

The juridical system in Germany regarding the freedom of religion and equal opportunities*

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With the general subject „*Freedom of Religion and Equal Opportunities in Hungary and in Europe*“, OCIPE Hungary has chosen a material which is of fundamental importance for the development in eastern Middle Europe and in the process of European Integration. I would first of all like to give you an overview of the basic concepts of freedom of religion in the German constitution (I.). Following that I will speak a little more detailed about the interpretation of freedom of religion in practice, especially in the jurisdiction of the Federal Constitutional Court (II.). Finally, I will focus on some recent developments and challenges being actually discussed in Germany (III.)

I.

The German Basic Law (*Grundgesetz*) guarantees the human right of religious freedom in a complete sense. According to Article 4 Section 1 the freedom of religious creed, the freedom of conscience and the freedom of religious and ideological profession are inviolable. Section 2 adds the guarantee of free religious practice. Concerning religious equality, two provisions are important: According to Article 3 Section 3 nobody may be privileged or discriminated by reasons as his faith or his religious convictions. Especially for the scope of public service, Article 33 Section 3 contains another ban of discrimination as it declares the access to public functions being independent of religious convictions.

The mentioned provisions constitute in a certain sense the core of religious freedom which statutes both an element of freedom and of equality. A more detailed analysis of the text shows that the constitution protects three different scopes in which this freedom can be developed: First, religious

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freedom contains the creed, the conscience and an ideological conviction as such, i.e. the formation of a religious or non-religious conviction (*forum internum*). Secondly, religious freedom also means the right to communicate that convictions to others, thus to confess it (*forum externum*). Thirdly, everybody is allowed to practise his religion or ideological conviction in the public, e.g. in worship, processions, pilgrimages etc.

To all these guarantees every human being is entitled without regard to his nationality: Different to other basic rights of the German constitutional law, religious freedom is constituted as a human right, not only as a citizens' right.

Around the mentioned core of religious freedom and equality more legal positions are grouping, some of them entitle the individuals, some of them the churches and religious communities:

An important provision for the scope of school is the provision of Article 7. According to Section 3, religious education is obligatorily taught at public schools. The content of that education has to be authorized by the church, as it is the church who gives an ecclesiastical mission to the teachers (*missio canonica*). Nevertheless the participation at this education, which is taught as a confessional one and not only as religious information, is voluntary. Parents may free their children thereof, if the children are 14 years old, they may decide by themselves about the participation. Some federal states (*Länder*), which are competent for educational affairs in Germany, have instituted a substitute subject in secular ethics for those pupils not joining religious education.

Of continued importance for religious freedom are some provisions of the Constitution of the Weimar Republic of 1919 which are incorporated into the Basic Law and therefore form valid constitutional law (perhaps you know that technique from Austrian constitutional law in which some even older provisions are part of the present constitution, for instance the State Basic Law of 1867). These are legal positions which mainly refer to churches and

religious communities but also benefit individuals. The most important provisions of that complex within institutional law, the ecclesiastical law (*Staatskirchenrecht*) are the following ones:

- the prohibition of an established church (Article 140 BL, Article 137 Section 1 CWR);
- the right of churches to deal with their internal affairs by their own (right of self-determination or church autonomy, Article 140 BL, Article 137 Section 3 CWR);
- the persistence of the legal status of the traditional churches as corporations of public law and also the right of other religious communities to reach that status (Article 140 BL, Article 137 Section 5 CWR);
- as a consequence of the status of corporation of public law the right of these churches to raise church tax with the support of the state in administration and execution (Article 140 BL, Article 137 Section 6 CWR) and finally
- the right of the churches to offer worship and, more generally spoken, spiritual service to people in public institutions such as prisons, hospitals and the armed forces by special chaplains which are mainly paid by the state (Article 140 BL, Article 141 CWR).

This brief tour d'horizont focuses on the fact that the provisions of German legal system on religious freedom are quite complex (to avoid more complications I will limit my report on the statute law by leaving away contract law between state and church as especially the concordats). In a systematic view, we can distinguish two different systems: On the one hand the right of religious freedom in a strict meaning and, on the other hand, the more institutional ecclesiastical law. There are, of course, many implications between both systems, although they are not identical.

II.

In practice, the interpretation of religious freedom developed by the Federal Constitutional Court in its jurisdiction is largely dominating. Different to the mentioned literal sense of Article 4 BL the Federal Constitutional Court understands the provision as a uniform basic right of religious freedom: Its content would be granting the individual the right to orientate all his behaviour according to the doctrines of his creed and to conduct in accordance with its internal religious conviction. This interpretation is, as the Federal Constitutional Court says itself, excessive. The Court gives two reasons for that, one historical and one systematic: The original intent of the constitutions' fathers would have been to avoid future restrictions of religious freedom – especially of the free exercise – as occurred during the Nazi reign and in the soviet occupied part of post-war Germany. The systematic argument is that the constitution does not limit religious freedom by a mere reservation of law. Thus, according to the jurisdiction of the Federal Constitutional Court religious freedom may only be limited by such reservations being part of the constitution itself. And this leads the Federal Constitutional Court to the conclusion of a supreme importance of religious freedom which is the striking argument for the mentioned position that this right had to be interpreted excessively.

This jurisdiction has been criticized in the literature for years (also by me). I don't want to deepen that controversy at this place, but I would only like to outline the general issue: The interpretation of the Federal Constitutional Court dates back nearly 40 years now. The background of this interpretation is the based on the structure of society and especially sociology in those years. But it has to be doubted that the interpretation given 40 years ago corresponds with the changed facts in a multi-cultural and multi-religious society. That leads to a second aspect: According to the jurisdiction of the Federal Constitutional Court, the question what behaviour is protected by religious freedom has to be answered by taking account of the self-determination of the individual or the religious community involved. Here we can find a central point of the relationship between state and church or, more generally spoken, of law and religion: In what matter can the appeal

for creed, conscience or ideological conviction entitle the individual or a community to be exempted from the general enforcement of law?

An other important issue of the jurisdiction of the Federal Constitutional Court is that basic rights in general are not only – as it was the interpretation of former dogmatic (e.g. of *Georg Jellinek*) – individual rights against the state to limit its power. Rather they constitute an order of objective constitutional values which is binding for all state powers, especially for the legislature. According to the jurisdiction of the Federal Constitutional Court the following principles apply in a specific way to the right of religious freedom:

- The individual does not only have the right to confess and to practice his religion but also – in an opposite sense – the right to have no religion (negative religious freedom). In other words, nobody may be involved in religious affairs by the state against his will.
- The Federal Constitutional Court has developed a general principle from that negative religious freedom as well as from the mentioned rights of religious equality and the prohibition of an established church: the principle of neutrality of the state in all religious and ideological matters. As a consequence, the state may not identify itself with a definite religion or a definite church.
- On the other hand that neutrality does not include a prohibition to the state granting any form of religion. As opposed to France, Germany is according to its constitution not a laicistic state. The state is not urged to ignore the factor “religion” or “church” (of course, he must not fight them since in that case he would not be neutral any more). If he does so he is obliged to treat all of them – religions and churches – equally (*principle of impartiality*).

The significance of these principles may be illustrated by three cases taken from the jurisdiction of the Federal Constitutional Court which found some great attention not only among lawyers but also in the field of public and politics:

- (1.) In the very beginning of the 1990s a pupil and his parents urged for the removal of a crucifix hanging in the classroom of a public school in Bavaria. They argued with their negative religious freedom which would prohibit the confrontation with a symbol of a creed rejected by them. Furthermore, a crucifix in a public institution would interfere with the principle of religious neutrality of the state. In a 5:3-decision the Federal Constitutional Court quashed the law giving the basis for the hanging of the crucifix. – One issue in this case is the negative religious freedom. On the other hand, the positive religious freedom of other pupils in favour of the presence of the crucifix also should be taken into account. As you can see the issue at stake is one of a three-pole relationship in human rights.
- (2.) We can also find this issue in another case discussed since the late 1990s: A young woman applied as a teacher in a public school and declared she would wear an Islamic headscarf in class which was an expression of her religion and her dignity as a Muslim woman. After that the *Land* (which, as mentioned, is competent for educational affairs) refused to employ her as a civil servant. The reason given was a lack of suitability as a civil servant because she did not want to act in a neutral manner by wearing a religious symbol in class. As opposed to the crucifix decision the Federal Constitutional Court ruled (also in a 5:3-decision) that a religious symbol could be allowed in a public school. But that would be a question to decide by the *Länder* on means of a law. Meanwhile some *Länder* have ruled such laws which prohibit to teachers to wear religious and political symbols. The Federal Administrative Court has accepted those decisions in principle but has also focussed that such a prohibition had to apply to all religions and religious communities.
- (3.) Let us have a look at a case of institutional ecclesiastical law finally: Since the early 1990s "Jehova's Witnesses" have applied for the granting of the legal status as a corporation of public law. According to German law the consequences of that status are numerous legal advantages but also a higher prestige. Both the administration and the Federal Admini-

stration Court rejected this demand because they felt the community was not loyal to the state (especially for the reason that it urges its members not to participate in general elections). In contrast to this the Federal Constitutional Court felt that the only necessity was to fulfil the legal requisitions. Bound by the principle of neutrality the state could not be entitled to value the contents of a religion or a religious community. Meanwhile the Higher Administrative Court of Berlin has granted the legal status of corporation of public law to "Jehova's Witnesses".

III.

Law always has to be confronted with the challenges of reality and life. In fact problems which were discussed 30 or 40 years ago have often lost their significance. On the other hand, we have to legally value today some developments which the fathers of the constitution have not seen, even not could have seen. Here I restrict myself to three descriptions of problems:

(1.) A central challenge is the mentioned trend to a multi-cultural and multi-religious society. The "extensive" interpretation of religious freedom given by the Federal Constitutional Court has to be seen in the context of a nearly homogeneous Christian population. In those times, 40 years ago, a generous treatment of – as it used to be said – "outsiders and sectarians" did not really seem to be a problem. But now new questions have to be asked, especially as a result of the presence of Islam: Does religious freedom apply to the ritual slaughtering of animals? Can a Muslim appeal to religious freedom if he wants to marry more than one woman? Does the state have to intervene if women are oppressed in Muslim families by their male relatives? In all these as in other cases the question is if religious freedom can limit or even suspend the general rule of law for every citizen. As a specific problem of Islam we can regard the fact that Islam is a holistic religion without separation of religious and

secular affairs – different to Christianity where that distinction is known since its beginnings.

- (2.) In the modern state the question for the right relation between freedom and equality often was controversial. But it was nearly always the state which was in action. Nowadays positions of basic rights tend to include more and more a horizontal effect with the consequence that one citizen can claim for a specific conduct of another citizen. The problematic evolving with such horizontal effect also refers to religious freedom caused by the law of the European Union:

According to Article 13 of the EC treaty, the Council “may take appropriate action to combat discrimination” based on several motives (as sex, race, religion, disability or “sexual orientation”). Based on this authorization there are yet some directives about anti-discrimination which prohibit any discrimination in employment and occupation based on the mentioned reasons. Most of them have been implemented into domestic law (Germany is one of the member states in delay). Being at first view a provision in favour of religious freedom those directives also can be taken as a weapon against religion or church: May a church school continue to employ only such teachers granting the maintenance of the ethos of those schools? Or would the catholic or orthodox church be obliged to ordain women to the priesthood in future? Sure, presently the directives content some exemption clauses in favour of the churches. But conditions are not always formulated very clearly – who has for example to decide if a specific qualification (such as “religion”) is essential for a named employment?

- (3.) Finally, a further challenge is at presence secularism. If it is based on society, church has of course to live with that phenomenon. Religious freedom as other legal guarantees enables the church to act in public, but they do not promise any success of that action. But it is a problem if the state adopts such secularism from society to its own sphere by acting according to its spirit against individuals and churches. One basis of the

constitutional system is the prohibition of any established church. That provision has to be completed by the prohibition of any established ideology. But there is a tendency in some parts of Germany to establish such an ideology by state: In Berlin and the eastern *Land* Brandenburg, religious education is not installed in public schools but, in contrary, classes in secular ethics which are obligatory for all pupils (even those assisting the voluntary religious education). In many cases the subject is taught by that teachers having taught communist indoctrination ("*Staatsbürgerkunde*") before 1989. Until now there was a great conformity in Germany that the state itself would not act in the field of education in values but that he would cooperate with such organizations in society whose actions also give profit to the state. Here we are confronted with a central issue: On what historical and cultural fundamentals state is based? That issue is also an aspect of religious freedom.

IV.

The mentioned constitutional lawyer *Georg Jellinek* one time pointed out the character of religious freedom as the original basic right. My intention was just to outline a small overview about the legal system of religious freedom in Germany and the significance of that right in practice. I hope that I was able to convene some basic ideas about all these issues.