

**Identity discourses  
in the German headscarf debate**

by

Robert Gould

**Robert Gould**

School of Linguistics and Applied Language Studies (SLALS)

627 Dunton Tower

Carlton University

1125 Colonel By Drive

Ottawa, ON

K1S 5B6

[robert\\_gould@carleton.ca](mailto:robert_gould@carleton.ca)

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## **Abstract**

The public discourse in Germany on the subject of immigration and notions of German identity tends to regard the headscarf worn by some women as a manifestation of a foreign set of values, including those concerning the position of women in society and before the law. This paper examines the judgement of the Second Chamber of the Federal Constitutional Court (*Zweiter Senat des Bundesverfassungsgerichts*) released on 24 September 2003 concerning the appeal of a citizen who claimed that her constitutional rights had been breached by the education authorities of the State of Baden-Wurtemberg when they refused to grant her a teaching licence because she wished to continue to wear a headscarf as an expression of her Muslim beliefs. This case is used to shed light on the decision of the Christlich Demokratische Union (CDU) which rapidly moved from an initial position of justifying its legislative proposals to ban headscarves in the public service by means of arguments supporting civil service neutrality and protection of Muslims, to a hard-line position which was then carefully co-ordinated from state to state in 2004 as “headscarf bills” were presented in various parliaments. An analysis follows of how the CDU government of Schleswig-Holstein abandoned this position in 2006. This paper thus complements and develops earlier discussions of the conduct of the debate and the use of language at the highest judicial level and at the level of state parliaments.

## **Résumé**

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*Aber dass in unserem weltanschaulich neutralen Staat religiöse Minderheiten die Grundrechte unseres Grundgesetzes gegen unseren Staat ausspielen, dagegen müssen wir uns zur Wehr setzen dürfen.*

*[But when in our state, which is neutral in religious and political matters, religious minorities use the fundamental rights contained in our constitution against our state – we are certainly justified in protecting ourselves.]*

– Karin Wolff (CDU), Minister of Education of Hesse, to the State Parliament, 18 February, 2004<sup>1</sup>

## **Introduction**

Within the public discourse in Germany on the subject of immigration, the position of foreigners in the country, and notions of German identity, the headscarf worn by some women as a manifestation of a certain understanding of Islam has taken on a symbolic character. It is frequently presented as a metonymy for a very foreign set of values, including the position of women in society and before the law, and may even include the notion of the state itself.<sup>2</sup> In addition, it has also a function as a collective symbol, so that when the term “headscarf” is used, non-Europeans, particularly Turks and Muslims, are understood. Taken together, this means that the headscarf is frequently viewed as both alien and in opposition to what are presented as unrestrictedly positive autochthonous values.<sup>3</sup> Consequently it is viewed with very mixed – and even hostile – reactions by broad segments of the population. This hostility was naturally exacerbated by the post-9/11 syndrome across Europe which had led to the general tightening of security laws and increases in police powers (Fekete 2004). In addition, the wide variations in what the headscarf can mean to wearer, observers, and even the judicial systems in different European countries have helped foster a climate in which opponents have found further justification in stridently voicing their opposition.<sup>4</sup>

Against this background, then, this paper first examines the judgement of the Second Chamber of the Federal Constitutional Court (*Zweiter Senat des Bundesverfassungsgerichts*) released on 24 September 2003 concerning the appeal of a citizen who claimed that her constitutional rights had been breached by the education authorities of the State of Baden-Württemberg when they refused to grant her a licence to teach in the publicly-financed junior and middle-schools (*Grundschulen* and *Mittelschulen*) of the state because she wished to continue to wear a headscarf as an expression of her Muslim beliefs.<sup>5</sup> The aim here is to deal with specific

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<sup>1</sup> Plenarprotokoll des Hessischen Landtages, 16. Landtag 30. Sitzung, 18 February 2004, page 1908.

<sup>2</sup> For an overview of the topics associated with the headscarf in the German media, see Motzki 2004.

<sup>3</sup> For a commentary on this widespread phenomenon, see Sezgin 2006, 39.

<sup>4</sup> See, for instance, van Koningsveld and Shadid 2005 or Wohlrab-Sahr 2004.

<sup>5</sup> The court’s decision is summarised at the beginning of the judgement in the following way: “Ein Verbot für Lehrkräfte, in Schule und Unterricht ein Kopftuch zu tragen, findet im geltenden Recht des Landes Baden-Württemberg keine hinreichend bestimmte Grundlage. Der mit zunehmender religiöser Pluralität verbundene gesellschaftliche Wandel kann für den Gesetzgeber Anlass zu einer Neubestimmung des zulässigen Ausmaßes religiöser Bezüge in der Schule sein.” [Prohibiting the wearing of a headscarf by teachers on school premises and while

discourse elements which reflect certain conceptualisations likely to have an impact on the transmission and reinforcement of social values and practices in German society.<sup>6</sup>

The fundamental approach follows that of Dietrich Busse in his paper “Das Eigene und das Fremde: Annotationen zu Funktion und Wirkung einer diskurssemantischen Grundfigur” [Native and Alien: Notes on the Function and Effect of a Fundamental Discourse-Semantic Figure]. In this paper Busse demonstrates a long-standing discourse-semantic opposition between the two value systems (German and Foreign) which has coloured German identity discourse for centuries. The fundamental statement in Busse’s paper is the following:

Discourse semantic figures determine an internal structure of discourses, which certainly does not always have to be identical with the thematic structure of the texts in which they appear; they form a sort of framework which can then effectively form the basis of conceptual . . . links to other discourses. (Busse 1997, 20)<sup>7</sup>

When, within the political (and inevitably) media discourse on German and foreign values and their places in state and society,<sup>8</sup> the Native and the Alien are presented as absolutely contrasting images of each other, it can certainly happen that individuals interpret the Alien as representing a danger to their own identity and person, as well as to the collectivity to which they belong.<sup>9</sup>

I shall demonstrate that this contrasting figure of Native and Alien is totally avoided in the majority decision of the Federal Constitutional Court, but that it is central to the dissenting opinion, which appears to wish to inscribe the figure of Native and Alien in valid jurisprudence. Following that I shall show how the political discourse surrounding the headscarf decision as exemplified in written statements and parliamentary speech in late 2003 and early 2004 accepts

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teaching lacks a sufficiently clear legal foundation in the current legislation of the State of Baden-Wurtemberg. Societal change linked to increasing religious diversity can be sufficient justification for the legislature to redefine the permissible extent of religious references in schools.] (BVerfG, 2 BvR 1436/02 vom 3.6.2003) The decision is available at [http://www.bverfg.de/entscheidungen/rs20030603\\_2bvr143602.html](http://www.bverfg.de/entscheidungen/rs20030603_2bvr143602.html).

<sup>6</sup> The foundation for this is the view phrased by Fairclough in the following way: “. . . discourses do not just reflect or represent social entities and relations, they construct or ‘constitute’ them.” (Fairclough 1992, 3)

<sup>7</sup> “. . . diskurssemantische Grundfiguren betreffen eine Tiefenebene der Textsemantik, die dem Willen des Sprechers nicht völlig entzogen sind; sie offenbaren sich und damit auch Charakteristiken des Denkens des Produzenten durch Regelmäßigkeiten. Sie bilden eine Art Raster, das als Grundstruktur fungiert. Sie können einem ganzen Diskurs zugrundeliegen – zumal Diskurse sich nicht nur durch Regelmäßigkeiten in der Thematik charakterisieren sondern auch durch Regelmäßigkeiten im Auftreten und Behandlung bestimmter inhaltlicher Elemente.” (Budde 1997, 20)

<sup>8</sup> For an overview see Butterwegge 2005. The paper contains a bibliography on the topic of the reception of migrants in Germany in general, and the media discourse in relation to migrants in particular.

<sup>9</sup> Rosenthal 2000 traces ways in which the development of the concept of a Germany threatened by foreigners was propagated in certain media.

the analysis of the dissenting opinion and operationalises the Native / Alien dichotomy. In the process, I shall show how the CDU rapidly moved from an initial position of justifying its legislative proposals to ban headscarves in the public service by means of arguments supporting civil service neutrality on the one hand and protection of Muslims on the other, to a strongly expressed hard-line position based on the Native / Alien dichotomy which was then carefully coordinated from state to state in 2004 as “headscarf bills” were presented in the different parliaments. Finally, I will indicate how, possibly under federal pressure as exemplified in what I shall call the “federal discourse”, or after more mature reflection, the CDU government of Schleswig-Holstein abandoned this position in 2006. In this way the analysis complements earlier discussions and provides new insights into the conduct of the debate and the use of language at the highest judicial level and at the level of state parliaments. And secondly, on the basis that all public parliamentary language is, in fact “zum Fenster hinaus”, this in turn provides information on the language that politicians are convinced will gain them support with voters.

## 1. The Judgement of the Federal Constitutional Court

In order better to understand what is happening in the discourse it is important to review the findings of the court. By findings I understand in the first instance the position taken in the majority decision as represented in paragraphs 29 to 74, which constitute the binding jurisprudence.<sup>10</sup>

The headscarf represents only a theoretical (the court calls it “abstract”) danger (§49 and §58). In the recent past it had been seen more and more as a political symbol of Islamic fundamentalism, but this is not the case with the appellant (§51). By using the indicative the court indicates that it accepts the view of an expert witness that the headscarf should not be reduced to a symbol of female subjugation, and that it is also a proven method for women to maintain contact with the culture of origin while at the same time leading an autonomous life (§52). The court stated clearly that it is not demonstrated that the headscarf communicates values in conflict with the constitution (§52). There is no proof that it will influence the religious orientation of children faced with a headscarf-wearing teacher (§54). There is no hard evidence (*keine greifbaren Anhaltspunkte*) that wearing a headscarf by the appellant specifically endangered the smooth functioning of the school (*der Schulfriede*), and any fears of possible difficulties from parents objecting to their children being taught by someone in a headscarf did not materialise during the appellant’s practice teaching (§58). It cannot be argued that wearing a headscarf would prevent the appellant from fulfilling her duty imposed by the Public Service Act of Baden-Wurtemberg (*Landesbeamtengesetz*) to serve the public good (*das Wohl der Allgemeinheit*) (§59). However, religious references may be re-defined by State Parliaments on the basis of the duty of the state to remain neutral in political and religious matters (*Pflicht des Staates zu weltanschaulich-religiöser Neutralität*) (§62, and see also §64). On the other hand, and very importantly, while there may be good reasons to give a stricter definition to *staatliche Neutralitätspflicht* to avoid the potential for conflict, one could also find good reasons for incorporating the increasing religious diversity into schools as part of an effort to promote

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<sup>10</sup> A discussion of the decision outlining the various issues from a legal point of view is to be found in Mager 2004.

tolerance by all parties, and in this way contribute to integration (§65). However, regulations concerning behaviour and clothing may be legislated to protect religious calm at school (*den religiösen Frieden in der Schule*) (§66). The criteria for such legislation must be the basic principles of the Federal Constitution (*die tragenden Prinzipien des Grundgesetzes*), especially fundamental rights (§68), and, significantly, there has to be equal treatment for the members of different religious groups (*gleiche Behandlung für Angehörige unterschiedlicher Religionsgemeinschaften*) (§71). These matters which concern the collision of different fundamental rights are so serious that they can be dealt with only in a (parliamentary) procedure which gives the public the opportunity to develop and present its views in public debate and places legislative bodies under the obligation to define the necessity and extent of restrictions of fundamental rights (§68).<sup>11</sup>

It is important to note that the justices who signed this majority view are careful to avoid any conceptualisations or argumentation which present either the appellant, or her values, or the value system possibly represented by the headscarf, in a way which constructs a fundamental opposition between German social and constitutional values on the one hand, and different cultural systems on the other. They do not say that the headscarf as such *has* to be banned or that it represents an alien value system. In addition, and this is important for understanding both the contradictory position of the dissenting opinion and the direction in which the political discourse developed, the majority opinion speaks only in terms of a *potential* danger to the smooth functioning of the school (§65 and §66).

But the real importance of the opinion lies in the implications it bears when considered from the point of view of the text-semantic feature of the Native / Alien dichotomy. As a minimum, the majority opinion is in fact opening the door to change on the part of the Native, or is even encouraging it. This is to be found in the statement, “Consequently, one can imagine good reasons for citing the increasing diversity in schools and using it as a means to practice reciprocal tolerance, and in this way to contribute towards the efforts being made to promote integration” (§65),<sup>12</sup> and the immediately following view that, because of the possibility of conflict, “there may well be good reasons to define the requirement for state neutrality with regard to schools more strictly and in a more distanced manner than hitherto, and consequently to remove entirely from students any religious messages conveyed by the outward appearance of a teacher in order to avoid any possibility of conflict with students, parents or other teachers” (§65).<sup>13</sup> The Native is being encouraged to change. The possibility of a ‘stricter and more

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<sup>11</sup> “. . . das der Öffentlichkeit der Gelegenheit bietet, ihre Auffassungen auszubilden und zu vertreten, und die Volksvertretung dazu anhält, Notwendigkeit und Ausmaß von Grundrechtseingriffen in öffentlicher Debatte zu klären.” (§68)

<sup>12</sup> “Es ließen sich deshalb Gründe dafür anführen, die zunehmende religiöse Vielfalt in der Schule aufzunehmen und als Mittel für die Einübung von gegenseitiger Toleranz zu nutzen, um so einen Beitrag in dem Bemühen um Integration zu leisten.” (§65)

<sup>13</sup> “Es mag deshalb auch gute Gründe dafür geben, der staatlichen Neutralitätspflicht im schulischen Bereich eine striktere und mehr als bisher distanzierende Bedeutung beizumessen und demgemäß auch durch das äußere Erscheinungsbild einer Lehrkraft vermittelte religiöse Bezüge von den Schülern grundsätzlich fern zu halten, um Konflikte mit Schülern, Eltern oder anderen Lehrkräften von vornherein zu vermeiden.” (§65)



distanced definition of (religious) neutrality in schools' in order to find a constructive way of dealing with the new situation in society means in particular that the religion practiced by the majority of the population, Christianity, can no longer occupy the predominant position ascribed to it in the constitutions of some of the states and / or in their education acts (examples will be given in the discussion below). These central aspects of the decision make absolutely clear that the majority justices are not thinking in terms of the established Native / Alien duality and that this discourse-semantic figure is totally absent from the court's decision.

There is, however, one position in the majority decision which will provide political parties with a means to ignore the suggested paths for a new identity discourse. The justices state in §53 that in assessing whether wearing a headscarf constitutes unsuitability (*ein Eignungsmangel*) on the part of the teacher “. . . it [the assessment] depends on how a headscarf can influence an observer” (. . . *kommt es darauf an, wie ein Kopftuch auf einen Betrachter wirken kann (objektiver Empfängerhorizont)*). This court-sanctioned concept that has been called an *objektiver Empfängerhorizont* will be referred to frequently in the following analyses, where it will be shown that, following the thinking of the dissenting opinion and the attitudes propagated in xenophobic media and street discourses,<sup>14</sup> parties make use of it in order to promote legislation banning headscarves in schools and discourage new directions in the German identity discourse.

## **2. The Dissenting Opinion**

The very strongly-worded dissenting opinion argued that the headscarf should be prohibited. It is the view of this article that the dissenting opinion reflects the fundamental dichotomy of Native and Alien as outlined by Busse. It expressed complete acceptance of negative attitudes towards the headscarf as legitimate in themselves, and also validated them as criteria for making administrative and legal decisions.

The particular arguments employed by the dissenting justices to be considered here are the following: 1) the negative attributes ascribed to the headscarf and the contrasting of these with German constitutional values; 2) the headscarf as a real source of conflict for colleagues, parents, and children; and 3) the threat topos related to the concepts of the Native and the Alien as a fundamental part of the argumentation.

### **2.1. Negative Attributes of the Headscarf**

#### **a) Human Dignity**

The fundamental statement of the German Constitution (Article 1) states “Human dignity is inviolable. It is the responsibility of all state power to defend and protect it”. When, then, in §123 the dissenting opinion cites *Würde des Menschen* (human dignity) as being opposed to the

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<sup>14</sup> Amply documented, for example, in Jäger 1993, other publications of the Duisburger Institut für Sprach- und Sozialforschung, and by many other researchers. The recommendations contained in Ruhrmann 1999 (95-108) on how reporting should change in order to avoid xenophobia further indicate current practices.

Islamic practice of covering the face (*Verschleierung*), already referred to in §121, and *Verhüllung* (a more general term which can include hiding the body) in §118, it does so in the knowledge that, constitutionally, this evokes the gravest problems.

Even on a purely personal, as opposed to constitutional, level, the notion of dignity is used in the dissenting opinion to problematise the headscarf. The appellant had argued that she felt her personal dignity to be diminished if she went out in public without a headscarf (*sie fühle sich in ihrer Würde verletzt, wenn sie sich mit unbedecktem Haupthaar in der Öffentlichkeit zeige* (§119)). The argument is then made that any woman who does not cover herself renounces her dignity. This is deliberately done in order to emphasise the potential of the headscarf to create conflict.

#### b) The Equality Provisions of the German Constitution

The reference here is to Article 3 “Men and women possess equal rights. No-one may be disadvantaged or favoured by reason of gender [ . . . ]” (*Männer und Frauen sind gleichberechtigt. Niemand darf wegen seines Geschlechts [ . . . ] benachteiligt oder bevorzugt werden*). The dissenting argument that a headscarf on a teacher will cause conflict in the population (made in §122 and §132) is based on the premise that the values of Article 3 have been collectively internalised by Germans in general who are then offended (it is claimed) by their being publicly rejected in a constitutionally-protected space, with the result that specific individuals spontaneously defend them. It is for this reason that conflict is inevitable.

The founding documents of each of the two opposing groups and personal identities are explicitly mentioned as representing the clashing value systems: the Koran and the Constitution. On one hand “In any case, in the views of important Koran commentators the commandment to hide the person of a woman – quite separate from the question of whether there is a strict obligation to do so – is rooted in the necessity of maintaining women in a role in which they are subordinated to men” (§121),<sup>15</sup> and on the other the Constitution, “This distinction between man and woman is quite alien to the values expressed in Article 3, para. 2 of the Federal Constitution” (*Diese Unterscheidung zwischen Mann und Frau steht dem Wertebild des Art. 3 Abs. 2 GG fern* (§121)).

#### c) Lack of Open-Mindedness and “Modernity”

This emerges particularly in a juxtaposition in §102 and §103. In the second of these paragraphs the argument uses as its basis of comparison *der[ . . . ] moderne[...] aufgeschlossene[...] und couragierte[...] Staatsdiener* (the modern, open-minded, and principled public servant) and states that **even** such a person’s rights are restricted if his views enter into direct conflict with policy goals or impede him in the exercise of his functions. In the preceding paragraph the counter-model is the appellant whose actions in connection with the headscarf are described as

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<sup>15</sup> “*Immerhin wurzelt auch nach Meinung wichtiger Kommentatoren des Korans das Gebot der Verhüllung der Frau – unabhängig von der Frage, ob es überhaupt ein striktes Gebot in diese Richtung gibt - in der Notwendigkeit, die Frau in ihrer dem Mann dienenden Rolle zu halten.*” (§121)

“uncompromising”: *das kompromisslose Tragen des Kopftuchs* (the **uncompromising** [my emphasis] wearing of the headscarf). She and other headscarf-wearers thus become an anti-model.

d) It is a symbol of an intolerant culture (implicit: while “our culture” is tolerant)

In addition to being a self-justification strategy, this is part of the argument of incompatibility of cultures. The positive characterisation of German culture as “open” and “tolerant” is made in §113. This culture became tolerant, it is stated, as a result of *leidvolle historische Erfahrung* (painful historical experience). In setting up an explicit contrast between the painfully-acquired cultural values of the Federal Republic and those of the Third Reich, the implication is present that the culture to which the headscarf belongs and which is described as deliberately challenging German culture (§121), should be associated with what had been overcome – Nazism. The headscarf, it is stated in §117, is a symbol of this culture: *ein Symbol des politischen Islamismus* (a symbol of political **Islamic fundamentalism**) [my emphasis]. The argument of the dissenting opinion explicitly takes the headscarf into an area beyond anything which the appellant had raised (she had restricted her arguments to identity, religious practice, and personal dignity). It uses the headscarf to evoke the post-September-11<sup>th</sup> widely-known stereotype of the religious fanatic.<sup>16</sup> The political discourse will seize on this argument of the dissenting opinion.

e) Incompatibility with the Liberal Democratic State

This follows from the assertion above that the headscarf represents more than an expression of religious obligation. A strong thrust within the dissenting argument is that the Constitution ensures a liberal state, and that the function of the civil servant is to realise *der demokratische Volkswille* (the democratic will of the people). Throughout, the implication is that the headscarf would hinder this. In other words, it would undermine the state, its democratic foundation, realisations, and objectives.

## 2.2. The Headscarf as a Source of Conflict

Briefly put, in the dissenting opinion this important argument is constructed around the basic enthymeme: the wearing of a headscarf by a teacher is in conflict with societal and constitutional norms; the conflict with societal norms will disrupt the tranquil functioning of the school (*der Schulfriede*), and the conflict with constitutional norms (if tolerated) would disrupt the functioning of the state along traditional lines; consequently the practice must be banned.

The proposition that a headscarf would cause conflict with members of society was first expressed in the decision of the *Verwaltungsgerichtshof Baden-Württemberg* (Administrative Court of Baden-Wurtemberg) rejecting the appeal of the appellant. This view that a headscarf would cause conflict was then upheld throughout the whole appeals process – but in the decision of the Federal Constitutional Court it was reduced to only a potential danger.

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<sup>16</sup> For more on the relationship between language and stereotypes, and their functioning through the inferability of the value judgements they normally contain, see Quastoff 1987.

In the dissenting opinion, however, and in accordance with the argumentation in the previous stages of the case, it is expressed with particular force, particularly in the sections referring directly to the appellant. The intention of the dissenting justices is to depict the appellant, her attitudes, and proposed actions as totally at odds with accepted German standards and practices. They argue for a wider understanding of the concept of danger to the smooth running of the school and employ a wide range of compounds and derivations of *Gefahr* (danger) (multiple references in §103 to §106, and also in §110 and §116);<sup>17</sup> they emphasise the inevitability of conflict with parents and other teachers arising from the headscarf's being, among other things, “an Islamic fundamentalist Symbol” (*ein islamisches Symbol*, §111) and a “Symbol of political Islamic fundamentalism with potent symbolic meaning” (*Symbol des politischen Islamismus mit starkem Symbolgehalt*) (§117; and see also §107, §108). All of the above will inevitably encounter or engender “Incomprehension of rejection on the part of students and parents or guardians with different points of view” (*Unverständnis oder Ablehnung bei andersdenkenden Schülern und Eltern oder deren Erziehungsberechtigten*) (§111). The argument continues with the assertion (which contradicts §58 of the majority opinion) that all of the above had already led to such conflicts during the preparatory teaching of the appellant (§112). The intention here is to emphasise the polar opposites of Native and Alien and their complete incompatibility.

The argument of the inevitability of conflict is reinforced by the way in which the German social environment is defined: it is “a social environment which strongly rejects the headscarf” (*ein [ . . . ] das Kopftuch dezidiert ablehnend[es] sozial[es] Umfeld*) (§114; see also §117). Specifically, because the headscarf in public is a symbol of “a moral distinction between men and women” (*ein[...] sittlich[er] Unterschied[...] zwischen Männern und Frauen*) it will inevitably cause “controversy and a polarisation of views in general” (*Widerspruch und Polarisierung*) in general (§118 and §121) and conflict with parents and teachers in particular (§117-§120).

### 2.3. The Threat Topos

This particular case came to the Federal Constitutional Court because the appellant considered that her rights as an individual had not merely been threatened, but had been actively breached by the Stuttgart Education Authority. However, what is moved into the foreground in the dissenting opinion are the ways in which the state, its principles and organisation are threatened by the claims of the appellant. The person who claims that she has been victimised becomes in a process of victim-perpetrator-reversal the person who would turn the state and all that it stands for into the victim of her religious – and the dissenting opinion argues – political convictions. That this position was accepted and actively propagated in the political discourse is demonstrated by the statement made by the Hessian Minister of Education quoted at the head of this paper.<sup>18</sup>

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<sup>17</sup> Gefährdung, Gefährdungslage, Gefahrenlage, Gefahrbegriff, Gefahrenschwelle, Gefahrenmodalitäten.

<sup>18</sup> A similar argument was used by Karl-Heinz Klare to the State Parliament of Lower Saxony on 28 April, 2004: Niedersächsischer Landtag, Stenografischer Bericht, 31. Sitzung, p. 3286.

As indicated by Busse, the discursive construction of German identity has a long history of rejection of the Alien and of its use as a negative image of the Native. The position of the dissenting justices thus stands in this tradition.

### 3. The Political Texts

In order to show the development of the discourse arising from both the majority and minority positions of the Federal Constitutional Court and the significant shifts in conceptualisations and argumentation - and even misrepresentations - this discussion will focus on three areas: a) the rapid transformation of the nature of the symbol which the headscarf is deemed to be; b) the shifts in the arguments why the headscarf should be banned; and c) its use to emphasise a cleavage between East and West. This will demonstrate above all the adoption of the position of the dissenting opinion and the further hardening of the “native” and “alien” conceptualisations visible there. What this means is that the CDU / CSU systematically ignored the openings provided by the court for a public redefinition of German identity (both collective and individual). They choose to ignore the explicit statement of the Court to the effect that the headscarf does not necessarily represent opposition to German constitutional values; instead, they act in favour of a *status quo* which privileges Christianity. In other words, in their rhetoric they deny or undermine the notion of an identity based on a civic patriotism compatible with a variety of practices and beliefs in favour one which remains founded in a society hostile to external practices (Laborde 2002). In addition, the emphasis, derived from the dissenting opinion, on the legitimacy of the evaluations and assessments ascribed to the headscarf by the wider public (*objektiver Empfängerhorizont*) means that the attitudes contained in the long-existing and powerful popular discourse around the exclusiveness of German identity are supported, legitimised, and are to pass into law as valid identity-conferring criteria.

#### 3.1. Berlin: 22 October 2003, Motion: Berlin says No to the Headscarf in the Public Service; 5 February 2004, A Bill to amend the Berlin Schools Act

The case of the motion by the CDU in Berlin (22 October 2003 – Drucksache 15/ 2122, and the bill dated 5 February 2004 - Drucksache 15/2509 Neu) to obtain a legislated prohibition to the wearing of headscarves by members of the civil service is particularly revealing. The motion is based on a stated desire to avoid exposing Muslim women to the sight of a headscarf on a representative of the state. The bill has shifted to a discourse founded on the dissenting opinion and clearly and explicitly co-ordinated with wider-ranging arguments which can be followed from state parliament to state parliament as CDU bills were proposed beginning in February of the following year.

The motion of 22 October 2003,<sup>19</sup> just one month after the decision, does not follow the lead of either the majority or the minority on the court. It chooses a third way, but one which also avoids a Native / Alien, them vs. us confrontational discourse. It urges the Senate to introduce

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<sup>19</sup> Abgeordnetenhaus von Berlin – 15. Wahlperiode. Drucksache 15/2122: Antrag der Fraktion der CDU **Berlin sagt Nein zum Kopftuch im öffentlichen Dienst** (Motion proposed by the CDU Group **Berlin says no to the Headscarf in the Public Service**).

legislation prohibiting the wearing of the headscarf by civil servants is based on the following new argument, outlined in the “*Begründung*”.

The state may not endanger religious peace (*der religiöse Frieden*); no-one should have a religion or a particular interpretation of a religion forced on them as religion is a private matter. In a mixed city like Berlin, the only way to ensure religious peace is to avoid such potent religious symbols as the headscarf in the public service. Consequently, in government buildings no-one should be confronted with “such aggressive religious manifestations” (*offensive Glaubensbekenntnisse dieser Art*).

The stated background to this enthymeme is the following: the vast majority of Muslim women and girls do not wear a headscarf; however, their refusal to wear a headscarf is represented to them as a lack of modesty (*Würde*), a false interpretation of the Koran, and non-acceptance of the subordinate role of women demanded in a number of Muslim countries. Modern and integrated women and girls must be protected from such fundamentalist views in the areas controlled by the public service. What is foregrounded in this argument is congruity of values. This congruity of values **unites** the vast majority of Muslims and non-Muslims in Berlin and is the reason for the protection to be afforded Muslim women by the proposed legislative measure. In addition, the headscarf is presented as purely a religious symbol, and no argument is made that it is incompatible with the constitution. The proposal thus has to be seen as one of minority rights: the right of a religious group to be free from harassment or proselytisation by hard-liners - at least in the area where the state can readily legislate because of its constitutional obligation to be neutral.

This short-lived Berlin CDU position does not become a discourse in the sense of having a long-term existence. As a public position it could have developed into a discourse, but it was very quickly cancelled or withdrawn from the public eye and ear. It is not given the opportunity to spread, to be re-used, and to colonise media and public conceptualisations.

It contrasts also very strongly with the bill introduced on 5 February 2004.<sup>20</sup> This bill is part of what emerged in early 2004 as the consistent CDU / CSU discourse attacking the headscarf as totally inconsistent with constitutional values. The strategy was to model the parties’ public discourse on that of the dissenting justices. This modelling can be very close indeed; it includes repeated intertextualities, references and direct quotation.

The starting point of the CDU bill lies in the Native / Alien dichotomy of the dissenting opinion and specifically in the incompatibility of the headscarf with “human dignity, the equality of men and women as laid down in Article 3 of the Federal Constitution, fundamental rights of (personal) freedom and the free and democratic nature of society” (*die Menschenwürde, die Gleichberechtigung der Menschen nach Art. 3 GG, die Freiheitsgrundrechte oder die freiheitlich-demokratische Grundordnung*); secondly, it is incompatible with “propagation of Christian and Western educational and cultural values or traditions” (*Bekundung christlicher und abendländischer Bildungs- und Kulturwerte oder Traditionen*).

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<sup>20</sup> Abgeordnetenhaus Berlin, Drucksache 15/2509 NEU (5 February, 2004).

The justification for the bill opens with a statement explicitly referring to its measures being largely modelled on those proposed in the bill presented to the Baden-Wurtemberg Parliament on 14 January and debated on 4 February (see below). A number of important points must be made concerning the position taken in the written justification (*Begründung*):

1. It foregrounds the concept of the *objektiver Empfängerhorizont* (§53, see above), i.e. the possible reactions of the public to the headscarf, as opposed to the intentions of the wearer;
2. It gives explicit preference to Christianity in the functioning of the school, an argument to be repeated in bills presented to other state parliaments.
3. In addition, the document contains an important statement forming part of the topos of the threat to the constitutional values of the equality of the sexes and the separation of religion and state. This statement (to be referred to in future as the “Baden-Wurtemberg statement”), first used two weeks earlier in connection with the bill presented to the State Parliament of Baden-Wurtemberg, is later used verbatim or nearly verbatim in the justifications of bills presented to a number of state parliaments. Wearing a headscarf is not permissible “because at least some of those who support [the headscarf] associate with it both a subordinate position of women in society, state, and family that is incompatible with Articles 1 and Paragraphs 2 and 3 of Article 3 of the Federal Constitution, and also associate with it an aggressive fundamentalist position in favour of a theocratic state in contradiction of the fundamental values of Article 20 of the Federal Constitution”.<sup>21</sup> This invalidates the position of any teacher / civil servant who proposes to wear a headscarf for reasons of belief and modesty.
4. Interwoven with these is the additional argument of preserving the normal functioning of the school (*der Schulfriede*).

These positions now form the basis of the consistent CDU / CSU position throughout the following year.

What is (deliberately) overlooked in connection with the threat topos is that the decision of the court (as opposed to the dissenting opinion) makes clear that a *possible* or *theoretical* (the judgement calls it *abstrakt*) danger to the smooth functioning of the school does not provide sufficient justification for a ban. In a second respect the judgement of the court is communicated in a misleading manner. The document presented to the parliament recognises that the Federal Constitutional Court had said “ . . . the denominational or religious composition and long-standing traditions of the population may be considered” ( . . . *die konfessionelle bzw. religiöse Zusammensetzung und Verwurzelung der Bevölkerung [darf] berücksichtigt werden*). From there the statement accompanying the bill argues that “In a Germany which is moulded by Christian traditions there can consequently be no constitutionally-based obligation to treat all religions equally (*Im christlich geprägten Deutschland kann es dabei keine aus der Verfassung abgeleitete Verpflichtung geben, alle Religionen gleich zu behandeln*). But in fact the court had explicitly limited the geographical extent of its comment to an individual state, and certainly had not

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<sup>21</sup> “. . . weil zumindest ein Teil seiner Befürworter mit ihm sowohl eine mindere Stellung der Frau in Gesellschaft, Staat und Familie, die mit Art 1 und Art 3 Abs. 2 und 3 GG unvereinbar ist, als auch eine fundamentalistische, kämpferische Stellungnahme für ein theokratisches Staatswesen entgegen den Grundwerten des Art 20 GG verbindet.”

spoken in terms of Germany as a whole,<sup>22</sup> and in fact, as already outlined, had insisted that any prohibition must affect all religions equally. The statement thus implies that the court had provided a definition of Germany as a Christian nation or country, when in fact it had done no such thing.<sup>23</sup>

### 3.2. Baden-Wurtemberg: A Bill to amend the Education Act, 14 January 2004

Introduced on 14 January, 2004 and first debated on 4 February, the introduction to the text of the amendment to the Education Act<sup>24</sup> immediately uses the threat topos: Teachers in publicly-financed schools are to be prevented from making any form of communication (*Bekundung*) which “can endanger or disturb the neutrality of the state or the peaceful functioning of the school and, most importantly, can show disregard for fundamental constitutional values.”<sup>25</sup>

In the justification the position relating to the prohibition of headscarves in the public service can be summarised in the following ways:

1. The threat topos in the text of the bill itself (above) is repeated verbatim;
2. The *objektiver Empfängerhorizont* is the touchstone by which verbal utterances, items of clothing, badges, etc., on the part of public servants are to be judged. (It makes clear in its summary of the public hearings that the Baden-Wurtemberg School Advisory Council (*Landesschulbeirat*), a group which exists to provide a link between the Ministry of Education and the public, is strongly opposed to a headscarf’s being worn by any teacher;
3. The statement, quoted above and referred to as the Baden-Wurtemberg statement, justifying the headscarf prohibition because of the views of a minority of its wearers is present.
4. The predominant position ascribed to Christianity in schools and the education process by Articles 12, 15, and 16 of the Baden-Wurtemberg Constitution provides a constitutional basis for excluding the teaching of Christian values from any prohibition. Because it refers to the State Constitution and to legislation this is a stronger affirmation of the Christian nature of

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<sup>22</sup> In fact, given Berlin’s proportionally large Muslim, small Christian, and majority non-believing populations, if applied on the level of Berlin, the court’s opinion could be viewed as arguing in favour of wearing a headscarf. In the hearings of the *Ausschuss für Inneres, Sicherheit und Ordnung* (Committee for Internal Affairs, Security, and Order) of the Berlin State Parliament on the CDU bill to amend the Education Act originally presented on 15 February 2004, the following figures were given on religious affiliation: Muslims 5.9%, Catholics 9%, Lutherans 22%, Jews 0.3%, and 62% with no religion. (Abgeordnetenhaus Berlin, Inhaltsprotokoll InSichO 15 / 53, 17 January, 2005, page 9)

<sup>23</sup> The Federal Constitution provides no justification for this. Articles 4 and 7 deal directly with religion. They do not speak of Christianity, but guarantee the protection and free practice of religion. Article 33 states that in the public service persons shall not be given preference or disadvantaged because of their religion or political views.

<sup>24</sup> Landtag von Baden-Württemberg, Drucksache 13/2793, 14 January 2004.

<sup>25</sup> “B. Wesentlicher Inhalt: Lehrkräften sollen an öffentlichen Schule solchen äußeren Bekundungen untersagt werden, die die Neutralität des Landes oder den Schulfrieden gefährden oder stören, vor allem grundlegende Verfassungswerte missachten können.“



society than in the case of Berlin and can be seen as a stronger challenge to the Court's insistence on equal treatment for all religious symbols.

Here, as in the second Berlin document, the dichotomy of Native and Alien is complete.

These arguments and positions were repeated and developed in the speech by the Minister of Education, Annette Schavan, when she opened the debate in the State Parliament on 4 February, 2004.<sup>26</sup>

### **3.3. Bavaria: An Act to amend the Bavarian Schools Act, 18 February 2004**

The full conceptualisations and argumentation in the Bavarian Government's (CSU) legislative reaction to the judgement are to be found in the bill submitted to the State Parliament on 18 February 2004.<sup>27</sup> This proposed legislation places teachers explicitly under an obligation to communicate constitutional values in a credible manner and forbids the wearing of garments or symbols which can be interpreted by the young people or their parents (the concept of the *Empfängerhorizont*) as incompatible with such values and / or Christian and Western (*christlich-abendländisch*) educational and cultural values (repeated three times). The justification itself strongly develops this dichotomy between constitutional values and Islamic values by means of repeated references to specific articles of the Bavarian Constitution and paragraph of the Bavarian Schools Act and verbatim quotations from these documents referring specifically to a range of virtues and attitudes to be inculcated in the schoolchildren.<sup>28</sup> Thus a position is created whereby there is both a total contrast between both religions and regions: Judaeo-Christianity vs.

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<sup>26</sup> Landtag von Baden-Württemberg, Plenarprotokoll, 13 / 62, pages 4385-4389. For more public statements by the minister, see Weber (above).

<sup>27</sup> Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen; Bayerischer Landtag, Drucksache 15/368. The first notice of changes had been given in brief on 23 November 2004; GVBl. S. 443.

<sup>28</sup> *Zu den obersten Bildungszielen der Verfassung, die in Art. 131 BV benannt sind und in Art. 1 Abs. 1 Satz 3 und Satz 4 BayEUG wiedergegeben werden, zählen Ehrfurcht vor Gott, Achtung vor religiöser Überzeugung, vor der Würde des Menschen und vor der Gleichberechtigung von Männern und Frauen, Selbstbeherrschung, Verantwortungsgefühl und Verantwortungsfreudigkeit, Hilfsbereitschaft, Aufgeschlossenheit für alles Wahre, Gute und Schöne und Verantwortungsbewusstsein für Natur und Umwelt. Die Schüler sind im Geist der Demokratie, in der Liebe zur bayerischen Heimat und zum deutschen Volk und im Sinn der Völkerversöhnung zu erziehen. Zu den in Art. 2 Abs. 1 BayEUG aufgeführten Aufgaben der Schulen gehört unter anderem die Förderung der Gleichberechtigung von Frauen und Männern und die Befähigung der Schülerinnen und Schüler zu einer gleichberechtigten Wahrnehmung ihrer Rechte und Pflichten in Familie, Staat und Gesellschaft.* Among the principal, constitutionally-anchored, educational goals contained in Article 131 of the Bavarian Constitution and in Article 1, Paragraph 1, sentences 3 and 4 of the Bavarian Education Act are fear of God, respect for religious conviction, for human dignity, for the equality of men and women, self control, responsibility and willingness to accept responsibility, willingness to help others, openness to everything which is True, Good, and Beautiful, awareness of responsibility for nature and the environment, the spirit of democracy, love of Bavaria and the German people, and understanding between nations.

Islam, Europe and the West vs. the (Middle) East. By these means, the “cultures” are presented as static and irreconcilable, and the long list of positive values enunciated in the quotations from the Education Act and the State Constitution are implicitly indicated as being totally absent from Islam and the Islamic world. Following the lead of the dissenting opinion, the *objektiver Empfängerhorizont* is emphasised in both the bill and the justification, which makes public perception, not the intention of the wearer, the criterion by which judgements are to be made. The threat topos becomes explicit with the use of the metaphor of an *Einfallstor* (taken from media discourse and conveying the idea of a breach in a defensive wall) and the endangerment (*Gefährdung*) of the smooth functioning of the school. The Baden-Wurtemberg statement (partly verbatim or slightly varied)<sup>29</sup> is also employed, reinforcing the notion of an absolute contrast between Islamic values and German constitutional values. This absolute cleavage between the German and the Muslim value system is reiterated in the assertion that all the Christian denominations and Jewish congregations unrestrictedly support Constitutional values and those of the education system. This argument provides the foundation for an explicit statement that the wearing of nuns’ habits remains permissible under the legislation.<sup>30</sup>

### **3.4. Hesse: “An Act to Protect the Neutrality of the State”<sup>31</sup>, 10 February 2004**

The presentation of the bill in the State Parliament of Hesse on 10 February 2004<sup>32</sup> follows and develops the pattern which demonstrates a co-ordination of approach by CDU governments at the state level. This is immediately evident in the direct intertextualities perceptible and in the references to, and the quotations from, the statements in the Parliament of Baden-Wurtemberg, where a bill to outlaw the headscarf had been presented just three weeks earlier.

As in Bavaria, the situation whereby there is no legal basis for prohibiting headscarves in the public service is described as a “problem”. The principal arguments cited for prohibiting it are:

1. The reaction of the public to a headscarf (*objektiver Empfängerhorizont*), which is placed in the foreground;

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<sup>29</sup> Vor diesem Hintergrund ist das Tragen eines Kopftuchs unstatthaft, weil zumindest ein Teil seiner Befürworter damit eine mindere Stellung der Frau in Gesellschaft, Staat und Familie oder eine fundamentalistische Stellungnahme für ein theokratisches Staatswesen im Widerspruch zu den Verfassungswerten in Bayern verbindet.

<sup>30</sup> This provision was later withdrawn and is not present in the final version of the bill, passed on 11 November, 2004: Bayerischer Landtag, Drucksache 15/1964. The opening speech of the debate, by Georg Eisenreich (CSU) draws attention to this point: Bayerischer Landtag, Plenarprotokoll vom 11.11.2004, 15/27. The line taken earlier has had to yield to the intervening decision of the Federal Administrative Court (*Bundesverfassungsgericht*) which had made clear that no differentiation could be made between Muslim garments and Christian ones – in the form of monks’ and nuns’ habits.

<sup>31</sup> “Gesetz zur Sicherung der staatlichen Neutralität”.

<sup>32</sup> Hessischer Landtag, Drucksache 16/1897 neu, 18 February, 2004.

2. The protection of public-service neutrality and consequently of the political, religious, or *weltanschaulich* peace within society is primordial. The wearing of a headscarf would threaten these values: i.e. the use of the threat topos, with the headscarf at its centre;
3. The headscarf is also a political symbol;
4. Christianity has forged the fundamental values on which the state and society are founded and which are “essential to carry out the tasks of the state” (*maßgebend für die Erfüllung der Aufgaben des Staates*);
5. Symbols which indicate “the tradition, strongly influenced by Christianity and humanism, of the State of Hesse” (*die christliche und humanistisch geprägte Tradition Hessens*) are permitted. This argument is buttressed by references to both the judgement of the Federal Constitutional Court and the Education Act of Hesse, which ascribes a particular value and function to Christianity.

While the justification does not contain the Baden-Wurtemberg statement, it does show the Native / Alien dichotomy, both in the form of Christian / Muslim and also in the political sphere. Indeed, the Christian and western elements are repeated twice in the actual text of the bill itself, where “the western tradition, strongly influenced by Christianity and humanism, of the State of Hesse” is laid down as the criterion on which judgements concerning both the neutrality of conduct on the part of public servants and the likelihood of disturbances to the smooth functioning of school and state are to be judged.<sup>33</sup>

### 3.4.1. Speeches in the Hessian State Parliament

As an indication of the way in which public political discourse used in state parliaments expressed very forceful and total opposition to the headscarf as a symbol representing the complete opposite of constitutional values, and consequently of everything which the German people are presented as standing for, I shall briefly examine the speech with which Franz Josef Jung, Chair of the CDU group in the Hessian Parliament introduced the bill on 18 February, 2004.<sup>34</sup>

The opposition is first repeatedly and explicitly between “**our** Constitution” (*unsere Verfassung*; my emphasis) and this “symbol of fundamentalist Islamic forces” (*islamistische Kräfte*). This introductory opposition is repeated approximately seven times. Within that sequence there are statements that the headscarf stands for anti-Semitism, absence of democracy, the subordinate position of women, misogyny, oppression, tyranny, intolerance, and the unity of religion and state; the assertion is repeated that the headscarf is incontrovertibly a symbol of Islamic fundamentalism. The teacher who brought the case to the Federal Constitutional Court is described as a “fundamentalist” (*islamistisch*). Later the headscarf is equated with *Scharia* – which is represented as prescribing “flogging, amputation, and lapidation” (*Auspeitschung, Amputation und Steinigung*). The Chair of the CDU Group and proposer of the bill then speaks of the overwhelming support among the population of Hesse for the bill, quoting surveys respectively by the Hessian Radio and the Hessian Ministry of Education (the latter survey

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<sup>33</sup> Bei der Entscheidung . . . ist der christlich und humanistisch geprägten Tradition des Landes Hessen angemessen Rechnung zu tragen.

<sup>34</sup> Hessischer Landtag Plenarprotokoll 16/30, pp. 1897-1899.

referred particularly to schools) which indicate that respectively 80% and 97% of respondents favoured banning the headscarf in the public service (which includes teachers). Finally, he emphasises the western, Christian, humanistic traditions of society, links this to passages in the Federal Constitution and the Hessian Education Act, and so draws the conclusion that these factors justify explicitly maintaining both the presence of Christian symbols in schools and legislating a ban on the wearing of a headscarf by public servants. The distinctions between German and Muslim, Native and Alien, are absolute. There is total rejection, no point of contact, and, implicitly, no possibility of reconciling the two.

Similarly, during the debate the Minister of Education, Karin Wolff, based the major thrust of her argument on the absolute opposition of constitutional values and the Islamic fundamentalist views which, she asserts, are represented by the headscarf.<sup>35</sup> But rather than elaborating on this, for the sake of brevity, I shall deal only with the statement quoted at the head of this paper made in reference to the fact that the Islamic Council and the Central Council of Muslims in Germany had covered the entire costs of the legal action brought by the trainee teacher who believed that her rights as a citizen had been breached.<sup>36</sup> Its primary significance lies in the fact that here a member of the cabinet is using before the parliament, and is thus legitimising, an argument frequently heard in street-level xenophobic discourse.<sup>37</sup> Contained in the statement are a number of implications which need to be spelled out in full. The implied premise on which it is built is that headscarf-wearers are in a plot to undermine the state: it thus built on the threat topos which is fundamental to the anti-headscarf, and thus anti-muslim, discourse which represents a potent variant of the Native / Alien dichotomy and which was foregrounded in the dissenting opinion of the Federal Constitutional Court. Consequently it demonstrates and unwillingness at a high level of political life and activity within the CDU to accept the position of the Court. A further implication in the statement is that minorities should not be allowed access to the courts to assert their rights in the same way that the majority population is. In addition, it also implies that “religious minorities” are not part of “us”, of “our” state: in other words they are not German.

### **3.5. Schleswig-Holstein; A Bill for the Further Development of the School System in Schleswig Holstein,<sup>38</sup> 11 October 2006**

The CDU discourse did not continue in the ways or with the vehemence already outlined for Bavaria, Baden-Wurtemberg, Berlin, and Hesse. The State Parliament was in possession of the memorandum from the Federal Commissioner for Migration, Refugees, and Integration to be discussed below. Despite all the political, legal, and social arguments the memo contained, the CDU parliamentary group had initially wanted to ban the headscarf specifically, and the Chair of

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<sup>35</sup> This position is based on a statement in the decision of the Federal Constitutional court, which, however, starkly differentiates the appellant’s position from frequently stated views that the headscarf is a symbol of fundamentalist views (§51).

<sup>36</sup> Plenarprotokoll des Hessischen Landtages, 16/30, 18 February 2004, page 1908.

<sup>37</sup> For further information on this, see the publications of DISS, the Duisburger Institut für Sprach- und Sozialforschung and other items indicated above in connection with street discourse.

<sup>38</sup> Schleswig-Holsteinischer Landtag, Drucksache 16/1000

the CDU Womens' Union, Staatssekretärin Karin Wiedemann, even wished to prohibit the wearing of the headscarf by girls in school,<sup>39</sup> something which the Court had said was quite outside government control. But in the debates in the State Parliament and in public statements the whole issue is played down and not treated in the fashion of early 2004. The CDU had to compromise and accept the possibility of a headscarf being permitted. They recognised that, under the doctrine of equal treatment for all religions, to hold on to a headscarf ban would have meant accepting the prohibition of Christian symbols. As of October 2006, the previously described discourse did not continue at the political level.

#### 4. The Federal Discourse

What is understood by federal discourse here are memos from the Federal Commissioner for Migration, Refugees, and Integration, Marieluise Beck, sent on 27 April 2004 to at least two state parliaments (North Rhine-Westphalia and Schleswig-Holstein) considering headscarf legislation.<sup>40</sup> One can hypothesise that the memo went at least to all the parliaments named below. The date and content make clear that they were sent after the publication of the bills and the early debates in Berlin, Bavaria, Hesse, and Baden-Wurtemberg, and after the passage of the legislation in the latter state, but before the bill and the debate in Schleswig-Holstein.

The memos argue against a generalised headscarf ban and openly criticise the Baden-Wurtemberg legislation and the bills in Bavaria, Berlin, Hesse, Lower Saxony, and the Sarre as counterproductive. They reject the long-standing unwillingness of people and politicians to recognise permanent immigration, and state that autochthonous and new populations are faced with the challenge of “naturalising” (*einbürgern*) Islam in Germany. Consequently, facing the question of teachers wearing a headscarf in schools is of great importance in relation to integration policies. Granting a teaching licence to a woman wearing a headscarf on the basis of an individual assessment of her suitability is possible and offers an opportunity to make a contribution to integration (*einen Beitrag in dem Bemühen um Integration zu leisten*, which is in fact a quotation from the court's decision). As is to be expected, the federal position is absolutely consistent with that of the Federal Constitutional Court.

The major arguments they contain in favour of allowing a headscarf in schools are the following. Employing headscarf wearers in schools has a significant symbolic value in that it represents the “naturalisation” (*Einbürgerung*) of Islam. Doing so also demonstrates to newcomers that visible differences do not justify exclusion and that constitutional provisions grant their religion equal treatment. In addition, legislative or other attempts in the “headscarf debate” to distinguish between permissible and non-permissible religious references in the public sphere based on the notion of “alien culture” (*kulturelle Fremdheit*) are highly problematic as

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<sup>39</sup> Despatch from the Evangelischer Pressedienst dated 26 September 2006.

<sup>40</sup> Schleswig-Holsteinischer Landtag Umdruck 15/447, Stellungnahme zur Anfrage des Bildungsausschusses des Schleswig-Holsteinischen Landtags betreffend „Konsequenzen der Landesregierung aus dem „Kopftuch-Urteil“ des Bundesverfassungsgerichts, Antrag der Fraktion der CDU, Drucksache 15/3008“; and “Stellungnahme zur öffentlichen Anhörung unter Federführung des Hauptausschusses des Landtags Nordrhein-Westfalen, am 6. Mai 2004, Thema Kopftuchverbot: Landtag Nordrhein-Westfalen, 13. Wahlperiode, Zurschrift 13/3921.

they could also lead to a strengthening of the tendency of immigrants to withdraw from the majority society.

Additional arguments are anchored in the view that any generalised prohibition against the headscarf is contrary to the integration requirements in an increasingly pluralistic society, highly dubious in the light of the decision of the Federal Constitutional Court, and counter-productive in that it renders the integration process of young women more difficult. Furthermore, any legal act which prohibited the headscarf but permitted “Christian-occidental” garments or symbols (such as had been enacted in Baden-Wurtemberg and was being proposed in Bavaria, Hesse, Lower Saxony and the Sarre) would emphasise inequality of religions, consequently supporting the extremists’ argument that equality is impossible in German society.

## Conclusions

While the major part of the political discourse in 2004 is designed to emphasise the Native / Alien dichotomy, in the process legitimising and employing the street discourse of xenophobia and islamophobia, the federal discourse functions differently. It has as its centre the radically different concept of *Einbürgerung*. Naturalisation, too proceeds from an awareness of difference, but also from the conviction that it is possible, and even desirable, to reduce it.

In the political statements directly arising in 2004 out of the court’s decision, and also others which cannot be discussed here for reasons of space, the Native / Alien contrast is no longer an underlying discourse-semantic figure according to Busse’s definition, but has emerged as an utterly explicit expression of positive and negative values to be maintained and opposed by legislation in the name of German identity. The obligation imposed on governments by the court to pass legislation if they wished to proceed with outlawing the headscarf in the civil service provided the opportunity for them to operationalise this established and hegemonic figure.

The analyses reveal the deliberate and even intractable refusal of significant elements within the judiciary<sup>41</sup> and political life<sup>42</sup> to accept the proposals of the majority justices on the

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<sup>41</sup> It is very reliably reported that the discussions on this case within the Federal Constitutional Court were extremely heated and bitter.

<sup>42</sup> For reasons of space there is no opportunity in this paper to consider the various statements by the SPD. However, it can be stated with certainty that, as a group, the SPD has not promoted any radically different position. It must also be noted that in those states where the SPD was in coalition with the CDU in early 2004 (e.g. the Sarre and Bremen) they accepted the position, terminology, and argumentation outlined above in the analyses of CDU (CSU) documents from Baden-Wurtemberg, Bavaria, Berlin, and Hesse. See *Gesetzentwurf der CDU-Landtagsfraktion und der SPD-Landtagsfraktion betr. Gesetz zur Änderung Gesetz zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland* Drucksache 12/1072 (12.2.2004). In the case of Bremen the parallels are particularly close, including the explicit acceptance of the wearing of a small cross - *Bremische Bürgerschaft, Drucksache 16 / 12.01.2004*. The ways in which the SPD has allowed itself to be pushed to the right in many areas concerning non-Germans is noted by Bukow and Yildiz above. See also Butterwegge et al. 2002.

Federal Constitutional Court towards redefining German identity in more inclusive and flexible terms adapted to the new realities of the country, its residents and citizens. At the same time they have shown the immediate rejection of the early positive contribution by the Berlin CDU to the post-constitutional-court strand of the headscarf and identity discourse. However, in the Schleswig-Holstein case in 2006 we have briefly indicated the later shift in the public political discourse by elected officials away from the highly problematic and hostile practice of constructing an overt dichotomy between Moslem symbols and German values.

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