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**European Law of Religion – organizational and institutional analysis of national systems
and their implications for the future European Integration Process**

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European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process

by Lasia Bloß

Abstract:

The present study puts its main emphasis on the corporate element of the freedom of religion in the European context. The collective side of fundamental rights' protection is often neglected in academic discussion, even though it has major impacts on the whole institutional shape of a given polity. It is not only touching upon the question whether an association should be allowed to be granted legal capacity in its own name and exercise rights and duties of its members as a separate legal person or in the function of an agent, but it is too a question of how a political entity chooses to accept or renounce repercussions due to different standards of how religion as a social phenomenon is established in a given societal context. This paper will analyze existing legal frameworks in four European Member States concerning the organization of state and church; within this approach state-church systems such as the Anglican Church in the United Kingdom, the principle of *laïcité* in France (with the current French controversy about legislation to ban religious symbols from public schools, as proposed by President Jacques Chirac on 17 December 2003) or the more cooperative-oriented systems in Spain and Germany appear to draw a highly differentiated picture of the European Union as a whole being divided into several major legal approaches in this arena. Yet, despite considerable differences in areas such as church tax or public education, a closer analysis allows to detect significant similarities too, especially regarding arising conflicts e.g. facing the increasing number of Muslim populations in each Member State.

Religious organizations and their secular equivalents as one major part of civil society can and will play a meaningful role for the future cohesion of the Union; religion as a social phenomenon, and not only because it is by definition an a-national feature not knowing frontiers in terms of nation states but claiming the one and only (ideological) truth beyond national boundaries, cannot and should not be underestimated – and this not only in perspective to an Osama Bin Laden and his Al'Qaeda or other fundamentalist groups justifying violation with their religious fanaticism, but rather because religion as a sociological feature determines life and values of peoples to a higher degree than politics often presumes. Henceforth, the paper dedicates one chapter to the role religion plays in Western European post-modernist societies by introducing the theoretical approach put

forward by the sociologist Grace Davie. Furthermore, the ECHR-jurisprudence in the religious sector is analyzed throughout another chapter by outlining the sometimes rather contradictory decisions of the Strasbourg organs.

The European Union is facing major challenges, especially under the premise of the enlargement process towards the Central and Eastern European countries – each of them bringing their own culture and history – and their own way of acknowledging religion within their societies. However, the cornerstone has been laid down more than fifty years ago when the Council of Europe concluded the European Convention on Human Rights and Fundamental Freedoms as early as in 1950 – and included in Article 9 ECHR the freedom of religion as the common basis for all States being signatories of this human rights instrument, and so for the European Union Member States and the candidate countries too. The near future will show if and how the Union will be able to establish an own “corporate identity” including policy sectors such as culture and education which, up to date, have played only a minor role in the Brussels sphere by safeguarding domestic idiosyncrasies that shape national identities to be respected in accordance with Article 6 TEU.

Abbreviations

AO	Abgabenordnung (tax law in Germany)
BVerfG	Bundesverfassungsgericht (German Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
CM	(European) Commission
DG	Directorate General
EC	European Community
ECHR	European Convention on Human Rights
ECHR Strasbourg	European Court of Human Rights, Strasbourg
ECJ	European Court of Justice
EKD	Evangelische Kirche in Deutschland
EU	European Union
GDR	German Democratic Republic
GG	Grundgesetz (Constitutional Treaty of Germany)
ICJ	International Court of Justice
IGC	Intergovernmental Conference
ISKCON	International Society for Krishna Consciousness
LOLR	Ley Orgánica de Libertad Religiosa (Spain, 1980)
NGO	Non-governmental Organisation
TEC	Treaty Establishing the European Communities (Maastricht, later Amsterdam version)
TEU	Treaty Establishing the European Union (Amsterdam)
UK	United Kingdom
UN	United Nations
WRV	Weimarer Reichsverfassung (Weimar Constitution)

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I. Introduction

Religion and law correlate primarily in the context of a state; however, the topic “religion and freedom of religion” expands widely beyond the scope of the domestic legal order and has been touching questions of international law for hundreds of years. Much less attention is paid to the European level, particularly to the EU legal order when it comes to religious issues. Approaching the subject from an analytical point of view, some preliminary remarks seem to be necessary: first, it has never been clear, i.e. uniformly agreed upon what the content of the terms “religion” or “freedom” actually encompasses. Therefore, the term “freedom of religion” can only be developed through specific prevailing circumstances – theologically, philosophically, and politically speaking – in a given time frame and a given social entity. Freedom of religion adopts a different connotation depending on the environment and the context that is taken into consideration. This is even more so when regarding non-religious communities which are covered by the same legal provision – the freedom of religion in its negative variant – often phrased with its German original term of “*Weltanschauungsgemeinschaften*” since the expression “*Weltanschauung*” is a genuinely German term deriving from German philosophy. It is nearly impossible to agree upon any sort of coherent content of what should be falling under the roof of this provision since the number of existing or possibly thinkable concepts of individual “*Weltanschauungen*” is probably limitless.

Another unsolved question in the present context is the direction of the liability in terms of addressees – a question which is directed at a precise relation between a constituted polity and the Church as a generic entity. Who is obligated to grant resulting individual and collective rights, i.e. to protect this freedom? This question is answered differently according to the framework one is taking into consideration so that the final picture features various characteristics depending on whether the nation state is cooperating with the prevailing churches inside its territory (e.g. Germany) or whether there is a strict (at least formal) separation between the state and the church (e.g. France)¹. Yet, how *does*, *should* or *can* the analogous picture be drawn for the European level? So far the typical

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¹ For further background information on this topic cf. Blum, Nikolaus, Die Gedanken-, Gewissens- und Religionsfreiheit nach Art. 9 der Europäischen Menschenrechtskonvention, 1990, 44 et seq.

interdependency between individual liberty and institutional relations on the national level² does not find a corollary, i.e. an adequate equivalent in the framework of the TEC.

Leaving this aspect apart, the freedom of religion and conscience evidently belongs to the broader debate about the evolution of the process called the “European constitutionalization” for which the codification of the Charter of Fundamental Rights finalized and officially proclaimed in December 2000 during the IGC in Nice was just one of the first steps – independently of whether or not one agrees with the thesis of *Georg Jellinek* claiming that the freedom of religion is the primary or original fundamental right³ ever.

One last preliminary remark regarding sociological facts concerning the distribution of religion throughout Europe within the history of the EU: The pre-eminent influence of Christianity in Europe is beyond doubt. Similarly evident are the steady tendencies towards pluralism in the history of the Union – while the Six from 1957 were more or less coherently stamped by Catholicism, in 1973 the accession of the United Kingdom and Denmark and then in 1995 with Sweden and Finland added the reformatory element. With the accession of Greece in 1981 the Union enlarged the Christian horizon towards the oriental orthodox branch of Christianity – a part that could be enlarged soon with the inclusion of Rumania and Bulgaria into the Union – one of the facets completely unstudied in the field of enlargement impacts. Tendencies of pluralization do not only occur inside Christianity but as well on the broader level; the Islam, for instance, has already to date become a constant in the social realities of European societies – and the recent discussion about the possible accession of Turkey to the EU has only added fuel to the fire⁴.

In times when the individual as well as the community seem to undergo a new dimension of spiritual pathway, reinvigorated particularly after the atrocious attacks of September 11, 2001, religion and the quest, the longing for refuge in a higher instance, for the deeper sense of life, plays probably a more important role than before; yet, religious patterns have ever since mankind evolved in a societal framework played a pre-eminent role for the interrelations of people and peoples within a nation – as well as beyond. In this sense, religion can not only be characterized as one of the mirrors of humanity, but as well as one of the human stimuli – for bad or for good – which are, apparently, able to lead human beings to actions never thought of their realization be feasible in terms of ferocity – yet, not to draw a one-sided painting, as well in terms of benevolence and charity. Hence, religion forms an inherent part of the history of humanity ever since its genesis⁵ –

² Weber, Hermann, *Zeitschrift für evangelisches Kirchenrecht* 45 (2000), 109 (114)

³ Jellinek, Georg, *Die Erklärung der Menschen- und Bürgerrechte*, 3 ed., Munich, Duncker & Humblot, 1919

⁴ See an interview with Valéry Giscard d’Estaing in *Le Monde*, 9 November, 2002, pp. 1 et seq. in which the former French President and current President of the Convention on the Future of Europe claims that the accession of Turkey to the EU would be “the end of the Union”; this debate has quickly spread throughout the European public and media landscape and is heavily discussed and fueled basically each day.

⁵ “God created man in His own image, in the image of God created He him; male and female created He them.” (Gen. 1:27)

in one sense or the other; even agnostics or atheists, Buddhists or followers of natural religions (e.g. some native African tribes) cannot be regarded as standing entirely and therefore independently outside this scope; hence, in this meaning one would probably paraphrase “religion” as one particular view of the world, as a concretized concept of ideology, as an individualized frame and sometimes detailed picture of *Weltanschauung*.⁶

Thus, we do not need to analyze either the conundrum of the situation in the Middle East, more specifically, in Israel and Palestine, the persistent conflict between India and Pakistan about Kashmir, or the regime of an Osama Bin Laden together with the Taliban in Afghanistan and its underlying fanaticism to realize the overwhelming impact of religious matters for the community of mankind – in a rather small part of the world (cf. Jerusalem), a bigger nation state (cf. India and the recent confrontations and civil war-like street fights in villages in West India between Muslims and Hindus, or facing the subliminal powder keg at the border to Kashmir involving even the threat of use of nuclear weapons) or on the global level (cf. the universal threat of terrorism with its recent implementations). Even bearing in mind that the past century with its increasing tendencies of secularism and renunciation of the institution “Church” as such in many countries seemed to establish a new set of values being acknowledged by (post-) modern society as the superposed guiding principles which lead to happiness and self-fulfillment/self-realization, religious world views and religious origins of *Weltbilder* never vanished as deeply rooted characteristics of manhood. Linked to this issue of religious determinations of multiple *couleur* is the topic of the inherent potential for conflict regarding their claim of uniqueness, their allegation of being the one and only “right” representation of God/a higher instance on earth etc. – a pretension which is put forward by nearly every single religious community existing in the world, and especially so by the three large monotheistic religions Christianity, Islam, and Judaism.

Rephrasing the drafted subject in legal terms: a variety of differing religious communities living in peaceful coexistence in one given administrative entity evokes inherently the question of providing a specific legal status to all of them, some of them or, radically, none of them. And, indeed, reality reflects this first sight statement: Regarding the structural systems existing within the relatively small part of the world, the continent of Europe, and even more specifically, within the European Union, one detects quickly that not all of the Member States, considered to be rooted on a shared cultural and historical heritage⁷, have established one coherent and persistent system of state-church-

⁶ This is just a paraphrase for what “religion” might be perceived as – despite the long standing controversies (in academic literature and outside) of how “religion” as social phenomenon should be defined. There is and probably cannot be a universally valid definition of “religion”; bearing in mind the innumerable attempts to deliver the *one* definition which all failed and had to fail because the underlying conceptions and ideas of different social groups and ethnicities vary to such an extent that uniform agreement on *one* approach seems to be far beyond possible reach. That statement made does not exclude, however, the usefulness of those attempts and the significance of religious studies as such – be it in sociological, political, theological, legal, or interdisciplinary frameworks.

⁷ This fact is emphasized in nearly every academic *œuvre* – and used as one of the primary forces to advance with the European integration, see e.g. Yourow, Howard Charles, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International, The Hague, Boston, London, 1996, 3 et seq.; “What has struck me most in the Commission is the degree of uniformity in European legal thinking. One might expect that lawyers from 21 [plus] different countries

relationship while they all acknowledged the fundamental right of religious liberty⁸ within their proper constitutional contexts. In fact, taking France as the most extreme example of a system of separation of State and Church and juxtaposing this system with the United Kingdom⁹ where the Anglican Church is acknowledged as Established Church with the Queen holding both the highest representative position within the state and the highest symbolic position within the Anglican Church reveals only the two most fundamental possibilities of organizing the state-church-relationship – so to say the outer poles of the scale. Maintaining this scheme and moving towards the middle, to a kind of intermediate, temperate position, one finds several European Member States which decided to base their polity upon a mixture between those systems found in France respectively in Great Britain – a system of cooperation between the state and one or more of the larger churches existing in those entities. Among these nations stands Spain next to Germany, Italy, Luxembourg, or Belgium. They all voted, due to historical circumstances in their particular nation state, for a cooperative structure, not excluding the well-established majority church/es from the participation of the guidance of the state as such, but, on the other hand, not willing to preserve the determined *de iure* and *de facto* identity between state and church which prevailed for hundreds of years in European history before. Whereas Germany, for instance, laid down the theoretical principle of neutrality in religious matters in Article 140 *Grundgesetz* in connection with Article 137 (1) *Weimarer Reichsverfassung*: “*Es besteht keine Staatskirche.*” (“There is no State Church.”), Spain adopted in its relatively young Constitution from 1978 a sort of caveat, a proviso which grants special privileges to the Catholic Church in Spain, and, first and foremost, a closer cooperation with the state in comparison to every other religious community forming part of Spanish society.

The Scandinavian countries, however, traditionally follow up to date a very peculiar way of dealing with religion within their statal entities; they have adopted – due to a factual

with different cultural and legal backgrounds would think differently about concepts such as fair trial, freedom of the press, or corporal punishment, but in the Human Rights Commission, however divergent its composition, the members think much the same on such issues. This may be due in part to our common roots in Roman law, and in part to modern communication systems which ensure that increasingly we all read the same news, and often the same law books. Of course, there are differences within the Commission as there are differences in any society. Some members are more willing than others to leave a large degree discretion to national authorities and national courts...”, Schermers, Henry G., *The European Commission of Human Rights from the Inside: Some thoughts on human rights in Western Europe*, 1990, 1; for a substantive elaboration on the European system of protection of the freedom of religion cf. Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001

⁸ Tertullian, *Ad Scapulam*, *Patrologia Latina*, I, 699: “It is a fundamental human right, a privilege of nature, that all human beings worship according to their own convictions; one human person’s religion neither harms nor helps another. It is not proper to force religion. It must be undertaken freely, not under pressure.”

⁹ There are two established (or state) churches in the UK, the Church of England (Anglican) and the Church of Scotland (Presbyterian). There are no established churches in Wales or Northern Ireland, but the Church in Wales, the Scottish Episcopal Church, and the Church of Ireland are members of the Anglican Communion. The Church of Ireland comprises dioceses throughout entire Ireland, not only Northern Ireland. The Church of England has a special status on the Isle of Man where the bishop of Sodor and Man is Member of Parliament and in Guernsey and Jersey; none of these three territories, however, forms part of the United Kingdom; cf. McClean, David, *Staat und Kirche im Vereinigten Königreich*, in: *Staat und Kirche in der Europäischen Union*, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, 333-350 (333)

majority since the Lutheran Reformation in the 16th century in Europe – an approach to acknowledge the Protestant Church as National Church, meaning that the state identifies itself with this Church and does not grant comparable privileges to other religious communities. Nonetheless, this traditional picture of Scandinavia slowly but surely undergoes a substantial change: some of the Nordic States have recently been adopting regimes which are supposed to render their domestic organizational structure more open and less rigid in terms of identification of the state with the Protestant Lutheran Church (cf. Sweden changed its public religious structure through a law enacted March 5, 1998 and entered into force January 1, 2000)¹⁰.

Focusing upon concrete situations in which these varying European constellations may cause severe and not easy to solve legal problems on the level of protection of fundamental/human rights within the European Union¹¹ one can highlight the following scenario:

Imagine the following: a migrant worker from a little village in the north-western part of France wants to settle down in Greece near Thessalonica in order to work in a branch of his home company and live there together with his wife and their two children. Imagine further that this same migrant worker was, home in the *Bretagne*, engaged in a religious community which is acknowledged under the French legal system as an official legal entity, granted a minimum set of legal protection with a specific set of civil rights. Several members of this same religious community now want to establish a branch of their congregation in Greece and therefore apply for legal protection given that the status of being officially acknowledged comes along with particular legal and factual consequences within an administrative unit, e.g. fiscal authority, employment authority etc. However, its request is being rejected by the Greek agencies in charge since the Greek legal system within the domestic state-church organization in Greece does not provide an equivalent or comparable standard for (religious) institutions on the national level.

Does this outlined situation disclose a legal discrimination in the light of the granting of a common basic level of fundamental rights protection – both in individual and in corporate terms – in the legal framework of the European Union? Does it affect the exercise of the free movement of persons under the regime of the EC-Treaty (TEC) being recognized as one of the elementary pillars of European integration and therefore unhide a fundamental gap in terms of individual restraints of rights which were supposed to be drafted, in their original conception, in favor of individual freedoms, flexibility and geographical

¹⁰ cf. <http://www.svenskakyrkan.se/svk/eng/engkyst.htm>

¹¹ For the American situation and problems discussed in the context of the First Amendment, Monsma notes the following: “[...] one thinks of spoken prayers or Bible readings in public schools; public displays of the Ten Commandments; religious symbols such as a cross, nativity scene, or menorah in a public park; prayers at the start of legislative sessions; religious mottoes on coins or on city or state seals; and prayers at commencement exercises or [...] at high school football games.”, Monsma, Stephen V., in: *Church-State Relations in Crisis, Debating Neutrality*, Monsma, Stephen V. (ed.), Rowman & Littlefield Publishers, Inc., Lanham, Boulder, New York, Oxford, 2002, 262; generally for further reference to the American debate on State-Church issues see Monsma, Stephen V., *Positive Neutrality, Letting Religious Freedom Ring*, Greenwood Press, Westport, Connecticut, London, 1993

mobility? Possibly, such a negative effect will be revealed only indirectly given that it creates a significant disincentive to move freely within the Member States of the EU while not discriminating overtly between domestic citizens and other European citizens.

These are crucial issues since the broader discussion of fundamental rights is one of the major contentious subjects of the current larger debate touching upon the development of a “Constitution of Europe”¹²; furthermore, these legal domains directly touch upon the liberty of the European citizens living in societies considered to be the most liberal and “civilized” existing in the contemporaneous world – next to the United States that still serves as a comparator in terms of the model character of a Federal State vs. a Federation of States¹³.

Enrobing the exemplified situation in a more abstract costume: taking any religious community potentially being rather small in number of members and therefore rather negligible in terms of representation of a specific societal group within a given national context, the discrimination might be simplified by evaluating that case as being only one out of zillion of minority drawbacks in democracies; but instancing the in fact huge religions in terms of membership such as Judaism or Islam, things are different and cannot be disregarded easily as a question of a minor and therefore quantitatively negligible societal group.

The present study tries to immerse deeper into the spheres of questions concerning the legal protection of “corporate religions”, and, in its institutional dimension, questions of the differently shaped state-church-relationships existing within the Member States of the European Union under the perspective of the guarantee of fundamental rights – not only as a legal requirement in the national context, but as well under the roof of the European Union as a supranational institution exercising powers that can directly affect not only individuals but as well associations – claiming itself to have as its primary objective the establishment of “an ever closer union among the peoples of Europe”¹⁴. Exactly because the topic of collective protection of fundamental rights on the level of the Union has major significance for the overarching development of the Union as such, this paper chooses the following approach to tackle the factual discrepancies in the religious arena existing in the different EU Member States: The overarching objective of this paper is, by way of comparison, to uncover problems, to point a finger at potential legal clashes and

¹² See Weiler, Joseph H. H., A Constitution for Europe? Some Hard Choices, in: *Journal of Common Market Studies: Reassessing the Fundamentals: Integration in an Expanding EU*, vol. 40, n 4, November 2002 including various contributions dealing with issues surrounding the larger debate on the future “Constitution of Europe”

¹³ For the use of terminology cf. BVerfGE 89, 155, 12 October 1993 – Maastricht-judgment of the German Constitutional Court; for the broader constitutional debate and scientific model comparisons between the United States and the European Union cf. Weiler, Joseph H. H., *Federalism and Constitutionalism: Europe’s Sonderweg*, Harvard Jean Monnet Working Paper No. 10/2000, Cambridge, MA, 2001; Bermann, George A., *Regulatory federalism: European Union and United States*, *Recueil des Cours* 263 (1997), 12; v. Bogdandy, Armin, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform – zur Gestalt der Europäischen Union nach Amsterdam*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, 61; Hay, Peter, *Federalism and Supranational Organization: pattern for new legal structures*, 1966; Lenaerts, Koen, *Constitutionalism and the many faces of federalism*, *AJCL* (1990), 205

¹⁴ Preamble of the Treaty Establishing the European Communities (Maastricht-Treaty)

predictable respectively already existing discriminatory situations, to raise and increase awareness in this field of societal discussion, especially of those people who work and, henceforth, shape the future institutional and legal framework of the European polity; in other words, to reveal a legal problem of crucial significance instead of presenting ready-made solutions for a well-known discussed issue.

The case of the present research question incorporates a highly complex and multiply interwoven system of nationally grown idiosyncrasies and historically developed patterns of European state-church-relationships that will be presented in extracts in the course of this paper. This area of research cannot disregard the eminently significant and decisive impact resulting from history across the past centuries and the associated cultural choices that fundamentally determined and thoroughly shaped (and still nowadays continue to do so) one specific social entity.

Referring to the British sociologist *Grace Davie* who introduced in her work “Religion in Britain since 1945: believing without belonging”¹⁵ the concept of the detachment of believers from their institutional anchors – the traditional as well as modern churches and other religious and non-religious communities – it is worthwhile to have a closer look at the underlying issues of why people got and get detached from existing organizational frameworks, why the demand for affiliation decreased over the last couple of decades, why people do not feel the necessity anymore to find shelter in regular events offered by churches and similar institutions such as the Sunday services etc. – put it in general terms: How come that people do not go to church as frequently as they used to do in the past? Can this feature be evaluated as an indicator for a general religious disinterest growing steadily or is this just one, amongst others, development of a complex social, economic and political vicissitude affecting churches as well as their secular equivalents such as political parties and trade unions? Sticking a little longer to the work of *Grace Davie*: in her recent book published in 2000¹⁶ she deals with questions surrounding the separation of belief on the one hand and affiliation to a religious community on the other hand in greater depth coming to the conclusion that the view drawing a dividing line between the belief as such and the existence of an active membership in an institutionalized framework taken together with the engagement within this given structure goes too far. She introduces the term “vicarious religion” to illustrate that people constituting an active minority perform the function of exercising religion ***on behalf of*** the majority which is implicitly welcoming and approving the fact that the minority is acting ***for*** them, i.e. vicariously.

Put it differently: the average European citizen does not regularly go to church, yet, is glad that the churches do exist. *Davie* characterizes this phenomenon is typically European – in contrast to the American approach where people do not understand what is meant by “vicarious religion”. The United States, put it simply, work on the basis of a capitalist market; pursuing this economic analogy a little further one could phrase it the following way: European churches work on the premise of public institutions. And we do

¹⁵ Davie, Grace, *Religion in Britain since 1945: Believing without Belonging*, Oxford, Cambridge, MA, Blackwell, 1994

¹⁶ Davie, Grace, *Religion in modern Europe: a memory mutates*, New York, OUP, 2000

need these public institutions; we expect them to be there, even if we do not make use of them frequently. The American society, in contrast, functions on a different premise: here, the concept of something being “vicarious” is unknown, even more so, it is perceived as being Un-American; American citizens either make use of the locally provided facilities or they regard them as being not necessary and, hence, in that case they would be rather inexistent.

Now, how could one measure this somehow bizarre phenomenon of a “vicarious religion”? Since it is not possible to count it, *Davie* proposes to build up an intuition, exactly because this occurrence can not be empirically grasped. In the follow-up of this thought she puts forward an example which I find quite appealing and convincing:

Something extraordinary happens, in this case in Sweden – a country being regarded as the one of the most secular societies within Europe or even on a world-wide scale – the ferry “Estonia” sinks in the Baltic Sea. And where do the Swedes seek refuge and comfort in midst of their mourning and grieving about this horrible event causing so many casualties? In their churches. They expect them to be there, open for their needs, embracing them in times of sorrow, welcoming them with open doors when they come to knock at those, they expect the archbishop to render an explanation for such dreadful incident – and he, on his part, was exactly expecting to fulfill this task too. On a more abstract level, this reflects a picture of a lived reality in which the balance between the broader public and the institution “church” is apparently functioning well, even if the Swedes do usually not go to church and do not, to a broad extent, subscribe themselves to any type of conventional Christian belief. What they, however, to an amazingly large degree do, is to pay church taxes – as so many other European citizens within their respective nation state do as well. *Davie* interprets this social fact as major indication for what she paraphrases with the term “vicarious religion”.¹⁷

These considerations give me an incentive to draw two conclusions: on the one hand, there seems to be something typically European, a social phenomenon that *Davie* classifies as that specific minority-majority related division of function of the contemporaneous churches which is apparently not existing or at least not in the same manner in other parts of the world, and, secondly, even if it is true that there are specific characteristics within Europe and its history that shaped a lot of societal systems around the world or at least had a major impact on one or the other e.g. through the colonial history etc. one cannot conclude that every development having taken or taking place within the European continent is just the prototype for a global evolution in social terms, i.e. one should be aware of the fact that even if modernization in Europe is accompanied by a parallel stream of secularization this does not automatically implicate that this is true on a global scale too. Especially regarding the recent religious developments – even within the limited scope of Christianity – in the United States, in Latin America, in southern Africa, in South Korea, or in the Philippines one can find increasing indicators

¹⁷ *Davie, Grace, Religion in Britain since 1945: Believing without Belonging, Blackwell, Oxford, Cambridge, MA, 1994*

for growing religious activities in these parts of the world; this statement is even more valid when analyzing the Islam and its impacts on Muslim societies¹⁸.

II. Potential Conflicts arising for churches and other religious denominations facing European law

A. Approaching the sector “religion”

Possible conflicts in religiously motivated areas are not restricted to the sector of labor and employment law, though, these are probably the most often quoted fields of law with a potential for clashes, i.e. with an immanent conflict of church internal competencies to set up their own regulations concerning their employees and Brussels-imposed regulations seeking to harmonize the economy of the Member States on a large scale basis. The freedom of religion as the center of individual, public, and even national interests – considered as being part of the state providing essential facilities – has its relevance next to its social and identification-creative as well as identification-supportive power in the whole field of application of the common European framework of services and in the general creation of a common European social reality. Examples of religiously relevant questions possibly causing legal problems are, among others, the following:

Update of nationally granted privileges to religious denominations on the European level, equal treatment in the social sector (rhythm of work, religious holidays, religious education for the children of migrant workers etc.), applicability of directives concerning public construction commissions to churches, application of the European competition rules to (charitable) economic activities of churches/religious communities, consideration of religious communities in the composition of pluralistic organs in the framework of the organizational and institutional law of the European Union, the general question whether it would be appropriate to establish a broad exemption in the style of Article 137 (3) WRV in favor of an autonomous religious sector benefiting churches and other denominations – bearing in mind Declaration No 11 to the Amsterdam Treaty¹⁹ as an example to manifest the European will to grant a

¹⁸ Davie, Grace, Die Bedeutung der Religion für den Aufbau eines humanen und demokratischen Europas, in: Bericht über das Symposium “Rechtliche Aspekte der Beziehung zwischen der künftigen Europäischen Union und den Glaubens- und Überzeugungsgemeinschaften – Die Rolle dieser Gemeinschaften und die Zusammenarbeit für eine gemeinsame europäische Zukunft“, edited by Win Burton and Michael Weninger, Politischer Beraterstab, European Commission, Working Paper 2002, Symposium 12/13 November 2001 in Brussels, Belgium, 11-15 (15)

¹⁹ Amsterdam Treaty Declaration No 11 on the status of churches and non-confessional organizations: “The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organizations.”

relatively large degree of autonomy to churches and their secular equivalents. Article 22 of the Charter of Fundamental Rights of the EU could be pointing into the same direction by stating in a rather general manner that “[T]he Union shall respect cultural, religious and linguistic diversity.”²⁰

Especially with regard to the objective side of the coin analyzing the freedom of religion as one of the crucial and most important fundamental rights²¹, its institutional and corporate content, it is of minor use to draw the reference to one or another national organizational system as a model to build thereupon an analogous framework between Church (*in abstracto*) and the European Union so to speak at the upgraded level. Such relegation is at the utmost capable of providing inspirations, theoretical models, of serving as a starting point to develop a proper co-operational regime on the European stage representing the new-to-develop and, hence, idiosyncratic European standard, and, thus, European character, – which is supposedly and has to or *should* be something different than the sum of the single national inputs, more than the lowest common denominator and eventually something new that has not been known before²². In demand is, hence, a new determination of the relationship between the European Union and the religious communities being in existence within her, respectively in her components, the Member States. Theoretically, this necessity of defining an ideological standpoint on the part of the supranational European institutions is justified by the anthropologically substantiated phenomenon of the well-consolidated religious desideratum as empirical social fact in the contemporary liberal societies throughout Europe. Nucleus and legal common denominator in the EU Member States is clearly the freedom of religion²³ resulting in a positively recognizable content in terms of equality and human dignity in the sector of public services provided for by the state.²⁴

²⁰ Article 22 of the Charter of Fundamental Rights of the European Union, cf.

http://www.europarl.eu.int/charter/pdf/text_en.pdf

²¹ According to Georg Jellinek, the freedom of religion is the “original freedom” (“*Urfreiheit*”) of all civil liberties.

²² On the futility of notions such as “high” and “low” national standards of protection in the context of fundamental rights’ protection on the European level see Weiler, Joseph H. H., *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in: *The Constitution of Europe – “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge University Press, 1999, Chapter 3, pp. 102-129

²³ “The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces that the world has ever known. But its full realization can come about only when the repressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through cooperative policies; and when the methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as the national plane.”, Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in the Matter of Religious Rights and Practices*, E/CN.4/Sub.2/200/Rev.1 (1960) [hereinafter the “Krishnaswami study”]

²⁴ For a more substantive elaboration on the notion of human rights as societal values and their potential for conflict within the European architecture see Weiler, Joseph H. H., *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European*

It was as early as in 1977 when *Pernice*²⁵ called in his annotation to the *Prais*-judgment of the ECJ²⁶ for a condign place granted to religious interests as a socially relevant factor, including an *ex-ante* protection of fundamental rights, in the general framework of the pluralism of involved interests; religion as a social fundament growing beyond the borders of the Nation State deserves – according to *Pernice* – a substantive recognition on the part of the European bodies as well, in addition to their recognition in the domestic legal systems. Furthermore, he pointed out that not only a consideration of religious interests in the scope of an “European law of religions” in material terms, yet, as well in institutional terms could be opportune for integration purposes, and, on the other side of the coin, there could arise new concepts, dimensions, and models of regulation for the international relations of the religious communities among themselves.²⁷

For a realistic examination of current legal developments in the field of religion or, broader speaking, in the field of public church law, it is indispensable in the first place to explore the phenomenon of religion itself, how it is perceived in a given society and which significance is attributed to it as a value determining people’s attitude towards life in general in a broad sense, and life in particular in its individualistic sense. In this context, it is important to be aware of the fact that religion refers to more than just one individual human being having a specific set of opinions or the expression of such opinions in a liturgical context since the way in which religion manifests itself in society is a complex sociological feature; religion has a major impact on culture, convictions, organizational structures, social relations and social behavior; it has social, educational, communicative, and institutional dimensions as well. In order to understand legal developments with regard to religion it is important also to see religion within these phenomena, in the way it is actually expressed in society, including its legal infrastructure. Many aspects remain implicit expressions of religion the transfer of which is undergone through mass media, education, charities, and voluntary work²⁸.

What, ultimately, is the function of the freedom of religion? In order to find a substantive answer to this question one has to look at the function/s of religion as such, i.e. rather ask the question: What is the function of *religion*? – instead of focusing on the legal component given that one can only detect an urge to create a legal protection for a social phenomenon in the case where the exercise of the feature as such is controversial or incorporates inherently a potential for conflicts.

Liturgical and other explicit and visible expressions of religion occupy an important place in the relatively broad field of the guarantee of the freedom of religion, and, in legal

Legal Space, in: The Constitution of Europe – “Do the New Clothes Have an Emperor?” and Other Essays on European Integration, Cambridge University Press, 1999, Chapter 3, pp. 102-129

²⁵ Pernice, Ingolf, Religionsrechtliche Aspekte im Europäischen Gemeinschaftsrecht, JZ 1977, 777-781 (781)

²⁶ Vivien Prais v. Council of the European Communities, judgment of the ECJ from 27 October 1976, C-130/75, ECR 1976, p. 1589

²⁷ Pernice, *supra* note 25, *ibid.*, 781, Fn 74

²⁸ van Bijsterveld, Sophie C., Freedom of Religion: Legal Perspectives, in: Law and Religion, Current Legal Issues, Volume 4, O’Dair, Richard/ Lewis, Andrew (eds), Oxford University Press, 2001, 299-309 (304 et seq.)

discussions touching this area as well. This is not an astonishing phenomenon given that it is precisely these common manifestations that are most blatant. They do not, however, cover the whole of *religion*; they are “only” visible expressions of deeper convictions and insights. Religions’ objectives are, in the first place, to offer coherent patterns of worldviews, of values and norms, visions of humanity and its fate, visions and explanations of life and God(s); they concern ways of associating with others and of dealing with fundamental questions of philosophy, and provide ethical awareness and ideological approaches. Religious experience and celebration, expression and communication with others, take place in all sorts of socialization and communication processes. Guarantees of the freedom of religion and belief that lean too heavily towards one aspect of religion would deprive it of a great part of its importance and of its idiosyncrasy as being a multi-layered and diverse phenomenon available to every human being on this planet being free to choose an affiliation to a specific community or not.

B. Religion and Law

In (post-) modern times, religious inspiration and religious institutions have performed at least five functions in the international legal system; these functions may be described as creative, aspirations, didactic, custodial, and meditative. They can, and sometimes do, promote global order, just as religious animosity so frequently and dramatically seems to disrupt it.

Religion and international law often appear to be congruent. They share elements of ritual, tradition, authority and universality²⁹ that “connect the legal order of any given society with that society’s beliefs in an ultimate transcendent reality”.³⁰ At the same time, these four elements give sanctity to legal values and thereby reinforce people’s legal emotions: the sense of rights and duties, the claim to an impartial hearing, the aversion to inconsistency in the application of rules, the desire for equality of treatment, the very feeling of fidelity to law and its correlative, the repulsion of illegality.

²⁹ Ritual, that is, ceremonial procedures which symbolize the objectivity of law; tradition, that is, language and practices handed down from the past which symbolize the continuation of law; authority, that is, the reliance upon written or spoken sources of law which are considered to be decisive in themselves and which symbolize the binding power of law; universality, that is, the claim to embody universally valid concepts or insights which symbolize the law’s connection with an all-embracing truth; cf. Berman, Harold J., *The Interaction of Law and Religion*, Abingdon Press, Nashville, New York, 1974, 31

³⁰ Berman, Harold J., *The Interaction of Law and Religion*, Abingdon Press, Nashville, New York, 1974, 25, “Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence. [...] A society’s beliefs in an ultimate transcendent purpose will certainly be manifested in its processes of social ordering, and its processes of social ordering will likewise be manifested in its sense of an ultimate purpose. Indeed, in some societies (ancient Israel, for example) the law, the Torah, *is* the religion. But even in those societies which make a sharp distinction between law and religion, the two need each other – law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect. Where they are divorced from each other, law tends to degenerate into legalism and religion into religiosity.”

Law is not only a bare, inanimate body of rules; it is people legislating, adjudicating, administering, negotiating – it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. And religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life, in individual as well as in abstract terms, – it is a shared intuition of and commitment to transcendent values, it is celebrating in community an internal feeling of adoration to an upper instance, it is the free choice of people being devoted to a common set of values about life and death.

As ethical systems, both law and religion address the global order in a profound manner; both are concerned with the manner in which societies accept and organize the world and universe around them.³¹

Religion is thus more than adherence to a set of intellectual beliefs and the manifestation of these beliefs through certain rituals like, e.g., Sunday morning services in the Christian churches or the equivalent ceremonies in other congregations; religion is an image of social reality. It is linked to thought, to action; it influences our view on humanity and on the world as a whole; it influences culture and our concept of freedom itself. Religion regarded as a social phenomenon is thence not restricted to the “private sphere” but has a mirror in the broader societal context. This is realized in most Western European countries – in contrast, for instance, to the legal situation in the United States (despite the fact that even there the First Amendment cannot be considered as establishing a strict and rigid separation of church and state³²) where religion is thoroughly treated as being a private matter only – and demonstrated in the creation of certain legal mechanisms, in enabling participation in public systems of mass media, in education systems (religion as subject taught in public schools), in incorporation in public services, in chaplaincy services, in the system of public holidays (the Sunday as legal holiday being the most prominent example), and in building facilities as well as monumental protection laws.

C. The Freedom of Religion in Europe

Some common features of the church-state systems in Western Europe which, nonetheless, create or at least potentially create difficult questions – once coming to the European level since their peculiarities in the implementation can vary to a certain degree – are:

³¹ See for further elaboration on the – at least five – functions of religion Nafziger, James A. R., *The Functions of Religion in the International Legal System*, in: Religion and International Law, Janis, Mark W./ Evans, Carolyn (eds), Martinus Nijhoff Publishers, The Hague, Boston, London, 1999, 155-176

³² For further elaboration on the legal situation in the United States and the rich jurisprudence of its Supreme Court in the field of Church and State Separation cf. Feldman, Stephen F. (ed.), *Law and Religion, A Critical Anthology*, New York University Press, New York and London, 2000

- Freedom of worship, individually and collectively;
- A certain degree of church autonomy (in systems with established churches, at least for the non-established churches);
- State facilitated (financed) chaplaincy services in public institutions;
- Financial relief in the form of direct support and/or tax relieves;
- Participation and/or representation in mass media and school systems;
- Support on an equal basis in the cultural and social realm, such as in the case of ancient church monuments and social care.³³

III. The freedom of religion as a collective right³⁴

In general terms, analyzing the corporate aspect of fundamental rights can be much more revealing than its counterpart, the often centered approach to concentrate on individual rights' protection. The supporting arguments for this conclusion are the following: corporations as part of society have to be granted legal institutes in order to be constituted – the legal order, hence, is forced to provide for theoretical frameworks in order to allow an accumulation of people to form some sort of federation or association – and these social groups have to be put subsequently into the position to be able to exercise rights on their behalf, obtain legal personality in their own name. It is exactly the *how* of granting a specific scope, the width of this scope, and the details incorporated by this scope which tell us something important about a given society, about its perception of how people should be living, interacting and working together, of how a balance is supposed to be achieved between individualism and communitarianism. The freedom of religion (and conscience) is in this context only one example of how a fundamental right – which is in the present case usually perceived as being essential for the inner world of an individual system of belief, of (transcendent) world views linked with a specific way of articulating this system via services, worshipping, prayers, etc. – is put into practice, how its content is substantiated and transformed into real life. Many religious communities carry out noteworthy social functions – they educate, baptize, marry, and bury people, they resolve disputes and run hospitals as well as retirement homes, they offer all sorts of social activities for specific groups in society, they engage in fund raising and support different types of charities etc. They therefore form an integral part of the complex network of society, and their elimination would create a vacancy that is not easily replaceable.

Looking first at the jurisprudence developed on the European level and articulated by the Strasbourg organs, the jurisdictional body of the Council of Europe which set out for the

³³ See van Bijsterveld, Sophie C., Church and State in Western Europe and the United States: Principles and Perspectives, Brigham Young University Law Review, 2000, 989-996 (994)

³⁴ The classic argument for collective religious liberty is that of Figgis, John Neville, Churches in the Modern State, 2nd ed., London, 1914, quoted by Rivers, Julian, Religious Liberty as a Collective Right, in: Law and Religion, Current Legal Issues 2001, Volume 4, O'Dair, Richard/ Lewis, Andrew (eds), Oxford University Press, 2001, 227-246 (227)

first time in European history a common catalogue of fundamental rights throughout the continent in 1953³⁵ – before coming back to the sphere of the European Union.

A. Legal status of religious communities under the ECHR

The Strasbourg Commission had initially taken the view that applications from religious organizations were *per se* inadmissible³⁶. Since Article 9 ECHR only protected individual interests in religious liberty, collective entities could *a priori* not be victims for the purposes of Article 34 ECHR³⁷. In the subsequent jurisprudence delivered by the Strasbourg jurisdictional organs, however, this position was changed, but the reasoning provided for allowing applications by religious communities remains ambiguous up to date: “a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members”. This formula reappears at regular intervals, yet, it indicates that the association simply represents the common individual interests of its members, so to say as sum of its components.

In cases involving religious property, for example, the collective element is inevitable, since such property is usually held by a religious organization as a legal person, or on trust for religious purposes. Thus, in the *Holy Monasteries case*³⁸ there was no question that the applicants were the monasteries as corporate bodies themselves. In *Serbo-Greek Orthodox Church in Vienna v. Austria*³⁹, which concerned the occupation of church premises in the aftermath of a church schism, the Commission accepted that the victim was the Church itself, and not the particular priests who would have been the beneficiaries of the tenancy agreement at issue.

In *ISKCON v. United Kingdom*⁴⁰ the reasoning of the Commission shows that it considered the primary victim of planning constraints on Bhaktivedanta Manor to be the International Society for Krishna Consciousness, and not the individual priests who applied at the same time as well. The distinction between individual and collective religious liberty at the admissibility stage would be trivial enough were it not for the fact that in some admissibility decisions the Commission has relied on the existence of breaches of individual liberty to deny standing to an association. Exactly this occurred in the recent Scientology decision⁴¹, in which the Commission reaffirmed a strand in the

³⁵ Cf. Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, Oxford 2001

³⁶ *Church of X v. UK*, No 3798/68, 29 CD 70 (17 December 1968), 75. The Commission has maintained its position that freedom of conscience could not be enjoyed by a collective body: *Verein Kontakt-Information-Therapie v. Austria*, No 11921/86, 57 DR 81 (12 October 1988), 88

³⁷ Article 34 ECHR – Individual applications – reads as follows: “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

³⁸ *Holy Monasteries v. Greece* A 310 (9 December 1994)

³⁹ *Serbisch-Griechisch-Orientalische Kirchengemeinde zum Heiligen Sava in Wien v. Austria*, No 13712/88 (2 April 1990)

⁴⁰ *ISKCON and 8 Others v. the United Kingdom*, No 20490/92, 76 DR 90 (8 March 1994)

⁴¹ *Scientology Kirche Deutschland e.V. v. Germany*, No 34614/97 (7 April 1997)

Strasbourg case-law stating that “a corporate applicant cannot claim to be itself a victim of measures alleged to have interfered with the Convention rights of its individual members”. Where an association claimed to represent its members, it had to identify them and demonstrate it had received specific instructions from each of them, as their agent. In other cases, though, the Commission has shown much more flexibility. Hence, in *Hautaniemi v. Sweden*, which concerned the right of a Finnish-speaking congregation in the Church of Sweden to use a liturgy of the Finnish Lutheran Church, the Commission accepted that both the parish and the minister were victims; thus, the fact that the minister was a victim himself did not prevent the congregation’s own right to apply.

The Commission’s refusal to treat an application alleging a breach of Article 9 ECHR in *Kustannus v. Finland* is an explicit example of a failure to recognize collective religious liberty. In this case, the Finnish Freethinkers’ Association had established a limited liability company to carry out its publishing and distribution function. The Association remained a majority shareholder in the new company. The company maintained that it had a humanist and atheist ethos, and that the provision under Finnish law that only individuals could be exempt from paying church tax on religious grounds was a breach of its Convention rights. While it is unquestioned that individuals required to pay church tax against their conscience enjoy the protection of Article 9 ECHR the Commission held that the association in question could not benefit from the protection of Article 9 because it was not a religious community and not a non-profit organization. But, why should not a group of like-minded people form a commercial company and seek to operate it according to their (and thus the organization’s) corporate ethos?

However, perhaps the most conspicuous example of a Strasbourg-denial of collective religious liberty is the recent decision in *Serif v. Greece*⁴². Serif claimed to be the elected and true chief mufti of Rodopi in Thrace, in opposition to the government-appointed chief mufti⁴³. He was convicted of various criminal offences including the usurpation of the functions of a minister of a known religion. In his defense, he argued that this was a breach of his religious liberty and that of the Muslim community in Thrace which had elected him as their chief mufti. The Greek government’s response was that in law the chief mufti was government-appointed and therefore, no fault had been committed. The ECHR accepted that Serif’s religious liberty was infringed, and approached the problem by asking whether his conviction was *necessary* in a democratic society. They held that, since allegations of his performing administrative functions (such as conducting weddings) were unsubstantiated, the only ground for his conviction was his wearing the clothes traditionally associated with the office, and issuing messages of spiritual guidance and encouragement. Even if he were not chief mufti, to convict somebody in those circumstances would be an unjustifiable breach of his freedom of religion; in short, people have a positive right under the ECHR to pretend to be clergy if they wish to do so.

⁴² Serif v. Greece, No 38178/97 (14 December 1999)

⁴³ Cf. [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/EUR250012000ENGLISH/\\$File/EUR2500100.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/EUR250012000ENGLISH/$File/EUR2500100.pdf) and <http://www.uni-tuebingen.de/kirchenrecht/nomokanon/urteile/eughmr021017.htm> for the most recent decision in this area of disputes: Agga v. Greece, No’s 50776/99 and 52912/99, 17 October 2002 dealing with the same matter of “usurping” the functions of a minister of a “known” religion.

Unfortunately, the reasoning in *Serif* misses the point entirely. The issue at the core of the dispute in question was rather, *who* had the right in Greek law to appoint the chief mufti of Rodopi, and then, regardless of Greek domestic law, whether the Muslim community had the right under the European Convention collectively to elect their spiritual leader if they so wished. The Court ducked that central issue – central at least in terms of analyzing the corporate element of the fundamental right in question – completely.⁴⁴

B. The Structure of the Corporate Religious Liberty

Collective or, corporate religious liberty is not simply an aggregation of individual members' interests, i.e. the sum of totaled individual liberty rights. Rather, it is the set of rights, immunities, privileges, and powers held by a religious association, or its non-confessional equivalent, as such. Collective religious liberty in this sense is the liberty of a community of people sharing a common religious faith to organize themselves and structure their corporate life according to their own ethical and religious precepts.

1. Religious communities as ordinary legal associations

If collective liberty is to be recognized at all, religious communities must, at least, be able to take the form of legal associations, whether incorporated or unincorporated. They must be able to benefit from all powers that legal persons usually enjoy – such as owning property, trading for the purposes of the organization, employing people, suing and being sued etc. Problems concerning the legal status of a church, in the case to be presented hereafter, the Catholic Church in Greece, arose in the case *Canea Catholic Church v. Greece*⁴⁵. Here, the Catholic Church was in dispute with neighbors over the demolition of a party wall and the construction of a window overlooking its property. The Court of Appeal and the Court of Cassation denied the Church a remedy on the grounds that it failed to fulfill the formalities for acquiring legal personality under Greek domestic law. The European Court held that, in the light of the long-standing judicial and administrative practice assuming that the Catholic Church had legal personality without formal registration, there had been a breach of Article 6 ECHR, and that any requirement that the Catholic Church register forthwith would be unreasonable as it might imply that the Church lacked legal personality before the date of incorporation. Given that the Church in question had existed since 1879, and the diocese of Crete since 1213, the ECHR could not see any plausible reason for the fact that in 1996 the Greek Catholic Church still did not enjoy a precise legal status.

A number of interesting issues were raised by the *Canea* case. First of all, there was considerable disagreement about whether the case fell under Article 9 or Article 6 ECHR. A majority of the Commission went for Article 9 on the grounds that the ability to protect property associated with a manifestation of religion was a means of exercising the right to freedom of religion. Since there existed a possibility of acquitting legal personality under

⁴⁴ See Rivers, Julian, Religious Liberty as a Collective Right, in: Law and Religion, Current Legal Issues 2001, Volume 4, O'Dair, Richard/ Lewis, Andrew (eds), Oxford University Press, 2001, 227-246 (231)

⁴⁵ *Canea Catholic Church v. Greece* No 25528/94, RJD 1997-VIII 2843 (16 December 1997)

Greek law, there was no breach of Article 9 per se, but the insistence that the Catholic Church should now fulfill those formalities was, in the circumstances, discriminatory and a breach of Article 14 in connection with Article 9 ECHR.

While one can accept the general point about the relevance of Article 9 to the acquisition of legal personality and civil rights by religious associations, this case was an ordinary property dispute between two neighbors, and the minority view in the Commission, subsequently adopted by the Court, that this was more properly an issue of civil rights is probably to be preferred.

Another interesting issue at hand was the question whether the failure to recognize the Catholic Church as having public law (as distinct from private law) personality was discriminatory. Although, in general, the Commission and Court are prepared to accept that established majority churches may have special rights and privileges without finding a per se discrimination, in Greece the relatively small Jewish community also enjoys public law status. Both the Commission and the Court took the view that Catholicism was one of three principal and long-standing forms of religious belief in Greece, and that the position of the Catholic Church as the only one being neglected a public law status was thus anomalous. However, the Court would go no further than “noting” this fact, and explicitly left the choice of legal form for the Catholic Church open.⁴⁶ Hence, no explicit title has been established by the Strasbourg jurisprudence granting a right to claim public law status to an association wanting to have its organizational structure to be protected by law – grounding its claim on a European legal base, after having exhausted available domestic legal remedies that did not grant the desired legal protection.

The outcome in this case demonstrates once again that the European jurisdictional organs do not dare to cross a specific borderline avoiding risking the following of the national courts and agencies – even though their judgments have a significant impact and do shape and help to develop a proper European standard of rights and obligations.⁴⁷

⁴⁶ No 25528/94, RJD 1997-VIII 2843 (16 December 1997), para. 47: “It is not for the Court to rule on the question whether personality in public law or personality in private law would be more appropriate for the applicant church or to encourage it or the Greek Government to take steps to have one or the other conferred. The Court does no more than note that the applicant church, which owns its land and buildings, has been prevented from taking legal proceedings to protect them, whereas the Orthodox Church or the Jewish community can do so in order to protect their own property without any formality or required procedure.”

⁴⁷ There are good reasons for States to be concerned to limit the right to freedom of religion or belief, particularly the desire to ensure that they can deal effectively and coherently with social problems without being frustrated by small, sometimes unreasonable groups of believers. Yet, there are also bad reasons for States to favor a limited concept of religion or belief. People who choose to exercise their autonomy in religious matters may use this as a basis for resisting social control. Religions may also be independent voices that speak with some authority to challenge government corruption, to advocate the rights of the marginalized, or to criticize the predominant political morality in a given society. This makes them uncomfortable for the authorities, but it is one of the reasons why religious freedom is worth protecting. Yet, the narrow scope attributed to Article 9 (1) ECHR means that such activities fall generally outside the protection of the Convention. Religion or belief are largely limited to the church, synagogue, temple, or mosque and to closely associated activities. This reflects maybe the view of most States as to what a religion should be or of how it should be treated, but it does not reflect the reality of religious experience for many people. The Court and Commission in Strasbourg have, over the years, accepted a view of

2. Exemptions from the general law

Recognizing religious liberty as a specific fundamental and constitutional right requires exemptions from the application of the general law to accommodate religious belief and practice. This does not mean that exemptions must always be granted, whenever religious interest is raised, because there will be times when society will want to insist on certain standards regardless of their incompatibility with some minority religious practice and in so doing set priorities of how a social phenomenon is to be treated in the general framework of societal forces, in the community trying to strike a balance between individual and collective forces as a mirror of how values are perceived and of how ethics are lived on the moral level of that given society. This middle path approach of granting exemptions from the general law unless “*necessary in a democratic society*” for the protection of certain important interests is exemplified by the structure of Article 9 ECHR with its paragraph 2 stipulating that “[F]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” As *Weiler* puts it in more abstract terms: “Another way of describing the play of the ECHR in this context is to say that it defines the margin within which States may opt for different fundamental balances between government and individuals. It defines the area within which fundamental boundaries may be drawn.”⁴⁸

3. Transfer from the level of the ECHR to the level of the EU

It is exactly this process of striking a balance – or more precisely the space necessary for the creation of such a balance – that is essential on the level of the European Union, too. This necessity arises as soon as fundamental rights issues are involved since these imply so to speak automatically a borderline between competing social values as an expression of a compromise in a given polity. Yet, these basic questions do not only arise on the national level having to deal with citizens and their respective national public authorities, but as well on the supranational level of the European Union taking decisions and effecting policies which are reflected on the individuals in each Member State. If the EU forms a polity on its own, if we are ready and willing to consider this alliance as having an own “corporate identity” then we have to acknowledge too that such a borderline has to be struck on that supranational level as an expression of its own, proper set of values as well. This procedure of determining a European borderline in matters of fundamental

religion or belief that reflects the concerns of States to a greater extent than that of individual applicants. Some authors therefore argue for a substantial reconceptualization of both Article 9 (1) and 9 (2) ECHR; cf. Evans, Carolyn, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, 2001, 204

⁴⁸ Weiler, Joseph H. H., *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in: idem, *The Constitution of Europe*, Cambridge University Press, UK 1999, 102-129 (107)

rights' protection is an already ongoing process, having started with the jurisprudence of the ECJ in the late sixties of the past century⁴⁹ and being put explicitly on the agenda of an IGC in December 2001 in Nice when the Heads of States and Governments were asked to give the Charter of Fundamental Rights of the European Union a place in the framework of the Treaties – which was eventually circumvented by “only” issuing a solemn political declaration while renouncing any legal effects of this newly drafted document⁵⁰ – and this process has to continue and will inevitably continue. This is probably the most visible expression of giving the Union an own face, of epitomizing its proper values, of incarnating its substance – even if there is a multitude of disagreements of precisely how such an incarnation should look like, and even if the drawing of the borderline is a much more complicated issue on the European level than it already is on the national levels – since a simple copying of one of the existing schemes is neither possible nor desirable⁵¹, and since the greater the number of states involved, the greater the scale of well-established differences will be so that the finding of a European standard – if it is not supposed to be the lowest common denominator – is perhaps the most difficult task for the people and institutions involved in the years to come.

The following, in character analytical chapter will be highlighting four selected State-Church systems existing in the present EU – whereby the choice is not accidental, but done with the objective to cover the most extreme examples of organizational structures – France, Spain, Germany, and the United Kingdom – as representatives of categories, i.e. generic systems. The aim is to accentuate substantial discrepancies and their reflections on the level of corporations – as well as detecting similarities – especially in cases of conflicts or collisions of social interests such as the wearing of a headscarf by Muslim women which aroused public, academic, and judicial debate in several European Member States (cf. *infra*). That followed, I will outline a brief summary of the disclosed observations in the final chapter concluding that religion as social phenomenon cannot and should not be underestimated on the part of the supranational European institutions, and that legal differences create at least the potential for social as well as legal conflicts – which is then the point where we are in the mid of the debate of how to strike a borderline in terms of fundamental rights' protection as a European matter with a European mirror reflecting its own “corporate identity”.

⁴⁹ Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 425, [1970] C.M.L.R. 112, 119 (1969) where the ECJ asserted for the first time that fundamental rights are “enshrined in the general principles of Community law and protected by the Court.”

⁵⁰ Cf. McCrudden, Christopher, *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01, 2001, <http://www.jeanmonnetprogram.org/papers/01/013001.html>

⁵¹ In this sense Weiler, *supra*, note 48

IV. State-church-relationships in Europe⁵²

A. France

To lead off with one of the most extreme countries in terms of organization of state and church: France with its constitutional principle of *laïcité*. The French Republic nowadays remains a majority Catholic country, though the statistics are considerably less convincing than they were in the immediate post-war period.

Contrary to the other European countries being member of the European Union, France established in Article 2 of the Constitution dating from 4 October 1958 the principle of separation of church and state (*laïcité*)⁵³. Having said this, it is first of all necessary to draw the distinction between *laïcité* in its philosophical or ideological sense and its juridical sense. Whereas the first notion depends heavily on political and/or ideological interests involved, the second term can basically be reduced to the neutrality of the state in religious matters, more broadly speaking its self-commitment to the principle of secularism/neutrality. Public services are secularized, religious denominations enjoy legal equality and the principle of non-discrimination applies among individuals in terms of their beliefs. Moreover, the strict neutrality in the educational sector of primary schools is assured (cf. Preamble of the Constitution of 1946 via reference in the Preamble of the Constitution of 1958). Finally, the State has no right to get involved in the internal functioning and organization of religious denominations as soon as those matters cover religious practices or questions of belief.

The French Government does not keep official statistics on religious affiliation. The vast majority of the population is nominally Roman Catholic, although many Catholics do not practice their faith actively⁵⁴. Muslims are the second largest group in number (ca. 3.000.000). According to various estimates, about 6% of the country's citizens are unaffiliated; Protestants account for 2%; and the Buddhist population accounts for 1 percent. Jehovah's Witnesses claim that 250,000 persons attend their services either regularly or periodically. Orthodox Christians number between 80,000 and 100,000; the

⁵² For a theoretical framework on the issue "State-Church Relation" cf. van der Vyver, Johan D., Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations, Conference Papers of the Second European/American Conference on Religious Freedom, Trier, Germany, 27-30 May, 1999

⁵³ « La France est une République (...) laïque. Elle assure l'égalité devant la loi de tous les citoyens sans distinction de religion. Elle respecte toutes les croyances ».

⁵⁴ Basdevant-Gaudemet states that approximately 80% of the French people are Catholics, albeit less than 15% attend Sunday services on a regular basis, see Basdevant-Gaudemet, Brigitte, Staat und Kirche in Frankreich, in: Staat und Kirche in der Europäischen Union, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, 127-158 (127)

vast majority of these persons are associated with the Greek or Russian Orthodox Churches. The Jewish community residing in France numbers between 600,000 and 700,000 persons (approximately 1 percent).

The principle of equality in religious affairs is explicitly stated in Article 2 of the Constitution thereby implying the precept of non-discrimination between individuals, and between individuals and the administration. This principle is as well reflected in the relationship between the State and the corporate religious denominations; yet, the general statement that French law in the religious arena is essentially directed at the regulation of individuals in the framework of the private sphere remains certainly undisputed⁵⁵.

The regime of cults in France is diverse and complex whereby two larger categories can be regrouped – on the one hand those communities recognized by the State, on the other hand those existing in a strict separation to the State. The former are notably characterized by an organizational status in the sector of public law whereas the latter can usually be ranged in the field of private law. Distinguishing even one step further, one can draw a legal division between general law and local laws.

1. General Law

The general law is basically applicable throughout the whole French territory and finds its main source in the statute enacted on December 9, 1905 stipulating freedom of conscience and religion and placing the religious denominations into a structural framework whereby strictly prohibiting any form of public funding respectively other subsidies – this being an exception to the general rule applicable to all other sorts of associations in France which may well receive all forms of public financial support on the part of the state.

Religious groups must apply with the local prefecture to be recognized as an association of worship and therefore receive tax-exempt status under the 1905 statute. The prefecture, upon reviewing the documentation supplied regarding the association's purpose for existence, can grant that status. In order to qualify, the purpose of the group must be solely the practice of some form of religious ritual. Printing publications, employing a board president, or running a school can disqualify a group from receiving tax-exempt status. Religious groups usually use both of the categories « *associations cultuelles* » (associations which are exempt from taxes)⁵⁶ and « *associations culturelles* » (cultural

⁵⁵ Messner, Francis, *Le droit français des religions*, in: *Staatliches Religionsrecht im europäischen Vergleich*, Puza, Richard/ Kustermann, Abraham Peter (eds), Freiburg Switzerland, 1993, 33-57 (39)

⁵⁶ Article 4 of the Law 1905 determines that the capital of former public institutions established under the Law from 1 July 1901 regulating the general law of associations can be transformed to newly constituted «associations cultuelles»; Article 19 stipulates that their exclusive purpose must be the exercise of a cult and that they are not allowed to receive any subsidy whatsoever from the state, the department or the communes; since 1905 numerous Protestant and Israelite denominations have made use of these provisions and profit from several beneficial tax regulations linked to the status of a cult association under the French legal system. Practical problems can arise, though, when defining a “cult” or a “religion” since the law does not provide for any further details required to be fulfilled; in these cases, the courts have to decide on a

associations which are not exempt from taxes); the Church of Jesus Christ of Latter-Day Saints, for example, runs strictly religious activities through its association of worship and operates a school under its cultural association. The Government currently does not, for instance, recognize Jehovah's Witnesses or the Church of Scientology as fulfilling the requirements for a religious association, and therefore subjects them to a 60% tax on all funds they receive.

2. Local laws

In the field of local laws one has to differentiate between laws deriving from private law, hence, the 1905 law of separation, from public law, hence, recognized denominations, and finally those religious groups being established under private law, yet not falling under the statute of December 1905.

a) « Décrets Mandel »

The decrees from 16 January and 6 December 1939 are a late version of the law of separation from 1905 applicable in the former French colonies where the 1905 law could not be implemented (*Territoires d'Outre Mer de St Pierre et Miquelon, Iles Marquises, Wallis et Futuna, Nouvelle Calédonie*). In certain circumstances, these decrees, created specifically for the French Overseas Territories, do not incorporate a strict separation between public authorities and the Church, since, for instance, they allow the composition of administrative councils in a religious denomination explicitly prescribing that the public authority has to give its consent for the nomination of the members of such a body; a similar procedure is realized in the field of the nomination of the residential bishops. In addition, the general council of *St Pierre et Miquelon* supports its main cult via subsidies meaning that, despite the fact that Article 1 of the decree of 16 January 1939 states that its provisions are applicable in the French colonies and protectorates under the guidance of the principle of separation of Church and State, this maxim is not always implemented in its purest meaning.

b) Départements du Rhin et de la Moselle

The history of these nowadays French territories developed differently so that the current legal situation in this region differs significantly from the rest of France. The local law still in force dates back to the law *Germinal* year X (8 April 1802) that merged a Concordat signed on 15 July 1801 and organic articles of the Catholic and Protestant religion. The Israelite religion was established a couple of years later via a decree from 17 March 1808. Thus, four congregations are officially recognized by the state: the Catholic Church, the Lutheran Church (*Confession d'Augsbourg, d'Alsace et de*

case-by-case basis, cf. Basdevant-Gaudemet, Brigitte, *Staat und Kirche in Frankreich*, in: *Staat und Kirche in der Europäischen Union*, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, 127-158 (133 et seq.)

Lorraine), the Reformed Church Alsace-Lorraine and the Israelite religion. The law of the recognized denominations is historically characterized by the principle of non-separation which nowadays exists only in theory. In fact, the public authorities intervene inter alia in the fields of creation and modification of e.g. dioceses, parishes, consistories etc. as well as in the nomination procedures of most of the ministers whose salaries are being paid by the state.

c) The Catholic cult recognized in Guyana

The specificity of this French Oversea Territory is its peculiar mixture of separation and non-separation established by an edict dating from 27 August 1828 and laying down a similar recognition as that realized by the law *Germinal* year X. The non-Catholic religions in Guyana are grouped under a separate legal category in order to create the possibility of granting them legal capacity at all.

d) The non-recognized cults in *Alsace-Moselle*

For these religious communities neither the law of 1905, the law of 1 July 1901 nor the decrees *Mandel* are applicable since the three departments *Alsace-Moselle* have never been a French colony. Yet, this region knows a specific local law being composed of general principles of local law, the jurisprudence and the doctrine. Contrary to the general law, this legal situation in these departments allows even public subsidies for the benefit of non-recognized denominations which are effectuated in the majority of the cases through the provision of edifices or public space in general. In the future, there could easily arise a situation in which the State has to decide to grant, in particular the Islam communities, recognition in order to pay tribute to lately emerged social realities. Concerning fiscal exemptions, however, a recent law introduced quasi-equality in comparison with the general law and the provisions pronounced in the statute of 1905.

3. Overview: The public support mechanisms for religious denominations in France

Regarding the diversity of legal solutions existing in the territory of the French Republic, one has to state first and foremost that a clear and simple analysis – contrary to the general perception of the so-labeled *République laïque*⁵⁷ – is not possible; historical

⁵⁷ Most recently, there has arisen a broader public debate and political conflict in the French Republic about what to do with the current *laïcité* system, cf. special title report in *Le Monde*, 7/8 December 2003, 1, 6, 8, 9; 13 December 2003; on 17 December 2003, President Jacques Chirac called for legislation barring the Islamic headscarf and other conspicuous religious signs from state schools (“discours relatif au respect du principe de *laïcité* dans la République”). The ban was recommended by a commission appointed by Chirac during the summer 2003 to consider the issue. Among the practices he wants banned is women’s refusal to be treated by male doctors in public hospitals. The French Council of the Muslim Faith called the president’s decision “disastrous”. It is afraid that this and other steps to restrict Islamic practices will worsen race relations. The imam’s council said they had not been consulted on “a purely religious matter”

developments explain the plurality of regulative systems partly; other reasons might be detected in the varying attitude of the public authorities which chose – from time to time acting rather pragmatically instead of coherently – to benefit the one or the other religious community in dependence of its social significance and its political influence. Yet, keeping in mind the fundamental bases of freedom of religion and conscience, neutrality of the State and the principle of equality respectively non-discrimination to which France committed itself nationally and internationally, one can nonetheless draw a structural picture in accordance with the differing privileges religious denominations might obtain or have obtained on the part of the State.

a) Denominations directly financed by the government

The four religions recognized in the *Départements du Rhin et de la Moselle* and the Catholic Church in the department of Guyana are exceptionally supported by the State: organized in the framework of public law, they receive subsidies and public financing in general; additionally, they benefit from fiscal exemptions that are usually only awarded to public institutions. Teachers for religious education in public primary and secondary schools in *Alsace-Moselle* are mandated by the religious authority, however, it is the National Ministry of Education which is nominating them and paying their salaries.

b) Cults indirectly supported by the State

In the broad sense of its meaning, the principle of strict separation of state and church is not homogeneously implemented and is far from offering equal conditions to every religious community. Whereas title IV of the 1905 Statute guarantees the freedom to form religious associations, the legal advantages of the status thereof are only granted after administrative, or even judicial, control.

and would “oppose legislation by every legal means as an anti-constitutional attack on personal freedom”. Opinion polls, however, showed that 69% of voters are in favor of a ban on the conspicuous display of Islamic headscarves, Christian crosses and Jewish skullcaps in schools and the public services and opposed to the introduction of public holidays to celebrate Muslim and Jewish feasts. Cf. current public debate in print media e.g. on www.guardian.co.uk/france ; <http://www.taz.de/pt/2003/12/12/a0197.nf/text.ges.1> ; www.elysee.fr/magazine/actualite/2003/12/11/88084_page_0.htm (the Stasi commission); www.oumma.com (French Muslim portal); International Herald Tribune, 19 December 2003, commentaries on p. 8; 20/21 December 2003, p. 6 “Lifting the veil in France”; the large debate in *Le Monde*, 19 December 2003, pp. 1, 7-10, 17, 20, see especially the editorial with the title “Politique de la peur”. The U.S. Department of State voiced misgivings about President Chirac’s plan to bar wearing of religious symbols in public schools; in Washington, one sees the freedom of religion in severe danger, cf. *Süddeutsche Zeitung*, 20/21 December 2003, p. 6. German newspapers also comment critically on the French debate, cf. *Frankfurter Allgemeine Zeitung*, 20 December 2003, p. 12. In London, British officials assured Muslims that a ban would contradict British tradition. Foreign Office Minister Mike O’Brien told a group of Muslim organizations: “In Britain we are comfortable with the expression of religion, seen in the wearing of the hijab, crucifixes or the kippa. Diversity is part of our strength and it is an important part of our Britishness.”, cf. International Herald Tribune, 19 December 2003, p. 3.

c) Cults without public assistance

On the bottom of the spectrum, one encounters religious groups of controversial social nature. Whilst they cannot be deprived of the fundamental values of freedom of religion and freedom of association, the State, evoking the general clause of *ordre public*, denies them any form of assistance supporting neither their religious nor their possibly economic activities. The most prominent example for this public indifference consists of the denial of granting them the legal status as “religious association” introduced by the 1905 Law and consequently avoiding admitting any fiscal exemptions in favor of those religious entities. Commonly called “sects”, these recently growing social groups nevertheless are treated differently by the State – in dependence of their activity being considered as antinomian to the prevailing practices and beliefs and, hence, to a certain conception of individual dignity, they are denied legal status on the part of the state or are even combated officially through public campaigns such as warnings, booklets, posters etc. To put it in slightly negative terms: whether or not the State evaluates an economic input or harmful spiritual effect of a given association as being more important than its desired or at least accepted religious/ideological impact in French society, it decides how to treat that given denomination in legal and political terms⁵⁸.

4. Islam in France

French Islam is as variegated as are the countries, or regions, from which it originates, from the strong West African, chiefly Senegalese, communities, to those deriving in the Arab Maghreb, chiefly in Algeria, but also in Tunisia and Morocco. Problems experienced by Muslims – to stress this fact once again: they represent the second largest religious community in France – appear to be based on cultural differences more than on differences in their religious beliefs. Debate continues over the question whether denying Muslim girls the right to wear headscarves in public schools constitutes a violation of the right to practice their religion. In 1989, local school officials in Grenoble denied Muslim

⁵⁸ In 1995, a number of MPs comprising a French Parliamentary Commission assembled a list of those groups it considered “sects”; there are 172 groups on this list. Some of the most notable and well-known of the groups listed are:

- Pentecostal and Evangelical Christian churches, including the Pentecostal Evangelical Church of Besançon and the Universal Church of God
- Jehovah’s Witnesses
- Nîmes Theological Institute (Baptist Christian)
- Soka Gokkai (a Buddhist group)
- Paris Dharma Sah (Buddhist)
- Sri Chinmoy (a major new Eastern religion)
- International Society for Krishna Consciousness (Hindu group also known as “Hare Krishna”, ISKCON)
- Culture Office of Cluny (Catholic religious retreat)
- Order of Invitation to Intense Life (Catholic group)
- Fraternity of Notre Dame (Catholic order of nuns)
- Church of Scientology
- The Rosicrucians (old Christian movement oriented around mysticism and healing)

female students the right to wear their *foulard* in class due to a law that prohibits proselytizing in schools. Their action was upheld in a decision rendered in 1989 by the *Conseil d'Etat*, which ruled that the “ostentatious” wearing of the Muslim headscarves violated the law in question⁵⁹. After much unfavorable media attention to the wearing of the *foulard*, the Ministry of Education issued a directive in 1994 that prohibits the wearing of “ostentatious political and religious symbols” in schools. The directive does not specify the “symbols” in question, leaving school administrators considerable authority and discretion to do so. The *Conseil d'Etat* in 1995 affirmed that simply wearing a headscarf does not provide grounds for exclusion from school and subsequently struck down some decisions to expel girls for wearing their *foulards*⁶⁰.

5. Conclusion: State and Church in France

The picture the observer gains from the organizational structure realized in France and above all from its at least theoretically laid down principle of *laïcité* is more varied and complex than the 1958 Constitution in its Article 2 would like him to suggest. Some authors chose to label the organizational system « *laïcité positive* » in order to emphasize that the state has to intervene for the safeguard of a continuous realization of the concrete conditions which allow the exercise of every religion – since the freedom of religion asks for the provision of the general frame of possibilities to attend religious ceremonies of one's congregation as well as to receive instruction about one's religion and its dogmata of belief. This positive *laïcité* signifies that the state has to provide access to the exercise of the religious convictions of its citizens; this includes public facilities where it is usually hard for the individual to leave the institution for purposes of exercising religious duties to a specific point of time. Article 2 of the 1905 Statute lists secondary schools, colleges, hospitals, and prisons, while in practice the regulations concerning each of these institutions can vary quite substantially given that there are quite some differences in the possibilities to leave a college or a prison deliberately, for instance. Statal organization of priests in the armed forces is an expression of parallel demands⁶¹.

Statistics seem to prove that the French Republic is still nowadays a predominantly Catholic country; yet, the actual proportion of citizens actively practicing their religion and belief in this group is significantly lower than in, for instance, the Muslim community. However, this is a general observation which is not only applicable to France, but valid for each society where Muslims as a minority are or have been settling down in a mainly Christianized environment. Apparently, Christian traditions manifest themselves less and less in a strict institutional framework where the churches play a dominant part in people's lives (cf. *supra*, chapter about the sociology of religion) whereas in a Muslim community, religion does play a much more significant and

⁵⁹ Conseil d'Etat, Assemblée Générale, No 346.893 – 27 November 1989, <http://www.conseil-etat.fr/ce-data/aquoi/avis7.htm>

⁶⁰ Conseil d'Etat, 10 March 1995, Fatima et Fouzia Aoukili c. Collège Xavier Bichat de Nantua

⁶¹ Law from 8 July 1880; the *Conseil d'Etat* decided that there is no restriction on the provision of spiritual care in the armed forces as public institutions since the Statute from 1905 does not exclude this possibility. Currently, there are services for the Catholic, the Protestant, and the Jewish denominations provided for military affiliates.

influential role in the daily life of its adherents, just instancing the religious duty to pray five times per day, the observance of the month of Ramadan, or the holy duty of Islamist believers to do a pilgrimage to Mecca at least once in their lifetime.

France, in its overall religious structure, is dominated by the Law from December 1905 (enacted shortly after the breaking off of diplomatic relations with the Holy See in 1904) stipulating the general separation of state and church, yet, history still – and heavily so – preserves its influence in the French legal system by safeguarding specific rules applicable to certain areas or territories where political developments did not allow the establishment of a coherent and uniform system throughout the whole political unit. To which degree religion still is a vital topic of discussion in the French society is demonstrated and emphasized by the current political debate about the introduction of a law banning headscarves and other conspicuous religious symbols from public schools – as President Chirac called for on 17 December 2003⁶². It also underlines the interlinkages with the present efforts to combat international terrorism and its liaisons with Islamic fundamentalism.

⁶² The current debate also embraces the sport as part of the public controversy outlining the fact that in specific regions in France the number of female students participating in sports education is constantly decreasing, cf. *Le Monde*, 20 December 2003, p. 23; the French prime minister, Jean-Pierre Raffarin, declared on Thursday, 18 December 2003, that work on the legislation to be passed will be starting beginning of 2004 in order to reaffirm “[la laïcité] comme une valeur forte de la République.” The minister of federal education, Luc Ferry, announced that the first law will be presented to Parliament in February 2004. In this context, Shirine Ebadi, Nobel Peace Prize 2003, expressed her fear that “cela profite seulement aux fondamentalistes. Laisser ces filles aller à l’école est leur donner leur seule chance de pouvoir s’émanciper. La seule façon de lutter contre le fondamentalisme, c’est le savoir, la culture, l’instruction.” – the Iranian advocate on a press conference in Paris, 18 December 2003, *Le Monde*, 20 December 2003, p. 8.

B. Spain

1. Historical situation in Spain

Traditionally, Spain has been a confessional state with Catholicism being the state religion; this status was only briefly interrupted during the intervals when Spain had republican constitutions in 1873 and 1931. After centuries of the *Reconquista*, in which Christian Spaniards fought to drive Muslims away from Europe, the Inquisition sought to complete the religious purification of the Iberian Peninsula by chasing away Jews, Protestants, and other nonbelievers. The Inquisition was finally abolished in the 1830s, and even after that major change of the political system freedom of religion was denied in practice, if not in theory. After the Civil War (1936-1939), General Franco established an autocratic regime, incorporating the Catholic Church as the official State religion and restoring the church's privileges. Common features accompanying this legal policy were, amongst others, the radical nullity of any legal form not compatible with the doctrine of the Catholic Church, the presence of members of the Church hierarchy in numerous political bodies, the reinforcement of the presence and control of the Catholic Church in the Spanish culture, and the practice to regulate the common fields or *res mixtae* between State and Church through Concordats⁶³.

The Roman Catholic Church was the one and only religious entity that could own property or publish books. The Spanish Government not only continued to pay priests' salaries and to subsidize the Church, but it also assisted in the reconstruction of church buildings damaged during the war. Laws were passed abolishing divorce and banning the sale of contraceptives, Catholic religious instruction became a mandatory subject in public schools.

Franco secured in return the right to name Roman Catholic bishops in Spain, as well as veto power over appointments of clergy down to the parish priest level. In 1953, this fusion of Throne and Church favored by Francoism reached its climax and was formalized in a new Concordat with the Vatican that stipulated a guarantee of exclusivity to the Catholic Church and granted it an extraordinary set of privileges⁶⁴: mandatory canonical marriages for all Catholics, exemption from government taxation, subsidies for new building construction, censorship of materials the church deemed offensive, the right to establish universities, to operate radio stations, and to publish newspapers and magazines, protection from police intrusion into church properties, and exemption of clergy from military service.

⁶³ Cf. Ibán, Iván C., Staat und Kirche in Spanien, in: Staat und Kirche in der Europäischen Union, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, 1995, 99-126 (100 et seq.)

⁶⁴ Article 1 of the Concordat reads in the original: « La Religión Católica, Apostólica y Romana sigue siendo la única de la nación española y gozará de los derechos y prerrogativas que le correspondan de conformidad con la Ley divina y el Derecho Canónico ».

Yet, during the last years of the Franco regime important changes occurred within the Catholic Church itself: the Second Vatican Council's (11 October 1962 – 8 December 1965) documents and in particular the *Dignitatis Humanae* Declaration on religious freedom from 1965⁶⁵. The assumption laid down in Article 2 of the "*Ley de Principios del Movimiento Nacional*"⁶⁶ based on the doctrine of the Catholic Church could no longer be upheld so that in June 1967 a new law on religious freedom was enacted granting rights to non-catholic denominations of which those communities had been deprived previously for centuries – yet, also reaffirming the existing privileges of the Catholic Church. Any attempt to revise the 1953 Concordat substantially met the dictator's rigid resistance.

2. Current constitutional framework (Constitución Española from 1978)

A new milestone in Spanish history of the past century is marked by the promulgation of the new and current constitution in 1978 establishing a constitutional democracy in Spain and abandoning the legal restrictions enforced by the dictatorship under General Franco. The new constitution created the basis for a modern democracy and introduced inter alia a new system of Church-State relations disestablishing Catholicism as state religion. Article 16 of the Spanish Constitution provides for the guarantee of freedom of ideology, religion and worship for individuals as well as communities, with only those limitations that might be necessary for the maintenance of the *ordre public*⁶⁷. In addition, it affirms that nobody can be compelled to declare his or her ideology, religions or beliefs. Finally, this article establishes a non-confessional State whereby the Spanish authorities are obliged to develop and perpetuate appropriate relations of cooperation with the Catholic Church and other religious denominations. Article 16 must be read in connection with other constitutional provisions stipulating supplementary rules such as the responsibility of the public authorities to promote conditions so that liberty and equality of the individual and the groups he joins will be real and effective⁶⁸, religious equality before the law⁶⁹, interpretation of the fundamental rights and liberties according to the Universal Declaration of Human Rights and other treaties and international covenants signed and

⁶⁵ Declaration on Religious Freedom – *Dignitatis Humanae* – promulgated by his Holiness Pope Paul VI on 7 December 1965, cf. text downloadable on

http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html

⁶⁶ « La Nación española considera como timbre de honor el acatamiento a la Ley de Dios, según la doctrina de la Santa Iglesia Católica, Apostólica y Romana, única verdadera y fe inseparable de la conciencia nacional, que inspirará su legislación. » Ley de principios del movimiento nacional, 17 de mayo de 1958

⁶⁷ Article 16 of the Spanish Constitution (1978) reads as follows: (1) Freedom of ideology, religion and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.

(2) Nobody may be compelled to make statements regarding his religion, beliefs or ideology.

(3) There shall be no State religion. The public authorities shall take the religious beliefs of the Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and the other confessions.

⁶⁸ Article 9 (2) of the Spanish Constitution

⁶⁹ Article 14 of the Spanish Constitution

ratified by Spain⁷⁰, and the right to determine the religious education of one's children freely⁷¹. Moreover, academic freedom⁷², freedom to establish schools⁷³, the right of conscientious objection to military service⁷⁴ etc. influence the current Church-State-relationship in Spain.

The 1978 Constitution sought to establish a middle course between the strict separatism proclaimed during the Second Spanish Republic (1931-1939) and the Catholic regime supported by Franco's autocracy (1939-1975) by embracing four core principles guiding the current church-state relations which are:

Firstly, Spain adopted with its new constitution the principle of freedom of religion. Its basic content is that religious liberty is understood not only as a fundamental freedom but also as the basic attitude of the state toward religion. Formally, the state does not support one particular religion; instead it is requested to promote the freedom of each citizen – in fact, through avoiding to legally establishing one religion as official state religion.

Secondly, the Spanish constitution incorporates the principle of secularism signifying that the state is impartial towards the various individual religious subjects; yet, this does not mean that Spain voted for a rigid separation between religion and the state.

The third principle is reflected by the general legal rule of non-discrimination laid explicitly down in Article 14 of the Spanish Constitution – a provision perfectly comparable to equivalent ones to be found across the border in virtually each and every European constitution, and in Article 12 TEC, too.

The last principle under this heading is the constitutionally stipulated duty of cooperation. Since the constitution recognizes that the state and the religious denominations are separate entities pursuing different objectives they are not subordinate to one another, yet, they do operate in the same societal context. Thus, they cannot be regarded in isolation from one another, and any form of strict formal separation like the one chosen by the French legal system (cf. *supra*) would be artificial. The Spanish Constitution presumes that the religious phenomenon is particularly worthy of protection, hence, the materialization of religious freedom is not left to the free interplay of the existing social forces. Instead, public authorities are positively encouraged to intervene in this sector of Spanish society with the objective to create equilibrium and to facilitate the effective exercise of the constitutionally guaranteed rights.

Government financial aid to the church has always been a difficult and contentious issue in Spain. The Catholic Church argued that, in return for the subsidy, the state had received the social, health, and educational services of tens of thousands of priests and nuns who fulfilled vital functions which the state itself could not have performed.

⁷⁰ Article 10 (2) of the Spanish Constitution

⁷¹ Article 27 (3) of the Spanish Constitution

⁷² Article 20 (1) c of the Spanish Constitution

⁷³ Article 27 (6) of the Spanish Constitution

⁷⁴ Article 30 (2) of the Spanish Constitution

Nevertheless, the revised Concordat was supposed to replace direct state aid to the church with a scheme that would allow taxpayers to designate a certain portion of their taxes to be diverted directly to the church. Through 1985, taxpayers were allowed to deduct up to 10% from their taxable income for donations to the Catholic Church. Partly because of the protests against this arrangement from representatives of Spain's other religious groups, the tax laws were changed in 1987 so that taxpayers could choose between giving 0.5239% of their income tax⁷⁵ to the church and allocating it to the government's welfare and culture budgets. This sum is not a supplementary tax next to the general income tax, but part of the latter so that the system is not based on self-contained church tax (in contrast, for instance, to the German tax scheme, cf. *infra*).

This is evidently not the only public financing mechanism benefiting the Catholic Church given that the state is providing for the salaries of teachers of Catholic religion, the priests in military services and in prisons – which it is not, at least to the same extent, doing for other religious communities. Additionally, the Catholic Church receives further resources as a result of its social activities such as in the sector of medical care, education, and charitable work.⁷⁶

3. Ley Orgánica de Libertad Religiosa (1980)

After the death of General Franco, the Concordat of 1953 was substituted by a number of treaties concluded under public international law, among those four negotiated with the Catholic Church being the most important ones. These agreements dating from December 1979 deal with four main issues, the first being legal matters (marriage, legal personality recognition according to Canon Law, protection of religious sites and religious archives, and observance of religious days), the second covering financial matters such as tax exemptions and governmental funds, the third one dealing with religion and culture including religious education in public schools, church monitored education facilities and ecclesiastical properties of cultural or historical value, and the fourth being agreements dealing with religious attendance of the armed forces and military service of clergymen and members of religious orders⁷⁷.

In July 1980, Spain saw a new legal development with the enactment of the General Act of Religious Freedom⁷⁸ establishing as exclusive limits to the freedom of religion

⁷⁵ This is the percentage that would have constituted the amount of money which was given to the Catholic Church on the part of the state before enacting the new law regulating finances and church; the conceptual idea was to increase the quota after a transitional period of three years given that some citizens might opt for the solution to designate that part of their income tax to social purposes. Eventually, this adjustment was not realized, yet, without any practical implications because the state is equalizing the lacking amount of money via a direct allocation of funds so that the Catholic Church has a secured income as well after introduction of the new system.

⁷⁶ Cf. Ibán, Iván C., Staat und Kirche in Spanien, in: Staat und Kirche in der Europäischen Union, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft Baden-Baden, 1995, 99-126 (118)

⁷⁷ Cf. Rossell, Jaime, State-Religion relations in Spain and Portugal: a brief outline, <http://www.giurisprudenza.unimi.it/~olir/commenti/Istanbul1999/rossell.pdf>

⁷⁸ Article 3 (1) of the General Act of Religious Freedom (7/1980 of 5 July 1980, BOE No 177, 24 July 1980, *Ley Orgánica de Libertad Religiosa*, LOLR) reads as follows: "The rights deriving from the freedom

possible infringements of public liberties and the safeguard of public health, morality and order – subject of protection in any democratic society. Moreover, this Act lays down several tools available to the Spanish State in order to ensure a co-operational basis between the state and the various religious denominations; – primarily envisaged are religious groups next to the Catholic Church since her position was already well determined by the agreements concluded with the Holy See. First instrument newly introduced in 1980 is the *Religious Entities Register Book* maintained by the General Directorate of Religious Affairs of the Ministry of Justice which endows religious communities with a special legal position within the Spanish legal system granting the status of “religious confession”.

However, not every religious group applying to be registered in this book is automatically granted that status; according to the General Act, formal preconditions include foundation within the Spanish territory, identification details, representatives, and, as substantial element, the Act requires a “religious purpose” of the congregation whereby the law does not specify in greater detail what exactly is to be understood under such a “religious purpose” in the positive sense. Instead, it defines which categories are not covered by that provision: “activities, purposes and Entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act”.

It has already been stated that registration is one of the requirements, although not the only one, by which a congregation can arrive at an agreement with the state. It has been shown that religious entities recorded in the Register Book are granted legal status. But legal status is not the only resulting consequence – the Spanish legal system envisages at least the following additional favorable effects coming along with registration:

(a) Corporate organizations are awarded rights to name, identity, and title over goods and assets, and, among others, the right to legal negotiation.⁷⁹

(b) From the right of identity derives the related right of independent internal organization and management of personnel. Registration thus guarantees independence and safeguards identity and belief.⁸⁰ The recognition of denominational autonomy implies a governmental admission that the religious entity does not have its origin in the state.

of worship and religion may not be exercised to the detriment of the right of other to practice their public freedoms and fundamental rights or of public safety, health and morality, elements which constitute the order ensured under the rule of Law in democratic societies.”

⁷⁹ See Spanish Civil Code, Arts. 35-39

⁸⁰ Article 6 of the General Act of Religious Freedom (LOLR) reads as follows:

(1) Registered Churches, Faiths and religious Communities shall be fully independent and may lay down their own organizational rules, internal and staff by-laws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses on the safeguard of their religious identity and own personality, as well as due respect for their beliefs, without prejudice to the rights and freedoms recognized by the Constitution and in particular those of freedom, equality and non-discrimination.

(2) Churches, Faiths and religious Communities may create and promote, for the accomplishment of their purposes, Associations, Foundations and Institutions pursuant to the provisions of ordinary legislation.

(c) Registered entities benefit from tax exemptions and receive special treatment with respect to places and activities related strictly to worship. The general criteria concerning fiscal benefits are based on the legal system's recognition of religious denominations as non-profit or charitable organizations. States the LOLR: "In the agreements or accords, and always respecting the principle of equality, fiscal benefits anticipated in the general legal system for non-profit entities and other organizations of a charitable nature may be extended to ... churches, denominations, and communities" (Article 7 (2) LOLR). Application is, in practice, twofold: (1) The legal system which applies to charitable and non-profit associations; and (2) the specific system for religious organizations that have signed agreements with the state. In sum, fiscal benefits to denominations are based on the manifestations of religious freedom reflected in the constitutional mandate of cooperation.

(d) Only registered denominations may participate in advisory agencies of the administration dealing with all projected legislation affecting the freedom of religion⁸¹. Example: The designation of representatives of the most significant Spanish churches to the Advisory Committee on Religious Freedom.

(e) Those religious organizations that are formally established may enter into agreements of cooperation with the state⁸², cf. *infra*.

Second instrument introduced by the General Act is the so-called Committee on Freedom of Worship, "created in the Ministry of Justice whose membership, which shall be stable, shall be divided equally between representatives of the Central Government and of the corresponding Churches, Faiths and religious Communities or their Federations including, in any case, those that have a notorious influence in Spain, with the participation as well of persons of renowned competence whose counsel is considered to be of interest in matters related to this Act. Such Committee may have, in turn, a standing commission whose membership shall be likewise equally apportioned. The functions of such Committee shall consist of reviewing, reporting on and setting forth proposals with respect to issues relating to the enforcement of this Act and such intervention shall be mandatory in the preparation of and recommendations for the Cooperation Agreements or Conventions referred to in the preceding article"⁸³.

The third tool is incorporated in Article 7 (1) of the General Act⁸⁴ laying down the option to conclude agreements with the Spanish Government – provided that the given religious community is already registered in the Register Book and that it exerts a *notorious*

⁸¹ Article 8 of the General Act of Religious Freedom

⁸² Article 7 of the General Act of Religious Freedom

⁸³ Article 8 of the General Act of Religious Freedom

⁸⁴ "The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Co-operation Agreements or Conventions with the Churches, Faiths or religious Communities enrolled in the Registry where warranted by their notorious influence in Spanish society, due to their domain or number of followers. Such Agreements shall, in any case, be subject to approval by an Act of Parliament".

influence in the Spanish society. The second requirement is a rather obscure term, being interpreted by scholars in many different ways and being contrasted with similar provisions existing in the Italian and German legal systems; yet, the Spanish Government has applied this clause with a large portion of discretion so that any attempt to give it an academic content has failed so far. As a matter of fact, the government has adopted a historical interpretation rather than a numerical one. This approach explains why Spain has signed agreements with Muslims and with Jews, however not with the Jehovah's Witnesses, a quantitatively larger religious community in Spain in comparison to the former ones.

In 1992, three further agreements were concluded under Article 7 (1) of the General Act: with the evangelic entities, the Jewish communities and the Muslim Commission⁸⁵. These agreements have been highly praised since they, for the first time in Spanish history, represent cooperation between the State and non-Catholic religious communities. Technically speaking, the conventions are built on the model of the analogous agreements with the Catholic Church and provide similar rights and obligations⁸⁶.

In geographical terms, there is one further paradigm being of special interest in the context of this research: the competence of the so-called *Comunidades Autónomas* to sign themselves agreements with religious communities – with the consequence that the Spanish legal system, in ecclesiastical terms, is composed of a mixture of agreements between first, the Catholic Church and the State, second, other religious communities and the State, third, between churches and the *Comunidades Autónomas*, and, finally, between regional religious congregations and the according *Comunidad Autónoma*.

4. Conclusion: Current situation of Church and State in Spain

Spain, despite the fact that its relatively young Constitution from 1978 introduced the fully-fledged freedom of religion and grants formal equality to every religious community wanting to be established in the territory of Spain, continues to be a predominantly Catholic country⁸⁷. In spite of this sociological fact, there were forces at work causing fundamental changes in the place of the church in Spanish society during the past decades. One such force was the improvement of the economic fortunes of the majority of Spaniards, rendering Spanish society *prima facie* more materialistic and therewith less religious, a typical phenomenon being observed in other Western societies as well. Another, yet closely linked force was the massive shift in population from farm and village to the growing metropolitan centers where the church had less influence over

⁸⁵ The three agreements were signed by the Federation of Evangelical Religious Entities of Spain (Law 24/1992, BOE No 272, 12 November 1992), the Federation of Israelite Communities of Spain (Law 25/1992, BOE No 272, 12 November 1992), and the Islamic Commission of Spain (Law 26/1992, BOE No 27, 12 November 1992); cf. as well http://www.mju.es/asuntos_religiosos/ar_n00_i.htm for further references on Spanish legislation on religious affairs

⁸⁶ For further elaboration on this issue cf. de la Hera, Alberto, Relations with Religious Minorities: The Spanish Model, in: Brigham Young University Law Review, 1998, 387-400

⁸⁷ Estimations fluctuate according to the institutions that issue the figures; yet, an overall comparison reveals a current affiliation of Spanish population to the Catholic Church of approximately 93%.

the values and morals of its members. One momentous indicator of the transformations having taken and taking place is the substantial reduction in the number of Spaniards in Holy Orders⁸⁸. Being a Catholic in Spain has less and less to do with regular attendance at Mass and more with the routine observance of important and widely adhered to rituals such as baptism, marriage, and burial of the dead. It is not astonishing that a system being determined by Catholicism for several centuries showed and continues to show an extraordinary presence of the Catholic Church in public institutions. A specific feature of this presence is the spiritual care which is being accomplished still nowadays in basically the same way as it has been done in former times when the Catholic Church has been the official state religion in Spain. It is its public justification that changed with the introduction of the new constitutional system of 1978: spiritual care is not provided any more because of the state being confessional, but rather because of the state having to protect fundamental rights, in particular the freedom of religion⁸⁹.

In legal terms, two idiosyncrasies of the Spanish constitutional framework have to be highlighted: first of all, the Constitution positively recognizes religion as a relevant social phenomenon by stating explicitly that “[t]he public powers shall take into account the religious beliefs of Spanish society”⁹⁰ which means that religion as such is evaluated as being a beneficial ingredient in Spanish community life; and secondly, that the Constituting Power committed itself to “maintain the appropriate relations of cooperation, with the Catholic Church and other denominations”⁹¹.

Two conclusions can be drawn from this ascertainment, one being that the religious phenomenon is a particularly valuable asset, and accepted to be worthy of protection in Spanish society; the second being the constitutionally laid down principle of cooperation which means that the state put itself in a position of being called upon to provide assistance for confessional objectives being pursued by religious denominations. Looking exclusively on this aspect of cooperation, one could be tempted to quickly state that the Catholic Church finds itself in the closest relation to the Spanish State possibly imaginable under a framework of a formal separation of State and Church and receiving

⁸⁸ In 1984, Spain had more than 22,000 parish priests, nearly 10,000 ordained monks, and nearly 75,000 nuns. These numbers concealed a troubling reality, however. More than 70% of the diocesan clergy was between the ages of 35 and 65; the average age of the clergy in 1982 was 49 years. At the upper end of the age range, the low numbers reflected the impact of the Civil War, in which more than 4,000 parish priests died. At the lower end, the scarcity of younger priests reflected the general crisis in vocations throughout the world, which began to be felt in the 1960s. The crisis was seen in the decline in the number of young men joining the priesthood and in the increase in the number of priests leaving Holy Orders. The number of seminarists in Spain fell from more than 9,000 in the 1950s to only 1,500 in 1979, even though it rose slightly in 1982 to about 1,700.

⁸⁹ Article 9 (2) Spanish Constitution: “It is the responsibility of the public powers to promote conditions so that liberty and equality of the individual and the groups he joins will be real and effective; to remove those obstacles which impede or make difficult their full implementation, and to facilitate participation of all citizens in the political, economic, cultural, and social life.”

Yet, this argumentation is critically put into question by some authors, cf. Ibán, Iván C., *Staat und Kirche in Spanien*, in: *Staat und Kirche in der Europäischen Union*, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, pp. 99-126 (119-120), Fn 71, while the majority of Spanish academia supports this approach.

⁹⁰ Article 16 (3) Spanish Constitution

⁹¹ Article 16 (3) Spanish Constitution

preferential treatment in comparison to any other existing religious community on basically all levels. Yet, the recent agreements concluded with the Evangelical, Jewish and Islamic communities in 1992 demonstrate the readiness and willingness of the State to acknowledge their independence and autonomy, their tax status resembling the one given to the Catholic Church – apart from the fact that the tax payers' choice (cf. *supra*) via the income tax fraction signifies a direct economic collaboration between the State and the Catholic Church – and other legal effects being at least comparable to the ones the Catholic Church enjoys, e.g. religious teaching in public schools, the payment of the religious teachers' salaries by the state (since 1996), and the concession of civil effects to religious marriage (although not as extensively as it is granted to marriages concluded under Catholic Canon law).

However, it remains undisputed in academic literature that the Catholic Church enjoys without any doubt the maximum degree of State cooperation and, accordingly, of recognition of its autonomy; – some illustrative examples of this overall conclusion are: legal personality in Spanish law is automatically granted to the circumscriptions of the ecclesiastical territorial organization (chiefly dioceses and parishes), after due notification by ecclesiastical authorities; religious institutes and orders as well as canonical associations can also obtain legal personality quite easily via a simple procedure of registration in the Registry of Religious Entities – in which there is a special section assigned to the Catholic Church and its sub-institutions; canonical marriage produces civil effects, and these effects are – under certain conditions – granted even to the judicial decisions of ecclesiastical courts declaring the nullity of marriages; inviolability of places of worship is guaranteed. Additionally, important tax benefits and significant educative facilities are granted in two further 1979 Agreements⁹², including the capacity to establish centers, at any level, for secular as well as for ecclesiastical studies. Furthermore, the traditional Catholic system of military chaplaincies is deeply integrated within the structure and legislation of the Spanish Army, and a similar feature exists in the framework of Spanish prisons too.⁹³

Two issues can be regarded as being problematic within the present topology of Spanish State-Church relations: firstly, the definition of the legal concept of religion, and secondly, the unsatisfactory legal status of some churches which are presently out of the scope of the agreements' system, but which have quite a few thousand followers within Spain – most notably the Jehovah's Witnesses and the Church of Jesus Christ of the Latter-Day Saints (Mormons). These two churches have been asking for an agreement with the State; however, the government did not, in 1992, and does not currently, consider that any further agreement with religious corporations would be useful or necessary. Apparently the Spanish Government is satisfied with having granted a negotiated legal status to the most traditional religious groups – next to the Catholic Church – and does not see any need to establish a similar status for religious associations that are certainly spread throughout the country and do sometimes clearly outnumber e.g.

⁹² See Agreement on Economic Affairs, Agreement on Educational and Cultural Affairs, both dating from 3 January 1979

⁹³ Martínez-Torrón, Javier, Church Autonomy and Religious Liberty in Spain, Spanish Report to the Second European/American Conference on Religious Freedom, Trier, 28-29 May 1999, 9 et seq.

the Jewish community, but which possibly emerged only a couple of years ago and/or are sometimes not very popular in the broader society. While quantitative criteria are most certainly not the best and only means of determining the requirement of “notorious influence” in Spanish society in accordance with Article 7 of the General Act, they are nevertheless a necessary element of it, and, not to neglect, can be assessed relatively objectively.

In terms of defining the legal concept of religion, several problems have arisen with religious minorities in Spain during the past couple of years given that the traditional, narrow concept utilized until to date by the government and judiciary excludes certain groups, like the Church of Scientology or the Church of Unification; these associations present themselves as religious and are well known and respected in many other countries. As *Martínez-Torrón* rightly points out, their claims to be legally acknowledged as legitimate religious denominations cannot easily be dismissed with a simple “Sorry, you do not fit into our traditional notion of religion”.⁹⁴

All these observations allow to conclude that the Spanish legal system is still nowadays fundamentally dominated by the Catholic Church – within a framework of collaboration between primarily that Christian religion including its sub-divisions and the Spanish public authorities, both on the federal level and the level of the *Comunidades Autónomas*; while it is certainly safe to simultaneously pinpoint to the fact that Spanish society is still nowadays much more religiously characterized than other Western European societies, and this especially so in the non-urban areas of the Iberian peninsula. Spain only recently realized some sort of egalitarian treatment in legal terms concluding agreements with other religious associations than the historically overwhelming Catholic Church while still preserving some sort of unequal treatment towards young religions such as the Church of Scientology or others; however, this is no specific characteristic of Spain alone.

⁹⁴ Ibid., 12

C. Germany

1. Relevant constitutional provisions and historical synopsis⁹⁵

Standing together with the freedom of religion and the separation of state and church, the recognition of the right of self-determination for churches is the third prominent pillar of the German system of state-church relations laid down in the constitution⁹⁶. This guarantee applies to all religious communities without regard to whether they enjoy the rights of a corporation under public law or are an association under civil law, or even lack legal capacity entirely under the domestic legal system. The constitution not only gives them a right to self-administration but also acknowledges their right to self-determination, their freedom from supervision and tutelage through the state.

In Germany, as in many other European countries, the State-Church relationship has been experiencing a diversified and complex history. There were the well-known deep divisions at the time of the Reformation, predominantly influenced and shaped by Martin Luther, and these continued for many decades⁹⁷. In the early nineteenth century, there was still no unified German State and the approximately 300 kingdoms, dukedoms and baronies remained divided religiously as well as politically, with the Protestant and Catholic Churches variously dominant in the various territories. Even after 1871, when Germany became a Nation State (*Deutsches Reich*), a major State-Church conflict developed, primarily between the Protestant Prussian Government of the Reich under Otto von Bismarck on the one side and the Catholic Church on the other (the so-called

⁹⁵ Article 140 GG: “The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919, are an integral part of this Basic Law.”

Article 137 WRV:

(1) There is no state church.

(2) Freedom of association is guaranteed to religious bodies. There are no restrictions as to the union of religious bodies within the territory of the Federation.

(3) Each religious body regulates and administers its affairs independently within the limits of general laws. It appoints its officials without the cooperation of the Land, or of the civil community.

(4) Religious bodies acquire legal rights in accordance with the general regulations of the civil code.

(5) Religious bodies remain corporations with public rights in so far as they have been so up to the present. Equal rights shall be granted to other religious bodies upon application, if their constitution and the number of their members offer a guarantee of permanency.

When several such religious bodies holding public rights combine to form one union this union becomes a corporation of a similar class.

(6) Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls, in accordance with the provisions of Land law.

(7) Associations adopting as their work the common encouragement of a world-philosophy shall be placed upon an equal footing with religious bodies.

(8) So far as the execution of these provisions may require further regulation, this is the duty of the Land legislature.

⁹⁶ Article 137 (3) *Weimarer Reichsverfassung*

⁹⁷ For further elaboration on church history in Germany in and since the Reformation cf. Zippelius, Reinhold, *Staat und Kirche – Eine Geschichte von der Antike bis zur Gegenwart*, München 1997

*Kulturkampf*⁹⁸). Protestant Prussia saw the foundation of the Catholic political party *Das Zentrum* (The Center) in 1871 as a threat to its recently gained political dominance in the *Reich*; the Catholic Church was therefore subject to various restrictions. All Catholic schools in Prussia came under State control in 1872, as did the general administration of the Church in 1873, and in 1875, all State subsidies to the Catholic Church were suspended. The differences were eventually settled in the late 1880s, and the State developed harmonious relations with the both major Churches.

The incorporation of Article 137 (1) WRV (“There is no State Church.”) into the *Weimarer Reichsverfassung* of 11 August 1919 formally rejected the concept of an official State Church within Germany. However, it was decided that religious communities which had hitherto been corporations under public law could preserve this status, and that other religious organizations could apply to be granted equivalent rights, if they could demonstrate their durability by means of their constitution and the number of their members (Article 137 (5) WRV).

The *Grundgesetz*, enacted on 23 May 1949 and entered into force the day after, established the right to religious freedom, i.e. freedom of belief, freedom of conscience, freedom of religious and philosophical creeds (Article 4 (1) GG), and the right to practice one’s religion without interference (Article 4 (2) GG). Article 140 GG incorporates – unaltered – into the *Grundgesetz* the relevant articles (136, 137, 138, 139 and 141) of the *Weimarer Reichsverfassung* relating to the freedom to practice one’s religion – or to practice no religion – and the freedom of religious organizations to organize and administer their own affairs without public interference.

2. Privileges granted to (religious) corporations with public law status

Thus, although the *Grundgesetz* does not recognize a State Church, the major Christian denominations, the Jewish congregations, and other religious organizations which have been recognized as corporations under public law enjoy a status which confers powers and rights that only the State otherwise has, such as employing officials and the ability to levy (Church) tax on the basis of the civic tax lists (Article 140 GG in conjunction with Article 137 (6) WRV). Critics consider the relationship between the State and the two main Churches in Germany, the Catholic Church and the member Churches of the Council of Protestant Churches⁹⁹, to be too close and too powerful. As far as the German voluntary sector is concerned, the Church’s dominance in the area of social welfare provision, heavily subsidized by the State, has been criticized as being a “monopoly” and thus discriminatory against non-religious organizations being engaged in the welfare

⁹⁸ Cf. <http://www.newadvent.org/cathen/08703b.htm> ; for further references see Franz-Willing, Georg, *Kulturkampf: Staat und katholische Kirche in Mitteleuropa von der Säkularisation bis zum Abschluß des preußischen Kulturkampfes*, Callwey, Munich, 1954; Schmidt-Volkmar, Erich, *Der Kulturkampf in Deutschland: 1871-1890*, Göttingen, Musterschmidt-Verlag, 1962

⁹⁹ *Evangelische Kirche in Deutschland (EKD)*, the German umbrella association for all Protestant *Landeskirchen*

sector as well. “Public Benefit” organizations in Germany qualify for various tax concessions such as relief from corporate income tax (§ 9 *Körperschaftsteuergesetz*) and inheritance and gift taxes (§ 13 (1), No 16 and 17 *Erbschaftsteuergesetz*). The purposes that qualify an organization for tax privileges are set out in detail in §§ 51-68 of the German Fiscal Code (*Abgabenordnung, AO*).

Religious corporations under public law rank in a special category as far as these tax privileges are concerned, defined in § 54 AO as *kirchliche Zwecke* (church purposes)¹⁰⁰. To fulfill the stipulated criteria, the organization’s activities must constitute the altruistic promotion of a religious community which is a corporation under public law (§ 54 (1) AO); these purposes include in particular the establishment and maintenance of churches, the holding of religious services, the training of clergy, religious education, the burial of the dead, the administration of Church property, the payment of clergy and other personnel, the care of the old and infirm and their widows and orphans (§ 54 (2) AO). Any further laws needed to implement these provisions are made by each of the *Bundesländer*. As far as the two main Churches in Germany are concerned, each of the *Länder* has concluded separate contracts with the Protestant *Landeskirchen* within its jurisdiction, as well as with each relevant Catholic Diocese or Archdiocese laying down details of their respective relationship.

Other – private law – religious associations may qualify for tax privileges under the general provision outlining *gemeinnützige Zwecke* (public benefit purposes) as set out in § 52 AO. Such purposes are broadly defined as the altruistic promotion of the material, spiritual, or moral advancement of the public, and “advancement of religion” is one of the many purposes specifically mentioned. As far as this latter heading is concerned, German law has encountered the same difficulties as other countries in reaching decisions about organizations outside the mainstream, such as youth sects (generally not regarded as being of public benefit because of their methods of recruitment and the danger of “brain washing”¹⁰¹), meditative communities, and freemasons’ lodges.

The Church of Scientology, recently refused registration as a charity in England and Wales, has been variously granted or refused public benefit status by the German *Bundesländer*. Next to considering whether Scientology is of “public benefit”, the courts in some *Bundesländer* have refused to grant applications on the grounds that the Church of Scientology, which charges for the seminars and courses it runs, is based on commercial rather than altruistic principles, while others have concluded that the

¹⁰⁰ § 54 AO in the original version reads as follows:

“(1) Eine Körperschaft verfolgt kirchliche Zwecke, wenn ihre Tätigkeit darauf gerichtet ist, eine Religionsgemeinschaft, die Körperschaft des öffentlichen Rechts ist, selbstlos zu fördern.

(2) Zu diesen Zwecken gehören insbesondere die Errichtung, Ausschmückung und Unterhaltung von Gotteshäusern und kirchlichen Gemeindehäusern, die Abhaltung von Gottesdiensten, die Ausbildung von Geistlichen, die Erteilung von Religionsunterricht, die Beerdigung und die Pflege des Andenkens der Toten, ferner die Verwaltung des Kirchenvermögens, die Besoldung der Geistlichen, Kirchenbeamten und Kirchendiener, die Alters- und Behindertenversorgung für diese Personen und die Versorgung ihrer Witwen und Waisen.“

¹⁰¹ For further information concerning the so-called youth sects cf. Scheffler, Albert Cornelius, „Jugendsekten“ in Deutschland – öffentliche Meinung und Wirklichkeit; eine religionswissenschaftliche Untersuchung, Lang, Frankfurt a. M. et al., 1989

commercial activities are carried out in pursuance with the Church's idealistic purposes¹⁰². Some *Bundesländer* have accepted at face value the Church's claim to be a religion, while others have refuted this assertion a priori.

Next to the already mentioned associations qualifying for tax privileges in Germany there is another group of entities which meet the requirements of § 53 AO under the heading *mildtätige Zwecke* (benevolent purposes, i.e. the support of those in physical or economic need). However, neither this category of organizations nor those qualifying for *gemeinnützige Zwecke*, whether classified as religions or not, enjoy the special privileges accorded to the corporations under public law carrying out *kirchliche Zwecke* in accordance with § 54 AO.

As noted above, *kirchliche Zwecke* relate only to corporations under public law, which have a special status according to the terms of the Weimar Articles incorporated via Article 140 GG into the *Grundgesetz*. The status is not confined to the two main Christian Churches and the Jewish congregations only; other religious and philosophical/ideological organizations may apply and have done so in the same way.

A rather special case are the Jehovah's Witnesses; they have been trying to be recognized as a corporation under public law since the early 1990s, and are still pursuing their case before the German courts. Their long legal battle has been seen as a test case for applications from non-mainstream religions or "sects". Following hearings in the lower courts, a Federal Administrative Court decision from 26 June 1997 rejected the Jehovah's Witnesses application. In detail:

3. Test case: Jehovah's Witnesses¹⁰³

The plaintiff in this case was a member in a community of Jehovah's Witnesses from the former GDR which had been recognized as a religious community on 14 May 1990 by the last GDR government after being removed from the list of permitted religious organizations in 1950 by the communist regime of the GDR. The plaintiff's claim that the community's national membership of around 170,000 and its history of almost a hundred years proved its durability was not disputed. However, the court stated that the legal status of corporations under public law was given in the expectation that such bodies would work together with the State. Cooperation of this kind, the court said, demands a certain loyalty, or, at least, mutual respect. Just as the State should not interfere with a religion, so the religion should not interfere with the State and should not question the fundamental principles of the State's existence. Yet, Jehovah's Witnesses do not

¹⁰² Cf. Gutachtliche Stellungnahme zu der Frage „Ist das Menschen- und Gesellschaftsbild der Scientology-Organisation vereinbar mit der Werte- und Rechtsordnung des Grundgesetzes?“, erstellt im Auftrag der Ministerpräsidentin des Landes Schleswig-Holstein, Informations- und Dokumentationsstelle „Sekten und sektenähnliche Vereinigungen“, Abel, Ralf B., April 1996, <http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/abel.html>

¹⁰³ BVerfG 2 BvR 1500/97, 19 December 2000, NJW 2001, p. 429; the Federal Administrative Court in a judgment issued on 17 May 2001 (BVerwG, 17.05.2001 - 7 C 1.01) referred the case back to the High Administrative Court Berlin for further factual investigation.

participate in political elections and forbid their members to vote or to stand for public office, which the court felt was not conducive to the principle of democracy and State order.

In the follow-up, the Jehovah's Witnesses lodged an appeal against this decision on 13 August 1997 and in a judgment from 19 December 2000 the Federal Constitutional Court confirmed that the rights of the religious congregation in question deriving from Article 140 GG in conjunction with Article 137 (5) WRV had been violated and referred the case back to the Federal Administrative Court. The arguments put forward in the appeal were based on the fact that the Jehovah's Witnesses were simply seeking a legal form for religious organizations which is provided in the *Grundgesetz* and which over 30 religious organizations in Germany have been granted up to date. The Jehovah's Witnesses claimed therefore that they were only asking for equal treatment compared to other religions, as guaranteed in the *Grundgesetz*, and the freedom to practice their religion without interference. Against the argument put forward by the Berlin Supreme Court that their non-participation in political elections contradicts the principle of democracy and loyalty to the State, they pointed out that the provision in the *Grundgesetz* to the granting of public law corporation status to religious denominations does not make any reference to loyalty to the State, and they claimed that their non-participation in political elections is not anti-democratic, but is simply the exercise of a basic democratic right. They argued further that, if the State is demanding loyalty from religious denominations, then this is tantamount to creating State Churches, which is contrary to the main church article in the *Grundgesetz* (Article 137 (1) WRV).¹⁰⁴

4. Minor religious communities in Germany

Some *Bundesländer* have also recognized as public law corporations some non-mainstream religions, inter alia Mormons, Christian Scientists, Adventists, and the New Apostolic Church. According to Article 137 (7) WRV non-religious organizations can qualify for public law status as well provided that they are dedicated to public welfare. Thus, the German Humanist association as well as the Salvation Army have been recognized as a corporation under public law, as have a number of regional non-denominational associations.¹⁰⁵

¹⁰⁴ In the meantime, the Italian Government, whose Church tax system has been compared favorably with that of Germany, signed a concordat with the Jehovah's Witnesses on 20 March 2000 which entitles them, inter alia, to provide spiritual support to people in the army, hospitals, and penal institutions. They can also perform marriage ceremonies recognized by the State and can obtain their share of the Italian Church tax; see La Intesa tra la Repubblica Italiana e la Congregazione Cristiana dei Testimoni di Genova, Roma, 20 marzo 2000, http://host.uniroma3.it/progetti/cedir/cedir/Lex-doc/It_int_Geova.doc ; as well as La Intesa tra la Repubblica Italiana e l'Unione Buddhista Italiana, Roma, 20 marzo 2000, http://host.uniroma3.it/progetti/cedir/cedir/Lex-doc/It_int_UBI.doc

¹⁰⁵ See for an overview the list on <http://www.uni-trier.de/~iev/r/religionsgemeinschaften.htm>

The rapidly growing number of Muslims in Germany¹⁰⁶ does not appear to have reached a coherent view about whether they wish to attain public law status; there is no unified Islamic identity in Germany, and no single overarching institution claiming to be the representative body of the Islamic religion. Only a small percentage of Muslims living in Germany are members of a Muslim association, and none of the various Muslim organizations which do exist are acknowledged corporations with public law status. There is, however, an ongoing debate about whether or not it would be useful for the Islam as such to be granted the status as corporation under public law; yet, in any instance, one major problem remaining is that many Muslims do not belong to any umbrella organization at all and would therefore fall out of the net anyway.

5. Religious education in German schools

An important and mostly heavily contested aspect of State-Church relationships generally is the religious education of children. Although under State supervision, the content of the religious education in most German public schools is the responsibility of the Churches (“Notwithstanding the State’s right of supervision, religious education will be given in accordance with the principles of the religious denominations.”, Article 7 (3) GG¹⁰⁷). As far as the two main (Protestant and Catholic) Churches are concerned, there is still a geographical division in the various *Bundesländer* with regard to which is the dominant religion, and a corresponding division in which religion is taught in schools. This means that it can be difficult for children belonging to other religious persuasions to receive instruction in their own faith in schools dominated by one or the other of the two main religions. Parents are free to decide whether or not their children will participate in the religious education provided, and reaching the age of 14, children can decide themselves (Article 7 (2) GG and § 5 Law concerning religious education of children¹⁰⁸). Usually, a class in ethics or philosophy is offered as an alternative for those pupils who have opted out.

In an increasingly secular society, there are, naturally, many who have no religious faith at all, and a controversial law in Bavaria decreeing that a crucifix should be displayed in

¹⁰⁶ „Über die Gesamtzahl der gegenwärtig in Deutschland lebenden Muslime sind keine exakten statistischen Angaben möglich. Diese statistische Unfaßbarkeit hat zum einen mit der äußeren Wahrnehmung und zum anderen mit dem Selbstverständnis der Muslime zu tun.“ <http://www.fes.de/fulltext/asfo/00803006.htm> Islamische Organisationen in Deutschland, Thomas Lemmen (electronic ed.), Friedrich-Ebert-Stiftung, FES Library, 2000; estimations range between 2.7 and 3.3 million Muslims; regional focal points are the Metropolitan areas of Munich and Hannover, the Rhine-Main-region, the Ruhr-region and Berlin, http://www.lpb.bwue.de/aktuell/bis/4_01/islam04.htm

¹⁰⁷ Article 7 (3) GG in the Original reads as follows: „Der Religionsunterricht ist in den öffentlichen Schulen mit Ausnahme der bekenntnisfreien Schulen ordentliches Lehrfach. Unbeschadet des staatlichen Aufsichtsrechtes wird der Religionsunterricht in Übereinstimmung mit den Grundsätzen der Religionsgemeinschaften erteilt. Kein Lehrer darf gegen seinen Willen verpflichtet werden, Religionsunterricht zu erteilen.“

¹⁰⁸ § 5 Gesetz über religiöse Kindererziehung: „Nach Vollendung des 14. Lebensjahrs steht dem Kinde die Entscheidung darüber zu, zu welchem religiösen Bekenntnis es sich halten will. Hat das Kind das 12. Lebensjahr vollendet, so kann es nicht gegen seinen Willen in einem anderen Bekenntnis als bisher erzogen werden.“

each classroom was successfully challenged in court by atheist parents of a child attending one of the schools concerned. In a judgment dating from 21 April 1999¹⁰⁹ the Federal Administrative Court upheld the parents' right under Article 4 (1) GG not to believe in any religion, and concluded that the mere fact that they did not wish their daughter to be exposed to religious influences of any kind in the course of her education was a sufficient ground to oblige the school administration to remove the crucifix¹¹⁰.

Another on-going debate concerns the introduction of Islamic religious education into State schools, in particular whether all *Bundesländer* should be obliged to allow Muslim organizations to provide for religious education on a par with the major Christian religions.

Some authors favor replacing the system of separate religious instruction for the different faiths by the approach adopted in some other countries of teaching school pupils about all the great world religions instead of focusing on one prevalent religion. As well as assisting to promote mutual understanding and tolerance for other religions, this would, so the argument goes, be more compatible with the right to religious freedom embodied not only in German domestic law but also in the ECHR. Parents with a particular religious faith could, if they so chose arrange for this general religious education to be supplemented outside the State educational system by lessons in their own and deliberately chosen framework of religious instruction. However, the law which currently applies to the majority of German schools does not facilitate this approach. As noted above, religious education must conform to the principles of the religious communities as it is laid down in Article 7 (3) *Grundgesetz*; it is, therefore, linked to and determined by the prevalent religious denominations in each *Bundesland*.

Religious instruction in schools is not the only controversial aspect of State-Church relations in which the two main Churches in Germany play a dominant role. The right to levy Church tax (*Kirchensteuer*) is a unique and much debated tax privilege which is accorded only to religious (and some humanitarian) communities which are corporations

¹⁰⁹ BVerwG 6 C 18.98, 21 April 1999

¹¹⁰ Already in 1995, the Federal Constitutional Court decided that the installation of a crucifix in classrooms was a violation of Article 4 (1) GG declaring an according Bavarian law prescribing an obligatory crucifix in each classroom unconstitutional and therefore void, BVerfG – BvR 1087/91, 16 May 1995, the so-called and heavily contested – in public debate as well as in academia – “Kruzifix-Urteil”. In the so-called “Kopftuch-Streit”, the Federal Constitutional Court Bundesverfassungsgericht decided on 24 September 2003 in favor of an Islamic female teacher, Fereshta Ludin, however with the caveat that the *Bundesländer* could pass legislation prohibiting the wearing of religious symbols. By issuing this judgment, the Constitutional Court avoided the real issue at stake, risking that – after such laws will be entered into force, as is planned in several *Bundesländer* already [“Die Kultusministerin Anette Schavan hat am 28.10.2003 einen Gesetzentwurf vorgelegt, der das Tragen eines Kopftuches an den Schulen des Landes verbietet. Demnach sind religiöse Bekundungen, die die Neutralität des Landes gegenüber Schülern und Eltern gefährden, verboten. Ausgenommen sind christliche und abendländische Bildungs- und Kulturwerte oder Traditionen, weil sie dem Erziehungsauftrag der Landesverfassung entsprechen. Der Tübinger Verfassungsrechtler Ferdinand Kirchof hat die Ministerin bei der Fassung des Gesetzentwurfs beraten.” cf. <http://www.lexisnexis.de/aktuelles.php?showaktuelles=38531>] – it will have to decide in substance eventually once a Muslim person feeling discriminated by the law will submit a *Verfassungsbeschwerde* claiming then that the law in question is violating constitutional rights, i.e. the freedom of religion. Overall, this means that the conflict is not solved yet.

under public law, cf. list *supra*. Not all of them choose to exercise their right to levy tax, sometimes preferring to rely on freely offered donations only; yet, the two large Churches not only levy the tax but also have an arrangement with the State to collect this tax on their behalf.

6. Church Tax (*Kirchensteuer*) in Germany

Church tax has been a part of German law in one form or another since the nineteenth century, and even centuries earlier there were similar methods of financing the Church when tithing of goods and later money was practiced. Industrial development in the nineteenth century meant that the Churches acquired new fields of work, and their duties (then under the financial management of the State) expanded. With the increase of populations, especially in cities, new Church congregations came to be established, with a consequent increase in the work carried out by the Churches and the number of priests and other personnel required. The State decided at this time to transfer financial management to the Churches themselves, and in order to enable them to raise the necessary revenue, allowed them to levy a tax on their members.¹¹¹

Church tax was initially introduced on a Land-by-Land basis starting in the early nineteenth century; local parishes were at that time responsible for administering the tax, but during the days of the Weimar Republic the tax was gradually transformed into a Diocesan tax for the Catholic Church or *Landeskirchen* tax for the established Protestant Churches. Church tax was incorporated into national German law with the *Weimarer Reichsverfassung* of 1919 which granted religions established as corporations under public law the right to levy Church tax. This arrangement was carried over into the *Grundgesetz* in 1949, and in 1990, it was extended through the unification treaty to the former GDR.

The tax denotes – to some, notably the Churches themselves – an important piece of Church freedom, underlining the official separation of State and Church. Church members are predominantly responsible for financing the Churches, with some 8 thousand million EURO being raised each year in Church tax, and the Churches are entirely free to decide how the money should be spent. However, the fact that the State collects the tax on behalf of the two main Christian Churches and generally works closely with them is regarded as a preferential treatment towards public law corporations and, hence, a discrimination against other religious associations.

The Church tax is collected by the State on behalf of the Churches through automatic payroll deductions and is transferred to the relevant Catholic Diocese or Protestant

¹¹¹ The Church taxes of the so-called “free professions”, or the self-employed, such as doctors, lawyers, architects, and farmers, are deducted from their income through the relevant finance offices while the Church taxes of employees are deducted by their employers and sent on to the appropriate finance offices. From there they go to the central finance office from where the money is distributed to the Catholic Dioceses and Protestant *Landeskirchen*. The contribution is tax deductible on the Church member’s annual tax declaration. Most contributing taxpayers pay between 2-3 % of their income in Church tax; the amount paid depends on income, with the wealthier paying more.

Landeskirche according to the religious affiliation of the employee. There are seven Catholic Church provinces/archdioceses and 20 dioceses while the Protestant Church consists of 24 legally independent *Landeskirchen*. The central Church bodies then pay the clergy and lay employees, and money is distributed to the individual congregations according to their need. Some have argued that it would be more transparent if the Church tax went directly to the congregations, however, the counter-argument stresses that such a system would be less just, as there is a great disparity in the wealth of the different congregations. The present central administration and distribution of the tax according to established criteria guarantees that each congregation has a fair financial basis, regardless of how much tax is collected from its own members.

Almost 67% of the 82.26 million population of Germany¹¹² belong (on paper at least) to one or other of the two main Christian Churches (both, the Protestant Church as well as has the Catholic Church count approximately 27 million members¹¹³). However, over 60% of the Church members – for example, pensioners and the unemployed – are non-taxpayers and therefore do not contribute to the Church tax budget either. Family allowance is also deducted before the Church tax is calculated. The level of tax – a percentage of income tax – is set by the Churches; they pay the State 3-4% of the income raised for the cost of administering the Church tax. This administrative cost is calculated by the State and deducted from the tax before the residue is handed over to the Churches. As there are approximately the same number of adherents in total in the Catholic and Protestant Churches in Germany, they receive approximately the same amount of money each year, i.e. circa 4 thousand million EURO each¹¹⁴.

There have been harsh criticisms of the German Church tax system; these voices maintain that the Churches are compromised by having the State collect the tax on their behalf¹¹⁵. However, supporters of the current system deny this, pointing out that there is a substantial difference between the State giving money to the Church and the State collecting money from Church members on the Churches' behalf. The Churches remain convinced that the current system is fair and efficient and that it serves both Church and State, as the State benefits from the numerous social welfare activities realized by the churches which the State would otherwise have to finance itself and the churches benefit from the administrative aid offered by the state.

The main arguments in favor of the Church tax system as it exists today may be summarized as follows:

¹¹² <http://www.destatis.de/basis/d/bevoe/bevoetab5.htm> ; official website of the "Statistisches Bundesamt Deutschland" Wiesbaden providing the latest figures for the year 2000.

¹¹³ Official statistics say there were 27.017.401 Catholics living in Germany in 1999, see <http://dbk.de/daten/Daten-1999.pdf>

¹¹⁴ Figures for the EKD in 2000 see http://www.ekd.de/statistik/3217_kirchensteueraufkommen.html (4.249.982.000 EUR)

¹¹⁵ Cf. for further reference Marre, Heiner, *Die Kirchenfinanzierung in Kirche und Staat der Gegenwart – die Kirchensteuer im internationalen Umfeld kirchlicher Abgabensysteme und im heutigen Sozial- und Kulturstaat Bundesrepublik Deutschland*, 3rd ed., Ludgerus-Verlag, Essen 1991

- The system is fair because it is based on ability to pay.
- The fact that the tax is collected from all those eligible to pay (approximately 35% of the German population) means that the financial burden is shared and the Churches are not dependent on donations from a few wealthy members who may then seek to control how the money is spent.
- The tax gives the Churches the financial stability they need to plan and carry out their tasks.
- Countries where the Churches are primarily financed through donations and collections generally raise less money, there is no continuity for the Churches, and the principal donors dictate how the money they give is spent.
- The social welfare and educational programs which the Churches run cover many services which the State would otherwise have to provide itself, possibly at greater cost.
- The Church tax collection procedure is relatively simple and unbureaucratic, and the money is handed over globally and anonymously, so that the Church has no knowledge of individual salaries.
- If the Churches had to set up the administration necessary to collect the church taxes themselves it would cost considerably more than it does to have the State collect it (the estimated cost, based on the experience of other countries, is between 20-25% of the income raised); in contrast, with the current system, two collection procedures are merged to one, thus, saving one set of administrative fees.

Arguments against the existing German Church tax system:

- The levying of a tax is a form of financial coercion – Church members should be allowed to give to the Church what they choose.
- In an increasingly secular country the Church tax is no longer appropriate at all.
- Most Church members do not pay the tax so that the burden falls on the minority.
- It is an impersonal form of financing the Church and does not encourage contact between the Church as social institution and its members.
- Church tax is inextricably bound to the politics of State tax and thereby makes the Churches dependent on the State and changing policies.
- Some consider that the social welfare function of the Churches could be carried out more cheaply and more efficiently by the State.
- The Churches could be financed alternatively through income from their property and investments.
- Critics say the current church tax system favors centralization of the Church hierarchy with its luxurious staff and power structure.
- The political neutrality of the Churches is perceived as being compromised by having the State collect Church tax.¹¹⁶

¹¹⁶ Barker, Christine R., Church and State Relationships in German “Public Benefit” Law, in: International Journal of Not-for-Profit Law, Vol. 3, No 2, Dec. 2000, http://www.icnl.org/journal/vol3iss2/ar_barker.htm

In the interest of transparency, and in order to help persuade their members of the value and necessity of the Church tax, the Catholic Dioceses and the Protestant *Landeskirchen* publish their annual budgets at the beginning of each calendar year, setting out details of how the collected money will be used. In the Catholic Church, this budget is decided by elected committees where the laity has a majority, and the Protestant Church is advised by its Synod – a democratically elected “Church Parliament”.

Everyone has the possibility to opt out of the Church tax system by giving up his or her Church membership. However, this so-called *Kirchenaustritt* involves a formal declaration stating that one is leaving the Church and has to be proved through a legally validated certificate from a State authority. This is an official legal act and is recorded in both civil and Church registers. In recent years, a significant number of people have chosen to undertake this step. Thus, although the Church tax still provides the large Churches with a stable income, it is an income which is declining in relation to rising Church costs. This is not only because of people opting out of Church membership but is also due to the high level of unemployment in certain parts of Germany, notably in the eastern *Bundesländer*, where there are also considerably less Church members than in the West.

7. Church Monopoly of Social Welfare Provision?

A basic characteristic of the German State is the principle of subsidiarity meaning that the State leaves as many social welfare duties as possible to independent, self-governing agents¹¹⁷. For example, 46% of German hospitals are run by the Third Sector. The self-governing agencies are, however, to a great extent still dependent on public subsidies.¹¹⁸

In practice, much of the social welfare in Germany is provided by the two major Churches, which means that they receive substantial amounts of public funding to be able to fulfill their attributed tasks. This has led to reproaches of a Church monopoly. There are some 100,000 Church-based charitable foundations involved in social welfare provision of one kind or another, and the two Churches are the second biggest employers within Germany – after the public sector¹¹⁹.

¹¹⁷ Barker, Christine R., *ibid.*

¹¹⁸ The non-profit sector in Germany generally is far more heavily subsidized by the State than in other countries, as the following figures demonstrate:

Funding of the Third Sector	International Average	Germany
Public funding	42%	64%
Sales of services	47%	32%
Philanthropic giving	11%	3%

In: Bertelsmann & Maecenata 1999, 2

¹¹⁹ Robbers points out that the large churches in Germany employ more than 600.000 people in Germany; he then explores in greater detail the structure of the labor relations within the German churches with its parallels to the public system of employing civil servants and its peculiarities differentiating the churches from regular public authorities, cf. Robbers, Gerhard, *Staat und Kirche in der Bundesrepublik Deutschland*, in: *Staat und Kirche in der Europäischen Union*, idem (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, 61-78 (70-72)

The Church has a long tradition of helping those in need, but while in many other countries the State, in conjunction with the wider non-profit sector, has taken over the provision of social welfare functions, in Germany the Churches continue to be the main providers of social services from pre-school education to health care for the elderly¹²⁰. A substantial part of this is paid for out of the Church tax budget, with the State covering the rest out of the general tax budget. In this respect the Churches do not differentiate themselves from other agencies, such as, e.g. the German Red Cross, which similarly receives State subsidies for the social services it implements. Critics argue, however, that by having the Churches carry out so many public welfare services, the State is breaching its duty to neutrality, and, by the same token, they consider it inappropriate for the Churches to be subsidized by public taxes.

The Churches, on the other hand, dispute this with incisiveness. First, they do not regard it as inappropriate for the Churches to provide social welfare care; on the contrary, they consider it as a natural part of their mission, a practical enactment of the spiritual life of the Church. As far as financial resources are concerned, they point out that almost a fifth of the income from Church tax (i.e. over 1.5 thousand million EURO of their total income of approximately 8 thousand million EURO) is spent on social services.¹²¹

The Churches contest therefore that their social service provision is principally financed by the State; although the State does pay a great part of the remaining costs, it does not have the burden of organizing it, which, so the argument goes, would cost the State much more. Additionally, they point out that the use of the Church buildings alone saves substantial rental costs, and argue that the State would have to set up taxes to do all what the Churches do, emphasizing the fact that the Churches provide their social welfare services on a non-profit basis.

A middle road is proposed by those who support the Italian (introduced in 1990) and Spanish (introduced in 1988) system having adopted the so-called *cultural tax*, whereby the public finance offices deduct automatically 0.8% respectively 0.5239% (cf. *infra*) of income tax from all tax paying citizens, regardless of their religious adherence, and the citizens can determine freely whether their contribution is paid to a Church of their choice or to the State to be used for social, humanitarian, or cultural purposes.

8. Religion as social phenomenon in Germany

Churches in the German context are primarily perceived as long-established institutions providing for basic needs in spiritual matters; they belong to the outer appearance and image of each and every smaller village as well as bigger town, they do not only shape

¹²⁰ In France, for instance, the health care system is primarily a public function provided by the state while religious communities are still allowed to run their own facilities, cf. Basdevant-Gaudemet, Brigitte, *Staat und Kirche in Frankreich*, in: Robbers, Gerhard, *Staat und Kirche in der Europäischen Union*, Nomos Verlagsgesellschaft, Baden-Baden, 1995, 127-158 (139)

¹²¹ In Mainz, for example, the *Kindergärten* provided by the Church in 1999 were used by 15,440 children of all faiths and nationalities. These were provided at a cost of 14.1 million EURO (19.4% of the Church tax received) without any public subsidy.

the architectural landscape of German cities, but do influence society on a broader scale. In addition to the fact that recent figures seem to prove that church affiliation is decreasing substantially and that the quota of people leaving the church via the so-called *Kirchenaustritt* (cf. *supra*) is growing, Sunday service attendance has been diminishing significantly during the past couple of years – not only in Germany, but nearly everywhere in (Western) European societies. Yet, the roots of Christianity are even nowadays clearly visible, and, to quote maybe the most manifest example of Christian impact in today's life: the majority of German families do attend the mass on Christmas Eve. Admittedly, this observation could be of minor significance, a more or less secularized family tradition without having to say much in terms of religious belongingness to one or another Church. And yet, it tells us more about underlying values determining the perception of life and about people's setting of priorities, educating their children in a specific way, potentially even on the subconscious level. German society is still fundamentally characterized by Christian traditions, numerous hospitals are run by religious congregations, theological faculties (traditionally affiliated to public universities) do not record a significant decrease in terms of enrolled students¹²², discussions about euthanasia and suicide are still largely determined by Christian ideas and moral arguments often based on religious ethics, voluntary organizations are widely linked to a Christian community, great amounts of donations are collected each year in the name of Christian denominations and groups based on and committed to Christian ideas, beliefs and concepts of life¹²³, and most of the kindergarten facilities as well as many residential homes for the elderly are to a large extent run and maintained by religious institutions.

Churches as social institutions¹²⁴ as well as religion in abstracto being a social phenomenon determining social reality are more than places where rituals are celebrated once a week. Assuming a scenario where the state was supposed to cope with the variety of services provided for by the churches – that would probably pull the rug out from under. It would not only be much more expensive in financial terms for the state to cover these branches of social work, but it would as well be much more burdensome for the whole bureaucratic apparatus since it would involve a restructuring of the general civil servants' framework as well as a redistribution of duties in several fields of society, especially in the sectors of medical care and public welfare. Organizational frameworks in which a given society is rooted and due to which its functioning can be evaluated on a scale of efficiency are – on a more abstract, constitutional theoretical level – a mirror of the chosen distribution between individualism and communitarianism of that particular

¹²² „Trotz zunehmender Verweltlichung der Gesellschaft und schlechterer beruflicher Möglichkeiten für Theologen ist bundesweit das Interesse am katholischen Theologiestudium in den vergangenen 20 Jahren angestiegen. Das geht aus einer Statistik hervor, die jetzt der Katholisch-Theologische Fakultätentag in Deutschland vorgelegt hat. Im Wintersemester 1978/79 wurden 19.387 Theologie-Studenten gezählt, 1997/98 waren es 21.706.“; <http://www.uni-erfurt.de/theol/nachrichten/n990221.htm>

¹²³ e.g. Bread for the World, Misereor, Arbeiter-Samariter-Bund, Caritas, Deaconry, Hospices, Missions, Red Cross and Red Crescent, Arbeiterwohlfahrt, numerous smaller organizations based on charitable donations etc.

¹²⁴ Another disputed issue being brought frequently before the courts is the bell-ringing of churches. The Federal Administrative Court decided on 30 April 1992 (7 C 25/91) that the peal of bells other than for religious purposes can be interdicted, in particular the hourly bell-ringing during the night, cf. *die tageszeitung*, 20/21 December 2003, p. 5.

society. Citing one of the most contentious decisions recently delivered by the Federal Administrative Court as well as the Federal Constitutional Court in the field of religion is the saga around the headscarf worn by the Islamic female teacher Fereshta Ludin in class¹²⁵ – a topic which has gone before the courts not exclusively in Germany¹²⁶.

This episode underlines the potential for conflict in the years to come with the European societies facing major migratory movements of primarily immigrants with Islamic origins coming from the Mediterranean, African, and Eastern countries and trying to settle down in the North-Western-part of the continent; this development will manifest itself even more rigorously with the upcoming enlargement of the European Union and with the general phenomenon of immigration into (Western) European societies – which suffer on their parts from a notorious loss of population respectively an increasing aging of their populations and, thus, do rely on an increasing degree of immigration in order to guarantee the future of their human resources. The recent court decision prohibiting the female teacher to wear her headscarf in a German class is crucial for one specific reason: assuming an analogous scenario by swapping the Muslim teacher with a Catholic nun. In this constellation, would anybody in these days dare to prohibit her to wear her cloth she traditionally wears as a sign of her affiliation to the Catholic Church or her particular fraternity, and hence, put into question her quality of being an appropriate teacher for the German pupils?

The answer to this question can be left to the critical reader – however, this exemplification might illustrate quite nicely how established societies have to adapt themselves to new and constantly changing social circumstances and environments in the years ahead.

¹²⁵ This is not the right place to engage in a deeper discussion about this judicial dispute, however, it remains to be said that this case raised major public awareness of the problem and polarized the fronts, cf. BVerwG 2 C 21.01, 4 July 2002 (“Kopftuch-Streit”) and BVerfG, 24 September 2003, 2 BvR 1436/02, http://www.bverfg.de/entscheidungen/frames/rs20030924_2bvr143602

¹²⁶ Cf. *supra*, chapter on the legal system of the French state and church relationship; similar discussions about the Muslim headscarf take place in other European Member States, too.

D. United Kingdom

1. The role of the Monarch in past and present

Although originally the sovereign enjoyed considerable personal power, since the seventeenth century this power has increasingly shifted to other actors within the British Constitution, most notably to Parliament, and then to the Prime Minister and Cabinet. Nonetheless, the sovereign retains a number of residual powers, including *de iure* assent to all Acts of Parliament, and thus membership of the legislature. There are firm junctions between the Crown and the Church of England outlined in detail below:

The sovereign is the supreme governor of the Church of England¹²⁷, although not *ipso facto* a minister of that Church. The control of the sovereign over the Church of England was declared by the Act of Supremacy 1558, which united and annexed all ecclesiastical powers of visitation, reformation, and correction of the Church of England with the Crown¹²⁸. The sovereign also possesses wide powers of appointment to offices within the Church of England¹²⁹. Although the monarch is responsible for a range of functions within the life of the Church of England, there is no provision for delegation of these functions in the event that he/she should be of a different denomination or religion, as is the case for, e.g., the Lord Chancellor¹³⁰.

In 1688, the Protestant Parliament offered the Crown to the Protestant William and Mary, prince and princess of Orange. As part of the Bill of Rights 1688, which confirmed this constitutional change, Parliament provided:

“whereas it has been found by experience that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a popish¹³¹ Prince or by any King or Queen marrying a papist¹³² the said Lords and Commons pray that it may be enacted that all and every person that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist shall be excluded and be forever incapable to inherit possess or enjoy the crown and government... or to have use or exercise any regal power authority or jurisdiction.”¹³³

¹²⁷ See Act of Supremacy 1558, s. 9, this Act united and annexed spiritual jurisdiction to the Crown, s. 8; “We acknowledge that the Queen’s excellent majesty, acting according to the laws of the realm, is the highest power under God in this kingdom and has supreme authority over all persons in all causes as well as ecclesiastical as civil.” (Canon A7)

¹²⁸ Act of Supremacy 1558, s. 8

¹²⁹ See Halsbury’s Laws of England, vol. xiv, para. 358

¹³⁰ See Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, ss. 1, 2

¹³¹ i.e. Roman Catholic

¹³² i.e. Roman Catholic

¹³³ Bill of Rights 1688, s. 1 (the spelling has been modernized)

This provision of the Bill of Rights, though far-reaching, is primarily negative. Although it serves to bar Roman Catholics or those who choose to marry them from inheriting or occupying the throne, it does not positively state a mandatory religion of the sovereign as such. It should be remembered, however, that the Bill of Rights was enacted in a time context where the only realistic faiths of a sovereign were Roman Catholic or Protestant, although it should be noted that the latter covered a range of possibilities. Strictly speaking, this does not cover the position of a non-Catholic, non-Protestant inheriting from a sovereign who was not barred from succession or office by the Bill of Rights, but the provision in question was supplemented by a requirement that the sovereign take an oath, normally at coronation, renouncing certain aspects of the Roman Catholic doctrine. Again, strictly speaking, a non-Christian could have honestly taken this original oath, but it was replaced in 1688 by an obligation to protect the Protestant religion and in 1910 by a shorter form containing a positive declaration that the sovereign was “a faithful Protestant”. In 1700, the succession to the Crown has been laid down by statute, and limited to Protestants. The same Act reaffirmed the relevant provisions of the Bill of Rights, and provided that “whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established”.¹³⁴

The effect of these provisions can be summarized as follows: Only Protestant Christians can inherit the Crown, and they must affirm this faith at their coronation. Protestants may not inherit the Crown if they are married to a Roman Catholic, even if that marriage is no longer in existence. Reigning monarchs who convert to Roman Catholicism, or marry a Roman Catholic, lose the Crown instantaneously, which passes to the next Protestant in line by force of law. Reigning sovereigns who convert to any faith other than Roman Catholicism, or who marry anyone of any other faith, retain the Crown as long as they have joined “in communion with the Church of England”.

2. The Anglican Church as a privileged body within the British legal system

There are three groups of actors whose place in the British legislature depends, at least to a certain extent, upon their religious affiliation. First, ministers of religion, who were, until recently (cf. *infra*), excluded thereby from membership in the House of Commons, second, the Lords Spiritual in the House of Lords, whose legislative position depends upon their position within a particular religious hierarchy, and, third, the sovereign, whose position is hedged around with both positive obligations towards Anglican Christianity, and negative obligations concerning Roman Catholicism. This final point means in abstracto that if the laws concerning the beliefs of the sovereign are of any importance they represent the United Kingdom as a primarily Protestant, and thus

¹³⁴ Act of Settlement 1700, s. 3 and Coronation Oath Act 1668

Christian, state; if they have no importance at all they must be regarded as an unnecessary remnant of anti-Catholic prejudice.¹³⁵

Focusing upon the House of Lords, it might be argued that the Lords Spiritual could be expected to make an impact by transporting certain values into the House of Lords. Given the career structure of the Church of England, one might expect them to be men of some maturity, with experience of running complex, yet non-commercial, organizations, and with a considerable track record in relatively poorly paid public service area. They might also be expected to defend a core of values not necessarily associated with loyalty to any particular political party, giving them a degree of insulation from ordinary political life. Finally, they might be expected to be Christians of some moral courage, willing to express themselves on points more commonly construed as private, rather than public, morality. If the individual characteristics of the Lords Spiritual thus justify their presence in the House of Lords, it seems more appropriate to select these individuals on the basis of those characteristics, rather than a conceptually distinct place in the Church of England – particularly one that, while female priests cannot become bishops, includes selection by gender.

It seems at least possible, however, that the Church of England has a voice in the legislative process not simply because the Lords Spiritual are likely to be individuals capable of contributing substantially to the legislative debate, but because the voice of the Church of England as such is seen as an especially strong voice within British society. The Church of England as institution is seen as providing religious input into an otherwise secular legislative process. This input is seen as an important ingredient to the quality of the process of making laws, rather than, as would have been the case in earlier periods in British history, a beneficial entitlement of the Anglican Church itself¹³⁶.

One can identify two problems with prioritizing the religious voice of the Church of England; first, it is troublesome to view a single religious organization as providing undifferentiated religious input into a state organ. Some defenders of the Lords Spiritual have argued that non-Anglicans, and even non-Christians, view their input into debate as essential, and as a means ensuring that a *religious* perspective is always kept before the otherwise secular legislature. Yet, one can doubt whether a homogenization of all religious traditions and belief systems does justice either to their diversity or to their various social missions. In particular, this may require the Lords Spiritual to raise issues concerning religious beliefs or practices they find difficult to accept. One such crucial issue could, for instance, be the following question: Would one require the Lords Spiritual to advocate an exemption for animal sacrifice to Satan during a debate on cruelty to animals' legislation?

¹³⁵ Edge, Peter W., Religious Remnants in the Composition of the United Kingdom Parliament, in: Law and Religion, Current Legal Issues 2001, Volume 4, O'Dair, Richard/ Lewis, Andrew (eds), Oxford University Press, 2001, 443-455 (451)

¹³⁶ Edge, Peter W., Religious Remnants in the Composition of the United Kingdom Parliament, in: Law and Religion, Current Legal Issues 2001, Volume 4, O'Dair, Richard/ Lewis, Andrew (eds), Oxford University Press, 2001, 443-455 (453)

Secondly, legislators do not leave their own religious beliefs at the doorway to the legislating chamber. Although believers in some traditions may feel that specialist clergy are the appropriate individuals to formulate and voice their religious doctrines, this is not to say that only such clergy would be expected to adhere to them. In a society which is predominantly Anglican, one would expect a sizeable number of the legislators to be Anglican so to say automatically. If the society is not predominantly Anglican, one might query why the Anglican input should be given special status at all.

The third area of concern was the exclusion of some ministers of religion from the House of Commons until recently. The legal situation till May 2001 was problematic¹³⁷, not least for its incompatibility with the European Convention on Human Rights.

Article 9 ECHR stipulates the primary guarantee of freedom of religion. Convention organs have generally been reluctant to allow individuals to rely on Article 9 in relation to employment or office (cf. *supra*), preferring to construe the freedom of religion as the right to leave an office which imposes restrictions upon religious rights¹³⁸. In the recent case *Buscarini v. San Marino*¹³⁹, however, the applicants were elected to the Parliament of San Marino and asked permission to take their oaths of office without reference to “the Holy Gospels”, as it was foreseen in domestic law. Their request was refused, and the applicants eventually took the prescribed oath, under protest. The Court found that this imposition “did indeed constitute a limitation within [Article 9], since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats”¹⁴⁰. As this was “tantamount to requiring the elected representatives of the people to swear allegiance to a particular religion”, it was a limitation unacceptable under the European Convention¹⁴¹. The Court opted for a more pluralistic vision stating that “it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs”¹⁴².

The emphasis on the democratic mandate in this case may limit its applications to parallel or similarly construed situations of democratically elected office holders; even with this narrow reading, however, if elected representatives were denied their place in the House of Commons because of their ministry, a claim under the European Convention on Human Rights would probably have stood a good chance of success. This indicates that the statutes imposing such restrictions were *prima facie* contrary to the ECHR. It would have been possible to invoke the Human Rights Act 1998 in order to interpret the statutory provisions narrowly, especially as the Act requires particular regard to be given to the religious interests of religious organizations¹⁴³. Yet, in 2001, the House of

¹³⁷ In 2001, the House of Commons enacted the Removal of Clergy Disqualification Act which received Royal Assent on 11 May 2001.

¹³⁸ See Edge, Peter W., Religious Rights and Choice under the European Convention on Human Rights, 2000, 3 Web Journal of Current Legal Issues, <http://webjcli.ncl.ac.uk/2000/issue3/edge3.html>

¹³⁹ *Buscarini and Others v. San Marino*, 18 February 1999, HUDOC 24645/94

¹⁴⁰ *Buscarini*, para. 34

¹⁴¹ *Ibid.*, para. 39

¹⁴² *Ibid.*

¹⁴³ Human Rights Act 1998, s. 13; cf. <http://www.hmso.gov.uk/acts/acts1998/19980042.htm>

Commons enacted the Removal of Clergy Disqualification Act which received Royal Assent on 11 May 2001 so that this *prima facie* illegal situation has been removed.

Only a small number of individuals are likely to be directly interested in or affected by the processes described under this heading outlining the British system of State-Church-relationship. Very few people are likely to be in a position where the limits on election to the House of Commons directly affected them; fewer still by the composition of the House of Lords, or the limits on freedom of conscience of the sovereign. Nonetheless, these constitutional issues are significant to all citizens of the United Kingdom.

First, constitutional rules can effectively limit full participation in political life of the State; for instance, the British constitution of the early nineteenth century restricted political activities of Jews, Roman Catholics, and atheists. Exclusion of religious adherents from office represents a stilling of voices, and an intended impoverishment of pluralism. Second, constitutional rules can seek to support a particular religion, sometimes as part of a state ethnicity. The debate on religious education in state schools, resolved in the Education Reform Act 1988, appeared to structure the United Kingdom as a primarily Christian country putting emphasis on Christianity and Christian values at several places in the Act¹⁴⁴. The emphasis given to the Church of England in the House of Lords, and to Protestantism in succession to the Crown would suggest that Great Britain should be structured – and is, in fact, structured – as a first and foremost Protestant country.

This special treatment of a dominant church, either dominant in terms of traditional links with the state's territory or its dominance being grounded on demographics, can be seen as a positive recognition of the role of that particular organization in the life of the state in question. In other words, this seemingly preferential treatment is no more than official recognition of the *de facto* social situation within a given entity. The problem here is that this view concentrates on the experience of those who are members of the dominant religious community. Respect for one's religious identity by the state is crucial for a feeling of full affiliation to that polity. By making use of constitutional rules to support the linkage between particular religious communities and the State, one creates the danger that those who exclude themselves from the dominant groups will feel at least partly excluded from full citizenship. If Christianity, and particularly Protestant Christianity in the British case, occupies a special constitutional position due to national history and culture, there is at least a potential that non-Christian and non-Protestant associations in their specificity of being a different pool of collective interests will be automatically construed as less than full participants in the State, because of their less than full participation in that part of national history and cultural identity. The symbolic importance of these constitutional rules does not necessarily depend on a practical impact, or the extent of the legal rules. Yet, the limits on the religious beliefs of the sovereign, due to the symbolic power of the monarch as head of state, are significant and should not be neglected; although a non-Protestant may not be in a position to succeed to the throne in the foreseeable future, the a priori exclusion of this possibility certainly sends an important emblematic message and creates a specific image of the United

¹⁴⁴ See http://www.hms0.gov.uk/acts/acts1988/Ukpga_19880040_en_1.htm

Kingdom in the framework of European states being committed to a set of shared rights and values – first and foremost laid down in the ECHR – this major European international covenant functioning as the primary Human Rights Charter Europe-wide that has explicitly been incorporated into British Law via the Human Rights Act 1998.¹⁴⁵

3. Religious denominations next to the Anglican Church

Religious bodies in the UK, other than the Church of England, are largely treated in law as ordinary private associations whose members are voluntarily bound together by contract. However, such contracts are not simply private matters for their members. Particularly modern employment law has greatly restricted the freedom of contract, notably in order to eliminate discrimination and to prevent unfair dismissal on the grounds of race or gender. In Britain, there is no such thing as a formal register of “acknowledged” churches – whereas church buildings can be registered for various reasons, especially for marriage ceremonies¹⁴⁶. Problems can arise – and already arose in practice – when deciding whether a specific religious community constitutes a church or not. The Scientology Church, for instance, wanted to register one of its chapels; yet, the Court of Appeal decided that registration required a reunion of people worshipping God or according reverence to a supreme being, whereas instruction in secular philosophies is not sufficient¹⁴⁷. The humanistic community “South Place Ethical Society” was denied status as welfare institution since it was not promoting religious purposes¹⁴⁸. In this sector, the likely impact of the Human Rights Act 1998 is a subject of wide-ranging debate. In assimilating the rights prescribed by the ECHR into UK law, one of the most crucial issues is whether the Act will lead to new restrictions which will prevent employers from requiring particular religious affiliations of their employees.

Religious bodies are important not merely as associations composed of individual members but as vessels for major traditions and structures of belief which underlie society on a more basic level. For those within these broad traditions fully to influence national life there need to be effective and publicly recognizable religious communities which relate with the State at a national and at a local level. The history of religion shows that the identity of faith communities is extremely vulnerable to fragmentation. Such fragmentation may pose a greater threat to the effective life of faith communities than unorthodox views which are contained within them.¹⁴⁹

¹⁴⁵ Cf. Betten, Lammy, *The Human Rights Act 1998: what it means – the incorporation of the European Convention on Human Rights into the legal order of the United Kingdom*, M. Nijhoff Publishers, The Hague, Boston, 1999; Coppel, Jason, *The Human Rights Act 1998: enforcing the European Convention in the domestic courts*, J. Wiley, Chichester, New York, 1999

¹⁴⁶ Places of Worship Registration Act 1855

¹⁴⁷ *R v Registrar-General, ex parte Segerdal* [1970] 2 QB 697

¹⁴⁸ *Barralet v Attorney-General* [1980] 3 All ER 918

¹⁴⁹ Harte, David, *Defining the Legal Boundaries of Orthodoxy for Public and Private Religion in England*, in: *Law and Religion, Current Legal Issues 2001*, Volume 4, Oxford University Press, 2001, 471-495 (493)

4. The Legal Status of Islam in the United Kingdom

The Muslim community within Great Britain is one with considerable historical antecedents. *Badawi* notes that the first Muslim immigrants into the United Kingdom came in the Middle Ages¹⁵⁰; according to *Anwar* the first mosque in Britain was established in Woking in 1890¹⁵¹. However, large scale immigration did not begin until the 1950s and was largely a peculiarity of the 1950s and 1960s¹⁵². According to official Government statistics, approximately 0.52 million Muslims are currently living within the UK although other sources give even higher figures; an increasing proportion of these Muslims are British born. There are only 0.11 million Jews, 0.14 million Hindus and 0.27 million Sikhs¹⁵³. The size of the Muslim population, and the particular ontology and ideology of the religion, has been perceived as being of particular importance to British society.

“... I ought to explain the significance of Muslims [in Great Britain]. They form over half of the non-Christians and will grow in both absolute and relative terms as they are the youngest of all population groups and have large families at a time when the population base of other groups is static or declining. They probably also have a level of religious participation which is as high or higher than any other group. Moreover they are connected with, actually and potentially, the largest ethno-religious minority in the EC, and ultimately with the politics of the populous Muslim world, not least with the rise of political Islamism as a challenge to Western ideological hegemony and domination.”¹⁵⁴

Muslims have a higher incidence of religious observance as compared to other traditional religious associations. Being Muslim is frequently more important to the individual than their ethnic identity – a phenomenon that is now in the process of being realized within academic literature too¹⁵⁵. However, it is equally important to remember that Islam is not a monolith. One finds major religious and cultural divides among Muslims¹⁵⁶ – issues that are of great importance to one section of the Muslim community may be of much less significance to other subgroups. Obviously, this has an impact when considering the relationship between law and Islam on the whole.

Another point that needs to be kept in mind is the fact that Muslims tend to come from the lowest socio-economic levels within (British) society; those belonging to immigrant communities tend to be found disproportionately in the low-income sections of society.

¹⁵⁰ Badawi, Zaki, *Islam in Britain*, London, Ta Ha Publishers, 1981, 7

¹⁵¹ Anwar, Muhammad, *Muslims in Britain: 1991 Census and Other Statistical Sources*, Birmingham, Centre for the Study of Islam and Christian-Muslim Relations, Birmingham, 1993, 1

¹⁵² Badawi, *supra* note 150, 8

¹⁵³ *Social Trends 1995*, London, HMSO, 1995, 222

¹⁵⁴ Modood, Tariq, *Establishment, Multiculturalism and British Citizenship*, 65 *Political Quarterly* 53 (60)

¹⁵⁵ Samad, Yunas, *Book burning and race relations: Political mobilisation of Bradford Muslims*, 18 *New Community*, 1992, 507 (508)

¹⁵⁶ Raza, Mohammad S., *Islam in Britain*, Leicester, Volcano Press, 1991, 85

The fact that a person is a Muslim in contrast to being Christian will most certainly make a difference in the way the law treats that individual. It is evident too that in the majority of cases the fact that a person is Muslim rather than Christian will mean that he is less well-treated by the law. For instance, it will be more difficult to get married, impossible to marry according to one's traditional ceremonies, more burdensome to retain custody of children, difficult to educate children in the Muslim manner and rather impossible to defend one's faith by the use of law.¹⁵⁷

The cultural presence and influence of Islam in the formation of European civilization is naturally far vaster than its expansion in territorial terms. The figure of the Muslim as such has not necessarily been negative in popular perception in the past centuries; indeed, from the Saladin of the tales of the *Decameron* to *Pasha Selim* of the Abduction from the Seraglio, the Muslim was often the incarnation of magnanimity, clemency, justice, and honor. Islam as a self-contained set of values can be regarded as an essential component of European history. The question of Islam's presence and condition in Europe therefore seems to be an aspect of the character of Europe's institutions, of its political systems, and not just a marginal chapter concerning the treatment of transitory colonies of migrant foreigners entering and exiting European countries on a steady basis. The problems posed by Islam's presence cannot, hence, be considered and dealt with in the same manner as questions regarding the legal condition of foreigners. Such issues must be tackled in the context of relations within multicultural societies which European societies typically are and hopefully will continue, probably increasingly, to be. The question of religious rights of members of European Islam has obvious effects in the field of civil rights, due to the extension of religious rules into legal and social provisions, particularly regarding labor and employment law. This question cannot be dealt with and solved by means of the mechanisms of private international law, which provides for the choice of which law is to be applied in the case of a collision, together with a general and not qualified principle of religious tolerance. Such an approach would lead to unsatisfactory and substantially discriminative and iniquitous solutions, given that different rulings would be made in cases involving identical facts or needs, as the rulings would vary according to the citizenship of the subject and, therefore, according to the rules applicable to the conflict. The believer's need to observe the rules of behavior dictated by his faith are recognized, but they are not put in question here. The real problem is that the satisfaction of this need cannot depend on whether or not he is a citizen of the State where he resides, which is wholly foreign to his religious belief. Nor can it depend on the application or not of a rule of private international law, which uses citizenship instead of residence as the basis of its rulings.¹⁵⁸

¹⁵⁷ Cf. Bradney, Anthony, The Legal Status of Islam within the United Kingdom, in: Islam and European Legal Systems, Ferrari, Silvio/ Bradney, Anthony (eds), Ashgate, Dartmouth, Aldershot, Burlington USA, Singapore, Sydney, 2000, 181-197 (195)

¹⁵⁸ Conetti, Giorgio, Concluding Remarks, in: Islam and European Legal Systems, Ferrari, Silvio/ Bradney, Anthony (eds), Ashgate, Dartmouth, Aldershot, Burlington USA, Singapore, Sydney, 2000, 199-203 (200)

5. Conclusion: Church and State in the United Kingdom

British law regulating the State-Church relationship does not explicitly provide for clauses establishing and preserving the autonomy of churches – while the Anglican Church as the Established Church of England enjoys *a priori* a prominent status in the legal framework of the UK, and the Act of Supremacy 1558 stipulates overtly the prime position of the monarch with the requirement of him/her being member of the State Church. The State does not acknowledge any other ecclesiastical law rather than that of the Anglican Church – except the Presbyterian Church in Scotland¹⁵⁹ – as “ecclesiastical” law; in other words, other denominations next to the State Church do not dispose over more rights than ordinary private associations – their organizational set of rules is composed of private law contracts between their members, their property is generally administered by a trustee, the common legal instrument in British property law, and British law does not provide a public register book comparable to that existing in Spain of acknowledged religious communities. Churches are not publicly financed; the only monetary support granted to religious associations is subsidies to the conservation of historic church buildings up to a percentage of 40% of the total costs¹⁶⁰.

¹⁵⁹ Cf. *supra*, FN 9, for details concerning the organizational structure of the different parts of the UK

¹⁶⁰ McClean, David, Staat und Kirche im Vereinigten Königreich, in: Staat und Kirche in der Europäischen Union, Robbers, Gerhard (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1995, 333-350 (347 et seq.)

V. Religion reflected in Primary/Secondary European Law

The codified law of the European Union does not, so far, mention explicitly the position and function of Churches within the Union – a status that is perfectly comprehensible looking at the history and the original objectives of the formerly European Communities when they were founded in the 1950s – the aim proclaimed was and still is to foster economic integration, to abolish customs duties, i.e. to establish a free trade area etc. That process of establishing and achieving economic unity can be regarded as (more or less) finalized so that the Union is now looking for new objectives to pursue and to implement, first and foremost on the level of cultural and social integration. It is in this context that Religion as social phenomenon plays an extraordinary role, in the degree varying in each MS, but overall it cannot and should not be underestimated. It is already in Article 2 of the TEC where it is laid down that the Union shall have as one of its objectives “the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”, so that the Union pursues cultural policies as well as provides for a high standard of education in schools as in vocational training¹⁶¹. These features demonstrate that the competencies of the Union in sectors such as education, culture, labor law, and social/fiscal law issues are already existent and will probably increase in number and in scope in the years to come, and, what is extraordinarily relevant in our context, that churches and religious communities are directly affected by this fact.

First indications of a *droit des religions européen* are already apparent. It finds its foundation above all in the guarantee of the freedom of religion throughout the Union – determined in each MS as well as on the European level (via jurisprudence of the ECJ following the ECHR and resulting from the constitutional traditions common to the Member States, as general principles of Community law). The second element of this structural manifestation is the Union’s commitment to neutrality in ideological matters, tolerance towards different religions and ideologies, and equal treatment of (religious) associations. The preservation of national cultures and identities according to Article 6 III TEU requires the respect of domestically grown institutional idiosyncrasies, the principle to respect national constitutional structures as a characteristic of the general rule of mutual loyalty between the MS and the EU bans unilateral legal assimilation or harmonization as far as “national identities” in the sense of Article 6 III TEU are concerned. Finally, Article 5 TEC articulates explicitly the principle of subsidiarity applicable to each and every activity carried out by the Union, i.e. for the sector state-church-relations in particular.

It is the secondary law too that takes into consideration religious issues; to cite in the first place the staff regulations of officials of the EU Institutions, then e.g. specific exemptions

¹⁶¹ Cf. article 151 TEC

in directives such as the one for data protection¹⁶² or specific rights granted according to Directive 89/552/EEC which determines that religious broadcastings and transmissions of church services cannot be interrupted by TV commercials¹⁶³, and that those commercials are not allowed to infringe upon religious sentiments¹⁶⁴.

There are, furthermore, some provisions which cannot be classified as belonging to one or the other aforesaid legal category, but which could unfold normative quality by some means or other: the above cited Declaration No 11 of the Amsterdam Treaty and Article 10 of the Charta of Fundamental Rights of the EU (cf. *supra*). Additionally, the ECJ-jurisprudence, first and foremost in the cases such as Vivien Prais¹⁶⁵, Udo Steymann¹⁶⁶, Torfaen Borough Council¹⁶⁷, and Van Roosmalen¹⁶⁸ specified some important aspects relevant throughout the religious sector, however, this case law cannot be illustrated in situ.

A. The TEC-Competition Rules and the Churches

Especially under the premise of analyzing legal problems on the level of corporate entities, their organizational structure and their institutional relevancy, i.e. the degree of protection being granted to collective units in the institutional sense rather than the classical approach of measuring the standard of protection for individuals and their claims of being violated in their liberty rights, the TEC provisions dealing with the regulation of markets¹⁶⁹, in other words, the EC competition rules are of major significance for (charitable) economic activities of churches and other religious communities. Since there is no legal provision exempting confessional and non-confessional organizations from the applicability of these articles their activities are *a priori* covered by the TEC.

The primordial concern under this heading is that any economic activity pursued by a church or religious association (or its secular equivalent) would be generally falling under Article 81 TEC and henceforth be covered by the control mechanisms of the European Commission – which implies that dominance on a relevant market could be regarded as

¹⁶² Cf. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 008, 12/01/2001 P. 0001 - 0022

¹⁶³ Cf. article 11 (5) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17.10.1989 (“Television without Frontiers”)

¹⁶⁴ Cf. article 12 c Directive 89/552/EEC

¹⁶⁵ Case C-130/75, Vivien Prais v. Council, ECR 1976, 1589, cf. *supra*

¹⁶⁶ Case C-196/87, Udo Steymann v. Staatssecretaris van Justitie (Baghwan), ECR 1988, 6159

¹⁶⁷ Case C-145/88, Torfaen Borough Council v. B & Q plc, ECR 1989, 3851

¹⁶⁸ Case C-300/84, Van Roosmalen v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, ECR 1986, 3097

¹⁶⁹ Cf. articles 81 et seq. TEC, treaties downloadable from the Europe-server at:
http://www.europa.eu.int/eur-lex/en/search/search_treaties.html

an infringement of European law. Given that the market is first and foremost the health and welfare sector including care for children and the elderly, the subject area concerned is pretty restricted, and a dominant position supposedly easily achieved, simply due to the usually small number of competitors on these relevant markets. The legal consequence would be that activities run by churches, especially church administered hospitals, kindergartens etc. would be falling under the strict control of DG Competition – except that the TEC were to stipulate a general exemption (*Bereichsausnahme*) for those activities – which it does not for the moment being.

A second concern analyzing the EU competition rules and their potential to affect the religious sector is the merger control area as such – given that religious entities often do belong to one and the same roof top, e.g. the Catholic Church as one of the major institutions being economically and charity-bound engaged in multiple areas of society. The question arising is whether it would be necessary and useful to make churches subject to the control implemented by the EU Merger Task Force – or whether this sector is, respectively should, *a priori* not be falling under the TEC competition provisions – putting forward arguments of the nature of the activities in question being not comparable to “ordinary” economic activities. So far, there has not been a single case involving religious organizations, yet, it cannot per se be excluded that such situations may arise in the future.

The third untouched question in this context refers to Article 87 TEC which stipulates the general prohibition of state aids; however, the Treaty recognizes in this context in paragraph 3 lit. d¹⁷⁰ the possibility for exemption for “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest”. Yet, the present formulation, situated under the heading of possible, facultative exemptions, leads to the conclusion that this provision is meant to protect the conservation of religious monuments etc. – i.e. areas of common cultural interest and value on the national sphere where national governments should not be inhibited from supporting these efforts financially so that in consequence, this provision has to be interpreted narrowly in terms of exempting general economic activities pursued by churches. What surprises most is the fact that there is not a single decision taken by the Commission or the Court which includes a church or religious community so far – which can either mean that the religious sector as such does not disclose major problems in terms of its economic impact or that this area has been disregarded or willfully neglected entirely so far – for whatever reason it may be. If this fact simply reflects the implied and absolute respect for the religious authority of the MS the supranational institutions of the Union kept away, consciously or even unconsciously, from probably the most complicated issues and the most sensitive area in terms of infringing what is most commonly called “national identity”.

¹⁷⁰ http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf

B. Secondary legislation

Especially in terms of a church/religious association being in the position of an employer, European secondary legislation plays or at least can play a significant role in terms of abiding to restrictions and general objectives set out by EU regulations and directives. A recent tool of European anti-discrimination policies is Council Directive 2000/78/EC¹⁷¹ which lies down a General Framework for Equal Treatment in Employment etc.; for our perspective highly interesting is Article 4 II of this Directive which provides that churches may maintain established standards of choosing their proper staff – “by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization’s ethos.” This example illustrates that the EU is willing and ready to accept areas where legal harmonization is less important than the preservation of grown and established rights determining the specific character of domestic organizations so that general anti-discrimination policies find their limits in national systems granting specific rights to religious communities in terms of their self-determination. Example: The Protestant Church in Germany could not be inhibited from renouncing a German Catholic minister applying for a job simply by arguing that this person does not fulfill the ethical or personal requirements laid down by the Protestant Church.

Further examples are the Television without Frontiers and the Data Protection Directives, cited above, which start to draw a European picture of how Churches/religious communities and the European Union as an autonomous polity can set up a legal framework of cooperation in which mutual respect is safeguarded and the religious sector is explicitly acknowledged as one significant part of civil society on the European level.

¹⁷¹ <http://www.hrea.org/erc/Library/hrdocs/eu/2000-78-EC-en.pdf> , Council Directive 2000/78/EC of 27 November 2000 with its most important provision (Article 4 II) for the religious sector determining that: “Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization’s ethos. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.”

VI. Conclusion

In its most institutional form, the relationship between religion and law¹⁷² is expressed in the legal relationship existing between church and state. In Western European countries and their constitutions, these relationships take the shape of (more or less strict) separation between church and state (cf. France, to a large extent as well Ireland), cooperational links between the two (cf. Spain, Germany, Belgium, Italy, Austria, Portugal), or established church systems (Scandinavian countries, UK, Greece). These systems and their respective evolution are often deeply rooted in legal and cultural historic traditions developed throughout the past centuries, and heavily influenced by the events of the Lutheran Reformation and its counter-movements on the European continent from the 16th century onwards in particular. By the same token, in pluralistic and individualized societies, these characterizations, to a large extent, shape the “constitutional identity” of a polity.¹⁷³ The specific features of France as a *république laïque* and the status of the Anglican Church as The Established Church of England, for instance, are exemplifications of how the relationship between church and state can shape the constitutional identity of a country, and, as a consequence thereof, the cultural (not least religious) identity of its people. In general terms, these national idiosyncrasies tell us something about the balances being struck between the spiritual-religious and the legal-political organization of the state as a polity determining its balances and powers according to modern democratic procedures, yet, possessing significant structures taken over from history.

In this study, I have put forward an analysis of the most striking features of structural frameworks implemented in the more “important” EU Member States (in terms of their political weight, their economic power, their geographical size etc.) – France, Spain, Germany, and the UK – whereby outlining existing discrepancies as well as stressing

¹⁷² For further elaboration on the difference between the terms “law” vs. “religion” and “state” vs. “church” http://www.mackenzieinstitute.com/1998_01_World_Islam_Modernity.html for the Muslim doctrine of the interwoven concepts and Ahdar, Rex H. (ed.), *Law and Religion*, Ashgate Publishing, Burlington, 2000; generally, the topic has an importance that goes beyond scholarly, theoretical concerns alone, it affects the lives of the people directly, and especially those of the poor and powerless. For the rich and middle class it is pretty easy to circumvent inconveniences, e.g. by sending their children to a private, faith-based school or by purchasing a home in a school district more congenial to their values, they can receive social and health services from private providers, or they can finesse or manipulate the system to their advantage. Yet, as Monsma notices for the American context, “[...] the poor, the uneducated, the racial minorities, and others of the powerless in society have fewer options. They are dependent on government for more services. If government cannot or will not provide options more in tune with their values and faith commitments or that are caring and effective, they have no alternatives.”, Monsma, Stephen V. (ed.), *Church-State Relations in Crisis, Debating Neutrality*, Rowman & Littlefield Publishers, Inc., Lanham, Boulder, New York, Oxford, 2002, 270

¹⁷³ van Bijsterveld, Sophie C., *Church and State in Western Europe and the United States: Principles and Perspectives*, in: *Brigham Young University Law Review*, 2000, 989-996 (989)

common parameters due to at least comparable, historically conferred, primarily Christian values and traditions. How these features will develop with the coming EU-enlargement towards the Central and Eastern European countries will be a question to be looked at through country-specific studies and further general research in the sector of state-church-relations, respectively Europe-church-relations (*droit des religions*).

The overall outcome of this paper can be briefly summarized as follows:

Western European constitutions, each in its own way, aimed at creating a balance in the relationship between church and state, and, between religion and law. For instance, the Irish system of organizational and financial separation of church and state compensates for the strong position of the church in Irish society. In addition, the financial relationships in Belgium and Luxembourg (countries in which the state provides for the wages and the pensions of the clergy) and Germany (with a state supported system of Church tax collection, cf. *supra*) go hand in hand with guarantees of organizational independence and church autonomy. Finally, Spain and Italy combine guarantees for minority churches with the guarantees granted to the majority Church, the Catholic Church, in their respective constitutions as an expression of social reality. Despite the fact that the Western European systems are deeply rooted in historic traditions, they are by no means static; in Finland and Sweden, for example, certain developments have placed the various existing churches on an equal footing by abandoning the former privileges of the Protestant Church as National Church. A similar move towards this kind of equality took place in the 1970s in the southern countries of Italy, Portugal, and Spain, here regarding the Catholic Church.¹⁷⁴

In Denmark and England, the constitutional positions of the established churches seem to be quite firm, yet, the predominant patterns are largely softened by secondary legislation. In a country like France, where the idea of separation of church and state was quite rigorously introduced in the early twentieth century as a consequence of the *Kulturkampf* and where this concept still has a strong ideological charge, church and state increasingly intersect in various areas; furthermore, not the entire territory of France is covered by one and the same religious legal structure (cf. *supra*). As *van Bijsterveld* rightly points out, the categorization of typologies, indisputably useful and necessary for purposes of analyzing, confronting, comparing and highlighting characteristics idiosyncratic to one country only – in confrontation to others – has simultaneously a significant drawback that should not be underestimated: typologies do not – and cannot do so – offer a clear insight into the more refined developments that are taking place in the legal relations between church and state. First, similarities and differences in law relating to church and religion often run crosswise through all of these typologies. At the subconstitutional level, the picture may look slightly different to what the typology suggests. Second, the interactions

¹⁷⁴ Cf. <http://www.keston.org/020501BackBrief.htm> on the requirements for registration of religious communities in the former Soviet Republics where the national legal systems do not provide for equality yet and are, thus, under major critique on the part of Human Rights Organizations etc.

between church and state in current Western European polities seem less focused on the institutional positions but more concerned with social aspects of religion, especially with value discussions and ethical approaches to certain controversial topics such as euthanasia, abortion, homosexual marriages, biotechnology, or the cloning of human beings. However, with these two considerations in mind, one can nevertheless assert the importance of the churches' institutional positions in a political entity as they reflect at their very roots the presence and, potentially, the official acknowledgement of religion as such in a given societal framework.

On the European level, this fact reveals for the moment being an astounding diversity in the existing systems, looking at the typologies in a formal way; yet, illuminating "religion" as social phenomenon being dealt with in the Nation States under each existing system of church-state-relationship discloses remarkable similarities, a certain common set of European values¹⁷⁵, which is not infrequently incarnated by contested issues that eventually ended up before the courts, either national or international ones, to be concretized. In a more abstract sense one can state that in the religious sphere, a common denominator can be found allowing the European Union to establish "an ever closer union among the peoples of Europe" as it has been laid down in the Preamble of the Treaty Establishing the European Union in Maastricht, while preserving national characteristics being responsible for individual features and idiosyncratic specifications, which do not necessarily need to be harmonized on the supranational level on the part of the European institutions to achieve harmony for Europe as a polity.

In the prospect of an enlarged Union, however, the whole framework of the current Community institutions will be challenged politically and administratively¹⁷⁶ – the recent

¹⁷⁵ See for the "community of values" Häberle, Peter, *Verfassungsvergleich und Verfassungsgebung – der Beitrag der Rechtswissenschaft zum Entstehungsvorgang der europäischen Verfassung(en)*, in: *Entwicklungsperspektiven der europäischen Verfassung im Lichte des Vertrags von Amsterdam*, Klopfer, Michael/ Pernice, Ingolf (eds), Nomos Verlagsgesellschaft, Baden-Baden, 1999, 100-116 (106): „Das gern gebrauchte Wort von Europa als ‚Wertegemeinschaft‘ bedarf einer näheren Begründung. Für das Europarecht i.w.S. kann sie aus der EMRK von 1950 ebenso gewonnen werden (vgl. Präambel: ‚tiefer Glauben an diese Grundfreiheiten‘, ‚europäische Staaten, die vom gleichen Geist beseelt sind und ein gemeinsames Erbe an geistigen Gütern...‘) wie aus der älteren Satzung des Europarates von 1949 (Präambel: ‚in unerschütterlicher Verbundenheit mit den geistigen und sittlichen Werten, die das gemeinsame Erbe der Völker sind‘; Art. 1 a: ‚Förderung der Ideale und Grundsätze‘) und dem späteren Europäischen Kulturabkommen von 1954 (Art. 1 und 5: ‚gemeinsames kulturelles Erbe Europas‘). Für das Europarecht i.e.S. sind einschlägig: aus der Präambel von ‚Maastricht‘ (1992) Worte wie Stärkung der ‚Identität und Unabhängigkeit Europas‘ und Art. F (‚demokratische Grundsätze‘, ‚gemeinsame Verfassungsüberlieferungen‘, aus dem Vertrag von Amsterdam (1997) fast alle Passagen im Kultur-Artikel 151 sowie in Art. 149 Abs. 2: ‚europäische Dimension im Bildungswesen‘ und im Parteien-Artikel 191 (‚Faktor der Integration in der Union‘, ‚europäisches Bewußtsein‘), - ‚Integration und Pluralität‘, im nationalen Rahmen oft diskutiert, werden zu verfassungstheoretischen Stichworten für Europa. Diese Elemente sind ‚verfassender‘ Natur; im Zusammenhang mit den anderen Aspekten wie ‚europäische Öffentlichkeit‘, Unionsbürgerschaft und Kommunalwahlrecht der Unionsbürger verstärken sie ihre konstitutionelle Potenz.“

¹⁷⁶ Cf. for the complex debate on enlargement of the European Union Dehousse, Renaud (ed.), *An ever larger Union? – The Eastern enlargement in perspective*, Nomos Verlagsgesellschaft, Baden-Baden, 1998

failure of the IGC in Brussels on 13 December 2003 concerning the envisaged adoption of the draft constitution only stresses the complexity of the issue at hand¹⁷⁷ – and “religion” as one element constituting “society” does, naturally, not remain unaffected¹⁷⁸. The enlargement process will pose and reveal new and hidden problems particularly in the field of the so-called “European religious law” (*droit des religions européen*) given that among the candidate countries, there are not only several Orthodox nations, but also with Turkey an Islamic country applying to become fully-fledged member of the EU (though the debate about Turkey’s possible accession to the EU is a much more complicated and multi-layered one¹⁷⁹). Moreover, these countries all have their own cultural affinities and historic peculiarities, and, in addition, form *en bloc* a whole different European culture which can, in many aspects, be differentiated from the development the Western part of the continent has been taking – leaving apart the economic parameters and political history of socialism/communism of the past fifty years or so. The way ahead seems to be knotty – both for the European Union as supranational polity trying to find its institutional future after Enlargement, and for the Churches and other (religious) communities existing in its components, the Member States, where there are quite a few idiosyncrasies worth being safeguarded and even, under certain circumstances, promoted by the competent domestic public authorities, yet, as well substantive common values, predominantly Christian ones, throughout the entire continent, which might allow enhanced cooperation between one and the other religious congregation, on the ecumenical level or in other to-be-set-up frameworks across nation borders.

The exceedingly vital role the Islam¹⁸⁰ already plays nowadays and will continue to do so in the years ahead cannot and should not be underestimated on the political forum of the European Union – and neither on the national fora – since demographic prognoses and sustained immigration movements forecast clearly a growing proportion of Muslim citizens waiting to be integrated into the traditional frameworks of European societies.

The current French debate in the follow-up of President Chirac’s call for legislation to ban the wearing of Islamic headscarves and other conspicuous religious symbols in public schools (including other anti-discriminatory practices such as banning women’s refusal to be treated by male doctors in public hospitals) stresses the importance of the

¹⁷⁷ A follow-up commentary on the Brussels-IGC is provided by the French Foreign Minister, Dominique de Villepin, in *Le Monde*, 20 December 2003, pp. 1, 14.

¹⁷⁸ Cf. Symposium: Mountain or Molehill? – A Critical Appraisal of the Commission White Paper on Governance, Kenneth A. Armstrong, *Civil Society and the White Paper - Bridging or Jumping the Gaps?*; <http://www.jeanmonnetprogram.org/papers/01/011601.html> on the broader debate of the impact of Civil Society for the European Integration, in particular after the recent Commission White Paper of 2001, download on: http://europa.eu.int/comm/governance/white_paper/index_en.htm

¹⁷⁹ Cf. for example the ongoing public debate in Germany about the possible accession of Turkey to the European Union at <http://www.ftd.de/pw/de/1040216121098.html?nv=cpm>

¹⁸⁰ Cf. Armstrong, Karen, *A History of God – The 4,000-Year of Judaism, Christianity and Islam*, Ballantine Books, New York, 1993; Gleave, R./ Kermeli, E. (eds), *Islamic Law – Theory and Practice*, I.B. Tauris Publishers, London, New York, 1997; Khare, R. S. (ed.), *Perspectives on Islamic Law, Justice, and Society*, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Oxford, 1999

role of religion in society and of the complex and multi-faceted questions arising in multi-religious entities. In any event, religion cannot and will not be vanishing into thin air – and this is exactly why it has to be dealt with in institutional as well as substantial terms as part of European societies and identities – even more so if fundamental rights protection is taken seriously on the part of the European Union, and this not only in the traditional well-established manner of adopting or copying the standards evolved under the ECHR by the Strasbourg jurisdictional organs, but rather through newly to-be-developed mechanisms including in particular the corporate element of the freedom of religion (being judicially concretized in Strasbourg to an unsatisfying outcome, cf. analysis of the often contradictory and ducking Strasbourg-jurisprudence *supra*), and probably not only of this specific fundamental right being under closer review in the course of this paper.

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