

Abuse of Religious Freedom?

Ethical Preliminary Remarks on “Religion-Based” Resistance against COVID-19 Protective Measures

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Introduction: Religion-based rejection of COVID-19 protection measures

On Sunday, 31 January 2021, a few hundred people marched through the centre of Vienna to take a visible public stand against the protective measures imposed by the Austrian government in the wake of the COVID-19 pandemic. They passed off their Sunday inner-city procession as a “Christian procession” to escape the bans on political demonstrations previously prescribed by the courts and police under the protection of the free exercise of religion. In the days before, about a dozen gatherings had been registered for Austria’s capital but had not been approved by the responsible authorities, with reference to the relevant protection measures against COVID-19, prohibiting any larger gatherings for the purpose of interrupting chains of infection. As a result, many of the initiatives affected by the assembly ban called upon people in the relevant social media to take part in this same Sunday “Christian procession.” For its part, the Catholic Church in Vienna immediately warned against the demonstration, which was merely declared as a Christian procession and thus superficially disguised. The spokesperson of the Archdiocese of Vienna spoke of a “clear abuse of religion and religious freedom.”¹

As early as 2012, the so-called Celtic Druidic Faith Community (*Keltisch-Druidische Glaubensgemeinschaft*) was founded in Germany. It sees itself as an anti-vaccination religion: as the self-description accessible online states, “the Celtic Druidic Faith Community was brought into being to protect us from

1 Kleine Zeitung (31 Jan. 2021).

some state obligations.”² The “faith community” makes no secret of the fact that the invocation of religious freedom is of a purely instrumental-strategic nature: there are no priests, rituals, prayers or prohibitions in the Celtic Druidic Faith Community. According to their opinion, people do not really need any religious or church affiliation at all and they think that the leaders of the established churches bully their believers and suppress their personal development simply to “secure a good income.” Nevertheless, nationally and internationally, “freedom of religion and church law are held in high esteem in conjunction with constitutionally guaranteed freedoms. We must use these advantages for the members of our community by demanding and claiming these guaranteed rights for ourselves.” In this way, it is possible to effectively protect self-responsible lifestyles from the encroachments of the state: “Our faith and our dignity protect us from state encroachments on our private autonomy. As a faith community, we resist, for example, compulsory vaccination as in Switzerland, which was introduced via an Epidemic Diseases Act. In Germany, we are taking ways to escape the increasing paternalism by ‘authorities’ and thus the violation of our dignity, our private autonomy and our principles of faith.”

Right at the beginning of the COVID-19 pandemic, the Catholic community Institute of St. Philip Neri in Berlin filed a lawsuit against the complete ban on church services, which was also imposed by the state of Berlin at the time. While the two large Christian churches – the Archdiocese of Berlin and the Evangelical Church of Berlin-Brandenburg-Silesian Upper Lusatia (EKBO) – expressly welcomed the ban on even the Holy and Easter liturgies and declared it binding for all of their congregations,³ some free-church or diocesan-independent Catholic communities resisted these orders and took legal action against the general decrees or state ordinances on which the bans were based, citing the freedom of religion, which is particularly protected under constitutional law and precisely comprises the public and communal practice of religious beliefs. Above all, the congregation leader and provost told the press that

2 Keltisch-Druidische Glaubensgemeinschaft: Über uns, <https://keltisch-druidisch.de/keltisch-druidisch/grundsaeetze/uber-uns>, accessed on: 23 Jan. 2023.

3 For an overview of the reactions of the two major churches in Germany, see Mückl, Stefan: “Die Katholische Kirche in Deutschland in der Corona-Pandemie,” in: Stefan Mückl (ed.), *Religionsfreiheit in Seuchezeiten*, Berlin: Duncker & Humblot 2021, pp. 135–162; Frisch, Michael: “Das bisherige normative Handeln der evangelischen Landeskirchen in Deutschland aufgrund der Corona-Pandemie,” in: Mückl (ed.), *Religionsfreiheit in Seuchezeiten*, Berlin: Duncker & Humblot 2021, pp. 163–186.

they are opposed to unjustified unequal treatment that reveals a lack of knowledge or even appreciation of communal worship. Provost Gerald Gösche stated: "I don't begrudge everyone to work in their free time, but it's not vital when DIY stores open. I think it is wrong for the state to consider only material things as necessary. In church services we praise God which strengthens and comforts the faithful. Especially in times of crisis, this gives support. Some people are really disturbed that this is no longer possible."⁴

Three examples from German-speaking countries with comparable state or constitutional structures shed light on the very heterogeneous picture of religion-based rejection of the respective state's COVID-19 protection policy. Here, "religion-based" stands for a broad range of ways in which institutions and associations justify their sometimes vehement, sometimes even militant rejection, with reference to their (alleged) religious potential. For example, the Celtic Druidic Faith Community finds its home in the German *Reichsbürger movement*⁵ against the globally prevailing protection policies against COVID-19. Further facets of this picture could be added from the international scene. Particularly striking are state actors who – with reference to their religious convictions – oppose the widely recognised COVID-19 protection measures, such as those repeatedly called for by the World Health Organisation. Moreover, they prevent their implementation in their own areas of responsibility, such as the (now former) Presidents of Brazil (Bolsonaro) and the U.S. (Trump) or the strictly Catholic President of Tanzania, John Magufuli, who was in power at the beginning of the pandemic. The latter explicitly demanded and promoted to keep churches and mosques open, since it was precisely praying and celebrating communities that promised true healing, stating: "COVID is the devil, and it cannot survive in the body and church of Christ."⁶

4 Weiss, Julia: "Gemeinde klagte gegen Gottesdienstverbot. 'Uns wurde das Coronavirus an den Hals gewünscht'" (16 Apr. 2020), <https://www.tagesspiegel.de/berlin/uns-wurde-das-coronavirus-an-den-hals-gewunscht-4695676.html>, accessed on: 23 Jan. 2023.

5 See chapter "Populist Reinterpretation and Appropriation of Religious Freedom Worldwide," footnote 30.

6 Jacobs, Andreas: "Corona-Test für Religionspolitik. Das Verhältnis von Staaten und Religionsgemeinschaften zu Beginn der COVID-19-Pandemie," in: Jeannine Kunert (ed.), *Religion und Corona. Religiöse Praxis in Zeiten der Pandemie (EZW-Texte 268)*, pp. 35–49, p. 42.

Admittedly, not all opposition to the prevailing protection measures against the COVID-19 pandemic that is in any way identified as religion-based is automatically an abuse of religious freedom. What is obvious for the disguised protests against COVID-19 restrictions in Vienna and elsewhere⁷ or the Celtic Druidic Faith Community does not automatically apply to the efforts of individual communities such as the Institute of St. Philip Neri, who – with reference to religious freedom – are defending themselves in court against certain protective measures against COVID-19. One may judge such efforts as lacking solidarity or their religious convictions as being theologically untenable. A judicial review of considerable restrictions of a fundamental right – and the prohibition of a service on the highest holiday of a religious community undoubtedly represents such a restriction – is a legal and legitimate exercise of constitutional rights, which is also open to people who consider themselves to be at home in strictly conservative and – for many – largely inaccessible thinking environments. Indeed, even the former president of Tanzania, who according to some sources might have died of COVID-19, will not be directly accused of an abuse of his religious freedom, in the knowledge of his deep Catholic religiosity, unless – as the highest representative and regent of his state – he in fact denied his population essential protective measures in gross negligence, and took them hostage for his religious convictions.

When looking back at the course of the COVID-19 pandemic (so far), one may observe that the *religion-based* resistance to governmental protective measures against the coronavirus has remained within a manageable framework, at least in the overall picture. After all, religious communities around the world have not only accepted the respective protective measures and the sometimes extremely sensitive losses of religious practice associated with them, but have even explicitly justified them for religious reasons; for example with reference to the religiously commanded duty of solidarity and love of one's neighbour. Nevertheless, it is instructive and significant to address this phenomenon of religion-based rejection. However, it occurs, abuse of religious freedom in the

7 There were similar attempts in Germany, such as in Nuremberg on 16 January 2021 (Der Spiegel: "Kirche warnt vor falschem Gottesdienst durch Corona-Leugnerinnen und -Leugner" [16 Jan. 2021], <https://www.spiegel.de/panorama/nuernberg-kirche-warnt-vor-falschem-gottesdienst-durch-corona-leugner-a-2ca14d04-09cb-414d-a215-foe296376a89>, accessed on: 23 Jan. 2023) or Munich on 2 November 2020 (Kirche+Leben: "Anti-Corona-Demo in München als ‚Gottesdienst‘ – Kirchen protestieren," [2 Nov. 2020], <https://www.kirche-und-leben.de/artikel/anti-corona-demo-in-muenchen-als-gottesdienst-kirchen-protestieren>, accessed on: 23 Jan. 2023).

context of protective measures against the coronavirus can not only severely endanger entire populations but can also backfire on the meaning and value of religious freedom itself. In a public increasingly critical of religion, the abuse of religious freedom can discredit it at the same time.

Abusive vs. erroneous references to religious freedom: The legal framework

The Celtic Druidic Faith Community is bluntly making public what many other opponents of protective measures against the coronavirus are probably counting on, namely the special protection that they hope to receive from invoking religious freedom, and if not legal protection, necessarily, then the protection of public opinion. Legally, the courts dealing with this request have largely rejected this instrument, as the abusive appeal of such movements coming from coronavirus deniers, *Querdenker*⁸ or right-wing populist circles was too obvious. On the other hand, they could benefit politically – at least upon first glance – from the fact that with the invocation of religious freedom a moment of “higher” absoluteness flashes up, which can at least count on a certain understanding among the general public.

8 *Querdenker* („lateral thinkers“) are a protest movement against coronavirus protection measures in the German-speaking world. The roots of the movement are heterogeneous. While in south-western Germany the movement was initially mainly driven by anthroposophical, alternative and esoteric milieus, right-wing extremists played a central role in eastern Germany from the outset. A pronounced skepticism towards vaccinations is widespread in the scene; in line with a distorted concept of freedom, coronavirus protection measures are perceived as oppressive. Protesting is perceived as an act of resistance against alleged deception and oppression. There is a strong mistrust of political institutions and traditional media; in the course of increasing radicalization, these institutions have even been stylized as the enemy. Conspiracy theories, such as that influential businessmen are having the population forcibly vaccinated, are popular in the scene. There is also a particular susceptibility to anti-Semitic and anti-democratic narratives; in some cases, there is also great sympathy of *Querdenker* protesters for the US conspiracy ideology *QAnon*. Central figures in the movement avoided a clear demarcation to the far right, which in turn was used by radical actors such as the right-wing extremist AfD to present themselves as representatives of the protesters' interests to promote themselves to gain support from within the movement.

In fact, freedom of religion already has a very high status under the constitution. Article 4 of the German Basic Law is unambiguous: “Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable” (Art. 4 para. 1 GG). Moreover, “the undisturbed practice of religion shall be guaranteed” (Art. 4 para. 2 GG). Unlike other fundamental rights (Art. 2 (2) GG: Right to freedom of the person; Art. 5 (2) GG: freedom of expression, freedom of the press), the practice of religion is not even subject to a direct legal restriction clause. Attempts in the Parliamentary Council to add the words “within the framework of the general laws” to the granting of religious freedom and at least address the exercise of religious freedom in the public sphere failed.⁹ The (public) practice of religion can only be subject to restrictions if it conflicts with other fundamental rights, such as the fundamental right to life and physical integrity (Article 2 (2) of the Basic Law). Freedom of religious and ideological confession – like freedom of faith and conscience – even has a special proximity to the core of human dignity: according to the former President of the German Federal Constitutional Court and Federal President Roman Herzog, “if it applies to any fundamental right article, Article 4 is a direct outflow of the principle of human dignity declared inviolable in Article 1 I and thus at the same time one of the ‘inalienable and inviolable human rights’ addressed by Article 1 II.”¹⁰

Even without this direct reference to the core of human dignity, freedom of religion – in its unity with freedom of thought and conscience – has a high status in the International Covenant on Civil and Political Rights (ICCPR), in terms of both its internal conviction (*forum internum*) and its public and communal exercise (*forum externum*). Consequently, this International Covenant also subjects any restrictions on these rights to a similarly high barrier as the German Basic Law: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (Art. 18 (3) ICCPR).

The protective measures against the coronavirus that have been imposed in many parts of the world on a legal basis and led to considerable restrictions on

9 Hillgruber, Christian: “‘Ungestörte’ Religionsausübung in der Pandemie?,” in: Stefan Mückl (ed.), *Religionsfreiheit in Seuchzeiten*, Berlin: Duncker & Humblot 2021, pp. 113–132, p. 116f.

10 Herzog, Roman, in: Maunz/Dürig, *Grundgesetz Kommentar* Loseblatt, Stand 92. Lfg. August 2020, Art. 4 Rn.11.

freedom (including freedom of religion) over a long period must also be judged against this normative background. In Germany, the protective measures include (or included) a wide range of instruments: in addition to basic protective measures such as basic hygiene rules, room ventilation, distance requirements or the obligation to wear a medical mouth and nose protection mask or the quarantines and domestic isolation of infected persons and proven close contacts, it was above all the sometimes comprehensive restrictions on movement and contact that massively impaired the public and private co-existence of people and in turn caused considerable social, health, cultural or even economic damage.¹¹ All measures served to stop chains of infection and thus prevent an unacceptable number of severe and fatal courses of disease, as well as protecting the intensive care health system from collapse.

As the pandemic progressed, further protective measures became possible and were also taken, which allowed movement and contact restrictions in particular to be eased: a far-reaching testing strategy as well as the start of the vaccination campaign in spring 2021 and associated "2G" or "3G" rules¹² made it possible for part of the population to enter spaces of communal life (restaurants, cultural institutions, visits to inpatient facilities for particularly vulnerable groups, travel, etc.). While in principle the COVID-19 protection measures were met with widespread acceptance in large parts of the population, the basic protection measures and later especially the vaccination campaign mobilised an initially still heterogeneous group of so-called "*Querdenker*,"

11 See the statement of the German Ethics Council on the presentation and effects on individuals and society in detail: "Vulnerabilität und Resilienz in Krise – Ethische Kriterien für Entscheidungen in einer Pandemie," Berlin: Deutscher Ethikrat 2022, p. 94. The restrictions on religious freedom are only mentioned in two sentences: "The public practice of religion was also severely restricted. In many cases, digital event formats were offered as a substitute." (Translated into English by the editors of this book.) A particular concern of the 24-member panel, which in addition to two constitutional lawyers also includes six theologians of different denominations and religions, is definitely not discernible from this rather casual remark.

12 During the pandemic, at times rules were in place in Germany that tied access to some places or activities to certain requirements. "3G" stands for the three German terms "*geimpft*," "*genesen*" and "*getestet*." The access requirement under the 3G rule was therefore either to be vaccinated against COVID-19, to have recovered from the virus or to have tested negative for the virus. "2G" stands for the German terms "*geimpft*" and "*genesen*." Accordingly, the entry requirement under the 2G rule was to be vaccinated or recovered.

“Corona deniers,” “*Reichsbürger* movement” or “vaccination opponents” to oppose the protection measures against the coronavirus. They were very quickly joined by the usual right-wing populist or extremist groups and parties, as they sensed considerable potential support for their own political agenda.

With the vaccination campaign, a new facet of religion-based rejection of protective measures against the coronavirus emerged. Up to this point, restrictions on movement and contact led to bans on liturgical services with physical presence of the faithful¹³ or the limitation of worship celebrations such as baptisms, first communions or even funerals. They thus considerably restricted the public and communal practice of religion. The situation is different now with compulsory vaccination, although the introduction of a statutory obligation to vaccinate *everyone* ultimately failed in Germany in the spring of 2022.¹⁴ However, prior to this the German parliament had passed an institution-related vaccination obligation for members of such professions who inevitably come into contact or have to come into contact with particularly vulnerable persons (groups). Moreover, quite a few people felt pressured to be vaccinated at least because a sufficient vaccination status was a prerequisite for admission to public events in the course of the so-called “2-G” or “3-G” rules. However, what happens if one refuses any form of vaccination for religious or ideological reasons and thus this form of highly personal private religious practice inevitably radiates into the public sphere, precisely because vaccination refusers must expect consequences (non-admission to professional practice or to community events, etc.)? Would this not constitute discrimination on religious or ideological grounds? If so, shouldn't this virtually act as an invitation to everyone to take refuge under the (supposedly) safe roof of this very specific exercise of religious freedom with their opposition to vaccination or their rejection of COVID-19 protection measures in general?

Of course, even in this constellation, religious freedom offers only limited protection to escape protective measures against the coronavirus. The refusal

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- 13 Online liturgies are of course ordinary liturgies, even if they are not atmospherically comfortable (for understandable reasons!). The best-known (short) liturgical act is the papal blessing *urbi et orbi*, the liberating effect of which (indulgence of even serious transgressions) is even granted to TV viewers without any loss.
- 14 Only those who cannot be vaccinated for medical reasons should be excluded. These medical reasons should also include those that trigger traumatic fear reactions to new vaccinations as a result of previous vaccination damage or complications.

of medical measures on religious grounds is accepted, even if they are medically indicated to save life. The example of Jehovah's Witnesses who refuse any blood transfusion – even in a life-threatening condition – is appropriate. However, the acceptance of their religiously based refusal finds its legitimate limit exactly where their religious conviction endangers others. Thus, parents are threatened with the loss of custody of their children whenever they withhold medically imperative measures from their children out of religious or ideological conviction. The same applies to vaccination refusers, whose (religiously based) decision is to be respected. Nevertheless, there is a considerable qualitative difference between the *obligation* to vaccinate (possibly with sanctions) and *compulsory* vaccination.¹⁵ However, the persons concerned are not fundamentally protected from the possible consequences of such a decision, at least not if it involves serious risks and harm to others. It is true that such consequences must be limited to what is absolutely necessary and never sanction the religious or ideological conviction as such. However, if certain consequences are suitable and necessary to protect the fundamental rights of others, any unavoidable disadvantages are legitimate.

Moreover, the mere invocation of a decision based on conscience or religion is insufficient. Decisions of conscience – like beliefs – must also undergo elementary tests of plausibility and truthfulness. In principle, if one claims a moral dilemma, "one must be able to demonstrate the seriousness of one's moral dilemma in a comprehensible way."¹⁶ The European Court of Human Rights (ECHR) argued similarly when it affirmed this in principle in a landmark decision on the legality of religion-based rejection of vaccination obligations, but made it dependent on a sufficient degree of validity, seriousness, coherence and significance.¹⁷

Motives for the abusive reference to religious freedom

Even if it should emerge that the quantitative extent of the abusive reference to religious freedom as a defence against COVID-19 protection measures is na-

15 Deutscher Ethikrat: Impfen als Pflicht?, Berlin: Deutscher Ethikrat 2019.

16 Rixen, Stephan: "Die Gewissensfreiheit der Gesundheitsberufe aus verfassungsrechtlicher Sicht," in: Franz-Josef Bormann/Verena Wetzstein (eds.), *Gewissen. Dimensionen eines Grundbegriffs medizinischer Ethik*, Berlin: De Gruyter 2014, pp. 65–88, p. 73.

17 *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13, ECHR 8 Apr. 2021.

tionally and internationally kept within reasonable limits after a concomitant analysis of the empirical findings,¹⁸ it should not be neglected as it is a qualitatively relevant problem.

On the one hand, in the very obvious cases of abusive reference to religious freedom, such as in the case of the Celtic Druidic Faith Community or demonstrating anti-vaccination activists and “*Querdenker*,” the question emerges concerning why these movements do not simply refer to the freedom of conscience or ideology – which holds equal importance under constitutional and human rights law – but instead explicitly seek the protection of religious freedom. In any case, an original religious interest that would make this immediately plausible is not recognisable. It is possible that these groups and movements hope for more acceptance in state and society by referring to religious freedom. In fact, with the reference to freedom of conscience, one is *alone* in case of doubt, and with the reference to a worldview, one always remains bound to *life in this world*. By contrast, the reference to an authority in the *hereafter* – which is associated with a religion – promises a special aura of the unconditional and immovable. To see oneself (ostensibly) compelled by one’s own conscience to defend oneself against COVID-19 protection measures always remains somewhat weaker – at least in terms of external effect – than seeing oneself (ostensibly) compelled by a higher and otherworldly authority, which one believes one can only oppose by sacrificing the salvation of one’s soul.

On the other hand, another motive may be responsible for the abuse of religious freedom. Indeed, it is striking that especially right-wing populist groups and movements use their opposition to the COVID-19 protection measures to give new impetus to their anti-etatist agenda against the “political elites” in governments, parliaments, business, science, culture or even in churches. For this purpose, they need new allies or at least supporters who are sympathetic to their cause. Right-wing conservative circles – especially in the Christian churches – offer themselves directly for this purpose. There have been “cultural bridges” to these milieus for a long time, with which right-wing populist agendas are intended to and can be made compatible.¹⁹ Occasionally,

18 There is currently no relevant empirical social science survey on this. The present preliminary considerations also draw their empirical basis more from “anecdotal” evidence, which is mainly fed by everyday observations.

19 I cannot discuss these questions in more detail here. See also Sekretariat der Deutschen Bischofskonferenz (ed.): *Dem Populismus widerstehen. Arbeitshilfe zum kirchlichen Umgang mit rechtspopulistischen Tendenzen* (= Arbeitshilfe Nr. 305), Bonn 2019; Lob-Hüdepohl, Andreas: “Kirche gegen Rechtspopulismus – auch in den eigenen Rei-

even right-wing populist actors such as a board member of the association "Christians in the AfD" and member of the European Parliament explicitly call on churches to value and support their commitment to religious freedom.²⁰

It is certainly no coincidence that even leading right-wing Catholic circles around the former officials Archbishop Carlo Maria Vigano and Curia Cardinal Gerhard Ludwig Müller follow the right-wing populist narrative that the protective measures against the coronavirus – including against the practice of religion – actually only served those in power as a tried-and-tested means of pushing the religious life of the Christian churches in particular out of the public eye. Even if church members are not receptive to such conspiracy-theoretical suggestions, they may start to wonder when even in actually scientifically high-quality statements there are still fragments of beliefs that call for special caution regarding COVID-19 protection measures, although this direction has long since been overcome both theologically and church-officially: constitutional lawyer Christian Hillgruber states that "according to the teachings of the Catholic Church, the Holy Mass is about making present the sacrifice of Jesus Christ on the cross, through which the individual believer receives a share in the redemptive graces acquired through Christ's death on the cross. The so-called personal fruit of the Mass is only given to the priest who celebrates and to the faithful who are physically present."²¹ Shouldn't we do everything in our power to avert the impending loss of salvation for Catholics at the last minute?

"Abusive" is to be carefully distinguished from "erroneous." If believers refer to a (supposed) requirement of their religious tradition and therefore defend themselves (in court) against protective measures against the coronavirus, they may falsely invoke the absolute nature of their religious freedom. This will have to be decided by the court and does not yet constitute an abuse of their religious freedom. However, this is definitely the case when political movements and groups merely make use of the protection and social prestige of religious freedom as a helpful instrument to better stage their actual political agenda, and

hen," in: Bernd Emunds (ed.), *Christliche Sozialethik – Orientierung welcher Praxis?*, Baden-Baden: Nomos 2018, pp. 239–259.

20 Kuhs, Joachim: *Offener Brief: Gottesdienste für alle – ohne Corona-Beschränkungen* (2 Dec. 2021), <https://www.joachimkuhs.de/offener-brief-gottesdienste-fuer-alle-ohne-beschaenkungen/>, accessed on: 6 Feb. 2023; Kuhs, Joachim: *Massenexodus: Rekord bei Austritten aus katholischer Kirche* (11 Jul. 2022), <https://www.joachimkuhs.de/massenexodus-rekord-bei-austritten-aus-katholischer-kirche/>, accessed on: 6 Feb. 2023.

21 Hillgruber: *Religionsausübung*, p. 129.

when they consciously seek to fish in such milieus for which certain religious practices are particularly sacred and can thus at least become secret supporters.