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### RELIGION AND EDUCATION IN WEST GERMANY: A SURVEY AND AN AMERICAN PERSPECTIVE

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#### INTRODUCTION

The recent years have witnessed a movement of educational reform in West Germany. As a result of this reform movement, many questions relating to the place of religion in the educational scheme have received fresh attention. Traditionally, the confessional public school has played a major role in the German school system. The current trend indicates a declining demand for the confessional public school and conversely, an increased demand for the interdenominational or community school.<sup>1</sup> However, parents are constitutionally assured the right to have their children receive religious education in the public schools. How is this right to be exercised in a system that is losing its confessional character? Likewise, parents are guaranteed the right to send their children to private or parochial schools—a right which assumes subordinate significance as long as public confessional schools are maintained. The movement away from the confessional school may mean an expansion of parochial schools. Does the right of a parochial school education carry with it an implied governmental duty to support the parochial schools?

A cursory examination of some of these critical questions, which have been raised by the school reform movement in West Germany, suggests parallel problems that are the subject of public interest and concern in the United States. Our educators are critically examining the possibilities of a positive treatment of religion in the public schools. In response to the financial crisis faced by parochial schools, which traditionally have depended upon voluntary support, a concerted effort is under way in the United States to provide public financial assistance for these schools or the children attending them. However, the solution to these mutual problems must be found within the matrix of constitutional structures that yield important points of comparison and contrast. The United States and

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1. See notes 28-58 *infra* and accompanying text.

West Germany have federal systems and the primary responsibility for education rests with the constituent states. Both countries are governed by a combination of federal and state constitutions, enforceable by a process of judicial review.

Despite historical, sociological and constitutional differences between the two countries, current trends point to an identification of the common problems regarding the relationship of governmental assistance and religious instruction in the educational system.

The purpose of this article is to examine the significant developments in religious education and school aid in West Germany. These developments will also be examined with respect to the American experience, considering both constitutional limitations and the direction of current movements. To this extent the authors are attempting a comparative study. Attention will be focused on two principal issues: 1) the place of religion in publicly supported education; and 2) the relationship of the government and private parochial schools. One objective of this inquiry is to determine to what extent differences in constitutional limitations affect proposed solutions to current problems. That part of the educational systems consisting of higher education at the colleges and universities will be excluded from consideration in this paper. While the question of religion at the institutions of higher learning and the companion question of public support of private colleges and universities are interesting and significant, any attempt to deal with the distinctive aspects of these problems would unduly extend the scope and length of this article. We shall confine our treatment to a discussion of the problems within the context of that part of the educational system which comprises what may be described as the elementary and secondary schools.

#### RELIGION AND EDUCATION IN WEST GERMANY:

#### THE ROLE OF RELIGION IN PUBLICLY SUPPORTED EDUCATION

##### *Historical Perspective*

Until recently, the confessional public school system<sup>2</sup> was the predominate system in West Germany. A brief examination of certain historical developments illustrates the reason for this predominance and indicates why this phenomenon is unparalleled in Europe or the United States.<sup>3</sup>

The Reformation provided the impetus for a system of universal education featuring state sponsored, but religiously orientated and church

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2. The features of this state supported but religiously oriented school system are discussed at notes 23-27 *infra* and accompanying text.

3. See K. MÜLLER, UNSER SCHULSTREIT-DAS ERBE UNSERER SCHULGESCHICHTE IM 19. JAHRHUNDERT 24 (1968).

related common schools. During the sixteenth and seventeenth century such school systems developed in several cities and principalities.<sup>4</sup> A universal system of education was implemented on a larger scale during the period of "enlightened absolutism" and the "age of reason." Prussia may serve to illustrate this development. Education was made compulsory<sup>5</sup> in Prussia in 1717<sup>6</sup> and the *Generallandschulreglement* of 1763<sup>7</sup> provided for a Christian school system in the state which focused on the neglected rural areas.

During the age of reason the state established itself as a power, with its notion of supremacy reflected in the pattern of a state church. By the end of the eighteenth century, schools were mainly controlled by the government in all German states.<sup>8</sup> Accordingly, the continuing cooperation between church and state in matters of school administration and supervision was more and more reduced and accepted by the state primarily for practical reasons.<sup>9</sup>

The history of education is integrally related to Germany's political history and shares its complexities. This is a crucial truism with respect to nineteenth century developments, since a religiously neutral common school system did not develop in the German states to the same extent as it developed in other Western countries during this period.

Due to the influence of the eighteenth century pedagogical and theological dogma and to the developing ideas of democracy and liberalism, it appeared to be only a matter of time before the idea of a somewhat secularized interdenominational public school system would be put into practice. Another factor giving impetus to the movement toward the implementation of such a system was the territorial redistribution in 1815 (Congress of Vienna) that resulted in a greater confessional mixture in many states. It may be noted, however, that the interdenominational system created by Nassau in 1817 was the sole instance of such a system over a fifty-year period.<sup>10</sup> Nevertheless, some slow progress was made in favor of the interdenominational school during the period of restoration

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4. 1 F. PAULSEN, *DAS DEUTSCHE BILDUNGSWESEN IN SEINER GESCHICHTLICHEN ENTWICKLUNG* 46-49 (1906).

5. Weimar and Gotha made education compulsory in 1619 and 1642, respectively. *Id.* at 85-86.

6. Ordinance of September 28, 1717, reprinted in L. FROESE & W. KRAWITZ, *DEUTSCHE SCHULGESETZGEBUNG, BAND I: BRANDENBURG, PREUSSEN UND DEUTSCHES REICH BIS 1945* 91 (2d rev. ed. 1968).

7. *Id.* at 23.

8. See *Allgemeines Landrecht für die Preussischen Staaten* of June 1, 1794, Teil II, Titel 12, §1, in *KÖNIGLICHE HOFBUCHDRUCKEREY* (1835).

9. E. SPRANGER, *DIE ENTSTEHUNGSGESCHICHTE DER DEUTSCHEN VOLKSSCHULE* 20 (1944).

10. K. MÜLLER, *supra* note 3, at 12-14.

from 1819 to 1847. The Revolution of 1848 created the opportunity for a breakthrough and the old demands were written into the Constitution of Paulskirche.<sup>11</sup> However, the reaction of the established powers caused a severe setback, particularly in the area of primary education. Concentrating on the developments in Prussia, it is sufficient to draw attention to the Revised Prussian Constitution of January 31, 1850,<sup>12</sup> and in particular to the Regulative of 1854.<sup>13</sup> The Regulative were intended to reinstitute the Evangelical primary school of the Reformation period by limiting the curriculum of teacher's colleges and schools to the four R's in an attempt to control and discipline teachers and students alike. To put it bluntly—the monarchy became afraid of a too enlightened citizenry.

Although a different approach was taken in the other states of Germany, the developments in Prussia continued to be typical in that no solution of the confessional public school question could be reached. Concentrated efforts were made to reach a solution in 1872, 1906 and during the period of the Weimar Republic. However, the confessional school remained the dominate school type.<sup>14</sup> In addition to Nassau, only Baden achieved school peace by establishing common interdenominational schools (*Simultanschule*) as the regular school type.

The confessional school question remained unsettled at the termination of World War I. Although the Weimar Constitution<sup>15</sup> provided for a common school (*Grundschule*) including the possibility of establishing confessional schools or *Weltanschauung* schools upon parental request, the issue remained controversial. A detailed system should have been worked out in a federal school statute. Such a statute was never enacted,<sup>16</sup> since a solution could not be reached that would have been supported by the Catholic Center Party.

During the period of National Socialist control, educational provisions were not altered. Rather, the totalitarian results were reached by administrative and political manipulation. Thus, the problem was presented again in 1945.

Stating the matter succinctly, a uniform solution has not been reached in the Federal Republic since it was established by the Basic Law of 1949. Instead, the various *Länder* have worked out solutions of their

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11. PAULSKIRCHE CONST. arts. 5, 6 (1849).

12. As to the confessional character of the school system see the PRUSSIAN CONST. art. 24 (1850).

13. The Regulative of 1854 were written by Ferdinand Stiehl at the request of the Prussian Government and are contained in G. GIESE, QUELLEN ZUR DEUTSCHEN SCHULGESCHICHTE SEIT 1800 145 (1961).

14. K. MÜLLER, *supra* note 3, at 19-24.

15. WEIMAR CONST. art. 146 (1919).

16. As a result, the status quo was maintained. WRV art. 174.

own, that can be broadly classified along confessional lines—the *Länder* with Protestant majorities favor interdenominational schools and those with Catholic majorities favor confessional schools. Presently, the necessity for school centralization and school reform are operating as unifying forces.

### *The West German School System*

It must be remembered that the control of education is in the hands of the constituent states or *Länder*<sup>17</sup> and that greater diversity exists in the educational pattern of West Germany than in the United States. However, since 1948 the *Länder* have been working closely together in the Permanent Conference of the Ministers of Education for the *Länder*.<sup>18</sup> As a result of these conferences and actions taken by the *Länder* in response to recommendations issuing from them, considerable standardization has been achieved in a number of matters relating to the public schools.<sup>19</sup> It should also be emphasized that in recent years the *Länder* have enacted a substantial body of educational reform legislation,<sup>20</sup> much of which affects the issues relating to the place of religion in the public schools.

School attendance is compulsory from the age of six to the age of eighteen.<sup>21</sup> The full-time compulsory schooling continues for nine years. Thereafter, pupils who no longer attend a full-time school must attend a vocational school.

The German *Volkschulen*—corresponding to the public school system in the United States—consists of two parts: the *Grundschule* (basic or elementary school) and the *Hauptschule*<sup>22</sup> (main or intermediate school), which is a continuation of the *Grundschule* that lasts another three to five years. The *Hauptschule* like the *Grundschule* provides a general education. Practically, the *Hauptschule* is a part of the system of secondary schools consisting of the *Hauptschule*, the *Realschule* and the *Gymnasium*. Traditionally, pupils qualifying for the *Realschule*, which is designed to

17. Cf. GRUNDGESETZ arts. 30, 70 (hereinafter cited as BASIC LAW).

18. See H. HECKEL & P. SEIPP, *SCHULRECHTSKUNDE* 24 (1969); W. SCHULTZE & C. FÜHR, *DAS SCHULWESEN IN DER BUNDESREPUBLIK DEUTSCHLAND* 9-10 (1966). The publications of the national advisory committees provide further general information. Prior to 1965 the committee was entitled Deutscher Ausschuss für das Erziehungs- und Bildungswesen and since 1965 Deutscher Bildungsrat.

19. EMPFEHLUNGEN UND GUTACHTEN DES DEUTSCHEN AUSSCHUSSES FÜR DAS ERZIEHUNGS- UND BILDUNGSWESEN 1953-65 (1966). For the most recent recommendations of the Deutscher Bildungsrat see note 23 *infra*.

20. This has occurred pursuant to the Agreement of Düsseldorf of 1955 and the Agreement of Hamburg of 1964 between the *Länder* of the Federal Republic.

21. H. HECKEL & P. SEIPP, *supra* note 18, at 349.

22. See note 20 *supra*. For a general description of these schools see W. SCHULTZE & C. FÜHR, *supra* note 18, at 28-33.

precede training at engineering schools and other higher vocational schools, or for the *Gymnasium*, which prepares students for the university, transfer to either of these schools at the end of four years in the *Grundschule*. However, changes are being made to permit greater freedom of transfer after a pupil enters the *Hauptschule*.<sup>23</sup> For our purposes, it is sufficient to note that the period of secondary education ends in the *Hauptschule* at the ninth grade, in the *Realschule* at the tenth grade and in the *Gymnasium* at the thirteenth grade.

In comparison with the United States, the *Grundschule* and the *Hauptschule* cover a period of education that corresponds with the elementary and junior high school grades. In relation to the religious questions with which we are concerned, the *Grundschule* and *Hauptschule* assume the greatest significance.

Within the framework of the general educational system a further classification based upon the relevancy of the religious element to the educational program and process may be made. The *Grundschule* and the *Hauptschule* can be divided into two general types: the confessional school and the community or interdenominational school. It should be emphasized that both types are *public schools* since they are publicly financed and under public controls.

The confessional school, which at one time was the dominate school type, is a public school committed to a particular religious faith. In other words, the general philosophy, choice of teaching materials and the study of religion reflect a Catholic or Protestant orientation.<sup>24</sup> The teachers necessarily share the faith to which the school is committed. The confessional school corresponds closely to the parochial school in the United States. The parochial school is distinguishable in that it is a religiously oriented private school controlled and financed by a particular denomination. It is not subject to state control except for minimum standards relating to the general educational requirements.

The community school or interdenominational school, as distinguished from the confessional school, has no denominational orientation and is attended by children of various faiths. However, two types of schools may be distinguished within the general classification of community schools. The community school may be an interdenominational Christian school

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23. For recent recommendations issued by the German Council of Education (Deutscher Bildungsrat) relating to new standards for secondary education see DIE ZEIT, May 2, 1969, at 24; DER SPIEGEL, May 5, 1969, at 44.

24. Judgment of March 26, 1957, 6 BVerfG 309, 339; A. v.CAMPENHAUSEN, ERZIEHUNGS-AUFTRAG UND STAATLICHE SCHULTRAGERSCHAFT 172-74 (1967); W. KEIM, SCHULE UND RELIGION. DIE RELIGIÖS—WELTANSCHAULICHE NEUTRALITÄT DES STAATES UND DIE VERBREITUNG RELIGIÖSEN GEDANK ENGUTSMIT HILFE DES SCHULWESENS IN DEN VEREINIGTEN STAATEN VON AMERIKA UND IN DEUTSCHLAND 86-88 (1967).

in which the Christian faith and its general presuppositions form the basis for the school program and furnish the foundation for the values stressed in the program or it may be an open and free school system in the sense that it relies on a somewhat broader basis to form its educational outlook. The key words to this educational approach are *good citizenship* and *common cultural heritage*.<sup>25</sup> The latter may be described as a secular school in which the Christian tradition receives recognition as a part of the cultural heritage.

In making these classifications the emphasis is on the general orientation and philosophy of the school system. It should not be confused with the question of religious instruction. Each public school is constitutionally required to afford parents the opportunity for the religious instruction of their children in accordance with their faith.<sup>26</sup> For this reason alone, it is not accurate to refer to a community school as strictly secular. In the United States, the term is used to describe the public schools that are prohibited by constitutional limitations from offering sectarian instruction as a regular part of the school program.

As indicated above, the school type classification by reference to religious orientation is particularly relevant to the *Grundschule* and *Hauptschule*. The situation with respect to the *Gymnasium* is relatively uncomplicated. The *Gymnasien* have traditionally been interdenominational in the broadest sense.<sup>27</sup>

#### *School Types: Current Trends*

As pointed out earlier,<sup>28</sup> the confessional school was traditionally the dominant school type in the German educational system, however, the rapid growth of the community school has resulted in its present pre-dominance. In response to this recent development within the school system,<sup>29</sup> the center of controversy has shifted from the issue of school

25. For an excellent discussion see A. v. CAMPENHAUSEN, *supra* note 24, at 194; H. PETERS, *ELTERNRECHT, ERZIEHUNG, BILDUNG UND SCHULE* 408-09 (1960); E. SPRANGER, *DIE WISSENSCHAFTLICHEN GRUNDLAGEN DER SCHULVERFASSUNGSLEHRE UND DER SCHULPOLITIK* 58 (2d ed. 1963).

26. BASIC LAW art. 7(3).

27. The secularization and professionalization of secondary education was substantially completed by the nineteenth century. As to the qualification of secondary school teachers and the curriculum plan for the *Gymnasium* of 1816 see G. GIESE, *supra* note 13, at 84, 88.

28. See note 24 *supra* and accompanying text.

29. In 1958 43.1 percent of the elementary schools were community schools, 17.2 percent were Protestant confessional schools and 39.1 percent were Catholic confessional schools. G. Niemeier, *Artikel Schule und Kirche*, 5 RGG 1562 (1961). By 1967 2,900,000 pupils were attending community schools and 2,700,000 were attending confessional schools. The confessional schools constituted 89.2 percent of the school system in Bavaria, 81.3 percent in North Rhine-Westphalia, 21.9 percent in Lower Saxony, 65.6 percent in Rhineland-Palatinate and 99.4 percent in the Saar. DER SPIEGEL, May 8, 1967, at 60.



types to the present concern relating to the degree of Christian orientation in the community and Christian community schools.

Most of the *Länder* did not desire a return to the confessional school system after World War II. The Christian character of the community schools was assured by the provision requiring religious education as a regular part of the public school curriculum.<sup>30</sup> In the political sense, this was the price paid for the departure from the confessional school system.<sup>31</sup> The following discussion and summary illustrates the contrasting positions that the *Länder* have assumed in the current school reform movement.

#### Exclusive Community School *Länder*

In seven of the *Länder* the public school system consists wholly of interdenominational or community schools.<sup>32</sup> Except for Berlin, Bremen and Hamburg, where there are secular community schools of the general open type, the remaining four *Länder* provide for Christian community schools. It may be noted that the matter remains controversial in Hesse.

As required by its constitution,<sup>33</sup> the educational system in Baden-Württemberg is composed of Christian community schools. This means that the entire educational program is influenced by the Christian heritage, but lacks a specific confessional orientation. In accordance with a constitutional amendment<sup>34</sup> and an implementing statute of 1968,<sup>35</sup> Bavaria provides for the Christian community school as the only public school type. Under certain circumstances so-called *confessional classes* may be established within that framework.<sup>36</sup> In any event, one Christian community class must be included in the curriculum. Although Berlin lacks a constitutional provision,<sup>37</sup> the school system is governed by a statute that, in effect, creates a community school of the general open type. The general open type of community school relies on the cultural heritage of humanity, including classical antiquity and Christianity, to achieve its goals. The Bremen Constitution<sup>38</sup> does not set forth a detailed educational system, however, it clearly provides for the establishment of community schools. The only religious instruction permitted is a course in Biblical history that, as interpreted, is to be taught on a general Christian basis

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30. BASIC LAW art. 7(3).

31. Address by Konrad Müller, Meeting of the Representatives of the Evangelical Church, Jan. 24, 1968.

32. Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hesse and Schleswig-Holstein.

33. BADEN-WÜRTTEMBERG CONST. art. 16 (1953).

34. BAVARIAN CONST. art. 135 (1946, amended 1968).

35. Law of Dec. 13, 1968, art. 7-I, [1968] GVB1. 402.

36. *Id.* art. 9.

37. Law of May 3, 1968, §§ 1, 13, [1968] GVB1. 549.

38. BREMEN CONST. arts. 32, 33 (1947).

rather than a confessional basis. The Hamburg statute<sup>39</sup> establishes a public school system of community schools for all children, regardless of confession or *Weltanschauung*. Religious education is guaranteed as a regular elective course according to the teachings of the various churches. The same result has been reached in Hesse<sup>40</sup> by judicial decision.<sup>41</sup> However, the decision has been criticized as violating the agreement between Hesse and the Evangelical churches in Hesse and the state's constitution.<sup>42</sup> In Schleswig-Holstein the interdenominational community school is the exclusive public school type, but a treaty with the Evangelical churches provides that these schools shall be Christian community schools.<sup>43</sup>

### Dominant Community School *Länder*

In Lower Saxony the interdenominational school is the regular school type, but not the exclusive one.<sup>44</sup> A confessional school may be established in a given community upon parental request if there is an adequate school for students of all confessions and religions within a reasonable distance. The religious orientation of the community school in Lower Saxony exhibits a peculiar contrast to the Christian community school. Within certain limits, the extent to which personal religious or confessional beliefs will influence instruction is left to the teacher's discretion. Thus, the system is a highly flexible one in which the number of public school teachers of a given confession is determined by the proportion of students of the same confession. Therefore, it could be argued that the differences between interdenominational and confessional schools in Lower Saxony are differences of degree and not of substance.<sup>45</sup>

The community school dominates the North Rhine-Westphalia educational system on the intermediate school level. While confessional and community schools were formerly of equal status, constitutional and statutory amendments<sup>46</sup> have established the Christian community school

39. Law of July 1, 1968, [1968] GVB1. 183.

40. HESSE CONST. art. 56-II (1946).

41. Judgment of Oct. 27, 1965, 16 ESVGH 1 (1967).

42. See Böckenförde, *Religionsfreiheit und öffentliches Schulgebet*, 19 DÖV 30, 35-37 (1966).

43. Cf. SCHLESWIG-HOLSTEIN CONST. art. 6-III (1949) with Treaty of May 23, 1957, [1957] GVB1. 73.

44. For a general description of the educational system in Lower Saxony see Law of June 20, 1968, §§ 2, 3, 8. [1968] GVB1. 98. Section 31 of the same statute guarantees the traditional system consisting exclusively of confessional schools in the district of Oldenburg. The remainder of Lower Saxony will begin to convert in the 1969-70 school year. FAZ of May 23, 1969, at 6, col. 1.

45. See A. v. CAMPENHAUSEN, *supra* note 24, at 200, 202; E. G. Mahrenholz, *Das niedersächsische Konkordat und der Ergänzungsvertrag zum Loccumer Vertrag*, 12 ZevKR 217 (1967).

46. Law of March 5, 1968, [1968] GVB1. 36.

as the regular type of intermediate school. In addition, a confessional school may be established by parental vote.<sup>47</sup> As a result of these changes, during the 1968-69 school year 1,294 of the intermediate schools were Christian community schools and sixty-one were Catholic confessional schools.<sup>48</sup> The character of the Christian community school has also been redefined. Article 12 of the North Rhine-Westphalia Constitution no longer bases its definition of the Christian community school upon Christian cultural and educational values.<sup>49</sup> The present definition encompasses Christian confessions and other religious and *weltanschauliche* confessions.

### Confessional-Community School *Länder*

The distinguishing feature of the confessional-community school *Länder* is the parental privilege of voting for the establishment of either type of school. This privilege existed in Bavaria, North Rhine-Westphalia, Rhineland-Palatinate and the Saar when the confessional school type was dominant. Bavaria has now established the Christian community school as the exclusive type and North Rhine-Westphalia has established the Christian community school as the regular type of intermediate school. Accordingly, the legal equality of community and confessional schools exists only in North Rhine-Westphalia (as to the elementary schools), Rhineland-Palatinate and the Saar. However, differences exist within these *Länder* and changes have occurred that clearly indicated a preference for community schools.

The most important change in the elementary schools of North Rhine-Westphalia is that single classroom schools are no longer considered adequate.<sup>50</sup> At least one class must be established for each age group.<sup>51</sup> As a protection to minority groups, a two-thirds parental vote is required to change or establish confessional or community schools.<sup>52</sup>

The Constitution of Rhineland-Palatinate<sup>53</sup> recognizes the confessional and Christian community schools as equal types. However, a statutory solution similar to that worked out in North Rhine-Westphalia assures elementary schools of a sufficient size and safeguards minority rights.<sup>54</sup> As in North Rhine-Westphalia, elementary schools must provide

47. *Id.* § 18(2).

48. 8 SCHULE HEUTE 219 (1968).

49. Law of Dec. 13, 1968, art. 12(6), [1968] GVB1. 402.

50. The standard is also applied to intermediate schools. NORTH RHINE-WESTPHALIA CONST. art. 12(2); Law of Dec. 13, 1968, art. 12(6), [1968] GVB1. 402.

51. NORTH RHINE-WESTPHALIA CONST. arts. 12(2), 12(3); Law of Dec. 13, 1968, § 16(a), [1968] GVB1. 402.

52. Law of Dec. 13, 1968, § 17(3), [1968] GVB1. 402.

53. RHINELAND-PALATINATE CONST. art. 29 (1947, amended 1965).

54. Law of May 9, 1968, § 18, [1968] GVB1. 73.

at least one class for each age group and intermediate schools must provide at least two classes for each age group. The type of school is determined by secret ballot and requires a two-thirds majority to establish a confessional intermediate school and a simple majority to establish a confessional elementary school. To establish a confessional elementary school, two-thirds of the students must profess the confession that the school represents.<sup>55</sup> It should be noted that a significant trend has developed in Rhineland-Palatinate. Of the first sixty-seven intermediate schools established in the 1968-69 school year, three were Catholic confessional schools and the remainder were Christian community schools.<sup>56</sup>

Although the Saar Constitution<sup>57</sup> provides for a system of confessional and community schools, Saar has failed to implement the provision. Although plans do exist to establish a system similar to that of North Rhine-Westphalia, the traditional system, consisting almost entirely of confessional schools, continues to function.<sup>58</sup>

#### *Constitutional Guarantees and Limitations*

The foregoing description of the general school system of West Germany, including the reference to public confessional schools, the Christian community schools and the constitutional guarantee of religious instruction in the public schools, immediately suggests to the American reader what would be major constitutional difficulties in the United States. An examination of the West German constitutional guarantees and limitations yields significant points of comparison and contrast.

The document descriptively characterized as the West German Constitution is officially entitled the Basic Law (*Grundgesetz*) for the Federal Republic of Germany.<sup>59</sup> It was drafted at Bonn and promulgated in 1949.<sup>60</sup>

Before closely examining the particular provisions which are relevant to the school problems under discussion, attention must be given to church-state relations under the Basic Law. The Basic Law does not have its own independent and substantive provisions concerning church-state relations. Because of the inability of the delegates, who drafted and approved the Constitution, to arrive at what might be considered a

55. *Id.* §§ 15, 19, 25.

56. 77 WESTDEUTSCHE SCHULZEITUNG 235 (1968).

57. SAAR CONST. art. 27(3) (1947, amended 1965). A recent amendment to the Saar Constitution provides for the Christian community school as the exclusive type. *Süddeutsche Zeitung* of Nov. 7, 1969, at 1, col. 2.

58. For the most recent developments in the trend toward confessional classes see *Frankfurter Rundschau*, July 1, 1969, at 15, col. 3.

59. BASIC LAW art. 7 contains the educational guarantees and limitations. See note 69 *infra*.

60. Law of May 23, 1949, [1949] BGB 1.

satisfactory definitive solution to church-state problems, a compromise was reached by incorporating the provisions of articles 136, 137, 138, 139 and 141 of the earlier Weimar Constitution<sup>61</sup> into article 140 of the Basic Law. Basic church-state relations are determined, therefore, by the old provisions of the Weimar Constitution. Without attempting a thorough analysis of these provisions, it is sufficient to make several observations. Article 137 of the Weimar Constitution declares that there is no state church. This is the basic principle underlying church-state relations in West Germany. The same article guarantees freedom of association to religious bodies and the freedom of each to regulate and administer its affairs independently within the limits of the general laws. Religious bodies can acquire legal rights in accordance with the general regulations of the civil code and become corporations with public rights. Equal rights are granted to other religious bodies upon application, but only if their constitution and the number of members offer a guarantee of permanency. Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax in accordance with the laws of the *Länder*. Associations encouraging a generalized world philosophy are granted a status equal to other religious bodies.<sup>62</sup>

While the foregoing discussion does not fully summarize the provisions of the Weimar Constitution that are incorporated into the Basic Law, it provides a general understanding of church-state relations in West Germany. Since there is no state church in West Germany, a theory of separation has been followed. Yet, it should be clearly understood that the conception of church-state relations and of separation as constitutionally recognized and practiced is substantially different from that in the United States.<sup>63</sup> Among the features that should be noted and which offer contrasts to the American experience is the recognition that certain religious bodies are corporations of public law.<sup>64</sup> In this capacity they have certain special privileges and rights not accorded to other church

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61. For the legislative history see v.Doernning, Füsslein & Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, 1 JÖR N.F. 1, 899 (1951); H. Quaritsch, *Kirchen und Staat. Verfassungs- und staats-theoretische Probleme der staatskirchenrechtlichen Lehre der Gegenwart*, 1 DER STAAT 175-97, 289-320 (1962); R. Smend, *Staat und Kirche nach dem Bonner Grundgesetz*, 1 ZEVKR 4 (1951). Smend's interpretation of the legislative history, although controversial, is the leading analysis. For a comprehensive survey see K. Hesse, *Artikel Kirche und Staat*, EVANGELISCHES STAATSLIXIKON 904 (1966).

62. WRV art. 137.

63. For a presentation of the peculiarities of the German system of church-state relations in contrast to the American pattern see U. Scheuner, *Tendenzen im gegenwärtigen Staatskirchenrecht*, ESSENER GESPRACHE Bd. 1, 108, 130-38 (1969).

64. Körperperschaften des öffentlichen Rechtes, WRV art. 137-V (1919). For a recent reevaluation of this traditional legal status see K. Hesse, *Fric Kirche im demokratischen Gemeinwesen*, 11 ZEVKR 337, 357-59 (1965).

groups. For example, they are afforded various tax exemptions and are permitted to enter special agreements or compacts with *Länder* defining the rights and privileges of the church. Moreover, a church tax is levied on behalf of these bodies by the civil authorities and fixed at a percentage of the regular tax levied for governmental purposes. The proceeds of this tax are turned over to the churches to meet their budgetary requirements. As a reimbursement for this service, the government receives a fee from the churches. It may be noted that the taxpayer has the choice of designating the church that is to receive the tax revenue. He may completely immunize himself to the tax by withdrawing from church membership, however, so long as he remains a member of a church he is subject to the tax.<sup>65</sup>

In view of these provisions it would be incorrect to characterize the situation in West Germany in terms of separation of church and state, at least as this term is constitutionally construed in the United States.<sup>66</sup> The United States Constitution precludes any use of the state taxing power to raise finances for church purposes. It also precludes any special agreements between the government and the churches defining their privileges. Furthermore, the churches are not recognized as having special standing or privileges as corporations of public law. Obviously, the constitutional position of the churches is stronger in West Germany. Also, there is a greater constitutional recognition of the positive role of religion in public life than in the United States.

The Basic Law established the federal constitutional system for West Germany. While it is not as distinctively federalistic as the United States Constitution, the division of legislative authority is important, since education is one of the few areas reserved to the *Länder*.<sup>67</sup> This reflects the reaction against the nationalization and control of the entire school system during the National Socialist Regime.<sup>68</sup> There are, however, provisions in the Basic Law that define the limits within which the *Länder* may operate in establishing school systems and in dealing with the problem of religion in the schools. With respect to the federal system, it may be said that West Germany closely parallels the United States in that education is generally controlled by the states (with the possibility of

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65. BASIC LAW art. 140 as incorporated into WRV art. 137(6). This method of taxation has produced considerable public controversy. DER SPIEGEL, March 24, 1966, at 42.

66. M. Heckel, *Die Kirchen unter dem Grundgesetz*, 26 VVDSTRL 5, 31 (1968). The author presents an interesting discussion of the separation issue for he interprets article 137 in terms of *mutual emancipation*.

67. BASIC LAW arts. 70, 71, 72, 73, 74, 75.

68. The reaction to nationalization was a desire to return to the Weimar system. Statutory changes would have been unnecessary as the National Socialist regime had achieved control through administrative changes.

federal financial aid entering into the picture), but subject to limitations derived from the Federal Constitution in addition to those imposed by their own constitutions.

Article 4 of the Basic Law provides that freedom of faith and conscience, freedom of creed, religious or ideological, and the undisturbed practice of religion are inviolable. However, article 7 deals directly with the problems of religion and education.<sup>69</sup> The article initially states that the entire educational system is under the supervision of the state.<sup>70</sup> This embodies a principle previously recognized in the Weimar Constitution and supported by German experience and practice since the era of Frederick the Great.<sup>71</sup> Article 7 also provides that persons entitled to raise a child have the right to decide whether he shall receive religious instruction.<sup>72</sup> Moreover, article 7 explicitly states that "[r]eligious instruction forms part of the ordinary curriculum in state and municipal schools, except in secular schools."<sup>73</sup> The provision is extremely important since it guarantees the opportunity for religious instruction according to the religious interest and preference of the parents. This right exists in all school systems, whether confessional or interdenominational. Another important provision guarantees the right to establish private schools subject to certain limitations.<sup>74</sup>

Article 7 does not explicitly require the *Länder* to establish a specific type of school, provided the system they establish is within the framework

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69. BASIC LAW art. 7:

1) The entire educational system is under the supervision of the state. 2) The persons entitled to bring up a child have the right to decide whether it shall receive religious instruction. 3) Religious instruction forms 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 is given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction. 4) The right to establish private schools is guaranteed. Private schools, as a substitute for state or municipal schools, require the approval of the state and are subject to the laws of the *Länder*. This approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their teaching staff, and if a segregation of the pupils according to the means of the parents is not promoted. This approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured. 5) A private elementary school shall be admitted only if the educational authority finds that it serves a special pedagogic interest or if, on the application of persons entitled to bring up children, it is to be established as an interdenominational or denominational or ideological school and a state or municipal elementary school of this type does not exist in the community. 6) Preparatory schools remain abolished.

Translation according to a version supplied by the German Embassy.

70. BASIC LAW art. 7(1).

71. See note 7 *supra* and accompanying text.

72. BASIC LAW art. 7(2).

73. *Id.* art. 7(3).

74. BASIC LAW art. 4.

of these constitutional limitations. For example, it does not provide that the *Länder* must establish confessional, interdenominational or secular schools.<sup>75</sup> On the other hand, it is clear that whatever the school type, there must be an opportunity for religious instruction in the public schools. While the right to establish private schools is recognized in article 7, it is unclear whether the *Länder* must, or may not give financial support to private schools. These provisions raise questions of interpretation that will be subsequently considered.<sup>76</sup>

### *The Educational Reform Movement*

What may strike the observer as most significant is the general movement for reform of the public school system in West Germany. The principal objective of the reform movement is the establishment of a more democratic school system through the elimination of the relics of the former class orientated system. At the same time, adjustments are being made to create an educational system responsive to a technological society. These reforms necessitate a reevaluation of German educational philosophy, particularly with respect to the place of religion within the educational process.

The salient feature of the reform movement has been the decline of the confessional school as the prevalent type of public school. The interdenominational or community school was well established in parts of Germany prior to the present reform movement. The reforms have resulted in a school system in which community schools have emerged as the dominant type.

While the parental voice in the determination of the type of school to be adopted is not a unique feature of the reform movement, it has to some extent been preserved within this movement. This element of self-determination displays the considerable sensitivity shown towards minority groups in a given community. Thus, in some *Länder* it is possible to establish a confessional school in the area where an interdenominational community school is present. If the local population is insufficient to support a separate confessional school, minority groups may establish confessional classes in an otherwise community school (Bavaria) or gain special representation in a confessional school through the appointment of teachers of the minority faith (North Rhine-Westphalia).

Several factors appear to have effected the movement away from the

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75. It should be noted that an ongoing German controversy involves the issue of whether public denominational schools are always unconstitutional. K. OBERMAYER, *GEMEINSCHAFTSSCHULE-AUFTRAG DES GRUNDGESETZES 25-28 (1967)*; K. Obermayer, *Religious Schools and Religious Freedom: Proposals for Reform of the German Public School System*, 16 AM. J. COMP. L. 552, 558 (1968).

76. See notes 129-63 *infra* and accompanying text.



confessional school: 1) the inferior quality of education in many of the small confessional schools located in rural areas; 2) the economic savings and the opportunity for improved education in consolidated community schools; 3) the divisiveness resulting from the maintenance of separate confessional schools; 4) a heightened sensitivity to the position of minority groups in the community; and 5) the growing belief that the public schools can best perform their educational responsibility when they are not oriented to the confessional presuppositions of a particular faith. Also, forces as diverse as a growing ecumenism and developing secularism have played a significant role in working out a new system of community schools.

The search for a new system defining the relationship of religion and education provides a perspective for assessing the clearly established trend away from confessional schools. This search leads to two alternatives, each posing separate yet interrelated questions. The question is raised whether the private confessional school is both a substitute and an alternative for the former confessional schools and the existing community schools, which are becoming increasingly more neutral and secularized.<sup>77</sup> On the other hand, it is questioned whether a system of Christian community schools with varying degrees of emphasis on the Christian tradition may still be advocated as the common school of a religiously neutral state.<sup>78</sup> Despite the presence of federal constitutional guarantees, the place of religious education in the public school curriculum is being seriously challenged.<sup>79</sup>

The present trend indicates that the future role of private confessional education is still open to question.<sup>80</sup> At present it seems clear that only the Catholic Church may establish a substantial number of private confessional elementary and secondary schools. The Christian character of the community school has yet to be determined by the Federal Constitutional Court (*Bundesverfassungsgericht*). However, the Court may make this determination in the near future. As a result of recent legislation, several factions have challenged the degree of Christian

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77. H. Heckel, *Privatschule zwischen heute und morgen*, SCHULRECHT UND SCHULPOLITIK 107, 125 (1967).

78. Compare M. STALLMAN, DIE CHRISTLICHKEIT DER "CHRISTLICHEN SCHULE" (1968) with K. Nipkow, *Die christliche Schule-eine Einführung in den gegenwärtigen Stand der Diskussion*, P/MATERIALDIENST DER EVANGELISCHEN AKADEMIE BAD BOLL (1969).

79. Recent leaflet campaigns have suggested that pupils over fourteen years of age, the age of majority in religious matters, should drop religion classes. 20 DER EVANGELISCHE ERZIEHER 449, 484 (K. Ringshausen ed. 1968); E. Fischer, *Zur Problematik des Religionsunterrichts*, 7 VORGÄNGE 421 (1968).

80. See notes 122-28 *infra* and accompanying text.

character that the public school system may assume.<sup>81</sup>

Regardless of the outcome of the litigation, it is safe to assume that if a substantial Christian orientation of the common public school is accepted, it will be extremely difficult to establish "the line of demarcation between a school system which permissibly reflects the will of the majority, and a school system which impermissibly infringes the rights of a religious minority."<sup>82</sup>

### *Religious Instruction in the Public Schools*

As noted previously,<sup>83</sup> the question of school type, whether confessional or interdenominational, should not be confused with the question of religious instruction in the public schools. The opportunity for parents to have their children instructed in the faith of their preference is guaranteed by the Basic Law.<sup>84</sup> Therefore, it is unquestioned that the state must establish religious education classes as part of the public school curriculum. Further, these classes must be sectarian and the tenets of the respective confessions must be the subject matter of instruction. Grades are to be given and the teacher must be a regular member of the faculty. However, religious education classes are optional and parents or guardians may declare in writing that they do not desire their children to participate. Also, no teacher may be compelled to teach religion classes.<sup>85</sup>

The question has been raised whether the Basic Law requires all public schools to include religious education or whether only elementary public schools must meet this requirement. The Basic Law addresses itself to public schools and excludes only those of a non-confessional type. In the earlier drafts<sup>86</sup> of article 7 the language was more explicit. In referring to public schools it specifically mentioned elementary, intermediate, vocational schools and secondary schools. That article 7 as finally drafted refers in general terms to state and municipal schools does not mean that secondary schools and vocational schools are to be excluded. In fact, the constitutional guarantee has been construed to extend to

81. Fifty-one Catholic parents have attacked a recent constitutional amendment in North Rhine-Westphalia. 8 SCHULE HEUTE 283 (1968). Further cases have been prepared by the Humanistische Union (a civil liberties organization) challenging the Christian character of the community schools of Baden-Württemberg and Bavaria. E. Fischer, *Brief for Humanistische Union*, 7 VORGANGE 307 (1968).

82. K. Obermayer, *Religious Schools and Religious Freedom*, 16 AM. J. COMP. L. 552, 561 (1968).

83. See notes 24-26 *supra* and accompanying text.

84. BASIC LAW art. 7(2).

85. BASIC LAW art. 7(3); R. v. DRYGALSKI, DIE EINWIRKUNGEN DER KIRCHEN AUF DEN RELIGIONSUNTERRICHT AN ÖFFENTLICHEN SCHULEN 60 (1967).

86. See H. v. Mangoldt, *Schriftlicher Bericht zum Entwurf des Grundgesetzes für die Bundesrepublik Deutschland*, PARLAMENTARISCHER RAT 5, 10 (1948-49); v. Doemming, Füsslein & Matz, *supra* note 61.

them.<sup>87</sup>

Despite a basic uniformity in matters of religious education among the *Länder*, there are differences of varying significance. The Bremen and Berlin patterns warrant special attention.

The Basic Law expressly exempts from the religious instruction guarantee the *Länder* of Bremen and Berlin.<sup>88</sup> The provision is properly called the Bremen Provision since Bremen promoted it and is the only *Land* in West Germany that does not provide for religious education along confessional lines.<sup>89</sup> In a recent decision,<sup>90</sup> the high court of Bremen held that the guaranteed instruction of Biblical history in its Constitution excludes religious instruction of Biblical history on a confessional basis. The court ruled that instruction in Biblical history should be premised on general Christian principles.<sup>91</sup> Thus, the court answered the argument of the Catholic Church that the Bremen schools were essentially Protestant schools and that the state was discriminating against Catholic education by not supporting Catholic parochial schools to the same degree it supported the public schools.<sup>92</sup>

In Berlin an interesting solution has been reached which can be described as *cooperative separatism*.<sup>93</sup> A distinctive system has been established that recognizes the nature of religious education, the common interest in including religion as educational subject matter and the state's responsibility to provide the most favorable educational conditions. The Berlin solution proceeds on the premise that religious education is education by the churches and not by the state.<sup>94</sup> Therefore, there is *no* state control. In matters of training and curriculum control the teachers are responsible only to their churches. The churches finance the religious instruction, although they are subsidized by the *Land*.<sup>95</sup> The state

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87. This issue has failed to generate any controversy. D. DEUSCHLE, *KIRCHE UND SCHULE NACH DEM GRUNDGESETZ. DAS SCHULKIRCHENRECHT DES BUNDES* 124 (1968); R. SCHMOECKEL, *DER RELIGIONSUNTERRICHT. DIE RECHTLICHE REGELUNG NACH GRUNDGESETZ UND LANDESGESETZGEBUNG* 86, 87 (1964).

88. BASIC LAW art. 141.

89. BREMEN CONST. art. 32(1). See notes 93-96 *infra* and accompanying text for a discussion of the solution reached in Berlin.

90. Judgment of Oct. 23, 1965, DÖV 812 (1965).

91. *Id.* at 814.

92. For a full development of this argument see G. DÜRIG, *DIE RECHTSSTELLUNG DER KATHOLISCHEN PRIVATSCHULEN IM LANDE BREMEN* (1964). For a critical review of the decisions' historical context see R. v.DRYGALSKI, *supra* note 85, at 125-28; U. Scheuner, *Deutsches Staatskirchenrecht*, 19 DÖV 145, 149 (1966).

93. On the use of this term see P. Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1 (1961).

94. Compare Law of May 3, 1968, § 13, [1968] GVB1. 549 with BASIC LAW arts. 7(1), 7(3).

95. See notes 133-41 *infra* and accompanying text.

provides all the facilities for religious instruction and the teaching of religious classes is credited to the teachers as part of their regular teaching assignment.<sup>96</sup> Thus, Berlin acknowledges religious education as appropriate to the school program and to this extent it is treated as a part of the regular school curriculum (*schulplanmässiges Lehrfach*).

The practical implementation of religious education in the framework of the public school curriculum requires various regulations and agreements, especially with respect to teacher qualification and the determination of subject matter content.

Since religious education is an indoctrination in the tenets of a specific faith, it is necessary to include the subject of religion as a part of teacher education. Appropriate provisions are made for this in all *Land* statutes and church-state treaties.<sup>97</sup> The Treaty of Loccum<sup>98</sup> typifies these provisions. It provides that "Evangelical students shall have the opportunity to obtain a scientific education in Evangelical pedagogics at all teacher training colleges for elementary school teachers."<sup>99</sup> In accordance with the agreement a representative of the church must participate in "the assessment of the students' capacity for teaching religion."<sup>100</sup> Although this may be considered as the initial step in protecting the teaching of religion "in accordance with the tenets of the religious communities,"<sup>101</sup> it is questioned whether it provides a sufficient safeguard. These questions are validly raised since the instruction must occur "without prejudice to the state's right of supervision."<sup>102</sup> As this language indicates, there is a statutory source of conflict regarding church-state cooperation in matters of religious education.<sup>103</sup>

Real difficulties are faced when church-state cooperation involves the questions of curriculum, textbook selection and teacher supervision. As

96. See Law of May 3, 1968, § 13, [1968] GVB1. 549.

97. R. SCHMOECKEL, *supra* note 87, at 150. It should be noted that those *Länder* with a significant number of confessional schools also established their teacher's colleges along confessional and/or interdenominational lines. This pattern, however, is about to be changed as a consequence of recent legislation. Although this does not affect the religious instruction required in teacher education, the opportunity has been granted to establish private church related teachers colleges financed by the state. BAVARIAN CONCORDAT art. 5, § 5, (1924) as amended Dec. 13, 1968, [1968] GVB1. 398.

A similar possibility has been provided in Rhineland-Palatinate and is being discussed in North Rhine-Westphalia. For general information compare DER SPIEGEL, April 21, 1969, at 89.

98. Treaty between Evangelical Churches and Lower Saxony (1955), as amended Jan. 6, 1966, [1966] GVB1. 3.

99. *Id.* art. 4(1) (author's translation).

100. *Id.* art. 4(2) (author's translation).

101. BASIC LAW art. 7(3).

102. *Id.*

103. See R. v. DRYGALSKI, *supra* note 85, at 60-72, 98-100; R. SCHMOECKEL, *supra* note 87, at 118, 158-61, 170-74.

the complex nature of these problems suggests, there are practical, constitutional and basic church-state issues involved. In practice, however, workable solutions have been reached despite the collateral aspects of the continuing legal controversy.<sup>104</sup>

In textbook selection and curriculum planning, the churches have generally undertaken the initial selection and drafting. The governmental departments responsible for cultural affairs (*Kultusministerien*) cooperate with the churches, particularly with respect to pedagogical issues, and generally accept their recommendations though retaining the power to amend.<sup>105</sup> Generally, the churches have preserved their doctrine by exercising curriculum control. The varying degree of control is reflected in the state constitutions and statutes.<sup>106</sup> These range from a complete right of supervision to no right of supervision at all.

The constitutional aspects of the religious instruction guarantee continue to be the principle source of controversy. The predominant view is that within the limits of the constitutional guarantee the *Länder* may exercise some discretion in determining the system of religious instruction in the public schools. However, in order to free the state from any involvement in the issue of church doctrine, the religious communities were given the *right* to exercise their influence in these matters within the public school system.<sup>107</sup> A contrary view is that in the interests of separation and neutrality there can be no interference with the state's authority in school matters.<sup>108</sup> Therefore, churches should not have the *right* to participate indirectly in state government by expressing the *principles* to which the state is bound. However, the participation of the churches and their religious communities should be sought as a practical matter.

A further proposal would implement the separation theory and shift the center of religious education to the churches, thus making it solely a matter of church responsibility. Thus, the result would be similar to the solution reached in Berlin.<sup>109</sup>

The arguments premised on the principle of separation and that favor church centered religious education are countered by those who seek to reevaluate the function of religion in the public educational system. In rejecting the separatist's position and the correlative position that

104. W. KEIM, *supra* note 24, at 148-49 n.838.

105. R. SCHMOECKEL, *supra* note 87, at 139-40.

106. A. v.CAMPENHAUSEN, *supra* note 24, at 156.

107. R. SCHMOECKEL, *supra* note 87, at 120, 128.

108. T. MAUNZ & G. DÜRIG, KOMMENTAR art. 7 Randnummer 49 (1966); R. v.DRYGALSKI, *supra* note 85, at 70-72; W. KEIM, *supra* note 24, at 148-51.

109. W. KEIM, *supra* note 24, at 151 n.823; R. v.DRYGALSKI, *supra* note 85, at 99-104.

religious education is solely the function of the church, one well-known expert contends that religious education is both necessary and desirable in a state educational system. He argues that religion is related to moral and ethical education—developments in which the state has a vital concern. Further, religion is an integral part of man's historical experience and can no more be excluded from the educational program than can human history or the natural sciences.<sup>110</sup> To ignore or deny that Christianity is an essential facet of the nation's heritage is tantamount to intellectual dishonesty.<sup>111</sup>

It is evident from these arguments<sup>112</sup> that the discussion eventually must involve the same basic considerations which dominate the American debate on the subject.

### THE STATUS OF PRIVATE EDUCATIONAL INSTITUTIONS IN WEST GERMANY

#### *General Considerations*

Private education in West Germany is influenced by two significant factors. First, the period of National Socialist control completely destroyed the flourishing private school system of the preceding era.<sup>118</sup> Secondly, the system of elementary confessional public schools eliminated much of the pressure that was exerted upon the churches to create a private confessional school system. Before a further consideration of the impact of these factors, it is necessary to examine the statutory and constitutional provisions that affect education in the various *Länder*.

According to the Basic Law, the right to establish private schools

110. A. v.Campenhausen, *Zum Verständnis des evangelischen Religionsunterrichts*, 13 ZevKR 32, 39, 42 (1967).

111. *Id.* at 41.

112. While the Catholic Church traditionally adheres to a catechetical approach, differing Protestant theories of religious education have developed. 1) Catechetical theory of *Evangelische Unterweisung*. The catchphrase here is *church in the school* (*Kirche in der Schule*). Based upon a reevaluation of religious education during the Weimar Republic and the period of church resistance (*Kirchenkampf*) to the Third Reich, this position was programmatically articulated after the Second World War by Helmuth Kittel. H. KITTEL, *VOM RELIGIONSUNTERRICHT ZUR EVANGELISCHEN UNTERWEISUNG* (1947, 3rd rev. ed. 1957). 2) Educational theory of religious education. Religious education is defined as school-oriented. Accordingly, a more historical and theological approach is suggested that should be intellectually and existentially gratifying in conveying the traditions of biblical faith. The most prominent supporters of this approach are Gert Otto and Martin Stallman. G. OTTO, *SCHULE-RELIGIONSUNTERRICHT-KIRCHE. STELLUNG UND AUFGABE DES RELIGIONSUNTERRICHTS IN VOLKSSCHULE, GYMNASIUM UND BERUFSSCHULE* (3rd rev. ed. 1968); M. STALLMAN, *EVANGELISCHER RELIGIONSUNTERRICHT* (1968). For an early survey see O. Hammelsbeck, *Artikel Religionsunterricht*, *EVANGELISCHES STAATSLIXIKON* 1858 (1966). Apart from reform considerations, the second approach seems to be more prevalent among Protestant religious educators.

113. H. HECKEL, *DEUTSCHES PRIVATSCHULRECHT* 17, 39 (1955).

is guaranteed.<sup>114</sup> However, private school establishments serving as substitutes for public schools must be approved by the state and are subject to *Land* legislation. In addition, compliance with public school academic standards is required and teachers must meet certain educational qualifications. The segregation of students according to family income is not to be favored or supported.<sup>115</sup>

The Basic Law provides that private elementary schools can be approved only if there is a special pedagogical or religious interest or need. The need must be demonstrated by the absence of a public school of the appropriate type.<sup>116</sup>

The implementation of these provisions by *Land* legislation<sup>117</sup> has understandably raised a number of legal issues. How is the constitutional provision providing for state supervision of all schools reconciled with the independent character of private schools? Does the guarantee of private schools mean a system of dual but equal schools or does the public school system have a preferred position? Also, does the private school guarantee imply a *Land* obligation to support private schools?<sup>118</sup>

Private schools experienced a revival after World War II.<sup>119</sup> Statistically, this is clearly evidenced in the area of special and higher education. While there is a substantial number of private vocational, specialized and professional schools on the secondary level, private elementary schools are not available in significant numbers.<sup>120</sup> Although the statistics support the conclusion that confessional schools do not

114. BASIC LAW art. 7(4), § 1.

115. *Id.* art. 7(4), §§ 2-4.

116. *Id.* art. 7(5).

117. Compare the private schools statutes of: Baden-Württemberg—PSchG of May 14, 1968, [1968] GB1, 223; Bavaria—*EUG Gesetz Über das Erziehungs-und Unterrichtswesen* of March 9, 1960, [1960] GVB1. 19; Berlin—PSchG of May 13, 1954, [1954] GVB1. 286; Bremen—PSchG of July 3, 1956, [1956] GB1. 77; Hamburg—PSchG of March 29, 1957, [1957] GVB1. 207; Hesse—PSchG of June 28, 1961, [1961] GVB1. 99; Lower Saxony—PSchG of March 16, 1967, [1967] GVB1. 77; North Rhine-Westphalia—*SchOG Gesetz zur Ordnung des Schulwesens* of March 5, 1968, [1968] GVB1. 36; Rhineland-Palatinate—PSchG of June 18, 1962, [1962] GVB1. 57; Saar—PSchG of Jan. 30, 1962 (Amtsblatt 159); VEREINBARUNG DER UNTERRICHTSVERWALTUNGEN DER LÄNDER IN DER BUNDESREPUBLIK DEUTSCHLAND ÜBER DAS PRIVATSCHULWESEN (Aug. 10-11, 1951) in H. HECKEL, *supra* note 113, at 85.

118. *Sec* notes 130-63, *infra* and accompanying text.

119. H. HECKEL, *supra* note 113, at 17.

120. Private elementary and secondary schools compose three percent of the public school system. But only 0.2 percent of elementary students, twelve percent of secondary students and twelve percent of preprofessional school students (*Berufsjach* and *Fachschulen*) attend private institutions. STATISTISCHES BUNDESAMT WIESBADEN, STATISTISCHES JAHRBUCH FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 76-77 (1968). For statistical information concerning the separate *Länder* see H. HECKEL, *SCHULRECHT SCHULPOLITIK. DER EINFLUSS DES RECHTS AUF DIE ZIELSETZUNG UND DEN ERFOLG IN DER BILDUNGSPOLITIK* 108-09 (1967).

occupy a numerically significant role in the private school sector, they do not adequately portray the potential expansion of private confessional schools. To what extent there will be an increase in private confessional schools as a consequence of the decline of the public confessional schools would be mere speculation. However, it will be useful to point to several factors that may play a significant role in the outcome.

As indicated earlier,<sup>121</sup> the Evangelical Church<sup>122</sup> is not interested in a confessional private school system as an alternative and the Catholic Church<sup>123</sup> is at least hesitant. In view of the strong public school system, it would seem more effective to preserve the maximum flexibility for confessional education within the public school system rather than convert to a new system. On the other hand, it was not altogether clear that the majority of Catholic parents would support the new system. Indeed, recent polls point in the opposite direction.<sup>124</sup> Related to the interest in confessional education is the question of whether the reformed systems offer sufficient possibilities for confessional education, thus resulting in a declining need for a confessional private education.

An examination of Baden-Württemberg, in which the shift from public to private confessional schools has recently been made possible in the region of Südwürttemberg-Hohenzollern, fails to support the conclusion that a substantial increase in private schools may be expected. Although the expense of transforming a public confessional school to a private confessional school is assumed by the *Land*, this region had only three schools convert in the past two years and only two more will be converted in 1969.<sup>125</sup> Whether this approach will be followed in the future remains to be seen. It is feasible that a system of highly sub-

121. See note 80 *supra* and accompanying text.

122. *Das Wort der Generalsynode der Evangelischen Kirche in Deutschland zur Schulfrage*, KIRCHLICHES JAHRBUCH 85 (J. Beckmann ed. 1958). In this statement the Evangelical Church is addressing itself to a free public school system to which it offers a free service.

123. The general position of the Catholic Church is responsive to the diverse conditions found in various countries. 58 ACTA APOSTOLICA SEDIS 728-39 (1966), in 2 LEXIKON FÜR THEOLOGIE UND KIRCHE UND KIRCHE ON VATICANUM II 357 (1967) and W. ABBOTT, THE DOCUMENTS OF VATICAN II 673 (1966). In Germany, the official position of the Catholic Church is reflected by a statement of the *Kulturberrat des Zentralkomitees der deutschen Katholiken* in which the public confessional school is given priority over a private confessional school. *Herder Korrespondenz* 307, 554 (1967). Currently, the minority position favoring the private confessional school is gaining strength. H. Hermans, *Die Zukunft der katholischen Schule in Deutschland*, 179 STIMMEN DER ZEIT 241, 250 (1967).

124. DER SPIEGEL, Dec. 18, 1967, at 56. Seventy-five percent of the Catholics polled favored interdenominational public schools. See also K. ERLINGHAGEN, ERZIEHUNG ZWISCHEN KONFESSIONALITÄT UND PLURALITÄT IN KONZEPTE FÜR EINE NEUE SCHULE 85 (1967).

125. Letter from Bischöfliche Kanzlei Rotenburg to Rudolf Halberstadt, Dec. 2, 1968.



sidized private schools, similar to the system developed in Hamburg to satisfy religious minorities, will be developed.<sup>126</sup>

In addition to the religious aspect of the problem, the possible establishment of a plural school system which would include a substantial number of private schools is also being considered in order to realize democratic ideals. In particular, the school system of the Netherlands is being evaluated in this context.<sup>127</sup> It is the opinion of an articulate author, in view of German educational history, that a previously suppressed demand for private schools exists in West Germany.<sup>128</sup>

### *Public Support of Private Schools*

In view of the potential growth of private education, the issue of public support of private schools has assumed increased significance, particularly since the advocates of a private school system contend that they should be supported to the same extent as the public schools.<sup>129</sup>

The Basic Law is silent on the question of public support for private schools.<sup>130</sup> As a condition to the approval of a private school, the Basic Law requires that adequate faculty salaries be assured.<sup>131</sup> This condition has not been construed to imply a right to economic support. Rather, the great majority of scholars and courts have until recently considered the *Länder* free to subsidize private schools if they wish to do so. This was the position taken in the *Länder* Agreement of 1951 concerning private schools.<sup>132</sup>

Virtually all the *Länder* provide economic support for private schools. Generally, the basis of the support is statutory,<sup>133</sup> although North Rhine-Westphalia has a constitutional provision requiring such support.<sup>134</sup> Notwithstanding a great diversity in the methods of sup-

126. Hamburg has a highly Protestant population with a substantial Catholic minority. The public school system, representing Protestant secularism of a general type, is complemented by a private elementary system which is attended by 4.5 percent of the city's elementary students. Eighty-five percent of these schools are Catholic, five percent Evangelical and eight percent Rudolf-Steiner-Schools. W. KEIM, *supra* note 24, at 196.

127. W. HARTMANN, ZUR SITUATION DER FREIEN SCHULE IN DEN NIEDERLANDEN (1967); W. Hartmann, *Die Freie Schule in den Niederlanden ein Modell für die Bundesrepublik?*, 23 PÄDAGOGISCHE RUNDSCHAU 73, 74, 80 (1969).

128. K. Müller, *supra* note 31, at 21.

129. H. Heckel, *supra* note 77, at 127; K. ERLINGHAGEN, DIE SCHULE IN DER PLURALISTISCHEN GESELLSCHAFT 60 (1964).

130. H. v. Mangoldt, *Jahrbuch des Oeffentlichen Rechts*, 1 NEUE FOLGE 112 (1951).

131. See BASIC LAW art. 7(4), *supra* note 69.

132. See § 10 of the *Länder* agreement concerning private schools *supra* note 117.

133. See note 134 *infra*.

134. The provisions of the *Länder* are as follows: Baden-Württemberg—Law of May 14, 1968, [1968] GB1. 223; BADEN-WÜRTTEMBERG CONST. art. 15-11 (1967). The latter provision was implemented on February 8, 1967, to provide total support for the schools in Süd-württemberg-Hohenzollern that have been or will be transformed

port,<sup>135</sup> the *Länder* exhibit similarities in the degree of support. Hamburg, North Rhine-Westphalia and Saar have granted economic support that approaches a total subsidization of the operating expenses for both elementary and secondary schools.<sup>136</sup> While Bavaria subsidizes its private elementary schools to a similar degree<sup>137</sup> and Baden-Württemberg assumes the financial burden for *converted* private confessional schools in the region of Südwürttemberg-Hohenzollern,<sup>138</sup> both *Länder* support the remaining private schools to a lesser extent (70 to 80 percent of operating expenses).<sup>139</sup> Assistance is limited to teacher's salaries in Lower Saxony and Rhineland-Palatinate.<sup>140</sup> The remaining *Länder* (Berlin, Bremen, Hesse, Schleswig-Holstein) are more reluctant to support private schools and provide only half of the necessary operational expenses.<sup>141</sup>

Thus, the freedom of the *Länder* to support private schools is unchallenged. However, to what extent do the private schools have a constitutional right to such support? Since the adoption of the Basic Law, arguments have been made in support of such a right.<sup>142</sup> The controversy involves two constitutional issues. First, it is argued that the Basic Law must be interpreted to guarantee the right of private schools

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from public confessional schools into private confessional schools. Law of Feb. 8, 1967, § 5, [1967] GB1. 7. Bavaria—*Volksschulgesetz* of Nov. 17, 1966, art. 67, [1966] GVB1. 402; *Privatschulleistungsgesetz* of July 5, 1960, art. 1, [1960] GVB1. 123 as amended March 14, 1966, [1966] GVB1. 115. Berlin—*Privatschulgesetz* of May 13, 1954, § 8, [1954] GVB1. 286; *Durchführungsverordnung* of Dec. 9, 1959, [1959] GVB1. 1223. Bremen—*Privatschulgesetz* of July 3, 1956, § 17, [1956] GB1. 77. Hesse—*Privatschulfinanzierungsgesetz* of June 28, 1961, [1961] GVB1. 99. Lower Saxony—*Privatschulgesetz* of March 16, 1967, [1967] GVB1. 71. North Rhine-Westphalia—NORTH RHINE-WESTPHALIA CONST. art. 8-IV; *Ersatzschulfinanzgesetz* of June 27, 1961, [1961] GVB1. 230. Rhineland-Palatinate—*Privatschulgesetz* of June 18, 1962, [1962] GVB1. 57. Saar—*Privatschulgesetz* of Jan. 30, 1962, §§ 22, 28, [1962] Amtsbl. 159.

135. A. v.CAMPENHAUSEN, *supra* note 24, at 76-78.

136. Although Hamburg's subsidization is total, there is not a statutory basis. North Rhine-Westphalia—NORTH RHINE-WESTPHALIA CONST. art. 8-IV; *Ersatzschulfinanzgesetz* of June 27, 1961, [1961] GVB1. 230. Saar—*Privatschulgesetz* of Jan. 30, 1962, §§ 22, 28, [1962] Amtsbl. 159.

137. *Volksschulgesetz* of Nov. 17, 1966, art. 67, [1966] GVB1. 402; *Privatschulleistungsgesetz* of July 5, 1960, art. 1, [1960] GVB1. 123 as amended March 14, 1966, [1966] GVB1. 115.

138. Law of May 14, 1968, [1968] GB1. 223; BADEN-WÜRTTEMBERG CONST. art. 15-II (1967), as implemented by Law of Feb. 8, 1967, § 5, [1967] GB1. 7.

139. *Id.* See note 137 *supra*.

140. Lower Saxony—*Privatschulgesetz* of March 16, 1967, [1967] GVB1. 71. Rhineland-Palatinate—*Privatschulgesetz* of June 18, 1962, [1962] GVB1. 57.

141. Berlin—*Privatschulgesetz* of May 13, 1954, § 8, [1954] GVB1. 286; *Durchführungsverordnung* of Dec. 9, 1959, [1959] GVB1. 1223. Bremen—*Privatschulgesetz* of July 3, 1956, § 17, [1956] GB1. 77. Hesse—*Privatschulfinanzierungsgesetz* of June 28, 1961, [1961] GVB1. 99. Schleswig-Holstein—No statutory basis exists.

142. A. Susterhenn, *Zur Frage der Subventionierung von Privatschulen*, 7 JZ 474 (1952); R. Thoma, *Die Subventionierung der Privatschulen im Rahmen des Art. 7 des Grundgesetzes*, 6 JZ 777 (1951).

to operate within the general school system. Consequently, the state is obligated to intercede if private schools are financially imperiled. This contention is further supported by the argument that the state is obligated to provide financial support for private schools in order to enable them to fulfill the constitutional requirements of article 7. Article 7 requires the state to approve a private school provided that sufficient economic security for private school teachers is assured and free access to all pupils regardless of parental income is not hindered. It is submitted that unless these constitutional requirements are interpreted to imply a duty of support on the state, the private school freedoms are meaningless since current educational costs cannot be met without public financial aid.<sup>143</sup> The second argument is premised upon the equality provision of article 3. Professor Maunz applies this by comparing the state's financial treatment of private schools with the support given to the public schools.<sup>144</sup> He argues that since private schools have attained constitutional equality, it constitutes unequal treatment if parents must assume the added financial burden of paying private school tuition.

The three factions involved in the controversy are: those who advocate a constitutional right to financial support;<sup>145</sup> those who oppose any right to financial support;<sup>146</sup> and those who maintain that the government owes only a moral or political obligation to the private school.<sup>147</sup> However, the controversy has become somewhat moot as a result of a Federal Administrative Court decision.<sup>148</sup> The court ruled that "a right for support cannot in principle be denied."<sup>149</sup> The decision was primarily based on the article 3 argument that private schools and public schools have an equal right to governmental support. The court stressed the special services provided by the public schools, the grants and fellowships provided for students and other ancillary benefits that private schools generally cannot afford.<sup>150</sup> The court's opinion was a recognition of the fact that private schools do perform a public educational function.

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143. H. HECKEL, *supra* note 113, at 48, 50.

144. T. MAUNZ & G. DÜRIG, KOMMENTAR art. 7, Randnummer 87 (2d ed. 1964).

145. The principal supporters of this concept are Dürig, Hamann and Heckel. G. DÜRIG, DIE RECHTSSTELLUNG DER KATHOLISCHEN PRIVATSCHULEN IM LANDE BREMEN 27 (1964); A. HAMANN, DAS GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND VON 23. MAI 1949, 27 (2nd ed. 1964); H. HECKEL, *supra* note 77, at 121.

146. H. Barion, *Gleich und ungleich in der Schulfinanzierung*, 20 DÖV 16 (1967); H. v.MANGOLDT & F. KLEIN, DAS BONNER GRUNDGESETZ art. 7(6) (2d ed. 1957); H. Weber, *Subventionierungspflicht des Staates zugunsten privater Schulen?*, 19 NJW 1798 (1966).

147. A. v.CAMPENHAUSEN, *supra* note 24, at 73, 74; D. DEUSCHLE, *supra* note 87, at 109; H. PETERS, *supra* note 25, at 442.

148. 23 BVerwG 347; 19 DÖV 653 (1966); 19 NJW 1236 (1966).

149. 23 BVerwG 347, 350 (1966).

150. *Id.* at 349-50.

Also, they noted that the operation of private schools results in public savings. While the court failed to indicate the extent of support required, it held that two indicia are determinative—the degree of public service provided and the resulting amount of public economic benefit.<sup>151</sup>

The same result was reached in two recent Federal Administrative Court decisions.<sup>152</sup> Although the substance of the 1966 decision was not altered, the court clearly adopted the social welfare theory.<sup>153</sup> In rejecting the equality argument it held that article 3 cannot be interpreted to mean that the state is legally obligated to put private and public institutions with similar aims on a level of economic equality.<sup>154</sup> Relying instead on article 7 which provides that children are not to be separated according to their parents' economic status, the court referred to it as expressing the fundamental idea of the social welfare clause.

Before discussing the arguments presented by the court's critics, it must be emphasized that the court's reasoning rests upon article 7. In guaranteeing the private school as an institution the court recognized its importance in a free society.<sup>155</sup> Additionally, the court set specific standards that must be met to qualify for financial aid. The latter prescription has resulted in the requirement that private schools demonstrate their need in a financial statement<sup>156</sup> and that the amount of assistance be determined in such a way as to prevent the economic ruin of a school and its closing down.

H. Weber,<sup>157</sup> the most ardent critic of the court, maintains that the 1966 and 1967 decisions are contrary to the language and history of article 7. In particular, he regards a constitutional interpretation requiring public support to insure the full enjoyment of a right as illogical and unacceptable.<sup>158</sup> Similar opposition to "a reversal of the essence of basic rights" is shared by Barion and Menger and Erichsen.<sup>159</sup>

The term *public function* is narrowly interpreted by Barion. He contends that schools established by societal minority groups do not perform a significant public service when public schools are available to all students in a given area.<sup>160</sup> He further argues that article 7 is capable

151. *Id.* at 350-51.

152. Judgment of Sept. 27, 1967, 27 BVerwG 360 (1967); Judgment of Aug. 30, 1968, 22 DÖV 395 (1969).

153. Judgment of Sept. 27, 1967, 27 BVerwG 360, 364 (1967).

154. *Id.*

155. *Id.* at 362-63.

156. *Id.* at 365-66.

157. See Weber's comments in 19 NJW 1798 (1966); 23 JZ 779 (1968).

158. 23 JZ 779, 781 (1968).

159. H. Barion, *Feudaler oder neutraler Staat. Das religionsrechtliche Problem der Bremer Klausel*, 19 DÖV 361, 367 (1966); C. Menger & H. Erichsen, *Höchstrichterliche Rechtsprechung zum Verwaltungsrecht*, 59 VERWALTUNGSARCHIV 275, 276 (1968).

160. H. Barion, *supra* note 146, at 516, 517.

of only one interpretation—that it is within the discretion of the *Länder* to determine whether private schools will be supported.<sup>161</sup> Weber believes that the financing of private schools is a private matter.<sup>162</sup> He suggests that if all approved private schools must receive support, the decision of approval must then imply a determination of eligibility for aid. The tacit approval of support in this manner could result in a more stringent interpretation of the standards that must be satisfied to qualify as an approved private school. Such an interpretation would not only avoid the costs of aid, but also affect the freedom to establish private schools.<sup>163</sup>

Although it is difficult to predict future developments, it is safe to assume that the Federal Constitutional Court will eventually have to resolve these constitutional issues.

#### AN AMERICAN PERSPECTIVE

##### *Religion in the Public Schools*

The American public schools have become distinctively secular. The basis for the present system<sup>164</sup> of free, publicly supported schools and compulsory attendance<sup>165</sup> was established in the middle of the last century. In a nation so highly pluralistic and diverse in its national, racial and religious elements, the public or common school served as part of the great melting pot operation for reducing these differences and helping to create a cohesive community. Notwithstanding the conspicuous religious element in the early stages of the American public school

161. *Id.* at 517.

162. 19 NJW 1798 (1966).

163. 23 JZ 779, 782 (1968). Special problems with respect to control arise in the context of financial aid to private schools. The question whether it is constitutionally admissible to attach "strings" which go beyond the minimum standard, health and approval requirements mentioned by article 7 should clearly be answered in the negative. This is evident from the ruling of the Federal Administrative as well as the Federal Constitutional Court. 23 BVerwGE 347 (1966); 6 BVerfGE 309, 355 (1957). It is also the position of most scholars and is well reflected by the existing practice. A. v. CAMPENHAUSEN, *supra* note 24, at 73-74, 78; H. Heckel, *Entwicklungslinien im Privatschulrecht*, DÖV 595, 597 (1964).

164. Since the control of public education in the United States is primarily reserved to the states under the federal system, it may appear inappropriate to speak of an educational system. Despite diversity among the states, the basic pattern reveals such similarities that the term may properly be used in a general way. Indeed, there is probably more uniformity in the school system of the United States than in West Germany. The part of the system on which we are fastening attention is that of elementary and secondary education. The system consists of elementary, intermediate and high schools, embracing twelve years of education beginning at age six.

165. All of the states have compulsory education laws, but they differ in their scope. Under the laws of some states the period of compulsory attendance begins at age six and ends at age eighteen. This is the maximum period of compulsory attendance. The laws of most states prescribe a somewhat shorter period. For a listing of the requirements of the several states, see 9 ENCYCLOPEDIA AMERICANA 608 (1967).

development, it came to be recognized that in the context of this pluralism the public schools could not favor one religion or be used as a vehicle for sectarian indoctrination.<sup>166</sup> As the nation spread westward and new state constitutions were adopted, the organic documents began to include provisions which, in their common substance, provided that no sectarian teaching would be permitted in the public schools or universities and that they should be free of sectarian control.<sup>167</sup> Thus, the constitutional tradition precludes any notion of public *confessional* or public *Christian* schools. Moreover, the same tradition precludes the use of the public school system for purposes of sectarian instruction or indoctrination.<sup>168</sup>

Despite these limitations, the religious factor was not, at least in the earlier stages, completely absent from public educational institutions. Reflecting in part the earlier traditions and the general religious orientation of the community, many public schools engaged in programs distinctively religious in character. Prayer and Bible reading exercises were a common feature of many schools, even though sectarian instruction and indoctrination were not permitted. Indeed, it was often a complaint of Catholics that the public schools were Protestant schools and opposition developed to reading the King James version of the Bible.<sup>169</sup> Notwithstanding these developments, the trend toward the secularization of public education, while slow, was sure and unmistakable.

The secularization of the public educational system, derived primarily from sociological considerations and buttressed by state constitutional provisions, received further support from the United States Supreme Court in the landmark decision of *Everson v. Board of Education*.<sup>170</sup> The Court held that the establishment clause of the First Amendment was applicable to the states and that this limitation meant, among other things, that the Constitution required separation of church and state. Further, the Court declared that neither the federal government nor the

166. See II STOKES, *CHURCH AND STATE IN THE UNITED STATES* 47-72 (1950); PFEFFER, *CHURCH, STATE AND FREEDOM* 321-38 (rev. ed. 1967). See also Justice Brennan's concurring opinion in *School District of Abington Township v. Schenpp*, 374 U.S. 203, 238-42 (1967).

167. CALIF. CONST. art. IX, § 8:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction therein be permitted, directly or indirectly, in any of the common schools of this state.

The relevant provisions of the various state constitutions are collected and annotated: ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965).

168. See *McCullum v. Board of Education*, 333 U.S. 203 (1948).

169. See *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910) where a public school practice of daily Bible reading from the King James version was condemned as a form of sectarian instruction.

170. 330 U.S. 1 (1947).

states could aid any religion and that tax moneys could not be used to support religious education.<sup>171</sup> The significance of *Everson* was that now, the Federal Constitution, as interpreted by the Court, was to assume an authoritative role on the question of religion in the public schools and a minimum uniform constitutional standard was to apply throughout the federal system. Any contrary results reached in the interpretation of state constitutions would necessarily yield to the federal standard as interpreted by the Court. On the other hand, a state could apply a more restrictive limitation of its own constitution as interpreted by its highest court so long as it was not inconsistent with any federal limitation.

In *McCullum v. Board of Education*,<sup>172</sup> the first substantive application of the federal standard, the Court declared invalid a local *released time* plan whereby public school children, with the consent of their parents, were released from their regular public school program for one hour a week during the school day for religious instruction on the school premises by teachers supplied by the various churches.<sup>173</sup> The Court reasoned that the public school system was being utilized to recruit children for religious education and in turn restraining the liberty of the children who did not attend these classes. The state was thereby giving its support to sectarian teaching; a result which the Court found to be an establishment of religion. In a later case, however, the Court distinguished *McCullum* and held constitutional a similar *released time* program where the instruction took place off the school premises.<sup>174</sup> According to the Court, the Constitution did not prohibit this accommodation of the educational system to the religious needs of its people. Obviously, the Court was attempting to find a middle ground position to reconcile the constitutionally required secular character of the public schools with the legitimate concern of parents for religious education.

Released time for religious instruction had been promoted by various groups, notably churches, as a means of overcoming an increasing illiteracy in religious matters and the pervasive secularization of the public school system. The movement reflected the concern of educators and churchmen over the loss of spiritual and moral values and the declining role of the schools in preserving and promoting these values. The Court's decisions, while invalidating only released time classes conducted on school premises, took much of the life out of the released time movement. After World War II, some states enacted legislation that was

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171. *Id.*

172. *McCullum v. Board of Education*, 333 U.S. 203 (1948).

173. *Id.*

174. *Zorach v. Clauson*, 343 U.S. 306 (1952).

designed to restore religious practices that had been prevalent in the public schools at one time. These practices had been abandoned in a number of states—in some cases as a result of adverse judicial decisions by state courts.<sup>175</sup> However, in *Engel v. Vitale*<sup>176</sup> and *School District of Abington Township v. Schempp*,<sup>177</sup> the Court condemned all Bible reading and prayer exercises in the public schools as a form of establishment forbidden by the First Amendment.<sup>178</sup> Thus, it is well settled that the American concept of separation, in its application to public schools, precludes not only the public confessional school, but also any form of sectarian instruction and any type of religious exercises.

It is important to observe, however, that the *Schempp* decision, in dealing with the Bible reading and prayer exercise questions, contained a positive aspect. The Court explicitly recognized that the objective study of the Bible in its literary and historical aspects and the objective study of religion as an integral element of culture and history were appropriate functions of the public schools.<sup>179</sup> This recognition has opened up a new field of inquiry. For the first time, educational and religious leaders are seriously considering the problems relating to the introduction of Biblical and religious courses, the contents and objectives of such courses, the types of materials to be used and the training required for skilled teaching in these areas. As a result, experimental programs are being undertaken. The movement is just in its infancy, but its vitality reflects a deep-seated conviction that the study of religion is an appropriate subject in the secular public school system. The pervasive issue, as it concerns religion in the American public schools, is how the schools may effectively deal with religion as an academic discipline.<sup>180</sup>

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175. For a brief but instructive review of this development and reference to authorities, see Justice Brennan's concurring opinion in *School District of Abington Township v. Schempp*, 374 U.S. 203, 266-79 (1963).

176. 370 U.S. 421 (1962).

177. 374 U.S. 203 (1963).

178. *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

179. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment. *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

180. For discussion, see BEGGS & McQUIGG, *AMERICA'S SCHOOLS AND CHURCHES* (1965); *THE BIBLE AND THE PUBLIC SCHOOLS* (Frommer ed. 1963); LODER, *RELIGION AND THE PUBLIC SCHOOLS* (1965); PANOCHE & BARR, *RELIGION GOES TO SCHOOL: A PRACTICAL HANDBOOK FOR TEACHERS* (1968); Phenix, *Religion in American Public Schools*, 1965 *RELIGION AND THE PUBLIC ORDER* 82-109 (1966); *RELIGION AND PUBLIC EDUCATION* (Sizer ed. 1967); Spivey, *Religion and Public School Education: A Plan for the Future*, 10 *A JOURNAL OF CHURCH AND STATE* 193-205 (1968). On questions related to the teaching of religion at state universities and colleges, see *RELIGION AND THE STATE UNIVERSITY* (Walter ed. 1958); HALLOWELL, *THE STUDY OF RELIGION IN AMERICAN*



*Public Support of Parochial Schools*

Private educational institutions, which are largely church related and controlled on the primary and secondary levels, occupy a more significant position in the American educational system than in West Germany.

Approximately eighty-seven percent of all children enrolled in elementary and secondary schools attend public schools—schools that are supported wholly by public funds and under the control of public authorities. Approximately twelve percent attend parochial schools (private schools supported and controlled by the churches) and the remaining one percent attend privately supported and controlled schools of a non-sectarian character.<sup>181</sup> Two words of caution are necessary respecting these figures. First, the percentage of students attending parochial schools is highly variable, due to differences in the relative strength in given geographical areas of the churches which support these schools. The figure given is a national average. In some communities the figure may be as high as thirty-five percent to fifty percent. Secondly, the total percentage of students attending parochial schools is declining. Faced with severe financial difficulties, many parochial schools are being closed.<sup>182</sup> If this movement continues the statistics at the end of another decade will reflect a dramatic decrease in the percentage of parochial school attendance.

The general movement of the last century that led to the establishment of the public school and state university systems as secular institutions also produced the corollary proposition that public funds should not be used in support of private educational institutions. This limitation, which typically prohibits the use of tax funds to support sectarian schools or sectarian education, was commonly incorporated into state constitutions.<sup>183</sup> Moreover, state constitutions usually included an even broader

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UNIVERSITIES (1965); McLEAN & KIMBER, *THE TEACHING OF RELIGION IN STATE UNIVERSITIES* (1960); Katz, *Religious Studies in State Universities*, 1966 WIS. L. REV. 297; Michaelson, *Legal Syndrome and the Study of Religion in the Context of the State University*, 35 J. OF HIGHER ED. 373 (1964); Casad, *On Teaching Religion at the State University*, 12 KAN. L. REV. 405 (1964).

181. For the enrollment figures of elementary and secondary schools in the year 1965-66, see *Digest of Educational Statistics: 1968*, NATIONAL CENTER FOR EDUCATIONAL SERVICES (1968).

182. For example, nonpublic schools in the state of Michigan report over a ten percent decrease in enrollments since 1964. See MICHIGAN CHALLENGE, May, 1968, at 9. The Archdiocese of Detroit alone lost 30,782 pupils in the period of 1964 to 1968. Detroit Free Press, Nov. 10, 1968, at 2-A.

183. See, for instance N.Y. CONST. art. XI, § 4:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid of maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is

provision that limited the use of public funds to public purposes or to institutions under public control, thereby prohibiting state support not only of distinctively sectarian schools, but also of all privately controlled institutions.<sup>184</sup> Of course, the matter is not one of wholly state imposed limitations. When the Supreme Court held that the First Amendment's establishment clause was applicable to the states and declared that the government could not aid any religion, the way was opened for overall federal limitations on the use of tax moneys to support parochial schools.<sup>185</sup>

However, the limitation that tax funds may not be used to support any sectarian educational institution does not reflect a hostility toward privately supported and controlled education. On the contrary, the freedom of churches and other voluntaristic groups to create and operate educational institutions is recognized as an important facet of American pluralism. In *Pierce v. Society of Sisters*,<sup>186</sup> the Court held a state law that required parents to send their children to public schools to be an unconstitutional interference with the freedom of parents to control the education of their children. Therefore, parents have the right to decide whether to send their children to a public or private school, although the state may enact compulsory education laws, set minimum standards for all schools and prescribe qualifications for teachers.<sup>187</sup> This freedom of choice, resting on parental right, occupies an important place in the current discussions regarding various proposals for giving public as-

taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

For the relevant provisions of the various state constitutions see ANTIEAU, CARROLL & BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965).

184. See CALIFORNIA CONST. art. IV, § 2; N.Y. CONST. art. VII, § 8.

185. 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 pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to 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 non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, 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 groups or *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'

*Everson v. Board of Education*, 330 U.S. 15-16 (1947).

186. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

187. In recent controversies involving the Old Order Amish, the issue has been raised whether the extension of compulsory attendance laws to formal education at the high school level violates the religious liberty of the parents and their children. See *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966); Casad, *Compulsory High School Attendance and the Old Order Amish*, 16 KAN. L. REV. 423 (1968).

sistance to private education. Yet, it should be observed that the right of parents to send their children to a private school has not been held to create an implied governmental duty to support private schools in whole or in part. Obviously, such a proposition flies in the face of the policy expressly included in many state constitutions and it would be surprising if the Court were to find such a duty implicit in the free exercise clause of the First Amendment.

Thus, it is apparent that the American educational system rests on a series of related propositions: 1) publicly supported institutions must be secular in character; 2) public funds may not be used to support sectarian educational institutions or any other private institutions; 3) churches and other voluntaristic groups are free to establish and control educational institutions; and 4) parents have a constitutional right to send children to the school of their choice, public or private, provided the school meets standard requirements imposed by law. While these propositions accurately state the accepted view, continuing developments have brought the second proposition into question.

A part of the present day crisis in American education is that private institutions face serious financial difficulties as a result of the mounting costs of operating budgets and capital improvements. Churches, which operate the major portion of private schools at the elementary and secondary level, are faced with the choice of finding new sources of financial support or closing their schools. Of course, the latter would result in parochial students being forced to attend public schools, which are already overcrowded and inadequately financed in many communities. Concerted movements are currently under way to secure some type of governmental assistance to meet this problem. The following arguments are made in support of this movement: 1) private schools play an important role in the American educational system; 2) the melting pot argument which gave a preferred place to the public school as a means of unifying the community is no longer relevant; 3) the parental freedom of choice with respect to the education of their children becomes illusory if the operation of private schools is financially impossible; 4) it is unjust to deny parents, who elect to send their children to private schools and incur this cost, the benefit of support from the school taxes they are required to pay along with the parents who send their children to the public schools; and 5) the operation of private schools saves the state the cost of educating these children at the public schools.

This movement is not going unchallenged. Its opponents counter with a series of arguments: 1) freedom of parental choice creates no implied duty of public support for private schools; 2) no person should be taxed to support a system of religious education which he finds objection-

able; 3) public support of parochial schools is inconsistent with the established policy that prohibits sectarian teaching and practices in the public schools; 4) public support of private schools will result in the proliferation of these schools, undermine the public school system and contribute to religious and racial divisiveness; and 5) the historic position that parochial schools must depend on private and voluntary support is a sound application of the separation principle, since public support must of necessity be accompanied by public controls which will entangle church-state relations and in the end impair the freedom and independence which these schools claim and now enjoy.

The movement in favor of some form of financial assistance from the government for private educational institutions raises critical constitutional issues. It is clear that under most state constitutions direct grants to parochial schools, whether for capital or operating expenses, are invalid under restrictions that prohibit appropriations of tax funds in support of sectarian education or sectarian institutions. Indeed, in many states such general grants are invalid even as to private, nonsectarian institutions because of the broad public purpose limitation.

Even though the breadth of the language used in the *Everson* opinion suggests that any use of public funds in support of religious education is forbidden, it is by no means clear whether the establishment clause of the First Amendment operates as a federal limitation to preclude both the state and federal governments from making direct grants to parochial schools to aid their overall programs. It is being argued that such grants can be sustained on any of three theories: 1) that the government would be removing the financial obstacle to the constitutional right of parents to send their children to a parochial school; 2) that the government would be recognizing and supporting the secular educational purposes served by these schools; and 3) that only by making such grants can the government maintain the neutrality which the Court has recently stressed as a basic objective of the dual religion clauses in the First Amendment.<sup>188</sup>

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188. For discussions, see BLUM, FREEDOM OF CHOICE IN EDUCATION (rev. ed. 1963); KATZ, RELIGION AND AMERICAN CONSTITUTIONS 72-75 (1963); KAUPER, RELIGION AND THE CONSTITUTION 109-13 (1964); PFEFFER, CHURCH, STATE AND FREEDOM 509-604 (rev. ed. 1967); Drinan, *The Constitutionality of Public Aid to Parochial Schools*, THE WALL BETWEEN CHURCH AND STATE, 55-72 (1963); Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, THE WALL BETWEEN CHURCH AND STATE 73-94 (1963); Jones, *The Constitutional Status of Public Funds for Church-Related Schools*, 6 J. CHURCH & ST. 61 (1964); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. (1968); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

On the implication of the Court's new emphasis on neutrality, see Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3-40.

However, the question of whether direct grants to parochial schools in aid of their overall budget are valid is largely academic. Because of constitutional considerations, the current movement in favor of support for parochial schools is aimed at indirect and more limited types of assistance. Thus, a number of states authorize the use of public funds to provide bus transportation for children attending both public and private schools.<sup>189</sup> Likewise, in some states public funds may be used to provide secular textbooks for children attending public and private schools.<sup>190</sup> Several states are currently considering proposals that would provide public support for the teaching of secular courses at private schools.<sup>191</sup> In some communities shared time arrangements are in effect whereby parochial school children are enrolled in classes such as science, home economics and physical education at the public school while continuing to receive the major part of their education at parochial schools.<sup>192</sup> The federal government in legislation authorizing appropriations of federal funds for elementary and secondary education provides that the benefits of certain programs financed by these funds and administered by public school authorities must be made available to children attending private schools.<sup>193</sup>

What distinguishes all these programs is that, while assisting in the maintenance of parochial schools, no funds are made directly available by way of general grants to private school authorities. On the contrary, the government funds, insofar as they are used to benefit children attending private schools, are earmarked for specific uses and the expenditures are made by the public schools authorities. Two principal theories are advanced to support the constitutionality of these programs: 1) that these programs are intended to benefit the child rather than the school; and 2) that the programs are directed toward secular educational objectives that may properly be financed by state.<sup>194</sup>

Support may be found for these theories in several Supreme Court decisions. In the *Everson* case, the Court held that the use of state funds

189. N.Y. EDUC. LAW §§ 1807, 3635 (McKinney 1968); N.J. STAT. ANN. tit. 18A, § 18A: 39-1; CAL. EDUC. CODE § 16806 (West 1969); CONN. GEN. STAT. ANN. § 10-281 (1967); KY. REV. STAT. ANN. § 158.115 (1969).

190. N.Y. EDUC. LAW § 701 (McKinney 1968); LA. REV. STAT. ANN. tit. 17, ch. 1, § 351, 352 (1963); MISS. CODE tit. 24, ch. 5, § 6656 (1942).

191. Pennsylvania has already enacted such a law. See PA. STAT. ANN. tit. 24, ch. 23, § 5601. See also Mich. H.R. 2424 (1968-69); Md. H. Del. 795 (1968-69).

192. See Powell, *Shared Time, 1964: A Turning Point?*, 1964 RELIGION AND THE PUBLIC ORDER 62 (1965); Katz, *Note on the Constitutionality of Shared Time*, 1964 RELIGION AND THE PUBLIC ORDER 85 (1965); Comment, 65 MICH. L. REV. 1224 (1967).

193. Title II, Elementary and Secondary Education Act of 1965, 20 U.S.C.A. § 821 (1965). See Amdurshy, *The First Amendment and Federal Aid to Church-related Schools*, 17 SYRACUSE L. REV. 609 (1966); Note, 41 IND. L.J. 302 (1966).

194. See note 188 *supra* for a discussion of these ideas.

to finance the cost of busing children to parochial schools was not forbidden by the establishment clause. The Court reasoned that the legislation was a child welfare measure intended to insure the safe transportation of children to school. The Constitution does not prevent the state from being evenhanded in extending this kind of service to children attending all schools whether public or private. This type of aid achieves a secular purpose and does not support religious education. Further, it was considered immaterial that this kind of assistance might make it more attractive for parents to send their children to a parochial school.

The secular purpose theory received further support and a new application in *Board of Education v. Allen*.<sup>195</sup> The Court held that a state's program of distributing secular textbooks to children in parochial as well as public schools was constitutional. Relying on the *Everson* doctrine, the Court said that the state could appropriately advance the secular aspects of parochial school education. Of significance was the Court's observation that the state was justifiably concerned with the quality of education of all its children. The decision necessarily assumed that the government can sufficiently identify the secular aspects of parochial school education and thereby support them without also supporting its religious objectives.

The child benefit and secular purpose theories can be interpreted to include other types of programs designed to give assistance to parochial school education, at least as far as the Federal Constitution is concerned. However, state supported programs must satisfy state constitutional limitations as well. Some state courts have invalidated statutes providing for free bus transportation<sup>196</sup> and free textbooks<sup>197</sup> for parochial school children. It seems clear, however, that the child benefit and secular

195. *Board of Education v. Allen*, 392 U.S. 236 (1968).

196. For the more recent cases reaching this result see *Visser v. Nooksack Valley School District*, 33 Wash.2d 699, 207 P.2d 198 (1949); *Board of Education v. Antone*, 384 P.2d 911 (Okla. 1963); *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953).

*Contra*, *Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); *Nichols v. Henry*, 301 Ky. 434, 191 S.W.2d 930 (1945); *Adams v. County Commissioners*, 180 Md. 550, 26 A.2d 377 (1942); *Everson v. Board of Education*, 133 N.J.L. 350 (1946), *aff'd*, 330 U.S. 1 (1947); *Snyder v. Town of Newton*, 147 Conn. 374, 161 A.2d 770 (1960).

197. *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951); *Dickman v. School District*, 366 P.2d 533 (Ore. 1961). See also *Haas v. Independent School District*, 69 S.D. 303, 9 N.W.2d 707 (1943).

*Contra*, *Chance v. Mississippi State Textbook and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1940); *Cochran v. Louisiana State Board of Education*, 168 La. 1030, 123 So. 664 (1929), *aff'd*, 281 U.S. 370 (1930); *Board of Education v. Allen*, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), *aff'd*, 392 U.S. 236 (1968).

purpose theories will influence some state courts in interpreting their own constitutional limitations.

In passing, it may be noted that questions relating to the validity of federal financial aid to parochial schools have gone unresolved because of the remedial problem faced in bringing suits to challenge such spending. In *Flast v. Cohen*,<sup>198</sup> however, the Court held that a federal taxpayer has standing to challenge federal appropriations on the basis of alleged violations of the establishment clause. The *Flast* decision was the first to grant standing, and it may well be expected that in the next few years the Court will be reviewing a substantial number of cases in this area and that its opinions will do much to resolve the present uncertainties respecting the use of public funds to assist parochial schools.

#### COMPARISONS AND CONCLUSIONS

In making this survey and comparison attention has been centered on two principal areas: 1) religion in the public schools; and 2) the state's position *vis-à-vis* the private school. The same underlying questions are present in both systems. However, the approach to these questions is conditioned upon great differences in the historical, sociological and constitutional background.

In the United States a rigid separation principle, currently enforced on a national basis, requires that public schools be secular. The concept of a public confessional school is entirely alien to the American understanding and practice. The requirement that public schools be secular means not only that a public school may not have a distinctive religious orientation, but that confessional or sectarian religious instruction cannot be included as part of the regular school program. Moreover, an established constitutional tradition prohibits general state support of parochial schools. Thus, while parents have the right to send their children to private schools, the state supports only the public secular school system.

The American position reflects the application of a separation principle that, as a practical matter, is required in view of the highly pluralistic character of American society. The result is a system that best serves the interests of both the state and the churches. Religious education is viewed as a responsibility of the church and the home. Moreover, the American position is not premised on an indifference to religion as an element in the pupil's total education. As part of their regular program schools may permit pupils to attend religious education classes taught off of the school premises by teachers supplied by the churches. Of more importance is the current movement to provide an opportunity in the

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198. *Flast v. Cohen*, 392 U.S. 83 (1968).

public schools for the nonsectarian teaching of religion and study of the Bible. There is a growing recognition that the educational process is incomplete without an appreciation of religion as an important element of the whole cultural heritage.

In turn, the traditional policy of not granting financial assistance to parochial schools is being relaxed to some extent. The current financial crisis faced by private schools is creating a demand for assistance in ways designed to avoid constitutional difficulties. Programs for limited assistance are being advanced on the basis of the child benefit, secular purpose or neutrality theories. It is by no means clear that all these proposals are constitutional under either the Federal Constitution or under the respective state constitutions. However, the Court's secular purpose doctrine is susceptible to a liberal interpretation. At least insofar as the federal limitation is concerned, a liberal interpretation could sanction some measure of public support of parochial school education. Implicit in the secular purpose doctrine is the recognition that private schools that meet the state's minimum educational standards perform a public service that the government can recognize.

Whether these programs, even if they are held constitutional, will be successful in assuring the continued operation of the parochial school system is problematical. Apart from the financial and constitutional problems, serious questions are being raised within the churches as to the desirability of maintaining parochial schools. Thus, the decline of the parochial school may be abetted by a feeling that they are no longer necessary or desirable. Therefore, the future of the parochial school in the United States is an uncertain one.

The educational pattern in West Germany has developed within the context of a far less rigid separation principle and against a historical background that was featured by the predominance of the confessional school at the elementary and intermediate level. Because of their own federal limitations, the present system leaves the *Länder* free to abolish or modify the confessional school pattern. Of interest is the general trend evident in the current school reform movement to replace the confessional school with the community school type. The latter may be either an interdenominational Christian school or an open school, more nearly secular in character but in which the Christian tradition serves as a historical and cultural factor.

In West Germany the trend is clearly away from sectarianism in the public schools. In the United States it is away from a secularism that denies the legitimacy of the religious factor as an appropriate element of public educational concern.



It may be that if the present trend continues, the confessional public school will cease to be an important element in the West German school system in the near future. Whether the West German public schools will become as completely secularized as the American schools is another question. The community schools established in some of the *Länder* are distinctively interdenominational Christian schools and it is doubtful that the open type of community schools established in other *Länder* are strictly secular in the American sense. Moreover, the federal constitution guarantees the opportunity for religious instruction in the public schools. An interesting point here is the current discussion involving the role of the churches in respect to this instruction. The Berlin solution to this problem suggests a variation of on-the-premises released time for religious instruction, a method used in the United States until it was declared unconstitutional. In Berlin, the church is totally responsible for religious education. Government subsidies are granted to reimburse expenses, facilities for instruction are supplied and the classes are a part of the regular school program.

With the decline of the confessional school, the private parochial school may assume substantially greater significance in the West German school system, although the limited experience to date furnishes no basis for any solid conclusions. The West German constitutional limitations and guarantees present interesting and important contrasts to the American provisions that generally prohibit direct support of parochial schools. Far from prohibiting financial support of private parochial schools, the Basic Law has recently been interpreted to require some measure of governmental support of private schools as a means of implementing the constitutional guarantee respecting such schools.<sup>199</sup> In all of the *Länder* private schools continue to receive substantial financial support. If the recent decisions prevail, this type of support may assume even greater proportions. The current controversy over the question of whether the right of parents to send their children to a private school implies a correlative obligation to support these schools and the recent judicial declaration that the government must support private schools to the extent that they perform a public service and relieve the state of educational expenses it would otherwise incur, is echoed by some of the arguments that enter into the contemporary American debate on the parochial school issue.

A prime consideration respecting the parochial school issue is that, according to traditional American constitutional thinking, public

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199. Judgment of Sept. 27, 1967, 27 BVerwG 360; Judgment of Aug. 30, 1968, DÖV 395 (1969).

support of private schools invites or even compels a substantial measure of statutory and administrative control, thereby paradoxically impairing the private character of these schools. This argument does not assume a prominent place in the West German discussions. Private schools in West Germany may accept substantial financial aid from the government without thereby subjecting themselves to state control other than that required to administer the constitutional and statutory requirements designed to insure a standard quality of education.<sup>200</sup> The difference in theory on this vital question may be one of the most crucial in any comparison of the two systems on the parochial school issue.

Although one must say this cautiously, the West German school system, in moving away from its confessional orientation, is moving toward the American public school pattern. At the same time, new attention is being given to the problem of religious education in the public schools and the parochial school is acquiring increased significance. A principal concern in the United States is in finding a way of according the study of religion a meaningful place in the curriculum of the secular public schools. Furthermore, a significant movement that supports financial assistance to parochial schools has made much progress. However, the similarities of the systems should not be over extended. The American public schools are secular in their orientation. The West German interdenominational or community schools either retain a general Christian orientation or are committed to values founded in the Christian heritage. Moreover, the West German schools, unlike the schools in the United States, are constitutionally required to provide an opportunity for religious instruction. The implementation of this provision is currently the subject of much debate. The debate has raised questions similar to those in contemporary American discussions in which educators are struggling with the problem of how the public schools can adequately deal with religion in its historical, cultural and literary aspects.

The same questions and concern for values underlie the current movements in both countries. Can public education serve its function in a democratic state without becoming secularized? Can the public schools be secular without at the same time promoting a philosophy of secularism? What are the respective roles of the home, church and state with respect to religious education? Can any educational system be complete if it does not deal with the religious factor in history, culture and human experience? Can there be a prescribed public school program that deals intelligently and constructively with the religious factor while avoiding indoctrination and commitment? Can such a program have validity with-

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200. See note 163 *supra*.

out giving attention to the cultivation of spiritual and moral values? In a free democratic society that recognizes diversity, the need and importance of the private voluntaristic area and parental freedom of choice, must there not only be freedom to maintain private schools but also a duty on the part of government to accord them financial support? Ultimate solutions to these basic problems will reflect historical, sociological and constitutional differences. But the thought may be ventured that in view of present movements, the American and West German school systems can be viewed as converging on common goals and that the differences are not as substantial as they first appear to be. In view of common problems, concerns and objectives a basic exists for an exchange and discourse that should prove mutually profitable and instructive.