

# How Much Veil Is Too Much Veil: On the Constitutionality and Advisability of Face Veil Bans for German Public School Students

*By Kerstin Braun\**

### Abstract

With increasing cultural and religious diversity in Germany, a debate has emerged over the extent and limits of religious freedom in day-to-day life. While much controversy arose over whether public school teachers have the right to wear Islamic head coverings, students as private individuals are free to wear a headscarf at school if they wish. Yet, recent school and administrative court decisions suggest that the situation is different for students who wear niqab and Islamic face veils rather than just head veils. This Article contemplates whether niqab-wearing students can be expelled from public school under current German law. In addition, this Article addresses the constitutionality of law reform in this area especially considering the European Court of Human Rights' jurisprudence in the French context. The Article subsequently contemplates the advisability of such law reform while also drawing on the experiences of countries which have already enacted so-called burqa bans. As many countries are currently in the process of considering face veil bans, this Article may have relevance beyond the German context.

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\*Dr Kerstin Braun is a Lecturer in Law at the School of Law and Justice at The University of Southern Queensland, Australia. Email: Kerstin.braun@usq.edu.au. The author wishes to thank the editorial team of the German L.J. for their helpful remarks.

## A. Introduction

Europe's increasing religious and cultural diversity, due in large part to the recent waves of immigration, sparked debate once more over the extent and limits of exercising religious freedom in multicultural societies. This includes questions concerning religious dress and symbols in day-to-day life. Islam is Germany's second most prevalent religion, and many Muslims find ritual dress an important aspect of their religious practice.<sup>1</sup> Questions concerning teachers' display of Islamic religious symbols, including headscarves in public schools, have caused fierce debate and have kept German courts occupied for over two decades.<sup>2</sup> This discourse is commonly referred to in Germany as the "headscarf debate."<sup>3</sup>

Thus far, and in comparison to a number of other European countries,<sup>4</sup> the headscarf debate in Germany-at-large has not focused on public school students displaying religious symbols, but rather on teachers who are public servants and thus representatives of the state.<sup>5</sup> The discourse mainly revolves around the conflict between the state's constitutional obligation to remain neutral in questions of religion and the individual teacher's religious freedom.<sup>6</sup> Students' decisions to wear Islamic headscarves are tolerated because they are considered

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<sup>1</sup> See Mathias Rohe, *Religion in Schools from a Legal Viewpoint*, in HUMAN RIGHTS AND RELIGION IN EDUCATIONAL CONTEXTS 73, 75 (Manfred L. Pirner, Johannes Laehnemann & Heiner Bielefeld eds., 2016).

<sup>2</sup> Other issues that have arisen in the school context include making prayer facilities available for Muslim students and giving students time during lessons to pray. See Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court], Nov. 30, 2016, 141, 223. On the obligation for female Muslim students to participate in co-educate swim classes, see Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court], Sept. 11, 2013, 147, 362.

<sup>3</sup> Called *Kopftuchdebatte* in German. For a discussion on the "first and second headscarf decision" in English, cf. Christine Langenfeld & Sarah Mohsen, *Germany: The Teacher Head Scarf Case*, 3 INT'L J. CONST. L. 86 (2005); Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94 (2005); Johann Ruben Leiss, *One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10*, 16 GERMAN L.J. 901 (2015); Matthias Mahlmann, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Federal Constitutional Court's Second Head Scarf Decision*, 16 GERMAN L.J. 887 (2015).

<sup>4</sup> See, e.g., the situation in France where students have also been banned from wearing religious symbols at public school since 2004. See, e.g., Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251 (2006).

<sup>5</sup> See the decisions of the German Federal Constitutional Court on whether teachers or other pedagogues have the right to wear headscarves at public school: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 24, 2003, 2 BvR 1436/02, [hereinafter *First Headscarf Decision*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, 1 BvR 471/10 [hereinafter *Second Headscarf Decision*]. For comparative discussion of the issue, see Nicky Jones & Kerstin Braun, *Secularism and State Neutrality: The Headscarf in French and German Public Schools*, 23 AUSTL. J. HUM. RTS. 61 (2017).

<sup>6</sup> The principle of state neutrality is derived from Articles 4 and 33 of the Basic Law and Articles 136 and 137 of the Weimar Constitution. Articles 136–139 and 141 of the Weimar Constitution form an integral part of the Basic Law as per article 140 of the Basic Law. See Langenfeld & Mohsen, *supra* note 3, at 88.

the personal decisions of private individuals to display religious symbols.<sup>7</sup> In a decision concerning the lawfulness of dismissing a Muslim teacher wearing a headscarf, the Federal Administrative Court in 2004 explicitly pointed out that the “prohibition [of wearing a headscarf] only relates to teachers as public servants while students in public schools. . . . remain free to wear a headscarf.”<sup>8</sup>

Yet, the Court’s toleration of veiled students in public schools only relates to Islamic head veils which cover the head and the neck. It does not extend to Islamic face veils, including the niqab and burqa, which do not leave the face exposed.<sup>9</sup> So far, the Federal Administrative Court and the Federal Constitutional Court have not been called upon to decide on the issue of the use of Islamic face veils by public school students. The absence of jurisprudence may be because these garments were never prominent Islamic dress in Germany. The majority of Muslims in Germany are of Turkish origin who traditionally wear head, but not face veils.<sup>10</sup> In the past, the burqa and niqab have caused so little conflict that Thielmann and Vorholzer contended that the burqa in Germany was “not really an issue.”<sup>11</sup>

Possibly fueled by the fear of radical Islam caused by the rise of the Islamic State and the latest terror attacks in Germany,<sup>12</sup> the debate on Muslim face veils in public spaces has recently taken on a life of its own. The discourse has been popularly referred to as the burqa ban although other face veils, such as niqabs, are included in the debate. A 2016 survey on burqa bans in Germany found that 51% of Germans favored a complete ban in public, while

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<sup>7</sup> See Sagy Maayan, *Islam and the European Legal Systems: The Headscarf Debate in France and Germany as Case Studies* 34 (Aug. 2008) (M. A. thesis, The Hebrew University of Jerusalem).

<sup>8</sup> See BVerwG, Jun. 24, 2014, 2 C 45.03, VGH 4 S 1439/00, 14 (translated by the author).

<sup>9</sup> A Niqab is a face veil which leaves a slit for the eyes and a burqa is a veil which covers the face with textile mesh. See Rohe, *supra* note 1, at 88. For further explanations on Islamic dress, see Roberta Aluffi Beck-Peccoz, *Burqa and Islam*, in *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPHERES* 15 (Alessandro Ferrari & Sabrina Pastorelli eds., 2016): “Hostility has shifted from the Islamic scarf to the burqa whose compatibility with the European way of life is hotly contested.” For an explanation on the different Islamic veils, see James Vyver, *Explainer: Why Do Muslim Women Wear a Burqa, Niqab or Hijab?* ABC NEWS (Oct. 2, 2014), <http://www.abc.net.au/news/2014-09-23/why-do-muslim-women-wear-a-Burqa-niqab-or-hijab/5761510>.

<sup>10</sup> Around 70% of Turkish women cover their heads, but only 3% wear burqa in Turkey. See Mitchel Kay, *The French Burqa Ban: A Global Look*, 33 *WOMEN’S RTS. L. REPORTER* 351, 352 (2012); Joern Thielmann & Kathrin Vorholzer, *Burqa in Germany-Not Really an Issue: A Short Note*, in *THE BURQA AFFAIR ACROSS EUROPE: BETWEEN PUBLIC AND PRIVATE SPHERES* 189 (Alessandro Ferrari & Sabrina Pastorelli eds., 2016).

<sup>11</sup> See Thielmann & Vorholzer, *supra* note 10, at 189.

<sup>12</sup> Overall, seven terror attacks occurred in Germany in 2016, including a suicide bomber in Ansbach, a shooting in a Munich shopping center, and an attack on a Berlin Christmas market. See Darren Boyle, *Germany’s Year from Hell: How the Country Has Been Rocked by Seven Terror Attacks Leaving 22 Dead*, *DAILY MAIL* (Dec. 21, 2016), <http://www.dailymail.co.uk/news/article-4052696/Germany-s-year-hell-country-rocked-seven-terror-attacks-leaving-22-dead.html#ixzz4UvrCLuKf>.

30% were in favor of a partial ban in public services and schools. Only 15% of surveyed participants were against a burqa ban.<sup>13</sup>

In addition, in the past few years a number of administrative courts have addressed the question of whether and under what circumstances schools can expel students who refuse to remove their niqab, a face veil leaving only the eyes exposed, from class.<sup>14</sup> This development marks a change and adds a new dimension to the German “headscarf debate.” The issue has now shifted from rights and responsibilities of public servants bound by the principle of state neutrality, to students—and thus private individuals—exercising their religious freedom without an obligation to remain neutral. Richard Lauenstein, managing director of the German Trade Union for Education and Science, has been reported as saying that the number of niqab-wearing students in Germany is negligible and the debate surrounding the burqa and niqab in public schools is artificially fostered in order to influence voters in the next election.<sup>15</sup> Indeed, it is unclear how many Muslims in Germany today wear niqab or burqa as neither the German Government nor the Federal Statistical Office is able to provide any figures.<sup>16</sup> Yet, instances where students have worn a niqab to school have continued to arise in past years. These situations are also likely to reoccur in the future because Germany has recently received many immigrants from places such as Syria and Afghanistan where face veils are not uncommon.

This Article considers the constitutionality of expelling students who wear the niqab and burqa from public schools *de lege lata* and *de lege ferenda*. The Article draws on the principles set out in the Federal Constitutional Court’s “first headscarf decision” in 2003 and contends that students who wear a face veil for religious purposes cannot be asked to remove their veil without specific Parliamentary law on the matter.<sup>17</sup> The Article puts

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<sup>13</sup> See Survey Requested by ARD Morgenmagazin and Carried Out by Infratest Dimap, Große Mehrheit der Deutschen plädiert für Burqa-Verbot (Aug. 23, 2016), <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/umfragen/aktuell/grosse-mehrheit-der-deutschen-plaedierte-fuer-burqa-verbot/>.

<sup>14</sup> At the time of writing, two administrative court decisions have been published and are discussed below.

<sup>15</sup> See Andrea Scharpen, *Verschleierungs-Verbot in Schule, Kritik an Ausschluss von Muslimin*, DIE TAGESZEITUNG (Aug. 24, 2016), <http://www.taz.de/!15326675/>. In this context it is noteworthy that the populist right party AfD—who advocates anti-immigrant policies and failed to obtain sufficient votes to enter Parliament at the last Federal election—became Germany’s third strongest party in the September 2017 Federal elections. See *German Elections 2017: Full Results*, THE GUARDIAN (Sept. 25, 2017), <https://www.theguardian.com/world/ng-interactive/2017/sep/24/german-elections-2017-latest-results-live-merkel-bundestag-afd>.

<sup>16</sup> It is frequently reported that around 300 women in Germany wear the burqa. It is unclear, however, from where that figure is derived. Julia Löffelholz, *Burqa 300*, DIE ZEIT (Sept. 17, 2016), <http://www.zeit.de/politik/deutschland/2016-09/Burqa-women-germany-muslims>.

<sup>17</sup> See *First Headscarf Decision*. In August 2017, two German states, Lower Saxony and Bavaria, amended their school laws to prohibit students from wearing face veils at school. Due to their recentness, the law reforms could not be reflected in the body of this Article. The law reforms do not affect the arguments made in this Article, especially those relating to constitutionality and political advisability of burqa bans for students.

forward the argument that even where more specific laws are introduced, an absolute face veil ban for students at public school is not in line with the German Constitution: A result which remains unchanged by the 2014 decision of the European Court of Human Rights upholding bans on face coverings in France. The Article contends, however, that considering the 2015 Federal Constitutional Court's "second headscarf decision," laws which allow the banning of face coverings for students as a last resort in certain narrowly tailored cases where a concrete danger for maintaining school peace exists may be constitutional.

Lastly, for argument's sake, the Article considers whether an abstract burqa ban at public school is socially or politically advisable in Germany by assessing acclaimed benefits and associated risks. The analysis also draws on the experiences of other European jurisdictions which have introduced a burqa ban and concludes that absolute face veil bans for public school students will likely do more harm to the individual student and German society overall than good.

While many European countries have already introduced burqa bans to varying degrees, others, including Germany, are in the process of contemplating their lawfulness and functionality. The analysis in this Article may therefore have relevance beyond the German context.

### **B. Burqa Ban for Students at Public School: De Lege Lata**

While the overall number of reported cases of students wearing niqab to school is low, the cases that do arise appear to be inconsistently resolved: Some students who refuse to take off their face veil must leave school while others are allowed to continue studying despite wearing niqab.<sup>18</sup>

At the time of writing, two cases of students wearing niqab at public school have been decided by administrative courts in two German states, one in Bavaria in 2014 ("Bavarian

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<sup>18</sup> In 2006, two 18-year-old students in the 11<sup>th</sup> grade at a local comprehensive school in Bonn were reportedly suspended for two weeks for wearing niqab at school after returning from Easter break. One of the students agreed to take off the niqab during class while the other decided to drop out of school. The issue did not reach the courts. See *Bonner Burqa-Schuelerinnen, Muslimin meldet sich vom Unterricht ab*, SPIEGEL ONLINE (May 9, 2006), <http://www.spiegel.de/lebenundlernen/schule/bonner-Burqa-schuelerinnen-muslimin-meldet-sich-vom-unterricht-ab-a-415338.html>. In May 2014, the University of Giessen prohibited a student from wearing a face veil when attending courses and lectures. The student agreed to take off the niqab around campus. See Pascal Gerard, *Streit um Niqab an der Uni Giessen, Studentin muss Ganzkoerperschleier ablegen*, STERN (May 13, 2014), <http://www.stern.de/panorama/streit-um-niqab-an-der-uni-giessen-studentin-muss-ganzkoerperschleier-ablegen-3194466.html>. A student in Belm in Lower Saxony in the 8<sup>th</sup> grade has been attending school for years while wearing a niqab. See Christoph Link, *Verschleiert in der achten Klasse*, STUTTGARTE ZEITUNG (Sept. 30, 2016), <http://www.stuttgarter-nachrichten.de/inhalt.niedersachsen-verschleiert-in-der-achten-klasse.24d93335-6b45-4a09-a098-01e0b67b4844.html>.

Case”)<sup>19</sup> and one in Lower Saxony in 2016 (“Lower Saxon Case”).<sup>20</sup> In 2013 in Bavaria, a school for vocational training revoked the placement of a female Muslim student because she insisted on wearing her niqab to class. Similarly, in 2016, an evening grammar school in Lower Saxony revoked an 18-year-old female Muslim student’s placement *inter alia* because she refused to take off her niqab during class. Both cases raise the question of whether students can be lawfully expelled from German public school if they refuse to remove their face veil, especially considering their constitutionally guaranteed religious freedom.

### *I. Wearing Niqab and Burqa and Religious Freedom*

#### *1. The Protective Realm of Article 4 of the Basic Law*

Excluding niqab-wearing students from school could constitute a serious infringement of their religious freedom as enshrined in Article 4 of the German Basic Law.<sup>21</sup> Article 4 *inter alia* guarantees religious freedom and the right to exercise one’s religion. This includes the right to comply with a religion’s required dress code.<sup>22</sup> In Germany, as well as in other countries, controversy has arisen over whether burqa or niqab can be considered required Muslim dress.<sup>23</sup> While some have interpreted Sura 24 Verse 31 and Sura 33 Verses 53 and 59 of the Qur’an<sup>24</sup> to contain an obligation for female Muslims to wear a headscarf outside their homes, it is less clear whether an obligation to cover one’s face can be derived from these Suras.<sup>25</sup> An additional difficulty stems from the fact that no Islamic institution appears to have the authority to definitively answer this question.<sup>26</sup>

<sup>19</sup> See Verwaltungsgerichtshof Muenchen [Administrative Court Munich], Apr. 22, 2014, 7 CS 13.2592, 7 C 13.2593, [hereinafter *Bavarian Case*].

<sup>20</sup> See Verwaltungsgericht Osnabrueck [Administrative Court Osnabrueck], Aug. 22, 2016, 1 B 81/16 [hereinafter *Lower Saxon Case*].

<sup>21</sup> See GRUNDGESETZ [GG] [BASIC LAW], art. 4, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>22</sup> The manifestation of one’s religion on the outside is referred to as *Forum Externum*. See, e.g., Burkhard Breig, *Law and Religion in Germany: The Case of Circumcision of Boys*, in *THE ROLE OF RELIGION IN EASTERN EUROPE TODAY* 83, 87 (Julia Gerlach & Jochen Töpfer eds., 2014).

<sup>23</sup> For the Australian debate, see, e.g., Renae Barker, *Rebutting the Ban the Burqa Rhetoric: A Critical Analysis of the Arguments for a Ban on the Islamic Face Veil in Australia*, 37 *ADEL. L. REV.* 191, 197 (2016).

<sup>24</sup> An English translation of the Suras is available at <https://quran.com>.

<sup>25</sup> See Guy & Jakob Beaucamp, *In Dubio pro Libertate*, 5 *DIE OEFFENTLICHE VERWALTUNG*, 174, 174–75 (2015). It was assumed in the *Bavarian Case* that wearing burqa and niqab can be seen as a religious requirement, *id.* at para. 17. On the interpretation of the Suras with further references, see Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?*, 25 *EMORY INT’L L. REV.*, 1431, 1436 (2011).

<sup>26</sup> Tristan Barczak, *Zeig mir Dein Gesicht, Zeig Mir, Wer Du Wirklich Bist*, 2 *DIE OEFFENTLICHE VERWALTUNG* 54, 56 (2011).

The assumption has been, however, that wearing burqa and niqab can generally be conduct protected by Article 4 of the Basic Law.<sup>27</sup> Yet, German courts assess whether wearing a face veil constitutes conduct protected by the realm of religious freedom on a case by case basis. Each individual complainant has the burden of proof to establish that they feel religiously bound to wear said covering and not merely bound by other motives, including societal or familial pressure.<sup>28</sup> Simply alleging a religious obligation is not sufficient in this context.<sup>29</sup> Both, the Lower Saxon and Bavarian Court found that the respective complainant had failed to discharge their burden sufficiently. In the Lower Saxon Case, the complainant failed to appear at the oral hearing in which the Court planned to examine her on her personal motives for wearing niqab. The Lower Saxon Court explained that it was insufficient to merely allege said obligation in an affidavit.<sup>30</sup> It is reported that the complainant did not appear on the day of the hearing to avoid the vast media attention the case had attracted.<sup>31</sup> The Administrative Court of Munich, however, found that the complainant who argued that she was religiously obligated to wear niqab did not sufficiently discharge the burden of proof to demonstrate a particular severe infringement of her religious freedom by being expelled.<sup>32</sup> The Court outlined that the complainant's alleged obligation to wear niqab should have been substantiated by relying on supporting opinions of religious scholars or other written proof in this context.<sup>33</sup>

## 2. Restricting Religious Freedom Through Parliamentary Law

Where complainants are successful in establishing that they wear niqab or burqa for religious purposes, a restriction of this religiously motivated conduct is only possible in narrowly tailored circumstances. The Basic Law itself does not explicitly restrict religious

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<sup>27</sup> *Bavarian Case*, at para. 17; *Lower Saxon Case*, at 7; Guy & Jakob Beaucamp, *supra* note 25, at 175; WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGES, BURKA-VERBOT IN ÖFFENTLICHEN GEBÄUDEN LASSEN SICH BURKAS IN ÖFFENTLICHEN GEBÄUDEN VERBIETEN? 7 (2010).

<sup>28</sup> See also Barczak, *supra* note 26, at 56–57. Referred to in German as *Plausibilitätslast*.

<sup>29</sup> See *id.* at 56.

<sup>30</sup> See *Lower Saxon Case*, at 17. Questions on whether the complainant believed that wearing a niqab was religiously binding were raised by the court because the complainant had previously participated in catholic religion classes at school and had not worn niqab in a passport photo she attached to her school application materials at 20 years of age.

<sup>31</sup> See *Schule darf Muslimin wegen Gesichtsschleier ablehnen*, SPIEGEL ONLINE (Aug. 22, 2016), <http://www.spiegel.de/lebenundlernen/schule/nikab-und-schule-muslimin-bekommt-mit-schleier-keinen-platz-a-1108900.html>.

<sup>32</sup> See *Bavarian Case*, at para. 24. The Court assumed that wearing the niqab is protected by Article 4 of the Basic Law, but considered the obligation of the complainant to demonstrate that she was bound by religious rules under the question of whether the infringement was particularly severe.

<sup>33</sup> See *id.*

freedom. Nevertheless, a person's religious freedom can be curtailed where it collides with constitutional rights of others or constitutional principles with community value.<sup>34</sup> In that case, the colliding rights or principles must be reconciled with one another.<sup>35</sup> In addition, limiting an important constitutional right such as religious freedom is only possible where a Parliamentary law specifically allows said restriction.<sup>36</sup>

It must be noted that the German federal states (so-called *Laender*) have the power to legislate school related matters and thus a burqa ban at public school falls within the jurisdiction of each individual German state.<sup>37</sup> At the time of writing in early 2017, no German state has enacted explicit legislation banning students from wearing face coverings at public school. The school and the supervising school authority in the Bavarian and Lower Saxon Case based their decision to revoke the student's placement at their educational institution on general clauses in their respective school laws.

In Bavaria, Section 56, Part 4 of the Bavarian Law on Education and Teaching stipulates rather generally that students must act in a way that allows the school to fulfil its tasks and reach its educational goals and that students must attend classes on a regular basis.<sup>38</sup> The school and its supervising authority as well as the Administrative Court of Munich on appeal found the norm to be sufficiently specific to allow the exclusion of a niqab-wearing student from public school. The Court argued that where a student covers her face with a niqab, a concrete danger for the functioning of the school system exists as open communication between the student and teacher is no longer possible. In the Court's opinion, a niqab-

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<sup>34</sup> This is settled case law of the Federal Constitutional Court. See BverfG, 1 BvR 1087/91, May 16, 1995 [hereinafter *Crucifix Decision*]; Cf. WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGES, *supra* note 27, at 7.

<sup>35</sup> Rohe, *supra* note 1, at 75–76.

<sup>36</sup> Barczak, *supra* note 26, at 57; so-called necessity jurisprudence (*Wesentlichkeitsrechtssprechung*) meaning that Parliament is tasked with legislating on all essential matters, rather than leaving the decision up to the executive or judiciary. Cf. Jens Theilen, *Towards Acceptance of Religious Pluralism: The Federal Constitutional Court's Second Judgment on Muslim Teachers Wearing Headscarves*, 58 GER. Y.B. INT'L L. (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2695384](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695384). The Administrative Court of Munich assumes that a specific law is unnecessary because wearing niqab always constitutes a concrete danger for the functioning of the school system, *Bavarian Case*, at para. 25. German Federal law has entered into force in June 2017 prohibiting Federal public servants including judges from wearing face veils while carrying out their duties (Gesetz zu bereichsspezifischen Regelungen der Gesichtshüllung und zur Änderung weiterer dienstrechtlicher Vorschriften).

<sup>37</sup> For the distribution of jurisdiction between the Federation and the states, see GRUNDGESETZ [GG] [BASIC LAW] art. 70, para. 1, *translation* at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>38</sup> See Bayerisches Gesetz ueber das Erziehungs und Unterrichtswesen (May 31, 2000) (GVBl. S. 414, 632, BayRS 2230-1-1-K in the 2016 version): All students have to conduct themselves in a way that allows the school to carry out its task and reach its educational goal. Students are especially under the obligation to attend class regularly and to participate in school events. Students must abstain from everything that disrupts the school routine or school order of their or any other school (translated by the author).

wearing student thus hinders the school to fulfil its educational task.<sup>39</sup> Surprisingly—especially in light of the settled case law of the Federal Constitutional Court on the necessity of a Parliamentary law for the restriction of religious freedom—the Munich Court assumed without further explanation that no specific Parliamentary law which prohibited face coverings was required in this case.<sup>40</sup> The Lower Saxon Court, however, acknowledged that a sufficiently specific Parliamentary law is necessary to prevent the wearing of niqab at school which could not be found in the general clause of the Lower Saxon School Act.<sup>41</sup>

It is highly doubtful that general clauses in the school laws and educational acts of the German states embody a sufficiently specific Parliamentary law allowing the exclusion of niqab-wearing students from public school. This is particularly the case considering the principles set out in the 2003 Federal Constitutional Court decision concerning teachers wearing headscarves in public schools (the so called “first headscarf decision”). The decision—although dealing with a teacher rather than a student and a headscarf rather than a niqab—is indicative for the case at hand. The decision and the principles relevant for the analysis in this Article are outlined below.

### 1.1 The “First Headscarf Decision”

In its 2003 “first headscarf decision,”<sup>42</sup> the Second Senate of the Federal Constitutional Court was called upon by Fereshta Ludin, a naturalized German citizen born in Afghanistan, to decide whether it was constitutional to deny her admission as a public school teacher in the German state Baden-Wuerttemberg after she passed the required teacher training. The school authority denied her access on the basis of “unfitness for duty” as she, a practicing Muslim, continued to wear a headscarf while teaching. The school authority argued that the headscarf symbolized non-integration and infringed upon state neutrality as well as the negative religious freedom of students and parents.<sup>43</sup>

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<sup>39</sup> See *Bavarian Case*, at para. 21.

<sup>40</sup> See *id.* at para. 25. Entering into force in August 2017, the Bavarian Law on Education and Teaching has been amended and now explicitly states in Section 56, Part 4, Sentence 2 that students are not allowed to cover their faces. Due to its recentness, the law reform could not be reflected in the body of this article.

<sup>41</sup> See *Lower Saxon Case*, at 19. In August 2017, section 58, Sentence 2 was inserted into the Lower Saxon School Act which states that students must not complicate communication with others at school through conduct or dress. The sentence was included with the aim of addressing the face veil situation. See *Türkische Gemeinde befürwortet geplantes Nikabverbot an Schulen*, SPIEGEL ONLINE (Jul. 24, 2017), <http://www.spiegel.de/lebenundlernen/schule/niedersachsen-geplantes-nikab-verbot-an-schulen-a-1159416.html>. Due to its recentness the law reform could not be reflected in the body of this article.

<sup>42</sup> See *First Headscarf Decision*.

<sup>43</sup> See *id.* at para. 3.

The complainant had exhausted all instances of administrative jurisdiction unsuccessfully. In her submissions to the administrative courts, she argued that the principle of state neutrality allowed her to wear a headscarf for religious reasons in public, including public schools. She alleged that public schools should be considered a mirror of society's pluralism. Prohibiting her from wearing a religious head covering would turn the German principle of state neutrality into the French principle of *laïcité*.<sup>44</sup> Yet, the administrative courts held that as a public school teacher she was a representative of the state and that the headscarf was not an exclusively cultural tradition, but a religious symbol to which her students were being exposed even if she did not engage in missionary activities.<sup>45</sup> The students and their parents—so the administrative courts argued—had their negative religious freedom violated, namely the freedom to hold no religious belief and to abstain from participating in religious practices. This freedom could be adequately protected only by the removal of the complainant's headscarf at school. The administrative courts therefore assumed that where a person acts as a representative of the German state, their freedom rights—including their right to religious freedom while teaching—must take a back seat to protect the rights of students and parents who are the subject of state authority in public schools.

The complainant's application to the Federal Constitutional Court argued that the administrative courts' decisions upholding the denial of admission *inter alia* violated her constitutionally guaranteed right to non-discrimination, religious freedom, and equal access to public office without discrimination on the basis of religion.<sup>46</sup> The Court, in a five to three majority decision, held that prohibiting the complainant from wearing a headscarf was unjustified because no law in Baden-Wuerttemberg at the time specifically allowed for such preclusion. The Court did not find that any existing sections of the Civil Service Act (Landesbeamtengesetz) or the relevant school laws in Baden-Wuerttemberg were specific enough to require a teacher to take off her head veil at school.<sup>47</sup> The Court highlighted that where basic rights collide, Parliament is called upon to enact laws that balance the diverging interests as much as possible and to discuss infringements and how to resolve them in the public sphere.<sup>48</sup> The Court outlined that, particularly in school matters, Parliament has to make key decisions itself and cannot leave important matters up to the school administration. This is especially the case, so the Court argued, when changing societal

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<sup>44</sup> See *id.* at para. 18.

<sup>45</sup> See *id.* at paras. 5, 11; Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 55 (2002), 3344 (upholding the headscarf prohibition); Verwaltungsgerichtshof Baden-Wuerttemberg [VGH BadenWuerttemberg] [Baden-Wuerttemberg Court of Administrative Appeals], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 54 (2001), 2899 (upholding the headscarf prohibition).

<sup>46</sup> See GRUNDGESETZ, [GG] [Basic Law], art. 3 (equality before the law), art. 6 (religious freedom) and art. 33(3) (equal citizenship-public service), *translation* at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>47</sup> See *First Headscarf Decision*, at paras. 60–61.

<sup>48</sup> See *id.* at para. 68.

circumstances and increasing religious diversity lead to the exclusion of all religious symbols, and a decision would have significant consequences for the rights of students, teachers, parents, and the state.<sup>49</sup> The Court concluded that where the denial of access to public employment is not based on a specific law, the complainant's basic rights—including her freedom of religion—are violated.<sup>50</sup>

As a result of the decision, by 2006 eight German states introduced specific laws banning political, ideological, and religious symbols for public officials. The remaining eight states have not adopted any specific laws and apply a case by case approach when considering whether a teacher can wear a headscarf or other religious symbols in public schools.<sup>51</sup> Five of the states without specific regulations, however, are East German states with small Muslim populations where the need to regulate headscarves in public schools may not have arisen.

### *1.2. Implication of the "First Headscarf Decision" for Students Wearing Face Veils*

The "first headscarf decision" highlights that Parliamentary laws regulating teachers' displays of religious symbols at public school are essential because of the issue's delicate nature and the need to discuss such matters in the public sphere. Where no specific Parliamentary law exists, a teacher cannot be denied employment as a public servant for wearing a religious head covering. The same considerations apply to students who wear the niqab and burqa at public school. If a law must already be in place to regulate teachers' displays of religious symbols to whom stricter standards apply as public servants then *a fortiori*, a Parliamentary law must be in place to regulate students' conduct as private individuals with no neutrality obligations.<sup>52</sup> A controversial decision such as the exclusion of face veils in public schools cannot be left up to the school administration and the courts.

It is submitted that, contrary to the view of the Administrative Court of Munich, general clauses in school acts of the German states are not specific enough to exclude a niqab-wearing student from public school. Section 56 of the Bavarian Act is a general clause containing only the obligation for students to enable the school to reach its educational goals and to attend classes on a regular basis. Nothing suggests that Parliament intended to specifically regulate the wearing of face coverings and/or other religious symbols when

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<sup>49</sup> See *id.* at para. 69.

<sup>50</sup> The dissenting judges argued that no formal law was required and that the decision could be left up to the individual schools. *Id.* at para. 75.

<sup>51</sup> States with these regulations are Baden-Wuerttemberg, Bavaria, Hesse, Lower Saxony, Saarland, Bremen, Berlin, and North Rhine-Westphalia. States without regulations are Schleswig-Holstein, Rhineland Palatine, Hamburg, Brandenburg, Saxony, Mecklenburg-Vorpommern, Thuringia, and Saxony-Anhalt.

<sup>52</sup> For the applicability of the decision in the context of students and niqab, see also *Lower Saxon Case*, at 17.

introducing this section, and no public debate on whether religious symbols—including face coverings—should be allowed at school occurred at the time of its introduction.<sup>53</sup> The Lower Saxon Court correctly highlighted that the relevant general clause in the School Law of Lower Saxony could not serve as the legal authorization for expelling a veiled student due to its general character.<sup>54</sup> It emphasized, however, that the Bavarian section appeared more specific than its Lower Saxon counterpart, thus avoiding any positioning on the rightfulness of the Administrative Court of Munich's verdict.

Students who wear niqab for religious reasons cannot be expelled from public school on the basis of general clauses in school laws as they are not specific enough to prohibit the wearing of face veils. Yet, as the aftermath of the “first headscarf decision” has shown, German states may enact more specific school laws that address this situation in the future. This gives rise to the underlying question of the constitutionality of face veil bans in German public schools.

### C. Burqa Ban at Public School: De Lege Ferenda

As pointed out above, the German restriction of a person's religious freedom must be derived directly from the Constitution. When a collision between different constitutional rights and principles occurs, a specific Parliamentary law must resolve the clash by balancing the colliding rights with one another in a proportionate fashion. In the case of students wearing face veils at school, a potential collision could occur between their religious freedom and the negative religious freedom of other students, parents, and teachers (Article 4 of the Basic Law) as well as with the state's mission to provide education (Article 7 of the Basic Law) regarding open communication and keeping a peaceful school environment.<sup>55</sup>

#### *1. Clash with Article 4 and Negative Religious Freedom of Other Students, Teachers, and Parents*

Article 4 of the Basic Law also contains the so-called negative religious freedom, meaning the right not to exercise any religious views and not to participate in any religious ceremonies.<sup>56</sup> As other students and their parents as well as teachers are confronted with

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<sup>53</sup> For the argument that a specific Parliamentary law must be in place, see Guy & Jakob Beaucamp, *supra* note 25, at 176.

<sup>54</sup> See *Lower Saxon Case*, at 20. The Lower Saxon Court, however, rejected the case on the basis that the student had not sufficiently demonstrated that they were bound to wear niqab by religious rules because they failed to attend the main hearing and thus their religious freedom was not infringed.

<sup>55</sup> A law, however, could not single out the Islamic face veil as this would constitute direct discrimination on the basis of religion. On the unconstitutionality of the North Rhine-Westphalian law excluding the display of Christian-occidental symbols from a general ban for public servants, see the *Second Headscarf Decision*.

<sup>56</sup> See WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGES, ZUR VERINBARKEIT EINES KOPFTUCHVERBOTS UND EINES BURQAVORBOTS MIT DEM DEUTSCHEN RECHT, 16 (2010).

students wearing face veils at school, their negative religious freedom could be infringed upon. Nevertheless, it has been established that the right does not shield individuals against religious displays of others.<sup>57</sup> That, so it is argued, is simply part of living in a multicultural and religiously diverse society. Therefore, the right of students to wear a face veil—even in a school setting—does not clash with the negative religious freedom of classmates, parents, or teachers.<sup>58</sup>

## *II. Clash with Article 7 and the Principle of Open Communication*

Article 7 of the Basic Law contains the state's mission of education. It is no basic right as such, but rather a constitutional principle. The Federal Administrative Court has interpreted the Article to contain the state's right to determine all school matters, including the power to plan, organize, and conduct all school-related business as well as the right to set out the curriculum and to decide how it is taught.<sup>59</sup>

In its verdict in the Bavarian Case, the Administrative Court of Munich added to the Article 7 definition that the norm also gave the state the power to decide on specific teaching methods. The Administrative Court of Munich outlined that this included the teaching method of open communication between students and teachers. According to the Court, open communication has been a standard teaching method in Germany for many years and is more efficient than classic frontal teaching—a teacher centered learning style—as it allows for greater student engagement.<sup>60</sup> The Court argued that the principle of open communication is not limited to verbal communication and includes non-verbal communication, such as mimic and gestures, which are frequently expressed subconsciously.<sup>61</sup> For example, whether a student has understood certain concepts often becomes clear to the teacher from their non-verbal communication. The Court went as far as saying that non-verbal communication elements are a requirement for the functioning of education,<sup>62</sup> and assumed that where non-verbal communication elements are missing

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<sup>57</sup> See Barczak, *supra* note 26, at 57; Guy & Jakob Beaucamp, *supra* note 25, at 179; WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGES, *supra* note 56; *Crucifix Decision*, at paras. 53–54.

<sup>58</sup> See WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGES, BURQA-VERBOT IN OEFFENTLICHEN GEBAEUDEN, LASSEN SICH BURQAS IN OEFFENTLICHEN GEBAEUDEN VERBIETEN? 12–13 (2010); cf. Guy & Jakob Beaucamp, *supra* note 25, at 179; Tobias Buescher & Stefan Glasmacher, *Schule und Religion*, 55 JURISTISCHE SCHULUNG 513, 515 (2015).

<sup>59</sup> See BVerwGE, Sept. 11, 2013, 147, 362 (dealing with the question of whether female Muslim students must attend coeducational swim lessons or can be exempt).

<sup>60</sup> See *Bavarian Case*, at para. 19.

<sup>61</sup> See *id.* at para. 21.

<sup>62</sup> See *id.*

education is impossible.<sup>63</sup> The Court outlined that schools were not required to offer alternative teaching methods or lesson content for individual students where this counteracted the school's general educational concept.<sup>64</sup> The Court specified that students wearing face veils could not communicate openly and that the school was unable to provide an alternative teaching method in the form of frontal teaching as this was at odds with the chosen teaching method of open communication.<sup>65</sup> On this basis, the Court concluded that students must accept that they have to remove their niqab at school.

While Article 7 of the Basic Law enunciates the state's educational mission, it is less clear whether the vaguely worded Article enshrines the right of the state to set out specific teaching methods. Yet, the Munich Court's interpretation of Article 7 calling into existence a "principle of open communication" between teachers and students based not only on oral communication, but also on mimic and gesture and the conclusion that the face veil is a hindrance to open communication has been accepted and frequently rehearsed in subsequent literature without further explanation.<sup>66</sup> Critically, Guy and Jakob Beaucamp remark, however, that the methods a teacher applies should not be dependent on a regulation, but should remain a flexible decision based on the individual needs of the students in a classroom.<sup>67</sup>

Even if one can be moved to assume that the state has the right to dictate teaching methods based on Article 7 of the Basic Law and has done so in the form of open communication between students and teachers, it remains unclear why students who wear niqab should not be able to communicate openly in class. These students can communicate verbally and can use gestures. The niqab also leaves the eyes exposed so mimic in that area is still visible. While the mimic may be reduced because the mouth and forehead are covered, it is not entirely eliminated.<sup>68</sup> Similarly, the Equal Treatment Commission in a Dutch case regulating the face veil at an educational institution found that a face veil "leaves sufficient possibilities for communication," including non-verbal communication.<sup>69</sup> Likewise, staff at Leiden

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<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> Agreeing that Article 7 of the Basic Law and the state mission of education requires open communication is Rohe. *See* Rohe, *supra* note 1, at 88; JUERGEN BROCKMANN, KLAUS-UWE LITTMANN & THOMAS SCHIPPMMANN, PRAXIS DER KOMMUNALVERWALTUNG NIEDERSACHSEN para. 3261 (Jun. 2016); Buescher & Glasmacher, *supra* note 58, at 515.

<sup>67</sup> *See* Guy & Jakob Beaucamp, *supra* note 25, at 180.

<sup>68</sup> *See id.* at 179.

<sup>69</sup> *See* the decision discussed in Annelies Moors, *The Dutch and the Face-Veil: The Politics of Discomfort*, 17 Soc. ANTHROPOLOGY 393, 397 (2009).

University, when questioned on their personal experiences with students wearing face veils, stated that they did not have practical problems with communication itself.<sup>70</sup>

Contrary to the Court's view, alternative teaching methods for students wearing face veils that do not counteract the school's general educational concept and fit within "open communication" can easily be implemented. Frontal teaching—as the Court assumed—is not necessary to educate students wearing face veils. Rather, teachers can simply ask veiled students questions to see whether the students have grasped the principles if the teachers are unable to deduct this from students' non-verbal communication. Whether certain content has been understood will also become clear from any written or oral work submitted by the student.<sup>71</sup> This approach is surely already necessary when teaching students who are unable to express mimic or gesture at all or only to a certain degree, for example, students with facial injuries, neuromuscular disease, or certain mental health issues. Where no flexibility exists for individual teachers to amend their teaching style and vary the concept of open communication based on the individual needs of their students, any special needs students would have to be deemed unteachable in German public schools. This surely cannot be the desired result.

It is submitted that students wearing niqab do not fail to comply with the method of open communication *per se* as verbal communication and gesture as well as mimic—to a certain degree—remain possible. Additionally, teaching techniques can easily be adjusted further within the concept of open communication to accommodate affected students. As such, no collision between the student's religious freedom and the educational mission in the context of open communication exists. Rightly, Bakht points out that refusing to teach students who wear a face veil is more about making a statement against the face veil itself rather than about the ability to teach veiled students.<sup>72</sup>

### *III. Clash with Article 7 and the Protection of a Peaceful School Environment*

Courts have recently interpreted the protective realm of Article 7 of the Basic Law to also include the protection of the school peace (*Schulfrieden*).<sup>73</sup> Where the school peace is disrupted by students wearing face veils, a collision between the state's mission of education (Article 7 of the Basic Law) and the religious freedom of the individual student (Article 4 of the Basic Law) occurs. Yet, this does not automatically mean that the school peace prevails.

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<sup>70</sup> See *id.* at 405. The staff, however, had a problem with the face veil as a symbol of oppression in general.

<sup>71</sup> A similar argument is made by Natasha Bakht, *Veiled Objections*, in *REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY* 70, 91–92 (Lori G Beaman ed., 2012).

<sup>72</sup> See *id.*

<sup>73</sup> See Guy & Jakob Beaucamp, *supra* note 25, at 180.

Rather, the clash requires a balancing process to reach a proportionate result in which no legal position can be favored *per se*.<sup>74</sup>

### 1. Constitutionally Legitimate Aim for Restricting Article 4 of the Basic Law

The religious freedom of the individual can be restricted by law only where a constitutionally legitimate interest exists in doing so (“rational connection test”).<sup>75</sup> Laws prohibiting face veils at public school aim at safeguarding school peace which is protected by Article 7 of the Basic Law and thus constitutes a legitimate aim.<sup>76</sup>

### 2. Proportionality *Sensu Stricto*

When laws restricting an individual’s religious freedom have a legitimate aim, a strict balance between the colliding rights or principles must occur (“proportionality *sensu stricto*”).<sup>77</sup>

In the balancing process, it must be considered what effect a law banning face veils at school would have on the individual student. Schooling in Germany is compulsory in all German states up until grade nine or ten depending on the state, and home schooling is generally against the law.<sup>78</sup> Where school-aged students frequently fail to attend school, their parents can be sentenced to a prison term or receive monetary fines.<sup>79</sup> In addition, police can forcefully escort students to school.<sup>80</sup> In some states the family courts can even suspend parental rights if the child’s school attendance is only sporadic.<sup>81</sup> Therefore, the consequences of a law banning face veils are severe, especially for younger students who are under the obligation to attend school. Some students may not return to school despite the duty to attend to avoid breaching their religious obligations. These students risk fines and the possible imprisonment of their parents and are left with a low level of education for

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<sup>74</sup> See *Bavarian Case*, at para. 18.

<sup>75</sup> See Jens Theilen, *supra* note 36.

<sup>76</sup> While the law must also be necessary, considerations relating to necessity will be analyzed under strict proportionality.

<sup>77</sup> See Jens Theilen, *supra* note 36.

<sup>78</sup> See, e.g., Aaron Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT’L & COMP. L. 225 (2010); Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 EVALUATION & RES. EDUC. 180 (2003).

<sup>79</sup> See Aaron Martin, *supra* note 78, at 232.

<sup>80</sup> See Spiegler, *supra* note 78, at 180–81.

<sup>81</sup> See *id.*

the rest of their lives. Others may struggle psychologically with having to violate what they consider religiously binding norms to receive an education. The conflict these children are placed in seems particularly grave considering their young age.

Higher education, however, is voluntary in Germany meaning that no student can be forced to attend school past the obligatory school age. The Administrative Court of Munich argued that in the Bavarian Case, a niqab ban for the complainant did not constitute a grave infringement of her religious freedom as she was under no obligation to attend school any longer and the school type in question was non-compulsory.<sup>82</sup> The Munich Court explained that the complainant was able to seek alternative education and to obtain her degree online and thus did not have to subject herself to restrictions of her religious freedom.<sup>83</sup> The Court's assumption that the student was not severely affected, however, falls short. While some female Muslims may study online, others may not be able to do so due to preference or practicability. These girls and women are effectively prevented from receiving a higher education—including obtaining a university degree—in Germany. Consequently, Muslim women wearing niqab or burqa are likely to receive less schooling than men, ultimately perpetuating outdated gender roles in which women take the back seat and are forced into the domestic setting. Even Muslim girls and women who choose to study online will lose the benefit of daily interactions with other students and teachers which constitutes an important aspect of the educational experience. Having to study at home without any social interaction is likely to further their isolation.

Education, including higher education, plays a fundamental role and is important for society's overall functionality. Legislating a burqa ban at school and placing students in a position where they must choose between obtaining an education and complying with the rules of their religion significantly influences students of all ages.

In the balancing process, the interests of the State and the school in banning face veils by law must also be accounted for. The State's interest in legislating against face veils for public school students lies in maintaining a conflict free learning environment and in reducing any interferences with the educational process itself as much as possible. A conflict-free learning environment increases the focus on educational content rather than on external issues, allowing the state to fulfil its educational mission.

From a proportionality perspective, however, the question arises whether an absolute face veil ban for all students is constitutionally legitimate or whether a ban can only occur on a

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<sup>82</sup> See *Bavarian Case*, at para. 23.

<sup>83</sup> See *id.*

case by case basis where a concrete risk for the school peace arises.<sup>84</sup> The so-called “second headscarf decision” of the Federal Constitutional Court relating to teachers wearing headscarves provides some guidance on this question.

### 2.1 The “Second Headscarf Decision”

The “second headscarf decision” was handed down by the Federal Constitutional Court with a six to two majority verdict in January 2015.<sup>85</sup> It is legally binding only for the law in North Rhine-Westphalia.<sup>86</sup> Nevertheless, given the similarity of the introduced laws in other German states, their constitutionality has also come into question.<sup>87</sup> The decision concerned the complaints of two female German pedagogues of Muslim faith and the rightfulness of employment sanctions against them due to wearing head coverings while working in public schools.<sup>88</sup> The two pedagogues unsuccessfully challenged their sanctions in the respective labor courts. Subsequently, the complainants initiated proceedings in the Federal Constitutional Court and argued that their constitutionally guaranteed religious freedom and equal access to office was violated by the respective sanctions and decisions of the labor courts.

The Federal Constitutional Court held that the sanctions and the labor courts’ decisions based on the North Rhine-Westphalian law violated both complainants, among others, in their right to religious freedom. The Court explained that the North Rhine-Westphalian provision had to be restrictively interpreted as requiring a sufficiently concrete danger for state neutrality or the school peace in the individual case to meet the standards of the constitution. Without a sufficiently concrete danger, merely wearing religious symbols could not be prohibited as an abstract danger and was therefore disproportionate and unconstitutional.<sup>89</sup> The Federal Constitutional Court reiterated this stance in a 2016 decision

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<sup>84</sup> This Article will not consider how a law allowing for the removal of a face veil at school would have to be phrased to avoid direct discrimination on the basis of religion.

<sup>85</sup> See *Second Headscarf Decision*. The *Second Headscarf Decision* was handed down by the First Senate in comparison to the *First Headscarf Decision* which was handed down by the Second Senate.

<sup>86</sup> See Education Act of North Rhine-Westphalia, Section 57, para 4, sentence 1 (Jun. 13, 2006) (now repealed).

<sup>87</sup> The Federal Constitutional Court in the *Third Headscarf Decision* from October 2016 held that a general headscarf ban for early childhood teachers in Baden Wuerttemberg was unconstitutional. BverfG 1 BvR 354/11, Oct. 18, 2016 [hereinafter *Third Headscarf Decision*].

<sup>88</sup> One complainant was a teacher and the other complainant was a social worker. Both complainants were employees of the state North Rhine-Westphalia.

<sup>89</sup> See *Second Headscarf Decision*, at paras. 82–112.

concerning the right of an early childhood teacher to wear a headscarf at a state run day care and kindergarten center.<sup>90</sup>

In its 2015 decision, the Court outlined that a concrete danger exists, for example, where older students hold controversial religious views fueled by teachers wearing religious symbols ultimately leading to conflict and the disturbance of the school's routine.<sup>91</sup> Yet, the Court held that such conflict does not automatically justify the prohibition of the headscarf or the dismissal of the teacher. Rather, it needs to be assessed whether the teacher can be employed in a different position subject to less controversy. The Federal Constitutional Court quashed the labor courts' verdicts and referred the matter back for retrial. Enzensperger concludes that if the Court had been comprised of more conservative judges, the decision may have been significantly different.<sup>92</sup>

## 2.2. Implications of the "Second Headscarf Decision" on Burqa Bans at Public School

Applying the principles of the "second headscarf decision" to laws regulating the wearing of face veils in public schools makes clear that an absolute ban is unconstitutional. It cannot be assumed that students wearing face veils cause conflict and disrupt the school peace *per se*. A law based on a merely abstract danger for the school peace is disproportionate due to its severe impact on the individual student as highlighted above. To be proportionate, a law would have to enshrine that a student can be asked to remove her face covering as *ultimo ratio* only when it created such a severe conflict that the school routine could no longer be restored in any other way.

It is hard to imagine a situation, however, in which tension caused by a student wearing a face veil cannot be resolved through dialogue and used as a teaching tool. Schools should be able to educate their students on cultural and religious diversity, acceptance, and tolerance. Ruitenbergh argues that:

[P]ublic education needs to help students examine the discursive acts that they are likely to encounter in the public sphere, discursive acts that may be similar to or different from discursive acts that they hear in the private sphere of the home, but that, regardless, form

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<sup>90</sup> See *Third Headscarf Decision*.

<sup>91</sup> See *Second Headscarf Decision*, at para. 113.

<sup>92</sup> See Daniel Enzensperger, *Verfassungsmaessigkeit eines pauschalen Kopftuchverbots fuer Lehrkraefte an oeffentlichen Schulen*, NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT 871, 873 (2015).

new iterations of public discourse and become part of the public world.<sup>93</sup>

She explains that banning the burqa at public school has a “miseducative” effect because the matter is taken out of the educational sphere thereby limiting its critical examination and possibility for questioning.<sup>94</sup> As such, face veils should be embraced as an educational opportunity for the school cohort.

The facts in neither the Bavarian nor the Lower Saxon Case mention any protest stemming from teachers or other students and their parents regarding the niqab. In fact, the students in either case were almost immediately expelled after the school term commenced and they started to attend classes with a face veil. When no evidence suggests that the school peace is severely endangered, a student who wears her face veil for religious reasons cannot be expelled from an education institution in Germany even after law reform in this area.

#### *IV. Implications of the European Court for Human Rights’ Jurisprudence*

The question arises whether the above interpretation of Article 4 of the Basic Law in the context of face veil bans for public school students requires modification considering the European Court of Human Rights’ (ECtHR) jurisprudence on public face covering bans in France.

It is the German Federal Constitutional Court’s established case law that within the German norm hierarchy, the European Convention on Human Rights (ECHR) ranks only at the level of Federal law and thus has a lower rank than the German Constitution.<sup>95</sup> Nevertheless, the Federal Constitutional Court clarified that the rights enshrined in the ECHR and relevant jurisprudence of the ECtHR are important authoritative interpretation guidelines for the German Constitution as long as they do not diminish the protection of the individual’s fundamental rights under the Basic Law.<sup>96</sup>

In 2014, the ECtHR, in a majority decision, upheld a French law preventing the wearing of garments that conceal the face in public spaces.<sup>97</sup> The French government had enacted a law banning all face coverings in public spaces mainly based on three aims: The protection of

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<sup>93</sup> See Claudia Ruitenberg, *B is For Burqa, C is for Censorship*, 43 EDUC. STUD. 17, 21 (2008).

<sup>94</sup> See *id.* at 21–23.

<sup>95</sup> Cf. BVerfG 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10, May 4, 2011, at para. 87, <http://www.hrr-strafrecht.de/hrr/bverfg/09/2-bvr-2365-09-1.php?view=print>.

<sup>96</sup> See *id.* at para. 88.

<sup>97</sup> See *SAS v. France*, App. No. 43835/11, (July 1, 2014.), <http://hudoc.echr.coe.int/eng?i=001-145466>.

public safety, the “protection of the rights and freedoms of others” by ensuring “respect for the minimum set of values of an open and democratic society,” and the protection of gender equality.<sup>98</sup> The ECtHR held that France has a broad margin of appreciation in the context of enacting said law, especially in light of the French constitutional principle of *laïcité*.<sup>99</sup> Furthermore, it pointed out that no violation of Article 9 of the ECHR—namely the freedom of thought, conscience, and religion—occurred as the law fostered living together “*le vivre ensemble*.”<sup>100</sup> This Article does not analyze the ECtHR jurisprudence further.<sup>101</sup> The ECtHR jurisprudence upholding the French face veil ban appears to provide legal justifications for countries wishing to introduce similar laws. At the time of writing, face veil bans in public have been enacted in several European jurisdictions including Belgium, France, parts of Switzerland, some municipalities in the Netherlands, and Spain and Italy to various degrees.<sup>102</sup> While some states seem to rely on the ECtHR case law when introducing burqa bans, the discussion below outlines why the decision is inapt to support a general face veil ban in public spaces—including public schools—in Germany.

The French situation which was the subject of the Court’s decision differs greatly from the German situation due to a diverging understanding of secularism in the two jurisdictions. The German Basic Law, in comparison to French law, is not based on *laïcité*, but on the fundamentally different principle of state neutrality.<sup>103</sup> Maayan suggests that the reason for the different concepts of secularism in France and Germany is that the secular political movement never had the same prominence in Germany that it did in France at the end of the nineteenth century.<sup>104</sup> While French *laïcité* is mainly characterized by the rigid separation between state and church placing religion exclusively in the private sphere, German state neutrality obligates the state to ensure that all individuals can exercise their respective religion in the private and public sphere and to treat all religions equally and impartially.<sup>105</sup>

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<sup>98</sup> See *id.* at para. 82.

<sup>99</sup> See *id.* at paras. 129, 131, 155.

<sup>100</sup> See *id.* at paras. 153, 157. On the concept of French *laïcité* and the relationship between France and its Muslim population, see Nanwani, *supra* note 25, at 1448.

<sup>101</sup> For analysis of the decision with further references, see Eva Brems, *SAS v France: A Reality Check*, 25 NOTTING. L.J., 58 (fn. 1) (2016).

<sup>102</sup> See *id.* at 58–59; *The Islamic Veil Across Europe*, BBC (Dec. 6, 2016), <http://www.bbc.com/news/world-europe-13038095>.

<sup>103</sup> See Christian Joppke, *State Neutrality and Islam Headscarf Laws in France and Germany*, 36 THEORY & SOC’Y 313, 327 (2007).

<sup>104</sup> See Maayan, *supra* note 7, at 24.

<sup>105</sup> See Joppke, *supra* note 103, at 327; Rohe, *supra* note 1, at 74.

A law banning face coverings in public spaces may be appropriate in the French context. Yet, as *laïcité* does not form part of the German constitutional tradition, the decision of the ECtHR has no direct application to Germany and is irrelevant for the purpose of interpreting the Basic Law in this context.<sup>106</sup>

#### D. Advisability of Burqa Bans in German Public Schools

Even if one assumed, for the sake of argument, that laws containing an absolute face veil ban for public school students were constitutional in Germany, it is unclear what benefits can be expected from such laws. The below critically analyses assumed advantages of burqa bans, while outlining associated risks and concludes that legislated bans for public school students, apart from being unconstitutional, are neither socially nor politically advisable.<sup>107</sup>

##### *I. Open Communication and the Hope of Integration*

Proponents argue that banning face veils is necessary to allow and enhance open communication in which the face of another is visible in all areas of life, including schools.<sup>108</sup> Especially in the school context, it has been contended that face veils hinder classroom interactions between students and teachers and between students and their peers.<sup>109</sup> Supporters of the face veil ban therefore argue that legal coercion to outlaw the burqa and niqab in public will enhance the integration of Muslim women in Western societies.<sup>110</sup>

As pointed out above, however, the introduction of laws allowing schools to expel niqab-wearing students affects younger students who are caught between their obligation to attend school without a face veil and their religious beliefs and family traditions. As such, the introduction of uncompromising black letter law would polarize the debate on face veils between affected religious minorities and the state rather than creating religious tolerance and fostering integration. It is unrealistic to expect that the introduction of legislation will ad hoc resolve any conflict or change attitudes in strictly religious families and groups

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<sup>106</sup> For the argument that the jurisprudence of the ECtHR on face veil bans in France does not translate to the situation in Germany, see also WISSENSCHAFTLICHER DIENST DES DEUTSCHEN BUNDESTAGS, ZUR VERFASSUNGSMÄßIGKEIT EINES VERBOTS DER GESICHTSVERSCHEIERUNG UNTER BESONDERER BERÜCKSICHTIGUNG DES URTEILS DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE VOM 1. JULI 2014 – AZ.: 43835/1, 14 (2014).

<sup>107</sup> Another argument frequently raised in support of Burqa bans in public involves security considerations. The issue of security will not be discussed in this Article as it is not relevant to the issue of burqa bans for public school students. For analysis, see Moors, *supra* note 69, at 403–04.

<sup>108</sup> See SAS, App. No. 43835/11, at para. 122 (on “living together”).

<sup>109</sup> See Cassandra Vogel, *An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools*, 78 BROOK. L. REV. 741, 774 (2013).

<sup>110</sup> See also Shaista Gohir, *The Veil Ban in Europe: Gender Equality or Gendered Islamophobia*, 16 GEO. J. INT’L AFF. 24, 26 (2015).

towards religious garments or the role of women in general. The opposite is likely the case. In the context of the 2011 French burqa ban in public spaces, de Feo points out that the French ban enhanced Islamophobia and contributed to the rise of Muslim extremists.<sup>111</sup> She explains that those who have left France to fight for the Islamic State, for example, have done so also because the burqa ban sent the message that “Islam was not welcome in France.”<sup>112</sup> According to Bouteldja’s research, some women in France who had not worn face coverings prior to the French ban adopted the niqab after its introduction as a protest measure against the French government.<sup>113</sup> Nothing suggests that law reform in this area in Germany would be more successful than it has been in France.

Gopher remarks regarding the UK that banning a small number of women from wearing face veils is unlikely to advance the integration of the majority of Muslim women as none of the barriers to integration—such as discrimination and unemployment—are addressed by a face veil ban.<sup>114</sup> It is equally unclear how a burqa ban in German public schools will foster the integration of Muslim women in Germany on the whole.

## *II. Saving Women and Their Dignity*

Another benefit associated with a face veil ban in public, including public schools, is creating gender equality and protecting women and their dignity.<sup>115</sup> The argument is based on the assumption that in Muslim countries such as Afghanistan, Saudi Arabia, and Iran, the face veil is worn to make women invisible in order to avoid tempting men. Allowing burqas or niqabs in western society, so the argument goes, means accepting the notion that women play an isolated role.<sup>116</sup> Many in Western society therefore consider the full-face veil as a symbol of gender discrimination and of a “particularly oppressive, inegalitarian, and patriarchal ideology.”<sup>117, 118</sup>

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<sup>111</sup> De Feo is a sociologist and a documentary film maker. She is quoted in Ben McParland, *Burqa Ban Five Year On-We Created a Monster*, THE LOCAL (Oct. 12, 2015), <http://www.thelocal.fr/20151012/france-burqa-ban-five-years-on-we-create-a-monster>.

<sup>112</sup> See *id.*

<sup>113</sup> See NAIMA BOUTELDJA, *AFTER THE BAN: THE EXPERIENCES OF 35 WOMEN OF THE FULL-FACE VEIL IN FRANCE 2* (2013).

<sup>114</sup> See Gohir, *supra* note 110, at 26.

<sup>115</sup> See Benito Alaez Corral, *Some Constitutional Thoughts About the Islamic Full Veil Ban in Europe*, 3 VIENNA J. INT’L CONST. L. 275, 301 (2013); Barker, *supra* note 23, at 201.

<sup>116</sup> As discussed in Gohir, *supra* note 110, at 25.

<sup>117</sup> See Cécile Laborde, *State Paternalism and Religious Dress Code*, 10(2) INT’L J. CONST. L. 398, 406 (2012).

<sup>118</sup> See Coral, *supra* note 115, at 301.

As Corral rightly points out, however, it is the decision of the individual Muslim woman whether wearing a face veil is improper for her and not up to a majoritarian culture.<sup>119</sup> Yet, proponents of the ban also assume that women do not have a genuine choice to wear a face veil, but are forced to do so by their husbands or other kin.<sup>120</sup> Requiring the removal of face veils by law, so it is argued, therefore liberates Muslim women. Moors describes these arguments as “variants of the colonial trope of ‘the oppressed Muslim woman’ who needs to be saved by an enlightened Western government from the pressures her male kin, husband, or the Muslim community at large exert on her.”<sup>121</sup>

While burqa and niqab do express an extremely conservative understanding of Islam and it may well be that some women in Europe are forced to wear the face veil, this cannot be generalized.<sup>122</sup> A qualitative study on women wearing face veils in Belgium published in 2015 by Brems et al found that the majority of women were not forced, but rather made the autonomous decision to wear their face veil.<sup>123</sup> Interviews conducted by Bouteldja with women who wear face veils in France and the UK found that their decision was multidimensional and dynamic and the decision was not based on hierarchical power structures.<sup>124</sup> Remarkably, Bouteldja identified that where parents did apply pressure to their children, it was applied to achieve the removal of the face veil and not the donning of the garb.<sup>125</sup>

In Germany, no official figures are available on the number of women who wear niqab or burqa, and no research exists on women’s reasons for doing so.<sup>126</sup> While the debate on burqa bans in Germany has become heated with even the German Chancellor, Angela

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<sup>119</sup> See *id.*

<sup>120</sup> As discussed in TATJANA HÖRNLE, DAS VERSCHLEIERTE GESICHT – GRUND FÜR STRAFRECHTLICHE VERBOTE?, Arbeitspapier des Fachbereich Rechtswissenschaft der Goethe-Universität Frankfurt/M., Nr. 8/2015, para 16 (2015); cf. Brems, *supra* note 101, at 62; Phyllis Chesler, *Ban the Burqa? The Argument in Favour*, 17 MIDDLE EAST Q. 33, 38 (2010).

<sup>121</sup> See Moors, *supra* note 69, at 402.

<sup>122</sup> See Gohir, *supra* note 110, at 26.

<sup>123</sup> See EVA BREMS ET AL, WEARING THE FACE VEIL IN BELGIUM; VIEWS AND EXPERIENCES OF 27 WOMEN LIVING IN BELGIUM CONCERNING THE ISLAMIC FULL FACE VEIL AND THE BELGIAN BAN ON FACE COVERINGS 5 (2012), <http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf>.

<sup>124</sup> See Naima Bouteldja, *France vs. England*, in THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 115, 131 (Brems ed., 2014).

<sup>125</sup> See *id.*

<sup>126</sup> Similarly, in France and Belgium no empirical research was available on the motives for wearing face veils prior to enacting the face veil bans and no attempt was made to consult with affected women. See Eva Brems, *supra* note 101, at 61.

Merkel, supporting a ban where legally possible,<sup>127</sup> the assumption that the removal of the burqa or niqab is necessary to protect and liberate women is only speculative. It would be necessary to hear from women who wear face veils in an effort to identify their motives, interests, and needs prior to enacting laws based on western notions and assumptions about religious minorities.

In addition, a law prohibiting face veils in public—including public schools—will do little to improve the actual situation for girls and women whether they wear face veils voluntarily or not. Women who wear face veils voluntarily and feel bound to do so in public for religious reasons are likely to leave school and miss social interactions and education in which they may have been able to partake with a face cover. Therefore, a ban is likely to suppress women's freedom, cause greater isolation, and leave affected Muslim women with a lower level of education.<sup>128</sup> A burqa ban will also not improve the situation of women who are forced to wear a face veil by their husbands or other male relatives because it is unlikely that these women will be allowed to attend school without said coverings.<sup>129</sup> Where men dictate women's clothing, a law is unlikely to change men's attitude towards women in general or promote gender equality.

Ultimately, legal coercion to unveil at school is likely to marginalize Muslim women further, drive them out of education institutions, and reinforce constricting domestic roles. For the emancipation of women, it may be more suitable—also from the standpoint of interethnic and interreligious relations<sup>130</sup>—to seek a dialogic approach in order to achieve attitudinal change towards the role of women and their rights in strictly religious Muslim communities in Western societies.<sup>131</sup>

### *III. Reducing Confronting Symbols*

Face veil bans in public are also supported on the basis that members of Western society—in the case of public schools other students, teachers, and parents who find face veils offensive—are spared any confrontation.<sup>132</sup> Regarding sensitivities toward Islamic garb, US

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<sup>127</sup> See BBC, *supra* note 102.

<sup>128</sup> See Nanwani, *supra* note 25, at 1459.

<sup>129</sup> See *id.* at 1460.

<sup>130</sup> Cf. arguments by Laborde, *supra* note 117, at 409.

<sup>131</sup> On the benefits of a dialogic approach in comparison to hard law in the context of human rights and LGBT people, see Kerstin Braun, *Do Ask, Do Tell: Where is the Protection Against Sexual Discrimination in International Human Rights Law?*, 29 Am. U. Int'l. L. Rev. 871 (2014).

<sup>132</sup> See Bijan Fateh-Moghadam, *Religiös-weltanschauliche Neutralität und Geschlechterordnung: Strafrechtliche Burqa-Verbote zwischen Paternalismus und Moralismus* 21 (Center for Religion and Modernity, 2013),

college students interviewed on the matter stated that the religious symbols of their classmates—including burqas—made them feel “very sad,” “pushed away,” and “uneasy about talking to them.”<sup>133</sup> Chesler describes a face veil as “demoralizing and frightening to Westerners of all faiths.”<sup>134</sup>

Some in western society do not want to see the face veil in public as they consider it a symbol of non-integration.<sup>135</sup> Brems states, however, that such an understanding is a strictly outsider interpretation and not intended by niqab or burqa wearers.<sup>136</sup> Others believe the face veil to be a symbol of discrimination even if worn voluntarily. Laborde, for example, compares the voluntary wearing of face veils with the notion of a “contended slave.”<sup>137</sup> She therefore ponders the question of whether this gives the state the right to ban face veils by law.

As Fateh-Moghadam rightly points out, however, the negative feelings of certain members of Western society towards face veils are insufficient to justify a legislative ban.<sup>138</sup> Ultimately, such a ban simply pushes the religious morals of a country’s majority onto the remainder of society and aims to protect an “imaginary Leitkultur.” This, however, is not in accordance with the principle of state neutrality.<sup>139</sup> In addition, the Basic Law affords individuals religious freedom irrespective of whether the majority agrees with their religious views. The negative feelings some in society may harbor towards the face veil are therefore irrelevant in this context.

#### *IV. Symbolic Message*

Some argue that a law banning burqas in public spaces including schools, whether it has any practical application, conveys an important message. German politician Jens Spahn, for

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[https://www.unimuenster.de/imperia/md/content/religion\\_und\\_moderne/preprints/crm\\_working\\_paper\\_2013\\_02\\_fatehmoghadam.pdf](https://www.unimuenster.de/imperia/md/content/religion_und_moderne/preprints/crm_working_paper_2013_02_fatehmoghadam.pdf).

<sup>133</sup> See Chesler, *supra* note 120, at 44.

<sup>134</sup> See *id.*

<sup>135</sup> See Brems, *supra* note 101, at 64.

<sup>136</sup> See *id.*

<sup>137</sup> See Laborde, *supra* note 117, at 406.

<sup>138</sup> Considering justifications for a Burqa ban from the criminal law perspective, see Fateh-Moghadam, *supra* note 131, at 22.

<sup>139</sup> See *id.*

example, is reported saying that laws enacting a burqa ban in Germany are necessary to send the clear message to the world that European values are non-negotiable.<sup>140</sup>

A burqa ban sends the message that strictly religious Muslims are not welcome in Germany. It is unclear what can be gained from such a message. It certainly cannot be expected that terror attacks will no longer occur in Germany because a potentially small number of girls and women are banned from wearing face veils in public. While the benefits of this symbolic law are uncertain, the associated risks are real. As pointed out above, the law contributes to the stigmatization of religious minorities and can be perceived as the undesired involvement of cultural outsiders in affairs of cultural insiders. As such, it has the potential to contribute to the polarization of the issue causing affected minorities to take up increasingly more extreme positions. In conflict situations, trust and respect for the opponent are likely to diminish which may ultimately contribute to the radicalization of Islam.

On a different note, it needs to be remembered that laws should be enacted only to regulate the functioning of society, not to create symbolism.<sup>141</sup> Enacting laws merely to express a general political attitude holds the risk of devaluing the rule of law in a democratic state like Germany.<sup>142</sup>

The above has shown that none of the arguments raised in favor of face veil bans in German public schools withstand close scrutiny. The passing of black letter law may in fact hinder integration more than allowing a potentially small number of girls and women who wear niqab to receive a public-school education ever could.

## E. Conclusion

At the time of writing, no provisions exist specific enough to prohibit public school students to wear face veils. That means *de lege lata* no student who wears a face veil for religious purposes can be expelled or denied placement at a German public school on this basis.

Nevertheless, calls for burqa bans in public places—including schools and other public buildings in Germany—continue to be made with increasing intensity. Numerous German

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<sup>140</sup> See Jens Spahn cited in Claudia Kade & Thomas Vitzthum, *Ein Verbot ist überfällig. Ich bin Burqaphob*, DIE WELT (Jul. 30, 2016), <https://www.welt.de/politik/deutschland/article157398148/Ein-Verbot-ist-ueberfaellig-ich-bin-Burqaphob.html>.

<sup>141</sup> In the context of enacting laws specifically penalizing forced marriages in Germany, see Kerstin Braun, “I Don’t Take This Man to Be My Lawfully Wedded Husband”: Considering the Criminal Offense of “Forced Marriage” and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany, 16 GERMAN L. J. 846, 864 (2016).

<sup>142</sup> In the context of forced marriage laws, see *id.*

politicians have positioned themselves on both ends of the spectrum.<sup>143</sup> Therefore, legal reform in this area may occur in Germany in the not too distant future. This Article argued that laws containing an absolute face veil ban for public school students are disproportionate and therefore unconstitutional. Laws that allow the removal of face veils as a last resort on a case by case basis where a concrete danger for the school peace arises, however, appear in line with the Constitution.

Even if one could be moved to argue, contrary to the views in this Article, that the introduction of an absolute face veil ban at public schools in Germany is constitutional, it does not follow that passing said laws is politically or sociably advisable. The anticipated benefits such as further integrating female Muslims in Western society, saving women from oppression, and enhancing emancipation are unlikely to be gained by preventing a potentially small number of girls and women who wear niqab from attending classes. A burqa ban does not even address the real obstacles to integration such as discrimination and unemployment.

The laws may, however, reduce the number of face veils and respectively, what some consider, confronting symbols in the public sphere and deliver a symbolic message. Yet, protecting the sensitivities of members of German society and using the law as a political tool by legally coercing girls and women to remove their face veil comes at a high cost. The law stigmatizes female Muslims and requires them to choose between an education and what they consider religiously binding obligations. Given that no figures exist on the number of women wearing burqa or niqab in Germany, it is unclear whether many or few women will be affected by a face veil ban. Yet, even if very few women were actually affected, passing a law would nevertheless remain a risky undertaking due to its symbolic message. A law banning face veils in schools or elsewhere sends the message that Muslims who choose to dress in a strictly traditional way, or possibly all Muslims at all, do not belong in Germany. Laws like these, while they may have little practical application, have the power to create an “us” against “them” mentality, hinder integration, and potentially contribute to the radicalization of Islam.

Constitutionality aside, it is important to avoid introducing absolute face veil bans for public school students to hinder the polarization of the issue and to put a stop to any anti-Islam hysteria in a multicultural society such as Germany. Ultimately, using dialogue with other students, teachers, and parents aimed at fostering tolerance for religious diversity and deciding on a case by case basis whether a student can attend school with a face veil without disrupting the school peace appears an overall more flexible and less intrusive approach.

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<sup>143</sup> Many politicians belonging to the conservative Christian Democratic Party and Christian Democratic Union (CDU/CSU) including current Chancellor Angela Merkel are supporting a burqa ban where legally possible. See Adam Taylor, *Germany's Potential Burqa Ban Has a Problem: Where are the Burqas?* WASH. POST (Dec. 6, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/08/19/germanys-potential-burqa-ban-has-a-problem-where-are-the-burqas/?utm\\_term=.7ec7b2e88b89](https://www.washingtonpost.com/news/worldviews/wp/2016/08/19/germanys-potential-burqa-ban-has-a-problem-where-are-the-burqas/?utm_term=.7ec7b2e88b89).