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## CONFLICTS BETWEEN GENERAL LAWS AND RELIGIOUS NORMS

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### I. FREEDOM OF RELIGION IN THE SECULAR CONSTITUTIONAL STATE

#### A. *The Return of Religion*

For quite some time freedom of religion was not among the most controversial fundamental rights, at least in Germany and other European countries. The controversies between the Christian denominations faded away, partly because an increasingly secular society cared less and less about them, partly because the growing secularization of society prompted the Christian churches to move closer to each other and to emphasize their commonalities instead of insisting on the differences. In addition, the state, which is the addressee of fundamental rights, rarely gave the religious communities cause to worry about their freedom. The churches, in turn, had made their peace with the secular state and were even prepared to accept it as part of God's world plan.

This state of affairs was reflected in constitutional law and jurisprudence. With very few exceptions, the great social and political controversies that reached the German Constitutional Court did not emerge from the field of religion. There were some cases concerning education that drew a lot of interest: school prayer is an example, and there was the famous case about the crucifixes in classrooms of Bavarian elementary schools. But it seems significant that the largest number of cases concerning freedom of religion dealt with the monetary aspect of this right, the church tax, which members of the Christian churches have to pay in Germany and which the state collects together with the income tax.

However, this situation has changed since 1989-90. With the disappearance of the East-West-divide, which had pushed all other conflicts into the background, religion and religious communities

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reappeared on the public scene and began to insist more vigorously on respect for their belief and on living according to the commandments of their creed. As has often been observed, a process of re-politicization of religion is taking place that goes along with a corresponding process of de-secularization of society. Religious issues play an increasing role in the public debate.

This development does not leave the law unaffected. European societies face a growing number of conflicts with a religious background. The courts, including the German Constitutional Court, are increasingly concerned with claims based on freedom of religion. Yet, this is not a revival of the old inner-Christian controversies. Neither is the reason a new hostility of the state vis-à-vis religion or a new identification with a single denomination as was the tradition in many European countries. Rather, the conflicts have their source in the growing multiculturalism of European societies, caused by the immigration of members of non-Christian beliefs.

Quite often, these are beliefs that, like the Christian denominations, claim possession of a divine and therefore absolute truth, but, unlike the Christian denominations, have not undergone the process of historicization and contextualization of God's revelation that permits the Christian churches to adopt a more distant attitude vis-à-vis sacred texts and the commandments following from them. Moreover, some religious communities have not learned to distinguish between the error and the erring person, such that it is difficult for them to bridge the incompatibility of religious dogmas by a spirit of tolerance vis-à-vis believers of a different faith. Finally, the immigrants often are not accustomed to the secular state, a pluralistic society, and a law independent from religion.

All this is particularly true for the Islamic religion, albeit not for Islam altogether and certainly not only for Islam. But for a number of reasons the Islamic religion is in the center of the controversies in Europe. The most obvious reason is, of course, that here the vast majority of immigrants are Muslims. For many of them the confrontation with Western norms and life styles and the ensuing experience of the contingency of one's own beliefs and ways of life is deeply disturbing. In addition, many Islamic societies not only remain unaffected by Western modernization, but rather reject it explicitly, and draw the justification for this attitude from their religious beliefs. They are accustomed to a state that proclaims itself as an Islamic state, meaning that no clear distinction is made between religion, politics and law.

As a consequence, new lines of conflicts appear. General laws that do not have religious implications in Western countries or reflect the Christian tradition of the Western world enter into conflict with the

religious norms of the immigrants. The German society, like some other societies in Europe, has not yet found a consensus as to how to respond to this challenge. It is torn between the postulate of assimilation on the one hand and an unconditioned acceptance of otherness on the other hand, whereas the immigrants often react by insulating themselves within their host societies. There are also some who prefer to fight the Western way of life and do not always rule out the use of force.

One should not forget, however, that for Western countries, formed by Christianity, this is an encounter with their own history. For many centuries, Christian denominations confronted heretics and pagans with a similar attitude. The history of these countries is full of crusades, inquisitions, ordeals, censorship, etc. It took a long time until a peaceful coexistence of the Christian denominations became a normality, before Christians and non-Christians enjoyed equal rights, and before a pluralism of ideas, religious as well as political, was regarded as legitimate. In order to understand the present situation one has to realize however that the historical development, which is interpreted as progress in the West, often appears as relativism or decadence to the immigrants. It is this difference that gives the conflict its particular severity.

#### B. *The Secular Constitutional State*

This leads to the question of how the West succeeded in overcoming the inter-Christian conflicts. The answer is, in short, by establishing the secular constitutional state. Its emergence is part of a long process whose beginnings date back to the Middle Ages. The decisive turn occurred, however, in the wake of the Reformation of the 16th century. Far from being a spiritual event only, it destroyed the religious foundation of the existing social and political order—not because the relevance of God’s revelation for the worldly order and for individual behavior was now questioned, but because the content of the revelation and of God’s will was no longer uncontested. The immediate consequences of the dispute about the truth were the devastating religious wars of the 16th and the 17th century.

In this situation, the restoration of internal peace became the most important political task of the time. The solution was the secular constitutional state. This is not to say that the three elements of the notion of a “secular constitutional state” came about simultaneously. Neither were they necessarily linked to each other. But only together did they form the achievement that enabled the peaceful coexistence of persons of different beliefs in one polity and the recognition of the

diversity as legitimate. All in all, it was a protracted process, full of deviations and setbacks, producing different solutions from country to country. All this cannot be described here. Suffice it to describe the product on a rather high level of abstraction, leaving aside the many regional and national differences.

(1) The *State*—By “state” we understand a political entity in which the various prerogatives that had been dispersed in medieval times among many independent bearers and that did not refer to a territory, but to persons, were united in one hand (historically in that of the prince) and condensed into the public power in the singular to which all inhabitants of a territory were subjected. In order to fulfill his pacifying function, the bearer of this unprecedented public power claimed the right to make law regardless of divine revelation and to enforce it against everybody, a right that presupposed the monopoly of legitimate force, the consequence of which was the privatization of civil society. In short, an autonomous political system emerged.

(2) The *secular State*—The secular state is the state that dissolves its bonds with religion and claims independence from religious truths. This state no longer derives its legitimacy from God, but instead bases its power on worldly grounds. It does not serve a divine destination and does not feel responsible for the eternal salvation of its subjects. Rather, it pursues a common good of a worldly nature whose core consists in the security and welfare of its inhabitants. This does not mean that religious truths lose their right to exist, but they are privatized. They become a matter for the individual and the associations that the individual chooses to join. They are regarded as compatible with the secular state as long as they do not claim absolute validity for society as a whole and stay within the framework of the public order.

(3) The *secular constitutional State*—The secular constitutional state, finally, is the state that derives its legitimacy from a consent of the governed. In short, it is the democratic state, in which a paramount law regulates the establishment and exercise of political power. Political power is regarded as a mandate, limited in time and scope, the bearers of which are accountable to the people for the way they use their power. Moreover, it is the state in which the legal order is determined in a discursive public process, subject to change, and in which participation of the citizens in the formation of the collective will is guaranteed, as well as is their individual liberty and equality vis-à-vis government.

One of these liberties is freedom of religion, yet, not understood as

freedom of one single religion with the exclusion of others. For in this case, it would be a privilege instead of equal freedom for all religious beliefs. Freedom of religion is an essential part of the constitutional state. The secular constitutional state should therefore not be confused with a secular society. Both are not in contradiction. The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.

However, different secular constitutional states may have quite different attitudes toward religion. There is a militant secularism that denies religious beliefs any public role and insists on their belonging strictly to the private sphere. There is also a secularism that separates church and state: the state accepts the role religion plays in society, but is prohibited from promoting religious activities or giving material or immaterial subsidies to religious communities. There is finally a type of secularism that recognizes religion as an elementary human urge that seeks public expression, an urge that the state not only has to respect, but also must protect and maybe even promote—altogether the opposite of a secular fundamentalism.

### *C. Scope and Limits of Religious Freedom*

The scope of religious freedom can vary with the type of secularism that prevails in a country. However, the core of this freedom is fundamentally the same in each secular constitutional state. In most constitutions, freedom of religion is framed as an individual right. But the object of the protection, religion, refers to a supra-individual phenomenon: a set of beliefs and practices that are shared by a plurality of individuals. Religion presupposes a community that is united in its belief in some truths of a transcendental nature and that develops common forms of worship and interaction. One would call neither a worldview without a transcendental reference nor the transcendental assumptions of a single person a religion. This is why freedom of religion has not only an individual but also a collective side.

In individual terms, freedom of religion guarantees everybody the right to decide about his religious faith, to join a community of like-minded people, to confess and propagate his belief, and to lead his life according to his belief's commandments. But the freedom also includes the opposite: the right to not adhere to a religion or to leave a religious community, to hide one's religious beliefs and to not follow religious commandments. In collective terms, freedom of religion is the freedom of religious communities to determine autonomously the content of their

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creed, to lay down what they consider as sacred, to define the requirements that follow from the creed and to practice their religion in common.

This has a number of consequences for the state as the addressee of freedom of religion. Since religious freedom means equal freedom, the state may neither privilege nor discriminate against certain religious groups. This is also true with regard to those religious communities that are traditionally supported by the native society—the state is not entitled to treat them preferentially. Yet, preferential treatment of a religion as such must be distinguished from protection of the values, traditions, and customs that, although originally rooted in a country's predominant religion, have lost their religious connotations and are no longer viewed as specific expressions of a religion but rather have become a part of the country's general culture that includes believers and non-believers.

Moreover, the state may not presume to declare what the content of a religious creed is or requires. Whatever a religious group understands as the meaning or the commandment of its religion, the state must take it as such. The state is not entitled to instruct a religious group as to what its religion truly means or does not mean, or what it requires or forbids. Likewise, the state may not reproach a religious group of diverging from the official teachings of its belief. Religious freedom must not be turned into a protection of orthodoxy. Yet the state has the right to determine whether a certain belief is religious in nature in the first place, and whether a group is truly a religious community—as opposed to a group seeking to hide other purposes behind a religious façade.

However, self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Freedom of religion is not an absolute right, and religious communities are not extraterritorial. Like all fundamental rights, religious freedom may be limited by the state. The need for limitations follows, firstly, from the fact that freedom of religion is equal freedom for all individuals and all religious groups. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole.

This requires a distinction between the internal and the external sphere. Claims based on an allegedly absolute truth may be raised within the religious group only. They may not be imposed on the external world. The freedom of religious groups to follow their religious commandments can be recognized only when the state rejects any claim to make these commandments universally binding. This does

not exclude missionary activities of religious groups, but they must rely on means of convincing others of the preferability of a creed; all sorts of force, be they direct or subtle, are unacceptable.

The need for limitations follows, secondly, from the fact that religious freedom is neither the only constitutionally guaranteed liberty nor the highest one. Neither are the various liberties necessarily in harmony with each other. They often collide. If no hierarchy among them is established, it must be decided which one prevails and which one has to give way in case of conflict. Hence, next to the limits ensuing from the equal allocation of one and the same liberty to many bearers are limits ensuing from the existence of other equally important liberties.

Because of the imperative character of religious beliefs, limitations of religious freedom for the sake of the same freedom of others or for the sake of other liberties are a serious matter for believers. It is the very nature of religion that its commandments are not negotiable as mere interests would be. If this is so, the state's power to restrain religiously determined or motivated behavior cannot be unlimited in itself. Not only must every limitation have a basis in general law, but these laws must also strike a proper balance between religious freedom on the one hand and the good in whose interest freedom of religion is restricted on the other. This requirement of proportionality is valid for the formulation as well as for the application of the law.

However, the immense variety of conflicts does not allow a valid single solution for all of them. On the other hand, the specific contribution of the law to solving problems of this kind is that it offers rules that apply to more than one case and are based on broader principles. This presupposes an overview of the sorts of conflicts that use to appear in a secular constitutional state. The attempt of this paper is, therefore, to facilitate the solution of individual cases by developing a typology of conflicts between religious norms and general laws. This typology is based on a number of cases that courts in various countries have had to decide. The purpose is not, however, to discuss the judgments on their merits, but rather to use them as examples that illustrate the abstract categories.

## II. RELIGIOUSLY MOTIVATED CONFLICTS OF NORMS

### A. *Typology of Conflicts*

It is impossible to give a substantive definition of religious norms or general laws. Anything can be the object of a religious commandment as well as of a secular law. A religious commandment is

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whatever a religious community regards as ordered by some supernatural, transcendental authority. This indeterminacy is what increases the conflicts between religious norms and general laws in multicultural societies. General laws, in turn, are understood here as laws that are not directed against religion as such or against specific religious faiths, but which pursue a legitimate public interest. In doing so, however, they may collide with the religious requirements of certain groups—often those of immigrants, but also the norms of indigenous religious groups.

Basically, a believer or a religious group may claim a *liberty* that is not granted by the general laws, or they may claim *equality* rights that are not designated by the general laws. Freedom claims and equality claims do not mutually exclude each other. Questions of liberty can be reformulated in terms of equality and vice versa. The classification depends on whether this or that principle is emphasized. Each of these two basic categories, freedom-centered and equality-centered claims, has two sub-categories, and in each subcategory two modalities appear. This means that altogether eight types of conflicts can be distinguished which cover the field of conflicts between general laws and religious norms.

Within the group of *freedom claims*, the demand is either to extend or to restrict the generally guaranteed freedom in the interest of freedom of religion.

An *extension* of freedom can be requested in order to allow members of a religious community to do something in pursuance of their religion that is generally prohibited (*type 1*). Examples are the ritual killing of animals, polygamy, consumption of drugs in a ritual context, and interruption of work for purposes of prayer. An enlargement may also be requested to allow believers not to do something that is generally required (*type 2*). Examples are the legal obligation of motorcyclists to wear a helmet, which is incompatible with the religious commandment to wear a turban, the duty to send children to school, and military service.

A *restriction* of the generally guaranteed freedom for members of a certain religious community is at stake if a religion forbids believers a certain behavior that is generally allowed, be it a total prohibition or a prohibition under certain circumstances (*type 3*). Examples are the right to obtain a divorce, the choice of one's spouse, blood transfusions, and swimming in public places. A restriction of the generally existing liberty is also at stake when a religious community requires something from its members that is optional for everybody else (*type 4*). Examples are dress and food codes, the duty to marry a person not chosen by the believer himself or herself, and forced divorce against the will of both spouses.

In the group of *equality* claims the issue is either equal treatment of various religious groups or the application of the equality principle within a religious group. In this context it is important to realize that the principle of equality not only applies when the law treats different groups of persons differently, but also when it treats different groups equally although the differences between them are such that a differentiation would be necessary.

*Equal protection* of religious groups usually raises the question whether all religious communities enjoy the same rights or whether indigenous religious beliefs may be privileged (*type 5*). Examples are the construction of mosques in non-Islamic countries, the call of the Muezzin (just as the Christian churches ring their bells), public display of religious symbols of all faiths, state subsidies for religious activities, the recognition of the holidays of immigrants, and the equal treatment of various religious heritages in education.

The demand for *unequal treatment* is raised if equal treatment would prevent believers from fulfilling their religious duties or would amount to a de facto discrimination against the members of a certain religious community (*type 6*). Examples are kosher food for Jewish inmates of prisons, closing a major road for traffic on Sabbath in an area mainly populated by orthodox Jews, permission for Jewish merchants to open their shops on Sundays as a compensation for the religious obligation to close on Saturdays, depicting or ridiculing the prophet Mohammed, and handling family law issues not in the general civil courts, but in Sharia courts.

The application of the principle of *equality within* religious groups is at stake if a religion requires unequal treatment whereas the general laws prescribe equal treatment (*type 7*). In almost all cases these are questions of gender equality. Examples are the reservation of certain professions (e.g., priests) for men, granting the right to claim a divorce to the husband only, and the exclusion of daughters from higher education. But it is also possible that a religion requires equal treatment where the general laws differentiate (*type 8*). This type comes as a consequence of the scheme, but it is not easy to find examples. A religiously motivated permission to have sex with children, as is sometimes reported in the media, may serve as an example.

For a better survey, here again is the scheme:

I. Freedom claims

1. More freedom in favor of religion
  - (a) Permission to do what is generally prohibited
  - (b) Permission not to do what is generally required
2. Less freedom in favor of religion
  - (a) Permission to prohibit what is generally allowed

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- (b) Permission to require what is generally optional
- II. Equality claims
- 1. Equal treatment of religious groups
    - (a) Equal treatment of all religions
    - (b) Privileges for some religious groups
  - 2. Equality within religious groups
    - (a) Permission to differentiate where equal treatment is generally required
    - (b) Permission to treat equally where differentiation is generally required

B. *Accommodation of Freedom Claims*

There are no uniform answers to these problems. On the one hand, the fact that freedom of religion is a constitutionally guaranteed fundamental right excludes an unconditional application of the general laws. On the other hand, the fact that freedom of religion is not a preferred freedom that always trumps other freedoms excludes the unconditional recognition of religious claims. Hence, the solution of each conflict depends on a balancing of the competing legally protected values. Sometimes freedom of religion will prevail; other times the good protected by the general law will prevail. The typology can be helpful in getting the balance correct, but it does not determine the outcome.

The extension of the generally existing freedom in order to make fulfillment of a religious duty possible (to do what is generally forbidden; not to do what is generally prescribed—types 1 and 2) is the typical case for balancing. Two preparatory steps are necessary. On the one hand, the importance of the religious commandment for the believers and the loss of religious freedom if they have to obey the general law are to be ascertained. On the other hand, the importance of the good that is protected by the general law and the danger it would face if freedom of religion prevailed are to be determined. In a third and final step, the question as to what weighs heavier must be answered.

In many cases belonging to these two types, a dispensation from obeying the general laws will be possible. The legal order is full of exemptions for various reasons and such exemptions do not lead to a legal chaos or an undermining of the trust in the law. An exemption will usually be possible if the general law does not protect third persons or society as a whole or important communal interests, but instead the individual against himself. Here the religious duty will usually be given higher weight. The same is true if the general laws protect certain habits or customs of the host society by prohibiting alternative ways of

life. A protection of the host society against mere irritation would not be a sufficiently strong ground to suppress religious freedom.

If the general law serves an interest of third persons or society as a whole, the importance of the good protected, the potential danger if an exemption is granted and the likelihood and degree of the danger will play a role. If the law regulates the relationship between private persons (as in the case of praying during work), the question will usually be whether one can reasonably expect the other side to tolerate the fulfillment of a religious duty. If the general law wants to maintain communal values, it will be necessary to ascertain their importance for the community and its identity. One may be inclined to grant an exception from the prohibition on ritually killing animals, but less so from the duty to send children to school or from monogamous marriage.

The more difficult case is, however, the restriction of a generally existing freedom for believers in a certain religion (prohibiting what is generally allowed; requiring what is generally optional—types 3 and 4). Here, differently from the two previous types of conflicts, it is not the relationship between members of a religious community and third persons or society at large that is at stake, but the relationship between a religious community and its members. The problem is not whether a religious community may determine duties that curtail the believers' freedom—it is not the business of the state to decide which duties follow from a religious creed. Nor can a religious community be prevented from sanctioning the violation of religious duties, provided the sanctions are of a religious nature only (such as excommunication).

This is different, however, when the sanctions affect not only the religious, but also the civil status of a person (e.g., his or her right to marry), and when the sanctions cannot be implemented without the state's assistance. The secular constitutional state is under no obligation to implement religious norms or commandments. The state may not lend its enforcement power to religious norms without a sufficient secular ground. Purely religious norms have to be distinguished, however, from norms that have a religious origin but have been adopted into the secular legal order, or norms that are simultaneously valid within the state and a group of believers (e.g., many prohibitions of the Decalog, blasphemy laws, where they still exist, for the sake of the public peace).

In this context it is important that, within the secular constitutional state, religious freedom cannot be recognized unconditionally, even within a religious community. There are two main reasons for this. First, unlike the general laws, which are binding independently of the addressee's consent, religious norms depend on voluntary compliance. The state's monopoly of legitimate force does not allow compulsory means in the hands of religious communities. Consequently, the state

must prevent attempts by a religious community to enforce religious norms against an unwilling believer. Since freedom of religion includes the right not to join a religious community, the state must also guarantee the right to exit.

Secondly, fundamental rights, at least in the German understanding, are considered not only as negative rights, but have a positive aspect as well. They do not only obligate the state to refrain from certain actions, but also require the state to actively protect constitutionally guaranteed liberties against intrusions by private actors. This duty to protect may be a duty in favor of religious freedom (if, for example, an employer unduly limits an employee in complying with his religious duties). But it can as well be a duty to protect a believer from a religious community (e.g., the dismissal of an employee in a church-owned institution for violating a religious norm).

Moreover, the secular constitutional state cannot tolerate a religiously required behavior even if the believer complies voluntarily with the commandments of his creed, if the behavior contradicts the very essentials of the constitutional order. There is no obligation to sacrifice the identity of civil society to religious demands. The question of what belongs to these essentials will be answered by every society for itself. In Germany, human dignity and the dignity core of most fundamental rights, as well as the principle of equality, would count among the essentials; so would the physical and psychic integrity, and the right to participate in public discourse and in the formation of the public will.

### C. *Accommodation of Equality Claims*

As far as *equality* claims are concerned, the easiest case is the one in which immigrant religious groups request rights that the indigenous religious groups or churches already enjoy (type 5). But this must be distinguished from state activities favoring traditions that may have Christian roots, but which developed a formative effect for society without retaining a specific religious connotation. In cases like these, freedom of religion would not serve as a basis for equal treatment of the cultural heritage of immigrants. Holidays are an example. Although most holidays that are observed in Germany and other European countries have Christian roots and are still meaningful for believers, this does not support a claim of other religious groups for a similar amount of their holidays.

The same applies to the treatment of religious matters in education. The state is entitled to promote those traditions that have developed in its history and had a formative effect on its own identity. One of the tasks of education is enculturation, and this refers to the domestic

culture as it emerged over time, including, of course, all the foreign influences to which cultural development is exposed. The state may not deny immigrant religious groups the right to promote their own cultural and religious traditions—this is part of their religious freedom—but it is under no duty to make this its own concern.

Claims of religious communities or individual believers for privileges in order to be able to live according to the commandments of their religions (type 6) can normally be solved with proportionality or balancing means. The problem typically arises when persons are under the special tutelage of the state (e.g., as inmates in a state institution), and therefore unable to take care of themselves. The question in these instances will be one of the importance of the religious commandments for the believer on the one hand and the burden for the state to provide the demanded facilities on the other. If it is not an undue burden to provide a believer with the means to comply with his religious obligations in a foreign environment, the state will be obligated to assist the person.

This may be different, however, when the fulfillment of such claims causes a disadvantage for other groups. Thus, the permission for Jewish merchants to open their shops on Sundays did not lead to equal treatment with the non-Jewish competitors, but to preferential treatment. The state has no obligation to compensate for every disadvantage that may flow from compliance with religious duties. This is all the more true if the religiously motivated claim can only be fulfilled by limiting the fundamental rights of others. This would be the case, for instance, if criticism of certain religious beliefs, persons or symbols prohibited by a certain religion were also denied to non-believers.

The same is true regarding claims to withdraw certain areas of the law from application of the general laws and from the jurisdiction of state courts. This would mean at the same time that they are exempted from the control of the constitution and the protection it renders to individual freedom, regardless of the religious affiliation of a person. The most important realm in this regard is, of course, family law, which some Muslim groups would like to take away from the ordinary courts and hand over to the Sharia courts. This can certainly not be done if the decisions of such courts are not subject to review by state courts whose duty it is to enforce the basic guarantees of the constitution.

As far as exemptions from the general requirement of equal treatment are requested on the ground of religious freedom (type 7), the question is which constitutionally protected interest deserves higher weight. The question cannot be answered in a uniform way. Freedom of religion is affected in its very core if religious services, cults and worship are concerned. In this field, the intervention of the state is therefore limited. If, for instance, cultic activities of a religious

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community may be performed by men only, it would be a violation of religious freedom if the state obligated a religious community to also accept women as priests, rabbis, mullahs, etc.

There is a difference, however, if the enforcement of religious norms has consequences for the civil status of believers. If, for example, ritual services may be performed by unmarried persons only, a religious group cannot prevent such persons from engaging in marriage. But the person may, as a consequence, lose the capacity to perform religious rituals. If a religious norm regulates the relationship between members of their group, such as marital relations, in a manner contradicting constitutional principles, this norm cannot be enforced in a state court, with the consequence that the decision of the religious community cannot take civil effect.

Finally, the answer to the question whether religiously motivated or required equal treatment where the general laws differentiate (type 8) can be tolerated on grounds of freedom of religion depends on the reasons that support the differentiation. If the differentiation is the consequence of a protective duty of the state, an exemption seems impossible. In this way, the hypothetical case of sex with minors would be solved. In cases where the differentiation does not follow from a duty of the legislature to protect fundamental rights, the religious claim would be submitted to a proportionality test.

Balancing is a non-hierarchical way to solve conflicts between constitutionally protected rights or interests. It requires the legislator and the judge to take the colliding rights and interests seriously, weigh them against each other and try to preserve as much as possible of both. Thereby it can mitigate religious conflicts and create an atmosphere of mutual consideration. But balancing does not save the legislator or the judge from deciding which right or interest shall ultimately prevail in which situation. This means that religious freedom may be on the losing side regardless of the importance of a religious requirement for the believer. There are situations in which the only alternative is adaptation to the secular norm or emigration.