

# The German Headscarf Debate

*Axel Erbr. von Campenhausen*\*†

## I. INTRODUCTION

Nearly twenty years ago, teachers employed by the state in Germany began to wear the reddish-colored clothing of the Bhagwan (Osho) religious movement in obligatory state schools, thus silently yet highly visibly advertising for their religious community, which at that time was still considered a “youth sect” [*Jugendsekte*]. Many courts at the time prohibited this activity without much controversy.<sup>1</sup> In contrast, with its Headscarf Decision<sup>2</sup>

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\* Professor von Campenhausen is a member of the Law Faculty of the University of Göttingen and specializes in public law, church law, church-state law, and foundation law [*Stiftungsrecht*]. This Article is reproduced in similar form in German in MATERIALDIENST DES KONFESSIONSKUNDLICHEN INSTITUTS IN BENSHEIM (Spring, 2004).

† Translated from German by John B. Fowles, B.A., Brigham Young University; M.St., University of Oxford; J.D., J. Reuben Clark Law School, Brigham Young University.

The following list of abbreviations provides the uniform abbreviation and the English approximation for each German legal periodical and other select sources cited in this Article.

### LIST OF ABBREVIATIONS

BVerfGE	Entscheidungen des Bundesverfassungsgerichts	Decisions of the Federal Constitutional Court
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts	Decisions of the Federal Administrative Court
DVBL.	DEUTSCHES VERWALTUNGSBLATT	GERMAN ADMINISTRATIVE GAZETTE
EPD	EVANGELISCHER PRESSEDIENST DOKUMENTATION	PROTESTANT NEWS SERVICE DOCUMENTATION
ESSGESPR.	ESSENER GESPRÄCHE ZUM THEMA STAAT UND KIRCHE	ESSEN DISCUSSIONS ON THE TOPIC OF CHURCH AND STATE
GG	GRUNDGESETZ	BASIC LAW (FEDERAL CONSTITUTION)
JZ	JURISTENZEITUNG	JURIST'S JOURNAL
KUR	KIRCHE UND RECHT	CHURCH AND LAW
NJW	NEUE JURISTISCHE WOCHENSCHRIFT	NEW JURIDICAL WEEKLY
NVWZ	NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT	NEW JOURNAL OF ADMINISTRATIVE LAW
VBLBW	VERWALTUNGSBLÄTTER FÜR BADEN-WÜRTTEMBERG	ADMINISTRATIVE GAZETTE FOR BADEN-WÜRTTEMBERG

of September 24, 2003, the German Federal Constitutional Court has unleashed an avalanche of controversy; that is, the court has needlessly raised a difficult political dispute. Specifically, although the court ruled that a prohibition on a Muslim teacher from wearing a headscarf—which has previously been held valid<sup>3</sup>—is indeed theoretically permissible, the court nevertheless declared the specific legal regulation at issue insufficient<sup>4</sup> and therefore mandated elected legislatures to create a “sufficiently clear legal basis”<sup>5</sup> on which to justify such a limitation of religious freedom, yet provided them with no guidance in doing so.

In Germany—a country largely unshaken by religious conflicts and where every individual enjoys full religious freedom under an overall satisfactorily functioning rule of law—the court has spoken in terms of religious freedom in the debate about the headscarf of a Muslim school teacher.<sup>6</sup> In holding the administrative regulation

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ZBR	ZEITSCHRIFT FÜR BEAMTENRECHT	JOURNAL OF CIVIL SERVICE LAW
ZEVKR	ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT	JOURNAL OF PROTESTANT CHURCH LAW

1. *See, e.g.*, Oberverwaltungsgericht Hamburg [OVG Hamburg] [Hamburg High Administrative Court], NVWZ 1986, 406; Bayerischer Verwaltungsgerichtshof [Bay VGH] [Bavarian Court of Administrative Appeals], NVwZ 1986, 405; *see also* AXEL FRHR. VON CAMPENHAUSEN, STAATSKIRCHENRECHT [THE LAW OF CHURCH AND STATE] 72 (3d ed. 1996) [hereinafter VON CAMPENHAUSEN, LAW OF CHURCH AND STATE]; 3 AXEL FRHR. VON CAMPENHAUSEN, GRUNDGESETZKOMMENTAR [COMMENTARY ON THE BASIC LAW] art. 136 (Weimarer Reichsverfassung [WRV] [The Constitution of the Weimar Republic]) n.34 (Mangoldt, Klein & Starck eds., 4th ed. 2001).

2. Kopftuch-Urteil [Headscarf Decision] (Sept. 24, 2003), BVerfGE 108, 282, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], NJW 56 (2003), 3111, 2 BvR 1436/02, [http://www.bverfg.de/entscheidungen/rs20030603\\_2bvr143602.html](http://www.bverfg.de/entscheidungen/rs20030603_2bvr143602.html).

3. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], NJW 55 (2002), 3344 (upholding the administrative prohibition on teachers wearing a headscarf in public state schools); Verwaltungsgerichtshof Baden-Württemberg [VGH Baden-Württemberg] [Baden-Württemberg Court of Administrative Appeals], NJW 54 (2001), 2899 (upholding the administrative decision prohibiting teachers from wearing a headscarf while teaching).

4. Headscarf Decision, BVerfGE 108, 282 (303), NJW 56 (2003), 3111 (3114), 2 BvR 1436/02, para. 49.

5. *Id.*

6. The headscarf problem can surface anywhere. For information concerning this issue in employment in the civil service (e.g., a school teacher), compare the situation in Germany, Oberverwaltungsgericht Lüneburg [VG Lüneburg] [Lüneburg High Administrative Court], ZEVKR 48 (2003), 219, and the decision below, Verwaltungsgericht Lüneburg [VG Lüneburg] [Lüneburg Administrative Trial Court], NJW 54 (2001), 767, with the situation in Switzerland, Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447, *reported in German*

prohibiting a Muslim school teacher, as a civil servant, from wearing a headscarf while teaching insufficient, the court nullified all related regulations immediately, with no transitional period.<sup>7</sup> Now, laws in each of Germany's sixteen federal states [*Bundesländer* or *Länder*] must be amended if a particular state's law does not declare directly that the state [*Bundesland* or *Land*] prefers not to legislate on whether a Muslim teacher may or may not wear a headscarf while teaching, as in the case of the *Land* Northrhine-Westphalia.<sup>8</sup> In response to the Headscarf Decision, the *Länder* Baden-Württemberg, Bavaria, and Lower Saxony have already submitted or announced draft laws to provide a legal basis for prohibiting teachers from wearing headscarves while teaching.

Prominent public figures—not jurists but experienced politicians who are also authorities on religion—have entered the constitutional fray, speaking against a prohibition on headscarves. For example, Hans Maier, the former Bavarian Minister of Education [*Kultusminister*], has supported the integration of Muslims in society through upbringing and education since the 1970s.<sup>9</sup> In this effort, he has strived to promote dialogue in schools and colleges

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*translation in* Europäischer Gerichtshof für Menschenrechte [EGMR] [European Court of Human Rights], NJW 54 (2001), 2871. For employment relationships outside of the civil service (e.g., a saleswoman), compare BVerfG [Federal Constitutional Court], NJW 56 (2003), 2815, and the decision below, Bundesarbeitsgericht [BAG] [Federal Employment Court], NJW 56 (2003), 1685, with Landesarbeitsgericht Hessen [LAG Hessen] [Hessen State Employment Court], NJW 54 (2001), 3650. For the issue of presenting personal identification documents with or without head coverings for both foreigners and German citizens, see Verwaltungsgerichtshof München [VGH München] [Munich Court of Administrative Appeals], NVWZ 2000, 952, and Verwaltungsgericht Berlin [VG Berlin] [Berlin Administrative Trial Court], NVWZ 1990, 100.

7. Cf. Headscarf Decision, BVerfGE 108, 282 (338), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02, para. 133 (Jentsch, Di Fabio & Mellinghoff, dissenting).

8. The *Land* Northrhine-Westphalia has expressly opted for a tolerant stance towards Muslim teachers wearing a headscarf while teaching. *Mal Hü, mal Hott* [First One Thing, Then Another], SPIEGEL ONLINE, Oct. 3, 2003, at <http://www.spiegel.de/unispiegel/stadium/0,1518,268138,00.htm> (on file with the BYU Law Review). That is, the *Land* has declined to legislate even though there are currently at least fifteen teachers in the *Land* who wear a headscarf while teaching. *Id.* The *Land* Minister of Education [*Schulministerin*], Ute Schäfer, a Social Democrat, has explained that wearing a headscarf while teaching has never led to a conflict within the school, stating that “this is a sign of the high degree of toleration of people in our *Bundesland*.” *Id.* (“Ich glaube, dass dies auch ein Zeichen der großen Toleranz der Menschen in unserem Bundesland ist.”).

9. Hans Maier, Editorial, *Zwischen Kopftuch, Kita und Kreuz* [Between Headscarf, Kippah and Crucifix], RHEINISCHER MERKUR, Jan. 8, 2004, at 26, available at [http://www.merkur.de/archiv/neu/rm\\_0402/po/fdzindex.html](http://www.merkur.de/archiv/neu/rm_0402/po/fdzindex.html).

between the “Children of Abraham”<sup>10</sup> who, despite their common roots, are all so different from each other. That is why he could “only be horrified at this blind zeal”<sup>11</sup> behind the drive for a renewed prohibition following the Headscarf Decision. Maier is against a renewed prohibition on headscarves because he fears the undesired consequences it would have for all religious symbols.<sup>12</sup> According to Maier, nothing is as important as equality in a secular state.<sup>13</sup> Especially the younger generation of judges has learned this lesson, asserts Maier.<sup>14</sup> Furthermore, much like the Federal Constitutional Court,<sup>15</sup> Maier also pointed to the variety of interpretations of the headscarf:

[T]he headscarf does not have one single interpretation; rather, it can mean many things (as it did until recently for our own mothers, grandmothers, and aunts!): it can be an expression of tradition, heritage, religious affiliation but also a sign of sexual unavailability, a freely chosen way . . . to lead a self-determined life without breaking with cultural heritage.<sup>16</sup>

Johannes Rau, the Federal President of Germany, has expressed a similar conclusion on the Headscarf Decision in public. First, the Federal President demanded in news interviews that the Islamic headscarf and a Christian amulet be treated equally as the *Länder* work out their new legislative schemes for prohibiting the headscarf following the Headscarf Decision.<sup>17</sup> Then, using a celebration in

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10. *Id.*

11. *Id.*; see also Axel Frhr. von Campenhausen, Editorial, *Noch einmal: das Kopftuch*, RHEINISCHER MERKUR, Jan. 12, 2004, at 26, available at [http://www.merkur.de/archiv/neu/rm\\_0407/po/fdzindex.html](http://www.merkur.de/archiv/neu/rm_0407/po/fdzindex.html).

12. Maier, *supra* note 9, at 26.

13. *Id.*

14. *Id.*

15. Headscarf Decision, BVerfGE 108, 282 (298–99), NJW 56 (2003), 3111 (3114), 2 BvR 1436/02, paras. 50–52.

16. Maier, *supra* note 9, at 26 (“Das Kopftuch ist nämlich nicht eindeutig, es kann für vieles stehen (wie es auch bei unseren Müttern, Großmüttern und Tanten vor kurzem noch für vieles stand!): Es kann ein Ausdruck für Tradition, Herkunft, religiöse Bindung sein aber auch ein Zeichen für sexuelle Nichtverfügbarkeit, ein frei gewähltes Mittel . . . , um ohne Bruch mit der Herkunftskultur ein selbstbestimmtes Leben zu führen.”) (omission in original).

17. See Interview with President Johannes Rau, BERLIN DIREKT (Television Station ZDF), Dec. 28, 2003, selections reprinted in EPD 4/2004, at 12 (on file with the BYU Law Review); Interview with President Johannes Rau, WELT AM SONNTAG [WORLD ON SUNDAY], Jan. 4, 2004, selections reprinted in EPD 4/2004, at 12–13 (on file with the BYU Law Review).

Wolfenbüttel of the 275th birthday of Gotthold Ephraim Lessing<sup>18</sup> as an occasion to reiterate his original demand, President Rau took the surprising approach of explaining that religious freedom is guaranteed to all Germans<sup>19</sup>—a proposition that does not seem to have been called into question.<sup>20</sup> As had Maier, President Rau made

18. Gotthold Ephraim Lessing (1729–81)—a thinker, author, and aesthete of the German Enlightenment—explored the brotherhood of man and the possible harmony of the three great religions of Judaism, Christianity, and Islam in his last play, *Nathan der Weise* [*Nathan the Wise*] (1779), a “dramatic poem” expressing Lessing’s own “enlightened humanitarianism,” F.J. LAMPORT, *GERMAN CLASSICAL DRAMA* 64 (1990), and his concern with “the essential unity of all true religions and the falsity of religious bigotry,” *id.* at 69. Writing from Brunswick-Wolfenbüttel, the small German principality where he served as court librarian from 1770 until his death in 1781, Lessing wrote *Nathan the Wise* as a rejection of “literal obedience to the dictates of any religion, be it Christianity, Judaism, or Islam.” *Id.* at 71. In this work, however, Lessing acknowledges that “an enlightened knowledge of the need for human brotherhood is not sufficient to bring such brotherhood about.” BENJAMIN BENNETT, *MODERN DRAMA & GERMAN CLASSICISM: RENAISSANCE FROM LESSING TO BRECHT* 82 (1979). Rather, deeds are needed. Cf. IMMANUEL KANT, *CONFLICT OF THE FACULTIES [DER STREIT DER FAKULTÄTEN]* 71 (Mary J. Gregor trans. & ed., 1992) (1798) (“The only thing that matters in religion is deeds.”).

19. Johannes Rau, Speech in Wolfenbüttel on the 275th Birthday of Gotthold Ephraim Lessing (Jan. 22, 2004), pt. V, para. 9 [hereinafter Speech in Wolfenbüttel], *available at* [http://www.bundespraesident.de/top/dokumente/Rede/ix\\_94041.htm](http://www.bundespraesident.de/top/dokumente/Rede/ix_94041.htm).

20. One of the most well-known aspects of Lessing’s *Nathan the Wise* is the famous “Ring Parable” [*Ringparabel*], which bears mention here because President Rau was alluding to its teachings on religious toleration by addressing the headscarf debate in a speech commemorating Lessing’s 275th birthday. In *Nathan the Wise*, a Christian Templar, Nathan the Jew, and the Muslim Sultan Saladin realize their familial relationship to each other. The “centerpiece” of this development is the Ring Parable. LAMPORT, *supra* note 18, at 70. Attempting to press Nathan the Jew into lending him money, Saladin the Sultan asks Nathan to tell him which religion is true because “[o]f these three Religions only one can be the true one.” GOTTHOLD EPHRAIM LESSING, *NATHAN THE WISE, MINNA VON BARNHELM, AND OTHER PLAYS AND WRITINGS* act 3, sc. 5, at 230 (Peter Demetz trans. & ed.), in 12 *THE GERMAN LIBRARY* (Volkmar Sander ed., 1991). Instead of answering the Sultan’s question directly, Nathan the Jew wisely relates the Ring Parable:

In days of yore, there dwelt in eastern lands/  
A man who had a ring of priceless  
worth/  
Received from hands beloved. The stone it held,  
An opal, shed a hundred  
colors fair,  
And had the magic power that he who wore it,  
Trusting its strength,  
was loved of God and men.  
No wonder therefore that this eastern man/  
Would never cease to wear it; and took pains/  
To keep it in his household for all time.  
He left the ring to that one of his sons/  
He loved the best; providing that in turn/  
That son bequeath to his most favorite son/  
The ring; and thus, regardless of his birth,  
The dearest son, by virtue of the ring,  
Should be the head, the prince of all his  
house. . . .  
At last this ring, passed on from son to son,  
Descended to a father of  
three sons;  
All three of whom were duly dutiful,  
All three of whom in  
consequence he needs/  
Must love alike. . . .  
Then came the time/  
For dying, and  
the loving father finds/  
Himself embarrassed. . . .  
He sends/  
In secret to a jeweler,  
of whom/  
He orders two more rings, in pattern like/  
His own, and bids him spare  
nor cost nor toil/  
To make them in all points identical.  
The jeweler succeeds. . . .

comments about possible interpretations of the headscarf, concluding that the possible misuse of an object cannot be allowed to inhibit its proper use.<sup>21</sup> Above all, he rejected a perceived growing laicism that, in his opinion, resulted from a headscarf prohibition for teachers.<sup>22</sup> On Lessing's grave, President Rau called for toleration<sup>23</sup> and at the same time refuted the draft laws prepared in several *Bundesländer* prohibiting Muslim teachers from wearing the headscarf.<sup>24</sup> In President Rau's view, one cannot forbid one religious symbol and maintain the status quo for everything else:<sup>25</sup> "That is not compatible with the religious freedom which our Basic Law guarantees all people and would therefore open the gate to a development that most proponents of a headscarf prohibition do not want."<sup>26</sup> In essence, the prohibition, according to President Rau,

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In glee and joy he calls his sons to him,/ Each by himself, confers on him his  
blessing—/ His ring as well—and dies.

*Id.* act 3, sc. 7, at 231–32. After the death of the father, the three sons dispute among themselves who has the true ring, which makes its possessor beloved of God and men. *Id.* To resolve this conflict, the three brothers appear before a judge whom they ask to determine which brother has the true ring. *Id.* But to the surprise of the three brothers, the judge finds that "O then you are, all three, deceived deceivers," on the basis that none of the brothers exhibits the type of moral action characteristic of the bearer of the true ring. *Id.* at 234. The judge does not leave it at that, however, and proposes a solution to the problem:

Let each strive/ To match the rest in bringing to the fore/ The magic of the opal in  
his ring!/ Assist that power with all humility,/ With benefaction, hearty  
peacefulness,/ And with profound submission to God's will!/ And when the magic  
powers of the stones/ Reveal themselves in children's children's children:/ I bid  
you, in a thousand thousand years,/ To stand again before this seat.

*Id.* at 235. This exposition of the Ring Parable reveals President Rau's misplaced agenda in using his speech honoring Lessing as an opportunity to enter the political fray of the headscarf debate. That is, an appeal to religious toleration on Lessing's grave meant to reinforce the assertion that religious freedom is guaranteed to all in Germany does not address the real issue: whether a civil servant's status as a representative of the state subjects the civil servant to demands of state neutrality in matters of religion at the expense of a certain degree of that civil servant's constitutionally guaranteed religious freedom. See *infra* Parts II.C and III.B for a treatment of the dissent's correct view in the Headscarf Case that a civil servant who voluntarily enters into this representative relationship with the state needs to be willing, in order to be qualified for the job, to relinquish some degree of religious freedom in the interest of the state's religious neutrality.

21. Speech in Wolfenbüttel, *supra* note 19, pt. VIII, paras. 4–5.

22. *Id.* pt. XI, para. 5.

23. *Id.* pt. VI, para. 9.

24. *Id.* pt. III, para. 1.

25. *Id.* pt. XI, para. 4.

26. *Id.*

would cause an even clearer separation of church and state in Germany.<sup>27</sup>

A flood of academic treatments<sup>28</sup> of the issue that cannot be overlooked suggests that foundational questions must first be debated before the headscarf prohibition can be enacted through

27. *Id.* pt. XI, para. 5.

28. See, e.g., Bertrams, *Lehrerin mit Kopftuch? Islamismus des Grundgesetzes* [Teacher with a Headscarf? The Islamism of the Basic Law], DVBL 2003, 1225; Ernst-Wolfgang Böckenförde, „Kopftuchstreit“ auf dem richtigen Weg? [“Kopftuchstreit” in the Right Way?], NJW 54 (2001), 723; Debus, *Machen Kleider wirklich Leute? – Warum der „Kopftuch-Streit“ so „spannend“ ist* [Do Clothes Really Make the Person?—Why the “Kopftuch-Streit” is so “Exciting”], NVWZ 2001, 1355; Klaas Engelken, *Anmerkung zum Urteil des BVerfG vom 24.9.2003* [Commentary on the Decision of the Federal Constitutional Court of Sept. 24, 2003], DVBL 2003, 1539; Helmut Goerlich, *Religionspolitische Distanz und kulturelle Vielfalt unter dem Regime des Art. 9 EMRK* [Religio-politico Distance and Cultural Diversity Under the Regime of Art. 9 of the European Convention of Human Rights], NJW 54 (2001), 2862; Goos, *Kruzifix und Kopftuch—Anmerkungen zur Religionsfreiheit von Lehrerinnen und Lehrern* [Crucifix and Headscarf—Comments on the Religious Freedom of Teachers], ZBR 2003, 221; Halfmann, *Der Streit um die „Lehrerin mit Kopftuch“* [The Conflict Surrounding the “Teacher with a Headscarf”], NVWZ 2000, 862; Hans Michael Heinig & Martin Morlok, *Von Schafen und Kopftüchern* [Of Sheep and Headscarves], JZ 58 (2003), 777; Ipsen, *Karlsruhe locuta, causa non finite*, NVWZ 2003, 1210; Karl-Hermann Kästner, *Anmerkung zum Urteil des BVerfG vom 24.9.2003* [Commentary on the Decision of the Federal Constitutional Court of Sept. 24, 2003], JZ 58 (2003), 1178; Sacksofsky, *Die Kopftuch-Entscheidung—von der religiösen zur föderalen Vielfalt* [The Headscarf Decision—from Religious to Federal Diversity], NJW 56 (2003), 3297; Winter, *Die Kopftuchentscheidung—Das Bundesverfassungsgerichtsurteil in der öffentlichen Debatte* [The Headscarf Decision—The Federal Constitutional Court Decision in Public Debate], KUR 2003, 129; see also JEAND’HEUR & KORIOTH, GRUNDZÜGE DES STAATSKIRCHENRECHTS [PRINCIPLES OF CHURCH-STATE LAW] n.130 (2000); Jestaedt, *Grundrechtsschutz vor staatlich aufgedrängter Ansicht. Das Kopftuch der Lehrerin als Exempel* [Protection of Fundamental Rights Against State Imposed Beliefs. The Teacher’s Headscarf as an Example], in Festschrift für JOSEPH LISTL 259 (1999); Karl-Hermann Kästner, *Religiös akzentuierte Kleidung des Lehrpersonals staatlicher Schulen* [Religiously Accentuated Clothing of the Teaching Staff at State Schools], in HECKEL Festschrift 359 (1999); Karl-Hermann Kästner, *Religiöse und weltanschauliche Bezüge in der staatlichen Schule* [References to Religious and World Views at State Schools], in OPPERMANN Festschrift 827 (2001); Korioth, *Commentary on Art. 140 of the Basic Law and Art. 136 of the Weimar Constitution*, in GRUNDGESETZ [BASIC LAW] marginal note 61 (Maunz & Dürig eds., 2003); Lothar Michael, *Anmerkung zum Urteil des BVerfG vom 4.7.2002* [Comments on the Federal Constitutional Court Decision of July 4, 2002], JZ 58 (2003) 256; Martin Morlok & Krüper, *Auf dem Weg zum „forum neutrum“? – Die „Kopftuch-Entscheidung“ des BVerfG* [On the Way to the “Forum Neutrum”?—The “Headscarf Decision” of the Federal Constitutional Court], NJW 56 (2003), 1020; Muckel, *Gleicher Zugang zu jedem öffentlichen Amte – auch für muslimische Lehrerinnen mit Kopftuch?* [Equal Access to Every Civil Office—Also for Muslim Teachers Wearing Headscarves?], in Festschrift für CHRISTOPH LINK 331 (2003); Müller-Elschner, *Zum Kopftuchstreit in Frankreich* [On the Headscarf Debate in France], VBLBW 2003, 342; Thüsing, *Vom Kopftuch als Angriff auf die Vertragsfreiheit* [On the Headscarf as Attack on the Freedom of Contract], NJW 56 (2003), 405; Zacharias, *Der Streit um das Kopftuch* [The Debate About the Headscarf], KUR 2002, 115.

new laws in the *Länder*. Such high academic attention has not been forthcoming since the Crucifix Decision<sup>29</sup> of the same court. But the new decision looks like it will be more readily accepted than was the Crucifix Decision.<sup>30</sup> This Article examines some of these foundational questions, explaining why the basic reasoning of the majority opinion in the Headscarf Decision was significantly flawed. Part II critically discusses the majority and dissenting opinions in the Headscarf Decision. Part III first analyzes the reasoning of the majority opinion in holding the regulatory prohibition on wearing a headscarf while teaching insufficient, and then concludes that the dissenting opinion was correct in supporting the administrative prohibition. Part IV looks to the French approach to the headscarf problem, distinguishes it from the German situation and philosophy of church-state separation, and recommends distance from the French approach. Finally, Part V concludes that the Federal Constitutional Court failed in its Headscarf Decision to come to a solution for the problem of teachers wearing headscarves in public schools and that the issue will thus surely come before the court again in the near future.

## II. THE HEADSCARF DECISION

### A. *The History of the Headscarf Decision*

The Headscarf Decision is the culmination of a six-year legal battle fought by a Muslim school teacher, Fereshta Ludin, for the right to wear her Islamic headscarf while teaching in a public school. Ludin was born in Afghanistan but has lived continuously in Germany since 1987, becoming a German citizen in 1995.<sup>31</sup> In 1997, as Ludin neared completion of her pedagogical studies in Stuttgart, the Stuttgart School Supervisory Authority [SSA] [*Oberschulamt Stuttgart*] turned down her application for a position

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29. Kruzifix-Urteil [Crucifix Decision] (May 16, 1995), BVerfGE 93, 1.

30. For an overview of the Crucifix Decision, see VON CAMPENHAUSEN, LAW OF CHURCH AND STATE, *supra* note 1, at 64, 76 (listing relevant sources); *see also* Christoph Link, *Der Streit um das Kreuz—Trendwende in der Rechtsprechung?* [*The Conflict Surrounding the Cross—A Reversal of the Trend in Caselaw?*], KUR 2002, 101. For an American treatment of the case in English, see Lark E. Alloway, Comment, *The Crucifix Case: Germany's Everson v. Board of Education?*, 15 DICK. J. INT'L L. 361 (1997).

31. Headscarf Decision, BVerfGE 108, 282 (284), 2 BvR 1436/02, para. 2.

as a student teacher.<sup>32</sup> The *Land* Minister of Education, Annette Schavan, a Christian Democrat, intervened on Ludin's behalf in this instance to allow her to finish her studies.<sup>33</sup> Upon completion of her studies in 1998, the Stuttgart SSA denied her application for employment in the state school system because of her "lack of personal qualifications."<sup>34</sup> Specifically, Ludin continued to insist on wearing a headscarf, even while teaching.<sup>35</sup> On July 15, 1998, the parliament of Baden-Württemberg, the *Land* encompassing Stuttgart, expressly decided not to enact a general legislative prohibition on wearing a headscarf while teaching.<sup>36</sup> Shortly thereafter, Ludin appealed the administrative denial of her application for employment, thus inaugurating her legal battle with Baden-Württemberg.

Ludin's case failed at all levels of administrative appeal: she would not be found eligible to teach in the public schools so long as she uncompromisingly refused to remove her headscarf while teaching. On August 14, 1998, Ludin made an internal appeal of the initial administrative denial of her application for employment to the SSA.<sup>37</sup> She argued that "wearing a headscarf is not only a characteristic of her personality, but is also an expression of her religious conviction. According to the precepts of Islam, wearing a headscarf is part of her Islamic identity."<sup>38</sup> The SSA rejected this internal appeal on February 4, 1999.<sup>39</sup> The SSA first reasoned that paragraph 3 of article 33 of the Basic Law<sup>40</sup> indeed prohibited

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32. *Kopftuchstreit: Chronik der Ereignisse* [*Headscarf Debate: Sequence of Events*], SPIEGEL ONLINE, Sept. 24, 2003, at <http://www.spiegel.de/unispiegel/studium/0,1518,266936,00.html> [hereinafter *Sequence of Events*] (on file with the BYU Law Review).

33. *Id.*

34. Headscarf Decision, BVerfGE 108, 282 (284), 2 BvR 1436/02, para. 3 ("mangelnder persönlicher Eignung").

35. *Sequence of Events*, *supra* note 32.

36. *Id.*

37. *Id.*

38. Headscarf Decision, BVerfGE 108, 282 (284), 2 BvR 1436/02, para. 4 ("das Tragen des Kopftuchs sei nicht nur Merkmal ihrer Persönlichkeit, sondern auch Ausdruck ihrer religiösen Überzeugung. Nach den Vorschriften des Islam gehöre das Kopftuchtragen zu ihrer islamischen Identität."). In the Headscarf Decision, the Federal Constitutional Court conveniently summarized all of the holdings below and serves as a reference to the holdings of the lower courts.

39. *Sequence of Events*, *supra* note 32.

40. GRUNDGESETZ [GG] [BASIC LAW] art. 33, para. 3, *English translation available at* <http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html> ("Enjoyment of civil and civic rights[,] eligibility for public office, and rights acquired in the public service are independent of

denying an employment application because of religious affiliation alone but then concluded that the same did not exclude the possibility of considering a lack of qualifications for working in the civil service based on an applicant's religion.<sup>41</sup> The SSA then admitted that wearing a headscarf fell within the protections of article 4 of the Basic Law<sup>42</sup> but based its denial of her application on the idea that "[t]he religious freedom of the complainant is limited by the fundamental right of the students to negative religious freedom, the parent's right of upbringing from paragraph 2 of article 6, as well as by the state's obligation to religious and worldview neutrality."<sup>43</sup>

Ludin appealed this SSA decision to the Stuttgart Administrative Court, which rejected her complaint on March 24, 2000. The Stuttgart Administrative Court held that "[w]earing a headscarf for religious reasons by a teacher constituted a lack of qualification in the sense of section 11, paragraph 1 of the Baden-Württemberg's Law on State Civil Servants" because of the interplay between the teacher's religious freedom and the neutrality of the state, on the one hand, and the rights of the students and parents on the other.<sup>44</sup>

Next, Ludin appealed this rejection of her complaint to the Baden-Württemberg Court of Administrative Appeals, the *Land* administrative appellate court, which upheld the Stuttgart Administrative Court's denial of Ludin's complaint on June 26, 2001.<sup>45</sup> The Court of Administrative Appeals pointed out that an

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religious denomination. No one may suffer disadvantage by reason of his adherence or non-adherence to a denomination or ideology.").

41. Headscarf Decision, BVerfGE 108, 282 (285), 2 BvR 1436/02, para. 5.

42. Article 4 of the Basic Law provides that

(1) Freedom of faith and of conscience, and freedom of creed religious or ideological, are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render war service as an armed combatant. Details will be regulated by a Federal law.

GG art. 4.

43. Headscarf Decision, BVerfGE 108, 282 (285), 2 BvR 1436/02, para. 5 ("Die Religionsfreiheit der Beschwerdeführerin werde durch das Grundrecht auf negative Religionsfreiheit der Schülerinnen und Schüler, das Erziehungsrecht der Eltern aus Art. 6 Abs. 2 GG sowie die Verpflichtung des Staates zu weltanschaulicher und religiöser Neutralität aber eingeschränkt.").

44. Headscarf Decision, BVerfGE 108, 282 (285), 2 BvR 1436/02, para. 6 ("Das religiös motivierte Tragen eines Kopftuchs durch eine Lehrerin stelle einen Eignungsmangel im Sinne des § 11 Abs. 1 Landesbeamtengesetz Baden-Württemberg (LBG) dar.").

45. VGH Baden-Württemberg, NJW 54 (2001), 2899.

appellate court has limited powers of review in an administrative decision about whether an applicant is qualified for a job.<sup>46</sup> Nevertheless, the Court of Administrative Appeals highlighted the problem of allowing a teacher to wear a headscarf while teaching: “[w]earing a headscarf while teaching could influence the students religiously and could lead to conflicts within the affected classrooms.”<sup>47</sup> The headscarf constituted a religious symbol “which the observer [in the school classroom] cannot avoid.”<sup>48</sup> But Ludin was not satisfied with these justifications of the regulation prohibiting her from wearing a headscarf while teaching and appealed this decision of the *Land* Court of Administrative Appeals to the Federal Administrative Court in Berlin.

Ludin was no more successful in the Federal Administrative Court than she had been in the courts below. The Federal Administrative Court in Berlin rejected Ludin’s complaint,<sup>49</sup> explaining that “[I]mitations [of an individual’s religious freedom] arise from the Basic Law itself, particularly from colliding fundamental rights of those who believe differently.”<sup>50</sup> In fact, the religious freedom guaranteed by the Basic Law necessitates some such limitations, especially in the context of public schools in the name of the state’s mandated religious neutrality.<sup>51</sup> In short,

The right of the teacher to act according to her convictions must retreat from the competing religious freedom of the students and parents while teaching. Neither the requirement of toleration nor

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46. Headscarf Decision, BVerfGE 108, 282 (286), 2 BvR 1436/02, para. 8 (summarizing the Baden-Württemberg Court of Administrative Appeals’s reasoning).

47. Headscarf Decision, BVerfGE 108, 282 (287), 2 BvR 1436/02, para. 11 (“Das Tragen des Kopftuchs durch eine Lehrerin im Unterricht könne zu einer religiösen Beeinflussung der Schüler und zu Konflikten innerhalb der jeweiligen Schulklasse führen . . .”).

48. *Id.* (“dem sich der Betrachter nicht entziehen könne”).

49. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], NJW 55 (2002), 3344 (upholding the administrative prohibition on teachers wearing a headscarf in public state schools).

50. Headscarf Decision, BVerfGE 108, 282 (288), 2 BvR 1436/02, para. 13 (“Einschränkungen ergäben sich aus der Verfassung selbst, insbesondere aus kollidierenden Grundrechten Andersdenkender.”).

51. *Id.* (“In dem vom Staat organisierten und gestalteten Lebensbereich der bekenntnisfreien Pflichtschule komme Art. 4 Abs. 1 GG freiheitssichernde Bedeutung vornehmlich zugunsten der schulpflichtigen Kinder und ihrer Eltern zu. . . . Kinder seien in öffentlichen Pflichtschulen ohne jegliche Parteinahme des Staates und der ihn repräsentierenden Lehrkräfte für christliche Bekenntnisse oder für andere religiöse und weltanschauliche Überzeugungen zu unterrichten und zu erziehen.”).

the principle of practical harmony compel the conclusion that the parent's right to the upbringing of their children and the religious freedom of the parents and the children must be repressed in favor of a teacher who wears a headscarf.<sup>52</sup>

In response to these results in the administrative courts, Ludin entered a complaint with the Federal Constitutional Court alleging that the administrative regulation of the SSA prohibiting her from wearing a headscarf while teaching violated her fundamental rights under the Basic Law.<sup>53</sup> Unlike the administrative courts that uniformly rejected Ludin's complaints, the Federal Constitutional Court ruled the prohibition as promulgated and implemented by the SSA legally insufficient<sup>54</sup> to deprive Ludin of her religious freedom.<sup>55</sup> But this holding is infirm because of its lack of guidance and the political controversy it has aroused.

*B. The Majority Opinion in the German Headscarf Decision*

The Federal Constitutional Court found Ludin's complaint that the school authorities and the administrative courts had violated her right to religious freedom to be valid. Accordingly, the court found that the statutory scheme in place in Baden-Württemberg's existing laws did not provide a "sufficiently clear legal basis"<sup>56</sup> upon which to use an administrative decision to prohibit wearing headscarves while teaching. Proceeding from article 33, paragraph 2 of the Basic Law—under which every German enjoys equal access to every public office according to his eligibility, ability, and professional qualifications—the court noted that this access to employment in the civil service can indeed be limited by subjective acceptance criteria, as provided, for example, in the Law on Guidelines for Employment in the Civil Service [*Beamtenrechtsrahmengesetz*] and the Laws on State

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52. Headscarf Decision, BVerfGE 108, 282 (289), 2 BvR 1436/02, para. 14.

53. Headscarf Decision, BVerfGE 108, 282 (289), 2 BvR 1436/02, para. 16.

54. See *infra* note 82 for a discussion of the principle that essential matters—such as the limitation of a fundamental right—are reserved to democratically elected legislatures that create the clear legal basis to guide any legislative delegation that results in the restriction of a fundamental right.

55. Headscarf Decision, BVerfGE 108, 282 (303), NJW 56 (2003), 3111 (3114), 2 BvR 1436/02, para. 49.

56. Headscarf Decision, BVerfGE 108, 282 (294), NJW 56 (2003), 3111 (3111), 2 BvR 1436/02, para. 30.

Civil Servants [*Landesbeamtengesetzen*].<sup>57</sup> In setting these criteria, the lawmaker has wide discretion.<sup>58</sup> According to the court, the exercise of a fundamental right, such as the right to freedom of religious expression, by a civil servant while at work can be limited by the general demands of the position or by special requirements of the public office in question.<sup>59</sup> Even in the prognostic decision on the future official activities of someone applying for a position, the state as an employer still has wide discretion that can only be reviewed narrowly by the courts.<sup>60</sup>

But in the Headscarf Decision problems arose from article 4 of the Basic Law, whose scope in protecting religious freedom the court recapitulated based on earlier decisions. The religious freedom ubiquitously guaranteed by article 4 also encompasses the right to profess and to preach one's faith<sup>61</sup> and to base all of one's behavior on the teachings of one's religion. Religious convictions that dictate one behavior as the correct way to cope with circumstances are also protected by article 4.<sup>62</sup> Because the article 4 rights of religious

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57. The Court conceded that "[i]n principle, the lawmaker has wide discretion in setting eligibility criteria for a particular position in the civil service and in defining the job description against which to judge the qualifications of an applicant for that position." Headscarf Decision, BVerfGE 108, 282 (296), NJW 56 (2003), 3111 (3111), 2 BvR 1436/02, para. 34 ("Der Gesetzgeber hat bei der Aufstellung von Eignungskriterien für das jeweilige Amt und bei der Ausgestaltung von Dienstpflichten, nach denen die Eignung von Bewerbern für den öffentlichen Dienst zu beurteilen ist, grundsätzlich eine weite Gestaltungsfreiheit."). Compare Decision of May 22, 1975, BVerfGE 39, 334 (370) (upholding loyalty to the state as an eligibility requirement for employment in the civil service), with Beamtenrechtsrahmengesetz [BRRG] [Law on Guidelines for Employment in the Civil Service] § 7, v. 31.3.1999 (Bundesgesetzblatt [Federal Gazette] I S. 654), and Landesbeamtengesetz Baden-Württemberg [LBG] [Law on State Civil Servants Baden-Württemberg] § 11, para. 1, v. 19.3.1996 (Gesetzblatt [Legal Gazette] S. 286).

58. Headscarf Decision, BVerfGE 108, 282 (296), NJW 56 (2003), 3111 (3111), 2 BvR 1436/02, para. 34.

59. *Id.* (citing Decision of Feb. 25, 1981, BVerwGE 56, 227).

60. Headscarf Decision, BVerfGE 108, 282 (296), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 35; *cf.* Decision of May 27, 1992, BVerwGE 86, 244; Decision of Dec. 18, 1984, BVerwGE 68, 109; Decision of Oct. 19, 1982, BVerwGE 61, 176 (186); Decision of May 22, 1975, BVerfGE 39, 334 (354) (holding that a court can only narrowly review eligibility for employment in the civil service decision by the state).

61. Headscarf Decision, BVerfGE 108, 282 (297), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 37; *cf.* Decision of Oct. 16, 1968, BVerfGE 24, 236 (245) (holding that article 4 of the Basic Law not only guarantees the freedom to have or not to have religious convictions but also the freedom to teach and spread such convictions).

62. Headscarf Decision, BVerfGE 108, 282 (297), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 37; *cf.* Decision of Dec. 17, 1975, BVerfGE 41, 29 (49) (reasoning that article 4 of the Basic Law not only prohibits the state from intruding into the area of an

freedom are guaranteed unconditionally,<sup>63</sup> any limitations on these rights must also arise directly from the Basic Law.<sup>64</sup> “In addition, the limitation of the unconditionally guaranteed freedom of religion requires a sufficiently clear legal basis.”<sup>65</sup> Accordingly, any limitation of article 4 rights is subject to especially strict justification demands.

The court considered wearing a headscarf to be a right protected by article 4’s guarantee of religious freedom. The court rightly supported its position on the subjective conviction of the complainant and not on the question of whether Islam generally and universally requires women to wear a headscarf.<sup>66</sup> In any event, according to the court, it is enough if the obligation to wear a headscarf can plausibly fall under article 4.<sup>67</sup> Incidentally, all earlier courts had also reached this conclusion in an unobjectionable way. As other constitutional rights that might potentially collide with the right to religious freedom, the court identified the state educational mandate,<sup>68</sup> the parents’ right to upbringing,<sup>69</sup> and the negative

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individual’s religious freedom but also requires positive action on the part of the state to allow for the active exercise of one’s convictions); Decision of April 11, 1972, BVerfGE 33, 23 (28) (stating that religious freedom guarantees more than just the freedom to believe or not to believe what one wishes—it also guarantees that right to orient one’s entire behavior to the tenets of one’s faith and to act according to one’s convictions); Decision of Oct. 19, 1971, BVerfGE 32, 98 (106) (noting that freedom of religion in Germany also protects religious convictions that determine a certain way to react to situations in life as the best way to overcome such circumstances even if the religion does not demand such behavior).

63. Headscarf Decision, BVerfGE 108, 282 (297), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 38.

64. *Id.*; cf. Decision of May 26, 1970, BVerfGE 28, 243 (260) (holding that limitations on the right to conscientious objection cannot be justified based merely on laws, norms, and institutions, but rather can only be justified on colliding fundamental rights of third parties); *see also* Crucifix Decision (May 16, 1995), BVerfGE 93, 1 (21) (same).

65. Headscarf Decision, BVerfGE 108, 282 (297), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 38 (citing Decision of Nov. 27, 1990, BVerfGE 83, 130 (142)).

66. Headscarf Decision, BVerfGE 108, 282 (298–99), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 40; *see also* Martin Heckel, *Religionsfreiheit und Staatskirchenrecht in der Rechtsprechung des Bundesverfassungsgerichts* [*Religious Freedom and Church-State Law in the Jurisprudence of the Federal Constitutional Court*], in 2 BUNDESVERFASSUNGSGERICHT FESTSCHRIFT 379, 393 (2001).

67. Headscarf Decision, BVerfGE 108, 282 (299), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 40.

68. GG art. 7, para. 1 (“The entire education system is under the supervision of the state.”).

69. GG art. 6, para. 2 (“Care and upbringing of children are the natural right of the parents and a duty primarily incumbent on them. The state watches over the performance of this duty.”).

religious freedom of the schoolchildren.<sup>70</sup> But the court then applied the religion/worldview neutrality required of the state only to the state itself and not to representatives of the state—e.g., public school teachers—who parents and schoolchildren admittedly cannot choose themselves.<sup>71</sup> The court straightforwardly explained that the necessary latitude for the active exercise of one’s religious convictions and the realization of one’s autonomous personality or individuality also belong under article 4’s protections:<sup>72</sup>

The State singly may not exercise a conscious influence for the benefit of a specific political, ideological, or worldview perspective, or identify itself either expressly or impliedly with a particular faith or worldview through measures that either proceed from it or that are attributed to it and thereby endanger the religious peace in society.<sup>73</sup>

Similarly, aside from the obligatory nature of public school, the court noted that, irrespective of their negative religious freedom, students and parents do not have the right to avoid confrontation with foreign confessions of faith, acts of worship, and religious symbols.<sup>74</sup>

The court recognized in detail the right of the *Länder* to create the public school system and to ban improper influences from schools. The religiously motivated clothing of a teacher, which also may be interpreted as a statement of a teacher’s religious convictions, could also have this effect, according to the court.<sup>75</sup> With reference to the distinction used by the police between abstract and concrete danger, the court found that a teacher wearing a headscarf in an obligatory state school only entails an abstract danger—only the possibility of harm or a conflict. But the limitation of an

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70. GG art. 4, para. 1 (“Freedom of faith and of conscience, and freedom of creed religious or ideological, are inviolable.”); *see also* Crucifix Decision (May 16, 1995), BVerfGE 93, 1 (4), (21–24) (ruling that Bavarian *Land* regulations requiring crucifixes to hang in classrooms in public schools violated students’ negative religious freedom, or the freedom not to adopt a certain belief).

71. *See* Headscarf Decision, BVerfGE 108, 282 (299–300), NJW 56 (2003), 3111 (3112–13), 2 BvR 1436/02, paras. 42–43.

72. Headscarf Decision, BVerfGE 108, 282 (300), NJW 56 (2003), 3111 (3113), 2 BvR 1436/02, para. 43.

73. *Id.*

74. Headscarf Decision, BVerfGE 108, 282 (301–02), NJW 56 (2003), 3111 (3113), 2 BvR 1436/02, para. 46.

75. Headscarf Decision, BVerfGE 108, 282 (303), NJW 56 (2003), 3111 (3114), 2 BvR 1436/02, para. 49.

unconditionally guaranteed fundamental right requires a sufficiently clear legal basis, which the court found missing in this case, in part apparently supported by this standard from the police of a lack of concrete danger posed by a teacher wearing a headscarf.<sup>76</sup> That is, even though the applicant made clear from the beginning that she was not willing to comply with the headscarf prohibition, the court only found this to constitute an abstract possible danger which did not justify the current intrusion into this fundamental right.<sup>77</sup> The court considered the fact that no tangible clues were visible to identify any concrete danger.<sup>78</sup> Future conflicts will thus need other regulations.<sup>79</sup> Furthermore, the teachers' general obligations of restraint did not substantiate a policy prohibiting the wearing of certain clothing or other symbols at school.<sup>80</sup> But the court found that the *Land* legislatures were free to provide the previously missing legal basis for such a prohibition by reevaluating, within the framework of the constitutional requirements, the allowable degree with which references to religion may appear in the school.<sup>81</sup> This would put an applicant on notice (as they were already) that eligibility for employment in this field might be denied if the applicant reveals from the beginning that he or she cannot adopt the required restraint, for example, by not committing to refrain from wearing such symbols.

The Federal Constitutional Court's approach to the issue of teachers wearing an Islamic headscarf in public school is significantly flawed. Legally, the determining factor for the Federal Constitutional Court was that the question of eligibility for employment in the civil service cannot be decided by an administrative education authority familiar with the problem, although that has previously been the case with generally satisfactory results. The court held that the *Wesentlichkeitstheorie*, or "theory of essentiality,"<sup>82</sup> demands that

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Headscarf Decision, BVerfGE 108, 282 (308), NJW 56 (2003), 3111 (3115), 2 BvR 1436/02, para. 60.

81. Headscarf Decision, BVerfGE 108, 282 (309), NJW 56 (2003), 3111 (3115), 2 BvR 1436/02, para. 62.

82. Headscarf Decision, BVerfGE 108, 282 (312), NJW 56 (2003), 3111 (3116), 2 BvR 1436/02, para. 69. The *Wesentlichkeitstheorie* is a principle of German constitutional and administrative law concerning the legality of administration. Two main principles govern the

democratically elected legislators issue these types of regulations because they have an assessment prerogative at their disposal, unlike administrators and judges.<sup>83</sup> In fact, the court reasoned that agencies and courts *could not* claim such a prerogative for themselves.<sup>84</sup> Specifically, the court substantiated this position with the principles of parliamentary reservation of material issues [*Parlamentsvorbehalt*], the constitutional state founded on the rule of law [*Rechtsstaatsprinzip*],<sup>85</sup> and the democratic imperative

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legality of administrative acts in the Federal Republic of Germany. First, the “priority of statute” [*Vorrang des Gesetzes*] “means that administrative decisions must never contravene statutes, since the latter have been passed by a democratically elected body. Thus administrative actions are bound by the law and must be fully reviewable by the courts.” NIGEL G. FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM & LAWS* 165 (3d ed. 2002).

Second, the principle of “statutory reservation” [*Vorbehalt des Gesetzes*], which gives rise to the *Wesentlichkeitstheorie*, “requires a legal basis whenever the executive takes administrative action, especially when restricting the citizen’s basic rights but also when granting rights to the individual.” *Id.* Thus, “the principle of ‘statutory reservation’ goes beyond the first principle: The executive is not only prohibited from contravening existing legal provisions when acting. Rather, it needs a legal basis to act . . . [This is because] all actions of the executive must be democratically justified and foreseeable by the citizen.” *Id.* In this context, the *Wesentlichkeitstheorie* is a rule created in the jurisprudence of the Federal Constitutional Court “according to which essential matters have to be regulated by Parliament.” *Id.* The Court found this rule necessary to help distinguish between delegated legislation covered by the principle of statutory reservation and “parliamentary reservation” [*Parlamentsvorbehalt*]:

[T]he more essential a matter is for the citizen and the public the more detailed Parliament’s regulation has to be on this matter, leaving less discretion to administrative decisions when implementing the statute. . . . [I]t has at least been generally accepted that matters which are of importance to the individual’s enjoyment of basic rights are “essential matters.” Therefore they must be decided upon by Parliament and cannot be left to delegated legislation.

*Id.* at 165–66.

83. Headscarf Decision, BVerfGE 108, 282 (310), NJW 56 (2003), 3111 (3116), 2 BvR 1436/02, para. 66.

84. *Id.*; cf. Decision of March 1, 1979, BVerfGE 50, 290 (332); Decision of March 2, 1999, BVerfGE 99, 367 (389).

85. It is true that “[t]he principle of *Rechtsstaat* is often translated as *rule of law*,” however, “such a translation can be misleading.” FOSTER & SULE, *supra* note 82, at 163. That is, “[t]he term itself . . . indicates the supremacy of law (*Recht*) within the state (*Staat*)” which indeed at first closely resembles the essence of the “British *rule of law*.” *Id.* But the term *Rechtsstaat* also includes a substantive component missing in the British rule of law: “[T]he experiences of the Third Reich have shown that formal Acts of Parliament do not necessarily safeguard against blatantly unjust and inhumane measures taken by the state against individuals.” *Id.* For this reason, “the principle of *Rechtsstaat* now also includes a substantial element” which means that “state authorities such as [the] judiciary and the executive are not only bound by Acts of Parliament (*Gesetz*) but also [by] ‘the law’ (*Recht*) meaning ‘substantial rightness and justice’ as expressed by fundamental constitutional values, namely the basic rights.” *Id.* at 163–64.

[*Demokratiegebot*].<sup>86</sup> In order to realize fundamental rights, the court held, the controlling regulations must be laid out in law.<sup>87</sup> In any case, the lawgiver is committed to determine on its own the contours of conflicting guaranteed freedoms as far as such a determination is material for the exercise of these freedoms.<sup>88</sup> The court noted that the power to limit fundamental freedoms and to balance colliding fundamental rights are powers reserved to the parliament under the Basic Law.<sup>89</sup> This applies especially to schools, the court found, where the teachers' obligations have previously not been sufficiently defined.<sup>90</sup>

The Headscarf Decision will result in further heated political arguments. Such controversy is even more likely since the court uncharacteristically failed to provide instruction as to what such a valid regulation should contain.<sup>91</sup> The court might have made this omission because none of the numerous other courts (including the Federal Administrative Court) or the *Land* legislatures had treated the problem and the prevailing principle in the debate about these questions in quite this way before. One more problematic aspect of the court's decision is that it does not grant an adequate transition period for the *Länder* to develop a new constitutionally sufficient legal basis for a headscarf prohibition.<sup>92</sup> This has created a legal vacuum: between the day of the Decision and the forthcoming and possibly conflicting regulations currently being developed in the *Länder*, a public school teacher may not be prohibited from wearing

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86. Headscarf Decision, BVerfGE 108, 282 (311), NJW 56 (2003), 3111 (3116), 2 BvR 1436/02, para. 67.

87. *Id.* The democratic imperative [*Demokratiegebot*], the *Rechtsstaatsprinzip*, and the parliamentary reservation [*Parlamentsvorbehalt*] together "require that essential matters cannot be regulated by delegated legislation but have to be dealt with by Parliament itself." FOSTER & SULE, *supra* note 82, at 196. See *supra* note 82 for a brief summary of the legality of administrative acts and the *Wesentlichkeitstheorie*.

88. *Id.*; *cf.* Decision of Nov. 27, 1990, BVerfGE 83, 130 (142).

89. Headscarf Decision, BVerfGE 108, 282 (312), NJW 56 (2003), 3111 (3116), 2 BvR 1436/02, para. 68; *cf.* Decision of March 25, 1992, BVerfGE 85, 386 (403).

90. Headscarf Decision, BVerfGE 108, 282 (312), NJW 56 (2003), 3111 (3116), 2 BvR 1436/02, para. 69.

91. See, *e.g.*, Headscarf Decision, BVerfGE 108, 282 (302–03), NJW 56 (2003), 3111 (3113–14), 2 BvR 1436/02, para. 47 (noting merely that, in creating a sufficiently clear legal basis for a prohibition, a *Land* can consider certain factors such as the colliding rights at issue, the school tradition in that *Land*, and the denominational composition of the local population, but failing to list concrete criteria that would assure the validity of a new prohibition).

92. Headscarf Decision, BVerfGE 108, 282 (338), NJW 56 (2003), 3111 (3121–22), 2 BvR 1436/02, paras. 134–35 (Jentsch, Di Fabio & Mellinghoff, dissenting).

a headscarf while teaching. Neither the case law nor the academic literature to date suggest that a civil servant's official duties must be established by law if they relate to religious freedom, as noted by the sounder dissenting opinion.

### *C. The Dissenting Opinion*

Substantively, the dissenters in the Headscarf Decision emphasized the role a teacher plays as a representative of the state. In this context, the dissent notes the significance of the fact that “whoever wishes to become a civil servant freely chooses to side with the state.”<sup>93</sup> Thus, “right from the beginning, teachers who are civil servants, by their status as civil servants, do not enjoy the same protection of their fundamental rights as do parents and schoolchildren. Rather, teachers are bound to fundamental rights because they take part in the exercise of public power.”<sup>94</sup> The relationship of a teacher to the state is an exceptionally close one.<sup>95</sup> Still, the teacher in the capacity of teacher is not a mere “executive instrument” [*Vollzugsinstrument*] of the state by nature of this relationship.<sup>96</sup> Nevertheless,

[h]e who wishes to become a civil servant must nevertheless identify himself with the constitutional state in important fundamental questions and in the performance of his official responsibilities because the State is also represented by the official service of the teacher and therefore is identified with the actual individual so serving. All principles of the civil service are governed by this idea of mutuality and proximity.<sup>97</sup>

Essentially, the civil servant, properly understood, waives his or her constitutional rights that are not compatible with the position of

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93. Headscarf Decision, BVerfGE 108, 282 (315), NJW 56 (2003), 3111 (3117), 2 BvR 1436/02, para. 77 (Jentsch, Di Fabio & Mellinghoff, dissenting) (“Wer Beamter wird, stellt sich in freier Willensentschließung auf die Seite des Staates.”).

94. *Id.* (Jentsch, Di Fabio & Mellinghoff, dissenting).

95. Headscarf Decision, BVerfGE 108, 282 (317), NJW 56 (2003), 3111 (3117), 2 BvR 1436/02, para. 81 (Jentsch, Di Fabio & Mellinghoff, dissenting).

96. *Id.* (Jentsch, Di Fabio & Mellinghoff, dissenting).

97. *Id.* (Jentsch, Di Fabio & Mellinghoff, dissenting) (“Wer Beamter werden will, muss sich jedoch mit dem Verfassungsstaat in wichtigen Grundsatzfragen und bei der Wahrnehmung seiner dienstlichen Aufgaben loyal identifizieren, weil umgekehrt auch der Staat durch seinen öffentlichen Dienst repräsentiert und deshalb mit dem konkreten Bediensteten identifiziert wird. Von dieser Idee der Gegenseitigkeit und der Nähe sind alle Grundsätze des Berufsbeamtentums beherrscht.”).

civil service at issue—here, teachers in a public, obligatory state school. “The majority did not take sufficient account of this structural difference” between the relationship of a normal citizen to the state and that of a civil servant.<sup>98</sup>

The dissenting opinion also criticizes the court’s apparent equation of the eligibility determination in the framework of the special equality clause in article 33, paragraph 2 of the Basic Law—which guarantees all citizens equal access to employment in the civil service—with state interference with religious freedom guaranteed by article 4, paragraph 1 of the Basic Law.<sup>99</sup> The conflation of these two constitutional provisions is novel and cannot be allowed.<sup>100</sup> In contrast, according to the dissent, the intrusion by the state into the sphere of normal citizens is normally a prerequisite for a claim that such classic rights and freedoms have been violated.<sup>101</sup> But the dissent points out that, in the case of a civil servant job applicant in a public school (i.e., a teacher) the state is not intruding into the sphere of ordinary citizens; rather, a bearer of fundamental rights is seeking affiliation with the state apparatus and thus associates with the state, or the fundamental rights addressee [*Grundrechtsadressaten*].<sup>102</sup> However, the dissent notes that a civil servant’s freedom while in service is limited from the beginning by the nature of the circumstances and, above all, by the constitutional form of the office.<sup>103</sup>

Finally, the dissent sharply criticizes another aspect of the court’s opinion that bears mention here as problematic. The dissent notes that the court seems to ignore clear constitutional mandates in finding that the regulatory prohibition on wearing a headscarf while teaching does not proceed from a “sufficiently clear legal basis”<sup>104</sup>

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98. Headscarf Decision, BVerfGE 108, 282 (316), NJW 56 (2003), 3111 (3117), 2 BvR 1436/02, para. 79 (Jentsch, Di Fabio & Mellinghoff, dissenting).

99. Headscarf Decision, BVerfGE 108, 282 (318–19), NJW 56 (2003), 3111 (3117–18), 2 BvR 1436/02, paras. 84–87 (Jentsch, Di Fabio & Mellinghoff, dissenting).

100. Headscarf Decision, BVerfGE 108, 282 (318), NJW 56 (2003), 3111 (3118), 2 BvR 1436/02, para. 85 (Jentsch, Di Fabio & Mellinghoff, dissenting).

101. *Cf. id.* (Jentsch, Di Fabio & Mellinghoff, dissenting).

102. *Id.* (Jentsch, Di Fabio & Mellinghoff, dissenting).

103. *Id.* (Jentsch, Di Fabio & Mellinghoff, dissenting).

104. *Cf.* Headscarf Decision, BVerfGE 108, 282 (306), NJW 56 (2003), 3111 (3115), 2 BvR 1436/02, para. 57 (establishing that there was not a “sufficiently clear legal basis” for the administrative decision that Ludin was not qualified according to the eligibility criteria for employment in the civil service because of her continued refusal to teach without her headscarf).

and in finding that in order to prohibit teachers from wearing headscarves, the *Länder* needed to legislate and create a “sufficiently clear legal basis.”<sup>105</sup> But the Basic Law itself provides the legal basis<sup>106</sup> for a determination that a civil servant who categorically refuses to remove a headscarf while on the job does not meet the eligibility criteria for employment in the civil service.<sup>107</sup> Thus, “[u]ncompromisingly insisting on wearing a headscarf while teaching in a public school, as the complainant has done, is not compatible with the [constitutional] imperative of moderation and neutrality required of a civil servant.”<sup>108</sup>

### III. ANALYSIS OF THE FLAWED MAJORITY OPINION IN THE HEADSCARF DECISION

#### *A. Why the Court Got It Wrong*

At first glance, the Headscarf Decision seems to be doctrinally consistent with case law. Existing case law has long merited the approval of relevant academic literature. The Decision confirms, in the first place, previous arguments in case law<sup>109</sup> and literature for religious/worldview neutrality in the sense of openness and promotion<sup>110</sup>—in contrast to the French type of exclusionary laicism, or secularization, that is not and should not be valid in Germany.<sup>111</sup> In the Headscarf Decision, the court has reemphasized the legal equality of all religions and worldviews, but has also indicated that not every kind of behavior of an individual, as subjectively

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105. Headscarf Decision, BVerfGE 108, 282 (320), NJW 56 (2003), 3111 (3118), 2 BvR 1436/02, paras. 90–91 (Jentsch, Di Fabio & Mellinshoff, dissenting).

106. GG art. 33, para. 2; *see also* Decision of Feb. 21, 1995, BVerfGE 92, 140 (151); Decision of July 8, 1997, BVerfGE 96, 189 (197).

107. Headscarf Decision, BVerfGE 108, 282 (320, 323–25), NJW 56 (2003), 3111 (3118–19), 2 BvR 1436/02, paras. 90, 97–101 (Jentsch, Di Fabio & Mellinshoff, dissenting).

108. Headscarf Decision, BVerfGE 108, 282 (325), NJW 56 (2003), 3111 (3119), 2 BvR 1436/02, para. 102 (Jentsch, Di Fabio & Mellinshoff, dissenting).

109. *Compare* Headscarf Decision, BVerfGE 108, 282 (297–300), NJW 56 (2003), 3111 (3112–13), 2 BvR 1436/02, paras. 37–42, *with* Decision of Dec. 17, 1975, BVerfGE 41, 29 (49); Decision of April 11, 1972, BVerfGE 33, 23 (28); Decision of Oct. 19, 1971, BVerfGE 32, 98 (106).

110. Headscarf Decision, BVerfGE 108, 282 (299–300), NJW 56 (2003), 3111 (3112–13), 2 BvR 1436/02, para. 42.

111. *See infra* text accompanying notes 149–71 for a discussion of the French approach to religious neutrality and why Germany should not ascribe to it.

interpreted by that individual to be an expression of protected religious freedom, can be seen as such.<sup>112</sup> The court demands plausibility in order to find any given behavior within the protected realm of freedom of religion and conscience.<sup>113</sup> But despite appearance to the contrary, the Headscarf Decision leaves a conflicting impression in many ways.

### 1. *Deciding not to decide*

The court conspicuously avoids taking a position on a religious question in the Decision by returning the issue to the *Land* legislatures.<sup>114</sup> This is reminiscent of two recent reactions by the court to questions of religious freedom. First, the court avoided adjudicating the merits of such a question in the case concerning the *Land* of Brandenburg's worldview and ethics course known as LER.<sup>115</sup> In the LER case, the *Land* Brandenburg was accused of violating the state's obligation to religious/worldview neutrality because the "religious sciences" [*Religionskunde*] aspect of the LER curriculum was considered generally hostile toward religion.<sup>116</sup> The LER case ended with a court-suggested settlement after the court granted the *Land* five years to dismantle its controversial position, thus never proceeding to a judgment on the merits.<sup>117</sup> Second, the court's Kosher Butcher Decision<sup>118</sup> concerned a prohibition on slaughtering animals without anesthesia for religious reasons. In the Kosher Butcher Decision, the court simply passed the problem of

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112. Headscarf Decision, BVerfGE 108, 282 (298), NJW 56 (2003), 3111 (3112), 2 BvR 1436/02, para. 40 ("nicht jegliches Verhalten einer Person allein nach deren subjektiver Bestimmung als Ausdruck der besonderen geschützten Glaubensfreiheit angesehen werden könne").

113. *Id.*

114. Headscarf Decision, BVerfGE 108, 282 (302-03, 309), NJW 56 (2003), 3111 (3113, 3115), 2 BvR 1436/02, paras. 47 & 62-63.

115. "Lebensgestaltung-Ethik-Religionskunde" [Life Orientation-Ethics-Religious Sciences]. See generally LER Decision (Oct. 31, 2002), BVerfGE 106, 210; Hans Marcus Heimann, *Ethikunterricht im religiös und weltanschaulich neutralen Staat* [Ethics Lessons in a Religious/Worldview Neutral State], ZEVKR 48 (2003), 17.

116. Heimann, *supra* note 115, at 17.

117. *Id.* at 17 n.1.

118. Schächt-Urteil [Kosher Butcher Decision] (Jan. 15, 2002), BVerfGE 104, 337; see also Nina Arndt & Michael Droege, *Das Schächturteil des BVerfG—Ein „Dritter Weg“ im Umgang mit der Religionsausübungsfreiheit* [The Kosher Butcher Decision of the Federal Constitutional Court—A "Third Way" in the Interaction with the Free Exercise of Religion], ZEVKR 48 (2003), 188.

protecting animal welfare on to the Executive, which the court charged to ensure that animal welfare interests be observed in individual cases “through side determinations and by supervision of their observance as well as through examination of expert studies and the personal qualification of the claimant also in relation to the particular skills required for kosher butchering.”<sup>119</sup> The court proceeded in a similar responsibility-shifting fashion in the Headscarf Decision.

There has apparently never been an attempt to challenge the constitutional protection of wearing a headscarf for religious reasons under the protections of the free exercise of religion. Even civil servants are permitted to wear headscarves in public while not working. The only point of contention is whether this freedom is restricted while engaged in the civil service. To this extent, the Headscarf Decision offers little new insight. As expressed by the dissenting opinion, “[t]he court has failed its duty to answer a basic constitutional question even though that case was justiciable.”<sup>120</sup> The German news magazine *Der Spiegel* formulated it much more concisely: the court has unfortunately “decided not to decide.”<sup>121</sup>

## *2. Contradicting prior case law and departing from foundational principles*

In addition to shifting responsibility, the Headscarf Decision also contradicts prior case law. The court has previously emphasized the primacy of protecting children and teenagers from various dangers to their development.<sup>122</sup> It was in this vein that the court issued its Crucifix Decision.<sup>123</sup> This line of reasoning played no part in the

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119. *Id.* at 348 (“durch Nebenbestimmungen und die Überwachung ihrer Einhaltung ebenso wie bei der Prüfung der Sachkunde und der persönlichen Eignung des Antragstellers auch in Bezug auf die besonderen Fertigkeiten des Schächtens”); see also Karl-Hermann Kästner, *Das tierschutzrechtliche Verbot des Schächtens aus der Sicht des Bundesverfassungsgerichts* [*The Animal Welfare Prohibition on Kosher Butchering from the Perspective of the Federal Constitutional Court*], JZ 57 (2002), 491.

120. Headscarf Decision, BVerfGE 108, 282 (337), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02, para. 133 (Jentsch, Di Fabio & Mellinshoff, dissenting) (“Der Aufgabe, eine verfassungsrechtliche Grundsatzfrage zu beantworten, ist der Senat nicht gerecht geworden, obwohl der Fall entscheidungsreif ist.”).

121. Dominik Cziesche et al., *Das Kreuz mit dem Koran* [*The Cross with the Qur'an*], DER SPIEGEL, Sept. 29, 2003, at 82.

122. Decision of Nov. 27, 1990, BVerfGE 83, 130 (140).

123. Crucifix Decision (May 16, 1995), BVerfGE 93, 1.

Headscarf Decision. But a piece of clothing conspicuously displayed by a teacher for religious reasons arguably makes a bigger impression than does the familiar symbol of a cross or crucifix. A crucifix or cross typically hangs on the wall with no missionary intentions, hanging instead as a simple “trademark” of a constitutionally permitted type of school.<sup>124</sup> Even though the cross does not appear in certain schools for religious reasons, but rather may appear as a cultural symbol and trademark of a type of school and its curriculum, the court unduly complicated “learning under the cross”<sup>125</sup> in the Crucifix Decision.

Wearing a headscarf, by contrast, is seen in the Headscarf Decision as possibly meaning something very different,<sup>126</sup> even though no one doubts that the teacher in this case wore a headscarf as a manifestation of her religious convictions. Additionally, the court does not discuss the perception horizon of the children at the developmental age who are obligated to go to school. Quoting itself, the court notes that, in a society that gives room to different religious convictions, there is no right “to be spared contact with different religious statements, rites, and symbols,”<sup>127</sup> but then leaves the actual problem unsolved. This is not about people being exposed to religious impressions on the street, but rather it concerns “a situation created by the state in which the individual is exposed to the influence of a specific faith, to the actions in which this faith manifests itself, and to the symbols in which this faith is represented.”<sup>128</sup> It is surprising that the court does not discuss further the extent to which the state can legally force parents to

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124. Axel Frhr. von Campenhausen, *Offene Fragen im Verhältnis von Staat und Kirche am Ende des 20. Jahrhunderts* [Open Questions in the Relationship Between Church and State at the End of the Twentieth Century], *ESSGESPR.* 34 (2000), 105, 110.

125. See Karl-Hermann Kästner, *Lernen unter dem Kreuz? Zur Zulässigkeit religiöser Symbole in staatlichen Schulen nach der Entscheidung des BVerfG vom 16. Mai 1995* [Learning Under the Cross? On the Permissibility of Religious Symbols in Schools After the Decision of the Federal Constitutional Court of May 16, 1995], *ZEVKR* 41 (1996), 242.

126. Headscarf Decision, BVerfGE 108, 282 (303–05), NJW 56 (2003), 3111 (3114), 2 BvR 1436/02, paras. 50–52.

127. Headscarf Decision, BVerfGE 108, 282 (302), NJW 56 (2003), 3111 (3113), 2 BvR 1436/02, para. 46 (“von fremden Glaubensbekundungen, kultischen Handlungen und religiösen Symbolen verschont zu bleiben”); see also Crucifix Decision, BVerfGE 93, 1, 15.

128. Headscarf Decision, BVerfGE 108, 282 (302), NJW 56 (2003), 3111 (3113–14), 2 BvR 1436/02, para. 46 (“eine vom Staate geschaffene Lage, in welcher der Einzelne ohne Ausweichmöglichkeit dem Einfluss eines bestimmten Glaubens, den Handlungen, in denen dieser sich manifestiert, und den Symbolen, in denen er sich darstellt, ausgesetzt ist”).

expose children to a religious influence conveyed by a headscarf by means of general compulsory education.

Finally, the foundational principles regarding the legal position of civil servants are completely repealed with this Decision. The relationship between article 33, paragraph 3 and article 4, paragraphs 1 and 2 of the Basic Law, the applicability of fundamental rights to the law governing civil servants, determinations of qualification, and eligibility for employment in the civil service according to article 33, paragraph 3 of the Basic Law are all abolished with the comment that fundamental rights are of ultimate importance.<sup>129</sup>

### *3. Catering to politics and special interests*

Fundamental political decisions are also at play in this Decision, and these must be dissimulated. It is not the case that three or five percent of the population of Germany is Muslim; rather, in some parts of Germany that number is sixty or ninety percent.<sup>130</sup> Behind these Muslims, as behind the claimant teacher in the Headscarf Decision, stand powerful special interest groups that have expressed their desire to change society.<sup>131</sup> Allowing teachers to wear headscarves will not be the end of it; these special interest groups will only stop once they have effected change in all social institutions: state registrars, judges, and policewomen, all who insist on wearing headscarves, and even possibly policemen with turbans. These are the problems that lurk in the background. In this respect, this Decision is not helpful but ominous. To this extent, one must also question the comments about neutrality in the Decision. The objective effect of this Decision is that the state appears to identify itself with the teacher who functions by mandate of the state and in its name not only in the content and nature of the lessons that she teaches, but also in the striking potential effect of her religiously toned clothing. We do not need to decide what to do with nuns and monks who are so often and gladly mentioned in this context because they uniformly appear in their respective manner of dress in private parochial schools; otherwise we would have had corresponding cases and

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129. Cf. Böckenförde, *supra* note 28 (employing the same logic as the Federal Constitutional Court in a discussion of the Decision of Oct. 16, 2000, in the Administrative Trial Court of Lüneburg, NJW 54 (2001), 767).

130. BUNDESTAGSDRUCKSACHE 14/4530, at 9.

131. *Id.* at 66.

treatments in the relevant academic literature decades ago in Germany.<sup>132</sup> Under these circumstances, it is even perplexing that the majority opinion in the Headscarf Decision speaks only generally about a “piece of clothing” [*Kleidungsstück*] and compares this with a simple Christian or Muslim piece of jewelry on a necklace. In this respect, the court surpasses even France’s *laïcité*,<sup>133</sup> which exempts normal pieces of jewelry that are not ostentatiously large from the prohibition of religious symbols at school.

*B. Why the Dissent Got It Right*

In accord with the dissenting opinion,<sup>134</sup> it is crucial to distinguish between citizens who are subject by law to compulsory education in public schools on the one hand, and applicants for positions as teachers who have voluntarily chosen to become part of the state apparatus as civil servants in those state schools, on the other. Previously—and irrespective of differing legal rationales—it was undisputed that a civil servant could not rely to the same extent on the effect of fundamental rights that guarantee freedom as could the normal citizen.<sup>135</sup> A citizen’s fundamental rights are directed against the state, and the school teacher, as part of the state apparatus, is a primary addressee of that citizen’s fundamental rights. Naturally, the teacher also has fundamental rights. The teacher’s rights are not dismissed out of hand. But they experience a limitation in the interest of the civil servant’s position; the extent of the limitation depends on the nature of the office in question. Teachers carry their own pedagogical responsibility, not in the cognition of their own freedom, but rather on behalf of the state and under its control. The dissenting opinion expresses this idea.

The Decision of the Federal Constitutional Court does not dispute this in any way. The court merely explains that the formulation of the duties of civil servants cannot be substantiated by state administrative channels, as has previously been the case. The actual loser in this Decision, therefore, is the state administration.

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132. See generally ERWIN FISCHER, *VOLKSKIRCHE ADE! TRENNUNG VON STAAT UND KIRCHE* [*VOLKSKIRCHE ADE! THE SEPARATION OF CHURCH AND STATE*] (4th ed. 1993).

133. See *infra* Part IV.A for a discussion of French secular humanism, or *laïcité*.

134. See *supra* text accompanying notes 93–108.

135. See, e.g., Decision of Dec. 21, 1977, BVerfGE 47, 46; Decision of June 22, 1977, BVerfGE 45, 400; Decision of Jan. 27, 1976, BVerfGE 41, 251; Decision of Dec. 6, 1972, BVerfGE 34, 165.

The court is demanding a shift of importance from the executive to the legislative branch.<sup>136</sup> The court does not dispute that the state regulates the uniform loyalty to the law and the constitution of the administration with the duties of civil servants in the domestic sphere. The only question is how far the state regulation must go; that is, how much discretion does the hiring official in the field have?

The scope of civil servants' fundamental rights has been hammered out in the debate surrounding what has previously been termed "special relationships of power" [*Besondere Gewaltverhältnisse*]. But the term "special relationship of power" became uncommon in constitutional jurisprudence because a relation of power can be associated with a contradiction to a relationship of law [*Rechtsverhältnis*].<sup>137</sup> That is why other terms became common—without harming the substantive meaning—such as "special relationships of law" [*Sonderrechtsverhältnisse*], "special connection" [*Sonderbindung*], "heightened relationship of dependence" [*gesteigertes Abhängigkeitsverhältnis*], "special relationship of duties" [*besonderes Pflichtenverhältnis*], and "special status" [*Sonderstatus*]. All of these terms still describe relationships of law "that are characterized by an especially close connection of the individual who stands in such a position through state power."<sup>138</sup> The relationship of the civil servant and the school always appears next to the relationship of the soldier and of the prisoner to the state in this context of special relationships that might affect the fundamental rights of those involved in the relationships.

Undoubtedly, fundamental rights are still valid even in these special relationships.<sup>139</sup> But the nature of their validity constitutes a

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136. Cf. Headscarf Decision, BVerfGE 108, 282 (336), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02, para. 131 (Jentsch, Di Fabio & Mellinghoff, dissenting).

137. Wolfgang Loschelder, *Grundrechte im Sonderstatus* [*Fundamental Rights in the Special Status*], 5 HANDBUCH DES STAATSRICHTS [HANDBOOK OF STATE LAW] § 123 n.6 (1992); see also KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] marginal no. 321 (20th ed. 1995).

138. 1 INGO VON MÜNCH, GRUNDGESETZKOMMENTAR [COMMENTARY ON THE BASIC LAW] Vorb. arts. 1–19, marginal no. 59 (5th ed. 2000); see also CHRISTIAN STARCK, in 1 GRUNDGESETZKOMMENTAR [COMMENTARY ON THE BASIC LAW] art. 1, marginal no. 255 (Von Mangoldt et al. eds., 4th ed. 1999).

139. See Loschelder, *supra* note 137, § 123 n.6; see also HESSE, *supra* note 137, at marginal no. 321. Older legal perspectives were overcome especially in the jurisprudence of the Federal Constitutional Court. See, e.g., Strafgefangenen-Entscheidung [Prisoner Decision] (Mar. 14, 1972), BVerfGE 33, 1. For expressions of this change in the area of public schools,

legal problem. Here we are obviously dealing with legal relationships that demand a special type of protection of freedom since their nature differs from the general relationship of citizens to the state. It would exceed the comprehensive legal bounds of state power if fundamental rights could be restricted arbitrarily or by discretion in such relationships of special status. Therefore, in the words of the Federal Constitutional Court, even in such special relationships, a restriction of fundamental rights may be considered

only if the restriction is indispensable for the achievement of the community oriented goals covered by the value regime of the Basic Law and in constitutional forms provided for there. . . . Thus, it may only occur through a law or on the basis of a law . . . , which will, however, not be able to dispense with blanket clauses that are as narrowly tailored as possible.<sup>140</sup>

Examples of such “constitutional forms” provided for in the Basic Law for justifying restrictions of fundamental rights within these special relationships include constitutional determinations for the military,<sup>141</sup> for the establishment of the civil service,<sup>142</sup> for the

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see Decision of Oct. 20, 1981, BVerfGE 58, 257; Decision of Dec. 21, 1977, BVerfGE 47, 46; Decision of June 22, 1977, BVerfGE 45, 400; Decision of Jan. 27, 1976, BVerfGE 41, 251; Decision of Dec. 6, 1972, BVerfGE 34, 165.

140. Prisoner Decision, BVerfGE 33, 1 (11) (“nur dann in Betracht, wenn sie zur Erreichung eines von der Wertordnung des Grundgesetzes gedeckten gemeinschaftsbezogenen Zweckes unerlässlich ist und in den dafür verfassungsrechtlich vorgesehenen Formen geschieht. . . . also nur durch Gesetz oder auf Grund eines Gesetzes . . . , das allerdings auf—möglichst eng begrenzte—Generalklauseln nicht wird verzichten können”).

141. GG art. 17a. This article provides:

(1) Laws concerning military services and alternative service may by provisions applying to members of the Armed Forces and of alternative services during their period of military or alternative service, restrict the basic right freely to express and to disseminate opinions by speech, writing, and pictures (Article 5, paragraph (1) first half-sentence), the basic right of assembly (Article 9), and the right of petition (Article 17) insofar as it permits to address requests or complaints jointly with others.

(2) Laws for defense purposes, including the protection of the civilian population may provide for the restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

142. GG art. 33, paras. 4–5. These paragraphs determine that

(4) The exercise of state authority as a permanent function shall as a rule be entrusted to members of the public service whose status, service and loyalty are governed by public law.

(5) The law of the public service shall be regulated with due regard to the traditional principles of the permanent civil service.

public school system,<sup>143</sup> and for the penal system.<sup>144</sup> Thus, the scope of fundamental rights is restricted by general rules in these “state internal areas” [*staatlichen Innenbereichen*] of particular obligation. Naturally, the restriction will conform to the characteristics of the particular state-organized sphere.

Case law has deepened the legal questions surrounding the relationships of special status. Until recently, many have taken for granted that only “material” questions regarding these relationships should be reserved for the legislature.<sup>145</sup> Certain specific duties are circumscribed by these general rules even in civil service and education law. However, details about the specific duties necessarily rest with administrative bodies.

The headscarf conflict repeats this debate about what role the legislature plays in this context, and the court has apparently assumed the equality of the fundamental rights of civil servants, on the one hand, and of citizens who are subject to state compulsion

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143. GG art. 7. This article concerns the State’s role in education in Germany:

- (1) The entire education system is under the supervision of the state.
- (2) The persons entitled to bring up a child have the right to decide whether they shall receive religious instruction.
- (3) Religious instruction forms part of the ordinary curriculum in state and municipal schools, excepting secular schools. Without prejudice to the state’s right of supervision, religious instruction is given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.
- (4) The right to establish private schools is guaranteed. Private schools as a substitute for state or municipal schools, require the approval of the state and are subject to the laws of the Laender. This approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their teaching staff, and if a segregation of the pupils according to the means of the parents is not promoted. This approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.
- (5) A private elementary school shall be admitted only if the educational authority finds that it serves a special pedagogic interest or if, on the application of persons entitled to bring up children, it is to be established as an interdenominational or denominational or ideological school and a state or municipal elementary school of this type does not exist in the community.
- (6) Preparatory schools remain abolished.

144. GG art. 74, no. 1 (“Concurrent legislative powers extend to the following matters: 1. civil law, criminal law and execution of sentences, the system of judicature, the procedure of the courts, the legal profession, notaries and legal advice . . .”).

145. Decision of Dec. 21, 1977, BVerfGE 47, 46 (78–79); Decision of June 22, 1977, BVerfGE 45, 400 (417); Decision of Jan. 27, 1976, BVerfGE 41, 251 (259); Decision of Dec. 6, 1972, BVerfGE 34, 165 (192).

(students in obligatory schools, prisoners in the penal system, etc.),<sup>146</sup> on the other. It seems to me that rather than equating the fundamental rights of these two, the court should have counted teachers as representatives of those owing fundamental rights and not as those who possess claims for freedom that are generally directed against the state. I also question whether it is helpful in a system such as the public school system to reserve material questions of education law to the legislature under the theory of essentiality [*Wesentlichkeitstheorie*].<sup>147</sup> The result will be a de facto limitation of the freedom of those subject to state compulsion in these areas and for whose benefit the theory of essentiality—the legal reservation of material questions to the legislature—has been expanded into education law. It has the effect of making obligatory state schools available to teachers as a stage on which they can develop their personalities through constitutionally protected fundamental rights, independent of the democratically determined school system. German schools have not experienced problems in this area before; contrary to many of its neighbors, Germany enjoys peace at school.<sup>148</sup>

#### IV. HEADSCARVES IN FRANCE

Understandably, an investigation of the headscarf debate shifts from Germany to France.<sup>149</sup> The headscarf has been the cause of disturbance and controversy in the public schools in France for approximately the last twenty years. And as recently as February 10, 2004, a so-called *laïcité* law has passed the National Assembly in its first reading. It might seem at first blush that Germany could profit

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146. For a general treatment, see Böckenförde, *supra* note 28.

147. For a discussion of the *Wesentlichkeitstheorie*, or the “theory of essentiality,” see *supra* note 82 and sources cited there.

148. Compare *infra* Part IV for a treatment of the situation in France.

149. See Werner Heun, *Die Religionsfreiheit in Frankreich* [*Religious Freedom in France*], ZEVKR 49 (2004), 273; cf. Brigitte Basdevant-Gaudemet, *Staat und Kirche in Frankreich* [*Church and State in France*], in STAAT UND KIRCHE IN DER EUROPÄISCHEN UNION [CHURCH AND STATE IN THE EUROPEAN UNION] 127 (Gerhard Robbers ed., 1995); René Metz, *Staat und Kirche in Frankreich. Auswirkungen des Trennungssystems—neuere Entwicklungstendenzen* [*Church and State in France. Effects of the System of Separation—New Developmental Trends*], ESSGESPR. 6 (1972), 103. See generally AXEL FRHR. VON CAMPENHAUSEN, STAAT UND KIRCHE IN FRANKREICH [CHURCH AND STATE IN FRANCE] (1962), also published in French as L'ÉGLISE ET L'ÉTAT EN FRANCE (1964).

from the experiences in France. But this is not so since the systems differ so widely from each other.<sup>150</sup>

*A. Background to France's Approach to the Headscarf Problem*

According to its Constitution of 1958, the French Republic is a secular republic, “une République . . . laïque.” A radical separation of church and state has prevailed for the last one hundred years in France.<sup>151</sup> The reasons for this stem from an understanding of the laicism, or the secularism, that banished religion from the public sphere and state institutions, especially from the public schools, and that prescribed ignoring religion and oppressing its expression.<sup>152</sup> While religious freedom reigns in Germany and every individual has the right “to orient his whole bearing on the teachings of his faith and to act according to his inward and outward faith and convictions,”<sup>153</sup> French law relegates the exercise of religion to the private sphere. Accordingly, even Muslim schoolchildren in France have been forbidden to express their religious conviction as adherents of Islam by wearing a headscarf.

It is difficult to understand this radically different state of affairs between Germany and France without some historical insight.<sup>154</sup> Ultra-Catholic and anticlerical excesses had ruptured French society since the French Revolution.<sup>155</sup> The separation law of December 9, 1905,<sup>156</sup> was meant to take care of this poisoning conflict once and for all by forbidding any sort of recognition or support of churches

150. VON CAMPENHAUSEN, LAW OF CHURCH AND STATE, *supra* note 1, at 393–407.

151. *See generally* VON CAMPENHAUSEN, *supra* note 149.

152. *Id.* at 86–113.

153. Decision of Oct. 19, 1971, BVerfGE 32, 98 (106) (“sein gesamtes Verhalten an den Lehren seines Glaubens auszurichten und seiner inneren und äußeren Glaubensüberzeugung gemäß zu handeln”); *see also* Decision of Oct. 16, 1968, BVerfGE 24, 236 (246).

154. *See generally* VON CAMPENHAUSEN, LAW OF CHURCH AND STATE, *supra* note 1, at 393–407. *See also* the recent sources listed in Heun, *supra* note 149.

155. CULTURE WARS. SECULAR-CLERICAL CONFLICT IN NINETEENTH-CENTURY EUROPE (Christopher Clark & Wolfram Kaiser eds., 2003); STATHIS N. KALYVAS, THE RISE OF CHRISTIAN DEMOCRACY IN EUROPE (1996); HUGH MCLEOD, RELIGION AND THE PEOPLE OF WESTERN EUROPE 1789–1989 (1997).

156. Loi du 9 décembre 1905 [Law of Dec. 9, 1905], C. adm. 787 (Fr.) (23rd ed. 1994) [hereinafter Law of 1905], *reprinted in German in* GIACOMETTI, QUELLEN ZUR GESCHICHTE DER TRENNUNG VON KIRCHE UND STAAT [SOURCES ON THE HISTORY OF THE SEPARATION OF CHURCH AND STATE] 272 (1926); *see also* Hanna Clayson Smith, Comment, Liberté, Egalité, et Fraternité at Risk for New Religious Movements in France, 2000 BYU L. REV. 1099, 1106–08 (introducing the Law of 1905).

by the state and by declaring anything religious to be a private matter.<sup>157</sup> This approach overlooked the fact that, while the state and church *institutions* can indeed be totally separated, this does not work for people because an individual can be both a citizen and a member of a religion.<sup>158</sup> Even the external disentanglement produced unanticipated problems. For example, the cathedrals and churches nationalized during the French Revolution are still owned by the state even today. They are carried by the state but used by the Catholic Church.<sup>159</sup> Should they be closed? This was actually threatened at one point.<sup>160</sup> This and many other repugnant developments were gradually curbed by thoughtful adjudication, especially by the Conseil d'État.<sup>161</sup> The principle of radical laicism, or secularization, transformed into the more moderate principle of *laïcité*,<sup>162</sup> which in many respects corresponds to the concept of neutrality in matters of religion and worldview.

The present situation in France is livable, since legal or merely factual breaches of the hallowed state-separation principle have mitigated its restrictions on religious freedom. Such breaches of the strict principle include, among other things, public schools granting one free day per week for the purpose of making it possible for students to obtain religious education outside of school. The situation has also been relaxed by the emigration of a large portion of society out of the public schools and into private, state-subsidized parochial schools. This accords with the modern understanding of religious freedom but not with the secularization principles of the

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157. Metz, *supra* note 149, at 103.

158. *Id.*

159. For this reason, the financing prohibition contained in the Law of 1905 could not be complied with in the manner prescribed in the law from the very beginning. Further ruptures have come in the course of the last ninety-nine years. See A. BOYER, LE DROIT DES RELIGIONS EN FRANCE [THE RIGHT OF RELIGIONS IN FRANCE] 126 (1993); Basdevant-Gaudemet, *supra* note 149, at 141.

160. The closing of these churches was prevented at the last minute by the Law of Jan. 2, 1907, which hardly revealed that something substantive was being revised. See VON CAMPENHAUSEN, *supra* note 149, at 7–9.

161. *Id.* at 116.

162. For a succinct definition of *laïcité*, see Smith, *supra* note 156, at 1102 n.11 (“Translated literally from the French, *laïcité* means ‘secularism.’ Others have translated *laïcité* to mean the French idea of ‘secular humanism,’ which embodies a set of political, philosophical, and, often, antireligious principles.” (citations omitted)); see also Jean Baubérot, *Secularism and French Religious Liberty: A Sociological and Historical View*, 2003 BYU L. REV. 451; Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. REV. 637.

separation law of 1905, which have never been abrogated.<sup>163</sup> Rather, these principles live on latently in French society. Thus, laicism, or secularization, continues to pose a threat as an exclusionary principle that curtails religious freedom.<sup>164</sup>

Jacques Chirac, the French President, clearly demonstrated the potential threat of France's latent laicism in his speech of December 17, 2003. In the name of toleration and religious freedom, President Chirac rose up the standard of *laïcité* and demanded respect for it.<sup>165</sup> In doing so, he did not appeal to what Germans refer to as the religious/worldview neutrality [*die religiös-weltanschauliche Neutralität*] of the schools; rather, he plead for a conception of public schools as a type of republican taboo zone, a "sanctuary"<sup>166</sup> from which anything religious should be completely banned.

In this context, the new direction of recent French legislation belongs in the gestalt of the so-called *laïcité* law. Previously, the French legislature had hid behind the Conseil d'État, France's pre-enforcement constitutional court. But the Conseil d'État has emphasized the principle of religious freedom and has only disallowed the wearing of headscarves in public school buildings when accompanied by provocative behavior.<sup>167</sup> Schoolmasters had been given broad discretion to decide individual cases as they came up.<sup>168</sup> But the pressure of militant Islamic organizations and the threat of Islamicization have caused headmasters to shrink from the responsibility of suspending such students from school. It is on this background that the French are creating this new *laïcité* law.

### *B. Germany Should Not Take the French Approach*

The legal situations in France and Germany are fundamentally different. In Germany, which in comparison to other European

163. See Metz, *supra* note 149, at 142–43.

164. See VON CAMPENHAUSEN, *supra* note 149, at 156; Heun, *supra* note 149, at 283; Axel Frhr. von Campenhausen, „Laizismus,” in 1 EVANGELISCHES STAATSLEXIKON col. 1951 (3d ed. 1987).

165. See *Respekt der Laizität* [Respect *Laïcité*], FRANKFURTER ALLGEMEINE ZEITUNG FRANKFURT GENERAL NEWSPAPER], Jan. 29, 2004.

166. *Id.*

167. Theodore Dalrymple, *France's Headscarf Problem*, CITY J., Apr. 23, 2003, at [http://www.city-journal.org/html/eon\\_4\\_23\\_o3td.html](http://www.city-journal.org/html/eon_4_23_o3td.html).

168. *Nicht überall ein Konfliktstoff* [Not Everywhere Material for Conflict], SPIEGEL ONLINE, Sept. 24, 2003, at <http://www.spiegel.de/unispiegel/studium/0,1518,266948,00.html> (on file with the BYU Law Review).

countries has long been a model country in the field of religious freedom,<sup>169</sup> such mismatched fragments from the French experience cannot be simply adopted, especially since France espouses a more limited concept of religious freedom.<sup>170</sup> The separation of church and state—that is, the autonomy and independence of state and church institutions—has thrived in Germany since 1919. In Germany, both church and state work together to further the citizens' interest in matters that intersect the responsibilities of both institutions. This was prescribed by the Weimar Constitution of 1919 as much as it is by the Basic Law of today.<sup>171</sup> Furthermore, the German prohibition on teachers wearing headscarves underscores the religious/worldview neutrality of the state—in this instance in the form of a teacher as the representative of the state school authority. France, on the contrary, is regulating the apparel of the schoolchildren and engaging in semantic subtleties to differentiate between jewelry and other adornments that are to be either allowed or disallowed in the future. It should not go that far in Germany.

#### V. CONCLUSION

The *Land* legislatures, which want to secure peace in their respective *Länder* by maintaining the status quo of not allowing teachers to wear headscarves, are not to be envied in their task. In contrast to other decisions, the court here provides no criteria by which a legislature may correctly enact a prohibition after striking down the administrative regulation employed by the state of Baden-Württemberg as insufficient to create a sufficient legal basis.<sup>172</sup> New problems will also arise from the demand for concretization of

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169. AXEL FRHR. VON CAMPENHAUSEN, 6 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [HANBOOK OF THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] § 136, marginal n. 6 (Josef Isensee & Paul Kirchhof eds., unrevised 2d ed. 2001).

170. Heun, *supra* note 149, at 273, 276–79.

171. Christoph Link, *Ein Dreivierteljahrhundert Trennung von Kirche und Staat in Deutschland* [Three-Quarters of a Century of the Separation of Church and State in Germany], in FS THIEME 98 (1993). For a discussion of the principle differences in the systems of separation in France, the United States, the former eastern bloc, and Germany, see VON CAMPENHAUSEN, LAW OF CHURCH AND STATE, *supra* note 1, at 393–407. See generally Axel Frhr. von Campenhausen, *Die Trennung von Staat und Kirche in Deutschland und das kirchliche Selbstbestimmungsrecht* [The Separation of Church and State in Germany and the Church's Right of Self Determination], ZEVKR 47 (2002), 359–68.

172. See *supra* text accompanying notes 91–92.

constitutional limitations in new laws.<sup>173</sup> In the interest of equality, the different branches of the administrative state must be provided with specific regulations as well. Restrictions on religious freedom that are necessary in the civil service will then have to be weighed against the individual's claim to fundamental rights. The equality issue sharpens the problem "because the legislative branch will have to develop consistent substantive distinguishing criteria for specific provisions that will need to include certain branches of the civil service, for example teachers, differently than other civil servants."<sup>174</sup>

Thus, it is true that a treatment providing a satisfactory result for problematic cases always becomes more complicated in the future. Previously, the administrative apparatus has been charged with determining the legal qualification and eligibility of applicants for positions in the civil service. It is unclear how a legislature—which is now required to formulate generally applicable and abstract regulations on the eligibility of civil servants for employment by the state—can be expected to do a better job of it. "An increase in legal certainty and equity in individual cases can hardly result from this Decision."<sup>175</sup>

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173. Cf. Headscarf Decision, BVerfGE 108, 282 (336–37), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02, para. 131 (Jentsch, Di Fabio & Mellinghoff, dissenting) (criticizing the majority for demanding the *Länder* to legislate in an area in which they explicitly did not want to legislate and that the new law must "concretize constitutional limitations" without giving any criteria by which to do so).

174. Karl-Hermann Kästner, *Darf eine muslimische Lehrerin im Unterricht das Kopftuch tragen? Anmerkung zum Urteil des BVerfG vom 24.9.2003 [May a Muslim Schoolteacher Wear a Headscarf While Teaching? Commentary on the Decision of the Federal Constitutional Court of Sept. 24, 2003]*, JZ 58 (2003), 1178 (1180) ("denn die Legislative muss für spezifische Vorschriften, welche einzelne Zweige des öffentlichen Dienstes, wie beispielsweise die Lehrerschaft, anders erfassen sollen, als sonstige öffentliche Bedienstete, konsistente sachliche Differenzierungskriterien entwickeln").

175. *Id.* ("Ein Zuwachs an Rechtssicherheit und Einzelfallgerechtigkeit dürfte sich hierdurch schwerlich ergeben.").

