

Anerkennung und Überzeugung: Contradictions in
German State Neutrality and Religious Freedom
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Germany positions itself in the Grundgesetz as a neutral state in religious affairs: that is, the state can neither favor nor discriminate upon religion, nor can it define what constitutes religion or religious practice. Individual and collective religious freedoms are also enshrined in the constitution, which distinguishes between positive and negative religious freedom: the former is defined in the usual sense of freedom in religious thought, practice, and expression, while the latter encompasses the right not to confess a faith or to be exposed to religion in a compulsory manner or in a subordinate position.

These tenets may seem contradictory given that many aspects of the country's Christian past continue to be seen in the dominant culture of the modern day. Despite professing neutrality, Christian iconography is starkly visible in most contexts of mainstream German society; despite protecting freedom of expression, similar displays of Muslim headscarves are hotly contested by the courts. Perhaps most representative of this paradox in self-perception and presentation is a 1995 ruling by the Bundesverfassungsgericht that explicitly names "[der] christliche Glaube" and "die christlichen Kirchen" as cultural and historical roots, rather than religious pillars, upon which the cohesion and function of the secular society is dependent.¹ Meanwhile, the courts deemed in 2001 that a decision by Fereshta Ludin, a public-school teacher, to wear hijab in the classroom rendered her unfit for civil service, on the grounds that her right to positive religious freedom infringed upon students' right to negative religious freedom.²

Relative to its treatment of the cross, recent political and legal discourse surrounding the so-called 'headscarf debate' in Germany indeed reveals that, behind its façade of neutrality and religious freedom, the country's mainstream society not only perceives itself as incontrovertibly

¹ BVerfG, Beschluss des Ersten Senats vom 16. Mai 1995, 1 BvR 1087/91.

² BVerfG, Urteil des Zweiten Senats vom 24. September 2003, 2 BvR 1436/02.

Christian, but further leverages its culture and history to suppress the emergence of new minority cultures and histories which challenge the dominant Christian narrative. Such a power imbalance between the preexisting cultural majority and the present cultural minority renders all notions of neutrality and religious freedom subjective, and hence, superficial.

Though Germany's state neutrality should in theory curb the presence of any dominant culture, it fails in practice because the dominant Christian culture skews conceptions of neutrality in the first place. The 1983 Baden-Württemberg Education Act, for instance, stipulates that "Lehrkräfte an öffentlichen Schulen...dürfen in der Schule keine politischen, religiösen, weltanschaulichen oder ähnliche äußeren Bekundungen abgeben, die geeignet sind, die Neutralität des Landes...zu gefährden oder zu stören," but adds that "[Darstellungen] christlicher und abendländischer Bildungs- und Kulturwerte oder Traditionen widerspricht nicht [diese Neutralität]." ³ This pointed exemption is made on the basis that, due to their high visibility and general acceptance in the mainstream, Christian symbols are considered by the state to be a cultural and historical facet of society rather than a political or religious one. Berlin's 2015 Neutrality Laws reaffirm this viewpoint insofar as they forbid public school teachers from wearing "sichtbar[e] religiös[e] oder weltanschaulich[e] Symbole" or "auffallend[e] religiös oder weltanschaulich geprägt[e] Kleidungsstücke" at work. ⁴ The words "sichtbar" and "auffallend" are telling. 'Visible' and 'conspicuous' relative to what? If the religious neutrality of individual actions is gauged by their conformity to a religious collective culture, then neutrality itself becomes no objective measure of secularism, but rather a warped and subjective façade behind which the majority continues to perpetuate its biases and maintain the status quo.

³ § 38 Absatz 2 Satz 3 SchG Landesrecht BW 1983.

⁴ § 2 Absatz 1 Satz 1 VerfArt29G BE 2005.

Case studies show that the state's protection of religious freedom is likewise skewed, particularly in how the courts resolve conflicts between positive and negative religious freedom. Initial rulings in the 2001 Ludin case suggest that "[Ludins] Religionsfreiheit...werde durch das Grundrecht auf negative Religionsfreiheit der [Schüler*innen]...sowie die Verpflichtung des Staates zu weltanschaulicher und religiöser Neutralität...eingeschränkt."⁵ The dubious priority given to collective negative freedoms over individual positive freedoms will be addressed later in this paper. More immediately significant is that Ludin's right to express Islamic symbols is prohibited in the name of a neutrality which simultaneously permits the display of Christian equivalents. Again, it becomes clear that, behind the façade of religious freedom, the values at stake are in fact cultural. In her 2004 article, "Cloth on her Head, Constitution in Hand," Beverly Weber argues that Ludin's headscarf is controversial not for its religious import but for its cultural significance in "[marking] the arrival of the immigrant woman into a very special space of Germanness."⁶ The public school, Weber explains, is "a particularly important space for the enactment of state power and the production of citizens"; by working "as a public teacher, Ludin would have embodied the state and its constitutional principles, based in an understanding of 'Western' democratic values, while as a Muslim woman wearing a headscarf she is...associated with a form of Islam perceived as a clear contradiction to those same values."⁷ The state's use of the word 'neutral' can hence be understood as synonymous to 'western,' or 'Christian'; given

⁵ BVerfG, 24. September 2003, 2 BvR 1436/02.

⁶ Beverly Weber, "Cloth on Her Head, Constitution in Hand: Germany's Headscarf Debates and the Cultural Politics of Difference," *German Politics & Society* 22, no. 3 (72) (2004): 34.

⁷ Ibid.

this definition of neutrality, it would make sense that western or Christian symbols do not contradict state neutrality while Ludin's headscarf does. The sequence of laws passed in the years following, which more explicitly bans public school teachers from wearing headscarves, also becomes unsurprising.⁸

Though it may be tempting to draw parallels between the Ludin verdict and the 1995 Kruzifix-Beschluss, close analysis reveals fundamental differences in how the courts handle negative religious freedom in both cases:

First, no individual's right to positive religious freedom is violated in the crucifix verdict. The mandatory display of crosses in public Bavarian classrooms is strictly an infringement upon the negative rights of students and upon state neutrality, and their exclusion does not restrict any individual's positive rights to meet that neutrality. In Ludin's case, however, the decision to safeguard students' negative rights strips Ludin of her positive right to expression; the very act of prioritizing the religious freedoms of one party over those of another nullifies objective neutrality. The BVerfG itself acknowledges this, writing in its 1995 opinion that "negative Religionsfreiheit besitze keinen Vorrang vor der positiven Seite dieses Grundrechts," in the interest of preserving "Neutralität...im Rahmen seines schulischen Erziehungsauftrages."⁹ The Ludin verdicts, in contrast, demonstrate a clear prioritization of students' negative religious freedom over Ludin's positive right to the same, and so, by the court's own precedent, fail to uphold neutrality in German public schools. In such cases—where objective neutrality is lost—legal rhetoric becomes discriminatory and indefensible.

⁸ ArbG Düsseldorf, Urteil vom 29. Juni 2007, 12 Ca 175/07.

⁹ BVerfG, 16. Mai 1995, 1 BvR 1087/91.

Second, as noted earlier, the definition of negative religious freedom itself encompasses a right not to be exposed to faith in a subordinate position. While as a schoolteacher Ludin would certainly occupy a position of authority over her students, as a minority she simultaneously holds a subordinate status in mainstream society relative to most of the students she would teach. Thus, whether the argument is made on religious or cultural grounds, the dominant Christian presence in German institutions—recognized, as seen above, by the institutions themselves—puts Ludin in a position of lesser power and so makes it impossible for her to violate students’ negative religious freedom at school. If anything, it is the Christian majority which violates her negative religious freedom.

Third, criticisms of the Kruzifix-Beschluss just as easily lend themselves to Ludin’s case. Jörg Müller-Volbehr writes in his 1995 article, “Positive und negative Religionsfreiheit: Zum Kruzifix-Beschluß des BVerfG,” that “[die] Deutung des Kreuzessymbols geht fehl,” insofar as the court “verkennt, daß es sich um ein sinnvariierendes Symbol handelt.”¹⁰ Beyond its religious meaning “hat [es] vielfältige Profanierungen gegeben, angefangen bei seiner Funktion als Ausdruck staatlicher Traditionsbestände bis hin zum Symbol der Menschlichkeit und Hingabe (Rotes Kreuz), zum bloßen Zeichen ohne jeglichen Glaubensbezug (Nationalflaggen, christliche Seefahrt).”¹¹ Can the same not be said of hijab? Though a fixture of Islamic tradition, nowhere in the Qur’an is the headscarf defined, and hijabis often regard it as “a personal and cultural concept, not a religious one.”¹² And what about the crescent moon, which originated as a secular

¹⁰ Jörg Müller-Volbehr, “Positive Und Negative Religionsfreiheit: Zum Kruzifix-Beschluß Des BVerfG,” *JuristenZeitung* 50, no. 20 (1995): 997.

¹¹ Ibid.

¹² Caryl-Sue Micalizio, “Hijab: Veiled in Controversy,” n.d.

Byzantine symbol and can also be found on numerous national flags? Where Müller-Volbehr's arguments hold water for the cross, they also do for hijab—and so, they do nothing to clarify why Christian symbols should be treated any differently in jurisprudence than their Islamic counterparts.

But say that Müller-Volbehr and the courts have a point. Even as it strives for state neutrality, Germany and its numerous social, educational, political, and legal institutions are deeply rooted in Christianity, and it would be impractical and insensitive to disregard this facet of its cultural identity. Mainstream German society is not only well-aware of this fact but seems to have made concessions and adjustments to help secularism and Christianity coexist in the public sphere. None of this is inherently problematic. The majority culture fails in self-perception not because it sees itself as incontrovertibly Christian, but because it sees itself as immutably so. That is, while it embraces the historical influence of Christianity, it actively suppresses the present influence of other cultures such as Islam. Yet if “[die] Bejahung des Christentums...sich insofern auf die Anerkennung des prägenden Kultur- und Bildungsfaktors, nicht auf bestimmte Glaubenswahrheiten [bezieht],” it seems foolish for Germany not to recognize the religious affiliation of its largest ethnic minority as a similar ‘cultural’ and ‘educational’ influence.¹³ If under state neutrality, Christian symbols can remain visible in public institutions, then the same should be afforded to Islamic analogs. To this end, Germany must reshape its understanding of its own cultural identity to include present-day factors outside the western and Christian spheres of influence. Otherwise, its practice of state neutrality and religious freedom will remain both a subjective farce and a front for the erasure of minority cultures.

¹³ BVerfG, 16. Mai 1995, 1 BvR 1087/91.

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