

DEVELOPMENTS IN GERMAN STATE-RELIGION RELATIONS

GERHARD ROBBERS
University of Trier

Abstract: This study outlines some developments in German state-religion relations which interfere with the right of religious communities to self-determination. State intervention into religious affairs is growing partly due to decreasing acceptance in society of a special position of religion and partly due to the challenges of migration.

Keywords: Self-determination of religious communities, migration, labour law in churches, Islam, Religious instruction in public schools.

Resumen: Este estudio analiza algunos desarrollos en las relaciones Estado alemán-religión que interfieren con el derecho de las comunidades religiosas a la autodeterminación. La intervención estatal en los asuntos religiosos está creciendo en parte debido a la disminución de la aceptación en la sociedad de una posición especial de religión y en parte debido a los desafíos de la migración.

Palabras clave: Autodeterminación de comunidades religiosas, migración, ley laboral en iglesias, Islam, enseñanza religiosa en escuelas públicas.

SUMMARY: I. Introduction. II. Current fields of growing state intervention. 1. State baptising control of converted asylum seekers. 2. Church asylum. 3. Language requirements for foreign religious employees. 4. Labour law within religious institutions 5. Evidence for determining who is Jewish. 6. Religious instruction in public schools.

I. INTRODUCTION

One of the key features of the German law on religion is the right to self-determination of religious communities. This right is constantly challenged. Some of these challenges result from a decline of political influence of

the Roman-Catholic and the Protestant churches, some other have their roots in the current immigration into the country.

In its core, the right of self-determination of religious communities serves as a stronghold for the strict separation between the state and religious communities. The German constitution, the Basic Law, provides: «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 has its place in Article 140 of the Basic Law in conjunction with Article 137 Section 3 of the 1919 Weimar Constitution, the constitution of the German Empire, the Articles 136 to 139 and 141 of this constitution, which relate to the status of religious communities, being incorporated into the current German constitution. In recent years, however, there seems to be a development of narrowing the scope of self-determination of religious communities.

While the basic right to self-determination –also called autonomy– of religious communities as such is not under attack, narrowing its scope is predominantly based on an increasingly restrictive interpretation and application of the limitation clause in Article 137 Section 3 of the Weimar Constitution. This limitation clause holds that self-determination of religious communities is guaranteed only ‘within the limits of the law that applies to all’. The Federal Constitutional Court has held this limitation clause to mean that all limitations to the right of self-determination of religious communities must be proportionate in a strict sense always taking into due account the high importance of the right to self-determination.

This study points at some examples of current restrictions to the right of self-determination. Each one of them may seem manageable and tolerable, together they may well amount to first steps to a new state domination of religious communities. Some of these issues have not yet met an at least preliminary solution, and it remains uncertain what their final outcome will look like. The issues to be looked at are: state baptising control of converted asylum seekers, church asylum, language requirements for foreign religious employees, lobar law within religious institutions, evidence for determining who is Jewish, and religious instruction in public schools.

II. CURRENT FIELDS OF GROWING STATE INTERVENTION

1. State baptising control of converted asylum seekers

In some countries of the world Muslims who convert to Christianity are severely persecuted. Such persecution can amount to political persecution in

the meaning of asylum law. Religiously persecuted foreigners may be entitled to political asylum in Germany. There are a considerable number of Muslims from countries in which such persecution occurs. When these foreigners convert to Christianity while they are already staying in Germany, they may face persecution when they return to their home country. This would create retroactive asylum entitlements or grounds subsequent to fleeing. There have been quite a number of cases of such conversions¹.

The German foreigners authorities are suspicious of asylum seekers obtaining baptism merely in order to obtain asylum status. They are also suspicious of clergy who baptise Muslims just in order to create such subsequent asylum entitlements and prevent the foreigners in question to be deported from Germany. Churches regularly deny that such misuse of baptism in fact does occur. They point at baptism courses in advance of baptism and at the honesty of their clergy.

The German Foreigners authorities have introduced hearings with the asylum seekers concerned in which they ask questions about their beliefs and examine their knowledge about Christian teaching. It is reported that in several cases the officials conducting these examinations are themselves not knowledgeable in the Christian teaching. Also, questions would require a level of knowledge which the normal German member of a Christian church would usually not have. Furthermore, it is quite unclear whether the questions asked are really suitable to determine whether the person does believe. Beyond these more factual issues the question arises whether the state has the competence to inquire into the belief of persons. On the other hand, the foreigners authorities argue that they only look for evidence whether or not the asylum seeker's belief is strong or evident enough that it would create a situation of persecution in his or her home country.

Whatever the final solution of this ongoing controversy between the state and the churches will be, the state does set foot into and field that is a core field of religion.

2. Church asylum

Another field of controversy is church asylum or sanctuary movement. Many congregations support asylum seekers who have not granted asylum and are about to be deported by granting them church asylum. They grant accom-

¹ Cf. e.g. <https://www.tip-berlin.de/wer-bestimmt-wer-%C2%ADwirklich-christ-ist/>.

modation and shelter in church premises, organize special religious services, provide food and friendship, and urge state authorities to rethink and reconsider their previous negative decision. While church asylum has been a legal institution in history, it is not a specific legal institution in state law nor in the laws of the Roman Catholic or Protestant churches in Germany any more. Some hold it to be illegal arguing that such actions amount to aiding and abetting of criminal offences in foreigners law. Others argue that church asylum is not more than assistance to people in need and a religious task based on freedom of religion or belief and freedom of speech, this being the case at least as long as the asylum seeker is not hides away from state authorities or state actions are not prevented or hindered in other ways.

Meanwhile, state authorities and the Roman Catholic and Protestant churches have agreed on formalized procedures in cases of church asylum². Leaving aside many complexities these procedures can be described as follows: If church asylum is granted to asylum seekers, the congregation has to inform the foreigners authorities about this fact and about the identity of all persons in the particular church asylum. The congregation will forward a statement to the foreigners authorities arguing that the circumstances constitute a hardship case. The foreigners authorities will then reconsider the case as a hardship case. If the decision is positive, the persons in church asylum may stay in Germany, if it is negative, they have to leave the church asylum.

It seems that in these cases of church asylum the state and the churches have found a basically valid solution which respects the tasks and duties of state authorities as well as core functions of religious care and mission. The success of the agreement depends, however, on the good will, trust, and responsible behaviour of all actors involved. In its basic approach, the agreement is an example of cooperation between state and religious communities.

3. Language requirements for foreign religious employees

In 2019, the German government has taken steps to introduce language requirements for foreign employees of religious communities. While in the past there were no such conditions, the amendment of the Employment Ordinance will require employees who are employed predominantly for religious reasons to pass a German language examination before entering Germany. The require-

² <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2015/02/geltungsvorrang-staatliches-recht-kirchenasyl.html>.

ment is first A1 of the Common European Framework of Reference for Languages³, after a period of a further 18 months it will be A 2. A1 means that the speakers can understand and use familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type, can introduce themselves and others and can ask and answer questions about personal details such as where they live, people they know and things they have and can interact in a simple way provided the other person talks slowly and clearly and is prepared to help.

A 2 requires that the speakers can understand sentences and frequently used expressions related to areas of most immediate relevance (e.g. very basic personal and family information, shopping, local geography, employment), they can communicate in simple and routine tasks requiring a simple and direct exchange of information on familiar and routine matters and can describe in simple terms aspects of their background, immediate environment and matters in areas of immediate need. A2 needs several weeks of study.

The amendment is a follow up of the coalition agreement concluded by the governing political parties according to which Imams should be able to speak German. It answers concerns that in particular Imams sent by the Turkish religious authorities usually and on purpose do not speak German, cannot and do not follow German political, cultural and societal life; they are regarded as hampering integration of parts of the population which has come from Turkey or which have a Turkish Muslim background. The government explicitly wants to support integration by this amendment.

The amendment does not only apply to Imams, but also to all other religious communities. There are some 800 Roman-Catholic mother-tongue congregations in Germany and 3000-4000 foreign Protestant congregations and communities which need mother-tongue clergy. In addition, a multitude of non-Christian foreign religious communities exist, often for foreign business people; they all need foreign clergy. On the other hand, there are about 1000 foreign Imams working in Germany, a large part of those come from Turkey. Thus, a great majority of foreign religious personnel is affected by the new rules, personnel which has not indicated any sign of failing integration. This raises severe questions of proportionality. It also seems a violation of the German constitution that just religious personnel is being used to foster integration, not, though, business people with the same level of expertise and social standing. The amendment tries to address these problems by introducing several instruments of decision in the individual case such as hardship as well as un-

³ <https://www.coe.int/en/web/common-european-framework-reference-languages>.

reasonableness clauses and by excluding foreign religious personnel coming from countries with specific visa-exceptions from the language requirements. The latter applies to the United States of America, Australia, Israel, Japan, Canada, the Republic of Korea, and New Zealand. Special exemption rules also apply for nationals of Andorra, Brazil, El Salvador, Honduras, Monaco, and San Marino. Nationals from Member States of the European Union are exempt from any such restrictions, anyway.

The new language requirements as well as the day-to-day handling of the exemption clauses will bring religious communities further unto the decision making of state authorities. It will now be the foreigners offices and their staff which will make far reaching decisions on how and with whom to entrust with religious offices. Integration now will be a requirement for religious office. The state will have a decisive say in how best to perform a religious task. Exemptions from the language requirement will be in the hands of state officials who do not necessarily and very often do not have any idea about the religious needs of the congregation at stake. All this seems to be a further step into diminishing self-determination of religious communities.

4. Labour law within religious institutions

A further step in narrowing the scope of religious autonomy relates to labour law. The two big churches in Germany are the second largest employer in the country, they run hospitals, schools and many other establishments; they all are regarded as church institutions if they meet certain criteria such as that the church has the last say in decision making. In 2019, the two churches employed about 1.3 million employees. State labour law applies to most of them directly, however, because of the right of self-determination of religious communities, this right has to be taken into due account when applying ordinary labour law. The Federal Constitutional Court has repeatedly decided that the right to self-determination of religious communities entitles them to decide which services should exist in their institutions, in which legal form they are to be performed, and which are the loyalty obligations of their employees. In cases of disagreement the self-understanding of the religious community plays a predominant role in deciding the case.

The churches have introduced specific rules on loyalty obligations of church employees which are constantly debated in the public opinion. State labour courts have become increasingly reluctant in applying these church rules. Two recent cases are significant: The case Egenberger of the Protestant

Church⁴ and the head physician case of the Roman-Catholic Church⁵. Both cases have been deeply influenced by the European Court of Justice and European Union law.

The case Egenberger is still pending before the Federal Constitutional Court. Ms. Egenberger had applied for an employment in a protestant institution in 2012, but was not employed, because she did not belong to any church.

The post was offered for a project for producing a report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. The offer of employment specified the conditions to be satisfied by candidates in line with the general labour law rules of the Protestant church. One of these required the candidates to be a member of a Protestant church or a church belonging to the Working Group of Christian Churches in Germany (*Arbeitsgemeinschaft christlicher Kirchen in Deutschland, AcK*). Ms Egenberger, of no denomination, applied for the post offered, but was not invited to an interview. Ms Egenberger brought an action before the labour courts claiming compensation in money. She argued that the taking of religion into account in the recruitment procedure was not compatible with the prohibition of discrimination.

The Federal Labour Court brought the case before the European Court of Justice asking for a preliminary ruling on Art. 4 of the Directive 2007/78. According to this provision, Member States may provide that a difference of treatment shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Provided that its provisions are otherwise complied with, the Directive thus does not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos.'

The European Court of Justice held that, where a church or other organization whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organiza-

⁴ ECJ 17 April 2018 C-414/16.

⁵ ECJ 11 September 2018 C-68/17.

tion, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case. The genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organization concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organization. That requirement must comply with the principle of proportionality. Article 17 TFEU cannot invalidate that conclusion.

The German Federal Labour Court then decided, using this ruling of the European Court of Justice as a basis, that the church had to pay compensation to the plaintiff⁶. The court doubted that membership in a church is a necessary occupational requirement and held that there was no likely and significant danger of impairment to the ethos of the church because the plaintiff would not be in a position to independently decide in matters of the church's ethos.

The church institution has submitted a constitutional complaint to the Federal Constitutional Court against this decision which in substance neglects the requirements of religious mission. The case is still pending.

The head physician case of the Roman-Catholic Church is somewhat less disputed. It refers to a head physician of Catholic faith in a Catholic hospital who had been divorced; when he remarried without his first marriage having been annulled, the hospital dismissed him. While the court decisions in this case are based on a very similar reasoning as in the Egenberger case, the basic facts represent an approach which is even less shared in public opinion.

After the decision of the European Court of Justice the Federal Labour Court held that the dismissal was illegal⁷. It argued that a loyalty obligation which requires not to conclude a marriage that is invalid according to the beliefs and the law of the Catholic Church does not constitute a genuine, legal and justified requirement. Like the European Court of Justice it held that the church must not demand different loyalty obligations from Catholic and non-Catholic employees in such positions. The German Catholic Church meanwhile has amended its rules on remarriage of employees. It has not filed a constitutional

⁶ Bundesarbeitsgericht, Urteil vom 25. Oktober 2018 - 8 AZR 501/14, <https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=21978&linked=urt>.

⁷ Bundesarbeitsgericht, Urteil vom 20.02.2019, 2 AZR 746/14, <https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=22558&linked=urt>.

complaint against this judgement. Nevertheless, both judgements do signify an approach of state courts which narrows the scope of religious self-determination.

5. Evidence for determining who is Jewish

Another pending case is pointing at the darkest days of German history. German Land federations of Jewish communities are entrusted by Land governments with distributing state subsidies to their member communities which are designed to support Jewish life and culture in Germany. The subsidies are distributed according to the number of members of the member communities. At times there are some disagreements within the Land federations about the exact number of members. This does result in particular from Jewish immigration into Germany specially from the former Soviet countries. After the fall of the Soviet Union there have been considerable statutory measures facilitating immigration of Jews from those countries. The Central Council of Jews in Germany requires a number of formal conditions to regard a person as being Jewish. According to these requirements it is not sufficient that someone states that he or she is Jewish, further evidence is needed. The Federal Administrative Court has, however, held in a case in which a Jewish community has been satisfied with just the statement of persons to be Jewish that such statement is sufficient if the individual Jewish community so decides⁸. This approach by the state court disregards the internal structures of decision making within the overall Jewish community in Germany. It replaces the religious decision of what kind of evidence is needed to establish who is a Jew by state stipulations. In this approach it is the state who decides who is Jewish.

The Jewish Land Federation has filed a constitutional complaint against the decision of the Federal Administrative Court, the case is still pending before the Federal Constitutional Court.

6. Religious instruction in public schools

A matter of constant dispute in public debate is religious instruction in public schools. The constitutional provisions are quite clear: The German federal constitution provides in its Article 7 Section 3: «Religious instruction shall form part of the regular curriculum in state schools, with the exception of

⁸ Beschluss des Bundesverwaltungsgerichts of 14 September 2017, Az. 6 B 61.17 et alt.

non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.» There are some exceptions to this rule for the Länder Bremen and Berlin for historical reasons. The Länder which joined the Federal Republic in 1990 have created systems of religious instruction in public schools that also contain some compromises regarding confessional religious instruction. Basically, however, the German system of religious instruction is confessional religious teaching, while alternative offers provide secular teaching in ethics.

Muslim immigration has added further challenges to the system. While it is clear that also Muslim pupils have a right to religious instruction in their religion, German authorities find it difficult to identify Muslim religious communities. The constitution requires religious communities to decide about the religious content of the teaching. The secular state is not in a position to decide about theological questions. Muslim associations in Germany, however, are predominantly defined by regional or national origin of their members, Islam theology seems to be alien to the idea of religious community. An important difficulty is furthermore posed by the fact that the largest Muslim association, the DITIB, is an offspring of the Turkish Diyanet, the Directorate of Religious Affairs as a state authority. German authorities insist on independence of German schools from foreign state interference.

This basic situation has prompted the Land of North Rhine-Westphalia to introduce a new system of religious instruction for Muslim pupils⁹. Because of the lack of viable Muslim religious communities an Islamic Advisory Council was created which was to decide on the religious content of the Muslim religious instruction. It also was to decide about the suitability of the teachers to teach Islam. There were to be four members of the Council nominated by Muslim religious associations and four members nominated by the Land. Because this Advisory Council did not work properly –DITIB, as being the largest Muslim association in the Land, did not take part in the Council– the newly elected government of the Land passed an amendment to the law on 2 July 2019¹⁰. Instead of the Advisory Council a Commission is entrusted with decisions on the

⁹ Cf. Gesetz zur Einführung von islamischem Religionsunterricht als ordentliches Lehrfach (7. Schulrechtsänderungsgesetz) of 22 December 2011, <http://www.iru-beirat-nrw.de/dokumente/IslamRU.pdf>.

¹⁰ Cf. Gesetz zum islamischen Religionsunterricht als ordentliches Lehrfach (14. Schulrechtsänderungsgesetz), Gesetz- und Verordnungsblatt (GV. NRW.) Ausgabe 2019 Nr. 14 of 16 July 2019 p. 299 to 342, https://recht.nrw.de/lmi/owa/br_vbl_detail_text?anw_nr=6&vd_id=17857&ver=8&val=17857&sg=0&menu=1&vd_back=N.

religious contents and teachers' religious suitability. All the members of the commission will be nominated by Muslim associations, the Land will not nominate any of the members. There is no limit to the numbers of members of the commission, but each Muslim association may nominate only one member regardless of the number of adherents it may have. The Muslim associations with the right to nominate will not necessarily be religious communities. The right to nominate requires an agreement between the Land and the Muslim association. The agreement may only be concluded with Muslim associations which meet certain requirements, such as independence from a state. A Muslim religious community which provides religious instruction in public schools pursuant to Article 7 of the Basic Law may not be represented in the commission.

In North Rhine-Westphalia there are about 415.000 Muslim pupils in public schools. In the school year of 2017/2018 more than 19.000 pupils were taught Muslim religion in public schools. Teaching is deployed by teachers who have been trained within Germany. Instruction is in German language and under German state supervision¹¹.

The new law provides less state intervention into religious affairs than its predecessor did, because state authorities do no longer nominate members of a committee which decides on religious issues. The new system will yet have to show its practicability. However, it is a further step in a difficult situation with the aim to provide Muslim religious instruction.

¹¹ <https://www1.wdr.de/nachrichten/landespolitik/islamunterricht-nrw-102.html>.