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COMPARATIVE CONSTITUTIONAL LAW

concerning § 11 of the course

Case 1

(facts of the case)

The close friends Ibrahim (a refugee from Syria) and Karl (a German citizen) are attending a public school in Germany in the Land L. While most of their classmates are Christians, Ibrahim is a deeply religious Muslim and Karl is an atheist. They often discuss about religious topics in an open and friendly way. They are sensitive. Freedom and tolerance in an open society are important values for them.

One day, when they come back from school holidays, they notice that in all classrooms a crucifix of a size of 80 cm to 60 cm, showing the corps of the dying Jesus Christ, has been installed in the field of vision behind the teacher's place, next to the blackboard, appearing like a statement of the school. It is not possible to follow the classes without looking all the time at the crucifix. Both, Ibrahim and Karl feel pressurised and threatened by the crucifixes, whose sight they cannot avoid. They and their parents ask the school management in vain to remove them during the time of their classes. The headmaster informs them that a new law in the Land L requires public schools to install crucifixes in every classroom.

Ibrahim and Karl are of the opinion that their freedom of religion under art. 4(1) of the Basic Law for the Federal Republic of Germany (the German constitution) is violated. The headmaster, however, objects that the school does not prohibit Ibrahim to keep and practice his Islamic faith, nor does it prohibit Karl to be an atheist. He is of the opinion that Ibrahim, as a Muslim living in Germany, with its Christian tradition, must accept to be confronted with crucifixes everywhere and at anytime, including in the classroom when he is legally required to be present to attend the classes. Concerning Karl, the headmaster holds that he is not protected by the fundamental right of freedom of religion at all because an atheist does not have a religion. Furthermore, the headmaster argues that he must take due account of the interests of the majority of Christian school students in the class.

Ibrahim and Karl still think that their freedom of religion is violated. Are they right?

Does it make a difference if a crucifix, according to the new law in the Land L, is only installed in one of several recreation rooms which the school students can use?

Does it make a difference if the school, according to the new law, does not install crucifixes itself but allows the Christian school students to install a smaller cross or crucifix in the back of the classroom?

Art. 4(1, 2) BL:

(1) The Freedom of faith, of conscience, and the freedom to profess a religious or philosophical creed shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

COMPARATIVE CONSTITUTIONAL LAW

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Case 1

(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; how to examine the possible violation of a defensive fundamental right; inherent limits of fundamental rights (in German const. law); freedom of religion (in particular negative freedom of religion); state's educational mandate.

OUTLINE OF THE CASE SOLUTION

A. Violation of the freedom of religion of Ibrahim and Karl in the original case

Ibrahim and Karl are right, that is to say their fundamental right of freedom of religion under art. 4(1) BL is violated, if (I.) the sphere [scope]¹ of protection of this fundamental rights is concerned, (II.) the crucifixes in the classrooms represent an encroachment on [interference with]² the freedom of religion and (III.) this encroachment is not justified by the fundamental right's limits.³

I. Sphere of protection [Schutzbereich]

The sphere of protection of the freedom of religion is concerned if the criticised measure of a German authority, here: the permanent installation of crucifixes in the classrooms by the public school, (1.) concerns a holder (protected person) of this fundamental right (personal sphere of protection) and (2.) concerns an activity protected by it (material sphere of protection⁴).⁵

1) Personal sphere of protection [persönlicher Schutzbereich]

Ibrahim and Karl must be holders of the freedom of religion. Unlike some other fundamental rights under the German Basic Law (e.g. the freedom of assembly and the freedom of association, art. 8 and 9(1) BL), the freedom of religion is not reserved for the Germans but guaranteed to everyone. So not only the German citizen Karl but also the refugee Ibrahim from Syria enjoys this right. The personal sphere of the freedom of religion is concerned.⁶

¹ In English, both terms and also the terms "area of protection" and "protected area" are common.

² In English, both terms are common. Note that they do not necessarily mean "violation" (= "infringement"). Only an encroachment/interference that is not justified by the freedom's limits is considered as a violation of the freedom.

³ Note: This introductory sentence is important because it is indicative of the dogmatic structure of the freedom of religion as a fundamental right and it presents without unnecessary explanations the structure of the following examination. Such introductory sentences may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers, head of departments ...).

There are two possible structures for the examination of a violation of a defensive fundamental right: Strictly dogmatically, there are two steps with each several substeps: (I.) Encroachment on the sphere of protection of the fundamental right (that means that the right in question is affected) and (II.) Unconstitutionality of this encroachment (no constitutional justification by the right's limits). However, it has become a more common practice to split the first step into two steps and follow a three steps pattern: (I.) Sphere of protection, (II.) Encroachment, (III.) No justification by the fundamental right's limits. Although the first alternative is more accurate, both ways are appropriate.

⁴ In English, some authors use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

⁵ Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of the examination of complex, important or difficult aspects. However, the general context must always be clear (here: this is not the start of a new examination but 1. and 2. are sub-aspects of I.).

⁶ Note: Concluding sentences at the end of small sub-parts of the examination can be useful to make the line of thoughts more apparent and, thus, facilitate the orientation of the reader.

2) Material sphere of protection [sachlicher Schutzbereich]

The installation of the crucifixes in the classroom must concern an activity (which can also be a behaviour or conduct) which is protected under the freedom of religion. The fundamental right guarantees the freedom to develop, have and express a faith (including the expression by visual and acoustic symbols) and to act in accordance with the faith (the right to prayer, worship, processions etc. and to align one's lifestyle to the rules of the faith).⁷ In the given case, as the headmaster of the school points out, the school does not order or prohibit anything. So none of the mentioned classical activities is concerned. However, Ibrahim and Karl may be affected in a more subtle way. They feel pressurised and threatened by the big crucifixes behind the teacher's place whose sight they cannot avoid, and this may have an impact on their general behaviour and conduct with regard to religion. If Ibrahim is intimidated so that he may profess to Islam or practice it more restraints, the material sphere of his freedom of religion is also concerned.

Concerning Karl, at first glance there may be doubts because he is an atheist. The headmaster argues that the freedom of religion of atheists cannot be concerned because atheists don't have a religion. One may object that at least those atheists who firmly believe that there is no God, are believers and somehow religious too. Since it is not possible to prove by evidence if there is or there is no God, this is a question of belief for both sides and atheists are not more "rational" or less "metaphysical". One may argue that only agnostic atheists who do not pretend that there is no God but simply do not care about it, are not religious.

However, this question can be left open since the fundamental right under art. 4(1) BL, like all freedom rights, does not only have a positive but also a negative dimension. It also guarantees the "negative religious freedom" [negative Glaubensfreiheit], that is the *right not to profess a creed, not to participate in religious practices and to distance oneself from religious symbols*. This comprises the *right to be free from any constraints created by public authority, in which the citizen is exposed without possibility of escape to coercive psychological influencing by religious activities or symbols*. Just as believers must not be exposed to coercive influencing by activities or symbols of other religions, atheists must not be exposed to influencing by religious activities or symbols at all.

See the explanations of the Federal Constitutional Court [Bundesverfassungsgericht] in its *Crucifix Decision* of 1995⁸: "Art. 4(1) Basic Law protects freedom of religion. The decision for or against a faith is according to it a matter for the individual, not the State. The State may neither prescribe nor forbid a faith or religion. Freedom of religion does not however mean just the freedom to have a faith, but also the freedom to live and act in accordance with one's own religious convictions ... This freedom relates similarly to the symbols in which a faith or religion presents itself. Art. 4(1) Basic Law leaves it to the individual to decide what religious symbols to acknowledge and venerate and what to reject. Certainly, in a society that allows room for differing religious convictions, the individual has *no right to be spared from others' manifestations of faith*, acts of worship or religious symbols. This is *however* to be distinguished from a *situation created by the State where the individual is exposed without possibility of escape to the influence of a particular faith, to the acts through which it is manifested and to the symbols in which it is presented*. ... Art. 140 Basic Law taken together with Art. 136(4) of the Weimar Constitution (WRV) takes account of this by explicitly prohibiting compelling anyone to take part in religious practices."

In the given case, Ibrahim and Karl are exposed to the psychological influencing that may be caused by the permanent sight of the crucifix during the classes. The crucifix is a specific symbol of the Christian religion. In the nineties, in the crucifix case, this was controversial among the Federal Constitutional Court's judges. While some considered the crucifix a general symbol of values and norms of the Christianity-marked Western culture,⁹ the Court finally upheld that the cross, even today, is the Christian symbol par excellence.¹⁰ This is correct, in particular with regard to the crucifixes as a special kind of cross, which show the body of the dying Jesus Christ: Without the religious context, they would just be a symbol for torture in the old Roman Empire. The Christian Churches have occasionally reminded of the specific religious meaning of the cross and criticised their official installation in state buildings as usurpation.¹¹

⁷ See for the details *Bumke/Voßkuhle*, German Constitutional Law. Introduction, Cases, and Principles, 2019, no. 530 ff.

⁸ BVerfGE 93, 1, 15 f. (Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 93, p. 1 ff., quoted text passage at p. 15 f.); English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615>.

⁹ See the dissenting vote of the judges SEIDL, SÖLLNER and HAAS, 1, BVerfGE 93, 25 (32).

¹⁰ BVerfGE 93, 1 (19).

¹¹ See the article at *Reuters*, World News 01.05.2018, www.reuters.com/article/us-germany-bavaria-cross/catholic-leaders-join-criticism-of-bavarian-crucifix-order-idUSKBN1120U.

So with regard to the exposure of Ibrahim and Karl to the psychological influencing by the crucifixes in the classrooms, also the material sphere of the freedom of religion is concerned. The sphere of the fundamental right under art. 4(1) BL is concerned.¹²

II. *Encroachment* [Eingriff]

The crucifixes can only violate the freedom of religion if they represent an encroachment on [interference with] this freedom that means actually affect it. Since they do neither prohibit nor order any activities, there is no classical encroachment. However, Ibrahim and Karl are exposed several hours every day, without possibility to escape, to the psychological influence of the crucifixes as a symbol of a belief which they reject. This represents an encroachment on their religious freedom if the crucifixes, under the given circumstances, exert a significant psychological coercive effect. There is no encroachment if their effect is small and negligible.

1) Principally, in a free and democratic society that builds on pluralism and tolerance, the individual has *no right to be spared from the religious manifestations, worshipping or symbols of others*. They will meet them often in their daily life. This applies to Christian crosses as to the symbols of other religions in the society. So not every cross which has been mounted in a school building encroaches on the freedom of religion of Muslims and atheists.

2) In the given case, however, the crosses have not been mounted by religious fellow citizens but *officially installed in a public school building by public authority*. Placed behind the teacher's place next to the blackboard, appearing like a statement of the school, they *express a clear message*: that the school (and the state behind it) identify with the Christian belief and, having regard to their authority, urge the school students to do so too. Thus, the public school, as a public authority, *exercises psychological pressure* on the school students. This pressure is considerably enhanced by the fact that the students cannot follow the classes without looking at the teacher's place and/or the blackboard and, thus, cannot avoid the sight of the cross and are directly and permanently exposed to its appellative function. Moreover, the school has not chosen a simple Christian cross but the more *impressive symbol of the crucifix*, reminding permanently of the death of Jesus Christ, *in the impressive size* of 80 to 60 cm. Under these circumstances, the crucifixes generally exert a significant psychological coercive effect.

See the explanations of the Federal Constitutional Court on the *appellative character of the official crosses* in classrooms: "Schooling is oriented towards encouraging their personality development comprehensively, and particularly also to influencing their social conduct. It is in this context that the cross in the classroom takes on its importance. It has appellative character and identifies the contents of belief it symbolizes as exemplary and worthy of being followed. This takes place, moreover, in relation to persons who because of their youth are not yet fixed in their views, still have to learn critical capacity and the formation of viewpoints of one's own, and are on that account particularly easily susceptible to mental influencing ..."¹³

3) The significant effect must not only occur in general but also in the individual case. If the classmates who are not Christians, do not mind the crucifixes because they are used to them in their daily life, have a solidified worldview or simply are not susceptible for a religious appellative effect, their freedom of religion is not affected. In the modern German society, this may often be the case. Ibrahim and Karl, however, often discuss about religious topics, are sensitive and actually feel pressurised and threatened by the crucifixes. So the coercive effect is significant in the given case.

The crucifixes in the classroom whose sight Ibrahim and Karl cannot avoid, represent an encroachment on their freedom of religion.

III. *Unconstitutionality of the encroachment (no justification by the fundamental right's limits)*

An encroachment on a fundamental right does not yet signify a violation. Despite its negative impact, the measure is constitutional if the encroachment is justified by the fundamental right's limits [Schranken].

1) The limits of the freedom of religion

The limits of the freedom of religion under the Basic Law are controversial. Art. 4(1, 2) BL, unlike other fundamental rights clauses, does not contain a specific limitation clause. In particu-

¹² Note: Every major part of the examination *must* be finished by a concluding sentence that indicates clearly, which sub-question has been answered (in which context) with which result. This is crucial for the orientation of the reader. Without such concluding sentences at the end of major parts, the reader will soon lose his bearings.

¹³ BVerfGE 93, 1 (20); English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615>.

lar, there is no specific legal reservation [Gesetzesvorbehalt]. That cannot mean, however, that the freedom of religion is unlimited.¹⁴

Some constitutionalist scholars propose to use art. 140 BL, read together with art. 136(1) Weimar Constitution, as limitation clause.¹⁵ According to the latter, civil and political rights and duties are neither dependent on nor restricted by the exercise of the freedom of religion. The majority of the constitutionalists and the Federal Constitutional Court reject this approach, since the Basic Law has removed the freedom of religion from the context of the constitutional law on state-church-relations [Staatskirchenrecht], incorporated it into the fundamental rights catalogue at the beginning of the Constitution, guaranteed it without any reservations and, thus, has upgraded it.¹⁶ They refer to the concept of inherent limits of fundamental rights [immanente Grundrechts-Schranken], which in Germany applies to all fundamental rights without a specific limitation clause. The details of this concept are controversial themselves.¹⁷ However, it has largely been accepted that these fundamental rights are considered especially important by the Basic Law and therefore can *only* be restricted in the event of a *collision with fundamental rights of other citizens or other constitutional values*. Even in this case they can only be restricted by or by virtue of a statutory law and only if in the concrete case, thoroughly weighed against the conflicting constitutional values, the freedom of religion proves to be subordinate.¹⁸ This solution is appropriate because it lives up to the fact that the Basic Law, by guaranteeing these rights, unlike others, without any specific reservation, clearly expresses that it considers them more important and more precious than the others.¹⁹ This evaluation of the importance of fundamental rights, a classical function of a constitution, must have an impact on their application.

2) The justification of the encroachment according to these criteria

The encroachment on the freedom of religion of Ibrahim and Karl, which is based on a new law in the Land L as legal basis, is justified if there is a collision with fundamental rights of other citizens or other constitutional values and in the given case, thoroughly weighed, the freedom of religion is subordinate.

a) Collision with fundamental rights of others or other constitutional values

aa) Collision with the freedom of religion of the majority of Christian school students

Since Germany is a country with a Christian tradition and most classmates of Ibrahim and Karl are Christians, there may be a collision between the freedom of religion of Ibrahim and Karl and that of the majority of Christian school students who may want to have a crucifix in their classroom. The headmaster of the school apparently assumes such a collision. It was also occasionally alleged, even by the dissenting constitutional judges in their dissenting vote,²⁰ in the discussion about the crucifix case before the Federal Constitutional Court. They argued that the negative freedom of religion (of the atheists) was not superior to the positive freedom (of the Christians), that it was not a right to prevent religion and that the necessary adjustment between the two manifestations of religious freedom must be brought about through tolerance.

This reasoning may seem conclusive at first glance but in reality - in the given context - it is not only wrong but even demagogical: A collision between the negative and positive freedom of religion presupposes that the school would encroach on the freedom of religion of the Christian school students if it did *not* officially install a crucifix in the classrooms in a way that it appears like a statement of the school. This is obviously not the case: The *freedom of religion of the believer*, as a classical defensive right, encourages his own religious activity but *does not grant him a claim against public authorities to officially equip their premises with the symbols of his personal belief*. Even if there were no

¹⁴ Example: Freedom of religion cannot, as a result, grant the right to make "human sacrifices" for religious reasons.

¹⁵ See in particular *Starck*, in: von Mangoldt/Klein/Starck, Kommentar zum Grundgesetz [Commentary on the Basic Law], vol. 1, 6th edition 2010, art. 4 no. 84 ff.; *von Campenhausen*, in: Isensee/Kirchhof (editor), Handbuch des Staatsrechts [Handbook of States Law], vol. VII, 3rd edition 2009, § 157 no. 111.

¹⁶ Cf. BVerfGE 33, 23 (31) with references to similar approaches of scholars.

¹⁷ See for a detailed presentation (in German) my practical training case "Crucifix", www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Grundrechtsfall_Kruzifix.pdf, p. 5 ff.

¹⁸ Cf. BVerfGE 32, 98 (108); 30, 173 (193); *Jarass/Pieroth*, Grundgesetz für die Bundesrepublik Deutschland. Kommentar [Basic Law for the Federal Republic of Germany. Commentary], 15th edition 2018, preliminary remarks before art. 1, no. 48 ff. with further references.

¹⁹ Note: If a scholarly controversy is important for the case you must not only present the different opinions but also - at least shortly - state your own position and give reasons for it. The reference to "authorities", such as courts and scholars, cannot replace your own reasoning.

²⁰ SEILD, SÖLNNER and HAAS, dissenting vote to BVerfGE 93, 1, BVerfGE 93, 25 (31 f.).

non-Christians in the class, the Christian school students were not entitled to require the school to install a crucifix. They may install one themselves, as expression of their personal belief, but that is another question. Moreover, even Christian students may not necessarily want a Christian symbol, in particular a big crucifix, in their classroom. There are no hints in the facts of the given case that indicate that the students in Ibrahim's and Karl's class asked for that.

So the freedom of religion of the Christian students is not concerned if the school does not install a crucifix in the classroom and the freedom of religion of Ibrahim and Karl is not colliding with it.

bb) Collision with the educational mandate of the state (art. 7(1) BL)

There is, however, a collision between the negative freedom of religion of Ibrahim and Karl and the state's educational mandate. In Germany, according to art. 7(1) BL, the entire school system is under the supervision of the state. This is understood as a comprehensive authority of the state in school matters. It includes, as a constitutional value, a *general educational mandate of the state in the public schools*. The mandate implies, among others, the authority to determine the subject matters, goals and methods of the education.²¹ In everyday school life, it inevitably entails numerous restrictions of the freedoms of the school students, including restrictions of the freedom of religion. This also applies in the given case, since the state also decides about the equipment and the display of contents and symbols in the classrooms.

So there is a collision between the freedom of religion of Ibrahim and Karl and another constitutional value.

b) Subordination of the freedom of religion in the given case

The encroachment on the freedom of religion of Ibrahim and Karl is only justified by the freedom's limits if in the concrete case, thoroughly weighed against the colliding educational mandate of the state, the freedom of religion proves subordinate.

According to the jurisprudence of the Federal Constitutional Court,²² the state is not obliged to refrain from religious-philosophical references when carrying out its educational mandate. The Christian belief and the Christian Churches have strongly influenced culture, society and state. Recognizing them as a formative cultural and educational factor, the values, norms, traditions of thought and patterns of conduct deriving from them can be taught at school. However, this must happen without violating the religious-philosophical neutrality of the state. The obligation to this neutrality derives from the freedom of religion (art. 4(1) BL) read together with the prohibition of discrimination on grounds of faith or religious opinions (art. 3(3) BL) and other clauses directed against unequal treatment because of religious creed or affiliation (cf. art. 33(3) BL, art. 140 BL read together with art. 136, 137 Weimar Constitution).²³

The religious-philosophical neutrality of the state does not prohibit the confrontation of non-Christians with the Christianity-marked image of the world, as long as there is *no discriminatory denigration of non-Christian philosophies of life* and the objective is not to convey Christians beliefs but to *support the school students' realisation of an autonomous personality in the religious and philosophical sphere*, in accordance with the basic decisions of art. 4 BL. As the Federal Constitutional Court stresses, religious-philosophical compulsions need to be excluded as far as possible.²⁴ This limit is not respected if the school, following the new law in the Land L, installs a cross in the form of a big crucifix in the classroom in a way that it appears as if the school is identifying with the Christian belief and urging the students to do so too, and the cross exerts a significant psychological coercive effect on the non-Christian school students.

So the freedom of religion of Ibrahim and Karl, balanced against the educational mandate of the state, is not subordinate in a way that this would allow the installation of crucifixes in the classrooms in the given way.

The encroachment is not justified according to the criteria of the doctrine of inherent limits which applies to fundamental rights guaranteed without a specific limitation clause.

The encroachment on the freedom of religion is not justified by the fundamental right's limits.

Result: The freedom of religion of Ibrahim and Karl is violated. They are right.

²¹ Cf. BVerfGE 93, 1 (21); 34, 165 (181).

²² Cf. BVerfGE 41, 65; 93, 1 (22 f.).

²³ Cf. *Jarass/Pieroth* (note 18), art. 4 no. 5 with further references.

²⁴ BVerfGE 93, 1 (23).

B. Violation of the freedom of religion of Ibrahim and Karl by the crucifix in the recreation room

If a crucifix is only installed in one of several recreation rooms which the school students can use, the freedom of religion of Ibrahim is not violated because there is no encroachment: First, it is already questionable if in this case the crucifix can be interpreted as a statement of the school (and the state behind it) that it identifies with the Christian belief and urges the school students to do so too, since it can only be found in one of several rooms with the same function. It can also be understood as a measure of the school to provide for the large group of Christian school students a room where they feel comfortable while the others, if they prefer, can stay more comfortable in the rooms without it. Second, there is no psychological pressure on Ibrahim and Karl because they can avoid any potential coercive effect by choosing another room for their recreation.

C. Violation of the freedom of religion of Ibrahim and Karl by allowing the Christian school students to install a cross or crucifix in the back of the classroom

If the school does not install crucifixes itself behind the teacher's place but only allows the Christian school students to install a smaller normal cross or crucifix in the back of the classroom, the freedom of Ibrahim and Karl is also not violated because there is no encroachment: The Christian symbol is not used by the school (or the state behind it) but just by the other classmates who *express* their *personal, private belief*. Therefore, the state is not exerting any pressure on the non-Christian students. Furthermore, Ibrahim and Karl can avoid the sight of the cross or crucifix during the classes and therefore are not exposed to a permanent psychological effect.

There may still be a minimal psychological influencing, since also a crucifix used by private persons has an appellative function. However, in an *open and pluralistic democratic society* with freedom of religion, where there are many religions, philosophies and ideologies, the citizen is required to show tolerance when being confronted with the expressions of worldviews of others he rejects. The term "tolerance" derives from the Latin word "tolerare" which means to bear, to endure. In a free and democratic state, the citizen must be tolerant even if his intellect or conscience makes him suffer. Only if the Christian classmates install a cross or crucifix in such an exaggerated size or way that not the symbol but the way of expression exerts a strong psychological pressure, a collision between their freedom and that of Ibrahim and Karl emerges and the school may need to intervene by virtue of its duty of protection to protect the freedom of Ibrahim and Karl and to achieve a harmonious balance. If the school only allows to install a smaller cross or crucifix in the back of the classroom, this risk is excluded.

Ibrahim and Karl need to accept the private cross or crucifix in the classroom but may add symbols of their own religious resp. philosophical creeds too (e.g. a poster with an image of the Qur'an or a religion-critical symbol). The Christian students must tolerate that just as Ibrahim and Karl need to tolerate the Christian cross. In a free and democratic state with a pluralist society, such a parallel display of contrary religious and philosophical views is nothing special.

FURTHER READING:

See for the original crucifix case Federal Constitutional Court, BVerfGE 93, 1, English translations at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=615> and *Bröhmer/Hill/Spitzkatz (editors)*, 60 Years German Basic Law: The German Constitution and its Court, 2nd edition 2012, www.kas.de/wf/doc/26197-1442-1-30.pdf, p. 301 ff.; see on this decision and its impact *Caldwell*, The Crucifix and German Constitutional Culture, *Cultural Anthropology* 11(1996), www.jstor.org/stable/656450?seq=4#metadata_info_tab_contents; *Zaatan/Wallrabenstein*, The Impact of the German Federal Constitutional Court on the Educational Agenda: Freedom of Faith in the German Educational System, *CPG Online Magazin*, Issue 3, 2018, www.cpg-online.de/2018/05/01/the-impact-of-the-german-federal-constitutional-court-on-the-educational-agenda-freedom-of-faith-in-the-german-educational-system/; in German: *Schmitz*, *Chronik der Rechtsprechung des Bundesverfassungsgerichts - 1995*, *European Review of Public Law/Revue Européenne de Droit Public* 8 (1996), 1263 (1280 ff.) = www.iuspublicum-thomas-schmitz.uni-goettingen.de/ChronBVerfG/1995-1.htm#G6-Kruzifix, and my practical training case "Kruzifix", last update 2012, www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Grundrechtsfall_Kruzifix.pdf.

The crucifix in Italian classrooms has also occupied the European Court of Human Rights. In 2009 a Chamber of this Court considered art. 9 of the European Convention on Human Rights violated.²⁵ However, in

²⁵ Cf. ECHR, judgement of 03.11.2009, *Lautsi v. Italy*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95589>.

2011 the Grand Chamber did not follow this assessment.²⁶ See on this jurisprudence *Astengo*, Freedom of Religion Crucified? Secularism and Italian Schools before the European Court of Human Rights, *Politique européenne* 2013/3 (no. 41), 12, www.cairn.info/revue-politique-europeenne-2013-3-page-12.htm#.

See for a case on freedom of religion and administrative law case 1 from my contribution to the course Administrative law, Semester 2, 2018/19, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_AdminLaw_case1.pdf. See for the sophisticated techniques of practical legal case-solving my material Introduction to legal case-solving from the course Introduction to legal case-solving and mootng, Hanoi Law University, Semester 1, 2013/14, http://www.thomas-schmitz-hanoi.vn/Downloads/Schmitz_Case-solving_introduction.pdf.

More information on this course at www.thomas-schmitz-yogyakarta.id. For any questions, suggestions and criticism please contact us in our offices (Building A, room A.IV.11/13) or via e-mail at tschmit1@gwdg.de.

(Date: Case 1 (CompConstLaw))

²⁶ Cf. ECHR, judgement of 18.03.2011, *Lautsi v. Italy*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

A. Violation of the freedom of religion of Ibrahim and Karl in the original case

I. Sphere of protection [Schutzbereich]

1) Personal sphere of protection [persönlicher Schutzbereich]

2) Material sphere of protection [sachlicher Schutzbereich]

- negative religious freedom
- crucifix a specific symbol of Christian religion

II. Encroachment [Eingriff]

- no right to be spared from the religious manifestations, worshipping or symbols of others
- however, here: official installation of the impressive symbol of the crucifix in impressive size in a public school building by public authority
- significant psychological coercive effect
 - also in the individual case of Ibrahim and Karl

III. Unconstitutionality of the encroachment (no justification by the fundamental right's limits)

1) The limits of the freedom of religion [Schranken]

- inherent limits of fundamental rights [immanente Schranken]

2) The justification of the encroachment according to these criteria

a) Collision with fundamental rights of others or other const. values

- aa) Collision with the freedom of religion of the majority of Christian school students
- bb) Collision with the educational mandate of the state (art. 7(1) BL)

b) Subordination of the freedom of religion in the given case

- with regard to the religious-philosophical neutrality of the state

B. Violation of the freedom of religion of Ibrahim and Karl by the crucifix in the recreation room

- still identification of the school with Christian belief?
- no psychological pressure to identify with Christian belief

C. Violation of the freedom of religion of Ibrahim and Karl by allowing the Christian school students to install a cross or crucifix in the back of the classroom

- only expression of private belief without exertion of strong psychological pressure by the Christian classmates
- obligation of Ibrahim and Karl to be tolerant but right to add symbols of own creeds