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**Religion in Schools from a Legal Viewpoint**

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*Abstract*

*Religious life in German schools has led to some fierce controversies in the last years. The center of attention has shifted from “fundamentalist“ Christians who campaigned against things like sex education to the presence of Islam. Teachers wearing headscarves, the exemption from co-educative swimming lessons, ritual prayers during recess and last but not least the introduction of Islamic religious education are being dealt with by the courts and politicians. This contribution aims at outlining the legal rules for such conflicts and clarifying reasonable solutions for them. Since the German secular constitutional law opens broad fields for religion in public space, the German situation may serve as an example for European legal orders and societies with a generally positive attitude towards the societal potential of religious life and convictions, and for weighing up conflicting interests in public space more generally. It may also be used for comparison with more laicist approaches in other European and Western countries.*

**1. Introduction: the legal framework**

German religious constitutional law follows the model of free religious secularism (see Campenhausen & de Wall, 206, pp. 338-340, 356-357). This differs, for instance, from the strict laicism of France (except for the Districts of Alsace and Moselle)[[1]](#footnote-1), which attempted to reduce the strong influence of the Catholic Church with their restrictive laws of 1901 and 1905. On the contrary, Germany subscribes to a model of free religious secularism, as is evident for instance in Art. 4,7 §3 and 140 of the German Constitution, as well as throughout religious constitutional law. Far from being banned from the public sphere, religion is quite visible there, can engage in debate, is an important part of university research and education and finds its place in confessional religious instruction in the public schools of many German states and in many facets of further cooperation between federal and religious organizations. Here religion is not seen as a basic threat to the power of the federal government, but rather as a positive resource for community life and social meaning.

Freedom of religion applies equally to all individuals.[[2]](#footnote-2) The federal government is obligated to ensure equal treatment of all religions and world views. Insofar as certain religious communities, at least those from the Christian spectrum enjoy special rights, these derive from historical developments and hence deserve legal protection. Where more emphasis is placed, including in the school system, on the Christian character of Germany, its states or certain institutions, this is not done on faith-based content, but rather in the sense of a factor which impacts culture.[[3]](#footnote-3) Individual attempts to interpret the constitution as giving the dominant Christian religion precedence and thus diminishing the status of other religions, particularly Islam, are mistaken.[[4]](#footnote-4) In the significant words of Martin Heckel (Heckel, 2009, p. 353): “The remembrance of the Christian origins of and impact on our modern social and national system should be strongly kept in mind in view of the historical obliviousness of pluralistic society. But it cannot be misused for a direct or flowery rechristianization or reconfessionalization of the secular forms of religious law.”

Federal neutrality towards religions in concrete terms means that the government and its institutions may not intervene in inner-religious debates on the “right” stance and its interpretation.[[5]](#footnote-5) This applies to the Christian understanding of the Eucharist as well as for Jewish and Muslim religious rituals. Thus if a certain action or position is to be qualified as being religious, it first falls under the protective realm of the applicable fundamental rights. Of course this does not mean that all kinds of religious views take precedence over other legal positions. Although it is true that constitutional law has not stipulated legal restrictions on freedom of religion, as it has with other freedoms, nevertheless there is consensus that religious rights have to be reconciled with other fundamental rights with which they clash. Clashing rights then have to be weighed in the individual case in view of their proportionality. As Konrad Hesse has pointed out, they have to be brought into a “practical concordance” in view of the respective individual case (Hesse, 2008, pp. 72-73). This also applies to the school system. In the process it has to be kept in mind that on the one hand religion may be practiced in the public realm, but that on the other hand restrictions are allowable, or even preferable with the increasing proximity to governmental activity.[[6]](#footnote-6)

In relation to the “old establishment” of the Christian and Jewish religions, there are long-standing and stable forms and structures of cooperation between the government and the religious communities. Altogether there has been little concrete potential for conflict for a long time: Questions of religious symbolism in school buildings – the cross or crucifix[[7]](#footnote-7) – are subject to controversial discussion, it is true, but in practice viable solutions have been developed. Similar solutions have been found for exemption from certain aspects of school instruction, particularly sexual education and biology instruction due to religious reasons (see Epping, Hillgruber & Germann, 2013, Art. 4 Rn. 51.3 wfr). Here jurisprudence has developed guidelines according to which it is the educational mandate of the school to prepare school pupils objectively for life together in a country marked by a plurality of views and lifestyles, while ideological indoctrination has to be excluded. The debates on curriculum reform in Baden-Württemberg since 2013[[8]](#footnote-8), however, show that in the case of structural reorientation religious viewpoints introduce themselves emphatically into the debate, a sheer matter of course in the framework of a constitution based on freedom of religion.

The following remarks take Islam as a paradigm for the legal treatment of religion in schools. For one thing, we can see clearly here how the norms of the secular legal system are implemented. Muslims in Germany are the second largest religious population after Christianity and for a considerable number of them religious rituals and visible signs of their religious beliefs are significant. Against this background parliaments, governments, administrative offices and courts have been dealing comparatively often with pertinent legal questions since the 1990s.

In addition, the treatment of Islam can function as a litmus test for the practicability and honesty of the existing basic procedures under rule of law: while fundamentalist Christian views are largely regarded with bemusement but not perceived as a threat, Islam (and far more rarely: the Muslims) have become a fear factor for large parts of the German population (See Rohe, 2006, esp. pp. 30-32). This has led to statements and opinions that contradict the constitutional rule of law. The highly ideological and often blatantly anti-religious voices that demand the banishment of Islam and all religions to the purely private sphere are less significant here.[[9]](#footnote-9) Far more significant is a majority opinion that, according to representative surveys, would not be afraid to restrict the religious rights of Muslims in Germany noticeably (Decker, 2010, p. 134).[[10]](#footnote-10) Against such a background the objective, impartial application of the existing rule of law becomes all the more important. This context forms the background against which the so-called state treaties or state contracts have to be viewed, which have been in effect between the states of Hamburg[[11]](#footnote-11) and Bremen[[12]](#footnote-12) and various Muslim organizations since 2013. Their content largely follows the course of legal practice up to the present. However, their significance must be highly appreciated for the comparative precision and unequivocal consensus with which it provides guidelines for administrative practice, particularly in the social framework conditions of considerable uncertainty.

Due to restrictions of space, what follows cannot include treatment of all the legally relevant questions. Thus, for one thing, the sector of private religious schools (here, see Epping, 2013, Art. 7 Rn. 73 ff. wfr) will remain undiscussed. For another, we will not go into the doubtlessly important establishment of Islamic religious instruction. This involves particularly complex legal questions that have already been treated in specialized publications (cf. Dietrich, 2006; German Islam Conference and Federal Agency for Migration and Refugees, 2011). Let it suffice to mention that in addition to broadly designed attempts at models of Sunni Muslim religious instruction in Baden-Württemberg, Bavaria, Lower Saxony, Northrine-Westphalia and Schleswig-Holstein, now Hessen is offering regular religious instruction for the first time with DITIB and the Ahmadiyya Muslim Jamaat. The Alevite Association of Germany AABF has already been acknowledged as a cooperation partner for Alevite religious instruction in several German states.

Differences in legal practice, however, can result from the mere numerical differences: members of numerical minority groups may have a tendency to encounter greater problems in advancing their interests compared to the majority. That is not necessarily unjust: limitations can result, for instance, through requirements of minimum student numbers, etc. In the end this is the impact of the basic principle of proportionality, according to which – limited – resources have to be allocated efficiently, while at the same time the minority may not be deprived of a fair share. From such a perspective the majority and the minority are to a certain extent “unequal”, which may mean that different treatment is not only permissible but even essential (see Aristoteles, 1967, p. 159). Details can only be clarified on the basis of individual case issues.

**2. Individual legal questions**

*2.1 Teachers*

Teachers in Germany represent the government when they practice their profession. In the school sector furthermore students cannot escape confrontation with teachers in the framework of compulsory school attendance. For this reason caution is called for in regard to visible commitments to religions or worldviews (the moderation requirement). On the other hand, governmental representatives do not lose their personal rights. The less likelihood of “confusion” in the sense of identification between the state and the behavior of the teacher, the greater the freedom for individuality (see von Campenhausen & de Wall, 2006, pp. 72-74, wfr; Coumont, 2008, pp. 440, 443-445, wfr). In the 1980s the courts were dealing with cases in which the teachers subscribing to the Sannyasin religion wore red clothing and so-called “Malas” with an image of their Guru (see the documentation in Epping, Hillgruber & Germann, 2013, Art. 4, Rn. 56.7). More recently the headscarves worn by Muslim women teachers have been the subject of partially bitter debates, court decisions and lawmaking initiatives. In half the states of Germany the wearing of headscarves outside of religious instruction is prohibited for women teachers not in training. The first landmark decision of the federal constitutional court up to this point was made in 2003[[13]](#footnote-13) and showed lawmakers two possible paths: On the one hand, religious pluralism can be seen as a potential benefit and a broad spectrum of possible actions and behaviors can be allowed. On the other, the perception of potential danger of conflict may rather lead to restrictive limitations. In both cases all religions have to be treated alike, which was doubtful in the structure of a number of state laws. A plethora of publications for and against the wearing of headscarves have appeared since then,[[14]](#footnote-14) and we will refrain from dealing with the subject any further for reasons of space (see Coumont, 008, pp. 440-522, wfr; Oestreich, 2004; Berghahn & Rostock, 2009 wfr). Suffice it to say that against the expectations of the Federal Constitutional Court there was no substantive debate on the complexity of wearing headscarves in the states which decided to prohibit them.[[15]](#footnote-15) Experience in Bavaria and other states shows that motivated Muslim women teachers with objective attitudes towards religion are lost to the school system and partially opt for jobs abroad, while male Muslim teachers who wear beards for religious reasons are not subject to similar legal considerations. On the other hand, the state of Rhineland-Palatinate allowed teachers to wear headscarves, which did not cause any problems in schools except in one case, when people from outside intervened, The school direction managed to settle this conflict as well.

In the light of such experiences, according to a new landmark decision has been made in January 2015, which declared unconstitutional laws which banned wearing headscarves in an abstract way, without taking concrete problems into account. Now, only in cases of serious tensions which would endanger peace in school, a teacher can be moved to another school[[16]](#footnote-16), but still wearing a headscarf cannot serve as an objection for the appointment as a state officer or would be considered as discriminatory regarding employments in the private educational sector.

*2.2 Students/Parents*

2.2.1. Introduction

In many regions of Germany, the presence of a large number of Muslim students, both male and female, has become the norm.[[17]](#footnote-17) For instance, in Bavarian schools more than 100,000 Muslims are being taught.[[18]](#footnote-18) To a great extent their needs and interests are no different from those of others: a reduction in or even just focus on their religious affiliation would be wrong. Where there are significant differences, these are generally connected with the immigration history of a large majority of Muslims in Germany, who often, but by no means consistently, come from backgrounds with a weak educational tradition. This ranges from Muslims from a Turkish immigration background in which only 27,5% come from a high educational level, while up to 50% have a low educational level or no school diploma whatsoever, all the way to those of Iranian background, of whom 81,4% have a high educational level and only 12% have a low level of education or no school diploma at all.[[19]](#footnote-19)

The focus here is not the question of language acquisition and access to adequate education, both of which are eminently more important than the question of religion: but the latter is at least for a considerable portion of students[[20]](#footnote-20) a matter of concern. This is particularly true for those who belong to a direction of Islam which has always been strong and for whom obedience to the tenants of their faith, like those of orthodox Judaism, is very essential. In addition there is the impact of religious and cultural traditions, such as the attitude toward gender roles, which derive from a mixture of oriental and patriarchal living conditions and traditional religious views. A few key words here are exemption from school instruction, as well as treatment of holidays and clothing, all of which have been the subject of public debate for some time. German law, as will be shown, has some balanced and well thought out solutions to offer.

2.2.2 Participation in instruction

*Basic principles*

The mission of the school to educate and foster students applies equally to all school subjects. There are usually special rules for religious and sexual education. The state mission to educate and foster students basically assigns the same rank for parental rights of education and the constitutional law of respect for religion.[[21]](#footnote-21) The state may also pursue its own educational goals, whereby it is obligated to ensure neutrality and tolerance for the educational ideas of the parents.[[22]](#footnote-22) The mission of the state, of course, also includes the goal of educating responsible citizens of the state who are capable of taking part in a pluralistic society in a manner that is equal and responsible and who are socially competent in dealing with those who think differently than themselves.[[23]](#footnote-23) This would not be compatible with cutting off or isolating students from moral, ethical and religious positions common to society in general. Thus the state can act to prevent the development of religious or ideological “parallel societies” and instead of that promote a culture of living tolerance.[[24]](#footnote-24) The students and parents cannot claim a form of instruction without a treatment of ways of faith or views which are foreign to them.[[25]](#footnote-25) For this reason exemption from instruction remains the exception; for a serious religious objection, the individual posing religious reasons is obligated to explain his or her position.[[26]](#footnote-26) Only significant objections, also those of religious nature, can justify such an exception.[[27]](#footnote-27)

*Sport and swimming instruction*

Comparatively few Muslim students[[28]](#footnote-28) apply for exemption from instruction. Most of them are female Muslim students who want to be exempted from participation in coeducational swimming or other sports instruction. The older landmark decision of the BVerwG (Federal Administrative Court) from the year 1993[[29]](#footnote-29) was fairly generous in defining the requirements for exemption from instruction from puberty onwards. From the age of puberty on, parents or students were allowed to claim exemption from coeducational swimming instruction. This was based on an interpretation of Islam that forbids appearing to the opposite sex in the bathing suits commonly used in Germany. Since then a number of very patriarchal and traditional-minded Muslim associations have offered forms for exemption applications.

More recent decisions of the Administrative Courts up to and including the new landmark decision of the Federal Administrative Court from the year 2013[[30]](#footnote-30) have become increasingly restrictive.[[31]](#footnote-31) A comparison of relevant decisions with regard to Christians and Muslims showed little consistency up to the 1990s: Muslims tended to press their interests more successfully than Christians. Since then there has been increasing convergence towards a comparatively more restrictive policy on exemption with Muslims as well. The mission of the state to educate and foster students appears to carry more weight. This development is, in my opinion, to be seen as a facet of more successful integration. Muslim students are now mostly Germans and moreover “belong” to Germany, regardless of the nature of their citizenship. It is not a coincidence that along with this development instruction “in the mother tongue” was eliminated, which had been designed to prevent children from losing touch with their “real” ethnic culture.

Now, as far as it is possible for female students to take part in instruction in a bathing suit that covers the entire body except for face, hands and feet (“Burkinis”), there is no call for exemption. The material of such “Burkinis” is such, that even when it is wet it does not reveal the contours of the body. With this step the religious and often cultural goal of largely remaining concealed from others was sufficiently met. This is also the opinion of the Central Council of Muslims in Germany (ZMD), one of the umbrella organizations.[[32]](#footnote-32)

Further arguments presented only played a minor role: The possibility of undesirable body contact with fellow students can be minimized through attentive teachers and self control. The sight of fellow students in bathing suits and trunks have to be accepted as part of German life style. Schools are a reflection of the daily living environment, in which one need not approve of everything but must rather learn to deal with it. This is also in the view of the court applicable in reverse for Muslim students.[[33]](#footnote-33) On the other hand, the importance of swimming instruction for all students has grown, as fewer and fewer children are able to learn swimming from their parents or from an organization. The Federal Administrative Court, when all is said and done, regards the mission of the state as more important than the conflicting religious interests of the students.

However it cannot be overlooked that the Muslim milieus, which are oriented towards norms derived from religious practice, are being subjected to massive propaganda, which derives above all from the Wahhabi Sunni branch of Islam practiced in Saudi Arabia. Among other things there is almost a compulsive obsession with separation of the sexes coupled with extreme requirements that girls and women cover themselves completely, including their faces. The association with the form through which the female student sued for exemption from instruction appears to follow this view. Characteristically, after defeat of the lawsuit the girl’s father stated that he had now done everything in his power for Allah. From this it is clear that the new legal assessment can reduce social pressure: one can, but does not have to, identify oneself as “particularly pious” in order to apply for exemption.

In places like Bavaria, where generally non-coeducational instruction is preferred from the fifth class level on, the present position remains unchanged.[[34]](#footnote-34) This practice clearly shows that certain assumptions, for instance in relation to gender relationships, need not be specifically religious. In certain age groups coeducational physical training is typically subject to many factors that cause disturbances and distraction, so that coeducational sport instruction can only partially yield concrete educational goals.

*Sex education*

In the field of sexual education occasional conflicts arise in the spectrum of both Christians and Muslims. Jurisprudence has repeatedly had occasion for judgments in regard to Christian complainants (see Anger, 2003, pp. 230-232, wfr.; Epping, Hillgruber & Germann, 2013, Art. 4 Rn. 51.3, wfr.). The guidelines developed herein are, in my opinion, convincing and applicable to adherents of other religions. An objective and neutral sex education that is adequately adapted to age level is of considerable importance, particularly in the form of coeducational instruction (just see Anger, 2003, pp. 236-237). There are no objections to sex education from the side of Muslims insofar as neutral information is offered about reproduction and sexuality. However adequate sexual education cannot cease with humdrum topics, when – as for instance, in the case of premarital or extramarital sex, contraception, or same sex relationships – topics meet with partially massive religiously motivated objection. Factual information even in these areas is essential for students both male and female. This takes precedence over differing religious convictions.[[35]](#footnote-35)

*Religious holidays*

In addition to secular occasions, only Christian holidays are legally recognized. However the Jewish holidays are accompanied by lesser but comparable legal protection: Passover, the Feast of Weeks, the Feast of Tabernacles, Rosh Hoshana, and Yom Kippur (see Art. 6 Bavarian Holiday Law). In addition, Jewish students can absent themselves from Saturday classes or school events, insofar as attendance at religious services requires it, according to No. 2 of the Declaration of the Bavarian State Ministry of Education and Culture from 1978.[[36]](#footnote-36) In addition to further exemptions this appears to do justice to all recognizable interests of religious practice in the area of school education.

According to No. 4 of the same Declaration, Muslim[[37]](#footnote-37) students are exempt from participating in instruction or other school events on the first two days of the Feast of Breaking the Fast at the end of the month of Ramadan and on the Feast of Sacrifice. In both instances the most important holidays of the Islamic calendar are concerned with visible significance for religious and cultural practice. This is sufficient recognition of the constitutional rights of the respective students and parents (so also Coumont, 2008, pp. 332-334).[[38]](#footnote-38) It would be helpful if the Muslims in Germany could agree as to which day marks the end of the Fast; both internationally and domestically there are differing views in this regard which, among other things, depend on mere calculations of, or the genuine sight of, the moon.

Unlike the case of Jewish students with their Sabbath obligation, there is no provision for exemption from instruction, say, for the midday prayer on Friday, on which Muslims obligated to prayer are to assemble in the Mosque[[39]](#footnote-39) (see Monnot, 1995, p. 930). This may possibly represent a violation of the constitutional law of equal treatment. Such an objection cannot be invalidated with the incorrect suggestion that (other than for Jewish students on Saturdays) the entire day of Friday would have to be free (so according to Coumont, 2008, p. 331). Participation in the noon prayer would only affect individual hours at school. In my opinion, there is a significant difference, in that Friday, other than Saturday, is a regular school day and hence exemption would have a more severe impact on the educational mission of the school than would exemption on Saturdays (so, too, Langenfeld, 2001, p. 423). However individual instances are conceivable, in which older students might be granted an exemption if they were to pray in a nearby mosque and then to participate in instruction immediately afterwards, so that only a single hour of instruction were involved.

Individual demands that have been brought forward to have the non-Christian high feastdays of Islam declared legal holidays are completely understandable subjectively. However I don’t believe that they can be enforced legally, at least not under the aspect of necessary equal treatment of the religions in a religiously neutral country. The existing legal holidays have, it is true, extensive Christian roots, but are now largely to be seen in a secular function, as shared times of recreation and rest from work life. Thus they benefit not only Christians who want to participate in religious services, but also all residents equally. Additionally, the institution of legal holidays has considerable economic consequences, particularly for firms who have to continue to pay their employees or to pay wage allowances while their production suffers. For reasons of proportionality and the justifiable unequal treatment of unequals, it is not objectionable if only those holidays are legally privileged which derive from the faith tradition of the overwhelming majority of the population.[[40]](#footnote-40)

2.2.3 Ritual prayer

According to the majority of Muslims religiously mature Muslims are in principle obligated to perform the five daily ritual prayers, for which there are certain windows of time (see Koran, Sura 14, 31; 4, 103, as well as – instead of many – Mc Auliffe, 2004, pp. 226-225, wfr.; Ramadan, 2004, p. 89). This is valid in spite of the fact that most Muslims in Germany for various reasons manage it differently. In many cases they probably either find the religious rituals less important or are prevented by external reasons from doing so. Likewise, the group performance of midday and evening prayer, or of evening and night prayer, is generally allowable for reasons of external necessity.[[41]](#footnote-41) For religiously mature school students who want to maintain the strict rules of prayer, there can be particular conflicts in connection with the all-day school.

The general rule is that the practice of religion in state institutions such as schools may be permissible. The Federal Administrative Court basically confirmed this[[42]](#footnote-42) in the year 2012 for ritual prayer during school recess or in free hours as the result of a very convincing decision of the Administrative Court of Berlin.[[43]](#footnote-43)

There are several possible constellations in this regard. If a student insists on performing ritual prayer during instruction there are far superior arguments against it. For one thing, the mission of the state for education and fostering the child would be endangered because of frequent absence from instruction (prayer in the classroom is not an option at all). For another thing, other students would be unreasonably affected through the inevitable disturbance. And anyway the call to political demonstration through prayer in the school and the pressure exerted on fellow students is unacceptable from the outset.[[44]](#footnote-44)

However, the same situation can have a different outcome if the student, as in the case of Berlin, is willing to perform his or her prayers during recess or during the free hours. Leaving the school building – as far as this is permissible – is not a practicable solution due to the fact that there is in all likelihood no suitable space near the school. For this reason, the school has to consider the wish of the student in conjunction with considerations of space and organization in the school. No more is needed than a clean space in which a prayer rug can be placed. Should such a space be available and should there be nothing to hinder temporary use for the objective needs of the school organization, there is, to my mind, no legal reason why such a use should be prohibited. In my opinion, the wish of the student should not be denied simply because of the widespread attitude outside of the world of Islam that religious duties are less strict. The religious provisions for “travelling” do not apply to a permanent stay in a particular place.[[45]](#footnote-45)  Here, as well, the fundamental principle is to take the self-defined full picture of religious practice as a starting point and then to balance it with possible conflicts with constitutional values.

Should such a desire for prayer develop from the single case known to date into a mass phenomenon – and there is no indication of that at present –, certainly schools, in view of their other needs and limited financial resources, would not be obliged to provide additional premises. And vice versa, the weight of religious needs would be reduced because even according to strict religious interpretation prayer need not be performed in the presence of insurmountable barriers (such as a duly justifiable prohibition on the part of the school). According to a non-representative survey undertaken by the author, Muslims trained in their religion, such as Imams or teachers regularly advise performing prayers outside of the school or school times. They argue that the necessity of a solid school education without avoidable conflicts takes precedence over precise timing of religious rites. In individual cases pragmatic solutions should be devised, particularly in view of the fact that the desire for precision timed performance of prayer may be short-lived.

2.2.4 Fasting

Religiously mature students may well feel bound by the requirement to fast during the month of Ramadan.[[46]](#footnote-46) From dawn to sundown no food or drink may be consumed. When Ramadan, which is calculated by the moon calendar, occurs in the summer, the window of time for consumption of food is reduced to only a few hours. Often the faithful rise very early, in order to eat or drink something before sunup. In the evening, the breaking of the fast occurs – often opulently – which also has a strong social component (hospitality for guests). In areas of the world where Islam is predominant, public life often adapts to these customs. In Germany, however, there is a particularly efficient work rhythm. Nevertheless, the number of those who participate in the fast seems to be increasing.[[47]](#footnote-47) Many school administrators can be heard to report that the abilities of students to concentrate and perform are considerably impaired (see Kleff, 2009, p. 2).

Certainly, in classes with a high proportion of Muslim students who take part in the fast, there will be considerations to avoid scheduling tests and examinations in the period near the end of Ramadan, when experience shows that performance impairment is the greatest. Likewise, in sport instruction no unreasonable demands should be made on students who are physically weakened. But is there a legal claim to regard for the fast beyond such individual cases?

Release from school during the festival days after the Breaking of the Fast is unthinkable; the loss of an entire month would not be compatible with the state educational mission. As far as I can see, there is also no legal claim to dispensation from examinations or reduction of the workload. On the one hand, the material to be learned is so immense and the tasks of coordination of examinations is so large that special circumstances for Muslims could not be reasonably be expected to be managed. On the other hand, the strength of this religious claim cannot weigh very heavily. Although it cannot be expected that religiously mature students oriented towards religious practice in Germany are exempt from the relevant obligations, setting the dispensation for “travelling” would be wrong, both from the aspect of content, as well as from the aspect of integration policy. It is urgently advisable to avoid fostering an attitude whereby Muslims in Germany are viewed as a kind of structural “state of emergency.”[[48]](#footnote-48)

But the Islamic teaching on norms is also familiar with the basic principle of proportionality.[[49]](#footnote-49)  In most decisions in life the advantages and disadvantages are to be weighed. The purpose of fasting in Islamic self-perception is inner purification and a deepening of closeness to God. But it should not bring lasting disadvantages. Not without reason are, for instance, exceptions to the obligations of fasting made for those who are pregnant or ill. Since education is highly valued in Islam and is in addition indispensable for professional advancement in Germany, individuals would, as a rule, decide in favor of the conditions for advancement. Thus they would not be directly affected by the obligation to fast; “missed” days can be made up later. While there may be isolated differing opinions, the state need not evaluate whether or not they are “valid.” In its deliberations it can note that a broad majority of the faithful supports the view that facilitates compatibility with external necessities. Thus isolated extreme views are assigned weaker weight in the sense that in general the individual has to bear the consequences of his or her own judgment and that the larger public cannot suffer because of it.[[50]](#footnote-50)

In regard to children not yet religiously mature it can be stated that many of them already take part to an extent in fasting as part of their training for later practice,[[51]](#footnote-51) or from pride to already “belong.” Here attention is needed, if the children visibly suffer from this. First in consultations with the parents,[[52]](#footnote-52) and, if necessary, with other suitable measures a solution for the good of the child has to be found. Respective consultation with Muslim organizations is also to be welcomed.

2.2.5 Clothing

The headscarves worn by many female school students have pragmatic meaning (see at length on this Anger, 2003, pp. 168-170, esp. pp. 150-52 wfr.). Unlike female teachers of religion in various German states, female students are free to wear headscarves in every conceivable color, form and tying styles (see only Coumont, 2008, pp. 499-501 wfr.). Isolated incidences in German states of Hesse (2000)[[53]](#footnote-53) and Northrhine-Westfalia (2008),[[54]](#footnote-54) in which school administrations prohibited the wearing of headscarves, were subject to correction by the responsible supervisory authorities. Indeed, the voluntary wearing of headscarves for religious reasons is protected by freedom of religion. It provides no barrier to verbal or nonverbal communication, or to identification of the student concerned. Lately voices have been raised that would demand prohibition of head scarves at least in regard to younger pupils.[[55]](#footnote-55) The main argument is “optical sexualisation” through a clothing piece that should protect the wearer from male advancements, an argument often proffered for headscarves which, however, in the end can be interpreted as a sign of a repressive physical regime (see on this the lucid comments in Tezcan, 2009, p. 70, esp. pp. 78-79).

At the same time other motives are brought forward, among others the simple advice to accept God’s commandment without further reflection.[[56]](#footnote-56) Thus in my opinion empirically proven reasons for severe disadvantage of the student through the wearing of headscarves would have to be advanced, whereby the mere possible negative reaction of the environment is insufficient reason. Otherwise freedom of religion for all or certain religions would be dependent on not always rationally understandable views of the majority – and minorities would be especially at risk. So long as there is no sufficiently proven knowledge of considerable “endogenous” disadvantages, freedom of religion will continue to outweigh all else.

Not permissible, on the contrary, are pieces of clothing which make communication impossible or at least strongly restrict communication options. Unlike headscarves, this is true of facial veils which only leave a small slit for the eyes (so-called Niqabs) and also of the burka, which only allows the wearer to gaze through a textile mesh (already noted by Mahrenholz, 1998, p. 287; Ganz, 2009, pp. 155-56). In Germany only one such case in Lower Saxony is known, in which the wearing of a niqab was to be forbidden (see Oebbecke, 2000, pp. 308-309 wfr.).[[57]](#footnote-57) This type of clothing also finds isolated voices which argue from the standpoint of religion: the Niqab is associated with an obsessive gender-based Islam of Saudi Wahhabite nature which is being propagated around the world with considerable means. Such extreme views can fall in the scope of freedom of religion, but far more weighty arguments are offered against them by the state mission of education.

**3. Conclusion**

The legal framework for space and limits of religion in schools has proven sound in general. New challenges, particularly in regard to Islam, are to be met through simple application of the existing rule of law. Developments are burdened by non-legal factors, which are due in part to the immigration history of many Muslim men and women and in part to diffuse fears in large sectors of the population. It is, however, both possible and necessary to bring the religious needs of Muslim students to practice their religion into a gentle balance with the state mission of education. The legal framework is largely clear and applies to members of all religions equally. However, care must be taken that the actual problems of religious minorities, for instance holidays that unlike Christian ones are not already part of the school schedule, be kept to a minimum. The school mission of education has to be viewed just as seriously as the religious rights of those concerned. In spite of all firmness brought to bear in behalf of the educational goals, as a rule pragmatic solutions can be found for the benefit of students. Approaches reminiscent of a “culture war”, as have been seen in isolated illegal measures to limit freedom of religion, have been prevented by the school authorities but serve as a warning example. In the end the public school must remain a place where all students can feel accepted in the legal framework, which applies equally to all.

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1. There the reform laws were not introduced because this area was part of the Reichsland Elsass-Lothringen and belonged to Germany. [↑](#footnote-ref-1)
2. The recent literature on this has meanwhile grown. See the exhaustive overviews in Muckel & Tillmanns, 2008, pp. 234 wfr (= with further references); Anger, 2003, pp. 34-36; on the school system in general Rathke, 2005, esp. pp. 106-108. For the basics on religious freedom in Germany, von Campenhausen & de Wall, 2006, pp. 39-41, 52-53, 84. [↑](#footnote-ref-2)
3. See BverfGE 41, 29, 52 and 41, 65, 78; BVerfG NVwZ 2008, 72, 74; Epping, 2013, Art. 4 Rn. 42.1ff. wfr. [↑](#footnote-ref-3)
4. On this see the impressive fundamental comments in Heckel, 2009, pp. 309-311, esp. 314-316, 343-345, 347-349. [↑](#footnote-ref-4)
5. See BVerfGE 35, 366, 376; BVerwG NVwZ 1994, 578, 579; OVG Münster NVwZ 1992, 77,78f; OVG Lüneburg NVwZ 1992, 79, 80. [↑](#footnote-ref-5)
6. Helpful for understanding here is the tripartite division of public space developed by Silvio Ferrari: Ferrari, 2012, pp. 139, 149-152. He distinguishes between the general, open, “common” space, the free and plural “political” space, and the neutral “institutional” space. [↑](#footnote-ref-6)
7. See in connection with the decision of the BVerfG E 91, 1 Epping, Hillgruber & German, 2013, Art. 4 Rn. 41.3. ff.; 51.6 wfr. [↑](#footnote-ref-7)
8. See the press release of the Evangelical National Church and the Catholic Church in Baden-Württemberg from 10. January, 2014 (<http://www.zeit.de/gesellschaft/zeitgeschechen/2014-01/erklaerung-bildungsplan-kirchen-bawue.pdf>) (retrieved on 15. March 2014). [↑](#footnote-ref-8)
9. See for example the comments untroubled by little knowledge of the facts made by Alice Schwarzer, who has documented her distance to governance by rule of law in multiple ways, or those of Necla Kelek; on this, see the intelligent polemical treatise of Patrick Bahners: Bahners, 2011, pp. 223-235, 131-133. [↑](#footnote-ref-9)
10. According to them, in the year 2010 58.4% of the population was of the opinion that the religious rights of Muslims should be noticeably curtailed. [↑](#footnote-ref-10)
11. See esp. Art. 3 on holidays and 6 on religious instruction, as well as the preparatory report by Klinkhammer & de Wall, 2012. [↑](#footnote-ref-11)
12. Because of the unique constitutional situation of Bremen (see Art. 141 GG) religious instruction will be omitted here. [↑](#footnote-ref-12)
13. BVerfGE 108, 282ff. For thorough detail, see, for example, Coumont, 2008, pp. 440, 441-443. [↑](#footnote-ref-13)
14. According to the opinion of the author, the restriction of the freedom of representatives of the state (state employees) also needs a convincing factual reason, which in the case of headscarves appears doubtful; see also Epping, Hillgruber & Germann, 2013, Art. 4 Rn. 56.8. [↑](#footnote-ref-14)
15. On this see the author’s statement from the hearing in the state parliament (Landtag) of Northrine-Westphalia on 6 May 2004 (http://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMZ 13-3922.pdf) (retrieved 18 March 2014). [↑](#footnote-ref-15)
16. BVerfG decision of January 27, 2015, available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html;jsessionid=EB6C369CF3F91FA6037BFEF487487638.2_cid370> (accessed 21.09.15). [↑](#footnote-ref-16)
17. According to the latest, comparatively well-documented findings, between 3.8 and 4.3 million Muslims live in Germany; see Bundesamt für Migration und Flüchtlinge, 2009, pp. 11, 59-61. [↑](#footnote-ref-17)
18. See the data in the answer of the Hessian Minister of Culture, Henzler, to a small query of several representatives concerning instruction in Islam from 7 April, 2009, Landtagsdrucksache 18/60, p.2; Wenn Allah nu rein eifersüchtiger alter Mann ist,” (If Allah is just a jealous old man), Nürnberger Zeitung from 17 March, 2009, retrievable under <http://www.nz-online.de/artikel.asp?art=985476&kat=4>. [↑](#footnote-ref-18)
19. See the information in Bundesamt für Migration und Flüchtlinge, 2009, p. 215 with Fig. 55. [↑](#footnote-ref-19)
20. See, e.g. the information in the surveys of Brettfeld & Wetzels of young Muslim students in Bundesministerium des Innern, 2007, pp. 242-244. (87% of those questioned declared themselves as believers, far more than half of them chose the value “very strong believer” and “strong believer” as opposed to 19% of the “natives” with affiliations to a religious community). See also the information in Blume, 2008, pp. 44-46. [↑](#footnote-ref-20)
21. BVerfGE 52, 223, 236; BVerwG NVwZ 1994, 578, 579 wfr. [↑](#footnote-ref-21)
22. BVerfG NVwZ 2008, 72, 73 wfr. [↑](#footnote-ref-22)
23. BVerfG NVwZ 2008, 72, 73 wfr. [↑](#footnote-ref-23)
24. BVerfG NVwZ 2008, 72, 74 wfr. [↑](#footnote-ref-24)
25. NVwZ2008, 72, 74 wfr. [↑](#footnote-ref-25)
26. See BVerfG NVwZ 1994, 578, 579f wfr;OVG Münster NVwZ 1992, 77, 78. [↑](#footnote-ref-26)
27. On developments, see the detailed account in Anger, 2003, pp. 205 wfr. [↑](#footnote-ref-27)
28. According to the latest findings only a fraction in the lower one percentile fails to take part in coeducational swimming instruction due to religious reasons (0,1% of male students, 1,9% of female students); see Bundesamt für Migration und Flüchtlinge, 2009, p. 184 with table 27. For coeducational sport instruction the numbers fall even further to 0,1% for both groups (l.c., 183 with table 26). [↑](#footnote-ref-28)
29. BVerwGE 94, 82 ff. [↑](#footnote-ref-29)
30. BVerwG NVwZ 2014, 81. On the implications for the school day, see Rohe 2013, pp. 338-340. [↑](#footnote-ref-30)
31. See VG Hamburg NVwZ-RR 2006, 121 (The Central Council for Muslims in Germany (ZMD) approved of this decision.) See “Zentralrat begrüßt Hamburger Urteil,” (The Central Council approves the Hamburg decision), Islamische Zeitung 02/2004, p. 15); VG Düsseldorf NWVBl. 2006, 68, and BeckRS 2008, 36099; VG Augsburg BeckRS 2010, 54920); OVG Münster BeckRS 2009, 35827: A secondary school is allowed to make acceptance of a student (of 11 years of age) dependent on participation in coeducational swimming instruction in view of religiously adequate clothing options. The parents had objected that according to their religious beliefs children had to be protected from sexual temptation from the age of 7 onward. The state mission of education can by no means yield to obsessions of this kind. [↑](#footnote-ref-31)
32. See “Zustimmung für ‘Burkini’”-Urteil (Approval for Burkini Decision), FAZ from 13 September 2013, p. 4. [↑](#footnote-ref-32)
33. See VG Köln BeckRS 2012, 60246. [↑](#footnote-ref-33)
34. See also the pertinent teacher info of the Bavarian Ministry of Education and Culture, retrievable under <http://www.stmuk.bayern.de/km/lehrerinfo/thema/2005/02514/index03.asp>. [↑](#footnote-ref-34)
35. On these principles, see BVerfGE 47, 46, 69ff. [↑](#footnote-ref-35)
36. KMBI l, p. 434; revised through the Notice of 03 November 1993, KWMBI I p. 630; printed in Amberg/Falckenberg/Stahl, Das Schulrecht in Bayern (School Law in Bavaria), loose leaf under 62.25. [↑](#footnote-ref-36)
37. The notice chose the obsolete and in content erroneous term “Mohammedan” students, which features the (naturally unconscious) insinuation that Mohammed is theologically parallel to Jesus Christ, a gross misconstrual of the position of Mohammed, who in strictly monotheistic Islam is (only) a prophet. [↑](#footnote-ref-37)
38. According to Coumont (l.c., 334) the exemption for one day each should suffice, in order to maintain orderly instruction continuity. This may be doubtful in view of the number of Christian holidays, including Easter and Pentecost Monday. In addition an exemption for two days each can regularly be compensated for through compensatory homework. The realistic alternative of a pro-forma school visit during the festival period makes room for doubt in the meaningfulness of the limitation to only a single day. The Bavarian ruling, in my opinion, suffices completely to satisfy the constitutional requirements. [↑](#footnote-ref-38)
39. According to tradition this is an obligation for men, and is optional for women. In my opinion, however, this should not lead to stricter requirements for female students who want to take part in the Friday prayer services. [↑](#footnote-ref-39)
40. This is comparable to Stollman, 2005, p. 1394, 1396 wfr. [↑](#footnote-ref-40)
41. See for example the comments on the website of the Central Council of Muslims in Germany (ZMD), listed under “Besondere Formen und Gebete, 11. Erleichterungen für den Reisenden” (retrieved on 18 March 2014 under <http://www.islam.de/63.php>); Borek, 1999, p. 210. [↑](#footnote-ref-41)
42. BVerwG NVwZ 2012, 162. See the praise of the decision in Epping, Hillgruber & Germann, 2013, Art. 4 Rn. 51.4. [↑](#footnote-ref-42)
43. VG Berlin Beck RS 2009 39311. The VG (Administrative Court) determined the right of the student to perform his Islamic prayer once daily on the school premises outside of instruction times. The author was an expert witness involved in the civil law proceedings. [↑](#footnote-ref-43)
44. Compare the report “Mit Gebetsteppich im Sportunterricht – Mülheimer von der Schule verwiesen,“ (With prayer rug in sport instruction – Mülheimer [student] expelled), WAZ from 04 March 2014 (<http://www.derwesten.de/staedte/muelheim/mit-gebetsteppich-im-sportunterricht-muelheimer-von-der-schule-verwiesen-id9077053.html>) (retrieved on 18 March 2014), as well as the WDR-Report “Schulverweis für missionierenden Moslem“ (“School expulsion for missionizing Muslim”) from 6 March 2014 (<http://www.wdr5.de/sendungen/morgenecho/schulverweis100.html>) (retrieved on 18 March 2014). The available prayer room was not used by the student. [↑](#footnote-ref-44)
45. See ZMD (Footnote 55). [↑](#footnote-ref-45)
46. Koran, Sura 2, 184f. [↑](#footnote-ref-46)
47. On the growing orthodoxy of religious practice among Muslims, see the differentiated overview of the status of research in the Bundesministerium des Innern (the federal ministry of internal affairs) 2007, pp. 15-17 wfr (specific to fasting among school students 248-249), the information in the study commissioned by the German Islam Conference (DIK) (Deutsche Islam Konferenz/Bundesamt für Migration und Flüchtlinge, 2009, pp. 134-135) and the exemplary information in Alacacioglu, 1999, p. 67 (5 out of 30 youths who participated in the research prayed five times a day); specifically on fasting, see Bundesamt für Migration und Flüchtlinge, 2009, pp. 155-157. [↑](#footnote-ref-47)
48. On muslim basic attitudes, see Rohe, 2011, pp. 383-385; clearly rejected, for instance, by the former director of the Islamic Faith Community in Austria: Balic, 2001, pp. 69-70, 210. [↑](#footnote-ref-48)
49. “Necessity” (darura) can permit what is forbidden and forbid what is permitted; on this normative principle, see Rohe, 2011, pp. 66-67, 192, 194 and frequent. [↑](#footnote-ref-49)
50. See the comparable case of a woman who, because of her insistence on a facial veil, was impossible to place in the job market, in respect to the failure of social welfare: VG Mainz 26 February 2003 (Az. 1 L 98/03.MZ), unpublished, report under becklink 88243. [↑](#footnote-ref-50)
51. See for relevant statement (Fatwas) from largely traditionalist circles, http://fataatalkhayr.wordpress.com/2014/03/07/f-wie-können-wir-unseren-kindern-helfen-sich-an-das-fasten-zu-gewöhnen/ (retrieved on 18 March 2014). [↑](#footnote-ref-51)
52. Here religious and cultural sensitivity as well as openness are just as needed as firmness in the matter, particularly in light of the state mission in Germany for promotion of the well-being of the child in cooperation with the parents. In not a few migrant families the co-responsibility of the state does not correspond to experiences in the country of origin and must first be raised to consciousness. [↑](#footnote-ref-52)
53. See Anger, 2003, p. 168 wfr. [↑](#footnote-ref-53)
54. See the report “Wie Rektoren das Kopftuchverbot ausweiten wollen“ („How school directors want to expand the prohibition of headscarves”), in Spiegel-online from 16 October 2008 (<http://www.spiegel.de/schulspiegel/wissen/muslimische-schuelerinnen-wie-rektoren-das-kopftuchverbot-ausweiten-wollen-a-584023.html>) (retrieved on 18 March 2014). According to the designated report the director of the school called his action a “blackout” in conversation with the supervisory authorities. [↑](#footnote-ref-54)
55. The first initiative of this type occurred in the 90s on the part of the rightest radical party “The Republicans” in the state parliament (Landtag) of Baden-Württemberg; On this, see Anger, 2003, p. 168 wfr.In the meantime the debate has shifted to a broad political spectrum, whereby in part actual problematical aspects of headscarf wearing, especially for younger female students have been brought forward. [↑](#footnote-ref-55)
56. On the different motives for wearing headscarves, see Rohe, 2004; on recent findings, Bundesamt für Migration und Flüchtlinge, 2009, pp. 193-195. [↑](#footnote-ref-56)
57. Due to the departure of the student from the country, the case was resolved without a final decision. [↑](#footnote-ref-57)