

Religion and the Secular State in Germany

I. SOCIAL CONTEXT

In order to give an outline of the relationship between state and religion in the Federal Republic of Germany in general and its legal fundaments in particular, let us start off with some brief remarks on the social context of this relationship.¹ During the last sixty years these basic sociological conditions have changed dramatically. In 1950, more than 96 percent of the population in the Federal Republic of Germany belonged to one of the major Christian confessions. About 50 percent were Protestants, about 46 percent belonged to the Catholic confession. Until the beginning of the 1960s this situation had hardly changed. Then, however, the decline of the Christian confessions began and the number of persons leaving the churches increased.

Of course, such a process of an increasing secularization and moving away from the churches can be regarded as a fairly typical phenomenon of almost the entire Western world² (perhaps with the one so important exception of the United States of America).³ Yet within the specific German context another crucial aspect has to be taken into account: the division of Germany into two different states belonging to two politically, as well as ideologically, distinct systems from 1949 till 1990. As we will see, the German Basic Law, the *Grundgesetz*,⁴ establishes a legal framework that firmly supports religion and religious confessions. In contrast, within the so-called German Democratic Republic the socialist regime practiced deliberately anti-religious politics. Unlike other efforts of the socialist state, this campaigning for atheism was remarkably successful: When the regime finally collapsed and the two German states were re-unified, hardly 30 percent of the population in the GDR still belonged to one of the great Christian confessions.⁵

With these two developments taken together, the current situation is this: about 31 percent of the population belong to the Catholic and about 30 percent to the Protestant confession. Roughly speaking a third of the population does not belong to any religious confession. Thus, the first remarkable tendency is an ongoing process of moving away from the churches. It is accompanied by a second tendency of religious pluralisation. Whereas the social relevance of Christian faith has declined and continues to decline, the importance of non-Christian religions, in particular that of Islam, is increasing. Though there are hardly reliable data, one supposes that approximately 4 percent of the people in Germany are Muslims. Most of them are immigrants and descendants of former immigrants. As we will see, this appearance of new religious groups causes specific problems for the legal system.⁶

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1. See Stefan Koriouth, “‘Jeder nach seiner Façon’: Grundgesetz für die Multireligiöse Gesellschaft,” in *Verfassungsrecht und Gesellschaftliche Realität / Kritische Justiz*, ed. Günter Frankenberg and Felix Hanschmann (Baden-Baden: Nomos Verlagsgesellschaft, 2009), 175.

2. See Charles Taylor, *A Secular Age* (Cambridge [MA]: Harvard University Press, 2007).

3. See, e.g., Marcia Pally, *Die Hintergründige Religion. Der Einfluss des Evangelikalismus auf Wissenschaftsfreiheit, Pluralismus und die US-Amerikanische Politik* (Berlin: Berlin University Press, 2007).

4. Official translation by Christian Tomuschat & David P. Currie available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

5. See Detlef Pollack, *Säkularisierung – ein Moderner Mythos?* (Tübingen: Mohr Siebeck, 2003), 77.

6. For an overview see Stefan Muckel, “Religionsfreiheit für Muslime in Deutschland,” in *Dem Staat, was*

The law has to deal with religious phenomena which were irrelevant and thus unfamiliar at the time when the *Grundgesetz* came into effect in 1949. Against the background of the changed social context the question arises whether or not the old constitutional arrangement is still adequate to meet the current challenges.⁷ The possibly anachronistic character of the constitutional regulations becomes even more questionable if one takes into account that some of the relevant constitutional norms are even older than the *Grundgesetz*. The founding fathers and mothers of the *Grundgesetz* simply adopted some statutes concerning the relationship of state and churches from the Weimar constitution from 1919.⁸

II. THEORETICAL AND SCHOLARLY CONTEXT

Before we go on to analyze the decisive constitutional framework for the relationship in question, we should take a short look at the history of this relationship and the respective legal regulation. It will help us to understand the theoretical and scholarly background of the legal constructions and thus the construction itself.⁹ In the historical perspective, the current relationship of church and state has to be seen as the product of century-long conflicts between the different confessions. The first major attempt to end the struggle between the confessions was the Peace of Augsburg in 1555. It provided the first legal basis for a peaceful co-existence of Catholicism and Lutheranism. By establishing the principle *cuius regio, eius religio* it guaranteed the aristocratic leaders of the different separate states within the *Reich* a *ius reformandi*, that is to say, a right to freely choose their own confession and thus determine the confession of their citizens. Yet in order to prevent religious civil war, the princes at the same time conceded to their citizens a *ius emigrandi*, i.e., the right to leave the state.

We can regard this *ius emigrandi* as a first step towards the acceptance of individual religious freedom. Though the following centuries, and with specific brutality the Thirty Years' War, demonstrate that the menace of religiously motivated (civil) wars was not abandoned, one can detect in this guaranteed choice a certain tendency: The general idea in this context is to establish peace by banning religion from the field of politics. The state starts to withdraw from the religious field, and at the same time religion has to move away from politics.¹⁰ This process of differentiation between politics and religion had important modifying effects on the general idea of religion. Religion became more and more a primarily private and not that much public affair. It thus demands an internalisation by one's own conscience, the *forum internum*, whereas public ceremonial exercises of faith are increasingly limited to non-political aspects.¹¹

III. CONSTITUTIONAL CONTEXT

The present relationship between state and religion is fundamentally constituted by

des Staates – der Kirche, was der Kirche ist. Festschrift für Joseph Listl zum 70. Geburtstag, eds. Josef Isensee, Wilhelm Rees, and Wolfgang Rübner (Berlin: Duncker & Humblot, 1999), 239.

7. See Hans Michael Heinig, "Ordnung der Freiheit – das Staatskirchenrecht vor neuen Herausforderungen," *Zeitschrift für Evangelisches Kirchenrecht* 53 (2008): 235–54; Christian Walter, "Religiöse Freiheit als Gefahr? Eine Gegenrede," *Deutsches Verwaltungsblatt* 123 (2008): 1073–80; Martin Heckel, "Zur Zukunftsfähigkeit des Deutschen 'Staatskirchenrechts' oder 'Religionsverfassungsrechts?'" *Archiv des Öffentlichen Rechts* 134 (2009): 309–90.

8. See on this historical context Martin Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen: Mohr Siebeck, 2006), 40.

9. See Stefan Koriath, "Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation," in *Staatskirchenrecht oder Religionsverfassungsrecht?*, eds. Hans Michael Heinig and Christian Walter (Tübingen: Mohr Siebeck, 2007), 39.

10. See Karl-Heinz Ladeur and Ino Augsberg, "The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges," *German Law Journal* 8 (2007): 143; Gerd Roellecke, "Die Entkopplung von Recht und Religion," *JuristenZeitung* (2004): 105.

11. See Ladeur and Augsberg, "The Myth of the Neutral State," 144.

the legal statutes of the *Grundgesetz*. These norms have a double function: On the one side, they set the stage for the role of religion with respect to the individual and his or her relationship to the state. This individualistic position is further strengthened by rights of equal treatment forbidding any discrimination with regard to religion. On the other side, the constitutional rules determine the relationship of the state and the diverse religious communities.

The central constitutional norm is the right of individual religious freedom laid down in Article 4 paragraphs 1 and 2 GG. It obliges the state to respect the religious activities of its citizens and to secure their free development. Freedom of religion in this sense includes not only freedom of confession, but also freedom of worshipping. Furthermore, it guarantees to the individual religious person the right to lead a life according to the rules of his or her personal belief.¹² Part of the religious freedom is also its negative dimension, that is to say the freedom not to have any religion. As a human right this freedom of religion is not limited to German citizens only, but belongs to all persons within the German state. Besides, not only individuals, but also the religious communities as such are subjects of religious freedom and hence may invoke this basic right. The same protection as for religious faith applies to *Weltanschauung*, i.e., a philosophical creed. Both types of convictions are equated.

The importance of this basic right is underlined by the specific character of the legal proviso concerning the possibility to interfere in and thus restrict the freedom of religion. Whereas other basic rights, for instance the freedom of assembly according to Article 8 GG, explicitly concede that – in the case of an outdoor assembly – this right may be restricted by or pursuant to a law, the text of Article 4 GG contains no such possibility. However, that does not mean that religious activities are beyond any state control and restriction. Yet if the state decides to restrict religious activities, it has to pursue specific purposes. These purposes must be related to the protection of other constitutional rights as important as religious freedom, e.g., basic rights of other citizens.

This freedom to have (or: not to have) a certain religious or philosophical creed is strengthened by the basic right of equality before the law. According to Article 3 paragraph 3 GG no person shall be favored or disfavored because of his or her personal religious opinions. Article 33 paragraph 3 GG specifies this general rule by stating that neither the enjoyment of civil and political rights, nor eligibility for public offices, nor rights acquired in the public service shall be dependent upon religious affiliations. No one may be advantaged or disadvantaged because of his or her adherence or non-adherence to a particular religious denomination or philosophical creed.

Turning now to the second pillar of the German constitutional law concerning religious issues, we must first mention a certain formal aspect. With respect to the relationship of state and religious communities, the *Grundgesetz* has used a special technique. Article 140 GG refers to and therewith incorporates the relevant norms from the Constitution of the former Weimar Republic (*Weimarer Reichsverfassung*, WRV). According to the German Constitutional Court, the *Bundesverfassungsgericht*, this technique does not imply a minor status of the incorporated norms. Rather, they are a fully effective, integral part of the constitution.¹³

In contrast to the individual approach of Article 4 GG, these incorporated rules constitute the institutional aspect of the German law concerning religion and religious communities. They establish an intricate balance between a separation as well as a cooperation of state and religious communities. The fundamental rule states that there shall be no state church (Article 140 GG and Article 137 paragraph 1 WRV). It determines a basic separation of religion and state. Confirming their autonomy, Article 137 paragraph 3 WRV declares that all religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. In particular, these societies shall confer their offices without the participation of the state or the civil

12. See BVerfGE 32, 98, 106.

13. See BVerfGE 19, 206, 219.

community. However, the fundamental separation of church and state established therewith is not to be seen as a conception of *laïcité* in the strict French sense. As the following legal statutes show, the separation does not exclude certain fields of cooperation between state and religious groups. Only forms of cooperation which integrate religious communities into the state organization are prohibited.

IV. THE STATE AND RELIGIOUS AUTONOMY

Before we take a closer look on these fields of possible cooperation between state and church, we can name the fundamental idea of the German law concerning religious issues. Both aspects of individual religious freedom and the separation of state and church taken together constitute the basic principle for the relationship of state and religion in Germany. This principle is known as the idea of state neutrality.¹⁴ Accordingly, the state is principally neither allowed to favor nor to discriminate against certain confessions. As a concept of equidistance, the principle of neutrality towards all religious communities commits the state to generally withdraw from religious issues. Though the principle has recently been criticised for being a mere “*chiffre* for indifference”¹⁵, it has also been decidedly defended as the necessary fundament for the legal regulation of religious issues.¹⁶

This principle of state neutrality has important consequences for the legal concept of religion. The state is obliged not to define what can legitimately be classified as religion and religiously connoted behaviour.¹⁷ There exists no *numerus clausus* of acceptable religious confessions. In contrast, religious freedom allows for the development of totally new forms of confession. Yet if the state is not allowed to determine what religion means, who else is responsible? In order to deal with a comprehensible phenomenon, there has to be some concept of religion that the law can work with. The answer of the German constitutional law, as developed by the *Bundesverfassungsgericht*, is this: the religious groups themselves are responsible. The legal concept of religion is based on the self-conception of the allegedly religious communities.¹⁸

Nevertheless, there have to be some precautionary measures preventing misuses of religious freedom. Thus it cannot be exclusively the alleged religious community deciding whether and to what extent certain behaviour may be classified as religious and thus shall be granted specific legal protection. There must be some form of state control.¹⁹ Yet with regard to the central role of the self-conception of the religious communities this necessary state control is limited to a form of plausibility check. Only if a certain group evidently misuses the idea of religious freedom in order, e.g., to use it for obviously economic purposes, the state may intervene. This issue has been lively discussed with

14. See BVerfGE 12, 1, 4; BVerfGE 19, 206, 216; hereunto Stefan Huster, *Die Ethische Neutralität des Staates: Eine Liberale Interpretation der Verfassung* (Tübingen: Mohr Siebeck, 2002); Stefan Huster, “Die Religiös-Weltanschauliche Neutralität des Staates. Das Kreuz in der Schule aus Liberaler Sicht,” in *Der Streit um das Kreuz in der Schule*, eds. Winfried Brugger and Stefan Huster (Baden-Baden: Nomos, 1998), 69; Rolf Schieder, *Wieviel Religion Verträgt Deutschland?* (Frankfurt/M.: Suhrkamp, 2001), 16; for neutrality as a character of the German ‘Grundgesetz,’ see, e.g., Rolf Gröschner, “Freiheit und Ordnung in der Republik des Grundgesetzes,” *JuristenZeitung* (1996): 637. Contra Gabriele Britz, *Kulturelle Rechte und Verfassung. Über den Rechtlichen Umgang mit Kultureller Differenz* (Tübingen: Mohr Siebeck, 2000), 233; skeptically Frank Holzke, “Die ‘Neutralität’ des Staates in Fragen der Religion und Weltanschauung,” *Neue Zeitschrift für Verwaltungsrecht* (2002): 903.

15. See Ladeur and Augsburg, “The Myth of the Neutral State,” 144.

16. See Hans Michael Heimg, “Verschärfung der oder Abschied von der Neutralität?,” *JuristenZeitung* (2009): 1136.

17. See BVerfGE 104, 337, 353; furthermore Martin Morlok, *Selbstverständnis als Rechtskriterium* (Tübingen: Mohr Siebeck, 1993), 78; Stefan Muckel, *Religiöse Freiheit und Staatliche Letztentscheidung* (Berlin: Duncker & Humblot, 1997), in particular at 1, 27, 121.

18. See BVerfGE 24, 236, 247; 53, 366, 401; 66, 1, 22; 70, 138, 167; 72, 278, 289; BVerwGE 112, 227, 234; Axel Isak, *Das Selbstverständnis der Kirchen und Religionsgemeinschaften und seine Bedeutung für die Auslegung des Staatlichen Rechts* (Berlin: Duncker & Humblot, 1994).

19. See BVerfGE 83, 341.

regard to the so called “Church of Scientology.”²⁰

This specific importance of religious self-conception is the result of a developing jurisdiction. Indeed, within former decisions of the *Bundesverfassungsgericht* there have been attempts to establish narrower and more concrete definitions. The Court tried to establish a “clause of adequacy of culture” determining religion with regard to “those confessions which have in the course of time been developed by civilized people on the basis of common moral convictions”.²¹ As these definitions did not match the constitutional obligation of state neutrality, later jurisdiction has rightfully abandoned them.²² Consequently nowadays there exist only very open, formal definitions of what can properly be called a religion or religious community. The subject of religion is said to be “an assurance regarding the existence and the content of certain truths being connected to a human being.”²³

Against the background of this conception of state neutrality the most important form of cooperation may come as some surprise: according to Article 140 GG and Article 137 paragraph 5 WRV, “Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency.” The most important consequence of this status as public corporations is stated in the following paragraph: According to Article 137 paragraph 6 WRV religious societies that have achieved this status are entitled to levy taxes on the basis of the civil taxation list.

This possible particular legal status²⁴ might seem to be at odds with the general idea that there shall be no state church. Apparently by being granted this legal status religious communities can participate in state authority and thus tend to become an integral part of the state. Yet this would be a misunderstanding of the general conception. The idea has to be understood against its historical background. It is the result of a compromise which was achieved in the proceedings for the Weimar Constitution. Its primary purpose was to spare the traditional churches the status of mere private associations. Compared to the churches’ outstanding social function and relevance, this status was considered as inadequate and dishonourable.²⁵

However, the possibility of a status as public corporations should not contradict the general rule that there is no state church. This description is valid also for the legal situation of the *Grundgesetz*: despite their status as corporations under public law the respective religious communities remain distinct from the state. They do not become an integral part of state organization.²⁶ The independent regulation and administration of their internal affairs, as guaranteed by Article 140 GG, Article 137 paragraph 3 WRV, applies to those corporations under public law as well as to those under private law. Thus, in contrast to ordinary corporations under public law there exists no state supervision of the internal proceedings within the religious communities.

Consequently, the status as a corporation under public law does not modify the

20. See *Bundesarbeitsgericht* (Federal Labour Court), *Neue Juristische Wochenschrift* (1996), 143, 146, on the one hand (denying the status as religious community) and *Oberverwaltungsgericht Hamburg* (Higher Administrative Court), *Neue Zeitschrift für Verwaltungsrecht* (1995), 498, 499, on the other (affirming the status). Stefan Muckel, “The ‘Church of Scientology’ under German Law on Church and State,” *German Yearbook of International Law* 41 (1999): 299.

21. BVerfGE 12, 1, 4; 24, 236, 246.

22. See Bernd Jeand’Heur and Stefan Koriath, *Grundzüge des Staatskirchenrechts* (Stuttgart: Boorberg, 2000), 80.

23. BVerfGE 32, 98, 107.

24. See Klaus G. Meyer-Teschendorf, “Der Körperschaftsstatus der Kirchen,” *Archiv des öffentlichen Rechts* 103 (1978): 329; Hans Michael Heinig, *Öffentlich-Rechtliche Religionsgesellschaften. Studien zur Rechtsstellung der nach Art. 137 Abs. 5 WRV Korporierten Religionsgesellschaften in Deutschland und der Europäischen Union* (Berlin: Duncker & Humblot, 2003); Stefan Magen, *Körperschaftsstatus und Religionsfreiheit. Zur Bedeutung des Art. 137 Abs. 5 WRV im Kontext des Grundgesetzes* (Tübingen: Mohr Siebeck, 2004).

25. See Koriath, “Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation,” 54.

26. See BVerfGE 18, 385, 386 et sq.; 42, 312, 321; 53, 366, 387; 102, 370, 387.

general state-church relationship. According to the judicature of the *Bundesverfassungsgericht*, the status does not alter the churches' fundamental independence from the state; rather, this independence shall be confirmed therewith.²⁷ Thus, the status is misunderstood if it is conceived of as a sort of award for those religions being particularly loyal to the state. The only explicit demand which Article 137 paragraph 5 WRV states – permanency – is not to be supplemented by an unwritten necessity to faithfully participate in state actions. The question was decided in a famous case concerning the possible status as corporation under public law of Jehovah's Witnesses.²⁸

This religious community instructs its members not to participate in state elections. The *Bundesverwaltungsgericht* – i.e., the German Federal Administrative Court – regarded this instruction as a sufficient reason to deny the applied status as corporation under public law. It claimed that this status presupposes some kind of loyalty to the state.²⁹ This decision was overruled by the *Bundesverfassungsgericht*. It explained that it is not an infringement of the constitution if a religious community objects to the state as a secular institution. As long as the religious community does not attempt to overthrow the current legal system in order to install a theocratic regime, i.e., as long as it respects the fundamental rights of the citizens and the principle of religious tolerance, its attitude towards the state is an inner religious phenomenon which the state may not criticise.³⁰

Furthermore, the cooperation is realized by numerous contracts between the state and the different religious communities.³¹ These contracts concern issues as religious education in state schools, establishment of faculties of theology, and pastoral care in the military services.³² They constitute a reliable legal framework for both parties.

These possible forms of cooperation between state and religious communities demonstrate the particular character of the constitutional arrangement for the state-church relationship in Germany. The constitution does not strictly oppose state and religious communities, nor does it tend to keep them entirely apart. Rather, it instructs state authorities to assist the different denominations. According to the *Bundesverfassungsgericht's* jurisdiction, the neutrality imposed on the state “has to be understood as an open and comprehensive attitude which supports religious freedom of all confessions in an equal manner.”³³

V. RELIGION AND THE AUTONOMY OF THE STATE

As we have seen, this kind of state neutrality limits only forms of cooperation which tend to make religious communities part of the state organization. Correspondingly, the religious communities have to accept that they may not interfere in state affairs. The autonomy of religion ends where divergent societal functions are at stake.³⁴ Thus it would, for instance, be unacceptable if a religious community tried to establish a religious law system which attempted to undermine state authority.³⁵ As Article 137 paragraph 3 WRV states, religious communities are subordinate to the law that applies to all. This does not exclude the possibility of an internal ecclesiastical jurisdiction judging specific affairs within the religious community. But as far as external aspects are concerned, state courts have to have the last word.³⁶

27. See BVerfGE 30, 415, 428.

28. See BVerfGE 102, 370; Stefan Koriath, “Loyalität im Staatskirchenrecht?,” in *Gedächtnisschrift Jeand'Heur*, eds. Wilfried Erguth et al. (Berlin: Duncker & Humblot, 1999), 221.

29. See BVerwGE 105, 117.

30. See BVerfGE 102, 370, 395.

31. See generally Axel von Campenhausen and Heinrich de Wall, *Staatskirchenrecht*, 4th ed. (München: C. H. Beck, 2006), 141.

32. See Jeand'Heur and Koriath, *Grundzüge des Staatskirchenrechts*, 189 et seq.

33. BVerfGE 108, 282, 300.

34. See Ino Augsberg, “Die Entstehung des Neutralen Staates als Vorgang der Säkularisation,” *Zeitschrift für Evangelisches Kirchenrecht* 53 (2008): 445.

35. See Ladeur and Augsberg, “The Myth of the Neutral State,” 146.

36. See Jeand'Heur and Koriath, *Grundzüge des Staatskirchenrechts*, 245.

VI. LEGAL CONTEXT

If we now turn to the more general legal context, the remarks on this subject can be rather brief. Because of the rather detailed constitutional context, there is not much room left for legal statutes to alter the basic relationship between state and religion.

Yet one important area of statutory law on the level of the *Bundesländer*, the German Federal lands, has been revealed in the context of a conflict which is well known in other countries, too: the teacher's headscarf case.³⁷ The *Bundesverfassungsgericht* decided in such a constellation that the *Bundesländer* are not generally obliged to employ teachers unwilling to divest themselves of their headscarves during classes. However, any restriction of religious freedom needs a particular purpose which is itself characterised as a constitutional right. Moreover, this restriction can, for reasons of democratic legitimation, be done only by or pursuant to a law.

Since there was no such legal statute in the respective *Bundesland*, the Court considered the current practice to deny the teacher's employment an unjustifiable infringement of the teacher's religious freedom. In consequence of this decision, several *Bundesländer* enacted laws which forbid teachers to wear religious symbols in class rooms. The *Bundesverwaltungsgericht* has accepted these statutes as long as they remain indifferent towards all kinds of religion and thus respect the principle of state neutrality.³⁸ Accordingly, certain exemption clauses for Christian or Jewish religious symbols have to be regarded in this context of strict neutrality. Besides the national law and the law of the *Bundesländer*, legislation on the transnational level of the EC (or, according to the new nomenclature of the Treaty of Lisbon: the European Union) has become an increasingly important subject.³⁹ "Germany's Basic Law and the European treaties can [...] be described as partial constitutions, and only in tandem do they establish the fundamental order of the society."⁴⁰

This applies also for the legal framework concerning religious issues: Though the constituent treaties confer on the Union no immediate legal competence over such issues, legal acts of the EU do have at least indirect implications on the legal position of religious communities and the relationship between state and religion. Based on Article 13 TEC (now, after the Lisbon Treaty's entry into force, Article 19 of the Treaty on the Functioning of the European Union), some European Directives are explicitly directed on banning discrimination on the grounds of race, ethnic origin or religion.⁴¹

What is more, the EU respects and protects (via the ECJ) religious freedom. Article 6 paragraph 2 TEU obligates the EU to safeguard fundamental rights in line with the European Convention on Human Rights ("ECHR") and the legal traditions common to the member states. Thus, individual religious freedom, as guaranteed by Article 9 ECHR (and protected by the jurisdiction of the European Court of Human Rights)⁴² as well as by the national constitutional fundamental rights, is part of the EU law, too.

Moreover, the European Charter of Fundamental Rights contains an explicit

37. See BVerfGE 108, 282; Christine Langenfeld and Sarah Mohsen, "Germany: The Teacher Head Scarf Case," *International Journal of Constitutional Law* (2005): 86-94; Matthias Mahlmann, "Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case," *German Law Journal* 4 (2003): 1099-1116.

38. See BVerwGE 121, 140; Ernst-Wolfgang Böckenförde, *JuristenZeitung* (2004): 1181; Hans Hofmann, "Religiöse Symbole in Schule und Öffentlichkeit – Stand der Entwicklung der Landesgesetzgebung und Rechtsprechung nach der Richtungsentscheidung des BVerfG von 2003," *Neue Zeitschrift für Verwaltungsrecht* (2009): 74, 77.

39. See Stefan Mückl, *Europäisierung des Staatskirchenrechts* (Baden-Baden: Nomos, 2005); Hans Michael Heinig, "Law on Churches and Religion in the European Legal Area – Through German Glasses," *German Law Journal* 8 (2007): 563-567.

40. Heinig, "Law on Churches and Religion in the European Legal Area," 567.

41. See Council Directive 2000/43/EC of 29 June 2000; Council Directive 2000/78/EC of 27 November 2000; hereunto Mahlmann, "Religious Tolerance, Pluralist Society and the Neutrality of the State," 1113.

42. See Françoise Tulkens, "The European Convention on Human Rights and Church-State-Relations: Pluralism vs. Pluralism," *Cardozo Law Review* 30 (2009): 2575-2591.

guarantee of religious freedom.⁴³ Though not legally binding until December 1 2009, the Charter has now become effective with the Treaty of Lisbon.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

The constitutionally guaranteed freedom of religion has certain effects on the legal regulation of specific social phenomena. It forces the state to establish exemption clauses which pay tribute to religious issues. This general commitment of the legislator and the administration can be exemplified with respect to the problem of kosher butchering on the one hand and the general idea of animal protection on the other. Section 4 of the German Law on Animal Protection (*Tierschutzgesetz*, TierSchG) prohibits killing vertebrates without using anaesthesia. According to section 4a paragraph 1 TierSchG the same applies for the kosher butchering of animals. However, with regard to certain religious rules claiming a kosher butchering without anaesthesia, section 4a paragraph 2 no. 2 TierSchG states that there can be exceptions if those are necessary to meet religious demands. If these demands are described by the respective religious community in a comprehensible way, then the general idea of animal protection has to withdraw.⁴⁴

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

The most important source of income for religious communities in Germany is constituted by tax receipts.⁴⁵ As already mentioned above, Article 140 GG in combination with Article 137 paragraph 6 WRV guarantees the possibility to levy taxes to those religious societies being organized as corporations under public law. Moreover, the respective religious communities may use the state and its tax authorities in order to collect these taxes for them.⁴⁶ In contrast, those communities having the legal form of private incorporated associations⁴⁷ depend on donations and contributions by their members.⁴⁸

Furthermore, there exist numerous public subsidies for religious communities.⁴⁹ These subsidies were originally established in order to give compensations for the expropriation of churches during the process of secularization in the nineteenth century. According to Article 140 GG, Article 138 paragraph 1 WRV, these old subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the *Bundesländer*. However, such a redemption has not yet taken place. Rather, in many cases the old contractual obligations have been replaced by new ones.⁵⁰

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

Generally speaking, the secular law does not recognize legal effects to acts performed by religious group members according to religious law. An interesting aspect of civil legal effects of religious acts could be seen in a recent modification of civil law concerning the

43. Charter of Fundamental Rights of the European Union, Article 10, OJ C 364, 18.12.2000, 1.

44. See BVerfGE 104, 337; Kyriell-Alexander Schwarz, *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des 'Rituellen Schächtens'* (Baden-Baden: Nomos, 2003); Fabian Wittreck, "Religionsfreiheit als Rationalisierungsverbot. Anmerkungen aus Anlaß der Schächtentscheidung des Bundesverfassungsgerichts," *Der Staat* 42 (2003): 519-555.

45. See von Campenhausen and de Wall, *Staatskirchenrecht*, 226.

46. See id. at 234.

47. See generally Josef Jurina, "Die Religionsgemeinschaften mit Privatrechtlichem Status," *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, 2nd ed., vol. 1, eds. Joseph Listl and Dietrich Pirson (Berlin: Duncker & Humblot, 1994), 689.

48. See Jeand'Heur and Koriath, *Grundzüge des Staatskirchenrechts*, 183.

49. See Michael Droegge, *Staatsleistungen an Religionsgemeinschaften im Säkularen Kultur- und Sozialstaat* (Berlin: Duncker & Humblot, 2004).

50. See von Campenhausen and de Wall, *Staatskirchenrecht*, 281.

wedding ceremony of the state on the one hand and the church on the other.⁵¹ Until 2008 it was illegal to marry in church before the official marriage ceremony at the civil registry office. In 2008 the legislator modified this rule, enabling citizens now to have a previous church wedding. Yet this modification does not change the legal effects of church weddings. Still the only act that produces a legally binding marriage is the ceremony before the civil registry office. From the legal point of view, church weddings remain an unbinding, voluntary act.

However, the respect of internal religious issues can have effects on civil legal affairs. The relevance of this matter can be shown in the field of labour law. State courts have accepted that persons working within church-owned organizations can be expected to share the community's basic convictions.⁵²

Further specific legal effects are connected to the status of corporations under public law.⁵³ Besides the central possibility to levy taxes, this status establishes some other possible courses of action. For instance, it enables the respective communities to dedicate so called "public objects" for special purposes, e.g., church bells. Moreover, the status allows for the establishment of public employments.⁵⁴

X. RELIGIOUS EDUCATION OF THE YOUTH

Because of its federal structure, education in schools in Germany is basically a matter that has to be treated on the level of the *Bundesländer*. However, an important article of the *Grundgesetz*, Article 7 paragraph 3, sentence 1 GG, explicitly addresses the issue of religious education. It states that religious instruction is to be taught as a normal school subject. That means that religious education shall form part of the regular curriculum. It is not just an optional possibility. Though the state keeps its right of supervision, the educational program is determined by the different denominational communities. Religious instruction "shall be given in accordance with the tenets of the religious community concerned" (Article 7 paragraph 3 sentence 1 GG). Thus, religious instruction not only takes the form of a neutral explanation of what the different confessions believe, it teaches the respective faith itself. Because of this particular character of religious education on the one hand and the guaranteed religious freedom (particularly in its negative dimension) on the other, no student can be forced to participate in this kind of religious education. For those not willing to join religious classes there exists an alternative educational program in the form of ethics courses. In recent times, there have been two major areas of conflict concerning religious education.

The first is connected with the topic of ethics courses.⁵⁵ Some *Bundesländer* have enacted laws which made the participation of ethics courses obligatory for all students, reducing at the same time religious education to a mere optional possibility. In order to avoid the apparent infringement of Article 7 paragraph 3 GG, they referred to an exemption clause established by Article 141 GG. This clause declares that Article 7 paragraph 3 sentence 1 GG shall not apply in any *Bundesland* in which Land law provided otherwise on 1 January 1949. At the time when the *Grundgesetz* was originally enacted, this clause concerned merely the lands Bremen⁵⁶ and West Berlin. After the reunification, the question arose whether or not the clause should apply in the new

51. See Dieter Schwab, "Kirchliche Trauung ohne Standesamt," *Zeitschrift für das Gesamte Familienrecht* (2008): 1121; Richard Puza, "Zum Neuen Personenstandsgesetz: Kirchliche Trauung ohne Vorhergehende Standesamtliche Eheschließung," *Kirche und Recht* (2008): 207.

52. See BVerfGE 70, 138; von Campenhausen and de Wall, *Staatskirchenrecht*, 179.

53. See von Campenhausen and de Wall, *Staatskirchenrecht*, 251.

54. See Jeand'Heur and Koriath, *Grundzüge des Staatskirchenrechts*, 172, 174.

55. See Stefan Koriath and Ino Augsberg, "Ethik - oder Religionsunterricht? Eine Bestandsaufnahme aus Verfassungsrechtlicher Sicht," *Zeitschrift für Gesetzgebung* 24 (2009): 222-236.

56. See hereunto Ralf Poscher, "Religions- oder Religionskundeunterricht? Eine Fallstudie zu Einer Verfassungsrechtlichen Dichotomie am Beispiel des Bremer Unterrichts in Biblischer Geschichte," *Recht der Jugend und des Bildungswesens* (2006): 460-474.

Bundesländer of the former GDR. The land Brandenburg as well as the re-united Berlin claimed that they could invoke this clause.⁵⁷

The second major field of discussion is connected to the specific problems caused by the appearance of new religious groups, as mentioned at the outset. The particular problem here is whether there can be a confessional religious education of Islam.⁵⁸ With regard to its content, such religious instructions would have to be organized in accordance with Islamic tenets. However, in Islam there are hardly any central tenets binding for all Muslims. Rather, the state is confronted with numerous different groups with different tenets disputing with one another. Thus, the question is whether instead of organizing religious education in the strict sense of Article 7 paragraph 3 GG, the state shall offer an educational program teaching Islamic confession in a rather objective, scientific manner.

The problem reappears with respect to the question of private schools.⁵⁹ Article 7 paragraphs 4 and 5 GG guarantee the establishment of private schools only if the private schools prove to be not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff. The establishment must not be approved by state authorities if the type of school in question encourages segregation of pupils according to the means of their parents. One might ask whether the danger of segregating pupils with regard to their religious denomination could be seen as another reason for denying state approval.

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

One of the most discussed legal cases of the last years has been the question of the crucifix in school rooms.⁶⁰ In Bavaria, it was obligatory to have a crucifix at the wall of every classroom. The *Bundesverfassungsgericht* decided that this practice – which was based on legal obligation – infringed the constitutional idea of religious freedom in its negative dimension. According to the judges, it is unacceptable to force students to learn “under the cross,” as this cross should properly be understood not only as a cultural, but as a genuinely religious and even “missionary” symbol.⁶¹ In a similar constellation the presence of a crucifix in court room was declared an infringement of the constitution as well.⁶² In both cases the *Bundesverfassungsgericht* considered the hanging of the crucifix as an act of state demonstrating an identification with the respective religious symbol. As such, it was regarded as an infringement of the neutrality principle.

XII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The German Criminal Code, the *Strafgesetzbuch* (StGB),⁶³ contains a specific chapter dealing with “offences related to religion and ideology.” The most important of the respective statutes, section 166 StGB, forbids the defamation of religion and religious, as well as ideological, associations. The subsequent section 167 StGB forbids the

57. See Bernhard Schlink, “Religionsunterricht in den Neuen Ländern,” *Neue Juristische Wochenschrift* (1992): 1008; Stefan Mückl, “Staatskirchenrechtliche Regelungen zum Religionsunterricht,” *Archiv des Öffentlichen Rechts* 122 (1997): 513, 537.

58. See Stefan Koriath, “Islamischer Religionsunterricht und Art. 7 III GG,” *Neue Zeitschrift für Verwaltungsrecht* (1997): 1041; Thorsten Anger, *Islam in der Schule Rechtliche Wirkungen der Religionsfreiheit und der Gewissensfreiheit sowie des Staatskirchenrechts im Öffentlichen Schulwesen* (Berlin: Duncker & Humblot, 2003); Hans Markus Heimann, “Alternative Organisationsformen Islamischen Religionsunterrichts,” *Die Öffentliche Verwaltung* (2003): 238-246; Wolfgang Bock, ed., *Islamischer Religionsunterricht? Rechtsfragen, Länderberichte, Hintergründe*, 2nd ed. (Tübingen: Mohr Siebeck, 2007).

59. See Karl-Heinz Ladeur and Ino Augsberg, *Toleranz – Religion – Recht* (Tübingen: Mohr Siebeck, 2007), 101.

60. See Jeand’Heur and Koriath, *Grundzüge des Staatskirchenrechts*, 84.

61. See BVerfGE 93, 1, 20.

62. See BVerfGE 35, 366.

63. Official translation by Michael Bohlander available at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

disturbance of the exercise of religion, in particular of religious worshipping. The aim of the norms is, however, not primarily the protection of the individual religious believer or religious community. Rather, the aim is to secure the public peace, i.e., the peaceful co-existence of all citizens in the public sphere. With regard to this specific aim, courts have recently been rather reluctant to classify certain statements as such a defamation of religion.⁶⁴ As a result to the public discussions on the Danish caricatures of the Prophet Mohammed, some German politicians proposed that one should tighten the legal measures in order to augment the prevention of religious denominations.⁶⁵ However, these attempts remained as yet unsuccessful.

XIII. OUTLOOK

Let us conclude with a short outlook on our initial question whether the now over sixty-year old German constitution still meets the contemporary challenges. The problem is emblematically reflected in the discussion of whether or not one should substitute the traditional German notion for the legal model of the State-religion-relationship, *Staatskirchenrecht*, with the new concept of *Religionsverfassungsrecht*.⁶⁶ The first expression means, literally translated, “law of state church.” Against the background of our previous explanations, it should have become clear enough that this literal meaning is mistaking. As there is no state church, there can be no law of it. The expression has to be understood in a wider sense as “ecclesiastical constitutional law.”

Yet there remains, then, a reference to the church, *ecclesia*, which one might find inadequate for our present pluralist society. *Religionsverfassungsrecht*, in contrast to this concept, means “constitutional law of religion.” On first view, this concept seems to be more adequate in order to describe the deliberately open conception of the *Grundgesetz*. It is designed to stress the importance of the individualistic religious freedom at the costs of the traditional institutional conception. Against the background of the recent sociological changes this might appear as the more promising approach. Yet we should be careful.⁶⁷ Within the recent German debates on the relationship of religion and the state one can observe an increasing tendency “to regard the privatization of religion and the principle of the ‘neutrality’ of the state in religious matters as the central elements of the constitutional status of religion,” while at the same time the “public role of religion within the state” is downplayed.⁶⁸ This perspective misconceives the productive role that the German model has played in the past. What is more, it also misconceives the future possibilities of this model. Even in the modern pluralist society a merely individualistic conception of religion is insufficient. It underestimates the functional relevance which religious convictions can have not only for the individual citizen, but also for an entire society and its cultural processes.⁶⁹ Furthermore, the emphasis on individual forms of religious belief could tend to privilege a certain, Christian tradition, thereby suppressing or at least ignoring other conceptions which rather accentuate collective aspects of religion. Contrarily, the double perspective of the German *Staatskirchenrecht* enforcing individual basic rights and coinstantaneously enabling cooperations with religious communities meets the requirements of religion as both an individual as well as a social phenomenon.

64. See e.g. *Landgericht München* (district court of Munich), *Zeitschrift für Urheber- und Medienrecht* (2006), 578, concerning the possible banning of the animated sitcom “Popetown.”

65. See the proposal for an amendment which the *Bundesland* Bavaria made in the Federal Council of Germany, the *Bundesrat* (BR-Drs. 683/07, available at http://www.bundesrat.de/eln_051/nn_8694/SharedDocs/Drucksachen/2007/0601-700/683-07,templateId=raw,property=publicationFile.pdf/683-07.pdf).

66. See the contributions in *Staatskirchenrecht oder Religionsverfassungsrecht?*

67. See Stefan Koriath, “Vom Institutionellen Staatskirchenrecht zum Grundrechtlichen Religionsverfassungsrecht. Chancen und Gefahren Eines Bedeutungswandels des Art. 140 GG,” in *Der Staat des Grundgesetzes – Kontinuität und Wandel. Festschrift für Peter Badura zum 70. Geburtstag*, eds. Michael Brenner, Peter M. Huber, and Markus Möstl (Tübingen: Mohr Siebeck, 2004), 727-747.

68. Karl-Heinz Ladeur, “The Myth of the Neutral State and the Individualization of Religion: The Relationship of State and Religion in the Face of Fundamentalism,” *Cardozo L. Rev.* 30 (2009): 2445, 2451.

69. See Ladeur and Augsberg, “The Myth of the Neutral State,” 148.