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Increasing plurality, religious freedom, and the importance of law

Some Remarks on developments in Germany as an example for new challenges

Dear colleagues and participants of this conference,

first I would like to say: thank you very much for the invitation to travel to the United States and take part at this conference. Although we can use the opportunities given by new media and internet, it is very important to meet each other and to organize inter-change and discussion on such important subjects like religious freedom. The theme of this conference is so important because we have to discuss about an idea, an impression or prejudice, that religious freedom – one of the basic human rights – is realized in democratic societies and has to be implemented or defended in societies or states with non-democratic, hierarchic structures or in states with dictatorships. My thesis will be that there are risks for religious freedom in democratic societies too. These risks have to be recognized, and strategies for the protection of religious freedom have to be developed.

Introduction

Dear participants of this section: Normally no one would think that religious freedom has to be protected in Germany or no one would think that we might have to discuss strategies for implementation of religious freedom in Germany's law, state or society. As in all other democratic societies, religious freedom is part of the constitution of Germany, and religious communities join this freedom. Religious freedom in Germany – this is the freedom of belief, the freedom of religious practice, the freedom to establish religious organizations, and religious freedom is the right to leave or to change a community, and of course religious freedom implies the right to deny the existence of god or religion. To classify or to recognize the status of religious freedom in the constitution of Germany we have to see that the human right of religious freedom has no restriction: Normally the German fundamental rights are limited with a sentence like "restrictions are possible only by common law". The religious freedom in article 4 of the German constitution does not know such an limitation. This means that restrictions of religious free-

Statement at the conference "International Protection of Religious Freedom: National Implementation"

Brigham Young University, Provo (Utah), Oct. 5-7, 2008.

byu2008-rink.odt | 10/02/2008

dom can only be derived from other fundamental principles of the constitution like dignity of human being, inalienable rights, for example the equality of man and women. So, why should religious freedom be in danger? Of course, Germany has problems with antisemitism and xenophobia, but not more than other European countries like Spain, Great Britain, or France. And less than countries in Eastern Europe. But I do not want to talk about these "common" enemies of freedom. I want to direct our attention to an interesting correlation: a correlation between religious plurality and restrictions of religious freedom.

Historical background

Perhaps some of you know that until World War II Germany was characterized by a nearly biconfessional structure. There were regions with a protestant or others with a catholic majority. This was the result of the 30-year-war 1618-1648 and the so called "Peace of Westphalia" on its end. This dictum confirmed the rule "cuius regio, eius religio", which was established after the reformation in the 16th century: the religion of the ruler is the religion of his people. And the ruler was the "chair", bishop, leader of the church, which was defined as the church for all men and women who lived in the ruler's territory. Those who followed a different confession, were persecuted and sometimes allowed to leave the country. Here we find one of the reasons for migration to America in the 17th and 18th century. In this confessional dualism between protestants and catholics the small number of Jews or believers in other reformationian christian denominations had no real importance. For example: In Marburg, a small town in Hessa where I come from, there have been no catholic worships from the time of reformation until the end of 18th century.

It is easy to comprehend that such a history of relationship between religion, church and state influences the common notion of that what "religion" has to be. "Religion" is part of public order and has functions in relation to matters of public sphere like ethics, morality or political developments. In this sense, the situation of protestant and catholic regions was equal. Conflicts arose in processes of emancipation. Two examples from Prussia: The church fought against the government, because the government claimed the responsibility in the field of education. Here the state pushed back the influence of religion in public sphere. Second example: The state of Prussia united lutheran and reformationian churches by decree because of political reasons. A united church could be controlled easier, even in a situation while the expansion of Prussia grasped more and more protestant and catholic regions.

But - and that's the point here - in general the correlation of religion and state existed until the mid of 20th century, and in this frame some christian and non-christian minorities could exist, normally with ban of mission activities. The discrimination of Jews, anti-judaism since the middle age and political antisemitism since 19th century is a special issue, and if we read Lutheran texts about Jews we realize another time that the reformation in the 16th century was not a initiation for more religious plurality or diversity, it was only an initiation for an other christian confession with exclusive ways to salvation. That's the reason why marriages between protestants and catholics were not possible and, in present times, not accepted by the local communities until the 60s of last century - even if protestant and catholic villages are closed, like they are in the region of my home, Marburg.

Religious Plurality in Germany

I think it is very important to notice that this nearly bioconfessional structure existed from the 16th century until 50 years in the past. After World War II refugees recombined this situation, so that catholics settled more and more in protestant regions and vice versa – but each as minorities. In the 60s of the 20th century, some new religious movements had success, and in the 80s the popularization of esoteric knowledge in the so-called New-Age-Movement had some followers. Totally different the development in the former GDR, the German Democratic Republic. The socialist government fought religions. In result, at the end of GDR 1989 only 15 to 20 % of the population were members in one of the two christian churches.

Nowadays, in the re-united Germany, the religious structure has changed from a bi-confessional to a three-parted situation: 30 % of the 82,5 million Germans are member of the Roman-Catholic Church, 30 % are member of Lutheran or Reformation church, united in the Protestant Church in Germany (EKD), and 30 % are atheists or indifferent in religious affairs. The rest of 10 % is divided in 1.5 million believers of smaller christian churches like Baptists, Jehova's Witnesses, Mormons, New Apostolic Church, and the rising number of local non organized charismatic groups, 1.4 million followers of orthodox and oriental christian churches, about 1 million members of esoteric circles or new religious movements, 250.000 Buddhists, 110.000 Hindus, 110.000 Jews – and 3.5 million Muslims.

According to these numbers, speaking of a multi-cultural or multi-religious society in Germany is at least not correct, even when we include the fact that – of course – the two great christian churches are no monolithic organizations in which all members believe the same or live identical values. But the point is: The religious membership, the religious resources and the possibility to define religious values in the public sphere is dominated by the two christian churches.

The description of the religious situation in Germany is incomplete, if we fade out the legal structure given by law and constitution. Three elements or degrees are important: (1) There is no governmental office for official registration of religious communities or churches. A decision of the highest court in Germany says, if a community declares itself as religion and if the practice and character of organization, activities, teachings and so on are "religious" in a common sense – might confirmed by scientific expertise –, they have all rights of a religion. In result it is the task of courts to decide about the status of religion. But this happens only in cases of conflict in order to confirm the extended rights of religious communities derived from religious freedom, guaranteed in the constitution – or to deny these extended possibilities, for example the right for mission on public places without approval by local authorities.

(2) As other communities religions can organize themselves as privileged associations, in other countries known as registered societies. Condition for this status is, that the community pursues only religious aims and the economic activities are not the main field of activities. As such an association the community has an easier and better fiscal status, especially concerning taxes. They have to pay less or nothing. And there is no personal responsibility of the members of the leading committees; the society is a "legal person" by itself. But: this legal status as a registered society does not influence the possibilities and rights of religious freedom.

(3) German constitution knows the status of "corporation of public law". Such a corporation has real advantages. Not only that they can use the tax fiscal offices to collect fees

from their members. These corporations can establish their own internal law system, they are automatically members of the board of governmental TV-stations, they have to be involved in projects of city planning – including the right to erect religious buildings outside common local rules for "secular" buildings –, they are automatically acknowledged as partners for social welfare with less strength supervision by authorities – and "partner" means financial support by government –, and last but not least those corporations have the right to hold confessional religious education in public schools, financed by state – including rooms at school and instruction of teachers at the public universities.

This legal structure for religions in Germany generates a three-class-system of religions. Although this structure has nothing to do with the recognition and realization of religious freedom as a fundamental right for all religions, it is part of reasons for the actual risks for religious freedom. Why that?

Mental Traditions, Plurality, and Discussion on deviant Religions

Especially the status of corporation of public law is a remnant of the biconfessional structure from the time of protestant reformation and the established closed link of throne and altar. It is a remnant which could not be destroyed by the democratic constitutions in Germany of 1848 (civil revolution), 1918 (Weimar Republic) and 1949. As we have seen, the privileges for corporate-religions concern the relationship between church and state. The state confers tasks and rights to religions and the state establishes these privileged religions in some spheres as quasi-governmental organizations, as a part of the affairs of state. Not at all, but in some parts, for example education, school system or social welfare. These privileges are not part of religious freedom – but they include real advantages.

You might expect which religious groups have this status of corporation: at first the two great churches, Roman-Catholic and Protestant, second most of the orthodox churches, the Jewish community, and some smaller Christian denominations. Condition to get this status is a sufficient number of members and a time of existence in Germany which will proceed for the future. In assumption of this status during Weimar Republic from 1918 to 1933 by about 20 communities, after 1949 only three or four religious groups could get this status as new ones. One of these groups was the Church of Jesus Christ of Latter-Day Saints.

The main result of this sketched structure – beside the legal advantages – is the determination or "public definition" of what religion is. Although religion – especially the Christian religion with its Roman-Catholic Church – are target of critique, most of the people accept the Protestant and Catholic Church as the normal case, the normal character of religion. Important elements are: Members do not need to comprehend all doctrines; there is no commitment to take part at the activities of the community, the services of the church are free (because the members pay taxes to the church) and the religious organizations have no economic interests; the main areas of activities are religious education, social work, support of poor or disabled persons, foreign aid and the practical work for social and political justice; church and state are separated, but in democratic societies they accept each other as partners who work for the same objectives.

The other side of such notions what "religion" and "church" has to be and of the dominant, hegemonic status of the two great christian churches is the discussion on and the discrimination of the so called "sects", sometimes called "cults" or "destructive cults". This discussion is not only a religious one, for example on issues like the best ways for salvation. In 1996, the German parliament established a committee of investigation about "so called sects and psycho-groups". The instruction given by the parliament was to find out, in which way these smaller religious groups like Asian meditation movements, the Unification Church, ISKCON, Scientology, but satanic groups and protestant charismatic movements too, are dangerous for their followers and for the society, how important economic activities are (with prejudice that this is the main interest), and how they practice international networking – maybe to hide criminal activities, maybe for funding. But, the commission worked out that there are no special kinds of danger going out of so called sects. And, might the most important result: The commission, which published a very critical report at half time of its work, pointed out that the term "sect" should be avoided because of its discriminating meaning. This is important for the public discussions. Here the term "sect" is not used in a theological or scientific way. On the contrary, the term "sect" is used more and more in a political or emotional way. All phenomena – religious ideas, religious expressions, religious activities, religious life-style – which are a little bit strange, different or deviant from common opinions, values and behavior, got the verdict "sect". That participation of the German parliament at those discussion illustrates the risks of stigmatization. Under the idea of protection of young people, families, physical, financial or psychic exploited members of such incriminated groups and movements, the state forced the critical discussion about alternative religiosity.

What is interesting: on the one hand the state underlined its religious neutrality, because he said he did not want to judge about the religious ideas of these religious groups – but it would be the state's obligation to secure the fundamental rights against the behavior of such groups or the behavior of followers, which was initiated by such religious groups. From the perspective of the state, the behavior of citizens can not be distinguished between religious or political or simple individual behavior, and nor the law does not know such distinctions. As a result of the engagement of the state in the discussion on new religious movements or alternative, deviant religious groups, the public opinion on religion, on "good" or "bad" religions was strengthened. – One remark about the consequences: A similar parliamentary committee in France worked out a list of dangerous "sects". So in Germany we had luck that the committee of investigation worked out its serious and scientific founded results in the second half of its session until the final report in 1998.

But for our discussion we have to be aware of the public attitude, which has been formed over a very long time and which is based on this christian biconfessional or in some countries monoconfessional structures in continental Europe with its closed correlation of religion and state and between religion and society.

So, I would say that the separation of religion and state, which is one of the fundamentals of modern constitutions, is not only a question of law, but of the mental constitution, of mental values and attitudes, developed and established in a long term history. In Germany we speak of a "limping separation" of religion and state because of the legal privileges in the status of corporate of public law I described just above. With view on discussions on Islam in France with its very strict laicistic principles in the constitution,

I would prompt to discuss the relationship between religion and state and / or religion and society beside the legal principles given in constitutions and law.

Examples for mental correspondence of religion and state

To illustrate this thought and lead up to the main thesis of my contribution, I want to give two examples.

(1) In 1995, the constitutional court of Germany decided about the question, if the cross – with or without the crucified Jesus – is allowed to be hung up in classrooms of public schools or court halls. Especially in Bavaria, but not only there, such a cross is installed in many public rooms. The constitution of Bavaria, for example, or the Bavarian law of schools, refer to christian religion and values and the occidental history as principles for education and morality. Three pupils and their parents, followers of anthroposophy, argued, that the cross as a christian symbol, and in public rooms, where the pupils have to go, the presence of a religious symbol restricts the religious freedom. Because the cross is a specific religious symbol, it influences the pupils who have to learn in view of this cross. The government of Bavaria argued, that the cross is not a religious symbol, but it represents social and ethical values, independent from specific religions, so to say values for themselves, formed in a history of greek and roman philosophy and jewish and christian religion, but nowadays accepted from all religious belief systems and non-religious ethics. But this position could not help. The constitutional court decided that the cross has to be removed, if one of the pupils or their parents wants this, referring their right of religious freedom.

(2) My Second example is the legal conflict between the Jehova's Witnesses and the Land of Berlin, started 1993, ended 2006. The Jehova's Witnesses wanted to get the privileged status of corporate of public law. Because one of the two german associations of Jehova's Witnesses is organized in Berlin, the Land of Berlin had to decide about this demand – and denied. The authority took the opinion, that behavior, which is result of the belief system of Jehova's Witnesses, is not in correspondence with the fundamental values of the constitution: Jehova's Witnesses have no democratic structures and depend on the head office in Brooklyn, the refusal of blood transfusion is against the children's right of life (because parents decide), the methods of education include the use of violence and separate children from others, members have no free will because they have to follow the instructions given by the organization, when Jehova's witnesses do not participate on political elections they demonstrate that they have no positive attitude to state, law and society, more: when Jehovas Witnesses declare the sphere of state and society as the "systems of things" under control of Satan, they put themselves in opposite of the state from which they want to get to privileged partnership by status of corporate of public law. In conclusion the authority repeated the reproaches against so-called sects.

Over the years, the court decisions were different, so that the constitutional court had to decide. They argued, that in addition to the formal conditions – sufficient number of members, long-term perspective of existence – the government indeed has the right to put the conditions for privileged partnership in concrete terms. But the conditions have to be on a lower level as the authorities of Berlin argued. In the relationship of religion and state the community which wants to become a corporate of common law does not need to have a supporting, positive, congruent position to the principles of state. For the

needed loyalty to the state and its foundations it is sufficient that the community accept the authority of the state and its organs and the order of law. Concerning the complex of children the court pointed out that it is a fundamental right, guaranteed in the constitution, that the parents have the first responsibility for their children. The judges worked out some other points. One of them is very important: The real behavior and not the scriptures are the main basis, when the authorities proof the keeping of the conditions for attaining the privileged legal status for religion.

In the course of the processes after this decision we can recognize the effort of authorities to prove the prejudices and reproaches against Jehovahs Witnesses in real behavior, but the last court decision from 2006 stated: in the real every day life behavior are no indications that Jehova's Witnesses do not fulfill the conditions for the privileged status for religions. So, in 2006 the government of Berlin handed out the document which Jehova's Witnesses fought for more than 13 years.

Conclusion: Defense of religious freedom by execution of law

The public opinion supported in both cases the position of authorities and accepted the decisions of the constitutional court only because of its esteem high regard in general. The decision concerning Jehova's Witnesses produced the anxiety about the possibility for other deviant religions to get the status of partnership to state and government. The islamic communities have been demanding this status for many years, and the idea that Scientology could take place at the table of governmental decisions brings up drops of perspiration on the foreheads of many self-proclaimed protectors of the jewish-christian-occidental cultural heritage. The so-called crucifix-decision – the first case I told about – led to similar fears to lose the cultural identity. In recent times, Germany had the discussion if a teacher at public schools is allowed to ware special clothing – muslim scarf or christian uniform. The result of public discussion, law and judgment is without doubt: no scarf for muslimas, because the scarf is a symbol for religius surpression and inequality of man and women On the other hand: The permission for uniforms weared by sisters of christian orders, because this is fundamental part of social, political and religious tradition and mainstream in history and presence.

Bringing together the elements of my statement, we should discuss three considerations:

(1) Even if the principles of religious freedom are part of constitution and law system, the realization in every day life depends on history, tradition and processes of formation of public opinion. Especially the authorities in democratic societies can not disregard the public opinion, and governments depend on this.

(2) The realization of religious freedom – understood as the large extended possibility of religious self-determination for organizations and followers – changes society. Religious freedom is part of autonomy of people. The challenge concerns espially societies with long traditions of non-pluralistic structures, with strong orientation on state and its institutions to secure and guarantee values, welfare, security, social peace, or – important in our days – integration of refugees, religions or minorities under the roof of democratic principles, represented by state and its institutions. Religious freedom changes state and society, because more and different religious groups demand their participation in public affairs. The two examples of conflicts I reported demonstrate how the state – the government, the authorities – wants to protect the status quo against such demands in

correspondence with public opinion and mental traditions. This happens even in democratic societies. Only court decisions direct to more self-restriction of state and authorities in religious affairs. While protection religious freedom, the peace-keeping function of law gets new areas of work.

(3) In such a situation of conflict between keeping and change, the legal principles become new importance. The democratic state and society are based on the free democratic constitutional structure. It is part of their identity as modern, liberal society. Religious freedom as part of fundamental rights, as part of freedom, self-fulfillment, and autonomy, can not be denied. In this sense, court decisions in which the principles of religious freedom are confirmed "remember" state and people of a fundamental part of their own identity. Contrary to theories in which law systems are only reflections of balances of social power and law system strengthen this status quo, law includes a task for "constructing" society, for organizing the increasing plurality with its sometimes not compatible values, morality, ethics, belief systems and ways of life. Of course, such new tasks for jurisdiction are problematic. Normally, courts do not have to make politics – this is assigned to the parliament. But in situations of restriction or uncertainty the power of jurisdiction has to oblige all parts of society on its fundamentals, expressed in constitution and law system. In this perspective, the political, social and religious independence of jurisdiction is an indispensable condition for its authority. Surveys in Germany show the very high confidence especially on constitutional court – because of its independent position, independent from political parties and government.

In conclusion, we see a contradictory situation of increasing religious plurality and tendencies of restriction of religious freedom. Even if religious freedom is part of national law system, state and society have to learn to accept religious plurality and demands of religious groups to be equal part in all public affairs. Plurality leads to conflicts of interests. Increasing plurality evokes reaction of conformity and restriction of plurality to beware traditional identities and supposed certainties. To avoid those risks and to converse principles of law in real life, an independent jurisdiction will become an important power, even in modern, liberal and democratic societies.

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