Emil Lehmann's Petition to Improve the Legal Rights of Jews in Saxony (November 25, 1869)

Abstract

Emil Lehmann (1829–1898) was a Dresden lawyer and the first Jew to be elected (in 1865) to Dresden's municipal council. From 1875 to 1881, he also held a seat in the lower house of the Saxon state parliament as a member of the Progressive Party. The son of a Dresden merchant, Lehmann attended the Jewish Community School and then, from 1842 to1848, the Kreuzschule in Dresden. In 1848, he moved to Leipzig, where he studied jurisprudence until 1851. He returned to Dresden thereafter and practiced law from 1863 onwards, at which point he also turned his attention to the struggle for Jewish rights. He was elected head of Dresden's Jewish community [*Gemeinde*] in February 1869. A proponent of Jewish assimilation, Lehmann had already contributed substantially to the (formal) emancipation of the Jews in Saxony on December 3, 1868—that is, before passage of the Law on Religious Freedom by the North German Reichstag (July 3, 1869). Later, he supported the founding of the Central Association of German Citizens of the Jewish Faith in 1893. Lehmann's lot in the Kingdom of Saxony was not an easy one, for at the time Saxony was home to some of Imperial Germany's most rabid antisemites. Lehmann was heavily engaged in the pro- and anti-Jewish pamphlet literature that flourished in the years 1878–1882. Initially, his writings displayed argumentative brilliance, but in later years they were marked by increasing bitterness—and with good reason. In 1883, Lehmann lost his seat in Dresden's city council at the hands of a coalition of antisemitic "Reformers" and Conservatives. In the following petition, Lehmann uses his legal experience to fashion a damning indictment of Saxony's continuing legal discrimination against the Jews. The devil is in the details. Lehmann's concluding lines summarize what the Saxon parliament must do to remove these discriminatory laws and practices.

Source

The Legal Situation of Jews in Saxony

(Petition to the *Landtag* of the Kingdom of Saxony for the repeal of regulations conflicting with § 33 of the Constitutional Charter—Dresden, November 25, 1869)

On the basis of Item II of the law of December 3, 1868, according to which § 33 of the Constitutional Charter now reads: "The enjoyment of civic and political rights is independent of religious confession. Religious confession must not detract from civic and political rights"—the principle of religious freedom attained constitutional status in the Kingdom of Saxony, just as it went on to do [throughout German territory] through the federal law of July 3, 1869.

Nonetheless, in some respects the legislation of our fatherland [the Kingdom of Saxony] and its legal practices still do not everywhere conform to this constitutional principle. And if the respectfully undersigned feels pressed (initially from his confessional standpoint as an Israelite) to point out these instances, which appear to him in need of remedying, then he is not only following a dictate of duty in the interest of his co-religionists; rather, he is also hoping to contribute to the cause of religious freedom in general.

I.

The decree issued on August 12, 1869, concerning the effects of equality for religious denominations in civic and political terms [*Law and Administration Gazette* from 1869, p. 239] orders that, "to eliminate

doubts and misunderstandings that have arisen regarding the retroactive effect of the regulation under Item II of the law cited above from December 3, 1868, and the federal law of July 3, 1869, on the regulations at the state [*Land*] level," the following are invalidated:

a) the law and decree of August 16, 1838, aside from an exception in § 2 regarding names,
b) the decree of May 6, 1839, concerning the residence of foreign Jews in Dresden and Leipzig,
c) § 13 of the law of July 2, 1852,
d) a passage in the first clause and the entire second clause in § 41 of the Municipal Code, whereas (§ 2) "what shall be left in place in the future is the regulation, to be controlled by authorities to the present extent, that any Jew living in Saxony must go by a certain inherited last name and a first name that must be preserved without alteration and used in legal dealings of any sort."

Insofar as this decree, as its introduction indicates, aims to eliminate doubts about the retroactive force of the current § 33 of the Constitutional Charter with respect to the existing legislation, its utility is hardly subject to doubt. Closer inspection, however, immediately reveals the difficulty of imposing the form of a short decree on something that is supposed to express the notion: all contrary regulations are repealed.

For the decree does not suffice on this score, and nor does it remain within the narrow confines of a merely explanatory, instructive decree.

With the principle of freedom of religion and the principle of civic and political equality for all denominations having taken effect, all laws and decrees stating the contrary have lapsed.

If some of these lapsed laws are considered separately, without taking the rest of them into consideration as well, doubts may easily emerge as to whether precisely these laws might not actually continue to hold validity. This is, for example, certainly not the case with the following regulations [which are invalid], even though they were not mentioned in the decree:

1. the decree of May 6, 1839, pertaining to marriage among Jews. This decree is based on the regulations, described as closed, contained in the law of May 6, 1839, and includes in §§ 2 to 4 a number of rules that have not been applied for a long time. The regulation in § 2 has been superseded by the decree specified for clergymen of all denominations of February 5, 1852; the norm in §§ 3 and 4, according to which Saxon Jews may get married abroad or to foreign women only by authority of the Interior Ministry, has not been applied for several decades at least. Nevertheless, the decree was only formally repealed through the law of December 3, 1868.

Likewise, the same decree invalidates the following:

2. No. 6 and 7 of the decree of July 5, 1867, concerning the implementation of the Constitution of the North German Confederation.

Far more important appears the invalidation effected by:

3. the words: "as a rule, the difference in religion does not establish any difference in civil law," which are contained in § 51 of the Civil Code of January 2, 1863. This sentence is justified in its motives [Siebenhaar, *Kommentar* I, page 83] with the fact that "in accordance with § 33 of the Constitutional Charter, the Christian religion alone as it is represented in the Christian ecclesiastical societies accepted in Saxony grants the full enjoyment of all civic rights; therefore, all non-Christians hold a special position." Against this regulation, its motivation, and against the application to civil law of § 33 of the Constitutional Charter in effect at the time, the Israelite religious communities in Dresden and Leipzig, with the author of this petition acting on their behalf, issued complaints on April 30, 1861, pointing to the more adequate version in § 46 of the former draft: "The difference in religion and of status has no influence on private rights, except as far as this is specifically stipulated by laws."

What remained, however, were the words “as a rule,” because exceptions definitely continued to be in effect with respect to Jews who are not Saxon citizens, as well as other non-Christians, e.g., Muslims and heathens. [Siebenhaar loc. cit. p. 85.]

After all of these exceptions have now been eliminated by the older version of § 33 of the Constitution Charter, it is necessary to omit the words “as a rule” in § 51 of the Civil Code, even if the form of a decree does not suffice for this purpose.

4. The drawing up and renewal of a restriction conflicting with § 33 of the constitutional document has a far more serious effect than an omission, as it can be read in § 2 of the decree quoted word for word earlier.[1] The regulation thus stipulated and repeated on the maintenance of unalterable first and last names is—under the proviso that dispensations may be ordered in exceptional cases—quite appropriate *per se* and necessary in the interest of legal security, not only for Jews exclusively but also for everyone. Nevertheless, the legislation of our fatherland lacks a universally applicable legal norm, so that baptisms of proselytes and other occasions have witnessed successful name changes without permission by the authorities or the government; not to mention the practice so common in earlier times of heavy-handedly translating first names into their Latin, Greek, French, and English equivalents (Gottlieb to Theophil, Johann to Jean, etc.). If now even the Royal Ministry of the Interior, in a decree published a few weeks ago, starts with the assumption: that the principle of inalterability was already observed in the past with regard to the first names of Christian citizens and shall be observed in the future, then this principle lacks the desirable legal basis *per se*, so that especially according to the sentence “what is not prohibited, is allowed,” the right associated with the fatherly authority of name-giving does not rule out the changing of names.

But if no law currently exists on the inalterability of first and last names for citizens, then making it an obligation for a single category of co-religionists conflicts with the current § 33 of the Constitutional Charter and thus repeatedly establishes a restriction based on denominational grounds.

The regulation concerned is based on § 9 of the law of August 16, 1838 [*Law and Administration Gazette* from 1838, p. 396] and § 8 of the implementing ordinance issued on the same date [in idem, p. 399].

The former law, passed—as the introduction indicates—in order to “grant an expedient improvement to the civil conditions of local Jews,” rules that “as far as it has not already happened,” every Jew at home has to adopt a certain hereditary last name and submit it for approval by the local authority.

From this very proper interim regulation, the implementing ordinance has drawn the further conclusion, which is appropriate *per se* but definitely does not belong to an implementing ordinance accompanying a law that does not contain anything on the matter, that: “once adopted, a Jew’s real name can neither be changed later on nor replaced with another name, but has to be preserved without alteration and used in civil life and in legal dealings of any sort.”

There is no need to explain that the leap from last to first name had not even been legally admissible in that implementing ordinance, just as the regulation, for its part, is incompatible with a literal interpretation. In accordance with it, a Jew would not be allowed to conclude any legal transaction without specifying his first name! — The law and decree of August 16, 1838, have become ineffective for domestic Jews by virtue of the basic rights published in the decree of March 2, 1849, and the law of May 12, 1851, § 3—until recently, when the long-forgotten regulation that it included, and, with it, the incongruity of the law and the decree already in place in those days, was renewed by means of regulation. Based on what has been said, no doubt should remain that § 2 of the decree of August 12, 1869, cannot be upheld vis-à-vis the law, indeed vis-à-vis the constitutional law.

II.

The principle of equality for all citizens irrespective of their denominational affiliation as stated in the present § 33 of the Constitutional Charter disturbs the syllogism that the Constitutional Charter stated in §§ 32, 33, and 56.

The three sections correspond with each other only in the earlier version. They express the idea: Everyone enjoys freedom of conscience but only the accepted Christian religious societies have civic and political equality as well as freedom of worship.

The intermediate link is eliminated, and now everyone is entitled to civic and political equality. The consequence of this is that there can no longer be an opposition between *religio recepta* and *religio tolerata*, of admitted and tolerated religion, for this would contradict the principle of civic legal equality. In fact, none of the constitutions—which, in accordance with the "Basic Rights of the German People," make the enjoyment of political rights independent of religious denomination—preserve the preference of any one denomination over another.

From this perspective, subjecting §§ 32 and 56 to a revision may be justified.

This revision, by the way, could be carried out by merging both sections to the effect that: "Each inhabitant of the state is granted complete freedom of conscience and freedom of public worship […] paragraph 2 of § 56."

III.

Strictly speaking, the prohibition stated in § 1617 of the Civil Code: "Christians cannot enter into marriage with persons not professing a belief in the Christian religion" does not contain a restriction specifically for non-Christians, since it affects Christian citizens evenly as well. Nevertheless, with proper appreciation for the underlying motive, scholarship has understood this regulation to be imposed specifically on the Jews. [Schmidt, *Vorlesungen über Sächs. Privatrecht* I, p. 66.]

If, however, this work also states that § 1617 "has upheld" the prohibition on marriage, one must contradict this for the same reasons that have already been emphasized in the aforementioned petition of 1861, whose validity has recently been acknowledged by the authorities. The Civil Code has not upheld but newly established this prohibition on marriage.

The author begs leave to repeat the relevant passages from that older petition:

"Whereas the special motives of the draft in question do not take the stated principle into consideration at all, treating it as natural, the following was given as grounds for a similarly formulated original draft (1418): 'The difference in religion has been transferred from existing law as an impediment to marriage, because no domestic bliss can be expected from marriages between Christians and non-Christians. The fundamentals of Christian religion diverge so substantially from the dogmas of other religions, their confessors are so dissimilar, that lasting love in marriage and good and uniform child rearing cannot be expected unless an indifference regarding religion by both spouses already exists at the time of the wedding or develops during the marriage. In its legislation, however, the state must not assume such a prerequisite.'"

To begin with, the question is whether, according to existing laws, marriages between Jews and Christians are absolutely prohibited.

This question would be answered affirmatively according to ancient Roman law, but this is not the case according to Saxon, or even Old Saxon, law.

Roman law stipulated an unconditional prohibition in 1. 6 cod. de Judaeis I. 9.

In this passage, marriage between Jews and Christians is threatened with nothing less than the penalties for adultery.

Yet this section of the codex has never been applied unconditionally, and at all times, in either Germany as a whole or Saxony in particular.

[…]

And if one interprets the question only from this perspective, if one disregards recent legislative outcomes, then this alone is enough to raise reservations about a piece of legislation that intends only now, after 1000 years of silence, to incorporate into particular law a Roman legal prohibition from a distant period whose views on the influence of religion on legal capacity have been long since overridden, and that, according to the monumental character of the present draft, also intends to pass that legacy on to late descendants!"

The fate of this petition, which was submitted in 1861, is described in Siebenhaar, *Kommentar* III., p. 28.

The unambiguous prohibition on marriage in accordance with Protestant ecclesiastical law declared [in this petition] was not confirmed by the aforementioned Saxon teachers of ecclesiastical law.

The author of this petition was also fortunate enough to find support for his view in the following legal case from the senior authorities.

[In the legal case concerning the legal status of children from a Jewish-Christian marriage] the Royal Ministry of Cultural Affairs and Public Education decreed on May 9, 1867: "that the union of the persons named would have to be deemed void both materially and formally, since the regulation contained in § 1617 of the Civil Code only encompassed that which had already been legal in Saxony before the promulgation of this Code and that, as a result, the children produced from this relationship were to be regarded as extramarital."

Accordingly, the Royal District Administration instructed the Dresden City Council on May 22, 1867, to take official steps against the cohabitation of the persons in question in accordance with § 1621 of the Civil Code.

And, indeed, based on this decree and by means of resolution dated July 12, 1867, the Royal Police Department in Dresden, to which the City Council had to delegate the matter, ordered the woman to leave the accommodation occupied by the man to avoid a fine of 20 groschen[2] or two days of arrest and then ordered the man under penalty not to permit the woman to live there after that time. In response to the appeal lodged in conjunction with a request for dispensation, which emphasized above all that according to the older legislation relevant in this case such marriages were not prohibited by law in Saxony, on November 8,1867, the Royal Ministry of the Interior repealed the expulsion order, while the Royal Ministry of Cultural Affairs and Public Education issued a dispensation and, by a decree dated July 6, 1868, declared the marriage valid on the following grounds:

"That according to the Civil Code, marriage between Christians and Jews is void *ipso jure*, even without, as a rule, the requirement of judicial explanation, is beyond doubt. The case under review, however, involves a union sealed before the promulgation of the Civil Code. How such a relationship should be assessed is doubtful, however; for even though Canon Law already contains strict regulations against such marriages, it has been impossible to develop an unambiguous and consistent practice, not least because of the rarity of these cases. What is certain, however, is the fact that one desisted from proceeding with the kind of full force perhaps justified by canon law, feeling prompted instead to refrain from an explicit annulment, without, however, elaborating on the possible legal consequences, whose evaluation does not belong to the jurisdiction of the undersigned ministry. After repeated consideration,

the ministry has now come to the conclusion that the case at issue ought to be treated in the same way."

This process proves that with § 1617 the Civil Code has undergone a step backwards, one that certainly cannot be wished for even by an unbiased supporter of the status quo.

With this regulation and its justification, our Civil Code has in fact regressed even further back than the almost 100-year-old Prussian Common Law, which, in its version: "A Christian cannot enter marriage with persons who are prevented by the principles of their religion from submitting to the Christian laws of marriage," [II. Part I. Heading § 36] intended to loosen prohibitions on marriages between Christians and Jews, as the following statement by Suarez, one of the authors of the Prussian Civil Code, proves: "Why would one wish to practically prohibit marriages between Jews and Christians? There is nothing in the Christian marriage laws that a Jewess could not submit to completely. Therefore, if she does not take issue with the wedding liturgy, she may marry a Christian at any time. After all, Paul allows Christians to get married to heathens." [Linde, *Zeitschrift für Civilrecht und Prozeß*, new edition IV. 13.]

Most recently, as Grolman already emphasized in the aforementioned publication, in the form of civil marriage, one has found the most suitable way to eliminate all the obstacles that clergymen could possibly erect.

[…]

What has been seen in states with civil marriage seems to indicate that this institution would not deprive God of what is God's, that spouses married by civil ceremony, whatever their denomination, not only seek and find the inner agreement of souls but also outer consecration of the house of God.

Based on the unanimous expert's reports of Judicial Privy Councilor Professor Dr. Wasserschleben in Gießen and the recognized authority on matrimonial law, Prof. Dr. Emil Friedberg (then in Freiburg im Breisgau), the Eighth German Jurists' Meeting has voiced its support for the introduction of civil marriage and for lifting the ban on marriages between Christians and non-Christians, [*Deliberations of the VIIIth German Jurists' Meeting I*, p. 253, p. 271]; so now the question must be deemed settled in academic terms.

Therefore, it is only a matter of time before §§ 1617 and 1588 of the Civil Code will be eliminated in Saxony as well; that this should happen quickly is to be hoped for all the more since the issue at stake is freeing the Civil Code from the shadow of a backward step.

[…]

IX.

The overall outcome of this portrayal of the current legal situation of Jews in Saxony leads to the following petitions:

Let the high chambers kindly decide upon the following:

that	I.	§ 2 of the decree of August 12, 1869, and § 51 of Civil Code be repealed,
that	II.	the §§ 32, 56 of the Constitutional Charter undergo a revision along the lines of universal freedom of religion,
that	III.	§ 1617 of the Civil Code be struck,
that	IV.	the decree of August 3, 1868, be interpreted or supplemented, respectively, in such a way that §§ 4, 5 of the law of May 30, 1840, are also eliminated by it, and so that it will be followed closely even in cases when other courts are consulted,

that	V.	the closing passage in § 7 of the implementing ordinance adjunct to the Notary's Rules of June 3, 1859, be repealed,
that	VI.	the state government be appealed to for the admission of Jewish private attorneys to practice in matrimonial courts, and
	VII.	in order to issue the decree concerning the hearing of Jewish marital disputes before the courts of appeal,
	VIII.	that Jewish religious communities be authorized, prior to the introduction of universal civil status registers, to exclusively manage birth, marriage, and death rolls for their co-religionists.

Yours in most humble deference,
Emil Lehmann, lawyer.

NOTES

[1] Meaning: "what shall be left in place in the future is the regulation, to be controlled by authorities to the present extent, that any Jew living in Saxony must go by a certain inherited last name and a first name that must be preserved without alteration and used in legal dealings of any sort."—trans.
[2] Starting in 1840,1 groschen equaled 10 pfennigs in Saxony—trans.

Source: Emil Lehmann, "Die Rechtsverhältnisse der Juden in Sachsen" (Petition an den Landtag des Königreichs Sachsen um Aufhebung der mit § 33 der Verfassungsurkunde in Widerspruch stehenden Bestimmungen—Dresden, 25. November 1869), in Emil Lehmann, *Gesammelte Schriften*. Berlin: H. S. Hermann, 1899, pp. 154–69, here 154–62, 168–69. Available online at: https://sammlungen.ub.uni-frankfurt.de/freimann/content/titleinfo/856147.

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