ARTICLES

The Myth of the Neutral State: The relationship between state and religion in the face of new challenges

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A. Introduction

On a global level, we are witnessing a revitalisation of religion, which also includes a re-politisation of religion, particularly within contemporary Islam. Religion has become, once again, a political *topos*.[1] The secularised western world[2] is thus facing a new challenge, for which it appears to be inadequately prepared. The idea of freedom of religion, guaranteed as a fundamental right, obliges western democratic states to respect the religious activities of their citizens and to secure their free development. Therefore, the state is principally neither allowed to favour nor to discriminate against certain professions of faith. This concept of equidistance is known as the principle of state neutrality:[3] it commits the state to generally withdraw from

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[1] *See* in more detail KARL-HEINZ LADEUR & INO AUGSBERG, TOLERANZ – RELIGION – RECHT. DIE HERAUSFORDERUNG DES „NEUTRALEN" STAATES DURCH NEUE FORMEN VON RELIGIOSITÄT IN DER POSTMODERNEN GESELLSCHAFT 1 (2007); on the concept of a "revival of the religious" see also Gianni Vattimo, *Die Spur der Spur*, in DIE RELIGION 107 (Jacques Derrida & Gianni Vattimo, eds., 2001); GIANNI VATTIMO, JENSEITS DES CHRISTENTUMS. GIBT ES EINE WELT OHNE GOTT? 29 (2004); JÜRGEN HABERMAS, ZWISCHEN NATURALISMUS UND RELIGION. PHILOSOPHISCHE AUFSÄTZE 7 (2005); Jacques Derrida, *Glaube und Wissen. Die beiden Quellen der „Religion" an den Grenzen der bloßen Vernunft*, in DIE RELIGION 9 (Jacques Derrida & Gianni Vattimo, eds., 2001), at 69

[2] On the concept of secularisation in general *see* GIACOMO MARRAMAO, DIE SÄKULARISIERUNG DER WESTLICHEN WELT (1996); for its ideological use *see* HERMANN LÜBBE, SÄKULARISIERUNG. GESCHICHTE EINES IDEENPOLITISCHEN BEGRIFFS (1965).

[3] *See further* 12 BVerfGE 1, 4; *see also* 19 BVerfGE 206, 216; STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES. EINE LIBERALE INTERPRETATION DER VERFASSUNG (2002); Stefan Huster, *Die religiös-weltanschauliche Neutralität des Staates. Das Kreuz in der Schule aus liberaler Sicht*, in: DER STREIT UM DAS KREUZ IN DER SCHULE 69 (Winfried Brugger/Stefan Huster eds., 1998); for a critical perspective, *see* ROLF SCHIEDER, WIEVIEL RELIGION VERTRÄGT DEUTSCHLAND? 16 (2001); for neutrality as a character of the German *Grundgesetz* (Basic Law), *see for example* Rolf Gröschner, *Freiheit und Ordnung in der Republik des*

religious issues, especially the political act of defining what can legitimately be classified as religion and religious behaviour.[4] The leeway given to the self-conception of religious groups by the German Federal Constitutional Court and its wide understanding of what kind of behaviour has a direct relationship to faith and therefore deserves protection by the freedom of religion, is to be understood against the context of this general principle. However, with regard to the new challenges mentioned above, the neutrality principle increasingly serves yet another purpose. The courts use it as an exit-option in order to avoid addressing problems which appear to be too complex for the law relegating religion to sociological study. In this context, state neutrality merely functions as a *chiffre* for indifference. But this strategy of avoidance, though understandable in the light of the complexity of religious pluralism, undermines the law's function of conflict resolution. Furthermore, it neither corresponds to the historical development nor to the functional aspects of the idea of religious freedom.

B. A Historical and a Sociological Approach to the Idea of Freedom of Religion

The state's withdrawal from religious life corresponds to the withdrawal of religion from politics more generally.[5] The differentiation between politics and religion, first established by the Pope in the Investiture Conflict[6], modifies the idea of religion – particularly Christianity. Religion now demands an internalisation by one's own conscience, the *forum internum*, which then is primarily constituted by an observation not of others, but of the Other, *i.e.* God. The liberalisation of conscience correlates to the internalisation of faith, the public ceremonial exercise of which is limited to non-political aspects. From this individualist perspective, religious tolerance

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Grundgesetzes, JURISTENZEITUNG 637 (1996); in contrast: GABRIELE BRITZ, KULTURELLE RECHTE UND VERFASSUNG. ÜBER DEN RECHTLICHEN UMGANG MIT KULTURELLER DIFFERENZ 233 (2000); for a skeptical view, *see* Frank Holzke, *Die „Neutralität" des Staates in Fragen der Religion und Weltanschauung*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 903 (2002).

[4] For the problem of kosher butchering *see* 104 BVerfGE 337, 353; *generally* MARTIN MORLOK, SELBSTVERSTÄNDNIS ALS RECHTSKRITERIUM 78 (1993); STEFAN MUCKEL, RELIGIÖSE FREIHEIT UND STAATLICHE LETZTENTSCHEIDUNG 1, 27, 121 (1997). For the importance of the self-conception *see furthermore* 24 BVerfGE 236, 247; 66 BVerfGE 1, 22; 70 BVerfGE 138, 167; 72 BVerfGE 278, 289; 112 BVerwGE 227, 234; *see* AXEL ISAK, DAS SELBSTVERSTÄNDNIS DER KIRCHEN UND RELIGIONSGEMEINSCHAFTEN UND SEINE BEDEUTUNG FÜR DIE AUSLEGUNG DES STAATLICHEN RECHTS (1994).

[5] *See* Gerd Roellecke, *Die Entkoppelung von Recht und Religion*, JURISTENZEITUNG 105, 109 (2004); *see also* LADEUR & AUGSBERG, TOLERANZ – RELIGION - RECHT, *supra* note 1, at 15.

[6] *See* Jacob Taubes, *Statt einer Einleitung: Leviathan als sterblicher Gott. Zur Aktualität von Thomas Hobbes*, in DER FÜRST DIESER WELT. CARL SCHMITT UND DIE FOLGEN 9, 14 (Jacob Taubes, ed., 2nd ed. 1985).

is a rather pragmatic concept: since the individual conscience cannot be forced to the right decision, any act of violence becomes futile.[7] Therefore, the state is then justified in abstaining from using its power to enforce religious commands. According to John Locke, the state, while still receiving its direction from God, is limited to those tasks that have a non-spiritual character.[8] The state so conceived has the secular purpose of guaranteeing the lives of its citizens, but – for theological reasons – it cannot guide the inner beliefs of citizens through force when it comes to matters of religion.[9] Citizen deviance from religious commands, which a majority of the population might still regard as absolute truth, no longer calls for persecution, but toleration. This explains the continuing reservations to Catholicism: its capacity of an institutionalised decoupling of individual faith and politics was called into question.[10] Accordingly, there are voices claiming that within the Islamic world this move from a "collective" to an "individual" subject, which makes tolerance in the modern sense possible, has not yet occurred.[11] Hence the de-politisation of the Islamic world – if possible – is still to come.

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[7] This idea already appeared in the very beginnings of Christian theology, especially in Tertullian. *See* RELIGIÖSE TOLERANZ. DOKUMENTE ZUR GESCHICHTE EINER FORDERUNG 18 (Hans R. Guggisberg ed.,,1984).

[8] Ian Harris, *Eglise et Etat chez Locke, in* 1 LES FONDEMENTS PHILOSOPHIQUES DE LA TOLÉRANCE 175, 201 (Yves Charles Zarka ed., 2002); *see also* JONATHAN ISRAEL, RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY 1650 – 1750, 265 (2001).

[9] Therefore Habermas' concept of tolerance as a *Gunsterweis*, *i.e.* doing of a favour, deduced from the historical example of French absolutism and serving as a mere prologue of "true" tolerance merging in the rules of public discourse, is onesided. *See* Jürgen Habermas, in JÜRGEN HABERMAS/JACQUES DERRIDA. PHILOSOPHIE IN ZEITEN DES TERRORS. ZWEI GESPRÄCHE, GEFÜHRT, GELEITET UND KOMMENTIERT VON GIOVANNA BORRADORI 66 (2004). The same critique applies to the *Erlaubniskonzeption*, *i.e.* the concept of concession, developed by RAINER FORST, TOLERANZ IM KONFLIKT. GESCHICHTE, GEHALT UND GEGENWART EINES UMSTRITTENEN BEGRIFFS (2003).

[10] For the U.S. *see* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002). For the development of the Catholic idea of the state *see* RUDOLF UERTZ, „VOM GOTTESRECHT ZUM MENSCHENRECHT". DAS KATHOLISCHE STAATSDENKEN IN DEUTSCHLAND VON DER FRANZÖSISCHEN REVOLUTION BIS ZUM II. VATIKANISCHEN KONZIL, 1789-1965 (2005). Hegel, still, considered Catholicism to be incompatible with the idea of the modern state. *See* GEORG WILHELM FRIEDRICH HEGEL, VORLESUNGEN ÜBER DIE PHILOSOPHIE DER GESCHICHTE 530 (Werke [Collected Works], ed. Glockner, vol. XI).

[11] *See* Cynthia Fleury, *Difficile tolerance*, in: Yves Charles Zarka, ed., (*supra*, note 8) 179, 213. For a psychoanalysis of Islam referring to this idea *see* Josef Ludin, *Zwischen Allmacht und Hilflosigkeit. Über okzidentales und orientalisches Denken*, MERKUR 542, 404 (1994).

What can be interpreted as a historical confinement of freedom of religion in this sense has its theoretical counterpart in a functionalistic theory of fundamental rights. According to Niklas Luhmann's sociological analysis, fundamental rights are not only personal freedoms. Rather, within a poly-contextual world without a central point of observance but only intelligible by multiple second-order perspectives,[12] fundamental rights guarantee the differentiation of society in several relatively autonomous social spheres.[13] Thus fundamental rights serve as a barrier against totalitarian tendencies of certain societal subsystems.[14] This theory applies almost perfectly to the recent manifestations of religiously motivated and politically ambitious movements. The tendency of these movements towards the totalisation of society creates the general conflict concerning the relationship between state and religion. In this respect Islam demonstrates with particular distinctiveness a structural problem concerning all types of religion. Followers of Christianity increasingly tend to exert influence on the political process, too.[15] By contrast, it is the task of fundamental rights to secure an independent sphere of action for each societal subsystem. Therefore, the guarantee of freedom of religion can only reach as far as the exertion of faith does not encroach upon the activities of the other social spheres.

The evocation of the Islamic *sharia* or the Jewish *halaka* as religiously determined legal orders, or a religiously motivated refusal of scientific theories reaching beyond the private realm, *e.g.* in the public education system, is not backed by the German Basic Law. Neutrality of the state does not exempt religion from the chal-

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[12] *See* NIKLAS LUHMANN, BEOBACHTUNGEN DER MODERNE 100 (1990).

[13] *See* NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION. EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE. 79 (2nd ed., 1975); HELMUT WILLKE, STAND UND KRITIK DER NEUEREN GRUNDRECHTSTHEORIE. SCHRITTE ZU EINER NORMATIVEN SYSTEMTHEORIE 21, 157 (1975); Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (2003); KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT. ZUR VERTEIDIGUNG DER RATIONALITÄT DER „PRIVATRECHTSGESELLSCHAFT" 194, 348 (2006). With a particular focus on religion *see* NIKLAS LUHMANN, DIE RELIGION DER GESELLSCHAFT 315 (2000); FRIEDRICH WILHELM GRAF, DIE WIEDERKEHR DER GÖTTER. RELIGION IN DER MODERNEN KULTUR 239 (2004).

[14] *See* NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION 23, 72 (1975); Compare with UDO DI FABIO, DAS RECHT OFFENER STAATEN 61 (1998); Udo Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 235, 252 (1997).

[15] *See*, particularly for the U.S., HABERMAS, *supra* note 1, at 120. *See also* however Marcia Pally, *Duell der Paradoxien. Anmerkungen zum Thema Religion in den USA und Europa*, INTERNATIONALE POLITIK 6 (April 2005). Pally correctly emphasizes the phenomenon is not due to institutional considerations but to the habitual entanglement of religion and politics that has a long tradition within the U.S.

lenges of the modern world. On the contrary, the principle expects religious communities to come to terms with these challenges. Neutrality is but a symbol of the instability of the differentiation of the societal subsystems, which has to be continually reproduced as a *process* of neutralisation. It therefore calls upon the state as the political system to set up variable demarcations *vis-à-vis* other social systems, including religious subsystems.

C. The Necessity to Reshape the Neutrality Principle

The traditional concept of the neutral state apparently cannot be upheld when confronted with the new challenges. According to a common reading of this principle, the state may not "identify" itself with any particular faith.[16] The neutrality principle follows naturally from such a narrow interpretation: freedom of religion – both for individuals and denominations – entails the societal freedom to base one's actions and beliefs on knowledge which is precisely outside of the reach of the state's disposition. Accordingly, a non-neutral state would be a state that puts the differentiation of the societal subsystems in question, but then the neutrality principle would be of hardly any relevance. This situation must be distinguished from the cases in which the state forces its citizens to participate in religious activities, *e.g.* mandatory school prayers. Such state action does not correspond to the idea of the social differentiation, either. However, this variant of state intervention in dissenter's freedom of choice is no longer playing a major role today. Rather, what is of practical importance is the preferential treatment of certain denominations by law which – at the same time – risks to factually curb others' freedom of religion: for instance the voluntary school prayer, from which students have to sign off; financial support for religiously motivated activities; the display of a crucifix in the class room or teachers wearing clothes arousing religious connotations *etc.* Well known decisions of the German Federal Constitutional Court demonstrate how misleading the neutrality principle, as traditionally understood, can be in this context, *e.g.* the crucifix[17] and the headscarf cases.[18] Here, the contours of the neutrality

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[16] *See* STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES (2002), *supra* note 3.

[17] *See* 93 BVerfGE 1; *see also* the judgement pronounced after the new legislation, i.e. the introduction of the objection principle („Widerspruchslösung"), of the *Bundesverwaltungsgericht*, NEUE JURISTISCHE WOCHENSCHRIFT 3068 (1999); *see further* the decision by the *Bayerischer Verfassungsgerichtshof*, DEUTSCHES VERWALTUNGSBLATT 1195 (1997); discussed by Ludwig Renck, NEUE JURISTISCHE WOCHENSCHRIFT 994 (1999). *See generally* Peter Badura, *Das Kreuz im Schulzimmer*, BAYERISCHE VERWALTUNGSBLÄTTER 33 (1996); critical from a communitarian perspective Winfried Brugger, *Zum Verhältnis von Neutralitätsliberalismus und liberalem Kommunitarismus. Dargestellt am Beispiel des Kreuzes in der Schule*, in: DER STREIT UM DAS KREUZ IN DER SCHULE 109 (Winfried Brugger/Stefan Huster eds., 1998); for another

principle remain blurred: the presumption that – in the "headscarf case" – the state was identifying itself with a particularly strict variant of Islam, if it allowed the teacher to wear the headscarf, is rather far-fetched. Furthermore, the observance of the neutrality principle, understood as an objective right, cannot (as sometimes suggested) depend on the approval of the parents and teachers involved: If the behaviour in question is incompatible with the idea of the "neutral" state, no individual consent can cure the infringement. In this interpretation, the difference to a subjective construction of both positive and negative freedom of religion is leveled out.[19] The court delineates the boundary of factual interferences with the negative religious freedom of dissenters which is – once again in a very diffuse manner – equated with an objective interest in state neutrality.

Taking all this into account, the idea of "neutrality,"[20] the central principle supposed to determine the relationship between state and religion in the liberal western world, has to be fundamentally reshaped. First, this pertains to a negative perspective: since state neutrality is the consequence of the freedom of religion guaranteed as a basic right, it must not become a mere code for indifference towards the problem of religiously motivated attempts to de-differentiate society. Inasmuch as the state is obliged to guarantee the freedom of religions, it not only has to be willing, but also capable to critically assess the reach of religious activities. In order to safeguard the negative religious freedom, it is the state's duty to protect its citizens against excessive demands of individual religious groups. Neutrality in this affirmative sense, then, means that the public sphere must not be structured by religious codes. It cannot be the idea and function of state neutrality to accept a classification of private expressions of opinions according to a scheme "pleasing to God/blasphemous" and – as has recently been discussed – to sanction it by enact-

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critical perspective *see* Ronald Pofalla, *Kopftuch ja – Kruzifix nein? Zu den Widersprüchen der Rechtsprechung des BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT 1218 (2004).

[18] *See* BVerfGE 108, 282; on this *see* Christoph Gusy, *Kopftuch – Laizismus – Neutralität*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 153 (2004).; Ute Sacksofsky, *Das Kopftuch – von der religiösen zur föderalen Vielfalt*, NEUE JURISTISCHE WOCHENSCHRIFT 3297 (2003); Christine Langenfeld/Sarah Mohsen, *Germany: The Teacher Head Scarf Case*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 86 (2005).

[19] On the necessity of a compensation *see already* Axel von Campenhausen, *Zur Verfassungsmäßigkeit der christlichen Volksschule*, BAYERISCHE VERWALTUNGSBLÄTTER (1970) 153, 154.

[20] Compare STANLEY FISH, THE TROUBLE WITH PRINCIPLE 162 (1999), with Andrew Koppelman, *The Fluidity of Neutrality*, REVIEW OF POLITICS 633 (2004), ; on the German debate *see* STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES, *supra* note 3.

ing corresponding criminal law[21]. The secular judicial system has to ignore any kind of theological argument[22].

However, reshaping of the principle of neutrality also calls for a more positive perspective. This requires developing a far more complex idea of religion than merely its equation with religious "doctrine" serving as a guideline to determine individual behaviour. In this reading, also adopted by the German Federal Constitutional Court, religion is conceived of as a merely irrational, private, extra-societal phenomenon. Therefore, it principally requires equal treatment of all religious groups. Yet the individualisation of faith accompanying the decoupling of politics, law and religion in Europe described above does not mean that – within the modern polity – all forms of religious activities are completely banned from the public sphere. For such a strict limitation would too harshly contradict the character of religion as a collective phenomenon.[23] Since religions in general are "extra-personal mechanisms for the perception, understanding, judgment and manipulation of the world,… for the *organisation* of social and psychological processes,"[24] the subjectivation of religion as a historical process is itself a product of transsubjective procedures of religious changes.[25] And in these processes, religion still remains connected to its surrounding society by structural couplings and operations of exchange. Because of their intensive interaction with culture as a collective phenomenon (and not just as an individual choice), and because of their contribution to structuring and specifying cultural identities, religions generate orienting criteria for the selection of attentiveness and "collective relevance." In this respect, religions, as a part of the postmodern culture, are the memory of society challenged by the necessity to interpret

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[21] Hence the caricatures of Mohammed displayed in a Danish newspaper may have been neither an ideal example of political wisdom or decent education, but they are not a problem of state neutrality: quite on the contrary.

[22] Gerd Roellecke, *Die Entkoppelung von Recht und Religion*, *supra* note 5, at 105.

[23] ROLF SCHIEDER; WIEVIEL RELIGION VERTRÄGT DEUTSCHLAND?, *supra* note 3, at 58. A classic reference is Emile Durkheim, *Zur Definition religiöser Phänomene*, in: RELIGION UND GESELLSCHAFT. EINFÜHRUNG IN DIE RELIGIONSSOZIOLOGIE, 120, 140 (J. Matthes ed., 1967); *see* in more detail LADEUR & AUGSBERG, TOLERANZ – RELIGION – RECHT, *supra* note 1, at 48.

[24] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES, (1973) 216; *see also* SCOTT ATRAN, IN GODS WE TRUST. THE EVOLUTIONARY LANDSCAPE OF RELIGION, (2002) 254; FRIEDRICH WILHELM GRAF, DIE WIEDERKEHR DER GÖTTER, *supra* note 13, at 205.

[25] MARCEL GAUCHET, LA RELIGION DANS LA DEMOCRATIE, (1998); LUC FERRY/MARCEL GAUCHET, LE RELIGIEUX APRES LA RELIGION, (2004).

reality under the condition of uncertainty.[26] Without a "common point of reference"[27] underlying all explicit (how ever complex it might be in a liberal democracy) communications, societal reproduction is not possible.[28] It is precisely this task which the – in particular Christian – religions have fulfilled to a large extent: In a long history of evolution, these denominations have generated and reproduced an asset of thoughts, behavioural patterns, values, procedures etc. forming a "common knowledge"[29] and thereby facilitating the navigation of society under conditions of uncertainty. These "cultural accomplishments" cannot be secularised.

This rejection of a solely individualist understanding of religion oversimplifying its societal function, which is the dominant perspective within legal practice, also marks the contrast to currently observable extremistic forms of religion. Rejecting the productive effects of a collective dimension of religion as elaborated above, the fundamentalist attempt to de-privatise religion[30] on the one hand strives to disengage religion from its cultural surrounding and the mutual exchange connected with it, for the benefit of a one-dimensional hegemony of religion. Yet on the other hand, religious fundamentalism supports, paradoxically at first glance only, confronting a hostile cultural environment characterised by social differentiation, the individualisation of faith.[31] This may even be strategic: In the light of the simplified understanding of religion as a mere personal construction of identity, each act of state intervention in religious issues appears as an illegitimate unequal treatment. Accordingly, the plaintiffs in the "headscarf cases"[32] before German and European

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[26] *See* DIRK BAECKER, WOZU KULTUR?, (3rd ed., 2003) 92, 157, 175.

[27] Cf. ALAIN MINC, LE CREPUSCULE DES PETITS DIEUX, (2005) 85, 98.

[28] *See* MYRIAM REVAULT D'ALLONNES, LE POUVOIR DES COMMENCEMENTS. ESSAI SUR L'AUTORITÉ, (2006) 124; MARY DOUGLAS HOW INSTITUTIONS THINK 23 (1986).

[29] Cf. SCOTT ATRAN, IN GODS WE TRUST, *supra* note 24, at261. For the necessity of presupposing common conventions, perspectives etc. forming a "common point of reference", *see also* Alain Finkielkraut, *Interview*, Magazine Littéraire No. 445 (2005) 32.

[30] *See* Ahmed Cigdem, *Religiöser Fundamentalismus als Entprivatisierung der Religion*, in: POLITISIERTE RELIGION. URSACHEN UND ERSCHEINUNGSFORMEN DES MODERNEN FUNDAMENTALISMUS, 91 (Heiner Bielefeldt/Wilhelm Heitmeyer eds., 1998).

[31] Cf. MARCEL GAUCHET, UN MONDE DESENCHANTE?, (2004) 176.

[32] *See* BVerwGE 116, 359; BVerfGE 108, 282; *Bundesverwaltungsgericht*, JURISTENZEITUNG 1178 (2004), commented by Ernst-Wolfgang Böckenförde; for the point of view of the ECHR *see* Katharina Pabel,

courts engaged in an entirely "identical" interpretation of the freedom of religion, refuting its collective aspects.

These considerations on the productive effects of religion for its respective society can help to positively reshape the neutrality concept. In the perspective advocated here, it is no longer discrimination, but a mere diagnosis that these cultural accomplishments have been primarily generated by the predominant religions in a certain society. Consequently, their privileged status is not only justified by a quantitative, but also a qualitative, functional aspect. If freedom of religion, against religious self-conception, is not to be reduced to its merely individualistic dimension, religious minorities will actively have to find their place in the society. This excludes an undifferentiated equal treatment of all different religions. Instead, a comparison with the proportionate treatment of political parties might be adequate. According to the German statute on political parties, time for commercials on public television is allocated not according to the principle of formal equality, but according to success in the most recent elections[33]. Similarly, the acceptable influence of religious contents on school instruction might be determined.[34] The dominance of the prevalent religion or "Weltanschauung" in a certain society is of crucial importance for the educational process. This also holds true for other political and judicial variants of "participation" of the religions in the reproduction of culture, e.g. the composition of the representative body of public broadcasting corporations.

D. Conclusion

New challenges require new problem-solving strategies. As demonstrated, the mere pursuit of state "neutrality" is no longer sufficient. Rather, a more differentiated approach is needed. This does not suggest to differentiate according to religious criteria of rightness – which is beyond state competence – but to develop a kind of "conflicts norm" structuring the relationship of cooperation, coordination and subordination between the state and religious norms and values.[35] In this con-

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Islamisches Kopftuch und Prinzip des Laizismus. Besprechung des EGMR-Urteils im Fall Leyla Sahin, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 12, 13 (2005).

[33] *See* § 5 I 2 of the German "*Parteiengesetz*".

[34] *See* Martin Stock, *Viele Religionen in der einen öffentlichen Schule: Der Bildungsauftrag als oberster Richtwert,* RECHT DER JUGEND UND DES BILDUNGSWESENS, 94 (2005); Martin Stock, *Einige Schwierigkeiten mit islamischem Religionsunterricht*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT, 1399 (2004).

[35] Andrew Koppelman, *The Fluidity of Neutrality*, *supra* note 20, at 647.

text, the formative power of Christian belief for the development of present western culture must not be ignored. This does not mean, however, to exclusively acknowledge and consider the cultural accomplishments of churches and religions stripped of their genuinely religious profession of faith. Rather, at issue here is the legitimisation of a specific state decision to "couple" religious contents and symbols with the exercise of state functions.[36]

[36] See more in detail, with suggestions for resolutions of the individual areas of conflict, LADEUR & AUGSBERG, TOLERANZ – RELIGION – RECHT, *supra* note 1, at91.