and the Roma and Sinti. To organize instruction in their own language these minorities have to claim their right to establish private schools (see above). There is a private primary school and a private lower secondary school for the Czech and for the Slovak minority in Vienna (*Komensky Schule*). There are also some Jewish schools in Vienna. Another possibility to receive instruction in the minority's language can be the Mother Tongue Instruction, which is currently the case with all three languages – Czech, Romanes and Slovak (see below).

Citizens who belong to 'new' linguistic minorities, e.g. Turkish or B/K/S speaking pupils, are not entitled to any special linguistic rights. In fact, their linguistic status does not differ from that of migrants with a valid resident permit. The only difference is that pupils who are already Austrian citizens do not have to fulfill the Integration Agreement (see below).

#### Relevant International standards for citizens with non-German mother tongue

Besides the Treaty of St. Germain, which includes internationally based guarantees with specific regard to the already mentioned recognized minorities, Austria has also ratified two Council of Europe-instruments which contain provisions concerning minority language education. One is the Framework Convention for the Protection of National Minorities<sup>35</sup> (hereinafter FCPNM) and the other one is the European Charter for Regional and Minority Languages<sup>36</sup> (hereinafter ECRML). None of the relevant provisions in both treaties (Article 13 FCPNM and Article 8 ECRML respectively) entitle single members of the relevant minorities with individual rights, but for the Austrian state they still represent binding international obligations.

The fulfilment of both treaties is supervised by advisory boards which periodically have to adopt opinions and recommendations on the signatory's current situation. The last Opinion the Advisory Committee on FCPNM adopted on Austria indicated a general satisfaction with the recent development of bilingual elementary education in the traditional settlement areas of the already mentioned minorities in Carinthia and Burgenland.<sup>37</sup> On the contrary, the educational possibilities of these minorities in secondary school and outside their traditional areas in general were found unsatisfactory. Additionally, the non-existing bilingual teaching of the Hungarian and the Croatian minority in Vienna (which is represented to a great extent by migrated Burgenland-Croatians) was stressed by the committee.<sup>38</sup> Another point of concern has been that there is still no comprehensive strategy to facilitate instruction for the Roma in their language neither in Burgenland nor in Vienna.<sup>39</sup> Quite similar was the last critique by the Committee of Experts on ECRML in their report on Austria in 2009.<sup>40</sup> Here, too, the situation of minority language instruction in Vienna was criticized.<sup>41</sup>

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<sup>35</sup> Framework Convention for the Protection of National Minorities, opened for signature Feb. 1, 1995, C.E.T.S. No. 157 (entered into force Feb. 1, 1998), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.

<sup>36</sup> European Charter for Regional and Minority Languages, opened for signature Nov. 5, 1992 C.E.T.S. No. 148 (entered into force March 1, 1998) available at <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm>.

<sup>37</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion ACFC/OP/III(2011)005, (Austria) (Jun., 28.,2011), available at [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Austria\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Austria_en.pdf).

<sup>38</sup> See *ibid.*

<sup>39</sup> See *ibid.*

<sup>40</sup> Committee of Experts' Evaluation Report, Austria (March., 2000) at 9, available at [http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/AustriaECRML2\\_en.pdf](http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/AustriaECRML2_en.pdf).

<sup>41</sup> See *ibid.*

## II) NON-CITIZENS

### 1. Non-national EU-citizens (EU migrants)

Since the entry of Austria to the EU in 1995 the number of European Union-, other EEA- and Swiss citizens in Austria has increased drastically. Statistics show that at the beginning of this year nearly 400.000 citizens from this states resided in Austria. The biggest groups are German citizens and citizens of EU member states, which came to the EU in 2004.<sup>42</sup>

Neither EU-citizens nor other EEA- or Swiss citizens are expressively entitled to any linguistic rights. Still, European Union law has an effect on their legal position. First of all, according to the already mentioned Article 14 of the EU-Fundamental Rights Charta, EU-citizens could now be entitled to found schools, being able to invoke it as a constitutional right with all relevant consequences.

Besides, Slovene, Hungarian and quite soon also Croatian citizens could benefit from ECJ-Case Law, concerning the discrimination of EU-citizens in comparison with linguistic rights of nationals belonging to recognized minorities who have the same language (European Court of Justice ECJ 24 November 1998, C-274/96, *Bickel and Franz*, ECR I-7637); whether this might have practical implications of linguistic rights in education cannot be foretold at this moment.

Finally, there are private schools which use languages of EU member states as language of instruction. Besides, there is bilingual education in English and sometimes also in other Western European languages, especially in academic secondary schools lower level (see above).

### 2. Non-EU-citizens (third country migrants)

#### a. Third Country Migrants with a valid residence permit

The Austrian Residence and Abode Act (*NAG-Niederlassungs- und Aufenthaltsgesetz* BGBl I 157/2005, last amendment BGBl I 2012/50) contains a special residence permit for pupils. The relevant Section 63 leg.cit. provides that ordinary pupils and in case of their first residence permit also extraordinary pupils (see above) can be given a temporary residence permission. The provision comprises not only pupils registered in public but also in private schools. Nevertheless, only public school pupils have to prove that they have no negative marks (*Schulerfolg*) to have their permit prorogated.

Despite of that, the majority of the migrants who, attend compulsory school derive their right of residence or abode from their parents or other related persons. As already mentioned, all permanent residence permits for third state migrants, who do not derive their residence from an EEA or Swiss national are bound to language requirements relating to the so called Integration Agreement (*Integrationsvereinbarung*). This instrument, which was introduced first in 2002 is regulated in the Sections 14-16 leg.cit. Section 14 leg.cit. reads as follows:

*The Integration Agreement serves the integration of third country members with a valid legal residence in the federal area. It has the purpose to promote the acquisition of profound knowledge in German language in order to enhance the third country members to participate in Austria's social, cultural and economic life.*

On the contrary to the wording this legal instrument cannot be qualified as an agreement strictu sensu. Moreover, every third state migrant, who wants to reside in Austria for more than 12 months, has to sign this agreement within the following two years after entering the country. Its non-fulfillment can even be sanctioned with the person's deportation from the country.

The Integration Agreement consists of two different language modules (*Modul 1* and *Modul 2*). Whereas the first module targets the acquisition of knowledge as *to profound elementary language use*

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<sup>42</sup> Source: Statistik Austria, Bevölkerung am 1.1.2012 nach zusammengefasster Staatsangehörigkeit, Geschlecht und Altersgruppen available at [http://www.statistik.at/web\\_de/statistiken/bevoelkerung/bevoelkerungsstruktur/bevoelkerung\\_nach\\_staatsangehoerigkeit\\_geburtsland/index.html](http://www.statistik.at/web_de/statistiken/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html).

(A2 CEFR), the second shall provide for using the language in a *self-reliant way*, which the government equates with B1 CEFR. *Modul 1* has to be fulfilled within a period of two years after the solicitation of the residence permit. There is no such period for *Modul 2* but it is a binding requisite to obtain permanent legal residence and in further consequence Austrian citizenship.

What is the relevance of the Integration Agreement, when it comes to young migrants who are about to attend or who are already integrated in compulsory school? Generally speaking, only migrants over the age of nine or those, who because of their age are not yet concerned by compulsory school, are totally exempted from it. Nevertheless, *Modul 2*, whose fulfillment automatically replaces that of *Modul 1*, is also considered accomplished by pupils if they are attending or have recently attended primary school. This is also valid for pupils in secondary school, who have had a positive grade in the subject German in their last semester exam and for pupils who can prove that they have attended at least five years of compulsory school in Austria and who additionally have finished the subject German with a positive grade.

If this is not possible, the required knowledge of German language has to be certified by determined language institutions. The relevant exams, as well as the preparatory language courses, are often subsidized but still have to be paid at least partly by the migrants, themselves.

After a recent case of ECJ (European Court of Justice 15 November 2011, C-256/11, *Dereci*, OJ 2012/25) the language requirements of the IV have to be qualified as an infringement of Article 41 paragraph 1 of the Additional Protocol of 23 November 1970 of the Agreement establishing an Association between the European Economic Community and Turkey (OJ 1972 L 293, p. 4). This is of great interest because it means that Turkish citizens must now be exempted from the language requirements.

#### b. Third country migrants without a valid residence permit

For those pupils whose procedures concerning their residence permit or their status as a refugee have been ended by a negative decision or for those to whom legal residence has been denied or prohibited with regard to the residence permit of their parents, as well as for those, who have been denied international protection (*Internationaler Schutz*) after an asylum procedure Article 8 ECHR can become relevant. The Austrian legislator has implemented several criteria developed by the ECtHR as to the proportionality of state interference within measures terminating a residence. They are to be found in the Foreign Police Act (*FPG-Fremdenpolizeigesetz* BGBl I 2005/100, last amendment BGBl I 2012/50) and in the Asylum Act (*AsylG-Asylgesetz* BGBl I 2005/100, last amendment BGBl I 50/2012).

The relevant provisions list different conditions such as the relation of the person to his or her state of origin or the worthiness of the protection of private and family life. Another condition is the so-called grade of integration (*Integrationsgrad*). Especially this requirement has a clear linguistic dimension, since administrative and judicial practice has established the command of the German language as one parameter for the grade of integration. In several cases the Austrian Constitutional Court and the Asylum Court (*Asylgerichtshof*) have revoked administrative decisions, in which the authorities had not fully taken into account the command of German and the social integration of pupils in school (for example Decisions of the Austrian Constitutional Court VfGH 5 March 2008, B 1859/07; VfGH 7 October 2010, B 950/10; VfGH 5 March 2012, U 1548/11; Decisions of the Austrian Asylum Court AsylGH 25 April 2012, C 11 307396-1/2008; AsylGH 1 August 2011, C 17 309348-1/2008). It can be argued that pupils who have attended compulsory school are generally likely to be socio-linguistically integrated into Austrian society. Besides, some of these children do not have any relation to their (parents') state of origin. Nevertheless, especially in the respective administrative authorities the argument prevails that children of an 'adaptable age' can be reintegrated more easily in the state of origin after their deportation (e.g. Decisions of the Asylum Court AsylGH 4 June 2012, D 4 312729-2/2012 and D 4 416741-2/2012). It seems that the authorities consider these facts reluctantly because they want to prevent beforehand that this way relatives of the respective child cannot be removed because of the guarantees of Article 8.

Furthermore, this policy interferes with the children's rights. A possible violation of the Right to Education as granted in the Convention of the Rights of the Child was often alleged in the appeals but in most cases the courts did not examine these objections thoroughly. In the case of a Croatian child, who was attending a special school due to his impairment, the relevant authority, i.e. the Ministry of Interior Affairs, stated that the child could visit a special school in Croatia without having investigated into the child's concrete impairment and his language skills. This decision was overruled by a Decision of the Constitutional Court, because it was seen as a violation of Article 8 ECHR. The right to education, however, was not considered relevant (Decision of the Constitutional Court VfGH 29 September 2007, B 328/07, VfSlg 18.223).

### **3. Asylum seekers and refugees**

In Austria non-citizens, who state that they are persecuted because of reasons listed in the Geneva Convention for Refugees 1951 (ratified in Austria by BGBl 1955/55), automatically apply for International Protection (*Internationaler Schutz*). If Austria according to the Dublin II Regulation (Regulation 2003/343/CE) is authorized for their asylum procedure, they are entitled to a temporary permit, which enables them to stay in the country as asylum seekers. For asylum seekers who are between six and fifteen years old school attendance is mandatory. According to several regional statutes concerning the so-called Basic Care (*Grundversorgung*) asylum seekers receive financial aid for the school books and transport.<sup>43</sup> Furthermore, unaccompanied young asylum seekers have to be provided with special support such as day-structuring or psychological and pedagogical aid.<sup>44</sup> To be effective this service has to imply a certain linguistic dimension. Besides, Mother Tongue Instruction and German support classes (see above) can be helpful to foster these children's linguistic development.

De facto, young asylum seekers are confronted with serious problems regarding compulsory education. Very few of them have any German skills when they enter school and because of their age some do not qualify for compulsory education. If they are subject to general compulsory schooling, they often do not achieve proficiency in German. This again hinders them to attend secondary education upper level schools (as to the problematic situation of young asylum seekers in vocational education see below). Asylum seekers, who successfully apply for International Protection, are officially declared as refugees or granted subsidiary protection. They are entitled permanent residence. Nevertheless, this is not connected with any additional linguistic rights regarding compulsory school education.

### 3. LANGUAGE RIGHTS IN NON-COMPULSORY EDUCATION

#### Secondary school upper level

In the different school types of secondary education upper level, which last for four or five years (normally from 15-18 or from 15-19), the linguistic status of the mentioned groups does not differ considerably from their already outlined status in compulsory secondary education lower level. One difference is that the mentioned School Instruction Act only provides for the enrolment of non-native German speakers as irregular pupils in vocational and technical secondary schools but not in academic schools upper level. It is remarkable that especially in academic schools upper level the group of pupils who have a vernacular language different from German is clearly underrepresented.<sup>45</sup>

An empirical explanation of this phenomenon cannot be carried out in this investigation and there are certainly many reasons. Nevertheless, this might also indicate that mentioned language policy measures such as German support classes or Mother Tongue Teaching do not yet effectively influence the preparation and motivation of pupils with non-German mother tongue to continue their education after compulsory school.

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<sup>43</sup> For example s 6 para 1 Basic Care Act of the Land Salzburg (*Salzburger Grundversorgungsgesetz* LGBl 2007/35, last amendment LGBl 2010/64).

<sup>44</sup> For example s 6 para 2 Basic Care Act of the Land Salzburg (n 42).

<sup>45</sup> Source: Statistik Austria (n 20).

### Vocational schools and apprenticeship

A valid apprenticeship agreement and the fulfillment of compulsory school are necessary to have access to vocational school education. Migrants with a permanent residence permit normally have access to apprenticeship and therefore to vocational school education, where they can also enroll as irregular pupils.

For young migrants with a temporary residence but especially for young asylum seekers, however, apprenticeship is based on premises hard to fulfill. First of all the person or the institution who wants to enter in the apprenticeship contract with an asylum seeker has to apply for a working permit (*Arbeitsbewilligung*). According to the relevant Section 4 para 2 Foreigners Working Permit Act (*AuslBG-Ausländerbeschäftigungsgesetz* BGBl 1975/218, last amendment BGBl I 2011/25) asylum seekers furthermore have to accomplish different legal conditions as to their ongoing asylum procedure. Additionally, it lies within the discretion of the authorities whether the training place market and the labor market on the whole allow that a permit for apprenticeship can be issued. In practice, authorities largely banned asylum seekers from being contracted as apprentice. This was highly controversial. It is known that only few asylum seekers go to secondary school upper level because of already mentioned problems (see above). According to Section 4 leg.cit. they are also practically exempted from other forms of employment. Practically they are therefore condemned to do nothing.

With a recent decree Austria's Ministry of Labour and Social Affairs (*BMASK-Erlass* 14 June 2012, BMASK-435.006/0005-VI/AMR/7/2012) intended to improve this situation. It states that asylum seekers can principally be permitted as apprentices. However, they have to be less than 18 years old and should additionally possess necessary German skills. Regarding the actual situation of young asylum seekers not many of them might be able to accomplish these requirements. All in all, this seems to be an interference with the right to have access to vocational training as granted in Article 14 of the EU-Fundamental Rights Charter (as to its constitutional rank see above). Still the courts have not been concerned whether this interference is to be qualified as proportional.

### Higher education

During the last years the number of higher education institutions in Austria has been notably increasing. Currently, there are 21 public universities, 13 private universities and 19 universities of applied sciences (*Fachhochschulen*). Additionally, the academic and practical training of future teachers in primary, modern secondary and New Middle School has been integrated in higher education. There are now eight Universities of Teacher Education (*Pädagogische Hochschulen*) and one University of Agricultural and Environmental Teacher Education (*Hochschule für Agrar- und Umweltpädagogik*).

According to Section 63 of the University Act (*UG-Universitätsgesetz* BGBl I 2002/120, last amendment BGBl I 2012/52) the command of German is a unitary requisite to be admitted to a regular study program in every public university in Austria. This provision furthermore states that students, whose native language is not German shall, provide proof of proficiency in German if and insofar it is necessary for the successful continuation of their studies. This provision enables universities to establish statutory ordinances regarding different language requirements for exams, courses and theses. Because of its wording it is not surprising that the relevant university accession ordinances vary considerably as to their linguistic content. Additionally, the rectorate can prescribe language tests if no proof of German proficiency is provided.

By contrast, neither the University of Applied Sciences Act (*FHSStG-Fachhochschulstudiengesetz* BGBl 1993/340, last amendment BGBl I 2011/74), nor the statute on the Universities of Teacher Education ('Higher School Act', *HG-Hochschulgesetz* BGBl I 2006/30, last amendment BGBl I 2011/73), nor the Private University Act (*PUG-Privatuniversitätengesetz* BGBl I 2011/74) contain such a requirement of German skills.

Section 59 University Act contains furthermore the right of the student to write any kind of theses (*wissenschaftliche Arbeiten*) in a foreign language, if this is accepted by the supervisor. There are similar provisions concerning the students of Universities of Teacher Education (Section 63 Higher School Act). Finally, it has to be mentioned that additional study courses held in Slovene, Croatian and Hungarian have to be guaranteed in the curricula of these Universities of Teacher Education in Carinthia and the Burgenland respectively, which is a consequence of the outlined status of these languages in the education system of the said regions (see above).

#### 4. CONCLUSIONS

Out of a legal perspective enforceable linguistic rights are only to be found in primary education, to a lesser amount in secondary education but generally not in vocational and higher education.

Furthermore, these linguistic rights are closely connected with citizenship and exclusively granted to determined ethnic and linguistic minorities. On the contrary, non-binding educational measures such as German support classes and Mother Tongue Teaching can principally benefit any pupil in Austria with a first language different from German. Finally, EEA and Swiss citizens but also refugees, asylum seekers and now most probably Turkish citizens are exempted from the binding linguistic requirements within the Integration Agreement. The following graph tries to illustrate these differences:

		<b>+ enforceable linguistic rights in education</b>	German support classes	Mother tongue teaching	<b>- Language requirements (IV)</b>
<b>Citizens</b>		yes (Slovenes [Carinthia], Croatians and Hungarians [Bgl])  no (Roma, Czech, Slovak [Vienna], Turkish or BKS native speakers, etc.)	if first language other than German, other than Croatian, Hungarian, Slovene (in Bgl and Carinthia respectively) and if available	if first language other than German, other than Croatian, Hungarian, Slovene (in Bgl and Carinthia respectively) and if available	no
<b>EEA- and Swiss citizens</b>		no	if first language other than German and if available	if first language other than German and if available	no
<b>Third country migrants</b>	<b>Valid residence permit</b>	no	if available	if available	yes  no (Turkish citizens)
	<b>No valid residence permit</b>	no	if available	if available	-----
<b>Asylum seekers</b>		no	if available	if available	no
<b>Refugees</b>		no	if available	if available	no

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