

## Germany: Religion, State and Constitution

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As is the case for most modern constitutions, the German *Grundgesetz* (Basic Law) provides for the separation of church and state. Classically, the doctrine of separation of church and state encompasses two principles, freedom of religion and the secularity and religious neutrality of government. You will find both of these principles in the *Grundgesetz*. However, the *Grundgesetz* also stipulates a cooperation between church and state, most importantly by guaranteeing the subject 'religion' in public schools and by providing for a 'church tax'. For this reason, it is sometimes proposed that the separation of church and state in Germany is *hinkend*, i.e. limping. While this choice of wording is questionable, Germany surely is not an example of a strictly laicist state. In the following, I will illustrate the German notion of religious neutrality and freedom of religion with some recent case law, before I turn to the distinctively German synergies between church and state.

### 1. Secularity and Religious Neutrality of the State

Interestingly, the principle of secularity is not stipulated by the *Grundgesetz* itself. Instead, Art. 140 GG incorporates Art. 136 *et seq.* of the Weimar Constitution (WRV) of 1919. Art. 137 WRV decrees that there is no state church. Further, Art. 137 WRV guarantees the freedom to form religious congregations and allows religious groups to independently arrange their own affairs, including the appointment to offices. This institutional separation of church and state is complemented by an implicit commandment of religious neutrality of the state, i.e. an attitude which comprehensively fosters religious freedom for all denominations. At the same time, it is accepted wisdom that the deep cultural ties with the Christian religion and its impact on the German culture need not be disavowed.

In the year 1995, the *Cruxifix*-decision of the German Federal Constitutional Court stirred considerable political and legal debate (BVerfGE 93, 1 *et seq.*). Following the Bavarian school laws of the time, each classroom had to be fitted with a cruxifix, i.e. a cross with a representation of Jesus' corpus. The Federal Constitutional Court held that while no one had a right to be spared the view of other people's demonstration of faith, the principle of religious neutrality did not allow the state to affiliate itself with one particular religious denomination. Even if the majority of pupils in the school possessed the Christian faith, students were not obliged to tolerate such a symbol in the classroom, since the German provisions for compulsory education made a withdrawal from those religious symbols extremely difficult. Finally, the Court argued that the cross was such a decisive symbol of the Christian religion that it could not be regarded as a general cultural symbol.

Another recent case of the Federal Constitutional Court concerned governmental warnings or declarations regarding religious cults (BVerfGE 105, 279 *et seq.*). The Court held that the principle of neutrality did not stop the government from voicing criticism regarding religious groups. However, the critique needs to be precise and based upon a factual explanation. Sweepingly branding a particular religious movement as 'destructive' or 'pseudo-religious' is inadmissible.

## 2. Freedom of religion

Art. 4 GG guarantees the freedom of religion and religious exercise. It further stipulates that no one may be forced to do military service with a weapon against their conscience. Freedom of religion includes the right to negate the existence of God, and no one may be forced to undertake religious acts. This human right is in principle not subject to any limitation, however, it may need to be restricted in order to achieve a coordinated coexistence with the fundamental rights of other persons or other fundamental principles of the constitution. Let me give you some examples:

A recent case before the Federal Constitutional Court concerned *zabiha*, i.e. the killing of vertebrates without anesthesia by religious Muslims (and would apply in the same line to the Jewish equivalent *shechita*). While the Federal Administrative Court had argued that the ban on such butchering techniques did not interfere with religious freedom since neither Islam nor Judaism obliged the believers to eat meat in the first place (BVerwGE 99, 1 *et seq.*), the Federal Constitutional Court held that butchers of the particular faith could apply for a special approval, provided that the circumstances ensured appropriate consideration for the animals' needs (BVerfGE 104, 337 *et seq.*). There is some debate whether this decision would need to be reversed after animal protection was proclaimed a state goal by Art. 20a GG, which was introduced in the year 2002.

The *Headscarf*-case (BVerfGE 108, 282 *et seq.*) concerned a muslim woman who was refused employment as a primary school teacher due to her unwillingness to take off her headscarf in class. As in the *Cruxifix*-case, the problem was that students of other beliefs would necessarily and inescapably have been confronted with the religious symbol during lessons, particularly so since most classes are taught by the same teacher in primary school. Despite the obvious parallels, there was also a significant difference: The debate in the *Cruxifix*-case centered around a state decree ordering crosses to be affixed to classrooms, i.e. around the government's identification with the symbol of a particular religion. In the *Headscarf*-case, it was quite plain that the display of the religious symbol was a personal choice and that the government, respectively the school authorities, did not express a preference for Islam. The Constitutional Court held that the government possessed a prerogative in establishing a balance between the religious rights of teachers and students: In times of increasing religious plurality within a changing society, the government might either opt for a stricter concept of religious neutrality in order to avoid religious conflicts within schools, or it might choose to allow obvious displays of faith in an attempt to foster tolerance and integration. In any case, the decision on how to establish the balance of interest was too important to be left to the singular school authorities, but had to be decreed by statutory law. In the aftermath of the decision,

several German states have introduced specific legislation which bars teachers from wearing religious symbols in the class. Some of these statutes make distinctions between headscarves and Christian symbols, the underlying reason being that the former is declared a political symbol of fundamental Islam as well as a symbol of women's oppression, whereas the latter is seen as a cultural symbol. It is questionable whether these distinctions would be upheld by the Federal Constitutional Court.

Religious symbols worn by students are generally considered to be unproblematic. The discussion regarding students' expression of their beliefs rather centers around their right to miss particular parts of school, i.e. the question whether Muslim girls are entitled to be excused from sports classes or class trips and whether parents may request that their children not be exposed to sex education in school. While the Federal Administrative Court has accepted that Muslim girls may be exempted from sports classes, the general trend in case law is to handle exemptions restrictively in view of the state's responsibility for education, which is put forward in Art. 7 (1) GG.

### **3. Cooperation between Church and State**

As I've already noted above, Germany is not a strictly laicist state. The preamble of the *Grundgesetz* explicitly refers to God, albeit not one of a particular faith, and Art. 140 GG in conjunction with Art. 136 *et seq.* WRV provide for a cooperative relationship between church and state.

The most striking indicator for the cooperation between church and state is the fact that the German constitution explicitly allows for a church tax, which is levied from church members. The historic origin of this tax dates back to the early 19th century, when many of the German states lost their territory to France as a result of the wars of the French Revolution and the military successes of *Napoleon Bonaparte*. The now stateless monarchs were compensated with territory which had formerly belonged to the churches, roughly 95.000 square kilometres of land (*Reichsdeputationshauptschluss* of 1803). On the other side of the coin, the princes suddenly had to provide for the salaries of clerics and the upkeep of churches. They tried to alleviate this part of the secularisation process by imposing fiscal duties upon church members. The Weimar Constitution of 1919 acknowledged these fiscal duties by granting the churches a right to raise taxes.

Art. 137 WRV allows religious communities to apply for the status as 'corporations under public law' (*Körperschaften des öffentlichen Rechts*). Whilst this status does not entail any additional duties and responsibilities, it allows the churches to levy 'church tax' upon their members. The church tax is collected through the state-organized tax-collection system, comes as an addition to the income tax and currently amounts to 9 % in most German states (8 % in Bavaria and Baden-Wuerttemberg). The status of 'corporations under public law' is granted to religious groups irrespective of their particular beliefs, as long as they provide a guarantee of continuity and their present conducts shows that they do not pose a risk for the fundamental principles laid down by the *Grundgesetz*. A recent application by the Christian denomination *Jehova's Witnesses* was successful, even though the group regards any secular political system, including

the constitutional order of the *Grundgesetz*, as 'part of the world of satan' and its congregation does not, as a matter of principle, participate in elections. The German Federal Constitutional Court held that Art. 137 WRV did not presuppose a particular loyalty to the State beyond the requirement that the religious community's actions are not directed against the constitutional order (BVerfGE 102, 370 *et seq.*).

Apart from Art. 137 WRV, Art. 7 (3) GG accommodates religious groups with the constitutional guarantee of a subject 'religion' in public schools. Historically, this guarantee is tailored towards the two big German churches, the Evangelical Church and the Roman Catholic Church. Nonetheless, other convictions are to be considered as long as the religious group constitutes a reliable, permanent partner for the State which is able to articulate authoritative principles regarding their faith. Due to the short tradition and fragmentation of the Islamic belief in the religious communities within Germany, attempts to enforce Islamic religion as a subject in public schools have so far failed in German courts. However, several states have undertaken trial phases in which a subject of 'neutral' Islam was offered as an alternative to Islamic pupils.

Suggested reading:

Hans-Jürgen Papier, Aktuelle Herausforderungen im Verhältnis zwischen Staat und Kirche unter besonderer Berücksichtigung der staatlichen Neutralitätspflicht, in: Pitschas / Uhle (eds.), Festschrift für Rupert Scholz zum 70. Geburtstag [2007], pp. 1123-1139.