

## Germany: The teacher head scarf case

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*Positive and negative freedom of religion—Islamic head scarf of teacher in public school—state neutrality—German Constitutional Court rules that act of parliament is required for prohibition of religious symbols in public schools—decision of September 24, 2003<sup>1</sup>—related rulings of the European Court of Human Rights*

In September 2003, the German Constitutional Court, by a five to three vote, ruled on the complaint of a German teacher, a Muslim, who fought for her eligibility for employment in the civil service. The complainant was not willing to remove her head scarf during classes. She asserted that taking off the scarf, which was for her an integral part of her Islamic identity, would infringe Articles 4(1) and (2), as well as 33(3), of the German Basic Law.<sup>2</sup>

The Constitutional Court's decision was awaited eagerly due to its potential significance for the integration of Muslims into German society. The Muslim community, comprising more than three million members, is the second most prevalent religious group after Christianity. While the head scarf is only one of the issues that has arisen with regard to Muslims in Germany in recent years,<sup>3</sup> it is especially controversial because it is an ostentatious sign of religious affiliation and, for some, the most visible symbol of the suppression and unequal treatment of women.

Although Germany is a strictly secular state, religious references per se are not forbidden in its public schools. Furthermore, the Constitutional Court has held that the nondenominational Christian-school paradigm (*Christliche Gemeinschaftsschule*) is compatible with the Basic Law.<sup>4</sup> However, in its order of May 1995, concerning the display of crucifixes in a Bavarian elementary school, the Court made clear that an ever-present cross could be sufficiently compelling as to contravene the fundamental freedoms of parents as well as

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<sup>1</sup> Judgment of September 24, 2003-BVerfGE 108, 282.

<sup>2</sup> See Bundesgesetz, Teil I, May 23, 1949, BGBl.I [Federal Law Gazette], amended on July 26, 2002 BCBl.I 2862. The English version is available at [http://www.bundesregierung.de/static/pdf/GG\\_engl\\_Stand\\_26\\_07\\_02.pdf](http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf).

<sup>3</sup> As a recent example, see the decision of the Constitutional Court decision concerning ritual slaughter (*Schächten*) of 2002-Jan. 15 BVerfGE 1793/99; 9 NEUE JURISTISCHE WOCHENSCHRIFT 663 (2002). See also Christine Langenfeld, *Germany*, 1 INT'L J. CONST. L. (I-CON) 141 (2003). That decision made clear that a Muslim butcher under certain circumstances may obtain an exceptional permit to perform ritual slaughter.

<sup>4</sup> See the Constitutional Court's decision concerning the admissibility of nondenominational schools of Christian character, 1975-Dec. 17 BVerfGE 41, 29.

children<sup>5</sup> and declared the Bavarian school regulations incompatible with Article 4(1) of the Basic Law.<sup>6</sup> All the federal states mandate compulsory schooling; the choice of school is not subject to individual preference but, rather, is determined by the location of the child's residence. Furthermore, the vast majority of schools are maintained by the state, while the private school sector is not as developed as in other European countries. The Christian "paradigm" and "classroom crucifix" decisions, cited above, provide guidance in determining the degree of religious exposure that is permissible in public schools.

The plaintiff in the instant case, a German national of Afghan origin, after completing her teacher-training period (*Referendariat*), applied for employment in the civil service. The competent school authority (Oberschulamt Stuttgart) rejected her application on the grounds of "personal aptitude," or fitness, specifically, on her unwillingness to refrain from wearing the head scarf. For the Oberschulamt, the scarf was not only a symbol of religious conviction but also a political manifestation, which was not compatible with the principle of state neutrality. The school authority argued that young schoolchildren were easily influenced, and therefore, could be negatively impacted.<sup>7</sup>

The teacher sued before the Higher Administrative Court<sup>8</sup> and then appealed that court's rejection of her claim to the Federal Administrative Court, which also ruled against her. The appellate court emphasized that a public schoolteacher was regarded by her pupils as a representative of the state,<sup>9</sup> and that the Islamic head scarf was a religious symbol, not merely a cultural tradition. This conflict between the religious freedom of the teacher, on the one hand, and the fundamental rights of students and their parents, on the other, could be resolved adequately only by a prohibition of the head scarf. Weighing the possible influence exerted by the scarf, which it viewed as an infringement of the latter's rights, the courts affirmed the school's decision.<sup>10</sup>

<sup>5</sup> Order concerning the affixation of crucifixes in state compulsory schools, 1995-May 16 BverfGE 93, 1.

<sup>6</sup> The former Bavarian Volksschulordnung contained, in its § 13, a provision that in every classroom a cross should be displayed on the wall. After the decision of the Constitutional Court a clause was inserted that in case of conflict a compromise has to be sought by the school authority. See Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen of May 31, 2000, in GVBl. Bayern 414 (2000), last amended on March 24, 2003, GVBl. Bayern 262 (2003).

<sup>7</sup> This aspect becomes even more important in elementary schools where pupils are mainly taught by a single homeroom teacher.

<sup>8</sup> See Decision of the Verwaltungsgerichtshof Baden-Württemberg (VGH) [Court of Appeal], June 26, 2001—4 S 1439/00, 39 NEUE JURISTISCHE WOCHENSCHRIFT 2899 (2001).

<sup>9</sup> See Decision of 2002-July 4 BverwGE 116, 359 [Highest Administrative Court].

<sup>10</sup> See also Judgment of Oct. 16, 2000—1 of the Verwaltungsgericht Lüneburg (VG) [Trial Court] A 98/00 [hereinafter Trial Court Judgment], 10 NEUE JURISTISCHE WOCHENSCHRIFT 767 (2001). The court declared that the wearing of an Islamic head scarf by an elementary schoolteacher of the Muslim faith does not constitute incapacity for public-sector employment, that the religious

The judgment of the Constitutional Court refers to Article 33(2) and (3) of the Basic Law, which stipulates the equal eligibility of all German citizens for admission to the civil service. The legislature is allowed to articulate hiring criteria, for which there is broad discretion, as long as they are in conformity with fundamental freedoms and other constitutional norms. Religious affiliation is not a lawful criterion for selection. The employer must give an assessment of a candidate's fitness to perform the duties set forth in the relevant civil service law. Those duties must be legally specified and are subject to the individual rights of the applicant. In this respect, the Court's ruling reaffirms that wearing an Islamic head scarf is covered by the fundamental freedom of religion and belief, notwithstanding dissent within the Muslim community on this matter. Freedom of religion is guaranteed to everyone without reservation and can be limited only by other constitutionally protected values.

Foremost among these values is the principle of neutrality in questions of religion, which the state must guarantee. This principle derives from Articles 4(1) and 4(2), 3(3) and 33(3) of the Basic Law as well as Articles 136(1) and 136(4) and Article 137(1) of the constitution of Weimar.<sup>11</sup> As a consequence, the state is not allowed to give priority to any religion or belief and must guarantee their equal treatment. At the same time, Article 6(2) of the Basic Law defines the care and upbringing of children as a natural right of parents, which encompasses their right to convey whatever convictions in matters of belief and philosophy they see fit. However, this provision does not accord to parents the exclusive right to educate their children; according to Article 7(1) of the Basic Law, the public school system is under the supervision of the state. It follows from this that the state has a mandate for education.

Finally, the children's freedom of religion must be taken into consideration. Although an individual has no right to be spared exposure to manifestations of

symbol cannot be regarded in isolation from the perspective of the bearer. The abstract danger of potential conflicts does not justify the denial of access to the civil service. On the contrary, the Islamic head scarf can even be interpreted as a contribution to the promotion of democracy and tolerance towards other religions as prescribed by § 2 of the School Law (*Schulgesetz*) of Niedersachsen. The Higher Administrative Court of Lüneburg overruled this decision on 2002-Mar. 13–2 BverwGE 2171/01, 8 NIEDERSÄCHSISCHE VERWALTUNGSBLÄTTER 212 (2002).

<sup>11</sup> According to Article 140 of the German Basic Law (GG), the provisions concerning the relationship between the State and the religious communities/churches of the Weimar Constitution (Arts. 136 to 139, 141) form an integral part of the Basic Law. The Weimar Constitution was adopted in 1919 as the constitution for the German Reich after the German Empire had been overthrown in the aftermath of First World War. Germany became a federal republic with a national president elected by universal suffrage for a seven-year term, a chancellor and a ministry appointed by the president, but responsible to the Reichstag. The Reichstag was composed of the deputies of the German people. A system of proportional representation was also established. The rights and duties of the individual were protected by a bill of rights. During the "Third Reich" (1933–1945), the Weimar Constitution was suspended. In 1933, the Reichstag passed the so-called enabling act, which was the first of a series of laws and decrees, that converted the democratic republic into a totalitarian state with Hitler as the supreme leader.

belief or to religious symbols, generally, account is taken of the fact that pupils in universal compulsory schools cannot avoid the possible influence of particular faiths that may be in evidence. The wearing of a head scarf, say, in a public school could be regarded as an infringement of a child's right to abstain from a religion or belief, that is, as a religious influence that would contravene this fundamental right. It might also entail an endangerment to school peace that would interfere with the state's exercise of its educational mandate. However, the Court's decision also emphasizes that there is no empirical research to prove that a teacher's Islamic head scarf has a negative effect on schoolchildren. Hence, an abstract danger to religious freedom and school peace in and of itself cannot justify the public administration's prohibition of the scarf and the consequent restriction of the plaintiff's freedom of religion. Baden-Württemberg's Civil Service Law (*Landesbeamtengesetz*) does not contain a provision that could justify a prohibition of the Islamic head scarf, absent a demonstrable violation of the principle of neutrality or negative impact on the fundamental rights of pupils and parents. The question of how to deal with an abstract threat posed to other constitutional values is one that must be decided by the legislature. The Court admitted that the federal states (*Länder*) had a wide margin of appreciation; they were free to pass new laws prohibiting the wearing of religious insignia in general. That is to say, they could redefine the balance between state neutrality and religious displays in public schools as long as they gave due attention to the protection of fundamental freedoms. According to the Court, societal change and increasing religious plurality may offer good reasons to rethink this balance. It was conceivable, for example, as a result of regional particularities or different school traditions, that the *Länder* could come to divergent solutions—either generally banning religious symbols in schools or admitting them on the condition that the individuals involved are not trying to proselytize the pupils.

The Constitutional Court made clear that, under the rule of law and the principle of democracy, such questions must be dealt with in the parliament and not by public administrators. Liberty rights, such as the positive or negative freedom of belief, as well as the right of parents to rear their children, are subject to no explicit reservations. Only the legislature is competent to formalize the content of these rights. The Court emphasized that policies dealing with this issue would have to be faithful to the equal treatment provisions of Articles 3 and 33(3) of the Basic Law. Finally, it concluded that the denial of access to public employment, when not based on specific legislation, infringed the complainant's rights as determined by Articles 33(2), 4(1) and (2) of the Basic Law and is, therefore, incompatible with Article 33(3).<sup>12</sup>

<sup>12</sup> See Para. 75 of the decision, for the dissenting opinions of Judges Jentsch, Di Fabio, and Mellinshoff, who consider the complaint not to be well founded. From their point of view, a legal reservation had not been made in the present case. The prohibition of the Islamic head scarf, therefore, could be left to the discretion of the school administration. It lies in the exclusive competence of the Constitutional Court to judge regarding the ultimate range of fundamental freedoms and not

The decision of the Federal Administrative Court was thus revoked and remanded.<sup>13</sup>

In the aftermath of the decision, the *Länder* have begun to deliberate on possible modifications to their present regulations. Some of them have already presented draft laws to their parliaments; April 2004 saw the enactment, by the parliament of Baden-Württemberg, of the first law providing that teachers in public schools are not allowed to demonstrate any political, religious, or ideological convictions that could challenge the principle of state neutrality or endanger school peace.<sup>14</sup> The law presumes, in § 38(2) sentence 3, that manifestations of Christian or other traditional Western beliefs do not contravene the law, and that such manifestations fulfill the educational mandate conferred on the state by the constitution.<sup>15</sup>

On April 29, 2004, the amended school law of Niedersachsen was adopted by the parliament; it contains a provision stipulating that a teacher's outward appearance should leave no doubt as to his or her fitness to convey the state's educational values.<sup>16</sup> The text does not distinguish among different religions, but administrative practice generally seems to interpret the wearing of a head scarf as raising such doubts.<sup>17</sup>

Most recently, at the time of this writing,<sup>18</sup> the parliament of the Saarland passed its own amendment. While making no explicit mention of the Islamic

in the hands of the parliament. The dissenting judges also make the criticism that the majority's decision risks an imbalance between legislative and executive power. They assert that the principle of neutrality directly emanates from the Constitution and, therefore, has to be respected by the state and its officials. The fundamental freedoms of a teacher are functionally limited and thus do not have the same weight as the rights of children and their parents. It is up to the employer to give a prognosis regarding the applicant's willingness to fulfill the prescribed duties. The judges also stress that the decision must not be based on a concrete endangerment of school peace.

<sup>13</sup> See Federal Administrative Court's Judgment of June 24, 2004-2 C 45.03 (full text not yet available to the public).

<sup>14</sup> See amended law of April 1, 2004, GVBl. Baden-Württemberg 178 (2004). According to the press release published by the court, the new law was considered to comply fully with the principles laid down in the decision of the Constitutional Court. The Federal Administrative Court held that the provisions applied equally to all religious affirmations and thus did not constitute discrimination against the Muslim faith. As a consequence, the teacher's request for employment was rejected. It is not yet clear whether the claimant will appeal the decision to the Constitutional Court.

<sup>15</sup> See Decision of the Federal Administrative Court on the amended law, *supra* note 13.

<sup>16</sup> See Law of April 29, 2004, GVBl. Niedersachsen 140 (2004). The provision concerning teachers' appearance is § 51 (3).

<sup>17</sup> See Trial Court Judgment, *supra* note 10. In the case of a Muslim schoolteacher in Niedersachsen, the administration rejected the request for employment without any indication of a concrete threat to school peace. Neither were there any complaints presented by pupils or their parents. In the meantime, the teacher agreed not to wear the head scarf during class lessons. As a consequence, the pending case before the Federal Administrative Court was concluded without judgment.

<sup>18</sup> June 2004.

head scarf, as does the law of Baden-Württemberg, the lawmakers clearly consider the garment impermissible. The relevant provision is meant to indicate that Western traditions are an integral part of the values to be conveyed by public schools and anything hostile to those values cannot be allowed to endanger school peace or state neutrality.<sup>19</sup>

In this context, the proposal presented by Bavaria is also notable. This draft states that any symbol or garment that might be interpreted as contravening constitutional and educational values is prohibited.<sup>20</sup> The lawmakers generally consider the Islamic head scarf to be inadmissible and to constitute, independent of the wearer, a forbidden symbol; this is based on the perception that some parts of the Muslim community connect it not only with an Islamist point of view but also with the discriminatory treatment of women. Therefore, the head scarf might be interpreted by pupils in a way that would run counter to fundamental principles of the Constitution.

The draft presented by Hesse aims at extending the ban on religious symbols to the civil service as a whole.<sup>21</sup> However, the amendments proposed, both to the civil service law and the school law,<sup>22</sup> are qualified by the understanding that Christian and occidental traditions should be duly taken into account when applying the law. Berlin's proposed amendment, on the other hand, would generally exclude all religious manifestations from the civil service.<sup>23</sup>

The new state regulations are problematic in two respects: first, they mostly interpret the head scarf as a political symbol that contravenes fundamental constitutional values. Thus, the state arrogates to itself a unilateral right to define the garment's meaning without reference to the motivation of the individual teacher. Her fundamental right to religious freedom is disregarded even in those cases in which the teacher is wearing the head scarf purely for personal religious reasons and poses no threat to the fundamental rights of pupils and their parents or to school peace. The decision as to whether a teacher is to be prohibited from wearing the head scarf during classes has to be taken on a case-by-case basis. In this context, it must be carefully examined whether the teacher wearing the head scarf will, by her behavior, threaten her pupils' religious freedom or endanger

<sup>19</sup> See Document No. 12/1072, available at <http://www.landtag-saarland.de>. The final text is not yet published in the official journal.

<sup>20</sup> Document No. 15/368, § 59(2), available at <http://www.bayern.landtag.de>.

<sup>21</sup> Document No. 16/1897 neu, available at <http://www.hessischer-landtag.de>.

<sup>22</sup> Hessisches Beamtengesetz § 68(2) and Hessisches Schulgesetz § 86(3), respectively.

<sup>23</sup> All the draft laws (as well as those already enacted) provide exemptions for the teacher-training period, on the theory that the state has a monopoly on teacher education and that this provision is accordingly required in order to guarantee the teacher's occupational freedom, as laid down in Article 12 of the Basic Law. However, the exemption seem inconsistent in that teachers also conduct classes during their training period and thus could conceivably have the supposed negative influence on their pupils the laws are meant to forestall.

school peace. In borderline cases, the benefit of the doubt should be given not to the teacher but to the fundamental rights of the pupils (and their parents).

A further criticism is that most of the laws suggest (whether explicitly or in various interpretations) that the manifestation of Christian or other traditional Western beliefs does not contravene the rule of neutrality and even that it fulfills the state's educational mandate. It is highly doubtful that the Constitutional Court will find these provisions in conformity with the equality clauses of the Basic Law, given the emphasis that the Court has placed on equal treatment of religious groups by the legislature.<sup>24</sup>

The European Convention on Human Rights (ECHR) deals in Article 9 with "freedom of thought, conscience, and religion."<sup>25</sup> These freedoms are not unlimited and can be restricted if "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." In practice, the European Court of Human Rights grants a margin of discretion to national legislatures. However, any restrictive measure they adopt must be supported by sufficient reasons and must be proportionate to its desired end. In a recent decision on the exclusion of a Muslim teacher from service, the court declared her complaint to be ill founded.<sup>26</sup> The plaintiff was a Swiss elementary schoolteacher who had been disqualified from service three years after she had begun wearing the head scarf to class. Although no complaints had been made by pupils or their parents, the competent school authority had prohibited the head scarf in 1997. The prohibition had been justified on the grounds that the garment endangered the state's neutrality. The Swiss Federal Court rejected the teacher's complaint. It saw nothing disproportionate about the impugned measure and argued that, especially in the canton of Geneva where the principle of state neutrality is strongly held, teachers had to abstain from manifesting religious affiliations of any kind.

The European Court of Human Rights, when petitioned, held that the prohibition was not incompatible with Article 9 of the ECHR, and that it was justified in principle as well as proportionate to the stated aim of protecting the rights and freedoms of others, public order, and public safety. The decision of the school authority was "necessary in a democratic society." The court also denied the plaintiff's claim of sex discrimination in violation of Article 14. From those holdings it might be deduced that the court takes a restrictive point of view regarding religious garments in public institutions. However, its stance must be understood against the background of the secular Geneva tradition, which, as in France, generally prohibits the manifestation of religious affiliation by teachers in public schools.

<sup>24</sup> Para. 71 of the Court's decision, *supra* note 1.

<sup>25</sup> European Convention on Human Rights, 213 U.N.T.S. 221, also available at <http://www.echr.coe.int/Eng/BasicTexts.htm>.

<sup>26</sup> See Decision of the European Court of Human Rights, *Dahlab v. Switzerland*, February 15, 2001—Application No. 42393/98, available at <http://hudoc.echr.coe.int/default.htm>.

These principles seem also to have been applied by the ECHR in the case of two Turkish students who fought for their right to wear the head scarf at a state university.<sup>27</sup> The principle of laicism as the fundamental basis of the Turkish Republic prohibits any religious manifestation in public institutions, such as schools or universities. Here again, the court considered the measure imposed on the students to have been adopted in pursuit of a legitimate aim—namely, bearing in mind the country’s historical experience with radical political movements, the preservation of pluralism in the university setting. The court ruled, therefore, that the head scarf ban was “necessary in a democratic society” and found no violation of Article 9 of the ECHR.

France has recently witnessed a heated debate on the application of the principle of laicism (*principe de laïcité*) in public schools, leading to the adoption of a new law, based on this core principle of the French Republic, that guarantees the peaceful and equal coexistence of different religions in French society. Mentioned in France’s 1789 Declaration of Human Rights, this principle was legally introduced in 1905 as the expression of a long tradition of separation of church and state and is now enshrined in Article 1 of the French Constitution. This principle demands a strict separation between the secular state and religion and thus generally prevents teachers from wearing religious symbols, such as head scarves or kippas. Lately, however, the wearing of such symbols by pupils has provoked a strenuous debate on the scope of the principle of laicism. The State Council (*Conseil d’État*) ruled in 1989 that it was up to the educational institutions to decide, on a case-by-case basis, whether the head scarf was to be prohibited or not. This led to inconsistent practices among the different school authorities, underscoring the need for a clear legal provision. The Stasi commission<sup>28</sup> and the Debré information mission<sup>29</sup> were formed to examine the question of the secularity of public institutions. Both concluded in their reports that a new law should be enacted to delineate and clarify the application of the principle of laicism. The new law, passed by Parliament in March 2004, explicitly outlaws any religious sign or garment that overtly manifests the religious affiliation of the wearer<sup>30</sup> and also mandates, in Article 4, an evaluation of the law’s implementation after one year.

The legal setting in France concerning religious references in public schools is not comparable to the German legal situation, where the freedom of pupils

<sup>27</sup> See Decision of the European Court of Human Rights, *Leyla Sahin v. Turkey*, June 29, 2004—Application No. 44774/98, available at <http://hudoc.echr.coe.int/default.htm>. The other case, that of *Zeynep Tekin v. Turkey*, Application No. 41556/98, was struck from the list after the claimant withdrew her application without specifying a reason.

<sup>28</sup> For details see the Stasi Report at <http://www.publicsenat.fr/dossiers>.

<sup>29</sup> Report No. 1275 of Mr. Jean-Louis Debré, President of the Parliament, at <http://www.assemblee-nat.fr>.

<sup>30</sup> See Law No. 2004–228 of March 15, 2004, J.O. March 17, 2004, p.5190, J.C.P. 2004, III page 640. The text is also available at <http://www.legifrance.gouv.fr>.



to wear religious clothing has never been called into question.<sup>31</sup> As noted, Germany is a secular state, with no state religion and no alignment with a particular religion. However, the German system traditionally has taken a different approach to the relationship between the secular state and religion, conceiving of state neutrality as an open-ended concept that does not exclude all forms of religious life from the public sphere, accepting the notion that teachers as well as parents in public schools have certain religious needs. The examples of France and Germany show that questions of religious manifestations in the public sphere will be decided not on a uniform basis but, rather, in light of the variations in the different historical traditions governing the relationship between religion and the state.

<sup>31</sup> It is understood, however, that in exceptional cases, where instruction is negatively influenced by the appearance of a pupil, a prohibition on such clothing may be compatible with the provisions of the law.

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## Germany: Freedom of conscience in public schools

**Oliver Gerstenberg\***

*The Constitutional Court's "teacher-head scarf" decision—the question of "danger" to social cohesion—religious freedom—the majority and minority views—the challenge to democracy—freedom of conscience as a personal and political right.*

### 1. Background

Fereshta Ludin was born in Afghanistan in 1972 but moved to Germany in 1985 and, in 1995, became a German citizen.<sup>1</sup> Her goal was to become a schoolteacher. Having passed two state exams that qualified her to teach German, English, and social studies in public elementary schools, she applied for a position as a teacher in a state school in Baden-Württemberg.

When Ludin declared that she would wear the Muslim head scarf not only in private but also in the classroom, the school board rejected her application.

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<sup>1</sup> Bundesverfassungsgericht (BverfGE), 2 BverfGE 1436/02 Judgment of Sept. 24 2003 ("teacher-head scarf" decision.)