Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the *Headscarf Case*

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A. Introduction

Some of the most magnificent achievements of human culture, from the *Parthenon* to *Paradise Lost*, have been inspired by religion and some of the worst atrocities of human history have been committed to worship its commands. In consequence, whenever questions of religion become part of the political and legal agenda of a society one might be very insecure about the solution of the problem but can be absolutely confident that the stakes are high and the discussions intense. This general observation about religious issues has gained a special dimension due to the events of September 11, 2001, and the wars in Afghanistan and Iraq. Since then the role of religions in general and of Islam in particular is at the very core of central debates of global civil society and of the deliberations and actions of policy makers.

In this context even a question of German law regulating the duties and rights of civil servants can gain an important cultural and political dimension that transcends by far its concrete significance in purely legal terms. The head scarf issue and the recent decision of the German Federal Constitutional Court[1] exemplifies

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[1] BVerfG, 2 BvR 1436/02, 24.9.03; available at: http://www.bverfg.de. There is another decision of the German Constitutional Court dealing with head scarves. The Federal Labour Court had ruled that it is impermissible to dismiss an employee in a department store because this employee wears a head scarf. The defendant had argued that he would incur financial losses because costumers were not accustomed to such a sight. The Federal Labour Court did not engage in a principled discussion of the role of fundamental rights like the freedom of religion in this case but argued simply that there was no evidence for the economic losses given. Compare BAG, 2 AZR 472/01, DB 2003, 830. The Federal Constitutional Court followed this argumentation, compare BVerfG, 1 BvR 792/03, 30.7.2003, available at: http://www.bverfg.de.

On the background of the head scarf issue and the divided opinion in German constitutional doctrine compare STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES 143 –144 (2002) .

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this: a wide ranging debate has immediately begun about Islam, the neutrality of the state, the limits of religious freedom and the prospects of a pluralist society. The initial legal question is, however, straight forward enough: Precondition for the appointment as a civil servant in German law is, among others, her *Eignung* (qualification) for the position concerned. This precondition is a statutory demand in the German federal law governing the rights and duties of civil servants, and for civil servants of the *Länder* (federal states) in the respective framework legislation[2] and in laws of the *Länder* themselves. It is buttressed as a central principle of rational recruitment of a modern state by Article 33.2 of the *Grundgesetz* (GG- Basic Law) thus becoming a constitutional guarantee. For a Muslim woman applying for a teaching position at a German public school who feels committed to abide by the rules of religious tradition, wherever its source may lie, by wearing a head scarf and who is otherwise qualified for the position the question arises inevitably: Is it part of the qualification of a teacher to be prepared *not* to wear a head-scarf?

Behind this rather clear starting point a plethora of difficult questions is lurking that unfolds the real dimensions of the case. What about the freedom of religion of the women concerned, a right which is for some the primordial fundamental right, the right that perhaps initiated the modern triumphant march of human rights and that is guaranteed by Articles 4.1 and 4.2 of the Basic Law? What about the principle of equal treatment, here more concretely Article 33.3 of the Basic Law that provides for equal access to public offices irrespective, among others, of religion? Do these norms make not a strong case for the permissibility of wearing the head-scarf at work?

What, however, about the freedom of religion of the children who are taught by a teacher with a head scarf? There is general consensus that this right encompasses not only the right to believe and live according to a religious faith, but also the right not to believe and not to be indoctrinated (even though according to German jurisdiction this right goes not so far as to prohibit any exposition to any religious faith). If that is so does this not demand abstinence from any visible display of religious beliefs by a teacher? What about the right of parents to determine the principles of education of their children, as guaranteed in Article 6.2 Sentence 1 of the Basic Law, including their religious education? Is a teacher displaying her belief not taking away central choices of the parents guaranteed by this provision? Is she not taking away the special responsibility of the state to supervise public education, Article 7.1 of the Basic Law, with its inherent duty to guarantee religious neutrality? Is this not clearly violated by a civil servant who displays during her working hours very visibly a peculiar religious allegiance? Finally, are not the rights of women not of

[2] § 7 *Beamtenrechtsrahmengesetz*

great importance here, too? Is the head-scarf not a symbol of a patriarchal structure, of the subjugation of women, disguised as religious piousness and therefore irreconcilable with the principal of equal treatment, enshrined in Articles 3.2 and 3.3 of the Basic Law?

These complicated questions have confronted German courts now for a considerable time, as in other countries where similar problems arise. The German Federal Constitutional Court has now delivered its long awaited judgement on the case with an extensive and sharply formulated dissenting opinion. Whether it has the doctrinal format to legally solve the puzzles outlined and pacify the controversy will be the topic of some short comments after a summary of the judgement itself. One should hope that it does because the issue might arise in other contexts as well e.g Jewish men who wish to wear a kippa teaching math to first graders. Is this allowed in Germany? What about a judge who feels thus inclined? Or a policeman who wants to wear a turban because he is Sikh? Is this a possible practice as in Great Britain where police women are even allowed to wear head scarves? German society is not accustomed to these questions at all but still has to find answers very soon.

B. The Ruling

I. The Background

The case the Federal Constitutional Court had to decide upon concerns a woman of German citizenship, born in Kabul, who went through her teacher's training at the university and the *Referendariat* (a compulsory two year practical stage), and then sought employment in Baden-Württemberg. The responsible administration regarded her as not qualified according to § 11 Landesbeamtengesetz Ba-Wü, that reiterates the preconditions set out in Article 32.2 of the Basic Law and § 7 Beamtenrechtsrahmengesetz for the appointment as a civil servant, among them appropriate *Eignung*. Two lower instance administrative court decisions upheld this decision[3] and the case reached the Federal Administrative Court that decided last year.[4] The Federal Administrative Court acknowledged that the freedom of religion of the applicant was touched by the administrative decision and that any appointment has to be made irrespective of religion.[5] The Court, however, confirmed the initial

[3] VG Stuttgart NVwZ 2000, 959; VGH Mannheim NJW 2001, 2899.

[4] BVerwG JZ 2002, 254. For some comments compare Morlok/Krüper, *Auf dem Weg zum "forum neutrum" – Die "Kopftuch-Entscheidung" des BVerwG*, NEUE JURISTISCHE WOCHENSCHRIFT 1020 (2003); Wiese, *Urteilsanmerkung*, ZBR 39 (2003).

[5] *Id*.

decision arguing that any civil servant has to accept special limits to his constitutional rights under Article 33.5 of the Basic Law to enable the functioning of public administration.[6] The Court regarded the preservation of the neutrality of the state as to religious doctrines and matters of belief as one of the core constraints.[7] This principle is not explicitly stated in the German Constitution but derives itself clearly and uncontentiously from central constitutional norms governing questions of religion.[8] It is of special importance for Article 7.1 of the Basic law that establishes the responsibility of the state for educational matters. According to the Federal Administrative Court this principle actually gained even more importance in recent times due to the increased plurality of religions in modern society that makes it, in its opinion, advisable to adhere strictly to religious neutrality in the public sphere.[9] The Court buttressed this consideration by referring to the negative freedom of religion of the children, Article 4.1 of the Basic Law and the rights of the parents to determine the content of education, Article 6.2 of the Basic Law.[10] It held that the head scarf is a powerful symbol of religious affiliation.[11] It rejected, this being a core problem of the whole case, the argument that wearing a head scarf is not violating the principle of the neutrality of the state because it is not a symbol of the state in the first place, but rather a personal statement of the person concerned that cannot and may not be taken as a statement of the state.[12] In other cases concerning head scarves other lower instance courts have followed this line of argument[13] with support of well established legal opinion.[14] The point is important because of the ruling of the Federal Constitutional Court in the Crucifix-Decision, one of its most contentious judgements that raised a storm of dissent in public life.[15] In this decision the Court held that parents can demand a crucifix to be removed from a classroom of a public school to preserve the neutrality of the state. Keeping such a

[6] *Id*. at. 255.

[7] *Id*. at. 254.

[8] More precisely from Art. 4.1, 3.3. Sentence 1, Art. 33.3 and 140 of the GG, the latter incorporating Art. 136.1, 136.4, Art. 137.1 of the Constitution of Weimar into German constitutional law.

[9] BVerwG JZ 2002, 255.

[10] *Id*. at 254.

[11] *Id*. at 255.

[12] *Id.*

[13] VG Lüneburg NJW 2001, 767. Overruled by OVG Lüneburg, NVwZ-RR 2002, 658.

[14] Compare the remarks in favour of a more liberal attitude of former Federal Constitutional Judge Böckenfoerde, "*Kopftuchstreit" auf dem richtigen Weg*, NJW 2001, 723.

[15] BVerfGE 93, 1.

religious symbol would, in its view, illegitimately violate the negative freedom of religion of the children. It was widely argued that applying these standards to the head scarf issue would necessarily lead to the interdiction of head scarves in school rooms as well. Here the aforementioned argument sets in, differentiating between symbols that the state employs itself and symbols that show nothing else but the personal allegiance of the civil servant not to be identified with a statement of the public body that employs her.[16]

The Federal Administrative Court felt encouraged in its ruling by a decision of the European Court of Human Rights. The European Court of Human Rights regarded the dismissal of a teacher who had taught for three years without problems with children or parents in a Swiss school to be within the margin of appreciation under Article 9 of the ECHR and no violation of the ECHR was found.[17]

II. The Decision of the Federal Constitutional Court

1. The Outcome in a Nutshell – Freedom of Religion Proceduralised

The Federal Constitutional Court had to decide under the constitutional complaint mechanism whether the Administrative Courts had ruled rightly through three instances. It delivered a decision that is without doubt unexpected in outcome and reasoning and that, among other issues, led to the criticism of the dissenting judges that the Court violated one of the most basic principles of legal proceedings, the right to be heard.

The Court took as decisive the same constitutional norms the courts before it had considered; access to public service according to qualification[18] irrespective of religion[19] and freedom of religion[20] as the rights of the applicants possibly violated by the denied appointment.[21] On the other hand the Court considered the following: supervision of public education according to the principle of the neutrality of the state[22], parent rights[23] and negative freedom of religion of the pupils as possibly

[16] Böckenfoerde, NJW 2001, 723, 726.

[17] Eur. Court H.R., *Dahlab v. Switzerland*, Judgment of 15 Febuary 2001, Appl. Nr. 42393/98 available at: http://hudoc.echr.int.

[18] Art. 33.2 of the Basic Law.

[19] Art. 33.3 of the Basic Law.

[20] Art. 4.1. and 4.2 of the Basic law.

[21] BVerfG, *supra* note 1, Nr. 33 et. seq.

[22] Art. 7.1 of the Basic Law.

limiting the prima facie legal positions of the plaintiff.[24] It weighed their importance in a new way and came to other conclusions than the courts before it. It held that as German Law stands there is no legal basis for forbidding the wearing of head scarves in schools.[25] It ruled that due to the essential nature of the issue for the constitutional rights of the applicants, a statute is constitutionally indispensable for the abstract decision whether or not it is permissible in general to wear a head scarf in schools.[26] It added that the Länder, having the competence for school legislation in Germany, are free to create such legislation.[27] The core of the decision is an allocation of the competence to solve the problem, not a material decision on the admissibility of head scarves in German schools itself. The Court thus proceduralises the problem, determining the path to solving it was through new legislation created in a democratic process, without authoritatively deciding how it should be solved.

2. The Reasoning in More Detail

One of the main issues in the debate about the head scarf concerns the question: What does a head scarf actually symbolise? What is its exact meaning? The Court ruled that the head scarf unfolds some meaning only in conjunction with the person who is wearing it.[28] Decisive is not the subjective intentions of the person but how the head scarf is objectively understood by a *objektiver Empfängerhorizont* (neutral observer).[29] The Court reasoned, after reviewing the meagre empirical evidence on the meaning of head scarves and the motives of women to wear them, it cannot be reduced to a sign of the suppression of women.[30] The Court stated as an important side remark that the head scarf *per se* does not in principle impede the teaching of the values of the German constitution.[31]

It argued that there is a crucial difference between a religious symbol that is displayed due to a decision of a public authority or due to a decision by an individual

[23] Art. 6.2 of the Basic Law

[24] *Id.* at Nr. 41et. seq.

[25] *Id.* at Nr. 30, 57et. seq..

[26] *Id.* at Nr. 67et. seq..

[27] *Id.* at Nr. 62 et. seq..

[28] *Id.* at Nr. 50.

[29] *Id.* at Nr. 52.

[30] *Id.* at Nr. 52.

[31] *Id.* at Nr. 52.

to do so. If the state tolerates such a symbol worn by an individual it does not make this, in the view of the Court, a symbol of its own.[32] The Court differentiated between a concrete danger of manipulation by the teacher violating the demanded neutrality and the abstract danger embodied in just the head scarf itself.[33] Whereas the former can affect the qualification of the applicant and is a proper object in the view of the Court of the decision of the administration, the latter is governed by other rules. Here, the Court first stated that there is not sufficient empirical data to indicate any harmful influence of the head scarf on children.[34] It acknowledged the possibility but allows for the contrary as well. Given this unclear situation, there is no basis for the administration to interpret the open legal concept of qualification in a manner that rules out the possibility to wear a head scarf while teaching children.

The Court held further that in any case there is no sufficient legal regulation of this matter.[35] It drew in this context on a well-established doctrine of German constitutional law, the so-called *Wesentlichkeitstheorie*, that states that essential matter, e.g. matters that are relevant for the exercise of a fundamental right by a citizen, are to be regulated by a legislative act.[36] This doctrine has been developed to increase the protection of fundamental rights against inroads by the administration and in order to base major limitation of fundamental rights on a democratic decision of the legislature. The Court reviewed various norms of German law[37] potentially important for this question as regulating rights and duties of civil servants and comes to the conclusion that none of these norms is sufficient ground for the decision of the administration not to appoint the plaintiff.[38] A constitutional norm that is often cited in the discussion, Article 33.5 of the Basic Law, is not considered in this context.

Thus, it is up to the state legislative to create such a legal basis. Here another decisive point of the ruling is reached: The German Constitutional Court has not been reluctant in the past to give detailed advice to the legislator how to create an act that it would regard constitutional. The best example for this is the second decision of the Court on the abortion issue, where it delivered the most detailed demands

[32] *Id.* at Nr. 54.

[33] *Id.* at Nr. 49, 58.

[34] *Id.* at Nr. 56.

[35] *Id.* at Nr. 59et. seq..

[36] BVerfGE 49, 89 (126); 61, 260 (275); 83, 130 (142).

[37] Like § 11, §§ 70pp Landesbeamtengesetz Ba-Wü or Art. 11 – 22 of the state constitution of Baden-Württemberg

[38] BVerfG, supra note 1, Nr. 60 et. seq..

for future legislation.[39] In the head scarf decision only some remarks can be found. The starting point is that the legislator is in principle free to do what he wants. He might follow the consideration of the Federal Administrative Court and conclude that the increasing heterogeneity of modern society demands an even stricter adherence to the principle of the neutrality of the state than in the past.[40] Consequently, he will ban head scarves from school. He might, to the contrary, conclude from this development that it is advisable to integrate this social and cultural pluralism in the schools to enable the children from early age onwards to deal with this phenomenon that will accompany them through life.[41] As a result, head scarves would be allowed.

The lack of empirical evidence on the factual influence of a head scarf on children appears not to be a problem for the legislator. He enjoys, in the view of the Court, a prerogative in deciding on this matter. This point is not quite clear in the decision but it is the most reasonable interpretation of what it says. The Court underlined that forbidding the head scarf in schools would be in accordance with the ECHR as decided by the European Court of Human Rights.[42] It finally buttressed its argumentation by Article 33.3 of the Basic Law and the principle of equal access to public service irrespective of religion enshrined in this norm. It held that it is the legislature that is best qualified to maintain equality and not individual administrative decisions.[43] The Court did not explicitly use the differentiation of direct and indirect discriminations. The former is defined as unequal treatment because of a certain characteristic, the latter as an apparently neutral provision, criterion or practise that nevertheless puts persons with a special characteristic in a particular disadvantage compared with other persons. This distinction is a standard of modern international equality provisions and recognized in German Constitutional Law.[44] It appears that the Court regarded the head scarf prohibition as an indirect discrimination, even though its does not explicitly state so.[45] Justification is supposed to be in this case only possible, if the discrimination respects the religious freedom of the person discriminated against.[46]

[39] BVerfGE 88, 203.

[40] BVerfG, supra note 1, Nr. 64.

[41] *Id.* at Nr. 65.

[42] *Id.* at Nr. 66.

[43] *Id.* at Nr. 71.

[44] BVerfGE 97, 35 (43).

[45] BVerfGE, supra note 1, Nr. 39.

[46] *Id.*

The immediate legal consequence of this decision is that the Federal Administrative Court has to decide upon the case of the plaintiff again on the basis of the legal opinion of the Federal Constitutional Court.

II. The Dissenting Opinion

The decision was based on a 5 to 3 vote. The three dissenting judges formulated an elaborate and scathing critique of the judgement. They thought that the Court has dodged the principle question at stake even though the case was ripe to be decided.[47] They maintained that its basis is a fundamental misunderstanding of the consequences of the principle of the separation of powers and in this context, of the importance of fundamental rights in the civil service.[48] They thought that the Court should at least have formulated clear yardsticks for the legislature and given advice how the Federal Administrative Court should now precede: Is it supposed to admit the plaintiff to the public service? Or is it supposed to wait, keeping the case pending until the legislature has decided?[49]

A core criticism concerns the role of fundamental rights for civil servants. Here the judges held a restrictive view arguing that a civil servant enters the sphere of the state and can thus not enjoy the fundamental rights like a citizen because these rights are directed in their *status negativus* against the state. Only if the civil servant's status is concerned does he enjoy the full protection of fundamental rights.[50] Equality clauses like Articles 33.2 and 33.3 of the Basic Law should not be confused with limitations of constitutional freedoms.[51] Only this understanding, the dissenting judges argued, unfolds properly the doctrine of the separation of power. The civil servant is included from this perspective in the state sphere and enjoys thus no liberty of obstructing the will of the executive in applying the general will of the legislature.[52]

The idea that a special legal basis has to be created for the prohibition of wearing head scarves in schools did not convince the dissenters. They argued that there is sufficient base in the constitution itself. The public servant's duty to be politically

[47] *Id.* at Nr. 75.

[48] *Id.*

[49] *Id.*

[50] *Id.* at Nr. 76 et. seq..

[51] *Id.* at Nr. 86.

[52] *Id.* at Nr. 95 et. seq..

neutral and moderate is in their opinion enshrined in Article 33.5 of the Basic Law.[53] This norm concerns the traditional principles of the civil service that include, in the view of the dissenters, the duty to abstain from the display of religious symbols in schools. Special statutory regulations are thus possible but not mandatory. They doubt the doctrinal logic of the demand for such an act: The laws would, given the constitutional basis of the rights and duties of the civil servant, only be declarative, not constitutive and thus less than useful.[54] The state legislature is not competent to concretise the immanent limitations of the freedom of religion. This is the inherent duty of the Federal Constitutional Court itself.[55]

The dissenters thought that the objective possibility of the head scarf to create conflicts in schools is enough to make it improper to wear it.[56] An abstract danger is enough for the decision not to employ the teacher, the distinction of abstract and concrete dangers familiar in German police law is not helpful, empirical evidence for the consequences of head scarves is in their view not necessary.[57] The administration is, in their view, the proper agent to decide whether the person is qualified or not. To judge individually is the best way to preserve individual justice.[58] Norms are even unsuited to regulate the matter properly. The judges argued that it makes no difference whether a crucifix is installed by the school or a teacher is wearing a head scarf.[59] Both symbols are held to be directly attributable to the state. In a side comment, the judges even regarded it as admissible to have crucifixes in the class rooms which are merely signs of a culture, not predominantly of a religion.[60] The head scarf is, in their view, a symbol of political Islamism.[61] It implies that a woman without a head scarf loses her dignity as it is supposed to protect the dignity of the wearer. It is a symbol of the subjugation of women.[62] The judges admitted that there are other religions (they do not name them) that allow discrimination of

[53] *Id.* at Nr. 97.

[54] *Id.* at Nr. 130 et. seq..

[55] *Id.*

[56] *Id.* at Nr. 108.

[57] *Id.* at Nr..106, 110, 116.

[58] *Id.* at Nr. 126.

[59] *Id.* at Nr. 113.

[60] *Id.* at Nr. 113.

[61] *Id.* at Nr. 117.

[62] *Id.* at Nr. 119.

women and that are free to do so under German Law, but maintained that the head scarf crosses a border line these religions do not transgress.[63]

Finally, the judges accused the Court of denying the defendant, the state of Baden-Württemberg, legal hearing. They argued that the issue of special statutory preconditions for an interdiction of wearing the head scarf had not been raised in the proceedings. Thus the defendant had no possibility to give his opinion on this matter.[64]

C. Some Comments

Most observers expected a decision of the Court outlawing or allowing the wearing of head scarves in schools. The outcome is, therefore, surprising. The immediate consequence is a lively debate in the German Länder as to what to do now. There are some states, apparently the majority, indicating that they have the intention to interdict the wearing of head scarves in German public schools. Some participants in the discussion demand the consequent interdiction of any religious symbols in schools, others want exceptions for Christian symbols. A few officials disagree pointing to the experience with teachers wearing a head scarf for years without creating any problems e.g. in Hamburg. Many voices demand a coordinated solution to avoid different regulations in different regions. Politically no clear camps are defined: The critics of wearing head scarves in schools are right wing extremists, conservatives, Social Democrats, Greens, feminists or activists of immigrant groups. Accordingly, the motives for banishing head scarves are so diverse as the hope to serve Christianity by reducing Islamic influences, dislike of any personal political and religious profiles of the civil servants *per se*, the idea to foster atheism by the ban of religious symbols, strict conceptions of the neutrality of the state or laïcist ideals of statehood, hopes of emancipation of Muslim women or fear of further disintegration of immigrants and of the rise of intolerant forces in the immigrant community, or outright xenophobia to name just a few. On the other hand, the defenders of a more liberal attitude towards the questions are politically and, as to their religious beliefs, nearly equally heterogeneous.

The judgement, which stirred these debates, has certainly many merits. To give some examples: The defence of the fundamental rights of civil servants seems convincing. The dissenting opinion has too narrow of a view of their role in the public service; reminiscent of older doctrinal constructions limiting considerably the legal protection of the fundamental rights in certain areas with a special relationship to

[63] *Id.* at Nr. 124.

[64] *Id.* at Nr. 136.

state activity.[65] There are without doubt legitimate limits to the fundamental rights of civil servants derived from the functional needs of their official capacity (Article 33.5 of the Basic Law), but they are much narrower than dissenting judges suggest.

The Court displays a welcome sociological sensitivity by reviewing the empirical evidence for the consequences of a head scarf or other attributes for this matter worn by teachers. To declare any empirical evidence irrelevant, as the dissenting opinion does, seems hardly convincing. If there is hard empirical evidence that a head scarf (or a kippa, a turban, a monk's or a nun's habit) worn by one of the various teachers children have in their lives does not influence them at all, if there is perhaps even data that the confrontation with a different religion in reality instead of only in text books might even foster their understanding and their responsible decision about their own religious beliefs (which, by the way, they are supposed to be able to reach at the age of 14 in German law, because this is the age of a child's personal determination in religious and church matters) – could there be any justification for forbidding it? Is the same not true for the contrary?

This factual point is important because much depends on the question of what kinds of effect a head scarf has on children. There is a psychological conviction widespread in discussions that children identify especially in early age with the teacher and are thus prone to be influenced by him or her. Another concern is that other Muslim girls not wearing head scarves might be intimidated by a teacher wearing such a scarf. Different effects are certainly imaginable as well. Children have not only one teacher, but many, and accordingly various influences play a role. The behaviour and appearance of a teacher is the object of discussions with other children, with parents and other adults. Additionally, children have minds of their own and certainly do not copy any behaviour of their teachers who they might like or dislike. They might love the way the teacher explains counting but dislike the head scarf (or like the jokes of a teacher but not his monk's habit or his kippa). It is not surprising that the Court decided to find out what is known in this area of child psychology and it is noteworthy that it came to the conclusion, after reviewing some evidence, that actually little is known about the effect of religious symbols worn by teachers on the development of children.

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[65] These relations were traditionally termed following O. Mayer "Besonderes Gewaltverhältnis" and encompassed the prison regime, civil servants, soldiers or schools. The Federal Constitutional Court has strengthened the protection of fundamental rights by the demand of legislative acts in this field, too, as the fundamental rights are here applicable as everywhere else, compare e.g. BVerfGE 33, 1 (11) on the applicability in the prison regime. On the current view that the fundamental rights are in principle applicable, that they unfold their effect in the classical *status negativus*, too and that the civil servant does not lose them by entering the sphere of the state as proposed in older doctrinal constructions, Kunig, *in* BESONDERES VERWALTUNGSRECHT Rn 46-48, 168-174 (Schmidt-Aßmann ed., 12th ed. 2003). Lecheler, *in* HANDBUCH DES STAATSRECHTS, BD. III, § 72 Rn. 69 (Isensee/Kirchhof eds. 1996).

The interpretation of the head scarf by the Court is more convincing than other, less differentiated ones that appear in the discussion that take it to be the banner of Islamism and the subjugation of women. There is no doubt that the head scarf can have that sort of meaning. However, it is not a piece of fabric but a person teaching in school and thus the Court is right that there is no way to determine the real meaning of the head scarf in concrete cases but in conjunction with the person who wears is.

The Court did not take Article 3.2 of the Basic Law guaranteeing the equality of man and women as a reason for banning the head scarf. This is relevant because this principle is at the forefront of some criticism against the head scarf. The question of the equality of man and women arises in two contexts: first as to the teacher herself and second as to the influence of the display of the head scarf on children. There are two decisive reasons against the relevance of Article 3.2 of the Basic Law as to the teacher concerned: First, it seems to be a rather surprising strategy to foster the emancipation of Muslim women by blocking their professional careers. Second, it cannot be part of a legal equality regime to force a certain course of comportment onto individual women who want something else, whether one likes their decisions or not. This is certainly not done with non-Muslim teachers who live, perhaps visibly for their pupils, in rather unequal or even patriarchal role models. As to the pupils, Article 3.2 of the Basic Law is relevant because of Article 7.1 of the Basic Law. Here, again the answer to the question depends on the comportment of the women concerned and the meaning the head scarf consequently obtains. The Court was, therefore, right to conclude that the head scarf alone will not prevent the teacher to fulfil her duties in the framework of the constitution and more concretely Article 3.2 of the Basic Law.[66]

It is also convincing that the Court differentiated between religious symbols directly installed by the state and personal attributes of a civil servant. A head scarf is not the same as a Quaran sura written across the class room door. A state that tolerates the presence of various religious symbols in the public service does not endorse any of these symbols. It just offers space for a visible religious variety of its staff. The dissenting opinion is much less convincing in this respect. There is even the surprising side remark on the permissibility of crucifixes in school rooms. One certainly cannot take away the religious meaning from a crucifix in the first place

[66] On the various questions raised by Art. 3.2 of the Basic Law compare concisely Britz, *Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungsvorschriften für Frauen und Grundgesetz*, KJ 2003, 95. For Hufen, the protection of Muslim girls against pressure to wear a head scarf is a decisive reason for banning it for teachers. *See*, Hufen, *Das Kopftuch-Urteil des BVerfG – Steine statt Brot oder mehr*, 43 NEUE JURISTISCHE WOCHENSCHRIFT (2003).

and make it nothing but a cultural symbol.[67] To demand strict neutrality of the state in the case of head scarves (that are not even directly attributable to the state) but to argue for the permissibility of (small) crucifixes over school doors leaves the aftertaste of religious bias.

The idea of the Court to let the legislature decide on the conflict also has some appeal. There is certainly a tendency in German politics to let the judges decide upon hard cases the politicians do not want to tackle. The question is whether this case is not a paradigm case for what constitutional courts, as far as they are concerned with the protection of human rights, are institutionalised for in the first place: To assess whether or not a minority needs protection against majority will or not.[68] The criticism of the dissenters seems to have considerable merits in this point: This case could have been decided and given the prospects of different rules in different states, should have been decided in this or that way. Perhaps here the widespread respect for proceduralism, emanating from Habermas´ discourse ethics[69] in German legal science, was ill applied in this classical case of minority protection.

A clear problem seems to be that there is no differentiation as to the age of the pupils concerned. It seems very hard to argue that children, as mentioned in Germany from the age of 14 onwards, can choose their religion but are too immature to be exposed to a teacher wearing a head scarf.[70] Thus, from a certain age onward a ban seems to constitute an unproportional limitation of the freedom of religion of the teacher concerned, as it is hard to see that the negative freedom of religion of the children or the parental rights could be sufficiently affected from this age onwards. To base the ban solely on the principle of the neutrality of the state would turn this doctrine into laicism protected for its own sake.

Another question concerns the principle of equal treatment irrespective of religion, Article 3.3 and Article 33.3 of the Basic Law. It is questionable that a ban on a head scarf is only an indirect discrimination as the Court apparently thinks: Head scarves are not banned as such independently of their meaning but (only) as a religious symbol. According to the recent jurisdiction of the German Constitutional

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[67] BVerfGE 93, 1 (20) rightly pointed out that such an understanding would be a profanation of its meaning.

[68] J. S. Mill in ON LIBERTY rightly defended with this argument the necessity of civil rights even in democracies against Rousseauians' ideas of the absolute reign of the democratic *volunté générale*.

[69] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 292, et. seq. (1992), on the role of constitutional courts.

[70] Mager, *in* GRUNDGESETZKOMMENTAR I, ART. 4 Rn 65 (v. Münch/Kunig eds. 2000) rightly draws the attention to the question of age, concluded, however, that in early age before 14 teachers should not display any religious symbols.

Court on personal characteristics like religion, a strict test of the proportionality of the unequal treatment applies.[71] This test, however, could have no other results than the proportionality test in the context of the freedom of religion of the teacher. This is, therefore, the decisive norm in this context as well.

There are two European Directives on this matter; one banning discrimination on the grounds of race and ethnic origin[72], the other banning such discrimination in the work sphere on the ground of religion, among others.[73] The ban on religious symbols can be relevant in both areas: It can be a discrimination on the base of religion and an indirect discrimination on the base of ethnic origin because it may affect particularly a special ethnic group. Both directives still have to be implemented in national legislation. For future cases on the display of religious symbols their relevance is certainly of great interest but should not to be overestimated.[74] It is not to be expected that the future legislation implementing the directives in public law will go beyond the guarantees of Articles 3.3 or 33.3 Basic Law. It should also be remembered that the European Court of Justice to an increasing degree follows the European Court of Human Rights in interpreting human rights. Given the *Dahlab*-Decision of the European Court of Human Rights[75] there is little reason to believe (if such a case would reach the European Court of Justice at all) that the European Court of Justice would necessarily regard a ban on head scarves in schools not reconcilable with the anti-discrimination regime of community law.[76]

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[71] BVerfGE 88, 87 (96).

[72] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

[73] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ, 2.12.2000, p. 16.

[74] There are various problems involved: The directives are for example only applicable „within the limits of competence conferred on the community". A similar provision exists in Art. 13 of the EC. There are voices that maintain that it means that Art. 13 of the EC gives the Community no original competence to legislate on discrimination matters in areas where it has no competence anyway, compare Bell, EUROPEAN ANTI-DISCRIMINATION LAW 131 et. seq. (2002). Others have more extensive view, arguing that if the Community has a competence at all, Art. 13 allows for legislative action in this area, compare on the matter, Mahlmann, *Gerechtigkeitsfragen im Gemeinschaftsrecht*, *in* 40/03 LOCCUMER PROTOKOLLE 51 (2003). Accordingly e.g. Art. 149.4 of the EC that explicitly excludes measures of harmonisation in the area of education might be an argument against the applicability of the directives in school matters or for it if one follows a more extensive interpretation. These questions are far from being clarified.

[75] See *supra*, note 17.

[76] The directive on religion for sees e.g. that it should be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others, Art. 2.4. If one assumes an indirect discrimination further justifications are possible.

The states have to decide now. The German public has to make up its mind what kind of schools, and perhaps in a short while, what kind of other public institutions it wants. So far Germany did not adhere to a laïcist ideal of statehood like France. The concept of the neutrality of the state was interpreted as open, encompassing: The idea is to open the sphere of the state for religions in principle though within certain limits, to give them room without endorsing any of them.[77] This means concretely that Christian influences in public schools have been regarded permissible if the schools remain open for other creeds as well.[78] There seems to be a prima facie case for such a concept because it allows for more liberty in religious matters than strict exclusion. As religions are about the most profound beliefs of human beings about the world and the sense of human life and thus a core of human individuality, increasing the freedom in this area appears as a very valuable good. This good is not only for religious believers, but also for human beings without religious faith who defend and cherish the intrinsic value of liberty itself. This conception of the neutrality of the state is therefore preferable, at least as long as the relations of the religions are more or less amicable in the society concerned. In a situation of strong religious tensions, laicism might be the only way to preserve peace in a society. This is, however, not the situation of present day Germany.

Some problems in this sphere are not difficult to solve. There might be for example religious practices which violate central constitutional values like human dignity. The *Burqa* that,unlike the head scarf, suppresses completely the personality of the women concerned is certainly on this ground not acceptable. There are additional functional demands of the civil service that can impose very practical limits on the display of religious symbols e.g. Turbans for fire fighters (even though in England apparently some kind of special protective clothing is developed). Beyond this kind of solvable cases other harder problems may appear. To take the examples mentioned: Can a Jew teach math in a primary school wearing a kippa? Could he be a judge? Can a Dominican monk or a nun teach Latin to children? Or explain the philosophy of Thomas Aquinas? What about the policeman with a turban or the policewoman with a head scarf like in England? Would the neutrality of the state be abandoned when a German citizen meets the police man in the morning, the judge at noon and the teacher in the evening in a parents' reunion? Or would she find the neutrality of the state impressively displayed because the many religions of German citizens like herself could be seen in one day illustrating clearly that the state does not identify with any of them?

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[77] Compare e.g. BVerfG, *supra*, note 1, Rn 43 – 44; v. Campenhausen, *Der heutige Verfassungsstaat und die Religion*, *in* HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 77 (Listl/Pirson eds, 2. ed., 1994). STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES, (2002).

[78] BVerfGE 41, 29 (49 et. seq.); 52, 223 (236 et. seq.).

The best answer to these difficult questions might be found if the central doctrines of the enlightened philosophy of religion are not forgotten. Central thinkers of this age fought against the idea that the appearance of a religion is confounded with its essence - a misunderstanding that is one of the many, but particularly strong roots of intolerance. This is the central doctrine of Lessing's 18th century adoption of Boccaccio's parable of the ring in "Nathan der Weise." Every child in Germany learns here that one should judge the merits of religions and of their individual adherents by their deeds and not by the outward religious allegiance. This is also a central thesis of Kant´s magnificent critique of what he calls the *statutarischen Gesetze* (the statutory laws of religion) the historically given rules of outward comportment, the rites and observances of a religion.[79] The critique of outward religious appearance is the starting point for unfolding a most appealing alternative: a religion within the realm of reason alone that is a faith of universalistic moral beliefs and actions.[80]

If one remembers these lessons, two consequences come to mind: First, the conviction that not appearance but real action should count. Only if the concrete comportment of an applicant counts as decisive for the qualification for the appointment at a public post this person is taken seriously as a human being. Only then this person gets what she certainly deserves: a chance to prove that she, as an individual with all the properties she may have beyond being a bearer of a religious symbol, is a good choice for the post concerned. One wonders whether the quick identification of a religious symbol with an inhumane conviction and behaviour of a concrete person is not the result of a rather narrow vision of humanity itself. Not many holy men and women populate the world. Inhumanity and intolerance can take many forms and wear very different clothes. The same is true, however, for humanity and tolerance. It can be found not only in costumes, jeans, or behind ties but also under head scarves, turbans, kippas or in a monk's habit. One may disagree strongly with aspects of the personal vision of life embodied in religions, but still respect and cherish the humanity of a particular human being who for whatever reasons made this religion her faith. Thus, the courts and legal scholars that emphasise that the head scarf cannot be decisive itself, but only the comportment of the person, draw the right conclusion from one of the most important results of the philosophy of tolerance and religion.

Secondly, these traditions open another equally important perspective: The enlightened philosophy of religion leads to an open critique of religious rites and obser-

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[79] IMMANUEL KANT, DIE RELIGION INNERHALB DER GRENZEN DER BLOßEN VERNUNFT 99, (Akademie Ausgabe, Bd. VI).

[80] *Id*. at 98 et. seq., 170.

vances, where ever they might be found; especially if they do not match certain fundamental standards, most importantly of the freedom, equality and dignity of man. On this level, to be clear, there seems to be a lot to be said against the head scarf tradition as against other religious observances e.g. the exclusion of women from important positions in certain faiths. This critique, however, is one that needs a long breath and is a matter of the political and religious culture at large. It is a matter of morality and politics, not of legal bans. If a person in her actions abides by the basic rules of a society and the special functional demands of public service there is no reason that the legal system should anticipate by legal exclusions the result of this cultural process of religious critique.