RELIGION & STATE DEVELOPMENT COOPERATION

*A German-South African dialogue on
historical and current challenges*

Editors
Renier Koegelenberg
Udo Hahn

EVANGELISCHE AKADEMIE
TUTZING

EFSA

Religion and the state: lessons learned from 70 years' experience of the Federal Republic of Germany

Hans-Jürgen Papier¹

The famous question by Gretchen: “Now how do you feel about religion?” caused hardship for the troubled Faust. In the light of the challenges in the relationship between the state and church in the 21st century, in particular with regard to state neutrality towards religion and ideology, this question can be posed in a modified version: How does the state feel about religion? Should it even have an opinion about religion, or does a multi-religious society perhaps call for the state’s complete absence when it comes to matters of faith? Can the state solve conflicts that arise from the clash of the most diverse religions or from the clash of certain religions and a largely a-religious society by banishing everything religious from the public sphere? Or, on the contrary, must it create the framework conditions for an open dialogue between the religions? This is therefore a question of principle: the relationship between state and religion under conditions of religious-ideological plurality.

1. Constitutional framework for religion

As is well known, social structures have fundamentally changed with the emergence of new religions in Germany, and particularly with the growth of

¹ Prof. Dr Hans-Jürgen Papier, former President of the Federal Constitutional Court, Tübingen.

Muslim populations, but also in view of the fact that the membership of the two large Christian churches in the total population of Germany has fallen far below 60%. As a result of this far-reaching loss of “folk-church substance” (Depenheuer, *Zwischen Neutralität und Selbstbehauptung* [Between Neutrality and Self-assertion], in: *Die politische Meinung* 2004, No. 415, p. 42), the pre-constitutional harmony between a Christian state and a Christian society, whose harmony had facilitated the coexistence of state and church, has unquestionably and definitively ended (Waldhoff, *Neue Religionskonflikte und staatliche Neutralität, Gutachten D zum 68. Deutschen Juristentag* [New Religion Conflicts and State Neutrality, Expert Opinion D on the 68th German Lawyers’ Day] Berlin 2010, in: *Verhandlungen des 68. Deutschen Juristentages Berlin 2010, Vol. I, Gutachten D*, p. 16). Against this background, many voices have advocated a rebalancing of the relationship between the state and religion, and between the state and the church, in the sense of strengthening the neutrality of the state.

The totality of those legal principles that regulate the relationship between the state and religious communities and their members is commonly referred to as the “State Church Law.”

This term is, however, misleading in two respects: firstly, because it not only encompasses the churches in the traditional sense, but all religious communities; secondly, because Article 140 GG incorporates the provision of Article 137 (1) of the Constitution, and thus precisely the prohibition of a state church, into the Basic Law [*Grundgesetz*].

Therefore, one should probably rather speak of constitutional law for religion. In any case, the prohibition of a state church at the same time addresses the principle of the separation of state and church. Alongside individual and collective religious freedom and the law of self-administration of the church, it represents one of the cornerstones of the legal structure of the church in Germany.

From a historical perspective, the separation of state and church was the culmination of secularisation, which after the devastating religious wars of the 16th and 17th centuries, served as a medium for establishing a comprehensive order of peace throughout Europe. Only state power, which no longer defined its claim to validity on the basis of a religious claim to truth, could create framework conditions for the peaceful coexistence of hostile religious groups. The answer

by the state to the question of which religion is the “right” or “true” one was entrusted to the private decision of the individual human being. Since the French Revolution the radical separation of state and church was for the first time enforced and the great secularisation accomplished with the Main Resolution of the Imperial Resolution [*Reichsdeputationshauptschluss*] in 1803, which heralded the end of the *Reichskirche*.

The realization of the idea of the secular state as guarantor of peace demanded a sacrifice from both sides. The state had to renounce its religious justification and confine itself to pursuing purely worldly purposes. The religious parties also had to abandon their religious justification of power because they were no longer able to assert their claim to truth with the help of state power.

In the states of Europe secularisation has notoriously led to very different models of state church laws, ranging from secular orders in states such as France to state churches in England, Scotland and parts of Scandinavia. According to the Basic Law's state church law, churches and religious communities are guaranteed free internal organization and administration of their own affairs. This guarantees that the freedom of the religious life and work of the churches is supplemented by the freedom of organization, norms and administration which is indispensable for the performance of their tasks. In this respect the churches and religious communities are granted the freedom to establish a specific social order. The state recognizes the churches and other religious communities as inherently independent institutions which do not derive their jurisdiction from the state. Consequently, the church confers its ministries without the participation of the state or the civic community.

Conversely, the separation of state and church demands the independence of public offices and civil and civic rights from confession.

The necessary separation of state and church in terms of institutions and content, however, will not result in the complete exclusion of religions from the community. This is evident from the incorporation of the church articles of the Weimar Constitution into the Basic Law, which in important areas requires the cooperation between the state and the religious communities such as, for instance, if religious communities are offered the opportunity to organise themselves as public corporations, or are enabled to levy a church tax. Another

example is the guarantee in Article 7.3 of the Basic Law of confessionally bound education in religion at public schools as a proper subject.

At the moment the German secular state is not strictly secular. Rather, it chooses a balance between secularism and the state church, and it has a legitimate interest in the religious diversity of its people. Occasionally, there is talk of a “limping separation” of state and church, whereby the term “to limp” is an unfortunate choice. Under the Basic Law, the ideological and religious communities should therefore be able to present themselves, function and flourish in the community. More crucial than the controversial terminology for this system is the content of this system. Given the debate about headscarves, the teaching of Islam, affixing crosses in classrooms and similar topics, one might be inclined to argue that a stricter separation of state and church than provided for by the German Basic Law would make it easier for the state to fulfil its tasks, especially in the field of education. This, however, is a misconception. Let me reiterate that the German secular state has a legitimate interest in the religious vitality of its people, because otherwise there is a danger that claims for final justification will be brought to it and, with that, the danger of totalitarian currents will be strengthened.

According to the concept of our constitution, religious communities should therefore be active in the community, be able to develop themselves and be supported by the state in the performance of their social tasks. In a nutshell: secularity can be demanded for public order within the state, but not for the public space of society.

2. The neutrality imperative

A state in which followers of different or even opposing religious and ideological convictions live together, however, can only ensure peaceful coexistence of these convictions if it itself maintains neutrality in matters of faith. Similarly, the Federal Constitutional Court consistently emphasises in its jurisprudence the importance of state neutrality in religious matters. Such neutrality is a precondition for the development of religious freedom, even if at no point in the Basic Law is it expressly stated as a state obligation.

The imperative of a separation of state and church – understood in a more institutional sense – is therefore complemented by the imperative of religious-ideological neutrality. However, the neutrality of the state is not to be understood as a decidedly dissociative stance, but rather one that is open and overarching, promoting freedom of faith equally for all confessions. The state's obligation to remain neutral, in other words, has a positive and a negative side.

In a negative sense, the neutral state must initially refrain from exerting certain influences. It may not identify itself expressly or by implication with a certain faith and a certain ideology through measures emanating from it or attributable to it, and thereby endanger religious peace in a society on its own initiative.

Furthermore, it is barred from classifying a religion or belief as true or false. Were the state to make such an assessment, it would no longer be able to do justice to its role as guarantor of peace. For instance, a religious conviction that rejects an oath of witness (cf. Federal Constitutional Court 33, p. 23 et seq.) or that requires slaughter without anaesthesia for the consumption of animal meat (cf. Federal Constitutional Court 104, p. 337 et seq.) is thus not subject to a substantive assessment by the state. The Federal Constitutional Court regarded affixing a crucifix in state-run schools as a violation of the principle of neutrality, because the crucifix is not only the manifestation of an occidental culture co-shaped by Christianity, but actually the religious symbol of Christianity par excellence (Federal Constitutional Court 93, p. 1, 15 ff.).

If the state orders that the crucifix be displayed in all public administrative bodies, as happened in principle in the Free State of Bavaria, this is an objective violation of the constitutional principle of state neutrality based on this interpretation of the Federal Constitutional Court, which incidentally has not remained undisputed. Another question is whether anyone can argue in court that their own rights have been violated, by a mounted crucifix.. In my view, the rights of those citizens who visit or work in those official institutions, in the absence of state interference in their fundamental right to freedom of religion, have not been violated.

Yet even the Christian churches, in my opinion, could not invoke an encroachment on their collective freedom of religion through the state's use of the religious symbol of Christianity.

In a positive sense, the obligation of the state to be neutral implies that it must ensure that there is space available for the active practice of religious beliefs and for the realisation of the autonomous personality in the field of ideology and religion. This may be achieved either by actually enabling liturgical activities or other activities specific to religion, or by conferring the status of a public corporation without evaluating the religious contents.

The prohibition of identification can also play a role when the state supports religious communities. A people's religious vitality can only flourish if the state equally supports all confessions and does not disadvantage any. However, the principle of treating religious communities equally does not demand schematic equal treatment, but instead permits differentiations that are based on actual differences of the individual religious communities, as long as the kind of differentiation is not alien. If, for instance, the state's support consists of awarding public services, the expectations of reciprocal services of a cultural or social nature on the part of the religious communities could play a differentiating role.

3. Corporate status

Corporate status can only be granted if the religious community ensures that its future conduct does not endanger the fundamental constitutional principles described in Article 79.3 of the Basic Law, the fundamental rights of third parties entrusted to state protection and the fundamental principles of liberal religious and religious constitutional law (cf. Federal Constitutional Court 102, pp. 370 et seq.) These include not only the guarantee of human dignity and fundamental rights, but also and in particular the principles of the rule of law and democracy.

This also includes, however, the fundamental separation of state and church. The state must not accept a systematic impairment or endangerment of these principles, especially not on the part of a religious community constituted as a corporation under public law.

So in principle, corporate status must be open to all religious communities. However, for Islamic associations the problem presents itself from a different point of view; as a matter of course an adequate organisation of the religious

community is necessary, which by its constitution and the number of its members must offer a guarantee of permanence. Islam, however, does not have a central organisation or regional subdivisions. Its associations often consist of a fluctuating circle of believers not constituted under membership law.

A clear regulation of membership in the sense of an identifiable affiliation in the long run is, nonetheless, an indispensable prerequisite for granting corporate status. It is therefore a minimum condition for granting corporate status under public law, based on organisational sociological and on secular considerations. Considering the support provided by the public sector, this condition is by no means inappropriate. At the same time, the state must not impose this condition on religious communities. It is up to the religious communities whether they want to fulfil the requirements in order to be granted corporate status at all.

4. Religious education

Incidentally, in many cases Islamic associations do not have a membership-based structure, which is also a factor when considering the question of introducing lessons on Islam as an ordinary subject in public schools. According to Article 7 (3) of the Basic Law, only religious communities can assert such a claim. However, one can only speak of a religious community if it is an assembly that brings members of one and the same confession, or of several closely related confessions, together to fulfil all the tasks set by the common confession. The judiciary, nonetheless, has recognised (see Federal Constitutional Court 123, p. 49 et seq.) that, in principle, an Islamic association can also be or form a religious community if it is entrusted with identity-creating tasks that are not limited to a mere coordinating function and which are carried out independently. Whether the constitutionally vested claim to religious education can also be claimed by an Islamic association is therefore presumably determined not only by the evidence required here of adherence to the constitution, but also whether a corresponding organisational structure exists in the specific case. According to jurisprudence, neither the Central Council of Muslims in Germany nor the Council of Islam meets these criteria. In their statutes they are not endowed with the necessary authority and competence to carry out religious activities that form an identity, nor can they enforce their religious authority in their respective communities all the way

down to the mosque communities. Only recently has the Higher Administrative Court for the State of North Rhine-Westphalia ruled in this respect again.

5. Headscarf ban for teachers

The most recent ruling by the Federal Constitutional Court concerning headscarves dated 27 January 2015 (Federal Constitutional Court, 38, p. 296 et seq.) triggered heated and controversial discussions. In accordance with this decision, the fundamental right to freedom of religion and confession also grants teachers in public schools the freedom “to satisfy a requirement of coverage that is understood to be mandatory for religious reasons”. This refers in the first instance to the wearing of an Islamic headscarf. A general ban under state law on teachers wearing such headscarves at school could not be justified solely on the grounds of an abstract threat to the state’s neutrality in religious and ideological matters with regard to its overall educational mandate and the contradictory freedom of religion and confession enjoyed by school children and their parents. Only if the threshold to a sufficiently concrete endangerment or disruption of peace at school or neutrality of the state is reached in certain schools or school districts on account of substantial situations of conflict over the correct religious conduct could such a prohibition be constitutionally admissible.

In an earlier decision of the Federal Constitutional Court in 2003 (Federal Constitutional Court 108, p. 282 et seq.), the state legislature was explicitly given room for manoeuvre. It was able to assimilate the increasing religious diversity in schools and use it as a means of practising mutual tolerance in order to contribute to the integration efforts. On the other hand, however, the lawmakers were also expressly empowered to attach stricter and more dissociative importance to the obligation of state neutrality in the school system. At that time, this meant in clear text: lawmakers were entitled to keep the religious references conveyed through the outward appearances away from pupils, in order to avoid conflicts with pupils, parents or other teachers before they arose.

The Federal Constitutional Court now has a different opinion. On the one hand, there would be the freedom of religion and confession for those teachers who, for religious reasons, invoke a requirement to cover up which is understood to

be obligatory; on the other hand, there would be the state educational mandate based on state neutrality and the negative freedom of religion and confession of the pupils and their parents, as well as the parental rights of care and custody. The decisive difference compared with an earlier interpretation of the law by the Federal Constitutional Court is that the court now reconsiders the conflicting constitutionally protected interests and denies the proportionality of the former legislative reconciliation, if the interests brought against the wearing of headscarves are merely exposed to an abstract hazard. Only to avert a sufficiently concrete endangerment or disturbance of school peace or state neutrality may a headscarf ban be pronounced.

I would just like to make a critical remark here that, in my opinion, the emphasis on freedom of faith and denomination did not take sufficient account of the fact that the teacher here invokes the freedom of religion while holding public office. This is not about the limits of the religious freedom of a private person in general, but about the limits of public office. The limits of freedom of religion or confession of a public official from the state when holding public office shall in any case be more restrictive than those of a private person or a public official outside of his or her official duties. In my opinion, the result of the court's consideration of this matter loses ground in the problematic assessment and emphasis on the protection of teachers' fundamental rights in the exercise of public office.

Nor do I think much of the court's requirement to establish a concrete threat to or disturbance of school peace. In this way, the decision on the arrangement of the obligation towards neutrality in schools is shifted from the democratically legitimized legislator to the administrative authorities and the courts. Moreover, this solution can virtually act as a – certainly undesirable – incentive for generating concrete scenarios of danger and disruption, and it can lead to highly unpleasant disputes, which will presumably be settled on the backs of precisely those who wish to invoke their freedom of faith and conscience.

From what has just been said, one can conclude that a general prohibition of specific religiously motivated dress in public spaces would not be constitutionally permissible.

This applies just as much to the headscarf as to the full veil or the ban on wearing a burka. In the Basic Law the free practice of religion, which can also manifest

itself in the wearing of a particular dress, is in principle protected in a very strict and comprehensive manner. Restrictions are only permissible to the extent that they are necessary for the protection of constitutionally equally protected goods and concerns. For example, a special ban on burka may be justified in order to preserve the neutrality of the public official while holding a public office, or for reasons of safeguarding public safety, whether in traffic or when exercising the right of assembly.

6. Protection of Sundays and holidays

According to Article 140 of the Basic Law – as already outlined – the articles of the Weimar Constitution under state church law are to be declared an integral part of the Basic Law, thus also of Article 139 WRV. This states: “Sundays and the nationally recognized holidays remain legally protected as days of rest from work and of spiritual elevation.” In this context it must be taken into consideration that the constitutional safeguarding of the protection of Sundays is not only a matter of the fundamental right of freedom of religion under Article 4 of the Basic Law, but that Article 139 of the Constitution also has a secular-social meaning in addition to its religious-Christian significance. Notwithstanding the systematic anchoring in the articles of state church law, this is a consequence both of the history of its origin and of the regulatory purposes of this constitutional article. “With its protection, it secures an essential basis for human recreation and at the same time for social coexistence and is thus also a guarantor for the exercise of fundamental rights which serve the development of personality” (Federal Constitutional Court 125, 39, 80). By granting regularly recurring days of rest from work, the principle of the welfare state would also be substantiated.

Already the history of its origin illustrates the connection between the religious and social aspects of the protection of Sundays: when the Basic Law was adopted and the articles of the Weimar Constitution concerning state church law were incorporated, this “alliance of different motivations” between efforts to promote religion and “labour relations policy” was not questioned. Thus, despite its Christian roots, the protection of Sundays and public holidays under constitutional law serves not only the realization of freedom of religion, but also of other freedoms. Thus, no real breakthrough or disparagement of the

principle of neutrality can be seen in it. On the other hand, it does not provide a constitutional basis for the statutory adoption of further holidays, in particular of Muslim holidays. At the same time, Art. 139 of the Constitution contains a mandate to the legislature which provides for a rule and exception for work on Sundays and public holidays.

According to the Federal Constitutional Court, the typical “workday activity” must always cease on Sundays and public holidays. In other words, the constitutionally guaranteed protection of Sundays and public holidays can only be restricted to a limited extent. Departures from the principle of rest on Sundays and public holidays are only possible in order to safeguard the legal interests of a higher or equivalent value with constitutional rank. In any case, the legislature must maintain an adequate level of protection of Sundays and public holidays (Federal Constitutional Court 125, 85).

7. Conclusion

Let me conclude by saying that the question concerning the need for a redefinition of the relationship between the state and religious communities perhaps cannot be addressed in general terms and for all time, certainly not for all countries, in one direction or another.

One thing is certain: churches and religious communities in the 21st century face completely new and possibly more difficult challenges than they did even a few decades ago. Admittedly, it seems to me that reaching an inter-religious consensus to secure cultural and social peace in the constitutional state of the Basic Law through the moderate integration of the religious communities into the community is more likely than through a strict banishment of all religious matters from the public sphere, which probably has more of the character of a strategy of conflict suppression. The constitutional order of churches and religious communities, with its balanced separation of state and religion, enables them to fulfil their tasks, especially in an increasingly multi-religious society or in a largely a-religious society.

As already stated, secularity is to be demanded for the public order of the state, but also for the public space of society.

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The churches and religious communities are able to make full use of the regulatory and structuring framework granted to them by the state, but they should also make use of it, because sooner or later it will otherwise lose its plausibility and will increasingly evoke controversy and contradiction. The significance and weight of churches and religious communities as institutions of civil society depend on people filling the constitutional framework with life, faith and conviction. The state itself neither can nor should achieve or guarantee this.