IS THERE A "MINIMUM OF RELIGIOUS EXISTENCE"?

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I

The highest German Court, the Federal Constitutional Court (Bundesverfassungsgericht), in a decision on July 2, 1980, came to the conclusion that violation of religious liberty may be a reason to grant asylum. The Court, however, also called for severe restrictions in the interpretation of religious liberty. The right to religious freedom is only relevant for asylum seekers if the "intensity and severity of the expected infringements violate the dignity of the human person and would go beyond that which the citizens of the home country [of the asylum seeker] would generally have to accept because of the ruling system" (BVerGE[1] 54, 341). The same words appear in a decision by the Federal Administrative Court on March 31, 1981. It is conspicuous that both Courts use a language, which is not very specific. Both go on the assumption that there may be different categories of violations of religious liberty, which are marked by the words "intensity" or "severity". How intensity or severity can be measured or what they include is nowhere mentioned. Furthermore, a political system is given the right to determine certain violations, which citizens must accept and an asylum seeker must also endure, if he/she returns to his/her home country.

It is astounding that Courts would use this kind of language when a basic human right is in question. When does the violation reach such a degree that it is "intense" enough for German courts to grant asylum? One can find phrases, which are just as vague and imprecise as are "intensity" and "severity" when, e. g. it is declared that a state may not intrude into the "primary area of a moral person", because otherwise, the "self-determination" which is "necessary for an existence worthy of a human being" is no longer possible and "the metaphysical basis of human existence is destroyed".

The Courts came up with a theory, which was first developed by the Federal Administrative Court in a decision of Feb. 18, 1986 (BVerwGE 74, 41 ff.) and over the years received axiomatic status. The theory is enshrined in the phrase "minimum of religious existence" (= *religiöses Existenzminimum*). Only if this minimum is infringed upon, do German courts agree that the dignity of the human person is violated. As long as this is not the case,

[1] BVerwGE = Bundesverfassungsgericht.

encroachments upon religious liberty may take place, but they do not violate the dignity of a religious person.

It is, therefore, important to ask some pertinent questions such as

- Is it acceptable to make a difference between the dignity of the human person and a person's right to religious liberty?
- May there be violations of religious liberty without, at the same time, violating the dignity of a person?
- How would "intensity" and "severity" be defined and measured?
- What is meant by religious freedom?
- What is a "minimum of religious existence"?

Although all the questions are somehow interrelated, it is suggested that a beginning is made with the last question and that a concrete example is taken to illustrate what is meant.

An individual from Iran who is an asylum seeker converts from Islam to Christianity in Germany. He/she is baptized upon his/her confession of faith and participates actively in the life of the congregation by attending worship services, Bible study and prayer meetings regularly as well as actively and publicly witnessing his/her new faith. This person's religious activities suggest that there is enough evidence that he/she really underwent a religious conversion experience.[2] German courts find it quite natural to expect those individuals to refrain from any public worship or witness of their faith when they are returned to their home country, Iran. The courts concede that it would be almost impossible for these "apostates", as they are referred to in Islamic countries, to attend public church services of existing Iranian churches, but that does not endanger the "minimum" of their religious existence. For such individuals could meet in private homes or within a neighborhood and could, without being physically endangered, discharge whatever religious duties they feel needed to be carried out. In other words, apart from official church institutions, various possibilities exist to converse about one's faith, to confess one's religion and to pray among like-minded "apostates" within the confines of one's home. To attend a public worship service is not indispensable for the exercise of the Christian faith and not necessary for an individual to exist as a Christian believer. If a state intrudes into the *forum internum* of an individual or if it demands an abandonment of one's

[2] No observer and no courts may therefore assume that this person only pretends that a conversion happened for the sake of being treated favorably in his/her quest for asylum. It must be added here that German Courts are very reluctant to accept a religious conversion as reason for granting asylum if that conversion had nothing to do with the reason for fleeing one's home country. It is different if the conversion was the reason or at least one of the reasons for escaping and applying for asylum.

religion or if a person is hindered to confess his/her faith in the private sphere, then, and only then, do German courts believe that an infringement of religious liberty is at stake and in these rare cases, asylum needs to be granted. The religious minimum is thus defined by the courts as a devotional exercise with like-minded believers and within the private sphere of one's home. Any public exercise of religion is to be suppressed. This also includes any missionary work, which is specifically mentioned.[3]

The point is that the concept of a "minimum" of religious activities severely limits the liberty of an individual to express his/her religious convictions. The judges seem to think that these limitations must be accepted as they do not infringe upon the dignity of the human person. Their point of departure seems to be Article 1 of the German Constitution, the Basic Law (*Grundgesetz*). The law declares (against the background of the experiences of the Nazi dictatorship) that the dignity of every human person is inviolable. Even though there is no overall international or national definition of "dignity", there can be no doubt that the civil rights as enumerated in the Basic Law and which are "directly valid law on legislation, administration and judiciary", are all derived from the "dignity of the human person". The dignity is the "basis" of the "Basic" Law. One could possibly use theological language to explain what is meant and say that the "dignity of the human person" is the *norma normans*, the norming norm, of all other rights. An infringement upon this dignity must, therefore, be avoided at all times. The next step in the thinking of judges is their contention that these principles apply in Germany, and that it is not the task of the country to "export" the value system of the Basic Law to other countries (cf. BVerwGE 74, 31; BVerfGE 76, 143).[4] They also expressly state that their concept of a "minimum" of religious existence is in accordance with "international standards".

The questions that were raised above can now all be answered. The judges differentiate between the dignity of the human person and religious liberty. Under certain circumstances and in foreign countries, individuals must accept limitations of religious expressions, especially in public. As long as they can retain their belief system and practice it within their homes or neighborhoods, the judges find no violation of their dignity. This also gives the criterion for "intensity" or "severity" of state interventions. A state may not forcefully change one's religious affiliation. The *forum internum*, where according to the courts, religious life primarily takes place, must at all times be protected. It is a "sacred" realm within a person with an inherent integrity that may not be touched. It is obvious, however, that the free exercise of religion is different from the "minimum" religious requirement. The

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[3] A summary of these arguments can be found in: **BVerwG**, 1 C 9, 03, Jan. 20, 2004, <http://www.bundesverwaltungsgericht.de>.

[4] Decision of Feb. 18, 1986; and of July 1, 1987 respectively.

exercise of religion is particularly limited as far as the public is concerned. To avoid any public worship or any missionary activities is, according to the theory of a "minimum of religious existence", compatible with a limited understanding of religious liberty as long as the *forum internum* remains intact.

To claim, as German judges have been doing for a long time, that this is in line with international standards is, for all practical purposes, nothing but wishful thinking. All relevant international agreements do not know the German limitations.

What is just as astounding as this theory is the more than friendly understanding of the highest German Court – the Constitutional Court – towards a state religion: "Particularly if a state bases its existence upon a certain religion as is the case in Iran, measures which it undertakes for a closer definition and limitation of membership in this state religion cannot be seen as persecution, notwithstanding its infringement upon religious liberty, as long as the 'minimum of religious existence' which is commanded by the dignity of the human person remains intact" (BVerfGE 76, 143).

Several objections must be made here:

1. The Christian religion cannot be individualized as the courts imply. The community, i. e. the church as the body of Christ, to put it theologically, is of greatest importance for the Christian religion. In the early church, theologians used to say, "One Christian is no Christian", which adequately describes the state of affairs.
2. The "minimum" theory is not an international standard. The UN-Charta on human rights, the International Covenant of Civil and Political Rights and the European Convention on Human Rights know no such limitations. Just as bread, water and human communication within a household will not suffice for a human being to survive physically, so the minimum of religious existence is not enough to survive spiritually.
3. The right to do missionary work and to worship in public places of worship is recognized in all relevant international agreements. A limitation of religion to a *forum internum* is, therefore, a gross misunderstanding of religious freedom as a basic human right.
4. The Christian religion is a mission-minded and mission-oriented religion. Jesus commanded his followers to take the gospel into all the world and to disciple all the nations (Matth. 28). If mission is part of the nature of the Christian religion, a limitation of religious activities to the realm of a *forum internum* or a *devotio domestica* amounts to a denial of Christian identity.

It follows, then, that the minimum theory as put forth by German courts has no international foundation, no theological basis and is very weak as far as its judicial underpinning is concerned. It must not serve as a model in European countries.

II

In the second part of the paper, the questions must be addressed why German judges reach such a conclusion and why they display such a remarkably friendly attitude toward a state religion such as the one in Iran. These questions give cause to look for present as well as historical reasons.

The first question concerning mission undoubtedly has to do with the outer appearance of both major churches in Germany. Until unification, more than 90% of the population belonged to the Protestant territorial churches or to the Roman Catholic Church. Comparatively few people were, therefore, unchurched. The need to undertake home mission was virtually non-existent. Accordingly, only very few people in the churches spoke of "mission". Mission work in the public "market place" was not an outstanding feature in church life. The two churches were not visibly present in society by missionary programs, but invisibly by relying upon privileges, which they had inherited from the past. This state of affairs would support the notion, inherited from the period of Enlightenment, that religion was a "private matter", and it is small wonder that judges would not see any need to take public missionary work into consideration and to look at it as an essential element of religion.

Most observers of the German situation agree that active participation of church members in the affairs of the congregations is very low. Church attendance on Sunday mornings for worship, for example, is down to less than 5% in Protestant regions. Sociologists refer to Western Europe as the most unreligious or secularized part of the world, even though statistics until 1990 did not support this assertion. According to figures there was almost an identity between society and the two major churches. When unification came, the statistics changed dramatically. Today one third of the entire population in Germany is not on the church rolls. The reason is that most people in the former German Democratic Republic (East Germany) had left the churches in such great numbers that in this part of the country the unchurched make up the vast majority of the population. The churches are in an extreme minority situation. This is not to say that the West Germans are more religious, but to suggest that in the East, the figures display the real state of affairs. In the East, it was culturally acceptable or even expected to leave the churches whereas in the West there is an underlying, but hard to explain reluctance to do so. In either case, the churches are confronted with an enormous task.

Pope John Paul II spoke about "re-evangelizing" the European continent, and the synod of the *Evangelische Kirche in Deutschland* (EKD), the umbrella organization of all territorial churches, which was held in Leipzig in 1999 had as its theme "mission". The churches are now squarely facing what Karl Barth said a long time ago, namely that the Church is either a "missionary church" or it is no church at all. The German judges so far have failed to see these theological and societal changes when they insist that public missionary work is not part of the normal Christian behavior of individuals or churches.

The outer appearance and the failure to notice major changes in both society and theological perceptions are two present reasons for the conclusions of German courts. There are other reasons that take us back into history, and they seem to be just as important. All reasons make up a syndrome that may help to explain the current debate.

One of the most important reasons is undoubtedly that within German history, the concept of religious liberty and its implications for religions and society played almost no role until the end of World War I. The church in its Roman Catholic and Lutheran manifestations went on the assumption that religious pluralism, which is the natural outgrowth of religious liberty, is detrimental to both the church and the state. According to Roman Catholic thinking, this church was the only true church, and if that church had the political influence, it would suppress any other religious organization. The truth needs only one expression, which is in the form of the Roman Church. Error has no right to go public. Therefore, Roman Catholic territories granted as little tolerance as possible to others. In such territories where the Roman Church was not in control, it sought as much freedom for Catholics as possible.

Ever since Luther elevated the princes that had followed his teachings to what he called "emergency bishops" was there a very close alignment between the Lutheran churches and the territories. Even today the Lutheran churches are organized along territorial bounds: There exists no nation-wide Lutheran church. Therefore, Lutheran churches would also "control" territories and would consider any new church as intruding into its own turf. The two churches claimed virtually a religious monopoly in "their" territories. The public functions of the churches were provided for by the prince-bishops and the ruling nobility. The churches were closely tied to the powers that be.

The fact that Lutheran churches are defined by geographical boundaries gave them a very provincial perception of the world. Even though the Roman Church is also organized along geographical entities called dioceses, it never developed a provincial attitude as Lutheranism because all dioceses were and of course still are part of a worldwide church with its focus on the Pope in Rome as its center of unity.

The overall setting, however, was in both cases damaging to the concept of mission. This was re-enforced by infant baptism. Through this sacrament or rite, newborns were admitted into the church. Neither a decision nor a commitment was necessary for church membership. People were in the churches from the beginning of life to their death. Any missionary work to "win" people for the church ran counter to the idea of a total identity of church and society. Thus, a culture of religion developed.

In the mid 17th century, a nobleman from Austria directed a question to the professors of theology at Wittenberg University, the bedrock of orthodox Lutheranism. He wanted to know how the Great Commission as recorded in Matth. 28 ("go ye into all the world…") is to be implemented as he saw no Lutheran go into all the world. The professors responded that the Great Commission had no relevancy for today. It had been a personal privilege (*personale privilegium*) of the twelve Apostles. They had gone into all the world and therefore fulfilled the Great Commission. The provincial attitude led these learned professors to an interpretation of Scripture, which represented wishful thinking rather than sound exegesis.

Then there is another long lasting factor. During the Enlightenment, the concept of tolerance developed. But to whom would toleration be displayed? It would be directed only to the judicially accepted religious parties, i.e. Catholicism, Lutheranism and Calvinism. All others were considered "sectarians" and excluded from any toleration. In religiously homogenous territories, there were hardly any dissenters or dissenting groups who were given the opportunity to enjoy toleration. When in the 1830's, dissenting churches – Baptists, Methodists and others – began to emerge and to organize, both the "accepted" churches and the territorial powers, including the courts, retaliated with persecution, imprisonment, harassment and severe discrimination. Not even in the so-called "tolerant" cities of Hamburg or Berlin was there any toleration. Religion was coercive rather than free, intolerant rather than forebearing, discriminatory rather than welcoming, forced upon people rather than freely accepted, authoritarian rather than Christ-like. The enlightened idea of toleration was applied to oneself and to one's own church in a way that turned out to be harmful to any genuinely religious sentiments: The church was tolerated as a public institution for the moral good of the common folk, but the enlightened people, mostly intellectuals, would privately detach themselves from church control and would privately believe whatever they wished. A dichotomy began to develop between "public" and "private" religion, which amounted to a double standard. Public religion was the churchly, orthodox religion that was needed to keep the general public in line with accepted moral principles. The intellectuals, however, began their journey into an "inner emigration" from the churches. They needed no moral restrictions, which an authoritarian church seemed to dictate, but claimed

they were "inwardly free" to follow their own reason or their reasonable form of private Christianity which was considered superior to the revelatory form of public Christianity.

The attitude that religion was but a private affair was later in the 19th Century shared by the leaders of the Social Democrats and the Union movement, although for other reasons. They identified the churches with the ruling classes, and since there seemed to be no place in society for the new working class, religion was rejected or at best declared to be the private business of each person. The party platform of the newly organized Social Democratic Party (SPD) declared that religion ran counter to societal progress and hence should have no place in public life.

Whether a tolerant, enlightened society or a socially sensitive society was the guiding principle, a missionary church was undesirable. It did not fit into the pattern of thought.

These are some of the reasons why for a member of the intellectual elite in Germany, the idea that the Christian religion had a missionary component mattered very little. The present and past experiences with the church suggested that in order to be a respectable Christian one need not to be mission-minded.

Why do judges react so favorably to a state religion? Again, the historical lack of religious liberty seems a prime reason. Only at the end of WW I did the Weimar Constitution declare that there is not to be a state church. However, the real consequences were not drawn so that a leading scholar in the field, Ulrich Stutz, declared in 1925 that the separation of state and church was only a "limping" separation. Whatever he had in mind by coining this metaphor, the fact is that "limping" is not normal. It is either an inherited defect or it is an acquired abnormality. But even after World War II, this deviation from normalcy was not rectified. As a compromise, the articles from the Weimar Constitution, which covered church-state relations, were through article 140 incorporated as a whole into the new Basic Law. Ulrich Scheuner, an expert in church state studies, suggested that the new situation was a, "somewhat loosened continuation of the union of state and church."

It takes little imagination to indicate that German judges are used to thinking in terms of close ties between religion and state rather than a separation of the two entities for the good of the whole. Given this kind of judicial provincialism and the history of churchly provincialism, it follows that the way out can only come from outside. This is exactly what seems to be happening right now.

The European Union's Council Directive 2004/83/EC of April 29, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection lists in Article 10 the reasons for persecution, which

the member states of the EU shall take into account. Among these is religion which is defined as follows: "(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private *or in public*, either alone or in community with others, other religious acts or expressions of view, or forms of personal or *communal conduct* based on or mandated by any religious belief". This Directive says in no uncertain terms that visible public worship and communal conduct constitute necessary elements of religious behavior. Where these activities are denied, religious liberty is being denied, and where religious liberty is denied, the dignity of the human person is denied. It follows that the theory of a "minimum of religious existence" cannot stand the test of the EU. It needs to be reversed, which is a victory for all freedom loving people.