

The Constitutionalisation of Secularism in Germany

**Migration, religion and secularism
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1. Modern statehood and the concept of secularisation

a) Secularisation and historical complexity

The creation of modern statehood has often been described as an evolving process marked by different distinguishing properties, most importantly perhaps, the development of the sovereignty of the state, the depersonalisation of public powers and the establishment of a rule of law. Another essential feature of this process is – in the eyes of many commentators – the secularisation of modern statehood. From this perspective, the modern state had to liberate itself from its religious content and foundations to become part of the political culture of modernity.

This classical thesis is contentious. Some studies paint a more differentiated picture drawing attention to phenomena of the historical evolution that do not fit neatly into a linear development of secularisation. The fact of the confessionalisation during the reformation of evolving modern states is underlined in this context or the persisting religious determination of many states in the modern epoch.

There is certainly much to be said for a more complex picture of the history of modern statehood than presented in some classical accounts of the development of modern statehood. Notwithstanding these necessary differentiations, one can state with some self-confidence that at least in the 20th century the reality of modern states is very much shaped by the idea of secular statehood. Whatever the history might have been – for many modern democracies secularism forms in one way or the other part of their normative identity. Modern democracies conceptualise themselves not as religious communities of one or the other kind but as human orders with secular tasks. This normative self-understanding of societies is often expressed in the constitution as the legal tool that modernity has developed to establish the normative basic order of a society.

b) The sociology of religious power

The secularity of modern statehood has two mayor dimensions beyond the immediate constitutional framework. The first is empirical. It concerns social facts. More precisely, this empirical dimension is formed by the social distribution of religiously based power in a society. Religions are not just internal systems of belief and orientation but are often organised social entities that act as mayor social actors. This is certainly true for the Christian churches in Europe and to a certain degree, too, for other religious communities. Secular statehood is, therefore, determined in its scope, character and limits by the social position of the organised religious communities in a given society. No concept of secularism can be complete without a sociology of religious power in a community. The secularism of modern states means in consequence that, at least to a certain degree, the formation and the exercise of political power is not only normatively conceptualized as being independent from religious actors but is in social reality free from such influences – be it by formal mechanisms of influence or informal channels of determining the course of state action..

c) The secularisation of legitimacy

The second dimension is connected with the problem of the legitimacy of the modern state. The theories dealing with this problem are manifold. For the European context the tradition formulating the idea of two realms, the one forming the secular order of the state, the other the spiritual order of believers is of much importance. The idea with the well known

evangelical inspiration has been developed by Augustine through his differentiation of a *civitas dei*, a spiritual community of the Christians and a *civitas terrena*, the community of corrupted mankind following the dictates of desires. The second is not to be confused with the state orders. Quite to the contrary, the order of the state is legitimized by its function to create peace in a world tormented by sin and desires and thus an *aliud* both to the *civitas dei* and the *civitas terrena*. The believers have to use – according to Augustine - the “Babylonian peace” created by the secular order to pursue their individual path to redemption. The commands of God take prerogative in case of conflict over the secular laws. Augustine formed certainly a inspiration for the claims of the rising papacy of its supremacy over secular political powers. This theory created nevertheless a relative independence of the state from the order of spiritual salvation and dispensation – for the Christian tradition a decisive move, not only because of the tactical advantage inspiring Augustine’s endeavours, namely to account for the fall of Rome despite Christianity having become the state religion of the Empire shortly before this catastrophe by dissociating any secular state from a direct connection to the history of salvation

Luther was not only inspired in his theory of justification by Augustine’s theology. He echoed Augustinian ideas about the different roles of the secular and the spiritual order in his – shifting – conception of the relation of Christianity and the state. Luther is often credited with deepening the idea of the independence of the state from religion. This is to a certain degree true, as these orders fulfil in his theory a function of preserving peace and order comparable to that assigned to them by Augustine. The freedom of a Christian is thus something that is mainly realised beyond these mundane spheres in the inner realm of belief. This conception is partly responsible for the often criticised passive and authority-orientated strand in Luther’s theory of society and the state. During the process of reformation, the secular state gained, however, some functions that were more directly connected with the achievement of salvation, especially by dealing with the schisms in the protestant confessions and with other beliefs, more precisely their suppression, contrary to Luther’s earlier impressive defence of religious tolerance. In any case, the state gained both in the Augustinian and Lutheran conception only a relative independence from religious foundations as the order as a whole was still one determined by God’s will and command.

With the new scientific outlook, the rise of the age of critical reflection, the secularisation of legitimacy covered new ground. The justification of state orders was derived without any reference to a order of salvation. There are many variants, predecessors, and main

contributors to this process, in natural law theory, in the theories of social contract, in the Enlightenment from Bayle's then shocking argument for the possibility of moral and political order even among atheists to Kant's foundation of autonomous morality as the bases of the legitimacy of the state. With these intellectual and cultural movements, the state legitimacy was finally secularised.

One should not underestimate the liberating importance of this development. It was a central step toward the rationalisation and – most importantly – *humanisation of state legitimacy*. States have – given this step – justify their existence not as regards to some transcendental order of salvation and its imperatives but as regards to the needs, interests and moral values of justice of human beings. The secularisation of state legitimacy is thus not only a negative development depriving the state order from a characteristic ascribed to it in the past but a process toward a distinguished positive end: the self-vindication of humankind as the last source of justifications of state power.

2. Secularism and the neutrality of the state

a) Models of the neutrality of the state

The secularity of the state manifests itself in the constitution of the state order, by its independence from religious forces in society and its legitimacy without religious sources. In the practise of social life, it is connected to the concept of the neutrality of the state. If the state is secular, the consequence of this property is that the state does not foster any single religious creed, even less so at the expense of others. The state action withdraws in principle from the sphere of religion and leaves this sphere to itself - for prospering or decaying. This neutrality has, however, important and evident limits. The religious exercise has to respect fundamental social norms and individual rights – the neutral state is thus, not different to other areas neutral only within this sphere which is not always easy to circumscribe exactly.

The neutrality of the state can take different forms. With much generalisation, one can distinguish three kinds of neutrality pursued today. There is the laicist model, that creates a strict differentiation between state and religion. This strict separation manifests itself for example in the interdiction of the presence of religious symbols in the public sphere. Officials

or even private persons in public institutions are not allowed to manifest their beliefs while being in office or in the public institutions. France is taken often as an example for a such a laicist conception of statehood, though many qualifications certainly have to be made.

A different approach follows a liberal paths. Here the neutrality of the state is mainly interpreted as non-intervention with private rights and liberties. The presence of religious symbols in the public sphere is therefore not taken as much of a problem, as the manifestation of belief is taken to be a purely personal matter. The neutrality of the state is taken to be preserved as long as the state does not actively foster certain beliefs. It is not violated if the state refrains from blocking their manifestation in the public sphere. As an example for this approach England is often named.

A third model somehow situated between these two is Germany, to which the attention is turned now.

b) Secularism and the neutrality of the state in Germany

aa) Secularism and the public sphere

Germany is from a standard perspective a secular society. Religion does not play openly a political role, though the religious communities have much informal power through various channels of influencing politics and lobbying for certain matters. This is certainly true for the Christian Churches with their 50 million members. It is also true for other religious communities, most importantly for the Jewish community, whose voice is widely heard in Germany given the racist crimes of the past.

In social life, religion is only to a limited degree a matter of much debate. Most issues, with notable exceptions like abortion or bioethics, are dealt with without reference to religious instances or commands. The same is true for scientific questions like evolution. Discussions like, for example, in the US about creationism do not arise much attention if they are taking place at all. The public sphere in Germany is thus to a considerable degree a secularised forum of debate.

bb) Secularism and the constitutional order

The constitutional order is secular as well. The preamble of the Grundgesetz (Basic Law), contains a reference to God. This reference is widely interpreted as not referring to any particular God, most importantly not to the Christian God alone. This reference plays in the doctrinal unfolding of the constitutional order no important role.

Various norms are of significance for the constitutional secularism of Germany and the concept of the neutrality of the state. Art. 4.1 and 4.2 Grundgesetz established the freedom of religion. This norm has been interpreted widely by the Federal German Constitutional Court giving it much weight in the order of fundamental rights in Germany. A religion is taken to be any system of belief with some form of reference to a transcendental order establishing a doctrine of sense of the world and humankind's position in it. This definition extends not only to established religions but to newly created as well irrespective of the size and social importance of this religion. The court follows – here as in other matters – an individualistic conception of religion, not surprisingly so, as it regards the freedom of religion intrinsically connected with the supreme norm of the German constitutional order, the dignity of human beings.

The protection of freedom of religion extends not only to the having of a religious belief but to the exercise of it as well. This right can only be limited with reference to other constitutional values. As in other jurisdictions hard questions arise in this context - mostly connected with the limits of the possible reasonable accommodation of religious practises.

The freedom of religion is buttressed by norms outlawing the discrimination of human beings on the ground of certain religions, most importantly in Art. 3 Grundgesetz but in more specialised contexts as well. An example is the equal access to public service irrespective of religion provided for in Art. 33 Grundgesetz.

Finally, the Grundgesetz has incorporated some norms of the Constitution of Weimar. This is so, because these norms of the Constitution of Weimar formulate a compromise between the newly founded republic and the Christian churches after the reformation of the German public order after the first World War. During the process of framing the Grundgesetz, the deliberations lead to no new consensus, the old regulations were therefore reincorporated. This process of compromise shows neatly by its very existence that secularism

is nothing naturally and consensually being established in the modern world but to the contrary that it is the product of social and political struggles of the most profound nature.

These norms of the constitutional compromise state that there is no state church in Germany. They create in addition the preconditions for some peculiarities of Germany's constitutional regime regulating the legal status of religious communities. Some communities can attain the status of incorporations of public law, thus forming principally a public body, but outside the state and without its jurisdiction. The most important consequence of this regulation is the collection of taxes through the financial authorities of the state for the Christian Churches that enjoy this special status. This lays the financial foundation for the considerable role the Churches play in education, healthcare, and social services in general in Germany, though these services are financed in some cases through other sources as well, for example the public (and private) health insurance systems. The existence and content of this peculiar legal status is the object of some debate. The Federal German Constitutional Court has extended the privilege of this status in principal to all religious communities provided that they fulfil certain precondition, most importantly do not engage in activities contrary to the constitutional order of Germany. The question is e.g. relevant for the legal status of Jehowa's witnesses.

cc) The open neutrality of the state

The Federal German Constitutional Court has developed from the aforementioned norms the idea of the so called "open neutrality of the state". The idea behind this conception is, that Germany is not a laicist state. The religions are supposed to have a positive role not only in private, but in public live as well. The neutrality and thus the secularity of the state manifests itself not by strictly banning the presence of religion in the public sphere but by fostering or discriminating non of them.

This conception has been particularly important for matters of education, e.g. school prayers or Christian public schools. The concept was important, too, in the landmark case of the Crucifix-decision of the Federal German Constitutional Court outlawing the installation of Crucifixes on the walls of public schools. This judgement caused one of the most intense debates in Germany's constitutional history as it was seen by many Christians as an illegitimate judicial attack on the cultural and religious foundations of Germany.

This conception is, of course, also one of the important issues in the headscarf debate in Germany. Here Germany follows a twisted course between a laicist model, a liberal approach and the attempt to differentiate between various religions. One point is not contentious: Pupils are generally allowed to wear headscarves and other religious symbols. This right is not a matter of debate as it is taken as a personal affair whether a private person wants to wear such symbols or not. The question thus arises only as regards to public employees so far mostly as regards to teachers. The Federal Constitutional Court has ruled on this matter in another important decision. As a result it allowed in principle both the ban of religious symbols and its presence in schools. It ruled that it is for the democratically legitimised legislator to decide whether or not the religious symbols are allowed in schools. The various German *Länder* that have the competence in educational matters do not follow a homogenous course. Some allow the presence of religious symbols, others do not. The bans are often selectively drafted to ban headscarves but not other religious symbols like nuns' habits or kippas. There is much debate whether or not this is permissible. Some political actors and some representatives of the Christian Churches argue that the differentiation is necessary as the headscarf stands for the suppression of women, theocracy and the contempt of human rights whereas the Christian religious symbols have no such connotation or are, to the contrary, symbols for the equality of humans and their dignity.

This differentiation, however, seems hardly reconcilable with the neutrality of the state that forbids such difference in treatment of various religions. The jurisdiction of the Federal Constitutional Court is unequivocal in this respect as well. It demands strict equal treatment of all religions. There is therefore much reason to believe that such differentiations in the laws of some *Länder* are unconstitutional.

c) The case for a liberal approach

aa) Humanistic individualism and secularism

The conception of the open neutrality of the state was without doubt initially partly inspired by the desire to accommodate the persisting influence of the Christian Churches in German public life. It has, however, many merits that make it an interesting conception from the standpoint of other religions and even a radical secular, agnostic or atheistic standpoint as

well. The reason for this is that it formulates a liberal doctrine of the neutrality of the state and secularism in general. This doctrine has many merits and is perhaps best suited to deal with the increasing religious pluralism of European societies, not the least created through immigration of various kinds and motives. The following remarks will try to indicate some reasons for this perception.

Religions have many features. One of the most distinguishing is their existential importance. Religions are not about some minor issue in human lives. They are about how human beings interpret their bewildering existence in the shadow of conscious mortality, with the need and responsibility for ethical acting, under personal and historical circumstances that are often of a kind that some source of comfort, of assurance of sense is needed as a shield against desperation. Religions have enormous emotional power. They can be and were among the most destructive forces in human history, have inspired some of the most impressive ethical deeds and magnificent cultural achievements in art.

There is no reason to believe that religions will in the long run in a necessary process of secularisation disappear from the scenes of human life. It is true that there is a sociological correlation between indicators of social and economic development of a society and its level of secularism. This correlation holds for most states, with the notable exception of the USA.

But it would be wrong to conclude that this means inevitable death sentence of religions in the epochs to come. This is not only true because of the selective prospects of development for many countries given the current course of affairs on a global scale or the renaissance of political religiosity in various forms which is in no way limited to Islamism. It is also true for the secular societies as well because of the persisting human condition that throughout history created the need for religious orientation in the many shapes religions took in the past. It is thus not at all surprising, that religions continue to play an important role though often in private life. Even new forms of spirituality are developed and pursued. Given some new ethical questions like those posed by bioethics for many ethical yardsticks continue to be dependent on religious instances. Whether one agrees with these developments or not: There is good reason to assume that the reality of most societies will be partly determined by the presence of various religions as a central aspect of life.

Given these facts, a liberal approach to these matters based on a religiously open-minded secularism is a path worth pursuing. To avoid misunderstandings: This liberal approach has merits not because of the intrinsic transcendental value of the religions

concerned and not because their contribution to the salvation of human beings but because of the role religions play in the lives of human beings. The liberal approach is justified not because of respect for religions as such but because of respect of the believers as human beings and their choices of life.

Because this liberal humanism forms the basis of this approach, it is preferable not only from a religious standpoint that applauds any extension of its room for action but from an agnostic or atheist standpoint as well. This is so, because at the core of the argument is not the acceptance of the prospering of religion as an intrinsic value - religions might be legitimately criticised or even abhorred as intellectually unacceptable or ethically dubious tools to manufacture metaphysical peace where only unrest or rebellion is warranted. At the core is, to the contrary the quite different consideration that human beings with their manifold needs and wishes have to be respected whether one agrees with the content of these modes of life or not for their humanity's sake. One cannot deny this respect in the case of a matter of such existential importance like religion just because of a critical distance to this matter if the concept of respect for human beings as such is supposed to have any real and not only rhetorical sense.

There might be exceptional social and historical circumstance where this case for liberal secularism is not convincing, namely in the case of religious civil war. In this extreme situation some kind of laicism might be the only solution as any presence of religious symbols stirs more fighting and strife. This situation is, however, not the situation the European and many other states, where these questions arise. This should not be forgotten in the discussion about secularism, liberalism and its limits.

bb) Liberal humanism and the presence of religions in the public sphere

The consequences of this liberal approach are manifold. There is certainly no contradiction of this standpoint and the need to ban any state action fostering particular religions. The reason for this is that as far as state action as such is concerned the premise of the argument is not fulfilled as no questions of the self-realisation of individuals arise. A decision like the Crucifix-decision banning the presence of Crucifixes in schools is in consequence very much justified from this point of view. The state has to refrain from such visible identification with a particular religion. If it does not it ceases to be a neutral and

secular state. The informal contributions to religions by state action can also be criticised from this point of view.

Clearly, however, given this individualistic approach there is no need to ban the presence of religious manifestations by action or symbols from the public sphere as such if the manifestations or symbols are identifiable as expressions of individuals. Certainly in Germany, but perhaps in other states, too, there is a tendency to identify too quickly public servants in all respects of their behaviour with the state. There is no reason apart from some – in many aspects quite illiberal – traditions. There is a big difference between a Crucifix installed by the school authority at the classroom wall and a teacher wearing a headscarf, to take just a very pertinent example. There is no reason to take the headscarf as symbol the state as such identifies with. If more religious plurality would be the norm this would be obvious.

If a German citizen would meet a police woman with a headscarf in the morning (as allowed in England), a judge with a turban as being a Sikh (as sitting in the High Court in England) at noon and a teacher with a kippa in the evening at a parents' reunion, it would be farfetched to assume that the German state endorses all of these creeds. To the contrary, the citizen would conclude that the neutral and secular state in Germany endorses none of them but gives individuals space to pursue their mode of living as far as possible.

cc) Limits of liberalism

As in other respects, any form of liberalism has to define its limits. Certainly, the liberal approach to individual manifestations of faith and its accommodation through law has to be aware of this and somehow define the scope of the permissible. These limits have to be developed on a case to case basis as there is no sphere of life that is not potentially affected by manifestations of religion. In the context of these remarks, only some abstract indications are possible, that nevertheless should indicate that there is no reason for fear that the liberal approach jeopardizes the humanistic order it attempts to create by undermining its perseverance against illiberal, even totalitarian threats.

On a very practical level, all kinds of justifications of limitations might arise. A fire fighter will not be able to wear any religiously motivated headgear, to take an example with even some real life importance in some countries. More important are other limits that raise questions of normative limits of an important kind. No religious practise will be allowed from

the most liberal standpoint possible if this practise violates other human beings rights in an unjustifiable manner.

The colliding rights have to be balanced in these situations. It is for example justified to allow a religion to ring their bells on certain occasions during the week, even though some citizens might feel disturbed and would prefer to listen to Shostakovich instead. Other cases are more difficult to decide. The headscarf issue is again a case in point as not only the freedom of religion of the teacher but the rights of the children are concerned as well. One has to investigate carefully whether or not their right to be free from religious indoctrination is violated by the wearing of the headscarf or – the presumably the more appropriate view – whether such a violation can only be constituted only by a certain comportment of a teacher beyond the sheer wearing of the headscarf, e.g. through missionary endeavours.

Some religiously motivated comportment will be evidently not allowable in any case. An example is the wearing of Burqas in the classroom. Here other issues than in the headscarf case arise as the Burqa not only makes personal communication impossible but extinguishes the personality of the teacher as such. This is not reconcilable with the idea of human dignity.

The case law of many jurisdictions have developed quite differentiated yardsticks for many constellations that should be carefully studied to avoid rash and undifferentiated solutions that are prone to become prey of religious prejudice.

4. Religion and the ethical foundations of the modern state

a) The paradox of secularism

There is the view that religions have not much to contribute to modern society. Sometimes, e.g. by Bertrand Russell, it has been argued that religions through the weakening of the forces of reason, limited as they are anyway, the fostering of dogmatism and beliefs not open to critical scrutiny and some concrete content of their doctrines have done more harm than good in human history.

Others take a more positive view. Habermas, for example, has in a recent essay spoken of the post-secular society, referring to the persistent importance of religions in modern

society. He was not endorsing this persistence explicitly and formulated that he lacks – using Weber’s terms – a religious musicality. He argued, however, that in religious creeds cultural resources are embodied that have to and can be translated into the language of values of secular societies.

There is the widespread perception that this more positive analysis is not strong enough, even for the purposes of the project of the secular state. It is maintained that the modern state, based on positive law, normatively rooted in a constitutional regime, and in some way or the other in central aspects based on human rights cannot provide for the cultural basis it is founded on. This basis consist of values that a secular state cannot create itself. These values are unthinkable without a religious foundation, the argument continues. Core values as human dignity and equality, freedom and solidarity are not justifiable without the reference to certain religious traditions, most importantly Christianity. A concrete example for this hidden religious foundation of the values of the secular state is the widely perceived foundation of human dignity in the *imago-dei* conception of the Genesis.

This argument can be called the apparent paradox of the secular state. In its light, the secular state frees itself from religious influences, gains independence and autarky, but realises and embodies in this very development in fact values based on religion itself. The secularism of the modern state is thus its hidden sacralisation. The overcoming of the religious determination of state power turns into the realisation on a more profound level of the religious values the state tries to transcend.

b) The force of secular ethics

This analysis is of much importance. If it is true, a global civil war, cold or hot, between the religions might be regarded as unavoidable. The danger is that from this point of view not every religion is equally capable to generate the values the secular state is founded on. There is a clear prerogative of Christianity in the eyes of some commentators in this respect. Other religions, most notably Islam are supposed to embody no such values.

The answer to this challenge seems to be the old but still true answer of the enlightenment. It is not based on an evaluation of the ethical value of different religions but on the self-confidence of the human ability for practical judgement. Its core is the autonomy of practical insight, its independence of religious ethics. There is no reason to neglect Kant’s

insight, that any ethics has to derive its obliging power from human autonomous judgement alone and not from the authority of religion if it wants to stand the test of critical reflection.

One will not escape this insight by pointing to the religious determination of the apparently secular ethics of enlightened thinkers, say the pietism of Kant. One misses the point of modern ethical reflection if one does not see that a genuine secular ethics has evolved, contentious as its contents and deeper modes of justification might be.

Many contentious issues arise in this context of such secular ethics, as to its concrete content or its epistemological foundations and merits. This secular ethics suffices, however, to provide good arguments for the foundation of liberal constitutional orders, for human solidarity and responsibility on a more than at the moment fashionable and politically popular scale and core human rights that protect the much abused dignity of humankind.

Given this secular ethics of concrete humanism, the apparent paradox of the secular state loses its biting sting. The state is certainly dependent on values it cannot guarantee, on the allegiance of the citizens to democracy, social solidarity and human rights, but these values have their real and safe foundation in a secular ethic and its commands.

There is no reason for contempt for the secular ethics from a religious point of view. If one looks more closely at these ethics it becomes quickly clear that these religious ethics are not a given body of clear doctrines somehow beyond the epistemic insecurities of ethical reflection. To the contrary, religious ethics share the fate of any ethical reflection. They are contentious, unclear and the object of sometimes quite profound change through time. This comes to no surprise. Religious ethics are not less the product of human reflection (though often disguised as sheer application of sacred commands) than the openly human attempts to justify values and norms. The modern Christian ethics is, for example, in many aspects the product of the profound influence of the Enlightenment on Christian reflection.

The secularism of the modern state is thus self-contained. It is not secretly nourished by religious sources beyond itself. The political theology of values is not unavoidable. Its rational alternative is the critical reflection of secular ethics.

This self-contained secularism is not irreconcilable with religious faith. It provides something like the lowest common denominator for human civilisation. Whatever the religious outlook might be, whatever spiritual questions beyond this ethical base line are posed, there is no reason to assume that these spiritual answers will be necessarily answered

in some religions contrary to an ethics of human worth and liberty. There are many developments in religious history that nourish this hope. The door for trans-religious understanding is thus in principle open, though human beings might choose, as often in the past, a different and destructive path.