RELIGIOUS EXPRESSION IN THE WORKPLACE: THE CASE OF THE FEDERAL REPUBLIC OF GERMANY

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I. THE CHANGING CONTEXT

Questions related to religious expression in the workplace have always been discussed in German labor law. The focus, however, has changed considerably over the last few years. This change reflects the development from a relatively religiously homogeneous to a religiously diverse society in Germany, due to the constant immigration Germany has faced since the 1960s.

Indeed, religious diversity is nothing new for Germany. As a result of the Protestant reformation in the sixteenth century and the then following confessional wars religious tolerance had been recognized within certain limits. The most important steps in this direction were the Augsburgian Confessional Peace of 1555 ("*cuius regio – eius religio*") and the Westphelian Peace of 1648.[1] However, these religious conflicts, torturing the population of the German empire for almost two centuries, were of a mere confessional character; the common ground of these religious conflicts between the Catholic Church and the different Protestant churches were the Christian religion. Thus, the compromise that could be reached between the different confessions always was superimposed by a broad consensus about Christian "values." Religious tolerance therefore was typically limited to different denominations and Christian groups that existed within Christianity whereas other religious groups, in particular the numerous Jewish communities in Germany, could not benefit from this limited religious tolerance: Until the Napoleonic wars in the early nineteenth century, the Jews were not only the target of repeated

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1. For an overview of the history of the confessional wars and their impact on the relationship between State and Churches, see AXEL VON CAMPENHAUSEN & HEINRICH DE WALL, STAATSKIRCHENRECHT—EINE SYSTEMATISCHE DARSTELLUNG DES RELIGIONSVERFASSUNGSRECHTS IN DEUTSCHLAND UND EUROPA; EIN STUDIENBUCH 9–14 (4th ed. 2006).

persecutions ("pogroms"), but were also submitted to a specific and discriminatory legal regime banning them to specific districts in the towns, the "Ghettos," and excluding them from a number of professional activities and from public offices. In addition, they were not allowed to practice their religious beliefs in the public sphere. Their situation only changed in the course of the nineteenth century when they were recognized as full citizens and entitled to exercise their religious belief without the former legal restrictions. However, this fragile emancipation process could not avert that the Jewish community, under the Nazi regime, became the victim of the most atrocious crimes.

The situation did considerably change with the influx of immigrants many Western countries experienced during the last three or four decades. As a result of this massive migration, religious diversity has widened considerably: Today, nearly all relevant religions of the world are represented in Germany and do coexist. In particular, the Muslim community has become the most relevant and visible religious group alongside Christian churches, which poses a number of problems regarding integration into German society.[2]

Although this change started several decades ago, it has only been a few years that people belonging to non-Christian religious groups have been exercising their religious beliefs with much more self-consciousness than before and have been increasingly willing to claim their religious freedom with the help of the judicial system; in particular, this applies to the numerous Muslims living in Germany. This process forces German lawyers to revisit the existing legal framework for religious freedom. However, in addition, the entire German discussion on religious diversity gains a much more fundamental relevance since it is embedded in the wider controversy about the need of cultural homogeneity in modern society. Immigration and its most obvious consequences, cultural and religious diversity, are considered (especially by some German Conservatives) as challenging the Christian and Occidental "dominant culture" [*Leitkultur*] that they consider to be threatened. Consequently, the religious and cultural dimensions of a diverse society are inseparably tied. It is not exaggerated to consider this debate on cultural and religious identity, for which the Muslim headscarf has become *the* symbol, as a new "*Kulturkampf*."

The following paper picks up these developments. The main argument is that German law in general and German labor law in particular still have not developed a coherent concept to cope with these new challenges arising

2. According to the Federal Government [*Bundesregierung*], the Muslim community in Germany amounts to 3.4 million people (2006). *See Bundesregierung*, Stand der rechtlichen Gleichstellung des Islam in Deutschland, in: Bundestagsdrucksachen 2 (BT-Drs.) 16/5033.

from religious diversity in German society. Although German law recognizes religious freedom as a constitutional right, the traditionally predominant religious communities in Germany, i.e., the Roman Catholic Church as well as the various Protestant churches on the state level, still have a number of legally recognized privileges whereas other religious groups, especially the different Muslim communities and most of the other non-Christian communities, so far have not acquired the same legal status. As a result, the growing religious diversity of German society has not been transformed yet into a real concept of religious pluralism founded on the idea of an equal recognition of the different religious beliefs that are represented in German society. This already makes clear an analysis of the constitutional mapping of the relationship between State and religion (Section II): Religious expression in the workplace is embedded in this wider context, which therefore first must be taken into account. These constitutional foundations considerably influence the legal tools German labor law essentially provides in order to cope with conflicts arising from religious expression in the workplace (Section III). However, particular emphasis will be placed on the different areas in which religious expression in the workplace raises legal conflicts (Section IV). Finally, some conclusions shall be drawn (Section V).

II. THE CONSTITUTIONAL MAPPING OF THE RELATIONSHIP BETWEEN STATE AND RELIGION

A. Religious Freedom and Religious Neutrality as the Main Pillars

Since the Republic of Weimar, founded in the aftermath of World War I (1919), the German constitutional system has been grounded on the principle of separation between the State and the churches. In the words of article 137 paragraph 1 Constitution of Weimar—the provision still is in vigor (incorporated in the German Constitution [*Grundgesetz* – abbr. GG] by its article 140): "There is no State church." In this respect, the constitution of Weimar marked a considerable change in the relationship between state and churches. Indeed, section 147 of the constitution of the 1848/49 National Assembly in Frankfurt (the so-called constitution of the Parliament of the St. Paul's Church) already promised the separation between state and churches. However, this first democratic constitution of Germany did not come into force due to the failure of the revolutionary movement in 1849; and after the foundation of the German Empire in 1871 by Bismarck, the German States still maintained a strong influence on the Churches, in particular on the Protestant churches, until the end of World

War I:[3] The princes of the states (e.g., the king of Prussia) remained the heads of the Protestant church in their states.

Today's German constitutional law addresses the protection of religion and the relationship between the religious groups and the State in various provisions. Indeed, the core elements are the guarantee of religious freedom enshrined in article 4 GG and the principle of religious neutrality of the State. However, these principles are superposed by the so-called "Church articles" of the constitution of Weimar (articles 137–141) that have been incorporated by article 140 GG into the GG and that are still favoring the big Christian churches in Germany.

1. Religious Freedom Under Article 4 GG

The wording of article 4, paragraph 1 GG is as follows: "Shall be inviolable, freedom of faith and of conscience and freedom to profess a religious or philosophical creed." Article 4 paragraph 2 GG supplements this right in guaranteeing the undisturbed practice of religion. The fundamental right of religious freedom is not, contrary to the guarantee of religious freedom in article 135 of the Constitution of Weimar, under the reservation that the legislature limits the freedom by statutory law. It is guaranteed without any reservation, which underlines the eminent value religious freedom has in German constitutional law.

a. The Scope

Religious freedom under article 4, paragraph 1 GG essentially has two dimensions. On the one hand, it protects the religious freedom of the individual. This implies the right of the individual to freely choose a religious belief and to live according to the rules of this belief. Consequently, article 4 GG not only guarantees the *forum internum* but also the *forum externum*. In addition, the guarantee of individual religious freedom also implies the right not to have a religious belief and not to join a religious community or to abandon a certain religious belief.[4] This so-called negative religious freedom guarantees, according to the explicit rule of article 136 paragraph 3 of the Constitution of Weimar, the right not to participate in religious festivities; moreover, the negative religious freedom prohibits the installing of a Christian crucifix in classrooms of public

3. *See* VON CAMPENHAUSEN & DE WALL, *supra* note 1, at 26–30.

4. *See* Bundesverfassungsgericht [BVerfG,] Dec. 17, 1975, BvR 63/68, 41 BVerfGE 29 (49) (F.R.G.); BVerfG, Feb. 8, 1977, 1 BvR 329/71 et al., 44 BVerfGE 37 (49) (F.R.G.); BVerfG, May 16, 1995, 1 BvR 1087/91, 93 BVerfGE 1 (15) (F.R.G.).

schools[5] or a common prayer in public schools (except when the participation in the prayer is not mandatory).[6]

On the other hand, religious freedom under article 4 GG has a collective dimension. The constitutional guarantee also implies the freedom of individuals to form religious groups and to exercise their religious beliefs collectively. In addition, religious communities themselves can invoke the constitutional guarantee of religious freedom.[7] This guarantee of collective religious freedom under article 4 GG is complemented by the provisions of the Constitution of Weimar on the religious societies (in particular article 137 of the Constitution of Weimar) that have been incorporated into the GG by article 140 GG; they will be considered more into detail below.[8]

b. Complementary Prohibition of Discrimination on the Ground of Religious Belief

The guarantee of religious freedom under article 4 GG is supplemented by the prohibition of discrimination on the ground of religious belief (article 3, paragraph 3 *GG*). Whether article 3, paragraph 3 GG only covers direct or indirect discriminations[9] is still an object of a debate[10] that, after two recent decisions of the Federal Constitutional Court, seems to be decided in favor of the submitting of indirect discriminations.[11] As far as the access to the public service is concerned, article 3, paragraph 3 GG is complemented by article 33, paragraph 3 GG that guarantees *inter alia* the access to all public offices independently from religious belief.[12]

5. *See* BVerfG, May 16, 1995,1 BvR 1087/91, 93 BVerfGE 93 1 (15) (F.R.G.).

6. BVerfG, Oct. 16, 1979, 1 BvR 647/70, 7/74, 52 BVerfGE (223–55) (F.R.G.).

7. *See* BVerfG, June 26, 2002, 1 BvR 670/91, 105 BVerfGE 279 (293) (F.R.G.); BVerfG, Feb. 5, 1991, 2 BvR 263/86, 83 BVerfGE 341 (354) (F.R.G.) (*Bahá'i*).

8. *See infra* section B.

9. The distinction between direct and indirect discrimination has been developed by the anti-discrimination law of the EC. Direct discrimination arises when a person is treated less favorably on one of the grounds forbidden by EC-law (e.g., gender, religious belief, handicap, etc.) than another is, has been or would be treated in a comparable situation. In contrast to this, indirect discrimination targets measures of employers that are discriminatory in effect, though they do not make expressly a distinction between individuals of different genders, religious beliefs, etc. To take the example of gender discrimination: it is considered discriminatory to apply a gender-neutral measure, criterion, or practice when in fact this measure disadvantages a much higher percentage of women than men, unless that difference can be justified by objective factors unrelated to any discrimination on the grounds of sex. For a more in depth analysis of this distinction, see CATHERINE BARNARD, EC EMPLOYMENT LAW (3d ed. 2006) 324–25, with further references.

10. For further details, see Lerke Osterloh, *Article 3 Grundgesetz*, *in* KOMMENTAR ZUM GRUNDGESETZ n.255, with further references (Sachs ed., 3d ed. 2003).

11. *See* BVerfG, Nov. 27, 1997, 1 BvL 12/91, 97 BVerfGE 35 (43) (F.R.G.); BVerfG, Jan. 30, 2002, 1 BvL 23/96, 104 BVerfGE 373 (393) (F.R.G.).

12. *See also* section 7 of the Federal Framework Act on civil career servants [*Beamtenrechtsrahmengesetz*] and BVerwG, Nov. 24, 1988, 2 C 10/86, 81 BVerwGE 22 (F.R.G.).

2. The Principle of State Neutrality

The German constitution does not explicitly guarantee the principle of state neutrality in religious matters. However, doctrine and jurisprudence deduce this important constitutional principle from a synopsis of different constitutional provisions, in particular of religious freedom (article 4 GG), the prohibition of discriminations on the ground of religious belief (article 3, paragraph 3 GG), the equal access to public service (article 33, paragraph 2 GG) as well as of the principle that the civil rights do not depend from a certain religious belief (article 136, paragraph 1 Constitution of Weimar), the right of every citizen not to be forced to participate in religious festivities (article 136, paragraph 4 Constitution of Weimar), and the prohibition of a State Church (article 137, paragraph 1 Constitution of Weimar).[13]

In particular, this principle prohibits the establishing of a State Church, the privileging of certain confessions or religious beliefs, and the ban of other religions. The State has the duty to equally treat the different religious groups represented in Germany and cannot identify with one of them. However, this does not mean that the constitution requires a strict separation of state and religion. Religious neutrality has to be understood in the sense of an open attitude, promoting equally the different religious confessions. The Federal Constitutional Court had to clarify this principle on various occasions. One famous example will suffice: in 1995, the Court banned crucifixes from the class rooms of Bavarian public schools.[14]

B. Attenuation of a Strict Separation Between State and Churches

Religious neutrality of the State and religious freedom are undoubtedly the pillars of the constitutional relationship between State and religion under the GG. Their underlying concept is the separation between State and religious groups. However, these two constitutional principles are only one side of the constitutional medal. They are not only supplemented but also attenuated by articles 136–41 of the Constitution of Weimar; these constitutional provisions have been incorporated into the *GG* by article 140 GG and are therefore applicable constitutional law of the Federal Republic of Germany. The core element of the so-called "Weimar Church-compromise" is the privileged status of religious societies [*Religionsgesellschaften*] (Section 1). The constitutional guarantees of

13. *See* BVerfG, Dec. 14, 1965, 1 BvR 413/60, 1 BvR 416/60, 19 BVerfGE 206 (216) (F.R.G.); BVerfG, Oct. 16, 1968, 1 BvR 241/66 (F.R.G.); BVerfGE 24, 236 (246); BVerfGE 33, 23 (28); BVerfGE 93, 1 (17). *See also* Juliane Kokott, *Article 6 Grundgesetz*, *in* KOMMENTAR ZUM GRUNDGESETZ ¶¶ 4–5 with further references (Michael Sachs ed., 3rd ed. 2003).

14. *See* BVerfG, May 16, 1995, 1 BvR 1097/81, 93 BVerfGE 1 (F.R.G.).

Sunday as a day of weekly rest and legally recognized holidays also affect the relationship between State and religion (Section 2).

1. The Constitutional Guarantee of the Autonomy of Religious Societies

Although there is no State Church in Germany (article 137, paragraph 1 of the Constitution of Weimar) the German constitution privileges religious societies, particularly the Catholic and different Protestant churches, in various ways. These privileges have their constitutional basis in article 137 of the Constitution of Weimar and also affect the labor law status of their workers. By consequence, the strict separation between the State and the churches is attenuated in favor of a mutual cooperation between both. This particular relationship has been characterized as a "limping separation of State and Churches."[15]

a. What is a Religious Society?

Article 137 of the Constitution of Weimar does not define what a religious society is. Religious groups can be accorded the legal status of an association according to the rules of the Civil Code [*Bürgerliches Gesetzbuch* – abbr. BGB] (article 137, paragraph 4 of the Constitution of Weimar) or can obtain the recognition of the State authorities as a statutory corporation [*Körperschaft des öffentlichen Rechts*] (article 137, paragraph 5 of the Constitution of Weimar). The only explicit requirement for this recognition is that their constitution and the number of their members guarantee for a durable existence.

The following are traditionally recognized as religious societies under article 137, paragraph 5 of the Constitution of Weimar: dioceses, certain parish and various associations (e.g., the *Caritas*) of the Roman Catholic Church, the Protestant churches on State-level [*Landeskirchen*] the *Diakonische Werk*, the charity of the Protestant Church in Germany, several Jewish communities on local level and their umbrella organization, the Central Council of Jews in Germany [*Zentralrat der Juden in Deutschland*], various Lutherian communities, other evangelic churches, the Old Catholic Church, and the Russian Orthodox Church.[16] In recent times, other religious communities are also trying to acquire the status of a statutory

15. That is the famous characterization of the relationship between the State and the Churches under the Constitution of *Weimar* expressed by 25 ULRICH STUTZ, DIE PÄPSTLICHE DIPLOMATIE UNTER LEO XIII NACH DEN DENKWÜRDIGKEITEN DES KARDINALS DOMENICO FERRATA, IN: ABHANDLUNGEN DER PREUßISCHEN AKADEMIE DER WISSENSCHAFTEN 54 n.2 (Berlin 1926).

16. For an overview of the religious societies recognized as statutory corporations, see *Bundesregierung*, Stand der rechtlichen Gleichstellung des Islam in Deutschland, BT-Drs. 16/5033, pp. 25–26 and pp. 75–76.

corporation. In the case of the Jehovah's Witnesses, the State of Berlin refused to give recognition as a religious society. The then following law suit against the State before the administrative courts did not succeed: The Federal Administrative Court [*Bundesverwaltungsgericht*], in last instance, ruled that the state's refusal to recognize the Jehovah's Witnesses as religious society was lawful, since the status of a statutory corporation would require a minimum of constitutional loyalty missing in the case of the Jehovah's Witnesses.[17] In this context, the *BVerwG* essentially invoked the Jehovah's Witnesses refusal to participate in municipal, state, or federal elections. The Federal Constitutional Court,[18] however, overruled this decision of the Federal Administrative Court and decided that the Jehovah's Witnesses have to be recognized as a religious society by the State authorities. According to the Federal Constitutional Court, Article 137, paragraph 5 of the Constitution of Weimar only requires religious societies that respect the fundamental constitutional principles mentioned in article 79, paragraph 3 GG such as the core elements of the fundamental rights (articles 1–19 GG), the rule of law, the principle of democracy, and the welfare state clause (article 20, paragraph 1 GG). A further constitutional loyalty of religious societies would not be in line with the principle of autonomy of religious societies enshrined in article 137, paragraph 3 of the Constitution of Weimar. However, in the case of the Scientology Church, the Federal Labour Court has refused to recognize this group as a religious society under article 137 of the Constitution of Weimar: The main argument was that Scientology is a business organization and not a religious society.[19]

As far as the various Muslim communities in Germany are concerned, many of them also claim to be legally recognized as religious societies under article 137, paragraph 5 of the Constitution of Weimar. They want to obtain the same legal privileges as the Christian churches.[20] So far, there has only been one community demanding formally the status of a statutory corporation.[21] The major legal problem to be raised in this context is that the Muslim communities have no formal affiliation. Contrary to the affiliations to the Christian Churches or other religious societies, Muslim communities do not require a formal joining in terms of the association law.

17. BVerwG, June 26, 1997, 7 C 11/96, 105 BVerwGE 117 (F.R.G.).

18. BVerfG, Dec. 19, 2000, 2 BvR 1500/97, 102 BVerfGE 370 (392–99) (F.R.G.).

19. *See* Bundesarbeitsgericht [BAG], Mar. 22, 1995, AZB 21/94, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 823 (1995).

20. *See, e.g.*, the political claims of the Islam Council for the Federal Republic of Germany, *available at* http://www.islamrat.de (last visited Jan. 1, 2009).

21. *See Stand der rechtlichen Gleichstellung des Islam in Deutschland*, 16/5033 BUNDESREGIERUNG [BT-Drs.] 25 (2007), *available at* http://dip21.bundestag.de/dip21/btd/16/050/1605033.pdf. The administrative procedure in this case is, according to my knowledge, still pending.

However, article 137, paragraph 5 of the Constitution of Weimar requires that the society's constitution and the number of its members guarantees for a durable existence.[22] Thus, the structure of Islamic communities itself is an obstacle for its recognition as a statutory corporation. It remains to be seen how the courts will deal with this challenge.

b. Autonomy of Religious Societies

The key element of the status of religious societies is their autonomy under article 137, paragraph 3 of the Constitution of Weimar. They shall have the right to regulate and to administer their own affairs within the limits determined by the law applying to everyone [*innerhalb der Grenzen des für alle geltenden Gesetzes*]. Are benefitting from this autonomy status all institutions belonging to a religious society, regardless of their legal structure, when their test is according the self-conception of the religious society to contribute to the Church's mission.[23] Consequently, article 137, paragraph 3 of the Constitution of Weimar covers all social institutions of churches (hospitals, schools, nurseries, kindergartens, etc.) that are organizationally associated with a Church.

This constitutional autonomy covers in principle all matters that are considered by a religious society as own affairs,[24] namely internal constitution and structure, the rules concerning the membership within the group, its activities (e.g., the maintenance of charity institutions), and also the rules concerning the service within the church, particularly the statute of the so-called church civil servants [*Kirchenbeamten*].[25] Furthermore, the jurisdiction of the Federal Constitutional Court and the legislature deduce from this principle a specific status of religious societies within the State labor law; we will come back to this point later.[26]

The autonomy of religious society is only limited by "laws applying to everybody." This criterion has been controversially discussed over the years.[27] The Federal Constitutional Court[28] considers that these state laws

22. *See* GERHARD CZERMAK, RELIGIONS- UND WELTANSCHAUUNGSRECHT ¶ 210 (2008). *See also* Michael Klöpfer, *Der Islam in Deutschland als Verfassungsfrage*, *in* DIE ÖFFENTLICHE VERWALTUNG (DÖV) 45–55 ¶ 53 (2006); VON CAMPENHAUSEN & DE WALL, *supra* note 1, at 87; Bundesregierung, Stand der rechtlichen Gleichstellung des Islam in Deutschland, BT-Drs. 16/5033, p. 26.

23. *See* BVerfG, June 4, 1985, 2 BvR 1703, 1718/83, 856/85, 70 BVerfGE 138 (162) (F.R.G.).

24. For further details, see VON CAMPENHAUSEN & DE WALL, *supra* note 1, at 100–06. On the historical background of these State subsidies, see Josef Isensee, *Staatsleistungen an die Kirchen und Religionsgemeinschaften*, *in* II HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND§ 35 A I 1 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994).

25. *See* VON CAMPENHAUSEN & DE WALL, *supra* note 1, at 149–96, with further references.

26. *See infra* 542.

27. For an overview of this debate, see VON CAMPENHAUSEN & DE WALL, *supra* note 1, at 107–14 and Konrad Hesse, *Das Selbstbestimmungsrecht der Kirchen und Religionsgemeinschaften*, *in* I

are not identical to state laws binding every citizen, regardless of their religious belief. Instead, are only those State laws considered as "laws applying to everybody" which do not affect the Churches harder than they affect other "citizens."[29] Thus, a judicial control of internal church acts by state courts, for instance, that have no immediate effect on the State sphere is not in line with the autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar.[30]

c. Other Privileges of Religious Societies

As statutory corporations, religious societies are not integrated into the administrative hierarchy of the state. They do not fulfill any state function and are not controlled by the state authorities. However, these religious societies have considerable privileges compared to religious societies that are not recognized as statutory corporations and to all other religious groups.

One core element of their legal status is the privilege that most of the states levy church taxes and collect them from the Church members.[31] Article 137, paragraph 6 of the Constitution of Weimar only provides that religious societies, recognized as statutory corporations, have the right to levy taxes on the basis of the tax lists of the state. The Federal Constitutional Court, however, has ruled that this state support related to the church tax collection is in line with the constitutional principle of separation between state and churches (article 137, paragraph 1 of the Constitution of Weimar).[32] As a result, they are not in the same situation as common law associations that have to enforce their membership-fee claims at the civil courts; churches benefit from the severe execution rules of the fiscal code in favor of the state.

Although article 138, paragraph 1 of the Constitution of Weimar provides that the existing state subsidies for religious societies have to be removed by state law, there has not been any state regulation on this issue since the coming into force of the constitution of Weimar in 1919. The

HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 17 IV (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994).

28. BVerfG, Sept. 21, 1976, 2 BvR 350/75, 42 BVerfGE 312 (334) (F.R.G.).

29. *See* BVerfG, Feb. 17, 1965, 1 BvR 732/64, 18 BVerfGE 385 (386) (F.R.G.); BVerfG, Sept. 21, 1976, 2 BvR 350/75, 42 BVerfGE 312 (334) (F.R.G.); BVerfG, June 4, 1985, 2 BvR 1703, 1718/83, 856/85, 70 BVerfGE 138 (167) (F.R.G.).

30. BVerfG, Feb. 17, 1965, 1 BvR 732/64, 18 BVerfGE 385 (386) (F.R.G.); BVerfG, Dec. 9, 2008, 2 BvR 717/08 (not published yet).

31. For an overview, see CZERMAK, *supra* note 22, ¶¶ 235–47 with further references.

32. BVerfG, Oct. 25, 1977, 1 BvR 323/75, 46 BVerfGE 266 (F.R.G.); BVerfG, Oct. 23, 1978, 1 BvR 439/75, 49 BVerfGE 375–77 (F.R.G.); BVerfG, May 25, 2001, 1 BvR 2253/00, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 909 (2001). *See also* Bundesfinanzhof [BFH] [Federal Financial Court] July 4, 1975,VI R 173/72, 16 BFHE 485 (F.R.G.).

religious societies still obtain state subsidies (e.g., for the maintenance of their sacral buildings) to a considerable extent.[33] Furthermore, the religious societies have to be admitted to religious services and worships within the army, state run hospitals, penitentiary centers, and other public institutions where there is a need for worships (article 141 of the Constitution of Weimar). As far as public schooling is concerned, article 7, paragraph 3 GG derogates the principle of separation between state and churches and imposes to the state the duty to establish a religious instruction within public schools. The content of this religious instruction shall be determined in conformity with the principles of the corresponding religious societies. In practice, this means that the Catholic Church or the Protestant churches decide autonomously upon the teaching program and are entitled to choose the personnel for these classes.[34] Finally, they have certain privileges in tax law[35] and receive various forms of State subsidies.[36]

2. Constitutional Protection of Sunday as Day of Weekly Rest

Finally, the constitutional protection of Sunday as day of weekly rest is also linked with religious freedom under the constitution. According to Article 139 of the 1919 Constitution of Weimar, Sunday and legally recognized holidays remain protected as days of rest and of moral exaltation [*seelische Erhebung*]. The provision does not guarantee individual rights to citizens but only contains an institutional guarantee to protect Sunday and the then (in 1919) legally recognized holidays.[37] It, moreover, does not protect the maintenance of specific religious holidays.[38] Also article 139 of the Constitution of Weimar has to be considered as part of the so-called Weimar Church compromise. It is interesting to note that a large majority of the Members of the National Assembly voted in favor of a constitutional protection of Sunday and legally recognized holidays as days of rest.[39] The

33. For more details, see CZERMAK, *supra* note 22, ¶¶ 352–63.

34. However, it should be noted that there are various efforts on State-level in recent times to establish classes in Muslim religion at the public schools. This instruction in the Muslim religion is not organized in cooperation with the various Muslim federations in Germany. For an overview on the existing religious instruction on State-level, see *Bundesregierung*, Stand der rechtlichen Gleichstellung des Islam in Deutschland, BT-Drs. 16/5033, pp. 44–52.

35. *Id.* at 69–71.

36. For a critical overview of these State subsidies, see CZERMAK, *supra* note 22, ¶¶ 50, 365.

37. BVerfG, Sept. 18, 1995, 1 BvR 1456/95, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3378, 3379 (1995) (F.R.G.).

38. *Id.*

39. For a more in-depth analysis of the discussion on article 139 Constitution of *Weimar* within the National Assembly, see Georg Kaiserberg, *Art. 139 – Feiertagsschutz*, *in* 2 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHSVERFASSUNG 428–29 (Hans Carl Nipperdey ed., 1930). *See also* ANDREAS GRUBE, DER SONNTAG UND DIE KIRCHLICHEN FEIERTAGE ZWISCHEN GEFÄHRDUNG UND BEWÄHRUNG – ASPEKTE DER FEIERTAGSRECHTLICHEN ENTWICKLUNG IM 19. UND 20. JAHRHUNDERT,

reason for the great acceptance of article 139 is, certainly, that both Christian traditionalists as well as secularists were satisfied by the wording: it combined the Christian doctrine with the social-democrat idea of a protection of Sunday and legally recognized holidays. The provision not only protected on a constitutional level traditional (Christian) holidays, but also had to be considered a constitutional "program" to legally recognize secular holidays such as a War Memorial Day or the first of May as labor day; a political compromise on what holidays shall be legally recognized, however, could not be reached during the Weimar Republic (1919–1933).[40]

The main impact of this constitutional provision on labor law is the prohibition of Sunday work by the statutory regulation of the working hours (see section 1, paragraph 2 of the Working Time Act [*Arbeitszeitgesetz* – abbr. ArbZG]) and the statutory limitation of the opening hours of retail shops on Sundays in section 3, paragraph 1 of the Act on the closing of shops [*Ladenschlussgesetz*]. However, recently there has been a trend to soften these statutory restrictions and to perforate like a piece of Swiss cheese the guarantee of Sunday as a day of rest. The prohibition of Sunday work has been undermined by considerable exceptions in section 9–13 ArbZG. In addition, many Federal States [*Bundesländer*] have deregulated the shop closing times on Sundays since the Federalism Reform of 2006 when the regulation of shop closing times shifted from the federal to the state competence.[41]

III. LEGAL TOOLS TO COPE WITH CONFLICTS ARISING FROM RELIGIOUS EXPRESSION AT THE WORKPLACE

This constitutionally determined relationship between state and religion has a considerable impact on how German labor law copes with conflicts arising from religious expression in the workplace. This raises the question of what are the essential tools German labor law is providing to master these difficult problems. There are, in particular, four legal instruments that shall be discussed in the following sections. Traditionally one important tool is the horizontal effect of religious freedom under article 4 GG (I.): Thus, workers whose religious freedom at the workplace is limited by the employer can invoke article 4 GG against their employer. The second tool is the constitutional guarantee of autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar that

FRANKFURT AM MAIN 134–37 (2003); JAN HEINEMANN, GRUNDGESETZLICHE VORGABEN BEI DER STAATLICHEN ANERKENNUNG VON FEIERTAGEN 94–96 (2004).

40. *See* GRUBE, *supra* note 39, at 137–45.

41. *See* Jürgen Kühling, *Ladenschluss nach der Föderalismusreform – Öffnungszeiten und Arbeitnehmerschutz*, AuR 384–86 (2006).

requires, according to the Federal Constitutional Court and the doctrine, a specific status for religious societies within the State labor law (Section B). As the third tool, collective labor law shall be analyzed (Section C). And finally, the anti-discrimination law, originally leading a shadowy existence, is increasingly becoming the most important legal instrument to cope with religious expression at the workplace (Section D).

A. The Horizontal Effect of Religious Freedom

The constitutional guarantee of religious freedom under article 4 GG—as most of the other constitutional rights enshrined in the GG—is only binding the state in exercising its legislative, executive, and judicative power (article 1, paragraph 3 GG). Following this traditional understanding of fundamental rights, article 4 GG protects, first and foremost, the individual vis-à-vis the State power. However, the Federal Constitutional Court has already recognized in his famous *Lüth*-decision of January 15, 1958, that the fundamental rights also have an impact on the relationships between individuals, the so-called horizontal effect of the fundamental rights [*Drittwirkung der Grundrechte*].[42] This means, that the judge always has to take into consideration fundamental rights in contractual or other legal relationships belonging to private law. Contrary to some early decisions of the Federal Labour Court[43] that were inspired by its then president Hans Carl Nipperdey,[44] the Federal Constitutional Court has not favored a direct but only an indirect horizontal effect of the fundamental rights: Accordingly, the judge has to interpret the general clauses of the civil code such as good faith, the *boni mores* [*Gute Sitten*] (section 138 BGB), the principle of good faith [*Treu und Glauben*] laid down in section 242 BGB or the principle of equity [*billiges Ermessen*] (section 315 paragraph 1 BGB, section 106 Trade Act [*Gewerbeordnung*—abbr. GewO]) in the light of the constitutionally guaranteed fundamental rights. One important impact of this doctrine is that judges have the constitutional duty to intervene into contractual relationships in order to compensate a normally existing disequilibrium between the parties by controlling the terms of contract on the basis of the principles of equity and good faith. It is obvious that this constitutional duty plays an important role for the employment contract characterized *per definitionem* by the dependence of the worker.

42. 1 BvR 400/51, 7 BVerfGE 198 (203–12); see also Oct. 19, 1993, 1 BvR 567, 1044/89, 89 BVerfGE 214 (231–34) (F.R.G.).

43. BAG, Jan. 15, 1955, ARBEITSRECHTLICHE PRAXIS [AP] Art. 3 GG No. 4 (F.R.G.).

44. *See* Hans Carl Nipperdey, *Gleicher Lohn der Frau für gleiche Leistung – Ein Beitrag zur Auslegung der Grundrechte*, RECHT DER ARBEIT [RdA] 121 (1950); LUDWIG ENNECCERUS & HANS CARL NIPPERDEY, 1 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 15 II 4 (15 ed. 1959).

These principles also apply to the protection of religious freedom within the employment relationship. The horizontal effect of religious freedom under article 4 GG can have an important impact on the workers' position. According to the common law rules on the non-performance of an obligation (section 275, paragraph 3 BGB), the obligor is entitled to refuse the work performance when he is to perform the work in person and when, after balancing the obligee's interest in the work performance and the impediment to performance, the work performance cannot be reasonably required of the obligor. There is no doubt that this general rule of law of obligations also applies to performance obstacles resulting from religious duties of the obligor.[45] Another example is the employer's direction power, which has to be exercised, according to section 106 GewO, in respect of the principle of equity. The Federal Labor Court, in its constant jurisprudence, considers that the employer has to take into account a religious or a conscience conflict of his workers when directing the work performance.[46] However, one criterion in balancing the interests of the parties is whether the worker could foresee the conflict when concluding the employment contract: Thus, considerations of fault might also take place in this context.

B. The Labor Law of Religious Societies

These general principles do not fully apply to employment relationships with religious societies under article 137 of the Constitution of Weimar. According to recent estimates, about 1.2 million workers are employed by church institutions in Germany.[47]

As already pointed out, religious societies in the legal form of a statutory corporation are entitled under article 137, paragraph 3 of the Constitution of Weimar to establish their own church civil servant law [*Kirchenbeamtenrecht*]:[48] They can employ church civil servants [*Dienstherrenfähigkeit*]. In particular priests as well as deacons in the Protestant Church and persons employed in certain positions within the church administrations (e.g., of the diocese or of the Protestant Church on State-level) have the status of church civil servants.[49] The Protestant

45. *See* ErfK/*Preis*, BGB § 611, ¶ 687 with further references.

46. *See* BAG, May 22, 2003, 2 AZR 426/02, AP § 1 KSchG 1969 Wartezeit No. 18 (F.R.G.); BAG May 24, 1989, 2 AZR 285/88, NJW 203 (1990); BAG Dec. 20, 1984, 2 AZR 436/83, AP § 611 BGB Direktionsrecht No. 27. *See also* Fritz-René Grabau, *Die Wahrnehmung religiöser Pflichten im Arbeitsverhältnis*, BETRIEBS-BERATER [BB] 1257 (1991).

47. *See* Harald Schliemann, *Europa und das deutsche kirchliche Arbeitsrecht*, NZA 407 (2003).

48. *See supra* page 537.

49. For an overview on the legal situation in the Roman Catholic Church and in the different Protestant Churches on State-level, see Dietrich Pirson, *Das Dienstrecht der Geistlichen und Kirchenbeamten*, *in* II HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 64 I 2 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1995).

Church in Germany [*Evangelische Kirche in Deutschland*—abbr. EKD]—the umbrella organization of the different Protestant state churches on the Federal level—has established its own Act on Civil Servants of the Church and the different State Churches have specific Acts on the Service as a Pastor [*Pfarrerdienstgesetze*];[50] to the other church civil servants, the civil servant law acts of the corresponding church on state level apply. Also in the Roman Catholic Church priests have the status of Church civil servants: Their status is defined by the rules of the *codex iuris canonici* in conjunction with Episcopal Acts on diocese level.

In the case that religious societies create employment contracts with their workers, they have chosen as applicable law the rules of State labor law and are, in principle, bound by them. Consequently, the statutory rules protecting workers such as the Act on Protection against Dismissal, the provisions on Sick Pay, the Working Time Act, or the state labor law rules on health and safety at work are applying to their employment relationships. However, article 137, paragraph 3 of the Constitution of Weimar, in the interpretation of the Courts and of the dominant doctrine, guarantees to religious societies a specific status in labor law. The Federal Constitutional Court, in its important decision of June 4, 1985, holds that religious societies, as far as they act as employers, are entitled, under article 137, paragraph 3 of the Constitution of Weimar, to order the service in the Church according to their self-concept; only by this competence, the churches are able to maintain their authenticity in their service.[51] Thus, the churches can impose specific loyalty duties on their workers corresponding to the fundamental rules of their religious dogma and ethics and can "clericalize," within certain limits the employment relationship. The Christian Churches used to characterize their self-conception of the service in the Church as Christian service community [*Christliche Dienstgemeinschaft*]. The Catholic Church, for instance, has concretized the loyalty duties of its workers in the "Fundamental Order for the Service in the Church in the Frame of Employment Relationships" [*Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse*].[52] It is perfectly in line with the case law of the Federal Constitutional Court that the Federal legislature has created with section 9, paragraph 2 of the 2006 General Act on Equal Treatment [*Allgemeines Gleichbehandlungsgesetz*—

50. *See, e.g.*, the Act on the Status of Pastors of the State Church of *Hesse* and *Nassau* [*Evangelische Kirche in Hessen und Nassau*]. The Act can be found online at http://www.ekhn.de/recht/bd2/410.pdf (last visited Jan. 1, 2009).

51. 2 BvR 1703/83, 2 BvR 1718/83, 2 BvR 856/85, 70 BVerfGE (138–73).

52. The text of this document is published with a short commentary in NJW 1394–98 (1994). *See also* the commentary of Wilhelm Dütz, *Neue Grundlagen im Arbeitsrecht der katholischen Kirche*, NJW 1369–75 (1994) and of Reinhard Richardi, *Die Grundordnung der katholischen Kirche für den kirchlichen Dienst im Rahmen kirchlicher Arbeitsverhältnisse*, NZA 19–24 (1994).

abbr. AGG] a statutory provision saying that the loyal duty churches are imposing on their workers does not constitute discrimination on the ground of religious belief; the provision transposes the so-called "Church-clause" of article 4, paragraph 2 of the Directive 2000/78/EC.[53] It is obvious that these higher loyalty duties for workers employed by the churches and their institutions might cause conflicts with the individual religious freedom of workers. Some of these conflicts will be considered more into detail below.[54]

As far as collective labor law is concerned, article 137, paragraph 3 of the Constitution of Weimar, in the predominant interpretation of this provision, justifies far-reaching restrictions in the institutions of religious societies. The works council system, for instance, does not apply to them. As long as they have the status of a statutory corporation, they are exempted from it by section 130 of the Works Constitution Act [*Betriebsverfassungsgesetz*—abbr. BetrVG] excluding all statutory corporations from the scope of the works council system. Furthermore, section 118, paragraph 2 BetrVG explicitly exempts their establishments from the scope of the works council system. Hence, in church hospitals or in nursing homes run by a church the workforce is not represented by works councils [*Betriebsräte*]. In addition, the worker representation system for the public sector [*Personalvertretung*] also does not apply to the establishments of religious societies (section 112 Federal Act on Worker Representation in the Public Sector [*Bundespersonalvertretungsgesetz*]); at least as far as religious societies have the status of a statutory corporation it would be logical to submit the churches to the public sector representation system. The Catholic as well as the different Protestant churches, however, have established their own worker representation systems [*Mitarbeitervertretungen*] by church law.[55] But in general, these representation systems are below the participation standards of the public sector representation system. The churches have often been criticized for their "second class" representation regime. However, the general exemption of the churches from the works council system in section 118, paragraph 2 BetrVG has never been seriously questioned.

53. For a more in depth analysis of this Church-clause, see *infra* 554 et seq. with further references.

54. *See infra* 555 et seq.

55. For further details on the worker representation within the institutions of the Churches see REINHARD RICHARDI, ARBEITSRECHT IN DER KIRCHE: STAATLICHES ARBEITSRECHT UND KIRCHLICHES DIENSTRECHT (4th ed. 2003). For the recent reform of these systems of worker representation in the Churches, see GREGOR THÜSING, KIRCHLICHES ARBEITSRECHT – RECHTSPRECHUNG UND DISKUSSIONSSTAND IM SCHNITTPUNKT VON STAATLICHEM ARBEITSRECHT UND KIRCHLICHEM DIENSTRECHT § 4 (2006).

The regime of the board-level co-determination [*Mitbestimmung*] also does not apply to Church institutions: Section 1, paragraph 3 of the 1976 Co-determination Act as well as section 1, paragraph 2 of the Act on Co-determination by One Third [*Drittelbeteiligungsgesetz*] just repeat the wording of section 118, paragraph 2 BetrVG and therewith exempt church institutions from the codetermination. Finally, the majority of the doctrine poses that the collective bargaining system does not apply to church institutions. Essentially, this means that trade unions cannot go to strike for collective agreements with church institutions. In practice, there are only very few church entities who have voluntarily passed a collective agreement with the correspondent trade union. By far, most of them determine the working conditions of their workers by the so-called "third way" which means that a commission composed by an equal number of church and worker representatives is fixing the working conditions on diocese level in the Catholic Church and on the level of the state churches within the Protestant Church in Germany [EKD].[56]

C. The Contribution of Collective Labor Law

One of the traditional instruments of labor law to protect workers is to give them a collective voice. Collective labor law still is a very important tool in protecting worker interests at the workplace. Therefore a glance shall be thrown at the contribution of German collective labor law to the protection of religious freedom at the workplace. In this context, the two main pillars of German industrial relations—both collective bargaining as well as the participation of the works councils [*Betriebsräte*] on the establishment level—merit a closer look.

1. Collective Bargaining

a. Religiously Inspired Trade Unions

As far as collective bargaining is concerned, one strategy of workers to influence their workplace in the sense of the religious doctrine they belong to has been—by far more in the past than in the present—to build or to join religiously oriented trade unions.

In principle, the constitutional guarantee of freedom of association (article 9, paragraph 3 GG) allows unions with a religious orientation: Their program, therefore, can reference on the dogma of a church or another

56. For an overview on the "third way," see Reinhard Richardi, *Das kollektive kirchliche Dienst- und Arbeitsrecht*, *in* HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 67 III, Band II (Joseph Listl & Dietrich Pierson eds., 2d ed. 1995). For a critical perspective on the "third way," see RAINER KEßLER, DIE KIRCHEN UND DAS ARBEITSRECHT 23 (1986).

religious group.[57] It is part of the internal autonomy of coalitions to determine their political or religious direction. Freedom of association does not oblige unions to be politically and religiously neutral. The only restriction resulting from the guarantee of freedom of association in article 9, paragraph 3 GG is that unions lose their privileged status of a coalition if religious societies or churches have a dominating influence on the union making impossible the autonomous pursuit of workers interests:[58] This would be the case, for instance, if a Catholic bishop could make decisions with binding force for the workers of a Catholic trade union.

The only religiously inspired trade unions existing in Germany are the Christian trade unions. They have existed since the Wilhelminian Empire (1870–1918).[59] From their beginning on, they have been inter-confessional organizations uniting both Catholic as well as Protestant workers.[60] The current Christian Union Confederation of Germany [*Christlicher Gewerkschaftsbund Deutschlands*—abbr. CGB], as an umbrella organization, organizes around 280,000 workers in sixteen Christian sector unions,[61] the most important of which are the Christian Metalworkers' Union [*Christliche Gewerkschaft Metall*—abbr. CGM] and the Christian Union of the Chemical Industry (CGM). According to its own understanding, the CGB's union activity rests on the Christian social doctrine, although it does not become clear what that means for the collective bargaining policy of its affiliated unions *in concreto*. The Christian trade union movement only has little relevance in German industrial relations: The unions affiliated to the CGB have only a few members compared to the big Unions organized within the German Confederation of Trade Unions [*Deutscher Gewerkschaftsbund*—abbr. *DGB*]. Since the legal capacity of a trade union to create collective

57. With view to Christlicher Gewerkschaftsbund Deutschland [CGD] [Christian Union Confederation of Germany], see Landesarbeitsgerichte Düsseldorf [LAG Düsseldorf] [Regional Labor Court of Düsseldorf] Dec. 14, 1957, AP No. 2, Art. 9 GG (F.R.G.).

58. *See* MANFRED LÖWISCH & VOLKER RIEBLE, KOMMENTAR ZUM TARIFVERTRAGSGESETZ § 2, ¶ 15 et seq. (2d ed. 2005); Hartmut Oetker, *Section 2*, *in* KOMMENTAR ZUM TARIFVERTRAGSGESETZ ¶¶ 331–37 (Herbert Wiedemann ed., 7th ed. 2007); FRANZ GAMILLSCHEG, I KOLLEKTIVES ARBEITSRECHT 409 (1997).

59. The origins of the Christian trade union movement and its development until 1933 is analyzed by MICHAEL SCHNEIDER, DIE CHRISTLICHEN GEWERKSCHAFTEN: 1894-1933 (1982); for an overview see KLAUS SCHÖNHOVEN, DIE DEUTSCHEN GEWERKSCHAFTEN 72–76 (1987) with further references.

60. However, it has to be mentioned that there was an important debate within the Catholic Church on whether Catholic workers are allowed to join inter-confessional trade unions. The Prussian bishops, in the so-called Fulda Pastoral of August 22, 1900, only recognized Catholic worker associations under the guidance of Catholic priests, whereas Pope Pius X, in his Encyclical *Singulari quadam* of September 24, 1912, allowed under certain circumstances that Catholic workers would join inter-confessional unions. The Encyclical is published in *Bundesverband der Katholischen Arbeitnehmerbewegung*, TEXTE ZUR KATHOLISCHEN SOZIALLEHRE 41–59 (Katholischen Arbeitnehmer-Bewegung Deutschlands [KAB] ed., 8th ed. 1992).

61. That is the figure the Christlichen Gewerkschaftsbund Deutschlands [CGB] has published. *See* http://www.cgb.info/aktuell/imblickpunkt.php (last visited on Jan. 1, 2009).

agreements [*Tariffähigkeit*] (section 2, paragraph 1 of the Act on Collective Agreements [*Tarifvertragsgesetz*]) requires, according to the constant jurisdiction of the Federal Labor Court, a minimum of social power, their capacity to make collective agreements has been challenged.[62] However, there is a recent tendency of the CGB unions to compete in collective bargaining with the big unions of the DGB by making collective agreements whose social standards are much below the standards guaranteed by the DGB agreements.

Beside the unions of the CGB, there are two Catholic worker and employers' associations that should be mentioned here although they have practically no relevance. The Catholic Worker Movement [*Katholische Arbeitnehmerbewegung*—abbr. KAB] guarantees to its members legal advice and offers seminars and various insurances; but is not a collective bargaining actor.[63] On the employers' side there is only the Confederation of Catholic Entrepreneurs [*Bund Katholischer Unternehmer*—abbr. BKU]. The BKU is a network of 1,200 Catholic entrepreneurs and executive staff members and is not involved in collective bargaining.[64]

b. Religious Freedom in Collective Agreements

Theoretically, questions related to religious freedom at the workplace might be addressed by collective bargaining. It is imaginable, for instance, that the right to wear religious symbols at the workplace (e.g., the Muslim headscarf or a Sikh turban) or to take a leave of absence in order to fulfill religious duties such as the visit of worships or prayers is determined by collective agreements. As far as the practice of collective bargaining in Germany is concerned, however, these questions have no relevance at all. The important collective agreements, e.g., the public service agreements, are not handling these conflicts.[65] Even the collective provisions that concretize workers' rights to claim a salary in case of an inconsiderable absence based on a reason in his person (section 616 *BGB*) do not deal with

62. The most recent example is the long decision of BAG Mar. 28, 2006, 1 ABR 58/04, AP § 2 Tariffähigkeit [TVG], No. 4, in which the Court conceded the legal capacity to conclude collective agreements to the Christian Metalworkers' Union CGM challenged by the competing metalworkers' union Industriegewerkschaft (IG) Metall. The Federal Labor Court, however, recognized in this decision the *CGM*'s capacity to conclude collective agreements.

63. Further details on the KAB are *available at* http://www.kab.de (last visited on Jan. 1, 2009).

64. Further details on the Bund Katholischer Unternehmer [BKU] are *available at* http://www.bku.de/index.php (last visited on Jan. 1, 2009).

65. Section 52 Bundesangestelltentarifvertrag [BAT] [Federal Agreement for Employees] and section 29 Collective Agreement for the Public Service [TVöD].

the religiously justified absence of workers from the workplace (e.g., to attend a worship).[66]

There are several reasons for this omission. One important reason is certainly that workers with non-Christian beliefs are underrepresented within the unions of the German Confederation of Unions DGB. Their collective voice normally is not strong enough to force the unions to put questions of religious expression in the workplace on their collective bargaining agenda. A second reason for this lack might be that collective bargaining on sector level is still prevalent in German industrial relations[67] whereas many of the questions of religious freedom are raised at the workplace and therefore have to be resolved on that level: the need for a decentralized settling of these conflicts becomes obvious when making compatible complex working time schemes with the exercise of religious duties of workers (e.g., the duty to make a prayer also during the working hours, to respect the *Ramadan* or a religious holiday that is not legally recognized). Sector level collective bargaining often is not the right level to face the problems that are connected with religious expression at the workplace.

2. The Role of the Works Councils

Much more interesting than collective bargaining might be the worker representation on establishment level exercised by works councils according to the 1972 Works Constitution Act [*Betriebsverfassungsgesetz*—abbr. BetrVG]. Works councils have to be established in workplaces with at least five workers; they represent the whole workforce on establishment level, unionized or not, and have significant participation rights vis-à-vis the employer.[68]

There are several provisions of the Works Constitution Act that are particularly interesting in the context of religious expression at the workplace. One of them is section 75, paragraph 1 BetrVG extending the principle of equal treatment to the works constitution: according to that provision, works councils and employers have to ensure that all persons working in the establishment are treated according to the principles of law and equity. Section 75, paragraph 1 BetrVG considers the prohibition of discriminations to be a core element of law and equity, *inter alia* those on

66. The relevance of section 616 BGB for religiously motivated absences at the workplace will be analyzed *infra* in Section IV.D.

67. *See* Achim Seifert, *Employment protection and employment promotion as goals of collective bargaining in the Federal Republic of Germany*, 15 INT'L J. COMP. LAB. L. INDUS. REL. 343, 344–47 (1999).

68. For a detailed analysis of the German works council system, see MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW IN THE FEDERAL REPUBLIC OF GERMANY ¶¶ 551–621 (2008).

the grounds of religion and belief. The content of this prohibition is considered to be identical with the Directive 2000/78/EC and section 1 and 7 AGG. Hence, works councils and employers have to avoid not only direct but also indirect discriminations on the ground of religion.

As far as the missions of the works council are concerned, section 80, paragraph 1, No. 7 BetrVG does address religious expression at the workplace in an indirect but nonetheless important way. The rule obliges the works council to promote the integration of workers with a foreign nationality in the company and to deepen the mutual understanding between them and the German workers. The provision has only been established by the Works Constitution Reform Act of 2001 and addresses in particular the integration of foreign workers with other cultural or religious backgrounds such as the numerous Turkish workers, who are Muslims in their majority. One important element of their integration certainly is that they are represented within the works councils.[69] However, this is not self-evident in practice. Section 80, paragraph 1, No. 7 BetrVG is supplemented by the employer's duty to include in his report to the general assembly of workers some observations on the integration of workers with foreign nationalities into the company (section 43, paragraph 2, phrase 3 BetrVG) and by the workers' right to talk also about integration matters at the general assembly (section 45, phrase 1 BetrVG). Furthermore, works councils and employers can conclude so-called voluntary works agreements [*Betriebsvereinbarungen*] on measures regarding the integration of workers with foreign nationalities (section 88, No. 4 BetrVG).

Works councils can fulfill this integrationist mission by exercising their participation rights. A few examples will suffice: The works council has a co-decision right as far as the workers' behavior in the establishment and the work rules are concerned (section 87, paragraph 1, No. 1 BetrVG), which also implies the co-decision on the establishment of dress codes by the employer: works councils therefore have to ask themselves, for instance, whether a certain dress code can be an obstacle to or may promote the integration of Muslim workers wearing a headscarf. Furthermore, the works council has a co-decision right regarding the working time schedule (section 87, paragraph 1, No. 2 BetrVG) and thereby can take into consideration the interests of Muslim workers' duty to pray when determining the pauses. Further, in exercising their co-decision right

69. *See* Michael Blank, *Gleichbehandlung und Integration ausländischer Arbeitnehmer im Betrieb*, ARBEIT UND RECHT 286, 292 (1993). The Works Constitution Act, however, does not promote the representation of immigrant workers or of workers belonging to (religious) minorities within the works councils. Section 15, ¶ 1 BetrVG only requires that the different departments of the company and the different professional activities performed in the companies shall be represented within the works council and section 15, ¶ 2 BetrVG reserves works council sieges to the minority gender at least in the same proportion in which it is represented within the whole workforce.

regarding the administration of social institutions of the employer (section 87, paragraph 1, No. 8 BetrVG) such as company restaurants the works council can make sure that the different religious groups represented within the company can have menus that comply with their religious nutrition duties. Finally, works councils can fight the recruitment of persons who might disturb the peace in the shop by violating the principles of law and equity, in particular by xenophobic attempts (section 99, paragraph 2, No. 6 BetrVG), and they are entitled to request protection from the employer for the same reasons in the event of these workers' dismissal (section 104 BetrVG).

There is no empirical evidence, regarding the extent to which works councils (and employers) make use of these provisions to protect religious freedom in the workplace. Thus, statements on the effectiveness and usefulness of the works councils' activity have no empirical basis.

D. The Growing Relevance of Anti-discrimination Law

For a very long period of time, the constitutional principle of equal treatment (article 3 GG) has only possessed a shadowy existence. There has not been considerable case law of the Courts on the constitutional prohibition of discriminations on the ground of religious belief under article 3, paragraph 3 GG although the Federal Labor Court has recognized that a dismissal violating the principle of equal treatment under article 3, paragraph 3 GG is contrary to public policy and is therefore void (section 134 *BGB*).[70] Also the already-mentioned equal access to all public offices independent of religious belief (article 33, paragraph 3 GG) has not left its traces in the case law.

The reasons for this insignificance of the constitutional principle of equal treatment for the protection of religious expression in the workplace are two-fold. As far as the scope of article 3 *GG* is concerned, the Federal Constitutional Court has always considered that the provision exclusively covers direct, but not indirect, discriminations; only recently—and apparently under the influence of the EC anti-discrimination law that had to be transposed into German law—the Federal Constitutional Court seemed to abandon this restrictive interpretation of article 3 *GG*.[71] Another reason for the missing relevance of the constitutional principle of equal treatment in labor law might be that, contrary to the anti-discrimination law of the EC

70. BAG, Sept. 28, 1972, 2 AZR 469/71, Entscheidungssammlung zum Arbeitsrecht [EzA] No. 25 zu § 1 KSchG (F.R.G.).

71. *See* BVerfG, Nov. 27, 1997, 1 BvL 12/91, 97 BVerfGE 35 (43) (F.R.G.), and BVerfG Jan. 30, 2002, 1 BvL 23/96, 104 BVerfGE 373 (393) (F.R.G.).

(e.g., article 10 of the Directive 2000/78/EC)[72] the Courts have not accepted a shift of the burden of proof in anti-discrimination cases.

1. General Principles of the New Anti-discrimination Legislation

This shadowy existence of anti-discrimination law in Germany only ended recently as a result of the rapid development of European anti-discrimination law and its transposition into German law in the General Act on Equal Treatment [*Allgemeines Gleichbehandlungsgesetz*—abbr. AGG] from August 2006.[73]

As far as discriminations on the ground of religious belief are concerned, Directive 2000/78/EC from November 27, 2000, establishing a General Framework for Equal Treatment in Employment and Occupation, for the first time in EU-law laid down a legal framework for combating discriminations in the workplace.[74] It is not an exaggeration to say that the Directive overshadowed by far the relevance of article 3 GG. The Directive has been transposed by the Federal Republic of Germany—after a heated political debate and with a delay of several years—with the AGG.[75] Only a few words on the core elements of this new anti-discrimination legislation will be necessary in the present context.

Sections 1 and 7, in conjunction with section 3, paragraphs 1–2 *AGG* prohibit direct as well as indirect discriminations on the ground of religious belief. Furthermore, section 3, paragraph 4 AGG considers harassments related to the religious belief of a worker as discrimination. The same applies to instructions to discriminate against persons on any of the grounds prohibited by the AGG (section 3, paragraph 5 AGG). The prohibition of discriminations on the ground of religious belief covers—as the prohibition of discrimination on the other grounds enumerated in section 1 *AGG—inter alia* the conditions for access to employment, employment and working conditions, and pay (section 2, paragraph 1 AGG). Although section 2, paragraph 4 AGG explicitly provides that the Act on Dismissal Protection [*Kündigungsschutzgesetz*] should only apply for dismissals, the Federal

72. According to article 10, paragraph 1 of Directive 2000/78/EC, Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. It shall then be for the respondent to prove that there has been no breach of the principle of equal treatment. It is certainly no exaggeration to say that the shift of the burden of proof in such cases has become a general principle of the anti-discrimination law of the EC. For further details see Lerke Osterloh, *Article 3 GG*, KOMMENTAR ZUM GRUNDGESETZ art. 3, ¶ 255 with further references (Sachs ed., 3d ed. 2003).

73. O.J. of the FRG 2006 Part I p. 1897 [Bundesgesetzblatt Teil I].

74. OJ of the EC L 303/16 of Dec. 2, 2000.

75. For this reason, the European Court of Justice (ECJ) has condemned the Federal Republic of Germany. *See* ECJ, Feb. 23, 2006, C-43/05 (OJ C 131/23) (F.R.G.).

Labor Court has recently ruled, that dismissals also must respect the prohibition of discriminations enshrined in the AGG.[76]

Direct discriminations on the ground of religion or belief are forbidden in general. Section 8, paragraph 1 AGG, however, considers unequal treatment not to be a discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. In a modern society, however, there will be only very few cases in which the religion of the worker is a legitimate occupational requirement under section 8, paragraph 1 AGG.[77]

In addition, employers are not only obliged to abstain from discriminations in the sense of the AGG. They also have a prevention duty (section 12, paragraph 1 AGG): They have to guard against discriminations of their workers by taking the necessary measures. The employer fulfills this prevention duty by providing a training for his personnel in the anti-discrimination legislation (section 12, paragraph 2 AGG).

The AGG provides several sanctions for discriminations on the ground of religious belief. Leaving aside the right of the victim to complain (section 13 AGG), the victim of a harassment is entitled to refuse to perform his work without losing his remuneration (section 14 AGG). Furthermore, the victim can claim from the employer who has discriminated compensation of material damage (section 15, paragraph 1 AGG) as well as immaterial damage (section 15, paragraph 2 AGG); if the discrimination concerns a recruitment, the compensation for immaterial damage is limited to three months' salary when the victim has not been the best qualified candidate and would not have been recruited without the discrimination.

So far, there is no case law of the ECJ and of German labor courts on discrimination on the ground of religions or belief. However, all cases decided by the Courts before the coming into force of the AGG and referring to religious expression in the workplace have to be reconsidered in the light of the provisions of the AGG and of Directive 2000/78/EC. As the requirements of the Directive are more severe compared to those of the constitutional principle of equal treatment under article 3, paragraph 3 GG, the impact of the Directive cannot be underestimated. We will come back to this point when discussing some areas of conflict.[78]

76. BAG Nov. 6, 2008, 2 AZR 701/07 (not yet published) (F.R.G.). *See* the press release 87/08 of the Federal Labor Court at http://www.bundearbeitsgericht.de.

77. *See* Gregor Thüsing, *Allgemeines Gleichbehandlungsgesetz*, I/2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 8, ¶ 31 (5th ed. 2007).

78. *See infra* 553.

2. Anti-discrimination and Employment Relationships with Church Institutions

As far as occupational activities within churches or other religious groups are concerned, the German legislature has tried to cement the privileges of religious societies under article 137, paragraph 3 of the Constitution of Weimar.

According to section 9, paragraph 1 AGG, an unequal treatment of a religious society on the ground of religion shall, notwithstanding the exception of section 8 AGG, not be considered as discrimination when a certain religious belief constitutes a justified occupational requirement considering the self-conception of the religious society or the nature of the professional activity. Section 9, paragraph 2 AGG states that the prohibition of discriminations on the ground of religion does not affect the right of religious societies and their institutions to claim loyalty from their workers in the sense of their religious doctrine; thus, section 9, paragraph 2 AGG codifies the constant jurisprudence of the Federal Constitutional Court and of the Federal Labor Court rooting in the autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar and leaving it to the religious societies to determine autonomously the content of the loyalty duty for their workers, according to their religious dogmata.[79]

Section 9 AGG goes back to the so-called "Church-clause" of Article 4, paragraph 2 of Directive 2000/78/CE entitling the Member States to maintain existing rules

> [P]ursuant to which a difference of treatment, based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

Furthermore, article 4, paragraph 2 underlines that, provided its provisions are otherwise complied with, the Directive shall not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitution and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos. The "Church-clause" has been integrated into the Directive on the initiative of the Republic of Ireland advocating the interests of the churches within the legislation process.[80] Article 4, paragraph 2 is aimed at concretizing the—legally not binding—

79. *See supra* page 542.

80. *See* PETER HANAU & GREGOR THÜSING, EUROPARECHT UND KIRCHLICHES ARBEITSRECHT: BESTANDSAUFNAHME UND PERSPEKTIVEN 31 (2001).

EU Council Declaration on the status of churches and non-confessional organizations of June 18, 1997.[81]

So far, the extent to which article 4, paragraph 2 privileges churches still remains unclear. The ECJ has not had the opportunity yet to clarify the meaning of the "Church-clause." However, it is not excluded that the ECJ will interpret the rule in a restrictive sense emphasizing the nature of the work performed by a worker and will gradate the loyalty duty of workers in relation to their closeness to the *propria* of the church: Thus, a teacher in a Catholic school would be submitted to a much more intense loyalty duty than a charwoman in a Catholic hospital.

IV. RELEVANT AREAS OF CONFLICT

The foregoing rather abstract observations need some illustration on the basis of the existing case law of the labor courts. This permits us to develop the relevant areas of conflict between the operational interests of employers' and workers' religious expression in the workplace.

It is interesting to note that, contrary to other countries, proselytism of employers is not a relevant phenomenon in Germany: To my knowledge there is only one case of proselytism decided by the administrative courts where the employer tried to proselytize his apprentices.[82] The focus is clearly on the workers' religious freedom in the workplace. The conflicts concern, in particular, the employer's right to question candidates in the hiring process (Section A), the limits of the loyalty duty of workers employed by religious societies (Section B), the presence of religious symbols at the workplace (Section C), and the limits religious freedom is imposing on the workers' duty to work (Section D). These different areas of conflict merit a closer look.

A. Religious Freedom in the Hiring Process

As far as the hiring process is concerned, religious expression, or rather the freedom not to express a religious belief, can be at stake when the employer intends to obtain information on the religious orientation of the candidates.

Since religious belief is normally not relevant for the performance of work, an employer does not have the right to ask a candidate in an interview

81. O.J. EC No. C 340/133. In this declaration, the Council declared that "the EU respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States"; furthermore, the Council stated that the EU equally respects the status of philosophical and non-confessional organisations.

82. *See* BVerwG, Nov. 9, 1962, VII C 84.59, NJW 117 (1963); see also the appeal decision of the Oberverwaltungsgericht [OVG] Rheinland-Pfalz Oct. 16, 1956, 2 A 15/56, BB 1107 (1956) (F.R.G.).

to what religion belief he or she belongs. This corresponds to Article 136, paragraph 3 of the Constitution of Weimar according to which no one can be obligated to reveal his or her affiliation to a religious group. This constitutional provision does not only protect the individual versus state authorities, but also in relation to other individuals. Hence, it is consented that this question would violate the candidate's privacy and is therefore to be considered as unlawful in principle.[83] The candidate has the right not to answer or to give a wrong answer to the question ("right to lie"). The employer is not entitled to void the employment contract for willful deceit according to section 123, paragraph 1 BGB or for error (section 119, paragraph 2 BGB) after discovering that the worker has given a wrong answer to his question. In addition, also sections 1 and 7 AGG exclude questions from the employer on the religious orientation of candidates since that is a forbidden discrimination on the ground of religion or belief unless the religious belief is a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (section 8, paragraph 1 AGG); the anti-discrimination rules also explicitly apply to conditions for access to employment (section 2, paragraph 1, No. 1 AGG).[84]

However, there is one important exception from this principle. The Federal Constitutional Court considers church tax law rules constitutional [*Kirchensteuergesetz*], in constant jurisdiction, demanding from the employer to ask his workers about their affiliation to a religious society, in order to pay the workers' church tax in case they are affiliated to a religious society in the legal form of a statutory corporation under article 137, paragraph 5 of the Constitution of Weimar.[85] Thus, the right not to reveal an affiliation to a religious group does not exist for a large number of workers, in particular those who belong to the Roman Catholic or to one of the Protestant churches. Whether this jurisdiction is in line with the prohibition of discriminations on the ground of religious belief under the Directive 2000/78/CE remains to be seen.

83. ErfK/*Preis*, *supra* note 45, ¶ 274.

84. *See also* Grabau, *supra* note 46, at 1260, arguing with the constitutional principle of equal treatment (article 3 *GG*).

85. BVerfG, Feb. 17, 1977, 1 BvR 33/76 , BVerfGE 103–5 (F.R.G.); BVerfG, Oct. 25, 1977, 1 BvR 323/75, 46 BVerfGE 266 (F.R.G.); BVerfG, Oct. 23, 1978, 1 BvR 439/75, 49 BVerfGE 375–77 (F.R.G.); BVerfG, May 25, 2001, 1 BvR 2253/00, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 909 (2001). *See also* BFH July 4, 1975, VI R 173/72, 116 Bundesfinanzhof [BFHE] 485 (F.R.G.). For a critique of these decisions, see Johannes Wasmuth & Gernot Schiller, *Verfassungsrechtliche Problematik der Inpflichtnahme von Arbeitnehmern und Arbeitgebern beim Kirchlohnsteuereinzug*, NVwZ 852–59 (2001); Roman F. Adam, *Religionsfreiheit im Arbeitsrecht*, NZA 1375, 1379–80 (2003). For the constitutionality of the Church tax Acts, see Hans Ulrich Anke & Diana Zacharias, *Das Kirchenlohnsteuereinzugsverfahren aus der Sicht des Verfassungsrechts*, DÖV 140–47 (2003).

B. The Loyalty Duty of Workers in Religious Societies

It has been shown above that the autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar implies their right to define the content of the loyalty duty their workers are submitted to.[86] This principle has been recently codified in section 9, paragraph 2 AGG. The loyalty duty can even affect their conduct of life beyond the working hours. It has often occupied the labor courts. Just a few significant examples will suffice.

One famous case is the so-called *Rommelfanger* case. In its decision of June 4, 1985, the Federal Constitutional Court had to decide upon the dismissal of a doctor employed by a Catholic hospital who had signed a public statement with other doctors favoring a liberalization of the abortion legislation (section 218 Criminal Code). The doctor was immediately dismissed by the church institution with the argument that the statement was not compatible with the Catholic Church's doctrine on abortion. The Federal Constitutional Court held that it is up to the churches to determine their services according to their dogmata and can claim from their workers the respect of the fundamental rules of this dogma. Thus, behavior such as that of the dismissed doctor, can justify, in principle, a dismissal for disloyalty.

Other examples are the dismissal of a female teacher in a Catholic Church who had sexual relations with the schoolmaster, a monk,[87] and the dismissal of a governess in a Protestant kindergarten who, at the same time, was active in the Universal Church.[88] The Federal Constitutional Court considered the dismissals in both cases as justified by the autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar: The behavior of the dismissed workers in both cases violated their loyalty duty vis-à-vis the Church and thereby damaged the credibility of the Church in the public.

Dismissals of workers for having left the church for which they were working are problematic. According to canon law, church secession is a major misconduct. The Catholic Fundamental Order for the service within the church, in article 5, paragraph 2 provides that workers who have resigned from the church shall no longer be employed. Originally, the Federal Labor Court did not consider church secession of workers as such as a sufficient reason for dismissal: The Court required a gradation

86. *See supra* page 542.

87. *See* BVerfG, Jan. 31, 2001, 1 BvR 619/92, NZA 717 (2001).

88. *See* BVerfG, Mar. 7, 2002, 1 BvR 1962/01, NZA 609 (2002). *See also* the decision of the Federal Labor Court in the same case. BAG, Feb. 21, 2001, 2 AZR 139/00, AP § 611 BGB Kirchendienst, No. 29.

according to the proximity of the work performance to the mission of the church.[89] The Federal Constitutional Court in its important decision of June 4, 1984,[90] however, overruled the Federal Labor Court and held that the autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar guarantees the right of the churches to regulate the church service according to their own religious dogmata and ethics. Violations of these loyalty duties by the worker, such as the resigning from the church, can justify a dismissal. Nonetheless, there are some labor courts that still follow the old jurisdiction of the Federal Labor Court and gradate the loyalty duty according to the worker's proximity to the mission of the church.[91] Recently, the question came up again in a social security context: The Social Security Court of *Rheinland-Pfalz* decided in a ruling of March 30, 2006,[92] that an unemployed housekeeper who was dismissed by a hospital of the Catholic Church for having left the Catholic Church had to accept a freeze of three months for her unemployment benefits because the dismissal was caused by her mistake, i.e., her church secession. Whether this case law can be maintained under the Directive 2000/78/EC and the AGG is more than questionable: The so-called "church clause" of article 4, paragraph 2 only considers those differences of treatment within church institutions not to be discriminatory where, "by reason of the *nature* of these activities or of the *context* in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos." The emphasis of article 4, paragraph 2 is placing on the nature of the work performed by the worker and the context in which it is carried out is rather an argument for a gradation of the loyalty duty of church workers according to the function they are performing. Taking this as a basis, the loyalty duty of a housekeeper obviously cannot be as far-reaching as that of a teacher in a confessional school. It remains to be seen how the ECJ will interpret article 4, paragraph 2 of Directive 2000/78/EC.

C. Religious Symbols at the Workplace

Much more discussed in recent times is the question of the point at which workers can express their religious belief with religious symbols at the workplace. It is obvious that religious symbols at the workplace can

89. *See* BAG, Mar. 4, 1980, AP Art. 140 GG, No. 4; BAG Mar. 23, 1984, AP Art. 140 GG No. 16; BAG Dec. 12, 1984, AP Art. 140 No. 21.

90. 2 BvR 1703, 1718/83, 856/85, 70 BVerfGE 138 (162) (F.R.G.).

91. *See* LAG Rheinland-Pfalz Sept. 30, 2004, 6 Sa 346/04 (juris-doc.) and LAG Brandenburg Nov. 13, 2003, 2 Sa 410/03 (juris-doc.).

92. LSG Rheinland-Pfalz, L 1 AL 162/05, ARBEIT UND RECHT [AuR] 459 (2006). For a critical analysis, see the case note on that decision by Achim Seifert, AuR 450 (2006).

affect the employer's interests as well as interests of colleagues not sharing the same religious belief as the worker who shows symbols of his or her religion during the working time. The range of possible cases is wide: It can be a matter of a crucifix or religious posters hanging in the office of an employee or the wearing of religious garb such as the red garb of the *Baghwan* sect (*Mala*) or a *Sikh* turban during the working hours.[93] The religious symbol *par excellence*, however, that has come up to the German courts is undoubtedly the Muslim headscarf. It is no exaggeration to say that the ongoing public debate on religious freedom in the workplace is focusing on the headscarf problematic. Therefore, it is justified to concentrate on the headscarf cases in the following. As far as the admissibility of the wearing of a Muslim headscarf during the working hours is concerned, it has to be differentiated between the public and the private sector.

1. The Public Sector

As far as the public sector is concerned, the headscarf has been especially problematic in public schools. One case has become particularly famous and has caused a heated public debate of the issue: The so-called *Ludin* case.

a. The Decision of the Federal Constitutional Court

After finishing her traineeship [*Referendariat*] at a state secondary school, a young female teacher demanded from the State of Baden-Württemberg to be employed as a teacher. The State refused to recruit the woman with the argument that she intended to wear a headscarf during working time as an expression of her religious belief: The school administration argued that the headscarf would not be in line with the constitutional principle of religious neutrality of the state. Therefore Mrs. Ludin would not have the necessary eligibility required by article 33, paragraph 2 GG for the access to the public office.[94] In the following time, Mrs. Ludin brought the State of Baden-Württemberg before the administrative court and claimed her eligibility. Her lawsuit was dismissed on all points. The administrative courts mainly held that the constitutional principle of religious neutrality of the state justified the state's denial to hire Mrs. Ludin as a teacher. The wearing of a headscarf as a symbol of her religious belief during the working hours could, according to the

93. LAG Düsseldorf Mar. 22, 1984, 14 Sa 1905/83, DER BETRIEB [DB] 391 (1985).

94. Following article 33, ¶ 2 GG, every German enjoys equal access to public offices according to his eligibility, ability, and qualification.

administrative judges, have a determining religious influence on the pupils.[95]

The Federal Constitutional Court, in an important and highly discussed ruling of September 24, 2003, held that the state school administration was not authorized to forbid the plaintiff to wear the headscarf as a symbol of her religious belief during the school lessons.[96] The Court recognized that the refusal of the school administration to employ Mrs. Ludin restricted her religious freedom under article 4 GG. However, it did recognize that the headscarf can come into conflict with other constitutional rights. The state's duty to provide a public school system (article 7, paragraph 1 GG) that respects the constitutional principle of religious neutrality of the State was at stake in this case: The Court interprets this principle in the sense of open neutrality that tries to resolve arising conflicts in the spirit of tolerance within the public schools. Another conflicting constitutional right is the parents' right under article 6, paragraph 2 GG to educate their children, also implying the right to educate their children in religious matters. Finally, the negative religious freedom of pupils (article 4 GG) who do not belong to Islam was also at stake: As they are submitted to public schooling, they cannot avoid the demonstration of the teacher's religious belief during the school lessons by being absent from them. The Federal Constitutional Court admits that there is no empirical evidence for the assumption that a teacher's wearing of a headscarf while teaching might have a determining influence on the pupils' religious orientation. Nevertheless, it is, according to the Court, not in the competence of the school authorities to resolve these conflicts. As a result of the constitutional principle of the Parliament reservation of material matters with relevance to fundamental rights [*Parlamentsvorbehalt*], the Court held that only the democratic legislature of the state is competent to provide a solution of them. The Federal Constitutional Court therefore considered the school administration's refusal to recruit Mrs. Ludin as violation of her constitutional rights.

However, the Court made clear that the Federal States are free to establish parliamentary acts settling these complex conflicts arising from the presence of religious symbols in the public schools. In doing so, the State legislature has to take into account the fundamental rights of the teacher, the pupils, their parents, and the constitutional principle of religious neutrality of the State. The Federal Constitutional Court gave much discretionary power to the State parliaments in exercising their authority in this context. They can decide on a model that integrates religious diversity into the public school system or they can choose a more laic model placing

95. *See* BVerwG Nov. 23, 2000, 3 C 40/99, NJW 3344 (2000).
96. 2 BvR 1436/02, 108 BVerfGE 282 (F.R.G.).

greater emphasis on the distance between religion and public schools. Thus, the Federal Constitutional Court passed the ball back into the political arena.

b. Adoption of Neutrality Acts in the States

Shortly after this leading decision of the Federal Constitutional Court, several Federal States captured the ball and swiftly established so-called "Neutrality Acts" that explicitly outlaw the wearing of religious garb or of religious symbols and thereby Muslim headscarves for teachers during school lessons [e.g., Baden-Wurttemberg][97] or even in the whole public sector [e.g., Hessen].[98] Other States have not yet adopted Neutrality Acts. From a constitutional point of view, several Neutrality Acts are questionable as far as they explicitly allow reference to "Christian and occidental values" or to the "Christian occidental tradition" in public schools. They clearly express the state legislatures' view that the different non-Christian religions represented in Germany are not on the same level as the Christian churches.

It is obvious that these highly controversial provisions will occupy the Courts for years to come. Until now, the Federal Administrative Court [*Bundesverwaltungsgericht*—abbr. BVerwG] has considered the Neutrality Act of Baden-Württemberg as being in line with the constitutional principle of religious neutrality of the state.[99] The Constitutional Court of Bavaria [*Bayerischer Verfassungsgerichtshof*] held that the Bavarian neutrality provision in article 59, paragraph 2 of the Bavarian Act on Education and Instruction does not violate the constitutional rights of Muslim teachers: According to this provision religious symbols or religious garb worn by teachers during the school lessons are not admissible when they *can* be considered by pupils or by their parents as being contrary to the constitutional order including the values of the Christian-occidental culture.[100] As far as the access to the compulsory school traineeship [*Referendariat*] is concerned, the Federal Administrative Court softened the effect of these Neutrality Acts: In a ruling of June 26, 2008, the Court held that a general exclusion of applicants refusing to abstain from wearing religious symbols during school lessons is illegal since this would equal a

97. *Cf.* the new section 38, ¶ 2 Act on public schools of April 1, 2004 (OJ of the State of *Baden-Württemberg* 2004, p. 178).

98. *See* section 68, ¶ 2 of the State Act on public career servants [Hessisches Beamtengesetz] from Oct. 21, 2004 (OJ of the State of Hessen, Part I, p. 306).

99. BVerwG, June 24, 2004, 2 C 45.03, 121 BVerwGE 140. The decision has been highly criticized. *See* CZERMAK, *supra* note 22, ¶ 314.

100. Bayerischer Verfassungsgerichtshof [BV] [Constitutional Court of Bavaria] Jan. 15, 2007, Vf. 11-VII-05 (F.R.G.).

general prohibition to work as a school teacher; it has to be taken into account that private schools normally only recruit teachers who have passed the traineeship within the public school service.[101]

Although different models exist in the Federal States, one overarching tendency can be identified. With the exception of the Neutrality Act of the State of *Hessen*, which bans religious symbols from the whole public sector, the majority of the rules are trying to limit the restrictions of religious freedom of workers and civil servants to the cases in which state neutrality really might be affected, such as teaching in public schools. Nonetheless, it is highly questionable whether the reference made in several of these Neutrality Acts to the "Christian occidental tradition" complies with the Directive 2000/78/EC. As the Directive also applies to public sector employment relationships (Article 3, paragraph 1), all questions regarding the expression of religious belief at the workplace raised in the Member States now have to be reconsidered in the light of its provisions. It is obvious that a ban of the Muslim headscarf from public schools or even from the public sector, while Christian symbols in the school are tolerated, puts Muslim workers at a particular disadvantage compared with their Christian colleagues. The Neutrality Acts thereby constitute an indirect discrimination on the ground of religion. They are only admissible, for example, when the apparently neutral criterion or provision putting Muslim workers at a particular disadvantage compared with workers of other religious beliefs is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (section 8, paragraph 1 AGG). Indeed, the safeguard of state neutrality might be such a legitimate aim justifying the exclusion of religious symbols in public service. However, the question has to be raised whether these state acts are really necessary to achieve state neutrality.

2. The Private Sector

In the private sector, however, the interests at stake are others on the employers' side than in the public sector. Here, instead of the constitutional neutrality duty of the state, the employer's constitutional guarantee of free enterprise has to be taken into consideration.

The leading case for the private sector is the "headscarf" decision of the Federal Labor Court of October 10, 2002.[102] A saleswoman employed

101. BVerwG June 26, 2008, 2 C 22/07, NJW 3654 (2008).

102. BAG Oct. 10, 2002, 2 AZR 472/01, NJW 1685–88 (2003). For a more in-depth analysis of this important "headscarf-decision" of the Federal Labour Court, see Achim Seifert, Federal Labor Court strengthens religious freedom at the workplace, 4 GERMAN L.J. 559 (June 2003), *available at* http://www.germanlawjournal.de/article.php?id=280. *See also* Achim Seifert, Case Note on the Federal Labor Court's decision of October 10, 2002, 23 INT'L LAB. L. REP. 111 (2004).

in a big department store in a small town, upon returning from her parental leave, informed the employer that she had changed her religious belief and that from now on she intended to wear a Muslim headscarf during the working hours as an expression of her religious belief. As the employer feared that his customers, who in their majority hold "rural and conservative views," would not tolerate the headscarf, he dismissed the saleswoman. The resulting lawsuit forced the Federal Labor Court to balance the worker's constitutionally-guaranteed religious freedom and the employers' constitutional freedom of enterprise. The judges argued that the employer is obliged to discover by trial whether the worker's wearing of a headscarf eventually causes the kind of problems with colleagues or with customers' preferences that the employer anticipated. As a result, the employer has the contractual duty to figure out the actual limits of customers' tolerance of religious diversity in his workplace; mere allegations of contradicting customers' preferences are not taken into account by the Court. If customers indeed do not tolerate the saleswoman's headscarf, the employer needs to try to solve the problem in another way than by dismissing the worker. A dismissal is only justified as a last resort. The Court, consequently, aimed at protecting a maximum of religious freedom in the workplace and considered the dismissal as void.

Since the "headscarf decision" of the Federal Labor Court in 2002, the legal environment has changed considerably. Now the problematic of religious symbols at the workplace has to be reconsidered under the provisions of the new anti-discrimination act, transposing Directive 2000/78/EC in German law. Employers can only prohibit the presence of religious symbols such as the Muslim headscarf at the workplace when their directions are not directly or indirectly discriminating against workers on the ground of their religious belief. The new legislation will even strengthen the worker's position: In most cases, the general prohibition of the headscarf during the working hours (e.g., by neutrally formulated company dress codes) will be an indirect discrimination on the ground of religious belief. Furthermore, workers are now benefitting from a shift of the burden of proof, when they consider themselves victims of discriminations and establish facts from which it may be presumed that there has been a discrimination (article 10, paragraph 1 of the Directive 2000/78/CE, section 22 *AGG*). It is obvious that this new legal framework also strengthens the position of workers as far as other religious symbols at the workplace are concerned.

D. Conflicts Between Religious Freedom and the Duty to Work

Another area of conflict discussed in German labor law is how to reconcile the religious freedom of workers with work schedules in companies. The exercise of certain religious duties can conflict with the work schedule determined by the employer.

1. Day of Rest and Religious Holidays

The working calendar in Western countries typically privileges Christian workers. The weekly work schedule in which Sunday is *the* day of rest (article 139, Constitution of Weimar),[103] obviously disadvantages Muslims who consider Friday a day of rest or Jews who celebrate the Sabbath on Saturday. The same applies to the legally recognized religious holidays. The different Holidays Acts [*Feiertagsgesetze*] of the Federal States almost all recognize only Christian holidays.

a. Day of Rest

The respect of a day of rest required by religious rules can be very important for persons who aim to respect the rules of their religion. The Federal Administrative Court, for instance, ruled in the early 1970s that parents might be entitled to claim an exemption of their children from the compulsory school attendance on Saturdays when they belong to a religious group respecting the biblical command to sanctify the Sabbath.[104]

As far as the employment relationship is concerned, of course, there is no general contractual duty of the employer to respect the religious beliefs of his workers and to determine individually the day of rest according to the religious belief of each worker. Such far-reaching religious tolerance would cause extremely complex problems for companies to reconcile the different interests within their workforce when determining the work schedule. Notwithstanding this, the employer as obligee has the general duty resulting from section 241, paragraph 2 BGB, to be considerate of the rights and interests of the worker as an obligor: This means that he has to take into account the fundamental rights of the workers such as his religious freedom. The Regional Labor Court of Schleswig-Holstein, in a ruling of June 22, 2005, has recognized this principle and held that a worker belonging to the Seventh-day Adventist Church can be entitled to refuse work on Saturday for religious reasons, unless the employer can invoke

103. For further details see *supra* page 539.

104. BVerwG Apr. 17, 1973, VII C 38.70, 42 BVerwGE 128 (F.R.G.); CZERMAK, *supra* note 22, ¶ 262.

operational requirements in his favor; thus, the labor courts have to decide on a case-by-case basis.[105] In deciding that way, the Regional Labor Court of Schleswig-Holstein has just applied the principles of the Federal Labor Courts "headscarf decision" of October 10, 2002.[106]

Regarding the job placement service of the Federal Employment Agency [*Bundesagentur für Arbeit*], the Federal Social Security Court [*Bundessozialgericht*—abbr. BSG] has ruled that the Agency is not allowed to penalize an unemployed worker (belonging to the Seventh-day Adventist Church) who refused a workplace because the work would not allow him or her to respect Saturday as a day of rest.[107]

b. Religious Holidays

As far as religious holidays that are not legally recognized are concerned, there is no uniform solution provided by the law. Most of the state acts on holidays [*Feiertagsgesetze*] concretize the principle enshrined in section 275, paragraph 3 *BGB*, according to which the worker can refuse to perform the work if the performance cannot be reasonably required of the employer, and oblige employers to give their workers belonging to a church or to a religious society the opportunity to go to the service during a church holiday that is not legally recognized. However, the majority of these state regulations only privilege workers who belong to a recognized religious society under article 137, paragraph 5 of the Constitution of Weimar, i.e., the Roman Catholic Church or the Protestant Church.[108] Only the Holiday Act of North-Rhine Westphalia[109] and that of Bavaria extend this right to attend worships during the working hours to certain Jewish holidays (Yom Kippur and Rosh Hashanah). It is highly questionable whether this limitation to worship of recognized religious societies is in line with the prohibition of discrimination on the ground of religion and belief under Directive 2000/78/EC: After all, workers who do not belong to a religious society under article 137, paragraph 5 of the Constitution of Weimar are put to a particular disadvantage compared to their Catholic or Protestant colleagues in respect of the services on religious holidays that are not legally recognized.

It is interesting to note that section 7, No. 7 of the Regulation on Special Leave for Civil Servants of the Federal State [*Verordnung über den Sonderurlaub für Bundesbeamtinnen, Bundesbeamte, Richter und*

105. LAG Schleswig-Holstein, 4 Sa 120/05 (not published).
106. *See supra* page 561, with further references.
107. BSG Dec. 10, 1980, 7 Rar 93/79, NJW 1526 (1981).
108. *E.g.*, section 4, ¶ 1 Holiday Act of the State of Hessen.
109. Section 9 Holiday Act of North-Rhine Wesphalia.

Richterinnen des Bundes—abbr. SUrlV] goes even further and entitles civil servants of the federal state to a remunerated special leave of three working days (and in special cases even up to five days per year) in order to participate as a member at the meetings of committees of a church or another religious society having the status of a statutory corporation unless there are conflicting operational requirements; the same applies to the participation in Congresses of the Catholic or Protestant Church [*Kirchentag*]. The question has not been raised up to now, but in my view these provisions for civil servants have to be read in light of the rules of the anti-discrimination law and have therefore to be extended to members of the religious communities.[110]

As to the worker's remuneration for the period of his or her absence, it is not clear whether workers who exercise their religious freedom by attending worship on a religious holiday can claim a salary from the employer for that time. According to section 2, paragraph 1 of the Act on the maintenance of the remuneration pay [*Entgeltfortzahlungsgesetz*—abbr. EFZG], the worker can only claim the salary for holidays that are legally recognized. Hence, there is no maintenance of payment in cases where the religious holidays are not legally recognized.[111] As far as section 616 BGB is concerned, the situation is even more vague. Although it is recognized that religious duties can be a reason in the worker's person hindering their work performance under this statutory provision,[112] one Court decision posits that section 2 EFZG contains an exhaustive regulation of the salary payment in cases of (religious) holidays.[113] The affected workers, therefore, have to take a leave without remuneration, or take vacations according to the Federal Act on Vacations [*Bundesurlaubsgesetz*] in order to fulfill their religious duties.

The future will show whether this legal situation is in line with the provision of the AGG and with Directive 2000/78/CE. So far, the debate on a non-discriminatory determination of the workers' day of rest and of religious holidays is only beginning in Germany.

2. Working Time Interruption for Prayers

Another conflict between the working time schedule and religious freedom of workers can arise from Muslim workers' demands to interrupt

110. The Federal Administrative Court, however, applies the provision strictly *à la lettre* and does not concede the right to a special leave to civil servants who are members of a religious community that is not recognized as a statutory corporation. *See* BVerwG Nov. 13, 1984, 2 C 74/81, NVwZ 699 (1987).

111. *Martin Henssler*, *in* MÜNCHENER KOMMENTAR DES BÜRGERLICHEN GESETZBUCHS § 616, ¶ 46 (Franz Jürgen Säcker & Roland Rixecker eds., 5th ed. 2009).

112. *Id.* at § 616, ¶ 45 with further references.

113. In this sense LAG Düsseldorf Feb. 14, 1963, 7 Sa 581/62, DB 522 (1963).

the work for a prayer during the working time. In 2002, the Labor Court of Appeal of Hamm had to decide such a case, but only in a procedure that concerned a demand for an interlocutory injunction:[114] The plaintiff requested from his employer a working time interruption of three minutes between 6 and 8 a.m. for his morning prayer but the employer refused. Nonetheless, the plaintiff made his prayer without the authorization of his superior and received several warning notices by the employer. In the subsequent lawsuit, he demanded that the employer remove the warning notices. The Labor Court of Appeal of Hamm dismissed the lawsuit with the argument that the plaintiff could not claim the demanded working time interruptions for his morning prayer from the employer. The Court conceded that the prayer is covered by the constitutional right of religious freedom (article 4 GG) and that, in principle, the employer has the duty to take this right into consideration. However, the plaintiff could not demonstrate that the protection of his religious freedom prevails over operational requirements protected by the employer's right of free enterprise (article 12, paragraph 1, article 14 GG).

Until now, the ruling of the Labor Court of Appeal of Hamm is the only labor court decision dealing with this problem. Although this problem might occur in many companies, employers have not faced it by creating works agreements with their works councils or company agreements with a trade union. However, it can be expected that the question will continue to occupy the labor courts in the future.

3. Work Performance and the Respect of Ramadan

A specific problem for Muslim workers can be the respect of the fasting month of Ramadan. The strict observance of these religious rules might conflict with the duty to work and might make necessary work interruptions for Muslim workers or their temporary transfer to other workplaces. So far, the labor courts have not had to decide upon the employer's duty to be considerate of these religious interests of workers. There is no doubt that the employer has the duty, resulting from section 241, paragraph 2 BGB in conjunction with article 4 GG to take into consideration these religious duties of Muslim workers as far as operational requirements are not conflicting. In practice, these problems seem to be settled in the companies in an uncomplicated way by giving vacations to these workers or by using the flexibility of working time schemes existing in many companies.

114. LAG Hamm Jan. 18, 2002, 5 Sa 1782/01, NJW 1970 (2002).

V. CONCLUSIONS

As has been pointed out, religious expression in the workplace is an increasingly relevant issue in German labor law. At the beginning, it was basically an issue that concerned the balancing of worker protection by state labor law and the constitutional autonomy of religious societies under article 137, paragraph 3 of the Constitution of Weimar privileging in particular the Christian churches; as a result, a specific "labor law of Churches" [*Kirchenarbeitsrecht*] has been established recognizing a far-reaching loyalty duty of workers employed in church institutions. However, the increasing relevance of non-Christian religions in German society, in particular the growing presence of the Islam, going back to a heavy immigration during the post-war decades, has shifted the attention to how labor law has to cope with the challenges arising from this social process. In this respect, religious diversity and immigration are strongly linked issues in the German debate.

So far, German law has not developed a coherent concept coping with the various conflicts that arise nowadays from religious expression in the workplace and equally recognizing the different religious communities existing in Germany. The overall picture is rather contradictory. There is still preferential treatment of the traditionally predominant Christian churches. One important example is the specific labor law of the churches that has "clericalized" the employment relationships of workers in church institutions to a certain extent: The core element is their right to determine the character of the service in the churches according to their dogmata and to define accordingly the loyalty duty of their workers (section 9 AGG). In spite of the religiously neutral character of this provision, non-Christian communities, such as the Islam will have difficulties obtaining this status because of their believers' missing affiliation required by that article. Another example is the way various Federal States are presently dealing with the headscarf problem in the public sector: Although religious neutrality is recognized as a fundamental constitutional principle, the so-called neutrality acts of some of the Federal States emphasize the Christian and occidental tradition as being admitted to the public sphere.

On the other hand, there are serious attempts in the jurisdiction of the labor courts to also protect religious freedom of workers belonging to non-Christian religious communities. The Federal Labor Court's headscarf decision of 2002 is one definitive example in this context. Perhaps this process towards religious pluralism based on an equal recognition of the existing religions will be hastened by one "dark horse" that should not be under-estimated in this context: The impact of European anti-discrimination law on German labor law. It remains to be seen to what extent the future

jurisdiction of the ECJ regarding the prohibition of discriminations on the ground of religious belief under Directive 2000/78/EC will have an impact on religious expression at the workplace in German law.