Religious Freedom as a Prerequisite for a Multi-religious and Multi-cultural Europe. A Fragile Right Thrives on a Lively Social Discourse

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Let me begin my reflections on religious freedom in Europe by providing a frame of reference for them. Religious freedom does not mean a state or a society that is irreligious or without faith. The question is how the state can facilitate and protect the exercise of religious freedom in society. That said, we are not talking here about unlimited freedom for those who justify their actions by reference to religious motives and thus claim the right to religious freedom for themselves and their deeds. The issue is rather one of an adequate guarantee of religious freedom in society. Here, at the very latest, it transpires that religious freedom is not an absolute value or an absolute right but rather a right that has to be weighed against other values and rights. It is a right that has to be fought for. Therefore, the state constantly has to find the right balance in properly facilitating the free exercise of religion in a society undergoing change and development, not least as the result of migration, and thus providing an adequate guarantee and protection of the right to religious freedom.

Whenever there is talk of a threat to religious freedom it is generally seen in a global context with regard to events beyond the borders of Europe. In 2015, the renowned Pew Research Center in the United States published a comprehensive study looking at global restrictions on religious

freedom.[1] Its research team established that in over a third of all the countries investigated (39 percent of 198 countries) the right to religious freedom was "severely" or "very severely" curtailed by government or non-government players. In other words, the majority of the world's population (77 percent) suffers from a marked or very marked restriction of religious freedom. And the trend continues upwards. Whereas 68 percent of the world's population experienced severe restrictions of their religious freedom in 2007 and 76 percent in 2012, a new high was reached in the latest study published.[2]

Restrictions on religious freedom can be the result of state legislation or political will. It is often the case, however, that religious freedom is curtailed by radical social forces to which the state gives free rein or does not call an adequate halt. At first glance this would appear to be a problem that occurs only in respect of other world religions. The activities of Boko Haram, Al Shabaab and the terrorist militias of the Islamic State outside Europe immediately spring to mind. The Islamic State "presents itself as an apocalyptic movement and talks of the end of all days, of the return of the caliphate and of its dominance of the world "[3]. The fact is, however, that Islamic fanatics have succeeded in winning over a hitherto unparalleled number of sympathisers worldwide[4] and that Islamic terror and religiously motivated violence have long become a fact of life in Europe. Evidence of this has been provided in recent years not just in the form of terrorist assassinations executed with great military precision – the attacks in London, Madrid, Paris, Brussels, Copenhagen and other cities have burned themselves into the European consciousness – but also in spontaneous acts of excessive violence, one of whose recent victims was Adam Armoush. The 21-year-old Israeli of Arab, Christian and Jewish origins was wearing a Jewish kippa or skull cap when he was attacked in Berlin by radical young Muslims.[5]

1 Pew Research Center, Latest Trends in Religious Restrictions and Hostilities, http://www.pewforum.org/2015/02/26/religious-hostilities/ (16.06.2020).

2 See T. Volk, *Christen unter Druck? Das Menschenrecht auf Religionsfreiheit ist nicht verhandelbar*, in: "Konrad Adenauer Stiftung, Analysen & Argumente" (2016) no. 202, p. 5.

3 AFP interview with Hassan Hassan: IS has built near-impregnable base and mass appeal, reported 5 February 2015.

4 See M. Gehlen, *Die Zukunft des Nahen Ostens, Menschenrechte und Demokratieprozesse*, "Missio-Studienreihe Menschenrechte", Aachen 2018, p. 5.

5 See L.Vgl. Backes, J. Fleischhauer, J. Friedmann, L. Gorris, S. Hammelehle, J. Lombard, *Krach im Kiez*, in: "Der Spiegel" 2018, no. 18 (28 April) p. 14-20.

Incidentally, this attack took place just a few days after the album entitled "Young, Brutal, Good-looking" by Farid Bang and Kollegah received an Echo music award, even though critics had previously drawn attention to the lyrics on the album, which glorified violence and were anti-Semitic in part. The highly controversial presentation and the apparently religiously motivated attack on Adam Armoush raise the question of how free religion or religious fundamentalism in Germany can or must be, what relevance is attached to the respectful treatment of members of other religions in our society and to what extent the right to freely exercise one's religion is properly guaranteed and protected in the country.

1. Religious Freedom as an Inalienable Fundamental Right

Religious freedom is guaranteed as a fundamental or human right in the Federal Republic of Germany. Every individual has the constitutional right to profess their religious belief or philosophical creed, to canvas for their belief or creed, to belong to a religious community and to convert from one religious or philosophical creed to another of their own free will. Article 4 of the German Basic Law (Constitution) states that "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable."[6] This is followed by the sentence: "The undisturbed practice of religion shall be guaranteed."[7] The fathers of Germany's Basic Law of 1949 thus incorporated into the constitution a fundamental right which had been proclaimed by the General Assembly of the United Nations the year before in Paris in Article 18 of its Universal Declaration of Human Rights.[8] In terms of constitutional law, at least, the question of religious freedom in Germany would thus appear to have been answered: freedom of religion, faith, conscience and worship are guaranteed as the four pillars of religious

6 Basic Law (Constitution) Article 4 (1).

7 Basic Law (Constitution) Article 4 (2).

8 Article 18 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.."

freedom[9] in Germany. This applies to both individual and collective exercise of the legal right and refers both to churches and Christian communities as well as to philosophical creeds, whose adherents might consider them not to be a religion.[10]

In addition to the enshrining of religious freedom in the Basic Law and in the Universal Declaration of Human Rights, it is of relevance in international law that Germany also signed the International Covenant on Civil and Political Rights. Drafted ten years previously, this covenant came into force on 23 May 1976. Article 18 states in terms that are binding under international law: "(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." [11]

2. Religious Freedom as a Desideratum of Theology and Church

At the time this article of the International Covenant on Civil and Political Rights was drafted in 1966, various social circles were engaged in the debate on religious freedom. The year previously the Catholic Church had issued its declaration *Dignitatis Humanae*, in which it came out emphatically in favour

[9] See K. Hilpert, *Stichwort Religionsfreiheit*, in: *Lexikon für Theologie und Kirche* (vol. 8), Freiburg 1999, 1048f.

[10] See A. Liedhegener, *Religionsfreiheit als individuelles, kollektives und korporatives Grundrecht im liberalen Verfassungsstaat – für alle! Eine Erwiderung*, "Salzkörner" 18 (2012) no. 1, p. 10.

[11] International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966.

of religious freedom. One of the key concepts formulated in *Dignitatis Humanae* is that of the dignity of the person. The document accepts that people have a dynamic relationship with themselves and sees the growing awareness of dignity of the person as a sign of the times. In theological terms *Dignitatis Humanae* ultimately constitutes a Copernican turn away from a "claim to the truth" towards a "claim to dignity of the person".[12] The Council fathers state: "This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits. […] This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right."[13]

Dignitatis Humanae addresses the importance of religious freedom in both its positive and negative dimensions. Positive religious freedom describes the freedom of a person to found a religious community, to join a religious community, to publicly profess allegiance to a religious community and to participate in acts of worship or religious practices. Negative religious freedom is deemed to be the freedom of a person not to belong to any or to a certain religious community, to be able to leave a religious community at any time and not to be forced to participate in any acts of worship, ceremonies or other religious practices. Religious freedom encompasses freedom of faith, freedom of belief and freedom of worship. The Council fathers note that all people, irrespective of their religion, ethnicity or gender, have the right to freedom of religion, freedom of faith and freedom of worship. The Church explicitly advocates this human right not just for Christians, but also for Muslims, Jews, Buddhists, Hindus and adherents of other religious faiths. Everybody must have the right to profess their belief freely and in public without having to fear persecution, discrimination or exclusion.

The Council fathers draw attention to the special responsibility of the state to guarantee and protect religious freedom, but they also say that other social groups are called upon to help protect it: "Therefore the care of the right

12 See DH 1, DH 9.

13 DH 2.

to religious freedom devolves upon the whole citizenry, upon social groups, upon government, and upon the Church and other religious communities, in virtue of the duty of all toward the common welfare, and in the manner proper to each."[14] Furthermore, they point out that religious freedom is also a civil right which must not be withheld from Christians or non-Christians: "At the same time, the Christian faithful, in common with all other men, possess the civil right not to be hindered in leading their lives in accordance with their consciences. Therefore, a harmony exists between the freedom of the Church and the religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law."[15] As a theological reflection on religious freedom, the change of direction agreed by the Council fathers was nothing short of a Copernican turn. At the end of an international conference in Munich in December 2015 entitled "'Opening' the Council" some 200 theologians stated in their final declaration: "In recognising religious freedom as a human right the Second Vatican Council for the first time responded positively to the right to freedom in the modern era."[16]

3. Anthropological Focus

As is also the case in international law, the Council document *Dignitatis Humanae* approaches the issue of religious freedom from an anthropological standpoint.[17] The focus in the definition of religious freedom in international

[14] DH 6.

[15] DH 13.

[16] Final Declaration of the International Congress on "'Opening' the Council" from 6 to 8 December 2015 at the Bavarian Catholic Academy in Munich. http://www.das-konzil-eröffnen.de/schlusserklaerung (16.06.2020).

[17] Individual resolutions in the past have insinuated that protection must be afforded to religions as such, although in actual fact it is individual persons who are the focus of the right to religious freedom. This is readily apparent from Resolution 16/18 of the UN Human Rights Council entitled "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence against persons based on belief" (Human Rights Council Resolution 16/18 of 24 March 2011), in which it is stated clearly and unequivocally that it is persons who are to be protected. See H. Bielefeldt, *Streit um Religionsfreiheit. Aktuelle Facetten der internationalen Debatte*, in: *Erlangener Universitätsreden* 77/2012, vol. 3, p. 19.

law, as formulated in the International Covenant on Civil and Political Rights, is not on religion (a religious identity or religious feelings) but explicitly on the human person, whose dignity, rights and freedoms are to be respected.[18] Thus the right to religious freedom does not refer primarily to religious organisations, institutions, religious beliefs and practices, but to the individual, whose dignity and freedom are to be protected.[19] Moreover, religious freedom is granted to all people and not just to the adherents of established religions (or philosophical creeds), as is aberrantly asserted in numerous religions.[20] The 1993 General Comment of the UN committee monitoring the International Covenant on Civil and Political Rights unequivocally emphasises the universal nature of religious freedom.[21] Moreover, the definition of religious freedom also has a dimension of equality. Religious freedom is a right which accrues to all human persons on the grounds of their inalienable dignity and it must not be confined to certain social groups, members of specific religions, citizens of a certain state, etc. Finally, in accordance with the formulation set out in international law, religious freedom must be treated as a civil liberty which involves not only the right to freedom of conscience, religion, faith and worship, but also the right to freedom of education, assembly, etc.

4. The Fight for Religious Freedom

Crucial for an understanding of the right to religious freedom is that it is an indivisible human right. The human right to religious freedom is formulated

18 See H. Bielefeldt, *Philosophie der Menschenrechte*, Darmstadt 1998.

19 See J. Tempermann, *Blasphemy, Defamation of Religion and Human Rights Law*, "Netherlands Quarterly of Human Rights" 26 (2008) no. 4, p. 485-516.

20 Whereas five religions (Buddhism, Islam, Catholicism, Protestantism and Taoism) are officially recognised in the People's Republic of China, for example, (and other movements such as Falun Gong are persecuted), Eritrea recognises membership of the Catholic, Lutheran, Coptic-Orthodox Church and Islam, Indonesia recognises Islam, Catholicism, Protestantism, Hinduism, Buddhism and Confucianism as religions, while Russia declares Russian Orthodoxy, Islam, Judaism and Buddhism to be the country's four traditional religions in its law on religions.

21 UN Human Rights Council, General Comment No. 22, Section 2 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (16.06.2020).

as a legal entitlement in respect of the state. It thus restricts the use of force by the state in that it rejects unjustified state interference and imposes a duty on the state to take measures to avert any possible infringement of religious freedom by third parties.

Problems can arise, in particular, because religious freedom is a civil liberty and not an unlimited freedom. On the contrary, it must be implemented in such a way that the freedom accorded to one individual does not excessively undermine the freedom granted to someone else. Conflicts are unavoidable. References to the indivisibility of human rights (of which the right to religious freedom is one) can neither exclude nor resolve many a dilemma that inevitably accompanies civil liberties. It goes without saying that civil liberties, which are included among human rights, can come into conflict with one another. This poses the challenge of weighing up the different legal entitlements and finding the right balance between them. In this process a fundamental distinction must be made between a *forum internum* and a *forum externum*. While the *forum internum* refers to someone's personal, inner conviction, the *forum externum* relates to the right to external expression of an inner conviction. As Heiner Bielefeldt has repeatedly pointed out, only the external manifestations of religious life (*forum externum*) can be subject to restrictions, whereas no limitations can be imposed on a person's inner convictions.[22]

The struggle waged by a society to come to a proper understanding of religious freedom is not primarily an indication that religious freedom is in a precarious state in a certain country. On the contrary, the very fact that a struggle is waged at all over issues affecting religious freedom can be seen as a clear indication that the society concerned stands up for this human right. Active commitment to religious freedom – and particularly to the free exercise of religious beliefs by social minorities – is not something that is set in motion solely by a sense of ethic responsibility; it also has practical political consequences. The guarantee of religious freedom pays dividends in terms of the stability of a society and the quality of life it enjoys. It has been shown, for instance, that a limitation of religious freedom can be the cause of social

[22] H. Bielefeld, *Report of the Special Rapporteur on Freedom of Religion and Belief*. 23 December 2015, United Nations, General Assembly, printed matter: A/HCR/31/18, 4 and 9.

conflicts and that, on the contrary, advocacy of religious freedom has a positive impact on peaceful coexistence within a society.[23]

What relevance an open-minded social debate on issues of religious freedom has, how a contribution can thus be made to ensuring that religious freedom is first fought for and then granted will become apparent as I take a look now at three prominent disputes.[24] These are the "crucifix ruling" of 1995 (which took on new relevance as a result of the crucifix debate triggered by Markus Söder in 2018[25]), the discussion about the "wearing of a headscarf during school lessons" of 1999 (which resurfaced in 2017 thanks to the "We are not burka" remarks made by the former Federal Interior Minister, Thomas de Maizière[26]) and the Federal Constitutional Court ruling on the question of "circumcision" in 2012 (which was debated again last year after the National Association of Statutory Health Physicians announced that some 46,000 circumcisions are performed annually in Germany on boys under the age of sixteen[27]). All three are "classical" disputes that were discussed controversially some while ago but which have lost none of their topicality or social relevance in the meantime.

A look at the social debate on religious freedom in Germany is so important because religious freedom does not thrive on being considered monolithically in a conflict-free space. Religious freedom is far more fragile than would appear at first glance, and the very fact that a society is sensitive to the lines of conflict surrounding religious freedom, makes disputes transparent and conducts a social debate on these issues is undoubtedly a significant indicator showing that it is actively involved in guaranteeing the right to religious freedom for all.

23 See B. Grim, R. J./Finke, *The Price of Freedom Denied. Religious Persecution and Conflict in the Twenty-First Century*, Cambridge 2010.

24 On the following see K. Vellguth, *Religionsfreiheit: Ein Recht lebt mit und durch seine Konflikte*, in: K. Krämer, K. Vellguth (eds.), *Religious Freedom. Foundations – Reflections – Models (One World Theology, Volume 5)*, Freiburg 2014, p. 363-380.

25 See L.Vgl. Backes et al., op. cit., p. 14-20.

26 See ibid.

27 See http://www.sueddeutsche.de/leben/muslimische-soehne-beschneidung-kleiner-eingriff-grosse-fragen-1.3360303 (15.03.2018).

5. The Crucifix Dispute

On 10 August 1995, the Federal Constitutional Court in Karlsruhe published its judgment stating that the rule in the School Regulations for Primary Schools in Bavaria, whereby a crucifix was to be present in every classroom, was unconstitutional.[28] This stipulation, it said, was irreconcilable with Section 4 (1) of the Basic Law. The judges thus upheld the constitutional challenge of a mother and father from the Upper Palatinate, who considered the presence of a crucifix in the classroom to be an infringement of their right to religious freedom. The supreme judges (three of whom voted against the ruling) provided a precise and subtle analysis in passing their judgment, referring to the "degree of inevitability", the "unavoidability of encountering the crucifix in classrooms" and the duration and intensity of the confrontation with the crucifix. The judges said in the reasons for their judgment: "The crucifix is the symbol of a certain religious belief and not merely an expression of Western culture which has been moulded in part by Christianity […]. Any declaration by the state of a belief in the substance of this religion, to which third parties, among others, are exposed in their dealings with the state, impinges on religious freedom […]. The crucifix remains one of the specific religious symbols of Christianity. It is in effect a religious symbol per se […]. For non-Christians or atheists the crucifix – precisely because of the significance attaching to it in Christianity and in the course of history – has become a semiotic expression of certain religious beliefs and a symbol of their missionary dissemination. It would be a profanation running counter to the self-understanding of Christianity and of the Christian church if – as in the decisions under dispute – the crucifix were to be seen merely as an expression of Western tradition or as a ritual sign devoid of any specific religious connotation."[29]

As a convinced Catholic one may have cause to regret such a ruling, since it means the disappearance from the public space of a symbol that one personally deems important. However, the ruling passed down by the Constitutional Court can undoubtedly be seen in a more positive light, particularly as regards the question of how Germany addresses the question of religious freedom. For days the ruling by the Karlsruhe judges on crucifixes in school

[28] Section 13 (1), third sentence of the School Regulations for Primary Schools in Bavaria.

[29] http://www.sadaba.de/Rsp/RST_BfG_95_01_30.html (16.06.2020).

classrooms dominated the headlines and editorial comments in the regional and national newspapers, with passionate debates being conducted in readers' letters to the editors. Many of those who had always found the crucifix "irksome" welcomed the Constitutional Court ruling, among them the founder of the weekly news magazine *Der Spiegel*, Rudolf Augstein, who said: "In future, crosses and crucified persons will no longer hang in state classrooms – in compulsory schools, at least."[30] Axel Freiherr von Campenhausen retorted: "The crucifix ruling points in the wrong direction. In a religiously neutral state with a pluralistic society it is not dissidents alone who have the right to impose their views."[31] Meanwhile, Konrad Adam remarked in a conciliatory tone: "No matter which way you look at the Karlsruhe ruling, there is one thing that can be said in favour of it. It has made clear the irreconcilability of the objectives proclaimed in all innocence by the advocates of modernisation without them even suspecting a contradiction. But you cannot have both – strict orthodoxy and pluralism, multicultural nirvana and the Christian Occident, not even in down-to-earth Bavaria."[32]

The debate spawned a wide range of arguments. A sign of the passionate nature of the public discussion was that, in its edition of 28 August 1995, *Der Spiegel* reserved its readers' letters section exclusively for letters to the editor on the crucifix ruling – in an age it referred to as "apparently tired of religion". The daily *Passauer Neue Presse* even published a 16-page special supplement entitled "Let the crucifixes hang". Peter Pappert drew attention to the positive aspect of this public discourse, saying: "It is astonishing that no German bishop has yet expressed his gratitude to the Federal Constitutional Court. If Karlsruhe had dismissed the challenge and decided the other way, the outcome would have been accepted, filed and forgotten. Now, however, a dispute is raging about the significance of the crucifix with an intensity and attention to detail that most Germans have never witnessed before. What more could the Church want?"[33]

[30] R. Augstein, „Der Spiegel" of 14 August 1995.

[31] A. Campenhausen, V. Freiherr, *Karlsruhe fördert die Intoleranz*, "Rheinischer Merkur" of 18 August 1995.

[32] K. Adam, *Kreuz ohne Tränen*, "Frankfurter Allgemeine Zeitung" of 15 August 1995.

[33] P. Pappert, *Den Nerv getroffen. Engagierte Stimmen zum Kruzifix-Urteil von Karlsruhe*, Aachen 1995, p. 9.

Apart from the fact that the debate about the crucifix ruling suddenly triggered a public debate on religious symbols and the importance of faith for the individual, it was also an important indicator of the way in which religious freedom is dealt with in Germany. First of all, it can be seen as positive that, in a country with a Basic Law whose preamble refers to God and in which religious instruction at school is enshrined, the guardians of the constitution should have questioned whether the symbol of Christianity per se is admissible in schools. This shows, firstly, that the constitution is not misconstrued as a clientele-based lobbying tool and, secondly, that the constitutional judges do not take account exclusively of the interests and (religious) rights and freedoms of the majority, but also of the religious minorities.

The public debate about whether the right to religious freedom in this particular case should be interpreted to mean that crucifixes had no place in classrooms was fiercely controversial at times. Some politicians called for the ruling to be seen as a vote for the complete separation of state and church and for rigorous implementation of that separation. Their demands were in all likelihood based more on the personal difficulties they had in accepting that religion is part of the public space and less on the ruling of the Federal Constitutional Court, which argued in a more subtly differentiated manner. It is quite obvious that the principle of state neutrality in respect of religious and philosophical creeds provides no justification at all for the state to be declared a "religion-free zone" and for the conclusion to be drawn that there should be no place at all for the religious dimension in state schools. It is true, of course, that the state has a serious duty of care especially in schools attended by children and adolescents.[34] However, this duty of care must be interpreted in such a way that pupils are not one-sidedly indoctrinated in religious or philosophical terms but can freely come into contact with the religious dimension as well as with different religions. The consequences that can be drawn from this principle of state neutrality in respect of religious symbols such as the crucifix can certainly be viewed differently, as the minority vote of the three constitutional judges made clear. However, if we ignore for a moment the substance of the ruling at the material level and look at the way the debate evolved at the modal level, there can be no denying that it made a valuable contribution to raising social awareness of the need for sensitivity in matters of religious freedom at the heart of German society.

[34] See H. Bielefeldt, *Streit um Religionsfreiheit…,* op. cit., p. 27.

6. The Headscarf Dispute

On now to the next case. In 1999, four years after the "crucifix ruling", the case of the Muslim teacher, Fereshta Ludin, caused a public stir in Germany. She was refused employment as a probationary civil servant in the teaching profession in the federal state of Baden-Württemberg, because she insisted on wearing a headscarf during school lessons. The duty of a Muslim woman to cover her head can be derived directly from the Koran (sura 24, verse 31 as well as sura 33, verses 53 and 59), which is understood to mean that Muslim women should "wrap a portion of their headcovers over their chests" so that, on the one hand, they can be seen to be believers and, on the other hand, they are "not abused". While Ludin, referring to the guaranteed right to religious freedom, pointed out that she should not be forbidden from wearing a headscarf, the responsible Stuttgart school authority argued that the headscarf was a symbol of cultural demarcation and thus not only a religious, but also a political symbol. This case, too, was finally brought before the Federal Constitutional Court. In its so-called "headscarf ruling" of 24 September 2003 it stated that Fereshta Ludin would indeed suffer an infringement of her basic rights if she were to be forbidden from wearing a headscarf: "In the context under assessment here the wearing of a headscarf makes clear the complainant's adherence to the Islamic religious community and her personal identification as a Muslim woman. The qualification of such conduct as constituting a lack of suitability for the position of a teacher at primary and secondary schools interferes with the complainant's right to equal access to every public office […], since there is no sufficiently definite statutory basis in the current law." Once again, this ruling by the Federal Constitutional Court was not unanimous, three of the eight judges voting against it. However, it stipulated that a Muslim woman teacher can only be prohibited from wearing a headscarf if this is clearly regulated in federal state law. A headscarf ban is now currently in force in eight federal states in Germany.[35]

This case can be classified in different ways. Arguing from a gender-sensitive perspective, for instance, Heide Oestreich points out that the headscarf ban tends to discriminate against women and thus prevents them from

[35] Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, Thuringia and Saarland have issued a ban on teachers in their schools wearing headscarves.

emancipating themselves from their parents or husbands.[36] Interestingly enough, Hakki Keskin, the former Federal Chairman of the Turkish Community in Germany, takes a diametrically opposed point of view, saying that the wearing of a headscarf by women teachers and the call for separate sports and swimming lessons for boys and girls has "nothing to do with Islam, which is by its very nature extremely tolerant"[37]. He feels this was an attempt by numerically small groups within the Islamic population to exploit religion for political and ideological ends, a development he thought should be resisted. Irrespective of the interpretation of the subject manner, the lively headscarf dispute showed once again that religious freedom in Germany is an issue that is by no means fully resolved. On the contrary, conflicts occur in everyday life, for which a balanced solution taking due account of the legitimate right to religious freedom must repeatedly be found.

7. The Circumcision Dispute

In 2012, the German population witnessed a third dispute over the tolerance or acceptance of religious traditions. Most Jewish parents living in Germany today have their sons circumcised shortly after they are born (in reference to Gen 17:10-14)[38] by a *mohel* (Jewish circumciser). In the Jewish understanding, circumcision is the biblical sign of God's covenant with Abraham. The ritual performance of this covenant of circumcision (Hebrew: *brit mila*) is regarded as one of the most important Jewish religious rules. By tradition it is the duty of a Jewish father to have his son circumcised on the eighth day after he is born.

[36] Oestreich, Heide, Der Kopftuch-Streit. Das Abendland und ein Quadratmeter Islam, Frankfurt 2005. See B. Beckmann-Zöller, *Der Schleier – Zeichen für Unterwerfung oder Hingabe in Islam und Christentum?*, "Die neue Ordnung" 72 (2018) no. 2, p. 96-107.

[37] W.G. Lerch, *Symbole und Religionsfriede*, "Frankfurter Allgemeine Zeitung" of 19 January 2004.

[38] Genesis 17:10-12 states: "This is my covenant which you must keep between myself and you, and your descendants after you: every one of your males must be circumcised. You must circumcise the flesh of your foreskin, and that will be the sign of the covenant between myself and you. As soon as he is eight days old, every one of your males, generation after generation, must be circumcised, including slaves born within the household or bought from a foreigner not of your descent."

In Islam, too, many Muslims regard the circumcision of the male member as a religious duty. A wide-ranging public debate on the legitimacy (and legality) of the circumcision of underage boys in Germany was triggered by the ruling of the Regional Appellate Court in Cologne. On 7 May 2012 it classified the circumcision of underage boys as bodily harm, which could not be justified by reference to the religious motives of the parents or the right to religious freedom, since the child's basic right to physical integrity prevailed over the right to religious freedom that accompanied the parents' right of education.[39] The ruling resulted in nationwide protests from the Jewish communities, which saw it as a massive infringement of their religious freedom.

The Central Council of Jews made its views known, as did the Christian churches. Heinrich Mussinghoff, then Chairman of the German Bishops' Conference Sub-Commission for Religious Relations with the Jews, criticised the ruling, since "it in no way does justice to the constitutionally protected religious freedom of parents and their right of education. The contradiction between basic rights on freedom of religion and the well-being of the child brought up by the judges is not convincing in this particular case."[40]

After the German Ethics Council had been consulted and a bill on the circumcision of boys[41], which incorporated professional and medical opinions, had subsequently been debated in parliament, 434 members of the German Bundestag voted in favour of it on 12 December 2012 (with 100 no votes and 46 abstentions). The law stipulates that the circumcision of underage boys on religious grounds is permissible, provided (and this is where the criteria laid down by the Ethics Council come in) comprehensive information has been supplied to the holders of parental responsibility and approval given by them for proper

[39] See H.H. Henrix, *Die eigentliche Quelle ist das Herz Johannes' XXIII.. Entstehung und Wirkung der Konzilserklärung "Nostra Aetate"*, "Theologisch-praktische Quartalschrift" 161 (2013) no. 3, p. 291.

[40] German Bishops Conference, press release of 27 June 2012 – No. 101: Kritik am Urteil der Strafbarkeit von Beschneidungen: Bischof Mussinghoff: Gefahr für die Ausübung der Religionsfreiheit; http://www.dbk.de/nc/presse/details/?presseid=2123 (16.05.2016). See G.M. Hoff, *Auf einem guten Weg. Zum Stand der Beziehungen zwischen katholischer Kirche und Judentum*, "Herder Korrespondenz" 69 (2015) no. 2, p. 84.

[41] "Act on the Extent of Care for the Person of the Child in the Circumcision of Boys" of 12 December 2012, in: https://www.bundestag.de/dokumente/textarchiv/2012/41964402_kw50_sp_beschneidung-210212 (16.06.2020).

pain treatment to be provided, a competent performance of the intervention is guaranteed and no contrary expression of will has been voiced by the male child concerned.[42] While the hopes of the Islamic community and the Jewish community were thus fulfilled, the German Academy for Children and Youth Medicine expressed criticism of the act because it could not see any medical value in the circumcision of underage boys. The academy referred in doing so to studies from America which reject any medical indication for circumcision.

This piece of legislation caused a furore in Germany and far beyond. The social debate that took place in the run-up to it was again very passionate. The arguments put forward by some made it clear that they attached very little significance to the right to religious freedom. The daily newspaper *Frankfurter Allgemeine Zeitung* wrote in an editorial: "Any religion which includes regular bodily harm to minors […] finds itself in permanent conflict with key constitutional objectives – the more drastically so, the more liberal and secular the state is."[43] Just under a month later, Patrick Bahners took a different stance in the same newspaper. In its edition of 22 July he criticised the construction of a contradiction between the parental right of education and the fundamental right of the child to physical integrity, saying: "The parents appear to be the assailants here and so limits must be imposed on the arbitrary use of their power. However, the parental right of education is not a privilege to be asserted to the detriment of the child [… nor] is it a right to self-fulfilment. The fact of the matter is that it is the right of the child to be educated by its own parents which enjoys constitutional protection."[44] Just how vehement the discussion

[42] The new Section 1631d of the Civil Code states under the heading "Circumcision of the male child": "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. … 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." http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5757 (16.06.2020).

[43] G.P. Hefty, *Strafbare Beschneidung*, "Frankfurter Allgemeine Zeitung" of 29 June 2012, quoted from: M. Küntzel, *Kontaminiertes Terrain*, "Kirche und Israel" 27 (2012) no. 2, p. 177.

[44] P. Bahners, *Beschneidungsdebatte. Ein Rechenfehler*, "Frankfurter Allgemeine Zeitung" of 2 July 2012, quoted from: H.H. Henrix, op. cit., p. 293.

was at the time is illustrated by the words of the former Ashkenazi Chief Rabbi, Israel Meir Lau, who – in view of the sudden sympathy felt for the supposed bodily harm inflicted on a Jew in Germany – said (and this highlighted the highly sensitive nature of the debate in Germany): "I never witnessed such sympathy in my childhood. The blood of a Jew wasn't worth a thing and he could be trampled on by anyone wearing a Gestapo jackboot."[45]

Irrespective of the material assessment of the case, the modal observation of the social debate alone shows that, once again, a struggle was waged over the right to religious freedom, which is not something that is bestowed on a society with no effort required on its part but a right that can be secured by means of a clarifying debate.

8. Religious Freedom Thrives on Social Discourse

It may seem surprising that I should be presenting disputes over religious freedom here as models of the successful assertion of religious freedom. Moreover, I have cited three disputes in which members of the three Abrahamic religions felt that their religious freedom had been curtailed. However, it would be wrong to interpret religious freedom as meaning inter-faith harmony or a "state-protected harmony between religions"[46]. Religious freedom can certainly be regarded as a "peace concept" for society. But religious freedom does not exist in an environment of relaxed harmony. On the contrary, like all freedoms it consistently finds itself involved in a competition between the freedom of one individual and the freedom of another. These competing freedoms must be treated on a case-by-case basis and be constantly balanced against each other if justice is to be done to religious freedom (which always refers to specific persons and is therefore individual and not general in character) and the individual's justified entitlement to religious freedom which derives from it.

In the three disputes over religious freedom in Germany I have outlined here the focus was on the respective interests of Abrahamic religious

[45] Quoted from *Rituelle Beschneidung – Beschneidungsdebatte empört Israel* of 24 August 2012. http://www.faz.net/aktuell/politik/inland/rituelle-beschneidung-beschneidungsdebatte-empoert-israel-11867158.html (16.05.2016).

[46] See H. Bielefeldt, *Streit um Religionsfreiheit. Aktuelle Facetten der internationalen Debatte*, "Erlangener Universitätsreden" 77 (2012) no. 3, p. 52.

communities and the symbols and interests of their members. Whereas the crucifix ruling concerned the extent of the freedom Christians have to display their symbols in the public sphere, the issue at stake in the public debate over the female Muslim teacher wearing a headscarf was the extent to which Muslims should be allowed to wear their religious symbols in public. Finally, the focus in the circumcision debate, inter alia, was on the interests of the Jewish community, one of whose traditions is the circumcision of underage boys. Irrespective of whose right to religious freedom was at stake, all three cases caused a public stir. The question at issue throughout was the extent to which the individual's basic right to free exercise of his religion in a secular state can be limited by the state.

It is an encouraging sign that all three disputes in Germany were conducted with great verve and passion. It is also a good sign that the discussion of controversial issues was not stopped or "wound up", but kept going. As regards the Muslim veil, one need only think of the "We are not burka" statement made by the former Federal Minister of the Interior, Thomas de Maizière, and with regard to the crucifix of the recent initiative taken by the Bavarian Prime Minister, Markus Söder, to ensure that a crucifix is hung in the entrance to every Bavarian public office.[47] And it is also a good sign that the participants in the discussions cannot be assigned to any overly inflexible and ideologically predefined positions. In view of Söder's "crucifix initiative" even "high-ranking Catholics", such as the Chairman of the German Bishops' Conference, have voiced their criticism and warned of "division, unrest and conflict". Volker Resing notes that this initiative can be regarded as an attempt to exclude dissenters and unbelievers.[48] Even the editor-in-chief of the right-wing conservative magazine *Kirche heute* notes that "state and church must keep a close eye on the right relationship between politics and church"[49], while the former President of the Central Council of Jews in Germany, Charlotte Knobloch, has responded positively to the decision of the Bavarian state government, saying: "Given the mammoth task of integration that we face,

[47] See L.Vgl. Backes, op. cit., p. 14-20.

[48] V. Resing, *Den Stein ins Rollen bringen. Söders Kreuz-Erlass: Politisches Vorpreschen und die Folgen*, "Herder Korrespondenz" 72 (2018) no. 6, p. 7.

[49] E.M. Fink, *Ein Fanfarenstoß. Bekenntnis der Bayerischen Staatsregierung zum Kreuz*, "Kirche heute" (2018) no. 6, p. 5.

I think it is right to define the norms and values that are indispensable for coexistence in our country and to insist on their acceptance."[50] She points out that these include signs and symbols designed "to demonstrate our identity and characteristics".

These remarks show that German society and the church have not lost sight of the fact that religious freedom is a crucial individual freedom it is worth arguing over. It is precisely this public debate or public dispute which ensures that religious freedom is adequately guaranteed in society. Of course you can argue in a particular case whether the solution found in the dispute over the upholding of religious freedom is "adequate" to the facts of the case and to the rights of the parties to the conflict. It could be that a different outcome to the debate or ruling was desirable. But the very fact that a public argument takes place at all is, on the one hand, an indication of a society in which religious freedom is deemed a precious asset and, on the other hand, a key factor in ensuring that religious freedom continues to be defined not just as a constitutional norm, but as something that can be realised or guaranteed as a practical legal right.

Moreover, religious freedom must continue to be fought for in fervent public debates. In view of migratory processes and the challenges posed by multi-religious and multi-cultural societies in Europe, religious freedom is essential for peaceful inter-cultural and inter-religious coexistence, which in the age of globalisation the state must assert and protect and society must continually discuss and practise.

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[50] Ch. Knobloch, *Quoted from Schwienhorst-Schönberger, Ludger, Kreuz, Macht und Ohnmacht. Zur Debatte um das Kreuz in Bayern*, "Herder Korrespondenz" 72 (2018) no. 6, p. 13-16.

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