

RELIGION IN PUBLIC EDUCATION

HANS MICHAEL HEINIG*

I. INTRODUCTION

In Germany, rules concerning the status of religion within the public educational system fit into the general framework of the constitutional law pertaining to religious communities. The *Grundgesetz* (German Basic Law) constitutes a legal order concerning religion, which is characterized by the principles of freedom and equality, benevolent support, neutrality of the state and separation of state and church.¹ The state established under the *Grundgesetz* is open to the religions of its citizens, precisely so that the state may not become religious or ideological itself.² Accordingly, religion plays an important role within the public educational system.

II. GENERAL BACKGROUND

1. *Facts and Figures*

The public educational system in Germany contains both state and non-state (albeit publicly funded) nurseries and kindergartens as well as a four-tiered school system. Since the organization of the nursery and school system in Germany is a matter for the German federal states (*Länder*), it is shaped by federal diversity.

a) *Kindergarten and Nursery*

To this day, Germany is split when it comes to questions of pre-school education. In the German Democratic Republic, mothers in general returned to their jobs quickly after the birth of a child. A sufficient number of nurseries and kindergartens existed. In Western Germany, however, kindergartens have been designed as half-day care for a long time. Less than 50% of all children born in a given year make use of these facilities at all. Since the time when this system was created, though, the needs of parents have changed fundamentally. For the past ten years, intensified efforts to increase the number of full-time care facilities in Western Germany can be seen. The reasons are diverse: partly they originate from a gender approach (compatibility of family and job as a demand of women's emancipation), partly they are associated with the development of the population in Germany (demographic change and decreasing population numbers); at the same time they are justified due to integration and

* Prof. Dr., Executive Director of the Institute for Public Law (Chair for Public Law, Church Law and the Constitutional Law pertaining to Religious Communities), Faculty of Law, Georg-August-University and Director of the Institute for Ecclesiastical Law of the Protestant Church of Germany (EKD), Göttingen, Germany.

¹ *Heinig, ZevKR* 2008, 235 et seq.

² *Heinig, JZ* 2010, 359.

education policies (language acquisition by immigrants, change of a facility to just store children to an actual pre-school educational facility). Following the most recent research, the availability of kindergartens in Western Germany is still insufficient – especially outside the big cities.³ A lot of kindergartens are run by churches and other religious organizations. The number of local kindergartens depends on regional influences and the local degree of religious membership.

b) Structure of the school system

Traditionally, education in Germany takes place first in shared “*Grundschulen*” (basic schools), before classes are divided and based on standards of performance in “*Gymnasien*” (grammar schools the graduation from which allows access to university), “*Realschulen*” and “*Hauptschulen*”. In some states independent orientation classes (“*Förderstufe*”) mark the transition from elementary school to higher schools. In addition to this three-unit system, there exist different concepts of “*Gesamt-*” (comprehensive school) and “*Gemeinschaftsschulen*” (community schools). Also parts of professional education are organized as school-classes. (so-called “*berufsbildende Schulen*”, vocational schools).⁴

c) Statistical data

There are in total about 35,000 “*allgemeinbildende Schulen*” (general-educational schools) (among which there are 16,000 “*Grundschulen*”, 4,200 “*Hauptschulen*”, 2,600 “*Realschulen*”, 3,000 “*Gymnasien*” and 700 “*Gesamtschulen*”) and 8,900 “*Berufsschulen*”. Of 9 million students in general-educational schools, about 7 % attend private schools. Schools and pupils are divided as follows:⁵

Students according to types of general educational schools			
Type of school	Academic year		
	2007/08	2008/09	change ¹ in %
	absolute student numbers		
¹ change in comparison to the previous year.			
total	9,183,811	9,023,572	-1.7
in detail:			
Grundschulen	3,082,499	2,997,074	-2.8
Förderstufen	101,564	104,552	+2.9
Hauptschulen	889,132	825,730	-7.1

³ Bertelsmann-Stiftung, Ländermonitor Frühkindliche Bildungssysteme 2010.

⁴ For details see Basic Structure of the Education System in the Federal Republic of Germany, http://www.kmk.org/fileadmin/doc/Dokumentation/Bildungswesen_en_pdfs/en-2009.pdf.

⁵ For further information see <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Naviga tion/Statistiken/BildungForschungKultur/Schulen/Tabellen.psml>.

Students according to types of general educational schools			
Type of school	Academic year		
	2007/08		2008/09
	absolute student numbers		change ¹ in %
Realschulen	1,278,092	1,262,545	-1.2
Gymnasien	2,466,041	2,468,949	+0.1

Students according to types of vocational schools			
Type of School	Academic year		
	2007/08		2008/09
	absolute student numbers		change ¹ in %
¹ change in comparison to the previous year.			
² Including cooperative forms of one-year elementary vocational education.			
total	2,802,776	2,805,940	+0.1
of those			
Part-time vocational schools ²	1,709,936	1,726,703	+1.0

Students in private schools according to school types					
Type of School	Academic year				
	2007/08		2008/09		change ² in %
	absolute	percentage	absolute	percentage	
¹ Percentage of the students in private schools in comparison with all students.					
² Change in comparison to the previous year.					
total	912,300	7.6	926,426	7.8	+1.5
general-education schools					
total	674,892	7.3	690,757	7.7	+2.4
in detail:					
elementary schools	73,979	2.4	78,158	2.6	+5.6
Förderstufen	4,619	4.5	4,868	4.7	+5.4
Hauptschulen	25,783	2.9	25,452	3.1	-1.3
Schools with different types of schooling	8,651	2.9	11,237	3.7	+29.9
Realschulen	113,239	8.9	113,623	9.0	+0.3
Gymnasien	269,297	10.9	273,385	11.1	+1.5
integrated comprehensive schools	16,712	3.3	19,856	3.9	+18.8
vocational schools					

Students in private schools according to school types					
Type of School	Academic year				
	2007/08		2008/09		
	absolute	percentage	absolute	percentage	change ² in %
total	237,408	8.5	235,669	8.4	-0.7

2. Public and private schools with religious profile

a) Precedence of public schools over private schools

In the heartland of the Protestant reformation, the school system had long been shaped by the churches. Until the 19th century, churches were in charge of the local supervision of state schools.⁶ The religious influence of the school system is recognizable even today in some of the federal states (*Länder*).

In Germany, public schools enjoy in some way precedence over private schools. The *Grundgesetz* does protect the foundation of private schools. However, it prescribes some requirements.⁷ Social segregation is to be avoided. These policies are especially strict when it comes to *Grund-* and *Hauptschulen*. As a result, there are a lot less private *Grund-* and *Hauptschulen* compared to the number of private *Realschulen* and *Gymnasien*. (see above) The special denominational or ideological character of a private school provides a legitimate reason for its founding. The constitutional precedence of public over private schools is interpreted as an expression of the idea of democratic equality and aims for social inclusion.

b) Christian community school

To accommodate the regional characteristics of the religious influence on the school system, some *Länder* have provided special regulations for public schools. Partly public schools are run as Christian community schools (in the states of Baden-Württemberg, Bavaria, Rhineland-Palatinate) while in other states schools can be instituted as schools of religious denomination (cf. §§ 129 et seq. *Niedersächsisches Schulgesetz*, School Law of the State of Lower Saxony).

The characterization of public schools as Christian community schools was approved by the German Federal Constitutional Court (*Bundesverfassungsgericht*). However it is a

⁶ See Link, *Kirchliche Rechtsgeschichte*, 2009, pp. 148, 177.

⁷ Art. 7 GG: (1) The entire school system shall be under the supervision of the state.

...

(4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

(5) A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.

prerequisite that the religious freedom of the students is safeguarded as well as that the school does not exhibit missionary traits. The school may only be Christian in the sense of accepting and communicating the cultural shaping power of Christianity. The aim must be the practice of mutual tolerance.⁸

c) *State funding of private schools*

The school laws of the *Länder* all regulate the funding of private schools. Up to 90% of the costs are reimbursed by the state. Private schools run by the churches take part fully in this funding.

Because of the freedom to establish private schools under constitutional law, the *Bundesverfassungsgericht* considers the state to be obliged to fund the schools, if otherwise the existence of the private school system was endangered.⁹

3. *Religion as a Subject of Instruction and Its Substitutes*

Art. 7 sec. 3 GG guarantees religious instruction in public schools. Art. 7 sections 2 and 3 read as follows:

“(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.

(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction. ...”

The norm reflects the basic principles of German constitutional law pertaining to religious communities: the public school is not free of religion. In this respect the German constitutional order is secular but not to the same degree as e.g. in France. Religion has its place in school and is a proper - that is, regular or ordinary - subject of education in schools.

From this character of religious education as an ordinary subject in school it follows that the state offers religious instruction, pays the costs and is responsible for the organization of classes. As a matter of principle, religious instruction is to be treated like any other subject: school attendance is compulsory and the grade is relevant for passing classes.¹⁰

However, according to the *Grundgesetz*, religious instruction is not to be provided as the secular study of religions, but to convey authentically religious teachings theologically in accordance with the religious affiliation of the students. Religious instruction therefore is given according to the denomination of the students in question. Because the religiously neutral state does not have a religion of its own, it must cooperate with religious communities

⁸ BVerfGE 41, 29 et seq.; 41, 65 et seq.; see also *Robbers*, in: von Mangold/Klein/Starck, GG, 6th ed. 2010, Art. 7, margin nos 42 et seq.

⁹ BVerfGE 90, 128 et seq.; 75, 40 et seq.; for a critique see *Heinig*, *Der Sozialstaat im Dienst der Freiheit*, 2009, pp. 403 et seq.

¹⁰ *Robbers*, in: von Mangold/Klein/Starck, GG, 6th ed. 2010, Art. 7, margin nos. 130 et seq.

for this kind of teaching. It is the religious communities which have to guarantee the authenticity of the teaching and the theological reliability of the teaching staff. This denominational character and cooperation with religious communities ensures that religious instruction is neither based on an anti-religious world view of the state, nor on a privileged state religion. At the same time the liberal-cooperative state has to respect negative aspects of the freedom of religion. Therefore the law provides for withdrawal of the student from religion classes exists and no teacher is obliged to give lessons in religious education.

In this sense, religious literacy concerning one's own denomination has to be understood as the expression of a strictly anti-totalitarian and liberal religious education in public schools.

The question why this kind of religious instruction exists in the first place is not without political controversy. I see the following reasons as in favour of the current constitutional solution. Primarily, the focus is on religious education suited to the child's age in the sense of transmitting knowledge about religion. However, religion classes also play an important role to convey values and to strengthen the student's capability to make ethical judgments. In both perspectives a denominational religious literacy is more lasting than a general education in the science of religion and philosophical ethics. Finally a denomination-based religious education secures an element of religious socialization in the student's academic biography. In this sense, the public school becomes part of the process of religious rooting and homing. Therefore most of the pupils in Germany attend public schools, in contrast to, e.g., France where denominational private schools do not play an important role. This results, among other factors, from the fact that the religious interests of pupils and parents are taken into account by the denominational religious education in public schools.

A student who does not participate in religion classes (either after having withdrawn or because they belong to a religious community the principles of which are not taught in religion classes) normally has to attend a substitute class (commonly referred to as "values and norms" or "ethics") according to the school laws of the federal *Länder*.¹¹ The constitutionality of such a substitute class has been confirmed several times.¹² It is reasoned that the legislator would be allowed to offer religion and ethics classes to all students. This view, however, may be questioned: Art. 7 sec. 3 of the *Grundgesetz* implicitly forbids the legislator from offering forms of classes which challenge the guarantee of religion classes as a regular (in other words, normal) subject of education. This requirement, though, cannot be fulfilled if ethics classes or religious studies (science of religion rather than theological instruction) were to be created as substitutes for religious education as a primary subject.

According to the *Grundgesetz*, special rules exist for Bremen and Berlin. Art. 7 sec. 3 *Grundgesetz* does not apply there (Art. 141 *Grundgesetz*). With this exception, the *Grundgesetz* considers traditional local conventions.¹³ After German reunification, it was disputed whether the so-called "*Bremer Klausel*" (Bremen clause) should generally be applied to East Germany. The *Bundesverfassungsgericht* avoided a clear statement. The action before

¹¹ See von Campenhausen/de Wall, *Staatskirchenrecht*, 4th ed., 2006, p. 214.

¹² BVerfG, 18 February 1999, Case no. 1 BvR 1840/98; BVerwGE 107, 75 et seq.; VGH B.-W., NVwZ 1998, 309 et seq.; Bay. VGH, 14 December 1998, Case no. 7 ZE 98.3211; VG Hannover, NVwZ 1998, 316 et seq.

¹³ von Campenhausen/de Wall, *Staatskirchenrecht*, 4th ed., 2006, pp. 210 et seq.

the *Bundesverfassungsgericht* concerning the Brandenburg model, which implies nondenominational religious studies with a partial participation of religious communities, ended with a settlement.¹⁴ The regular class in Brandenburg is the subject “life skills – ethics – religion” (*LER*), which is exclusively organized by the state. However, students can withdraw from *LER* in favour of confessional religion classes.

But even outside these specific cases of Bremen, Berlin and Brandenburg, the practices of religious education vary between the different federal states. Depending on each *Land*, different minimum numbers of students are required for the creation of classes for a specific religion or denomination. The churches increasingly complain that the *Länder* are not ensuring education in this subject to the extent needed, in particular, that the states fail to reach all potential students in the state.

An unresolved problem is the establishment of regular Islamic religious education in public schools. The federal government and several state governments have expressed a political commitment to establish Islamic religious instruction. Art. 7 sec. 3 *Grundgesetz* requires the cooperation with the religious community in question. Islam, however, is currently not sufficiently organized to provide an adequate point of contact, that is, institutions with a clear structure of members for the state. Therefore, the states manage with the provisional solution of offering education in Islamic studies, which is organized by the state with the aid of councils which include representatives of Islamic organizations.¹⁵ Such solutions promise immediate success but threaten to blur the difference between state-run and denominational religious education. In addition there is a danger that temporary solutions become permanent and that the pressure on the Islamic community to organize ceases, thereby threatening the long-term integration of Islam into the framework of Germany’s constitutional law rules pertaining to religious communities.

Due to its guarantee under constitutional law, religious instruction formally has a strong position. It can only be abolished by changing the constitution. The model of imparting religious education through denominational teaching has proven itself in the past. This religious education contributes to a feeling of being at home in one’s own religion and thereby allows the transmission of values in a sustainable manner. In this context, ethics is not imparted in philosophical abstraction but derived from religious wisdom. At the same time the development of a reflected religious certainty of identity particularly allows a sound analysis of other religions and world views. Therefore from a pedagogical point of view the increasing religious pluralisation in Germany does not put the model of denominational religious education in doubt. On the contrary: high quality religious education is more necessary than ever.¹⁶

At the same time, however, because of the weakening of the population’s ties to churches and the plurality of religious affiliation in both East Germany and urban areas, the

¹⁴ BVerfG, joined cases no. 1 BvF 1/96, 1 BvR 1697/96, 1 BvR 1718/96, 1 BvR 1783/96 and 1 BvR 1412/97, Decision of 31 October 2002.

¹⁵ See http://www.deutsche-islam-konferenz.de/cln_110/nn_1864580/SubSites/DIK/DE/ReligionBildung/Schulversuche/schulversuche-node.html?_nnn=true. In North-Rhine-Westfalia regular instruction in Alevite religion was established in summer 2008.

¹⁶ See also *Korioth/Augsberg*, ZG 2009, 222 et seq.

practicability of the constitutional approach to religious instruction is in question. Organizational efforts increase in order to reach the same number of students as before. At the same time, cooperation transcending the borders of denomination and religion for specific projects appears to be useful to improve understanding of religious plurality in society.

III. RELIGIOUSLY MOTIVATED BEHAVIOUR IN PUBLIC SCHOOLS

In public schools, religion is not only present in religious instruction, but also in other parts of school life. At the beginning of the school year many schools offer an (optional) initial religious service at school. Moreover, in former times prayers at school were widely spread (my English teacher used to start each lesson with a prayer in the mid 1980s). The Federal Constitutional Court approved these prayers at public school as an expression of the students' positive freedom of religion, on condition that no student is forced to participate, absence is not stigmatized and does not lead to discrimination.¹⁷

Since the mid-1990s, an increasing number of restrictions can be observed from the jurisprudence of the Federal Constitutional Court. In particular, two judgments have been discussed intensely: a judgment about a crucifix in a classroom and a case concerning a female teacher wearing a headscarf. Right now, another spectacular case is running through the stages of appeal. It deals with a Muslim student who initiated a prayer during recess in a public school.

1. *Crucifixes in Classrooms*

Already in the 1970s, the Federal Constitutional Court judged that freedom of religion demands that the crucifix in a court room be taken down if a person who is involved in the lawsuit so desires.¹⁸

In 1995 the court gave a landmark decision concerning crucifixes in classrooms. The decision resembles in many ways the decision of the European Court of Human Rights in *Lautsi v Italy*.¹⁹ The Bavarian state law on schools ordered that a crucifix had to be attached to a wall in every class room in primary and secondary schools. In the court of first instance, legal actions against this decision were not successful. However, the Federal Constitutional Court considered this specific rule of the Bavarian law to be unconstitutional.²⁰ Freedom of religion does not protect one from being confronted with other religions and religious views as well as their symbolization. However, students are subject to mandatory attendance at school. Thus, they are not able to avoid being confronted with the sight of the crucifix. This touches upon the students' negative freedom of religion as well as the parents' right to educate their children. Furthermore, so the Court held, the instruction to put a crucifix in every class room cannot be justified by reference to the meaning of the crucifix as a cultural

¹⁷ BVerfGE 52, 235 et seq.

¹⁸ BVerfGE 35, 366 et seq.

¹⁹ ECtHR, *Lautsi v Italy*, Application no. 30814/06, judgment of 3 November 2009, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857725&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

²⁰ BVerfGE 93, 1 et seq.

symbol since the crucifix is the “religious symbol of Christianity *par excellence*” (author’s translation). The Court skates on thin ice with this line of reasoning. It makes an apodictic statement about the theological meaning of the crucifix and thereby violates its own commitment to the state’s neutrality in matters of religion and worldviews. It would have made more sense to admit the ambiguity of the crucifix. The perspective of the applicants’ (who were anthroposophists) was at least plausible: they interpreted the crucifix as a religious symbol, of which they disapproved. The government cannot counter this view by saying that they misinterpreted the meaning of the crucifix because the state would only remind those who see the crucifix of the cultural significance of Christianity. Rather, the negative freedom of religion and the rights of those who approve the crucifix in the classroom (the state’s authority to supervise and decide about topics at school according to Article 7 sec. 1 GG, positive freedom of religion of Christian students, Christian parents’ right to educate their children) have to be balanced.

The Bavarian school law has since made arrangements for proceedings in order to create such a balance (§ 7, sec. 3 Bavarian Law about academic affairs).²¹ The Federal Constitutional Court has approved these.²² Theoretically, the questionable reasoning in the first decision of the Constitutional Court provided no space for such a solution (which allows for a kind of objection procedure). However, the first decision of the Court concerning crucifixes in classrooms led to significant resistance among the population and to protests against the Court – a new experience for the Federal Constitutional Court which is used to a large degree to be approved of by the people. Not the least against this background, the Court revised its strict stance in later decisions. It is to be hoped that the European Court of Human Rights (ECtHR) will follow suit. Considering the decision of the ECtHR, the current Bavarian norm would, even if not by the judges in Karlsruhe, be disapproved of by the judges at Strasbourg.

2. *The Headscarf and Teachers in Public Schools*²³

a) *The story behind the leading headscarf case*

In order to better understand the symbolic, meta-legal dimension of the legal proceedings about the headscarf, we should first look to the history of the leading case.²⁴ The name of the

²¹ Art. 7 Abs. 3 BayEUG: “Due to the historical and cultural characteristics of Bavaria, a cross is to be affixed in every classroom. This expresses the will to realize the highest educational aims of the constitution on the basis of Christian and occidental values while respecting the freedom of religion. Should the affixation of the crucifixes be opposed for reasonable and understandable reasons of faith or world views, the head of the school will aim for an agreement. Should an agreement not be possible he or she, after informing the school authorities, is to decide on an individual basis in a manner which respects the freedom of religion of those opposed to the cross and which balances the views and faith of everybody affected in that class in a just manner while taking into account as much as possible the will of the majority.” (translation by the author)

²² BVerfG, NJW 1999, 1020 et seq.; BVerfG, VR 1998, 142 et seq.; see also Bay. VGH, NJW 1999, 1045 et seq.; BVerwGE 109, 40 et seq.

²³ The following part is an extract of *Heinig*, *The Headscarf of a Muslim Teacher in German Public Schools*, in: Brugger/Karayanni (ed.), *Religion in the Public Sphere*, 2007, pp. 181 et seq.

²⁴ BVerfGE 108, 282; BVerwG, NJW 2004, 3581; BVerwG, NJW 2002, 3344; VGH Mannheim, NJW 2001, 2899; VG Stuttgart, NVwZ 2000, 959; a second case ended with an agreement at the Federal Administrative Court (see before the settlement OVG Lüneburg, NVwZ-RR 2002, 658; VG Lüneburg, NJW 2001, 767).

Muslim woman who took the headscarf-case to court, and thereby found a place in the annals of German legal history, is *Ferestha Ludin*. She was born in 1972 in Afghanistan and has lived in Germany since 1987. She has been a German citizen since 1995. Following her university studies, she was accepted in the state preparatory service for grade school teachers in Baden-Württemberg; however, after passing the second state examination in 1998, she was not hired permanently as a public school teacher. In failing to hire Ms. Ludin, the school board could not, and did not intend to, suggest that she would misuse her teaching position for purposes of Islamic indoctrination, nor that she supported religiously-motivated violence, nor that she would tacitly advocate a strict Islamic lifestyle within the classroom. Instead, the decisive factor for the school board was that she was not willing to refrain from wearing a headscarf during instruction. Thus, she was deemed to lack the necessary “personal aptitude.”

At the various levels of administrative jurisdiction, Ms. Ludin was unsuccessful in challenging the rejection of her application for permanent placement.²⁵ Yet, she achieved partial success before the Federal Constitutional Court: it remanded the case to the Federal Administrative Court because there was no legal basis for refusing to hire a teacher merely based on her religious dress. The state of Baden-Württemberg passed such a statute at once,²⁶ so that the Administrative Court again rejected the complaint.

During the legal proceedings, which were backed among others by Germany’s Central Council of Muslims and *Ver.di*, a major labour union, Ms. Ludin put forward various reasons as to why her wearing of the headscarf was indispensable. At first she claimed that the headscarf was constitutive of her personality, and that she would be robbed of her dignity without the head covering, but she later emphasized her religious motivations. This shift in argument was not accidental. It allowed Ludin to avoid the unpleasant question of whether all (Muslim) women who do not wear a headscarf lack dignity due to their not wearing the headscarf.

At least politically Ludin further opened herself to attack by categorically rejecting any form of compromise (for example, during oral proceedings before the Federal Constitutional Court) while simultaneously calling for tolerance from parents, children, and professional colleagues. From the very beginning, she refused to acknowledge the religious interests of third parties in the matter—for instance, a student’s right to be free from the effect of the headscarf’s religious appeal.

It is also remarkable that, during the lawsuit, Ms. Ludin began working for a private grade school belonging to the Islamic Federation in Berlin – an organization closely associated with the Islamist group Milli Görüs.²⁷ Confronted with this fact, Ludin responded on record that she had been completely unaware of the school’s background. Whether such a claim is credible, one must decide for oneself. At any rate, it certainly demands extraordinary skepticism: either Ludin knowingly began employment with a dubious private school, categorized as Islamist, which would mean she was publicly untruthful, or she is profoundly naïve. In either case, the state would be well advised to do without such personnel.

²⁵ See note 22.

²⁶ Gesetz zur Änderung des Schulgesetzes vom 01.04.2004 (GBl. 2004, 178).

²⁷ On Milli Görüs see the Report of the Department of the Interior about the protection of the constitution 2004; *Bundesministerium des Inneren*, Verfassungsschutzbericht 2004, 213-219.

b) *The Federal Constitutional Court's judgment on the teacher's headscarf*

aa) *Content of the decision*

According to the Court, the legislature should, in principle, define more closely the criteria for aptitude in public service. In the case of a Muslim teacher with a headscarf, the lawmaker must respect constitutional limitations – freedom of religion and the guarantee of access to public positions without discrimination based on religious affiliation. These rights belonging to the teacher then must be weighed against the negative freedom of religion of the students, the parents' right to educate their children, and the state's duty to supervise the school system (article 7, sec. 1 *Grundgesetz*). The Court held that the task of balancing these two sets of interests is incumbent on the democratic lawmaker (here, the federal states). However, without a specific legal basis, the non-placement of the teacher due to her headscarf was unconstitutional.

The Court reasoned that, so long as the legislator tolerates a teacher's wearing of a headscarf, it would not *per se* be seen as the state identifying itself with a particular religion.²⁸ The headscarf did not represent a concrete, constant endangerment of peaceful school operations, although such a danger could not be ruled out for all time and in all cases. The Court held that an "abstract danger" exists,²⁹ and that parliament would thus have to conduct a prognosis to measure the degree of such threats. For this, the legislature may consider the objective appearance of the headscarf and its effect on third parties and may also abstract from the wearer's concrete motivations.³⁰

bb) *Problems of the decision*

The Constitutional Court's decision expressly permits the federal states "to arrive at varying outcomes, since the appropriate middle course may also incorporate school tradition, the denominational composition of the population and the degree to which it is religiously rooted" (author's translation).³¹ The Court thereby consciously accepts that extremely different regulations might be adopted in the sixteen federal states. This has led to some criticism. However, if one accepts the Court's premises that different political decisions can be constitutional and at the same time that each state's is to make that political decision, albeit within the framework of constitutionally permissible regulations, then the possibility of divergence among the states is unavoidable.

(a) Is every solution really constitutional?

²⁸ BVerfGE 108, 282 (299-301, 305-306).

²⁹ BVerfGE 108, 282 (303).

³⁰ A dissenting minority of the Court's Second Senate would have held the then existing regulations of civil-service law to be sufficient to justify the complainant's non-placement. A separate headscarf provision was not necessary, they reasoned, and public officials could raise their fundamental rights only to the degree that the position's specific legalities allow. In the case at hand, the teacher's headscarf was considered a violation of the civil servant's duty of moderation – a duty which can directly be drawn from the constitution – since the headscarf was objectively suited to "bring about impediments to school operation or even conflicts in the school relationship with implications for fundamental rights" (author's translation); BVerfGE 108, 282 (314-340).

³¹ BVerfGE 108, 282 (303).

The critics of the Court's decision, however, are correct insofar as they fault the Court for failing to offer any significant assistance in actually shaping permissible regulation.

A close reading of the judgment gives the impression that not only multiple but virtually all imaginable solutions to the problem would be equally compatible with the constitution. In this sense, the margin of discretion seems overextended. Following its holding on the crucifix in the classroom the Court should have, at the very least, ruled out an unconditional right on the part of the teacher to realize her religious interests. In weighing the teacher's interests against the conflicting fundamental rights of the students and parents, the teacher necessarily must be in the structurally weaker position. The teacher voluntarily enters the educational field; she or he has freely chosen this career with the state as one's employer.³² In contrast, the students are subject to mandatory attendance without any possible alternative. Their freedom of religion would be completely repressed were teachers able to assert their religious interests in the school in every instance and without consideration for the interests and rights of students, parents and colleagues. Therefore, for the sake of safeguarding the fundamental rights of third parties, a teacher at a public school can and must be required to refrain from wearing a headscarf or other religious garments in school in cases of serious conflict, motivated by religion or other worldview. Put simply: whoever would teach tolerance cannot merely demand tolerance, but must also personally live it. In Ms. Ludin's case, this required minimum was evidently not met.

By the way: if one follows the line of logic outlined here, this would also function to "expose" fundamentalist teachers with headscarves. If a teacher is willing, if need be, to defer observance of a rule which is considered religiously obligatory, such as the wearing of a headscarf, then she thereby necessarily displays a modern, democratic understanding of religion. That is, she will not absolutely insist upon her own, certainly sincere, faith in all circumstances and irrespective of the rights of third parties.

A consequence of the considerations presented here is that the rejection of an applicant, who under no circumstances would forego wearing her headscarf during classes, actually required no specific legal justification. Indeed, the civil servant's duties to the law, moderation and neutrality would have sufficed. Thus, the Constitutional Court's reasoning, albeit well-founded in large part, is doubtful on this point. The Court assumes that specific legal regulation would be required for any case of not hiring a teacher on account of her wearing a headscarf. Such a requirement, in my opinion, would only be valid, if the framework of constitutional permissibility were defined by state-specific solutions. Yet the Basic Law already prohibits one specific solution to the conflict - here, the solution of conceding extensive priority to the teacher's interests. In this regard, specialized regulation is not required for what is self-evident. Consequently, the provisions of civil service law would have been sufficient.

(b) Constitutional and unconstitutional differentiations

Regrettably, the Federal Constitutional Court neither made such clarifications and differentiations nor supplied further detail on state-law implementation. All the same, it did

³² In this regard, the teacher's constellation of fundamental rights is substantially different than that of a student who wears a headscarf.

affirm that civil-service duties that interfere with freedom of religion must “respect the imperative of equal protection for the various belief systems” (author’s translation).³³ Accordingly, the prohibition of religious discrimination is to be interpreted restrictively. An explicit differentiation between Christianity and other worldviews, between Christian and other symbols, would be unconstitutional.

Thus, it is not unproblematic that, in the wake of the Court’s ruling, some federal states have adopted exception clauses in school statutes for the display of Christian and Occidental values and traditions.³⁴ To the degree that they specifically intend to prefer a Christian teaching staff, they contradict the judicial guidelines. For example it is not justifiable to explicitly forbid the wearing of a headscarf while permitting a teacher to wear a visible cross. Accordingly, the Federal Administrative Court’s second judgment on the headscarf issue upheld Baden-Württemberg’s exception clause as constitutional, as it does not prefer any specific religion, but only allows the classroom display of the world of values that has emerged from the Christian-Occidental culture.³⁵ In this sense, it permits a didactic illustration of Christian symbols but *not* the profession of a Christian faith on the teacher’s part. Consequently, for instance, a nun who teaches at a public school must refrain from wearing her habit except during religious instruction. Likewise, a Jewish public school teacher may not wear a yarmulke.

Sure enough, the Constitutional Court’s decision leaves open the question whether non-religious differentiations in dress code for teachers would be acceptable. Two cases, in particular, are imaginable: first, some symbol might disrupt the peaceful operation of the school or, second, a symbol’s objective appearance and its potential effect as an unconstitutional symbol.

The first differentiation plays a role when teachers are forbidden by law from wearing religious symbols that are objectively suited to upset school order.³⁶ Similarly, such a differentiation plays a role when case-by-case decisions are made, for example, when the headscarf is generally permitted and prohibited only after students and parents object, or when the headscarf is preventatively forbidden and permitted in specific cases. All three constellations involve differentiation based not expressly on religious grounds but on some other conflict or tension in the school.

The second differentiation focuses on possible expression that itself is hostile to the constitution, leading to bans on symbols that are seemingly repugnant to the constitution and educational goals.³⁷ Here, too, the state does not evaluate the religious statement, as such, and does not differentiate in terms of religious doctrine and content; rather, the state looks to potential outward effects. In this respect, such constitutional safeguards in the behavior and

³³ BVerfGE 108, 282 (313).

³⁴ So (in different way) in Baden-Württemberg (§ 38 II Schulgesetz), Hesse (§ 86 III Schulgesetz) and Bavaria (Art. 59 § 2 Gesetz über das Erziehungs- und Unterrichtswesen). For an overview of the legislative measures in the states see <http://www.uni-trier.de/%7Eievr/kopftuch/kopftuch.htm>.

³⁵ BVerwG, NJW 2004, 3581.

³⁶ Such clauses exist in nearly every state which enacted legislation after the Constitutional Court’s decision, e.g. in Baden-Württemberg (§ 38 II Schulgesetz), Hesse (§ 68 II Beamten-gesetz, § 86 III Schulgesetz), Bavaria (Art. 59 § 2 Gesetz über das Erziehungs- und Unterrichtswesen), Bremen (§ 59b IV Schulgesetz).

³⁷ See note 36; also Lower Saxony (§ 51 III Schulgesetz).

dress codes for schoolteachers are not directed against a particular religion; instead, they discriminate according to the negative, outward, objectively determinable impact. The latter—as the Constitutional Court has repeatedly stressed—does not contravene the state’s neutrality of religion and worldview. When religious regulation is understood not only as cultural law but also as regulation of social dangers, such state action even becomes almost imperative in a militant democracy.

It seems to me that such religion-unspecific differentiation is certainly permissible, if properly applied, that is, with due respect for freedom of religion and the principle of equality, and where compelling, constitutionally legitimate reasons exist. Examples of such reasons would be, on the one hand, peaceful school operation and, on the other, the civil servant’s duty of political moderation, rooted in the state’s duty of neutrality, or the structural principles of the Basic Law as a whole.

The federal state of Berlin operates a system with no differentiation.³⁸ There, the wearing of any religious symbols for all public servants in schools, the police, and the judiciary is forbidden. From the perspective of constitutional theory, or at least of constitutional politics, one might ask whether this solution satisfactorily implements the system for weighing interests outlined above, whether such a generalized ban is compatible with a secular, but non-laical legal system that is to be religiously open and friendly. The Basic Law, at least as traditionally interpreted, establishes a religiously open system of reciprocal interaction, and there are good reasons to follow such an interpretation. As a consequence, then, the lawmaker should carry the burden of proof as to whether religious conflicts with this legal model can no longer be controlled due to the specifics of the situation (for example, increased pluralization or serious cultural and religious tensions between subpopulations). A laical total ban on religious symbols for civil servants, especially in public school, should therefore be considered only *after* the other solutions discussed here.

3. *Pupil’s Prayers in a School Break*

However, not only religious interests of Muslim female teachers keep the courts busy. The limits of the freedom of religion of students are also matters of judicial examination against the backdrop of increased religious heterogeneity in schools.

A student wanted to implement an Islamic daily prayer at school during break and in order to do so, knelt down on his jacket in an isolated place in the corridor in the school building. The school administration forbade such a publicly evident and ostentatious prayer. In their opinion the student endangered peace at the school, and other students have to be protected against being pressured to participate in these prayers at school. After all, the prayer at school contravenes the state’s neutrality of religion and worldview as they affirm. Thus, the school would have to provide a separate room for the student where he can pray without creating disturbances. On the other hand, though, the student is not entitled to demand such a room.

³⁸ §§ 1, 2 Gesetz zu Artikel 29 der Verfassung von Berlin.

The student concerned took legal action. At first instance the court lifted the ban,³⁹ whereas at second instance it was confirmed.⁴⁰ By returning this verdict, the Appeals Court spectacularly misunderstands the constitutional guidelines which have been outlined by the Federal Constitutional Court in the decisions about the crucifix in school buildings and the teacher's headscarf: the peace at the school is a legal good which is protected under Art. 7 sec. 1 *Grundgesetz* and which can limit the individual student's freedom of religion, but a concrete danger must exist, if the prohibition of the prayer is based on the general regulations of the school. Hence, a blanket ban of prayers in schools is simply unconstitutional.

IV. OPTING OUT OF SCHOOL OBLIGATIONS FOR RELIGIOUS REASONS

The constitutional regulations about the state's duty to supervise the school system (article 7, sec. 1 *Grundgesetz*) also include the state's duty to educate. This duty is opposed by the parents' right to educate their children (Article 6, sec. 2 *Grundgesetz*).

At the same time, the state's responsibility for education is the constitutional basis for compulsory education. This comprises at least nine years of full-time schooling, which either leads to another stage at school or to professional training, absolved in obligatory part-time schooling. In general, compulsory education ends after twelve school years.

The parents are responsible to contribute to education in order that the pupils satisfy their obligation to attend school. The obligation can only be satisfied by attending a public school or a recognized alternative private school. Compulsory education is sanctioned. It may be enforced under compulsion (with the aid of the police). Violating it means committing an administrative or criminal offence.⁴¹ At worst, the parents' might be deprived of their right to custody.⁴²

1. *The general obligation to attend school as a prohibition of home-schooling*

The school laws of the *Länder* do not offer the possibility for parents to educate their children by themselves (home-schooling). The Federal Constitutional Court always used to approve this compulsory school management which is relatively restrictive when compared to international standards. Though the right balance between the state's responsibility for education and the parents' right to educate their children has to be achieved, the state does not only aim to deliver the knowledge which is essential for a self-determined life, but also to develop the students' personality. In school, the children are to learn how to assert themselves under normal conditions of society. Furthermore, compulsory schooling prevents the formation of "parallel societies" and promotes social integration. These aims would never be achieved by parental home-schooling, irrespective of the parents' capacity.⁴³ Thus, there is no constitutional reason why the state should not prevent religiously motivated home-

³⁹ VG Berlin, 29 September 2009, Az: 3 A 984.07.

⁴⁰ OVG Berlin-Brandenburg, 27 May 2010, Case no. OVG 3 B 29.09.

⁴¹ BVerfG, 31 May 2006, Case no. 2 BvR 1693/04.

⁴² OLG Hamm, 01 September 2005, Case no. 6 WF 298/05; BGH FÜR 2008, 115 et seq.

⁴³ BVerfG, NVwZ 2008, 72 et seq.; BVerfG, BayVBl. 2006, 633 et seq.; see *Waldhoff*, *Neue Religionskonflikte und Staatliche Neutralität*, 2010, pp. D 112 et seq.

schooling.⁴⁴ It is remarkable that due to this, a German family has been granted asylum in the United States of America.⁴⁵

2. *Permission not to attend faith-specific religion classes*

Article 7 sec. 3 *Grundgesetz* explicitly provides for opting out of confessional religious instruction despite the principle of compulsory education. Those who are part of a religious community which offers religious instruction at school are usually obliged to attend the class in question. This follows from the religious education's character as an ordinary subject. However, Article 7 sec. 2 *Grundgesetz* enables the child's legal guardians to withdraw their child from confession-based religion classes. After attaining religious majority (according to § 5 of the *Gesetz über die religiöse Kindererziehung*, the Law about the Religious Education of Children, at the age of 14), the child is able to decide for him- or herself. This regulation concerning the opting out of religious education is a result of the principle of proportionality because the alternative would be that the child would have to leave the religious community he or she is part of in order to avoid the compulsory education for the religious instruction. In comparison to this, not attending classes serves freedom of religion more effectively.

3. *Opting out of specific subjects*

For all other subjects besides religion, the *Grundgesetz* itself does not make any arrangements. However, as a rule, there are some general clauses about the exemption from compulsory education in the federal states' school laws or school regulations. These arrangements are provided for atypical circumstances such as a long-lasting illness.

As to partial opting out we can differentiate between the desire of parents and students not to attend school on religious holidays and the desire not to attend a specific subject.

For a long time the administrative jurisdiction approved the general right of Muslim girls to be exempt from co-educative sport and swimming classes, due to religious reasons in respect of the freedom of religion.⁴⁶ In order to prevent conflicts, the Federal Administrative Court suggested that schools should first attempt to offer separate classes for both genders. If this is not possible, the courts used to issue rather liberal exemptions. However, this right was not granted to parents of Christian girls.⁴⁷

With regard to other subjects, in particular biology classes and reproductive education, the courts have decided on a significantly more restrictive approach.⁴⁸ The school laws of the *Länder* include special clauses concerning reproductive education which require the schools to be respectful of different views on the part of the parents. The aim of the instruction is to

⁴⁴ BVerwG, DÖV 2010, 147; OVG Bremen, NordÖR 2009, 158 et seq.; OVG Münster, DÖV 2008, 119 et seq.; VG Gelsenkirchen, 19 March 2008, Case no. 4 K 1674/06; VG Bayreuth, 18 April 2005, Case no. B 6 K 04.620; VG Dresden, 7 March 2007, A. 5 K 2283/02; VG Stuttgart, 26 July 2007, Case no. 10 K 146/05.

⁴⁵ Robertson, Judge in Memphis Grants Asylum to German Homeschoolers, *New York Times*, 1 March 2010, p. A12.

⁴⁶ BVerwGE 94, 82 et seq.; *Waldhoff*, *Neue Religionskonflikte und Staatliche Neutralität*, 2010, pp. D 110 et seq.

⁴⁷ BVerwG, DVBl. 1994, 168; *Classen*, *Religionsrecht*, 2006, p. 216.

⁴⁸ See e.g. VG Ansbach, 18 December, Case no. AN 2 K 04.02508.

promote both sexual self-determination and responsible sexual behaviour. However, the aim is not governmental enforcement of a specific type of sexual morals, irrespective of whether it is restrictive or liberal.⁴⁹ Thus, compulsory education in reproductive biology has to take precedence over the interests of parents.

Concerning the theory of evolution, the Court came to the same conclusion. Schools are not required to give to the theological doctrine of creation the same degree of attention as is given to the theory of evolution in biology classes.

In sum, a peculiar picture emerges: there are no exemptions from biology classes due to religious reasons; however, for Muslim girls it is not difficult to get an exemption from sports classes and in particular swimming classes, whereas Christian students were refused the same exemption. This result is hard to bear as freedom of religion also protects Christian parents and students in their religious understanding of the sexes. Furthermore, sports and swimming classes are by no means lower-ranked subjects, but an integral part of the school's curriculum, which aims to develop the student's personality in total. Sport not only means physical training, but also learning elementary social skills such as team spirit and fair play. Therefore, it is more than welcome that the recent jurisprudence again puts a stronger emphasis on the implementation of compulsory schooling.⁵⁰

4. *School trips and similar events*

Besides having to attend classes, compulsory school education includes other obligatory school activities such as school trips. Parents do not have the right to withdraw their children from school trips⁵¹ or study projects⁵² merely because they are concerned about the risk that their child could be exposed to influences which are in conflict with their religious views. In practice, though, it is hard to implement compulsory education in such cases. As usual when dealing with topics concerning compulsory education, informing the parents and cooperating with them is more effective than applying any means of governmental compulsion.

5. *Opting out of specific holidays*

Being exempted from classes on specific holidays significantly differs from being exempted from special subjects as in the case of exemptions for holidays the government's aims concerning academic affairs and the contents of education are not put into question. The duty to integrate and to educate is not involved. Thus, the administrative practice and the jurisprudence present a much more liberal point of view with regard to questions about the exemption from compulsory education for specific religious holidays than about the

⁴⁹ OVG Niedersachsen, 5 March 2003, Case no. 13 LB 4075/01; VG Augsburg, 17 April 2008, Case no. Au 3 S 08.344.

⁵⁰ See VG Hamburg, NVwZ-RR 2006, 121; OVG Münster, NWVBl. 2009, 394; VG Düsseldorf, 7 May 2008, 18 K 301/08; VG Gelsenkirchen, 19 March 2008, Case no. 4 K 1674/06; see *Waldhoff*, *Neue Religionskonflikte und Staatliche Neutralität*, 2010, pp. D 109 et seq.

⁵¹ VG Hamburg, 7 April 2009, 15 K 3337/08.

⁵² For example learning magicians' tricks in a project about the circus: VG Minden, 03 February 2005, Case no. 2 K 7003/03 (the students learn that their tricks are just tricks and not the result of supernatural, occult powers).

exemption from particular subjects or about home-schooling.⁵³ In the Weimar Republic, Jewish students used to be exempted from classes on Saturdays. An older decision by the Federal Administrative Court underlines this by approving a claim for exemption from school attendance on Saturdays concerning Seventh-Day-Adventists and other religious groups.⁵⁴ Statutory orders and administrative regulations on the state (*Länder*) level include very detailed rules as to which religious groups can apply for exemptions and for which days.⁵⁵

⁵³ See *Waldhoff*, *Neue Religionskonflikte und Staatliche Neutralität*, 2010, p. D 114; *Classen*, *Religionsrecht*, 2006, p. 216.

⁵⁴ BVerwGE 42, 128 et seq.

⁵⁵ See e.g. Appendix to § 4 (2) Nr. 1 und 2 Schulbesuchsverordnung Baden-Württemberg (GBl. 1982, 176) or Ausführungsvorschriften über die Beurlaubung und Befreiung vom Unterricht Berlin vom 3.12.2008 (ABl. 2008, 2729).