

NON-DISCRIMINATION LEGISLATION AND CHURCH (LABOUR) LAW WITHIN THE EKD, ITS MEMBER CHURCHES AND ORGANISATIONS

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Summary

The Church is not a free master of its own order, but bound by the requirements of its doctrine. In Germany, the Constitution respects the Churches' right to self-determination, so that these can administer their affairs in line with their theology. Human Rights are part of the Church order, as they are deeply rooted in the Church's teaching on the dignity of the human being. The Church is also a beneficiary of fundamental rights, especially the right to freedom of religion. When making use of civic freedoms, conflicts with the rights of others are unavoidable. This also applies to the Church, for example when defining occupational requirements for its employees. When balancing rights that clash, the Church's identity as a religious community needs to be taken into account. The best solution for the secular legal order is to include special provisions concerning religious freedom in its legislation so as to avoid any unintended discrimination by the Church when exercising its rights. This is also a contribution to a pluralistic society and social engagement of believers.

According to the Theological Declaration of Barmen¹, the Church rejects the misconception, whereby it could be "permitted to abandon the form of its message and order to its own pleasure or to changes in prevailing ideological and political convictions" (thesis 3). Its order must, therefore, be in line with its message and doctrine. From this notion it follows that all ecclesial law must be shaped in a way that is consistent with the ecclesiology of the respective Church. The extent to which this is possible, however, depends on the degree of corporative or institutional religious freedom guaranteed by the legal order of the country in which a Church is located. This form of religious freedom is also known as the Churches' right to self-determination².

In Germany, the general framework of state/Church-relations has been governed by the same constitutional provisions at federal level since 1919. They are now enshrined in Art.

¹ The Theological Declaration of Barmen, adopted in May 1934, was a statement of the "Confessing Church" against the heresies of the German Christian Movement, which tried to reconcile National Socialism with Christianity. After 1945, it has become an official confession in many Churches in Germany and worldwide.

² Whereas the Churches' "right to self-determination" originates from the Church itself and only has to be respected and guaranteed by the state, "Church autonomy" in legal matters that are directly applicable in the secular legal order is conferred on the Church by the state.

140 Grundgesetz. One of its central norms reads: "*Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all*". (Art. 140 GG, incorporating Art. 137, paragraph 3, of the Weimar Constitution). This norm has been interpreted by the Federal Constitutional Court in several landmark decisions as providing a space of legal independence for the Churches. The Weimar Constitution effectively disestablished the Protestant Churches in Germany, thus paving the way for a state that is neutral in religious matters. Such a state, however, can no longer claim any sort of religious expertise. As the Grundgesetz also enshrines freedom of religion (and it does so without any *caveat* except the other provisions of the constitution itself), it is basically up to the Churches to define what are the theological requirements in their legal set-up. The state has to respect these decisions.

The reservation "*within the limits of the law that applies to all*" has to be interpreted restrictively considering that only norms and values immanent to the constitution may limit religious freedom. "Their affairs", on the contrary, has to be interpreted broadly: The self-understanding of a Church is a key measure for the scope of its own affairs. According to the Federal Constitutional Court, a wide range of activities such as education, social care or youth work are covered by this formula. Religious freedom and the Churches' right to self-determination are separate norms, but complementary: What is at the centre of the latter, originates in the former. It would, therefore, not be comprehensible if totally different standards were applied to the individual exercising his or her right to religious freedom or many individuals doing so together and in a structured form (collective and corporate aspects of the freedom of religion). It is therefore always a matter of balancing of conflicting legally protected interests to determine which laws fall under the category of the "*law that applies to all*". To avoid the courts having to do this balancing, many laws in Germany already contain "Church clauses" with the necessary exemptions.

When administering "their affairs", the Church is on the one hand free to apply its own standards, on the other hand limited by the overall constitutional order of which the fundamental rights of the individual are a key constituent. However, in the first place fundamental rights protect the individual from the sovereign power of the state. They do not directly bind private citizens or institutions. If the state decides to extend its powers into the domain of private relations, this has to be done by a concrete law for a concrete area. Such laws will have to balance the fundamental rights they want to protect, with conflicting rights. In the case of the Church, religious freedom and the Church's right to self-determination can make for such conflicting rights. According to German constitutional doctrine, this balancing must be done in a way that none gains improper dominance over the other and none shall be treated in derogatory fashion in its essence. Accordingly, Churches have to guarantee certain rights, but where these collide with their religious identity it must be determined which impact would be the greater: to limit the individual's or to limit the Church's exercise of their rights. The jurisdiction of the Federal Constitutional Court has established that the Churches' right outweighs the individuals' right in all cases where the Church would be forced to accept a permanent, even structural violation of its teachings or identity. An example is the physician in a Catholic hospital who publicly advocated the right to abortion: The Court deemed it appropriate for the Church to end the contract with this³.

To avoid any misunderstanding: Such cases are very rare. The churches in Germany endorse the fundamental rights of the individual, which have been derived, to a large

³ BVerfGE 70, 138. This decision has also been confirmed by the European Court for Human Rights (Application No. 12242/86 – Maximilian Rommelfanger vs. Federal Republic of Germany).

extent, from their own teachings on the dignity of the human being. So far, there is only one area where such collisions have every so often become an issue: labour law, both individual and collective. This has occurred because with labour law the sphere of Church autonomy reaches far into society. In Germany, the Protestant Church (EKD), the Roman-Catholic Church and their main social agencies, Diakonie and Caritas, together employ more than 1 million people. In an open, pluralistic society and with a registered Church membership of about 2/3 of the overall population, it is only natural that not all applicants for positions in the Church bring along the knowledge and convictions needed to form the ecclesial order in accordance with the Church's ethos. Also, when it comes to shaping its order, the Church cannot rely on the Holy Spirit only, but needs to set the frame by means of laws. No-one can vouch for the belief of every individual, but ecclesial law can set up an objective framework for the ministry of the Church. It binds its members when acting in its service, by its mandate and in its name.

The crucial question for the Church is how its engagement in the social, educational and cultural sector is defined vis-à-vis its spiritual identity: Is it something second to its nature, or part of it? For most denominations the answer is quite clear: The Christian faith does not exist for its own sake alone, but must needs be transformed into action for others. To take on responsibility and get involved in society – and also to get engaged in the processes that determine the conditions under which we live – is part of being the Church in the world, for the world. So it is indeed always "the Church" that acts, even if the legal form of its different institutions varies. What it essentially is, cannot be reduced to cult and teaching; its mission cannot be separated from the vision it grows from. It is, therefore, in the legitimate interest of the Church to perform its duties itself. For this reason, Church law must apply the same basic norms to the Church proper and its various organisations and institutions. In the Protestant tradition, there is also no hierarchy in the different tasks within the Church: *"The various offices in the Church do not establish a dominion of some over the others; on the contrary, they are for the exercise of the ministry entrusted to and enjoined upon the whole congregation"*. (Theological Declaration of Barmen, thesis 4). The whole congregation, minister and presbyter, sexton and organist, nurse and social worker – they act not only as individuals satisfying their need for an income, but also as members of the Church partaking in its ministry. The concept behind this is derived from St Paul who described the Church as a community of service. Following from the above-cited constitutional norms, the Churches in Germany are relatively free to establish such a "community of service" by means of Church law, but are also limited by some basic principles of a constitutional order.

Applied to collective labour law, this means that the Church must allow for its employees to participate in the fixing of salaries and work conditions, but can do so in line with its ecclesiology. As it is incompatible with the nature of the Church to suspend its service for the world (strike) or for its different offices to fight with each other (as in the logic of "collective action"), the Church has chosen to determine all such matters through independent commissions representing leading Church officials and other Church employees in equal numbers. Collective agreements are reached in these commissions by majority vote. Employee representations have to agree to most decisions concerning the staff. This system is currently under pressure as the recent introduction of free market rules in the social sector exposes the Church to unprecedented competition. The Church is willing to adapt in a way that serves both the interests of the Church to continue to work effectively and in keeping with its order, and the interest of its members in fair conditions when contributing to these tasks as employees. By doing so, all those in positions of responsibility must keep in mind that the law can only provide a framework, but that the "community of service" derives from the spirit that is nurtured within it.

Applied to individual labour law, this means that the Churches will require most of their employees to be Church members and all to comply with their ethos in their conduct, professional and private. It is these requirements that constitute the area where Church and secular order are most likely to be at odds. The first is based on the Church being a

community constituted by baptism and upheld by belief – or, insofar as belief is impossible to measure either theologically or legally, at least formal dedication. As such it requires positive distinction on the grounds of religion, which needs to be dissociated from discrimination. The second may be relevant in a number of cases, ranging from conflicting opinions (as in the case cited above), which bears on the freedom of expression, to issues like the sexual orientation of clergy which could, again, be viewed as discrimination. For Germany, the Federal Constitutional Court has established that Churches are well within their rights to lay down such requirements. However, all member states of the EU operate in a multi-level legal system of which national constitutions are only a part. Community law is another, and has, in most cases, primacy in application.

In Europe, there are more legal systems defining the relationship of Church and state than there are states: Regional and religious history and identity have been closely bound up over centuries. The resulting differences are still relevant. The German Federal Constitutional Court, in its well-known decision of 2009 on the compatibility of the Lisbon-Treaty and the German Constitution, named this legal field as one of the few that form a specially protected core of national identity and authority. Neither has the EU any intention of extending its legislation into this field, as it is well aware of the differences – and pit-falls. Art. 17 paragraph 1 of the Treaty on the Functioning of the European Union (part of the Lisbon Treaty), therefore reads: *"The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States"*.

This does not, however, exclude any EU-influence on pertinent national law. EU legislation on non-discrimination, especially at the work place, is one field where the EU did not intend to establish specific Church/state-law, but effectively had an influence on this law in its member states. As it has no interest in a conflict over the law on religion, but very definite interest nonetheless in ensuring that its legislation is applied comprehensively, the EU makes use of the same method already mentioned for the German legal order: special "Church clauses" already balancing the potentially conflicting rights. One such clause can be found in Art. 4, paragraph 2 of Directive 2000/78/EC, the interesting part of which is this: *"... 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 organisation's ethos"*. The Directive accepts that in Church labour law a difference of treatment with regard to an employee's religion or belief does not necessarily constitute discrimination. That is important. Equally important is the reference to the organisation's ethos, as the evaluation of whether a religion or belief does constitute a genuine, legitimate and justified occupational requirement cannot be made without having regard to the Church's self-understanding.

Even in Churches that do not know a hierarchy of priests and laypersons, a certain distinction is surely only reasonable if a "clericalisation" of all labour relations is to be avoided. While it is undisputed that a member of the clergy should be of the denomination of the Church in question, to be Christian should surely suffice for a doctor or social worker. In some cases it might also be advisable to delegate a specific task to a non-Christian, if such a task can be better achieved this way. In a kindergarten with many Muslim children, a nursery teacher of that religion might be an asset for integration, which is also part of the institution's overall aim. The decision, however, must lie with the Church, not with a labour tribunal. People choosing a Christian institution, be it a school, a hospital or a home for the elderly, do so for a reason. They expect to encounter a certain attitude and spirit, which can only be realised through the people working there.

However, for both collective and individual labour law within the Church, one rule must apply: Either the Churches make use of the space proffered by the secular order and enact legislation in line with their self-understanding, or else accept that secular law is applied in lieu thereof. The Churches owe legal clarity to all those who work within their sphere. A lack of regulation would lead to arbitrary decisions, probably varying from case to case. This would be unacceptable. To meet the requirements of European non-discrimination legislation, Churches must make detailed provisions concerning the relevance of membership for their identity. This does not need to be done for each and every position, but can be done in a more general way, for example for certain categories. The EKD has complied with the requirement of legal clarity in the *Directive Concerning Occupational Requirements within Church and Diakonia*, of 1 July 2005. Art. 3, paragraph 2, of this directive states that for positions not concerned with proclamation, pastoral care, instruction or leadership, Christians from other denominations may be employed, if no suitable member of an EKD member Church applies for it.

Recent legislative developments suggest that the EU will extend the protection from discrimination also to the area outside the workplace, including the provision of goods and services. This will raise the question if and how Churches might be affected. The impact on the social or cultural work of the Church will be negligible, though. Neither when caring for the poor or needy nor when contributing to the cultural life of our society, do Christians ask whom it is they serve. Nevertheless, establishments like confessional schools will need to be able to ensure that a majority of their pupils share the convictions these institutions are based on. Likewise, when letting Church property, it will be asked if the new tenant blends in with the general character of the Church. Legal issues that might arise from such decisions do not, however, pose new problems: They are subject to the same balancing of conflicting legally protected interests. The protection of a Church's identity will have to be a key element in this process. Appropriate exemptions are already being negotiated.

While, in their relation to the state, citizens are beneficiaries of the franchise, not addressees of the obligations from fundamental rights, non-discrimination legislation extends some of these obligations to relations between private actors. Such relationships are not determined by the exercise of sovereignty, but other powers are being exercised that can be almost as relevant in daily life. Non-discrimination legislation can help create an environment in which factual power structures are not abused in a way detrimental to the dignity of the human being and the cohesion of society. The protection from discrimination on the ground of religion is a form of guaranteeing the right to freedom of religion. It is in the interest of every believer and his or her religious community that religion should not prevent one from obtaining employment – or advancing oneself in one's position. Churches should therefore welcome such legislation, as long as it is balanced and leaves room for individual decisions and preferences (even such as might not be in line with a social consensus). The basic equality of all human beings must bear on the social reality in society. To guarantee fundamental rights and freedoms means to guarantee diversity and pluralism. These can only prosper where people have the actual opportunity of living according to their convictions, values and decisions.

Exceptions like the Church clause of Dir. 2000/78/EC are not in contradiction with this overall aim of non-discrimination, but in fact serve its very purpose. Even though some Churches may be active in many fields of social and cultural life and are, therefore, also major employers, they remain, at core, institutions based on and serving a religion. They are institutions set up by people who want to exercise their religion together and for others. If they could not do so, because to do something together with those of the same mind and conviction necessarily excludes others, non-discrimination would turn into discrimination and undermine the plurality it should serve. Fortunately, the European legislator has made way for Church autonomy, so that the Churches have the freedom to continue with their ministry for the world.