

ARTICLE
PROTECTING RELIGIOUS FREEDOM AND
CONSCIENCE:
WHAT AUSTRALIA MIGHT LEARN FROM
GERMANY

*by Patrick T. Quirk**

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I. INTRODUCTION

The recently published Australian Government’s *Religious Freedom Review*,¹ of December 2018, drew attention to a perceived “limited understanding in the general [Australian] community about the human right to religious freedom, its application, and how it interacts with other human rights.”² This is particularly apparent in the understanding of, and legal implications surrounding, conscience protection.³ Countries other than Australia have wrestled with this problem over extended periods and under diverse circumstances.⁴

Australia’s founding fathers borrowed heavily from the United States in drafting the Australian Constitution.⁵ The constitutions of other countries also have much to offer as Australia now considers how to protect freedom of conscience and religious practice in a globalized world.⁶ One such country is the Federal Republic of Germany.

1. THE HON. PHILIP RUDDOCK (EXPERT PANEL CHAIR), RELIGIOUS FREEDOM REVIEW: REPORT OF THE EXPERT PANEL (2018), <https://www.pmc.gov.au/domestic-policy/religious-freedom-review> [<https://perma.cc/627X-34KD>] [hereinafter Ruddock Review].

2. *Id.* ¶ 1.410.

3. The meanings and history of “freedom of conscience” are much-disputed. For example, Nehal Bhuta argues, “its contemporary meanings are an unstable mixture of values and preoccupations derived from distinct political problems—the management of sectarian strife and the constitution of sovereign power, the bourgeois revolt against the absolutist *Polizeistaat*, and finally, a postwar attempt to refound Western European political culture on a politics of human dignity. This unstable mixture is the foundation for the European Court’s circumstantial casuistry in the headscarf cases.” See Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 SOUTH ATLANTIC QUARTERLY 9, 11 (2014).

4. See, for example, the reports published by the United States Commission on International Religious Freedom and the materials available at the Pew Research Center (www.pewforum.org). In Europe, see Martina Prpic, *Religion and Human Rights*, EUROPEAN PARLIAMENT (2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630290/EPRS_BRI\(2018\)630290_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630290/EPRS_BRI(2018)630290_EN.pdf) [<https://perma.cc/FT4D-ZRQ2>].

5. This intellectual plundering was, as a rule, quite carefully done. In the words of Clifford L. Pannam, it was a “very discriminating” exercise; at other times, slavish or even “completely senseless copying” was arguably the order of the day. Pannam, *Travelling Section 116 with a U.S. Roadmap*, 4 MELB. U. L. REV. 41, 41 (1963).

6. For a brief history of conscientious objection at the constitutional level across many countries, including Germany, see Hon. José de Sousa e Brito, *Political Minorities and the Right*

Germany is a leading candidate for comparison because it has a comprehensive and detailed constitutional guarantee of freedom of conscience inside a federal structure. In contrast, Australia has (effectively) no such guarantee and this absence is becoming starker under the glaring lamps of legal opinion and ensuing legislative activity.⁷ The lack of unity in Australian law has left academics scratching their heads and has left the Australian polity in an awkward situation of legal and conceptual disunity. This Article outlines further reasons for comparison based on the work already done in the realm of German-American comparison conducted by Edward Eberle.

Thus, this Article explores recent cases regarding conscience and religious liberty in the German and Australian legal systems and offers commentary on the context of those cases and the possible implications for both countries. This Article also follows from this author's prior discussion of the approach to conscience protection in Germany taken by leading constitutional scholar Josef Isensee, as discussed in his seminal article, "Conscience in Law: Does the General Law Only Apply in Accordance with the Individual Conscience?"⁸ In this and other work, Isensee highlights, *inter alia*, the difficulties associated with a legal definition of conscience in a secular context, the religious roots of the concept, the difficulties of ever-expanding protection, the

to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law, BYU L. REV. 607, 611–16 (1999). (Brito was a Justice of the Constitutional Court of Portugal from 1989–2002. He perceptively notes, "conscientious objection represents the transformation of the principle of tolerance, previous to the constitutional state in a human right," at 608).

7. On August 29, 2019, Christian Porter, the Australian Attorney-General, released an "exposure draft" Religious Discrimination Bill together with two associated Bills for consultation and discussion. While the Bill "would make it unlawful to discriminate on the basis of religious belief or activity in key areas of public life...[t]he Bill does not create a positive right to freedom of religion." See Media Release, Thursday, August 29, 2019, Morrison Government delivers on religious reforms, available at <https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx> [<https://perma.cc/BPW4-CH7W>]. This Bill contains 68 sections in nine parts and seeks to implement many of the recommendation of the Ruddock Report. A complete consideration of the Bill remains beyond the scope of this Article.

8. Josef Isensee, *Gewissen im Recht; Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen Gewissens?* [Conscience in Law; Does the General Law Only Apply in Accordance with the Individual Conscience?], in DER STREIT UM DAS GEWISSEN [THE DISPUTE OVER CONSCIENCE] 41, 41 (Gerhard Höver ed., 1993), discussed in Patrick Quirk's, *The Undefined Remains Unprotected: Tensions between Conscience and the Law in Germany by Way of Joseph Isensee*, 27 TUL. J. INT'L & COMP. L. 55, 92 (2018).

problem of *quis iudicabit?* [*who decides?*] and conflict resolution through partial exemptions.⁹

The concept of conscience also has a critical role to play in the formation of a common culture (*Leitkultur*). Recent German constitutional cases appear in a variety of contemporary settings, such as those related to taking witness oaths,¹⁰ wearing religious clothing (Islamic headscarves),¹¹ circumcision ceremonies,¹² acts of ritual slaughter,¹³ displaying Christian crucifixes in classrooms,¹⁴ and refusal of blood transfusions based on religious beliefs.¹⁵ These significant cases have contributed to the legal framework inside which the broader debate over *Leitkultur* takes place.¹⁶ To some degree, German identity

9. See where Isensee discusses “Konfliktlösung durch partielle Entpflichtung” (resolution of conflict through partial exemptions).

10. *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court] 33 BVerfGE 26 (1972), 2 BvR 75/71 (23, 33) (Ger.) (deciding that the state should accommodate an evangelical pastor who refused to swear an oath in a Düsseldorf criminal case based on an interpretation of the Sermon on the Mount Matthew 5:33-37). The dissent of Justice Von Schlabrendorff is notable in the way it incorporates the notion of God into the Basic Law: “The preamble of our Basic Law states that the German people have chosen a new system in the awareness of their responsibility to God and mankind.” See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY: THIRD EDITION, REVISED AND EXPANDED* 546 (2012) [hereinafter KOMMERS]. Before his elevation to the Federal Constitutional Court, Judge von Schlabrendorff was one of those tried before the Nazi People’s Court in 1945 for being part of the plot against Hitler.

11. BVerfGE 2015, 1 BvR 471/10, 1 BvR 1181/10, ¶¶ 1-31 (Ger.) (“The protection afforded by the freedom of faith and the freedom to profess a belief (Basic Law Article 4, §§1 and 2) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf”); see Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2 *BYU L. REV.* 665, 66 (2004).

12. See Marianne Heimbach-Steins (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies [hereinafter RACAS]), *Religious Freedom and the German Circumcision Debate* 1, 1-16, EUI Working Paper RSCAS 2013/18 addressing a court decision in 2012, which held that the circumcision of boys amounted to grievous bodily harm; following wide discussion in Germany, including amongst the Muslim and Jewish groups, the relevant law was updated to afford the practice protection on religious grounds.

13. BVerfGE 2002, 1 BvR 1783/99, ¶¶ 1-61 (holding ritual slaughter to be an exception under the Basic Law, Article 4).

14. BVerfGE 1987, 11 BvR 1087/91 (holding, “The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art; 4(1) Basic Law”).

15. BVerfGE 1971, 1 BvR 387/65 (deciding that under Article 4 of the Basic Law, blood transfusions may be refused based on religious belief).

16. For an overview of the German case law until 2004, see Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 *TUL. L. REV.* 1023, 1030 (2004). For a remarkable overview in English—running to 178 pages—of legal provisions affecting religion

is arguably played out inside these formative legal frameworks.¹⁷ This article suggests that a comparative reflection of these issues could helpfully inform constitutional debate in Australia and, to some degree, Germany at both federal and state levels.

This Article does not consider all of the available ‘conscience cases,’ but focuses on the German constitutional cases dealing with headscarves and classroom crucifixes, and two very recent Australian cases concerning religious headwear in Australian courtrooms. In broad terms, it considers elements of comparative law, constitutional law, with the occasional foray into the realm of public reason. Part I sets out the case for German-Australian comparison. Part II introduces the problem of defining conscience in a legal context and prepares the way for a discussion of the law of conscience protection in Germany and Australia in two key areas: crucifixes and religious clothing.¹⁸ Part III outlines the German constitutional guarantee while Part IV looks at the pivotal German crucifix and headscarf cases decided by the Federal Constitutional Court. Part V will allow for some comparative observations while discussing in detail several recent Australian court cases and trends in religious conscience protection which these cases have presented. In due course, this Article will draw conclusions about what each country might learn from the other while highlighting what the Commonwealth of Australia might learn from the Federal Republic of Germany.

in Germany, see Gerhard Robbers et al., *German Legal Provisions Related to Religion in the Federal Republic of Germany*, UNIVERSITY OF TRIER (Aug. 2002), https://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Deutschland/Religionsnormen/German_Legal_Provisions/German_Legal_Provisions_Relating_to_Religion_March_2002.pdf [<https://perma.cc/4TMS-EHXY>]. This study runs a wide range of possible legislative norms including those at Federal and State levels, laws on education, assembly, media, monuments, burial codes, funding, labor law, data protection, Church-State treaties, and much more; see, e.g., herein is found an English translation of the Treaty between the Holy See and the Free State of Thuringia (Staatsvertrag zwischen dem Heiligen Stuhl und dem Freistaat Thüringen), LAW AND ORDINANCE GAZETTE OF THURINGIA [GVBl] June 11, 1997 at 266 (Eng.). This Treaty is also available on the Vatican website (Ger.), http://www.vatican.va/roman_curia/secretariat_state/1997/documents/rc_seg-st_19970611_sede-turingia_ge.html [<https://perma.cc/EWN4-ZJ3B>] (last visited Apr. 27, 2019).

17. *Culture War Over German Identity: Religious Symbols Take Center Stage*, SPIEGEL ONLINE (May 3, 2018), <https://www.spiegel.de/international/germany/religious-symbols-at-heart-of-german-search-for-identity-a-1205572.html> [<https://perma.cc/64M3-ARXT>].

18. Other areas of conflict in the realm of religious freedom and “conscientious objection” such as cooperation in abortion, euthanasia or any number of other morally charged scenarios lie beyond the scope of this article.

II. THE ARGUMENTS FOR GERMAN-AUSTRALIAN COMPARISON

Edward J. Eberle persuasively argues the benefits of comparing the US and German jurisprudence on religion and religious freedom.¹⁹ His arguments, it is submitted, are equally coherent in comparing Australia with Germany, at least over the past several decades.²⁰ He notes significant developments in the law in recent years, especially in the United States, under the guidance of US Chief Justice William Rehnquist.²¹ The brisk pace of these developments has not been matched in Australia. The unhurried, or even dawdling development of religious freedom laws in Australia supports an inquiry into the reasons for the lack of improvement.²² In addition, the few recent but significant Australian court cases that have been handed down bear serious consideration, including one concerning the issue of religious freedom in a corporate context.²³ Other comparative studies also merit discussion but will not be the focus of this article.²⁴

Eberle asserts that “German law accords wider scope to individual free exercise freedoms than American law.”²⁵ This greater latitude is

19. Eberle, *supra* note 16, at 1023.

20. While going back further might allow an opportunity for consideration of larger forces at work (e.g., the rise of National Socialism or the fall of the Weimar Republic), doing so is beyond the scope of this study.

21. Eberle, *supra* note 16, at 1025 (referring generally to the change of emphasis from that under *Sherbert v. Verner*, 374 U.S. 398 (1963) to that of *Emp’t Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)).

22. See Denise Meyerson, *The Protection of Religious Rights under Australian Law*, *BYU L. REV.* 529, 552 (2009) (concluding that there are “significant gaps in the *de iure* protection afforded religion. Legal protection for religious rights in Australia is not only limited but also affected by arbitrary factors such as where a person lives and whether the religious group to which he/she belongs can be categorized as an ‘ethnic’ group”).

23. *Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd* (“Cobaw”) (2014) 308 ALR 615, 617 (Court of Appeal) (Austl.) (Victorian Court of Appeal holding, *inter alia*, that a corporation could not claim “personhood” for the purposes of a religious exemption). For commentary, see generally Shawn Rajanayagam & Carolyn M., Evans, *Corporations and Freedom of Religion: Australia and the United States Compared*, 37 *SYDNEY LAW REVIEW* 329 (2015) (arguing that corporations should not possess a right to religious freedom). This is such a large area for discussion that it must be left for another day.

24. See Iain T. Benson, *Religious Liberty in Australia: Some Suggestions and Proposals for Reframing Traditional Categorisations*, 139 *ZADOK PERSPECTIVES* 10, 17 (2018) (an evaluative review of religious freedom laws in Australia, Canada, and South Africa). See generally STEPHEN V. MANSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN SIX DEMOCRACIES* (2017) [hereafter Mansma & Soper].

25. EBERLE, *supra* note 16, at 1026.

arguably also the case in any Australia-Germany comparison, especially since the so-called ‘religion clause’ in the Australian Constitution (section 116) has been narrowly construed by the courts, despite its similarity with parts of the US First Amendment.²⁶ Further, Eberle views Germany as “a highly developed, industrial, democratic society committed to constitutional government and situated within the Western cultural tradition.”²⁷ So too may Australia easily lay claim to such a description and even assert democratic traditions that antedate those of the Weimar Republic.²⁸ Eberle argues, “German freedoms are roughly comparable to American freedoms as a matter of text, historical understanding, and constitutional design.”²⁹ This claim is also worth exploring at various levels of a German-Australian comparison, despite the constitutional and historical divergences apparent between Australia and Germany.³⁰

Beyond Eberle’s comparative model, other cogent reasons for embarking on a comparison between Germany and Australia exist, including the multicultural social environment of both countries, their recent, sometimes fraught, immigration histories,³¹ their activities in

26. See generally CAROLINE MAREE EVANS, LEGAL PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA 71 (1st ed. 2012) (on the limited scope of Section 116 of the Australian Constitution). For a discussion of section 116 in the context of a proposed Australian Bill of Rights, see Paul Babie & Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821, 825 (2010).

27. Eberle, *supra* note 16, at 1026.

28. Germany was declared a federal republic at the beginning of the German Revolution in November 1918. On August 11, 1919, President Friedrich Ebert signed the democratic Weimar Constitution.

29. Eberle, *supra* note 16, at 1027.

30. Despite a justifiable bias in favor of highlighting the Anglo-centric origins of the Australian Constitution, German and Swiss ideas, mediated through the work of Johann Caspar Bluntschli (1808–1881) and Georg Jellinek (1851–1911), also played a significant role. see Nicholas Aroney, *The Influence of German State-Theory on the Design of the Australian Constitution*, 59 (3) INT’L & COMP. L.Q. 669, 669–99 (2010) (drawing attention to a critical but neglected story about the dissemination of German and Swiss state-theories among English-speaking scholars in the second half of the 19th century and the influence of these ideas on those who designed and drafted the Australian constitution).

31. The immigration debate in both countries has been long and sometimes painful. The German Basic Law is rare amongst world constitutions in that it provides a constitutional right to asylum (Article 16a). In 2015, German Minister of State Maria Böhmer stated, “Germany is new to acknowledge that it is an immigrant country. . . Australia has a lot of experience in this area [of diversity].” See Latika Bourke, *Germany Is Looking to Australia’s Success as an Immigration Nation*, SYDNEY MORNING HERALD (Dec. 10, 2015) <https://www.smh.com.au/politics/federal/germany-is-looking-to-australias-success-as-an-immigration-nation-20151210-gljuhu.html> [<https://perma.cc/KEZ8-NWBU>].

defending religious freedom at the international level, and their complex church-state relations in such areas as school funding and general welfare provision.³² One may also consider that even though Germany, like England, is perhaps (at least historically) more familiar with the idea of a confessional state, Australia shares enough English legal history to be considered a distant but legal part of that tradition.³³

Finally, looking into the future, the classical problems of conscience, such as those arising in the military and medical contexts, are also now being aggravated and even overtaken by advances in technology with implications that regularly extend beyond national borders.³⁴ Recent examples of this lie in the questions raised by “moral machines,”³⁵ autonomous cars,³⁶ and a remarkable “digital case study,”

32. For a discussion of Church-State relations and in the areas of welfare and education in Australia and Germany in particular, see chapters 5 (Australia) and 7 (Germany) see generally MANSMA AND SOPER, *supra* note 24.

33. Soper would disagree, assigning Australia to the category of “pragmatic pluralist” (along with The Netherlands, a “principled pluralist” country); see MANSMA & SOPER, *supra* note 24, at 85ff. Germany and England are each assigned a category closer to that of the confessionalized state.

34. For example, consider the “actions” of autonomous weapons systems across national borders and the extent to which their activities may be sheeted home to human actors. See Duncan B. Hollis, *Setting the Stage: Autonomous Legal Reasoning in International Humanitarian Law*, 30 TEMP. INT’L & COMP. L.J. 1, 15 (2016) (setting the stage for a symposium on the issues surrounding autonomous weapons systems in the context of Saint Thomas Aquinas’ classic analysis of human acts). In the medico-military context see generally Christopher E. Sawin, *Creating Super Soldiers for Warfare: A Look into the Laws of War*, 17 J. HIGH TECH. L. 105 (2016) (arguing that the use of technology to create superior soldiers is not currently prohibited under humanitarian laws of war). This raises the question as to whether super-soldiers, bred for battle and with genetic or drug-induced limitations on their power to empathize, are even human and thus capable of conscientious objection. Other areas of concern for conscience in the non-military medical context could include extreme cosmetic surgery, or other forms of advanced but unnecessary treatment.

35. See Mass. Inst. of Tech. (MIT), *About Moral Machine*, MORAL MACHINE, <http://moralmachine.mit.edu/> [<https://perma.cc/T9GQ-8FVG>] (last visited Apr. 27, 2019). About machine intelligence overtaking human decision making, Iyad Rahwan, Edmond Awad, & Sohan Dsouza stated, “[f]rom self-driving cars on public roads to self-piloting reusable rockets landing on self-sailing ships, machine intelligence is supporting or entirely taking over ever more complex human activities at an ever-increasing pace. The greater autonomy given machine intelligence in these roles can result in situations where they have to make autonomous choices involving human life and limb. This calls for not just a clearer understanding of how humans make such choices, but also a clearer understanding of how humans perceive machine intelligence making such choices”). See *Ethics of Autonomous Vehicles*, WINBROOK, <http://www.rri-tools.eu:8080/-/moral-machine> [<https://perma.cc/8HGX-ZT8A>].

36. *Can Autonomous Cars Have a Moral Conscience? Views from DW’s science desk*, DW (Dec. 10, 2018), <https://www.dw.com/en/can-autonomous-cars-have-a-moral-conscience->

in which Google engineers claimed conscientious objection against participation in software manufacture designed to improve international military drone targeting.³⁷ Although these topics are beyond the scope of this Article, they demonstrate that the defense of conscience, and the associated freedom of religion will remain firmly on the social and legal agendas for the foreseeable future.

III. DEFINING ‘CONSCIENCE’ FOR LEGAL PURPOSES

Definitions of the notion of conscience usually belong in the realms of theology and moral philosophy. Both areas typically draw deeply on religious origins, but now also find some forms of secular definition.³⁸ An example of the former is to be discovered in the work of John Henry Newman, who speaks of conscience as the voice of

views-from-dws-science-desk/a-46056690 [https://perma.cc/CP5K-LXDU] (last visited Apr. 26, 2019).

37. Shane Scott & Wakabayashi Daisuke, *The Business of War: Google Employees Protest Work for the Pentagon*, N.Y. TIMES (Apr. 4, 2018) <https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html> [https://perma.cc/6J83-TT5M] (last visited Apr. 26, 2019) (“Thousands of Google employees, including dozens of senior engineers, have signed a letter protesting the company’s involvement in a Pentagon program that uses artificial intelligence to interpret video imagery and could be used to improve the targeting of drone strikes”). Google reportedly disengaged from this work at a later date. See Shane Scott & Wakabayashi Daisuke, *Google Will Not Renew Pentagon Contract that Upset Employees*, N.Y. TIMES (June 1, 2018) <http://www.nytimes.com/2018/06/01/technology/google-pentagon-project-maven.html> [https://perma.cc/UB63-4GL7] (last visited Apr. 26, 2019). Google later produced a set of AI objectives precluding its use in weapons and human rights violations; see Devin Coldeway, *Google’s New ‘AI Principles’ Forbid Its Use in Weapons and Human Rights Violations*, TECHCRUNCH (June 7, 2018) <http://social.techcrunch.com/2018/06/07/googles-new-ai-principles-forbid-its-use-in-weapons-and-human-rights-violations/> [https://perma.cc/3HMY-8SFX] (last visited Apr. 26, 2019). For AI’s seven objectives, see Sundar Pichai, *AI at Google: Our Principles*, GOOGLE (June 7, 2018), <https://www.blog.google/technology/ai/ai-principles/> [https://perma.cc/M58Y-STH9] (last visited Apr. 26, 2019).

38. See JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 13 (Jane Marie Todd, trans., 2011) (“Core beliefs and commitments, which we will also call ‘convictions of conscience,’ include both deeply held religious and secular beliefs and are distinguished from the legitimate but less fundamental ‘preferences’ we display as individuals”) [hereafter MACLURE & TAYLOR]. This is an English translation of DOMINIQUE LEYDET, *LAÏCITÉ ET LIBERTÉ DE CONSCIENCE* LES ÉDITIONS DU BORÉAL (2010). For a critical review of Maclure and Taylor, see generally Jude P. Dougherty et al., *Secularism and Freedom of Conscience*, 65 REV. OF METAPHYS. 434 (2011). For a review of SORABJI, see Margaret Atkins, *MORAL CONSCIENCE THROUGH THE AGES* by Richard Sorabji, NEW BLACKFRIARS 736-38 (Oct. 5, 2016), https://onlinelibrary.wiley.com/doi/epdf/10.1111/nbfr.3_12239 [https://perma.cc/JT64-G58D].

God.³⁹ The more secular manifestation may be found, for example, in the work of Jocelyn Maclure and Charles Taylor, where conscience is discussed not only on a religious basis but also in the context of deeply held secular convictions.⁴⁰ However, conscience, as defined by theologians or philosophers, is not something necessarily (or easily) translatable into a *legal* definition interpretable by citizens and, ultimately, by the courts.⁴¹ Isensee has labeled this the ultimate legal problem of defining conscience (the “definitions problem”);⁴² this is a problem that cannot be avoided by courts or lawyers when the word is used in a piece of legislation, or, indeed, in an elemental document like a national constitution. The Federal Republic of Germany exemplifies just such a case because the foundational document of the *Rechtsstaat*,⁴³ the German Basic Law (Constitution), uses the word ‘conscience’ five times in three different Articles.⁴⁴ The term must, then, be given a meaning that is legally stable and able to be used over time, in cases that concern different and diverse facts (*Tatbestände*). Once established, such a definition must also be applied in order to decide cases between parties with mixed and often contrary interests. We now turn to explore more precisely what the Basic Law guarantees its citizens in this area.

39. John Henry Newman asserts, “conscience is the voice of God, whereas it is fashionable on all hands now to consider it in one way or another a creation of man”; see Letter from John Henry Newman to the Duke of Norfolk, in *THE GENIUS OF JOHN HENRY NEWMAN: SELECTIONS FROM HIS WRITINGS* 262-263 (Ian T. Ker ed., 1989).

40. See generally MACLURE & TAYLOR, *supra* note 38.

41. The discussion surrounding what lawyers and judges actually do when they interpret words and the rules that contain them is an interesting one; see generally DAVID MIERS & WILLIAM TWINING, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* (5th ed. 2010). This discussion sometimes lapses into a “rivalry of emphasis” between interpretive approaches to statute law and common law case law; see Janet S. Lindgren & John Henry Schlegel, *Review: Thinking about Statutes: Hurst, Calabresi, Twining and Miers*, 9 AM. BAR FOUND. J. 458, 458-68 (1984).

42. Isensee, *supra* note 8, at 46.

43. In German, this *Rechtsstaat* is sometimes contrasted with the *Polizeistaat* (*police state*). For a recent book-length treatment of the concept of the *Rechtsstaat*, see generally STEPHAN KRISTE, *THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT)* (James R. Silkenat et al. eds., 2014).

44. See GRUNDGESETZ (GG) [BASIC LAW] and in particular, art. 4 (Freedom of Faith, Conscience, and Creed); art. 12a (Compulsory Military or Alternative Service); and art. 38 (Elections: Elected Members of the Bundestag are to be “representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience”); translation available at <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510> [<https://perma.cc/A53C-K7PG>].

IV. THE GERMAN CONSTITUTIONAL GUARANTEE

Freedom of conscience is guaranteed in broad terms by Article 4 [Freedom of Faith, Conscience, and Creed] of the German Basic Law:

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.
- (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.⁴⁵

The guarantees in sections (1) and (2) are notably free from qualification or limitation while, due to associated “federal regulations,” section (3) is not. Collectively, these serious and comprehensive guarantees were forged in the aftermath of World War II, as well as in the rooms of the Royal Palace of Herrenchiemsee in August of 1948.⁴⁶ Intended at the time as a merely transitional document, the Basic Law was broadly interpreted by the newly-formed Federal Constitutional Court during the 1950s as a bulwark of fundamental rights. Cases like *Elfes*⁴⁷ and *Lüth*⁴⁸ and their progeny made the Court, and by implication the Constitution, “a moral success story to match the economic miracle.”⁴⁹ The document has shown remarkable endurance despite some democratic alterations and updates along the way.⁵⁰

45. *Id.* art. 4.

46. On the processes and outcomes of drafting three German Constitutions, including the successful Basic Law of 1949, see Inga Markovitz, *Constitution Making after National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1307-46 (2007).

47. BVerfGE 3, 58. “In *Elfes*, the Court developed the famous concept of a ‘general’ fundamental right, which can be invoked against any act of public authority to vindicate freedoms not explicitly guaranteed by the constitutional text.” Florian Meinel, *The Constitutional Miracle on the Rhine: Towards a History of West German Constitutionalism and the Federal Constitutional Court*, 14 INT’L J. CONST. LAW 261, 284 (2016).

48. BVerfGE 7, 198 (extending constitutional oversight even into the area of private law); Meinel, *supra* note 47, at 284.

49. JUSTIN COLLINGS, *DEMOCRACY’S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 1951–2001* 61 (2015); Meinel, *supra* note 47, at 261. For a discussion in English of the theories of fundamental rights under the German Basic Law, see generally KOMMERS, *supra* note 10. For a less glowing assessment of German moral and economic success, see Paul Hockenos, *Germany has an Arrogance Problem*, FOREIGN POLICY (MAY 6, 2019) <https://foreignpolicy.com/2017/04/27/germany-is-getting-too-arrogant-merkel> [<https://perma.cc/M2BZ-2YCP>].

50. The Basic Law has been updated sixty-two times since 1949.

The guarantee in Article 4 must be seen in the light of other provisions of the Basic Law, which deal with relations between church and state more generally. These include Article 140, which sweeps up five articles of the Weimar Constitution,⁵¹ including a particularly German form of the non-establishment clause,⁵² and incorporates them into the Basic Law. These five articles (sixteen paragraphs in total) deal generally with religion and religious associations, including such matters of “status, powers, and duties of religious associations.”⁵³ There are also important far-reaching economic ties between churches and the German state in the form of the *Kirchensteuer* (the church tax, authorized under the above provisions of the Weimar Constitution),⁵⁴ indexed endowment payments (compensation for historical confiscations of Church property),⁵⁵ and other welfare provisions.⁵⁶

Other provisions scattered throughout the Basic Law also protect religious belief (and thereby conscience) more indirectly. These appear

51. Arts. 136-40.

52. Article 137(1) provides, somewhat bluntly, “There shall be no state church.” As Kommers notes, this is quite different from the US version of non-establishment. “Rather than the “separationist approach taken in the United States, Germany’s system may be described as cooperative, anticipating a limited partnership between church and state.” KOMMERS, *supra* note 10, at 539. As discussed below, when compared to the United States, the situation in Germany is far more similar to that of Australia.

53. KOMMERS, *supra* note 10, at 538.

54. Specifically, article 137(6), which provides “Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* (State) law.” THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art. 137(6).

55. The 100th anniversary of the decision to cease such payments occurred in 2019. To date, these payments continue since—it has been alleged—it would cost the government far too much to retire them. Not all states are affected (*e.g.*, Bremen and Hamburg). The Religion News Service reports, “[o]fficially, the historical payments known as “endowments,” fork out taxpayer funds to compensate the churches for valuable farmlands and buildings that secular rulers have taken from them over the centuries. Some were seized by the French after Napoleon annexed lands up to the western banks of the Rhine River two centuries ago; other confiscations go back to the Reformation.” Tom Heneghan, *Germany Continues Payments to Churches a Century after Deciding to Stop*, RELIGION NEWS SERVICE (Feb. 13, 2019), https://religionnews.com/2019/02/13/germany-continues-payments-to-churches-a-century-after-deciding-to-stop/?utm_source=Pew+Research+Center&utm_campaign=05db11d2c3-EMAIL_CAMPAIGN_2019_02_14_02_52&utm_medium=email&utm_term=0_3e953b9b70-05db11d2c3-399905589 [https://perma.cc/X3NY-3ZFU].

56. For example, Caritas, an organization of the Catholic Bishops Conference of Germany, has more than half a million staff working in Germany and about half a million volunteers. The international department of Caritas Germany is working with a staff of about 100. *See Germany*, <https://www.caritas.org/where-caritas-work-europe/germany/> [https://perma.cc/5ND9-RWQ2] (last visited Apr. 26, 2019).

in provisions on equality,⁵⁷ suitability for public office,⁵⁸ freedom from compelled religious exercise or disclosure,⁵⁹ including oath-taking and use of an affirmation by citizens or the President taking office.⁶⁰ Even less direct, but significant, protection is found in rights of parents to decide whether children receive religious instruction in state schools.⁶¹ It should also be noted that the European Convention of Human Rights offers a more qualified guarantee of some of these rights.⁶²

V. CRUCIFIXES, CLOTHING, AND GERMAN CONSCIENCE CASES

A. *The German Crucifix Cases*

The display of crosses or crucifixes has been the subject of litigation in European courts at different times over the last few

57. "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art. 3(3).

58. "Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art 33(3).

59. "No person shall be required to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership of a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires." THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art 136(3) (incorporated by article 140 of the Basic Law).

60. Article 136(4) of the Weimer Constitution provides "No person may be compelled to perform any religious act or ceremony, to participate in religious exercises or to take a religious form of oath." After providing the form of the Oath of Office, the final sentence of Article 56 provides: "The oath may also be taken without religious affirmation." THE CONSTITUTION OF THE GERMAN REICH, Aug. 11, 1919, art 136(4). *See generally* KOMMERS, *supra* note 10, at 538.

61. "(1) The entire school system shall be under the supervision of the state. (2) Parents and guardians shall have the right to decide whether children shall receive religious instruction. (3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction." BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, May 23, 1949, art. 7(1)-(3).

62. A. H. ROBERTSON, HUMAN RIGHTS IN EUROPE 144-47 (Manchester Uni. Press ed., Oceana Publications, 1963) (1964).

decades, most notably in Germany and Italy.⁶³ The topic continues to generate controversy as evidenced by a 2018 Bavarian mandate to affix crucifixes in the entrances of public buildings.⁶⁴

In Germany, two major constitutional cases are essential to consider. First, in the 1973 *Courtroom Crucifix Case*,⁶⁵ the question was whether a Düsseldorf Administrative Court may display a crucifix over the objections of a Jewish litigant.⁶⁶ The result, on appeal to the Federal Constitutional Court, saw the crucifix taken down, but without a general prohibition on their placement in a courtroom.⁶⁷ In doing so, the Court was careful to reiterate the principle of state neutrality.⁶⁸

In the second case, the *Classroom Crucifix Case II* (1995)⁶⁹ the Federal Constitutional Court held that a Bavarian law requiring crucifixes be placed on the wall of state classrooms was a violation of the German Federal Constitution (Basic Law).⁷⁰ This case, and its preceding litigation created a firestorm of public protest and

63. Aside from Germany, the Italian case of *Lautsi v. Italy* (2011) holding that an Italian law mandating the display of crucifixes in classrooms does not violate the European Convention on Human Rights. See generally Grégor Puppinc, *The Case of Lautsi v. Italy: A Synthesis*, 3 *BYU L. REV.* 873 (2012).

64. Guy Chazan, *Bavaria Imposes Law on Displaying Cross in State Buildings*, *Financial Times* (June 1, 2018), <https://www.ft.com/content/1e2bec76-6572-11e8-a39d-4df188287fff> [<https://perma.cc/NP6K-4LBT>] (last visited Mar. 25, 2019).

65. 35 BVerfGE [Federal Constitutional Court] 366 (1973).

66. The court held that such a display was lawful and “the mere presence of a crucifix in a courtroom does not demand any identification with the ideas and institutions symbolically embodies therein or compel any specific behavior in accordance thereof.” *Id.* KOMMERS, *supra* note 10, at 545.

67. See Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 *V AND J. TRANSNAT’L L.* 1127, 1129 (1998). See also KOMMERS, *supra* note 10, at 545.

68. 35 BVerfGE [Federal Constitutional Court] 366, 375 (1973).

69. See KOMMERS, *supra* note 10, at 577-83. Note that the preceding case from 1991, known as Classroom Crucifix I Case, the Federal Constitutional Court considered—and rejected—a request for an injunction to take down the crucifix. See 85 BVerfGE 94 (1991). BVerfGE 93, 11 BVR 1087/91 Kruzifix-decision (“Classroom Crucifix Case”) (Ger.), May 12, 1987, translated in <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615#top> [<https://perma.cc/H78Y-XJNH>]. Classroom Crucifix II went beyond the procedural issues associated with an injunction and dealt with the substantive arguments.

70. BVerfGE 1987, 11 BvR 1087/91 (Ger.), May 12, 1987, translated in <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615#top> [<https://perma.cc/H78Y-XJNH>] (holding that “the affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art. 4(1) of the Basic Law”).

discussion.⁷¹ Bavaria's pragmatic response was to draft a new law (in 1995), which was later confirmed as constitutional in Bavaria and Berlin in 1997.⁷² As summarized by Ingrid Brunk Weurth:

The new [1995] law draws substantially from a report commissioned by the state of Bavaria and written by Peter Badura, former president of the Federal Constitutional Court. Like the old law, the new one provides for crosses in Bavarian classrooms. Under the new law, however, if parents object to the cross based on honest and "visible" or expressible principles of their faith or world view, then the school must seek a compromise. If it finds no compromise, then the school must create a rule for each individual case that respects the freedom of the complainant and the religious views of everyone in the class. In that decision the school must consider, to the greatest degree possible, the desires of the majority. The new law, according to Badura, stays within the "Spielraum" or "room for play" afforded to the states by the Basic Law and Constitutional Court's 1995 decision (citations omitted).⁷³

The cultural impacts and debates were significant across Germany but more so in the south than in the north.⁷⁴ Citizens of the former German Democratic Republic (GDR) were perhaps less interested in such disputes.⁷⁵ Some commentators have criticized the final decision as one that generated more conflict than it resolved and that might lead to a legitimate "questioning of the constitutionalists monopoly of virtue."⁷⁶

The nature of the alleged affront to the conscience of the litigant in the *Courtroom Crucifix Case* and to the child and parents in the *Classroom Crucifix* case(s) bears some discussion in the context of conscience protection in schools. Here, noticeable differences exist between the majority and dissenting judgments. After a discussion of the principle of tolerance, the minority decided that no unacceptable

71. Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES (Aug. 23, 1995), <https://www.nytimes.com/1995/08/23/world/crucifix-ruling-angers-bavarians.html> [<https://perma.cc/FB6E-8A64>].

72. Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA J. INT'L & COMP. L. 405, 491 (1999). See James Arthur, *Learning under the Cross: Legal Challenges to 'Cultural-Religious Symbolism' in Public Schools*, 20 EDUCATION & THE LAW 337, 341 (2008).

73. Wuerth, *supra* note 67.

74. See Peter C. Caldwell, *The Crucifix and German Constitutional Culture*, 11 CULT. ANTHROPOL. 259, 272 (1996).

75. *Id.*

76. Howard Cagill & Alan Scott, *The Basic Law versus the Basic Norm? The Case of the Bavarian Crucifix Order*, 44 POL. STUD. 413, 506-16 (1996).

burden was imposed on the conscience of students exposed to the classroom crucifix, nor by implication to their parents. They noted:

In view of the cross's symbolic character, non-Christian pupils and their parents are obligated to accept its presence in the classroom. The principal of tolerance requires as much, and the display of the cross does not constitute an unacceptable burden on the religious conscience of non-Christian pupils.

The psychological effect that exposure to the cross has on non-Christian pupils is relatively mild. The mental burden here is minimal, for pupils are not required to behave in a given way or to participate in religious practices before the cross. In contrast to compulsory school prayer, pupils are not forced to reveal the ideological or religious convictions through nonparticipation. This precludes any discrimination against them.⁷⁷

Terms such as “psychological effect” (upon students) or “mental burden” due to exposure to religious symbols are, the court appears to argue, a lesser form of interference with conscience than a requirement forcing one to act, behave, or participate in a religious ceremony or activity (e.g., prayer). This is in keeping with the earlier decision affirming positive religious freedom in cases concerning school prayer decided in 1979.⁷⁸

The majority dealt with the issue quite differently, finding that such a burden did exist and that the crucifix could not be left on the wall, but must be removed as constitutionally inappropriate. The court made a number of points in reaching this conclusion, the following of which touch directly or indirectly upon the question of the burdens of conscience:

- In a society that tolerates a wide variety of faith commitments, the individual clearly has no right to be spared exposure to

⁷⁷. KOMMERS, *supra* note 10, at 583.

⁷⁸. *Id.* at 567-71; Wuerth summarizes: “Rejecting the lower court’s conclusion that the prayers were coercive, the court reasoned that the right to not reveal one’s religious convictions did not take precedence over the rights of others to practice their religious beliefs. Moreover, the court pointed out, the Basic Law itself created situations, particularly the refusal to bear arms, in which those who seek exemptions must similarly reveal something of their religious convictions. The court went on to note that in exceptional cases particularly sensitive students in unsympathetic schools might mean that the school must forego the prayers, but this did not justify the lower court’s conclusion that any and all such prayers were unconstitutional. The court made clear that the positive freedoms involved did not compel schools to institute prayers.” Wuerth *supra* note 10, at 1180-81.

quaint religious manifestation, sectarian activities, or religious symbols.⁷⁹

- Given the context of compulsory education, the presence of crosses in classrooms amounts to state-enforced “learning under the cross,” with no possibility to avoid seeing the symbol. This constitutes the critical difference between the display of the cross in a classroom and the religious symbols people frequently encounter in their daily lives.⁸⁰
- The cross, now as before, represents a specific tenet of Christianity; it constitutes its most significant faith symbol. It symbolizes human redemption from original sin through Christ’s sacrifice just as it represents Christ’s victory over Satan and death and his power over the world. Accordingly, the cross symbolizes both suffering and triumph . . . to this day, the presence of a cross in a home or room is understood as an expression of the dweller’s Christian faith.⁸¹
- On the other hand, because of the significance Christianity attributes to the cross, non-Christians and atheists perceive it to be the symbolic expression of certain faith convictions and a symbol of missionary zeal. To see the cross as nothing more than a cultural artifact of the Western tradition without any particular religious meaning would amount to a profanation contrary to the self-understanding of Christians and the Christian church.⁸²
- Coercion is to be reduced to an indispensable minimum. In particular, the school must not proselytize on behalf of a particular religious doctrine or actively promote the tenets of the Christian faith.⁸³

And finally:

- Christianity’s influence on culture and education may be affirmed and recognized, but not particular articles of faith. Christianity as a cultural force incorporates in particular the idea of tolerance toward people of different persuasions.

79. KOMMERS, *supra* note 10, at 578.

80. *Id.* at 579.

81. *Id.* at 579-80.

82. *Id.* at 580.

83. *Id.* at 581.

Confrontation with a Christian worldview will not lead to discrimination or devaluation of a non-Christian ideology so long as the state does not impose the values of the Christian faith on non-Christians; indeed, the state must foster the autonomous thinking that Article 4 of the Basic Law secures within the religious and ideological realms.⁸⁴

While difficult to summarize, the above approach takes the claims of Christianity seriously (‘Christ’s victory’), and at the same time, takes a ‘hands-off’ approach to the imposition of values. This approach, arguably, is a strong endorsement of the freedom of conscience policy sought to be promoted by Article 4. On the other hand, the “mild psychological effect” of being required to study under the cross claimed by the dissenting judges would seem to agree in substance with the majority about protecting the individual’s conscience but differ on the degree of exposure that is burdensome. Unlike the majority, the dissent also makes clear that the cross does not “imply any kind of missionary activity.”⁸⁵ Based on these arguments, the difference between the majority and minority opinions seems to be more one of degree than substance.

B. Major German Headscarf Decisions

The so-called headscarf debate (*Kopftuchdebatte*) in Germany has been raging for years and been the subject of multiple cases, including two at the level of the Federal Constitutional Court.⁸⁶ Both of these cases related to headscarves worn by teachers in state schools, but headscarves in courtrooms have also been much-disputed, even as

84. *Id.* at 581.

85. *Id.* at 583.

86. These cases were decided in 2003 and 2015. *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court], 24, 2003, 2 BvR 1436/02 [hereinafter *First Headscarf Decision*]. While only the German version is authoritative, an English translation is available on the German Federal Constitutional Court website at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs200309_24_2bvr143602en.html [<https://perma.cc/7FFD-VNE7>] (last visited Apr. 26, 2019); *Bundesverfassungsgericht* [BVerfGE] [Federal Constitutional Court], January 27, 2015, 1 BvR 471/10, (Ger.) [hereafter *Second Headscarf Decision*]. See the copious references in Kerstin Braun, *How Much Veil Is Too Much Veil: On the Constitutionality and Advisability of Face Bans for German Public School Students*, 18 GERMAN L. J. 1331, 1331–58 (2017).

recently as 2013,⁸⁷ and a 2019 Bavarian case confirming that headscarves are not to be worn by judges or prosecutors.⁸⁸

The link between conscience and the wearing of items of clothing deserves some preliminary discussion. By way of introduction, it is important to note that the headscarf debate covers a wide range of issues and is extremely complex, touching upon many questions, including intra-religious expression. These intra-religious expressions and expectations of dress codes are based on differing interpretations of the Qur'an,⁸⁹ inter-religious relations and the singling-out of particular religions for special treatment,⁹⁰ the equal treatment of men and women,⁹¹ psychological effects on students,⁹² parental rights, and workplace clothing codes and the associated labor laws, especially in public service.⁹³ Further, the legal issues as they relate specifically to conscience protection are also complex.

1. The First Headscarf Decision

The *First Headscarf Decision* concerned a German citizen, who applied to teach in state primary and secondary schools,⁹⁴ in the Land (Federal state) of Baden-Württemberg.⁹⁵ In addition to implicating

87. See Joachim Wagner, *Legal Limbo: Lawyers Seek Clarity on Headscarves in Court*, SPIEGEL ONLINE (Sept. 17, 2013), <https://www.spiegel.de/international/germany/muslim-lawyers-seek-clarity-on-allowance-of-headscarf-in-court-a-922522.html> [https://perma.cc/K43E-FCMA].

88. *Germany: Bavarian Court Upholds Headscarf Ban for Judges, Prosecutors*, DW (Mar. 18, 2019), <https://www.dw.com/en/germany-bavarian-court-upholds-headscarf-ban-for-judges-prosecutors/a-47960676> [https://perma.cc/3P5L-ZQYN].

89. See generally Heiner Bielefeldt, *Zur aktuellen Kopftuchdebatte in Deutschland—Anmerkungen aus der Perspektive der Menschenrechte [On the Current Headscarf Debate in Germany—Observation from the Human Rights Perspective]*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE [GERMAN INSTITUTE FOR HUMAN RIGHTS] https://www.ssoar.info/ssoar/bitstream/handle/document/31669/ssoar-2004-bielefeldt-Zur_aktuellen_Kopftuchdebatte_in_Deutschland.pdf [https://perma.cc/3QZ6-3SNE].

90. *Id.*

91. Basic Law for the Federal Republic of Germany art. 3(2) provides that “[m]en and women shall have equal rights.”

92. Bielefeldt, *supra* note 89, at 5.

93. See Achim Seifert, *Religious Expression in the Workplace: The Case of the Federal Republic of Germany*, 30 COMP. LAB. L. & POL’Y J. 529, 568 (2009).

94. The Stuttgart Higher School Authority was responsible for teachers at both primary (*Grundschule*) and non-selective secondary (*Hauptschule*) schools.

95. The main protagonist has since written a book on the case and other matters; see generally Fereshta Ludin, ENTHÜLLUNG DER FERESHITA LUDIN. DIE MIT DEM KOPFTUCH [THE UNVEILING OF FERESHITA LUDIN: THE ONE WITH THE HEADSCARF] (2015).

Article 4 of the Basic Law, the case also required analysis of Articles 33(1) and 33(2), which guarantee equal political status in the areas of eligibility for and performance in public service.⁹⁶

The complainant's application was progressively rejected by the Stuttgart Higher School Authority, the Stuttgart Administrative Court, the Stuttgart Administrative Court, the Baden-Württemberg Higher Administrative Court, and the Federal Administrative Court.⁹⁷ The various stages of appeal allowed for lengthy public as well as legal debates, and, as illustrated below, full consideration of the many arguments both for and against the state's refusal to grant accreditation. These included discussions of religious identity;⁹⁸ state neutrality in the presence of religious symbolism, as well as the various degrees of such symbolism;⁹⁹ the extent of students' rights to "negative religious freedom;"¹⁰⁰ parents natural rights to the care and upbringing of children under Article 6.2 of the Basic Law;¹⁰¹ state neutrality;¹⁰² students' rights when confronted with an ongoing "expression of faith;"¹⁰³ the effects of a teaching wearing a headscarf on "schoolgirls

96. Article 33 provides, *inter alia*, (1) Every German shall have in every Land the same political rights and duties. (2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements. (3) Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

97. *First Headscarf Decision*, *supra* note 86, ¶¶ 1–15. For ease of reference, references point to paragraph numbers found in the right-hand margin of the translation provided by the Federal Constitutional Court (Bundesverfassungsgericht), however, as noted above, only the German version is authoritative.

98. *Id.* ¶ 4.

99. In the course of its discussion, the Federal Constitutional Court noted, "Unlike the crucifix, the headscarf was a not [an inherent] symbol of religion." *Id.*

100. "Negative religious freedom" denotes the right to be free from any religious influence in a state context. *See id.* ¶ 4. For example, see the Interdenominational School Case of 1975 (BVerfGE 41, BVerfGE 29) (upholding the constitutional validity of a Christian interdenominational school in Baden-Württemberg in the face of the argument put by parents that their children should be protected from all religious influence at such a school. The courts noted that the legislature must "choose a type of school which, insofar as it can influence children's decisions concerning faith and conscience, contains only a minimum of coercive elements"); at 575.

102. *Second Headscarf Decision*, *supra* note 86, ¶¶ 2–6.

103. *Id.*

of the Muslim faith;¹⁰⁴ the potential teacher's "aptitude" for teaching under the relevant law;¹⁰⁵ students' inability to select teachers or to avoid exposure to religious symbols of their own accord;¹⁰⁶ the state's duty to provide education under Article 7(1) of the Basic Law;¹⁰⁷ the need to balance the interests of teachers and students in a practical way ("practical concordance");¹⁰⁸ the importance of "respectful [state] neutrality";¹⁰⁹ the irrelevance of any teacher-declaration of the intention to avoid recruiting or proselytism;¹¹⁰ the inability of primary school pupils to "intellectually assimilate the religious motivation" of a teacher's actions;¹¹¹ and the role of the "class teacher" and the inability for students to easily change classes or schools.¹¹²

After numerous preliminary appeals, the Federal Administrative Court decided,¹¹³ "[t]he teacher's right to conduct herself in accordance with her religious conviction must have lower priority than the conflicting freedom of faith of the pupils and parents during

104. The Federal Constitutional Court noted, "considerable pressure to conform might arise here; this would contradict the school's pedagogical duty to work towards the integration of the Muslim pupils." *Id.* ¶ 5.

105. Specifically, §11.1 of the Baden-Württemberg Land Civil Service Act (Landesbeamtengesetz Baden-Württemberg-LBG). In discussing aptitude, the Federal Constitutional Court noted, "[t]he personal aptitude of teachers was in part to be determined on the basis of how far they were in the position to put into practice the educational objectives laid down under Article 7.1 of the Basic Law and to fulfill the state's duty to provide education." *Id.* *Second Headscarf Decision*, *supra* note 86, ¶ 85.

106. *Id.* ¶ 7.

107. Article 7(1) of the Basic Law provides: "The entire school system shall be under the supervision of the state." GRUNDGESETZ [GG] [BASIC LAW], art. 7(1).

108. *Second Headscarf Decision*, *supra* note 86, ¶ 9. Practical concordance (*praktische Konkordanz*) represents a form of practical balancing when rights are in conflict.

109. "The duty of neutrality in ideology and religion imposed on the state by the Basic Law was not a distancing and rejecting neutrality of the nature of laicist non-identification with religions and ideologies, but a respectful neutrality, taking precautions for the future, which imposed on the state a duty to safeguard a sphere of activity both for the individual and for religious and ideological communities." *Id.* ¶ 10. The court goes on to discuss the role of "precautionary neutrality." *Id.* ¶ 10.

110. *Id.* ¶ 11.

111. *Id.*

112. "An acceptable pragmatic solution of the conflict that allowed the complainant's freedom of belief to be taken more extensively into account was not possible in view of the principle of the class teacher, which was predominant at the primary school and the non-selective secondary school, and because of organisational difficulties with regard to moving from one school or class to another." *Id.* ¶ 11.

113. For instance, immediately prior to the appeal to and consideration by the Federal Constitutional Court. *Id.* ¶ 8.

lessons.”¹¹⁴ The court noted, “freedom of faith was not guaranteed without restriction”¹¹⁵ and held:

In the context of secular compulsory schools, organized and structured by the state, Article 4.1 of the Basic Law as a guarantee of freedom benefited above all children required to attend school and their parents. Here, the state was also obliged to take account of the freedom of religion of the parents and the right of education guaranteed to them under Article 6.2 sentence 1 of the Basic Law. Children must be taught and educated in state compulsory schools without any partiality on the part of the state and of the teachers representing it in favor of Christian beliefs or of other religious and ideological convictions.¹¹⁶

The Federal Administrative Court also noted a change in Germany’s religious and denominational landscape as follows:

With growing cultural and religious variety, where a growing proportion of schoolchildren were uncommitted to any religious denomination, the requirement of neutrality was becoming more and more important, and it should not, for example, be relaxed on the basis that the cultural, ethnic and religious variety in Germany now characterized life at school too.¹¹⁷

Both the Federal Government and the state of Baden-Württemberg presented arguments. The former argued that there is no ‘right’ to hold public office,¹¹⁸ and that decisions on employment were made on the basis of the requirements of the post and the personality of the applicant. In the case of a teacher, this included “the ability and the readiness of the teacher to comply with the official duties arising from the status of a civil servant under the concrete conditions of working at school.”¹¹⁹ In discussing this argument, the Court also noted Article 33(5) of the Basic Law, which allows for some limitations on basic rights of those who are engaged as civil servants, and in particular, that they carry out their duties neutrally and with

114. *Second Headscarf Decision*, *supra* note 86, ¶ 15.

115. *Id.* ¶ 13.

116. *Id.*

117. Federal Administrative Court as characterized by the Federal Constitutional Court in the *Second Headscarf Decision*. *Id.* ¶ 13.

118. *I.e.*, no right could be grounded on the wording of Article 33(2) of the Basic Law. *Id.* ¶ 21.

119. *Id.*

objectivity.¹²⁰ The Federal Government also referred to the possibility that “the teacher’s conspicuous outer appearance might have a long-term detrimental influence on the peace at the school.”¹²¹ This reasoning relied on the *Crucifix Case* by contending that the ubiquity and longevity of the exposure to the symbolic headwear was a “decisive factor.”¹²² Like the crucifix, the headscarf could not be avoided and exposure to it was permanent and unavoidable. The complainant’s symbolic act (of wearing) was also to be attributed not only to her but to the state that she represented. The Federal Government was, however, careful to avoid a secular understanding of such a line of argument, insisting rather, “consideration was merely being given to the growing importance of state neutrality in view of an increasing number of religions in society.”¹²³

The arguments of the state of Baden-Württemberg centered on the non-arbitrary nature of the decision of the Federal Administrative Court. In doing so, they emphasized the rights of parents. Specifically:

account had to be taken of the fact that schoolchildren’s personalities were not yet fully developed, and as a result school children were particularly open to mental influences by persons in authority, and in their developmental phase they learned in the first instance by imitating the behavior of adults. In addition, in particular in the case of children who have not reached the age at which they can decide on religious matters themselves, the parents’ right of education applies.¹²⁴

The court also drew on the concept of practical concordance between the state duty to provide education and the rights of parents. This, it was argued, is best achieved by “the state’s conducting itself

120. “The traditional fundamental principles of the permanent civil service laid down in Article 33.5 of the Basic Law, which restricted the fundamental rights of civil servants, included the obligation of teachers, who were civil servants, to carry out their duties objectively and neutrally. This official duty also comprised the duty to carry out one’s duties neutrally from the point of view of religion and ideology, respecting the viewpoints of pupils and parents.” *Id.* ¶ 21.

121. *Id.* ¶ 22.

122. “Just as in the case of the crucifix in the classroom, the decisive factor with regard to the Muslim headscarf was the fact that because of compulsory school attendance for all children—unlike in the case of a brief encounter in everyday life—continuous confrontation with a religious symbol could not be avoided.” *Id.* ¶ 23.

123. *Id.* ¶ 23.

124. *Id.* ¶ 25.

neutrally in religious and ideological matters.”¹²⁵ This “attained all the more importance the more diverse the religions in society,” and “[t]he state’s neutrality must be shown in the person of the teacher.”¹²⁶ Furthermore, “[t]he Federal Administrative Court had not introduced an altered concept of neutrality, but merely accorded a growing importance to the requirement of neutrality in a society that was pluralist from the point of view of religion.”¹²⁷

The Federal Constitutional Court took up the matter in 2003, deciding that the teacher’s “constitutional complaint is admissible and is well-founded.”¹²⁸ In the course of the Court’s judgment, several important principles were stated:

- Article 4 of the Basic Law “extends not only to the inner freedom to believe or not to believe but also to the outer freedom to express and disseminate the belief.”¹²⁹
- Such right “includes the individual’s right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions.”¹³⁰
- Also, “[t]his relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behavior is the correct one to deal with a situation in life.”¹³¹
- In addition, “[t]he freedom of faith guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be contained in the constitution itself.”¹³²

The School Board’s decision to reject the complainant’s application to teach was held contrary to the Basic Law.¹³³ It was deemed unconstitutional.¹³⁴ In practical terms, however, her “success” was tempered by the reasoning that surrounded the state legislative powers over school clothing. Essentially, while the German states (*Länder*) have broad powers over schools, the state’s civil service law

125. *Id.* ¶ 26.

126. *Id.*

127. *Id.*

128. *Id.* ¶ 29.

129. *Id.* ¶ 37.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 38.

133. BvR 1436/02, at 1.

134. *Id.*

(*Landesbeamten-gesetz*) contained no provision that could reasonably justify a ban on headscarves. This lacuna led to a rapid revision of state laws. By June 2006, eight of the sixteen German states had opened the way for an effective ban on wearing the headscarf in state schools.¹³⁵ Some commentators have noted that this was an effective transfer of the final decision from the judiciary to the legislature.¹³⁶

2. The Second Headscarf Decision

The *Second Headscarf Decision* extended the jurisprudence of the *First Headscarf Decision*. In the words of Matthias Mahlmann, “[i]t decided that an abstract ban on headscarves and other visible religious symbols for teachers at a state school is not compatible with the Constitution because it is disproportionate.”¹³⁷ The Court left open the possibility of a ban in cases where there was a “sufficiently specific danger” to the peace of the school or the neutrality of the state.¹³⁸ The Court also noted that such a ban was possible, saying, “over a region or possibly even over an entire Land (state) . . . with regard to interdenominational state schools, [but] only if there is a sufficiently specific danger to the aforementioned legal interests throughout the area to which the prohibition applies.”¹³⁹ The case also raises serious issues of process, as well as questions about the rights of students as measured against those of teachers.¹⁴⁰

135. Some authors have divided this into three models: “exclusive Christian,” “strict neutrality,” and “open neutrality.” See Christian Henkes & Sascha Kneip, *Die Plenardebatten um das Kopftuch in den Deutschen Landesparlamenten* [Plenary Debates in the German State Parliaments], in *DER STOFF AUS DEM KONFLIKTE SIND: DEBATTEN UM DAS KOPFTUCH IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ* [THE STUFF OF CONFLICT: HEADSCARF DEBATES IN GERMANY, AUSTRIA AND SWITZERLAND] 249–74 (Sabine Berghahn & Petra Rostock eds., 2015). See also the 2009 Bielefeldt Transcript, cited in Stephanie Sinclair, *More Than Just a Piece of Cloth: The German “Headscarf” Debate*, 16 *IMPLICIT RELIGION* 483, 486 (2013).

136. See Seyla Benhabib et al., *The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey*, 36 *PHIL. & SOC. CRITICISM* 451, 460 (2010).

137. Matthias Mahlmann, *Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court’s Second Headscarf Decision*, 16 *GERMAN L. J.* 887, 891–92 (2015).

138. *Second Headscarf Decision*, *supra* note 86, ¶ 80.

139. *Id.*

140. G. Taylor, *Teachers’ Religious Headscarves in German Constitutional Law*, 6 *OX. J. LAW RELIGION* 10, 93 (2017) (arguing, *inter alia*, that “[m]uch more attention needed to be paid to the needs of the pupils in the specific context in which they find themselves: people in a very vulnerable stage of life compelled by law regularly to attend an institution which is crucial for

Seminal to the *Second Headscarf Decision*, the Federal Constitutional Court interpreted the right to religious freedom and conscience as follows:

In its section 1, Art. 4 GG guarantees the freedom of faith and of conscience, and freedom to profess a religious or ideological belief; in section 2 it guarantees the right to the undisturbed practice of religion. The two sections of Art. 4 GG contain a single fundamental right that is to be understood as all-encompassing (citation omitted). It extends not only to the inner freedom to believe or not to believe—i.e., to have a faith, to keep it secret, to renounce a former faith, and to turn to a new one—but also the outer freedom to profess and disseminate one’s faith, to promote one’s faith and to proselytise (citation omitted). Therefore, it includes not only acts of worship and the practice and observance of religious customs, but also religious instruction and other forms of expression of religious and ideological life (citation omitted). This also includes the right of individuals to align their entire conduct with the teachings of their faith, and to act in accordance with this conviction, and thus to live a life guided by faith; and this applies to more than just imperative religious doctrines (citation omitted).¹⁴¹

This is a comprehensive definition, and notably includes a right for the religion/person to proselytize, and to align one’s “entire conduct with the teachings of their faith.” The court continues:

When assessing what qualifies as an act of practising a religion or an ideological belief in a given case, one must not disregard what conception the religious or ideological communities concerned, and the individual holder of the fundamental right, have of themselves (citation omitted). However, this does not mean that all conduct by a person must be viewed as an expression of freedom of faith in the same way that the person views it subjectively. The authorities may analyse and decide whether it has been sufficiently substantiated, both in terms of its spiritual content and its outer appearance, that the conduct can in fact plausibly be attributed to the scope of application of Art. 4 GG; in other words, that it does in fact have a motivation that is to be

their personal and psychological as well as intellectual development. This is particularly so when we are talking about Muslim girls, who constitute a minority that faces challenges with adapting to its societal surroundings”).

141. *Second Headscarf Decision*, *supra* note 86, ¶ 85.

viewed as religious. However, the state may not judge its citizens' religious convictions, let alone designate them as "right" or "wrong." This is especially the case when divergent views on such points are advanced within a religion (citation omitted).¹⁴²

The court noted that the female Muslim complainants in the case maintained a religious reason for wearing their headwear and concluded they were doing so as an "imperative religious duty, and as a fundamental component of an [Islamic] lifestyle."¹⁴³ This was held to be so despite the fact that "the exact content of the rules of female clothing is indeed in dispute among Islamic scholars."¹⁴⁴ The court next held that the prohibition on wearing headscarves was "a serious interference with [the complainants'] fundamental right of freedom of faith and freedom to profess a belief."¹⁴⁵ It also notes that a "headscarf, specifically, is not as such a religious symbol,"¹⁴⁶ and goes on to make a comparison with the Christian cross, which is more inherently representative of Christianity than is the headscarf of Islam. It is useful to quote this section in its entirety:

A headscarf, specifically, is not as such a religious symbol. It can exert a comparable effect only in combination with other factors (citation omitted) To that extent, for example, it differs from the Christian cross (citation omitted). Even if an Islamic headscarf serves only to fulfil a religious requirement and the wearer does not attribute symbolic character to it, and merely views it as an article of clothing prescribed by her religion, this does not change the fact that, depending on social context, it is widely interpreted as a reference to the wearer's adherence to the Muslim faith. In that sense, it is an article of clothing with religious connotations. If it is understood as an outer indication of religious identity, it has the effect of an expression of a religious conviction without any need for a specific intent to make this known or any additional conduct to reinforce such an effect. The wearer of a headscarf tied in a typical way will usually also be aware of this. Depending on the circumstances of the individual case, this effect may also occur for other forms of coverings for the head and neck.¹⁴⁷

142. *Id.* ¶ 86.

143. *Id.* ¶ 88.

144. *Id.* ¶ 89.

145. *Id.* ¶ 90.

146. *Id.* ¶ 94.

147. *Id.*

The unique nature of ‘symbolic meaning’ for the religious observer is well-highlighted in this passage. Such symbolic meanings are usually assumed to be protected in broad terms in some form of constitutional guarantee in most democracies. In Australia, this turns out to be much more honored in political rhetoric than in law. In the startling assessment of Paul Babie and James Krumrey-Quinn:

In Australia, citizens may believe that they too enjoy limitations on the ability of government to infringe upon their exercise of religious autonomy or right to display symbols of those connections that matter deeply to them. Such a belief is erroneous. In fact, Australia remains the only western liberal democracy without a constitutional or legislative protection of fundamental rights and freedoms.¹⁴⁸

We now turn to these issues in more detail. It is convenient to begin with an overview of conscience protection afforded citizens in Australia. Thereafter follows an analysis of the laws surrounding crucifixes and religious clothing.

VI. CONSCIENCE PROTECTION IN AUSTRALIA—SOME COMPARATIVE OBSERVATIONS

According to Christopher Soper’s work on pluralism in six democracies,¹⁴⁹ Germany is to be grouped with England as a country that applies an ‘establishment’ model to church-state relations.¹⁵⁰ Meanwhile, Australia is grouped with the Netherlands as applying a pluralist model, and the United States and France are held up as models of “separation.”¹⁵¹ Australia and the Netherlands are further divided on

148. Paul Babie & James Krumrey-Quinn, *The Protection of Religious Freedom in Australia: A Comparative Assessment of Autonomy and Symbols*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 259, 278 (Liora Lazarus et al. eds., 2014). Babie and Krumrey-Quinn do acknowledge, however, a “minimal patchwork of constitutional, legislative and common law provisions differing not only in their applications to the Commonwealth, State and Territory governments in the Australian federation, but also in the scope and strength of protection afforded,” at 259.

149. MANSMA & SOPER, *supra* note 24.

150. *Id.* Under Part III: *Models of Establishment*, Chapter 6 is devoted to England and Chapter 7 is devoted to Germany.

151. *Id.* Under Part II: *Models of Pluralism*, Chapter 4 is devoted to the Netherlands and Chapter 5 is devoted to Australia. Under Part I: *Models of Separation*, Chapter 2 is devoted to the United States and chapter 3 is devoted to France.

the basis that the Netherlands brand of pluralism is “principled” and that of Australia is “pragmatic.”¹⁵²

As previously stated, Australia has more limited case law on the question of religious freedom, and likewise, on the more focused topic of conscience protection. Major cases decided at the highest level of consideration, the High Court of Australia, are rare. This is probably in keeping with the politically pragmatic approach to such issues,¹⁵³ as well as a less active resort to rights protection via litigation,¹⁵⁴ and the already narrow approach to section 116 of the Australian Constitution.

Section 116 provides as follows:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹⁵⁵

The Ruddock Review notes the following limitations on this section:

First, it is a limitation on the legislative power of the Commonwealth only. The States are not limited by its terms. Whether the Territories are restricted by section 116 has been considered by the High Court on a number of occasions but the position remains unclear. Second, section 116 is a limitation on Commonwealth legislative power; it does not create a ‘right’ for individuals to hold or manifest their faith. Nor does it create a positive obligation on the Commonwealth to do anything to ensure freedom of religion.¹⁵⁶

These limitations have been narrowly interpreted such that “[a] law will only fall foul of the ‘free exercise’ limb of section 116, for example, if its purpose is to restrict religious practice, even if its effect is to burden

152. Soper asserts, “the most important principles in church-state relations in Australia are pragmatism and tolerance.” He goes on to argue that this had changed over time, stating, “Australia has vacillated among four different church-state models in its two-hundred-year history: establishment, plural establishment, liberal separationism, and pragmatic pluralism.” *Id.* at 121.

153. *Id.*

154. The fewer constitutional rights available to litigate may mean few lawsuits but suits filed does not necessarily reflect the level of concern in the community, especially when the rights of minorities are in issue.

155. *Australian Constitution* s 116.

156. Ruddock Review, *supra* note 1, ¶ 1.90.

disproportionately the practices of a particular religion.”¹⁵⁷ Only one Australian State Constitution—that of Tasmania—contains constitutional protection for religion and conscience,¹⁵⁸ and this provision has also been narrowly construed.¹⁵⁹ There is little else at the federal,¹⁶⁰ and little at the constitutional level of any Australian State or Territory, that is protective of conscience or religion.¹⁶¹ There are, however, a large number of lower-level (i.e. ordinary) statutes which deal, in a fragmentary fashion, with vilification, discrimination, and in some

157. *Id.* at 1.91.

158. See section 46 of the *Constitution Act 1934* (Tasmania) which provides: “(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.”

159. *Id.* See Ruddock Review, *supra* note 1, ¶ 1.94-95 (noting that section 46 of the *Constitution Act 1934* (Tasmania) has not been subject of judicial consideration and that recent comments of Tracey J. in the case of *Corneloup v Launceston City Council* [2016] FCA 974 suggest it section 46 may be of limited scope and “does not, in terms, confer any personal rights or freedoms on citizens.” *Corneloup v Launceston City Council* [2016] FCA 974, 38.

160. *Defence Act 1903* s 61A provides that the following persons are exempt from service in the Defence Force in time of war:

- ...
- (d) ministers of religion;
 - (e) members of a religious order who devote the whole of their time to the duties of the order;
 - (f) persons who are students at a college maintained solely for training persons to become members of a religious order;
 - (g) persons who are students at a theological college as defined by the regulations or are theological students as prescribed;
 - (h) persons whose conscientious beliefs do not allow them to participate in war or warlike operations;
 - (i) persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations; and

(1A) Persons whose conscientious beliefs do not allow them to engage in duties of a combatant nature (either generally or during a particular war or particular warlike operations) are not exempt from liability to serve in the Defense Force in time of war but are exempt from such duties while members of the Defense Force as long as those beliefs continue.

Defence Act 1903 s 61A, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/da190356/s61a.html [<https://perma.cc/2EUJ-JZD3>].

161. See, e.g., *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) as discussed in EVANS, *supra* note 26, at 98ff.

cases the education of children.¹⁶² These statutes lie beyond the scope of this study.¹⁶³

A. Crucifix Laws in Australia

Religious objects (e.g., a crucifix) are regularly placed in classrooms in religious schools in Australia.¹⁶⁴ There is usually no such placement in government (public) schools, and to the author's knowledge, there are no decided cases on the issue.

In comparing the situation in Australia with that in Italy (as decided in the *Lautsi* decision),¹⁶⁵ Babie and Krumrey-Quinn have argued and concluded that “[a]s in *Lautsi*, crucifixes would also be left to hang in Australian public schools.”¹⁶⁶ As has been demonstrated, the situation in Germany is quite different and gives highlight to a number of comparative points.

First, the German analysis relies on constitutionalized freedom of religion, for which there is no equivalent in Australia or at least none that has been interpreted in the same way as Germany's. Second, the Australian courts may consider the hung crucifix as a religious custom (observance), thus falling directly within the scope of Section 116 of the Australian Constitution. This, however, is not irrefutably certain since, as Babie and Krumrey-Quinn also note:

the mere presence of the students in the classroom is unlikely to constitute a religious observance carried out by the students as

162. See, e.g., *Education Act 1990* (NSW) s 32 (“Section 32 Special religious education: (1) In every government school, time is to be allowed for the religious education of children of any religious persuasion, but the total number of hours so allowed in a year is not to exceed, for each child, the number of school weeks in the year”). According to s 32(2) special religious education “is to be given by a member of the clergy or other religious teacher of that persuasion authorised by the religious body to which the member of the clergy or other religious teacher belongs.” *Education Act 1990* (NSW) s 32, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/ea1990104/s32.html [<https://perma.cc/9J62-QKUT>].

163. See the comprehensive lists in Appendix C of the Ruddock Review, *supra* note 1, at 128-29. See generally chapters 6 and 7 of EVANS, *supra* note 26.

164. See, e.g., Bishops of N.S.W. & the Austl. Cap. Terr., *Catholic Schools at a Crossroads: Pastoral Letter of the Bishops of NSW and the ACT*, CATHOLIC SCHOOLS NSW 10 (Aug. 8, 2007), <https://www.csnsw.catholic.edu.au/wp-content/uploads/2018/03/catholic-schools-at-a-crossroads.pdf> [<https://perma.cc/6TWY-B9M8>] (affirming that Catholic schools “are places cultivating a Catholic imagination, where prayer and liturgy are supported by a Catholic visual culture, including crucifixes and pictures of Our Lady and the saints”).

165. *Lautsi v. Italy*, App. No. 30814/06, 2011-III Eur. Ct. H.R. 18, 63 (2011).

166. Babie & Krumrey-Quinn, *supra* note 148, at 272.

there is no custom associated with this action. That there is, for example, no required veneration of the symbol by the members of the class upon entrance to the classroom, leaves application of the clause ambiguous.¹⁶⁷

In Germany, the (successful) arguments about “learning under the cross” are relevant here. Australian courtrooms do not contain crucifixes,¹⁶⁸ although witnesses typically swear on a Bible, and oaths of affirmation are also legally available.¹⁶⁹ Some aspects of the Bible oath are regulated in a positive and negative way (e.g., holding in the hand is required—if feasible—but kissing is not required).¹⁷⁰ This includes the form of words used,¹⁷¹ and the placement of the swearing hand,¹⁷² amongst other things.

There has been a recent call by a Magistrate in the State of Victoria for Bibles to be removed from all courtrooms in Victoria on the basis that they are “relics from another time and like the gavel, the wig, and the quill and ink, they belong in a museum, not a modern court.”¹⁷³ Given Bibles may be, and often are used by witnesses in oath-taking, it is not clear exactly what was being requested and the suggestion that they be entirely removed remains a curious one.

Because the placing of crucifixes on walls of Australian public schools has never been a political issue, and those in religious schools

167. *Id.*

168. The author has not been able to uncover any examples of this, although the written and pictorial record remains open.

169. *See, e.g.*, in the state of NSW, *Oaths Act 1900 No 20* (NSW) s 11A.

170. *See id.* Section 11A(1) provides, “Any person taking any oath on the Bible or on the New Testament, or the Old Testament, for any purpose whatsoever, whether in judicial proceedings or otherwise, shall, if physically capable of doing so, hold a copy of the Bible or Testament in his or her hand, but it shall not be necessary for the person to kiss such copy by way of assent.” *Id.*

171. *See id.* Section 11A(2) provides, “The officer administering the oath may repeat the appropriate form of adjuration, and the person taking the oath shall thereupon, while holding in his or her hand a copy of the Bible, New Testament, or Old Testament, indicate his or her assent to the oath so administered by uttering the words ‘So help me, God[.]’” *Id.* Section 11A(3) provides, “The person taking the oath may, while holding in his or her hand a copy of the Bible, New Testament, or Old Testament, repeat the words of the oath as prescribed or allowed by law.” *Id.*

172. *See id.* Section 11A(5) provides, “Provided that any witness in any judicial proceeding may swear with up-lifted hand in the following manner and form: The witness with uplifted hand says—I swear by Almighty God as I shall answer to God at the Great Day of Judgment that I will speak the truth, the whole truth, and nothing but the truth.” *Id.*

173. *See* Genevieve Alison, *Call to Cut Bibles Out of Court*, *DAILY TELEGRAPH*, Apr. 23, 2019, at 9.

are placed regularly and without comment, there would appear to be no case law that may offer a ready comparison with the German saga that has unfolded there in recent decades. Religious clothing in the Australian courtroom, however, is increasingly an issue and has been prominent in recent cases, to which we now turn.

B. Religious Clothing in Australia

Cases on wearing religious clothing in Australia, including schools and courtrooms, are rare. Several cases have been decided based on one-off regulations in schools as well as courtrooms.¹⁷⁴ There has also been some confected controversy over the wearing of the Burka in the Federal Parliament,¹⁷⁵ but this was resolved in favor of a “no dress code” approach.¹⁷⁶

In the school context, David Furse-Roberts has argued that any such regulation should take careful note of Australia’s common law traditions as well as international obligations, but that the most critical factor is the avoidance of “a ‘one-size-fits-all’ approach to both government and non-governments schools [which] could actually militate against religious freedom, particularly in circumstances where faith-based schools wish to enact their own uniform policies pursuant to their religious convictions.”¹⁷⁷ An example of the legal problems raised by a one-size-fits-all approach occurred in a 2017 case from the

174. See *Arora v. Melton Christian College* (Human Rights) [2017] VCAT 1507. See also *Elzahed v. State of New South Wales* [2018] NSWCA 103 (18 May 2018), both discussed below.

175. See Avi Selk, *An Australian Senator Wore a Burqa in Parliament—Then Called for a Ban on Muslim Immigrants*, WASH. POST: WORLDVIEWS (Aug. 17, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/08/17/an-australian-senator-wore-a-burqa-in-parliament-then-called-for-a-ban-on-muslim-immigrants/?utm_term=.90d95efa26dd [<https://perma.cc/U88Q-M4W8>].

176. See *Guides to Senate Procedure, No. 23 - Provisions governing the conduct of senators in debate*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_23 [<https://perma.cc/4MLJ-QDR4>] (last visited Mar. 27, 2019) (“15. Dress. There are no formal dress rules in the standing orders and the matter of dress is left to the judgment of senators, subject to any ruling by the President. Advisers are also expected to maintain appropriate standards of dress, but a resolution of the Senate indicates that advisers and media representatives are no longer required to wear coats”).

177. See David Furse-Roberts, *Religious Freedom in the Playground: Public Policy and the Wearing of Religious Attire in Australian Schools*, AUSTRALIAN POL’Y & HIST. (Nov. 12, 2017), <http://aph.org.au/religious-freedom-in-the-playground-public-policy-and-the-wearing-of-religious-attire-in-australian-schools/> [<https://perma.cc/2J6L-W8HB>] (last visited Apr. 24, 2019).

state of Victoria, which concerned the wearing of a patka¹⁷⁸ by a Sikh boy.¹⁷⁹ A Christian school banned the clothing on the basis of a declared uniform policy, which sought to promote, amongst other things, “uniformity, inclusivity, and protection from inadvertent discrimination.”¹⁸⁰ This was held to be a breach of the state’s Equal Opportunity Act (2010).¹⁸¹ In commenting on the case, Barker has noted the similarity with the notable UK House of Lords decision of *Begum, R (on the application of) v. Denbigh High School* in 2006,¹⁸² and “[t]he problem with neutrality is that it tends only to in fact be neutral for the majority. It is only those from minority groups that are asked to compromise. Equality does not always equal equity.”¹⁸³

At least one state government, New South Wales, (“NSW”) has indicated that students have positive rights to wear religious clothing and “ruled that students could not be suspended for doing so.”¹⁸⁴ The fact that most Australian schools already regulate clothing in the form of an official ‘school uniform’ may weigh against any further legislation in this area.¹⁸⁵

178. See generally Renae Barker, *School Uniform Policies Need to Accommodate Students’ Cultural Practices*, Topics, SBS NEWS: VOICES (July 27, 2017), <https://www.sbs.com.au/topics/life/culture/article/2017/07/27/school-uniform-policies-need-accommodate-students-cultural-practices> [<https://perma.cc/TJ5B-ZBTM>] (“The patka is a smaller version of the turban, or dastar, worn by most Sikh men. It is an important article of faith. It therefore forms an important part of a Sikh child’s identity. It is not simply a piece of clothing”).

179. *Arora v Melton Christian College* [2017] VCAT 1507 (Austl.).

180. *Id.* at 59, 66, 84, 86, 97.

181. Section 38(1), of the *Equal Opportunity Act 2010* (Vic) (the “EO Act”) provides, “An educational authority must not discriminate against a person—(a) in deciding who should be admitted as a student; or (b) by refusing, or failing to accept, the person’s application for admission as a student; or (c) in the terms on which the authority admits the person as a student.”

182. *Begum, R (on the application of) v Denbigh High School* [2006] UKHL 15 (appeal taken from EWCA Civ) (UK) (concerning alternative forms of dress available to female students in a Muslim school).

183. Barker, *supra* note 178; see the suggestions of Benson, *supra* note 24, at 11 (referring to the need to focus on “unjust discrimination” not just “discrimination” together with “a presumption in favour of diversity”).

184. David Furse-Roberts, *Religious Freedom in the Playground: Public Policy and the Wearing of Religious Attire in Australian Schools*, APH ESSAYS (NOV. 12, 2017), <http://aph.org.au/religious-freedom-in-the-playground-public-policy-and-the-wearing-of-religious-attire-in-australian-schools/> [<https://perma.cc/MZE7-Y7K9>].

185. This regulation derives its authority from the relevant State education department or—in the case of a private school—the school itself. Consequences for failure to wear the required uniform vary. For a discussion of the recent history of uniforms, see William McKeith, *School uniforms: who needs them?*, SYDNEY MORNING HERALD (Sept. 13, 2017),

In the area of general law enforcement, at least two Australian states have made changes to the laws of personal identification (mainly for the purposes of police patrols). Thus, in 2011, NSW introduced changes to the Law Enforcement (Powers and Responsibilities) Act 2002, which made it easier for police to identify persons in, for example, routine traffic stops, or for the purpose of driver's license production during a random breath test for alcohol.¹⁸⁶ In a lengthy report given in August 2013 by the NSW Ombudsman,¹⁸⁷ the changes were seen as mostly successful but with the recommendation that, in deference to cultural sensitivities, such identification would run more smoothly if female police officers were available for such activities.¹⁸⁸

Identification laws raise other issues, one of which is worth pursuing briefly here. The NSW law discussed above also stipulated that failing to comply with a request for identification carried possible

<https://www.smh.com.au/opinion/the-case-for-dropping-school-uniforms-altogether-20170913-gygmt8.html> [<https://perma.cc/PVC4-FAMF>].

186. See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 3 div 4 (Austl.) [hereinafter LEPR].

187. A position authorized by Statute, the NSW Ombudsman describes his role as “to safeguard the community in their dealings with government and non-government agencies that fall within the Ombudsman’s jurisdiction. This is done in many ways—by responding to enquiries, investigating complaints, initiating investigations, monitoring compliance with the law, auditing administrative conduct, monitoring how organizations handle issues that have been notified or referred to the office, and promoting good administration, transparency, and responsive complaint handling. The Ombudsman is independent of the government agencies and persons it deals with and investigates.” Michael Barnes, *Ombudsman’s Message*, OMBUDSMAN NEW SOUTH WALES, <https://www.ombo.nsw.gov.au/what-we-do/about-us/ombudsmans-message> [<https://perma.cc/F3LN-TZTZ>] (last visited Apr. 27, 2019).

188. Bruce Barbour & New South Wales Office of the Ombudsman, *Review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification*, OMBUDSMAN NEW SOUTH WALES (Aug. 2013), http://www.ombo.nsw.gov.au/_data/assets/pdf_file/0014/11372/Review-of-Divison-4,-Part-3-of-the-Law-Enforcement-Powers-and-Responsibilities-Act-2002-face-coverings-and-identification.pdf [<https://perma.cc/D9G2-5YCA>]. In summary, the Ombudsman opined, “the recommendations we have made centre on making it a lawful requirement that a female officer be made available, only where requested and where practicable, to look at the face of any woman wearing a face covering for religious reasons. We also recommend that police be given further guidance to help them handle situations where they need to identify a person whose face is covered. In particular, practical information about how privacy can be afforded in the situations where the law is currently most commonly used—identifying female drivers in traffic matters—would be most useful for traffic and general duties officers who patrol in key locations in metropolitan Sydney. Focusing on police officers is not enough, however, particularly as individual officers may only need to use the powers occasionally. It is also important that women who wear a niqab and the wider Muslim community have a greater understanding about the new law.” *Id.* at iii.

punishment, but this is itself fraught with the same identification problem. In the words of the NSW Ombudsman:

[I]f the officer decides to penalise the person for committing the offence of refusing to comply with the requirement, the officer will then be faced with a somewhat circular dilemma, as they need to issue an infringement or court attendance notice but cannot confirm to whom they should address the notice. In practice, if the person has given them a driver licence, the officer could address the notice to the licence holder. However, this does carry the possibility that the penalty could be successfully challenged, on the basis that the person who committed the offence was not the licence holder . . . Because of this, the only option at this point may be to arrest the person, even though he or she may not have committed any other offence, or the other offence is minor (for example, to do with a traffic matter).¹⁸⁹

This issue would rarely arise. It does, however, show the complexities that can arise in identification scenarios where cultural expertise is deficient, and both sides are struggling to understand one another. In the end, the law must address such problems as best it can.¹⁹⁰

In the employment context, there is generally no specific law at federal or state levels dealing with religious clothing in the workplace.¹⁹¹ However, a variegated web of federal and state laws and regulations covers a range of potential conscience issues.¹⁹² There have

189. *Id.* at 33.

190. For example, by additional warnings (although this may add even more impractical complication), education of the religious rights of those wearing religious clothing, and cultural education of law enforcement. The Ombudsman's Report also discusses the question of perceived differences between a police officer viewing the picture of a face on a driver's license, and viewing the face itself; *see id.* at 37.

191. There is, however, a general provision in the laws of the state of South Australia which allows for an exemption to non-discrimination laws in circumstances where reasonable face recognition is required. "This Part does not apply to discrimination on the ground of religious appearance or dress if the discrimination arises as a consequence of a person refusing to reveal his or her face in circumstances in which the person has been requested to do so for the purpose of verifying the identity of the person, and the request was reasonable in the circumstances." *South Australia Equal Opportunity Act 1984* (SA) s 85ZN (Austl.), available at <https://www.legislation.sa.gov.au/LZ/C/A/EQUAL%20OPPORTUNITY%20ACT%201984/CURRENT/1984.95.AUTH.PDF> [<https://perma.cc/5XAX-GXWY>] (last visited Apr. 27, 2019).

192. *See* Joan Squelch, *Religious Symbols and Clothing in the Workplace: Balancing the Respective Rights of Employees and Employers*, 20 MURDOCH U. L. REV. 38-57 (2013).

been two superior court cases, albeit none at the highest level,¹⁹³ dealing with religious clothing worn in an Australian courtroom, to which we now turn.¹⁹⁴

1. The Elzahed Case—The Case of the Plaintiff/Witness

The highest-level reported case dealing with religious headscarves in Australia is the New South Wales Court of Appeal decision in *Elzahed v. State of New South Wales*.¹⁹⁵ Despite its narrow focus, the decision is an interesting one and worth detailed consideration.

Moutia Elzahed (“Elzahed”) was the subject of a police raid during 2014, in which she alleged assault and battery by the police.¹⁹⁶ This allegation resulted in a trial, in which Elzahed would only give evidence “with her entire face, other than her eyes, covered by a veil known as a niqab.”¹⁹⁷ The decision on whether to permit evidence to be given in such a way was entirely a matter for the judge and was governed by the laws relating to judicial discretion under the well-known case of *House v. The King*.¹⁹⁸ The district court judge took the arguments of both sides into account and “accepted the need to take into account the appellant’s religious beliefs,” [and] stated, “[o]n the other hand, I must take into account whether I would be impeded in my ability to fully assess the reliability and credibility of the evidence . . .

193. The highest appellate court in Australia is the High Court of Australia. *Australian Constitution* s 71.

194. While not specifically religious in nature, the case of *Ellenbogen v. Cullen* is worth noting in the context of courtroom clothing (where the court held that wearing a headband, which bore the colors of the Aboriginal flag, does not amount to contempt of court). *Ellenbogen v Cullen* (Unreported, Supreme Court of New South Wales, Smart J, 30 July 1990) (Austl.), available at <http://www.supremecourt.nsw.gov.au/doc/judgements/2002/0/20020206NTSC10.htm> [<https://perma.cc/HKM9-X3Z5>].

195. *Elzahed v State of New South Wales* [2018] NSWCA 103 (Austl.), available at <https://www.caselaw.nsw.gov.au/decision/5afb85c7e4b074a7c6e1f411> [<https://perma.cc/PR5G-92ZC>] [hereinafter *Elzahed Appeal*]. This case was an appeal from the decision of Balla DCJ in *Moutia Elzahed & Ors v Commonwealth of Australia and State of New South Wales* [2016] NSWSC 327; see also the decision of *Moutia Elzahed & Ors v Commonwealth of Australia and State of NSW* [2017] NSWDC 160 (dealing with the question of court costs).

196. *Elzahed Appeal*, NSWCA 103 ¶ 10.

197. *Id.* ¶ 1.

198. *House v The King* (1936) 55 CLR 499; [1936] HCA 40 (Austl.).

if I am not afforded the opportunity of being able to see her face when she gives evidence.”¹⁹⁹

The appeal court upheld the decision of the trial judge to refuse the giving of evidence wearing a full veil.²⁰⁰ In the course of the judgment, the court of appeal discussed an *Explanatory Note on the Judicial Process and Participation of Muslims*,²⁰¹ which stated that “it is not contrary to Sharia law for a woman to uncover her face when giving evidence in court.”²⁰²

Cases from other countries, in which the wearing of a niqab was considered and treated “a little differently,” were cited but not considered persuasive by NSW the appeals court.²⁰³ While Australia’s highest court had not considered this specific issue, it had issued clear statements about “witness demeanor” and in a 2003 decision had noted:

[I]n recent years judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of demeanor. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the “established principles about witness credibility”; but it tends to reduce the occasions where those principles are seen as critical.²⁰⁴

The “established principles about witness credibility” included, by implication, the ability to see the witness’ face free of clothing in the interests of trial that is fair to both parties. The Court of Appeal also made clear that in deciding to uphold the trial judge’s ruling on giving evidence with an uncovered face, they were not making a general ruling with “wider implications for a group of women in Australia of Islamic

199. *Elzahed Appeal*, NSWCA 103, ¶ 32.

200. *Id.* ¶ 70.

201. Australian National Imams Council, *Explanatory Note on the Judicial Process and Participation of Muslims*, DISPUTES CENTRE (Dec. 12, 2017), <https://disputescentre.com.au/wp-content/uploads/2017/12/PUBLIC-STATEMENT-Explanatory-Note-on-the-Judicial-Process-and-Participation-of-Muslims.pdf> [<https://perma.cc/9MNY-65ZA>].

202. *See Elzahed Appeal*, NSWCA 103.

203. *Id.* ¶ 44. The cited cases were: *Police v. Razamjoo* [2005] DCR 408 (N.Z.); *R v. NS* [2012] 3 SCR 726 (Can.) and *The Queen v. D (R)* [2013] EW Misc 13 (CC) (Eng.).

204. *Elzahed Appeal*, NSWCA 103, ¶ 46 (citing the High Court of Australia (HCA) in *Fox v. Percy* (2003) 214 CLR 118).

faith.”²⁰⁵ The court also quoted with approval a recent article on this topic, which stated, “while . . . there are circumstances where a woman may appear in court with her face covered, in all of the cases considered in this article the witness has ultimately been ordered to remove her veil in order to give evidence.”²⁰⁶ Scholarly work covering five common law jurisdictions has confirmed this now appears to be the general approach.²⁰⁷ This is borne out somewhat in the next case.

2. The Chaarani Case—The Case of the Courtroom Spectator

The second case concerning courtroom clothing, *The Queen v. Chaarani*,²⁰⁸ was heard before a single judge in the Supreme Court of Victoria. That case concerned the trial of the husband of Aisha Al Qattan (hereafter “Ms. Al Qattan”) on charges related to the preparation of a terrorist attack.²⁰⁹ Ms. Al Qattan wished to be present in the courtroom’s public gallery to support her husband and was required to remove her religious clothing, a nikab,²¹⁰ for that purpose. The written judgment records nine arguments in favor of wearing the nikab in the gallery, all of which were rejected.²¹¹ The first argument centered upon religious freedom asserting, “Ms. Al Qattan has a strong religious belief that she should wear the nikab in public. It is a ‘fundamental way in which she observes her faith.’”²¹² While conceding that Ms. Al Qattan’s beliefs were religious and were strongly held, the judge was persuaded that security concerns, including the possibility that a spectator might do (rare) or say (less rare) inappropriate things in the courtroom, should prevail.²¹³ The possibility was also canvassed that

205. *Id.* ¶ 63.

206. *Id.* ¶ 65 citing Renae Barker, *Burqas and Niqabs in the Courtroom: Finding Practical Solutions*, 91 AUSTRALIAN L. J. 225, 226 (2017).

207. Barker, *supra* note 178, at 40 (on religious apparel and appearance in court in Australia). See EVANS, *supra* note 26, at 202–08.

208. *The Queen v. Chaarani (Ruling 1)* [2018] VSC 387 (Austl.), available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/387.html?context=1;query=chaarani;mask_path=au/cases/vic/VSC [<https://perma.cc/RS9Z-DDPW>] (last visited Apr. 27, 2019).

209. *Id.* ¶ 1.

210. There was some discussion of the correct spelling of this term. The Judge commented on his use of the spelling as ‘nikab’ rather than ‘niqab’ as follows: “‘Nikab’ is sometimes spelt ‘niqab.’ I have taken the former spelling from the *Explanatory Note on the Judicial Process and Participation of Muslims*.” *Elzahed Appeal*, NSWCA 103, ¶ 44.

211. *Id.* ¶ 27.

212. *Chaarani*, VSC 387, ¶ 3.

213. *Id.*

more than one person could wear such clothing and that security officials would thereby find it harder to identify an individual in the gallery with multiple spectators, and to deter any possible future offense. His honor explained

It is not good court management, in my view, to adopt a reactive approach, that is, to allow spectators to have their faces covered but eject them, and refuse them re-entry, if they are detected misbehaving. First, prevention is better than cure. Second, it is naïve to think that misbehavior will always be immediately detected by court security staff. A person to whom something improper is said or done may be too stunned or frightened to raise the alarm immediately, enabling the culprit to get away. Or there may not be sufficient court security staff on hand. Court security resources are limited and one cannot always predict which cases will generate problems in the public gallery.²¹⁴

The court also made several unambiguous references to religious freedom. These included the following: “Open justice, religious freedom and the right to participate in public life are fundamental values that must be accorded full respect in our society and in this court. But no one could sensibly claim that these principles and rights brook no limitations.”²¹⁵

The court also referred to the state *Charter of Human Rights and Responsibilities Act 2006* (the “Charter”) which plainly recognizes the rights of persons²¹⁶ to “religious freedom,”²¹⁷ and to “participation in public life.”²¹⁸ Even though no evidence was put forward by the

214. *Id.* ¶ 23.

215. *Id.* ¶ 25.

216. “Person” is defined as “a human being.” See *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 3 (Austl.).

217. *Id.* s 14 (Freedom of thought, conscience, religion and belief: (1) Every person has the right to freedom of thought, conscience, religion and belief, including (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching).

218. *Id.* s 18 (Taking part in public life: (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. (2) Every eligible person has the right, and is to have the opportunity, without discrimination—(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and (b) to have access, on general terms of equality, to the Victorian public service and public office).

lawyers for Ms. Al Qattan as to the religious motivations for her desire to wear the nikab,²¹⁹ the court was prepared to assume this was the case. The judge declared:

I have assumed for the purpose of this ruling that Ms. Al Qattan wants to wear the nikab in court for religious reasons, and that her religious beliefs are strongly held. In other words, I accept that the right of religious freedom is engaged. I also accept that it is a very important right, which may go to the core of a person's identity. Likewise, I accept that the right to participate in public life is engaged and that it is an important right.²²⁰

The law of courtroom behavior in Australia prohibits wearing anything that might indicate disrespect or offense towards the justice system,²²¹ so the ruling was explicit in noting that this was not a factor in the outcome. The Judge confirmed this, asserting, "I do not consider the wearing of nikabs in court for religious reasons to be disrespectful, offensive or threatening, although, as I will explain shortly, I do consider it to be an impediment to the deterrence and punishment of misbehavior by spectators in the public gallery."²²² The desire to wear religious dress in court should, the court noted, be allowed "as much as possible" but not without limit:

Australia is obviously a multicultural society and I agree that religious dress should be accommodated as much as possible, but the right of religious freedom and the right to participate in public life are not absolutes. As s[ection] 7 of the Charter recognizes, these rights may be subject to limitations which can be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom."²²³

219. *Chaarani*, VSC 387, ¶ 5.

220. *Id.*

221. *See, e.g., Court Etiquette*, HIGH COURT OF AUSTRALIA, <http://www.hcourt.gov.au/about/court-etiquette> [<https://perma.cc/62CZ-M6BG>] (last visited Apr. 25, 2019) (stating that "inappropriate clothing may not be worn" You should be adequately and neatly dressed, including footwear").

222. *Chaarani*, VSC 387, ¶ 6.

223. *Id.* ¶ 18; *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 7(2) (Austl.) ("A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve).

The question of modesty in appearance was also raised. The court quoted the following from an Explanatory Note issued by the Australian National Imams Council (“ANIC”):

Muslim women commonly wear a headscarf referred to as a Hijab to cover their head and hair. On fewer occasions, women may wear a Burka or Nikab, which also covers their face. The Hijab and Burka or Nikab *are seen as a sign of modesty*, and a symbol of religious faith. [Italics added by the court].²²⁴

The court responded in the following terms:

A requirement that spectators have their faces uncovered is not to force anyone to act immodestly. First, the exposure of one’s face in a courtroom cannot reasonably be viewed as an immodest act: subjective views to the contrary cannot rule the day, or the management of a courtroom. Second, if someone feels strongly that it would be improper for them to uncover their face in court, they can choose not to attend. If that is Ms. Al Qattan’s choice, arrangements will be made for live streaming of the proceedings to a remote facility within the court building so that she can still view the trial.²²⁵

It is not known whether the opportunity that Ms. Al Qattan might view the proceedings from a remote location was taken up. The Australian case of Elzahed was also cited as supporting Ms. Al Qattan’s argument in favor of wearing the nikab, as were three foreign-jurisdiction cases: *Police v. Razamjoo* (New Zealand),²²⁶ *R v. D* (England),²²⁷ and *NS v. The Queen* (Canada).²²⁸ The submission was that all of these cases supported wearing the nikab in court in some circumstances and so should be extended to wearing them in all circumstances.

224. Australian National Imams Council, *supra* note 202; see *Court Etiquette*, *supra* note 222. *Police v. Razamjoo*, [2005] D.C.R. 408, 441.

225. *Chaarani*, VSC 387, ¶ 24

226. *Police v. Razamjoo* [2005] DCR 408, 441. For a valuable discussion of the case and its surrounding issues, see Rex J. Ahdar, *Religious Liberty in a Temperate Zone: A Report from New Zealand*, 21 EMORY INT’L L. REV. 205, 225-227 (2007).

227. *R v. D(R)* [2013] UKSC (unreported, Crown Court at Blackfriars, Murphy J), Judge Peter Murphy, 16 September 2013), available at [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/The+Queen+-v-D+\(R\).pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/The+Queen+-v-D+(R).pdf) [<https://perma.cc/YD2M-TUTM>].

228. *NS v. The Queen* [2012] 3 S.C.R. 726; [2012] SCC 72.

In *Razamjoo*, two witnesses for the prosecution wanted to wear the nikab but were ultimately ordered to remove them while giving evidence.²²⁹ They were, however, allowed to give evidence from behind a screen thus limiting their exposure to women court officials, the judge, and counsel.²³⁰ In *NS v. The Queen*, the Supreme Court of Canada affirmed a lower court ruling requiring that a nikab be removed while evidence was given, but refused to make this an absolute rule.²³¹ In *R v. D*, a person charged with intimidating a witness requested to wear a nikab during their trial.²³² This request was granted except for the times when the accused was giving evidence.²³³ While finding these cases somewhat persuasive, Beale J distinguished them because:

these cases suggest that witnesses may wear a nikab if they are not giving contested evidence and that an accused, where identity is not in issue, may wear a nikab except when testifying. If participants in court proceedings may wear nikabs in certain circumstances, then it follows, so the argument goes, that spectators in the public gallery may do so. But there is at least one point of distinction. An accused is compelled to be present in court and, more often than not, witnesses for the prosecution are subpoenaed to attend court. Ms. Al Qattan is under no legal compulsion to attend court.²³⁴

The case of *R v. Chaarani* has been criticized as disappointing for those desiring to exercise their right to religious freedom in the State of Victoria.²³⁵ Despite this criticism, the issue of court security, the

229. *Police v. Razamjoo*, [2005] D.C.R. 408

230. *Id.*

231. In Justice Beale's summary, he noted, "McLachlin CJ, Deschamps, Fish and Cromwell JJ [of the Supreme Court of Canada] dismissed the complainant's appeal but indicated that, what they called an extreme approach—never allowing a witness to testify in a nikab or always permitting it—was unsustainable and that it may be permissible for a witness to testify in a nikab if their evidence is uncontested. Le Bel and Rothstein JJ, who agreed in the result, preferred a clear rule that nikabs not be worn by witnesses at any stage of a criminal trial." *Chararani*, VSC 387, ¶ 14.

232. *R v. D*(R) [2013] UKSC (unreported, Crown Court at Blackfriars, Murphy J).

233. *Id.*

234. *The Queen v Chaarani* (Ruling 1) [2018] VSC 387 (16 July 2018).

235. Sarah Hort, *Victorian Supreme Court Finds Charter Does Not Protect Right to Wear Nikab in Court*, HUMAN RIGHTS LAW CENTRE (July 16, 2018), <https://www.hrlc.org.au/human-rights-case-summaries/2018/12/17/victorian-supreme-court-finds-charter-does-not-protect-right-to-wear-nikab-in-court> [<https://perma.cc/E8J8-ZVBL>].

possibility of a mistrial,²³⁶ and the proper ordering and regulation of witnesses seem to be entirely legitimate reasons for the limitation imposed in this case.²³⁷ The individual judge has power over the courtroom, and this extends, on the whole, not only to members of the public and the accused but also to the lawyers and other officials.²³⁸

3. Lessons from Elzahed and Chaarani

These two cases (*Elzahed v. NSW* and *R v. Chaarani*) show Australian superior courts grappling with questions of evidence law, courtroom demeanor, and to some degree, conscience or religious-based desires to dress in a certain way while participating in the court process. In neither case is the main protagonist a simple witness. In *Elzahed*, they are a plaintiff/witness, and in *Charani*, they are a mere courtroom spectator, albeit one tied closely to the defendant.²³⁹

It would be a mistake to draw too many parallels between these cases and the major German constitutional cases already discussed. They are different in many significant ways: the courtroom is not the schoolroom, and the plaintiff/witness problems bear little resemblance to the teacher (or student) seeking to wear religious dress in the classroom or school, while in the employ of the government.

Thus, it may be reasonably argued that while the Australian cases may be of mild interest to a German lawyer, and the German cases likewise for an Australian (or common) lawyer, they are vastly different and not comparable in any meaningful way, save for the fact that they involve the legal permission to wear (or not wear) female

236. The judge noted, “In some cases, things said or done by spectators may necessitate the discharge of a jury, which may cause great distress to participants in the trial, not to mention the cost to the community.” *Charani*, VSC 387, ¶ 21.

237. “Deterrence, identification and proof are all served by a requirement that spectators in the public gallery have their faces uncovered. The efficacy of an order for witnesses out of court is also facilitated by such a requirement.” *Id.* ¶ 19. The court provided a footnote explanation to this reasoning in the following terms: “To preserve the integrity of the court process, it is commonplace for witnesses to be ordered to remain out of court until they have given their evidence. But if spectators can wear face coverings in court, a witness may be able to circumvent such an order.” *Id.* ¶ 19 n.10.

238. *But see*, for example, the Australian High Court case of *MacGroarty v. Clouston* [1989] HCA 34, holding that a charge of contempt against a barrister was not sufficiently delineated by the judge in accordance with the relevant section of the District Courts Act (1967) (Qld), and so the conviction was overturned.

239. *See generally Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW* [2016] NSWDC 353. *See generally Queen v. Chaarani* [2018] VSC 387.

headwear in both fact scenarios. Thus both engage primary human rights relating to religion. Moreover, the German cases concern headwear that still shows the full face whereas both Australian cases concern clothing that obscures the face almost entirely. There is one serious caveat to the above lessons, and this relates to the lack of comprehensive religious freedom laws in Australia discussed above. For as long as there is no such Australian guarantee of this fundamental right at a constitutional level, the Australian approach will remain piecemeal and potentially incoherent.

VII. CONCLUSION

As Denise Meyerson has noted, “the formal protections afforded religious freedom under Australian law are relatively weak—particularly when compared to many other liberal democracies.”²⁴⁰ By contrast, Germany has constitutionalized protections for religion and conscience, which have been litigated seriously and at length over many decades since the end of World War II and most recently in the crucifix and headscarf cases. The recent Australian court cases dealing with these issues are grounded in the law of process, evidence, and courtroom demeanor and are bubbling up toward an as yet non-existent all-encompassing set of principles, upon which coherent judicial norms for freedom of conscience at a constitutional - or at least a national - level can be based. These principles will not appear out of thin air but must be deliberated and decided in the light of present irregularities. The German constitutional guarantees, together with their judicial interpretations, provide a valuable model for this and will repay thoughtful and disciplined consideration by Australian policymakers and judges alike.

240. Meyerson, *supra* note 22, at 552.

