

меняется и религиозный ландшафт. И даже базовые принципы свободы религии, отделения церкви и государства, нейтральности государства не означают, что их конкретное воплощение на практике застыло в раз и навсегда данных правовых документах - оно может и должно развиваться.

STATE AND CHURCH IN GERMANY

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1. Within Germany there are two Churches which are nearly equal in size and importance. Of the German population of about 80 million, the Catholic Church has about 28.2 million members, while the Evangelical Church has 29.2 million members. The Evangelical Church consists of numerous separate territorially based Landeskirchen, each of these Churches being an independent unit. Together they form the Evangelical Church of Germany. There is also a number of smaller Evangelical Churches that have chosen to stay outside this federation. The Evangelical Churches are either Lutheran or Reformed Churches, some follow a unified confession, shaped in various ways from these two creeds. Islam in Germany has approximately 2.5 million members, mostly foreign workers and their families, but also about 100,000 German nationals. The Jewish communities consist of about 60,000 members. There are also many smaller religions in Germany, some having a long-established tradition in Germany, others having been in Germany for only a short while. Their membership is estimated at about 2 million persons. There is also an estimated 16 million inhabitants of Germany who profess themselves to be without any confession [1]. This stems in part, although not entirely, from the reunification of Germany, as the political system of the former East Germany took a hostile stance towards the Churches.

2. The Basic Law guarantees the freedom of religion in Art. 4. Freedom of faith, of conscience, and freedom of creed, religion or ideology, shall be inviolable. The undisturbed practice of religion is guaranteed. These individual rights guaranteeing the free existence of religion are complemented by and laid out in Art. 140 GG. These norms incorporate Art. 136-139 and 141 of the Weimar Constitution of 11 August 1919 into the Basic Law, so that they are fully ledged constitutional rights. More-over, Art. 7 paras. 2 and 3 of the Basic Law guarantee religious education in the public schools. Numerous other regulations, such as the existence of theological faculties at State universities, are contained within the Constitutions and other laws of the Bundeslander (federal states). Large parts of Church-State relations in Germany are assigned to the competence of the Bundeslander.

The Federal Republic of Germany and its Bundeslander have established many concordats and Church-State treaties with the Churches in Germany [2]. In relation to the Catholic Church, the Reichskonkordat of 1933 is an essential basis which is recognised as a treaty under international law. Church-State treaties with the Evangelical Church and those made with Catholic dioceses are sui generis but are treated as being in a category similar to that of international treaties. Treaties or

agreements also exist with a whole range of other smaller religious congregations. The subject matter of such Church-State treaties include the co-operation between the State and the bishops, the guarantees and arrangements of religious education in public schools, the theological faculties, the military chaplains and the position of the Church in the public sphere, such as the financing of religious parishes.

3. Under the Church-State systems of Europe, Germany takes a middle of the road approach between that of having a State Church and having a strict separation between Church and State. The Basic Law lays down a system under which there is a separation of Church and State while at the same time there is a constitutionally secured form of co-operation between the two institutions. The German State-Church legal basis is therefore structured around three basic principles: neutrality, tolerance, and parity.

Neutrality requires the State not to be identified with a Church; there is to be no Established Church (Art. 137 para. 1 WRV in conjunction with Art. 140 GG).[3] The State is not allowed to have any special inclination to a particular religious congregation or to judge such a congregation's particular merits or ideologies as true. Ideological institutions are to be on equal footing with religious institutions; this deals with congregations which have a humanistic ideology or a position without reference to the question of a God or gods. This has however only minimal social consequences. On the other hand, religious institutions must not be placed in a more disadvantageous position than societal groups; this forbids a decision for State atheism. Neutrality therefore means, more than anything else, non-intervention: the State is not allowed to take decisive action in the affairs of religious communities. This is made particularly clear in Art. 137 Para. 3 WRV: Every religious community regulates and administers its own affairs independently within the framework of the laws that are valid for all. This right of self-determination is valid, regardless of the legal status of the religious congregation,

The principle of tolerance obliges the State not only to be indifferent as between all the different religious views, but also to maintain a sphere of positive tolerance that makes room for the religious needs of society.

Parity, as the last of the principles, means the obligation to treat equally all religious communities, so that through a constitutional differentiation of legal status a sort of graded parity exists that provides an adequate basis for dealing with the various social phenomena. This parity is a specific, group-oriented shaping of the idea of equal treatment that finds its historical roots in the equality of confessions, the result of the religious wars of the 16th and 17th century. These basic principles are also to be seen in the laying out of the freedom of religion according to Art. 4 GG. It is here that one finds the requirement of positive tolerance. Freedom of faith is guaranteed in order to give every individual the right to believe what they want. Included is also the freedom of faith in a negative aspect, that is the right not to have a creed and/or not to belong to a particular religious faith. Religious freedom also guarantees the right to act according to one's beliefs, and to missionarize [4].

Freedom of faith in its meaning as positive tolerance also allows for the possibility of the State offering in public schools the opportunity for an inter-denominational school prayer, so long as participation is a part of the existing social attitude and as such is completely voluntary. The State must make sure that it provides for an atmosphere of tolerance. The State in certain circumstances, in which it has control over a person's surroundings, such as when one is obliged to attend school, is required to provide for the religious needs of those persons put into such a position [5]. This applies equally to the National Defence Force and penal institutions.

Religious institutions may also rely on the freedom of faith, which exists as a collective right.

4. The religious communities with large memberships in Germany, but also a considerable number of the smaller religious communities, have the status of public corporations. Unlike other public corporations, the religious communities with this status are not integrated in the State's structure. They retain their complete autonomy, even as public corporations. Under this legal norm, no particular identification between the Church and State is meant; quite the contrary, as the State's view accepts such a description as a justification for the religious communities being part of public life. Only a few particular rights are associated with this status. Every religious community, upon application to the responsible federal state, will receive the status of a public corporation, when they can prove through their bye-laws and the number of their members that they are indeed a permanent community (art. 13j para. 2,2 WRV, art. 140 GG).

Other religious communities receive their legal capacity as a result of civil law. They will be at the least private registered societies. As a result of the guarantees of the freedom of faith, the peculiarities of a religion must be taken into account; where necessary, the civil law conditions must be adjusted to meet the religious requirements [6].

5. The right to self-determination according to Art. 137 para. 3 WRV in conjunction with Art. 140 GG, can be considered to be the central reference point for the legal and social existence of religious communities in the Federal Republic of Germany. Every religious community independently regulates and administers its own affairs within the boundaries of the laws that are valid for all. Every religious community can then, regardless of its legal status, independently regulate its own affairs. This right of self-determination covers such things as religious dogma and teaching, making official appointments, religious services, the organisation of charitable activities, matters concerning the important parts of the relationship between employer and employees, and data protection.

Not uncontroversial is the meaning and formulation of the limits of the right of self-determination. It exists only within the boundaries of the laws that are valid for all. The Federal Constitutional Court has used the formula whereby a barrier is raised when the law represents a provision of particular importance to the common weal [7].

Important for the understanding of this matter is that the Federal Constitutional Court attributes major importance to the Church's Self-identity: what is meant by the Church's own affairs is determined particularly by how the Church itself views its own affairs, although the competence to

take a final decision on the basis of the Basic Law is still reserved for the State courts. The central relevance of the right of self-determination of a Church must furthermore be taken into account when defining the boundaries of this right.

A Church's right of self-determination is not restricted to a narrowly-drawn field of specifically "ecclesiastical" activities. The idea of freedom of religious practice extends to preserve the right of self-determination in other areas that are also based or founded upon religious objectives, such as the running of hospitals, kindergartens, retirement homes, private schools and universities.

In very substantial ways, the large Churches in Germany provide social services, particularly in the form of the Caritas of the Catholic Church and the Diaconical Works of the Evangelical Church. Without these services, the guarantees of a social State in Art. 20 para. 1, 28 para. 1 GG would be mere empty postulates. All these activities are part of what religious communities and the Church really mean. The right of self-determination therefore is not merely attributed to the Church itself and its legally independent part, but instead it is something common to all institutions which are connected in some way or another with the Church regardless of the legal framing of these links [8].

6. The large Churches in the Federal Republic of Germany operate a rather significant number of private schools. The majority of them are recognised as replacing public schools. This means that they offer an equal standard of education to that offered in State schools. As a result, they are made subject to various important regulations that apply to the public schools. The entire school system of Germany exists on the basis of Art. 7 para. 1 GG and is thus under the control of the State; compared to the number of State schools, Church or other private schools or educational establishments form a small minority. Concerning the financing of private schools, the Churches, like other organisations running private schools, receive public funding. To a considerable extent, the large Churches operate kindergartens for children between about 4 to 7 years of age.

According to Art. 7 para. 3 GG, religious education in public schools, with the exception of non-confessional schools, is to be a standard subject. Notwithstanding the State's right of visitation, religious education is to be conducted in accordance with the guidelines of the religious communities. No teacher is obliged, against his or her will, to teach religious education. The parent or guardian of a child has the right to regulate the participation of their child in religious education; in principle when the child reaches the age of 12 years, the parental decision is not allowed to be in conflict with the child's. Upon reaching 12 years of age, the child may decide for themselves. Religious education, according to the requirements of Art. 7 para. 3 GG, is to be a standard subject in public schools, and it is therefore not permissible to put it into the position of simply a minor or an optional subject. The content of the religious education is to be decided by the confessional teachings of the relevant religion. When a minimal number of students of the same confession is reached, normally between six to eight pupils, the public school is obliged to offer corresponding religious education. Children, parents and religious communities have a constitutional right to such educational services. A question often raised today (without a definite answer) is in relation to the religious instruction for Moslem school children; despite basic standing entitlement to such religious instruction, claims for the service often founder because of the lack of a representative on the part of the Islamic communities.

At numerous public universities there are theological faculties of a specific confession. In a variety of differently fashioned State-Church agreements, the Churches have a more or less determinative influence upon the appointment of professors and in the curriculum and examinations. In this area the Catholic Church enjoys a greater area of control than does the Evangelical Church. The professors of the theological faculties at State universities are State officials; nevertheless at Catholic faculties they need the *missio canonica* from the Catholic Church. If it is withdrawn, the particular professor is not allowed to remain a member of the theological faculty. He will however still retain his rights and duties as a State official and must be given another position within the university. For the vacant theological professorships, the State is obliged to seek for the necessary replacement.

Moreover, the large Churches also have their own theological faculties. The Catholic Church has its own university in Eichstatt, which also has a significant number of nontheological faculties. There is also a large number of Church-run colleges, that as such offer an education that is more vocationally oriented than that of a university.

It is part of the special position of the Churches that they have in a special way a public mandate. This public mandate is secured by State-Church treaties and has its foundations in the religious freedoms of the Churches. This accordingly allows them to have a say and a right to information in the matters and affairs of public life. On the basis of their public mandate, religious institutions have reserved time-slots on television and radio. They are also, as a result, given a representative position on the supervisory boards of public institutions where a particular societal representation is necessary. The Churches' position is relevant to the broadcasting commissions of public broadcasting corporations such as ZDF, ARD and the Land-based broadcasting corporations, the supervisory commissions for the private television and radio stations, and also appraisal and indication boards in order to identify and restrain scripts and films that are deemed harmful to young viewers and listener.

7. The large Churches of the Federal Republic of Germany employ together more than 700,000 persons; their important position as an employer is therefore evident.

As public corporations, the large Churches are considered to be entitled to confer public office. This means that they are able to have employees who are considered to be civil servants; reciprocally the Church administrations are structured along the same lines as their State counterpart. The Churches orient their own civil service law along the same lines as the public civil service law, even in respect to salaries and benefits. For priests and ministers, there is in force a separate service law that also copies, so far as possible considering the special context, the public civil service law.

However, for the large majority of the employees in a Church's service, the normal labour laws are in effect. It is nevertheless in many circumstances modified, on the basis of the Church's right of self-determination and its particular religious relationship. Freedom of religion demands that the special conditions which result from the duties of the Churches must be taken into consideration when examining the Churches' labour status.

This is particularly expressed, in that Church employees owe a particular obligation of loyalty to their Church employer. It is the Church itself, which within the constitutional framework of the notion of *ordre public*, good faith and prohibition of arbitrariness, determines the contents of these obligations. The right of self-determination of the religious communities allows the Churches, within the limits of the laws valid for all, to regulate Church work conditions according to their own terms and to make obligatory specific duties of the Church employees. Which basic duties of the Church are important as items of the terms of employment is judged according to the organised Church's own acknowledged standards. In cases of dispute, the labour courts have to respect the standards of the Church in assessing contractual obligation of loyalty, insofar as the Basic Law recognises the right of the Church to regulate the matter internally. It is thus as a rule left up to the organised Church to decide what is required for the credibility of the Church and its teaching, what specific Church duties are, what are essential principles of the faith and morality, and what is to be considered contrary to these norms. In the case of a violation of such an obligation of loyalty by the employee, the public labour courts are finally to rule whether a termination of employment of a Church employee is justified or not [9]. As a result of their religious mandate, Churches have a right to give notice to an employee, when they in their public way of life or in their publicly expressed opinions act contrary to Church teachings. The Federal Constitutional Court ruled that it was constitutional to give notice of termination to a physician employed at a Catholic hospital who had publicly taken a stance against the Church on television and in a magazine concerning the right of women to have an abortion. This decision was reaffirmed by the European Commission of Human Rights [10].

Also in the sphere of collective labour rights, the Churches as a result of the notion of freedom of religion and consequently the right of self-determination, are in a special position. Their structures are not subject to the public co-determination laws [11]. The State is in principle not allowed to intervene with the inner organisational structures and setup of the Churches [12]. The Churches in this area have developed the so-called third way. They understand their vocation, especially in the area of charity, as part of one undivided, religiously-based commitment. This in principle does make it impossible for them to accept a legal structure in labour relations which is based on the idea of a fundamental opposition between employer and employee. The Catholic Church along with most of the Protestant Churches therefore rejects the conclusion of agreements through collective bargaining with labour unions [13]. Within the Church structure there exists no right to strike, just as there is by way of internal Church decision no possibility to lock out employees. The Churches have created their own system of employee's representation and co-determination. It confers, to quite a considerable extent, more extensive rights on their employees than does the public co-determination system.

8. As a result of repeated secularisation of Church property in the past, the Churches in Germany have only a small amount of property. As compensation for the secularisation of 1803, a series of government benefits were to guarantee funds for the Churches. They are guaranteed by Art. 138 para. 1 WRV in conjunction with Art. 140 GG. This provision also envisages the ending of those payments which are necessarily linked to the payment of compensation; this so far has not been

pursued on grounds of impracticality. Also other subsidies granted by the State are often related to longstanding claims of the Churches; an important example is the fact that the local authorities must discharge the public duty to contribute to the up-keeping of Church buildings. Likewise, on the basis of contractual terms, there are some obligatory contributions to be made by the State to the Church, such as subsidies to the salaries of Church officials.

Approximately eighty per cent of the entire Church budget, however, is covered by the Church tax; guaranteed by Art. 137 para. 6 WRV in conjunction with Art. 140 GG. On the basis of the civil tax lists, in accordance with the law of the Lander, the religious communities that are public corporations are allowed to levy taxes. The large Churches have made ample use of this opportunity but also smaller religious communities with the status of public corporation have done likewise, such as the Jewish communities.

Only members of the particular Church justified in levying the Church tax are obliged to pay. The Church tax was instituted at the beginning of the 19th century in order to relieve the national budget of its obligations to the Churches, which were based in turn on the secularisation of Church property.

Those desiring to be free of the tax may achieve that result by leaving the Church with civil legal results. The withdrawal from the Church is done by de-registering with the proper State officials and simply means that one has, according to the State classification, officially ended one's membership with the particular Church in question. However, most Evangelical Churches see the withdrawal as a withdrawal from their particular Church as well. The Catholic Church, as a general rule, views the withdrawal as a serious violation of one's obligations to the Church, without bringing one's theological Church membership as such into question. The rate of the Church tax is between eight and nine per cent of one's wage and income tax liability.

Other tax standards may also be used; such is the case with the Jewish communities which have tied in the Church tax to property tax. Although this concept is not a requirement, in most cases, the Church tax, as a result of an arrangement with the State, is collected by the State tax authorities for the larger Churches. For this service, the Churches pay in compensation between three and five per cent of the tax yield to the State. If a Church member refuses to pay the required tax, legal means can be used to collect the tax; the Churches however are not required to pursue legal action in the case of non-payment. In so far as the Church tax is tied into the income tax of employees the employer will directly provide the financial authorities with the Church tax along with the income tax.

In 1992 the combined Church tax provided the two large Churches with about DM 17.1 billion.

A further important source of income for some Church institutions is being part of general public financing systems. Church-run hospitals, which in some part of Germany make up the majority of the available hospital beds, are in this way a part of the publicly-run financing systems for hospitals, that are supported foremost by money paid out by the medical insurance for the number of

beds filled. Further, many Churches receive allocations from the State for activities in the same way as other publicly funded events, it is a part of the idea of State neutrality that Church activities are not to be put in a worse position than that of State funded local athletic clubs.

Churches also receive a certain number of tax exemptions. The Church tax and charitable donations to the Church may be deducted from income tax, as applies equally to donations to non-profit organisations. Churches are also not required to pay certain taxes and duties.

9. In so far as the need for religious services and religious assistance in the armed forces, hospitals, penal institutions or other public institutions is concerned, the various religious institutions are permitted to undertake such activities. They have a right to conduct religious assistance in hospitals and for prisoners. The religious activities within the police and the military forces are particularly regulated by contracts. The military chaplains are sent from the Churches for a specific time. They are for the time of their service given the status of State officials. Their top superior in matters of their State position is the head of the Federal Defence Ministry. In Church matters they are subordinate to their respective military bishop, who is responsible for his Church, though only in matters of public administration to the Federal Defence Minister.

ENDNOTES

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1. Cf. Statistisches Jahrbuch der Bundesrepublik Deutschland, 1893, p.68, pp. 105, data for 1991/1987.
2. Cf. Joseph Listl (ed), Konkordate und Kirchenverträge in der Bundesrepublik Deutschland, 2 vols., 1987.
3. Cf. also art. 136 WRV in conjunction with art. 140 GG, art. 4, 33 para. 3 GG.
4. Cf. BVerfGE 32, pp. 98.
5. Cf. BVerfGE 52, pp. 223.
6. Cf. BVerfGE 83, pp. 341.
7. Cf. BVerfGE 42, 312/334; 66,1/20.
8. Cf. BVerfGE 70, 138/162 with further references.
9. Cf. BVerfGE 70, pp.138.
10. Cf. BVerfGE 70, pp. 138; EKMR, 12242/86, decision of 06.09.1989.
11. 18 BetrVerfG; § 1 IV MitbestG.
12. Cf. BVerfGE 53, pp. 366/400.
13. Some Evangelical Landeskirchen (Nordelbien, Berlin-Brandenburg) have instead concluded collective bargaining agreements for their employees.

ГОСУДАРСТВО И ЦЕРКОВЬ В ФЕДЕРАТИВНОЙ РЕСПУБЛИКЕ ГЕРМАНИЯ

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В Европе, где существуют различные модели государственно-церковных отношений, ФРГ занимает промежуточное положение между моделью государственной церкви и моделью полного отделения церкви от государства. Германская модель базируется на трех главных принципах: нейтральность, толерантность и равенство.

Нейтральность означает, что государство не становится на сторону какой-либо из религий, не выступает в пользу или, наоборот, против какой-либо из них. Государство не идентифицирует себя с какой-либо религией. Это означает также, что государство не вмешивается во внутренние дела церкви.

Толерантность означает не только то, что государство просто толерирует различные религии, но и то, что оно гарантирует удовлетворение религиозных запросов своих граждан.

Равенство означает, что государство применяет одинаковые правила ко всем религиям. В то же время, Конституционный суд в Германии установил, что государство может делать определенные различия по отношению к религиозным организациям, принимая во внимание количество их членов и общественное влияние.

В Германии существует два различных юридических статуса для церквей и религий. Крупнейшие из них, а также ряд немногочисленных -- всего около 15 - имеют специальный статус. Эти религиозные организации должны быть подлинно религиозными, а не коммерческими ассоциациями; обладать достаточно определенной и отличной от других религиозных общин доктриной; число ее членов, денежные доходы организации и структура должны быть вполне достаточными для существования в рамках государственных законов. На практике земли Германии устанавливают ценз в районе 1% от общего количества населения земли и такое количество членов позволяет церкви претендовать на особый статус. (Хотя способ его получения в разных землях имеет определенные отличия).

Немногочисленные по количеству членов религиозные организации не имеют специального статуса.

Все религиозные организации могут организовывать свою внутреннюю жизнь в соответствии со своими собственными предписаниями.

Крупнейшие церкви имеют свои школы, которые получают государственное финансирование таким же образом, как и другие нерелигиозные публичные или частные школы. То же касается и детских садов.

Религиозное образование в школах обязательно. Но родители вправе выбрать взамен уроков религии уроки этики. Если в публичной школе как минимум 6-8 учеников, принадлежащих к определенной религии, они должны быть обеспечены уроками соответствующей религии.

Церкви в ФРГ дают работу более 600 тысячам человек. Крупнейшие церкви имеют собственное трудовое законодательство, которое находится в соответствии с общим трудовым законодательством, но имеет и определенные отличия. Это в частности означает, что работающий в церкви имеет большую ответственность в смысле лояльности к церкви, чем работающий в иных организациях перед своими работодателями.

Финансово церкви не зависят от государства и финансируют себя сами. Церкви, обладающие специальным статусом, имеют право и систему налогообложения. Церковные налоги, в соответствии с контрактами между церквями и государством, собираются налоговыми служащими и составляют от 8 до 9% дохода граждан. Ни одно правительство до сих пор не осмелилось отменить эту систему ввиду большой работы, совершаемой церквями на социальном поприще. Кроме того, церкви получают государственную финансовую поддержку как и другие каритативные учреждения, особенно для детских садов, больниц, школ, военных капелланов и др. Церкви, имеющие особый статус, освобождены также от различных налогов. Для граждан, платящих церковный налог и делающих пожертвования церкви, соответственно уменьшен подоходный налог.

Церкви, которые не имеют специального статуса, имеют почти такие же права относительно налогообложения: пожертвования в их пользу вычитаются из общего дохода донора.

Деятельность церквей в армии, местах лишения свободы, в лечебных учреждениях и т.п., регулируется специальными контрактами с государством.

Германское законодательство не знает особого статуса священнослужителей. Лишь для церквей со специальным статусом делается некоторое исключение: если против их священника или работника возбуждается уголовное дело, соответствующую религиозную организацию ставят в известность.

В отличие от других европейских стран церковь в Германии не является субъектом семейно-брачного права. Браки заключаются в специальных регистрирующих учреждениях.

В каждой земле ФРГ есть департамент министерства по делам культуры, ответственный за отношения между государством и церквями. Новообразованные ассоциации обычно уведомляют о себе это учреждение, что, однако, не обязательно. Руководители этих учреждений со всех земель по меньшей мере раз в год собираются для обсуждения и координации своей работы.

FREEDOM OF RELIGION: THE UNITED STATES MODEL

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I. INTRODUCTION

Religious freedom is a congeries. It has a unitary name that suggests it is a unitary right. But in fact It is an interrelated family of claims closely linked to all of the most fundamental human rights and liberties. It protects individuals and groups against unequal treatment and discrimination; it lies at the core of freedom of expression; it often overlaps with the protection of family rights; it protects a particularly vital form of association; and above all, it is linked to the core of human dignity and personality. Moreover, because religion is linked to humanity's deepest community building instincts, and has profound impact on communal structures and values, it must be understood in the deeper context of structuring relations among subcommunities within society and between subcommunities and society as a whole.

Because each of these underlying dimensions of religious liberty Is linked to independently evolving bodies of doctrine in modern legal systems, the understanding of religious freedom is inevitably subject to the gravitational influence of developments in these closely related secular bodies of law.[1] At times, religious freedom becomes a domain in which the prioritization of the competing values of equality, speech, association, dignity, and personal liberty is mediated[2]. Further, because of the significance of the overlapping values, the effort is sometimes made to reduce religious freedom to its secular components [3].

Religious liberty resists such reductionist efforts. It is greater than the sum of its parts. Central to religious freedom is the right of religious modes of life to be accepted and respected on