

Headnotes

to the Order of 13 October 1998

– 2 BvR 1275/96 –

- 1. The purpose of Article 138.2 of the Weimar Constitution is to guarantee the protection of the status and the freedom of the Churches in their material basis as assured by Article 4.1 and 4.2 of the Basic Law and Article 137 of the Weimar Constitution.**
- 2. The guarantee of Church property protects all religious communities, independently of their form of organisation, and covers their property intended for religious purposes.**
- 3. Article 138.2 of the Weimar Constitution guarantees the continuation of Church property rights in line with their existing legal quality, but does not expand them. The determination of this quality is a matter for interpretation and application by ordinary law, initially in the nonconstitutional courts.**
- 4. If a right protected by Article 138.2 of the Weimar Constitution relates to a specific constituted Church, membership of individual parishes in this Church is initially in line with the self-perception of the Church.**

IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

of G(...), represented by the Church Council, Church President K(...), Deputy Church President A(...) and Church Secretary Dr. T(...),

– authorised representative: Rechtsanwalt Georg Buchner-Baucevich,
Schillerstraße 14, Munich –

against a) the judgment of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) of 25 October 1995 – 7 B 90.3798 –,

b) the judgment of Federal Administrative Court (*Bundesverwaltungsgericht*) of 15 November 1990 – BVerwG 7 C 9.89 –

the Federal Constitutional Court – Second Senate – with the participation of Justices

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Limbach,

Kirchhof,

Winter,

Sommer,

Jentsch,

Hassemer,

Broß

held on 13 October 1998:

The constitutional complaint is rejected as unfounded.

Reasons:

A.

The constitutional complaint relates to the surrender of the St. Salvator Church in Munich to the Free State of Bavaria. The complainant is a registered association. Its purpose is “to assert and support the spiritual and secular interests and to safeguard the needs of the Greek (St. Salvator) Church in Munich”.

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I.

The St. Salvator Church was initially a Catholic church. It was secularised in 1803. Since then, the Free State of Bavaria has been entered in the land register as the owner of the church. In 1828, King Ludwig I of Bavaria issued the following order “the assignment for use of the St. Salvator Church in this place for Greek worship on reservation of state ownership”. In 1830, the Greek Orthodox parish was constituted in the legal form of a private church society in accordance with the content of §§ 32 to 43 of Supplement II to the Constitutional Certificate of the Kingdom of Bavaria (*II. Beilage zur Verfassungsurkunde des Königreichs Bayern*) of 1818 (*Religion Edict – Religionsedikt*). The private church society ceased to exist on entry into force of the Constitution of the Free State of Bavaria (*Verfassung des Freistaats Bayern*) in 1919. In 1924, the complainant was entered in the register of associations. Since then, it has fulfilled the function of a church parish for the St. Salvator Church.

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Under church law, the St. Salvator Church was certainly subject to the jurisdiction of the Greek Orthodox Autocephalous Church of Greece from 1833 onwards, as desired by Ludwig I. There was a split in this Church in 1923 with regard to the question of whether the old Julian calendar was to be retained, or the new Gregorian one introduced. The Autocephalous Church of Hellas introduced the new calendar.

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This Church was later officially recognised by the Greek State. There is also a religious society named the “Genuine Orthodox Christians of Greece”, adhering to the old-calendarian rite. In 1924, the Autocephalous Church of Hellas handed its jurisdiction over the Greek Orthodox diaspora parishes to the Ecumenical Patriarchate of Constantinople. In 1953, the Ecumenical Patriarchate created the Metropolis of Germany, which has appointed the priests for the St. Salvator Church since at least 1965.

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In 1976, disputes arose between the Metropolis and the complainant, in the course of which the Metropolis instructed the then parish priest of the St. Salvator Church not to hold services and official acts for the time being. In 1976/77, the complainant had its long-serving cantor ordained as a priest in the old-calendarian “Church of the Genuine Orthodox Christians of Greece and the Diaspora”. Since then, old-calendarian priests have been holding services and carrying out official acts in the St. Salvator Church.

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II.

On 26 July 1977, the Free State of Bavaria informed the complainant that it was terminating the free assignment of the St. Salvator Church on expiry of 31 August 1977, and called on it to give up the Church. [...] 6

After the complainant had refused to surrender, the Free State filed a civil court action for surrender of the Church. By judgment of 16 December 1977, Munich Regional Court I (*Landgericht*) admitted the action since the complainant was said to have no right to possession. 7

In response to the complainant's appeal on points of fact and law, Munich Higher Regional Court (*Oberlandesgericht*) overturned the first instance judgment in its judgment of 12 April 1979 and rejected the action. [...] 8

The appeal on points of law only submitted by the Free State of Bavaria to the Bavarian Highest Regional Court (*Bayerisches Oberstes Landesgericht*) was rejected by judgment of 12 December 1980. The complainant was alleged to be the holder of the dedication as a *res sacra*. The characteristic of "*res sacra*" was said to afford it a right of possession within the meaning of § 986 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*). [...] As long as [...] the dedication continued to exist, the complainant could not be ordered to surrender the Church because of ownership. 9

III.

By letter of 1 March 1983, the Free State of Bavaria requested the complainant to terminate the dedication of the St. Salvator Church as on 30 June 1983. The complainant did not comply with the request. 10

1. The Free State of Bavaria thereupon filed an action against the complainant before the Bavarian Administrative Court Munich (*Bayerisches Verwaltungsgericht München*), moving to oblige the complainant to terminate the dedication. The action was rejected by judgment of 12 December 1984. [...] 11

2. In response to the appeal on points of fact and law of the Free State of Bavaria, the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) by judgment of 6 May 1987 overturned the judgment of the Administrative Court and obliged the complainant to declare that the dedication of the St. Salvator Church benefiting it was terminated. The Free State of Bavaria was said to be entitled to a right of revocation on the basis of the reservation of revocation. This right – from which the right to rescission of rights of use was alleged to follow – was not opposed by state church law: The right to rescission of rights of use did not violate Article 140 of the Basic Law in conjunction with Article 137.3 of the Weimar Constitution. [...] Also Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution did not act in favour of the complainant. [...] 12

3. In response to the complainant's appeal on points of law only, the Federal Administrative Court (*Bundesverwaltungsgericht*) by judgment of 15 November 1990 over- 13

turned the judgment on appeal on points of fact and law and referred the case back to the Bavarian Administrative Court for a new hearing and a ruling.

a) The ruling of the Administrative Court was alleged to violate Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution. The latter was also said to protect religious societies constituted under private law and their rights of use. With its revocation demand, the Free State of Bavaria was said to encroach on these rights. The complainant's right of use was said not to have expired, automatically so to speak, on the basis of a weakness of effect inherent in it from the outset (as for instance by virtue of the passage of time or commencement or cessation of a precondition). Rather, there had been a need for a special decision of the Free State of Bavaria, namely revocation. It was particularly this kind of encroachment that Article 138.2 of the Weimar Constitution had been intended to prevent. 14

[...] 15-18

A right to revoke the assignment for use could [...] only be considered if the purpose of furtherance pursued with the assignment of the St. Salvator Church could be much better pursued in the long term by handing over the Church to the Metropolis than was currently the case. This was said to be contingent on the complainant having become so clearly in the position of a minority that it appeared to have become negligible with regard to the Greek Orthodox believers in Munich as a whole because it represented them to a negligible degree. For this reason, the Bavarian Administrative Court had to clarify how many members the complainant and the Metropolis each had, and how well attended services and other church events were. 19

b) Article 140 of the Basic Law in conjunction with Article 137.3 sentence 1 of the Weimar Constitution was said not to have been violated by the ruling of the Bavarian Administrative Court. Article 137.3 sentence 1 of the Weimar Constitution was said not to stand in the way of an obligation to submit a declaration of rescission of rights of use. The complainant was said to have been ordered only to submit a declaration of intent in the area of private law; a prohibition of secularisation within the Church was said to be suppressed by the "law valid for all" within the meaning of Article 137.3 sentence 1 of the Weimar Constitution. The principle of the protection of public confidence was said to be included in Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution. For adjudication of the legal situation, moreover, it was irrelevant whether the Church constituted a *res sacra* or not. 20

4. Once the case had been referred back to the Bavarian Administrative Court, the Free State of Bavaria amended its action. It now applied to oblige the complainant to surrender the St. Salvator Church. The Metropolis was co-summoned. The complainant was ordered to surrender the St. Salvator Church by judgment of 25 October 1995. 21

The final rejection of the civil law action for surrender allegedly did not stand in the way of a ruling on the merits. The legal force did in principle include the foundations of 22

all substantive-law claims. The Bavarian Higher Regional Court, however, had not carried out a comprehensive examination of the subject-matter of the dispute. It had presumed that surrender was opposed at the time only by the characteristic of the Church as “*res sacra*” within the meaning of a *res publica*; this characteristic could be terminated. It had restricted the scope of the legal force of its judgment by the reservation “as long as the dedication continues to exist”. This reservation of legal force applied not only if the dedication had been rescinded in the meantime, but also if in reality there had never been a *res publica* the rights of use of which could be rescinded, as was alleged to be the case here. The dissenting view of the Bavarian Highest Regional Court was said not to have become final.

[...]

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The surrender claim asserted was said to be well-founded on the basis of the public-law relationship of assignment for use. This was said to be characterised by its purpose, and hence to be understood as a revocable relationship of furtherance. It was the “will of the founder”, namely King Ludwig I of Bavaria, which counted. It had been Ludwig I’s intention to privilege the Munich Greek Orthodox Church community as a parish of the Church of Hellas abroad.

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In view of the principles established by the Federal Administrative Court, revocation was said to be justified because that purpose was not being met; the complainant was said to now only represent the Greek Orthodox believers in Munich to a negligible degree. The Metropolis was said to be clearly more worthy of furtherance in accordance with its legal status as a corporate body under public law, in accordance with the degree of its public effect and in accordance with its cultural and socio-political significance. Furthermore, it clearly took precedence with regard to its size and spread:

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[...]

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The purpose of furtherance was also not satisfied insofar as Ludwig I had intended to privilege the Munich Church parish as a parish of the Church of Hellas abroad. According to its own information, the new-calendarian Autocephalous Church of Hellas had no canonical relations with the complainant. It granted jurisdiction over the Greek Orthodox parishes abroad to the Ecumenical Patriarch, which in turn had assigned it to the Metropolis.

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Furthermore, compliance with the generally valid principles of Orthodox Church law had been included in the will of the founder, namely Ludwig I. By changing from the new- to the old-calendarian rite, the complainant had allegedly breached generally valid principles of Orthodox Church law, and hence violated the will of the founder.

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Whether those inside the Church might consider excommunication to be necessary was insignificant for state law. The right to surrender was also said not to be opposed by the principle of proportionality. This in particular did not constitute an obligation to leave the church in the possession of the complainant and to grant only a right of use to the

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Metropolis. The complainant was said to have already violated the purpose of the subsidy by changing from the new- to the old-calendarian rite.

The appeal on points of law was not admitted. 30

5. The complaint against denial of leave to appeal submitted against this by the complainant was rejected by order of the Federal Administrative Court of 29 May 1996. 31

IV.

The complainant filed a constitutional complaint to the Bavarian Constitutional Court against the judgment of the Bavarian Administrative Court of 25 October 1995. The constitutional complaint was rejected by ruling of 29 August 1996. 32

V.

With the constitutional complaint to the Federal Constitutional Court against the judgment of the Bavarian Administrative Court of 25 October 1995, and against the judgment of the Federal Administrative Court of 15 November 1990, the complainant complains of a violation of Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution and Article 137.3 of the Weimar Constitution, Article 4.1, Article 3.3, Article 20.3 and Article 19.3 in conjunction with Article 4.1, Article 19.4, Article 20.3 in conjunction with Article 101.1 of the Basic Law. 33

The impugned rulings are alleged to violate Article 4.1 of the Basic Law and Article 138.2 of the Weimar Constitution. As a religious society, the complainant is said to have been a holder of the fundamental right under Article 138.2 of the Weimar Constitution. It had been entitled to the right of possession of the St. Salvator Church uninterruptedly as one of the “other rights” within the meaning of Article 138.2 of the Weimar Constitution. The Free State of Bavaria and the courts were said to have violated this right by requesting, and subsequently obliging it to surrender the church. The encroachment was said not to be justifiable, including not on the basis of Article 137.3 of the Weimar Constitution. 34

The Bavarian Administrative Court had allegedly been wrong to presume a “general implied reservation of revocation” to be a law valid for all within the meaning of Article 137.3 of the Weimar Constitution. The specific requirement of an Act of Parliament was not to be understood such that the general principles on the cessation of the basis for the transaction were able to apply. The purpose of Article 138.2 of the Weimar Constitution was said to be to protect the properly acquired positions of the religious society. If and to the degree that a religious society held the “other rights” continuously, the State was prevented from examining this legal position from today’s point of view from a stance of mere expediency and undermining or destroying them. The core of the guarantee of Church property was said to be to protect religious societies’ “other rights” against encroachments emerging from a change in society and its legal views and from the development of “new criteria”. 35

Also the principles regarding “positive furtherance” of religious societies were said not to apply here. These principles, for example, were said to encroach on rights which were protected by the guarantee of Church property, over and above furtherance pure and simple. The standard for such encroachments could certainly not be defined by mere considerations of expediency. Such a standard was said to undermine the guarantee of Church property. In particular, it was not permissible to make considerations which evaluated the headcount of churchgoers and the significance of the parish in relation to other religious groups as the basis for rescission of rights of use. 36

Even if one were to presume that the principles on the “positive furtherance” of religious societies were applicable here, the Bavarian Administrative Court had applied them incorrectly; it had in fact not taken note of the facts, or had evaluated them erroneously: The demand to surrender was said to correspond not to a need for more church space, but to a demand for a “symbolic value”. Such a value was said not to be actionable. 37

According to the statistics of world Orthodoxy, roughly 90 percent of the Orthodox community consists of old Calendarists. Also, the constitutional situation of today’s old Calendarists in Greece, where they enjoy full constitutional protection and full equality in comparison with the new Calendarists of the Orthodox Church, had not been taken into account. The old Calendarists in Greece were said to be in possession of ancient, venerable churches and monasteries, including the Church of the Holy Mount Athos. 38

The judgment of the Bavarian Administrative Court and the judgment of the Federal Administrative Court were said over and above this to violate the constitutionally safeguarded principle of protection of public confidence in conjunction with Article 138.2 of the Weimar Constitution. The complainant was said to have been in possession of the St. Salvator Church since 1830. There had been several unsuccessful attempts to remove the church from that possession. Also for this reason, the complainant must be able to rely on its possession not being removed by invoking mere expediency. 39

The Free State of Bavaria was alleged to have violated the principle of state neutrality under church law. This was said to be documented by settlement talks which took place during the proceedings. The Free State of Bavaria was said to have announced to the complainant that were it to submit to the ecclesiastical jurisdiction of the Metropolis and be reconciled with it, the Free State would discontinue the administrative court proceedings. 40

The judgment of the Administrative Court was also said to violate the principle of proportionality. The Free State of Bavaria was said to have omitted to examine whether and to what degree less incisive measures than the total withdrawal of use and possession of the St. Salvator Church could be considered to bring about the intended legal consequence. 41

The ruling of the Bavarian Administrative Court was said to violate Article 19.4 and Article 20.3, as well as Article 101.1 of the Basic Law. The court was said to have ruled once again in the same case on the basis of the same motion (namely for surrender), despite the final ruling of the Bavarian Highest Regional Court of 12 December 1980. 42

VI.

The Federal Constitutional Court afforded those entitled to make a statement the opportunity to do so. 43

[...] 44-69

VII.

[...] 70-72

VIII.

In response to the complainant's motion, the First Chamber of the Second Senate of the Federal Constitutional Court by order of 13 February 1997 prohibited the enforcement of the judgment of the Bavarian Administrative Court of 25 October 1995 by means of an injunction for the duration of the constitutional complaint proceedings. The injunction was extended by orders of 11 August 1997 and 5 February 1998. 73

B.

The constitutional complaint is admissible. 74

The complainant is entitled to submit the constitutional complaint. As a domestic legal person under private law the purpose of which is the care and furtherance of the (old-calendarian) Greek Orthodox confession and the proclamation of the faith of its members, the complainant is a holder of the fundamental right of the freedom of religion under Article 4.1 and 4.2 of the Basic Law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 19, 129 (132); 70, 138 (161); established case-law). 75

The possibility of a violation of the fundamental right by revoking the right of use of the St. Salvator Church has been sufficiently stated. The freedom of religion may also be affected if the state power removes from the holder of the fundamental right the house of God which it uses; hence, the guarantee of Church property may be affected. In this respect, Article 4.2 of the Basic Law is given concrete form by virtue of Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution (see BVerfGE 42, 312 (322); 83, 341 (354-355); ruling of the First Chamber of the Second Senate of 28 February 1992 – 2 BvR 1088/88 and 1/89 [...]). 76

C.

The constitutional complaint is unfounded. The impugned rulings do not violate the 77

I.

In its examination of an admissible constitutional complaint, the Federal Constitutional Court is not restricted to an examination of whether the fundamental rights and rights equivalent to fundamental rights listed in Article 93.1 no. 4.a of the Basic Law, §§ 13 no. 8.a, 90 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) have been violated. The impugned rulings may, rather, be examined from every conceivable aspect for their constitutional unobjectionability (see BVerfGE 70, 138 (162) with further references – established case-law).

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II.

The impugned rulings are compatible with Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution. The revocation of the assignment for use does not encroach on Church property as guaranteed by Article 138.2 of the Weimar Constitution.

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1. Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution guarantees to the religious societies and religious associations ownership of and other rights in their property intended for worship, educational and charitable purposes. The content and meaning of this guarantee of Church property emerges only in the context of the church articles introduced to the Basic Law by Article 140, which in turn must be read in the context of the guarantee of the collective freedom of religion under Article 4.1 and 2 of the Basic Law. The church articles of the Weimar Constitution incorporated in the Basic Law form an organic whole with this Basic Law (see BVerfGE 19, 226 (236); 53, 366 (400); 70, 138 (167)). The Federal Constitutional Court has already referred in another context to the significance of Church property for realising self-determination within the meaning of Article 140 of the Basic Law in conjunction with Article 137.3 of the Weimar Constitution (see BVerfGE 66, 1 (20 et seq.)). Similar significance attaches to Church property for the freedom of religion under Article 4.1 and 4.2 of the Basic Law. This provision therefore also protects the substantive substrata of the freedom of religion. The purpose of Article 138.2 of the Weimar Constitution is to guarantee the protection of the status and the freedom of the Churches in their material basis as assured by Article 4.1 and 4.2 of the Basic Law and Article 137 of the Weimar Constitution.

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a) The guarantee of Church property contained in Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution covers all religious societies, irrespective of their constitution. Their protection in particular is not restricted to those religious societies which have the status of a corporate body of public law. The wording of Article 138.2 of the Weimar Constitution, which in addition to the religious societies explicitly lists also those religious associations which are not corporate bodies under public law, is already set against such a reduction of the personal scope of protection. What is more, significance attaches here too to the connection between

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the guarantee of Church property and the guarantee contained in Article 137.3 of the Weimar Constitution of the Churches' right of self-determination, which is not restricted to corporate bodies of public law (see BVerfGE 70, 138 (162) with further references). Since the guarantee of Church property guarantees the material basis of the religious societies' right of self-determination, its subjective range must also cover all these religious societies.

b) Article 138.2 of the Weimar Constitution also protects "other rights" in addition to the property intended to be put to worship, educational and charitable purposes, insofar as such rights are counted among the property of the religious societies and are correspondingly earmarked. Protection of the guarantee of Church property is granted to cover the entire property of the religious societies earmarked for religious purposes.

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c) The "other rights" in the area of the guarantee of Church property also include ownership rights and rights of use as to real estate, namely assignment of rights of use in church buildings. The addition "and other rights" was included in the guarantee of Church property contained in the Weimar Constitution with regard to such rights of use in Church buildings. The draft of the constitution initially provided only for the protection of ownership. It is only in the course of the negotiations that the constituting National Assembly (*Nationalversammlung*) was made aware that the church buildings had remained in the ownership of the churches after secularisation only in some dioceses. In other dioceses, the Churches only had rights of use, such as in the shape of a usufruct. For their protection, the "other rights" were included in the provision of the constitution [...].

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d) The protection afforded by Article 138.2 of the Weimar Constitution does not depend on whether the right of use awarded to a religious society is rooted in private or public law. Article 138.2 of the Weimar Constitution is an expression of the rationale that the right to use a thing requires protection because this thing is part of the substantive substrata of the freedom of religion. The task of serving the freedom of religion remains completely untouched by the allocation of the right of use to one or other legal area. Moreover, such legal relationships were frequently established in times in which, in contradistinction to today's situation, there was no self-evident separation of public and private legal relationships. Even today, whether a relationship of use is established under public or private law may be decided by purely practical considerations unrelated to the religious function of the thing.

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e) Article 138.2 of the Weimar Constitution protects the property of the religious societies only to the degree that is justified in accordance with the relevant civil or public law. In doing so, the nonconstitutional law must however meet constitutional requirements. Article 138.2 of the Weimar Constitution guarantees the continuation of Church property rights in line with their existing legal quality, but does not expand them (see BVerfG, First Chamber of the Second Senate, Judgment of 28 February 1992 [...]; also BVerfGE 18, 392 (398)). For this reason, it does not touch on the guar-

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antee contained in the guarantee of Church property if a right ceases to apply because a restriction immanent in it has been updated, as may be the case for instance when a resolutive condition starts to apply.

f) The determination of the content and scope of legal positions founded on ordinary law initially follows from the interpretation and application of this right, and is therefore a preserve of the nonconstitutional courts. This applies to all legal positions which are protected by Article 138.2 of the Weimar Constitution, and includes those questions as to the immanent restrictions with which they were founded, what the content of these restrictions is at the present time, or whether and with what consequences they are now affected by actual developments. In this respect, the Federal Constitutional Court is concerned only as far as determining whether the nonconstitutional courts have sufficiently considered the meaning and scope of constitutional law, in particular the guarantee of Church property and other state church law provisions contained in the Basic Law, such as the principle of neutrality and the Churches' right of self-determination. The examination of the Federal Constitutional Court must be all the more intensive here the clearer the specific relationship between the immanent restriction and the guarantee contained in Article 138.2 of the Weimar Constitution.

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2. The complainant's right of use flowing from the public-law relationship of assignment for use enjoyed the protection of Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution until its revocation.

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a) The complainant is a religious society in the legal form of a registered association. Independently of its legal form, it may invoke the guarantee of Church property contained in Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution.

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b) The right of use in the St. Salvator Church is one of the "other rights" within the meaning of Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution. The holder of the right of use until its revocation was the complainant. The Bavarian Administrative Court found in this respect that a legal succession could not be considered because the private church society, as the original addressee, had ceased to exist at the end of the kingdom in 1918. As the functional successor of the private church society, the complainant had however become the holder of the right of use by serving as a parish for the Greek Orthodox Christians living in Munich and the surrounding area. These findings are constitutionally unobjectionable.

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c) The Bavarian Administrative Court furthermore reached the view that the legal relationship on which the assignment for use was based is to be allocated to public law. The protection of Article 138.2 of the Weimar Constitution does not depend on this qualification.

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3. The revocation of the relationship of assignment for use by the Free State of Bavaria did not constitute an encroachment on the sphere protected by the guarantee

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of Church property under Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution.

a) Not every instance of revocation based on a reservation can be regarded as an update of a restriction that was immanent in the right from the outset, with the consequence that it does not touch upon the guarantee of Church property. The opposite view, put forward by the Bavarian Administrative Court in its first judgment on appeal on points of fact and law, would not be compatible with Article 138.2 of the Weimar Constitution. The Bavarian Administrative Court had based its findings on the point of view that already for this reason no encroachment existed on the guarantee of Church property because the right of use had been encumbered with a reservation of revocation, and in this respect had been freely revocable. 92

This view would deny the historical meaning of the protection that the guarantee of Church property can also have in respect of revocation. It must be taken into account that the rights of assignment for use applicable on entry into force of the Weimar Constitution, which were to be protected by Article 138.2 of the Weimar Constitution, [...] were not infrequently under a general revocation reservation. Also in the case at hand, the Bavarian Administrative Court proceeded on the basis of an implied revocation reservation because the Constitution of the Kingdom of Bavaria had stood in the way of irrevocable assignment for use. The free revocability of a right does not as such permit the protection of Article 138.2 of the Weimar Constitution to be disregarded. 93

b) On the other hand, Article 138.2 of the Weimar Constitution also does not guarantee the continued existence of rights that are subject to a revocation reservation per se and with regard to all instances of revocation. Otherwise, revocation would already have to be regarded as an encroachment because the right had not ceased to apply in its own right, but its cessation had been contingent on a specific and deliberate decision. This is however not the point here. 94

c) If the State only awards a legal status to a religious society under certain constitutionally unobjectionable preconditions, it is not relevant for the area protected by Article 138.2 of the Weimar Constitution in what manner the continued existence of the right is bound to these preconditions in terms of legal technique. It does not make any difference whether a right that is subject to a condition ceases to exist per se on cessation of the preconditions to apply, or whether it requires revocation as a formal precondition. 95

When it comes to encroachment, it is consequently vital to know on which reason the revocation may be based. If the right is based on an original restriction because it is tied to specific preconditions, and if revocation aims to implement formally the restriction which became acute on the cessation of application of the preconditions, it does not encroach on the protected area. 96

4. Such is the case at hand. 97

a) In accordance with the findings of the Bavarian Administrative Court, the assignment for use was tied to the purpose of furtherance, namely to place a house of God at the disposal of the Munich Greek Orthodox Church parish as the parish of the Greek Orthodox Church of Hellas abroad. It was said that the assignment for use could be regarded as a “subsidy relationship” the interpretation of which was to be based on the “will of the founder”, namely King Ludwig I of Bavaria. The possibility of using the legal institution of a subsidy to ensure that the benefit would be used as intended best served the interest of Ludwig I in the fulfilment of the purpose of furtherance. In accordance with the findings of the nonconstitutional courts, this purpose of furtherance can no longer be achieved if use remains assigned to the complainant after its change of jurisdiction. 98

b) In accordance with the findings of the nonconstitutional courts, the purpose of furtherance pursued by virtue of the assignment for use still entailed that the St. Salvator Church has been assigned to the Munich Greek Orthodox parish particularly as a parish of the Greek Orthodox Autocephalous Church of Hellas abroad: Ludwig I had intended to privilege the Munich Greek Orthodox Church parish as the parish of the Church of Hellas abroad. Its furtherance had been linked to the foreign policy commitment of Ludwig I in the Greek fight for freedom against the Ottoman Empire. In doing so, Ludwig I had pursued the objective, and indeed achieved it in 1832, of installing his son Otto on the Greek throne. Accordingly, he had placed the St. Salvator Church within the jurisdiction of the Autocephalous Church of Hellas. 99

According to the findings of the Bavarian Administrative Court, this purpose of furtherance can no longer be achieved because in accordance with the self-perception of the Greek Orthodox Autocephalous Church of Hellas, the complainant can no longer be regarded as its parish abroad. It is this self-perception that is relevant. If a right protected by Article 138.2 of the Weimar Constitution itself as to its legal foundation relates to a specific constituted Church, membership of individual parishes within this Church is thus initially defined in accordance with their self-perception. This also corresponds to the Church's right of self-determination under Article 137.3 of the Weimar Constitution, which may be significant when it comes to lending concrete shape to rights of use (see BVerfGE 70, 138 (162 et seq.)). 100

On this, the findings state that the new-calendarian Autocephalous Church of Hellas in accordance with its own information has no canonical relations with the complainant, that on the other hand however it recognises the Ecumenical Patriarch of Constantinople as having jurisdiction over the Greek Orthodox parishes abroad, which the latter has in turn transferred to the Metropolis. Also, an independent old-calendarian Greek Church, to which the complainant considers itself to belong after its change of jurisdiction, has been recognised by none of the autocephalous Orthodox Churches. In world Orthodoxy, only the new-calendarian leadership under Archbishop Seraphim was said to be recognised as a representative of the Autocephalous Church of Hellas, which had achieved its autocephalous status in 1850 by virtue of recognition by the Ecumenical Patriarch. 101

c) Revocation of the assignment for use which, as here, is based only on the further realisation of the will of the founder, is not an encroachment on a purely intra-Church dispute incompatible with the principle of state neutrality towards the religions and confessions (see BVerfGE 93, 1 (16) with further references). 102

The legal dispute pursued between the Free State of Bavaria and the complainant regarding surrender of the St. Salvator Church is admittedly linked to the complainant's change of jurisdiction, which also led to intra-Church disputes with the Metropolis. The State has however not intervened in this conflict without authorisation. It has restricted itself to the arrangement of the secular consequences of the change of jurisdiction, in which it was unavoidably involved. Because of the special legal situation as to the St. Salvator Church, it was indispensable for the State to decide on the allocation of the right of use because it remained the owner of the church and a party to the public law relationship of assignment for use. As such, it had to answer the question as to whether the purpose of furtherance could still be realised in light of the changed situation, or whether the church was now to be assigned to the Metropolis according to the purpose of furtherance. 103

5. The Bavarian Administrative Court also based its conclusion that the purpose of furtherance was not met on a comparison between the complainant and the Metropolis as to the degree of public significance, cultural and socio-political significance and outer size and spread. However, the impugned ruling is not based on this. Whether a "redistribution" based on these considerations would have been compatible with the principle of neutrality or parity (see BVerfGE 32, 98 (106) with further references) therefore does not need to be discussed. 104

There is equally no need for a ruling on whether the Bavarian Administrative Court has violated constitutional law by wishing to regard a violation of the will of the founder as lying in the complainant not having adhered to Greek Orthodox Church law. That a state court simply presumes that it has jurisdiction to interpret and apply Church law is not free of reservations with regard to the Churches' right of self-determination and the principle of neutrality (see BVerfGE 18, 385 (388); 70, 138 (162)). However, the ruling is not based on this presumption. 105

6. That the Church in implementation of the purpose of furtherance is now given over to the Metropolis is a major precondition and the obligatory consequence of the constitutional evaluation of the revocation. It is not that the State asserts for itself a right to the Church's property, but that the Metropolis as a religious society enforces its right to the church in the context of the will of the founder. The State merely provides the legal protection for this which is the preserve of its courts. 106

III.

1. Article 140 of the Basic Law in conjunction with Article 138.2 of the Weimar Constitution lends concrete form to the protection of the freedom of religion under Article 4.1 and 4.2 of the Basic Law with regard to Church property and other rights. For the 107

revocation in question here, the freedom of religion certainly does not acquire any protective effects over and above the guarantee of Church property. For the same reason, there has been no violation of the freedom of property under Article 14.1 of the Basic Law.

2. In the instant proceedings, no ruling is required as to whether the right of use in the St. Salvator Church constitutes a “state benefit” within the meaning of Article 140 of the Basic Law in conjunction with Article 138.1 of the Weimar Constitution. Protection under Article 138.1 of the Weimar Constitution would not reach further under the special circumstances of the instant case with regard to revocation than that of the guarantee of Church property under Article 138.2 of the Weimar Constitution. 108

3. That the complainant may have to exsacrate the St. Salvator Church in the course of the surrender does not give rise to a violation of the Churches’ right of self-determination under Article 140 of the Basic Law in conjunction with Article 137.3 sentence 1 of the Weimar Constitution. No direct demand of exsacration was made to the complainant, and nor does it form the subject-matter of the title of surrender. If, as the complainant submits, the St. Salvator Church would have to be exsacrated according to the old-calendarian understanding of Greek Orthodox Church law, despite being given over to a Greek Orthodox parish, it would only be a necessary consequence of the secular obligation to surrender the Church which certainly does not encroach on the right of self-determination as long as the obligation to surrender is the consequence of and not a restriction on this right. 109

IV.

The rights of the complainant related to the rule-of-law right to guarantee of justice and the court proceedings, in particular its right to its lawful judge (Article 101.1 sentence 2 of the Basic Law), have not been violated by the Bavarian Administrative Court having obliged the complainant to surrender the Church although the Highest Bavarian Regional Court had in the past finally rejected such an action for surrender of the church. The Bavarian Administrative Court dealt with this circumstance in detail. In doing so, it reached the conclusion with considerable reasoning that in this case the substantive legal force did not oppose the renewed filing of an action for surrender. 110

This legal application in an individual case neither denies the scope of the legal certainty guaranteed with rule-of-law court proceedings (see BVerfGE 15, 313 (319); 60, 253 (267)), nor does it counter the requirements of Article 3.1 of the Basic Law (see BVerfGE 87, 273 (278-279)). The view put forward by the Bavarian Administrative Court that the Highest Bavarian Regional Court had stipulated a reservation of legal force also in the event of there being no “dedication” with regard to the St. Salvator Church is also comprehensible. This also applies to the view that the finding of the characteristic of the church as a “*res sacra*” had not gained legal force.

Limbach

Kirchhof

Winter

Sommer

Jentsch

Hassemer

Broß

**Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 13. Oktober 1998 -
2 BvR 1275/96**

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