Ecumeny and Law

Vol. 4

Religious Freedom Today

Wydawnictwo Uniwersytetu Śląskiego · Katowice 2016

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Table of contents

Part One
Ecumenical Theological Thought

Part Two
Ecumenical Juridical Thought

Part One

Ecumenical Theological Thought

Ecumeny and Law, vol. 4 (2016)
pp. 7—17

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Augustine's Argumentation against Religious Freedom

Keywords: Augustine, religious freedom, original sin, state authorities, Donatism

Freedom and religion

We will begin with a few comments on the very notion of religious freedom, as it is an entirely modern concept. In the teaching of the Catholic Church, it was first recognised as a positive value in the Declaration on Religious Freedom *Dignitatis Humanae*.[1] Common perception regards it as an essential element of civil freedoms.

However, we need to raise a question whether the concept applies to the description of the reality and the rules of social life in ancient Rome. For the sake of diligence, the two elements of the phrase have to be considered separately.

Freedom. Roman culture and, consequently, legislation, cherished the notion of freedom; in the legislation, however, it was not expressed as an equality of citizens vis-à-vis the state, but on the contrary, as the differentiation of their rights and responsibilities depending on the social class they belonged to. The very idea of Roman law was based on the recognition that the power of the state was not absolute — the Romans, at least those who were free, were citizens, not subjects of an absolute ruler. Of great significance is a well-known rule of Roman law: *Cogita-*

[1] *Dignitatis Humanae*, 2.

tionis poenam naemo patitur — "Nobody should be punished for their thoughts." The rule set the limits for the application of law and kept the power of the state on the outside of the citizen — the state had no power over one's inner part, the soul or human thoughts.

Religion. The statement that Christianity is a religion seems an obvious one today, but early Christians, especially before Constantine, were reluctant to apply this term to themselves. Apologists even opposed including Christianity to religions and defined it as either the true philosophy (Justin) or the perfect law (Tertullian); they firmly renounced any association with religions contemporary with them. And that is how Christians were perceived from the outside: one of the standard accusations appearing in anti-Christian texts of the first three centuries was that of atheism.

In fact, for ancient Rome religion meant first of all cult — external and, most of all, public worshipping of a god, gods, or deities. The question of doctrine, that is, orthodoxy — a concept that is fundamental for Christianity — was practically irrelevant for religions or cults practiced within the Roman Empire. Therefore, what we today describe as religious syncretism was an obvious phenomenon: mutual permeation of different cults, participation in ceremonies devoted to different gods depending on, for example, the place of stay — when someone arrived in a town where a local god was worshipped, they simply joined in and were never asked about the substance of their faith. The situation looked different for mystery religions. However, they do not fall within the scope of our subject.

Thus, Roman religions consisted of a set of rites and as such, they had an important place in public life. Anyone who refused to participate in those rites would automatically exclude themselves from public life.

The Roman authorities basically accepted and appreciated such a state of play, but simultaneously one has to notice an evolution which took place already in the era of the Empire. From the very beginning, Roman emperors defined themselves as *divus*, divine, yet, over the 1st and the 2nd centuries, they generally did not interfere in religious cults. Obviously, they exercised certain care, or rather control over them: starting with Augustus, emperors took over the title of *pontifex maximus* from Roman priests. In the 3rd century AD, however, the emperors realised what power the religious authority may have, and they began to look at the religious unity as an important binding element to provide for the unity of the enormous Empire. The construction of the official cult of the Empire was launched. It cannot be excluded that the Roman emperors followed the example of the eastern empires, mainly Persia, whose influence was growing and where the state religion (Zoroastrianism of the 3rd and the 4th centuries) played an essential role in the legitimisation and consolidation of power.

Such a transformation caused the rise of persecution of the Church in the 3rd century. On the one hand, emperors increasingly promoted the cult of the state and participation in rites was treated as a test of loyalty to the authority, and on the other hand, the Church became more and more powerful as an organization and a religious organization which for fundamental reasons could not accept participation of Christians in worship ceremonies of the state. There is no doubt that leaders of the Church, that is, bishops, were becoming more and more aware of the power they had.

Edict of Milan

Following this introduction we will quote an important part of Constantine's Edict:

> When you see that this has been granted to [Christians] by us, your Worship will know that we have also conceded to other religions the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as they please; this regulation is made that we may not seem to detract from any dignity of any religion.[2]

The Edict in this fragment clearly refers to the idea of freedom and recognises the right of citizens to free choice of religion or worship. In the light of what has just been referred to, it sounds revolutionary as well as very contemporarily. It seems that Constantine gave up entirely the logic that had driven activities of former emperors in the 3rd century and he no longer intended to use any religion for promotion of the imperial power. The text of the Edict refers to the Roman tradition from the times of the Republic, according to which all religions were good for the country and they were encompassed by the state's benevolent care. It was an element of Roman law alluded to by Justin and Tertullian in their apologias, in which the mentioned authors stated that Christians were good citizens just because they were Christians, and therefore, from the point of view of the stability of the state, it was beneficial to allow Christians practice their faith freely and not to force them to pursue acts that were contrary to their conscience.

[2] *Edict of Milan*. In: Lactantius: *On the Deaths of the Persecutors* (*De Mortibus Persecutorum*), ch. 48. opera, ed. 0. F. Fritzsche, II, pp. 288 ff. (*Bibl Patr. Ecc. Lat.* XI).

However, it soon appeared that both the Emperor and the Church, interpreted the text in a different way: not as a departure from the logic of a single religion strengthening the power, but as adoption of Christianity as the only religion that would support the power instead of the previously promoted religion of the state.

What indicates such an understanding of the Edict by Constantine? We need to remember that he immediately got involved in intra-Christian disputes stating that preservation of the unity of the Church is a matter of national importance.

However, the fact that such an understanding of the Edict was dominant in the Church from the very beginning is far more interesting for us. We can only mention the introduction and the final part of *Ecclesiastical History* by Eusebius. From his point of view the Church was the winner and her history ends with a description of joyful life of the Church after years of persecution. Final pages of the history of the Church sound almost like a description of the advent of the messianic peace and the ultimate victory of Christ. Eusebius called Constantine *pontifex maximus* of Christianity.

More importantly, events which took place over the years 312—313 in Africa only confirm the thesis. At this time the Donatist schism flourished there. Both parties, that is, Donatus followers and Caecilian supporters, asked Constantine to settle the dispute. Thus, Constantine was regarded as the entitled adjudicator of intra-Church disputes and he did not refuse to intervene.

It is very interesting as Donatists, that is, the supporters of Donatus, are commonly regarded as anti-Roman. In the 4th century Donatist movement became increasingly a separatist movement against Roman rule in Africa. In 313, however, Donatists decided that it was the emperor that had the authority to settle the dispute and believed that as a defender of purity of the Church he would take their side.

The later history fully confirmed that both the Church and subsequent emperors had a specific understanding of the Edict. They interpreted it as the act which provided Christianity with the status of the state religion. The culmination of this process was Theodosius the Great's policy and his edict of 392 which formally raised Christianity to the rank of the state religion. Conflicts of Theodosius the Great with Ambrose of Milan fall within the scope of this article. They both recognised Christianity as the state religion and believed that it was the duty of the state to support it. Taking this approach state authorities increasingly fought against all other forms of worship. Theodosius stuck to the traditional understanding of *pontifex maximus* office (he did not call himself *Pontifex Maximus* of the Church) and in his opinion the emperor was above

the Church and its internal laws. Ambrose, on the other hand, effectively established a new kind of relationship between the Church and the state. He viewed the Church as a custodian and guardian of the universal God's commandments and thus the church exerted power over the emperor in this respect.

As a result, it became the foundation of relations between the state and the Church in Middle Ages that a bishop could anoint a ruler and a ruler could not appoint a bishop.

Augustine's decisions in Donatist dispute

Augustine learned Christianity from Ambrose. Being a bishop in Africa, the latter had been involved in disputes between Catholics and Donatists. As it is commonly known, he advocated the Roman military intervention against Donatists and supported Catholics. In the light of what has been said so far, it is easy to explain Augustine's attitude. Augustine simply followed Ambrose as well as commonly accepted principles of those times.

Many scholars claim that only Donatist conflict forced sensitive Augustine, who after all had had a long history of displaying spiritual interest in Manichaeism and had experienced very personal conversion in the spirit of freedom and absence of any external coercion, to revise his beliefs. Briefly speaking, the view that Augustine's acceptance or even request of military aid from Rome against Donatists was purely practical and somewhat against his deepest beliefs about God's actions and the nature of man's relationship with God, is not uncommon among scholars of Augustine's thought.

In my opinion his approach was completely different. Augustine was convinced that being a bishop and a pastor it was his duty to use any means, including direct coercive measures to bring the people entrusted to him to the true Church. It was the result of his deepest religious beliefs. In other words, Augustine adopted *cogite intrare* principle due to his profound theological reasons, and not due to external political and social circumstances.

Cogite intrare means "compel them to enter" (see Luke 14:23). Augustine regarded the words of the Parable of the Great Banquet as a motto of his approach to the people who did not want to convert voluntarily from Donatism to the Catholic Church, but above all he adopted it as a universal principle of dealing with those who did not demonstrate good will to enter the Church.

Augustine on Grace and Original Sin

I will try to present a theological basis for Augustine's approach.

Augustine viewed a man as created by God and as such a man was *capax Dei*. But at the same time a man was burdened with original sin. Augustine is a great theologian of original sin. He pointed out that this sin affects mainly the free will of man. Its result is lust which practically makes human freedom illusive. Thus a man living on earth is above all possessed by lust, separated from God, incapable to fulfill commandments and reach God. This is possible only by the grace of God. Therefore, it is justified to call Augistine *Doctor gratiae*.

But how does the grace of God work? Obviously, Augustine knows that God acts freely and it is impossible to control the grace of God. The *do ut des* principle which, in the context of religion, means offering gifts to deity to gain its favour constituted the basis of the entire religion of Rome and Augustine viewed it as the essence of paganism and a denial of the Christian faith. God is always first. You cannot "earn" anything or persuade God to be granted his grace as gratitude for sacrifice. God is love and he is always the first in giving. His gifts are for free. Augustine's dispute with Pelagius allowed for a comprehensive and clear presentation of the doctrine of the absolute gratuity of grace.

We can indirectly learn possible paths of the grace of God in *De civitate Dei* according to Augustine.

In the first twelve books he criticises pagan Rome. It is very interesting to see how Augustine, a Roman in his formation and culture, perceives various elements of this culture. Augustine makes an overview of the history of Rome and analyses it critically to show that it was Romans' sins and not conversion to Christianity that led to the fall of Rome.

The basis of this analysis is the following theological perspective: he perceived Rome as a community of people living in original sin, a theater of demons' acts that tempted, deceived, and led to perdition.

However, when you read it more carefully, it appears that, according to Augustine, demons act by different forces, depending on a sphere of life. They are most powerful with respect to various Roman cults, which is not surprising. Augustine also finds it obvious that any magic practices, divination or spells, are within demons' power. It is however interesting that Augustine has very critical attitude towards philosophers stating that they seek the truth, but, at the same time, are easily deceived by demons. For this reason one cannot trust their wisdom. The smallest influence of demons Augustine sees in the rights of Rome. In his opinion emperors are under influence of demons when they are incited to wage a war in order

to gain power and commit atrocities, but the Roman ruler as a guardian of rights, and law enforcement are perceived by Augustine as good. Despite all his criticism of the sins of Rome, Augustine is a Roman who appreciates everything that contributed to the power of Rome, that is, its legal structure and thus the structure of authority enforcing the law. There is no explicit mention of it, but this is the area which Augustine perceives as one of the paths of God's grace rather than the works of philosophers.

As we know, Augustine is convinced that a man after his death will be judged by Christ, and if he dies in sin he will be punished with eternal torments in hell. Augustine knew the eastern opinions derived from Origen and openly expressed by Gregory of Nyssa on the final universal salvation of all people, and firmly rejected and even combat them.

Augustine was aware that it is difficult to reconcile the doctrine of the absolute gratuity of grace with the doctrine of judgment and hell which assumes man's personal responsibility for sins, but he did not try to find any "golden mean" and stood by both statements. This tension is always present in his writings and provides new profound dimension of theological and philosophical reflection on human freedom. We can say that before Augustine freedom as an essential characteristic of the man did not constitute an important subject for philosophers. They would rather assume that the man is free and capable to make decisions. Only Augustine's juxtaposition of human freedom and absolute omnipotence of God and his primacy, raised this issue to a new level of discussion. It seems that it is only modern and contemporary thought that takes Augustine's question regarding existential dimension of human freedom seriously.

Practical implications of Augustine's theology

Augustine as a shepherd regarded that his main task is to take care of salvation of the faithful entrusted to him. As he was convinced of the reality of hell, he knew that this was an immense responsibility. Also as a bishop he intervened in the Donatist dispute and it should be perceived as a form of his pastoral care namely his care for salvation. Any external elements such as political systems and relationship between the state and the church and everything that seems to explain quite well previously described situation is for Augustine of secondary importance. He is primarily a person who should care for salvation of the faithful and as a shepherd he does not want to interfere with the grace of God which is in the

service of God's love. Thus he follows God's love and cares for the faithful like a father caring for his children.

Father is primarily concerned with welfare of his children. Eternal salvation is the only ultimate good. Augustine adopts a Roman model of a father who is demanding and is not afraid to be hard on his son. This is the main manifestation of father's love. So it is not surprising that strict Roman law, including coercive measures applied in order to ensure justice and punish injustice constitutes for Augustine a model for understanding God's love as a Father.

Calling troops to compel the Donatists to return to the Catholic Church does not constitute a deviation from the principle of love, but its execution. Its underlying cause is not the lack of faith in the grace of God, but allowing it to take action.

In this light we should read the famous passage from Augustine's sermons on the First Epistle of St. John. Augustine's sermons are intended to be the anthem praising God's love. This letter includes St. Augustine's favourite phrase: "God is love" (1 John 4:16). It also contains the following passage:

> This we have said in the case where the things done are similar. In the case where they are diverse, we find a man by charity made fierce; and by iniquity made winningly gentle. A father beats a boy, and a boy-stealer caresses. If thou name the two things, blows and caresses, who would not choose the caresses, and decline the blows? If thou mark the persons, it is charity that beats, iniquity that caresses. See what we are insisting upon; that the deeds of men are only discerned by the root of charity. For many things may be done that have a good appearance, and yet proceed not from the root of charity. For thorns also have flowers: some actions truly seem rough, seem savage; howbeit they are done for discipline at the bidding of charity. Once for all, then, a short precept is given thee: Love, and do what thou wilt: whether thou hold thy peace, through love hold thy peace; whether thou cry out, through love cry out; whether thou correct, through love correct; whether thou spare, through love do thou spare: let the root of love be within, of this root can nothing spring but what is good.[3]

Thus, it is shepherd's negligence if he does not take any actions when he sees that people persistently go wrong. As a shepherd he cannot just hope that a man will learn the truth himself and should not leave him on his own when he can act. It is better for the sake of wrongdoer's salvation

[3] Augustin: *Homily 7 on the First Epistle of John 8*. Translated by H. Browne. In: *Nicene and Post-Nicene Fathers, First Series*, Vol. 7. Edited by Ph. Schaff. Buffalo, NY: Christian Literature Publishing Co., 1888. Revised and edited for New Advent by K. Knight.

to employ external coercion as long as it is in line with the law rather than fail to act.

Augustine could not accept religious freedom understood as programmed abstention from intervention by the state authority aimed at bringing people to the true Church, and thus enabling them to escape the clutches of wrongdoing as he perceived a man as a being whose free will has been thoroughly corrupted by original sin. The grace of God, which is the expression of God's love can come from the outside, by application of law or even coercion. The duty of the bishop is to allow for the work of the grace of God.

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Augustine's Argumentation against Religious Freedom

Summary

Augustine, the Bishop of Carthage participated in the Donatist conflict. In this dispute he was an advocate of involvement of Roman authorities, including their military and police forces, on the Catholic side and against the Donatists. On the basis of this decision he more broadly justified his view that the state had a duty to actively promote the true faith, that is, Catholicism. He believed that bringing a man on the path of truth and thus protecting him from perdition in hell is a great good. In his opinion a man without such a support from the state could easily get lost and could not learn the truth. His view was based on two pillars. On the one hand, Augustine was convinced that the original sin destroyed the free will of a man to such extent that it was no longer capable of choosing the good, and on the other hand, he saw the law of the Empire, the Christian state, as an important path of God's grace. Therefore, he believed that the adoption of the principle of religious freedom, that is, being neutral in religious issues by the state authorities would constitute a major betrayal of the duties of the authorities.

Jan Słomka

L'argumentation d'Augustin contre la liberté religieuse

Résumé

En tant qu'évêque de Carthage, Augustin a participé au litige donatiste. Dans le cadre de ce litige, il s'est déclaré pour l'engagement du pouvoir romain, y compris la force militaire et policière ; il s'est rangé sous la bannière catholique et non celle des donatistes. Pour ce qui est de sa décision, il a justifié son point de vue en constatant que le pouvoir étatique est obligé de soutenir activement la vraie foi, c'est-à-dire le catholicisme. Il trouvait que le fait de remettre l'homme sur la voie de la vérité et, par là, le protéger contre son anéantissement aux enfers est un grand bien. L'homme, dépourvu d'un tel soutien de la part de l'État, erre trop facilement et n'arrive pas à connaître la vérité. Son point de vue se fondait sur deux piliers. D'une part, Augustin était convaincu que le péché originel a si considérablement détruit le libre arbitre de l'homme que celui-là n'est point capable de choisir le bien de lui-même. D'autre part, il considérait la loi de l'Empire, étant un État chrétien, comme une voie importante de l'activité de la grâce divine. Cela étant, il pensait que le fait d'avoir adopter par les pouvoirs publics le principe de la liberté religieuse, à savoir la neutralité dans les questions liées à la religion, serait un manquement significatif aux devoirs de ce pouvoir.

Mots clés : Augustin, liberté religieuse, péché originel, pouvoir étatique, donatisme

Jan Słomka

L'argomentazione di Agostino contro la libertà religiosa

Sommario

Agostino in qualità di vescovo di Cartagine partecipò alla controversia donatista. Nell'ambito di tale controversia fu sostenitore dell'impegno dell'autorità romana, tra cui delle sue forze dell'esercito e della milizia, dalla parte cattolica contro i donatisti. Sul canovaccio di tale decisione motivò più ampiamente la sua opinione secondo la quale l'autorità dello stato ha il dovere di sostenere attivamente la fede autentica – il cattolicesimo. Riteneva infatti che condurre l'uomo sul cammino della verità, e quindi proteggerlo dalla perdizione dell'inferno, fosse un grande bene. L'uomo, lasciato senza quest'aiuto da parte dello stato, erra troppo facilmente e non giunge a conoscere la verità. Questa sua opinione poggiava su due pilastri. Da un lato Agostino era convinto che il peccato originale danneggiò così fortemente il libero arbitrio dell'uomo che da solo non è capace di scegliere il bene; dall'altro, scorgeva la legge dell'Impero, dello stato cristiano, come un cammino importante di azione della grazia di Dio. Per tale motivo sosteneva che l'accettazione da parte delle autorità dello stato del principio della libertà religiosa, e quindi della neutralità nelle questioni religiose, avrebbe rappresentato una sottrazione essenziale agli obblighi di tale autorità.

Parole chiave: Agostino, libertà religiosa, peccato originale, autorità dello stato, donatismo

Ecumeny and Law, vol. 4 (2016)
pp. 19—40

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Freedom and Christology according to *Theologiae Benedictae* Two Concepts, Two Anthropologies, One Logos/Son

Keywords: Christ, Holy Spirit, Christianity, Christocentrism, truth, freedom, liberalism, modernity, ideologies, dialogue, anthropology, creation

"Jesus' message is the Gospel not because we like it without reservation or because it is comfortable and nice, but because it comes from the One who holds the keys to authentic joy. The truth is not always convenient for man, however only the truth sets one free and only freedom gives happiness."[1] The meaning of life, that is, a genuine joy of life, comes from the bond between the truth and freedom. For the truth sets one free and freedom obtained this way (there is no other way) gives one happiness, which is joy coming from the sense of meaning (other joys happen in life as well, but in comparison to the joy of the meaning, they appear to be superficial). Therefore: from the truth to freedom, from the truth into freedom. Thanks to the truth — freedom.

But there is also a negative side of this interrelation, and more specifically, of the absence thereof, the effect of atrophy of understanding of an internal dependence of the truth and freedom or the effect of life in falsehood and slavery — quite often a mixture of the both, in various proportions. Joseph Ratzinger writes: "[…] anarchistic pseudo-freedom remains active where the relation between the truth and its requirements […] is

[1] Benedykt XVI/J. Ratzinger: *Formalne zasady chrześcijaństwa. Szkice do teologii fundamentalnej*. Trans. W. Szymona. Poznań 2009 (hereafter: FZC), p. 101.

being questioned. These falsified freedoms are quite powerful nowadays, they are a real threat to the real freedom. Clarification [*La chiarificazione*[2]] concerning the notion of freedom is today a decisive task, when it comes to rescue of people and the world."[3]

And this issue is not restricted to our contemporary times. Regardless of the era and particular questions (as well as the current threats, such as a type of "misstatements of freedom," etc.), the essence of man always remains the same: freedom suspended between good and evil, between life and death.[4] Freedom — a great gift of God, indelible feature of our similarity to the Creator and our biggest task, makes our fate both wonderful and "Divine" (image and likeness) as well as unsettled and endangered in many ways. Christianity — following God — respects freedom to its ultimate consequences and never offers any cheap, fraudulent, quasi-magical certainty of salvation.[5] This is the essence of Christian thinking and realism in this respect: freedom — with all its unique, irreplaceable beauty and drama — is real. Therefore, in the profundity of the soul that the Bible calls "heart," the man is always in need of salvation.[6] He needs help, he needs God, and — let us refer to an adage by Benedict XVI, one of his most famous ones — "all the answers that do not reach up to God are too myopic."[7] Freedom, this crucial space of humanity in which the definitive is decided upon, cannot be deceived. It cannot be filled by things that do not reach up to the definite.

1. Logos — Divine source of freedom

"De-falsification" and "enlightenment" regarding the notion of freedom[8] must reach up to the very roots of the origin of freedom and understanding of the notion. And the roots are in God — the Creator of man. Therefore, freedom is so deeply related to love — in God, in the creation;

[2] J. Ratzinger: *Natura e compito della Teologia. Il teologo nella disputa contemporanea. Storia e dogma*. Milano 1993, p. 42.

[3] Idem: *Prawda w teologii*. Trans. M. Mijalska. Kraków 2001 (hereinafter: PwT), p. 46.

[4] Benedykt XVI: *Myśli duchowe*. Trans. W. Szymona. Poznań 2008 (hereinafter: MD), pp. 202—203.

[5] J. Ratzinger: *Kościół. Pielgrzymująca wspólnota wiary*. Trans. W. Szymona. Kraków 2005, p. 94.

[6] MD, p. 203.

[7] MD, p. 167.

[8] PwT, p. 46.

from God comes this inseparable closeness. In the deepest sense freedom cannot be "taken the possession of" (reached, obtained, regained, etc.) neither by violence, courage, deceit, nor by work. Indeed, partly through all these means (and through many other, more or less effective actions), but only partially — as a matter of fact — and not with respect to the heart of freedom reaching its ontic substance: this one is related to love. Because it is the gift of God-Love, who made freedom an indelible mark of purity of his creative act, and therefore the image and likeness. Joseph Ratzinger on the exodus from Egypt, the paradigm of all kinds of liberation of man, nations and mankind, with a clear reference to the Divine "heart of freedom": freedom can be accomplished only by love that sacrifices itself and binds men together in their own depth, and this because it allows them to maintain the divine dimension."[9]

This dependence is, which is theologically obvious, mutual. Freedom is the basis of the mystery of love.[10] And this also includes "Divine" (of God). What is important in this relationship is its Divine source: Logos. The Christian faith, containing comprehensive understanding of freedom, sees the foundation of freedom in Logos — within the logic of the all-comprising-reality that it implies, the Christian faith sees the foundation of freedom, justification of its primacy in the structure of creation: "Only relationship with Logos establishes freedom as a structural principle of reality."[11] How?

Since the logos of all existence, which supports and embraces everything, is consciousness, freedom, and love, it follows that freedom (reasonable, open to love and being a prerequisite of love) is the highest in the world, higher than a cosmic necessity and fate of determination. Freedom is the structure of the world that — for this reason, for reasons of freedom and love — is impossible to comprehend, unpredictable. It cannot be reduced to the mathematical logic.[12] Theo-logy is something more when compared to the logic, but for the price of mystery. Equally to a mystery of its name and unpredictability of a person contrary to banality of a number. True, names in the Bible are given by the indefinitely free God, while numbers are bestowed by someone else, someone held captive by evil. However, the world, thanks to this mystery, as the field of love, is the space open to

[9] J. Ratzinger: *Kościół — Ekumenizm — Polityka*. Ed. and trans. by L. Balter and others. Poznań—Warszawa 1990 (hereinafter: KEP), p. 298.

[10] J. Ratzinger/Benedykt XVI: *W czas Bożego Narodzenia*. Trans. K. Wójtowicz. Kraków 2001, p. 15.

[11] J. Ratzinger: *Czas przemian w Europie. Miejsce Kościoła i świata*. Trans. M. Mijalska. Kraków 2001, pp. 99—100.

[12] Idem: *Wprowadzenie w chrześcijaństwo*. Trans. Z. Włodkowa. Kraków 2006[3] (hereinafter: WwCh), p. 161.

freedom. But through this it allows for the risk of evil. "It risks the mystery of darkness with a view to the greater light, which is freedom and love."[13] It is not possible to love without freedom — this is the decisive argument of the Christian faith.[14] As one concludes from God's logic, this is a priceless argument. This world (with freedom, love, and the risk of evil) is wanted by God, such a world has been created by Him. Consent to this risk of darkness is probably one of the most theologically difficult issues. The Creator is worthy of His creation's trust: these are matters of God: freedom and love, "the light bigger than that darkness." The structure of the world is of Logos, of the divine Word and Wisdom, of God. It is bigger than anything else — it is light that is bigger here: freedom and love as its result.

Along those lines, freedom is something absolutely essential to Christianity, for its very capability. It is the environment of its life — it is water in which the Christian faith flows to its aim, it is the air that it breathes. However, this freedom — with all its greatness and indispensability — includes (by its very nature) the risk which creates the ambiguity and equivocation of its image. It is fragile, susceptible to injuries, but without it we would not be people, children of God. A magnificent hymn in honour of freedom, containing both a description of its greatness and its internal implications, its passionate defense, arguments for its indispensability for human affairs, is presented in the central parts of the encyclical *Spe Salvi*. This is a hymn in honour of freedom as the only warrantor of human hope, against its political instrumentalisation in the name of progress (especially totalitarian structures meant to serve the so-called future of mankind, which always ends up in genocide). Here is a great Christian lesson on freedom, a lesson of Logos — neither happiness nor hope for the price of depravation of freedom exists:

> […] freedom is always new and he must always make his decisions anew. These decisions can never simply be made for us in advance by others — if that were the case, we would no longer be free. Freedom presupposes that in fundamental decisions, every person and every generation is a new beginning. Naturally, new generations can build on the knowledge and experience of those who went before, and they can draw upon the moral treasury of the whole of humanity. But they can also reject it, because it can never be self-evident in the same way as material inventions. The moral treasury of humanity is not readily at hand like tools that we use; it is present as an appeal to freedom and a possibility for it. This, however, means that:

[13] WwCh, p. 162.

[14] J. Ratzinger: *Bóg i świat. Wiara i życie w dzisiejszych czasach* [conversation with P. Seewald]. Trans. G. Sowinski. Kraków 2001 (hereinafter: BiŚ), pp. 51—53.

> *a*) The right state of human affairs, the moral well-being of the world can never be guaranteed simply through structures alone, however good they are. Such structures are not only important, but necessary; yet they cannot and must not marginalize human freedom. Even the best structures function only when the community is animated by convictions capable of motivating people to assent freely to the social order. Freedom requires conviction; conviction does not exist on its own, but must always be gained anew by the community.
> *b*) Since man always remains free and since his freedom is always fragile, the kingdom of good will never be definitively established in this world. Anyone who promises the better world that is guaranteed to last forever is making a false promise; he is overlooking human freedom. Freedom must constantly be won over for the cause of good. Free assent to the good never exists simply by itself. If there were structures which could irrevocably guarantee a determined — good — state of the world, man's freedom would be denied, and hence they would not be good structures at all.
>
> […] a hope that does not concern me personally is not a real hope. It has also become clear that this hope is opposed to freedom, since human affairs depend in each generation on the free decisions of those concerned. If this freedom were to be taken away, as a result of certain conditions or structures, then ultimately this world would not be good, since a world without freedom can by no means be a good world.[15]

Careful reading of this section shows us the power of Christian knowledge and why the Church of Christ is the biggest in the history of mankind, real protector of the real freedom (indeed, pseudo-protectors of pseudo-freedom were louder). Even if the followers of Christ, co-creators of the Church, are weak, sinful and did not manage to build a good world… pro-freedom power of Christianity resides in the truth about man and the world, in the purity of intentions, in freedom of naive realism of perception and understanding of human nature. But all this has even deeper source: Logos, the intellect that comes from God. Intellect to

[15] Benedict XVI: Encyclical *Spe Salvi* (30.11.2007), Nos. 24, 30. "Freedom that stems from historical necessities and therefore belongs to man from outside, as it were, is not freedom at all. And on the contrary, within human history there can never be a final, inviolable social order, for man is free, and this freedom allows him to transform good into its denial. If any society would take this freedom away from him definitely, this society would become absolute tyranny, and therefore a society that is disordered.

The myth of a necessary and directable development of history is gradually dispelled. It becomes clear, that its perspective is not a historical one. For the real history denies it constantly. It can be conveyed, however leaving behind the real history." KEP, p. 289.

which faith clings and on which it is nourished. Thanks to this (thanks to Him, because it is Jesus Christ we are talking about) Christianity knows that "His kingdom is not of this world" (J 18:36), that one should abandon "waiting for any internal-historic salvation," that freedom of man in a temporal order of things is constantly opened both to "yes" and "no", that the great drama of history of the world is not a puppet show, and freedom is the truth to the very core of humanity and the created reality. The world project is "unfinished" indeed, a both construction and deconstruction are equally possible. Truth sets one free, freedom is real.[16]

And the Christian faith knows that in all this (not outside or beside) Christ is the Lord of history and Saviour of our freedom.

2. Two concepts of freedom — two anthropologies

At this point, however, we should finally ask a question that is fundamental for further reflection: What is freedom? How should it be understood? What ideas and theories are hidden behind its particular interpretations (and implementations or at least attempts of implementation)? What vision of reality, what philosophy, anthropology, theology are to be found "underneath"? And the most important question: What is freedom in the light of the Eternal Word of God, *in veritatis splendore*?

In the mid-1980s two documents of the Congregation for the Doctrine of the Faith on the Theology of Liberation were published. Both the documents were signed by the prefect of the congregation (Joseph Ratzinger) and its secretary (Alberto Bovone). The first one is *Instruction on certain aspects of the "Theology of Liberation"* dated 6 August 1984. The second one is *Instruction on Christian freedom and liberation* dated 22 March 1986. Both of the instructions, widely discussed in theology and commentaries of the last decades of the 20th century (even today, to be exact) constitute a compendium of views of the present pope on freedom and liberation in the context of the phenomenon of the so-called Theology of Liberation. But they are first and foremost a peculiar centre around which other, numerous texts concerning the issue of freedom were written (e.g. *Freedom and liberation*[17]; *Eschatology and utopia*[18]; *Freedom and ties in the*

[16] Cf. KEP, pp. 280—281; J. Ratzinger: *Sól ziemi. Chrześcijaństwo i Kościół katolicki na przełomie tysiącleci* [conversation with P. Seewald]. Trans. G. Sowinski. Kraków 1997, p. 189.

[17] KEP, pp. 287—304.

[18] KEP, pp. 271—286.

Church[19]). They include two major answers to a question concerning the nature of freedom and their detailed description and analysis. Two concepts of freedom emerge from the articles of that time. The first one is defined by Ratzinger in one of the texts as "the notion of 'freedom' in the modern history of spirit," the second one as "a modern concept of 'freedom' in the life of the Church."[20] To simplify, in a justifiable way, we may call the former concept the "Enlightenment-liberal" one, while the latter concept can be described as the "Biblical-theological one."

3. The concept of "freedom" in the modern history of spirit

The former concept, in accordance with its name, is derived by Ratzinger from the spirit and the letter of the Enlightenment, from its *sapere aude* ("dare to use reason"), a peculiar focus on reason (that distances itself from the sphere of religious faith) and the self-determination.[21] It has been 200, maybe 300 years (depending on how we date the Enlightenment, disputes of historians are still going on) and the Enlightenment concept of freedom gets extended — over Romanticism, the national awakening of the 19th and 20th century, bloody totalitarian turmoil and the two world wars — into liberal democracy, where the will of the majority will decide upon everything and specify what is reasonable and ethical and therefore shall make law, deciding arbitrarily about the content of the notion of "truth" and, what interests us the most at the moment, the shape, understanding, and the scope of freedom. For the last 22 years (1989—2011) *Gazeta Wyborcza* daily, which undoubtedly is the mass media organ of the Enlightenment-liberal concept of freedom in Poland, at least several times (if not more) mentioned Voltaire's motto according to which "there is no freedom for the enemies of freedom" (as defined by liberals, of course). There is a reason to be afraid, because Europe is a place where this type of seemingly theoretical theses have been (and still are) painfully put into practice. Not to mention its softer version, that is, deprivation of freedom of thought: academic exclusion, social ostracism.

In any event, on the way to the situation of freedom of the first decades of the 21st century, the Enlightenment Kant was joined by an idealist Hegel. In the latter's opinion, freedom is served by those who stand on the

[19] KEP, pp. 224—240.
[20] KEP, pp. 225, 231.
[21] KEP, p. 225.

side of the logic of history[22] (in this concept theo-logic is subordinated, let us be absolutely clear about it). Karl Marx developed this extremely dogmatic concept of freedom (imminent historical necessity is freedom, and therefore, history of freedom is history of the party[23]). Those who are an obstacle to the advance of freedom (religionists, bourgeoise, kulaks, etc.) must be removed. This conglomerate has been enriched by Sartre: a man deprived of essence, pure existence, is yet to be invented and created.[24] On top of this comes neo-Marxism (who knows, maybe the current king on campuses of European and American universities, especially in the realm of disputes concerning ideas of freedom and its content) and postmodernism in plurality of varieties of its "poor thought," which makes no claim to define anything (especially positive content of the notion of freedom) and is satisfied with a encroaching deconstruction of all kinds of ideas (especially those which are able to make a living on them). And yet the encroachment has a clearly defined direction: nothingness.

Source and conceptual disorder is rather considerable here:

> Evolutionary ideas, Hegelian influence, legacy of Marxist thought, reflections of humanities — all this is mixed with each other in a single, difficult to define, or specify, conceptual aggregate. The entire history is depicted as a process of progressing liberations, the mechanism of which is explained gradually and thanks to this we are able to control it. And here a fascinating promise is made: man is able to be the engineer of his own history. He or she no longer has to count on his or her always uncertain and fragile good will or put his trust in his moral decisions. Now he looks at the very fabric of the process of freedom and is able to create conditions, in which will is good in itself — similarly to the current situation, in which will is evil in itself. Ethical concerns and efforts may become unnecessary, when it is man himself who directs history.[25]

However, the effect of this demiurgical hodgepodge is tragic:

> […] approval of anthropology, which seems to be […] a consequent completion of the Enlightenment, bringing up a man to specific attitudes based on values seem to be enslavement of his very essence, and indeed, even upbringing itself is as an assault committed by an authority and tradition. Only one pedagogy seems to be right as the real pedagogy of freedom: upbringing to rebellion against any existing values, unlimited liberation of man who is in the process of "creative" self-definition. […] It has not been decided, what is man and what he should be.

[22] KEP, p. 229.
[23] KEP, p. 229.
[24] KEP, p. 230.
[25] KEP, p. 288.

> […] the idea of freedom is brought here to the extreme radicalism, it is understood not as an emancipation from tradition and authority, but as an emancipation from the idea of creation, which took a shape of man, emancipation from its own essence, total indeterminism, open to everything. However this is a kind of freedom that becomes hell at the same time, to be free is to be doomed.[26]

What does a supporter of the Enlightenment-liberal concept of freedom expect? Probably he or she expects more or less things that Karl Marx "defined as a full vision of freedom," the results of liberation, revolution, and a new social awareness: "…hunt in the morning, fish in the afternoon… criticism after dinner, just as I have a mind…"[27] Can it be that banal according to the major ideologist of freedom? To shed an ocean of bourgeois and proletarian blood to be able to go fishing? Freedom as an opportunity to do everything that one wishes to do, but only things that one wishes alone? This is only willfulness, nothing more, and its destination is only anarchy…[28] Is it possible that ideas reached to the cobbles and the essence of the Enlightenment-liberal freedom in Europe is "to have vacation" and that "freedom smells of petrol"? In August 2011 protests against economic austerity measures came to a halt in Athens, Madrid saw beginning of protests against the pope coming to the World Youth Days, there were riots on the streets of London accompanied by destruction of the city caused by greed and anarchic sense of power over good and evil, lust to destroy, type of "freedom," which loves destruction. But the columnist of *Gazeta Wyborcza* defends his Enlightenment-liberal point of view:

> I do not believe in simple explanations that seek reasons of riots either in multiculturalism or atheisation [anything but the latter! — J. Sz.]. Young people like the thrill of emotions provided by robbery of shops and setting buildings on fire, due to the same reasons for which they like extreme

[26] KEP, p. 230. For the purpose of illustration: In *Wysokie obcasy*, a Saturday addition to *Gazeta Wyborcza* an advertisement and enthusiastic review of a book by a German psychologist and therapist Ute Ehrhardt entitled *Good girls go to heaven, bad girls go everywhere* (Warsaw 2010) was published. Once again: "Freedom becomes hell at the same time, to be free is to be doomed."

[27] *Marx-Engels-Werke*. Berlin-Ost 1967—1974, III, p. 33; cf. K. Löw: *Warum fasziniert der Kommunismus?* Köln 1980, pp. 64 ff. (quotation: after: KEP, p. 290).

[28] K. Löw: *Warum…*, after KEP, p. 290: "A German town, second half of the 80s, Autumn, Sunday, I am going for a walk. Suddenly I can see a guy, 60 years old, long grey hair, skating down the street and smiling at me. I thought: my goodness, this is freedom. I wish I could be like this, too. When we won the elections, this first trip abroad came to my mind, maybe a little bit naively. A few years later, it was me who was skating down the road."

> sports. Their bodies produce such hormones, as easy as that. If we do not want them to satisfy these hormonal needs on the streets — we need to have real policemen on the streets [not only cameras — J. Sz.].[29]

Is that it? Is it really so? Guilty are the hormones and the entire concept of freedom implemented this way, from Immanuel Kant to Rorty and Sloterdijk is indisputably correct? In the same August 2011, parallel to the mentioned events, the World Youth Day with Benedict XVI takes place in Madrid. A million and a half people participated in the Holy Mass on Sunday, August 21st, at Cuatro Vientos airport. Prayer, joy, hope. Peace. Do not their bodies produce hormones, too?

And for sure atheisation is not responsible for any sickness of human freedom? Atheisation is too simple an explanation?

4. The modern concept of "freedom" in the life of the Church

The second concept, the biblical-theological one, is based on the conviction that the Christian faith is a genuine liberation of man.[30] The key concept of Greek philosophy is the word *eleutheria* (freedom), which, irrespective of the so-called freedom of choice (because it is the result, not the essence of freedom), is the opposite of slavish since it refers to affiliation, to a sense of "being at home," to co-responsibility and satisfaction: "free is the one who is at his/her place, at home."[31] The Bible reinforces the entire issue even further: free is the one, who is born of Sarah, not of Hagar, he shall have a right of inheritance (cf. Galatians 4:21—31). So the difference between freedom and slavery is understood here "most of all on the status, the type of belonging that defines he right of inheritance, the right of residence and ownership. To be free means to be an heir, that is, to be the owner, freedom is identical with the sonhood (Galathians 4:5).[32] The heir is the Son. And with Him all his brethren and sisters.

Here is the essence of the matter: to be free means to participate in the status of existence of Jesus Christ, the status of the Son of God — with all the responsibility on the heir and the dignity of the child of God. The biblical-theological concept of freedom would be the following:

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[29] W. Orliński: "Cyberkulturowo o zamieszkach, czyli fiasko społeczeństwa inwigilacji." *Gazeta Wyborcza*, dated 18.08.2011 — *Duży Format*, no. 31(939), p. 13.

[30] KEP, p. 234.

[31] KEP, p. 235.

[32] KEP, p. 235.

> […] freedom is something else than indeterminism. It is a participation, not a participation in a specific social structure, but a participation in the being itself. This means that one is the owner of one's being, not its subject. Only on this basis one is able to describe God as the Personified Freedom, since He possesses his being completely. We can also say that freedom is identical with the highlands of being, which however makes sense only when these highlights of being are indeed "the highest": the gift of love and — giving oneself in love. Therefore, the pedagogy of freedom is about leading to the highlights of being, upbringing to being, upbringing to love, and therefore leading toward θείωσιζ, toward deification. This "being like God" is undoubtedly also the objective of radical, emancipation pedagogues who postulate unlimited, divine freedom and fullness of disposition. The objective is valid here, only the image of God is incorrect.[33]

Yet another longer quotation seems to be necessary here:

> […] in anarchic sense of freedom man would like to become God, who as a matter of fact does not exist outside himself. Does realism of Christian concept of freedom mean that man gives himself up, comes back to his own definiteness and wants to remain only a man? Not at all. In the light of the Christian experience of God it becomes clear that the unlimited freedom of omni-knowledge and omnipotence is modelled upon an idol, not God. True God is a self-bonding in a three-dimensional love and therefore a pure freedom. The vocation of the man is to be an image of this God, to become like Him. Man has not been invincibly closed in his finitude. First of all, he must for sure learn to acknowledge this finitude. For he should acknowledge, that he is not self-contained or autonomous. He must renounce falsehood, lack of references and discretion. He must accept his shortage, the others, their presence, the creation, limitation and direction of his own existence. Whoever is able to choose only between preferences, is not free yet. An individual is free when, along his actions, he draws solely from his interior and does not need to subdue to any external pressure any more. And an individual is free, because he became as one with his nature, one with the truth itself. For he who is one with the truth, no longer operates according to external requirements and necessities; in him the essence, desire and deed become one. In this way man is able to reach the indefinite in the finite, unite with him and — acknowledging the boundaries — be infinite himself. So finally it becomes clear again that the Christian doctrine of freedom is not a meticulous moralisation. It is accompanied by an all-embracing vision of man.[34]

This is a fundamental shift in the centre of gravity in the answer to the question on the essence of freedom, let us emphasise it once again:

[33] KEP, p. 236
[34] KEP, pp. 303—304.

the biblical-theological concept of freedom differs radically from the Enlightenment-liberal one, because it assumes the essence of what it is, *eleutheria* not in (ethical) freedom of choice, but in (ontic) freedom of (man's) being. This goes in line with the paradigm of derivation of all the theo-logical processes: *logos* precedes *ethos*. In other words: I am able to express freedom only when I am free, its expression itself, with the status of a slave, is pretending, self-deception, a tragic farce, an empty gesture, a road to nowhere, if you like.[35]

5. Good — a measure and matter of freedom

The differences between these two concepts of freedom bear, which is obvious when it comes to such an existential issue, enormous and far-reaching practical consequences. Some of them had already been mentioned above, directly and indirectly, while presenting a theoretical background of the issue. One has to clearly emphasise one of the consequences of the Enlightenment-liberal concept, namely anarchy and its consequences — the issue articulated clearly and repeatedly in the writing of Joseph Ratzinger/Benedict XVI. Anarchy (a notion originating from Greek, meaning literally "a lack of authority or its negation")[36] is understood by him as boundless lawlessness of an individual, who

[35] Benedykt XVI: *Święto wiary. O teologii mszy świętej*. Trans. J. Merecki. Kraków 2006, p. 62. Lack of the truth, a split between "a fact" and "an act," is a source of confusion, aberration, tragedy: "I can express joy only when the world and being a man indeed give reasons to be joyful. Is it really so? If these questions are not asked, a party — an attempt to find a feast in a non-religious world — shall quickly become a tragic masquerade. Therefore it is no coincidence that where people were searching for their 'deliverance,' that is experiencing liberation in self-realisation from the burdens of everyday life, as well as experiencing community than transgresses the 'I,' the party soon had to blow up the borders of a small-minded entertainment, transforming it into bachanalia. Drugs taken not individually, but in groups are to generate a trip to something totally different, a trip experienced as a truly liberating journey from everyday life to the world of freedom and beauty. In the background there is the question of all questions, namely a question concerning the power of suffering and death, which cannot be defied by any freedom. A person who does not ask such questions, dwells in the world of fiction [...]. The truth sets one free. Christian freedom is not freedom of 'thinking something out' (which does not exist), but releasing the world and ourselves from death, and it is only this freedom that may enable us to receive the truth and love one another in the truth." Ibidem, pp. 62—65.

[36] J. Ratzinger, H. Maier: *Demokracja w Kościele. Możliwości i ograniczenia*. Trans. M. Labiś. Kraków 2004 (hereinafter: DwK), p. 11.

in an extreme version rejects all bonds — religious, moral, social and family ones — understanding them as ties that restrict freedom.[37] Where man is being "detached" from God (in all possible ways: ontic, intellectual, moral, symbolic one, etc.), where man is "thought of" without God, where anthropology disassociates itself from theology — automatically a relation between freedom and the truth and its requirements is questioned. This is the soil on which "fake freedoms" are grown, and (amongst them) today the "anarchic pseudo-freedom" is on the top.[38] Possibilities to strive for any vision of good that seems attractive to us are boundless,[39] and validity of choice is impossible to verify (the truth does not exist or is beyond our reach). If we were to refer to fashionable clichés, in the modern Polish we would say *grunt to bunt* (rebellion is what really counts)[40] or, even stronger, in the form of a disparaged motto *róbta, co chceta* (do whatever you want to do).

Of course, criticism of anarchic counterfeits of freedom is by no means questioning a "holy and inviolable"[41] rule of individual and personal freedom of every man. In this area, according to the pope, the "only absolutely necessary and indisputable value, which can even become a verification tool for other rights, is the right to individual freedom, which has to be implemented without any orders, provided that this does not affect the right of a/the neighbour"[42] — so it is defined, according to the pope, by "the rationalism of the Enlightenment." This principle, legitimate in its core and with a strong Christian root, is dangerous in its pursuit of its own absolutisation. For individual freedom "is impossible" (literally, in its essence and effects) in isolation from God and, therefore, the truth. Sooner or later it shall transform in this disconnection (rather sooner than later) into dictatorship of *ego* and a centre of building tyranny[43]; into verbosity, and a tragic one, too. This shall be an anti-family tyranny (a family shall be announced an environment of enslavement and oppression),[44] anti-educational (education is manipulation; child should be given only "pure" information to decide freely),[45] etc.

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[37] KEP, p. 291.

[38] J. Ratzinger: *Wykłady bawarskie z lat 1963—2004*. Trans. A. Czarnocki. Warszawa 2009 (hereinafter: WB).

[39] T. Rowland: *Wiara Ratzingera. Teologia Benedykta XVI*. Trans. A. Gomola. Kraków 2010, p. 184.

[40] G.K. Witkowski: *Grunt to bunt. Rozmowy o Jarocinie*. Poznań 2011.

[41] M. Pera: "Wprowadzenie. Propozycja." In: J. Ratzinger: *Europa Benedykta w kryzysie kultur*. Trans. W. Dzieża. Częstochowa 2005 (hereinafter: EB), p. 30.

[42] Ibidem.

[43] KEP, p. 293.

[44] KEP, p. 292.

[45] KEP, p. 85.

A space left by God shall not be empty: it shall be taken by an egotist, free of bonds/relationships, who shall wish "to be like God." And this shall be false (since deprived of the truth) vision of deification, an attempt to take up a throne of an unreal god, just an idol — a monstrous egoist who makes the world his subject, a perfect contradiction of God-Love.

Lack of the truth is not going to defend the border of "respecting the rights of a neighbour" and his individual freedom. Lack of the truth shall infringe upon this border, indeed, it shall contribute to its destruction. For a friendly to everyone and everything symbiosis of nice egoists does not exist. Anarchistic philosophy of life focused on "I" shall inevitably show its terrible face, as well as fangs and claws. And from under the icing, from behind the facade of "unlimited freedom" an ugly gob of enslavement and misery shall emerge.[46] First for the other,[47] and in the end for the very "navel of the world." First it shall enslave the others and make them unhappy, in the end the boundlessly free "navel of the world" itself shall become enslaved and unhappy.

The idea of freedom that seems to be unlimited, turns out to have a limit, which at the same time is an abyss: it leads to auto-destruction of freedom.[48] Therefore, freedom needs its measure and content. The measure, in order not to become violence toward the others. The content, in order not to become capable of anything out of the internal emptiness.[49] For freedom can annihilate itself, get bored with itself, it happens when it becomes an empty freedom. This emptiness — which is ultimately an emptiness of the soul — gives birth to nihilism. Both Nazism and communism had this type of empty, anarchistic moral freedom in their bloodstream, especially at their beginnings, in their article of incorporation. Joseph Ratzinger referred to the issue, with the power of a prophet, on 7 November 1992 in Paris, when he was awarded a membership in the Academy of Moral and Political Sciences of the Institut de France.

> […] both the Nazi and communist dictatorships did not regard any deed as evil in itself and definitely immoral. Everything that served the objectives of the movement or the party was good, even if it was perceived as inhuman. A moral sense has been trampled upon for decades. One day it shall inevitably lead to a total nihilism, where man shall no longer recognise any of his former aims and when freedom shall become only a possibility of doing anything capable of making empty life more engaging and interesting.[50]

[46] KEP, p. 293; DwK, pp. 11, 14.

[47] KEP, p. 293.

[48] EB, p. 59.

[49] J. Ratzinger: *Prawda, wartości, władza. Kiedy społeczeństwo można uznać za pluralistyczne*. Trans. G. Sowinski. Kraków 1999, p. 62.

[50] Ibidem, pp. 17—19.

Panta moi eksestin, "I have the right to do anything" (1 Corinthians 6:12) — they said in Corinth. "But not everything beneficial" and "I will not be mastered by anything" — replied St. Paul (1 Corinthians 6:12). For Christian freedom is not anarchy or libertinism. It is neither a release from ethics nor dispensation from doing good.[51] Freedom has a deep meaning and measure, as St. Paul taught the same Corinthians in his second Epistle: "Now the Lord is the Spirit, and where the Spirit of the Lord is, there is freedom." (2 Corinthians 3:17). "The letter kills, but the Spirit gives life" (2 Corinthians 3:6). But the Spirit is not an anarchic idea, an unlimited justification of lawless interpretations, visions and deeds that do not obey any norms. *Pneuma* (Spirit, wind) "breathes where he will" (J 3.8A), but it is precisely where He wants to; and it is impossible to appropriate Him. Paul makes a discovery: "The Spirit is Christ and Christ is the Lord who shows us the way."[52] There is (the) freedom.

It is this Christian discovery of the essence of freedom, its biblical-theological content and measure, is the essence of the mission of the Church and her liberating, freedom-oriented vision. A genuine freedom of the man has its source in in his creation in the image and likeness of God, in the Sacrifice of Christ, in the gift of the Holy Spirit. This is what the Church reminds us about, this is what she proclaims and brings up to — to the freedom referred to the truth.[53]

Also this (only apparently) theoretical vision of freedom has its deep practical consequences that penetrate through the Christian existence. Freedom, says realism and hard facts of this vision, is protected by the Ten Commandments by orders and prohibitions of the Gospel, the teaching of the Church. They are the means given by the Lord for protection of our freedom, they are "affirmation for development of a genuine freedom."[54] Because the real threat (literally: derived from the truth about man) to our freedom is evil. Therefore, freedom from evil gives security and courage to act, love and life give the courage to act, love, and live.[55] Because liberation from evil is necessary to implement the most vital purpose of freedom: the good. This is how Ratzinger explains the issue in his conversation with Seewald:

> Freedom means that I accept willingly the possibilities of my own being. However it is not so that I can say only "yes" or "no". Beyond negation

[51] Benedykt XVI: *Katechezy o św. Pawle*. Ed. and trans. *L'Osservatore Romano*. Kraków 2009, p. 120.

[52] Idem: Apostolic adhortation *Verbum Domini* (30.09.2010), No. 39, p. 46.

[53] MD, p. 153.

[54] MD, p. 103.

[55] WB, pp. 212—214.

> there is a boundless space of creative possibilities of good. Essentially, we are of the opinion that if a person does not say "no" to the evil, he/she is already deprived of freedom, that this is the case of distortion of freedom. For freedom finds its vast creative space in the sphere of good. Love is creative, the truth is creative — only in this sphere our eyes open up, only there I can learn about so many matters.[56]

6. The Prayer of the Son — laboratory of freedom

Theo-logic of freedom reaches its peak — the biggest depth and fullness of content — in Chistology. This is a privileged synthesis of the truth and freedom, a reflection of the Event, in which freedom of God is shared by man and the other way round.

Because this "the other way round," this to be (free) "like God," desire to become like God — this is a thought on which all the attempts to liberate man has always been focused.[57] Since the desire of freedom is a substance of humanity, people look for ways to be free "like God": this desire shall not be satisfied by finiteness. A lot of observations (and comments) made above on the contemporary shapes of anarchic and libertarian freedom, confirm this desire — a cry for total, demiurgical, "divine" freedom can be heard from all directions. How to reach this aim, become free "as God," gain "deification"?[58]

Christology brings the answer. Joseph Ratzinger/Benedict XVI sees its centre (following Maximus the Confessor) in a deliberating genius of the

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[56] BiŚ, p. 87. "When we look at lives of great men, at lives of saints, we can see that in the course of the ages they exhibit totally new human possibilities, that have never been seen by internally blind or dumb. In other words: freedom indeed manifests its action, when in the enormous sphere of good something undiscovered develops and expands our capacities. While it is wasting itself, when it believes, that its will can be confirmed only by negation. In such a situation I am using my freedom, but at the same time I am distorting it." Ibidem

"Genuine freedom is expressed in responsibility, in action marked by taking responsibility for the world, for ourselves and for others […] [The Holy Spirit] teaches us to look at the world, at the others and ourselves through the eyes of God. We do not do good as slaves, who being deprived of freedom, may not proceed otherwise; but we do it because we are personally responsible for the world; because we love the truth and good, because we love God himself, and therefore also His creation." Benedykt XVI: *Homilia w wigilię Uroczystości Zesłania Ducha Świętego*, 3 June 2006. In: MD, pp. 139—140.

[57] J. Ratzinger: *Chrystus i Jego Kościół*. Trans. W. Szymona. Kraków 2005² (hereinafter: CiJK), p. 40.

[58] CiJK, p. 41.

Prayer of the Son in Gethsemane: "Yet not what I will, but what you will" (Mark 14:36).[59] And he explains the issue in the following way:

> *Logos* humbles himself to accept the man's will as his own and turns to the Father in his human *I*, transmitting, as it were, his *I* to this man, and in this way he converts a word of man into the eternal Word, into his divine: "Yes, Father." Giving the man his *I*, His own identity, He makes man free, saves him and deifies him. Here we can as it were touch what is the meaning of the sentence: "God became man." God transforms a deadly fear of man into obedience of the Son, transforms the words of *a servant* into the words of *the Son*. This way […] a mode of our deliverance, our participation in the freedom of the son becomes comprehensible.[60]

Each prayer that is incorporated in this prayer of Jesus Christ, becomes *laboratory of* freedom[61] — here (in our Lord, in his Work, His prayer) slavery is transformed into freedom, man becomes as free as God.

Commenting upon the issue of Christology of freedom J. Ratzinger/Benedict XVI repeatedly refers to the myth of Prometheus, who fights with gods for divine fire for the Earth and in this way opens a new world. In the homily during Mass on the Pentacost Sunday (Cathedral in Munich, 14 May 1947), he quoted the last seven verses of the a poem *Prometheus* (1773) by Johann Wolfgang Goethe:

> Here I sit, forming people
> In my image;
> A race, to be like me,
> To suffer, to weep,
> To enjoy and delight themselves,
> And to mock you —
> As I do![62]

These pompous words of Prometheus tossed in the face of Zeus became almost a programme of the modern times: to be an image not of God, but of oneself, seize power over the world, to ignore the Divine authority. Not to count on God, not to expect anything from Him. But is not this fire from heaven, won this way, going to burn us and the earth?[63]

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[59] CiJK, p. 47.

[60] CiJK, p. 47.

[61] CiJK, p. 48.

[62] J.W. Goethe: "Prometheus." Trans. S. Lichański. In: J.W. Goethe: *Dramaty wybrane*. Warszawa 1984, vol. 1, p. 236. I quote an English translation of an anonymous author.

[63] J. Ratzinger/Benedykt XVI: *W dzień Pięćdziesiątnicy*. Trans. K. Wójtowicz. Kraków 2006 (hereinafter: WDP).

It seems that one can smell burning and see bloody glows of the world which "mocked him" that no longer heeds God.

Hence Christologic conclusion and most wonderful, Christ-oriented reinterpretation of the ancient myth, during Eucharist, at Pentacost: "Pentacost tells us that the Holy Spirit is the Fire, and Christ is Prometheus, who brought the fire from heaven to the earth."[64] Man should have fire — be free, be like God. But the fire of deliverance is not brought by a giant who marginalises God — but by the Son.[65] It is Him who baptises "with the Holy Spirit and fire," it is Him who casts fire on our earth and wishes it was kindled (Matthew 3:11; Luke 12:49). This fire is not going to burn the world, because it comes from a fiery chariot of the cross, because it is the fire of the burning bush, which is on fire but does not burn out.[66] This fire is not going to destroy but to brighten, warm up, feed.

And this is how the eternal yearning of humanity is fulfilled: to have the fire, to be free, to be like God. It is brought by Jesus Christ, the new Prometheus — the only answer to the question concerning liberation of man.[67] In the speech to the General Assembly of the Congregation for the Doctrine of the Faith delivered on 10 February 2006 the thought was expressed as follows:

> Light radiating from Jesus is the radiance of the truth. Any other truth is a part of the Truth which is Him, and which refers to Him. Jesus is the leading star of human freedom, without Him freedom loses its direction, because without knowledge of the truth freedom becomes degenerated, isolated and turns into futile lawlessness. With Him freedom finds itself, discovers the fact that it has been created for the purpose of good, and is manifested in deeds and behaviour dictated by love.[68]

Jesus Christ: a prayer to Him and with Him is a laboratory of freedom, while He becomes its pole star. The new Prometheus. This is very important with respect to "the enlightenment concerning the notion of freedom"[69]: it is not Prometheus and it is not Sisyphus. But it is the New Prometheus whose Grace is effective, not Sisyphean.

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[64] WDP, p. 17.

[65] WDP, p. 18.

[66] WDP, p. 51.

[67] Cf. J. Ratzinger: *Eschatologia — śmierć i życie wieczne*. Trans. M. Węcławski. Poznań 1984, pp. 79—82; SP, p. 61; J. Ratzinger: *Słudzy waszej radości. Chrześcijaństwo, apostolstwo, kapłaństwo*. Trans. T. Jaeschke, K. Wójtowicz. Wrocław 1990, pp. 29—31, 36.

[68] MD, p. 88.

[69] PwT, p. 46.

7. The grace of free "yes"

Christology is linked intrinsically with Mariology. Also here in the very heart of the issues related to human freedom. In the life and destiny of Mary, the entire truth of human freedom is embedded. In her history one can see a vast greatness of God (His love, omnipotence, humility, and respect for the creation which is treated as a partner in the work of salvation) and greatness of man (his ontic self-determination and ability of trusting the Creator totally). One can see how far realism of freedom can reach,[70] how man can be "as God" (in Annunciation) and how freedom is the gift of God (through the Immaculate Conception).

God asks for human "yes." He needs freedom of a free partner to make his Kingdom real — the Kingdom based not on external authority, but on the power of love, which exists precisely from freedom and in freedom. "Yes" of Mary is a complete grace, and a complete freedom. "Everything is grace" (Bernanos?). That is why, because grace does not destroy freedom, but it creates it.[71]

The more grace, the more freedom, the closer to God, the less captivity. This is the light that lightens human freedom. This is the light from the fire that the New Prometheus gave us.

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[70] There has been a dispute on realism and the shape of freedom between J. Ratzinger and Karl Rahner. (Cf. FZC, pp. 228—231).

[71] J. Ratzinger: *Eucharystia. Bóg blisko nas*. Ed. S. O. Horn, V. Pfnür. Trans. M. Rodkiewicz. Kraków 2005, pp. 18—19. Human history is the history of freedom and does not succumb to unavoidable determinism. The call to repentance is always in its essence the call directed at human freedom: God (often through Mary and other saints) calls us to transform ourselves and thus transform history. (Cf. BiŚ, p. 287).

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Jerzy Szymik

Freedom and Christology according to *Theologiae Benedictae* Two Concepts, Two Anthropologies, One Logos/Son

Summary

The basis for theological reflection about freedom is the truth about creation of man in the image and likeness of God who is absolutely free. Here is the source of human's yearning for freedom, pursued through endless tension between good and evil. Abstracting in the definition of freedom from the religious foundation inevitably leads to replacing the truth about freedom with the ideology of freedom, the example of which may be modern and contemporary liberal world views, converting themselves into totalitarian social and political systems. Though just in itself, the mere desire for freedom leads humans to nothingness and enslaves them, if it takes the form of lawlessness and Promethean struggle with God. Christianity shows that freedom is not a human prey, but a gift of God, grounded in ontology; the man is free because he was created and saved — he is a son in the Son. Christ is a new Prometheus, who "cast fire on the earth," in the gift of the Holy Spirit — the Spirit of freedom. What constitutes the way to man's freedom is not autonomy, but grace, leading to love.

Jerzy Szymik

La liberté face à la christologie selon *theologiae benedictae* Deux conceptions, deux anthropologies, Un Logos/Fils

Résemé

La vérité sur la création de l'homme — complètement libre — à l'image de Dieu et à sa ressemblance est le point de départ de notre réflexion théologique sur la liberté. C'est là que tire son origine la soif humaine de la liberté, à laquelle conduit un chemin marqué par une tension continue entre le bien et le mal. Si, en définissant la notion de liberté, on se détache d'un fondement religieux, cela conduit inévitablement à remplacer la vérité sur la liberté par une idéologie de liberté ; ce sont les conceptions libérales contemporaines se transformant en systèmes sociopolitiques totalitaires qui en constituent les exemples. Si le désir de liberté, étant juste en lui-même, adopte les formes d'un comportement arbitraire et d'une usurpation prométhéenne, il conduit l'homme vers le néant et, en fin de compte, il le réduit en esclavage. Le christianisme montre que la liberté n'est pas un butin de l'homme, mais un don de Dieu et se fonde sur l'ontologie. La liberté constitue le principe du monde créé par amour, et l'homme — quant à lui — est libre parce qu'il a été créé et racheté : il est le fils dans Le Fils. C'est grâce au Christ que la liberté de Dieu devient le partage de l'homme. Le Christ est un nouveau Prométhée qui, en offrant le Saint-Esprit (étant Esprit de liberté), « jette un feu sur la terre ». Ce n'est point l'autonomie ou l'usurpation qui sont la voie de liberté de l'homme, mais la grâce qui rapporte l'amour.

Mots clés : le Christ, Saint-Esprit, christianisme, christocentrisme, vérité, liberté, libéralisme, modernité, idéologies, dialogue, anthropologie, création

Jerzy Szymik

La libertà e la cristologia secondo la *theologiae benedictae*
Due concezioni, due antropologie, Un Logos/Figlio

Sommario

Il punto di partenza della riflessione teologica sulla libertà è la verità sulla creazione dell'uomo ad immagine e somiglianza di Dio — assolutamente libero. Qui ha origine la nostalgia umana per la libertà e l'aspirazione alla stessa si realizza nella tensione incessante tra il bene e il male. Nella definizione del concetto di libertà il prescindere dal fondamento religioso porta immancabilmente a sostituire la verità sulla libertà con l'ideologia della libertà, di cui sono esempio le concezioni liberali moderne e contemporanee che degenerano nei sistemi socio-politici totalitari. Il desiderio di libertà di per sé giusto, se assume la forma dell'arbitrio e dell'usurpazione prometeica, porta l'uomo alla nullità e alla fine lo riduce in schiavitù. Il cristianesimo mostra che la libertà non è un bottino umano, ma un dono di Dio e si basa sull'ontologia; la libertà costituisce il principio del mondo creato per amore, e l'uomo è libero, in quanto è stato creato e redento – è il figlio nel Figlio. Grazie a Cristo l'uomo è partecipe della libertà di Dio. Cristo è il Nuovo Prometeo che nel dono dello Spirito Santo — Spirito della libertà — "getta il fuoco sulla terra". La strada della libertà dell'uomo non è l'autonomia o l'usurpazione, ma la grazia che porta il frutto dell'amore.

Parole chiave: Cristo, Spirito Santo, cristianesimo, cristocentrismo, verità, libertà, liberalismo, modernità, ideologie, dialogo, antropologia, creazione

Ecumeny and Law, vol. 4 (2016)
pp. 41—61

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Religious Freedom in the Doctrine of the Evangelical (Lutheran) Church of the Augsburg Confession

Keywords: Human rights, religious freedom, Lutheran World Federation, Community of Protestant Churches in Europe, Evangelical Church in Germany, the Evangelical (Lutheran) Church of the Augsburg Confession in Poland

Introduction

Due to the specifics of the evangelical tradition, which is characterised firstly by the lack of one institutional or personal centre defining the doctrine, and consequently, pluralism of thought and speech in many essential questions of the theological or ethical nature, the obligation to present the question within the doctrine of the Evangelical (Lutheran) Church of the Augsburg Confession poses, in the very beginning, an essential problem. First, the range of the material which should be the basis for the consideration has to be defined. Because of the independence of local Lutheran churches combined with their rooting in the modern theological heritage, as well as the fact of their wide cooperation on the forum of various international organisations, limiting the perspective only to the Evangelical (Lutheran) Church of the Augsburg Confession does not seem appropriate. In this situation, the natural reference point for the representatives of the Lutheran tradition seems to be the common acknowledgement of the 16th-century Reformation's doctrinal heritage in the *Book of Concord*, that is, in the complex of Lutheran confessions, also

called confessional books, as normative. However, in the case of the issue of religious freedom this point of reference is unfortunately not helpful, due to the fact that the Lutheran Confessions, because of their being conditioned by the 16th-century arguments, do not speak on this type of problems.

As the further reference point one can assume Martin Luther's thought. In this wide heritage one can find, among others, the statement condemned later in the *Exsurge Domine* bull: "We should overcome heretics with books, not with fire."[1] At the same time one should keep in mind that the Reformer from the Wittenberg saw the tasks of the secular authority in the following way: "[…] no ruler ought to prevent anyone from teaching or believing what he pleases, whether it is the gospel or lies. It is enough if he prevents the teaching of sedition and rebellion."[2] Such depiction was often accompanied by sharply formulated calls to the secular authority to deal with those who cause unrest and riots and motivate them with religion. It referred not only to the rebelling peasants — followers of Thomas Münzer, but also the Anabaptists, who evaded their responsibilities towards the secular authority. Such perspective referred not only to the opponents in the religious arguments, but also to the Lutheran preachers: "My Lutherans ought to be willing to abdicate and be silent if they observed that they were not gladly heard, as Christ teaches,"[3] and further in the same text he added: "It is not a good thing that contradictory preaching should go out among the people of the same parish. For from this arise divisions, disorders, hatreds, and envyings which extend to temporal affairs also."[4]

The picture presented above allows to agree with two theses of modern evangelical ethicists. Martin Honecker states about Luther: "The thought of public freedom of teaching was unknown to him; he allowed only a personal freedom of belief and conscience."[5] And Ulrich Körtner summarises the question of religious freedom in the Wittenberg Reformation as follows: "But also the Reformation itself did not bring religious freedom in the modern sense of the word, that is, as an individual right. Even as Luther argued in favour of the freedom of conscience and God's Word, he was convinced that the heretics were dangerous and that the secular

[1] M. Luther: "To the Christian nobility of the German nation concerning the reform of the Christian estate." In: *Luther's works*. Vol. 44. Saint Louis 1966, p. 196.

[2] Idem: "Admonition to peace a reply to the Twelve Articles of the peasants in Swabia." In: *Luther's works*. Vol. 46. Saint Louis 1967, p. 22.

[3] Idem: "Psalm 82." In: *Luther's works*. Vol. 13. Saint Louis 1956, p. 63.

[4] Ibidem.

[5] M. Honecker: *Das Recht des Menschen. Einführung in die evangelische Sozialethik*. Gütersloh 1978, p. 88.

authority should take coercive action against them when needed, not for religious reasons, but for the sake of political peace."[6]

Looking for further points of reference for reflection on religious freedom in the Evangelical-Lutheran theological tradition, one should take into account Martin Honecker's statement: "Human rights as a topic were discovered by the evangelical theology and the church in Germany only in 1970."[7] One should also give up limiting its scope to the German evangelical theology. The biggest international Lutheran organisation as well — the Lutheran World Federation — spoke on the subject of human rights only in the 1970 in the resolution of its Fifth General Assembly in Evian.[8]

Of the collection of thought of the evangelical churches and theologians on the topic of religious freedom, two German debates taking place in the 1970s will be presented below. Then, the positions of the Lutheran World Federation and the Community of Protestant Churches in Europe, to which also Lutheran churches belong. And at the end specific examples from the work of two national churches: Evangelical Church in Germany (to which also the Lutheran churches belong) and The Evangelical (Lutheran) Church of the Augsburg Confession in Poland.

The debate in the German theology in the 1970s

In the discussion on the human rights in German evangelical theology, there were several models of their theological reception. Below, two of them will be presented — a model by Martin Honecker, as well as the one by Heinz Eduard Tödt and Wolfgang Huber. In both of them we find significant references to the issue of religious freedom.[9]

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[6] U. H. J. Körtner: *Evangelische Sozialethik. Grundlagen und Themenfelder*. Göttingen 1999, p. 164.

[7] M. Honecker: *Grundriß der Sozialethik*. Berlin 1995, p. 342

[8] "Resolution zur Frage der Menschenrechte." In: *Evian 1970. Offizieler Bericht der Fünften Vollversammlung des Lutherischen Weltbundes*. Eds. Ch. Krause, W. Müller-Römheld. Witten–Berlin 1970, pp. 191—193.

[9] On the model of human rights reception by M. Honecker and H. E. Tödt as well as on Wolfgang Hubera in general see: M. Hintz: *Etyka ewangelicka i jej wymiar eklezjalny. Studium historyczno-systematyczne*. Warszawa 2007, pp. 166 f., 170; overview of most interpretation models of the debate from the 1970s see: U. H. J. Körtner: *Evangelische Sozialethik*…, pp. 160—167.

Martin Honecker

In his analysis of the human rights, Martin Honecker refers not to their theological justification, but to their obviousness, noticing in them a type of argumentation useful also for theology. A separate subchapter of his work is devoted to the analysis of the right to religious freedom as an example of the "seemingly individual human right."[10] After presenting his interpretation in the Western European and socialist tradition, as well as in Islam, and the presentation of the historical outline of the attitudes of Christianity to the idea of religious freedom, Honecker moves to presenting doubts and motions as to the right to religious freedom.[11]

Firstly, he points to the connection of religious freedom with the freedom of conscience, as well as shows that the first does not only concern inviolability of merely the internal freedom of conscience and faith, but also the right to express them publicly and to practice their faith in communion with the others (freedom of worship practice). Hence, freedom of the churches is based on religious freedom.[12]

Secondly, he indicates the tension between the claims of each revelation of the truth, which necessarily includes the intolerance, and the requirement of respecting the religious freedom in the conditions of a worldview neutral state. Martin Honecker points out that the Christians and churches have to endure this tension. It is also necessary that they subject to critical analysis the missionary means they use, as well as the ways of public proclamation of faith, considering their admissibility from the perspective of religious freedom. This self-criticism should also comprise the evaluation of Church's position in the state and the answer to the question whether it claims unjustified privileges. Honecker also points out that religious freedom is not limited to Christians. It also concerns atheists and radical critics of the Church.[13]

Thirdly, he points out that religious freedom is not an absolute freedom. Referring to the Art. 9 point 2 of the European Convention on Human Rights[14] he shows that one must not, citing religious freedom,

[10] M. Honecker: *Das Recht des Menschen*..., p. 82.

[11] Ibidem, pp. 82—91.

[12] Ibidem, p. 91.

[13] Ibidem, pp. 91 f.

[14] "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (13.04.2015)).

harm other people (e.g. through starving during exorcism) or put a strain on them (e.g. with the noise of the bells at night). He also stresses that religious freedom is limited by rights and freedoms of others, and that public manifestation of the internal beliefs of faith and conscience can question social relations.[15]

Religious freedom also comprises the regulation of state-Church relations. The obligation of worldview neutrality of the former cannot cause atheism or religious indifference to gain a status of a state religion. Also, state's action in favour of an atheist worldview is a violation of religious freedom. Honecker thinks also that the principle of religious freedom can be reconciled with supporting religious communities or groups, while retaining the principle of their equity. A state which is neutral in matters of religion guards pluralism, also in the areas such as social work etc., which does not, however, exclude the possibility of cooperation with Churches and their institutions. It is possible insofar as the citizens expect it. It assumes possible changes of the ways religious freedom is realised depending on the changes in society.[16]

The question whether freedom of conscience and of confession is in force only within a community as a whole, or if an agreement within a Church itself is required, is considered by Honecker particularly important and difficult to solve. Because it is impossible for the Church to be religiously neutral, freedom of conscience cannot be preserved in the internal law of the Churches as it is in the state law. It does not, however, settle the use of other human rights within the Church. Again, it is impossible to simply transfer them from the state law, but some of them, like the ones referring to human dignity or responsibility should find their reflection in the Church law. It should however be actualised each time in a dialogue between the possibility of applying specific human rights and the mission of the Church.[17]

Martin Honecker stresses the significance of religious freedom for the regulation of order and social freedoms in face of ideological contradictions, because on its strength the state and Church resign from enforcing the truth by means of political sanctions. He refers in this context to the other freedoms: freedom of conscience and of expressing opinion. All of them, including religious freedom, are the basis for preserving peace based on mutual respect of other people's beliefs and dignity.[18]

He reminds us that until the Peace of Westphalia the religious freedom only had a collective character. However, he notices that with the develop-

[15] M. Honecker: *Das Recht des Menschen*…, p. 92.
[16] Ibidem, pp. 92 f.
[17] Ibidem, p. 93.
[18] Ibidem, p. 95.

ment of the concept of religious freedom, it started to protect minorities and give them the possibility to disclose themselves. Honecker stresses the significance of the social dimension of religious freedom, as well as points to the significance it had won in the ecumenical debates. He also notices that in different legal systems this collective freedom has different forms: freedom to practice religion, freedom to undertake tasks of missionary, educational, or prophetic (understood as the criticism of the established social reality) nature, or for the activity in the field of social help and diaconia. There is also the fact of conditioning the images that actualise the collectively understood religious freedom by different confessional traditions.[19]

Heinz Eduardt Tödt and Wolfgang Huber

The theological model of interpretation of the human rights proposed by Heinz Eduardt Tödt and Wolfgang Huber is based on pointing both to the analogies and to differences between the theological theses and human rights. They concentrate their analysis around three rights that are essential in their opinion: right to freedom, to equality, and to participation. They put forward a thesis that these freedoms are reflected in the Christian faith, and at the same time they are "radicalised in a specific way."[20] The particular topic of religious freedom appears in the context of analysing the rights to freedom and equality.

In the context of the former, Tödt and Huber point to the public character of Christian testimony, which demands religious freedom understood as a freedom of religious practices. They stress, however, that political freedom cannot be considered a prerequisite for religious freedom, because a place for it has not been foreseen in the human concept of organised world.[21] The relationship of political and religious freedom is the opposite: "[…] the reality of the Christian freedom itself urges by the strength of its relation to the world also to realising political freedoms and works then of course together with various human incentives to anchor the freedom in law."[22]

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[19] Ibidem, pp. 93—95.

[20] W. Huber, H. E. Tödt: *Menschenrechte. Perspektive einer menschlichen Welt*. Stuttgart—Berlin 1977, p. 163.

[21] Ibidem, p. 165.

[22] Ibidem.

In context of the right to equality, Tödt and Huber refer to equality in being God's children based on Gal. 2, 26 ff. They point out that it presupposes a fundamental equality, independent from the disparities between different religions. This equality is not established by people, but it is promised to them and given in baptism. They also show that, while the analogy between the content of the Christian faith and legal reality point to a particular character of equality, one should remember that in the legal reality it is only guaranteed by the defined legal basis, whereas in case of the Christian community it is based on love.[23]

Tödt and Huber conclude their analysis concerning human rights with a chapter entitled "Verantwortung für das Recht des Menschen" (Responsibility for the right of a human). In it they deal, among others, with implementing religious freedom. In the beginning they point to the particular responsibility of Churches for implementing the right to religious freedom taking into account the fact that it is an essential prerequisite for uninhibited public proclamation of the Gospel. They also stress that the right to religious freedom cannot be identified with right to freedom for the Churches. It is supported by the historical arguments, because the right to religious freedom was shaped in opposition to the Churches privileged in the state. This is why the right to religious freedom is not only the right to freedom for the Churches, but also the right to oppose the monopolistic claims of specific Churches reinforced by political sanction. The right to freely shape their own order for the Churches results from the right to religious freedom, but it is not identical with it. The right to religious freedom also includes the right to having no religious beliefs at all. And the support Churches grant to the religious freedom has to include showing support to freedom of those who think differently.[24]

Tödt and Huber indicate that "freedom of belief and conscience constitutes […] in a very principled sense the first human right. Because in it the inviolability of a person, and through it the basis for all human rights, is shown to advantage in the clearest way."[25] In reference to the ecumenical debate within the World Council of Churches they show further that the right to religious freedom is firstly the right of an individual, because the religious confession is always a confession of some individual. However, it is also expressed in the community, hence the right to religious freedom also has a corporate dimension. It concerns the right to public religious practices, but also to public activity. They stress that the right to religious freedom in the corporate sense not only means the right

[23] Ibidem, pp. 166 ff.
[24] Ibidem, p. 209.
[25] Ibidem, pp. 209 f.

to freely shape the internal basis, goals, practice, and order of the religious communities, but is also a right to public proclamation of political and social theses, resulting from religious convictions. Then they point to examples of violating such religious freedom not only in the countries of the former Eastern Bloc, but also in the Park regime in South Korea, or during the coup in Chile in September 1973. In the end, they point out that such presentation of the matter of defending religious freedom can cause allegations that this way the witness of the Church was conditioned by achieving certain conditions of political nature, and to be precise — realisation of religious freedom.[26] In response to this accusation they refer to Dietrich Bonhoeffer's concept, presented in his ethics of division to the Forelast and Last things.[27] Based on this distinction they find that the guarantees of religious freedom should be considered Forelast things and they state: "The fight of a Christian community for the human rights, also for freedom of religion, is actually a fight for the Forelast, for the sake of the Last."[28]

International Organisations

Lutheran World Federation

For the first time, the issue of human rights appeared on the General Assembly of the Lutheran World Federation (further: LWF) in Evian (Switzerland) in 1970. They were a subject of interest for the section of the Assembly dealing with the topic: "Responsible participation in today's society." Its subsection "Economic justice and human rights" was prepared later and accepted by the Assembly Resolution on Human Rights. It recommended to the Churches that they undertake actions to familiarise their members with the Universal Declaration of Human Rights, as well as to reflect on possibilities of applying it in particular milieu, in which a particular Church lives and functions. It was also pointed out that in this process of education and analysis, special attention should be given to Art. 18 concerning the right to religious freedom.[29]

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[26] Ibidem, pp. 210—214.
[27] Cf. D. Bonheoffer: *Ethik*, 7. Aufl. München 1966, pp. 142 ff.
[28] W. Huber, H. E. Tödt: *Menschenrechte*..., p. 215.
[29] "Resolution zur Frage der Menschenrechte..."

The next General Assembly, which took place in 1977 in Dar Es Salaam (Tanzania), also issued a statement dedicated to the human rights. In it we read: "We confirm our Christian task of supporting, together with those who think differently than us, realisation of full freedom of thought, conscience and religion, and at the same time we stress the right to practice a communion of faith over the national borders. We clearly confess that freedom of conscience also includes a right to not be affiliated with any religion."[30] In the recommendations of the III Seminar of the Assembly dealing with the topic "In Christ — Responsible Care for Creation" there is also a declaration of the LWF and its member Churches that they will undertake further efforts to make the situation within the scope of religious freedom better, in cooperation with the ecumenical and political partners. There was also a call for prayer for the persecuted Churches and its members, and for undertaking all possible activities to help them in their situation. The importance of maintaining communication between Churches beyond state borders was stressed as well.[31]

The General Assembly in Budapest in 1984 also adopted a statement concerning human rights. As one of the particularly moving examples of violating the human rights, it was pointed to violating religious freedom in its many aspects: public or private worship, public statement of faith, upbringing of the youth or right to live in accordance with the conscience. The point of reference for defining these areas was the "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief" from 25 January 1981.[32] In the adopted statement, the Assembly "[…] condemns all attempts to violate the dignity of human being, a dignity that by right belongs to all people of whatever […] faith."[33]

The last of the General Assemblies of the LWF dealing in its final documents directly with the issue of religious freedom, was the Assembly in Hong Kong in 1997. In its message, in the part entitled "Called to be a Witnessing Community," in the section on advocacy, human rights, justice, peace, and reconciliation, there is a fragment dedicated to religious

[30] "Menschenrechte." In: *Daressalam 1977. In Christus — eine neu Gemeinschaft. Offizieler Bericht der Sechsten Vollversammlung des Lutherischen Weltbundes*. Eds. H.-W. Hensler, G. Thomas. Frankfurt am Main, p. 211.

[31] "Bericht Seminar III. In Christus — verantwortliche Sorge für die Schöpfung." In: *Daressalam 1977…*, p. 166.

[32] "Erklärung über Menschenrechte." In: *„In Christus — Hoffnung die Welt" Offizieler Bericht der Siebenten Vollversammlung des Lutherischen Weltbundes. Budapest, Ungarn 22. Juli-5. August 1984*. Ed. C. H. Mau: *LWB-Report*, vol. 19/20 (1985), pp. 189 f. Cf.: *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, http://www.un.org/documents/ga/res/36/a36r055.htm (11.04.2015).

[33] "Erklärung über Menschenrechte"…, p. 190.

freedom. In it, it was stated that violating or ignoring the question of religious freedom and tolerance — one of the basic human rights — cannot take place in any of the modern countries claiming to be democratic. It was also stated that no religion or religious institution can propagate its faith in a way that would violate the inborn freedom of each man. And in face of the fact that in many parts of this world there is still a religious intolerance and discrimination, the Assembly called the member Churches of the LWF and the ecumenical community to stronger efforts to support and protect the religious freedom, both in particular countries, and internationally.[34]

The Assembly in Hong Kong also adopted the Statement on Freedom of Religion. In it, it repeated the assertions included in the Message of the Assembly and supplemented it, firstly with the assertion that religious freedom is realised through assuming a chosen religion, or rejecting it. Secondly, with a criticism of fundamentalism, both religious and political, as contradictory to the basic values of human dignity and freedom. It was pointed out, that it is often the religious people who offence against these values the strongest. Thirdly, it was stated that the principles of ideological or fundamentalist character lead to violating the right to religious freedom also in the countries which have good legal solutions protecting religious freedom. Fourthly, it was demonstrated that the phenomena of intolerance and discrimination on religious grounds grow stronger also in those countries that have strong traditions of abiding human rights. Fifthly, the Churches were called to, on the occasion of the 50th anniversary of adopting the Universal Declaration of Human Rights, to pay attention in their activities to the issue of religious freedom in the context of other human rights: economic, social, cultural, citizen's, and political. As means of this work it was pointed to liturgical actions (prayers, worship, Bible studies), preparing educational materials and seminars, public appearances, cooperation with representatives of other religions, stepping out in front of state and religious authorities to defend individuals and groups whose religious freedom is limited or taken away from them.[35]

The engagement for the human rights in the LWF has not only a declarative dimension, but also an institutional one. According to the recommendation of the General Assembly in Budapest, an Office for Human Rights was appointed in the Secretarial Office of the LWF

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[34] "*In Christus — Zum Zeugnis berufen* Bericht und Verpflichtungen." In: *Im Christus — zum Zeugnis berufen. Offizieller Bericht der Neunten Vollversammlung des Lutherischen Weltbundes. Hong-Kong 8.-16. Juli 1997*, Genf, p. 60.

[35] "Erklärung zur Religionsfreiheit." In: *Im Christus — zum Zeugnis berufen*..., pp. 74 f.

in Geneva.[36] In the present structure of the so-called LWF Communion Office this topic is dealt with by the Department for Theology and Public Witness. As its major areas within international affairs and human rights it points to the activities towards advocacy, human rights, justice, peace, and religious freedom, describing its task closer as follows: "Advocacy is an LWF priority. We understand that holistic mission includes proclamation, service, and advocacy. We aim to be a reliable and effective voice for justice, peace, and human rights. We want our member Churches to have strong capacities for public witness on behalf of vulnerable and oppressed people."[37] An expression of interest in the topic are the publications of LWF dedicated to the issue of human rights.[38]

Community of Protestant Churches in Europe

In the founding document of the Leuenberg Church Fellowship, since 2003 called Community of Protestant Churches in Europe (further: CPCE), whose members are the Churches of Lutheran, Reformed, United, and Methodist tradition, as well as the Waldensian Church and the Church of the Czech Brethren, has included a commitment of its member Churches to undertake together studies, among other things, within the scope of the relations of Church and society.[39] In a series realising this commitment, *Leueberger Texte = Leuenberg Documents*, interest in the topic of human rights in general and religious freedom in particular is also voiced.

The topic appears for the first time in the CPCE studies on freedom, undertaken by the decision of the CPCE's General Assembly in Strasbourg in 1987, which have fortunately coincided with the wave of freedom changes in the Eastern and Central Europe. The result was a study document "The Christian Witness on Freedom," which reminds about the problem of religious freedom in a wider context of considering the

[36] "Berichte der Arbeitsgruppe und Ausschüsse der Vollversammlung. Arbeitsgruppe 11: Verwirklichung der Menschenrechte." In: „*In Christus — Hoffnung die Welt*"..., p. 261.

[37] *International Affairs and Human Rights*, http://www.lutheranworld.org/content/international-affairs-and-human-rights (11.04.2015).

[38] *A Lutheran Reader on Human Rights*. Ed. J. Lissner, A. Sovik. "LWF Report", vol. 1/2, September 1978; *Faith and Human Rights: Voices from the Lutheran Communion*. Ed. P. N. Prove, L. Smetters, "LWF Documentation", vol. 51 (2006).

[39] *Agreement between Reformation churches in Europe (The Leuenberg Agreement)*, http://www.leuenberg.net/sites/default/files/media/PDF/publications/konkordie-en.pdf (13.04.2015), pp. 5 f., nos. 37—41.

human rights, seen as an expression of the emancipation process of the nations, including also the emancipation of an individual. The process did not take place without tensions and conflicts. On this background it was pointed to religious freedom, next to the freedom of conscience, freedom of speech, freedom of press, etc. as those of freedoms whose wide and common observance makes conspiracy and oppression more difficult.[40]

The works on the topic of freedom produced a second document, also entitled "The Christian Witness on Freedom." It was prepared by the representatives of the Churches belonging to the regional group of southern Europe. It defines human rights as an expression of the modern man becoming free of any guardianship, also a spiritual and religious one.[41]

A wider study of the human rights' issue with broader references to the question of religious freedom comes up in the document "Law and Gospel. A study, also with reference to decision-making in ethical questions," which was created in the process of study work in the last decade of the 20th and the first decade of the 21st century. Human rights, beside the bioethical questions, have become a basis for the two examples of practical application of the document's analyses of applying the teaching on Law and Gospel for building judgement in ethical questions. The choice of human rights as one of the two examples proves the importance of this issue to the CPCE member Churches. For the description of the problematic of religious freedom it is significant that from the human rights perspective this became, next to the equality of men and women, a subject of detailed analysis in the document in question.[42]

The authors begin with presenting the understanding of human rights. Amongst it, following the trail of western liberalism's tradition, they count religious freedom as one of the rights ensuring freedom within the scope of personal activity or living space, or protecting them from the interferences from outside, and especially from the side of the state. They add here that the right to religious freedom can be understood in two ways. As a negative freedom, that is, freedom from the obligation of participating in religious practices or disclosing one's religious convictions,

[40] "The Christian Witness on Freedom. Findings of the project group on ethics following six consultations." *Leuenberg Documents*, vol. 5 (1999), pp. 114 f. I presented the document wider in my study: "Wolność i kryteria etycznego osądu — tematyka encykliki Jana Pawła II *Veritatis splendor* z perspektywy ewangelickiej." In: *Prawda oświeca rozum i kształtuje wolność. Encyklika* Veritatis splendor *Jana Pawła II po 20 latach*. Lublin 2014, pp. 63—69.

[41] "The Christian Witness on Freedom. Findings of the South Europe Regional Group." *Leuenberg Documents*, vol. 5 (1999), p. 164.

[42] "Law and Gospel. A study, also with reference to decision-making in ethical questions." *Leuenberg Documents*, vol. 10 (2007), pp. 161—296. I presented the document wider in the study: "Wolność i kryteria etycznego osądu…," pp. 80—90.

or as a positive freedom, that is, freedom to unlimited practicing one's religion. They consider the first typical for the Western-European tradition, the latter — for the USA and Germany. They then point out that certain human rights groups (individual, social, rights of the so-called third generation) do not complement each other harmoniously, but there are tensions between them. It concerns especially the conflict between freedom and equality. As an example from the area of religious freedom they provide two questions: the presence of religious education in public schools, and the presence of religious symbols in the public sphere. In both cases it comes to a conflict between the freedom to practice religion and freedom from a religious constraint. The document's authors connect with the question of conflict within the scope of human rights also the question of how far particular human rights (e.g. religious freedom, equality of women) are to shape the records of a Church's internal law.[43]

The next extensive issue, to which the described CPCE document refers, is the question of presence of the human rights in religious discussion, especially in Islam. They point to different starting points in the European tradition of human rights, which understands them as rights of a self-defining subject, established rationally and granted by the community, and the Islam's attitude, in which individual rights are subordinated to the superior Islamic community and fulfilment of the duties resulting from the Sharia law. This difference is especially visible in the understanding of religious freedom, which in the areas of Islam's reign is restricted only to the Jewish and Christian minorities. It is also unacceptable to leave the Islam community, that is, to change religion. Concerning the areas where Muslims are a minority, the superiority of the Islam community finds its expression in the acceptance of the local laws as far as they allow freedom of religious practices to the Muslims. It is also reflected in the declarations regarding human rights, created in the Islamic environment.[44]

In the context of reflections on Islam and human rights, a problem of the right to wear a veil by Muslim women working on civil posts or in public education system in European countries appears. It has been pointed to different traditions of legal regulations concerning religion in various European countries, in which this topic is intensely discussed, which lead to different legal decisions (French secularity — a ban, German ideological neutrality of the state — a lack of ban, Austrian tradition of a multi-national state — lack of interest in the problem in public discussion). Then it was pointed to many factors which should be taken into

[43] Ibidem, pp. 269—273
[44] Ibidem, pp. 274—276.

consideration in the assessment of the phenomenon of wearing veils by Muslim women. Firstly, it is important to identify the actual significance of wearing the veil for the Muslim women themselves, while taking into consideration if in the answer to this question the right to self-defining of other cultures and of women were observed. In a situation when the state prefers a positive model of separating from religion, prohibiting wearing the veils understood as a religious symbol will lead to a negation of the principle of the citizen's equality. At the same time it was pointed out that if the veils are a political symbol (of self-separating of the Muslims in a society or of women's subordination) they contradict the constitutional values of the western countries and they cannot be tolerated in civil service or public schools. In the summary it was stated that in case of the Muslim women's veils we have to do with a conflict of many duties and freedoms: positive religious freedom of women teachers, negative religious freedom of the students, their parents' right to their upbringing, as well as an obligation to worldview neutrality of the country. It was pointed out that in this situation a solution is not to generally regard the veils as a suspicious symbol and ban them, because such solution strikes at the Western-European community of values.[45]

The second part of the CPCE document dedicated to human rights deals with their evaluation from a theological perspective. It uses intensively and critically the insights of the debate in German theology in the 1970s. In reference to Law and Gospel it also points to the reserve towards the necessity of solely theological justification of human rights, as well as towards accepting their obviousness on a rational footing. In the latter context appears the issue of conditioning the mind by different interests, which often renders a purely rational justification of human rights impossible. It was pointed out here that for the evangelical tradition, a key issue for justifying human dignity is the theological truth about justification of the sinner by grace alone.[46]

In the context of the last issue reappear detailed considerations of Muslim's religious freedom. The authors use here a model of analogy between the theological statements and human rights. They show that the event of justification is from its definition an asymmetrical acceptance by God, hence the human rights have a priority before the duties put on a person. This is why they have a superior character also in relation to the state legislators, who cannot use them freely, as well as determine their effectiveness based on mutuality from other countries. What follows is that the Churches are responsible for guaranteeing to the Muslims an

[45] Ibidem, pp. 276 f.
[46] Ibidem, pp. 277—279

intact freedom to practice their religion, independently of whether this right is guaranteed to them in the Muslim countries. They also bring into focus the importance of human rights for building a peaceful coexistence of Christians and Muslims in Europe. At the same time, one cannot speak in this context only about religious freedom, but also has to take into consideration the question of equality of men and women, which cannot be infringed by tradition or legal solutions.[47]

Examples of the Evangelical Church's statements

Evangelical Church in Germany

Evangelical Church in Germany was interested in the issue of human rights in the 1970s. Its Kammer der EKD für öffentliche Verantwortung (Committee for Public Responsibility) published a document entitled "Human Rights in the Ecumenical Dialogue." The definition of religious freedom included in the document refers to the decisions of the consultation with the World Council of Churches concerning human rights in St. Pölten in October 1974: "There is a right to choose freely a religion or belief which includes freedom, either alone or in community with others and in public or private, to manifest his/her religion or belief in teaching, practice, worship, and observance."[48]

In the second part of the document it was stated that every form of discrimination of individuals and groups, among others, for religious reasons cannot be reconciled with the idea of human rights. Then it was shown that the existence of political freedoms is not an assumption or a basis for preaching the Gospel and faith. Still, Christians aim at expressing their faith in Word and deed in the world, which results in the aspiration to gain an area of freedom, in which this faith can be realised and preserved. Within the concept of human rights, this possibility is ensured by religious freedom in political and social dimension. The authors point out that the Christian support and fulfillment of the idea of the right to religious freedom do not result only from socio-political reasons, but it is

[47] Ibidem, pp. 279 f.

[48] "Die Menschenrechte im ökumenischen Gespräch. Ein Beitrag der Kammer der Evangelischen Kirche Deutschland für öffentliche Verantwortung." In: *Die Denkschriften der Evangelischen Kirche in Deutschland*, vol. 1/2. Gütersloh 1978, p. 98 point 8.

also shaped in the perspective of realising the freedom of faith. Christian support for the right to religious freedom includes acknowledgement and protection of the individual's right to publicly express their religious or not religious views, right to change them and to demonstrate them on their own or in a community with others. Recognising by the Christians and Churches the right to religious freedom also means a claim to recognising the common right to freedom of conscience and thought, which should be respected also on the Churches' part. Support for the right to religious freedom as a human right was considered also by the authors of the document as an expression of the conviction that the state and society do not have unlimited rights towards a human.[49]

The interest of the Evangelical Church in Germany in the issue of religious freedom found a new impulse in the decisions of the *Charta Oecumenica*,[50] regarding this question. As a reaction to the commitments made there, in the official book series of the Church — *EKD-Texte* — a volume on the situation of the persecuted Christians in various parts of the world was prepared. Beside the reports from places like Egypt, China, India, Indonesia, Pakistan, Russia, Sudan, and Turkey, there are introductory texts on history of the right to religious freedom, as well as the history of legal guarantees of religious freedom in the international law. Because of the volume's practical side, it also includes the third part with recommendations on how to get engaged in the parish work for the religious freedom.[51]

The issue of right to religious freedom also appeared in the document *Christlicher Glaube und nichtchristliche Religionen. Theologische Leitlinien* (Christian faith in non-Christian religions. Theological guidelines) prepared by the Kammer für Theologie der Evangelischen Kirche in Deutschland (Theological Committee of the Evangelical Church in Germany) in 2003. The task of the document was to refer from the Christian perspective to the challenge, which is the growing number of non-Christian minorities in Europe in the context of tensions, materialising among others in the form of terrorist attacks. In the document, the Committee referred to the question of religious freedom as follows: "Just like the state cannot be connected with any religion or worldview, also religion has to be free

[49] "Die Menschenrechte im ökumenischen Gespräch"..., pp. 101 f., point 13.

[50] It includes among others the commitment "to recognise the freedom of religion and conscience of these individuals and communities and to defend their right to practise their faith or convictions, whether singly or in groups, privately or publicly, in the context of rights applicable to all" — http://cid.ceceurope.org/who-we-are/charta-oecumenica/ (13.04.2015).

[51] *Bedrohung der Religionsfreiheit. Erfahrungen von Christen in verschiedenen Ländern. Eine Arbeitshilfe*. Hannover 2003

from state constraint and political power. Because each man must vouch for his own faith and for the conviction of his conscience. Confirming this, the Church also confirms the principle of the *religious freedom*, and through it the worthy of protection right of every religion to develop in our society."[52]

The Evangelical (Lutheran) Church of the Augsburg Confession in Poland

The topic of religious freedom appeared also on the background of the discussion in the Evangelical (Lutheran) Church of the Augsburg Confession in Poland surrounding Poland's joining the European Union. The arguments presented to support the positive assessment of the accession process, as well as hopes expressed concerning the place of the Church and Christians in the societies integrating within the EU assumed a positive reception of the concept of religious freedom referring both to the individuals and the Churches as organizational entities. The Synod's Council of the Evangelical (Lutheran) Church of the Augsburg Confession in Poland wrote in its statement from the year 2000: "We hope that, according to the clause included in the Final Act of the Amsterdam Treaty from 1991, we shall find in the European Union a partner ready for dialogue, acknowledging democratic principles, protecting the rights to diversity and differences of convictions, preserving regionalisms and one's own traditions, community in which the Christians will be able to build future on equal rights."[53] At the same time this voice was supplemented by a support for pluralist model of society and a vision of the Church's place in it not as a community which rules, but one that serves.[54]

The Church's Synod also stressed in its statement the standards of freedom in the European Union. This unity, created not by force but by law requires including in the integration process also on religious level.[55] Further, the Synod, referring to the equality towards God, also points to the

[52] *Christlicher Glaube und nichtchristliche Religionen. Theologische Leitlinien. Ein Beitrag der Kammer für Theologie der Evangelischen Kirche in Deutschland*. Hannover 2003, p. 21.

[53] "Oświadczenie Rady Synodalnej Kościoła Ewangelicko-Augsburskiego w RP z 2000 roku." *Przegląd Ewangelicki*, no. 1 (2003), p. 82.

[54] Ibidem.

[55] "Wspólna Europa. Stanowisko Synodu Kościoła Ewangelicko-Augsburskiego w RP wobec procesu integracyjnego w Europie." *Przegląd Ewangelicki*, no. 1 (2003), p. 83.

equal rights of individuals, nations, or groups of people "in our common, European home," regardless of the race and confession. The point of reference here is the European Convention on Human Rights and Church clause of the Amsterdam Treaty. Hope was also expressed that the principle of equality and observing the rights of minorities had been voiced not only in the declarative, but also in the practical sphere of European legal life.[56]

Similarly sounded the ecumenical message prepared by three Consistories of the Evangelical Churches in Poland.[57] It gave not only a religious, but also socio-cultural significance to the evangelical model of "unity in *reconciled* diversity,"[58] pointing out that it, on the one hand, accepts the pluralism of modern societies, and on the other hand recommends looking for common spiritual foundations. Then the document's authors formulated the following assessment: "That is why we are full of hope when we refer to the European integration as a process respecting the local, national, as well as confessional identity and diversity."[59]

Summary

The above examples of evangelical reflection on the right to religious freedom in the context of theological and church reception of the idea of human rights undertaken by the Lutheran Churches, organisations, or theologians, show that in the modern evangelical debate a positive reception of the right to religious freedom does not arouse any reservations. This right is understood both as a right of an individual, and of communities. It should be stressed that the right of an individual is fundamental, and the rights of communities, including Churches, are based on the individual's religious freedom. The individual has a right to confess a chosen religion, to change it, but also to have no convictions of a religious character.

This individual accent of religious freedom does not, however, negate the right to express one's religious convictions together with other people, not

[56] Ibidem, p. 85

[57] The Evangelical (Lutheran) Church of the Augsburg Confession in Poland, Evangelical Reformed Church in the Republic of Poland, and Evangelical Methodist Church in Poland.

[58] Cf. K. Karski: *Od Edynburga do Porto Allegre. Sto lat dążeń ekumenicznych*. Warszawa 2007, pp. 37 ff.

[59] "Stanowisko w sprawie integracji europejskiej przyjęte przez Konsystorze Kościołów ewangelickich w Polsce." *Przegląd Ewangelicki*, no. 1 (2003), p. 87.

only in form of religious practices, but also missionary activity, upbringing of youth, as well as activity on the socio-political field, which results from certain convictions of religious communities. In the context of the community dimension of the right to religious freedom it is worth stressing that the quoted evangelical statements stress the protection of the right to religious freedom of those thinking differently, individuals as well as groups.

A negative opinion is expressed concerning monopolistic claims of the Churches to promote their religious concept by means of constraint typical of state machinery, as well as concerning the signs of fundamentalism and intolerance in the actions of people and religious communities. It is connected with the demand to constantly self-evaluate critically various activity of the Churches, both directly connected with realising their freedom of religious practices or missionary activity, and realised publically in the socio-political questions. It should be a constant question for the Churches, in how far their activities respect the individual's rights to religious freedom.

Finally, it is worth to point out the strong practical accents in the described reflection of the evangelical circles. It has more than once stressed the necessity of practical engagement of the Churches, both to educate their own members concerning the human rights, and to support those whose right to religious freedom is violated. This last area is seen as a field for cooperation both with the ecumenical partners and state or international institutions of a political character.

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Jerzy Sojka

Religious Freedom in the Doctrine of the Evangelical (Lutheran) Church of the Augsburg Confession

Summary

The article presents the reception of the right to religious freedom in the theological and church Lutheran debate, on the example of Martin Honecker, Heinz Eduard Tödt, and Wolfgang Huber's concept of human rights, as well as statements of the Lutheran World Federation, Community of Protestant Churches in Europe, Evangelical Church in Germany and the Evangelical (Lutheran) Church of the Augsburg Confession in Poland. The examples presented show a positive reception of the right to religious freedom by the Lutheran circles. It is interpreted firstly as an individual right, on which the rights of religious communities are based. A significant exception is that an important field of work for the Evangelical organisations is also practical engagement for the right to religious freedom.

Jerzy Sojka

La liberté religieuse dans la doctrine de l'Église protestante de la Confession d'Augsbourg

Résumé

L'article *La liberté religieuse dans la doctrine de l'Église protestante de la Confession d'Augsbourg* présente la réception du droit à la liberté religieuse dans le débat théologico-ecclésiastique luthérien à l'exemple de la conception de la réception des droits de l'homme de Martin Honecker et de Heinz Eduard Tödt, ainsi que de Wolfgang Huber et des discours de la Fédération luthérienne mondiale, de la Communion d'Églises protestantes en Europe, de l'Église évangélique en Allemagne et de l'Église protestante de la Confession d'Augsbourg en Pologne. Les exemples présentés montrent une réception positive du droit à la liberté évangélique par les milieux luthériens. En premier lieu, il est interprété comme un droit individuel sur lequel se fondent les droits revenant aux communautés religieuses. Ce qui est aussi important, c'est le fait qu'un engagement pratique pour le compte du droit à la liberté religieuse est un champ d'activité significatif pour les organisations protestantes.

Mots clés : droits de l'homme, liberté religieuse, Fédération luthérienne mondiale, Communion d'Églises protestantes en Europe, Église évangélique en Allemagne, Église protestante de la Confession d'Augsbourg en Pologne

Jerzy Sojka

La libertà religiosa nella dottrina della Chiesa Evangelico-Augustea

Sommario

L'articolo *La libertà religiosa nella dottrina della Chiesa Evangelico-Augustea* presenta la ricezione del diritto alla libertà religiosa nel dibattito teologico-ecclesiale luterano, sull'esempio della concezione della ricezione dei diritti dell'uomo di Martin Honecker, di Heinz Eduard Tödt e di Wolfgang Huber come pure sulle affermazioni della Federazione Mondiale Luterana, della Comunità delle Chiese Protestanti in Europa, della Chiesa Evangelica Tedesca e della Chiesa Evangelico-Augustea in Polonia. Gli esempi presentati mostrano la ricezione positiva del diritto alla libertà evangelica da parte degli ambienti luterani. Viene interpretato in primo luogo come diritto individuale su cui sono basati i diritti che spettano alle comunità religiose. Un tema essenziale è costituito dal fatto che un campo di azione importante per le organizzazioni evangeliche è rappresentato anche dall'impegno pratico in favore del diritto alla libertà religiosa

Parole chiave: diritti dell'uomo, libertà religiosa, Federazione Mondiale Luterana, Comunità delle Chiese Protestanti in Europa, Chiesa Evangelica Tedesca, Chiesa Evangelica-Augustea in Polonia

Ecumeny and Law, vol. 4 (2016)
pp. 63—75

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The Role of Christian Freedom in the Light of the Orthodox Church's Teachings in a Secularized Society

Keywords: Christian freedom, society, sin, death, Orthodox Church, personality, self-determination, choice, liberty, law, the Kingdom of God

The concept of freedom has several meanings. Here we are going to discuss three of them. The first one relates to its metaphysical dimension, where freedom is understood as one of the most fundamental qualities of human nature; the free will, expressed in the inner self-determination of the individual in front of the choice, first and foremost, between the good and the evil. The free will is one of those qualities the loss of which leads to complete degradation of the individual. No one has the power over this freedom, neither another individual, nor society, laws, any authority, demons, angels, nor even God himself. Macarius of Egypt says: "And you are created in the God's own image, because God is free and creates what he wants […] thus free are you."[1] "Therefore, our nature is favourable for the good and for the evil, and for the grace of God, as well as for the adversary." The classic aphorism of Fathers of the Church: "God created us without us: but he did not will to save us without us" beautifully expresses the Christian understanding of the meaning and the importance of this freedom.

[1] Макарий Египетский: *Духовные беседы* (Перевод с греческого. Репринтное издание 1904 г.). издание, Свято-Троицкая Сергиева Лавра 1994, p. 121.

The second dimension of freedom is a social one. It means a set of certain individual rights in the state and society. It is in this area that the most difficult issues occur, since in the society many individuals with free will are interacting and confronting one another. Overall, it is the problem of external freedoms of an individual, or the problem of allowed (by laws, customs, religion, and conventional morality) actions in the surrounding world.

The third dimension of freedom is spiritual one. Unlike external freedom, it carries the meaning of the superiority of the man over his/her selfishness, his/her passions, sinful feelings, and desires — power over oneself. This freedom is achieved only with proper spiritual life that makes the believer able to communicate with God who is the only one in the possession of absolute spiritual freedom. Saints who are free from passions can achieve great freedom. The "common" people have a relative spiritual freedom (John 8:34). Only those who had become consolidated with the evil, who had spoken against the Holy Spirit (Matthew 12:31—32) and, as a result, were not capable of goodness, lost it. Christianity, therefore, sees the ideal of spiritual freedom in God, and thus in principle rejects any possibility of absolute freedom in the man. Sergei Bulgakov wrote: "Freedom [of a person] is relative […]. It stands and falls, it is overcome and surpassed and excelled during the path through the earthly life to its deification. Freedom does not means the self-dependent strength, and it is the infirmity in the face of God."[2] Saint Isaac the Syrian, in turn, says: "For there is no perfect freedom in this imperfect age."[3]

Paul the Apostle says: "Where the Spirit of the Lord is, there is freedom" (2 Corinthians 3:17). He calls the person who has reached the Christian freedom "the new self" (Ephesians 4:24), stressing the renewal of his mind, heart, will, and body. And vice versa, those who live sinfully are called "old selves" (Ephesians 4:22), "slaves" (Romans 6:6—17), as those who cannot follow his words, as well as faith, mind, and conscience, and they know it to be a blessing. This state of spiritual slavery as the antithesis of the true freedom is described by Paul the Apostle in the following way: "I do not understand what I do. For what I want to do I do not do, but what I hate I do […]. For I do not do the good I want to do, but the evil I do not want to do — this I keep on doing […], but I see another law at work in me, waging war against the law of my mind and making me a prisoner of the law of sin at work within me" (Romans 7:15, 19, 23).

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[2] Епископ Сильвестр Каневский (Малеванский): *Опыт православного догматического богословия (с историческим изложением догматов)*, Т. 1, [Сочинение] епископа Сильвестра, 3-е изд. Киев: типография Г.Т. Корчак-Новицкого, 1892, p. 40.

[3] Ibidem, p. 42.

These three dimensions of freedom mentioned above allow us to say with absolute confidence what kind of freedom is the primary purpose of the life to a Christian. Of course, it is the spiritual freedom which can only be achieved by living a righteous life. What kind of life is this? What laws apply here? And according to which criteria one can judge the rightness or wrongness of the chosen path? And finally: What stages must the man pass in order to reach such freedom? — are some of the important questions that require special consideration.

When discussing the freedom of the Church, however, we should take into account different dimensions of freedom. In this case, first of all, it is necessary to refer to the understanding of the Church as such. The Church is the unity of all intelligent creatures in the Holy Spirit who follow the will of God, and thus are the part of the Mystical Body of Christ — "His Body" (Ephesians 1:23).[4] The degree of His involvement into individual Christians, is hidden from the external view, because the sincerity of faith and sanctity of soul are impenetrable for human standards.

External and always imperfect expression of the Body of Christ — the Church — is a visible Christian community headed by a bishop who guarantees the unity of faith, the foundations of spiritual life, control, and discipline. The membership in the visible Church is no longer a secret: all are christened, regardless of holiness or depravities of their lives. Thus, canonically none of them is excluded from it. Along those lines, no local Church is save from degradation, possibly ending in the total loss of the Holy Spirit and conversion to a laic organization by its objectives and goals that keep all Christian set of attributes.

However, while the visible Church keeps the dogmatic teaching intact, the correct doctrine of spiritual life, the basic principles of canonical order and zeal of its members to live by the Gospel, and with the presence of natural human flaws, as the soul in the body, it has the Holy Spirit of Pentecost, and it constitutes a kind of the foundation which accompanies the process of birth, formation, and salvation of a Christian. Therefore, the Church is the anthropic. And because of its double nature, it has two different freedoms that are unparalleled among themselves. The Church as the invisible unity in the Holy Spirit of all those who love Christ is always free, because "where the Spirit of the Lord is, there is the freedom." It is higher than all external freedoms, rights, and privileges. It is not afraid of any human limitations and oppressions, thus persecution can only add to it more glory. Such it was during the earthly life of Jesus Christ and His

[4] Наан Густав Иоганнович: *Симметричная Вселенная*. Доклад на Астрономическом совете АН СССР 29 января 1964 г. Тартуская астрономическая обсерватория. Публикации. Тарту, Т. 56, 1966, p. 43.

apostles, such it is after His Resurrection, Ascension and it is so to this day, because "Jesus Christ is the same yesterday and today and forever" (Hebrews 13:8).

The visible Church is a community that, alike any public and/or religious organizations, requires appropriate conditions for its existence, including the religious freedoms regulated by state laws.

Religious freedom is the right to confess openly and practically implement the religious beliefs, both individually and collectively. In this respect, religious freedom is no different from the most important social or external freedoms and rights which citizens of the country and members of various secular organizations have.

The subject of Christian freedom is one of the deepest and brightest amongst the moral messages of Church. Whatever manifestations of the human person were examined and studied by Church, their ethical evaluation is possible only when the freedom of moral self-determination rights is presupposed. The interpretation of the problem of freedom has an essential ideological value and comprehensively encompasses human existence. The secret of freedom lies in the explanation of the moral value of human life, the key to the fall of primordial human (the biblical Adam and Eve) and his/her fate. The theme of freedom seems to be an important motif in the context of Orthodox Christian faith and, above all, the Church's teaching on salvation and deification of the human. The promise of the Kingdom of God belongs to those who entered into a new life in Christ during their terrestrial existence and, as a result, are not subjected to the law but to the Grace, and open themselves for joy and celebration of spiritual freedom. And since we cannot come to God because of the sin, which became an insurmountable obstacle to us, God Himself came to us.[5] In playing the whole system of life based on personal spiritual freedom, Eastern Orthodox tradition sees one of the most important conditions for achieving human deification as the initial problem of human existence.

Freedom is the ability of an individual for a creative development within the possibilities that are determined by God. In terms of its metaphysical meaning, freedom is a priceless gift of God's goodness, wisdom, and love that a person gets in his/her possession. God gives a human freedom in his/her property as a kind of source which allows people to reveal their potenetial creatively and become stronger in the present secularized society. Although everything in the world lies within the law of necessity, human, thanks to freedom, is not subjected to this law after all. A human is the author of his/her establishment as he/she has freedom.

[5] Калліст (Уер), митрополит: *Православна Церква*. Перевод, Киев: ДУХ І ЛІТЕРА, 2009, p. 225.

It is within human power to change and guide the process of his/her formation and development. A human is the cause of his/her condition. Having the gift of freedom, a person mentions the process of his/her formation, preferring a particular law of existence. Embodying capacity for moral guidance in values, one consciously and freely makes moral choices and forms him-/herself in the process of becoming a moral person. Freedom is the deepest moral basis of personality, his/her exclusive privilege and inalienable gift. It is worth paying attention to the words of Jesus Christ in the New Testament: "Ye shall know the truth and the truth shall make you free" (Jn. 8:32). Freedom cannot come from below, by nature, as in nature there is no freedom. Freedom can only come from above, only if there is an Absolute Spirit of Freedom, if the Divine Freedom, being not determined by anyone or anything, reigns over the world of nature and determinism. According to the Reverend Sylvanus Athos: "The essence of an absolute freedom lies beyond any dependency or need, any restriction to determine one's existence. This is freedom of God, an individual does not have that/this freedom."[6]

It is written in Bible: "And God said: Let us make man in our image, after our likeness" (Genesis 1: 26) reveal to us the man as the image and likeness of the Free Divine Spirit and indicate that a human is a carrier of freedom in the world of nature. Human is not only the soil but the spirit as well. "Where the Spirit of the Lord is, there is freedom" (2 Corinthians 3:17). Holy God protects ontological human freedom never humiliating one's will. Freedom is the meaning and fullness of life. St Paul exhorts: "Stand for freedom that Christ has given us, and not fall again under the yoke of bondage" (Gal. 5:1). Freedom here is opposed to slavery, which refers to sin and death. Sin is not that we fall and sin, but that we do not notice a real fall, do not notice the fall and degradation of our life. The same can be said about the enslavement of human by death. Despite the fear of it, we recognize it completely legitimate and normal. Thus, sin is "part of our conscious recognition of death."

Therefore, until the man is enslaved by sin and death and he or she feels them as terrible oppression, considerations of human freedom are all in vain. Nowadays, many people struggle for freedom, free speech, and democracy. This is good, but those struggles need to be liberated from sin by means of the Holy Spirit. Often those who crave freedom are the servants of sin, a sin of vanity and pride, avarice, and the accumulation of wealth. If we talk about ordinary people, among them there are many slaves to, for example, alcoholism, and drug or sex addiction.

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[6] Софроний (Сахаров) Архимандрит: *Преподобний Силуан Афонский.* Сергиев Посад: Свято-Троицкая Сергиева Лавра, 2006, p. 115.

The task of becoming human presupposes his/her freedom. Like any gift received by the man from God, freedom is open to improvement. Compared with absolute freedom of God, human freedom is incomplete and imperfect. God gave man the gift as a kind of guarantee, by using which a person could bring freedom to the moral perfection and completeness which, in turn, could be mostly found to display absolute freedom of God. Human is free, that is, he/she is the image of divine freedom due to which one is endowed with the ability to choose.[7] From this standpoint, the individual is entrusted with a task of achieving deification, so it is necessary and important to establish what is able to determine the completeness and perfection of one's will.

To answer the addressed question, one must bear in mind the duality of human nature and human existence, that is, the human "ownership" right to the both worlds — the material and the spiritual. This duality is an existential root of human freedom, the mystery of one's self-determination in terms of achievement and realization of the value of one's life. The Orthodox patristic tradition considers the duality of human nature and human existence as the brightest and the most unique characteristic of a person which demonstrates the versatility of his/her purpose in the overall structure of the world. In St Gregory the Theologian we find the most striking interpretation of the duality of human existence in the entire patriotic literature. "God sets another angel on earth, of different natures composed fan […]. As a viewer of visible creation, and the one to whom the spiritual creation is revealed, the man stands on the border of two worlds."[8] The body of a human belongs to the earth, but his/her mind comes out of the material world and belongs to the world that mind can see, a spiritual world.

The man has a task of creative self-determination in two worlds — the material and spiritual, in values belonging with two dimensions — the real and the ideal. The value of self-determination is that a human is a creative being who is confirmed and always functions within the dynamics of development. Being a human means operating under the sign of the divine definition. The task of spiritual and moral self-determination as human beings in this society involves a move from the world of sense to the transcendental world, from the real world to the ideal. But for us also the real world is sacred, and not only in the sense we use this word when we say that human life is sacred. The world is sacred in the sense that it

[7] Павел Евдокимов: *Православие*, Перевод с французского (Серия «Современное богословие»). Москва: Издательство ББИ, 2012, p. 105.

[8] Григорий Богослов: *Собрание творений*. Перевод Московской духовной академии (Серия «Классическая философская мысль»). Минск, Т. 1. Слова. Москва, АСТ, 2000, p. 215.

belongs to God not only potentially, but in its essence. It is God's own world and the Living God is in it.[9]

The real world is a world that is sensible and clear, but at the same time, a biographical world within each individual — the world that passes. A perfect world is a world that can only be grasped by human mind; it can be perceived as a gift and, at the same time, as an expected future world. The value of freedom is the possibility of moral orientation in line with the real and the ideal world, it is a part of the human moral orientation in every single moment of life and in the last closing moment it determines one's fate in eternity. Although, according to the teachings of the Orthodox Church, the real physical world in any case is not evil, it is, however, fraught with temptations that lead to evil. The evil is the manifestation of the inertia of human existence, while the task of becoming human involves an active overcoming of this inertia and achieving moral perfection. Hence, the focus on the real, sensual world has a tendency to stagnate and wane, while the focus on human ideal world excludes this trend. The essence of moral self-determination is that the said orientation in personal life prevails.

If moral orientation of the individual has a constant tendency to prefer the ideal rather than real, for example, prefer spiritual values rather than practical interest, then we can perceive it as a yearning to reach freedom that is both perfect and complete. If this tendency is not present, if the human values real over ideal, then one's personal freedom has not yet reached perfection, and so there may occur stagnation of spiritual life and moral decline. If you put a real goal in front of a human, a tangible goal to which one is dedicated with all his/her heart, it certainly reduces one's freedom. No matter how valuable a given goal is, it will make people consider everything else as a stepping stone or as a means to achieve it. There is only one step from absolutizing any real, sensuous or utilitarian aim to the justification of lawlessness in the course of its achievement. Only the orientation of the individual towards the ideal self-determination, which clearly expresses the absolute will of God, does not limit one's freedom and thus does not exclude the values of the temporal world. Therefore, a person's freedom is initiated by his/her uncoerced actions.[10] In a state of perfect freedom a person is the holder of worldly goods, but none of this goods enslaves a human and inhibits one's will. The orientation of an individual on self-determination as a desire to reach self-fullness in God opens the way for a perfect and complete Christian freedom; for where the Spirit of the Lord is, there is freedom.

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[9] Антоний (Блум), митрополит Сурожский: *Церковь*. Киев: Пролог, 2005, p. 138.

[10] Іоан Дамаскин, преподобний: *Точний виклад Православної віри*. Київ: Видавничий відділ УПЦ Київського Патріархату, 2010, p. 140.

In the outside world, where everything except the human person is subjected to the law of necessity, we see in the entire creation the creative freedom seal of God. The variety in the manifestation of animal forms of life reminds us of our own liberty. For example, anything related to inanimate nature expresses itself through the form. In the realm of the inanimate our imagination can affect pretentiousness patterns and lines, and beauty of colours and shades, variety of minerals form amazing crystals, artistic shapes rocks and mountain ranges. In this apparent richness and diversity it is hard to escape the impression that inanimate nature tends to use every opportunity to express itself clearly, originally, and colourfully. And what is even more, our imagination affects the processes occurring in inanimate nature through the change and fluidity of its forms. Impressive displays of natural elements in the paintings of the majestic flow of mighty rivers, formidable movement of the waves in the glare of lightning thunder, white winter storm — all of it testifies us more to the freedom of these elements than to the subordination to the law of necessity.

In wildlife we encounter the infinite variety of plant and animal forms. A plethora of trees and grass, beauty and fragrance of flowers and fruit, elegant plumage and polyphonic singing of birds, elegance and grace of animal movement is the general desire of living organism to express themselves through their singularity. A picture of a wild animals, mostly playing, fish that swim in the water, or birds flying high in the sky, makes us forget about the law and the need, however, in contrast to us, serves as a kind of a symbol of freedom, an opportunity to freely exercise our own desires.

If in the creative ideas of God everything inanimate expresses itself through the lifeless form (be it a structure or a process), everything animate expresses itself through its singularity (be it plant or animal individual species), all conscious expresses itself through a person or hypostasis (be it of human or of angelic nature). Registration of nature by hypostasis is the deepest, perfect self-expression and personal creation. There is no animal or plant in which the Creator would not put any force, useful for a human.[11] It follows that freedom as the basis of human self-determination is the most absolute and essential characteristic of the individual. God created man and gave him mind along with freedom, with the help of which man is able to generate and show himself as a person.

One cannot present the problem of human freedom only in abstract and metaphysical dimension; it is simply not possible, for example, to speak of human freedom as his/her consent “to be” or “not to be” until it

[11] Іоан Дамаскин, преподобний: *Точний виклад Православної віри*. Видавничий відділ УПЦ Київського Патріархату, Київ 2010, p. 108.

occurs. Freedom is a moral, not an ontological basis of personality, because human is the ontological foundation of the creative action of God. Thus, freedom is not an ontological category, but a moral order, a special category of existential importance. Freedom is a self-identity, not based on the dichotomy of "nothingness—being," but rather "good—evil," and it is in this final self-identification that the foundation of human choice lies. If the creation of man understood as raising him/her from oblivion to being is realized within the ontological order that excludes human choice, the introduction of human pristine paradise, is a condition of his/her morale, provided in future by human self-determination and choice. The possibility of choice was given because the life in paradise not only constituted a gift of the Creator, but also a merit of human. The man had a goal to establish himself in freedom, within which he was created and where he lived. In observance of the commandments, that is, in obedience to the will of God, the human was to develop the gift of freedom received from God.

From the very beginning, the will of God confronts Adam in two ways. On the one hand, this is the blessing of domination over all the earth and all of the creation.[12] On the other hand, it is a conditional limitation of the will which is contained in the prohibition against eating of the tree of knowledge of good and evil. This duality pointed to the state of exposition of the person in his/her freedom. Without freedom, the prohibition would have had no meaning, without the commandment freedom could not really be held and would have had no value. Instead of admission of the educational value in paradisiacal commandment, that is required for spiritual ascent, Adam ascribes this ban to the jealous desire to God, who wants to keep his supremacy, and shows disobedience. Freedom of the first man really demonstrated the superiority of lower desires and aspirations over the highest spiritual goals.

Throughout the history God reveals His will to the sinful mankind. He gives a person the law and commandments as the rules necessary for life. Again, instead of seeing a moral law bans that limit the power of the evil, man succumbed to the law of sin, the psychological law of the irrational confrontation with the will of God. The nature of the Original Sin and the consequences of Adam's disobedience led to the fact that people tend to resist all generally mandatory standards. Christ — the new Adam — through voluntary submission to the law freed man from the bondage of the law. Instead of law which subordinated and condemned a human, Christ gave grace that frees and saves people. From now on, no sin, no death separates us from God, because Baptism immerses us in the death

[12] Догматичне богослів'я: *Підручник*. Чернівці: Рута, 2002, p. 176.

of Christ in order to resurrect us along with Him.[13] The Son of God came onto the Earth to inform captives, and set the oppressed free. Christ freed fallen man from sin and gave him the true freedom in which each person opens himself to God's Kingdom. The Kingdom of God is a kingdom of spiritual triumph of freedom in its perfect and inexhaustible fullness. Entering the Kingdom of God implies the full realization of the gift of freedom by man.

To summarize, it should be noted that only Christianity could generate the idea of indisputable rights of the human. These human rights are the image and likeness of God, an ontologically unique being. The image of God in a human is saved through the gift of freedom, because it is identical to the personal model of existence, which is the ability to assert or deny true love in life. And because totalitarian regimes oppress and despise God-given human freedom, they are anti-clerical and godless. Any democratic state should help Church to get real freedom that will ensure the formation of free, creative people, able to transform post-totalitarian state into the independent Christian country.

[13] Владимир Лосский: *Очерк Мистического богословия восточной Церкви. Догматическое богословие*. Киев: Издательство имени святителя Льва, папы Римского, 2004, p. 495.

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Volodymyr Vakin

The Role of Christian Freedom in the Light of the Orthodox Church's Teachings in a Secularized Society

Summary

This article is dedicated to the Christian understanding of freedom, its kinds and how does a present-day Orthodox Christian use freedom in his/her life. The first kind of freedom pertains to metaphysical dimension. Here we talk about the free will of a human as an image of God, the freedom which is characterized by the presence of a very limited inner choice between the good and the evil. This freedom from the Christian point of view is the person's quality, the losing of which can lead to the complete degradation of a human. There is also a different understanding of freedom. It is connected with a possibility of an individual's actualization in a society, in the social conditions, in a nowadays environment. Here we talk about the freedom of human deeds. One may call it the outer freedom. If we speak of more concrete facet of human life, the social dimension thereof, then it translates into the human rights — the human's freedom. But this outside freedom is not only restricted to human rights. Every country guarantees its own rights, but the external freedom is more complicated — it represents the human attitude to nature. So the outer freedom is a very broad concept. Christianity points to the third kind of freedom, the most important one from the Christian point of view. This is the spiritual freedom. This third category means the human's superiority to his/her desires, in other words, the rule of mind's priority over the heart. In Christianity this ascendancy has a special content because here we first of all talk about the root of all addictions, which is pride.

Volodymyr Vakin

Le rôle de la liberté chrétienne à la lumière de l'enseignement de l'Église orthodoxe dans la société sécularisée

Résumé

Cet article est consacré à la compréhension chrétienne de la liberté, à ses types et aux façons d'appliquer cette liberté dans la vie d'un chrétien orthodoxe contemporain. Le premier type de liberté a une dimension métaphysique. On parle du libre arbitre de l'homme créé à l'image de Dieu, d'une liberté se caractérisant par la présence du choix intérieur limité entre le Bien et le Satan. Cette liberté, du point de vue chrétien, constitue une valeur particulière dont la perte peut conduire à la dégradation complète de l'homme. Il existe aussi une autre compréhension de la liberté. On l'unit à la possibilité de la réalisation d'un être humain dans la société, dans les conditions sociales contemporaines. On parle de la liberté des actes de l'homme. On peut l'appeler une liberté extérieure. Son extension n'est pas déterminée uniquement par les droits de l'homme. Chaque pays garantit ses propres droits de liberté et la liberté extérieure englobe aussi l'attitude de l'homme envers la nature.

Par conséquent, la liberté extérieure est une notion très vaste. Le christianisme dénote également le troisième type de liberté, étant le plus important du point de vue chrétien. C'est une liberté spirituelle. Cette troisième catégorie désigne l'avantage de l'homme sur ses désirs, en d'autres termes, il s'agit du principe de la supériorité de l'esprit sur le cśur.

Mots clés : liberté chrétienne, société, péché, mort, Église orthodoxe, personne, autodétermination, choix, volonté, droit, Royaume de Dieu

Volodymyr Vakin

Il ruolo della libertà cristiana alla luce degli insegnamenti della Chiesa ortodossa nella società secolarizzata

Sommario

Quest'articolo è dedicato alla comprensione cristiana della libertà, ai suoi generi e ai modi di fruire di tale libertà nella vita del cristiano ortodosso di oggi. Il primo genere di libertà ha una dimensione metafisica. Parliamo del libero arbitrio dell'uomo creato ad immagine di Dio, della libertà caratterizzata dalla presenza della scelta interiore limitata tra il Bene e Satana. Questa libertà, dal punto di vista cristiano, costituisce un valore personale la cui perdita può portare al decadimento completo dell'uomo. Esiste anche una comprensione diversa della libertà. La si unisce alla possibilità di realizzazione dell'individuo nella società, nelle attuali condizioni sociali. Parliamo della libertà d'azione dell'uomo. Si può chiamarla libertà esterna. Il suo campo non è delimitato soltanto dai diritti dell'uomo. Ogni stato garantisce i propri diritti di libertà, e la libertà esterna include anche la condotta dell'uomo nei confronti della natura.

La libertà esterna è quindi un concetto molto ampio. Il cristianesimo indica anche un terzo genere di libertà, il più importante dal punto di vista cristiano. Si tratta della libertà spirituale. Questa terza categoria significa la prevalenza dell'uomo sui suoi desideri, in altre parole il principio della precedenza dell'intelletto sul cuore.

Parole chiave: libertà cristiana, società, peccato, morte, Chiesa Ortodossa, persona, autodeterminazione, scelta, volontà, diritto, Regno di Dio

Ecumeny and Law, vol. 4 (2016)
pp. 77—101

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Religious Freedom in the Middle East

Keywords: genocide, internally displaced peoples (IDPs), persecution of Christians, refugees, religious freedom

> Since in the course of centuries not a few quarrels and hostilities have arisen between Christians and Moslems, this sacred synod urges all to forget the past and to work sincerely for mutual understanding and to preserve as well as to promote together for the benefit of all mankind social justice and moral welfare, as well as peace and freedom.
>
> *Nostra aetate* (1965), no. 3

The present worldwide persecution of Christians

In our times, we are witnesses to a deliberate and targeted persecution of Christians across broad areas of the world. The situation is now so critical that some have spoken, not simply of "persecution" but of an outright "war against religion" in many countries of the world,[1] on a planned and increasingly global scale. It manifests itself in the form of legal oppression, social victimisation, the exclusion of the members of religious minorities from society by treating them as second- or third-class citizens, or indeed not as citizens at all, and direct physical violence. One

[1] OSCE Conference in Astana, Kazakhstan, June 2010, see: http://www.osce.org/event/summit_2010 (retrieved 15.05.2016).

argument for using the term "war" rests on the sheer number of victims involved. The 21st century is already coming to be regarded as a "century of martyrs." Innumerable Christians are being killed solely for the reason that they are Christians.

One of the most shocking examples can be found in the Me'eter prison camp in the Eritrean desert. In this camp, where Christians are crammed together in containers, helplessly exposed to the searing heat, denied all privacy, and subjected to horrific tortures, the cruelties against them are extreme. Yet there are hundreds of other places in the world where Christians are suffering. For example in the state of Orissa in eastern India a series of anti-Christian pogroms took place between Christmas 2007 and August 2008 which must rank among the most brutal examples of violence against Christians. More than 500 Christians were cruelly murdered, while hundreds of homes, schools, and churches were destroyed and Catholic nuns raped. Worst of all, however, is the fact that the perpetrators have never been brought to book.

One could list numerous countries in which there is outright persecution of Christians, among them North Korea, Burma, and Nigeria.

The Middle East is no exception to this. The Pew Forum on Religion and Public Life comes to the conclusion that 70% of the world's population now lives in countries "with serious restrictions on religious freedom" (see the Annex). Sadly, we must note that in those countries Christians are the group most heavily discriminated against. According to the OSCE — the Organisation for Security and Cooperation in Europe — some 200 million of the 2.3 billion Christians (which amounts to 8.7%) in the world are today subjected to some form of hatred, violence, threat, confiscation of property, or other abuse on account of their religion.[2] In the Arabian Peninsula alone some 2.5 million Christians are oppressed, discriminated against, and persecuted.[3] And this persecution is increasing rather than decreasing.

[2] Open Doors: "Saudi-Arabien, Stand des Länderprofils: Januar 2016," see https://www.opendoors.de/verfolgung/laenderprofile/saudiarabien/#inhalt (retrieved 15.05.2016).

[3] Between 1,500 and 1,900 Christians composed approximately 15% of the region's population. Cf. D. B. Barrett, T. M. Johnson: *World Christian trends AD 30-AD 2200*. William Carey Library 2001, pp. 323, 327.

The present situation of Christians in the Middle East

Introduction

When speaking about the Middle East, it is essential to closely analyse the developments that have taken place here over the past one hundred years. During the 20th century there have been profound changes, which have led to an exodus of Christians from the region. Prior to the First World War, the proportion of Christians in the Middle East was still around 20%; today it is barely 4% — and decreasing. In fact the situation is changing at an alarming rate.[4] Today geopolitical changes are reshaping the face of the region. New states have been founded and the cards of power have been reshuffled.[5] Here are some examples of the aforementioned processes:

- The increasing nationalism in Turkey in 1915 led to the genocide of 1.5 million Armenians and between 400,000 and 500,000 Assyrians. Additionally, during the Turkish-Greek war of 1919—1992, Greek Christians were expelled from Turkey and Turkish Muslims were expelled from Greece. This has likewise contributed to a situation in which one can to all intents speak of the extinguishing of Christianity within the territory of Turkey today. Whereas in 1914 Christians still made up some 23% (or 21.7%) of the population of Turkey, today they account for barely 0.2%.[6]
- The founding of the state of Israel in 1948 transformed the situation both for Christians and for Muslims. Approximately 1.5 million Palestinians were expelled, including 50,000 Christians.[7]

[4] Cf. the Annex.

[5] T. M. Johnson, Gina A. Zurlo: "Ongoing Exodus: Tracking the Emigration of Christians from the Middle East." *Harvard Journal of Middle Eastern Politics and Policy* III (2013—2014), p. 44.

[6] It is believed that during the 1948 war in Palestine more than 700,000 Palestinian Arabs fled or were forced to leave their homes. It is to say that circa 80% of the Arab inhabitants left the territory which became Israel, that is, 50% of the overall Arab population living in Mandatory Palestine. Cf. N. Masalha: *Expulsion of the Palestinians*. Institute for Palestine Studies 2001 [1992], p. 175; R. Khalidi: *Palestinian Identity: The Construction of Modern National Consciousness*. Columbia University Press 1998. pp. 21 ff. "In 1948 half of Palestine's […] Arabs were uprooted from their homes and became refugees"; P. Lemarchand (ed.): *Atlas Géographique Moyen-Orient et du monde Arabe: le croissant des crises*. Éditions Complexe 1994, p. 185.

[7] D. Byman, K. M. Pollack: *Things Fall Apart: Containing the Spillover from an Iraqi Civil War*. Brookings Institution Press 2008, p. 139.

- The bloody civil war and subsequent violence in Lebanon lead to 1 million Lebanese leaving the country, among them 700,000 Christians.[8]
- The American invasion of Iraq in 2003 indirectly led to what has sometimes been described as the "greatest persecution of Christians in modern times."[9] Since the fall of Saddam Hussein and his government, there have been no fewer than 70 attacks on Christian churches and innumerable Christians have been threatened, abducted and murdered. Those who were able to do it, left the country.
- Within the past decade alone number of Christians has fallen to between 350,000 and 400,000 — little more than half the previous number. And the exodus continues.

For certain power groups related to power in the Middle East today, Christians are occasionally useful for achieving their ends. For example, when it is a matter of gaining votes in an election. Equally, they are sometimes a source of money through blackmail, proving easy victims for abduction, followed by ransom demands (above all in Iraq), since there is no danger of them retaliating.[10] For others, their attacks on Christians can serve as

[8] M. Bommes, H. Fassmann, W. Sievers (eds.): *Migration from the Middle East and North Africa to Europe: Past Developments, Current Status and Future Potentials*. Amsterdam University Press 2014, p. 199.

[9] H. Hendawi, Q. Abdul-Zahra: "ISIS Is Making Up to $50 Million a Month from Oil Sales," see http://www.businessinsider.com/isis-making-50-million-a-month-from-oil-sales-2015-10?IR=T (retrieved 23.10.2015); J. Pagliery: "Inside the $2 billion ISIS war machine," see http://money.cnn.com/2015/12/06/news/isis-funding (retrieved 11.12.2015).

[10] Oasis: "The Restless Middle East. Between Political Revolts and Confessional Tensions," see http://www.oasiscenter.eu/the-journal/the-restless-middle-east-between-political-revolts-and-confessional-tensions (retrieved 15.05.2016). In *Communiqué* of the Catholic Ordinaries in the Holy Land and Justice and Peace Committee "Are Christians being persecuted in the Middle East?" (2.04.2014) we read: "In the name of truth, we must point out that Christians are not the only victims of this violence and savagery. Secular Muslims, all those defined as 'heretic', 'schismatic' or simply 'non-conformist' are being attacked and murdered in the prevailing chaos. In areas where Sunni extremists dominate, Shiites are being slaughtered. In areas where Shiite extremists dominate, Sunnis are being killed. Yes, the Christians are at times targeted precisely because they are Christians, having a different set of beliefs and unprotected. However they fall victim alongside many others who are suffering and dying in these times of death and destruction. They are driven from their homes alongside many others and together they become refugees, in total destitution."

At the December 10—12, 2015 conference *Under Caesar's Sword* hosted by the University of Notre Dame's Center for Civil and Human Rights, Bishop Anba Angaelos, general bishop of the Coptic Orthodox Church of Alexandria and head of the Coptic Orthodox Church in the UK, said that as Christians we are called to "embrace and accept out persecution thankfully," but all Christians also have a "moral responsibility to be advocates, speaking for those who cannot speak, to be a voice in the wilderness. […] There is a growing disregard for the sanctity of life, and that must be what offends us. […] It is not about

a display of power and a way of making their presence noticed in the world media. In this way Christians are merely used as pawns in their regional power play and as other chess figures in a battle of foreign interests.

Yet, in all the contemporary conflicts, the position of Christians has been clearly stated: "Christians do not ask for privileges for some, they ask for rights for everyone."[11] It means simply that — as the representatives of the various Christian communities in the Middle East are constantly stressing — all they are asking for is to enjoy the same rights and duties as every other citizen in their own country.

The conflict between Sunni and Shia Muslims

It is a mistake to regard Islam as a religious monolith. Rather it comprises several dozen different splinter groups and factions, all fighting among themselves and all claiming to hold the exclusive vision of eternal salvation, and each of them believing that all the others will eternally merit hell fire.

Particularly crucial here is the conflict between Sunni and Shia Muslims, which could well become the major issue determining the fate of the entire Middle East. In Iraq we can already speak of civil war between Sunnis and Shia,[12] but it is Christians who will pay the highest price.

There is a reason to fear the same thing for other countries of the Middle East. Bishop Samir Mazloum of the Maronite patriarch eight of Antioch believes that the conflict between Sunnis and Shia is currently the real great problem in the Middle East. For the whole Arab world is caught up in this division, he says, whether they are Shia or Sunni Muslims. But it is a problem that affects not only the Arab but the entire Muslim world,

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Christians or Muslims being killed, but about life and humanity as God's creation, and that disregard is a violation that we cannot be silent about. In response, we must realize that we have to respond together, collaboratively. […] It's not enough to empathize with them (Christians). We must act." In: Latin Patriarchate of Jerusalem: "Persecution of Christians in the Middle East: Communiqué of the Assembly of Catholic Ordinaries in the Holy Land, In Communiqué of the Catholic Ordinaries in the Holy Land and Justice and Peace Committee, 'Are Christians being persecuted in the Middle East?'" (2.04.2014), http://en.lpj.org/2014/04/03/persecution-of-christians-in-the-middle-east-communique-of-the-assembly-of-catholic-ordinaries-in-the-holy-land/ (retrieved 15.05.2016).

[11] Cf. L. G. Potter: *Sectarian Politics in the Persian Gulf*. New York: Oxford University Press 2014, p. 83.

[12] Kirche in Not: "Vom Nachbarland mit Angst beobachtet," see http://www.kirche-in-not.de/aktuelle-meldungen/2011/09-29-libanesischer-bischof-angst-vor-umbruch-in-syrien (retrieved 5.02.2014).

including Iran, which is not Arab, but Islamic, and Turkey as well. The development of this conflict, which could well become an "explosion of the entire region" is being watched with apprehension, he believes.[13]

Among all of this, it is possible that Lebanon might be an exception. Nonetheless, a fragile union between Sunnis and Shia might just tip the political balance in the country to the disadvantage of the Christians, Bishop Mazloum fears. For if the representation in the government of the country were to reflect the actual share of the population, then the Christians would undoubtedly lose out. While in 1975 Christians still made up 53% of the population of Lebanon, today they account for barely 40%. Indeed some sources suggest a proportion of only 34.3%.

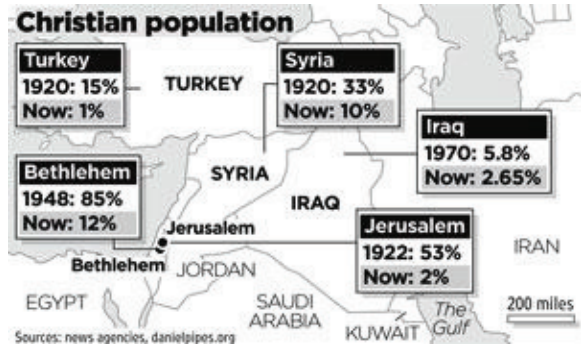

Figure 1. The decreasing proportion of Christians in the Middle East
Source: http://www.danielpipes.org/

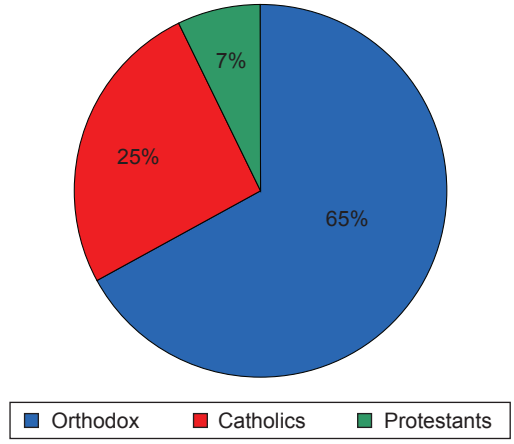

Figure 2. The percentage of the main denominations among Christians in the Middle East (2013)
Source: Pew Research Centre

[13] T. M. Johnson, G. A. Zurlo: "Ongoing Exodus…," p. 44.

Syria

In March 2011 the situation in Syria escalated, with demonstrations in Homs against the governor. On Good Friday blockades were erected to prevent demonstrators from moving freely through the streets. Shortly afterwards, seven of them were shot dead. Altogether, on this one day, it appears that over 1,000 demonstrators were killed.

The involvement of the Europeans in the ongoing Syrian conflict

In the above described situation of competing military and commercial interests, arms dealing represents an extremely profitable market, with arms being delivered indiscriminately to all parties in the conflict.

The interest and involvement of European politicians in this conflict can be better understood when we note that there are 95 different nationalities involved in fighting for the Syrian opposition, many of whom have European passports and, following an eventual ceasefire, they will in all probability return to Europe, having already committed appalling acts of violence and accordingly psychologically disposed. Such people represent a danger that should not be underestimated.

Some facts about the present situation in Syria

Generally speaking, the Christians in Syria, and in particular the Catholics, are not involved in the fighting. Yet despite that, they are precisely the group in society who suffer most in percentage terms.

Only in 2014 alone, some 55,000 people were killed in the war. Over 13.5 million people in Syrian territory are in need of humanitarian aid.[14] More than 4.5 million Syrians have fled abroad and over 6.5 million people are internally displaced within Syria. These figures mask numerous truly shocking individual tragedies. For example, Maronite Archbishop Samir

[14] The European Commission: "Syria crisis," see https://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf (retrieved 15.05.2016).

Nassar of Damascus told us of a woman who was fleeing the bombing of her village together with her four children. After walking for four hours to the mountains and valleys, she was forced to leave her two smallest children behind on the roadside, because she simply could no longer carry them in her arms. She had to make the tragic choice between all of them dying or at least trying to rescue the two older children.

A father of a family, who had lost everything, compared his situation to that of a beetle trapped in the bottom of a container and unable to escape: "It runs round and round in a circle until it drops down and dies. That is my situation."

The Syrian health system, once the best among Muslim countries, is now virtually in ruins as a result of the bombing of the pharmaceutical industrial plants and the fact that most of the doctors have fled. Around 15,000 doctors have already left the country. Being a doctor in Syria today is one of the most dangerous professions of all, since they can be ordered to the front at any time, not only by the government forces but also by the rebel opposition. On the top of this there has been a rise of an average of 50% in the cost of medications.

Since the outbreak of the conflict in 2011 an estimated 300,000 people have been killed as direct victims of the war, a slaughter that has been condemned around the world and described as "barbaric" and "inhuman." But to this huge number of direct victims we must also add another 350,000 of so frail and sick individuals who have died as a result of the lack of appropriate medical care.

Nor must we forget that the sanctions against the Assad regime have also in some cases included medical supplies, thereby directly impacting the suffering population. In many respects, the sanctions hurt above all the most vulnerable and not those against whom they were originally meted out.

The exodus of Syrians

Again and again, the wave of victims seeking to emigrate from the Middle East has been described as a "tsunami." It was an image also used by Patriarch Gregorios III Laham, the head of the Greek Melkite Catholic Church, in August 2015, in an open letter written to young people. In it he writes that this exodus is so severe that it seriously endangers the future of the Church in Syria. "The general wave of emigration by the young, especially from Syria, but also from Lebanon and Iraq, breaks

my heart and wounds me deeply, like a mortal blow. What future will the Church have in the face of such a tsunami of emigration? What will become of our homeland? What will happen to our parishes and Church-run establishments?"[15]

And yet the people of Syria strongly desire to stay on in their home country. The Church seeks to help them, and there is still hope that many will return once the situation improves.

Destruction of Church properties and persecution of Christians

During the course of the year (2016) so far, more than 200 churches have been destroyed, while many Christians have been expelled from their ancient homelands, threatened, and murdered. Among the victims there have also been several bishops and priests. For example, Jesuit Father Frans van Lugt, who lived in Homs, was shot dead on 7 April 2014 in the garden of the parish centre.[16]

At least the abduction of two other Catholic priests ended more fortunately, at the end of 2015. The first of them, Father Jacques Mourad, had been abducted in May that year by the rebels of IS. He spent six months in captivity, but was finally able to escape with the help of a Muslim friend, whose family he had been able to help through his programme for the poor and disadvantaged in the country. This friend, who had contacts within IS, told Father Mourad how he had been impressed with the work Father Mourad had done in Qaratayn, providing food, medications, and accommodation with the help of funding from various agencies, including Aid to the Church in Need (ACN). In an exclusive interview with ACN, he later said: "What ACN has done to help us has played a great role in setting me free."[17]

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[15] C. Creegan, J. Pontifex: "SYRIA/MIDDLE EAST: Please don't abandon Syria," see http://www.acnuk.org/news.php/590/syriamiddle-east-please-dont-abandon-syria (retrieved 15.05.2016).

[16] Hundreds of thousands of Christians have been displaced by fighting or left the country. Melkite Greek Catholic Patriarch Gregorios III Laham said that in 2014 more than 1,000 Christians had been killed, entire villages cleared, and dozens of churches and Christian centres damaged or destroyed. Cf. BBC: "Syria's beleaguered Christians," see http://www.bbc.com/news/world-middle-east-22270455 (retrieved 25.02.2015).

[17] J. Pontifex: "SYRIA: 'You helped set me free'," see http://www.acnuk.org/news.php/600/syria-you-helped-set-me-free (retrieved 15.05.2016).

The other abducted priest was the Franciscan Dhiya Aziz, who had been abducted for the first time in July 2015 and then released again after a week. He was then abducted again, for a second time on 23 December, and then released again on 4 January 2016.[18]

Iraq

Also in Iraq the situation is critical. Since January 2014, around 3.4 million people have been either expelled or become refugees within their own country.[19] Added to this are the 1.13 million internal refugees already present from earlier years. Altogether some 10 million people — constituting one third of the overall population — are now dependent on humanitarian aid, yet even this figure is likely to rise to between 11 and 13 million by the end of 2016, according to information given to the European Commission.[20]

The situation of the Christians in Iraq

Here too, the situation of the Christians is particularly tragic. In the past, Christians were present in Iraq on every level of society and represented the highest levels of literacy. Prior to 2003, the Christians, although

[18] Custodia Terrae Sanctae: "Communique of the Custody of the Holy Land," see http://www.custodia.org/default.asp?id=779&ricerca=Dhiya&id_n=29645 (retrieved 15.05.2016); Custodia Terrae Sanctae: "Communique of the Custody of the Holy Land: Fr. Dhiya Azziz has been liberated," see http://www.custodia.org/default.asp?id=779&ricerca=Dhiya&id_n=29711 (retrieved 15.05.2016).

[19] There are a least 4.7 million people of concern in Iraq: non-Syrian refugees (55,700); Syrian refugees (246,123); stateless (50,000); Iraqi returnees (983); IDP returnees (557,389); internally displaced (4,344,334); total (4,697,140). UNHCR has been heavily underfunded: by April they received only 12% of what they should have received for 2016 (funds requested amount to USD 558.5 million). Cf. United Nations Iraq: *UNHCR — Fact Sheet April 2016*. See http://www.uniraq.org/index.php?option=com_k2&view=item&id=5547:unhcr-fact-sheet-april-2016&Itemid=626&lang=en (retrieved 15.05.2016).

[20] United Nations Iraq: "WFP Iraq Situation Report #38 — 27 June 2016," see http://www.uniraq.org/index.php?option=com_k2&view=itemlist&task=category&id=161:factsheets-reports&Itemid=626&lang=en&limitstart=6 (retrieved 27.06.2016).

making up only around 3% (or 5% according to some sources) of the population, provided 40% of physicians and engineers in the country. They also made up a large percentage of the intellectuals, the writers, and the journalists. The Christians were the motor of modernization in Iraq. In the year 2003 there were still approximately 1.5 million Christians in Iraq. Today, however, there are no more than 300,000. This means that over the past 12 years, on average, 100,000 Christians have left the country each year. Up until 2003 there were 60,000 Christians living in Mosul; following the events of that year there remained no more than 35,000. And today, after the city has been seized by the so-called Islamic State, there is not a single Christian left in the city.

So-called Islamic State — a threat to the country and minorities

Since 2014, the explosive spread of the so-called Islamic State has made this terrorist organization one of the most dangerous, and wealthiest, fanatical religious groups in the region.

Minorities betrayed thrice in 2014

Many Christians and other minorities in the above-mentioned regions are faced with the impossible choice between converting to Islam, paying the jizyah tax, and being killed. In practice this means that they are no longer regarded as equal citizens in the country. Even within the Iraqi government there is a continuing creeping Islamisation. For example, in October 2015 the Iraqi parliament rejected a proposed legal amendment, brought forward by Christian representatives, which sought to modify an earlier proposal whereby underage children were to be regarded as having automatically converted to Islam in the event that one of their parents converted to Islam.

Many Christians no longer see any future for themselves in the country and, still worse, some have the feeling of having been betrayed. Especially since the summer of 2014, the small remnant of Christian community in northern Iraq has a right to feel betrayed on many levels. In the face of the advancing IS troops, they were assured by the Kurdish govern-

ment and the *peshmerga* fighters that they would have been safe and that IS would not have harmed them. Many of those who were subsequently driven from their homes later told us that "the *peshmerga* told us to stay at our homes and that they were there to protect us." But just half an hour later there was not a single *peshmerga* fighter to be seen and IS had begun to bombard their villages.

The present situation of the Internally Displaced Peoples (IDPs)

For these refugees (IDPs) who are very grateful for our support there is one recurring question: "When can we return to our towns and villages?" If there is even the smallest chance that these Christians will be able to return to their former homes (in Homs, and the Niniveh plain), then Aid to the Church in Need will be ready to help rebuild the Christian infrastructure there. Last year the Christian refugees in Kurdistan, registered by the Church, totaled 13,500 families. However, since there is no immediate prospect of them being able to return home, to find work or a safe environment to live, some 3,500 of these families have already left the country.

The tragic situation of the children

All in all, there are 2 million children in Iraq who are unable to attend schools. For another 1.2 million children aged 5—14 there is also a looming danger of not being able to continue doing so. From the total number of 5,300, almost a third of all Iraqi schools have been destroyed, rendered unsafe or turned into emergency accommodation for refugees. Others have been co-opted for military use. Hence another priority is to enable these children, and above all the children of the refugee families to attend some form of schooling.

More recently there have been some positive developments in Iraq. The situation has settled to certain extent, and there is a hope that the "Shia" government and its army will be able to work in cooperation with the

majority Sunni towns and cities to regain the towns that have been taken over by IS. Collaboration of this type between Sunni and Shia forces is something of a novelty, and it could be a source of hope for the future.

The genocide of the minorities

Severe discrimination, lawlessness, and inhuman, unheard-of barbarism perpetrated against Muslim and other minorities, and in particular against Christians, have led to discussions on the international level whether the term "genocide" should be used to describe what is currently being committed in Iraq and Syria. On 4 February 2016 the European Parliament in fact passed a resolution to this effect, following a similar statement by the Council of Europe of 27 January 2016. And in March 2016 the US Foreign Ministry also defined the events in Iraq and Syria using the term "genocide."

The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide states the following: "This term has a precise and formal legal meaning in international law and could therefore be the starting point for an initiative to put a stop to those groups seeking to wipe out Christianity in the Middle East. It also holds out the possibility of justice and reparation to the victims."

In a statement made to ACN, Bishop Antoine Chbeir of Latakia (Syria) observed: "There is no need to create new terms to describe what is happening to us […]. All acts of genocide are crimes against humanity but not vice versa. And [if a situation is declared to be a genocide] the UN has clearly prescribed actions to follow with its members that do not necessarily include sending soldiers on the ground."[21]

Meeting between the Pope and the Grand Imam

Another highly significant event was the meeting between Pope Francis and the Grand Imam Ahmed al-Tayeb, of the Sunni Al Azhar Univer-

[21] Aid to the Church in Need: "ACN welcomes US State Department's charging ISIS with 'genocide' of Christians," see http://www.churchinneed.org/site/News2?page=NewsArticle&id=8911 (retrieved 15.05.2016).

sity which took place on 23 May 2016. This is the most important Islamic institution in Egypt and, at the same time, one of the most renowned institutions and highest authorities of Sunni Islam. However, it broke off the ongoing bilateral talks with the Holy See in 2011, allegedly in response to the call by Pope Benedict XVI for better protection of religious freedom in Egypt, which the Al Azhar University claimed was an unacceptable interference in the internal affairs of Egypt. The Pope had been speaking in response to the bloody attack on a Coptic church in Alexandria on New Year's Day 2011, as a result of which many people were killed and injured. Speaking of the more recent meeting, Father Rafik Greiche, the media spokesman for the Catholic Church in Egypt, told ACN: "We think this has broken the ice in relations between the Vatican and the Al Azhar University […]. The resumption of the official dialogue, suspended by the University in 2011, has not in fact been explicitly announced, but that is merely a matter of form. I fully expect that the discussions will once more be resumed."[22]

Christians killed and missing

Remembering martyrs who died not as result of the war, but expressly on account of their faith, is also practiced in Syria. On 22 April 2013, the two metropolitans, Mar Gregorios Youhanna Ibrahim (Syrian Orthodox) and Boulos Yazigi (Greek Orthodox) were abducted from Aleppo. To this day, there has been no trace of either man. On 28 July of the same year the Italian missionary Father Paolo Dall'Olio was also abducted. Father Francis Murad, a 49-year-old monk, was murdered on 23 June 2013 in Gassanieh, probably by the Islamist Jabhat al-Nusra-Front.

On 7 April 2014, the 75-year-old Jesuit Father Frans van der Lugt was shot in the head in cold blood. He had been working in Syria since 1967 and refused to leave the besieged Old City of Homs, but instead decided to stay on and help the population.[23]

[22] Aid to the Church in Need: "The ice has been broken," see http://www.acn-aed-ca.org/category/egypt/ (retrieved 15.05.2016).

[23] Aid to the Church in Need: "Priest killed in Syria," http://www.churchinneed.org/site/News2?page=NewsArticle&id=7805 (retrieved 15.05.2016).

Concluding remarks

In assessing the current events in the countries of the Middle East and Northern Africa there is one thing that should not be forgotten, namely that those states declaring themselves to be "Islamic" neither acknowledge nor allow democracy. Once a country becomes an Islamic state, there will be no peace.

In Libya, for example, the initial hopes for democracy were quickly dashed. Just two days after the death of Gaddafi, the National Transitional Council announced that the sharia would be introduced as the basis of the new legal system in the country. In countries where there is no common basis for society, the sharia serves as a unifying force and as the sole source of law and jurisprudence.

However, despite all the tendencies towards greater extremism and radicalism, Islam, which is divided (with)in itself, is not as powerful as it appears to be. Its divisions make its followers vulnerable to manipulation and more uncertain. The next five years will undoubtedly be a decisive period for the fate of the entire region, in which an increased persecution of Christians is to be expected.

Yet we can also expect to witness a fragmentation and hence a weakening of Islam. We should note what Bishop Antoine Audo has said, namely: "It is clear that, faced with modernity and globalisation, the Arab-Islamic world feels threatened and is losing faith in itself and in others."

The enormous needs of the people of these regions demand an exceptional degree of solidarity on the part of the rest of the world, in support of the people. And yet Stephen O'Brien, UN Undersecretary of State for Humanitarian Affairs and Emergency Relief Coordinator, reported on 17 September 2015 that the governments concerned had so far actually contributed only 30% of the monies pledged for the victims of the conflicts in Syria and Iraq.

Undoubtedly, the international community has put up a huge amount of money for helping the victims of the wars in Syria and Iraq. Yet, at the same time, it is also true that Christians have in many respects been neglected, partly because they are reluctant to register officially with the agencies out of fear and for other reasons. The situation has deteriorated enormously.

Father Khalil Jaar, one of the leading coordinators of the refugee relief programme in Jordan run by an association Messengers of Peace also laments the fact that the Christians are being overlooked by Western governments and that Christians and other minorities are not given equal opportunities in seeking asylum in Europe. He also points to the fact

that Christians in the refugee camps often experience discrimination and persecution. "Why does the West not do more for Christians and other minorities?," he asks. "They are the ones who are suffering the most. If Christians remain in Syria and Iraq, they risk being wiped out by Islamist extremists. And when they seek protection abroad, in the major refugee camps, they are maltreated by those who are already there."[24]

As Christian churches, we currently face a number of challenges:

1. We must help those Christians who are struggling to stay on in their home countries in the Middle East, in very difficult circumstances. Above all we must make every effort to help ensure that their children get a good education. Christians ought not to be more poorly educated than the rest of society but should in fact be given a better education. At the same time, Church schools should continue to be open to Muslim pupils, who will later also play a role in society. In Christian schools they will learn to respect Christian values, and this will help to build bridges for the future and provide a platform for mutual dialogue.
2. We must provide pastoral care for Eastern Christians who have emigrated and now live in Europe, America, or Australia. Here too we unfortunately only have figures regarding the number of Catholics who have emigrated, but undoubtedly the picture will be similar for Orthodox Christians.
3. Representatives of the Christian churches need to be trained to engage in a fruitful dialogue with representatives of Islam.

[24] J. Pontifex: "Targeted for elimination, Middle East Christians need rescue by the West, priest says," see http://www.churchinneed.org/site/News2?page=NewsArticle&id=8791&news_iv_ctrl=1461 (retrieved 15.05.2016).

Annex

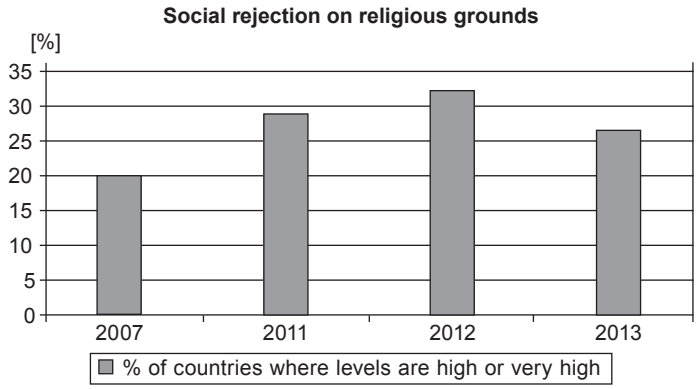

Figure A1. Social exclusion on religious grounds (countries)

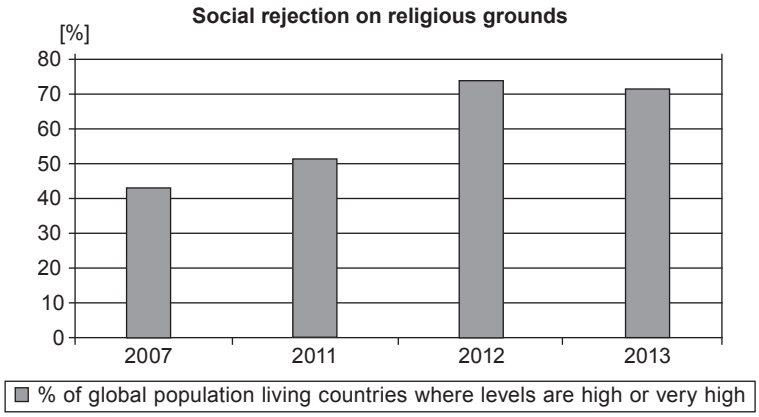

Figure A2. Social exclusion on religious grounds (population)

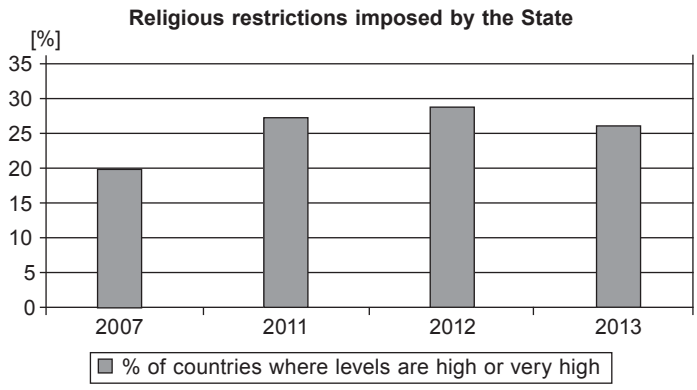

Figure A3. Religious restrictions imposed by the state (countries)

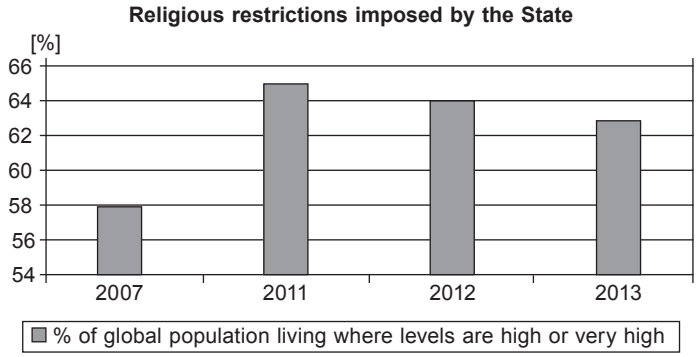

Figure A4. Religious restrictions imposed by the state (population)

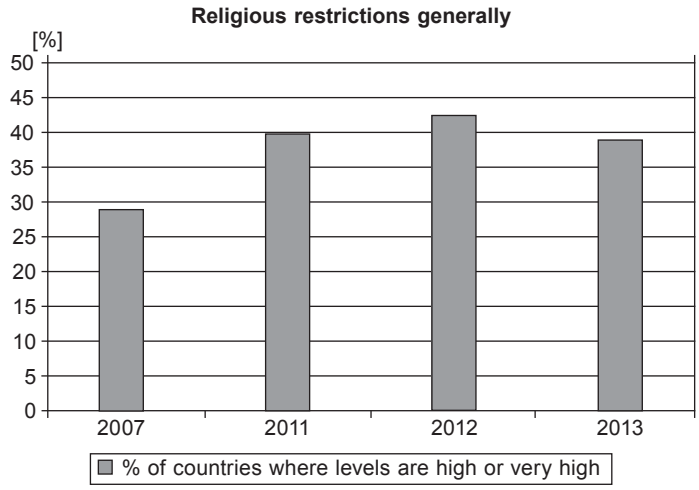

Figure A4. Religious restrictions generally (countries)

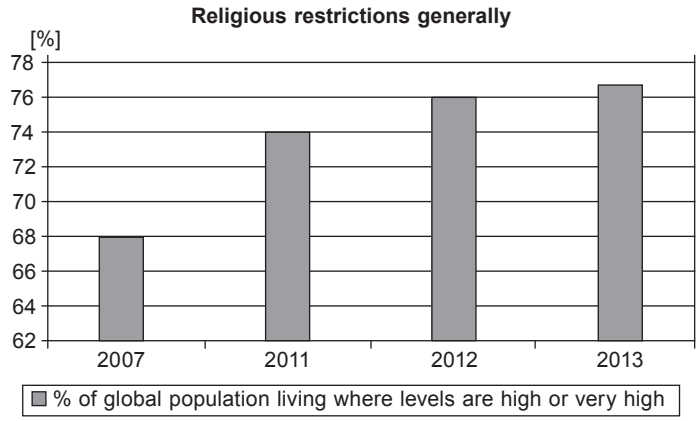

Figure A4. Religious restrictions generally (population)

Table A1. Christians by country in the Middle East (1910—2025)

Country	1910		1970		2010		2025	
	N	%	*N*	%	*N*	%	*N*	%
Bahrain	220	0.3	8,200	3.9	163,000	13.0	211,000	13.4
Cyprus	214,000	77.9	469,000	76.4	793,000	71.8	905,000	71.5
Egypt	2,263,000	18.7	5,778,000	15.9	7,876,000	10.1	8,208,000	8.5
Iran	130,000	1.2	268,000	0.9	272,000	0.4	317,000	0.4
Iraq	171,000	6.3	369,000	3.7	448,000	1.4	295,000	0.6
Israel	38,000	8.0	79,000	2.8	180,000	2.4	160,000	1.8
Jordan	16,600	5.8	83,400	5.0	172,000	2.7	163,000	1.9
Kuwait	240	0.3	38,600	5.1	264,000	8.8	362,000	8.2
Lebanon	408,000	77.5	1,436,000	62.5	1,487,000	34.3	1,534,000	30.4
Oman	20	0.0	3,900	0.5	121,000	4.3	188,000	3.9
Palestine	39,600	11.6	53,200	4.7	74,600	1.9	60,600	1.0
Qatar	75	0.4	4,900	4.4	168,000	9.6	224,000	8.4
Saudi Arabia	50	0.0	18300	0.3	1,193,000	4.4	1,525,000	4.5
Syria	314,000	15.6	617,000	9.7	1,119,000	5.2	758,000	2.7
Turkey	3,354,000	21.7	290,000	0.8	194,000	0.3	165,000	0.2
United Arab Emirates	80	0.1	13,600	5.9	1,061,000	12.6	1,449,000	12.6
Yemen	5,000	0.2	1,700	0.0	39,200	0.2	54,800	0.2

Source: T.M. Johnson, B.J. Grim: *World Religion Database* (http://www.worldreligiondatabase.org/). Many media reports and some academic sources mention that the 1987 Iraq census claimed 1.4 million Christians in the country. This contradicts all other sources, including data from the Catholic and Orthodox churches. See Y. Habbi: "Christians in Iraq." In: *Christian Communities in the Arab Middle East: The Challenge of the Future*. Ed. A. Pacini. Clarendon Press 1998, pp. 294—304.

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Andrzej Halemba

Religious Freedom in the Middle East

Summary

Nowadays, we are witnesses to a deliberate and targeted persecution of Christians across broad areas of the world. The Middle East is no exception to this. The Pew Forum on Religion and Public Life informs that 70% of the world's population now live in countries "with serious restrictions on religious freedom." According to the OSCE some 200 million Christians (about 8.7%) of the 2.3 billion Christians in the world are today subjected to some form of hatred, violence, threat, confiscation of property, or other

abuse on account of their religion (OSCE Conference in Astana, Kazakhstan, June 2010). In the Arabian Peninsular alone some 2.5 million Christians are oppressed, discriminated against and persecuted. And this persecution is increasing rather than decreasing. In speaking about the Middle East it is essential to closely analyse the developments that have taken place here over the past hundred years. Prior to the First World War, the proportion of Christians in the Middle East was still around 20%; today it is barely 4% — and decreasing. In fact the situation is changing at an alarming rate. According to Father Khalil, the imams play a key role in regard to the problem of the integration of Muslims in the western world, since they often "brand it as a heathen culture." Young Muslins should in fact be able to develop into personalities and judge according to their own conscience. Islam must renew itself from within and clarify its relationship to violence. And there is likewise a need to clarify the relationship between the various Muslim groupings themselves, since all experts agree that the explosive situation in the Middle East is above all due to the conflicts within Islam (i.e. between Sunnis and Shias, etc.). And Europe too must stop being so very naive. The God of Islam is not identical with the Christian God.

Andrzej Halemba

La liberté religieuse au Proche-Orient

Résumé

À notre époque, nous sommes témoins de la persécution délibérée et intentionnelle des chrétiens dans bien des régions du monde. Le Proche-Orient n'est pas une exception. Pew Forum on Religion and Public Life constate que 70% de la population mondiale vit dans des pays où la liberté religieuse est considérablement restreinte. Selon OSCE (Organisation pour la sécurité et la coopération en Europe), environ 200 millions de chrétiens (envers 8,7%) de 2,3 milliards de tous les chrétiens dans le monde sont l'objet de différentes formes de haine, de violence, d'intimidation, de confiscation des biens ou d'autres abus motivés par la religion (cf. les données du Colloque d'OSCE à Astana, Kazakhstan, juin 2010). Seulement sur la péninsule arabique, envers 2,5 millions de chrétiens sont opprimés, discriminés et persécutés. Et cette persécution plutôt augmente que diminue. En parlant du Proche-Orient, il est nécessaire d'analyser précisément le développement de la situation qui a lieu au cours du dernier siècle. Avant la Première Guerre mondiale, la proportion des chrétiens au Proche-Orient était de 20% environ ; aujourd'hui, il n'y en a que 4%, et leur nombre continue à diminuer. Effectivement, la situation change rapidement. Selon le père Khalil, les imams jouent un rôle prépondérant dans le problème lié à l'intégration des musulmans dans le monde occidental, parce qu'ils décrivent fort souvent la culture de l'ouest comme celle « des païens ». Cependant, les jeunes musulmans devraient avoir la possibilité de développer leurs propres idées et de juger selon leur propre conscience. Il faut que l'islam se restaure à son intérieur et qu'il définisse son attitude envers la violence. Étant donné que tous les experts constatent unanimement que la situation explosive au Proche-Orient est due avant tout aux conflits situés dans le cadre de l'islam (c'est-à-dire entre sunnites et chiites, etc.), il existe un besoin urgent d'expliquer la relation entre différents regroupements musulmans. Il faut également que l'Europe cesse d'être naïve. Le Dieu de l'islam n'est pas identique à celui du christianisme.

Mots clés : génocide, déplacés internes (IDPs), persécution de chrétiens, réfugiés, liberté religieuse

Andrzej Halemba

La libertà religiosa in Medio Oriente

Sommario

Ai giorni nostri siamo testimoni della persecuzione meditata ed intenzionale dei cristiani in varie aree del mondo. Il Medio Oriente non è un'eccezione in questo caso. Il Pew Forum on Religion and Public Life sostiene che il 70% della popolazione mondiale vive in paesi con "gravi limitazioni della libertà religiosa". Secondo l'OSCE circa 200 milioni di cristiani (l'8,7% circa) dei 2,3 miliardi di cristiani nel mondo attualmente sono oggetto di varie forme di odio, violenza, intimorimento, confisca di beni o di altri abusi a sfondo religioso (cfr. i dati della Conferenza OSCE di Astana, Kazakistan, giugno 2010). Solo nella Penisola Araba circa 2,5 milioni di cristiani sono oppressi, discriminati e perseguitati. E tale persecuzione aumenta invece di diminuire. Parlando del Medio Oriente è indispensabile analizzare con precisione lo sviluppo della situazione nel corso dell'ultimo secolo. Prima della I guerra mondiale la proporzione dei cristiani in Medio Oriente ammontava al 20% circa; oggi sono solo il 4%, ed il loro numero continua a diminuire. In effetti la situazione sta cambiando ad un ritmo allarmante. Secondo padre Khalil, gli imam hanno un ruolo chiave nell'ambito del problema dell'integrazione dei musulmani nel mondo occidentale, perché spesso definiscono la cultura occidentale con l'appellativo di "cultura pagana". I giovani musulmani devono invece avere la possibilità di sviluppare i propri intelletti e di giudicare secondo la propria coscienza. L'islam deve rinnovarsi dall'interno e chiarire il suo rapporto con la violenza. Esiste anche la necessità di chiarire le relazioni tra i diversi gruppi musulmani in quanto tutti gli esperti convengono che la situazione esplosiva in Medio Oriente esiste soprattutto a causa dei conflitti nell'ambito dell'islam (ossia tra i sunniti e gli sciiti, ecc.). L'Europa deve anche cessare di essere ingenua. Il Dio dell'islam non è identico al Dio cristiano.

Parole chiave: genocidio, sfollati interni (IDPs), persecuzione dei cristiani, rifugiati, libertà religiosa

Part Two

Ecumenical Juridical Thought

Ecumeny and Law, vol. 4 (2016)
pp. 105—125

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The Law of the Church — the Law of Freedom*

Keywords: law, freedom, *Dignitatis Humanae*, law of Church, religious freedom

1. Legislators of the Church's *ius Ecclesiae* idea today

The Study Congress, organized in the Vatican in 2008, by the Pontifical Council for Legislative Texts, entitled: "Canon Law in the Life of the Church. Investigations and Perspectives in Keeping with the Recent Papal Magisterium: On the Occasion of the 25th Anniversary of Promulgating the Code of Canon Law," gave the highest Church legislator an incentive to deliver an occasional speech.[1] In what exactly does this speech's fundamentality, and especially the power of reasoning that brings back memories of the unforgettable allocutions of the theologian of law, as Pope Paul VI was referred to, reside?[2] The answer proves easy: The emphasis of the vital role of the mentioned dicastery — which reminds that

* This article has originally been published under the title "*Libertas religiosa w kościelnym porządku prawnym*." In: *„Reddite ergo, quae sunt Caesaris, Caesari et, quae sunt Dei Deo". Księga jubileuszowa dedykowana Księdzu Profesorowi Józefowi Krukowskiemu z okazji 50-lecia pracy naukowej*. Eds. M. Sitarz, P. Stanisz, H. Stawniak. Lublin 2014, pp. 175—190.

[1] Benedict XVI: *Address to the participants in the Study Congress organized by the Pontifical Council for Legislative Texts on the occasion of the 25th anniversary of the promulgation of the Code of Canon Law* [15.01.2008] — http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/january/documents/hf_ben-xvi_spe_20080125_testi-legislativi.html (accessed: 14.12.2015).

[2] See Ch. Huber: *Papst Paul VI und das Kirchenrecht*. Essen 1999; P. Carlos Olmos: *La fundamentación del Derecho canónico en las alocuciones de Pablo VI*. Roma 2000.

its prerogative is watching over completeness and updating the Church's legislation, and making efforts for the cohesion[3] — is accompanied by the intent of the author of the jubilee speech to direct this retrospective perception, on the set of general law standards of the Latin Church (CIC 1983), toward "the changing circumstances of the historical reality of the People of God"[4] dynamics. These are the challenges of the future recognized "in light of the Church's living Magisterium" that make Benedict XVI once again take the issue of the troublesome features (determinants) *ius Ecclesiae*, which — contemporarily — underscore "the close link that exists between canon law and Church life in accordance with the desire of Jesus Christ."[5]

To some degree the pope makes John Paul II's famous words from the *Sacrae Disciplinae Leges* constitution the starting point of this mini-lecture on the theology of law: "[…] the Church is constituted as a social and visible structure; as such the Church 'must also have norms: in order that her hierarchical and organic structure be visible; in order that the exercise of the functions divinely entrusted to her, especially that of sacred power and of the administration of the sacraments, may be adequately organized; in order that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well defined; in order, finally, that common initiatives undertaken for an ever more perfect Christian life may be sustained, strengthened and fostered by canonical norms'."[6] According to Pope Ratzinger, these words make it possible to capture the rudimental thought, which gives shape to the entire canon law, in the best way. It would be a big simplification, should this law (among others the code law) be perceived exclusively as a set of standards prepared by the Church's legislator. The truth about *ius ecclesiale* is much more complex. Although its quite comprehensive display requires a more complex approach, one thing can be acknowledged at once: the thing that comes to the foreground in the relevant, that is, existential and dynamical depiction[7] of the said phenomenon, is well reflected by a constatation which implies that canon law is an authoritative definition of duties and rights, which have their foundations in the Word of God and sacraments, and as such — are a valid expression

[3] Benedict XVI: *Address to the participants in the Study Congress…*

[4] Ibidem.

[5] Ibidem.

[6] Ioannes Paulus II: *Constitutio apostolica "Sacrae disciplinae leges"* [25.01.1983]. *Acta Apostolicae Sedis* [further: AAS] 75 (1983), Pars 2, p. XI; Benedict XVI: *Address to the participants in the Study Congress…*

[7] Cf. R. Sobański: "Niezmienność i historyczność prawa w Kościele: Prawo Boże i prawo ludzkie." *Prawo Kanoniczne*, vol. 40, nos. 1—2 (1997), pp. 23—44.

of Christ's will.[8] In such a way, according to Benedict XVI, the truth that "the *Code of Canon Law* contains the norms formulated by the Ecclesial Legislator for the good of the person and of the communities of the whole Mystical Body,"[9] should be understood.

The offered introductory remarks direct the papal discourse toward an idea which constitutes the *clou* of the discussed speech, which years ago the outstanding canonist Profesor Józef Krukowski included in a well-crafted, greatly instructive dictum: the entire structure of the Church identifies, as a matter of fact, one relation: Christ's authority — Christian's freedom.[10] "Church's law is first and foremost *lex libertatis*"[11] — Benedict XVI proclaims, giving this speech — similarly to the aforementioned Polish expert in 1980 at the IV International Canon Law Congress in Freiburg[12] — a *par excellence* personalistic context. It means that, first of all, the Church's legal order cannot be, by the means of any measure, brought down to a set of isolated, autonomous regulations, which promulgated: officially valid and effective, should be perceived — invariably (!) — as binding.[13] Such reason-

[8] Cf. Benedict XVI: *Address to the participants in the Study Congress…*

[9] Ibidem.

[10] *Tutta la struttura della Chiesa può essere definita da un'unica relazione: autorità di Cristo — libertà del cristiano* — J. Krukowski: "Libertà e l'autorità nella Chiesa." In: *Les Droits Fondamentaux du Chrétien dans* l'Eglise et dans la Société. Actes du IV[e] e Congrès International de Droit Canonique, Fribourg 6—11.X.1980. Eds. E. Corecco, N. Herzog, A Scola. Fribourg—Freiburg—Milano 1981, p. 160.

[11] Benedict XVI: *Address to the participants in the Study Congress…*

[12] The title of the second chapter of the mentioned Professor Józef Krukowski's congress speech is significant: "L'interpretazione personalistica della relazione: libertà — autorità nella Chiesa" — J. Krukowski: "Libertà e l'autorità…," p. 160.

[13] In the quoted jubilee speech, Benedict XVI falsifies the thesis which suggests that law becomes real, and thereby just, only when the formal requirements are met. Suffice it to say that to refer to a fragment of a papal comment: "[Canon law — A.P] must be bound to the theological foundation that gives it reasonableness and is an essential title of ecclesial legitimacy; on the other hand, it must keep up with the changing circumstances of the historical reality of the People of God. Furthermore, it must be formulated clearly, without ambiguity, and must always be in harmony with the rest of the Church's laws. It is therefore necessary to abrogate norms that prove antiquated; to modify those in need of correction; to interpret — in light of the Church's living Magisterium — those that are doubtful, and lastly, to fill possible *lacunae legis*. As Pope John Paul II said to the Roman Rota: 'The very many expressions of that flexibility which has always marked canon law, precisely for pastoral reasons, must be kept in mind and applied' (*Address to the Roman Rota*, 18 January 1990, n. 4) — Benedict XVI: *Address to the participants in the Study Congress…*; see also R. Sobański: "Słuszność w prawie." *Państwo i Prawo* 56 (2002), no. 8 (666), pp. 3—12; A. Pastwa: "Ochrona praw podmiotowych w kościelnym porządku prawnym: w optyce systemowej zasady aequitas canonica (kan. 221 KPK)." In: *Problemy z sądową ochroną praw człowieka*. Eds. R. Sztychmiler, J. Krzywkowska. Vol. 1. Olsztyn 2012, pp. 41—55.

ing, contaminated with a legal positivism, would introduce, in an obvious way, a disparity between law and life, and as a consequence it would "radically deny the possibility of an anthropological foundation of the law."[14] Meanwhile — in his own way: competent and with a flair of a learned scholar, Professor Remigiusz Sobański expands on the magisterial thought: "argumentation from Church's law is ultimately the argumentation from Church's faith and practice. […] Canonist argumentation ought to be 'clear for values', however, not in the static or quite declarative meaning, but in specifying goods realized by specific entities in specific circumstances. Additionally, what is crucial is to argue not only 'from the point of view of the regulations', but also and at the same time, from the point of view of the addressee of the standards."[15] What conclusions follow from this? Canon law becomes the law of freedom to such an extent — Benedict XVI concludes the main thread of his speech — to which those who are obliged to follow it are familiar with the experience of the immediacy of law. What remains the concern of Church's legislator is the broad exhibition of the *ius canonicum* relation with the life of the Church in *hic et nunc* "programming" of protection and promotion of subjective rights,[16] especially of the most vulnerable people,[17] but also in the system concern for the authenticity of Sacraments (which together with the Word of God constitute the "space" of realizing the personalistic *salus animarum*),[18] so protection "of those delicate 'goods' which […] the Church cannot allow to be deprived of an adequate protection on the part of the Law."[19]

From acknowledging that the law of the Church is the first and foremost *lex libertatis* there is only one step to proving the authenticity and significance of the word uttered by the blessed Antonio Rosmini (†1855). Indeed by referring verbatim to *Filosofia del diritto*, one of the most important monographs of this author, Benedict XVI ponders upon the "flagship" dictum included in it: human person is the essence of law.[20]

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[14] Benedict XVI: "Allocutio ad Tribunal Rotae Romanae in inauguratione Anni Iudicialis [27 I 2007]." *AAS* 99 (2007), pp. 89, 86—91.

[15] R. Sobański: "Kanonistyka i pozytywizm prawniczy." In: *„Ecclesia et status". Księga jubileuszowa z okazji 40-lecia pracy naukowej Profesora Józefa Krukowskiego*. Eds. A. Dębiński, K. Orzeszyna, M. Sitarz. Lublin 2004, pp. 222—223.

[16] Cf. A. Pastwa: "Ochrona praw podmiotowych…," pp. 53—54.

[17] Benedict XVI: *Address to the participants in the Study Congress…*

[18] Cf. R. Sobański: "Iudex veritatem de matrimonio dicit." *Ius Matrimoniale* 4 (1999), p. 191.

[19] Benedict XVI: *Address to the participants in the Study Congress…*

[20] This key fragment, which the pope refers to, is as follows: "[…] la persona ha nella sua natura stessa tutti i costitutivi del diritto: essa è dunque il diritto sussistente, l'essenza del diritto" — A. Rosmini-Serbati: *Filosofia del diritto*. Milano 1841, vol. I, lib. I, cap. 3, p. 225.

"What this great philosopher said with profound insight of human law, we must with all the more reason reassert for canon law: the essence of canon law is the Christian person in the Church."[21]

Does this Benedict XVI's enunciation not evoke associations with John Paul II's leading thought from his speech to the Roman Rota of 1979,[22] dedicated to the current legal and pastoral challenges that the Church has to face? It is enough to remind that in this speech the papal consideration concentrates around the issue of an optimal realization of — particularly promoted *in Ecclesia* (as it was highlighted beforehand) — subjective rights of Christians.[23] If we assume that executing these rights, in the spirit of the *salus animarum* principle, is inscribed in the context of "the unity and communion that are proper to the Church,"[24] then this fact determines, in an obvious way, the "comunion" profile of *exercitio iurium christifidelium*: "never in separation from Church's *communio*" — "always in community of faith, hope, and love."[25] In such a way the papal words about supporting, by the Church, the integral realization of the calling of person-Christian, which is at the same time personal and communal, should be understood.[26]

This constatation suggests a crucial conclusion. Not for a different reason, but due to the respect toward man — a person "equipped" in universal, inalienable, and unalterable rights, and moreover in attributes of supernatural dignity[27] — in pastoral understanding (and application) of law, the temptation of individualistic thought should be overcome.[28] It is difficult not to see that the Church's legal order unveils its authentic countenance in this way, an order which — we can boldly say — in a broad perspective of legal culture potentially constitutes the sign for the world: model

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[21] Benedict XVI: *Address to the participants in the Study Congress…*

[22] Ioannes Paulus II: "Allocutio ad Decanum Sacrae Romanae Rotae ad eiusdemque Tribunalis Praelatos Auditores, ineunte anno iudiciali [17.02.1979]." *AAS* 71 (1979), pp. 422—427.

[23] Cf. Codex Iuris Canonici [further: CIC], can. 223.

[24] Benedict XVI: *Address to the participants in the Study Congress…*

[25] Cf. Ioannes Paulus II: "Allocutio ad Decanum Sacrae Romanae Rotae…," p. 422, n. 1.

[26] Ibidem, p. 423, n. 1.

[27] Cf. P.V. Pinto: *Diritto amministrativo canonico. La Chiesa: mistero e istituzione*. Bologna 2006, pp. 63—65; J. Krukowski: *Kościelne prawo publiczne. Prawo konkordatowe*. Lublin 2013, pp. 119—122.

[28] Cf. Ioannes Paulus II: "Allocutio ad Decanum Sacrae Romanae Rotae…," p. 423, n. 1. Let us recall the fact that Pope John Paul II undertook a complex critique of individualism as a harmful antipersonalism, in relation to the teaching concerning the fundmanetal issue "issue of human freedom," in the *Veritatis Splendor* encyclical — Idem: "Litterae encyclicae *Veritatis splendor* [6.08.1993]." *AAS* 85 (1993), pp. 1158—1161, nn. 31—34.

of civilizational advancement and highest respect toward human dignity.[29] To dispel all doubts it is worth to spell it out: originality and specificity of *ius Ecclesiae* (not only in the area of ideas, but also at the level of *praxis*) is presented only by the *stricte* ecclesiastic view. As John Paul II notices in his famous address to the Roman Rota of 1990, this dependence is well reflected by the pragmatics of the Church's judicature operations. The realization of this "model" judiciary will make the countenance of the Church (*speculum iustitiae*) transparent to such an extent, to which it will take place according to an immanent "community logic," that is, in the trend of communion — creating activity, evangelizational testimony of building — often reconstructing: restoring and strengthening — bonds that reside at the foundations of Church's community, so, in other words, as part of updating *ordo iustitiae*, which Christ himself laid down.[30] Within this optics Benedict XVI's words, which constitute a peculiar bracket fastening together all trains of the discussed speech: *ius Ecclesiae* — as in the nature of things *lex libertatis* — "should be loved and observed by all the faithful," whereas the faithful following of this law signifies, in its essence, adherence to Jesus in love, grow in a fuller meaning.[31]

2. *Ecclesia iuris* and the religious freedom

What is the point of posing a question about religious freedom inside the very Church? — by the means of this rhetorical, title question, the highly respected canonist cardinal Péter Erdö begins his remarks upon the religious freedom in a monograph entitled *Theologie des kanonischen Rechts*.[32] What is characteristic, the essential framework of the answer is already signalled in the first sentence of the said work: The Second Vatican Council clearly declared in *Dignitatis Humanae* that the ceremoniously proclaimed *libertas religiosa* principle constitutes, in its essence, an affirmation of God's gift of human freedom and dignity.[33] As the Hungarian canonist remarks, this clear stance of the Catholic Church has to be tightly connected with a broader "programme" of a consistent promotion

[29] Cf. Idem: "Allocutio ad Romanae Rotae Praelatos, auditores, officiales et advocatos anno iudiciali ineunte [18.01.1990]." *AAS* 82 (1990), p. 876, n. 7.

[30] Ibidem, p. 874, n. 4.

[31] Benedict XVI: *Address to the participants in the Study Congress…*

[32] P. Erdö: *Theologie des kanonischen Rechts. Ein systematisch-historischer Versuch*. Münster 1999, pp. 163—170.

[33] Ibidem, p. 163.

of human rights.[34] To avoid any doubts, at the very beginning of the mentioned document we read: "[Considering the issue of religious freedom — A.P.] the council intends to develop the doctrine of recent popes on the inviolable rights of the human person and the constitutional order of society."[35]

What is crucial is that the *Vaticanum II* fathers aim at emphasizing, in the quoted statement, the continuity of the Catholic doctrine in a subject range, and above all, the grandeur of the merits of the unnamed promoter of conciliar revival Pope John XXIII. What assures us of it — as Cardinal Péter Erdö competently emphasizes — is the provenance of the significant dictum of the second point of the declaration: "the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself."[36] Consequently, what appears to be immensely justifiable is the examination of the main and immediate (diachronically) source of inspiration of this and similar conciliar enunciations, namely: the famous *Pacem in Terris*[37] encyclical. It is sufficient to remind the fact that the connection of this document with the key ideas of Vatican II is so crucial and profound that the name of the above-mentioned pope should be connected with a "breakthrough" in the ecumenical council[38] — in relatively legal areas: ecclesiology (*Lumen Gentium* constitution), ecumenism (*Unitatis Redintegratio* decree, *Nostra Aetate* declaration), and especially of religious freedom (*Dignitatis Humanae* declaration). Taking this research trail — here, of course, quite brief, tailored to relatively narrow research needs — appears to be very promising.

The first, how suggestive words of the prologue announce the depth of the humanistic thought of the author of *Pacem in Terris*: "Peace on

[34] Cardinal Péter Erdö's epistemological and methodological remark is very relevant here: "Die Konzilserklärung versucht, auf zwei miteinander zusammenhängende Grundfragen Antwort zu geben: Die erste ist die Frage nach der Freiheit der Gewissensentscheidung über die Grundwahrheit der Religion; die zweite die nach der freien Ausübung der Religion in der Gesellschaft" — ibidem.

[35] Vatican Council II: *Declaration on Religious Freedom "Dignitatis Humanae"* [7.12.1965] [further: DH], n. 1 — http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed: 14.12.2015).

[36] Ibidem, n. 2; cf. P. Erdö: *Theologie des kanonischen Rechts*..., p. 165.

[37] John XXIII: *Encyclical letter "Pacem in Terris"* [11.04.1963] [further: PT] — http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html (accessed: 14.12.2015); see also Pontificio Consiglio della Giustizia e della Pace: *Lettera enciclica Pacem in terris di sua Santità Giovanni XXIII e Messaggio per la Giornata mondiale della pace 2003*. Città del Vaticano 2003.

[38] S. Berlingò: *L'ultimo diritto. Tensioni escatologiche nell'ordine dei sistemi*. Torino 1998, p. 128.

Earth — which man throughout the ages has so longed for and sought after — can never be established, never guaranteed, except by the diligent observance of the divinely established order."[39] As we can see, the genius and extraordinary sensitivity to human affairs prompt John XXIII, in an exceptional peace message, to open humanism to transcendence,[40] bearing in mind the hermeneutic horizon of the mystery of redemption, realized in the Church and by the Church. The clear message does not leave space for any doubts: reaching true peace is a result of adopting moral order and adhering to its requirements.[41]

According to John XXIII, interpreting the "signs of the times" in the dialogue with the world,[42] peaceful sorting of interpersonal relations

[39] PT, n. 1.

[40] This value of John XXIII's teaching is competently emphasized by Benedict XVI: "Peace concerns the human person as a whole, and it involves complete commitment. It is peace with God through a life lived according to his will. It is interior peace with oneself, and exterior peace with our neighbours and all creation. Above all, as Blessed John XXIII wrote in his Encyclical *Pacem in Terris*, [...] it entails the building up of a coexistence based on truth, freedom, love, and justice. The denial of what makes up the true nature of human beings in its essential dimensions, its intrinsic capacity to know the true and the good and, ultimately, to know God himself, jeopardizes peacemaking. Without the truth about man inscribed by the Creator in the human heart, freedom and love become debased, and justice loses the ground of its exercise" — Benedict XVI: "*Blessed are the Peacemakers.*" *Message for the celebration of the World Day of Peace*, n. 3 — http://w2.vatican.va/content/benedict-xvi/en/messages/peace/documents/hf_ben-xvi_mes_20121208_xlvi-world-day-peace.html (accessed: 14.12.2015).

[41] See PT, n. 48. In the quoted address for the International Peace Day (2013), on the eve of the 50th anniversary of publishing *Pacem in Terris*, Benedict XVI presents a unique interpretation of the words found in this encyclical: "[...] peace presupposes a humanism open to transcendence. It is the fruit of the reciprocal gift, of a mutual enrichment, thanks to the gift which has its source in God and enables us to live with others and for others. The ethics of peace is an ethics of fellowship and sharing. It is indispensable, then, that the various cultures in our day overcome forms of anthropology and ethics based on technical and practical suppositions which are merely subjectivist and pragmatic, in virtue of which relationships of coexistence are inspired by criteria of power or profit, means become ends and vice versa, and culture and education are centred on instruments, technique and efficiency alone. The precondition for peace is the dismantling of the dictatorship of relativism and of the supposition of a completely autonomous morality which precludes acknowledgment of the ineluctable natural moral law inscribed by God upon the conscience of every man and woman. Peace is the building up of coexistence in rational and moral terms, based on a foundation whose measure is not created by man, but rather by God" — Benedict XVI: "*Blessed are the Peacemakers*"..., n. 2.

[42] PT, n. 75; cf. Vatican Council II: *Pastoral Constitution on the Church "Gaudium et Spes"* [7. 12.1965] [further: GS], n. 11 — http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html (accessed: 14.12.2015); International Theological Commission: *Theology Today*: *Principles*, *Perspectives* and *Criteria*, nn. 51—58 — http://www.vatican.va/roman_curia/con

can be only guaranteed by: truth, justice, love, and a genuine freedom of a human being.[43] That is also how the latter reveals itself — hand in hand with the promotion of the law of nature ("order established by God"[44]) — elementary doctrinal assumption of the above-mentioned encyclical, which — it is worth to bear it in mind — impressed a personalistic stigma on the conciliar depiction of the principle of observance of the freedom of conscience and religion, in all its aspects.[45] The foundation of the right to freedom of religion and other rudimental human rights[46] within the area of religious and civic activity (both in the individual and social dimensions) is the idea of both natural and supernatural (!) dignity of a human being.[47] This integral image of *persona humana* was initially used by the pope to proclaim the rights related to moral and cultural values: "[…] man has a natural right to be respected. […] He has a right to freedom in investigating the truth, and — within the limits of the moral order and the common good — to freedom of speech and publication."[48] It is not difficult to guess that subsequently this *passus* was treated by John XXIII as an introduction to the exposition of the renewed idea of religious freedom.[49] And the memorable words could finally be uttered: "[Everyone has the right — A.P.] to worship God in accordance with the right dictated by his own conscience, and to profess his religion both in private and in public."[50]

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gregations/cfaith/cti_documents/rc_cti_doc_20111129_teologia-oggi_en.html (accessed: 14.12.2015).

[43] PT, n. 87.

[44] PT, n. 1.

[45] Cf. J. Krukowski: *Kościelne prawo publiczne*…, pp. 118—135.

[46] "Religious freedom […] is at the basis of all other freedoms and is inseparably tied to them all" — John Paul II: "Epistula *The signal occasion* ad Conradum Waldheim, Consilii Nationum Unitarum Virum a Secretis, XXX expleto anno a *Declaratione Universali Iurium Hominis*" [2.12.1978]. *AAS* 71 (1979), p. 123.

[47] "[…] each individual man is truly a person. His is a nature that is endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights and duties are universal and inviolable, and therefore altogether inalienable. When, furthermore, we consider man's personal dignity from the standpoint of divine revelation, inevitably our estimate of it is incomparably increased. Men have been ransomed by the blood of Jesus Christ. Grace has made them sons and friends of God, and heirs to eternal glory" — PT, nn. 9—10.

[48] PT, n. 12.

[49] Here in an obvious way the papal thought is inscribed in the context of "hermeneutic of renewal in continuity," so in this original *aggiornamento*, which — as Benedict XVI emphasized — remains the only key to understanding the thought of Vaticanum II — Benedict XVI: *Address to the Roman Curia offering them his Christmas greetings* [22.12.2005] — http://w2.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.html (accessed: 14.12.2015).

[50] PT, n. 14.

The change of the paradigm is finally readable here. If so far the papal magisterium perceived the Catholic Church as the subject of religious freedom — as the only custodian of relative truth and Catholics — as its followers, and other religious Christian/non-Christian communities — and their representatives — it was right to tolerate, then from now on the abstract criterion of "relative truth" was substituted with an existential — practical criterion of "righteous conscience."[51] The Vatican II doctrine and the contemporary teaching of popes[52] as the foundation of a renewed depiction of religious freedom — closely connected with accepting full truth about a human being (capable by nature of experiencing objective truth and its voluntary acceptance as a personal good) — in principle create responsibility in conscience for everyone for his *credo* in the area of religious and worldview beliefs. "[…] Because faith-knowledge is linked to the covenant with a faithful God, who enters into a relationship of love with man and speaks his word to him, […] personal knowledge [that — A.P.] recognizes the voice of the one speaking, opens up to that person in freedom"[53] — this freedom requires wider protection in private and public life.

"It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free."[54] It is how St. Augustine's famous postulate *credere non potest homo, nisi volens*[55] found confirmation in conciliar declaration *Dignitatis Humanae*. By referring to the Revelation, the Vatican II fathers proclaimed the right to religious freedom rooted in *dignitas personae* — dignity, which we get to know, on the one hand through the revealed Word of God and on the other — our very mind.[56] However, this time, as Cardinal Walter Kasper, the recent chairman of the Pontifical Council for Promoting Christian Unity, establishes — what was clearly missing was the Christiologic foundation of the Christian image of freedom, to the shape of the "model" presentation of

[51] Cf. J. Krukowski: *Kościelne prawo publiczne*..., p. 118.

[52] It is worth to emphasize that creative undertaking of these John XXIII's ideas, subsequently developed during the Council, we will find in John Paul II's teaching — G. Feliciani: "La libertà religiosa nel magistero di Giovanni Paolo II." *Rivista internazionale dei diritti dell'uomo* 12 (1999), pp. 158—167; *La libertà religiosa negli insegnamenti di Giovanni Paolo II*. Ed. A. Colombo. Milano 2000.

[53] Francis: *Encyclical letter "Lumen fidei"* [5.07.2013], n. 29 — http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20130629_enciclica-lumen-fidei.html (accessed: 14.12.2015).

[54] DH, n. 10; CIC, can. 748 § 2: "No one is ever permitted to coerce persons to embrace the Catholic faith against their conscience."

[55] S. Augustinus: *Contra litteras Petiliani*, Lib. II, cap. 83 — CSEL 52, 112; PL 43, 315.

[56] DH, n. 2.

the *Gaudium et Spes* constitution, but at the same time what had significantly strong foundations was Professor Peter Krämer's outlook,[57] in which he claims that, among others, a strong "internal" impulse to strengthen and develop the participation of followers in the mission of the Church, emerges from the conciliar declaration of the right to religious freedom.[58] A fundamental conclusion, which suggests itself after immersing in the crux of Catholic *de libertate religiosa* teaching, is possible to be defined as follows: remaining on the ground of Vatican II doctrine unjustified would be a distortion of the title relation: law — religious freedom, be it by the means of covering up the differences between depictions of this relation in secular legal orders and canonical

[57] This expert's counter-argument can be understood: "Mir scheint diese Kritik nicht berechtigt zu sein, weil die konziliare Stellungnahme zur Religionsfreiheit keine Konstitution ist, in der eine theologische Lehre im einzelnen entfaltet wird, sondern eine an die ganze Welt gerichtete Deklaration. Diese verfolgt durch die eindrucksvollen Hinweise auf das Beispiel Christi und der Apostel lediglich die Absicht, die natürliche Argumentation zu bestätigen und zu bekräftigen, ohne das Verhältnis zwischen der allgemein menschlichen und der spezifisch christlichen Freiheit näher bestimmen zu wollen" — P. Krämer: "Religionsfreiheit und Absolutheitsanspruch der Religionen — aus der Perspektive des Christentums." In: *Recht auf Mission contra Religionsfreiheit? Das christliche Europa auf dem Prüfstand*. Eds. P. Krämer, S. Demel, L. Gerosa, A.E. Hierold, L. Müller. Berlin 2007, pp. 37—38; see more — P. Krämer: *Religionsfreiheit in der Kirche. Das Recht auf religiöse Freiheit in der kirchlichen Rechtsordnung*. Trier 1981. However, it is worth noticing that even accepting this optics, in which the right to religious freedom is understood as an universal right of man, cannot mean omitting assumptions of an relevant anthropology and soteriology: "The truth is that only in the mystery of the incarnate Word does the mystery of man take on light. [...] For, since Christ died for all men, and since the ultimate vocation of man is in fact one, and divine, we ought to believe that the Holy Spirit in a manner known only to God offers to every man the possibility of being associated with this paschal mystery" — GS, n. 22; cf. Jan Paweł II: *Encyklika „Redemptoris missio"* [7.12.1990], n. 10; see also J. Kreiml: "Der interreligiöse Dialog: zum Verhältnis des Christentums zu den anderen Religionen." *Forum Katholische Theologie* 21 (2005), pp. 136—143. Within this discussion what should count is the stance of the International Theological Commission: "L'«ecclesiocentrismo» esclusivista, frutto di un determinato sistema teologico o di un'errata comprensione della frase «extra Ecclesiam nulla salus», non è più difeso dai teologi cattolici. [...] Il «cristocentrismo» accetta che nelle religioni possa esserci la salvezza, ma nega loro un'autonomia salvifica, a motivo dell'unicità e dell'universalità della salvezza di Gesù Cristo" — Commissione Teologica Internazionale: *Il Cristianesimo e le religioni* (1997), nn. 10—11 — http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1997_cristianesimo-religioni_it.html (accessed: 14.12.2015).

[58] See P. Krämer: "Das Recht auf religiöse Freiheit und seine Relevanz für die innerkirchliche Rechtsordnung." In: *Annuario DiReCom 5/2006: Universalità dei diritti umani. Fra cultura e diritto delle religioni*. Eds. L. Gerosa, A. Neri, L. Müller. Lugano 2006, pp. 137—152.

order, or in the area of the very *ius Ecclesiae* — through deliberate or unknowing belittling of the "system" meaning of the right to religious freedom.[59]

Referring to the first issue, it seems important to notice that the elementary human rights — including the right to religious freedom — to such an extent have raison d'être in the Church's legal order, to which they correspond with their own purpose of order and the fact of its establishment in *ius divinum*.[60] Taking into consideration that the *novum* of the redemptive perspective tells us to see at the foundation of *ordo iustitiae*, defined by the Christ himself, the "higher" justice,[61] which greatly exceeds the "clearly human" justice means — defined by the means of a fundamental principle: *suum cuique tribuere*[62] (the testimony of the genius of humanistic thought present in Greek philosophy and Roman law). The truth about the process of interiorization of "new Christ's law" (*ordo Caritatis*), prompts — especially in scientific contemplation — a radically different approach to the principle of freedom on the mentioned planes. In the secular order the core of the notion of freedom remains "the freedom from" (well rendered in Italian: *libertà da* or *libertà di*),[63] which expresses the right to independence of a subject from any interference coming from the outside — on the one hand, and on the other — to a free self-definition and self-fulfillment. Whereas freedom in the Church's order, understood as "freedom to" (*libertà a*),[64] has to be a sign of, achieved by the means of theonomy, eschatological freedom; its rudimentary criterion is always the anchoring in God.[65] If we, therefore, assume that in the Church's law there is no place for abstract, depersonalized legal precepts, since in this "area" there are people-Christians called *in concreto* to live according to specified rules, then Gaetano Lo Castro is right when he states that: "indeed, freedom does not exist, a free man exists. To respect freedom means to respect the dignity of man. And since what we face

[59] Cf. GS, n. 10; W. Kasper: *Wahrheit und Freiheit. Die „Erklärung über die Religionsfreiheit" des II. Vatikanischen Konzils*. Heidelberg 1988, p. 32.

[60] Cf. R. Bertolino: *Il nuovo diritto ecclesiale tra coscienza dell'uomo e istituzione. Saggi di diritto costituzionale canonico*. Torino 1989, p. 152.

[61] Paulus VI: "Allocutio ad Praelatos Auditores et Officiales Tribunalis Sacrae Romanae Rotae [8.02.1973]." *AAS* 65 (1973), pp. 99—100.

[62] Let us recall how Ulpian defines justice: *Iustitia est constans et perpetua voluntas ius suum cuique tribuens* — D. 1, 1, 10.

[63] Cf. J. Krukowski: "Libertà e l'autorità...," pp. 155—156.

[64] Cf. ibidem, pp. 156—157.

[65] Cf. F. Pizzetti: "L'ordinamento costituzionale per valori." In: *Diritto 'per valori' e ordinamento costituzionale della Chiesa. Giornate canonistiche di studio, Venezia 6—7 giugno 1994*. Eds. R. Bertolino, S. Gherro, G. Lo Castro. Torino 1996, pp. 61—62.

here are not many types of freedom, but only one — of a human being, we should say: a free person."[66]

It is difficult to overestimate the importance of this constatation. Its fundamental meaning can be defined as follows: In the Church's order, in which both *persona humana* autonomy, as well as the binding power of acts, by no means find substantiation in itself, but rather in the Being, which exceeds them — rights and obligations are immanent in relation to the person. Consistently, the pastoral codification effort focused on declaring these obligations[67] is never, since it cannot be, an expression of arbitrary decisions of the shepherds of the Church, since the binding power of the statutory law comes from Christ (*sacra potestas*); it is in Him that both an individual person/Christian, as well as Church community of people, find its ontic foundation.[68]

Here the discourse logic guides us toward the key problem, exhibited in the first part of the title of this study: whereas *ius* is the internal structural dimension of Church's communion,[69] the religious freedom and the integral live message *depositum fidei*, closely related with it, constitute fundamental principles of the Church's legal order. What proves clear here is the fact that both categories *Ecclesia iuris* and *libertas religiosa* remain in a synergic relationship. Firstly, the originality of the community law is not possible to be understood without making oneself aware that its members, as having a new *esse in Christo* existence, respond with a free act of will (as free persons in Christ) to the grace of faith.[70] Secondly, the Church's order, remaining in the service to freedom, has dynamism inscribed in its essence, dynamism which creates conditions to make sure that the Word of God and sacrament pass on, in an authentic and comprehensive way, participation in the life of Triune God.[71]

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[66] C. Lo Castro: "La libertà religiosa e l'idea di diritto." In: *La libertad religiosa: memoria de IX Congreso Internacional de Derecho Canónico*. Mexico 1996, p. 23.

[67] "The meaning of Church's standards and institutions rests in the promotion of followers' participation in the mystery of redemption realized in the Church and by the Church" — R. Sobański: "*Dispensatio gratiae* (Uwagi o stosowaniu prawa kościelnego)." In: „*Vobis Episcopus Vobiscum Christianus*". *Księga Jubileuszowa dedykowana Księdzu Arcybiskupowi Damianowi Zimoniowi*. Eds. W. Myszor, A. Malina. Katowice 2004, pp. 33—34.

[68] Cf. C. Lo Castro: "La libertà religiosa…," p. 40; J. Krukowski: "Libertà e l'autorità…," pp. 160—163.

[69] *Il diritto ecclesiale è inteso come realtà non estrinseca, ma appartiene all'essenza stessa della Chiesa* — L. Gerosa: *Intoduzione al diritto canonico*. Vol. I: *Teologia del diritto ecclesiale*. Città del Vaticano 2012, p. 117.

[70] Cf. R. Sobański: La *Chiesa e il suo diritto. Realtà teologica* e *giuridica del diritto* ecclesiale. Torino 1993, pp. 32—33.

[71] See J. Ratzinger: "Freiheit und Bindung in der Kirche." In: *Les Droits Fondamentaux du Chrétien*…, pp. 37—53. What is worth noticing within this context is Peter

It is worth to briefly ponder upon the detailed conclusions that emerge from this constatation. The community of the Church (*communio*), boldly presented to the world by Pope Paul VI as *Ecclesia iuris*,[72] is such not as a result of accepting external law, but because of its own, immanent legal order. Two excerpts of the *Gaudium et Spes* constitution — put together — give this truth appropriate depth. In the 45th point the Council fathers preach: "[…] the Church is 'the universal sacrament of salvation', simultaneously manifesting and exercising the mystery of God's love"; and earlier, in point 17 we read: "man's dignity demands that he act according to a knowing and free choice that is personally motivated and prompted from within." If today we see in these texts an invitation to an integral interpretation of system determinants of Church's legal structure — around the triad: Church community—religious freedom—bonds of faith[73] — then we have to agree that an invaluable role in their recognition belonged to the initiator of the conciliar *aggiornamento* and revival of the Code of Canon Law by Pope John XXIII.[74]

The Church lives as a communion — a communal life of people, who through a free act of will accepted the gift of faith, the grace of redemption offered to them by Christ. His sanctifying presence *in Ecclesia* and *per Ecclesiam* — in a visible form: in the Word of God and sacraments — is a sign that manifests the love of God; this love is permanently spilt in human hearts by the Spirit of Father and Son. The answer of faith and love on the particular follower's part[75] is a straightforward consequence and development of the mentioned constitutive legal event. What goes shoulder to shoulder with the acquisition of a free person's existence, brought back to life in baptism, is obtaining own clear *esse* in the mystic body of Christ. Since the Holy Spirit incessantly gives his gifts, every

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Krämer's remark: "Nicht trotz, sondern wegen des Absolutheitsanspruches muss die Kirche sensibel sein für religiöse Freiheit, um ihre Botschaft in glaubwürdiger Weise den Menschen von heute nahe bringen zu können" — P. Krämer: "Religionsfreiheit und Absolutheitsanspruch…," p. 44.

[72] "In realtà, lo 'Spirito' e il 'Diritto' nella loro stessa fonte formano un'unione, in cui l'elemento spirituale è determinante; la Chiesa del 'Diritto' e la Chiesa della 'carità' sono una sola realtà, della cui vita interna è segno esteriore la forma giuridica" — Paulus VI: *Discorso ai partecipanti al II Congresso internazionale di diritto canonico* [17.09.1973], n. 5 — http://www.vatican.va/holy_father/paul_vi/speeches/1973/september/documents/hf_pvi_spe_19730917_diritto-canonico_it.html (accessed: 14.12.2015).

[73] Cf. P. Krämer: *Kirchenrecht*. Bd I: *Wort — Sakrament — Charisma*. Stuttgart—Berlin—Köln 1992, pp. 23—27.

[74] Cf. G. Feliciani: *La libertà religiosa*…, pp. 158—159.

[75] CIC, can. 748 § 1: "All persons are bound to seek the truth in those things which regard God and his Church and by virtue of divine law are bound by the obligation and possess the right of embracing and observing the truth which they have come to know."; cf. P. Erdö: *Theologie des kanonischen Rechts*…, pp. 166—167.

Christian has new areas of activity and a new dimension of tasks in the service of building unity and communion.[76] What is ontically inscribed in such Church's freedom order is the communication of redemptive gifts — according to the criterion of participation and principles of diaconia. Whereas the service to the communion is for a baptized individual a duty, the Church law is an indispensible tool used to formulate and organize the realization of this duty optimally.[77]

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The legal structure of the Church cannot allow for the universal service of redemption, which the People of God — Mystical Body of Christ fulfills for the world. Like the entire Church, also its law serves in the function of the sign. Indeed, the legal organization of Church's life should be a "clear sign of grace that lives in the community and spreads through it."[78] Even if the lack, in people who do not belong to the Church, of an interpersonal relation, based on faith, to the Church's legislator, devoids the latter one of effective foundations to establish a redemptive dialogue with them on a legal plane, then we still have to assume that the legislative activity of the Church — addressed directly to the followers — always serves the entire humankind, according to a paradigm: the order of justice is the order of love. In that way the sameness of the aim of Church's law *ad intra* and *ad extra* is depicted. The Church's legislative activity — based on the assumption of the unity of God and Church's law[79] — serves to the work of unifying all people and everything in Christ, and through that broadening the God's communion to the entire world.[80]

We are free to assume that the offered remarks, although embedded in ecclesiological doctrine of the Catholic Church, have their ecumenical dimension.[81] Indeed it is true that every genuinely Christian activity is at the same time ecumenical, it aims at unity given and pre-defined by Christ. Completely authorized, after the Second Vatican Council, affirming of the ecclesiastic character of Churches and Christian communities ("Baptism […] establishes a sacramental bond of unity which links all

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[76] Cf. GS, n. 1.

[77] See R. Sobański: "Recht und Freiheit des in der Taufe wiedergeborenen Menschen." In: *La norma en el Derecho Canonico. Actas del III Congreso Internacional de Derecho Canonico*, Pamplona, 10—15 de octubre de 1976. Pamplona 1979, pp. 877—896.

[78] Idem: *Kościół — prawo — zbawienie*. Katowice 1979, p. 191.

[79] Idem: *Recht und Freiheit*…, pp. 883—884.

[80] Cf. Idem: *Kościół*…, pp. 190—192.

[81] A broader exposition on this subject does not fit in the material framework of this study.

who have been reborn by it"[82]) means that the law of this communities constitutes *legitimum ius ecclesiale*, and what follows from it — every baptized individual is a rightful subject of Christian activity, which he should develop in his own religious homeland,[83] as a part of own autonomous legal order, which remains the unchangeable Church's order of freedom.

[82] Vatican Council II: *Decree on Ecumenism "Unitatis Redintegratio"* [21.10.1964], n. 22 — http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html (accessed: 14.12.2015).

[83] R. Sobański: "Ökumenismus und Verwirklichung der Grundrechte der Getauften." In: *Les Droits Fondamentaux du Chrétien*..., pp. 713—737.

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Andrzej Pastwa

The Law of the Church — the Law of Freedom

Summary

What is the point in posing a question about religious freedom in the bosom of the very Church? (Péter Erdö) — this rhetorical question, which constitutes the structure of this study, directs the thought toward one of the most important documents of Vatican II. In the famous declaration *Dignitatis Humanae* the Council Fathers clearly implied that the key principle *libertas religiosa* is, in its essence, an affirmation of God's gift of human freedom and dignity. "Church law is, first and foremost, *lex libertatis*" — Benedict XVI proclaims nowadays, giving this speech a *par excellence* personalistic context. The Church's legal order cannot be, by the means of any measure, brought down to a set of isolated, autonomous regulations, which promulgated: officially valid and effective, should be perceived — invariably — as binding. Such reasoning, contaminated with a legal positivism, would introduce, in an obvious way, a disparity between law and life, and as a consequence it would radically deny the possibility of an anthropological foundation of the law. Whereas *ius* is the internal structural dimension of Church's commu-

nion, the religious freedom and the integral live message *depositum fidei*, closely related with it, constitute fundamental principles of the Church's legal order. What proves clear here is the fact that both categories, *Ecclesia iuris* and *libertas religiosa*, remain in a synergic relationship. The remarks offered in this study, although embedded in ecclesiological doctrine of the Catholic Church, have their ecumenical dimension. Indeed it is true that every genuinely Christian activity is at the same time ecumenical: aims at unity given and pre-defined by Christ. Completely authorized, after the Second Vatican Council, affirming of the ecclesiastic character of Churches and Christian communities means that the law of this communities constitutes *legitimum ius ecclesiale*, and what follows from it — every baptized individual is a rightful subject of Christian activity, which he should develop in his own religious homeland, as a part of own autonomous legal order, which remains the unchangeable Church's order of freedom.

Andrzej Pastwa

Le droit de l'Église — étant le droit de liberté

Résumé

Quel est le sens de poser des questions sur la liberté religieuse au sein de l'Église elle-même ? (Péter Erdö) — cette question rhétorique, constituant la base du présent article, dirige notre pensée vers l'un des plus importants documents du Concile Vatican II. Dans la fameuse déclaration *Dignitatis humanae*, les pères du Concile ont explicitement donné à comprendre que le principe fondamental *libertas religiosa* est dans son essence l'affirmation du don divin de la liberté et de la dignité de l'être humain. « La loi de l'Église est, avant tout, *lex libertatis* » — proclame Benoît XVI, tout en donnant à ces propos un contexte purement personnaliste. L'ordre juridique de l'Église ne peut nullement être réduit à un catalogue de règles isolées et autonomes qu'il faut considérer immuablement, en tant que promulguées (c'est-à-dire formellement importantes et efficaces), comme valides. Une telle mentalité, infectée par le positivisme juridique, introduirait de façon évidente une dissonance entre le droit et la vie, et, en effet, exclurait radicalement la possibilité d'appuyer le droit sur un fondement anthropologique. Si *ius* est une dimension structurale interne de la communion ecclésiastique, la liberté religieuse et le message intégral vivant *depositum fidei* (strictement lié à cette liberté) constituent les principes fondamentaux de l'ordre juridique de l'Église. En l'occurrence, il paraît évident que *Ecclesia iuris* et *libertas religiosa* restent dans une relation synergique de catégories. Les remarques formulées dans l'article, bien qu'enracinées dans la doctrine ecclésiologique de l'Église catholique, ont leur dimension ścuménique. Il est cependant vrai que toute activité authentiquement chrétienne est en même temps ścuménique : elle aboutit à une seule activité donnée et indiquée par le Christ. Complètement légitime après le Concile Vatican II, l'affirmation du caractère ecclésiastique des Églises et communautés chrétiennes signifie que c'est *legitimum ius ecclesiae* qui constitue le droit de ces organisations et, ce qui en résulte, chaque personne baptisée est un sujet de l'activité chrétienne jouissant de tous ces droits. Cela étant, elle devrait développer cette activité dans sa patrie et dans le cadre de son propre ordre juridique autonome qui, quant à lui, reste invariablement un ordre ecclésiastique de libertés.

Mots clés : droit, liberté, *Dignitatis humanae*, droit de l'Église, liberté religieuse

Andrzej Pastwa

La legge della Chiesa — legge della libertà

Sommario

Qual è il senso della domanda sulla libertà religiosa in seno alla Chiesa stessa? (Péter Erdö) — questa domanda retorica che costituisce la trama del presente studio, orienta il pensiero verso uno dei documenti più importanti del Vaticanum II. Nella famosa dichiarazione *Dignitatis humanae* i padri del Concilio lasciarono intendere chiaramente che il principio cruciale della *libertas religiosa* è nella sua essenza l'affermazione del dono divino della libertà e della dignità della persona umana. "La legge della Chiesa è anzitutto *lex libertatis*" — proclama nei tempi contemporanei Benedetto XVI, conferendo a tale affermazione un contesto *par excellence* personalistico. L'ordine giuridico della Chiesa non si può ridurre in alcuna misura ad una raccolta di norme isolate, autonome che, quando promulgate, formalmente valide ed efficaci devono essere considerate — immutabilmente — vincolanti. Tale modo di pensare, contaminato dal positivismo giuridico, introdurrebbe in modo evidente uno iato tra la legge e la vita, e di conseguenza escluderebbe radicalmente la possibilità di basare la legge sul fondamento antropologico. Se lo *ius* è la dimensione strutturale interna della comunione ecclesiale, allora la libertà religiosa ed il messaggio integrale vivo del *depositum fidei*, strettamente correlato alla stessa, costituiscono i principi fondamentali dell'ordine giuridico della Chiesa. Appare ora già evidente il fatto che l'*Ecclesia iuris* e la *libertas religiosa* rimangono in un legame sinergico. Le osservazioni avanzate nello studio, malgrado siano radicate nella dottrina ecclesiologica della Chiesa cattolica, hanno una loro dimensione ecumenica. È vero infatti che ciascuna attività autenticamente cristiana è al tempo stesso ecumenica: mira all'unità data ed imposta da Cristo. L'approvazione, pienamente autorizzata dopo il Concilio Vaticano II, della natura ecclesiale delle Chiese e delle comunità cristiane significa che il diritto di tali società è costituito dal *legitimum ius ecclesiale*, e ciò che ne consegue — ciascun battezzato è un soggetto in possesso di tutti i diritti all'attività cristiana che è tenuto a sviluppare nella sua patria religiosa, nell'ambito del suo ordine giuridico autonomo che rimane invariabilmente l'ordine ecclesiale della libertà.

Parole chiave: diritto, libertà, *Dignitatis humanae*, legge della Chiesa, libertà religiosa

Ecumeny and Law, vol. 4 (2016)
pp. 127—143

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Freedom of Conscience in the Code of Canon Law

Keywords: freedom, Catholic Church, canon law, rights and duties, believers, liturgy, theology

1. Freedom within the full communion of the Catholic Church

It is clear that freedom of conscience of the faithful in the Church must be based on other principles than those of the secular law. The latter facilitates individual liberties through the principle of non-intervening of state power in the private sphere. This forms the so-called *status negativus* or *libertatis*, respectively.[1] A classic instance of this is the formulation found in the First Amendment to the US Constitution (1791): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2]

[1] "The negative status is characteristic especially for expressions of human freedom in the state and his autonomy towards the state. The essence of this concept is that the state must abstain from intervention in the special status of the citizen (this is the constitutionally delineated self-limitation of the state)." — V. Pavlíček et al.: *Ústavní právo a státověda. II díl. Ústavní právo České republiky.* Praha: Leges, 2011, p. 476.

[2] The Constitution of the United States of America. US Government Printing Press Office. Washington 2007, p. 13.

However, in the Catholic Church things are different. The goal of her legislation is to create a framework for passing on and celebrating the faith; only within this framework free choice can be variously exercised in the multiform manifestations of life lived in faith. While in the civil sphere legal order should primarily secure freedom, the canon law aims at assisting and pursuing life in faith. In this perspective, setting limits for professing faith — renouncing of which results in leaving the communion of the Church — does not contradict freedom of conscience of the Catholic faithful. The Code of Canon Law confirms this by establishing self-enacted penalty of excommunication *latae sententiae* in the case of those who apostatised (*apostatae*), committed an act of heresy (*haeretici*), or schism (*schismatici*).[3]

Nevertheless, we need to add that dogmatics typically distinguishes between a material and formal heresy. The 1917 Code of Canon Law knew both of the forms: non-Catholic Christians were called "heretics and schismatics"[4] and — similarly to the new code — it threatened with a penalty of excommunication for heresy currently held by a Catholic Christian.[5] However, with regard to ecumenical efforts, the post-conciliar code uses the terms "separated brothers (and sisters)" (*fratres seiuncti*)[6] or "brothers (and sisters) not in full communion with the Catholic Church" (*fratres qui in plena communione cum Ecclesia catholica non sunt*).[7]

Both codes also differ in determining the addressees of their merely ecclesiastical norms, but not in relation to the divine law whose norms are obligatory for all people. The former code did not respect the legitimacy of a different Christian identity other than the one in a visible communion of the Catholic Church,[8] therefore, it addressed its norms — albeit in vain — to all Christians regardless of confession[9]; the 1983 Code imposes self-limitation on its normativity only to the Christians in full communion with the Catholic Church based on ecumenical considerations: "Merely ecclesiastical laws bind those who have been baptized in the Catholic Church or received into it, possess the efficient use of reason,

[3] Cf. CIC/1983, can. 1364.

[4] See, for instance, can. 731 § 2 CIC/1917.

[5] CIC/1917, can. 2314.

[6] CIC/1983, can. 825 § 2.

[7] CIC/1983, can. 1124.

[8] "The position of the Church towards non-faithful is more moderate than towards non-Catholics, because non-Catholics are defiant according to the views of the Church: they understand Christianity, yet they detest Catholicism" — K. Henner: *Základy práva kanonického. Část druhá. Právo platné*. Praha: Self-published, 1921, p. 428.

[9] Cf. CIC/1917, can. 12.

and, unless the law expressly provides otherwise, have completed seven years of age."[10]

The visible unity of the Church is the goal of the ecumenical movement, however, it is not a reality yet; the code, therefore, imposes penal sanctions on those sacred ministers of the Catholic Church who would participate in sacred rites in a manner which does not correspond to the mutual communion of the Churches: "A person guilty of prohibited participation in sacred rites (*communicatio in sacris*) is to be punished with a just penalty."[11] This form of prohibited inter-communion refers to Eucharistic inter-celebration: "Catholic priests are forbidden to concelebrate the Eucharist with priests or ministers of Churches or ecclesial communities who do not have full communion with the Catholic Church."[12] However, if it relates to a type of worship where the Eucharistic communion as a sign of the visible unity of the Catholic Church does not need to be protected, it is not only possible, but desirable for Catholic Christians to freely make use of the options offered to them by the Ecumenical Directory, that is, a survey of the application norms concerning ecumenism: "In liturgical celebrations taking place in other Churches and ecclesial Communities, Catholics are encouraged to take part in the psalms, responses, hymns and common actions of the Church in which they are guests. If invited by their hosts, they may read a lesson or preach."[13]

2. The priority of obligations over rights

In contrast to legal civilistics, the canon law does not structure its legislation on the basis of a hierarchy of legal force, whereby constitutional norms would stand on the top. Such a concept was considered in the project of the Fundamental Law of the Church (*Lex Ecclesiae fundamentalis*): it presupposed a single collection of norms for the entire Catholic Church (including the Oriental churches), similar to state constitutions also as regards the basic rights of the faithful. However, in the course of the work on the codification of the new Code of Canon Law, this project was abandoned.[14]

[10] CIC/1983, can. 11.

[11] CIC/1983, can. 1365.

[12] CIC/1983, can. 908.

[13] *Directory for the Application of Principles and Norms on Ecumenism*, Art. 118.

[14] "[...] so — as regards the legal force — a canon stipulating the collegiality of the College of Bishops with the pope is just as weighty as the provision that every page of a court file should be numbered and signed by the notary. The result of this is that

As a result, the enumeration of the obligations and rights of Catholic Christians is doubled in both the Code for the Latin Church and in the Code of Canons of the Eastern Churches.[15] Anyway, the attempt to create a "Constitution of the Catholic Church" was subject to severe criticism.[16]

Contrary to the tendency to emphasise rights without the corresponding obligations, it is symptomatic for both of these catalogues that their very name stresses obligations (*obligationes*) of the Christians to the communion of the Church prior to claiming one's rights (*iura*). This delineates the basic space within which Catholic Christians realize their free decision-making; in fact, this is also the difference as regards the status of the citizen in relation to the state power in a democratic state based on the rule of law.[17] The exercise of freedom alone does not imply individual licence: "In exercising their rights, the Christian faithful, both as individuals and gathered together in associations, must take into account the common good of the Church, the rights of others, and their own duties toward others."[18] The ecclesiastical concept of the standing of a Catholic Christian should also be at a distance from the claiming attitude, which is nowadays represented especially in the multiplication of the so-called fourth generation of human rights.[19] However, this does not mean Cath-

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instead of a thorough awareness of the most important 'constitutional norms' among the general public — albeit at the expense of the other norms 'for the specialists' — there is no awareness at all (except for mediated information from other, non-legal sources" — A. I. Hrdina: "K vybraným aspektům zákonnosti v církvi." *Revue církevního práva* č. 10—2 (1998), pp. 81—90, especially p. 83.

[15] CIC/1983, can. 208—223; CCEO, can. 7—26.

[16] "Through indiscretion the proposals from 1969, 1971 and 1976 reached the public. This led to criticism among the professionals: from the theological point of view, the target of the criticism was the selection and the enactment of the theological theses, from the juridical point of view, the criticism targeted the intention to grant this constitution superior (constitutional) force, which could then be used to measure the other norms." — W. Böckenförde: "Neuere Tendenzen im katholischen Kirchenrecht. Divergenz zwischen normativem Geltungsanspruch und faktischer Geltung." In: N. Lüdecke, G. Bier (eds.): *Freiheit und Gerechtigkeit in der Kirche. Gedenkschrift für Werner Böckenförde*. Würzburg: Echter Verlag, pp. 111—131, p. 114.

[17] "State constitutions, which seek to guarantee the citizens (at least in general outline) as broad a space of autonomy as possible and not to bother them with the contributions and performances, first talk about right and only then about obligations. In the canon law, however, obligations precede the rights [...] because through the supreme commandment of love, Christians are first called to give then to accept (cf. Acts 20, 35) and in case of necessity sacrifice one's own benefit to the common good as fraternal mutuality requires"— L. Chiappetta: *Il Codice di Diritto Canonico. Commento giuridico-pastorale* I. Napoli: Edizioni Dehoniane, 1988, p. 273.

[18] CIC/1983, can. 223 § 1.

[19] "Typically, this include the right to favourable environment, the so-called 'solidarity rights', right to peace, right to information in the cyberspace, right to development

olics should not rely on the dispensation of justice securing their own rights: "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law."[20]

On the other hand, the Church requires that the faithful are not discriminated against from the outside, although even in their activities in the secular society the lay Christians should be mindful of their obligations to the Church: "The lay Christian faithful have the right to have recognized that freedom which all citizens have in the affairs of the earthly city. When using that same freedom, however, they are to take care that their actions are imbued with the spirit of the gospel and are to heed the doctrine set forth by the Magisterium of the Church. In matters of opinion, moreover, they are to avoid setting forth their own opinion as the doctrine of the Church."[21] The canon law also makes an appeal to a responsible stance of the Christians accompanying their mature manifestations of obedience towards ecclesiastical superiors: "Conscious of their own responsibility, the Christian faithful are bound to follow with Christian obedience those things which the sacred pastors, inasmuch as they represent Christ, declare as teachers of the faith or establish as rulers of the Church."[22]

3. Freedom to accept the Catholic faith and the choice of the state of life

Nevertheless, obedience must not be expanded beyond the Church: "No one is ever permitted to coerce persons to embrace the Catholic faith against their conscience."[23] This covers not only external physical coercion, as we know it from numerous lamentable examples, but also the liberty from any psychological pressure which would deprive the individ-

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and a common human heritage, right to death or free use of drugs, rights of smokers and non-smokers, rights of some social minorities, human rights of animals, right to cleanness in the ecospace (right to calm, quiet and darkness, etc.), right to sport, right to determine the sex of your future child, right not to be monitored, right to security (personal security) etc." — V. Zoubek: *Pravověda a státověda. Úvod do právního a státovědného myšlení*. Plzeň: Aleš Čeněk, 2010, p. 93.

[20] CIC/1983, can. 221 § 1.

[21] CIC/1983, can. 227.

[22] CIC/1983, can. 212 § 1.

[23] CIC/1983, cán. 748 § 2.

ual of the possibility to make the choice or of the responsibility for the individual decision.[24] In the legislation we find in the code, the Catholic Church proclaims the principle of the freedom of conscience as internally obligatory. On a more general level, one could perhaps substitute the wording "to embrace the Catholic faith" with the formulation "to embrace any faith." Nevertheless, once for all and in a definitive manner, the Church wished to clarify for herself and in the face of the world the ambiguities in the relation of its two defining principles: proclaiming the Gospel based on Christ's mandate,[25] and the respect to the freedom of conscience in conformity with the conciliar and post-conciliar Magisterium.[26] The proclamation itself should take into account those who are addressed: "By the witness of their life and word, missionaries are to establish a sincere dialogue with those who do not believe in Christ so that, in a manner adapted to their own temperament and culture, avenues are opened enabling them to understand the message of the gospel."[27] In the Code of Canons of the Eastern Churches, the dissemination of the Gospel should avoid any form of dishonest proselytism, of which the Church is sometimes accused:[28] "It is strictly forbidden to compel someone, to persuade him in an inappropriate way, or to allure him to join the Church; all the Christian faithful are to be concerned that the right to religious freedom is vindicated so that no one is driven away from the Church by adverse harassment."[29]

The principle of free acceptance of faith can, however, collide with the understanding of baptism as a necessary means for salvation: "Baptism, the gateway to the sacraments and necessary for salvation by actual

[24] "Nevertheless, can. 748 § 2 is criticised for being incomplete, because the protection of conscience against any form of coercion covers only the acceptance of faith, while no mention is made about the freedom of keeping the faith" — S. Demel: *Handbuch Kirchenrecht. Grundbegriffe für Studium und Praxis*. Freiburg im Breisgau: Herder, 2010, p. 529.

[25] Mark 16:15: "Go into all the world and preach the gospel to all creation."

[26] "All coercion and claim to be the secular arm of the law, all *compelle intrare* is abandoned" — J. Hanuš: *Křesťanství a lidská práva*. Brno: CDK—Praha: Vyšehrad, 2002, p. 24.

[27] CIC/1983, can. 787 § 1.

[28] "From the perspective of the Orthodox Church, this refers to the criticized proselytism of the Catholic Church on the canonical territories of Russian Orthodox Church. The Russian Orthodox Church perceives the activity of the Catholic Church in the Russian Federation as introducing Western, that is, alien cultural influences and forms of thinking" — M. Šmid: "Ruská pravoslávna cirkev a Katolícka cirkev v kontexte zjednocovania Európy." In: *Ročenka Ústavu pre vzťahy štátu a cirkvi 2003*. Eds. M. Moravčíková, E. Valová. Bratislava: Ústav pre vzťahy štátu a cirkvi, 2004, pp. 166—173, p. 167.

[29] CCEO, can. 586.

reception or at least by desire […].”[30] In dealing with the aporia, the code favours infant baptism: “An infant of Catholic parents or even of non-Catholic parents is baptized licitly in danger of death even against the will of the parents.”[31] This regulation reproduces a similar canon from the 1917 Code.[32] In the course of the codification, attempts were made to alter it, they, however, proved unsuccessful.[33] In the meantime, theological reflection on the salvation of non-baptised infants has progressed; nevertheless, even the conclusions of the International Theological Commission are not persuasive enough to lead to an alteration in regulation within the canon law.[34]

The decision of individual faithful should also be free as regards the choice of the state of life or of a particular spiritual vocation. The Church has been clear on this issue for ages, so although the post-conciliar canonical regulation of liberties in this field has adjusted to the current situation, basically it still follows the traditional doctrine of the Church: this was based on the natural law argumentation, as it is apparent in the case of the deficiencies of the marital consent, that is, the use of violence (*vis*) or the arousal of grave fear (*metus gravis*):[35] “A marriage is invalid if entered into because of force or grave fear from without, even if unintentionally inflicted, so that a person is compelled to choose marriage in

[30] Cf. CIC/1983, can. 849.

[31] CIC/1983, can. 868 § 2.

[32] CIC/1917, can. 750 § 1.

[33] “Major changes were introduced into this paragraph in the first draft of the sacramental law in 1975. Under this provision, a child may legally be baptised in peril of his/her life only unless both parents or legal representative explicitly express the wish not to do so. In the 1980 draft, one can again find the formulation ‘against the will of the parents’ with the limitation that baptism should not cause the danger of hating religion. However, it did not take long and the reference to the potential hatred towards religion was crossed out again. The rationale for this explained that the angry reaction to the baptism against the will of the parents is lesser evil” — F. Bernard: “Svoboda rozhodování v novém církevním právu.” *Revue církevního práva* č. 7—2 (1997), pp. 65—80, pp. 70—71.

[34] “Our conclusion is that the many factors that we have considered above give serious theological and liturgical grounds for hope that unbaptised infants who die will be saved and enjoy the Beatific Vision. We emphasise that these are reasons for prayerful hope, rather than grounds for firm knowledge” — Mezinárodní teologická komise: *Naděje na spásu pro děti, které umírají nepokřtěné* (The hope of Salvation for infants who die without being baptised). Praha: Krystal, 2008, pp. 60—61.

[35] “According to the commentaries, grave physical violence excludes the validity of the marriage on the basis of natural law; as regards assessing the fear, the views differ: some state this is a provision of Church Law, fewer authors talk about natural law, and some pass over this question in silence.” — D. Němec: *Manželské právo katolické církve s ohledem na platné české právo*. Praha: Krystal—Kostelní Vydří: Karmelitánské nakladatelství, 2006, p. 120.

order to be free from it."[36] Accepting the sacrament of ordination also requires complete freedom: "A person must possess due freedom in order to be ordained. It is absolutely forbidden to force anyone in any way or for any reason to receive orders or to deter one who is canonically suitable from receiving them."[37] Finally, regarding religious men and women, even for the profession of temporary vows (*professio temporaria*),[38] one must dispose of due freedom: "For the validity of temporary profession it is required that […] the profession is expressed and made without force, grave fear, or malice."[39] These entire component regulations concretize the fundamental right formulated in the code in a brief normative thesis: "All the Christian faithful have the right to be free from any kind of coercion in choosing a state of life."[40]

4. The right to worship in one's own rite and spirituality

"The Christian faithful have the right to worship God according to the prescripts of their own rite approved by the legitimate pastors of the Church and to follow their own form of spiritual life so long as it is consonant with the doctrine of the Church."[41] This formulation succinctly expresses the fact that the Catholic Church is not (and has never been) a monolith: the faithful have, therefore, access to diverse forms of experiencing and practicing their spiritual life. Also in this case, the boundary of freedom is the conformity of a particular spirituality with the faith of the whole Church.

The right to worship in one's own right cannot be granted without the corresponding willingness of the sacred ministers to comply with the approved liturgical books. Since the period after Vatican II was also marked by excessive creativity of the celebrants of the liturgy,[42] the Apos-

[36] CIC/1983, can. 1103.

[37] CIC/1983, can. 1026.

[38] "Primarily, their goal is pedagogical: confirming a comprehensive formation of the personality which began in the novitiate in the perspective of the profession of the solemn vows. The simple vows are not part of the ancient institutions of monastic law, as it is confirmed by the documents attached to Canon 574 § 1 CIC/1917." — B. W. Zubert: *Řeholní právo. Instituty zasvěceného života a společnosti apoštolského života*. Olomouc: Matice cyrilometodějská, 1996, pp. 193—194.

[39] CIC/1983, can. 656 4°.

[40] CIC/1983, can. 219.

[41] CIC/1983, can. 214.

[42] "I believe the days are over when priests themselves created Eucharistic prayers virtually for every Sunday. This was time, when e.g. in Belgium or the Netherlands, there

tolic See was trying to establish a disciplinary framework to make sure the Roman Rite was celebrated in accordance with the missal and other liturgical regulations: "it is the right of all of Christ's faithful that the Liturgy, and in particular the celebration of Holy Mass, should truly be as the Church wishes, according to her stipulations as prescribed in the liturgical books and in the other laws and norms. Likewise, the Catholic people have the right that the Sacrifice of the Holy Mass should be celebrated for them in an integral manner, according to the entire doctrine of the Church's Magisterium."[43] The faithful are robbed of this right by arbitrary improvisation or uncontrolled liturgical creativity.[44]

In fact, it was also liturgical excesses which have led groups of Catholic faithful of the Latin rite to give preference to the liturgy according to the Tridentine Missal of Pius V, which was last revised by John XXIII, at the time when Vatican II was opened. Given the accomplished schism (the Lefebvre case) which Benedict XVI sought to remove, the very same pope deemed it as appropriate to expand and simplify the access of the faithful to "traditional" liturgy. This is also buttressed by the fact that the pope in the Apostolic letter of 2007[45] does not proceed straight to enumerating the individual normative articles, but first appreciates the spiritual richness reflected in the ancient rite: "It is well known that in every century of the Christian era the Church's Latin liturgy in its various forms has inspired countless saints in their spiritual life, confirmed many peoples in the virtue of religion and enriched their devotion."[46] From the perspective of the continuity of liturgical law, it is remarkable — according to the pope — that at no time was formally abrogated the existing liturgy: "It is therefore permitted to celebrate the Sacrifice of the Mass following the typical edition of the Roman Missal, which was promulgated

were hundreds of them! Personally, I think this is more a verbiage: in fact, no one can really imagine that one can remould the same matter over so many times to arrive at a really new expression without endangering orthodoxy" — L. Pokorný: *Prostřený stůl*. Praha: Ústřední církevní nakladatelství, 1990, p. 119.

[43] *Redemptionis Sacramentum. Instrukce o tom, co se má zachovávat a čeho je třeba se vyvarovat ohledně eucharistie*, dokument Kongregace pro bohoslužbu a svátosti z 25. března 2004 (*Instruction Redemptionis Sacramentum*, the document of the Congregation for Worship and Sacraments, 25 March 2004), Praha: Česká biskupská konference, 2005, čl. 12, p. 6.

[44] "This communion with the single subject of the Church allows different forms and includes vital development. At the same time, however, it excludes wilfulness. This applies for individuals, for communities, for the hierarchy and the lay people" — J. Ratzinger: *Duch liturgie*. Brno: Barrister & Principal, 2006, p. 146.

[45] Motu proprio *Summorum Pontificum*. *Acta Apostolicae Sedis* 90 (2007), pp. 776—781; also in: *Acta České biskupské konference* 3(2008), pp. 50—54.

[46] *Summorum pontificium*, Introduction.

by Blessed John XXIII in 1962 and never abrogated, as an extraordinary form of the Church's Liturgy."[47] The subsequent instruction of the Papal Commission *Ecclesia Dei* presents the mutual connection of both rites: "The Roman Missal promulgated by Pope Paul VI and the last edition prepared under Pope John XXIII, are two forms of the Roman Liturgy, defined respectively as *ordinaria* and *extraordinaria*: they are two usages of the one Roman Rite, one alongside the other. Both are the expression of the same *lex orandi* of the Church. On account of its venerable and ancient use, the forma *extraordinaria* is to be maintained with appropriate honour."[48]

The right to one's own rite — not only liturgical, but encompassing also manifestations of spirituality — is even more weighty in relation to Eastern Catholic Churches. In the code, the Church expresses its resolve to protect these traditional manifestations of the faith. "The rites of the Eastern Churches, as the patrimony of the entire Church of Christ, in which there is clearly evident the tradition which has come from the Apostles through the Fathers and which affirm the divine unity in diversity of the Catholic faith, are to be religiously preserved and fostered."[49] This norm, together with others that implement it is directed against earlier detrimental practice of the so-called Latinization of Oriental Churches, whereby their faithful were often forced to accept elements of Western liturgy and spirituality. Moreover, when they moved to a place where the Latin Church was the majority one, in most cases it made them adopt their traditions.[50] However, as regards the obligation of Sunday worship, a Catholic can freely choose any Catholic rite: "The Christian faithful can participate in the Eucharistic sacrifice and receive Holy Communion in any Catholic rite […]."[51]

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[47] *Summorum pontificium*, Art. 1.

[48] Pontifical Commission Ecclesia Dei: *Instruction on the Application of the Apostolic Letter Summorum pontificum of His Holiness Benedict XVI* (30 April 2011).

[49] CCEO, can. 39.

[50] "Canon 39 substantially changes Canon 11 of the Motu proprio *Cleri sanctitati*, which stipulates that 'baptized non-Catholics of an Oriental rite, who are received into the Catholic Church may embrace the rite they prefer (*ritum quem maluerint amplecti possunt*); it is to be hoped nevertheless that they retain their proper rite.' Canon 11 was severely criticised during the discussion about the decree about Eastern Churches at Vatican Il, especially from the ecumenical perspective […] but also from the perspective of supporting the survival and flourishing of Catholic Oriental churches given the concern that the choice will be always oriented towards the Latin Church." — D. Salachas: *Istituzioni di diritto canonico delle Chiese cattoliche orientali*. Bologna: Edizioni Dehoniane, 1993, p. 90.

[51] CIC/1983, can. 923.

One of the spiritualities which asserted itself after Vatican II from among the countless others in the Catholic Church, the charismatic renewal brought new elements into the Church, including those that need to be legally regulated. The point of such regulation is not to set limits to the choice of the faithful, but facilitate the conditions in order to make sure that the specifics of a particular spiritual movement is in accordance with the discipline valid in the whole of the Church: "Confusion between such free non-liturgical prayer meetings and liturgical celebrations properly so-called is to be carefully avoided. Anything resembling hysteria, artificiality, theatricality or sensationalism, above all on the part of those who are in charge of such gatherings, must not take place."[52]

5. The right for free theological inquiry

The 1917 Code states: "Christ, our Lord, has entrusted to the Church the deposit of faith, in order that, by the continual assistance of the Holy Ghost, she might preserve the revealed doctrine and expound it faithfully."[53] Post-conciliar code adopted this formulation; nevertheless, to the obligation to preserve and expound the faith it added the requirement to explore this deposit of faith.[54] This opens a space for progress in theology, whose objective is speculative grasping of the faith, which can be explored more profoundly (*intimius perscrutaretur*). Here the deposit of faith (*depositum fidei*) is not understood statically, as something completed and definitively exhausted. At the same time, the deposit of faith is not something created by the power of the Church: Christ has entrusted it to the Church (*concredidit*).[55]

This exploration of the faith, however, requires due freedom: "Those engaged in the sacred disciplines have a just freedom of inquiry and of expressing their opinion prudently on those matters in which they possess expertise, while observing the submission due to the Magisterium of the Church."[56] The sensitivity towards the autonomy of the professional range of the theological work is clearly a consequence of the impulses

[52] *Instrukce Kongregace pro nauku víry o modlitbách za získání uzdravení od Boha ze 1. září 2000 — Instruction on Prayers for Healing (1 September 2000)*, Art. 5 §§ 2, 3.

[53] CIC/1917, can. 1322.

[54] CIC/1983, can. 747 § 1.

[55] Cf. 1 Tim 6:20; 2 Tim 1:14.

[56] CIC/1983, can. 218.

coming from Vatican II.[57] The 1917 Code conceived the relations between the Magisterium and its addressees in a stricter way: "It is not enough to eschew heretical depravity, but those errors also must be carefully avoided which more or less closely approach heresy; and for this reason all must observe also those constitutions and decrees by which the Holy See proscribes and forbids such perverse opinions."[58] In the past, the Church resorted to means of control that were outside the law, as it is documented in the monitoring and provocateur activity of the association Sodalitium Pianum during the pontificate of Pope Pius X.[59]

However, admitting the due, or to be precise "just" liberties (*iusta libertas*) by the legislator of the new code indicates an opposite problem in the post-conciliar period, which has been aptly expressed by the International Theological Commission already in 1976: "By its nature and institution, the Magisterium is clearly free in carrying out its task. This freedom carries with it a great responsibility. For that reason, it is often difficult, although necessary, to use it in such a way that it not appear to theologians and to others of the faithful to be arbitrary or excessive. There are some theologians who prize scientific theology too highly; not taking enough account of the fact that respect for the Magisterium is one of the specific elements of the science of theology. Besides, contemporary democratic sentiments often give rise to a movement of solidarity against what the Magisterium does in carrying out its task of protecting the teaching of faith and morals from any harm. Still, it is necessary, though not easy, to find always a mode of procedure that is free and forceful yet not arbitrary or destructive of communion in the Church."[60]

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[57] "Therefore, certain 'prophetic function' of theology necessarily requires space for the application of responsible freedom. Clearly, we should respect one another (cf. Phl 2:1—11) and love must prevail over individual charismas (cf. 1 Cor 12—13). The respect of the holders of the Magisterium, i.e. those who hold the charisma of the ultimate word, towards the theologians, who hold the charisma of the penultimate word, will in the end be manifested in a greater respect of the theologians towards the Magisterium whose natural authority will thus clearly be enhanced" — C. V. Pospíšil: *Hermeneutika mystéria. Struktury myšlení v dogmatické teologii*. Kostelní Vydří: Karmelitánské nakladatelství, 2005, p. 202.

[58] CIC/1917, can. 1324.

[59] "*Sodalitium pianum* was named after the holy Pope Pius V with a clear allusion towards the then ruling pope. The founder of this secret organisation was papal subsecretary Mons. Umberto Benigni. Even though the society did not achieve papal authorisation, it was, nevertheless, supported by the pope with some financial contributions and frequent laudatory statements" — J. Lenzenweger, P. Stockmeier, K. Amon, R. Zinnhobler: *Geschichte der katholischen Kirche*. Leipzig: St. Benno-Verlag, 1989, p. 425.

[60] The Eccesiastical Magisterium and Theology (International Theological Commission), thesis 8, point 1. In: *Dokumenty MTK věnované metodě do roku 1995 a Statuta MTK*. Kostelní Vydří: Karmelitánské nakladatelství, 2011, p. 32.

The Code recognised a vast space for free expression, that is, expression, which can be used by other faithful. However, even here clear limits are set putting emphasis on the doctrinal issues:[61] "According to the knowledge, competence, and prestige which they possess, they have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence toward their pastors, and attentive to common advantage and the dignity of persons."[62] A novelty in the 1983 Code is also the possibility of lay people to take part on the academic tuition of theological disciplines: "If the prescripts regarding the requisite suitability have been observed, they are also qualified to receive from legitimate ecclesiastical authority a mandate to teach the sacred sciences."[63] However, the lack of legislation in this regard prior to Vatican II does not mean that it is now an automatic right resulting from subjective law.[64]

6. Conclusions

In respect to its forerunner, the 1983 Code of Canon Law simplified discipline and gave the Catholic faithful more room for autonomous decision-making and individual choice of conscience. This, however, also implies obligation to assume a greater share of responsibility. The canon law also grades free initiatives of the faithful, for instance, by reserving

[61] "The soundness of faith and morals is an absolute condition. There neither is, nor can be right or freedom of expression with regard to the matters of the authentic teaching of the magisterium. However, even in the issues where various opinions are admissible, one needs to sustain discretion and caution, so that no wonder or scandal is caused" — L. Chiappetta: *Il Codice di Diritto Canonico*..., p. 278.

[62] CIC/1983, can. 212 § 3.

[63] CIC/1983, can. 229 § 3.

[64] "For the teaching of sacred sciences, they should be given a mandate by an ecclesiastical authority. In order to achieve it, they must prove their qualification. Lay people do not have any right to be given the mandate, because ecclesiastical authority has no obligation to grant it. Rather, it is to be understood as a ministry which can be carried out by lay people when they teach sacred sciences at universities or church schools. The qualification refers both to the scientific and pedagogical profile which needs to be attested by appropriate certifications, but also by the integrity of the doctrine and of life" — J. Ivan: *Laici v kánonickej normatíve Katolíckej cirkvi*. Michalovce: Vydavateľstvo Misionár, p. 84.

the right to grant the "Catholic" status only on some of them: "Since they participate in the mission of the Church, all the Christian faithful have the right to promote or sustain apostolic action even by their own undertakings, according to their own state and condition. Nevertheless, no undertaking (*inceptum*) is to claim the name Catholic without the consent of competent ecclesiastical authority."[65] The rights of which the faithful can make use of make sense only if they are realised in the organic communion of the whole Church and do not become a guise for the wilfulness of the individual faithful or their groups.

[65] CIC/1983, can. 216.

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Stanislav Přibyl

Freedom of Conscience in the Code of Canon Law

Summary

Whereas the democratic state, as not bound by any religious confession, is not entrusted with delating of certain ideology or religion, the commission of the Church consists in announcing of a concrete doctrine. Another difference consists in the fact that there is a canon law catalogue containing predominantly duties of believers over their rights. However, it is not allowed to compel externally anybody to adopt the catholic faith, and the Church has to abstain from a dishonest proselytism. The acts of the

faith and of the cult within the Church should be also realized within the framework of liberty guaranteed to the faithful by the norms of canon law. The paper continues by concrete examples in which these possibilities of liberty and choice may take a place, for example free choice of state of life, right of proper spirituality and rite or freedom of theological research. However, no undertaking of believers may be denominated as Catholic if it not obtains the consent of competent ecclesiastical authority.

Stanislav Přibyl

La liberté de conscience dans le Code de droit canonique

Résumé

Contrairement à un État démocratique et confessionnellement neutre dont le rôle n'est ni l'expansion de la religion ni l'idéologie, le devoir de l'Église est de professer une doctrine concrète. L'autre différence consiste dans le fait que dans le droit canonique catholique on trouve un catalogue où les devoirs des croyants l'emportent sur leurs droits. Cependant, on ne peut forcer nulle personne de l'extérieur à adopter la religion catholique, et l'Église elle-même doit s'abstenir d'un prosélytisme malhonnête. Aussi les actes de foi et de culte doivent-ils être réalisés dans le cadre de la liberté que les normes du droit canonique garantissent aux croyants. L'article contient des exemples concrets où ces possibilités de liberté et de choix peuvent être réalisées : ne fût-ce que le droit au choix libre du mode de vie, à son propre rite et à sa propre spiritualité ou encore à la liberté dans des recherches théologiques. Toutefois, aucune initiative individuelle des croyants ne peut être considérée comme catholique tant qu'elle n'aura pas reçu l'approbation de l'autorité ecclésiastique.

Mots clés : liberté, Église catholique, droit canonique, droits et devoirs, croyants, liturgie, théologie

Stanislav Přibyl

La libertà di coscienza nel Codice di diritto canonico

Sommario

A differenza dello stato democratico religiosamente neutrale il cui ruolo non è la divulgazione né della religione, né dell'ideologia, il compito della Chiesa è quello di predicare una determinata dottrina. Un'altra differenza è costituita dal fatto che nel diritto canonico cattolico troviamo un catalogo in cui prevalgono gli obblighi dei fedeli sui loro diritti. Dall'esterno infatti nessuno può essere costretto ad accogliere la religione cattolica, e la Chiesa deve astenersi dal proselitismo disonesto. Anche gli atti di fede e di culto devono essere realizzati nell'ambito della libertà che viene garantita ai fedeli dalle norme di diritto canonico. L'articolo contiene esempi concreti in cui tali possibilità di libertà e di scelta possono essere realizzate; anche solo nel diritto alla libera scelta dello stato di

vita, al proprio rito ed alla propria spiritualità o alla libertà negli studi teologici. Tuttavia nessuna iniziativa libera dei fedeli può essere riconosciuta cattolica, finché non avrà ricevuto l'approvazione dell'autorità ecclesiastica competente.

Parole chiave: libertà, Chiesa cattolica, diritto canonico, diritti e doveri, fedeli, liturgia, teologia

Ecumeny and Law, vol. 4 (2016)
pp. 145—163

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Religious Freedom in Spain

Keywords: ecclesiastical law, religious freedom, Church in Spain, Church-state relations, religious neutrality of the state, concordat, Spanish constitution, Vatican II's declaration *Dignitatis Humanae*

It is difficult to grasp the legal solutions in the area of religious freedom that are currently in force in Spain without the knowledge of the history of Spanish legislation in this regard. It is not necessarily a long story, albeit very turbulent and causing much controversy up to this day. Since 2015 marked the 50th anniversary of the Vatican Council's Declaration on Religious Freedom, *Dignitatis Humanae*,[1] in the following analysis I would like to focus on the role it played in the historical process of forming and changing the regulations concerning religious freedom in Spain.[2]

1. Religious freedom in Spain before *Dignitatis Humanae*

For the first time, constitutional separation of the state and Church, as well as the guarantee of "freedom of conscience and the right to freely

[1] The text of the Declaration was adopted in a vote on 19 November 1965, on the eve of the end of the Council.

[2] In this paper I will, for the most part, rely on the following monograph: P. Ryguła: *Wolność religijna w Hiszpanii na tle przemian społeczno-politycznych w latach 1931—1992* (Religious Freedom in Spain against the backdrop of socio-political changes in the years 1931—1992). Katowice 2009.

practice any religion,"[3] were contained in Art. 27 of the Republican Constitution of 9 December 1931. The Spanish republican system of the 1920s and 30s was built upon the pre-existing notion of negating the monarchy's legal and political solutions. Thus, paradoxically, apart from legislation designed to guarantee freedom of conscience and religious practice, the legislator would also put forward provisions which granted the state far-reaching interference and restriction of a substantive scope of freedoms of natural and legal persons based on religious beliefs, membership in a particular religious community, or a positions held by them therein.[4]

The constitution declared secularity of the state in Art. 3, according to which "the Spanish state shall have no official religion." The desire to move away from the existing practice of regulating state-Church relations through bilateral arrangements was expressed by this Act in Art. 14, where it is said that "exclusive competence of the Spanish state shall be legislation" with respect to the state-Church relations and religious worship. Article 27 of the Fundamental Law on the one hand granted all religions the right to private practice of religious rites; on the other hand, however, it also claimed that "public demonstrations of worship shall, in every case, be authorized by the government." The cited regulations indicate the legislator's desire to restrict the scope of religion's presence in public life, and exercise control over those manifestations of religious life which have remained in the public sphere of social life.

Along with the fall of the Second Republic, the Spanish legislator was gradually returning to the religious state system and to religious uniformity, where Catholicism was the foundation of unity — not only of the political community, but also the national one. Constitutional foundations of Francoist Spain were established in the long process of adopting new *leyes fundamentales*. For this reason, the regulations of "religious affairs" included in the laws provide an insight into the evolution of the legislator's approach toward this particular case. The first two fundamental laws, introduced in the period which can be defined as a time of political exploration (the Labor Charter of 1938[5] and the Law Constituting the Cortes of 1942[6]) did not include provisions on religious character of the state. Catholicism was recognized as "the religion of the Spanish State" in

[3] See: "Constitución de la República Española." *Gaceta de Madrid* 1931, n.° 344 (de 10 de diciembre), pp. 1578—1588.

[4] P. Ryguła: *Wolność religijna*..., p. 138.

[5] Fuero del Trabajo. *Boletín Oficial del Estado* 1938, n.° 505 (de 10 de marzo), pp. 6178—6181.

[6] Ley de 17 de julio de 1942 de creación de las Cortes Españolas. *Boletín Oficial del Estado* 1942, n.° 200 (de 19 de julio), pp. 5301—5303.

Art. 6 of the Charter of the Spanish of 1945.[7] Also, Art. 1 of the The Law of Leadership Succession of 1947[8] stated that "Spain, as a political unity, shall be a Catholic state." Finally, within the second rule contained in the Law of the Principles of the *Movimiento Nacional* of 1958,[9] the legislator declared the following: "the Spanish nation prides itself on respecting the law of God, according to the doctrine of the holy Catholic Church." Under these political circumstances, it is hardly a surprise that the convocation of the Second Vatican Council, as well as resulting deliberations and documents, were of great interest to Spain — a country whose fundamental laws were committed to shape their own legislation in accordance with the doctrine of the Catholic Church.

The followers of other religions in Francoist Spain were guaranteed religious tolerance. The aforementioned Art. 6 of the Charter of the Spanish stated that "no one shall be persecuted based on their religious beliefs or private practice of worship." However, the same article went on to claim that "other ceremonies or external manifestations outside the Catholic religion shall not be permitted."[10]

2. The impact of the Vatican Council's doctrine on the regulations concerning religious freedom in Spain

When speaking about the impact of the Vatican Council on the Spanish political system, one should first point to *Dignitatis Humanae* promulgated on 9 December 1965. According to the authors of the Declaration, the foundation of religious liberty is to be sought in man's dignity (or rather *human* dignity); this dignity — says the Declaration — "is recognized by the revealed word of God and reason." Because of this dignity, all men, "[as] persons, that is beings endowed with reason and free will,

[7] Fuero de los Españoles. *Boletín Oficial del Estado* 1945 n.° 199 (de 18 de julio), pp. 358—360.

[8] Ley de Sucesión en la Jefatura del Estado, Art. 9. *Boletín Oficial del Estado* 1947, n.° 208 (de 27 de julio), pp. 4238—4239.

[9] Ley fundamental de 17 de mayo de 1958 por la que se promulgan los principios del Movimiento Nacional. *Boletín Oficial del Estado* 1958, n.° 119 (de 19 de mayo), pp. 4511—4513.

[10] This formulation stems from the Spanish Constitution of 1876, with the only difference being that Art. 11 of the 19th-century Fundamental Law used the expression "public manifestations" instead of "external manifestaions"; for more information on Art. 11 of the Constitution of 1876, see: G. Barberini: *El artículo 11 de la Constitución de 1876. La controversia diplomática entre España y la Santa Sede*. Rome 1962.

and thus personal responsibility, shall be impelled by their nature and the moral obligation to seek the truth, especially in the field of religion." By admitting that religious liberty includes freedom to profess faith at the individual and social level, *Dignitatis Humanae* called for the recognition of this right in the state legislation forum as the right enjoyed by individuals and entire religious communities.[11]

Further, "the government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons, nor is there to occur any discrimination among citizens." Finally, considering the specific historical and social background of some countries, the Council Fathers agreed to the following: "If, in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom shall be recognized and made effective in practice." This statement, in relation to the countries adopting Catholicism as their official religion, constituted a reminder on the part of the Council Fathers to respect equality of non-Catholics in Catholic states.

Changes in statutory regulations in Spain, introduced under the influence of the Council's teachings, meant that former binomial, that is, *profession of faith — religious tolerance*, had been replaced by a new one, namely *profession of faith — religious freedom*. This correspondence was supposed to be the foundation of a new shape of the Spanish religious system. In the preamble to Ley Orgánica del Estado of 10 January 1967,[12] the legislator, referring to the need of legislation change with respect to creed, first cited the second principle of the *Movimiento Nacional*, according to which "the doctrine of the Church shall serve as an inspiration to […] the legislation" of Spain, only to go on and cite *Dignitatis Humanae* which "demands […] explicit recognition of this right and the resulting modification of Article 6 of the Charter of the Spanish." In making this modification, the legislator still recognized Catholicism as the official religion of the state and granted it "official protection," whilst providing "effective legal protection" to religious freedom.

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[11] This postulate has already been indirectly hinted in the very title of the document: *Declaration on Religious Freedom, on the right of the person and of communities to social and civil freedom in religious matters*. In the second issue of the Declaration, the Council Fathers wrote the following: "[…] this right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right."

[12] Ley Orgánica del Estado. n.° 1/1967, de 10 de enero. *Boletín Oficial del Estado* 1967, n.° 9 (de 11 de enero), pp. 466—477.

After the approval of Ley Orgánica del Estado (along with the amended text of Art. 6 "Fuero de los Españoles") in the Cortes (the Spanish parliament) and holding a national referendum on 24 February 1967, the Council of Ministers enacted the bill on religious freedom. This document, approved at the plenary session of Parliament on 26 June 1967, and signed two days later by *caudillo* (Francisco Franco), became the first act in the history of Spanish law on religious freedom.[13] Referring to *Dignitatis Humanae*, the legislator stated the following in Art. 1 of the said act: "[…] the Spanish state recognizes the right to religious freedom rooted in man's dignity and offers them, together with the necessary protection, freedom from coercion in the exercise of their rights" (Art. 1.1). In the same article, however, it is added that "exercising the right to religious freedom, understood in accordance with the teaching of the Catholic doctrine, shall be, in every case, consistent with the religious character of the Spanish State" (Art. 1.3). Thus, the legislator departed from the Council's teaching on such an important issue as the extent of that freedom, introducing legal regulations in this regard from their own political standpoint.

Writing about the impact of the Vatican II on the shape of the church-state relations and records relating to religious freedom, it is hard not to notice the slow but effective influence of the Council with regard to the transformation of the entire political system in Spain. The efforts of the Holy See aiming to regulate those relations in accordance with the doctrine of Vatican II, while simultaneously resisting political transformations proposed by supporters of the authoritarian system, resulted in the transformation process of the entire political system after General Franco's death, having been initiated with an amendment in religious law. Less than a month after taking over as the prime minister by reform-oriented Adolph Suárez, and a year before the elections to the new parliament that were to adopt a new constitution, state political structures would undergo the process of secularization.

On 28 July 1976, accompanied by the undergoing transformation, a concordat between the Holy See and the Government of Spain — commonly referred to as the basic agreement (*Acuerdo básico*) — was signed.[14] The text of the preamble stressed that change in the existing regulatory relations between the state and the Church had been made possible thanks to the transformations that had taken place in the Spanish society in the postconciliar Catholic Church, and also in the attitude of the state legislator who "allowed into their legislation the right to religious freedom

[13] P. Ryguła: *Wolność religijna*…, p. 259.

[14] Acuerdo entre la Santa Sede y el Estado Español. *Boletín Oficial del Estado* 1976, n.° 230 (de 24 de septiembre), pp. 18664—18665.

on the basis of human dignity." Addressing the necessity of signing new agreements based on the principles of "independence of both parties to an appropriate extent" and "healthy cooperation" between the state and the Church, the text of the preamble reflects the desire of the signatories to develop such a concordat system that would directly correspond to the emerging socio-political reality of the country as well as the Council's doctrine.[15]

The impact of the Council's doctrine was also evident during the Constituent Assembly's works on the text containing the provisions governing the constitutional guarantees of religious freedom. *Dignitatis Humanae* indicated the possibility to regulate the "issue of religion" not from the perspective of a political system (the only one then known to the Spanish society due to their legislative practice). During the parliamentary debate, devoted to Art. 16 of the Fundamental Law, the Council's teaching was therefore cited by those who wanted to move away from the solutions applied in the Republican period, and under Franco's rule. They comprised a large group of deputies, both supporters and opponents of the current wording of Art. 16 of the Constitution. It is because, for the most part, both camps strove to establish a new model of the Church-state relations. Finally, recognizing the impact of the Council's teaching on the works of the Constituent Assembly, it can also be said that the Council's doctrine served as an inspiration for the solutions contained in Ley Orgánica on Religious Freedom of 5 July 1980, being — after all — an extension of the provisions contained in Art. 16 of the Fundamental Law of 1978.[16]

3. Religious freedom in Spain — the current legal situation

3.1. Introduction

Basic constitutional provisions concerning religious freedom were concluded by the legislator in the aforementioned Art. 16 of the Fundamental Law, reading the following:

> 1. Individuals and communities shall be guaranteed freedom in the realm of ideology, religion and worship. Exercising these freedoms shall be subject only to such limitations regarding external mani-

[15] P. Ryguła: *Wolność religijna*..., pp. 294—295.
[16] Ibidem, p. 417.

festations of professed beliefs that are necessary to maintain public order protected by law.
2. No one shall be obliged to declare their ideology, religion or beliefs.
3. No religion shall be considered a state religion. Public authorities should account for religious beliefs of the Spanish society and maintain the consequent relations of cooperation with the Catholic Church and other denominations.[17]

The content of Art. 16 is proof to the legislator's desire to deviate from the existing system solutions in the field of the Church-state relations (both from the ones that characterized Francoist Spain as well as the Second Republic) and develop such a secular state model which, rooted in the experiences of Spain's own history, remains consistent with the current beliefs of the Spanish society. In other words, the article reflects the attitude of the government's departure from perceiving religion in political and systemic terms in favour of the social dimension which — as stated in par. 3 of the cited article — that government is to take into account.[18]

Article 1 of the Constitution states that the Spanish state is to "protect the highest values of its legal freedom, justice, equality, and political pluralism." In the literature (and not just the Spanish one), there is an opinion that these values determine the axiological foundations of the entire constitutional system.[19] Then, Art. 9.2 states that "public authorities shall be responsible for providing such conditions so that the freedom and equality of individuals and groups […] could be effectively and efficiently implemented." It also speaks of "removing obstacles that prevent or hinder their full implementation, and facilitating the participation of all citizens in political, economic, cultural, and social life." These guarantees also apply to religious freedom as one of the constitutionally protected freedoms.[20]

It is, at the same time, worth bearing in mind that the inclusion of Art. 16 of the Constitution in Chapter 1 on fundamental rights and pub-

[17] "1. Se garantiza la libertad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley.

2. Nadie podrá ser obligado a declarar sobre su ideología, religión o creencias.

3. Ninguna confesión tendrá carácter estatal. Los poderes públicos tendrán en cuenta las creencias religiosas de la sociedad española y mantendrán las consiguientes relaciones de cooperación con la Iglesia Católica y las demás confesiones." *Boletín Oficial de las Cortes* 1978, n.° 170 (de 28 de octubre), p. 3704.

[18] P. Ryguła: *Wolność religijna*…, p. 319.

[19] A. Łabno-Jabłońska: *Iberyjska droga do demokracji. Studium prawnokonstytucyjne*. Warszawa 1996, p. 42.

[20] P. Ryguła: *Wolność religijna*…, p. 319.

lic freedoms (*De los derechos y de las fundamentales libertades públicas*) of Section 2, "Rights and Freedoms" (*Derechos y libertades*), is synonymous with the understanding of the right to religious freedom as a fundamental right.[21]

3.2. The limitations of the constitutionally guaranteed religious freedom

Determining the scope of freedom guaranteed by Art. 16.1, the legislator states that the use of it "is subject only to such limitations regarding external manifestations of professed beliefs that are necessary to maintain public order protected by law." Therefore, the restrictions on the use of that freedom do not apply to the same content of ideological and religious beliefs (i.e. the internal scope of freedom in the realm of ideology, religion and worship), but only to external manifestations of those freedoms, and only those that could possibly disrupt public order.

Paragraph 2 of the cited article also provides that no one should be obliged to declare their ideology or religious beliefs. This provision should be understood not only as open prohibition of forcing individuals to submit verbal declarations relating to personal religious and non-religious convictions, but also as prohibition applicable to other kinds of manifesting those beliefs, such as participation in religious ceremonies.[22]

3.3. Religious neutrality of the state

Religious neutrality of the state[23] stems from Art. 16.3., which states the following: "No religion shall be considered a state religion." This for-

[21] J. Mantecón Sancho: *El derecho fundamental de libertad religiosa. Textos, comentarios y bibliografía*. Pamplona 1996, p. 121.

[22] Together with Art. 14, which states that "the Spanish shall be equal before the law," Art. 16.2. is also a guarantee of non-discrimination for reasons related to the beliefs of the individual. See: P. Ryguła: *Wolność religijna*..., pp. 323—324. See also: Z. Combalía: "Los límites del Derecho de libertad religiosa." In: *Tratado de Derecho eclesiástico* [VVAA]. Pamplona 1994, p. 470.

[23] In reference to Art. 16.3 the term *neutralidad religiosa del Estado* is used, among others, by Giménez y Martínez de Carvajal and Goti Ordeñana. Satorras Fioretti uses the term *aconfesionalidad*, while Martínez Blanco opts for *no confesionalidad*. Molano

mulation determines not so much the state's secularity, but rather a non-state nature of all faiths existing in Spain. It represents departure from the principle of *cuius regio eius religio* in favour of *cuius non-regio eius* religio.[24] In negative terms, such formulation of religious neutrality of the state signifies departure from the belief system put into effect, among others, during the rule of General Franco. By stating that "no religion shall be considered the state religion," the legislator also moves away from state-church relations that prevailed in the Second Republic.[25]

The legislator's departure from the existing political solutions in terms of the freedom concerned is also apparent when analyzing the positive dimension of the principle of neutrality. Guarantees of freedom in this dimension order public authorities to account for religious beliefs of the entire society as well as protect and promote religious freedom in this sense. Pursuing this constitutionally declared protection and promotion is to be practiced through cooperation with collective entities of religious freedom. In Art. 16.3, we read: "Public authorities shall account for religious beliefs of the Spanish society and maintain the consequent relations of cooperation with the Catholic Church and other denominations."[26]

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uses the term *laicidad*, while José María Porras Ramírez refers to it as *laicidad positiva*. See: J. Giménez y Martínez de Carvajal: "Principios informadores actual Régimen del español de Relaciones entre la Iglesia y el Estado." In: *Iglesia y Estado en España. Régimen jurídico de sus relaciones*. Eds. J. Giménez y Martínez de Carvajal, C. Salvador Corral. Madrid 1980, p. 42; E. Molano: "La laicidad del Estado en la Constitución española." *Anuario de Derecho Eclesiástico del Estado* 1986, vol. 2, pp. 239—256; J.M. Porras Ramírez: *Libertad religiosa, laicidad y cooperación con las confesiones en el Estado democrático de Derecho*. Cizur Menor 2006, pp. 121—138.

[24] See: R. M. Satorras Fioretti: *Aconfesionalidad del Estado y cooperación con las confesiones religiosas (Art. 16.3 CE)*. Barcelona 2001.

[25] Developed in 1977 by the parliamentary subcommittee, a preliminary draft of the Constitution in Art. 3 shared similarities with the text of the Republican Constitution. Due to strong opposition of large segments of society, to whom the wording of Art. 3 of the draft sounded very much alike to the provisions of the Republican Constitution, it was decided to amend the text of the said article from "The Spanish State shall not be a religious state" to the text being currently in force. Furthermore, the already amended article was attached to Art. 16, giving rise to a new wording of the text, that is, one article composed of three, instead of two, paragraphs. See: P. Ryguła: *Wolność religijna*..., p. 325.

[26] On the one hand, Art. 16 of the Constitution obliges public authorities to the neutrality in the so-called issue of religion; on the other hand, however, it forces them to account for religious beliefs of the society which, in this particular case, is not neutral. The state is therefore religiously neutral when it offers its citizens freedom in the sphere of religious life, and ceases to be so when — whether religious or secular — tries to impose its own point of view with respect to the national religious reality. Ibidem, p. 326.

In describing the approach to religious neutrality of the Spanish state, it should be noted that, in many of the comments from the field of Spanish religious law, religion is often qualified as a positive phenomenon (*fenómeno social religioso*) in the text of the Constitution being currently in force.[27] It would be difficult — as emphasized by the authors — to imagine the real protection of the right to religious freedom if the government negatively perceived the very notion of religion, and thus that part of social life that this freedom is concerned with.[28]

In addition to this positive (or at least neutral) qualification of religion, the provisions contained in already cited Art. 16 and Art. 9.2 also lead to protection of religious pluralism.[29] The duties of a neutral state should therefore include ensuring individuals and religious communities the possibility of exercising the right to religious freedom in conditions of social peace, so that no one is discriminated against by the state authorities and the general public because of their beliefs. The public authorities are also responsible for "removing obstacles that prevent or hinder […] full exercise" of the right to freedom, including religious freedom (Art. 9.2). It translates into providing such an environment which fosters actual exercise of the right to religious freedom, including the support for social atmosphere of religious pluralism.[30]

3.4. The cooperation of public authorities with the Catholic Church and other denominations

The provision regarding cooperation prevents interpreting the neutrality of public authorities as indifference of the state, characterized by a passive attitude towards religion or even hindering full exercise of the fundamental right guaranteed in Art. 16 of the Fundamental Law. It also does not allow for limiting the scope of religious freedom to the private sphere of life as a result of the marginalization of the religion's com-

[27] J. Calvo-Álvarez: *Los principios del Derecho eclesiástico español en las sentencias del Tribunal Constitucional*. Pamplona 1999, pp. 56—57; M. López Alarcón: "Relevancia específica del factor social religioso." In: *Las relaciones entre la Iglesia y el 27 Estado. Estudios en memoria del profesor Pedro Lombardía* [VVAA]. Madrid 1989, pp. 465—478.

[28] R. M. Satorras Fioretti: *Aconfesionalidad del Estado…*, p. 76.

[29] J. A. Souto Paz: *Derecho eclesiástico del Estado. El Derecho de la libertad de ideas y creencias*. Madrid 1995, pp. 81—94.

[30] This, of course, does not include supporting of certain religious communities with the sole purpose of creating a situation of the said pluralism.

munal dimension. An obligation to maintain "cooperative relations with the Catholic Church and other denominations"[31] clearly shows that the legislator, forcing public authorities to account for "religious beliefs of the Spanish society," did not refer solely to the views of society understood as a collection of individuals.[32] It is because, by using the freedom of association in accordance with their religious beliefs, those individuals form, in fact, a religious community.[33] Religious communities may, in turn, acquire legal personality under Spanish law in accordance with Art. 22 of the Constitution, where the right to freedom of association is considered a fundamental right.

However, Art. 16.3 of the Constitution does not oblige public authorities to cooperate with any legal entity resulting from exercising the right to freedom of association, but only with those religious communities that gained the status of religion in the state law forum. Therefore, this obligation does not apply to those entities governed by Spanish law whose (not necessarily the sole) reason for establishment were commonly shared religious beliefs, and even more so the communities constituted on the foundation of non-religious ideologies. The ability to cooperate with these legal entities is granted to public authorities under the provision contained in Art. 9.2 of the Constitution.[34]

The cooperation declared in Art. 16.3 of the Constitution is achieved via two basic instruments — the first one of legislative nature, and the second of institutional nature. These are the conventions or agreements concluded between registered Churches, denominations, and religious communities and the state as well as the Advisory Committee operating under the Ministry of Justice. It is the Spanish Ley Orgánica on Religious

[31] By recognizing the Catholic Church in the text of the Constitution as a legal entity that is in a position to establish relations of cooperation with public authorities, the legislator — acting in accordance with Art. 16.3 — "accounts for religious beliefs of the Spanish society." They thus refer to the Spanish socio-religious reality, strongly influenced by history, culture, and the current role of various religious communities in the social life of Spain. By citing the record on the Catholic Church, the legislator does not violate equality before the law of all religions legally existing in Spain. All they do is capture the actual disparity between the said Church and other religious communities. Reflecting the status quo, they simultaneously grant all religions equal scope of religious freedom. Cf. P. Ryguła: *Wolność religijna*..., p. 330.

[32] Ibidem, p. 326.

[33] As noted by Agustín Motilla, the majority of Spanish doctrine recognizes that religious communities date back earlier than the state itself, and are formed independently of it. See for example: A. Motilla de la Calle: *El concepto de confesión religiosa en el Derecho español. Práctica administrativa y doctrina jurisprudencial*. Madrid 1999, p. 73; J. Goti Ordeñana: *Sistema de Derecho eclesiástico del Estado*. Donosita 1992, pp. 6 f.

[34] P. Ryguła: *Wolność religijna*..., p. 329.

Freedom of 1980 that describes them as the two main "instruments" of the said cooperation.[35]

3.4.1. The Advisory Committee on Religious Freedom

In Art. 8 of Ley Orgánica, the legislator announces the establishment of an Advisory Committee on Religious Freedom, which, operating under the Ministry of Justice, is to be made up of state administration representatives, representatives of Churches, religious denominations and communities as well as "competent persons" in matters governed by this act. This Committee was established by Royal Decree of 19 June 1981.[36] Currently enforceable instructions relating to the composition and operation of the Committee are contained in Royal Decree 932/2013 of 29 November 2013.[37]

According to the above-cited Royal Decree, the Committee is to comprise Chairman and Deputy Chairman, Secretary and ordinary members, that is: representatives of state administration,[38] Churches, denominations, and religious communities,[39] as well as experts appointed to assist in the interpretation and implementation of the right to religious freedom.[40] Plenary meetings of the Committee are convened by its Chairman or at the request of a majority of its members. In addition, the Committee operates in a permanent manner within the framework of the Permanent Committee and working groups. Chairman of the Committee is General Director for Religious Affairs.

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[35] Ley orgánica 7/1980, de 5 de julio, de Libertad Religiosa. *Boletín Oficial del Estado* 1980, n.°177 (de 24 de julio), pp. 16804—16805.

[36] Real decreto 1890/1981, de 19 de junio, sobre constitución de la Comisión Asesora de Libertad Religiosa en el Ministerio de Justicia. *Boletín Oficial del Estado* 1981, n.° 213 (de 5 de septiembre), pp. 20450—20451.

[37] Real Decreto 932/2013, de 29 de noviembre, por el que se regula la Comisión Asesora de Libertad Religiosa. *Boletín Oficial del Estado* 2013, n.° 300 (de 16 de diciembre), pp. 98994—99002.

[38] The aforementioned Royal Decree of 2013 (see Art. 8) lists those ministries involved in the protection and promotion of the fundamental rights to religious freedom which are to be represented within the Committee.

[39] According to the Art. 8 of Ley Orgánica, among those representatives. there should, "in any case," be persons representing Churches and religious associations, "which are permanently rooted in the Spanish society."

[40] These experts are appointed by the Council of Ministers from among the candidates proposed by the Minister of Justice.

According to Art. 8 of Ley Orgánica of 1980, the Committee is to be responsible for "analyzing, informing, and submitting proposals" on the implementation of the provisions of Ley Orgánica. Its task is also to help with the drafting of texts of the agreements referred to in Art. 7 of the Act.[41] More information and specific responsibilities of the Committee are governed by Art. 3 of the cited Royal Decree of 2013. Among the tasks mentioned are: assessment of the degree of "rootedness" of specific religion in Spanish society on which depends the assessment of the possibility of signing a cooperation agreement with the state by a particular denomination. In what refers to the concordats with the Catholic Church, the Committee's action is complementary, that is, excluded from the remit of the Joint Church-State Committee.[42]

3.4.2. Agreements on cooperation between the State and religious associations

In Art. 7.1 of the said Ley Orgánica it is stated that: "The State, considering religious beliefs of the Spanish society, shall conclude […] agreements or conventions on cooperation with the Churches, denominations and religious communities entered in the register, who, through their scope and number of followers, have become firmly "rooted"[43] in the social reality of Spain. As for the State, the authority competent to negotiate the content of the contracts in question shall be the Ministry of Justice which acts on behalf of the General Directorate of Religious Affairs. As for the Church or a particular denomination, these authorities are the ones which are entitled to represent religious communities in accordance with their internal legislation. The legislator makes the entry into force of the bilateral arrangements contained in the agreement conditional on the approval of the Cortes Generales, as expressed in the act.[44]

In the case of the Catholic Church — which is subject of international law — cooperation agreements with the Spanish State are given the rank

[41] In practice, this task has been extended to include analysis of the implementation of these agreements after their entry into force; it also applies to agreements concluded prior to Ley Orgánica 7/1980.

[42] J. M. Contreras Mazario: "La Comisión Asesora de Libertad Religiosa." *Revista Española de Derecho Canónico* 43 (1987), pp. 142—144.

[43] According to Art. 8 of the abovementioned Act, the assessment of the level of "rootedness" is left by the legislator to the Advisory Committee on Religious Freedom (*Comisión Asesora de Libertad Religiosa*).

[44] P. Ryguła: *Wolność religijna*…, p. 349.

of a concordat.[45] State relations with other religions, devoid of such legal personality, are governed by the provisions of internal law.

The concordat system being currently in force comprises five international agreements signed by the Holy See and Spain. This system, perceived by the Spanish doctrine of religious law as one normative *corpus*, consists of five formally separate and mutually independent texts governing different aspects of the Church-state relations. The first of them, referred to as the basic agreement (*Acuerdo básico*), was signed on 15 August 1976.[46] Like the rest of the contracts, it contains a preamble where it presents the reasons for departure from the concordat regulations of 1953 in order to shape the Church-state relations in the spirit of the Second Vatican Council's teachings. The four other agreements were signed on 3 January 1979. They regulate legal issues,[47] economic issues,[48] matters related to teaching and culture,[49] as well as issues concerning military chaplaincy and military service of clerics.[50]

Speaking of international agreements underpinning relations between the state and the Catholic Church in contemporary Spain, in addition to the above five concordats, one should also mention the convention on the recognition of the civil effects of non-ecclesiastical studies completed at Catholic universities[51] (signed on 5 April 1962) as well as the agreement regulating issues of common interest to the state and the Church in the Holy Land (signed on 21 December 1994).[52]

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[45] In practice, bilateral agreements on cooperation with the Catholic Church are also concluded by autonomous communities and regional governments in their respective fields of activities and responsibilities, for instance, in matters regarding the protection of cultural heritage.

[46] Acuerdo entre la Santa Sede y el Estado español. *Boletín Oficial del Estado* 1976, n.° 230 (de 24 de septiembre), pp. 18664—18665.

[47] Acuerdo entre el Estado español y la Santa Sede sobre asuntos jurídicos. *Boletín Oficial del Estado* 1979, n.° 300 (de 15 de diciembre), pp. 28781—28782.

[48] Acuerdo entre el Estado español y la Santa Sede sobre asuntos económicos. *Boletín Oficial del Estado* 1979, n.° 300 (de 15 de diciembre), pp. 28782—28783.

[49] Acuerdo entre el Estado español y la Santa Sede sobre enseñanza y asuntos culturales. *Boletín Oficial del Estado* 1979, n.° 300 (de 15 de diciembre), pp. 28784—28785.

[50] Acuerdo entre el Estado español y la Santa Sede sobre la asistencia religiosa a las fuerzas armadas y servicio militar de clérigos y religiosos. *Boletín Oficial del Estado* 1979, n.° 300 (de 15 de diciembre), pp. 28785—28787.

[51] Instrumento de ratificación del Convenio entre la Santa Sede y le Estado español sobre el reconocimiento, a efectos civiles, de los estudios de ciencias no eclesiásticas realizadas en España en Universidades de la Iglesia. *Boletín Oficial del Estado* 1963, n.° 173 (de 20 de julio), pp. 10132—10134.

[52] Acuerdo entre el Reino de España y la Santa Sede sobre asuntos de interés común en Tierra Santa. *Boletín Oficial del Estado* 1995, n.° 179 (de 28 de julio), pp. 23027—23028.

The state also entered into cooperation agreements with other faiths and religions. However, Art. 7 of Ley Orgánica on Religious Freedom of 1980 allows for conclusion of such agreement only with those Churches, denominations, and religious communities which have been entered into the relevant register, and which, through their scope and number of followers, have become permanently rooted in the social reality of Spain. For this reason — to be able to reveal those roots — agreements between the state and non-Catholic denominations were signed not by individual, registered religious associations which, for various reasons, lacked a sufficiently large number of followers or have not been present in Spain for a long enough period of time, but instead by federations and committees associating them.

A large part of the registered Islamic religious communities belongs to[53] the Spanish Federation of Islamic Religious Associations and the Association of Islamic Communities of Spain. They both form the superior Islamic Commission of Spain (*Comisión Islamica de España*) which, having been entered into the Register of Religious Associations, is the legal representative of these communities in the relations between the state and the Commission. Most of the registered Jewish communities are part of the Federation of Israeli Communities of Spain (*Federación de Comunidades Israelitas de España*). Churches and associations derived from the evangelical tradition are mainly concentrated within the Federation of Evangelical Religious Associations (*Federación de Entidades Religiosas Evangélicas de España*). All registered religious associations forming part of a commission or federation may withdraw and no longer be subject to the regulations contained in the agreements signed by them. Similarly, each registered Church or community should be free to join a relevant commission or federation and thus be subject to the regulations contained in the agreements.[54]

Currently, there are three agreements between the Government of Spain and the said federations. These are:

1. Cooperation agreement between the Spanish state and the Federation of Evangelical Religious Associations of Spain[55];
2. Cooperation agreement between the Spanish state and the Federation of Israeli Communities of Spain[56];

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[53] P. Ryguła: *Wolność religijna*..., p. 386.

[54] Ibidem, p. 387.

[55] Ley 24/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España. *Boletín Oficial del Estado* 1992, n.° 272 (de 12 de noviembre), pp. 38209—38211.

[56] Ley 25/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España. *Boletín Oficial del Estado* 1992, n.° 272 (de 12 de noviembre), pp. 38211—38214.

3. Cooperation agreement between the Spanish state and the Islamic Commission of Spain.[57]

Reading of these agreements points to parallelism of all three texts. This editorial convergence is a testament to the willingness of equal treatment of all faiths, which are to be subject to the arrangements contained in those agreements, in the state law forum. The Spanish legal doctrine stresses that normative issues governed in those texts, forming the subject of each of the agreements, are common to all of them, albeit "adapted to the specifics of each religion."[58]

[57] Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España. *Boletín Oficial del Estado* 1992, n.° 272 (de 12 de noviembre), pp. 38214—38217.

[58] P. Ryguła: *Wolność religijna*..., p 388.

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Piotr Ryguła

Religious Freedom in Spain

Summary

The article opens with a historical analysis of the sources of contemporary legal regulations concerning religious freedom in Spain. Thus, the author discusses the legislation from the period of the Second Spanish Republic and General Franco's Spain. The text points to the fact that the political separation of Church and state, as well as the guaranty of "the freedom of conscience and the right to practice any religion in freedom" were included for the first time in the Republican Constitution of 9 December 1931 while the first law on religious freedom in Spain was introduced in 1967 during the period of General Franco's rule. However, in both cases the freedom declared in the documents was limited by the Spanish legislator because of the axiological assumptions of contemporary political systems.

Next, the author discusses the present-day legal regulations concerning religious freedom and religious neutrality of the Spanish state. The text analyzes Article 16 of the 1978 Constitution, which guarantees "individuals and communities [...] the freedom of ideology, religion and worship," as well as religious neutrality of the state. At the same time, the authorities are obliged "to consider religious beliefs of the Spanish people," and "as a result, to maintain a cooperative relationship with the Catholic Church and other denominations." The analysis encompasses also the activity of the Advisory Commit-

tee on Religious Freedom, as well as the content of cooperation agreements between the state and the particular confessional associations.

The reader's attention can be drawn to the point of view assumed by the author in order to present the historical process of creating the Spanish legislation concerning religious freedom. The author emphasizes the role of Vatican II's teaching, especially the declaration *Dignitatis Humanae*, which allowed the Spanish legislator "to get free" from the restrictions imposed on the declared right to religious freedom, which were present in both the republican regime and General Franco's rule.

Piotr Ryguła

La liberté religieuse en Espagne

Résumé

L'article commence par l'analyse historique des sources de l'état juridique actuel en Espagne dans le domaine de la liberté religieuse. En l'occurrence, l'auteur décrit la législation de l'époque de la Seconde République espagnole et de l'Espagne où Francisco Franco était au pouvoir. Il dénote que la séparation de l'État et de l'Église ainsi que les garanties concernant la liberté de conscience et le droit à pratiquer de manière libre n'importe quelle religion ont été incluses, pour la première fois, dans la constitution républicaine du 9 décembre 1931. Par contre, la première loi sur la liberté religieuse en Espagne a été introduite en 1967, sous le régime de Franco. Cependant, dans les deux cas, la liberté, bien que légalement déclarée, était limitée par le législateur espagnol pour des raisons liées à la situation politique.

Ensuite, l'auteur décrit l'état juridique étant actuellement en vigueur en Espagne dans le domaine de la liberté religieuse et la neutralité religieuse de l'État. Il analyse le contenu de l'article 16 de la constitution de 1978 qui garantit « la liberté d'opinion, de religion et de culte des individus et des communautés » et la neutralité religieuse de l'État ; les pouvoirs publics sont obligés de tenir « compte des croyances religieuses de la société espagnole » et de maintenir « les relations de coopération poursuivies avec l'Église catholique et les autres confessions ». L'analyse englobe également l'activité de la Comission consultative relative à la liberté religieuse ainsi que le contenu des contrats concernant la coopération de l'État avec des organisations religieuses particulières.

Ce qui mérite l'attention du lecteur, c'est la perspective dans laquelle l'auteur essaie de présenter le procédé historique de la formation de la législation espagnole dans le domaine de la liberté religieuse. Il évoque le rôle de la doctrine du Concile Vatican II et, en particulier, la déclaration *Dignitatis humanae* qui a permit au législateur espagnol de « se libérer » des restrictions — provenant du système républicain et franquiste — du droit à la liberté religieuse déclaré dans les deux systèmes.

Mots clés : Église catholique, Églises orientales, droit canonique, CIC, CCEO, oecuménisme, doctrine sociale de l' Église catholique, pluralisme

Piotr Ryguła

La libertà religiosa in Spagna

Sommario

L'articolo inizia con un'analisi storica delle fonti dell'attuale stato giuridico nel campo della libertà religiosa in Spagna. L'autore tratta quindi la legislazione del periodo della II Repubblica e della Spagna del gen. Franco. Mostra che per la prima volta la separazione politica dello stato dalla Chiesa ed anche le garanzie della "libertà di coscienza e il diritto a praticare in modo libero una qualsiasi religione" furono incluse nella costituzione repubblicana del 9 dicembre 1931. Invece la prima legge sulla libertà religiosa in Spagna fu introdotta nel 1967 durante il periodo del governo del gen. Franco. Tuttavia in entrambi i casi la libertà dichiarata per legge era limitata dal legislatore spagnolo per cause legate alla natura del regime politico.

Successivamente l'autore tratta lo stato giuridico attualmente vigente in Spagna nel campo della libertà religiosa e della neutralità religiosa dello stato. Analizza ciò che è prescritto nell'art. 16 della costituzione del 1978 che garantisce alle "diverse persone e comunità [...] la libertà nella sfera dell'ideologia, della religione e del culto", ed anche la neutralità religiosa dello stato; impegna invece le autorità pubbliche a "considerare le fedi religiose della società spagnola" ed a "mantenere i rapporti, che risultano dalle stesse, di collaborazione con la Chiesa cattolica e le altre religioni". L'analisi include anche l'attività della Commissione di Consulenza per la Libertà Religiosa e i contenuti degli accordi di collaborazione tra lo stato e le diverse organizzazioni religiose.

Merita l'attenzione del lettore la prospettiva dalla quale l'autore cerca di presentare il processo storico di formazione della legislazione spagnola nel campo della libertà religiosa. Essa indica il ruolo della dottrina del Concilio Vaticano II, ed in particolare della dichiarazione conciliare *Dignitats humanae*, che permise al legislatore spagnolo di "liberarsi" dalle limitazioni ereditate dal sistema repubblicano e franchista del diritto alla libertà religiosa, dichiarato in entrambi i sistemi.

Parole chiave: Chiesa Cattolica, Chiese orientali, diritto canonico, CIC, CCEO, ecumenismo, dottrina sociale della Chiesa cattolica, pluralismo

Ecumeny and Law, vol. 4 (2016)
pp. 165—180

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The Basic Right to the Freedom of Religion in Germany: Constitutional Legal Concept and Current Tendencies

Keywords: religious freedom, Germany, constitution (fundamental law), crosses and other religious symbols in public sphere, circumcision debate

Introduction

The Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948 ushered in a new epoch in the history of human rights. According to Art. 18 of this declaration "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The recognition and proclamation of the freedom of religion by the United Nations was a milestone in the history of human rights. Not only that human beings were permitted to worship and practice their faith, but also have other rights, the so-called human rights. The effect of this recognition became apparent in Europe, then the European Nations began to seek ways of protecting the rights and dignity of her citizens. Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, established by the Council of Europe, rec-

ognized the basic right of freedom of religion in Europe. This convention is legally binding for Germany since 1953.

The fundamental human rights, especially the right of religious freedom, the central aspect of this discussion, had been recognized in different ways nationally and internationally. The recognition of religious freedom in modern times has witnessed stages of development in Germany. Up till the middle of the 19th century only the members of Christian faith were given the rights of citizenship. But with the so-called Weimar Constitution (*Weimarer Reichsverfassung*, hereinafter WRV) of 11 August 1919,[1] the freedom of religion was guaranteed for all citizens of Germany. Now having changed from the German constitutional monarchy (*Kaiserreich*) to the republic, it became the duty of the constitution to protect this right.

The third section of the second main part of this constitution, which comprises articles 135 to 141, speaks about religion and religious societies ("Religion und Religionsgesellschaften"). Article 135 states: "All citizens of the Reich have the right of freedom of belief and conscience. The undisturbed practice of religion is guaranteed by the constitution and is under protection of the state. The General state laws remain unaffected."[2] Furthermore Art. 136 par. 1 states: "Civil and civic rights and duties of the citizens are neither determined nor restricted through the practice of religious freedom."[3]

The Weimar Republic 1919 to 1933 was already a political system that recognized and protected the freedom of religion in a modern sense. However, there were a lot of restrictions to this fundamental right, especially during the regime of the National Socialism, a regime that was in many ways against religion and the Church.

[1] Cf. F. Hammer: "Weimarer Reichsverfassung." In: *Lexikon für Kirchen- und Staatskirchenrecht*, vol. 3. Paderborn et al. 2004, pp. 873—874 (hereinafter WRV).

[2] Art. 135 WRV: "Alle Bewohner des Reichs genießen volle Glaubens- und Gewissensfreiheit. Die ungestörte Religionsübung wird durch die Verfassung gewährleistet und steht unter staatlichem Schutz. Die allgemeinen Staatsgesetze bleiben hiervon unberührt."

[3] Art. 136 Abs. 1 WRV: "Die bürgerlichen und staatsbürgerlichen Rechte und Pflichten werden durch die Ausübung der Religionsfreiheit weder bedingt noch beschränkt."

1. Freedom of faith and conscience in the German constitution (*Grundgesetz*)

The new constitution of the Federal Republic of Germany that came after the suppressive and destructive regime of the National Socialism had the protection of the right and dignity of the human person as its top priority. The German constitution (*Grundgesetz*, hereinafter GG) of 23 May 1949[4] began with a preamble whereby the fathers of this constitution stated their responsibility before God and mankind. The first part encompasses articles 1 to 19. This is the so-called basic law. Introductory Art. 1 states:

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.[5]

The freedom of religion comes up in Art. 4. The first two sections of this article state:

> (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
> (2) The undisturbed practice of religion shall be guaranteed.[6]

In comparison with the Weimar constitution it could be seen that the freedom of religion as basic law was not under the general law. It is recognized without restrictions and it can only be limited when there is a conflict between it and other basic rights. In this case only the legislation can define the limits.

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[4] Cf. M. Stolleis: "Grundgesetz." In: *Handwörterbuch zur deutschen Rechtsgeschichte*. 2nd edn., vol. 2. Berlin 2012, coll. 578—580.

[5] Art. 1 GG: "(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt. (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht."

[6] Art. 4 Abs. 1 and 2 GG: "(1) Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich. (2) Die ungestörte Religionsausübung wird gewährleistet."

The freedom of religion as a basic law is so meaningful that it should, for no reason, be compromised or impaired, and no legal regulation could impede its implementations (Art. 19 par. 2 GG). As a basic right, that is generally useful and accepted, then the regulation of Art. 19 par. 3 GG is of great significance for the freedom of religion. Therefore, the basic rights shall also apply to domestically juridical persons to the extent that the nature of such rights permits.[7] The freedom of religion has, according to German constitutional law, a collective aspect. This collective aspect is for the good of the Church, other religious communities, and ideologies, to the extent they are recognized in law as legal entities. This is the case especially for the large Churches and also for the Jewish society and other religious communities. As bodies governed by public law, they are not only supporters of religious freedom, but other basic rights, too, as long as they should be generally acceptable. In this case, the place of the Churches and religious communities in Germany are secured in public and they have the possibility of working and letting their impact be felt in the society.[8]

After the reunification of Germany through the coming over of the eastern states Brandenburg, Mecklenburg-Hither Pomerania, Saxony, Saxony-Anhalt and Thuringia in 1990, which were newly formed on the territory of the German Democratic Republic, part 1 of the Bonn constitution (*Grundgesetz*), the so-called catalogue of fundamental rights and with it the basic right of religious freedom according to Art. 4 became the governing law in all of Germany. The state constitutions of the Eastern Ger-

[7] Art. 19 Abs. 3 GG: "Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind."

[8] For the German constitutional order concerning religious rights and the relation between the state and religious communities see: *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, vol. 2. Eds. J. Listl, D. Pirson. 2nd edn., Berlin 1994—1995; B. Jeand'Heur, S. Korioth: *Grundzüge des Staatskirchenrechts*. Stuttgart et al. 2000; A. Freiherr von Campenhausen, H. de Wall: *Staatskirchenrecht. Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa*. 4th edn. München 2006; S. Mückl: "Trennung und Kooperation — das gegenwärtige Staat-Kirche-Verhältnis in der Bundesrepublik Deutschland." In: *Die Trennung von Staat und Kirche. Modelle und Wirklichkeit in Europa*. Eds. B. Kämper, H.-W. Thönnes. Münster 2007 (= *Essener Gespräche zum Thema Staat und Kirche* 40), pp. 41—83; S. Mückl: "Grundlagen des Staatskirchenrechts." In: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 7: *Freiheitsrechte*. Eds. J. Isensee, P. Kirchhof. 3rd edn., Heidelberg 2009, pp. 711—789; M. Germann: "Religion und Staat in der Bundesrepublik Deutschland: rechtliche Maßgaben." In: *Religion im öffentlichen Raum. Deutsche und französische Perspektiven*. Eds. B. Schröder, W. Kraus. Bielefeld 2009 (= *Frankreich-Forum* 8), pp. 47—66; H. de Wall, S. Muckel: *Kirchenrecht. Ein Studienbuch*. 4th edn. München 2014, pp. 60—94; A. Hense: "Kirche und Staat in Deutschland." In: *Handbuch des katholischen Kirchenrechts*. 3rd edn. Ed. S. Haering, W. Rees, H. Schmitz. Regensburg 2015, pp. 1830—1865.

man federal states that were promulgated in the 1990s took up this basic right as well, like it was done before in the constitutions of the Western German federal states. The freedom of religion is not only accepted in the *Grundgesetz*, but is also guaranteed in the constitutions of the different federal states of Germany.

2. The contextual aspect of the freedom of religion

Just as with the content of Art. 4 par. 1 and 2 GG which encompass two basic rights — the freedom of conscience and the freedom to profess one's faith, so too the freedom of religion is guaranteed a broadly defined protection. It implies also the freedom either to believe or not, and the possibility of performing religious rituals or not. This basic law has constitutional and legal implications. It gives also individual persons the right to live their lives and conduct their activities according to the tenets of their religion and belief. A religion will be assessed according to the character of its members and the character of their religious organisation.

In conventional sense, the freedom of religion means the freedom either individually or collectively, in public or in private to practice one's faith and to declare or show one's affinity for a particular religion or belief. This can be in the form of worship, in religious instructions and in the performance of religious rites, traditions, or customs. The freedom of religion as a basic law also implies the freedom and the possibility to change or decline one's faith or one's ideology. A consequence of this component of basic right in Germany is the possibility of individuals to decline or give up their membership from any religious organisation or worldview in the presence of a state authority. After this declaration the citizen in question is no longer a member of such institution.[9] The possibility to decline one's membership in the presence of a state authority does not touch the internal rights of the religious institution.

However, the freedom of religion cannot be exercised arbitrarily and should not be abused. Its usage is only for religious matters, and accord-

[9] Cf. S. Haering: "Der Kirchenaustritt vor dem Staat und seine Konsequenzen im staatlichen und im kirchlichen Bereich. Zur Rechtslage in Deutschland." In: *In mandatis meditari. Festschrift für Hans Paarhammer zum 65. Geburtstag*. Eds. S. Haering, J. Hirnsperger, G. Katzinger, W. Rees. Berlin 2012 (= *Kanonistische Studien und Texte* 58), pp. 1119—1139; *Der Kirchenaustritt. Rechtliches Problem und pastorale Herausforderung*. Ed. G. Bier. Freiburg—Basel—Wien 2013.

ing to the provisions of the constitution. It requires an organized notion of God or of ethics or metaphysical ideas of a particular conscience.[10]

It belongs to the freedom of faith as part of the freedom of religion to enjoy the right of showing or advertising one's faith, that means to evangelize or seek new members. Furthermore, the right to carry out charitable activities and other social activities, also enjoy the protection of the freedom of religion. As long as such activities are allowed they should be practiced and its implementation should not be hampered.

The freedom of religion has not only positive, but also negative implications or side aspects. The negative aspect encompasses the right to conceal one's belief or non-belief, and the right of not taking part in religious activities or practices. Like I said before it also gives the individual the right to decline or give up her membership from the Church in the presence of a state authority which is possible in Germany, and this right is another aspect of the negative side of the freedom of religion. The positive and negative aspects of religious freedom belong together, just like two sides of the same coin. It could surely lead to conflicts, especially when subjects teach different ideas as part of their right to the freedom of religion. Such conflicts could also arise especially if one religious group thinks they are the rightful religion or that they have the monopoly on truth. Practical experience shows that this problem hardly occurs in Germany today. Here there is a clear distinction of religious organisations from secular activities on one side, and from an aggressive atheism on the other side.

The negative aspect of the freedom of religion could also be actualised by not believing or by not being a member of any religious organisation. However, it does not exonerate one from confronting with religious beliefs. Also non-believers and those who do not belong to religious organisations are expected to respect and accept the fact that believers have the right to practice their faith through words and actions in public or in private. Every effort to force off or remove religion from the public into covert private sphere as consequent of the negative aspect of religious freedom is prohibited by the German constitutional law and its particular legal acts.

[10] Cf. Frhr. von Campenhausen, de Wall: *Staatskirchenrecht* (fn. 8), p. 55.

3. Amendments by the Weimar Church Articles

The basic law article of the freedom of religion was constitutionally supplemented and concretised through the so-called Weimar Church Articles. These articles were the basic state regulations regarding the relationship between the state and religion, the state and the different worldviews, and the individual freedom of religion. The German constitution and its founding fathers accepted and acclaimed the decision that was taken by the Weimar Republic of 1919 in this regard. They not only accepted this decision, but also concluded that there should be a separation between the state and religion. Formally Art. 140 of the German constitution (*Grundgesetz*) incorporated this decision without repeating the words. Articles 136, 137, 138, 139 and 141 of the Weimar constitution (*Weimarer Reichsverfassung*) especially were included in the new German constitution. However, it has to be recalled that not all regulations that were taken from the constitution of the Weimar Republic belong to the freedom of religion.

Some of these regulations were efforts and attempts made by the state to incorporate with religious organisations and the civil society in order to guarantee and foster the freedom of religion and worship. Others were attempts made at recognizing the special status and rights of the Church as corporate institution in the civil society (Art. 137 par. 5). The possibility of the church to impose and collect taxes from her members with the help of the state (Art. 137 par. 6) is not part of the constitutional legal concept of the freedom of religion unlike Art. 136 of the Weimar constitution.

Article 136 of the Weimar constitution was centred on the individual freedom of religion. It has to be reminded, according to this regulation, the citizens' rights and duties should neither be increased nor reduced because of their freedom of religion or religious affiliation. That means the citizens have rights and duties independent of their religious affiliation (par. 1). The right of the citizens and their rights to participate in governance or to take up ministerial duties and appointments should not be determined by their religious affiliation (par. 2). This regulation was also enshrined in the German constitution. According to Art. 33 of the German Basic Law, all the citizens have equal rights and enjoy equality of the law independent of their religious affiliation. Accordingly, no one should be advantaged or disadvantaged because of his faith or worldviews.[11] This norm is related

[11] Art. 33 GG: "(1) Jeder Deutsche hat in jedem Lande die gleichen staatsbürgerlichen Rechte und Pflichten. […] (3) Der Genuß bürgerlicher und staatsbürgerlicher Rechte,

to the right of equality of the citizens as enshrined in law. According to Art. 3 par. 3 of the German constitution no one should be favoured or disfavoured because of their faith, their religion, or their worldview.[12]

Furthermore, one has no obligation to declare publicly his faith or religion. In this case however, the state authority has the right to mandate one to declare his religion in order to determine other rights and duties, and for statistical purposes as required by law (Art. 136 par. 3 WRV). This is especially in context with the duties of paying church tax or taking part in religious instructions. Finally, it should be pointed out that no one should be forced to take part in church activities, ceremonies, feast, or to participate against their will in any religious activity. Also no one should be forced to take or make religious oath against their will (par. 4).

This constitutional norm gives no priority to the individual's negative right to the freedom of religion; it is simply there to protect the freedom of religion and the independence of the human person.

The priority of Art. 141 WRV is to guarantee the personal right of the individual to engage in military and prison service. According to this regulation, religious organisations have the right to offer their services, in hospitals, prisons, and other public institutions. This right should be respected and guaranteed. As long as the need be, they should be allowed to conduct religious services and work as chaplains, they have also the right to conduct religious activities in those places. The fathers of the constitution aimed at giving those people who are living in such difficult situation hope and the possibility of practicing their faith and the necessary pastoral and spiritual help they need. These regulations were not primarily intended to encourage missionary activities or evangelisation, but simply to offer spiritual and pastoral assistance to those who need it. In this case it is important to give soldiers, prisoners, patients, and others in custody the possibility of practicing their faith, irrespective of their difficult situation and imprisonment.

There are other constitutional regulations aimed at protecting and promoting the collective or corporate freedom of religion and the independence of religious organisations from government interference. To mention here are the freedom to form religious organisations (Art. 137 par. 2 WRV), and the Churche's right to organise itself and its activities (par. 3).

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die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind unabhängig von dem religiösen Bekenntnis. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnisse oder einer Weltanschauung ein Nachteil erwachsen. […]"

[12] Art. 3 par. 3 GG: "Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. […]"

Accordingly, the religious organisations have the right to pilot their affairs within the limits of general law. They also have the legal right and freedom to choose and appoint their leaders without the interference of the state authority. Specially to be mentioned here is the right of religious organisations to own and administer their properties without the interference of the state (Art. 138 par. 2 WRV). The right to own and administer its properties is part of the basic law of property, but its aim here is primarily to protect the right of the Church to own properties.

In summary it is clear that the integration of the Weimar Church Articles in the German constitution was intended not only to protect the individual freedom of religion, but also to recognise and guarantee the corporate part of the freedom of worship. In this instance it guarantees the right and the existence of the Church, other religious organisations, and worldviews.

4. Some selected topical problems and issues

Since a decade ago, there has been on the one hand the influx of refugees and other migrants with different religious inclinations into Germany. On the other hand, the society has witnessed a drastic rate of secularisation. Beside the two strong traditional Churches, there are now other Christian denominations and non-Christian religions in Germany today. About four million Muslims live in Germany today and practice their faith. The German society has been progressively secularised since the early 1990s as a result of the re-unification of the former areas of the former German Democratic Republic with the western part of Germany. With this re-unification there was a great influx of the former citizens of the German Democratic Republic. Many of those citizens belonged to non-religious organisations. This re-unification led to lots of changes in the German society. Nevertheless, the reduction in the percentage of the members of religious organisation could not be primarily attributed to this re-unification, but the re-unification played a major role. In any case, one out of every three German citizens today follows no religion or does not belong to any religious organisation. It is to be noted also that up till the late 1980s about 90% of the German citizens were members of one Christian church or the other. This societal change has led to a lot of debate and discussion on the importance of religion and the freedom of religion in the society.

It is necessary at this point to elaborate on some of these recurrent issues. In Germany today there are discussions or debates whether cruci-

fixes should be hanged in the classrooms. There are also discussions about the religious importance of circumcision of young boys and whether female teachers should wear hijabs in the schools. Other topics, that shall not be discussed here, include the question of slaughtering animals in accordance with religious prescriptions (ritual slaughter).[13]

In 1995 the so-called crucifix-judgement of the German constitutional court was published. The judgement of the High Court brought to an end the legal battle between the Bavarian school system and the Public Administrative Court over whether it should be allowed to affix crucifixes in classrooms or not. The parents of a school child had gone to court, challenging the decision of the Bavarian ministry of education that allows crucifix in classrooms. According to the parents, the presence of crucifix in classrooms violates their right of religious freedom and parental upbringing duties (Art. 6 par. 2 GG).

In its judgement the constitutional court ruled that the negative aspect of the freedom of religion encompasses and incorporates not only the freedom to practice one's faith, but also the freedom to decide what religious article should be allowed in the classrooms. It is not a question of the freedom to engage in religious activities or not. According to the court, the cross has an appealing character, and is a symbol of Christian faith that should be followed and emulated. Therefore, the allowance of cross in the classrooms is a means of protecting and defending the negative aspect of the freedom of religion and the general freedom of worship and faith. It is a means used by the state to protect the freedom of religion for such parents who want to train their children according to Christian values and that includes the possibility of allowing crucifix in the classrooms. However, to avoid conflicts, it is necessary to arrive at a compromise and respect the feeling of those who are not members of the Christian faith. All efforts should be made for a peaceful co-existence between various groups.

Nevertheless, it should be underscored that the constitutional court in its judgement did not prohibit or put an end to the possibility of hanging crucifix in the classrooms, because its presence does not compromise or

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[13] Cf. K.-A. Schwarz: *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des „rituellen Schächtens"*. Baden-Baden 2003 (= *Studien und Materialien zur Verfassungsgerichtsbarkeit* 94); N. Arndt, M. Droege: "Das Schächturteil des BVerfG. Ein 'dritter Weg' im Umgang mit der Religionsausübungsfreiheit." In: *Zeitschrift für evangelisches Kirchenrecht* 48 (2003), pp. 188—198. — In general concerning the questions on islamic religion and German legal order, see: S. Muckel: "Antworten des staatlichen Religionsrechts auf Herausforderungen durch den Islam." In: *Islam — Säkularismus — Religionsrecht. Aspekte und Gefährdungen der Religionsfreiheit*. Eds. L. Häberle, J. Hattler. Heidelberg 2012, pp. 61—78.

infringe upon the neutral nature of the state to religious affairs in general. In other words, the court accepted the decision of the Bavarian ministry of education that allows the presence of crucifix in the classrooms. But in the case where conflicts arise as a result of the presence of crucifix in the classrooms, it should be removed, declared the court.[14]

In 2012 there was a strong debate in Germany regarding the circumcision of young boys as part of religious initiation. This debate was propelled by the decision of the Magistrate Court in Cologne.[15] According to this judgement the circumcision of young Muslim boys was an act of mutilation and bodily harm and so is against the law and should be prohibited. This court's decision was in reference to the German constitution, which prohibits the mutilation and bodily injury on someone, independent of the religious motives for such actions. Also parents have the duty to protect their children from every kind of bodily injury as part of their parental upbringing's responsibility.[16]

The case in question did not apply primarily to Christians, but to Muslims and Jews, because both religious groups teach and practice the circumcision of their young boys as part of their religious initiation. This issue in question led to a lot of political discussions in Germany, especially in view of its nature: with regard to the Jews as a result of the persecution and destruction they suffered during the time of the National Socialistic regime, and by the Muslims regarding the integration of the so

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[14] Cf. also U. Rhode: "Religiöse Symbole in staatlichen Einrichtungen." In: *Recht auf Mission contra Religionsfreiheit? Das christliche Europa auf dem Prüfstand*. Eds. P. Krämer et al. Berlin 2007 (= *Kirchenrechtliche Bibliothek* 10), pp. 167—178; S. Muckel: "Schutz von Religion und Weltanschauung." In: *Handbuch der Grundrechte in Deutschland und Europa*. Eds. D. Merten, H.-J. Papier, vol. IV. Heidelberg 2011, pp. 541—615, 592 f.; concerning questions on the use of crosses and other religious symbols in the public, see some papers in: *Österreichisches Archiv für Recht und Religion* 57 (2010), issue 3.

[15] "Urteil des Landgerichts Köln vom 07.05.2012 (151 NS 169/11) zur Strafbarkeit der Beschneidung aus religiösen Motiven." *Archiv für katholisches Kirchenrecht* 181 (2012), pp. 272—274.

[16] Cf. K.-A. Schwarz: "Verfassungsrechtliche Aspekte der religiösen Beschneidung." *Juristen-Zeitung* 63 (2008), pp. 1125—1129; H. Bielefeldt: "Der Kampf um die Beschneidung. Das Kölner Urteil und die Religionsfreiheit." In: *Blätter für deutsche und internationale Politik* 57 (2012), H. 9, pp. 63—71; A. Hense: "Wie weit reicht Religionsfreiheit? Das Kölner Urteil zur Beschneidung gibt zu denken." In: *Herder-Korrespondenz* 66 (2012), pp. 443—447; J. Lutz-Bachmann: "Zum Beschneidungsurteil des LG Köln und zur Rechtslage hinsichtlich der Beschneidung minderjähriger Knaben aus religiösen Gründen in Deutschland." *Kirchliches Jahrbuch für die Evangelische Kirche in Deutschland* 139 (2012), pp. 3—15; D. Bogner: "Religion im Abseits? Das Kölner Beschneidungsurteil in sozialethischer Perspektive." *Theologische Quartalschrift* 193 (2013), pp. 158—174.

many Muslims in Germany. The solution to this problem was not left to the court, but the legislators decided that both religious groups should be allowed to practice their initiation rites.[17]

Finally, there are still discussions on the "wearing of headscarfs" judgement of the Constitutional Court in 2015. It was debated whether a Muslim female teacher should wear her head scarf in a state school. It should be remembered that it is part of the freedom of religion when one clothes oneself according to his religious belief. It does not matter if it is a way of promoting his faith or not.

As the case may be, it is without doubt that the woman in question has the right to wear her headscarf. However, the question remains, how far and under what circumstances should the woman wear her headscarf, because of the nature of her job as a teacher in a religiously neutral state school. There was no general judgement on this matter, but it could be decided according to the different situations and according to court order. Following the regulations and decisions of many state ministries of education, the wearing of headscarfs by teachers is forbidden. Such decisions have been accepted by the court.

The recent judgement of the constitutional court has put an end to this discussion. The court ruled that it is not generally prohibited for female teachers to wear headscarfs in the school. It could be said that as a result of this judgement the basic individual right of the freedom of religion was given greater impetus than the interest of a school system, that has primarily to do with the intellectual cultural identity of the school system. However, it should be noted that this new judgement has not put an end to this discussion or topic, because there are still a lot of political and legal discussions on this issue.[18]

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[17] "Gesetz über den Umfang der Personensorge bei der Beschneidung eines männlichen Kindes vom 20.12.2012." *Bundesgesetzblatt* I (2012), pp. 2749—2750. — Cf. S. Rixen: "Das Beschneidungsgesetz in der Kritik: verfassungsrechtliche Legitimation, Anwendungsprobleme, Reformbedarf." *Zeitschrift für medizinische Ethik* 60 (2014), pp. 33—43; J. Brantl: "Gefährliche Körperverletzung im Namen der Religion? Kernfragen in der Beschneidungsdebatte aus ethischer Sicht." *Zeitschrift für medizinische Ethik* 60 (2014), pp. 45—62; H. Kress: "Religiöse Vorgaben und individuelle Grundrechte im Konflikt. Die Frage der rituellen Beschneidung nicht einwilligungsfähiger Säuglinge und Jungen und ihr Stellenwert für das heutige Religions- und Staatskirchenrecht." *Ethica* 22 (2014), pp. 195—218; E. Mack: "Ethische Legitimität der Beschneidung?" *Zeitschrift für medizinische Ethik* 61 (2015), pp. 99—108.

[18] Cf. M. Hong: "Ein Gericht oder zwei Gerichte? Der Kopftuch-Beschluss, das Plenumsverfahren und der Grundsatz 'stare decisis'." *Der Staat* 54 (2015), pp. 409—434; C. Franzius: "Vom Kopftuch I zum Kopftuch II. Rückkehr zur Verhältnismäßigkeitsprüfung." *Der Staat* 54 (2015), pp. 435—452; M. Schulten: "Die Reaktionen der Landesgesetzgeber auf den Kopftuchbeschluss des Bundesverfassungsgerichts vom 27. Januar 2015, Az. 1 BvR 471/10 bzw. 1181/10." *Kirche & Recht* 21 (2015), pp. 168—178.

5. Summary and conclusion

The basic right to the freedom of religion is not respected everywhere in the world. Recent reports from many Arab and African nations show that many people are being maltreated, killed, and forced away from their homes because of their religious affiliation. In many countries today Christians are being persecuted because of their faith. Happily, in Germany today this is not the case. The freedom of religion in Germany is and remains an important component of the catalogue of the basic rights of the German constitution. The freedom of religion is allowed, and respected, despite the recurrent lack of interest in religious matters in the society at large. The discussion and debate about the circumcision of young boys shows the interest of the citizens on religious matters.

There have been different opinions about the freedom of religion in the society today. Following the constitutional court judgement about the hanging of a crucifix in the classroom in 1995, the importance of the negative aspect of freedom of religion over the positive aspect was unanimously declared unlike in the case of the circumcision of young boys. In order to avoid conflicts and disorder in the society and because of the interest of the international communities, the positive aspect of the freedom of religion was taken into consideration by the decision over the wearing of headscarfs. However, there have been various opinions about this judgement. Many people are of the opinion that the court judgements were made to avoid conflicts and breakdown of law in the society, others think that the Christians are not strong enough to defend their faith. The reasons for these opinions could not be answered here.

All problems and issues that could arise in Germany in future because of the freedom of religion are sure to be solved through constitutional and legal means. There is the hope that future political and societal development respects this juridical basis and acknowledges the importance of the basic right of the freedom of religion. They should avoid situations and policies that could compromise this right or its implementations.

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Stephan Haering

The Basic Right to the Freedom of Religion in Germany: Constitutional Legal Concept and Current Tendencies

Summary

This article deals with the fundamental right to religious freedom in the Federal Republic of Germany and its legal content. Firstly, a glance is cast at the constitutionally basic norm for religious freedom and the factual provisions of the German Constitution (*Grundgesetz*) associated to it. Then comes the focus on the issues of religious freedom, which have emerged over the past two to three decades due to social changes. Also, the following is specifically addressed: the Christian cross in government buildings or public places and the religiously motivated circumcision of boys and religiously characterized articles of clothing in the school. It concludes with a brief summary and a — basically positive — review of the German situation.

Stephan Hearing

La liberté de confession en Allemagne

Résumé

Le présent article concerne le droit à la liberté de confession — qui est un droit civique fondamental — en République fédérale d'Allemagne et sa réglementation juridique. Au début, l'auteur présente la norme essentielle de liberté résultant du droit constitutionnel ainsi que les prescriptions de la constitution allemande (loi fondamentale) qui y sont directement liées. Ensuite, il aborde les problèmes concernant la liberté de confession qui ont surgi dans les deux/trois dernières décennies à la suite des changements sociaux. On a précisément décrit : la croix chrétienne dans l'espace public, la circoncision des garçons motivée par la religion ainsi que les éléments vestimentaires caractéristiques d'une religion donnée portés à l'école. Un bref résumé et l'évaluation — tout à fait positive — de l'état réel de cette question en Allemagne clôturent l'article.

Mots clés : liberté de confession, Allemagne, constitution (loi fondamentale), croix et d'autres symboles religieux dans l'espace public, discussion sur la circoncision

Stephan Hearing

La libertà di professione della fede in Germania

Sommario

Il presente articolo riguarda il diritto civico fondamentale alla libertà di professione della fede nella Repubblica Federale Tedesca e la sua regolamentazione giuridica. Nell'introduzione l'autore tratta la norma giuridico-costituzionale fondamentale della libertà di professione della fede e le prescrizioni, sostanzialmente legate ad essa, della costituzione tedesca (della legge fondamentale). Successivamente si occupa dei problemi che riguardano la libertà di professione della fede che si sono presentati nelle ultime due-tre decadi in seguito ai cambiamenti sociali. Sono stati trattati dettagliatamente: la croce cristiana nello spazio statale e pubblico, la circoncisione dei bambini per motivi religiosi e il fatto di indossare a scuola di capi di abbigliamento tipici di una determinata religione. L'articolo termina con una breve ricapitolazione e con un giudizio, fondamentalmente positivo, sulla situazione reale in Germania in tal campo.

Parole chiave: libertà di professione della fede, Germania, costituzione (legge fondamentale), croce ed altri simboli religiosi nello spazio pubblico, discussione sulla circoncisione

Ecumeny and Law, vol. 4 (2016)
pp. 181—219

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The Rights to Religious Freedom and Beliefs — Development, Legal Foundations, and Recent Trends in Austria

Keywords: right to religious freedom, recognition of churches and religious communities, relationship between state and churches/religious communities, religious/ecclesiastical law, Muslims, religious symbols

Introduction

A minute of silence to commemorate the crucifixion of Jesus Christ, that was announced on public television on Good Friday at 3 pm, caused a turmoil in the Republic of Austria in 2012. People feel disturbed by the nocturnal striking of a church tower clock. The former resulted in a complaint to the Austrian Constitutional Court, the latter in a civil action taken in Linz. Today especially, the question of religious freedom gains importance in the Austrian society and state institutions, both in its individual as well as in its corporate form, that is, the rights of religious-ideological associations. The term religious freedom "includes the freedom of belief, freedom of conscience and freedom of religion on the one hand, and freedom of worship on the other hand. Freedom of religion includes the right to adopt a religion or belief freely and without legal disadvantages, to change or give up, to exercise the chosen religion freely and in a undisturbed manner, as an individual or in community (individual and collective freedom of religion) as well as the corporate religious freedom of churches and religious communities. The right also includes their cor-

porate and institutional manifestations and the guarantee of autonomy in their own affairs."[1]

Religious freedom is a modern phenomenon, which features prominently in various catalogues of fundamental human rights.

Freedom of religion is also recognized by the Catholic Church. The term religious freedom includes, in accordance with the declaration of the Second Vatican Council on Religious Freedom *Dignitatis Humanae* from 7 December 1965,[2] as Joseph Listl indicates, "not only the individual religious freedom with the inclusion of the common public exercise of religion in all forms of actualizing confession and freedom of worship, but also the corporate religious freedom, that is, the institutional church freedom."[3] In this respect, the council agrees with Art. 9 of the European Convention on Human Rights of 4 November 1950 (European Convention on Human Rights — hereinafter ECHR),[4] which has constitutional status in Austria, as well as with Art. 10, section 1 of the Charter of Fundamental Rights of the European Union (CFR)[5] that was signed by the Nice European Council on 9 December 2000 and has been made legally binding by the Lisbon Treaty,[6] which came into force on 1 December 2009. Only the guarantee of religious freedom, which the Vatican Council demands for all churches and religious communities, warrants the free operation of churches and religious communities. Besides the demand for religious freedom the Vatican Council speaks of, without using the expression verbatim, "a reverberating yes to the religious neu-

[1] H. J. F. Reinhardt: "Religionsfreiheit. III. Kirchenrechtlich u. staatskirchenrechtlich." In: LThK[3], Vol. 8 (1999), columns 1051—1052, column 1051.

[2] Full text: *Declaration on Religious Freedom "Dignitatis Humanae"*. Available from: http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed 26.01.2016).

[3] J. Listl: *Kirche und Staat in der neueren katholischen Kirchenrechtswissenschaft*. Staatskirchenrechtliche Abhandlungen. Vol. 7. Berlin 1978, p. 214; cf. further Idem: "Staat und Kirche in den Aussagen des Zweiten Vatikanischen Konzils." In: *Menschenwürde und freiheitliche Rechtsordnung. Festschrift für Willi Geiger zum 65. Geburtstag*. Eds. G. Leibholz, H. J. Faller, P. Mikat, H. Reis. Tübingen 1974, pp. 521—542; reprinted in: J. Listl: *Kirche im freiheitlichen Staat. Schriften zum Staatskirchenrecht und Kirchenrecht*. Eds. J. Isensee, W. Rüfner, W. Rees. Staatskirchenrechtliche Abhandlungen. Vol. 25. Berlin 1996, pp. 968—988, pp. 972—974.

[4] Full text: European Convention of Human Rights. Available from: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 26.01.2016).

[5] Full text: Charter of the Fundamental Rights of the European Union. Available from: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 26.01.2016).

[6] Full text: Treaty of Lisabon. Amending the Treaty on European Union and the Treaty establishing the European Community. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12007L%2FTXT (accessed 26.01.2016).

trality of the modern democratic state."[7] Basically, the fundamental right to religious freedom warrants the development of the individual person and of individuals and communities. It is therefore essential for diversity and plurality within a society and for the freedom of work and operation of churches and religious communities in a state. The prerequisite for the warranty of religious freedom by a state is that the state itself is religiously and ideologically neutral and does not identify itself with any church or religious community.

1. Social facts and constitutional foundations of the church-state relation in the Republic of Austria

Based on the census dated 15 May 2001 approximately 8 million (8,032,926) people live in Austria, with almost six million belonging to the Roman Catholic Church (5,915,274), 376,150 to the Church of Augsburg Confession and the Church of Helvetic Confession (Church AB and HB), and 338,988 people to different denominations of Islam. The number of Muslims is increasing (cf. 1971: 22,267; 2014: 573,876). The remaining residents of Austria belong — in contrast to the Federal Republic of Germany where the two major Christian churches have approximately the same number of members — to a variety of small churches and religious communities.[8] More precisely, in 2010, 74.0% of the Austrian population were Catholic, 5.0% Protestant, 4.0% Muslim, 3.3% did not identify themselves to any religious community, 2.0% were Orthodox Christians, and 3.3% other religious communities inherent. In general, it can be predicted that the religious landscape in the coming years will change due to migration flows, the increase in the number of Muslim citizens, secularization (and therefore less people without faith or belief), and the decrease of the Catholic population.[9]

[7] J. Listl: *Aussagen* (fn. 3), p. 974; see further J. Listl: *Kirchenrechtswissenschaft* (fn. 3), pp. 216—221.

[8] Cf. "Bevölkerung 2001 nach ausgewählten Merkmalen und Bundesländern." In: *Statistisches Jahrbuch Österreichs* 2013. Ed. Statistik Austria. Wien 2012, pp. 56—59, p. 57; A. Rinnerthaler: "Kirche und Staat in Österreich." In: *Handbuch des katholischen Kirchenrechts*. Eds. S. Haering, W. Rees, H. Schmitz. Regensburg [3]2015, pp. 1866—1887, pp. 1866—1872.

[9] Cf. "Demographen erwarten Umwälzungen in religiöser Landschaft. Internationale Experten bei Konferenz in Wien — Forscher-Prognosen zur Religionsverteilung im Wien des Jahres 2046 sehen Wachstum bei Muslimen und Orthodoxen, Schwund bei Katholiken." *KATHPRESS-Tagesdienst*, 21 November 2014, no. 278, pp. 4—5, p. 4.

2. Development of the fundamental right to religious freedom in Austria

The contemporary Austria has been, historically speaking, largely shaped by the Catholic Habsburgs. Nevertheless, Austria was — despite the prevalence of the Roman-Catholic denomination — a multi-ethnic state, which was faced earlier with a variety of people of different religious denominations. Various tolerance patents (tolerance edicts) given by Joseph II granted religious minorities a freer exercise of their religion. Particularly, the said minorities represented the Protestant churches, that is, the Lutherans and the Reformed, the Orthodox Church, and the Jews.[10] However, the warranty of tolerance is something other than the guarantee of religious freedom, which was carried out later as a consequence of the revolution during the year 1848. There was tolerance but not equivalence and equality. However, tolerance, understood "as a toleration of other faiths," was the "antecedent to the religious freedom."[11]

The Constitutional Act on the Fundamental Rights of Citizens (*Staatsgrundgesetz*; hereinafter StGG) of 21 December 1867 (RGBl. 1867/142), which was declared a constitutional law of the Federal State of Austria by Art. 149 (1) in the Federal Constitution of the Austrian Republic of 1920 (*Bundes-Verfassungsgesetz*; hereinafter B-VG), contains the most important fundamental rights. Article 14 of StGG guarantees the individual freedom of religion in the form of a guarantee of freedom, belief, and conscience,[12] Art. 15 of StGG the corporate religious freedom for legally recognized churches and religious communities.[13] Article 15 of StGG grants that every

[10] Cf. H. Schwendenwein: *Österreichisches Staatskirchenrecht*. Beihefte zum Münsterischen Kommentar. Vol. 6. Essen 1992, pp. 22—25.

[11] H. M. Heinig: "Religiöser Pluralismus, Religionsfreiheit und Toleranz." *Policy. Politische Akademie*, no. 38, November 2010, pp. 4—6, p. 6. Available from: http://library.fes.de/pdf-files/akademie/07572.pdf (accessed 18.12.2014); see further W. Rees: "Die Entwicklung der Beziehungen zwischen Kirche und Staat in Deutschland und Österreich im Licht des Zweiten Vatikanischen Konzils. Vortrag beim Dies academicus der Pontificia Universitas Antonianum Facultas Iuris Canonici am 7. März 2005." *Antonianum* 81 (2006), pp. 339—379, pp. 348—350; W. Rees: "Grundlagen und neuere Entwicklungen in der Verhältnisbeziehung von Staat und Religionsgemeinschaften in der Republik Österreich." In: *Ein Leben für Recht und Gerechtigkeit. Festschrift für Hans R. Klecatsky zum 90. Geburtstag*. Eds. F. Matscher, P. Pernthaler, A. Raffeiner. Graz 2010, pp. 585—611, pp. 588—592.

[12] Article 14 of StGG: "(1) Full freedom of belief and conscience is guaranteed for everybody." Only a natural person can practice the fundamental right.

[13] Full Text: Staatsgrundgesetz, December 21, 1867, über die allgemeinen Rechte der Staatsbürger. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from:

legally recognized religious community "has the right to common public religious practice." Further, each church or religious community has the right "to arrange and administer its internal affairs autonomously, and to retain possessions and enjoyment of its institutions, endowments, and funds devoted to worship, instruction, and welfare, but as in every society, is subject to the general laws of the land." Otherwise, in unrecognized religious communities only private worship was permitted (see Art. 16 of StGG). With this regulation, the distinction between legally recognized and legally unrecognized churches and religious communities was introduced. Since Art. 15 of StGG does not contain any criteria and detailed guidelines for the recognition, these had to be established. The reason was the splitting of the Roman Catholic Church and the Old Catholic Church. Franz Joseph I issued these criteria by way of introducing a law to Art. 15 of StGG on 20 May 1874, the Recognition Act (*Anerkennungsgesetz*; hereinafter AnerkennungsG). This law was made with a view of multi-religiousness in Austria, making the recognition of previously not legally recognized religious communities possible.[14]

The European Convention on Human Rights, which was adopted in the Republic of Austria in 1958 into the legal system and has constitutional status since 1964, guarantees freedom to religion in a comprehensive sense.[15] In the period before this the individual freedom of religion

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http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000006 (accessed 7.01.2016); Art. 15 of StGG: "Every Church and religious society recognised by the law has the right to joint public religious practice, to arrange and administer its internal affairs autonomously, and to retain possessions and enjoyment of its institutions, endowments and funds devoted to worship, instruction and welfare, but is like every society subject to the general laws of the land." See further W. Rees: "Religions- und Meinungsfreiheit in Österreich mit einem Blick auf die Rechtsprechung." In: *Recht, Religion, Kultur. Festschrift für Richard Potz zum 70. Geburtstag*. Eds. B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider. Wien 2014, pp. 705—731, pp. 705—710; J. Bair: "Religionsfreiheit im Licht der Arbeit der Österreichischen Grundrechtskommission." In: *In mandatis meditari. Festschrift für Hans Paarhammer zum 65. Geburtstag*. Eds. S. Haering, J. Hirnsperger, G. Katzinger, W. Rees: *Kanonistische Studien und Texte*. Vol. 58. Berlin 2012, pp. 853—866.

[14] Cf. H. Kalb, R. Potz, B. Schinkele: *Religionsrecht*. Wien 2003, pp. 95—112. Ibidem, p. 93 noted that at this time in addition to the Catholic Church "those churches and religious communities were recognized as religious communities that have been tolerated by the previous legislation, i.e. by the tolerance patent (*Toleranzpatent*) of Joseph II, i.e. the Protestant Church and the Greek Orthodox Church, further by the Jews patent the Jewish Religious Association."

[15] Article 9 § 1 of ECHR: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance."

was guaranteed by Art. 14 of StGG and Art. 63 of the State Treaty of Saint-Germain-en-Laye of 10 September 1919 (*Staatsvertrag von Saint-Germain-en-Laye*; hereinafter StVStGermain), which received constitutional status in 1920 (B-VG, Art. 149).[16] Article 63 of StVStGermain also guaranteed the followers of not legally recognized religious communities the right to public worship so that Art. 16 of StGG was derogated from this point.[17] Specifically, in accordance with Art. 2 of the First supplementary protocol of the ECHR, the state has to respect the religious and ideological right of parents with regard to upbringing: "The state has the right of parents to respect and by exercising this right in the field of education and teaching, it ensures such education and teaching in conformity with their own religious and philosophical convictions."

Although Art. 9 of ECHR addresses explicitly only the individual freedom of religion, it is today undisputed that Art. 9 of ECHR also includes "corporate religious freedom."[18] As the jurisprudence of the European Court of Human Rights points out, "the autonomous existence of religious communities is a centerpiece of Protection […], the Article 9 of the European Convention on Human Rights guarantees," and therefore it remains "indispensable for pluralism in a democratic society."[19] Nonetheless, the state must be interested, if "religious instruction is carried out in a spirit of tolerance or violent sermons […] and under what conditions, for example, traditional rites such as circumcision or slaughter of an animal" are performed.[20]

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[16] Article 63 of StVStGermain: "All inhabitants of Austria have the right to exercise in public or private every kind of belief, religion or confession freely, insofar as their exercise is not incompatible with public order or good morals." See also: "Treaty of Saint Germain." *Encyclopædia Britannica*. Available from: http://www.britannica.com/event/Treaty-of-Saint-Germain (accessed 26.01.2016).

[17] Cf. H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), p. 50.

[18] C. Grabenwarter: "Die korporative Religionsfreiheit nach der Menschenrechtskonvention." In: *Kirche und Religion im sozialen Rechtsstaat. Festschrift für Wolfgang Rüfner zum 70. Geburtstag*. Ed. S. Muckel. Staatskirchenrechtliche Abhandlungen. Vol. 42. Berlin 2003, pp. 147—157, p. 148 together with fn. 6; see further B. J. Berkmann: *Katholische Kirche und Europäische Union im Dialog für die Menschen. Eine Annäherung aus Kirchenrecht und Europarecht*. Kanonistische Studien und Texte. Vol. 54. Berlin 2008, pp. 130—139; K. Pabel: "Die Religionsfreiheit im Lichte der EMRK und der Rechtsprechung des EGMR." In: *Staat und Religion. 9. Fakultätstag der Rechtswissenschaftlichen Fakultät der Karl-Franzens-Universität Graz. 16. Mai 2014*. Eds. J. Marko, W. Schleifer. Graz 2014, pp. 231—238.

[19] R. Potz: "Staat, Kirche, Religion oder: Die bewährte österreichische Praxis der Kooperation": http://www.proreligion.at/proreligion/kooperationvonstaatundkir (accessed 18.12.2014), pp. 2—5, p. 4.

[20] H. Boberski: "Religion im Blick. Die mühsame Trennung von Staat und Religion." *Wiener Zeitung.at*, April 5, 2013, pp. 1—3, p. 2. Available from: http://www.wienerzei

3. Recognition of churches and religious communities

The recognition of churches and religious communities and their concrete practices are not without controversies in the Republic of Austria. One of the prerequisites to obtain the status of a recognized church or religious community[21] is, among others, that a religious community has existed for at least 20 years (including 10 years as a state-registered religious community), and at least 0.2% of the Austrian population belongs to it, which is currently around 16,000 people. The community must also show "a positive attitude towards society and the state." Not without controversy, Jehovah's Witnesses as a recognized religious community, was recognized on 7 May 2009 (BGBl. II 2009/139).[22] On 16 December 2010, the Alevis[23] were recognized by the specific office, called *Kultusamt* in the Ministry of Education, Arts and Culture as a recognized religious community with the label Islamic Alevi Faith Community in Austria (IAGÖ).[24] In August 2013, the recognition of the Free Churches in Austria took place, to which five free churches have joined forces (Anhänger des Bundes der Baptistengemeinden, des Bundes Evangelikaler Gemeinden, der ELAIA Christengemeinde (ECG), der Freien Christengemeinde — Pfingstgemeinde and der Mennonitischen Freikirche in Österreich). Recognition requirements can be found in § 2 of *AnerkennG* and § 11 of the Act on the legal Status of Religious Communities (*Bekenntnisgemeinschaften-Gesetz*; BGBl. I Nr. 1998/19; hereinafter BekGG). The required positive basic attitude

tung.at/meinungen/blogs/religion_im_blick/537128_Die-muehsame-Trennung-von-Staat-und-Religion.html (accessed 18.12.2014); see further H. Boberski, J. Bruckmoser: *Weltmacht oder Auslaufmodell — Religionen im 21. Jahrhundert*. Innsbruck—Wien 2013.

[21] For the currently 16 legally recognized churches and religious communities see: "Gesetzlich anerkannte Kirchen und Religionsgesellschaften." *HELP.GV.AT*. Available from: https://www.help.gv.at/Portal.Node/hlpd/public/content/82/Seite.820015.html (accessed 7.01.2016); further: W. Rees, K. Breitsching: "Gesetzlich anerkannte Kirchen und Religionsgemeinschaften." Available from: http://www.uibk.ac.at/praktheol/kirchenrecht/ru-recht/texte/originaltexte/religionsgesellschaften.html (accessed 8.08.2010).

[22] Cf. Verordnung der Bundesministerin für Unterricht, Kunst und Kultur betreffend die Anerkennung der Anhänger von Jehovas Zeugen als Religionsgesellschaft. BGBl., May 7, 2009, part II. Available from: http://www.jehovas-zeugen.at/fileadmin/user_upload/02-Anerkennung/Anerkennung-link-file/20090507_BGBLA_2009_II_139.pdf (accessed 18.12.2014); see further W. Rees: *Grundlagen* (fn. 11), pp. 593—594; R. Kohlhofer: "Jehovas Zeugen in Österreich als Körperschaft des öffentlichen Rechts." *österreichisches Archiv für recht und religion* 56 (2009), pp. 319—320. The Jehovah's Witnesses in Austria have currently approximately 23,000 members.

[23] Currently, about 60,000 Alevis are living in Austria.

[24] Cf. "Aleviten als muslimische Glaubensrichtung in Österreich anerkannt." *KATH-PRESS-Tagesdienst*, 21 December 2010, no. 297, pp. 3—4.

towards society and the state does not just mean that "a religious community is neither subversive nor antisocial," but must find its expression "in a commitment to active dialogue and support of the state in the realization of public duties."[25]

Apart from the recognized churches and religious communities the Republic of Austria has created another legal form for religious communities as "registered confessional communities."[26] In this form of registration, however, essential areas of corporate religious freedom are excluded, such as, among others, the right to give religious instruction in public schools or in schools with public status.[27] The BekGG, which entered into force on 1 January 1998, was ultimately enacted to make the recognition more difficult for a religious community, especially in that a certain number of members and a waiting period was required.[28] For the first time, in an amendment to the Act on Confessional Communities, which has been adopted in August 2011, there is a possibility for the annulment of recognition of religious communities.[29]

In addition to recognition and registration as a confessional community, the Federal Law on Associations (*Vereinsgesetz;* BGBl. I 2002/66; hereinafter VereinsG 2002), which entered into force on 1 July 2002, provided the possibility that religious communities can acquire legal personality as associations (cf. § 1 (3) of VereinsG 2002).[30] Since philosophical communities are not subject to acts under the legal status of religious Confessional Communities (see § 1 of BekGG), it remains to them "only a possibility of

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[25] H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), p. 101.

[26] Cf. Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010098 (accessed 7.01.2016); see further J. Hirnsperger: "Das neue Gesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften. Bemerkungen zu Anlaß, Zielen und Inhalten." In: *Wege zum Heil? Religiöse Bekenntnisgemeinschaften in Österreich. Selbstdarstellung und theologische Reflexion*. Eds. J. Hirnsperger, C. Wessely, A. Bernhard. *Theologie im kulturellen Dialog*. Vol. 7. Graz, Wien, Köln 2011, pp. 153—171.

[27] For the state-registered confessional communities see: Staatlich eingetragene religiöse Bekenntnisgemeinschaften. Bundeskanzleramt — Österreich. Available from: https://www.bka.gv.at/site/3405/default.aspx (accessed 7.01.2016).

[28] S. Hammer: "Zur Ungleichbehandlung von Religionsgemeinschaften in der neueren Rechtsprechung." *österreichisches Archiv für recht und religion* 52 (2005), pp. 209—226.

[29] Cf. S. Schima: "Die Aufhebung der Anerkennung von Religionsgemeinschaften. Anmerkungen zum neu erlassenen § 11a des Bekenntnisgemeinschaftengesetzes." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz* 70 (fn. 13), pp. 745—773.

[30] Cf. H. Tichy: "Religiöse Gemeinschaften nach dem Vereinsgesetz 2002." *österreichisches Archiv für recht und religion* 51 (2004), pp. 379—397.

being established as a registered association."[31] The former Law on Associations from 1951 (*VereinsG* 1951) has been interpreted to mean "that it was not applicable to religious communities."[32] This has been clarified by § 1 (2) of VereinsG 2002, when religious communities can constitute themselves as organizations and as such acquire legal personality.

The Austrian government has difficulties with the so-called New Religious Movements, which in recent years acquired an importance in Austria, such as the Church of Scientology, the Osho movement, the Hare Krishna movement or the Moonies.[33] Since there are "privileged and discriminated religions" in Austria, "the Austrian legal recognition requires a comprehensive review"; "an action by the legislator is to be urgent," as Brigitte Schinkele stresses.[34] Last but not least, the applicable system of recognition in Austria discriminates religious minorities and non-denominational persons and limits the exercise of their fundamental right to freedom of religion.

4. Individual freedom of religion

According to Art. 14 § 1 of StGG full freedom of belief and freedom of conscience is guaranteed to every-man.[35] This is true for the positive and the negative form of freedom of religion, that is, to reveal the personal religious or ideological convictions or not. Freedom of religion in the case of parents includes the right to religious and ideological education.[36] As

[31] L. Wallner: *Die staatliche Anerkennung von Religionsgemeinschaften*. Wissenschaft und Religion. Vol. 18. Frankfurt am Main 2007, p. 288.

[32] Hirnsperger: Gesetz (fn. 26), p. 155; see further L. Wallner: *Anerkennung* (fn. 31), pp. 313—319.

[33] Cf. B. Schinkele: "Religionsrecht und neue religiöse Bewegungen in Österreich." In: *Mit welchem Recht? Europäisches Religionsrecht im Umgang mit neuen religiösen Bewegungen*. Ed. K. Funkschmidt. EZW-Texte. Vol. 234. Berlin 2014, pp. 139—145.

[34] B. Schinkele: "Privilegierte und diskriminierte Religionen — korporative Religionsfreiheit in europäischer Perspektive." *österreichisches Archiv für recht und religion* 57 (2010), pp. 180—197, p. 194; see further K. W. Schwarz: "Historia docet: Freikirchen als Kläger über kultusrechtliche Beschränkungen der Religionsfreiheit." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz* 70 (fn. 13), pp. 817—833.

[35] See H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), pp. 52—61; H. Schwendenwein: *Staatskirchenrecht* (fn. 10), pp. 67—92.

[36] Cf. H. Mayer: *Das österreichische Bundes-Verfassungsrecht. B-VG, F-VG, Grundrechte, Verfassungsgerichtsbarkeit, Verwaltungsgerichtsbarkeit. Kurzkommentar*. Manzsche Kurzkommentare. Wien ²1997, Comment on Art. 14, II., p. 505.

long as children cannot comprehend the fundamental right to religious freedom, the religious education of children is covered by the fundamental right to freedom of conscience by parents.

The right to religious upbringing of children was regulated by the Law on the Religious Education of Children of 15 July 1921 (*Reichsgesetz über die religiöse Kindererziehung*; DRGBl I S. 393), which entered into force in Austria on 1 March 1939 (again announced by BGBl. 1985/155; *Bundesgesetz über die religiöse Kindererziehung*; hereinafter RelKEG). The law offers a phased religious freedom. At the age of 14, children can determine their religious affiliation for themselves. They can decide on the leaving a church or religious community from that moment on. Until the age of 10 years the decision on the religious affiliation of the child, or to change religion or belief is a right of parents. From the age of 10 the child must be consulted regarding this decision (§ 2 (3) RelKEG). From the age of 12, a change of religion can only be made with the expressed consent of the child.

In the context of parental education rights, private schools receive importance (cf. Art. 17 (2) StGG; Art. 14 (7) B-VG). Private schools are granted public status if they coincide in their teaching with the curriculum of the Austrian public schools. The declaration of the Second Vatican Council on Christian Education (cf. VatII GE), states that the Catholic Church "does not see the state comprehensive school system, but rather a pluralistic school system, as desirable and in accordance with a free and constituted society, in which the private schools are in coexistence and competition with the public schools."[37] "The right of parents is violated," as the Vatican Council explained, "if their children are forced to attend lessons which are not in agreement with their religious beliefs, or if a single system of education, from which all religious formation is excluded, is imposed upon all" (cf. VatII DH, Art. 5). The Republic of Austria satisfies this concern of the Second Vatican Council, which can be extended to all religious communities, by the private school system, which is ordered by the Federal Act of 25 July 1962 on the private school system (Private School Act; *Privatschulgesetz*; BGBl. 1962/244), and by the possibility of confessional religious instruction in public schools and schools with public status (cf. Art. 17 (4) of StGG).

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[37] J. Listl: "Die Aussagen des Codex Iuris Canonici vom 25. Januar 1983 zum Verhältnis von Kirche und Staat." *Essener Gespräche zum Thema Staat und Kirche* 19 (1985), pp. 9—37, p. 23; reprinted in: Idem: *Schriften* (fn. 3), pp. 1032—1058, p. 1048; see further W. Rees: "Katholische Schule und Religionsunterricht als Verwirklichung von Religionsfreiheit. Kirchenrechtlicher Anspruch und staatliche Normierung." In: *Dem Staate, was des Staates — der Kirche, was der Kirche ist. Festschrift für Joseph Listl zum 70. Geburtstag*. Eds. J. Isensee, W. Rees, W. Rüfner. *Staatskirchenrechtliche Abhandlungen*. Vol. 33. Berlin 1999, pp. 367—390, pp. 375—378.

Nevertheless, confessional religious instruction in public schools and in schools with public status is a compulsory subject for pupils who belong to a legally recognized church or religious community (see § 1(1) of the Religious Education Act; *Religionsunterrichtsgesetz*; BGBl. 1949/190; herinafter RelUG). Paragraph 1 (2) of RelUG grants the possibility to unregister from this lesson.[38] Pupils under 14 years may be withdrawn from religious instruction by their parents. The fundamental right to religious freedom in its negative form and the above-mentioned way of religious maturity are the basis for this. According to § 2 (1) of RelUG, attendance at church services that are held by the legally recognized churches and religious communities on special occasions in academic or political life, especially at the beginning and at the end of the school year, and the participation in religious exercises or events, are optional for the teachers and pupils. The students must be given permission for absence from ordinary classes (§ 2a (2) of RelUG). The possibility of a school prayer stems from § 2 of the School Organisation Act of 1962 (*Schulorganisationsgesetz;* BGBl. 1962/242; SchOG 1962), the so-called target-paragraph (*Zielparagraph*), which determines that the teaching of religious values to young people and religious exercises belong to the area of responsibility of the school. It is the onus of the pupils in a class to pay attention regarding interdenominational or interreligious prayers. Any coercion towards the student to participate in the practices is excluded.

In accordance with § 3 of AnerkennungsG, "for the public sector the belonging to a church or religious community depends on the Church's own law and the corresponding regulations." The requirements of membership and the nature of joining a recognized church are determined by its constitution. State regulations exist with respect to the withdrawal from a legally recognized church or religious community, which the state must warrant due to its ideological and religious neutrality and the fundamental right to religious freedom. According to Art. 5 of the law of 25 May 1868 whereby the interdenominational relations of citizens in relations stated therein are regulated (RGBl. 1868/49; Act on Interconfessional Relations; *Interkonfessionsgesetz*, hereinafter InterkonfG) all rights of the abandoned church or religious community to the person who has left this church or religious community will be lost, as well as the demands on this person from the church, that is, there is no obligation to pay the church tax (outstanding obligations remain existent) or to participate in a confessional religious education in public schools or schools with public status.

[38] "Students who have not attained the age of 14, […] are withdrawn in writing by their parents at the beginning of each school year from participating in religious instruction; Students over the age of 14 can make such a written notification themselves." Vgl. § 1(2) of RelUG.

Although a change of religious belief according to law is unproblematic, Muslims, in accordance with their self-image, have no right to convert to another religion. According to sharia law, religious freedom means the freedom of Muslims to practice their beliefs, and the freedom of all people to convert to Islam.[39] Religious freedom in its negative expression is not accepted, not even the right not to belong to a religious community. However, due to the right to religious freedom warranted by the Law of the Republic of Austria likewise Muslims have a right to change religion, although the conversion from Islam to Christianity for Muslims "may be associated with some risks."[40]

With regard to the prayer duty of Muslims employers in Austria have a duty to give workers the necessary time for the exercise of religious duties, provided that the time off work is compatible with the requirements of the company. An obligation by the employers to provide prayer rooms or to enable the exercise of religion during working hours is not incurred.[41] When workers take their religious duties during a time in which they are obliged by contract to perform work, there is a collision of interests. So the Supreme Court in Austria had recognized in its decision 9 ObA 18/96 of 27 March 1996 that the perception of religious duties of a Muslim worker during the regular working hours is a reason for dismissal if the exercise of prayer is not in accordance with the requirement of the company.[42]

[39] Cf. "Glaubensfreiheit im Islam." Available from: http://de.wikipedia.org/wiki/Glaubensfreiheit_im_Islam (accessed 29.03.2015).

[40] Cf. Deutsche Bischöfe: "Muslime haben Recht auf Religionswechsel. Neue Arbeitshilfe der Deutschen Bischofskonferenz zur Begleitung von Taufbewerbern mit muslimischem Hintergrund." *KATHPRESS-Tagesdienst*, September 16, 2009, no. 216, pp. 11—12, p. 11; *Christus aus Liebe verkündigen. Zur Begleitung von Taufbewerbern mit muslimischem Hintergrund*, 24 August 2009. Ed. Sekretariat der Deutschen Bischofskonferenz. Arbeitshilfen. No. 236. Bonn 2009.

[41] Cf. "Interkultureller Dialog im Unternehmen." Available from: http://www.integrationsfonds.at/news/aktuelle_news/interkulturellerdialog/. Accessed 29.03.2015; "Anregungen für den interkulturellen Dialog im Unternehmen. Der Islam." Ed. Industriellenvereinigung Niederösterreich. Wien 2011. Available from: http://www.iv-net.at/iv-all/publikationen/file_556.pdf (accessed 29.03.2015).

[42] Cf. the Judgement of the Austrian Supreme Court of Justice of 27 March 1996, 9ObA18/96. Available from: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_19960327_OGH0002_009OBA00018_9600000_000 (accessed 29.03.2015); A. Potz: "Dienstverhinderung aus religiösen Gründen." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz 70* (fn. 13), pp. 639—661; on the different view between Germany and France see W. Rees: "Religionsfreiheit und religiös-weltanschauliche Neutralität des Staates in der Republik Frankreich und in der Republik Österreich." In: *PluralismusKonflikte — Le pluralisme en conflits. Österreichisch-Französische Begegnungen*. Eds. M.-L. Frick, P. Mbongo, F. Schallhart. Austria: Forschung und Wissenschaft: Philosophie. Vol. 13. Wien—Berlin 2010, pp. 189—220.

5. Corporate Religious Freedom

Article 15 of StGG warrants the legally recognized churches and religious communities the right to public worship, the right to self-determination and a specific guarantee of their capital and property. Richard Potz reminds that the significance of public legal status of a church or religious community "has become less visible in the legal delegation of authority, but is instead expressed in the recognition of public activity of religious communities and the clarification, not wanting to push back the religious-ideological field in the private."[43] In Austria the state accepts and supports the work and activity of churches and religious communities in the public sphere. Thus, in Austria today there is no radical separation between the church and the state, which eliminates any influence by the churches and religious communities on public life, as it was demanded in the 19th century by the liberal and socialist side. Today, friendly cooperation between the church and the state takes place in many areas.

Article 15 of StGG guarantees the self-determination of internal affairs. This means "that it must not be interfered in the internal affairs of a church or religious community either by the legislature or by the executive."[44] Following the doctrine and the jurisprudence, the areas of faith and morals, the organization, religious statutes, membership, sacraments and ritual, religious education and employment law, asset management, collections, church contributions and tax count amongst the mentioned internal affairs. In intra-ecclesiastical matters the jurisdiction of state courts is limited or not applicable.

Expressly Art. 17 (4) of StGG guarantees to recognized churches and religious communities the right "to provide for religious instruction in public schools or in schools with public status." Details are governed by the RelUG that is valid for the religious education by recognized churches and religious communities in public schools and schools with public status.[45] By underscoring the "validity for all religious communi-

[43] R. Potz: "Zur öffentlich-rechtlichen Stellung der Kirchen und Religionsgesellschaften." In: *Die „Anerkennung" von Religionsgemeinschaften*. Ed. R. Kohlhofer. Schriftenreihe Colloquium. Vol. 6. Wien 2002, pp. 25—37, p. 31; see further K. Schwarz: "Überlegungen zum rechtlichen Status der Kirchen und Religionsgesellschaften in Österreich." In: *Bürgerliche Freiheit und Christliche Verantwortung. Festschrift für Christoph Link zum 70. Geburtstag*. Eds. H. de Wall, M. Germann. Tübingen 2003, pp. 445—463.

[44] Schwendenwein: Staatskirchenrecht (fn. 10), 196—217, p. 197.

[45] Cf. K. Pabel: "Verfassungsrechtliche Rahmenbedingungen des Religionsunterrichts in Österreich." *österreichisches Archiv für recht und religion* 59 (2012), pp. 64—86; W. Rees: "Neuere Fragen um Schule und Religionsunterricht in Österreich." In:

ties and consideration for minorities," this law takes into account "the multi-religious development in society."[46] More specifically, the religious instruction by the Roman Catholic Church is governed by Art. VI of the Concordat between the Holy See and the Republic of Austria of 5 June 1933 (BGBl. II 1934/2; ÖK) as well as by the Treaty between the Holy See and the Republic of Austria of 9 July 1962 concerning the regulation of questions relating to the school system (Schulvertrag; BGBl. 1985/77; SchulV).[47] Muslim religious instruction was set up in public schools since the school year 2003—2004; among the European Union member states, currently only in Austria it is so, although other countries in Europe seem to be following suit. This instruction provides, as Richard Potz et al. determine in their study entitled "Islamic religious education in Austria and Germany," "an important achievement for the integration by helping the pupils to reconcile their Muslim and Austrian identity with each other."[48] The training of Muslim teachers takes place at the Pedagogical Academy of the Islamic Religious Community in Austria (IRPA)[49] and at the Universities of Vienna and Innsbruck.[50] In Art. 17 § 4 of StGG the Austrian state

Neuere Entwicklungen im Religionsrecht europäischer Staaten. Eds. W. Rees, M. Roca, B. Schanda. Kanonistische Studien und Texte. Vol. 61. Berlin 2013, pp. 499—534, pp. 506—509.

[46] "Vor 60 Jahren wurde Religionsunterrichtsgesetz beschlossen. Schulamtsleiterin Mann: „Gesetz hat große Bedeutung für alle gesetzlich anerkannten Kirchen und Religionsgesellschaften" — In Österreich besuchen 95 Prozent aller katholischer Schüler den katholischen Religionsunterricht." *KATHPRESS-Tagesdienst*, 13 July 2009, no. 160, pp. 3—4, p. 3.

[47] Cf. W. Rees: "Religionsunterricht in österreichischen Schulen. Rechtliche Grundlagen und aktuelle Anfragen." In: H. de Wall, M. German: *FS Link* (70) (fn. 43), pp. 387—407; W. Rees: *Fragen* (fn. 45).

[48] R. Potz et al.: *Islamischer Religionsunterricht in Österreich und Deutschland. Executive Summary zu einem Forschungsprojekt des Instituts für Rechtsphilosophie, Religions- und Kulturrecht zusammen mit dem abif / analyse beratung interdisziplinäre Forschung*. Wien 2005. Available from: http://spl.univie.ac.at/fileadmin/user_upload/inst_rechtsphilo/IslamRU_ExSumPub2005.pdf (accessed 18.12.2014); see further W. Rees: *Fragen* (fn. 45), pp. 518—520.

[49] Cf. E. Aslan: "Religiöse Erziehung der Muslime in Österreich." *österreichisches Archiv für recht und religion* 55 (2008), pp. 1—13, pp. 7—13; M. Schmied: "Die Islamische Religionspädagogische Akademie (IRPA)." *österreichisches Archiv für recht und religion* 46 (1999), pp. 434—443; see further M. Ott: *Ausbildung islamischer Religionslehrer und staatliches Recht*. Münsterische Beiträge zur Rechtswissenschaft. Vol. 189. Berlin 2009.

[50] For Vienna see: Student Point. Universität Wien: Islamische Religionspädagogik. Available from: https://studentpoint.univie.ac.at/vor-dem-studium/detailansicht/studium/066-874/?tx_univiestudentpoint_pi1%5Bbackpid%5D=96352&cHash=edbdb5d8acdb6af82bf25a111547629b (accessed 07.01.2016); for Innsbruck: Universität Innsbruck: Bachelor's Programme Islamic Religious Education. Available from: http://www

recognizes not only a right for churches and religious communities to give religious instruction in public schools and schools with public status, but also a duty which it formulated for the first time in the Israelite Act 2012 (see § 9 (1) *Israelitengesetz*; IsraelitenG 2012).[51] The question is: Do the state guidelines allow a religious instruction which is managed jointly by different churches and religious communities in the face of secularization and pluralism of society in public schools? Here, the project "Cooperative Denominational Religious Education" (KoKoRu) should be mentioned, in operation since the school year 2008— 2009 in Vienna and aiming at making "a common teaching of the Christian churches on key areas of common liturgical year."[52] The state cannot force such an instruction on the recognized churches and religious communities, as it guarantees teaching according to their own religious principles. Such teaching will meet the StGG guaranteeing religious instruction, if the Roman Catholic, Protestant Church AB and HB, and the Greek Orthodox Church as participating churches see this instruction as teaching in the sense of Art. 15 of StGG. By and large, there are demands for multi-religious learning or accessible religious instruction for all the pupils, regardless of their own faith and religious affiliation. Such lessons would reflect the pluralism and diversity of churches and religious communities living in Austria. However, such instruction seems not to be covered by the Austrian constitution. With a view to religious instruction in public schools and schools with public status, changes are necessary in the future. But they require careful consideration. They must not restrict the exercise of fundamental rights, more specifically the right to freedom of religion for the pupils, their parents, and the churches and religious communities.

According to § 2 (3) of the Federal Act on the Austrian Broadcasting Corporation (*ORF-Gesetz*; BGBl. 1984/379; hereinafter ORF-G), "the importance of the legally recognized churches and religious communi-

.uibk.ac.at/studium/angebot/ba-islamische-religionspaedagogik/index.html.en (accessed 29.03.2015); cf. further E. Medeni: "Neuere Entwicklungen um den islamischen Religionsunterricht und die islamische LehrerInnenausbildung in Österreich." In: W. Rees, M. Roca, B. Schanda: *Entwicklungen* (fn. 45), pp. 373—386.

[51] Cf. B. Gartner: "Das neue österreichische Israelitengesetz. Eine historische Annäherung." In: W. Rees, M. Roca, B. Schanda: *Entwicklungen* (fn. 45), pp. 183—211, p. 199; R. F. Kneucker: "Das neue Israelitengesetz: Neuerungen im Staatskirchenrecht?" In: J. Marko, W. Schleifer: *Staat und Religion* (fn. 18), pp. 167—174.

[52] Cf. *Das Gemeinsame entdecken — Das Unterscheidende anerkennen. Projekt eines konfessionell-kooperativen Religionsunterrichts. Einblicke — Hintergründe — Ansätze — Forschungsergebnisse*. Eds. H. Bastel, M. Göllner, M. Jäggle, H. Miklas. Austria: Forschung und Wissenschaft: Religionspädagogik. Vol. 1. Wien 2006; see further W. Rees: "Die kirchenrechtlichen Rahmenbedingungen für den katholischen Religionsunterricht." *Essener Gespräche zum Thema Staat und Kirche* 49 (2016), pp. 75—106.

ties" is to be considered to the satisfactory degree when planning the programme (§ 4 (1) number 12 ORF-G).[53]

Since the exercise of their religion for individuals in some cases is difficult or impossible, the categorical pastoral care enables the exercise of one's religion, even under these special circumstances. This applies to the pastoral care in prisons and hospitals, but also in the military, the police,[54] or in emergencies, which is guaranteed in Austria. Churches and religious communities are active in the field of charity and social work. "The social-charitable operation as a characteristic manifestation of religious communities," is, as noticed by H. Kalb, R. Potz and B. Schinkele, "independent of their legal form — included within the right to self-determination of the churches and religious communities"; this also applies to "every action which is taken in exercise of the basic Christian mission."[55]

6. Issues facing Muslims

6.1. Legal status of Muslims in the Republic of Austria

Since 1912 the followers of Islam (particularly, the Hanafi school) have already been acknowledged by a separate law[56] as a recognized religious community in Austria. This recognition brought Islam equality with the other recognized churches and religious communities, such as the Roman Catholic Church, the Protestant Church etc.

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[53] Cf. H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), pp. 182—185.

[54] Cf. K. W. Schwarz: "Polizeiseelsorge — berufsfeldbezogene Supervision vor dem Hintergrund der Religionsfreiheit. Kultusrechtliche Anmerkungen aus österreichischer Perspektive." *österreichische Archiv für recht und religion* 55 (2008), pp. 30—46.

[55] H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), p. 303.

[56] Cf. *Gesetz*, July 15, 1912, betreffend die Anerkennung der Anhänger des Islam nach hanefitischem Ritus als Religionsgesellschaft, RGBl. 1912/159 (IslamG). The rite was the most abundant of the Ottoman Empire and mainly in Bosnia and Herzegovina area. In 1987, the Constitutional Court raised the phrase "according to hanefit rite." By this way the applicability of the law was extended to all Muslims. Cf. W. Rees: "Islam und Christentum in Österreich und in Europa. Kirchenrechtliche und religionsrechtliche Anmerkungen aus römisch-katholischer Perspektive." In: *Heilig — Tabu. Christen und Muslime wagen Begegnungen*. Eds. D. Kästle, M. Kraml, H. Mohagheghi. Kommunikative Theologie. Vol. 13. Ostfildern 2009, pp. 55—65; J. Bair: *Das Islamgesetz. An den Schnittstellen zwischen österreichischer Rechtsgeschichte und österreichischem Staatsrecht*. Wien—New York 2002.

6.2. New issues and problems

The question whether it is allowed for a Muslim teacher to wear a headscarf or not during class does not really stir any discussion in Austria, unlike in other European countries.[57] The same can be said about Muslim pupils wearing headscarves.[58] "A government ban on headscarves is an illegitimate restriction of religious freedom and complicates the integration of Muslims into secular society."[59] As Joachim Kahl noted, "the dropping off of the headscarf would make sense only as a voluntary act, as a result of an emancipatory learning process, that takes time."[60] Regarding burqa ban there has been no greater controversy in Austria, although minister Gabriele Heinisch-Hosek (SPÖ) had opened a public debate in December 2009 on it.[61] At the same time, the trial against Mohammed M. and Mona S. took place in March 2008 at the Vienna Criminal Court, during which the defendant Mona S. was excluded by the presiding judge from the proceedings for the reason of wearing the full-face veil (niqab)[62] and the refusal to remove it.[63] In present time the discussion about headscarf and full veil has become a reality again.

The issue of male circumcision for religious reasons, as it is performed by Jews and Muslims, has instigated no major public disputes in Austria, unlike in Germany.[64] Self-assured Muslims are using their right to

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[57] Cf. W. Rees: "Religionsfreiheit" (fn. 42).

[58] Cf. B. Gartner: *Der Islam im religionsneutralen Staat. Die Problematik des muslimischen Kopftuchs in der Schule, des koedukativen Sport- und Schwimmunterrichts, des Gebetsrufs des Muezzins, des Schächtens nach islamischem Ritus, des islamischen Religionsunterrichts und des muslimischen Bestattungswesens in Österreich und Deutschland*. Islam und Recht. Vol. 4. Frankfurt am Main et al. 2006, pp. 115—170.

[59] J. Kahl: "Inhalt und Grenzen von Religionsfreiheit — erörtert an Kopftuch, Muezzinruf, Kirchenglockenläuten." *Aufklärung und Kritik* 11/2 (2004), pp. 159—163, p. 162. Available from: http://www.gkpn.de/kahl_religion.pdf (accessed 29.03.2015).

[60] J. Kahl: "Inhalt" (fn. 59), p. 162.

[61] Cf. Rees: *Grundlagen* (fn. 11), pp. 598—600.

[62] § 162 of the Code of Criminal Procedure prohibits a witness, "to conceal their faces in such a way that their facial expressions cannot be perceived, as this is essential for assessing the credibility of his testimony."

[63] Cf. B. Schinkele: "Verschleierung einer Angeklagten im Gerichtssaal? Überlegungen aus grundrechtlicher Sicht." In: *Islamophobie in Österreich*. Eds. J. Bunzl, F. Hafez. Innsbruck, Wien, Bozen 2009, pp. 157—168.

[64] Cf. T. Schoditsch: "Die Beschneidung männlicher Kinder in Österreich — Handlungsbedarf für den Gesetzgeber?" In: J. Marko, W. Schleifer: *Staat und Religion* (fn. 18), pp. 110—119; H. Kalb: "Beschneidung. Eine europa- und völkerrechtliche Perspektive." Ibidem, pp. 213—220; K. Pabel: "Die religiöse Beschneidung von Jungen im Lichte der Grundrechte in Österreich." In: W. Rees, M. Roca, B. Schanda: *Entwicklun-*

build prayer rooms and mosques, which means going from the previously used backyards into the public.[65] The consideration by some to prevent the erecting of mosques or minarets by modification of the existing building code could impact detrimentally on the construction of Christian churches as well.[66] A ban on mosques and minarets is in the words of former Federal President Heinz Fischer at the same level as a ban on Jewish synagogues and Christian churches and church towers.[67] The debate about minarets and the discussion about the affixing of crosses in kindergartens and public schools have something in common in the sense that people try to ban religion and its symbols from public places. In this context more tolerance is still required in the Austrian society.

A desirable balance in the sense of tolerance has been achieved between animal protection law and religious freedom in the area of ritual slaughter.[68] Specifically, the Austrian Constitutional Court had ruled in 1998 that the kosher butchering (shechita) of animals is protected by the fundamental right to religious freedom.[69]

Until the new Islam Act of 2015, the funeral of Muslims in cemeteries[70] as well as a professional organization for pastoral care in hospitals, prisons, or the military was widely still an unsettled question in Austria. The new Islam Act has granted these rights. The question is whether it is appropriate

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gen (fn. 45), pp. 467—487; M. E. Herghelegiu: "Perspektiven der Religionsfreiheit aus Anlass der Beschneidungsdebatte in Deutschland." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz* 70 (fn. 13), pp. 149—166.

[65] Currently, there are four mosques with a minaret in Austria (Vienna/21. District, Telfs/Tirol, Bad Vöslau/Lower Austria and Saalfelden/Salzburg) and about 200 prayer rooms. Cf. F. Hafez: "Eine Moschee mit Minarett pro Bundesland! Zum Umgang mit der muslimischen Religion im öffentlichen Raum in Österreich am Beispiel von Moscheen und muslimischen Gebetsräumen." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz 70* (fn. 13), pp. 103—115.

[66] Cf. W. Rees: *Grundlagen* (fn. 11), pp. 597—598.

[67] Cf. H. Fischer: "Minarett-Verbot wäre verfassungswidrig. Bundespräsident Fischer will mit allen Möglichkeiten darauf achten, dass die Glaubensfreiheit respektiert wird. Ein Minarettverbot in Österreich wäre seiner Ansicht nach ebenso rechtswidrig wie ein Kirchturmverbot." *diepresse.com*, 3 December 2009. Available from: http://diepresse.com/home/politik/innenpolitik/525752/Fischer_MinarettVerbot-waere-verfassungswidrig (accessed 29.03.2015).

[68] Cf. B. Gartner: *Islam* (fn. 58), pp. 211—230; *Schächten. Religionsfreiheit und Tierschutz*. Eds. R. Potz, B. Schinkele, W. Wieshaider. Religionsrechtliche Studien. Vol. 2. Freistadt, Egling 2001.

[69] Cf. "Die Höchstgerichte zum muslimischen Schächten." Available from: http://www.islamheute.ch/vgh.html (accessed 29.03.2015); see further W. Wieshaider: "Iterum: Schächten. Rund ums neue österreichische Tierschutzgesetz." *österreichisches Archiv für recht und religion* 52 (2005), pp. 227—262.

[70] Cf. W. Rees: "Islam" (fn. 56), pp. 62 f. The first Islamic cemetery was founded on 3 October 2008 in Vienna.

that the regulation of state holidays is made only according to the majority religion or should other religious communities be considered.

6.3. The new Islam Act

In early October 2014, a new Islam Act was being drafted. In the period of wide and fierce criticism of the drafted law, the unequal treatment of Islam in comparison to other religions was raised. Criticism mainly concerned the ban on the financing of religious communities from abroad, because it is an inadmissible interference constitutionally with Art. 15 of StGG protecting so-called internal matters. Compared to other churches and religious communities, this ban was also seen as "negatively discriminatory and by violating the equality […] as unconstitutional."[71] The intended determination of the priority of state law against religious precepts by law was also questioned. As the chairman of the Islamic Community in Austria, Fuat Sanac, noticed: "such special determination in Islam Law [is both] unnecessary and negative discriminatory." Even Art. 15 of StGG, and thus valid constitutional law, "standardizes that the legally recognized churches and religious communities, like all other entities, are subject to the general state laws. We cannot accept that such additional distrust concerning the loyalty of the Muslims to the constitution is suggested and thus could fuel populist enemies of Islam."[72] Quite vague were the plans to establish the Islamic theological studies at the University of Vienna as well as the establishment of an Islamic theological institute.[73] In the drafted law, there were no rules for official secrecy relating to officially confirmed imams compared with the provisions for the protection of the confessional seal for priests in the Roman Catholic Church by § 155 (1) no. 1 of the Austrian Code of Criminal Procedure (*Strafprozessordnung*; hereinafter StPO).[74] This disparity is incompatible with the principle of equality and parity.

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[71] F. Sanac: "Die Novellierung des Islamgesetzes aus der Sicht der Islamischen Glaubensgemeinschaft." March 23, 2014. Available from: http://www.derislam.at/?f=news&shownews=1843 (accessed 18.12.2014).

[72] F. Sanac: "Novellierung" (fn. 71); see further H. Mohaghehgi: "Neue Aspekte in der Beziehung zwischen Muslime und Staat in Deutschland." In: W. Rees, M. Roca, B. Schanda: *Entwicklungen* (fn. 45), pp. 401—416.

[73] Cf. R. Potz: "Islamische Theologie an der Universität." In: S. Haering, J. Hirnsperger, G. Katzinger, W. Rees: *FS Paarhammer* 65 (fn. 13), pp. 929—949.

[74] Cf. B. Schinkele; "Beichtgeheimnis und geistliche Amtsverschwiegenheit aus kirchen-, straf- und religionsrechtlicher Sicht." In: B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner, W. Wieshaider: *FS Potz* 70 (fn. 13), pp. 775—804.

After a revision of the draft a new federal law on the external legal status of Islamic religious communities was published on 30 March 2015 in the *Federal Law Gazette* (Islamgesetz 2015; BGBl. I 2015/39; hereinafter *IslamG*).[75] This law became valid for the Islamic religious community (Islamische Glaubensgemeinschaft in Österreich; IGGiÖ) and also for the Alevi religious community (Islamische Alevitische Glaubensgemeinschaft in Österreich; hereinafter IAGÖ), but it clearly exposed that they are two separate religious communities. The new Islam Act includes, among others, claims to pastoral care in the army,[76] in prisons, and hospitals (see § 11 and § 18 of IslamG 2015), theological studies at the State University of Vienna (§ 24 of IslamG 2015), national public holidays (§ 13 and § 20 of IslamG 2015), which, along with the Friday prayer, guarantees the protection of the state. Furthermore, regulations on cemeteries (§ 15 and § 22 of IslamG 2015) and dietary restrictions (§ 12 and § 19 of IslamG 2015), and the protection of official or pastoral secrecy (§ 26 of IslamG 2015). The law requires that the allocation of funds for activities by the religious communities must be carried out domestically by themselves, the religious communities (*Kultusgemeinden*) or their members (see § 6 (2) of IslamG 2015). Religious officials from abroad may practice in Austria only up to one year after entry into the force of the law. Organized events posing a risk to the public security, order or public health, or to national security, or to the rights of others, are prohibited (§ 27 of IslamG 2015). Further, there must be neither unlawful interference relating to the existing legally recognized churches and religious communities nor to other religious communities (§ 4 (4) of IslamG 2015). Since the Austrian Government seeks an Austria- or an Europe-influenced version of Islam, the demand already

[75] There was no amendment to the Act of 1912, but a new law was created. Cf. Bundesgesetz über die äußeren Rechtsverhältnisse islamischer Religionsgesellschaften — Islamgesetz 2015. BGBl., March 30, 2015, part I. Available from: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_39/BGBLA_2015_I_39.pdf (accessed 7.01.2016).

[76] Cf. M. Khouja: "Europäische Militärseelsorge zwischen Christentum, Islam und Säkularisierung aus der Sicht der Islamischen Glaubensgemeinschaft in Österreich." Available from: http://www.bmlv.gv.at/pdf_pool/publikationen/ms_23_5.pdf (accessed 18.12.2014); W. Rees: "'Übt an niemand Gewalt noch Erpressung und seid zufrieden mit eurem Sold' (Lk 3,14). Militärseelsorge in Österreich mit einem Ausblick auf die Mitgliedstaaten der Europäischen Union." In: *Im Dienst von Kirche und Wissenschaft. Festschrift für Alfred E. Hierold zur Vollendung des 65. Lebensjahres*. Eds. W. Rees, S. Demel, L. Müller: *Kanonistische Studien und Texte*. Vol. 53. Berlin 2007, pp. 831—879; W. Rees: "Die katholische Militärseelsorge in Österreich als kirchliche und staatliche Einrichtung." In: *Kirchen und Staat am Scheideweg? 1700 Jahre Mailänder Vereinbarung. Beiträge zu einer Veranstaltung der Evangelischen, Katholischen und Orthodoxen Militärseelsorge am 19. November 2013*. Eds. C. Wagnsonner, K.-R. Trauner, A. Lapin. Ethica Themen. Institut für Religion und Frieden. Wien 2015, pp. 173—210.

made in the draft states that state laws take precedence over religious laws (§ 2 (2) of IslamG 2015). A similar demand already existed in the Act of 1912 (see § 5 of IslamG 1912).[77] The Director of the Centre for Islamic Theology at the University of Münster (Germany), Mouhanad Khorchide, spoke positively about the new Islam Act (IslamG 2015). He supported the ban on foreign funding of Muslim organizations and defended the Austrian Government against the accusation that the law discriminates against Muslims. More precisely, he sees the "influence of foreign governments and other groups on Muslims" in many European countries as "a problem." About 60 of the 300 Islamic preachers in Austria came from Turkey. The Turkish government practices "a supervision on migrants" in this way. Khorchide referred to a "religious fundamentalist threat," which currently exists in Europe and is caused by the activities of Islamists. He recalls that "without financing from Saudi Arabia […] militant Salafist associations in Austria and Germany can hardly survive."[78] The new law also brings advantages for Ednan Aslan, who is Professor for Islamic Religious Education and Director of the Institute of Islamic Studies at the University of Vienna, especially with regard to the theological training of future imams and pastors in Austria.[79] In the spirit of equality and parity an Islamic theological faculty at a state university in Austria would also be desirable, analogous to the four Catholic Theological Faculties at the state universities of Vienna, Graz, Salzburg, and Innsbruck, and the Protestant Theological Faculty in Vienna.[80]

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[77] Cf. C. Neuhold: "Muslime in Österreich. Regierung zieht Gesetz gegen Kritiker durch." *Wiener Zeitung.at*, 12 December 2014. Available from: http://www.wienerzeitung.at/nachrichten/oesterreich/politik/722045_Regierung-zieht-Islamgesetz-gegen-Kritiker-durch.html (accessed 18.12.2014); S. Schima: "Das IslamG im Kontext des österreichischen Religionsrechts." *österreichisches Archiv für recht und religion* 59 (2012), pp. 225—250, pp. 235 f.; see further B. Gartner-Müller: "Die Islamische Glaubensgemeinschaft und das Ausschließlichkeitsrecht der gesetzlich anerkannten Kirchen und Religionsgesellschaften.", ibidem, pp. 251—283.

[78] Quote after Khorchide, see: "Islam-Theologe Khorchide bezeichnet Österreichisches Islamgesetz als Vorbild für Deutschland." *Spiegel online*, February 27, 2015. Available from: http://www.spiegel.de/spiegel/vorab/islam-theologe-oesterreichisches-islamgesetz-als-vorbild-a-1020957.html (accessed 29.03.2015).

[79] Cf. E. Aslan: "Der Islam wird heimisch. Österreichs neues Islamgesetz wird von allen Seiten bekämpft. Das ist bedauerlich. Die großen Vorteile verschweigen die Kritiker beharrlich. Oft aus egoistischen Motiven. Ein Gastbeitrag." *Zeit Online*, March 3, 2015. Available from: http://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/islamgesetz-oesterreich (accessed 29.03.2015).

[80] Cf. W. Rees: "Katholisch-Theologische Fakultäten und Studium der Katholischen Theologie in der Bundesrepublik Deutschland und der Republik Österreich." In: *Dienst an Glaube und Recht. Festschrift für Georg May zum 80. Geburtstag*. Eds. A. Egler, W. Rees: *Kanonistische Studien und Texte*. Vol. 52. Berlin 2006, pp. 723—789.

7. Individual areas under discussion: Balance between positive and negative religious freedom

7.1. Crosses in public spaces

In recent years, intensive discussions took place in Europe about the affixation of crosses in public schools and other public buildings, such as courts, hospitals, or kindergartens. It was noted that the affixing of crosses was carried out on the orders of the state and this order could harm the religious and ideological neutrality of the state. An example of the latter is the decision of the European Court of Human Rights (ECHR) of 3 November 2009, whose responsibility it is to take care of European Convention on Human Rights, regarding the actions of an atheist father in Upper Austria (*Oberösterreich*) against a fixed cross in the kindergarten of his daughter. He challenged the purpose of the cross in the kindergarten of his daughter as unconstitutional since it would endanger the growth of his daughter without religion and a particular religious denomination.[81] Although the court ruling of the European Court of Human Rights has no legal effect in Austria and the legal requirement for affixing of crosses in schools or classrooms is clear in the Republic of Austria (see § 2b (1) of RelUG),[82] it caused a discussion on the understanding of the religious and ideological neutrality of the state regarding the primacy of negative or positive freedom of religion. As Roman Siebenrock noticed, "the development of the so-called ideological neutrality of the state in Europe seems to steer in the direction of a more secular or laical

[81] According to the Upper Austrian Childcare Act, the affixing of crosses is regulated by law, as in all Austrian provinces (except for the Vienna daily home-Regulation). Cf. R. Potz, B. Schinkele: "Gutachten zu den religionsrechtlichen Aspekten Niederösterreichischen Kindergartengesetzes." *österreichisches Archiv für recht und religion* 57 (2010), pp. 395—412.

[82] According to § 2 (b) (1) of RelUG public schools and schools with public status in which religious instruction is a compulsory subject have to affix a cross in classrooms if the majority of the pupils belong to a Christian denomination. Cf. H. Kalb, R. Potz, B. Schinkele: *Das Kreuz in Klassenzimmer und Gerichtssaal*. Religionsrechtliche Studien. Vol. 1. Freistadt 1996, pp. 23—30; see further W. Rees: "'Den Juden ein Ärgernis und den Griechen eine Torheit' — und den Menschen von heute? Schulkreuze, religiöse Übungen und Schulgebet in Geschichte und Gegenwart." In: *Historische und rechtliche Aspekte des Religionsunterrichts*. Ed. A. Rinnerthaler. Wissenschaft und Religion. Veröffentlichungen des Internationalen Forschungszentrums für Grundfragen der Wissenschaften Salzburg. Vol. 8. Frankfurt am Main and other 2004, pp. 259—295.

system based on the model of France, in which religious symbols may not be present in public."[83] The affixation of crosses in public schools corresponds to the neutrality, which is practiced by the Austrian state. This is because the understanding of neutrality must not be equated with agnosticism and hostility towards religion. Rather, the Austrian understanding of neutrality recognizes the presence of religion in society and its importance to the public and promotes it.[84] Religious and ideological neutrality does not call for a completely religion-free public space. In this sense, the Austrian Constitutional Court had decided in March 2011 that the mandatory affixing of crosses in schools and kindergartens should not be regarded as a "preference of the state for a particular religion."[85] A few days later, the European Court of Human Rights ruled that crosses in Italian schools are not a violation of human rights.[86] However, there remains the questions of how to proceed with the placement of symbols of other recognized churches and religious communities in schools and other public buildings in Austria and whether these churches and religious communities could raise a legal claim to affixing them.

7.2. The issue of church bell ringing

The ringing of church bells, the muezzin call, or church services and other religious events outdoors interfere with the life of many people and are often seen today as a violation of the freedom of religion of other religions followers and non-believers. In addition, it must be questioned whether and to what extent noise protection regulations (emission protection) may be used in this subject area. At the hearing before the Regional Court of Linz concerning the nocturnal striking of the clock of the cathedral in Linz it was discovered by the lawyer of a man living near the

[83] R.A. Siebenrock: "Die römisch-katholische Kirche und das Recht auf Religionsfreiheit. Die verfassungsrechtliche Gestalt der Gewissens- und Glaubensfreiheit als wesentliches Moment gesellschaftlicher Pluralität." In: M.-L. Frick, P. Mbongo, F. Schallhart: *PluralismusKonflikte* (fn. 42), pp. 225—239, p. 235.

[84] Cf. R. Potz: *Staat* (fn. 19), p. 3.

[85] Cf. The Judgement of the Austrian Constitutional Court of 9 March 2011, G287/09. Available from: https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_09889691_09G00287_01/JFR_09889691_09G00287_01.pdf (accessed 29.03.2015).

[86] Cf. The Judgement of the ECHR of 18 March 2011, Bsw 30814/06. Available from: http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20110318_AUSL000_000BSW30814_0600000_000/JJT_20110318_AUSL000_000BSW30814_0600000_000.html (accessed 18.12.2014).

church that the health of the client was at risk due to a volume of up to 77 decibels.[87] To avoid the interference, Muslims in Austria abstain from the muezzin call.

7.3. Minute of silence on Good Friday in television

The minute of silence in public television on Good Friday commemorating the crucifixion of Jesus is legally admissible in Austria.[88] Specifically, the Austrian Constitutional Court has dismissed a case by the pressure group "Religion Is a Private Matter" as being unfounded in November 2014. The Constitutional Court has confirmed with this ruling the decisions by the Media Authority (*KommAustria*) and the Federal Communications Board (*Bundeskommunikationssenat*; BKS) from 2012 that the minute of silence does not violate the principle of neutrality and objectivity of the ORF.[89] In general it was noted that specifically religious programmes do not automatically discriminate groups of people with other or no religious belief. According to § 14 of the ORF-G no advertising is allowed on Good Friday, All Saints Day and on 24 December in television.

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[87] Cf. "Rechtsstreit um Linzer Kirchenglocken geht weiter." *derstandart.at*, 30 November 2015. Available from: http://derstandard.at/2000026689342/Rechtsstreit-um-Linzer-Kirchenglocken-geht-weiter (accessed 7.01.2015); "Laute Glocken: Diözese Linz sieht sich im Recht." *derstandart.at*, 17 November 2014. Available from: http://derstandard.at/2000008209584/Anrainer-des-Linzer-Mariendoms-klagt-Pfarre-wegen-zu-lauter-Glocken (accessed 29.03.2015); "Klage gegen Kirchenglocken in Linz: Verhandlung vertagt." *derstandart.at*, February 6, 2015. Available from: http://derstandard.at/2000011375175/Klage-gegen-Linzer-Kirchenglocken-Verhandlung-vertagt (accessed 29.03.2015); "Einigung: Glocken schlagen nun leiser und seltener." *krone.at*, 25 February 2015. Available from: http://www.krone.at/Oesterreich/Einigung_Glocken_schlagen_nun_leiser_und_seltener-Causa_Linzer_Dom-Story-440806 (accessed 29.03.2015).

[88] Also in the ORF radio (except FM4) there are a few seconds of silence on Good Friday.

[89] Cf. "ORF-Schweigeminute am Karfreitag rechtlich zulässig. Die Initiative „Religion ist Privatsache" hatte eine Beschwerde beim Bundesverfassungsgerichtshof gegen die Schweigeminute eingebracht." *diepresse.com*, January 28, 2015. Available from: http://diepresse.com/home/kultur/medien/4649507/ORFSchweigeminute-am-Karfreitag-rechtlich-zulaessig (accessed 29.03.2015); see further The Judgement of the Austrian Constitutional Court of 29 November 2014, B 150/2013. Available from: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20141129_13B00150_00&ShowPrintPreview=True (accessed 29.03.2015).

7.4. Religious education

Due to the guarantee of freedom of religion, the state must permit the withdrawing of pupils from a confessional religious instruction in public schools and schools with public status. Today, the aim of the educational mission of the school in Austria is at risk because of the withdrawing of numerous pupils from denominational religious instruction by the Roman Catholic Church, and an increasing number of pupils who are not obliged to attend these classes. Therefore, the Austrian state, after a ten-year experiment of "Ethics" classes which began in autumn 1997, wishes to introduce such a teaching curriculum, but this request has not yet been realized. There are no problems here from the perspective of religion rights. The state can introduce ethics teaching. However, it is a question of the status of such teaching. Is it introduced as mandatory for all pupils or as an alternative subject for pupils who do not receive denominational religious instruction by the churches and religious communities. Religious education does justice to the exercise of religious freedom and is a fundamental right of parents as well as young people who have attained majority in religious matters and also of the churches and religious communities. Ethical education in which participation is mandatory for all pupils, instead of a confessional religious education, would limit these fundamental rights.

8. Limits to religious freedom

The right to freedom of religion and beliefs guaranteed by the Republic of Austria is not without its limits. Barriers could arise in the field of civic duties (cf. Art. 14 (2) of the Criminal Code; *Strafgesetzbuch*; hereinafter StGB), public order and safety, the general state laws (cf. Art. 15 of StGG), and the health and violation of fundamental rights of other persons. At this point the exclusion of women from public life and any illegal religious influence by teachers at school should be taken into consideration. Fundamental rights can contradict each other. In certain circumstances the circumcision of underage boys can stand against child welfare protection. The freedom of religion "cannot justify the exoneration of so-called honor killings in circles of fundamental Muslims."[90] A infringement of

[90] R. Michels: "Religionsfreiheit hat ihre Grenzen." *RP Online*, January 22, 2015. Available from: http://www.rp-online.de/panorama/deutschland/religionsfreiheit-hat-ihre

fundamental rights is apparent if the Austrian Assembly Act provides that processions, pilgrimages etc. are to be registered and must be approved as religious events (§ 5 *Versammlungsgesetz*; hereinafter VslgG).

A survey conducted among Muslim teachers in 2009 attracted considerable media attention, in addition to causing concern and consternation amongst the general public. According to this study, 21.9% of the questioned teachers rejected democracy. As many as 28.4% of them saw "being Muslim" and "being European" as irreconcilable contradiction.[91] Even though churches and religious communities determine their own affairs, the state must be granted the right to intervene if its understanding of democracy is endangered and anti-constitutional contents are taught. So the RelUG expressly allows the related review of textbooks for religious instruction. It limits legitimately self-determination of churches and religious communities.[92]

In order to meet the challenge of newly established religious communities, a government agency for sect issues (Federal Office for Sect Issues) has been created by the force of federal act with the establishment of a documentation and information centre (*Bundesgesetz über die Einrichtung einer Dokumentations- und Informationsstelle für Sektenfragen*; BGBl. I 1998/150; hereinafter EDISG). This Office has to document "the dangers that could be caused by sects or cult-like activities and to inform about them" (§ 1 EDISG).[93] It applies when exploring the limits of state information activity. On the one hand, the state must protect its citizens, and on the other hand it must respect the fundamental rights of these communities.[94]

-grenzen-aid-1.4816409 (accessed 29.03.2015); to the barriers see Schwendenwein: Staatskirchenrecht (fn. 10), pp. 92—111; H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), pp. 81—86.

[91] Cf. "Großer Wirbel um Islam-Studie." *wien.orf.at*, January 27, 2009. Available from: http://oesterreich.orf.at/wien/stories/338121/ (accessed 18.12.2014).

[92] According to § 2 (3) of RelUG textbooks and teaching aids "must not be in conflict with state principles." According to Art. I § 5 (2) of SchulV textbooks and teaching aids have to be "conducive to the public education." Cf. Rees: "Religionsunterricht in österreichischen Schulen" (fn. 47), p. 403; cf. further "Vereinbarung zwischen Unterrichtsministerin Schmied und der Islamischen Glaubensgemeinschaft": Islamischer Religionsunterricht in Tirol. Available from: http://islam-tirol.at/aktuell_3.htm (accessed 18.12.2014).

[93] Full Text: Bundesgesetz über die Einrichtung einer Dokumentations- und Informationsstelle für Sektenfragen. Bundeskanzleramt — Rechtsinformationssystem (RIS). Available from: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010108 (accessed 29.03.2015); cf. H. Kalb, R. Potz, B. Schinkele: *Religionsrecht* (fn. 14), pp. 147—154.

[94] Cf. ibidem, p. 148.

9. Conclusion

The right to freedom of religion is given in the Republic of Austria as an individual fundamental right and also as a fundamental right of churches and religious communities. Regardless of their historical-legal genesis, fundamental rights exist because of their positive exercise. In the present it indicates that the negative form of the right to religious freedom comes more to the fore. By granting a status of officially recognized church or religious community, the Austrian government expresses a given religion's importance for the common people and the public good. The special position enjoyed by the Roman Catholic Church alongside other recognized churches and religious communities, is expressed in the Concordat between the Holy See and the Republic of Austria of 5 June 1933 and the amendments made by later treaties between the Roman Catholic Church and the state concerning the regulation of questions relating to the school system and concerning the regulation of property. The Republic of Austria does have the possibility to sign a Concordat with the Roman Catholic Church, but it does not have — in contrast to the Federal Republic of Germany — the constitutional basis for a contract law with other churches and religious communities. To ensure the equal treatment of all legally recognized churches and religious communities, the Austrian state has moved towards negotiating the relevant regulations similar to the concordat with the Roman Catholic Church.[95] Today the Concordat and the amicable arrangements between church and state contained therein are widely questioned, not least by the failed referendum against church privileges.[96] The special protection of churches and religious communities and religious and philosophical freedom is also reflected in the fact that interference with, or hindering from religious practice, in accordance with § 189 (1) of the StGB, are punishable. Questions arise regarding the so-called right to freedom of communication, which includes the right to freedom of expression, freedom of information, and freedom of the press. Questions also arise with regard to the right to freedom of art, as shown by the dispute over the Mohammed caricatures, or the attack on 7 Janu-

[95] R. Potz: *Staat* (fn. 19), recalling Protestant Act 1961, Orthodox Act 1967, Oriental-Orthodox Act 2003 and Jewish Act 2012.

[96] Cf. Initiative gegen Kirchenprivilegien. Available from: http://www.kirchen-privilegien.at/ (accessed 18.12.2014); see further http://www.bmi.gv.at/cms/BMI_wahlen/volksbegehren/vb_xx_periode/anti_kirchepriv/start.aspx (accessed 18.12.2014); critical R. Potz: *State* (fn. 19), p. 1, holding the premises of the referendum for "not applicable" and the talk of the privileges of the legally recognized religious communities for "misleading".

ary 2015 against the satirical magazine *Charlie Hebdo*.[97] Questions also arise from the autonomy of the churches and religious communities or religious freedom, and the ban on discrimination based on sex.

[97] Cf. W. Rees: "Religions- und Meinungsfreiheit" (fn. 13), pp. 715—730; Z. Combalía: "The Right to Freedom of Expression in Islam. A Comparative Perspective." In: W. Rees, M. Roca, B. Schanda: *Entwicklungen* (fn. 45), pp. 101—132.

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Wilhelm Rees

The Rights to Religious Freedom and Beliefs — Development, Legal Foundations, and Recent Trends in Austria

Summary

In Austria, there is a variety of churches and religious communities. By recognizing them, the Austrian State gives some of them a special significance. In recent years, the issue of religious freedom has gathered momentum in the aspect of individual freedom of religion as well as the corporate religious freedom, that is, the rights of religious-ideological associations. The essay shows the development of the fundamental right to religious freedom and the legal foundations thereof in Austria. It throws light on the problem of recognition of churches and religious communities and issues of the individual and corporate freedom of religion, such as affixing crosses and religious education in public schools, church bell ringing and the limits of religious freedom. Special attention is directed to issues facing Muslims, such as whether to wear headscarf or not during class, circumcision, mosques and the new Islam Act in Austria. Against the backdrop of the history and the legal provisions, brand new questions are conspicuous.

Wilhelm Rees

Le droit à la liberté religieuse et celle de convictions : développement, bases juridiques et tendances actuelles en Autriche

Résumé

Beaucoup d'Églises et d'organisations religieuses fonctionnent en Autriche. Tout en acceptant les Églises et organisations religieuses, l'État autrichien attribue à certaines d'entre elles une importance particulière. Dans les dernières années, la question de liberté religieuse est devenue exceptionnellement actuelle aussi bien dans le contexte de la liberté de confession individuelle que la liberté religieuse collective. L'article présente le développement du droit fondamental à la liberté religieuse en Autriche en jetant par là la lumière sur le problème lié à l'acceptation des Églises et organisations religieuses par l'État. L'auteur décrit aussi les cas précis de la liberté de confession individuelle et collective, tels que les croix dans les lieux publics et l'enseignement de la religion dans les écoles publiques, la sonnerie des cloches, etc. L'auteur dirige une attention particulière sur les défis liés au fonctionnement des musulmans dans la société autrichienne, tels que les éléments vestimentaires portés durant les cours, la circoncision, les mosquées et la nouvelle Loi sur l'islam en Autriche. Le fond historique présenté dans l'article ainsi que les réglementations juridiques y décrites ont pour objectif d'inciter à poser d'autres questions et à entamer d'autres discussions.

Mots clés : droit à la liberté religieuse, reconnaissance des Églises et des organisation religieuses, relations entre l'État et les Églises/les communités, droit ecclésiastique, musulmans, symboles religieux

Wilhelm Rees

Il diritto alla libertà religiosa ed alla libertà delle convinzioni — sviluppo, fondamenti giuridici e tendenze attuali in Austria

Sommario

In Austria funzionano molte chiese e comunità religiose. Attraverso il riconoscimento delle chiese e delle comunità religiose lo stato austriaco conferisce ad alcune di loro una particolare importanza. Negli ultimi anni la questione della libertà religiosa è divenuta eccezionalmente attuale nel contesto sia della libertà individuale di professione della fede, sia della libertà religiosa collettiva. Lo studio presenta lo sviluppo del diritto fondamentale alla libertà religiosa in Austria facendo luce in tal modo sul problema del riconoscimento delle chiese e delle organizzazioni religiose da parte dello stato. L'autore tratta anche i casi dettagliati della libertà individuale e collettiva di professione della fede come quello delle croci nei luoghi pubblici e dell'insegnamento della religione nelle scuole pubbliche, l'uso delle campane della chiesa, ecc. L'autore fa notare, in particolare, le sfide legate al funzionamento dei musulmani nella società austriaca, quali la questione del velo indossato oppure no durante le lezioni, la circoncisione, le moschee e la nuova Legge Islamica in Austria. Lo sfondo storico tracciato e le norme di legge discusse costituiscono qui un contributo per porsi nuove domande ed intraprendere discussioni.

Parole chiave: diritto alla libertà religiosa, riconoscimento delle chiese e delle organizzazioni religiose, rapporto tra lo stato e le chiese/le comunità religiose, diritto ecclesiastico, musulmani; simboli religiosi

Ecumeny and Law, vol. 4 (2016)
pp. 221—234

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Religious Freedom in Romania

Keywords: religious denominations, fundamental freedoms, Romanian legislation

The right to religion, and consequently the right to religious freedom,[1] is an integral part of the sum of rights and fundamental freedoms of the human being[2] the legal protection of which has been ensured by the European legislator.[3]

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[1] N. V. Dură, C. Mititelu: *The Freedom of Religion and the Right to Religious*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Albena, pp. 831—838.

[2] See N. V. Dură: *Drepturile şi libertăţile fundamentale ale omului şi protecţia lor juridică. Dreptul la religie şi libertatea religioasă* (The rights and fundamental freedoms of the human being and their legal protection. Right to religion and religious freedom). "Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative", 3 (2005), pp. 5—33; Idem: *Drepturile şi libertăţile omului în gândirea juridică europeană. De la „Justiniani Institutiones" la „Tratatul instituind o Constituţie pentru Europa"* (The rights and the freedoms of the human being in the European legal thinking. From "Justinian Institutiones" to the "Treaty establishing a Constitution for Europe"). "Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative", 1 (2006), pp. 129—151; Idem: *Dreptul la demnitate umană (dignitas humana) şi la libertate religioasă. De la "Jus naturale" la "Jus cogens"* (The right to human dignity (Dignitas Humana) and to religious freedom. From "Jus Naturale" to "Jus cogens"). "Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative", 1 (2006), pp. 86—128; Idem: *The European juridical thinking, concerning the human rights, expressed along the centuries*. "Acta Universitatis Danubius. Juridica", (VII), 2 (2010), pp. 153—192; N. V. Dură, C. Mititelu: *The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe*. In: *Exploration, Education and Progress in the Third Millennium*, I, 5, Bucharest 2015, pp. 7—22.

[3] N. V. Dură: *Principalele organisme şi organizaţii internaţionale cu preocupări şi atribuţii în domeniul promovării şi asigurării protecţiei juridice a drepturilor omului* (The

Over the centuries religious freedom constituted one of the basic moral values derived from Christianity in Romania, even though Romanians perceive it as a part of "humanist legacy" of Europe[4] which has served as a basis and frame of reference both in the "constitutionalization" process of the member states of the European Union[5] as well as in the jurisprudence of the European Court of Justice.[6]

Undoubtedly, we cannot speak of religious freedom in Romania[7] without making express reference to the way in which religious denominations are established, organized, and recognized by the state.

The legal framework is provided by Law 489/2006,[8] which is aligned with the EU legislation.[9] In turn, the source for the latter is

main international bodies and organizations with concerns and responsibilities in promoting and ensuring the legal protection of human rights). "Dionysiana", I, 1 (2007), pp. 18—25; Idem: *Les droits fondamentaux de l'homme et leur protection juridique*. "Analele Universității Dunărea de Jos Galați, Fascicula XXII, Drept şi Administrație publică", 2 (2008), pp. 19—23; N. V. Dură, C. Mititelu: *Human rights and their universality. From the rights of the "individual" and of the "citizen" to "human" rights*. In: "*Exploration, Education and Progress in the third Millennium*", I, 4, Galați, 2012, pp. 103—127; N. V. Dură, C. Mititelu: *Principii şi norme ale Dreptului Uniunii Europene privind drepturile omului şi protecția lor juridică* (The principles and the rules of the European Union Law on human rights and their legal protection), Constanta, 2014; C. Mititelu: *The Human Rights and the Social Protection of Vulnerable Individuals*. "Journal of Danubius Studies and Reseaech", II, 1 (2012), pp. 70—77; Idem: *The Right to Life. From the Prevention of Torture and Inhuman Punishment to the Abolition of the Death Penalty*. "Ovidius University Annals, Economic Sciences Series", XIII, 2 (2013), pp. 128—133.

[4] N. V. Dură: *Valorile religios-creştine şi „moştenirea culturală, religioasă şi umanistă a Europei". „Laicitate" şi „libertate religioasă"* (The religious-Christian values and the "cultural, religious and humanist heritage of Europe". "Secularism" and "religious freedom"). In: "*Modernitate, postmodernitate şi religie*", Iasi, 2005, pp. 19—35.

[5] C. Mititelu: *Europe and the Constitutionalization Process of EU Member States*. "Ovidius University Annals, Economic Sciences Series", XIII, 2 (2013), pp. 122—127.

[6] N. V. Dură, C. Mititelu: *The right to Freedom of Religion in the Jurisprudence of the European Court*. "Journal of Danubius Studies and Research", IV, 1 (2014), pp. 141—152.

[7] Regarding this liberty, see N. V. Dură, *Religious Freedom in Romania*. "Theologia Pontica", V, 3—4 (2012), pp. 9—24.

[8] See Idem: *Legea nr. 489/2006 privind libertatea religioasă şi regimul general al Cultelor religioase din România* (Law no. 489/2006 on religious freedom and the general regime of religious denominations in Romania). In: *Biserica Ortodoxă şi Drepturile omului: Paradigme, fundamente, implicații*, Bucharest, 2010, pp. 290—311; C. Mititelu: *Legea nr. 489/2006 şi relațiile dintre Stat şi Biserică* (Law no. 489/2006 and relations between the State and the Church). In: RO-RUS-NIPPONICA, I, Craiova, 2010, pp. 36—43.

[9] N. V. Dură: *Statele Uniunii Europene şi cultele religioase* (The European Union States and the religious cults). "Ortodoxia", 2 (2009), pp. 49—72; Idem: *The Fundamental Rights and Liberties of Man in the E.U. Law*. "Dionysiana", IV, 1 (2010), pp. 431—464; Idem: *General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights*. "Journal of Danubius Studies and Research", III, 2 (2013), pp. 7—14;

the Edict of Milan[10] (313) describing basic principles of the right to religion.

As it is well known, despite the favourable climate relating to freedom of expression, the religious freedom itself, otherwise expressly provided in the texts of EU legislation, in some member states may still be infringed upon by means of "privileges" and "discrimination" present in the their religious policy[11] hence the existence of some "international bodies and organizations with concerns and responsibilities in promoting and ensuring the legal protection of human rights."[12]

After the events of the year 1989, Romania had no provision regarding the religious freedom that would be in accordance with the constitution, conventions, agreements, and international realities to which Romania was a party.

Therefore, in the entirely new social reality, up until 2006, in the absence of an up-to-date normative act the state operated on the conjectural bases.

A Romanian jurist and canonist noticed that for more than 16 years, from December 1989 — when the removal of the communist regime took place — until 2006, Romania had no new regulation concerning the legal status of religious organizations as such, they continued to observe and apply the provisions of Decree-Law no. 177/1948, which were remote from the provisions of principles enunciated by the main international instruments (treaties, conventions, declarations, etc.) on religious freedom, to which Romania had already been a party, largely even before the "events" of December 1989. In fact, even the socio-political and religious realities after 1989 in Romania no longer corresponded to those mentioned in the

C. Mititelu: *The European Convention on Human Rights*. In: *10th Edition of International Conference The European Integration — Realities and Perspectives*, Galati, 2015, pp. 243—252; N. V. Dură, C. Mititelu: *The Treaty of Nice, European Union Charter of Fundamental Rights*. In: 8*th Edition of International Conference The European Integration — Realities and Perspectives*, Galati, 2013, pp. 123—129; Idem: *International Covenant on Economic, Social and Cultural Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives*, Galati, 2013, pp. 130—136.

[10] See N. V. Dură: *Edictul de la Milan (313) şi impactul lui asupra relaţiilor dintre Stat şi Biserică. Câteva consideraţii istorice, juridice şi ecleziologice* (The Edict of Milan (313) and its impact on relations between State and Church. Some historical, legal and ecclesiological considerations). "Mitropolia Olteniei", 5—8 (2012), pp. 28—43; N. V. Dură, C. Mititelu: *The State and the Church in IV-VI Centuries. The Roman Emperor and the Christian Religion*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Albena, pp. 923—930.

[11] N. V. Dură: *Proselytism and the Right to Change Religion: The Romanian Debate*. In: *Law and Religion in the 21st Century. Relations between States and Religious Communities*, Edited by S. Ferrari and R. Cristofori, England, 2010, pp. 279—290.

[12] N. V. Dură: *Principalele organisme şi organizaţii internaţionale…*, pp. 18—25.

Law on Religious Denominations enacted by the rulers of the communist states of Soviet origin. Moreover, even some Romanian political scientists did not understand why the Decree no. 177/1948 was not repealed by the Romanian authorities. "Given the concern of the authorities to remove the effects of communist legislation, it is difficult to understand why the Decree no. 177/1948 was never formally repealed."[13]

The prospect of European integration necessitated the adoption of a law that could regulate the governing of religious communities according to the similar regulations in the EU countries and, at the same time, adjusted to the specific reality of Romania.

Along this line, since March 2005 there had been many meetings with the representatives of religious denominations and in the period of April—May 2005 four rounds of discussions with the representatives of the Religious Affairs took place.

The representatives of 16 religious denominations in Romania signed on 31 May 2005, along with the representatives of the Ministry of Culture and Religious Affairs, a draft text which, from 1st of June to 1st of July, was brought to the attention of the public, in accordance with the Law on Decision-Making Transparency in Public Administration, during which a number of comments were made, some of which included in the final form of the project.[14]

In order to popularize the bill both nationally and internationally the Ministry of Culture and Religious Affairs organized on 12—13 September 2005 the International Symposium entitled "The religious freedom in the Romanian and European context" which was attended by representatives of some international bodies such as the European Commission for Democracy through Law (the Venice Commission), OSCE, as well as leading experts from Europe and the United States. In addition, a number of organizations and institutions from Romania were invited. Prestigious institutions as the ODIHR/OSCE and the Venice Commission were asked for their opinion and advice.

The Venice Commission analysed the text of the draft bill of the 64th plenary session held on 21—22 October 2005 and wrote a favourable opinion recommending a number of improvements to the bill.

Unlike the OSCE's Office for Democratic Institutions and Human Rights (ODIHR)[15] which had issued no remarks regarding the draft bill

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[13] Idem: *Despre libertatea religioasă şi regimul general al Cultelor religioase din România* (On religious freedom and the general regime of religious Denominations in Romania). "Analele Universității Ovidius Constanța / Seria Teologie", VII, 1 (2009), pp. 20—21.

[14] See http://www.culte.gov.ro/detaliu-legislatie/vrs/IDleg/18 (accessed 3.03.2015).

[15] The Office for Democratic Institutions and Human Rights (http://www.osce.org/ro).

the U.S. Helsinki Commission has drafted and submitted a number of comments on the text of the Bill.

In the parliamentary proceedings in the Senate, the Judicial Committee for appointments, discipline, immunities and validations, and the Commission for Human Rights, denominations and minorities have developed a joint report of the bill for admission with a series of amendments that were otherwise admitted by the government representatives present on the debate.

The draft was adopted by the senate on 21 December 2005 through silent procedure in accordance with Art. 75 par. 2 of the Constitution.[16] It is not a case of an extraordinary procedure, since it occurred in the conditions where the lower house (Chamber of Deputies) was notified. In such a case the upper house does not pronounce on the draft within the statutory period of maximum 60 days.

The decisive chamber here was the Chamber of Deputies, the Judicial Committee, and the Commission of the Human Rights, Religious Affairs and Minorities drafting favourably joint report with amendments. The debates of the commission lasted from February until 7 December 2006.

During the debates, among others the U.S. Helsinki Commission sent their specified position on the discussed matters to the specialized committees of both chambers and to the Romanian government. The former expressed a negative opinion regarding to the quantitative and sustainability criteria defined by the bill for the recognition of new religious organizations.[17]

In the positions formulated, the U.S. Helsinki Commission have shown that this model is not specific only to Romania, but falls within the scope of broader European model for the regulations of the relations between state and religious organizations. Subsequently, the text by the government was drawn which said: "[…] in Romania there are prohibited any forms, means, acts, or actions of slander and religious enmity" with the express prohibition of "public offense to religious symbols." This amendment, adopted by the parliament, however, was heavily criticized by some associations of so-called freethinkers, as well as agnostics, atheists, etc. from Romania, who felt that this limits the freedom of expression.[18] We

[16] The current Constitution of Romania was approved by national referendum on 18—19 October 2003 and entered into force on 29 October 2003, following its publication in the *Official Gazette* of the Constitutional Court Decision no. 3 of 22 October 2003 to confirm the result of the national referendum of 18—19 October 2003 regarding the amending of the Law of the Romanian Constitution.

[17] See http://www.culte.gov.ro/detaliu-legislatie/vrs/IDleg/18 (accessed 3.03.2015).

[18] See † T. Petrescu: *Libertatea de expresie şi libertatea religioasă, libertăţi fundamentale ale persoanei umane* (The freedom of expression and the freedom of religion, fun-

should add that the amendment did not have a punitive element, but only a declarative character, so that the freedom of expression will not affect an area as sensitive as religious faith.

This provision is equally constitutional and in line with the European legal regime. It constitutes indeed an application of the provision of Art. 29 (2) of the Constitution which states that: "Freedom of conscience is guaranteed, it must be manifested in a spirit of tolerance and mutual respect." And as for the penal enforcement, for example, of the blasphemy, it is also found in the legislation of many European countries.

The plenary meeting of the Chamber of Deputies approved the draft of the bill on 13 December 2006 by an overwhelming majority of 220 votes in favour, one abstaining and one vote against. The President of Romania promulgated the Law by Decree no. 1437 on 27 December, that acquired the number 489/2006. It was published in *Official Gazette* no. 11 with a date 1 August 2007.

According to Law no. 489/2006 on Religious Freedom and the General Regime of Religious Affairs, published in the *Official Gazette*, part I, no. 11 of 1 August 2007, "the Romanian state respects and guarantees the fundamental right to freedom of thought, conscience and religion of any person in Romania, according to the Constitution and international treaties to which Romania is a party. Nobody can be prevented or constrained to adopt an opinion or to adhere to a religion contrary to their beliefs, nor be subject to discrimination, prosecuted or put in a position of inferiority for his faith or affiliation to a religious group, religious denominations or religious association or for the exercise under the conditions provided by law of religious freedom" (Art. 1 par. 1—2).

Regarding the content of religious freedom, the law provides as follows:

> The religious freedom includes the right of every person to have or to adopt a religion to express it individually or collectively, in public or in private, through the services specific to every religious denomination, including religious education and freedom to maintain or change religion.
>
> The freedom to manifest one's religion may not be subject to any restrictions other than those which are prescribed by law and are necessary in a democratic society for public security, protection of public order and health as well as the public morality, or for the protection of rights and fundamental freedoms of human being. (Art. 2 par. 1—2)

damental freedoms of the human person). "Analele Universității OVIDIUS Constanța, Seria: Drept şi Ştiințe Administrative", 1 (2006), pp. 26—29.

Therefore, according to the provisions of the law no. 489/2006, the right of every person to have or to adopt a religion is an inherent right of the religious freedom, which is however subject to restrictions prescribed by the law.

As for parental responsibilities in this respect: "Parents or guardians have the exclusive right to choose the religious education of minors, according to their own beliefs.

The religion of a child that reaches the age of 14 cannot be changed without his/her consent; the child who has reached the age of 16 has the right to choose alone his/her own religion" (Art. 3, par. 1—2).

It follows from the text of the law that the freedom to choose one's own religion without any interference from others, authorities, associations, denominational groups, organizations, etc., is guaranteed not only by the constitution but also by the Law 489/2006.

According to the constitutional text from 2003, the Art. 29 provides that:

> (1) Freedom of thought and opinions as well as the liberty of religious beliefs shall not be restricted in any way. No one may be compelled to adopt an opinion or to adhere to a religion contrary to his/her beliefs.
> (2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect.
> (3) All religious denominations are free and shall organize themselves according to their own statutes under the law.
> (4) In the relations between denominations are forbidden any forms, means, acts, or actions of religious enmity.
> (5) The religious denominations are autonomous from the state and shall enjoy support from it, including the facilitation of religious assistance in the army, hospitals, prisons, homes, and orphanages.
> (6) Parents or guardians have the right to ensure according to their convictions, the education of the minor children which is entrusted to them.[19]

In light of the constitutional provisions and the Law 489/2006[20] on religious freedom and the general governance of denominations, any person, religious organization, religious association, or religious group in Romania is free to establish and maintain ecumenical and brotherly relations with other people, religious organizations or religious groups and

[19] Art. 29, Law no. 489/2006 at http://www.culte.gov.ro/detaliu-legislatie/vrs/IDleg/18.

[20] For the content of this law, see http://patriarhia.ro/legea-nr-489-2006-privind-libertatea-religioasa-si-regimul-general-al-cultelor-539.html (accessed 17.05.2015).

inter-Christian and inter-religious organizations, nationally and internationally, and to manifest their religious beliefs collectively, according to their own beliefs and provisions of this law, both in religious structures with or without legal personality.

The religious structures with legal personality regulated by this law are religious denominations and associations, and structures with no legal personality, that is religious groups. The right of religious communities to freely choose their association structure in which to manifest their religion such as, for instance: religious organization, religious association, or religious group, was also granted. It is applicable in accordance with discussed law, but under the condition of upholding the obligation to respect the constitution and laws of the country and not to affect public safety, order, health, or morals, as well as to the rights and fundamental freedoms of humans.

Regarding the mentioned religious structures, namely, religious organizations, religious associations, and religious groups, some Romanian jurists claimed that the state should not differentiate between religious association and religious denomination because this distinction is discriminatory.

The same jurists believe that the implementation of Law 489/2006 gives religious groups "a special legislation, in addition to the state law" and that as they argue it "is especially dangerous," since they have the right to request the association agreement in order to achieve an illegitimate aim, and "there is no possibility of control" by the city authorities

According to the very same Romanian jurists, this type of association may be not only a legal loophole for many religious organizations, but also hiding place for many "terrorist groups which could invoke the so-called legitimacy of religious groups about which nobody knows anything, nobody controls anything, no one checks anything."[21]

Under the current Law on Religious Affairs, not only religious organizations, associations, and groups have the right to initiate and foster ecumenical relations at national and international level, but also "any person."[22]

Law 489/2006 prohibits the processing of personal data related to religious beliefs or for the membership within any type of denominations, except for the case of a national census approved by law or if the data subject has given expressly his/her consent to do this, as it is forbidden to compel an individual to declare their religion in any relationship with public authorities or private legal persons.

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[21] N. V. Dură: *Despre libertatea religioasă şi regimul general al Cultelor…*, p. 23.

[22] Ibidem, p. 35.

In the first chapter of the discussed law (no. 489/2006), the religious freedom is defined and regulated in the ways established by the texts of international conventions and treaties regarding the fundamental rights of the human being.

There were in sight, in particular, the provisions of Art. 9, 10, 11 of the European Convention on Human Rights; Art. 18, 19, 20 and 26 of the Universal Declaration of Human Rights; Art. 13 of the International Covenant on Economic, Social and Cultural Rights; Art. 18 of the International Covenant on Civil and Political Rights; the UN General Assembly Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

Amongst religious freedoms, the right to free association has a broad content and it encompasses the state protecting both religious groups, whose members do not consider it necessary to exercise their freedom within a framework structure with a legal status as well as religious structures with legal status, namely religious organizations and religious associations.

The regulatory system chosen for the religious life in the draft law is derived from the existing realities, and now, with two levels of recognition of these denominations, each of the two legal regimes corresponds to certain rights and obligations. The difference between the two regimes derives from the public utility that the state grants to religious denominations over other religious groups, according to criteria of sustainability and stability. This two-step regulatory system is characteristic of the majority of the EU countries (there occur the following delimitations: between denominations that have agreements with the state and those that have not, between state Churches and regular denominations, between religious associations regulated by private law and public law religious organizations etc.).

The second chapter of the law, called "The Religious Organizations" covers: (a) relations between the state and religious organizations, (b) acquiring the capacity to operate as a religious organization, (c) personnel, (d) patrimony, and (e) education organized by religious organizations.

The Romanian state recognizes the important role of the Romanian Orthodox Church and other Churches and religious organizations recognized in the national history of Romania and in the contemporary Romanian society. At the same time, it recognizes the spiritual, educational, social, charitable, cultural, and social role as well as religious partners and their status as factors of social peace.

The fundamental relations between the Romanian state and religious organizations are their mutual autonomy, neutrality, equidistance,

and non-discrimination of state towards them as well as the cooperation of the state and religious organizations in the areas of common interest.

The religious organizations' quality, in the light of the law, shall be acquired under a government decision on a proposal from the Ministry of Culture and Religious Affairs, by the religious associations which through their activities and number of members, offered guarantees of durability and stability, and in terms of personnel, recognizing the specificity of relations between the clergy and religious organizations as a legal person, as being internal affairs of religious organizations, and subject to their own jurisdiction.

The third chapter of the law, entitled "The Religious Associations," establishes a new legal entity, the religious association, that is, a legal person consisting of at least 300 members being Romanian citizens who reside within the territory of Romania and who are associated to manifest a religious belief.

This two-stage system concerning the governing of the legal regime of religious organizations with legal personality of religious organization and religious association is specific to most states in the European Union.

In the final chapter, "The Final Transitory Provisions," it is established that those 18 denominations which are already recognized and operate in the Romanian state are not required to undergo a new procedure to be recognized.

According to the law, "the central public authorities may enter into partnerships with the recognized religious organizations in the areas of common interest and agreements for the regulation of particular issues specific for the tradition of denominations, which shall be approved by law."

In Romania, there is no state religion, the state is neutral towards any religious or non-religious ideology, thus preserving the right of every person to freely choose their religion or belief, without restrictions or discrimination.

In conclusion, we can therefore say that by Law 489/2006 Romania has actually created a legal regime that corresponds to "all international standards set on international level guaranteeing the exercise of religious freedom, individually or collectively. For this reason, any challenge to this law on grounds of incompatibility with European values on which Romania must comply cannot be made only by ignoring the legal and religious realities"[23] which provides a practical and effective legal protection in the exercise of the right to religion, and, consequently, the right to religious freedom of every person.

[23] See https://grupareaaproape.wordpress.com/2007/01/09/legea-cultelor-salutata-de-institutul-inter-cluj-bucuresti-chisinau/ (accessed 15.05.2015).

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Religious Freedom in Romania

Summary

The right to religious freedom in Romania was provided in the texts of the Constitution published during the communist regime, in 1948, 1952, and 1965 (with subsequent amendments), but in practice it has not been respected. After the popular revolution of 1989, through Constitutions of 1991 and 2003, and particularly through the Organic Law 489/2006, in Romania this right was provided and maintained in full compliance with the provisions of European and international Law.

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La liberté religieuse en Roumanie

Résumé

Le droit à la liberté religieuse en Roumanie a été garanti par le texte des Constitutions publiées à l'époque du régime communiste en 1948, 1952 et 1965 (avec des modifications ultérieures), mais en pratique il n'était pas garanti.

Après la révolution de 1989, en vertu de la constitution de 1991 et de 2003, et en particulier conformément à la loi sur la liberté religieuse (489/2006), ce droit a été garanti en Roumanie et maintenu en plein accord avec les réglementations européennes ainsi qu'avec le droit international.

Mots clés : organisations religieuses, libertés fondamentales, législation roumaine

† Teodosie Petrescu, Bogdan Chiriluță

La libertà religiosa in Romania

Sommario

Il diritto alla libertà religiosa in Romania fu garantito dal testo delle Costituzioni pubblicate nel periodo del regime comunista, negli anni 1948, 1952 e 1965 (con emendamenti successivi), ma in pratica non era garantito.

Dopo la rivoluzione del 1989, in virtù delle costituzioni del 1991 e del 2003, ed in particolare mediante la Legge Organica 489/2006, in Romania tale diritto è stato garantito e mantenuto in piena conformità con le norme europee e il diritto internazionale.

Parole chiave: organizzazioni religiose, libertà fondamentali, legislazione romena

Ecumeny and Law, vol. 4 (2016)
pp. 235—256

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From the Church Autonomy of the Archbishop Andrei Şaguna to the Autonomy of the Religious Denominations in the Romanian State: Ecclesiological-Canonical Considerations

Keywords: Church-state relations, canonical Orthodox doctrine, religious freedom, Canon Codes

A few years ago, an Evangelical Lutheran theologian Johann Schneider,[1] wrote that, "in the twentieth century," the Romanian Orthodox Church was declared "dominant Church" but, in reality, it was "a state-run institution."[2]

According to Johann Schneider, who specialized in the pastoral-canonical activity of the Romanian hierarch Andrei Şaguna († 1873), the "Archbishop of Transylvania" (which in his times was under the rule of the Habsburg Empire), and the "Metropolitan of the Romanian Orthodox people from Hungary and Transylvania," "we could once again exploit the concept of a free and autonomous Orthodox Church" promoted by Şaguna. Moreover, he considered that, under this concept, we

[1] Born in Mosna (near Medias), in Transylvania (Romania), Johann Schneider moved to Germany, where he prepared a PhD thesis on the ecclesiology of the Metropolitan Andrei Şaguna. The thesis was defended in 2004 at the University of Erlangen.

[2] J. Schneider: *Ecleziologia organică a Mitropolitului Andrei Şaguna şi fundamentele ei biblice, canonice şi moderne* (The organic ecclesiology of the Metropolitan Andrei Saguna and its biblical, canonical and modern foundations). Sibiu 2008, p. 271.

could "negotiate on equal terms with the Romanian state, conscious of its power, and we could even criticize this one […]."[3]

In his ecclesiological-canonical analysis, the Evangelical Lutheran theologian reached the conclusion that the contemporary Romanian Orthodox Church should also rediscover and assert the content of the canonical principle of external autonomy in entirety, as the Metropolitan Şaguna did, by circulating and brilliantly valorizing it in his Church relationships with the Habsburg state and with the Royal House in Vienna.

For the canonical Orthodox ecclesiology, "the essential content of Orthodoxy" is included "in the truth of faith and in the general principles of organization and functioning thereof."[4]

These fundamental canonical principles of the Orthodoxy are included "in the universal constitutional charter of the Church, which consists of the collection of the Holy Canons," [and] "in the length and constant practice of church life, which become custom for the canon law."[5]

It should also be mentioned and noted that "some of these principles" have "a dogmatic content or foundation" and others have "only a juridical or canonical basis."[6]

The principle of external autonomy is part of the former category, that is of the fundamental or basic canonical principles, with dogmatic content, which are, otherwise, "juridical and canonical expressions of dogmatic truths, the main Church teachings which apply to the Community organization of the Christian life."[7]

Since the assessment of the mood in which the "external autonomy" — that characterizes the forms of organization and manifestation of the relations between the state and the Church, *recte* between the state and the religious denominations of its administrative-territorial area — was or was not asserted during a certain historical period,[8] could help us to better understand the contemporary realities regarding the juridical status[9] of religious

[3] Ibidem.

[4] L. Stan: "Despre principiile canonice fundamentale ale Ortodoxiei" (About fundamental canonical principles of the Orthodoxy). In: *Autocefalia, libertate şi demnitate* (Autocephaly, freedom, and dignity). Bucharest 2010, p. 18.

[5] Ibidem, pp. 18—19.

[6] Ibidem, p. 19.

[7] Ibidem.

[8] For example, see N. V. Durră: *Political-Juridical and Religious Status of the Romanian Countries and the Balkan People during the 14th-19th Centuries*. "Revue des Études Sud-Est Européennes", XXVII, 1—2 (1989), pp. 159—170.

[9] See Idem: *Despre libertatea religioasă şi regimul general al Cultelor religioase din România (About religious freedom and the general regime of religious Denominations in Romania)*. "Analele Universităţii Ovidius Constanţa / Seria Teologie" (Ovidius University Annals / Theology Series), VII, 1 (2009), pp. 20—45; Idem: *Proselytism and the Right to*

denominations, in our paper we examined and assessed first the type of relations between the state and the Church during the pontificate time of the Romanian Archbishop Andrei Şaguna the Metropolitan of the Romanian historical province, that is Transylvania.[10] Then, we examined the current legislation of the Romanian state, in order to assess both the contemporary relations between state and Church and the mood in which it was perceived the assertion of the canonical principle of external autonomy.

According to the canonical Orthodox doctrine, the Church[11] carries out its earthly activities within the geographical area of a state, and her members are state's citizens, but the Church differs from the state both in origin and nature, and in her spiritual-religious means used in order to achieve her goals,[12] that is *salus animarium* ('the salvation of souls').

On the ground of the same canonical doctrine of the Eastern Orthodox Church, the Church is a "divine-human institution," while the state is a purely human one.[13] However, following the statements of some canonists, the Church is to be understood as merely a "religious institution," a "religious society,"[14] a "social body"[15] (sic!).

Change Religion: The Romanian Debate. In: *Law and Religion in the 21st Century. Relations between States and Religious Communities*. Ed. S. Ferrari, R. Cristofori. England 2010, pp. 279—290.

[10] The ancient Greek and Latin historical sources attest that Transylvania was a province of Dacia, inhabited 2,000 years ago by our forefathers, Dacians, that is northern Tracians. The archeological results confirm also "à l'évidence" this historical reality. See A. Madgearu: *The Romanians in the Anonymous Gesta Hungarorum. Truth and Fiction*, Centrul de Studii Transilvane (Transylvanian Studies Center), (Bibliotheca Rerum Transsilvaniae, XXXIV). Cluj-Napoca 2005.

[11] See I. Ivan: *Importanța principiilor fundamentale canonice de organizație şi administrație pentru unitatea Bisericii* (The importance of the fundamental canonical principles of organization and administration to Church Unity). "Mitropolia Moldovei şi Sucevei" (Metropolitan Church of Moldavia and Suceava), XXI, 3—4 (1969), pp. 155—165; N. V. Dură: *Principiile canonice, fundamentale, de organizare şi funcționare a Bisericii Ortodoxe şi reflectarea lor în legislația Bisericii Ortodoxe Române* (Canonical fundamental principles for the organization and functioning of the Orthodox Church and their impact on the legislation of the Romanian Orthodox Church). "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), V, 9 (2001), pp. 129—140.

[12] See A. Şaguna: *Compendiu de Drept canonic al unei Sfinte soborniceşti şi apostoleşti Biserici* (Compendium of Canon Law of a Holy Synodal and Apostolic Church). 3rd edition. Sibiu, 1913, pp. 18—19; N. Milaş: *Dreptul bisericesc oriental* (Oriental Church Law). Translation by D. I. Cornilescu, V. Radu, and reviwed by I. Mihălcescu. Bucharest, 1915, pp. 569—570.

[13] Cf. N. V. Dură: *Biserica creştină în primele patru secole. Organizarea şi bazele ei canonice* (The Christian Church during the first four centuries. The organization and its canonical basis). "Ortodoxia" (The Orthodoxy), XXXIV, 3 (1982), pp. 451—469.

[14] I. N. Floca: *Drept canonic ortodox. Legislație şi administrație bisericească (Orthodox canon law. Legislation and Church administration)*. Bucharest, I, 1990, pp. 151—152.

[15] Foreword to the edition of 2004 of the *Pidalion*. Iaşi 2004, p. 18.

Some canonists also claimed that "the Church and the state are divine establishments, which aim is temporal and eternal happiness."[16]

The canonists of the Eastern Church also noted that the state, by virtue of its sovereignty, "does not tolerate on its territory any other sovereign power, namely, any other organization that voices a claim to be one,"[17] and, as such, the relations between the state and the Church cannot be perceived as equal.[18] Hence the obvious need that the relations between the two institutions, that is the state and the Church, be determined and justified only by the common necessity and endeavour to work *in solidum* (jointly), in order to promote social peace[19] and human society's welfare.[20]

However, this does not entail the claim or assertion of the so-called right of sovereignty, because, in this situation, one cannot speak of the right to religion,[21] and neither about the Church autonomy, which was expressly asserted both by the Roman-Byzantine Law[22] and by the current legislation of several states.[23]

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[16] N. Milaş: *Dreptul bisericesc*..., p. 569.

[17] I. N. Floca: *Drept canonic*..., II, p. 283.

[18] See L. Stan: *Biserică şi cult în Dreptul internaţional (Church and religious organization in international Law)*. "Ortodoxia" (The Orthodoxy), VIII (1955); Idem: *Relaţiile dintre Stat şi Biserică* (The Relationships between State and Church). "Ortodoxia" (The Orthodoxy), V, 3—4 (1952); L. Iacob: *Stat şi Biserică* (State and Church). "Ortodoxia" (The Orthodoxy), 1942, vol. I; G. Popescu—Prahova: *Raporturile dintre Stat şi Biserică* (The Relationships between State and Church). Chişinău, 1936.

[19] The Edict of Milan (313) also regulates in the same way (see N. V. Dură: *Edictul de la Milan (313) şi impactul lui asupra relaţiilor dintre Stat şi Biserică. Câteva consideraţii istorice, juridice şi ecleziologice* (The Edict of Milan (313) and its impact on the relationships between State and Church. Some historical, legal and ecclesiological considerations). "Mitropolia Olteniei" (The Metropolitan Church of Oltenia), 5—8 (2012), pp. 28—43; N. V. Dură, C. Mititelu: *The Freedom of Religion and the Right to Religious Freedom*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Albena, pp. 831—838).

[20] See N. V. Dură, C. Mititelu: *The State and the Church in IV—VI Centuries. The Roman Emperor and the Christian Religion*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Albena, pp. 923—930.

[21] See N. V. Dură: *Drepturile şi libertăţile fundamentale ale omului şi protecţia lor juridică. Dreptul la religie şi libertatea religioasă* (Human rights and fundamental freedoms and their legal protection. The right to religion and to religious freedom). "Ortodoxia", LVI, 3—4 (2005), pp. 7—55; N. V. Dură, C. Mititelu: *The right to Freedom of Religion in the Jurisprudence of the European Court*. "Journal of Danubius Studies and Research", IV, 1 (2014), pp. 141—152; Idem: *The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe*. In: "*Exploration, Education and Progress in the Third Millennium*", I, 5, Bucharest, 2015, pp. 7—22.

[22] See N. V. Dură, C. Mititelu: *The State and the Church in the fourth-sixth Centuries*..., pp. 923—930.

[23] See N. V. Dură: *The Law no. 489/2006 on Religious Freedom and General Regime of Religious Cults in Romania*. "Dionysiana", II, 1 (2008), pp. 37—54.

In the Romanian principalities, since the establishment of the Romanian states (13th—14th centuries) and their legitimization by the Basileus and the Patriarch of the Eastern Roman Empire (i.e. The Byzantine Empire),[24] the two basic institutions of society, namely the state and the Church, have worked together harmoniously, according to the classic Byzantine model,[25] in order to promote and materialize the common good, that is *ad utilitatem publicum*, without causing any collision or confusion within each other's jurisdictional power.

According to the assessment of Johann Schneider, the Roman-Catholic confession of the Habsburg Empire played "the role of state religion," while the Orthodox Church "was always suspected of religious and political disloyalty"[26] because it actually claimed the same status, both for itself, as a divine-human institution, and for its members, namely the Christians of "Romanian law," that is the Romanians of Orthodox Christian faith.

This type of "privileged" relationships still exist today in some EU countries,[27] as revealed by their legislation, hence the statement that — in this regard too — *nihil novum sub sole*.

According to Schneider, the ephemeral and short-term improvement of the less humane treatment applied to the Orthodox Church in Transylvania — by the Habsburg Empire — was triggered largely by "its foreign policy relationships with Russia and the Ottoman Empire."[28]

Despite some temporary relief, one can notice, as Schneider already did, the "marginalization" and discrimination of the Orthodox Church and of the Orthodox citizens in the Habsburg monarchy were not been officially condemned by the Metropolitan Şaguna. In fact, even "in his *Compendium of Canon Law* Şaguna does not exemplify his statements with examples of political practice."[29]

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[24] See M. Şesan: *Bizanțul şi România* (*Byzantium and Romania*). "Mitropolia Ardealului" (The Metropolitan Church of Transylvania), XXIV, 9—10 (1971).

[25] See N. V. Dură: *The Byzantine Nomocanons, fundamental sources of old Romanian Law*. In: "*Exploration, Education and Progress in the third Millennium*", I, 3, Galați 2011, pp. 25—48; C. Mititelu: *Dreptul bizantin şi receptarea lui în Pravilele tipărite, în Țările Române, din secolul al XVII-lea* (The Byzantine law and its reception of the Codes of Laws printed in the Romanian Principalities, in the seventeenth century). Bucharest 2014.

[26] J. Schneider: *Ecleziologia organică*…, p. 244.

[27] See N. V. Dură: *Relațiile Stat-Culte religioase în U.E. „Privilegii" şi „discriminări" în politica „religioasă" a unor State membre ale Uniunii Europene* (The Relationships between the State and the Religious Cults in the EU. "Privileges" and "discrimination" in the "religious" policy of some EU Member States). "Analele Universității Ovidius. Seria: Drept şi Ştiințe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2007), pp. 20—34.

[28] J. Schneider: *Ecleziologia organică*…, p. 244.

[29] Ibidem, p. 245.

In his *Compendium of Canon Law*,[30] Şaguna indeed assessed that "the Church of Christ is different from the state, in such way as the body is different from the soul; the former is subject to the state, and the latter to the Church; however, Şaguna wrote that the state and the Church can and must be able to coexist, because, the body and the soul, despite being two heterogeneous elements, still form together the human being, and from the perspective of the soul the human being is a member of his/her Church and, from the perspective of the body, he/she is a citizen of the state; by the same token, Christ's Church and the state can and should be able to coexist in order to solve the issue of Christ's Church and of the state. The problems and the means are not in any collision, nor are they dangerous to each other, regardless of the state regime, even when the Church has to operate within an unchristian state" (sic).[31]

Therefore, according to the Metropolitan Andrei Şaguna,[32] between the state and the Church there should be a relationship similar to the one that exists between body and soul. Also, Şaguna asserted that the state has legitimacy regardless of its "form of state regime" that is "absolutist, constitutional or republican,"[33] provided, however, that it "ensures the freedom of conscience and the religious beliefs of its citizens."[34]

Moreover, in accordance with the Andrei Şaguna's perception, the legitimacy of the state does not depend on its form of government (constitutional, republican, etc.), but on insuring the legal protection of "the freedom of conscience"[35] and of the "religious freedom"[36] to all its rightful subjects.

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[30] A. Şaguna: *Compendiu de Drept canonic al unei sfinte, sobornicești şi apostolice Biserici* (Compendium of the Canon Law of a Holy Synodal and Apostolic Church). Sibiu 1868.

[31] Ibidem, 2nd edition, Sibiu, 1885, p. 274.

[32] On his canonical-pastoral activity and his canonical work, see I. Ivan: *Statutul şagunian (o sută de ani de aplicare)* (Saguna's Status (one hundred years of application)). "Mitropolia Ardealului" (The Metropolitan Church of Transylvania), 4—6 (1969), pp. 330—334.

[33] A. Şaguna: *Compendiu de Drept canonic*..., 2nd edition, p. 274, note 2.

[34] J. Schneider: *Ecleziologia organică*..., p. 267.

[35] N. V. Dură: *„Conştiința" în percepția Teologiei şi a Filosofiei* ("Consciousness" in the perception of Theology and Philosophy). "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), XIII, 1 (2009), pp. 27—37; Idem: *The Theology of Conscience and the Philosophy of Conscience*. "Philosophical-Theological Reviewer", 1 (2011), pp. 20—29.

[36] Idem: *About the "Religious" Politics of Some Member States of the European Union*. "Dionysiana", III, 1 (2009), pp. 463—489; Idem: *Religious Freedom in Romania*. "Theologia Pontica", V, 3—4 (2012), pp. 9—24; N. V. Dură, C. Mititelu: *Dreptul la libertatea de Religie. Edictul de la Milan şi afirmarea principiilor lui în Legislația europeană şi internațională* (The right to the freedom of Religion. The Edict of Milan and the assertion of its principles in the European and international legislation). "Revista de Teologie Sfântul Apostol

Nowadays, these freedoms are seen as the matrix of the fundamental human rights[37] wherefore the EU legislation otherwise expressly provided rules in order to ensure their juridical protection.[38]

Archbishop Şaguna, who was influenced by the juridical-canonical Roman Catholic thinking of the Vienna School of his time, by the organizational model of the Evangelical Church of Augsburg Confession from the Habsburg Empire and by the declarations of some "liberal Catholic reformers" from Hungary,[39] said that the state uses its "means," that is, "political and criminal laws," in order to achieve its goal, namely "to guarantee the maintenance of good order between citizens and to exempt them regarding life, honour, wealth and honest and useful occupations, that is the preservation of the legal State; […]."[40]

According to Şaguna, "the legal State," that is "the Rule of law," should therefore be the state that practically and effectively uses the means at its disposal, namely, the political and legal laws, hence his plea for preserving it. But, what precisely was the Metropolitan Şaguna's perspective on the autonomy of his Church and on her relationships with the Habsburg State?

Andrei" (St. Andrew Journal of Theology), 1 (2013), pp. 43—60; C. Mititelu: *Legea nr. 489/2006 şi relaţiile dintre Stat şi Biserică* (Law no. 489/2006 and the relationship between State and Church). In: RO-RUS-NIPPONICA, I, Craiova 2010, pp. 36—43.

[37] See N. V. Dură, C. Mititelu: *Human rights and their universality. From the rights of the "individual" and of the "citizen" to "human" rights*. In: "*Exploration, Education and Progress in the third Millennium*", I, 4, Galaţi, 2012, pp. 103—127; N. V. Dură: *Les droits fondamentaux de l'homme et leur protection juridique* (Fundamental human rights and their legal protection). "Analele Universităţii Dunărea de Jos Galaţi" (Annales of Dunărea de Jos University), Fascicle XXII, Drept şi Administraţie publică (Law and Public Administration), 2 (2008), pp. 19—23; N. V. Dură: *The European juridical thinking, concerning the human rights, expressed along the centuries*. "Acta Universitatis Danubius. Juridica", VII, 2 (2010), pp. 153—192; Idem: *Principii şi norme generale ale Dreptului Uniunii Europene privind protecţia juridică a drepturilor omului* (Principles and general rules of EU law on the legal protection of human rights). In: RO-RUS-NIPPONICA, I, Craiova, 2010, pp. 32—36; C. Mititelu: *The European Convention on Human Rights*. In: *10th Edition of International Conference The European Integration — Realities and Perspectives*, Galati 2015, pp. 243—252.

[38] N. V. Dură, C. Mititelu: *Principii şi norme ale Dreptului Uniunii Europene privind drepturile omului şi protecţia lor juridică* (Principles and rules of EU law on human rights and their legal protection). Constanţa, 2014; C. Mititelu: *The Human Rights and the Social Protection of Vulnerable Individuals*. "Journal of Danubius Studies and Reseaech", II, 1 (2012), pp. 70—77; Idem: *The Right to Life. From the Prevention of Torture and Inhuman Punishment to the Abolition of the Death Penalty*. "Ovidius University Annals, Economic Sciences Series", XIII, 2 (2013), pp. 128—133; Idem: *Europe and the Constitutionalization Process of EU Member States*. "Ovidius University Annals, Economic Sciences Series", XIII, 2 (2013), pp. 122—127.

[39] J. Schneider: *Ecleziologia organică…*, p. 266.

[40] A. Şaguna: *Compendiu de Drept canonic…*, 2nd edition, p. 274.

In the view of the Romanian hierarch, they were expressed and primarily materialized by "the factual recognition of the freedom of conscience and of the religious belief of its citizens." Secondly, "in refraining from any interference in religious and purely dogmatic matters." Thirdly, "in compliance with dogmas and with other positive church institutions and with the decisions taken by the ecclesiastical authorities." Fourthly, in compliance with the canon law. Fifthly, "in the pecuniary support of the clergy's subsistence, of schools and of philanthropic institutions." And last but not least, in promoting "the development of the Church and the country's citizens' religious life."[41]

If we compare the six obligations of the state mentioned by Şaguna — with the contemporary Romanian reality, we can say that only some of them are really still observed and applied, namely: the guarantee of the freedom of conscience and religious belief (Art. 29 of the Constitution); the (relative) Church autonomy and the pecuniary support (in a form of either social aid or assistance) granted to religious denominations, including therefore to the Orthodox Church (cf. Law 489/2006).[42]

Regarding the rights to freedom of conscience and to religious freedom,[43] we should mention that they are distinct both in their content and in their forms of expression.

The fundamental human rights[44] provided both by international instruments,[45] which have the power of *Jus cogens*, and by the legislation of EU member states (constitutions, laws on religious denominations etc.), which reaffirm in fact the principles enunciated by the Universal Declaration of Human Rights (New York, 1948), by the European Convention on Human Rights (Rome, 1950), by the Charter of Fundamental Rights of the European Union (Nice, 2001) etc., differ from those invoked by the

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[41] Ibidem, p. 282.

[42] See N. V. Dură: *The Law no. 489/2006 on Religious Freedom*..., pp. 37—54.

[43] See Idem: *Dreptul la demnitate umană (dignitas humana) şi la libertate religioasă. De la "Jus naturale" la "Jus cogens"* (The right to human dignity (Dignitas Humana) and to religious freedom. From "Jus naturale" to "Jus cogens"). "Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2006), pp. 86—128.

[44] See Idem: *The Fundamental Rights and Liberties of Man in the E.U. Law*. "Dionysiana", IV, 1 (2010), pp. 431—464.

[45] Idem: *General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights*. "Journal of Danubius Studies and Research", III, 2 (2013), pp. 7—14; N. V. Dură, C. Mititelu: *International Covenant on Economic, Social and Cultural Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives*, Galati, 2013, pp. 130—136; Idem: *The Treaty of Nice, European Union Charter of Fundamental Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives*. Galati 2013, pp. 123—129.

Metropolitan Andrei Şaguna, both by their universal dimension, which by far exceeds the other geographical areas of the Habsburg Empire of his time, and by their content.

The text of these legal international and EU instruments makes also express reference to *dignitas humana*[46] (human dignity) (cf. Art. 6 of the European Constitution), which it was first ranked as the supreme value of the humanity by the founder of Christianity, our Lord Jesus Christ, and asserted afterwards by His disciples and by the Church Fathers of East and West in the first millennium AD,[47] by invoking the rules set by the "Natural Moral Law as the grounds for its mandatory compliance."[48]

Regarding the autonomy[49] of the religious denominations in contemporary Romania — including the Romanian Orthodox Church and the Roman Catholic Church, which both occupy a prominent place — we should also highlight the fact that it differs substantially from the one perceived and stated by Andrei Şaguna.

According to the Romanian constitution, currently in force, religious denominations are legal persons of public utility, and they "are autonomous from the state and enjoy its support […]" (Art. 29 par. 5).

Among others, in his commentary to this constitutional article — regarding the relationships between the state and religious denominations — Ioan Muraru, a professor of Romanian constitutional law, wrote

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[46] See N. V. Dură: *Dreptul la demnitate umană (dignitas humana)…*, pp. 86—128.

[47] See Idem: *Dreptul în percepția Părinților Bisericii ecumenice din primul mileniu* (The Law in the perception of the ecumenical Church Fathers of the first millennium). "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), X, 1 (2006), pp. 7—16; Idem: *Thinking of Some Fathers of the Ecumenical Church on the Law*. "Christian Researches", VI, 2011, pp. 230—245.

[48] Idem: *Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne*. In: *La morale au crible des religions* (Studia Arabica XXI), coord. M. Th. Urvoy, Paris, 2013, pp. 213—233; Idem: *Law and Morals. Prolegomena* (I). "Acta Universitatis Danubius. Juridica", 2 (2011), pp. 158—173; Idem: *Despre „Jus naturale". Contribuții filosofico-juridice* (About "Jus naturale". Philosophical and legal contributions). "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), XVIII, 1 (2014), pp. 39—52.

[49] Regarding the canonical status of the autonomy, see L. Stan: Despre principiile canonice fundamentale…, pp. 18—26; N. V. Dură: *Organizarea Bisericii etiopiene şi bazele ei canonice* (Ethiopian Church organization and its canonical basis). Bucharest 1990; N. V. Dură: *Le Régime de la synodalité selon la législation canonique, conciliaire, oecuménique, du I^er millénaire*. Bucharest 1999, pp. 816—915; Idem: *„Scythia Mynor" (Dobrogea) şi Biserica ei apostolică. Scaunul arhiepiscopal şi mitropolitan al Tomisului (sec. IV—XIV)* ("Scythia Minor" (Dobrogea) and its apostolic Church. The Archbishopric and Metropolitan See of Tomis (fourth-sixth centuries)). Bucharest 2006, p. 19 ff.; Idem: *Forme şi stări de manifestare ale autocefaliei Bisericii Ortodoxe Române. Mărturii istorice, ecleziologice şi canonice* (Forms and conditions of manifestation of the Romanian Orthodox Church autocephaly. Historical, ecclesiological and canonical testimonies). In: *Autocefalia, libertate şi demnitate* (Autocephaly, freedom and dignity). Bucharest 2010, pp. 113—155.

that the separation between the Church and the state actually guaranteed "the autonomy of the religious denominations, but required the state to support them […]."[50] But, in reality, the constitution makes no mention — either direct or indirect — to the so-called separation of the Church and the state, which occurred in France by the Law of 1905. Moreover, in reality, neither can we speak in terms of separation of the two basic institutions of human society, but only of the separation of their fields of activity, that is, the terrestrial (earthly) and the spiritual-religious (ecclesiastical) one.

However, most constitutionalists — and, in general, jurists, political scientists, historians etc. from the EU member states — still pay heed to the ideological-political thought of the French Revolution of 1789, and to the Law of 1905, drafted it in order to ensure the separation between the Church and the state, confirmed afterwards, *expressis verbis* by both the constitutions of France and those of other European countries.

The same Romanian constitutional text states that religious denominations "are free to organize themselves according to their own statutes, under the law" (Art. 29 par. 3). It refers, of course, to the Law no. 489/2006,[51] which expressly provides that the religious denominations recognized by the state "are organized and function under the constitution and under the present laws, autonomously, according to their own statutes and canonical codes" (Art. 8 par. 1).

This law also provides that, "in Romania, there is no state religion; the state is neutral towards any religious faith or atheistic ideology" (Art. 9 par. 1). In other words, in accordance with this law, the Romanian state has adopted a position of neutrality not only towards religious faith, but also to Communism ideology.

We underline also the fact that the Law 489/2006 did not provide the separation between the two basic historical institutions of human society, or a "position of indifference towards religions," as it is still stated incorrectly by some Romanian constitutionalists who were trained in some French law schools or who remained tributary to the ideas conveyed by these schools regarding the relations between the state and religious denominations, as provided by the Law of 1905.

Regarding the financial aid granted to the clergy by the Romanian state, the Law on Religious Denominations refers only to "the support" can offer, "upon request," regarding the "remuneration of the clerical and non-clerical staff belonging to recognized religious denominations" (Art. 10 par. 4).

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[50] I. Muraru: "Commentary on Article 29." In: *Constituția României. Comentariu pe Articole* (The Romanian Constitution. Commentary on Articles) Bucharest 2008, p. 285.

[51] Published in the *Official Gazette*, Part I, no. 11/18. 01. 2007.

Additionally, in accordance with stipulations of the Law no. 489/2006, "the religious denominations recognized by the state may benefit, upon request, the state's financial support for the expenditure regarding the functioning of worship establishments […]" (Art. 10 par. 6).

Therefore, we could say that, in the text of this law, there is not mention so much about the remuneration of the clerical and non-clerical staff of the religious denominations recognized by the Romanian state, but about the financial support or help,[52] granted "upon request."

According to the currently enforceable statute for the organization and functioning of the Romanian Orthodox Church, "the worship units of the Romanian Orthodox Church, in the country and abroad, can also apply for subsidies from the state budget and local budgets for supporting patronal, spiritual, cultural, social and urban activities" (Art. 191, par. 1).[53]

Although these subsidies are sometimes long in coming or do not always cover the amount of money required for these activities, it is noteworthy that the Romanian Orthodox Church signed the Protocol of cooperation with the Romanian Government on 2 October 2007, that is 18 years after the events of December 1989. This is the Protocol on cooperation in social inclusion,[54] which the prime minister at that time considered "an important partnership for the promotion and respect of fundamental social human rights,"[55] and which the current Patriarch of the Romanian Orthodox Church His Beatitude Daniel, saw as "a natural and practical consequence of the new law on religious Denominations, which recognizes the contribution of the Romanian Orthodox Church […] to the Romanian social life."[56]

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[52] See C. Mititelu: *Regulations Regarding the Organisation and the Governance of the Accounting by the Legal Persons Without Patrimonial Purposes*. "Ovidius University Annals, Economic Sciences Series", XI, 2 (2011), pp. 815—820; N. V. Dură: *Accounting, Institution of the Economic Liberal System, and the Great Religions of the World. Prolegomena*. "Ovidius University Annals, Economic Sciences Series", XI, 2 (2011), pp. 396—400.

[53] *Statutul pentru organizarea şi funcţionarea Bisericii Ortodoxe Române* (The Statute for the organization and functioning of the Romanian Orthodox Church). Bucharest 2008, p. 105.

[54] C. Mititelu: *The Cooperation Protocol on Social Inclusion, Concluded between the Government of Romania and the Romanian Patriarchate. Juridical and Canonical Considerations*. "Teologia" (The Theology), XVIII, 2 (59) (2014), pp. 58—70.

[55] *Colaborarea la nivel social dintre B. O. R. şi Guvern s-a întărit ieri printr-un acord* (The social collaboration between the ROC and the Government strengthened yesterday by an agreement). In: Ziarul Lumina ("Lumina" newspaper), Miercuri, 3 decembrie 2007 (Wednesday, 3 December 2007), p. 2.

[56] Ibidem.

The Romanian state grants to the 18 recognized religious denominations via their executive central or local bodies,[57] which act as social service providers, a modest financial support.[58] Certainly, this kind of support remains an evident expression of the process regarding the reactivation of the traditional cooperation relationships between the state and the Church.

The (historical) traditional relationships of collaboration,[59] between state and Church, based on customary law and *jus positivum* (written law), that is on *Jus valachicum* or "the Law of the Land,"[60] could be also invoked as an evident testimony of the autonomy of the religious Denominations in their relationships with the Romanian state.

As regards the compliance with the canon law to which the Metropolitan Andrei Şaguna made express reference, it must be said that the aw on the religious Denominations" mentions only the "canonical Code," which is none other than the canonical ode of the Roman Catholic Church, and, by extension, of the Greek Catholic Church. But, it is not the state's fault that the canon law or the "canonical legislation" of the Orthodox Church are not mentioned directly or indirectly; it is the fault of the representatives of the Romanian Orthodox Church, who either did not know — since they were not accompanied by the Church jurists (canonists) — or unfortunately overlooked this aspect.

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[57] See N. V. Dură: *Organismele executive centrale şi locale ale Bisericii Ortodoxe Române şi activitatea lor managerială* (The central and local executive bodies of the Romanian Orthodox Church and their managerial work). In: *Contribuţii la conturarea unui model românesc de management* (Contributions to the outline of a Romanian management model), coord. I. Petrescu. Bucharest 2014, II, pp. 413—447.

[58] C. Mititelu. *The Cooperation Protoco…*, pp. 58—70.

[59] Regarding these old collaboration relationships between tate and Church, see C. Mititelu: *Vechi instituţii europene prevăzute de legislaţia nomocanonică din secolul al XVII-lea (Pravila de la Iaşi şi Pravila de la Târgovişte*) (Old European institutions under the nomocanonical Legislation from the seventeenth century (the Nomocanons of Iasi and Targoviste)). Bucharest 2014; N. V. Dură, C. Mititelu: *Legislaţia canonică şi instituţiile juridico-canonice, europene, din primul mileniu* (Canonical legislation and European juridical-canonical institutions of the first millennium). Bucharest 2014.

[60] See N. V. Dură, C. Mititelu: *Istoria Dreptului românesc. Contribuţii şi evaluări cu conţinut istorico-juridico-canonic* (The history of Romanian Law. Contributions and assessments of legal-historical-canonical content). Bucharest 2014; N. V. Dură: *„Lex terrae" în percepţia unor jurişti şi istorici ai vechiului Drept românesc. Evaluări şi precizări ("Lex terrae" in the perception of some jurists and historians of ancient Romanian law. Assessments and clarifications).* "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), XIV, 1 (2010), pp. 18—42; C. Mititelu: *Consideraţii privind Legea Ţării şi instituţiile ei (Considerations on the Law of the Country and its institutions).* "Analele Universităţii *OVIDIUS* Constanţa / Seria Drept şi Ştiinţe Administrative" (Ovidius University Annals / Series Law and Administrative Sciences), 1 (2007), pp. 291—312; Idem: *Începuturile Dreptului scris la români* (The beginnings of the Romanian written law). "Dionysiana", 1 (2009), pp. 417—426.

The express reference to the canon law — in the Law on religious denominations — could have been invoked as grounds stating that the canonical legislation of the Eastern Church, and, *ipso facto*, of the Romanian Orthodox Church, are part of the legal heritage or of the *Corpus juris* of the Romanian state, being thus invested with the authority of civil power, as it was in Byzantium, where the canon law had precedence[61] over the imperial law of the Eastern Roman State.

Regarding the aid provided by the Church to the state, Metropolitan Şaguna reduced it to five obligations, namely:

1. "Performing daily prayers, prescribed by the Church rule for the Prince and his dynasty, for his soldiers and for all citizens."
2. "Preaching the word of God, concerning the fulfillment of Christian and civic desires."
3. "Religious admission for the citizens' submission and obedience to their superiors."
4. "Performing the emperor's doxology upon his birthday" (sic!).
5. "Performing prayers in extraordinary cases of epidemic, internal rebellion, external war and other similar cases."[62]

As it is well known, of those five obligations, only the performance of prayers "for the country's rulers and for the Romanian people,"[63] as well as in extraordinary cases (epidemics, wars etc.) remained binding until ours days.[64] But, the second and the third obligations — provided by Metropolitan Andrei Şaguna — had been fulfilled only until the "events of December 1989."

Until these "events," the Clergy of ancestral shrines were indeed forced to preach from the pulpit — in accordance with the party ideological directives they received — about the Christians' civic "duties" towards the country and the "people," and about their duty to obey and submit to state authorities, even if they were living during a totalitarian regime and a communist-atheist ideology.

Andrei Şaguna granted the Emperor in Vienna the "right to supreme inspection"[65] (sic!) in the jurisdictional area of the Orthodox Church.

[61] Emperor Justinian (527—565) apodictically expressed himself in this way (see Justinian's Novels, especially Novel 123).

[62] A. Şaguna: *Compendiu de Drept canonic…*, 3rd edition, p. 282.

[63] See the Litanies of the Orthodox Liturgy.

[64] See the Special Prayers of the Orthodox Euchologion.

[65] A. Şaguna: *Statului organicu alu Bisericei ortodocse romane din Ungaria şi Transilvania* (The Organic Statute of the Romanian Orthodox Church from Hungary and Transylvania). Sibiu 1868, p. 1. See also the German translation: *Organisches Statut der griechisch-orientalisch-romanischen Kirche in Ungaru und Siebenbürgen*. "Archiv für Kirchenrecht", 25 (1871), pp. 235—276.

However, by recognizing the emperor's right to "inspection" in the territorial boundaries of his Church, Metropolitan Şaguna unwillingly gave up the autonomy of his Church in her relations with the Habsburg State, autonomy which he had actually expressly stipulated in the Organic Statute published in Sibiu in 1868. Indeed, this statute provided expressly that "the Romanian Orthodox Church from Hungary and Transylvania [is] an autonomous Church, according to its canon aw, also guaranteed by the law of 1868 […]" (Art. 1).[66]

The fact that the autonomy of Metropolitan Andrei Şaguna's Church was restricted or limited in its content of expression — and sometimes even abolished by the imperial Habsburg power — is also attested by Johann Schneider, who — among others — wrote that, "in the eyes of the Austrian Ministry of the Interior, both before and after 1848, the Orthodox priests from Transylvania were primarily accomplishers of its measures of order and, although they were often incriminated themselves, they were used in police roles."[67]

If we compare the situation of the Orthodox clergy during the pontificate of Metropolitan Andrei Şaguna with that of the years 1948—1989, we could say — quoting the Ecclesiast — that "there is nothing new under the sun," because, during the communist regime in Romania, the external autonomy of the Church, namely the one concerning its *status quo* in terms of the relationships with the state, was not respected in its entirety. Moreover, during the post-war period, no hierarch could not be elected or invested in his See without the consent of the proletarian-communist state authority. Nonetheless, we should not ignore or hide the fact that, during that period of repression[68] there were some Romanian Orthodox clerics who protested — with courage and dignity — against the demolition of the Romanian people's churches,[69] and whose biographies should

[66] Idem: *Statului organicu alu Bisericei ortodocse…*, p. 1.

[67] J. Schneider: *Ecleziologia organică…*, p. 247.

[68] About this period, and its victims — among which we mention particularly the Rev. Prof. G. Calciu († 2007) and the Rev. C. Sîrbu († 1975) — see M. Valică, P. Chirilă: *Prigoana cea dinăuntru* (The inner persecution). Bucharest 2011, pp. 83—126.

[69] See C.T. Dârţu: *Personalităţi române şi faptele lor (1950—2000)* (Romanian personalities and their deeds (1950—2000)). Iaşi, VIII, 2004, pp. 115—171. See also the articles published by N. V. Dură, in the Magazine of Father G. Calcium (USA), and in those of his twin brother, Prof. Rev. PhD Ioan V. Dură, published in the Magazine "Mărturie ortodoxă" (Orthodox Confession) (Romanian Orthodox Community Magazine in the Netherlands, The Hague). It is worthy to be noticed the fact that the Reverend Professor Ioan V. DURĂ was the only Romanian Orthodox priest from the diaspora of the Romanian Orthodox Church who openly condemned the communist atheist totalitarian regime, and the only one who took concrete actions so that the Church on the Metropolitan Hill and the Patriarchal headquarters not to be demolished. Among other

not be obscured, forgotten or ignored, but, on the contrary, they have to be honoured.

We cannot conclude this brief presentation concerning the manner in which the Romanian Orthodox Church asserted or not her right to autonomy in its relationships with the state without emphasizing the fact that, under Law 489/2006,[70] all recognized religious denominations are considered to be "independent from the state" (Art. 29 par. 5). As such, they can organize themselves and function "autonomously, according to their own Statutes and canonical Codes" (Art. 8 par. 1).

Nevertheless, it has been a long way leading from the *sui generis* autonomy of the Orthodox Church in the Habsburg Empire, guided by Metropolitan Andrei Şaguna, to the autonomy of the 18 religious denominations recognized by the Romanian state, provided by Law no. 489/2006. This long process has been marked by transformations actually determined by the party ideology of different time periods.

Over time, the autonomy of the Church or of the religious denominations — in their relationships with the state — was perceived differently, and often the very content of the autonomy principle was affirmed, extended, limited or even abolished by some political rulers, as dictated by the interests of those times and imposed by their party ideology.

This reality is also clearly confirmed by the canonical-juridical status of the Romanian Orthodox Church from Şaguna's epoch, which represents a documentary landmark whenever we tackle the topic concerning the relationships between the state and the religious denominations, and whenever we assess the manner in which "the external autonomy principle" was or was not fully stated.

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things, he also appealed to the Secretary General of the Ecumenical Council of Churches (Geneva) to demand expressly the igh ommunist authorities from Bucharest not to fulfil their criminal intentions.

[70] See N. V. Dură: *The Law no. 489/2006 on Religious Freedom*…, pp. 37—54.

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tul Apostol Andrei" (St. Andrew Review of Theology), XIII, 1 (2009), pp. 27—37.

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Nicolae V. Dură

From the Church Autonomy of the Archbishop Andrei Şaguna to the Autonomy of the Religious Denominations in the Romanian State: Ecclesiological-Canonical Considerations

Summary

From the pages of this study, the reader familiar with the canonical organization of a local Orthodox Church could become acquainted with the fact that one of the main canonical fundamental principles of the Eastern Church, that is the principle of (external) autonomy, was affirmed and applied by the Archbishop of Transylvania, Andrei Şaguna, in his Church, in the totality of its content. But, through its forms of manifestation, this principle characterizes not only the relationships between the Church and the state, during Andrei Şaguna's times († 1873), the Metropolitan of the Orthodox Church from "Hungary and Transylvania," but also the contemporary relationships between Romanian state and religious denominations, expressed in the Romanian Constitution and the Law no. 489/2006, although, in its content, this principle was not affirmed and applied in the same manner during these two periods of time.

Nicolae V. Dură

Dès l'autonomie de l'Égise à l'époque de l'Archevêque Andrei Şaguna jusqu'à l'autonomie des organisations religieuses en Roumanie Réflexions ecclésiastiques et canoniques

Résumé

L'un des principes fondamentaux de l'Église orientale, c'est-à-dire le principe de l'autonomie (extérieure) a été perpétué et appliqué par Andrei Şaguna, Archevêque de Transylvanie. Ce principe, et les formes sous lesquelles il apparaît réellement, définit non seulement les relations entre l'Église et l'État à l'époque d'Andrei Şaguna (décédé en 1873), Métropolite de l'Église orthodoxe de « Hongrie et Transylvanie », mais aussi les relations contemporaines entre l'État roumain et les organisations religieuses. Ces relations ont été exprimées dans la Constitution roumaine et dans la loi 489/2006 ; notons que dans la dernière, le principe de l'autonomie extérieure n'a pas été confirmé et appliqué de la même manière que précédemment.

Mots clés : relations Église-État, doctrine canonique orthodoxe, liberté religieuse, codes canoniques

Nicolae V. Dură

Dall'autonomia della Chiesa dei tempi dell'Arcivescovo Andrei Şaguna fino all'autonomia delle organizzazioni religiose nel diritto romeno Riflessioni ecclesiologico-canonistiche

Sommario

Uno dei principi canonici fondamentali della Chiesa Orientale, ossia il principio dell'autonomia (esterna), fu consolidato e applicato dall'Arcivescovo di Transilvania Andrei Şaguna. Tale principio definisce, attraverso le forme nelle quali si manifesta effettivamente, non solo i rapporti tra la Chiesa e lo stato ai tempi di Andrei Şaguna († 1873), Metropolita della Chiesa Ortodossa di "Ungheria e Transilvania", ma anche i rapporti contemporanei tra lo stato romeno e le organizzazioni religiose. Tali rapporti sono stati espressi nella costituzione romena e nella legge n. 489/2006 anche se nel contenuto di quest'ultima il principio dell'autonomia esterna non è stato confermato e applicato nello stesso modo in cui ebbe luogo originariamente.

Parole chiave: rapporti Chiesa-stato; dottrina canonica ortodossa; libertà religiosa, codici canonici

Ecumeny and Law, vol. 4 (2016)
pp. 249—273

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Conscientious Objection in Current Czech Law

Keywords: conscientious objection, constitutional law, penal law, law on health protection, seal of the sacrament, pastoral secrecy

Introduction

The right to assert conscientious objection is not an old and traditional matter of state legislation, but on the contrary a fairly recent legal provision, existing mainly in democratic countries.

Beginning with a description of the legal basis of conscientious objection in the Czech constitutional law (in the first section), three areas of realization of such objections regulated by Czech legislation are presented: the military service (in the second section), the seal of the confessional and pastoral secrecy (in the third section), and healthcare (in the fourth section).

1. The legal basis in Czech constitutional law

This section presents the recent evolution of the legal bases of conscientious objection in constitutional law up until 1992 in Czechoslovakia and as of 1993 in the newly established Czech Republic.

1.1. Former Czechoslovakia: The Charter of Fundamental Rights and Freedoms from 1991

Up until the so-called Velvet Revolution in November 1989, fundamental human rights were guaranteed in the constitution as of 1960[1] and in international treaties as well. In actuality, they were violated by the communist government.

As of 1990, after the victory of the "Velvet Revolution," one of the first and very important social phenomena was the growing respect for human rights guaranteed by the valid communist legislation. It was useful, however, and there was a need to construct the regulations of fundamental human rights in a new way. As part of these efforts, the Federal Parliament of Czechoslovakia introduced the Charter of Fundamental Rights and Basic Freedoms in 1991 as a separate document different from the constitution, but granted it the same legal standing as the constitution itself.[2] The charter took its content above all from international law binding Czechoslovakia, although in certain aspects it developed more the existing stipulation, particularly, its Art. 16 dealt with religious freedom and provided in its section 2 an extremely large guarantee of corporate religious freedom, not only for individuals, as it is provided in international law.

1.2. On the founding of the Czech Republic in 1993

Former Czechoslovakia split in two new countries, the Czech Republic and the Slovak Republic, on 1 January 1993. Shortly before, in November 1992, the new constitution of the Czech Republic was drafted[3] and immediately after the Charter of Fundamental Rights and Freedoms was introduced in its entirety as part of the constitutional system of the new state.[4] There was consequently no legislation regarding human rights in

[1] Constitutional Act of the National Assembly No. 100/1960 Coll., the Constitution of the Czechoslovak Socialist Republic. There is no provision regarding liberty of conscience in the Constitution.

[2] Constitutional Act of the Federal Assembly No. 23/1991 Coll., wherein the Charter of Rights and Freedoms is introduced as a constitutional act.

[3] Constitutional Act of the Czech National Council No. 1/1993 Coll., the Constitution of the Czech Republic.

[4] Resolution of the Presidium of the Czech National Council of 16 December 1992 No. 2/1993 Coll. on the declaration of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.

the Czech Constitution and as a consequence the legal situation remained unchanged.

1.3. Conscientious objection and freedom of conscience in the Charter of Fundamental Rights and Freedoms

The Czech Charter of Fundamental Rights and Freedoms[5] does not contain any general regulations concerning conscientious objection. There is the only one regulation concerning it, namely in Art. 15, section 3:

> No one may be compelled to perform military service if such is contrary to his conscience or religious conviction. Detailed provisions shall be laid down in a law.

There are, however, quite general provisions in Art. 15, section 1 in the first sentence regarding conscience:

> Freedom of thought, conscience and religious conviction is guaranteed.

It is actually extremely difficult, or even impossible, to refer to this general provision without any further (special) regulation by law.

2. Exceptions in the area of military service

In this chapter we want to emphasize the most traditional objection in conscience: in the area of obligatory military service.

Two different periods need to be distinguished: the existence of compulsory military service (known in the Czech legislative as "basic military service") until 2004 and the existence of a professional army since 2005.

[5] See hereinbefore footnotes no. 2 and 4. The English version is available at: http://www.legislationline.org/documents/section/constitutions (accessed 25.08.2016).

2.1. The legal situation until 2004

Up to the end of the communist regime, it was extremely difficult for individuals to avoid compulsory military service. The only "simple" legal possibility was based on a statement of a bad state of health, otherwise it was only possible by working in a mine for several years, or — very exceptionally — by so-called alternative service, usually due to social reasons.[6]

The possibility of fulfilling the military obligation by means of civilian service which lasted 50% longer than the compulsory military service was introduced in 1990, naturally under the condition of keeping the binding proceeding.[7] This provision has been repeated by later legislation up until 2004[8] and found an explicit echo in the Charter of Fundamental Rights and Freedoms.[9] Civilian service played an extremely important part in social work/services in particular (Caritas, Diaconias, hospitals, etc.).

2.2. The legal situation from 2005

Based on the new military act from the end of 2004, the army of the Czech Republic became professional on 1 January 2005. Compulsory military service ceased to exist and, as a result, the alternative in a form of civilian service became inapplicable as well,[10] which caused several practical problems in social services.

A general liability for military service remained, however, but only in extraordinary situations as a state of emergency to the country or as a state of war. This service is referred to in the above-mentioned act as "extraordinary service." One can refuse to carry out the extraordinary service according the § 6 of the above-mentioned act within a limit of 15 days, with the only reason acceptable by law being "because of conscience or of religious conviction." In such cases the duty to fulfil additional social service, practically civilian service, was differently conceived in comparison with the former civilian service existing up until 2004.

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[6] Act No. 92/1949 Coll., Military Act.

[7] Act No. 72/1990 Coll., Amendment of the Military Act and Act No. 73/1990 Coll., on Civilian Service.

[8] Act No. 18/1992 Coll., on Civilian Service and Act No. 218/1999 Coll., Military Act.

[9] See above Section 1.3.

[10] Act No. 585/2004 Coll., Military Act.

2.3. Summary

The refusal of military service due to issues of conscience is also the oldest and traditional case of conscientious objection in the Czech Republic. It is also the only case mentioned *expressis verbis* in the Czech (originally Czechoslovak) Charter of Fundamental Rights and Freedoms, which is a part of the Czech constitutional legal system.

The practical importance of this objection has been radically reduced by the introduction of a professional army in the Czech Republic as of 1 January 2005. The objection could only be used in extraordinary military service which has not occurred in the Czech Republic since 2005.

3. Observance of the seal of confessional and pastoral secrecy

The seal of confessional and pastoral secrecy has varying importance in particular Churches and religious societies.[11] The seal of the confessional is particularly important in the Catholic Church and in the Orthodox Church and considerably less weighty in Protestant Churches, which deny the sacramental character of confession. Pastoral secrecy is extremely important, however, for all Churches and religious communities.

The legal position within Czech law is unequal, however, and it is not entirely clear (particularly after the first reading of legal texts) if the guarantee of confessional secrecy is the same as in the case of pastoral secrecy.

[11] The term "Churches and religious societies" is traditional in the Austrian legal system and has been adopted in the Czech one as well. The legal position of each Church or religious society is identical in principle. The state does not distinguish if the religious congregation should be called a Church or religious society.

3.1. The unequal position of various Churches and religious communities

Since the communist legislation was introduced in October 1949, neither the seal of the confessional nor pastoral secrecy was respected under Czechoslovak law.

The first explicit regulation was with the first law on religious freedom no. 308/1991 Coll. from 1991[12] in its § 6 for all registered Churches and religious societies:

> The State acknowledges the duty of secrecy for persons entrusted with the exercise of the ecclesiastical ministry.

The above-mentioned act, still valid in the Slovak Republic, has been replaced in the Czech Republic with a new act no. 3/2002 Coll.[13] The new act, reducing radically the required number of believers for registration of a new church or religious society (from 10,000 to 300), actually introduced two kinds of Churches and religious societies. Those which are "only" registered and those allowed to exercise "special rights" (§ 7 of the above-mentioned act) referred to by experts as "accredited Churches." One of the "special rights" is

> (e) to observe the obligation to maintain secrecy by the clergymen in connection with the exercise of the seal of the confessional or with the exercise of a right similar to the seal of the confessional, if such an obligation has been a traditional part of the doctrine of the church or of the religious society for at least 50 years; it is not overturned by the obligation to prevent a crime, imposed by a special act.

According to the regulation of this act, it is necessary to present a requirement to reach the acknowledgement of respect for the seal of the confessional or for pastoral secrecy separately. Therefore not all Churches and religious societies with the right to exercise the special rights actually obtained this special right.

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[12] Act No. 308/1991 Coll., on the Freedom of Religion and Churches and Religious Societies. Unofficial English translation available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=85177&p_classification=01.05 (accessed 25.08.2016).

[13] Act No. 3/2002 Coll., on the Freedom of Religion and Churches and Religious Societies.

3.2. Extent of legal respect for the seal of the confessional and pastoral secrecy — penal law

The extent of legal respect for the seal of the confessional and pastoral secrecy is specified in Czech penal law.

The regulation is integrated in the Penal Code[14] under the title "Other Forms of Criminal Cooperation" which includes: incitement to criminal offences (§ 364), approval of criminal offences (§ 365), favouritism in criminal offenses (§ 366), non-prevention of criminal offences (§ 367) and non-reporting of criminal offenses (§ 368). Secrecy is only respected in the case of non-reporting of criminal offenses:

> (3) The duty to report according to Sub-section (1) does not apply to an attorney or his/her employee who learns about the committing of a criminal act in relation to performance of his/her legal profession or practice. The duty to report also does not apply to clergymen of a registered church or religious society authorized to exercise special rights when they learn about a criminal offence in connection with hearing confession or in connection with the practice of similar confessional secrets. […]

Consequently, the remainder of the above-mentioned forms of criminal cooperation are not covered by the acknowledgement of secrecy due to religious reasons. The failure of a planned crime is even explicitly mentioned in § 7 of the act no. 3/2002 Coll., on the freedom of religion and Churches and religious societies.

The respective reference to this provision can be found in § 99 of the Code of Criminal Procedure:[15]

> (2) The witness shall not be requested to testify if his testimony could infringe on his non-disclosure obligation imposed by the State, except when the competent body or the person in whose interest he has such obligation waives the non-disclosure obligation.
> (3) The ban on interrogation pursuant to paragraph (2) shall not apply to the testimony given in respect to an offence that the witness has the obligation to report under the Penal Act.

It is also important that both kinds of secrecy are to be respected by the state only in the case of clergymen. The definition of a clergyman is

[14] Act No. 40/2009 Coll., Penal Code. English version is not available, therefore translated by the Author.

[15] Act No. 141/1961 Coll., Code of Criminal Procedure. English version is not available, therefore translated by the Author.

reserved to the internal rules of each Church and religious society, but the definition is to be included in the "basic document" of a registered Church and religious society, registered at the respective department of the Ministry of Culture.[16]

3.3. The distinction between the seal of the confessional and pastoral secrecy?

It is not entirely clear (particularly after the first reading of the legal texts) if the guarantee of confessional secrecy is the same as in the case of pastoral secrecy. Both respective acts, act on Churches and penal code, use the same formula: "in connection with the exercise of the seal of the confessional or with the exercise of a right similar to the seal of the confessional."

This formula would seem to indicate an exclusive interpretation: either the seal of the confessional or pastoral secrecy. A grammatical interpretation of the Czech legal text allows to indicate that the formula "of the seal of the confessional or of a right similar to the seal of confessional" does not have an exclusive meaning but an intercalary one. It can therefore in fact either be granted only with respect to the pastoral secrecy or with respect to the seal of the confessional along with respect of pastoral secrecy.

It can consequently be concluded that the state does not distinguish between these two kinds of secrecy and that it respects both of them in the same way. The majority of Churches exercising this special right try to ensure respect for all persons in pastoral service referring to them as "clergymen." The Catholic Church therefore adopted in its "basic document" extension of the concept of clergy not only to deacons, priests, and bishops, but to non-ordained persons as well.[17]

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[16] The case of the Religious Society of Jehovah's Witnesses from 2013—2015, which originally indicated the lack of clergymen in their religious society, is relatively well known in the Czech Republic. This religious society did not at first obtain acknowledgment of the special right to secrecy. The representatives of the religious society consequently amended the basic document which included also the definition of clergymen, and consequently the society obtained the requested special right.

[17] D. Němec: "Právo na zpovědní a pastorační tajemství v evropském kontextu" (The Right to Protection of the Seal of Confessional and of Pastoral Secrecy in the European Context). In: *Konvergencie a divergencie v slovenských a českých štátno-cirkevnych vzťahoch — dvadsať rokov od vzniku samostatnej Českej republiky a Slovenskej republiky.* Eds. M. Šmid, M. Moravčíková. Trnava 2014, pp. 105—106.

3.4. Summary

Legal respect for the seal of the confessional and pastoral secrecy is in the Czech Republic fairly closely limited to Churches and religious societies with the right to exercise special rights. In fact, this respect in practice is granted to all Christian Churches.

The state actually provides relatively wide respect not only for the seal of the confessional but also for pastoral secrecy. This corresponds to the pastoral needs of Christian Churches.

4. Exceptions in the area of healthcare

The area of healthcare is particularly sensitive and closely linked with important moral questions. It is therefore an extremely typical sphere for the carrying out of conscientious objection.

Two different legal circumstances need to be distinguished in the Czech Republic, the border between which has been demarcated by the extensive and significant legal reform in healthcare adopted in 2011 and in force as of 1 April 2012.

4.1. The vague legal situation up until 2012

Since the communist regime adopted extremely coercive legislation,[18] it was impossible to introduce any exceptions due to conscience until 1989. Extensive reform to the healthcare system and health legislation was therefore necessary.[19] This reform was approved, however, only as late as in 2011. Due to this situation, the act No. 20/1966 Coll. proposed in § 23 a single legal instrument, this being the requirement of informed consent on the part of the patient and the possibility to refuse or recall this consent. The legal position of patients was enforced in 2001 by the

[18] Act No. 20/1966 Coll., on the Care of Health of People.

[19] J. Matějek: *Svědomí v lékařské etice* (Conscience in Medical Ethics). Doctoral thesis. Brno 2006, pp. 59—60. Available online at http://is.muni.cz/th/97853/lf_d/ (accessed 21.10.2015).

ratification of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, signed in Oviedo on 4 April 1997,[20] but without needed state legislation.[21] The above-mentioned convention stipulates:

> Article 9 — Previously expressed wishes
> The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.

The healthcare personnel could not find any legal basis for conscientious objection in the laws, although it was provided by the internal rules of professional chambers: the Ethics Code of the Chamber of Physicians from 1995 (§ 2 section 2), the Ethics Code of the Chamber of Stomatologists from 1992 (section 10) and the Ethics Code of the Chamber of Apothecaries from 1992. Other groups of healthcare personnel did not have any legal basis for their conscientious objection.[22]

4.2. Reform to Health Legislation of 2011 in force as of April 2012

4.2.1. Content of the New Health Legislation adopted in 2011

The widespread and extensive legal reform to healthcare adopted in 2011 consisted of four legal acts:
1. Act No. 372/2011 Coll., Healthcare Services Act.
2. Act No. 373/2011 Coll., Specific Healthcare Services Act.

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[20] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997, available in English at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98 (accessed 25.08.2016).

[21] L. Madleňáková: *Výhrada svědomí jako součást svobody myšlení, svědomí a náboženského vyznání* (Conscientious Objection as Part of Free Thinking, Conscience and Religious Conviction). Praha 2010, pp. 120—121.

[22] D. Němec: "Ochrana svobody svědomí v oblasti zdravotnictví v České republice" (Protection of the Freedom of Conscience in Healthcare in the Czech Republic). In: *Právna ochrana slobody svedomia*. Trnava 2013, pp. 93—97.

3. Act No. 374/2011 Coll., Emergency Medical Services Act.
4. Act No. 375/2011 Coll., Amendments of Acts in Connection with the Reception of the Healthcare Services Act; this act introduced amendments in further 120 (!) legal acts.

Of importance is the first act, the Healthcare Services Act, which defined comprehensively the rules of healthcare for all interested persons.

4.2.2. The problematic path to enforcement of the New Health Legislation in 2011

The legal reform of healthcare was prepared by the right-wing coalition government under the leadership of Petr Nečas, the head of the Civic Democratic Party. The reform met with strong resistance from left-wing parties, particularly from the Czech Social Democratic Party, which had the majority of senators in the Senate of the Parliament of the Czech Republic, the upper chamber of the parliament.

The reform was adopted by the Chamber of Deputies of the Parliament of the Czech Republic, the lower house of the Parliament, on 7 September 2011. The Senate of the Parliament of the Czech Republic expressed its disapproval, however, on 6 October 2011. The chamber of deputies overruled the veto of the Senate on 6 November 2011 and the act could consequently be promulgated on 8 December 2011 and came into force as of 1 April 2012.

The reform was quickly challenged by an appeal against it to the Constitutional Court of the Czech Republic, submitted by a group of 45 senators, primarily members of the Czech Social Democratic Party, on 6 January 2012. The appeal objected to the incompatibility of the reform with basic human rights guaranteed in the Charter of Rights and Freedoms, specifically the right to protection of health. The constitutional court made a decision on 27 November 2012 introducing a small amendment to the healthcare act, rejecting other objections (for details see below).[23] The decision was therefore promulgated in the Collection of Laws of the Czech Republic on 10 December 2012.

[23] Sentence of the Constitutional Tribunal of the Czech Republic Prot. No. Pl ÚS 1/12, available online at: http://nalus.usoud.cz/Search/ResultDetail.aspx?id=77126&pos=1&cnt=3&typ=result (accessed 26.08.2016).

4.3. Legal means for patients

The reform did not bring about any revolution in the legal situation of patients. First, the requirement for informed consent remained unchanged including the possibility to reject or recall the proposed treatment or to retract consent (with certain exceptions, i.e. the inability to express his/her will — cf. §§ 28 and 34).

Second, the act regulates in detail the realization of previously expressed wishes (§ 36). The original text of the act limited the validity of the previously expressed wishes for the term of five years with regard to the evolution of medicine and treatment (§ 36 section 3). The constitutional court abolished this time limitation with reference to illnesses with progressive deterioration, which could cause the inability to renew the former previously expressed wish. It should be acknowledged that the legal regulations did contain certain problematic aspects.[24]

4.4. Legal means for healthcare personnel

In contrast to the situation with patients, the situation for healthcare personnel was profoundly changed by the reform (§ 50) which introduced:

— the possibility to reject the execution of certain treatment because of direct menace to life or due to serious health peril of hygienists;
— the possibility to reject the execution of certain treatment due to reasons of conscience and religious conviction, but under the obligation that the treatment provider offers the realization of the required treatment by another hygienist of the same or of another provider (with the exception of direct menace of life or serious peril of health of the patient where it is not possible to adopt this rejection);
— the extension of the above-mentioned possibilities to all healthcare personnel — this is a truly revolutionary modification;
— the extension of rejection due to of reasons of conscience and religious conviction not only to particular hygienists (physical persons) but also

[24] L. Madleňáková: "'Výhrada' pacienta ve formě dříve projeveného přání a nová úprava v zákoně o zdravotních službách" ("Objections" of Patients in the Form of Previously Expressed Wishes and its New Regulation in the Healthcare Services Act). In: *Aké princípy vládnu zdravotníctvu?* Eds. I. Humeník, Z. Zoláková. Bratilava 2013, pp. 336—340.

to providers (juridical persons) under the duty to provide the realization of the required treatment by another provider.

The above-mentioned possibilities for refusal were challenged in the constitutional court as incompatible with the right to protection of life and of health, which are basic human rights guaranteed in the Charter of Rights and Freedoms. The court stated:

— in the case of refusal because of direct menace to life or because of serious peril to the health of healthcare personnel. It is impossible to solve the conflict of basic rights generally, but only in a judicial way in particular cases with regard to all important circumstances;
— in the case of refusal because of reasons of conscience and religious conviction. The basic right to protection of life and of health does not imply the obligation of every hygienist or of every provider to realize the required treatment, if there does not occur direct menace to life or serious peril to the health of the patient.[25]

4.5. Summary

The reform of healthcare legislation (specifically act no. 372/2011 Coll., Healthcare Services Act) was adopted in 2011 and came into force as of April 2012. It was the object of strong juridical (as well as political and ideological) controversy and caused major changes in the area of conscientious objection.

It regulates not only the rights of patients, including the detailed legal procedure regarding the previously expressed wishes, but in particular the rights of healthcare personnel, including all hygienists (physical persons) and providers (juridical persons) of healthcare.

Conclusion

Czech constitutional law has one specific aspect. The list of human rights and obligations is not included in the constitution of the state, but

[25] D. Němec: "Ochrana svobody svědomí v oblasti zdravotnictví v České republice" (Protection of the Freedom of Conscience in Healthcare in the Czech Republic). In: *Právna ochrana slobody svedomia*..., pp. 106—107, 110—111.

in a separate document distinct from the constitution, which in turn is imbued with the same legal standing as the constitution itself, namely: the Charter of Fundamental Rights and Freedoms. The objection to conscience does not find a broad basis in the Charter, but only one particular provision regarding military service and a very general provision on liberty of conscience.

Special laws regulate only three areas of the realization of the objection.

The objection in the area of military service is the only one which is explicitly mentioned in the Charter of Fundamental Rights and Freedoms. Its former wide use (including the duty of civilian service) lost its importance because of introducing the professional army on 1 January 2005 and was reduced to the occasional situation of extraordinary military service which did not yet occur as of 2005.

The state respect for the seal of the confessional and pastoral secrecy brought with it certain obstacles. On the one hand, this right is not applicable to all registered Churches and religious societies, but only for some of them. On the other hand, the State provides relatively wide respect not only for the seal of the confessional, but also for pastoral secrecy. Based on the special legislation, this right can be realized in the criminal area but only on the part of clergymen.

As for the common population, the possibility of conscientious objection in healthcare is the most important and feasible. It regards not only patients, but after the major reform of healthcare legislation can also be applied to all the healthcare personnel and by providers of healthcare as well.

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Act No. 73/1990 Coll., on the Civilian Service.

Act No. 18/1992 Coll., on the Civilian Service.

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vergences and Divergences in the Slovak and Czech Church-State Relations — Twenty Years from the Creation of the Czech Republic and the Slovak Republic). Trnava 2014, pp. 86—106

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Damián Němec

Conscientious Objection in Current Czech Law

Summary

Starting with a short analysis of the basis for conscientious objection in Czech constitutional law the author presents three areas of realization of the objections regulated by Czech legislative: in military service, where it practically lost its originally wide importance, in the guarantee of the seal of the confessional and of pastoral secrecy which can only be realized in the penal law by clergymen of certain (not of all) registered Churches and religious societies, and finally in the area of healthcare where it can be applied not only by patients, but also by the healthcare personnel, even by providers of healthcare. The third area consequently finds the widest application in daily life.

Damián Němec

L'objection de conscience dans le droit tchèque en vigueur

Résumé

Après avoir brièvement analysé les bases constitutionnelles de l'objection de conscience dans la loi tchèque, l'auteur présente trois domaines de la réalisation de l'objection de conscience réglementés par la législature tchèque : dans le service militaire où cette institution perd pratiquement son importance ; dans la garantie du secret de la confession avec le secret pastoral qui ne peut être employée dans le droit pénal que par les ecclésiastiques de certaines Églises et organisations religieuses enregistrées ; et enfin, dans le service de santé publique où l'objection de conscience peut être appliquée non seulement par les patients, mais aussi par le personnel du service de santé publique et même par les établissements du service de santé publique, et c'est bel et bien pour cette raison que le troisième domaine est le plus largement appliqué en pratique.

Mots clés : objection de conscience, droit constitutionnel, droit pénal, droit de santé, secret de confession, secret pastoral

Damián Němec

L'obiezione di coscienza nel diritto ceco vigente

Sommario

Partendo da una breve analisi dei fondamenti costituzionali dell'obiezione di coscienza nel diritto ceco, l'autore presenta tre campi di realizzazione dell'obiezione di coscienza, regolamentati dalla legislazione ceca: nel servizio militare, dove in pratica tale istituzione perde la sua importanza; mediante l'assicurazione del sigillo sacramentale insieme al segreto pastorale, che nel diritto penale possono essere applicati solo dai religiosi di alcune chiese e organizzazioni religiose registrate; e infine nel campo del servizio sanitario, dove può essere invocata non solo da parte dei pazienti, ma anche del personale sanitario, persino dalle stesse aziende sanitarie locali — e per tale ragione questo terzo campo ha l'applicazione più ampia nella pratica.

Parole chiave: obiezione di coscienza, diritto costituzionale, diritto penale, diritto alla tutela della salute, sigillo sacramentale, segreto pastorale

Ecumeny and Law, vol. 4 (2016)
pp. 275—296

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The Autonomy of Religious Denominations in Romania

Keywords: Church autonomy, religious communities, religious freedom

So far, in the European legal literature, the notion of "religious denominations" has not been perceived and defined yet in all its contents; hence the use of different legal categories in order to define the forms of religious institutional organization, such as religious group, religious association, and religious denomination, which are parties to an agreement with the state (concordat), etc.

From the perspective of human rights, such a categorization system is objectionable, since the state hierarchy leads to a system of "privileges" and, in fact, to discrimination.[1] Indeed, it creates a situation where religious communities and their members are denied their individual or collective rights based on the classifications and criteria imposed by the state.

[1] See N. V. Dură: *„Privilegii" şi „discriminări" în politica religioasă a unor State ale Uniunii Europene* ("Privileges" and "discrimination" in the religious policy of EU countries). "Biserica Ortodoxă Română" (The Romanian Orthodox Church), CXXIV, 1—3 (2006), pp. 491—510; Idem: *Relațiile Stat-Culte religioase în U.E. „Privilegii" şi „discriminări" în politica „religioasă" a unor State membre ale Uniunii Europene* (The State-Religious Denominations Relationships in the EU. "Privileges" and "discrimination" in the "religious" policy of several EU Member States). "Analele Universității Ovidius. Seria: Drept şi Ştiințe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2007), pp. 20—34; Idem: *About the "Religious" Politics of Some Member States of the European Union*. "Dionysiana", III, 1 (2009), pp. 463—489.

It should also be emphasized that, in the European Union, legally, there is still no common definition of the notion of religious denomination.[2] In some member states, for example, they may be "legal persons of public law" (Austria, Germany, Italy), and in others they have the status of "private legal persons" (France, England with the exception of the Anglican Church, and Estonia). Finally, in some countries, religious denomination have only the status of *sui generis* legal entities.

The religious denomination from Romania — including the Orthodox Church, which holds a prominent place and whose recorded history is confirmed not only by the nearly 2,000 years of existence on Romanian soil,[3] but also by the contribution that its members (clergy, laity, and monks)[4] brought into shaping and asserting the national existence and the nation's moral-religious and cultural spirituality, which translates into the European identity, too — are organized and operate according to their own legislation, *recte* according to their canons, statutes, and regulations.

The three religious historical denominations, namely the Orthodox, the Roman Catholic and the Greek Catholic Churches, are structured and operate under their own canon laws, which laid the basis for their own statutes of organization and operation.

These statutes actually include the principle provisions enunciated by their canonical legislation, hence the need to express the canonical doctrine[5] of these Churches. Under these statutes of organization and func-

[2] Idem: *Statele Uniunii Europene şi cultele religioase* (EU states and religious denominations). "Ortodoxia" (The Orthodoxy), I, 2 (2009), pp. 49—72.

[3] Regarding the history of Christianity in the Danubian—Pontic area, see Idem: *„Scythia Mynor" (Dobrogea) şi Biserica ei apostolică. Scaunul arhiepiscopal şi mitropolitan al Tomisului (sec. IV—XIV)* ("Scythia Mynor" (Dobrogea) and its apostolic Church. The Archbishop and Metropolitan See of Tomis (Sec. IV—XIV)). Bucharest 2006.

[4] Idem: *Monahii, al treilea element constitutiv al Bisericii* (Monastics, the third constituent element of the Church). "Biserica Ortodoxă Română" (The Romanian Orthodox Church), CXXI, 7—12 (2003), pp. 469—483.

[5] The canonical doctrine includes the sum of the fundamental canonical principles defining the form of organization and management of these Churches, and which are under their canonical ecumenical legislation from the first millennium. In this regards, see Idem: *Le Régime de la synodalité selon la législation canonique, conciliaire, oecuménique, du I*er *millénaire*. Bucharest 1999, pp. 287—382; Idem: *Colecţia canonică etiopiană (Corpus Juris Canonici Aethiopici)* (Ethiopian canonical Collection). "Studii Teologice" (Theological Studies), XXVI, 9—10 (1974), pp. 725—738; Idem: *Principiile canonice, fundamentale, de organizare şi funcţionare a Bisericii Ortodoxe şi reflectarea lor în legislaţia Bisericii Ortodoxe Române* (Canonical fundamental principles from the organization and functioning of the Orthodox Church and their impact on Romanian Orthodox Church legislation). "Revista de Teologie Sfântul Apostol Andrei" (St. Andrew Review of Theology), V, 9 (2001), pp. 129—140; Idem: *Codul de drept canonic (latin). Principiile eclezio-logico-canonice enunţate de Constituţia apostolică Sacrae disciplinae leges* (The Code of Canon Law (Latin). Ecclesiological principles enunciated by the Apostolic Constitu-

tioning, these Romanian Churches (Orthodox, Roman Catholic, and Greek Catholic) have also drawn a number of regulations.[6]

Under the basic law, that is, the Constitution of Romania, the religious denominations are structured "according to their own statutes" (Art. 29). Regarding the Romanian Orthodox Church — the first religious denomination recognized by the Romanian state — we are talking about its new statute of organization and operation approved by Government Decision no. 53/2008, which repealed the Decree no. 233/1949, which, in turn, had never been actually published in the *Official Gazette*.

If under the provisions of Law no. 489/2006 the religious denominations are "legal persons of public interest" (Art. 8 par. 1), however, in the statute of the Romanian Orthodox Church — approved by Government Decision no. 53/2008 — these are "private legal persons of public interest" (Art. 41 par. 1), and not public legal persons, as provided by the Decree no. 177/1948, Art. 28, and by the ROC Statute of 1949, Art. 186. But, regarding this statutory provision on "private legal persons" it was said that "it does not correspond to the definition given by the law" and that "no other law defines this category of legal persons mentioned in the Statute."[7]

To the administrative-territorial units of the Ecumenical Orthodox Church (parish, diocese, episcopacy, metropolitan church, exarchate, and patriarchate) were recognized the status of legal entity since the 4th—5th centuries, as confirmed both by the Roman-Byzantine legislation[8] and by the Byzantine[9] law. This legal status of these administrative-territorial basic establishments of the Orthodox Church was reaffirmed and developed

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tion — Sacrae disciplinae leges). "Anuarul Facultății de Teologie Ortodoxă. Universitatea Bucureşti" (The Yearbook of the Faculty of Orthodox Theology. University of Bucharest), 2001, pp. 517—537.

[6] Among the Romanian Orthodox Church Regulations, we mention, for example, "Rules of Procedure of the disciplinary and judicial courts of the Romanian Orthodox Church"; "Rules for organizing the monastic life and the disciplinary and administrative operation of the monasteries"; "Rules for the organization and functioning of parish and monasteries' cemeteries within the eparchies of the Romanian Orthodox Church," etc. (See *Legiuirile Bisericii Ortodoxe Române* (The Rules of the Romanian Orthodox Church). Bucharest 2003, pp. 57—148).

[7] V. Greceanu Cocoş: *Contabilitatea în partidă simplă şi legislaţia utilă unităţilor de cult religios (filii, parohii, mănăstiri, catedrale, paraclise, schituri)* (The simple bookkeeping and the legislation useful to religious establishments (branches, parishes, monasteries, cathedrals, chapels, convents)). Bucharest 2010, p. 5.

[8] See Codex Theodosianus (438 AD) (http://droitromain.upmf-grenoble.fr/Constitutiones/CTh01_mommsen.htm) (accessed 30.06.2014).

[9] See Codex Justinianus (529 AD, 533 AD) (http://droitromain.upmf-grenoble.fr/Corpus/codjust.htm) (accessed 3.02.2015).

under the canonical[10] and nomocanonical[11] legislation, which was also circulated and applied within the Danubian-Pontic-Carpathian space,[12] where there was a Church of apostolic origins, with a metropolitan organization, from the era of the First Ecumenical Council (Nicaea, 325 AD). This is the Apostolic Church of Scythia Minor (Dobrogea/Romania), which adapted its metropolitan form of organization immediately according to the principle directive taken by the Fathers of the First Ecumenical Council.

The Church of "Scythia Minor"[13] — which adapted its metropolitan form of organization according to the principle directive taken by the Fathers of the First Ecumenical Council — remained with this autocephalous metropolitan form of organization until its dissolution, triggered by the transfer of the archiepiscopal and metropolitan See of Tomis — (in the 12th—13th centuries[14]) — within the Carpathian Arc, where the capi-

[10] See N. V. Dură: *Le Régime de la synodalité*..., pp. 287—382; N. V. Dură: *Colecții canonice, apusene, din primul mileniu* (Western canonical Collections, from the first millennium). "Analele Universității Ovidius. Seria: Drept şi Ştiințe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2003), pp. 19—33; Idem: *Legislația canonică a Sinodului II ecumenic şi importanța sa pentru organizarea şi disciplina Bisericii* (The canonical legislation of the Second Ecumenical Council and its importance to the organization and discipline of the Church). "Glasul Bisericii" (The Church's Voice), XL, 6—8 (1981), pp. 630—671.

[11] See Idem: *350 de ani de la tipărirea Pravilei de la Govora. Contribuții privind identificarea izvoarelor sale* (350 years since the printing of the Code of Laws from Govora. Contributions to the identification of its sources). "Altarul Banatului" (The shrine of Banat), I, 3—4 (1990), pp. 58—79; N. V. Dură, C. Mititelu: *Istoria Dreptului românesc* (The history of the Romanian Law). Bucharest 2014, pp. 101—206; C. Mititelu: *Pravilele româneşti, tipărite, din secolul al XVII-lea. Infracțiuni şi pedepse* (The Romanian Nomocanons, printed, from the XVIIth century. Infractions and punishments). Bucharest 2012; Idem: *Începuturile Dreptului scris la români* (The beginnings of the Romanian written law). "Dionysiana", 1 (2009), pp. 417—426; Idem: *Elements of Penal Law in the Romanian Nomocanons printed in the XVIIth century*. "Dionysiana", 1 (2010), pp. 419—430; Idem: *Vechi instituții europene prevăzute de legislația nomocanonică din secolul al XVII—lea (Pravila de la Iaşi şi Pravila de la Târgovişte*) (Old European institutions under the Nomocanon legislation from the seventeenth century (The Codes of Laws from Iasi and Targoviste)). Bucharest 2014; Idem: *The Nomocanons (Pravilele) Printed in the Romanian Countries, in the Seventeenth Century, and Their Provisions of Criminal Law*. "Religion", 3 (2014), pp. 41—57.

[12] See N. V. Dură: *Les relations canoniques de l'Église roumaine nord-danubienne avec les principaux Sièges épiscopaux du Sud du Danube*. "Revue Roumaine d'Histoire", XL—XLI (2001—2002), pp. 5—20.

[13] Idem: *„Scythia Mynor" (Dobrogea) şi Biserica ei apostolică*..., 2006.

[14] Idem: *Forme şi stări de manifestare ale autocefaliei Bisericii Ortodoxe Române. Mărturii istorice, ecleziologice şi canonice* (Forms and conditions for the manifestation of the Romanian Orthodox Church autocephaly. Historical, ecclesiological and canonical evidence). In: *Autocefalia, libertate şi demnitate (Autocephaly, freedom and dignity)*, Bucharest 2010, pp. 113—155.

tal of the principality (Campulung and then Curtea de Arges) was established.

This administrative-territorial unit, that is, the Metropolitan See of Tomis, enjoyed the status of legal entity like other similar establishments from the Byzantine Empire, although at that time Byzantine law did not use the phrase "legal personality."

In Romania, the establishments of religious denominations were recognized as legal entities by the Law no. 54/1928, which was repealed by the Decree-Law no. 177/1948. In contrast, by Law no. 489/2006[15] the religious denominations were treated as "legal persons of public utility" (Art. 8 par. 1). The status of religious worship establishments was also recognized as the one of non-profit legal persons. However, this status "should have obliged them to the double-entry bookkeeping at all organizational levels, according to Annex no. 1 of Order no. 1969/2007 of the Minister of Finance."[16]

The term "private legal persons of public utility," that is, *ad utilitatem publicum*, mentioned in the statute of the Romanian Orthodox Church, is the result of combining the text taken from the two laws, namely the Law no. 21/1924 and the Law no. 489/2006. The Law no. 21/1924 made express reference to "non-profit or non-patrimonial foundations and associations, established or organized by individuals" who, in accordance with that law, were considered "private legal persons" (Law no. 21/1924, Art. 1). By Government Order no. 26/2000, associations and foundations were again defined as "non-patrimonial (i.e. non-profit, under Art. 1 par. 2) private legal persons" but the religious denominations were excluded from this category (Art. 1, par. 3).

According to an expert economist, the exclusion of religious denominations from the category of "non-patrimonial private legal persons" would have been done, "probably, so as not to require the fulfillment of the conditions laid down in Chapter IV" entitled "Associations and Foundations of public utility" (Art. 38—45).[17]

The Law no. 489 of 2006, in turn, defines religious denominations only as "legal persons of public utility" (Art. 8 par. 1). Thus, as can be seen, the Statute of the Romanian Orthodox Church took these words directly from Law 489/2006, to which it added the term "private law," taken from Government Ordinance no. 26/2000, which, in turn, had taken it from Law no. 21/1924. The difference lies only in the fact that both in

[15] C. Mititelu: *Legea nr. 489/2006 şi relaţiile dintre Stat şi Biserică* (Law no. 489/2006 and the relationship between State and Church). In: RO-RUS-NIPPONICA, I, Craiova, 2010, pp. 36—43.

[16] V. Greceanu Cocoş: *Contabilitatea*..., p. 5.

[17] Ibidem, p. 41.

the Law no. 21/1924 and in the Ordinance no. 26/2000, the term "private legal persons" referred only to associations and foundations, while the Statute of the Romanian Orthodox Church refers to the religious worship establishments of the Church, although this statute does not specify what "private legal person" and "public utility" mean. So, it is clear that, legally, for the authors of the Statute of the Romanian Orthodox Church, the religious worship establishments are treated as associations, foundations, and establishments of social-charitable nature.

Therefore, we find that the religious worship establishments — seen by the statute of the Romanian Orthodox Church as "private legal persons" — still remain without a legal basis for their operation. However, by analogy, a legal basis for the establishments of the religious organizations could be found, because — under Law no. 286/2006 — they are seen as bodies providing social services of public utility (Art. 1 (2), let. g, pt. 4 and 5). Nevertheless, in local and county government, this kind of bodies are "private legal persons of public utility."

Regarding the establishments of the Romanian Orthodox Diaspora, it should be noted and remembered that these are not private legal persons, but "public legal" ones.[18]

In assessing the type of the relationships between the Church and the state, the jurists (canonists) commonly made reference to how the principle of external autonomy was asserted and applied. This is one of the fundamental canonical principles[19] of the Eastern Church, set by the Founder of the Church Jesus Christ, asserted by the Holy Apostles and provided by the Fathers of the ecumenical Church in the text of the canonical legislation of the first millennium.[20] Nevertheless, these fundamental canonical principles are not included only "in the universal constitutional charter of the Church, which consists of the Holy Canons Collection," but also "in the long and constant practice of Church life, which becomes a custom of canon law."[21]

"The principle of external autonomy" — which expresses the relationships between the state and the Church, and, in fact, between the state and the religious organizations — is classified by the Orthodox canonists among the "fundamental principles of dogmatic content or foundation."[22]

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[18] Ibidem, p. 47.

[19] See L. Stan: *Despre principiile canonice fundamentale ale Ortodoxiei* (About fundamental canonical principles of the Orthodoxy). In: *Autocefalie, libertate şi demnitate* (Autocephaly, freedom and dignity). Bucharest 2010, pp. 18—26; N. V. Dură: *Principiile canonice, fundamentale…*, pp. 129—140.

[20] N. V. Dură: *Le Régime de la synodalité…*, pp. 210 ff.

[21] L. Stan: *Despre principiile canonice…*, p. 18.

[22] Ibidem, pp. 18—19.

These principles are otherwise seen by the jurists (canonists) of the Orthodox Church as "legal and canonical expressions of dogmatic truths, fundamental teachings of the Church, which apply to the organization of Christian life."[23]

Over time, the nature of the relations between the state and the Church was not always assessed based on the canonical doctrine regarding "the principle of external autonomy," but, usually, based on the geopolitical context and on the mentality of each era. However, such an approach also entailed some disparities, and, therefore, the Eastern Church has always appealed both to its tradition and to the canonical legislation of the first millennium, on the one hand, and to the Byzantine one, in the 6th—15th centuries, when the relations between the state and the Church remained, in many ways, paradigmatic for the Churches and the states in South-East Europe,[24] including Romania.

The Romanian constitutions of 1991 and 2003 (the latter being currently in force) define the relationship between the state and the Church, or, more precisely, the relationship between the state and the religious organizations (Art. 29), in the following terms: "All religious Denominations are free to organize themselves according to their own statutes, under the law"; "All religious Denominations are autonomous from the state and enjoy its support, including the facilitation of religious assistance in the army, hospitals, prisons, homes, and orphanages."[25]

However, Law no. 489 of 28 December 2006 on religious freedom and the general governance of religious organizations[26] provides that the Romanian state recognizes the role of religious organizations as "social partners" (Art. 7 par. 1). The protocol of "social partnership" between the Romanian Church and the Romanian government also testifies the recognition of the role played by the religious organizations in Roma-

[23] Ibidem, p. 19.

[24] See L. Stan, L. Turcescu: *Religie şi Politică în România postcomunistă* (Religion and Politics in Post-Communist Romania). Bucharest 2010, pp. 55—57; N. V. Dură: *Political-Juridical and Religious Status of the Romanian Countries and the Balkan People during the 14th-19th Centuries*. "Revue des Études Sud-Est Européennes", XXVII, 1—2 (1989), pp. 159—170.

[25] Constitution of Romania published in the *Official Gazette* no.767/31.10.2003, Art. 29, par. 3 and 5.

[26] See N. V. Dură: *Legea nr. 489/2006 privind libertatea religioasă şi regimul general al Cultelor religioase din România* (Law no. 489/2006 on religious freedom and the general regime of religious Cults in Romania). In: *Biserica Ortodoxă şi Drepturile omului: Paradigme, fundamente, implicaţii* (The Orthodox Church and Human Rights: Paradigms, fundamentals, implications). Bucharest 2010, pp. 290—311; C. Mititelu: *Legea nr. 489/2006 şi relaţiile dintre Stat şi Biserică*..., pp. 36—43.

nia.[27] The tradition of Church autonomy and the state support granted to the Church was kept in a very low and minimal form, even during the communist regime, since both the Constitution of the Romanian People's Republic (from 1948 and 1952) and of the Socialist Republic of Romania (1965) did not expressly provide for the separation between the state and the Church[28] and the state awarded a minimal financial support for the priests' salaries, be it only formally.

The religious autonomy during the communist regime was restricted, and the state's control was quite oppressive, generated, of course, by the fact that the communist atheistic ideology was the official ideology of the Romanian state; moreover, it was fervently and skillfully propagated and applied by its mercenaries. In addition, recent studies show that, in the period 1947—1989, the Church was never fully autonomous from the state,[29] and that it had to accept, *nolens volens*, the state's control, which was done by its repression bodies. Moreover, the Law on Religious Affairs of 4 August 1948 actually granted the "Ministry of Religious Affairs total control over the religious life."[30]

A first repressive measure, taken by the political regime of the time, consisted in the seizure of the Church's tangible assets through the act of forced nationalization of Church property. Naturally, not having a sufficiently consistent and stable financial situation, the Church had to resort to the support of the Romanian state,[31] and, in fact, it became subservient to the political interests of its leaders.

Article 32 of the Law on Religious Affairs of 1948 stated that "the priests with anti-communist attitudes could be temporarily or permanently deprived of their wages." Or, as some scholars have noted, this article was written in order to punish "the Orthodox priests who openly expressed their anti-communist positions."[32]

Under the same Law, in order to freely organize themselves and operate, the religious denominations had to be officially recognized by the state, which, by law, could always revoke the recognition without substantiating the respective act (Art. 13).

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[27] C. Mititelu: *The Cooperation Protocol on Social Inclusion, Concluded between the Government of Romania and the Romanian Patriarchate. Juridical and Canonical Considerations*. "Teologia" (Theology), XVIII, 2 (59), 2014, pp. 58—70.

[28] A. Lemeni, F. Frunză, Ş. Ioniță: *Viața religioasă în România* (Religious life in Romania). 2nd edition. Bucharest 2005, pp. 10—11.

[29] L. Stan, L. Turcescu: *Religie şi Politică*..., pp. 60—67.

[30] Ibidem, p. 61.

[31] G. Enache: *Ortodoxie şi putere politică în România contemporană* (Orthodoxy and political power in contemporary Romania). Bucharest 2005, p. 50 and pp. 68—90.

[32] L. Stan, L. Turcescu: *Religie şi Politică*..., p. 61.

Also in the year 1948 the Romanian communist state denounced the Concordat with the Roman Catholic Church and abolished the Greek Catholic Church. Only 14 religious denominations were officially recognized, "but no other group was recorded until 1989,"[33] that is, up to the events of December 1989, which led to the overthrowing of Ceauşescu's communist dictatorship.

The researchers who specialize in the communist Romanian era (1947—1989) claim that "by 1965, the state had made considerable efforts to establish the role of the Church in society and to bring the church hierarchy under its control, by depriving it, by law, of its status as national Church and of the right to carry out charitable and educational activities."[34] Of course, "by canceling the Church's autonomy, the state has made known to church-goers that religiosity is not compatible with the communist spirit."[35]

Finally, the same researchers further reveal that "in 1979, religious persecution intensified […] and Ceauşescu's regime continued its anti-religious policy without interruption, until December 1989,"[36] that is, until the removal of the communist dictatorship in Romania. It is no wonder that "Romania was the last country in the region which adopted a new law on religious affairs, precisely in 2006, in order to replace the communist law of 1948."[37]

The fact that the state support granted to religious organizations was expressly stipulated in the two Romanian constitutions after 1989, and in the Law on Religious Affairs (no. 489/2006), was due not only to the Byzantine tradition regarding the relations between the state and the Church — clearly provided for in the old Romanian nomocanons[38] — but also due to the current, concrete sociopolitical and economic realities, and, of course, to the European and international legislation on the right to free-

[33] Ibidem, p. 62.
[34] Ibidem, p. 63.
[35] Ibidem, p. 62.
[36] Ibidem, p. 66.
[37] Ibidem, p. 67.
[38] L. Stan: *Tradiţia pravilnică a Bisericii. Însemnătatea şi folosul cunoaşterii legilor după care se conduce Biserica* (The Nomocanonical Tradition of the Church. The importance and the benefit of knowing the laws that govern the Church). "Studii Teologice" (Theological Studies), XIII, 5—6 (1960), pp. 17—39; L. Stan: *Importanţa canonică şi juridică a Pravilei de la Târgovişte* (The canonical and legal importance of the "Pravila" (Nomocanon) from Targoviste). "Studii Teologice" (Theological Studies), V, 9—10 (1952), pp. 47—73; N. V. Dură, C. Mititelu: *The State and the Church in IV—VI Centuries. The Roman Emperor and the Christian Religion*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*, I, 2014, Albena, pp. 923—930; N. V. DURĂ: *350 de ani de la tipărirea Pravilei de la Govora…*, pp. 58—79.

dom of religion,[39] the frame of reference and a basis for all human rights and their legal protection.[40]

The religious denominations recognized by law are legal persons of public utility. They are organized and operate under the law and under the constitution, autonomously, according to their own statutes and canonical codes.[41] The component units of religious organizations are also legal persons, as specified in their own statutes or canon codes, if they meet their requirements.

Taking into account the important role played by religious denominations in social life, apart from subsidizing their activities, the Romanian state supports religious worship establishments by providing tax incentives, under the law. Also, the state promotes the citizens' material support of religious organizations through deductions from the income tax and encourages the sponsorship of religious organizations.

By the financial support granted to religious organizations, the EU member states — including Romania — actually promote their policy towards them, which is manifested in the right to financially control of religious worship establishments. However, the exercise of this right entails serious damage both to the principle of religious freedom — set by the main legally binding instruments of the European Union, such as the European Convention on Human Rights and the Treaty establishing a Constitution for Europe — and to the autonomous status of religious

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[39] See N. V. Dură, C. Mititelu: *The right to Freedom of Religion in the Jurisprudence of the European Court*. "Journal of Danubius Studies and Research", IV, 1 (2014), pp. 141—152; Idem: *The Treaty of Nice, European Union Charter of Fundamental Rights*. In: *8th Edition of International Conference The European Integration — Realities and Perspectives* Proceedings. Galati 2013, pp. 123—129; Idem: *The Freedom of Religion and the Right to Religious*. In: *SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism*. I, 2014, Albena, pp. 831—838.

[40] Idem: *Human rights and their universality. From the rights of the "individual" and of the "citizen" to "human" rights*. In: "*Exploration, Education and Progress in the third Millennium*", I, 4, Galați 2012, pp. 103—127; Idem: *The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe*. In: "*Exploration, Education and Progress in the Third Millennium*", I, 5, Bucharest 2015, pp. 7—22; C. Mititelu: *The Human Rights and the Social Protection of Vulnerable Individuals*. "Journal of Danubius Studies and Reseaech", II, 1(2012), pp. 70—77; Idem: *The European Convention on Human Rights*. In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Galati 2015, pp. 243—252.

[41] In Art. 8, par. 1, the Law on religious Cults (no. 489/2006), regarding the religious freedom and the general regime of religious Cults, published in the *Official Gazette* no. 11/08.01.2007, refers only to the Canonical Codes of the Roman-Catholic Church and of the Greek Catholic Church, not to the canonical, ecumenical legislation of the first millennium, which is actually the constitutional "Charter" of the Orthodox Church (see N. V. Dură: *Le Régime de la synodalité…*, pp. 287—382).

organizations, provided both by the constitutions of those member states and by the Law on Religious Affairs.

Since there is no strict control by the state as far as it concerns the identification and record of the number of church-goers of a religious denominations, every one of them may require the remuneration of its church staff because this staff is the one that serves in its religious worship establishments, although, sometimes, not each and every "religious group" or "religious association" has the required number of believers to give them the right to remuneration from the state. Therefore, "the criteria regarding the number of believers should be applied in all parts of a religious organization, at all levels, and they should also be controlled by the designated state authorities."[42]

The Ordinance of the Minister of Finance no. 1969/2007, on the approval of accounting regulations for non-profit legal persons, established not only the basic principles and rules, the form and content of the annual financial statements of the accounting within religious worship establishments, but also the right of state bodies to exert financial and accounting control. Or, if this control does not take into account the principle of external autonomy[43] — which defines the legal status of Church autonomy, in its relationships with the state — we are dealing with restriction or even with serious harm to Church autonomy, and, in general, to any religious organizations officially recognized by the Romanian state.

Due to such harm or violation of this autonomy — provided for not only in the canonical and nomocanonical Byzantine legislation, but also in the constitutional text[44] and by the Law on Religious Affairs[45] in our country — the legal governance of the religious organizations in Romania[46] is not respected and applied in accordance with the principles enunciated by the EU legislation (treaties, conventions, pacts, declarations, etc.) to which Romania is a party.

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[42] I. V. Dură: *Reflecţii pe marginea textului final al proiectului legii privind libertatea religioasă şi regimul cultelor în România* (Reflections on the final text of draft law regarding the freedom of religion and the religious Cults in Romania). "Analele Universităţii Ovidius. Seria Drept şi Ştiinţe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2005), p. 83.

[43] See N. V. Dură: *Principiile canonice, fundamentale*..., pp. 129—140.

[44] See Art. 29 from the Constitution of Romania.

[45] See Law no. 489/2006.

[46] See N. V. Dură: *Despre libertatea religioasă şi regimul general al Cultelor religioase din România* (About religious freedom and the general regime of religious denominatios in Romania). "Analele Universităţii Ovidius Constanţa / Seria Teologie" (Ovidius University Annals / Theology Series), VII, 1 (2009), pp. 20—45.

Therefore, we believe that the Romanian legislator should be acquainted both with the canonical and the nomocanoical legislation[47] of the Church and with its specificity, so as not to violate or harm its autonomy in the relationships with the state; this autonomy was stated by its founder Jesus Christ, and provided for, in fact, in its own legislation, until Prince Cuza (1859—1866) was part of the same *Corpus Juris* of the nation, which still exists in countries such as the UK.[48]

Regarding the relationship between the state and the religious organizations, provided by Law no. 489/2006, some jurists, academics and practitioners state that "the very title of the law reveals the state's disguised intention to decide on the rules concerning the (individual and collective) faith. In fact — judge Anton Paraipan of the Bucharest Tribunal wrote — the state should recognize, proclaim, guarantee and protect the freedom of religion and not make assertions about it. Therefore, the state is fundamentally wrong even when it recognizes the religious organizations. Indeed, the religious organizations, as group organizations, should not be recognized, but only inventoried because their recognition entails the tacit enslaving of the one which is recognized to the one which recognizes it. The recognition is made by the one that is superior to the one which is recognized. However, the state has no right to approve or disapprove. The state's prerogative is only to inventorize an independent body, like all the other "organizations" (parties, NGOs, foundations). The one which authorizes is superior to the one which required the authorization and the religious organization should not be inferior to the state. The religious activity — a former Romanian magistrate remarked — is completely different than the state's activity. They are on totally different plains."[49]

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[47] In the Eastern Church, the most representative Nomocanon remains "The Nomocanon in XIV Titles", assigned to Patriarch Fotie (9th century). Regarding its content, see N. Milaş: *Canoanele Bisericii Ortodoxe însoţite de comentarii* (The canons of the Orthodox Church with comments). Trans U. Kovincici, N. Popovici. Arad 1930, I, pt. I, pp. 158—176. Regarding the canonical Collections of the first millennium, see N. V. Dură: *Colecţii canonice, apusene…*, pp. 19—33; Idem: *The Byzantine Nomocanons, fundamental sources of old Romanian Law*. In: "*Exploration, Education and Progress in the third Millennium*", I, 3, Galaţi, 2011, pp. 25—48.

[48] N. V. Dură: *Statele Uniunii Europene şi cultele religioase…*, pp. 49—72; N. V. Dură: *Dreptul canonic, disciplină de studiu în Facultăţile de Drept din prestigioase Universităţi europene (Canon law, subject of study in the Faculties of Law of prestigious European Universities)*. "Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative" (Ovidius University Annals. Series: Law and Administrative Sciences), 1 (2007), pp. 328—332.

[49] A. Paraipan: *Câteva consideraţii asupra Legii nr. 489/ 2006 (privind libertatea religioasă şi regimul general al cultelor)* (Several considerations on Law no. 489/2006 (on freedom of religion and the general regime of religious denominations)). "Analele Universităţii *Ovidius* Constanţa / Seria Teologie" (Ovidius University Annals / Theology Series), 1 (2007), pp. 247—248.

However, not only the jurists, but also the canonists, the theologians and the Church historians have noted some shortcomings of Law no. 489/2006, even since its project phase. In his reflections on the final draft of the Law — which is, *grosso modo*, in the current text — one of these theologians of historical training remarked that the text of the constitution currently in force "does not mention," "the religious freedom" but "the freedom of religious faith" (Art. 29). By contrast, the very constitution provides for other freedoms, namely the freedom of conscience (Art. 29), the freedom of expression (Art. 30), the individual freedom (Art. 23), the freedom of assembly (Art. 36), and the freedom of the press (Art. 30). But, even the 1948 Constitution provided for the freedom of religion (sic!), although it is well-known what this so-called religious freedom provided for in that onstitution, being an emanation of the communist regime, meant.

In Art. 28, the constitution of 1965, promulgated in the *Official Gazette* no. 65 of 29 October 1986, stated that "the Citizens of the Socialist Republic of Romania are guaranteed the freedom of speech, the freedom of the press, the freedom of assembly, of meetings and of demonstrations." Therefore, Nicolae Ceauşescu was proud of his constitution and found no need to bring any change even in November 1989, a few days before Congress XIV, as remembered by the then head of the dictator's chancery, Silviu Curticeanu, in his book published in 2000. On the above mentioned issues, he writes: "[…] imagine my surprise when, before Congress XIV, Ceauşescu asked me for a copy of the Constitution, telling me that he wants to read it quietly, to see if changes are needed; I gave it to him and it remained on his desk for a long time without anything happening; finally, he returned it to me, mentioning that although he read and reread it many times, he found nothing that would justify modifying it, neither regarding the citizens' rights and freedoms nor the democratic nature of the state. […] No comment is necessary here!"[50]

Law no. 489/2006 provides that "in Romania there is no state religion; the state is neutral towards any religious or non-religious ideology. Religious denominations are equal before the law and public authorities. The state through its authorities shall not promote or favour the granting of privileges or the discrimination against any religious organization" (Art. 9 par. 1—2).

As it can be seen, the Romanian legislator has transferred the reality from the banks of the Seine onto the banks of the Dambovita, enacting thus the neutrality of the Romanian state in its relations with religious organizations.

[50] Apud I. V. Dură: *Reflecţii pe marginea…*, p. 87.

But, the term "neutral" attributed to the state in Art. 9 par. 1, is entirely unsuitable. In fact, what does really mean this *syntagme*, that is, the state is neutral towards "any religious faith"?! Certainly, in Romania, where almost all citizens manifest a religious belief, the state cannot be absolutely "neutral" towards the Christian religion of the overwhelming majority of its citizens. Moreover, in everyday practice, it can be seen that not only in Romania, but also in other European countries — even in secular France, upon the death of Pope John Paul II — the state cannot remain totally "neutral" towards its majority religious denominations.

Moreover, how could the state be "neutral" when Art. 32 par. 3 of the revised constitution states that "the state must preserve spiritual identity, support national culture, foster the arts, protect and preserve the cultural heritage, develop contemporary creativity, promote Romanian cultural and artistic values in the world." But, how to preserve these things if not by collaborating with religious organizations? In fact, the Romanian state cannot remain neutral neither when anti-Christian ideas and atheistic ideologies are promoted in the media. Of course not, because the religious belief of the vast majority of its citizens and their fundamental rights and freedoms, including freedom of religion, are violated.[51]

We should not ignore or hide the fact that the very "concept of human rights is incompatible with the existence of the absolutist, despotic, totalitarian, authoritarian etc. state, where individual or collective *status libertatis* ('the freedom status') is cancelled or restricted. Therefore, in such states, constitutional laws do not provide an effective guarantee of the freedom of religion even if, theoretically, they also proclaimed its effective exercise *expressis verbis*. Or, as we know, such infamous reality was also reflected by the situation in our country, because the articles of the Romanian constitution from 1948—1989 stated that freedom, but, in practice, it was restricted and, in some cases, even abolished."[52]

The Statute for the organization and functioning of the Romanian Orthodox Church is actually the fundamental law of this Church. This *lex fundamentalis* gives evident expression to the ways in which the basic canonical principles, set by the canonical ecumenical legislation from the first millennium,[53] are stated. However, one of these basic canonical prin-

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[51] N. V. Dură: *Drepturile şi libertăţile fundamentale ale omului şi protecţia lor juridică. Dreptul la religie şi libertatea religioasă* (Fundamental human rights and freedoms and their legal protection. The Right to religion and religious freedom). "Ortodoxia" (Orthodoxy), LVI, 3—4 (2005), pp. 7—55.

[52] Idem: *Drepturile şi libertăţile fundamentale ale omului*..., p. 14.

[53] With regard to its "collecting" stages, and its contents, see N. V. Dură: *Le Régime de la synodalité*..., pp. 287—382.

ciples is the external autonomy, that is, the autonomy towards the state,[54] under which the Romanian Orthodox Church organizes and manages its own managerial, economic, and financial activities.[55]

The current statute of the organization and functioning of the Romanian Orthodox Church was approved by the Holy Synod by Decision no. 4768/2007 of 28 November 2007, and recognized — under Law no. 489/2006 — by Government Decision no. 53 of 16 January 2008, published in the *Official Gazette* of Romania, Part I, no. 50/22 January 2008.

In the preface to the statute of the organization and functioning of the Romanian Orthodox Church, the Primate of our Church noted that, "in recent years" there was carried out "a systematic and coordinated action in order to correlate the church legislation with the state legislation, according the Holy Canons of Orthodox Tradition."[56] Nevertheless, His Beatitude, Patriarch Daniel, had the main merit in this action conducted in order to correlate the two types of legislation, Church and state. In fact, it was the first time (since the interbellum) when such action took place within the Romanian society.

The current statute for the organization and functioning of the Romanian Orthodox Church[57] states that "the Patriarchate, the Metropolitan Church, the Archbishopric, the Bishopric, the vicariate, the deanery, the monastery and the parish are legal persons of private law and public utility" (Art. 41 par. 1). The same statute says that "these legal persons are entitled to two unique tax registration codes, both for non-profit and for economic activities" (Art. 41 par. 1—2).

According to its statute,[58] the Romanian Orthodox Church "is administered independently through their representative bodies, composed of clergy and laity, according to the Holy Canons, the provisions of this

[54] Idem: *Principiile canonice, fundamentale...*, pp. 129—140.

[55] Idem: *Organismele executive centrale şi locale ale Bisericii Ortodoxe Române şi activitatea lor managerială* (Central and local executive bodies of the Romanian Orthodox Church and their managerial activity). In: *Contribuţii la conturarea unui model românesc de management* (Contributions to the outline of a Romanian management model), coord. I. Petrescu. Bucharest, II, 2014, pp. 413—447; C. Mititelu: *Regulations Regarding the Organisation and the Governance of the Accounting by the Legal Persons without Patrimonial Purposes*. "Ovidius University Annals, Economic Sciences Series", XI, 2 (2011), pp. 815—820.

[56] See Patriarhia Română (Romanian Patriarchate), *Statutul pentru organizarea şi funcţionarea Bisericii Ortodoxe Române* (Statutes for the organization and functioning of the Romanian Orthodox Church). Text approved by the Holy Synod, by Resolution no. 1768/2007 of 28 November 2007 and recognized by Government Decision no. 53 of 16 January 2008, published in the *Official Gazette*, Pt. I, no. 50/22 January 2008, Art. 3 par. 2, Bucharest 2008, p. 6.

[57] Ibidem, pp. 36—37.

[58] Ibidem.

statute and other provisions of the competent ecclesiastical authority"[59] (Art. 3, 2).

The same statute says *expressis verbis* that "the Romanian Orthodox Church is autonomous from the state and from other institutions" and, as such, it "establishes relationships of dialogue and cooperation with the state and with its various institutions, in order to accomplish its pastoral, spiritual-cultural, educational, social and philanthropic missions."[60]

Instead of conclusions we could say that the present or future Romanian state should take into account — in its relationships with the Church — its status of autonomy, asserted *ab antiquo* (since antiquity), that is, since the epoch of Emperor Constantine the Great (305—337), who — by the Edict of Milan, in 313 — actually put the bases of the autonomy of religious denominations in their relationships with the state.

In Romania, both the Law 489/2006 and the constitution in force expressly reaffirmed the autonomous status of religious denominations. This status was made explicitly evident by the canonical ecumenical legislation, in the first millennium, and by the nomocanonical (Byzantine) legislation. Certainly, it remains to be seen if the Romanian state will apply the canonical principle of external autonomy, which was expressly stated by the canonical ecumenical legislation of the first millennium (cf. the Apostolic canon 30; 4 ecumenical Council I; 4 the Seventh Ecumenical Council), which categorically prohibited any state interference in the life of the religious denominations, including in the elections "of presbyters or deacons" (Canon 3, the Seventh Ecumenical Council).

[59] Ibidem, p. 13.
[60] Ibidem, Art. 4.

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Cătălina Mititelu

The Autonomy of Religious Denominations in Romania

Summary

Over the centuries, the manifestations of Church autonomy, in its relationships with the state, and, in fact, the materialization of the support granted to the Church by the state differed from one ruler or prince to another, and from one era to another. In Romania, the Church autonomy and the state's support followed the Byzantine tradition, stipulated by the ancient juridical principle of the συμψωνία, expressed in terms of reciprocal consent for the collaboration and the benefice of the two basic institutions of the human society, the state, and the Church. Both the constitution currently in force and Law 489/2006 demonstrate the autonomous status of the religious denominations in Romania, although some jurists continue to perceive it in terms of the language used by the Law of 1905 in France, whereby the two areas, that is, the spiritual-religious and the secular ones, were separated; hence the improper assertion that the state is "neutral" to any religious faith (Art. 9 of Law 489/2006).

Cătălina Mititelu

L'autonomie de religions en Roumanie

Résumé

Durant des siècles, les manifestations de l'autonomie de l'Église dans ses relations avec l'État et, par là, la matérialisation du soutien attribué à l'Église par l'État variaient en fonction du souverain et de l'époque.

En Roumanie, l'autonomie de l'Église et le soutien de la part de l'État résultaient de la tradition byzantine, c'est-à-dire de la coexistence symbiotique et de la coopération des deux institutions de la société humaine : État et Église.

Aussi bien la Constitution étant en vigueur que la loi 489/2006 déterminent le statut autonome des organisations religieuses en Roumanie bien que certains juristes continuent à le considérer dans les catégories de la langue employée dans la loi de 1905 en France, où deux domaines (religieux et laïc) ont été séparés ; d'où la fausse constatation que l'État est « neutre » à l'égard d'une religion quelconque (art. 9 de la loi 489/2006).

Mots clés : autonomie de l'Église, communautés religieuses, liberté religieuse

Cătălina Mititelu

L'autonomia delle fedi religiose in Romania

Sommario

Per secoli le manifestazioni dell'autonomia della Chiesa nei suoi rapporti con lo stato, e nel contempo la materializzazione del sostegno concesso alla Chiesa da parte dello stato, si differenziarono a seconda del governante o dell'epoca.

In Romania l'autonomia della Chiesa e il sostegno dello stato risultavano dalla tradizione bizantina ossia dalla coesistenza simbiotica e dalla collaborazione di due istituzioni fondamentali della società umana: lo stato e la Chiesa.

Sia la Costituzione vigente, sia la legge 489/2006 definiscono lo status autonomo delle organizzazioni religiose in Romania, anche se alcuni giuristi continuano a percepirlo nelle categorie del linguaggio usato nella legge del 1905 in Francia, in cui le due aree, ossia quella spirituale-religiosa e quella laica, furono divise; da ciò risulta l'affermazione errata secondo cui lo stato è "neutrale" rispetto a qualsiasi fede religiosa (art. 9 della Legge 489/2006).

Parole chiave: autonomia della Chiesa, società religiose, libertà religiosa

Part Three

Reviews

Ecumeny and Law, vol. 4 (2016)
pp. 299—301

Philosophy and Canon Law. Vol. 1: *The Family Institution: Identity, Sovereignty, Social Dimension*. Ed. A. Pastwa. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2015

It should probably be brought to readers' attention that a new noteworthy phenomenon has appeared on the academic publishing market, namely a journal *Philosophy and Canon Law*. The said publication appears to constitute both international and interdisciplinary forum for the exchange of philosophical and legal (particularly coming from the field of canon law) reflections, that also welcomes contributions from representatives of other fields of study.

The first volume of this annual periodical, entitled *The Family Institution: Identity, Sovereignty, Social Dimension*, is rather compelling study of the titular issues in the context of contemporary philosohy and canon law. The volume is divided into three parts: Philosophical Thought, Juridicial Canonical Thought, and Reviews.

In the initial article entitled "Family and *Polis*. The Socio-Philosophical Legacy of Plato and Aristotle at the Present Time," the author (Pavol Dancák from the University of Prešov, Slovakia) ponders the current social changes which have had a detrimental impact on the economy in general. As a possible remedy to the mentioned crisis Dancák proposes the wisdom imbuing the Ancient Greeks' philosophy and underscores its timelessness. The second text, "The Family in the Contemporary World. Catholic Social Teaching and Gender" written by Krzysztof Wieczorek from the University of Silesia in Katowice, Poland, focuses on the two possible attitudes to be assumed in the process of searching for one's identity and the proper way of individual and communal life. One of them is influ-

enced by the Church, the other by secularization that seems ubiquitous in the postmodern world.

Helena Hrehová (University of Trnava, Slovakia) in her article entitled "The Role of the Women in the Development of Human Rights" reflects on the indisputably important part played by women in the advancement of human rights. The authoress takes up the said subject comprehensively. Aneta Gawkowska (University of Warsaw) in turn, with her text "New Feminism as a Response to the Modern Crisis of Community" attempts to interpret the concept of New Feminism as a variety of personalist humanism. "Love as a Gift of Self: Call to Holiness in Christian Marriage in the Light of Eastern Monasticism" by Yosyp Veresh (International Theological Institute in Trumau, Austria) shows some characteristics of the spiritual life of monastic community and their potential application in a Christian marriage.

The final article of this part of the journal is entitled "Moral Issues of Advance Directives" and its author Witold Kania (also from the University of Silesia) tracks the vital bioethical role of advance directives (such as living will and health care proxy). The initial sections of the article draw a historical outline of this form of declaration, whereas the reminder of the text includes a description and discussion of an actual case concerning the advance directive.

The journal's second part containing six articles mostly pertains to canon law and its view of family and marriage. An article by Andrzej Pastwa (University of Silesia in Katowice), the editor-in-chief of the publication, offers canonical reflections on marriage and family life in a study titled "Common Good of Marriage and the Family." The article is based on John Paul II's Letter to Family (1994). According to the author, the profound theological thought contained in the papal document translates into valuable conclusions in the realm of canon law. The article "Sovereign Family" by Tomasz Gałkowski from the Cardinal Stefan Wyszyński University in Warsaw discusses the very same document but this time the author analyses such concepts as identity, subjectivity, and sovereignty of the family and their interrelationships. "The Significance of Canonical Form of Marriage," an article by Piotr Majer (from the Pontifical University of John Paul II in Kraków) provides arguments for the canonical form of contracting marriage *ad validitatem matrimonii*. The subsequent article of the volume, "Effects of Matrimonial Canon Law: Pastoral Aspects," is written by a Czech author Stanislav Přibyl from the University of South Bohemia in České Budějovice. By referring to legal tools that may help the betrothed in solving particular problems and support them in their way of sacramental life, Stanislav Přibyl gives the spouses constructive advice.

In the volume's penultimate text entitled "Church Teaching on Marriage and Family as an Instruction for the State Legislator in the Context of Poland," Piotr Kroczek (also from the Pontifical University of John Paul II in Kraków) analyses the Church teaching on marriage and family, whereas the last article of the volume "Family as a Subject of Protection in the State Family Policy" by Lucjan Świto from the University of Warmia and Mazury in Olsztyn, deals with the subject of the state family policy and whether it can really be perceived as a source of good examples for families of Poland.

Since families are the most important building blocks of our societies and the entire mankind, we need to protect the core values that relate to family life and marriage which were given to us by the Church. There are many inspiring articles in the discussed publication and it is highly recommended to read *Philosophy and Canon Law*'s volume 1, not just for members of academic society, but also for the general public.

Daniel Slivka

Ecumeny and Law, vol. 4 (2016)
pp. 303—305

Encyklopedia ekumenizmu w Polsce (1964—2014) [*Encyclopedia of Ecumenism in Poland (1964—2014)*]

Eds. J. Budniak, Z. Glaeser, T. Kałużny, Z. Kijas
Wydawnictwo Naukowe
Uniwersytetu Papieskiego Jana Pawła II w Krakowie
Kraków 2016, 560 pp.

The second millennium of Christianity went down in history as a period marked by division of the Church of Christ. However, in recent times, more than ever before, divided Christians feel remorse for their division and long for a visible unity in the Church. The intensity of this longing is proved by the work of the Second Vatican Council. In the decree *Unitatis redintegratio*, the Council says about "the sacred mystery of the unity of the Church" (UR 2), which "finds its highest exemplar and source in the unity of the Persons of the Trinity: the Father and the Son in the Holy Spirit, one God" (UR 2). John Paul II in his encyclical *Ut unum sint*, saying that "ecumenism is the way of the Church and a duty of the Christian conscience enlightened by faith and guided by love" (US 8), stressed that the process of building a unity between Christians is a duty of ecclesial mission.

The call of the Second Vatican Council for an increased involvement of all Christians in ecumenical activities of the Churches received a definitely positive response in Poland. After the Council all Churches and Christian communities undertook an intense cooperation whose fruits were many visible ecumenical initiatives. They were described in the literature concerning this issue. The comprehensive scientific description of Polish ecumenical initiatives can be found in the work called *Encyclopedia of Ecumenism in Poland (1964—2014)* edited by distinguished Polish the-

ologians: Professor Józef Budniak from the University of Silesia in Katowice, Professor Zygfryd Glaeser from the Opole University, as well as by Professor Tadeusz Kałużny SCJ and Professor Zdzisław Kijas OFMConc, both from the Pontifical University of John Paul II in Kraków.

The encyclopedia contains 560 pages and is divided into three main parts preceded by the following editorial pages: Contents (pp. 5—8), List of abbreviations (pp. 9—14), and Introduction (pp. 15—21).

The first part called "The General Characteristics of Polish Ecumenism" consists of the following subsections: "The Beginnings and Development of the Ecumenical Movement in Poland" (Chapter 1), "Current Ecumenical Structures in Poland" (Chapter 2), "Spiritual Aspects of Polish Ecumenism" (Chapter 3), and "Interfaith Doctrinal Dialogues in Poland" (Chapter 4). The second part deals with "Profiles of Polish Ecumenists" (pp. 121—412). The third part is the Appendix (pp. 413—530). All of the parts have a three-point structure, according to which the documentation concerning the ecumenical structures in Poland, documents of Christian Churches and ecumenical institutions in Poland, and documents of ecumenical dialogues in Poland were systematized. At the very end of the book is a list of publications (pp. 531—540), Index of names (pp. 541—550), and Subject index (pp. 551—560).

The idea to compile the *Encyclopedia…* was inspired by the 50th anniversary of the promulgation of the Decree on Ecumenism *Unitatis redintegratio* by the Second Vatican Council. The authors of the encyclopedia point out rightly that the mentioned conciliar document became "crucial for the development of joint work between the Roman Catholic Church and non-Catholic Churches and Christian communities. […] It is often referred to as *Magna Carta* of both the Council's and Roman Catholic engagement in the unity of Christians" (p. 15). This document defines the fundamental rules concerning the Roman Catholic ecumenical theory and practice. A new language was proposed in relations among Christians. A language free of words condemning and excluding those who "believe in a different way" and expressing respect and appreciation for the faithful from the Churches and Christian communities. "In the Decree on Ecumenism it was officially admitted that in non-Catholic Churches and Communities there exist essential elements of truth and goodness, and also 'real life of grace'" (p. 15). One of the essential elements of the Church's new ecumenical logic presented in the decree *Unitatis redintegratio* was a call for a dialogue among Christians and among the Churches because "the division [among Christians] openly contradicts the will of Christ, scandalizes the world, and damages the holy cause of preaching the Gospel to every creature" (UR 1). The fact that "ecumenism is the work of the Holy Spirit" (UR 1; 2) was fully accepted. "Catholic princi-

ples of ecumenism were expounded (see UR 2—4). It was stressed that Catholics should undertake 'every effort to avoid expressions, judgments, and actions which do not represent the condition of our separated brethren with truth and fairness and so make mutual relations with them more difficult' (UR 4)" (p. 5). The Council reminds that "all Christians, also Catholics, are responsible for the division, which means, that all are called to undertake with vigour the task of renewal" (p. 16).

The ecumenical programme for the Church worked out by the Second Vatican Council, which was also the priority for the pastoral activities of post-conciliar popes (from John XXIII to Francis), was an inspiration for the authors of the reviewed book. The premise of the work is to "chronicle" the events and people, institutions and works which were and are engaged in ecumenical activities in Poland over the past half century.

Encyclopedia of Ecumenism in Poland (1964—2014) is a joint work of three academic centres: Kraków, Opole, and Katowice-Cieszyn. The editorial project was carried out as part of the research grant of the National Science Centre (decision no. DEC — 2013/09/B/HS1/00483). What makes this work even more valuable is the fact that the authors cooperated fully and closely not only with different environments within the Church but also with non-Catholic circles. This kind of research hermeneutics helped to present a very objective approach to ecumenism which is a very sensitive matter.

Encyclopedia of Ecumenism in Poland (1964—2014) is not only an academic work that widely uses source documents relating to the history of Polish ecumenism, but also the fruit of openness and common effort of Polish (not only Roman Catholic!) ecumenical circles. This book has a genuinely innovative character and its singularity in the world literature makes it worth recommending to anyone interested in the problem of ecumenism and a widely understood dialogue in the Church and in the modern world.

Józef Budniak

Ecumeny and Law, vol. 4 (2016)
pp. 307—309

Society under Construction — Opportunities and Risks
Eds. P. Bałdys, K. Piątek, 207 pp.
Bielsko-Biała: Wydawnictwo Naukowe
Akademii Techniczno-Humanistycznej, 2015

Prepared in English and edited by Patrycja Bałdys and Katarzyna Piątek, the reviewed book presents interesting results of research and analyses carried out by Polish and Ukrainian scholars. It constitutes another important outcome of the Polish and Ukrainian scientific initiative that brings research results worth disseminating. In the reviewed volume, attention is focused primarily on various aspects of the complex processes of transformation in Poland and Ukraine.

In the article "Pros and Cons of Polish Socio-Economic Transformation (1989—2015)," Patrycja Bałdys and Katarzyna Piątek examine multiple consequences — and diverse assessments — of processes occurring in the Polish transformation after 1989.

"Modern Ukraine as a Society at Risk," an article by Larysa Klymanska and Viktor Savka, analyses — as the title suggests — different aspects of change and social crises in Ukraine in which, in many respects, there exists a specific society at risk.

The text titled "It Takes a Vision to Raise a Nation: Peacebuilding with Men in Ukraine" by Maureen P. Flaherty considers the complex processes which accompany creating a national identity and the possibility of forming a democracy in the conditions existing in modern Ukraine.

In the article "Myth or Reality. Religion and the Contemporary Ukrainian National Idea," Katarina Novikova discusses the meaning of religion in the formation of modern Ukrainian identity. The role of Christian Churches (especially the Greek Catholic, Roman Catholic, and Orthodox

Churches) is considered here, but also neo-pagan beliefs that gain a growing number of followers. The authoress thinks that the subsequent waves of Ukrainian social protests, which are acquiring a large scale (Maidan), significantly strengthen the current processes of national self-identification (Ukrainian self-understanding).

Three authoresses of the text titled "Evaluation of the Past as a Risk and Opportunity in the Social Development," Larysa Klymanska, Marina Klymanska, and Halyna Herasym, take into consideration the socially important issue of distorting Ukrainian history and the effects of this practice. How to shape the memory of history not to deform it and not to generate conflicts? This question, as it were, constitutes the axis of the text's reflection.

In his article "Ideology of Responsible Business and Its Research Application in Social and Economic Reality," Robert Geisler competently analyses the notion of corporate social responsibility understood in many different ways and broadly promoted nowadays (at least as a catchy slogan).

Yaroslav Pylynskyi, in his text titled "Proper Education Helps Ukraine to Overcome Corruption," considers the functions of educational activities in overcoming one of the most distressing (anti-developmental) Ukrainian social pathologies at present, namely the scope of corruption. In the article, the role of education in shaping desirable social attitudes and eliminating unwanted behaviour is rightly considered indispensable.

In the text titled "The (Re)constructing of a Multicultural Old Industrial Region in a Turbulent Context. The Case of Upper Silesia, Poland," Adrian Cybula undertakes to discuss the (re)construction of multicultural border of Upper Silesia after 1989; the author also highlights the current socio-economic capital of the region.

The article "Social Institutions in Unstable Society: Problems of Stability and Dynamics" by Viktor Savka examines manifold transformations of the Ukrainian society, especially in the dimension of its constituent subsystems.

Marta Geisler's text "Space and Relationships in the Age of Postmodernity" considers the postmodern context of changes in interpersonal relationships in their various dimensions (from the microscale to the macroscale), including dynamically developing virtual communities.

In Agnieszka Wrońska's text titled "Polish-German Stereotypes. History and the Present," the mutual perception of Poles and Germans (among others stereotypes about Germans) undergoes the authoress's analysis on the basis of rich and aptly selected source material.

In the text by Patrycja Bałdys and Katarzyna Piątek titled "Toward the Year 2025: Opportunities and Risk of Transformation in Poland and

Ukraine. Final Reflections," the authoresses discuss current and possible future effects of social, political, and economic changes in Poland and Ukraine, as well as the transformation of Polish and Ukrainian relations (taking into account the complex history of their relations). At this point, it is hard to provide conclusive answers; however, the authoresses show prospects for multifaceted transformation in an interesting and discussion-provoking a manner.

This publication should initiate a series of successive Polish and Ukrainian publications regarding social changes taking place in both countries. This is an important task and a challenge that must be taken already at present. I would like to encourage the Editors of the volume to continue their efforts in this respect. Thanks to its substantial advantages, the book should also contribute to a better mutual understanding in the Polish and Ukrainian relations.

Marek Rembierz

Ecumeny and Law, vol. 4 (2016)
pp. 311—312

Monika Menke: *Církevní soudnictví v českých zemích v období kodifikovaného práva*. Olomouc: Univerzita Palackého v Olomouci, 2016, 262 pp.

In the Czech Republic, Church tribunals are a practically unknown phenomenon, which concerns not only general public, but also the experts in legal matters (with the exception for canonists) who do not know what the content of the Church judicial courts' work actually is and how they proceed. What is more, neither the history of their establishment nor the nature of their staffing is known in terms of the Catholic Church in the Czech Republic.

The reviewed book by Monika Menke, notary of the Interdiocesan Tribunal in Olomouc, fills this gap. Consisting of five chapters, skilfully proceeding from general topics to a particular subject of the author's interests, the book systematically describes the undertaken subject.

While the two initial chapters encompass the general part, the remainder of the book covers the specialized knowledge. This division also suggests some pedagogical considerations, since it is impossible to discuss the activities of actual ecclesiastical tribunals in the Czech Republic without having previously introduced the general legal regulation of their operation, the types of cases they decide, the history of their home dioceses, and other elementary information required in order to understand the specifics the actual tribunals' activities, subsequently discussed in the specialized sections of the book.

It is only logical that the information contained in the general part does not and cannot make any claim to originality, for the reason that the author simply intends to describe the sense of the tribunals operation under the provisions of both codes of canon law. It would be pointless to merely refer to studies written by other authors. What the reader needs

is to compare the data contained in the specialized section, paying close attention to the legal basis for the tribunals' actions.

The value and novel nature of this work is mainly based on the author's thorough investigation. Tracing information about the activity of the ecclesiastical tribunals in the Czech Republic, their personnel composition, and the cases handled by them was certainly difficult and required a lot of stamina. The result thereof is a hitherto unpublished outline of the collected data. Especially fascinating, from a researcher's point of view is how the author managed to find archival documents relating the periods when our part of Europe was dominated by two main totalitarian regimes of the 20th century. In this regard, the work also may have a broader impact because even in such a particular topic as the tribunals' actions it shows how the Catholic Church was often heavily damaged by the interventions of the mentioned regimes. The work points to the bravery of priests — functionaries holding offices in ecclesiastical tribunals, often suffering long-term imprisonment — but also to other Church officials who were willing to collaborate, which often disrupted, or even hindered, the functioning of Church administration.

The description of the operation of the Church tribunals after 1989 is more detailed since the documents about their activities are complete and easily retrievable. Another thing stressed by the author is the adequate erudition required to perform various functions in ecclesiastical tribunal. Particularly, she gives detailed biographical profiles of some of the most important ecclesiastical judges, who are also renowned for their lecturing and publishing *(littera scripta manet)*. Then, in the fifth chapter she discusses in detail the method of organizing the necessary training in canon law that was needed to fill a 40-year hiatus where it was impossible to achieve the level of education needed to perform the relevant tasks in the Church judiciary.

Comprehensive and exhaustive footnotes as well as the proper bibliography at the end of the book, bring the necessary historical context to the provided knowledge. Even though they do not introduce anything new, for the virtue of being systematic, these elements of the book add a logical structure to the overall summary. As I have pointed out, the phenomenon of the ecclesiastical judiciary has not been exhaustively elaborated upon since 1989, so this work can serve as a foundational text for a further exploration of both the historical aspects as well as the further development of the ecclesiastical tribunals. Authoring such a text was certainly challenging, especially in the passages based on relevant archival sources. So this position by my colleague Monika Menke is undoubtedly beneficial for both professionals and the general public.

Stanislav Přibyl

Ecumeny and Law, vol. 4 (2016)
pp. 313—314

Dokumenty tridentského koncilu (latinský text a překlad do češtiny)
Trans. Ignác Antonín Hrdina, 335 pp.
Praha: Krystal OP, 2015

Nowadays, in various academic disciplines we can observe a dangerous tendency of a too strong concentration on contemporary urgent issues. But the present time is strongly connected with previous periods and with their scientific discussions. Therefore, knowledge of the past and of scholarly tradition is crucial, and even more so is this true in the humanities. This is true especially in theology, where we can very often observe interpretation of the theological, pastoral, and canonistic developments since the Second Vatican Council in terms of discontinuity, and in particular in a sharp contrast to the Council of Trent.

The best answer to such tendencies is more in-depth knowledge of the past, including the previous ecumenical council. Assistance in achieving this goal has been provided by the publishing house Krystal OP, the imprint of the Czech Dominican Province. Before annotated documents of the First Vatican Council had been published in 2006, prepared by a coordinated group of translators supervised by Prof. Karel Skalický from the Faculty of Theology at the University of South Bohemia in České Budějovice. At about the same time, the documents of the Council of Trent have been published in the translation of Prof. Ignác Antonín Hrdina OPraem., the judicial vicar of the Archdiocese of Prague and lecturer of canon law and state ecclesiastical law at the Catholic Faculty of Theology at Charles University in Prague and at the Faculty of Law at the University of West Bohemia in Pilsen.

The discussed publication contains the Latin and Czech texts of the dogmatic and reformist decrees and canons adopted over a total of 25 meetings of the Council of Trent (1545—1563), as well as the procedural decisions regarding the transfer or adjournment of the meetings, etc. Also, the appendix contains five "implementing" acts of Pope Pius IV from the years 1564—1565 and the "censorship Decalogue," prepared on the basis of the requirements of the Council. In the left column the pages of the publication display the original Latin text taken from the Latin-German edition of the documents of Trent and the First Vatican Council edited by Franz Seraph Petz, the capitulary of Passau Cathedral (*Des heiligen ökumenischen Konzils von Trient Canonen und neuer DECR in deutscher Uebersetzung. Mit einem Anhang: Die dogmatischen Constitutionen des Vatikanischen Konzils und die neueren päpstlichen Entscheidungen*. Passau: Joseph Bucher, 1877), and in the right column its Czech translation. Some textual and factual explanations are to be found in the footnotes, and there is at the end of the publication both the nominal index and a very detailed table of contents, which enables the location of particular issues.

Besides a more thorough knowledge of canonical tradition, this book offers very emphatic assistance in searching for the answers to many of the historical and theological questions connected with this period of conflict, with the Protestant Reformation and the very different interpretations of the task of the Council of Trent, both in general history and in Church history.

I am convinced that a reading of the documents of the aforementioned council allows not only a view of its very broad determination of Catholic doctrine and of the necessary reformation of vices in the life of the Church, but also an estimation of its pastoral significance, with a stimulus very perceptible up to the present day.

It is useful to note that this book fits well within the broad scientific effort of the author, which includes: Roman law, the history of law, canon law, and state ecclesiastical law, expressed by, for example, three volumes of texts devoted to the study of state ecclesiastical law *(Texty ke studiu konfesního práva)* of 2006—2007, including Europe and the US, the Czech state and Czechoslovakia. So the reviewed work by Professor Hrdina is another very important resource that will benefit both professionals and the general public.

Damián Němec

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Copy editor
Krystian Wojcieszuk

Computer-generated forms
Alicja Załęcka

ISSN 2353-4877
(print edition)
ISSN 2391-4327
(digital edition)

Published by
Wydawnictwo Uniwersytetu Śląskiego
ul. Bankowa 12B, 40-007 Katowice
www.wydawnictwo.us.edu.pl
e-mail: wydawus@us.edu.pl

First impression. No. of copies: 100 + 50. Printed sheets: 20.25 Publishing sheets: 23.5. Offset paper, III grade, 90g Price 24 zł (+VAT)

Printing and binding:
„TOTEM.COM.PL Sp. z o.o." Sp.K
ul. Jacewska 89, 88-100 Inowrocław