Special Issue
Böckenförde Beyond Germany

Ernst-Wolfgang Böckenförde's Oeuvre on Religious Freedom Applied to Recent Decisions of the European Court of Human Rights

By Ute Sacksofsky[*]

Abstract

In Europe, issues concerning religious freedom are hotly debated. Many courts had to consider cases concerning infringement of religious freedom. This Article will focus on three examples: Headscarves, burqas, and crucifixes. Often, the interests of members of minority religions have lost in European courts and European constitutional courts. This is particularly true considering the decisions of the European Court of Human Rights. The European Court of Human Rights upheld bans on headscarves for students in universities and public secondary schools, as well as for teachers in public schools. The Court also accepted bans on full-body veils worn in public areas. Finally, mandatory crucifixes in public schools have been deemed to conform to the standards set by the European Convention on Human Rights. In all of these cases, the European Court of Human Rights has not adequately construed religious freedom as a strong right.

This is where the work of Ernst-Wolfgang Böckenförde comes in. Böckenförde has thoroughly discussed the proper role of religion in a democratic society. Coming from a theoretical starting point, he developed an understanding of religious freedom as a strong right. He also explained why State neutrality should be understood in terms of open neutrality. Both perspectives help to more fully explain the scope of religious freedom.

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https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

A. Introduction

The meaning and scope of religious freedom remains highly contested. Many courts have considered cases concerning infringement of religious freedom. This Article will focus on three examples: Headscarves, burqas, and crucifixes. European courts, including constitutional courts in many European countries, have rendered decisions in these three areas. Often, the interests of members of minority religions have lost. This is particularly true considering the decisions of the European Court of Human Rights. The European Court of Human Rights upheld bans on headscarves for students in universities[1] and public secondary schools,[2] as well as for teachers in public schools.[3] The Court also accepted bans on full-body veils worn in public areas.[4] Finally, mandatory crucifixes in public schools have been deemed to conform to the standards set by the European Convention on Human Rights.[5] In my opinion, the Court has not done full justice to the fundamental right of religious freedom. In all of these cases, the European Court of Human Rights has not adequately construed religious freedom as a strong right.

This is where the work of Ernst-Wolfgang Böckenförde comes in. Böckenförde has thoroughly discussed the proper role of religion in a democratic society. Coming from a theoretical starting point, he developed an understanding of religious freedom as a strong right. He also explained why State neutrality should be understood in terms of open neutrality. Both perspectives help to more fully explain the scope of religious freedom. Despite Böckenförde's clear conviction that religious freedom represents a strong right for all religions, he does not fully develop the equality of religions. In some aspects, he accepts the predominance of the majority religion. As similar arguments are brought up in many current interventions, it is important to see how he reaches his conclusion—and what limitations he puts on it, even though I ultimately disagree with this particular point.

This Article proceeds in four steps. In section B, I will look at Böckenförde's oeuvre constructing religious freedom as a "strong" right. In section C, I will show how a liberty perspective dominates Böckenförde's thinking at the cost of an antidiscrimination perspective. Sections D and E apply Böckenförde's approach to the three topics where the European Court of Human Rights failed—headscarves, burqas, and crucifixes. Explicitly,

[1] *See* Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173 [hereinafter *Şahin Case*].

[2] *See* Dogru v. France, App. No. 27058/05 (Mar. 4, 2009), http://hudoc.echr.coe.int/ [hereinafter *Dogru Case*]; Kervanci v. France, App. No. 31645/04 (Mar. 4, 2009), http://hudoc.echr.coe.int/.

[3] Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447 [hereinafter *Dahlab Case*].

[4] S.A.S. v. France, 2014-III Eur. Ct. H.R. 341 [hereinafter *S.A.S. Case*].

[5] Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61 [hereinafter *Lautsi Case*].

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

Böckenförde has only addressed the issue of the headscarf; section D describes his interventions in the German headscarf debate. Discussion of the other two topics—bans on burqas and State-sponsored crucifixes in public schools—draws inferences from Böckenförde's general thinking. Section E will show the fruitfulness of Böckenförde's work to analyzing the decisions of the European Court of Human Rights.

B. Religious Freedom as a Strong Right

In the area of constitutional law, Böckenförde's work focuses on constitutional history, fundamental questions about the State, basic constitutional concepts, and methods of constitutional interpretation. His work tends not to focus on any particular fundamental right—with one exception: Böckenförde has written extensively on religious freedom and freedom of conscience. This is not a coincidence. Böckenförde's interest in religious freedom is closely connected to his fundamental works on constitutional history and constitutional theory.

I. Protection of Human Rights as Task of the Liberal State

The fundamental question Böckenförde is struggling with is: "How far can a constitution that sees the State as a democratic embodiment of the rule of law actually guarantee freedom of conscience without placing itself in jeopardy in the process?"[6] He aims to answer this question by analyzing the historical process through which freedom of conscience emerged as a basic right. He views religious freedom as part of a broader concept of freedom of conscience. His general thoughts about freedom of conscience may therefore also apply to religious freedom.

Böckenförde is concerned with the fundamental question of how States should deal with conflicts resulting from differing religious and State norms. On the one hand, he begins his fundamental article *Basic Right of Freedom of Conscience* by asking whether the State is in any position to recognize a freedom of the individual conscience that goes beyond the freedom of introspection of the so-called *forum internum*.[7] Specifically, would the State doing so not "relinquish its universality and its universal validity, the very foundation of its power to keep the peace, particularly in a non-homogeneous society?"[8] On the other hand, as he points out, if the *Rechtsstaat* and liberal democracy aim to guarantee the liberty of the individual, then surely the individual's conscience—the innermost core of his personality—

[6] Ernst-Wolfgang Böckenförde, *Das Grundrecht der Gewissensfreiheit*, 28 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VVDStRL] 33, 37 (1970), *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *The Basic Right of Freedom of Conscience*, *in* 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018). As the translation is not quite finalized, some slight changes have been introduced.

[7] Böckenförde, *supra* note 6, at 33.

[8] *Id.*

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must be inviolable. Thus, as a matter of principle, the State must refrain from forcing its citizens to go against their conscience.[9] Böckenförde shows that the State should not separate religious freedom from the ability to act in conformity with conscience. Doing otherwise would reduce religious freedom "to a level that any dictator might guarantee, provided only that he refrained from using Orwellian methods. (...) From its earliest beginnings as a legal concept, freedom of conscience has always been oriented towards the freedom to act in conformity with conscience."[10]

Böckenförde further emphasizes the "full" character of religious freedom. Religious freedom includes the right to have a religious faith (*Glaubensfreiheit*), to profess this faith privately or publicly (*Bekenntnisfreiheit*), to exercise one's religion publicly (*Kultusfreiheit*), and to join with others to form a religious group (*religiöse Vereinigungsfreiheit*). These rights also include the rights to abstain from doing the listed conduct.[11]

Devising the real substance of a human right requires defining the scope of possible actions covered by the right while simultaneously considering the State's powers to restrict the right. Accordingly, Böckenförde identifies permissible restrictions to religious freedom. To achieve this goal, he describes in detail the constitutional development of religious freedom until the 1949 enactment of the current German constitution—the *Grundgesetz*.[12] Arguing for high standards of judicial review, he then identifies constitutional limits to restrictions on religious freedom. Notably, the most important task for guaranteeing religious freedom is ensuring that the individual "be undisturbed and inviolable in what constitute[s] the inner core of his personality."[13] Böckenförde emphasizes that the conflict long-experienced between the commands of the State and the dictates of God and conscience should not continue to exist. In doing so, he rejects the pointed contention of Gerhard Anschütz, one of the great commentators of the *Weimarer Reichsverfassung*: "The citizen is not permitted to give the God in whom he believes greater obedience than he gives the state." Böckenförde states that this maxim can no longer serve as a guide for interpreting freedom of belief and conscience.[14]

Nevertheless, the question remains whether the State can unconditionally guarantee religious freedom. Böckenförde's answer is clear:

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[9] *Id.* at 73.

[10] *Id.* at 51.

[11] ERNST-WOLFGANG BÖCKENFÖRDE, *Bekenntnisfreiheit in einer pluralen Gesellschaft und die Neutralitätspflicht des Staates, in* KIRCHE UND CHRISTLICHER GLAUBE IN DEN HERAUSFORDERUNGEN DER ZEIT 439, 442 (2d ed. 2003).

[12] Böckenförde, *supra* note 6, at 37.

[13] *Id.* at 49.

[14] *Id.*

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

> Surely absolute, unconditional freedom of conscience will logically entail surrendering the validity of the entire legal system to the private judgement—in conscience—of citizens and thus in practice nullifying it. It will take away from the State, and the nation as a whole represented therein, the *quis judicabit* so indispensable to the peaceful organization of the State and give it back to individuals, thus incapacitating and undermining the authority of the organs of State and eventually dissolving the State itself.[15]

Freedoms may thus never take the form of an absolute legal freedom. Nevertheless, part of the logic of modern political theory requires that the purpose or ratio *(Umwillen)* of the State lie primarily in guaranteeing and safeguarding the human rights of the individual.[16] The State presumes the inviolability of conscience because it is the innermost core of an individual's personality and liberty. Consequently, the State must respect the right as much as possible.[17] The State may only acceptably limit freedom of conscience when direct threats to its aims exist. Such aims include keeping peace, maintaining the existence of the State and the integrity of its borders, and safeguarding the life and liberty of others. Freedom of conscience must thus respect the rights and liberties of others. Böckenförde takes the argument even further. Noting that conscience may not agree to this kind of elementary observance of social contracts as well as the State's obligation to curb or punish the exercise of conscience,[18] Böckenförde concludes that the State may nevertheless respect conscientious conviction by reducing the nature and severity of the sanctions it imposes.[19] The State should consent to a "system of allowances and partial lifting of obligations."[20]

[15] *See id*. at 53.

[16] *See id.* at 54.

[17] *See id*. at 54.

[18] Thankfully, few such cases exist.

[19] *See* Böckenförde, *supra* note 6, at 60.

[20] *See id*. at 61 (citing Adolf Arndt, an important German social-democrat and jurist in the early times of the Federal Republic).

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II. Open Neutrality

Drawing on his historical description of the process of secularization,[21] Böckenförde discusses the concept of neutrality. He describes the secularized State as one which does not have or represent a religion and acts and understands itself as a religiously neutral State. The neutral State does not identify with any religion or religious community; it does not justify its policies on religious grounds; and it denies religious access to State institutions and offices.[22] Beyond these obvious demands of State neutrality, the question remains: What does neutrality really mean? Böckenförde distinguishes two concepts of State neutrality.[23] First, the concept of distancing neutrality, realized in exemplary fashion in the French *laïcité*. Second, the concept of encompassing open neutrality, as notably found in the Federal Republic of Germany, although it is by no means the only State to do so.[24] Distancing neutrality tends towards consigning and confining religion to the private and the private-social sphere. Encompassing open neutrality additionally concedes religion's development in the public sphere—for example, in schools, educational institutions, and in what is summarily referred to as the public order. Of course, doing so occurs without any form of State identification to any particular religion.

Böckenförde strongly argues for the concept of open neutrality:

> After all, the human right of religious freedom, which encompasses freedom of belief, freedom of confession, and free exercise of religion, aims at religious freedom not only in the private but also the public sphere, at the general possibility of living life in accordance with religion, though naturally within the framework of the basic demands of social coexistence.[25]

[21] *See generally* ERNST-WOLFGANG BÖCKENFÖRDE, *Die Entstehung des Staates als Vorgang der Säkularisierung*, *in* STAAT, GESELLSCHAFT, FREIHEIT (1976), *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularization*, *in* 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

[22] Böckenförde, *supra* note 6, at 61.

[23] *See* ERNST-WOLFGANG BÖCKENFÖRDE, DER SÄKULARISIERTE STAAT: SEIN CHARAKTER, SEINE RECHTFERTIGUNG UND SEINE PROBLEME IM 21. JAHRHUNDERT 43–72 (2nd ed. 2015), *translated in* ERNST-WOLFGANG BÖCKENFÖRDE, *The Secularized State: Its Character, Justification, and Problems in the 21st Century*, *in* 2 RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

[24] *See* Böckenförde, *supra* note 11, at 446–48.

[25] *See* BÖCKENFÖRDE, *supra* note 23, at 20.

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He identifies encompassing open neutrality as the appropriate understanding of neutrality for a liberal State.

III. The Problem of Fundamentalism

Böckenförde also strongly argues that the *Rechtsstaat* only requires the willingness to obey laws. It does not require a moral agreement with the content of the laws. Böckenförde notes that the individual may hold on to "internal reservations" that distance themselves from the State's order, even if these go beyond the fundamental structure of the State. The liberal State does not require individuals to profess their devotion to its value system. Rather, the liberal State remains content with the individual's respect for and compliance with laws. According to Böckenförde, it is in this manner that the State affirms its liberal nature.

Böckenförde rejects the contention that broad acceptance of all religions, irrespective of their position towards the liberal State, leads to utopia.[26] He reminds us that such acceptance represents the way by which Catholics integrated themselves into positions within the secularized State in the nineteenth century onward. Prior to the Second Vatican Council, Catholics did not have to affirm religious freedom as a general principle on the basis of their faith. Only after this important event could Catholics begin to embrace religious freedom as a principle.

Nevertheless, Böckenförde notes a caveat that he calls the "diaspora proviso."[27] A State should not accept such fundamentalism unless the members of the given religion remain in the minority. Böckenförde argues that the secularized State cannot and must not give any religious conviction the opportunity to undermine the State's liberal order from within. Allowing such an opportunity to develop would eventually do away with the secularized State. The State should ensure that fundamentalist religions remain in minority positions because they present the acute danger of rising to a majority position that then rejects religious freedom as a principle. In Böckenförde's opinion, this may necessitate relevant political measures to the freedom of movement, migration, and naturalization.[28] Thus, in this narrow area, he accepts the concept of militant democracy that prevails in Germany.

[26] *Id.* at 38.

[27] *Id.* at 39.

[28] *Id.*

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IV. Religion as a Presupposition of the State

In Germany, Böckenförde's fame extends from one quote in particular: "The liberal, secularized State draws its life from presuppositions that it cannot itself guarantee."[29] Academia, political discussions, and media all have made innumerable use of this quote.

The reasoning that led to this thesis has much to do with understanding religious freedom as a strong right. Böckenförde concerns himself with asking, "From where and how does the liberal, secularized State acquire—currently and in the future—the measure of pre-legal togetherness and sustaining ethos that is indispensable for a thriving coexistence in a liberal system?"[30]

Building on the work of the Weimar constitutional theorist Hermann Heller, Böckenförde concludes that no State can rise solely from the concentration of power and the exercise of coercion. A State can only exist if people view it as legitimate and voluntarily obey its laws for the most part. But, this is not enough. Böckenförde regards it as an "illusion to believe that a State system could live entirely by guaranteeing self-related, individual freedom, without a unifying bond that conveys a certain us-feeling and precedes this freedom."[31] In Böckenförde's view this unifying bond, often described as "relative homogeneity," extends from various sources. These include socio-economic, cultural-mental, and biological-natural sources. Böckenförde notes that many people tend to overestimate the importance of biological-natural homogeneity.[32] According to Böckenförde, religion plays an important role, but is not the only factor within cultural-mental sources. [33]

Despite religion's capacity to generate a unifying bond and to act as a sustaining, stabilizing force within the State, this may not necessarily occur. The secularized State cannot control whether religion actually lives among its citizens. The liberal State cannot guarantee the survival and vitality of any religion, nor can it declare a religion as the obligatory foundation of the community's shared life. Religious freedom ensures only the possibility of religious practice and its vitality, not the existence of religion as such. Of course, the State can and should support and protect religions and religious vitality to the extent that they exist. The State should also protect them against hostility and denigration going beyond free and open discussions and debates, including those critical of religion. According to Böckenförde,

[29] BÖCKENFÖRDE, *supra* note 21, at 60.

[30] BÖCKENFÖRDE, *supra* note 23, at 24.

[31] *Id.* at 25.

[32] *Id*.

[33] *Id*.

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furthering religion in this sense fully complies with the principle of religious-ideological neutrality.[34]

C. Ambivalence: Equal Treatment

Böckenförde's reasoning regarding equal treatment of religions exhibits an inner tension. On the one hand, Böckenförde very clearly states that religious freedom protects people of every creed and every denomination. On the other hand, in some instances, he still concedes some privileges to the Christian religion. I argue that this results from not adopting an antidiscrimination perspective. To support this thesis, I draw on his articles on school prayer and crucifixes in courtrooms.

In 1965, the Constitutional Court of the State of Hesse declared school prayer in public schools unconstitutional.[35] The school prayer in question took place at the beginning of the school day. Before class started, pupils would get up from their seats and the teacher would begin with the first word of the prayer. Even though the pupils did not have to participate in the prayer, the Court held that this school prayer violated a pupil's right not to have to declare his religious convictions by abstaining. Böckenförde disagreed with this decision.[36] He argued that the fundamental right of religious freedom did not contain the absolute and unconditional right not to declare one's faith. As long as the school did not force the pupils to participate in prayer, he could not identify a violation of their rights.[37] He found it particularly deplorable that the Court had construed a "right to be silent" in matters of religion.[38] To be clear, Böckenförde abhors the idea of forcing students to pray, but he saw no reason why abstaining did not represent a viable choice.

In 1979, the Federal Constitutional Court upheld the validity of school prayers that do not have mandatory elements to them.[39] Böckenförde agreed with the result.[40] He emphasized that voluntary school prayers do not form a part of class. In his opinion, the State itself does

[34] *Id.* at 26.

[35] Staatsgerichtshof Hessen [StGH Hessen] [Hessian State Constitutional Court] Oct. 27, 1965, 21 JURISTENZEITUNG [JZ] 337 (1966).

[36] *See generally* Ernst-Wolfgang Böckenförde, *Religionsfreiheit und öffentliches Schulgebet*, 49 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 30 (1966).

[37] *Id.* at 32.

[38] *Id*.

[39] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Oct. 16, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 223.

[40] Ernst-Wolfgang Böckenförde, *Zum Ende des Schulgebetsstreits*, 61 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 323, 324 (1980).

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

not execute prayers; rather, it simply provides the "organizational framework" for them.[41] Böckenförde thus construes prayers as the actions of individual persons exercising their religious freedom.[42] In this way, schools represent the nexus where society and State come together.[43] Because pupils spend most of their day in school, they should have the right to engage in religious activities therein. Here, Böckenförde differs from the Federal Constitutional Court's decision. He considers it wrong that the Federal Constitutional Court simply allowed school prayer.[44] Instead, Böckenförde goes further and requires the State to provide an opportunity for school prayer where pupils—or their parents—wish for it.[45]

In 1970, Böckenförde rendered an expertise on crucifixes in court-rooms (*Rechtsgutachten*). The expertise had been mandated by the Catholic Bishops of Northrhine-Westfalia to be used in proceedings before the Federal Constitutional Court. The Federal Constitutional Court held that a lawyer and his client have the right to require that court proceedings take place in a room without a crucifix. Böckenförde's expertise was never used in the court proceedings for which it was meant. Yet, in 1975, Böckenförde published his expertise.[46] Böckenförde concluded that hanging crucifixes in courtrooms violated the State's obligation to exhibit neutrality towards religion.[47]

Despite Böckenförde recognizing a violation of State neutrality, he did not acknowledge that a crucifix in a court room may also constitute a violation of an individual's religious freedom. As Böckenförde argued, in displaying a crucifix during a trial, the Court had not forced the parties to express anything relating to their religious views. The Court had not forced the parties to pay their respects to the crucifix or even require their presence at a time when the judge would presumably pay his respect to the cross. Böckenförde concluded that the mere exhibition of a crucifix could hardly constitute a violation of freedom of faith.[48] Further, according to Böckenförde, individuals appearing before the Federal Constitutional Court could not successfully challenge crucifixes in court rooms in general. Böckenförde, however,

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] Böckenförde, *supra* note 40, at 325.

[45] *Id*.

[46] *See generally* Ernst-Wolfgang Böckenförde, *Kreuze (Kruzifixe) in Gerichtssälen?*, 20 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 119 (1975).

[47] *Id*.

[48] *Id*. at 139.

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does allow for an exception in extraordinary circumstances.[49] Freedom of conscience may give an individual the right to have his or her proceedings in a courtroom without a crucifix, albeit only in very limited circumstance.

Accordingly, in 1995, when the Federal Constitutional Court held that crucifixes in classrooms violated religious freedom,[50] Böckenförde probably would not have agreed. Böckenförde did not make his dissent public, though. I believe his understanding of the rules that govern the behavior of a judge sitting at the Federal Constitutional Court led to his decision to refrain from publicly dissenting. The First Senate rendered the crucifix decision at a time when Böckenförde sat for the Second Senate. Böckenförde would have likely considered it improper to take issue with decisions of the other Senate. Nevertheless, hidden in an article about a different topic, Böckenförde endorsed the Bavarian reaction to the ruling of the Federal Constitutional Court.[51] In Bavaria, the crucifix decision met public outcry and considerable resistance. The Bavarian Parliament insisted on fixing into law that crosses had to adorn Bavarian classrooms, even after the decision of the Federal Constitutional Court. Such a statement constituted an unheard-of display of disrespect. The law ultimately passed with minimal changes and concessions. Presently, crosses will remain in classrooms unless pupils or parents object. Furthermore, simple objections will not necessarily cause removal of the crucifix. The school director's sole obligation is to attempt to find a consensual solution. The Federal Administrative Court upheld this statute despite its open contradiction to the Federal Constitutional Court's decision.[52] Böckenförde seems to consider this a jolly good solution, even going so far as hailing it as a model.[53] I do not.

Böckenförde's conviction of the supreme importance of an individual's positive freedom—that is, one's capacity to express one's faith—drives his willingness to let the State promote school prayer or sanction the display of crucifixes in schools. He does not want to endanger this right by allowing negative freedom to dominate—namely, allowing an individual's freedom to abstain to intrude upon another's expression of faith. But, in his attempt to protect positive freedom, Böckenförde goes too far. He underestimates the resulting discriminating and exclusionary effects of the State endorsing a particular religious expression. I wholeheartedly agree that it is appropriate and constitutionally required to make room for religious expression in schools. This includes students wanting to pray over the course of a school day. Permitting such conduct, however, is only appropriate where an

[49] *Id.* at 144.

[50] Bundesverfassungsgericht, May 16, 1995, 93 BVERFGE 1 [hereinafter *Judgment of May 16, 1995*].

[51] Böckenförde, *supra* note 11, at 439.

[52] *Cf.* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Apr. 21, 1999, 109 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 40, with *Judgment of May 16, 1995*.

[53] BÖCKENFÖRDE, *supra* note 11, at 452.

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

individual's desire to pray is unaccompanied by State endorsement. Parliament passing a statute mandating a cross in every classroom is not a protection of an individual's right to practice one's religion, but rather a State message about the "proper" religion in Bavaria. The Federal Constitutional Court rightly noted that the cross has an "appellative character" insofar as it identifies the faith for which it stands as being exemplary.[54] Clearly, such a statement has an exclusionary tendency. Exclusion has always been at the heart of discrimination. The same holds true when a teacher leads a class in prayer where each pupil—except for the ones resisting—stands at their desk in their classroom. In my view, State neutrality invariably requires avoiding such exclusion.

Böckenförde's thinking gives significant weight to freedom. Such thinking, however, would strongly benefit from simultaneously considering an antidiscrimination perspective.

D. In Particular: Böckenförde's Interventions in the Debate on Headscarves for Teachers

Böckenförde never limited his writings to purely academic audiences. He often intervened in political debates. His interventions in the debate about headscarves for teachers reach particular noteworthiness. These culminated in the years 2001 to 2004—well after his time as a judge. To contextualize his interventions, I will provide a brief overview of how the headscarf issue played out in Germany.[55]

Until the late 1990s, headscarves had not been an issue of public debate or legal action in Germany. Around the turn of the millennium, this changed drastically. Beginning in 2000, the headscarf became a hotly debated issue. In the legal sphere, the quarrels started with the *Ludin* case. Fereshta Ludin applied for a teaching position in a public school in the State of Baden-Wuerttemberg. The school turned her down for one simple reason—she refused to teach without covering her head with a headscarf. Interestingly, in the legal proceedings that followed, the school administration never argued that there was any doubt as to Ludin's qualifications. Thus, in the courts, the case presented a clear-cut question: Can public schools deny teachers a position solely because they believe their religion requires them to wear a headscarf? Ludin took the case all the way up to the Federal Administrative Court (*Bundesverwaltungsgericht*) and lost.[56] The courts held that the religious neutrality of the State could justify denying a teacher a position in a public school on the basis of wearing a headscarf. The headscarf, as a highly visible religious symbol, represented a perceivable danger to State neutrality. The courts also saw a violation of the negative religious freedom

[54] *Judgment of May 16, 1995* at para. 18.

[55] *See generally* Ute Sacksofsky, *Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective, in* EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 353–70 (Dagmar Schiek & Victoria Cheg eds., 2008) (providing a fuller story of the development of the headscarf debate up to 2009).

[56] Bundesverwaltungsgericht, Jul. 4, 2002, 116 BVERWGE 359.

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

of children and parents that wished to avoid exposure to a specific religion.[57] In 2003, the case reached the Federal Constitutional Court.[58] The Federal Constitutional Court handed down a split decision, clearly a compromise. Ludin won and lost at the same time. The Court held that freedom of religion in the federal Basic Law does not necessarily include the right to wear religious symbols for teachers in public schools.[59] The Court thus left it up to the States to determine whether they wanted to ban wearing religious symbols in schools.[60] Notably, such bans on religious symbols or clothing within school settings could only proceed by enacting new state statutes. Technically, this meant that Ludin won at this stage as no such specific state statute existed at the time. The Court sent the case back to the Federal Administrative Court which delayed the proceedings until Baden-Wuerttemberg passed a new statute banning headscarves. In the end, Ludin lost; she never became a tenured teacher in Baden-Wuerttemberg.

As a result of the Federal Constitutional Court's decision, many German States passed statutes banning the wearing of religious symbols by teachers in public schools. Some went even further and banned all civil servants from donning religious symbols. But, most States did not want to ban all religious symbols from schools. They still wanted to have traditionally clothed Christian nuns or monks teach in German public schools. Thus, instead of forbidding the wearing of all religious symbols, these States included an exception for wearing symbols displaying Christian or Judeo-Christian values. This obviously led to a problem concerning the equal treatment of religions, which the Constitution undisputedly guarantees. The States accordingly tried to disguise their goal, thus leading to rather strange phrased statutes. The statues prohibited political, religious, ideological, and similar demonstrations which had the potential to endanger or disturb the neutrality of the State or school peace. They added that the exhibition of Christian values would not constitute a violation of this prohibition. Despite a challenge to such a statute, Ludin again lost before the Federal Administrative Court.[61] Although acknowledging that privileging the Christian religion constituted a constitutional violation, the Court construed the statutory provision in such a way that it did not contain a privilege for religion but instead a privilege for "traditions" formed by Christianity. According to the Federal Administrative Court, "Christian" in the sense of the statute, signified a "world of values" ("*Wertewelt*") that reflects western Christian traditions and culture detached from religious origins.[62]

[57] *Id*.

[58] Bundesverfassungsgericht, Sept. 24, 2003, 108 BVERFGE 282.

[59] *Id*.

[60] *Id.* at paras. 302, 309.

[61] Bundesverwaltungsgericht, Jun. 24, 2004, 121 BVERWGE 140.

[62] *Id*.

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In 2015, things changed dramatically as the Federal Constitutional Court issued a new decision on headscarves. It struck down the provision privileging Christianity and tried to limit the possibilities forbidding headscarves. Whereas before, the headscarf could present an "abstract danger," the Court now demanded a showing of "concrete" danger originating from teachers wearing headscarves.[63] Short of overruling the older decision, the Court clearly tried to do as much as possible to allow civil servants to wear headscarves. Regardless, overruling the previous ruling would have been difficult on procedural grounds.

Böckenförde had been vocal before this new decision. He wrote scholarly articles commenting on the decisions of the administrative courts and criticizing their reasoning. He gave numerous interviews on the topic of headscarves.[64] He similarly served as an expert in the hearings of many State Parliaments. He clearly and unequivocally defended the right of teachers to wear headscarves. One headline reads: "The Headscarf is Part of Integration."[65]

All the ingredients of Böckenförde's thinking come together in his interventions relating to headscarves: Construing religious freedom as a strong right, promoting comprehensive neutrality, clearly announcing that freedom of religion pertains to all faiths or denominations, and allowing some privileges for Christians.

Böckenförde emphasizes the concept of open and comprehensive neutrality. Based on his distinction between uniquely State authority and the societal sphere, distancing neutrality cannot rule the area of schools. The office of a teacher does not require not showing one's religion. As a general principle, teachers have the right to express their religion. This right, however, has its limits. Showings of certain concrete indications of danger can justify restricting the teacher's right. But in reaching such a restriction, both the teacher and the school administration must demonstrate flexibility and tolerance.[66] This statement can be read as anticipating the 2015 decision of the Federal Constitutional Court. Nevertheless, the Federal Constitutional Court maintained a more cautious approach in its initial 2003 decision.

Böckenförde adamantly upholds equal treatment for all religions. He clearly states that prohibiting religious symbols in schools will cut both ways: "The banning of the headscarf

[63] Bundesverfassungsgericht, Jan. 27, 2015, 138 BVERFGE 296 [hereinafter *Judgment of Jan. 27, 2015*].

[64] *See, e.g.*, Ernst-Wolfgang Böckenförde, *Das Kopftuchverbot trifft auch Kreuz und Kippa,* SÜDDEUTSCHE ZEITUNG, Oct. 13, 2004, at 6; Ernst-Wolfgang Böckenförde, *Das Kopftuch ist ein Stück Integration*, SÜDDEUTSCHE ZEITUNG, Jul. 17, 2006, at 6 [hereinafter Böckenförde, *Das Kopftuch ist ein Stück Integration*].

[65] Böckenförde, *Das Kopftuch ist ein Stück Integration*, *supra* note 64.

[66] *See* Ernst-Wolfgang Böckenförde, *"Kopftuchstreit" auf dem richtigen Weg?*, 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 723–28 (2001).

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also hits cross and kippa."[67] Böckenförde explains that States should treat all religions equally.[68] States should not distinguish between religions on the basis of tradition, history, or number of followers.[69]

Again, Böckenförde does not follow through with his purported equal treatment of religions. While he deplores the clause privileging Christianity, he does not disagree with the Federal Administrative Court's decision to uphold it. He accepts the Court's distinguishing cultural symbols—which may be privileged—from religious symbols which may not. Consequently, his reading of the Court's decision prohibits a nun from wearing her habit at school, arguing that a religious habit cannot be construed as only cultural. Böckenförde insists that a nun's habit represents a religious symbol. He thus calls the decision a "Pyrrhic victory."[70] Once again, he fails to recognize a discriminatory effect. Even if this decision only represents symbolic legislation, it sends a loud and clear message. In my opinion, States cannot possibly hope to construe clauses favoring Christian symbols in a constitutional manner (*verfassungskonforme Auslegung*). To this point, the Federal Constitutional Court struck down the clause in 2015.[71]

E. Recent Decisions of the European Court of Human Rights Seen Through Böckenförde's Eyes

We have previously looked at Böckenförde's work on religious freedom. His adamant understanding of religious freedom as a strong right means that States cannot reduce religious freedom to simply secure the "*forum internum*." Religious freedom must also include the right to act according to one's convictions. In light of these arguments, let us review the core issues in the decisions of the European Court of Human Rights on the topics of burqas, headscarves, and crucifixes.

Article 9 of the European Convention on Human Rights provides that:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to

[67] Böckenförde, *supra* note 64.

[68] *Id*.

[69] *Id*.

[70] Ernst-Wolfgang Böckenförde, *Zum Verbot für Lehrkräfte in der Schule ein islamisches Kopftuch zu tragen*, 59 JURISTEN ZEITUNG [JZ] 1181, 1184 (2004).

[71] *Judgment of Jan. 27, 2015*.

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

> manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[72]

This wording from the Convention gives reason to regard freedom of religion as a strong right. But the European Court of Human Rights did not follow through with construing Article 9 of the Convention as such a strong right. Instead, the Court left a broad margin of appreciation to the States.

I. Ban of Burqas and Niqabs

In 2014, the European Court of Human Rights upheld a French statute prohibiting anyone from concealing their face in public places.[73] This statute targeted Muslim women who wear full-body coverings, including a mesh over the face (*burqa*) or a full-face veil that only leaves an opening for the eyes (*niqab*).

The Court accepted the applicant's claim that she wanted to wear the niqab for religious grounds. The ban on wearing religiously mandated clothing therefore constituted a limitation on the exercise of religion.[74] The analysis proceeded by determining whether the State could justify such a limitation. An acceptable justification requires showing that the limiting statute serves a legitimate aim. The Court accepted as a legitimate aim that "the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier."[75] Even though the Court announced that it would engage in a careful examination of the necessity of the impugned limitation, "in view of the flexibility of the notion of 'living together' and the resulting risk of abuse," it ultimately accepted France's argument.[76] Specifically, the Court concluded that "[t]he systematic concealment of the face

[72] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T. 222 [hereinafter European Convention for Human Rights].

[73] *S.A.S.*, 2014-III Eur. Ct. H.R. 341.

[74] *Id.* at 109–10.

[75] *Id.* at 122.

[76] *Id.*

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

in public places, contrary to the ideal of fraternity . . . falls short of the minimum requirement of civility that is necessary for social interaction."[77]

Böckenförde's work shows why the Court wrongly decided the case. According to Böckenförde, the State needs strong reasons to restrict religious freedom. Simply making life "easier" certainly does not constitute a sufficiently strong reason. The kind of reasons Böckenförde identified as acceptable included keeping peace, maintaining public safety, or upholding the rights of others. Aiming for simple "civility" goes beyond these reasons. Even if a face-veil made it more difficult to communicate, no "right" to social interaction or communication on the street exists. Not being able to see the face of a person walking on the street does not threaten one's life or liberty. Böckenförde's understanding of freedom of religion as a strong right necessarily excludes increased ease of socialization as an acceptable reason to restrict the right.

II. Ban on Headscarves

The European Court of Human Rights has rendered decisions on quite a few cases concerning bans on headscarves, including those that involve teachers and students. In 2001, the Court rejected the claim of a primary school teacher from Switzerland after a school prohibited her from wearing a headscarf during the performance of her professional duties. In denying her claim, the Court considered the measure "necessary in a democratic society."[78] In 2005, the Court had to address whether a student of medicine rightfully faced disciplinary actions for wearing a headscarf to a university in Turkey.[79] The Court accepted the ban on religious dress in universities because a discernable uniform conception of religion did not exist throughout European societies: "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."[80] The Court—employing similar reasoning—also found no infringement of religious freedom in a French case where a school had expelled a pupil for refusing to take off her headscarf in physical education class.[81]

In the previous section, I have shown in detail how Böckenförde intervened in the German debate on bans on headscarves. He advocates for open and comprehensive neutrality as it relates to construing religious freedom as a strong right. He argues with particular fervor for

[77] *Id.* at 141.

[78] *Dahlab*, 2001-V Eur. Ct. H.R. 447.

[79] *See Şahin*, 2005-XI Eur. Ct. H.R. 173.

[80] *Id.* at 109.

[81] *Dogru*, App. No. 27058/05.

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

openness in religion in spheres where the State and society jointly operate. He identifies schools as the paramount example for such a sphere.

Böckenförde has argued intensely against bans of religious symbols for teachers in public schools. He deems bans on headscarves for students and pupils as even less justifiable because of their more tenuous connection to the State, if such a connection exists at all. Clearly, for Böckenförde, a ban on religious clothing in schools—whether for teachers or students—constitutes an infringement of religious freedom.

Böckenförde, however, may conceivably agree with the decisions of the European Court of Human Rights. He accepts that other countries may have a different understanding of neutrality. He explicitly mentions the *laicistic* (secular) structures of Turkey and France as evidence of this plurality. In light of these diverse approaches to the relationship of State and religion in Europe, it might make sense to leave this balancing to the States instead of creating uniformity throughout Europe. But, that would simply amount to an argument concerning the role of the European Court of Human Rights. Böckenförde considers open neutrality as superior to the distancing neutrality of *laicité*. Distancing neutrality, he argues, depends on growing objections and becomes harder to justify as religious freedom becomes more effective.[82] In substance, Böckenförde would insist that religious freedom requires allowing religious garbs in schools.

III. Mandatory Crucifixes

In 2011, the Grand Chamber of the European Court of Human Rights decided an Italian case involving a crucifix hanging on a wall of each classroom in a public school.[83] The Small Chamber of the Court had previously held that this constituted a violation of Article 9 of the Convention.[84] The Grand Chamber viewed this differently and accepted that contracting States enjoy a margin of appreciation. It therefore denied a violation of religious freedom.

Böckenförde would probably agree with this outcome. In section B, I extensively discussed Böckenförde's view on crucifixes in classrooms. Again, his view of schools as a joint enterprise of State and society would likely make him favor the religious freedom of the majority. I am not sure whether he sees the discriminatory and exclusionary effect this has on others or whether he chooses to ignore it. It may well be that in Böckenförde's view, living in the diaspora is not a problem. In this I disagree. If a State is indeed a home for all its citizens, the State cannot single out one religion and give it special privileges.

[82] BÖCKENFÖRDE, *supra* note 23, at 20.

[83] *Lautsi*, 2011-III Eur. Ct. H.R. 61.

[84] *Id.*

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

E. Conclusion

Ernst-Wolfgang Böckenförde represents one of Germany's most eminent constitutional theorists. As a judge for the Federal Constitutional Court he has also obviously been involved in practical-orientated legal reasoning. "Translating" theoretical concepts and insights into solutions for existing legal problems demonstrates one of the highest aptitudes in legal academia and something which Böckenförde does extremely well.

Böckenförde develops his understanding of religious freedom as a strong right from his answer to the question of the relationship of State and religion. He proves to be a theorist and defender of the liberal State in its most freedom-oriented (*freiheitlich*) form. This aspect of his work is extremely well thought out and equally convincing. Just one small critical point remains: The construction of religious freedom as a strong right needs to be augmented by a more comprehensive treatment of the equality side of religious freedom.[85] Böckenförde's answers to the questions of how a pluralist society can work and what role religion can play within it provide a very helpful framework for confronting the problems many European countries face.

[85] *See generally* Ute Sacksofsky, *Religiöse Freiheit als Gefahr?*, 68 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VVDStRL] 9 (2009).

https://doi.org/10.1017/S2071832200022707 Published online by Cambridge University Press

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