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WOLFGANG EICHELE
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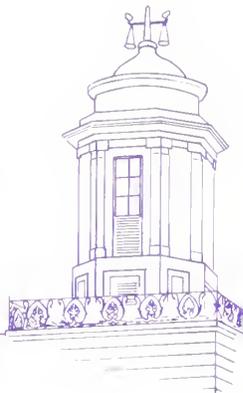
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Wolfgang Eichele

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CHURCH OF SCIENTOLOGY SPECIFICALLY

by

WOLFGANG EICHELE

1. juristisches Staatsexamen, Freie Universitaet Berlin, Germany, 1998

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A Thesis Submitted to the Graduate Faculty
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of the
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MASTER OF LAWS

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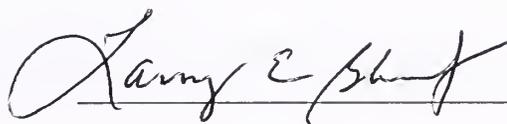
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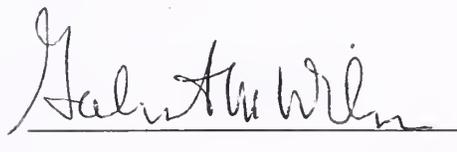
by

Wolfgang Eichele

Approved:

 Date 8/18/00

Major Professor

 Date 8/18/00

Chairman, Reading Committee

Approved:



Graduate Dean

August 21, 2000

Date

To my parents

Karl und Regine Eichele (Koblenz, Germany)

Mark Fagerburg and Julie Grimes (Richmond, Virginia)

Blessed are those who hunger and thirst for righteousness, for they will be filled.

Matthew 5.6

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I would like to thank Professor Blount supporting me as Major Professor

and

Professor Wilner as the Chairman of the Reading Committee

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Chapter 1

Introduction

The notion of Freedom of Religion belongs to the fundamental Rights in the Western Hemisphere. Still in some countries persecution of religious minorities takes place. When it comes to the treatment and acceptance of religious groups, governments and courts argue about the definition of “religion” or a “church”. The intention of this thesis is to provide information about the abstract provisions of Freedom of Religion in Germany and the United States of America. Historical developments and court rulings shall demonstrate that the notion of Religious Freedom is a complex, not a static one in both countries. The main differences between both nations will be provided and will explain why different treatments of religious organizations are possible, using as a paradigm the Church of Scientology.

Scientology is deemed to be a most controversial religious movement in the world today. Critics have called it a “cult, a false religion, a scam to take money from the vulnerable and a belief-system derived from the imagination of its founder, a writer of science fiction tales, L. Ron Hubbard.”¹ It has certainly proven to be the most litigious of religious movements.² The organization has spent millions of dollars aggressively suing

¹ *Scientology and Germany* (visited April 25, 2000) <http://www.germany-info.org/content/np_3k.html>.

² *Scientology and the Courts*, Alphabetical List of Cases (visited April 25, 2000) <<http://mars.superlink.net/user/mgarde/alpha.htm>>.

its critics for defamation and copyright infringement. In particular the Internal Revenue Service of the United States was one of the main opponents for many years.³

However, there is a mounting support for this controversial religion. The Church of Scientology puts a lot of effort into its public relations. Its books, well produced, sold at a reasonable cost and can now be found easily in bookstores. The Hollywood bonus is very supportive as well. The number of famous actors, such as John Travolta, Jenna Elfman and Christie Alley are convinced Scientologists and allege its belief system has turned them into brighter, more charismatic people.⁴

Especially in Germany there has been a lot of trouble around the Church of Scientology. Many courts, including the Federal Labor Court, deny Scientology the status as a church on the ground that Scientology is not a religion. Rather they treat the group as a for-profit company with a strict hierarchy that could threaten democratic society by violating human dignity.⁵ Scientologists, on the other hand, accuse Germany of being intolerant and using Nazi methods to achieve its political goals⁶ by suppressing religious minorities.

Even though the United States grants the Church of Scientology the protection of the First Amendment, and the City of Los Angeles even has named a street the "L. Ron Hubbard Way", after Scientology's founder⁷, there have been some problems regarding

³ *The Shadowy Story Behind Scientology's Tax Exempt Status* (visited March, 28, 2000) <<http://wpxx02.toxi.uni-wuerzburg.de/~cowen/essays/nytimes.html>>.

⁴ L. RON HUBBARD, *SCIENTOLOGY, THE FUNDAMENTALS OF THOUGHT* introduction pages (1988); RON L. HUBBARD, *DIANETICS, THE MODERN SCIENCE OF MENTAL HEALTH* introduction pages (1992).

⁵ See 79 BAGE 319, 349 (1995).

⁶ *Religious Freedom Alert: Germany 1999* (visited April 25, 2000) <<http://germany.freedommag.org/>>; *The Intolerance File* (visited April 25, 2000) <http://scientology.org/p_jpg/scnnews/intolrnc.htm>.

⁷ Michael Browne, *Should Germany stop worrying and love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 IND. INT'L & COMP. L. REV. 155 (1998).

its tax exempt status on the basis of being a non profit organization; and presently a major wrongful death case charged against Scientology in Clearwater, Florida shakes the religious reputation of the Church.⁸

The paper will first give background information about the general development of fundamental rights in both Germany and the United States and specifically the freedom of religion. The analysis will discuss in particular freedom of religion granted by Article 4 of the Basic Law in Germany and the religious clauses of the First Amendment of the American Constitution. In a first conclusion the differences of the interpretations of the religious clauses both in Germany and the United States will be stated. These differences will then be illustrated by a discussion on the Church of Scientology through its basic facts, history, ideas and attitude. The most important German and American court rulings will be provided which confront the issue of whether or not the Church of Scientology is legally defined as a church.

Even though the American courts do not provide a definition of religion, the Internal Revenue Service does. The issue arises whether or not Scientology meets these requirements.

In an excursus the paper examines, whether Scientology theologically is a religion. Finally, there will be a discussion of German constitutional issues regarding the Church of Scientology.

The conclusion states that Germany does not neglect the fundamental right of religious freedom in its actions against Scientology but protects its relatively young democracy from the threat of extremism and fundamentalism; whereas the United States

⁸ *Lisa McPherson Memorial Page* (visited April 12, 2000) <<http://www.lisamcpherson.org/>>.

is able to grant more freedom due to its better established and secured democracy, it still has some control through the scrutiny of the Internal Revenue Service.

Chapter 2

Background about Religious Freedom

A. Germany

1. The German Constitutions and the “Basic Rights” in general

a. The 1849 Constitution⁹

Motivated by the American and French Constitutions, the eighteenth century Enlightenment and the anachronistic European order after 1815 under Metternich, who established the “Restoration”¹⁰ giving Europe its old order after the Napoleonic wars, many German Liberals deemed it necessary to create a formal Constitution.¹¹ A unified German nation did not exist; instead the land consisted of many small states joined in a loose federation.¹² The time around 1848 was even called a revolution because people, especially students, wanted individual freedoms, such as the freedom of press, speech, assembly and association. During this time of Romanticism people considered ideas of German unity and a guarantee of individual liberties through a Constitution rather than given by the state rulers. German state rulers, afraid of rioting, agreed to a national assembly¹³ that would pass a Constitution.¹⁴ For the first time in German history this

⁹ “Paulskirchenverfassung”.

¹⁰ “Restoration” = restoration.

¹¹ THE DEMOCRATIC TRADITION, FOUR GERMAN CONSTITUTIONS 3 (Elmar M. Hucko ed.) (1987).

¹² DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY I (1994).

¹³ “Nationalversammlung”.

¹⁴ CURRIE, *supra* note 12, at 2.

Constitution created a federal state with a centralized government, as well as fundamental rights that would bind the government in the protection of individual liberties.¹⁵

Section V, Article 144 of the 1848 Constitution states, “Every German has complete freedom of religion and conscience. No one is required to reveal his religious convictions.”¹⁶

However, this Constitution was never enforced. The revolutionary movement vanished too fast and the old powers established themselves again. The Prussian State introduced its own Constitution and a restoration of monarchy took place. Nonetheless, the new ideas of Liberalism provided in the Constitution survived and became an example for later Constitutions.¹⁷

b. The “Reich”¹⁸ Constitution of 1871

Even though a planned deal came true with the German unification in 1871 after the French - German war in 1870-1871, the new Constitution contained many safeguards of Conservatism. It was a compromise between the King of Prussia and four state princes of South Germany.¹⁹ On the one hand, the Constitution granted universal and equal manhood suffrage, but on the other hand the constitutional order of 1871 was not by the will of the people. This marked the main difference to the Constitutions of France and America. The Reichskanzler Bismarck, who was mainly responsible for the unification, saw the Constitution and the parliament (Reichstag) as granted by the German princes, a gift the state leaders could always take back. Fundamental or basic rights were not

¹⁵ CURRIE, *supra* note 12, at 3.

¹⁶ Hucko, *supra* note 11, at 108.

¹⁷ HANS BOLDT, *DEUTSCHE VERFASSUNGSGESCHICHTE* 103 (1990).

¹⁸ “Reich”= empire.

reflected until the Weimar Constitution. However, Article 3 of the Reich Constitution suggests the inclusion of individual liberties:

There shall be a common citizenship for all Germany, and the citizens of all member states shall be treated as natives in every other state and shall accordingly have the right to become permanent residents, to carry on business, to hold public office, to acquire real estate, to obtain citizenship, and enjoy all other civil rights under the same conditions as the natives of this state. They shall also receive the same treatment as regards judicial remedies and legal protection. No German shall be restricted in the exercise of these rights by the authorities of his native state or by the authorities by any other state of the federation.²⁰

c. The Weimar Constitution of 1919

After the First World War, the deputy leader of the Social Democratic Party, Phillip Scheidemann, pronounced the Republic of Germany from the Reichstag in Berlin on November 9th 1918 with the words, “Down with the war! Down with the Emperor! Hurrah for the Republic!” For the first time, a democratic Republic was established in Germany.²¹ This new republic passed a new Constitution on August 11th 1919. Articles 109 to 165 of the Weimar Constitution provided fundamental rights for the German people. However, the “founding fathers” were somewhat reluctant to include the chapter on fundamental rights because they were convinced that no need exists for this kind of protection in a modern society. The founding fathers’ understanding of basic rights

¹⁹ GERMAN CONSTITUTIONAL GOVERNMENTS SINCE 1871, 15, (Louise Holborn et al. eds., 1970).

²⁰ *Id.* at 158.

²¹ Hucko, *supra* note 11, at 40-42.

influenced their rank under the new Constitution. Many of the fundamental rights of the Weimar Constitution were subject to changes in future legislation.²² They could be restricted by simple legislation. According to Article 76 of the Weimar Constitution,²³ the fundamental rights could be changed by a majority vote of two thirds. Thus the basic rights were subject to relativism. This constitution did not establish an intangible Bill of Rights.²⁴

d. The Basic Law of the Federal Republic of Germany of 1949

The allied powers were aware of the factors that led to World War II. One of these might be considered the isolation of Germany created by the Treaty of Versailles after World War I.²⁵ Thus Churchill and Roosevelt decided in 1941, in the Atlantic charter, to seek "a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want."²⁶ Therefore, at the Potsdam Conference in 1945, the Allied powers' intent was not to destroy Germany but rather to give them the chance to establish a democratic society.²⁷ This established a common ground, which made it possible for Germany to start all over again. In 1948, the Allied powers allowed

²² Id. at 60.

²³ Article 76 of the Weimar Constitution, "The Constitution may be amended by legislation. But decisions of the Reichstag (Parliament) as to such amendments come into effect only if two-thirds of the legal total of members be present, and if at least two-thirds of those present have given their consent. Decisions of the Reichsrat (representative body of the states) in favor of amendments of the Constitution also require a majority of two-thirds of the votes cast. Where an amendment of the Constitution is decided by an appeal to the people as the result of a popular initiative, the consent of the voters is necessary. Should the Reichstag have decided upon an alteration of the Constitution in spite of the objection of the Reichsrat, the President of the Reich shall not promulgate the law if the Reichsrat, within two weeks, demands an appeal to the people."

²⁴ Hucko, *supra* note 11, at 60.

²⁵ CURRIE, *supra* note 12, at 8.

²⁶ LUCIUS CLAY, DECISIONS ON GERMANY 11 (1950).

²⁷ CURRIE, *supra* note 12, at 8.

the recently appointed German state prime ministers to call a Constitutional Convention to pass a new Constitution. The rules were laid that the German people should establish their own Constitution, provided it was democratic, federal and contained fundamental rights.²⁸ Thus, the German Basic Law (Constitution) was established, ratified, published in the "Bundesgesetzblatt"²⁹ and took effect on May 23, 1949,³⁰ following twelve years that had born witness the worst time in history.

What happened? It was probably not the Weimar Constitution, the first German approach to democracy that failed. Most likely the German people were unable to handle democracy. The ideas of individual freedom, the revolutionary beliefs in human kind, with its power to strive for humanitarian ideals, backfired in 1933 by the people who were fighting for freedom 100 years ago. The German people voted Adolf Hitler and his Nationalsocialistic party into the democratic parliament, thus committing democratic suicide. The penalty for that failure, and the following pains, are still felt all over the world today. During the years of 1939 through 1945, when Germany involved the globe in the largest war ever over 50 million people were killed. Among them twenty million Russians, 20 % of the Polish population and over 6 Million Jews were killed in and outside of concentration camps.³¹ The German citizens' failure to realize the nature in which this new found freedom had come to manifest itself resulted in the loss of freedom, national unity, daily sustenance and their international reputation. On September 6, 1946, the U.S. Secretary of State, James Byrnes, explained the American attitude towards Germany in Stuttgart:

²⁸ *Id.*

²⁹ German: "The Federal law Publisher"= the official federal law bulletin.

³⁰ CURRIE, *supra* note 12, at 10.

³¹ Hucko, *supra* note 11, at 62.

The United States cannot relieve Germany from the hardships inflicted upon her by the war her leaders started. But the United States has no desire to increase those hardships or to deny the German people an opportunity to work their way out of those hardships so long as they respect human freedom and follow the paths of peace. The American people want to return the government of Germany to the German people. The American people want to help the German people to win their way back to an honorable place among the free and peace-loving nations of the world.³²

The burden Germany carried in the following years, was tremendous; creating an environment in society in which issues surrounding democracy and individual liberties were treated in a hypersensitive manner.

The preamble of the Basic Law contains the ideals of the post war years:

The German people in the States of Germany (enumeration of the West German states) conscious of their responsibility before God and men, animated by the resolve to preserve their national and political unity and to serve the peace of the world as an equal partner in a united Europe, desiring to give a new order to political life for a transitional period, have enacted, by virtue of their constituent power, the Basic Law for the Federal Republic of Germany. They have also acted on behalf of those Germans to whom participation was denied. The entire German people are called upon to achieve in free determination the unity and freedom of Germany.³³

In contrast to the Weimar Constitution where the fundamental rights were only an appendage to the Constitution,³⁴ the Bill of Rights³⁵ is located in the very beginning of

³² U.S. DEPARTMENT OF STATE, DOCUMENTS ON GERMANY, 1945-1985, at 99 (Washington, 1986).

³³ Preamble Version before reunification of Germany on October 3, 1990.

³⁴ CURRIE, *supra* note 12, at 10.

the Constitution in order to highlight the importance of those provisions; Article 1 (2) of the Basic Law even states, "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."³⁶ Individual rights are clearly a main goal of the new Constitution.

The German Basic Law of 1949 is not only a framework of positive provisions. By emphasizing the human dignity on the top of the Bill of Rights in Article 1, it stresses the importance of the inalienable dignity of human beings.³⁷ As the Federal Constitutional Court explained, the nature of the Basic Law is an "objective order of values" on the one hand and "a unified structure of substantive values" on the other hand.³⁸ Thus there are "supra-positive" values provided, the preamble even speaks of God.

The German Constitution consists of three basic ideas: Initially, as mentioned above, a fundamental principle is human dignity, according to Article 1 GG.³⁹ Secondly, Article 20 GG guarantees Germany a democratic, federal, parliamentary and social system. Furthermore it provides that the people as the "sovereign" of the State; whenever necessary the German people have a right of resistance.⁴⁰ Third, the Federal Republic of

³⁵ "Grundrechtskatalog".

³⁶ Hucko, *supra* note 11, at 194.

³⁷ Emily A. Moseley, *Defining Religious Tolerance: German Policy toward the Church of Scientology*, 30 VAND. J. TRANSNAT'L L. 1129, 1146 (1997).

³⁸ Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 843 (1991).

³⁹ Article 1 GG:

(I) "The dignity of men shall be inviolable. To respect and protect it shall be the duty of all state authority." (II) "The German people therefore acknowledge inviolable and inalienable human rights as the basis of the every community, of peace and justice in the world. (III) The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law."

⁴⁰ Article 20 GG:

(I) "The Federal Republic of Germany is a democratic and social federal state." (II) "All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs." (III) "Legislation shall be subject to the constitutional order; the executive and judiciary shall be bound by law and justice." (IV) "All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible."

Germany is a “Rechtsstaat”, meaning “state governed and bound by law.” Legislative, Executive and Jurisdiction powers are bound to the Basic Law.⁴¹

Compared with the former Constitutions, the Basic Law highlights the importance of the individual. The dignity of the human being becomes more important than the State. “Liberty is vested in man by nature.”⁴² While the older Constitutions granted the State the power to provide freedom for individuals, the Basic Law grants the individuals freedom to establish a state.⁴³ “Hence, positive rights are grounded in the moral order inherent in the Basic Law, not in the State itself.”⁴⁴

2. History of Religious Freedom until 1945

The separation of church and state, a foundation for religious tolerance, came late into German public life. In 1555, following Martin Luther’s reformation, which established the Protestant Church, spawning a number of different denominations like Lutheranism, Calvinism and Reformed Churches, the rule of peace was settled in Augsburg.⁴⁵ The “religious peace”⁴⁶ of that period guaranteed that every state ruler could determine what religion (Protestant or Catholic) should be the leading religion in his state. Since Protestantism became the faith of the majority of the German people and their leaders, thus it enjoyed a great portion of state support.⁴⁷ This lasted until the Napoleonic conquest in 1806. Religious intolerance increased and discrimination against the

⁴¹ Moseley, *supra* note 37 at 1145.

⁴² *Id.* at 1147.

⁴³ *Id.* at 1147.

⁴⁴ *Id.* at 1147.

⁴⁵ DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 446 (1989).

⁴⁶ “Religionsfrieden”.

⁴⁷ Moseley, *supra* note 37 at 1130.

minority of Catholic citizens ran rampant. They became isolated in both a cultural and political manner.

In 1870, under Bismarck, the so-called “Kulturkampf”⁴⁸ occurred between the German government and the Roman Catholic Church. The pope’s promulgation of the dogma of his infallibility concerning faith and morals gave rise to that conflict. The pope became the defender of the Roman Catholic Church against intrusions of the state, gaining support from the German bishops as well as the church members. Bismarck wanted to establish a strong central government, although he feared it might be undermined by the Catholic Church, which maintained a strong influence upon the Center party in the parliament. This whole situation led to the creation of the so-called anti-church laws. Finally, in 1887, after pope Pius IX had died and a *modus vivendi*⁴⁹ was found, the “conflict of cultures” calmed down. The religious intolerance towards the Catholic Church finally ceased.⁵⁰ However, Catholics, who made up a third of the German population, still had difficulties entering high positions in the German government. The situation regarding Jews was even worse, as they were systematically excluded from public services and the armed forces.⁵¹

An example of the failure in design to separate Church and State is found in the paradigm of the Protestant church. The German emperor Wilhelm II, ruling from 1888 to 1918, was also the King of Prussia. He was also the head of the Protestant Church. Therefore, the Berlin Cathedral, also called the “Kaiserkirche”⁵² has just as many

⁴⁸ German for “conflict of cultures”.

⁴⁹ *Modus vivendi* = compromise

⁵⁰ Koppers, *supra* note 45, at 446.

⁵¹ KOPPEL S. PINSON, *MODERN GERMANY*, 165-67, 173-93 (2d ed 1966).

⁵² German, “Emperor’s church”.

Emperor's symbols as Christian symbols inside. After World War I, the Weimar Constitution established, for the first time, a formal separation of Church and State.⁵³

The reign of the Third Reich oversaw the systematic oppression of human rights: "You are nothing but your nation is all" was the common motto. The Hitler regime neutralized the main churches (Protestant and Catholic), thus ceasing the recently introduced separation of church and state. The churches were supporting the Nazi regime; with the Protestants even calling themselves "German Christians." Only a small number of the "Confession Church" (Protestants) did not accept the Nazi doctrines.⁵⁴

Thus, religious freedom has not been established early in Germany. However, ideas of freedom of religion existed in various forms within the different Constitutions. As history taught, these ideas have not been secured enough to serve as a safeguard for religious liberty through the years. This safeguard was only established in the most recent German Constitution, the "Basic Law". The present provisions of religious liberty will be discussed *infra*. To compare the past ideas of religious liberty the American point of view shall be provided.

B. United States of America

1. The U.S. Constitution and the Bill of Rights in general

a. The Ideas

The U.S. Constitution as well as the Declaration of Independence was strongly influenced by the Enlightenment and the thinkers of the Renaissance. John Locke had crucial influences on the American Revolution, the Declaration of Independence and on

⁵³Article 137 (I) of the Weimar Constitution (see at 3.c.bb.).

the establishment of certain individual rights.⁷⁴ In his writing "Two Treatises of Government Part II" he presented the idea of a "social contract".⁷⁵ According to the second treatise Locke describes men as born free and equal. In the "natural state" there was no government.⁷⁶ Even though state would all their lives humans are not born evil, people would decide to establish a government. Only an elected government would be able to judge particular issues objectively whereas individuals would be rather biased in favor of their own advantage.⁷⁷ Creating a government therefore means to give an individual's power to judge according to law. Hence, in the natural rights to be free and equal are inalienable.⁷⁸ The enforcement of these government judgements has to be agreed upon as well. Once the person agreed upon creating a government they leave the natural state and enter into civil society.⁷⁹ However, since a government has been chosen it can be changed whenever the people deem it necessary.⁸⁰ Reflecting the establishment of the Constitution and its influence on present International Law, Zacher and Dixon write:

America remains unique in the role that rights play in the national culture.

The Declaration of Independence reflects the principles of Enlightenment individualism, including the idea that the individual's primary need is for liberty: the freedom to act without interference, to be secure against assault on his person or property, to think and speak his mind freely, to keep the fruits of his labor. And while

⁷⁴ *A Brief Historical and Legal Description of Foreign Law*, *Commentaries*, vol. 1, para. 16 (1995) (<http://www.usdoj.gov/olof/olof.html#commentary>).

⁷⁵ *John Locke, A Treatise of Government*, ed. C. B. Macpherson, University of Toronto Press, Toronto, 1970, 213, 224 (1996).

⁷⁶ *Id.* at 124.

⁷⁷ *Id.* at 124.

⁷⁸ *Id.* at 126.

⁷⁹ *Id.* at 126.

⁸⁰ *Id.* at 126.

government is necessary to secure that freedom, it is also the greatest danger to it. Thus, the concept of rights served two functions in the political theory of the Enlightenment: to legitimate government and to control it.⁶²

b. The Implementation

When the thirteen colonies sent delegates to Continental Congress in Philadelphia they adopted the Declaration of Independence at July, 4th 1776, which was confirmed after the Revolutionary War by the Treaty of Paris in 1783. In the meantime the so-called Confederation between the States existed. Shortly after the Declaration of Independence the Continental Congress had proposed the Articles of Confederation which was ratified in 1781 by all thirteen states. However, the Confederation was weak especially the central government was lacking power. It had broad powers over military and foreign affairs, coining and regulating money, but no tax powers. Hence, it was completely depend on the single states. Realizing this incompetence of the federal government the states send delegates to Philadelphia again. A new Constitution was drafted in 1787. Since then up to date only few changes took place. The admirable protection for fundamental Rights became an example for the whole world.⁶³

⁶¹ House, *supra* note 55 at 229.

⁶² HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 257 (2000).

⁶³ DAVID P. CURRIE, THE CONSTITUTION OF THE UNITED STATES 1 (1988).

2. History of Religious Freedom in the United States

The question arises whether or not the protection of religious freedom in the present meaning was always granted in the United States. Since the First Amendment is placed at first there must be crucial reasons for that.

Many immigrants from Great Britain came into Massachusetts as religious refugees persecuted by the Church of England. They found a new home in the New World for themselves and their religious beliefs.⁶⁴ However, these religious refugees set up their own established State church. Hence, religious liberty in the colony of Massachusetts was the freedom of the Puritan orthodoxy.⁶⁵ Ministers and laymen officials established their own law. Especially John Winthrop, governor of the colony “city on a hill” was a fanatical Puritan.⁶⁶ The Puritan believed in the “Covenant of Works,” receiving God’s mercy through actions, rather than the “Covenant of Grace,” receiving God’s mercy through belief in him.⁶⁷ At the same time the Puritan’s attitude towards “heretics” helped others develop their idea of religious tolerance. Anne Hutchinson and Roger Williams, members of the Massachusetts colony challenged the narrow-minded view of the Puritans. Both, Hutchinson and Williams believed in the “Covenant of Grace”, contrary to Puritan belief of the “Covenant of Works.” Both “rebels” were eventually driven out the Massachusetts colony but their spirit remained.⁶⁸ Roger Williams established the colony of Rhode Island, known for its religious tolerance. He believed that, “Persecution for the cause of conscience was directly opposed to the

⁶⁴ PAUL L. MURPHY, *THE SHAPING OF THE FIRST AMENDMENT* 4 (1992).

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 4.

⁶⁷ *Anne Hutchinson* (visited March, 2, 2000)

<<http://www.galegroup.com/library/resrcs/womenhst/hutchin.htm>>.

⁶⁸ MURPHY, *supra* note 64, at 5.

teachings of Christ.”⁶⁹ He thus provided an example of religious tolerance as part of the Christian faith.⁷⁰

Even though a strong antipathy against the British plan to centralize and uniform a State church was found, seven states still allowed establishments of religion by law.⁷¹ Even for those states that established freedom of religion favored particular religions. For example, in 1776, the Maryland Declaration of Rights provided religious liberty, but it was only for Christians; people of Jewish faith could not work in public offices until 1826.⁷²

The description of the early America situation was written by former Chief Justice Black, who, when deciding *Everson v. Board of Education*,⁷³ used American history as evidence for the founding father’s intention to separate church and state:

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of believe had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to

⁶⁹ *Id.* at 5 (quoting ROGER WILLIAMS, THE BLOODY TENANT OF PERSECUTION, FOR CAUSE OF CONSCIENCE (1644)).

⁷⁰ Murhy, *supra* note 61, at 5.

⁷¹ *Id.* at 5.

force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.⁷⁴

Justice Black continued explaining how European practices of State Church policies were implanted in the American colonies. Among these policies were levying taxes to pay the congregation's ministers, duty of church attendance, and general obligations to support church properties. These practices gave rise to the Virginian movement of religious liberty. The movement's idea was to prohibit government to levy taxes in favor of churches, the involvement of the state into church affairs and the entanglement with any individual person's religious faith.⁷⁵

Justice Black continued,

The movement towards this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it he eloquently argues that a true religion did not need support of the law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government established religions. Madison's Remonstrance received strong support throughout Virginia, and the assembly postponed consideration of the proposed tax

⁷² *Id.* at 6.

⁷³ 330 U.S. 1 (1947).

⁷⁴ *Id.* at 9-10.

⁷⁵ *Id.* at 11.

measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the assembly enacted the famous “Virginia Bill for Religious Liberty” originally written by Thomas Jefferson.

*“Almighty God had created the mind free; that all attempts to influence it by temporal punishment, burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.”*⁷⁶

Justice Black recognizes the Virginia Bill of Religious Liberty as the example for the First Amendment to the United States Constitution, particularly since Jefferson and Madison had a crucial influence upon drafting the religious clauses.⁷⁷

⁷⁶ *Id.* at 11-13.

⁷⁷ *Id.* at 13.

Chapter 3

Analysis of Freedom of Religion and the Treatment of the Church of Scientology within it

A. Freedom of Religion in the German Basic Law

1. Protection (Art. 4 I, II GG)

- (I) “Freedom of faith, of conscience, and freedom of creed, religious or ideological shall be inviolable”
- (II) “The undisturbed practice of religion is guaranteed”
- (III) (“No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law.”^{78,79})

Freedom of religion has a very important role within the German Basic Law. This is due to the fact that it has developed historically and has grown a part of the human dignity (Art. 1 GG). Article 4 of the Basic Law protects the religious and ideological freedom (I), as well as the undisturbed exercise of religion (II). At first glance the different phrases in this provision may seem superfluous. However, freedom of faith has not always incorporated the expression of creed or the inner beliefs. Before the 1848 constitutional ideas, freedom of religion was only included members of the “main

⁷⁸ Article 4 (III) shall be left out since it is a special provision referring to conscience and military service.

⁷⁹ Hucko, *supra* note 12, at 194.

churches,” such as Protestant and Catholic.⁸⁰ Following the statements of the “Paulkirchenverfassung” of 1848 and the Weimar Constitution of 1919⁸¹, the Basic Law extended the freedom of expression to all religious and ideological belief systems.⁸² The guarantee of free exercise in Article 4 (II) protects both individuals as well as organizations.⁸³ Noteworthy, is that Article 4 (I) defends religious and ideological freedom regarding thoughts and ideas, whereas Article 4 (II) refers only to the undisturbed exercise of religion. The Federal Constitutional Court⁸⁴ however has interpreted the term “religion” in Article 4 (II) broadly:⁸⁵ All beliefs, regardless of whether religious or non-religious, are protected. However, the broad interpretation of “religion” is limited, where provisions, ensuring public safety or peace, conflict with individual exercise of religions. In that case, courts have to examine the conflicting interests and decide upon the more pressing issue.⁸⁶

2. The Importance of Article 140 GG and the Weimar Constitution

Article 140 of the Basic Law states that articles 136, 137, 138, 139, 141 of the Weimar Constitution are part of the Basic Law, to be read in context with article 4 and to have the same rank as the Basic Law provisions. The most relevant articles for underlying purposes are 136 and 137:

⁸⁰ KOMMERS, *supra* note 45, at 446.

⁸¹ *See supra* notes 7 *et. seq.*

⁸² KOMMERS, *supra* note 45, at 447.

⁸³ *Id.* at 451.

⁸⁴ “Bundesverfassungsgericht”.

⁸⁵ 12 BVerfG 1, 4 (1960) “Tobacco Atheist Case”.

⁸⁶ Kommers, *supra* note 45, at 451

a. Article 136 of the Weimar Constitution:

- (I) Civil and political duties are neither dependent upon nor restricted by the practice of religious freedom.
- (II) The enjoyment of civil and political rights, as well as admission to official posts, are independent of religious creed.
- (III) Nobody is bound to disclose his religious convictions. The authorities have the right to make inquiries as to membership of a religious body only when rights and duties depend on it, or when the collection of statistics ordered by law requires it.
- (IV) Nobody may be forced to take part in any ecclesiastical act or ceremony, or to participate in religious practices or to make use of any use of any religious form of oath.

b. Article 137 of the Weimar Constitution:

- (I) There is no state church.
- (II) Freedom of association is guaranteed to religious bodies. There are no restrictions as to the union of religious bodies within the territory of the Federation (Reich).
- (III) Each religious body regulates and administers its affairs independently within the limits of general laws. It appoints its officials without the cooperation of the State, or of the local authorities.
- (IV) Religious bodies acquire legal rights in accordance with the general regulations of the civil code.
- (V) Religious bodies remain legal corporations in so far as they have been so up to the present. Equal rights shall be granted to other religious bodies upon application, if

their constitution and the number of their members offer a guarantee of permanency. Where several such religious bodies holding public rights combine to form one union this union becomes a legal corporation.

- (VI) Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls, in accordance with the provisions of the State law.
- (VII) Associations devoting themselves to the common promotion of a world-philosophy shall be placed upon an equal footing with religious bodies. So far as the execution of these provisions may require further regulation, this will be the duty of the state's legislature."⁸⁷

2. Legal definition of religion

The Federal Constitutional Court⁸⁸ ruled in 1991 that solely the assertion and the self-professed status of a religion or religious group does not meet the legal standards for consideration under Article 4 of the Basic Law. This states that religion or religious groups are judged by their inner content and outer appearance. The other courts have to decide if the alleged religious group can be defined as a religion in legal terms. The courts have to consider the constitutional idea, to be found when interpreting the Basic Law, of the notion of religion. Aspects of that can include reality of life, cultural traditions and common, sense as well as a religious scientific understanding.⁸⁹ Courts

⁸⁷ All provisions are taken from Sartorius, *Verfassungs- und Verwaltungsgesetze der Bundesrepublik*; translations taken from Hucko, *supra* note 12, at 179-180.

⁸⁸ "Bundesverfassungsgericht".

⁸⁹ 83 BVerfGE 341, 353.

just have to be cautious not to evaluate religious groups from a biased Christian perspective.⁹⁰

The Administrative Court of Frankfurt (Main)⁹¹ stated three characteristics of a religion, first, it must be a voluntary association of not less than two persons, with a minimum of organizational structure, that does not depend on legal or civil status as per public or civil law and does not depend on its numerical strength or social relevance. Second, there must be a common understanding of the sense of human existence, as well as basic principles of individual conduct. Third the group must strive for its purposes and be visible to the outside world. Notably, is absolutely no requirement of fixed dogma.⁹²

4. Limitations

Many provisions in the Basic Law allow specific limitations on their application, whereas Article 4 is considered to be a sacred fundamental human right, thus not containing any explicit restrictions within the provision. This means that no regular law⁹³ may limit the freedom of religion regarding belief ((Article 4 (I)) or exercise (Article 4 (II)).⁹⁴ However, the freedom of religion is not absolute. It is implicitly limited by some of the other fundamental rights within the Basic Law (Articles 1-20). The protection of human dignity⁹⁵ acts as one of the greatest limits to the freedom of religion.⁹⁶ Therefore,

⁹⁰ BT- Drs. 13/8170, 13.

⁹¹ "Verwaltungsgericht".

⁹² Verwaltungsgericht Frankfurt, No. IV/2 E 2234/86 4 September 1990, Scientology Mission of Frankfurt v. City of Frankfurt .

⁹³ Regular law in the sense of passed by parliament as opposed to constitutional provisions.

⁹⁴ KOMMERS, *supra* note 45, 451.

⁹⁵ Article 1 (1) of the Basic Law states, "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."

whenever the dignity of person “A” is endangered, the freedom of religion of person “B” is subject to restriction, limitation or even denial. Not only the fundamental rights of other individuals, but also the democratic constitutional order, protected in Article 20⁹⁷ of the Basic Law, restricts not expressly limited basic rights.⁹⁸ Hence a “religious” group threatening⁹⁹ the granted constitutional order is not protected by Article 4 of the Basic Law.

5. Doctrine of Neutrality (Art. 140 GG, Art. 137 I WRV)

There are certain provisions in the Basic Law emphasizing the neutrality of the state. Article 3 (III) prohibits the legislation from pass laws classifying people based upon religious beliefs.¹⁰⁰ Article 4 guarantees freedom of faith, creed and conscience.¹⁰¹ Article 140 of the Basic Law refers to Article 137 (I) which prohibits the establishment of a state church.¹⁰²

Even though the separation of church and state is a central issue in Germany today the Basic Law does allow: public schools to teach “religion” as a subject,¹⁰³

⁹⁶ This relates to all liberties that are not expressly subject to restriction such as artistic and academic; see 173 BVerfG, 193-96 (1971).

⁹⁷ See *supra* note 39.

⁹⁸ See *supra* note 93.

⁹⁹ Acts of “religious groups” are normally protected by the free exercise clause in Article 4 (II), see *supra* section III. A.4.b .

¹⁰⁰ Article 3 (III) of the Basic Law states:

“No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.”

¹⁰¹ See discussion below under 3.b..

¹⁰² See Article 137 (I) Weimar Constitution (*see* section 3.c.bb.).

¹⁰³ Article 7 (III) of the Basic Law states:

“Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instructions.”

acknowledges churches as legal corporations (“corporate bodies under public law”),¹⁰⁴ and permits those acknowledged as legal corporations to levy taxes on their members.¹⁰⁵ Thus, German law allows taxation of church members with the taxes going to the churches. The state has a responsibility to be neutral and, in this, treat the different churches and creeds equally. However, there does not have to be total neutrality and some cooperation between churches and the state may be found. If church organizations meet certain requirements on areas such as permanency, steady population, and a particular show of loyalty to the state, they can apply for the status of a legal corporation¹⁰⁶ which, in turn, allows them to levy church taxes from their particular members through the government.¹⁰⁷ A recent issue was the denying of the corporate status under public law to Jehovah’s witnesses.¹⁰⁸

Obviously there is no complete separation of church and state. Cole Durham described the German situation as,

nonintervention, nonidentification, equality, and cooperation. Nonintervention requires the state’s disentanglement from religious organizations in the interest of preserving their autonomy; nonidentification requires the state to refrain from taking sides in religious conflicts and from endorsing any religion or ideology; equality requires, of the level of the institutional church, that the denominations share equally

¹⁰⁴ See Article 140 of the Basic Law referring to Article 137 (V) of Weimar Constitution (at 3.c.bb.).

¹⁰⁵ *Id.*

¹⁰⁶ “Koerperschaft des oeffentlichen Rechts”.

¹⁰⁷ U.S. Department of State, Annual Report on International Religious Freedom for 1999:Germany. Released by the Bureau for Democracy, Human Rights, and Labor Washington D.C.(visited September 9, 1999)

<http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_germany99.html>.

¹⁰⁸ *Id.*

in the distribution of public benefits and burdens; cooperation, finally, implies accommodation or joint action in various fields of activities.¹⁰⁹

Even though Article 137 WRV guarantees that there is no State Church, the Federal Constitutional Court supports widespread state support of churches.¹¹⁰ However, there have been quite a variety of cases before the Federal Constitutional Court involving issues of religion in public law. Some recent court cases have dealt with issues such as State-sponsored denominational cases, prayer in schools and the famous “classroom-cross” case.¹¹¹ The Court held the former two constitutional; however, the highest German Court drew the line at allowing the Christian Cross in classrooms in favor of religious minorities, particularly atheists.¹¹²

Overall, separation of Church and State exists formally in Germany. However, the Basic Law and the Federal Constitutional Court allow a strong state support in favor of church institutions. Due to that support however, it is necessary to put limits on the Constitutional protection to avoid abuse. Therefore particular definitions are applied scrutinizing whether or not a religion or a church meets the required standards.

6. Who may enjoy the fundamental right of religious freedom?

Natural persons enjoy the protection in Article 4 of the Basic Law. From the age of 14, teenagers may decide what religion they want to belong to, or whether or not they want belong to any kind of religious group at all according to § 5 RKEG.¹¹³

¹⁰⁹ Cole Durham *in* Kommers, *supra* note 45, at 472.

¹¹⁰ Moseley, *supra* note 37 at 1155.

¹¹¹ *Id.*

¹¹² *Id.* at 1156.

¹¹³ Law concerning Religion.

Legal persons of private law (non-profit associations according to § 21 BGB) may be applied by Article 4 according to Article 19 III of the Basic Law¹¹⁴.

Legal persons of public law, such as the corporate bodies under public law are protected as religious entities (Article 140 GG, 137 WRV) by Article 4 GG if they meet special requirements.¹¹⁵

7. Legal Status of churches

a. Public-law corporation (Art. 140 GG, Art. 137 V WRV)

If religious groups meet certain requirements, these organizations may request that they may be deemed “public law corporations” status according to Article 140 GG, 137 V WRV.¹¹⁶ The requirements are 1) assurance of permanency, 2) certain size of organization and 3) an indispensable loyalty to the state (Reichtstreue), consisting of fulfilling the requirements of Article 9 II GG,¹¹⁷ conforming with the present provisions and exercising within the limits of Article 4 GG.¹¹⁸

A religious group established as a public law corporation is not a normal public law corporation, due to their granted freedom of religion granted in Art. 4 GG.¹¹⁹ It is not an organ of the state, but an institution sui generis. The corporation thus has the same position towards the State as normal natural persons, except for actions performed in a

¹¹⁴ Article 19 III of the Basic Law:

“The Basic Rights shall apply also to domestic juristic persons to the extent that the nature of such rights permit.”

¹¹⁵ KOMMERS, *supra* note 45 at 445.

¹¹⁶ Scott Kent Brown II, *Jehovah’s Witnesses v. Land Berlin: Requiring Religious Communities Seeking Public Corporation Status in Germany to Satisfy the “Meaning and Purpose of Corporation Status” Test*, B.Y.U.L. REV. 673, 674 (1999).

Article 9 II of the Basic Law, “Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.”

¹¹⁸ *See supra* notes 90-96 and accompanying text.

¹¹⁹ Bodo Pieroth & Bernhard Schlink, *Grundrechte Staatsrecht II* 40, 125 (14th ed. 1998).

manner typical of public law corporations (e.g. levying taxes). Churches as corporate bodies under public law may levy taxes on its members according to Art. 140 GG, 137 IV WRV which are collected by the State (the amount totals around 8-10 % additional to income tax).¹²⁰

Other advantages of compiling as a public law corporation are the special protection of property; there may not be any expropriations because church property is considered *res sacrae*. In addition churches as public law corporations enjoy a better reputation in society.¹²¹

However, not every religious group gets accepted as a corporation under public law. A recent example is the decision of the Federal Administrative Court upholding the State's of Berlin decision to deny Jehovah's witnesses that status.¹²² The highest Federal Court held, that even though the Jehovah Witnesses met the requirements of permanency and loyalty, the religious group did not pass the "meaning and purpose of corporation status test".¹²³ This test examined whether there is a "reciprocal respect between church and state and a loyalty to the state".¹²⁴

As stated before the court did not deny Jehovah Witnesses loyalty to the state (*Reichstreue*) but the court criticized the Witnesses attitude towards government's elections and the oppressing of its members who would vote.¹²⁵ Hence, by encouraging its members not to vote the Jehovah Witnesses indirectly disrespect the fundamentals of a democratic parliamentary system that relies on the power of its citizens through

¹²⁰ KOMMERS, *supra* note 45 at 479.

¹²¹ Pieroth & Schlink, *supra* note 119 at 125.

¹²² BverwGE NJW 1997, 2397.

¹²³ Brow, *supra* note 116 at 684.

¹²⁴ *Id.* at 686.

¹²⁵ *Id.* at 687.

elections.¹²⁶ Even though there is no law enforcing elections a democracy only survives due to the initiative of its people. A religious group demanding its members not to participate in elections deems therefore somewhat hostile to the democratic system of a state.¹²⁷

In case a religious entity is denied the public corporate status, the questions arises what company law form a church can chose that does not meet the requirements of a corporate body under public law. An answer is provided in the Law of Associations.

b. Law of associations (§§ 21, 22 BGB)

According to Article 140 GG, 137 IV WRV religious communities gain legal status pursuant the regular law of associations. Hence a religious group that does not meet the requirements of a corporate body under public law will form according to the provisions regarding the law of incorporated non-profit associations (Idealverein) according to § 21 BGB.¹²⁸

The general requirements for an incorporated non-profit association are: a) there must not be an economic purpose of the association; b) the association must have at least seven members; c) the association must establish a charter with standing rules; d) the association has to register at the local district court.¹²⁹

Looking at the historical background of the law of association, the issue arises whether or not these requirements apply to religious groups. When the Weimar Constitution was established in 1919, most of the population belonged to churches which

¹²⁶ *Id.* at 687.

¹²⁷ *Id.* at 688.

¹²⁸ Palandt, Einf. v § 21, Rn 17 (Bassenge et al ed. 58 ed. 1999).

¹²⁹ *Id.* at § 21 Rn 9.

were public law corporations.¹³⁰ Naturally the issue of churches formed as incorporated non-profit organizations was not a crucial one. The remaining minority of religious groups automatically had the right to establish as a non-profit association regardless of the actual requirements. At that time, the Constitution fathers did not consider the possibility of small churches that would be run like a business.¹³¹

This notion changed over the years, especially when a new movement of cults and religious groups came to Europe from the United States in the 1970's.¹³² Then courts and scholars decided that there is no need to treat religious groups different from other non-profit organizations. Therefore religious groups also have to fulfill the requirements for non-profit organizations.¹³³

The legal issue arises, what will happen if a church, registered as a non-profit association, reveals itself as a for-profit organization by having profit making goals. Since the religious group is registered at the local district court the non-profit status does not just disappear.¹³⁴

One could argue that a religious group should maintain a non-profit organization, due to its special status guaranteed by the religious freedom clauses in Article 4 GG. However, the creditors of this religious group have only the few protections provided by the law of associations. This tends to be an unfair disadvantage towards the creditors, especially if the economic actions of the religious group are tremendous compared to its

¹³⁰ Ferdinand Kopp, *Religionsgemeinschaften als wirtschaftliche Vereine i.S. von § 22 BGB?*, 40 NJW 2497 (1989).

¹³¹ *Id.* at 2499.

¹³² *Id.*

¹³³ Karsten Schmidt, *Entziehung der Rechtsfaehigkeit bei unrechtmässig eingetragenen Wirtschaftsvereinen* 16 NJW 1126 (1998).

¹³⁴ *Id.* at 1124.

religious intentions. Therefore there is no need to apply the provisions of the non-profit associations to religious groups performing as businesses.¹³⁵

According to § 43 II BGB, the legal status of the non-profit organization can be withdrawn. This procedure takes place before the administrative agency.¹³⁶ When the non-profit association status is withdrawn, the entity no longer has legal status. § 22 BGB provides the possibility to establish as a trade association.¹³⁷

However, this provision is subsidiary and only applies if the entity does not have the possibility to establish itself as a corporation according to commercial law (stock-corporation, private limited company, etc.).¹³⁸ If the group decides not to establish itself as a legal person, it can simply remain a non-incorporated association with no legal power. German Labor unions are established as non-incorporated associations, but still can take part in the legal system due to their historical background under Bismarck times. They should be as independent as possible but still be able to participate within the legal system. However, any analogy to religious groups is impossible for several reasons. The labor unions are supposed to protect the workers against unfair treatment of their employers.¹³⁹ Religious groups, however, still have the protection pursuant Article 4 GG, even though they are considered a for-profit organization. It would be unfair to creditors and other parties contracting with a for-profit religious group. In the case of bankruptcy they would lose claims against the religious group, claims they would have if the religious group had been established as a corporation according to commercial company law.

¹³⁵ *Id.* at 1126.

¹³⁶ *Id.* at 1124.

¹³⁷ Palandt, *supra* note 128, § 22 Rn. 1.

¹³⁸ *Id.* at § 22 Rn. 1.

8. Important court cases concerning Free Exercise of Religion and the Establishment of a Religion

a. Interdenominational Public Schools

The Federal Constitutional Court decided upon the important issue of religion in public schools.¹⁴⁰ Article 7 (III) of the Basic Law¹⁴¹ states that religion shall be an ordinary subject in public schools. The Federal Constitutional Court reasoned that banning religious education from public schools would be an impermissible supporting of secularism.¹⁴² In Germany many schools are interdenominational¹⁴³ and even though Article 7 (II) GG¹⁴⁴ guarantees parents the right to determine the children's participation of the religious education, the parents do not have influence on the state's legislature establishing schools and the education according to Article 7 (I).¹⁴⁵ Naturally, conflicts arise between the authority of the state and those parents who want the schools to confirm with beliefs.¹⁴⁶

In 1975 the Federal Constitutional Court upheld a State's Constitution provision¹⁴⁷ by reasoning that "parents' freedom from religion must be balanced against other parents'

¹³⁹ CREIFELS, RECHTSWOERTERBUCH 1261 (12.ed 1994).

¹⁴⁰ Moseley, *supra* note 37, at 1156.

¹⁴¹ Article 7 (III) GG:

"Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction."

¹⁴² KOMMERS, JURISPRUDENCE, *supra* note 45 at 473.

¹⁴³ Moseley, *supra* note 37 at 1156.

¹⁴⁴ Article 7 (II) GG:

"The persons entitled to bring up a child shall have the right to decide whether it shall receive religious instruction."

¹⁴⁵ Article 7 (I) GG: "The entire educational system shall be under the supervision of the State."

¹⁴⁶ Moseley, *supra* note 37, at 1156.

¹⁴⁷ 41 BverfG, 29.

freedom to practice.”¹⁴⁸ Parents of a kid attending a public school in this State challenged a 1967 amended provision of the Baden –Wuerttemberg State Constitution establishing solely Christian interdenominational schools. The “Beschwerdefuehrer” (complainants) claimed a violation of their religious freedom according to Article 4 (I) GG.¹⁴⁹ The Court held:

No exclusive parental claim to the education and upbringing (of their child) exists, and the State has an equal and independent educational mandate. Parents’ interests in their children’s education and the State’s interest must in educating its citizenry must be harmonized. The Land may establish any of three legally permissible types of schools: interdenominational, denominational, or ideological. If parents do not find a school that satisfies their ideological criteria, their child may attend a private school.¹⁵⁰

Article 4 of the Basic Law protects the negative as well as the positive manifestation of religious freedom against encroachments by the State. This freedom especially effects the organization of those areas of life which, because of their social necessity or political aims, are not left to the free play of social forces but have been taken into the care of the State. Additionally, where compulsory school attendance is at issue, the education of young persons is involved- an area in which religious and ideological ideas have always been relevant. In the instant case the complainants’ request to keep the education of their children free from all influences, based on Article 4 (I) and 4 (II) of the Basic Law, must inevitably conflict with the desire of other citizens to afford their children a religious education, also based on Article 4 of the Basic Law. There is a tension here between “negative” and “positive” religious

¹⁴⁸ Moseley, *supra* note 37 at 1157.

¹⁴⁹ KOMMERS, JURISPRUDENCE, *supra* note 45 at 473.

freedom. The elimination of all ideological and religious references would not neutralize the existing ideological tensions and conflicts, but would disadvantage parents who desire a Christian education for their children and would result in compelling them to send their children to lay a school that would roughly correspond with the complainants' wishes.¹⁵¹

b. The Crucifix Cases

Another important issue arising under Article 4 of the Basic Law is the balancing between positive and negative religious rights. Positive rights are the guarantee of the free exercise of one's beliefs. At the same time freedom from religion is granted to nonbelievers.¹⁵² This conflict arises in situations where believers and non-believers co-mingle. Hence, the public school again is the legal target.

In Germany it was quite common to have crucifixes in classrooms.¹⁵³ In 1995 the Federal Constitutional Court had to decide the "Classroom Crucifix Case".¹⁵⁴ The Complainants alleged that the Christian cross "influenced their children in the Christian sense; this contradicts their educational beliefs, especially their philosophy of life."¹⁵⁵

The Court held:

The installation of a cross or a crucifix in the classrooms of a compulsory school violates Article 4. First, crosses and crucifixes are not religiously neutral symbols. The installment of crosses and crucifixes in classrooms violates the duty of the state to religious and ideological neutrality. The cross is the distinctive symbol

¹⁵⁰ Moseley, *supra* note 37 at 1157.

¹⁵¹ KOMMERS, JURISPRUDENCE, *supra* note 45 at 475, 476.

¹⁵² Moseley, *supra* note 37 at 1163.

¹⁵³ *Id.* at 1164.

and representative sign of the Christian religion. Second such iconography, when displayed in an area such as a school, can have a significant impact on children. Children and Juveniles are easily influenced; their ability to stand up for their beliefs and to form their own critical judgements is by far smaller than that of adults. Thus the Court recognizes that in religiously diverse society, religious symbols, even those seen by many as an innocuous part of general western culture, retain their religious significance.¹⁵⁶

Overall, there seems to be a movement towards a more neutral court ruling as well as a new interpretation of legal structures of new religious entities. This may be caused by an opening of Europe to international immigrants from all over the world, bringing new ideas and thoughts. Therefore, German courts and the legislative have to adjust their actions to the recent changes.

B. Freedom of Religion in the American Constitution: The First Amendment

The First Amendment (enacted 1791) to the United States Constitution states, **“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”**

In spite of the fact that the initial sentence of the first amendment to the Constitution is often referred to as two “religious clauses”, consisting of the Establishment Clause and the Free Exercise Clause, there are important distinctions between the concepts of both

¹⁵⁴ 93 BVerfGE, 1 (1995).

¹⁵⁵ 93 BVerfG, 4 (1995).

¹⁵⁶ Moseley, *supra* note 37, at 1666.

these two clauses.¹⁵⁷ The fundamental ideas underlying the religious clauses are that religion and executive functions are being best performed if they do not become entangled with one another, and that religious issues are individual ones and hence shall be protected as such.¹⁵⁸ Conflicts are predictable: The First Amendment encourages individual religious life, yet it prohibits governments intrusion into religious life.¹⁵⁹ Questions arise over issues involving state support for parochial entities, religious actions in public life, tax exemption issues for religious groups. There is tension between people exercising their religious beliefs under the free exercise clause and the risk of the government getting involved in religious matters in violation of the establishment clause. Both issues came to the attention of the Supreme Court around middle of the 1900.¹⁶⁰

1. The Establishment Clause

a. Overlook

Robert Cord defines the establishment clause as follows:

The Establishment clause was designed to establish a separation of church and the national State. This separation was to be ensured by denying to Congress the constitutional authority to pass legislation providing the formal and legal union of any single church, religion or sect with the Federal Government. Thus the preferential status of one church, religion or sect – elevating it to an exclusive governmental

¹⁵⁷ Henry J. Abraham, *Religion, the Constitution, the Court, and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of the Possible*, Robert A. Goldwin and Art Kaufman ed., *How does the Constitution protect religious freedom* 18 (1987).

¹⁵⁸ Browne, *supra* note 7 at 162-163.

¹⁵⁹ *Id.* at 163.

¹⁶⁰ Holger Fleischer, *Von Krippen, Kreuzen und Schulgebeten: Negative Religionsfreiheit und staatliche Neutralitaet im Spiegel der amerikanischen Rechtsprechung*, 20 JZ 1001, 1002 (1995).

position of power and favor over all other churches or religious denominations – would be prevented.¹⁶¹

Looking at the historical background, the first leaders of Virginia, Thomas Jefferson and James Madison, had a crucial influence on the separation of church and state. According to the motto “a page of history is worth more than a volume of logic”,¹⁶² the Supreme Court cited Jefferson and Madison in its many important court decisions. Probably the most important Supreme Court decision interpreting the establishment clause was Everson v. Board of Education.¹⁶³ In 1947 the Supreme Court decided in the aforementioned case by 5-4 vote, that a New Jersey town may reimburse parents for the cost of bus transportation to and from parochial schools. Justice Black stated,

The “establishment of religion” clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly participate in the affairs of any religious organizations or

¹⁶¹ ROBERT L. CORD, SEPERATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 5 (1982).

¹⁶² New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

¹⁶³ 330 U.S. 1 (1947).

groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law intended to erect a “wall between Church and State.”¹⁶⁴

These words became an example ever since. Since Everson the American people have become aware of the importance of separation of church and state.¹⁶⁵

The issue has arisen in three problematic fields: the financial aid to parochial entities; religious influences in public schools; and religious exhibitions in public life.¹⁶⁶

In Walz v. Tax Commission¹⁶⁷ the Supreme Court upheld a tax exemption for real property of religious entities. The plaintiffs claimed this practice to be an “impermissible state assistance to religion.”¹⁶⁸ The Supreme Court clearly described the meaning of separation of church and state under the Establishment Clause.

The granting of tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the churches support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees’ on the public payroll. There is no genuine nexus between tax exemption and establishment of religion.¹⁶⁹

In 1971, in Lemon v. Kurtzman decision, the Supreme Court established a three-part test to determine if a government action constitutional or unconstitutional.¹⁷⁰ “First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion, finally the statute must not foster

¹⁶⁴ *Id.* at 15-16.

¹⁶⁵ Fleischer, *supra* note 160 at 1001.

¹⁶⁶ *Id.* at 1002.

¹⁶⁷ 397 U.S. 664 (1970).

¹⁶⁸ IRA C. LUPU, *THE LINGERING DEATH OF SEPARATIONISM, IN THE FIRST AMENDMENT, A READER* 445, 448 (John H. Garvey and Frederick Schauer, 2nd ed. 1996).

¹⁶⁹ *Walz* 397 U.S. 664, 675 (1970).

an excessive government entanglement with religion.”¹⁷¹ Applying the new test, the Court stroke down two state programs aimed at aiding parochial schools, holding there would be an excessive entanglement between government and religion.

The “Lemon-test” however, provoked strong criticism.

The “purpose” requirement, taken literally, would invalidate all deliberate government accommodations of religion, even though such accommodation is something required by the free exercise clause, and has sometimes been held permissible under the establishment clause even if not constitutionally compelled. Further, the legislative “purpose is in any case difficult to ascertain in a multi-member body, and the “entanglement” prong contradicts the previous two – some administrative “entanglement” is essential to ensure that government aid does not excessively promote religious purposes.¹⁷²

Under the Bush government, the executive branch recommended replacing the “Lemon test” with an “endorsement of religion”- test,¹⁷³ as a solution to the Supreme Court case Lee v. Weisman.¹⁷⁴ The Court had to decide whether or not the actions of school officials in Providence were constitutional. School officials were inviting clergymen to give eulogies at school graduation ceremonies. Justice Kennedy wrote for the majority, saying, “the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”¹⁷⁵ The school’s action violated the second part of the Lemon test by advancing

¹⁷⁰ Browne, *supra* note 7 at 163.

¹⁷¹ Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

¹⁷² GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1501 (13th ed. 1997).

¹⁷³ Fleischer *supra* note 160 at 1002.

¹⁷⁴ Lee v. Weisman, 505 U.S. 577 (1992).

¹⁷⁵ *Id.* at 578.

religion to these students. These students “are often susceptible to pressure from their peers towards conformity.”¹⁷⁶

A brief overview of court cases involving establishment clause cases regarding different holdings due to different interpretations of the establishment clause shall be provided in order to illustrate the different treatment of the Court when dealing with these issues.

¹⁷⁶ *Id.* at 593.

b. Judicial Inconsistencies applying the Establishment Clause

Upheld State Programs	Stricken State Programs
A State may lend to parochial school children geography textbooks that contain maps of the United States. <i>Board of Education v. Allen</i> , 392 U.S. 236 (1938).	A State may not lend maps of the United States for use in geography class at parochial schools. <i>Meek v. Pittenger</i> , 421 U.S. 349, 362-66 (1975).
A State may lend a science book to parochial school children. <i>Walmon v. Walter</i> , 433 U.S. 229, 249 (1977).	A State may not lend a science kit. <i>Wolman v. Walter</i> , 433 U.S. 229, 249 (1977).
A State may lend textbooks on American colonial history. <i>Meek v. Pittenger</i> , 421 U.S. 354-55, n. 3 (1975).	A State may not lend a film on George Washington or a film projector to show it in history class. <i>Meek v. Pittenger</i> , 421 U.S. 349, 354-55, n. 3-4 (1975).
A State may lend classroom workbooks. <i>Meek v. Pittenger</i> , 421 U.S., 354-355, n. 3-4, 362-366 (1975).	A State may not lend workbooks in which the parochial children write, thus rendering them nonreusable. <i>Meek v. Pittenger</i> , 421 U.S. 349, 355, n. 3-4, 362-366 (1975).
A State may pay for bus transportation to religious schools. <i>Everson v. Board of Education</i> , 330 U.S. (1947).	A State may not pay for bus transportation from parochial schools to the public zoo or natural history museum for a field trip. <i>Wolman v. Walter</i> , 433 U.S. 229, 252-255 (1977).
A State may pay for diagnostic services conducted in the parochial schools. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).	A State may pay for therapeutic services but they must be given in a different building. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).
A State may conduct speech and hearing diagnostic testing inside the sectarian school. <i>Wolman v. Walter</i> , 433 U.S. 229, 241 (1977).	A State may not conduct speech and hearing "services" inside the sectarian school. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).
A State may provide counseling to exceptional parochial school students if outside of the parochial school such as trailer park down the street. <i>Wolman v. Walter</i> , 433 U.S. 229, 241-248 (1977); <i>Meek v. Pittenger</i> , 421 U.S. 349, 352, n. 2, 367-373.	A State may not provide counseling to exceptional school students unless outside of the parochial school such as a trailer park down the street. <i>Wolman v. Walter</i> , 433 U.S. 229, 241-248 (1977); <i>Meek v. Pittenger</i> , 421 U.S. 349, 352, n. 2, 367-373.
A State may give cash to a parochial school to pay for the administration of state-written test and standardized reporting services. <i>Comm. For Public Educ. & Religious Liberty v. Regan</i> , 444 U.S. 646 (1980).	A State may not provide funds for teacher-preparation tests on secular subjects. <i>Levitt v. Comm. For Public Educ. & Religious Liberty</i> , 413 U.S. 472 (1973).
A State (public school) may release students during the day for religion classes elsewhere and may enforce attendance at those classes. <i>Zorach v. Clauson</i> , 343 U.S. 306 (1952); <i>Wallace v. Jaffree</i> , 472 U.S. 38, 110-111, 127-136 (1985).	A State (public school) may not provide for religious instruction inside a public school. <i>Illinois ex rel. McCollum v. Board of education</i> , 333 U.S. 203 (1948).

Source: data from H. Wayne House, *A Tale of Two Kingdoms: Can there be peaceful coexistence of religion with the secular state*, 13 *BYU J. Pub. L.* 203, 258 (1999)

c. Explanation of Inconsistencies –Developments within the Supreme Court-

The Supreme Court has changed its point of view from, a traditional Christian one to an encompassing understanding of religious beliefs, respecting whatever is important for an individual regardless if something godlike is involved or not.¹⁷⁷ Ira C. Lupu divided the development of the Establishment Clause into two parts: The Dominant Era of Separationism from 1947 to 1980¹⁷⁸ and the Attack on Separationism from 1980 to 1992.¹⁷⁹

The first era contains Supreme Court cases such as the 1947 Everson v. Board of Education case, the various School Prayer Cases, Walz v. Tax Commission and Lemon v. Kurtzman.¹⁸⁰ Lupu states, “Everson is the best and most importantly remembered for its broad separationist dicta and for the Court’s unanimous adoption of the Virginia history of religious liberty as the key to the meaning of the First Amendment’s Establishment Clause.”¹⁸¹ Commenting on the School Prayer Cases¹⁸² Lupu elaborates that by “invalidating the common practice of school prayers, the Supreme Court particularized the doctrine of church-state separation by applying it to the widespread, highly symbolic, often popular, and crisply defined practice of school prayer.”¹⁸³ In Walz v. Tax Commission the application of strict separationism was the basis for establishing “citizens’ spiritual life” by granting tax exemptions for religious entities.¹⁸⁴ Finally the

¹⁷⁷ House, *supra* note 55 at 257.

¹⁷⁸ LUPU, *supra* note 168 at 447.

¹⁷⁹ *Id.* at 448.

¹⁸⁰ *Id.* at 447, 448.

¹⁸¹ *Id.* at 447.

¹⁸² See *Engel v. Vitale*, 370 U.S. 421 (1962), *School Dist. V. Schempp*, 374 U.S. 203 (1963).

¹⁸³ Lupu, *supra* note 168 at 447.

¹⁸⁴ *Id.* at 448.

Lemon decision deemed to have set rules for the future of strict separatism by establishing the three-part scrutiny test.¹⁸⁵

The second era Lupu titles “The attack on Separationism.”¹⁸⁶ The time between 1980 and 1992 was strongly influenced by the Reagan-Bush government. “The development of the Religion Clauses reflected a retreat from judicial policing of the boundaries between religion and government.”¹⁸⁷ The notion of nonendorsement arose. Even though in Lee v. Weisman a small majority struck down the constitutionality of the religious graduation eulogy, a new approach towards the establishment clause was obvious;¹⁸⁸ Lupu explains the nonendorsement principle as

resting on a foundation profoundly different from that of separationism. The nonendorsement principle is concerned with the individual alienation, or feelings of exclusion, that an observer of a government-sponsored religious symbol might experience; separationism focuses upon the social, rather than individual, harms that church-state merger may create. Similarly, the attention paid in nonendorsement writing to “insiders” and “outsiders” rings with equal protection considerations. Though separationism achieves minority-protecting functions, it reflects the broader social purpose of secularizing the public arena and discouraging sectarian rivalries. These rivalries are more likely to occur as separationism wanes and the new regime emerges.¹⁸⁹

¹⁸⁵ *Id.* at 448.

¹⁸⁶ *Id.* at 448.

¹⁸⁷ *Id.* at 448.

¹⁸⁸ *Id.* at 450.

¹⁸⁹ LUPU, *supra* note 168 at 450.

Hence, there has been a development within the court, from a strict separationist view in *Everson*, to more moderate holdings approaching the nonendorsement principle and balancing of individual rights.

2. The Free Exercise Clause

Free exercise clause cases generally arise out of conflict between secular laws and individual religious beliefs. The Supreme Court stated,

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities. However, the Court has rejected challenges under the Free Exercise Clause to governmental regulations of certain overt acts prompted by religious beliefs or principles. Even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions.¹⁹⁰

The court added that "in this highly sensitive constitutional area, only the gravest abuses endangering paramount interest, give occasion for permissible limitation."¹⁹¹

The Supreme Court established a balancing test to determine whether or not the government's action is a violation of the free exercise clause.¹⁹² The test weighs the individual's interest in the religious practice and the state's interest in regulating such behavior. The plaintiff must be acting upon a "sincere believe," and that belief must be limited by a government action. Once the aforementioned requirements are met, the state

¹⁹⁰ *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).

¹⁹¹ *Id.* at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1937).

has the burden to prove that its action has a crucial importance and, fourth, that by granting the individual's freedom of religion, the state's intention is prevented.¹⁹³

As decided in *Cantwell*,¹⁹⁴ "the freedom of exercising religion" contains the freedom to believe and to act. Justice Owen J. Roberts emphasized that:

The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. However, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.¹⁹⁵

3. Towards a Constitutional Definition of Religion

A critical issue is that the Constitution does not provide a definition of religion.

Derek Davis commented:

To define the term would have placed a permanent imprimatur upon only those forms of faith and belief that conformed to their definition. The framers instead chose to leave the term undefined, thereby protecting a diversity of beliefs, not merely the traditional ones, from undue advancement or prohibition of expression by government. This guarantee of freedom of religion, the centerpiece of American liberties, has served to protect all religions, old and new, against governmental preference, intrusion, and harassment.¹⁹⁶

¹⁹² *Browne*, *supra* note 6 at 168.

¹⁹³ *Id.* at 168.

¹⁹⁴ *Cantwell v. Connecticut*, 310 U.S. 196 (1940).

¹⁹⁵ *Id.* at 306.

¹⁹⁶ Derek Davis, *The Courts and the Constitutional Meaning of "Religion": A History and Critique*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 89, 90 (James E. Wood, Jr. & Derek Davis, eds. 1993).

Due to the various interpretations and backgrounds of the religious clauses, a somewhat incoherent case law exists concerning religious issues exists¹⁹⁷. Depending on the justices sitting on the Supreme Court, liberal and conservative ideologies are represented.¹⁹⁸ Since the liberal tradition is considered to be more anti-religious, Court decisions consisting of a majority of liberal justices tend to be more hostile to religious issues in public life. A majority consisting of conservative justices tends to be more accepting of religion co-mingling with the public arena.

However, the Supreme Court's interpretation of religion went through changes over the years. In its prior decisions, at the turn of the 19th century, the Supreme Court characterizes religion as "relationship between a person and some Supreme Being."¹⁹⁹ In connection with this interpretation, the First Amendment was not used to protect religions other than Christianity.²⁰⁰ At that time the Supreme Court still used a "substantive" definition of religion and therefore examined the content of each particular religion.²⁰¹ Today, however, the Court applies the "functional" definition of religion,²⁰² which examines the importance of the particular belief in a person's life.²⁰³ This changing to a new approach took place in 1944, when the Supreme Court decided United States v. Ballard.²⁰⁴ The Supreme Court held for the first time that there might not be a determination of whether or not an individual's belief is a decent belief.²⁰⁵

¹⁹⁷ Mark Tushnet, *The Constitution of Religion*, 50 *Rev. of Pol.* 628, (1988).

¹⁹⁸ *Id.* at 628.

¹⁹⁹ Davis, *supra* note 196 at 92.

²⁰⁰ Browne, *supra* note 7 at 166.

²⁰¹ *Id.* at 166.

²⁰² *Id.* at 167.

²⁰³ Browne, *supra* note 7 at 167.

²⁰⁴ 322 U.S. 78 (1944).

²⁰⁵ Browne, *supra* note 7 at 167.

Justice Hand commented on the applied Selective Training and Service Act of 1940:²⁰⁶

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men.... It is a belief finding expression in a conscience, which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.... (Conscientious objection) may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.²⁰⁷

What resulted from this shift from the substantive definition to the functional definition? Since the middle of the 20th century, the new definition of religion has allowed individuals to have beliefs and religious experiences outside the traditional theories and faith systems.²⁰⁸ For example, the Supreme Court acknowledged a Secular Humanists' refusal to take a Christian oath in order to become a notary public, thus striking down a provision requiring that oath.²⁰⁹

In 1965 the Supreme Court established the so-called "sincerity test".²¹⁰ This test does not examine the content of a religious belief, but rather the sincerity of the individual who believes in the religion. The Supreme Court held, "religious are all sincere held beliefs based upon a power or being, or upon a faith, to which all else is subordinate or upon all else is ultimately dependent."²¹¹ Five years later, this "sincerity

²⁰⁶ *Id.* at 167.

²⁰⁷ *Id.* at 167 (citing *United States v. Kauten*, 133 F. 2d 703, 708 (2d Cir. 1943).

²⁰⁸ *Id.* at 168.

²⁰⁹ *Torasco v. Watkins*, 367 U.S. 488 (1961).

²¹⁰ 380 U.S. 163 (1965).

²¹¹ *Id.*, at 176.

test” was broadened²¹² in Welch v. United States²¹³ when the Court had to examine an exemption from the military draft based upon religious belief. The Supreme Court held that the plaintiff’s claim for an exemption could only be denied if his faith did not “rest at all upon moral, ethical, or religious principles but instead rest solely upon considerations of policy, pragmatism, or expediency.”²¹⁴

4. The Government’s ability to regulate Religion by taxes

The Internal Revenue Code (hereinafter IRC) provides that an organization may be exempt from federal income tax if it is organized and operated exclusively for a “religious” purpose.²¹⁵ Rationale for this provision is the notion that non-profit religious organizations benefit the whole society and therefore should not be “punished” with federal income tax.²¹⁶ However, religious groups must fulfill four requirements in order to achieve tax exempt status. First, the organization must be *organized* and *operated* for religious purposes. Second, the entity’s net earnings must not inure to the benefit of any

²¹² Browne, *supra* note 7 at 168.

²¹³ Welch v. United States, 398 U.S. 333 (1970).

²¹⁴ *Id.* at 342-343.

²¹⁵ Title 26, Subtitle A, Chapter 1, Subchapter F, Part I, Section 501 (c) (3):

“(List of exempt organizations) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, nor part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

²¹⁶ Trevor A. Brown, *Religious Nonprofits and the Commercial Manner Test*, 99 YALE L.J. 1631 (1990).

private shareholder or individual. Third, the group can not engage in politics. Finally, the organization must not act against public policy.²¹⁷

If an organization attains tax exempt status it has no duty to pay federal income tax. In addition, “donors” to that religious group can deduct their “donations” from their personal income tax.²¹⁸

Unfortunately, the income tax regulations do not contain any definition of the term “religious”. Over the years, the Internal Revenue Service (hereinafter IRS) and the courts have struggled to define, for tax purposes, what is or is not a “religious” activity or organization- despite obvious policy and constitutional law constraints.

Naturally, a conflict arises between the protection of the First Amendment and the fact that the government is examining whether or not a group should be granted tax exemption status as a religious organization. When making such determinations it is difficult for the IRS not to infringe into a religion’s protected sphere.²¹⁹

Both the Courts and the IRS apply the “commercial manner test” to determine whether or not a religious organization meets the IRC requirements.²²⁰ This test examines if the organization has particular commercial standards.²²¹ This scrutinizing test is rationalized by the fact that tax exemption must be limited to non-profit religious organizations, since only these entities deserve special treatment.²²²

However, a religious group can also lose its tax exempt status. The IRS is authorized to revoke an organization’s tax exempt status, notwithstanding an earlier

²¹⁷ *Id.* at 1632.

²¹⁸ James Walsh, *Tax Treatment of the Church of Scientology in the United States and the United Kingdom*, 19 SUFFOLK TRANSNAT’L L. REV. 331, 337 (1995).

²¹⁹ BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS*, 202 (6th ed 1992).

²²⁰ Brown, *supra* note 216 at 1631.

²²¹ *Id.* at 1631.

²²² *Id.* at 1631.

recognition of its exemption by IRS or court order, where the organization violates one or more of the requirements for the applicable tax-exemption.²²³

Due to the lack of a definition for religion, the IRS applies a two-pronged test to determine whether or not a group meets the standard to be religious. First, the “particular religious beliefs of the organization must be truly and sincerely held,” and second, “the practices and rituals associated with the organization’s religious belief or creed must not be illegal or contrary to clearly defined public policy.”²²⁴

5. IRS’s definition of “church”

In 1978, the IRS established fourteen criteria to determine whether or not an organization can be qualified as a church; the particular group has to fulfill at least some of the following requirements though not all of them.²²⁵

- distinct legal existence
- a recognized creed and form of worship
- a definite and distinct ecclesiastical government
- a formal cod of doctrine and discipline
- a distinct religious history
- a membership not associated with any other church or denomination
- an organization of ordained ministers
- ordained ministers selected after completing prescribed studies
- a literature of its own
- established places of worship
- regular congregations

²²³ Walsh, *supra* note 218 at 338.

²²⁴ *Id.* at 337.

- regular religious services
- Sunday school for the young
- Schools for preparations for its ministers

C. First Conclusion regarding religious Freedom in Germany and the U.S.

Religious freedom in the U.S. is connected two the identity of the state. The American nation was established by religious refugees coming from Europe and served as a new home for the persecuted. Hence, religious freedom is not just a fundamental right, but the reason the United States was founded.²²⁵ Comparatively, in Germany it is historically grown and part of the human dignity. Therefore the freedom of religion in Germany can be limited in cases where there is a violation of another person's dignity. What the dignity of a person is must to be defined and interpreted on a case to case basis. In comparison to the relatively simple statement in the First Amendment to the U.S. Constitution the number of the Basic Law provisions on church and state relations contrasts significantly. Additionally, Article 140 GG incorporates the only pre WWII Weimar Constitution provisions regarding religious freedom into the present German Basic law. This is a unique situation because the U.S. Constitution existed for over 200 years, whereas the fifty years old Basic Law of the Federal Republic of Germany had to "borrow" provision from its predecessor Constitution. Somewhat unique as well because the Weimar Constitution might be regarded as Constitution that made the Nazi party rise eventually even though it was intended to establish a democracy.

²²⁵ Wendy Gerzog Shaller, *Churches and their enviable Tax Status*, 51 U.PITT.L.REV.345, 353 (1990)

²²⁶ Endbericht der Enquete-Kommission "Sogenannte Sekten und Psychogruppen", Zur Sache 5/98.

Another marked difference is in the ethnic and cultural background of the United States and Germany. Because the United States are a “melting pot” of different cultures, many different types of ideology and religion are fused together. People in the United States are accustomed to many different denominations. Courts obviously have had to deal with that as well. In Germany, however, for many hundreds of years only the large churches, Protestant and Catholic existed, as “peoples-churches.” Smaller churches were somewhat tolerated, as long as they did not try to interfere in public life. After World War II a growing Moslem population caused the Courts to face new issues of freedom of religion. The holding in the Interdenominational School Case, decided by the Federal Constitutional Case in 1975 highlights the impact of Christianity in every day life. The Court held that Christianity is not only a large Church, but a part of German culture, and must be considered when deciding upon an Article 4 GG issue.

A very important point, however, is the two countries’ different understandings of “separation between church and state.” The establishment clause in the First Amendment of the U.S. Constitution requires a wall of separation between church and state, meaning total absence of the state in religious matters and vice versa. However, Art. 137 WRV requiring a separation of church and state, allows the main churches to establish themselves as corporate bodies under public law, thereby receiving certain powers from government.

There are historical reasons for both treatments of separation. The American understanding traces back to the denial of a state church, like the Church of England. Those persecuted under that state church felt that church and religious belief should be completely private. The religious refugees from Europe established a new country based

on their beliefs. On the other hand, the notion of separation of Church and State in the Weimar Constitution was somewhat revolutionary, because until the end of WWI the emperor was the highest bishop in the Protestant church. There Church was always a part of the state until the end of WWI. Thus the separation came suddenly with the Weimar Constitution.

Today these different interpretations of separation of church and state have different legal consequences. In the U.S., the issue arises how much state support parochial schools may receive or how much impact religion may have in public life such as school prayers or prayers at sport events.

In Germany, legal issues deal with the actual qualification as a church. When does Article 4 GG apply to a religious group and therefore protects this religious group and when is a entity only abusing the name of religion to benefit from all the legal preferential treatments?

In the following chapter the Church of Scientology will be discussed as an example of different treatment under the constitutional provisions of religious liberty in both the U.S. and Germany.

D. The Church of Scientology

“The Sun never sets on Scientology” (L. Ron Hubbard, September 1965)²²⁷

I. Basic Facts

a. Foundation, members, subdivisions, locations

The word Scientology derives from the Latin word “scio “ (knowledge) and the Greek word “λογος ” (knowledge, word) thus meaning “The knowledge of knowledge/know how”. Scientology is a system of belief based on the books of its founder, L. Ron Hubbard (referred to by his followers as “LRH”). In 1950, Hubbard published his first modern, mass-market, “self-help” book, Dianetics, the Modern Science of Mental Health, which became a best seller. Hubbard began to organize and promote his belief system, “Scientology,” as a physical and mental health curative system.

Soon his belief system became a “religion.” Scientology expanded to South Africa, Australia, New Zealand, Cairo and Tel Aviv. In 1955, the Founding Church of Scientology was established in Washington D.C., to handle the increasing influence on foreign congregations. Scientologists believe that the establishment of this organization provided sufficient recognition as an official religion to protect the rights of Hubbard’s followers under U.S. Constitutional Law. Critics oppose Hubbard’s claim, stating his use of religion acts as a façade to detour government scrutiny while keeping the benefits of a tax-free status. Today there are 3100 churches, missions and associated organizations,

²²⁷ L. RON HUBBARD, SCIENTOLOGY, THE FUNDAMENTALS OF THOUGHT, 169 (1988).

with 8 million members.²²⁸ The Management Center is located in Los Angeles and the spiritual center is placed in Clearwater, Florida.²²⁹

The European headquarters are located in Copenhagen, Denmark. In Germany there are seven “churches,” located in Berlin, Duesseldorf, Frankfurt, Hannover, Hamburg, Muenchen, Stuttgart. Further Scientology claims to have 10 missions and 3 celebrity centers.²³⁰ Scientology reports to have 30,000 German members²³¹ whereas the German Constitution Protection Agency evaluated the church to have around 8000 members.²³² In Germany, Scientology was founded in Munich in 1970, as an incorporated non-profit organization.²³³

There are a variety of organizations related to the Church of Scientology that do not bear the name of Scientology

- **NARCONON**, offering therapies for drug addicts, guarantees a great chance of success of their rehabilitation. The German government explicitly warns people before participating in these programs.²³⁴
- **CRIMINON** is a Scientology related organization that attempts to reintegrate former prisoners in society.²³⁵
- The “**Commission for Violations of Psychiatry against Human Rights**”²³⁶ is located in eight different places in Germany. The Commission’s purpose is

²²⁸ DIE SCIENTOLOGY-ORGANIZATION –GEFAHREN, ZIELE, PRAKTIKEN 10, (ed. by minister of family, seniors, women and youth) (1996).

²²⁹ *Id.* at 10.

²³⁰ *Id.* at 10.

²³¹ *Id.* at 10.

²³² U.S. DEPARTEMENT OF STATE ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 1999: GERMANY (visited October 29, 1999)

<http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_germany99.html>.

²³³ SCIENTOLOGY OEGANIZATION, *supra* note 228 at 10.

²³⁴ *Id.* at 11.

²³⁵ *Id.* at 13.

the revelation and fighting of abuses in Psychiatry. However, their campaigns are defamatory against Psychiatrists and Psychologists. The Commission attempts to draw vulnerable and weak persons to its techniques, which are those of Scientology. The actual intention is not to cure these people, but rather to recruit them for Scientology. The Commission even managed to get into Kindergartens, as salesmen for puppets and teddy bears, in order to reach kids and influence them.²³⁷

- The “**Center for Individual and Effective Learning**”²³⁸ is related to the Church of Scientology International’s organization, “**APPLIED SCHOLASIC INTERNATIONAL.**” This Center teaches teenagers and adults Scientology’s study methods by providing individual educational support, as well as homework support.²³⁹
- **WISE** (World Institute of Scientology Enterprises) was founded in 1979. It is economic branch of Scientology. The Main purpose of WISE is the infiltration of Scientology’s ideas into business life. The different controlling mechanisms of Scientology are supposed to be applied within the business structure of enterprises. Individuals, as well as corporations, are able to receive WISE membership. This membership is promised to provide higher effectiveness.²⁴⁰ So called “Chief Executives” supervise the enforcement and are expected to

²³⁶ Kommission fuer Verstoesse der Psychatrie gegen Menschenrechte (KVPM).

²³⁷ SCIENTOLOGY ORGANIZATION, *supra* note 228 at 11.

²³⁸ Zentrum fuer Individuelles und Effektives Lernen (ZIEL).

²³⁹ SCIENTOLOGY ORGANIZATION, *supra* note 228 at 12.

²⁴⁰ *Id.* at 27.

introduce Scientology standards into other important arenas, such as communities, states, and governments.²⁴¹

· **The Sea Organization (SeaOrg)** was founded by Hubbard in 1967 as an Elite fraternity of Scientologists.²⁴² Around 5000 members dedicated themselves to Scientology by signing a contract over 1 billion years hard working for little money.²⁴³

²⁴¹ *Id.* at 28.

²⁴² THOMAS KRUCHEM, *STAATSFEIND Scientology?*, 372 (1999).

²⁴³ *Id.* at 372.

b. The Church of Scientology’s organizational structure in the world²⁴⁴

<p>RTC (Religions Technology Center) Chairman: David Miscavige Distribution of licenses for all organizations of Scientology for the usage of trademarks (Los Angeles)</p>	<p>Church of Scientology International “Mother Church,” headquarter for planning expansion and coordination of single churches and activities (Clearwater, Florida)</p>	<p>IAS (International Association of Scientologists) International organization of Scientologists; fights all anti-scientology groups</p>	
<p>The Watchdog Committee is the highest planning-, order-, and guarding authority. The Committee regulates the Office for Special Affairs. The Office is in charge of dealing with critics of Scientology, such as governments, journalists and opposition groups.</p>			
<p>Celebrity Centers Aimed at artists and popular people; their elevated position in society is supposed to upgrade Scientology influence in every day life</p>	<p>Churches, Missions and Orgs (Organizations) Aimed at the average population; encouragement to buy books and courses to increase business</p>	<p>Wise (World Institute of Scientology Enterprises International) Aimed at the economic achieve influence in businesses</p>	<p>ABLE (Association Better Living and Education) Aimed at students and young adults in the educational field NARCONON KVPM ZIEL CRIMINON</p>

Source: Data from Scientology Organization, supra note 224 at 13.

a. The founder, L. Ron Hubbard- Messiah or Madman?

“I have high hopes of smashing my name into history so violently that it will take a legendary form... That goal is the real goal as far as I am concerned.”²⁴⁵

²⁴⁴ SCIENTOLOGY ORGANIZATION supra note 228 at 13.

Lafayette Ron Hubbard was born March 13, 1911, in Tilden, Nebraska. He is described as a Jack-of-all-trades and a genius by his members. At the age of 12, his mentor was Commander Joseph C. Thompson, who was the first military official to study under Sigmund Freud and learn the theory of psychoanalysis.²⁴⁶ Hubbard was greatly influenced by his many travels to foreign countries. During this time, he studied a broad range of Eastern philosophies, including Hinduism, Taoism and Buddhism. His institutional studies consisted primarily of math, engineering and nuclear physics at George Washington University, although he never completed his Bachelors degree. He served as a Naval Officer during World War II and was severely injured. During his recovery, Hubbard returned to his studies of Eastern philosophy. Afterwards he developed the theory of Dianetics and later Scientology. Hubbard lived on a ship during these years among his family and staff. From there he could control the Scientology “enterprise.”²⁴⁷ Even though he officially retired in 1966, Hubbard was still considered to be in control of all important transactions. Thus his signature for financial actions remained required.²⁴⁸

L.R.H. died on January 24, 1986. The third most powerful executive of the Church of Scientology, David Miscavige, delivered his eulogy in the Hollywood Palladium, to the members of the Los Angeles area who surrounded him. Members all over the world tuned in by Satellite, as Miscavige²⁴⁹:

²⁴⁵ L.R.H. writing to the first of his three wives in 1938, more than a decade before he created Scientology, Los Angeles Times, Sunday 24 June 1990, page A 36:3.

²⁴⁶ *Life of Ron Hubbard* (visited April 25, 2000) <<http://aboutronhubbard.org/eng/wis31s.htm>>.

²⁴⁷ Jerold A. Friedland, *Constitutional Issues In Revoking Religious Tax Exemptions: Church of Scientology of California v. Commissioner*, 37 U. FL. L. REV. 565, 568 (1985).

²⁴⁸ *Id.* at 568.

²⁴⁹ BENT CORYDON, L. RON HUBBARD, MESSIAH OR MADAMAN 16 (1992).

He (Hubbard) has now moved on to the next level of OT²⁵⁰ research. It is a level beyond anything any of us ever imagined. This level is in fact an exterior state. Meaning that it is done completely outside the body. Of this level of OT, the body is nothing more than an impediment and encumbrance to any further as an OT. Thus at 2000 hours, the 24th of January, AD 36, L. Ron Hubbard discarded the body he had used in this life time for 74 years 10 month and 11 days. ... He thought it was important that Scientologists be the first to become aware of this fact. ... The body is a physical object. It is not the being himself. The being we know as L. Ron Hubbard still exists; however, the body could no longer serve his purposes. His decision was made at complete cause. ... He was simply moved on to his next step.²⁵¹

2. Ideals and Ideas

a. Dianetics and Scientology

“Dianetics is an adventure. It is an exploration into *terra incognita*,²⁵² the human mind, that vast and hitherto unknown realm half an inch back of our foreheads.”²⁵³ Dianetics, published in 1950, is one of the primary sources of Scientology today, in addition to the writings and lectures around it, the evaluations and personal achievements of Hubbard. The theory of Dianetics breaks the human mind into two components; analytical and reactive.²⁵⁴ The analytical section of the mind is consciously aware of what is going on. The reactive section, which is located beneath the analytical, takes over

²⁵⁰ OT= Operating Thetan (a spiritual being restored to his “native state” of godlike abilities).

²⁵¹ Corydon, *supra* note 249, at 17.

²⁵² “*terra incognita*”, Latin= unknown land, place.

²⁵³ L. RON HUBBARD, DIANETICS, THE MODERN SCIENCE OF MENTAL HEALTH 1 (1992).

²⁵⁴ SCIENTOLOGY ORGANIZATION, *supra* note 228, at 14.

the latter in times of material and immaterial pain.²⁵⁵ Thus, the analytical part of the brain closes down and the reactive mind perceives everything going on; the person itself is not aware of this procedure. The process of absorbing information from the reactive part of the mind is called an “engram”, further defined “as a complete recollection of every perception occurring during the described stage of unconsciousness.”²⁵⁶

Because the person experiencing the engrams has not been aware of having received negative information, thus he or she does not remember traumatic impressions. However, once an engram has placed itself in the human mind, it will stay there. According to the theory, this engram manifests itself as an individual’s inability to utilize his full potential.²⁵⁷

To counter this effect, Hubbard developed a therapy called “auditing.”²⁵⁸ In practice this helps the individual seek the engrams, and finally, to delete them.” The therapist is considered to be a minister, or minister-in-training, and is referred to as the “auditor.” He listens to persons not yet cleared of their engrams, referred to as the “preclears.”²⁵⁹ While conducting the auditing sessions, the auditor is alone with the preclear in a quiet room with a “E- meter”²⁶⁰ which evaluates the energy rays while exploring an engram.²⁶¹ The auditor tries to pinpoint the engram of the preclear by asking the individual “process questions.”²⁶²

²⁵⁵ *The Church of Scientology* (visited October 10, 1999)
<<http://cti.itc.virginia.edu/~jkh8x/soc257/nrms/scientology.html>>.

²⁵⁶ *Id.*

²⁵⁷ SCIENTOLOGY ORGANIZATION, *supra* note 228, at 23.

²⁵⁸ “Audire” in Latin means to listen.

²⁵⁹ *The Church of Scientology*, *supra* note 255.

²⁶⁰ E- meter= Electropsychometer.

²⁶¹ *The Church of Scientology*, *supra* note 255.

²⁶² *Id.*

The aim of the auditing sessions is to delete all engrams, to clear the preclear, thus freeing him from unnecessarily occupied space. This leads to conscious receiving of information by the analytical mind. To members of Scientology, this translates to “the highest state of awareness as a spiritual being.”²⁶³ Dianetics itself is considered the “modern science of mental health.” Scientologists used the principles of Dianetics; now calling Scientology “an applied religious philosophy”.²⁶⁴ Hence, the “Science” of Dianetics is brought a step further, now being called a religion under Scientology.²⁶⁵ It is believed that man is not a mind or a body, but rather a soul or a spiritual being; referred to as a “Thetan.”²⁶⁶ Sociologist William Brainbridge described the meaning of a “Thetan”²⁶⁷ as analogous to the Christian notion of a soul. All humans are thetans, immortal spiritual entities possessing virtually infinite powers.”²⁶⁸ Scientology claims that a comparison between Psychology and Scientology is of no use since Psychology, considered to be the study of the spirit or the mind,²⁶⁹ would simply deny the spirit of the humans.²⁷⁰ Hubbard referred to the Psychologist Wilhelm Wundt, who believed that human beings are animals without souls and not able to improve. Scientology however believes in changing the intelligence and behavior of humans.²⁷¹

Using Dianetics, humans can become “clear” and reach their status on the “bridge of total freedom.” The freedom spoken of is the freedom from all material

²⁶³ *The Bridge To A Better Life* (visited October 29, 1999) <<http://www.scientology.org/pipg/wis/wiseng/wise4-6/wis61.htm>>.

²⁶⁴ HUBBARD, *Scientology*, *supra* note 227, at 9.

²⁶⁵ *The Church of Scientology*, *supra* note 255.

²⁶⁶ *Id.*

²⁶⁷ “Thetan”= from Greek letter “J” meaning thought.

²⁶⁸ *The Church of Scientology*, *supra* note 255.

²⁶⁹ Psychology= deriving from Greek: “*ps uch*” and “*l ogos*” meaning theory or science of the soul or spirit.

²⁷⁰ HUBBARD, *Scientology*, *supra* note 228, at 9.

²⁷¹ *Id.* at 10.

surroundings, including the body. According to the “State of Operating Thetan,” a church document, the “Thetan” reaches total freedom when leaving Matter, Energy, Space and Time (MEST). It is centers around the pursuit of perfection.²⁷²

As Scientologists progress up the bridge, they learn the details of Hubbard’s cosmology, which articulates a many-trillion-year history similar to the “galactic space opera” of Hubbard’s prolific science-fiction efforts. Operating Thetan Level III, which details how, when, and why humans came to Earth, is a good sample of this cosmology.

The symbol for Dianetics is shaped like the Greek letter delta, with yellow stripes symbolizing life and four green panels, representing four subdivision’s of the urge for man’s survival. The Eight Dynamics of Scientology continue Hubbard’s examination into the importance of survival. The Eight are Self, Creativity, Group Survival, Species, Life Forms, Physical Universe, Spiritual Dynamic, and Infinity. Each of these pertains to the role of survival of each of these components. The Eight Dynamics transcend throughout all of nature, including animals and vegetation, and beyond.²⁷³

b. The Introspective Rundown

The Introspective Rundown is a procedure used to clear the body from any toxication.²⁷⁴ According to Hubbard, ecological poisons, drugs and other unhealthy substances stay in the body and cause irritations of the mind years later. Thus the person

²⁷² *The state of Operating Thetan* (visited October 29, 2000) <<http://www.auditing.org/13-ot.htm>>.

²⁷³ *The Church of Scientology*, *supra* note 255.

²⁷⁴ KRUCHEM, *supra* note 242 at 365.

will experience anything from disturbed vision and perception up to brain failure.²⁷⁵ To prevent that from happening, Hubbard developed the “rundown,” consisting of a series of steps.²⁷⁶ The first step is to:

“isolate the person wholly with all attendants completely muzzled. Auditing lessons are given infrequently to search for the cause of the psychotic break during this rundown, otherwise the person is isolated in complete silence. When it is obvious the person is out of his psychosis and up to responsibility of living with others his isolation is ended. The supervisor in charge of the person being isolated tests the person’s condition.”²⁷⁷

Further parts of the rundown are combinations of running, sauna, and a vast amounts of vitamins.²⁷⁸ Hubbard declared this rundown as “technical breakthrough” which made psychiatry superfluous.²⁷⁹

b. Rehabilitation Project Force (RPF)

The RPF consists of certain sanctions against Sea-Org members who violated their obligations. The Rehabilitation Project can be compared with rigid monasteries, contained of strict working rules and separation from family members.²⁸⁰ Critics call the project a concentration camp with humiliating treatment, inmate clothing, and withdrawal

²⁷⁵ *Id.* at 365.

²⁷⁶ *The Introspection Rundown* (visited April 12, 2000) <<http://www.stud.uni-hannover.de/user/76201/lisa/introspe.htm>>.

²⁷⁷ *Id.*

²⁷⁸ KRUCHEM, *supra* note 242 at 366.

²⁷⁹ *The Introspection Rundown*, *supra* note 272.

²⁸⁰ KRUCHEM, *supra* note 242 at 365.

of food and sleep.²⁸¹ The aim of the Rehabilitation Project Force is to reconfirm the “renegade” to Scientology’s system and structure by punishing him severely.²⁸²

c. Goals and Aims

Scientology wants to establish the new human being in a world that functions pursuant to Scientology’s ideas. Scientology strives for a society apart from democracy. “Scientology wants a world without insanity, without war and criminals, the able should prosper and the honest people will have rights and where mankind is free to develop to higher standards. Scientology does not seek a revolution but an evolution.”²⁸³

Hubbard describes the democratic system as useless, without differentiating among different appearances of democracy.²⁸⁴ According to Hubbard, a real democracy can only exist when all humans are Scientologists.²⁸⁵ The existing world is condemned to vanish. The exclusive salvation is the realm of Scientology. The fear of people is taken advantage of to sell Scientology books and courses in order to save their lives. Non-Scientologists have no chance to survive.²⁸⁶

d. Scientology attitude towards critics

According to Hubbard, the purpose of litigation is:

to harass and discourage rather than to win. The law can be used very easily to harass and enough harassment on somebody who is simply on the edge anyway, well

²⁸¹ *Id.* at 365.

²⁸² *Id.* at 365.

²⁸³ HUBBARD, *Scientology*, *supra* note 228, at 167.

²⁸⁴ SCIENTOLOGY-ORGANIZATION, *supra* note 228 at 15.

²⁸⁵ *Id.* at 15.

²⁸⁶ *Id.* at 16.

knowing that (his) is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.²⁸⁷

E. Scientology and its relation to Germany

The Church of Scientology has financed a considerable number of public relation campaigns against Germany through worldwide publications. There have been full-paper sized campaigns in such respected newspapers as The New York Times and The Washington Post, accusing modern Germany of treating Scientology like the Jews in the Holocaust during the Third Reich.²⁸⁸ When the advertisements attacking Germany ran in the International Herald Tribune in 1997, the journalists took out a counter-advertisement in their own newspaper dissociating themselves from the Church's claims. The U.S. State department responded to this Scientology campaign, stating it was "an outrageous charge against the German government. It bears no resemblance to the facts of what is going on in Germany. The language is needlessly provocative."²⁸⁹

For Scientology, Germany is the home of its greatest opponents, the disciples of Psychology and Psychiatry. According to Hubbard, "modern psychology is a German military system, which is used to condition people for war and which is supported by the government in American and other universities during times when they are having difficulties in recruiting for the military."

Thus, the relationship between Scientology and Germany is a very hostile one and vice versa. Germany is an easy target for Scientology because Germany is very

²⁸⁷ *Scientology and the Courts, An Introduction* (visited April 25, 2000)

<<http://mars.superlink.net/user/mgarde/intro.htm>>.

²⁸⁸ *The Scientology Public Relations Campaign Against Germany* (visited October 27, 1999)

<<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/government.html>>.

vulnerable due to its history. In the following passage, the legal treatment of Scientology will be demonstrated.

1. Is the Church of Scientology a legal “Church”?

Court opinions

- a. In 1995, The Federal Labor Court of Germany²⁹⁰ decided, that according to Article 4 of the Basic Law, the Church of Scientology is not a church and therefore has no protection pursuant to the establishment clause.²⁹¹ Staff members of Scientology are regular employees, and working for a “community” does not permit denial of labor protection laws. The Plaintiff was working for Scientology, and participating every Thursday in meetings in an inner management circle. The employees were called for 11 p.m., but meetings often did not start until midnight and seldom ended before 2 a.m. The Plaintiff also had to participate in planned activities, like distributing advertisements materials on Saturdays. He was required to send videos and materials to German politicians, providing information about Scientology, which lasted to 4 a.m. When leaving for a vacation without the church’s security check, he received a severe “ethic order.” He worked until the end of September 1991.

In 1990 he earned 4000 DM, and in 1991 5300 DM; he prepaid the Scientology church 17, 500 DM for “auditing” and was refunded 6, 500 DM in 1992. He claims that he should get 3500 DM monthly, 71, 947 for 1990 and 52, 800 for 1991.

²⁸⁹ *Id.*

²⁹⁰ “Bundesarbeitsgericht”.

²⁹¹ 79 BAGE 319 (1995).

Scientology claims that plaintiff did religious work, all his activities including meetings were voluntarily, and security check is a part of counseling preventing that long term members leave. The Court rejected Scientology's response:

The main basis of the court's holding was that it considered not only Scientology's own understanding of being a religious entity, but also the outer appearance and ideas, when examining whether or not Scientology is a church. The primary purpose in a church must be religious one. The court viewed Scientology as abusing the religious aspect to achieve economical goals.²⁹² Since the plaintiff had to pay approximately the same amount of money in "donations," prior to working for Scientology, as he would receive after having worked for Scientology, the court concluded that the plaintiff did not get paid at all. The court mentioned similar cases where employees of Scientology even had to secure loans in order to pay their "fixed donations" to Scientology.²⁹³

Additionally, advertisements offering auditing services support the argument of the commercialization of Scientology. The court argued, that by offering a 10 % commission to recruit people, Scientology was utilizing a deceptive recruiting method, which a church would not likely to be using.²⁹⁴ Hence, the acts of Scientology are not covered under the free exercise clause, but rather by the regular provisions of labor and corporate law. According to the Court's holding, the Organization must be treated as a company, rather than a church, for both its tax and labor law benefits.²⁹⁵ Further, the court argued that Scientology humiliates its members through internal directions,

²⁹² 79 BAGE 319, 338 (1995).

²⁹³ *Id.* at 343.

²⁹⁴ *Id.* at 348.

²⁹⁵ *Id.* at 349.

by pushing them constantly to strive and reach supreme achievement.²⁹⁶ Finally, the court shows the totalitarian tendencies in Scientology's security checks as obvious methods to prevent member loss.²⁹⁷

a. The Federal Administrative Court²⁹⁸ held that Scientology should register its economic activities, especially the sale of its books and courses, with the appropriate offices. However, the court did not rule on the legal status of Scientology being a religion or not.²⁹⁹

b. The Administrative Court³⁰⁰ in Cologne ruled, on March 29, 1995, that federal Labor minister, Norbert Bluem, could call Scientology a "criminal money laundering organization" and a "cartel of oppression with contempt for human beings." Bluem also called Scientology leader "criminals brainwashing" their members.³⁰¹

c. The Upper Administrative Court³⁰² of Lueneburg ruled that Scientology of Hanover could no longer sell books or approach passers-by in public.³⁰³

d. On March 3, 1996 the District Court³⁰⁴ of Heidelberg ordered a Scientology member to pay a fine for threatening a member of the youth organization of the Christian Democratic Party (CDU) because the 17 year-old publicly criticized Scientology.³⁰⁵

²⁹⁶ *Id.* at 349.

²⁹⁷ *Id.* at 353.

²⁹⁸ "Bundesverwaltungsgericht".

²⁹⁹ *Bundesverwaltungsgerichtsbeschluss* (visited April 25, 2000) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/bverwglb.html>>.

³⁰⁰ "Verwaltungsgericht".

³⁰¹ VG Koeln, Az: 10 L 1942/ 94.

³⁰² "Oberverwaltungsgericht".

³⁰³ OVG Lueneburg, Az: 12 L 1856/ 93; 12 L 2141/ 93.

³⁰⁴ "Amtsgericht".

³⁰⁵ AG Heidelberg Az:/ 7 Cs 15 Js 4193/95.

Overall, courts have problems treating Scientology as a religious group. Except for the Federal Labor Court, however, no Superior Federal Court has decided upon the religious character of Scientology. Especially the Federal Constitutional Court's opinion would render a more transparent point of view. Yet, the Federal Constitutional Court's decision is to come.

F. Scientology and its relation to the United States

1. Auditing, E-meter and The Free Exercise of Religion

In 1963 the Food and Drug Administration raided the Founding Church of Scientology of Washington.³⁰⁶ The FDA seized E-meters and Scientology writings, arguing they violated the Food, Drug and Cosmetic Act.³⁰⁷ The FDA alleged that the usage of the E-meter and the descriptions of auditing in Scientology's publications mislead the public by suggesting it could treat and heal illnesses.³⁰⁸ In Founding Church of Scientology v. United States,³⁰⁹ Judge Wright, "a twenty-five hour course cost \$500 at the time of the trial, while E-meters could be purchased for about \$125."³¹⁰ The question arose whether Scientology was considered to be a religion. Scientology was held to have made out a prima facie case of being a religion, by "incorporating as a religion, using licensed ministers and the fact that its fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions."³¹¹

³⁰⁶ Paul Horwitz, *Scientology in Court: A Comparative Analysis And Some Thoughts On Selected Issues In Law And Religion*, 47 DEPAUL L. REV. 85, 103 (1997).

³⁰⁷ *Id.* at 103.

³⁰⁸ *Id.* at 103.

³⁰⁹ 409 F.2d 1146 (D.C. Cir. 1969).

³¹⁰ Horwitz, *supra* note 306 at 103.

³¹¹ *Id.* at 103.

At that point, the Court had to examine the FDA's claims that the E-meter and the auditing principle set forth in various Scientology publications are misleading.³¹² By recognizing Scientology as a religion and its publications as religious, the examination of the effectiveness and validity of Scientology's auditing and its devices would result in an examination whether or not the religion of Scientology is right or wrong.³¹³ This, however, would lead to a crucial violation of Freedom of Religion. Thus, as long as Scientology's publications are considered to be religious, its doctrines and actions accordingly are protected by the First Amendment.³¹⁴ However, that does not mean that any Scientology publication is immune to the Food, Drug and Cosmetic Act.³¹⁵

2. Tax Exemption and Scientology or Scientology's "war" against the IRS

a. Timeline of Scientology versus the IRS

After the Church of Scientology had decided to shift from the science of Dianetics to the religion Scientology, it applied for tax exempt status. Scientology was granted tax-exempt status in 1957.³¹⁶ 10 years later the IRS revoked the tax exempt status for the "mother" church in California.³¹⁷ This action was not due to a denial of Scientology's status as a religion, but rather due to a failure to meet the operating requirements.³¹⁸ The IRS claimed that the founder, Hubbard, and his family were enriching themselves with church funds.³¹⁹ After the revocation of the tax-exempt status,

³¹² *Id.* at 103.

³¹³ *Id.* at 103.

³¹⁴ *Id.* at 103.

³¹⁵ *Id.* at 104.

³¹⁶ Browne, *supra* note 7 at 191.

³¹⁷ *Id.* at 191.

³¹⁸ *Id.* at 191.

³¹⁹ Walsh, *supra* note 218 at 337-338.

a large number of court cases were filed by Scientology against different government entities.

In Brown v. Commissioner the U.S. Tax Court held that the auditing sessions are not deductible medical expenses.³²⁰ In Hernandez v. Commissioner, the Supreme Court decided that the fees for auditing sessions are not a tax-deductible "donation".³²¹

The following chart details the timeline of "struggles" with the Internal Revenue Service.³²²

1950s

- * **Dec 1953** Church of Scientology, Church of American Science and Church of Spiritual Engineering incorporated in Elizabeth, New Jersey by **L.Ron Hubbard**. Co-signatories were Mary Sue Hubbard, L. Ron Hubbard Jr. and Henrietta Hubbard.
- * **2 Jan 1957** The Internal Revenue Service grants a tax exemption to the Church of Scientology of California (CSC).

1960s

- * **18 July 1967** The Internal Revenue Service revokes CSC's tax-exempt status, citing three reasons:
 - Scientology practitioners are profiting from the "non-profit" Church;
 - The Church's activities are commercial;
 - The Church is serving the private interests of L. Ron Hubbard (a practice known as inurement).
 Scientology denounces the revocation, declares its intention to ignore the decision and withholds payment of taxes for the next 26 years.
Ref. Church of Scientology of California vs IRS, 24 Sept 1984 judgement

³²⁰ Brown v. Commissioner, 62 T.C. 551 (1974).

³²¹ Hernandez v. Commissioner, 109 S. Ct. 2136 (1989).

³²² All data from: *Timeline of Scientology versus IRS* (visited April, 25, 2000)

<<http://wpxx02.toxi.uni-wuerzburg.de/~cowen/essays/timeline.html>>.

1970s

- * **20 April 1973** **L. Ron Hubbard** devises the Snow White Program for Scientology's intelligence agency, the Guardian's Office (GO), in an effort to root out and remove "false files" about the Church and Hubbard held by governments around the world. This becomes a sophisticated worldwide Espionage operation targeting 17 governments and three international organizations.
Ref- Guardian Order 732, 20 April 1973
- * **Early 1974** **Kenneth Urquhart**, "LRH Communicator", overhears L. Ron and Mary Sue Hubbard discussing infiltrating the IRS in Washington, DC.
Ref: "A Piece of Blue Sky ", Jon Atack (1992), p. 227
- * **Summer 1974** **Cindy Raymond** (Collections Officer in the US Information Bureau of the GO) in Los Angeles, California, sends a directive to Michael Meisner (Assistant Guardian for Information, Washington, DC), ordering him to recruit a loyal Scientologist to be placed as a covert agent at Internal Revenue Service in Washington, D.C. The agent is to obtain employment with the Internal Revenue Service for the purpose of taking from that agency all documents which dealt with Scientology, including those concerning pending litigation initiated by Scientology against the United States Government. A number of Scientologists are interviewed as prospective agents. However, none are found to be suitable.

Ref.- Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, p. 18
- * **Sept 1974** **Gerald Bennett Wolfe** is selected by Raymond to infiltrate the IRS on behalf of the Church of Scientology.
Ref.- Stipulation of Evidence, United States of America vs Marl, Sue Hubbard et al, Oct 1979, p. 1
- * **21 Oct 1974** **Jane Kember**, the Guardian World Wide (based in East Grinstead, England) issues Guardian Order 1361. Its "operating targets" include the following:
10. Immediately get an agent into DC IRS to obtain files on LRH, Scientology, etc. in the Chief Council's (sic) office, the Special Services staff the intelligence division, Audit Division, and any other areas.

16. Collect data on the Justice Dept. Tax Division for the org board, the current terminals, and the people handling Scientology.

17. When the correct areas are isolated, infiltrate and get the files.

It also calls for the planting of "an agent, trustworthy and well grooved in, to infiltrate the IRS LA office" (target 2). That agent is "to obtain any files on LRH, Scientology", etc. from both the Intelligence Division (target 3) and the Audit Division (target 4) of the Los Angeles IRS Office. It also calls for the location (target 20) and infiltration (target 22) of the IRS office at the US Embassy in London, England in order to "obtain all documents" (target 22).

Ref. - Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, pp. 19-21

* 1 Nov 1974

Michell Hermann, the GO's Information Branch I Director, plants a radio-transmitting bug in the conference room of the IRS' Chief Counsel, where a confidential meeting is to be held concerning Scientology. The meeting is to discuss pending legal actions involving the various Churches of Scientology and to establish general guidelines for determination of what constituted a "religious institution" entitled to exemption from taxation under the Internal Revenue Code. The entire meeting is recorded and transcribed by GO agents in a car outside the building.
Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al Oct 1979, pp. 23-24

* 18 Nov 1974

Scientology agent Gerald Wolfe obtains employment at the IRS as a clerk typist.

Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, p. 1

*4 Dec 1974

Using fake passes, **Hermann and Meisner** illegally enter the Exempt Organization Division of the IRS and steal a file on Scientology, which they describe in a telex as "two shipments from DC . . . about ten inches" thick.

Ref: Stipulation of Evidence, United States of America vs AI4n, Sue Hubbard et al, Oct 1979, p. 3

*around 30 Dec

- 1974** **Hermann** orders Wolfe to obtain all documents related to Scientology from the IRS office of Barbara Bird, an attorney in Refund Litigation Service.
Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, P. 41
- *Jan -July 1975** Wolfe steals thousands of documents, totaling some 10 feet in height, from the offices of Barbara Bird and Lewis Hubbard of the Chief Counsel's Office and from the Chief Counsel's file room, as well as from other offices within the suite of offices comprising the Office of the Chief Counsel.
Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, p. 53
- *May 1975** "Project Horn" is devised by **Greg Willardson** (Deputy Deputy Guardian for Information) and the order to implement it given to Meisner. Its aim is to "provide a cover for PR [Public Relations] and legal for the way they obtained IRS docs." This project further implements Guardian Order 13 6 1, Target 6, which already provides for the creation of a "suitable cover" to disguise the true manner in which stolen documents have been obtained from the IRS so that the Public Relations Bureau can use them without fear of being connected to the thefts. Meisner is ordered to steal documents concerning organizations other than Scientology. Thus, whenever any stolen IRS documents are later released, those other organizations will also be perceived as having received them and their publication will not point to the Church of Scientology alone. Additionally, the project orders the theft of IRS stationery so it might be used by the GO to draft false letters from a fictitious IRS employee disgruntled with the organization. Wolfe is tasked with the actual thefts and accomplishes them successfully.
Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, pp. 48-4
- *7 May 1975** **Willardson** requests the Guardian's Office World-Wide to approve an additional expenditure of funds for the excerption, xeroxing and cross-filing of 15,000 documents stolen from the IRS. This is so that Mary Sue Hubbard and other senior GO personnel can be advised "as fast as

possible as to the IRS's intentions in regards to the Church during the ongoing IRS tax exemption negotiations." The letter adds that "[t]his was a valuable action in that it resulted in a more real estimate as to the IRS scene than was visible [sic] from the Legal viewpoint."

Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, pp. 55-56

* 27 May 1975

Mary Sue Hubbard writes a letter to her deputy, Jane Kember, Scientology's "IRS Strategy". It states: Our overall strategy

1. To use any method at our disposal to win the battle and gain our non-profit status.
2. To buy all the time we can in terms of years ... So we work to win, but also to delay as time works on our side, not theirs

Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 1979, pp. 65-66

* 11 June 1975

The GO gets wind of a major financial audit to be made by the IRS of the Church of Scientology of California. Accordingly, the GO decides to obtain as much inside information as possible on the IRS' "line of attack". Meisner devises "Project Beetle Cleanup" for obtaining "all DC IRS files on LRH, Scientology, etc., in the Intelligence section, OIO (Office of International Operations), and SSS (Special Services Staff)".

The project proposes the placement of "FSMs" (Field Staff members, or agents) in the "required areas or good access developed", and further that "Pitts" (the code name for **Nancy Douglass**-a GO agent who had infiltrated the Drug Enforcement Agency) and "Silver" (Wolfe) attempt to obtain employment at the Internal Revenue Service Intelligence Division and Office of International Operations respectively.

Ref: Stipulation of Evidence, United States of America vs Mary Sue Hubbard et al, Oct 19 79, pp. 70-71

* July 1975

The Church of Scientology brings a Freedom of Information Act suit against the IRS. **Raymond** orders **Meisner** to obtain information from the office of Charles Zuravin, the IRS attorney who would be defending the FOI case. This establishes a pattern:

Scientology systematically sues the IRS and other Federal agencies, then penetrates the agencies' attorneys' offices to steal the papers which Scientology was trying to access through FOI in the first place.

Ref "A Piece of Blue Sky" Jon Atack (1992), p. 233

* **5 Dec 1975**

L. Ron Hubbard orders the Guardian's Office to establish an "Early Warning System" to alert him of any moves by US Federal and State authorities against Hubbard personally. This is to be achieved through the planting of agents in dozens of different official bodies. The Assistant Guardian for Information (i.e. intelligence) in Washington, DC is ordered to "Place a separate agent into the IRS Office of International Organizations (010) (as this office has a case preparation or investigative action going on LRH personally for income tax evasion or something similar)."

Ref: Guardian Order 158, 5 Dec 1975

* **3 March 1976**

U.S. Directorate Secretary World-Wide Michael Taylor informs **Greg Willardson** that the IRS London targets have been "handled."

Ref: Stipulation Of Evidence, United States of America vs Marv Sue Hubbard et al, Oct 1979, p. 21

* **11 June 1976**

Meisner and Wolfe are caught by the FBI, after a security guard at the U.S. Courthouse becomes suspicious of their (forged) IRS credentials. Meisner escapes and is hidden from the FBI by the GO, but eventually turns himself in.

Ref: "A Piece of Blue Sky", Jon Atack (1992), p. 237

* **June 1977**

Wolfe is convicted of the forgery of credentials and is sentenced to probation and community service.

Ref- "A Piece of Blue Sky" Jon Atack (1992), p. 240

* **7 July 1977**

The FBI raids Scientology's headquarters in Washington, DC and Los Angeles. The GO is taken by surprise and tens of thousands of incriminating documents are seized, including complete records of the infiltration and burglary of the IRS and other government departments.

Ref- Various, including Los Angeles Times and other newspaper reports

- * **October 1979** Eleven Scientologists, including Mary Sue Hubbard, are convicted of conspiracy and imprisoned for between two and six years. L. Ron Hubbard goes into hiding in California and does not reappear again until his death in January 1986.
Ref: Various, including Los Angeles Times and other newspaper reports

1980s

- * **1 Nov 1980** The IRS places a lien on the Scientology's Los Angeles headquarters, the Cedars of Lebanon complex.
Ref: "A Piece of Blue Sky", Jon Atack (1992), p. 262

- * **Mid-Nov 1980** Scientology appeals against the IRS tax assessment for the years 1970-72.
Ref: "A Piece of Blue Sky", Jon Atack (1992), p. 262

- * **October 1982** The corporate structure of the Church of Scientology and associated entities undergoes radical restructuring. At a Mission Holders' Conference held in San Francisco, Warrant Officer Lyman Spurlock is introduced as the "Corporate Affairs Director of the Church". Spurlock starts his speech by saying "Prior to the end of 1981, a few of *us from the CMO* got together and took a look at the corporate structure of the Church with the view in mind of making it more defensible and more regular *and particularly no understandable by the traditional enemies of the Church such as the IRS* and to make an overall improvement". (The phrases in italics are omitted in the transcript, but exist in the tape of the Conference.)

Ref: Tape recording of the Mission Holders Conference, San Francisco, 1982

- * **24 Sept 1984** Scientology loses its appeal over the IRS tax assessment for the years 1970-72. The Tax Court judge documents in detail how huge sums were moved out of Scientology accounts into those of L. Ron Hubbard during the period in question. The judgement also describes the obstructionist tactics used by Scientology to thwart the IRS; for instance, deliberately jumbling two million pages of tax-related material, so that IRS officials would have to sort it out at the cost of a great deal of time and US tax-payers' money.
Ref: "A Piece of Blue Sky", Jon Atack (1992), p. 345

* **Late 1984**

The Church's new intelligence agency, the Office of Special Affairs (which superceded the discredited Guardian's Office), strikes back at the IRS with the creation of a front group, "The National Coalition of I.R.S. Whistle-blowers." According to ex-OSA member Stacy Young, Scientology's aim was to undermine the agency's credibility. The group's president, Paul J. DesFosses, says Scientology provided substantial financing, but denies that the church ran the group, which helped fuel Congressional hearings in 1989 into accusations of

corruption at the I.R.S. Kendrick L. Moxon, a longtime church lawyer, acknowledges that the coalition was founded by Freedom Magazine. He says its work was well known and part of a campaign by Scientology and others to "reform" the IRS.

Ref: New York Times, 9 March 1997

* **Summer 1989**

Scientology hires private investigators to investigate the personal lives (and, as L. Ron Hubbard's theories on "suppressives" would have it, the "crimes") of senior IRS officials involved in the ongoing Scientology litigation. According to Octavio Pena, a private investigator in Fort Lee, N.J., a Scientologist identifying himself as Ben Shaw visits him in the summer of 1989 to explain that the church was concerned about IRS corruption and would pay \$1 million for Pena to investigate IRS officials. Pena refuses. Two more PIs, Michael L. Shomers and Thomas J. Krywucki work for Scientology for at least 18 months in 1990 and 1991. Working from his Maryland office, Shomers sets up a phony operation, the Washington News Bureau, to pose as a reporter and gather information about church critics. He infiltrates IRS conferences to gather information about officials who might be skipping meetings, drinking too much, or having affairs. Scientology lawyer Kendrick Moxon - one of those cited in the Snow White scandal in 1979 - admits to the use of private investigators but claims that they are needed to counter lies spread by "rogue government agents".

Ref: New York Times, 9 March 1997

1990's* **October 1991**

Scientology leader David Miscavige and Marty Rathbun, another senior Scientology official, claim to have held an unscheduled meeting with IRS Commissioner, Fred T. Goldberg Jr. Miscavige

offers to drop all the suits against the IRS if Scientology is given tax exemption. Goldberg agrees and creates a special five-member working group under Howard M. Schoenfeld, to resolve the dispute, bypassing the agency's exempt organizations division, which normally handles those matters - an exceptionally unusual arrangement.

Ref: New York Times, 9 March 1997

*** 19 Jan 1992**

John E. Burke, the assistant commissioner for exempt organizations, agrees to Scientology's demand that its the bulk of its financial details should be kept secret.

Ref: New York Times, 9 March 1997

*** 29 June 1992**

The U.S. Claims Court upholds the IRS' longstanding denial of a tax exemption for Scientology's Church of Spiritual Technology. The ruling strongly supports the agency's concerns over the commercial nature of Scientology and other matters. It states that the corporate structure of Scientology was "something of a *deceptus visus*. Real control is exercised less formally, but more tangibly, through an unincorporated association, the Sea Organization..."

Scientology claims that the ruling has ignored the facts and is filled with "gratuitous comments".

Ref: New York Times, 9 March 1997

*** 13 Aug 1992**

The IRS agrees to grant tax exemptions to every Scientology entity in the United States, plus foreign entities based in the UK and Cyprus. The Church files new applications for exemptions as part of the agreement.

*** 10-14 Sept 1993**

Two IRS tax analysts write internal memoranda saying that they have been instructed to ignore substantive issues in reviewing the new Scientology applications.

Ref: New York Times, 9 March 1997

*** 1 October 1993**

The agreement comes into force. Scientology pays the IRS \$12.5m in back taxes and drops all the lawsuits brought by Church entities and individual Scientologists against the IRS.

Ref: Closing agreement on final determination covering specific matters, 1 Oct 1993

*** 8 October 1993**

David Miscavige holds a "victory rally" attended by 10,000 cheering Scientologists in the Los Angeles Sports Arena. He declares that "the war is over"

and explains that he has defeated the secret "master plan" of the psychiatrists - or rather, the "pea-brained psycho-indoctrinated mental midgets" - namely, to use the IRS to destroy Scientology.

Ref: Speech of David Miscavige to the International Association of Scientologists, 8 Oct 1993

*** 15 October**

In Washington DC, the IRS formally announces exemptions for about 150 Scientology entities for 1993. Remarkably, this includes at least one body which is an explicitly for-profit commercial organization: the IRS accepts that the publication of Hubbard books by Bridge Publications is a charitable activity. The IRS declares the agreement secret, despite its legal obligation, under Internal Revenue Code § 6104, to disclose information submitted to the IRS by tax-exempt organizations.

Ref: Closing agreement on final determination covering specific matters, 1 Oct 1993

*** 10 Nov 1993**

The consumer affairs group, Tax Analysts, submits a Freedom of Information request to obtain the exemption agreement.

Ref: Tax Analysts press release, 26 June 1995

*** 7 Feb 1994**

The IRS refuses the FOI request, and Tax Analysts files suit.

Ref: Tax Analysts press release, 26 June 1995

*** 15 March 1996**

The U.S. District Court for the District of Columbia orders the IRS to release to Tax Analysts field service advice memorandums (FSAs) prepared by the IRS Office of Chief Counsel.

Ref: Tax Analysts press release, 21 Mar 1996

*** 30 Dec 1997**

The secret agreement is leaked to the Wall Street Journal, which promptly puts it on its Web site and leads with a front-page story. Newspapers across the United States report the story.

Ref: Wall Street Journal, 30 Dec- 1997

*** 31 Dec 1997**

The IRS announces that it is to hold an internal inquiry into how the agreement was leaked. The Church of Scientology denounces the leak. Scientologists accuse

unnamed participants in the Internet newsgroup alt. religion.scientology of being involved.
Ref: New York Times, 1 Jan 199 alt. religion.scientol

Source: All data from: Timeline of Scientology versus IRS (visited on April, 25, 2000)
<<http://wpxx02.toxi.uni-wuerzburg.de/~cowen/essays/timeline.html>>.

b. Conclusion

The question arises whether or not the 1993 grant of tax exemption status to Scientology was based on legal grounds. After the IRS had revoked Scientology's tax exemption status in 1967, there has been fraud, theft, pressuring and other illegal activities, as well as "legal activities" by Scientology, such as hundreds of lawsuits against IRS. Due to the broad interpretation of religion, Scientology was never denied the religious status. The question arises whether or not Scientology has met the operating requirement of section 501(c) (3). The following questions remained unanswered:

- § Tax courts have found that IRS was correct to denying Scientology tax exempt status because of "the commercial character of much of Scientology," its "virtually incomprehensible financial procedures," and its "scriptural-based hostility to taxation." These comments were made by the U.S. Claims Court in 1992. What has changed between then and the granting of tax exemption in 1993?
- § Why was a special committee set up to negotiate a settlement outside normal agency procedures? Why were the IRS's tax analysts ordered by their superiors not to consider substantive questions such as whether Scientology was unduly commercialized or provided excessive private benefit to its leaders? (Ref. New York Times)

- § What effect did Scientology have in bringing in 2,500 lawsuits against IRS and individual officials?
- § Why did Scientology employ private detectives to investigate individual IRS officials for their “crimes”?³²³

3. The Lisa McPherson Case

From the age of 18, until her death in the age of 36 Lisa McPherson was member of the Church of Scientology since 1977.³²⁴ Lisa’s was living at 210 S. Ft. Harrison in Clearwater, which is property of the Church of Scientology.³²⁵ She was reported dead upon arrival to the Clearwater Florida Hospital on December 5, 1995.³²⁶ McPherson had been involved in a minor car accident several weeks earlier, on November 18, 1995.³²⁷ Even though she was not injured in the accident, she had a nervous breakdown and was mentally disturbed. She was taken to a hospital to be psychological examined.³²⁸ Accompanying Scientologists explained their disbelief towards Psychology and took McPherson to their property in Clearwater.³²⁹ There is evidence that from the time of the accident until Lisa’s death on December 5, 1995 the Church of Scientology practiced its Introspection Rundown on Lisa.³³⁰

An autopsy by the Pinellas-Pasco Medical Examiner’s Office showed

McPherson’s 5-foot-9, 108-pound body was severely dehydrated, her arms and legs

³²³ *Why is the Scientology-IRS battle such a big deal?* (visited February 17, 2000) <<http://wpxx02.toxi.uni-wuerzburg.de/~cowen/essays/bigdeal.html>>.

³²⁴ *Combined story of Lisa McPherson from newspaper articles and other sources* (visited April, 12, 2000) <<http://www.stud.uni-hannover.de/user/76201/lisa/lisasum.htm>>.

³²⁵ *Lisa McPherson Memorial Page* (visited April 12, 2000) <<http://www.lisamcpherson.org/>>.

³²⁶ *Id.*

³²⁷ *The Introspection Rundown*, *supra* note 276.

³²⁸ *Lisa McPherson Memorial Page*, *supra* note 325.

³²⁹ *Id.*

were bruised, her skin was cracked and scaling, and she had bug bites. Her left pulmonary artery was blocked by a fatal blood clot brought on by dehydration and bed rest.³³¹

At the same time, the Clearwater police explained that this was a not natural death.³³²

On November 13, 1998, the Church of Scientology was indicted on 2 felony charges in Lisa's death. On December 6, 1999, prosecutor Bernie McCabe presented a response to Scientology's attempt to get the case dismissed.³³³ "Currently, the civil lawsuit against Scientology in Lisa's case is scheduled to begin June, 2000. The criminal case is rescheduled for October 16, 2000."³³⁴

The prosecutors accuse Scientology of abusing Lisa McPherson and practicing medicine without license.³³⁵ The Church argues that the treatment at Ft. Harrison was not causal to Lisa's death, but was based on sincere held belief.³³⁶ Furthermore, the Church argues that the Introspection Rundown is a religious practice under the Free Exercise clause, and thus protected by the First Amendment and not subject to scrutiny by any court.³³⁷ The prosecutors reply that "unlicensed Scientology staffers who also gave McPherson a prescription sedative and injected her with a muscle relaxant, engaged in the improper practice of medicine."³³⁸ The Church argues, however, that "prosecution

³³⁰ *The Introspection Rundown*, supra note 276.

³³¹ Combined Story of Lisa McPherson, supra note 324.

³³² *Id.*

³³³ Lisa McPherson Memorial Page, supra note 325.

³³⁴ *Id.*

³³⁵ Thomas C. Tobin, *Scientology to argue for dismissal of case*, St. Petersburg Times, published April 4, 2000 (visited April 12, 2000) <<http://www.lisamepherson.org/spt4-4.htm>>.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

has harmed Scientology staffers and parishioners worldwide, illegally burdening their religious practice.”³³⁹

G. Excursus: Is the Church of Scientology a “religion” *theologically*?

1. Definition

The Webster Dictionary defines religion as;

Religion: The outward act or form by which men indicate their recognition of the existence of a god or of gods having power over their destiny, to whom obedience, service, and honor are due; the feeling or expression of human love, fear, or awe of some superhuman and overruling power, whether by profession of belief, by observance of rites and ceremonies, or by the conduct of life...

Note: Religion, as distinguished from theology, is subjective, designating the feelings and acts of men which relate to God; while theology is objective, and denotes those ideas which man entertains respecting the God whom he worships, especially his systematized views of God. As distinguished from morality, religion denotes the influences and motives to human duty which are found in the character and will of God, while morality describes the duties to man, to which true religion always influences.³⁴⁰

Applying this definition to Scientology, one discovers that there is no God or even many Gods involved. It seems that Scientology is more a philosophy, believing in a spirit of man (Thetan). “The technology (of Scientology) is therefore not expounded as

³³⁹ *Id.*

³⁴⁰ Webster’ Revised Unabridged Dictionary (1913) (visited April 25, 2000) <http://work.uscd.edu:5141/cgi-bin/http_webster?religion> .

something to believe but something to do.”³⁴¹ The question then arises, whether one can legally define religion with a fundament of “technology to do” rather than of “faith to believe in”.

In essence, technology refers to a science rather than to a religion and a science does not accept faith as evidence for its existence. Therefore, it is safe to denote that science and faith are contradictory disciplines. However, Scientology calls its method, Dianetics, “the Modern *Science* of Mental Health”.³⁴²

2. Scientology compromises its own claim to be a religion

When recruiting on the street, Scientologists tell people that they are not a religion but a science and that the church status is only claimed for tax purposes. This tactic is used to encourage the interest of individuals who may not typically respond to religious movements and are more apt to respond to the diminished threat of self-help theories.³⁴³ In Greece, for example, Scientology claims to be a philosophy, rather than a religion, because philosophical movements do not have to pay taxes.³⁴⁴ “Scientology is not a dogmatic religion in which one is asked to believe one thing on faith. An individual discovers for himself that Scientology works by applying its principles and experiencing the result.”³⁴⁵

³⁴¹ HUBBARD, SCIENTOLOGY, *supra* note 227 at 11.

³⁴² HUBBARD, DIANETICS, *supra* note 253 cover.

³⁴³ *Is Scientology a Religion* (visited April 25, 2000) <<http://cisar.org/trn1020.htm>>.

³⁴⁴ *Id.*

3. Scientology's argument for claim as religion

Scientology draws parallels to the beliefs of other religions with special attention to the eastern philosophies, such as Buddhism and Taoism. By alleging those religions are sources of Scientology, there is some evidence of Scientology being a religion. Also, using traditions, especially those of the Christian Church, could be further evidence of being a religion (e.g. having "churches," symbols like "crosses," calling Scientology staff members "ministers," naming auditing courses "spiritual counseling," and saying payments for the courses are "fixed donations."³⁴⁶

4. Critics of Scientology's claim to the status of "religion"

The internal transition from being "Dianetics, The Modern Science of Mental Health," to the "religious philosophy" Scientology took place over night. When the United States IRS became interested in Scientology's accounting system, adherents did not want to pay income tax. At the same time, the organization suffered from a bad reputation after the FDA denied Scientology's claim as a "scientific technology." In respond to this blow, they pursued the claim for status as a religious organisation, carrying close the knowledge that it is much harder being prosecuted being protected under the first amendment of the Constitution.³⁴⁷

³⁴⁵ *What is Scientology ?* (visited April 25, 2000)

<<http://www.whatisscientology.org/html/part12/chp36/pg0635.html>>.

³⁴⁶ *Metamorphosis to Religion* (visited April 25, 2000) <[http://ezlink.com/~perry/Co\\$/Christian](http://ezlink.com/~perry/Co$/Christian)>.

³⁴⁷ *Id.*

H. Is the Church of Scientology unconstitutional under a German perspective in its legal claim to be a church while acting as a totalitarian entity?

When representatives of the U.S. Congress recently introduced a bill criticizing Germany for its politics towards religious tolerance, the Chairman of the House of International Relations Committee, Benjamin A. Gilman, stated,

The problem of religious intolerance in Europe is widely recognized, even in Europe itself. It should be obvious, especially to Europeans, that intolerance is much more harmful than is any so-called harm that may arise from adherence to one or another of the many new religions to have arisen from the past few years. Germany is a country that should be a leader in tolerance and ought to be setting an example. Sadly it is not doing so. Indeed not only have countries such as Austria, Belgium, and France joined in its efforts to suppress disfavored groups on the basis of their religion or belief, but newly-developing democracies in Eastern Europe are following Germany's example. As recently as this week I have personally asked German government officials to open a dialogue, in particular, with Scientologists, which seems to be the group that they are most anxious about, but I have been rebuffed, as has the United States government when it made the same request. And so I will be joining in co-sponsoring a resolution on this subject, and will work to find other opportunities to use my influence to foster an atmosphere of tolerance of differences on the grounds of religion or belief.³⁴⁸

Hence, the question arises whether Germany is really intolerant towards new religions, as asserted, or whether Germany has a very alert attitude towards anti-

³⁴⁸ *Alt.religion.scientology*, week in review, volume 4, Issue 30- October 24, 1999 (visited April 25, 2000) < <http://xenu.net/archive/WIR/wir4-30.html>>.

democratic tendencies, which by chance, are incorporated in a so-called “church-organization.” Even though the German Basic Law provides a very broad interpretation of “religion” or “church-organization,” there are limitations.

As discussed earlier, Germany’s democracy arose out of the ruins of a great massacre by the goodwill of the Allied powers. It was probably Germany’s last chance to establish a peaceful union among the members of the United Nations. With a history that demanded awareness, the German people favored a “military democracy,” fighting every attempt to disturb that new order.³⁴⁹ Thus, the German Constitution Protection Agency monitors certain groups with extreme ideologies.³⁵⁰ In other words the legal treatment of Scientology to date is partially in response to the perceived threat this entity projects towards democratic society. Now the issue becomes whether or not the Church of Scientology has such “anti-democratic tendencies.”

After intensive research, the German federal government concluded that Scientology can endanger an individual’s mental and physical health. Court experts have testified that membership can give rise to psychological and physical dependency.³⁵¹ As the Federal Labor Court’s decision stressed, Scientology performs inhuman and totalitarian practices.³⁵²

³⁴⁹ Horwitz,, *supra* note 306 at 120.

³⁵⁰ Horwitz,, *supra* note 306, at 120.

³⁵¹ *Is Scientology a threat ?* (visited April 25, 2000) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/government.html>>.

Chapter 4

Conclusion

The provisions on the freedom of religion hold a central position within the German Basic Law as well as in the Bill of Rights of the American Constitution. Due to the historical development of the ideas surrounding religious liberties, the courts of the Federal Republic of Germany interpret this provision very broadly. However, certain limitations are possible just as in the United States. While the U.S. Supreme Court refuses to define the term "religion," in order not to violate the First Amendment, the German courts work with definitions, but apply them very broadly. In fact, Scientology is the first organization to have serious confrontations with German Courts. Issues regarding Scientology involved both the judicial and eventually the legislative branch. At first it might appear that a broad objection to the acceptance of a new religion undermines the plausible acceptance of Scientology's claim, however in greater depth this issue is increasingly complex and the actions taken do more to protect democratic structures than to rebuke freedom. There is some evidence that Scientology treats members in an inhuman manner by putting them under extreme pressure; denying their dignity, paying their employees little or no salary, punishing people to the extreme manner and threatening critics through illegal methods. These actions cannot be protected by a "free exercise clause" as understood in Germany.

³⁵²79 BAGE 319, 349 (1995).

In the United States, however, where government's power to interfere is very limited, citizens enjoy more freedom but are more likely to be threatened, and possibly even abused, by corporations such as Scientology.

The notion of democracy in Germany is probably a more protected, therefore State guarded one; a democracy protects the freedoms of individuals in their own pursuits as long as they do not infringe on the fundamental freedoms of other citizens. A central suprapositive provision is most certainly the human dignity stated in Article 1 of the Basic Law: The State is responsible for its citizens and human dignity is inalienable.

However ideas and thoughts, religious or ideological should never be restricted; the State should be completely separated from these. Only if an exercise of these thoughts and ideas is deemed unconstitutional should the democratic state intervene to protect its own structure. Therefore, Scientology should have its own ideals and ideas, and be free to exercise them, as long they do not infringe on rights of other citizens.