

Conference on Church-State Relations and Religious Liberty: Comparative Perspectives

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EQUALITY AND RELIGIOUS FREEDOM: GERMANY

Panel II The New Hope Case

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I. The Legal Setting in Sub-constitutional Law

1. Adoption in Germany is a matter of federal law. It is in terms of material law governed by the *Civil Code*, § 1767 - 1772. Adoption agencies are operated by the youth care authorities that are institutions of the federal Länder (the federal States) and that apply federal law. In addition to that there are non-State adoption agencies such as private and church agencies. They also are bound by federal law.
2. The (federal) *Law about the Procurement of Adoption*¹ lists among others the charity institutions of the German Protestant Church (Diakonisches Werk) and the Roman Catholic Church (Caritas) as recognized agents for adoption; other institutions can be recognized when they meet certain requirements. The State youth care offices work cooperate with these free agencies of adoption.
3. For lack of competency, local community or Länder authorities could not require church adoption agencies to procure adoption into homosexual partnerships. They could therefore also not withhold possible funding because church adoption agencies would object to place children into same sex partnerships.

II. Funding Practice of Church Operated Adoption Agencies

1. Church operated adoption agencies do not receive any direct funds from government sources in Germany. They are completely depending on their own resources. They are financed by what they charge parents who adopt children. Furthermore, the church adoption agencies receive funds from the respective churches' national charity organizations, i.e. the 'Diakonisches Werk der Evangelischen Kirche in Deutschland' for the Protestant Church and the 'Deutscher Caritasverband' for the Roman Catholic Church.

¹ See § 2 Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz – AdVermiG).

2. The churches' national charity organizations receive a variety of general funding from government sources. The most important of these in respect of church adoption agencies is the German federal government's '*Children and Youth Plan*' (Kinder- und Jugendplan, having the status of binding directives for subsidy practice). It provides for general subsidies of church activities in the field of children and youth care to which adoption belongs. Church adoption agencies can and do apply for subsidies that originate from this Children and Youth plan. Indirectly, thus, church adoption agencies do enjoy State funding. The Children and Youth Plan as such, however, does not take any detailed influence on the work of adoption agencies. According to I No. 4 Subsection 6 of the Children and Youth Plan the independence of the institutions of the free youth care is respected while supporting them.

III. Adoption into Same Sex Partnerships

1. The law in Germany does not provide for joint adoption by a same sex partnership. Although Germany has a same sex registered partnership, these couples cannot jointly adopt a child. What is legally possible is that one of the same sex partners individually adopts a child.
2. Church adoption agencies generally do not place a child into same sex partnerships. However, there can be exceptions in individual cases.

IV. The Principle of Church Autonomy

1. Any attempt to oblige church adoption agencies to place children into same sex partnerships would have to comply with the principle of church autonomy that is guaranteed by constitutional law.
2. The right to self-determination (Art. 137(3) WRV (Weimarer Reichsverfassung = Constitution of the Republic of Weimar)), in conjunction with Art. 140 GG (Grundgesetz = Basic Law)), may be considered to be the central reference point for the legal and social existence of religious communities in the Federal Republic of Germany. It is closely related to freedom of religion guaranteed by Article 4 GG. Freedom of religion does not only provide for the inner freedom to believe or not to believe, but also for the right of the religious community as such to base its whole activity in the teaching of its belief and to act according to its internal convictions and beliefs. This is related to imperative teachings as well as to those religious convictions that give advice to the best way of handling a situation in life.²
3. According to the guarantee of church autonomy, 'every religious community independently regulates and administers its own affairs within the limits of the law that applies to all.' Every religious community may, regardless of its legal status, manage its own affairs independently. This right of self-determination covers not only such things as religious dogma and teaching, but also the organisation of charitable activities.

² See BVerfGE 32, 98, 106 f.; BVerfGE 33, 23, 28; BVerfGE 41, 29, 49; BVerfGE 70, 138, 162 with further references.

4. It is important to note that the Federal Constitutional Court attributes major importance to the Church's self-identity: what is meant by the Church's own affairs is determined in particular by how the Church itself views its own affairs, although the competence to take a final decision on the basis of the Basic Law is still reserved for the State courts. The central relevance of the right of self-determination of a Church must also be taken into account when defining the boundaries of this right. Churches view their child adoption agencies as an expression of manifesting their religion in practice.
5. A religious community's right of self-determination is not restricted to a narrowly-drawn field of specifically "ecclesiastical" activities. The idea of freedom of religious practice extends to preserve the right of self-determination in other areas that are also based on religious objectives, such as the running of hospitals, kindergartens, retirement homes, private schools, and universities. Church autonomy also covers the set up of organizational structures. The German Federal Constitutional Court has held that the right to church autonomy covers all actions taken in pursuit of the charity activities that are determined by the ecclesiastical assignment, e.g. decisions on the structure, about the personnel and all decisions necessarily connected with securing the 'religious dimension' of the activity in the sense of the self-determination of the churches.³ All this also applies to the procurement of adoptions.
6. Far reaching church autonomy is a basic principle in German law. It is an expression of freedom of religion, pluralism, State neutrality in religious matters, and of strict separation of State and Church. Independence and autonomy of free welfare institutions are respected, because of a general conviction that alternatives to State welfare institutions should exist and that alternative sets of value perspectives enrich society.

V. Limitations to Church Autonomy

1. Autonomy of religious communities exists only within the boundaries of the law that applies to all. The meaning and scope of these limitations are not uncontroversial. Most adequate is a formula used by the Federal Constitutional Court whereby the right to self-determination cannot prevail against a general law that represents a pressing need to the common weal.⁴ Any limitation to the right of church autonomy, however, has again to be balanced in the light of the importance of church autonomy and thus limited itself.
2. There is no case law whether adoption into a same sex partnership would constitute a pressing social need in the meaning of church autonomy limitation. However, it would most probably not be regarded as such.

VI. The Autonomy of Religious Welfare Institutions

1. Charity of churches is explicitly mentioned in a number of German constitutions. Article 138 WRV/ Art. 140 GG stipulates, that 'Property rights and other rights of religious societies or associations in their institutions, foundations, and other assets intended for

³ BVerfGE 57, 220, 243.

⁴ BVerfGE 42, 312, 334; 66, 1, 20.

purposes of worship, education, or charity shall be guaranteed.⁵ Constitutions of a number of German Länder explicitly secure the charity activities of the churches. E.g., the Constitution of the Free State of Saxonia provides that the significance of the churches and religious communities for the securing and strengthening of the religious and moral foundations of human life is recognized. The churches and religious communities are separate from the State. They develop themselves in fulfilling their assignments within the frame of the law that applies to all free from State interference. The relations of the Land with the churches and religious communities will also be regulated by treaties. The diaconical and caritative activity of the churches and religious communities shall be guaranteed.⁶

2. The *social code, book VIII - children and youth care* - (Sozialgesetzbuch VIII) states in its § 3: The youth care is characterized by the multitude of subjects of different value orientation and the multitude of contents, methods, and forms of work. In matters of care and advancement of the family and the education of the youth the participation of the churches, religious and philosophical communities and the associations of the free charity shall be guaranteed according to this law. The social activity of the churches, the subjects of the free charity, and the free youth care shall be protected and supported.

VII. Equal Treatment in German National Law

1. The German federal constitution does not provide for a special prohibition of discrimination based on sexual orientation. However, the general equal protection clause states that ‘all persons shall be equal before the law.’ This applies also to sexual orientation.
2. The basic sense of the equality provision is that like things must be treated alike, and unlike must be treated unlike, with due regard to their nature. Any departure from this principle must be justified on objectively reasonable grounds. The Federal Constitutional Court usually describes the meaning of the equal treatment clause for the legislature in the following way: ‘The law must not treat one group of legal subjects differently from another group of legal subjects if there are no differences of such a nature and such gravity between the groups as to justify the unequal treatment.’⁷ Thus, the application of the general provision on equality is linked to the idea of proportionality. This includes the balancing of conflicting interests. Church autonomy would clearly be a legitimate interest that would justify different treatment of church adoption agencies in regard of child placement in same sex partnerships.

⁵ Similar provision: Art. 44 Constitution of Rheinland-Pfalz,

⁶ Constitution of Saxonia Artikel 109 [Bedeutung der Kirchen/Diakonische Arbeit/Weimarer Kirchenartikel] ,(1) Die Bedeutung der Kirchen und Religionsgemeinschaften für die Bewahrung und Festigung der religiösen und sittlichen Grundlagen des menschlichen Lebens wird anerkannt. (2) Die Kirchen und Religionsgemeinschaften sind vom Staat getrennt. Sie entfalten sich bei der Erfüllung ihrer Aufgaben im Rahmen des für alle geltenden Gesetzes frei von staatlichen Eingriffen. Die Beziehungen des Landes zu den Kirchen und Religionsgemeinschaften werden im übrigen durch Vertrag geregelt. (3) Die diakonische und karitative Arbeit der Kirchen und Religionsgemeinschaften wird gewährleistet. (4) Die Bestimmungen der Artikel 136, 137, 138, 139 und 141 der Verfassung des Deutschen Reiches vom 11. August 1919 sind Bestandteil dieser Verfassung.’ Similar provisions in the constitutions of Mecklenburg-Vorpommern Article 19; Rheinland-Pfalz Article 26; Berlin Article 22; Brandenburg Article 45; Baden-Württemberg Article 6.

⁷ BVerfGE 55, 72, 88; 85, 238, 244; 96, 315, 325.

VIII. Equal Treatment According to European Union Law

1. At the moment, European Union law provides protection against discrimination based on sexual orientation – as well as age, disability, religion and belief – in the area of employment (*Employment Framework Directive 2000/78*). European legislation does not protect against discrimination based on sexual orientation, age, disability, religion and belief, in other areas of life.
2. The European Commission has proposed a new anti-discrimination directive on 2 July 2008. This proposed anti-discrimination directive would prohibit discrimination on the grounds of age, disability, sexual orientation and religion or belief in a number of areas including social protection. Article 3 of the draft directive states that within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons in relation to social advantages. If this draft directive comes into force it might be interpreted as applying also to the placement of children into same sex partnerships. As to the limited competencies of the European Community this may apply especially to trans-national adoptions.

IX. Conclusion

The prophecies of what the courts will do in fact are in fact a most pretentious endeavour. In the light of the language of constitutional law and long standing court practice church adoption agencies in Germany could not be obligated to procure adoption of children into same sex partnerships when the agencies object to this for religious reasons. It would not be possible to withhold State funding from them in such a case.