

European Diversity and Autonomy Papers  
EDAP 3/2006

# The Headscarf as a Symbol of Non-Integration? Integration of Muslims in Austria

Margareth Prisching



*Managing editors:*

Emma Lantschner / Francesco Palermo / Gabriel N. Toggenburg

*Editorial Board:*

*In alphabetical order:*

Craufurd Smith Rachel (University of Edinburgh, UK)  
Dani Marco (Università di Trento, I)  
De Witte Bruno (European University Institute, I)  
Gamper Anna (Universität Innsbruck, A)  
Henrard Kristin (University of Groningen, NL)  
Kujovich Gil (Vermont Law School, US)  
Kymlicka Will (Queens University, CAN)  
Marko Joseph (Universität Graz, A)  
Nic Shuibhne Niamh (University of Edinburgh, UK)  
Ortino Sergio (Università di Firenze, I)  
Packer John (Tufts University, US)  
Poggeschi Giovanni (Università di Lecce, I)  
Sasse Gwendolyn (London School of Economics, UK)  
Tarr William (Rutgers University, US)  
Teachout Peter (Vermont Law School, US)  
Toniatti Roberto (Università di Trento, I)  
Woelk Jens (Università di Trento, I)

*Assistant to the Managing editors:*

Paulina M. Borowska

Europäische Akademie Bozen  
Drususallee, 1  
39100 Bozen - Italien  
Tel. +39 0471 055200  
Fax +39 0471 055299  
[edap@eurac.edu](mailto:edap@eurac.edu)  
[www.eurac.edu/edap](http://www.eurac.edu/edap)

Accademia Europea Bolzano  
Viale Druso, 1  
39100 Bolzano - Italia  
Tel. +39 0471 055200  
Fax +39 0471 055299  
[edap@eurac.edu](mailto:edap@eurac.edu)  
[www.eurac.edu/edap](http://www.eurac.edu/edap)

*Copyright Information:*

Any sort of reproduction - including excerpts - is permitted only when indicating the exact EDAP source. Please quote EDAP as indicated in the following example: Gabriel N. Toggenburg, "The Debate on European Values and the Case of Cultural Diversity", 1 *European Diversity and Autonomy Papers- EDAP* (2004), 10, at [www.eurac.edu/edap](http://www.eurac.edu/edap).

## Abstract

A debate is raging in Europe about what kind of policies states should adopt regarding the integration of Muslims. On one hand, policies are pursued which ask Muslims to “assimilate” and give up features of their (religious) traditions, on the other hand policies are promoted which encourage minorities to celebrate their “difference”. In Austria, the debate heated up again at the occasion of the widely debated study titled “Perspectives and Challenges Regarding the Integration of Muslims in Austria” in May 2006.

This paper investigates the headscarf as a religious symbol in a Western state. Although there has not been a case before the Austrian courts on religious neutrality of public schools with regard to the limits of religious freedom evident in the headscarf cases all over Europe, the debate on religious practices in the public realm has also reached Austria, which makes a glance at the debate in Germany even more interesting. In Germany, a vibrant debate has been going on for years. Only recently, on the 7th of July 2006, a decision by the VG Stuttgart turned the debate into a different direction. To give an overview, the main strands of the German discussion will be outlined. This debate will be described against the background of the recent decisions of the ECtHR, which have set the guiding posts of the debate.

## Author

Margareth Prisching studied English and Law at the University of Graz, University of Minnesota (US) and the University of Tilburg (NL). She is currently working as a research assistant at the Civil Law Department at the Karl-Franzens University Graz, where she completed her PhD in 2005 (“Gutgläubiger Mobiliarerwerb im Rechtsvergleich”). She has been involved in the Project “The Transfer of Property Rights in Movables” as part of the “Study Group on a European Civil Code” and the European Research Training Network “Global Justice”.

The author can be reached at: [ma.prisching@uni-graz.at](mailto:ma.prisching@uni-graz.at)

## Key words

Headscarf Debate - Muslims - Integration Report 2006 - *Leyla Sahin v. Turkey* - laïcité - ECHR.

## Table of contents

1. How much “Unity in Diversity”?	5
1.1. “Accommodation”, “Assimilation” and “Integration”	5
1.2. The Austrian Integration Report 2006	6
1.3. New Challenges	7
2. State and Church	9
2.1. Different Approaches	9
2.2. Strict Division, State-church and Pluralism	9
2.3. The ECHR and National Law	13
3. The Headscarf as a Religious Symbol	14
3.1. The Situation in Austria	14
3.2. The Ongoing Debate in Germany	16
4. Diversity in a Multicultural State	20

# The Headscarf as a Symbol of Non-Integration? Integration of Muslims in Austria

Margareth Prisching

## 1. How much “Unity in Diversity”?

### 1.1. “Accommodation”, “Assimilation” and “Integration”

A vibrant debate is raging in Europe about what kind of policies states should adopt regarding the integration of people with transnational migration background - in particular the integration of Muslims. This discussion is primarily looked upon from the perspective of the majority of the population, which is usually in the stronger position.<sup>1</sup> “Accommodation”, “assimilation” and “integration” are the dominant concepts, which are used as the main criteria to evaluate or predict behaviour of migrants.<sup>2</sup>

On one hand, policies are pursued which ask Muslims to “assimilate” and give up some (or even all observable) features of their (religious) traditions, on the other hand policies are promoted which encourage minorities to celebrate their “difference”<sup>3</sup>. In the latter case, multiculturalism - as a policy approach, which manages to accommodate cultural diversity and is built upon respect and tolerance for differences - is used as the concept, which should become the common goal for changing societies in Europe. The European motto “Unity in Diversity”, which was officially proclaimed in May 2000 in the European Parliament, also catches the debate about what exactly integration means. How much “assimilation” and, vice versa, how much “diversity” should Europe or each member state encourage? In any case, pluralism clearly poses new challenges in an era of global migration.<sup>4</sup>

Is it necessary in a multicultural society to ban religion from the public sphere? Is it not possible to accommodate diversity in a pluralist society and accept differences? Even though laws prohibiting public school teachers from

---

<sup>1</sup> See Wilhelm Heitmeyer, “Gesellschaftliche Integration, Anomie und ethnisch-kulturelle Konflikte”, in Wilhelm Heitmeyer (ed.), *Was treibt die Gesellschaft auseinander?* (Suhrkamp, Frankfurt am Main, 2004), 629-652, at 638.

<sup>2</sup> See Paul Mecheril, “Zugehörigkeitserfahrungen von Anderen Deutschen. Eine empirische Modellierung”, in Ludger Pries (ed.), *Transnationale Migration* (Nomos, Baden-Baden, 1997), 293-314, at 293.

<sup>3</sup> See Joel Fetzer and Christopher Soper, *Muslims and the State in Britain, France and Germany* (Cambridge University Press, Cambridge, 2005), 3.

<sup>4</sup> See Reinhart Kößler, “Globalisierung, internationale Migration und Begrenzung ziviler Solidarität. Versuch über aktuelle Handlungsformen von Nationalstaaten”, in Pries (ed.), *Transnationale Migration ...*, 329-347, at 329.

expressing their religious beliefs could legally be justified in a secular state like Germany, in social and cultural terms, this limitation of tolerance should not be supported.

When we speak of a secular society, we talk about a society which is open and tolerant towards different religions - a society which accepts diverse beliefs, in the public as well as in the private realm. But what does integration into this open and tolerant society mean? For sure, integration cannot mean the giving up of one's own religion, the prohibition of all other religious symbols besides Christian symbols and the avoidance of any diversity in the sphere of the "neutral" state.

### 1.2. *The Austrian Integration Report 2006*

In Austria the debate on the integration of Muslims heated up again when in May 2006 the widely debated study titled "Perspectives and Challenges Regarding the Integration of Muslims in Austria"<sup>5</sup> composed by Mathias Rohe on integration of Muslim citizens in Austrian society was presented. A political controversy<sup>6</sup> surrounding this Austrian government report erupted. In a first press statement, Interior Minister Liese Prokop claimed that 45% of Muslims in Austria are not integrated and do not possess any interest in doing so.<sup>7</sup> The main countries of origin of Muslims in Austria are Serbia/Montenegro (18,7%), Turkey (17,9%) and Bosnia and Herzegovina (15,2%).<sup>8</sup> While the study divides the 340.000 Muslims, who live in Austria and make up 4,2% of the total population, into four categories - Religious Conservative, Traditional Conservative, Moderate Liberal and Secular -, Prokop combined the first two groups and simply claimed that these were not interested in integration into Austrian society. It is, however, a bold proposition to equate strong religious affiliation with non-integration attitudes. After legitimate criticism from different sides, this statement was weakened since the report itself does not speak explicitly about non-integration at all. It is, however, true that the situation in Austria is not perfect. The study shows deficits with regard to

<sup>5</sup> See Mathias Rohe, "Perspektiven und Herausforderungen in der Integration muslimischer MitbürgerInnen in Österreich. Executive Summary", Erlangen 2006, at [http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/Perspektiven\\_Herausforderungen.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/Perspektiven_Herausforderungen.pdf).

<sup>6</sup> See eg Rainer Münz, "Kein Deutsch, kein Studium, kein Job", *Die Zeit*, 24 May 2006, at [http://www.zeit.de/2006/22/514\\_Zuwanderer\\_Text](http://www.zeit.de/2006/22/514_Zuwanderer_Text); "Mainstream hat integrationsfreundliche Haltung", *Die Presse*, 19 May 2006, at <http://www.diepresse.at/Artikel.aspx?channel=&ressort=ai&id=559842>.

<sup>7</sup> Liese Prokop: "Mir ist die Integration sehr wichtig. Aber es gibt Gruppen im Land, die wollen das nicht. Wir haben eine Studie über die Muslime in Österreich machen lassen. Herausgekommen ist, dass 45 Prozent nicht an einer Integration interessiert sind. Da müssen wir aufpassen, dass wir nicht Verhältnisse wie in Frankreich oder in Berlin bekommen." In "Prokop: Kein Bawag-Wahlkampf, Tirol bei Asylplätzen hinten", *Tiroler Tageszeitung*, 12 May 2006, at <http://www.tirol.com/politik/national/36910/index.do>.

<sup>8</sup> See Rohe, *Perspektiven ...*, 4.

integration and speaks about a “great distance”<sup>9</sup> between the Muslims and Austrian society.

The report was commissioned by the Federal Ministry for Internal Affairs and consists of three parts. The first part is based on two telephone surveys among 1000 Austrians, which were conducted at the end of 2005 and beginning of 2006 regarding the contacts of the Austrian population with Muslims. 23% of the interviewees expressed an extremely positive attitude towards Muslims and expressed the need for mutual tolerance, acceptance of differences and integration measures. 37% were indifferent, 24% uttered a slightly negative opinion towards Muslims and expressed a distinct scepticism towards integration. 16% voiced a very negative, rudimentary hostile attitude towards Muslims.<sup>10</sup>

The second part consists of interviews with 251 Turks and 253 Bosnians living in the area of Vienna. A clear difference can be seen regarding the situation of Turks and Bosnians. While only 12% of the Bosnians but 67% of the Turks have been living in Austria for more than 15 years, the Bosnians have adapted to the Austrian lifestyle much better. Half of the Bosnians considered themselves well integrated as opposed to only 11% of the Turks.<sup>11</sup>

The third part consists of an analysis of the print media, and takes a look at the documentation of Austrian (1997-2005), Turkish and Arabic (2005-2006) newspapers regarding topics of integration, foreigners and Islam.<sup>12</sup>

### 1.3. New Challenges

Since the beginning of the 1990s immigration and integration have been present in the political as well as in the scientific realm.<sup>13</sup> This debate has

---

<sup>9</sup> “erhebliche Distanz”; Rohe, *Perspektiven ...*, 44.

<sup>10</sup> See Rohe, *Perspektiven ...*, 26 *et seq.*

<sup>11</sup> See Rohe, *Perspektiven ...*, 35 *et seq.* This selection however seems arbitrary, since it is unusual to conduct a survey of such political impact and only include Turks and Bosnians or people with origins in one of these two countries, while the biggest percentage come from former Serbia/Montenegro (18,7%). The biggest group was simply not included. Besides the mentioned groups, there are also other Muslim minorities and an integration report commissioned by the Federal Ministry for Internal Affairs should not be restricted to only 500 interviewees, who only belong to two countries of origin. Furthermore, the term Bosnians (or in the report the German term “Bosnier”) refers usually to all people living in Bosnia. Since the population of Bosnia and Herzegovina is however made up by the three largest ethnic groups of Muslims, Serbs and Croats, the term Bosnians includes also all these groups. The Muslims in Bosnia and Herzegovina are however called Bosniaks, and are today besides the Serbs and the Croats in the Constitution of Bosnia and Herzegovina mentioned as constituent peoples. Thus it would have been less confusing to use the term Bosniaks in the study. See Jens Woelk, “Federalism and Consociationalisms as Tools for State Reconstruction? The case of Bosnia and Herzegovina”, in Joseph Marko, Alan Tarr and Robert Williams (eds.), *Federalism, Sub-national Constitutional Arrangements and the Protection of Minorities* (Greenwood/Praeger, Westport, 2004), 1-3. Third, it seems not really clear in the report, how the results were calculated and on which bases the presented conclusions were drawn.

<sup>12</sup> See Rohe, *Perspektiven ...*, 15 *et seq.*

become even more intense in the last few years in the aftermath of the attacks in New York in 2001 and London in 2005. The fact that many of the terrorists had lived and been trained in Western states, raised the question of how to improve the integration of Muslims into Western society. Since Islamic fundamentalism - also called "Dschihadismus" - has found its breeding ground amongst others in the second and third generation Muslims living in Europe, something must have gone wrong these last few decades, many critics argued.<sup>14</sup> These young Muslims living in the West face the challenge of finding their own approach.<sup>15</sup> This radicalism is not a direct export of conflicts present in the Middle East, but the result of numerous external factors - among them the immigration into the Western world, the existence of the immigrant population as minority in Western countries and the import of western life style in Muslim societies.<sup>16</sup> Thus a so called "Clash of Civilizations" - which is rooted along cultural and religious lines - exists and will become even more dramatic in the future, some argue.<sup>17</sup> Also the Netherlands, which has been the role model of tolerance and a successful integration policy, has changed its policies after the murder of the Islam critic Theo van Gogh, who had been shot and stabbed in 2004 in Amsterdam by a Dutch citizen of fundamentalist Islamic belief with Moroccan origin<sup>18</sup>, and Pim Fortuyn. After these events, the social and political climate changed and the discontent with the failed integration of the Muslim minority grew.<sup>19</sup> In 2006 the debate heated up again, when Danish Mohammed cartoons were published and worldwide protests erupted challenging the right of freedom of speech.<sup>20</sup>

These recent conflicts demonstrate that Europe faces new challenges with regard to the accommodation of Muslims and Western society within the framework of the modern nation state. However, integration of Germans or Austrian citizens of Muslim background into Western society is essential to

<sup>13</sup> See Franz Nuscheler and Birgit Rheims, "Migration und Sicherheit: Realitäten und Halluzinationen" in Pries (ed.), *Transnationale Migration ...*, 317-327, at 317.

<sup>14</sup> Further reading regarding problems faced by the second generation see Nikola Ornic, *Chancen und Grenzen des Pluralismus von Religionen und Ethnien. Zur Analyse eines kultursoziologischen Grundproblems im Licht österreichischer Erfahrungen mit dem Islam zu Beginn des 21. Jahrhunderts* (Diss. Graz 2005).

<sup>15</sup> See Werner Schiffauer, "Vom Exil- zum Diaspora-Islam. Muslimische Identitäten in Europa", *4 Soziale Welt* 2004, 347-368, at 347 *et seq.*

<sup>16</sup> See Olivier Roy, "Wiedergeboren, um zu töten", *Die Zeit*, 21 July 2005, at <http://www.zeit.de/2005/30/Islamismus>.

<sup>17</sup> See Samuel Huntington, *Kampf der Kulturen* (Siedler, Berlin, 1998); See also Thomas Schwinn, "Konvergenz, Divergenz oder Hybridisierung? Voraussetzungen und Erscheinungsformen von Weltkultur", *2 Kölner Zeitschrift für Soziologie und Sozialpsychologie* (2006), 201-232, at 205.

<sup>18</sup> See "Mutmaßlicher Van-Gogh Mörder vor Gericht", *Die Zeit*, 11 July 2005, at [http://www.zeit.de/2005/28/Van\\_Gogh](http://www.zeit.de/2005/28/Van_Gogh).

<sup>19</sup> See Philip Ebels, "Die Niederlande: Das Ende der Toleranz", *Cafebabel. Die Europa-Zeitung*, 6 March 2006, at <http://www.cafebabel.com/de/article.asp?T=T&Id=6207>.

<sup>20</sup> See Agnes Callamard, "Freedom of Speech and Offence: Why Blasphemy Laws are not the Appropriate Response", 18 *Equal Voices* (2006), 7, at <http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf>.

avoid an even bigger divide resulting in the establishment of two societies within one.

One could also argue that the divide between modern Western society and religion becomes much more drastic for Muslims living in Europe. Muslims living in Western society must decide, whether religious rules shall constitute a part of their belief system or not. This decision may have an influence on further decisions, eg regarding work. As we will see in the headscarf debate in Germany or France, this personal decision can go so far as to determine for a Muslim woman if she can work as a teacher in a public school or not. The central question is whether this personal decision *should* have this influence or not. Must the integration of minorities and the creation of a multicultural society build upon the “accommodation”, “assimilation” or “elimination” of these differences? What does the use, the prohibition or the tolerance of religious symbols in the public realm (and thus also in public schools) mean? And furthermore: What is “integration”? What are its contents, its symbols and its indicators? These ideas will be further explored in the present paper.

## 2. State and Church

### 2.1. *Different Approaches*

The existence of large Muslim communities in France, Italy and Great Britain poses new challenges to each of these states as well as to Europe.<sup>21</sup> With more than three million Muslims living in Germany, it is clear that Muslim women too would want to teach in public schools without giving up their right to wear their headscarf as an expression of their religious belief. Since the headscarf does not seem to disturb the teaching per se, the discussion seems to deal with the basic question of how neutral (in religious terms) public schools must be, or better: what the relation between religion and state should be like.<sup>22</sup> According to the different national approaches taken up in Europe, three different models can be distinguished regarding the relation between church and state.<sup>23</sup>

### 2.2. *Strict Division, State-church and Pluralism*

The first model assumes a strict division between state and church in the public realm and considers religion a personal, private matter. The French as well as the Turkish state are based on this idea of *laïcité* and the concept that

---

<sup>21</sup> See Open Society Institute, “Monitoring the EU Accession Process: Minority Protection” (2002), 38, at <http://www.eumap.org/reports/2002/minority>.

<sup>22</sup> See Gerhard Robbers, “Muslimische Lehrerinnen, das Kopftuch und das deutsche Bundesverfassungsgericht”, 50 *ÖARR* (2003), 405-417, at 405 *et seq.*

<sup>23</sup> See Stephen Monsma and Christopher Soper, *The Challenge of Pluralism. Church and State in Five Democracies* (Rowman & Littlefield, New York, 1997), 6 *et seq.*

minorities should be part of a neutral, secular public life as citizens and not as active political members of their minority groups.<sup>24</sup>

In France this concept leads to the result that in 2004 a law<sup>25</sup> was passed as an amendment to the French Code of Education, which banned “conspicuous religious symbols” (in contrast to “discreet religious symbols”) - like headscarfs, yarmulkes for Jews, turbans for Sikhs and large Christian crosses - in primary and secondary public schools. With regard to the headscarf debate this means that not only teachers but also students are not allowed to wear a headscarf in public schools.

In Turkey this ban goes even further. In a recent decision (*Leyla Sahin v. Turkey*<sup>26</sup>) by the ECtHR regarding Turkey, the Grand Chamber decided in 2005 that regulations of the Istanbul University, which banned the headscarf, interfered with Leyla Sahin’s right to manifest her religion. However, this interference was prescribed by law and pursued one of the legitimate aims set out in Article 9 of the European Convention on Human Rights (ECHR). “It was justified in principle and proportionate to the aims pursued and could therefore be regarded as having been ‘necessary in a democratic society’“. Thus the ECtHR accepts in the special case of Turkey the broad ban of Islamic headscarfs in the public realm.<sup>27</sup>

The other side of the coin is vested in an established church model, where the church and the state together are considered the basis of a stable society. For example, the Church of England is Episcopalian, which is established by the state, and changes to the structure, doctrine or liturgy must be approved by parliament. Great Britain is, however, a very liberal example for a close relation of church and state. A more extreme model of theocracy, where the

<sup>24</sup> See Marcel Maussen, “Islamic Presence and Mosque Establishment in France. Colonialism, Arrangements for Guest Workers and Citizenship” (working paper 2006), at 3 *et seq.*, Fetzer and Soper, *Muslims ...*, 19; Open Society Institute, “The Situation of Muslims in France” (2002), 72, at [http://www.eumap.org/reports/2002/eu/international/sections/france/2002\\_m\\_france.pdf](http://www.eumap.org/reports/2002/eu/international/sections/france/2002_m_france.pdf).

<sup>25</sup> Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, at <http://www.assemblee-nationale.fr/12/dossiers/laicite.asp>. Regarding the historical development see Axel Spies, “Verschleierte Schülerinnen in Frankreich und Deutschland”, 7 *NVwZ* (1993), 637-640.

<sup>26</sup> ECtHR, Appl. No. 44774/98, *Leyla Sahin v. Turkey*, judgment of 29 June 2004. See eg Katharina Pabel, “Islamisches Kopftuch und Prinzip des Laizismus”, 1 *EuGRZ* (2005), 12-17; Roberta Medda-Windischer, “The Jurisprudence of the European Court of Human Rights”, 4 *European Yearbook of Minority Issues* (2004/5), 557-594, at 569; Niraj Nathwani, “Headscarfs and Human Rights: a critical analysis of the respective case law of the European Court of Human Rights” (working paper 2006), at 2 *et seq.*

<sup>27</sup> The ECtHR cited the case Appl. No. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi and Others v. Turkey*, judgment of 13 February 2003, where the Court held: “In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9(2) of the Convention”.

institutions of the religious realm play an important role in the political sphere, is eg the Iran - a system, which is clearly out of the question for a Western modern European state.

The third model can be considered a pluralist model, which can be described as neutral but open to different religions; Austria as well as Germany belong to this model.<sup>28</sup> While the national variations differ, various religious groups - among them also Muslim communities - participate in the public realm according to the national constitutional framework. How this pluralist approach goes together with the ongoing headscarf debate in Germany will be further investigated.

In Austria, churches and religious communities can become legally recognized according to the *Gesetz über die Anerkennung von Religionsgesellschaften*<sup>29</sup>. If that is the case, they are then recognized religious communities according to Article 15 of the *Staatsgrundgesetz* (StGG)<sup>30</sup>. If the prerequisites are met, this amounts to a legally enforceable claim.<sup>31</sup> According to § 11 (4) of the *Bundesgesetz über religiöse Bekenntnisgemeinschaften*<sup>32</sup> the religious community has to possess, additionally to the prerequisites “a positive attitude toward society and state”. But also religious communities, which are not recognized according to these laws, can - according to § 2 (6) *Bundesgesetz über religiöse Bekenntnisgemeinschaften* - attain the status of a legally recognized religious community. According to Article 15 StGG, legally recognized religious

---

<sup>28</sup> See Fetzer and Soper, *Muslims ...*, 19; Norbert Janz and Sonja Rademacher, “Islam und Religionsfreiheit - Die religiöse und weltanschauliche Neutralität des Staates auf dem Prüfstand”, 7 *NVwZ* (1999), 706-713, at 706; Ute Sacksofsky, “Die Kopftuch-Entscheidung - von der religiösen zur föderalen Vielfalt”, 46 *NJW* (2003), 3297-3301, at 3298.

<sup>29</sup> RGeBl 1875/68.

<sup>30</sup> Jede gesetzlich anerkannte Kirche und Religionsgesellschaft hat das Recht der gemeinsamen öffentlichen Religionsübung, ordnet und verwaltet ihre inneren Angelegenheiten selbständig, bleibt im Besitze und Genusse ihrer für Kultus-, Unterrichts- und Wohltätigkeitszwecke bestimmten Anstalten, Stiftungen und Fonds, ist aber, wie jede Gesellschaft, den allgemeinen Staatsgesetzen unterworfen. (StGBl 303/1920).

<sup>31</sup> VfGH in VfSlg 14.295.

<sup>32</sup> Zusätzliche Voraussetzungen für eine Anerkennung nach dem Anerkennungsgesetz.

§ 11: (1) Zusätzliche Voraussetzungen zu den im Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften, RGeBl. Nr. 68/1874, umschriebenen Voraussetzungen sind:

1. Bestand als Religionsgemeinschaft durch mindestens 20 Jahre, davon mindestens 10 Jahre als religiöse Bekenntnisgemeinschaft mit Rechtspersönlichkeit im Sinne dieses Bundesgesetzes,
2. Anzahl der Angehörigen in der Höhe von mindestens 2 vT der Bevölkerung Österreichs nach der letzten Volkszählung,
3. Verwendung der Einnahmen und des Vermögens für religiöse Zwecke (wozu auch in der religiösen Zielsetzung begründete gemeinnützige und mildtätige Zwecke zählen),
4. positive Grundeinstellung gegenüber Gesellschaft und Staat,
5. keine gesetzwidrige Störung des Verhältnisses zu den bestehenden gesetzlich anerkannten Kirchen und Religionsgesellschaften sowie sonstigen Religionsgemeinschaften.

(2) Dieses Bundesgesetz findet auf laufende Verwaltungsverfahren auf Grund des Gesetzes betreffend die gesetzliche Anerkennung von Religionsgesellschaften Anwendung. Anträge auf Anerkennung als Religionsgesellschaft sind als Anträge gemäß § 3 zu werten, wobei der Tag des Inkrafttretens dieses Bundesgesetzes als Tag der Einbringung gilt. (BGBl I 1998/19).

communities and churches are considered autonomous bodies of the public law, since they take over tasks usually belonging to the state. Article 14 and 16 StGG<sup>33</sup> together with Article 63 (2) *Staatsvertrag von St. Germain*<sup>34</sup> guarantee the individual right to pursue a chosen belief, as long as the practice is not incompatible with public order or public morals.<sup>35</sup> Already in 1912, Austria recognized the adherents of Islam according to the Hanafite rite already in 1912 as a recognized religious community.<sup>36</sup> In 1979 the Islamic Community in Austria was established as an autonomous body of the public law. This is, however, an exception in the European picture.

In Germany under Article 140 *Grundgesetz* (GG) together with Article 137(1) *Weimarer Reichsverfassung* (WRV), church and state are predominantly separate entities.<sup>37</sup> The GG, however, expects from the German government the creation of a realm where religious beliefs can be expressed. This includes the recognition of religious communities as autonomous public bodies. Prerequisites are the consistency and the existence of thirty years in the German society as well as their respect for the law. Thus the German state has two functions: neutrality towards the religious sphere and the creation of a realm where religious groups can provide their answers to the quest for belief. According to Article 4 GG which defines freedom of religion, the positive as well as the negative freedom of religion of natural as well as legal persons are protected. The freedom of religion can, however, be restricted, if other constitutional rights conflict.<sup>38</sup> These rights have to be weighted against each other. Today no Islamic religious community is recognized as an autonomous body of the public law in Germany; there are, however, numerous religious communities. Therefore in Germany - where the recognition of the Islamic community as an autonomous body of the public law has not occurred - a representative “contact person”, who is able to speak for the Islamic community and can also influence the Community from within, is missing.

<sup>33</sup> Art 14 Die volle Glaubens- und Gewissensfreiheit ist jedermann gewährleistet. Der Genuss der bürgerlichen und politischen Rechte ist von dem Religionsbekenntnisse unabhängig; doch darf den staatsbürgerlichen Pflichten durch das Religionsbekenntnis kein Abbruch geschehen. Niemand kann zu einer kirchlichen Handlung oder zur Teilnahme an einer kirchlichen Feierlichkeit gezwungen werden, in sofern er nicht der nach dem Gesetze hiezu berechtigten Gewalt eines anderen untersteht.

<sup>34</sup> Art 63 (2) Alle Einwohner Österreichs haben das Recht, öffentlich oder privat jede Art Glauben, Religion oder Bekenntnis frei zu üben, sofern deren Übung nicht mit der öffentlichen Ordnung oder mit den guten Sitten unvereinbar ist. (StGB 303/1920).

<sup>35</sup> See Mathias Rohe, “Zur öffentlichrechtlichen Situation von Muslimen in ausgewählten europäischen Ländern”, Erlangen 2006, at [http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/Perspektive\\_n\\_Herausforderungen.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/Perspektive_n_Herausforderungen.pdf), 6 *et seq.*

<sup>36</sup> RGBl 159/1912; Anerkennungsverordnung BGBl 1988/466.

<sup>37</sup> See Janz and Rademacher, “Islam ...”, 706; Ralf Abel, “Die aktuelle Entwicklung der Rechtsprechung zu neuen Glaubens- und Weltanschauungsgemeinschaften”, 6 *NJW* (2001), 410-419.

<sup>38</sup> See eg Ralf Halfmann, “Der Streit um die ‘Lehrerin mit Kopftuch’ - Die Religionsfreiheit von Beamten im Konflikt mit dem religiös-weltanschaulichen Neutralitätsgebot des Staates”, 8 *NVwZ* (2000), 862-868, at 864.

### 2.3. The ECHR and National Law

Since Austria and Germany have ratified the ECHR, a glance should be taken at Article 9 ECHR<sup>39</sup> which guarantees the freedom of thought, conscience and religion.<sup>40</sup> The ECtHR<sup>41</sup> states that in a democratic society, the plurality of religions must be protected and it is the task of the state to secure respect and tolerance and not to ban pluralism as the cause of conflicts.<sup>42</sup>

In Austria the ECHR is considered to be at the same level as constitutional law, in Germany the Convention possesses the status of a simple federal law (Article 59(2) GG).<sup>43</sup> Article 9 guarantees the freedom of thought, conscience and religion of the individual person, which thus protects a part of the personal identity of each individual and is closely connected with human dignity. This right is part of the main principles pluralist societies are built upon. The ECHR does not exclude the existence of a state church per se as long as the rights of people of other beliefs are not violated. Protected are not only recognized religions but all “identifiable” religions. A concrete definition of religion is not necessary since Article 9 also protects different beliefs to the same extent. Article 9(1) does, however, not protect all activities which are somehow religiously motivated but requires that the religion is evident in the activity. From the positive right to practise a religion, the negative freedom not to practise any religion can be distinguished.<sup>44</sup> The right to freedom of religion is supplemented by Article 14, which includes the principle of non-discrimination.

Article 9(2) ECHR includes limits to the right to manifest one’s religion or beliefs with certain reservations. These limitations must be “prescribed by law” and must be “necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or the protection

<sup>39</sup> Art 9 ECHR (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

<sup>40</sup> In Austria the ECHR was lifted to the constitutional level in 1964 through BGBl 1964/59. See Christoph Grabenwarter, *Europäische Menschenrechtskonvention* (Beck, München, 2nd ed. 2005), 15 *et seq*; Jens Meyer-Ladewig, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (Nomos, Baden-Baden, 2003), 155 *et seq*.

<sup>41</sup> As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. ECtHR, Appl. No. 14307/88, *Kokkinakis v. Greece*, judgment of 25 May 1993.

<sup>42</sup> See Grabenwarter, *Europäische Menschenrechtskonvention ...*, 220 *et seq*.

<sup>43</sup> See *ibid.*, 17.

<sup>44</sup> See *ibid.*, 220 *et seq*.

of the rights and freedoms of others.” This limitation only applies to the manifestation and not to the right to freedom of thought, conscience and religion *per se*.<sup>45</sup> Thus, limitations of the freedom can be necessary, for example, to protect the health of individuals. Along these lines, the obligation of a Sikh to wear a helmet which hinders him from wearing his religious turban, is legitimate.<sup>46</sup> This means that the measure has to be proportional to the pursued aim. A limitation of this right is only legitimate if “necessary in a democratic society” - a requirement, which was fulfilled in the case *Leyla Sahin v. Turkey*, and thus the prohibition for students to wear a headscarf in public universities was considered in line with the ECHR.

Thus a certain common basis of freedom of religion is established in the countries having ratified the ECHR, which leaves room for limitations according to Article 9(2) and thus for different rules regarding religious practices. Different national practices can be noticed eg regarding the headscarf debate.

### 3. The Headscarf as a Religious Symbol

The following part of this paper will investigate more closely the headscarf as a religious symbol in a Western state. While no case law exists in Austria, in Germany a vibrant debate has been going on for years. Only recently, on the 7th of July 2006<sup>47</sup>, a decision by the VG Stuttgart turned the debate again into a different direction. To give an overview, the main strands of the German discussion will be outlined. This debate will be described against the background of the recent decisions of the ECtHR<sup>48</sup>, which have set the guiding posts of the debate.

#### 3.1. The Situation in Austria

Without any case law on the headscarf issue in Austria, teachers as well as students are allowed to wear the Islamic headscarf in public schools;<sup>49</sup> also accepted as a religious rite is the religious form of slaughtering animals (*shehitha* or *schächten*). This rite does not fall under the provisions against cruelty against animals, public order or public morals.<sup>50</sup> Islamic religious

---

<sup>45</sup> See Hermann Weber, “Die individuelle und kollektive Religionsfreiheit im europäischen Recht”, 47 *ZevKR* (2002), 265-302; ECtHR, Appl. No. 42393/98, *Dahlab v. Switzerland*, judgment of 15 February 2001; Stefan Mückl, *Religions- und Weltanschauung im Europarecht* (Winter, Heidelberg, 2002), 34 *et seq.*

<sup>46</sup> Appl. No. 7992/77, *X v. the United Kingdom*, Commission decision of 12 July 1978, DR 14, 234.

<sup>47</sup> VG Stuttgart 18 K 3562/05.

<sup>48</sup> See *Dahlab v. Switzerland*; *Sahin v. Turkey*. See Medda-Windischer, “The Jurisprudence ...”, 569 *et seq.*

<sup>49</sup> See also Bundesministerium für Bildung, Wissenschaft und Kultur: Erlass zum Tragen von Kopftüchern von Schülerinnen mit islamischem Glaubensbekenntnis, Wien 23 June 2004.

<sup>50</sup> See VfGH 17 December 1998, B 3028/97 VfSlg 15394. Regarding the discussion, whether this form of slaughtering could or could not be subsumed under § 222 StGB (cruelty against animals): Robert

instruction in public schools was already introduced in 1983 according to § 2 (2) of the *Religionsunterrichtsgesetz*<sup>51</sup>, and Islamic religious teachers are also paid by the state. The situation in Austria - the establishment of a “legally accepted Islam” - is often mentioned as one reason why there are so few fundamentalist groups in Austria. In Germany, however, no Islamic religious instruction exists in public schools. This should be seen as a mistake, since this lack of structured and organized religious instruction is easily replaced by private possibly obscure or hostile groups.<sup>52</sup> Austria could thus be considered a role model of tolerance and religious pluralism.<sup>53</sup>

Although there has not been a case before the Austrian courts on religious neutrality of public schools with regard to the limits of religious freedom evident in the headscarf cases all over Europe, the debate on religious practices in the public realm has also reached Austria, which makes a glance at the debate in Germany even more interesting. One could read in March 2005 in an Austrian newspaper that Prokop stated that she was very much in favour of a prohibition of teachers to wear a headscarf in school.<sup>54</sup> A few days after this statement, and after a talk with Anas Shakfeh, the president of the Islamic Community, Prokop withdrew her utterance and stated that Austria will continue the culture of dialogue and that such a ban would go contra this approach.<sup>55</sup> In May 2006, in a public school in Tyrol a debate started about two girls who were wearing headscarfs in class. After a public discussion and some mediative attempts of the *Bildungslandesrat* Erwin Koler the case could, however, be solved without going to court.<sup>56</sup>

First of all, one should ask why in particular an Islamic headscarf should be banned from public schools and why a diversity of religious symbols and thus religious diversity in public schools should not be supported, since pluralism and multiculturalism are principles our democracies should embrace.

---

Krammer, “Tierschutz und Religionsfreiheit. Sind Schächtungsverbote verfassungswidrig?“, 10 *JRP* (2002), 269-281.

<sup>51</sup> BGBl 190/1949 idF BGBl 256/1993.

<sup>52</sup> See Jürgen Wallner, “Kopftuchdebatte - Österreich ist anders“, *Der Standard*, 8 January 2004, at <http://diestandard.at/?url=?id=1530555>.

<sup>53</sup> See Rohe, *Situation ...*, 9 *et seq*; Ornig, *Chancen ...*, 141.

<sup>54</sup> “Ich habe ein Problem mit Lehrern, die in einer öffentlichen Schule Kopftuch tragen. Ich halte das für anstößig, weil es nicht mit den Werten unserer Gesellschaft zusammenpasst.“ “Prokop: Kopftuchverbot für moslemische Lehrerinnen“, *Die Presse*, 8 March 2005, at [http://diepresse.at/textversion\\_article.aspx?id=469062](http://diepresse.at/textversion_article.aspx?id=469062).

<sup>55</sup> See “Prokop nun ‘absolut nicht für ein Kopftuchverbot’“, *Der Standard*, 11 March 2005, at <http://diestandard.at/?url=?id=1978261>.

<sup>56</sup> See “Volksschule Neu-Arzt: Stück Stoff wirbelt viel Staub auf“, *Tiroler Tageszeitung*, 10 May 2006, at <http://www.tirol.com/politik/innsbruck/36718/index.do>.

### 3.2. The Ongoing Debate in Germany

Many considered it only a matter of time<sup>57</sup> until the first *headscarf case* would reach the BVerfG in Germany. This first case was decided on September 24, 2003 by the BVerfG<sup>58</sup> and dealt with the complaint of *Fereshta Ludin*, a Muslim teacher, who was not allowed to enter the teaching profession in Baden-Württemberg, since she was considered “not suitable” for the job. This “lack of suitability” (“Eignungsmangel”) was seen in her religiously motivated decision, to wear an Islamic headscarf during class. The school authorities as well as the administrative courts held, that the headscarf was not only considered a religious symbol but also a political statement, that the political statement was an objective statement of non-integration, and that it was not compatible with the principle of state neutrality.<sup>59</sup> Also even, if a teacher was not preaching her beliefs, an influence on the students could not be denied and at least her affiliation with Islam was always present and visible.<sup>60</sup> Children at the age from four to fourteen can be easily influenced, since the teacher always represents a role model. Here the BVerwG refers to the decision by the ECtHR *Dahlab v. Schweiz*<sup>61</sup>, where the ECtHR states that it is difficult to estimate the influence of such a visible and powerful religious symbol as a headscarf of a Muslim teacher on young children. *Ms Dahlab* has taught in a class with children between four and eight, and the Court decided that the wearing of a headscarf might have “some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality.” It thus seems impossible to reconcile the wearing of a headscarf with the “message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.” Therefore the Court held that the prohibition to wear a headscarf while teaching was “necessary in a democratic society.” Particularly Muslim students could feel pressured to follow the practises of the teacher. This would again be against the task of a school to support the integration of Muslim students into society. As a teacher she is employed by the state and acts as a representative of the state. The state, however, is obliged to guarantee neutrality of the state, and has to be considerate of the different beliefs of the parents in a multicultural society. Here a reference is made to the *Kruzifix* decision<sup>62</sup>, which made it clear that

<sup>57</sup> See Robbers, “Muslimische Lehrerinnen ...”, 405 *et seq.*; Jörn Ipsen, “Karlsruhe locuta, causa non finita - Das BVerfG im so genannten ‘Kopftuch-Streit’”, 10 *NVwZ* (2003), 1210-1213.

<sup>58</sup> BVerfG 24 September 2003, 2 BvR 1436/02, NJW 2003, 3111.

<sup>59</sup> BVerwG 4 July 2002, 2 C 21/01 (Mannheim), NJW 2002, 3344; VGH Mannheim 26 June 2001, 4 S 1439/00, NJW 2001, 2899; VG Stuttgart 24 March 2000, 15 K 532/99, NVwZ 2000, 959; Bescheid Oberschulamt Stuttgart 10 July 1998 in der Gestalt des Widerspruchsbescheids 3 February 1999.

<sup>60</sup> BVerwG 4 July 2002, 2 C 21/01 (Mannheim), NJW 2002, 3345.

<sup>61</sup> *Dahlab v. Schweiz*. See also Pabel, “Islamisches Kopftuch ...”, 12.

<sup>62</sup> BVerfG 16 May 1995 NJW 1995, 2477. See Ronald Pofalla, “Kopftuch ja - Kruzifix nein? Zu den Widersprüchen der Rechtsprechung des BVerfG”, 17 NJW (2004), 1218-1220, at 1218.

students should not be forced to study under a Christian symbol, ordered by the state. This violated the freedom of religion of the students (Article 4(1) GG) as well as the right of their parents (Article 6(2) GG). The command of religious neutrality increases with cultural and religious diversity and thus the prohibition to wear a headscarf is justified and not disproportional.<sup>63</sup>

Regarding the symbol of a headscarf, the BVerfG states that the headscarf is in comparison to the Christian cross not per se a religious symbol. The headscarf only becomes a religious symbol when worn by a religious woman. The headscarf can also mean different things.<sup>64</sup> First it can be a symbol of religious faith, or it can simply be a symbol of tradition of the country of origin. It can, however, also be the symbol of Islamic fundamentalism (which then would go against basic principles on which our Western world is built upon), it can also be a symbol of lack of sexual availability (according to Sura 33:59). Because of the variety of motives for wearing a headscarf one cannot immediately conclude that a headscarf is a symbol of female oppression, which goes against the basis of a democratic society.<sup>65</sup>

The BVerfG<sup>66</sup> repealed the decision of the BVerwG with a five to three vote and referred the case back to the BVerwG, since - after an evaluation of arguments for and against the decision of the BVerwG - a legal basis for the exclusion of Fereshta Ludin from the public teaching profession was missing. The legislature of the *Land* could, however, legislate and then legitimize its decision. Thus the BVerfG did not really get to the essence of the headscarf question, which is widely criticized.

The BVerfG considered the qualification, that the wearing of a headscarf constitutes a lack of suitability for the job, an interference with *Ludin's* rights, and held that Article 33(2) GG<sup>67</sup> (equal access to public jobs) together with Article 4(1),(2) GG<sup>68</sup> (freedom of religion) and Article 33(3) GG<sup>69</sup> were violated. The fact that the claimant was wearing a headscarf expressed her

<sup>63</sup> BVerwG 4 July 2002, 2 C 21/01 (Mannheim), NJW 2002, 3345.

<sup>64</sup> See Nathwani, "Headscarfs ...", 16; Anne Debus, "Machen Kleider wirklich Leute? - Warum der 'Kopftuchstreit' so 'spannend' ist", 12 *NWZ* (2001), 1355-1360, at 1355; Felix Ekardt, "Gerät die Kopftuchdebatte auf Abwege?", 7 *ZRP* (2005), 225-227, at 226.

<sup>65</sup> See Robbers, "Muslimische Lehrerinnen ...", 405 *et seq.*

<sup>66</sup> BVerfG 24 September 2003, 2 BvR 1436/02, NJW 2003, 3111.

<sup>67</sup> (2) Jeder Deutsche hat nach seiner Eignung, Befähigung und fachlichen Leistung gleichen Zugang zu jedem öffentlichen Amte.

<sup>68</sup> (1) Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich.

(2) Die ungestörte Religionsausübung wird gewährleistet.

<sup>69</sup> (3) Der Genuss bürgerlicher und staatsbürgerlicher Rechte, die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind unabhängig von dem religiösen Bekenntnis. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnis oder einer Weltanschauung ein Nachteil erwachsen.

belonging to the Islamic religious community and her identification as a Muslim. The duty of a teacher not to show her affiliation with her religious belief in public schools interfered with Article 4(1) and (2) GG, which guarantee individual freedom of religion. Article 4(1) GG includes the freedom of religion and Article 4(2) GG the peaceful practise of the religious belief. This article includes not only the freedom to believe but also the freedom to express and spread the belief. Thus the prohibition to wear a headscarf interferes with this right. Restrictions of these freedoms have to accrue from the Constitution itself and need a sufficient legal basis. Article 33(3) GG forbids a correlation between access to public jobs and religious affiliation.<sup>70</sup> Such a severe interference would only be consistent with Article 4(1) and (2) GG, if constitutionally guaranteed rights were violated and the limitation of the freedom of religion was based on a sufficient legal basis. This was, however, missing, and as long as no legal basis exists, which obliges a teacher to abstain from using any religious symbols in school, a teacher wearing a headscarf cannot be considered not suitable for this job.<sup>71</sup>

Thus the BVerfG states that the legal framework in Germany does not require a ban on headscarfs; such a prohibition could be possible, it must, however, be stated in a law. Herefore, the BVerfG legislates in the realm which has been drawn by the ECtHR.<sup>72</sup>

The legislator in Baden-Württemberg reacted and changed (1 April 2004) the law. § 38 of the *Schulgesetz*<sup>73</sup> states now that teachers in public schools

<sup>70</sup> See Ernst-Wolfgang Böckenförde, “‘Kopftuchstreit’ auf dem richtigen Weg?“, 10 *NJW* (2001), 723-728, at 724.

<sup>71</sup> BVerfG 24 September 2003, 2 BvR 1436/02, *NJW* 2003, 3116.

<sup>72</sup> See Matthias Mahlmann, “Dienstrechtliche Konkretisierung staatlicher Neutralität“, 4 *ZRP* (2004), 123-126, at 123.

<sup>73</sup> (2) Lehrkräfte an öffentlichen Schulen nach § 2 I dürfen in der Schule keine politischen, religiösen, weltanschaulichen oder ähnliche äußeren Bekundungen abgeben, die geeignet sind, die Neutralität des Landes gegenüber Schülern und Eltern oder den politischen, religiösen oder weltanschaulichen Schulfrieden zu gefährden oder zu stören. Insbesondere ist ein äußeres Verhalten unzulässig, welches bei Schülern oder Eltern den Eindruck hervorrufen kann, dass eine Lehrkraft gegen die Menschenwürde, die Gleichberechtigung der Menschen nach Art. 3 des Grundgesetzes, die Freiheitsgrundrechte oder die freiheitlich-demokratische Grundordnung auftritt. Die Wahrnehmung des Erziehungsauftrags nach Art. 12 I, Art. 15 I und Art. 16 I der Verfassung des Landes Baden-Württemberg und die entsprechende Darstellung christlicher und abendländischer Bildungs- und Kulturwerte oder Traditionen widerspricht nicht dem Verhaltensgebot nach Satz 1. Das religiöse Neutralitätsgebot des Satzes 1 gilt nicht im Religionsunterricht nach Art. 18 S. 1 der Verfassung des Landes Baden-Württemberg.

(3) Die Ernennung eines Bewerbers nach § 9 des Landesbeamtengesetzes für eine Tätigkeit an öffentlichen Schulen nach § 2 I setzt als persönliches Eignungsmerkmal voraus, dass er die Gewähr für die Einhaltung des Absatzes 2 in seiner gesamten voraussichtlichen Dienstzeit bietet. Für die Versetzung einer Lehrkraft eines anderen Dienstherrn in den baden-württembergischen Schuldienst gilt Satz 1 entsprechend. GBl S. 178

(4) Für die Ableistung des Vorbereitungsdienstes für ein Lehramt können auf Antrag Ausnahmen von den Absätzen 2 und 3 im Einzelfall vorgesehen werden, soweit die Ausübung der Grundrechte es zwingend erfordert und zwingende öffentliche Interessen an der Wahrung der amtlichen Neutralität und des Schulfriedens nicht entgegenstehen.

(5) Absätze 2 bis 4 gelten entsprechend für Lehrkräfte im Angestelltenverhältnis.

are not allowed to express any political, religious or similar statements which are fit to jeopardize the neutrality of the *Land* towards the students or their parents; in particular a behaviour which could generate the impression that a teacher violates human dignity, equal rights, basic rights or the democratic order. An exemption exists for classes in religious instruction.<sup>74</sup> Since *Miss Ludin* was not willing to abstain from wearing her headscarf, she did not fulfil the prerequisite of neutrality. § 38 (2) protects already an abstract danger. This means that not only the acts which endanger the neutrality of the *Land* can be subsumed under the provision but already the abstract danger of such a violation falls under the provision. Certain behaviour is already prohibited, if it is suitable to endanger neutrality.

However, the presentation of Christian and occidental educational and cultural values does not violate § 38. The legislator emphasizes that these values should be seen detached from its religious roots, as part of the occidental cultural background, which are also included in the GG. Among these values one can find the protection of human dignity (Article 1 GG), freedom of religion (Article 4 GG) and values like solidarity.

Besides Baden-Württemberg<sup>75</sup>, seven other *Länder* have meanwhile forbidden an Islamic headscarf worn by teachers in public schools. Most recently, Nordrhein-Westfalen banned the headscarf for Muslim teachers from class.<sup>76</sup>

Thus the decision of the BVerfG led to the fact that the *Länder* now pass laws that restrict teachers in the expression of their beliefs to fulfil the prerequisite of neutrality at school.<sup>77</sup> This goes very much into the direction of the French system, which reaches, however, still one step further and bans the headscarf also for students at public schools.<sup>78</sup>

On the 7<sup>th</sup> of July 2006<sup>79</sup>, a recent decision by the VG Stuttgart turned the debate around again. Based on the new *Schulgesetz* in Baden-Württemberg, a 55-year-old teacher was expelled from school because she was wearing an Islamic headscarf. One would expect that the case would end there. The VG, however, decided that this expulsion from school, which is based on § 38 (2), violates her rights of equal treatment since nuns in Baden-Baden are allowed to teach in their traditional religious clothing in a public school. Since the

---

<sup>74</sup> BVerfG 24 June 2004, 2 C 45/03 (VGH Mannheim), NJW 2004, 3581.

<sup>75</sup> See Erich Röper, "Kopftuchgesetz - Die Bekleidungs- und Verhaltensregeln im Islam ernst nehmen", 1 *ZRP* (2005), 32-33, at 32.

<sup>76</sup> Decided by the Düsseldorfer Landtag on 31 May 2006.

<sup>77</sup> See Ekardt, "Gerät die Kopftuchdebatte ...", 225.

<sup>78</sup> Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, at <http://www.assemblee-nationale.fr/12/dossiers/laicite.asp>.

<sup>79</sup> VG Stuttgart 18 K 3562/05.

habit of nuns is also religiously motivated and not only something worn out of tradition without a religious meaning, this different treatment is not justified. The *Schulgesetz*, however, does not allow such a privileged treatment of the Christian faith, since it does not allow any political, religious or similar statements. Furthermore the claimant argues that her headscarf is not a statement about political, religious or other points of views on the world and does not constitute an abstract danger to the peace at school; because of the headscarf she is even considered by the parents of the students, who are 60% immigrants, a competent contact person also with regard to questions concerning Islamic belief.<sup>80</sup>

#### 4. Diversity in a Multicultural State

Religious pluralism increases the potential of conflicts.<sup>81</sup> The prohibition to wear specific pieces of clothing affects members of religious communities differently but members of various groups have to be treated equally.<sup>82</sup> Criticism can be uttered in line with the most recent decision of the VG Stuttgart with regard to the different treatment of religions in Germany, which violates the rights of equal treatment. Since the clothing of nuns is accepted, the headscarf, however, is not, a “double standard” exists. This unequal treatment is disclosed and criticised by the VG Stuttgart and leads the court to the widely debated outcome that the headscarf has to be accepted if other religious symbols are. Also the neutrality of the state forces the state to provide enough space to express religion in the public realm. Precondition for this tolerant approach is, however, that the Islamic headscarf is not misused as a political statement; neither by the teacher to evangelise her students nor by any other public figure. Thus the situation has to be avoided that the headscarf of the teacher is considered missionary. One of the main aims of education is to teach culture and create identities, which will never occur without a personal touch. It is out of question that education should entail mutual tolerance and open discussions on different religious views. Thus it is not the task of the state to present the students with a “closed society or world”. The function of a teacher is also different of that of a policeman or a judge, who represent the state in their function. The state which accepts a teacher with a headscarf does not immediately make her religious belief its own. And even if a public function in the police would be filled with a person, wearing a headscarf there are arguments for her working as a policewoman, since she represents a multicultural state which accepts exactly these different beliefs. There are good reasons to assume that this does not conflict with the neutrality of a pluralist state.

---

<sup>80</sup> “Kopftuch und Ordenstracht”, *Die Zeit*, 7 July 2006, at <http://www.zeit.de/online/2006/28/kopftuchstreit>.

<sup>81</sup> See Robbers, “Muslimische Lehrerinnen ...”, 405 *et seq.*

<sup>82</sup> BVerfG 24 September 2003, 2 BvR 1436/02.

Austria should continue its own way to become an open, multicultural society, which accepts and integrates different religions and does not see the need to ban all kinds of religious symbols from the public sphere. If a tolerant society can be established that is not necessary. Also legally, Austria can be seen as a role model, where the Islam has been legally recognized since 1912, and where Islamic religious instruction in public schools is financed by the state. Only through dialogue an improvement of integration of Muslims into our open society will occur. This mutual respect is for sure a reason, why conflicts are small and cannot be compared to those in Germany or France. This openness, however, should be continued in the legal, cultural as well as in the political sphere - where provocative statements are often misused.

The changes in our society towards a more multicultural society are in particular evident in schools where tolerance and acceptance of the “foreign other” should be practised. If public schools do not want to lose legitimacy, they should not restrict themselves in their diversity and not reduce themselves to providing information.<sup>83</sup> The positive religious freedom provides for the expression of religion also in the public sphere and thus also in public schools. Diversity in society should also be present in public schools.

---

<sup>83</sup> See Robbers, “Muslimische Lehrerinnen ...”, 405 *et seq.*; Böckenförde, “‘Kopftuchstreit’ ...”, 726.

## Bibliography

Abel Ralf, "Die aktuelle Entwicklung der Rechtsprechung zu neuen Glaubens- und Weltanschauungsgemeinschaften", 6 *NJW* (2001), 410-419.

Böckenförde Ernst-Wolfgang, "'Kopftuchstreit' auf dem richtigen Weg?", 10 *NJW* (2001), 723-728.

Callamard Agnes, "Freedom of Speech and Offence: Why blasphemy laws are not the appropriate response", 18 *Equal Voices* (2006) 7, at <http://eumc.europa.eu/eumc/material/pub/ev/ev18/ev-18.pdf>.

Debus Anne, "Machen Kleider wirklich Leute? - Warum der 'Kopftuchstreit' so 'spannend' ist", 12 *NVwZ* (2001), 1355-1360.

Ebels Philip, "Die Niederlande: Das Ende der Toleranz", *Cafebabel. Die Europa-Zeitung*, 6 March 2006, at <http://www.cafebabel.com/de/article.asp?T=T&Id=6207>.

Ekardt Felix, "Gerät die Kopftuchdebatte auf Abwege?", 7 *ZRP* (2005), 225-227.

Fetzer Joel and Soper Christopher, *Muslims and the State in Britain, France and Germany* (Cambridge University Press, Cambridge, 2005).

Grabenwarter Christoph, *Europäische Menschenrechtskonvention* (C.H. Beck, München, 2nd ed. 2005).

Halfmann Ralf, "Der Streit um die 'Lehrerin mit Kopftuch' - Die Religionsfreiheit von Beamten im Konflikt mit dem religiös-weltanschaulichen Neutralitätsgebot des Staates", 8 *NVwZ* (2000), 862-868.

Heitmeyer Wilhelm, "Gesellschaftliche Integration, Anomie und ethnisch-kulturelle Konflikte", in Heitmeyer Wilhelm (ed.), *Was treibt die Gesellschaft auseinander?* (Suhrkamp, Frankfurt am Main 2004), 629-652.

Huntington Samuel, *Kampf der Kulturen* (Siedler, Berlin, 1998).

Ipsen Jörn, "Karlsruhe locuta, causa non finita - Das BVerfG im so genannten 'Kopftuch-Streit'", 10 *NVwZ* (2003), 1210-1213.

Janz Norbert and Rademacher Sonja, "Islam und Religionsfreiheit - Die religiöse und weltanschauliche Neutralität des Staates auf dem Prüfstand", 7 *NVwZ* (1999), 706-713.

Krammer Robert, "Tierschutz und Religionsfreiheit. Sind Schächtungsverbote verfassungswidrig?", 10 *JRP* 2002, 269-281.

Köbler Reinhart, "Globalisierung, internationale Migration und Begrenzung ziviler Solidarität. Versuch über aktuelle Handlungsformen von Nationalstaaten", in Pries Ludger (ed.), *Transnationale Migration* (Nomos, Baden-Baden, 1997) 329-347.

Mahlmann Matthias, "Dienstrechtliche Konkretisierung staatlicher Neutralität", 4 *ZRP* (2004), 123-126.

Maussen Marcel, "Islamic Presence and Mosque Establishment in France. Colonialism, Arrangements for Guest Workers and Citizenship" (working paper 2006).

Mecheril Paul, "Zugehörigkeitserfahrungen von Anderen Deutschen. Eine empirische Modellierung", in Pries Ludger (ed.), *Transnationale Migration* (Nomos, Baden-Baden, 1997) 293-314.

Medda-Windischer Roberta, "The Jurisprudence of the European Court of Human Rights", 4 *European Yearbook of Minority Issues* (2004/5), 557-594.

Meyer-Ladewig Jens, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (Nomos, Baden-Baden 2003).

Monsma Stephen and Soper Christopher, *The Challenge of Pluralism. Church and State in Five Democracies* (Rowman & Littlefield, New York, 1997).

Mückl Stefan, *Religions- und Weltanschauung im Europarecht* (Winter, Heidelberg, 2002).

Nuscheler Franz and Rheims Birgit, "Migration und Sicherheit: Realitäten und Halluzinationen" in Pries Ludger (ed.), *Transnationale Migration* (Nomos, Baden-Baden 1997), 317-327.

Nathwani Niraj, "Headscarfs and Human Rights: a critical analysis of the respective case law of the European Court of Human Rights" (working paper 2006).

Open Society Institute, "Monitoring the EU Accession Process: Minority Protection" (2002), at <http://www.eumap.org/reports/2002/minority>.

Open Society Institute, "The Situation of Muslims in France" (2002), at [http://www.eumap.org/reports/2002/eu/international/sections/france/2002\\_m\\_france.pdf](http://www.eumap.org/reports/2002/eu/international/sections/france/2002_m_france.pdf).

Ornig Nikola, *Chancen und Grenzen des Pluralismus von Religionen und Ethnien. Zur Analyse eines kultursoziologischen Grundproblems im Licht österreichischer Erfahrungen mit dem Islam zu Beginn des 21. Jahrhunderts* (Diss. Graz 2005).

Pabel Katharina, "Islamisches Kopftuch und Prinzip des Laizismus", 1 *EuGRZ* (2005), 12-17.

Pofalla Ronald, "Kopftuch ja - Kreuzifix nein? Zu den Widersprüchen der Rechtsprechung des BVerfG", 17 *NJW* (2004), 1218-1220.

Robbers Gerhard, "Muslimische Lehrerinnen, das Kopftuch und das deutsche Bundesverfassungsgericht", 50 *ÖARR* (2003), 405-417.

Rohe Mathias, *Perspektiven und Herausforderungen in der Integration muslimischer MitbürgerInnen in Österreich. Executive Summary*, Erlangen 2006, at

[http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/Perspektiven\\_Herausforderungen.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/Perspektiven_Herausforderungen.pdf) .

Rohe Mathias, *Zur öffentlichrechtlichen Situation von Muslimen in ausgewählten europäischen Ländern*, Erlangen 2006, at [http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/Perspektiven\\_Herausforderungen.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/Perspektiven_Herausforderungen.pdf).

Roy Olivier, "Wiedergeboren, um zu töten", *Die Zeit*, 21 July 2005, at <http://www.zeit.de/2005/30/Islamismus>.

Röper Erich, "Kopftuchgesetz - Die Bekleidungs- und Verhaltensregeln im Islam ernst nehmen", 1 *ZRP* (2005), 32-33.

Sacksofsky Ute, "Die Kopftuch-Entscheidung - von der religiösen zur föderalen Vielfalt", 46 *NJW* (2003), 3297-3301.

Schiffauer Werner, "Vom Exil- zum Diaspora-Islam. Muslimische Identitäten in Europa", 4 *Soziale Welt* (2004), 347-368.

Schwinn Thomas, "Konvergenz, Divergenz oder Hybridisierung? Voraussetzungen und Erscheinungsformen von Weltkultur", 2 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (2006), 201-232.

Spies Axel, "Verschleierte Schülerinnen in Frankreich und Deutschland", 7 *NVwZ* (1993), 637-640.

Wallner Jürgen, "Kopftuchdebatte - Österreich ist anders ", *Der Standard*, 8 January 2004, at <http://diestandard.at/?url=/?id=1530555>.

Weber Hermann, "Die individuelle und kollektive Religionsfreiheit im europäischen Recht", 47 *ZevKR* (2002), 265-302.

Woelk Jens, "Federalism and Consociationalisms as Tools for State Reconstruction? The Case of Bosnia and Herzegovina", in Joseph Marko, Alan Tarr and Robert Williams (eds.), *Federalism, Sub-national Constitutional Arrangements and the Protection of Minorities* (Greenwood/Praeger, Westport, 2004).

### *Newspaper Articles*

"Prokop: Kopftuchverbot für moslemische Lehrerinnen", *Die Presse*, 8 March 2005, at [http://diepresse.at/textversion\\_article.aspx?id=469062](http://diepresse.at/textversion_article.aspx?id=469062).

"Prokop nun 'absolut nicht für ein Kopftuchverbot'", *Der Standard*, 11 March 2005, at <http://diestandard.at/?url=/?id=1978261>

"Mutmaßlicher Van-Gogh Mörder vor Gericht", *Die Zeit*, 11 July 2005, at [http://www.zeit.de/2005/28/Van\\_Gogh](http://www.zeit.de/2005/28/Van_Gogh).

"Volksschule Neu-Arzt: Stück Stoff wirbelt viel Staub auf", *Tiroler Tageszeitung*, 10 May 2006, at <http://www.tirol.com/politik/innsbruck/36718/index.do>.

. "Prokop: Kein Bawag-Wahlkampf, Tirol bei Asylplätzen hinten", *Tiroler Tageszeitung*, 12 May 2006, at <http://www.tirol.com/politik/national/36910/index.do>

"Mainstream hat integrationsfreundliche Haltung", *Die Presse*, 19 May 2006, at <http://www.diepresse.at/Artikel.aspx?channel=&ressort=ai&id=559842>.

Münz Rainer, "Kein Deutsch, kein Studium, kein Job", *Die Zeit*, 24 May 2006, at [http://www.zeit.de/2006/22/514\\_Zuwanderer\\_Text](http://www.zeit.de/2006/22/514_Zuwanderer_Text).

"Kopftuch und Ordenstracht", *Die Zeit*, 7 July 2006, at <http://www.zeit.de/online/2006/28/kopftuchstreit>

Published in the EDAP series:

2/2006

Palermo Francesco, “Linguistic Diversity within the Integrated Constitutional Space”, 2 *European Diversity and Autonomy Papers - EDAP* (2006), at [www.eurac.edu/edap](http://www.eurac.edu/edap)

1/2006

Blokker Paul, “The Post-enlargement European Order: Europe ‘United in Diversity?’”, 1 *European Diversity and Autonomy Papers - EDAP* (2006), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

4/2005

Marko Joseph, “Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina”, 4 *European Diversity and Autonomy Papers - EDAP* (2005), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

3/2005

Ferri Delia, “EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks”, 3 *European Diversity and Autonomy Papers - EDAP* (2005), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

2/2005

De Schutter Olivier and Verstichel Annelies, “The Role of the Union in Integrating the Roma: Present and Possible Future”, 2 *European Diversity and Autonomy Papers - EDAP* (2005), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

1/2005

Toggenburg Gabriel N., “Die Sprache und der Binnenmarkt im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten“, 1 *European Diversity and Autonomy Papers - EDAP* (2005), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

7/2004

Marko Joseph, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance”, 7 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

6/2004

Petričušić Antonija, "Wind of Change: The Croatian Government's Turn towards a Policy of Ethnic Reconciliation", 6 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

5/2004

Henrard Kristin, "The European Convention of Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity", 5 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

4/2004

Neuwirth Rostam J., "The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in Light of the WTO", 4 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

3/2004

Herold Anna, "EU Film Policy: between Art and Commerce", 3 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

2/2004

Bia Maria Teresa, "Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns", 2 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).

1/2004

Toggenburg Gabriel N., "The Debate on European Values and the case of cultural diversity", 1 *European Diversity and Autonomy Papers - EDAP* (2004), at [www.eurac.edu/edap](http://www.eurac.edu/edap).