

About the Relationship of State and Religion in Germany, Austria, Poland, the Czech Republic and the EU

Introduction

In the course of one's academic life, one is always faced by the challenge of how to fill twenty minutes: whether as a student in seminars, because they are so long or as lecturer in an event such as this because it is so short. Therefore, I don't want to dwell on preambles, and will start by presenting the outline of my lecture:

1. I will begin with a few notes about the legal subject matter we are dealing with: the so-called state-church law.
2. I will then sketch the main features of state-church law in Europe.
3. Narrowing down the focus, I will observe the legal position in Germany, Austria, Poland and Czech Republic and finally
4. throw a glance at the relationships of the EU and religion (religious communities).

1.) State-church Law

State-church law covers all state standards that regulate the relationship between state and religions/religious communities or the "individual in his religious dimension"¹ Therefore, the term *Religious constitutional law*² is often used, but it also isn't correct because it also deals with, for example concordats, contacts and simple law policies. *Religious law* is usually the term used for the laws adopted by the religions (ecclesiastical law, Shariah etc.); however, one could differentiate between *state religious law* and *confessional religious law*.

Every definition of the field remains incomplete when one only interprets the wording without keeping the legal practice and the "social relevance"³ in mind, because the models are all based on - conscious or unconscious -presumptions about

- § the social reality of a country,
- § the relationship between state and society,
- § between state and religion,
- § between society and religion,
- § the significance of the individual compared to state and society,
- § the meaning of (unwritten) traditions for / in constitutional reality

¹ Winter, Jörg, *Staatskirchenrecht der Bundesrepublik Deutschland. Eine Einführung mit kirchenrechtlichen Exkursen*. Neuwied, Kriftel 2001, 9.

² For the first time Häberle, Peter: *Staatskirchenrecht als Religionsrecht der verfassten Gesellschaft*, in: DÖV 1976. cf. discussion: Hense, Ansgar: *Staatskirchenrecht oder Religionsverfassungsrecht: mehr als ein Streit um Begriffe?* in: Michael Heinig (ed.), *Religion und Weltanschauung im säkularen Staat*, Stuttgart 2001, [9-47]); has been recently taken up as a subtitle in the 4th edition of the textbook *Staatskirchenrecht* by Axel von Campenhausen / Heinrich de Wall, to express "that German state-church law defines the legal framework for all religious communities" (Campenhausen, Axel Freiherr von / de Wall, Heinrich, *Staatskirchenrecht*, Munich⁴2006, preface).

³ Robbers, Gerhard: *Staat und Kirche in der Europäischen Union*, in: id. (ed.), *Staat und Kirche in der Europäischen Union*, Baden-Baden²2005, 631; Christian Calliess / Matthias Ruffert (edd.), *Verfassung der Europäischen Union. Kommentar der Grundlagenbestimmungen* (part I), 577, Rn. 5.

§ and comparable factors about which sociologists rather than lawyers can provide information.

Summary: State-church law is enmeshed with what we refer to as "national identity", and often highly formative for the self-conception of a national community: in integration and separation (for example in the French Laicism). It can be easily understood by taking a closer look at the various European models.

2.) The State-Church Law Systems in Europe

It is important to distinguish two levels: the first is the fundamental rights level. For all signatory states of the European Convention on Human Rights (ECHR) there is a uniform, basic protection of fundamental rights. Art. 9 ECHR protects the right to freedom of thought, conscience and religion. We distinguish between individual, collective and corporative freedom of religion, this right includes "*the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance*" and create communities that serve this purpose.

The European Court of Human Rights (ECHR) has also protected these communities and their activities: partly from the inner legal logic, because creating communities is often a religious requirement, partly from the connection to other fundamental rights, because the freedom of association automatically also protects religious corporations, the freedom of opinion also automatically protects their statements regarding social and political themes.

The European Convention on Human Rights and Strasburg's jurisdiction are valid in all the Council of Europe states. Of course the nation states also have constitutional guarantee of religious freedom that in cases can exceed the level of protection guaranteed by the Convention. But they must not fall short of it under any circumstances.

There is a further level beneath the fundamental rights level: the institutional definition of the relationship between state and religion. This area is particularly closely connected to the history and self-conception of a country. Of course we can distinguish and typify models here, but none is exactly the same as the other because there are as many institutional definitions as states.

To simplify matters I will begin with the typification.

For this purpose a few historical outlines:

1. In Europe, the relationship of the state to religion and religious communities is marked by the relationship of the state to Christianity and the church. Initially, for political reasons, later it successively began to integrate other religions as a part of constitutional guarantees.
2. While in Europe both cultural areas emanate from the one Christian community, the history of the Latin West is marked by the (in parts fierce) confrontation with religious and secular powers, the history of the Orthodox East by the endeavour to "harmonize" both powers.
3. The result was respectively the division of the public spheres into secular and religious competencies, whereupon in the West the separation of state and church was regarded as being the logical consequence of the process, whereas it took place later in the East and was imposed mainly by the communist rule.

4. In the West the process of separation was interrupted by reformation and absolutism. The result of both was that the state strived for control of the church (National Church in Protestantism, Josephinism and also in Catholicism).
5. The Enlightenment and the secularisation processes of the 19th century finally brought about a separation of state and church that established itself in a variety of degrees all over Europe.

Today three⁴ or actually four⁵ basic models prevail:

- § The first type of separation is the most inconspicuous: the state-church. Today, this only applies to states in which the Reformation was introduced by the conversion of the head of state⁶. The state/church relationship is regulated by national laws. They include a number of different forms: in Denmark, the state-church is really nearly a public administration, in England it is essentially autonomous, in Finland two churches (Lutheran and Orthodox) are equally recognised as state-churches.
- § The second type of separation is the most conspicuous: Laicism. The state/church relationship is not subject to separate treatment by the law. The only explicitly laicist state in the EU is France; Slovenia also practices a fairly strict separation.
- § The third and most extensive type consists of different cooperation models. Churches and religious communities generally obtain a *sui generis* status despite principal independence from the state. They have often developed through the disestablishment of state-churches. The state/church relationship is often regulated by law either by contractual agreement or at the least by mutual agreement⁷.
- § The fourth model is closely related to the cooperation model and consists of states in which a religious community plays a special role because of its traditional and historical significance. This ought to include also national churches that are partially counted among the state-churches, but have no institutional connection to the government entities. If anything their certification is rather declarative, their influence is not formalised.

Of course, the typification does not comprise the legal and social reality that is marked by various factors⁸. In Italy, state and church are strictly divided, but Catholicism and the Vatican have a relevant social and political influence whereas England has a state-church whose influence today is mainly confined to the 26 Lord Bishops in the House of Lords, and receives no financial support whatsoever from the taxpayer. Therefore, the differences and similarities partially run crossways to these models⁹. They are therefore not fully relevant¹⁰. Nevertheless, of course they provide a basis for the relationship between state and religion.

⁴ For example: Robbers, (FN 3), 630f.

⁵ The fourth category was introduced by Triebel (for example Triebel, Matthias: *Das europäische Religionsrecht am Beispiel der arbeitsrechtlichen Anti-Diskriminierungsrichtlinie 2000/78/EG*, Frankfurt/M. 2005, 196f.).

⁶ With the exception of Malta. The classification for Greece is contested.

⁷ Mückl, Stefan: *Die Religions- und Weltanschauungsfreiheit im EU- und Gemeinschaftsrecht*, in: J. Bohnert (Hrsg.), *Verfassung - Philosophie – Kirche: FS Hollerbach*, Berlin 2001, [181-213], 189.

⁸ A further differentiation was provided by contentual criteria, such as the closeness of the cooperation and the provision of special legal forms for churches and religious communities. This would be appropriate against the background of the demand for a not solely literary, but rather constitutional interpretation that reflects the constitutional reality; however this exceeds the possibilities of this outline.

⁹ Torfs, Rik: *Die rechtliche Sonderstellung von Kirchen und religiösen Gemeinschaften im europäischen Kontext*, in: ÖARR 1999, [14-45].

¹⁰ Mückl, Stefan: *Europäisierung des Staatskirchenrechts*, Baden-Baden 2005, 387ff.

By the way, there are convergence tendencies towards "self-determination of the religious" and to a "cooperation between the state and religious communities"¹¹. As an example, I can take the autonomy the former Swedish state-church achieved in 2000 on the one hand, and refer to the fact that in France efforts are being made to intensify the religious contacts and even institutionalise them, on the other; this is exemplified by the *Conseil Francais du Culte Musulman* (with regard to the other religions they also range from the old *laïcité combatif*, the *laïcité neutrale* to the *laïcité positive*). There are numerous reasons for this approximation: on the one hand, an increased need for dialogue on the part of the state, that cannot ignore Islam as well as the other religions in general, if it wants to be aware of the social reality (and solve social problems); on the other hand, an increased desire for autonomy on the part of the religions that are increasingly resisting monopolization and heteronomy. They are being supported by the influence of the constitutional on the institutional level.

It is typical of Europe's legal history that despite the reciprocal influences of national and European law, the convergence of the legal systems in the member states came to pass in which "national characteristics still remain in force that significantly distinguish the character of the constitutional orders of the member states"¹². This definitely applies to the relationship between state and religion.

6.) Case study 1: Germany

Churches in Germany have a significant social position. It was particularly pronounced in post-war Western Germany at a time when the churches were considered to be the only major social facility that had morally survived the National Socialist era reasonably unscathed and acknowledged its moral complicity at an early stage. At the time, "coordination theories" that viewed state and church as equal partners prevailed. The consequence of a pluralism that commenced in the 1960's was that the churches only expressed one voice in the concert of social powers. However, they are by far still the largest organisations that are not state-run: the majority of the population still belongs to one of the two mainstream churches, respectively just under one third to the Catholic and Protestant churches. Approximately two million persons profess other Christian faiths, 32 % belong to a non-Christian religious community or not at all¹³: amongst them approx. 3.4 million Muslims¹⁴. The pan-German image is an average derived from approx. 79 % church membership in the West and less than 30 % in the new federal states. Exact numbers are available because the church tax system requires the registration of the church members.

¹¹ Robbers, Gerhard: *Rechtsbeziehungen zwischen Staat und Religionsgemeinschaften in Europa*. Contribution to the symposium „*Rechtliche Aspekte der Beziehungen zwischen der künftigen Europäischen Union und den Glaubens- und Überzeugungsgemeinschaften. Die Rolle dieser Gemeinschaften und die Zusammenarbeit für eine gemeinsame europäische Zukunft*“ on 12./13.11.2001. printed in the report about the symposium, published by Win Burton and Michael Weniger, GOPA Working Paper 2002, [17-20], 17.

¹² Schwarze, Jürgen: *Die Entstehung einer europäischen Verfassungsordnung*, in: id. (ed.), *Die Entstehung einer europäischen Verfassungsordnung. Das Ineinandergreifen von nationalem und europäischem Verfassungsrecht*, Baden-Baden 2000, [463-570], 464.

¹³ Statistisches Bundesamt (Federal Office of Statistics): *Datenreport 2002*, Bonn: Bundeszentrale für politische Bildung, p. 171ff.

¹⁴ Estimation according to BT-DS 16/5033 dated 18.04.2007. The problem is that these estimations classify migrants from mainly Muslim influenced countries and their offspring as Muslims. This ignores the individual's right to choose a religion. Admittedly, an exact collection of data without introducing membership structures in Islamic religious communities is impossible. They would be desirable because they could solve a problem the so-called representative associations have with their lack of legitimacy, and enable the estimate of the real representative ratio of the various groups in cooperation with the state. The protection of minorities from unsolicited and unwanted representation already calls for it.

The original religious *constitutional* law is in various articles of the Basic Law of the Federal Republic of Germany:

- § Freedom of faith, conscience, and creed (Sec. 4),
- § mainly provisions respecting religious communities in Sec. 140 [in connection with Sec. 136-139 and 141 WRV (Weimar Constitution)],
- § Religious education (Sec. 7 II, III and 141),
- § Equal rights (Sec. 3 III and 33)¹⁵.
- § In addition in the broader sense the preamble:
"...conscious of their responsibility before God and Man..."

There are three fundamental pillars¹⁶:

- § Freedom of religion (Sec. 4 Basic Law),
- § institutional separation between State and Church (Sec. 137 I Weimar Constitution) and
- § Church self-determination right (Sec. 137 III Weimar Constitution).

These regulations provide the framework; meanwhile the jurisdiction of the state-church law is in the power of the federal states¹⁷. Despite the differences in the details, the regulations in the federal and federal state constitutions "coincide substantially"¹⁸. Sometimes reference is made to ecclesiastical contract law for further regulations.

State-church law comprises all the contractual agreements between the federation, the federal states and religious communities¹⁹. As a rule, contractual agreements are also extended to other religious communities for reasons of parity (for example, the military chaplaincy contract was only signed with the German Protestant Church). The contractual path has stood the test of time as an instrument of compensation²⁰ and in the new states in particular it has experienced a "Renaissance". In Germany, it is structured as in no other country²¹.

Due to the self-determination right of the churches (Sec. 137 III Weimar Constitution) in its interpretation of the Federal Constitutional Court and the ability to settle difficult individual issues amicably by means of a contract, the unilateral norm setting practice on the part of the state has largely receded. It is an expression of the discontinuation of the state-church sovereignty²². Unilateral legal regulations are especially found where they are necessary by virtue of the matter (for example secession from the church)²³.

The first pillar is the freedom of religion. It is a basic right, not a civil right. This right is guaranteed without restrictions. While other fundamental rights are subject to restrictions (and

¹⁵ Von Campenhausen/de Wall also include (in view of the Reichskonkordat) Sec. 123 II Basic Law (FN 2, 40).

¹⁶ Von Campenhausen/de Wall, (FN 2), 99.

¹⁷ Its terms can be very different and range from elaborate regulations (in particular in the new federal states) to a simple reference to Basic Law (for example North Rhine-Westphalia, Baden-Württemberg). Some constitutions (for example Bavaria, Rhineland-Palatinate) show a greater closeness to Christian constitutional aims, others (for example Bremen, Hesse) emphasise the separation of state and church, others simply omit it (for example Schleswig-Holstein, Lower Saxony, Hamburg).

¹⁸ Winter (FN 1), 10; Von Campenhausen/de Wall, (FN 2), 44.

¹⁹ Concordats and bishops contracts with Holy See and Catholic dioceses, church contracts with Protestant regional churches, state contracts for example with the Central Council of Jews.

²⁰ Von Campenhausen/de Wall, (FN 2), 47.

²¹ Winter (FN 1), 208.

²² Von Campenhausen/de Wall, (FN 2), 50.

²³ Von Campenhausen/de Wall, (FN 2), 50.

these in turn have a restrictive control in certain principles - *ordre public*, public health amongst others), in Germany freedom of religion is a key constitutional right that cannot be restricted by a simple statute. As a result of the experiences during the so-called "Third Reich", a high level of protection and broad protection area is guaranteed: religion must not be limited to a purely private matter by way of the law.

To compare, see Art. 9 ECHR, but also Art. 5 ECHR with its restriction regulations.

Freedom of religion Art. 9 II ECHR:

"Freedom to manifest one's religion or belief 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."

Freedom of expression Art.5 II Basic Law:

"These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour."

Freedom of religion Art. 4 I and II Basic Law:

"1. Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
2. The undisturbed practice of religion shall be guaranteed."

Of course, this doesn't mean that freedom of religion is free of restrictions, these are constitutionally *immanent*: in the constitutional principles and in conflicting fundamental rights. If conflicts arise, one must try to conciliate the rights in need of equalisation with care without overruling the substance of any of the fundamental rights ("practical concordance")²⁴.

A fundamental right can also be used on (domestic) legal entities "to the extent that the nature of such rights permits". (Sec. 19 III Basic Law). This applies to religious communities, but the German Basic Law with Art.140 reached separate regulations for them.

The second pillar is the separation of state and church. The ban of the state-church was "moderately" interpreted in the Weimar Republic²⁵. It is not a *laïcité* command. An attribute of the German model is the separation of the institutions, not the areas which they affect. Church and state acknowledge the responsibility for the same human beings. Although they are vested with different mandates, this divided responsibility is mutually executed in certain areas: *not* in religious-ritual and *not* in civic areas, *however* in the social-socio-political ones. A number of these areas arise from the constitution and social reality. This directly includes school education, i.e. religious education in public schools, regulations for denominational schools and theological faculties, moreover church tax law, pastoral care for institutions and forces personnel, and cemetery law amongst others.

In these areas church and state encounters take place under conditional separation. The state can cooperate with religious communities; it can also adopt and encourage individual secularised religious values (as opposed to assertions of faith), but it must never violate neutrality and parity. As a result of the amicable attitude of the state, on the one hand, and its neutrality on the other hand, the constitution entitles extensive self-governing rights to the churches. The state cannot organise appropriately wherever it has neither the authority to appeal nor judge: "Every religious community administrates its own affairs without interference of state or community". (Sec. 137 III Weimar Constitution).

²⁴ Bernd Jeand'Heur / Stefan Koriath: *Grundzüge des Staatskirchenrechts*, Stuttgart 2000, Rnn. 125-127.

²⁵ Jeand'heur/Koriath, (FN 24), Rn. 127.

"Its own affairs" are not simply the ritual laws (*iura in sacra*), but rather the complete structure, organisation and administration (*iura circa sacra*). As a rule, defining the scope resides with the self-concept of the religious communities. This can also include economic activities²⁶, provided that they are assigned and subordinated to the religious mandate: "where the secular state in its widespread cultural and social activities comes into contact with religious phenomena, it can only make decisions regarding its secular side, according to its own secular competence and standards"²⁷. The organisation of the church labour relations with the secular labour legislation, thus the conclusion of labour contracts, does not lift their affiliation to their "own matters"²⁸. It does not question the constitutionally protected, specifically ecclesiastical nature of church service. Also in balancing out other constitutional values "particular importance must be attached to the self-concept of the churches"²⁹.

The right of self-determination applies to all religious communities. It benefits from "support" if public corporation status is granted. This must be granted to all religious communities "whose constitution and number of members ensure the guarantee of continuity"³⁰. A particular closeness to state and constitution as requested by the Federal Administrative Court³¹ was rejected by the Federal Constitutional Court, as long as no violation of the constitutional *principles* is proven³². All religious communities subject to public law can have the state collect a church tax from its members – currently for 4 % expense allowance.

Further leitmotifs of the cooperative system in Germany can be concluded:

- § The state acknowledges that it lives from values and cohesiveness which it cannot bring forth as a neutral state if it wants to remain the home of all citizens. Therefore, it supports the social "value givers" – also those with varying opinions (pluralism).
- § State and religious communities act in mutual responsibility for the part of the population that is assigned to both: as citizens and as members.
- § The social and cultural state is bound to the principle of subsidiarity (the precedence of free – also denominational - entities).

To understand the cooperative model, it is necessary to realise that neutrality calls for assessment prohibition and equal treatment, not indifference to religious policies or even their denial³³. Freedom of faith and religion "is guaranteed for the sake of actualisation. [...] Therefore, faith and religion will not be expelled to an area irrelevant for the constitution, and the powers that carry that process will be positively assessed by the constitution."³⁴ Thus, the state is advised to support all the religious communities in and according to their significance

²⁶ German Constitutional Court 24,236.

²⁷ Heckel, Martin: *Das Bekenntnis – ein Vexierbild des Staatskirchenrechts?*, in: *Verfassung – Philosophie – Kirche* (FS Hollerbach), Berlin 2001, [657-690], 685.

²⁸ German Constitutional Court 53, 366.

²⁹ German Constitutional Court 53, 366; 66, 1.

³⁰ This regulation sometimes represents an obstacle for religious communities if they - as the Islam – are not subject to membership law and as such the census and verification of the prerequisite "number of members" is not possible (Von Campenhausen/de Wall, [FN 2], 86f.).

³¹ Federal Administrative Court 7 C 11.96 - Nr. 18/2001 dated 17.05.2001 (Federal Administrative Court 105, 117)

³² German Constitutional Court 102,370.

³³ Von Campenhausen/de Wall, (FN 2), 266, 371; Jeand'heur/Korioth, (FN 24), Rn. 167; Winter (FN 1), 51f.

³⁴ Hesse, Konrad: *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg ¹⁸1991, Rn. 382.

for the community³⁵. The German system is therefore not a "hobbling separation"³⁶, but rather – possibly particularly sophisticated and in any case well tried – embodiment of this cooperation.

This now takes me to the other countries, in which I am naturally not an expert. I will therefore restrict myself to the basic principles and essential distinctions to the German system. To satisfy the initial demand that surrounding social conditions be taken into account, I will respectively begin by presenting sociological core data:

5.) Case study 2: Austria

From all the countries that we are dealing with, Austria³⁷ is the only country that was neither entirely nor partly subjected to the massive forced secularisation under communist rule; this is why the relative number of believers is quite high: nearly 74 % of the Austrians are Roman Catholics; Protestants and Muslims both account for 4-5 % and only 12 % do not belong to any religion.

Similar to Germany, there is a religious *constitutional* law in the real sense. The Constitution of 1867 guarantees both the individual fundamental right (Sec. 14) as well as institution guarantees (Sec. 15). In addition to the simple law regulations there are also the Treaty of St.Germain and the Concordat of 1933.

The Austrian Law currently has three options to attach a legal status to religious communities:

- § as "legally accepted religion",
- § as registered religious community.
- § as religious association.

The Austrian Constitution is still based on the "legally accepted religions". The longstanding history of recognition of non-Christian religious communities is worth mentioning [Israelitengesetz (Jewish Law) 1890 and Islamgesetz (Islam Law) 1912]. The later differentiation became necessary when it became visible that in a pluralist society a sole representation of all believers by respectively one umbrella organisation was not possible: Christian, Jewish and Islamic "*dissenters*" strived for their own communities. The registration is a kind of candidacy for recognition, for which no legal right exists. All in all though, it achieves "less positive legal substance than the clarification that the state does not view religion as a private matter."³⁸ The legally recognised communities, however, enjoy certain benefits – similar to those of the public corporations in Germany: protection of name, protection against secularisation, right to establish confessional schools, right to teach religion. Sec.15, for example, stipulates that "*every church and religious society recognized by the law has the right to joint public religious practice, arranges and administers its internal affairs autonomously, [...]*." As opposed to Germany, where the right of self-determination applies to all, i.e. not only to the public corporate religious communities, it seems that it is reserved to the "recognised religious communities" in Austria – which is problematic from a constitutional standpoint.

³⁵ This can result in admissible unequal treatment in particular cases (Jeand'heur/Koriotoh, (FN 24), Rn. 169).

³⁶ Stutz, Ulrich: *Das Studium des Kirchenrechts an den deutschen Universitäten*, in: Deutsche Akademische Rundschau 6 (1924), 12.

³⁷ If not otherwise stated cf. : Potz, Richard: State and Church in Austria, in: Gerhard Robbers (ed.), State and Church in Europe, Baden-Baden ²2005, [390-418] or Robbers, (FN 3), [425-453].

³⁸ Potz: *Staat und Kirche*, 430.

Further state-church law elements are also pastoral care for forces personnel and the police and in institutions; the theological faculties, confessional universities, protection of church labour legislation and the coverage of religious themes in public media. Essentially, the financing of the church stems from so-called church contributions, which are binding for members, but are not automatically collected - as is the German church tax.

3.) Case study 3: Poland

Although Poland³⁹ was under communist rule for over forty years, it remained a Catholic country. The religious quota is even higher than in Austria. There are no reliable figures because data regarding affiliation is not collected for reasons of constitutional law⁴⁰. According to demoscopic estimates⁴¹ 96 % of the Polish population is Catholic, the other 4 % is Orthodox, Jehovah's Witnesses and Unitarian, in this order. The Lutherans are estimated with fewer than 100.000 members. 68 % of the Polish population state that they regularly participate in religious events.

Catholicism is closely enmeshed in the Polish identity and stabilised it during the partitions of Poland, the occupations and communism. Therefore, its influence on politics is still significant, even nowadays: some analysts believe that the Kaczynski brothers won the elections because they professed to be explicitly Polish Catholics, and then again lost them because their religiousness proved unconvincing in practice. At any rate, the opinion of the church – also after the death of the Polish pope - plays an important part in public opinion, although the pluralisation reveals a slow drop.

Poland belongs to the states that do not have a state religion, but mentions one religious confession in particular in its constitution. Sec. 25 IV states: "The relations between the Republic of Poland and the Roman Catholic Church shall be determined by an international treaty concluded with the Holy See, and by statute."⁴²

The constitution protects the fundamental rights of the individual (Sec. 53), the religious identity of minorities (Sec. 35), grants institutional guarantees (Sec. 25) and protects against discrimination due to religious affiliation. The constitutional guarantees and the 1989 law on freedom of creed apply to all the communities. Concordats and laws put into effect based on previous agreements with religious communities always only apply to the parties of the agreement. The possibility of these agreements, as intended in Sec. 25 of the Polish Constitution is a clear indicator for a cooperative system. Since you are already acquainted with this system, I will restrict myself to a few keywords: it is realised in denominational kindergartens, schools, universities, theological faculties at state universities, the recognition of marriage of registered religious communities and the pastoral care for forces personnel and institutions. The churches are financed by donations and investment income (for example from

³⁹ If not otherwise mentioned cf. : Rynkowski, Michal, State and Church in Poland, in: Robbers, (FN 37), [390-418]. Irena Borowik gives us interesting socio-economic insights into churchliness and private religiosity in Poland, in: Detlef Pollack / Irena Borowik / Wolfgang Jagodzinski, *Religiöser Wandel in den postkommunistischen Ländern Ost- und Mitteleuropas*, Würzburg 1998, [253-270].

⁴⁰ Sec. 53 VII of the Polish Constitution states: No one may be compelled by organs of public authority to disclose their philosophy of life, religious convictions or belief.

⁴¹ Here: US International Religious Freedom Report 2007, <http://www.state.gov/g/drl/rls/irf/2007/90193.htm>.

⁴² The contractual form is also applied to other religious communities in Para. 5: "The relations between the Republic of Poland and other churches and religious organisations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers."

property), but church institutions can profit from the flexible cultural tax, in which taxpayers can assign 1 % of their income tax for payment to specific non-profit organisations.

There is quite an interesting solution for a reference to God in the Preamble; one speaks of the citizens as "both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources." This wording was also in discussion for the preamble of the European Constitution.

4.) Case study 4: Czech Republic

The Czech Republic⁴³ is perhaps the most secularised country in Europe. It is certainly a result of the counter reformation: ~~the~~ Catholicism that was forced upon them was never internalised and therefore exposed to erosion. There was also a large break off in the 1920's when the Catholic church was deemed to be too closely linked to the Habsburg Dynasty. For the rest, the dechurchification took place under the communist rule. The result: in 2001 more than 58 % of the population stated that they were non-denominational. Only approx. 32 % belong to a religious community. The Catholic church is by far the largest with approx. 2,7 million members. Almost all of the elites no longer belong to a confession.

The Czech state-church law is modelled on the

- § constitution,
- § legal regulations and provisions and
- § contractual state-church law.

The "Charter of Fundamental Rights and Freedoms" is particularly important in the constitution. It guarantees the fundamental rights of the individual (Sec. 15) and provides institutional guarantees (Sec. 16.) This comprises in particular the right to self-determination of churches and religious education.

All religious communities must be registered. The registered churches and their entities are legal entities *sui generis*, though one differentiates between those with "special rights" and those with "simple legal character". The Catholic church and the Jewish community have been recognised from time immemorial, the Protestant church since as early as 1781. As of 1991, recognition was no longer necessary, only the registration⁴⁴. Since 2002, the proof of 300 members is stipulated (it used to be 10,000). But: if they have been in existence for 10 years, and can also prove that their members make up 0.1 % of the population (i.e. approx. 10,000 persons), they are entitled to the status of communities "with special rights": this includes religious education, pastoral care for forces personnel and institutions, public welfare and confessional schools. Whereby church schools financed by the state must be distinguished from private schools founded by the churches. Religious universities would be possible, but haven't yet been founded. Representatives of the church are represented in the national Broadcasting Council. The restitution of nationalised church assets and the Concordat of 2002 between the Czech Republic and the Apostolic See, which has been signed but not yet ratified,

⁴³ If not otherwise mentioned cf. : Tretera, Jiří Rajmund., State and Church in the Czech Republik, in: Robbers, (FN 37), [35-54]. Sociological comparison Mišovič, Ján: *Religion und Kirche in der Tschechischen Republik*, in: Pollack, (FN 39), [271-285].

⁴⁴ In 2002, some regulations came into effect that slightly restricted the religious communities in comparison with their 1991 status.

are some of the open issues⁴⁵. It seems likely that domestic contracts with other religious communities will only be concluded after the ratification.

6.) Outlook: The European Union and the Religions

The EU has competences only when they are explicitly agreed in treaties (principle of conferral). A religious competence does not exist. In the Church Statement of Amsterdam, the member states have pledged to respect the status of the churches according to national legislation and not interfere with it through Community law. The Union does not hold an independent cultural competence that could perhaps indirectly substantiate jurisdictions.

As a result of the fact that the Union does not hold any relevant competences, we cannot deduce that Community law remains without influence on the religious communities. EU law is responsible for many parts of national legislations: values of 80 % often circulate⁴⁶. An average of 35 % is probably realistic⁴⁷. These standards take priority over⁴⁸ national law, including constitutional law. In addition, the integration-friendly interpretation of Community law by the European Court of Justice (ECJ) has led to the fact that also areas in which one thought Community law was not applicable, have been legally overwritten, for example in the social security system⁴⁹, sport⁵⁰ and in religion as well⁵¹.

Wherever churches come into contact with civil law, they can also come into contact with Community law⁵². The further their actions lead the churches into these areas – in charitable and social commitment⁵³, in social welfare work and ethical awareness, in education and learning⁵⁴, research and teaching⁵⁵, in mission and journalism; but also in the traditional income from agriculture and forestry⁵⁶ –, the more they are affected.

⁴⁵ Tretera, Jiří Rajmund / Horak, Zboj: *Das Verhältnis von Staat und Kirche in Tschechien*, ZEvKR 52 (2007), [57-577].

⁴⁶ Such in pure economic law (source: http://www.unfallkassen.de/webcom/show_article.php/_c-459/i.html). Similar estimates also circulate in EP itself (cf. A5-0272/2003 REV1 = PE 322 023, 8).

⁴⁷ The data reference manual of the German Bundestag for the 14. legislative period listed laws "based on European impulses": interior affairs (18.9 %), justice (35.9 %), finances (40.8 %), economics and technology (47.2 %), nutrition, agriculture, forestry, consumer protection (69.3 %), labour and social affairs (23.8 %), family, women, elderly and youth (36.4 %), health (20 %), transport, building and housing (30.4 %), environment, nature conservation and nuclear safety (69.2 %) = total 35.3 %. (Source: *Datenhandbuch zur Geschichte des Deutschen Bundestages*, Verwaltung des Deutschen Bundestages (ed.), Berlin 2005, 601f.

⁴⁸ cf. ECJ Rs. 6/64 (Costa/ENEL), Slg. 1964, p. 1251. and others; in the literature, for example: Streinz, Rudolf, *Europarecht*, Heidelberg⁷2005, Rn. 222f.

⁴⁹ cf. to this and others: Gaertner, Joachim: *Der Dienst des juristischen Stellvertreters beim Bevollmächtigten des Rates der EKD bei der Bundesrepublik Deutschland und der Europäischen Union*, ZevKR 51 (2006), 90-20, 200ff.; Erdmenger, Katharina, *Kirche, Diakonie und europäisches Wettbewerbsrecht*, in: Dill / Reimers / Thiele (edd.), FS Gaertner, [177-184], 177.

⁵⁰ for example European Court of Justice (ECJ) Rs. C-415/93 (Bosmans), Slg. 1995, p. 4921.

⁵¹ for example European Court of Justice (ECJ) Rs. 300/84 (van Roosmalen), Slg. 1986, p. 3097; European Court of Justice (ECJ) Rs. 196/87 (Steymann), Slg. 1988, p. 6159.

⁵² The following footnotes include examples from the Federal Republic of Germany.

⁵³ In 2004, the Diakonische Werk operated approx. 26,800 facilities and services with over one million places nationwide. Over 420.000 employees worked full or part-time for the Diakonie. And that's not including the approximately 400.000 volunteers (www.diakonie.de). A total of 24,989 facilities and services are associated to the Caritas. 482,172 are employed full-time in facilities and services (www.caritas.de). Including all the associated facilities, the churches are considered to be the largest non-state employer in Germany with approx. 1.3 million employees in employment relationships under civil law alone (Oswald, Robert: *Streikrecht im kirchlichen Dienst und in anderen karitativen Einrichtungen*, Frankfurt/M. 2005, 11).

⁵⁴ In 2004, the Protestant church was responsible for 988 schools nationwide, with 147,382 pupils. Altogether the Protestant Church in Germany is in charge of approximately 9,000 day care centres for children. Approximately

However, apart from being indirectly affected, the Union can also put regulations into effect that are explicitly religious law, if this is done to realise one of their competences. The Anti-Discrimination Directives⁵⁷ on the basis of Art. 13 ECT are an example. The relationship of Community and Church law still suffers from the fact that it does not consider the provision for church and religious matters as "an economically relevant church law, but rather as church-relevant economic law".⁵⁸ This results in recurring conflicts; the problem could be solved by removing the structural fault that anchors on occasion church freedom in complicated exemption clauses⁵⁹ instead of recognising it as a fundamental principle of Community law⁶⁰.

Fundamental rights are not granted by the state, they are warranted. They precede its authority. It is therefore desirable that with the Treaty of Lisbon, the European Union has more explicitly linked its state authority to the fundamental rights than previously. The Fundamental Rights Charta shall be legally binding, the EU as such wants to accede to the ECHR.

In freedom of religion it is particularly important that the state and those enjoying fundamental rights – be it individuals or religious communities – remain in discourse about the content of this fundamental right, whose provision is revoked by the religiously neutral state. Therefore, the Treaty of Lisbon not only incorporates the previous declaration No. 11 of the Treaty of Amsterdam as a new Article in primary legislation, it also supplements this very defensive

62,000 employees work there; they take care of more than 540,000 children. Together, the Protestant and Catholic church support approximately 50 % of all day care centres in the Federal Republic of Germany. (www.ekd.de). There are 1,146 Catholic schools, with approx. 370,000 pupils (<http://www.katholisch.de>). The Catholic church/Caritas support approx. 10,000 day care centres for children. They employ nearly 83,500 full-time staff and 745,000 places are available. (www.dbk.de).

⁵⁵ There are 19 Protestant-theological faculties or departments and three ecclesiastical universities (<http://evtheol.fakultaetentag.de>). There are also twelve Catholic theological faculties at the state universities, 30 Catholic theological institutes for the academic education of religious education teachers, the Catholic University in Eichstätt, three separate theological faculties as well as the "Philosophical Theological Studies" in Erfurt, and eight officially recognised polytechnic colleges (www.dbk.de).

⁵⁶ Last census by the Protestant Church in Germany dated 01.01.1986 (old West German states): real estate 144,364 ha (= 0.6 % the total surface of the FRG); of which: developed 7,618 ha (church or social purposes 7,218 ha; other buildings 399 ha); burdened with heritable building rights 1,841 ha; undeveloped 130,473 ha (agricultural use 99,658 ha; forest 26,328 ha); cemeteries 4,432 ha (Source: <http://www.ekd.de/EKD-Texte/steuer.NB.2>).

⁵⁷ 2000/73/EU (civil law) and 2000/78/EU (labour law).

⁵⁸ Kirchhof, Paul: *Der unverzichtbare Kern des deutschen Staatskirchenrechts und seine Perspektive im EU-Gemeinschaftsrecht*, in: Axel Frhr. von Campenhausen (ed.), *Deutsches Staatskirchenrecht zwischen Grundgesetz und EU-Gemeinschaft*, Frankfurt/M. 2003, [147-165], 155.

⁵⁹ Art. 4 para. 2 of the labour law Anti-Discrimination Directive reads: "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 organisations 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 organisation'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. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

⁶⁰ Kirchhof, Kern, 156.

provision to protect the national competence regarding a dialogue of the Union with the churches, religious and ideological communities:

Art. 15b: Status of churches and non-confessional communities

1. "The EU undertakes to respect and not prejudice the status under national law of churches and religious associations or communities in the Member States."
2. The EU similarly undertakes to respect the status under national law of non-confessional communities.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations".

This Article is a parallel standard to the dialogue with civil society (Art. 8b ECT-Lisbon). Both must be understood in the context of the principle of "participative democracy". It is based on the knowledge that "public welfare" cannot be taken for granted, but that in pluralism it has to be developed through the discourse of the social forces. This is why the different interests need to be expressed. They are integrated in the decision-making, even when the decisions themselves are reserved to the "representative democratic entities" (decision-making decision-taking). The separation of "religious" and "civil" dialogue takes the special features of the religions and their constitutional status into account. It comprises the exchange regarding values and social principles irrespective of consultation processes in concrete legislative proceedings.

This dialogue is already happening; it is taking place on different levels: from the working level of the churches and European experts to the yearly meetings of the Commission, Council and Parliament presidents with important European religious leaders. The embodiment in primary legislation secures this exchange and makes clear that also on EU level religion and state cannot and do not want to live at cross-purposes, but in mutual respect and with all due respect for the different powers; together they want to ensure the public welfare and the well-being of the individual.