



The importance of religious freedom to security and integration policy

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Key Points

- Religious freedom is an unreserved but not unlimited fundamental right guaranteed by the Basic Law of Germany (*Grundgesetz*). Restrictions to protect the rights of others and other constitutionally protected legal interests are still permissible. The Basic Law also protects against religiously motivated attempts to abolish free basic democratic order.
- Religious education, corporate status and theological faculties all fall under the right to exercise religious freedom granted by the State. They support religion's important role in public welfare. In the long run, however, those permissions can only be justified if they do not appear to unilaterally privilege Christian churches, but must equally benefit other religious communities as well. Political efforts to expand these permissions to other religions, in particular Islam, therefore contribute to the continuation of their legitimacy.
- Restricting religious freedom should occur only in individual cases where there are specific circumstances that result in other legally protected rights being negatively impacted. Blanket headscarf bans for teachers at school or bans on wearing full-face veils in public do not satisfy this requirement. However, proportionately appropriate restrictions are possible where the specific circumstances meet this requirement. Freedom of religion might not be enforced where required in the process of dealing with conflict. There is no *carte blanche* for any form of worship at any time or place.

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An unconditional but not unlimited fundamental right

I. Introduction

There can be no doubt that, on a global scale, religious freedom is still a vulnerable fundamental right. Reports on the persecution of religious minorities can be found in many regions of the world and at the very least general problems of discrimination on the basis of religion are nearly ubiquitous. It is therefore right that the United Nations has been devoting its attention to religious freedom for the past 30 years through its own protective mechanism, which takes the form of a "Special Rapporteur on Freedom of Religion or Belief".¹ The reports submitted by the various Special Rapporteurs over the years make clear that there are certain States where particularly serious problems with the protection of religious freedom are evident. Yet they also reflect on the more general issues that arise in many places when dealing with the protection of religious freedom: religious freedom in the workplace, religious freedom and religious education of children, religion and violence, protection of religious sensibilities and freedom of expression, etc.²

Two aspects in particular crop up in many of the issues mentioned, aspects that have always played a role in talking about religion but whose importance has increased so much in recent years that they are now at the core of the societal and political debate: security and integration. Religiously motivated acts of violence have become an important issue of domestic and international security. This has seen freedom of religion increasingly encroaching upon the security policy sphere, an area it has previously only played a minor role in. The second aspect concerns the importance of religion for community building. Societies use affiliations and delineations to define common religions. Beyond that, freedom of religion has become an important if not the most centrally important fundamental right in the debate about Muslim migration and integration over the past several years – ranging from the legal aspects of the organisation of religious communities, to Islamic religious education and theological education at universities, to halal food, wearing headscarves and burqas, and prayer in school. With this in mind, the analysis that follows will focus on the importance of religious freedom to issues of security (III) and integration (IV). First, we shall begin with some general considerations on the dogmatic structure of religious freedom (II) important for our fundamental understanding of this issue.

II. Freedom of religion – an unconditional but not unlimited fundamental right

Unlike most other fundamental rights guaranteed in the Basic Law of Germany (*Grundgesetz* [GG]), the freedom of religion guaranteed in Article 4 GG is not subject to any statutory reservation. This highlights the particular importance of this fundamental right is. However, this (conscious) decision of the authors of the Basic Law³ does not mean that there are to be no restrictions whatsoever. Instead, it only raises the bar for restrictions. Only those restrictions intended to protect other legal constitutional interests are permitted (conflicting constitutional rights).⁴ This not only includes the fundamental rights of others⁵, but the fundamental principles on which the organisation of the State is based, such as the principle of democracy or the State's monopoly on the use of force.⁶ This indicates that the principles of sound democracy also apply to religious communities. Efforts aimed at dismantling this free democratic basic order need not be need not be accepted, even if they are religiously motivated.⁷

Basic Law's fundamentally open attitude towards religion

This makes the normative standards found in the Basic Law more stringent than those found in the European Convention on Human Rights (ECHR), the European Charter of Fundamental Rights and the international treaties on human rights protection, such as the International Covenant on Civil and Political Rights. These standards can be restricted by (qualified) statutory reservations.⁸ This special treatment of religious freedom by the Basic Law has shaped the German constitution's attitude towards religion as a fundamentally open and friendly one. This attitude is not limited to Article 4. In fact it is also found when addressing the issue of religious education in Article 7 Paragraph 4 GG and corporate status in Article 140 GG in conjunction with Article 137 Paragraph 5 of the Weimar Constitution.⁹

Any and all restrictions on religious freedom are subject a strict proportionality test under both German constitutional law and the provisions of the European and international agreements on the protection of human rights. Such measures are then justified only where they are reasonable and constitute the minimum possible interference to achieve a legitimate aim.¹⁰

III. Religious freedom and security policy

1. Public security as a justification for bans on burqas?

Attempts to ban the burqa have special significance in the current political debate in Germany. The French ban on full-face veils has set the trend for this public debate.¹¹ This applies both to its practical effects (about which opinions are mixed) and the clarification of legal issues. The European Court of Human Rights' decision in the case *S.A.S. v. France* is of fundamental importance in this respect.¹² Although the court has ruled that the French ban is compatible with the Convention, it has made important distinctions with regard to the legal justifications. In justifying the ban, France lodged two key arguments: one related to security policy and one to integration policy. The justification in terms of security policy was based on the criterion of "public security" as defined in Article 9 Paragraph 2 of the ECHR, arguing that there were particular difficulties in establishing the identity of veiled persons and the risk that dangerous objects or explosives could be hidden under a burqa. The argument – based on integration policy – was that Member States are permitted to establish minimum requirements for communication in public within the scope of "protecting the rights and freedoms of others" in Article 9 Paragraph 2 of the ECHR. These include eye contact and face-to-face interaction, both of which they argued were impeded when a person wears a full-face veil.

Whilst the court accepted the integration policy argument, it rejected the security policy argument, at least in the current form as adopted by the French legislature, which is tantamount to a blanket ban on wearing a full-face veil in public. A purely abstract risk is not sufficient justification for taking such a drastic measure as a total ban of being fully veiled in public.¹³

This situation makes clear that the security policy justifications for a ban on burqas are only borne out if they address specific risk situations. So, for example, a valid ban on wearing hoods during a demonstration could be extended to wearing full-face veils. Another conceivable iteration would be a temporary ban on full-face veils when there is an elevated risk to the general public (for example, following a terrorist attack).¹⁴ Aside from these specific constellations¹⁵, addressing the issue of full-face veils does not fall under the jurisdiction of security policy, but is primarily a job for integration policy.¹⁶

Security and integration policy was used to justify the burqa ban in France.

Security policy justifications valid only in specific risk situations.

2. Religious affiliation as reasonable grounds for suspicion?

Religious affiliation cannot be considered reasonable grounds for suspicion.

As part of the fight against terrorism motivated by religious fundamentalism, efforts have been made to classify religious affiliation as reasonable grounds for suspicion and to link terrorism to certain religious affiliations as a preventive measure. As such, there were discussions on whether meal preferences had to be disclosed to the immigration authorities when collecting and passing on passenger name record (PNR) data.¹⁷ The agreement in place between the EU and the US¹⁸ allows this information to be disclosed. The equivalent directive for the EU region itself, adopted in April 2016, provides for the immediate deletion of all data “revealing a person’s race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation.”¹⁹

Religious affiliation, among other criteria, may be used for electronic profile searching.

In Germany, religious affiliation may represent one of many criteria for electronic profile searching. There are no specific criteria set out in the statutory provisions on electronic profile searching. However, the landmark decision taken by the German Federal Constitutional Court (*Bundesverfassungsgericht*) on 4 April 2006 makes perfectly clear that such surveillance can be tied to religious affiliation, at least in practice. The German Federal Constitutional Court does not deem it to be fundamentally out of bounds, but increasingly takes into account the proximity to the characteristics set out in Article 3 Paragraph 3 GG when determining the intensity of such intrusions.²⁰ However, the intensity of this kind of interference with fundamental rights led the court to require a specific danger be present in order to carry out electronic profile searching.²¹ The special protection against discrimination provided by Article 3 Paragraph 3 GG is only considered if establishing the risk involves any reference to the characteristics stated therein, i.e. that a danger is based on a person being of a specific skin colour, religion or gender.²²

IV. Religious freedom and integration policy

The State’s constitutional provisions relating to religion.

The Basic Law contains several religion-related provisions that, when taken together with the German Federal Constitutional Court’s decision to award corporate status to Jehovah’s Witnesses can be seen as the State making overtures to put freedom of religion of the State into practice. The State’s freedom of religion-related constitutional offerings – religious education and theology at public universities in addition to corporate status – were historically developed with the Christian churches in mind. Their application to Islam has largely framed the debate on constitutional religious parity in recent years (1). Particular difficulties also arise with respect to the practice of religion in school; both teachers wearing headscarves and students praying between lessons have led to controversy (2). Finally, the aspect of integration once again leads to discussing the ban on the burqa (3).

1. The State’s constitutional provisions on religious freedom

Religious education and corporate status should be open to Islam.

With religious education and corporate status, the Basic Law contains religion-related regulations that may seem out of place at first in the context of freedom of religion, but on closer inspection do in fact reveal how the State has provided for putting the freedom of religions into action. The German Federal Constitutional Court has expressly developed this perspective for corporate status (a). It also forms the basis for the guarantee of religious education as a regular school subject (b). Finally, it also affects theological faculties at public universities. Unlike in the Weimar Constitution, the Basic Law does not expressly guarantee them under constitutional law, but they are an important prerequisite for religious education and are in most

cases covered by concordats or church agreements (c). These constitutional provisions related to exercising religious freedom can only be sustained in the long term if they are not seen as unilaterally favouring Christian churches but are also extended to Islam, taking into account actual and religious needs (d).

a) Corporate status

Since its landmark decision to grant corporate status to Jehovah's Witnesses, the German Federal Constitutional Court now considers the status of a public corporation as defined by Article 140 GG in conjunction with Article 137 Paragraph 5 of the Weimar Constitution to be a State provision for the development of religious freedom.²³ This State provision is not limited to certain religious communities. The Basic Law has no cultural reservations in this respect.²⁴ Though much of the discussion surrounding the "Weimar Church and State Compromise" ("*Weimarer Kirchenkompromiss*") of 1919 is fairly contested, there is no denying that the continuous use of the term "religious communities" instead of "churches" ("*Religionsgemeinschaften*" instead of "*Kirchen*") and the parity given to philosophical communities and religious communities (Article 137 Paragraph 7 of the Weimar Constitution) represented a rejection of the idea that Christian churches should hold any constitutional privilege.²⁵ It is therefore conceivable that Muslim communities might attain public corporation status "if they, by the means of their number and constitution, indicate to be lasting" (Article 140 GG in conjunction with Article 137 Paragraph 5 Sentence 2 of the Weimar Constitution) and act lawfully. The German Federal Constitutional Court has adopted the requirement of lawful compliance as a sort of unwritten constitutional condition for awarding corporate status, and has furthermore measured access to corporate status against the requirements of religious freedom and expressly rejected proximity to the State or even "loyalty to the State" as criteria for granting it.²⁶ When examining the outlook for a community's "indication of being lasting", German Federal Administrative Court case law does not rely on the absolute number of members or their proportion to the overall population, but instead on an overall assessment in which its lasting presence in Germany and the growth of its membership may be considered. "Corporate status is extended to every religious community that indicates to be lasting in order to develop their religious freedom, regardless of any circumscribing importance for public life whatsoever."²⁷

b) Muslim religious education

Religious education in public schools (Article 7 Paragraph 3 GG) is also considered a provision for the exercise of religious freedom. Although Article 7 Paragraph 3 Sentence 1 GG as amended does not explicitly grant any subjective right of children or parents to access religious education, teaching children about religion is considered part of parents' freedom of religion,²⁸ allowing for the possibility of religious education in public schools in a manner that allows parents to exercise this fundamental right. Religious communities are granted a provision that allows them to teach their beliefs in schools. The German Federal Administrative Court considers the understands the standardised obligation of the State to organise religious instruction as set out in Article 7 Paragraph 3 Sentence 1 GG "a means to develop and support the religious freedom that is constitutionally guaranteed [to religious communities]".²⁹

Extensive efforts have been made in recent years to allow Islamic religious education in public schools. In addition to being considered religious instruction that does not meet the standards for "regular curriculum" as defined by Article 7 Paragraph 3 GG (specifically including relevance for promotion in school and equal treatment of material and staff as compared to other subjects³⁰), the focus of legal efforts in

Make public corporation status open to Islamic communities

Lawful compliance required along with proof of membership and guarantee of permanence

State guaranteed religious education in schools as an expression of religious freedom.

The Muslim communities lack an authorised contact/spokesperson

recent years has been on the equality of the configuration of Catholic and Protestant religious instruction in schools.³¹ The problem therein lies in the fact that the State is obliged to religious and ideological neutrality and is therefore unable to specify the content of instruction and examination itself. It must instead rely on cooperation with a religious community with a certain degree of consistency in its institutional structure. (Co-)determining what aspects are relevant falls under religious communities' right of self-determination. The same is true with regard to selecting religious teaching staff, and the religious communities in question must be involved. A sufficiently cohesive institutional structure is what has largely been and still remains lacking for Islam. This has led to the state legislature in North Rhine-Westphalia adopting a solution through an advisory board that aims to put the participatory rights to which a religious community is entitled into practice for Muslims.³² Other forms of cooperation are in place in other German states.³³

c) Islamic theology at public universities

There is a lack of legitimate cooperation, even in departments of Islamic theology

Similar requirements for the involvement of religious communities are involved on the issue of theology at public universities.³⁴ The German Federal Constitutional Court also notes a State provision for religious communities in this regard.³⁵ Here, too, the State must rely on cooperation with a religious community in organising and determining the curriculum and examination content and when selecting personnel. Accordingly, models very similar to those applied to religious instruction in schools are used. These are intended to allow Islam the same participation despite the fact that the religion lacks a legal entity comprised of its members that could exercise its right to participate on behalf of those members.³⁶

d) Importance of constitution provisions for religion from the viewpoint of integration

Importance of provisions for implementing religious freedom to integration.

All three of the legal spheres mentioned above consist of historic State provisions that have been developed based on the needs of Christian communities in Germany and are structurally aligned with these communities. The demographic changes in Germany have increasingly made these provisions appear to be a privilege requiring legal justification, whether it be because the attitude towards religion has become more critical overall in some sectors of the population or because there are no comparable provisions in place for the growing proportion of Muslims. The response seen in federal policy and state-level policy in many German states has been increased efforts in exploring options to extend these provisions to Muslim religious communities. The decision to do so is only somewhat required by law (one example of a legal requirement would be corporate status since a constitutional right to this being granted exists if the criteria are met³⁷). In fact this corresponds to the nature of a "provision": the decision to extend provisions is frequently a political one and has largely been based on integration policy motives, something that has become very clear in the debate on religious instruction and Islamic theology. This makes these areas a particularly good example of the importance of religious freedom to integration policy. Immigration by groups whose identity is strongly defined by common religious ties makes the handling these religious ties an important aspect of integration policy.

2. Religious worship at school

In terms of practicing religion in school, the main focus of public attention in recent years has (once again) been teachers wearing headscarves (a) and the dispute over tolerance for Muslim students in Berlin praying in school (b). The decisions in both cases are based on the common justification of preserving peace at school, which in turn reveals integration policy motives (c).

a) Teachers wearing headscarves

The question of whether teachers are permitted to wear headscarves in the classroom has plagued German courts for more than twenty years. The decision of the German Federal Constitutional Court on 24 September 2003 was an initial step, conceding to the German states the right to establish special legal justifications for a ban on religiously motivated clothing, but also implicitly suggesting that such bans could not unduly interfere with the teacher's freedom to practise their religion.³⁸

The bans subsequently enacted in many German states were then once again put to the test before the German Federal Constitutional Court in 2015. On the basis of the provision in the North Rhine-Westphalian Education Act, the German Federal Constitutional Court further clarified its standards and now considers it disproportionate for the wearing of a headscarf in and of itself to be considered a threat to school peace. Instead, such provisions require more specific circumstances indicating that headscarves create or exacerbate a school conflict.³⁹ This has served to further accentuate the Court's current interpretation of the Basic Law as being friendly towards religion. The initial headscarf decision raised doubts as to this since it had indicated the possibility of the Court stressing distance in its interpretation of neutrality.⁴⁰

A stricter focus on individual cases is necessarily tied to requiring a specific threat to school peace school for justifying headscarf bans for teachers, which the statutory provisions avoided by abstractly classifying headscarves as disruptive to school peace. The individual case test now required by the German Federal Constitutional Court certainly presents a special challenge for school administrators in certain school districts.⁴¹ However, this focus on individual cases comes down to the general tendency towards the adjudication fundamental rights and, in principle at least, is nothing new. It also ensures a more appropriate balance of the conflicting legal positions than the blanket ban, which came at the expense of the teacher's religious freedom.

b) Berlin school prayer case

Another situation involving the exercise of religious freedom arose and became known as the Berlin school prayer case. In this case, Muslim students wanted to pray outside of lesson times but in classrooms. The school administration forbade this on the grounds that religious expressions, especially prayers, belonged "in people's private spaces or in places of worship".⁴² This statement seems to evince a secularist understanding of religious freedom, something seen repeatedly in France in particular. According to German Federal Constitutional Court European Court of Human Rights case law, however, there can be no doubt that practising religion is of course protected in public spaces as well and restrictions on this practice must therefore be legally justified.⁴³

A teacher can be prohibited from wearing a headscarf based on jeopardising peace at school.

The German Federal Constitutional Court calls for a case-by-case assessment

Contrary to secularist understanding religious freedom is protected in public spaces.

As the case proceeded, the German Federal Administrative Court ultimately considered the preservation of peace in the school environment to be the decisive justification.⁴⁴ There can be no objections to this on the abstract level of legal doctrine.⁴⁵ The microcosm of the school reflects the prevailing social conditions⁴⁶ and therefore the conflicts posed by a religiously plural society. Peace in the school environment seems to be a special characteristic of the State's general responsibility to ensure peaceful and orderly coexistence in society. Taken from the viewpoint of integration in particular, however, we must once again take a closer look at to whom this interference with a peaceful school environment is attributed.

c) School peace as a justification for restricting freedom of religion in school

As a court of appeals limited to reviewing questions of law, the German Federal Administrative Court has not engaged in more closely examining the actual criteria for specific interference with school peace in the Berlin school prayer case. This is understandable from a procedural point of view. However, the German Federal Constitutional Court's ruling on the headscarf case indicates that it depends on specific risks to school peace. Mere suppositions, for example how other pupils and parents might possibly respond, are not sufficient here. Furthermore, we know and recognise from our experiences with the right to free assembly that massive public reactions to a demonstration project can only lead to its ban in very exceptional cases.⁴⁷ For a start, because of the high value placed on freedom of assembly, the principle that the State must commit to taking a protective role for the planned demonstration holds true here. This valuation can also be transferred to the legal classification of religiously motivated behaviour at school. When engaged of the balancing act between conflicting legal positions, one must certainly distinguish between something that is considered religiously imperative (such as wearing a headscarf) or whether it involves a form of worship that could instead be performed at another time and another place (which possibly could have been the case with the prayer issue). In any case, the comparison with freedom of assembly highlights the fact that, when relying on the legal justification of "maintaining peace at school", possible interference with this does not be automatically and exclusively attributed to the student exercising their right to religious freedom. Instead a gentle balance must be sought to avoid one side of the conflict bearing the full responsibility for its resolution.⁴⁸

3. Once again: the burqa ban

Integration policy considerations also underpin some of the arguments put forward in favour of a burqa ban. These arguments involve the image of women symbolised by wearing full-face veils to avoid the emergence of parallel societies and – at least according to the decision of the Grand Chamber of the European Court of Human Rights in the case of *SAS v. France* – the minimum requirements for the ability to communicate in public on which a society may agree by democratic decision. With this reasoning, the Court acted strictly in accordance with what the French government had submitted, which had been based on minimum requirements for social interaction.⁴⁹

The solution found in this way may seem reasonable at first glance, especially for an international system of human rights protection based on a treaty under international law because it awards the democratic decision-making in the Member State a high priority.⁵⁰ In this regard, the decision deserves strong support. The fact remains, however, that the Court's handling of the justification for the rights and freedoms of others must face critical scrutiny. In the creative establishment of sep-

A gentle balance must be sought.

Integration policy considerations in the French burqa ban

arate grounds based on the “fundamental requirements of living together”, the Court is specifically clarifying the wording of the text of the Convention, which simply speaks of the “rights and freedoms of others” and relies on arguing an abstract principle which it attempts to rank behind these rights and freedoms of others. This ignores the fact that no explanation was given either by the French government during the proceedings or during the jurisprudential debate of which specific rights of others were actually being affected. Such specific descriptions of the legal positions affected had previously naturally been considered necessary.⁵¹ The Court has therefore not only succeeded in diverging from its previous practice, but also in dissolving the comparably specific standard text into a general and vague principle. This deserves methodical criticism.

However, the methodological shortcoming is further reflected in an outcome that is generally problematic from the viewpoint of conflicting fundamental rights. The idea of striking the most delicate possible balance applies when dealing with conflicting fundamental rights. This is expressed by the term “practical concordance” in German constitutional law. The European Court of Human Rights in principle follows this approach when resolving situations involving conflicts of human rights.⁵² This new justification now raises the bar for testing justification to a level of abstraction test but is now raised to a level of abstraction that requires people to stop wearing full-face veils, which the Court itself classified as falling under the protection of religious freedom, whether in the form of a burqa or similar garment, and to do so as a matter of principle without any more detailed examination of the specific individual circumstances.⁵³ This abstract justification test stands in contrast to the case law of the German Federal Constitutional Court and German Federal Administrative Court on restrictions to religious freedom analysed above. The facts suggest that a blanket ban on full-face veils would be unconstitutional in Germany.

However, it must also be said that restrictions are of course conceivable under the Basic Law given the existence of specific justifications for them.⁵⁴ The communication between a teacher and her pupils relies on non-verbal forms of interaction in addition to verbal ones, something a full-face veil prevents. The same could be said of most other public and private legal activities since a minimum amount of non-verbal interaction is necessary almost everywhere. Nevertheless, a blanket ban on full-face veils in public cannot be justified.

V. Final remarks: Balancing the right to religion – between enabling personal liberty and preventing danger

Especially with the freedoms relating to communication, which not only includes freedom of expression and the right to political participation but freedom of religion as well, a State committed to freedom must also accept forms of this exercise of freedom that are undesirable to a majority of citizens and potentially even State institutions themselves.

However, this does not mean there is carte blanche for any form of worship at any time in any place. Even religious freedom is subject to limitations. If the fundamental rights of others are affected, consideration based on the specific circumstances of each case is necessary. If the fundamentals of the liberal democratic legal system are involved, the system must be capable of action, even when faced with religiously motivated attacks.

An across-the-board ban on full-face veils not permissible in Germany.

Freedom of religion is protected, but is also subject to limitations.

Supporting religious communities is in the interest of the State

Despite the aspects of religion ultimately considered negative by the State, we must not forget that religious-minded beliefs and behaviours are in many ways of critical importance to social cohesion. From voluntary charitable engagement to forums for social activities, the ritualisation of fundamental aspects of human life and the basic questions of meaning religion always deals with, there are a number of areas that make clear that promoting and supporting religious communities is of great interest to the State.

This ultimately delves into the heart of the core concerns behind freedom of religion as set out in the Basic Law: It protects religious freedom against disproportionate restrictions, promotes the exercise of those rights through provisions such as religious education and corporate status, but also prevents abuse where necessary with the classical sovereign instruments of bans and constraints.

- 1| For more on this, see, for example, M. Wiener, *Das Mandat des UN-Sonderberichterstatters über Religions- oder Weltanschauungsfreiheit*, (Frankfurt, 2007).
- 2| See the individual annual reports (<http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>) and the reports on country visits (<http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Visits.aspx>) [29 Aug 2016].
- 3| *Jahrbuch des öffentlichen Rechts (new)*, Volume 1 (1951): 74.
- 4| For more information, cf. M. Morlok, in: Dreier, H. (ed.): *GG Kommentar*, Article 4, marginalia 123 et seq.
- 5| Cf. J. Kokott, in: Sachs, M. (ed.): *GG Kommentar*, Article 4, marginalia 134 et seq.
- 6| G. Robbers, in: Kahl, W., Waldhoff, C. and C. Walter (eds.): *Bonner Kommentar zum Grundgesetz (loose leaf)*, Article 20, marginalia 1819.
- 7| C. Walter, "Kann der moderne, liberale Staat Zugeständnisse an illiberale Religionsgemeinschaften machen?," in: Gabriel, K. and C. Horn (eds.): *Säkularität und Moderne*, Freiburg/Munich (2016): 202 et seq. (222).
- 8| Article 9 Paragraph 2 of the European Convention on Human Rights (ECHR); Article 52 Paragraph 1 EU Charter of Fundamental Rights; Article 18 Paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR).
- 9| For more on the Basic Law's neutrality principle of religious openness, cf. H.M. Heinig, *Verschärfung der oder Abschied von der Neutralität? Zwei verfehlt Alternativen in der Debatte um den herkömmlichen Grundsatz religiös-weltanschaulicher Neutralität*, *JZ* (2009): 1136 et seq.
- 10| M. Germann, in: Epping, V. and C. Hillgruber (eds.), *BeckOK GG*, Article 4, marginalia 48.
- 11| *Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*.
- 12| ECHR, 1 Jul 2014, *S.A.S. v. France*, No. 43835/11.
- 13| *Ibid.*, marginalia 139.
- 14| Cf. here the relevant passages of the ECHR (footnote 13).
- 15| For other specific situations, such as testifying in courts, other justifications apply, for example, the administration of justice, which also includes the court being able to assess the credibility of a witness through unimpeded perception of facial expressions.
- 16| Also discussed in Section IV below.
- 17| Cf. the request by MEP M. Ehrenhauser for a written response from the Commission (P-005315/2011) and the response from C. Malmström dated 20 Jun 2011, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-005315&language=DE> and <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2011-005315&language=DE> [29 Aug 2016].
- 18| *Agreement between the United States of America and the European Union on the use of passenger name record data and their submission to the United States Department of Homeland Security of 14 Dec 2011 (OJ L 215/5)*.
- 19| Article 13 Paragraph 4 Sentence 2 of Directive 2016/681 of the European Parliament and of the Council of 27 Apr 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ L 119/132).
- 20| *German Federal Constitutional Court (Bundesverfassungsgericht [BVerfG]) decision 115: 320 (352 et seq.)*.

- 21| BVerfG decision 115: 320 (360).
- 22| For information on the stringent requirements for protection against discrimination under Article 3 Paragraph 3 GG, cf. Higher Administrative Court of Koblenz, decision of 21 Apr 2016, ref: 7 A 11108/14, marginalia 106 – juris regarding checks on trains regardless of whether a suspicion exists and limiting discretion to select persons for checks by protecting them against discrimination.
- 23| BVerfG decision 102: 370 (387).
- 24| Cf. also the different emphasis in C. Hillgruber, *Der deutsche Kulturstaat und der muslimische Kulturimport* (1999): 538 (547); *ibid.*, *Staat und Religion* (2007): 49 et seq.; A. Uhle, *Staat-Kirche-Kultur* (2004): 158 et seq.; *ibid.*, *Freiheitlicher Verfassungsstaat und kulturelle Identität* (2005): 454 et seq.; taking a similar direction, cf. also K.-H. Ladeur and I. Augsberg, *Toleranz – Religion – Recht* (2006): 84 et seq.
- 25| Cf. in particular C. Waldhoff, *Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates?* Report D for the 68th Deutscher Juristentag (2010): D 49.
- 26| BVerfG decision 102: 370 (390 et seq., especially 395).
- 27| "Der Körperschaftsstatus wird jeder Religionsgemeinschaft, die die Gewähr der Dauer bietet, zur Entfaltung ihrer Religionsfreiheit angeboten, unabhängig von ihrer wie auch immer zu umschreibenden Bedeutung für das öffentliche Leben." German Federal Administrative Court (Bundesverwaltungsgericht [BVerwG]), *Neue Verwaltungsrecht-Zeitung (NVwZ)* (2013): BVerwG decision, NVwZ 2013, 943 (944).
- 28| According to the language in Article 2 additional protocol 1 ECHR; ECHR, 7 Dec 1976, Kjeldsen et al. v. Denmark, No. 5095/71, marginalia 52.
- 29| BVerwG decision 123: 49 (53).
- 30| Cf. M. Thiel, in Sachs (footnote 5), Article 7, marginalia 46 et seq.
- 31| Cf. the overview of this development in H. Engin, *Die Institutionalisierung des Islams an staatlichen und nichtstaatlichen Bildungseinrichtungen*, in: Rohe, M., Engin, H., Khorchide, M., Özsoy, Ö. and H. Schmid (eds.): *Handbuch Christentum und Islam in Deutschland*, Vol. 1, Freiburg et al. (2014): 369 et seq.; from a legal standpoint, cf. in particular M. Rohe, *Rechtliche Perspektiven eines islamischen Religionsunterrichts in Deutschland*, *Zeitschrift für Rechtspolitik mit Rechtspolitische Umschau (ZRP)* (2000): 207 (209 et seq.); J. Oebbecke, *Islamischer Religionsunterricht – rechtsdogmatische und rechtspolitische Fragen*, in: Bauer et al. (eds.): *Islamischer Religionsunterricht: Hintergründe, Probleme, Perspektiven*: 55 et seq.; S. Spriewald, *Rechtsfragen im Zusammenhang mit der Einführung von islamischem Religionsunterricht als ordentliches Lehrfach an deutschen Schulen*, 2003; M. Dietrich, *Islamischer Religionsunterricht* (2006).
- 32| Section 132a Paragraphs 4-7 of the Education Act of the State of North Rhine-Westphalia (*Schulgesetz NRW*), introduced by the "Act introducing Islamic religious instruction as a regular subject (7th Amendment to the Education Act) (*Gesetz zur Einführung von islamischem Religionsunterricht als ordentliches Lehrfach – 7. Schulrechtsänderungsgesetz*) of 22 Dec 2011; for further information on this, cf. also: <http://www.iru-beirat-nrw.de> (German only).
- 33| Cf. here Article 8 of the Agreement between the Free Hanseatic City of Bremen and The Islamic Religious Communities in the State of Bremen (*Vertrag zwischen der Freien Hansestadt Bremen und den Islamischen Religionsgemeinschaften im Lande Bremen*) of 15 Jan 2013 and Articles 4 and 6 of the Agreement between the Free and Hanseatic City of Hamburg, the Hamburg Regional Association of the Turkish-Islamic Union for Religious Affairs, SCHURA – Council of Islamic Communities in Hamburg and the Association of Islamic Cultural Centres (*Vertrag zwischen der Freien und Hansestadt Hamburg, dem DITIB-Landesverband Hamburg, SCHURA – Rat der Islamischen Gemeinschaften in Hamburg und dem Verband der Islamischen Kulturzentren*) of 13 Nov 2012.
- 34| Cf. H. de Wall, *Der religionsrechtliche Rahmen für die Einrichtung des Fachs "Islamische Studien" und für Beiräte für islamische Studien*, in: Walter, C., Oebbecke, J., von Ungern-Sternberg, A. and M. Indenhuck (eds.): *Die Einrichtung von Beiräten für islamische Studien* (2011): 15 et seq.
- 35| BVerfG decision 122: 89 (111).
- 36| Cf., for example, the documentation of a draft regulation for the University of Münster and the ensuing legal discussion by Walter, Oebbecke, von Ungern-Sternberg and Indenhuck (footnote 34).
- 37| D. Ehlers, in Sachs (footnote 5), Article 140 in conjunction with Article 137 of the Weimar Constitution, marginalia 29.
- 38| BVerfG decision 108: 282 et seq.
- 39| BVerfG decision 138: 296 (340 et seq.).
- 40| BVerfG decision 108: 282 (310): "There may therefore also be good reasons to accord the state duty of neutrality in schools a stricter importance that is more distanced than it has been previously [...]."
- 41| Cf. also the dissenting opinion of judges W. Schluckebier and M. Hermanns, BVerfG decision 138: 296 (368 et seq.), Paragraph 16; cf. also B. Rusteberg, *JZ* (2015): 637 (640).
- 42| Cf. Berlin Administrative Court, decision of 29 Sep 2009 – 3 A 984.07, marginalia 4 – juris.
- 43| For information on the provisions of the Basic Law of Germany (*Grundgesetz*), cf.: BVerfG decision 24: 236 (246); A. Frhr. v. Campenhausen, *Handbuch des Staatsrechts der Bundesrepublik Deutschland (HStR) VII*, Section 157, marginalia 92; and for information on the provisions of the ECHR: ECtHR, 25 May 1993, *Kokkinakis v. Greece*, No. 14307/88, marginalia 31; ECtHR, 1 Jul 1997, *Kalac v. Turkey*, No. 20704/92, marginalia 27; cf. also C. Grabenwarter and K. Pabel, *European Convention on Human Rights*, Section 22, marginalia 113.
- 44| BVerwG NVwZ (2012): 162 (166 et seq.), marginalia 41 et seq.
- 45| H.M. Heinig, "Religionsfreiheit auf dem Prüfstand – Wieviel Religion verträgt die Schule?," *Kirche und Recht (KuR)* (2013): 8 (18).

- 46| Cf. also C. Enders, note, *JZ* (2012): 363 (363).
- 47| *BVerfG, Neue Juristische Wochenschrift (NJW)* (2001): 2069 (2072); *BVerfG NJW* (2001): 1411 (1412 et seq.); *Cologne Administrative Court, decision of 5 May 2009 – 20 L 650/09 – juris*.
- 48| Enders (footnote 46): 366.
- 49| Cf. the government's submission in marginalia 82 and the opinion of the court in marginalia 140-142.
- 50| Cf. in particular marginalia 129 as well.
- 51| Cf. the comprehensive analysis in C. Grabenwarter and K. Struth, *Das französische Verbot der Vollverschleierung – Absolutes Verbot der Gesichtsverhüllung zur Wahrung der "Minimalanforderungen des Lebens in einer Gesellschaft"?*, *Europäische Grundrechte-Zeitschrift (EuGRZ)* (2015): 1 (3).
- 52| Cf. *ECHR, 24 Jun 2004, von Hannover v. Germany, No. 59320/00, marginalia 57 et seq.*; *ECTHR, 9 Apr 2009, A. v. Norway, No. 28070/06, marginalia 64 et seq.*; *ECHR (GK), 7 Feb 2012, Axel Springer AG v. Germany, No. 39954/08, marginalia 83 et seq.*
- 53| Cf. here judges A. Nußberger and H. Jäderblom's dissenting opinion, which offers a persuasive critique of the majority decision in the case of *S.A.S. v. France*.
- 54| For information on specific approaches, cf. the "Berlin Declaration by CDU and CSU Interior Ministers on Security and Cohesion in Germany" ("Berliner Erklärung der Innenminister und -senatoren von CDU und CSU zu Sicherheit und Zusammenhalt in Deutschland") dated 19 Aug 2016, p. 8, available (in German only) at: http://www.regierung-mv.de/serviceassistent/_php/download.php?datei_id=1577972 [29 Aug 2016].

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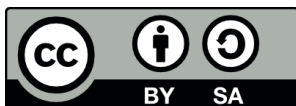
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