UNIVERSITÀ
DI TRENTO
Facoltà di
Giurisprudenza

STATE AND RELIGION: AGREEMENTS, CONVENTIONS AND STATUTES

CINZIA PICIOCCHI
DAVIDE STRAZZARI
ROBERTO TONIATTI
(eds.)

2021

UNIVERSITÀ
DI TRENTO
Facoltà di
Giurisprudenza

QUADERNI DELLA FACOLTÀ DI GIURISPRUDENZA

53

2021

Al fine di garantire la qualità scientifica della Collana di cui fa parte, il presente volume è stato valutato e approvato da un *Referee* esterno alla Facoltà a seguito di una procedura che ha garantito trasparenza di criteri valutativi, autonomia dei giudizi, anonimato reciproco del *Referee* nei confronti di Autori e Curatori.

Redazione a cura dell'Ufficio Pubblicazioni Scientifiche
dell'Università degli Studi di Trento

ISBN 978-88-8443-967-3
ISSN 2284-2810

Il presente volume è pubblicato anche in versione cartacea, nell'ambito del progetto PRIN 2017 "Dal pluralismo giuridico allo Stato interculturale. Statuti personali, deroghe al diritto comune e limiti inderogabili nello spazio giuridico europeo", per i tipi di Editoriale Scientifica - Napoli, con ISBN 979-12-5976-216-0.

Dicembre 2021

GERMANY'S COOPERATION WITH RELIGIOUS AND BELIEF GROUPS: BILATERAL AGREEMENTS AND EXEMPTION RIGHTS

Rossella Bottoni

1. Introduction

This chapter aims to explore the cooperation system between the State and religious and belief groups in Germany, in order to assess the space afforded to religion- and belief-based rules by the German legal system and their impact upon it[1].

At the constitutional level, Germany is characterized by a peculiar arrangement, where the relationships between the State and religions/beliefs play an important role. The Weimar Constitution of 1919 (*Weimarer Weimarer Reichsverfassung* – WRV) was founded on a compromise between the supporters of France's separation model and those of the unionist systems of northern Europe[2]. The provision that

[1] The definitional issue of 'religious rules' goes beyond the purposes of this chapter. On the attempts at and difficulties in defining what 'religious rules' are, see S. FERRARI, *Religious Rules and Legal Pluralism: An Introduction*, in R. BOTTONI, R. CRISTOFORI, S. FERRARI (eds.), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview*, Berlin, 2016, pp. 3-7.

[2] P. UNRUH, *Is German Religionsverfassungsrecht under threat from the European Union?*, in *Oxford Journal of Law and Religion*, 9(1), 2020, pp. 2-3. For a summary of Germany's legal and historical developments, see G. ROBBERS, *Germany*, in M. HILL

«There shall be no state church» (Art. 137 § 1 WRV) established a «*hinkende Trennung* (''limping separation'') between Church and State – a term even used by the German Constitutional Court»[3]. This regulation was confirmed by the Basic Law of 1949 (*Grundgesetz* – GG) which, by virtue of Art. 140 GG, incorporated Arts. 136-139 and 141 WRV. "Limping separation" has been strengthened by a complex constitutional framework which mentions God[4] and, at the same time, founds a "neutral" – but not "secular" (in the French meaning of *laïc*) – State[5]. In fact, the German notion of neutrality does not exclude coop-

QC (ed.), *Religion and Discrimination Law in the European Union*, Trier, 2012, pp. 155-159.

[3] R. HENKEL, *State-church relationships in Germany: past and present*, in *Geo-Journal*, 67(4), 2006, p. 310.

[4] «This *invocatio dei* makes reference to the idea of God; it is not an *advocatio dei*, which would directly place the constitution under the will of God as is the case in many other countries' constitutions such as the Irish constitution or the one of Greece.

The preamble does not restrict its reference to the Christian idea of God. It would be a thought unthinkable that in 1949, after the murder of the Jewish by the Germans, and in the attempt to reconnect Germany with its pre-Nazi and anti-Nazi good traditions, the new German constitution would exclude the Jewish idea of God. It is generally understood that the preamble of the Basic Law does not refer to any specific idea of teaching of God such as the Christian, the Jewish or the Muslim or any other specific concept of God.

Instead, the reference to God is a reference to religion as such. The preamble of the German constitution by making reference to God acknowledges the existence of transcendence, of the idea that there is more than the visible world, that there is something beyond. By this reference to the responsibility before God the preamble of the Basic Law accepts that there is something more and other than the state and its constitution, something that goes beyond what is made by human kind. It is thus acknowledging that the state the constitution creates and structures is not all-encompassing, that is, the state is not total. The reference to God in the German constitution is anti-total and is thus anti-totalitarian» (G. ROBBERS, *Religion and Law in Germany*, Alphen aan den Rijin, 2010, p. 75). See also S. TESTA BAPPENHEIM, *'Veluti si Deus daretur': Dio nell'ordinamento costituzionale tedesco*, in J.I. ARRIETA (ed.), *Ius divinum. Atti del XIII Congresso internazionale di diritto canonico, Venezia, 17-21 settembre 2008*, Venezia, 2010, pp. 253-271; ID., *Cenni sulla costituzionalizzazione delle radici cristiane in Germania*, in *Ius Ecclesiae*, 3, 2006, pp. 755-771.

[5] S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 18, 2019, p. 3. See also p. 18.

eration[6]; it rather encourages it. Further, cooperation in the Federal Republic of Germany is promoted not only at federal level, but also by the *Länder*, which are responsible for most competences in ecclesiastical matters[7]. This also applies to the *Länder* of the former German Democratic Republic: after the reunification in 1990, Western Germany's system of religion-friendly separatism and cooperation was extended to Eastern Germany[8].

As a last introductory remark, it should be noted that Germany's constitutional regulation dates back to a time characterized by quite a different religious demography. Today's German population belongs to a far greater variety of religions and beliefs, while the number of the members of the two traditional Churches has decreased: approximately 28 per cent is Catholic and 26 percent belongs to a confederation of Evangelical-Lutheran, Reformed and United Protestant Churches. 39 percent of the population is unaffiliated or belongs to groups not count-

[6] I. AUGSBERG, S. KORIOTH, *The interplay between state law and religious law in Germany*, in R. BOTTONI, R. CRISTOFORI, S. FERRARI (eds.), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview*, Berlin, 2016, p. 179; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, in G. ROBBERS (ed.), *État et Églises dans l'Union européenne*, Baden-Baden, 2008, p. 83; P. UNRUH, *op. cit.*, p. 4; K.G. VANCE, *German Religious Liberty Jurisprudence: A Proposed Solution for the U.S. Supreme Court's Double-Barreled Dilemma*, in *Journal of Church and State*, 2020, p. 18; A. HOLLERBACH, *National identity, the constitutional tradition and the structures of law of religions in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Religions in European Union Law*, Milan, 1998, p. 91. For a more detailed treatment, see C. HAUPT, *Religion-State Relations in the United States and Germany: The Quest for Neutrality*, New York, 2012; G. ROBBERS, *Religious freedom in Germany*, in *Brigham Young University Law Review*, 2, 2001, pp. 649-655.

[7] V. PACILLO, *Churches and Federal State in Europe: the paradigm of Germany and Switzerland*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 2011, pp. 3-14; G. ROBBERS, *Religious freedom in Germany*, cit., pp. 645-646; S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, cit., p. 27.

[8] R. HENKEL, *op. cit.*, pp. 311-312; B. THÉRIAULT, *A Land of Opportunity? Ecclesiastical Strategies and Social Regulation in the New German Länder*, in *Journal of Church and State*, 40(3), 1998, pp. 603-604; S.P. RAMET, *Religion and Politics in Germany since 1945: The Evangelical and Catholic Churches*, in *Journal of Church and State*, 42(1), 2000, p. 133.

ed in official statistics, 5.3 percent is Muslim (most are Sunni) and 1.9 percent is Christian Orthodox. Other religious and belief groups, which together constitute about 1 percent, include Buddhists (270,000), Jews (100,000-200,000), Jehovah's Witnesses (169,000), Hindus (100,000); Mormons (40,000), Sikhs (10,000-15,000) and members of the Church of Scientology (3,400)[9].

2. Germany's constitutional regulation of religion/belief

This section aims at introducing the analysis on the role of religion- and belief-based rules within the general framework of Germany's constitutional regulation of religion. A useful interpretative framework is the European model of State-religion relationships, elaborated by Silvio Ferrari and characterized by three principles shared – albeit in different forms and degrees – by European countries: *a)* the right to freedom of religion or belief, *b)* religious and belief groups' right to doctrinal and organizational autonomy, and *c)* the selective character of State cooperation with religious and belief groups[10].

2.1. The right to freedom of religion or belief

Under Art. 4 §§ 1-2 GG «Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviola-

[9] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, pp. 2-3, in *https://www.state.gov/reports/2019-report-on-international-religious-freedom/germany*.

[10] S. FERRARI, *Islam and the European system of State-religions relations throughout Europe*, in M.-C. FOBLETS, J.-F. GAUDREAULT-DESBIENS, A. DUNDES RENTELN (eds.), *Cultural Diversity and the Law. State Responses from Around the World*, Brussels, 2010, pp. 479-484; ID., *Models of State-Religion Relations in Western Europe*, in A.D. HERTZKE (ed.), *The Future of Religious Freedom: Global Challenges*, Oxford, 2012, pp. 203-205; ID., *Religion and Religious Communities in the EU Legal System*, in *Insight Turkey*, 17(1), 2015, pp. 68-73.

ble. The undisturbed practice of religion shall be guaranteed»[11]. As specified by the Federal Constitutional Court,

> Art. 4(1) and (2) GG contains a coherent fundamental right that must be understood to be comprehensive […]. It extends not only to the inner freedom to believe or not to believe – i.e. to have a faith, conceal such a faith, renounce one's faith and turn to a new one – but also to the outer freedom to express, spread and promote one's faith, and to turn others away from their faith […]. Thus, it encompasses not only acts of worship and the practise and observance of religious customs, but also religious education and other expressions of religious and ideological life […]. This includes the right of the individual to align their entire behaviour with the teachings of their faith and act in accordance with this belief, i.e. live a life guided by their faith; this applies to more than just imperative religious doctrines[12].

Unlike other constitutional rights which find their limits in the provisions of general law, Art. 4 GG does not state that freedom of religion or belief may be restricted by or pursuant to a law. This does not mean that manifestations of religion or belief may not be limited. They may be limited indeed, but only in order to protect other equally important constitutional rights. Limitations on the right to freedom of religion or belief are thus interpreted narrowly[13], and they are also more restricted

[11] English translation in *https://www.btg-bestellservice.de/pdf/80201000.pdf*. Robbers has noted that «Religious freedom has a prominent place in Germany's constitution. Freedom of religion is protected before many other freedoms. Only human dignity, freedom and life, and equal protection are human rights placed before religious freedom in Germany's constitution» (G. ROBBERS, *Religious freedom in Germany*, cit., pp. 643-644).

[12] Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), Judgment of the Second Senate of 14 January 2020 – 2 BvR 1333/17 –, para. 78, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/01/rs20200114_2bvr133317en.html*.

[13] G. ROBBERS, *Religious freedom in Germany*, cit., p. 647; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 178.

than those prescribed by Art. 9 of the European Convention on Human Rights[14].

In principle this leaves considerable room for the respect of religion- and belief-based rules interfering with State law. In practice the application of such precepts in everyday life should not be taken for granted. The above-mentioned judgment issued in January 2020 by the Federal Constitutional Court did recognize the existence of the individuals' right to align their behaviour to the precepts of their religion or belief and, more broadly, to their convictions (which include not only imperative religious doctrines, but also convictions on which behaviour is correct or wrong in a situation of life). Nevertheless, in the examined case, the court concluded that the ban on wearing a headscarf by legal trainees, albeit interfering with the freedom of faith of the individual guaranteed in Arts. 4 §§ 1-2 GG, is constitutional.

Art. 4 § 3 GG stipulates that «No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law». Although conscientious objection could be based «on religious conviction, ethical or humanitarian views, or ideological-pacifist reasons»[15], objectors to military service had to undergo an administrative procedure, whereby their application had to be approved. Exemption was granted only from all services entailing the use of weapons, and objectors were still required to perform alternative service, which was

> by no means a freely eligible alternative to military service […]. It [was] rather a privilege in the actual sense of the word granted to an individual by the state out of consideration for his plight of conscience[16].

[14] A. VON CAMPENHAUSEN, *The application of the freedom of religion principles of the European Convention on Human Rights in Germany*, in A. EMILIANIDES (ed.), *Religious Freedom in the European Union*, Leuven, 2011, p. 180.

[15] J. KUHLMANN, E. LIPPERT, *The Federal Republic of Germany: Conscientious Objection as Social Welfare*, in C.C. MOSKOS, J. WHITECLAY CHAMBERS II (eds.), *The New Conscientious Objection: From Sacred to Secular Resistance*, Oxford, 1993, p. 99.

[16] W. LOSCHELDER, *The non-fulfilment of legally imposed obligations because of conflicting decision of conscience. The legal situation in the Federal Republic of Ger-*

Germany abolished conscription in July 2011, but interestingly this reform has not relegated the problem of conscientious objection to military service to the realm of history. In 2018, 127 requests from professional soldiers for discharge on ground of conscience were accepted, with a refusal rate of 30-40%[17].

Under Art. 138 WRV «Sunday and holidays recognised by the state shall remain protected by law as days of rest from work and of spiritual improvement». In 2006, the so-called Federalism Reform transferred the legislative competence to regulate shop opening hours to the *Länder*. The *Länder*'s laws, while confirming the general rule that shops may not open on Sundays and holidays, provided for exceptions. The *Land* Berlin's 2006 *Shop Opening Hours Act* prescribed the opening of shops on all four Sundays in the period of Advent. The Evangelical Church Berlin-Brandenburg-Silesian Oberlausitz and the Berlin Archdiocese lodged a constitutional complaint challenging Berlin's legal provision, whereby the possibilities of opening shops on Sundays and holidays were more extensive as compared to the former legal regulation and to the provisions enacted by other *Länder*. In 2009 the Federal Constitutional Court decided that the impugned provision was incompatible with Art. 4 §§ 1-2 GG in conjunction with Art. 140 GG and Art. 139 WRV. The press release issued by the court's press office specified that

> the Berlin Shop Opening Act is neither a targeted encroachment on the complainants' freedom of religion, nor do the different provisions and options regarding the opening of shops on Sundays and holidays constitute the "functional equivalent" of an encroachment because the provisions which are challenged here are directed towards retail shop owners and not towards the religious communities. Freedom of religion is, however, not limited to the function of a right of defence, but rather it also requires in a positive sense to safeguard the space for active exercise of religious conviction and the realisation of autonomous person-

many (FRG), in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *L'obiezione di coscienza nei paesi dell'Unione europea*, Milan, 1992, pp. 33-34.

[17] EUROPEAN BUREAU FOR CONSCIENTIOUS OBJECTION, *Annual Report on conscientious objection to military service in Europe*, 2019, p. 15, in *https://ebco-beoc.org/sites/ebco-beoc.org/files/attachments/2020-02-14-EBCO%20_Annual_Report_2019.pdf*.

> ality in the area of ideology and religion. The state has this duty to protect also towards the religious communities […].
> The duty of the state to observe ideological and religious neutrality does not run counter to lending the scope of protection of Article 4.1 and 4.2 GG concrete shape by Article 139 WRV. For the constitution itself places the Sunday and the holidays, to the extent that they are recognised by the state, under a special mandate of protection by the state and thus performs an evaluation which is also rooted in the Christian, Western tradition and which uses its calendar.
> As regards work on Sundays and holidays, Article 139 WRV establishes inter alia a relationship of rule and exception. In principle, typical "working-day activity" has to cease on Sundays and holidays, with the protection provided by Article 140 GG in conjunction with Article 139 WRV not being limited to a religious or ideological meaning of Sundays and holidays. In the secularised social and state order, however, the provision is also aimed at pursuing secular objectives such as personal rest, contemplation, relaxation and diversion. Here, the possibility of spiritual edification which is also covered by Article 139 WRV is intended to be granted to all people irrespective of a religious commitment.
> On this basis, it emerges that statutory concepts of protection for guaranteeing rest on Sundays and holidays must, as a rule, make those days, in a recognisable manner, days of rest from work. As regards the shop opening hours at issue here, this means that the exception requires a factual reason which does justice to the protection of Sundays. A mere economic interest of retail shop owners in generating turnover and an everyday interest in purchasing ("interest in shopping") of potential buyers are in principle not sufficient for justifying exceptions from the protection of rest from work and of the possibility of spiritual edification on Sundays and holidays which is directly anchored in the constitution. Apart from that, exceptions must remain recognisable as such for the public and may not amount to life on Sundays and holidays being virtually the same as on working days with their activity[18].

[18] BVerfG, Judgment of the First Senate of 1 December 2009 – 2 BvR 2857/07 –, in *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-134.html*. See also I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 180; K.G. VANCE, *op. cit.*, p. 11.

2.2. Religious and belief groups' right to doctrinal and organizational autonomy

The right to freedom of religion or belief may be exercised either alone or in community with others. It includes the right to form religious or belief associations[19] and, in this respect, it is closely linked to the right to freedom of association. The associational dimension, in turn, is strictly related to the institutional one[20]. Under Art. 137 § 3 WRV

> Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

This principle «basically means absence of state intervention in the doctrine and internal organisation of religious communities»[21]. German scholars have interpreted it as a declination of the principle of neutrality[22] and have defined it the third pillar of the German system of State-religion relationships, along with the right to religious freedom and the principle of separation[23]. While Art. 4 GG protects «corporate expressions of faith»[24], which traditionally only includes freedom of wor-

---

[19] P. UNRUH, *op. cit.*, p. 3; A. VON CAMPENHAUSEN, *The application of the freedom of religion principles of the European Convention on Human Rights in Germany*, cit., p. 184.

[20] «R]eligious freedom, though highly personal and individual, cannot do without institutions. Religion as a matter of social fact is a matter of community, exercised in community with others. Institutions are the framework, the basis, and the structure in which individual belief prospers. No legal order disregarding the institutional aspect of religious freedom can fully guarantee this human right» (G. ROBBERS, *Religious freedom in Germany*, cit., p. 658).

[21] S. FERRARI, *Islam and the European system of State-religions relations throughout Europe*, cit., pp. 480-481.

[22] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 83.

[23] A. VON CAMPENHAUSEN, *Le regime constitutionnel des cultes en Allemagne*, in AA.VV., *The constitutional status of Churches in the European Union countries*, Milan, 1995, p. 47.

[24] K.G. VANCE, *op. cit.*, p. 17.

ship[25], Art. 137 § 3 WRV recognizes religious and belief groups' right to doctrinal and organizational autonomy. The notion of autonomy encompasses a broader range of matters which are recognized to be within religious and belief groups' competence, like the definition of the contents of one's doctrine, the choice between a hierarchical or democratic structure of self-organization, the choice of one's religious leaders and about their education and training, the possibility to carry out charity and social activities, the implementation of the decisions adopted by one's internal organs and based on one's procedural law, the rules on membership and the definition of members' rights and duties, and so on[26]. Specific declinations of the right to autonomy are the right to obtain legal personality[27] and the right to own property[28]. For the purposes of this chapter, the relevant content of the notion of autonomy is «self-determination of religious groups by means of religious rules»[29]. A court decision may be mentioned to highlight the implications for the application of religious or belief rules.

The Baha'i religious community is part of a hierarchically structured religion and its application for registration as an association under Art. 41 of the Civil Code was rejected on the ground that its governing body, the Spiritual Assembly, did not demonstrate to have the necessary legal independence. On 5 February 1991 the Federal Constitutional Court reversed the lower court's decision by referring inter alia to the applicant's religious law. In doing so, it obliged «public authorities to make possible exemptions from the general rule in order to allow reli-

[25] A. VON CAMPENHAUSEN, *Le regime constitutionnel des cultes en Allemagne*, cit., p. 48.

[26] P. UNRUH, *op. cit.*, p. 5; I. AUGSBERG, S. KORIOTH, *op. cit.*, pp. 180-181; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 86.

[27] «Religious communities acquire legal capacity according to general provisions of civil law» (Art. 137 § 4 WRV).

[28] «Property rights and other rights of religious societies or associations in their institutions, foundations and other assets intended for purposes of worship, education or charity shall be guaranteed» (Art. 138 § 2 WRV).

[29] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 179.

gious communities being registered in accordance with their religious norms»[30].

> [To the extent that] courts generally regard the influence of the National Spiritual Assembly on existence, membership and activity of the local Spiritual Assembly provided in the Statutes as impermissible third-party determination of the association from outside, they have misjudged the specific nature of religious associations which organize themselves as a sub-organization of a religious society with a hierarchy defined by their beliefs, and hence the significance of the fundamental right of religious freedom of association for the interpretation and application of the principle of autonomy of association. They have regarded the National Spiritual Assembly as an alien organization determined by other goals and interests which exercises a dominating influence, without accommodating the unity and commonality given by the connection under religious law. The same ultimately applies to the selection of the members of the local Spiritual Assembly by the faithful of the local Baha'i community. By virtue of the connection under religious law, these are also not to be regarded as third parties subjecting the association to determination from outside, and hence removing its self-determination; rather, this type of establishment of memberships complies with the purpose of the association, as a hierarchical management

[30] G. ROBBERS, *Minority Churches in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *The legal status of religious minorities in the countries of the European Union*, Milan, 1994, p. 165. This decision is consistent with the case law that the European Court of Human Rights (ECtHR) developed later, in particular *Metropolitan Church of Bessarabia and Others v. Moldova*, 45701/99, 13 December 2001; *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, 40825/98, 31 July 2008. «In order to render religious communities autonomous, a State must first recognize the legal personality of those that wish to have this status. Without such recognition, they simply cannot *exist* before the State and within the State's legal system. But the State should also provide for a legal status that allows them to exist *autonomously*, that is, to structure themselves internally as prescribed by their doctrinal principles. For example, a hierarchical Church should be allowed to have a legal status that does not force it to adopt democratic rules, where a majoritarian principle is applied to decision-making or the clergy is elected by the believers instead of the competent religious authorities» (R. BOTTONI, *The Legal Treatment of Religious Minorities: Non-Muslims in Turkey and Muslims in Germany*, in H. GÜLALP, G. SEUFERT (eds.), *Religion, Identity and Politics: Germany and Turkey in Interaction*, London, 2013, p. 122).

> body to administrate the affairs of the local Baha'i community (Art. 2.1 of the Statutes and the Preamble), and in fact serves to realize it[31].

The notion of autonomy thus allows room for the application of religion- and belief-based rules, which in turn leads to the recognition of exemptions from laws of general application, for example in the field of tax law, data protection law or – as we will see later on – labor law[32]. At the same time, it should be stressed that autonomy is not absolute, and limitations apply («within the limits of the law that applies to all»)[33]. This is the case of religious adjudication. Germany does not recognize it explicitly, but this may take place in the form of either mediation or arbitration. Criminal law and most matters of family law (like marriage, divorce and the status of children) remain nevertheless – as stated by the Federal Court of Justice itself – «absolute state monopoly»[34].

> In Germany, there is no system of personal laws based on religious affiliation. The state legal system is wholly secular. Religious activities are protected, but there is no part of the law which adopts religious rules as a source of law[35].

Religious marriages may be celebrated, but they may not be recognized civil effects. Only civil marriage has legal effects. Further, until 2008 the celebration of a religious wedding before contracting civil

---

[31] English translation in W.C. DURHAM JR., B.G. SCHARFFS, *Law and Religion: National, International, and Comparative Perspectives*, New York, 2019, p. 493. See also U. SCHAEFER, *An introduction to Bahā'ī law: doctrinal foundations, principles and structures*, in *Journal of Law and Religion*, 18(2), 2002-2003, p. 350.

[32] G. ROBBERS, *Religious freedom in Germany*, cit., p. 654; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181.

[33] On the courts' approaches to elaborate the limitation clause, see G. ROBBERS, *Religious freedom in Germany*, cit., pp. 654-655.

[34] Quoted by I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 183. State-endorsed methods of alternative dispute resolution should not be confused with informal solutions linked to the phenomenon of the so-called sharia councils. See M. JARABA, *Khul' in action: How do local Muslim communities in Germany dissolve an Islamic religious-only marriage?*, in *Journal of Muslim Minority Affairs*, 40(1), 2020, pp. 26-47.

[35] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 180.

marriage was a criminal offence (but no penalty was formally prescribed)[36]. There are two main exceptions to the general rule of compulsory civil marriage. The first one concerns two non-Germans entering – in Germany – into a religious marriage, which can obtain civil effects in the home country of one of the spouses. The second one concerns German citizens marrying abroad. For example, a couple may celebrate a religious wedding in Italy. This can be recognized civil effects in Italy and, thus, would be valid also under German civil law[37].

The Civil Code stipulates that an existing marriage or civil partnership is an impediment to marriage (Section 1306)[38], and that a marriage entered into contrary to this provision may be annulled (Section 1314). Bigamy is also a criminal offence. Under Section 172 of the Criminal Code, «Whosoever contracts a marriage although he is already married, or whosoever contracts a marriage with a married person, shall be liable to imprisonment not exceeding three years or a fine»[39]. As regards bigamous or polygamous marriages celebrated abroad, case law had evolved. On 30 April 1985 the Federal Administrative Court ruled that the right of a second wife in a polygamous marriage to stay in Germany

[36] S. KORIOTH, I. AUGSBERG, *Religion and the Secular State in Germany*, 2010, p. 327, in *https://classic.iclrs.org/content/blurb/files/Germany.pdf*; R. PUZA, *Religion in criminal law: Germany*, in M. KOTIRANTA, N. DOE (eds.), *Religion and criminal law*, Leuven, 2013, pp. 108-111; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 96. The rule that civil wedding must always precede religious one may be found in the legal systems of other European countries. Some of them have even enshrined it in the constitution. This is the case of Belgium (Art. 21: «[…]. A civil wedding should always precede the blessing of the marriage, apart from the exceptions to be established by the law if needed»); Luxembourg (Art. 21: «Civil marriage must always precede the nuptial benediction») and Romania (Art. 48 § 2: «[…]. A religious marriage ceremony can be celebrated only after the civil ceremony»). See EUROPEAN PARLIAMENT'S COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Religious practice and observance in the EU Member States*, 2013, p. 24, in *https://www.europarl.europa.eu*.

[37] G. ROBBERS, *Civil effects of religious marriage in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Marriage and religion in Europe*, Milan, 1993, pp. 213-214.

[38] «A marriage may not be entered into if a marriage or a civil partnership exists between one of the persons who intend to be married to each other and a third party». English translation in *https://www.gesetze-im-internet.de/englisch_bgb*.

[39] English translation in *https://www.gesetze-im-internet.de/englisch_stgb*.

had to be regarded as covered by Art. 6 § 1 GG («Marriage and the family shall enjoy the special protection of the state»)[40]. In a subsequent case, the Higher Administrative Court of North Rhine-Westphalia held that the second wife was not entitled to family reunification with her husband and his first wife[41]. In 2004, the Residence Act was approved, which stipulates that «If a foreigner is married to several spouses at the same time and lives together with one spouse in the federal territory, no other spouse will be granted a temporary residence permit» (Section 30(4))[42], consistently with Art. 4 § 4 of the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[43].

2.3. The selective character of State cooperation with religious and belief groups

The cooperation between the State and religious (and, in some case, also belief) groups is the rule in Europe, not the exception.

> There are two reasons that explain this propensity towards cooperation. On the one hand, a tendency to cooperate with all social organizations, both religious and non-religious, is deeply embedded in the genetic code of the European modern state, which is founded on the consensus of its citizens. Cooperation with social groups is the normal way of governing the state. […]. On the other hand, in the eyes of many states, religions preserve an important significance in terms of social resource, both from a cultural, ethical or political point of view. This explains why, in many legal systems, religion is considered, together with

[40] G. ROBBERS, *Civil effects of religious marriage in Germany*, cit., p. 216.

[41] P. FOURNIER, *Muslim marriage in Western courts. Lost in transplantation*, 2010, p. 60.

[42] English translation in *https://www.gesetze-im-internet.de/englisch_aufenthg*. See also H.M. HEINIG, *Immigration and religion in Germany*, in A. MOTILLA (ed.), *Immigration, National and Regional Laws and Freedom of Religion*, Leuven, 2012, pp. 103-104.

[43] «In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor». Official *Journal L 251 of 3 October 2003*.

art and science, a 'civilizational factor' of general interest which must be safeguarded and encouraged by public powers[44].

The remarks above apply admirably to Germany. Religions and beliefs are recognized to play a positive role. «They have not only private but public standing, without being part of the state. German legal culture recognizes a public sphere, which is distinct from governmental or private spheres»[45]. Not only religious and belief groups have the right to carry out a number of social activities as part of their mission (being their right to organizational autonomy recognized)[46], but such activities also enjoy the protection and assistance of the State because they are regarded as having a positive impact on society at large[47]. Two of the most typical forms of State support (in Germany and elsewhere) are public funding and favorable fiscal treatment[48], whereas the recognition of religious and belief groups' public standing is especially evident in the place assigned to religious teaching in public schools. Germany's

[44] S. FERRARI, *Religion and Religious Communities in the EU Legal System*, in *Insight Turkey*, cit., pp. 71-72.

[45] G. ROBBERS, *Religious freedom in Germany*, cit., p. 659.

[46] See G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 87.

[47] «The church-related welfare associations, together with the state, also play an important role in providing social services. The Free Welfare Associations, among which *Caritas* and *Diakonie* are giants, delivered, until unification, 70 percent of all family service, 60 percent of all service for the elderly, 40 percent of all hospital beds, and 90 percent of all employment for the handicapped in West Germany» (B. THÉRIAULT, *op. cit.*, p. 606). For a general treatment of this topic, see A. VON CAMPENHAUSEN, *State and Church in the social field in Germany*, in I. DÜBECK, F.L. OVERGAARD (eds.), *Social welfare, religious organizations and the State*, Milan, 2003, pp. 33-46.

[48] G. ROBBERS, *Financing religion in Germany*, in B. BASDEVANT-GAUDEMET, S. BERLINGÒ (eds.), *The financing of religious communities in the European Union*, Leuven, 2009, pp. 169-176; A. HOLLERBACH, *Finances and assets of the churches. Survey on the legal situation in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Stati e confessioni religiose in Europa. Modelli di finanziamento pubblico. Scuola e fattore religioso*, Milano, 1992, pp. 57-76; R. ASTORRI, *Il finanziamento tributario delle confessioni religiose. Profili comparatistici*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2006, pp. 3-25. For recent figures, see US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit.

legal regulation in this realm «can be read as something of a reaction to the Nazi regime's moves to control education from the national level, to ignore the rights of parents, and to restrict religious education and pluralism in education policy»[49]. Under Art. 7 § 3 GG

> Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

Whereas instruction in a specific religion is offered in public schools whenever a minimum number of students require it (usually six to eight)[50], other forms of cooperation are reserved to specific religious and belief groups, that is, they are not available to all of those existing and operating in the German territory. As noted by Silvio Ferrari,

> everywhere in Europe this cooperation is selective. States do not collaborate in the same way with all religious communities: some receive more and others less, and yet others nothing at all. The readiness of states to collaborate with religious groups is greater when there is harmony between the values that regulate religious society and those that lie at the basis of civil society; it is less where this harmony does not exist. That is the reason why almost everywhere in Europe it is more complicated and expensive to build a mosque than to build a church […]. In other words, state support is mainly directed toward those religious communities that, by virtue of the number of their members, the time they have been in a country, or the political wight they

[49] K.G. VANCE, *op. cit.*, p. 11. See also G. ROBBERS, *Religious freedom in Germany*, cit., pp. 652-653; A. VON CAMPENHAUSEN, *State, school and church in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Stati e confessioni religiose in Europa. Modelli di finanziamento pubblico. Scuola e fattore religioso*, Milano, 1992, pp. 175-178; A. BARB, *The New Politics of Religious Education in the United States and Germany*, in *German Law Journal*, 20(7), 2019, pp. 1041-1045; S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 328.

[50] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 89.

> carry are better integrated into the cultural and social traditions of a people and are in harmony with the rules and values that inspire it[51].

The selective character of cooperation in Germany results not only in a given policy of signing bilateral agreements (as we will see later on), but also in the provision of specific forms of legal personality. All religious groups may acquire legal personality according to the general provisions of civil law (Art. 137 § 4 WRV), but those whose statute and number of members offer a guarantee of their permanency may obtain recognition as corporations under public law (Art. 137 § 5 WRV)[52]. The latter do not become organs of the state apparatus[53], but obtain a recognition of their public standing and of the importance of their existence and activities in the public sphere. This implies a number of benefits, which «are usually referred to as a 'bundle of privileges' since there are advantages in tax law, employment law, social law, building law and media law»[54].

---

[51] S. FERRARI, *Models of State-Religion Relations in Western Europe*, in A.D. HERTZKE (ed.), *The Future of Religious Freedom: Global Challenges*, Oxford, 2012, p. 204.

[52] «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 rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organisation, it too shall be a corporation under public law».

[53] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 85.

[54] S. MÜCKL, *Religious persons as legal entities – Germany*, in L. FRIEDNER (ed.), *Churches and Other Legal Organisations as Legal Persons*, Leuven, 2007, p. 113. See also US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 4; A. HOLLERBACH, A. DE FRENNE, *New rights and new social developments in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *"New liberties" and Church and State Relationships in Europe*, Milan, 1998, pp. 131-133; M. GAS-AIXENDRI, *Protection of Personal Data and Apostasy: Comparative Law Considerations*, in *Journal of Church and State*, 57(1), 2015, p. 82; A. VON CAMPENHAUSEN, *The Churches and employment regulations in the Federal Republic of Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Churches and labour law in the EC countries*, Milan, 1993, pp. 105-113; M. GERMANN, *The portrayal of religion in Germany: the media and the arts*, in N. DOE (ed.), *The portrayal of religion in Germany: the media and the arts*, Leuven, 2004, pp. 77-107.

The most known one is the right to levy the church tax on one's members. Under Art. 137 § 6 WRV «Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* law». The status of corporation under public law is granted by each *Land*. The two major Churches (Catholic and Protestant) have this status in all *Länder* and levy the church tax, which provides them with about 80 per cent of their entire budget. Although this is a right, and not a duty, a number of religious minorities having the status of corporation under public law – including the Jewish communities – have used this opportunity, too[55].

> The rate of the church tax is between eight and nine percent of the individual's wage and income tax liability. Other tax standards may also be used. Although this concept is not a requirement, in most cases the church tax is collected by the state tax authorities for the larger religious communities, as a result of an arrangement with the state. For this service the religious communities usually pay four percent of the tax yield to the state by way of compensation[56].

The ECtHR has regarded this funding system as consistent with the European standards of human rights protection.

> The applicants are entirely free to practise or not to practise their religion as they please. If they are obliged to pay contributions to the Roman Catholic Church, this is a consequence of their continued membership of this church, in the same way as e.g. the duty to pay contributions to a private association would result from their membership of such association. The obligation can be avoided if they choose to leave the church, a possibility for which the State legislation has expressly provided. By making available this possibility, the State has introduced sufficient safeguards to ensure the individual's freedom of religion. The individual cannot reasonably claim, having regard to the terms of Art. 9 of the Convention, to remain a member of a particular church and nevertheless be free from the legal obligations, including financial obligations, resulting from this membership according to the autonomous regulations of the church in question. The same considerations would also apply if the matter were to be considered under Art. 11 of the Convention (freedom of association).

[55] G. ROBBERS, *Financing religion in Germany*, cit., p. 170.

[56] G. ROBBERS, *Financing religion in Germany*, cit., p. 170.

> The Commission therefore concludes that there is no appearance of any interference with the applicants' rights under Art. 9 (and/or 11) of the Convention, and their complaint in this respect must accordingly be rejected as being manifestly ill-founded[57].

In recent years, in Germany – like in other European countries characterized by a church-tax based funding system – an increasing number of members of religious groups having the status of corporation under public law have apostatized to avoid paying the church tax. This can be done by means of a declaration before state authorities. An issue has raised concerning those faithful unwilling to pay the church tax but still expecting to have access to church services. On 26 September 2012, the Federal Administrative Court endorsed the Catholic Church's position, rejecting the possibility of a partial membership: admission to the sacraments and religious services requires the payment of the church tax[58]. The judges held that

> state authorities may not accept a declaration of withdrawal from 'the church as a corporation under public law'. Such a declaration could be understood as a theological qualification or condition, the validity of which the secular state is not competent to judge[59].

On 24 September, two days before the court decision, a decree of the German Bishops' Conference had entered into force, stating that those who – for whatever reason – declared apostasy before the competent civil authorities violated their duty to remain in communion with the Catholic Church and to contribute financially to the carrying out of its mission. They would not be automatically excommunicated, but they would not be admitted to confession and Eucharist nor could be a godparent or hold office in the Church[60].

---

[57] *E. and G. R. v Austria* [dec.], application no. 9781/82, 14 May 1984. See also *Klein and Others v. Germany*, 10138/11, 6 April 2017.

[58] PEW FORUM, *In Western European Countries With Church Taxes, Support for the Tradition Remains Strong*, 30 April 2019, in *https://www.pewforum.org*.

[59] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, in *Ecclesiastical Law Journal*, 15, 2013, pp. 70-71.

[60] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, cit., p. 70. See also P.V.A. BRAIDA, *Breve commento al decreto generale*

Today there are reportedly 180 religious groups having the status of corporation under public law[61], but a significant number still remains excluded from this form of cooperation. German scholars have stressed that this difference does not breach the principles of parity and equal treatment.

> The difference in status draws its legitimacy from the social impact and relevance that the various religions and denominations have; it also meets differences in approach and self-understanding of those religions and denominations. Rights that are attached to each status match duties that follow from the status. Either status can be obtained when the individual religious community meets minimum requirements[62].

Consistently with the ECtHR case law on this matter, differences can be made, provided that they are based on 'objective and reasonable justification' and that all religious groups complying with the prescribed requirements may have access to the most privileged status[63]. As regards Germany, it has been noted that, on the one side, the church-tax based funding system was introduced after State Churches were disestablished, in order to make them dependent on their own income[64]. On the other side, religious minorities – especially new ones – did not suffer from past expropriations and, thus, they do not need to be compensated; further, they do not carry out social activities to the same great extent as traditional Churches[65].

---

della conferenza episcopale tedesca entrato in vigore il 28.9.2012 circa l'uscita dalla Chiesa (Kirchenaustritt), in *Quaderni di diritto e politica ecclesiastica*, 2, 2013, pp. 479-495; S. TESTA BAPPENHEIM, *Brevi cenni introduttivi alla fattispecie del Kirchenaustritt in Germania*, in *Diritto e Religioni*, 11, 2011, pp. 327-338.

[61] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 5. A non-exhaustive list is provided at *https://www.uni-trier.de/index.php?id=26713*.

[62] G. ROBBERS, *Germany*, cit., pp. 161-162; see also I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 184.

[63] ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, 40825/98, 31 July 2008, paras 87-104; *Savez crkava "Riječ života" and Others v. Croatia*, 7798/08, 9 December 2010, paras 85-92.

[64] G. ROBBERS, *Religious freedom in Germany*, cit., p. 651.

[65] G. ROBBERS, *Financing religion in Germany*, cit., p. 175.

Examining in greater detail who are the subjects included in and those excluded from Germany's system of selective cooperation, the first important category to mention is belief groups. Under Art. 137 § 7 WRV, «Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies». All Member States of the Council of Europe offer legal protection to the individual dimension of what nowadays tends to be called as 'non-religion' – an expression encompassing the worldviews of «atheists, agnostics, sceptics and the unconcerned»[66]. Germany belongs to the tiny minority of countries treating belief groups (that is, 'belief' as a collective or institutional reality, and not as an individual conviction) in the same way as religious groups[67]. Belief groups in Germany may organize a teaching of non-denominational ethics and morals in public schools, when this is requested by students non attending denominational religious courses. In fact, the organization *Humanistischer Verband Deutschlands* has made use of this possibility[68]. They may obtain the legal status as corporations under public law at the same conditions prescribed for religious groups. When they obtain this recognition, they may levy the church tax on their members[69]. The Criminal Code prohibits and punishes offences against religious and belief groups alike[70].

---

[66] ECtHR, *Kokkinakis v. Greece*, 14307/88, 25 May 1993, para. 31

[67] The Belgian constitution stipulates that «The salaries and pensions of representatives of organizations recognized by the law as providing moral assistance according to *a non-denominational philosophical* concept are paid for by the State» (Art. 181 § 2), and that «Schools run by public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognized religions and *non-denominational ethics* teaching» (Art. 24 § 1). The Norwegian constitution stipulates that «Our values will remain our Christian and *humanist* heritage» (Art. 2), and that «The Church of Norway, an Evangelical-Lutheran church, will remain the National Church of Norway and will as such be supported by the State. […]. All religious and *belief* communities should be supported on equal terms» (Art. 16). The italics is mine.

[68] See S. COGLIEVINA, *Il trattamento giuridico dell'ateismo nell'Unione*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2011, p. 82.

[69] PEW FORUM, *op. cit.*

[70] S. TESTA BAPPENHEIM, *Il delicato bilanciamento costituzionale fra libertà di parola e tutela del sentimento religioso: profili comparati*, cit., pp. 24-25; R. PUZA, *Religion in criminal law: Germany*, cit., p. 98. Under Section 166 (Revilement of religious faiths and religious and ideological communities) of the Criminal Code, «(1) Whoever

The recognition of the status as corporation under public law did not cause conflicts until the Congregation of Jehovah's Witnesses in the *Land* of Berlin applied for it in the early 1990s[71]. On 26 June 1997 the Federal Administrative Court denied it on the ground of the group's lack of loyalty to the State. German scholars have maintained that the *Grundgesetz* «contains an unwritten requirement of legal loyalty: a religious community applying for public law status may not revolt against the legal order or interfere with existing law»[72]. This requirement was allegedly not met by the Jehovah's Witnesses because they are instructed not to exercise active and passive electoral rights in state elections, although voting is not a legal duty in Germany[73]. The Federal Constitutional Court vacated the decision.

> The principle of strict parity would be undermined if content-related and confession-related aspects were to be used as delimitation criteria with the aid of an additional, unwritten precondition for the award. […]. Insofar as the decision not to participate in state elections was religiously motivated, there was specific protection of not only the propagation of this faith conviction, but also of its practice, namely by Article 4 of the Basic Law in conjunction with the Church's right of self-determination (Article 137.3 of the Weimar Constitution). […]. As the writings of the Jehovah's Witnesses are alleged to document, their understand-

publicly or by disseminating material (section 11 (3)) reviles the religion or ideology of others in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine. (2) Whoever publicly or by disseminating material (section 11 (3)) reviles a church or other religious or ideological community in Germany or its institutions or customs in a manner which is suitable for causing a disturbance of the public peace incurs the same penalty».

[71] S. MÜCKL, *Relationship between State and Church – Public Church Law versus Religious Constitutional Law*, in H. PÜNDER, C. WALDHOFF (eds.), *Debates in German Public Law*, Oxford, 2014, p. 166; C. HOFHANSEL, *Recognition Regimes for Religious Minorities in Europe: Institutional Change and Reproduction*, in *Journal of Church and State*, 57(1), 2013, pp. 111-112. For a description of the background situation, see G. BESIER, R.-M. BESIER, *Jehovah's Witnesses' Request for Recognition as a Corporation under Public Law in Germany: Background, Current Status, and Empirical Aspects*, in *Journal of Church and State*, 43(1), 2001, pp. 35-48.

[72] S. MÜCKL, *Religious persons as legal entities – Germany*, cit., 112.

[73] G. ROBBERS, *Religious freedom in Germany*, cit., p. 650. See also S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 325.

> ing of religious neutrality – with the consequence of non-participation in elections – did not mean that they rejected elections as forming the basis of the democratic state. The Jehovah's Witnesses, rather, accepted the results of democratic elections as forming the basis of state authorities which were also legitimate in the light of their religion. […].
> A religious community which wishes to become a corporate body under public law must be true to the law. It must offer an assurance that it will comply with the valid law, in particular that it will exercise the sovereign powers assigned to it only in compliance with the constitutional and other statutory ties. […]
> A religious community which wishes to acquire the status of a corporate body under public law must offer in particular an assurance that its future conduct will not endanger the fundamental constitutional principles set forth in Article 79.3 of the Basic Law, the fundamental rights of third parties which are entrusted to the protection of the State, or the fundamental principles of the liberal law on religious organisations and state law on churches that are enshrined in the Basic Law. […].
> Requiring loyalty to the State on the part of the religious bodies that are corporate bodies over and above the requirements that have been named is not necessary to protect the fundamental constitutional values, and moreover is incompatible with them. […].
> Over and above this, the demand that a religious body that is a corporate body must be loyal to the State is a legal point of difficulty. "Loyalty" is a vague term amenable to an extraordinary number of possible interpretations, ranging through to the expectation that the religious community must adopt specific state goals or regard itself as the guardian of the State. The term namely relates to an inner disposition, to a notion, and not merely to external conduct. Hence, it not only endangers legal certainty, but it also leads to a drawing together of religious community and State which is neither required nor permitted by the state's law on churches that is enshrined in the Basic Law[74].

Thus, loyalty is due to the law, not to the State. This clarification points to the core of the notion of cooperation. According to the Federal Constitutional Court

> it cannot be an aim in accordance with the Basic Law to award corporate body status in order to use privileges to persuade a religious community to cooperate with the State. The Basic Law explicitly prescribes

[74] BVerfG, Judgment of the Second Senate – 2 BvR 1500/97 –, paras. 38, 42, 77, 83, 92 and 94, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rs20001219_2bvr150097en.html*.

> cooperation of the State with the religious communities in some instances – for instance in the levying of church tax (Article 140 of the Basic Law in conjunction with Article 137.6 of the Weimar Constitution) or in religious instruction (Article 7.3 of the Basic Law) – and permits it in other areas. However, it does not impose this on the religious communities as a prerequisite. Whether they accept such offers or seek to keep their distance from the State is left to their religious self-perception[75].

In subsequent years, the Congregation of the Jehovah's Witnesses was awarded the status of corporation under public law in other *Länder* and, although in some cases the issue was brought to court, by 2017 it had obtained this legal status in all 16 *Länder*[76].

Far more controversial is the Church of Scientology, which has been involved in a great number of court decisions. A study of 2003 has found 85 reported cases[77]. In Germany, the Church of Scientology is regarded as a business organization and, as such, it is not covered by either the term 'religious' or 'ideological' association within the meaning of the *Grundgesetz*[78]. It is maintained that, although traditional Churches are also involved in commercial activities, these are part of their charity and social mission, and business is not the true motivation of their activities[79]. What is more, public authorities at the federal and *Land* level monitor the activities of the Church of Scientology, and so called 'sect filters' are used by public and private employers. Major parties like the Christian Democratic Union, the Christian Social Union,

[75] BVerfG, Judgment of the Second Senate – 2 BvR 1500/97 –, cit., para 96.

[76] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2017, p. 8, in *https://www.state.gov/reports/2017-report-on-international-religious-freedom/germany*.

[77] G. TAYLOR, *Scientology in the German courts*, in *Journal of Law and Religion*, 19(1), 2003-2004, p. 156.

[78] S. MUCKEL, *The Church of Scientology under German Law on Church and State*, in *German Yearbook of International Law*, 41, 1998, p. 316. See also G. ROBBERS, *Religious freedom in Germany*, cit., pp. 661-663. See also S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 323.

[79] S. MUCKEL, *The Church of Scientology under German Law on Church and State*, cit., p. 307.

the Social Democratic Party and the Free Democratic Party exclude members of the Church of Scientology from the party[80].

Different concerns are raised by Islam. Its religious nature is undisputed and, on the one side, the increase of the Muslim population, mainly as an effect of immigration from Turkey[81], poses the same challenges as the spread of other non-traditional religious and belief groups.

> This appearance of non-Christian religious groups causes specific problems for the legal system, which was framed when these new religious phenomena were by and large irrelevant. Against the background of a changed social context the question arises as to whether the old constitutional background is still adequate to meet the current challenges[82].

On the other side, the 'Islam Question' is harshened by the securitization of religious freedom policies in many countries of the world[83], which has had an adverse impact on the approach towards religious practices such as religious slaughter, the wearing of an Islamic head-

---

[80] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 9.

[81] «Turkish and Italian immigrants constitute the most important sections of the alien population in Germany. The reason for this is, that in the days of recruitment of guest workers, it was mostly Turkish and Italian citizens who carne to Germany on account of special agreements Germany had with these countries. As the groups became settled in Germany, a phase of family reunification followed. Nowadays the search for work and family reunification are still the most common reasons for immigration to Germany» (H.M. HEINIG, *Immigration and religion in Germany*, cit., p. 94).

[82] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 177. See also G. ROBBERS, *Minority Churches in Germany*, cit., p. 170; A. VON CAMPENHAUSEN, *New and small religious communities in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *New religious movements and the law in the European Union*, Milan, 1999, pp. 177-190; M. KOENIG, *Incorporating Muslim Migrants in Western Nation States – A Comparison of the United Kingdom, France, and Germany*, in M. BURCHARDT, I. MICHALOWSKI (eds.), *After Integration. Islam, Conviviality and Contentious Politics in Europe*, Berlin, 2015, pp. 43-58.

[83] H.-C. JASCH, *State-Dialogue with Muslim Communities in Italy and Germany. The Political Context and the Legal Frameworks for Dialogue with Islamic Faith Communities in Both Countries*, in *German Law Journal*, 8(4), 2007, pp. 346-47. See also S. FERRARI, *Individual Religious Freedom and National Security in Europe After September 11*, in *Brigham Young University Law Review*, 2, 2004, pp. 357-384.

scarf and ritual circumcision. Manifestations of religion, which used to be balanced against the protection of other equally important fundamental freedoms, now tend to be evaluated in terms of their adherence to a certain notion of national identity. The expression of different cultural values tends to be regarded in itself as a threat to the democratic order[84].

It is against this political and ideological framework that the issue of the *Islamic Charta* by the Central Council of Muslims in Germany on 20 February 2002 should be placed. This document states inter alia that

> 11. Whether German citizens or not, the Muslims represented by the Central Council (ZMD) accept the basic legal order of the Federal Republic of Germany as guaranteed by its Constitution, [providing] for the rule of law, division of power, and democracy, including a multi-party system, universal suffrage and eligibility, and freedom of religion. Therefore they accept as well everybody's right to change his religion, to have another religion, or none at all. The [Quran] forbids any compulsion or coercion in matters of faith.
> 12. We do not aim at establishing a clerical theocracy. Rather we welcome the system existing in the Federal Republic of Germany where State and religion harmoniously relate to each other.
> 13. There is no contradiction between the divine rights of the individual, anchored in the [Quran], and the core right as embodied in Western human rights declarations. We, too, support the intended protection of individuals against an abuse of State power. Islamic law demands equal treatment of what is identical and permits unequal treatment of what is not identical. The command of Islamic law to observe the local legal order includes the acceptance of the German statutes governing marriage and inheritance, and civil as well as criminal procedure.
> 19. The Central Council (ZMD) promotes an integration into society of the Muslim population which will not be detrimental to their Islamic

[84] See for example S. MUCKEL, *Islam in Germany*, in R. POTZ, W. WIESHAIDER (eds.), *Islam and the European Union*, Leuven, 2004, p. 42; M. PULTE, *Securitisation of religious freedom: religion and the limits of state control. The German situation*, in M. KIVIORG (ed.), *Securitisation of religious freedom: religion and limits of state control*, Granada, 2020, p. 237. A theoretical framework is provided by J. HÜTTERMANN, *Figurational Change and Primordialism in a Multicultural Society: A Model Explained on the Basis of the German Case*, in M. BURCHARDT, I. MICHALOWSKI (eds.), *After Integration. Islam, Conviviality and Contentious Politics in Europe*, Berlin, 2015, pp. 17-42.

> identity. Therefore it supports all efforts for a better minority command of the German language and for better access to German citizenship[85].

The latter is an especially sensitive issue, because of public authorities' perceived need to reduce Turkish influence on German Muslims[86]. Like other European countries, Germany has been concerned with the construction of a national Islam. These efforts – where the drive for cooperation needs to be carefully balanced with the respect for Muslim organizations' autonomy – led in 2006 to the launch of the German Islam Conference, a forum for the dialogue between public authorities and Muslims in Germany[87], and in 2018 to the establishment of an institute of Islamic theology in order to train imams and teachers of Muslim religion[88]. The provision of an Islamic religious teaching in public schools has been an especially debated issue for the last few decades[89]. Only in two cases has the status of corporation under public law been awarded to Muslim groups: the Ahmadiyya Muslim Jamaat obtained this recognition in the *Länder* Hesse in 2013 and Hamburg in 2014. It is reported that it does not levy the church tax – just like the Congregation of the Jehovah's Witnesses[90]. An application for the award of the status of corporation under public law to the Ahmadiyya

---

[85] English translation in *http://www.zentralrat.de/3037.php*. See also M. ROHE, *The Application of Shari'a Law in Europe: Reasons, Scope and Limits*, in P. KRUINIGER (ed.), *Recht van de Islam 23. Vereniging tot bestudering van het Recht van de Islam en het Midden-Oosten*, Den Haag, 2009, p. 54.

[86] See for example US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 13.

[87] H.-C. JASCH, *op. cit.*, pp. 372-378.

[88] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 13. See also M. PULTE, *Public authorities and the training of religious personnel in Europe – the German perspective*, in M. MESSNER (ed.), *Public Authorities and the Training of Religious Personnel in Europe*, Granada, 2015, p. 123.

[89] See J. LUTHER, *Il modello tedesco della politica ecclesiastica e religiosa*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2014, pp. 217-218; S. MUCKEL, *Islam in Germany*, cit., pp. 71-75; M. PULTE, *Public authorities and the training of religious personnel in Europe – the German perspective*, cit., pp. 121-122; G. ROBBERS, *Religious freedom in Germany*, cit., pp. 657-658; US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., pp. 6 and 12.

[90] PEW FORUM, *op. cit.*

Muslim Jamaat has been pending in the *Land* North Rhine-Westphalia since 2018. The party Alternative for Germany introduced a motion to parliament to deny recognition alleging that the religious group aimed at establishing a theocratic order. The motion was rejected by other parties on the ground that only the State Chancellery is competent in this matter[91].

The most recent developments have concerned the institution of Muslim and Jewish military chaplaincies. The government discussed it with the German Islam Conference in 2019, and actuals measures were taken with regard to the Jewish communities. In July a bill was approved in order to appoint Jewish military chaplains for about 300 Jews serving in the army. The Conference of Orthodox Rabbi praised this measure as «an important signal, especially in times […] when there is again fertile ground for anti-Semitism, hate from the far right, and conspiracy theorists»[92]. In June 2021, Rabbi Zsolt Balla, based in the synagogue of Leipzig in Saxony, became the first Jewish military chaplain to be appointed since the expulsion of all Jews from the army in 1933[93]. Earlier in December 2019, Baden-Württemberg appointed for the first time two rabbis as police chaplains – one for Baden and the other one for Württemberg[94].

[91] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 9.

[92] Cit. in US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2020, p. 14, in *https://www.state.gov/reports/2020-report-on-international-religious-freedom/germany*.

[93] See *https://www.haaretz.com/world-news/europe/.premium-the-first-jewish-chaplain-to-the-german-military-in-100-years-takes-office-1.9925258*. See also P.C. APPELBAUM, *Loyalty Betrayed: Jewish Chaplains in the German Army During the First World War*, Portland, 2014.

[94] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2020, cit., p. 14.

3. Bilateral agreements[95]

Unlike other European constitutions, the German one does not mention bilateral agreements[96]. The authorization for the State to conclude them is grounded on Art. 138 § 1 WRV[97] read together with Art. 123 § 2 GG[98], which includes the *Reichskonkordat* signed in 1933 between

[95] 'Agreement' is the English word which will be used throughout this chapter, following Greg Taylor's note: «The German name for it is *Vertrag*; *Staatsvertrag* is also sometimes used for this or other agreements with Jewish and other religious groups. Vertrag is the German word for "treaty" as well as "contract", so that the word *Staatsvertrag* could be translated as "state treaty" and the word *Vertrag* as "treaty" or "contract". However, "treaty" would be quite misleading in English, as it would suggest that the agreement has a status in international law which it clearly does not have. "Contract", too, would sound odd». Hence the preference for «the all-purpose English word "agreement"» (G. TAYLOR, *German Courts Decide Who Is Jewish: On the Agreements between the German State and Jewish Groups, and the Resulting Litigation*, in *Journal of Law and Religion*, 20(2), 2004-2005, p. 397, fn. 1).

[96] See for example Albania (Art. 10 § 6: «Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers. These agreements are ratified by the Assembly»); Italy (Art. 7 § 2: «[The relationships between the State and the Catholic Church] shall be regulated by the Lateran pacts. Amendments to such pacts which are accepted by both parties shall not require the procedure of constitutional amendments»; Art. 8 § 3: «[The relationships of denominations other than Catholicism] with the State shall be regulated by law, based on agreements with their respective representatives»); Poland (Art. 25 §§ 4-5: «The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers»).

[97] «Rights of religious societies to public subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the Länder. The principles governing such redemption shall be established by the Reich».

[98] «Subject to all rights and objections of interested parties, treaties concluded by the German Reich concerning matters within the legislative competence of the Länder under this Basic Law shall remain in force, provided they are and continue to be valid under general principles of law, until new treaties are concluded by the authorities competent under this Basic Law or until they are in some other way terminated pursuant to their provisions».

the Holy See and Germany amongst the international treaties. Bilateral agreements are indeed mentioned in the *Länder*'s constitutions[99]. They are regarded as special acts not of administrative law, but of internal public law (and, in the case of concordats with the Holy See, also of international law). They do not confer the status of corporation under public law, nor is this status a prerequisite to conclude an agreement[100]. Nevertheless, religious and belief groups signing one are usually corporations under public law strengthening the cooperation relationship through the bilateral instrument[101].

German scholars have identified three generations of bilateral agreements. The *Reichskonkordat* and the agreements signed in the 1920s and 1930s by Bavaria, Prussia and Baden respectively with the Catholic and the Evangelical-Lutheran Churches were characterized by the conferral of privileges counterweighted by strong jurisdictionalism[102]. The agreements of the 1950s and 1960s reflected Germany's new democratic orientation through the recognition of religious groups' autonomy and the guarantee of religious freedom. Those decades were further characterized by the signing of the first agreements with religious and belief groups other than the two traditional Churches. Finally, after Germany's reunification the bilateral instrument has experienced a great expansion[103]. An increasing number of agreements has been

[99] W. WIESHAIDER, *L'intesa tra il Governo Federale Tedesco e il Consiglio Centrale degli Ebrei in Germania*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2003, pp. 425-426. See also J. LUTHER, *op. cit.*, pp. 212-213, fn. 9.

[100] J. LUTHER, *op. cit.*, p. 212.

[101] R. ASTORRI, *Lo sfondamento dell'orizzonte tradizionale: dalla prospettiva nazionale a quella globale. Stati e confessioni religiose alla prova. Religione e confessioni nell'Unione europea tra speranze disilluse e problemi emergenti*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 10, 2014, p. 10.

[102] Francesco Margiotta Broglio has referred to them as 'totalitarism concordats'. See F. MARGIOTTA BROGLIO, *L'istituto concordatario negli Stati totalitari e negli Stati democratici*, in *Ulisse*, 15, 1980, pp. 24-50.

[103] J. LUTHER, *op. cit.*, p. 214; G. ROBBERS, *Treaties between religious communities and the State in Germany*, in R. PUZA, N. DOE (eds.), *Religion and law in dialogue: Covenantal and non-covenantal cooperation between State and religion in Europe*, Leuven, 2006, pp. 60-62. See also A. HOLLERBACH, *Concordati e accordi concordatari in Germania sotto il pontificato di Giovanni Paolo II*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 73-79; R. PUZA, *Convenzioni concordatarie e diritto statale*

signed not only by Eastern *Länder* exiting the system of State-religion relationships of the communist age[104], but also by Western *Länder*. There have been notable cases like Hamburg, which signed no bilateral agreement before Germany's reunification and concluded five between 2005 and 2012 – respectively with the Holy See, the Evangelical-Lutheran Church, the Jewish community, the Alevite community and jointly with three Muslim organizations. Nowadays, all *Länder* have agreements with the Evangelical-Lutheran Church (in some of them the one concluded with Prussia is legally binding) as well as with the Jewish community. Agreements with the Catholic Church are in force in all *Länder* except Berlin (also in this case some consider the one signed with Prussia as legally binding)[105]. The website of the Gregorian Pontifical University, which contains the most updated database of existing concordats, reports as many as 49 agreements signed at the *Länder* level. Some are general, whereas others focus on specific topics, like the legal regulation of theological faculties[106]. A smaller number of *Länder* have signed agreements with Muslim organizations (Bremen and, as

in materia religiosa. L'esperienza della Germania, in *Quaderni di diritto e politica ecclesiastica*, 2, 1997, pp. 317-322; A. VON CAMPENHAUSEN, *Conventional cooperation between State and religion: Austria and Germany*, in R. PUZA, N. DOE (eds.), *Religion and law in dialogue: Covenantal and non-covenantal cooperation between State and religion in Europe*, Leuven, 2006, pp. 7-9.

[104] R. ASTORRI, *Gli accordi concordatari durante il pontificato di Giovanni Paolo II. Verso un nuovo modello?*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 33-34; R. ASTORRI, *Le convenzioni generali con i nuovi Länder della Germania*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2009, pp. 307-315.

[105] R. ASTORRI, *Lo sfondamento dell'orizzonte tradizionale: dalla prospettiva nazionale a quella globale*, cit., pp. 10-11.

[106] See *https://www.iuscangreg.it/accordi_santa_sede.php#SGermany*.

mentioned, Hamburg[107]) or the Alevite community (Bremen[108], Hamburg[109], Lower Saxony[110] and Rheinland-Palatinate[111]).

Bilateral agreements often repeat fundamental provisions of constitutional law or specify rights recognized in non-bilateral laws[112]. The matters they regulate typically include theological faculties, religious teaching in public schools, private education, spiritual assistance in the army and hospitals, the media, tax exemptions and funding[113]. As regards theological faculties in State universities, the Catholic Church enjoys a wider sphere of autonomy than the Evangelical-Lutheran Church. Professors in these institutes are public employees, but those working in Catholic ones must obtain a canonical mandate (*missio canonica*). When this is revoked, the concerned professor may no longer teach at the theological faculty but, being still a public employee, he

[107] G. ROBBERS, *The mutual roles of religion and State in Germany*, in B. SCHANDA (ed.), *The mutual roles of religion and State in Europe*, Trier, 2014, p. 85; S. TESTA BAPPENHEIM, *Accordo fra Libera Città Anseatica di Amburgo e comunità islamiche locali. Un prototipo per la Germania, una prospettiva per altri Paesi?*, in C. CARDIA, G. DALLA TORRE (ed.), *Comunità islamiche in Italia*, Torino, 2015, pp. 533-555.

[108] The text in original language is available at *https://www.rathaus.bremen.de/sixcms/media.php/13/Alevitischen_Gemeinde_in_Deutschland.pdf*.

[109] The text in original language is available at *https://www.hamburg.de/contentblob/3551366/4e1faf8a197766a1d54a25acf7e5ee3a/data/download-alevitische-gemeinde.pdf*.

[110] The text in original language is available at *https://www.mk.niedersachsen.de/download/102951/Vertragsentwurf_Aleviten.pdf*.

[111] The text in original language is available at *https://mwwk.rlp.de/fileadmin/mbwwk/Service_Sonstiges/Vertrag_Land_RLP__Alevitische_Gemeinde_Deutschland_eV.pdf*.

[112] G. ROBBERS, *Treaties between religious communities and the State in Germany*, cit., p. 62.

[113] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 82; R. PUZA, *Citoyens et fidèles dans les pays de l'Union européenne: l'Allemagne*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *Citizens and believers in the countries of the European Union*, Milan, 1999, pp. 401-402. See also R. ASTORRI, *La qualificazione professionale degli insegnanti di religione cattolica tra riforma della scuola e riforma dell'Università*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2001, pp. 132-134; R. PUZA, *Giovanni Paolo II e i concordati. Il finanziamento della Chiesa*, in *Quaderni di diritto e politica ecclesiastica*, 1, 1999, pp. 123-124.

or she must obtain another university post[114]. We will return later on the issue of the ministerial exception.

Although religious rules – as noted – are not a source of law in Germany, both state laws and bilateral agreements may refer to them[115]. Nevertheless, the reference to religion- and belief-related rules does not tend to be related to exemption rights. For example, the 2003 Agreement between the Federal Republic of Germany and the Central Council of Jews in Germany does not regulate any religion-specific needs (religious dietary rules, holidays, and so on). The preamble acknowledges «the special historical responsibility of the German people for Jewish life in Germany having regard to the immeasurable suffering that the Jewish population endured in the years from 1933 to 1945»[116]. As it has been noted

> Reviewing the agreement, one notes that it does not contain very much else beyond expressions of goodwill. Doubtless its chief importance (besides the allocation of funds for which it provides) lies in the fact that it exists at all. It represents a recognition by the whole German nation of the importance of good relations with Jewish people and of their valued place in society. There is no such comparable nationwide agreement with any other religious or ethnic group in German society, not even the Christian churches, unless one would include the Concordat of 1933[117].

Jewish communities' religion-specific needs are typically regulated by agreements signed with each *Land*, although they are not necessarily treated as exemption rights. For example, Art. 4 of the agreement with Saxony-Anhalt ensures the rights of indemnity contained in the Act on

---

[114] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 89. See also I. RIEDEL-SPANGERBERGER, *La Facoltà di teologia in Germania*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2001, pp. 187-190.

[115] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181.

[116] An English translation of the agreement is available in G. TAYLOR, *German Courts Decide Who Is Jewish*, cit., pp. 419-421.

[117] G. TAYLOR, *German Courts Decide Who Is Jewish*, cit., p. 411. On payments to Holocaust survivors and subsidies to Jewish groups, see also US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., pp. 6 and 13-14.

Sundays and Holidays on Jewish holidays, but it does not include any specific clauses on Jewish public employees or students in public schools[118]. Art. 5 § 3 of the agreement with Hamburg commits the Land to offer as far as possible, within the existing possibilities, a diet complying with religious dietary rules in public institutions. Art. 6 of this agreement, like Art. 3 of the one signed with Bremen[119], guarantees the Jewish community's right to maintain cemeteries, to establish new ones and to modify existing ones[120]. No mention is made of specific burial-related rules, though. By contrast, the agreements signed jointly with three Muslim organizations by Hamburg (Art. 10) and Bremen (Art. 6) recognize their right to have on-purpose burial sites in cemeteries, with no obligation to use coffins and with the exemption from exhumation[121]. It should be noted that exemption rights in this matter may also be granted by non-bilateral legislation. For example, Art. 1 § 4 of the Burial Decree of the *Land* Hamburg grants exemptions from the compulsory requirement to use coffins when this request is grounded on religion or belief[122]. The guarantee to have access to food compliant with Islamic dietary rules in healthcare, justice and police structures and the right to observe three Islamic holidays are recognized respectively by Arts. 7 and 3 of the Hamburg agreement and by Arts. 7 and 10 of the Bremen one.

Another exemption right that may be found in a bilateral agreement is the protection of the seal of confession. Under Art. 9 of the *Reichskonkordat*

> The clerics may not be required by judicial and other authorities to give information concerning matters which have been entrusted to them

[118] See GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *German Legal Provisions Relating to Religion in the Federal Republic of Germany*, p. 156, in *https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Religionsnormen/German_Legal_Provisions/German_Legal_Provisions_Relating_to_Religion_March_2002.pdf*.

[119] The text in original language is available at *https://www.transparenz.bremen.de*.

[120] The text in original language is available at *http://www.landesrecht-hamburg.de*.

[121] S. MUCKEL, *Islam in Germany*, cit., p. 58.

[122] J. LUTHER, *op. cit.*, p. 216.

> while exercising the cure of souls, and which therefore come within the obligation of pastoral secrecy[123].

The recognition of this exemption right is especially relevant today, because the scandal of child sexual abuses had led lawmakers in different states around the world to discuss mandatory reporting to authorities by the clergy of related crimes learned during confession, or even to introduce bills in parliament[124]. In Germany this exemption right is not reserved to the Catholic Church. For example, Art. 21 of the Agreement of the Free State of Thuringia with the Protestant Churches in Thuringia stipulates that

> The statutory provisions in accordance with which clerics, their assistants and persons, while being trained for their profession participate in this professional activity, are entitled to refuse to give evidence on what is entrusted to them or becomes known to them in their capacity as spiritual advisers shall remain unaffected. The Free State of Thuringia shall stand for the preservation of this protection of the seal of confession and the secrecy regarding cure of souls[125].

Non-bilateral legislation extends this exemption right to all ministers of worship (Section 139 § 2 of the Criminal Code; Section 383 of the Code of Civil Procedure)[126]. Under Section 53 of the Code of Criminal Procedure, a clergyman/woman may not be heard as a witness concerning facts learned during confession or spiritual advice. This prohibition may not be derogated even if the concerned member of the clergy is willing to reveal information. Any evidence given in such circumstances is null and void[127].

---

[123] English translation in GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *op. cit.*, p. 138.

[124] See M. CARNÌ, *Segreto confessionale e derive giurisdizionaliste nel rapporto della* Royal Commission *Australiana*, in *Diritto e Religioni*, 12(1), 2019, pp. 46-63; R. PALOMINO LOZANO, *Seal of confession and child abuse*, in *Ius Canonicum*, 59(118), 2019, pp. 767-812.

[125] GERMAN FOUNDATION FOR INTERNATIONAL LEGAL COOPERATION, *op. cit.*, p. 167.

[126] G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 97.

[127] R. PUZA, *Religion in criminal law: Germany*, cit., p. 106.

4. Exemption rights

This section will examine derogations from general legal rules on the grounds of religion or belief in non-bilateral legislation and in case law.

As mentioned, exemption rights are not recognized in the field of criminal or family law. Cases of deviation from this principle are rather unusual. In 2007 a wife applied for a fast-track procedure of divorce (before the one-year period of separation from her husband) on the grounds of his repeated abuses and death threats. The judge did not grant the request because the parties, of Moroccan origin, were from a cultural environment where it was not unusual for the husband to use physical punishment against the wife – as if this was something which the wife could not therefore reasonably complain about. The judge was also reported to have cited a Koranic verse supporting her decision. The judgment sparked immediate, wide outrage and the judge was removed[128].

Parents do not have the right to refuse a life-saving medical treatment (like a blood transfusion can be in some instances) for their minor children[129]. Responsibilities are different when adults are involved. In 1971 the Federal Constitutional Court decided a case concerning a husband who had been charged with and convicted of involuntary manslaughter for failing to persuade his dying wife to receive a blood transfusion. The couple belonged to the Evangelical Brotherhood Association and believed in the healing power of prayer. The judges justified the man's behavior on the grounds of Art. 4 GG[130].

[128] I. AUGSBERG, S. KORIOTH, *op. cit.*, pp. 185-186. See also *https://www.au.org/church-state/may-2007-church-state/au-bulletin/german-judge-s-use-of-quran-sparks-debate*.

[129] W. LOSCHELDER, *op. cit.*, p. 40; H.-L. SCHREIBER, *New liberties and the physical integrity of the individual life and death in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH-STATE RESEARCH (ed.), *"New liberties" and Church and State Relationships in Europe*, Milan, 1998, p. 112.

[130] K.G. VANCE, *op. cit.*, pp. 7-8; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 84.

A study based on the qualitative reading of 72 decisions of German courts from the 1970s to 2016 on religion-based exemptions requested from school activities (coeducational swimming classes, school trips and sex education classes) has revealed that requests were made by Muslims and by Christians alike. As regards Muslims, the author has noted a shift in the case law from toleration and acceptance of exemption requests (the first ones date back to the mid-1980s) to a firm rejection thereof since the 2000s. This change is linked with increasing concerns about the multicultural character of the German society and the visibility of Islam in the public square[131]. Against the common assumption by the public at large that such legal challenges are a sign of failed integration, this study suggests that just the opposite may be held as true:

> Legal challenges by Muslim parents could only be made because parents acquired German linguistic skills, knowledge of the German legal system, and a sense that they can and should take part in shaping the country's socio-political landscape. Conclusions from the analysis in this article suggest that the more Muslims have become integrated and rooted in Germany, the less their religious concerns have been tolerated in the political and social spheres[132].

4.1. The ministerial exception

One of the most typical exemption rights recognized by Germany – as well as by other Member States of the European Union and of the Council of Europe – is the ministerial exception[133], consisting in a derogation from employment antidiscrimination law which allows religious or belief groups to hire personnel whose views are consistent with their own, and to dismiss them when such views (and related behavior) are regarded as no longer consistent. This is a well-established

[131] F. SPENGLER, *Shar'ī norms and German Schools: Court Challenges to Participation in Swimming Lessons, School Trips and Sex Education*, in *Islam and Muslim-Christian Relations*, 30(3), 2019, pp. 363-382.

[132] F. SPENGLER, *op. cit.*, p. 378.

[133] See P. SLOTTE, H. ÅRSHEIM, *The Ministerial Exception. Comparative Perspectives*, in *Oxford Journal of Law and Religion*, 4(2), 2015, pp. 171-198.

principle, whose application is nevertheless increasingly contested, mostly because of the difficulty to draw a line between public behavior which the employer has the right to scrutinize, and private one where the individual has a right to self-determination. A matter of controversy is also the definition of the different degrees of loyalty attached to each professional position: it is reasonable to expect for example that the teaching personnel in a religion- or belief-based private school is bound to different contract obligations than the cleaning staff.

Section 9 of Germany's General Act on Equal Treatment regulates permissible difference of treatment on the grounds of religion or belief.

> (1) Notwithstanding Section 8, a difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity.
> (2) The prohibition of different treatment on the grounds of religion or belief shall be without prejudice to the right of the religious community referred to under Section 1, the facilities assigned to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation[134].

Controversies originated by the application of the ministerial exception are decided by German courts taking into account not only State law but also the concerned religious or belief group's legal rules defining the relationships between employers and employees[135]. Two cases are worthy of special attention, because they have been brought to the Federal Constitutional Court. The first judgment dates back to 4 June 1985. Maximilian Rommelfanger was a physician working in a hospital of a Catholic foundation, which provided medical care to patients regardless of their religion or belief and whose personnel also included

[134] English translation in *https://www.gesetze-im-internet.de/englisch_agg*.

[135] I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 187; G. ROBBERS, *Germany*, p. 164.

non-Catholics (about 20%). The employment relationships were governed by guidelines stipulating that the employer could terminate the contract for important reasons including inter alia breaches of loyalty or serious offences against the Catholic Church's moral principles. In 1976 Germany decriminalized abortion at certain conditions. In 1979 the physician signed a letter with about fifty persons, which was published by the magazine *Stern*, to express disapproval of the criticism made by some circles against the abortion law. In 1980 his employment contract was terminated, because his views were just the opposite of those of the Catholic Church and he had further widely circulated them by means of the published letter. Dr. Rommelfanger challenged the dismissal. The three instances of labor courts (Essen, regional and federal) rejected the views of the employer, which then lodged a constitutional complaint. The Federal Constitutional Court noted that voluntary abortion was a serious crime under the Canon Law of the Catholic Church – a crime prescribed since the very first centuries of Christianity and sanctioned by excommunication. It thus found that the applicant had breached his duty of loyalty and that his dismissal was valid. Dr. Rommelfanger remained unemployed for one month and then found a new job in a non-Catholic hospital. He also applied to the European Commission of Human Rights alleging a violation of Art. 10 of the European Convention on Human Rights, but his application was rejected as manifestly ill-founded[136].

The second case originated from the dismissal of a senior doctor working in a Catholic hospital, on the ground that he remarried without a prior annulment of his first marriage. On 22 October 2014, the Federal Constitutional Court annulled the Federal Labor court's decision whereby the dismissal had been declared void. Interestingly the constitutional judges referred to the ECtHR case law which, in their view, did not justify a change in the interpretation of constitutional law in this matter[137]. Nevertheless, a subsequent case, originated from similar cir-

[136] *Maximilian Rommelfanger against the Federal Republic of Germany*, 2242/86, 6 September 1989 [dec.]. See also G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 91; I. AUGSBERG, S. KORIOTH, *op. cit.*, p. 181, fn. 4.

[137] F. CRANMER, *German Constitutional Court upholds dismissal of divorced & remarried Roman Catholic doctor*, in *Law & Religion UK*, 27 November 2014, *https://*

cumstances, led to a different outcome. In that case, the Federal Labor Court requested a preliminary ruling to the Court of Justice of the European Union and, on 20 February 2019, it decided in favor of the plaintiff, a Catholic chief of medicine in a Catholic hospital, who had been dismissed for marrying a second time[138].

It should be noted that a number of the most relevant decisions by the European Court of Human Rights[139] and the Court of Justice of the European Union[140] have involved Germany. This may be partly explained by the circumstance that about 1.5 million people are employed by Germany's largest Churches together[141].

---

lawandreligionuk.com/2014/11/27/german-constitutional-court-upholds-dismissal-of-divorced-remarried-roman-catholic-doctor.

[138] E. TÖPFER, *Franet National contribution to the Fundamental Rights Report 2020*, p. 40, in *https://fra.europa.eu/sites/default/files/fra_uploads/germany-frr2020_en.pdf*.

[139] See the cases *Obst*, 425/03, 23 September 2010; *Schüth*, 1620/03, 23 September 2010; *Siebenhaar*, 18136/02, 3 February 2011; *Müller*, 12986/04, 6 December 2011 [dec.]; *Baudler*, 38254, 6 December 2011 [dec.]; *Reuter*, 39775, 6 December 2011 [dec.]. The texts of the judgments are available at *https://hudoc.echr.coe.int*. See also G. ROBBERS, *Church autonomy in the European Court of Human Rights. Recent developments in Germany*, in *Journal of Law and Religion*, 26(1), 2010-2011, pp. 281-320; F. CRANMER, *Employment Rights and Church Discipline: Obst and Schüth*, in *Ecclesiastical Law Journal*, 13(2), 2011, pp. 208-215; N. HERVIEU, *Salarié d'une Église, Tu pourras commettre l'adultère … Enfin pas systématiquement (CEDH 23 septembre 2010, Obst et Schüth c. Allemagne). Licenciement pour cause d'adultère et obligations spécifiques des salariés d'organisations religieuses*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 2010, pp. 1-5; C. WALTER, *German national report*, in M. RODRÍGUEZ BLANCO (ed.), *Law and Religion in the Workplace. Proceedings of the XXVIIth Annual Conference, Alcalá de Henares, 12-15 November 2015*, Granada, 2016, pp. 196-198.

[140] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, 17 April 2018; *IR v JQ*, 11 September 2018. The texts of the judgments are available at *http://curia.europa.eu*. For a broader discussion of the ministerial exception in the European Union, see E. SVENSSON, *Religious Ethos, Bond of Loyalty, and Proportionality. Translating the 'Ministerial Exception' into 'European'*, in *Oxford Journal of Law and Religion*, 4(2), 2015, pp. 224-243.

[141] C. EVANS, A. HOOD, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, in *Oxford Journal of Law and Religion*, 1(1), 2012, pp. 82-83; G. ROBBERS, *État et Églises en République fédérale d'Allemagne*, cit., p. 90.

4.2. Religious slaughter

The derogation from the compulsory previous stunning of animals to slaughter according to a religious rite is one of the most controversial exemption rights in Germany as well as in other European countries[142]. Few religious practices are as misunderstood as religious slaughter.

Religious slaughter is the slaughter of an animal carried out according to a religious rite, in order to eat the meat thereof. The slaughter of an animal in order to offer it as a sacrifice to a deity, without consuming its meat, is not covered by the legal protection afforded to religious slaughter. Although in practice the only relevant religious rites in the European territory are the Jewish and Islamic ones, any religious community having internal rules that regulate the slaughter of an animal for the production of food for human consumption would be covered by the same legal provisions.

There exists a widespread idea that religious slaughter (and only religious slaughter) is characterized by the throat cut. In fact, a large part of the public opinion and media associate religious slaughter to the image of blood. However, it should be stressed that the cut of the throat of large animals also takes place in conventional slaughter. This is a compulsory requirement prescribed by the State (or any other secular competent authority): for hygienic reasons, blood must be drained from any large animals whose meat is meant to be used for human consumption.

The definition of religious slaughter as slaughter without previous stunning is equally misleading. It is true that, in the State's perspective, the main difference between conventional and religious slaughter is that the former is carried out *after* stunning, whereas there are religious rites prescribing slaughter *without* previous stunning. However, in the religious community's perspective, religious slaughter is characterized by a number of rules, rites and procedures far more complex than the mere slaughter without previous stunning. Further, a number of Muslim communities allow previous stunning, provided that the animal is only

[142] R. BOTTONI, *I recenti decreti delle Regioni vallona e fiamminga sulla macellazione rituale nel contesto dei dibattiti belga ed europeo in materia*, in *Quaderni di diritto e politica ecclesiastica*, 2, 2017, pp. 545-580.

rendered unconscious, and that death is actually caused by the act of slaughter (and not of stunning).

Religious slaughter was practiced by ancient Jews long before the Christian age as a humane method to kill animals. Jews in Europe practiced it for centuries without raising any problems, among other reasons because Christian communities had no rules on animal welfare. From the Jewish point of view, *shechita* was much less painful than clubbing or stabbing animals, hanging them upside down and cutting their throats (practices that were widespread amongst Christian communities). Methods alternative to *shechita* could leave the animal stunned, but not unconscious, and butchering could start while the animal was alive and even alert. It is worth noting that one of the seven Noahide laws – which in Judaism are regarded as applying to all human beings as descendants of Noah – prohibits the eating of a limb torn from a live animal[143]. This rule may seem odd in the 21st century, but it should be placed in the historical context where it developed – a context characterized by little or no consideration for animals as living being. There exists a common misunderstanding according to which animal welfare is a 'secular' interest (pursued by conventional slaughter, which allegedly does not harm animals). This would be opposed to a 'religious' interest (the protection of the right to religious freedom, which allegedly includes the right to harm non-human sentient beings). However, animal welfare is not an alien concept in Judaism and Islam. Jews and Muslims dealt with this issue before the enactment of the first secular legal measures to protect animals. Even stunning – which secular legal regulations regard as the technique allowing the slaughter of an animal in the least painful way, according to the current state of scientific knowledge and technological progress – was introduced in conventional slaughter in the context of industrialization, out of a need to kill as many animals as possible in as little time as possible[144].

[143] S. LAST STONE, *Jewish law. Dynamics of belonging and status*, in R. BOTTONI, S. FERRARI (eds.), *Routledge Handbook of Religious Laws*, London, 2019, p. 161.

[144] At this regard, Italy's National Bioethics Committee has developed some interesting considerations (*Opinion concerning religious slaughter and animal pain*, 19 September 2003). In Judaism and Islam, religious rules concerning slaughter address the problem of the legitimacy of killing animals to produce food for human consump-

Between World War I and World War II, religious slaughter was prohibited in most of Europe, including – it goes without saying – Germany (*Animal Slaughter Act* and *Ordinance on the Slaughter of Warm-Blooded Animals* of 21 April 1933, *Animal Welfare Act* of 24 November 1933 and *Ordinance on the Slaughter of Cold-Blooded Animals* of 14 January 1936)[145]. After the end of World War II, most European countries have allowed again this practice – that is, religious slaughter without previous stunning. As mentioned, the killing of an animal according to a religious rite envisaging prior stunning does not conflict with State law on slaughter. Limitations or prohibitions always and only apply to religious slaughter *without* previous stunning.

Under both the *Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing*, and the *Council Regulation 1099/2009 of 24 September 2009 on the protection of animals at the time of killing*, which repealed and replaced the Directive, previous stunning is compulsory. However, Member States may derogate from this compulsory requirement in the case of religious

---

tion. Religious slaughter stresses that other living beings are not freely available to human beings. By sacralizing the procedure to kill an animal, religious slaughter emphasizes the gravity of this act. Killing an animal is not something ordinary, which may be carried out without reflecting on the fact that it causes the death of a living being. Modern, industrial methods of slaughter have affected this original meaning, by making it misunderstood. Contemporary societies have lost the direct relationship between human beings and farm animals, which characterized the past and somehow 'humanized' the moment when an animal was killed. Slaughter aiming at the production of food has been depersonalized and organized according to economy- and industry-related needs. Nevertheless, the ethical value of religious slaughter should not be neglected. Detailed rules for example on the sharpness of the blade and the way the cut must be performed aim at reducing animal pain. It goes without saying that these provisions should be evaluated in the light of the knowledge and the techniques that were available when religious slaughter was codified. It is legitimate to ask the question of whether the progress of such knowledge and techniques allows room for reconsidering some of those rules. At the same time, it is necessary to stress that religious slaughter lacks any intention to be cruel against animals, and that it was rather envisaged to prevent any avoidable suffering. The text in original language is available at *http://bioetica.governo.it*.

[145] S. FERRARI, R. BOTTONI, *Legislation Regarding Religious Slaughter in the EU Member, Candidate and Associated Countries*, 2010, p. 88, in *https://issuu.com/florencebergeaud-blackler/docs/report-legislation*.

slaughter, provided that some requirements are complied with: religious slaughter may only be carried out 1) in slaughterhouses, 2) under the responsibility of the official veterinarian, and 3) provided that bovine animals are mechanically restrained before slaughter. Most EU countries have allowed a derogation, including Germany[146].

Germany provides for both a 'standard' and 'exceptional' derogation from the compulsory requirement of previous stunning. The former, which is easier to obtain, allows a religious community to modify stunning parameters in order to perform reversible stunning before religious slaughter. It is typically granted to Muslim communities. Under Art. 14 § 2 of the *Ordinance on the protection of animals at the time of slaughter or killing* of 3 March 1997

> By way of derogation from Article 13 § 6 in conjunction with Annex 3, the competent authority may authorise temporarily:
> […];
> 3. short-time electric stunning by way of derogation from Annex 3, part II, no. 3.2 with a minimum time for the current flow of two seconds, and by way of derogation from Annex 3, part II, no. 3.3 for cattle older than six months, without current flowing through the heart as a method for stunning, in so far as is necessary to meet the requirements of the members of certain religious communities, to whom mandatory rules of their religious community forbid the use of other methods for stunning[147].

The exceptional derogation allows to be exempted from any form of previous stunning and can only be applied for by religious communities, whose rules require slaughter without stunning or prohibit consumption of meat of animals slaughtered in a different way. Under Art. 4a of the *Animal Welfare Act*, enacted on 24 July 1972 and amended a number of times:

> (1) Warm-blooded animals may be slaughtered only if stunned before exsanguination.

[146] See R. BOTTONI, *Legal Aspects of Halal Slaughter and Certification in the European Union and its Member States*, in Y.R. AL-TEINAZ, S. SPEAR, I.H.A. ABD EL-RAHIM (eds.), *The Halal Food Handbook*, Hoboken, 2020, pp. 256-260.

[147] English translation in S. FERRARI, R. BOTTONI, *op. cit.*, p. 86.

> (2) Notwithstanding paragraph 1, stunning is not required in case
> 1. it is impossible under the circumstances of an emergency slaughter,
> 2. the competent authority have granted an exceptional permission for slaughter without stunning (religious slaughter); this exceptional permission may be granted only where necessary to meet the needs of members of certain religious communities in the territory covered by this Act whose mandatory rules require slaughter without stunning or prohibit consumption of meat of animals not slaughtered in this way or
> 3. this is provided through statutory ordinance according to Article 4b §3[148].

Thus, the exceptional permission requires the existence of a religious commandment, which all believers must respect. As a consequence, only the Jewish communities have always been granted the 'exceptional' derogation. By contrast, Muslim communities' requests to perform religious slaughter without previous stunning have often been rejected[149]. This difference of treatment may historically be grounded also on political considerations, as highlighted by the Gelsenkirchen Administrative Tribunal in a judgment of 1982.

> The permission for Jews to slaughter represents an act of political, cultural and humanitarian compensation to the Jews who are still alive (*den noch lebenden Juden*). The Jewish religion has in Germany a greater historical tradition than the Muslims. Jews have integrated more or less into the German people (*Volk*) as Germans with essentially the same rights and duties. There exists no violation against the principle of equal treatment with respect to the Muslims[150].

On 15 June 1995 the Federal Administrative Court justified the denial of the exceptional permission to a Muslim organization on the ground that «the faith of Sunnites, just as the faith of Muslims in general, does not contain any mandatory provisions that ban the consumption of the meat of animals that were stunned before they were slaughtered». This restriction does not violate the right to religious freedom

[148] English translation in S. FERRARI, R. BOTTONI, *op. cit.*, p. 84.

[149] See for example S. MUCKEL, *Islam in Germany*, cit., pp. 50-52.

[150] Quoted by S. LAVI, *Unequal rites – Jews, Muslims and the History of Ritual Slaughter in Germany*, in *Tel Aviver Jahrbuch für deutsche Geschichte*, 37, 2009, p. 174.

«if the religious conviction of the person concerned only prohibits him or her from the consumption of the meat of animals that were not ritually slaughtered»[151]. The court added that

> the adherents of such a religion […] are neither legally nor factually forced to eat the meat of animals that were not ritually slaughtered. The ban on ritual slaughter does not ban the consumption of the meat of animals that were ritually slaughtered. The adherents of such a religion can change over to food of vegetable origin or to fish, and they can resort to meat that is imported from other countries. Certainly, meat is a usual food today. Doing without meat, however, does, according to the Court, not constitute an unreasonable restriction of the freedom to develop one's personality. The court concluded that the difficulty that this restriction adds to planning one's diet, which is to be measured against the standard of Article 2.1 of the Basic Law is reasonable in the interest of the protection of animals[152].

A Turkish citizen and pious Sunni Muslim, who had been living in Germany for 20 years and operated a butcher's shop, had been granted the exceptional permission to cater for his customers until 1995, when the above-mentioned judgment was issued. He lodged a constitutional complaint arguing that

> with a view to the precept of the state's strict neutrality as regards religious and philosophical creeds, state courts cannot decide in a binding manner whether mandatory provisions in the mentioned sense exist for the individual member of the respective religious group. It is therefore sufficient if it can be inferred, with sufficient clarity, from the circumstances that a serious religious conviction exists[153].

Interestingly, the complainant also claimed a violation of his right to occupational freedom[154]. The Federal Constitutional Court regarded the

[151] Quoted by BVerfG, Judgment of the First Senate of 15 January 2002 – 1 BvR 1783/99 –, para 12, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2002/01/rs20020115_1bvr178399en.html*.

[152] BVerfG, Judgment of the First Senate of 15 January 2002, cit., para 11.

[153] BVerfG, Judgment of the First Senate of 15 January 2002, cit., para 20.

[154] BVerfG, Judgment of the First Senate of 15 January 2002, cit., paras 21-23. In India, where cow slaughter is a major socially and politically divisive issue, members

constitutional complaint as well-founded and, in the judgment of 15 January 2002, it recognized the claimant's right to be granted an exceptional permission to perform religious slaughter without previous stunning. This decision, adopted unanimously, rested on the interpretation of the legal elements 'religious group' and 'mandatory provisions'.

> [T]he concept of a "religious group" under § 4a.2.2 of the Animal Protection Act does not require that such a group: (1) fulfils the prerequisites for the recognition as a religious body under public law pursuant to Article 137.5 of the *Weimarer Reichsverfassung* [WRV, Constitution of the German *Reich* of August 11, 1919]; or (2) is entitled to engage in imparting religious instruction pursuant to Article 7.3 of the Basic Law. The Court found that for granting an exemption pursuant to § 4a.2, number 2 of the Animal Protection Act, it is sufficient that the applicant belongs to a group of persons who are united by a common religious conviction […]. This means that groups within Islam whose persuasion differs from that of other Islamic groups may also be considered as religious groups under the terms of § 4a.2, number 2 of the Animal Protection Act […]. This interpretation of the concept of a "religious group" is in accord with the Constitution and, in particular, takes Articles 4.1 and 4.2 of the Basic Law into consideration. […].
>
> Indirectly, this interpretation has consequences also when it comes to dealing with the concept of "mandatory provisions" that prohibit the members of the religious group in question from the consumption of the meat of animals that were not ritually slaughtered. The competent authorities, and in the case of disputes, the courts, are to examine and to decide whether the religious group in question complies with this prerequisite, because this is the legal element that is required for the grant of the exceptional permission that is sought. In the case of a religion that, as Islam does, takes different views as regards mandatory ritual slaughter, the point of reference of such an examination is not necessarily Islam as a whole or the Sunnitic or Shiitic persuasions of this religion. The question whether mandatory provisions exist is to be answered with a view to the specific religious group in question, which may also exist within such a persuasion […].

---

of the Muslim Quraishi Community who were mainly engaged in the butchers trade lodged a petition with the Supreme Court, complaining that the laws of the States of Bihar, Uttar Pradesh, and Madhya Pradesh infringed their rights to freedom of religion and freedom of occupation, too, insofar as they restricted cattle slaughter. See D. BARAK-EREZ, *Symbolic Constitutionalism: On Sacred Cows and Abominable Pigs*, in *Law, Culture and the Humanities*, 6(3), 2010, p. 427.

> In this context, it is sufficient that the person who needs the exceptional permission pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act in order to supply the members of a religious group, states, in a substantiated and understandable manner, that the common religious conviction of the religious group mandatorily requires the consumption of the meat of animals that were not stunned before they were slaughtered […]. If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself […] is to refrain from making a value judgement concerning this belief […]. In the light of Article 4 of the Basic Law, the state cannot negate the "mandatory" nature of a religious norm for the sole reason that the respective religion has also rules that take its adherents' pressure of conscience into consideration by admitting exemptions, *e.g.*, with a view to present environment of its adherents and the dietary habits that prevail there […][155].

In the same year (2002), the Parliament approved an amendment to constitution including animal welfare as a national objective, in order to give it constitutional protection and greater weight when balanced against religious freedom[156].

> Art. 20A GG. Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Subsequent case law remained divergent, with some courts that granted the 'exceptional' derogation, and others that did not[157]. In the political and public debate, the issue of religious slaughter remains a hotly debated one.

---

[155] BVerfG, Judgment of the First Senate of 15 January 2002, cit., paras 55-57. See also M. ROHE, *Islamic norms in Germany and Europe*, in A. AL-HAMARNEH, J. THIELMANN, *Islam and Muslims in Germany*, 2008, pp. 55-57; *The Constitutional Court's "Traditional Slaughter" Decision: The Muslims' Freedom of Faith and Germany's Freedom of Conscience*, in *German Law Journal*, 3(2), 2002, E7.

[156] C.E. HAUPT, *Free exercise of religion and animal protection: a comparative perspective on ritual slaughter*, in *George Washington International Law Review*, 39, 2007, pp. 868-872.

[157] S. FERRARI, R. BOTTONI, *op. cit.*, p. 89.

> Besides organizations for the protection of animals, some extremist nationalists used this conflict for defaming the judiciary to 'support the claims of immigrants (including Jews living in Germany since more than 1000 years?) against the ethic standards of Germans in their own country'[158].

In any case, the exceptional permission to slaughter without previous stunning may only be requested for the production of meat intended for internal consumption. Export of meat from animals subject to a method of religious slaughter without prior stunning is strictly forbidden[159]. This practice is only allowed to guarantee the right to religious freedom of those who live in Germany, and not to gain economic profit. This is a remarkable difference with other European countries, where religious slaughter without previous stunning is regarded as a powerful instrument to promote export to Muslim markets[160].

4.3. Religious symbols

Two different issues have emerged in Germany concerning religious symbols[161]: one is the controversy over the display of the crucifix in classrooms of Bavarian public school – which will not be addressed here as it is not related to an exemption right[162]–: the other one revolves

---

[158] M. ROHE, *Islamic norms in Germany and Europe*, cit., p. 57.

[159] S. FERRARI, R. BOTTONI, *op. cit.*, p. 88.

[160] This is the case of Lithuania, Poland and Italy. See R. BOTTONI, *I recenti decreti delle Regioni vallona e fiamminga sulla macellazione rituale nel contesto dei dibattiti belga ed europeo in materia*, cit., pp. 546-550; R. BOTTONI, *The Italian Experience with Halal Certification: The Case of Halal Italia*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 6, 2020, pp. 1-18.

[161] The most updated and comprehensive study on religious symbols is S. TESTA BAPPENHEIM, *I simboli religiosi nello spazio pubblico: profili giuridici comparati*, Napoli, 2019.

[162] On this issue see R. PUZA, *Citoyens et fidèles dans les pays de l'Union européenne: l'Allemagne*, cit., pp. 387-392; H.M. HEINIG, *Religion in public education – Germany*, in G. ROBBERS (ed.), *Religion in public education*, Trier, 2011, pp. 177-179; S.P. RAMET, *op. cit.*, pp. 140-141; K.G. VANCE, *op. cit.*, pp. 14-15; S. KORIOTH, I. AUGSBERG, *op. cit.*, p. 329; P. CAVANA, *I simboli religiosi nello spazio pubblico nella recente esperienza europea*, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoe*

around the right to wear a religious symbol. What is significant about the German experience is that a number of *Länder* have indeed granted a derogation from the general prohibition on some categories of people to wear a religious symbol, but they have granted it to Christian and/or Western symbols, and not to Islamic ones[163].

On 24 September 2003, the Federal Constitutional Court ruled in a case concerning Ms. Ludin, a Muslim woman who had not been appointed to the teaching profession

> on the grounds of lack of personal aptitude. By way of a reason, it was stated [by the Stuttgart Higher School Authority] that the complainant was not prepared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality[164].

The Stuttgart Administrative Court, the Higher Administrative Court of Baden-Württemberg and the Federal Administrative Court concurred that a teacher wearing a headscarf in the classroom was liable to impose a influence on young pupils, which they could not avoid[165]. In the opinion submitted to the Federal Constitutional Court, the Federal Government attached great importance

---

chiese.it), 28, 2012, pp. 33-35. See also ECtHR, *Lautsi and Others v. Italy*, 30814/06, 18 March 2011 [GC], para 28.

[163] The focus will be on the *hijab*. On *burkas* and *niqabs*, see J. THIELMANN, K. VORHOLZER, *Il burqa in Germania: un problema minore*, in *Quaderni di diritto e politica ecclesiastica*, 1, 2012, pp. 211-218; OPEN SOCIETY JUSTICE INITIATIVE, *Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments, and the State of Play*, 2018, pp. 44-49, in *https://www.justiceinitiative.org/uploads/dffdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf*.

[164] BVerfG, Judgment of the Second Senate of 24 September 2003 – 2 BvR 1436/02 – para 3, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html*.

[165] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., paras 7, 10 and 14-15.

> to the employer's prediction of future danger in that the teacher's conspicuous outer appearance might have a long-term detrimental influence on the peace at the school, in particular because throughout all the lessons the pupils were confronted with the sight of the headscarf and thus the expression of a *foreign* [*sic*!] religious belief, without a possibility of avoiding it[166].

The Federal Constitutional Court examined the meanings attached to the Islamic headscarf, which «is not in itself a religious symbol»[167]. These included the meanings of a «symbol for upholding traditions of the society of the wearer's origin» and of «a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women»[168]. By a majority of 5 vote to 3[169], the court did conclude that the complainant had «in a constitutionally unacceptable manner been denied access to a public office», but that this happened because the exclusion lacked the necessary, sufficiently definite statutory basis[170]. In doing so, the court invited the *Länder* to adopt legislation prescribing such prohibitions or limitations. In fact, it held that «the *Land* legislature responsible is at liberty to create the statutory basis that until now has been lacking»[171]. This position has been criticized in that it failed to provide some indications on permissible legislation, and it extended the margin of discretion to the point that all imaginable

[166] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 22. The italics is mine.

[167] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 50.

[168] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 51.

[169] M. MAHLMANN, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, in *German Law Review*, 4(11), 2003, p. 1107.

[170] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., paras 30, 38, 49, 57-58, 61, 72.

[171] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 62. For a general discussion of the judgement, see S. TESTA BAPPENHEIM, *Il Kopftuch e la libertà religiosa nelle scuole tedesche: una, nessuna, centomila*, in *Coscienza e libertà*, 38, 2004, pp. 104-121.

solutions might be regarded as equally legitimate from the constitutional point of view[172].

The minority judges attached a dissenting opinion holding that the majority seemed to ignore that the constitution itself provided the legal basis for the refusal to appoint a headscarved woman[173]. «The uncompromising wearing of the headscarf in class that the complainant seeks is incompatible with the requirement for a civil servant to be *moderate* and neutral»[174].

After the court decision, half of Germany's *Länder* adopted laws on neutrality regulating the wearing of religious symbols and clothing by teachers in public schools and, in some cases, of other categories of public officials (Baden Württemberg, Bayern, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia and Saarland)[175]. Interestingly, no *Land* of the former Democratic Republic has done so. As Joppke has noted, lawmakers basically faced two options. The first one was a prolongation of

> the German tradition of pro-religious neutrality, which would mean to generally accept veiled Muslim teachers in public school, much as veiled catholic nuns were already accepted in the same capacity. […]. The second option was to move toward stricter, French style neutrality,

---

[172] H.M. HEINIG, *Religion in public education – Germany*, cit., p. 183.

[173] The minority position has been endorsed by A. VON CAMPENHAUSEN, *The German headscarf debate*, in *Brigham Young University Law Review*, 2, 2004, pp. 69-694.

[174] BVerfG, Judgment of the Second Senate of 24 September 2003, cit., para 102. The italics is mine. It should be noted that German case law reached different conclusions in cases concerning private, and not public employees. In 1996 the Hamburg Labor Court found that the dismissal of a Sikh chef growing a beard and wearing a turban at the workplace was illegitimate. On 30 July 2003, the same year as the Ludin case, the Federal Constitutional Court also found that an employer had acted illegitimately by dismissing a veiled saleswoman out of fear of a decrease in sales. See S. TESTA BAPPENHEIM, *«Auri sacra fames?». Sì, ma non troppo. Nota a «BVerfG», 30 luglio 2003*, in *Quaderni di diritto e politica ecclesiastica*, 3, 2005, pp. 811-816; D. SCHIEK, *Just a Piece of Cloth? German Courts and Employees with Headscarves*, in *Industrial Law Journal*, 33(1), 2004, pp. 68-69.

[175] E. HOWARD, *Religious clothing and symbols in employment. A legal analysis of the situation in the EU Member States*, Brussels, 2017, p. 85, in *https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810*.

in which the state prohibits the veil, but then would have to prohibit all religious symbolisms, the Christian ones included[176].

Instead, a third path was followed by the greatest majority of the concerned *Länder*: they did not choose one of those two competing notions of neutrality, but a national version based on the promotion of Christian-Western values[177]. None of them prohibited expressly the Islamic headscarf, but this was «the focus of the laws' prior parliamentary debates and explanatory documents, which have emphasized the need to recognize the Western cultural tradition shaped by Christianity (and Judaism)»[178]. Five *Länder* – Baden-Württemberg, Bavaria, Hesse, North Rhine-Westphalia and Saarland – prohibited the wearing of religious symbols and clothing exempting those representing Christian-Western educational values[179]. Berlin's law, applicable to all civil servants in the justice and law enforcement sectors, made an exception for small crosses or crucifixes worn as jewels[180].

Most of these laws have been challenged before court[181]. A case reached the Federal Constitutional Court which, on 27 January 2015,

---

[176] C. JOPPKE, *State neutrality and Islamic headscarf laws in France and Germany*, in *Theory and Society*, 36, 2007, p. 328.

[177] C. JOPPKE, *op. cit.*, p. 328.

[178] HUMAN RIGHTS WATCH, *Discrimination in the name of neutrality. Headscarf Bans for Teachers and Civil Servants in Germany*, 2009, pp. 1-2, in *https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf*. On cultural Christianity and its alleged neutrality, and the desacralization of the symbols of the majority, see S. MANCINI, M. ROSENFELD, *Sotto il velo della tolleranza. Un confronto tra il trattamento dei simboli religiosi di maggioranza e di minoranza nella sfera pubblica*, in *Ragion pratica*, 2, 2012, pp. 421-452.

[179] HUMAN RIGHTS WATCH, *op. cit.*, pp. 25-27. The Baden-Württemberg case has been closely examined by C. JOPPKE, *op. cit.*, pp. 331-336.

[180] HUMAN RIGHTS WATCH, *op. cit.*, p. 37. For a general discussion of Berlin's neutrality law, reputed to reinforce the types of discrimination that EU law seeks to eliminate, see J.M. MUSHABEN, *Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate*, in *German Law Review*, 14(9), 2013, pp. 1757-1785.

[181] HUMAN RIGHTS WATCH, *op. cit.*, pp. 31-35 and 37-38; OPEN SOCIETY JUSTICE INITIATIVE, *op. cit.*, pp. 46-47; E. HOWARD, *op. cit.*, pp. 85 and 94; J.M. MUSHABEN, *op. cit.*, p. 1768.

issued a judgment concerning two employees in state schools in North Rhine-Westphalia, dismissed because they refused to remove the Islamic headscarf while on duty. By a majority of 6 votes to 2, the court held that

> A statutory prohibition on expressing religious beliefs at the *Land* level (in this case, pursuant to § 57 sec. 4 of the North Rhine-Westphalia Education Act) by outer appearance in an interdenominational comprehensive state school based on the mere abstract potential to endanger the peace at school or the neutrality of the state is disproportionate if this conduct can be plausibly attributed to a religious duty perceived as imperative. An adequate balance between the constitutional interests at issue – the educational staff's freedom of religion, the pupils' and parents' negative freedom of religion, the fundamental right of parents and the educational mandate of the state – can only be struck via a restrictive interpretation of the prohibitive provision, i.e. that there must be at least a sufficiently specific danger to the protected interests[182].

As regards the preference attributed to Christian and Western educational and cultural values or traditions in the carrying out of the educational mandate, the majority concluded that this resulted in a disadvantage for followers of religions other than Christianity and Judaism, which may not be justified under constitutional law[183]. This is not to say that Christian references should not be allowed, but other religious and ideological values should find space, too[184].

---

[182] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, headnote 2, in *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html*. This position has been welcomed as bringing German case law in line with international standards, defined not so much by the ECtHR which, in this matter, recognizes a wide margin of appreciation to contracting States, as by the UN Human Rights Committee, which has a more restrictive approach. See J.R. LEISS, *One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10*, in *German Law Journal*, 16(4), 2015, p. 914.

[183] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 124.

[184] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., paras 111 and 115. On subsequent case law, see E. HOWARD, *op. cit.*, p. 94.

The two dissenting judges rejected the argument that «only a sufficiently specific danger to the peace at school and to state neutrality can justify a ban»[185] on the Islamic headscarf, and they refuted the majority's view that the impugned provision constituted an exemption for Christian and Jewish religions, thus privileging them[186].

Two more court decisions are worth a brief mention. Since 1 January 2019 the municipality of Koblenz prohibited the wearing of the burkini for health-related reasons, but in June the High Administrative Court of Rhineland-Palatinate overturned the ban[187]. On 4 July of the same year, the Federal Administrative Court denied the religion-based exemption requested by a turban-wearing Sikh from the obligation to wear a helmet while riding a motorcycle[188].

4.4. Ritual circumcision

Circumcision is a practice typically associated to Judaism and Islam, but it should be noted that it is rooted also in other contexts, for example in some African cultures as a rite of passage[189]. In Judaism, it is

[185] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 2 of the separate opinion. This view is shared by G. TAYLOR, *Teachers' Religious Headscarves in German Constitutional Law*, in *Oxford Journal of Law and Religion*, 6(1), 2017, pp. 93-111. On the dissenting judges' position, see also M. MAHLMANN, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision*, in *German Law Review*, 16(4), 2015, pp. 895-896 and 898.

[186] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, cit., para 3 of the separate opinion.

[187] US DEPARTMENT OF STATE, *Report on International Religious Freedom: Germany*, 2019, cit., p. 11.

[188] An English translation of part of the judgment may be found on the court's website at *https://www.bverwg.de/en/040719U3C24.17.0*. See also F. CRANMER, *Sikh motorcyclists in Germany obliged to wear helmets*, in *Law & Religion UK*, 10 July 2019, *https://lawandreligionuk.com/2019/07/10/sikh-motorcyclists-in-germany-obliged-to-wear-helmets*.

[189] This has led some scholars to make a distinction (whose usefulness is negated by others) between traditional circumcision and ritual circumcision. See A. LICASTRO, *La questione della liceità della circoncisione "rituale" tra tutela dell'identità religiosa del*

quite uniform. It is the visible sign of the covenant between God and the Jewish people[190], and it is performed on 8-day old male children. As regards Islam, circumcision is not expressly referred to by the Koran (which more generally requires to follow the faith of Abraham)[191], but it is mentioned in a *hadith*. There is considerable variation in this practice amongst Muslims, including the age it should be performed (any time before puberty). As known, it is not traditional in Christianity, which soon abandoned it in the effort to focus on Hellenists and heathens[192].

Just like religious slaughter, ritual circumcision was practiced for centuries in Germany. In the history of the Federal Republic, case law occasionally dealt with it before the controversial judgement of 2012. Four decisions (three of civil law and one of criminal law) seemed to establish the principle that ritual circumcision was legal provided that it was performed *lege artis* and that consent was manifested by both parents and (if he had sufficient maturity) by the child himself. In two other cases, the court granted welfare aid to a Muslim family to finance in one case the circumcision and in the other case its celebration. In short, before 2012, German case law never challenged the principle that parents have the right to have their son circumcised[193].

---

gruppo e salvaguardia del diritto individuale alla integrità fisica, in *Stato, Chiese e pluralismo confessionale. Rivista telematica (www.statoechiese.it)*, 22, 2019, pp. 36-40.

[190] Genesis 17: 1-14; Leviticus 12: 1-3.

[191] Koran 16: 123.

[192] J. LUTHER, *op. cit.*, p. 219; D. ABRAHAM, *Circumcision: Immigration, Religion, History, and Constitutional Identity in Germany and the U.S.*, in *German Law Journal*, 18(7), 2017, p. 1752, fn. 15; S. GATZHAMMER, *Commento alla sentenza del Landgericht Köln del 7 maggio 2012 in tema di circoncisione e commento alla nuova normativa § 1631d del codice civile tedesco (BGB)*, in *Il diritto ecclesiastico*, 1-2, 2013, pp. 358-359.

[193] A. GÜNZEL, *Nationalization of Religious Parental Education? The German Circumcision Case*, in *Oxford Journal of Law and Religion*, 2(1), 2013, p. 207; M. GERMANN, C. WACKERNAGEL, *The Circumcision Debate from a German Constitutional Perspective*, in *Oxford Journal of Law and Religion*, 4(3), 2015, pp. 442-443. For a general treatment of this issue in a comparative perspective, see A. ANGELUCCI, *Dietro la circoncisione. La sfida della cittadinanza e lo spazio di libertà in Europa*, Torino, 2018; V. FORTIER (ed.), *La circoncision rituelle. Enjeux de droit, enjeux de vérité*, Strasbourg, 2016.

An investigation started in November 2010 concerning a child brought to hospital after circumcision led to two indictments: the first one of parents for child abuse, and the second one of the physician who had circumcised the boy «for aggravated battery, "use of a dangerous instrument to physically abuse another and damage their well-being", through a violation of the infant's physical integrity»[194]. The first-instance court acquitted all parties asserting

> that it was important to start from the fact that circumcision served as a rite of passage to document cultural and religious membership in the Muslim community. Uncircumcised, the boy would face the threat of stigmatization in that community. As a final point, the court also noted that its own appointed expert, as well as American practice, saw in circumcision a positive medical benefit improving hygiene and perhaps helping to prevent certain diseases[195].

However, the prosecutor insisted on pursuing the case against the physician and appealed. On 7 May 2012, the District Court of Cologne – disregarding both previous case law and legal literature in favor of ritual circumcision[196], and rather relying on «long-time anti-circumcision activists»[197] – held that circumcision, as a permanent and irreparable change to the child's body not motivated by medical reasons, was a violation of his rights to physical integrity[198] and self-determination, and it was not justified by parents' right to decide on their son's religious upbringing[199]. The physician was finally acquitted because he

[194] D. ABRAHAM, *op. cit.*, p. 1747.

[195] D. ABRAHAM, *op. cit.*, p. 1748.

[196] A. GÜNZEL, *op. cit.*, p. 207.

[197] D. ABRAHAM, *op. cit.*, p. 1748.

[198] Art. 2 § 2 GG: «Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law».

[199] This is covered by the right to religious freedom (Art. 4 §§ 1-2 GG) and the right to the care and upbringing of their children. Under Art. 6 § 2 GG, «The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty».

was found to lack guilt[200] under Section 17 (mistake of law) of the Criminal Code[201].

This decision attracted criticism not only for the outcome of the balancing test of the interests at stake, but also for the construction of such interests. Munzer has noted that Germany's cultural norms disfavor permanent modifications of children's bodies[202].

---

[200] G. ROBBERS, *Recent Legal Developments in Germany: Infant Circumcision and Church Tax*, cit., p. 69; V. PUSATERI, *Uno sguardo oltralpe: la Corte d'Appello di Colonia ritiene che la pratica di circoncisione maschile cd. rituale integri reato*, 2012, in *https://archiviodpc.dirittopenaleuomo.org/d/1728-uno-sguardo-oltralpe-la-corte-d-appello-di-colonia-ritiene-che-la-pratica-di-circoncisione-maschile*.

[201] «If, at the time of the commission of the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the penalty may be mitigated pursuant to section 49 (1)».

[202] S.R. MUNZER, *Secularization, anti-minority sentiment, and cultural norms in the German circumcision controversy*, in *University of Pennsylvania Journal of International Law*, 37(2), 2015, p. 577. It is interesting to note that – unlike other Western countries – Germany prohibits ear piercing and tattooing to persons below the age of 16 even when they have parents' permission. In the USA – just to cite a country which is typically referred to when dealing with male circumcision – «rarely if ever do state laws impede parents who wish to pierce even a baby's ears» (D. ABRAHAM, *op. cit.*, p. 1753). As just mentioned, the number of circumcised people in the USA for non-religious reasons as well as the World Health Organization's recommendation are typically taken as examples to show that what is regarded as undisputed medical evidence (that is, 'circumcision is not medically indicated') in countries like Germany is – to say the least – subjective (D. ABRAHAM, *op. cit.*, p. 1753; M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 456). The staunch support for circumcision that is attributed in particular to American health professional and paediatricians should be nonetheless evaluated in a broader context, where medical reasons historically went hand in hand with moral, social and cultural motives (S. MANCINI, *La Corte distrettuale di Colonia vieta la circoncisione*, in *Quaderni costituzionali*, 3, 2012, pp. 635-636). In the USA, the percentage of circumcised babies was 85 percent percent in 1985, but it has decreased to 32,5 percent today (S. MANCINI, *op. cit.*, pp. 635-636). In Canada, too, the circumcision rate has dropped from 70 percent in the 1970s to 30-40 percent (M. ADRIAN, *Reply to Stephen R. Munzer's "Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy"*, 2017, in *https://pennjil.com/melanie-adrian-reply-to-stephen-r-munzers-secularization-anti-minority-sentiment-and-cultural-norms-in-the-german-circumcision-controversy*). Today it is generally accepted that, even in America, circumcision may no longer be justified merely on medical grounds, and that

> The ritual status of circumcision is, however, more complicated than ascribing everything to secularization and German secularism. That status involves a blindness to the fact that what counts as "secular" is often modelled on Christian norms. What gives "ritual" circumcision a pejorative cast and makes it a practice seemingly eligible for prohibition turns on the facts that some secular views consider nonmedical circumcisions "strange" and that Christian social norms in Germany have never included circumcision as a Christian practice. […].
> Many non-Christian social norms are hardly uniquely German[203].

In Paz's opinion, too, the court's understanding of the physical body coincides with the one prevailing in Christianity[204], where visible signs of belonging are irrelevant.

Children's right to self-determination has been debated, too. Minors are legally incompetent and may not make use of their rights. The enjoyment of such rights requires a proxy, who does not exercise them but makes decisions in the child's place. According to Art. 6 § 2 GG, parents are better placed to determine the child's best interests than the State[205]. However, the determination of the best interests is not self-determination. If the State

> overrides the parents' definition of the child's best interests, it does not bring the child's autonomy to bear but instead a different kind of heteronomous determination. In any case, however, the child's self-determination cannot be claimed by either side[206].

Proper self-determination may be exercised only from a certain age, and at that point circumcision would not prevent him from making different religious choices, if he wishes so – although the court held oth-

---

prophylaxis may only strengthen choices that are made on non-medical grounds (that is, religious, ethical, personal…) (A. LICASTRO, *op. cit.*, pp. 35-36).

[203] S.R. MUNZER, *op. cit.*, p. 576.

[204] R.Y. PAZ, *The Cologne Circumcision Judgment: A Blow Against Liberal Legal Pluralism*, 2012, in *https://verfassungsblog.de/cologne-circumcision-judgment-blow-liberal-legalpluralism*.

[205] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 447.

[206] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 452-453.

erwise[207]. It is hard to see how the State may promote the child's alleged self-determination by prohibiting his religious socialization and by imposing an irreligious worldview and identity on him[208].

> As to the point of stressing the autonomy of the person, [this] argument seems to express a certain one-sided image of the adult as an autonomous person. It is exclusively based on the ideal of individual independence without, however, assuming to what extent social, cultural, and religious belonging can be constitutive for the development and the shape of a personal identity. In my view this is too narrow an understanding of autonomy. It neglects the fundamental role of human relationships and the social involvement each individual life is based on, including those relationships established later in life[209].

The court stressed the irreversible and permanent character of circumcision. This is obviously true, but most parental decisions are irreversible[210] – and so is baptism[211], although its irreversibility bears less stigmatization since it does not carry a physical mark. Last but not least, the deferral of the child's religious initiation is also irreversible. «It is not before the child can exercise his religious freedom autonomously that he can reverse the decision of the state in the same way as he could reverse the decision of the parents»[212].

Moving on to parents' right to decide on their son's religious upbringing, the court held that they should have waited until their son reached the legal age to decide for himself. However, this meant denying parents' right altogether[213].

> Freedom of religion is relevant in this case not only for the parents but also for the child. As indicated, a child's upbringing includes religious, cultural and ethical education. Just as the child learns his parents'

[207] M. HEIMBACH-STEINS, *Religious Freedom and the German Circumcision Debate. EUI Working Paper RSCAS 2013/18*, 2013, p. 8, in *https://cadmus.eui.eu/handle/1814/26335*.

[208] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 453.

[209] M. HEIMBACH-STEINS, *op. cit.*, p. 8.

[210] A. GÜNZEL, *op. cit.*, p. 209.

[211] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 454; D. ABRAHAM, *op. cit.*, p. 1759.

[212] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 454.

[213] A. GÜNZEL, *op. cit.*, p. 208.

> mother tongue and becomes integrated into the social circles to which they belong, the child is also introduced to his parents' religion. Since religion is not something one can really learn and understand in depth without being a part of it, it is only natural that the child has to be treated as a full member of the religion with all his rights and duties. Consequently, religious education means to perform all the relevant rituals, in this case circumcision, at the prescribed time and this way to integrate the child into the religious community of his parents. Only this way can a religious identity be formed[214].

The court decision became publicly known on 26 June 2012, starting an emotionally heated debate where virtually anybody seemed to take part.

> Lawyers, medical doctors, philosophers, theologians, activists for children's rights, religious representatives from the Muslim and the Jewish communities, but also from the Christian churches, politicians, artists and other citizens articulated themselves publicly, and expressed differing interests and perspectives with contradictory ways of understanding the problem at stake. […].
> Far from a balanced argumentation, a discussion "storm" came over the German public. Strong weapons were used: It seemed as if children had to be protected against religiously motivated violence and as if the values of enlightenment had to be restored against the destructive, archaic and unconstitutional powers performed by the religious traditions[215].

Not only did the court decision equate ritual circumcision to beating, psychological violence and other degrading treatments[216], but opponents in the public and political arena even equated – implicitly or explicitly – ritual circumcision with practices that under no circumstance may be justified, for example burning widows[217]. This comparison is highly problematic. Even opponents of male circumcision on religious grounds may not deny that this practice is admissible for medi-

[214] A. GÜNZEL, *op. cit.*, p. 208.

[215] M. HEIMBACH-STEINS, *op. cit.*, pp. 1 and 5-6. See also A. LICASTRO, *op. cit.*, p. 47.

[216] S. GATZHAMMER, *op. cit.*, p. 357.

[217] D. ABRAHAM, *op. cit.*, pp. 1751-1752.

cal reasons. By contrast, burning widows certainly has no therapeutic purpose and may not be permitted on any grounds.

> Many critics of circumcision are ingenious in inventing veritable *parades of horribles* that the relationship between the state and religion has yet in store, if circumcision remains legal. […]. 'What if religion requires a father to press a crown of thorns on his son's head?'[218].

The circumcision issue, as it developed, submerged the central ethical question, that is: what does the 'child's well-being' exactly mean and require?[219] Instead, an unprecedented, polarized discussion went on «for many months, not only in newspapers but also in a seemingly endless number of television talk shows, on the Internet, and in private conversations all over Germany»[220], and it did so – as noted by Angelika Günzel – because it touched upon four taboos of German society: 1) the relationship with Muslims, 2) the place of religion in secular Germany, 3) sexuality, and 4) the relationship with Jews[221].

The 'Islam Question' is not merely a recent outcome of contemporary jihadism, but it has since long been exacerbated by immigration waves. Although not all Muslims are migrants and certainly not all migrants are Muslims, the public at large often regards 'Muslim' and 'migrant' as synonyms. The tensions revolving around migration call issues of citizenship and identity into question. Migrants are associated to archaic and barbaric practices, which leads to the idea popular in some German (and European) circles that «whoever doesn't belong to our times, does not belong in our land»[222].

Despite the important role that the German legal system assigns to religions – as repeatedly stressed in this chapter, there seems to be a

---

[218] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 448.

[219] M. HEIMBACH-STEINS, *op. cit.*, p. 13.

[220] A. GÜNZEL, *op. cit.*, p. 206.

[221] A. GÜNZEL, *op. cit.*, p. 206. According to Munzer, factors like «increased secularization leading to an ever-increasing emphasis on human rights, and a strong history of anti-Semitism and a recent history of anti-Muslim sentiment go a long way in explaining why the circumcision controversy erupted in Germany» (S.R. MUNZER, *op. cit.*, p. 577).

[222] Quoted by D. ABRAHAM, *op. cit.*, p. 1754. See also pp. 1746-1747 and 1749-1750.

growing opinion that religion does not play a positive role in people's lives. Children should be recognized the right to be let free from parents' decisions concerning their religious belonging – which is nevertheless inconsistent with European and international standards on human rights protection recognizing parents' right to educate their children according to their religious or philosophical convictions[223].

> Those who vehemently claim the values of the enlightenment for themselves and their position in the debate – these are namely the most rigorous critics of religious practices (far beyond the single case discussed here) – often seem to stick to a very narrow understanding of what they claim. Some commentators criticise this attitude as 'vulgarised rationalism' […] or – as it was the case in a previous debate on Islam in Europe – 'enlightenment-fundamentalism'[224].

To my knowledge, only another author – Susanna Mancini – has dealt with the issue of sexuality in a comment on the 2012 court decision. She has noted that this judgment confirms a tendency of Western democracies to regulate traditional practices involving exclusively women and/or minor children of cultural minorities. *Others*' practices are regulated in the name of human rights, which nevertheless may hide far less noble motives. Recent years have been characterized by a rise in the number of mammaplasties and labiaplasties which, like ritual circumcision, have no therapeutical purpose. But whereas the first two types of intervention reflect glorification of sexuality, the third one is inserted in an ideological discourse where civilization is opposed to barbary. Women as well as children, with their bodies, become the symbolic places of a battle between competing values and identities. Human rights and the prohibition of discrimination risk legitimizing a dangerous attitude towards the hierarchization of cultures, criminalization of diversities, and forced homogenization[225].

Last but not least, Germany's relationship with Jews – quite different from that with Muslims – is unescapably a constant reminder of the

---

[223] M. HEIMBACH-STEINS, *op. cit.*, pp. 7, 9 and 11.

[224] M. HEIMBACH-STEINS, *op. cit.*, p. 12. See also M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 445.

[225] S. MANCINI, *op. cit.*, pp. 635-638.

country's responsibility in the Holocaust. The will to make Germany a hospitable place for surviving Jews has been central in the construction of the Federal Republic's national identity and in its public discourse. The prohibition of the practice which

> is arguably *the* core collective marker of Jewish ethnic identity, constitutive beyond any religious commitments, would be […] to cross a pronounced red line. A ban on circumcision would represent a disinvitation to Jews, a hostile act akin to Holocaust denial would significantly reverse endless efforts at reconciliation[226].

Not surprisingly is Angela Merkel reported «to have said that she does not 'want Germany to be the only country in the world where Jews cannot practice their rituals. Otherwise we will become a laughing stock'»[227]. On 19 July, less than one month after the court decision became public, the German parliament approved a resolution to guarantee the viability of Jewish and Muslim religious life in Germany. On-purpose legislation was passed on 12 December with 434 'yes', 100 'no' and 46 abstentions[228]. An amendment was made not to the Criminal Code, but to the Civil Code[229]. Under the new Section 1361d,

> (1) The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if the circumcision, even considering its purpose, jeopardises the best interests of the child.
> (2) In the first six months after the child is born, circumcision may also be performed pursuant to subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions[230].

[226] D. ABRAHAM, *op. cit.*, pp. 1750-1751.

[227] R.Y. PAZ, *op. cit.* See also S. GATZHAMMER, *op. cit.*, p. 358.

[228] M. HEIMBACH-STEINS, *op. cit.*, p. 1; D. ABRAHAM, *op. cit.*, pp. 1754-1755.

[229] M. HEIMBACH-STEINS, *op. cit.*, p. 4; S. GATZHAMMER, *op. cit.*, p. 359.

[230] English translation in M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 465.

It has been noted that the latter rule favors Jewish rather than Islamic practice. Jewish children are circumcised at the eight day of life by a special figure called *mohel*. Muslim children in Germany are circumcised at an older age, when they may be regarded by public authorities as being already able to give (or not) their consent[231]. It has further been noted that the new legal regulation was inserted in the title concerning parental custody, and not in the section concerning religious education, thus allowing in principle not only ritual but also traditional circumcision[232].

It goes without saying that the new legislation did not stop the polarized debate on circumcision. Despite being on opposite fronts, both opponents and proponents seemed to share one argument: the existence of a religion-based exemption right. The former complained that the Holocaust had made it impossible to prohibit this practice and allowed an otherwise unjustifiable privilege, whereas the latter argued that the respect due to Jews (and Muslims) required an exception[233]. This argument has been rejected by Michael Germann and Clemens Wackernagel. Their views are worth noting as appropriate conclusive remark of this section devoted to exemption rights and of this chapter alike.

> It is [a] misunderstanding that the right to religious freedom creates a privilege for individuals or groups of individuals that relieves them of the obligation to obey generally applicable laws. […].
> In any case, whosoever views such deference to basic rights concerns as being equal to a 'dispensation' from the obligation to obey the law puts into question the meaning of liberal basic rights in general. Whosoever rejects a 'religious justification in the sense of a particular permission' to certain behaviour deprives the right to religious freedom of its meaning. Whosoever purports to deduce from the principle of state neutrality

[231] J. LUTHER, *op. cit.*, p. 220. On 30 August 2013, in a case concerning the circumcision of a child born of a Kenyan mother and a German father, who were divorced, the court found that the mother's consent was invalid. What was further required was not the father's agreement to circumcision, but the involvement of the six-year-old boy in the decision. See M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 466.

[232] S. GATZHAMMER, *op. cit.*, p. 360.

[233] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 444-446 and 465-466. See also M. HEIMBACH-STEINS, *op. cit.*, p. 5.

> in religious matters that the religious convictions of the parents must be 'neutral' for their determination of the child's well-being, does not only misunderstand the principle of state neutrality but also the right to religious freedom. In essence, all arguments in this direction dismiss the fundamental function of the Basic Law's basic rights as defensive rights. […].
> Whosoever denounces 'religious privileges' must ask himself what kind of 'privileges' he deems legitimate and what role he attributes to fundamental rights if not as a safeguard against governmentally imposed homogeneity[234].

Ritual circumcision is not a socially shared practice and, only as such, it is not perceived of as objectively reasonable. Nevertheless, the fundamental freedoms guaranteed by the constitution are meant to accommodate different religions and beliefs, regardless of their perceived rationality. The recognition of the right to religious freedom implies taking into account religion- (or belief-)based reasons, and not inquiring into the consistency of a religious or belief system. This is not to say that there should be no limitations, but these should not be based on the religious or non-traditional character of a practice. If rights were extended only to individuals or groups having 'rational' beliefs, that is, behaving in a familiar way or according to a majoritarian consensus[235],

> society would become a homogenous group as an imagined extension of the 'self'. Founding state, politics, and law on such a concept of homogeneity has an infamous record. The Basic Law poses the challenge of embracing heterogeneity and difference[236].

[234] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 462-464. Likewise, Angelika Günzel has argued that an alarming element is the indication that «respecting the special religious needs of someone means to grant an unconstitutional privilege. This clearly undermines the concept of religious freedom as a fundamental right». See A. GÜNZEL, *op. cit.*, p. 208.

[235] M. GERMANN, C. WACKERNAGEL, *op. cit.*, pp. 446, 448, 464 and 467.

[236] M. GERMANN, C. WACKERNAGEL, *op. cit.*, p. 468.