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## CHURCH AUTONOMY IN GERMANY

AXEL FREIHERR VON CAMPENHAUSEN

Standing together with the freedom of religion and the separation of state and church, the recognition of the right to self-determination for churches<sup>1</sup> is the third column of the system of state-church relations of the constitution. The guarantee of Art. 140 GG (Basic Law) in connection with Art. 137 III WRV (Weimar Republic Constitution) reads: "Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community". This guarantee applies to all religious communities without regard to whether they enjoy the rights of a corporation under public law or if they are an association under civil law or if they completely lack legal capacity. The constitution not only gives them a kind of right to self-administration but acknowledges their right to self-determination, their complete freedom from supervision and tutelage through the state.<sup>2</sup>

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<sup>1</sup> *Konrad Hesse*, Das Selbstbestimmungsrecht der Kirchen und Religionsgemeinschaften, HdbStKirchR I<sup>2</sup>, p. 521 ff.; *Alexander Hollerbach*, Grundlagen des Staatskirchenrechts, HStR VI, § 138, No. 114-123; v. *Mangoldt/Klein/v. Campenhausen*, Das Bonner Grundgesetz. Kommentar, Vol. 14, München 1991, Art. 140 GG i. V. m. Art. 137 III WRV, No. 25 ff., 123 ff.; *idem*, Staatskirchenrecht, 1996<sup>3</sup>, § 14; *Paul Mikat*, Kirchen und Religionsgemeinschaften, in: *Bettermann-Nipperdey-Scheuner* (ed.), Die Grundrechte IV/1, 1960, p. 111 = Ges. Aufs. 1974 I, p. 29 (89 ff.); *Hermann Weber*, Die Religionsgemeinschaften als Körperschaften des öffentlichen Rechts im System des Grundgesetzes, 1966, p. 40 f.; *Josef Jurina*, Der Rechtsstatus der Kirchen und Religionsgemeinschaften im Bereich ihrer eigenen Angelegenheiten, 1972; *Ulrich Scheuner*, Begründung, Gestaltung und Grenzen kirchlicher Autonomie, in: FS Füllkrug, p. 1 ff.

<sup>2</sup> Today it goes without doubt, that the state supervision over churches, which has persisted

## I. THE ESSENCE OF THE RIGHT TO SELF-DETERMINATION

Despite the “extensive interpretation” of the constitutional right of freedom of religion (Art. 4 GG), the guarantee of the right to self-determination for churches plays a separate role. Art. 140 GG in connection with Art. 137 III WRV guarantees the right to organize and administer own matters independently, thus containing these necessary additions. Art. 4 GG and Art. 140 GG in connection with Art. 137 III WRV hence guarantee two different sections of the life and work of churches and religious communities, which supplement each other. The distinction between those two sections sometimes may be difficult, however, they are not identical. The Federal Constitutional Court following Hesse described the correlation between them as follows: “The guarantee of the right to organize and administer own matters independently (Art. 137 III WRV) proves to be a necessary, however legally independent guarantee, which adds to the freedom of religious life and work of churches and religious communities, the freedom of organization, legislation and administration, which is imperative to fulfill these tasks”.<sup>3</sup>

This distinction is not solely theoretical. If the right to self-determination was already protected through Art. 4 GG, a constitutional complaint would be admissible. According to Art. 93 I Nr. 4 a GG, § 90 I BVerfGG the alleged violation of constitutional rights but not the alleged violation of Art. 140 GG admissible for a constitutional complaint. “A constitutional complaint cannot be based on a violation of Art. 140 GG directly. This article does not grant any constitutional rights, which could be enforced through a constitutional complaint.”<sup>4</sup> The Federal Constitutional Court, however, has often decided, that the “status of churches” of Art. 140 GG is at its very core also protected through Art. 4 GG.<sup>5</sup> When a constitutional complaint complies with the demands of § 90 BVerfGG, the court regularly extends its competence of supervision to the verification of the accordance of the legal act at stake with other constitutional rights. Repeatedly, the court then found a violation of the constitutional right to self-determination of churches.<sup>6</sup>

The constitution describes the whole right to self-determination with the words “order” and “administration”. The guarantee encompasses all necessary possibilities of effect in and on the public sphere, so that the churches and

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in the times of the Weimarer Constitution, does no longer exist; cf. instead of all: BVerfGE (constitutional court decision) 30, 415 (428); 18, 385 (386 f.).

<sup>3</sup> BVerfGE 53, 366 (401); 72, 278 (289) following *Konrad Hesse*, *Das Selbstbestimmungsrecht der Kirchen und Religionsgemeinschaften*, HdbStKirchR I<sup>1</sup>, p. 414.

<sup>4</sup> BVerfGE 19, 129 (135); decision of 1.9.1980, ZevKR 27 (1982) p. 188 LS 1.

<sup>5</sup> BVerfGE 18, 385 (386); 19, 1 (5); 19, 129 (132 ff.); 42, 312 (321 ff.).

<sup>6</sup> BVerfGE 42, 312 (325 f.); 53, 366 (390); 57, 220 (241).

religious communities can exercise their religious responsibility freely and accordingly to their understanding of it. Guaranteeing the freedom to “organize” themselves the state cannot participate in the ecclesiastical legislation. The coming into force of ecclesiastical legislation no longer depends on a previous submission or a subsequent approval by the state. The right to independent *administration* encompasses the free activity of the organs to realize their tasks, which are given to a religious community, including the procedural law. This especially includes the free installation of offices (Art. 140 GG in connection with Art. 137 III S. 2 WRV). This part of the right to self-determination for churches is put down separately in Art. 137 III WRV only because of historical reasons. The words “order” and “administration” have to be interpreted widely. They comprise every-thing from direction of the church to the decision about the own organizational form. The own jurisdiction encompasses the right to solve own matters through the own courts, including the necessary procedural law. The big churches made uses of this right. As far as the church law also touches the worldly legal positions, the decisions by the ecclesiastical court underlie the review by the state courts. To put it in other words, their effect is only ecclesiastical.

In practice, today it is not difficult to determine the *area of own matters*. For centuries, it was discussed where to draw the line, because there was no consent to the factual competence of state and church. As it is well known, the medieval church made use of wide areas, which are today naturally regarded as being a matter of the state. On the other side, the state expanded its area of responsibility after the reformation and transformed parts of undoubtedly ecclesiastical matters to national administration or subjected it to a special state supervision for the churches, taking the special interest of the state into account. Today it is mostly agreed upon what the so called “own matters” are and where the line has to be drawn between state matters, church matters and such matters, in which both claim competence, the so called *common matters*. A prerequisite of this formerly unknown and also today not everywhere existing harmony is the experience of centuries with on the one hand problems of delimitation between state and church and on the other hand the now dominant realization, that the specifically religious matters are situated beyond the field of competence of the state being a worldly community. Today the conviction prevails that “the drawing of the line” is not a question of arbitrariness, but has to be done in accordance with the different functions of the state and the religious communities.

According to this, the mission and self-understanding of the churches are of great relevance for the qualification of a matter as an “own matter”. “To order` and `administrate` in the sense of Art. 137 III S. 1 WRV means the right of the churches to legally arrange all own matters according to the specific church order criteria, i.e. on the basis of the ecclesiastical self-understanding”.<sup>7</sup> This

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<sup>7</sup> BVerfGE 66, 1 (19); 70, 138 (165).

jurisdiction was issued in the view of charitable operation of the churches. It is of special importance, that it is not only applicable to the ecclesiastical institution by itself, but also to legally independent entities, which assume charitable functions in the name of the church. Here, the right to self-determination encompasses with the words of the Federal Constitutional Court “all measures, which have to be made in pursuit of charitable tasks determined by the fundamental mission of the church, e.g. specifications of structural type, the choice of personnel and the precautions to guarantee the ‘religious dimensions’ of the operation in the sense of the ecclesiastical self-understanding, which are inseparably connected to all these decisions”.<sup>8</sup> Thus the point of view of the churches and religious communities is decisive.<sup>9</sup>

The state, however, will not let the religious communities determine on his field of competence. It is his task to assign the freedom of the churches and religious communities to other freedoms and legal interests, which are protected through the constitution. This is done through concerted regulations in concordats and church treaties. This led to the churches committing themselves to the state in areas, which underlie their right to self-determination. On the other hand, the state agreed to the reassignment of tasks, which underlie the competence of state organs. Besides that there is the limit of the “law that applies to all” where the ecclesiastical self-understanding is not acceptable for the legal community of the state.

Included in the own matters, which are regulated by all religious communities independently, and which therefore form the subject of the right of self-determination, is everything that is described by the mission of the church and that is indispensable for the execution of this mission according to the self-understanding of the respective religious community.

For the affiliation to this it is insignificant whether only matters of purely religious nature are concerned, or if they produce consequences or effects within the worldly-legal, “civic” area.

Of most importance are teachings and the cult. The exclusive authority of the religious communities for the determination of the teachings, the prophecy, the arrangement of the service including the administration of the sacraments and the area of the religious welfare was only rarely denied. Subsequently the area of the ecclesiastical constitution and organization has to be mentioned. This

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<sup>8</sup> BVerfGE 57, 220 (243 f.).

<sup>9</sup> *Hesse*, Selbstbestimmungsrecht (Note 1), p. 542; *Martin Heckel*, Die Kirchen unter dem Grundgesetz, VVDStRL 26, 1968, p. 48; v. *Mangoldt/Klein/v. Campenhausen* (Note 1), Art. 140 GG i. V. m. Art. 137 III WRV, No. 30; *Hollerbach*, Grundlagen (Note 1), No. 116; *Paul Mikat*, Kirche und Staat, in: StLGG<sup>7</sup>, vol. 3, col. 495; *Willi Geiger*, Die Rechtsprechung des Bundesverfassungsgerichts zum kirchlichen Selbstbestimmungsrecht, ZevKR 26 (1981) p. 61.

includes the establishment of parishes, the territorial arrangement in substructures, the establishment and equipment of offices and authorities as well as the independent appointment of the church offices including the transfer or dismissal of the office holders. The fact that the delimitation of the competencies in this area was disputed can be seen in Sentence 2 of Art. 137 III WRV, which mentions the independent appointment of offices expressly.

Today, the *education and training of the clergymen* is also recognized as a matter of the church. This includes the right to establish and maintain the necessary schools, even if they have the character of a university. The fact that in earlier times the state claimed an authority in this area can even today be seen in the existence of state theological faculties. In the 19<sup>th</sup> century the interest was based on the importance and function of the clergymen within the context of the general moral education. Today, it is agreed that the maintenance and development of theology through research, teaching and study belong to the task of scientific universities of the state. The religiously neutral state can only have rights in this area based on contractual agreements.

*The rights and duties of the members* are determined by the religious communities in the context of their right to self-determination. This not only encompasses the regulations on the entrance, leaving and expulsion, but also the church discipline, also in the qualified form of disciplinary and teaching law as well as the definition of material obligations to pay contributions. The exclusive competence of religious communities in this field, however, does not mean the exemption from the supervision by state courts, as far as such measures produce effects outside of the purely religious area.

Additionally, the ecclesiastical *service and labor law* belongs to the own matters of the religious communities. Theological basis of the ecclesiastical service is the mission of the church, which is recognized by the religiously neutral state.<sup>10</sup>

Furthermore, the *administration of property* is an own matter of the church. This includes the establishment and maintenance of the buildings, which are necessary for the service, the clergymen and the administration, as well as their equipment. Also included is the property, which forms the material basis of the entire activity. In consideration of the substantial sums large churches need for payment and supply and the extraordinary resources, which are necessary for the maintenance of the often very old and art-historically precious buildings, this is a big fortune. Its administration is a matter of the churches. Patronizing regulations through the state are forbidden by the constitution. However, old laws of this kind partially exist anyway and are also still accepted. Monument protection laws can also impose duties on churches as the owner and debtor of building contributions.

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<sup>10</sup> BVerfGE 70, 138 (165 ff.).

Finally the *charitable activity* is a matter of the religious communities. It particularly plays an important role in the Christian churches as one of the most important tasks of church life apart from the prophecy, which cannot be abandoned. Today this traditionally area of church activity is protected through Art. 4 GG.<sup>11</sup> It is also protected from a complete displacement through national or communal competition, which because of the concentration of funds in the hands of the state would not be a real competition anyway.

Despite the direct connection and the contact of the interests of the religious communities, all matters that relate to the legal relations of the religious communities within the worldly area are not those of the religious communities but of the *state* in the sense of Art. 137 III WRV. This encompasses the regulations on the acquisition of the legal capacity, award of the rights of a body of the public right and the regulation of their content, the regulations on the representative bodies of church institutions, as well as, as far as the civic area is concerned, regulations on the acquisition and loss of membership, the religious education of children, but also parts of the worldly labor law etc. With the decree of such regulations the state thus does not intervene in matters of the religious communities, but acts as the competence of the worldly legal order.

## II. THE LIMITS OF THE LAW THAT APPLIES TO ALL

Art. 140 GG in connection with Art. 137 III WRV recognize the right to self-determination for churches, at the same time restricting it to the *limits of the law that applies to all*. This old formula, which has been transferred to the constitution has rightly been called a “changing-meaning-formula”, because with the same wording it unfolds different meanings in different systematic contexts. Many authors<sup>12</sup> have discussed the meaning of this limitation-clause, arousing the impression that this is a particularly controversial problem in praxis. This is not the case. Usually it is not even disputed that the church is bound to the state laws. The limit of the “law that applies to all” in Art. 137 III WRV has the same function and meaning as the limitation-clause in Art. 5 II GG, according to which the freedom of speech and the press is limited by the regulations of the “general law”. In both cases the regulation technique corresponds; both limitations have the same purpose: to assign two protected rights to each other appropriately, in order to help both to optimal importance. Here, state and church with their own functions are to be brought in a relationship of a careful balance maintain their independence. This is thus a

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<sup>11</sup> BVerfGE 24, 236 (248); 46, 73; 52, 223.

<sup>12</sup> Hesse, Selbstbestimmungsrecht (Note 1), p. 544 ff.; Hollerbach, Grundlagen (Note 1), No. 117 ff.; v. Mangoldt/Klein/v. Campenhausen (Note 1), Art. 140 GG i. V. m. Art. 137 III WRV, No. 123 ff., jeweils m. w. N.

problem of the interpretation of the constitution, which also exists when interpreting the other liberty rights, which stand under the provision of legality.<sup>13</sup>

A “law that applies to all”, thus limiting the ecclesiastical self-determination, ought to be acceptable, if that law is a mandatory requirement of the peaceful coexistence of state and church in a religiously and ideologically neutral political community. This is also laid down by the European Convention on Human Rights and Fundamental Freedoms in Art. 9 II: “Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Under the prerequisite of general validity each state law can limit the right to self-determination for churches, and this even is normally the case. A complete enumeration of the “law that applies to all” is not possible. The whole civil law as well as the regulations of the public law, which constitute the basis of the public order that applies to all, is part of it. Also included are: the laws about the building code and construction planing, about the soil and real estate transactions, about fire protection, protection of nature, landscape protection, environmental protection, disaster control, the law concerning the respective interests of neighbours, the laws protecting health and traffic regulations, finally labor law and the law of the protection of civilian employment and the right to social security, the press law, the criminal law etc. Without being particularly geared towards religious communities, these laws are part of the law that applies to all and thus potential limitations for the right to self-determination for churches.

On the other hand, the legislator is not authorized to any limitation of the right to self-determination. Not every concern of the state justifies a limitation of the independence of the church. The guarantee of independence unfolds its effect in relation to the state in two ways. First, Art. 140 GG in connection with Art. 137 III WRV gives a guideline for the state legislator. It is still without doubt, that he holds the sovereignty of lawgiving and determines the limits of the ecclesiastical autonomy. The mentioned limitations – together with Art. 4 GG and Art 140 GG in connection with Art. 137 I WRV –, however, urge the state to respect the independence of the religious communities and thus not to burden them with any laws, which are not mandatory. The state should only make use of its undisputed legislative competence, as far as the independence of the religious communities has to be brought into balance with the state order in the interest of this responsibility for the common weal, which the state defines and takes care of.

Therefore, a law that applies to all is only one, which is *mandatory* for a peaceful communal life in a state, which is neutral towards religion and ideology

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<sup>13</sup> Hesse, Selbstbestimmungsrecht (Note 1), p. 544 ff.

thus respecting the independence of the religious communities. It would consequently be inadmissible to realize freedoms and legal interests, the protection of which is the task of the state, at the expense of the right to self-determination for churches, which itself is protected by the constitution to the same extent. The principle of the unity of the constitution in the case of such collision binds the legislator to find a careful balance. Both legal interests should be brought in a relationship of concordance, in order to achieve an optimal effect by an adequate allocation.

The legislator often perceives right from the very outset, that a law, without being geared towards religious communities, could infringe their right to self-determination. Here, the consideration can lead to the fact that the legislator attaches more importance to the right to self-determination than to the legal interest, which was supposed to be protected through the law. In such a case he will then provide for exemption provisions. Such provisions are numerous. They provide the law from being a “law that applies to all”.

Only where such exemption provisions are missing, the necessity for balancing of interest arises. That can be the case, where the legislator did not consider the possibility, that this law could infringe upon the right to self-determination for churches. Or where he expects the churches and religious communities to obey to this law. Here, Art. 140 GG in connection with Art. 137 III WRV, according to which the right to self-determination can only be limited by a law that applies to all, come into effect. Then, the guarantee of the ecclesiastical freedom has to be assigned to the guarantee of other legal interests, which also belong to the order of the whole community, established by the constitution and which are substantial for it. When limiting the right to self-determination for churches through a law that applies to all, “the self-understanding of the churches has to be given special consideration”.<sup>14</sup> The proximity of the infringed right to the central mission of the church is to be considered. The more pronouncedly a matter displays the religious witnessing, the more respect the infringing legislator has to pay. In areas, where the competence of the church is not as strong, the impacts of the state regulations grow. These are problems of the consideration, which fill the literature on the right to self-determination for churches, although, in reality, they are by far not of the same importance. As mentioned above, they can also be found in the constitutional law and are known to the jurist from the jurisdiction concerning Art. 5 GG.

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<sup>14</sup> BVerfGE 53, 366 (401); 66, 1 (22); 72, 278 (289).



## Church Autonomy in Germany

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