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The meaning of religion in German Constitutional Court

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1. Introduction

This paper starts from the analysis of the relationship between law and religion in Germany, trying to answer the question “what is the meaning of religion”. This investigation will be carried on by examining German Federal Constitutional Court judgements about religion and focusing on the legal status of religious communities in Germany. Religion has a deep and interactive relationship with other social phenomena that constitute a society. Religious values and beliefs affect not only the members of the religious community, but also non-members and institutions. Thus, it is important to pinpoint some distinctive characteristics of religion both in terms of what it is (its essence or meaning) as well as what it does (its function).

The main reasons behind the deep interest that has arisen in Europe in the relationship between State and religion is the large increase of Muslim immigrants, whose religion sometimes affects their entire life

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and whose religious communities play an important social and cultural role.

Freedom of religion plays a key role answering the question about the meaning of religion in a State, in that it shows the level of secularization of that State.

In order to analyse the meaning of religion in German jurisprudence, it is necessary to examine the relationship between religion and state in Germany first, and then see how the German Constitutional Court interprets constitutional provisions about religion and religious communities, as well as the consequences of such regulations in an increasingly multi-religious society¹.

Today, a third of the population does not belong to any religious confession, and the social relevance of non-Christian faiths is increasing, the Islamic one in particular. This is the religion of approximately the 4 percent of the German population, which is made up of immigrants or descendants of former immigrants².

Such changes in the social context have made it necessary to deal with religious phenomena which the Constitutional fathers would not know.

¹ In Germany, during the last sixty years, social, economical and cultural conditions changed deeply. In 1950, more than 96 percent of the population in the Federal Republic of Germany belonged to one of the major Christian confessions, 50 percent were Protestants and about 46 percent belonged to the Catholic confession. Until the beginning of the 1960s this situation changed because of process of increasing secularization, and the current situation is this: about 31 percent of the population belong to Catholic Church and about 30 percent to Protestant confession.

² Cfr. G. ROBBERS, *Religious Freedom in Germany*, in *BYU Law Review*, n. 643/2001, <http://digitalcommons.law.byu.edu/lawreview/vol2001/iss2/12>.

This raises the question whether or not the current constitutional arrangement is still adequate to meet the needs of the current multi-religious society.

Before we analyze the constitutional framework about religious freedom, and in order to better understand the evolution of jurisprudence concerning the meaning of religion, it could be interesting to take a quick look at the history of the relationship between religion and State and its legal regulation. From a historical perspective, the relationship between church and State is the result of long-lasting conflicts.

The first major attempt to end the struggle between religions was the Peace of Augsburg in 1555, which provided the first legal basis for a peaceful co-existence of Catholicism and Lutheranism.

Through the newly established principle “*cuius regio, eius religio*”, the aristocratic leaders were granted the *ius reformandi* within their own, separate states, i.e. the right to choose their own confession and determine that of their citizens.

Meanwhile, in order to prevent religious civil wars, the princes did grant their citizens a *ius emigrandi*, i.e., the right to leave the State. This “*ius emigrandi*” was the first step toward the acknowledgement of personal religious freedom. During the following centuries, the chances of religious war would still pose a threat, especially with the Thirty Years War. This is how the belief spread out that in order to establish peace it was necessary to keep religion out of politics, which then brought about a process of separation between religion and politics.

Nevertheless, no such utter separation has been the case in Germany due to historical reasons, as far as Church and State are concerned³.

This process by which religion established itself as a field other than politics has affected the very definition of religion at a structural level. Religion has thus become a private rather than a public matter, requiring its own internalized space within “one’s own conscience, the forum internum, whereas public ceremonial exercises of faith are increasingly limited to non-political aspects”⁴.

The idea of separation prevailed firstly with the Protestant Reformation and then with the Enlightenment⁵.

Though the 1919 Weimar Constitution distinctly stated that the establishment of an official State-Church was explicitly forbidden within the society, the separation principle as interpreted by jurisprudence is a crucial issue. Many new religious movements have proliferated in Germany since the end of the Second World War, and the most relevant part of them is the result of the growing influx of migrant population.

³ About the relationship between Church and State in Germany see, among others, E. J. EBERLE, *Church and State in Western Society: Established Church, Cooperation and Separation*, Ashgate, Farnham, 2011, 125-153.

⁴ K. HEINZ LADEUR, I. AUGSBERG, *The Myth of the Neutral State. The relationship between state and religion in the face of new challenges*, in *German Law Journal*, n. 8 /2007, 143.

⁵ R. L. JOHNSTONE, *Religion a Society in Interaction: The Sociology of Religion*, Englewood Cliffs, New Jersey, n. 9/1970, 965-990.

2. The nomen case: the regulation of religious phenomenon in German Law.

The relationship between State and religion is fundamentally regulated by the Constitution, the so-called Basic Law (*Grundgesetz*), which guarantees the basic right of religious freedom and undisturbed practice of religion. Religious freedom has an important place in Germany's constitution: the main constitutional norm about religious freedom is art. 4 paragraphs 1 and 2 *Grundgesetz*, which states individual right to religious freedom and obliges the State to respect its citizens and to secure the free development of religious activities.

Art. 4 further protects "the undisturbed practice of religion", while art. 7 guarantees religious instruction in public schools and includes the right to abstain from that instruction, securing the right to establish and run religiously or ideologically based private schools.

Freedom of religion does not include only freedom of confession, but also freedom of worshipping; it guarantees the individual right to lead a life according to personal belief. Religious freedom is considered a fundamental human right that belongs to all people, not only to German citizens, and is also protected in its negative dimension, that is to say the freedom not to have any religion.

The freedom to have or not certain religious or philosophical creed is strengthened by the basic right of equality before the law: according to

article 3 paragraph 3 of German Constitution, none can be favored or disfavored because of his or her personal religious opinions⁶.

Germany's commitment to religious freedom is described firstly in the preamble to German constitution, which states: «Conscious of their responsibility before God and humankind, animated by the resolve to serve world peace as an equal part of a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law»⁷.

The reference to God does not allude to the establishment of any specific religious belief, but expresses the acknowledgment of a sphere of transcendence, suggesting that there is something other than the political order established by the Constitution, and that the State is not all-powerful⁸.

Article 33 paragraph 3 *Grundgesetz* specifies that «neither the enjoyment of civil and political rights, nor eligibility for neither public office, nor rights acquired in the public service shall be dependent upon religious

⁶ In Germany is explicit the extension of freedom to profess creed to ideological, nonreligious belief, as well as religious belief. Belief in nature or philosophical or existential belief could both fall within the ambit of article 4 of Constitution. Cfr. E. EBERLE, *Free Exercise of Religion in Germany and the United States*, in *Tulane Law Review*, n. 4/2004, 1023 ss.

⁷ M. SILAGI, *The Preamble of the German Grundgesetz—Constitutional Status and Importance of Preambles in German Law*, in *Acta Juridica Hungarica*, n. 1/2011, pp. 54–63.

⁸ Cfr. G. ROBBERS, *op. cit.*, 643-668.

affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed». In order to rule the relationship between State and religious communities, the *Grundgesetz* incorporated provisions of articles 136, 137, 138, 139 and 141 of German Constitution of 11 August 1919 (Weimar Constitution), that are considered integral part of German Basic Law⁹. Unlike the individual approach of article 4 *Grundgesetz* these rules, which have been incorporated from the Weimar Constitution, regulate the collective dimension of religious freedom, establishing a complex balance between the principle of separation and that of cooperation between State and religious communities.

Article 137 paragraph 1 of Weimar Constitution, as cited by art. 140 of *Grundgesetz*, provides for a separation between religion and State, confirming their autonomy: it declares that all religious societies shall regulate and administer their affairs independently within the limits of the law.

This meaning of separation must not be intended as the French concept of *laïcité*, which excludes the presence of any religious element from the public sphere. The German principle of separation does still leave room to areas of cooperation between State and religious groups, only

⁹ According to the German Constitutional Court, the *Bundesverfassungsgericht*, this technique does not imply a minor status of the incorporated norms. Rather, they are a fully effective, integral part of the constitution.

prohibiting those forms of cooperation which integrate religious communities into the State organization¹⁰.

Art. 137 grants the freedom of association to form religious bodies to “regulate and administer its affairs autonomously” and the ability to constitute religious bodies to “acquire legal capacity according to the general provisions of civil law”. According to art. 140 GG and art. 137 paragraph 5 of Weimar Constitution, “Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency.”

The most important consequence of this status as public corporations is indicated in the following paragraph, which provides that religious societies that have achieved this status are entitled to levy taxes on the basis of the civil taxation list.

However, the possibility to acquire the status of public corporations does not contradict the general principle that there is no state Church: in fact,

¹⁰ Cooperation between distinct groups is a trait of German society, perhaps reflecting and infusing the communitarian bent of the society. «To try seriously to separate church and society is to attempt the impossible so long as church and state exist side by side in society. They interact; they overlap; they touch the same people; they seek commitment and involvement from the same people. (...) The most prevalent relationship between religion and state in our contemporary world could be characterized as partial separation. Most societies today exhibit some variation on this pattern, that is, some independence for both the political and religious institutions, but some overlapping and mutual influences as well». Cfr. W. WEIB, A. ADOGAME, *The interplay of religion and law in Germany*, in *Religio: Revue pro religionistiku*, vol. 3/2000, 41-64.

despite their status as corporations under public law, religious communities remain distinct from the State and do not become integral part of the State organization.

In contrast to ordinary corporations, there is no such thing under public law as state supervision of the internal proceedings within the religious communities; therefore the status of corporation under public law does not modify the general state-church relationship. According to the judgments of the *Bundesverfassungsgericht*, the status does not alter the churches' "fundamental independence from the state. Rather, this independence shall be confirmed therewith"¹¹.

The principle of State neutrality has important consequences for the legal definition of religion: in a neutral State, public authority doesn't have the power to define what can be classified as religion and religious behaviour.

The various freedoms which are granted to religious institutions in Germany can be found in German constitution, in the constitutions of the German *Länder* and in ordinary laws, as well as in the various treaties between the State and specific religions¹².

The main idea of freedom means that all religious beliefs are free: in addition to mere toleration, German political system supports the idea of positive freedom. While government must not forbid certain beliefs nor

¹¹ See BVerfGE 30, 415, 428.

¹² Cfr. E. EBERLE, *Church and State in Western Society: Established Church, Cooperation and Separation*, Routledge, Oxford, 2011.

discriminate against them, it must also go further to create a positive atmosphere of integration within the society.

In order to explain the idea of positive religious freedom, the Federal Constitutional Court judgement about Baha'í religion can be mentioned as an example. In that case, the Court decided that the general association law of Germany must be interpreted in a manner compatible with the specific religious needs of the Bahá'í. The general interpretation of the law on associations normally requires each registered association to have a legally independent board of governors. The Court held that, because of religious liberty, the local associations of the Bahá'í, are free to formally affiliate themselves with one national board of governors¹³.

State authorities (administration, legislator and judges) must not interfere in religious affairs and they have to guarantee the freedom of religious groups and religious pluralism: religious freedom can be guaranteed by keeping equidistance to all religious denominations. This does not only mean that the State has to be neutral when it comes to religions, but also that State cannot give a definition of what religion is or ought to be¹⁴.

¹³ BVerfGE 83, 341. Cfr. E. EBERLE, *German religious freedom: the movement toward the protection of minorities*, in A. RUSSELL MILLER, P. ZUMBANSEN, *Annual of German & European Law*, vol. II - III, 2007, 15 ss.

¹⁴ "The wisest position for the law is a frank recognition that it cannot understand or represent religious experience with anything like fullness or accuracy". Cfr. J. BOYD WHITE, *Talking About Religion in the Language of Law*, in J. BOYD WHITE (ed. by), *From Expectation to Experience: Essays on Law and Legal Education*, Michigan Publishing, Ann Arbor, 1999, 124.

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3. The meaning of religion in German Constitutional Court.

The answer to the question “what is the meaning of religion” derives from German constitutional law, as developed by the *Bundesverfassungsgericht*. The legal meaning of religion is based on the self-conception of religious communities, but this requisite is not sufficient, because the definition of the exact meaning of “religion” plays an important role when State has to respond to the needs of groups that require protection by invoking the exercise of religious freedom¹⁵.

Self-determination is translated in German “*Selbstbestimmungsgarantie*”, which directly refers to guarantee of self-determination that has to be considered valid both for individuals and for religious communities and associations. However, the specific importance of religious self-conception is the result of a developing jurisdiction. Former decisions of the *Bundesverfassungsgericht* show how there have been attempts to establish narrower and more concrete definitions of “religion”. In 1960 the German Federal Constitutional Court tried to establish a “clause of adequacy of culture” determining religions with regard to “those

¹⁵ J. BOYD WHITE (ed. by), *How should we talk about religion? Perspectives, contexts, particularities*, Notre Dame Press, South Bend, 2006.

confessions which have in the course of time been developed by civilized people on the basis of common moral convictions”¹⁶.

This definition did not respect the constitutional obligation of state neutrality, though, which is why later jurisdiction abandoned it.

The most important case in which the meaning of religion and the criterium of self conception were discussed was the *Rumpelkammer* case in 1968: in that case the Court had to decide if a clothing drive conducted by a Catholic youth organisation for caritative purposes has to be considered a religious activity with a special legal treatment. In the judgement the Court expressed the principle that religion had to be

¹⁶ BVerfGE 12, 1. For a comment see S. KORIOTH – I. AUGSBERG, ‘*Religion and the Secular State in Germany*,’ in *Re-ligion and the Secular State / La religion et l’État laïque: Interim National Reports / Rapports Nationaux Intermédiaires*, issued for the occasion of the XVIIIth International Congress of Comparative Law, Washington, D.C. – <https://www.iclrs.org/content/blurb/files/Germany.pdf>, July 2010, 320. In that case the Court decided about the behaviour of an anti-Christian activist, that was member of a radical nationalist, movement the “Tannenberg-Bund”. In the 1950es he worked as a spy for the Soviet Union, was uncovered and sentenced to four years in prison. In prison he tried to move his prison inmates to leave the Church, offering them tobacco if they did so. This behaviour was considered a sign of moral wretchedness precluding any expectation of a law-abiding and life in freedom. The appellant regarded this statement as an infringement of his (negative) religious freedom. The Federal Constitutional Court, so, established its “clause of adequacy” and, denying that the activities of the appellant had anything to do with religious freedom, rejected his legal opinion and introduced the clause into the legal discourse not in order to exclude a positive statement of supposedly religious character, but in order to prevent a claim of anti-religious activity by a former Nazi. Of course this explanation of the circumstances of the case does not justify the clause.

protected “as long as it remains within the framework of certain consistent moral opinions of today’s civilised peoples”¹⁷.

Besides, in *Rumpelkammer* case the Federal Constitutional Court established the principle that the state would infringe upon the autonomy of religious communities as guaranteed by the *Grundgesetz* if it did not pay attention to the religious self-consideration.

Trying to understand which possible forms of behaviour might be considered as visible religious manifestations, the Court emphasised the importance of religious self-consideration and concluded that, according to Christian self-conception, caritative activities represent part of the exercise of religion, and so the clothing drive could be regarded as a religious practice and therefore ought to be granted constitutional protection.

Thus the self-consideration of religious groups, intended as an expression of state neutrality, became a decisive factor not only for determining the range of religiously motivated forms of behaviour, but also for the definition of religion itself.

As a consequence many formal definitions can be found nowadays of what can be considered religion or religious group.

The basic definition of religion is a particular conception of the world, from which human life itself derives its origin and goal. Religious faith is a system of doctrines connecting the human being with a transcendent

¹⁷ BVerfGE 24, 236.

principle that can neither be perceived and judged by human standards, nor fully explained by scientific knowledge.

Religion provides the human being with a basis of a transcendent and encompassing reality; it has been defined as “an assurance regarding the existence and the content of certain truths being connected to a human being”¹⁸, but to elaborate a set of parameters which may evaluate external manifestation of religious faith is not an easy task, if we consider that the German society is characterized by an increasing multi-religiosity, that cannot be reduced to a homogeneous view.

However, if the only prerequisite to be met would be the self-consideration of a group, the freedom of faith would be transformed into a right for all possible human behaviour: for this reason some precautionary measures are necessary, which ought to prevent misuses of religious freedom, requiring objective criteria.

Religion is a phenomenon that involves a group of people rather than an individualistic belief. One might also find legal arguments that justify this kind of differentiation: with regard to fundamental rights catalogue as presented by the *German Grundgesetz*, it can be argued that there does exist a specific legal guarantee for the individual decision, that is, the freedom of conscience. According to this theory, freedom of conscience guarantees personal conviction, while religious freedom regards a whole group of people who share the same belief.

¹⁸ BVerfGE 32, 98, 107.

Public authority doesn't have the competence to judge whether a certain faith is right or wrong, but case law of Federal Courts publicly criticizes the effects and teachings of religious groups and consequently issue warnings, if a danger for physical and psychological integrity is perceived. For this reason, Federal Courts and some regional governments in official pronouncements warned of new religious developments and so called "youth religions", "sects" and "cults"¹⁹.

In order to verify whether or not a certain behaviour may be classified as religious and shall as such be granted specific legal protection, some form of State control must be elaborated²⁰.

With regard to the central role of religious communities' self-conception, the necessary state control is limited to a form of "plausibility check". Only if a certain group evidently misuses the idea of religious freedom in order, e.g., to use it for obviously economic purposes, may the state intervene.

¹⁹ German Parliament commissioned an enquiry towards investigating such groups, in order to find out what conflicts could be ascribed to the new religious and ideological communities and psychogroups, and in order to decide whether governmental assistance are required. Cfr. *Final Report of the Commission of Enquiry of the Bundestag (the German Parliament) on "so-called Sects and Psycho Groups"*, Bonn 1998, on line at <https://archive.org/stream/FinalReportOfTheEnqueteCommissionOnSoCalledSectsAndPsychogroups>.

²⁰ See Federal Constitutional Court BVerfGE 83, 341, ruling that art. 4 self-autonomy allows Baha'i religion to rule itself as it likes, even when supreme religious authorities outside Germany order affairs differently than communities within Germany. Cfr. E. EBERLE, *German religious freedom: the movement toward protection of minorities*, cit., 20.

This issue has been discussed with regard to the Church of Scientology and Jehovah's Witnesses.

The Federal Labour Court decreed that Scientology was not a religion or creed, because Scientology used the name of a church as a pretense for economic purposes²¹.

A religious group may, and usually does, carry on different activities which are not merely religious, but it must not lose its peculiar religious character.

According to decisions of the Federal Administrative Court the government can even, without a concrete danger for the rights of others, criticize some religious teaching if and insofar as this teaching considerably contradicts the "axiology" which results out of the fundamental, basic rights of the Basic Law.

This can be the case if statements of a religious community are influenced by a different concept of human dignity or the value of human life. As we have seen before, religion impacts the social structure: for this reason, the State will be favourably disposed towards religious groups if they have a positive impact on the society and if that creed shares some positive values with the state. On the other hand, legal restraints are set up for groups which the State holds to have a negative

²¹ See furthermore S. MUCKEL, *The 'Church of Scientology' under German Law on Church and State*, in *German Yearbook of International Law*, n. 41/1999, 299. The Federal Labour Court ruled that Scientology was not a religion or creed. According to the ruling, Scientology used the name of a church as a pretence for economic purposes.

influence on its members and are considered as potentially dangerous for citizens. In 1997 the Federal Administrative Court in Berlin upheld a 1993 Berlin State Government's decision about Jehovah's Witnesses that had denied the church public law corporation status.

The Court decided that the group did not offer the “indispensable loyalty” towards the democratic state “essential for lasting cooperation” because it forbade its members to participate in public elections. On December 2000, the Constitutional Court decided in favour of Jehovah's Witnesses, remanding the case back to the Federal Administrative Court in Berlin. For the first time, the Constitutional Court examined the conditions for granting the status of a public law corporation, saying that the “loyalty to the state” cannot be considered a condition imposed on religious communities²².

As long as a religious community does not attempt to overthrow the current legal system in order to install a theocratic regime and as long as it respects the citizens' fundamental rights and the principle of religious tolerance, its attitude towards the state is an inner religious phenomenon which the state may not criticise²³.

According to the jurisdiction of the *Bundesverfassungsgericht*, the neutrality imposed on the state “has to be understood as an open and comprehensive attitude which supports religious freedom of all

²² Cfr. E. EBERLE, *Church and State in Western Society: Established Church, Cooperation and separation*, Routledge, London, 2016, 141 ss.

²³ See BVerfGE 102, 370, 395.

confessions in an equal manner”²⁴.

Not all the recipients of the right to freedom of religion are Christians or members of the predominant confessions: all religious groups are included, and one of the parameters the Courts use in order to individuate a religious group is the size of membership²⁵.

4. Conclusions.

As we have seen before, according to article 137 (5) of the Weimar Constitution, religious communities are granted the status of public corporations “where their constitution and the number of their members offer an assurance of their permanency”. The parameter of “permanency” has to be referred to the whole condition of the community, considering the meaning of the special status of public corporations in Germany.

The requirement of a specific number of members is not clarified in the Basic Law, but it should be large enough to demonstrate that the religious community has some relevance in public life. However, some *Länder* have granted the status of a public corporation to much smaller groups. For example, the status of public corporation was granted to the Christian Science Movement in Bavaria in 1949, even though the group had only four hundred members.

²⁴ See BVerfGE 108, 282, 300, cited in S. KORIOTH, I. AUGSBERG, *op. cit.*

²⁵ D. P. KOMMERS, *The constitutional jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham, 1989.

The State grants the special status of public corporations to churches and religious communities because of their impact and relevance for the larger society. Nonetheless, the qualification as public corporation is a useful, although not necessary consequence of the public importance of religious communities. According to the *judgements* of the *Bundesverfassungsgericht*, the status of public corporation does not alter the fundamental independence of churches from the state, but such independence is rather confirmed therewith.

Besides, further criteria to individuate a religion are the level of continuity of that religious community, its international popularity and its geographical spread.²⁶

Dealing with religious pluralism necessarily requires a clear definition of its own object. This problem that law has to solve becomes particularly important in an eterogenic society. When Europe was characterised by the dominance of the two major Christian confessions, the question of what could legitimately be called a religion was quite irrelevant. By contrast, the recent religious pluralism reveals that the traditional concept of religion is deeply influenced by Western Christian values that might not be adequate in order to deal with newly emerging phenomena. In this context, state orientation to criteria indicated basically by religious communities offers the legal system the opportunity to recognise religion as a completely distinct phenomenon without losing its grip on it as a potential object of legal treatment, including legal restrictions.

²⁶ W. WEIB, A. ADOGAME, *op. cit.*, 35 ss.