RESTRICTING FREEDOM OF RELIGION BY VIRTUE OF CHURCH-STATE RELATIONS: SOME THOUGHTS ON THE GERMAN AND FRENCH APPROACHES

Stephie Fehr

Part-Time Lecturer in Law
School of Law
Metropolitan University of Manchester.

Resumen: Durante los últimos años, los ordenamientos jurídicos alemán y francés han adoptado un modelo de relación Iglesia-Estado que han limitado el pleno disfrute de la libertad religiosa de los ciudadanos. El objeto de este trabajo consiste en mostrara algunas de las deficiencias ambos sistemas, mediante el análisis contrastado de las decisiones dictadas por los órganos judiciales de ambos países sobre el uso del velo islámico, a la luz del contenido de los avances legales y jurisprudenciales en esta materia en Reino Unido y en la Unión Europea.

Abstract: This paper suggests that during recent years, German and French laws have availed themselves of church-state relations inappropriately, as an argument to delimit the scope of the right to freedom of religion. With the aim to show the shortcomings of the approaches in question, the paper will highlight the so-called headscarf debates in both jurisdictions. The respective involvement of secularism as an argument in the debates will be contrasted to advances from the European Union and the United Kingdom.

Key words: Church-State relations, secularism, Freedom of religion, German Law, French Law.

Palabras clave: Relaciones Iglesia-Estado, laicidad, Libertad religiosa, Derecho alemán, Derecho francés.

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1. INTRODUCTION

All European Union Member States recognise a basic right to religious freedom and to non-discrimination on grounds of religion,[1] however, there are within these states, differences regarding the extent to which protection is afforded to this right. The same as any other human right in a democracy, freedom of religion ought to be restricted only under limited circumstances. For instance, under the Employment Framework Directive,[2] the legitimate reasons for religious discrimination in employment, are measures under national law that are necessary in a democratic society for "public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others".[3] Another situation allowing for religious discrimination is, if religion amounts to a "genuine and determining occupational requirement"[4]. In contrast, recent debates in the courtrooms and parliaments of some European jurisdictions colourfully illustrate, how restrictions to religious

[1] Hereafter, the term "freedom of religion" is to be read as inclusive of the right not to be discriminated against on the basis of one's religion.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and education, OJ-L 303/16.

[3] Article 2(5) of Directive 2000/78/EC.

[4] Article 4(1) of Directive 2000/78/EC; in addition, Article 4(2) of Directive 2000/78/EC purveys specific rules for employment within an entity with a "religious ethos", an area not within the ambit of this article.

freedom can be held justified due to an alleged incompatibility of the exercise of the right with the domestic relationship between church and state. Religious freedom has therefore been restricted based on the argument that a particular religious practice is not compatible with the separation of church and state, both in Germany and in France. Accordingly, this paper will examine whether church-state paradigms are under all circumstances suitable for limiting fundamental rights, considering that as such, this strategy has not been criticised so far. Within the selected disputes, opinions arguably tend to surface on grounds of imagined, rather than demonstrable facts, for instance, misunderstood historical underpinnings for the church-state framework. In addition, a particular difficulty seems to exist with regard to the acceptance of religious practice of minorities: due to a low level of awareness in relation to the precepts of minority denominations, arguments based on generalisations or personal perceptions occur and may be uncritically accepted as irreconcilable with state neutrality. Such outcomes entail the danger of impairing opportunities of minority group members in employment, education and other participation in public life, and thus have the potential to increase their marginalisation.

This paper centres on two topical debates in Germany and France and thus comprises two distinct sections, respectively detailing first, the model of church-state relations and second, cases in which the separation between church and state has produced arguments that were applied to limit religious freedom. The chosen debates advanced from a personal display of religious insignia in public sector employment in German and in French schools. In both scenarios, the principle of secularism found an interpretation that specifically affected the religious freedom of those following minority religions. The situation in Germany and France will be compared to corresponding cases from the United Kingdom, in order to offer alternative solutions. Finally, the French and German systems of utilising church-state relations within controversies on freedom of religion are placed in the light

of the states' membership in the European Union. Albeit the French debate concerns the rights of pupils in school education and is thereby outside the competence of the European Union, this perspective offers further thoughts on the link between church-state relations and freedom of religion.

2. SECULARISM AND PUBLIC SERVICE EMPLOYMENT IN GERMANY

German public sector employment is characterised by a number of privileges that, although currently decreasing, significantly exceed those of most employees in the private sector. In this respect, one could argue that the special rights of those working in the private sector can legitimately require a plus in duties towards the state as an employer, including the participation in the promotion of church-state relations. On the other hand, one could equally demand that the conditions of public sector employment needs to be strictly compliant with the state's Constitution, to the effect that employees can adequately enjoy the human rights enshrined therein. If both standpoints cannot be reconciled, the focus could be either way. Ultimately, the role of the state as an employer creating the content of rights, can amount to a powerful signal to the citizens. The state's conduct then has the potential to reflect its general attitude to other, not necessarily related issues. In the case of exercise of religious freedom, the state's tolerance, prohibition or encouragement of religious practice may mirror policies on integration, inclusion and diversity.

2.1 GERMAN SECULARISM: *NEUTRALITÄT*

In Germany, state and church are connected through a number of provisions, the most important of which are to be found in the Constitution. The preamble of the Constitution reads: "Being aware of the responsibility before God and the

people, willing to serve world peace as an equal element of a united Europe, the German people have provided themselves with this Constitution through the legislative power."[5] This reference to "God" may be seen as symbolic and in any case it is not devoid of the historical backdrop of the German Constitution.[6] According to *Menendez*, this choice of wording "could be understood as proper even by non-believers, as some kind of yardstick of individual and collective responsibility" after the holocaust.[7] Regardless of the underlying reasoning, the inclusion of the term "God" is at least a recognition of the monotheist faiths and as such not a reference to Christianity or a particular religion – potentially even being inclusive of any faith..[8] Hence the notion does not indicate a preference for a particular church or religion. Furthermore, there is no mention of "God" within the legally binding provisions of the Constitution, so that the notion in the preamble may indeed be a blanket expression.

The rules governing church-state relations of the Weimar Republic[9] were literally incorporated in the current Constitution, since the experience with the relevant articles had been positive.[10] Article 137(1) of the Weimar Constitution prohibits an official church or religion.[11] This ban of an established church expresses a fundamental separation of church and state. It is this rule that officially makes Germany a secular state and it thus forms the

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[5] This and subsequent translations are the author's.

[6] MENENDEZ, A.J., "A pious Europe? Why Europe should not define itself as Christian", in European Law Review, Vol.30, 2005, pp.133-148, at p.142.

[7] Ibid.

[8] Considering that also polytheists may refer to 'God" meaning the main God or a more general spiritual concept.

[9] The Weimar Republic was in place between in 1919 and 1933, i.e. in between the regimes accounting for the two world wars.

[10] HESSELBERGER, D., Das Grundgesetz, 13th ed., BZPB, Bonn, 2003, p.384.

[11] Since religion and non-religious belief are equated in Article 137(7), the prohibition extends to the state identifying itself with other belief systems.

cornerstone for the duty to neutrality and equality in religious matters.[12] The right to self-determination of churches is embedded in Article 137(3) of the Weimar Constitution and grants a strong and independent position to churches. The same provision further details that the state cannot participate in the nomination of church officials and that the legal status of churches is ordained under private law.[13]

However, this is not where the benefits held by German religious groups end. Article 19(3) of the German Constitution grants constitutional human rights to national legal persons as far as these rights are applicable by their nature. In this way, churches that have gained public corporation status can claim certain human rights.[14] The importance of this status lies in the fact that only public corporations can require the state to impose taxes on their behalf.[15] Additionally, these organisations can apply for a non-for-profit classification, which results in partial tax-exemptions. Hence achieving an official status may have a considerable impact on the sustainability und success of religious undertakings. An associated problem is that this status is subject to conditions, which cannot be fulfilled by all religions due to their specific nature. Accordingly, there has been criticism, as to the German state favouring some religions, in this case the Christian and Jewish faith, over others.[16] *Ahdar* and *Leigh* even view the modern day German model as a *de iure* "diluted form of quasi-establishment, due to the fact that the three main historical religious communities – Evangelical, Catholic and Jewish – are public corporations and qualify for support pursuant to the church

[12] *See* n.10 *supra*, p.388.

[13] *See* Articles 137(4) and 137(5) of the Weimar Constitution.

[14] *See* n.10 *supra*, p.176.

[15] Article 137(6) of the Weimar Constitution.

[16] *See* n.10 *supra*, p.389

tax".[17] No matter how German church-state relations are categorised, it certainly appears that the *Neutralität* infused in the Constitution strives to protect religious entities from state interference, rather than *vice versa.*

This take on German state neutrality is partially validated by *Hesselberger*, who considers the existence of churches as public corporations as a historically induced reality is a striking example of the difficulty of separating church and state in practice.[18] In spite of the official character of a public corporation and the privileges attached to the status, the German system nonetheless aims at strengthening independence and the original authority of the churches.[19] The constitutional provisions thus do not relegate churches to the private sphere, but accept their original public mandate.[20] Although state and church are theoretically separated in Germany, this separation is not implemented strictly: space is left deliberately for elements of connection and cooperation.[21] Due to the existing indirect facilitation of religious communities by virtue of the above support mechanisms, I argue that German law even more so needs to contain effective and clear elements of non-discrimination on grounds of religion, in order to achieve neutral conduct towards all religions. Whereas this may seem obvious, the subsequent set of cases seems to indicate otherwise.

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[17] AHDAR, R., and LEIGH, I., Religious Freedom in the Liberal State, OUP, Oxford, 2005, p.80; today nevertheless at least Islamic groups have also achieved corporation status relevant the above constitutional provisions.

[18] *See* n.10 *supra*, p.389.

[19] BVerfGE 30, 428.

[20] *See* n.10 *supra*, at p.385.

[21] ANDERSEN, U., and WOYKE, W., Handwörterbuch des Politischen Systems der Bundesrepublik Deutschland, 4th ed., BZPB, Bonn, 2000, p.258; and n.10 *supra*, p.385; examples are religious education at schools, Sunday as a day of rest, faculties of theology at universities and pastoral care in the military.

2.2 *DER KOPFTUCHSTREIT*[22] – RELIGIOUS FREEDOM IN PUBLIC SECTOR EMPLOYMENT

The point that the German state is to be religiously neutral has been used in a number of cases, concerning teachers who wear a headscarf for religious reasons. Since education is a matter of *Länder* competence,[23] these cases resulted in differing outcomes and finally, all the *Länder* changed their relevant legislation. Two of the cases will be highlighted here.

In the first case, an administrative court in Lüneburg ruled in favour of a Muslim schoolteacher who wished to wear a headscarf for religious reasons.[24] The Lüneburg court reached the conclusion that there is no general right of teachers to wear religious symbols, however, in this particular case no reason was found justifying a restriction to the teacher's right to freedom of religion. In its judgment the court regarded several aspects to great detail and found substantial scholarly support thereafter.[25] In terms of state neutrality the ruling clarified that the premise of neutrality does not intend to make teachers absolutely neutral since that would mean to exclude them from having opinions on moral questions.[26] This line of reasoning was derived from the

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[22] Literally meaning "the headscarf debate", a term frequently used in the German media to refer to the judgments analysed hereafter.

[23] Since Germany is a federal state, some areas of jurisdiction are allocated to the single countries, the *Länder*.

[24] VG Lüneburg,16 February 2000, (2001) NJW 767; however this judgment was later overturned by OVG Lüneburg, 13 February 2002, 2 LB 2171/01, to the effect that the teacher could not continue to work whilst wearing a headscarf.

[25] BÖCKENFÖRDE, E.-W., "'Kopftuchstreit' auf dem richtigen Weg", in Neue Juristische Wocheschrift, 2001, p.724.

[26] Moreover the court held that teachers ought to balance respective moral viewpoints by showing mutual acceptance and tolerance in line with the Constitution VG Lüneburg, (2001) NJW 767, p.768.

educational goals established by the Lower-Saxony School Act.[27] The judgment also mentions that teachers, who in the course and due to the nature of their work inevitably provide an individualised contribution, cannot be compared to fixing Christian crosses in classrooms, which is outlawed and often used as an argument in favour of also banning headscarves. In this context, *Britz* mentions that pupils can distinguish between a teacher wearing a religious symbol and this not being a symbol of the state, unlike crosses being attached to a public building.[28] In accordance with the Lüneburg court's ruling, headscarves and other items that identify teachers' denominations are compatible with the judges' perception of the neutral state.

The more known case, which broke loose the so-called headscarf-debate in Germany as a major media event, was the one of the teacher Fereshta Ludin. When this case came before the Federal Administrative Court,[29] the point of neutrality as a marker of secularism was clarified: as a result of the broad scope of the right to freedom of belief, the principle of state neutrality was deemed to require enhanced protection. The judges issued that due to the principle of neutrality, the state may neither influence in a religious way, nor identify itself with a particular religious community. On these grounds the court favoured the school's stance that a prohibition of a headscarf was legitimate. Albeit not explicitly stated, teachers in their role as civil servants

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[27] For instance, educational goal number 4 states that pupils must be enabled to comprehend and support the idea of international cooperation as well as to live together with individuals from different national or cultural backgrounds.

[28] BRITZ , G., "Das verfassungsrechtliche Dilemma doppelter Fremdheit: Islamische Bekleidungsvorschriften für Frauen und Grundgesetz", in MÜLLER-MAGDEBURG, C., (ed.), Unsere Aufgaben im 21. Jahrhundert, Festschrift für LM Peschel-Gutzeit, Nomos, Baden-Baden, 2002), p.96; similarly CZERMAK, G., "Kopftuch, Neutralität und Ideologie", in Neue Zeitschrift für Verwaltungsrecht, 2004, 943, p.944.

[29] BVerwGE 116, 359 (4 July 2002).

were thus clearly seen as a state representing authority. Explaining the prior point, the court issued that because of the state's role in having to take into account a range of opinions of the parents, as well as a pluralistic society with a growing number of pupils without religious denomination, it was necessary to ensure state neutrality more than previously.[30] Detailing the extent of the effect of a headscarf on neutrality, the judges submitted that it is a symbolic expression of Islamic faith to others and that in the context of state schooling, the headscarf of a teacher results in the pupils continuously and inevitably being confronted with an obvious symbol of a particular belief during the lessons.

This judgment received some applause, amongst other reasons for the argument that a headscarf is not reconcilable with the neutrality,[31] but also considerable criticism:

With regard to potential violations of state neutrality, it is argued that the Court opted for an understanding of neutrality that contradicts former rulings of the Federal Constitutional Court:[32] A considerable number of scholars accentuate that neutrality in general cannot only be defined as separating the state from churches, but also as an open concept with a mere creation of a distance, leaving space for pluralistic inclusion of the diversity of opinion in fact prevalent in the school sector.[33] Another factor

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[30] This was a counterargument to the teacher's claim that the diverse cultural, ethnical and religious manifestations are already part of school life.

[31] BERTRAMS, M., "Lehrerin mit Kopftuch? Islamismus und Menschenbild des Grundgesetzes", in Deutsches Verwaltungsblatt, Vol.113, 2003, 1225, p.1234; IPSEN, J., "Karlsruhe locuta, causa non finita", in Neue Zeitschrift für Verwaltungsrecht, Vol.22, 2003, 1210, p.1212; POFALLA, R., "Kopftuch ja-Kruzifix nein?" in Neue Juristische Wochenschrift, 2004, 1218, p.1219.

[32] As found in BVerfGE 41, 29 and BVerfGE 41, 65.

[33] GERSTENBERG, O., "Germany: Freedom of conscience in public schools", in International Journal of Constitutional Law, Vol.3, 2005, 94, p.98; BRITZ, G., n.28 *supra*, p.96; CZERMAK, G., n.28 *supra*, p.945; DEBUS, A., "Machen

assisting this view, is that teachers commencing their first post formally swear by the Constitution that they will respect it, in addition to there being sanctions in place should this ever be disregarded. Consequently it is suggested that there ought to be no doubt as such as to the compliance of a teacher wearing the headscarf with the constitutional values such as state neutrality.[34] This is in line with numerous others, who demand evidence to the effect that the teacher did not abide by her duty of upholding neutrality.[35] *Gerstenberg* also sees a misconception, in that occidental traditions and beliefs do not seem to interfere with the neutrality of the state and are thereby more acceptable than the ones originating from outside of Europe.[36] His view is worthy of further investigation, considering that there have not been any claims by teachers who were prevented from wearing a Christian cross, this being a potential indication for an absence of discriminatory practices to the detriment of the religious majority. It is added that the headscarf is only the expression of Ludin's own faith and that it is the right of teacher to have a denomination. This right cannot be sacrificed for the concept of neutrality, which is not even explicitly found in the Constitution.[37] Correctly, it is also stated that a headscarf is furthermore not even a central symbol of a faith.[38] In addition, a headscarf worn for religious reasons follows the purpose of modesty and is thus intrinsically linked to the internal dimension

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Kleider wirklich Leute – Warum der 'Kopftuch-Streit' so spannend ist", in Neue Zeitschrift für Verwaltungsrecht, 2001, 1355, p.1358.

[34] *Gesetze gegen Kopftücher*, www.br-online.de/bayern-heute/artikel/0311_kabinett/ (15/12/2004).

[35] *See* BRITZ, G., n.28 *supra*, p.96; CZERMAK, G., n.28 *supra*, p.944.

[36] *See* GERSTENBERG, O., n.33 *supra*, at p.92.

[37] MORLOK, M., and KRÜPER, J., "Auf dem Weg zum'forum neutrum'? – Die Koftuch-Entscheidung des BVerwG", in Neue Juristische Wochenschrift, 2003, 1020, p.1021.

[38] CZERMAK, G., n.28 *supra*, p.944.

of religious worship. Despite the prohibition of the headscarf seemingly affecting an outward manifestation of belief, any ban consequently also results in simultaneous restrictions to the forum internum. Therefore the interference with the individual's right to freedom of religion is much more severe than in cases, where the target of the limitation is the central sign of a religion, such as a cross, crescent, or David's star. In its weighting of interests at stake, the Federal Administrative Court appears to have ignored this aspect of the headscarf. Due to the fact that a distinction between a headscarf and other religious symbols was not made in the decision, one may conclude that the judges were either not aware of the full spiritual features of the teacher's headscarf, or that this was conveniently disregarded to focus the attention on the aspect of church-state relations as a restrictive force.

After having been rejected by the Federal Administrative Court, Ms Ludin filed a constitutional complaint at the Federal Constitutional Court against the judgment.[39] This action comprised the claim that the school authority had infringed some of her constitutional rights, in particular, her freedom of religion,[40] her right to dignity,[41] and the right to equality before the law.[42] The Federal Constitutional Court held in favour of Ludin that the Federal Administrative Court's ruling was ill founded, for the reason that there was no legal basis to request the teacher to enter school without a headscarf, in the absence of which fundamental rights cannot be restricted. Notably, the three dissenting judges argued that a headscarf was not to be permitted for teachers since it violated the neutrality of the state. In comparison, they said, the Christian cross was seen as merely an "everyday item" and "a general sign of culture ... that has

[39] BVerfGE 108, 282 (24 September 2003).

[40] Article 4 of the German Constitution.

[41] Article 1 of the German Constitution.

[42] Article 3 of the German Constitution.

developed tolerance".[43] This statement illustrates the division in opinion throughout the legal community, as well as the fact that once again, church-state relations were deemed a decisive reason to delimit freedom of religion.

As a result of this judgment, the *Länder* parliaments were prompted to reconsider their approach to the headscarf issue. The first *Landes*-government to change its school act was the one of Baden-Württemberg. It now has a provision prohibiting state schoolteachers from showing any political, religious, or ideological convictions that can interfere with the neutrality of the state. Strikingly, a rule was also included that displays of Christian and other occidental beliefs are not to be considered contrary to the law.[44] Far less clearly, the state of Lower Saxony altered its school act in as such as it now requires teachers to adjust their appearance in a manner that "reflects without a doubt that they transmit the state's educational values".[45] The states of Hessen and Berlin now generally exclude the exposure of religious insignia by public service employees, with the restriction in the case of Hessen that Christian and Western traditions enjoy some additional freedom.[46] Declaring that anything hostile to occidental traditions is not allowed in state schools, the Saarland parliament disseminated an act that clearly hints at headscarves being categorised as endangering the 'general school peace'. As these examples show, some of the school acts are effectively only in favour of religious neutrality as long as it is convenient for the majority of citizens.

Hence the question suggests itself, whether these school acts themselves are compatible with the German Constitution. The Baden-Württemberg and Hessen school acts are, due to the

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[43] *See* n.39 *supra*.

[44] Section 38 (2)(3) Schulgesetz BW.

[45] Section 51 (3) Schulgesetz NS.

[46] Section 86 (3) Schulgesetz Hessen.

direct discrimination against adherents to religions perceived as non-Western, likely to fall short of standards set by Articles 3 and 4 of the Constitution, as well as of the principle of neutrality of the state. However, the legality of the school acts that prohibit the visualisation of any religious affiliation, including Christian, again depends on the interpretation of neutrality of the state. Referring back to the findings regarding *Neutralität*, the impression reoccurs that the required non-interference on behalf of the state can either mean abstinence from impairing the teacher's right to religious liberty, or prevention of any religious emanations in a state endorsed environment. The constitutional provisions focussing on support to faith communities propose a tendency towards the former alternative.

Since the Federal Constitutional Court did not clarify this point in the *Ludin* decision, previous judgments may provide further assistance in interpreting *Neutralität*. About a decade prior to the *Ludin* ruling, this Court had expressly stated that freedom of religion included the right to make use of religious symbols oneself and, as a counterpart, the freedom necessarily did not comprise a right of not being confronted with religious manifestations of others, with the exception of situations facilitated by the state, in which the individual has no alternatives to escape.[47] The Court added that the state, in which adherents to different, or even contradicting religions coexist, can only guarantee peaceful coexistence, if it is itself neutral towards questions of beliefs.[48] Notably, this decision dealt with Christian crosses attached to the classroom walls in state schools and came

[47] "Kruzifix-Urteil", BVerfGE 93, 1 at paragraphs 15, 16.

[48] Ibid; in this ruling, the Federal Constitutional Court confirmed the reasoning applied in the 1970s referring to Christian crosses in courtrooms, BVerfGE 35, 366; interestingly, the dissenting judges in the "Kruzifix-Urteil" also argued that Christian crosses are not religious, but occidental cultural symbols, see "Abweichende Meinung der Richter Seidl und Söllner und der Richterin Haas zum Beschluss des Ersten Senats vom 16. Mai 1995" in 1 BvR 1987/91.

to the conclusion that this practice was irreconcilable with the neutrality of the state.

Contemplating on the statements made by the Court, one could on the one hand argue that teachers and civil servants impose their non-neutral looks on pupils and service users, just as the crosses in the classrooms. On the other hand, since the attachment of religious symbols to a public building can be considered to be a stronger and clearer link to the state as a whole, one ought to favour the position that this judgment cannot simply be transferred to the situation, in which an individual working for the state reveals their denomination. The second view can also find support in the judgment itself, as it mentioned that it is particularly the order made by the state to place the crosses on the walls, which amounts to partiality of the state towards the Christian faith.[49] Such an order made by the state can clearly not be identified in the case of a single teacher wearing a headscarf. Correspondingly, the teacher's headscarf would not reflect a partiality of the state towards Islam. As a result, the Federal Constitutional Court would possibly view headscarves as compatible with state neutrality. Since this outcome is contrary to some of the school acts, a clarification on this matter will depend on future challenges targeting these statutes.

2.3 COMPARATIVE PERSPECTIVES FROM THE UNITED KINGDOM: THE *AZMI* CASE

Cases dealing with religious dress in employment in the United Kingdom, have centred on restrictions held legitimate based on health, safety and uniform policies. Currently, there has been no debate on the legitimacy of headscarves worn by teachers or other public sector employees in this jurisdiction. A judgment that is nevertheless suitable to be distinguished from the above

[49] BVerfGE 93,1 at paragraph 28.

German cases dealing with religious freedom is the one of *Azmi* v. *Kirklees Metropolitan Borough Council*,[50] which also received widespread media coverage. This is a rare case in that it was found that carrying out a profession was physically impossible whilst wearing religious dress. Ms Azmi was employed as a teaching assistant by a primary school authority and was suspended on the basis that she wore a *niqab*.[51] Both the Employment Tribunal and the Employment Appeals Tribunal found indirect discrimination on grounds of her religion, however, the measure to suspend her was considered justified, concluding that the teacher's ability to show her facial expression was a genuine occupational requirement, according to Section 7 of the 2003 Employment Equality (Religion and Belief) Regulations. This outcome was achieved after comprehensive collection of evidence. This revealed that Ms Azmi was primarily engaged as a language assistant, since approximately 90% of the pupils had a mother tongue other than English, of which most required help accordingly. Consulted experts pointed out that face and mouth are especially important communicative means for children with language difficulties, the benefit of which was prevented by the teacher's *niqab*. Since Ms Azmi's suspension was entirely due to her inability to show her facial expressions to the children, the school was deemed to have acted legitimately. In contrast to the German headscarf cases, this example shows that a decision can be reached solely by virtue of facts. The Employment Appeals Tribunal hearing the *Azmi* case abstained from any subjective interpretations regarding the scope of freedom of religion and emphasised instead purely functional aspects relevant to the profession at stake.

[50] [2007] IRLR 484 (EAT).

[51] A piece of cloth, covering the complete face, except for the eyes.

3. SECULARISM AND RELIGIOUS FREEDOM IN FRENCH STATE SCHOOLS

In France, recent legislation prohibits minors from wearing religious attire at school[52] and one of the main points of justification for this statute was the perpetuation of *laïcité*, the principle describing the relationship between church and state in France.

3.1 FRENCH SECULARISM: *LAÏCITÉ*

The relationship between church and state in France is based on the concept of *laïcité*, which in itself was one of the key elements of the French Revolution in 1789 and thus originally relates to the specific separation between the monarchy and the Catholic Church at that time in history.[53] Until 1789, the Catholic clergy had a veto and control in all areas of public powers, so that their influence was immense.[54] In 1791 the notion *laïcité* was incorporated into the first Constitution of the French Republic to mark the separation of church and state, complemented with a principle of non-discrimination on grounds of *inter alia* religion.

Nowadays *laïcité* is still regarded as one of the core principles of the French Republic in the preamble of the constitution alongside with, for instance, democracy. Article 1 of the Act of 1905 on the separation of church and state,[55] which is still in effect today, reads as follows: "The Republic ensures the

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[52] Loi du 15 mars 2004 sur les signes religieux à l'école publique, hereafter: the *2004 Act*.

[53] KNIGHTS, S., Freedom or Religion, Minorities and the Law, OUP, Oxford, 2007, p.15.

[54] BAUBEROT, J., Histoire de la laïcité en France, 4th ed., PUF, Paris, 2007, p.4.

[55] Loi du 9 décembre 1905 concernant la separation des Eglises et de l'Etat, J.O. December 11, 1905, p.7205 and the amended version: http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm.

liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order. Article 2 continues: The Republic does not recognise, remunerate, or subsidise any religious denomination."[56] According to the text of these two sections, there are no recognised religions. Theoretically this leads to a levelling of all existing religions in the political and legal sphere and religion is hence not as such a public matter.[57] The background to 1905 Act is vital, since arguments in court to restrict freedom of religion are often based on its provisions. It is pointed out that the statute aimed at a legal reorganisation of the French church devoid of papal involvement, and it was this initial deep aversion to Rome effecting that church and state could no longer produce rules binding on the other.[58] Therefore it is convincing that the 1905 Act did not pursue to move religion away from the public to private life, but that the law's aim was to avoid religious discrimination and to overcome state interference with church affairs.[59] Complementing this line of arguments, *Errera* adds that the law's goal was to abolish the special status of the Catholic church held prior to its enactment.[60] Unlike, for instance, in the US, where church and state were separated with the aim to facilitate inner peace amongst the adherents to all denominations, French secularism thus targeted the anti-republican forces

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[56] Translation of ROBERT, J., "Religious Liberty and French Secularism", in Brigham Young University Law Review, 2003, pp.637-660, p.637.

[57] Ibid., at p.640.

[58] BRULEY, Y., Conference Proceedings, in FRASER, M., (ed.), Religion and the State - Common and Divergent Issues in Britain and France, London, 2005, p.7.

[59] Ibid., p.8.

[60] ERRERA, R., Conference Proceedings, in FRASER, M. (ed.), *see* n.58 *supra* at p.8.

exercised by the Catholic church in the 19th century.[61] Hence, the Act of 1905 dealt with problems of that particular era and determined rights as regards goods and property for the religions existing in France at the time. Therefore these religions now have advantages over other denominations.[62] Although the 1905 Act ended subsidies paid to the Catholic church of 40 million Francs annually,[63] and church properties fell in the ownership of the state, the latter are still available to the church without charge.[64] Since the Act of 1905 could in the absence of other faiths not take into account their practical needs, such as affordable premises, reconsideration may be a reasonable option.[65] *Robert* calls for a corresponding reapplication of these ideas in the spirit of the Act of 1905 without detriment to secularism, but taking into account the changes in the demographic composition in relation to existing denominations.[66] Currently, there remains the unequal support for the Catholic church in France.

The French Constitution of 1958 in contrast states that France is a secular state that assures equality before the law for all its citizens without distinction based on origin, race or religion.[67] None of the French Constitutions have included an insinuation to religion beyond the right of the individual to religious freedom and equality. The state thereby persistently

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[61] HERZ, D., and JETZLSPERGER, C., "Das Verhältnis von Staat und Kirche und seine Bedeutung für die Systematik der Grundrechte" in HÖVER, G., (ed), Religion und Menschenrechte, Nomos, Baden-Baden, 2001, p.86.

[62] *See* n.56 above, at p.656.

[63] POULAT, E., Conference Proceedings, in M. Fraser (ed.), *see* n.58 *above*, p.9.

[64] GUNN, J., "Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and laïcité in France", in Journal of Church and State, 2004, p.14.

[65] *See* n.54 *supra*, p.118; DEJAMMET, A., Conference Proceedings, in FRASER, M., (ed.), n.58 *supra*, at p.12.

[66] *See* n.56 *supra*, p.657.

[67] *See* n.56 *supra*, at p.642.

expresses the wish to avoid any from former links with religion. As a consequence, it can be said that there is overall a weaker link between church and state in comparison to Germany.

Due to the exceptions, however, *Laïcité* in France is thus not as absolute as it is often portrayed to be. In reality, there are even more remaining links between public functions and religion in France. For instance, one of the roles that the French Consul General in Jerusalem assumes is to "defend Catholic and Christian churches in the Holy Land".[68] The French state also funds private schools with religious affiliation, as well as it provides indirect financial aid through the collection of church taxes and the buildings granted free of charge to Christian churches since 1905.[69] In addition, there are general exceptions to the separation of church and state, such as in the département Moselle-Alsace.[70] Therefore the state can neither claim to be completely *laïc*, nor that it deals equally with all denominations in the limited areas where it has religious affiliation. *Ahdar* and *Leigh* nevertheless consider this French *laïcité* an example of structural separation of church and state, which illustrates a "desire to restrict, if not eliminate, clerical and religious influence, over the state".[71] This claim is comprehensible as regards the limitations imposed on individual religious practice.

[68] *See* n.64, p.12.

[69] *See* n.54 *supra*, p.122.

[70] *See* n.53 supra, p.15.

[71] *See* n.17 *supra*, p.73.

3.2 *L'AFFAIRE DU FOULARD*[72] – RELIGIOUS FREEDOM OF PUPILS IN STATE SCHOOLS

The question of religious symbols at school is part of the current debate on *laïcité*, which began in 2003, when Jacques Chirac set up an independent body to study the application of *laïcité* in contemporary France.[73] The resulting Stasi Commission, named after its chair Bernard Stasi, was composed of scholars and persons of official standing from diverse origins. The most controversial of the resulting 26 recommendations was certainly the one prohibiting ostentatious religious insignia in state schools, which found enactment in the 2004 Act. This 2004 Act's prohibition of religious symbols at state schools is phrased neutrally towards all denominations. In practice, nevertheless, the statute mostly affects religious manifestations of those individuals, whose religion requires conduct that necessarily entails a visible dimension. Thus the 2004 Act discriminates indirectly against adherents to most religions, with the exception of followers of Christianity. The same as the German school acts, the French 2004 Act thereby facilitates a particular detriment to members of minority religions.

In favour of this statute is *Weil*, who was a member of the Stasi Commission. He explains that there are two reasons why the ban is correct. One is, that the 1905 Law was a victorious moment of French history, as it prevented the Catholic church from interfering in public life and also brought the guarantee to practice religion and to wear religious symbols in private.[74] Although it is clear that the prohibition of symbols at school does not infringe the right to wear these in private, one may wonder if

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[72] Literally translated: "the headscarf affair"; a term used in the French media, referring to the discussions surrounding the enactment of a statute prohibiting ostentatious religious symbols at state schools, *see* n.46 supra.

[73] *Rapport sur la laïcité dans la République.*

[74] WEIL, P., La République et sa diversité, Seuil, Paris, 2005), pp.65 and 66.

a right to practice religion in the home can still be seen as a worthwhile content of freedom of religion in a context, where significant aspects of life take place in public. *Weil*'s second reason is more specific, namely to protect Muslim girls' freedom of religion, who are forced to wear a headscarf, mainly by fellow male pupils.[75] Even though there is no evidence for this proposition, he thus ironically utilises his preconceptions regarding Muslims to promote a statute enacted as a guard for secularism. In the light of his arguments, the proposition that the current form of secularism blends in well with the country's moral tendencies and concepts,[76] is at least more easily understood.

From the opposing end, doubts are expressed that in the 2004 Act, the concept of *laïcité* is abused to the end of religiously intolerant enforcement of uniformity:[77] to some it rather appeared that a historical, static application of *laïcité* was exactly what the Stasi Commission was asked to overcome or at least to revise. The result is said not to match the current situation, since minorities cannot be compared to a powerful institution the impact of which needs to be diminished, as was the Catholic church prior to the 20th century. There is also a claim that the French *laïcité* is not supposed to be adversarial to religion, but rather in line with a modern democratic state.[78] According to *Gunn laïcité* is falsely depicted as neutral and a protection against religious excess, but in reality bears the danger of splitting the population on matters of belief.[79] Most notable, he emphasises that originally *laïcité* referred to policies designed to limit or eradicate the influence of clerics or religion over the state and

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[75] Ibid., p.68.

[76] *See* n.56 *supra*, p.638.

[77] *See* n.64 *supra*, at p.24.

[78] *See* n.56 *supra*, p.639.

[79] *See* n.64 *supra*, at p.9.

that its essential component used to be tolerance.[80] In fact, these origins are often part of political rhetoric, when matters of religion are publicly discussed. *Sarkozy* describes *laïcité* as a cornerstone of French state principles and "not a belief like others. It is our shared belief that allows others to live with respect for the public order and with respect for the convictions of everyone."[81] Since the implementation of the concept both after the French Revolution and between 1879-1907 was marked by violent attacks on clerics and church property, *Gunn* replies that *laïcité* in the format exercised during these times cannot be the founding principle of tolerance and neutrality.[82]

Furthermore, it is held against restricting religious symbols, that the separation of church and state, if applied to limit the exercise of religious freedom that does not interfere with the freedom of religion of others, could trivialise a constitution by "converting it from a code of cardinal principles of national law into a codex of petty precepts of local life".[83] It can also be argued that *laïcité* itself cannot be a more weighty interest than the very freedom of religion it strives to achieve. Along similar lines, *Witte* reminds that "[a] [c]ourt must be at least as zealous in protecting religious conscience from secular coercion as protecting secular conscience from religious coercion."[84]

Secularism is not necessarily neutral, since any doctrinal position, whether religious or not, will determine how one thinks

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[80] *See* n.64 *supra*, pp.8, 9, 15, also referring to VOLTAIRE's Treatise on Tolerance, which explained *laïcité* in a way clearly contravening current French law and policy.

[81] SARKOZY, N., in his role as Minister of the Interior, "Speech to the Freemasons", 2003, in GUNN, J., n.64 *supra*, p.10.

[82] *See* n.64 *supra*, pp.12, 13, 15; as regards the conflicts during these periods, *see* also n.17 *supra*, pp.15-40 and 71.

[83] WITTE, J., "Facts and Fiction about the History of Separation of Church and State", in Journal of Church and State, 2006, 15, p.44.

[84] Ibid., referring to the US American Supreme Court.

about ethical issues. The use of *laïcité* in law outside the educational surround is said to be a recent occurrence, whereas historically, the concept signified freedom of conscience above all other aspects.[85] *Baubérot* deems it a paradox, that in the 21st century *laïcité* still has to be discussed, bearing in mind that the process of implementing its values of freedom of religion, equality before the law and free exercise of faith were already introduced in 1789.[86] Secular, anti-clerical Voltaire's "Prayer to God"[87] seems to espouse *Baubérot*'s view:

"Make us help each other bear the burden of our difficult and transient lives. May the small differences between the clothes that cover our weak bodies, between all our inadequate languages, all our petty customs, all our imperfect laws, all our foolish opinions, between all of the circumstances that seem so enormous in our eyes but so equal in thine – may all these small nuances that distinguish the atoms we call men not serve as a basis for hatred and persecution. ... May those who show their love for thee by wearing white cloth not detest those who express their love for thee be wearing black wool."

Finally, in this debate two distinctive forms of laïcité are identified by *Plesner*. She distinguishes between the notion of open and strict *laïcité*.[88] Open *laïcité* prohibits the state from identifying itself with a particular denomination for the sake of offering an equal right to freedom of religion to all citizens.[89] Opposed to this concept, strict *laïcité* privatises religious conduct

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[85] *See* n.64 *supra*, p.9.

[86] *See* n.64 *supra*, p.4.

[87] VOLTAIRE, Traité sur la Tolérance, XXIII – Prière à Dieu, GF Flammarion, Paris, 1989, p.141.

[88] PLESNER, I.T., "The European Court of Human Rights between fundamentalist and liberal secularism", Paper presented at the Conference 'The Islamic Headscarf Debate and the Future of Europe", Strasbourg, 28-30 July 2005, p.15.

[89] Ibid.; and n.17 *supra*.

or display.[90] The latter form is seemingly the predominant practice in France and embedded in the law, despite the plausible arguments in favour of open *laïcité* presented above.

3.3 COMPARATIVE PERSPECTIVES FROM THE UNITED KINGDOM: THE *BEGUM* CASE[91]

In the United Kingdom, the attempt of a state school to establish a general prohibition of items covering the head, failed already before the case were brought before a court, due to the successful intervention of the then Commission for Racial Equality,[92] which disagreed with the indirect discrimination of pupils wearing headscarves entailed in the rule.[93] Schools commonly allow for headscarves, as long as these are plain and in the colour of the school uniform.

The landmark case of the pupil Shabina Begum also related to a state school, but resulted in a more complex analysis, since her school had considered religious requirements of the pupils and therefore developed an alternative school *shalwar kamiz*-uniform[94] for female Muslim pupils, following the outcome of consultation with parents and representatives of local mosques. Ms Begum, however, rejected this uniform, as she did not find her legs adequately covered, this being in line with some Islamic scholars. Consequently, she wore a *jilbab*, which is a wide coat or

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[90] Ibid.

[91] *R (on the application of Begum)* v. *Denbigh High School* [2006] UKHL 15.

[92] Since 1 October 2007, the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission have merged into the Equality and Human Rights Commission, which deals with all legally prohibited grounds of discrimination.

[93] MCGOLDRICK, D., Human Rights and Religion – The Islamic Headscarf Debate in Europe, Hart Publishing, Oxford, 2006, p.179.

[94] A *shalwar kamiz* is a two-part outfit, consisting of wide-legged trousers and a loose shirt that covers all or most of the upper leg.

dress that reaches to the feet. This resulted in the school's reaction of requesting her to either wear the school uniform, or to face expulsion. After having been expelled, Ms Begum opted for legal action, which went through all three instances to the House of Lords, the highest court of the United Kingdom. The first instance had rejected her claim, based on the reason that the pupil voluntarily left the school, since she had not been formally suspended. In contrast, the second instance decided in favour of Ms Begum that Article 9 of the European Convention of Human Rights had been violated. This judgment highlighted the fact that a school was not authorised to decide, which interpretations within Islam is the preferable one. Finally, the decision of the House of Lords found in favour of the school. This judgment contains some remarkable findings, which may be highly significant for similar future cases. The primary question before the House of Lords was, whether the uniform rules of the school infringe Ms Begum's right to freedom of religion under Human Rights Act.[95] Lord Bingham firstly confirmed that no court is entitled to set rules as to the correct form of Islamic clothing, since such matters have to be decided in accordance with facts only.[96] The decisive point, however, was the fact that Ms Begum was voluntarily present at the school and therefore had the choice to attend another school that catered for her wish to wear a *jilbab*. On the basis of this voluntary aspect a parallel was drawn to the jurisprudence of the European Court of Human Rights in relation to freedom of religion in the workplace.[97] Correspondingly, the House of Lords emphasised that Article 9 of the European Convention on Human Rights does not contain a right to a convenient exercise of the right to freedom of religion. Hence the

[95] The Human Rights Act 1998 facilitates effect to the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms in the law of the United Kingdom.

[96] *See* fn.91 *supra*, at paragraph 2.

[97] *Ahmad* v. *UK*, (1982) 4 EHRR 126.

judges reached the conclusion that despite the discomfort experienced by changing schools, it was acceptable for Ms Begum to attend another institution, where she could wear a *jilbab*.[98] In a dissenting opinion, Baroness Hale criticised this route in that the circumstances involved in changing schools had been underestimated by her colleagues.[99] This criticism is welcome, in particular, since this case involved a minor. Similarly, the French Stasi Commission missed the point that excluding a teenager from his or her school may be a difficult, if not traumatic experience.

To lighten the burden of schools in the UK in devising a dress code, a non-statutory Guidance to schools on school uniform[100] was published by the governmental Department for Children, Schools and Families, presumably as a reaction to the *Begum* case. This Guidance strongly advises schools to assess, after consultation with the community's religious representatives, whether its uniform constitutes religious discrimination or an interference with freedom of religion, as well as to consider individual requests for accommodation of religious requirements.[101] Listed separately, under the heading "Human Rights Issues", the Guidance emphasis the outwardly appearing religious manifestations required by some religions in the context of Article 9 ECHR.[102] Reasonable accommodation is to take place,[103] however, a duty to accommodate is subject to the condition that no alternative school is available, the uniform of

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[98] *See* fn.91 *supra*, paragraph 25.

[99] Baroness Hale, *See* fn.91 *supra*, paragraph 96 and in support of this view, *see* also n.93 *supra*, p.197.

[100] DCSF *Guidance to schools on school uniform and related policies*, October 2007.

[101] Ibid., paragraph 4.

[102] Ibid., paragraph 18.

[103] Ibid., paragraph 19.

which would fulfil the pupil's religious needs. If no such school is at avail, religious manifestations may nevertheless still be limited for reasons of health, safety and the rights and freedoms of others.[104] Referring *inter alia* to the *Begum* ruling, the Guidance clarifies that this decision is not to be taken as justification for prohibiting specific religious dress *per se*, since a justification has to be found for each case individually.[105] Noteworthy in this outcome is the absence of a link to church-state relations in the House of Lords' ruling, as well as in the prior decisions concerned with Ms Begum's case and in the government's Guidance on school uniforms.

4. THE (IR)RELEVANCE OF CHURCH-STATE RELATIONS AS REGARDS RELIGIOUS FREEDOM IN THE UNITED KINGDOM

The two cases presented above, *Azmi* and *Begum*, reflect the general fact that in the UK the relationship between church and state is not used in court in view of justifications for curtailing freedom of religion. Hence the question arises, why this is not the case and whether this is of any significance to the approach taken in France and Germany. Certainly, there is a major difference between Germany, France and the UK, in that Germany and France are in theory secular states, whereas the UK comprises four countries that endorse varying church-state paradigms. Initially, all parts of Great Britain had state churches. Today, the Church of England is most noteworthy as a state church, since the 26 highest-ranking bishops sit and vote in the *House of Lords* in its parliamentary function.[106] The Church of

[104] Ibid., paragraph 20.

[105] Ibid., paragraph 21.

[106] *See* n. 53 *supra*, p.14; Clergy have participate in parliament since the 13th century, *see* LYNCH, A., "The Constitutional Significance of the Church of England", in RADAN, P., MEYERSON, D., and CROUCHER RF, (eds.), God, the State and Common Law, Routledge, London New York, 2005, pp.180-1.

Wales ceased to exist in 1920, when it was officially disestablished.[107] In Scotland, a state church still remains, however, the Church of Scotland does not enjoy any privileges, except the protection of its independence to determine its own affairs are not to be intervened with.[108] Thus the Church of Scotland is considered a case of "virtual disestablishment",[109] although it is *de iure*, an established state church, such as the Anglican Church.[110] The Church of Ireland was already disestablished at the point in time when Northern Ireland became a political entity in 1921. Accordingly, as part of the UK, Northern Ireland has never featured a state church. Regarding the circumstance of these differing church-state constellations throughout the UK, it is much less surprising that courts, in dealing with law that equally applies to the whole state, do not refer to either the secular or the non-secular nature of a respective country. From this perspective, it is understandable that *Knights* admits the significance of theories surrounding the links between religion, church, individuals and the state, but at the same time claims that these theories are unlikely to provide solutions for specific cases.[111] The distinctive and separate arrangements between churches and countries of the UK would indeed create difficulties, if one were to employ a single of four models in support of a disagreement with religious manifestations. Since the Human Rights Act, for example, applies to the UK as a whole, such an argument could produce differing results within the same

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[107] IPGRAVE, M., "Fidei Defensor Revisited: Church and State in a Religiously Plural Society", in GHANEA, N., (ed.), The Challenge of Religious Discrimination at the Dawn of a New Millennium, Martinus Nijhoff, Leiden Boston, 2003, p. 217.

[108] *See* Appendix to the 1921 Church of Scotland Act; Also n.17 *supra*, p.82.

[109] WOLFFE, J., Conference Proceedings, in FRASER, M. (ed.), *see* n.58 *supra*.

[110] *See* n.17 *supra*, p.80.

[111] *See* n. 53 *supra*, p.17.

state, an outcome that is not likely to be appreciated or sustainable.

Despite the considerably different starting point as regards the church-state constellations, the approach taken in the UK is to be preferred to the German and French bans on religious attire at schools, or in civil service, as it circumvents the issue of indirect discrimination entailed by any general prohibition of visible religious manifestation. This is even more so desirable, since the indirect discrimination resulting from the French 2004 Act and Berlin school act are detrimental to religious minorities in particular. Whereas the French and German law relies on vague and debated conceptions of church-state relations to limit individual freedom of religion, the UK law's omission of the topic altogether provides a solution based on criteria that are with certainty and clearly relevant to the specific case in question. In this way, statements coloured by a bias towards the majority religion, as displayed in Germany and France, with a potential to impair the relationship between the majority and minority religion, can be avoided. The UK approach in comparison constitutes an alternative that strives to focus on objective elements to set limitations to religious freedom.

5. THE EUROPEAN UNION AND SECULARISM

Neither law, nor policy of the European Union explicitly sanctions on a model of church-state relations in particular. There is no explicit competence of the EU to regulate church-state relations and consequently there are no prominent activities in this field. Nevertheless, there are some documents that consider the national arrangements for relating church and state, which will be assessed herein. It is also recorded that despite the Union's lack of power to act in the religious realm, several provisions of secondary law make concessions, so that European

law does not conflict with the existing national law on churches.[112] This shows that the EU had to compromise in some contexts, due to Member States' desire to uphold domestic church-state arrangements, to the end of encouraging their cooperation in agreeing to new legislation. Clearly, in this way, churches have an indirect impact on the EU's operations.

For the purpose of illustration, the now derelict Treaty establishing a Constitution for Europe[113] in its preamble highlights *drawing inspiration from the cultural, religious and humanist inheritance of Europe.* This inclusion of religion in the preamble of a potential Constitution for the EU shows that there is a divide over this issue in the member states.[114] Mentioning Europe's (Judeo-) Christian legacy was a preference of many member states, but strongly negated by France in particular, which pointed out the incompatibility of such a reference with the EU's secular character.[115] Those in favour of an express reference to Europe's Christian heritage, or even a statement that European integration aims for the establishment of Christian values, claim that Christianity is a common constitutional tradition of the member states.[116] This viewpoint is incompatible with the law in some member states. Not all refer to religion in their constitutions and of those that do, this does not necessarily need to be in regard

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[112] HEINIG, H.M., "Law on Churches and Religion in the European Legal Area – Through German Glasses", in German Law Journal, Vol.8, 2007, 563, p.564, who provides examples of this accommodation in the law on working times and religious discrimination in employment, for instance Art.17(1)(c) 2003/88/EC, OJ L-299, 18/11/2003.

[113] OJ C-310, 16 December 2004, pp.1-474; potentially to be replaced with the Lisbon Treaty.

[114] *See* n.17 supra, p.79; RIVERS, J., "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union", in Ecclesiastical Law Journal, Vol.6, 2004, pp.267-291.

[115] *See* n.17 *supra*, p.80.

[116] WEILER, J., Un'Europa Cristiana, Rizzoli, Milan, 2003), pp.54 and 61.

to the Christian faith, such as the reference to 'God' in the German Constitution. *Menendez* in addition opposes an affiliation of the EU with a Christian identity since "[t]oleration seems to put an end to the idea and the symbols of a dominant religion, and to be based on a basic value agreement, until proof to the contrary, is...best presented by secularism". [117] The Christian religion being affiliated with violent colonial ambitions of many EU member states, does not link easily with values currently predominant in Europe either.[118] The latter preference is to be applauded, since a democratic EU ought to serve everyone, regardless of their religion or other belief. Declaration 11[119], which inserted Article I-52 on the status of churches into the EU Constitution, clearly supports this idea and implies that an established state church is permissible:

"The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations."

This Declaration emphasises that the EU has no competence over state-church-relations, but also demands considerateness for those relations inasmuch as its own jurisdiction, for instance, in relation to employment or social affairs, has indirect bearings on national state-church-paradigms.[120] Some Member States had demanded either such a

[117] *See* n.6 *supra*, at p.145.

[118] Ibid., at p.144.

[119] Declaration 11 on the Status of churches and Non-Confessional Organisations to the Final Act of the Treaty of Amsterdam of 20 October 1997, OJ C-340, 10/11/1997, p.133.

[120] *See* n.10 *supra*, p.386.

statement, or for a similar principle to be incorporated in the Treaties, however, it was issued with non-legal status and therefore can only be used to interpret the law.[121] Although this is a major weakness from the standpoint of the churches, *Heinig* remarks that Declaration 11 constitutes a general illustration of the status of churches in Europe as being "no mere *quantité negotiable* on Brussels' stage, but ... recognized actors in Europe's policy-making drama."[122] Because of its emphasis on national identity, Declaration 11 is often seen in conjunction with Article 6(3) TEU, which reads "The Union shall respect the national identities of its Member States". Accordingly, it is maintained that the Member States' church-state laws are incidentally part of national identity and thereby enjoy protection of Article 6(3) TEU.[123] In the absence of ECJ case law it can only be presumed that in cases where fundamental rights are to be balanced with principles of a church-state model, the Court may experience difficulties in arguing in favour of the individual or entity claiming a violation caused by the particular national model. On the other hand, such a case may also offer an opportunity to advise on the scope and restrictions to freedom of religion as a fundamental right, an area that seems unclear under the national laws of some Member States.

Despite these indications of non-interference with national church-state regulations, there is a EU policy initiative that appears to call for a pluralist model. In 1994 a document titled "A Soul for Europe" was introduced, based on an idea of Jacques Delors, who had declared a desire for providing the EU with a spiritual and ethical dimension.[124] The resulting document

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[121] *See* n.112 *supra*, p.570.

[122] Ibid., p.570.

[123] Ibid., p.570.

[124] CAVANAUGH, K., "Islam and the European Project", in Muslim World Journal of Human Rights, Vol.4, 2007, pp.1-20, at p.5.

prescribed dialogue between the EU's organisation and religious communities, to promote a pluralist and equality agenda through funding for interfaith projects, as well as making facilities for two representatives for each religion.[125] Placed in a wider context, this programme strived to "contribute to the recognition and understanding of the ethical and spiritual dimension of European unification and politics".[126] In view of this agenda, it appears that the EU not only realised the significance of dialogue between religious groups, but also made genuine efforts to inclusively and equally involve all religions. The "Soul for Europe" programme is hence in direct opposition to French policies to ignore any religious reality. As a result, French implementation of EU measures to counter religious discrimination may struggle to reconcile the two competing demands. However, France may not be the only state to face difficulties of complying with EU demands. As *Cavanaugh* points out, contrary to EU efforts to promote pluralism, several Member States have more rigorously governed religious expression in public since September 11, 2005, portraying this as a necessity for national security, or as a natural component of a pluralist state.[127]

The reasons for the Union's general non-intervention in this area may be on the one hand, the lack of consensus on this issue amongst the Member States, but more likely on the other hand, the fact that there had been no necessity to consider the relationship between church and state, due to the lack of relevance to areas of EU competence. With the inception of the Employment Framework Directive in 2003 the EU signalled, at least, that public sector employment ought to be dealt with in the same manner as employment in the private sector. Still it is unclear whether the European Court of Justice would view restrictions to freedom of religion imposed on public servants as

[125] Ibid.
[126] Ibid.
[127] Ibid.

legitimate, if these were solely based on church-state relations. In this regard, two further factors may become relevant to the position of the church-state argument. Firstly, the Directive's exceptions are exclusive of others and most likely do not aim to include religious discrimination by virtue of church-state models.[128] It can therefore be anticipated that restrictions to individual religious practice by virtue of church-state relations would not be deemed acceptable. Secondly, the vagueness in understanding the effect of church-state relations on the individual right to freedom of religion and the corresponding exposure to political currents may also not find affirmation before the European Court of Justice. Otherwise the protection against religious discrimination could be undermined as a matter of political strategy, whereas any justification ought to rely on a sufficiently clear and objective legal basis.

6. CONCLUSIONS

As the two exemplary headscarf debates from Germany and in France highlighted, there are various ways for the relationship between church and state to impact on religious liberty. The paper presented, in its limited scope, the use of the argument of the separation of church and state to impose limitations to freedom of religion in certain public environments. Both the German and the French discussion revealed that the decisive point is not the actual model organising the church-state relationship, but the current interpretation thereof, as it needs to provide sufficient detail to relate to the respective interference with fundamental rights. Thus a concept with deep historical

[128] A standard reading of the provisions, Articles 2(5), 4(1) and 4(2) of the Directive, in conjunction with the fact that a distinction between public and private sector employment is not made, as well as with EU policies promoting diversity, *see* also RIVERS, J., n.114 *supra*, are likely to amount to such an interpretation.

roots is subjected to changing political predominance and corresponding interests.

This political influence mostly becomes problematic in relation to the practice of freedom of religion in public institutions, where the individual and the state are connected to some degree. Constraints normally appear to predominantly stem from the argument that a religious manifestation is incompatible with the separation of state and church, rather than from the privileged position of one or more churches. Moreover, the legislative aftermath of the German *Ludin* case forms a significant example of law allocating privilege to adherents of some faiths, through school acts that allow only occidental or Christian symbols, due to the pertinent religious or cultural heritage of the state. It is questionable whether the respective laws are compatible with the secular, neutral nature of the German state, as well as with the principle of equality.

Whereas German and French scholars promoting the separation of church and state as a justification for restrictions to all or conspicuous religious symbols imposed on public service providers or users currently succeed, there seem to be no workable arguments in favour of this view, apart from the close link between these individuals and the state. The point of discussion remains unanswered, of whether an individual working for the state can be seen as directly representing the state to the general public, the same as it is unclear, why service users have to comply with the church-state paradigm, such as the French pupils. Remarkable counter-arguments illustrate the weaknesses of the position that secularism requires the debated limitations to religious freedom. In contrast, an assessment of the historical underpinnings of the principles of secularism in France and Germany disclosed a rather different idea, in that the secular principles aimed at minimum interference of the state with the individual's freedom of religion. Apparently, both the German and French church-state regimes are destined to protect the individual's freedom, rather than to restrict it. As a consequence,

this contentious debate on the legitimacy of restricting religious liberty by authority of church-state relations highlights, that a thorough understanding of the historical background and development may be paramount to finding adequate solutions. There is indeed a strong indication, stemming from the presented debates that church-state constellations, both in France and in Germany, historically do not intend to limit religious liberty of individuals, but aim to protect these from the state and/or church exploiting their mutual links.

It is contended that individual manifestations of religious freedom as such are unlikely to infringe church-state-relating principles, unless further evidence is provided to support this claim in the specific instance. In order to prevent unfair results in some cases, these can be dealt with by the limitations set by supranational or international instruments, for instance, the ones set by the Employment Framework Directive, such as the rights of other individuals. Aiming towards this direction, the cases of *Azmi* and *Begum* from the UK presented an alternative path that does not rely on church-state relations, but instead evaluates the relevant interests more tangibly and objectively.