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TEACHERS' RELIGIOUS HEADSCARVES IN GERMAN CONSTITUTIONAL LAW

Abstract

In 2015 the German Federal Constitutional Court decided that Muslim teachers who wished to wear a headscarf in class must generally be allowed to do so : for any prohibition to be justified the headscarf had to cause a tangible danger of unrest in the school or the school district. The Court should have paid more attention to the interests of pupils to a productive and happy education, but it could not because there is no right to school education in the Basic Law to balance against religious rights. This case therefore highlights a major danger of rights catalogues – something important might be left out. Schools already face enough challenges without having to monitor the effect of headscarves in, for example, areas with a high Muslim population in which the local community may be divided on the question, and needing to take (unspecified) action. Furthermore, adolescence is already difficult enough, especially in a minority group, without the further pressure of teachers modelling behaviour which some female pupils may feel uncomfortable with. On the other hand, the Court was right to hold that it had not deviated from the *ratio decidendi* of an earlier decision.

1. Introduction

The German Federal Constitutional Court's decision of 27 January 2015¹ on the permissibility of the wearing of religiously inspired headscarves by schoolteachers raises interesting questions of both constitutional process and basic religious and educational rights.

¹ BVerfGE 138, 296; decision published in BGBl 2015 I 429. A prelude to this decision was the Court's determination that Justice Kirchhof was disqualified for apprehended bias from sitting on the case owing to his extensive involvement in developing laws such as the one under consideration : BVerfGE 135, 248. That decision is not analysed here. However, it had an interesting sequel : under s 19 (4) of the *Federal Constitutional Court*

It raises questions of constitutional process because the Court has been accused of departing from an earlier decision of June 2003 without following the proper process – namely, convening an *in banco* (“plenary”) session of all Judges of both permanent panels (“Senates”) of the Court. This is required under s 16 of the *Federal Constitutional Court Act* when one Senate wishes to depart from the *ratio decidendi* of a decision of the other. In the case at hand the issue is whether the First Senate, sitting in 2015 and mostly set up to deal with basic-rights cases, departed from the law laid down in 2003 by the Second Senate, mostly concerned with questions of governmental functioning.² The Second Senate had held in 2003 that the school authorities could not prevent a teacher from wearing a headscarf without a sufficient basis in the written law, and this was thought to imply that a law permitting such general prohibitions to be issued would be valid, whereas the First Senate held in 2015 that such prohibitions were unconstitutional unless there were a concrete danger of disturbances at a particular school or in a particular school district.

German Courts in general – and the Federal Constitutional Court is no exception – are notorious for their *horror pleni*, a strong disinclination to enlarge the normal Bench into an *in banco* or plenary Bench.³ Rather, decisions that vary from prior case law are frequently said to be continuations of the previous jurisprudence or specific applications of it rather than the changes of course that they actually are. In this case, however, it will be pointed out that there was in fact no departure in the First Senate’s 2015 decision from the earlier (2003) *ratio decidendi* of the Second Senate. While care must always be taken to ensure that the different cultural and statutory contexts are taken into account in making such comparisons, common-law insights can be applied without hesitation to the German situation given that Germany partly borrowed the rule about *rationes decidendi* of earlier decisions from the common-law world anyway, and the question is largely a matter of logical necessity rather than anything that is particularly culturally sensitive.

Act, a replacement Judge had to be chosen by lot from the other Senate of the Court, in this case the Second Senate. The lot fell upon Justice Hermanns, who, as we shall see, dissented, and thus voted to uphold her Senate’s understanding of the law expressed in the 2003 case.

² Ernst Benda, Eckart Klein & Oliver Klein, *Verfassungsprozeßrecht : ein Lehr- und Handbuch* (3rd ed., C.F. Müller, Heidelberg 2012), pp. 73f. The precise division of labour is as set out in s 14 of the *Federal Constitutional Court Act*. For a brief explanation in English of the Senates, see Donald Kommers/Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., Duke U.P., Durham 2012), pp. 18-20.

³ Indeed, a plenary session has occurred only five times since the establishment of the Federal Constitutional Court in 1951 : see the descriptive list in Christian Burkiczak in *id. et al.* (eds.), *Bundesverfassungsgerichtsgesetz* (C.F. Müller, Heidelberg 2015), pp. 205-210.

On the substantive point, there is much more room for criticism. The First Senate's decision of 2015 was to the effect that statutes could not prohibit the wearing of headscarves by teachers based solely on the need to maintain the state's religious neutrality or the abstract danger of disquiet or disturbances at their appearance in schools; rather, there would need to be a concrete, tangible danger of such difficulties. While I agree that the state's religious neutrality is not endangered by the appearance of headscarves on some of its teachers' heads – and Germany, unlike France, does not enforce rigid laicism⁴ – the requirement of a concrete rather than an abstract danger of disquiet or even disturbances at schools sets the bar too high. At the very least, voices from the practising teaching profession raising problems in real schools caused by headscarves should not have been ignored.

For schools do not exist for teachers' self-realisation, let alone for them to be able to make an admittedly silent public parade of their religious views in front of pupils. While pupils can and must be expected to cope in school with some degree of the very societal diversity they encounter outside school, schools exist solely for young people's and not for teachers' benefit, and this perspective was insufficiently emphasised in the First Senate's 2015 decision.

This has occurred, in the end, not because of any particularly gross failure on the part of the Court, but because only the teachers feature in the Basic Law's catalogue of rights, not schoolgirls (in their capacity as such). They are invisible to German constitutional law except as bearers of the comparatively unimportant negative freedom of religion; their rights to a productive education in peace and security do not have constitutional status. As a result, not only schoolgirls but the vast majority of the practising teaching profession, which has quite enough difficulties on its plate already, has been let down by the law. In the end, therefore, this article illustrates the danger of leaving out important rights from a rights catalogue.

⁴ Thomas Traub, „Abstrakte und konkrete Gefahren religiöser Symbole in öffentlichen Schulen“ NJW 2015, 1338, 1340f. On 26 November 2015, the European Court of Human Rights upheld a French law in *Ebrahimian v. France* [2015] ECHR 1041 which had resulted in the loss of employment of a hospital social worker who wished to continue wearing Islamic clothing. See also Sabina Garahan, Case Note, (2016) 5 *Oxford Journal of Law and Religion* 365. However, it is not necessary to go into the details of this decision here given that Germany is not a country in which such a strict separation is enforced and the provisions of the German Basic Law differ from those applied in that case.

2. Summary of decisions

The story starts with the Second Senate's decision of 3 June 2003⁵ which resulted from a constitutional complaint by a would-be teacher in the south-western State of Baden-Württemberg. Employment as a state school teacher was denied to her by the State when she stated that she would not teach without her headscarf. This occurred after she had passed all necessary examinations and practical training courses. The ordinary administrative Courts dismissed her suits relying on the general legal requirement for those applying for government jobs to be capable of performing the duties of the offices to which they seek appointment.

The Second Senate of the Federal Constitutional Court held, by five votes to three, that such a restriction on the trainee teacher's freedom of religion could be justified only by a specific law on the point, not by the general requirement of competence and suitability for the position. This was because of the importance of the right of religious freedom and religious practice in Article 4 (1) and (2) of the Basic Law as well as the right of all Germans to be treated equally in applying for government positions which is guaranteed by Article 33 (2).⁶ It was also necessary in order to ensure that there was no religious discrimination.⁷

The majority of the Second Senate added, however, this remark :

The State legislature is competent to, and may choose to enact the currently non-existent legal basis [for prohibiting the headscarf], by, for example, newly determining, within the constitutional boundaries, the permissible level of religious allusions in a school. In so doing it must take into account, in a suitable way, the freedom of belief of the teachers as well as of the affected pupils, the right of parents to bring up their children and the state's duty of neutrality towards ideologies and religions.⁸

⁵ BVerfGE 108, 382.

⁶ See especially BVerfGE 108, 282, 311.

⁷ BVerfGE 108, 282, 313.

⁸ BVerfGE 108, 282, 309.

In response to this decision and this *dictum*, various State legislatures duly enacted more specific legal bases for the prohibition of the headscarf. The State of Berlin, for example, enacted a law on 27 January 2005,⁹ ten years to the very day before the second decision, that of the First Senate, threw all such laws into grave doubt. The law prohibited higher office-bearers in the Courts and officials in the prisons and the police (s 1) as well as teachers in state schools, except in religious instruction (s 2), from wearing ‘visible religious or ideological symbols’ showing ‘membership in a particular religious or ideological community’ as well as, specifically, ‘noticeable items of clothing that are invested with a religious or ideological meaning’.

Although the wording of their laws varied considerably, after the 2003 decision a total of eight (of sixteen) German States enacted some sort of law taking up the invitation of the Second Senate to create a proper legal basis for the prohibition of headscarves and other religious apparel.¹⁰ It is remarkable that all of the eight States banning religious apparel were in old western Germany, with the exception of Berlin which is partly western and partly eastern; although three of the western States (Rhineland/Palatinate, Hamburg and Schleswig-Holstein) had no ban, all five eastern States were without one.¹¹ Various explanations could be suggested for this, such as there being more Muslims in the western States and especially in Berlin, but there is no obviously right explanation and it is not a topic that can be gone into in a legal journal.

It was the version current in the State of North Rhine/Westphalia which was the subject of the challenge decided before the First Senate in 2015. This was somewhat less specific than the Berlin law and did not refer to clothing at all; rather, it stated merely, so far as is presently relevant, that there were to be no religious manifestations by teachers and support staff with teaching-like roles, such as school counsellors, that were apt to endanger or disturb the peaceful functioning of schools, in particular by calling into question human dignity, equality or freedom and democracy. There was an exception for Christian and Western values in supposed accordance with the values proclaimed in

⁹ GVBl Berlin 2005, 92. In KG, NStV-RR 2013, 156, a convicted accused appealed unsuccessfully on the ground that a Judge at his trial had worn a hijab.

¹⁰ Guy Beaucamp/Jakob Beaucamp, „*In dubio pro libertate* : Überlegungen zur Kopftuch- und Burkaverbotsdebatte“ DöV 2015, 174, 176; Johann Ruben Leiss, “One Court, Two Voices” (2015) 16 *German Law Journal* 901, 913.

¹¹ There is a helpful list and map at <http://www.spiegel.de/schulspiegel/wissen/kopftuch-verbot-diese-bundeslaender-muessen-ihre-gesetze-pruefen-a-1023333.html>.

Articles 7 and 12 (6) of the State Constitution (designed to preserve nuns' habits and also the wearing of the Jewish skullcap – not a minor point in Germany).¹²

That exception was an easy target and held invalid by the First Senate under the equality provisions of the Basic Law. However, the provisions prohibiting religious manifestations were upheld but, by six votes to two, the First Senate in its decision of 2015 required them to be read down in order to necessitate that there should be a concrete and not a merely abstract danger to the peaceful functioning of the school before a teacher could be prevented from following what she considered a binding religious obligation. Otherwise, it held, a prohibition on clothing would be disproportionate. The Court did however concede some prophylactic margin of appreciation, noting even in a prominent headnote¹³ that a concrete danger in one part of a school district could be met by a ban in the whole school district. It referred as an example to cases in which the correct standard of religious conduct was the subject of 'very controversial' debate which 'seriously' could damage the functioning of the school, and such disputes could be produced or fanned by visible religious practices.¹⁴

¹² Traub, above n 4 at 1340.

Articles 7 and 12 (6) run as follows (a slightly altered version of the official translation, available at https://www.landtag.nrw.de/portal/WWW/GB_II/II.1/OeA/International/en/North_Rhine_Westphalia_Constitution_revised.jsp) :

Article 7

(1) The aim of education shall first and foremost be to instil reverence for God, respect for human dignity and readiness for social interaction.

(2) Young people shall be brought up in a spirit of humanity, democracy and freedom; to be tolerant, to respect the beliefs of others, to act responsibly towards animals and to preserve the fundamental principles of a natural way of life, with love for people and home, in a commonwealth of nations and in a spirit of freedom.

Article 12

(6) Community schools shall teach and educate children together on the basis of Christian educational and cultural values and shall be open to Christian denominations and to other religions and ideological convictions. Denominational schools shall teach and educate children of the Roman Catholic or Lutheran faith or of any other religious community in accordance with the principles of the denomination concerned. Ideological schools, including non-denominational schools, shall teach and educate children in accordance with the principles of the ideology concerned.

¹³ And at [114]. Headnotes are endorsed by the Court itself in Germany.

¹⁴ At [113].

It has to be said that the proportionality point made by the Court did have a substantial justification on the facts. This challenge was actually two challenges, brought by a teacher and a school counsellor; both had been appointed before the law that followed the 2003 decision, and after that the educational authorities had told them that they must comply with it by removing their headscarves. The school counsellor substituted for hers an otherwise unremarkable Basque-style beret and coverings for the throat such as a turtle-necked jumper. Even this aroused objections on the part of the educational authorities. The Court held that when the law was read down properly as it required, neither plaintiff could be prevented even from wearing a headscarf, but it seems extraordinary that a Basque beret could be banned simply because it took the place of an obviously religious headscarf.

The German approach to proportionality is now reasonably well known in the common-law world : testing the proportionality of a law requires a consideration of whether it is apt for the goal pursued; reasonably necessary to promote that goal; and proportionate in the strict sense.¹⁵ The Court indicated its doubts on the reasonable necessity for the law but held that it was clearly disproportionate in the strict sense. It stated :

Bringing religious or ideological references into schools and classrooms on the part of teaching staff can compromise the state's educational function, which must be discharged neutrally, parents' rights to bring up their children and the negative freedom of religion of the pupils. Doing so raises at least the possibility of influencing pupils and of conflicts with parents, which can disturb the peaceful functioning of the school and the discharge of its educational functions. Even religiously motivated clothing of teaching personnel which can be interpreted as proclaiming a faith can have this effect (*cf.* BVerfGE 108, 282, 303). Nevertheless, none of those competing constitutionally entrenched positions has such a weight that a mere abstract danger of their impairment would be capable of justifying a prohibition if on the other side the wearing of religiously laden clothing or symbols is demonstrably to be attributed to a religious command understood as an imperative.¹⁶

¹⁵ There is a recent, concise, witty and expert explanation of this in Gertrude Lübke-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court" (2014) 34 *Human Rights Law Journal* 12.

¹⁶ At [103]. It is not the present author's practice to reproduce mere references in quotations, but an exception is made here because the First Senate is here going out of its way to cite the decision of the Second Senate in 2003 (BVerfGE 108, 282) and thus to assert the continuity of that decision with its.

To explain its view that the countervailing factors did not prevail, the Court pointed out that such symbols were obviously not endorsed by the state; did not involve any active proselytising or indeed any verbal reference to religion at all; would be counter-balanced by the numerous teachers encountered without any religious clothing; and were in common use in the outside world which pupils must also encounter. They also pointed out that the German constitutional order, unlike the French, did not ban all references to religion in the state sphere and there was no right not to be confronted with visual religious symbols in public.

It was on these points that Justices Schluckebier and Hermanns dissented in relation to the outcome and the second plaintiff; they also would have held that the first plaintiff, the one with the Basque beret, had a justified complaint. On the main question of principle, however, they thought that too little weight had been given to the countervailing interests and that it was therefore legitimate to set up a general prophylactic rule. Those two Judges provided a much richer picture of the effect of school years on the personality, stating that school is designed to develop the emotional faculties and the personality as a whole as well as the mind and body.¹⁷ The two dissenters did not ignore the interests of the school pupils in their own education and development just because it is not a constitutionally guaranteed right. School experiences are crucial to every facet of a person's later life and great care has to be taken with every aspect of what happens to adolescents.

That perspective is completely missing from the majority judgment. As the minority also pointed out, teachers are in a special position as authority figures and role models and it is not to the point that pupils will be able to see headscarves on the heads of random people on the street.¹⁸ The minority also referred to the numerous warnings by practising teachers and headmasters that schools should not be expected to cope with these matters by themselves, with individual rules for each school responding to problems as they emerge.¹⁹

¹⁷ At [12].

¹⁸ At [11].

¹⁹ At [15].

3. The precedential point

As noted in the introduction, the law requires the convening of the whole Court *in banco* if one Senate proposes to deviate from the law laid down by the other. In such a plenary sitting both Senates meet jointly in order to resolve the conflict. It is submitted, however, that, despite views to the contrary that have been expressed by some German scholars, the First Senate's decision of 2015 did not deviate from the *ratio decidendi* of the Second Senate's decision of 2003 and the legal obligation to convene a plenary session therefore did not arise.

What has just been said does not represent any form of erroneous or illegitimate imposition of one legal system's categories on to that of another – for exactly the same distinction between *ratio decidendi* and *obiter dictum* is made in Germany in relation to the decisions of the Federal Constitutional Court, in respect of which (unlike in the rest of the legal system) there is a formal binding system of precedent created under s 31 (1) of the *Federal Constitutional Court Act*.²⁰ The textbooks themselves use the terms *ratio decidendi* and *obiter dictum* – my terms are not translations.²¹ Nevertheless, the

²⁰ The provision states: 'The decisions of the Federal Constitutional Court bind all constitutional organs of the Federation and the States and all Courts and authorities'. For explanations in English see Robert Alexy and Ralf Dreier, "Precedent in the Federal Republic of Germany" in N. MacCormick and R. Summers (eds.), *Interpreting Precedents: A Comparative Study* (Ashgate, Aldershot 1997), pp. 26f, 48; Kommers/Miller, above n 2 at 37.

²¹ For example, Christian Hillgruber/Christoph Goos, *Verfassungsprozeßrecht* (4th ed., C.F. Müller, Heidelberg 2015), p. 6; Dieter Hömig in Theodor Maunz *et al.* (eds.), *Bundesverfassungsgerichtsgesetz* (47th update, C.H. Beck, Munich 2015), § 16 p. 11. The Court itself, however, tends to prefer the term *tragende Gründe* to express the idea of *ratio decidendi* (e.g. BVerfGE 96, 375, 404). "Tragen" means to carry or support something, so this phrase might be rendered "the reasons that underpin the decision", or more freely as "the essential reasons". However, no difference in meaning is intended.

The idea of the *ratio decidendi* in German law has mixed German and Anglo-American pedigree. In public law it may be said to be a concept that was brought in only after the War, and the early decisions introducing the concept (BVerfGE 1, 14, 15 headnote 5; BVerfGE 4, 27, 28) involved, as President and Vice-President of the Federal Constitutional Court, the noted comparativist Professor Konrad Zweigert and Dr Rudolf Katz, a German Jew who had spent most of the Nazi period in the United States of America, including a stint at Columbia University. On the other hand, German private law has long contained requirements for Courts to convene plenary sessions of their Senates in cases of disagreement among individual Senates and also to follow the *ratio* of the appeals Court when cases are referred back after appeal hearings (not as a type of generally applicable precedent, but simply in order to have the lower Court apply the appeals Court's reasoning in the case referred back to it rather than re-apply its own views and thus nullify the whole point of the appeal): Civil Procedure Code s 563 (2) and s 132 (2) of the *Law on the Constitution of the Courts*; on their restriction to the *ratio*, see Hans-Joachim Heßler in Richard Zöller *et al.* (eds.), *Zivilprozeßordnung: Kommentar* (31st ed., Otto Schmidt, Cologne 2016), p. 1467; Herbert Mayer, *Gerichtsverfassungsgesetz* (8th ed., C.H. Beck, Munich 2015), p. 934. See further Klaus Rennert, "Historisches zur Bindungswirkung und Gesetzeskraft verfassungsrechtlicher Entscheidungen" *Der Staat* 32 (1993), 526 – referring most notably s 3 (3) of a law of 8 April 1920 (RGBl I 510) which confers the force of statute law on certain decisions of the *Reich* Court; Erwin Riezler, "Ratio decidendi und obiter dictum im Urteil" *AcP* 139 (1934), 161 (the last two words of the article's title mean "in the judgment").

obligation to convene a plenary sitting of the Court when one Senate wishes to deviate from a *ratio decidendi* of the other actually arises from s 16 (1) of the Act given that the Court does not bind itself under s 31 (1).²²

Whether the First Senate had deviated in 2015 from the *ratio decidendi* of the Second Senate in 2003 is a question that was debated in a lively exchange in March 2015 on www.verfassungsblog.de,²³ in which Professor Christoph Möllers of the Humboldt University Berlin was, in my judgment, bested by Dr Mathias Hong of Freiburg. It is certainly true, as Professor Möllers pointed out, that in its 2003 decision the Second Senate referred specifically to the need for a statutory basis for dealing with abstract dangers by prohibition; indeed, the majority said at one point in its judgment :

If teachers bring religious or ideological references into school and their teaching, that can impair the state's function of education which is to be fulfilled neutrally, parents' rights to bring up their children and the negative freedom of religion of the pupils. Doing so raises at least the possibility of influencing pupils and of conflicts with parents, which can lead to a disturbance of the school's peace and of the fulfilment of the educational function of the school. Religiously motivated clothing of teachers which is to be interpreted as proclaiming a religious conviction can have these effects. But these are only abstract dangers. If such bare possibilities of endangerment or of conflict by reason of the appearance of a teacher, not a concrete form of behaviour such as an attempt to influence or even to proselytise the pupils entrusted to care, are to be adjudged a breach of a civil servant's duties or a suitability-based

²² Section 16 (1) however states only that the obligation exists when one Senate disagrees 'on a legal issue with the view of the law contained in a decision of the other Senate'; the restriction of the obligation to proposed departures from earlier *rationes decidendi* of the other Senate has been read in by the Court's own case law.

Ralf Eschelbach in Dieter Umbach *et al.* (eds.), *Bundesverfassungsgerichtsgesetz* (2nd ed., C.F. Müller, Heidelberg 2005), pp. 328f advocates abandoning that case law and requiring the plenum to be convened for *obiter dicta* as well given that they are often treated effectively as binding (or are relied on by legislatures, we might add, as in the case presently under discussion). There would be an obvious need, if that course were adopted, to define when *obiter dicta* were important enough to warrant such treatment.

²³ <http://www.verfassungsblog.de/category/schwerpunkte/der-kopftuch-beschluss-zwei-senate-zwei-gerichte-de/>

obstacle to being employed as a civil servant, this requires a sufficiently clear statutory authorisation given that a restriction on the unrestricted basic right in Article 4 (1) and (2) of the Basic Law is involved. That is not present here.²⁴

However, while the Court thus clearly mentioned the concept of an abstract danger and stated that it could be dealt with by a law, this distinction was not necessary for its decision²⁵ : the Court was not called upon to decide whether an abstract danger would suffice for a statutory prohibition despite the basic rights. The Court was called upon to decide whether there was a sufficient legal basis for measures taken against a particular person, namely the refusal to allow her to become a teacher because of her decision about the headscarf. It held that there was no valid legal basis for doing so, because a specific law would be required and there was no such law. Anything the Court added about the validity of such a law was not necessary for its decision.

The approach of the Federal Constitutional Court itself to determining a *ratio decidendi* is this : could the statements in question be eliminated from the reasoning without affecting the result?²⁶ The need to define a decision's *ratio decidendi* does not arise nearly as often in Germany as it does with us, there being no general doctrine of precedent there, and it will be apparent to any common lawyer that this test will be in need of some refinements, explanations and finesse in its operation which can hardly all be dealt with here; our common-law experience certainly makes us (as are some Germans)²⁷ wary of simple solutions to the problem of finding the *ratio decidendi*. But whatever the defects or need for elaboration that may exist in relation to this basic approach, in this case it is clear that eliminating statements about what sort of law could be validly enacted would not change the result in 2003 because it was based on the fact that there is no such law.²⁸

²⁴ BVerfGE 108, 282, 303.

²⁵ This point is also missed by Leiss, above n 10 at 912.

²⁶ BVerfGE 96, 375, 404 is one of the latest statements of the Court to this effect. See also Kommers/Miller, above n 2 at 19f.

²⁷ Klaus Schlaich/Stefan Koriath, *Das Bundesverfassungsgericht : Stellung, Verfahren, Entscheidungen* (10th ed., C.H. Beck, Munich 2015), p. 348.

²⁸ Benjamin Rusteberg, „Kopftuchverbote als Mittel zur Abwehr nicht existenter Gefahren“ JZ 2015, 637, 639f (also expressing regret that even greater consensus had not been obtained by means of a decision of the plenum, even though one was not required – and thus could probably not have been lawfully convened). See also BVerfGE 132, 1, 4f (if an earlier decision had been reached by a number of alternative pathways, and one Senate wished to deviate from all of them, then it was necessary to convene the plenum, even though each individual pathway could notionally be eliminated from the Court's reasoning without changing the result; the Court reserved its view on what the position would be if deviation from only some pathways of reasoning were proposed).

Comparative law reinforces this conclusion. It would hardly be possible to go into great detail here about the various theories that have been propounded in common-law countries on the identification of the *ratio decidendi*. In a helpful overview and commentary, Professor Horst Lücke has identified

three main approaches : ‘the principle of law propounded by the Judge as the basis of his decision’; the widespread view, of which Julius Stone was a prominent supporter in Australia, which considers the whole notion that a single case could stand for a single *ratio decidendi* as a complete illusion; and the “material facts” theory developed by Goodhart.²⁹

Clearly the second option, whatever else may be said for it, is not available if the law requires us to identify a *ratio decidendi* of a single decision, at least if it is not the case that such a long time has passed that the case has been well digested and is generally accepted to stand for a particular proposition. The first view might lead us naturally to the Court’s headnote, for that has the endorsement of the Court itself in Germany; on the point in question, it states, ‘a prohibition on the wearing of a headscarf by teachers in schools and during instruction has no sufficiently clear statutory basis in the current law of the State of Baden-Württemberg’,³⁰ which makes no reference to the validity of any law that might be passed to correct that situation.

The “material facts” approach gives us no different answer : the material fact was that there was no such law; what such a law would need to state in order to be valid cannot possibly be a material fact but must be purely hypothetical.³¹ ‘If [...] a Judge in the course of his opinion suggests a hypothetical

²⁹ “*Ratio Decidendi* : Adjudicative Rationale and Source of Law” (1989) 1 *Bond Law Review* 36, 38. As can be seen from the original source, I have in my quotation amalgamated two parts of Professor Horst Lücke’s summary of the three views to make the quotation clear. The internal quotation is from J.L. Montrose, “*Ratio Decidendi* and the House of Lords” (1957) 20 *Modern Law Review* 124, 124. Professor Lücke is of German birth but has made his academic career in Australia and was writing about the common-law concept rather than German law specifically in the extract quoted.

³⁰ BVerfGE 108, 282, 282. Although German writers (for example, Andreas Heusch in Dieter Umbach *et al.* (eds.), above n 22 at 517; Christian Pestalozza, *Verfassungsprozeßrecht* (3rd ed., C.H. Beck, Munich 1991), p. 290; Schlaich/Korioth, above n 27 at 349) provide cautions not to use the Court’s own headnote as a substitute for the actual decision, and point out that, although approved by the Court, headnotes cannot automatically be used to determine the *ratio decidendi* and are not written with this issue in mind, this particular headnote seems to represent the decision very well.

³¹ So also Tonio Klein, „Das Kopftuch in Klassenzimmer : konkrete, abstrakte, gefühlte Gefahr?“ *DöV* 2015, 454, 466, who also refers to a newspaper report that convening a plenary session of the whole Court was considered by it but rejected.

fact, and then states what conclusion he would reach if that fact existed, he is not creating a principle', *i.e.* part of a *ratio decidendi*.³² If we, finally, apply a test not mentioned in Professor Lücke's list, namely Wambaugh's inversion test³³ – perhaps the closest to the German approach of testing the dispensability of the statements in question – and reverse the meaning of the Court's pronouncement that a statute could prohibit the headscarf even without a concrete danger, we see that its actual decision in 2003 yet again suffers no change; therefore this test too leads us to the conclusion that that pronouncement was not part of the *ratio decidendi*. Now none of these theories is undisputed or without its weak points, but when all applicable theories point to the same answer that must mean something.

It may well be that the utterance that a law is required for a certain step to be taken sometimes, or even often implies that there is some valid law that can possibly be passed and that will effectively permit the step to be taken – by analogy with what some philosophers of language call an existence presupposition, the presupposition that referring to someone as capable of doing or being something implies their existence at least.³⁴ However, even this is not necessarily so in all conceivable circumstances, and the fact that it is not necessarily so is enough to show that the *ratio decidendi* logically does not include any such presupposition. It is not necessarily so because the question may simply not be before the Court or properly to be decided upon by the Judges there assembled.

Another recent pair of cases also relevant to religion illustrates the point nicely also. In *Williams v. Commonwealth (No. 1)*³⁵ the High Court of Australia held in 2012 that legislation would be needed to

There may be rare cases in which judicial reflections on such a hypothetical might so closely approach a *ratio decidendi* in effect as to be practically indistinguishable from it, such as the legal position of the defendants had there been no exclusion clause in *Hedley Byrne v. Heller* [1964] AC 465; see Rupert Cross, *Precedent in English Law* (2nd ed., Clarendon, Oxford 1968), pp. 83f. However, such cases are the exception that proves the rule : such cases could not arise under the strictly formal test in the German statute as it depends on there being a lower Court which has to choose which of two conflicting statements to follow, the *ratio* of its own earlier decision or what was strictly an *obiter dictum* of the apex Court.

³² Arthur Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930) 40 *Yale Law Journal* 161, 179 – in the constitutional jurisdiction, the (non-)existence of a statute equates to a 'fact'.

³³ This is described and analysed in, for example, Cross, above n 31 at 51-61.

³⁴ See Kai von Fintel, "Would You Believe It? The King of France is Back! (Presuppositions and Truth-Value Intuitions)" in Marga Reimer/Anne Bezuidenhout (eds.), *Descriptions and Beyond* (Clarendon, Oxford 2004). The background is summarised in Ernest Lepore/Barry Smith (eds.), *Oxford Handbook of Philosophy of Language* (Clarendon, Oxford 2006), p. 93.

³⁵ (2012) 248 CLR 156.

authorise spending on a particular activity of the federal government (the school chaplaincy programme) : there being no such legislation, the spending was beyond its powers. In the successor case of 2014, *Williams v. Commonwealth (No. 2)*,³⁶ the Court invalidated the legislation enacted to validate the programme as not authorised under the federal Parliament’s enumerated powers. It seems that there is, in fact, no basis in the federal list of powers which could support such a law.³⁷ There is just no logical contradiction between “legislation is needed” and “this particular law is unconstitutional”, particularly when, as in Germany, one set of Judges appointed to decide on the first question utters the first statement and the other set appointed to decide upon the second utters the second.

This is very far from saying that it is always desirable for such things to occur. Perhaps, as Dr Hong pointed out on *Verfassungsblog*, more caution should be exercised in pronouncing *obiter dicta*. Certainly State legislatures were quite justified in relying upon the Second Senate’s *obiter dictum* of 2003. But the later decision was not in conflict with the *ratio decidendi* of the first, and there was no requirement to refer the matter to the plenary sitting of both Senates.

4. Analysis and criticism

We might begin, on the substantive issue of religious freedom, by asking ourselves why it is that there is so much excitement about a simple piece of cloth on the head. Although many will think it counterintuitive that the creator of the universe has stooped to ordain forms of dress, and that for half only of the human race, such a belief forces no-one else at all to wear particular items of clothing or believe in the same or indeed any creator. In the “German Law Journal”³⁸ Professor Matthias Mahlmann has pointed out that the insistence on the part of some people on wearing a strip of material on their heads is an opportunity for liberal constitutional orders to display their tolerance of diversity and the capacity of the human race to get along despite difference. It also makes sense to choose our

³⁶ (2014) 252 CLR 416.

³⁷ As matters turned out, the programme found a foothold under s 96 of the federal Constitution, which allows the federal government to fund State activities – but only because the States agreed to co-operate, accept the funding and pass it on to schools.

³⁸ “Religious Symbolism and the Resilience of Liberal Constitutionalism : on the Federal German Constitutional Court’s Second Headscarf Decision” (2015) 16 *German Law Journal* 887, 887f.

battles carefully given the numerous challenges now facing Western countries from various sorts of manifestations of Islam.³⁹ There is certainly a lot in all these points, although they could all be addressed to democratically legitimate legislatures as well as to Courts and it goes too far to say baldly that ‘it is not outward appearance but rather human substance that counts’⁴⁰ in evaluating religious dress. Various circumstances are not difficult to postulate in which religious dress, or any other type of dress, or for that matter nakedness, would certainly be far more questionable than a headscarf: the swastika is still an acceptable religious symbol in some countries, but I venture to suggest that a swastika could not be worn as a Buddhist symbol in German classrooms, given that meaning is attributed to symbols by viewers as well as users and is not dependent solely upon the intention of those using them. Fortunately no Buddhist is likely to put this hypothesis to the test.

However, what is glaringly missing in such analysis as well as the Court’s own reasoning⁴¹ is any consideration of the rights of the affected pupils – because there is no right to school education as such in the German Basic Law. Rather, the only right that the pupils can point to expressly in the Basic Law is their negative freedom of religion that applies to everyone in all contexts and is not sensitive to the school environment. Article 7 of the Basic Law does go into some details about the school system, but nothing in it guarantees an education to young people (or anything comparable such as the right to develop a young person’s talents).⁴² That right is therefore constitutionally invisible. And this is fatal in the present case, because the religious freedoms protected by Article 4 (1) and (2) are not subject to any sort of exception for ordinary non-discriminatory laws, but can be balanced only against other values of constitutional rank.⁴³ In this crucial respect, the German Basic Law differs from Article 9 of

³⁹ Mahlmann, *supra* n 38 at 889.

⁴⁰ Mahlmann, *supra* n 38 at 899. Rusteberg, above n **Error! Bookmark not defined.** at 640f, takes the even more categorical view that a headscarf does not create danger – the people who react to it do. Accordingly the headscarf should never be prohibited. This seems to be a proposition that would be difficult to generalise, involves a barely concealed value judgment and also places all the burden on one side.

⁴¹ See in particular above, text at n 16.

⁴² Peter Badura in Theodor Maunz *et al.* (eds.), *Grundgesetz : Kommentar* (74th update, C.H. Beck, Munich 2015), Art. 7 pp. 28f (also pointing out that some State Constitutions contain rights for young people to things such as healthy development, but the Basic Law does not); Ingo Richter in Erhard Denninger *et al.* (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (2nd ed., Luchterhand, Neuwied 1989), pp. 698f (suggesting that a claim to the minimum level of education might be able to be extracted from other rights, such as the right to freely develop one’s personality in Art. 2 (1) of the Basic Law, but otherwise ‘the socialisation of school pupils, under Art. 7 (1), is a public goal to which they are subjected, as its objects’).

⁴³ Roman Herzog in Maunz *et al.* (eds.), above n 42, Art. 4 pp. 42f; Traub, above n 4 at 1339. Daniel Enzensperger, „Verfassungsmäßigkeit eines pauschalen Kopftuchverbots für Lehrkräfte an öffentlichen Schulen“ NVwZ 2015, 871, 872 suggests using the constitutional values in Articles 1 (1) and 3 (1) and (2) of the Basic Law – human dignity and equality among the sexes – as counterweights, but this is not convincing.

the European Convention on Human Rights.⁴⁴ From this perspective, the 2015 decision is about the ever-present danger that some important rights might be disregarded if they are not on the list of constitutionally protected rights.

For the First Senate in 2015, therefore, it is only a slight exaggeration to say that the only rights-endowed participants are the teachers, and the only parties are the teacher plaintiff and the State, which wished to defend its law.⁴⁵ Much more attention needed to be paid to the needs of the pupils in the specific context in which they find themselves : people in a very vulnerable stage of life compelled by law regularly to attend an institution which is crucial for their personal and psychological as well as intellectual development. This is particularly so when we are talking about Muslim girls, who constitute a minority that faces challenges with adapting to its societal surroundings.

Those who are every day confronted with, and thus appreciate this sort of thing have had rather different views of the matter. Shortly after the decision was rendered, “Der Spiegel”⁴⁶ reported the views of a teacher at a struggling school in Mannheim. Its report had her saying (partly in direct quotation and partly in paraphrase) :

‘Many girls come to school with undeveloped ideas about who an honourable woman is and who isn’t.’ [...] The headscarf is quickly identified in such discussions as a badge of honour, and other girls are discriminated against.

For many years the number of schoolgirls with headscarves had been increasing, the teacher had observed. Clearly many girls are being pressured at home. ‘I have had girls sitting in front of me, sobbing as they say that they can no longer take part in sports classes or go on a school

⁴⁴ For a thoughtful review of U.K. cases under this provision, see Ian Leigh/Andrew Hambler, “Religious Symbols, Conscience and the Rights of Others” (2014) 3 *Oxford Journal of Law and Religion* 2.

⁴⁵ There are also the parents’ rights to bring up their children : Basic Law, Art. 6 (2); Beaucamp/Beaucamp, above n 10 at 176. However, this only further emphasises the exclusion of pupils themselves from rights-endowment.

⁴⁶ 21 March 2015, p. 61 – available on line at <http://magazin.spiegel.de/EpubDelivery/spiegel/pdf/132696516>

excursion’, the teacher said. If she spoke with the families, she is also denounced as not honourable. ‘For that reason I think the new headscarf decision sends the wrong signal.’

In 2011,⁴⁷ the Federal Administrative Court had to contend with a secondary school in Berlin in which there was a very serious conflict between adherents of conservative and less conservative Muslim streams, as a result of which there was a general climate of bullying among the pupils, anti-Semitic insults and sexism. It had not even been possible to set up a Muslim prayer room because of the disputes that arose among the girls about who was a faithful Muslim along with the boys’ refusal to use the same room as the girls. These dangers are not theoretical. We must also recall that not everything which is done or said in the playground in every school becomes public, let alone reaches either the Courts or authority figures within the school who might come to know of a real danger to the school’s peaceful nature – but it can still greatly damage a young person’s development and chances in life. In such a climate, the last thing that is wanted is a teacher visibly taking sides. This is avoided if there is a single uniform requirement not to wear a headscarf which all teachers must obey.

Adolescence is a notoriously difficult period of life in which many pressures to conform compete. It is hard to imagine any greater pressure than that felt by a teenage girl whose convictions and desires may be opposed to what she is hearing from family and even friends and schoolmates about “proper” or “honourable” female behaviour. Such a person is completely invisible to the Court. She is constitutionally non-existent. But it is for her that schools exist – not for teachers’ self-realisation or to enable them to make a display of their religious convictions. And it is undeniable that appearing in front of a class wearing a form of dress that is associated with a particular religion, and moreover a particular tendency within that religion which may include views about divinely ordained gender relations which not everyone shares,⁴⁸ is not a way of being neutral on that point towards those who might be struggling to have their own personal convictions accepted by themselves, their peers and their families. (It is certainly true that not all headscarf-wearers subscribe to the conservative views which the headscarf is ordinarily thought to represent,⁴⁹ but it is the appearance which conveys the

⁴⁷ BVerwGE 141, 223.

⁴⁸ For a demonstration that the hijab is associated with conservative views on gender relations, see in particular the analysis by two Muslim women in “National Post” (Toronto), 24 December 2015, p. A15, available online at : <http://news.nationalpost.com/full-comment/nomani-arafa-dont-want-a-mile-in-her-hijab>.

⁴⁹ Traub, above n 4 at 1340.

public message regardless of what the brain behind the headscarf may believe; as we have already seen, symbols do not obtain their meaning solely through the intention of those using them.)⁵⁰

It is interesting to note in the Court's recitation of the arguments presented to it that of the Alevite Community of Germany, which stated that teenage girls might be bullied if Muslim girls see a teacher wearing a headscarf and the Alevite girls, who are not required to wear headscarves, are thereupon accused by their schoolmates of infringing supposedly proper Islamic rules and even of being not proper Muslims.⁵¹

Then there are also the headmasters and schools' governing bodies, who from now on will be required to deal with yet another source of tension in schools because a clear rule has been replaced by the need for a crisis to arise followed by numerous options for dealing with it coupled with inevitably controversial value judgments. These people are also constitutionally invisible, but in carrying out their functions on behalf of school pupils they now face yet another suite of challenges. Dr Thomas Böhm, an expert in school law at the Institute for Teachers' Development, was quoted in "Der Spiegel"⁵² as stating that the teachers he had spoken to were unsure what the decision meant for them. They will be required, as the State Parents' Conference pointed out, to identify when a sufficient level of disturbance, or danger of disturbances, has been reached and to work out what action to take about it, all the while knowing that a Twitter storm, media campaign and lawsuit lurk in the background.⁵³

References to the peaceful operation of schools cover up the fact that every pupil has individual needs : the fact that there is no rioting in the playground does not mean that every pupil is adequately catered for as distinct from suffering in silence. It is all very well for the Court to speak from the placid surroundings of Karlsruhe Palace Park, but its decision indicates that the majority Judges have not considered the needs of pupils and schools, only of teachers. Teachers and the realisation of their full potential and rights are not the purpose of schools, however. Nobody is forced to become a teacher, and those who do so should be able to put their own interests a long way behind those of their pupils. In this respect teachers are different from most other state employees : they are not just sitting behind

⁵⁰ Karl-Heinz Ladeur, „Das islamische Kopftuch in der christlichen Gemeinschaftsschule“ JZ 2015, 633, 633.

⁵¹ At [68].

⁵² As above, n 46.

⁵³ Landtag Nordrhein-Westfalen, Stellungnahme 16/2749, p. 2.

a desk or digging up a road, but have vulnerable young people in their care. It would certainly be a mistake if earlier case law suggesting a lower standard of rights protection for civil servants as a whole were revived,⁵⁴ but at the very least the Basic Law is deficient in not referring to the right to a school education so that the rights of pupils also have a place in constitutional jurisprudence and rights-balancing exercises, while the Judges should have taken much more seriously the difficulties they were creating for other people by their decision.

It might finally be considered what the German legal system is impliedly saying about rights protection next door in France by this decision, given that the headscarf is completely banned for public servants there. Despite the differences between the two countries on this front, are the French, by taking that stance, not merely exercising their right to construct a different legal order from the Germans, but also committing gross violations of basic religious rights? The European Court of Human Rights, at all events, sides with the French.⁵⁵

5. Further developments

As a result of the 2015 decision, the *Schools Act* of the State of North Rhine/Westphalia was rapidly amended. The offending passage privileging the Christian and Western values referred to in Articles 7 and 12 (6) of the State Constitution was entirely deleted; indeed, it was already no longer part of the law, having been struck out by the Court's order. The portion of the law which stated that there were to be no religious manifestations by teachers and support staff that were apt to endanger or disturb the peaceful functioning of schools had been held valid, although in need of being read down. As a result, s 2 (8) of the *Schools Act* was amended and now states that religious manifestations by teachers may not endanger or disturb the peaceful functioning of schools – 'apt to' has been removed and with that step the law now requires a tangible rather than a merely abstract danger.

⁵⁴ Klein, above n 31 at 468.

⁵⁵ See above, n 4.

This was a more extensive change than in the government's original Bill, which would simply have repealed the passage about Western and Christian values while leaving everything else unchanged, but the deletion of 'apt to' was added to the law in the State Parliament's School and Further Education Committee and makes it unnecessary to read out those words to comply with the Court's decision.⁵⁶ However, the Committee found itself unable to provide any more specific statutory text, and stated: 'The circumstances of the individual case decide whether there is a concrete endangerment of school peace; an abstract definition is not possible'.⁵⁷ However, in its explanatory memorandum it went on to give examples such as a sustained disturbance of school operations as a result of a conflict between the headmaster and a teacher – again the pupils themselves were invisible, and it is their interests which should have been at the forefront of consideration.

The effort to give more detail about what constitutes a disturbance of the peaceful running of the school was not made, at least according to one Greens Party M.P., because that could be seen as an instruction manual for those opposed to the decision.⁵⁸ This is not as silly as it sounds at first – indeed, according to one commentator, 'to some extent the first reactions [to the 2015 decision] gave the impression that guidance was being sought on how to organise the necessary disturbances in schools so that the prohibition on headscarves could yet be maintained'.⁵⁹ That of course would not be in accordance with the intention behind the ruling. It does indicate the seriousness with which some people regard the matter; but it is likely that tempers will cool, and after all no-one objects to publishing the Criminal Code because some people might think it a recipe book!

It is therefore hard to disagree with the contrary view of the Free Democrats that some illustrative examples might have been given in the statutory text for the information both of individual schools and of administrators, along with such things as guidance about how long a dispute must last for or what consequences it must have to qualify as sufficiently concrete. Giving illustrative examples is a technique very frequently used in German legislative drafting. The idea floated in the First Senate's judgment that a restriction on headscarves may be extended beyond an immediately affected school in order to ensure that it does not spread to neighbouring schools should also have been dealt with expressly by an indication of things such as what district boundaries are to be used, how serious the

⁵⁶ State Parliament of North Rhine/Westphalia, printed paper 16/8999, pp. 3f.

⁵⁷ State Parliament of North Rhine/Westphalia, printed paper 16/8999, p. 18.

⁵⁸ Debates of the State Parliament of North Rhine/Westphalia, 24 June 2015, p. 8916.

⁵⁹ Hinnerk Wißmann, Case Note, ZJS 2015, 299, 303.

danger has to be and what classifications of schools may be affected by prophylactic measures.⁶⁰ More use, in other words, should have been made of the legislature's margin of appreciation in order to assist schools.

A different view of the Court's decision was taken in the State of Berlin – one that almost guarantees that the matter will again come before the constitutional Courts. In late October 2015 the Senate of Berlin – confusingly, this word now designates the State Cabinet; it is not a house of any legislature, let alone half of a Court – had decided that there was no need to change the Berlin statute of 27 January 2005 entirely prohibiting headscarves.⁶¹ The Senate of Berlin was at this time made up of a “grand” coalition between the two major parties, the Social Democrats and the conservative Christian Democrats; the announcement was made by Deputy Mayor Frank Henkel of the latter. According to newspaper reports he said that his officials had thoroughly examined the matter and there was no need for change because the law in Berlin, unlike that of North Rhine/Westphalia, did not contain a clause privileging Western or Christian values or any religion. It has also proved its value in practice and had been ‘very positive for co-existence in a diverse metropolis such as Berlin’. The Social Democrats went along with this although there was apparently some unease on their left wing.⁶²

However thorough the examination of this question by Herr Henkel's officials may have been, it seems more likely that they were aiming for the maximum they might be able to get away with rather than complete fidelity to the law as laid down by the Court. The Court not only held the privileging clause in North Rhine/Westphalia invalid; it also held that headscarves could not be prohibited without there being a concrete, not merely an abstract danger to the peaceful functioning of a school or perhaps schools in a defined area. The Berlin law simply bans headscarves without any reference to any such danger, concrete or abstract. It is therefore clearly invalid under the *ratio decidendi* of the 2015 decision. Furthermore, Berlin is a big city with numerous districts that differ greatly in religious and socio-

⁶⁰ State Parliament of North Rhine/Westphalia, printed paper 16/9080, pp. 2f.

⁶¹ See above, n 9.

⁶² „Der Tagesspiegel“, 28 October 2015, -p. 7; available on line at : <http://www.tagesspiegel.de/berlin/neutralitaetsgesetz-in-berlin-kopftuchverbot-fuer-lehrerinnen-bleibt/12504128.html>. „Der Tagesspiegel“, 22 December 2015, p. 7 (available on line at <http://www.tagesspiegel.de/berlin/neutralitaetsgesetz-in-berlin-spd-versteckt-gutachten-zum-kopftuch/12753080.html>) refers to an analysis by the Berlin State parliamentary research service to the effect that the Berlin law was clearly constitutionally invalid, which had however been marked as confidential and not for public release by the Social Democrats' parliamentary representatives but is nevertheless published on line at the web address stated (and has been reviewed by the present author).

economic composition : it could rarely, if ever, be said that if a concrete danger arises in one district it equates to a concrete danger for the whole city.

A legal challenge to the Berlin law by a Muslim would-be teacher came before the first-instance Labour Court in April 2016 and was rejected.⁶³ The Labour Court referred in its decision rejecting the challenge to matters I have just discussed and rejected as a basis for distinguishing the ruling of the Federal Constitutional Court, such as that Berlin is a big city and its law contained no clause privileging particular religions; decided that it was not convinced of the constitutional invalidity of Berlin's law; and accordingly held that it did not have to refer that law to the constitutional Courts for a ruling on that question. It said, remarkably :

In accordance [...] with the reasoning of the dissenting judgment in the decision of the Federal Constitutional Court of 27 January 2015 ("Headscarves II"), it cannot simply be concluded that the state merely accepts the exercise of basic rights by teachers that is not to be attributed to it or that school pupils are simply required to see a particular dress on the part of teachers which clearly is based on their personal decisions. Such a simplified distinction between symbols attributable to the state and the individual religiously influenced dress of teachers takes no account of the effect which such personal exercise of basic rights by a teacher can have on pupils.

Teachers do certainly enjoy individual freedom of religion. But at the same time they are holders of an office and thus required to observe the supportive neutrality of the state in religious affairs as well. For the state cannot act as an anonymous being, but only through its officials. They are its representatives. The duty of the state to be neutral therefore cannot be anything else but a requirement for its officials to be neutral ([14] of the dissenting judgment in the decision of the Federal Constitutional Court of 27 January 2015).

It is therefore within the constitutional margin of appreciation of the defendant State [Berlin], having regard to the specific situation of the metropolis of Berlin, to resolve the unavoidable

⁶³ ArbG Berlin, 14 April 2016, 58 Ca 13376/15.

tension of competing legal interests of constitutional status by giving greater weight to the educational duty of the state, which must be fulfilled in accordance with the duty of neutrality towards ideologies and religions, and to the protection of the parents' right to bring up their children and pupils' negative freedom of religion.⁶⁴

Despite the Labour Court's earlier feeble attempts to distinguish the Federal Constitutional Court's decision having regard to minor differences between Berlin's law and that of North Rhine/Westphalia, there can be no doubt that this Court prefers the minority view which the Federal Constitutional Court by majority rejected.⁶⁵ So does the present author as a matter of policy, but the difficulty is justifying it under the Basic Law which omits a right to school education and the long-standing doctrine that requires another interest of constitutional status before religious freedom can be compromised. Even if the Labour Court has in theory surmounted that hurdle by greatly exaggerated notions such as that simply beholding a piece of cloth on someone's head is an infringement of the pupils' negative freedom of religion, without any obligation to take any positive action on the part of the students, there is also the difficulty that the 2015 decision is meant to bind lower Courts,⁶⁶ and that means, of course, the majority ruling, not a dissenting judgment.

Some of the phrasing of the Labour Court's decision, not to say the overall impression of disobedience to a constitutional decision, is also strongly reminiscent of the *Crucifix Decision* of 1995⁶⁷ and the reaction to it – a long-running saga which cannot be gone into here in detail but which involved a highly controversial and widely disobeyed decision that the presence of a crucifix in Bavarian schoolrooms required by a State law was not consonant with the state's religious neutrality.⁶⁸ One obvious point of distinction between that case and this is, nevertheless, that a crucifix does not have basic rights, whereas teachers do.

⁶⁴ This is taken from <http://www.iww.de/quellenmaterial/id/186558>, where what appears to be a genuine copy of the Court's judgment is located. Searches did not indicate that it had been published in any printed form at the time of writing.

⁶⁵ There is also obviously some borrowing from the Second Senate's decision of 2003 as well as the majority judgment in 2015 : see above, fnn 8, 16.

⁶⁶ See above, fn 20.

⁶⁷ BVerfGE 93, 1.

⁶⁸ See, for example, Justin Collings, *Democracy's Guardians : A History of the German Federal Constitutional Court, 1951-2001* (O.U.P., 2015), pp. 260-266.

However, it will be some time before the Federal Constitutional Court can decide upon the point raised by the Labour Court's decision of April 2016, assuming that there is no compromise or abandonment of the claim or defence in the meantime. If there is to be another decision, can the needs of pupils be at the forefront, not the rights of teachers? It seems doubtful. The decision of the minority in the 2015 case, as taken up by the Labour Court in the decision just mentioned, shows a way in which that can theoretically be done, but it is clearly extremely precarious and unconvincing. It is also not very likely that the Federal Constitutional Court, should the matter reach it, would in effect overrule itself, and especially not so quickly.

Therefore, the need for bills of rights to be kept up to date must be the lesson drawn from this episode. Yet the very claim of such bills of rights to being a statement of eternal truths and their difficulty to amend can militate against this. Indeed, it is only a few years ago that three of eight Judges of the Federal Constitutional Court would have held that the basic rights, most obviously the right to marry and found a family, prevented the legal recognition of same-sex partnerships. I wrote at the time : 'What gets a big cheer one decade', such as marriage and the family, 'may seem hopelessly old-fashioned the next'.⁶⁹ Equally, the rights of school pupils were barely on the agenda in the late 1940s when the catalogue of rights was written, and indeed it was not until the early 1970s that the general list of basic rights was even recognised as fully applicable to school pupils in their capacity as such (a question which came up, for example, in relation to corporal punishment in schools).⁷⁰ Their continued constitutional invisibility needs correction. This need not occur by means of a provision such as s 29 of the South African Constitution, which might raise the difficult issue of "second generation" socio-economic rights. However, some allusion to the interests of school pupils, and indeed of society generally, in their education – perhaps along the lines of the existing Article 20a recognising the need to protect the environment and animals and thus elevating their interests to constitutional status – is certainly needed.

⁶⁹ Greg Taylor, "The New Gay and Lesbian Partnerships Law in Germany" (2003) 41 *Alberta Law Review* 573, 617.

⁷⁰ This was the so-called *besonderes Gewaltverhältnis*, "special power situation"; BVerfGE 33,1 is the case generally credited with its demise.