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The Basic Right to the Freedom of Religion in Germany: Constitutional Legal Concept and Current Tendencies

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Introduction

The Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948 ushered in a new epoch in the history of human rights. According to Art. 18 of this declaration “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

The recognition and proclamation of the freedom of religion by the United Nations was a milestone in the history of human rights. Not only that human beings were permitted to worship and practice their faith, but also have other rights, the so-called human rights. The effect of this recognition became apparent in Europe, then the European Nations began to seek ways of protecting the rights and dignity of her citizens. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, established by the Council of Europe, rec-

ognized the basic right of freedom of religion in Europe. This convention is legally binding for Germany since 1953.

The fundamental human rights, especially the right of religious freedom, the central aspect of this discussion, had been recognized in different ways nationally and internationally. The recognition of religious freedom in modern times has witnessed stages of development in Germany. Up till the middle of the 19th century only the members of Christian faith were given the rights of citizenship. But with the so-called Weimar Constitution (*Weimarer Reichsverfassung*, hereinafter WRV) of 11 August 1919,¹ the freedom of religion was guaranteed for all citizens of Germany. Now having changed from the German constitutional monarchy (*Kaiserreich*) to the republic, it became the duty of the constitution to protect this right.

The third section of the second main part of this constitution, which comprises articles 135 to 141, speaks about religion and religious societies (“Religion und Religionsgesellschaften”). Article 135 states: “All citizens of the Reich have the right of freedom of belief and conscience. The undisturbed practice of religion is guaranteed by the constitution and is under protection of the state. The General state laws remain unaffected.”² Furthermore Art. 136 par. 1 states: “Civil and civic rights and duties of the citizens are neither determined nor restricted through the practice of religious freedom.”³

The Weimar Republic 1919 to 1933 was already a political system that recognized and protected the freedom of religion in a modern sense. However, there were a lot of restrictions to this fundamental right, especially during the regime of the National Socialism, a regime that was in many ways against religion and the Church.

¹ Cf. F. HAMMER: “Weimarer Reichsverfassung.” In: *Lexikon für Kirchen- und Staatskirchenrecht*, vol. 3. Paderborn et al. 2004, pp. 873—874 (hereinafter WRV).

² Art. 135 WRV: “Alle Bewohner des Reichs genießen volle Glaubens- und Gewissensfreiheit. Die ungestörte Religionsübung wird durch die Verfassung gewährleistet und steht unter staatlichem Schutz. Die allgemeinen Staatsgesetze bleiben hiervon unberührt.”

³ Art. 136 Abs. 1 WRV: “Die bürgerlichen und staatsbürgerlichen Rechte und Pflichten werden durch die Ausübung der Religionsfreiheit weder bedingt noch beschränkt.”

1. Freedom of faith and conscience in the German constitution (*Grundgesetz*)

The new constitution of the Federal Republic of Germany that came after the suppressive and destructive regime of the National Socialism had the protection of the right and dignity of the human person as its top priority. The German constitution (*Grundgesetz*, hereinafter GG) of 23 May 1949⁴ began with a preamble whereby the fathers of this constitution stated their responsibility before God and mankind. The first part encompasses articles 1 to 19. This is the so-called basic law. Introductory Art. 1 states:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.⁵

The freedom of religion comes up in Art. 4. The first two sections of this article state:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.⁶

In comparison with the Weimar constitution it could be seen that the freedom of religion as basic law was not under the general law. It is recognized without restrictions and it can only be limited when there is a conflict between it and other basic rights. In this case only the legislation can define the limits.

⁴ Cf. M. STOLLEIS: "Grundgesetz." In: *Handwörterbuch zur deutschen Rechtsgeschichte*. 2nd edn., vol. 2. Berlin 2012, coll. 578—580.

⁵ Art. 1 GG: "(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt. (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht."

⁶ Art. 4 Abs. 1 and 2 GG: "(1) Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich. (2) Die ungestörte Religionsausübung wird gewährleistet."

The freedom of religion as a basic law is so meaningful that it should, for no reason, be compromised or impaired, and no legal regulation could impede its implementations (Art. 19 par. 2 GG). As a basic right, that is generally useful and accepted, then the regulation of Art. 19 par. 3 GG is of great significance for the freedom of religion. Therefore, the basic rights shall also apply to domestically juridical persons to the extent that the nature of such rights permits.⁷ The freedom of religion has, according to German constitutional law, a collective aspect. This collective aspect is for the good of the Church, other religious communities, and ideologies, to the extent they are recognized in law as legal entities. This is the case especially for the large Churches and also for the Jewish society and other religious communities. As bodies governed by public law, they are not only supporters of religious freedom, but other basic rights, too, as long as they should be generally acceptable. In this case, the place of the Churches and religious communities in Germany are secured in public and they have the possibility of working and letting their impact be felt in the society.⁸

After the reunification of Germany through the coming over of the eastern states Brandenburg, Mecklenburg-Hither Pomerania, Saxony, Saxony-Anhalt and Thuringia in 1990, which were newly formed on the territory of the German Democratic Republic, part 1 of the Bonn constitution (*Grundgesetz*), the so-called catalogue of fundamental rights and with it the basic right of religious freedom according to Art. 4 became the governing law in all of Germany. The state constitutions of the Eastern Ger-

⁷ Art. 19 Abs. 3 GG: “Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.”

⁸ For the German constitutional order concerning religious rights and the relation between the state and religious communities see: *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, vol. 2. Eds. J. LISTL, D. PIRSON. 2nd edn., Berlin 1994—1995; B. JEAND’HEUR, S. KORIOH: *Grundzüge des Staatskirchenrechts*. Stuttgart et al. 2000; A. FREIHERR VON CAMPENHAUSEN, H. DE WALL: *Staatskirchenrecht. Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa*. 4th edn. München 2006; S. MÜCKL: “Trennung und Kooperation — das gegenwärtige Staat-Kirche-Verhältnis in der Bundesrepublik Deutschland.” In: *Die Trennung von Staat und Kirche. Modelle und Wirklichkeit in Europa*. Eds. B. KÄMPER, H.-W. THÖNNES. Münster 2007 (= *Essener Gespräche zum Thema Staat und Kirche* 40), pp. 41—83; S. MÜCKL: “Grundlagen des Staatskirchenrechts.” In: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 7: *Freiheitsrechte*. Eds. J. ISENSEE, P. KIRCHHOF. 3rd edn., Heidelberg 2009, pp. 711—789; M. GERMANN: “Religion und Staat in der Bundesrepublik Deutschland: rechtliche Maßgaben.” In: *Religion im öffentlichen Raum. Deutsche und französische Perspektiven*. Eds. B. SCHRÖDER, W. KRAUS. Bielefeld 2009 (= *Frankreich-Forum* 8), pp. 47—66; H. DE WALL, S. MUCKEL: *Kirchenrecht. Ein Studienbuch*. 4th edn. München 2014, pp. 60—94; A. HENSE: “Kirche und Staat in Deutschland.” In: *Handbuch des katholischen Kirchenrechts*. 3rd edn. Ed. S. HAERING, W. REES, H. SCHMITZ. Regensburg 2015, pp. 1830—1865.

man federal states that were promulgated in the 1990s took up this basic right as well, like it was done before in the constitutions of the Western German federal states. The freedom of religion is not only accepted in the *Grundgesetz*, but is also guaranteed in the constitutions of the different federal states of Germany.

2. The contextual aspect of the freedom of religion

Just as with the content of Art. 4 par. 1 and 2 GG which encompass two basic rights — the freedom of conscience and the freedom to profess one's faith, so too the freedom of religion is guaranteed a broadly defined protection. It implies also the freedom either to believe or not, and the possibility of performing religious rituals or not. This basic law has constitutional and legal implications. It gives also individual persons the right to live their lives and conduct their activities according to the tenets of their religion and belief. A religion will be assessed according to the character of its members and the character of their religious organisation.

In conventional sense, the freedom of religion means the freedom either individually or collectively, in public or in private to practice one's faith and to declare or show one's affinity for a particular religion or belief. This can be in the form of worship, in religious instructions and in the performance of religious rites, traditions, or customs. The freedom of religion as a basic law also implies the freedom and the possibility to change or decline one's faith or one's ideology. A consequence of this component of basic right in Germany is the possibility of individuals to decline or give up their membership from any religious organisation or worldview in the presence of a state authority. After this declaration the citizen in question is no longer a member of such institution.⁹ The possibility to decline one's membership in the presence of a state authority does not touch the internal rights of the religious institution.

However, the freedom of religion cannot be exercised arbitrarily and should not be abused. Its usage is only for religious matters, and accord-

⁹ Cf. S. HAERING: "Der Kirchengaustritt vor dem Staat und seine Konsequenzen im staatlichen und im kirchlichen Bereich. Zur Rechtslage in Deutschland." In: *In mandatis meditari. Festschrift für Hans Paarhammer zum 65. Geburtstag*. Eds. S. HAERING, J. HIRNSPERGER, G. KATZINGER, W. REES. Berlin 2012 (= *Kanonistische Studien und Texte* 58), pp. 1119—1139; *Der Kirchengaustritt. Rechtliches Problem und pastorale Herausforderung*. Ed. G. BIER. Freiburg—Basel—Wien 2013.

ing to the provisions of the constitution. It requires an organized notion of God or of ethics or metaphysical ideas of a particular conscience.¹⁰

It belongs to the freedom of faith as part of the freedom of religion to enjoy the right of showing or advertising one's faith, that means to evangelize or seek new members. Furthermore, the right to carry out charitable activities and other social activities, also enjoy the protection of the freedom of religion. As long as such activities are allowed they should be practiced and its implementation should not be hampered.

The freedom of religion has not only positive, but also negative implications or side aspects. The negative aspect encompasses the right to conceal one's belief or non-belief, and the right of not taking part in religious activities or practices. Like I said before it also gives the individual the right to decline or give up her membership from the Church in the presence of a state authority which is possible in Germany, and this right is another aspect of the negative side of the freedom of religion. The positive and negative aspects of religious freedom belong together, just like two sides of the same coin. It could surely lead to conflicts, especially when subjects teach different ideas as part of their right to the freedom of religion. Such conflicts could also arise especially if one religious group thinks they are the rightful religion or that they have the monopoly on truth. Practical experience shows that this problem hardly occurs in Germany today. Here there is a clear distinction of religious organisations from secular activities on one side, and from an aggressive atheism on the other side.

The negative aspect of the freedom of religion could also be actualised by not believing or by not being a member of any religious organisation. However, it does not exonerate one from confronting with religious beliefs. Also non-believers and those who do not belong to religious organisations are expected to respect and accept the fact that believers have the right to practice their faith through words and actions in public or in private. Every effort to force off or remove religion from the public into covert private sphere as consequent of the negative aspect of religious freedom is prohibited by the German constitutional law and its particular legal acts.

¹⁰ Cf. Frhr. von Campenhausen, de Wall: *Staatskirchenrecht* (fn. 8), p. 55.

3. Amendments by the Weimar Church Articles

The basic law article of the freedom of religion was constitutionally supplemented and concretised through the so-called Weimar Church Articles. These articles were the basic state regulations regarding the relationship between the state and religion, the state and the different worldviews, and the individual freedom of religion. The German constitution and its founding fathers accepted and acclaimed the decision that was taken by the Weimar Republic of 1919 in this regard. They not only accepted this decision, but also concluded that there should be a separation between the state and religion. Formally Art. 140 of the German constitution (*Grundgesetz*) incorporated this decision without repeating the words. Articles 136, 137, 138, 139 and 141 of the Weimar constitution (*Weimarer Reichsverfassung*) especially were included in the new German constitution. However, it has to be recalled that not all regulations that were taken from the constitution of the Weimar Republic belong to the freedom of religion.

Some of these regulations were efforts and attempts made by the state to incorporate with religious organisations and the civil society in order to guarantee and foster the freedom of religion and worship. Others were attempts made at recognizing the special status and rights of the Church as corporate institution in the civil society (Art. 137 par. 5). The possibility of the church to impose and collect taxes from her members with the help of the state (Art. 137 par. 6) is not part of the constitutional legal concept of the freedom of religion unlike Art. 136 of the Weimar constitution.

Article 136 of the Weimar constitution was centred on the individual freedom of religion. It has to be reminded, according to this regulation, the citizens' rights and duties should neither be increased nor reduced because of their freedom of religion or religious affiliation. That means the citizens have rights and duties independent of their religious affiliation (par. 1). The right of the citizens and their rights to participate in governance or to take up ministerial duties and appointments should not be determined by their religious affiliation (par. 2). This regulation was also enshrined in the German constitution. According to Art. 33 of the German Basic Law, all the citizens have equal rights and enjoy equality of the law independent of their religious affiliation. Accordingly, no one should be advantaged or disadvantaged because of his faith or worldviews.¹¹ This norm is related

¹¹ Art. 33 GG: "(1) Jeder Deutsche hat in jedem Lande die gleichen staatsbürgerlichen Rechte und Pflichten. [...] (3) Der Genuß bürgerlicher und staatsbürgerlicher Rechte,

to the right of equality of the citizens as enshrined in law. According to Art. 3 par. 3 of the German constitution no one should be favoured or disfavoured because of their faith, their religion, or their worldview.¹²

Furthermore, one has no obligation to declare publicly his faith or religion. In this case however, the state authority has the right to mandate one to declare his religion in order to determine other rights and duties, and for statistical purposes as required by law (Art. 136 par. 3 WRV). This is especially in context with the duties of paying church tax or taking part in religious instructions. Finally, it should be pointed out that no one should be forced to take part in church activities, ceremonies, feast, or to participate against their will in any religious activity. Also no one should be forced to take or make religious oath against their will (par. 4).

This constitutional norm gives no priority to the individual's negative right to the freedom of religion; it is simply there to protect the freedom of religion and the independence of the human person.

The priority of Art. 141 WRV is to guarantee the personal right of the individual to engage in military and prison service. According to this regulation, religious organisations have the right to offer their services, in hospitals, prisons, and other public institutions. This right should be respected and guaranteed. As long as the need be, they should be allowed to conduct religious services and work as chaplains, they have also the right to conduct religious activities in those places. The fathers of the constitution aimed at giving those people who are living in such difficult situation hope and the possibility of practicing their faith and the necessary pastoral and spiritual help they need. These regulations were not primarily intended to encourage missionary activities or evangelisation, but simply to offer spiritual and pastoral assistance to those who need it. In this case it is important to give soldiers, prisoners, patients, and others in custody the possibility of practicing their faith, irrespective of their difficult situation and imprisonment.

There are other constitutional regulations aimed at protecting and promoting the collective or corporate freedom of religion and the independence of religious organisations from government interference. To mention here are the freedom to form religious organisations (Art. 137 par. 2 WRV), and the Church's right to organise itself and its activities (par. 3).

die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind unabhängig von dem religiösen Bekenntnis. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnisse oder einer Weltanschauung ein Nachteil erwachsen. [...]"

¹² Art. 3 par. 3 GG: "Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. [...]"

Accordingly, the religious organisations have the right to pilot their affairs within the limits of general law. They also have the legal right and freedom to choose and appoint their leaders without the interference of the state authority. Specially to be mentioned here is the right of religious organisations to own and administer their properties without the interference of the state (Art. 138 par. 2 WRV). The right to own and administer its properties is part of the basic law of property, but its aim here is primarily to protect the right of the Church to own properties.

In summary it is clear that the integration of the Weimar Church Articles in the German constitution was intended not only to protect the individual freedom of religion, but also to recognise and guarantee the corporate part of the freedom of worship. In this instance it guarantees the right and the existence of the Church, other religious organisations, and worldviews.

4. Some selected topical problems and issues

Since a decade ago, there has been on the one hand the influx of refugees and other migrants with different religious inclinations into Germany. On the other hand, the society has witnessed a drastic rate of secularisation. Beside the two strong traditional Churches, there are now other Christian denominations and non-Christian religions in Germany today. About four million Muslims live in Germany today and practice their faith. The German society has been progressively secularised since the early 1990s as a result of the re-unification of the former areas of the former German Democratic Republic with the western part of Germany. With this re-unification there was a great influx of the former citizens of the German Democratic Republic. Many of those citizens belonged to non-religious organisations. This re-unification led to lots of changes in the German society. Nevertheless, the reduction in the percentage of the members of religious organisation could not be primarily attributed to this re-unification, but the re-unification played a major role. In any case, one out of every three German citizens today follows no religion or does not belong to any religious organisation. It is to be noted also that up till the late 1980s about 90% of the German citizens were members of one Christian church or the other. This societal change has led to a lot of debate and discussion on the importance of religion and the freedom of religion in the society.

It is necessary at this point to elaborate on some of these recurrent issues. In Germany today there are discussions or debates whether cruci-

fixes should be hanged in the classrooms. There are also discussions about the religious importance of circumcision of young boys and whether female teachers should wear hijabs in the schools. Other topics, that shall not be discussed here, include the question of slaughtering animals in accordance with religious prescriptions (ritual slaughter).¹³

In 1995 the so-called crucifix-judgement of the German constitutional court was published. The judgement of the High Court brought to an end the legal battle between the Bavarian school system and the Public Administrative Court over whether it should be allowed to affix crucifixes in classrooms or not. The parents of a school child had gone to court, challenging the decision of the Bavarian ministry of education that allows crucifix in classrooms. According to the parents, the presence of crucifix in classrooms violates their right of religious freedom and parental upbringing duties (Art. 6 par. 2 GG).

In its judgement the constitutional court ruled that the negative aspect of the freedom of religion encompasses and incorporates not only the freedom to practice one's faith, but also the freedom to decide what religious article should be allowed in the classrooms. It is not a question of the freedom to engage in religious activities or not. According to the court, the cross has an appealing character, and is a symbol of Christian faith that should be followed and emulated. Therefore, the allowance of cross in the classrooms is a means of protecting and defending the negative aspect of the freedom of religion and the general freedom of worship and faith. It is a means used by the state to protect the freedom of religion for such parents who want to train their children according to Christian values and that includes the possibility of allowing crucifix in the classrooms. However, to avoid conflicts, it is necessary to arrive at a compromise and respect the feeling of those who are not members of the Christian faith. All efforts should be made for a peaceful co-existence between various groups.

Nevertheless, it should be underscored that the constitutional court in its judgement did not prohibit or put an end to the possibility of hanging crucifix in the classrooms, because its presence does not compromise or

¹³ Cf. K.-A. SCHWARZ: *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des „rituellen Schächtens“*. Baden-Baden 2003 (= *Studien und Materialien zur Verfassungsgerichtsbarkeit* 94); N. ARNDT, M. DROEGE: "Das Schächturteil des BVerfG. Ein 'dritter Weg' im Umgang mit der Religionsausübungsfreiheit." In: *Zeitschrift für evangelisches Kirchenrecht* 48 (2003), pp. 188—198. — In general concerning the questions on islamic religion and German legal order, see: S. MUCKEL: "Antworten des staatlichen Religionsrechts auf Herausforderungen durch den Islam." In: *Islam — Säkularismus — Religionsrecht. Aspekte und Gefährdungen der Religionsfreiheit*. Eds. L. HÄBERLE, J. HATTLER. Heidelberg 2012, pp. 61—78.

infringe upon the neutral nature of the state to religious affairs in general. In other words, the court accepted the decision of the Bavarian ministry of education that allows the presence of crucifix in the classrooms. But in the case where conflicts arise as a result of the presence of crucifix in the classrooms, it should be removed, declared the court.¹⁴

In 2012 there was a strong debate in Germany regarding the circumcision of young boys as part of religious initiation. This debate was propelled by the decision of the Magistrate Court in Cologne.¹⁵ According to this judgement the circumcision of young Muslim boys was an act of mutilation and bodily harm and so is against the law and should be prohibited. This court's decision was in reference to the German constitution, which prohibits the mutilation and bodily injury on someone, independent of the religious motives for such actions. Also parents have the duty to protect their children from every kind of bodily injury as part of their parental upbringing's responsibility.¹⁶

The case in question did not apply primarily to Christians, but to Muslims and Jews, because both religious groups teach and practice the circumcision of their young boys as part of their religious initiation. This issue in question led to a lot of political discussions in Germany, especially in view of its nature: with regard to the Jews as a result of the persecution and destruction they suffered during the time of the National Socialistic regime, and by the Muslims regarding the integration of the so

¹⁴ Cf. also U. RHODE: "Religiöse Symbole in staatlichen Einrichtungen." In: *Recht auf Mission contra Religionsfreiheit? Das christliche Europa auf dem Prüfstand*. Eds. P. KRÄMER et al. Berlin 2007 (= *Kirchenrechtliche Bibliothek* 10), pp. 167—178; S. MUCKEL: "Schutz von Religion und Weltanschauung." In: *Handbuch der Grundrechte in Deutschland und Europa*. Eds. D. MERTEN, H.-J. PAPIER, vol. IV. Heidelberg 2011, pp. 541—615, 592 f.; concerning questions on the use of crosses and other religious symbols in the public, see some papers in: *Österreichisches Archiv für Recht und Religion* 57 (2010), issue 3.

¹⁵ "Urteil des Landgerichts Köln vom 07.05.2012 (151 NS 169/11) zur Strafbarkeit der Beschneidung aus religiösen Motiven." *Archiv für katholisches Kirchenrecht* 181 (2012), pp. 272—274.

¹⁶ Cf. K.-A. SCHWARZ: "Verfassungsrechtliche Aspekte der religiösen Beschneidung." *Juristen-Zeitung* 63 (2008), pp. 1125—1129; H. BIELEFELDT: "Der Kampf um die Beschneidung. Das Kölner Urteil und die Religionsfreiheit." In: *Blätter für deutsche und internationale Politik* 57 (2012), H. 9, pp. 63—71; A. HENSE: "Wie weit reicht Religionsfreiheit? Das Kölner Urteil zur Beschneidung gibt zu denken." In: *Herder-Korrespondenz* 66 (2012), pp. 443—447; J. LUTZ-BACHMANN: "Zum Beschneidungsurteil des LG Köln und zur Rechtslage hinsichtlich der Beschneidung minderjähriger Knaben aus religiösen Gründen in Deutschland." *Kirchliches Jahrbuch für die Evangelische Kirche in Deutschland* 139 (2012), pp. 3—15; D. BOGNER: "Religion im Abseits? Das Kölner Beschneidungsurteil in sozialetischer Perspektive." *Theologische Quartalschrift* 193 (2013), pp. 158—174.

many Muslims in Germany. The solution to this problem was not left to the court, but the legislators decided that both religious groups should be allowed to practice their initiation rites.¹⁷

Finally, there are still discussions on the “wearing of headscarfs” judgement of the Constitutional Court in 2015. It was debated whether a Muslim female teacher should wear her head scarf in a state school. It should be remembered that it is part of the freedom of religion when one clothes oneself according to his religious belief. It does not matter if it is a way of promoting his faith or not.

As the case may be, it is without doubt that the woman in question has the right to wear her headscarf. However, the question remains, how far and under what circumstances should the woman wear her headscarf, because of the nature of her job as a teacher in a religiously neutral state school. There was no general judgement on this matter, but it could be decided according to the different situations and according to court order. Following the regulations and decisions of many state ministries of education, the wearing of headscarfs by teachers is forbidden. Such decisions have been accepted by the court.

The recent judgement of the constitutional court has put an end to this discussion. The court ruled that it is not generally prohibited for female teachers to wear headscarfs in the school. It could be said that as a result of this judgement the basic individual right of the freedom of religion was given greater impetus than the interest of a school system, that has primarily to do with the intellectual cultural identity of the school system. However, it should be noted that this new judgement has not put an end to this discussion or topic, because there are still a lot of political and legal discussions on this issue.¹⁸

¹⁷ “Gesetz über den Umfang der Personensorge bei der Beschneidung eines männlichen Kindes vom 20.12.2012.” *Bundesgesetzblatt I* (2012), pp. 2749—2750. — Cf. S. RIXEN: “Das Beschneidungsgesetz in der Kritik: verfassungsrechtliche Legitimation, Anwendungsprobleme, Reformbedarf.” *Zeitschrift für medizinische Ethik* 60 (2014), pp. 33—43; J. BRANTL: “Gefährliche Körperverletzung im Namen der Religion? Kernfragen in der Beschneidungsdebatte aus ethischer Sicht.” *Zeitschrift für medizinische Ethik* 60 (2014), pp. 45—62; H. KRESS: “Religiöse Vorgaben und individuelle Grundrechte im Konflikt. Die Frage der rituellen Beschneidung nicht einwilligungsfähiger Säuglinge und Jungen und ihr Stellenwert für das heutige Religions- und Staatskirchenrecht.” *Ethica* 22 (2014), pp. 195—218; E. MACK: “Ethische Legitimität der Beschneidung?” *Zeitschrift für medizinische Ethik* 61 (2015), pp. 99—108.

¹⁸ Cf. M. HONG: “Ein Gericht oder zwei Gerichte? Der Kopftuch-Beschluss, das Plenumsverfahren und der Grundsatz ‘stare decisis’.” *Der Staat* 54 (2015), pp. 409—434; C. FRANZIUS: “Vom Kopftuch I zum Kopftuch II. Rückkehr zur Verhältnismäßigkeitsprüfung.” *Der Staat* 54 (2015), pp. 435—452; M. SCHULTEN: “Die Reaktionen der Landesgesetzgeber auf den Kopftuchbeschluss des Bundesverfassungsgerichts vom 27. Januar 2015, Az. 1 BvR 471/10 bzw. 1181/10.” *Kirche & Recht* 21 (2015), pp. 168—178.

5. Summary and conclusion

The basic right to the freedom of religion is not respected everywhere in the world. Recent reports from many Arab and African nations show that many people are being maltreated, killed, and forced away from their homes because of their religious affiliation. In many countries today Christians are being persecuted because of their faith. Happily, in Germany today this is not the case. The freedom of religion in Germany is and remains an important component of the catalogue of the basic rights of the German constitution. The freedom of religion is allowed, and respected, despite the recurrent lack of interest in religious matters in the society at large. The discussion and debate about the circumcision of young boys shows the interest of the citizens on religious matters.

There have been different opinions about the freedom of religion in the society today. Following the constitutional court judgement about the hanging of a crucifix in the classroom in 1995, the importance of the negative aspect of freedom of religion over the positive aspect was unanimously declared unlike in the case of the circumcision of young boys. In order to avoid conflicts and disorder in the society and because of the interest of the international communities, the positive aspect of the freedom of religion was taken into consideration by the decision over the wearing of headscarfs. However, there have been various opinions about this judgement. Many people are of the opinion that the court judgements were made to avoid conflicts and breakdown of law in the society, others think that the Christians are not strong enough to defend their faith. The reasons for these opinions could not be answered here.

All problems and issues that could arise in Germany in future because of the freedom of religion are sure to be solved through constitutional and legal means. There is the hope that future political and societal development respects this juridical basis and acknowledges the importance of the basic right of the freedom of religion. They should avoid situations and policies that could compromise this right or its implementations.

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STEPHAN HAERING

The Basic Right to the Freedom of Religion in Germany: Constitutional Legal Concept and Current Tendencies

Summary

This article deals with the fundamental right to religious freedom in the Federal Republic of Germany and its legal content. Firstly, a glance is cast at the constitutionally basic norm for religious freedom and the factual provisions of the German Constitution (*Grundgesetz*) associated to it. Then comes the focus on the issues of religious freedom, which have emerged over the past two to three decades due to social changes. Also, the following is specifically addressed: the Christian cross in government buildings or public places and the religiously motivated circumcision of boys and religiously characterized articles of clothing in the school. It concludes with a brief summary and a — basically positive — review of the German situation.

STEPHAN HEARING

La liberté de confession en Allemagne

Résumé

Le présent article concerne le droit à la liberté de confession — qui est un droit civique fondamental — en République fédérale d'Allemagne et sa réglementation juridique. Au début, l'auteur présente la norme essentielle de liberté résultant du droit constitutionnel ainsi que les prescriptions de la constitution allemande (loi fondamentale) qui y sont directement liées. Ensuite, il aborde les problèmes concernant la liberté de confession qui ont surgi dans les deux/trois dernières décennies à la suite des changements sociaux. On a précisément décrit : la croix chrétienne dans l'espace public, la circoncision des garçons motivée par la religion ainsi que les éléments vestimentaires caractéristiques d'une religion donnée portés à l'école. Un bref résumé et l'évaluation — tout à fait positive — de l'état réel de cette question en Allemagne clôturent l'article.

Mots clés : liberté de confession, Allemagne, constitution (loi fondamentale), croix et d'autres symboles religieux dans l'espace public, discussion sur la circoncision

STEPHAN HEARING

La libertà di professione della fede in Germania

Sommarìo

Il presente articolo riguarda il diritto civico fondamentale alla libertà di professione della fede nella Repubblica Federale Tedesca e la sua regolamentazione giuridica. Nell'introduzione l'autore tratta la norma giuridico-costituzionale fondamentale della libertà di professione della fede e le prescrizioni, sostanzialmente legate ad essa, della costituzione tedesca (della legge fondamentale). Successivamente si occupa dei problemi che riguardano la libertà di professione della fede che si sono presentati nelle ultime due-tre decadi in seguito ai cambiamenti sociali. Sono stati trattati dettagliatamente: la croce cristiana nello spazio statale e pubblico, la circoncisione dei bambini per motivi religiosi e il fatto di indossare a scuola di capi di abbigliamento tipici di una determinata religione. L'articolo termina con una breve ricapitolazione e con un giudizio, fondamentalmente positivo, sulla situazione reale in Germania in tal campo.

Parole chiave: libertà di professione della fede, Germania, costituzione (legge fondamentale), croce ed altri simboli religiosi nello spazio pubblico, discussione sulla circoncisione