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From qualified neutrality *to* positive equality
The German Federal Constitutional Court's interpretation of religious neutrality in its recent decisions

Markus Krienke

> "The Basic Law lays down for the state as the home of all citizens the duty of religious and ideological neutrality"[1].

Summary

This paper shows in its first part the two main aspects of the specific attention which the German Federal Constitutional Court pays to the positive interpretation of religious neutrality: the broadest comprehension for the subjective definition of religious faith and its freedom corresponds to the restricted right of some religions to constitute themselves as institutions under public law. This "restriction" in combination with the very general openness of understanding religious freedom and admitting religious plurality, are the specific features of what is commonly called the "limping separation" between churches and state in Germany.

In the second part, a concrete case study is dedicated to the two judgments on the headscarf in 2003 and 2015, in order not only to show how these principles have recently been applied in a concrete matter, but also to reflect on how the German Federal Constitutional Court has changed in its argumentation: in difference to the principle of "limping separation" in the former jurisdiction, which is here positively defined as *qualified neutrality*, but has caused some contradictions in the 2003's judgment, this paper tries to register a specific shift in the comprehension of religious neutrality towards *positive equality*. The interpretative thesis of this paper is that while in the former case we deal with a substantial comprehension of state neutrality

[1] Judgement of September 24[24], 2003, 2 BvR 1436/02, BVerfGE 108, 282-340, n° 42.

based on a cooperative bound between the secular state and the Christian culture, in the latter case religious neutrality is thought as a concrete, procedural realization of equality between the religions in every single case. But contrary to some interpretation which follow that religious neutrality should therefore be defined only through individual religious freedom, this paper shows the advantages of its combination with the institutional definition of religious communities even – or properly – in a society that has to rule religious pluralism. Therefore, a critique of the most recent 2015's judgement and some perspectives for the future will close the paper.

1. *General aspects of the comprehension of "religion" in the recent jurisdiction of the German Federal Constitutional Court*

1.1 General outline of the Court's definition of neutrality

The analysis of the recent jurisdiction of the German Federal Constitutional Court shows a significant modification in its comprehension of 'religion' and of 'neutrality' of the secular state – two terms which are understandable only in their reciprocal relationship. This evolution of the determination of both terms from the former 'cooperation' between the secular state and the two Christian churches to the 'dialectic' of individualization of religion, on the one hand, and of a new plurality of religions in civil society, on the other, is one of the most characteristic signs of our late modern societies[2]: "the relevance of religion as factor for homogeneity in society has diminished also in the last years"[3], while at the same time religion gained an increased importance in the public sphere, first of all for the identification and collocation of groups, specially minorities. The "return of religions" in the public sphere is indeed no 'way back' to classic (ecclesiastical) religiosity, and properly *therefore* it implies a new comprehension of the secular state[4]:

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[2] Cf. A. Giddens, *Modernity and Self-Identity. Self and Society in the Late Modern Age*, Stanford 1997.

[3] S. Korioth, *"Jeder nach seiner Façon": Grundgesetz für die multireligiöse Gesellschaft*, in: Kritische Justiz (ed.), Verfassungsrecht und gesellschaftliche, 2009, 175-185, here 177; cf. id., *Loyalität im Staatskirchenrecht? Geschriebene und ungeschriebene Voraussetzungen des Körperschaftsstatus nach Art. 140 GG i.V.m. Art. 137 Abs. 5 WRV*, in: W. Erbguth / F. Müller / V. Neumann (eds.), Rechtstheorie und Rechtsdogmatik im Austausch, Berlin 1999, 221-245.

[4] P. Berger / G. Davie / E. Fokas, *Religious America, Secular Europe? A Theme and Variations*, Farnham 2008, 12f.; U. Beck, The Reinvention of Politics: Towards a Theory of Reflexive Modernization, in: id. / A. Giddens and S. Lash (eds.), *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*, Cambridge 1994, 1-55; R. B. Abel, *Die Entwicklung der Rechtsprechung zu neueren Glaubens- und Weltanschauungsgemeinschaften in den Jahren 2003 und 2004*, in: Neue

while in modern times, the secular state 'mandated' all religious questions to the Christian churches, such a 'division of labour' is no longer possible if we take seriously the pluralization of society in its religious aspect (which obviously includes also the atheist option). The most significant contradiction of this development is that the neutral constitutional law and its supreme institution are confronted with religious conflicts and claims, although the Constitutional Court is by definition not able to *decide* in these matters[5]. This new situation puts the institutional arrangements and definitions in a new light, which required most recently a significant shift in its jurisdiction: in other words, the specific 'modern' comprehension of 'neutrality' through 'division of labour' between the secular state and the churches in former jurisdiction is probably not any longer able to resolve conflicts. For this reason, according to the thesis of this paper, the secular neutrality of state should be interpreted – in a 'late modern' way – as *practical or positive equality* which can be guaranteed in the public sphere only by a new admission of religious plurality expressed through "positive religious freedom".

The indicated evolution fosters in the Court's conscience the conviction that it is not able to give any precise definition of what religion is[6]: as a secular institution, it cannot resolve this definition objectively, but has to leave it to the subjective definition of every faithful[7]. While in former decades, the definition of religion was practically identical with the Christian ecclesiastical faith, the Court sees now better what is defined in art. 4 of the Basic Law (*GG*, "Grundgesetz", the German Constitution): religious liberty as subjective right. Nevertheless, this does not mean that there could not be evidenced two 'objective' dimensions. (1) Religion must be a spiritual act from its inner side, for we do not deal with a religion if an association does not contain any spiritual element as final goal and acts for example only

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Juristische Wochenschrift 2005, 114-119, here 114; R. Münch, *Religiöse Pluralität im nationalen Verfassungsstaat. Funktionale Grundlagen und institutionelle Formung aktueller Konflikte*, in: Berliner Journal für Soziologie, 16, 2006, 463-484, here 463f.

[5] A. Reuter, *Säkularität und Religionsfreiheit – ein doppeltes Dilemma*, in: Leviathan, 35, 2007, 178-192, here 179, 184; M. Droege, *Der Religionsbegriff im deutschen Religionsverfassungsrecht*, in: M. Hildebrandt / M. Brocker (eds.), Der Begriff der Religion. Interdisziplinäre Perspektiven, Wiesbaden 2008, 159-176, here 173. And indeed, as we will see, it is no accident that the recent judgment (in 2015 on the headscarf question) was criticized to not be a really "decision" but to leave open the fundamental problems.

[6] Cf. S. Korioth / I. Augsberg, *Religion and the Secular State in Germany*, in: J. Martínez-Torrón / W. Cole Durham (eds.), Religion and the Secular State / La religion et l'État laïque. Interim National Reports / Rapports Nationaux, 2010, 320-330, here 323.

[7] T. P. Holterhus / N. Aghazadeh, *Die Grundzüge des Religionsverfassungsrechts*, in: Juristische Schulung 2016, 19-23, 117-122, here 20.

for monetary purpose. And of course, a religion cannot be recognized if it would act intentionally against the fundamental principles of the liberal and secular constitutional order, thus, if it would become demagogic fundamentalism. (2) For every religion, it is required a minimum of social and communitarian expression in an objective way which includes some organizational structure. An exclusive subjective 'religion' could not claim to be treated as religion in the sense of art. 4 GG. With these two basic dimensions the Constitutional Court in its decision of February 5th, 1991 distinguishes a religious faith from a mere opinion or a subjective conviction, which cannot claim the protection of a religious faith[8].

Once these presuppositions are assured, the Court must positively recognize the plurality of religious expressions[9]: and its concept of neutrality does not allow to give further criteria boarders to any 'essential' comprehension of it. In occasion of its famous judgment over the crucifix in 1995, the Court has specified what does 'neutrality' in the sense of the German Basic Law mean: (1) it is realized through the self-restriction of the law and the state in religious matter; (2) moreover through the admission of a plurality of religions in a tolerant climate, as long as this plurality is coherent with the other fundamental rights. But it is articulated also through a third element which is (3) the refusal to understand neutrality as public 'sterility'[10]. This 'sterility' means the pure negative interpretation of religious neutrality by the state e.g. if it would deny to its officials to wear any expressive sign or to give any concrete expression to their religious convictions[11]. In this way, the German Court defines clearly the difference of its idea of public neutrality to French laicism: "It is impossible to shake off the value convictions and attitudes which are culturally bequeathed and historically rooted, and which are the basis for the social cohesion and from which depends also the realization of the proper duties of the state. The Christian faith and the Christian churches […] have had a fundamental shaping power in this regard. The state cannot be indifferent towards the traditions of thought, the experiences of sense and the patterns of behaviour which come from that"[12]. But the same Court decided also that a positive law, which orders the installation of crucifixes in the classrooms, is not coherent with the idea of neutrality, even if Christian

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[8] Judgment of February 5th,1991, 2 BvR 263/86, BVerfGE 83, 341, Bahà'í.

[9] Holterhus/Aghazadeh, *Die Grundzüge*, 22.

[10] C. Link, *Stat Crux? Die "Kruzifix"-Entscheidung des Bundesverfassungsgerichts*, in: Neue Juristische Wochenschrift, 1995, 3353-3357, here 3353f.

[11] Judgment of May 16th, 1995, 1 BvR 1987/91, BVerfGE 93, 1, Kruzifix.

[12] BVerfGE 93, 1, 22.

religion has a specific and proper importance for our civil culture: the state should not identify itself with a certain religion, and this was argued with the broadest interpretation of individual religious freedom ex art. 4 GG[13]. Indeed, the weighting between the "Christian values" of the crucifix, on the one hand, and the individual religious freedom of the pupils who had to "learn under the cross" and the educational prerogatives of the parents ex art. 7 GG, on the other, led to a strong definition of the neutrality of the state, which was seen as the guarantee of individual religious freedom. The attribution of neutrality to a strong state which only in this way can guarantee religious freedom brought thus to the curious crucifix-decision despite – or better: due – to a very religious-friendly interpretation of the article 4 GG by the Court. In the discussion of this decision, the literature raised this neutrality principle in the range of the fundamental constitutional principles like democracy, federalism, rule of law and the social State: "In this way the neutrality principle contributes like the other principles mentioned in article 20 GG – the principle of democracy, of federal state, of rule of law, and of social state – to the chracteristics of the Basic Law. It ranges as equal public principle besides the others on the level of Basic Law, and is protected by the eternity clause of article 79 comma 3 GG"[14].

Article 4 GG guarantees the positive and negative religious freedom, that is to be free to choose, confess, live and proclaim publically a religious faith, for instance also to proselytise, as well as to not do all that due to an atheist conviction. This widest interpretation of the art. 4 GG does not dispose any restriction which could be given by positive law, while other fundamental rights do indeed have the clause, e.g. the right of private property. To the contrary, the right of religious freedom finds its "barrier" (*Schranke*) only in concrete conflicts to other fundamental rights[15]. But any conflict between fundamental rights, according to the German Constitution, can never be resolved by 'negation' of one of them, but only by "equilibrate compensation" (*schonender Ausgleich*) through "practical concordance" (*praktische Konkordanz*) so that the liberties (social primary goods)[16] in conflict do not

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[13] Cf. W. Brugger, *Zum Verhältnis von Neutralitätsliberalismus und liberalem Kommunitarismus. Dargestellt am Beispiel des Kreuzes in der Schule*, in: id. / S. Huster (eds.), Der Streit um das Kreuz in der Schule. Zur weltanschaulich-religiösen Neutralität des Staates, Baden Baden 1998, 109-154, here 109.

[14] A. Nolte, *Das Kreuz mit dem Kreuz*, in: Jahrbuch des öffentlichen Rechts der Gegenwart, 48, 2000, 87-116, here 111.

[15] Holterhus/Aghazadeh, *Die Grundzüge*, 120.

[16] I use the term "goods" here in the meaning of John Rawls' social philosophy. In *A Theory of Justice*, he defined that "[a]ll primary social goods are to be distributed equally unless an unequal

eliminate themselves because of their contradictious constellation[17], but become reciprocal condition for their maximal realization (*Optimierungsgebot*).

This widest interpretation of religious freedom is one of the characteristic elements of the German Federal Constitutional Court: if it would refer to a 'narrow' interpretation of religion, it would give to the State (legislative) and the courts the duty to decide *what is* and *in which cases* we deal with a religious phenomenon. More precisely, from the 1995's decision results that the two fundamental values which must be brought into an equilibrate compensation are the neutrality of the State, on the one hand, and the religious freedom, on the other. Like in this case, often other fundamental rights are implied e.g. the freedom to educate the own children. Before analysing the recent dynamics in the argumentation of the Court, we must have a look at the reflex of the changing religious phenomenon in the Court judgments of the last 25 years – which are characterized after the fall of Berlin Wall by the consequential loss of importance of the churches in the public sphere, and by the formation of the late modern society in which the Court tries to maintain the former concept of neutrality despite the fact that society was changing, for in a certain way the 'religions' are returning and that Christianity is less and less a religious point of reference in German society.

1.2. *The understanding of 'religion' ex art. 4 GG*

There are specifically two decisions in which the Court affirmed religious freedom in a context of positive and – how we try to define it – "qualified neutrality"[18]. According to this concept, neutrality is not understood as

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distribution is to the benefit of everyone" (J. Rawls, *A Theory of Justice*, Cambridge 1971, 150). Also Alexa Zellentin, *Liberal Neutrality. Trating Citizens as Free and Equal*, Berlin-Boston 2012, 138, refers explicitly to Rawls for treating the problem of religious neutrality in modern liberal states.

[17] H. Weber, *Änderungsbedarf im deutschen Religionsrecht?*, in: Neue Juristische Wochenschrift 2010, 2475-2480, here 2478.

[18] Cf. R. Carp, *Religion in the public sphere: is there a common European model?*, in: Journal for the study of religions and ideologies 10/28 (2011) 84-107, here 98; S. Ferrari, *Models of State-Religion Relations in Western Europe*, in: A. D. Hertzke (ed.). The Future of Religious Freedom: Global Challenges, Oxford 2012; D. P. Kommers D. P., *West-German Constitutionalism and Church-State Relations*, in: German Politics and Society 19, (1990), 1-13. The term "qualified neutrality" was introduced by a working group which published the outcome in A. Piccinin / G. Alfieri, *Christianity and the Secular State: European Models. The English and German Case as "Qualified Neutralities"*, in: S. Sangalli (ed.), Religion and Politics. Religious Liberty and Confronting New Ethical Challenges: What is the Public Role of Faith in Today's Globalized World?, Roma 2016, 189-232.

elimination of any religious portrayal in the public sphere of neutral law, but has to guarantee the necessary space for the self-expression of religion: law is not understood as institution of 'negation' but of 'enabling'. This ethical view on the nature of fundamental rights reflects its anthropological significance – and this dimension is without any doubt a heritage from the former tradition of the Court's jurisdiction which is rooted in the natural right philosophy.

The wide interpretation of religious liberty becomes clear in the judgment of January 15th, 2002, by which the Court recognizes the ritual slaughter to Muslims even in contradiction to the animal laws which have an anchor in the Constitution through art. 20a GG[19]. In this case it becomes evident that the Court does not intend religious freedom as something like a 'concession' or a 'privilege' to the religions which would therefore grant of 'exceptions' of the law (in this case of the law which saves the animals), but as real and authentic original realization of a freedom. The critics of this decision stressed that the Court's argumentation would be valid if the butcher was a Muslim, but not if the religious freedom concerned his customers[20]. An analogous decision was made eleven years later for the Hebrews: on February 8th, 2013: The Court refused a recourse against the German law on circumcision which allows operation – only in the first six months after birth – also by a religious official without medical formation[21]. This law was the political reaction to a decision of a court in Cologne, which defined the circumcision as act of invasion in personal integrity, in this case of the new-born. Given that the *Bundesverfassungsgericht* did not pronounce a complete judgment, but limited itself to renounce a recourse against this law because the person who did the recourse was not directly interested by it, we actually do not have any concrete position of the Court on the case of circumcision. But in an interesting judgment of August 2nd, 2001, the Court did not accept the recourse of a woman of Jehovah's Witnesses, who had received a blood transfusion, although previously she had declared that for religious motivations she would never agree to such a life-saving treatment[22]. The Court did not accept the recourse because it decided that in the moment of the

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[19] Judgment of January 15th, 2002, 1 BvR 1783/99, BVerfGE 104, 337, Schächten.

[20] J. Rux, *Tierschutz und Bekenntnisfreiheit*, in: Zeitschrift für Ausländerrecht und Ausländerpolitik, 2002, 152-154, here 153f.

[21] Judgment of February 8th, 2013, 1 BvR 102/13 (not accepted); for the actual debate cf. J. Friedrich, *Elternwille und Religionsfreiheit versus Kindeswohl – am Beispiel der Beschneidung*, in: F. Staudt / E. Schockenhoff (eds.), Ethik in der Medizin, Freiburg 2016, 175-187.

[22] Judgment of August 2nd, 2001, 1 BvR 618/93 (not accepted).

urgency of blood transfusion, when she was not conscientious, her husband was her juridical exponent. And the Court expressed serious doubts if the woman, being conscious, would had confirmed her declaration in the moment of urgent danger of death. In the occasion of this judgment, the Court gave another precious definition: that the exercise of a religious faith is never a mere individualistic action but it is always embedded in a social context. In a previous decision, the Court had no doubt that in the case of a minor son, his parents who are part of Jehovah's Witnesses are not allowed to refute a blood transfusion because of their religious faith. Further, the Court decided, that parents must not refuse to send their children to the obligatory school because of religious motivation[23].

In the light of these two cases, the already mentioned crucifix judgment of May 16th, 1995, seems outdated: it can be seen as the last decision which focused on personal religious freedom strictly with regard to a strong state neutrality. This means, that during the 90's the concept of state neutrality was still a quite 'substantial' one for the Court and led to the idea that only a severe affirmation of 'neutrality' can grant the widest interpretation of individual religious freedom: the latter was caught in the exclusive context of the first. And indeed, before 1995 the doctrine of "qualified neutrality" implied the crucifixes in classrooms within this definition of 'substantial' state neutrality in collaboration with the churches. But due to the social changes in this period the *Bundesverfassungsgericht* declared this concept no longer compatible with religious neutrality.

For the Court in this case the argument of state's neutrality prevailed on the expression of religious freedom: a religious sign on the classroom walls would not be expression of the latter, but a clear imposition by the state without the possibility that the school pupils could avoid it in any way. The principle that every space the school dedicates to religious expressions has to be qualified "by the principle of freedom" with the opportunity to avoid them, "is not assured when crucifixes are installed in the classrooms, which cannot be avoided by those who do not agree but think diversely"[24]. In this decision, the Court referred not only to article 4 GG (religious freedom of the pupils), but also to the article 6 which affirms the educative prerogative of the parents. Thereafter the Bavarian state modified the law implementing the possibility of non-compliance to the general rule (crucifixes in classrooms), when someone argues in a reasonable way against the crucifixes.

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[23] Abel, *Die Entwicklung*, 115.

[24] BVerfGE 93, 1, 24.

This modification referred to the specification of the Court's vice president, that the anti-constitutional element of the law is precisely the obligation of the crucifix *by the state*[25]. Since that decision, a direct rejection of the crucifix happened only once, when a teacher refused to teach under the cross (2002), while in another similar case was not uphold the complaint: a regional court did not accept the argument of teacher's damage on his soul. In this case it is noteworthy that in 2011 the European Court corrected its own 2009's decision against the crucifixes in Italy, defining the cross a "passive symbol" which therefore would not offend neither the religious neutrality of the State nor the individual religious freedom of the pupils. Indeed, someone asked, does the "crucifix" not stand also for the values of religious tolerance; is it not a sign against discrimination and against the identification of the public with a specific religion[26]?

1.3. *The concept of 'religion' ex art. 140 GG and 137 ff. WRV*

The second particular aspect of the constitutional norms of the German *Grundgesetz* which was object of the most significant decisions of the Constitutional Court in religious matters, is the institution of 'privileged religious communities', a sort of 'High Churches' (in the plural!) which actually in a full sense is applied only to both the major Christian confessions, the Catholic Church and the organization of the Protestant Churches in Germany[27]. This corporative comprehension of religion by article 140 GG recurs to the articles of the former Constitution, the *Weimarer Reichtsverfassung* (*WRV*) and incorporates the articles 136, 137, 138, 139 and 141 directly in the *Grundgesetz*. In these articles, the German Constitution integrates the individual fundamental right of article 4 with the necessity of institutionalizing religious communities as public corporative realities: a sort of horizontal *subsidiarity* which gives to the religious communities the possibility of full public recognition and corresponding privileges. But considering that the only privilege which could not be reached as organizations by private law, is the taxation, and that even as civil organizations they enjoy the largest au-

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[25] W. Flume, *Das "Kruzifixurteil" und seine Berichtigung*, in: Neue Juristische Wochenschrift, 1995, 2904-2905, here 2905.

[26] Link, *Stat Crux?*, 3354f.; R. Pofalla, *Kopftuch ja – Kruzifix nein? Zu den Widersprüchen der Rechtsprechung des BVerfG*, in: Neue Juristische Wochenschrift 2004, 1218-1220, here 1219.

[27] Actually the following denominations are formally enabled to benefit from this institution: Old Catholics, the Hebrews, some orthodox communities, the Anglicans, Methodists and Mennonites, the Mormons and Baptists and the Salvation Army.

tonomies which derive from article 4 GG, it was correctly commented that "[t]he status of corporations under public law is an organizational model which is independent from religious presuppositions. Therefore, it cannot serve the religious freedom in its institutional-collective sense, but at best the right of religious communities to self-determination"[28]. It is therefore *not* expression of "positive religious freedom", which is plainly guarenteed by art. 4 GG, but a specific institutional arrangement by the German Basic Law. In these juridical norms, which were introduced in order to give to religious communities the full institutional freedom and self-organization against the state, the idea of autonomy of religions reaches its full and essential expression and gives a new dimension for a subsidiary secular state. In this way, some churches become 'partners' of the state in organizing civil society. This is the specific German way of "limping separation", or better: *qualified neutrality*, which is the main the main objection against French laicism with its elimination of institutional guarantees, support and privileges[29]. Against some tendencies which try to divide the institutional question from the guarantee of individual religious freedom[30], it is clear that the institutions are the means for the realization of religious freedom, and therefore we deal with a relationship of reciprocal integration of both articles 4 and 140[31].

Article 140 GG does not have the function to assure religious freedom and neutrality, and only one time, in the already mentioned *Bahà'í*-decision, the Court incorporated one of its corporative dispositions directly in the interpretation of art. 4 GG. Even if this privilege is given just to some churches or religious communities, the right of self-organization is applied to all the other communities. Indeed, the commas 3 and 4 of article 137 WRV dispose that "[e]very religious association disciplines and dispenses in an autonomous way its proper interests, in the limits of the general laws. It supplies its charges without public intervention of the national or local authorities.

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[28] G. Neureither, *Die jüngere Rechtsprechung des BVerfG im Kontext von Recht und Religion*, in: Neue Zeitschrift für Verwaltungsrecht 2011, 1492-1497, here 1496.

[29] Cf. M. Heckel, *Zur Zukunftsfähigkeit des deutschen "Staatskirchenrechts" oder "Religionsverfassungsrechts"?*, in: Archiv des öffentlichen Rechts 134, 2009, 309-390 here 320f. "The constitutional religious institutions are no contradiction but an integration of the constitutional guarantee: they must be a support for the realization of religious freedom and equality amog the citizens" (ibid. 326).

[30] Cf. C. Hillgruber, *Der öffentliche Körperschaftsstatus nach Art. 137 Abs. 5 WRV*, in: H. M. Heinig / C. Walter (eds.), Staatskirchenrecht oder Religionsverfassungsrecht? Ein begriffspolitischer Grundsatzstreit, Tübingen 2007, 213-227; C. Walhoff, *Die Zukunft des Staatskirchenrechts*, in: Essener Gespräche zum Thema Staat und Kirche 42, 2008, 55-106.

[31] Cf. Heckel, *Zur Zukunftsfähigkeit*, 358.

The religious associations acquire the juridical capacities according to the general dispositions of the civil law".

A significant but surprising decision on this matter was given on December 17th, 2014[32] – surprising, at least, for those who reduce the constitutional aspects of religious freedom to the individual aspects of article 4 GG. A French couple who transferred to Frankfurt declared to the local authorities to profess the "mosaic" faith. They received the welcome letter of the Jewish community, but after six months they protested against this 'affiliation' and asked the public recognition of never have been part of the Frankfurt community. Indeed a court of first instance conceded that recognition to the couple, because they referred to the principle ex article 4 GG, that defines 'religion' on the basis of subjective self-declaration, and indeed the subjective will of the couple was never to be part of the Frankfurt community. But the Federal Court contradicted the first instances referring to the organizational autonomy of all religions: if the internal rules of a religious community set the affiliation in a certain way, the public law and the state has to recognize this self-determination. The Constitutional Court decided thus that the state had to protect this organizational autonomy, which regularly had registered the couple in the Frankfurt community. That means that it validated the *objective* will of the couple (and not their subjective and internal will), which was expressed when they registered as a couple of "mosaic faith" in Frankfurt, where only *one* Jewish community exists. The right of self-organization is thus widely applied by the Constitutional Court, and also to religious communities which do not enjoy the status of public corporations.

Comma 6 of article 137 of *Weimar Constitution* rules precisely this aspect and defines the "qualified neutrality" of the state: refuting a sterile neutrality, it collaborates with chosen churches or religious communities in social and educative matter[33]. Further, the communities under public law have the right to collect taxes. If the amount reaches certain measures, the State offers also its tax collecting offices. As the Constitutional Court underlines, this status gives to the respective churches and religious organizations also a diverse public perception: for the 'institutional character' of the 'German mentality', religions without this status are always perceived as 'religions of second class'. This disposition does not seem to the Constitutional Court any disregard of religious neutrality: with the concept of "qualified neutral-

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[32] Decision of December 17th, 2014, 2 BvR 278/11, BVerfG NVwZ 2015, 517, Staatliche Anerkennung der Mitgliedschaft in einer als Körperschaft des öffentlichen Rechts verfassten jüdischen Kultusgemeinde.

[33] Cf. Piccinin/Alfieri, *Christianity and the Secular State*.

ity" the churches in Germany realize a public rule to which – according to the interpretation of the Court – the neutral state could never correspond, because it cannot realize activities which presuppose the religious conviction of volunteers and members of religious communities. Therefore, this disposition answers to an important and necessary motivation resource which for the state is blinded by definition[34].

On December 19th, 2000, the Constitutional Court rejected another court's decision to negate the status of corporation under public law to Jehovah's Witnesses, even if this community refutes the recognition of the liberal state and does not contribute in a positive way to it[35]. In this occasion, it was precised that from religions cannot be required a positive profession of the fundamental principles of the democratic and liberal state, but only that they do not act effectively and intentionally against it: for religions it is necessary to be *rechtsreu* (loyal to the law and the Constitution) but not *staatstreu* (loyal to the state). Evidently only some casual breach of law is not sufficient to declare a religion in contradiction to the Basic Law and to doubt about its loyalty. In the case of Jehovah's Witnesses, the Court decided that their affirmations against the state are directed to a non-political reign, which is beyond the liberal-democratic state, to whom they may not express any positive solidarity. Such a 'tension' between religion and state is indeed fully recognized by the Court. In the same decision, the Court confirmed also the requisites for the recognition of a religious community as an organization of public law: besides the just mentioned loyalty to the constitution, a sufficient number of faithful, a sufficient economic dotation, a minimal duration, some juridical organization and a certain intensity of spiritual life. But it is also specified that these are rather 'indications' for a 'schematic application' than objective measures or 'hard' criteria. Moreover, in the mentioned decision comes out that this juridical personality of public law would not, in any way, be an indispensable condition for the collaboration between state and religious communities, and that the religious teaching in schools can be organized by a religious community also without this status. Indeed, actually, the teaching of Islamic religion in primary schools has been installed.

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[34] Cf. E.-W. Böckenförde, *Zur Entstehung des Staates als Vorgang der Säkularisation*, in: id., Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte, Frankfurt a. M. 2006, 92-114, here 112; for the recent debate of this thesis cf. J. Habermas / J. Ratzinger, *The Dialectics of Secularization. On Reason and Religion*, San Francisco 2006.

[35] Judgment of December 19th, 2000, 2 BvR 1500/97, BVerfGE 102, 370, Körperschaftsstatus der Zeugen Jehovas.

Without any doubt, the juridical personality of public right gives more force to the autonomy and interior discipline of the religions which the Court, in a general way, recognizes to all religious communities. In a particular judgment of October, 22nd, 2014[36], in merit of an hospital which fired a chief physician, because while he was under contract, he had divorced and had a second civil marriage. The problem was the collision between the fundamental rights of the worker plus his protected work by civil law and constitutional dispositions, on the one hand, and the right of self-determination and self-organization of religious communities, on the other. This decision is important because it extends the essential elements of religion also to all the institutions that a religious community supports in order to realize its ministry (in this case: the hospital). In this sense, every constituted reality, according to private law, can be seen as an integrative part of the positive realization of the faith in its social expression. But the critics of this form of 'loyalty' demonstrate the on-going development from the 'protected' sphere of the recognized 'High Churches' to the always more important subjective dimension of the individual[37]. This judgment of October 22nd, 2014 had no explicit reference to the constitution of the church as corporation of public law – indeed the reference is to the comma 3 and not 5 of article 137 WRV –, but it is a further document for the recognition of the wideness in which is understood the autonomy of church and religious communities[38]. This autonomy, not only in organization and administration, but also in moral questions, is recognized also where these projects are partially co-financed by public institutions. This is indeed the case of catholic or protestant hospitals in Germany. And therefore we deal with another example of what "qualified neutrality" means: even the nearly complete public funding of projects, which are organized by the churches, cannot justify any restriction of this inner liberty of religious organizations.

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[36] Judgment of October 22nd, 2014, 2 BvR 661/12, BVerfGE 137, 273, Kirchliches Selbstbestimmungsrecht und Arbeitsverhältnis.

[37] P. Melot de Beauregard / M. Baur, *Loyalitätspflichten des Arbeitnehmers im kirchlichen Arbeitsverhältnis – Eine Übersicht über die aktuelle Rechtsprechung*, in: Neue Zeitschrift für Arbeitsrecht Rechtsprechungsreport, 2014, 625-630, here 625, 630.

[38] H. Weber / R. Gerhardt, *Kirchliches Arbeitsrecht im Wandel? Weitere Lockerungen der Anforderungen an das Privatleben ratsam*, in: Zeitschrift für Rechtspolitik 2015, 156-157, here 157.

2. *The recent debate: from* qualified neutrality *to* positive equality

2.1 *The shift in the understanding of religious neutrality of the secular state in the 2003's and the 2015's judgment*

The most recent judgment of the Constitutional Court, which is of central interest for the issue of the essential elements of religions, is, without any doubt, the decision taken on January 27th, 2015[39]. This judgment signs a real 'Copernican revolution' in the jurisdiction of this Federal Constitutional Court, and this evident change in the basic principles is very surprising, because it means a sort of self-correction in an only 13-year time – even if the Court tries to avoid the impression of a self-correction. In 2003 the Court judged in the case whether a Muslim teacher would be allowed to wear the headscarf in classroom, that the "equilibrated compensation" between the religious freedom of the teacher, on the one hand, and the religious freedom of the pupils plus the educative prerogative of the pupils' parents, on the other, can be realized only through positive law by every region[40]: indeed, according to the German Constitution culture and education are legislative prerogatives of the *Länder*. In other words, the Court defined the question a genuine *politic problem* and committed it to the democratic legislator with the obligation to conserve public neutrality and therefore the principle of equal treatment of every religion. In this still 'substantial' comprehension of 'neutrality', every decision on its concrete realization or its 'qualifications' are prerogative of the state. It was further remarked that this case could not be compared to the crucifix decision, because the teacher is subjectively able to recur to his fundamental rights, first of all to article 4 GG. But at the same time, the Court affirms that wearing the headscarf could constitute a certain situation of "danger", threatening the public peace in school. Certainly this "danger" is not realized automatically and necessarily; and as a "potential danger" it consists in a certain influence which the teacher has on the pupils, on their religious freedom and the educational prerogative of the parents. The region's duty was defined, in other words, as solving this *abstract conflict* by means of an eventually apposite legislation. In the consequence of the assignment of the prerogative to the regional legislator, eight out of 16 regions – half of all – introduced a concrete legislation to resolve the "abstract danger". But it became immediately clear that the identification of this "abstract

[39] Judgment of January 27th, 2015, 1 BvR 471/10, BVerfG NJW 2015, 1359, Kopftücher in der Schule.

[40] Judgment of September 24th, 2003, 2 BvR 1436/02, BVerfGE 108, 282, Kopftuch Ludin.

danger" is not very easy for the religiously neutral legislator. What the *Länder* legislation only apparently had 'resolved', had to be concretely decided by the lower Courts in the line of the 2003's decision: and in the consequence, they prohibited also the nun dress and the Hebrew kippa[41].

But in 2015, when another Muslim teacher brought a case to the German Federal Constitutional Court, this judgment was changed and the question was anew resolved on the level of fundamental constitutional rights and not by demanding the solution from the regional legislator. With this second judgment, the Court realized an epochal shift in defining state neutrality: skipping definitively the possibility that a religious faith can constitute a sort of "abstract danger", wearing the headscarf was recognized for the first time as a pure individual expression of religious convictions, and therefore it was put under the full guarantee of art. 4 GG. Only in the possible case that the headscarf would constitute a "concrete danger" in some schools, causing a concrete disturbance to the public peace, the Court delegates the deciding prerogative to the direction of the school or to the competent office, in order to determine a concrete solution which could even be to prohibit the headscarf in the *concrete case*. That does mean that an "equilibrate compensation" has to be found in every concrete case, something like a 'concrete compensation'. The very new element of this decision is omitting a strong affirmation of 'substantial' state neutrality which would severely engage also the state administrators like the teachers[42]: The Court affirms that even if a teacher stays in the sphere of state neutrality and represents it, s/he does not lose his or her fundamental rule of religious freedom, and it does further not mean that the state would identify itself with eventual religious symbols and creeds of the teacher[43]. And even if there is no consensus in the Islamic debate if the headscarf is really a 'pure' religious symbol or whether it has also other political or social meanings, for the Court it is sufficient that such a pure religious comprehension *is*

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[41] C. Henkes / S. Kneip, *Von offener Neutralität zu (unintendiertem) Laizismus. Das Kopftuch zwischen demokratischem Mehrheitswillen und rechtsstaatlichen Schranken*, in: Leviathan 38 (2010) 589-616, here 608.

[42] This was still the idea of the 2003's decision, first of all of the minority of judges who "adamantly defended the state centered and antipluralistic idea of the state, the officialdom and the 'will of the people'" (R. C. van Ooyen, *Bundesverfassungsgericht und politische Theorie. Ein Forschungsansatz zur Politologie der Verfassungsgerichtsbarkeit*, Wiesbaden 2015, 188). But also the solution of the majority of judges stays in the classical tradition of neutrality, because they argued that the case of the headscarf is *paradigmatically different* from the crucifix case (cf. ibid. 185).

[43] M. Sachs, *Grundrechte: Kein allgemeines Kopftuchverbot für Lehrerinnen in der Schule*, in: Juristische Schulung 2015, 571-574, here 572; T. Traub, *Abstrakte und konkrete Gefahren religiöser Symbole in öffentlichen Schulen*, in: Neue Juristische Wochenschrift 2015, 1338-1341, here 1339.

possible[44]. Obviously, already in the 2003's judgment this individual religious freedom of the teacher was more important than the consideration that "a piece of clothing conspicuously displayed by a teacher for religious reasons arguably makes a bigger impression than does the familiar symbol of a cross or crucifix"[45]. And since this is another confirmation of the importance of the *subjective definition* of the religious act as it was defined in the *Bahà'í*-decision, we can see in this shift a consequence which was already on the horizon in the Court's decisions of the last 25 years. For the Court, it is enough that the headscarf is not per se e political sign of oppressing women or of opposition to the values of the constitution of the liberal and secular state[46]. With these two elements, the decision has defined, according to our analysis, *a new concept of state neutrality*: even if the language of the Court uses the classic term of "positive religious freedom", neutrality is no longer a substantial state character, but something that concretely *happens* in the relationships between people who are religiously identified[47], even if we deal with an official representative of the state[48]. We can also say that it is identified in a new way with *tolerance*. This shift in the understanding of state neutrality is immediately clear when we consider that the 2015's judgment explicitly rejected the regional law of *Nordrhein-Westfalen*, which was introduced after the 2003's judgment, and

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[44] S. Muckel, *Pauschales Kopftuchverbot an öffentlichen Schulen verletzt die Religionsfreiheit*, in: Juristische Ausbildung, 2015, 476-478, here 477; Sachs, *Grundrechte*, 572f.; Traub, *Abstrakte und konkrete Gefahren*, 1339.

[45] A. v. Campenhausen, *The German Headscarf Debate*, in: Brigham Young University Law Review, 2004, 665-700, here 688. Campenhausen argues here in favour of the minority position (*Sondervotum*) in the 2003's decision.

[46] Cf. D. McGoldrick, *Human Rights and Religion. The Islamic Headscarf Debate in Europe*, Portland 2006, 113.

[47] Already in the 2003's *Sondervotum* (the opinion of the minority judges) the three judges conceded that the context of fundamental rights is not any more the bi-polar modern distinction between the individual and the state, but that now in late modern societies the relationships are multi-polar and multi-dimensional: the individual freedoms are not any more 'rights against the State', and those who exercise a service in the name of the state do not reject to be an individual and private person.

[48] Nevertheless, the three judges of the minority opinion in 2003 conceded that a teacher is not any more a non-personal representative of a substantial state, they retain that the public ministers continue to be "basically" on the side of the State, and this "staying on the side of the state" would be further a result of a free and private decision of the teachers, while the pupils are obliged to go to school and therefore in a constitutive inferior relationship to the teacher. Every teacher would act a mandate of the society and in the responsibility for the state: in this function, they are explicitly *not* private people. For this reason, the three judges refer to article 33 comma 5 GG. To the contrary, the crucifix installed on the classroom walls would *not* be such an expression of individual faith but only a "passive symbol", not endorsed by a teacher: and if "active symbols" like the headscarf have more influence on the pupils, because they are a religious confession of a concrete person with authority on the children, then it would be contradictious to admit the headscarves after the crucifix decision in 1995; cf. also Pofalla, *Kopftuch ja – Kruzifix nein?*, 1219.

that stated that *some*, i.e. Christian, symbols could be excluded from the rule of strict neutrality. Since in 2015 the Court insisted very much on the neutrality problem in the *Nordrhein-Westfalen* law: it gave a concrete hint that neutrality is not any more to be realized in a 'substantial' way but only as *concrete or positive equality*[49].

As long as teachers would not advertise explicitly their religion or try to influence actively their pupils, threatening the school 'peace', according to the Court s/he would not offend their religious freedom. Since this disposition is very sensible for all concrete situations, it cannot give any criteria to individuate the practical cases of "concrete threat"[50]. Evidently, the judges thought about concrete cases of religious mobbing, insults or vituperation[51], but as some critiques remark, this effective 'case-by-case' solution leaves a broad space either for a very large, either for a restrictive interpretation[52], and so this judgment was criticized to not resolve the fundamental problem. But, as some reply, the alternative would have been only the affirmation of a radical 'substantial' neutrality of the State in a 'laicist' version, which would not only have had no traditional basis in the German jurisdiction, but would have been even an anachronistic decision: the 'substantial' sphere of the State is part of a modernity which also from a legal point of view is overcome by a late modern emphasis on individual rights. Therefore, it is correct to affirm that the Federal Constitutional Court has overcome the "wall of separation" between the art. 4 GG and the corporative dispositions through art. 140 GG[53]. In other words, the dimension of substantial neutrality of the public minister has no longer the same weight within the dogmatic of the 'juridical goods' of the Constitution. In this way, for the first time the issue of equality of all religions is admitted in its universality: neutrality is no longer a 'substantial' dimension of public ethics, which makes one great exception for the Christian churches, but it is realized only through the equal recognition of the plurality of religious professions in the civil sphere, from which the state is retiring[54].

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[49] Here we deal with two different concepts of neutrality, and both require a further clarification: the first that the prohibition of the headscarf is not an objection against religious symbols, and the second that it is not an affirmation that every Muslim woman has to wear it (cf. Zellentin, *Liberal Neutrality*, p. 164).

[50] Muckel, *Pauschales Kopftuchverbot*, 478.

[51] Traub, *Abstrakte und konkrete Gefahren*, 1339.

[52] R. Seth Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless – God Forbid – They are Religious*, in: New York Law School Review, 51, 2006/2007, 618-653, here 650.

[53] Neureither, *Die jüngere Rechtsprechung*, 1497.

[54] Cf. K.-H. Ladeur / I. Augsberg, *The Myth of the Neutral State. The relationship between state and*

2.2. *Some considerations for an understanding of religious neutrality in the German institutional tradition*

First of all, it is important to remember that the 'substantialistic' neutrality was introduced in order to protect religious freedom[55]. Further, the differentiation between state and religion required institutions for the collaboration, because the neutral secular state has no competencies for religion and therefore for the social dimensions of the religious reality which continued to exist and to form the social reality. And indeed, after the 2015's judgment it has explicitly been criticized: "This interpretation not only does not cope with the paramount position of the legislator, but also erodes the political and juridical room to manoeuvre"[56]. In this way, no legislative or executive limits would have been imposed to the religious freedom – and those limits indeed are not provided by article 4 GG. Because of the *dogmatic* necessity to negate that the headscarf would be an "abstract danger", the Court finished with the problematic result that it had to skip any concrete "equilibrate compensation" between the 'juridical goods' in conflict. And this is the pertinent objection of the two minority judges who in the 2015's *Sondervotum* criticized the unspoken presupposition that religious freedom generally would *not* enter in conflict with the neutrality of the state and the educative prerogatives of the parents. But since the local authorities have the duty to prevent conflicts or "concrete dangers", they can always 'decide' whether the school and public 'peace' is at risk and intervene directly. In this way the Court – by "not deciding" – would contribute to an accentuation of the conflicts, instead resolving them in a juridical way. This lack of problem solving would be evident also because the central concept of "public peace of the school" would not has been nearly determined: in other words, there are no criteria for the local authority to decide when a teacher must depose the headscarf. In this way the Court would bring the whole conflict inside the schools. Certainly, only the future cases could show if this prevision of new conflicts in schools is the right one or not. But anyway, coherently with the jurisdiction of the European Court for Human Rights, the two judges retain that it would have been better to leave the responsibility to how concretize the conflict between public religious neutrality and religious freedom to the regional legislator, as it was disposed by the 2003's judgment.

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religion in the face of new challenges, in: German Law Journal 8, 2007, 143-152.

[55] Cf. Heckel, *Zur Zukunftsfähigkeit*, 368.

[56] D. Enzensperger, *Verfassungsmäßigkeit eines pauschalen Kopftuchverbots für Lehrkräfte an öffentlichen Schulen*, in: Neue Zeitschrift für Verwaltungsrecht, 2015, 871-873, here 872.

Anyway, the court has demonstrated with this decision that it is able to distinguish between fundamentalist forms of religion which realize always an "abstract danger", and the positive expression of religious freedom which does not automatically threaten the liberal democracy and the neutrality of the secular state. In this sense, the interpretation of the headscarf as mere religious symbol and not presumptively as a political one, is a sign of great vitality of the liberal principles[57]. Of course, for Islam both 'reigns' are not as distinguishable as for the secular liberal state, but the latter one decides on the basis of its own distinctions, not on the basis of their problematic identification in other cultures. In the same measure this capacity of distinguishing is also being presupposed for the civil society and the pupils by the 2015's judgment.

But right this consideration sees the minority's *votum* in a new light, and the question if it was necessary to skip the 2003's disposition of the region's prerogative for concrete legislating has to be put again. Because the question how concretely can be realized that new understanding of neutrality, if it is seen in the sphere of civil society and therefore as 'positive equilibrium'. Right because it is now a question of civil society, it involves the democratic legislator[58]. Considering this fact, a new path for the Court's judgment would have been opened: The Court could have limited itself to impose religious neutrality of the regional laws, and *contemporarily* extend the institutional guarantees for churches also to the Islamic community, even if it is not structured in an analogous way to the Christian churches. In this way, the Court would have decided in the proper 'German tradition', thus opening it to the new understanding of religious neutrality. The juridical reason of Art. 140 GG would have be maintained: it was always seen as integration to Art. 4 GG, which only permits to continue to affirm Art. 4 GG in its widest guarantees for religious freedom.

In the recent 2015's judgment, indeed, it seems that the new idea of religious neutrality has been concretized only with reference to art. 4 GG. To not 'leave undecided' the problems concerning "abstract danger" (in the 2003's definition), someone proposes to restrain the wide individual reli-

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[57] For Zellentin, "the case for allowing headscarves is better supported by the liberal theories about neutrality than the case for strict laicism" (Zellentin, *Liberal Neutrality*, 164).

[58] "However, given the importance of political rights and liberties in the understanding of citizens as free and equal, implementing liberal neutrality also needs to leave ample room for democratic decision making" (Zellentin, *Liberal Neutrality*, 167); cf. T. Squatrito, *Domestic legislatures and international human rights law: Legislating on religious symbols in Europe*, in: Journal of Human Rights 15, 2016, 550-570, here 558.

gious freedom, and understand it only for the religious worship[59]. Others retain that the religious freedom has to be limited by the duties of general citizenship, and this through art. 140 GG and not art. 4 GG which does not conceive such a possibility[60]. These are tries to reinterpret the institutional dimension of religion by introducing other forms of concretizing and sharping religion in a pluralistic context. If it is necessary to avoid these solutions because of the German tradition of widest interpretation of art. 4 GG, the institutional disposition of art. 140 GG can be seen positively not only in a formal but also qualitative matter, because it distinguishes those religions which are expression of the civil society from the cultural irrelevant forms. Only the first ones can claim for the possibilities of religious instruction at school, theological faculties, religious taxes etc.[61] Therefore it is not true that in a pluralistic society the state has no possibility to differentiate[62]. So not the Christian tradition, but the institutional dimension of art. 140 GG is still important in a pluralistic society: "In no way the institutional civil right of the churches should be understood as an exclusive Christian tradition or as a privilege of the main Christian churches, even if historically it developed in that way and therefore it fitted to the churches"[63].

3. *Conclusion*

The analysis of these few but significant decisions of the Federal Constitutional Court of Germany gives a good insight on its comprehension of religious neutrality of the secular state and its relationship with the principle of religious freedom[64]: since the text of the Basic Law does not give a clear definition of these elements, it is the duty of the Court to interpret them concretely and on the basis of the fundamental principles of the Constitution. Generally, the German Federal Constitutional Court has always understood neutrality as "positive" and not "sterile", but in the recent decisions it

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[59] Cf. U. Vosgerau, *Freiheit des Glaubens und Systematik des Grundgesetzes. Zum Gewährleistungsgehalt schrankenvorbehaltloser Grundrechte am Beispiel der Glaubens- und Gewissensfreiheit*, 2007.

[60] Cf. S. Muckel, *Religiöse Freiheit und staatliche Letztentscheidung*, Berlin 1997, 224f.

[61] Cf. Ladeur/Augsberg, *The Myth*, 151.

[62] Although Nieuwenhuis distinguishes between the state- and the government-dimension in relationship to religion, he does not explicitly consider this differenciation, cf. *State and religion, a multidimensional relationship: Some comparative law remarks*, in: I-Con 10, 2012, 153-174.

[63] Korioth, *"Jeder nach seiner Façon"*, 184.

[64] Cf. also C. Joppke, *State neutrality and Islamic headscarf laws in France and Germany*, in: Theory and Society 36, 2007, 313-342.

passed from a specifically 'qualified' to a more 'equal-neutral' comprehension of it, which can be defined an "open and comprehensive" neutrality[65]. For Traub the best sign for the validity of this concept of neutrality is the fact that Germany was never condemned by the European Court for Human Rights for any violation of the article 9 ECHR (religious freedom)[66]. Nevertheless, the criterion of qualified neutrality is not cancelled and remains important, because the privilege of the corporations under public law is not overcome, but serves to give a necessary institutional structure also to a pluralistic comprehension of neutrality as *positive equality*. In this step it will become clear again that 'equality' is a correction of the 'qualification'-criterion. Or in other words the jurisdiction of the German Constitutional Court realizes the "tendency to subjectify and to bring the public law on the level of the fundamental rights"[67]. But the idea to create besides the corporations under public law and the possibilities of private associations of civil law another category specifically for religious communities, would not resolve this situation but rather create further confusion in the problem of collocating religions in the public sphere[68].

As it was evidenced, the 'equality'-criterion derives clearly from article 4 GG and not from art. 137 of Weimar constitution (through article 140 GG): and the increasing emphasis on article 4 GG is a clear resembling from the late modern development which puts in the first place the individual and less the relationship between individual and state. But, as it was pointed out, this new comprehension of public neutrality as *positive equality* does not dispense the democratic legislator, but it requires him perhaps even more, and gives a new actuality even to the institutional recognition of certain religious communities under public law.

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[65] Traub, *Abstrakte und konkrete Gefahren*, 1340.

[66] Traub, *Abstrakte und konkrete Gefahren*, 1341.

[67] Neureither, *Die jüngere Rechtsprechung*, 1495.

[68] Weber, Änderungsbedarf, 2480. "Even in the modern pluralist society a merely individualistic conception of religion is insufficient. It underestimates the functional relevance which religious convictions can have not only for the individual citizen, but also for an entire society and its cultural processes" (Korioth/Augsberg, *Religion and the Secular State*, 330).