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The Interplay of Religion and Law in Germany

Wolfgang Weiß – Afe Adogame

Introduction

Any suggestion of the inter-connectedness between religion and law immediately wells up two parallel questions in the minds of many. The first group of people will simply deny any connection between religion and law. A ready question will be: Can there be any relationship or connection between religion and law? Are they not two distinct spheres that have little or nothing in common? On the second level, the question of how religion and law are related will appear to be more problematic. In contemporary world, the tendency for many is to draw a wide imaginary gulf between church and state, and at the same time, also keep religion separated from law. Understandably, such an attitude begs the question and confuses the issue because religion is not necessarily identical to the church, and law is not necessarily identical to the state. This rhetorical stance of bifurcating church and state thereby calls for an elucidation of the connecting nexus between religion and law in a developed society like Germany. It must be stated from the onset that this paper does not intend in any way to do justice to the complex relationship between law and religion. Rather, it will be limited to examining the provisions of the German Constitutional Law on religion, and the explanation of the legal status of religious communities in Germany. It focusses especially on the different statuses of religious communities, those that enjoy the prerogatives of a public corporation as compared to those that do not. This explanation gives the background for an in-depth analysis of the question whether the fundamental right of faith is restricted or limited because of the different legal status religious communities have. The intended and unintended consequences of this special status on religious groups and their developments will be assessed.

Religion and Society: An Interdependent Relationship

Religion is a social phenomenon and is in an interactive relationship with the other social units that constitute a society. Aspects of the social phenomenon are in continual reciprocal, interactive relationship with other social phenomenon. This means that all social phenomena i.e. religion, law, politics, economy etc., within a given group or society are interrelated. Since the

phenomenon of religion interacts with other social institutions and forces in society, it will therefore be a misnomer to treat them totally as parallel domains. Johnstone[1] aptly summarizes this principle of the continual dialectic involving religion and other social phenomena that,

> religion interacts – is in a dynamic reciprocal relationship – with every other social phenomenon and process: religion both influences them and is influenced by them; religion both acts and reacts, is both an independent variable and dependent variable, both cause and effect.

In so far as religion is organized into groups (in some sense, religion is also an individual phenomenon) it exerts influences not only on its members, but also on non-members and on other groups and institutions.

What then is religion? This paper does not intend to enter into the age-long controversy surrounding the problem of definition. However, scientists of religion will subscribe to the view which encompasses the definitional characteristics of religion both in terms of what it is (the essence or meaning) as well as in terms of what it does (function). An acceptable definition of religion must therefore include the substantive and functional aspects. Johnstone[2] attempted to define religion as

> a system of beliefs and practices by which a group of people interprets and responds to what they feel is supernatural and sacred.

Although such a pragmatic definition might not be universally accepted, yet it could be helpful here for the purpose of our discussion here. We shall now turn to examining the historical relationship between religion and state in Germany, the provisions of the German Constitution on religion and religious communities, as well as the consequences of such regulations in an increasingly multi-religious society.

The German Landscape: Religion and State in Historical Perspective

An understanding of the intermix of religion and law needs to be located in the larger historical framework of the connection and/or separation of religion and state (politics) in Germany. Generally, some of the constitutive ingredients of most Western legal systems, and in contemporary times, the nexus between religion and law are grounded on the idea of the separation of church and state. Though the German society today upholds at least the concept of a partial separation of religion and politics, a look into her

1 R. L. Johnstone, *Religion a Society in Interaction: The Sociology of Religion*, Englewood Cliffs, New Jersey: Prentice-Hall 1970, 9.

2 *Ibid.*, 20.

historical past will show that total separation has never been the case especially with particular reference to church and state. What amounted to state churches or government sanctioned religions were common in earlier times of their history. State churches existed until the nineteenth century. Prior to the emergence of a German nation-state, several kings and rulers had their areas of jurisdiction, though with one *Kaiser* as the overall head. Bishops often assumed both spiritual and secular roles of leadership. For instance, a King of a German country could double as the head of the Lutheran Church in that country.

However, the changes started in the early nineteenth century owing largely to the incipience of secularism. The idea of separation prevailed first with the Protestant Reformation, and then with the Enlightenment. At the wake of the century, the distinction between Canon Law and Civil Law, ecclesiastical and civil jurisdiction was becoming well entrenched in Germany and elsewhere in Europe.[3] With the emergence of the new German nation and the adoption of the German constitution, however, Germany officially repudiated the concept of such church-government ties. In 1919, the Weimar Constitution clearly disestablished and abolished the German state churches. Such a development meant that the establishment of an official state church has thus been explicitly forbidden in the society. But an interpretation of where to draw the line between church and state, and what "separation of church and state" means in the context of this society is no doubt a herculian task. For instance, the power of influence of the Protestant and Catholic Churches in current socio-political context is apparent. Kehrer argues that this influential position is due, partly, to a legally obligated representation within the media and partly to the churches' own financial and organizational strength, which itself is based on "political protectionism".[4]

The relationship between church and state has remained a crucial but interesting issue all times. Though an exhaustive treatment of the intricate relationship between religion and state in the early German history goes beyond the purview of this paper, we should perhaps heed Johnstones' warning that

> to expect a perfect distinction and separation of church and state is to fly in the face of sociological reality and to try to reject fundamental sociological principles.[5]

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3 M. Introvigne, "New Religious Movements and the Law: A Comparison between Two Different Legal Systems (The United States and Italy)", in: E. Barker – M. Warburg (eds.), *New Religions and New Religiosity*, Aarhus: Aarhus University Press 1998, 276.

4 G. Kehrer, "Thesen zur Religionsgeschichte der Bundesrepublik Deutschland", in: G. Kehrer (ed.), *Zur Religionsgeschichte der Bundesrepublik Deutschland*, München: Kosel 1980, 195.

5 R. L. Johnstone, *Religion and Society...*, 180.

He argues further that so long as we assume and can demonstrate the interdependence of all societal elements we must expect a recurrent problem with the separation of church and state. In fact, to try seriously to separate church and society is to attempt the impossible so long as church and state exist side by side in society. They interact; they overlap; they touch the same people; they seek commitment and involvement from the same people.

The most prevalent relationship between religion and state in our contemporary world could be characterized as "partial separation". Most societies today exhibit some variation on this pattern, that is, some independence for both the political and religious institutions, but some overlapping and mutual influences as well. Thus, partial separation describes the reality, even though something approaching total separation may be the goal of many. What we shall therefore attempt here is an explication of the German experience with what we may call the partial separation approach to the relationship of religion and state. This in our view will help us to make sense of our major task in this paper, the relationship between religion and law (state) in Germany in contemporary era. Yinger argues that older relationships between the religious and political orders do not disappear when newer ones are added.[6] A "layered" pattern is more likely to develop, with several religious traditions interacting with the political situation in different ways. A nation such as Germany is characterized by contrasting types of relationship between religion and state – products of their histories and social structures. One key task in the examination of religion and politics is to discover the conditions under which these various relationships occur and their consequences (repercussion) for society. We shall concentrate on the German contemporary scene, because the development of a distinctly "secular state" and of religious institutions that are partially separate, if not actually independent, from the state has created a situation that points up in a clear way the various modes of relationship between religion and state. How did the relationship between state and church develop in Germany? Do the patterns of relationship between the two institutions reinforce or modify the principle of separation? What are the conditions under which this mode of relationship is changed? What are its consequences? What place does German law assign to religion and how far is religious liberty verifiable within the law? All these questions are germane here, but we cannot do justice to all of them within the scope of this paper. We shall try however to examine some of these issues.

The post-world war Germany has continued to witness new developments on the religious scene, especially with the proliferation of new religious

6 J. M. Yinger, *The Scientific Study of Religion*, New York: Macmillan 1970, 417.

movements. While a few of these religious initiatives are indigenous, much of it has come through external influences from abroad or a result of the growing influx of the migrant population. The historical growth of Pentecostalism in Germany, for instance, can be located under different phases of development. The earliest traces of Pentecostalism is linked to the impact of the Holiness Movement in late 19th century Europe, an era characterized by the resurgence of Pietism within the German Lutheran Church. The development of the Pentecostal Movement was further enhanced through external religious influences. The World War II marked the end of the first phase of German Pentecostalism, as well as the incipience of a new phase of development. In the post-world war era, Pentecostalism started to gain prominence again, especially with the emergence of the so-called "Free Pentecostal and Evangelical Churches". Though it appeared to have thrived in former West Germany in post-war period, it remained largely *religio illicita* in the former East Germany until the Unification in 1990. From the 1960s onwards, there has been a gradual proliferation of the so-called neo-pentecostal churches especially from America, Britain, Africa and elsewhere. Contemporaneous with this development is the growing increase of charismatic (renewal) churches from within and also independently of the orthodox churches, "immigrant" religious groups (i.e. indigenous religions, Islam, spiritual science movements), youth movements or "youth religions", para-church groups, to mention a few.

According to the Government of the Federal Republic of Germany, some of these new religious traditions have enfolded a bad, unwholesome influence especially on the youths. Because of this, the federal and some regional governments were constrained to issue official pronouncements in which they warned of new religious developments and so called "youth religions",[7] "sects" and "cults". An enquiry was commissioned in the Parliament towards investigating such groups.[8] The Bavarian Government refused to absorb into and retain in the civil service all those who did not clearly distance themselves from Scientology.[9] Owing to this hard stance of the government, some of these groups felt aggrieved that they are discriminated against by not being granted equal treatment with more "orthodox"

7 The term "Youth religion" was coined by Pastor Friedrich Wilhelm Haack, the "sect expert" of the Lutheran Church of the Bavarian State. For details see F. W. Haack, *Die neuen Jugendreligionen*, München: Evang. Presseverband für Bayern, [14]1977.

8 See the Final Report of the Commission of Enquiry of the *Bundestag* (the German Parliament) on "so-called Sects and Psycho Groups", Bonn 1998, published as printed paper of the Bundestag No. 13/10950.

9 Cf. Ruediger Zuck, "Scientology – na und!", *Neue Juristische Wochenschrift* (München) 50, 1997, 698.

groups like the Lutheran and Catholic Churches. In defence, they quickly referred to the government denial and obstruction of their fundamental rights. The Federal Labour Court in Germany ruled that the Church of Scientology was not a religious community.[10] Some Fiscal Courts also followed suit, thus resulting in the loss and erosion of some tax privileges by the Church of Scientology.[11] This controversial discussion did not only raise some dust in Germany, it also drew attention from abroad. One consequence was that the fundamental freedom of faith in Germany was revisited in many circles. One basic question that emerges from this scenario is the problem of the definition of what a church or a religious community is or ought to be. How is religion or a religious community defined by the framers of the Constitution? How is it being interpreted today by the government and the law courts? To what extent do such definitions and interpretations make sense to religious scientists, or at least their own conception and interpretations of the religious phenomena?

German Constitutional Provisions on Religion and Religious Communities

The Basic Right of Freedom of Faith

Article 4 of the Constitution of the Federal Republic of Germany, the so-called Basic Law (*Grundgesetz*),[12] guarantees, *inter alia*, the basic right of freedom of faith and undisturbed practice of religion. By this provision, it is clear that the basic right of freedom of faith does depend neither on the religion man belongs to or believes in, nor on an admission or recognition by any authority. As far as matters of religion are concerned, the state and all public authority has to behave in a neutral way. The state is not allowed to prefer a religious group or community to another in whatever way. In this context one has also to consider Article 3 (3) of the Basic Law which states that nobody shall be prejudiced or favoured because of, *inter alia*, their faith or religion. In principle, all people irrespective of status or creed, are equal before the law.

10 See *Neue Juristische Wochenschrift*, 49 1996, 143.

11 See e.g. the Fiscal Court of Muenster, *Entscheidungen der Finanzgerichte*, 1994, 811 et seq. The Federal Fiscal Court by decision of 21st August 1997 squashed that judgment because of formal reasons.

12 For an English version see Gisbert Flanz (ed.), *Constitutions of the Countries of the World*, Binder VII, Looseleaf, New York: Oceana Publications 1998.

Special Provisions as to the Rights of Religious Communities

Article 140 of the Basic Law states that the provisions of Articles 136 to 139 and 141 of the German Constitution of 11 August 1919, the so-called Weimar Constitution, are an integral part of the Basic Law. By this provision the validity of the afore-mentioned provisions of the German Constitution of 11 August 1919 is sustained. These provisions are of the same validity as Article 4 dealing with the freedom of faith. For purposes of this paper, we shall repeat some of the provisions of the Weimar Constitution here as follows:

Article 137

(1) There shall be no state church.
(3) Every religious community shall regulate and administer its affairs independently within the limits of the law valid for all and that it shall confer its offices without the participation of the state or the civil community.
(5) Religious communities shall remain public corporations if they have enjoyed that status hitherto. Other religious communities shall be granted like rights upon application where their constitution and the number of members offer an assurance of their permanency. Where several such public religious communities form one organization it too shall be a public corporation.
(6) Religious communities that are public corporations shall be entitled to levy taxes in accordance with the *Land* Law on the basis of the civil taxation lists.
(7) Associations which foster non-religious beliefs shall have the same status as religious communities.
(8) Any further legislation as may be required for the implementation of these provisions shall lie within the jurisdiction of the *Länder.*[13]

Art. 138

(1) State contributions to religious communities based on law or contract or special legal titles shall be redeemed by means of Land legislation. The principles for such redemption shall be established by the *Reich.*[14]
(2) The right to own property and other rights of religious communities or associations in respect of their institutions, foundations and other assets intended for purposes of worship, education or charity shall be guaranteed.

Art. 141

To the extent that there exists a need for religious services and pastoral work in the army, hospitals, prisons or other public institutions, the religious communities shall be permitted but in no way compelled to perform religious acts.

We have mentioned above that both Article 4 and 140 of the Basic Law as well as the above-mentioned provisions of the Weimar Constitution are

13 This means the diverse lands of the Federal Republic of Germany, like Bavaria, Saxony etc.
14 This means now the Federal Republic of Germany.

integral parts of the Basic Law. Owing to the unity of the constitution none of them is to be interpreted in isolation, or in such a way that it contradicts the other provisions.[15] This implies for example that the special legal status as a public corporation which a religious community can attain according to Art. 137 (5) of the Weimar Constitution is not a breach of the equal treatment of the religious groups and communities because this difference is explicitly made by the Constitution. Furthermore, this status can be gained by every religious community as soon as it fulfils the stipulated conditions. Art. 137 (5) clarifies that there is no total, radical separation of state and churches but only a moderate one.[16] But there is no state church. The original constitutional statement on the disestablishment of state churches bears eloquent testimony and is an expression of the combined influence of several forces working in the German society in the nineteenth and twentieth centuries. Can we possibly see the brevity or any vagueness of the constitutional provisions? In what ways does church and state relate today? What are the original intentions of the framers of the Constitution? Were they trying to separate religion from politics and government in the German society? Or recognizing that interaction and overlap between the two is inevitable, were they simply trying to avoid excesses from arising therefrom? Could it be argued in any way that the Constitution understates (or overstates) the mutual influence of religion and government in Germany?

Neutrality of the State in Religious Matters and Public Warnings of Religious Communities

As indicated above, one problem is to be able to define which groups that can refer or lay claim to the freedom of faith. According to the jurisprudence of the Federal Constitutional Court of Germany, it is not sufficient that a community and its members claim to be a religious group or think themselves to be such a group, although the self-conception or understanding of the group must also be considered. Therefore, the public authorities have to prove and decide whether a group is a religious one according to the meaning of that word in the Constitution. Taking this decision, the spiritual content and the outward appearance has to be taken into consi-

15 All provisions of the Constitution must be taken serious. The freedom of faith and the constitutional law on religious communities have to be seen together. They must be combined, cf. Axel Freiherr von Campenhausen, "Der heutige Verfassungsstaat und die Religion", in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts* I, Berlin: Duncker & Humblodt [2]1994, 54 et seq.

16 *Ibid.*, 71 et seq; Dirk Ehlers, in: Michael Sachs (ed.), *Grundgesetz*, Commentary, München: C. H. Beck 1999, Article 140, Art. 137 WRV, MN. 17.

deration.[17] A necessary requirement for faith is a transcendental moment which is the personal assurance that each individual is integrated in an otherworldly context which cannot be judged by human standards or fully explained by scientific knowledge. A believer has to refer to a personal or impersonal God or to a power or causality which is above human understanding. Can the Constitutional Court be said to have a broad concept and understanding of religion? Who and how do they decide this? What forms the real basis for the decision? Can the public authorities as "outsiders" of a religious group authentically discern its spiritual contents? What parameter is used in the consideration of its external manifestations? We contend here that such judgements by the courts are bound to be subjective and misleading in some cases. Such attempts may be tantamount to an observer viewing the contents of a translucent gold-fish bowl from outside. In this case, the observer is able to see through the semi-transparent bowl, although without making complete sense of the contents of the bowl.

Ideally, the freedom of faith is expected to protect all kinds of religion, not only Christian or predominant confessions, but also other religious groups. The size of the membership is irrelevant. And it is not only a freedom to have a certain attitude but to behave according to the religious conviction and to make the life conform to the teaching of the religion.[18] Perhaps, a recurring question here is: Who is in the vantage position to decide this, the religious practitioners themselves or the public authorities? In a way, one can agree with this jurisprudence. If the only prerequisite or decisive condition which must be met was the conception of a group to be a religious one, the freedom of faith would be transformed to a basic right for all possible human behaviour.[19] As mentioned above, the conception and self-understanding of the group must be taken serious, it is of considerable importance.[20] But in addition to that, objective criteria are to be required. Recently, the Federal Labour Court ruled that Scientology was not a religion or creed. According to the ruling, Scientology used the name of a church as a pretence for economic purposes, their aim was the increment of assets. With Scientology, economic and the other religious activities were seen to

17 Decisions of the Federal Constitutional Court, Vol. 83, 353.

18 Decisions of the Federal Constitutional Court, Vol 32, 106 et seq.; Decisions of the Federal Administrative Court, Vol. 99, 7.

19 See for instance Juliane Kokott, in: Michael Sachs (ed.), *Grundgesetz.*, Art. 4, MN 14.

20 Martin Morlok, in: Horst Dreier (ed.), *Grundgesetz*, Commentary I, Tübingen: J. Mohr 1996, Article 4, MN. 22. The study of Stefan Muckel (*Religiöse Freiheit und staatliche Letztentscheidung*, Berlin: Duncker & Humblodt 1997, 121, 286 et seq.) yields the same result although it stresses the important role of the state to decide in the long run.

be inseparably combined.[21] But how objective and far-reaching is this decision? The fact that the activities of a religious community are perceived to be of political or economic nature, or in actual sense characterized by some political or economic features, does of course not exclude such a group as a religious community. A religious group may, and usually does, engage in a number of subsidiary activities which are not purely religious, but it does not thereby loose its religious character. The problem however remains where to draw the line.

Because of the freedom of faith, the public authority is not allowed to judge whether a certain faith is right or wrong, convincing or not etc. Their neutrality forbids them to prefer one confession or religious group to another.[22] On the other hand, it is an established case law of the Federal Courts that public authorities can publicly criticize the effects and teachings of religious groups and consequently issue warnings. The basic right of freedom of faith is limited through the basic rights of others, for instance, the right of physical integrity whose protection is an obligation for the government. The basic rights of the "victims" of religious groups require the government to give information and if necessary to warn of the consequences of the teaching and practice of a religious community if the government perceives a danger. The State is under a special duty to protect the youths, as well as adults. Even if the government blames a certain religious group for the seduction, exploitation of youths and as a potential threat to youths, this does not violate the rights of that group as long as the action taken is adequate and necessary for the protection of the public interest. The State has to consider the principle of proportionality. This requires that the information given to the public is true, objective, unbiased and that their appreciation was not led by irrelevant reasons. In principle, the State especially is obliged to behave neutral in debates about religious questions.[23] Whether and how this is realized and determined in actual practice is a crucial question to be discerned.

The problem of authentic information on the new religious movements raises a further question of where the State draws her information from. To what sources does the state rely upon? Baumann has shown that

> Church authorities claimed to be the main, often only agent for spreading information about the dissemination of new religious movements in Germany. Special pastors, so

21 *Neue Juristische Wochenschrift* 49, 1996, 146 et seq. Other courts decided differently, e.g. Higher Administrative Court of Hamburg, *Neue Zeitschrift für Verwaltungsrecht* (München) 14, 1995, 498.

22 Decisions of the Federal Constitutional Court, Vol. 19, 216.

23 Cf. German Federal Constitutional Court, *Neue Juristische Wochenschrift* 42, 1989, 3269 (3270 et seq.); Administrative Court of Munich, *Neue Juristische Wochenschrift* 48, 1995, 2941.

> called "sect experts" (Sektenexperten), drew up information about the groups' structures, their contents and ways of recruiting members.[24]

In the early 1950s, the German Protestant Church instituted a special body, *Evangelische Zentralstelle für Weltanschauungsfragen-EZW* (Protestant Central Institute for Issues Relating to Worldviews) charged with observing and monitoring the activities of non-Christian religions and the so-called "world view communities". The German Catholic Church emulated this step in the early 1970s with the establishment of a similar institution. To complement the functions of the EZW, the Protestant authorities again inaugurated in the late 1960s regional "extra priest's offices".

These offices were to take up consultative and pastoral functions within their area, as the church was confronted by an increasing loss of public importance and a rising interest of young people in alternative forms of religiosity. Thus, the two main churches had delegated the problem of non-Christian religions to special institutions and offices. Its specialists were responsible for finding solutions to the problem.[25]

At the genesis of the controversial debate on new religious movements in the 1970s, it was Church (Protestant and Catholic) representatives and "sect experts" who often moulded, dictated and defined the tone, style and contents of the discussion. He argued that the kind of debate about the value of these new groups on the one hand mirrored socio-political conditions and structures of power and, on the other hand, revealed both limitations and possibilities of research in the sociology of religion and religious studies (*Religionswissenschaft*). Baumann, Flasche and Usarski have demonstrated variously through their studies[26] that the socially constructed portrait, depicting new religious movements as destructive, dangerous and manipulative, was purposely perpetuated by particular pressure groups. At the same time, these interest groups from the media, politics and Christian churches aimed to devalue critical voices and studies.[27] Despite the fact that

24 M. Baumann, "Channelling Information: The Stigmatization of Religious Studies as an Aspect of the Debate about the New Religious Movements in Germany", in: E. Barker – M. Warburg (eds.), *New Religions and New Religiosity*, Aarhus: Aarhus University Press 1998, 204-221.

25 *Ibid.*, 208.

26 H. W. Baumann et. al. (eds.), *"Jugendsekten" und neue Religiosität*, Gelsenkirchen-Buer: Farin & Zwingmann 1982; R. Flasche, "Gefahrenmomente für die Religions–freiheit in der Bundesrepublik Deutschland", in: J. Neumann - M. W. Fischer (eds.), *Toleranz und Repression*, Frankfurt: Campus 1987, 245-272; F. Usarski, *Die Stigmatisierung neuer Spiritueller Bewegungen in der Bundesrepublik Deutschland*, Wien: Böhlan 1988.

27 These empirical studies emanating from social scientists and historians of religion questioned essentially the "demonization" of new religious movements by these pressure groups such as the church.

since the 1970s the Christian churches have increasingly become competitors in the pluralistic market of religious offers, they have been able to maintain their public and political influence. This has enabled their officials not only to discredit the new religious movements, but also to appear in public as the protector and saviour of "true religion". In addition, their dominant position has enabled them to suppress critical and divergent views on the subject.[28] As early as the late nineteenth century, Christian apologetic experts were responsible for observing particular Christian and non-Christian groups in Germany. The perpetual "demonization" of new religions as dangerous groups *inter alia* credits the critics (i.e. the "sect-experts" from within the Protestant and Catholic Church) of the so-called *Jugendreligionen* with a feigned significance and societal responsibility. In contemporary times, we can find good examples of the role which sect experts played by taking a closer look at the Commission of Enquiry of the German Parliament on so-called "sects" and "psycho groups".[29]

According to a decision of the Federal Administrative Court, the government can even, without a concrete danger for the rights of others, criticize some religious teachings if and insofar as this teaching considerably contradicts thee "axiology" which results out of the fundamental, basic rights of the Basic Law. This can be the case if statements of a religious community are influenced by a different concept of human dignity or the value of human life.[30] One cannot agree with the latter decision because the protection of freedom of faith is also part of the "axiology" of the German Basic Law. The task of the goverment to defend and protect the basic rights only actualizes in case of a concrete danger for these rights. Otherwise this task would become a title for a dispute with all opinions and attitudes which – according to the meaning of the Government – diverge from the Constitution.[31]

The Special Status of a Religious Community as Public Corporation

I. The Special Status

Those religious communities which attain the status of a public corporation according to Article 137 (5) of the Weimar Constitution enjoy certain rights and privileges the other religious communities do not have. Firstly,

28 M. Baumann, "Channelling Information...", 215.

29 Cf. the critiques by Martin Kriele, *Zeitschrift für Rechtspolitik* (Baden-Baden) 31, 1998, 233 et seq., 353 et seq.

30 Federal Administrative Court, *Neue Zeitschrift für Verwaltungsrecht* 13, 1994, 163.

31 Joerg Mueller-Volbehr, "Das Grundrecht der Religionsfreiheit und seine Schranken", *Die öffentliche Verwaltung* (Stuttgart) 48, 1995, 310.

they are entitled to levy taxes (Article 137 (6)). The tax authorities collect these taxes if the religious community requests. Secondly, the rights they have are a result of their nature as a public corporation. They are no longer restricted to use private law but can operate public law, and are in fact an entity of public law. They are treated like an authority, but they are of course not a part of the State; they are self-determined.[32] Owing to their character as a public corporation, these communities are partly deprived of certain public fees, for example, the legal fees a plaintiff has to pay during court proceedings. Furthermore, they can participate in certain public councils like the Telecommunication Council which influences the programme of public television[33] or the Council on Evalutation of Media (*Bundesprüfstelle*) to protect the youths from books, films etc. which are deemed harmful to them.[34] They are given hearing by public authorities in certain matters as for example the specification of local building standards,[35] and they can take part in youth welfare work.[36] And there are a lot more provisions that entitle only religious communities which are public corporations.[37] Does these rights and privileges not presuppose that some religious groups which are non-public corporations are prone to some kind of direct or indirect suppression and inhibition from other groups which enjoy this somewhat special status?

The Criminal Law is another area in which the status of a public corporation has consequences. § 132a (3) of the Criminal Law Book protects official titles, robes and honours of churches and public corporations. In applying this provision, a leader of a small religious community that was not a public corporation was fined because he used the title "pastor".[38] This pastor was not ordained by, nor a minister of, a public corporation. It is almost a common opinion of German legal writers that titles like pastor,

32 Paul Kirchhof, in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts...* I, 655.

33 Christoph Link, in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts...* II, 273.

34 § 9 (2) No. 8 Law on the circulation of media harmful to youth (Gesetz über die Verbreitung jugendgefährdender Schriften), *Federal Law Gazette* (Bonn), 1985, I, 1502.

35 According to German construction laws, the public authorities have to consider the requirements of church services and counseling which was stated by churches and public corporations, cf. § 1 (5) No. 6 Baugesetzbuch, *Federal Law Gazette*, 1997, I, 2141.

36 § 75 (3) Social Law Book VIII (Sozialgesetzbuch VIII), *Federal Law Gazette*, 1996, I, 477.

37 See Dirk Ehlers, in: Michael Sachs (ed.), *Grundgesetz...*, Article 140, 137 WRV, MN 17.

38 Cf. the decision of the Upper Regional Court (*Oberlandesgericht*) Düsseldorf, *Neue Juristische Wochenschrift* 37, 1984, 2959, confirmed by the Federal Constitutional Court, *Zeitschrift für evangelisches Kirchenrecht* (Tübingen) 31, 1986, 90.

priest, bishop, archbishop can be used only by public corporations.[39] The problem that this opinion attracts and therefore of the court decision is that the protection of official titles can only be justified if it is a title of a special public corporation. Only in this case the holder of the title will be seen as an official minister of a special group. § 132 Criminal Law Book is not supposed to monopolize general religious titles, but to protect them from people who pretend to have special skills and credibility by using that title.[40] On one level, the title "pastor" is a general term for somebody who works as a priest and is responsible for a local church. It is the latin translation of "shepherd" and therefore signifies a ministry which is common to all Christian confessions.[41] The court erred in fact as it held that the title "pastor" was used only in the Lutheran Church. It can not be restricted to the Lutheran Church in Germany, especially if one bears in mind the worldwide use of that title among several religious traditions. In Germany, the title of pastor can be found in most Pentecostal and Evangelical (free) churches. If the state was to protect even such a title of a more general kind it would shirk and erode its religious neutrality.[42] On the whole, can we not suggest here that there is some religious undertones behind the protection of official titles, robes and honours of churches? Who defines the exclusivity of the title of pastor: the church or the law?

On the level of religious education, Article 7 (3) of the Basic Law entitles religious communities to teach religious education in public schools. It is not clear, however, whether this is only a right of religious communities which are public corporations[43] or also for those that are not. According to popular opinion in legal literature, a religious community is allowed to teach religious education if they meet and fulfil the same conditions like those communities which are public corporations. This means that their consti-

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39 Cf. von Bubnoff, in: Hans-Heinrich Jescheck et al. (eds.), *Strafgesetzbuch, Leipziger Kommentar*, Berlin: Walter de Gruyter [10]1988, § 132a, MN. 18; Adolf Schönke – Horst Schröder, *Strafgesetzbuch*, München: C. H. Beck [24]1991, § 132a, MN. 14 et seq.; Herbert Tröndle, *Strafgesetzbuch*, München: C. H. Beck [48]1997, § 132a MN. 14.

40 This was also the starting piont of the Federal Constitutional Court, *Zeitschrift für evangelisches Kirchenrecht* 31, 1986.

41 Therefore two lower courts, the Regional Court, Munich, and the Regional Court, Mainz, held that every religious community, not only public corporations, is entitled to use traditional common titles and restricted the scope of application of § 132a (3) Criminal Law Book; see Matthias Quarch, *Zeitschrift für evangelisches Kirchenrecht* 31, 1986, 93.

42 Hermann Weber, *Die Religionsgemeinschaften als Körperschaften des öffentlichen Rechts im System des Grundgesetzes*, Berlin: Duncker & Humblodt 1966, 125 with further references.

43 In this sense Stefan Korioth, "Islamischer Religionsunterricht und Art. 7 III GG", *Neue Zeitschrift für Verwaltungsrecht* 16, 1997, 1046 et seq.; Reinhard Schmoeckel, *Der Religionsunterricht*, Berlin: Luchterhand 1964, 78.

tution and the membership strength must offer an assurance of their permanency (Article 137 (5) Weimar Constitution). Therefore only those religious communities are allowed to participate in the religious education at public schools which are public corporations or could become one if they just applied.[44] The consequence is that not every religious community, especially the smaller ones, are entitled to teach their beliefs in public schools.

In recent years, the demand for Islamic religious education for Muslims at public schools has generated some problems. Due to the high number of Muslims in Germany[45] (more than four million Turkish Muslim citizens live in Germany) the demand for Islamic religious education was uttered. The Islamic religion enjoys the right to teach at public schools because of the equal treament the state has to grant to all religious communities which fulfil the conditions for recognition as a public corporation. But nevertheless, this constitutional demand is difficult to fulfil because the participation in teaching (Islamic) religious education presupposes an authorized body or organ which is by its sufficiently systematic structure legitimated to speak for and represent Muslims and to make binding assertions. This is necessary for the practical organization of the religious instruction. Someone has to define the required qualification of the personnel, the content of the instruction and so on. However, because of the Islamic self-conception this structure could hardly be found.[46] On the other hand, the state is not allowed to organize religious education on its own.

In addition to the above-mentioned rights, the Lutheran and the Catholic Churches in Germany enjoy some more rights which are laid down in Concordats, i.e. special treaties between the state (actually the *Länder*) and the churches, of which a bigger part was concluded in the 1920s. These treaties provide the establishment of Lutheran or Catholic theological departments at public universities, whereby the state refunds ninety percent of the overall costs, the obligation of the state to pay bishops and other church ministers, as well as some more financial assistance. Contracts like these are restricted to the Lutheran and Catholic Church. Other public corporations do not have or maintain departments of theology of their own, nor does the state contribute to the maintenance costs of ministers and of their buildings. These special provisions can be explained only by historical reasons. Article 138 (1) Weimar Constitution enables the continuation of state contributions.

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44 Dirk Ehlers, in: Michael Sachs (ed.), *Grundgesetz...*, Art. 7 MN. 41; Christoph Link, "Religionsunterricht", in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts...* II, 500.

45 Stefan Muckel ("Muslimische Gemeinschaften als Körperschaften des öffentlichen Rechts", *Die öffentliche Verwaltung* 48, 1995, 311) reports about two million Muslims.

46 Cf. Dirk Ehlers, in: Michael Sachs (ed.), *Grundgesetz...*, Art. 7 MN. 42; Christoph Link, "Religionsunterricht...", 500 et seq.

These state contributions were given as a kind of reimbursement or reparation, that is, taking into cognisance the damage the state caused the Lutheran and Catholic Church in the wake of secularization at the beginning of the nineteenth century.[47] But this historical justification of special provisions for the Lutheran and Catholic Church applies to contributions to their maintenance. It can especially not be relied on as far as the establishment of departments of theology and the affiliated financial assistance of the state is concerned.[48] This privilege raises the same question of how the special treatment of some religious groups can be justified.

II. The conditions for the Status of a Public Corporation

The above-mentioned privileges of public corporations draw attention to the issue of the criteria with regards to the attainment of this status. According to Article 137 (5) of the Weimar Constitution, religious communities are granted similar rights upon application where their constitution and the number of their members offer an assurance of their permanency. In addition to that requirement of permanency there is at least one additional non-written prerequisite: The applicant has to obey the law without reservation. Some add another prerequisite: Loyality to the state. This means that the religious community in general accepts, even approves of the state and the basic principles of its order and does not reject or struggle against them.

1. Permanency

The constancy which characterizes a religious community must be based on the way they are constituted as well as on the numerical strength of the group. Constitution here refers to the whole state of the community as far as quality (and not quantity) is concerned. To clarify this condition one has to consider the sense of the special status as a public corporation. The state grants this status to churches and religious communities because of their greater impact and relevance for the larger society. The qualification as public corporation is a useful, although not necessary consequence of the public importance of religious communities.[49] Like the state they care for the society at large and for individuals in all areas of life.[50] As we have shown

47 See Josef Isensee, "Staatsleistungen an die Kirchen und Religionsgemeinschaften", in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts*... I, 1009 et seq.

48 For the constitutional problems of departments of theology at public universities, see Ludwig Renck, "Verfassungsprobleme der theologischen Fakultäten", *Neue Zeitschrift für Verwaltungsrecht* 15, 1996, 333.

49 Paul Kirchhof, "Die Kirchen als Körperschaften des öffentlichen Rechts", in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts*... I, 656.

50 Decisions of the Federal Constitutional Court, Vol. 42, 333.

above, religion affects the social structure and the social structure in turn impacts on religion. This interconnection between religion and the social structure can be understood from both positive and negative dimensions. The state will be favourably disposed towards granting this special status to a religious group if the group is seen to impact positively on the society and when it shares some values with the state. On the other hand, groups which are seen by the state to have some negative influences on individuals and the society; as potentially dangerous to its citizens (i.e. youths) or those which are ideologically antagonistic to the state will no doubt experience inhibition and determent. We do not in anyway suggest here that some religious groups are inherently good or bad, or that some have negative characteristics while others do not. Such a judgement will be too simplistic. We contend that all religious traditions may have the predisposition towards positive as well as negative influences.

Arguing from a philosophical and practical standpoint, Fort has shown that law and religion are completely interdependent. He opined,

> both are ethical attempts to order life and make sense of all that surrounds us. Drawing on its sacred and metaphysical resources as well as its daily pragmatics, religion provides morality. Drawing on its existential wisdom as well as borrowing from philosophical and religious systems, law provides an ethic which expresses a way of life for a society more diverse than a denomination. Both efforts are attempts of expressing the outlines of a way of life by showing the important values by which we live ... Law and religion are deeper efforts to provide the ethics expressing society's values.[51]

Although the German society may be said to be highly secularized, religious values are an important part of the value core that holds it together as a society, giving it the minimum consensus necessary to a common life. Some may argue that because religion plays a similar role as law in the society, religious groups should therefore get the same legal status like the state. This acknowledges the autonomy and independence of the churches from the state.[52] By that the Basic Law does not separate church and state but obliges them to continue their cooperation. In this context the condition of permanency means an intimate relationship between church and state. This produces requirements for the internal structure. The religious community must have an organ which represents it, is authorized to decide about order and teaching, forms the objectives of the community and guarantees a long-lasting cooperation with the state.[53] We must again add that the

51 T. L. Fort, *Law and Religion*, London: McFarland & Co. 1987, 116.
52 Decisions of the Federal Constitutional Court, Vol. 30, 428.
53 See for more details Paul Kirchhof, "Die Kirchen als Körperschaften...", 684 et seq.; Stefan Muckel, "Muslimische Gemeinschaften...", 313 et seq. Cf. also Federal Administrative Court, *Zeitschrift für evangelisches Kirchenrecht* 43, 1998, 108.

common approach of identifying religion with church and law with state is somewhat constricting, and thus could lead to an incorrect description of German religious and legal history.

The requirement for the number of members is also not clarified in the Basic Law, thus making it ambiguous. But the number must be large enough to show that the religious community has already demonstrated its relevance in public life. One member per thousand inhabitants is necessary according to an often-uttered opinion. We may ask here: Who is in the best position to decide and what will be the basis for such figures? To determine the maturity of such a group, will such figures be compared to already existing groups, and why? There are also examples that the *Länder* granted the status of a public corporation to much smaller groups. For example, in 1949, Bavaria granted the status of a public corporation to the Christian Science Movement even though the group had only four hundred members.[54] In addition, such a large membership should exhibit some level of continuity. Irrespective of the low membership strength, law courts also take into cognisance the international popularity and geographical spread of a religious community in granting this status.[55]

2. Obedience to the Law

The rationale behind the prerequisite of obedience to the law of the state is that a religious community or group which would like to enjoy the status of a public corporation intends to use the legal system of the state. This requires that the religious community does not only accept the rights and advantages but also the duties and disadvantages. It is common sense that if a religious group crave special acceptance or recognition by the state, it must requite by accepting the legal system of the state.[56] No doubt, such a proviso stand the test of reason. This condition corresponds to a general obligation in Article 9 (2) of the Basic Law concerning the freedom of association. According to that provision, associations whose aims or activities contravene criminal law or are directed against the constitutional order or the notion of international understanding shall be banned. This rule applies also for religious communities for they are associations for the joint cultivation of a religious confession. It must be added that this requirement does not mean that the religious community is not allowed to criticize the state.

54 Cf. Hermann Weber, "Die Verleihung der Körperschaftsrechte an Religionsgemeinschaften", *Zeitschrift für evangelisches Kirchenrecht* 34, 1989, 355.

55 See Administrative Court of Munich, *Zeitschrift für evangelisches Kirchenrecht* 29, 1984, 628.

56 Christoph Link, "Zeugen Jehovas und Körperschaftsstatus", *Zeitschrift für evangelisches Kirchenrecht* 43, 1998, 20.

Furthermore, single violations of the law do not question the general obedience to the law, especially as religious communities are free to regulate and administer their affairs independently according to Article 137 (3) of the Weimar Constitution.[57]

3. Loyalty to the State

There is no consensus about this third prerequisite. Some would contest that there is such a provision. But in a recent court decision on the Jehovah Witness, the Federal Administrative Court held that the cooperation of public corporations and state requires a minimum of mutual recognition and respect. In the same way the state assists and promotes public corporations and their independence and does not interfere in their internal affairs, the public corporations are expected not to question the states' *raison d'être*. The religious community seeks the proximity of the state and may use its legal forms and means of power for religious purposes. A religious community which excommunicates members because of their participation in elections denies the basis of democracy and of a democratic state.[58] It was against this backdrop that the Jehovah Witness was denied the status of a public corporation. Hence, the Federal Administrative Court concludes this prerequisite from object and purpose of the status of a public corporation.[59]

Some agree with this court decision and stress that basic rights need a workable legal order. Thus, the religious community shall not deny the basis of the state legal order. Furthermore a public corporation is able and ready to exercise public authority. This must be done in a way to conform to the Basic Law because every public authority is bound to it. Therefore it is argued that Muslim groups will not get the status of public corporation if they demand penalties for apostates, even death penalties for blasphemers or if they discriminate against women.[60] Secularity, neutrality, parity and tolerance are principles a religious community has to respect in order to attain the status of a public corporation.[61]

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57 Federal Administrative Court, *Zeitschrift für evangelisches Kirchenrecht* 43, 1998, 111; Joerg Mueller-Volbehr, "Rechtstreue und Staatsloyalität: Voraussetzungen für die Verleihung des Körperschaftsstatus an Religions- und Weltanschauungsgemeinschaften?", *Neue Juristische Wochenschrift* 50, 1997, 3358.

58 Federal Administrative Court, *Zeitschrift für evangelisches Kirchenrecht* 43, 1998, 112 et seq.

59 *Ibid.*, 114. See also Paul Kirchhof, "Die Kirchen als Körperschaften...", 683 with further references.

60 For this view see Stefan Muckel, "Muslimische Gemeinschaften...", 316.

61 Axel Freiherr von Campenhausen, *Staatskirchenrecht*, München: C. H. Beck [3]1996, 151; Paul Kirchhof, "Die Kirchen als Körperschaften...", 683.

But this prerequisite has to be rejected. Obedience to the law is sufficient for the cooperation of state and religious groups. Furthermore the prerequisite of loyalty to the state brings the danger that the authority evaluates the content of a religion which is in contrast to its neutrality.[62] And it tends to turn Article 137 (5) of the Weimar Constitution into a discretionary decision. The argument that there is a need for a "quality test" where the state positively cultivates religion[63] must be rejected. As a matter of fact, those religious communities which enjoy the status of a public corporation substantially gain prestige and an increase in social influence.[64] The granting of that status expresses a special state appreciation for those communities.[65] Therefore the existing privileges for the public corporation should not be revaluated in their importance by making great demands on the applying religious communities. The greater the demands for the status of a public corporation, the more attention and credibility people will pay to a religious community. This then produces the danger that the state cements and even seals the existing differences in social influence and importance. This contradicts neutrality and will be understood as the state taking sides in religious questions and arguments with certain religious communities. Therefore care should be taken not to add too many prerequisites to those already laid down in the Constitution. Art. 137 (5) Weimar Constitution only mentions a guarantee of permanency.

III. Granting the Status

If the prerequisites are met, the state has to grant the status of a public corporation. There is no discretion for the state. The granting of the status is the responsibility of the *Länder*, not of the Federal Government. Therefore, the administration and application of these constitutional prerequisites can be slightly different from *Land* to *Land*. One implication of this is that every *Land* may apply and interpret the provisions slightly differently.

IV. Equality or Privilege?

The question is how the different treatment of public corporations compared to other religious communities can be justified. According to popular opinion, the religious communities which are public corporations are subjects of public authority and law like the state. This was a necessary consequence of their status as a public corporation. They used and applied

62 Joerg Mueller-Volbehr, "Rechtstreue und Staatsloyalität...", 3359.
63 Christoph Link, "Zeugen Jehovas...", 22.
64 Stefan Muckel, "Muslimische Gemeinschaften...", 312.
65 Ralf Abel, "Zeugen Jehovas keine Körperschaft des öffentlichen Rechts", *Neue Juristische Wochenschrift* 50, 1997, 2371.

public authority in their activities.[66] It could be adduced that the reason why certain religious communities should enjoy this special status is that the larger, well-established religious communities have a more profound religious and social influence or impact than the less-established ones. They had a special role in public life and for the legal system of the state. Due to this the different treatment of public corporations was seen to be justified.[67]

Article 3 (1) and (3) of the Basic Law show that as far as the religious content and truth is concerned, the religious communities had to be treated equally. But the differences in social and cultural meaning and efforts must be considered and allow a different treatment.[68] The principle of equal treatment allows a differentiation where the situation is different. Therefore some religious communities can gain a special status as public corporations. By this the difference in social importance is used to justify the special status. A privileged status which arises from an intimate cooperation of churches with the state does not violate the equality as far as the different religious positions and the equal regard the state has to show to them are concerned.[69] The state can and has to consider the social efficiency which reliefs the burden of the social state.[70] The state therefore rewards and legitimates the public commitment of the churches.[71]

On the other hand, this special status is also used as a starting point for a different treatment.[72] Somehow it seems that the special influence and importance which is required in order to become a public corporation is on the other hand increased, in certain aspects even created, by the granting of that status. This system is hence close to a circular reasoning. This problem is intensified where legal writers argue for a restrictive application in granting the status of a public corporation, e.g. by additional demands like loyalty of the state (see above). Other legal writers postulate as an additional prerequisite that the religious communities must have their origin in Euro-

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66 Cf. e.g. Decisions of the Federal Constitutional Court, Vol. 19, 134.

67 *Ibid.*; Theodor Maunz, in: Theodor Maunz – Günter Dürig – Roman Herzog – Rupert Scholz (eds.), *Grundgesetz-Kommentar*, Looseleaf, München: C. H. Beck 1998, Article 140, Art. 137 WRV, MN. 27.

68 Martin Heckel, "Das Gleichbehandlungsgebot im Hinblick auf die Religion", in: Joseph Listl – Dietrich Pirson (eds.), *Handbuch des Staatskirchenrechts...* I, 646.

69 Juliane Kokott, in: Michael Sachs (ed.), *Grundgesetz...*, Art. 4 MN 29.

70 Martin Heckel, "Art. 3 III GG – Aspekte des Besonderen Gleichheitssatzes", in: Hartmut Maurer (ed.), *Das akzeptierte Grundgesetz. Festschrift für Günter Dürig*, München: C. H. Beck 1990, 247.

71 Klaus Meyer-Teschendorf, "Der Körperschaftsstatus der Kirchen", *Archiv des öffentlichen Rechts* (Tübingen) 103, 1978, 326.

72 See Dirk Ehlers, in: Michael Sachs (ed.), *Grundgesetz...*, Art. 140, Art. 137 WRV, MN. 17; Martin Morlok, in: Horst Dreier (ed.), *Grundgesetz...* I, Art. 4, MN 124.

pean culture or agree with the constitutional cultural basis.[73] Demands like this seal the predominant religious attitudes. Such an understanding contradicts freedom of faith and is not required by the interpretation of Article 136 et seq. of the Weimar Constitution.

Equal chances and opportunities for all religious communities including "newcomers" are necessary. This is all the more urgent as the German (and not only the German) society lost the religious unity it had decades earlier. This development has to be considered. When constitutional lawyers justify the privileges of certain churches with their social influence, changes in the membership size must also have consequences for that argumentation. Especially in the eastern part of the Federal Republic of Germany, the predominant churches have less influence than in the west. In the new *Länder* which acceded to the Federal Republic of Germany on 3 October 1990, the date of the German reunification, the number of members is far smaller because communism destroyed the religious roots in society. Nevertheless, the Lutheran and Catholic Churches demand the same position like in the old *Länder*.

Concluding Remarks

The German Constitutional Law provides for a special status as a public corporation for certain religious communities. The unequal treatment which is caused by this does not violate the freedom of faith, for the state is allowed to consider the social significance of the established churches as compared to other religious communities. Specific situations can be treated differently. But this different treatment may lead to the problem of a "self-fulfilling prophecy". In times like this where societies lose their religious unity, this argumentation can be challenged more and more. Religion and law are not static, they are both dynamic. As a society changes, so are other aspects of the social structure changing along with it. We conclude that in such a religiously pluralistic society as Germany, it is expedient that constitutional provisions as to faith and those regulating religious developments may need to be revisited from time to time. This does not mean that the provisions themselves have to be changed but their interpretation. It could be done in such a way as to maintain and reinforce the "transparency" and

73 Cf. Axel Freiherr von Campenhausen, *Staatskirchenrecht...*, 151; Juliane Kokott, in: Michael Sachs (ed.), *Grundgesetz...*, Article 4, MN. 16. In this sense see also Decisions of the Federal Constitutional Court, Vol 24, 245 et seq., where the Court hold that the constitutional guarantee of undisturbed practice of religion (Article 4 (2) Basic Law) is valid only for those practices that do not go beyond the limits of certain common moral standards of todays cultured nations. This approach is rightly refused e.g. by Christoph Link, "Zeugen Jehovas...", 22; Joerg Mueller-Volbehr, "Das Grundrecht der Religionsfreiheit...", 305.

"neutrality" of the state in religious matters, while also reflecting the pluriformity which characterizes the contemporary religious scene in Germany.

RESUMÉ

Vztah náboženství a práva v Německu

Sociální vývoj, zvláště nová náboženská hnutí, staví německý právní systém před nové otázky, jež vznikají především v oblasti spolupráce mezi státem a církvemi. Po staletí působily v Německu státní církve, a dokonce ještě dnes, navzdory jejich zrušení, existuje jen částečná odluka církví od státu. Stát má blíže k těm náboženským skupinám, jež mají podobu veřejných sdružení, než k těm, jež ji postrádají. Skupiny, které nepožívají status veřejného sdružení, tak nemají určitá práva zajištěna.

Existence tohoto zvláštního statusu je důsledkem historického vývoje. V současnosti panuje názor, že zvláštní postavení je ospravedlňováno větším sociálním vlivem, který určité náboženské skupiny, tj. velké církve, mají. Avšak tento zvláštní status může trvale konzervovat stávající náboženskou situaci, a být tak v rozporu s principem rovnosti šancí náboženských hnutí. V nábožensky pluralitních společnostech může ospravedlňování zvláštního právního postavení některých skupin vést až ke zdůvodňování v kruhu, neboť zvyšuje, nebo dokonce vytváří sociální vliv, který tento status přepokládá. Institucionalizované spolupráci mezi státem a církvemi je proto třeba věnovat bedlivou pozornost od okamžiku, kdy se společnost stane nábožensky pluralitní.

Dalším problémem je neutralita státu v náboženských záležitostech, neboť nová náboženská hnutí znesnadňují její zachování. To vyžaduje nové právní vymezení, co všechno je možné zahrnout pod termín náboženství. Studie se zabývá touto otázkou ve světle německého práva.

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