

## Religious Freedom in Europe

Prof. Dr. Gerhard Robbers, University of Trier, Germany

Freedom of religion is a key freedom for human rights. Where there is no freedom of religion all other freedoms suffer, and when there is freedom of religion flourishing, other freedoms are flourishing as well. Religion is not the opium of the people, it is their proprium. He who forgets religion, forfeits life. Tolerance must be understood in a broad, in a positive sense, seen within the structures set by the idea of human rights: Tolerance means to accept the other belief, to acknowledge its legitimate being, accept it as an expression of good human existence, respected in being different, like my neighbour as an individual is and must be different from me as an individual. Only if he is different as an individual I can be a true and individual myself. And in this at least we are all equal. Tolerance must be more than mere negative bearing of what one cannot change, tolerance should mean to be strong enough to learn, strong enough to feel enriched, indeed, by those who differ.

It is this spirit of pluralism on which Europe is built. Europe draws its strength from diversity, diversity also in religion. It is the strong and confident knowledge of national, regional and also religious own identity of members and people on which freedom and tolerance for other identities can rely.

Religious freedom has also gained a strong position in European Union law. Gone are the days when European Integration seemed merely economic integration. Whoever believed this did not see the underlying structures, the necessities and aims of European union. To ever make impossible German aggression, devastating during the Second World War, European integration was imminent. Economic prosperity itself being an immediate aim - prosperity is a necessary condition for internal and external peace. It is indeed peace the aim of European integration. There is no peace, though, no prosperity, no proper justice without freedom, and in its core freedom of religion.

There are few other areas of law in which historic experience, emotional ties and basic convictions have as direct an influence as in civil ecclesiastical law (the law as to Church and State) The diversity of the civil ecclesiastical law systems in the European Union mirrors the diversity of the national cultures and identities.

On the other hand the different systems have common roots in the basic experiences of shared history. All the systems are based on the common background of Christianity. As can be said of European law in general, civil ecclesiastical law particularly is rooted in Christianity. At the same time however the contribution made by Islam and Judaism to European culture should not be forgotten. Both religions are important factors in most of the Member States of the European Union to which civil ecclesiastical law must give adequate consideration. And finally there is a multitude of small religious communities, often linked with larger communities in other parts of the world, which form a social factor in the structure of civil ecclesiastical law. Europe is a highly pluralistic entity. Its very identity is pluralism.

Statistical data in the Member States of the European Union differ strongly according to the basis of the inquiry and the social background; generally

speaking there exist little more than plausible estimates. Thus in Germany the most important sources are the statistics on baptism and withdrawal from Church membership, in other States only those on baptism or the self-assessment of those questioned.

The following table will give a more or less adequate view of the situation:

Total population	379.40 Mio.
Catholics	58.40 %
Protestants	18.40 %
Anglicans	11.00 %
Greek Orthodox Christians	2.70 %
Muslims	3.50 %
Jews	0.04 %
other denominations and persons not belonging to a denomination	7.50 %

The European States not or not yet members of the European Union strengthen catholic and orthodox approaches, but also atheism due to long standing communist rule.

The differences between the civil ecclesiastical law systems go back mainly to the varying results of the Reformation and the ensuing Wars of Religion of the 16th and 17th centuries. Whereas some States, for instance Spain and Portugal, remained largely untouched by these events, the Reformation prevailed almost completely in other countries and sometimes established a system limited strictly to the existence of a State Church. The results were different again, though of no less consequence, in those countries where the different denominations co-existed and were of approximately equal strength, particularly in Germany and the Netherlands.

The continental European States have for the most part the common experience of absolutist State Church sovereignty in the 17th and 18th centuries. A number of the Member States of the European Union took part to various degrees and with differing consequences in the Kulturkampf at the end of the 19th century; its results are particularly evident in France today.

In the European Union as elsewhere it is possible to distinguish three basic types of civil ecclesiastical law systems. The first basic type is characterised by the existence of a State Church. In this system there are close links of great consequence between State power of decision and the existence of the Church. The systems of England, Denmark and Greece and Finland belong to this basic category. On the other hand there are systems founded on a strict separation of State and Church, for instance in France with the exception of the three eastern departments and in some other parts of the community, and also in the Netherlands. There is to a great extent a legal separation in Ireland also. The third type features the basic separation of State and Church while simultaneously recognising a multitude of common tasks, in the fulfilment of which State and Church activity are linked: Belgium, Spain and Italy, Austria, and Portugal belong to this group; Germany and Sweden.

This classification according to legal and theoretical considerations is instantly overlaid and rendered questionable by social circumstance which suggest different groupings. The religious influence on the State in mainly Catholic Ireland is probably stronger and more direct than the wording of the constitutional provisions suggests. In the same way there would be a closer similarity in the social relevance of religion as between Greece, Spain and Italy than would be revealed in a comparison of Greece with Denmark or the United Kingdom.

The states not or not yet belonging to the European Union have quite similar features, most of them throwing benevolent cooperation between the state and the various religious communities.

Despite all the differences between the systems there does however seem to be a measure of convergence. In some countries the earlier anti-Church and anticlerical attitudes faded as the centuries passed and their legal consequences are being gradually reduced. Religious communities are given space for action and allowed greater freedom. Religion is acknowledged as an important element of social life; and, further, the conditions for meeting religious needs are created by the State. Often this follows from a more comprehensive understanding of the function of fundamental and human rights, according to which it is the task of the community positively to create the preconditions for human rights, and human rights are no longer held to be mere protective rights against State infringement. Finally it is generally acknowledged that, given a comprehensive support by the State of social activities, the religious communities may not be excluded from such support and so discriminated against.

On the other hand there are clear moves towards the disestablishment of the established churches. This may be exemplified by the power of decision which is increasingly being granted the General Synod of the Church of England.

There may also be observed a general tendency towards acknowledging the right of self-determination of religious communities. Even if in some systems still strongly influenced by the tradition of a State Church the power of making final decisions on some genuinely religious questions remains with State bodies, those who do not wish to be subject to such a decision appear to be completely free to form their own independent communities. Religious freedom as an individual right is generally and completely recognised. Nowhere are there legal provisions as to what the individual must or must not believe.

Significant differences in the legal mode of existence of religious communities are immediately apparent. While in some systems the religious communities themselves, their associations and subdivisions are legal entities, other systems do without any legal classification of religious communities as such. Everywhere however legal instruments are provided to allow the religious communities to act in the legal system, even if only indirectly by way of associations cultuelles or diocesaines or trustees.

A Church right to self-determination in a stricter sense is also commonly found. A number of Constitutions expressly mention this right. However the extent to which this right is granted differs greatly. The right of self-determination may be accorded to all institutions which are quite remotely

connected with the term "church" in the stricter sense of an official Church or synodical structures of government. It can on the other hand be limited to the official Church itself or similar institutions.

However, there seems to be predominant tendency to recognise the relevance of special religious aspects in an adequate way. This is certainly true in cases falling within the principle, created for enterprises of a certain ideological leaning, under which the ideological tendency of an institution, be it political, social or religious, has special consequences for the employees' obligation of loyalty and the internal organisational structure of the institution. The incorporation of such needs is present in a more fundamental way in the idea of religious freedom, which expresses the special needs of churches and religious communities more directly and precisely.

Most important is religious freedom as such, more important than the organisation and structures. Religious freedom can live and does live in all the different systems of state-church relations.

Religious freedom does not mean freedom from religion. Europe to many seems to be secular, agnostic, almost atheist - it is not. There is a strong underlying - and growing - religious spirit.

First Freedom: European Union law owes a lot to the Universal Declaration of Human Rights, directly and indirectly. The guarantee of religious freedom by the European Convention of Human Rights is valid within European Union law. To a large extent, its words are the same as those of the religious freedom clause of the United Nations Declaration.

All Member States do protect religious freedom, all of them on constitutional level and throughout their law. In France, after some intense debate in the public, the courts rule persistently that pupils can well wear the Shador in public school. And in fact, one of the predominant questions for freedom of religion in Europe is how to accommodate the needs of the Moslem population. We have more than twelve million Moslems in the European Union alone, in Germany 3.5 mio. In Germany the Federal Constitutional Court ruled that the Law on associations has to be interpreted open to very special needs of Bahai'i; Moslem girls can opt out of compulsory co-educational athletics instructions by reasons of religion, and the State must give room for religious instruction in public schools by an Islam community. In Spain and in Italy as in Germany, governments have extensively made treaties with also small religions. Religion as such is, over all at least, regarded as a positive, public factor, a public level between public government and mere private existence, not so much in France, but elsewhere in Europe.

Religious liberty has a long tradition in Europe. Not long ago 350 years of the Peace of Westphalia of 1648 was celebrated. This peace ended the 30 years war in central Europe which devastated that area from 1618 to 1648. The peace in fact put an end to a hundred years of religious wars in Europe. The peace of Westphalia based a system of religious tolerance in central Europe in which religious freedom could grow. Many people had lost their lives fighting for religious freedom here in Europe. They stand for liberties laid down as far back as in the Religious Peace of Augsburg in 1555. Tentative for freedom, at least giving liberties for Catholics and Lutherans, the grounds for more. It founded a system not yet of complete individual freedom of religion, but of far reaching

balance of Churches. It drew the consequences also from the theological idea that the true belief and worship of God can only come from the very free will of the individual believer. Belief cannot be forced. The end of the 16<sup>th</sup> Century first saw the idea of Human Rights centred in the freedom of religion as a right of the one and individual person. It was perhaps George Buchanan, the Scotsman, who in France first formulated the idea of individual human rights in the 1570s: stating that individual freedom of religion is a right to every single individual person.

Religious freedom is a European idea, an idea in Europe answering to the suffering of many.

That sounds nice - and it is nice. Aren't there any problems? What about the growing communities of Islam and their needs? What about religious holidays of minorities? How can new religious convictions fit into existing legal and social cultures? How does religious freedom prevail not only against government, but within society as such? Do governments act adequately to foster tolerance? Do they create enough room for the development of religion and belief?

There are many provisions now in European Union Law itself to protect religious freedom. Art. 13 of the Treaty on European Community holds that the European Council, under certain circumstances, may take appropriate action to combat discrimination based on religion or belief.

The right to equality and protection against discrimination gives adequate stand to all religions and religious communities. It is quite remarkable that the very first explicit mentioning of religion within primary European treaty law refers to equality and non-discrimination.

Religious liberty as one, religious equality as a further field - religious multitude is a third field of European Union law towards religious life. The Member States of the European Union have adopted a Unanimous Declaration in the Final Act of the Treaty of Amsterdam concerning churches and other religious associations:

"The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations".

The Charter of Fundamental Rights of the European Union guarantees religious freedom, respects religious diversity and protects religious equality. It is not yet binding law, but it will gain binding force by being integrated in the forthcoming European constitution which is right now in the making.

An ever closer European Union will not mean to impose the Danish regime of state-church relations onto Portugal, nor the French regime onto the United Kingdom, the German not to Italy, the one of the Netherlands not to Poland; nor will it mean to construe a completely new system to impose throughout all those most different European countries.

Fruitful coexistence of different, often contradicting systems in church-state relations is well possible. There are manifold examples: The United Kingdom knows an established Church, the Anglican Church in England, which is disestablished in Wales and in Northern Ireland. In Scotland there is the

Episcopal Church of Scotland, and the reformed, Presbyterian established Church of Scotland. The Church of England has a special status in the Isle of Man and in the two Bailiwicks of Guernsey and Jersey, all those territories not belonging to the United Kingdom. France is by definition a laic Republic. Rather strict separation between State and Church, this means, yet in perfect and long-lasting harmony it stands with intense rights of the State in Church matters in the eastern départements of the Rhine.

France alone has seven different systems of religious law within its frontiers. There are special cases in Alsace-Moselle, Guyana or again on the Island of Mayotte. Greece has the peculiar status of Mount Athos, Germany many a nuance between individual Länder. Some member states pay exceptional attention to the special needs of a variety of faith communities by means of treaties between the state and religious communities.

This diversity is in a constant state of flux within the member states themselves. Things are moving towards a degree of convergence. The systems of religious law throughout Europe are in the process of converging. State Church ties are being severed – as in Sweden – or loosening up – as in England. In Germany things are moving in fields such as religious education, church courts or corporation status. Structures that have been antagonistic one to another from their very historical origins are depling some energy towards co-operation. There is convergence in matters of self-determination in religious matters and a convergence for co-operation between States and religious communities.

Core structures of member states' religious rights constitute building blocks of the very identity of those member states. If – and there is an if – if guarantees have been given that member states' competence and individuality will be preserved, what they share in common needs to be brought out more strongly. The right to « laicity » in France is nowhere near as far removed from the German system of co-operation as if often assumed, to take but one example. French laicity contains a political clause on appointment of Catholic Bishops and another on pastoral care in the army. State schools in France allow timetable space for religious education. The particular status of « associations culturelles » and « associations diocesaines » is clear as is the state support for religion in matters of Catholic church buildings and utilisation of church premises. The French constitution invokes the « Supreme Being ». Germany – to continue with this example – talks of responsibility before God, and lays on religious education in state schools as a sign of separation between State and Church. The public law corporation status in Germany which many religious communities have, keeps State and Church separate. Church tax is a purely Church offering ; where the State collects it, the Churches pay the state for that service. Army chaplains in Germany have no military ranking and remain totally integrated within church structures in both religious matters and from the organisational point of view.

The French so-called « laïcité nouvelle », « laïcité positive », « laïcité neutre » should not viewed in opposition to co-operation systems such as exist in Spain, Italy, Germany or Austria more than necessary.

That having been said, « laicity » also exists as an underlying concept, a concept of historical relevance, underlying significance that goes beyond its

actual content as a legal term. This underlying content of the concept of laicity at least persists in some perceptions from without, in a fading anti-religious mood in the sphere of public life, which is quite alien to other systems of religious law in Europe. For this reason it would be quite mistaken to speak of the « laicity » of the European Union. This would also be dangerous for the European integration process. It would be more accurate to speak of the religious neutrality of the European Union, or better still, its religious openness.

Attempts in the past to marginalize religion as a phenomenon in society amongst other phenomena in society have consistently failed. The religious context has a special position in public life across the board.

The religious legal systems of Europe also converge on the common ground of religious freedom, with tasks for the future in this sphere too. Religion must be given sufficient space in positively recognised, actively supported religious freedoms. While the European Union cannot escape from religion if it wants to further its cultural base, become truly European, neither can it minimize religion as a mere purveyor of values. Religion is not the ancilla in ethics of the state. It is not the handy dupe for purely economic and political interests, and it is not a cultural history museum. Religion must have space for its own sake. Government has as task to make freedom a reality for individual people. It therefore also has a task to make possible precisely a life of religious fulfilment for people insofar as its competence extends.

A growingly strong position has gained the European Court of Human Rights in Strasbourg, the Court deciding on issues of the European Convention of Human Rights. This convention and its strong court together with the council of Europe form a vital clip all in all improving structure of Europe as a whole. It includes Portugal and Russia, Sweden and Turkey. It holds together Europe which is more than the still western based European Union. The jurisdiction of the European Court of Human Rights in matters of religion has intensified within the last ten years. It mirrors functions of religion within European states, founded in history and sometimes different from other places in the world. Religion can hold a nation together, and it can disrupt nations. In some of the successor states of the Soviet Union national identity is defined sometimes and to some extent by religious traditions of orthodoxy. These traditions often mirror and intensify national or ethnic minorities wishing to belong to a neighbouring state.

Religious minorities have to be respected. Religious equality will be one of the key issues of future European development.

Perhaps the most immediate challenge to the European policy in religious matters is to accommodate the growing minority of Moslems. More than twelve million Moslems form a substantial cultural and social group within European population. The French city of Marseille counts 25 % Moslem population.

The prevailing European approach tends to ask whether or not religious groups can adequately live their religion. The inquiry encompasses aspects such as social life, holidays and celebrations, education, and military chaplainry. In Europe, the governments assist in these aspects where necessary and permissible. Funding for cultural and social activities of religious communities

is well possible. In this approach, missionary work belongs to religion as one part of it. It is a broad meaning of religious freedom.

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

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

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

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

Smaller, newer religious groups will tend to view a system not based on the idea of identical rights as discriminatory and thus contrary to religious freedom. The alternative is to sever religion from the public institutions. This would certainly stunt positive religious freedom. Moreover, it would undermine the concept of democratic statehood: the will of the people determines the shape and content of the legal system. If religious orientation were stripped from the "will of the people", this will would cease to represent its constituents.

In Germany, representatives of the Catholic, Protestant, and Jewish constituencies, together with certain civic groups, hold seats on advisory boards and committees that relate to pluralistic representation and ethical issues. For example, boards on youth protection censor or classify pornographic literature; other boards govern public broadcasting institutions.



Their purpose is to interpose a layer of public, yet not governmental institutions between the private individual and the state. Today, up to 150.000 Jewish individuals live in Germany, a comparatively small number due to the nazi-murder of the Jewish people. The Jewish faith communities thus are not as much representative in terms of number, they are representative rather in terms of culture and history. To offer them participation is a moral duty in Germany today - it is a thought unthinkable to first kill millions and then deprive the survivors of their share in representation arguing they would be too few. These are different aspects of equality in Germany than exist in other countries in Europe and the world.

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