THE GERMAN HEADSCARF DEBATE: CONSTITUTIONAL COURT VS. PUBLIC DISCOURSES

ABSTRACT

In September 2003 the Federal Constitutional Court of Germany decided that the individual states were free to pass legislation to regulate (which includes the power to permit) the wearing of a headscarf by teachers in state schools, providing certain conditions were met. The ensuing political discourse on this contentious issue is examined in documents and statements to state parliaments. Robert Gould concludes that politicians are using the opportunity to respond to and to reinforce the widespread us-and-them attitude towards Moslems in what the dissenting judgement of the court called "a social environment which strongly rejects the headscarf".

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The German headscarf debate occupied media, political, and public attention sporadically following the refusal of the *Oberschulamt Stuttgart* [approximately: Stuttgart Education Authority] on 10 July 1998 to grant a woman a permanent licence to teach in the schools of Baden-Wurtemberg because of her insistence on wearing a headscarf. After the decision of the Federal Constitutional Court on 24 September, 2003 which vacated the judgements of the lower courts, the debate recommenced with renewed vigour and then continued as some of the states (which have exclusive jurisdiction over education) began the process of amending their legislation in order to ban headscarves. Although the situation appears quiet at the moment, the debate will quite conceivably be revived, for reasons to be outlined below.

Unlike the debate and then clarification of the situation by legislation in France, where the issue was ostensibly whether girls in state schools could wear a headscarf on the school premises, in Germany the issue concerned teachers. That students, as anyone else in Germany, can wear any garment or object that indicates religious affiliation is constitutionally guaranteed and uncontested. But at the same time, there is a constitutional tradition that, in the exercise of their functions, members of the civil service must demonstrate neutrality in their actions and dress. And school-teachers at all levels are civil servants. Thus there is an area of tension between two constitutional principles.

The question needs to be asked why it took several decades for this issue to arise – given that the movement of Moslems into Germany began in the late 1950s, when Turkish "guest workers" began to be recruited in increasing numbers to fill gaps in the labour market created by a booming economy. The answers lie on two levels, social and political, but principally on the conviction – broadly shared by politicians and population – that despite the eventual movement of several million people into the country, Germany was not a country of immigration: that is, immigration in the English-language sense of the word, understood as the movement of people who will remain in the receiving country and make it their permanent home. Instead, parties and public clung to the notion of a "rotation principle", i.e. workers would come, stay for a limited period to make money, return to their homeland, and be replaced by others. This basic principle, even when clearly contrary to fact, determined thinking for decades. Most importantly, it meant that until the end of the twentieth century there was no widespread will to adapt the Citizenship Act, based strictly on *jus patris* and dating back to 1913, to the new reality. As mentioned, school-teachers are civil servants, and to become a civil servant German citizenship is required.

On another level, the policy and, later, myth of the rotation principle meant that there was an absence of serious and long-term efforts towards integration. This absence of will existed widely on the part of both the newcomers and the German population, and consequently also of parties. The perceptible outcome of this was the development of what are effectively parallel societies: that is, areas where social and linguistic interchanges function principally according to the norms of the homeland. The result is, as the sociologist Thomas Meyer points out, that persons living there are significantly disadvantaged as they cannot learn the language, social mores and practices of the receiving country sufficiently well to guarantee equality of opportunity. This would include obtaining school-leaving qualifications, possible entrance to university, and completion of a degree programme. Without the latter, plus citizenship, admissibility to the teaching branch of the civil service is not possible.

In a five-to-three decision, the Federal Constitutional Court concluded that the headscarf did not necessarily constitute a symbol opposing constitutional values, that it would not necessarily influence the religious orientation of the students, and that it would not inevitably disturb the smooth functioning of

the school [*der Schulfriede*]. Consequently there was no basis in Baden-Wurtemberg law for the Education Authority's and the lower courts' excluding the appellant from a permanent teaching position in state schools. Importantly, the court expressed its awareness of *die gewachsene* religiöse Vielfalt in der Gesellschaft [increased religious diversity in society], and concluded in light of the new situation that it was essential to review past practices. Such an important task as modifying the reconciliation of conflicting constitutional obligations (civil-service neutrality on the one hand and the free expression of religion on the other) could only be undertaken by state parliaments and not by executive decision. It further laid down guidelines for future legislation: a state could define neutrality more strictly than in the past, or it could "use the increased religious diversity in schools as a means of promoting reciprocal tolerance in order in this way to make a contribution to efforts leading to integration" (§65)[i]. But whichever path would be chosen, the court insisted that "equal treatment be provided for members of different religious communities" (§71) as that was the only way that any restriction on religious symbols as part of a civil servant's clothing could be considered constitutional.

By implication, the decision calls into question a number of established practices and principles: the majority population will be confronted with the necessity of altering certain attitudes, views and behaviour patterns. It means also that the preferential role in state and society ascribed to Christianity – as evidenced by its particular mention in at least some of the individual states' Constitutions and / or Education Acts – is, conceivably, challenged.

The ways in which the two fundamental principles of the decision - insistence on a political solution and insistence on equal treatment for different religious communities - are now interacting are worth examining.

But before proceeding further, it must be noted that this decision was accompanied by a long and vigorous dissenting opinion which stated that the current constitutional and legal arrangements need not be changed. This minority opinion rejected one by one the arguments of the majority and contradicted some of its statements of fact. In addition, its tone was noticeably different from that of the decision. Where the latter was strictly neutral, restricting itself to a constitutional discourse, the dissenting opinion is remarkable for employing on top of its constitutional discourse a basic conceptualisation founded on the unbridgeable opposition between German and Moslem, which then r epresents a danger for the continued existence of existing social and political norms. The headscarf is, according to the dissenting opinion, a religious, political, cultural, ideological, and fundamentalist [*islamistisch*] symbol which will inevitably lead to rejection and conflict because it is being worn in "a social environment which strongly rejects the headscarf" (§114). In other words, what is constructed and then repeatedly reinforced is the concept of two monolithic and fundamentally incompatible value systems, and the appellant is a representative of this hostile value system.

One might speculate that the dissenting opinion was written with the inevitable consequence of the majority decision in mind: a series of debates in state parliaments as parties or governments, particularly ones in which the Christian Democrats held a clear majority or were in coalition, introduced bills to regulate or ban the wearing of headscarves by teachers or by civil servants generally.

The argument that the smooth functioning of the school has to be preserved and that consequently headscarves cannot be tolerated on teachers is based on the premise of widespread hostility in the population (including parents and teachers) to the garment and on the assertion that wearing it will inevitably give rise to conflict. Although this feature is absent from the majority decision, the dissenting judges and politicians lay great emphasis on it.

This foreseeable consequence began immediately. What is clear is that in the developing discourse positions were taken, arguments developed, and terms employed which, sometimes openly, sometimes implicitly, stand in contradiction to the insistence of the court on equal treatment of members of different religions. Frequently they refer to the dissenting opinion and quote from it as if it represented the judgement of the court.

Why and how is this possible, and what are the consequences? The political and popular reactions to the decision must first be placed both against the background of the attacks on New York, Istanbul, and Madrid and also of the consequences of the decades-long denial of *de facto* immigration outlined earlier. The latter has meant that little or no preparation had been made for what is, arising from the Court's decision, the potential for an important shift towards the acknowledgement of religious pluralism within the German state apparatus and consequently a development in German collective identity. More specifically, and on the level of the political discourse, the opposition expressed itself in a number of ways. Briefly, the most important of these are the position of Christianity, an often deliberate blurring of the distinctions between Islam and Islamism, assertions of the inevitability of the disturbance of the smooth functioning of the school (*der Schulfriede*), and the use of the argument of two monolithic and mutually exclusive value systems. For all of these positions and arguments justification is frequently found and cited in the dissenting opinion.

In the speeches to state parliaments or in the documents accompanying the legislation, the major argument cited in order to justify the explicit permitting of Christian (and sometimes Jewish) symbols worn by teachers (for instance, in Baden-Wurtemberg, Bavaria, Hesse, the Saarland) is that the

State Constitution or the Education Act (sometimes both) define Christianity as providing certain fundamental values on which the state is based or, as the case may be, which are to be transmitted in the education system. This concords in some measure with a position taken in the dissenting opinion which had argued that, in addition to its religious significance, the cross is "a general cultural symbol for a culture, nourished by Jewish and Christian sources, which is value oriented but also open, and which has become tolerant as a result of rich and also painful historical experience" (§113). It echoes also the expression "christlich-abendländische Kulturwerte" [Christian and occidental cultural values] firmly established before the headscarf debate and very frequently employed by politicians of the CDU and CSU. But what is being suggested to their constituents by the state politicians advancing the Christian argument is that the provisions of state law and constitutions take precedence over the decisions of the Federal Constitutional Court. Rhetorically it is no doubt effective to the public who want to be reassured that the *status quo* is not being affected. But how such an argument will be received in any further case brought to the Constitutional Court is another matter.

A second method is to define the headscarf as a political, rather than a religious symbol, and above all as one which stands in total contradiction to constitutional values, including human dignity, the equality of the sexes, separation of powers, rule of law, etc. Undoubtedly, for some Moslems, the headscarf is a political symbol. But the resulting blurring of Islam and Islamism in public discourse to be found in such statements as "…the wearing of a headscarf [by teachers in school] is not permissible because at least some of those supporting it [the headscarf] link it to the subordinate position of women in society, state, and family, or a fundamentalist position in favour of a theocratic state in contradiction to the constitutional values prevailing in Bavaria" (Landtagsdrucksache 15/368 vom 18.02.2004) has the unfortunate consequence of, by implication, putting in a very negative light even a totally apolitical woman doing her grocery shopping in the streets of Munich or Nuremberg.

The argument that the smooth functioning of the school has to be preserved and that consequently headscarves cannot be tolerated on teachers is based on the premise of widespread hostility in the population (including parents and teachers) to the garment and on the assertion that wearing it will inevitably give rise to conflict. Although this feature is absent from the majority decision, the dissenting judges and politicians lay great emphasis on it. For example, in the debate in the State Parliament of Hesse when the bill to ban headscarves was introduced (18 February 2004), the proposer (Franz Josef Jung) made the statement that in a survey by Hessian Radio 80 per cent of respondents had stated that anyone wearing a headscarf was not suited to educating children according to constitutional values, and that in a further survey conducted by the Hessian Ministry of Education 97 per cent of 37,000 respondents had agreed that headscarves should not be allowed on teachers (Hessicher Landtag, Drucksache 16/1897 neu). What is important here is not only the powerful political force of such apparent numbers, but more generally the consequences of the clear and public support for such views by elected representatives.

Clearly perceptible in the public statements by politicians and in the documents throughout 2004 and into 2005 is the high degree of co-ordination of the political discourse. This has meant that the same arguments against the headscarf, the same phrases, terms, and comparisons condemning it could be repeated by the media and be available on websites as six of the sixteen states passed a bill to ban the wearing of headscarves by teachers (Baden-Wurtemberg, Bavaria, Berlin, Hesse, Lower Saxony, and the Saarland) and as at least four others (a CDU and SPD coalition in Bremen, and the CDU opposition in North Rhine-Westphalia, Rhineland-Palatinate, and Schleswig-Holstein) introduced bills or motions with the same intent. With the exception of Berlin, where the SPD and PDS coalition government has banned all religious symbols equally, it is in virtually all cases the CDU (in Bavaria the CSU) which has taken the initiative. The argumentation and documents explicitly allow Christian symbols and in at least two cases even monastic habits (Bayerische Landtagsdrucksache 15/368 vom 18.02.2004 and Landtag Nordrhein-Westfalen Drucksache 13/4564). But what is noteworthy is that even when opposing the legislation, and despite some eloquent and articulate voices, the SPD as a whole has been unwilling to propagate an effective counter-discourse; and neither the Greens nor the PDS has succeeded, either.

Within the constitutional requirements of German federalism and of competing rights in an open and democratic state, the judgement of the Federal Constitutional Court sought to indicate equitable paths for legislators to follow in an increasingly diverse society. On the political level, the judgement has met with significant resistance, and political pressures have given rise to repeated statements and even legislation which reiterate a predominant role and function for Christianity within both state and society. At the same time, the nature of the now hegemonic accompanying discourse, emphasising the threats to German values and even the German state, is such as to recall to the public mind above all the militant and hostile forms of Islam. Thus, the Federal Constitutional Court's insistence on legislation to regulate a complex constitutional / legal / social situation resulted on the public level in an intensification of an us-and-them opposition. It is unlikely that the debate is over. And while the constitutional issues will not have changed, the critical question which remains is the one concerning the terms in which the political and public debate will be conducted. As discourse both reflects realities and is constitutive of them, including social realities and their associated evaluations, political, public, and media debates will continue to have an impact on whether Moslems can be viewed as part of the democratic structure of Germany or as an alien force to be combated.

Reference

Thomas MEYER: *Identitätspolitik: Vom Missbrauch kultureller Unterschiede*, edition Suhrkamp 2271: Suhrkamp, Frankfurt/Main, 2002.

Note

[1] References to the numbered paragraphs of the decision are indicated by the symbol §.