THE MYTH OF THE NEUTRAL STATE AND THE INDIVIDUALIZATION OF RELIGION: THE RELATIONSHIP BETWEEN STATE AND RELIGION IN THE FACE OF FUNDAMENTALISM

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I. INTRODUCTION

A. *What is the "Neutrality Principle"?*

Around the world, we are witnessing a revitalization of religious issues, which includes, in particular with respect to contemporary Islam, a re-politicization of religion. Religion has become, once again, a political *topos*.[1] The secularized western world is thus facing a new challenge for which it appears to be inadequately prepared. The idea of freedom of faith, guaranteed as a fundamental right, obliges the western democratic states to respect the religious activities of their citizens and to secure their free development. Therefore, the state is principally neither allowed to favor nor discriminate against certain denominations. This concept of equidistance is known as the principle of state neutrality. It commits the state to generally withdrawing from religious issues and, particularly, to not defining what can legitimately be classified as religion and religiously connoted behavior.[2]

The leeway given to the self-conception of religious groups by the German Federal Constitutional Court and its wide understanding of what kind of behavior has a direct relationship with faith, and therefore deserves protection as freedom of religion, is to be understood against this background. However, with regard to the new challenges mentioned above, the neutrality principle increasingly serves yet

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[1] *See* KARL-HEINZ LADEUR & INO AUGSBERG, TOLERENZE-RELIGION-RECHT 1 (2007). On the (misleading) concept of a "revival of the religious," see Gianni Vattimo, *Die Spur der Spur*, *in* DIE RELIGION 107 (Gianni Vattimo & Jacques Derrida eds., 2007); Gianni Vattimo, JENSEITS DES CHRISTENTUMS: GIBT ES EINE WELT OHNE GOTT? 29 (2004); JÜRGEN HABERMAS, ZWISCHEN NATURALISMUS UND RELIGION: PHILOSOPHISCHE AUFSÄTZE 7 (2004).

[2] For a case discussing kosher butchering, see Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Jan. 15, 2002, 104 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 337 (353) (F.R.G.).

another purpose. The courts use it as an escape-option in order to avoid dealing directly with problems which appear to be too complex under the law, but rather seem to be issues for the sociology of religion. In this context, neutrality merely functions as a *chiffre* for indifference. But this strategy of avoidance, though understandable in the face of the public sensitivity, undermines the law's function of conflict resolution. Furthermore, it corresponds to neither the historical development nor to the functional aspects of the idea of religious freedom.

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

Historically, the state's withdrawal from religion corresponds to the withdrawal of religion from politics.[3] This evolution modifies the idea of religion—that is here to say: Christianity. Religion now demands an internalization by one's own conscience, the *forum internum*, which is primarily constituted by an observation not of others, but of the Other, i.e., God. The liberalization of conscience correlates with the internalization of faith, the public ceremonial exercise of which is limited to non-political aspects. From this individualist perspective, religious tolerance is a rather pragmatic concept: since the individual conscience cannot be forced to the right decision, any act of violence becomes futile. This justifies abstention from using state power in order to enforce religious commands. So, according to John Locke, the state, while still receiving its tasks directly from God, is limited to those tasks that have a non-spiritual character.[4] The state, so conceived, has the secular purpose to guarantee the life of its citizens, but—for theological reasons—it cannot enforce their inner belief in certain confessions.[5] A deviance from specific religious commands, which a majority of the population might still regard as an absolute truth, then no longer calls for persecution, but can be tolerated instead. This explains the continuing reservations to Catholicism: its capacity as an institutionalized decoupling of individual faith and politics has been

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

[4] Ian Harris, *Eglise et Etat chez Locke*, *in* LES FONDEMENTS PHILOSOPHIQUES DE LA TOLÉRANCE: VOL. 1, at 175, 202 (Yves Charles Zarka et al. eds., 2002).

[5] Therefore Habermas's concept of tolerance as a "Gunsterweis," *i.e.*, performance of a favor, deduced from the historical example of French absolutism and serving as a mere prologue of "true" tolerance merging in the rules of public discourse, is one-sided. *See* JÜRGEN HABERMAS & JACQUES DERRIDA, PHILOSOPHIE IN ZEITEN DES TERRORS 66-68 (2004). The same critique applies to the "Erlaubniskonzeption", *i.e.*, the concept of concession, developed in RAINER FORST, TOLERANZ IM KONFLIKT: GESCHICHTE, GEHALT UND GEGENWART EINES UMST RITT ENEN BEGRIFFS (2003).

called into question.[6] Accordingly, there are voices today claiming that, within the Islamic world, this step from a "collective" to an "individual" subject, making tolerance in the modern sense possible, has not yet been taken.[7] Hence the de-politicization of the Islamic world—if possible at all—is still to come.

What can be interpreted as a historical confinement of freedom of faith in this sense has its theoretical counterpart in a functionalistic theory of fundamental rights. According to Niklas Luhmann's sociological analysis, fundamental rights are not only personal freedoms. Rather, within a poly-contextual world without a central point of observance, but only intelligible by multiple second-order perspectives,[8] fundamental rights guarantee the differentiation of society in several relatively autonomous social spheres.[9] Thus they serve as barriers against totalitarian tendencies of certain societal subsystems. This theory applies almost perfectly to the new phenomena of religiously motivated and politically ambitious movements. Their tendency to a total molding of an entire society creates the general conflict concerning the relationship between state and religion. In this respect, Islam demonstrates with particular distinctiveness a structural problem concerning all types of religion. But it can be observed that Christian confessions increasingly tend to exert influence on the political process, too. By contrast, one goal of fundamental rights is to secure an independent sphere of action for each societal subsystem. Therefore, the guarantee of freedom of faith can reach no farther than ensuring that the exertion of faith does not encroach upon the activities of the other social spheres. Hence, advocating rules of the Islamic *sharia* or the Jewish *halaka* as religiously determined legal orders or a

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[6] For a discussion of Catholicism in the United States see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002). For the development of the Catholic idea of the state, see RUDOLF UERTZ, VOM GOTTESRECHT ZUM MENSCHENRECHT: DAS KATHOLISCHE STAATSDENKEN IN DEUTSCHLAND VON DER FRANZÖSISCHEN REVOLUTION BIS ZUM II. VATIKANISCHEN KONZIL (1789-1965) (2005). Hegel still considered Catholicism to be incompatible with the idea of the modern state. *See* GEORG WILHELM FRIEDRICH HEGEL, VORLESUNGEN ÜBER DIE PHILOSOPHIE DER GESCHICHTE, WERKE VOL. XI 530 (Glockner 5th ed., 1971).

[7] *See* YVES CHARLES ZARKA & CYNTHIA FLEURY, DIFFICILE TOLÉRANCE 179, 213 (2004). For a psychoanalysis of Islam referring to this idea, see Josef H. Ludin, *Zwischen Allmacht und Hilflosigkeit. Über okzidentales und orientalisches Denken*, 542 MERKUR 404-412 (1994).

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

[9] *See* KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESEKKSCHAFT 194-96, 348 (2006); NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION. EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE 79-85 (2d ed. 1975); HELMUT WILLKE, STAND UND KRITIK DER NERERN GRUNDRECHTSTHEORIE: SCHRITTE ZU EINER NORMATIVEN SYSTEMTHEORIE 21-23, 157-71 (1975); Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1-28 (2003). For a particular focus on religion, see NIKLAS LUHMANN, DIE RELIGION DER GESELLSCHAFT 315 (2000); FRIEDRICH WILHELM GRAF, DIE WIEDERKEHR DER GÖTTER: RELIGION IN DER MODERNEN KULTUR 239-41 (2004).

religiously motivated refusal of certain scientific theories reaching beyond the private realm, e.g., at school, is not backed by basic German law. Neutrality of the state, in this perspective, does not mean exempting religion from the challenges of the modern world. On the contrary, it expects religious communities to come to terms with them. Neutrality, then, is but a symbol of the instability of the differentiation of societal subsystems, which has to be continually reproduced as a *process* of neutralization. It therefore calls upon the state as a political system to set up variable demarcations *vis-à-vis* other social systems, including religion.

II. FUNDAMENTALISM AND THE FRAGMENTATION OF THE SUBJECT N POSTMODERN SOCIETY

A. *The "Return of Religion" as a Postmodern Phenomenon*

The worldwide phenomena of a "return of religion," in western countries in particular, demonstrate the fact that both religion and the public realm into which it returns have undergone considerable change. The postmodern state, which might be described as a state which has lost the capacity to promote stable "*ideal*-egos" and to function as a public institutionalization of a "super-ego,"[10] tends to boil down its basic structure to a reduced version of the protection of individual "rights." A process of multiplication of "*ego*-ideals," which are offered for "autonomous" internalization, has been brought about; it finds its repercussions in the transformation of civil rights. Civil rights are no longer related to and embedded in stable legal or social institutions that structure a trans-subjective process of self-organization of freedom and create networks of inter-relationships in society (markets, mass communication, religion, art, etc.),[11] but they are regarded as protecting individual "identities," which can be readily generated in a multiplicity of versions and which can be freely chosen by persons following their preferences.[12] These seemingly autonomous choices are manipulated by special bureaucracies[13] and are, at the same time, failures of autonomous choice procedures, which are cured by the therapeutic state.

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[10] EUGÈNE ENRIQUEZ & CLAUDINE HAROCHE, LA FACE OBSCURE DES DÉMOCRATIES MODERNES 22 (2002).

[11] DANY-ROBERT DUFOUR, L'ART DE RÈDUIRE LES TËTES: SUR LA NOUVELLE SERVITUDE DE L'HOMME LIBERÉRÉ À LÈRE DU CAPITALISME TOTAL 127 (2003); MICHEL SCHNEIDER, LA CONFUSION DES SEXES 77 (2007).

[12] KENNETH J. GERGEN, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE 146 (1991).

[13] JEFFERY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS 207 (1988).

Meaning is no longer derived from religion or identification with a traditional nation-state.[14] As a consequence, religious freedom as a public, mainly collective, institution has been transformed into a fragment of a diffuse "right to identity" that blurs the line between the public and private domains. The public dimension of "civil rights" shrinks and re-emerges as a diffuse "right to recognition" of the freely chosen identity by public authorities and, finally, by every individual. "Recognition" is an extremely open formula whose volatility can be demonstrated by the fact that the classical liberal "harm principle," which was referred to when it came to the determination of the limits of the exercise of freedom, has lost its relevance in decision-making processes, both in public procedures and in private firms. This principle has an element of "social epistemology" to it, which was used as a frame of reference for the definition of social and normative rules. "Harm" refers to a social knowledge basis, which is implicit in a multiplicity of fields of practice, from which "experience," as a product of a distributed "culture of improvement," emerges—as opposed to a state-centered "*polizeywissenschaft*" (in Germany), which pre-supposes the centrality of the state and its privileged position as an observer of society.

This general cognitive framework is also based upon a kind of meta-decision on what one can expect from others, in general, and the more personal feelings which belong to the private sphere.

As Marcel Gauchet has convincingly argued, religious fundamentalism is a new phenomenon that challenges postmodern societies, particularly those which have done everything to demonstrate that religion is not necessary for them.[15] Religious fundamentalism is closely linked to its antidote, a weak, narcissistic personality, in a paradoxically symmetric way. Fundamentalism asserts an understanding of religion as a personal preference of the individual. The heteronomy of religion has been transformed into the autonomy of individual identity. The postmodern version of religious fundamentalism is focused on a personal expressive interiority of *feelings*, not of religious behavior, attitudes, or an attachment to a collective religious order.[16] This evolution has brought state schools, in particular, into troubled waters: one need only refer to the Crucifix-case in Bavaria (and in Italy), the "headscarf" affairs, sexual instruction, school prayers, home education, etc. It is much more difficult to strike a balance between conflicting *collective* understandings of religion and public "therapeutic" engagements with a view to the harmonization of conflicting "*personal* identities."

14 SAMUEL WEBER, BENJAMIN'S ABILITIES 254 (2008).
15 MARCEL GAUCHET, UN MONDE DÉSENCHANTÉ? 147 (2004).
16 *Id.* at 169, 183.

Against this background, it should be very important for postmodern secularized societies to reflect more on the fate of their *institutions* and try to find a way to re-establish a stable "binding" core element of the law,[17] not in the sense of a limit imposed on the imaginary autonomy of an individual that tries to assert its "identity," but of the law's constitutive character as a symbolic order of the "Other."[18] The recognition of this perplexing alien "Other" allows for the understanding of rules as a "grid for action"[19] and prepares the ground for the basic structure of a "communal setting among and between *selves*, rather than what is experienced within the *self*." Institutions are sets of anonymous rules, which blur the boundaries between normative and cognitive rationalities. Accepting the limits of autonomy and transparency, on the one hand, and the illusionary sovereignty of the nation-state and its claim to guarantee identity, on the other, opens up a trans-subjective structure generated and retained from the intergenerational process of observation of the patterns of co-ordination that limit the narcissism and the destructive fantasies of man, on the one hand, and make possible the emergence of trust in society (beyond inter-subjective relationships), on the other.

This consideration brings us back to religion. For a secularized society, it may be valuable to make more room for religion in public education in particular. Religion may remind even non-religious persons of the inescapability of a heterogeneous order that does not dissolve into a collection of identity choices that demand mutual recognition. Religion, in the sense referred to here, preserves the feeling of "perplexity" that emerges from the challenge of transcendence that has left its traces in the cultural infrastructure of (post)modern societies.[20] It may, then, be easier to look for some meta-rules of the "collision" of divergent religions in public institutions. Also, this approach may allow for a more differentiated observation of colliding religious orders. A distinction can be made, for example, between practical moral rules (sexuality) or cultural preferences in subjects of literature to be treated in courses and doctrinal "propositions" in theology, etc. Fundamentalism is itself based upon expressive cults of illusionary communities of *selves*, which try to escape from the inevitable involvement in the social realm of rules and practices that traditional religions have always accepted. The new versions of "me-religions" are no different from other understandings of

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[17] MYRIAM REVAULT D'ALLONNES, LE POUVOIR DES COMMENCEMENTS: ESSAI SUR L'AUTORITÉ 250 (2006).

[18] WEBER, *supra* note 14, at 54.

[19] ADAM B. SELIGMAN, MODERNITY'S WAGER: AUTHORITY, THE SELF, AND TRANSCENDENCE 93 (2000).

[20] Richard Velkley, *On the Roots of Rationalism: Strauss's Natural Right and History as Response to Heidegger*, 70 REV. OF POL. 245, 250 (2008).

"individual rights" regarded as asserting personal feelings against alienating heterogeneous social constraints.

III. INDIVIDUALIZATION AND PRIVATIZATION OF THE LEGAL STATUS OF RELIGION IN GERMANY

A. *The Recent Evolution of Constitutional Doctrine and Court Practice*

In Germany, there is an increasing tendency to regard the privatization of religion[21] and the principle of the "neutrality" of the state in religious matters[22] as the central elements of the constitutional status of religion. At the same time, it is undeniable that constitutional norms that integrate religion into the public realm are reduced to mere exceptions to the rule.[23] The right of religious communities to provide for religious instruction in public schools as an equal part of the teaching program (including in examinations), which is guaranteed by Article 7 par. 4 of the Federal Constitution (*Grundgesetz*), is one of the elements that grants religious communities a special "public status." The right itself has the character of a constitutional freedom to act, and, at the same time, remains a social right in as much as it includes the right to financial subventions for teachers and the equality of religious instruction in the school curriculum.

The recent tendency to downplay the public role of religion within the state seems to be not without consequence if one considers the norms of the federal constitution alone. But, in a systematic and historical interpretation, one has to pay tribute to the fact that the major norms on the constitutional basis of public instruction according to the division of competencies in the federal order are to be found in the constitutions of the *Länder*. In the earlier constitutions (not in the constitutions of the eastern *Länder*), one finds general norms about the Christian character of public instruction in general (beyond religious

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[21] *See* Angar Hense, *Zwischen Kollektivität und Individualität*, *in* RELIGIONSVERFASSUNGSRECHT 7, 26 (Christian Walter & Hans Michael Heinig eds., 2004); MARCEL GAUCHET, LA RELIGION DANS LA DEMOCRATIE: PARCOURS DE LA LAÏCITÉ 105-10 (2001); GAUCHET, *supra* note 15, 182-84 (2004) (taking the view that religion in postmodern times has necessarily become individualistic); Oliver Lepsius, *Die Religionsfreiheit als Minderheitenrecht in Deutschland, Frankreich und den USA*, 34 LEVIATHAN 321 (2006) (describing the transformation in a historical and comparative perspective).

[22] For a discussion of the concept of "neutrality," see STEFAN HUSTER, DIE ETHISCHE NEUTRALITAT DES STAATES 112-15 (2002); Stefan Huster, *Die Bedeutung des Neutralitätsgebotes für die verfassungstheoretische und verfassungsrechtliche Einordnung des Religionsrechts*, *in* RELIGIONSVERFASSUNGSRECHT, *supra* note 21, at 107, 109, 121.

[23] Huster, *Die Bedeutung*, *supra* note 22, at 120.

instruction in the stricter sense). These norms can be explained as part of a compromise between the state and the Christian churches, which demanded influence over public schooling in exchange for self-restraint in the field of private schools.[24] The Federal Constitutional Court has regarded these constitutional norms, for example, of the *Land*-Baden-Württemberg, on the Christian character of public schools as being in conformity with the federal constitutional requirements—this decision[25] was published in 1975, before the rise of the more recent above-mentioned tendency toward privatization of religion.[26]

In its 1995 decision about the restriction of the exhibition of the Christian crucifix in public classrooms,[27] the court paid little attention to an earlier judgment on the separation of powers in a federal system and discussed the importance of the negative right to religious freedom, *i.e.*, the right not to be confronted with religious symbols or rituals (school prayers) in the public realm.[28]

This constitutional freedom, whose status is not beyond doubt, has become increasingly the "Grundnorm" (the centerpiece) of the "constitution of religion" (*Religionsverfassungsrecht*),[29] which is regarded as one of the pillars of the principle of neutrality of the state (federal and *Länder*). This new concept tends to replace the older version of the law on the relationship between the state and the churches (*Staatskirchenrecht*). This evolution is one of the symptoms of an

[24] This sector of schooling is to this day underdeveloped, though the reticence of the churches to establish private religious schools is declining.

[25] For the constitutional status of religion in the "Christian community schools" in Baden-Württemberg, see Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 17, 1975, 41 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 29 (F.R.G.); and in Nordrhein-Westfalen, see Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 17, 1975, 41 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 88 (F.R.G.).

[26] Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 17, 1975, 41 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 29 (F.R.G.). The Federal Constitutional Court refers to the Christian "values of education and culture" as a legitimate framing of public education by the legislator and the constitutions of the Länder. *See* Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (F.R.G.); *see also* DER STREIT UM DAS KREUZ IN DER SHULZE ZUR WELTANSCHAULICHEN NEUTRALITÄT DES STAATES (Winfried Brugger & Stefan Huster eds., 1998) (providing documentation of the controversy that was raised by this decision) [hereinafter DER STREIT]. For a discussion of this matter under Italian law, see Corte Cost., Dec. 13, 2004, n.389. *See also* CLAUS DIETER CLASSEN, RELIGIONSRECHT paras. 185-187 (2006); Hans Michael Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, *in* RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 181 (Winfried Brugger & Michael Karayanni eds., 2007).

[27] *See* 93 BVerfGE 1; *see also* DER STREIT, *supra* note 26 (providing documentation of the controversy that was raised by this decision).

[28] *See* CLASSEN, *supra* note 26, at paras. 161-63, 291.

[29] For the evolution of the recent change towards "Religionsverfassungsrecht" instead of "Staatskirchenrecht," see the contributions in RELIGIONSVERFASSUNGSRECHT, *supra* note 21, in particular the overview by Hans Michael Heinig, *Kritik und Selbstkritiki*, at 357.

increasing individualization of religious freedom,[30] which increasingly undermines the former public status of the churches, and, as a consequence, the collective and organizational dimension of religion as opposed to the individual rights of man. This collective dimension had the repercussion of allowing churches to make binding contracts with the state in religious matters, including the recognition that the Holy See could use international law for its contracts (*Konkordat*).

B. *Which Role for "Constitutional Preconditions" in Doctrine?*

This new development towards a "constitution of religion" as an individualistic paradigm has recently been given a representative form by Christoph Möllers[31]—a rising star of constitutional law—at the annual conference of the association of German professors of "state law."[32] As a first step, Möllers denies the constitutional status of the "principle of neutrality" of the modern state[33] as the antidote of a more traditional principle of "coordination" of state and churches in the public realm because it cannot claim to add legal value to the protection of the individual guaranteed by constitutional liberties. As a second step, he denies the legal value of the western Christian culture as "constitutional presupposition" (*Verfassungsvoraussetzung*)[34] as a supposedly historical resource that might give orientation to the

[30] *See* Stefan Korioth, *Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation*, *in* RELIGIONSVERFASSUNGSRECHT, *supra* note 21, at 53, 59-60 (discussing the individualization of religious freedom); GAUCHET, *supra* note 21.

[31] Christoph Möllers, Religiöse Freiheit als Gefahr?, Oct. 2, 2008 (Report at the annual conference of the Association of German Professors of Public Law at Erlangen).

[32] This self-description had in itself a symbolic value in the past, because it distances itself from the more open concept of "constitutional law" with its comprehensive perspective on society.

[33] Möllers, *supra* note 31, thesis no. 4.

[34] German constitutional doctrine traditionally refers to "constitutional preconditions" in order to legitimize the assumption that an institution (like the state or, according to some, a church) has to be attributed a constitutional status beyond the wording of constitutional norms. This assumption is rejected in recent literature (with good reasons). *See id*.; CHRISTIAN WALTER, RELIGIONGSVERFASSUNGSRECHT 551, 553 (2006); Huster, *Die Bedeutung*, *supra* note 22, at 124. The position that is taken in this article does in fact invoke a "prepolitical conception" of culture (critique in Huster, *Die Bedeutung*, *supra* note 22, at 128) that does not reduce the collective dimension of the constitution to democratic decision-making, but regards culture as a frame of reference for public schools in particular. As such, it is characterized by "structural variety," DIRK BAECKER, WOZU KULTUR? 157 (2000), and "indefinitely extended, historical revisions," JOSEPH MARGOLIS, THE ARTS AND THE DEFINITION OF THE HUMAN: TOWARDS A PHILOSOPHICAL ANTHROPOLOGY 94 (2009). This is what one may call, with Margolis, "objectivity . . . in play." The "cultural world . . . is subject to indefinitely extended, historicized revisions" but it cannot be treated as an obsolete remainder of the past." *Id.* This process is structured by deference to trans-subjective historical constraints that have to be interpreted in public schooling in a paradoxical manner: scholars have to be taught their cultural heritage (including its varieties) and at the same time be prepared to continue the play.

understanding of constitutional norms. According to Möllers, such an assumption would neglect the "plurality and the contradictions inherent in existing traditions and their darker side".[35] Religious traditions can be part of a liberal constitutional order—and have, in fact, been integrated in the German constitution—but this is only due to the positive constitutional *decisions* to make them the objects of positive law. This construction follows in a problematic way the tradition of the subject philosophy and its "foundational function" in claiming to frame our experience of reality. By its supposedly self-reflexive transparency, it claims to be able to lay a foundation for knowledge, and, by its sovereignty, it posits itself as the founder of normativity.[36] One could read Jacques Derrida's reference to the "Christian scansion" of the history of fraternity as the precondition of democracy in "Politics of Friendship"[37] in the perspective taken here. Democracy seems to be "called forth by a tradition that precedes, overshadows, and sustains it."[38] The ongoing process of rewriting and rereading culture is a consequence of the inescapable experience of a recognition of the *Other, a heritage we cannot reject*—a recognition that is reflected in dialogue with the others as "neighbors.". This, in turn, requires first an understanding of the *Other*'s tradition, community, and conception of individuality.[39] In other words, identity needs a "social footing" as a precondition for communicability and as a basis for personality to which rights and obligations can be attributed.[40]

This version would follow the line drawn by Ernst-Wolfgang Böckenförde in his oft-quoted hypothesis that the modern secularized state lives on preconditions that it cannot create itself.[41] However, the argument that is given here would focus on the inescapability of the theologico-political founding of culture that is transformed and punctuated by a discontinuity of historical processes, but cannot be left behind. This would not end up in a religious mythology but in the Derridean "grammatological" displacement of the "voice" that pretends to (re)present reality to "scripture" and its semiological networks of

35 Möllers, *supra* note 31, thesis no. 5.

36 VINCENT DESCOMBES & CHARLES LARMORE, DERNIÉRES NOUVELLES DU MOI 180, 182 (2008).

37 JACQUES DERRIDA, POLITICS OF FRIENDSHIP 156 (George Collins trans., Verso 1997).

38 HENT DE VRIES, RELIGION AND VIOLENCE: PHILOSOPHICAL PERSPECTIVES FROM KANT TO DERRIDA 364 (2001) (attenuating this assumption with a question mark).

39 LEORA BATNITZKY, IDOLATRY AND REPRESENTATION: THE PHILOSOPHY OF FRANZ ROSENZWEID RECONSIDERED 193 (2000); ERIC L. SANTNER, ON THE PSYCHOTHEOLOGY OF EVERYDAY LIFE 5, 24 (2001).

40 HARRISON C. WHITE, IDENTITY AND CONTROL: HOW SOCIAL FORMATIONS EMERGE 1 (2005).

41 ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, GESELLSCHAFT, FREIHEIT:: STUDIEN ZUR STAATSTHEORIE UND ZUM VERFASSUNGSRECHT 60 (1976).

relationships as its substitute.[42]

C. *The Whithering of the "Public Sphere"*

The concept of the "public sphere" as a paradigm had attained a certain prominence in the 1960s, when the liberal constitutional model of the "society of individuals" was greatly remodeled by the creation of a new layer within a multi-level order of constitutional paradigms that impose a certain structure to constitutional norms and their understanding. This evolution was part of the transformation of the liberal society to the "society of organizations" that attributed not only empirical relevance but also normative value to groups, associations, organizations, media, etc., not only to the individual.[43] The contribution of certain groups to the interpretation of the public sphere as a domain of discussion and filtering or bundling of political alternatives (political parties)—between the individual, on the one hand, and the state as the public decision-maker, on the other—was regarded as essential for the reproduction of culture and political orientation. Among the central actors in this public realm, the churches played a privileged role.[44]

Christoph Möllers's paper tries to formulate a new line of compromise that no longer puts the emphasis on the public status of religion as a collective phenomenon according to its own rationality and following the "positive" freedom of religion. On the contrary, the specifically public constitutional momentum of religion[45] and its collective dimension is, albeit not shifted in a one-sided approach towards the "negative" freedom of religion of the individual, primarily attributed to the state as the organized public actor. This gives the state broad discretionary leeway, for example in deciding the problem of the legitimacy of presenting religious symbols in public schools (the Muslim headscarf, the exhibition of the crucifix in classrooms) as part

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[42] This goes back to Sigmund Freud's devaluation of the voice and the "presence" of words. *See* JACQUES LE RIDER, FREUD, DE L'ACROPOLE AU SINAÏ: LE RETOUR A L'ANTIQUE DES MODERNES VIENNOIS 258 (2002).

[43] *See* ULRICH K. PREUß, ZUM STAATRECHTLICHEN BEGRIFF DES ÖFFENTLICHEN (1969); HELMUT K. J. RIDDER, DIE ÖFFENTLICHE AUFGABE DER PRESSE IM SYSTEM DES MODERNEN VERFASSUNGSRECHTES (1962); ALFRED RINKEN, DAS ÖFFENTLICHE ALS VERFASSUNGSTHEORETISCHES PROBLEM: DARGESTELLT AM RECHTSSTATUS DER WOHLFAHRTSVERBÄNDE (1971).

[44] *See* RUDOLF SMEND, VERFASSUNG UND VERFASSUNGSRECHT 80 (1928) (providing a historical perspective); Korioth, *supra* note 30, at 39, 59 (discussing the evolution of the public dimension of churches in Germany).

[45] For a discussion of the *individual* self-interpretation in the process of doctrinal structuring of the limits of constitutional liberties, see MARTIN MORLOK, SELBSTVERSTÄNDNIS ALS RECHTSKRITERIUM (1993).

of a self-interpretation of the "democratic state." This is regarded as part of the "democratic *raison d'état*"—a symptomatic formulation—that can be referred to whenever the state wants to reject the widespread invocation of negative religious freedom against any unwelcome confrontation with religious symbols in the public sphere.

The problem of the argumentative weight of "constitutional preconditions" beyond the text of constitutional norms[46] as such is solved in a reductionist way: it is reformulated as the necessity to consider the self-interpretation of individuals, as in the domain of the arts, science, etc., on the one hand, while the collective dimension of this problem is boiled down by the recognition of the state itself as "the constitutional precondition *par excellence*."

According to a recent decision of the Federal Constitutional Court, in the event of a collision between the general obligation to attend schools and the religious freedom of parents who intend to teach their children at home[47] the former prevails because the state has a legitimate concern for the general capability to enter into dialogue with others that is taken to be a "basic precondition" (*Grundvoraussetzung*) of democratic decision-making and involvement in a public sphere.[48] Thus, religious freedom cannot be invoked to call the general obligation to attend schools into question. The knowledge-generating function of schools and their contribution to the formation of personal identities as a precondition of the exercise of constitutional liberties is reduced in quite a symptomatic way to the reproduction of the democratic *state*. One might ask whether the basic conditions of instruction cannot be guaranteed by parents themselves if certain requirements are fulfilled—as is the case in the United States—and attenuate the general obligation to attend public or private schools. This argumentation also includes a characteristic tendency to evade the collective dimension of religious freedom, which refers to different modes of coupling religion and western society.[49] This paradox seems to disappear when it is turned into the object of a democratic majority decision. At this point, it is no longer the entanglement of a historical form of life and constitutional law that is at stake, but merely a public decision that is, as such, beyond the constraint of justification. The productive societal tension between law, society and religion is being cooled off. The cultural-linguistic

46 *See* WALTER, *supra* note 34, at 76-78 (discussing the historical evolution).

47 Because of ethical concerns for sexual instruction and lax moral standards of behavior.

48 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Jun. 6, 2006, 2 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1693 (F.R.G.).

49 *See* CLASSEN, *supra* note 26, at paras. 76-79 (providing a discussion of the collective dimension of religious freedom (which is increasingly being played down)); Hense, *supra* note 21, at 14; *see also* Louis Dumont, *Religion, Politics and Society in the Individualistic Universe*, 7 (N. S.) PROCEEDINGS OF THE ROYAL ANTHROPOLOGICAL INST. 31, 32 (1971) (providing a comparative perspective).

symbolic dimension of a form of life that has dominated, and still dominates, the lives of individuals and societies[50] becomes a "competency" within the domain of state actions that seems to be able to absorb the collective character of what was formerly part of a separate societal public sphere. What is left to society is the individual option (a decision in itself) for religious freedom.

However, the collective dimension of the constitutive character of religion, which shapes the identity of individuals by paradoxical societal means—there is no self-construction of identity—is brought to bear when George Lindbeck assumes that "open societies" need religious communities in the process of inculcating "moral abstraction" in individuals, which is paradoxically necessary for the preservation of the openness and plurality of society.[51] In the same vein, Eric P. Santner takes the view that the biblical (in particular, the Jewish) tradition is the beginning of a form of life, and not only of reflection, which is the foundation of an opening towards the *Other*, the strangeness, as the reference to a "universality-in-becoming."[52] "Universality" is, in this perspective, regarded as a "possibility of a shared opening to the . . . turbulence *immanent* to the very construction of identity."[53] The "human being becomes a 'subject' by acts of foundation, preservation, and augmentation"[54]—with this conception, Santner builds a bridge between the psychoanalytic notion of the unconscious and the (not only Jewish) view of God and religion. From a similar perspective, Hans Joas regards religion as being founded in the "experience of transcendence."[55] This "experience of transcendence" is an experience in which the person also transcends himself or herself, not in the sense of a moral overcoming of the individual moral judgment, but in the sense of being thrown outside the limits of the self, of a being captured by something which lies beyond one's individual self, a movement that liberates from the fixation on one's self. The believers offer the non-believers the possibility of making this discovery of the *Other* for themselves—an offer that can, of course, miss the addressees.[56]

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[50] GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE 22 (1984).

[51] *Id.* at 66.

[52] SANTNER, *supra* note 39, at 5.

[53] *Id.*

[54] *Id.* at 26.

[55] HANS JOAS, BRAUCHT DER MENSCH RELIGION? ÜBER ERFAHRUNGEN DER SELBSTTRANSZENDENZ 17 (2004).

[56] *Id.* at 17, 31, 35.

IV. RELIGION WITHOUT CULTURE – CULTURE WITHOUT RELIGION?

A. *The Conflict Between Trans-Subjective and Subjective Components of Religious Freedom*

Under this construction, religion is attributed a basic function that, in Möllers's view, is encapsulated in a circular self-referential reflection of the state by a public decision. His argument that the plurality and ambivalence of religious forms (their potential destructive side) tended to be ignored in a reference to religion as a "constitutional precondition," as a societal non-state based "foundation," is itself erroneous; the openness and plurality of the Judeo-Christian tradition[57] is not an impediment to the construction of identity-building as a kind of appropriation of one's part in a collective culture.[58] On the contrary, it is the form that gives historical viability to the paradox of the collective venture of founding individual freedom. It goes without saying that this is not a plea for a "state religion." The state is not allowed to identify with religious ideas or discriminate against minority beliefs or non-believers—this is the true kernel of the "neutrality principle."[59]

This is different for those elements of religion that extend beyond "belief" in the stricter sense, and that have found their expression or repercussions in literature, morality or Christian symbols—including the crucifix.[60] At this point, a clarification is necessary: these remarks should not be misunderstood as a conception that denigrates the religious content of this symbol in favor of its cultural meaning,[61] as has been argued in the conflict over the constitutional acceptability of a crucifix in Bavarian or Italian state schools with the intention of reducing the emotional tensions that came to the fore in the public debate by formulating a compromise. However, the crucifix is a symbol that allows for different readings; it is a Christian religious symbol for

57 STEPHANE MOSÈS, EROS UND GESETZ 91 (2004).

58 DROR WAHRMAN, THE MAKING OF THE MODERN SELF: IDENTITY AND CULTURE IN EIGHTEENTH CENTURY ENGLAND 168 (2004).

59 *See* Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 GERMAN L.J. 2 (2007), *available at* www.germanlawjournal.com/article.php?id=795 (providing an English summary of LADEUR & AUGSBERG, *supra* note 1).

60 For the communicative message of the crucifix, see HUSTER, DIE ETHISCHE, *supra* note 22, at 152, and the dissenting opinion of three judges in Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (F.R.G.).

61 The crucifix is a religious symbol, but this does not exclude the possibility of a public authority as such—in a polycontextual setting of different systems—to observe the symbol as a cultural one.

some, and it can be a cultural symbol for others, which may be interpreted in a positive or a negative way. The state may well allow this conflict of interpretation to be deployed in the public domain. The principle of "neutrality of the state" implies that the state is not allowed to define "the religious"[62] but can only establish meta-rules for the management of a regime conflict that may open the regime of public education for a "reentry" of "the religious" as it is defined by religious institutions into the realm of public education as far as it is compatible with culture as the "collective memory."

Here, a parallel may be drawn with the decision of the Federal Constitutional Court on the legality of school prayers in state schools.[63] According to the view taken by the Court, an identification of the state, on the one hand, and a constraint imposed on the pupils, on the other, would be incompatible with the freedom of religion, even if "exceptions" for both teachers and pupils were accepted. However, giving the opportunity to both groups to say a prayer *before* the beginning of school instruction (early in the morning) is a constitutional option which follows the model of religious instruction according to the German understanding of "neutrality," which is not equivalent to the French "*laicité*." The role of the so-called negative freedom of religion, which may appear to be infringed by the public exhibition of religious symbols that can be attributed to "state acts," should not be overstated. It should not be invoked with the intention of imposing restrictions on that positive religious freedom of pupils and teachers which is the core of this civil right. In this respect, the German distinction between the positive and the negative version of this freedom may be misleading.

B. *Reenter the Cultural Dimension of Religion*

The coupling of religion and the evolution of collective cultural traditions that play a role in the formation of individual identities is also the means for legitimacy of the privileged position of the established Christian denominations. The dominant, more individualized interpretation of religion reinforces in a normative perspective a tendency to separate not only the state and religion but *culture* and religion.[64] This distinction opens the legitimate space for tolerance as the meta-norm for the management of conflicts with other minority

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62 In fact, this obviously happens more often than not in state practice. *See* OLIVIER REY, LA SAINTE IGNORANCE: LE TEMPS DE LA RELIGION SANS CULTURE 252 (2008).

63 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 16, 1973, 52 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 223 (F.R.G.); CLASSEN, *supra* note 26, at paras. 161-63.

64 REY, *supra* note 62, *passim*.

religions or non-believers.[65] Their position *vis-à-vis* the objective collective and cultural weight of religious traditions in the public sphere has to be guaranteed by the individual components of religious freedom, which have to be recognized in state schools in particular. This element is primarily embodied in the negative religious freedom, but is also present in the principle of respect for cultural diversity in public instruction in general. This is the counterpart of the collective momentum of religion and religious values in the process of forming identities in state schools.

The impact of religious traditions on the common culture and the reproduction of a shared knowledge basis in state schools is a consequence of the inscription of the trans-subjective element of the symbolic-linguistic forms of life, which must be inculcated in the process of the cultural reproduction of a society. The tendency towards a decoupling of religion and society is equivalent to an "exculturation" of religion, or alternatively a reduction in the meaning of culture.[66] In this respect, there cannot be an unlimited range of options offered to individuals; there is always a "heritage" that, in itself, includes a reference to the future openness and plurality of culture for the adolescent or adult individual. A formal equality of religions cannot be expected or established at this stage of identity construction in the domain of public schools. However, a specific "structural tolerance" ("*structure tolérance*")[67] in the public sphere has to be determined by the fact that, at a first stage of public education (of younger pupils), the "heritage" character of culture, the reproduction of a "collective memory,"[68] can take a privileged position to the detriment of cultural and religious divergence and plurality. As mentioned above, at this stage, the following stage of cultural reproduction already has to be anticipated and prepared for,[69] i.e., the transition from a presupposed, un-chosen model of identity to a culture of choice, of diversity and plurality that opens the path towards a self-reflexive position *vis-à-vis* the multiplicity of options inherent in the "pool of variety" of a liberal

[65] Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 16, 1979, 93 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (8) (F.R.G.); Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 16, 1979, 52 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 223 (241) (F.R.G); VOLKER WICK, DIE TRENNUNG VON STAAT UND KIRCHE 82 (2006).

[66] REY, *supra* note 62, at 153, 156.

[67] ZARKA & FLEURY, *supra* note 7.

[68] *Cf.* BAECKER, *supra* note 34, at 158; MARGOLIS, *supra* note 34, at 24, 94. *See generally* JAN ASSMANN, DAS KULTURELLE GEDÄCHTNIS: SCHRIFT, ERINNERUNG UND IDENTITÄT IN FRÜHEN HOCHKULTUREN 29, 34 (1997); MAURICE HALBWACHS, DAS GEDÄCHTNIS UND SEINE SOZIALEN BEDINGUNGEN (1985).

[69] ZARKA & FLEURY, *supra* note 7, at 148-49; *cf.* JEAN-CLAUDE KAUFMANN, QUAND JE EST UN AUTRE 89-90 (2008).

culture.[70]

This hypothesis does not imply the assumption that it is only through religion that access to the "common pool of ideas" of shared knowledge, which should open a space of individual choice and self-construction, is imaginable. But it can be assumed that an alternative is not easy to formulate, which is demonstrated by the irritating and uncertain role of state schooling in postmodern fragmented societies. The position taken in this paper only favors the hypothesis that it is difficult to renounce the contribution of religion to the formation of identities by schools in liberal societies.[71] This is why one can, in fact, speak of the role of established religious denominations in a collective culture as being a "precondition of the constitution" that, unlike an explicit decision, allows for a broad interpretation of the constitutional norms concerning the status of religion in state schools. This role cannot be attributed to religion solely by positive law in the stricter sense, as Möllers assumes, because of its inscription in a distributed knowledge base that finds its repercussions in literature, in practices of teaching, moral standards, and conventions of respect and politeness, etc., all of which are mainly implicit to a culture and can be reflected upon only in a limited and case-by-case way. This can be demonstrated by the case of the crucifix. What is the normative value of a norm that allows for the exhibition of the crucifix in state schools? There is no clear rule that might be imposed by positive law, but only the reference to a precondition of schooling, which loses its sense once it no longer resonates with the practice of learning. "Constitutional preconditions" have mainly an unconscious character; they are the "traces" of the past, which have to be interpreted and adapted again and again to the changing conditions of cultural reproduction, but they are not norms in the stricter sense that always presuppose the adult individual as the subject of choice and the addressee of obligations.

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[70] ZARKA & FLEURY, *supra* note 7, at 148-49*; see also* KAUFMANN, *supra* note 69, at 89-90.

[71] For the "blind spot" of the *becoming* of a person in theories of the public rationality of communication, see Jill Gentile, *Between Private and Public: Towards a Conception of the Transitional Subject*, 89 INT'L J. PSYCHOANALYSIS 959, 960, 970 (2008). "Through the creation of symbols . . . we actually create ourselves as symbols, becoming part of material and cultural life." The individual "truly belong[s] *between* private and public," which creates a paradoxical challenge for public schooling, which, in a sense, has to *generate* individuals and refer to liberty in the future. *Id.* The concept of the "transitional *subject*," which elaborates upon Winnicott's seminal idea of the "transitional object," might indicate the "not yet" of the adolescent's being a person. *See* D'ALLONNES, *supra* note 17, at 251 (providing a view to the trans-subjective "symbolic system," which structures a series of events and establishes a "longue durée" of meaning).

V. "COLLISION RULES" INSTEAD OF THE "NEUTRALITY PRINCIPLE"

A. *The Paradox of a Public Obligation to Form Free Individuals*

One should not be misled by the fact that, naturally, a (school) administration is the addressee of an obligation to exhibit the crucifix in classrooms (if such a norm exists). However, the explicit binding element *vis-à-vis* teachers and pupils is something different; it is, in fact, very limited. In this respect, it should be repeated that the role of civil liberties is not exhausted by its functions as a guarantee of individual choices in different social systems (arts, economics, science, etc.)[72] and a limit imposed on state acts that intend to reduce this liberty (*Abwehrrecht*), and a supplementary component of civil rights exists in the guarantee of the societal self-organization of norms, conventions, patterns of action, values and practices. This relational rationality of civil rights, which is concerned with the networks of relationships among individuals (and organizations), also finds its expression in institutions, such as state schools, which are meant to reproduce the possibilities of access to, and participation in, these networks. This is the background condition of the state school as the trans-subjective institution that has a constitutional status in Germany. This paradoxical trans-subjective component of public education cannot be reduced in a one-sided way to an individual right to public assistance because of its enabling role in the process of becoming a subject of choices. Neither can it be dissolved in the positive competency of the state to make decisions on the organization of public instruction (this would be Möllers's position).

A restriction of this collective element of schooling in the process of reproducing the "individual of society"[73] in a merely self-referential perspective on the reproduction of democracy as a form of the state and its entrenchment in a public realm of debate would not be viable either. The preliminary question of the paradoxical generation of the subject of liberties would be evaded. It should be stressed again that the reference to a concept of "identity" does not imply the assumption that a homogeneous unity of the individual could, or should, be the "goal" of public schooling. On the contrary! It is, instead, the *problématique* of the collective conditions of the constitution of the subject both *of* and *in* a liberal constitutional order that is at stake, and that is missed by the

[72] *See* LUHMANN, DIE RELIGION, *supra* note 9; WILLKE, *supra* note 9; KARL-HEINZ LADEUR, POSTMODERNE RECHTSTHEORIE. SELBSTREFERENZ—SELBSTORGANISATION—PROZEDURALISIERUNG 176-90 (2d ed. 1995).

[73] *See* MARKUS SCHROER, DAS INDIVIDUUM DER GESELLSCHAFT: SYNCHRONE UND DIACHRONE THEORIEPERSPEKTIVEN (2001).

reference to the reproduction of a democratic citizen as the goal of public education.[74] The question of a societal identity of the "individual of society" has to be raised first. "Identity" in this sense refers to the paradoxical question of the beginning of individuality, which cannot, by itself, be the object of "choice"[75] but does remain a precondition for making choices. The far-spread tendency to ignore this paradoxical unconscious or trans-subjective *Other* of the individual, its permanent "shadow," which haunts the individual even after having attained the reflexive capacity to make choices by its continuous processing of cultural revisions and reinterpretations,[76] misses the division in the subject. The individual is merely the self-determination that is emancipated even from the *Other* of the law or the judgment of others (the famous "man within" of Adam Smith) only when it dissolves in the purely ephemeral volatility of a continuously changing combinatory of expressive clichés that are "sampled" in the immediate self-experience offered by the postmodern consumer society.[77] In a less emotional way, individuality becomes the malleable object of permanent "bargaining" with both *Others* and *the state* about the construction of a self.[78]

The consequences of this evolution can be observed in the transformation of the legal system, whose objective abstract and universal structures are increasingly replaced or supplemented by situational "balancing" on a case-by-case basis, in which individual and general elements are entangled in a horizontal network of new "rights" to self-fulfillment and satisfaction of needs, instead of constitutional rights to participate in the trans-subjective networks of the differentiated social systems. The foundational character of the law is replaced by more complex procedural elements of *ad hoc* co-ordination of private and public interests that do not allow for the formation of social expectations, norms, conventions and patterns of action by self-organized institutions that generate a shared "common knowledge," and, on this basis, trust in the stability of society, on the one hand, and a

74 It is also a widespread illusion to assume that public education can be steered "democratically"—in European countries this illusion takes on the form of the never ending cycle of "reforms" and "reforms of reform." The well known book by Amy Gutmann, DEMOCRATIC EDUCATION 54-56 (1987), follows the concept of "value clarification," which ends up paying deference to a kind of self discovery of the individual. *See* SIDNEY B. SIMON, LELAND W. HOWE & HOWARD KIRSCHENBAUM, VALUES CLARIFICATION: THE CLASSIC GUIDE TO DISCOVERING YOUR TRUEST FEELINGS, BELIEFS AND GOALS (1995); *see also* MARIE-CLAUDE BLAIS, MARCEL GAUCHET & DOMINIQUE OTTAVI, CONDITIONS DE L'EDUCATION (2008) (providing a pertinent critique of postmodern public education).

75 WAHRMAN, *supra* note 58, at 168.

76 MARGOLIS, *supra* note 34, at 94-96.

77 *See* OLIVIER REY, UNE FOLLE SOLITUDE: LE FANTASME DE L'HOMME AUTO-CONSTRUIT 233 (2006); DANY-ROBERT DUFOUR, L'ART DE REDUIRE LES TÊTES 127 (2003).

78 LUCIEN JAUME, LA LIBERTÉ ET LA LOI: LES ORIGINS PHILOSOPHIQUES DU LIBÉRALISME (2000); CHARLES MELMAN, L'HOMME SANS GRAVITE 129-31 (2005) (providing a psychoanalyst's perspective).

movement of self-observation and self-control, on the other.

Religion stands for the inevitable retention of the "split" in the subject,[79] which is the basis of the self-transformation of society and the opening for its diversity and the universality of the *Other* and of the *Others* (the "neighbors"). This is why religion and churches have, with good reason, been the cornerstones of the "public sphere" situated between the state as the organized public actor and the private individuals in civil society.

The *problématique* of post-modernity is mirrored by the rise of the negative freedom of religion—beyond the limits of the obvious legitimacy of protection from constraint in a stricter sense—that has increasingly been transformed into a right not to be confronted with the *Other* of transcendency transfigured by religious symbols in the public sphere.[80] This is one of the phenomena of the transformation of religion in post-modernity, a replacement of transcendence with a need for an immediate expressive feeling of the *Other*, who is the object of a projection of a wish for recognition.[81] The other side of this immediacy of emotional self-affirmation is to be seen in the transformation of the trans-subjective character of religion into a "personal conviction"[82] that rejects any abstract and objective bindingness, including any meta-norms for the coordination of the rules of religion and public norms. This also has consequences for the legal and constitutional determination of what "religion" means: it has been pointed out above that the role of constitutional rights also consists of the self-organization of trans-subjective functional systems in society, including religion.[83] This idea has had repercussions in the earlier judgment of the Federal Constitutional Court, which tried to restrict the protection of the civil right to religious freedom to traditional religions (not just Christianity).[84]

This approach of giving religion more contours went, perhaps, too far, but at least it paid tribute to the trans-subjective component of religion, while the more recent jurisprudence has abandoned all attempts to determine a concept of religion that would reach beyond the subjective feeling of individuals who invoke the right to religious

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79 SLAVOJ ŽIŽEK, DAS UNBEHAGEN IM SUBJEKT 124-26 (1998).

80 Slavoj Žižek, *Neighbors and Other Monsters: A Plea for Ethical Violence*, *in* SLAVOJ ŽIŽEK, ERIC L. SANTNER & KENNETH REINHARD, THE NEIGHBOR: THREE INQUIRIES IN POLITICAL THEOLOGY 134, 184 (2005).

81 LINDBECK, *supra* note 50, at 22.

82 GAUCHET, *supra* note 15, at 169, 175; Leora Batnitzky, From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law 19 (unpublished Manuscript) (on file with author).

83 LUHMANN, DIE RELIGION, *supra* note 9.

84 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Nov. 8, 1960, 12 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (4) (F.R.G.); CLASSEN, *supra* note 26, at para. 79.

freedom. Civil rights in general, and religious freedom in particular, are reduced to different versions of the same right to personal self-expression and self–affirmation, whereas the unavoidable limits that the use of these rights has to accept is abstracted from the *eigen*-rationality of social systems, and take on the character of a generalized reservation for the requirements of "community" (*Gemeinschaftsbindung*) that is, more or less, defined by the state authorities, and balanced with the self-interpretation of individuals.[85] This evolution cannot be avoided once the *eigen*-rationality of the trans-subjective social systems and their potential self-organization and production of self-imposed constraints is played down. In the end, a definition of what a religion and its specific rationality are, according to a collective practice and its dogmatization, is no longer possible. At the same time, the criteria for the formulation of limits to religious freedom cannot be formulated in a specific manner that could be adapted to the collective understanding of its organizations and traditions. Rather, we are left with personal feelings, which cannot be evaluated in a rational way from the "outside."

B. *The Legal Management of a "Regime Collision"*

The development of Christianity, Judaism, Islam and other traditional religions has been accompanied by reflections on the "conflict of norms" of religious rules and state law. This "collision of regimes,"[86] the clash of religion and politics in particular, has led to a number of ways of internalizing the rules generated in other social systems within the *eigen*-rationality of religion. All traditional religions have also been shaped in the past by meta-norms, which allowed for a "structural coupling" of politics and religion. This cooperative approach, and as a consequence the search for "rules of collision," changes fundamentally when religions are increasingly personalized, or, as in the case of Islam, the individualization is used to escape from the legal requirements formulated by a non-traditional western state, while the coordination of religion and politics in Islamic countries poses no serious problems. This is another phenomenon that mirrors the deep transformation that religion has undergone in post-modernity.

The evolution of a personalized understanding of religion corresponds to the above-mentioned tendency to expand the role of

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[85] Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Nov. 8, 1960, 12 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (F.R.G.); CLASSEN, *supra* note 26, at para. 79.

[86] *See* Andreas Fischer-Lescano, *Kritik der praktischen Konkordanz*, 41 KRITISCHE JUSTIZ 166 (2008). *See generally* ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, REGIME-KOLLISIONEN: ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS 57-65, 170-71 (2006).

negative religious freedom because it may protect the "inner forum" of the believer, who does not refer to symbols in public in the same vein as non-believers. The invocation of the positive version of religious freedom still contains the remnants of a trans-subjective and collective role of religion in the public sphere. The individualization of the principle of tolerance and its coupling with a strong conception of "negative" religious freedom results in the recognition of the right of each individual to live according to his or her own values and preferences, and consequently, the protagonists of a relativistic morality have to refrain from communicating their hypotheses in a multi-cultural society because this would hurt the identity of the adherents of religions.[87]

The complex differentiated status of religion *vis-à-vis* the postmodern western state can be demonstrated with reference to religious instruction in state schools[88]: the right is granted to all religious communities in the same way but the specific relationships between Christian churches and the state have left their traces in the formulation of the conditions that have to be fulfilled by claimants. The right can only be invoked by "religious communities" that have organized themselves in a "church-like" manner, i.e., they have to be autonomous and separate from secular organizations. This condition cannot easily be met by Islamic associations, which do not, in general, acknowledge this principle of clear separation. In addition to this requirement, the constitution presupposes a religious doctrinal self-reflection of spiritual communities that guarantee a certain unity and consistency of the "denomination." This requirement is, again, not easily fulfilled by many of the "new" religious "sects" or by Islam. Notwithstanding the constitutional guarantee of religious instruction, this interpretation of the right of religious communities appears to be adequate because a regime of cooperation between the state and the religious community is at stake, not the self-affirmation of a religion. This is not just freedom of religion but its role in public instruction, which was to adopt certain standards of systematicity, doctrinal reflection for religious instruction, and, as a consequence, an academic education of the teachers. These requirements need not, of course, be met in the autonomous reproduction of faith in churches or equivalent organizations.

This link between a religious constitutional right and state authority is an example of the complexity of the relationship between religion and politics, which cannot be managed by "balancing" alone. It shows that, even in other fields of conflicts, the *problématique* of the

87 VINCENT DESCOMBES, LA RAISONNEMENT DE L'OURS 202 (2006).

88 *See* Werner Heun, *Integration des Islam*, *in* RELIGIONSVERFASSUNGSRECHT, *supra* note 21, at 339.

"principle of neutrality" in the public sphere in particular, the question has to be raised of which "collision rules"[89] have to be formulated for the coordination of the trans-subjective collective role of religion and its contributions to the reproduction of culture, on the one hand, and the requirements of respect and tolerance for individual "dissenters," on the other.[90]

A similar "rule of collision" that differentiates between religions and allows for a multilevel order following the conflict line that is at stake might be formulated for the regime of private schools, and religious private schools in particular. According to Article 7 paragraph 4 of the German Constitution, private schools have to be controlled and evaluated by the state. For primary schools, there is still a further requirement that there be a specific pedagogical interest in the establishment of a new type of private school (including a religious one), while, for secondary schools, it is the other way around: pedagogical or other public interest must not conflict with the task of the school. With respect to religious schools, a differentiation is possible, which would favor a cognitive or proof rule that privileges religions which have a long tradition of theological thinking and pedagogical practice. In contrast, new, "fundamentalist" religions should not be able to profit from these procedural rules and the underlying strict administrative scrutiny, which would not, in principle, exclude such religions from organizing private schools. It does not go without saying that fundamentalist religions that favor the emotional-expressive side of religion as opposed to the transcendental *Other* can refer to a rule of presumption that has been tested for traditional religions over the course of centuries.[91] It should not be neglected that this "multilevel" order of "collision rules" does not at all exclude the individual freedom to follow such a religion. At this point, the fundamental traditional "limit of damage,"[92] which can be regarded as a liberal test-standard for public restrictions imposed on individual liberties, can be brought into play. This limit has a protective effect in as much as the presence of the "danger" for a private or public good—not just any interest—is to be valued upon the basis of societal distributed "common knowledge," and not upon a privileged "state (or

89 Fischer-Lescano, *supra* note 86, at 166.

90 If one bears in mind that rules of collision for the conflict of opinions or religions should not primarily harmonize conflicts, but structure a controversy or a clash of values, the exclusion of religious symbols from public schools should only be the last measure taken; to avoid the conflict with the otherness of others should not be a primary goal of public education. *See* Žižek, *supra* note 80, at 178.

91 Karl-Heinz Ladeur, *Genehmigung privater Konfessionsschulen*, 41 RECHT DER JUGEND UND DES BILDUNGSWESENS 282 (1993).

92 *See* NADIA URBINATI, MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT 134, 162-64 (2002).

police) science" on which the state authorities my be tempted to base their decisions, as was the case during the absolutist reign in Europe. As mentioned above, the Federal Constitutional Court in an earlier decision[93] had, in principle, drawn a legal distinction between traditional ("familiar") religions and "alien," or new, religions. In this general form, the distinction is not compatible with religious freedom, although this distinction can be useful within a system of "rules of collision" when it comes to the point where trans-subjective networks of cultural relations have to be referred to, for example, in the conception of state education, or when the protection of children and younger persons from detrimental influences and the presumptive effect of a procedural "rule of freedom" does not count. Against the background of this distinction between individual freedom and the reproduction of "identity" in the above-mentioned way, the reproduction of a distributed "collective memory" and the link to the movement of the "self-transcendence" of the individual in educational processes does have an institutional standing in the multi-level management of the "collision of rules" (here, politics and religion).

C. *For a Differentiated Typology of Conflicts*

1. The Islamic "Headscarf" in Particular

This consideration leads to the question—which has already been raised with reference to school prayers[94]—of whether the role of the state in the process of enabling individuals (pupils, parents, teachers) and organizations to introduce certain subjects of instruction, symbolic forms, or rituals as part of the collective cultural dimension into state schools should not be kept separate from the "official" identification of the state with religious doctrines that might threaten the individual component of religious freedom. These ideas are not equivalent. There seems to be a whole range of relationships between religion and the state in public education. While the state merely offers a framework for personal encounters between teachers and pupils or for pupils among themselves by allowing time to be spent on prayer before the beginning of the official teaching, the state does not identify with religion, which would establish something like a state religion. The possibility of a

93 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Nov. 8, 1960, 12 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 1 (4) (F.R.G.); CLASSEN, *supra* note 26, at para. 79.

94 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 16, 1979, 52 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 223 (F.R.G.); CLASSEN, *supra* note 26, at paras. 161-63.

spillover in the form of discrimination against nonbelievers cannot be completely discarded, but this is more a pedagogical than legal question.

The necessity of drawing a distinction between different modes of public involvement in religious questions can also be demonstrated for the question of whether a Muslim female teacher is allowed to wear the "Islamic headscarf"[95] or, more generally, whether clearly visible religious symbols may be worn by teachers in public schools. It is clearly not the neutrality of the state, as such, that is at stake—nobody in a Christian or Jewish country would assume that the state identifies with Islam.[96] Instead, it can legitimately be asked whether the teacher as an individual identifies with a version of Islam that does not accept the implicit "collision norms" that are applied in the process of coordination of faith, religious components of the collective culture and the cognitive components of public education. A teacher has to be able to contribute to the pupils' access to their own culture, bearing also immigrants in mind in order for the teacher to manage the turbulence of a multicultural society. In this respect, a clear distinction has to be made between Islam and Judaism because the *Kippa*, for example, is not an indicator of the unwillingness or inability of its bearer to manage this cultural "conflict of norms." Anyhow, first, a clear distinction should be made between the identifications of an individual, even in a public function, and the state as such. Here again we have to draw a distinction that is ignored by the dominant individualistic interpretation of the relationship between state and religion: the headscarf is, unlike the crucifix and the *Kippa*, not really a sign but a "thing" that hides the female body (or a part of it) from the male gaze because of its supposed fascination.[97] This "thing" may of course be (and is in fact in post-modernity) recoded, but as such it demonstrates the close relationship between culture and religion because it inscribes a social status in the body, and this inscription collides with the cultural heritage of western societies.

2. The Constitutional Liberty of Private Schools As an Escape Clause

With respect to Islam, the collision has to be handled in a differentiated way as outlined above. Clearly, the evolution of a

[95] *See* Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVferGE] 282 (F.R.G.) (discussing the conflict over the "Islamic headscarf" in Germany); Huster, *Die Bedeutung*, *supra* note 22, at 117-18.

[96] *See* Huster, *Die Bedeutung*, *supra* note 22, at 118 (discussing the problem of the attribution of the symbolic value of the headscarf to the state).

[97] FETIH BENSLAMA, LA PSYCHANALYSE À L'ÉPREUVE DE L'ISLAM 195 (2003).

hermeneutically reflected Islam in western societies cannot be excluded for the future. However, for the time being, a rule of presumption in the procedure of decision making on the legality of private Islamic schools cannot be brought to bear on the legal evaluation. This is different again for the question of whether the individual female pupil can refer to Islamic rules of clothing for women: in this constellation, the individual option of the woman (even if it is chosen under the pressure of tradition) takes the lead over the collective dimension of the reproduction of identity in a western society, which would occur in a private school. This is the way a western society "constructs" a conflict between the elements of a collective memory and its reproduction on the one hand, and the rise of a competing collectivity on the other:[98] It can only be reduced to the domain of individual freedom,[99] although this may not seem satisfactory to Muslims. One has to add that this may be different from country to country; the "headscarf" may also become a real challenge for the pedagogical prerogatives of the state if it stands for an attitude of resistance against western education. Here, again, the differentiated "collision rules" may be brought to bear on the decision according to the status of religion in German constitutional law. One may not, as an individual parent, challenge the collective character of public education and its contents in a general way—it must be done by collectively founding a new private school, which has to be done in a public procedure. As shown above, the public privilege is reintroduced in this procedure by certain standards of education that cannot be questioned, but that do not exclude strong religious orientation.[100]

VI. OUTLOOK

On the basis of the considerations discussed above, the famous case of the Amish decided by the United States Supreme Court in 1972[101] might also find a differentiated solution. Here, we are confronted with a religious and cultural community that has existed in the United States for centuries. The "functioning" of the group within

[98] *See* NAZIH AYUBI, POLITICAL ISLAM: RELIGION AND POLITICS IN THE ARAB WORLD 91 (1991) (discussing the theologico-political constellation in Islamic countries); *see also* BENSLAMA, *supra* note 97, at 100-01 (discussing the relationship between the state and the individual).

[99] For the right of Muslim parents not to allow girls to attend co-educational sports courses, consider Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] July 12, 2000, 94 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 82 (F.R.G.); Oberverwaltungsgericht Nordrhein-Westfalen [OVG] [Court of Appeals in Administrative Matters] July 12, 2000, 11 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 77 (2001).

[100] This is also an argument for why the "Law of the Sharia" as a collective tradition cannot be accepted by a western postmodern society

[101] Wisconsin v. Yoder, 406 U.S. 205 (1972).

the American society is a value that has to be taken seriously; there is even a practice of opening the traditional community for an "escape" option, the so-called time of "rumspringa," which means that a young member can decide by himself or herself whether he or she prefers the traditional way of life to postmodern alternatives. This may be an illusionary "free" decision, but regardless, this is a kind of "rule of collision" that links the traditional community with a postmodern "corridor" of choice in the sense of the liberal constitution and that should be respected as a meta-rule of coordination.

In the conflict of "home education," which is legal in the United States once certain requirements concerning the capabilities of the home teacher have been met, a "collision rule" could also be formulated following the abovementioned considerations that could avoid the popular "balancing" of interests. This approach tends to give up any effort to search doctrinal contours of the rights and competences that conflict in this case. The constitutional value of the public responsibility for schools in general (public and private alike) alone is not an argument for a general obligation to attend schools and to reject "home-education" as unconstitutional. This is all the more so because the concern about the rise of a "parallel society" within postmodern fragmentation appears to be too unstructured, in particular when it is raised against Christian or Jewish "fundamentalists" who, in fact, do not tend to turn their back completely on the postmodern fragmented society. Instead—at least in Germany—it would be possible to take recourse to a rule of collision that, in this case, is part of the constitutional order of the school system. Again, one might claim that the collective trans-subjective momentum of religion and its contribution to the formation of "identity" is to be valued in a way that is different from the mere individual choice of a "belief." The freedom to establish private (religious) schools is not only part of the plurality and openness of a postmodern culture, but also a version of the positive value of this religious freedom. Religious diversity is only acceptable when a procedural component is recognized, *i.e.* a differentiated requirement to lay open the elements that constitute this divergence in a process that has the character of a public reflection in itself.[102] In this respect, the right to establish private schools is itself a procedural collective right that can be invoked by groups and for groups only. This may not be convincing to everybody, but, in this case, one may claim that this is the will of the Constitution. This view would, at least, fit into the procedural framework of the Constitution and the model of a set of "rules of collision" between trans-subjective, personal, and the cognitive elements of religious freedom in a postmodern society.

[102] See the procedural conditions outlined above.