

Contemporary Comments

THE FREEDOM OF RELIGION WITHIN A SYSTEM OF BASIC RIGHTS ACCORDING TO THE GERMAN BASIC LAW AND THE INDONESIAN CONSTITUTION*

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I. Constitutional Order with Basic Rights under Eternal Principles

The “Basic Rights” as laid down in the German constitution, the Basic Law of 1949, draw a conclusion from the universal idea of Human Rights: This idea is a crop of the belief, that every human being is endowed with dignity and therefore has a “right to have rights”. These Rights are universal, eternal, perhaps of divine origin, but can not be sued in a state court. The fundamental native rights of the human person therefore have to be written down and guaranteed in a constitution drafted and imposed by men – in the case of Germany: the so called Basic Law (see Art. 1 secs 1-3 GG). It is, as is the 1945 Constitution of the Republic of Indonesia (UUD 1945), which also

guarantees Fundamental Rights, an expression of the people’s free self-determination and constituent power (in other words: an expression of the sovereignty of the people) – as state unanimously the preambles of both constitutions as well as the relevant following provisions (of Art. 1 sec. 2 UUD 1945 and Art. 20 sec. 2 of German Basic Law).

If we compare the 1945 Constitution of Indonesia with the German Basic Law there are further similarities: Both constitutions refer to the people’s will of being part of an international community which is devoted to the United Nations principle of promoting *freedom, peace and justice* in the world (see Preamble UUD 1945; Art. 1 sec. 2 GG). So it is true for the two states of Indonesia and of Germany that

* In addition to this, also with regard to the decision of the German Federal Constitutional Court of January 27th 2015 (BVerfG – 1 BvR 471, 1181/10) and to the judgement of the Constitutional Court of the Republic of Indonesia (MKRI) of April 19th 2010 (Nr. 140/PPU-

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their national constitution is not the only source of law the state authority has to observe. Both states are integrated in the legal system of international law, including e.g. treaties on human rights such as the ICCPR; Germany moreover is part of the European Union and has to take into account the European Charter of Basic Rights, when enforcing European law in Germany. However, even then the constitution is, and remains, in some respect the “paramount law” (as the US Supreme Court stated in *Marbury vs. Madison* 1803), the supreme norm in the hierarchy of laws, which is setting the basic legal standards. This can be said of Indonesia as well as of Germany.

Even if we can't go into details here: There *must* be limits to the influence of external legal orders – at least because both constitutions claim to be built upon and to have founded the state on an unassailable, unalterable basis of implemented eternal principles. The 1945 Constitution of Indonesia is built on the five pillars of “Pancasila” as defined in its Preamble. Pancasila represents the quintessence of a

legitimate legal order and the `source of all sources of law² in Indonesia. These pillars or principles are Humanity, the Unity of Indonesia, a representative and deliberative Democracy, Social Justice, however *in the very first place*: the belief in the One and Only (Almighty) God. One might say the constitution thereby acknowledges “Theism” as Indonesia’s state philosophy³ and as the “fundamental basis of national life”⁴, that may never, and in no way, be changed or overthrown⁵. German Basic Law in a similar way declares certain constitutional principles for absolutely unalterable: The provision of Article 79 paragraph 3 of the Basic Law, the so called Eternity guarantee, stipulates that amendments to the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law – i.e. democracy, the rule of law, the principles of the social state, of the republic, of the federal state, as well as the substance of elementary fundamental rights – shall be inadmissible. That means: under no circumstances, not even by an amendment of the constitution, could

² S. Butt/T. Lindsey, *The Constitution of Indonesia, 2012*, p 14 quoting Art. 2, Law 10 of 2004 on Law-making.

³ MKRI Nr. 140/PUU-VII/2009 Par. 3.34.9; 3.34.23.

⁴ S. Butt/T. Lindsey, *The Constitution of Indonesia, 2012*, p 23.

⁵ MKRI Nr. 140/PUU-VII/2009 Par. 3.72.

Germany give up these principles – as this would be unconstitutional⁶.

However, apart from an obvious correlation, closer comparison between the two constitutional texts shows a significant difference: The founding Fathers (and Mothers) of the German Basic Law have been “conscious of their responsibility before God” (see the Preamble) and the German state does not have a distancing, hostile attitude towards religion and religious societies “in the sense of a strict separation of state and church”. On the opposite the state is called upon to safeguard religious freedom in many ways and to “(encourage) freedom of faith equally for all beliefs”⁷. However as a secular institution the state of the Basic Law stays neutral in regard to religious or philosophical creeds (so called religious and ideological neutrality required of the state)⁸. Religion is – as it is mostly in

western countries – a *private matter*, left to any individual’s “pursuit of happiness”⁹.

It doesn’t come as a surprise, that in Germany the individual right to the free development of one’s personality (the general freedom of action, the right to do whatever one wants to do) is limited by all the law in compliance with the constitution (the “constitutional order”), by the rights of others and even by the moral law (Art. 2 Par. 1 BL) – but *not by religious values*¹⁰. Not so in Indonesia: As Pancasila is the supreme source of law (setting the standards for all law), which includes as its first principle the belief in an almighty God, it qualifies religious values as a genuine part of the constitution, creating equally individual rights *and* obligations; obligations, which generate limitations of individual freedom¹¹. The Judgement of the Constitutional Court from the 19th

⁶ It is in compliance with the Basic Law though to impose a totally new Constitution, Art. 146 BL.

⁷ See Federal Constitutional Court (FCC) 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (339, Par. 110).

⁸ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (339, Par. 110).

⁹ *Christoph Enders*, Religion as a Private Matter, in: Enders/Afifah Kusumadara (ed.), *United in Diversity*, 2012, p. 9.

¹⁰ Art. 2.1 of the German Basic Law says: "Every person shall have the right to free development of his personality insofar as he does not violate

the rights of others or offend against the constitutional order or the moral law". Of course in Germany there is a close relationship between the rules of conduct handed down by the Christian (Catholic and Protestant) Church – as e.g. the rules given in the “Sermon of the Mount” in the Bible’s New Testament – and the rules of the “moral law” generally accepted in the society as a whole. Nevertheless those moral rules nowadays have a standing of their own and are no longer legitimated by their religious provenience.

¹¹ In contrary to the possible limitations stated in Art. 2.1 of the Basic Law Art. 28J.2 of the 1945 Constitution of Indonesia stipulates that laws

of April 2010 makes it very clear: The Indonesian “rule of law” has to be interpreted from a specific, not entirely secular perspective¹². “State implementation of the Pancasila” then is indeed all but “rhetoric”¹³.

II. Unlimited Criticism? Opinions defaming religions and religious associations

This difference between the Indonesian and the German constitutional perspective may be shown in examining cases that concern conflicts between religious groups and their opponents or critics that behave, according to the self-reception of the religious group, indecently. A typical area of tension and of such conflicts affecting Religion and religious sensations is the public debate over “Islamization”. In Germany the fear of obvious or hidden “Islamization” is omnipresent and manifests itself in public protest and demonstrations (e.g. against the influence of Salafist circles).

To articulate their critical standpoint the protesters often used to show the infamous Mohammed caricatures (drawn by the Danish illustrator Kurt Westergaard).

Of course, the constitution does not guarantee the freedom of demonstrations that are not peaceful, but violent (see Art. 8 GG)¹⁴. They are against the law and may be prohibited. Showing caricatures is, however, not the kind of violent behaviour outlawed by the constitution of the Basic Law. However, is it offensive to show such caricatures? The purpose of assemblies is to express opinions of the people assembled. If the opinions are offending other persons, they must not be expressed even in an assembly and the assembly therefore may be prohibited. Showing Mohammed caricatures indeed must be considered offensive – although only *in terms of religion and religious sensations*. German courts therefore ruled¹⁵, that showing the Mohammed caricatures is

may impose restrictions to the exercise of individual freedom “... in order to comply with just demands in accordance with considerations for morality, religious values (!), security and public order in a democratic society”. MKRI Nr. 140/PUU-VII/2009 Par. 3.34.8.

¹² MKRI Nr. 140/PUU-VII/2009 Par. 3.34.10, 11.

¹³Different from the assertion of S. Butt/T. Lindsey, *The Constitution of Indonesia, 2012*, p

14: “state implementation of the Pancasila has frequently been not much more than rhetoric”.

¹⁴ Art. 8.1 BL: „All Germans have the right to assemble peacefully (!) and unarmed without prior notification or permission”.

¹⁵ Higher Administrative Court North of Rhine-Westphalia, April 30, 2012 (5 B 546/12); Higher Administrative Court of Berlin-Brandenburg, August 17, 2012 (1 S 117/12). See Christoph Enders, “Freedom of Expression and Freedom of

not necessarily offending other persons, as we have to make a distinction between the individuals and their religion that is being criticized. Showing caricatures of religious symbols or persons that are kept holy by a religious group might then be *offending the religion and the religious belief of the group* – but the religion or the religious belief or the religious group are not protected as such and the intention to protect them is not as such justified when it comes to limiting other people’s freedom. Defaming a religion or a religious group therefore is *only prohibited* and sanctioned by the criminal law, *if* the defaming action is *disturbing public peace* (see § 166 StGB – Criminal Code¹⁶). Showing the Mohammed caricatures in general is not unlawful. The Indonesian Constitutional Court was right, when it stressed the difference between a western and the

Indonesian constitutional perspective and stated that in western countries defaming a religion or a religious group might be – under certain circumstances – allowed¹⁷.

III. Strong Constitutional Protection of the Religious Freedom – and its Limitations

1. Constitution’s Unconditional Guarantee of Freedom of Faith and Religion

On the other hand: The freedom of faith and the freedom to profess a religious (or ideological) belief are very strongly protected by the German Basic Law (Art. 4 secs. 1 and 2 GG)¹⁸. When examining the wording of these provisions we note that there is no explicit allowance for the legislative to interfere with these freedoms by enactment of a legal statute¹⁹. That

Assembly in the German Constitution”, in: Afifah Kusumadara/Christoph Enders (ed.), *United in Diversity – Citizenship and Education*, 2013, p. 1 (6).

¹⁶ Section 166 of the German Penal Code (“Defamation of religions, religious and ideological associations”) says: “(1) Whosoever publicly or through dissemination of written materials (section 11.3) defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment of not more than three years or a fine. (2) Whosoever publicly or through dissemination of written materials (section 11.3) defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of

disturbing the public peace, shall incur the same penalty.”

¹⁷ MKRI Nr. 140/PUU-VII/2009, Par. 3.34.10, 11. However also see the text at footnote 23. Interpreting religious rules as adhered to by a religious association or group in a specific way that differs from the majority’s standpoint and even outspoken criticism does not mean defaming a religion or a religious belief.

¹⁸ Art. 4.1,2 BL: “(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.”

¹⁹ Different from the regulation by the 1945 Constitution of Indonesia, which states

means that these freedoms are *guaranteed unconditionally*. Restrictions not only require a sufficiently definite statutory basis but must be *contained in the constitution itself*. “This includes the fundamental rights of third parties and community values of constitutional status ...”²⁰ The limitation in question here is a constitution-immanent limitation, a *limitation* to fundamental rights *inherent to the constitution*.

In addition these values of constitutional status are to be protected in a manner that is only interfering with the freedom of faith and religion as far as necessary. Interference has to be proportional, because burden of proof that exercising a guaranteed freedom causes damage for the community (the rights of its members or the values acknowledged by constitution) lies with the state authority. The constitutional principle of proportionality therefore stipulates, that each law that interferes with a constitutionally guaranteed individual freedom, must be proportional: it must be suitable and necessary to reach its legitimate aim and last but not least it must be appropriate. Disproportionate interferences with

guaranteed freedoms of the individual are unconstitutional, because they unreasonably restrict the freedom of the individual.

2. The German “Headscarf Cases” of 2015

These elements of the Constitution’s “unconditional protection” of the freedom of faith and religion describe the legal framework the Federal Constitutional Court had to take into account when deciding the “Headscarf Cases” in 2015: Two female Muslim teachers (of German nationality) would not be allowed to wear a headscarf (or: a woollen hat worn as replacement) at public school. Both argued that they would wear the headscarf for religious reasons, because they considered the rule to cover themselves in the public to be binding due to their Islamic religious belief. The school objected and imposed sanctions on the women, applying a law that prohibited wearing clothes with a religious connotation at public school in order to prevent any interference with the pupils` negative freedom of faith and to profess a belief.

limitations to the freedom of religion (Art. 29 sec. 2) in Art. 28J, see footnote 10.

²⁰ See FCC 24 September 2003 – 2 BvR 1436/02, Volume 108, 282 (297, par. 38).

The Constitutional Court however ruled that “wearing clothes with a religious connotation does not per se constitute an interference with the pupil’s negative freedom of faith and freedom to profess a belief (Art. 4 secs 1 and 2 GG). As long as members of the teaching staff do not verbally promote their position or their faith and do not try to influence the pupils apart from their outer appearance, pupils are only confronted with the positive freedom of faith as exercised by educational staff ...”²¹

Before we come to analyse the main argument of this ruling, the question arises, who decides that the behaviour of a person qualifies as exercise of his or her religious belief and therefore is protected by the Constitution. Not every Muslim woman is wearing a headscarf. So we might doubt, that the headscarf is worn due to an absolute binding rule, a rule that is perceived as imperative. Here the ruling of the German Constitutional Court differs from the argument given in the Decision of the Indonesian Constitutional Court of April 19th 2010 concerning the Blasphemy Law. The

Indonesian Court pointed out that the authentic interpretation of religious rules and duties – as far as outer appearance or conduct is concerned (“forum externum”) – is the responsibility of the officially recognised religious community and their official representatives (Ulama)²². This perspective causes difficulties for differing doctrines of minority cults and individuals. In contrast to this view the German Federal Constitutional Court notes that “one has to take into account the self-perception both (!) of the relevant religious community and of the individual concerned. However, the state authorities (not the individual!) may analyse and decide whether it has been made plausible, with sufficient substantiation, that the conduct can actually be attributed to the scope of application of Art. 4 GG”. On the basis of these arguments German courts e.g. qualified the “Church of the flying Spaghetti Monster” as a joke, that did not deserve being acknowledged as a religious association, and whose “rules” could not benefit from the protection that Freedom of Religion is awarded by the constitution.

²¹ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (337, Par. 105).

²² MKRI Nr. 140/PUU-VII/2009, Par. 3.53.

In the Headscarf Case, that the German Constitutional Court had to decide, it did not matter, as the court stated, “that the exact content of the female dress code is quite disputed among Islamic scholars and that some schools of Islam do not have such a compulsory rule. It is sufficient that this interpretation exists in different schools of Islam and can be traced back to two verses in the Quran, in particular”. The two Muslim women in this sense had “plausibly demonstrated that, in their case – and in accordance with the self-perception of some Islamic groups –, covering themselves in public constitutes an imperative religious duty”²³.

What is the main reason that the strict prohibition of expressing one’s religious belief by wearing the headscarf unreasonably restricts the freedom of faith, so that the limitation is disproportionate and unconstitutional? Shouldn’t the female Muslim teacher show consideration for the possible uneasiness of pupils and their parents and shouldn’t she therefore refrain from following the rule to cover her head and

take off her headscarf at public school? It is crucial here that pursuant to the (neutral and) pluralistic approach of the Basic Law’s constitutional order, there is no individual right to not be confronted with “cultic acts, religious symbols and professions of other faiths”. In the words of the Constitutional Court: “in a society that affords space to differing religious convictions, he or she has no right to be spared cultic acts, religious symbols and professions of other faiths”.²⁴ Consequently there is no specific duty of consideration for the religious sensations of other people, may they belong to the minority or the majority group. And *this exactly* makes a strict prohibition of the expression of religious beliefs, to prevent “a mere abstract danger to the peace at school or to the neutrality of the state” disproportionate and unconstitutional – because the religious-pluralist society is just mirrored in public school²⁵.

3. A Loophole: “Peace at School” and Public Peace

In the end, the German Constitutional Court has to calm down

²³ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (332, Par. 96).

²⁴ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (336, Par.

104; 343, Par. 116); FCC 24 September 2003 – 2 BvR 1436/02, Volume 108, p. 282 (301 f.).

²⁵ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (337, Par. 105).

critics, who are afraid that the state now has been deprived of any means that would allow him to guarantee peace at school and to exercise its educational mandate (Art. 7 sec. 1 GG) in any case, also in case of necessity. And we can see how the argumentations of the two courts, the German Federal Constitutional Court and the Indonesian Constitutional at last/eventually come closer to one another: A mere abstract danger, says the Federal Constitutional Court, to the peace at school does not necessitate, and therefore will not justify, a strict prohibition of the expression of religious beliefs. If there is a sufficiently specific danger to the peace at school or to the neutrality of the state however (more or less: for the public order), a prohibition of exercising freedom of faith may be justified – no matter who is responsible for this danger²⁶. So if pupils or parents would feel disturbed and offended by a Muslim teacher wearing a headscarf and would give loud and radical expression to this uneasiness, this could and probably would cause a

specific danger for peace at school. It then – obviously a loophole to keep up *in any case* peace at school as well as in the public – “would be reasonable to expect the educational staff to refrain from following the rule to cover their heads” – even if they (the Muslim teachers) perceive that rule as imperative²⁷.

This argument reminds us of the reasons given by the Indonesian Constitutional Court to uphold the Blasphemy Law in 2010²⁸: The state is responsible to protect public safety and public order and sometimes has to force the minorities to keep quiet, even if it is not them who imminently cause the social trouble or political unrest. Even the revolutionary French “Declaration of the Rights of Man and of the Citizen” (from 1789) was in this way concerned about the public order and therefore stated in its Article 10: “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law”. This seems to be a universal rule of

²⁶ We notice a similar reasoning in France, where – after the terror strike of July 14th 2016 – the use of Burkini bathing suites had been banned at some beaches by local mayors to protect public order. The ban imposed by a community at the Cote d’Azur has been annulled by the Conseil d’Etat (State Council) on August 26th 2016, because a mere abstract danger does not justify

such an interference with individual freedom. Only the protection against a specific danger to the public order may justify the prohibition of an outer conduct.

²⁷ See FCC 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10, Volume 138, p. 296 (341, Par. 113).

²⁸ MKRI Nr. 140/PUU-VII/2009, Par. 3.52, 3.61.

maintaining political authority, valid in Germany as in Indonesia as all over the world.