

10 Jewish and Muslim Claims to Religious Freedom, Participation, and Benefits Under Article 4 (1) and (2) of the German Basic Law – and Their Constitutional Limits

Hans Michael Heinig

Abstract

This chapter examines the protection of religious minorities under German constitutional law using the example of Jews and Muslims. To this end, the current legal instruments are presented and, in particular, the mode of operation of religious freedom under the Basic Law is explained. Its individual protection dimension is presented using several examples, as well as its cooperative dimension. In addition to the separation of state and religion, German constitutional law on religion is also characterised by cooperative elements, which in themselves are subject to the principle of equality. The forms of cooperation between the state and Muslim and Jewish religious organisations are traced. The chapter also addresses deficits in implementation in legal practice.

Keywords

antidiscrimination; chaplaincy; cooperation; equality; financial funding; holidays; religious; Islamic headscarf; Kipah; minority rights; neutrality; religious freedom; religious scope; religious limits; religious dimensions; religious instruction; religious societies; taxation of members; school; Shoah; secularity; self-understanding; slaughtering; theology at state universities

10.1 Introduction: The Fundamental Rights Protection of Religious Minorities from Democratic Majorities

Liberal-democratic orders are characterised by a double concept of freedom: they oscillate between individual self-determination and collective self-government. Effective protection of fundamental rights and democratic legitimation

of political authority are indissolubly linked in this conception of order, but they are also in permanent tension with one another.¹

This is also reflected in the way religious freedom and its limits are dealt with. Obligations to the law that applies to everyone and religiously justified exceptions to such general obligations compete with each other. Partly, special attention is paid to individual protection, partly to the democratic obligation of “neutral” laws for all. The problem becomes even more pressing when it comes to religious minorities. The interests of religious majorities are usually taken into account by the democratic majority in collectively binding decisions. The situation is different for religious minorities, which can be distinguished from a religious or secular majority culture. Then it depends in particular on what exactly one understands by “neutrality” (see Section 10.4.) and how minority-protective aspects of fundamental rights are reflected here.

The protection of minorities is not only achieved through special exemption clauses for certain religious minorities but also through further diversity-oriented structures of the legal system: prohibitions of discrimination, equal status in general cooperation, and support by the state but also the positive adaptation of special interests of individual religious cultures into the legal system can play a role.

The following chapter will take a closer look at how German law, guided by the constitutional guarantee of equal religious freedom, deals with two very different religious minorities, Jews and Muslims.² Their religious interests are partly congruent (e.g. *shechita*, different religious weekly rhythms than in Christianity, religiously accentuated clothing); in both cases, religious life in Germany is strongly influenced by migration experiences. However, their historical, political and socio-cultural starting points are completely different: Germany’s political culture includes an enduring awareness of the responsibility that falls to the people who perpetrated the Shoah. Religious conflicts with a Jewish connection always stand in the long shadow of National Socialism. This factor does not apply to Muslims. In Germany, Islam cannot look back on a long cultural history (unlike in Austria, for example).

Religious conflicts with a Muslim connection therefore take on a different dimension: rather in the long shadow of Islamic fundamentalism, including its trail of violence, as well as a considerable Islamophobic attitude in parts of the German population. While anti-Semitism is widespread among the general population but absolutely taboo in the dominant political culture in Germany,

1 J. Habermas, *Faktizität und Geltung Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1992).

2 Some passages on Muslim rights in this article are based on H.M. Heinig, *Rechtliche Rahmenbedingungen für die Entfaltung muslimischen Lebens in der Bundesrepublik Deutschland* (Göttinger: Universität Göttingen, 2023). <https://doi.org/10.47952/gro-publ-134>. Accessed May 3, 2024.

the same is not true of resentments or even hostility towards Muslims.³ Politicians are more inclined to take up anti-Muslim sentiments, including through legislation. Fundamental rights as minority rights are then of particular importance in order to set limits to such tendencies and to counteract them. The Federal Constitutional Court has repeatedly done this in recent years with reference to the fundamental right of freedom of religion and religious discrimination bans.

10.2 People of Faith, Membership, Organisational Landscape

Secular law on religion is characterised by a specific mixture of individual and corporate rights. Traditionally, the corporate dimension is very pronounced in Germany. The background to this is the experience of a bi-confessional legal space after Luther's Reformation, which (initially at the imperial level, then also in the individual territories of the empire) sought to resolve tensions and conflicts through a polity of equality between Catholicism and Protestantism. This had a lasting effect, even when the individualisation of law took hold at the end of the 18th century: The "religious parties" of the Peace of Westphalia became in the course of enlightened natural law thinking "religious societies", associations of members of a confession.⁴ To this day, the legal institution of the religious society plays a decisive role in the exercise of corporative religious rights (see Sections 10.7, 10.9, and 10.10). They act in cooperation with the state as religious authorities, for example for theological institutes and faculties at state universities or for religious instruction in public schools, as well as in chaplaincy in the military and in publicly funded hospitals.

In light of the guarantee of negative religious freedom, legal membership in a religious society cannot be established by descent or family affiliation but only by individual, even implied, declaration. In Christianity, baptism is the central point of reference for establishing legal membership. In order to be able to exercise the rights of such a membership-based religious society, organised Judaism in Germany had to develop a membership law based on individual declaration, independently of the theological principle of maternity.⁵

After 1945, under the impact of the Shoah, the model of the "Einheitsgemeinde" (unified community), which encompassed liberal, conservative, and orthodox

3 For the perspective of social science see G. Pickel, *Weltanschauliche Vielfalt und Demokratie. Wie sich religiöse Pluralität auf die politische Kultur auswirkt* (Gütersloh: Bertelsmann, 2019). https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/Religionsmonitor_Vielfalt_und_Demokratie_7_2019.pdf. Accessed November 16, 2024; for the approach of the right wing party Alternative für Deutschland on Muslims see H.M. Heinig, *Säkularer Staat – viele Religionen: Religionspolitische Herausforderungen der Gegenwart* (Hamburg: Kreuz Verlag, 2018): 61–70.

4 H.M. Heinig, *Prekäre Ordnungen historische Prägungen des Religionsrechts in Deutschland* (Tübingen: Mohr Siebeck, 2018): 4.

5 J. Kunze, *Bürgerliche Mitgliedschaft in Religionsgemeinschaften: Studie über die Rechtsbeziehungen der Mitglieder zu den römisch-katholischen*, (Göttingen: Göttinger Universitätsverlag, 2013).

traditions, prevailed. All synagogue communities were represented in the Central Council of Jews in Germany as an umbrella organisation. In the 1990s, there took place a massive immigration of Jews from the territory of the former Soviet Union, deliberately sought by the German government. This immigration drastically changed the character of the Jewish communities but at the same time saved them from imminent disappearance. Since the 1990s, there has also been a trend towards “reconfessionalisation”. New (mostly liberal but also orthodox) congregations have arisen independent of the Central Council and the “Einheitsgemeinden”. In addition, the orthodox Chabad Lubavitch movement plays an important role alongside or in many communities.⁶

German religion policy initially found it difficult to keep up with the reorganisation of the Jewish organisational landscape and to adapt the instruments for promoting Jewish life in Germany to the extended pluralisation.⁷

Today, an estimated 225,000 Jews live in Germany, 91,000 of whom are members of a synagogue congregation.⁸ This means, conversely, that roughly half of the Jews living in Germany are not members of a Jewish religious society. Some, but by no means all, are what are known as “secular Jews”.

This phenomenon of “believing without belonging” is even more pronounced among Muslims in Germany. The mosque communities have far more users than members. Whether and under what conditions their associations are religious societies in the legal sense is one of the most controversial issues in German law on religion. Many Muslims do not bind themselves as formal members to a specific legal entity; the communities and their associations also tend to differentiate themselves along ethnic rather than theological lines. The largest Islamic association, the Turkish Islamic Union of the Institution for Religion (DITIB), is closely linked to the religious authority in Ankara, which reports to the Turkish president, and is controlled from there. This poses a challenge to the law on religion because integration and foreign policy tensions repeatedly arise in which religion acts as a kind of proxy. In addition to DITIB, there are other umbrella associations with different characteristics. The question of how sub-organisations view human rights and democracy arises from time to time. Numerous Islamic organisations are monitored by the intelligence services on federal and state level. The exact number of members in the legal sense in mosque communities cannot be reliably determined, as official statistics only record membership of religious societies organised under public law, and Muslim

6 M. Demel, “Idee und Entwicklung der jüdischen Gemeinden und Landesverbände”. In: *Autonomie und Gesetz: Zum Verhältnis von Staat und Religion Die jüdische Gemeinschaft in Deutschland* (Berlin: Zentralrat der Juden in Deutschland, Hentrich & Hentrich, 2024): 146–165.

7 H.M. Heinig, *Die Verfassung der Religion* (Tübingen: Mohr Siebeck, 2014): 172.

8 “Judentum”, <https://mediendienst-integration.de/gruppen/judentum.html>. Accessed May 3, 2024.

associations have largely not yet achieved this status. The figures provided by the largest association, DITIB, fluctuate between 200,000 (2007)⁹ and 800,000 members (2017¹⁰; current figure: 400,000);¹¹ presumably this also includes family relatives who are not members in the legal sense. It is assumed that a total of around 5.3 million people with a Muslim religious affiliation lived in Germany in 2019.¹²

Muslim and Jewish life in Germany unfolds in a religiously and culturally heterogeneous and dynamic overall situation:¹³ In the area of East Germany, the former German Democratic Republic, the vast majority have no firm commitment to a religious community and describe themselves as atheist or completely uninterested in religion. In West Germany, the Protestant and Catholic churches are losing popularity dramatically year after year. The former “people’s churches” are literally eroding. However, the degree of religious diversity is also increasing, particularly as a result of migration. In Berlin alone, over 250 religious and worldview societies shall be active.¹⁴ Most recently, the number of Orthodox Christians in Germany has risen sharply due to war refugees from Ukraine.

10.3 Legal Sources and Legal Forms of the State Law on Religion

The law on religion uses the general legal forms of state law: primacy is given to the federal constitution with its fundamental rights guarantees; the Basic Law also determines the distribution of competencies for legislation and law enforcement between the federal and state levels.¹⁵ In Germany, for example, the federal government has general legislative powers for the law of associations, civil law or social and labour law – areas of law that are also indirectly relevant to the law on religion. However, the core competence for the enactment of laws relating to religion lies with the federal states.

9 “Mitgliederzahlen: Islam”. https://remid.de/info_zahlen/islam. Accessed May 3, 2024.

10 “DITIB 2017: Klare Vision für Deutschland – DITIB startet mit konzentrierter Projektarbeit in das neue Jahr”. <https://www.ditib.de/detail1.php?id=562&lang=de>. Accessed May 3, 2024.

11 “Bund der muslimischen Frauen. Starke Frau – Starke Gesellschaft”. <https://www.ditib.de/default1.php?id=6&sid=12&lang=de#:~:text=Diese%20sind%20an%20die%20Türkisch,der%20DITIB%20Moscheen%20organisiert%20sind>. Accessed May 3, 2024.

12 K. Pfündel, A. Sticks, K. Tanis, *Muslimisches Leben in Deutschland 2020* (Nürnberg: Bundesamt für Migration und Flüchtlinge, 2021). https://www.bamf.de/SharedDocs/Anlagen/DE/Forschung/Forschungsberichte/fb38-muslimisches-leben.pdf?__blob=publicationFile&v=16. Accessed May 3, 2024.

13 For an overview see D. Pollack, G. Rosta, *Religion in der Moderne. Ein internationaler Vergleich* (Frankfurt am Main: Campus, 2022).

14 “Religion und Weltanschauung”. <https://www.berlin.de/sen/kultgz/religion-und-weltanschauung>. Accessed May 3, 2024.

15 W. Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart, 2011).

The law on religion also has specific legal characteristics. Austria, for example, has special statutes for individual religious cultures, including Jews and Muslims;¹⁶ in Germany, on the other hand, contractual agreements with individual religious societies play an important role.¹⁷ In general, they are ratified by parliamentary act and then also have the status of a formal statute in the hierarchy of norms. Such agreements have also been concluded between the Central Council of Jews in Germany and the Federal Republic,¹⁸ as well as between the federal states and the local synagogue communities and their regional associations.¹⁹ These contracts serve in particular to take account of the specific religious interests of a certain religious culture in the legal system.

In the Islamic spectrum, however, only two small city states (Hamburg and Bremen) have concluded such a treaty, whereby the treaty in Hamburg was not ratified but merely brought to the attention of parliament by the government.²⁰

10.4 Secularity of Law and Neutrality of the State as Protection of Religious Minorities from Democratic Overpowering

Majorities, not religious truths, are decisive for democratic decision-making. The basis of state action is its democratic legitimacy, not its theological legitimacy of any kind: “All state authority emanates from the people”, states Article 20 § 1 of the Basic Law (GG).²¹

The liberal-democratic constitutional order of the Basic Law prohibits state religion and state ideology in the meaning of “worldview” (“Weltanschauung”). The principle of freedom is intended to protect people in their diversity. The state must be able to be a “home” for all of them. All religions and world views have equal rights. The state must not identify with any of them. In this sense, it is religiously and worldview neutral.²²

16 W. Wieshaider, “Comme à travers un kaléidoscope: le statut des minorités religieuses en Autriche”. In: M. Ventura (ed.), *The Legal Status of Old and New Religious Minorities in the European Union* (Granada: Editorial Comares, 2021): 185–201.

17 G. Robbers, *Law and Religion in Germany* (Alphen aan den Rijn: Kluwer, 2013): 146ff.

18 A. Hense, “Vergangenheit als staatliche Verpflichtung”. In: *Autonomie und Gesetz* 255–268.

19 J. Lutz-Bachmann, “Gleich oder doch anders? Die Staatsverträge der jüdischen Gemeinden mit den Ländern”. In: *Autonomie und Gesetz* 127–145; J. Lutz-Bachmann, *Mater iurum?* (Tübingen: Mohr Siebeck, 2015).

20 J. Lutz-Bachmann, “Gleich oder doch anders? Die Staatsverträge der jüdischen Gemeinden mit den Ländern”.

21 German Constitutional Law. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Accessed November 17, 2024. H.M. Heinig, “The concept of religious neutrality under German Constitutional Law”, *Quaderni di Diritto e Politica Ecclesiastica* vol. 21 (2018): 57–67.

22 German Constitutional Law. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Accessed November 17, 2024. H.M. Heinig, “The concept of religious neutrality under German Constitutional Law”, *Quaderni di Diritto e Politica Ecclesiastica* vol. 21 (2018): 57–67.

However, neutrality in the sense of German constitutional law means neither blindness towards German cultural history, which has also been influenced by Christian and Jewish traditions, nor exclusionary secularism. With the preamble (*nominatio dei*), the freedom of religion, the prohibition of religious and ideological discrimination, the provisions on religious instruction and chaplaincy in state institutions, the Basic Law establishes a constitutional system of law on religion that is open to the religions and worldviews of its citizens, precisely so that the state itself does not become religious, civil-religious or ideological.

The ban on the state church also means that the state cannot and must not give its own answer to the question of religious truth. There should be no state theology. If the state opens itself up to the religions and worldviews of its citizens (such as religious instruction in public schools), theological questions are left to them. This is why the Basic Law ties in with their self-organisation in religious societies: as associations of believers, these are authorised to speak for them vis-à-vis the state and to represent them in the legal sense. This need not be accompanied by a hierarchically structured theological doctrinal office (like in the catholic church) but by an authority to speak for the religious society as such.

The religious and worldview neutrality of the state does not prevent the state from pursuing to a certain extent a policy on religion as long as it serves purely secular public interests. The constitution recognises that religions are phenomena of ambivalence.²³ They can have an extremely socially productive effect (by providing meaning, comfort, and mobilising civil society involvement), but they can also have destructive consequences (religious extremism that seeks to violently limit individual self-determination). The liberal state therefore has an interest in the “domestication” of religious forces that threaten social peace (negative formulation) and (positive formulation) in religious cultures that develop “forms of life that accommodate the liberal-democratic order” (Jürgen Habermas). Public authorities may pursue this interest as long as they respect religious liberty and prohibitions on discrimination – admittedly a difficult balancing act at times, because in practice, this can be a gateway to prejudice and preferential treatment.

As we will see in a moment, both sets of norms, religious freedom and equality rights, do not per se preclude the state from protecting the rights of third parties and other constitutional principles or from pursuing other public welfare interests (as long as they are reflected in constitutional rights and obligations). The state can therefore without violating its duty of neutrality forbid a religious organisation that actively opposes the free and democratic constitutional order.²⁴ It can take the monstrous crimes suffered by European Jewry

23 H.M. Heinig, *Öffentlich-rechtliche Religionsgesellschaften: Studien zur Rechtsstellung der nach Art. 137 Abs. 5 WRV korporierten* (Berlin: Duncker & Humblot, 2003): 39.

24 BVerwG, *Schutzerklärungen v. Scientology*, 6 A 6/05, NVwZ [2006] 694; BVerwG, 6 A 3/13, NVwZ [2014] 1573.

under the Nazi regime as an impetus to make collective reparations to the synagogue communities and their associations without becoming religiously biased.²⁵ By establishing theological research institutions and degree courses at state universities that are committed to general academic standards, it can exert an indirect influence on the further development of religious cultures, provided that partners willing to cooperate can be found who are prepared to contribute their religious expertise.²⁶

10.5 The Fundamental Right of Freedom of Religion under the Basic Law

10.5.1 *Scope of Protection of Freedom of Religion and the Importance of Self-Understanding*

The central norm of the German constitutional law on religion, the “lex regia”, is Article 4 § 1 and § 2 of the Basic Law, the guarantee of religious freedom. It states, “(1) Freedom of faith, freedom of conscience and freedom of religious and worldview beliefs shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed”. In jurisprudence and legal practice, a distinction is made between the question of what behaviour a fundamental right generally protects and the freedom that is effectively guaranteed in concrete terms after a comparison with the rights of third parties and public welfare interests defined by the legislator.

In personal terms, it should first be noted that Article 4 § 1 and § 2 is a “human right”, not a civil right. Anyone can invoke freedom of religion in Germany, not just citizens.

The general protection of religious freedom, the scope of protection, is extremely broadly defined under the Basic Law. It is the case that the constitutional text distinguishes between belief, confession, and religious practice. However, case law has combined these partial guarantees into a uniform, broadly conceived area of protection. In the words of the Federal Constitutional Court:

Article 4 § 1 and § 2 of the Basic Law contains a unified fundamental right to be understood extensively [...]. It extends not only to the inner freedom to believe or not to believe [...] but also to the outer freedom to profess and propagate one’s faith, to promote one’s faith and to persuade others away from their faith [...]. This includes not only ritual acts and the practice and observance of religious customs, but also religious education and other forms of expression of religious and worldview life

25 M. Demel, *Gebrochene Normalität* (Tübingen: Mohr Siebeck, 2011).

26 C. Waldhoff, “Islamische Theologie an staatlichen Hochschulen”. In: W. Rüfner, D. Pirson, S. Muckel, M. Germann, E. Friesenhahn (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* vol. 1 (Berlin: Duncker & Humblot, 2020): 154–155; H.M. Heinig, *Prekäre Ordnungen historische Prägungen des Religionsrechts in Deutschland* 279.

[...]. This includes the right of individuals to align their entire behavior with the teachings of their faith and to act in accordance with this conviction, i.e. to live in accordance with their faith; this does not only concern imperative beliefs [...].²⁷

In other words, the freedom of religion in the Basic Law guarantees something like a religion-specific freedom of action, in which the religious motivation of an action that can also be interpreted in a non-religious way from the outside is sufficient to open up the scope of protection.²⁸ This broad understanding of religious freedom is particularly important for religious cultures in which everyday life is determined by religion – for example, through meal rules. The fundamental right to freedom of religion protects the right to align one's entire life with one's own religious beliefs – even (or especially) if these may be alien to the majority society.

The protection of fundamental rights is a significant protection of the individual. Therefore, the self-understanding of the holder of the fundamental right is central for the question of whether a behaviour falls under the freedom of religion, especially since the state itself has no religious competence.²⁹ The protection of minorities has always played an important role in religious freedom. The religious self-understanding is relevant, on the one hand, in relation to the majority society but, on the other hand, also in conflicts of interpretation within a religious culture.

The religious-cultural ideas of the majority society cannot be decisive in determining the scope of protection. In particular, religious orthodoxy and orthopraxy are also protected, even if a part of society that considers itself enlightened or progressive takes offence. However, holders of fundamental rights must make their self-understanding plausible. When they can fulfil this task, their perspective is decisive. Other religious doctrinal traditions within their religious culture do not reduce the protection of fundamental rights.

To give an example: As a Muslim woman, you can also refer to Islamic clothing practices if these are controversial amongst the believers. In the words of the Federal Constitutional Court:

When assessing what is to be regarded as the practice of religion and belief in individual cases, the self-understanding of the religious and worldview communities concerned and of the individual holder of fundamental rights must not be overlooked [...]. Muslim women who wear

27 2 BvR 1333/17, *Kopftuch III* [2020] BVerfGE 153, 1 nb. 78.

28 H.M. Heinig, "Religions- und Weltanschauungsfreiheit". In: W. Rübner, D. Pirson, S. Muckel, M. Germann, E. Friesenhahn (eds.), *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland* vol. 1 559–613; A. von Ungern-Sternberg, "Religionsverfassungsrecht". In: M. Herdegen (ed.), *Handbuch des Verfassungsrechts: Darstellung in transnationaler Perspektive* (München: Beck, 2021): 1335–1390.

29 M. Morlok, "Art. 4". In: H. Dreier (ed.), *Grundgesetz Kommentar*, vol. 1 (Tübingen: Mohr Siebeck, 2013) nb 60.

a headscarf tied in the manner typical of their faith can [...] invoke the protection of freedom of religion and belief under Article 4 § 1 and § 2 of the Basic Law. The fact that different views on the so-called covering requirement are held in Islam [...] is irrelevant in this respect, since the religious basis of the choice of clothing is in any case sufficiently plausible in terms of spiritual significance and outward appearance.³⁰

The same applies to doctrinal disputes over questions of religious lifestyle among Jews of liberal, conservative and orthodox provinces.

10.5.2 Dimensions of Religious Freedom

According to the Basic Law, all fundamental rights, including freedom of religion, are primarily defensive rights against the state. They protect a sphere of freedom against state interference. However, the Federal Constitutional Court has developed further dimensions of fundamental rights over the course of time: fundamental rights also constituted objective-law principles of the legal system (“system of values”). As such, they would have a transmission effect. For example, fundamental rights values must be taken into account in the interpretation and application of indeterminate legal terms and general clauses, including in the legal relationship between private individuals. In this way, freedom of religion has an impact on employment law when it comes to the contractual relationship between employer and employee.³¹ The employer’s right to issue instructions is therefore restricted by the employees’ freedom of religion: A balance should be struck as far as possible between company requirements and the religious interests of the employee. If, for example, a Muslim employee in a supermarket refuses to put alcoholic drinks on the shelves for reasons of conscience, the employer must endeavour to assign him other tasks. Dismissal is only a secondary consideration.³² However, if it is foreseeable for the employee at the time the contract is concluded that there will be conflicts of interest, he must disclose these. A Jewish sales employee in a store, for example, cannot unilaterally and without further notice refuse to work on Saturday if it was foreseeable that the store would be open on that day.

In addition, fundamental rights oblige the state to protect the legal interest guaranteed by fundamental rights and to combat interference by third parties. The criminal liability of disturbing the practice of religion (Section 167 StGB) or incitement to hatred against religious minorities that threatens public peace

30 2 BvR 1333/17, *Kopftuch III* [2020]nb. 80.

31 U.DiFabio, “Art. 4[Glaubens-, Gewissens- und Bekenntnisfreiheit, Kriegsdienstverweigerung]”. In: G. Dürig, R. Herzog, R. Scholz (eds.), *Grundgesetz Kommentar* (München: Beck, 2024), Beck-online, nb. 224; M. Germann, “Art. 4”. In: *BeckOnline Kommentar Grundgesetz*, Beck-online, nb. 77.

32 *Kündigung wegen Glaubenskonflikts*, 2 AZR 636/09 [2011] BAGE 137, 164.

(Section 130 StGB), for example, can be understood as a result of the state's duty to protect.³³ However, obligations to protect almost never convey an entitlement to specific state action. The state has a wide margin of discretion and judgement here.

10.5.3 Limits of Religious Freedom

No fundamental right is unlimited. As rights to prevent interference, fundamental rights must be able to be restricted; otherwise, no state order would be possible. In the tradition of Kant, it must be remembered that the freedom of the one finds its limit in the equally justified freedom of the other. Unlike most other fundamental rights, Article 4 § 1 and § 2 of the Basic Law does not contain a reservation of statutory rights, i.e. the parliamentary legislator cannot invoke arbitrary ideas of the common good to justify infringements of this fundamental right. A conflicting constitutional right or value is always required. Conflicting fundamental rights and other legal interests of constitutional status (such as the state objective provisions in Article 20a GG on environmental protection and animal welfare) can justify an interference with religious freedom.

The legal situation is somewhat different in the case of corporative freedom of religion.³⁴ For the right of self-determination of religious societies, Article 140 GG in conjunction with Article 137 § 3 WRV³⁵ expressly recognises the barrier of the "law applicable to all".³⁶ At first glance, this would appear to give the democratic legislator far-reaching scope for intervention. However, as in the case of individual religious freedom, there is another hurdle here too: in both constellations (individual and corporative), restrictions on religious freedom must be brought into an appropriately balanced relationship with freedom itself. Interventions in fundamental rights are subject to the principle of proportionality or (in the case of fundamental rights without statutory reservation) the principle of establishing practical concordance: conflicting rights should be given their relative weight in relation to each other, i.e. collisions should not simply be resolved unilaterally to the detriment of one side. Here, too, the self-image of the fundamental right bearers must be considered when determining the relative weight of their interests. Otherwise, there is a risk of religious interests being filtered, distorted, and marginalised by

33 B. Fateh-Moghadam, *Die religiös-weltanschauliche Neutralität des Strafrechts* (Tübingen: Mohr Siebeck 2019).

34 H.M. Heinig, *Öffentlich-rechtliche Religionsgesellschaften* 593; M. Germann, "Art. 4". In: *BeckOnline Kommentar Grundgesetz* nb. 47.

35 Die Verfassung des Deutschen Reichs [1919] RGBL. III, 401–402.

36 *Katholischer Chefarzt*, 2 BvR 661/1 [2014] BVerfGE 137, 273; M. Morlok, "Art. 4" nb.109, 126.

requirements of rational comprehensibility in the context of the proportionality test.³⁷ At the same time, due to the principle of equal status of the holders of fundamental rights and constitutional rights, one side cannot be given the final decision; this must remain the responsibility of the state and, ultimately, the courts.

However, this also means that religious freedom is not a super fundamental right that supersedes all other rights but can be restricted with good reason. There is always a dispute as to when such a good reason exists – especially when it comes to protecting the interests of a minority religion. The parliamentary legislature is the first to decide whether there are good reasons for restricting religious freedom. The executive always needs a legal basis for interfering with religious freedom. The legislature, for its part, is subject to a principle of proportionality that is handled quite strictly in the practice of the Federal Constitutional Court; in the specific application of a law in individual cases, the particular circumstances must be considered; the concrete application must also be proportionate.

In this way, the principle of proportionality based on fundamental rights sets relevant limits for the democratic majority, the exact course of which then depends on the specific circumstances. The democratic generality of the law and consideration for individual interests as an expression of a kind of individual justice are mediated by means of the principle of proportionality.

10.6 Individual Protection of Religious Liberty – Selected Legal Issues

The environments in which interference with religious freedom occurs are diverse, as are the legal interests that are used as justification in legal practice. Various cases can be used as examples to show what balancing legal interests in conflicting legal positions actually means in German constitutional law.

A functioning legal system, for example, sometimes requires the cooperation of citizens. Such obligations may then only apply to the extent that they are absolutely necessary: a photo showing the face may be required for official ID cards; a headscarf with no influence on the biometric function of the image, on the other hand, is harmless; an unconditional ban would therefore be unconstitutional.³⁸ The situation is similar when questioning witnesses in court. For the judicial assessment of evidence, it is necessary to be able to see the facial expressions of the witnesses. Otherwise, the religious clothing of

37 See in different (Canadian) context to this problem B.L. Berger, “Freedom of Religion”. In: N. Des Rosiers, P. Macklem, P. Oliver (eds.), *Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017): 755–776. <https://doi.org/10.1093/law/9780190664817.003.0036>.

38 § 7 Personalausweisverordnung (Verordnung über Personalausweise, eID-Karten für Unionsbürger und Angehörige des Europäischen Wirtschaftsraums und den elektronischen Identitätsnachweis (Personalausweisverordnung – PAuswV, BGBl. I S. 1460 No 54) provides therefore an exemption on religious grounds from the general rule that headgear is forbidden.

witnesses or the audience is of no concern to the court. If the state orders a personal appearance – for example, in a court case – it must take into account the holiday requirements of the parties to the proceedings. For example, a Jewish witness cannot be forced to appear in court on a high Jewish holiday if he can plausibly demonstrate that he wishes to observe the holiday.

The state aim of animal welfare (Article 20a GG) justifies the ban on slaughtering, but exceptions must be possible with regard to the requirements of religious communities, in particular in relation to high religious holidays, whereby animal welfare is then ensured as far as possible through qualification requirements and conditions.³⁹

In the funeral sector, the obligation to either cremate a deceased person or bury them in a coffin is intended to protect the environment and the post-mortem dignity of the deceased. Some federal states expressly provide for exceptions to the coffin requirement for religious reasons.⁴⁰

This must be distinguished from the so-called lying-in-place periods, i.e. the reburial of a grave after a certain period of rest. This is not an exemption, but an extended benefit. There is no constitutional right to this in public cemeteries; however, public authorities can extend the legally stipulated resting periods for religious reasons. In addition, religious communities can operate cemeteries. Numerous Jewish synagogue communities make use of this, as do Muslim mosque communities in some cases.

In the absence of a conflicting constitutional legal interest, a general ban on public full-face veils, as known in France (so-called burqa ban), is out of the question in Germany.⁴¹ However, a clear field of vision may be required for the purpose of road safety when driving a motor vehicle or in comparable situations.

The school sector plays a major role in the public perception of religious conflicts. Here, the state's educational mandate in Article 7 § 1 GG competes with the religious freedom of pupils and the right of parents to raise their children religiously in Article 6 § 1 GG in conjunction with Article 4 § 1 and § 2 GG. The state's educational mandate also includes making provisions for the proper functioning of the school system. The right of school staff to follow a religious dress code can therefore be restricted if it poses a concrete threat to school peace. However, a general ban on public school teachers wearing headscarves or kippahs would be unconstitutional, according to the Federal Constitutional Court.

39 *Slaughtering*, 1 BvR 1783/99 [2002] BVerfGE 104, 337; H.M. Heinig, "Art. 4". In: A. Voßkuhle, P.M. Huber (eds.), *Grundgesetz – Kommentar* (München: CH Beck, 2024) nb. 55, 87.

40 See § 11 Bestattungsgesetz Niedersachsen (Gesetz über das Leichen-, Bestattungs- und Friedhofswesen (BestattG) vom 08. 12. 2005 (Nds. GVBl. S. 381); § 13 Bestattungsgesetz Rheinland-Pfalz, GVBl. 1983, 69; § 18 Friedhofs- und Bestattungsgesetz Hessen, GVBl. I 2007, 338.

41 H.M. Heinig, "Art. 4" 82.

An even more far-reaching protection of freedom applies to pupils. The religiously and ideologically neutral state (see Section 10.4.) must accept the religious orientation of pupils; any school conflicts (such as pressure from classmates to observe fasting rules or to dress in a certain way) cannot be dealt with in such a way that clothing with religious connotations is banned. Limits are only reached when religious clothing makes it impossible to achieve the school's goals (e.g. when the entire face is covered by a burka).⁴²

Alienating or distancing pupils from their religion of origin is not a legitimate goal of school activities, although the school should create the educational foundations for a responsible and self-determined life. In this respect, the religious wishes of parents and pupils may have to take a back seat, depending on the circumstances. It is difficult to draw precise boundaries, and case law is not free from fluctuations. The general obligation to attend school is now considered to be of paramount importance and generally prevails over religious freedom.⁴³ This also applies to participation in coeducational sports and swimming lessons or school trips. In the background of the restrictive jurisdiction is the concern about “parallel societies”, without it being legally determined what exactly this should mean in a religiously and culturally diversified society that is committed to individual freedom. Applications for exemption from sex education lessons are consistently rejected, but sensitivity to the diversity of sexual-ethical orientations is required by law. In everyday school life, the organisation of lessons does not have to take special account of individual needs such as prayer times. However, school exemptions are required for high religious holidays; these exemptions are partly guaranteed by contract (for Judaism) and partly based on statute or ministerial decrees.⁴⁴

To “compensate” this relatively strict regime (e.g. no right of homeschooling based on religious concerns), the constitution guarantees religious instruction in public schools (which is always tricky to put into practice for minority religions due to organisational requirements such as minimum pupil numbers). But an extensive private religious school system, as in France, has therefore not developed in Germany. However, the right to establish and operate private schools with a religious profile alternative to public schools is expressly guaranteed under constitutional law. There are 16 Jewish schools on this basis in Germany.⁴⁵ The establishment of private Muslim schools is still in its infancy.

Also, pupils may not be denied the opportunity to pursue religious needs in the public school system, at least not if this does not disrupt the running of the

42 U. Di Fabio, “Art. 4 [Glaubens-, Gewissens- und Bekenntnisfreiheit, Kriegsdienstverweigerung]” nb. 154.

43 A. von Ungern-Sternberg, “Religionsverfassungsrecht” 1335–1390; C. Waldhoff, *Neue Religionskonflikte und staatliche Neutralität* (München: CH Beck 2010).

44 H. Rubin, “Jüdische Religionsausübung im schulischen Alltag”. In: *Autonomie und Gesetz* 206–220.

45 “Jüdische Krippen, Kindergärten und Schulen”. https://www.bildungsserver.de/onlinereource.html?onlinereourcen_id=59376. Accessed May 3, 2024.

school.⁴⁶ Freedom of religion in public schools does not give rise to a right to the provision of a special infrastructure, such as a prayer room. Nevertheless, prayers during breaks are just as permissible in principle as a practice of fasting (even if the latter can be at the expense of school performance and have a correspondingly negative impact on the assessment).

The higher education sector is currently discussing whether the Jewish and Muslim holiday calendars should be taken into account when scheduling examinations.⁴⁷ The problem arises for Jews in particular with compulsory examinations on Saturdays. While entitlements to school holidays are extensively regulated by statutory, contractual agreement, or ministerial decree, there are no comparable regulations for the postsecondary education sector.

There can also be a collision between parental educational ideas and the state legal system outside of school. The Basic Law attaches great importance to the parents' right to educate their children. The state's guardianship mentioned in Article 6 § 2 GG comes only into play when the well-being of the child requires state intervention. Therefore, the religiously motivated circumcision of boys is expressly permitted by the legal system (Section 1631d BGB) if it is carried out *lege artis*, whereas genital mutilation of girls is prohibited by criminal law (Section 226a StGB).⁴⁸

Religiously influenced clothing worn by civil servants cannot simply be attributed to the employer.⁴⁹ Wearing a headscarf, a kippah, or a visible cross on the neck on duty in public service is therefore not per se a violation of religious and worldview neutrality of the state.⁵⁰ Depending on the area in question, however, other constitutional interests may also be affected, such as the functioning of the judiciary, which is particularly dependent on trust in the neutrality and impartiality of the court system. These functional conditions are primarily ensured by qualification requirements and rules regarding bias. The restraint of individuality in the exercise of the judicial office is also symbolically represented in the obligatory official dress of judges and prosecutors (robes). The Federal Constitutional Court goes so far as to allow the legislator to prohibit the addition of a headscarf or kippah to the official robes.⁵¹ It may be objected that ultimately anti-religious resentment is being rewarded here. Whether the prohibition of a kippah or headscarf for judges and public

46 Critical to the Case Law of the Federal Administrative Court (6 C 20.10 [2011] BVerwGE 141, 223) H.M. Heinig, "Religionsfreiheit im Schul- und Mitgliedschaftsrecht", *Zeitschrift für evangelisches Kirchenrecht* vol. 61, no. 2 (2016): 202.

47 *Die Religionsfreiheit von Jüdinnen und Juden respektieren!: Das nordrhein-westfälische Feiertagsrecht an der Glaubensfreiheit ausrichten!* ([Berlin]: Tikvah Institut, 2023). https://tikvahinstitut.de/wp-content/uploads/Policy-Paper-ReliFrei-NRW_online.pdf. Accessed Mai, 3 2024.

48 M. Germann, "Art. 4". In: *BeckOnline Kommentar Grundgesetz* nb. 50.3.

49 *Kopftuch*, 2 BvR 1436/02 [2003] BVerfGE 108, 282.

50 *Kopftuch*, 2 BvR 1436/02 [2003] BVerfGE 108, 282; *Kopftuchverbot Nordrhein-Westfalen (Kopftuch II)*, 1 BvR 1181/10 [2015] BVerfGE 138, 296.

51 2 BvR 1333/17, *Kopftuch III* [2020].

prosecutors in the courtroom is really necessary to ensure the acceptance of court decisions and the perception of their independence and impartiality would have to be proven in more detail. A blanket assertion, measured against the usual prognosis requirements for justifying encroachments on fundamental rights, cannot actually be sufficient.⁵²

The question of religious freedom is particularly sensitive in social contexts that are largely controlled by the state: in addition to the school system just discussed, the military and prisons are worthy of mention. Here, the Basic Law seeks to compensate for the loss of freedom associated with such institutions by guaranteeing chaplaincy. However, consideration is also given to individual concerns and special circumstances, insofar as this is permitted by the purpose of the institution. For example, many Länder statutes stipulate that prisoners must be allowed to follow the food regulations of their religious community and that they may have a reasonable number of religious writings and objects of religious use.⁵³ If you talk to imams and rabbis who care for Muslim or Jewish prisoners, they sometimes perceive considerable deficits in the enforcement of the law. While prison laws clearly state the religious rights of prisoners, prison administrations repeatedly seem to find it difficult to adequately fulfil these rights.

10.7 Corporative Religious Freedom – Selected Legal Issues

The European Convention on Human Rights accurately states that freedom of religion includes the right to “manifest one’s religion or belief ... in community with others” (Article 9 § 1 ECHR⁵⁴). Most religious cultures are characterised by processes of community building and insist on communal religious practices. This usually requires a certain degree of organisation. This corporate side of religion is also protected by the Basic Law in terms of freedom. Freedom of religion includes the right to join together with other believers (freedom of religious association).⁵⁵ The fundamental right of freedom of religion under Article 4 § 1 and § 2 of the Basic Law applies to religious associations (“religiöse Vereine”) and religious societies (“Religionsgesellschaften”). Religious organisations acquire legal personality according to general civil law. Alternatively, religious societies may be granted the rights of a public corporation (Article 140 GG in conjunction with Article 137 § 2 WRV). There is a constitutional

52 H.M. Heinig, “Art. 4” nb. 86.

53 P. Weller, *The Accommodation of Religious Minority Beliefs in Prisons in Germany and the United States*, Doctor Thesis, (Fiesole: EUI, 2020). https://cadmus.eui.eu/bitstream/handle/1814/67090/Weller_2020_LAW.pdf?sequence=1&isAllowed=y. Accessed May 3, 2024.

54 European Convention on Human Rights as amended by Protocols Nos. 11, 14, and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, and 16 https://www.echr.coe.int/documents/d/echr/convention_ENG. Accessed November 15, 2024.

55 M. Morlok, “Art. 137 WRV”. In: H. Dreier (ed.), *Grundgesetz Kommentar*, vol. 3 (Tübingen: Mohr Siebeck, 2018) nb. 26.

entitlement to this status if the association is law-abiding and offers a guarantee of durability. However, the German legal system does not have a special recognition or licensing procedure like in other European countries.

Insofar as the organisation serves the general cultivation of religion, it is referred to as a “religious society” in the technical legal sense. Religious organisations that only realise partial purposes form “religious associations” (see also Section 10.2.). The terminology is characterised by the rational law of the Enlightenment, i.e. it does not follow a theological doctrine of the church (ecclesiology). However, it has clearly developed against the background of the social structure of the Christian churches: the churches themselves are religious societies, their charitable institutions are religious associations.

Organised Judaism in Germany has adapted to these types of organisation. Most synagogue communities are organised as corporations under public law due to the expanded organisational possibilities offered by this legal institute. Newly founded communities, such as liberal ones, are initially constituted according to general association law.

The situation is different regarding organised Islam. It is not easy to classify the organisations found here (in the sociological sense) under the legal category of “religious society” (see also Section 10.9.).⁵⁶ The precise assessment of some Islamic associations is the subject of important court decisions.⁵⁷ These work out that the constitution does not require “ecclesiasticalisation” but rather the self-organisation of believers for the all-sided cultivation of religion. This requirement is based on legitimate secular legal concerns: the safeguarding of negative religious freedom and the religious and worldview neutrality of the state in cooperative relationships. In the case of religious societies, the state knows who belongs to it and for whom it can speak. Such self-organisation can also be based on a division of tasks, as is common in Islamic umbrella structures, as long as the top level also fulfils religious functions of sufficient importance.

One may doubt that the German case law to this topic is consistently convincing.⁵⁸ Anyone observing the political debate and administrative practice might also occasionally get the impression that the discussion about the legal status of umbrella organisations takes the place of the problems that really need to be addressed: the external control of religious organisations by foreign government authorities, the hybrid character of organisations in which

56 H.M. Heinig, “Religionsgemeinschaft/Religionsgesellschaft”: Herkunft, aktuelle Bedeutung und Zukunft einer religionsverfassungsrechtlichen Zentralkategorie”, *Zeitschrift für evangelisches Kirchenrecht* vol. 64, no. 1 (2019): 1. <https://www.doi.org/10.1628/zevkr-2019-0001>.

57 6 C 2/04 [2005] BVerwGE 123, 49; *Anspruch islamischer Dachverbände auf Einrichtung von Religionsunterricht an öffentlichen Schulen Beschluss*, 6 B 94/18 [2018] BVerwG, NVwZ 2019, 236.

58 Critical observations: D. zu Hohenlohe, “Islamische Dachverbände als Religionsgesellschaften – ein Zwischenbericht”, *Zeitschrift für evangelisches Kirchenrecht* vol. 64, no. 1 (2019): 79. <https://www.doi.org/10.1628/zevkr-2019-0005>.

party-political and religious activities ultimately merge, the question of adherence to the law and the constitution, and sufficient social power in light of the weakly developed membership structure.

In addition to the formation of religious associations, it goes without saying that the freedom of religion also protects the internal organisation according to faith and the organisation's specific activities. In consideration of religious freedom, the state may also have to accept deviations from the requirements of general association law in the organisational structure.⁵⁹

In addition to the regulation and management of own affairs in an administrative-technical sense by religious societies, freedom of religious activities also includes the entire area of joint religious affairs, from the holding of religious services, religious teachings and missionary activities to charitable and religiously motivated social and youth work.⁶⁰

However, there are also limits to corporative freedom, which are generally defined by the non-religious provisions that apply to all: buildings used for religious worship must comply with public building law. Fire protection and emission control regulations must be observed for public events. Data protection law must be observed for missionary activities. The provisions of burial law apply to the operation of a cemetery (see also Section 10.6 on this topic).

10.8 Equal Treatment and Non-discrimination Rules

Traditionally, equal treatment provisions are of particular importance for minority religions. The Basic Law contains a variety of equal treatment provisions that are intended to counteract discrimination on religious and ideological grounds: The very guarantee of equal freedom of religion has a fundamentally egalitarian effect. In addition, the Basic Law consistently refers to religious communities or religious societies in the area of corporative law on religion. The terminology is deliberately designed to be inclusive. For example, all religious communities, not just the two larger Christian churches, are entitled to religious instruction in public schools (Article 7 § 3 sentence 1 GG), the legal form of a public corporation (Article 140 GG in conjunction with Article 137 § 5 sentence 2 WRV) or access to state institutions for the purpose of chaplaincy (Article 140 GG in conjunction with Article 141 WRV).

State discrimination on grounds of religion or belief is also expressly prohibited by Article 3 § 3 GG and Article 33 § 3 GG and Article 140 GG in conjunction with Article 136 § 2 WRV. Article 136 § 1 and 2 WRV (equal access to state offices; equal exercise of civil and civic rights).

These guarantees of equality, which are initially binding on the state, also have an impact on civil law in accordance with the aforementioned statements on the dimensions of fundamental rights (Section 10.5). Therefore, the

⁵⁹ *Bahá'í case*, 2 BvR 263/86 [1991] BVerfGE 83, 341.

⁶⁰ M. Morlok, "Art. 137 WRV" nb. 48.

constitutional prohibitions of discrimination on religious and worldview grounds are also relevant for general contract law, labour law, and tenancy law.

However, this so-called indirect third-party effect of fundamental rights is now overlaid by provisions of European law. As a result of the overlay of European law, equality issues are increasingly moving to the centre of the law on religion.⁶¹ Economics-related prohibitions of discrimination have always played a prominent role in the law of the European Union; in the course of its development into a political union, this path has continued: the only explicit competence of the Union in terms of religion policy concerns antidiscrimination measures (Article 19 TFEU⁶²). Directives were passed on this basis, which were implemented in Germany through the General Equal Treatment Act. This also explicitly covers indirect discrimination, i.e. provisions and practices that are religiously neutral but regularly have a religion-specific effect.

Union law also has an impact on the freedoms protected under constitutional law on religion, such as the question of the extent to which religious communities may make religious affiliation a prerequisite for establishing an employment relationship: The European Court of Justice has adopted a more restrictive stance here than was previously customary in Germany under the influence of the case law of the Federal Constitutional Court – with significant consequences for legal practice, considering that the two churches are among the largest employers in Germany, particularly thanks to the refinancing of charitable activities by the welfare state.⁶³ Although there were already a large number of Muslim employees in church social institutions before this, it has now been clarified by the courts that a specific religious affiliation can only be required in exceptional cases (such as responsibility for religious education or for the religious profile of an institution), but not in general for all doctors, nursing staff, office staff and other employees. The case law also binds Jewish and Muslim organisations.

10.9 Cooperation between Organised Islam and the State

As mentioned in Section 10.4, the German separation of organised religion and state is characterised by openness and a willingness to cooperate. In the words of the Federal Constitutional Court:

The religious and worldview neutrality required of the state is ... not to be understood as distancing in the sense of a strict separation of state and church, but as an open and overarching attitude that equally promotes freedom of belief for all denominations.⁶⁴

61 A. Tischbirek, “Ein europäisches Staatskirchenrecht?”, *Der Staat* vol. 58, no. 4 (2019): 621.

62 Treaty on the Functioning of the European Union [2012] OJ C 326, 47–390.

63 C-414/16, *Egenberger* [2018] ECLI:EU:C:2018:257.

64 *Headscarf Decision*, 6 C 20/10 [2011] BVerfGE 108, 282, 300.

This openness to cooperation of course also applies to organised Islam. In principle, the entire spectrum of cooperation is open to organised Islam: the operation of institutions that provide services financed by the welfare state (care for the elderly, hospitals, kindergartens); the establishment of Muslim religious instruction at public schools; research and teaching of Islamic theology at state universities; the operation of a private higher education institution run by a Muslim organisation; chaplaincy in prisons, in state hospitals, in the German armed forces; the operation of a cemetery with a special religious profile; participation in supervisory bodies of public broadcasting and the exercise of some rights to broadcast; and the possibility of collecting membership fees in the form of a tax from religious societies organised under public law.

However, legal cooperation requirements must also be met. In some constellations, for example, there must be a “religious society” in the technical legal sense (as in Article 7 § 3 GG, Article 140 GG in conjunction with Article 137 § 5 sentence 2 WRV and Article 141 WRV) – and then the academic dispute as to the conditions under which mosque associations and Islamic umbrella organisations constitute such a society takes on very practical significance (see Section 10.2 and 10.7).

Nevertheless, in order to achieve progress in cooperation, politicians sometimes try to help themselves with tricks and auxiliary constructions. For example, the agreement between Hamburg and Muslim associations simply refers to the Islamic contracting parties as “Islamic religious societies”. On a symbolic level, this was intended to signal recognition, albeit without any constitutional relevance: the treaty was not ratified in the form of a law (unlike concordats and Protestant state-church treaties and the state treaties with the Jewish associations) and, due to the primacy of the constitution, such a treaty cannot dispose of constitutionally defined characteristics.

The “Beirat” models developed for Islamic religious education and Islamic theology at state universities are particularly noteworthy.⁶⁵ The translation with “advisory board” would be misleading, because it is precisely not about advice but rather about decisive participation rights in theological questions regarding staff decisions, curricula, study, and examination regulations, which otherwise fall to a religious society. In some cases, the religious boards have found explicit statutory protection. Their appeal lies in the fact that the participation rights of Islamic organisations are structured in such a way that their character as a religious society in the technical legal sense is not decisive. Ultimately, however, it remains an open question as to whether religious education organised in this way constitutes religious instruction within the meaning of Article 7 § 3 GG or an aliud. In other words, whether it is at the disposal of the legislator.

In addition to the question of access to religious constitutional institutions, other problems and solutions play an important role in policy on religion. In

65 C. Schmischke, *Das Beiratsmodell* (Göttingen: Göttinger Universitätsverlag, 2018).

2006, the German government founded the German Islam Conference as a forum for dialogue (involving a wide range of state and civil society actors). Similar formats can also be found at state and municipal levels. In the wind shadow created by the relationships of trust established in this way, various forms of state project funding and other ways of cooperation have been established. The federal government will foreseeably step up its efforts to contribute to the creation of an Islamic welfare association. It is also endeavouring to establish a Muslim military chaplaincy – and, indirectly, to enable imam training in Germany following a degree in Islamic theology at German universities.

Here, however, as in all constitutional law on religion, the belief-neutral state is dependent on partners who are willing and able to cooperate in order to fill the guiding principle of an integrative and open separation with life. The ability to cooperate, depending on the area and scope, includes a certain degree of professional organisation, a certain social power, a sufficient guarantee of adherence to the law and the constitution (in particular respect for human dignity; recognition of the fundamental state structure principles of Article 20 GG as a binding political order in Germany; adoption of the basic principles of constitutional law on religion, such as the separation of state and religious organisations; and respect for religious freedom, including the right of all people to change or abandon their religion), and an organisational structure that enables sufficient religious autonomy of the believers – in contrast to primarily political control by a foreign state for the purpose of diaspora politics or by a foreign political party.⁶⁶ This last aspect in particular is difficult to define precisely in legal practice. The federal and state governments set different legal priorities when dealing with the guiding legal doctrines laid down in the Basic Law, supported, by the way, by very heterogeneous expert advice from legal scholars so that the impression of a consistent administrative practice that strictly follows the constitutional obligations does not arise.

To summarise, one can say: the cooperation of state authorities at the federal level, in 16 federal states, and their municipal level with “the Islam” in its organisational diversity and multifaceted spiritual movements oscillates between goodwill; constructive help for sufficient cooperation skills, awkwardness, and uncertainty; consideration for sensitivities critical to Islam not intended or recognised by constitutional law; and very tangible security concerns with regard to Islamic threats to internal security.

66 Critical observations: V. Beck, “Religionspolitik zur Verwirklichung von Freiheit und Gleichheit der Religion”. In: K. Abmeier, A. Jacobs, T. Köhler (eds.), *Rechtliche Optionen für Kooperationen zwischen deutschem Staat und muslimischen Gemeinschaften* (Münster: Aschendorff Verlag, 2019): 55–70.

10.10 Cooperation between Organised Jews and the State

In contrast, it becomes clear how different the situation is when it comes to the state's cooperation with organised Jewry in Germany. Three aspects are particularly noteworthy.

Synagogue communities and their associations (see Section 10.2) are quite obviously "religious societies" in the technical legal sense. There is no comparable debate to the one about the legal status of Muslim organisations. As in most cases, synagogue communities and their associations are corporations under public law. The state offers to collect membership fees in the form of a tax. In addition, special exemptions or considerations are granted in numerous areas of law in connection with the public law status. For example, religious societies under public law are automatically recognised as providers of child and youth welfare services, and in planning urban development, special consideration must be given to their interests.

Against the backdrop of the Shoah, the synagogue communities and their associations receive considerable financial funding from the federal and state governments based on treaties⁶⁷ (e.g. 22 Mio € per annum federal funding; 10 Mio. € per annum in Baden-Württemberg; 6,6 Mio per annum in Hessen). This is not limited to the subsidising of individual cultural, social and integration projects, as is the case with Islamic organisations, but is provided in a comprehensive form to support all tasks, including specifically religious activities. However, it is also designed to cover the considerable financial requirements for security measures for Jewish institutions in the face of anti-Semitic threats. Just how real these threats are was seen in Halle in 2019, when an armed assassin tried to break into a Jewish community celebration to indiscriminately kill as many people as possible.

As mentioned earlier, the Jewish community in Germany is small (approximately 100,000 members out of a population of 83 million). In different constellations, however, the German state is attempting to make restitution for the crimes committed during the Nazi era by placing the Jewish communities in a similar position they would have been in without the attempt to eradicate them.⁶⁸ For example, Jewish representatives are involved in broadcasting councils and other supervisory bodies in which civil society is to be represented in its diversity (although far larger religious communities are not represented).

It can also be observed in other places that the cooperative instruments of the law on religion are to be used as comprehensively as possible. For example, there is an institute for (liberal and conservative) Jewish theology at the University of Potsdam; and a Jewish university in Heidelberg, which is supported by the Central Council of Jews in Germany. There are also private Jewish schools, whose attendance satisfies state compulsory education

67 J. Lutz-Bachmann, "Gleich oder doch anders?" 127–145; J. Lutz-Bachmann, *Mater rixarum?*.

68 M. Demel, *Gebrochene Normalität*.

requirements (see Section 10.6), and day care centres in several federal states, albeit on a manageable scale (16 Jewish schools, 20 Jewish day care centres). In school practice, efforts can be observed to make Jewish religious instruction possible regardless of the low number of participants – for example, by offering it outside of the timetable and in the rooms of synagogue congregations across the year groups.

10.11 Conclusion

Under the Basic Law, German case law on religious liberty shows currently a tendency in favour of the individual-protective dimension of religious freedom. The fundamental right is not subject to a simple reservation by law. Only conflicting constitutional interests justify any interference with this fundamental right at all. In other words, interferences with religious freedom cannot be made in pursuit of arbitrary political ends but must serve a constitutional good. This tends to set higher hurdles for democratic majority decisions than for other encroachments on fundamental rights.

Any infringement of religious freedom must nevertheless have a basis in parliamentary law, and it must also be proportionate – even in individual cases. The intensity of judicial scrutiny regarding proportionality thus becomes the decisive adjusting screw for the constitutional control of religiously based exceptional claims. The Federal Constitutional Court practice – in international comparison – is an intensive proportionality test, which has repeatedly become decisive, particularly in cases relating to Islam.

However, the court also emphasises the leeway that the democratic legislator has in the accommodation of religion. The parliament has the right of first access when it comes to the concretisation of the conflict constellation between different rights and constitutional interests. In real life, legislative practice proves to be quite volatile in questions of exemption clauses for religion, dependent on political coincidences, while basic principles of jurisdiction on religious freedom (broad scope; importance of individual self-understanding; limitation of infringements by the proportionality test) prove to be relatively stable, despite all the changes in religious cultures and social practices (individualisation, secularisation, pluralisation).

Muslims tend to suffer particularly from this volatility in the political process because anti-Muslim stereotypes and resentments are being introduced into the democratic process under the impression of growing right-wing populism. This development becomes a litmus test for the value of the promises of equality and freedom that the constitution makes to Muslims and Jews, as well as to all other believers and non-believers. In too many areas, the legal reality, the law in action, is still too far away from the situation intended by the constitution, the constitutional law in the books. This also has to do with blurred boundaries to anti-constitutional political Islamism under the organised Muslims, with their lack of professionalism in the self-organisation but also with hesitancy and deficits in enforcement on the part of state authorities

that are questionable in terms of the rule of law. The example of organised Judaism in Germany shows that things can be different when dealing with religious minorities, that the state can also come up with wise solutions and sustainable cooperation based on the benevolence demanded by religious freedom. However, it remains to be seen how long this role model will last. How resilient will the far-reaching consensus in Germany among the political elite be about that there should be no room for anti-Semitism in political communication and political decision-making? The traditional (“bourgeois” and far-right) and immigrant (often Israel-related) anti-Semitism might put the current arrangement of accommodating Jewish religious needs under increased pressure.