

Chapter 17

Of Crucifixes and Headscarves: Religious Symbols in German Schools

Tobias Lock¹

The status of religious symbols in German schools has been a hotly debated topic not only in legal circles but also in the wider public domain for almost 20 years. The debate started with the conflict over the crucifix in classrooms, continued with the right of teachers to wear a headscarf at school and currently centres upon a possible ban of the headscarf for students. For instance a newly appointed minister of the *Land* of Lower Saxony suggested that crosses should be banned from classrooms (Schneider 2010). Germany's most prominent feminist Alice Schwarzer argued that girls should not be allowed to wear a headscarf at school (Spiegel Online 2010a). This contribution examines these issues from a legal perspective. It is divided into three sections: the first section is concerned with religious symbols installed by the State, the second section deals with religious symbols worn by teachers and the third section will examine whether students can be prevented from wearing religious symbols. This chapter aims to bring insights into the limits to the freedom of religion, the notion and content of the negative freedom of religion, the demand for neutrality of the German state in religious and philosophical matters and the interpretation of symbols as religious. The contribution is mainly based on the case law of the Federal Constitution Court ('FCC') but also considers the judgments of the lower courts and the relevant legislation, including the transposition of the equality directives of the European Union ('EU') into national law.

The legal framework for the discussion is as follows: Article 4 of the German constitution or *Grundgesetz* ('Basic Law') guarantees freedom of religion, faith and conscience:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.

¹ I would like to thank Dr Javier García Oliva (University of Manchester) for his valuable comments on an earlier draft, Ms Claudia Müller for her assistance in researching for this chapter and the editor for accepting it and editing it together with Arman Sarvarian to whom I also express my gratitude. All errors remain, of course, my own.

According to German doctrine, freedom of religion has two elements. First, everyone enjoys positive freedom of religion. This means that everyone has the right to adhere to a religion or to hold a belief (so-called *forum internum*). This includes atheism (Kokott 2007). In addition, everyone has the right to behave strictly in accordance with the rules of one's belief and to act according to one's religious convictions (so-called *forum externum*). Secondly, negative freedom of religion gives everyone the right not to share a certain belief (Kokott 2007). The State must not interfere with either of these freedoms. According to the FCC, the State is especially prohibited from prescribing a belief (BVerfGE 32, 98, 106; BVerfGE 93, 1, 15; BVerfGE 108, 282, 297). Freedom of religion is a fundamental right enjoyed by everyone, including children and, of course, their parents.

Parents also enjoy a fundamental right to educate their children according to Article 6(2) of the Basic Law: 'The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.' This right, however, is concurrent with the State's duty to educate, which is derived from Article 7(1) of the Basic Law providing that the entire school system is under the supervision of the State (BVerfGE 34, 165, 183). Thus parents and the State share responsibility to educate children.

It should further be pointed out that according to Article 70 of the Basic Law the organization of schools lies in the competence of the German states (*Länder*) so that there are 16 different sets of rules which govern the relations amongst schools, students and staff. This means that there can never be a single answer to the questions concerning religious symbols in German schools. Rather, we must compare 16 different systems. What the *Länder*, of course, have in common is that their legislatures are bound by the constitutional limits on legislative regulation set by the Basic Law. It is the aim of this contribution to precisely illustrate these limits and how the *Länder* have positioned themselves within them.

Finally, Germany does not have a state religion. It is a religiously neutral State. According to Article 140 of the Basic Law, Article 137 of the *Weimar* Constitution forms an integral part of the Basic Law and provides that there shall be no state church. This means, on the one hand, that the State is free from the influence of churches but also, on the other hand, that the churches are free from that of the State (Von Campenhausen and de Wall 2006). Moreover, it follows from the constitutional right to freedom of religion that the State must be neutral in matters of religion and philosophy of life (*Weltanschauung*) (BVerfGE 93, 1, 16). At the same time, there is strong cooperation between religious communities and the State. According to Article 137 of the *Weimar* Constitution, the State grants religious communities, most notably the incorporated churches, certain privileges such as a right to tax their members. The separation of Church and State is thus not strict. The relationship between Church and State is cooperative. This means for instance that state authorities are not prevented from religious avowals (Von Campenhausen and de Wall 2006). A number of early decisions by the FCC show that the State's neutrality must not be confused with the French (Adrian 2006) and

Turkish (Karakas 2007) concepts of *laïcité*, which postulate a strict separation of religion and State. Two decisions of the FCC concerned the legality of legislation passed in two *Länder* which introduced Christian schools. Article 15 of the constitution of the Baden-Württemberg *Land* provided that primary schools (and some secondary schools) are Christian comprehensive schools whereas Article 135 of the Bavarian constitution provided that children in public, primary schools are educated according to Christian principles. In the *Baden-Württemberg* case, the FCC held that the *Länder* enjoy a great degree of independence when it comes to organizing public schools – including their religious orientation (BVerfGE 41, 29, 45). It rejected the argument that the State must keep aloof from introducing religious references into schools (BVerfGE 41, 29, 48).

However, where the legislator chooses to introduce such references, the school must not proselytize or otherwise claim that Christian religious beliefs are binding. Rather, such a school must be open to other philosophical and religious persuasions and its educational mission must not be religious in character. The reference to Christianity is to be understood as the recognition of Christianity as a decisive factor in Western history and culture (BVerfGE 41, 29, 51). The FCC made a similar finding in its decision on the provision of the Bavarian constitution (BVerfGE 41, 65, 78). The Basic Law therefore prescribes ‘open’ neutrality (Wermölder 2007).

This openness towards religious elements introduced by the State into schools again arose in the FCC’s decision regarding school prayer (BVerfGE 52, 223). The FCC heard two joined cases. In the first case, the parents of a primary school pupil complained that the practice to say a daily prayer before school began had been abandoned following an objection by another pupil. In the second case, the parents of a primary school pupil argued that a school prayer was incompatible with their child’s negative freedom of religion. Only the first complaint was successful. The FCC recalled that it is possible for the *Länder* to introduce religious references into schools where the freedom of religion of all concerned is not violated (BVerfGE 52, 223, 238). It acknowledged that it constituted a promotion of Christianity for the State to allow a prayer as part of the school day (BVerfGE 52, 223, 240). The FCC went on to find that the school prayer was not a violation of the negative freedom of religion since the pupil had the possibility to avoid it by either leaving the room or simply not participating in the prayer (BVerfGE 52, 223, 248). Thus, a school prayer is generally compatible with the Basic Law. The decision therefore shows that Germany does not follow the strict French and Turkish models of secularism but a more moderate model of the separation of Church and State.

Symbols Installed by the State: the Crucifix Controversy

Almost 15 years before the *Lautsi* decision² by the European Court of Human Rights ('ECtHR') made the headlines, an almost identical case was decided by the FCC (BVerfGE 93, 1). Three siblings and their parents filed a constitutional complaint against the mandatory affixing of crucifixes and crosses in classrooms in Bavaria. The relevant provision in the Bavarian School Regulations for Elementary Schools (*Volksschulordnung*) provided that '[I]n every classroom a cross shall be affixed.' The parents were followers of the anthroposophical philosophy of life as taught by Rudolf Steiner. When one of their children started primary school, they found large crucifixes affixed to the walls of the classrooms in which she was taught. The crucifixes were in direct view of the blackboard. The parents requested that the crucifixes be removed. A compromise was found whereby the school replaced them with plain crosses, which were affixed above the door. Some time later, the parents unsuccessfully requested that the crosses in the classrooms be removed as well. The case ended up in the FCC, which in 1995 delivered one of the most controversial judgments in its history when it held that the affixing of a cross in a classroom violated the complainants' right to religious freedom.³

The FCC's Reasoning

The FCC held that the affixing of a cross in a classroom violated pupils' negative religious freedom. The FCC defined 'negative religious freedom' as the freedom to stay away from acts of worship of a faith not shared, which includes the freedom to stay away from the symbols of such a faith (BVerfGE 93, 1, 15). The FCC recognized that, in a pluralist society, an individual has no right to be completely spared from manifestations of other faiths. But the difference in the classroom was that the State itself created a situation wherein the individual was exposed to a religious symbol without any possibility of escape. The FCC's remarks on the cross as a religious symbol, the existence of an interference with freedom of religion and the neutrality of the State were most controversial at the time.

The FCC rejected the argument advanced by the Bavarian government that the cross was merely a symbol of Western culture marked by Christianity. The FCC found that the cross was still the primary symbol of the Christian faith (BVerfGE 93, 1, 19). In interpreting the significance of the cross as a Christian symbol, the FCC based this finding on an objective assessment of the cross and did not take into account the subjective intention of the State affixing it. The FCC distinguished the case from the school decisions referred to above. Whilst it found that the Christian mission of these schools was the recognition of Christianity as

² See notes 4 and 5 *infra*.

³ In that sense, the labelling of the decision as the 'crucifix' decision is a misnomer as the complaint was directed against plain crosses as well.

an important element of Western history and of Western culture, it felt unable to interpret the cross in such a narrow way.

The FCC considered the cross to interfere with negative freedom of religion. The main rationale was that pupils could not escape the cross during lessons. Since education in primary schools was compulsory, pupils were thus forced to study 'under the cross' (BVerfGE 93, 1, 18). This inescapability marked the difference with the school prayer decision discussed above. School prayers only happened at the beginning of a lesson and pupils had the chance to leave the room or simply not participate. Furthermore, the FCC cited its decision on the cross in courtrooms, where the display of the cross had also been held to be unconstitutional since a duty to argue a case 'under the cross' constituted an unreasonable inner burden both for the lawyer and the party represented by him (BVerfGE 35, 366). It was said that this case relating to courtrooms was not a relevant precedent since the FCC had relied on the subjective, inner burden of the particular parties – both the lawyer and his client in this case were former German nationals who had had to flee the country during the Nazi era because they were Jewish (Von Campenhausen 1996). By contrast, the FCC in the crucifix decision no longer took into account the particular circumstances of the individual plaintiff who objected to the cross but found crosses in classrooms to generally interfere with freedom of religion. The FCC expressly disagreed with the decisions of the lower courts which had held that the cross had no effect on pupils. Whilst the FCC admitted that the cross did not compel pupils to identify with it, it ascribed a soliciting character to it (BVerfGE 93, 1, 20). This means that the FCC considered that pupils might interpret the cross as objectively proselytizing and thus interfering with their negative freedom of religion.

The FCC did not regard this interference with freedom of religion to be justified. Negative freedom of religion was not an absolute right and, as was held in the decision on Christian schools and the school prayer, could be restricted because of the State's right to educate children arising from Article 7 of the Basic Law (BVerfGE 93, 1, 20). However, the FCC held that the affixing of a cross violated the neutrality of the State in matters of religion and philosophy of life. It conceded that it had acknowledged in the decisions on Christian schools that the State need not completely abandon all religious or philosophical references when educating children. However, when compulsorily educating children, the State must fulfil its duty in a non-proselytizing fashion. The affixing of a cross was considered to infringe this (BVerfGE 93, 1, 23). Moreover, the FCC made it clear that the positive religious freedom of the majority of pupils (who were Christian) could not override the right of the minority to be protected since fundamental rights were specifically aimed at their protection (BVerfGE 93, 1, 24).

Dissenting Views

The decision of the FCC was not unanimous, however. Three of the eight judges rendered a dissenting opinion arguing that there was no violation of the claimants'

freedom of religion. The minority dissented on the basis of the school decisions according to which there is no violation of the neutrality requirement if the *Länder* base schools on Christian values. This, they argued, also covered the affixing of a cross or crucifix in the classroom (BVerfGE 93, 1, 28). A similar point was made by von Campenhausen (1996) and by Müller-Volbehr (1995) who contended that if Christian schools were constitutional, then the cross as their symbol had to be constitutional as well.

In addition, von Campenhausen (1996) and Kokott (2007) criticized the FCC for finding that the exposure of pupils to the cross amounted to an interference with the negative freedom of religion of non-Christian pupils. One of the reasons advanced is that negative freedom of religion does not constitute a superior fundamental right, which always trumps freedom of positive religion (BVerfGE 93, 1, 31). However, this contention by the minority is based on the wrong assumption that the case of the crucifix deals with a conflict between the positive freedom of religion of Christian pupils and the negative freedom of religion of non-Christian pupils, that is essentially a question of horizontal application of fundamental rights (so called *Drittwirkung*). But that was not the issue of the case. Rather, the question was whether a binding order by the State to affix crosses in classrooms was compatible with Article 4 of the Basic Law, which is a classical vertical situation wherein an act of the State interferes with fundamental freedoms.

Moreover, the dissenters contended that, for a non-Christian pupil, the cross could not be a *religious* symbol but could only be a symbol representing Christian and Western values. This argument is unconvincing as it essentially negates the existence of negative religious freedom. Were it correct, it would mean that the manifestation of a religion could never interfere with anyone's negative freedom of religion since, as non-members of that particular religious group, they would not be able to understand the religious meaning of that manifestation which, at worst, could only amount for them to a nuisance (Borowski 2006). It was further argued by Müller-Volbehr (1995) that the effects of 'studying under the cross' had been exaggerated and could not be proven. The majority was also criticized for not making any reference to the position of the cross in the classroom. Müller-Volbehr (1995) maintained that it made a difference whether the cross was affixed within sight of the pupils or not.

The decision led to an amendment of the Bavarian legislation. Article 7 of the Bavarian Code on Education (*Bayerisches Erziehungs- und Unterrichtsgesetz*) still provides that a cross shall be affixed in each classroom. However, it was added that where parents object to the affixing of the cross for serious religious or philosophical reasons the head teacher must seek agreement with them. Where such agreement is impossible, the head teacher is bound to find a solution which respects the rights of the minority. The Federal Administrative Court ruled that the provision had to be interpreted in light of Article 4 of the Basic Law. It found that, in the end, the views of objecting pupils and parents had to prevail (Bundesverwaltungsgericht, 6 C 18/98). This, in effect, means that the cross has to be removed where they request it.

Comparison with *Lautsi*

Given that the facts of the two cases are nearly identical, it seems appropriate to draw a short comparison between the FCC's crucifix decision and the decisions by the ECtHR in *Lautsi*, where the Grand Chamber⁴ quashed the earlier Chamber⁵ judgment. The Grand Chamber adopted a markedly different approach to the FCC, which warrants a few comments. I shall provide a three-way comparison between the decisions. Both the Chamber and the FCC found that a cross in the classroom was in violation of the negative freedom of religion. However, it appears that the Chamber's definition of what constitutes negative freedom of religion was not the same as that of the FCC. The Chamber defined it as the freedom not to believe. In the FCC's understanding of freedom of religion, not holding a belief would be covered by positive freedom of religion. Negative freedom is defined as the right not to have to follow a certain belief and not to be confronted with religious manifestations. Whilst it stated the above definition of negative freedom, it appears that the Chamber actually applied the FCC's understanding of negative religious freedom when it said that the State must 'refrain from imposing beliefs'. The Grand Chamber did not pronounce on this question. It regarded Article 2 of Protocol 1 ECHR as *lex specialis* to Article 9 ECHR. Article 2 guarantees a right to education and imposes a duty on the part of the State to ensure education in conformity with the religious beliefs of the person educated. The FCC, the Chamber and the Grand Chamber all share the view that the crucifix and the cross are religious symbols and adopt an objective view when interpreting symbols that (also) have a religious meaning.

The most striking differences in the approaches of the FCC and the Chamber on the one side, and the Grand Chamber on the other relate to the issue of the interference that the cross may cause with the religious freedom of pupils and their parents. Both the FCC and the Chamber agreed that a religious symbol can interfere with negative freedom of religion where there is no possibility for pupils to escape. In contrast to the Chamber, the FCC considered that this interference could be justified by the State's right to organize education. The reason for this probably lies in the absence of any such right being mentioned in the European Convention on Human Rights 1950 ('ECHR'). As has been noted by Augsberg and Engelbrecht (2010), the ECHR is not a full constitution but only contains a number of (individual) human rights. However, the Chamber in *Lautsi* went further than the FCC in its unequivocal statement that the State has a duty to (absolute) confessional neutrality in public education, which appears to be the same as *laïcité*. This view is certainly not shared by the FCC, which in the crucifix decision confirmed its older case law on Christian schools. It is regrettable that the Chamber did not at least provide some arguments as to why the State should have a duty to be completely neutral under the Convention. But since this aspect of the

4 ECtHR Grand Chamber *Lautsi v. Italy* 18 March 2011, Application no. 30814/06.

5 ECtHR *Lautsi v. Italy* 3 November 2009, Application no. 30814/06.

decision was not upheld by the Grand Chamber, there are no further implications for German schools. In contrast to both FCC and the Chamber, the Grand Chamber did not seem to consider that the cross interfered with the religious freedom of parents and pupils. The Grand Chamber held that Italy had not overstepped the limits of the margin of appreciation granted to it by the Convention when it comes to reconciling its functions in relation to education and teaching with the parents' right to ensure such education in conformity with their own religious convictions (Grand Chamber judgment: para. 69.).

The limit set by the Grand Chamber is whether the provision of education by the Italian State, of which the physical school environment is part, leads to a form of indoctrination. The Grand Chamber did not find that the mere presence of the cross as a religious symbol led to indoctrination. It held that a crucifix on a wall is 'an essentially passive symbol' (Grand Chamber judgment: para. 72). The Grand Chamber thus contradicts the FCC's findings on this question. It is recalled that the FCC highlighted the inescapability of the pupils' situation and the soliciting character of the cross. The Grand Chamber's reasoning deserves some remarks. To begin with, it is regrettable that the reasoning of such an important decision remains short and rather unsatisfactory. It is not entirely clear whether the Grand Chamber regarded the presence of the religious symbol as a potential interference with religious freedom or not. Clarity in this respect is not helped by introducing the category of a 'passive symbol'. Symbols are, one would suggest, always passive. They remind us of a religion, brand or nation and so on and evoke associations we might have with that particular religion, brand or nation. But they never actively speak to us. After the Grand Chamber decision, one must, however, ask whether there is such a thing as an 'active' symbol and if so, what consequences this would have for the decision of a similar case or whether the expression 'passive symbol' is merely a tautology. Furthermore, the Grand Chamber's distinguishing of the *Dahlab* decision⁶ (*infra*), where the ECHR held that the Muslim headscarf constituted a 'powerful external symbol' is hardly convincing (Grand Chamber judgment, para. 73). The Grand Chamber merely distinguished the two cases on the basis of their facts but did not actually address the pertinent question of why the headscarf is a more powerful religious symbol than the crucifix. Both are arguably equally powerful. More importantly, the Grand Chamber fails to appreciate that in *Dahlab* the symbol was worn by a person who was the bearer of fundamental rights whereas in *Lautsi* the symbol was affixed by the State, which does not enjoy fundamental rights (a similar point is made by the dissenting judge Malinverni in the Grand Chamber judgment).

One should briefly ask what consequences the *Lautsi* decision might have for Germany. Judging from a legal perspective there are none. The Grand Chamber decision objects to indoctrination on the part of the State. It does not regard the Italian situation – with a mandatory crucifix on the walls of state classrooms – to amount to such indoctrination. One cannot infer that a ban on the cross as it was

6 Note 7 *infra*.

pronounced by the FCC would not be in accordance with the Convention. To the contrary, the decision contains no reason for the FCC to alter its case law. However, could the *Länder*, and especially Bavaria, reintroduce a mandatory affixing of the cross? As long as the decision of the FCC stands, this is not possible. The decision of the Grand Chamber cannot override the FCC's decision in this respect. The protection offered by the Basic Law and voiced by the FCC is thus greater than the protection offered by the Convention. Thus the legal situation in Germany has not been directly affected by the *Lautsi* case.

Cases Involving Teachers

A few years after the FCC's decision, the courts faced the question whether the reasoning would also apply to non-Christian teachers who argued that their negative freedom of religion was affected by having to 'teach under the cross'. In this scenario, the main difference between a teacher and a pupil is that teachers are employed by the State as civil servants so that they owe the State a degree of loyalty. This duty of loyalty is considered to be one of the 'traditional principles of the professional civil service' mentioned in Article 33(5) of the Basic Law. However, notwithstanding this duty, civil servants are also holders of fundamental rights.

Two decisions by the Bavarian administrative courts are worth exploring here. The first case was decided by the Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgeschichtshof, 3 B 98.563). The Court drew an analogy between the situation of a teacher and that of a pupil. It pointed out, however, that teachers generally had to comply with their duties which normally trumped their fundamental right to religious freedom. Furthermore, the personalities of teachers were fully developed and they were thus less likely to be indoctrinated by the cross. This means that teachers generally have to accept the cross in the classroom. The Court therefore chose to adopt the FCC's stance in the case concerning the cross in the courtroom mentioned above and tested whether there existed a situation where it was intolerable for the teacher concerned to teach under the cross. In that case, the teacher concerned demonstrated that he was not opposed to Christianity as such but had an aversion to the cross as a symbol. For him, it displayed crucifixion, which in his eyes was the cruellest of all techniques of execution. Furthermore, he considered the cross a symbol of anti-Semitism and the Holocaust. The Court found that, for this reason, it was unacceptable for him to teach classes in front of the cross and upheld his claim to have it removed.

Conversely, in the second case, the Augsburg Administrative Court (Verwaltungsgericht Augsburg, Au 2 K 07.347) found that it was not strong enough a reason for an atheist teacher to politically disagree with the display of the cross. A situation, which did not lead to an inner conflict for the teacher, does not constitute an atypical case. Thus the Augsburg court denied his claim. What is remarkable about both decisions, however, is that they offered a new interpretation of the cross in view of the amended legislation. Both courts argued that with the entry

into force of the new legislation, the legislator had changed the symbolism of the cross: it was now to be understood as merely a symbol for Christian and Western values and could no longer be construed as having a soliciting character. This reveals a fundamental misunderstanding of the FCC's reasoning in the crucifix case. The FCC explicitly considered the intentions of the State to be irrelevant. Rather, it based its findings on the impression the cross left on the addressees of the symbol, that is pupils. Similarly, in cases involving teachers, the administrative courts should have considered the addressees as well.

Symbols Worn by Teachers: the Muslim Headscarf

The Ludin Saga

A new facet of the controversy surrounding religious symbols in schools became evident when female Muslim teachers insisted on wearing a headscarf covering their hair and neck while teaching. In these types of cases, the fundamental rights situation differs from the crucifix case law. Courts must not only reconcile the negative religious freedom of pupils with the State's right to educate them and the State's duty to remain neutral in matters of religion and philosophy of life. Courts must also take into account the teacher's positive freedom of religion, which gives her a right to wear the headscarf.

This difficult situation faced the courts in the landmark *Ludin* case. *Ludin* was a German national, who applied to be employed as a primary school teacher by the Baden-Württemberg *Land* having just completed her teacher training there. As aforementioned, teachers in Germany are normally employed as civil servants. Article 33 of the Basic Law regulates access to the civil service:

(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.

(3) Neither ... eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

Article 33(2) is designed to ensure a meritocratic system, which results in the best candidate having a subjective right to be chosen for the office (Battis 2007). In the *Ludin* case the school authorities refused to employ Mrs Ludin, arguing that her insistence on wearing the headscarf in class showed that she lacked the aptitude to perform the job. The school authorities maintained that, as a teacher, she had to represent the values of the State (most notably tolerance) which it deemed impossible for a person wearing a headscarf. Furthermore, the school authorities

argued that the wearing of a headscarf by a representative of the State violated the State's duty to be neutral.

Ludin in the administrative courts

The school authorities' decision was upheld by the Stuttgart Administrative Court, (Verwaltungsgericht Stuttgart, 15 K 532/99), the Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg, 4 S 1439/00) and eventually the Federal Administrative Court (Bundesverwaltungsgericht, 2 C 21.01). The main argument of the administrative courts may be summarized as follows. One of the criteria when assessing the aptitude of candidates is an evaluation of whether they will fulfil their duties. Whilst the Federal Administrative Court acknowledged that the wearing of a headscarf is protected by Article 4 of the Basic Law, it stated that the freedom of religion guaranteed therein could be restricted. In the court's opinion, such a restriction follows from the State's duty to be neutral in religious matters. This duty extends to teachers as well since they act on behalf of the State. The teacher's personal religious freedom must be subordinated in such a case because schooling is a very sensitive area with young children who are easily influenced. The argument very much resembles that made by the Swiss Federal Court in the *Dahlab* case, which the ECtHR did not find to be unreasonable.⁷ Furthermore, in two decisions from the 1980s concerning teachers wearing Bhagwan dress, the Federal Administrative Court (Bundesverwaltungsgericht, 2 B 92.87) and the Higher Administrative Court of Hamburg (Oberverwaltungsgericht Hamburg, Bs I 171/84) argued along the same lines. The Federal Administrative Court found that the headscarf was a symbol of Islam since it was generally interpreted as an avowal to the Islamic faith. The Court admitted that there was no soft way of resolving the conflict: either the teacher was allowed to wear a headscarf or not. The Court refused, in particular, to allow for a trial period following which the effects of the headscarf on children would be assessed.

What is remarkable about the decision is that it does not once take into account the severe consequences for the teacher. Since the State has a quasi-monopoly on primary schools and since there are virtually no publicly funded Muslim primary schools, the decision had the consequence that the appellant would never be able to work as a teacher. Considering she had spent years studying for her teaching degree and her teacher training, this result was harsh.

Furthermore, it is worthwhile contrasting the reasoning by the administrative courts in the *Ludin* case with the decision of the Lüneburg Administrative Court in Lower Saxony which in 2000 had to decide a case with nearly identical facts (Verwaltungsgericht Lüneburg, 1 A 98/00). The arguments advanced by the school authorities, which refused to employ the plaintiff, were the same as in *Ludin*. The Court, however, quashed the school authorities' decision by finding that the teacher's religious freedom need not be subordinate to the State's neutrality. In

7 ECtHR 15 February 2001 *Dahlab v. Switzerland*, Application no. 42393/98.

the eyes of the Lüneburg Court, neutrality means that a teacher must abide by the principle of tolerance when dealing with the different religious and philosophical attitudes present in a school. But the tolerance principle does not require a teacher to abstain from any religious avowal when in school. It pointed out that a pluralism of religious convictions was not only existent in schools but was also the aim of Lower Saxony's school legislation. The Lüneburg Court expressly distinguished cases involving teachers wearing the headscarf from the crucifix decision, in which the situation was created by the State.

Ludin before the FCC – the majority opinion

Having lost her appeal to the Federal Administrative Court, Mrs Ludin filed a constitutional complaint to the Federal Constitutional Court. The FCC by a majority of five to three decided that her complaint was well founded (BVerfGE 108, 282). However, it did not definitively resolve the controversial question of whether a teacher may wear a headscarf at school. Rather, it argued that the denial to employ a teacher on that basis was an interference with her fundamental rights enshrined in Articles 33 and 34 of the Basic Law because it happened without the requisite statutory foundation. Thus the FCC decided the case on the technical point that the *Land* had failed to pass legislation explicitly requiring teachers to refrain from wearing religious symbols in the classroom. According to the FCC's 'doctrine of essentiality' (*Wesentlichkeitstheorie*), interferences with fundamental rights must have a legislative basis. The stronger the interference, the more precise that basis has to be. Notably, decisions concerning the organization of schools cannot be left to the executive branch but must be taken by the democratically elected legislature (BVerfGE 108, 282, 312).

Despite its less definitive result compared with the crucifix case, the *Ludin* decision contains important remarks about the headscarf as a religious symbol and the right of teachers to observe their religion. The FCC emphasized that the question of whether a ban on the headscarf amounted to an interference with religious freedom had to be answered from the point of view of the woman wearing it. If she considers that she must wear it in order to comply with her religion, then the ban on the headscarf constitutes an interference. The discussion within the Muslim community concerning whether women are required to wear the headscarf or not was considered to be irrelevant. (BVerfGE 108, 282, 312). The FCC therefore remained true to earlier case law (BVerfGE 33, 23, 28) by applying a subjective test to the question of whether the wearing of the headscarf falls into the scope of religious freedom. However, when it comes to assessing whether that exercise of religious freedom interferes with the negative freedom of religion granted to others, in this case to pupils, it opted for an objective test. It held that in contrast to a cross, the headscarf was not in itself a religious symbol (BVerfGE 108, 282, 304). Here, the FCC adopted the perspective of the objective observer.

In this context, it is worth discussing a later decision by the Federal Labour Court (Bundesarbeitsgericht, 2 AZR 499/08) concerning a female Muslim social

worker employed by a school under a private contract who insisted upon wearing a religiously neutral cap fully covering her hair, hairline and ears while working. The school reprimanded her for violating § 57 of the North Rhine Westphalia School Act (Schulgesetz Nordrhein Westfalen). This provision was added to the Act after the *Ludin* case had been decided by the FCC and provides that teachers must not wear symbols which call the neutrality of the *Land* into question. The social worker, whom the Court assimilated to a teacher because it was her task to mediate conflicts between pupils, argued that she did not wear the cap for religious reasons and thus did not violate her duty to wear religiously neutral clothes. The reason why she chose to wear the cap at school every day was that she had been used to wearing a headscarf for 18 years and felt exposed if she did not cover her head. The Court did not accept her argument but instead adopted an objective approach, preferring an interpretation which seemed likely to correspond to the views of a considerable number of objective observers (namely, parents and pupils). This decision shows that the interpretation of a piece of clothing as amounting to a religious symbol is not only of relevance where a person wishes to rely on provisions protecting freedom of religion but also in cases where a person claims that she wears a piece of clothing without religious motivation.

Having found that the headscarf constituted a religious symbol, the FCC drew a clear distinction between the crucifix case, where the cross was affixed by the State, and the present case, in which the State was only asked to tolerate a situation stemming from teachers' convictions. In the latter, the presence of religious symbols in public schools could not be attributed to the State (BVerfGE 108, 282, 305). The FCC's approach thus shows that teachers wearing the headscarf will fall under the ambit of the fundamental right to freedom of religion. However, it also indicates that since the wearing of a headscarf can lead to a conflict between teachers' rights and the State's duty to remain neutral in matters of religion and philosophy of life as well as with pupils' negative right to religion and their parents' right to educate their children in accordance with their convictions, restrictions on teachers' rights are possible. But such restrictions, the FCC added, could not be left to the executive but had to be decided by the democratically elected legislature.

Ludin before the FCC – the dissenting opinion

The three dissenting judges asserted that the majority had failed to appreciate the specific function of teachers as civil servants. As such, teachers had voluntarily sided with the State and therefore deserved less protection of their fundamental rights than pupils and their parents (BVerfGE 108, 282, 316). They argued that a civil servant only enjoyed fundamental rights insofar as they were compatible with the civil servant's loyalty to the State and other requirements of the job. Thus, a teacher who wore a headscarf in school violated her duty to neutrality (BVerfGE 108, 282, 325). The minority maintained that the question of aptitude as contained in Article 33 of the Basic Law should not be confused with an interference with fundamental rights. They therefore did not see a need for a legislative solution as the incompatibility of a teacher's headscarf with her duties could be directly derived

from the Basic Law. It is noteworthy that the minority opinion, in effect, denies the teacher any right to freedom of religion. Unlike the majority, the minority didn't consider it necessary therefore to balance the teacher's right to religious freedom with the neutrality of the State and the freedom of pupils and their parents. Rather, the three judges seemed to fully attribute the teacher's conduct to the State and equate the situation with that in the crucifix decision.

Critical analysis

The majority decision was the subject of much criticism. Most commentators at the time seemed to prefer the line of argument advanced by the dissenting minority, many critics considering the headscarf decision to be inconsistent with the crucifix decision (Käsnter 2003, Bader 2004, Pofalla 2004, von Campenhausen 2004). They argued that the situation was essentially the same since pupils were subjected in both cases to a religious symbol in the classroom which they were unable to escape. These critics disagree with the FCC's distinction between the cross, which was affixed to the wall of the classroom on behalf of the State, and the headscarf which is worn by a teacher and merely tolerated by the State. This criticism is based on two notions. The first is that a teacher, as a civil servant, is a representative of the State and is therefore subjected to the same restrictions as the State itself. The second notion is that the emphasis should be placed on the influence which religious symbols have on pupils, and on the interference it may cause with pupils' (and their parents') fundamental rights.

It is argued here that this view tends to be overly simplistic by neglecting the fact that the teacher is a bearer of fundamental rights too. The situation differs in a fundamental way from the situation in the crucifix decision. As Sacksofsky (2003) pointed out, the State's duty to remain neutral in religious and philosophical matters means that the State must not identify with a certain belief. While the affixing of a religious symbol by the State strongly suggests such identification to an objective observer, a religious symbol worn by a teacher does not. Thus, the critics tend to block out this additional dimension and reduce the issue to a vertical situation where the State, through the teacher wearing the headscarf, interferes with the negative religious freedom of pupils and their parents. Furthermore, it is hardly acknowledged that teachers like the applicant do not feel they have a choice not to wear the headscarf. For them, it is mandatory to do so when they appear in public. Since the State has a quasi-monopoly on primary education, the consequence of the minority opinion would have been to deny the teacher access to the profession for which she trained for many years. Comparing *Ludin* with the crucifix decision, it is remarkable that both the majority and the minority decisions in *Ludin* had no problem in regarding the presence of a religious symbol in the classroom as amounting to an interference with pupils' negative freedom of religion. This, it is recalled, was still very much contested in the crucifix case.

It has been suggested that the FCC deliberately avoided a clearer decision (von Campenhausen 2004) and even refused to decide the case (Käsnter 2003). It is submitted that the decision not to fully determine the fate of teachers wearing

religious symbols in schools was the correct one. As evidenced by both the public and the academic discussion around the headscarf, the dilemma to be resolved is rather delicate. The FCC thereby gives the legislatures a choice between a pluralistic solution, where religious avowals are relatively unrestricted, and a solution closer to *'laïcisme'*, where every religious avowal outside the context of Religious Education is banned (BVerfGE 108, 282, 310). It is not for a court to decide between these two options. Rather, the principle of democracy demands that such decisions are made by the democratically elected legislature.

The Reaction of the Länder to the FCC's Decision

Eight of the 16 *Länder* reacted and passed legislation designed to outlaw the wearing of headscarves by teachers. The *Länder* concerned opted for different approaches. Berlin chose an unambiguous ban of all religious symbols visibly worn by teachers and other civil servants (§ 2 of the Gesetz zu Artikel 29 der Verfassung von Berlin). Bremen took a less radical stance when legislating that 'the appearance of teachers in school ... must not be capable of disturbing the religious and philosophical sentiments of pupils or their parents' (§ 59b Bremisches Schulgesetz; author's translation). While Berlin opted for a clear-cut approach, the Bremen legislation necessitates that each individual case involving a teacher wearing a headscarf or any other religious symbol to be assessed on its facts.

This contribution focuses on the legislation passed in the remaining six *Länder*. The reason is that the wording of that legislation appears to privilege Christian and Western traditions. In the *Ludin* case, the FCC emphasized that any duty not to wear a headscarf would only be compatible with the non-discrimination provisions of the Basic Law if members of different religions were treated equally (BVerfGE 108, 282, 313). The Baden-Württemberg legislation, for instance, provides that:

Teachers at public schools ... must not make political, religious, philosophical or similar avowals, which are capable of endangering or disturbing the *Land's* neutrality vis-à-vis pupils and parents or a politically, religiously or philosophically peaceful school environment. ... The realization of the educational mission in accordance with [the] constitution of Baden-Württemberg and the accordant portrayal of Christian and Western cultural and educational values does not contradict the conduct required of teachers [described above] (§ 38 Schulgesetz für Baden-Württemberg; author's translation).

In a similar vein, the Bavarian legislation states:

External symbols or clothes, which express a religious or philosophical conviction, must not be worn by teachers in class as far as pupils or parents can perceive these symbols or clothes as an expression of an attitude which is incompatible with the core values and the educational aims of the constitution, including Christian and

Western educational and cultural values (Article 59 Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen; author's translation).

The other *Länder* chose similar formulations. At least in some of the *Länder*, the references to Christian and Western culture may be explained by the objective to proscribe the headscarf while at the same time enabling nuns or monks teaching in public schools to wear their habit. This was clearly apparent from the debates in the Baden-Württemberg parliament (Landtag Baden-Württemberg, 4 February 2004, Plenarprotokoll 13/62, 4399; 1 April 2004, Plenarprotokoll13/67, 4700, 4704, 4710, 4717, 4719) and until recently also featured on a website run by the Bavarian school ministry containing information for head teachers on 'Islam in Schools', which expressly stated that the habit of nuns was not affected by the legislation as it was a reflection of Christian and Western values (Dicks 2008). That a nun's habit would normally be covered by the ban is clear since it is an expression of a religious conviction. Therefore, the reference to Christian and Western values has given rise to challenges of that legislation in the courts. On the basis of the newly phrased provision in Baden-Württemberg, Mrs Ludin lost her final appeal before the Federal Administrative Court (Bundesverwaltungsgericht, 2 C 45/03). One of her arguments was that the legislation was unconstitutional because it violated the principle of equal treatment contained in Article 3 of the Basic Law. The Federal Administrative Court interpreted the provision in the same way as the FCC had construed similar references in its school decisions. The reference to Christian and Western cultural and educational values is to be understood not as a reference to Christian doctrine and religious belief as such but to values, which originated in Christianity but which are universally valid, even outside the religious context, such as the protection of human dignity, non-discrimination between the genders or religious freedom. The provisions of most other *Länder* have in the mean time been subjected to challenges of compatibility with the Basic Law. All of them have been upheld on the basis of similar arguments as the ones used by the Federal Administrative Court in the second *Ludin* case (Hessischer Verfassungsgerichtshof, P. St 2016; Bundesarbeitsgericht, 2 AZR 55/09; Verwaltungsgericht Düsseldorf, 2 K 6225/06). The FCC has not yet been called upon to rule.

The only court deviating from this line of argument was the Bavarian Constitutional Court, which upheld the Bavarian provision on different grounds (Bayerischer Verfassungsgerichtshof, Vf. 11-VII-05). Concerning the principle of equal treatment, the court stated that the legislation did not contain an objectionable privilege in favour of the Christian faith since the reference had to be understood as meaning Christian values independent of the actual doctrine. The court nonetheless concluded that some symbols may be in accordance with these values and others may not. Thus, some symbols and some types of clothing may be worn by teachers, and others may not. The latter statement deviates from the statements made in other proceedings. The Bavarian Court does not suggest that, in conformity with constitutional principles, all religious symbols should be illegal.

Rather, the Court appears to accept that unequal treatment is permissible to some extent in view of the Christian and Western heritage of Bavaria. The Court did not have to elaborate further on these statements since the complaint was a popular complaint based on Article 98 of the Bavarian Constitution by which everyone may have Bavarian legislation reviewed by the court as to its compatibility with the fundamental rights contained in the Bavarian constitution independently of litigation and a set of facts. One can easily conclude, however, that the court would generally be willing to accept a ban on the headscarf and yet allow teachers to wear Christian or Jewish religious clothes or symbols. It is submitted that the Bavarian approach would not be shared by the Federal Administrative Court or the FCC.

Challenges under Equality Law Provisions

So far, this contribution has focused on violations of freedom religion guaranteed under Article 4 of the Basic Law. However, in light of the fact that many cases under English law would be argued under anti-discrimination law as well, it seems appropriate to briefly address the courts' reactions to arguments based on equal treatment provisions both in the Basic Law and in the federal legislation implementing the EU's equal treatment directives (*Allgemeines Gleichbehandlungsgesetz – AGG*) which entered into force in August 2006, that is after the second *Ludin* decision. Article 3 of the Basic Law guarantees a right to equal treatment. Furthermore, Article 33(2) of the Basic Law is also an equal treatment provision. The FCC in *Ludin* regarded the refusal of school authorities to employ Mrs Ludin as amounting to an interference with her right to equal access to a public office and emphasized that such an interference could not be justified in the absence of an explicit legislative basis. The FCC then stressed that any such legislation would have to guarantee equal treatment of all religions (BVerfGE 108, 282, 313).

After the entry into force of the legislation implementing the EU's directives on equal treatment, applicants were able to rely on these provisions alongside those of the Basic Law. Article 31 of the Basic Law provides for the precedence of federal law over *Länder* law. Since the AGG is federal law, the *Länder* legislation banning religious symbols has to be compliant with it. Furthermore, any dismissal of an employee or refusal to employ a prospective employee must not infringe the AGG. This is also true where civil servants are concerned since §24 AGG provides that the Act also applies to the public sector. The AGG has unsuccessfully been invoked in a number of cases concerning the headscarf. The discriminations on grounds of religion were deemed justified in each instance (Verwaltungsgerichtshof Baden Württemberg, 4 S 516/07; Verwaltungsgericht Düsseldorf, 2 K 6225/06 (5 June 2007)).

In the case of the social worker, mentioned above, the Federal Labour Court admitted a direct discrimination on the basis of religion but considered that discrimination to be justified under § 8 AGG, which provides that a 'difference of treatment ... shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried

out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. The Federal Labour Court considered the restriction to serve a legitimate purpose, namely the preservation of a peaceful school environment. It was also deemed proportionate since the ban would only affect her during the school day and since it served the purpose of protecting the negative freedom of religion of others (Bundesarbeitsgericht 2 AZR 499/08). In another case, a female Muslim Turkish language teacher was dismissed for insisting on wearing the headscarf in class even though she only taught pupils of Turkish origin all of whom were Muslims. The Federal Labour Court upheld the dismissal with the same reasoning as in the case just discussed and regarded the discrimination to be justified (Bundesarbeitsgericht 2 AZR 55/09).

What is remarkable about these two cases is that the Federal Labour Court, without any discussion, adopted the reasoning of the administrative courts, ignoring the fundamental difference between a teacher or social worker who is employed under private law and a civil servant. While there is some room for the argument that civil servants represent the State and therefore have to accept more far reaching restrictions of their fundamental rights, this is not the case for private law employees. Furthermore, upholding the dismissal of the Turkish language teacher who only taught Muslims goes rather far. As is evident from paragraph 23 of the preamble to *Directive 2000/78/EC*, on which the AGG is based, discrimination can only be justified in 'very limited circumstances'. It is submitted that the Federal Labour Court failed to appreciate the very exceptional nature of the justification provision in this case.

It is further noteworthy that none of the decisions mentions § 4 AGG, which deals with multiple discriminations and requires justification under all those grounds. In the case of the ban on the headscarf, the courts are not only confronted with a potential discrimination on the basis of religion but also an indirect discrimination on the basis of gender (Vickers 2008). This failure to appreciate the existence of multiple discriminations in these cases is evidence of a slightly underdeveloped anti-discrimination jurisprudence by the German courts.

Overall Comments

The *Ludin* decision, albeit much-criticized, has provided a certain degree of legal certainty with regard to religious symbols and religiously inspired clothing worn by teachers. Where a *Land* wishes to ban such symbols, it must do so by way of legislation and must not discriminate between religions. With the exception of the Bavarian Constitutional Court, all courts held that a reference to the *Land's* Christian and Western heritage could not lead to a privileging of Christian and Western religious convictions. Rather, this reference must be understood to mean that the Western values marked by Christianity are to inspire teaching and cannot allow for indoctrination of Christian religious content.

The legislation of the eight *Länder* has created a situation for schools and teachers, which comes quite close to ‘*laïcisme*’. They are effectively banned from avowing to any religious belief when in school. To some observers this may seem ironic since the legislation, which contains explicit references to the Christian and Western heritage, was passed by *Länder* parliaments with a strong conservative majority consisting mainly of Germany’s Christian parties. Examples are the Christian Social Union in Bavaria and the Christian Democratic Union in Hesse, Baden-Württemberg, Lower Saxony, North Rhine Westphalia and Saarland.

Symbols Worn by Pupils: Any Room for Regulation In View of Religious Freedom?

The final point which this contribution briefly aims to address is the situation of pupils. At present there is no legislation or executive practice banning pupils from wearing religious symbols in schools. Yet the political discussion revolving around immigration and integration has recently seen some politicians and commentators call for a ban of the headscarf even for pupils (Akgün 2009, Sarrazin 2009). According to media reports, a few head teachers have tried to ban the headscarf in their schools (Dicks 2008, Spiegel Online 2010b). Yet, in each case the school authorities were quick to lift the ban.

Viewed from the perspective of the law, it would be very difficult to achieve such a ban in a constitutional manner. The *Ludin* case showed that a ban of the headscarf for teachers would require a legislative basis and could not merely be imposed by the executive. Since the interference with pupils’ freedom of religion would be at least as strong, there is much reason to believe that any such ban for pupils would have to be passed by the legislature. Of course, a ban on the headscarf only would not be possible either. In view of Article 3 of the Basic Law, which prohibits discrimination, the legislation would have to treat all religions equally and ban all religious symbols.

But even if that were to happen, such a ban would probably be considered an unconstitutional interference with the pupils’ freedom of religion by the FCC. That there would be an interference with that freedom is clear from the *Ludin* case and needs no further discussion. When it comes to justifying that interference, the fundamental difference between a teacher and a pupil in school would become pertinent. Pupils, at least until they have completed nine years of schooling,⁸ are subjected to compulsory education. This means that they have to attend school. If they were not allowed to wear the headscarf in school, this would in effect result in the State forcing them to violate their religious duty, which would constitute a grave interference with their freedom of religion. This interference could only be justified to protect other conflicting constitutional principles, such as the fundamental rights of others. In contrast to a teacher, where the neutrality of the State in religious and philosophical matters constitutes such a colliding principle, it would be hard to find a pressing interest to justify a similar ban for pupils. As

8 The length of compulsory education differs between the *Länder*.

has been pointed out, the neutrality of the German State in religious matters is not to be confused with *laïcité*. Thus, the reasoning of the Turkish State justifying the ban of the headscarf in Turkish universities in the *Şahin* case before the ECtHR would not work for Germany.

One argument for a ban would be to consider it necessary to protect young girls from being forced to wear the headscarf. Apart from the difficulties of distilling the State's duty to protect pupils from the Basic Law, this would have to be squared with parents' right to bring up their children according to their religious convictions, which is guaranteed by the Basic Law. This right inevitably involves a degree of religious indoctrination. Thus a ban on the headscarf for pupils would interfere with their parents' rights as well.

This line of argument finds some support in the Federal Administrative Court's decision on the right of a Muslim pupil not to be forced to take part in classes of physical education where boys and girls are taught in mixed classes (Bundesverwaltungsgericht, 6 C 8/91). The Court acknowledged that the state has a right to educate pupils arising from Article 7 of the Basic Law and that this right was of equal weight as the pupil's religious freedom, which demanded that she had to wear wide dresses and a headscarf so that male pupils would not be able to see her body shape. However, the court held that the state would have had the choice of teaching physical education in single sex classes. Thus the pupil's right to freedom of religion prevailed.

It would therefore be very difficult for a school or even the legislator to ban pupils from wearing a headscarf in school. Even though they are run by a religiously neutral State, schools are places which are open to religious avowals of the pupils attending them. This shows the difference between the German cooperative model of State/Church relations and the French and Turkish models of *laïcité*.

Conclusion

The controversies surrounding religious symbols in schools are testimonies of Germany's pluralistic society. Since politicians tend to shun making decisions which affect people's religion, these controversies are often decided in the courts. As a result, there is now a relatively settled case law on religious symbols. The courts interpret these symbols from the point of view of an objective observer. However, when deciding whether a religious symbol is compulsory for the person wearing it, the courts adopt a subjective test. Furthermore, the courts now seem to accept that a religious symbol can interfere with other people's negative freedom of religion. The situation for teachers wearing a headscarf has been clarified to a large extent. In the *Länder* which introduced a ban on the headscarf, teachers who wear a headscarf may be refused employment and those who are employed can be dismissed if they insist on wearing it in class. In the *Länder* which did not legislate for a ban, it is clear from the *Ludin* case that teachers are allowed to wear it. This fragmentation of the legal situation in the different *Länder* is regrettable.

but inherent in a federal system. The only way in which teacher wishing to wear a headscarf in schools might still be successful is under EU's anti-discrimination law. As this contribution has shown, the case law of the German courts in this respect is not developed in a very sophisticated manner. It is only a matter of time until the Court of Justice of the European Union will be asked to address these questions as well.

References

- Adrian, M. 2006. Laïcité unveiled: a case study in human rights, religion and culture in France. *Human Rights Review* 8(2), 102–14.
- Akgün, L. 2009. Nicht vor dem 14. Jahr! *Emma*, 5/2009. [Online]. Available at: <http://www.emma.de/hefte/ausgaben-2009/inhalt-emma-2009-5/lale-akguen-2009-5> [Accessed: 22 January 2011].
- Augsberg, I. and Engelbrecht, K. 2010. Staatlicher Gebrauch religiöser Symbole im Licht der EMRK. *Juristenzeitung* 65(9), 450–8.
- Bader, J. 2004. Cuius regio, eius religio – Wessen Land, dessen Religion. *Neue Juristische Wochenschrift*, 3092–4.
- Battis, U. 2007. Artikel 33 Grundgesetz, in *Grundgesetz*, edited by M. Sachs. 4th edn. Munich: C.H. Beck, 1078–1101.
- Borowski, M. 2006. *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, Tübingen: Verlag Mohr Siebeck.
- Dicks, B. 2008. Wie Rektoren das Kopftuchverbot ausweiten wollen. *Spiegel Online*, 16 October 2008. [Online]. Available at: <http://www.spiegel.de/schulspiegel/wissen/0,1518,584023,00.html> [Accessed: 22 January 2011].
- Karakas, C. 2007. Turkey: İslam and laicism: between the interests of State, politics, and society. *PRIF Reports* no. 78 [Online]. Available at: <http://www.hsfk.de/fileadmin/downloads/prif78.pdf> [Accessed: 22 January 2011].
- Kästner, K.-H. 2003. Anmerkung. *Juristenzeitung* 58, 1178–80.
- Kokott, J. 2007. Artikel 4 Grundgesetz, in *Grundgesetz*, edited by M. Sachs. 4th edn. Munich: C.H. Beck, 235–70.
- Müller-Volbehr, J. 1995. Positive und negative Religionsfreiheit. *Juristenzeitung* 50, 996–1000.
- Pofalla, R. 2004. Kopftuch ja – Kruzifix nein? Zu den Widersprüchen in der Rechtsprechung des BVerfG. *Neue Juristische Wochenschrift*, 1218–20.
- Sacksofsky, U. 2003. Die Kopftuch-Entscheidung – von der religiösen zur föderalen Vielfalt. *Neue Juristische Wochenschrift*, 3297–301.
- Sarrazin, T. 2009. Sarrazin fordert Kopftuchverbot für Schülerinnen. *Die Welt Online*, 12 December 2009. [Online]. Available at: <http://www.welt.de/politik/deutschland/article5507124/Sarrazin-fordert-Kopftuchverbot-fuer-Schuelerinnen.html> [Accessed: 22 January 2011].
- Schneider, J. 2010. Das Kreuz, ein Vorbild zu sein. *Süddeutsche Zeitung*, 27 April 2010, 2.

- Spiegel Online. 2010a. Alice Schwarzer fordert Kopftuch-Verbot für Schülerinnen. *Spiegel Online*, 21 September 2010. [Online]. Available at: <http://www.spiegel.de/politik/deutschland/0,1518,718785,00.html> [Accessed: 22 January 2011].
- Spiegel Online. 2010b. Kultusministerium prüft Kopftuchverbot. *Spiegel Online*, 23 November 2010. [Online]. Available at: <http://www.spiegel.de/schulspiegel/wissen/0,1518,730730,00.html> [Accessed: 22 January 2011].
- Vickers, L. 2008. *Religious Freedom, Religious Discrimination and the Workplace*. Oxford: Hart Publishing.
- Von Campenhausen, A. 1996. Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts. *Archiv des Öffentlichen Rechts* 121, 448–64.
- Von Campenhausen, A. 2004. The German headscarf debate. *Brigham Young University Law Review*, 665–700.
- Von Campenhausen, A. and de Wall, H. 2006. *Staatskirchenrecht*. 4th edn. Munich: C.H. Beck.
- Wermölder, H. 2007. Headscarves in public schools, in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, edited by M.L.P. Loenen and J. Goldsmith. Antwerp: Intersentia, 155–65.

Case law

Federal Constitution Court

- BVerfGE 32, 98.
 BVerfGE 93, 1.
 BVerfGE 108, 282.
 BVerfGE 34, 165.
 BVerfGE 41, 65.
 BVerfGE 41, 29.
 BVerfGE 52, 223.
 BVerfGE 35, 366.
 BVerfGE 108, 282.

Administrative Courts

- Bundesverwaltungsgericht, 2 B 92.87 (8 March 1988).
 Bundesverwaltungsgericht, 6 C 8/91 (25 August 1993).
 Bundesverwaltungsgericht, 6 C 18/98 (21 April 1999).
 Bundesverwaltungsgericht, 2 C 21.01 (4 July 2002).
 Bundesverwaltungsgericht 2 C 45/03 (24 June 2003).
 Obergerverwaltungsgericht Hamburg, OVG Bs I 171/84 (26 November 1984).
 Verwaltungsgerichtshof Baden-Württemberg, 4 S 1439/00 (26 June 2001).
 Bayerischer Verwaltungsgerichtshof, 3 B 98.563 (21 December 2001).
 Verwaltungsgerichtshof Baden Württemberg, 4 S 516/07 (14 March 2008).

Verwaltungsgericht Lüneburg, 1 A 98/00 (16 October 2000).
Verwaltungsgericht Stuttgart, 15 K 532/99 (24 March 2003).
Verwaltungsgericht Düsseldorf, 2 K 6225/06 (5 June 2007).
Verwaltungsgericht Augsburg, Au 2 K 07.347 (14 August 2008).

Federal Labour Court

Bundesarbeitsgericht, 2 AZR 499/08 (20. August 2009).
Bundesarbeitsgericht, 2 AZR 55/09 (10 December 2009).
Bavarian Constitutional Court
Bayerischer Verfassungsgerichtshof, Vf. 11-VII-05 (15 January 2007).
Hessian Constitutional Court
Staatsgerichtshof des Landes Hessen, P. St 2016 (10 December 2007).

European Court of Human Rights

App. no. 42393/98 *Dahlab v Switzerland* (15 February 2001).
App. no. 44774/98 *Şahin v Turkey* (10 November 2005).
App. no. 30814/06 *Lautsi v Italy* (3 November 2009).
App no. 30814/06 *Lautsi v Italy* (Grand Chamber) (18 March 2011).

Legislation

Allgemeines Gleichbehandlungsgesetz (Act Implementing European Directives Putting Into Effect the Principle of Equal Treatment) of 14 August 2006 (BGBl. I S. 1897) or in English [Online]. Available at: <http://www.antidiskriminierungsstelle.de/RedaktionBMFSFJ/RedaktionADSen/PDF-Anlagen/2009-08-28-agg-englisch-neues-design,property=pdf,bereich=adsen,sprache=en,rwb=true.pdf> [Accessed: 22 January 2011].
Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen (Gesetz- und Verordnungsblatt 2004, 443).
Bremisches Schulgesetz (28 June 2005, Bremisches Gesetzblatt S. 245).
Gesetz zu Artikel 29 der Verfassung von Berlin (Gesetz- und Verordnungsblatt für Berlin S. 92, Nr. 4).
Grundgesetz für die Bundesrepublik Deutschland. [Online]. Available in English at: http://www.gesetze-im-internet.de/englisch_gg/index.html [Accessed: 22 January 2011].
Schulgesetz für Baden-Württemberg (Gesetzblatt 2003, 359)
Schulgesetz Nordrhein Westfalen (Gesetz- und Verordnungsblatt für das Land Nordrhein-Westfalen, 2005, S. 102).
Verfassung des Freistaates Bayern (Gesetz- und Verordnungsblatt 1946).
Verfassung des Landes Baden-Württemberg (Gesetzesblatt 1953, 173).

