



GERMANY

Discrimination in the Name of Neutrality

Headscarf Bans for Teachers and Civil Servants in Germany

HUMAN
RIGHTS
WATCH



Discrimination in the Name of Neutrality

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I. Executive Summary

To use the language of sports, the law you put forward essentially says, “Ball games are forbidden in the schoolyard.” But then comes the second sentence: “Soccer is not a ball game.”

—Comment from an MP during the debate in the Baden-Württemberg parliament on the draft law banning religious symbols for teachers¹

In recent years there has been a debate in Germany, as in many other European countries, about how to deal with an increasingly diverse society. One of the most prominent controversies has been the wearing by some Muslim women of the headscarf, a form of religious dress that usually conceals the hair and neck. In half of Germany's states (*Länder*), the past five years have seen the introduction of restrictions on women wearing the headscarf in public employment, in particular in schools.

In Germany the laws and policies on the use of religious symbols in schools are the responsibility of the 16 states, not the federal government. The approach of the states toward the headscarf, and other religious symbols in schools, has varied, sometimes starkly. Eight states—Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland—have enacted legislation and policies to prohibit teachers in public schools from wearing certain visible items of religious clothing and symbols. In two states, Hesse and Berlin, the ban is even applied more widely, covering many civil servant roles.

None of the laws banning religious symbols and dress explicitly target the headscarf. The restrictions in Bremen and Lower Saxony focus on the effect of a particular teacher's outward appearance as regards the school's ideological and religious “neutrality,” but do not strictly prohibit religious clothing or symbols. Nor do they create explicit exceptions for the Christian faith or Western traditions and values. But the majority of the states with bans (Baden-Württemberg, Bavaria, Hesse, North Rhine-Westphalia, and Saarland) allow some form of exemptions for Christianity and Western cultural traditions.

The headscarf has, however, been the focus of the laws' prior parliamentary debates and explanatory documents, which have emphasized the need to recognize the Western cultural

¹ State parliament of Baden-Württemberg, plenary proceedings 13/62, election period, 62nd session, February 4, 2004, http://www.landtag-bw.de/Wp13/Plp/13_0062_04022004.pdf (accessed January 5, 2009), p. 4408.

tradition shaped by Christianity (and Judaism). Furthermore, the only court cases to date involving challenges to the laws have concerned women wearing a headscarf.

The state of Berlin takes another approach. Its law, introduced in 2005, categorically bars all public school teachers (including kindergarten teachers if parents object), as well as police officers, judges, court officials, prison guards, prosecutors, and civil servants working in the justice system, from wearing visible religious or ideological symbols or garments (with the exception of small pieces of jewelry). There have been no court cases yet in Berlin under the law.

Eight states have no specific legislation relating to religious clothing or symbols in employment. Three of those states—Brandenburg, Rhineland-Palatinate, and Schleswig-Holstein—considered but ultimately rejected such restrictions.

After examining the laws and policies in the eight German states that restrict the wearing of religious symbols, and how they are applied in practice, Human Rights Watch has found that they contravene Germany's international obligations to guarantee individuals the right to freedom of religion and equality before the law. These laws (either explicitly or in their application) discriminate against Muslim women, excluding them from teaching and other public sector employment on the basis of their faith.

Those states that ban religious clothing but still allow Christian symbols explicitly discriminate on the grounds of faith. In any event, in all eight states the ban is applied specifically against Muslim women who wear the headscarf. In practical effect, the ban also discriminates on the grounds of gender. The measures effectively force women to choose between their employment and the manifestation of their religious beliefs, violating their right to freedom of religion and equal treatment.

International human rights standards protect the rights of persons to be able to choose what they wish to wear, and in particular to be able to manifest their religious belief. Restrictions should only be implemented where fully justified by the state, and be the least restrictive necessary.

Policies and laws in countries that force women to wear the veil have repeatedly been criticized by Human Rights Watch. But laws such as in the German states, which exclude women who wear the headscarf from employment, also run foul of these international standards. These bans on wearing the headscarf in employment undercut individual

autonomy and choice, privacy, and self expression, in similar ways to how they are violated in countries where women are forced to wear the headscarf.

Such restrictions require detailed justifications, including why they are needed now, when they were not required until the recent past, and why they are in practice only applied against Muslim women. Sufficient justifications have not been provided. While there may be legitimate grounds for some regulation of religious symbols and dress in employment for civil servants and teachers, the current wide-ranging and discriminatory restrictions adopted in German states have not been shown to be proportionate to their stated aim, and therefore amount to unlawful discrimination under international human rights law as well as violation of the rights of religion and privacy of those affected.

These regulations are not abstract concerns. The restrictions have a profound effect on women's lives, as was described by women affected who spoke to Human Rights Watch.

In those states with bans in effect, women wearing the headscarf are not permitted to work as teachers. Immediately after the new laws came into effect, teachers were asked to remove the headscarf and were reprimanded if they refused to do so, and in some cases even dismissed. Teachers, some with many years of employment, have been threatened with disciplinary action if they continue to wear the headscarf, and have been subject to disciplinary action in North Rhine-Westphalia and Baden-Württemberg.

Although those who have permanent civil servant status enjoy greater protection, they may still be removed from their teaching position and may lose their civil servant status if they continue to wear the headscarf and fail with legal challenges. Muslim trainee teachers have been denied subsequent employment as teachers after successful completion of their education, unless they take off their headscarves.

These restrictions have led some women to leave their home state or leave Germany altogether, to prolong maternity and other leave from their employment, or to leave teaching after years of studies and investment in developing their skills. Women concerned feel alienated and excluded, even though many had lived in Germany for decades or even their entire lives, or are German-born converts to Islam.

These bans are not necessary, as accommodation based on mutual respect is possible. Human Rights Watch spoke to many affected women who sought compromise and were willing to consider alternatives to the headscarf (such as large hats and untypical styles of tying the scarf), that would still allow them to comply with their religious obligations.

Accommodation will require the states to genuinely consult across society, act in good faith, and seek workable solutions.

Where there are concrete concerns that a teacher's conduct infringes neutrality, those concerns should be dealt with through ordinary disciplinary procedures on a case-by-case basis. Teachers should be assessed on the basis of their actions, not views imputed to them by virtue of the manifestation of their belief. Such outright and discriminatory bans as the eight states have imposed are neither justified nor necessary.

Methodology

This report is based on research conducted between April and November 2008. During the course of the research we carried out a total of 72 interviews in Berlin, Hamburg, Baden-Württemberg, Lower Saxony, Hesse, North Rhine-Westphalia, and Bavaria. In addition a further 12 phone interviews were conducted with persons in North Rhine-Westphalia, Lower Saxony, Baden-Württemberg, Hesse, and Schleswig-Holstein. States examined for this research were targeted to represent all existing categories of approaches to this issue.

Among the interviewees were 34 Muslim women resident in Germany affected by state restrictions on the headscarf, including converts. Face-to-face interviews were conducted in German both privately and in group settings in their homes, mosques, and other public places. The majority of interviewees were identified with the assistance of an informal network in North Rhine-Westphalia (the state with most cases) composed of teachers, trainee teachers, students, and social workers specializing in education (known as "social pedagogues") who wear the headscarf.

Human Rights Watch also interviewed officials in relevant state ministries, as well as politicians, party spokespersons, representatives and parliamentarians in the states under analysis. Other persons interviewed included lawyers engaged in relevant court cases, academics, and members of civil society such as research institutes, foundations, NGO representatives (including anti-discrimination organizations and Muslim organizations), state institutions, and union representatives.

The identity of interviewees has been disguised with pseudonyms in many cases, and in some cases certain other identifying information has been withheld, to protect their privacy. Identifying information for other individuals has been withheld in some cases for the same reasons. Interviewees whose real names are used gave their permission. All participants were informed of the purpose of the interview, its voluntary nature, the ways in which the

data would be collected and used, and the purposes and advocacy plans of the research and report, and consented to be interviewed.

In addition to our field research, we analyzed existing laws and regulations, reviewed press reports, and examined studies by academics and civil society. Other sources of information included court judgments, government press releases and statements, parliamentary materials (including minutes of plenary proceedings), NGO reports and position papers, public initiatives, academic studies and articles, and news reports.

The research also involved legal and policy analysis (including national constitutional, anti-discrimination, administrative, and labor law). The legal analysis not only included a thorough analysis of legal regulations in different German states in the framework of human rights law, but also of existing jurisprudence of courts at various levels.

Key Recommendations

- State governments should repeal legislation on religious dress and symbols and ensure that their legislation and procedures are compatible with Germany's international human rights obligations, guaranteeing in particular that these do not discriminate on grounds of gender or religion.
- Should concrete concerns arise that a teacher's conduct infringes neutrality, those concerns should be dealt with through ordinary disciplinary procedures on a case-by-case basis.
- The Federal Anti-discrimination Office should issue public opinions assessing the discriminatory impact of state legislation restricting the headscarf and the compatibility of such legislation with the Equal Treatment Act.
- The United Nations special rapporteur on the freedom of religion or belief should conduct a country visit to Germany to assess the compatibility of measures in place in Germany banning religious symbols and clothing in public employment with international human rights law, and issue concrete recommendations for remedying abusive policies and practices.

II. Background

Germany has a federal system of government, with its 16 states (*Länder*) enjoying substantial legislative and judicial autonomy, through state parliaments and courts. The competence to regulate school policy, education, and cultural affairs belongs largely to the states. At the same time, states in Germany are bound by the German constitution (Basic Law)² and by rulings of the Federal Constitutional Court.

Within a total population of 82 million, Germany has an estimated Muslim population of between 3.2 and 3.5 million,³ about 1 million of whom are German citizens.⁴ Islam is the second largest religion in the country after Christianity. The Muslim community includes various religious orientations, such as for instance Sunnis, Shiites, Ahmadis, and Alevi, and those who are secular.

Many Evangelical Churches and the Roman Catholic Church, a number of minority Christian churches including Jehovah's Witnesses, and the Central Council of Jews, other Jewish organizations, and *Kultusgemeinden* have received the status of publicly recognized corporations ("*Körperschaften des öffentlichen Rechts*")—legal bodies under public law. This status includes a number of privileges such as the right to levy taxes on their members, with the help of state agencies. No Muslim congregation has obtained this status.⁵

The majority of Muslims in Germany originate from Turkey. They were originally considered as "guest workers" (*Gastarbeiter*)—a term that suggests they are temporary residents who will eventually leave. However, the majority has now settled permanently, been joined by their families, some have acquired citizenship and, as one study found, they have "established a wide range of Islamic political and socio-religious organizations."⁶

² Basic Law, art. 1 (3), art. 20 (3) and art. 28 (1).

³ Current exact statistics on religious affiliation do not exist for Germany. Statistical estimates usually attribute religious affiliation based on country of origin, which produces imprecision. See, for instance, 3.3. million according to the German Federal Foreign Office, "Facts About Germany," <http://www.tatsachen-ueber-deutschland.de/en/society/content/background/religions.html?type=1> (accessed November 25, 2008).

⁴ German federal government responding to a major interpellation by the Green party on the status of legal equality of Islam in Germany, BT-Drucksache 16/5033, 2007, April 18, <http://dip21.bundestag.de/dip21/btd/16/050/1605033.pdf> (accessed January 10, 2009), p. 6.

⁵ Sabine Berghahn and Petra Rostock, "Cross national comparison Germany," 2008, unpublished report produced for VEIL (Values, Equality & Differences in Liberal Democracies), a 6-th Framework Project of the European Commission.

⁶ Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006), p. 109.

Baden-Württemberg, Bavaria, Hesse, and North Rhine-Westphalia are the states with the largest populations of Turkish origin. Berlin and Lower Saxony also have a high number of Turkish migrants.

There were a few court cases involving the Islamic headscarf⁷ in Germany beginning in the 1980s. Most related to passport and identification pictures, and most resulted in the women being permitted to wear their headscarves.⁸ They received little attention from the public or politicians. It was not until the end of the 1990s that there began to be public debate in Germany about Muslim women wearing the headscarf in employment, leading to the first high-profile court cases. According to one analysis, the timing is also linked to increased enrollment in German universities by Muslim women who then began to seek work in teaching.⁹

The most influential case involved a woman named Fereshta Ludin. She applied in 1998 for a teaching job in Baden-Württemberg (see box below). Her case was eventually heard by Germany's highest court, the Federal Constitutional Court, and its outcome in September 2003 had a profound impact on the headscarf issue.

Although the court ruled unconstitutional the decision by Baden-Württemberg to deny Ludin employment as a public school teacher because she wore a headscarf, it did not question the constitutional ability of states to enact laws imposing such restrictions per se.

⁷ Muslim religious dress consisting of a kerchief worn over or around the head, often folded and tied, usually concealing the hair and neck. In Germany, Muslim women wear it in diverse forms, shapes, types and styles.

⁸ Notably a 1984 ruling by the Administrative Court Wiesbaden (VG Wiesbaden from 10.07.1984, AZ.: VI/1 E 596/82).

⁹ Sabine Berghahn and Petra Rostock, "Cultural Diversity, Gender Equality – The German case," paper presented for the conference "Gender Equality, Cultural Diversity: European Comparisons and Lessons," Amsterdam, June 8-9, 2006, http://www.fsw.vu.nl/en/Images/Berghahn%20Rostock%20The%20German%20Case_tcm31-41627.doc (accessed December 11, 2008), p. 15.

Fereshta Ludin and the Federal Constitutional Court

Fereshta Ludin was born in Afghanistan in 1972, lived in Saudi Arabia, and came to Germany in 1987. She attended university in Baden-Württemberg, qualifying to become a school teacher in German, English, and civics, for elementary and secondary school. She became a German citizen in 1995. Fereshta Ludin has worn the headscarf since the age of 12, a decision she says was her own, and not influenced by her parents. She already faced obstacles in 1997 getting a position as a trainee teacher, due to her wearing the headscarf, but was ultimately allowed to finish her education. In 1998 she applied for a position as a teacher in Baden-Württemberg state's school system, but was rejected. This refusal of employment of the *Oberschulamts* Stuttgart [Supervisory School Authority of Stuttgart] was based on her insistence that she be allowed to wear her headscarf while teaching, which the authority deemed made her lacking in personal aptitude, and unsuitable and unable to perform the duties of a public servant in accordance with the German Basic Law. It was never disputed that she was fully qualified to work in this profession and there had been no complaints by parents, children, or the school about her behavior during her preparatory service.

Ludin sought unsuccessfully to challenge the denial through the administrative courts in the state and the Federal Administrative Court, starting in 1998. In 2002 she appealed to the Federal Constitutional Court, challenging the constitutionality of her ban from public service.

On September 24, 2003, the majority of the Federal Constitutional Court (five judges out of an eight-judge panel) ruled that there was no legal basis for the refusal to employ Ludin as a teacher because of her wearing the headscarf, and that the refusal violated her fundamental constitutional rights.

The Constitutional Court ruled that any prohibition must be based on a clear statutory foundation. The Court outlined that state "neutrality" in public schools could mean "open inclusive neutrality" which permits all religions—accepting the increasing variety of religions at school and using it as a means for practising mutual tolerance and in this way making a contribution to the attempt to achieve integration. Or it could mean "strict distanced non-religious neutrality." If the state were to tolerate a teacher's being in religious dress at school by their personal decision, this cannot be treated in the same way as a state order to display religious symbols at school (for example, Christian crosses in school buildings). The court made clear that permitting individual "religious" statements by teachers through their clothing should not necessarily be considered as endorsement by the state. The ruling emphasized Ludin's basic right to religious freedom. But it also referred to conflicting constitutional rights, including the interest of the parents, the constitutional right of pupils of freedom from religion and the possible impact on pupils of being unavoidably confronted with a teacher's manifestation of religion, as well as the danger of interference with the peace of the school.

These dangers, the court admitted, are "abstract," and need not necessarily occur in reality. The mere potential that in-school conflicts may arise between the competing constitutional interests of the teachers, parents, and students is insufficient to resolve constitutional balancing of interests. However, if states wish to eliminate even such abstract dangers, it concluded, they must do so by regulating the problem in the applicable School Act or similar specific laws. Resolving this tension includes, the court mentioned, the possibility that the individual *Länder* may make different provisions, which may also take into account school traditions, the composition of the population by religion, and whether the population is more or less strongly rooted in religion. However, any regulation as well as its justification and the practice of enforcing it, the court also pointed out, must strictly treat all religions and religious communities equally, in law and in practice.

Fereshta Ludin won and lost at the same time. Predictably, Baden-Württemberg's government swiftly enacted a relevant law for public schools. While Ludin's case was remanded back by the Constitutional Court to the Federal Administrative Court for further proceedings, the Federal Administrative Court upheld Baden-Württemberg's new law. In the end, Ludin had had enough of the pressure and decided to abandon further appeals. She is now employed in a private Islamic elementary school in Berlin.

The judgment left open the possibility of states enacting a total ban of religious symbols or guaranteeing religious plurality in school, and left it to the state governments to determine which approach to adopt.

In the aftermath of Ludin case, the legislatures in half of Germany's states moved quickly to enact laws banning public school teachers from wearing religious symbols and clothing—with the actual initial target being headscarves—in school. In two states, the ban was extended to other civil servants. The remaining half decided ultimately not to enact specific legislation to ban or otherwise regulate headscarves (three discussed proposals for bans, but those proposals were later rejected by the majority in the state parliament, or abandoned).

State bans on the headscarf were subsequently litigated in state courts. Some cases have been dealt with by labor courts (which hear employment disputes)—at first instance in local labor courts and on appeal in the relevant state labor court. Others have been heard in the general administrative courts (which deal with civil service law and education cases, among other issues)—at first instance in local administrative courts and on appeal in the relevant state administrative court.

Legislation and cases on the headscarf issue attracted wide publicity in the media, in politics, and with the public, leading senior politicians to comment on the issue. Gerhard Schröder, Germany's then-chancellor, said in a 2003 interview that there was no room for headscarves in the public service.¹⁰ Renate Schmidt, minister for women from 2002 until 2005, also spoke out against the headscarf, as did a number of MPs of Turkish origin in the Bundestag. By contrast, Marieluise Beck, then-commissioner for migration, refugees and integration, spoke out against the restrictions, together with other prominent women politicians.¹¹

¹⁰ "Kopftücher haben für Leute im staatlichen Auftrag keinen Platz," *Bild am Sonntag* (Hamburg), December 21, 2003, reproduced at http://www.bpb.de/themen/MQo4WD,o,o,Kopft%FCcher_haben_f%FCr_Leute_im_staatlichen_Auftrag_keinen_Platz.html (accessed December 11, 2008).

¹¹ Many prominent women in Germany from the political and artistic world signed in December 2003 the call "Religious diversity instead of forced emancipation. Call against a headscarf law," initiated by Marieluise Beck, then-commissioner for migration, refugees and integration (Green Party) and member of the Bundestag; Barbara John, former Berlin commissioner for foreigners, migration and integration (Christian Democratic Union) and coordinator for language training for migrants at the Ministry for Education Berlin; and Rita Süßmuth, former president of the German parliament and chairwomen of the Commission on Immigration (Christian Democratic Union), http://www.bpb.de/themen/XUDYWD,o,o,Religi%F6se_Vielfaltstatt_Zwangsemanzipation!.html (accessed December 12, 2008).

Proponents of restrictions on the headscarf

Women's equality

Many supporters of headscarf bans—including the editor of the feminist magazine *Emma*, Alice Schwarzer,¹² and social scientist and writer Necla Kelek,¹³ lawyer Seyran Ates,¹⁴ and other commentators with a Turkish background—express their arguments using the language of women's rights.¹⁵ Proponents argue that the headscarf oppresses women and violates the constitutional principle of gender equality, and see restrictions on it as a positive element that upholds women's rights.¹⁶

It is also argued that the ban offers a form of protection against possible compulsion and pressure on women and girls by their communities to wear the headscarf. At the same time, it is argued, teachers who wear the headscarf will not be able to support girls who are fighting their family and community in order to choose not to wear the headscarf.¹⁷

The “neutrality” of the state

The principle of state neutrality refers to the duty of the state to preserve neutrality in ideology and religion. The Constitutional Court has determined that the principle derives from the Basic Law.

Some proponents of state legislation restricting the headscarf and other religious clothing—including Social Democratic Party (SPD) politicians in Berlin and Bremen, and Lale Akgün, an SPD MP of Turkish origin—claim that it is designed to ensure the neutrality of the teaching environment and public services as well as the “political and religious peace” of the school and of the state. They argue that the wearing of headscarves by teachers must be prohibited

¹² Germany's most famous feminist Alice Schwarzer has voiced her opinion on the headscarf frequently. She cites the order to veil the female body or hair as evidence of the incompatibility of Islam with German values of democracy and freedom.

¹³ The social scientist and writer is very outspoken against the headscarf as an Islamist flag.

¹⁴ Seyran Ates has faced death threats while representing victims of domestic violence. She argues that an end to the ban would pose a serious threat to women's freedoms hard-won since the 1960s.

¹⁵ The “call against a headscarf law” initiated by Marieluise Beck was criticized by feminists and in particular by a group of migrant women from Muslim countries. In 2004 this group opposed to the headscarf wrote an open letter to Beck, which stressed that religion should be a private affair and that those who “under the influence of the Islamists” choose to wear the headscarf in public life should not be eligible for the civil service. The letter is reproduced at http://www.bpb.de/themen/VKZXQL,o,o,F%FCr_Neutralit%E4t_in_der_Schule.html (accessed December 29, 2008).

¹⁶ These proponents include church representatives, women's groups, politicians (mainly the Christian Democrats, but also other political parties, with some variation by state), and public intellectuals. See also Berghahn and Rostock, “Cross national comparison Germany.”

¹⁷ See, for instance, Intercultural Council, “Theses on the headscarf,” January 2004, http://www.interkultureller-rat.de/argumente_1.pdf (accessed December 22, 2008), and Kirsten Wiese, *Teachers with Headscarf (Lehrerinnen mit Kopftuch)* (Berlin: Duncker und Humblot, 2008).

to protect pupils from what they describe as a freedom not to be confronted by a teacher (who represents the state and the school) manifesting a particular religion.¹⁸ State officials emphasize the importance of this principle (and protection from any possible indoctrination) in Germany, which imposes and implements strict compulsory school attendance (almost no home schooling is possible).¹⁹

Some Church representatives and (mainly Christian Democrat) politicians justify privileging Christianity in restrictions on the grounds that it is an integral part of German culture and the German value system. To them, the headscarf represents a threat to the Christian heritage that underpins German constitution values. By this logic, Christian symbols are not considered a threat to the principles of the constitution because they are cultural rather than religious and therefore neutral.

Islam and integration

In Germany, as elsewhere in Europe, the debate over the headscarf has intertwined issues of religious freedom with concerns over religious fundamentalism and the political use of religious symbols such as the headscarf. Some proponents of restrictions on the headscarf, including some Turkish organizations in Germany, women with a Turkish migrant origin, some feminists, the Christian Democratic Party, and the right-wing national parties The Republicans and the German People's Union (DVU) believe that Islamists pose a threat to the state as well as rights and freedoms of women, and that religious movements have a plan to eliminate secular structures slowly, with the acceptance of the headscarf being the first step, which will be followed by new demands.²⁰

¹⁸ See, for instance, statement at panel discussion in June 2008 by Dr. Fritz Felgentreu, member of the Berlin House of Representatives, in conference proceedings, "Integration between 'Leitkultur' and laicism – five years after the headscarf judgment of the Federal Constitutional Court," conference of the VEIL project in Berlin in cooperation with the Friedrich-Ebert-Stiftung, June 5-6, 2008, <http://131.130.1.78/veil/Home3/download.php?4882fd80acb79db3d38c9378a646bbb9> (accessed December 30, 2008). Similar arguments were also raised by feminists opposed to the headscarf—see http://www.bpb.de/themen/VKZXQL,o,o,F%FCr_Neutralit%E4t_in_der_Schule.html (accessed December 29, 2008), as well as in the explanatory memorandum of the draft law of the CDU faction amending the school law in North Rhine-Westphalia, November 4, 2003, Drcks. 13/4564, reproduced at http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Kopftuchverbot/NRW_Gesetzentwurf_CDU_Drs13-4564.pdf (accessed January 5, 2009), p. 8.

¹⁹ Human Rights Watch interviews with officials at the Ministry for School and Further Education of North Rhine-Westphalia, Düsseldorf, September 29; and the Ministry of Education of Hesse, Wiesbaden, October 9, 2008.

²⁰ See, for instance, Berghahn and Rostock, "Cross national comparison Germany"; and Turkish Community in Germany (TGD), "No compromises in the headscarf discussion" ("Keine Kompromisse in der Kopftuchdiskussion"), January 7, 2004, <http://www.tgd.de/index.php?name=News&file=article&sid=279> (accessed December 12, 2008).

The secular Turkish Community in Germany (TGD)²¹ and Turkish Union in Berlin-Brandenburg (TBB) have repeatedly warned against tolerance of the headscarf. The TGD favors a secular approach with the prohibition of all religious symbols in schools and throughout the whole civil service, and has been critical of headscarf regulations that exempt Christian symbols on the grounds that they discriminate against Muslims.²²

Some politicians and feminists in Germany also argue that the headscarf hinders the integration of Muslim women in Germany, and that restrictions on the headscarf in teaching and the civil service send a clear signal in favor of integration, to the benefit of young Muslim women.²³

²¹ Founded in 1995, the TGD is a nationwide umbrella organization for a number of regional Turkish communities in Germany and for associations such as the Turkish Academic Association, the Turkish Teachers' Association, and the Union of Turkish-European entrepreneurs. It advocates the judicial, social, and political equality of Turkish and other migrants in Germany, and counters xenophobia as well as any form of discrimination.

²² TGD, "No compromises in the headscarf discussion," and "14 religion policy theses of the Turkish Community in Germany" ("14 Religionspolitische Thesen der Türkischen Gemeinde in Deutschland"), September 26, 2006, <http://www.tgd.de/index.php?name=News&file=article&sid=615> (accessed December 12, 2008).

²³ See, for instance, Franz Josef Jung, political faction chairman of the CDU in the State Parliament of Hesse, Address Before the Hesse Parliament Regarding the Law for the Protection of the Neutrality of the State, 1, minutes of plenary proceedings 16/30, 16th election period, 30th session, February 18, 2004, Wiesbaden, <http://starweb.hessen.de/cache/PLPR//16/o/00030.pdf> (accessed December 19, 2008); and Second reading of the draft law amending the school act in the state of North Rhine-Westphalia, Drucksache 14/569, and recommendation for a decision and report of the main committee, Drucksache 14/1927, p. 3344.

III. Germany's Human Rights Obligations

Germany is a state party to the International Covenant on Civil and Political Rights (ICCPR),²⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁶ and the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).²⁷ It is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, European Convention on Human Rights).²⁸

The European Convention and its protocols have been incorporated into German law by the federal legislature, giving them the status of federal German statutes (*Gesetzesrang*).²⁹ German courts must observe and apply the Convention in interpreting national law.

As a member of the European Union, Germany is required to implement all EU law, as, essentially, part of domestic law.

To eliminate all forms of discrimination against women, as CEDAW requires, Germany needs to address instances where women suffer from multiple and intersectional discrimination (such as suffering discrimination both on grounds of gender and of religion). It is important to note that gender-neutral laws and policies can perpetuate gender inequality if they disproportionately affect women in practice.

²⁴ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. Germany ratified the ICCPR on December 17, 1973.

²⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976. Germany ratified the ICESCR on December 17, 1973.

²⁶ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. Germany ratified the ICERD on May 16, 1969.

²⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981. Germany ratified the CEDAW on July 10, 1985.

²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively.

²⁹ Basic Law, art. 59.2.

Gender Equality

Under international human rights law, Germany is required to respect the human rights of women, including their right to privacy and self expression, and to ensure that they are treated equally and without discrimination.

Through its ratification of CEDAW in 1985, Germany assumed the obligation to take action to end discrimination against women in all its forms. The treaty commits States to eradicate "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women..., of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."³⁰

The treaty obliges Germany "to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation [and]... to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women," and to eliminate discrimination against women in public life.³¹

The UN Human Rights Committee (which oversees state compliance with the ICCPR) has stressed that states are responsible to ensure to men and women equally the enjoyment of all rights provided for in the ICCPR without discrimination, by taking all necessary steps, including the removal of obstacles to the equal enjoyment and the adjustment of domestic legislation.³²

The Human Rights Committee has also emphasized "that any specific regulation of clothing to be worn by women in public may involve a violation of a number of rights guaranteed by the [ICCPR], such as: article 26, on non-discrimination; ... articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim."³³

The ICCPR also provides for protection against the effect of any laws and practices that may interfere with women's right to enjoy privacy and other rights under article 17 on the basis of

³⁰ CEDAW, art. 1.

³¹ *Ibid.*, art. 2 (d) (f) and art. 3. See also article 7 on public life.

³² UN Human Rights Committee, General Comment No. 28, Equality of rights between men and women (article 3), CCPR/C/21/Rev. 1/Add. 10, (2000), <http://www.unhchr.ch/tbs/doc.nsf/o/13b02776122d4838802568b900360e80>, paras 2-4.

³³ *Ibid.*, para. 13.

equality with men.³⁴ The right to a private life is also well established in the European Convention on Human Rights.³⁵ The right to freedom of expression is set out in the ICCPR and ECHR.³⁶

In Germany, equality before the law and the protection of all individuals from discrimination is a human right that is enshrined in article 3 of its Basic Law, which states that “[n]o person shall be favored or discriminated because of sex, parentage, race, language, national or social background, faith, or religious or political opinions.”³⁷

Nondiscrimination in Employment

Discrimination in employment on the grounds of gender or religion is widely prohibited under human rights treaties, including CEDAW, the ICCPR, and the European Convention on Human Rights³⁸

The ICCPR requires Germany to provide equal access to public service for women and men, and the Human Rights Committee has affirmed that the obligation includes the need for effective and positive measures to promote and ensure women's participation in high-ranking civil service positions and the judiciary.³⁹ Practices that discriminate against women with regard to access to better paid employment also violate article 26 of the ICCPR.

Under CEDAW, Germany must take all appropriate measures to eliminate employment discrimination against women in order to ensure the right to the same employment opportunities, including the right to free choice of profession and employment.

Germany has further obligations in this area through its membership of the International Labour Organization (ILO) and as a party to the ILO Convention dealing with discrimination in

³⁴ *Ibid.*, para 20.

³⁵ ECHR, art. 8.

³⁶ ICCPR, art. 19, and ECHR, art. 10.

³⁷ Basic Law, art. 3(3).

³⁸ In addition to CEDAW, see ICCPR, ICESCR, and their respective committees; the International Labour Organization (ILO), its Committee of Experts, and Convention No. 111 dealing with discrimination in employment; the Beijing Declaration And Platform For Action (BDPFA) and the Follow-up to the 4th World Conference on Women and Full Implementation of the Beijing Declaration and Platform for Action; and the Outcome of the 23rd special session of the General Assembly.

³⁹ ICCPR, art. 25. UN Human Rights Committee, General Comment No. 28, para 29.

employment.⁴⁰ The ILO's Committee of Experts has expressed concern about governments' restrictions on employment based on religious practice.⁴¹

EU Directive 2000/78/EC (the "Employment Directive") sets out a framework for the elimination of direct and indirect discrimination on grounds including religion and belief, in employment and occupation. It required member states to implement the provisions in national laws and regulations by 2003. As with discrimination on the grounds of sex, EU law does not allow for any justification for directly treating someone less favorably on the ground of religion (which is direct discrimination). Apparently neutral provisions which nevertheless would put persons of a particular religion under a disadvantage are also prohibited, as indirect discrimination, unless they can be shown to be carried out for a legitimate aim and be a proportionate means of meeting that aim.

The long-standing EU law prohibiting discrimination on the grounds of sex in employment was recently consolidated in Directive 2006/54/EC. Germany, like all EU states, was required to implement the provisions of this Directive in its domestic law by 15 August 2008.⁴² The Directive includes a requirement that the law prohibit all direct or indirect discrimination on the grounds of sex, in the public or private sectors in employment or working conditions.⁴³

The German General Act on Equal Treatment (*Allgemeine Gleichbehandlungsgesetz*, AGG) transposing the EU Directives on Equal Treatment came into force on August 18, 2006.

Germany's Basic Law guarantees the right to free choice of occupation.⁴⁴

⁴⁰ ILO Convention No. 111 concerning Discrimination in Respect to Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31, entered into force June 15, 1960, ratified by Germany on June 15, 1961.

⁴¹ Committee of Experts on the Application of Conventions and Recommendations (CEACR): Individual Observation concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Turkey (ratification: 1967) Published: 2005, ILO, Geneva, <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=8074&chapter=6&query=Turkey%40ref&highlight=&querytype=bool>.

⁴² Directive 2006/54/EC, art. 33.

⁴³ *Ibid.* The Directive defines direct discrimination and indirect discrimination in its article 2. Direct discrimination is "where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation," and cannot be justified. Indirect discrimination is where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

⁴⁴ Basic Law, art. 12.

Freedom of Religion

Human rights law requires Germany to ensure religious freedom for all its inhabitants. Universal and regional human rights instruments, including the ICCPR and the European Convention on Human Rights, refer to a person's freedom "to manifest his religion or belief in worship, observance, practice and teaching."⁴⁵

Article 18 of the ICCPR upholds individuals' rights to hold and to manifest their religious beliefs. According to the UN Human Rights Committee, "The concept of worship extends to [...] the display of symbols ... The observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings."⁴⁶

Article 2(1) of the ICCPR affords basic rights to all individuals without distinction or discrimination on any grounds including religion. In addition, article 26 places an obligation on states to ensure that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as... religion."

The Human Rights Committee has called on states to address the disproportionate impact of religious discrimination on women and emphasized "states parties must take measures to ensure that freedom of thought, conscience and religion ... —including the freedom ... to express one's religion or belief—will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination."⁴⁷

Freedom of religion is strongly formulated in the German Basic Law.⁴⁸ It recognizes the importance of equality, repeatedly emphasizing the right to the equal protection and enjoyment of rights and privileges, including the right to freedom of religion.⁴⁹ Unequal treatment of different religious groups violates the Basic Law.

⁴⁵ See the wording—with a slightly differing order of the list of possible manifestations of religion or belief—in article 18 of the Universal Declaration of Human Rights (UDHR), ICCPR article 18 (1), ECHR article 9(1), and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration of the General Assembly), article 1(1).

⁴⁶ United Nations Human Rights Committee General Comment No. 22, issued to clarify the meaning of article 18 (Forty-eighth session, 1993), adopted on July 20, 1993, Doc.CCPR/C/21/Rev.1/Add.4, para 4.

⁴⁷ UN Human Rights Committee, General Comment No. 28, para 21.

⁴⁸ Basic Law, arts. 3 and 4.

⁴⁹ Moreover, the Basic Law expressly prohibits, in article 33, discrimination in the public service on the basis of religion or world views: Clause (2) says, "Every German is equally eligible for any public office according to his aptitude, qualifications, and professional achievements," and clause (3) affirms, "Enjoyment of civil and political rights, eligibility for public office, and

Limitations on religious freedom

Religious freedom is a qualified right under human rights law.⁵⁰ Broadly speaking, limitations on the religious freedoms of individuals are permissible only where they are prescribed or determined by law and are deemed necessary in a democratic society to protect public safety, public order, health, or morals, or the fundamental rights and freedoms of others.

By contrast, the German Basic Law contains no statutory reservation on freedom of religion. As a consequence, restrictions on religious freedom will only be deemed compatible with the law if they serve to protect directly other fundamental rights or similarly important objects of legal protection.⁵¹

In its General Comment on religious freedom, the UN Human Rights Committee has clarified, “Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”⁵² Limitations are therefore not permissible if they violate the right of women to equality. The committee also observed that since the concept of morality derives from many social, philosophical, and religious traditions, any limitations on religious freedom justified for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.⁵³

Article 9(2) of the European Convention on Human Rights justifies limitations on freedoms of thought, conscience or religion, and expression only on the grounds of necessity. The European Court of Human Rights has clarified in the context of limitations on free expression that necessity implies the existence of a “pressing social need.”⁵⁴ While States Parties have a certain margin of appreciation in assessing whether such a need exists, the restriction must be construed strictly, in the form of law, and the need for any restrictions must be established convincingly.

rights acquired in the public service are independent of religious denomination. No one may suffer any disadvantage by reason of his adherence or non-adherence to denomination or to a conviction.” Basic Law art. 33(2)–(3).

⁵⁰ See, for example, UDHR, art. 29 (2); ICCPR, art. 18 (3); and ECHR, art. 9 (2).

⁵¹ See Heiner Bielefeldt [Director of the German Institute for Human Rights], “Threatened Human Right, Experiences with Freedom of Religion” (“Bedrohtes Menschenrecht, Erfahrungen mit der Religionsfreiheit”), *Herder Korrespondenz*, vol. 60, 2006/issue 2, February 2006, pp. 56-70.

⁵² Human Rights Committee General Comment No. 22.

⁵³ *Ibid.*

⁵⁴ European Court of Human Rights, *Sunday Times v. United Kingdom* (6538/74), Judgment of 26 April 1979, Series A No. 3, available at www.echr.coe.int, para. 49.

The UN special rapporteur on freedom of religion or belief has developed a set of general criteria in order to evaluate—from a human rights law perspective—restrictions and prohibitions on wearing religious symbols. According to her analysis, the following factors show “legislative and administrative actions which typically are incompatible with international human rights law”:

- The limitation amounts to the nullification of the individual’s freedom to manifest his or her religion or belief;
- The restriction is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved;
- Limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles deriving exclusively from a single tradition;
- Exceptions to the prohibition of wearing religious symbols are, either expressly or tacitly, tailored to the predominant or incumbent religion or belief;
- In practice, State agencies apply an imposed restriction in a discriminatory manner or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women;
- No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on this issue;
- Use of coercive methods and sanctions applied to individuals who do not wish to wear religious dress or a specific symbol seen as sanctioned by religion. This would include legal provisions or State policies allowing individuals, including parents, to use undue pressure, threats or violence to abide by such rules;⁵⁵

According to the special rapporteur, a prohibition on wearing religious symbols that is based on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual’s religious freedom.⁵⁶

Right to a Private Life

The right to a private life is protected both by the ECHR and the ICCPR.⁵⁷ As with the right to religion, a state can only restrict this right if such a restriction is carried out for a legitimate

⁵⁵ Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, E/CN.4/2006/5, January 9, 2006, Commission on Human Rights, sixty-second session, p.17, para. 55.

⁵⁶ *Ibid.*, p. 16, para 53.

⁵⁷ ECHR art. 8; ICCPR art. 17 (in the ICCPR it is a right to “privacy”).

aim, is nondiscriminatory, and the extent and impact of the restriction is strictly proportionate to meeting the aim. It is for the authority to justify its restriction.⁵⁸

Minority Rights

Under article 27 of the ICCPR, in states where religious (and other) minorities exist, members of those minorities shall not be denied the right, in community with the other members of their group, to profess and practice their own religion.

The UN General Assembly Minorities' Declaration adds to this by stating, in article 1, that States “shall protect the existence and ... religious ... identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”⁵⁹

Germany is also party to the Council of Europe's Framework Convention on National Minorities, which requires states to respect the religious rights of minorities. Article 6 of the Convention obliges states to encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic, or religious identity, in particular in the fields of education, culture, and the media.

However Germany has, unilaterally, stated it will only apply this Convention to only four groups it considers “historic” minorities: Danes, Sorbs, Roma/Sinti, and Frisians.⁶⁰

The European Court of Human Rights and the Headscarf

The bulk of international law that could apply to this issue, in particular that deriving from the UN human rights treaties and the EU anti-discrimination laws, requires Germany to positively protect the rights of members of its Muslim religious minority to publicly express their religion, and strictly prohibits discrimination on the grounds of religion or gender.

Unfortunately, the European Court of Human Rights has adopted an approach to restrictions on the wearing of headscarves (and recently turbans) that Human Rights Watch believes allows states to violate the rights of members of non-Christian religions who wish to wear specific clothing in public for religious reasons. The approach of the European Court over a series of cases has failed to give proper weight to the need for states to have strong

⁵⁸ See, for example, Human Rights Committee General Comment No. 16.

⁵⁹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992.

⁶⁰ See State Report of Germany, April 13, 2005.

justifications for such restrictions; the impact these restrictions have on the lives of the people concerned; and the discriminatory impact of bans that predominately apply to women and girls wearing headscarves.

In the 2001 case of *Dahlab v. Switzerland*, the court dismissed as inadmissible an application by a pre-school teacher in the canton of Geneva, Lucia Dahlab, who had converted to Islam and who had been prohibited from wearing a headscarf, after years in the performance of her professional duties.⁶¹ The court upheld the government's right to require the Muslim teacher to remove her headscarf on the grounds that "the ordinance did not target the plaintiff's religious beliefs, but rather it aimed to protect others' freedom and security of public order" given that the young children in Lucia Dahlab's classes (ages between 4 and 8) were "more easily influenced" by such a "powerful external symbol" than older children.

The court concurred with the view of the Swiss Federal Court that the prohibition on wearing a headscarf in the context of the applicant's activities as a teacher was "justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools."⁶²

The court returned to the issue in the case of *Leyla Şahin v. Turkey*, which concerned the refusal of admission to lectures and examinations in higher education institutions for students whose heads were covered. The court gave a wide margin of appreciation to the Turkish authorities and concluded that there had been no violation of article 9 of the European Convention.

According to the court, preventing adult students who wear the headscarf from attending university primarily pursued the legitimate aims of protecting the rights and freedoms of others and the protection of public order, and the interference was based on the principles of secularism and equality. Secularism in Turkey was consistent with the values underpinning the convention, it concluded. In the view of the court, "[T]here had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it."⁶³

⁶¹ ECHR, *Dahlab v. Switzerland*, application No. 42393/98, ECHR decision of February 15, 2001.

⁶² *Ibid.*

⁶³ ECHR, *Şahin v. Turkey*, application No. 44774/98, ECHR Chamber judgment of June 29, 2004, para. 108 and ECHR Grand Chamber judgment of November 10, 2005, para. 115.

In a dissenting opinion, however, Judge Françoise Tulkens was of the opinion that article 9 of the ECHR was violated: she disagreed with the manner in which the principles of secularism and equality were applied by the majority of the Grand Chamber, that is, the general and abstract appeal to secularism, and she doubted that the ban was proportionate.⁶⁴ Tulkens sharply dismissed the assumption that the headscarf intrinsically conflicts with principles of equality.

In November and December 2008, the European Court dealt with further cases concerning restrictions of religious freedoms for non-Christians, continuing the line of its previous jurisprudence. In *Dogru v. France*⁶⁵ and *Kervanci v. France*,⁶⁶ two 12-year-old girls were expelled from their school in 1999 for refusal to remove their headscarves during physical education class.⁶⁷ Their parents proposed that they wear hats but this was rejected by their school.⁶⁸ The European Court found no violation of the right to religion saying the girls had made an “ostentatious” display, and upholding French secularism, even though the issue was actually whether a headscarf or hat is incompatible with physical education class. The court found the expulsions not disproportionate because the girls could continue their education by correspondence course, and did not even consider arguments that their right to education was violated.

In *Mann Singh v. France*, a Sikh who had held driving licenses for 20 years with his picture showing him wearing a turban was told in 2004 he could not get a new license unless he had a picture without a turban, which he believed would be a fundamental violation of his religion.⁶⁹ He won a case in France that this decision had no basis in French law, but then the French government issued a circular saying that in all identity photos the subject had to be bareheaded. The European Court rejected the case outright on admissibility, without a hearing. Essentially the court took on board the government’s argument that bareheaded photos were necessary for identification purposes, not even considering why the authorities were accepting photos with persons wearing turbans up until 2005.

⁶⁴ ECHR Grand Chamber judgment of November 10, 2005, dissenting opinion of Judge Tulkens, para 4, 13.

⁶⁵ Chamber judgment in the case of *Dogru v. France*, application no. 27058/05.

⁶⁶ Chamber judgment in the case of *Kervanci v. France*, no. 31645/04.

⁶⁷ “Two Chamber judgments in respect of France on wearing the headscarf in school,” Registrar of the European Court of Human Rights press release, December 4, 2008, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=843951&portal=hbkm&source=externalbydocnumbe r&table=F69A27FD8FB86142BF01C1166DEA398649> (accessed December 20, 2008). The alleged violations in both cases occurred before the introduction in France of the law prohibiting pupils from wearing religious symbols in state schools.

⁶⁸ This was before the complete ban in French schools was enacted.

⁶⁹ Admissibility decision, *Mann Singh v. France* (application no. 24479/07). See European Court of Human Rights press release, November 27, 2008, <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=16567387&skin=hudoc-pr en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=74628> (accessed January 8, 2009).

Human Rights Watch regards the Court's decision in these cases concerning non-Christian religious clothing (predominately headscarves) as deeply problematic. Our starting point in this regard is that the European Court has repeatedly accepted that the wearing of the headscarf is a manifestation of religion and therefore enjoys in principle the protection of freedom of religion under Article 9 ECHR.⁷⁰

In *Dahlab* and *Şahin* though, the court gave significant weight to the alleged “danger” that the wearing of the headscarf posed for the rights of others, but this is a danger the respective governments produced very little evidence to justify. As Judge Tulkens underlines, only “indisputable facts and reasons whose legitimacy is beyond doubt” are capable of justifying interference with a right guaranteed by the convention.⁷¹

Human Rights Watch's critique of the *Şahin* judgment at the time criticized the court for its willingness to readily accept the Turkish government's arguments and the limited weight it gave to the impact of the severe restrictions of rights for Leyla Şahin and women like her.⁷²

In the *Şahin* judgment, the European Court effectively watered down the protection of article 9, paying excessive respect, and indeed apparently seeing itself as the defender of, the secular constitutional traditions of a particular state, although the Convention should be applied in a way that is consistent across all member states. In its *Şahin* judgment the Court failed to demonstrate what disadvantages or violence women who do not wear Islamic headscarves would concretely face in Turkey, if Islamic headscarves were permitted in universities.⁷³

Furthermore, one of the arguments used against headscarves in the *Şahin* case concerns the presumed link between the practice of wearing Islamic headscarves and political extremism. While there are certainly extremist political movements in Turkey, Human Rights Watch has noted in past reports that the campaign for the right to wear a headscarf has been entirely nonviolent for more than a quarter of a century.⁷⁴ And as Judge Tulkens noted, the right to freedom of religion and to manifest religion by an external symbol cannot be wholly

⁷⁰ ECHR, *Dahlab v. Switzerland*, p. 11; *Şahin v. Turkey*, application No. 44774/98, ECHR Chamber judgment of June 29, 2004, para 71; Grand Chamber ECHR *Şahin v. Turkey*, para 78.

⁷¹ ECHR, Grand Chamber judgment of November 10, 2005, dissenting opinion of Judge Tulkens, para 5.

⁷² See analysis in “Turkey: Headscarf Ruling Denies Women Education and Career,” Human Rights Watch news release, November 15, 2005, <http://www.hrw.org/en/news/2005/11/15/turkey-headscarf-ruling-denies-women-education-and-career>.

⁷³ Niraj Nathwani, “Islamic Headscarves and human rights: a critical analysis of the relevant case law of the European Court of Human Rights,” *Netherlands Quarterly of Human Rights*, vol. 25 no. 2, June 2007.

⁷⁴ “Turkey: Headscarf Ruling Denies Women Education and Career,” Human Rights Watch news release, November 15, 2005, <http://www.hrw.org/en/news/2005/11/15/turkey-headscarf-ruling-denies-women-education-and-career>.

overturned by the public interest in fighting extremism. That fight need not involve prohibiting the wearing of headscarves by individual women “who engage in this practice not to support extremism, but for other reasons”.⁷⁵

And the lack of understanding of the impact shown by the European Court to those affected by the bans on headscarves and on turbans is in marked contrast to its approach on cases concerning a need to protect the Christian religion. This is shown by the famous *Otto Preminger-Institute* case in which the Court upheld the seizure by Austrian authorities of a film, as it could have upset members of the Christian religion. The Court read into article 9 the need to protect the “respect for the religious feelings of believers”.⁷⁶ However when it comes to Muslim or Sikh manifestation of belief through particular clothes, the Court has been prepared to accept the denial of education to girls and women, or the denial of essential documents such as driving licenses.

⁷⁵ Nathwani, “Islamic Headscarves and human rights,” *Netherlands Quarterly of Human Rights*.

⁷⁶ *Otto Preminger-Institute v. Austria*, Judgment of 20 September 1994, application no. 13470/87, see in particular para. 48.

IV. State Bans on Religious Symbols in Public Employment

Eight of the 16 federal states in Germany—Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland—have enacted legislation to prohibit teachers in public schools from wearing visible items of religious clothing and symbols. In Baden-Württemberg and Berlin similar legislation exists for kindergarten teachers also. In Hesse and Berlin the ban extends to cover some or all other civil servants in the field of justice⁷⁷ and law enforcement (including judges, prosecutors, police officers, and court and prison officials).

Exceptions are allowed in the context of religious education in Baden-Württemberg Lower Saxony, Hesse, Bavaria, Berlin, and North Rhine-Westphalia. Trainee teachers can generally be exempted from these bans,⁷⁸ because the state has the monopoly of training in this field and the freedom of profession would therefore be infringed, affirmed by a decision of the Federal Administrative Court in June 2008 (see section below on “Bans without explicit exceptions for Christian symbols”).

Each of the eight states requires teachers to behave according to the principle of religious, political, and ideological neutrality. The Muslim headscarf is not mentioned explicitly in the laws, but has arisen in explanatory documents or parliamentary debates in all eight states, and all the legal challenges to the ban that have gone before the courts to date have concerned the headscarf: Since the introduction of the state laws, there have been at least 20 court decisions in 12 proceedings.

The plaintiffs in these cases include not only trainee teachers seeking teaching posts but also teachers and social workers specialized in education (“social pedagogues”) already working in education (sometimes for decades). The vast majority of legal challenges to these laws have not been successful. Most of the rare decisions in favor of allowing the headscarf concern trainee teachers.

Bans Exempting Christian Symbols and Clothing

Five of the states with religious clothing bans—Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia—contain an exception for Christian symbols and

⁷⁷ In the area of justice administration this applies only to public servants who exercise governmental functions.

⁷⁸ Explicitly regulated in the laws of all states banning religious symbols, with the exception of Bremen.

clothing, phrased in references to the exhibition or representation of Christian-Western educational values, beliefs, and traditions.

After the *Ludin* decision of the Federal Constitutional Court (see Chapter II), Baden-Württemberg was the first state to pass in April 2004 a new law amending its school act regulating the wearing of religious clothing and symbols by teachers in public schools.⁷⁹

Under the amended school act, teachers at public schools are not allowed “to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the *Land* towards pupils or parents or the political, religious or ideological peace of the school.”⁸⁰ The act deems as “particularly illegitimate” any “behaviour that can appear to pupils or parents to be a teacher’s demonstration against human dignity, gender equality according to article 3 [of the Basic Law], the rights of freedom or the free and democratic order of the constitution.”

The relevant section of the school act, however, goes on to say that “[t]he respective exhibition of Christian and western educational and cultural values or traditions do[es] not contradict [a teacher’s] ‘duty of behaviour,’” and correspond to educational objectives. By enacting this law, Baden-Württemberg intended to prohibit public school teachers from wearing the Islamic headscarf, while permitting teachers to continue to wear Christian religious clothing and symbols⁸¹ such as the nun’s habit.⁸²

The regulation in North Rhine-Westphalia adopted in June 2006 mirrors the language of the law in Baden-Württemberg.⁸³

Bavaria adopted its restriction on the headscarf in 2004.⁸⁴ Nuns’ habits are allowed.⁸⁵ In the Bavarian law teachers are not allowed to wear clothing that is incompatible “with

⁷⁹ Gesetz zur Änderung des Schulgesetzes, April 1, 2004, GBl. S. 178, and Gesetz zur Änderung des Kindergartengesetzes, February 14, 2006, GBl. S. 30.

⁸⁰ Gesetz zur Änderung des Schulgesetzes, April 1, 2004, GBl. S. 178, amendment of paragraph 38 of the School Act.

⁸¹ See, for instance, “Not without my habit” (“Nicht ohne meine Kutte”), *Der Spiegel* (Hamburg), October 12, 2004, <http://www.spiegel.de/schulspiegel/0,1518,322789,00.html> (accessed November 25, 2008), referring to statements made by Annette Schavan, Baden-Württemberg’s minister of culture at the time, demonstrating just that intent. She had also argued that the nun’s habit would be work attire, see “Class without coif” (“Unterricht ohne Haube”), *Der Spiegel*, October 18, 2004, <http://wissen.spiegel.de/wissen/dokument/dokument.html?id=32499129&top=SPIEGEL> (accessed January 28, 2009).

⁸² Human Rights Watch interview with officials from the Baden-Württemberg Ministry of Education, Youth and Sport, Stuttgart, September 24, 2008. The officials confirmed that Christian clothing and display have been deliberately exempted by the legislature and that nun’s habits, the cross, and the kippa are permitted.

⁸³ Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, June 13, 2006, GVBl. S. 270.

fundamental constitutional values and educational objectives.”⁸⁶ But those values are said to include “Christian-Western” educational and cultural values.⁸⁷

The regulation in Saarland adopted in June 2004 emphasises Christian values and traditions: “The School has to teach and educate pupils on the basis of Christian educational and cultural values showing due respect for the feelings of differently minded pupils.”⁸⁸

In Hesse, a very strict law was adopted in 2004, which bans all civil servants including public school teachers, from wearing religious clothing and symbols that may jeopardize the “neutrality of the administration and state” or endanger the “political and religious peace” in the state.⁸⁹ To determine what is banned under this law the “humanist- and Christian-influenced Western tradition of the Land of Hesse has to be taken into due account”.

Justifications for the restrictions

The state governments in Baden-Württemberg, Bavaria, Saarland, and North Rhine-Westphalia have argued that exempting Christian clothing and symbols (notably nun’s habits) from their bans does not privilege Christianity, because such clothing and symbols are in line with and preserve values expressed in their state constitutions (themselves influenced by Christianity).⁹⁰ They claim that Christian clothing and symbols do not therefore risk compromising the neutrality or peace of the school.

⁸⁴ Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen, November 23, 2004, GVBl. S. 443.

⁸⁵ Explanatory comments in the Bavarian government draft law, Gesetzesentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen, Bavarian parliament, 15th election period, Drucksache 15/368, February 18, 2004.

⁸⁶ Amendment to Bavaria School Act, art. 59.

⁸⁷ Ibid.

⁸⁸ Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland (Schulordnungsgesetz), June 23, 2004 (Amtsbl. S.1510). It should be noted that in the explanation to the draft law, the legislator explicitly points out that the regulation is not limited to headscarves. Nevertheless the wearing of Christian and Jewish symbols remains possible.

⁸⁹ Gesetz zur Sicherung der staatlichen Neutralität, October 18, 2004 (GVBl. I S.306).

⁹⁰ See explanatory comments in the Bavarian government draft law, Gesetzesentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen; First reading of draft law in state parliament of North Rhine-Westphalia, minutes of plenary proceedings 14/12, p. 1018, November 9, 2005; Second reading of the draft law amending the school law in the state parliament of Saarland, minutes of plenary proceedings 12/69, 12th election period, 69th session, June 23, 2004, p. 3684, <http://www.landtag-saar.de/dms/Land069.pdf> (accessed December 20, 2008); and debates in the state parliament in Baden-Württemberg at the first reading of the draft law amending the school act on February 4, 2004, plenary proceedings, 13/62, 13th election period, 62nd session, http://www.landtag-bw.de/Wp13/Plp/13_0062_04022004.pdf (accessed January 5, 2009).

An official from the Bavarian Ministry of education outlined to Human Rights Watch that “the admittance of Christian clothing and symbols, such as a nun’s habit, in school result from the interpretation of the law. It does not privilege Christianity, as such clothing and symbols are in line with the Bavarian constitution. Clothing and symbols of other religions which are not contrary to the goals and values of the constitution are also allowed.”⁹¹

The governing parties introducing the draft laws in the North Rhine-Westphalia parliament emphasized the importance of the “Christian Western and European tradition,” arguing that it is “not a breach of the neutrality requirement if a teacher commits to this tradition.”⁹² Accordingly, “the nun’s habit and Jewish kippa remain therefore permissible.”⁹³

Aside from exceptions for Christian symbols, some of these laws prohibit at first view the wearing of any political and religious clothing and symbols of belief. But it is clear from explanatory documents, debates in state parliaments, and statements from state government officials that the measures are aimed at restricting the headscarf.

The intention of legislators is demonstrated in the accompanying explanations in 2004 to the draft laws in Bavaria and Saarland, and in 2005 to the draft law in North Rhine-Westphalia. The latter explain that the headscarf must not be allowed during teaching “because at least a not insubstantial part of its proponents link it to an inferior position of women in society, state and family or a fundamentalist statement for a theocratic political system in contradiction to the constitutional values.”⁹⁴ Furthermore, the North Rhine-Westphalia explanation characterizes the headscarf as a political symbol⁹⁵ (as was also done by Christian conservative politicians in Baden-Württemberg),⁹⁶ and points to the

⁹¹ Human Rights Watch interview with official in Bavarian State Ministry of Education, Munich, October 17, 2008.

⁹² Gesetzentwurf der Fraktion der CDU und der Fraktion der FDP: Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, Drucksache 14/569, 14th election period, October 31, 2005.

⁹³ Ibid. Similar argumentation can be found in the explanation of the draft law in Saarland: Gemeinsamer Gesetzentwurf der CDU-Landtagsfraktion und der SPD-Landtagsfraktion zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland (Schulordnungsgesetz), February 12, 2004, Drucksache 12/1072), 12th election period, parliament of Saarland.

⁹⁴ Gesetzentwurf der Fraktion der CDU und der Fraktion der FDP: Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, Drucksache 14/569, 14th election period, October 31, 2005.

⁹⁵ Similarly a Bavarian ministry official to whom Human Rights Watch spoke stated that a nun’s habit is not a political symbol, while a headscarf can be also a political symbol conflicting with the equality of women. Human Rights Watch interview with official from Bavarian State Ministry of Education, Munich, October 17, 2008.

⁹⁶ See the then-minister for education, cultural affairs, youth and sport and other parliamentarians at plenary debate in the state parliament of Baden-Württemberg on February 4, 2004, minutes of plenary proceedings 13/62, 13th election period, 62nd session, http://www.landtag-bw.de/WP13/Plp/13_0062_04022004.pdf (accessed December 19, 2008).

jurisprudence of the European Court of Human Rights (as was also mentioned during the parliamentary debate in Hesse).⁹⁷

Official hearings on the draft laws in the Bavarian parliament and the parliament of North Rhine-Westphalia referred to the “headscarf ban.”⁹⁸ Introducing the draft law “on the safeguarding of state neutrality” in the Hesse parliament, the chairman of the CDU party explained, “[w]ith the draft law introduced by us we want to forbid Hessian teachers and civil servants from wearing the Islamic headscarf.”⁹⁹

The debate over the law in the North Rhine-Westphalia parliament featured the following positions from the committee behind the draft: “The headscarf has meantime become worldwide a symbol of Islamic fundamentalism. ... [It] can be regarded as political symbol of Islamic fundamentalism, which expresses the dissociation from values of the western society like individual self-determination and emancipation of women. ... according to the federal constitutional court ... it does not depend out of which motive the teacher is wearing the headscarf but how concerned parents and pupils perceive it.”¹⁰⁰ Similar statements had been brought forward by the party that introduced the law in the parliament in Hesse, where in the explanatory statement the ban expressly relates to headscarves.¹⁰¹

In justifying bans on religious dress and symbols, lawmakers in Hesse and Bavaria have argued that a teacher wearing a headscarf is not in a position to provide and convey education according to the constitution, in particular as regards the principle of equality between men and women.¹⁰²

⁹⁷ See for all arguments, Franz Josef Jung, Address Before the Hesse Parliament Regarding the Law for the Protection of the Neutrality of the State, minutes of plenary proceedings 16/30, 16th election period, 30th session, February 18, 2004, Wiesbaden, pp. 1897-1898, <http://starweb.hessen.de/cache/PLPR//16/o/00030.pdf> (accessed December 19, 2008).

⁹⁸ Anhörung zum Gesetzentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen (Drs. 15/368) (sog. Kopftuchverbot), June 15, 2004, http://www.landtag.de/cps/rde/xchg/SID-oA033D45-oA0590B4/www/x/-/www/16_1321.htm, (accessed November 25, 2008).

⁹⁹ Franz Josef Jung, Address Before the Hesse Parliament Regarding the Law for the Protection of the Neutrality of the State minutes of plenary proceedings 16/30, 16th election period, 30th session, February 18, 2004, Wiesbaden, <http://starweb.hessen.de/cache/PLPR//16/o/00030.pdf> (accessed December 19, 2008). See also an approving interjection by another CDU parliamentarian during the same first reading of the Law in the Hesse parliament, minutes of plenary proceedings 16/30, 16th election period, 30th session, February 18, 2004, Wiesbaden, p. 1902, <http://starweb.hessen.de/cache/PLPR//16/o/00030.pdf> (accessed December 19, 2008) responding to a Green parliamentarian’s summing up of the law’s objective as “headscarf no, cross yes.”

¹⁰⁰ Second reading of the draft law amending the school act in the state of Nord Rhine-Westphalia, Drucksache 14/569, page 3344; recommendation for a decision and report of the main committee, Drucksache 14/1927.

¹⁰¹ Franz Josef Jung, Address Before the Hesse Parliament Regarding the Law for the Protection of the Neutrality of the State.

¹⁰² Explanation in the Bavarian government draft law, Gesetzentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen, Bavarian parliament, 15th election period, Drucksache 15/368, February

Ministry officials in Hesse to whom Human Rights Watch spoke argued that the scope of application of the Hessian neutrality law must not be understood as limited to the headscarf. They stressed that in Hesse there were, for instance, individual cases of trainee lawyers participating in public court sessions and public prosecutions, who wore a ring through the nose or their hair in a brightly-dyed Mohawk and agreed to change this appearance when objections to it were raised. In other cases the assignment of chairing a session was refrained from or the hearing was followed from the seats for the spectators.¹⁰³ Other theoretical examples the officials offered as falling under the scope of application of the law were cases of men in “Taliban” clothing, traditional clothing of the Indian Bhagwan movement,¹⁰⁴ or political expressions of opinion on buttons or t-shirts with statements like “foreigners out” or “against atomic energy.”¹⁰⁵

An official from the Bavarian Ministry of Education stated the symbols and clothing to which the law applies would be assessed on a concrete case by case basis.¹⁰⁶ The official suggested that the absence of disputes involving teachers affected by the ban was evidence that the law achieved its aim and functions smoothly.

According to officials in the Baden-Württemberg Ministry of Education, Youth and Sport interviewed by Human Rights Watch, no concrete disruption of the school peace is needed to justify the ban in that state—abstract endangerment is sufficient.¹⁰⁷ The officials suggested that the only acceptable alternative to a headscarf would be a wig looking like a normal hairstyle.¹⁰⁸ According to the law trainee teachers can be exempted from the ban, which they are in practice, and in cases where trainee teachers wearing the headscarf would face problems at school, there would be a change of school.¹⁰⁹

18, 2004. See also speech of Franz Josef Jung, Address before the Hessen Parliament Regarding the Law for the Protection of the Neutrality of the State.

¹⁰³ According to information provided by the Hesse Ministry of Interior and Sport, these other cases concerned political expressions of opinion on stickers and t-shirts. All cases were resolved in conversations by the responsible training supervisor autonomously, partly after consulting the management of the department or authority.

¹⁰⁴ This argument was also put forward by the state government of Hesse in the legal proceedings brought to ask for direct judicial review of the school and civil servant law in Hesse. Judgment of Constitutional Court of Hesse on December 10, 2007, AZ.: P.St. 2016. Officials from the Ministry of Education, Youth and Sport of Baden-Württemberg made a similar argument to Human Rights Watch in an interview in Stuttgart on September 24, 2008.

¹⁰⁵ Human Rights Watch interview with Hesse Ministry of Interior and Sport officials, Wiesbaden, October 10, 2008.

¹⁰⁶ Human Rights Watch interview with official from Bavarian Ministry of Education, Munich, October 17, 2008.

¹⁰⁷ Human Rights Watch interview with officials from the Baden-Württemberg Ministry of Education, Youth and Sport, Stuttgart, September 24, 2008.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

Approach of the courts

Restrictions on the headscarf for teachers have been upheld by courts in Baden-Württemberg and North Rhine-Westphalia in several cases involving individual challenges to the bans. In addition, courts in Baden-Württemberg, Bavaria, Hesse, and North Rhine-Westphalia have issued rulings upholding or clarifying the bans.

Baden-Württemberg

Baden-Württemberg's law was the first to be tested in the courts. As noted above, the Federal Administrative Court considered the new law in the context of Fereshta Ludin's case in June 2004.¹¹⁰ The court upheld the decision by the Supervisory School Authority of Stuttgart to deny her employment on the ground that her wearing of the headscarf made her, under the terms of the new law, "unqualified" for a civil servant public school teaching position.

In the view of the court, Baden-Württemberg's law trying to ban an abstract danger struck an acceptable balance between the competing interests of Ludin's fundamental constitutional rights and those of students and their parents, and the principle of neutrality.

The attorney (and drafter of the law)¹¹¹ for Baden-Württemberg argued before the Federal Administrative Court that an Islamic headscarf falls under the law's prohibition against religious symbols but a nun's habit does not, since the latter constitutes "work attire"¹¹² and falls under the law's language excluding displays of Christian and Western traditions and values from Baden-Württemberg's law's restrictions.¹¹³

The Federal Administrative Court noted the Federal Constitutional Court's position that any law must treat different religions with strict equality, holding that "[e]xceptions for particular forms of religiously motivated clothing, as contended by the attorney [for Baden-Württemberg] during oral proceedings, are therefore not permissible."

¹¹⁰ Federal Administrative Court, June 24, 2004, 2 C 45.03, <http://www.bverwg.de/media/archive/2282.pdf> (accessed December 10, 2008).

¹¹¹ This person is today a judge at the Federal Constitutional Court.

¹¹² Notwithstanding German nuns' protests to that characterization of their habit—clothing that, for them, is clearly religiously motivated clothing. See "Nun's habit at schools: clearly religiously motivated clothing" ("Nonnentracht an Schulen: 'Eindeutig religiös motivierte Kleidung'), *Spiegel Online*, October 13, 2004, <http://www.spiegel.de/schulspiegel/0,1518,322964,00.html> (accessed December 11, 2008).

¹¹³ "Not Without My Habit", *Der Spiegel*.

But it failed to follow the logic of this position when assessing whether Baden-Württemberg's exception for the "exhibition of Christian and occidental educational and cultural values or traditions" violates these equal treatment principles.¹¹⁴

The court reasoned that the reference to Christian and Western values in Baden-Württemberg's law does not create an illegal preferential treatment of the Christian religion, because this is not, in fact, the display of an individual religious denomination. "Christian" values and virtues are actually detached from their religious meaning and should be seen instead as part of the fundamental values of the Basic Law. In the court's view, Christian educational and cultural values are ones with which every public servant should be able to agree, irrespective of his or her religious persuasion.

The effect of this reasoning is to uphold such laws that give exemptions from bans to the display of Christian and Western values and traditions, despite the clear intention of the legislator in order to be in conformity with equal treatment and the Basic Law.

The Federal Administrative Court also held that Baden-Württemberg's law "does not excessively affect the Islamic religious community" because "the prohibition is limited to teachers in public schools," and thus affects neither the right of students at public schools, nor the right of teachers at private schools to wear an Islamic headscarf.¹¹⁵

Courts in Baden-Württemberg have considered a second case involving the state's headscarf ban. The case was brought by Doris Graber, a Muslim convert, who served as a primary and secondary teacher for over 30 years at the same school in Stuttgart. Graber, who converted to Islam in 1984, began to wear a headscarf during classes in 1995. In 2004 the school board ordered her to remove the headscarf in the classroom, or be dismissed from her post.

Graber challenged the decision in the Administrative Court of Stuttgart. In July 2006 the court ruled that the order for Graber to remove her headscarf constituted a violation of the principle of equal treatment, since nuns wearing habits were permitted in a public school in Baden-Württemberg.¹¹⁶ It held that the state could not ban the headscarf from Baden-Württemberg's public schools if nuns were permitted to teach wearing habits.

¹¹⁴ Gesetz zur Änderung des Schulgesetzes, April 1, 2004, GBl. S. 178.

¹¹⁵ See also Ruben Seth Fogel, "Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless — God Forbid—they are Religious," *New York Law School Law Review*, vol. 51, issue 3, 2006-2007, pp. 618-653.

¹¹⁶ Judgment of the Administrative Court of Stuttgart, July 7, 2006. See also Dietmar Hipp, "Headscarf Decision: Nuns Rescue Islam" ("Kopftuch-Urteil: Nonnen retten den Islam") *Spiegel Online*, July 8, 2006, <http://www.spiegel.de/schulspiegel/0,1518,425678,00.html> (accessed February 3, 2009).

However, the judgment was overruled by the State Administrative Court of Baden-Württemberg in March 2008. The court held that the order was lawful.¹¹⁷ According to the court, wearing a headscarf during classes amounted to the display of a religious symbol contrary to the obligation to keep religious expression out of the classroom. According to the court, the decision to allow nuns to wear their habits was “a historic special case under a unique special contract basis.” However, the court went on to find that even if one would have to consider it an unequal implementation of the law, this would not entitle Graber to wear her religiously motivated headwear as there is no entitlement to “equal treatment in unjustness.”

North Rhine-Westphalia

Among the five states with bans that carve out exceptions for Christianity, North Rhine-Westphalia has seen the greatest number of cases of women challenging the ban, not all of which have resulted in litigation. There are currently at least seven initial proceedings and lawsuits which have led to various court decisions.

According to a February 2007 statement from the state’s school minister, there were at the time 12 teachers wearing the headscarf employed in the state, some of them with the status of civil servants (permanent career state employees).

The Administrative Court of Düsseldorf¹¹⁸ judged in June 2007 in first instance that a trainee teacher who refused to remove her headscarf could not become a teacher in the state. In a decision that defies logic, the court held that while the exception clause of North Rhine-Westphalia cannot be a justification for Christian or Jewish clothes or symbols worn by teachers, the ban did not need to apply to nuns teaching in public schools in the state, since these were rare exceptions and therefore did not constitute a so-called ‘deficit of execution’ (*Vollzugsdefizit*) of the law.

The Düsseldorf court reached a similar conclusion in August 2007 in the case of Mariam Brigitte Weiss, determining that it did not make a difference that she wore her headscarf in the ‘Grace Kelly style’¹¹⁹ (and she was still perceived as obviously manifesting her religion by doing so).

¹¹⁷ State Administrative Court of Baden-Württemberg, Judgment 4 S516/07, March 14, 2008.

¹¹⁸ Administrative Court Düsseldorf, judgment, June 5, 2007, 2 K 6225/06.

¹¹⁹ A headscarf which is tied by a knot at the back instead of pinned at the front, inspired by the way the actress and princess of Monaco, Grace Kelly, wore her headscarf.

Similar arguments to those of the judgments of the Administrative Court of Düsseldorf can be also found in rulings in other cases decided by administrative or labor courts in the state (for example Administrative Court Aachen, November 2007; Administrative Court Gelsenkirchen, February 2008; Labor Court Düsseldorf, June 2007;¹²⁰ Labor Court Herne, March 2007 (and State Labor Court, October 2008)).¹²¹ In addition, in July 2008, the Labor Court Wuppertal threw out the case of a Muslim teacher, previously employed since 2002 and who had been fired after refusing to take off her headscarf during teaching (having received a previous warning).¹²²

A June 2007 ruling by the first instance labor court in Düsseldorf drew a lot of public attention. It concerned a social worker specializing in education who had worn a headscarf for some years while working in a school, replacing it with a rose-colored “beret” which fully covers her hair and ears, following the new school act. The court judged that the function of the beret was the same as the function of a headscarf. In April 2008 the State Labor Court affirmed the lower court’s ruling in the case.¹²³ According to the State Labor Court, the teacher expressed her religious belief by wearing the hat, thereby violating neutrality and the “negative” religious freedom of pupils. The teacher refused a proposed settlement to wear a wig instead. The first instance administrative court in Cologne employed similar reasoning in an October 2008 judgment in the case of a Muslim teacher who had worn a beret while teaching since 2006 (and previously a headscarf).

As is evident from the above cases, courts in North Rhine-Westphalia have applied the prohibition on the headscarf for teachers in a strict way that does not tolerate substitutes that cover the hair, shoulders and ears like a Muslim headscarf, and still consider them a religious symbol. The courts’ rulings declare essentially that no options are available to the observant Muslim woman who wants to abide by what she considers a religious duty, even if the method used is not a recognizable religious symbol or has no conceivable associations of fundamentalism, such as a pink woolen hat.

¹²⁰ Administrative Court Aachen, first instance judgment, November 9, 2007, 1 K 323/07; Administrative Court Gelsenkirchen, first instance judgment, February 27, 2008, 1 K 1466/07; Labor Court Düsseldorf, first instance judgment, June 29, 2007, 12 Ca 175/05.

¹²¹ Labor Court Herne, first instance judgment, March 7, 2007, 4 Ca 3415/06. State Labor Court, judgment of October 16, 2008, 11 Sa 280/08 und 11 Sa 572/08.

¹²² Labor court Wuppertal, first instance judgment, 4 Ca 1077/08, July 29, 2008.

¹²³ State Labor Court judgment of April 10, 2008, Ref. 5 Sa 1836/07.

Bavaria, Hesse, and Saarland

The Constitutional Court of Bavaria upheld the state's law restricting religious dress in schools as compatible in principle with the Bavarian Constitution in January 2007.¹²⁴ It determined that detailed interpretation on its application in individual cases would have to be done by the specialized courts. However the court also stated that the legislature can allow certain symbols and clothing expressing religious or ideological belief, subject to their being compatible with the basic values and educational goals of the Constitution.

On December 10, 2007, a six-to-five majority of the Constitutional Court of Hesse upheld the state's law restricting religious symbols as compatible with its constitution.¹²⁵ The ban was challenged in April 2005 by the *Landesanwältin*, the lawyer responsible for verifying the constitutional compliance of all legislation enacted in the state. She argued that the ban was in violation of the freedom of religion as well as discriminatory and called for it to be lifted.

The majority in the Hesse Constitutional Court held that taking into account the Christian/Western tradition of Hesse in rulings on religious symbols would not represent a privilege for the Christian religion, but would simply reflect the fact that clothing and symbols in line with those values expressed in the constitution do not threaten neutrality or peace in school. The ruling applies only to the actual text of the law rather than to its application and does not state whether Islamic headwear is within the scope of the law. As in Bavaria, the application of the law is left to courts dealing with actual cases.

Neither judgment offers a clear answer as to whether Christian clothing would in fact be exempt, a matter left for lower courts in each state. Both courts affirm the duty of civil servants to behave neutrally, even at the expense of the right to religious freedom and of a private life.

At this writing, there have been no court cases in Hesse involving teachers. Human Rights Watch is aware of five cases involving trainee teachers who wear the headscarf where objections have been raised. According to officials in Hesse, in each case schools have been found to enable the women to carry out the practical part of their education.¹²⁶

¹²⁴ In legal proceedings brought to ask for direct judicial review of the Bavarian education law, judgment of the Bavarian Constitutional Court on January 15, 2007, AZ.: Vf.11-VII-05.

¹²⁵ In legal proceedings brought to ask for direct judicial review of the school and civil servant law in Hesse, judgment of Constitutional Court of Hesse on December 10, 2007, AZ.: P.St. 2016.

¹²⁶ Human Rights Watch interview with officials in the Hesse Ministry of Education, Wiesbaden, October 9, 2008.

At this writing, there have been no court cases in Saarland.

Bans without Explicit Exceptions for Christian Symbols

The laws in Bremen and Lower Saxony rely on the preservation of the neutrality of the school and the peace in school as the basis for restricting religious dress in schools. But unlike the laws in the five states above, the laws in Bremen and Lower Saxony state do not contain explicit exceptions for the Christian faith or western traditions and values.

Bremen's law, introduced in 2005, provides that "the outer appearance of the teaching and caring staff in school may not be such as to disturb religious and ideological feelings of pupils and parents or to carry tensions into school [that] endanger its peace through a violation of religious and ideological neutrality."¹²⁷ This applies to teachers in preparatory service as long as they teach, that is, to trainee teachers when they are in the classroom.

Lower Saxony's 2004 amendment of its School Act states that "the outer appearance of schoolteachers, even if chosen by a teacher due to religious or ideological reasons, may not create any doubts concerning the teachers' qualification to convincingly fulfill the educational mandate of the schools."¹²⁸ This also applies for trainee teachers who have been put in charge of a classroom, although in individual cases exceptions may be granted.

Despite the ostensible difference between these laws and those in the five states with explicit exceptions for Christian symbols, the parliamentary debates and explanatory documents in Bremen and Lower Saxony when the laws were introduced focused predominantly on the headscarf and mentioned the recognition of the western cultural tradition shaped by Christianity (and Judaism).¹²⁹

Furthermore, it should also be noted that although the law in Lower Saxony only refers to the state's responsibility for education and appears on first sight neutral, article 2 of the School

¹²⁷ Gesetz zur Änderung des Bremischen Schulgesetzes und des Bremischen Schulverwaltungsgesetzes, June 26, 2005, Brem. GBl. S. 245.

¹²⁸ Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes, April 29, 2004, Nds. GVBl. S. 140-142.

¹²⁹ See the debate during question time in the state parliament of Lower Saxony on the occasion of the first deliberation on a relevant draft law amending the school law, minutes of 23rd session, January 21, 2004, Hannover, pp. 2424-2426, http://www.landtag-niedersachsen.de/infothek/dokumente/dokumente_index.htm (accessed December 20, 2008). See also minutes of plenary proceedings, state parliament Bremen, 16th election period, 43th session, June 23, 2005, http://www.bremische-buergerschaft.de/volltext.php?look_for=1&buergerschaftart=1&dn=P16Loo43.DAT&lp=16&format=pdf&ppnr=16/43 (accessed February 3, 2009).

Act on the state's mandate for education names Christianity at the top of the list of the bases for developing further the personality of the pupils following preschool education. According to the explanatory section of the draft law the wearing of Christian and Jewish symbols remains possible.¹³⁰

The state of Berlin takes another approach.¹³¹ Its law, introduced in 2005, and which applies widely to civil servants in the state, contains a strict secular interpretation of neutrality. The act prohibits "any visible religious or ideological symbols that signal [to] the spectator an affiliation to a specific religious or ideological group and any noticeably religious or ideological imbued garments." It treats all religions alike, at least as a matter of law.

The law categorically bars all public school teachers (including kindergarten teachers in the case of parental objections), as well as police officers, judges, court officials, prison guards, district attorneys and civil servants working in the justice system, from wearing visible religious or ideological symbols or garments (with the exception of small pieces of jewelry).¹³² The latter exception thereby would exclude from the ban, for instance, small crucifixes as jewelry (although this is a very common way Christians display their religion.)

Approach of the courts

There have been no cases in Lower Saxony¹³³ or Berlin¹³⁴ under their laws. The only court case in Bremen to date concerns a woman wearing a headscarf whose application for teacher training was rejected.¹³⁵ (As noted above, Bremen does not allow trainee teachers to wear religious dress in the classroom. With the exception of Saarland's legislation, the other

¹³⁰ Gesetzentwurf zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes vom 13.01.2004 (Gemeinsamer Entwurf der Fraktionen CDU und FDP) (Drucksache 15/720) (Draft law on amendment of the Lower Saxony School Act of January 13, 2004).

¹³¹ Gesetz zur Schaffung eines Gesetzes zu Artikel 29 der Verfassung von Berlin und zur Änderung des Kindertagesbetreuungsgesetzes, January 27, 2005, GVBl. S. 92.

¹³² In the area of justice administration this only applies for public servants who exercise governmental functions.

¹³³ There was a case in Lower Saxony before the new law came into force. The claimant, a teacher who had converted to Islam, won at first instance in 2001 but the decision was reversed by the High Administrative Court in 2002. The teacher withdrew her appeal before the Federal Administrative Court ruled on the case.

¹³⁴ Complaints by two lawyers about a recording court clerk wearing a headscarf in Charlottenburg were deemed to fall outside the scope of the law by the justice senator in January 2008, on the grounds that the clerk did not perform "sovereign" functions. See <http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2008/0116/berlin/0086/index.html> (accessed January 5, 2009).

¹³⁵ Decision of the Administrative Court Bremen on May 19, 2005, 6 V 760705 (first instance); decision of the High Administrative Court Bremen on August 26, 2005; as well as judgments of the Administrative Court Bremen on June 20, 2006, 6 K 2036/05 and of the High Administrative Court Bremen on February 21, 2007.

states that restrict religious dress in schools allow individual exceptions for trainee teachers¹³⁶).

The trainee teacher won her appeal in the first instance administrative court in Bremen in 2005.¹³⁷ But the decision was overturned on appeal in the Higher Administrative Court (*Oberverwaltungsgericht*) of Bremen.¹³⁸ That decision was reversed in turn by the Federal Administrative Court in June 2008.¹³⁹ Germany's higher administrative court decided that since the state exercises a monopoly on teacher training, it would amount to disproportionate interference in freedom to choose one's employment to require persons to remove religious symbols in order to undergo such training, unless there was shown to be a concrete danger in relation to school peace and the rights of pupils and parents.

The positive impact of this ruling will depend on the extent to which there are meaningful opportunities at private schools for trainee teachers barred from working as public school teachers because they chose to wear religious symbols.

States without Bans

At present, eight states in Germany have no special legislation relating to religious clothing or symbols in employment. Three of states—Brandenburg, Rhineland-Palatinate, and Schleswig-Holstein—drafted laws. Brandenburg's and Rhineland-Palatinate's failed to pass and Schleswig-Holstein's was abandoned by the legislature.¹⁴⁰ The other five states—Hamburg, Mecklenburg-Lower Pomerania, Saxony, Saxony-Anhalt, and Thuringia—decided to not enact special legislation.

In each of these states, the wearing of religious symbols can be prohibited on a case-by-case basis if there is evidence that a person's actions contravene the neutrality of the school, using existing public services law that allows for sanctions in well-founded cases.

There have been no relevant court cases in any of the eight states.

¹³⁶ In Baden-Württemberg, North Rhine-Westphalia and Hesse these exceptions for the persons within preparatory service may not be granted "if compelling reasons/legal provisions stand against it."

¹³⁷ Administrative Court Bremen, May 19, 2005.

¹³⁸ Higher Administrative Court of Bremen, Judgment of February 21, 2007.

¹³⁹ Federal Administrative Court, June 26, 2008, AZ.: BVerwG 2 C 22.07

¹⁴⁰ On March 2, 2005, all political parties (CDU, SPD, PDS) in Brandenburg rejected a corresponding bill by the DVU faction in the first reading. All parties saw no need for regulations. A bill proposed in Rhineland-Palatinate by the Christian Democratic faction was rejected by the governing SPD and FDP in November 2005 as not necessary.

According to several teachers and a civil society representative interviewed by Human Rights Watch, there have been several cases where women wearing the headscarf in Hamburg and Rhineland-Palatinate have faced difficulty finding traineeships or places in schools and have been asked whether they would take the headscarf off.¹⁴¹

It is notable that five of the states that lack bans were formerly part of the German Democratic Republic (GDR).¹⁴² These states generally seek to avoid the issue of church-state relations because of a history of anti-Christian and anti-religious indoctrination and attacks on religious freedom during the Communist period.¹⁴³ There are also a low number of Muslim migrants living in Germany's East, which partly explains the lack of disputes involving Muslim teachers wearing the headscarf.

In Schleswig-Holstein, the SPD/CDU coalition government considered introducing a regulation banning religious symbols in school at the beginning of 2006.¹⁴⁴ It was convinced to withdraw the draft legislation after consulting with legal experts who pointed out that equal treatment of all religions in such a case would mean a ban of Christian symbols, and with church representatives who favored the maintenance of religious symbols in schools.¹⁴⁵

After withdrawing the bill in September 2006, the government proclaimed that although the duty of religious neutrality for teachers prevails there should be space for wearing religious clothes including the headscarf. A CDU contact person from Schleswig-Holstein told Human Rights Watch that there have been no disputes involving teachers wearing the headscarf in the state, and that the issue was "not a subject of discussion."¹⁴⁶ Were there to be concrete problematic cases of proselytizing, he said, the civil service law would be applied, but this would be based on the person's behavior not their attire. In his view, the neutrality of the

¹⁴¹ Human Rights Watch interview with Özlem Nas, spokeswoman from the Muslim women organization in North Germany, Hamburg, September 16, 2008. Human Rights Watch phone interview with Aida (not her real name) trainee teacher, Hamburg, October 27, 2008. Human Rights Watch interview with Enif Medeni, a teacher who trained in Hamburg and now teaches at a Berlin private Muslim elementary school, Berlin, September 22, 2008. Human Rights Watch interview with Farida (not her real name), a teacher in Rhineland-Palatinate who was born and raised in Germany and moved from Baden-Württemberg because the ban came into force after she finished her studies, Karlsruhe, September 14, 2008.

¹⁴² Mecklenburg-Lower Pomerania, Brandenburg, Saxony, Saxony-Anhalt, and Thuringia.

¹⁴³ See also Berghahn and Rostock "Cross national comparison Germany."

¹⁴⁴ Partly prompted by the case of a Muslim trainee teacher who had started her practical training year in February 2006 wearing a headscarf.

¹⁴⁵ Human Rights Watch telephone interview with a desk officer of the CDU faction in the Schleswig-Holstein state parliament, October 30, 2008. Experts consulted included Marieluise Beck and Dr. Silke Ruth Laskowski. Northelbien evangelical bishop Hans Christian Knuth and the Roman Catholic auxiliary bishop Hans-Jochen Jaschke spoke out on the issue.

¹⁴⁶ Ibid.

state is not endangered by the appearance of a headscarf, and in the balance of rights, the headscarf alone does not justify interference or restrictions.

In Hamburg, the first teacher who wore a headscarf in class, stating this was because of religious reasons, was employed in 1999.¹⁴⁷ An official in the education department in Hamburg told Human Rights Watch that this teacher was employed following an individual case assessment. In addition, the official said, there had been 2-3 cases where a teacher had converted to Islam in the course of their professional life. The school authority took no action in these cases.¹⁴⁸

There has been an increase in recent years in applications and expressions of interest from trainee teachers wearing the headscarf wishing to come to Hamburg from other parts of Germany. The school authority official reported a dozen applications by trainee teachers with headscarves for the last due date (none of whom ultimately took up their positions). No trainee teacher with a headscarf has been refused according to the school authority official, adding that if there were to be problems in one school, the authority would search for another school. In the search for schools, the school authority had so far no problems with parents, with the exception of one single Muslim parent who opposed a teacher with a headscarf. However after a conversation a solution was found. There are currently two teachers with headscarves working in the area of Hamburg (one of whom is the teacher referred to above who started in 1999). There are no cases of teachers with kippa or nuns' habit, nor known cases of other civil servants.¹⁴⁹

¹⁴⁷ The teacher concerned had previously converted to Islam.

¹⁴⁸ Human Rights Watch telephone interview with Amtsleiter Norbert Rosenboom, the head of the department for education in the authority for schools and vocational education in Hamburg, October 10, 2008.

¹⁴⁹ Ibid.

V. Impact of the Ban on Teachers and Civil Servants

When the new laws came into effect, teachers, some with many years of employment, were threatened with disciplinary action if they continued to wear the headscarf, and have been subject to disciplinary action in North Rhine-Westphalia and Baden-Württemberg. In at least two cases in North Rhine-Westphalia teachers (without civil servant status) were dismissed from their position.

In Berlin and Hesse, whose laws also cover civil servants other than teachers, there have been a handful of disputes involving “trainee lawyers” wearing the headscarf, and in Berlin about judicial clerks.¹⁵⁰

Although those who have civil servant status have greater protection, they may be removed from their teaching position and may lose their civil servant status if they continue to wear the headscarf and fail with any legal case.

Muslim women have had difficulties obtaining places as trainee teachers, and Muslim trainee teachers have been denied subsequent employment as teachers after successful completion of their education if they do not abide by the restriction.

These regulations are not abstract concerns. They have a profound effect on human lives. Women who spoke to Human Rights Watch described how after sometimes years or decades working as teachers without disputes or disciplinary problems, their employment and qualifications were suddenly in question.

The broad scope of the bans, and debates surrounding them, fuel a perception among Muslim women that they are suspect in the eyes of German authorities. Maryam (not her real name), an elementary school teacher in North Rhine-Westphalia who converted to Islam, had worn a headscarf in school for decades. She explained to Human Rights Watch, “One has the feeling ‘we don’t want you’... Where should I go? I belong here.... I would never have thought that would be possible.”¹⁵¹ Elma (not her real name), a secondary school teacher who trained in Baden-Württemberg, said she was the only trainee teacher the supervisory

¹⁵⁰ It cannot be excluded that there have been other cases solved by mutual agreement and that therefore have not become known.

¹⁵¹ Human Rights Watch interview with “Maryam,” converted elementary teacher in North-Rhine Westphalia, June 13, 2008.

school authority wanted to meet and get to know.¹⁵² Other women expressed similar concerns.¹⁵³

Women teachers who wear a headscarf are invariably asked to explain why they do so, and their independence and views on women's equality are questioned. Articulating her frustration at the assumptions she saw as underpinning the ban, Fahimah, an elementary school teacher in Essen (North Rhine-Westphalia), told Human Rights Watch, "Those who made these laws don't know us." She continued:

They should ask our colleagues, directors, school inspectors, the parents, the pupils what kind of persons we are. All of them have experienced me and know me so well, that they can attest for sure that I am not oppressed and that I do not wear the scarf because of oppression... [The authorities] cannot just simply allege this; for that they would have to get to know us to know if we are oppressed women who manifest this through the headscarf.... One cannot just simply assert this like this. One cannot regard the headscarf as a symbol for that."

Fahimah added,

There are certainly also persons who neither wear a headscarf nor are Muslim and are oppressed and where do you see it in their cases then? I don't understand how one can want to base this on a cloth."¹⁵⁴

Sara (not her real name), a teacher at a North Rhine-Westphalia secondary school echoed these frustrations:

I can imagine that one can come to this conclusion from the representation of Muslim women in the media. So what? I am not like this.... Many women with headscarves are not like this and one cannot completely condemn a

¹⁵² Human Rights Watch interview with "Elma," secondary school teacher in Rhineland-Palatinate, Karlsruhe, September 14, 2008.

¹⁵³ Human Rights Watch group interview with four women wearing the headscarf of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008.

¹⁵⁴ Human Rights Watch Interview with Fahimah Ulfat-Arjumand, a 33 years old elementary teacher (civil servant "on probation") of Afghan origin, on parental leave having previously taught Mathematics, German, art, and sports, Essen, June 12, 2008.

religion because of some being like this.... I am an example for integration ... going out, striving for a job, finished my studies, did not marry young and only after completion of my university education ... I chose my husband freely, not under compulsion, I knew him long before, like it all should be. I was also not forced to wear the headscarf—I am practically a model of what they look for. They have now a promotional program for migrant women to study to become a teacher. Hello? Here I am, take me! It is very sad to be confronted with being told I am of a type that I also only know from the media. I don't recognize the person they see me to be.¹⁵⁵

Women interviewed by Human Rights Watch, even many who had lived in Germany for decades or even their entire lives, or are German-born converts, expressed feelings of alienation and exclusion. One group of women interviewed by Human Rights Watch noted that what was important to them had been declared to be dangerous.¹⁵⁶ A Muslim convert elementary teacher from North Rhine-Westphalia described hearing the news about the ban: “I suddenly felt like a stranger in Germany...I will never forget that.”

Martina, a school teacher in Frankfurt, who is trying to apply for teaching positions in private schools, told Human Rights Watch,

I wear it because I deem it a religious duty for myself. I needed 10 years to decide [to wear] the headscarf. I will not go and tell a 15-year-old pupil to wear it. If I would like to influence pupils I could do that also without a headscarf—it would make more sense. ... Through the law they impute to me a sort of constant Islamic work, which I strongly reject. When I teach German, I teach German.... Neutrality should have to apply to everybody.¹⁵⁷

Other women similarly made the point that the ban would not effectively target possible indoctrination. As one respondent in a group interview put it, “The headscarf is

¹⁵⁵ Human Rights Watch interview with “Sara,” a secondary school teacher, June 12, 2008. The paradox simultaneous demand for more teachers with a minority background was also pointed out in Human Rights Watch interview with a special education teacher with civil servant status Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁵⁶ Human Rights Watch group interview with four women wearing the headscarf of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008.

¹⁵⁷ Human Rights Watch interview with Martina (Mamak) Makowski-Johari, July 30, 2008, Frankfurt, primary school teacher who completed her study and is on maternity leave because she has had a baby.

overestimated. One does not need a headscarf to manipulate and there are other mechanisms to act against [indoctrination]”¹⁵⁸

An elementary school teacher in North Rhine-Westphalia expressed her incomprehension at why her skills and ability to reach out to migrant pupils and parents were not valued:

The pupils and the parents did not have a problem with it [the headscarf] ...
The director said she would get even more problems with the Muslims than she already has because of me, but on the contrary I could have helped her and also speak with the Muslim parents, but she did not understand that.¹⁵⁹

Women have told Human Rights Watch that they feel “reduced to the headscarf”¹⁶⁰—by the regulations and debates surrounding them. One told us, “You become the ‘headscarf woman’”¹⁶¹ Another remarked, “Before the headscarf law, I was just simply wearing the headscarf. Since there is the headscarf law and one is put so much in the centre of attention I am wearing my headscarf much more consciously.... It feels like being on show. Everyone looks at you: colleagues, who also follow it in the press ... the situation is disgusting.”¹⁶² A third woman said, “The headscarf was just the ‘dot on the i’ for me, not so important, never an issue”.¹⁶³

According to the secondary school teacher Sara, demands to take off the headscarf gave her an impossible decision:

To have to actually imagine coming to school, having to take off the headscarf and go to the staff room for the first time. When I just think of it now, it nauseates me. One feels humiliated. It is something else if I don’t want to wear the headscarf anymore and go like this to school, but when it happens under compulsion. ... also in front of the pupils ... I always told them you have

¹⁵⁸ Human Rights Watch group interview with four headscarf-wearing women of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008. Human Rights Watch interview with Rania (not her real name), elementary teacher in North-Rhine Westphalia, Cologne, July 29, 2008, who is currently on prolonged parental leave because of the ban. Human Rights Watch phone interview with “Aida,” trainee teacher, Hamburg, October 27, 2008.

¹⁵⁹ Human Rights Watch Interview with an elementary teacher, North-Rhine Westphalia, June 2008.

¹⁶⁰ Human Rights Watch interview with Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁶¹ Human Rights Watch group interviews with four headscarf-wearing women of diverse professional backgrounds at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF), Cologne, April 11, 2008.

¹⁶² Human Rights Watch interview with “Sara,” a secondary school teacher on June 12, 2008.

¹⁶³ Human Rights Watch interview with “Rania,” elementary teacher in North-Rhine Westphalia, Cologne, July 29, 2008.

to think what you stand for, and then you stand for it, unless you are convinced by something else. ... and then I go myself and take my headscarf off? ...I am no role model then.¹⁶⁴

Other women told Human Rights Watch how the ban led them to make unwanted decisions about wearing substitutes for the headscarf, going to another state or leaving Germany, or prolonging maternity leave and having to investigate new careers after years of studying and working at developing their teaching skills.

The elementary school teacher in North Rhine-Westphalia mentioned above, described to Human Rights Watch the difficulties she experienced even after deciding to wear a hat as a substitute:

The school administration, the director, suggested I take parental leave [as I was entitled to] to reflect on what to do now. I liked them and they liked me a lot... I have been wearing the headscarf since I was 16 years old, including during years as a trainee. Ok no scarf, so I'll wear a hat and I thought that way we don't have this whole symbol anymore and everybody profits from it, but that wasn't allowed either.... I had talked beforehand to the school inspector about wearing the hat and he told me, "I don't care what you wear on your head, [what is] important is that you are a good teacher. Well then go with the hat, let's try."...It was my idea.... At the time, although there was already the headscarf law, we did not know that the hat is also not allowed. This came only later when the cases with hats occurred. Only then it was said that a hat is also not allowed.... My director had to report that I am wearing it. I don't blame her ... she did not want to go against the law.¹⁶⁵

To avoid being dismissed, this teacher finally took up the suggestion of taking parental leave. At the time she met with Human Rights Watch, she was contemplating moving to a state where she could teach without giving up her headscarf: "I am thinking of going to Rhineland-Palatinate ... but my children's father [from whom she is divorced] is here ... [I]t's difficult for the children ... but I also have to think how to provide for them, also later when they want to study.... But if the law also comes in Rhineland-Palatine then I am back to the start again....

¹⁶⁴ Human Rights Watch interview with "Sara," a secondary school teacher, June 12, 2008.

¹⁶⁵ Human Rights Watch Interview with an elementary teacher in North-Rhine Westphalia in June 2008.

My whole family is here, therefore it would be difficult for me to leave. I need this contact with family and friends.”¹⁶⁶

Emilie (not her real name), an elementary school teacher in North Rhine-Westphalia who converted to Islam explained the financial difficulties she faced as a result of the ban, having decided to extend maternity leave and then take extended parental leave to avoid coming into conflict with the new law, even though her husband was unemployed and they needed her income from teaching:

Since my husband was also looking for a job, we will go now for some time abroad [to Morocco]. I am leaving with mixed feelings, since even a part-time job would have enabled a frugal life here. Now I am waiting for other Muslim women to fight for the right of free practice of religion, and hope it will be successful.”¹⁶⁷

One Muslim convert trainee teacher, told by an official of the Bavarian State Ministry of Education she would not be allowed to do her practical years wearing a headscarf, moved to Vienna (Austria) to work as an assistant at an Islamic primary school.¹⁶⁸

Those who have decided to take off their headscarf in order to keep their jobs or to wear a wig that does not cover the ears or neck described the upset and unease this caused them. In the words of one teacher from southern Germany:

I started to wear the headscarf [when I was] 15. ... There are no pictures with me and the wig, I avoid that. I feel uncomfortable. I don't like to go out in public with it on: I do excursions with my pupils because it is important for the children, but I don't like to take the tram with it. I also avoid further training outside the school and try to do it in our school. No, I don't feel comfortable.... Otherwise I would have been outside [wearing it]. It was basically the question: Do I give up on all my years of studies and complete

¹⁶⁶ Human Rights Watch Interview with an elementary teacher in North-Rhine Westphalia in June 2008.

¹⁶⁷ Human Rights Watch email correspondence with “Emilie,” converted elementary school teacher with civil servant status on maternity leave from North-Rhine Westphalia on May 26, 2008. She studied German, mathematics and art, but was also used for other subjects when necessary including sports.

¹⁶⁸ Human Rights Watch interview with Elisabeth (not her real name), who had done special studies for three years to become a “supporting teacher” on June 4, 2008 in Bavaria.

education or do I find a loophole to still work?... To leave my home town would have been too much of a sacrifice.¹⁶⁹

Rabia, a special education teacher in Dortmund, who converted to Islam and has been wearing a headscarf throughout her education and work as a teacher (since 1995 at the same school) has worn a broad hairband since the ban was introduced in 2006 in North Rhine-Westphalia. She first tried to wear a scarf, but would not have been allowed into class like that.

I consulted with my conscience, and conferred with my husband how I would bear it ... and decided to take the headscarf off. I am wearing the hair band in defiance, to have something. It does not look good and is uncomfortable. I also looked at wigs before, which are quite expensive. “Like real” the saleswoman said at the end, and I thought, “I might just as well show my own hair.” To renounce the headscarf is very difficult. On the first day I “disguised” myself in the school toilet. When a colleague spoke to me, I broke down in tears.”¹⁷⁰

Rabia added, “My son asked me, ‘What is more important—Allah or work?’ I answered him that it is complicated, when he gets older...”¹⁷¹

Although trainee teachers are supposed to be exempt from bans, following the June 2006 ruling of the Federal Administrative Court, in practice they have faced difficulties accessing training places or traineeships, although they ultimately found a place.¹⁷² Trainee judges have told Human Rights Watch about incidents of access to some training roles being limited, such as sitting next to the judge or representing the prosecution.¹⁷³ In the states with bans on the headscarf for teachers, no trainee teacher who wears the headscarf has found employment in a public school since the bans were introduced.

¹⁶⁹ Human Rights Watch interview with teacher in South Germany.

¹⁷⁰ Human Rights Watch interview with special education teacher with civil servant status Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁷¹ Human Rights Watch interview with special education teacher with civil servant status Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁷² Human Rights Watch interview with Nuray (not her real name), student teacher, Berlin, September 12, 2008. Human Rights Watch phone interview with “Aida,” trainee teacher in Hamburg, October 27, 2008.

¹⁷³ Human Rights Watch phone interview with Menekse Citak, trainee judge at the state court in Bielefeld, October 26, 2008. Human Rights Watch phone interview with trainee judge in Berlin, October 28, 2008. Human Rights Watch phone interview with trainee judge Zahra Oubensalh in Hannover, November 1, 2008. Human Rights Watch phone interview with Shahla [pseudonym] trainee judge in Bielefeld, November 3, 2008.

Court cases and accompanying media attention also put considerable pressure on women affected by the headscarf ban, as well as on their schools and families.¹⁷⁴ This is why some avoid legal action. According to an elementary teacher in North Rhine- Westphalia: “I would never go to court, I do not have the strength and nerves to deal with that. Even if maybe it would help others if many of us would go to court, I just can’t. That is why I never considered it.”¹⁷⁵

Sara, who moved after her home state’s ban to North Rhine-Westphalia, only to be confronted with the same ban there, and whose court case in North Rhine-Westphalia was put on hold after she became pregnant, talked about the pressure she feels under:

When I come back to work, I will continue the court case to be able to stay in my job with the headscarf, which I hope will then not be necessary anymore ... This is what I say now ... I don’t know how it be will be when the time for a decision is upon me ... a lot of things go through your head then ... This puts an extreme pressure on you and your family. My husband backs me whatever my decision, but it is still difficult. I was never someone who is politically or legally versed.¹⁷⁶

The elementary teacher Emilie from North Rhine-Westphalia whose financial problems and decision to leave temporarily for Morocco are mentioned above, explained her decision not to go back to work rather than fight the ban:

I have four children and was on maternity leave when the headscarf ban began on June 13, 2006 ... In that year I had thought I would go back to work less then part-time but that [idea] moved to the back burner because of the ban. I didn’t have the strength to fight on both levels: To manage with four children, one of whom has serious attention deficit problems...and I thought, I cannot also get into conflict with the law. I saw what other colleagues faced [when they challenged the law]: the press comes to the school, [they] receive inquiries and also sometimes hostility.¹⁷⁷

¹⁷⁴ Human Rights Watch interview with Maryam Brigitte Weiss, spokeswoman of the community of interest ISGG (Initiative for self-determination, belief and society), women’s representative and vice-chairman of the Central Council of Muslims, Cologne, April 12, 2008.

¹⁷⁵ Human Rights Watch Interview with an elementary teacher, North-Rhine Westphalia, June 2008. Similar reasons were mentioned in Rights Watch interview with Rabia (Renate) Karaoglan, Dortmund, July 28, 2008, who also mentioned that only with the Ludin case she and others attracted attention, before they “had been in the system.”

¹⁷⁶ Human Rights Watch interview with Sara [pseudonym], a secondary school teacher, June 12, 2008.

¹⁷⁷ Human Rights Watch interview with Emilie [pseudonym], elementary school teacher, Aachen, June 13, 2008.

At a further education center developed and run by and for Muslim women in North Rhine-Westphalia, women we met expressed their belief that their decision to wear the headscarf means that they would have had no chance to get work in education. They also reported problems in the state faced by women who wear the headscarf finding training places with lawyers¹⁷⁸

The headscarf ban debate appears to have had a negative effect on the employment as lay judges of women who wear the headscarf (lay judges being ordinary citizens without legal training who are elected to sit as judges).¹⁷⁹ Although the state ban does not apply directly to lay judges, there have been several cases in North Rhine-Westphalia¹⁸⁰ in 2006 (and one request in Berlin in 2004¹⁸¹) where lay judges who wear the headscarf have been ordered by the chairing judge to remove their headscarves during the trial, and excluded from sitting as a judge in the court if they refused to do so.¹⁸²

There have been cases in Berlin,¹⁸³ Hesse,¹⁸⁴ Lower Saxony,¹⁸⁵ and North Rhine- Westphalia¹⁸⁶ where trainee lawyers wearing the headscarf have had their access to court for training

¹⁷⁸ Human Rights Watch group interview with four headscarf-wearing women of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008. Human Rights Watch interview with Maryam Brigitte Weiss, secondary school teacher wearing headscarf in North-Rhine Westphalia and “Grace Kelly style” lawsuit, spokeswoman of the community of interest ISGG (Initiative for self-determination, belief and society), women’s representative and vice-chairman of the Central Council of Muslims, Cologne, April 12, 2008.

¹⁷⁹ The position of lay judge is honorary. They are required to be neutral and impartial and enjoy the same independence as professional judges.

¹⁸⁰ In January 2006, a judge of the district court Bielefeld refused a lay judge because of her headscarf. As the lay judge consequently left the court room, no formal court decision was issued. The regional court Bielefeld rejected however to also generally strike her off the list of lay judges. In Dortmund, the chair judge of the regional court (Landgericht) excluded in November 2006 a lay judge from the trial because she refused to take off her headscarf during the hearing and replaced her by a substitute.

¹⁸¹ In the Berlin case in 2004, the defendant applied for the exclusion because of impartiality but the request was rejected by the court, http://www.welt.de/print-welt/article295150/Erstmals_Schoeffin_mit_Kopftuch_in_einem_Berliner_Gericht.html (accessed January 2, 2008).

¹⁸² Regional Court Bielefeld, decision from March 16, 2006, Az. 3221 b EH 68, *Neue Juristische Wochenschrift* (NJW) 2007, 3014; Regional Court Dortmund, decision of November 7, 2006, Az. 14 (III) Gen Str. K, 14 (VIII) Gen.Str.K., *Neue Juristische Wochenschrift* (NJW) 2007, 3013; Regional Court Dortmund, decision of February 12, 2007, Az. 14 Gen Str K 12/06.

¹⁸³ See Sigrid Kneist, “Religion clash: Muslim trainee is not allowed into the court room with headscarf” (Religionsstreit: Muslimische Referendarin darf nicht mit Kopftuch in den Gerichtssaal), *Der Tagesspiegel*, October 7, 2001, <http://www.tagesspiegel.de/berlin/;art270,1972352> (accessed January 2, 2008).

¹⁸⁴ The justice minister of Hesse decided in July 2007, after complaints from a lawyers’ association, that a trainee lawyer at the district court in Offenbach because of her headscarf could attend the hearings not on the bench but only in the auditorium, would not be allowed to take evidence nor could she perform as the representative of the prosecution in session, which is also part of the education. See “Fail because of headscarf” (Ungenügend wegen Kopftuch), *Der Spiegel* 27/2007, July 2, 2007, p. 18, <http://wissen.spiegel.de/wissen/image/show.html?did=52109088&aref=image036/2007/06/30/ROSP200702700180018.PDF&thumb=false> (accessed January 2, 2008).

purposes restricted. They were released from parts of the education and training as they were not allowed to perform as the representative of the prosecution in session (*Sitzungsververtretungen*) or sit at the judge's bench.

Academics and representatives of women's groups and Muslim groups (including Muslim women's groups) interviewed by Human Rights Watch suggested that state headscarf bans and debates in Germany have aggravated discrimination against women who wear the headscarf. Research by the Berlin state equality office indicates the ban in Berlin has an effect for women who wear the headscarf in other employment sectors not covered by the law and on the headscarf debate more broadly.¹⁸⁷ The spokesperson for legal affairs of the SPD-faction in the Berlin House of Representatives acknowledged the danger of discrimination is real, but noted that restrictions in the private sector based on the headscarf would be unlawful.¹⁸⁸

Some of the women affected and organizations interviewed argued that the law has a negative impact on social cohesion and that, instead of prohibiting religious symbols, the school system should teach the peaceful cohabitation of communities and universal values.¹⁸⁹

¹⁸⁵ In 2003 a trainee lawyer at the prosecution in Osnabrück in the district of the High State Court of Oldenburg had given a written release declaration to renounce wearing a headscarf on duty. See "Headscarf is taboo in Lower Saxony's justice" (Kopftuch ist in Niedersachsens Justiz tabu), *Welt Online*, November 14, 2003, http://www.welt.de/print-welt/article273006/Kopftuch_ist_in_Niedersachsens_Justiz_tabu.html (accessed January 2, 2008).

¹⁸⁶ According to a May 2004 non-binding recommendation of the Cologne council of judges, Muslim trainee lawyers with headscarves should sit separated from the judges amongst the witnesses and spectators, to prevent being "identified with the court." It includes a clear instruction that each judge is responsible for deciding individually whether trainees are permitted to wear headscarves during court proceedings. See European Forum for Migration Studies (EFMS) Migration report, May 2004 at http://www.efms.uni-bamberg.de/dmaio4_e.htm (accessed January 2, 2008). There was a 1998 case involving a trainee lawyer in Cologne who lost her lawsuit in the Administrative Court in Cologne against her release from the training of tasks representing the prosecutor during the hearing. Another conflict case in 2000 at the district court in Düsseldorf concerned an apprentice judicial clerk, who was prohibited to sit next to the judge's desk while taking the minutes wearing her headscarf. A compromise was agreed, that she was only allowed to attend the hearings sitting in the auditorium. See Sigrid Kneist, "religion clash: Muslim trainee is not allowed into the court room with headscarf" (Religionsstreit: Muslimische Referendarin darf nicht mit Kopftuch in den Gerichtssaal), *Der Tagesspiegel*, October 7, 2001, <http://www.tagesspiegel.de/berlin/;art270,1972352> (accessed January 2, 2008).

¹⁸⁷ "With headscarf left out?" (Mit Kopftuch außen vor?), Leaflet of the equality office of Berlin on discrimination of women with headscarves, also outside the public service in 2008.

¹⁸⁸ At a panel discussion in June 2008, Dr. Fritz Felgentreu, member of the Berlin House of Representatives; conference proceedings, "Integration between 'Leitkultur' and laicism – five years after the headscarf judgment of the Federal Constitutional Court", Conference of the VEIL project in Berlin in cooperation with the Friedrich-Ebert-Stiftung, June 5-6, 2008, <http://131.130.1.78/veil/Home3/download.php?4882fd8oacb79db3d38c9378a646bbb9> (accessed December 30, 2008).

¹⁸⁹ Human Rights Watch interview with Maryam Brigitte Weiss, Cologne, April 12, 2008. Human Rights Watch interview with Rania [pseudonym], Cologne, July 29, 2008. Human Rights Watch phone interview with "Aida," trainee teacher, Hamburg, October 27, 2008. Human Rights Watch interview with Özlem Nas, spokeswoman from the Muslim women organization in North Germany, Hamburg, September 16, 2008.

Muslim groups, women's groups and some of the women interviewed argue that a headscarf ban hinders the integration of Muslims in Germany because it dictates to them in a discriminatory paternalistic way how to behave and dress.¹⁹⁰ As one interviewee put in, "I was well on my way to reducing prejudices, but they did not let me."¹⁹¹ They argue that the measures foster alienation and dependency by hindering independent means of income, and contribute to a deterioration in the social positions of the women affected instead of empowering them.¹⁹² In the words of one woman (echoed by another): "as long as we were cleaning in schools, nobody had a problem with the headscarf."¹⁹³

¹⁹⁰ Human Rights Watch group interviews with four women wearing the headscarf of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008. Human Rights Watch interview with Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁹¹ Human Rights Watch interview with special education teacher with civil servant status Rabia (Renate) Karaoglan, Dortmund, July 28, 2008.

¹⁹² Human Rights Watch group interviews with four women wearing the headscarf of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008.

¹⁹³ Human Rights Watch group interviews with four women wearing the headscarf of diverse professional background at a centre and association for further education and encounter of Muslim women (Fortbildungs- und Begegnungszentrum muslimischer Frauen e.V., BFmF) in Cologne, April 11, 2008, of which one added: "In the schools most cleaning ladies wear headscarves and then you show the girls that with headscarf they only let you take cleaning jobs."

VI. Human Rights Violations

The restrictions not only have a significant practical effect on the lives of the women affected by them: they also constitute violations of their human rights and of Germany's obligations under human rights law.

Gender Discrimination and Other Violations of Women's Rights

Policies of forced veiling and other obligations on women's attire violate international human rights standards, and have repeatedly been criticized by Human Rights Watch.¹⁹⁴ But policies of excluding women who wear the headscarf from employment also run foul of these international norms, such as article 11 of the Convention for the Elimination of Discrimination against Women and the International Covenant on Civil and Political Rights. A ban on the headscarf in employment undercuts individual autonomy and choice, a fundamental aspect of women's rights that is also violated in countries where women are forced to wear the

¹⁹⁴ Human Rights Watch, *Perpetual Minors: Human Rights Abuses Stemming from male Guardianship and Sex Segregation in Saudi Arabia*, April 2008, http://www.hrw.org/sites/default/files/reports/saudiArabia0408_1.pdf, p.26; Human Rights Watch, *World Report* (New York: Human Rights Watch) 2009, 2008, 2007, 2005, 2003, and 2002 editions, Afghanistan chapter, <http://www.hrw.org/en/node/79295>; <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/afghan17600.htm>; <http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/afghan14863.htm>; <http://www.hrw.org/legacy/english/docs/2005/01/13/afghan9827.htm>; <http://www.hrw.org/legacy/wr2k3/asia1.html>; <http://www.hrw.org/legacy/wr2k2/asia1.html>; Human Rights Watch, *World Report* (New York: Human Rights Watch) 2007, 2006, 2005, and 2003 editions, Saudi Arabia chapter, <http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/saudia14717.htm>; <http://www.hrw.org/legacy/english/docs/2006/01/18/saudia12230.htm>; <http://www.hrw.org/legacy/english/docs/2005/01/13/saudia9810.htm>; <http://www.hrw.org/legacy/wr2k3/mideast6.html>; Human Rights Watch, *Killing You is a Very Easy Thing for Us: Human Rights Abuses in Southeast Afghanistan*, vol. 15, no. 05(C), July 2003, <http://www.hrw.org/en/reports/2003/07/28/killing-you-very-easy-thing-us-o>, pp. 84-87; Human Rights Watch, *World Report 2002* (New York: Human Rights Watch, 2002) Iran chapter, <http://www.hrw.org/legacy/wr2k2/mena3.html>; Human Rights Watch, *World Report 2002* (New York: Human Rights Watch, 2002) Women's Human Rights chapter, <http://www.hrw.org/legacy/wr2k2/women.html>; Human Rights Watch, *We Want to Live as Humans: Repression of Women and Girls in Western Afghanistan*, vol. 14, no. 11(C), December 2002, <http://www.hrw.org/legacy/reports/2002/afghnwmn1202/>, pp. 33-39; "Afghanistan's Women Still Need Our Help," Human Rights Watch news release, December 12, 2002, <http://www.hrw.org/en/news/2002/12/12/afghanistans-women-still-need-our-help>; Human Rights Watch, *Taking Cover: Women in Post-Taliban Afghanistan*, May 2002, <http://www.hrw.org/legacy/backgrounder/wrd/afghan-women-2k2.pdf>, p.2; "Saudi Arabia: Religious Police Role in School Fire Criticized," Human Rights Watch news release, March 14, 2002, <http://www.hrw.org/en/news/2002/03/14/saudi-arabia-religious-police-role-school-fire-criticized>; Human Rights Watch, *Human Rights in Saudi Arabia: A Deafening Silence*, December 2001, <http://www.hrw.org/legacy/backgrounder/mena/saudi/saudi.pdf>, p.4; Human Rights Watch, *Humanity Denied: Systematic Violations of Women's Rights in Afghanistan*, vol. 13, no. 5(C), October 2001, <http://www.hrw.org/legacy/reports/2001/afghan3/>, pp. 7-8, 13-14; Human Rights Watch, *Stifling Dissent: The Human Rights Consequences of Inter-Factional Struggle in Iran*, vol. 13, no 4(E), May 2001, <http://www.hrw.org/legacy/reports/2001/iran/Iran0501.pdf>, p.3.

headscarf. Muslim women concerned risk not being employed in the first place, and when they do have jobs, risk reprimands, suspension, and dismissal directly connected to the wearing of the headscarf. In fact, a blanket exclusion of women with headscarves from public schools amounts to a life-time employment ban in this specific career.

Government restrictions on women's attire of any kind interfere with their right to privacy and self-expression. In the case of the headscarf, which is part of the identity of those who choose to wear it and also reflects their religious beliefs, the restrictions violate those rights. Restrictions prevent Muslim women from identifying themselves through the display of a religious symbol, the headscarf, which is unjust, illegitimate, and unacceptable in a democratic society.

It further denies women equal protection, by declaring a select group of females the basis of "(fundamentalist) indoctrination" without assessment of their actual behavior. This amounts to a reversal of the burden of proof used in discrimination cases in German and EU law, where, once a difference in treatment is shown, it is for the authorities to justify why this has taken place.

The laws in all eight of the states discriminate on the grounds of gender and on the grounds of religion. Women's religious freedom is being violated, as these restrictions have been applied in practice exclusively against women wearing the headscarf. By such a clear negative distinction between men and women, they violate anti-discrimination provisions of international human rights law outlined above.¹⁹⁵ For Muslim women who consider the wearing of the headscarf to be an obligation of their beliefs, the laws require them to choose between their deeply held beliefs and their employment as teachers in public schools or other civil servants.

It has been argued by state officials and politicians that men could fall under the restrictions if they were to wear typical Muslim clothing¹⁹⁶ or if there were to be cases of teachers wearing traditional clothing of the Indian Bhagwan movement¹⁹⁷ (there had indeed been a

¹⁹⁵ See also Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf Human Rights Watch Briefing Paper June 29, 2004.

¹⁹⁶ At a panel discussion in June 2008, Dr. Fritz Felgentreu, member of the Berlin House of Representatives; conference proceedings, "Integration between 'Leitkultur' and laicism – five years after the headscarf judgment of the Federal Constitutional Court", Conference of the VEIL project in Berlin in cooperation with the Friedrich-Ebert-Stiftung, June 5-6, 2008, <http://131.130.1.78/veil/Home3/download.php?4882fd80acb79db3d38c9378a646bbb9> (accessed December 30, 2008).

¹⁹⁷ Cases of teachers employed by in state schools in Germany who began to wear the highly visibly reddish-colored clothing of the in the 1980s increasingly appearing Bhagwan (Osho) religious movement (and the Mala, the image of Bhagwan in a

few such cases involving teachers in the 1980s).¹⁹⁸ But there have in fact been no such cases since the laws have been enacted, and in practice it has affected only women who wear the headscarf, leading to double discrimination on the grounds of gender and religion.¹⁹⁹

As noted above, proponents of the restrictions argue that they can be justified by the need to protect gender equality and women's human rights: The wearing of the headscarf may be the reflection of coercion emanating from family or the individual's social context. However it is also clear that some sincerely desire to wear the headscarf as a part of their religious identity. All the cases documented by Human Rights Watch including the best known court cases have all involved adult women insisting that their decisions were personal, not imposed.

Some feminists, among them many scholars from universities, argue that wearing the headscarf represents individual expression covered by the right to religious freedom. They advocate in favour of integration and the right of Muslim women to reach higher qualifications and jobs. They are, just as the majority of the judges of the Federal Constitutional Court,²⁰⁰ of the opinion that the headscarf is interpreted rather differently by each of the women who wear it.

In this regard it should be noted, that the Federal Constitutional Court had concluded in its 2003 judgment that there was no evidence that Ludin, "merely because she wears a headscarf, might for example make it more difficult for Muslim girls who are her pupils to develop an image of woman that corresponds to the values of the Basic Law or to put it into effect in their own lives." Furthermore, Germany's Muslim population is diverse and

medallion on a necklace), which at that time was considered a sect. Courts at the time prohibited this in two cases: see Oberverwaltungsgericht Hamburg [Hamburg High Administrative Court] decision from November 26, 1984, *Neue Zeitschrift für Verwaltungsrecht* NVWZ 1986, 406; Bayerischer Verwaltungsgerichtshof [Bavarian Administrative Court] decision from September 9, 1985, NVWZ 1986, 405, Federal Administrative Court decision from March 8, 1988, NVWZ 1988, 937. The movement does not have any important number of members anymore and their leader Rajnesh abolished the practice of wearing red clothing in 1985 and the Mala in 1987.

¹⁹⁸ See for instance debate in the state parliament in Baden-Württemberg at the first reading of the draft law amending the school act on February 4, 2004, plenary proceedings, 13/62, 13th election period, 62nd session, http://www.landtag-bw.de/Wp13/Plp/13_0062_04022004.pdf (accessed January 5, 2009). In information provided in interview with Ministry of education of Hesse, October 9, 2008, Wiesbaden, officials also referred to the Bhagwan cases as further prehistory to the law.

¹⁹⁹ See also HRW press release "France: Headscarf Ban Violates Religious Freedom", February 26, 2004, <http://www.hrw.org/en/news/2004/02/26/france-headscarf-ban-violates-religious-freedom>.

²⁰⁰ In its ruling on the Ludin case, the Federal Constitutional Court pointed out that the headscarf worn by Muslim women is perceived as a reference to greatly differing statements, moral concepts and diverse reasons for wearing it. Consequently in view of the variety of motive, the interpretation of the headscarf may not be reduced to a symbol of the social repression of women. Rather, the court underlined, the headscarf can for young Muslim women also be a freely chosen means to conduct a self-determined life without breaking with their culture of origin.

therefore one-sided oversimplified perceptions and public discourses on the Muslim communities should be avoided. Often, it is overlooked that Muslims in Germany are not a homogenous group.

Instead, the dominant image of a Muslim woman in Germany can lead to questionable misperceptions.²⁰¹ As the director of the German Institute for Human Rights, Heiner Bielefeldt, points out, there is a danger that policies that should be aimed at improving the opportunities for women and girls from migrant families, will instead turn into a “clash of cultures” with Islam. This tendency can already be identified in the alternatives confronting Muslim women with or without the headscarf. “Either they have to constantly distance themselves from or explain their religion, or they have to put up with being globally viewed as either victims or even accomplices of authoritarian family structures.”²⁰²

In the light of the state's paramount obligations to protect human rights, coercion by the state in banning headscarves is arguably even more serious than coercion by private parties in requiring the headscarf. Legitimate efforts to eliminate coercion of those who do not wish to wear the headscarf do not justify the state in coercing others not to do so.

Banning adult women from wearing headscarves in state employment will not necessarily prevent familial or social pressure. In formulating these restrictions, the states do not appear to have assessed whether a blanket ban will have an impact on possible sources of compulsion.

In any event, these issues should be tackled on their own terms, rather than by restricting the rights of women who chose to wear the headscarf.²⁰³ It would be far better to look for legislative or regulatory safeguards for the rights of women who choose not to wear the headscarf, as well as strong public endorsements of women's freedom to dress according to

²⁰¹ See also Sabine Berghahn and Petra Rostock, Cultural Diversity, Gender Equality – The German Case, VEIL Project, paper for the Conference ‘Gender equality, cultural diversity: European comparisons and lessons, Vrije Universiteit Amsterdam June, 8-9 2006, <http://www.fsw.vu.nl/en/research/research-programmes/sociology/social-change-and-conflict/conference-gender-equality.asp> (accessed December 30, 2008).

²⁰² Heiner Bielefeldt, Das Minarett in Duisburg-Marxloh, die tageszeitung, April 8, 2006, <http://www.taz.de/nc/1/archiv/archiv-start/?dig=2006%2Fo4%2Fo8%2Fa0194> (accessed December 30, 2008). See also Sabine Berghahn and Petra Rostock, Cultural Diversity, Gender Equality – The German Case, VEIL Project, paper for the Conference ‘Gender equality, cultural diversity: European comparisons and lessons, Vrije Universiteit Amsterdam June, 8-9 2006, <http://www.fsw.vu.nl/en/research/research-programmes/sociology/social-change-and-conflict/conference-gender-equality.asp> (accessed December 30, 2008).

²⁰³ See Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf Human Rights Watch Briefing Paper, June 29, 2004.

their own free choice. Above all, state governments could actively and broadly seek out civil society groups representing women (including Muslim women wearing the headscarf) to cooperate on these concerns.

All women who spoke to Human Rights Watch emphasized that the decision to cover their head was a private choice that they would not seek to impose upon other Muslim women.²⁰⁴ They argue that the headscarf does not oppress women, and emphasize that nobody should force a women to wear a headscarf or to take off her headscarf.

Discrimination on the Grounds of Religion

Most of the state restrictions on religious symbols in Germany discriminate on their face on the grounds of religion. As such they violate provisions of the ICCPR and the European Convention on Human Rights, as well as EU law.²⁰⁵ Such direct discrimination cannot be justified.

As noted in Chapter IV, the laws in Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia contain explicit exceptions for Christian and Western values and traditions, and in Bremen and Lower Saxony the explanatory documents and parliamentary debates for the legislation stated that Christian traditions do not breach the neutrality requirement relied on to justify the restrictions. Consequently, the laws allow states to treat members of certain (popular) religious groups differently from otherwise similarly situated members of other (less popular) religious groups. In practice, this means that school authorities in those states can legally ban headscarf-wearing Muslim public school teachers while continuing to allow Christian nuns who are teachers to wear religious clothing and symbols.²⁰⁶

The restrictions in these seven states target Muslims or otherwise have a disproportionate effect on them. This is evidenced by the fact that all of the court cases in relation to the constitutionality of the restrictions on religious symbols and their application in practice have concerned women who wear the headscarf for reasons of Muslim religious expression. Moreover, as noted above, when the measures were introduced, state government representatives made clear in several cases that the aim was to restrict the wearing of the headscarf and not other religious symbols.

²⁰⁴ This was expressed in all interviews with concerned women.

²⁰⁵ Article 2(1) and 26 ICCPR and article 9 of the European Convention on Human Rights.

²⁰⁶ See also Ruben Seth Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, Unless — God Forbid —they are Religious*, Volume 51 2006/07.

This focus was acknowledged by the Federal Administrative Court when it heard Fereshta Ludin's case. The court recognized the effect of the Baden-Württemberg law on "the Islamic religious community" even though it concluded that the effect was not "excessive" because of the possibility of Muslim teachers who wear the headscarf finding employment in private schools.

The only other cases in Germany involving restrictions on dress were of a secular nature. As mentioned above, there were cases in which trainee judges agreed to alter a "punk hair style" and remove piercings deemed to breach the neutrality of the state. In addition, a "left-wing" trainee teacher in Baden-Württemberg was refused a teaching post because he was engaged with the organization Antifa. The teacher went to court, losing at first instance in 2006, but won his appeal at the state administrative court in 2007 and is now teaching.²⁰⁷ In other words, when a person's fundamental beliefs were at stake, the case was resolved in his favor notwithstanding the risk to the neutrality of the school.

The discriminatory nature of the restrictions was further underscored by efforts by Baden-Württemberg, Bavaria, and North Rhine-Westphalia to exempt Christian nuns who wore habits from the restrictions, even after the ruling of the Federal Administrative Court that all religions must be treated equally under the law. Baden-Württemberg continued to permit nuns to wear their habits while teaching in public schools, and therefore failed to implement the judgment.

As former Federal Constitutional Court judge Ernst-Wolfgang Böckenförde has pointed out, the efforts of states to maintain exceptions for nun's habits even while they ban the headscarf constitute discrimination and violate the right to equality.²⁰⁸ In the long run, he points out, Germany, and especially states with close ties to the Catholic faith, risk losing the opportunity to express Christian values and traditions if they prohibit Muslim symbols in schools and public spaces, as the need to be non-discriminatory when adopting such an approach to "neutrality" is likely to result in secularism.²⁰⁹

²⁰⁷ Confirmed by statement of Ministry of education, youth and sport of Baden-Württemberg, Human Rights Watch interview with officials, Stuttgart, September 24, 2008.

²⁰⁸ *Unterricht ohne Haube* [Class Without a Habit], Spiegel Online, October 18, 2004, <http://www.spiegel.de/spiegel/0,1518,323678,00.html>.

²⁰⁹ See Berghahn and Rostock "Cross national comparison Germany"; and Ernst-Wolfgang Böckenförde, „Bekenntnisfreiheit als Menschenrecht. Bemerkungen zum Kopftuchstreit in Deutschland.“ [religious freedom as human rights. Comments on the headscarf dispute in Germany], *Jahrbuch Menschenrechte 2005 – focus: assert women rights!*, German Institute for Human Rights, Frankfurt/Main, Suhrkamp, pp. 314-317, <http://www.jahrbuch-menschenrechte.de/>.

It should be noted that some church representatives have also spoken against a headscarf ban, motivated by a concern that the obligation enumerated by the Constitutional Court to treat all religions equally would ultimately lead to secularism, and the exclusion of Christian symbols and dress.²¹⁰

In understanding the context of the restrictions on the headscarf it is also important to note that Islam is not a formally recognized religion in Germany and therefore Islam has not been granted equal status and rights in the same way as the Christian and Jewish religions.²¹¹

Berlin

Berlin takes a different approach, in that it bans all expression of visible religious commitment in the appearance of teachers. This raises a question about whether the “visibility” of religious symbols should be a criterion for the exercise of religious freedom. Obviously a headscarf is “more visible than a small golden cross fixed to a necklace”. One can argue that Berlin’s law has a disproportionate impact on Muslims.²¹²

Leaving aside that issue, it is clear that Berlin’s law disproportionately impacts teachers who have religious faith they wish to manifest. It is not neutral between teachers with religious faith and those without it.

While ostensibly fairer than the other restrictions as it formally treats all religions equally, the law in Berlin nevertheless discriminates against those of faith who wish to enter state public service and to manifest their beliefs, by forcing them to choose between their job and their religion.

Furthermore, Berlin’s the ban on religious clothing also affects in practice at present only women wearing the headscarf, amounting to indirect discrimination.

²¹⁰ See for example, public statements by: the governing body and the women section of the Northelbian Evangelical Church as well as the Working Group of Christian Churches Kiel in 2006 and Bishop Hans Christian Knuth, chairperson of the Northelbian evangelical church council in August 2006, <http://www.bischoefin-hamburg.de/>; the Evangelical state bishop of Schaumburg-Lippe, Jürgen Johannesdotter, the Praeses of the Church of Rhineland Nikolaus Schneider and the Bishop from Thuringia Christoph Kähler in 2004. See also <http://www.katholisch.de/10595.html>, <http://www.katholisch.de/9918.html> and <http://www.katholisch.de/10235.html> (accessed December 30, 2008).

²¹¹ Berghahn and Rostock, “Cross-national comparison Germany.”

²¹² See also Sabine Berghahn/ Petra Rostock: Cultural Diversity, Gender Equality – The German Case, VEIL Project.

Denial of the Right to Religious Freedom

A blanket prohibition on teachers and civil servants wearing visible religious symbols in schools violates freedom of religion. The ICCPR, among other sources of international human rights law, obliges state authorities to avoid coercion in matters of conscience, and states must take this obligation into account when devising school dress codes. Countries such as Iran or Saudi Arabia that force women to wear headscarves violate this principle. So too do countries that adopt blanket prohibitions on visible religious symbols.²¹³

As noted above, religious freedom, including the freedom to manifest one's religious beliefs through clothing and symbols, is not an absolute right. The state may impose reasonable restrictions on rights for the purpose of regulating a legitimate state interest.

The current bans in eight German states on religious symbols for teachers and other civil servants, however, do not constitute reasonable restrictions. Headscarves do not pose a threat to public safety, health, order, or morals, and they do not impinge on the rights of others. They are not inherently dangerous or disruptive of order, and do not undermine the educational function. There may be specific circumstances in which state interests justify regulation of religious dress, as when such dress would directly jeopardize individual or public health or safety. Such concerns, however, cannot justify a blanket prohibition.²¹⁴

The German state laws, particularly those that include exceptions for Christianity, include many of the "aggravating factors" identified by the UN special rapporteur on freedom of religion or belief," providing further evidence that the measures are incompatible with international human rights law: (1) The restrictions lead to discrimination or camouflaged differentiation depending on the religion involved; (2) The limitations are based on principles deriving exclusively from a single tradition and exceptions are tailored to the predominant or incumbent religion or belief; (3) In practice, state authorities apply the imposed restriction in a discriminatory manner, for example by arbitrarily targeting certain communities or groups, in particular Muslim women. (4) Finally, no due account is taken of specific features of religions or beliefs.

Restrictions on the wearing of the headscarf by teachers in public school engage two conflicting aspects of religious freedom: the teacher's positive freedom to manifest her

²¹³ See also "France: Headscarf Ban Violates Religious Freedom," Human Rights Watch news release, February 26, 2004, <http://www.hrw.org/en/news/2004/02/26/france-headscarf-ban-violates-religious-freedom>.

²¹⁴ Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf Human Rights Watch Briefing Paper, June 29, 2004.

religion, and possibly the negative freedom of religion of the pupils in her class from “indoctrination.” Parents or legal guardians have the right to ensure the religious and moral education of their children in general conformity with their own convictions about a child’s upbringing.²¹⁵

In Human Rights Watch’s assessment, however, restrictions can be imposed on a teacher only when an assessment of that teacher’s entire behavior has shown that the teacher has taken action that would interfere with the freedom of religion of the children, for example through coercion. A general ban on headscarves is not a proportionate measure: It is based on a possible abstract danger of a negative effect, without any concrete evidence that teacher’s wearing a headscarf, in and of itself, leads to a coercive influence on children to adopt Islam or would lead Muslim girls to feel compelled to wear the headscarf.

None of the grounds under human rights law for limiting religious freedom is satisfied in the case of Germany’s headscarf ban. The protection of health and morals is hardly an issue in connection with the headscarf ban. Neither is prevention of disorder or crime. It is not the responsibility of teachers who feel religiously obliged to wear the headscarf to maintain harmony by removing themselves altogether.

The appeal to the principle of secularism or neutrality in Germany in justifying this ban is unconvincing for several reasons. Firstly, one has to question whether the arrangements in Germany (with the exception of Berlin) can be described as secular at all, given the explicit exceptions granted for Christian values and symbols. Secondly, besides referring to the abstract principle, state governments in Germany have not shown how permitting a teacher to wear a headscarf in a state school could in practice compromise state neutrality. It would not constitute endorsement of those views by the state.

The interests of public order are not overriding, and the benefit of limiting a right has to be balanced against the interests of those who wish to exercise their right. In this case, the costs for the women denied state employment are heavy, whereas the benefit for other citizens is far from clear, since to the best of Human Rights Watch’s knowledge, headscarves were worn by school teachers and other civil servants without incident before the laws were enacted.

²¹⁵ See article 5 (1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981.

In the same vein, Germany's headscarf ban cannot be justified as necessary for public safety. Again, the experience before the enactment of the laws puts the accuracy of this in question. It is difficult to see how teachers and civil servants wearing a headscarf, accompanied by credible safeguards for women who choose not to wear the headscarf, could present a threat to public safety convincing enough to justify such a drastic limitation of an individual's right to freedom of religion and expression.

The final justification commonly advanced for the headscarf ban is that it protects the rights and freedoms of others who choose not to cover their heads. Human Rights Watch is not aware of any evidence from before the laws were introduced to suggest that this is a genuine problem. Excluding women with headscarves from teaching or even entirely from state employment cannot be a reasonable and proportionate response to a future, hypothetical, threat of exclusion posed to women who leave their heads uncovered. The governments cannot reasonably claim that a restriction on head-covering answers a "pressing social need" and advances democracy and rule of law, especially in a country in which Muslims constitute a minority.

Minority Rights

In fact in none of the states concerned is there any evidence that the authorities considered their duties to take particularly steps to ensure the protection of religious minorities and that they can practice their faith. On the contrary, there is explicit or implicit attempt to privilege the majority religion. Therefore Germany, by virtue of being responsible for its *Länder*, is in clear violation of its duties to protect the rights of minorities.

VII. The Way Forward

As the European Court of Human Rights has repeatedly stressed, the State has a duty to remain neutral and impartial to ensure the preservation of pluralism and the proper functioning of democracy. When an issue such as the headscarf becomes a source of tension, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups at least tolerate each other and respect each others' rights.²¹⁶

Accommodation based on mutual respect is possible. Many of the women interviewed by Human Rights Watch sought compromise by wearing hats and were willing to consider other alternatives that comported with their religious obligations. The majority of the Muslim women wearing the headscarf whom we interviewed accepted that it could be appropriate for states to impose restrictions on teachers wearing forms of Muslim dress that cover the face if it was shown to interfere with occupational requirements, such as children learning language and other skills through imitating their teacher's facial expressions.

Accommodation will require the states to genuinely consult across society. Doing so would give proponents of restrictions an opportunity to express their reservations and to suggest safeguards or undertakings that the government could make to protect society against the erosion of rights—and in particular, the rights of women—they fear would result from a lifting of the headscarf ban.

By listening to the concerns of women from all sides of the argument, the governments may be able to break away from the ban and move toward a genuine pluralism that allows women to make their own free choice whether to wear the headscarf. If those concerns are reflected not only in the final form of a law, but also in a broader government program to protect women's rights, legislation consistent with international human rights standards will also address concerns expressed.

The anti-racist organization Intercultural Council Germany is opposed to blanket bans on the wearing of the headscarf. The Council is an umbrella group that includes civil society organizations, unions, employers' organizations, municipalities, state institutions, and media. It advocates intercultural and interreligious dialogue in order to prevent the ethnic

²¹⁶ Board of Experts of the International Religious Liberty Association, *Guiding Principles Regarding Student Rights to Wear or Display Religious Symbols* (15 November 2005), Principles Nos. 6 and 7, www.irla.org/documents/reports/symbols.html.

segregation of minorities. The Council published in January 2004 a collection of “theses on the headscarf” listing arguments for and against the headscarf, addressed at the majority society as well as Muslim organizations.²¹⁷ It argues for a case-by-case approach with state action in headscarf cases only where the constitutional loyalty of the teacher is in doubt.

This suggests the way forward. There is undoubtedly a potential for actual concerns on the part of parents arising in particular from teachers wearing the headscarf. And schools have a duty to ensure that teachers exercise their function in accordance with the constitution. But the way to deal with those concerns while respecting the rights of those teachers who wish to wear the headscarf is to approach each case on its own merits. Teachers should be assessed on the basis of their actions, not on what they choose to wear.

Where there exist concrete concerns that a teacher’s conduct infringes neutrality, those concerns should be dealt with through ordinary disciplinary procedures on a case-by-case basis. Schools and educational authorities should also look favorably on offers by teachers to wear alternative head coverings that do not resemble the headscarf but are nonetheless consistent with their faith.

²¹⁷ Intercultural Council, Theses on the headscarf, Darmstadt, January 2004, http://www.interkultureller-rat.de/argumente_1.pdf (accessed December 22, 2008).

Expanded Recommendations

To the State (Land) governments in Germany

- State governments should revise and repeal existing legislation on prohibition of religious dress and symbols to ensure that freedom of religion and expression are protected and that the principle of nondiscrimination is guaranteed, and with the objective of ending discrimination on both religious and gender grounds in these sectors of employment.
 - In the interim, schools and educational authorities should look favorably on offers by teachers to wear alternative head coverings that do not resemble the headscarf but are nonetheless consistent with their faith.
 - In the interim, the state governments should take appropriate measures to better inform authorities, and more generally the German population, about the exact scope and limits of the law. It should be made clear that the wearing or display of religious symbols is an essential part of the right to manifest one's religion or belief that can only be limited under specific and restricted conditions. The governments should also promptly provide redress in any situation where a person has been the victim of discrimination or other act of religious intolerance because of their religious symbols.
- Concrete concerns that a teacher's conduct infringes neutrality should be dealt with through ordinary disciplinary procedures on a case-by-case basis.
- Conduct a thorough review, in consultation with all relevant groups, to ensure that legislation and regulations concerning dress in higher education are fully consonant with international law and standards concerning freedom of religion and freedom of expression.
- State governments that intend to regulate the wearing of religious symbols should consider seeking advisory services from the UN Office of the High Commissioner for Human Rights and the special rapporteur on freedom of religion and belief.
- Ensure that state practice is consistent with the United Nations Convention on the Elimination of All Form of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and other relevant UN treaties.

To the Federal Government of Germany

Minister of State in the Federal Chancellery and Federal Government Commissioner for Migration, Refugees, and Integration

- Review the effects of the state-level restrictions on religious dress and symbols and their compatibility with Germany's international human rights obligations, including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and with EU anti-discrimination law.
- Remove the restrictions on the application of the Framework Convention on National Minorities in Germany, so that it applies to all minorities.

Federal Anti-discrimination Office

- In cooperation with local nongovernmental bodies and anti-discrimination organizations, take the lead in raising awareness and shaping the debates on the issue amongst policy makers, the general public, and victims of such regulations. Specifically:
 - Issue public opinions on relevant state legislation, analyzing discriminatory impact and overall compatibility with the Equal Treatment Act (AGG) and the EU Directives on equal treatment.
 - Include relevant statistics, concerns, and recommendations on this issue in its first regular report to the Bundestag.

To the European Union

- EU member states should review their legislation and policies in light of the concerns raised in this report to ensure that any restrictions on religious dress—in state employment or otherwise—comply with international human rights standards and the EU Charter of Fundamental Rights.
- The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) as well as the Committee on Women's Rights and Gender Equality should undertake a (possibly joint) report analyzing member states' legislation and practices in light of the concerns raised in this report, in particular with respect to freedom of religion and discriminatory impact.
- The Fundamental Rights Agency should include the issue as a thematic priority in its work program for 2010, or design a thematic research project, continuing to monitor measures restricting religious symbols and clothing in EU member states and

assessing their compliance with the fundamental human rights norms underpinning the Union, in particular the Equal Treatment Directives.

To the Council of Europe

- The commissioner for human rights should make an assessment (in the form of a “viewpoint” or otherwise) on the impact of existing bans on religious symbols in the Council of Europe region.
- The commissioner should raise with the German government the concerns detailed in this report, including the discriminatory impact of restrictions incompatible with Germany’s human rights obligations, and steps needed to ensure religious freedom.
- The Parliamentary Assembly’s Legal Affairs and Human Rights Committee and its sub-committee on rights of minorities should undertake an analysis of legislation and practices throughout the Council of Europe region in light of the concerns raised in this report, in particular with respect to discrimination and religious freedom
- The Parliamentary Assembly’s Committee on Equal Opportunities of Women and Men should consider the impact of restrictions outlined in this report in light of its 2005 report on women and religion.
- The European Commission against Racism and Intolerance (ECRI) should in its next report on Germany follow up on the concerns raised in this report and should question the government on the discriminatory impact of bans in place.
- The Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM) should address this issue in its next review of Germany.

To the United Nations

- The United Nations special rapporteur on freedom of religion or belief should conduct a country visit to Germany to investigate the compatibility of Germany’s measures with international human rights law, and issue relevant recommendations drawing on the set of general criteria concerning religious symbols as outlined in her report to the Commission on Human Rights (E/CN.4/2006/5).
- The Human Rights Committee should use the opportunity of its next review of Germany to raise concerns about the policies and practices documented in this report, and formulate specific recommendations to German authorities.

Acknowledgments

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Discrimination in the Name of Neutrality

Headscarf Bans for Teachers and Civil Servants in Germany

In recent years there has been a debate in Germany, as in many other European countries, about how to deal with an increasingly diverse society. One of the most prominent controversies has been the wearing of the headscarf by some Muslim women.

Since 2004, half of Germany's 16 states (*Länder*) have introduced laws prohibiting public school teachers (and other civil servants in several states) from wearing the headscarf at work. The eight other German states have no such restrictions.

Some of the laws banning religious symbols and dress exempt Christian symbols. None of the laws explicitly target the headscarf, but parliamentary debates and official explanatory documents prior to the introduction of the laws make clear that the headscarf is the focus. Furthermore, the only court cases to date involving challenges to the laws have concerned women wearing a headscarf.

Human Rights Watch has repeatedly criticized countries that force women to wear the veil. But laws such as those in Germany, which exclude women who wear the headscarf from employment, run foul of the same international standards. They discriminate against Muslim women who wear a headscarf, on the grounds of religion and gender.

The bans in Germany are neither necessary nor justified. Where there are concrete concerns that a teacher's conduct breaches the duty to ensure that schools remain neutral on questions of religion and ideology, they should be addressed through ordinary disciplinary procedures, on a case-by-case basis. Teachers should be assessed on the basis of their actions, not views imputed to them by virtue of religious dress.

Teacher Fereshta Ludin is pictured prior to the verdict in her case at Germany's Constitutional Court in September 2003. The court ruled that it was open to states to restrict religious dress in public schools, leading to bans in eight of Germany's sixteen states.

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