

# Religious Freedom in Germany

*Gerhard Robbers\**

## I. INTRODUCTION

At least from a U.S. perspective, religious freedom in Germany has become a matter of concern in recent years.<sup>1</sup> It may well be time to reconsider the law and the facts of religious life in a country under scrutiny due to its twentieth-century history. Upholding religious freedom is a key issue in any community committed to the idea of human rights. After the end of the devastating rule of national-socialism, Germany reestablished its long-standing cultural history in which it had intensively contributed to the development of human rights. The purpose of this article is to describe the various normative sources of religious freedom in Germany and to establish an understanding of religious freedom as a positive freedom in harmony with the legitimate culture of the people concerned.

## II. THE NORMATIVE SYSTEM

### *A. Constitutional Provisions*

Religious freedom has a prominent place in Germany's constitution.<sup>2</sup> Freedom of religion is protected before many other

---

\* Professor, Faculty of Law, University of Trier, Germany. Professor Robbers is the Director of the Institute for European Constitutional Law and a judge at the Administrative Court of Appeals Rhineland-Palatine. He is a member of the Board of Directors of the European Consortium for Church-State Research and is also a member of the OSCE Board of Experts on Religious Freedom. He is the managing co-editor of *Archiv des öffentlichen Rechts* and editor of *STATE AND CHURCH IN THE EUROPEAN UNION* (1997).

1. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: GERMANY (Sept. 5, 2000) (visited Mar. 15, 2001) <[http://www.state.gov/www/global/human\\_rights/irf/irf\\_rpt/irf\\_germany.html](http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_germany.html)> [hereinafter U.S. STATE DEP'T 2000 REPORT].

2. Religious freedom is guaranteed in Article 4 of the German Constitution, which translates as follows:

- I. Freedom of belief and of conscience and freedom of creed, religious or ideological, are inviolable.
- II. The undisturbed practice of religion shall be guaranteed.

freedoms. Only human dignity,<sup>3</sup> freedom and life,<sup>4</sup> and equal protection<sup>5</sup> are human rights placed before religious freedom in Germany's constitution. Religious freedom under the German constitution means freedom of belief and freedom to act according to one's beliefs. The constitution secures religious freedom for both individuals and collective bodies.

The various freedoms guaranteed for religious institutions in Germany can be found in the German constitution, in the constitutions of the German *Länder* and in ordinary laws, and in the various treaties between the state and specific religions.<sup>6</sup> In addition to the central guarantee of religious freedom, the constitution offers additional religious rights and institutional guarantees for churches and religious communities. According to Article 3 of the constitution, no one shall be prejudiced or favored because of his faith or religion.<sup>7</sup> This guarantee is specified for civil rights, public office, and public service.<sup>8</sup> Article 4 provides for the right to refrain from military service in the name of religion.<sup>9</sup> Article 7 guarantees religious instruction in public schools and includes the right to abstain from that instruction.<sup>10</sup> Article 7 also secures the right to establish and to run religiously or ideologically based private schools.<sup>11</sup>

Several far-reaching institutional guarantees for churches and other religious communities referred to in the German constitution<sup>12</sup> have been incorporated from the German Reich's Weimar constitution of 1919 ("WRV").<sup>13</sup> The most important provisions are

---

III. No one may be compelled against his conscience into military service involving armed combat. Details shall be regulated by federal law.

GRUNDGESETZ [Constitution] [GG] art. 4 (F.R.G.).

3. GG art. 1.

4. GG art. 2.

5. GG art. 3.

6. All sixteen *Länder* (i.e., states) of the Federal Republic of Germany have their own constitutions, most of which contain guarantees of fundamental rights including religious freedom.

7. GG art. 3(III).

8. GG art. 33(III). *See also* GG art. 140; WEIMARER REICHsverFASSUNG [Constitution of the Weimar Republic] [WRV] art. 136.

9. GG art. 4(III), 12a(II), (III).

10. GG art. 7(II), (III).

11. GG art. 7(IV), (V).

12. GG art. 140.

13. WRV arts. 136–39 & 141.

as follows: there shall be no state church, i.e., no established church;<sup>14</sup> all religious communities shall enjoy the right to self-determination,<sup>15</sup> the status of certain religious communities as public corporations,<sup>16</sup> equal rights to associations that foster a non-religious, philosophical creed,<sup>17</sup> the guarantee of Sundays and feast-days,<sup>18</sup> and chaplainry in public institutions.<sup>19</sup>

The preamble to the German constitution also describes Germany's commitment to religious freedom. It states: "Conscious of their responsibility before God and humankind, animated by the resolve to serve world peace as an equal part of a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law."<sup>20</sup> The reference to God and humankind acknowledges responsibility for the crimes committed during national-socialism and responsibility to prevent a repetition of those events in Germany. This reference to God does not allude to nor establish any specific religious belief.<sup>21</sup> Rather, by referring to God, the preamble acknowledges a sphere of transcendence, indicating a borderline for the state—that is, a field beyond the reach of the state. It suggests that there is something other than the political order established by the constitution, that the state is not all-powerful. The preamble is anti-totalitarian.

#### *B. Other Textual Sources of Religious Freedom*

Religious freedom in Germany is rooted as well in texts other than the constitution, such as the *Länder* constitutions, agreements between the government and specific religious organizations, and case law. The *Länder* are responsible for most competencies in matters of religion, churches, and other religious communities. *Länder* constitutions and ordinary laws govern the concrete shape of

---

14. WRV art. 137(I).

15. WRV art. 137(III).

16. WRV art. 137(V).

17. *Weltanschauungsgemeinschaften* [non-religious philosophical organizations]; WRV art. 137(VII).

18. WRV art. 139.

19. WRV art. 141.

20. GG preamble.

21. See Christian Starck, *Präambel*, No. 36, in 1 DAS BONNER GRUNDGESETZ, KOMMENTAR [THE BONN CONSTITUTION, COMMENTARY] (Hans von Mangoldt et al. eds., 1999).

the regime of church-state relations and religious freedom in Germany. They do so in a variety of ways, all rich in detail and diversity.<sup>22</sup> The basic, and sometimes controversial, features of this system include the legal status of churches and other religious communities, the church tax, religious instruction in public schools, and the right to self-determination. Many details of the German system of religious freedom are being laid down in agreements between the state and a considerable number of religious communities.<sup>23</sup> Through these agreements, the specific needs of various religious communities can be adequately accommodated. As for the influence of case law, the jurisdiction of the courts regarding church-state issues is vast.<sup>24</sup> Despite a number of questionable decisions, German courts and the administration are generally favorably disposed toward religion and religious communities, accepting them as an integral part of society.

### III. THE BASIC PRINCIPLES OF THE LAW ON RELIGION: FREEDOM, STATE NEUTRALITY, AND EQUAL TREATMENT

The sources of the law on religion as discussed above may be categorized into three basic ideas: freedom, state neutrality, and equal treatment. These underlying ideas are undoubtedly interlinked. Additional principles, such as tolerance, also figure into their implementation. To state these basic ideas does not amount to structuring a theory, but merely to identify some of the most predominant leading categories.

Religious freedom is fully understood only as a positive freedom. State neutrality is in harmony with the special status of religions, as well as with religious instruction in public schools, and it requires far reaching self-determination of religious institutions. Equal treatment

---

22. See AXEL FREIHERR VON CAMPENHAUSEN, STAATSKIRCHENRECHT: EIN STUDIENBUCH [CIVIL ECCLESIASTICAL LAW: A HANDBOOK] (3d ed. 1996). See generally Heiner Marré, *Das kirchliche Besteuerungsrecht* [Church Taxation Law], in 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [HANDBOOK OF CIVIL ECCLESIASTICAL LAW IN GERMANY] 1101 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994); BERND JEAND'HEUR & STEFAN KORIOTH, GRUNDZÜGE DES STAATSKIRCHENRECHTS [PRINCIPLES OF CIVIL ECCLESIASTICAL LAW] (2000).

23. See DIE KONKORDATE UND KIRCHENVERTRÄGE IN DER BUNDESREPUBLIK DEUTSCHLAND [CONCORDATS AND CHURCH CONTRACTS IN GERMANY] (Joseph Listl ed., 1987).

24. For a more complete reference to recent German (and French) court decisions in matters of religion, see the database at <<http://www.uni-trier.de/~ievr>> (visited Feb. 15, 2001).

requires awareness of the specific needs of different religions. These principles and their adequate interpretation rest in underlying cultural convictions rooted in Germany's cultural history.

#### *A. Religious Freedom*

The primary idea of freedom means that all religious creeds are tolerated and free to flourish. In addition to mere toleration, the German political system supports the idea of positive freedom. While government must not forbid certain beliefs nor discriminate against them, it must also go further to create a positive atmosphere of tolerance within society. In this context, one may mention the problems there were some time ago with the Church of Scientology, or, on quite a different level, shameful ongoing attacks on Jewish institutions, even if not directly rooted in religious prejudice. The legal framework embodied in the basic idea of positive religious freedom must give ample room for the exercise of religious beliefs.

Pursuant to this idea of positive religious freedom, the Federal Constitutional Court decided, for example, that the general association law of Germany must be interpreted in a manner compatible with the specific religious needs of the Bahá'í.<sup>25</sup> The general interpretation of the law on associations normally requires each registered association to have a legally independent board of governors. The Court held that the local associations of the Bahá'í, because of religious liberty, are free to formally affiliate themselves with one national board of governors.

In recognition of the importance of religious freedom, Germany's constitution mandates that laws that limit religious freedom comply with special requirements. Other freedoms, like the freedom of association or the free exercise of one's profession, can be limited by laws protecting any legitimate public interest and complying with other constitutional standards like proportionality, certainty, or the protection of reasonable trust. Religious freedom cannot be limited by just any law purporting to protect the public interest. It can only be limited by a law that enforces public interests laid down in the Constitution itself.<sup>26</sup> These limits should be interpreted narrowly, thereby respecting the importance of religious

---

25. Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court] [hereinafter BVerfGE] 83, 341.

26. BVerfGE 32, 98 (107).

freedom. Thus, an optimal balance has to be found respecting both religious freedom and other legitimate public interests.

The Federal Administrative Court has recently weighed religious freedoms against public interests to decide whether students and teachers may participate in religious traditions that may interfere with public school regulations. In one instance, the Federal Administrative Court allowed a female Islamic student in public school to opt out of otherwise compulsory coeducational sports classes, such as coeducational swimming. Her religious belief prescribed certain dressing rules for girls incompatible with the normal level of coeducational sports involvement.<sup>27</sup> In addition, Islamic pupils can obtain leave from school for certain high Islamic religious holidays.<sup>28</sup> Female Islamic pupils are also permitted to exercise their right to religious freedom by wearing religious head scarves in school; apparently this creates no legal problems nor public concern in Germany. However, the issue of whether an Islamic public school teacher can wear a religious scarf poses the question of whether or not this interferes with the public schools' obligation to maintain religious neutrality. There are two cases pending before courts on the matter. The Administrative Court in Stuttgart decided that the duty of religious neutrality in school prevails over the religious rights of the teacher.<sup>29</sup> By contrast, the Administrative Court in Lüneburg decided that the teacher's right to religious freedom prevails.<sup>30</sup> Both cases are now pending before higher courts.

The decisive question in both of the above-mentioned cases is probably not that of religious freedom. It is instead the ability of the individual teacher to ensure neutrality of public school education and not to indoctrinate children. If teachers are able to abstain from indoctrinating the children, the teacher should be allowed to wear her head scarf, as is known to be the practice in Northrhine-Westfalia.

---

27. Entscheidungen des Bundesverwaltungsgerichts [Decisions of the Federal Administrative Court] [hereinafter BVerwGE] 94, 82.

28. See Answer of the Federal Government to the Question of the Fraction of CDU/CSU, Bundestags-Drucksache [Federal Parliament-Printed Document] [hereinafter BT-Drs.] 14/4530 (08.11.2000) [Nov. 8, 2000].

29. Verwaltungsgericht [Administrative Court] [hereinafter VG] Stuttgart, NVwZ [NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT/NEW J. FOR ADMIN. L.] 959 (2000).

30. VG Lüneburg, NJW [NEUE JURISTISCHE WOCHENSCHRIFT/NEW LEGAL WKLY.] 707 (2001).

### *B. Neutrality*

The second category of Germany's law on religion is neutrality. Neutrality embraces the principles of non-identification and non-intervention. From the principle of non-identification it follows that there is no established church in Germany.<sup>31</sup> Religious communities are either organized as private associations or as corporations under public law. There is no special register for religious communities in Germany. A manifestation of non-intervention is that the government guarantees far reaching self-determination of religious communities.

#### *1. Public law status*

Germany retains neutrality in part by not maintaining an established state church. The basic elements for legally organizing a church are outlined in Article 140 of the Constitution. It provides that religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past.<sup>32</sup> Other religious societies shall be granted the same rights upon application if their constitution and the number of their members give assurance of their permanency.

Granting churches and other religious communities legal status as corporations under public law does not incorporate them into the state hierarchy.<sup>33</sup> On the contrary, it is a status *sui generis* ("in a class of its own"). Each religious community that gives some assurance of its permanency and its loyalty to the law<sup>34</sup> can obtain this status as a public corporation. In fact, many various religious communities are organized as public law corporations in the various *Länder*. The two largest churches in Germany, the Catholic and the Protestant Church, each of which comprises about twenty-seven million members,<sup>35</sup> are both public law corporations. So are Jewish cult

---

31. WRV art. 137(I); GG art. 140.

32. WRV art. 137(V); GG art. 140.

33. BVerfGE 18, 385 (386); BVerfGE 30, 415 (428); BVerfGE 42, 312 (332); BVerfGE 66, 1 (19).

34. See WRV art. 137(V); GG art. 140.

35. As of 1997, the population of Germany was estimated at 82 million. Of this, there are approximately 27.4 million Catholics, 27.4 million Protestants, 3 million Muslims, 1 million Orthodox, 150,000 Jews, 140,000 Buddhists, 66,000 Hindus, 5000 Bahá'í, 2 million members of numerous smaller religious communities, and 21 million of no religious membership. The data for some religious communities is rather uncertain; in recent years there

communities, the Seventh-Day Adventist Church, the Church of Jesus Christ of Latter-day Saints, the Baptist Church, the Christ-Catholics, the New Apostolic Church, the Anglican Church, a number of Orthodox Churches, Pentecostal Communities, Christian Science, the Mennonites, the Methodist Church, and the Salvation Army. A number of philosophical, non-religious communities such as the Alliance for Spiritual Freedom or the Humanist Community are also public law corporations.<sup>36</sup>

Whether Jehovah's Witnesses should obtain the status of public corporation is now pending again before the Federal Administrative Court. In its first decision, the Court, contrary to the lower courts, decided that a religious or philosophical community must be "loyal to the State" to achieve the status of a public law corporation.<sup>37</sup> This element was somewhat of a surprise addition to the requirements generally recognized by law and jurisprudence to achieve this status. Moreover, the Court held that Jehovah's Witnesses did not meet this requirement because Jehovah's Witnesses, as a compelling precept of faith, denied the active and passive right of their members to vote in democratic state elections. Although there is no individual legal duty in Germany to vote, the denial of participation in public elections would undermine part of the basic principles of democratic order.

The Federal Constitutional Court vacated the judgment and remanded the case to the Federal Administrative Court.<sup>38</sup> The Federal Constitutional Court held that loyalty to the state is not requisite to obtaining public law status for a religious community. A religious community applying to become a corporation under public law must, however, be loyal to the law. It must guarantee that it will observe the law and that it will exercise its rights in accordance with the constitution and other laws. Furthermore, it must guarantee that its future conduct will not endanger the fundamental principles of

---

has been strong Jewish immigration from eastern countries. See STATISTISCHES JAHRBUCH FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [STATISTICAL YEARBOOK FOR GERMANY] 95 (2000); *Deutschland, in* 2 RELIGION IN GESCHICHTE UND GEGENWART [RELIGION IN HISTORY AND CURRENT TIMES] 751 (4th ed. 1999).

36. For an updated list of churches and religious communities, as well as philosophical bodies with public law status, see the website of the Institute for European Constitutional Law at the University of Trier: <<http://www.uni-trier.de/~ievr>> (visited Feb. 15, 2001).

37. BVerwGE 105, 117.

38. BVerfG 19.12.2000 – 2 BvR 1500/97. See <[http://www.bverfg.de/entscheidungen/frames/rs20001219\\_2bvr150097](http://www.bverfg.de/entscheidungen/frames/rs20001219_2bvr150097)>.



the constitution contained in Article 79.<sup>39</sup> These include human dignity, the core principles of human rights, the rule of law, and state democracy. The religious organization must not endanger the fundamental rights of third persons. Finally, it must not infringe upon the fundamental principles of law concerning religion, based on the idea of freedom and established by the constitution. The law does not require any loyalty to the state extending further than that.

Whether Jehovah's Witnesses will obtain status as a public law corporation is still uncertain. The Federal Administrative Court must now determine whether this religious community would persistently act contrary to the law. For example, if Jehovah's Witnesses endanger the well-being of children by their rules on education or if they coerce disaffected members into staying in the community, these practices would be considered contrary to law.

There are some specific rights attached to the status of religious or philosophical public law corporations. They have the right to employ civil servants and to create public law things (*res sacrae*, etc.).<sup>40</sup> The most obvious example of the rights attached to the public law status is a church's right to tax its members. This tax functions like a membership fee. Those churches that do tax their members usually levy a tax of eight or nine percent of what the member pays in state income taxes. Some of the taxing churches use the state's taxation system, i.e., the state machinery collects the church tax. For this service, a churches pays four to five percent of its tax revenue to the state. Indeed, the church tax system was introduced to de-establish former state churches in the nineteenth century and to force them to depend on their own income.<sup>41</sup> The institution of church taxes is thus a consequence of state neutrality.

---

39. GG art. 79(III).

40. "Public law things" (*öffentliche Sachen*) is a special institution of German law meaning the dedication of means such as streets, places, furniture, books, or the like to public use, irrespective of civil law ownership. The dedication creates a special status of these things protecting the public use. For a discussion of the relationship between public law things and churches, see Dieter Schütz, *Res sacrae*, in 2 HANDBUCH DES STAATSKIRCHENRECHTS [HANDBOOK OF CIVIL ECCLESIASTICAL LAW] 3 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1995).

41. See Marré, *supra* note 22, at 1101.

*2. Religious instruction in public schools*

The idea of religious instruction<sup>42</sup> in public schools in Germany also follows from state neutrality. Religious instruction in public schools is offered as an ordinary subject by the state. Its content, however, is determined by the relevant religious communities, irrespective of their status as private or public law corporations. Thus Catholic religious instruction is provided for Catholic pupils, Protestant instruction for Protestants, Jewish instruction for Jews, and Islamic instruction for Muslims.<sup>43</sup> As soon as a minimum number of pupils aggregate in a public school,<sup>44</sup> the school must provide religious instruction funded by the state. There is no obligation to attend, for the pupils can opt out, and no teacher is obliged to teach contrary to his or her own religious convictions.

The reasoning behind this system follows from the idea of state neutrality. Because the state makes schooling compulsory, the government takes much of the pupils' time and energy. Indeed, the government takes over the responsibility for the children's education in all aspects. As such, at least from the view of positive religious freedom, the state must also accommodate religious needs.

Many say<sup>45</sup> this system of providing religious instruction in public schools is a direct consequence of the idea of separation of church and state. Public education is based on the idea that the state has some responsibility to educate the upcoming generation. This responsibility stands alongside the right of the parents to raise their children according to their own convictions. An important purpose for religious education in public schools is the objective of integrating the population, of unifying the pluralistic and sometimes antagonistic society.

Education is a process of developing the whole personality of a

---

42. See generally Gerhard Robbers, *Art. 7, in 1 DAS BONNER GRUNDGESETZ, KOMMENTAR* [THE BONN CONSTITUTION, COMMENTARY], *supra* note 21; Christoph Link, *Religionsunterricht, in 2 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* [HANDBOOK OF CIVIL ECCLESIASTICAL LAW IN GERMANY], *supra* note 22, at 439.

43. Regarding Islamic religious instruction, see BVerwG, DVBl. [DEUTSCHES VERWALTUNGSBLATT/GERMAN ADMIN J.] 1001 (2000); Martin Heckel, *Religionsunterricht für Muslime?* [Religious Instruction for Muslims?], JZ [JURISTENZEITUNG/JURIST'S J.] 74 (1999); see also *infra* Part III.C.2-3.

44. Anywhere from five to twelve pupils can constitute a sufficient minimum.

45. For references, see generally Link, *supra* note 42, at 503.

young human being. The purpose of education is not only to convey certain specific knowledge of facts and specific technical abilities, but to integrate a personality into a culture. This holistic understanding of education also encompasses religion. To form a personality also means to open the field of religious convictions and ideas to an individual. The religious side of a personality cannot be formed by merely confronting a youth with different ideas, leaving the decision completely to that person in a later age. Forming a personality within a religious life means to convey and accept a set of truths and deeply-rooted convictions. Embracing religion means to rely on certain truths.

The necessity of teaching religion through religious convictions may be compared to teaching a language. A child in Spain does not learn how to speak by comparing all the different major languages in the world in order to one day be able to choose between all of them whichever one may best fit his or her convictions. Children in Spain are simply taught Spanish. Any other method would inhibit children from being able to speak at all. After the initial language is mastered, additional languages can be learned and explored.

Teaching a child within one specific religion, however, poses a dilemma for the neutral state. The neutral state cannot implement religious truth, but has to be open to different religious ideas. Bearing the responsibility—along with parents—of forming the personality of the young person, the state has a duty to cultivate the religious side of the personality. Rejecting religion completely by pushing it aside to the evening hours or to Sundays, or in other ways ignoring the thirst for truth, would discriminate against religion. This again would lead to a compromise of state neutrality. Moreover, rejecting religion would mean to fail in the task of forming the whole personality of the child and of integrating important aspects of society.

To achieve these goals, the state facilitates religious instruction in public schools, but allows the relevant religious communities to define its content. The religious organizations decide on the spiritual curriculum; they decide on truth. The state is obliged only to make religious instruction adequately available and to guarantee that no one is forced to take these courses. If it is truly voluntary, this cooperationist approach neatly separates church and state.

### 3. *Religious communities and self-determination*

*a. Principles of religious self-determination.* Governmental neutrality also means nonintervention in the internal affairs of religious communities. All religious communities, regardless of their organizational status, enjoy very broad self-determination or autonomy. All enjoy a number of exemptions or special considerations with regard to labor laws, data protection laws, etc. The legal treatment of religious communities is somewhat similar to the treatment of tendency corporations, whose employees can be legally dismissed by the employer if they publicly contradict the opinions their employer represents. For example, a medical doctor was legally dismissed by a Catholic hospital in Germany when he advocated far-reaching abortion rights in a national newspaper and on television, while identifying his position in the Catholic hospital.<sup>46</sup> The religiously based employer is quite free to define the loyalty obligations of its employees in order to protect the employer's public image. This latitude must be balanced against the employee's freedom of expression.

*b. Limits to religious self-determination.* Limitations to church self-determination are only those prescribed by a "law that applies to all."<sup>47</sup> There is some debate about the correct meaning of that limitation phrase. The Federal Constitutional Court has offered different explanations.

The first attempt to elaborate the limitation clause amounts to a theory of spheres.<sup>48</sup> The Court recognizes an inner sphere of church affairs insulated from matters of the state or secular society. The inner sphere would, for example, embrace the doctrines of the church. No state law may limit autonomy within this inner sphere. Outside this core, an outer sphere of church affairs embraces its

---

46. BVerfGE 70, 138; European Commission for Human Rights 06.09.1989 [Sept. 6, 1989] BNr. 12242/86; Rommelfanger.

47. WRV art. 137(III); GG art. 140; Konrad Hesse, *Das Selbstbestimmungsrecht der Kirchen und Religionsgemeinschaften* [*The Right to Self-Determination of Churches and Religious Communities*], in 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDES-REPUBLIK DEUTSCHLAND [HANDBOOK OF CIVIL ECCLESIASTICAL LAW IN GERMANY], *supra* note 22, at 521; Alexander Hollerbach, *Der verfassungsrechtliche Schutz kirchlicher Organisation* [*The Constitutional Protection of Church Organization*], in 6 HANDBUCH DES STAATSRCHTS [HANDBOOK OF STATE LAW] 557 (Joseph Isensee & Paul Kirchhof eds., 1989).

48. BVerfGE 18, 385 (387); BVerfGE 42, 312 (334); BVerfGE 66, 1 (20); BVerfGE 72, 278 (289).

interaction with public matters. Business activities, such as banking or insurance, fall into this sphere. State laws can limit church activities in this outer sphere in the same way as for any other purpose.

Charmingly simple at first glance, this theory has provoked intense criticism. It is very difficult—probably impossible—to clearly distinguish these two spheres. Filling offices in the church would generally be regarded as a core question for the church. The question of women priests, imams, or rabbis, for example, raises important theological problems. Removing someone from church office—such as a Catholic priest who converts to Protestantism—seems to be a matter of the inner sphere, but it would also clearly implicate state interests in protecting individuals from undue dismissal.

The second attempt to elaborate the limitation clause is the so-called “everyone clause.” It states that only those limitations on church autonomy are valid that affect churches or other religious communities in no other way than anyone else.<sup>49</sup> Yet there are numerous laws that only affect the religious organizations or affect them specifically, and the constitutionality of these laws is undisputed. These laws concern, for example, church taxation, church subsidies, or religious instruction in public schools. Many laws impact churches differently than they impact other organizations. For instance, regulations on public noise affect church bell-ringing or imam prayer call.

The third approach is the balancing theory—the prevailing “test” today. It approves of general laws that limit church autonomy only if they are necessary to guarantee the “compelling requirements” of peaceful coexistence in a society that is religiously neutral and respects the freedom of religious communities. Competing interests of church and state must be carefully balanced, leading, if possible, to an optimum for both.<sup>50</sup>

---

49. BVerfGE 42, 312 (334).

50. BVerfGE 53, 366 (401); BVerfGE 66, 1 (22); BVerfGE 70, 138 (167); BVerfGE 72, 278 (289).

### C. *Equal Treatment*

#### 1. *The theory of equal treatment*

The third category of Germany's law on religion is equal treatment. The rights of religious organizations do not depend on the state's opinion of their creed. Indeed, the state is forbidden from judging the spiritual truth of any creed. All religions have similar rights, whether the organization is large or small, traditional or newly founded.<sup>51</sup> There can be, however, certain variations according to the social importance of a group. Religious instruction in public schools requires a certain number of pupils of the same religious community.<sup>52</sup> State collection of church taxes requires a certain number of members—25,000 in Bavaria or 40,000 in Northrhine-Westfalia.<sup>53</sup> In qualifying as a corporation under public law, the size of membership can indicate the organization's prospects for permanency.<sup>54</sup>

This is quite in line with the principle of equal protection. Taken seriously, the idea of equal rights makes possible a system of adequate attribution of positions. Equality does not mean identity, but adequacy, i.e., appropriate rights and positions. From the perspective of equality differences are possible as long as they are legitimate. Differences have to be based on legitimate reasons.

#### 2. *Putting theory into practice: Islamic immigration and integration into Germany*

Probably the foremost challenge in German law on religion today is the need to integrate the large Islamic population. About three million Muslims live in Germany today. The most recent official statement about Muslims in Germany is found in an Answer of the Federal Government to the Parliamentary Question of the

---

51. Gerhard Robbers, *Minority Churches in Germany*, in THE LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION 153 (European Consortium for Church-State Research ed., 1994); Josef Jurina, *Die Religionsgemeinschaften mit privatrechtlichem Rechtsstatus* [*Religious Communities with Private-law Status*], in 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [HAND-BOOK OF CIVIL ECCLESIASTICAL LAW IN GERMANY], *supra* note 22, at 689.

52. See Robbers, *supra* note 42, at No. 144.

53. See VON CAMPENHAUSEN, *supra* note 22, at 267.

54. WRV art. 137(V); GG art. 140.

Fraction of the CDU/CSU.<sup>55</sup> The experience of integrating Islam on a large scale is new. The overwhelming majority of Muslims, primarily from Turkey, have immigrated into the country seeking work within the last four decades. Originally, immigrants were expected to return to their home country after finishing their work, but now many have decided to stay in Germany. In response, Germany's law on religion will have to show its ability to integrate or will risk losing legitimacy. Christians and Muslims have long-established and deeply rooted sets of values. In meeting, both must be open to adaptation to assure peaceful coexistence. Many cultural habits can result in social tensions. It is remarkable how few incidents of that kind have occurred. So far, xenophobia has not crystallized on religious questions.

German law, like all European and North American law, is deeply influenced by Judeo-Christian ideas. To date, for the law, the most difficult aspect of handling Islam is its different cultural attitudes toward representation. Many public institutions must interact with someone who represents the community of believers in order to provide religious freedom. A representative is needed to form a public corporation, to establish the content of religious instruction in public schools, or to apply for an exception to animal protection laws that prohibit ritual slaughter.<sup>56</sup> Considerable progress has been made as Muslims have organized themselves in Islamic associations and have achieved representation before government offices. However, there remains considerable fluctuation in terms of institutions and personnel.

### *3. Islamic religious instruction in public schools*

Following a decision of the Federal Administrative Court, Islamic religious instruction as a distinct subject can now be offered in public schools in Berlin.<sup>57</sup> This development will influence the situation in the other *Länder*; about 700,000 Islamic pupils attend German schools.

In general, though, Islamic religious instruction is still taught differently from normal religious instruction in many public schools

---

55. BT-Drs., *supra* note 28, 14/4530 (08.11.2000) [Nov. 8, 2000].

56. BVerwGE 99, 1; BVerwG (23.11.2000) [Nov. 23, 2000] – 3 C 40.99.

57. BVerwG DVBl. [DEUTSCHES VERWALTUNGSBLATT/GERMAN ADMIN. J.] 1001 (2000).

and thus deviates from the constitutional requirements. Since the need for Islamic religious instruction in public schools has become urgent in the last three decades, no representatives of Islam (who could determine the Islamic curriculum) have been accepted by the relevant Islamic population as legitimate. Meanwhile, in order to provide some Islamic instruction, it is taught as an integral part of the classes in Islamic culture and language that are offered in many public schools to enable Muslims, especially Turks, to remain rooted in their mother tongue and culture. Similar instruction is offered in Farsi and Arabic. In doing so, some *Länder* are cooperating with certain local Islamic associations in Germany to establish the relevant curricula, and others are cooperating with the Turkish consulates. Yet, this means that state authorities decide on curricula on religion contrary to the constitution, though at present it is as near to the constitutional requirements as possible. For the future one can hope that a number of Islam associations may prove representative enough to establish Islam curricula in order to introduce confessional Islamic religion instruction on a larger scale in complete conformity with the constitutional requirements.

*D. Background Convictions of Religious Freedom in Germany*

Three cultural convictions stand behind the current German system: the necessity of institutions for religious life, freedom of religion as a positive freedom, and the idea that religion is a positive factor in public life. These explain the current legal system in Germany regarding freedom of religion.

First, religious freedom, though highly personal and individual, cannot do without institutions. Religion as a matter of social fact is a matter of community, exercised in community with others. Institutions are the framework, the basis, and the structure in which individual belief prospers. No legal order disregarding the institutional aspect of religious freedom can fully guarantee this human right.

Second, religious freedom is adequately guaranteed as a positive freedom. The law must actively accommodate the religious convictions of the people. If government supports culture by providing theatres for the fine arts and supports fitness by providing stadiums and swimming pools, then the government must not discriminate against human religious needs just because they are religious.



Third, religion and philosophical creeds are regarded as a positive factor in public life. They have not only private but public standing, without being part of the state. German legal culture recognizes a public sphere, which is distinct from governmental or private spheres.

#### IV. READY LAW AND REAL LIFE: CONTROVERSIAL ISSUES

Like a number of other European states and organizations, Germany has conducted a parliamentary report on smaller and new religious communities.<sup>58</sup> This report became an object of particular concern especially in the United States. Parliamentary reports were published in France, Spain, Belgium, the Netherlands, Italy, Sweden, Germany, the European Union, and the Council of Europe.<sup>59</sup> The German parliamentary report, compared to most of the other

58. BT-Drs. 13/10950, Neue religiöse und ideologische Gemeinschaften und Psychogruppen in der Bundesrepublik Deutschland—Endbericht der Enquête-Kommission “Sogenannte Sekten und Psychogruppen” [New Religious and Ideological Communities and Psychological Groups in Germany—Final Report of the Enquête-Commission “So-Called Sects and Psychological Groups”] vom 9.6.1998 [from June 9, 1998].

59. France: Rapport no. 2468 de M. Jacques Guyard, fait au nom de la commission d’enquête sur les sectes, President M. Alain Gest, 22.12.1995 [(Parliamentary) Report No. 2468 from Mr. Jacques Guyard, done in the name of the enquiry commission about the sects, President Mr. Alain Gest, Dec. 22, 1995]; Belgium: Rapport fait au nom de la commission d’enquête par Mm. Duquesne et Willems, Rapport de la Commission Parlementaire belge d’enquête sur les Sectes [Report done in the name of the enquiry commission by Mr. Duquesne and Mr. Willems, Report of the Belgian parliamentary commission of enquiry into sects] 313/7 – 95/96; Spain: Sectas en España [Sects in Spain], Juan Manuel del Pozo Alvarez, III Legislatura [III legislation], Madrid 1989; Netherlands: Onderzoek betreffende Sekten, Overheid en nieuwe religieuze bewegingen, Tobias A. M. Witteveen, Tweede Kamer der Staten – Generaal, Vergaderjaar [Enquiry concerning sects, office of new religious movements, Tobias A. M. Witteveen, Second Chamber of the States-General, session year] 1983–1984, Drucksache [Printed document] 16635, 1984; Italy: Sette religiose e nuovi movimenti magici in Italia, Ministero dell’ Interno, Dipartimento della Pubblica Sicurezza, Roma [Religious sects and new magic movements in Italy, Ministry of the Interior, Department of Public Security, Rome] 1998; Sweden: In Good Faith, Society and the new religious movements, Summary. SOU 1998: 113, at <[http://www.social.regeringen.se/propositionerum/sou/pdf/sou98\\_113eng.pdf](http://www.social.regeringen.se/propositionerum/sou/pdf/sou98_113eng.pdf)> (visited Mar. 15, 2001). European Union; EP EG No. C 078 of 18.3.1996, at 0031; Council of Europe: AS Jur (1998) 38 – 15.5.1998 – 06–17, ajdoc 38.98. In the United Kingdom, there were government-initiated enquiries: Sir John Foster, Enquiring into the Practice and Effects of Scientology HMSO, 1971; Eileen Barker, New Religious Movements: A Practical Introduction, HMSO, 1989; *see also* Australia: Report of the Board of Enquiry into Scientology, Anderson, K. V., Q. C., State of Victoria, Australia 1965; New Zealand: Hubbard Scientology Organisation in New Zealand and any Associated Scientology Organizations or Bodies in New Zealand, Report of the Commission of Inquiry, Wellington 1969.

parliamentary reports, probably draws the least far reaching conclusions. It found that existing law was, on the whole, adequate to handle any specific dangers posed by those communities. Probably the most far reaching suggestion was to consider introducing criminal liability for legal persons. So far, the concept of criminal liability for legal persons is alien to German law. Introducing it would have implications by no means focused on religious communities. The report states explicitly that problems and dangers for individual believers (that might result from conflicts in their individual and social sphere) must be balanced against the individual and social benefit that people can experience in these religious groups. The report thus suggests interdisciplinary and independent research in the field of religious, ideological, and psychological phenomena.<sup>60</sup>

Certainly one can doubt the necessity and perhaps the legitimacy of parliamentary reports on religious communities. The dangers are obvious. Governments could be tempted to make statements about the truth of the different doctrines contrary to state neutrality. Religious communities could feel attacked and intimidated by being publicly monitored. The fact of certain religious communities being the object of parliamentary scrutiny might deter individuals from joining such communities.

The preliminary, interim report<sup>61</sup> was by no means appropriate to ease such concerns. The final report, though, managed in general to avoid undue statements. The report, in order to avoid stigmatization, did not contain a list of relevant communities.

The report would justify its monitoring of religious communities by the very duty of government to prevent public danger. The Federal Constitutional Court has upheld the government's right to warn against dangers of religious communities.<sup>62</sup> Reports of collective suicides or mass murder,<sup>63</sup> and of child misuse in some

---

60. BT-Drs., *supra* note 57, 13/10950, 6.1/6.2.

61. BT-Drs. 13/8170.

62. BVerfG NJW [NEUE JURISTISCHE WOCHENSCHRIFT/NEW LEGAL WKLY.] 3269 (1989).

63. For example, the activities of Aum-Shinrikyô in Japan created widespread concern. Cf. R.J. Kisala, *Reactions to Aum: The Revision of the Religious Corporation Law*, in 22 JAPANESE RELIGIONS 60-74 (1997); Charles Schwarzenegger, *Über das Verhältnis von Religion, Sekten und Kriminalität, Eine Analyse der kriminologischen und strafrechtlichen Aspekte am Beispiel der japanischen Aum-Shinrikyô-Sekte* [On the Relationship between Religion, Sects, and Crime, An Analysis of the Criminological and Criminal Law Aspects Based on the

religious communities had created widespread concern.<sup>64</sup> The German parliamentary report in fact did focus somewhat on the psychological status of children in the relevant religious communities.

Many questions had arisen in German society as to whether certain smaller, new, unknown religious communities complied with the very basic requirements of a democratic and peaceful community under the rule of law. Reports, mostly from former members, alleging totalitarian and exploitative practices by religious communities had gained public attention.<sup>65</sup> German society, because of its experience with totalitarian, national-socialist rule, is very sensitive to the threat of any further totalitarianism. Nazi rule rapidly spread from a very small group with an intense ideology and belief to grasp hold of the whole country. A fundamental concern in German society is to ensure against that ever happening again. Being rightly attentive to this issue, however, may occasionally lead the government to be somewhat oversensitive.

In the end, the conclusions of the final parliamentary report almost completely assuaged public concern. The question was off the political agenda virtually overnight. Ultimately, the parliamentary report contributed intensively to religious tolerance in Germany.

It may well be regarded as having been unwise of the report to somewhat single out the Church of Scientology. This report, however, must be considered in its contemporary context. At that time, intense public debate and probably undue excitement raged on all sides. In the time before the report was published, the Church of Scientology had distributed a pamphlet indicating its situation in Germany to be alike the persecution of the Jews under national-socialism.<sup>66</sup> This reproach was felt to be a gross and outrageous

---

*Example of the Japanese Aum-Shinrikyō Sect*], in SEKTEN UND OKKULTISMUS, KRIMINOLOGISCHE ASPEKTE, REIHE KRIMINOLOGIE [SECTS AND OCCULTISM, CRIMINOLOGICAL ASPECTS, CRIMINOLOGICAL SERIES] 14 (Pierre-Henri Bolle et al. eds., 1996).

64. ARBEITSGEMEINSCHAFT KINDERUND JUGENDSCHUTZ HAMBURG E.V.: SATANISMUS UND RITUELLER MISBRAUCH, AKTUELLE ENTWICKLUNGEN UND KONSEQUENZEN FÜR DIE JUGENDHILFE [COMMITTEE FOR CHILD AND ADOLESCENT PROTECTION IN HAMBURG: SATANISM AND RITUAL ABUSE, CURRENT DEVELOPMENT AND CONSEQUENCES FOR THE PROTECTION OF YOUTH] (1996).

65. *See* ENTKOMMEN [ESCAPED] (1993).

66. HASS UND PROPAGANDA [HATE AND PROPAGANDA] (Church of Scientology International ed., 1993).

misuse of the deep suffering of millions; the Special Rapporteur for Religious Freedom of the United Nations, Abdelfattah Amor rejected the comparison as childish.<sup>67</sup> It was felt that the number of debatable decisions regarding the Church of Scientology and the reaction of the free press in Germany could not possibly compare in any reasonable way with the mass-murder and persecution committed under national-socialism. In its latest official statement about the Church of Scientology, which is under observation from the Constitution Protection Office (*Bundesamt für Verfassungsschutz*), the federal government declared it had no information about criminal activity by the Church of Scientology or its members in Germany or about the Church's influence on the economy.<sup>68</sup>

It is estimated that the Church of Scientology has about 8000 adherents in Germany.<sup>69</sup> The whole matter indeed raises central questions about the structures necessary for religious freedom to flourish in Germany. Obviously it is not a uniquely German problem. The Church of Scientology in Germany has not heretofore generally been accepted as a religious community.<sup>70</sup> Since, in general, there is no registration process for religions in Germany, the question of the Church of Scientology's status depends on the courts' determination of cases involving religious matters. A number of court decisions concerning rather different cases<sup>71</sup> relate to whether Scientology is a religion at all. Seemingly, lower courts have been more open to accept Scientology as a religion than have the higher courts.

In 1984, a member of the Church of Scientology struggled to gain acknowledgment as a priest of that community. The status of priest would free him from compulsory military service, an exemption that applies to priests of all religious communities. The

---

67. Implementation of the Declaration of the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief. Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23, Addendum, Visit to Germany: Commission on Human Rights 54th session E/CN.4/1998/6/Add.2.

68. BT-Drs. 14/4541 [Answer of the Federal Government to a Question of the Fraction of the CDU/CSU].

69. See U.S. STATE DEP'T 2000 REPORT, *supra* note 1.

70. Gregor Thüsing, *Ist Scientology eine Religionsgemeinschaft?* [*Is Scientology a Religious Organization?*], 45 ZevKR [ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT/J. FOR PROTESTANT ECCLESIASTICAL L.] 592 (2000).

71. A list of court rulings concerning the Church of Scientology can be found at <<http://www.uni-trier.de/~ievr>> (visited April 30, 2001).

administrative court found him to be a priest. However, the Federal Administrative Court finally rejected his claim on the basis that the Church of Scientology was not a religious community.<sup>72</sup> Most cases about the Church of Scientology's status relate to economics, i.e., whether Scientology is a religion or a business.

It is because of the comfortable, somewhat privileged situation of religion and religious communities in German law that some sort of definition is required as to what a religion would be in terms of the law. In a way, German law is at a loss to define religion as a legal term. The superior courts up to now mainly have decided the following way: Religion as well as ideological creed (*Weltanschauung*) is a certainty about specific statements about the whole of the world as well as about the source and the aim of the life of the human beings. Religion is based on a reality that is transcendent to the human being, whereas ideological creeds take to immanent explanations. An association is a religious or ideological association in the sense of the Basic Law, when its members or followers confess on the basis of a common religious or ideological conviction corresponding ideas about the meaning and the accomplishment of human life.<sup>73</sup> The Federal Constitutional Court, reluctant to give a definition of religion within the last years, has held the following about the range of the freedom of religion clause: in order to define what a religion is, the self-perception of the relevant believer is of major importance for the Court's decision. In a system in which legal consequences are attributed to the status of religion, though, the law, and thus the courts and the state, must have the final decision.<sup>74</sup>

#### V. APPROACHES TO SECURING FREEDOM OF RELIGION

Today, there seem to be two ways to secure human rights: a monitoring approach and a structural approach. The monitoring approach surveys various countries to detect any breach of human rights. Findings are reported to publicly expose misconduct. It can be effective in individual cases, and, if consequently performed, it might well contribute to general keeping in line. This approach

---

72. BVerwG NJW 393 (1985).

73. BVerwGE 89, 368/370; BVerwGE 90, 112/115 f.; BAG JZ 1995, 951/952.

74. BVerfGE 83, 341; cf. Gerhard Robbers, *Staat und Religion* [State and Religion] in 59 VVDStRL [VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER/PUBLICATIONS OF ASS'N OF GERMAN ST. L. TCHRS.] 231 (2000).

resembles the approach of a court or prosecutor. It attempts to effect positive change quickly, and it is a short term perspective.

Alternatively, the structural approach essays to integrate the human rights perspective into the legal and social structures of a culture. This more cooperative approach attempts to work from where the people concerned are. This opens a more long-term perspective, trying to get to the roots. It seeks not to threaten, but to convince. Like other freedoms, religious freedom cannot be adequately described in isolation. This thread weaves into a fabric of freedoms and interests. Freedom of internal belief is undisputed and unproblematic. Freedom to *act* according to one's belief leads to friction. This scope of freedom is limited by other persons' freedoms, the interests of community and state, and cultural circumstances. The difficulty in balancing competing interests within one's own cultural tradition multiplies when one looks at foreign cultures. Values change, different historical, social, and cultural requirements evolve. Restrictions that seem incidental or even illegitimate in one setting may be substantial and legitimate elsewhere.

#### *A. The European Approach to Religious Freedom*

There seems to be a deep difference in some contemporary American approaches to religious freedom and the prevailing German and European approaches. This difference does have some intense consequences, not so much in Germany and Western Europe, but in Eastern Europe.

The prevailing European approach tends to ask whether or not religious groups can adequately live their religion. The inquiry encompasses aspects such as social life, holidays and celebrations, education, and military chaplainry. In Europe, the governments assist in these aspects where necessary and permissible. Funding for cultural and social activities of religious communities is possible as well. In this approach, missionary work belongs to religion as one part of the entire structure. It is a broad meaning of religious freedom.

#### *B. The Marketplace Model*

The other approach experienced in Europe as a predominantly American one is somewhat different. It could be called a marketplace approach of religious freedom. The main question seems to be how

to convince as many people as possible of one's own truths. It is a basically proselytizing idea of religious freedom, drawn from the idea of competition. It is clear that the latter approach can be viewed as a threat by the old, well situated, socially predominant religions. This is especially the case when the new proselytizing religion can spend a lot of money, when it can promise not only truth and tradition, but economic forthcoming, better standard of living, and world travel. That idea of a free marketplace itself is at stake, and with it the idea of fair competition, if from the very beginning some of the competitors have all the money, all the economic resources, and the other competitors have none. Needless to say, this not only threatens the traditional religions, but is also an economic and cultural factor of opening markets.

In the marketplace view of religious freedom, the principle of equal treatment is paramount. Any differences in treatment of religious groups, any special registering of religious groups, any different calibration according to size or social influence, any reasoning drawn from the historical dominance of certain religious denominations are immediately suspect. Any such distinctions are decried, not merely as matters of religious discrimination, but as assaults on religious freedom itself.

### *C. Religious Liberty as a Positive Freedom*

The situation becomes more complicated when religious freedom is understood as a positive freedom. This means that religion is actively given room by public authorities to flourish. As soon as religion is actively given a public role it is necessary to distinguish and to ask for criteria of distribution of means.

For example, when church representatives sit on boards of youth protection or public broadcasting stations, when they act as advisors in parliament's lawmaking process, when they shape religious education in public schools, or when they serve as military chaplains, they cannot do so in precise demographic proportions. How is exact numerical representation possible when certain religious groups consist of a handful of individuals—sincere and religious though they may be? Enlarging the system of public representation to absolute inclusion would bloat institutions to an enormous and unworkable size.

Smaller, newer religious groups will tend to view a system not based on the idea of identical rights as discriminatory, and thus

contrary to religious freedom. The alternative is to sever religion from the public institutions. This would certainly stunt positive religious freedom. Moreover, it would undermine the concept of democratic statehood: the will of the people determines the shape and content of the legal system. If religious orientation were stripped from the “will of the people,” this will would cease to represent its constituents.

#### *D. Germany's Experience*

In Germany, representatives of the Catholic, Protestant, and Jewish constituencies, together with certain civic groups, hold seats on advisory boards and committees that relate to pluralistic representation and ethical issues. For example, boards on youth protection censor or classify pornographic literature; other boards govern public broadcasting institutions. Their purpose is to interpose a layer of public, yet not governmental, institutions between the private individual and the state. Today, up to 150,000 Jewish individuals live in Germany, a comparatively small number due to the Nazi murder of the Jewish people. The Jewish faith communities thus are not as much represented in terms of number, but rather in terms of culture and history. To offer them participation is a moral duty in Germany today—it is a thought unthinkable to first kill millions and then deprive the survivors of their share in representation, arguing they would be too few. These are different aspects of equality in Germany than those that exist in other countries in Europe and the world.

To safeguard religious liberty, the correct paradigm is equal rights, not identical rights. The paradigm of identical rights cannot appreciate the societal function of a religion, its historical impact, or its cultural background. Identical rights would preclude a multitude of manifestations of positive religious freedom. For instance, if an identical right to sit on youth protection boards was granted to each and every religious denomination, any utility of these boards would be crushed by their enormity. The only other way to achieve all inclusive representation would require trampling another religious right to achieve proportional representation. It would require compelling all religious denominations to organize a national board to nominate common delegates. This outcome—identical, all-inclusive representation by government decree—would establish a civil religion.



## VI. CONCLUSION

Religious freedom is safeguarded by a large number of provisions in German law that protect individual as well as collective and corporate freedom. The German idea of religious freedom views this right as a positive freedom, and the government is obliged to give adequate room to actively live one's religion. The system thus established is structured by religious freedom, state neutrality, and equal treatment of religions. It guarantees far reaching self-determination of religious associations. The special status of some religious communities as corporations under public law, and the ability to engage in religious instruction in public schools are in full accordance with these requirements. The most important challenge for Germany's law on religion is the need to integrate large numbers of Islamic immigrants into the system. Gratefully, many positive steps have been taken to achieve this goal. Equal treatment of religion does not require identical, but adequate and proportional rights for all religions. Freedom of religion requires more than the mere idea of a free marketplace of religions. It requires room for actively living one's religion in all its aspects, with religion being positively integrated in law and society.

Securing human rights requires more than the monitoring of other countries—it requires an understanding of different cultures. Monitoring, indeed, is necessary, as it identifies specific problem areas. There are certainly problems in Germany—indeed, how else could it be in a community of 82 million people? A fair evaluation requires a vision of the whole picture. Any concern about specific problems must be considered a concern about religious freedom in general. Concern about home politics or about political or economic influence abroad should not blur the screen. Religious freedom flourishes best in legal and social structures, in atmospheres, in longer-term implementation.

Religious freedom will grow, but only in community with churches and other religious communities, and only with respect of regional experience, traditions, and contemporary and future needs. Protection of human rights is not a one-sided protection of mere individual interests; it involves individuals and community, and must balance often conflicting interests. This balance cannot be modeled in abstracts, and there are no pre-formulated concepts that could ever work. This balance to be brought about requires knowledge of the specific traits of the people concerned, of their aims and needs, of

their historical experiences and emotions, of their values and fears,  
and it will only succeed with openness to new developments.