1. **There is no sufficiently definite statutory basis in the current law of the Land (state) Baden-Württemberg for a prohibition on teachers wearing a headscarf at school and in lessons.**
2. **Social change, which is associated with increasing religious plurality, may be the occasion for the legislature to redefine the admissible degree of religious references permitted at school.**

Judgment of the Second Senate of 24 September 2003
on the basis of the oral hearing of 3 June 2003
– 2 BvR 1436/02 –

...

RULING:

1. The judgment of the Federal Administrative Court (Bundesverwaltungsgericht) of 4 July 2002 - BVerwG 2 C 21.01 -, the judgment of the Baden-Württemberg Higher Administrative Court (Verwaltungsgerichtshof Baden-Württemberg) of 26 June 2001 - 4 S 1439/00 -, the judgment of the Stuttgart Administrative Court (Verwaltungsgericht Stuttgart) of 24 March 2000 - 15 K 532/99 - and the ruling of the Stuttgart Higher School Authority (Oberschulamt Stuttgart) of 10 July 1998 in the form of the ruling on an objection of 3 February 1999 - 1 P L., F./13 - infringe the complainant's rights under Article 33.2 in conjunction with Article 4.1 and 4.2 and with Article 33.3 of the Basic Law. The judgment of the Federal Administrative Court is overturned. The matter is referred back to the Federal Administrative Court.
2. The Federal Republic of Germany and the Land Baden-Württemberg are ordered each to pay half the complainant's necessary costs for the constitutional complaint proceedings.

GROUNDS:

The complainant petitions to be appointed to the teaching profession of the *Land* Baden-Württemberg. In her constitutional complaint she challenges the decision of the Stuttgart Higher School Authority, which has been confirmed by the administrative courts, refusing to appoint her as a civil servant on probation as a teacher at German primary schools *(Grundschule)* and non-selective secondary schools *(Hauptschule)* on the grounds that her declared intention to wear a headscarf at school and in lessons means that she is unsuited for the office. 1

I.

1. The complainant was born in Kabul, Afghanistan in 1972; since 1987 she has lived without interruption in the Federal Republic of Germany, and in 1995 she acquired German nationality. She is of the Muslim religion. After passing the First State Examination and doing teaching practice, in 1998 the complainant passed the Second State Examination for the teaching profession at the primary school and the non-selective secondary school, with the main emphasis on the secondary school and the subjects German, English and social studies/economics. 2

2. The Stuttgart Higher School Authority refused the complainant's application to be appointed to the teaching profession at the English primary school and the non-selective secondary school in the *Land* Baden-Württemberg on the grounds of lack of personal aptitude. By way of a reason, it was stated that the complainant was not pre- 3

pared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality.

3. In her objection, the complainant submitted that the wearing of the headscarf was not only a mark of her personality, but also the expression of her religious conviction. Under the precepts of Islam, wearing a headscarf was part of her Islamic identity. The decision refusing her petition, she submitted, violated the fundamental right of freedom of religion under Article 4.1 and 4.2 of the Basic Law *(Grundgesetz* – GG*)*. Although the state had an obligation to preserve neutrality in questions of religion, when it fulfilled its duty to provide education under Article 7.1 of the Basic Law it was not obliged to refrain completely from religious and ideological references, but had to enable a careful balance between the conflicting interests. Unlike the crucifix, the headscarf was not a symbol of religion. In addition, the present case concerned her individual and religiously motivated acting as a subject of fundamental rights. 4

4. The Stuttgart Higher School Authority dismissed the complainant's objection. It submitted that although Article 33.3 of the Basic Law prohibited the rejection of an applicant on the grounds of the applicant's religion alone, it did not exclude the possibility of relying on a lack of aptitude for the civil service associated with the belief. Wearing the headscarf for reasons of faith was protected by Article 4.1 of the Basic Law. However, the complainant's freedom of religion was limited by the fundamental right of the pupils to negative religious freedom, the parents' right of education under Article 6.2 of the Basic Law and the obligation of the state to preserve neutrality in ideology and religion. Even if the complainant did not proselytise for her religious conviction, by wearing the headscarf in lessons she expressed her affiliation to Islam at every time and without the pupils being able to escape this; in this way, she forced the pupils to confront this expression of faith. As young people with personalities that were not yet established, they were particularly open to influences of every kind. The crucial factor in this respect was solely the objective effect of the headscarf. Specifically for schoolgirls of the Muslim faith, a considerable pressure to conform might arise here; this would contradict the school's pedagogical duty to work towards the integration of the Muslim pupils. 5

5. The Stuttgart Administrative Court dismissed the complainant's action and stated as grounds for its decision that the religiously motivated wearing of a headscarf by a teacher constituted a lack of aptitude in the meaning of § 11.1 of the Baden-Württemberg *Land* Civil Service Act (*Landesbeamtengesetz Baden-Württemberg* – LBG). The complainant's freedom of religion conflicted with the state's duty of neutrality and the rights of the pupils and their parents. 6

The headscarf worn by the complainant demonstrated strikingly and impressively her profession of Islam; in this connection it was irrelevant that the headscarf, unlike 7

the crucifix for the Christian faith, was not regarded as the symbolic embodiment of the Islamic faith. By reason of general compulsory school attendance and the lack of influence of the pupils on the selection of their teachers, the pupils had no possibility of avoidance. This gave rise to the danger of influence – including unintended influence – by the teacher, who was felt to be a person in authority.

6. The appeal against this was dismissed by the Baden-Württemberg Higher Administrative Court. The court held that in the discretionary decision as to whether to appoint an applicant, an assessment was made on the aptitude of the applicant; here, a prediction had to be made, and this was only to a limited extent subject to judicial review. One of the elements of aptitude was the expectation that the applicant would fulfil his or her duties as a civil servant. The assessment that because the complainant intended for religious reasons to wear a headscarf in lessons she lacked aptitude for the post she sought, that of a teacher at the primary school and non-selective secondary school in the state school service, was unobjectionable. The personal aptitude of teachers was in part to be determined on the basis of how far they were in the position to put into practice the educational objectives laid down under Article 7.1 of the Basic Law and to fulfil the state's duty to provide education. If the employer refused to make an appointment because an applicant for religious reasons did not intend to observe the constitutionally created restrictions in teaching, the employer did not infringe the prohibition of unfavourable treatment in Article 33.3 of the Basic Law for lack of a causal link to the applicant's religion. 8

At school, the differing religious and ideological convictions of the pupils and their teachers confronted each other in a particularly intensive way. The conflict arising from this called for a balancing of the interests in practical concordance. Here, the state did not have to completely dispense with religious and ideological references at school. In addition, when the employer assessed aptitude, the employer had to take the applicant's fundamental rights into account. For this reason, the exercise of freedom of religion and belief could not in itself be a reason for rejection. But wearing a headscarf in class, as the complainant intended, would infringe the requirement of neutrality that the state had to observe at schools and the fundamental rights of the students and their parents and thus the official duty of the complainant as a representative of the state to carry out her duties impartially and in the service of the public interest. 9

The duty of neutrality in ideology and religion imposed on the state by the Basic Law was not a distancing and rejecting neutrality of the nature of laicist non-identification with religions and ideologies, but a respectful neutrality, taking precautions for the future, which imposed on the state a duty to safeguard a sphere of activity both for the individual and for religious and ideological communities. Within the meaning of this precautionary neutrality, however, the state was not permitted to endanger religious peace at school of its own motion. In class, the students were exposed to religious symbols without the opportunity to avoid them; here, the requirement of state neutrality gave paramount protection to the negative religious freedom of students of differ- 10

ent faiths and the parents' right to educate their children with regard to religion and ideology.

If a teacher wore a headscarf in lessons, this could lead to religious influence on the students and to conflicts within the class in question, even if the complainant had credibly denied any intention of recruitment or proselytising. The only decisive factor was the effect created in students by the sight of the headscarf. The headscarf motivated by Islam was a plainly visible religious symbol that the onlooker could not escape. Primary school pupils in particular were scarcely in a position to intellectually assimilate the religious motivation for wearing a headscarf and to decide consciously in favour of tolerance or criticism. The danger of religious influence inherent in this could not be reconciled with the required protection of the negative religious freedom of students and parents and conflicted with the requirement of state neutrality. In addition, the pre-emptive prevention of conflicts caused by religion at school, such as were sufficiently foreseeable in the present case on the basis of experience of life, was a legitimate goal of the state's organisation of schools. An acceptable pragmatic solution of the conflict that allowed the complainant's freedom of belief to be taken more extensively into account was not possible in view of the principle of the class teacher, which was predominant at the primary school and the non-selective secondary school, and because of organisational difficulties with regard to moving from one school or class to another. 11

7. The Federal Administrative Court dismissed the complainant's appeal. It held that the decision to make the complainant's employment as a civil servant in the teaching profession dependent on her readiness to remove her headscarf in lessons had been correct. 12

The court held that since the complainant derived the requirement to wear a headscarf from her religion, she was protected by the fundamental right in Article 4.1 of the Basic Law and the right equivalent to a fundamental right in Article 33.3 sentence 1 of the Basic Law. Notwithstanding the fact that there was no constitutional requirement of a specifically enacted statute, freedom of faith was not guaranteed without restriction. Restrictions followed from the Basic Law itself, in particular from the conflicting fundamental rights of persons of a different opinion. Nor did Article 4.1 of the Basic Law give the individual any unrestricted right to exercise his or her religious convictions within the framework of state institutions or to express it with state support. The comprehensively guaranteed freedom of faith gave rise to the precept of state neutrality towards the various religions and denominations. In the context of secular compulsory schools, organised and structured by the state, Article 4.1 of the Basic Law as a guarantee of freedom benefited above all children required to attend school and their parents. Here, the state was also obliged to take account of the freedom of religion of the parents and the right of education guaranteed to them under Article 6.2 sentence 1 of the Basic Law. Children must be taught and educated in state compulsory schools without any partiality on the part of the state and of the teachers representing it in favour of Christian beliefs or of other religious and ideological convictions. 13

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

By reason of the significance that Muslims attached to the "Islamic headscarf", others too saw the headscarf as the symbolic expression of a particular religious conviction and it was generally seen as a profession of Islamic faith. If the teacher wore a headscarf in lessons, this meant that during class hours the pupils were constantly and unavoidably confronted, at the instigation of the state, with this clear symbol of a religious conviction. The duration and intensity of this confrontation meant that it was not a trifling matter as far as the pupils' freedom of faith was concerned. The teacher confronted the pupils as a person in authority appointed by the state and representing the state. Admittedly, it was difficult to determine whether her visible sign of religious faith had any influence on the pupils; however, at all events influence of the items of faith symbolised by the headscarf on pupils of primary school and non-selective secondary school age from four to fourteen could not be excluded. 14

The teacher's right to conduct herself in accordance with her religious conviction must have lower priority than the conflicting freedom of faith of the pupils and parents during lessons. Neither the requirement of tolerance nor the principle of practical concordance (*praktische Konkordanz*) created a compulsion to override the parents' rights and the freedom of faith of the parents and the pupils of a state school in favour of a teacher wearing a headscarf. Under Article 33.5 of the Basic Law, teachers were obliged to accept restrictions of their positive freedom of religion; these were necessary in order to guarantee that school lessons took place in an environment of religious neutrality. 15

II.

In her constitutional complaint, the complainant challenges the decisions made in the administrative procedure and in the proceedings before the administrative courts. She challenges a violation of Articles 1.1, 2.1, 3.1, 3.3 sentence 1, 4.1 and 4.2 and 33.2 and 33.3 of the Basic Law. 16

The complainant argued that a Muslim applicant wearing a headscarf also had a constitutional right to be appointed under Article 33.2 of the Basic Law. Admission to public office had to occur independently of a profession of religious belief (Article 33.3 sentence 1 of the Basic Law) without permitting the applicant to be disadvantaged for this reason (Article 33.3 sentence 2 of the Basic Law). Wearing a headscarf therefore did not constitute a lack of aptitude. 17

The ordinary courts based their decisions on a changed attitude to the state requirement of neutrality in the Federal Republic of Germany. This strict understanding of neutrality resulted in restricting the possibility of a civil servant professing his religious 18

beliefs at work. Unlike a laicist state, the Federal Republic of Germany, by its constitution, was open to religious activity even in schools, and in this way it pursued what is known as a comprehensive, open and respectful neutrality. School was not a refuge in which one could close one's eyes to social plurality and reality. On the contrary, the school's duty to provide education meant preparing adolescents for what they would encounter in society.

The decisive statements in the Federal Constitutional Court's crucifix decision were not applicable to the present case. Whereas that case concerned a religious symbol that the school, as a state institution, was responsible for installing, in this case the complainant, as a subject of fundamental rights, had suffered an encroachment upon her right to freedom of faith. In the case of fundamental rights that were unconditionally guaranteed, a restriction of the exercise of the right could be considered only in cases of specific endangerment. There was no such endangerment; there was no evidence of the alleged suggestive effect of the headscarf and the alleged possibility of a detrimental psychological effect. When the complainant had done teaching practice, there had been no conflicts or serious difficulties. The endangerments set out by the appointing body were merely of an abstract and theoretical nature. If concrete conflicts arose, there were acceptable means of solving them. 19

III.

The Federal Government and the *Land* Baden-Württemberg submitted opinions on the constitutional complaint. 20

1. In the name of the Federal Government, the Federal Ministry of the Interior stated that neither Article 33.2 of the Basic Law nor the provisions of *Land* law passed to put the Article into concrete terms gave a right to be appointed to a public office. Instead, the employing authority made this decision according to its best judgment. The aptitude of an applicant depended on the requirements of the specific post to be filled; this aptitude was to be decided on the basis of a prediction, which required the whole personality of the applicant to be assessed. Aptitude for the teaching profession included the ability and the readiness of the teacher to comply with the official duties arising from the status of a civil servant under the concrete conditions of working at school. The traditional fundamental principles of the permanent civil service laid down in Article 33.5 of the Basic Law, which restricted the fundamental rights of civil servants, included the obligation of teachers who were civil servants to carry out their duties objectively and neutrally. This official duty also comprised the duty to carry out one's duties neutrally from the point of view of religion and ideology, respecting the viewpoints of pupils and parents. 21

Independently of the complainant's subjective appraisal that it was far from her intentions to demonstrate her religion, great importance attached to the employer's prediction of future danger in that the teacher's conspicuous outer appearance might have a long-term detrimental influence on the peace at the school, in particular because throughout all the lessons the pupils were confronted with the sight of the 22

headscarf and thus the expression of a foreign religious belief, without a possibility of avoiding it. An employer who in these circumstances proceeded on the assumption that the teacher lacked aptitude because he or she could not be used in all circumstances was within the scope of evaluation permitted an employer. Nor did the employer violate the prohibition of discrimination in Article 33.3 of the Basic Law, since the rejection was not based on the teacher's religion, but on her lack of distance and neutrality. Teachers at the primary school and non-selective secondary school were required to refrain from wearing an Islamic headscarf in class and thus also to refrain from exercising their freedom of belief in this respect.

Just as in the case of the crucifix in the classroom, the decisive factor with regard to the Muslim headscarf was the fact that because of compulsory school attendance for all children – unlike in the case of a brief encounter in everyday life – continuous confrontation with a religious symbol could not be avoided. The fact that the complainant is a subject of fundamental rights did not alter the fact that the symbol she used was to be attributed to the state. However, it should be taken into account when weighing interests that the wearing of the religious symbol was itself the exercise of a fundamental right. In the attempt to achieve practical concordance, consideration should be given not only to the conflicting fundamental rights positions, but also to the state's requirement of neutrality, which was not at the court's disposal. This could be taken into account in the present case only by not using the religious symbol. This did not involve an intensification of the requirement "in the direction of a laicist understanding" of it. Rather, consideration was merely being given to the growing importance of state neutrality in view of an increasing number of religions in society. 23

2. The *Land* Baden-Württemberg (Stuttgart Higher School Authority) submitted that the constitutional review had to be restricted to considering whether the judgment of the nonconstitutional court had been free of arbitrariness and if it contained errors of interpretation that were based on a fundamentally erroneous view of the significance of a fundamental right, in particular of the extent of its scope of protection. The Federal Administrative Court had illuminated the constitutional aspects of the case in full, assessed and weighed them thoroughly and come to a correct result, free of arbitrariness. 24

Both Article 33.2 of the Basic Law and the fundamental rights in Articles 4 and 6 of the Basic Law had been correctly interpreted and applied. Article 4.1 and 4.2 of the Basic Law as the guarantee of negative freedom of religion secured freedom from expressions of religious opinions from which the pupils could not escape at school. Here, account had to be taken of the fact that schoolchildren's personalities were not yet fully developed, and as a result schoolchildren were particularly open to mental influences by persons in authority, and in their developmental phase they learnt in the first instance by imitating the behaviour of adults. In addition, in particular in the case of children who have not reached the age at which they can decide on religious matters themselves, the parents' right of education applies. 25

Under Article 7.1 of the Basic Law, the state had an independent duty to provide education which is of equal weight to that in Article 6.2 of the Basic Law. Practical concordance between the state's duty to provide education and the rights of parents and children under Article 4.1 and 4.2 of the Basic Law is achieved by the state's conducting itself neutrally in religious and ideological matters. The requirement of neutrality attained all the more importance the more diverse the religions in society. The state's neutrality must be shown in the person of the teacher. Even a comprehensive, open and respectful neutrality did not permit exercise of individual religions as the emanation of state power. The Federal Administrative Court had not introduced an altered concept of neutrality, but merely accorded a growing importance to the requirement of neutrality in a society that was pluralist from the point of view of religion. Since during lessons the headscarf was permanently before the children's eyes, the possibility that it influenced them could not be excluded, and this alone infringed the requirements of neutrality towards children who had not reached the age at which they could decide on religious matters themselves. 26

On the question of the influence of religious forms of expression in the state education system on the pupils, the Stuttgart Higher School Authority submitted a statement by Professor Dr. Dr. h.c. Oser, Fribourg/Switzerland, as an expert witness. 27

IV.

In the oral hearing, the complainant and her attorney, and the *Land* Baden-Württemberg (Stuttgart Higher School Authority), represented by Professor Dr. F. Kirchhof, amended and extended their written submissions. The following expert witnesses were heard: Dr. Karakasoglu, Essen, on the reasons why young Muslim girls and women in Germany wear a headscarf; Professor Dr. Riedesser, Hamburg, Professor Dr. Bliesener, Kiel, and Ms Leinenbach, Director of the Psychological Department (Stuttgart Higher School Authority) on questions of a possible influence on children of primary school and non-selective secondary school age from the point of view of child and developmental psychology. 28

B.

The constitutional complaint is admissible and is well-founded. The decisions challenged violate Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law and with Article 33.3 of the Basic Law. 29

In the context to be assessed here, wearing a headscarf makes it clear that the complainant belongs to the Islamic religion and identifies herself as a muslima. Defining such conduct as a lack of aptitude for the office of a teacher at the primary school and non-selective secondary school encroaches upon the complainant's right to equal access to every public office under Article 33.2 of the Basic Law in conjunction with the fundamental right of freedom of faith guaranteed to her by Article 4.1 and 4.2 of the Basic Law, without the necessary, sufficiently definite statutory basis for this being satisfied at present. In this way, the complainant has in a constitutionally unaccept- 30

able manner been denied access to a public office.

I.

Constitutional review in connection with a constitutional complaint concerning a judgment is normally restricted to examining whether the decisions challenged, in their interpretation and application of law below the constitutional level, are based on a fundamentally erroneous view of the meaning and scope of the fundamental right relied on or are arbitrary (on this, cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 18, 85 (93); established case-law). However, to the extent that the court whose decision is challenged by the constitutional complaint directly interpreted and applied provisions of fundamental rights itself, the Federal Constitutional Court has a duty to determine the scope and limits of the fundamental rights and to establish whether fundamental rights were taken into account without any error of constitutional law with regard to their extent and weight. This is the situation in the present case. The Federal Administrative Court and also the lower courts based their decisions on a particular interpretation of Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law. In accordance with its duty of preserving, developing and extending constitutional law and in particular interpreting the various functions of a legal provision containing a fundamental right (cf. BVerfGE 6, 55 (72); 7, 377 (410)), the Federal Constitutional Court in this regard, in its relation to the nonconstitutional courts, is not restricted to examining whether the nonconstitutional courts applied constitutional law in a non-arbitrary manner, but must itself take final and unappealable decisions on the interpretation and application of constitutional law. 31

II.

1. Article 33.2 of the Basic Law grants every German, in accordance with his or her aptitude, qualifications and professional achievement, equal access to every public office. 32

The right in Article 33.2 of the Basic Law, which is equivalent to a fundamental right, guarantees the degree of free choice of one's occupation or profession (Article 12.1 of the Basic Law) that is possible in view of the number of positions in the civil service, which is, and is permitted to be, restricted by the public corporation responsible in each case (cf. BVerfGE 7, 377 (397-398); 39, 334 (369). Article 33.2 of the Basic Law grants no right to be appointed to a public office (cf. BVerfGE 39, 334 (354); Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, BVerwGE 68, 109 (110)). The access to activity in a public office (admission to an occupation, which also relates to free choice of occupation) may in particular not be restricted by subjective requirements for admission (cf. BVerfGE 39, 334 (370)). This is done in accordance with § 7 of the Civil Service Law Framework Act (*Beamtenrechtsrahmengesetz – BRRG)* of 31 March 1999 (Federal Law Gazette, *Bundesgesetzblatt,* BGBl, I p. 654) in the Civil Service Acts of the *Länder* by provi- 33

sions on the personal requirements necessary for those appointed to the status of civil servants. § 11.1 of the Baden-Württemberg *Land* Civil Service Act as amended on 19 March 1996 (Baden-Württemberg Law Gazette, *Gesetzblatt,* GBl, p. 286) which applies in the present case, provides that appointments are to be made on the basis of aptitude, qualifications and professional achievement, without taking into account gender, descent, race, belief, religious or political convictions, origin or connections.

b) When laying down aptitude criteria for the relevant office and when defining official duties by reference to which the aptitude of applicants for the civil service is to be assessed, the legislature in general has a broad legislative discretion. Limits to this legislative discretion follow from the value decisions in other constitutional norms; the fundamental rights in particular impose limits on the legislature's legislative discretion. Even for those with the status of civil servants, the fundamental rights apply, although the civil servant's sphere of responsibilities under Article 33.5 of the Basic Law restricts the civil servant's legal possibility of relying on fundamental rights (cf. BVerfGE 39, 334 (366-367)): Limits may be imposed on the civil servant's exercise of fundamental rights in office; these limits follow from general standards imposed on the civil service or from particular requirements of the public office in question (cf. e.g. BVerwGE 56, 227 (228-229)). However, if even access to a public office is refused by reason of future conduct on the part of the applicant that is protected as a fundamental right, then the assumption that there is a lack of aptitude for this reason must in turn be justifiable with regard to the fundamental right affected. 34

c) The evaluation by the employer of an applicant's aptitude for the public office applied for relates to the applicant's future occupation in office and at the same time contains a prediction, which requires a concrete assessment of the applicant's whole personality based on the individual case (cf. BVerfGE 39, 334 (353); 92, 140 (155)). This also includes a statement with regard to the future as to whether the person in question will fulfil the duties under civil-service law that he or she is subject to in the office applied for. In this assessment with regard to the future, the employer has a wide scope of discretion; the review by the nonconstitutional courts is essentially restricted to determining whether the employer proceeded on the basis of incorrect facts, misjudged the civil-service law and constitutional-law context, disregarded generally valid standards of value or took irrelevant matters into consideration (cf. BVerfGE 39, 334 (354); BVerwGE 61, 176 (186); 68, 109 (110); 86, 244 (246)). The employer's prediction as to an applicant's aptitude for a particular office must be based on the civil servant's duties (§§ 35 *et seq.* of the Civil Service Law Framework Act; §§ 70 *et seq*. of the Baden-Württemberg *Land* Civil Service Act). Official duties that the applicant is expected to carry out must be sufficiently specified in law and must respect the limits imposed by the applicant's fundamental rights. 35

2. If a duty is imposed on the civil servant that, at school and in lessons, teachers may not outwardly show their affiliation to a religious group by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of faith guar- 36

anteed by Article 4.1 and 4.2 of the Basic Law. It confronts those affected with the choice either to exercise the public office they are applying for or obeying the religious requirements as to dress, which they regard as binding.

Article 4.1 of the Basic Law guarantees freedom of faith, conscience and religious and ideological belief; Article 4.2 guarantees the right of undisturbed practice of religion. The two subsections of Article 4 of the Basic Law contain a uniform fundamental right which is to be understood comprehensively (cf. BVerfGE 24, 236 (245-246); 32, 98 (106); 44, 37 (49); 83, 341 (354)). It extends not only to the inner freedom to believe or not to believe, but also to the outer freedom to express and disseminate the belief (cf. BVerfGE 24, 236 (245)). This includes the individual's right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions. This relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behaviour is the correct one to deal with a situation in life (cf. BVerfGE 32, 98 (106-107); 33, 23 (28); 41, 29 (p 49)). 37

The freedom of faith guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be contained in the constitution itself. This includes the fundamental rights of third parties and community values of constitutional status (cf. BVerfGE 28, 243 (260-261); 41, 29 (50-51); 41, 88 (107); 44, 37 (49-50, 53); 52, 223 (247); 93, 1 (21)). Moreover, restricting the freedom of faith, which is unconditionally guaranteed, requires a sufficiently definite statutory basis (cf. BVerfGE 83, 130 (142)). 38

3. Article 33.3 of the Basic Law is also affected. It provides that admission to public offices is independent of religious belief (sentence 1); no-one may suffer a disadvantage by reason of belonging or not belonging to a faith or to an ideology (sentence 2). Consequently, a connection between admission to public offices and religious belief is out of the question. Article 33.3 of the Basic Law is directed in the first instance against unequal treatment directly linked to the profession of a particular religion. In addition, the provision at all events also prohibits refusing admission to public offices for reasons that are incompatible with the freedom of faith protected by Article 4.1 and 4.2 of the Basic Law (cf. BVerfGE 79, 69 (75)). This does not exclude creating official duties that encroach upon the freedom of faith of office-holders and applicants for official offices, and that thus make it harder or impossible for religious applicants to enter the civil service, but it does subject these to the strict requirements of justification that apply to restrictions of freedom of faith, which is guaranteed unconditionally; in addition, the requirements of strictly equal treatment of the various religions must be observed, both in creating and in the practice of enforcing such official duties. 39

4. a) The wearing of a headscarf by the complainant at school as well as outside school is protected by the freedom of faith, which is guaranteed in Article 4.1 and 4.2 of the Basic Law. According to the findings of fact made by the nonconstitutional courts and not disputed in the proceedings relating to the constitutional complaint, the 40

complainant regards the wearing of a headscarf as bindingly imposed on her by the rules of her religion; observing this dress rule is, for her, the expression of her religious belief. The answer to the controversial question as to whether and how far covering the head is prescribed for women by rules of the Islamic faith is not relevant. It is true that not every form of conduct of a person can be regarded as an expression of freedom of faith, which enjoys special protection, purely according to its subjective intention; instead, when conduct by an individual that has been claimed to be an expression of the individual's freedom of faith is assessed, that his or her particular religious group's concept of itself may not be overlooked (cf. BVerfGE 24, 236 (247-248)). A duty of women to wear a headscarf in public may, by its content and appearance, as a rule of faith founded in the Islamic religion, be attributed with sufficient plausibility to the area protected by Article 4.1 and 4.2 of the Basic Law (on this, see also BVerfGE 83, 341 (353)); this was done by the nonconstitutional courts in a manner that cannot be constitutionally objected to.

b) The assumption that the complainant lacks the necessary aptitude to fulfil the duties of a teacher at the primary school und non-selective secondary school, because, contrary to an existing official duty, she wanted to wear a headscarf at school and in lessons, and this headscarf showed clearly that she was a member of the Islamic religious group, and the refusal to admit her to a public office, which was based on this, would be compatible with Article 4.1 and 4.2 of the Basic Law if the intended exercise of freedom of faith conflicted with objects of legal protection of constitutional status and this restriction of the free exercise of religion could be based on a sufficiently definite statutory foundation. Interests that are protected by the constitution that conflict with freedom of faith here may be the state's duty to provide education (Article 7.1 of the Basic Law), which is to be carried out having regard to the duty of ideological and religious neutrality, the parents' right of education (Article 6.2 of the Basic Law) and the negative freedom of faith of schoolchildren (Article 4.1 of the Basic Law). 41

aa) In Article 4.1, Article 3.3 sentence 1 and Article 33.3 of the Basic Law, and in Article 136.1, Article 136.4 and Article 137.1 of the Weimar Constitution (*Weimarer Reichsverfassung*) in conjunction with Article 140 of the Basic Law, the Basic Law lays down for the state as the home of all citizens the duty of religious and ideological neutrality. It bars the introduction of legal structures in the nature of a state church and forbids giving privileged treatment to particular faiths and excluding those of a different belief (cf. BVerfGE 19, 206 (216); 24, 236 (246); 33, 23 (28); 93, 1 (17)). The state must be careful to treat the various religious and ideological communities with regard to the principle of equality (cf. BVerfGE 19, 1 (8); 19, 206 (216); 24, 236 (246); 93, 1 (17)) and may not identify with a particular religious community (cf. BVerfGE 30, 415 (422); 93, 1 (17)). The free state of the Basic Law is characterised by openness towards the variety of ideological and religious convictions and bases this on an image of humanity that is marked by the dignity of humans and the free development of personality in self-determination and personal responsibility (cf. BVerfGE 41, 29 (50)). 42

However, the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. Article 4.1 and 4.2 of the Basic Law also contain a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion (cf. BVerfGE 41, 29 (49); 93, 1 (16)). The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency or expressly or impliedly identifying itself by way of measures originated by it or attributable to it with a particular belief or a particular ideology and in this way itself endangering religious peace in a society (cf. BVerfGE 93, 1 (16-17)) The principle of religious and ideological neutrality also bars the state from evaluating the faith and doctrine of a religious group as such (cf. BVerfGE 33, 23 (29)). 43

Under the understanding until now of the relationship between state and religion, as it is reflected in the case-law of the Federal Constitutional Court, this applies above all to the area of the compulsory school, for which the state has taken responsibility, and for which, by its nature, religious and ideological ideas have always been relevant (cf. BVerfGE 41, 29 (49); 52, 223 (241)). In this view, Christian references are not absolutely forbidden in the organisation of state schools; however, school must also be open to other ideological and religious content and values (cf. BVerfGE 41, 29 (51); 52, 223 (236-237)). In this openness, the free state of the Basic Law preserves its religious and ideological neutrality (cf. BVerfGE 41, 29 (50)). For the tensions that are unavoidable when children of different ideological and religious beliefs are taught together, it is necessary, giving consideration to the requirement of tolerance as the expression of human dignity (Article 1.1 of the Basic Law) to seek a balance (cf. BVerfGE 41, 29 (63); 52, 223 (247, 251); 93, 1 (21 ff.); for more detail, see dd) below). 44

bb) Article 6.2 sentence 1 of the Basic Law guarantees to parents the care and education of their children as a natural right, and together with Article 4.1 of the Basic Law it also includes the right to educate children in religious and ideological respects; it is therefore above all the responsibility of the parents to convey to their children the convictions in religious and ideological matters that they regard as right (cf. BVerfGE 41, 29 (44, 47-48); 52, 223 (236); 93, 1 (17)). Corresponding to this is the right to keep the children away from religious convictions that appear to the parents to be wrong or harmful (cf. BVerfGE 93, 1 (17)). However, Article 6.2 of the Basic law does not contain an exclusive right of education for the parents. Separately and in its sphere given equal rights beside the parents, the state, to which under Article 7.1 of the Basic Law the supervision of all education is delegated, exercises its own duty to provide education (cf. BVerfGE 34, 165 (183); 41, 29 (44)). How this duty is to be carried out in detail, and in particular to what extent religious references are to have their place at school, is subject within the limits laid down by the Basic Law, above all in Article 4.1 and 4.2 of the Basic Law, to the freedom of organisation of the *Länder* (cf. BVerfGE 41, 29 (44, 47-48); 52, 223 (242-243); for details, see dd) below). 45

cc) Finally, the freedom to exercise religious conviction relied on by the complainant conflicts with the negative freedom of faith of the pupils in her wearing of a headscarf at school and in lessons. Article 4.1 and 4.2 of the Basic Law, which protects equally the negative and the position manifestations of freedom of faith, also guarantees the freedom to stay away from cultic acts of a religion that is not shared; this also applies to cults and symbols in which a belief or a religion represents itself. Article 4 of the Basic Law leaves it to the individual to decide what religious symbols he or she recognises and reveres and which he or she rejects. Admittedly, in a society that affords space to differing religious convictions, he or she has no right to be spared cultic acts, religious symbols and professions of other faiths. But this must be distinguished from a situation created by the state in which the individual is exposed without an alternative to the influence of a particular faith, to the actions in which this manifests itself and the symbols through which it presents itself (cf. BVerfGE 93, 1 (15-16)). In this respect, Article 4.1 and 4.2 of the Basic Law have the effect of securing freedom precisely in areas of life that are not left to be organised by society itself but that the state has taken responsibility for (cf. BVerfGE 41, 29 (49)); this is affirmed by Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar Constitution, which prohibits forcing anyone to take part in religious exercises. 46

dd) The Basic Law gives the *Länder* a broad freedom of organisation in education; in relation to the ideological and religious character of state schools too, Article 7 of the Basic Law takes account of the fact that the *Länder* are to a large extent independent and within the limits of their sovereignty in education matters may in principle organise compulsory schools freely (cf. BVerfGE 41, 29 (44-45); 52, 223 (242-243)). The relationship between the positive freedom of faith of a teacher on the one hand and the state's duty of religious and ideological neutrality, the parents' right of education and the negative freedom of faith of the pupils on the other hand, taking into account the requirement of tolerance, is inevitably sometimes strained, and it is the duty of the democratic *Land* legislature to resolve this tension; in the public process of developing an informed opinion, the legislature must seek a compromise that is reasonably acceptable to everyone. When legislating, the legislature must orientate itself to the fact that on the one hand Article 7 of the Basic Law permits ideological and religious influences in the area of education, provided the parents' right of education is preserved, and on the other hand Article 4 of the Basic Law requires that ideological and religious constraints are excluded as far as at all possible when the decision is made in favour of a particular form of school. The provisions must be seen together, and their interpretation and their area of influence must be coordinated with each other. This includes the possibility that the individual *Länder* may make different provisions, because the middle course that needs to be found may also take into account school traditions, the composition of the population by religion, and whether it is more or less strongly rooted in religion (cf. BVerfGE 41, 29 (50-51); 93, 1 (22-23)). 47

These principles also apply to the answer to the question as to the extent to which teachers may be subjected to duties as to their appearance and conduct at school, 48

restricting their individual fundamental right of freedom of faith, in connection with the preservation of the ideological and religious neutrality of the state.

5. If teachers introduce religious or ideological references at school and teachers, this may adversely affect the state's duty to provide education, which is to be carried out in neutrality, the parents' right of education and the negative freedom of faith of the pupils. It at least opens up the possibility of influence on the pupils and of conflicts with parents that may lead to a disturbance of the peace of the school and may endanger the carrying out of the school's duty to provide education. The dress of teachers that is religiously motivated and that is to be interpreted as the profession of a religious conviction may also have these effects. But these are only abstract dangers. If even such mere possibilities of endangerment or of a conflict as a result of the appearance of the teacher, rather than concrete behaviour that presents itself as the attempt to influence or even proselytise the schoolchildren for whom the teacher is responsible, are to be seen as an infringement of duties under civil-service law or as a lack of aptitude which prevents appointment as a civil servant, then, because this entails the restriction of the unconditionally granted fundamental right under Article 4.1 and 4.2 of the Basic Law, it requires a sufficiently specific statutory basis permitting it. This is lacking in the present case. 49

a) In considering the question of whether a specific form of dress or other outward sign has a religious or ideological significance in the nature of a symbol, attention must be paid to the effect of the means of expression used and to all possibilities of interpretation that are possible. Unlike the Christian cross (on this, see BVerfGE 93, 1 (19-20)), the headscarf is not in itself a religious symbol. Only in connection with the person who wears it and with the conduct of that person in other respects can it have such an effect. The headscarf worn by Muslim women is perceived as a reference to greatly differing statements and moral concepts: 50

As well as showing the desire to observe dress rules that are felt to be binding and have a religious basis, it can also be interpreted as a symbol for upholding traditions of the society of the wearer's origin. In the most recent times, it is seen increasingly as a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women. However, according to the findings of fact in the nonconstitutional courts, which were also confirmed in the oral hearing, this is not the message that the complainant wishes to convey by wearing the headscarf. 51

The expert witness Dr. Karakasoglu, who was heard in the oral hearing, carried out a survey of about 25 Muslim students at colleges of education, twelve of whom wore a headscarf, and on the basis of this survey she showed that the headscarf is also worn by young women in order to preserve their own identity and at the same time to show consideration for the traditions of their parents in a diaspora situation; in addition, another reason for wearing the headscarf that had been named was the desire to obtain more independent protection by signalling that they were not sexually avail- 52

able and integrating themselves into society in a self-determined way. Admittedly, the wearing of the headscarf was intended to document in public the value one placed on religious orientation in one's own life, but it was understood as the expression of an individual decision and did not conflict with a modern lifestyle. As understood by the women questioned, preserving their difference is a precondition for their integration. It is not possible to make any statements that are representative of all Muslim women living in Germany on the basis of the interviews conducted and evaluated by the expert witness, but the results of the research show that in view of the variety of motive, the interpretation of the headscarf may not be reduced to a symbol of the social repression of women. Rather, the headscarf can for young Muslim women also be a freely chosen means to conduct a self-determined life without breaking with their culture of origin. Against this background, there is no evidence that the complainant, merely because she wears a headscarf, might for example make it more difficult for Muslim girls who are her pupils to develop an image of woman that corresponds to the values of the Basic Law or to put it into effect in their own lives.

To assess whether the intention of a teacher to wear a headscarf at school and in lessons constitutes a lack of aptitude, the decisive question is what effect a headscarf can have on someone who sees it (the objective standpoint of the onlooker); therefore all conceivable possibilities as to how the wearing of a headscarf might be regarded must be taken into account in the assessment. However, this has no effect on the fact that the complainant, who plausibly stated that she had religiously motivated reasons for her decision always to wear a headscarf in public, can rely for this conduct on the protection of Article 4.1 and 4.2 of the Basic Law, which is closely related to the paramount constitutional value of human dignity (Article 1.1 of the Basic Law; cf. BVerfGE 52, 223 (247)). 53

b) With regard to the effect of religious means of expression, it is necessary to distinguish whether the symbol in question is used at the instigation of the school authority or on the basis of one single teacher's personal decision; such a teacher may rely on the individual right of freedom in Article 4.1 and 4.2 of the Basic Law. If the state tolerates teachers wearing dress at school that they wear by reason of a personal decision and that can be interpreted as religious, this cannot be treated in the same way as a state order to attach religious symbols at school (on this, cf. BVerfGE 93, 1 (18)). The state that accepts the religious statement of an individual teacher associated with wearing a headscarf does not in so doing make this statement its own and is not obliged to have this statement attributed to it as intended by it. The effect of a headscarf worn by the teacher for religious reasons may, however, become particularly intense because the pupils are confronted with the teacher, who is the focal point of lessons, for the whole time when they are at school without a possibility of escape. On the other hand, the teacher may differentiate when explaining to the pupils the religious statement made by a garment, and in this way she may weaken its effect. 54

c) There is no confirmed empirical foundation for the assumption that the complainant would commit an infringement of her official duty because of the feared con- 55

trolling influence of her headscarf on the religious orientation of the schoolchildren.

In the oral hearing, the expert witness Professor Dr. Bliesener was heard on this point; he stated that from the point of view of developmental psychology there is at present no confirmed knowledge that proves that children are influenced solely because every day they meet a teacher who wears a headscarf at school and in lessons. Only if there were also conflicts between parents and teacher that might arise in connection with the teacher's headscarf were onerous effects to be expected, in particular on younger pupils. The two other expert witnesses heard by the Senate, Ms Leinenbach, Director of the Psychology Department, and Professor Dr. Riedesser, presented no information that contradicted this. Such an unconfirmed state of knowledge is not sufficient as the basis of an official application of the indeterminate legal concept of aptitude, which encroaches substantially upon the complainant's fundamental right under Article 4.1 and 4.2 of the Basic Law. 56

d) At all events, there was not a sufficiently definite statutory basis for rejecting the complainant for lack of aptitude as a result of her refusal to remove the headscarf at school and in lessons. 57

The school authority and the nonconstitutional courts present the view that the complainant's intention to wear a headscarf as a teacher constitutes a lack of aptitude because pre-emptive action should be taken against possible influence on the pupils, and conflicts, which cannot be ruled out, between teachers and pupils or their parents should be avoided in advance; at present this view does not justify encroaching upon the complainant's right under Article 33.2 of the Basic Law, which is equivalent to a fundamental right, nor the accompanying restriction of her freedom of faith. No tangible evidence could be seen in the proceedings before the nonconstitutional courts that the complainant's appearance when wearing a headscarf created a concrete endangerment of the peace at school. The fear that conflicts might arise with parents who object to their children being taught by a teacher wearing a headscarf cannot be substantiated by experience of the complainant's previous teaching as a trainee. The current civil service and school legislation in the *Land* Baden-Württemberg is not adequate to permit a prohibition on teachers wearing a headscarf at school and in lessons on the grounds of abstract endangerment. The mere fact that conflicts cannot be ruled out in future does not, in the absence of a legal basis designed for this purpose, justify deriving from the general civil-service-law requirement of aptitude an official duty on the part of the complainant to give up exercising her religious conviction by wearing a headscarf. 58

Under civil service law, in view of the state's duty of religious and ideological neutrality at school described above under B. II 4. b) aa), neither the concept of aptitude contained in § 11.1 of the Baden-Württemberg Civil Service Act nor the duties for civil servants laid down in §§ 70 *et seq.* of the Baden-Württemberg Civil Service Act, which are to be taken into consideration as orientation in assessing the aptitude of an applicant for a public office, can serve as the basis for a duty of teachers not to permit 59

their affiliation to a particular religion or ideology to be outwardly discernible, in order in this way to pre-emptively counter potential dangers.

Under § 70.1 sentence 1 of the Baden-Württemberg Civil Service Act, the civil servant serves all the people, and under § 70.1 sentence 2 the civil servant must fulfil his or her duties impartially and fairly, and must take account of the welfare of the public in carrying out his or her duties. Under § 70.2 of the Baden-Württemberg Civil Service Act, the civil servant must acknowledge the free democratic fundamental order of the Basic Law and stand up for its preservation in all his or her conduct. It is not apparent that the complainant would be prevented from doing this by wearing a headscarf. Nor does the requirement of moderation in § 72 of the Baden-Württemberg Civil Service Act, which provides that a civil servant who is involved in politics shall observe the moderation and restraint that follow from his or her position *vis-à-vis* the whole of society and from the consideration for the duties of his or her office, cover the case of wearing a headscarf for religious reasons. The same applies to the duty of civil servants to devote themselves with full dedication to their office (§ 73.1 of the Baden-Württemberg Civil Service Act), to exercise their office unselfishly to the best of their belief (§ 73.2 of the Baden-Württemberg Civil Service Act) and to base their conduct both on duty and off duty on doing justice to the respect and the confidence demanded by their profession (§ 73.3 of the Baden-Württemberg Civil Service Act). A prohibition preventing teachers at a state primary school and non-selective secondary school from wearing a headscarf for religious reasons and that restricts fundamental rights cannot be derived from these general duties under civil-service law. Finally, § 94 of the Baden-Württemberg Civil Service Act contains no regulations on a particular form of working dress for teachers. 60

Nor do the provisions in Articles 11 to 22 of the Constitution of the *Land* Baden-Württemberg of 11 November 1953 (Baden-Württemberg Law Gazette p. 173) on education and teaching and the Baden-Württemberg Education Act *(Schulgesetz für Baden-Württemberg* – SchG) as amended on 1 August 1983 (Baden-Württemberg Law Gazette p. 397), in particular §§ 1 and 38 thereof, contain any provision under which the general civil-service-law duties of moderation and restraint for teachers could be interpreted in concrete terms to mean that they were not permitted at school to wear any dress or other symbols that show that they belong to a particular religious group. At present, therefore, the necessary sufficiently definite statutory basis does not exist to decide that teachers of the Islamic faith, by reason of their declared intention to wear a headscarf at school, lack aptitude for service at the primary school and non-selective secondary school and thus to restrict their fundamental right under Article 4.1 and 4.2 of the Basic Law. 61

6. However, the *Land* legislature responsible is at liberty to create the statutory basis that until now has been lacking, for example by newly laying down the permissible degree of religious references in schools within the limits of the constitutional requirements. In doing this, the legislature must take into reasonable account the freedom of faith of the teachers and of the pupils affected, the parents' right of education and the 62

state's duty of ideological and religious neutrality.

a) The Federal Administrative Court, in the judgment challenged, emphasised *inter alia* that with growing cultural and religious variety, where an increasing proportion of schoolchildren were uncommitted to any religious denomination, the requirement of neutrality was becoming more and more important, and it should not, for example, be relaxed on the basis that the cultural, ethnic and religious variety in Germany now characterised life at school too. In the oral hearing, the representative of the Stuttgart Higher Education Authority, Professor Dr. F. Kirchhof, argued that the state's duty of ideological and religious neutrality in schools must now be treated more strictly, in view of the changed circumstances. 63

Social change, which is associated with increasing religious plurality, may be the occasion for redefining the admissible degree of religious references permitted at school. A provision to this effect in the Education Acts may then give rise to concrete definitions of teachers' general duties under civil-service law, including duties with regard to their appearance, to the extent that the latter shows their affiliation to particular religious convictions or ideologies. It is therefore conceivable that there could also be statutory restrictions of the freedom of faith, in compliance with the constitutional requirements. If it is apparent from the outset that an applicant will not comply with such rules of conduct, this can be stated to the applicant as a lack of aptitude. 64

A provision prohibiting teachers from continuously showing their membership in a particular religious group or belief by external signs is part of the law determining the relationship between state and religion in schools. The religious diversity in society, which has evolved gradually, is reflected here particularly clearly. School is the place where differing religious views inevitably collide and where this juxtaposition has particularly great effects. Tolerant coexistence with people of other beliefs could be practised here with most lasting effect through education. This need not mean denying one's own convictions; instead, it would give a chance for insight and to strengthen one's own point of view, and for mutual tolerance that does not see itself as reducing all beliefs to the same level (cf. BVerfGE 41, 29 (64)). Reasons could therefore be given for accepting the increasing variety of religions at school and using it as a means for practising mutual tolerance and in this way making a contribution to the attempt to achieve integration. On the other hand, the development described above is also associated with a greater potential for possible conflicts at school. There may therefore also be good reasons to accord the state duty of neutrality in schools a stricter importance that is more distanced than it has been previously, and thus, as a matter of principle, to keep religious references conveyed by a teacher's outward appearance away from the pupils in order to avoid conflicts with pupils, parents or other teachers. 65

b) It is not the duty of the executive to decide how to react to the changed circumstances, and in particular what rules of conduct with regard to dress and other aspects of behaviour towards schoolchildren should be imposed on teachers to define 66

more specifically their general obligations under civil-service law and to preserve religious peace at school, and what requirements therefore are part of aptitude for a teaching post. Rather, it is necessary for the democratically legitimated *Land* legislature to make provisions in this respect. Only the legislature has a prerogative of evaluation to assess the actual developments; it depends on this assessment whether conflicting fundamental rights of pupils and parents or other values of constitutional status justify legislation that imposes on teachers of all religions extreme restraint in the use of symbols with religious reference; authorities and courts cannot exercise this prerogative of evaluation themselves (cf. BVerfGE 50, 290 (332-333); 99, 367 (389-390)). The assumption that a prohibition of wearing headscarves in state schools may be a permissible restriction of freedom of faith as an element of a legislative decision about the relation between state and religion in the education system is also in harmony with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. European Court of Human Rights, decision of 15 February 2001, *Neue Juristische Wochenschrift* 2001, pp. 2871 ff.).

aa) The constitutional necessity of legislation follows from the principle of the requirement of parliamentary approval. The principle of a constitutional state and the requirement of democracy oblige the legislature to pass the provisions essential for the realisation of fundamental rights itself (cf. BVerfGE 49, 89 (126); 61, 260 (275); 83, 130 (142)). How far the legislature must itself determine the guidelines necessary for the area of life in question depends on its relation to fundamental rights. The legislature does have such an obligation if conflicting fundamental civil rights collide with each other and the limits of each are fluid and can be determined only with difficulty. This applies above all if the fundamental rights affected, like positive and negative freedom of faith in the present case and the parents' right of education are, by the wording of the constitution, guaranteed without a constitutional requirement of the specific enactment of a statute and a provision intended to organise this area of life is necessarily obliged to determine and specify their limits inherent in the Basic Law. Here, the legislature has a duty at all events to determine the limits of the conflicting guarantees of freedom at least to the extent that such a determination is essential to the exercise of these civil rights and liberties (cf. BVerfGE 83, 130 (142)). 67

When it is necessary for parliament to pass legislation can be decided only in view of the subject area and the nature of the object of constitutional definition involved. The constitutional criteria of evaluation here are to be derived from the fundamental principles of the Basic Law, in particular the fundamental rights guaranteed there (cf. BVerfGE 98, 218 (251)). Admittedly, the mere fact that a provision is politically controversial does not mean that it would have to be seen as essential (cf. BVerfGE 98, 218 (251)). Under the constitution, however, the restriction of fundamental freedoms and the balancing of conflicting fundamental rights are reserved to parliament, in order to ensure that decisions with such repercussions result from a procedure that gives the public the opportunity to develop and express its opinions, and that requires parliament to clarify the necessity and extent of encroachments upon fundamental rights in 68

public debate (cf. BVerfGE 85, 386 (403-404)).

In the education system in particular, the requirements of a constitutional state and the principle of democracy of the Basic Law oblige the legislature to make the essential decisions itself and not to leave them to the school board (cf. BVerfGE 40, 237 (249); 58, 257 (268-269)). This also applies, and applies in particular, if and to the extent that, in reaction to changed social circumstances and increasing ideological and religious variety at school it is intended to respond with a stricter restraining of all religious references and thus to newly define the state's duty of neutrality within the boundaries laid down by the constitution. Such a division is of considerable significance for the realisation of fundamental rights in the relationship between teachers, parents and children, and also the state. 69

bb) A provision that one of the duties of a teacher is to refrain in class from wearing a headscarf or any other indications of religious conviction is a material *(wesentlich)* provision in the meaning of the case-law on the requirement of parliamentary approval. It encroaches substantially upon the freedom of faith of the person affected. It also affects people belonging to various religions with varying intensity, depending on whether they regard the observance of particular dress customs as part of the exercise of their religion or not. As a result, it has special effects of exclusion for particular groups. Because of this relation to groups, the creation of such an official duty for teachers is of material significance, over and above its significance for the exercise of the individual fundamental right, for the function of social organisation inherent in the freedom of faith. 70

Finally, the introduction of an official duty that prohibits teachers from allowing their outward appearance to show their religion must be expressly laid down by statute, for one reason because such an official duty can only be justified and enforced in a constitutional manner – *inter alia* compatible with Article 33.3 of the Basic Law – if members of different religious groups are treated equally by it. This is not guaranteed to the same extent if it is left to authorities and courts to decide from case to case whether such an official duty exists and what its scope is, depending on their predictions as to the potential for influence and conflict of identifying characteristics of religious affiliation in the appearance of the teacher in question. 71

III.

As long as there is no statutory basis that indicates specifically enough that teachers at the primary school and non-selective secondary school have an official duty to refrain from identifying characteristics of their religious affiliation at school and in lessons, then on the basis of prevailing law it is incompatible with Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law and Article 33.3 of the Basic Law to assume that the complainant lacks aptitude. The decisions challenged by the constitutional complaint therefore infringe the legal position of the complainant guaranteed in these provisions. The judgment of the Federal Administrative Court is overturned and the matter is referred back to the Federal Administrative Court (§ 95.2 of the Fed- 72

eral Constitutional Court Act, *Bundesverfassungsgerichtsgesetz*). It is to be expected that the proceedings can be concluded there on the basis of § 11.1 of the Baden-Württemberg *Land* Civil Service Act, which under § 127 number 2 of the Civil Service Law Framework Act admits an appeal on a point of law; in these proceedings, the decisive concept of aptitude must be interpreted and applied in accordance with the provisions – amended if applicable – of the law of school education of the *Land*.

The decision on the reimbursement of necessary expenses is based on § 34a.2 of the Federal Constitutional Court Act. 73

C.

This decision was passed by five votes to three. 74

(signed)	Hassemer	Sommer	Jentsch
	Broß	Osterloh	Di Fabio
	Mellinghoff		Lübbe-Wolff

Dissenting opinion

of the judges Jentsch, Di Fabio and Mellinghoff
on the judgment of the Second Senate of 24 September 2003

– 2 BvR 1436/02 –

The majority of the Senate assume that particular official duties of a civil servant, if they are connected to the civil servant's freedom of religion or ideology, may be created only by a law passed by parliament. Until now, this view has been stated neither in case law nor literature, nor by the complainant herself. If this point of view is adopted, not only does the fundamental constitutional question submitted to the court as to the state's neutrality in the school's sphere of training and education remain undecided; the view also results in an erroneous weighting, not based on the Basic Law, in the system of the separation of powers and in the understanding of the normative power of fundamental rights in connection with access to public offices. The decision disregards the expressly stated intention of the Baden-Württemberg *Land* parliament that it would not pass a formal statute by reason of the complainant's case; in addition, it leaves the parliament uncertain as to how a constitutional provision can be made. Finally, the majority of the Senate give the *Land* legislature no possibility of preparing itself for the new situation under constitutional law that the Senate assumes will exist, and neglects to inform the judiciary and the administration how they are to proceed until a *Land* statute is passed. 75

I.

In order to justify the constitutional requirement that a statute must be specifically enacted, the majority of the Senate wrongly assume that there was a serious encroachment upon the complainant's freedom of religion and ideology. In this they fail to appreciate the functional restriction, with regard to civil servants, of the protection of fundamental rights. In the case of access to a public office, there is no open situation where legal interests of equal value are weighed up; the legal relationship that is essential to the realisation of fundamental rights at school is shaped in the first instance by the protection of the fundamental rights of pupils and parents. 76

1. Those who become civil servants place themselves by a free act of will on the side of the state. A civil servant can therefore not rely on the effect of the fundamental rights to guarantee freedom in the same way as someone who is not part of the state organisation. In exercise of their public office, therefore, civil servants are protected by the promise of freedom as against the state guaranteed by fundamental rights only to the extent that no restrictions arise from the special reservation to civil servants of the exercise of sovereign powers. Teachers with the status of civil servants, even within the scope of their personal pedagogical responsibility, do not teach in exercise of their own freedom, but on the instructions of the general public and with responsibility to the state. Teachers who are civil servants therefore from the outset do not enjoy the same protection by fundamental rights as parents and pupils: instead, the 77

teachers are bound by the fundamental rights because they share in the exercise of state authority.

In formulating official duties for the civil servants, the state administrative authority also fulfils the requirements of its obligation under Article 1.3 of the Basic Law; the civil servant's official duty is the reverse side of the freedom of the citizen who is confronted by state authority in the person of the official. If official duties are imposed on the teacher for the exercise of his or her office, therefore, this is not a matter of encroachments upon society outside the state-controlled sphere or an occasion for the ensuing call for law passed by parliament to protect the citizen. The state relies on official duties to ensure in its internal sphere uniform administration complying with statute and the constitution. 78

The majority of the Senate did not take this difference in structure adequately into account. As a result, the situation of the teacher on the one hand and of the pupils and parents on the other hand, which differ with regard to fundamental rights, are not correctly understood. In particular the legal position of the applicant, who has no legal claim to enter the sphere of state control as he or she desires, may not be seen under the aspect of a subject of fundamental rights defending himself or herself against the state. Voluntary entry into the status of a civil servant is a decision made by the applicant in freedom, choosing obligation to the public interest and loyalty to an employer that, in a democracy, acts for the people and is monitored by the people. A person who wishes to become a civil servant may therefore not reject the requirement of moderation and of occupational neutrality, neither in general nor with reference to specific official or private constellations that can be recognised in advance. At all events it cannot be reconciled with these duties if the civil servant plainly uses his or her employment, within the sphere of that civil service, as a space to profess beliefs, and thus effectively as a stage on which to develop the civil servant's own fundamental rights. The duty conferred on the civil servant consists in expertly, objectively, dispassionately and neutrally assisting in giving effect to democratic intention, that is, the intention of legislation and of the responsible government, and in taking second place as an individual where the civil servant's claims to realisation of his or her personality are likely to create conflicts in his or her employment and thus obstacles to the realisation of democratically formed will. 79

2. Civil servants are fundamentally different from those citizens who are subjected to a special status relationship by measures of public authority but do not in this connection enter the sphere of the state, merely a special legal relationship, such as pupils and their parents, who have the right to educate them, in the compulsory state school (BVerfGE 34, 165 (192-193); 41, 251 (259-260); 45, 400 (417-418); 47, 46 (78 ff.)) or prisoners in prison (BVerfGE 33, 1 (11)). It is therefore an error to believe that it is possible to fight another battle for the Basic Law's idea of freedom, following the struggle against the institution of the special relationship of subordination *(besonderes Gewaltverhältnis)*, by emphasising fundamental rights positions in the internal sphere of the civil service. The opposite is the case. If one sees teachers, who are 80

bound by fundamental rights, primarily as subjects of fundamental rights, and thus sees the teacher's personal liberty rights in opposition to those of pupils and parents, one reduces the freedom of those for whose sake the theory of materiality (*Wesentlichkeitstheorie*, the theory that material decisions must be laid down by the legislature rather than decided by the executive), broadened the constitutional requirement in school education law that matters should be specifically enacted in statutes.

The relationship of the civil servant to the state is a particular relationship of proximity with its own inherent rules, which are recognised by the constitution and regarded as worth preserving. Under the balanced concept of the Basic Law, civil servants are certainly intended to be freedom-conscious citizens – if not, loyalty to the free constitution would only be lip service – but at the same time they are to observe the fundamental priority of official duties and the intention of the democratic institutions embodied in it. As a personality, the civil servant is not a mere "instrument of execution", even if he or she decides to work for the public good. Those who wish to become civil servants, however, must loyally identify themselves with the constitutional state in important fundamental questions and when observing their official duties, because the state, conversely, is represented by its civil service and is identified with the concrete civil servant. All the principles of the permanent civil service are dominated by this idea of reciprocity and proximity. 81

Fundamental personal liberty rights of a civil servant or of a person applying for a public office are therefore from the outset guaranteed only to the extent that they are compatible with these laws inherent to the civil service. They form part of these necessities of the civil service if there is no fear of obstructions to the working routine. Any other approach than such a priority of the exercise of sovereign powers with regard to fundamental rights of the civil servants in office would be incompatible with the constitutional requirement of practical concordance. Failing this, the interpretation of the constitution would give rise to a contradiction that is not contained in the Basic Law itself. The fundamental rights are intended to guarantee distance between political power and society outside state control, and they are not intended to take effect in the very context where the constitution intends there to be a particular proximity and therefore excludes mutual distancing. 82

The fundamental rights preserve distance between citizens and state authority precisely in order to place limits upon state rule (Loschelder, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. V, 2nd ed., 2000, § 123, marginal number 16; Di Fabio, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer,* VVDStRL, 56, p. 235 (253-254)). This most elevated function of the fundamental rights may not, however, develop without restriction where the distance is specifically intended to be removed by incorporation into the state and therefore the constitution does not intend the distance to exist. In a relationship of proximity that is institutionally desired by the constitution, therefore, the most basic function of a fundamental right cannot assert itself without calling into question the relationship of proximity and the 83

constitution's decision in favour of a democratically guided civil service.

3. The evaluation of aptitude in connection with the special right of equality under Article 33.2 of the Basic Law must not be mistaken for an encroachment upon the freedom under Article 4.1 of the Basic Law. 84

The requirement and, as it were, the normal case of classical civil rights and liberties is an intrusion by state authority into the sphere of the citizen. The constellations in which the citizen approaches the state, claims benefits from the general public or offers his or her services to the general public deviate from this normal case. Here, state authority does not intrude on society, but subjects of fundamental rights seek proximity to the state organisation, desire the state to act, seek a legal relationship. 85

The constitutional complaint challenges the violation of Article 33.2 in conjunction with Article 33.3 of the Basic Law and therefore relies on a special right of equality. If rights of equality are asserted in isolation or connection with a claim for performance, however, the constitutional requirement of the specific enactment of a statute cannot be relied on. The infringement of equality does not give rise to an encroachment upon a right of freedom that could trigger the requirement of the specific enactment of a statute. The constellation surrounding the encroachment is different: the appointment of a teacher whose person does not offer a guarantee that he or she will carry out his or her duties neutrally in class indirectly affects fundamental rights of the pupils and their parents; as a result, at best there could be a discussion as to whether a statute is necessary with regard to protecting the freedom of the pupils and parents. 86

If the state forbids a person to wear a headscarf, which is at least in part motivated by religion, in a public place, it undoubtedly encroaches upon the fundamental right of freedom of religion. If the civil servant, on the other hand, wishes to display indications that are understood as religious in a space that the constitution has already defined as neutral – in this case when teaching in a compulsory state school – and as a representative of the general public, the civil servant is not exercising, in the social sphere, a freedom to which he or she is entitled as an individual. The civil servant's exercise of freedom at work is from the outset restricted by the necessities and above all the constitutional definition of the office; if this were not so, the realisation of the will of the people would fail for an excess of personal liberty rights on the part of the representatives of the state. When carrying out his or her official duties, the teacher must respect the fundamental rights of the pupils and their parents; the teacher is not merely on the state's side, but the state also acts through the teacher. Those who see the civil servant, except in questions of status, as having unrestricted fundamental rights *vis-à-vis* the civil servant's employer dissolve the boundary that has been drawn, in order to create liberty for children and parents, between the state and society. In this way they accept the risk that the democratic development of informed opinion will become more difficult, and in place of this they prepare the way for the courts to weigh the fundamental rights of teachers, parents and pupils, a process which is difficult to monitor. 87

4. Finally, another reason for which there is no need for a statute is that the evaluation of the aptitude of a civil servant has indirect effects in a legal relationship that is material for fundamental rights. Admittedly, in the past the application of the constitutional requirement in education law that a statute be specifically enacted was extended for the sake of the parents and pupils, but not to protect the teachers who were civil servants. The situation of civil servants, as a relationship of particular proximity between citizen and state, was, unlike education law with its character of a benefit directed outwards and affecting the rights of parents, specifically not understood as a legal relationship shaped by the civil servant's claim to fundamental rights (cf. Oppermann, *Verhandlungen des 51. Deutschen Juristentages 1976*, vol. I, part C, reports, *Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?*, C 46-47). 88

From the point of view of materiality, therefore, it could be of significance only if a *Land* permitted the headscarf, or other religious or ideological symbols likely to lead to conflict, in class. For then, even without the encroachment upon fundamental rights affecting the rights of pupils and parents, already specifically asserted, a dangerous situation from the point of view of fundamental rights would have arisen that needed to be legislated for. An extension of the constitutional requirement of the specific enactment of a statute, under the aspect of materiality, to include civil rights and liberties of the teacher in exercising his or her official duties, on the other hand, has not yet been advocated. 89

II.

The civil servant's duty of neutrality follows from the constitution itself; it does not need to be further supported by *Land* statutes. Civil servants who give no guarantee that in their conduct as a whole they will carry out their duties neutrally and in a way appropriate to the requirements of the particular employment lack aptitude in the meaning of Article 33.2 of the Basic Law (cf. BVerfGE 92, 140 (151); 96, 189 (197)). 90

The grounds given by the majority of the Senate push the constitutional personal liberty rights a long way into civil-service law without giving appropriate weight to the structural decision made by the Basic Law in Article 33 of the Basic Law. These grounds can therefore not be brought into accord with fundamental statements of the constitution on the relationship between society and state. In particular, they misjudge the position of the civil service in realising democratic will. 91

1. Those who aspire to a public office seek in the *status activus* (rights to take part in a democratic state) proximity to public authority and, like the complainant, wish to create a particular relationship of service and loyalty to the state. This particular position of duty, which is constitutionally protected by Article 33.5 of the Basic Law, takes precedence over the protection of the fundamental rights (cf. BVerfGE 39, 334 (366-367)), which in principle applies to civil servants too, to the extent that the duty and purpose of the public office so require. Accordingly, the citizen's right arising under Article 33.2 of the Basic Law grants equal access to public offices only if the appli- 92

cant fulfils the factual requirements of the right, which is equivalent to a fundamental right – aptitude, qualifications and professional achievement. The employer is authorised and constitutionally obliged to determine that an applicant is fit for a public office (Article 33.2 of the Basic Law).

In this discretionary decision, it is necessary to assess aptitude, qualifications and professional achievement; this is an act of evaluative decision-making, and it is to be reviewed by the court only to a restricted extent, to determine whether the administrative authority based the assessment on incorrect facts and whether it misjudged the civil-service-law and constitutional-law framework within which it can move without restriction. Apart from this, since there is no right to be accepted into the status of a civil servant, the review is restricted to checking for arbitrariness (cf. BVerfGE 39, 334 (354)). The interpretation of the indeterminate legal term "aptitude" necessitates a predictive decision in which the employer must comprehensively evaluate all the characteristics that the office in question requires of its holder (cf. BVerfGE 4, 294 (296-297); BVerwGE 11, 139 (141)). 93

Here, the employer must also give a prediction as to whether the applicant will fulfil his or her professional duties in future in the office sought. Aptitude includes not only a guarantee that the civil servant is equal to the professional tasks, but also that the civil servant's person satisfies the fundamental requirements that are indispensable for the exercise of a public office that has been conferred. One of these requirements, which are protected by Article 33.5 of the Basic Law with constitutional status, is the guarantee that the civil servant will observe his or her official duties neutrally. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by general principles, but also by the concrete requirements of the office. 94

2. The state whose constitution is the Basic Law needs the civil service in order that the will of the people may take effect in practice. The civil service realises the decisions of parliament and of the responsible government; it puts the principle of democracy and the constitutional state into a concrete form (Article 20.1 of the Basic Law). The design of the constitution aims at democratic rule in a legally constituted form. Both the legislation passed by parliament and the political leadership given by the government therefore require the neutral civil service with its expert knowledge (cf. BVerfGE 7, 155 (163)). Statute and law are a promise for the citizen who is subject to state authority that the form in which a fact situation will be legislated on will be abstract and general and without respect of person. In conformity with this, the civil servant too, who is called to implement the law and to realise the political will of the government in a legal form, acts as a neutral fiduciary *vis-à-vis* the citizen. 95

The decision in favour of the constitutional state requires the civil servant to be bound by statute, as a counterweight to the political leadership of the government. He or she realises the democratic will. Under the design of the Basic Law, sovereign duties are normally assigned to civil servants (Article 33.4 of the Basic Law). The per- 96

manent civil service, founded on factual knowledge, expert performance and loyal fulfilment of its duties, is intended to secure a stable administration and thus to act as a balancing factor in face of the political forces that shape life in the polity (cf. BVerfGE 7, 155 (162); 11, 203 (216-217)). Civil servants must carry out their tasks impartially and justly; in exercising their office they must take account of the public welfare, be loyal to the state and behave, both inside and outside their office, in such a way that they do justice to the respect and the trust that their position requires (cf. § 35.1 of the Civil Service Law Framework Act; § 73 of the Baden-Württemberg *Land* Civil Service Act). Their conduct in office must be oriented solely towards factual correctness, faithfulness to the law, justice, objectivity and the public interest. These obligations form a fundamental basis for the trust of the citizens that the duties of the democratic constitutional state will be fulfilled.

3. The requirement of neutrality and moderation for civil servants that follows from this is one of the tradition fundamental principles of the permanent civil service (Article 33.5 of the Basic Law); it has been enacted in nonconstitutional law in sections 35.1, 35.2 and 36 of the Civil Service Law Framework Act and in the civil service Acts of the *Länder* (cf. § 72 of the Baden-Württemberg *Land* Civil Service Act: cf. BVerfGE 7, 155 (162); Battis in: Sachs, *Grundgesetz* 3rd ed., Article 33, marginal number 71; Lübbe-Wolff in: Dreier, *Grundgesetz*, vol. II, 1998, Article 33, marginal number 78). This corresponds to the basic duty of neutrality of the state, which also applies in the sphere of religion and ideology, which is derived precisely from the freedom of faith of Article 4 of the Basic Law in conjunction with Article 3.3, Article 33.3 of the Basic Law and from Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and Article 137.1 of the Weimar Constitution (cf. BVerfGE 19, 206 (216); 93, 1 (16-17); 105, 279 (294)). To this extent, the principles of the permanent civil service under Article 33.5 of the Basic Law create a direct constitutional reservation that in advance restricts the scope for civil servants to exercise their fundamental rights: to protect the fundamental rights of those who are not integrated into the state organisation. 97

The previous case-law of the Federal Constitutional Court derived rights and duties of the civil servant directly from Article 33.5 of the Basic Law. Nonconstitutional provisions governing the civil servant's rights and duties are possible and to a certain extent desirable here, but they are not constitutionally required (BVerfGE 43, 154 (169-170)). The duties of the civil servant created directly under Article 33.5 of the Basic Law include moderation and restraint, in particular when carrying out his or her official business. If the civil servant in office behaves in a way that is not neutral politically, ideologically or in religion, he or she violates his or her official duties if the behaviour is objectively likely to lead to conflicts or obstruction in observing public duties (cf. BVerfGE 39, 334 (347)). Especially in religious and ideological matters, the civil servant must be restrained, because this is required of the state for whom the civil servant acts, for the sake of the freedom of the citizens. 98

Under Article 4.1 of the Basic Law and under Article 3.3 sentence 1, Article 33.3 and Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and 137.1 of the 99

Weimar Constitution, the state and its institutions are obliged to conduct themselves neutrally in questions of religious and ideological belief and not to endanger religious peace in society (BVerfGE 105, 279 (294)). For this reason too, when the civil servant first joins the civil service he or she must, constitutionally, already offer a personal guarantee of neutral conduct that neither provokes nor challenges in carrying out his or her future duties (Article 33.5 of the Basic Law).

4. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by these general principles, but also by the concrete and changing requirements of the office. These requirements too need not be separately laid down by statute as official duties, because it is a specific mark of the permanent civil service that official duties are not understood as restrictions on the civil servant's freedom, but are laid down by the employer in accordance with the relevant needs of a constitutional and factually effective administration. The standard for the assessment of aptitude is marked out for the authority in its essential lines in this respect too by Article 33.5 of the Basic Law with regard to the principle of neutrality and moderation. These principles, which constitutionally apply directly, need no further statutory definition, even in relation to school. The nonconstitutional-law requirements of the civil servant's duty of political neutrality are to this extent declaratory and not integral to the assessment of aptitude on entry into public offices in the meaning of Article 33.2, Article 33.5 of the Basic Law. 100

The general duty of neutrality applies to a particular degree for civil servants who exercise the office of a teacher at state schools. Teachers carry out the state's duty to provide education and training (Article 7.1 of the Basic Law). In this, they have direct pedagogical responsibility for teaching and the education of the pupils. By reason of their function, they are put in a position to exercise influence on the development of the pupils entrusted to them in a way comparable to the parents. Connected with this is a restriction of the parents' right of education, which is guaranteed as a fundamental right (Article 6.2 sentence 1 of the Basic Law); this restriction can be accepted only if schools endeavour to achieve objectivity and neutrality not only in the political sphere, but also in religious and ideological matters. One reason why this is the case is that under Article 6.2 sentence 1 of the Basic Law the parents also have the right to bring up children in religious and ideological respects and they can in principle keep convictions that they feel are wrong away from their children (cf. BVerfGE 41, 29 (48); 41,88 (107)).Observing these rights is one of the essential duties of school, required by the Basic Law itself; at the same time, they are a mirror image of the official duties to be observed by the teachers. 101

III.

A teacher at a primary school or non-selective secondary school violates official duties if, in lessons, she uses symbols as part of her dress that are objectively likely to result in obstacles at school or even constitutionally significant conflicts in relation to school. The uncompromising wearing of the headscarf in class that the complainant 102

seeks is incompatible with the requirement for a civil servant to be moderate and neutral.

1. When civil servants exercise a public office, even if they are modern, open and courageous, fundamental rights are guaranteed by the constitution only if there is no suspicion that there will be a marked conflict with the employer's development of informed political opinion and no obstacle to the exercise of the public office conferred. When the majority of the Senate assume that only the existence of tangible evidence of a "concrete endangerment of the peace of the school" is sufficient to deny the aptitude of an applicant for a civil service post, they misjudge the standard for the assessment of aptitude. 103

The Senate majority themselves also admit that religiously motivated dress of teachers may influence schoolchildren, lead to conflicts with parents and in this way disrupt the peace of the school. In the case of conflict in particular, they state, it must also be expected that there will be onerous effects on younger pupils. This potential situation of danger, however, cannot be cited in response to a prospective teacher at the stage of "abstract danger", but only when tangible evidence of the endangerment of the peace of the school has materialised. In this view, if conflicts have not crystallised, the authority making the appointment can no longer find there is a lack of aptitude. 104

In this view, the majority of the Senate misjudge the standard of evaluation for the assessment of aptitude under Article 33.2 of the Basic Law. For because the removal from office of a person retaining civil service status for life on account of violation of his or her official duties is possible under the traditional principles of permanent civil service only to a restricted extent and by way of formal disciplinary proceedings, the employer must in advance see to it that no-one becomes a civil servant who cannot be guaranteed to observe the official duties under Article 33.5 of the Basic Law. The constitutionally legitimate means for this is the consideration and decision of whether the applicant has the necessary aptitude for the office applied for. Doubts as to this that cannot be removed permit the appointing authority to make a negative prediction, since here it is not possible to establish aptitude positively (cf. BVerfGE 39, 334 (352-353)). Preventive measures to protect children and the parents' right of education, moreover, do not in principle require that a situation of danger be scientifically and empirically proved (cf. BVerfGE 83, 130 (140)). 105

Reference to the concept of "abstract danger", which is taken from police law, cannot therefore appropriately solve the conflicts in the assessment of aptitude. On the contrary: the free constitutional state is prohibited from postponing denying that civil servants have the necessary aptitude until it becomes probable that their foreseeable conduct in office will cause damage to particular objects of legal protection, as the concept of danger implies. The distinction between concrete and abstract danger may therefore be used to describe the classical threshold of interference in the relationship between the citizen and the state, but not to describe the standard for the dis- 106

cretion in appointment incumbent on state administration. It cannot accord with the civil-service-law reservation to civil servants of the exercise of sovereign powers if the constitutional state would have to rely on the threshold of danger under police law against its own civil servants who represent the state and through whom the state acts in order to control their conduct in office. This applies all the more in that the complainant wishes to teach primary school and non-selective secondary school pupils in a state compulsory school, that is, in an area that is sensitive for pupils and parents from the point of view of fundamental rights. In this respect it is therefore not a question of potential dangers or modalities of danger under police law, but merely whether the school authority, in putting into specific terms not only provisions of *Land* law, but also the constitutionally valid principles of permanent civil servants in the meaning of Article 33.5 of the Basic Law assumed on a basis that can be followed that there was a risk of a violation of duty. This is clearly the case.

2. The school board, on the evidence of the record of the conversations relating to aptitude and according to the statements in the oral hearing before the Federal Constitutional Court, certainly showed understanding of the complainant's religious convictions; conversely, however, the complainant clearly showed no understanding for the employer's desire to show neutrality. Except in extreme cases such as the immediate threat of violence, she found she would not be capable of refraining from wearing a symbol of strong religious and ideological expressiveness while teaching. Apart from the fact that this rigidity gives rise to doubts as to the complainant's prior loyalty to the political aims of her employer and the order of values in the Basic Law, *inter alia* in a possible conflict with religious convictions of Islam, in this way, even at the early stage of evaluation of aptitude, circumstances became known that would make it substantially more difficult to use the applicant in every function at school and that would bring the *Land* authority of the state into conflicts with pupils and their parents, but possibly also with other teachers, that can be predicted even today. 107

The headscarf worn by the complainant is here not to be assessed abstractly or from the point of view of the complainant, but in her concrete relationship to school. The requirements of the office of a teacher at the primary school and non-selective secondary school include the duty to avoid for his or her person political, ideological or religious symbols that are objectively expressive. In the teaching profession, teachers must refrain from using such meaningful symbols, which are likely to awaken doubts as to their neutrality and professional distance in topics that are controversial politically or from the point of view of religion or culture. Here it cannot be relevant what subjective meaning the teacher who is a civil servant associates with the symbols he or she uses. What is decisive is the objective effect of the symbol. 108

Assessing such an effect in concretely changing situations is fundamentally the duty of the employer and can be reviewed for plausibility and conclusiveness by courts only to a limited extent. The professionally competent administration is best suited to carry out the assessment; putting official duties into specific terms is traditionally a domain of the employer. In doing this, the employer must react to changing situations. 109

The use of symbols changes over the course of time, as does the violence of the resonance created by them: sometimes slogans on political badges (e.g. "Stop Strauß"; "Nuclear Power – No Thanks") are in the foreground, sometimes symbols derived from religion such as the orange-coloured dress of the followers of Bhagwan (Osho) (BVerwG, *Neue Zeitschrift für Verwaltungsrecht,* NVwZ 1988, p. 937). The employer, in the last instance the competent *Land* minister in his parliamentary and political responsibility, with his particular expertise with regard to the requirements for functions in the school situation, must assess in each case what use of symbols by the civil servant is compatible with the requirements of civil-service law in general and with the special requirements in the teaching profession, or is to be prohibited.

3. A distinction between abstract and concrete danger, such as the majority of the Senate regard as significant, is of no importance here, and as a result has to date not been relied on to determine official duties or in connection with decisions as to aptitude. All that is important if there are proceedings at a nonconstitutional court challenging the decision as to aptitude is whether the assessment that particular symbols are incompatible with the requirement of neutrality in the civil service was based on a clearly erroneous factual foundation or on conclusions that cannot be understood. 110

The assumption on which the decisions challenged rest, that if the complainant were employed in a general primary school or non-selective secondary school in Baden-Württemberg there would be apprehension of possible interference with the peace of the school is understandable. The majority of the Senate also assume that a teacher who permanently wears the headscarf in lessons as an Islamic symbol does at least give rise to "abstract danger". A symbol worn by the teacher that is – at present – expressive and has objective religious, political and cultural meaning is indeed likely to encroach upon the negative freedom of religion of pupils and parents and upon the parents' right of education (Article 6.2 of the Basic Law). Especially the wearing of a garment that unequivocally indicates a particular religious or ideological conviction of a teacher at state schools may encounter lack of understanding or rejection among pupils who are of a different opinion or the persons entitled to educate them and may affect this category of persons in their fundamental right of negative freedom of belief because the pupils cannot escape such a demonstration of religious conviction. 111

Teaching and education at state schools are benefits given by the state; accepting these benefits has been made a statutory duty for the children. For children and their parents, therefore, taking part in school lessons is for all intents and purposes unavoidable. In addition, the children's opportunities in life depend substantially on their level of achievement and on the competence of school institutions and their practice with regard to appropriate support and education. Consequently, neither the parents nor the state can reasonably be expected to wait and see how conflicts develop in the individual case when a future conflict situation becomes evident during the job interview. In addition, it seems likely that some parents will fail to protest because they fear there might be disadvantages for their child if they did so. The possibility that peace at school might be disrupted has, apart from this, already taken on a concrete 112

form in the case of the complainant, as is shown by experience in teaching practice and the negative reaction of other teachers.

4. The assumption of the majority of the Senate that the cross on a classroom door and the headscarf of a teacher in class are not comparable, a comparison decided in favour of the complainant, misjudges the fundamental rights position of the pupils and parents affected. The decisive factor here is the influence to which the individual pupil in a compulsory state school and under state responsibility is subjected. If, in surroundings with a Christian influence, a cross hangs above the school door – not a large crucifix behind the teacher (cf. BVerfGE 93, 1 (18)) – this can scarcely any longer be regarded as an encroachment upon the negative freedom of religion or the parents' right of education. Children have too few associations with a mere everyday object on the wall that has no immediate relation to a concrete person or real-world fact situation. The cross, over and above its religious significance, is too much a general cultural symbol for a culture, fed by Jewish and Christian sources, bound by values but open, that has become tolerant as a result of wide historical experience, some of it painful. 113

In contrast, teachers, as persons and as personalities, have a material moulding effect on the children, especially at primary school and in the function of class teachers. If a teacher wears striking dress, this creates impressions, gives rise to questions and encourages imitation. In the oral hearing, the expert witness Professor Dr. Bliesener stated on this point that the conduct of the teacher encourages the pupils to imitate it: this happens because the pupils at a primary school often have a close emotional relationship, and the teacher is also expect to aim for this, for pedagogical reasons, and because the attention of children is clearly directed at the teacher and the teacher's authority is also perceived in the context of the school. 114

The complainant's statement that if there were questions about the headscarf she would answer these untruthfully and in contradiction to her religious conviction, saying it was only a fashion accessory, is not appropriate to avoid a conflict of fundamental rights. For children too are aware of the religious significance of wearing a headscarf permanently, that is, even indoors. In addition, schoolchildren interact not only with the teacher, but also with their parents and wider social surroundings. Parents who answer their children's questions truthfully within their own understanding of education will not be able to avoid explaining that the teacher wears the headscarf because only in this way can she preserve in public her dignity as a woman. But here there are the seeds of a conflict with the moral concepts of children with non-Islamic parents, and possibly even with Islamic parents who do not believe in a requirement that women cover themselves in public. The objective irritation effect of a symbol that is also political and cultural may easily reach the child, by way of reactions in its social surroundings, and lead the child to ask whether, in a conflict of values that it cannot judge, it should take the side of the teacher or the side of its social surroundings, which decidedly reject the headscarf, and which may include its parents. In the oral hearing, the expert witness Professor Dr. Bliesener in this connection referred to the 115

possibility that children of primary school age might be emotionally overtaxed if a permanent conflict developed between the teacher on the one hand and the parents or individual parents on the other hand.

5. In order that an official duty, directed towards moderation in the civil servant's dress, can lawfully be put into concrete terms by the employer, no empirical proof of "dangerous situations" is needed, and still less is it necessary for the *Land* legislature to carry out scientific surveys in order to establish the "endangerment". A constitutional requirement of the specific enactment of a statute with a duty for the legislature to offer proof, for the mere purpose of putting official duties into concrete terms and ordering them to be applied, is not merely foreign to the system, but also takes the free constitutional state further into an immobility that obstructs its effectiveness. It is quite adequate for the assessment of aptitude that the use of meaningful symbols as part of dress a conflict appears reasonably possible or even likely. 116

This is the case, because the headscarf clearly, at least in part, carries a heavy symbolic meaning as a symbol of political Islamism – this is shown even by the public reactions to the court proceedings instigated by the complainant – and corresponding defensive reactions are to be expected. This objective content also includes the emphasis of a moral distinction between women and men that is likely to lead to conflicts with those who in turn support equality, equal value and equal treatment in society of women and men (Article 3.2 of the Basic Law) as a high ethical value. 117

The assessment that permanently wearing a headscarf in lessons is incompatible with the civil servant's duty of ideological and religious neutrality was convincingly described as free from errors in all three administrative-court judgments. The headscarf as a religious and ideological symbol for the necessity that women cover themselves in public is at all events at present objectively likely to give rise to contradiction and polarisation. 118

6. The complainant stated that she felt her dignity was violated if she appeared in public with her hair uncovered. Even if the complainant did not expressly state it in so many words, this suggests the converse conclusion that a woman who does not cover her head gives up her dignity. Such a distinction is objectively qualified to give rise to values conflicts at school. This applies even in the relationship between the teachers, but particularly in relation to parents; their children, experience shows, develop a special relationship to their teacher in the primary school in particular. 119

Whether it is politically or pedagogically right or wrong to confront children as soon as possible with other standards of value or a lives based on a different understanding of the dignity of women than that of their parents is legally immaterial. The only significant factor is whether the appointing authority's assessment is understandable when it argues that there is a possibility of conflicts at school that could perfectly well have been avoided if the teacher had shown moderation in this respect. The responsible school board assumed without error that this was the case. 120

The headscarf, worn as the uncompromising compliance with an Islamic requirement that the complainant assumed existed for women to cover themselves, at present represents for many people inside and outside the Islamic religious group for a cultural and political statement with a religious foundation, relating in particular to the relationship of the sexes to each other (cf. e.g. Nilüfer Göle, *Republik und Schleier*, 1995, pp. 104 ff.; Erdmute Heller/Hassouna Mosbahi, *Hinter den Schleiern des Islam*, 1993, pp. 108 ff.; Rita Breuer, *Familienleben im Islam* 2nd ed. 1998, pp. 81 ff.; Tariq Ali, *Fundamentalismus im Kampf um die Weltordnung*, 2002, pp. 97ff.). The majority of the Senate did not attach enough significance to this circumstance. As a result, they also did not consider the question as to whether, among the adherents of the Islam faith in Germany, there was a not insignificant or even growing number of people who regard the headscarf and the veil as a cultural challenge made to a society whose value system they reject, and above all, whether defensive reactions are to be expected from among the majority of the citizens of different faiths, and if so, what form these reactions might take. At all events, important commentators on the Koran are also of the opinion that the requirement that women cover their heads is based on the necessity of keeping women in their role of serving men, independently of the question as to whether a strict requirement to this effect even exists. This distinction between men and women is far removed from the values of Article 3.2 of the Basic Law. 121

It is therefore not important whether such an opinion is the only valid opinion within Islamic society or merely the predominant opinion, or whether the opinion submitted by the complainant in the proceedings, that the headscarf is, instead, a sign of the growing self-confidence and emancipation of women of Islamic faith, is held by a large number of persons. It is sufficient that the opinion that if women cover their heads this guarantees that they are subordinated to men is clearly held by a not insignificant number of the adherents of the Islam religion and is therefore likely to lead to conflicts with the equal rights of men and women, which is strongly emphasised in the Basic Law too. 122

7. In the claim asserted by the complainant to the right to work as a schoolteacher wearing a headscarf, she enters a grey area that is culturally and legally problematic and full of tension. Even one further step to completely covering her face, which is also practised in the Islamic religious community, might be regarded under an understanding of the German constitution, as incompatible with the dignity of humanity: free human beings show their faces to others. 123

But the Basic Law, in the sphere of society, also respects religious and ideological views that document a relation between the sexes that is difficult to reconcile with the order of values in the Basic Law, as long as they do not overstep the limits of the state's order of peace and law. The value system of the Basic Law, including its understanding of the equality of men and women, does not close itself to all change; it confronts challenges, reacts and preserves its identity in change. 124

This openness and tolerance does not, however, go so far as to grant entry into the civil service to symbols that challenge the existing standards of value and are therefore likely to result in conflicts. The fundamental openness and tolerance in society may not be transferred to the state's internal relationships. On the contrary: there is a constitutional requirement to keep the internal organisation of state administration free from the obvious possibility of such severe conflicts, in order that – in the concrete case – school lessons and education at school can proceed without interruption, and in general, because the state must remain capable of acting and must be able to conduct itself with a minimum of uniformity. 125

IV.

The majority of the Senate extend the constitutional requirement of the specific enactment of a statute to an area which, because it is dependent on the individual case and because it is subject to existing constitutional obligations, is in practice not accessible to control by statute (cf. BVerfGE 105, 279 (304)). 126

1. The parliament of the *Land* Baden-Württemberg expressly and with good reasons refused to pass a formal statutory provision occasioned by the assessment of aptitude in the present case. In the period relevant for this litigation, the *Land* parliament twice dealt with the problem of teachers who wish to wear a headscarf in class (Minutes of plenary proceedings *(PlenarProt.)* 12/23 of 20 March 1997, pp. 1629 ff.; Minutes of plenary proceedings 12/51 of 15 July 1998, pp. 3977 ff.). The concrete case of the complainant was debated in detail in the plenary debate of 15 July 1998 (Minutes of plenary proceedings 12/51 of 15 July 1998) and a resolution was passed on a motion by the parliamentary *Republikaner* party; the motion was for legislation to be passed (*Land* parliament document, LTDrucks, 12/2931 of 9 June 1998). By a large majority, with only the votes of the *Republikaner* party opposing, the parliament voted not to pass legislation on the question of assessment of aptitude with regard to the wearing of religious symbols in class. The decision was stated to have been made because broader and more detailed legislation was not necessary; statutory provision would make it more difficult to make the appropriate assessment of aptitude based on the individual case and thus also to exercise the scope for interpretation in awarding public offices and at the same to do justice to personal liberties. 127

The call for a formal statute, based on the federal constitution, does not result in any advantage from the point of view of materiality for the democratic basis of an administrative decision. In complex questions of the individual assessment of applicants for a public office, a formal statute that in principle encourages freedom can have the reverse effect of reducing freedom, since in this way measures designed for the individual case are made more difficult. A general statutory provision, which in any case is foreign to the system for laying down official duties and assessing aptitude under civil-service law, does not create more justice in the individual case, but less. Under the scheme of school policy of the *Land* government and the *Land* parliament, it would certainly be possible to appoint a teacher wearing a headscarf to a teaching 128

post in the individual case if it could be seen that she was prepared to refrain from wearing the headscarf not only in extreme situations, as submitted by the complainant in the oral hearing, but also in everyday teaching situations in a primary school.

The school authority, the minister and the *Land* parliament, however, took offence specifically at the fact that the complainant categorically refused to take a step in the direction of a more flexible approach to her attitude to the headscarf. From this, the authority responsible for assessing her aptitude was entitled to conclude that in the case of conflicts with the negative freedom of religion of parents and children, solutions adapted to the individual case at mixed-religion schools would be very much more difficult (cf. Article 15.1, Article 16 of the Constitution of the *Land* Baden-Württemberg). It was also entitled to conclude that the persistence of the applicant's refusal was capable of arousing doubts as to her neutrality and moderation, although this did not appear beyond objective justification and arbitrary. 129

2. The majority of the Senate require the *Land* legislature to put constitutional restrictions inherent in the Basic Law into concrete terms, although they can be determined concretely enough from the Basic Law. It is therefore doubtful whether the *Land* legislature is even authorised to put these inherent restrictions into concrete terms, beyond making a declaration confirming them or clarifying them. 130

The Federal Constitutional Court has to pass a final and unappealable decision on the extent and scope of inherent restrictions of fundamental rights. It is not the task of a *Land* legislature to repeat in a declaration the restrictions that arise directly from constitutional law. Nor is the appropriate respect accorded to the *Land* parliament if it is forced to pass statutory wording that on the one hand it expressly and in a well-considered way did not desire and that on the other hand – in the opinion of the majority of the Senate – put direct constitutional barriers in concrete form which will again be tested in later proceedings before the Federal Constitutional Court. A competent court that in such a controversial fundamental constitutional question refers to the legislature must at least inform the legislature how the latter is to carry out the task presented to it of putting direct constitutional limits into a concrete form. 131

In the present case, however, all questions remain open as to how the legislature is to draft legislation incorporating its political will, which it has already declared openly in the *Land* parliament. Is it sufficient if the legislature makes it an official duty for teachers to avoid religious and ideological dress symbols that are likely to result in negative effects on the peace of the school? Would it be admissible to prohibit the use of such religious, ideological or political symbols in the teaching profession that are likely to endanger the equality of men and women and its enforcement in practice (Article 3.2 of the Basic Law)? May civil-service law for teachers be defined in such a way as the then *Republikaner* party group in the *Land* parliament demanded in its motion of 9 June 1998 (*Land* parliament document 12/2931), "that the wearing of the headscarf as the symbol of Islam in class represents an inadmissible, one-sided, ide- 132

ological and political statement"? Must the *Land* legislature, because this is said by the majority of the Senate to be required by the Basic Law, carry out empirical research with regard to possible disruptions, and if so, to what extent? Or must it constitutionally and for reasons of equality prohibit without exception all religious symbols in the dress of the teachers, even if, like a small ornamental cross, they make no significant statement and therefore are from the outset unlikely to result in conflicts of values at school? Could such a prohibition of dress symbols without any objective provocative content whatsoever be justified at all?

3. The Senate did not do justice to the task of answering a fundamental constitutional question, although the case is ripe for a decision. As a result, the *Land* legislature must now pass a statute, which according to the dissenting opinion is not even necessary, and this without being granted a transitional period for this surprising necessity. In addition, it would scarcely be compatible with the principle of equality to incorporate a statutory basis for a general prohibition of significant religious or ideological symbols in office, as suggested by the majority of the Senate, only in the Education Act and not generally in the *Land* Civil Service Act; the relevant conflict situations may occur in other areas of the civil service too, for example in connection with the youth welfare service, social work, public safety or the administration of justice. 133

4. The majority of the Senate ought at least to have granted the legislature a transitional period. Taking into account earlier decisions of the Federal Constitutional Court on the constitutional requirement of the specific enactment of a statute, this would have been appropriate and would have reduced the effects of a surprise decision. 134

a) The Federal Constitutional Court derived the prohibition of surprise decision from the requirement of a fair hearing under Article 103.1 of the Basic Law. The parties to the proceedings may be surprised neither by a judicial decision in itself (BVerfGE 34, 1 (7-8)) nor by its factual (BVerfGE 84, 188 (190-191)) or legal (BVerfGE 86, 133 (144-145)) content. A judicial decision may be based only on facts and results of evidence to which the parties were able to respond. Merely informing the parties to the proceedings is not enough; they must also have a concrete opportunity to express a reaction to the facts (BVerfGE 59, 330 (333)). A statement relating to the circumstances and facts is regarded as satisfying the requirements of a fair hearing in the meaning of Article 103.1 of the Basic Law, and the possible to make a statement on the legal situation is deemed equivalent to this (BVerfGE 60, 175 (210); 64, 125 (134); 86, 133 (144); 98, 218 (263)). The parties must be given the possibility of asserting their point of view by way of arguments on fact and law in the proceedings. In special cases, it may here be necessary to draw the attention of the parties to a legal opinion on which the court intends to base the decision. Granting a fair hearing in a way that satisfies the constitutional right requires that the party, using the care to be expected of him or her, is capable of recognising the aspects on which the decision may depend. If the court relies on a legal point of view without prior reference, and even a conscientious and informed party to the proceedings, even taking into account the variety of legal opinions that might be held, could not expect the court to rely on 135

this legal point of view, the result may be the equivalent of prevention of submissions on the legal situation. This applies in particular if the court's interpretation of the law has to date not been argued either in case law or in literature, albeit in principle there is no right to a judicial dialogue or a reference to the court's legal viewpoint (BVerfGE 86, 133 (144-145); 96, 189 (204); 98, 218 (263)).

The majority of the Senate fail to adequately take into account the procedural right to a fair hearing that is also due to the state as a party to the proceedings when they introduce a requirement of the specific enactment of a parliamentary statute in order to create official duties in connection with the freedom of religion and ideology of the civil servant, where until now neither case law and literature nor the complainant herself have called for such a requirement, and this was not made a serious subject of the judicial dialogue in the oral hearing before the Senate. The *Land* Baden-Württemberg had neither occasion nor opportunity to express its opinion on this legal opinion, which was surprising for all parties and a major factor in the decision. The *Land* should have been given an opportunity to express an opinion on this aspect. The majority of the Senate accuse the *Land* of an omission. They state that it had not created a sufficiently definite statutory basis for the encroachment upon the complainant's right under Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law. The *Land* was unable to react to this charge, because it did not know of it nor was it obliged to know of it. 136

b) In view of this procedural omission, the majority of the Senate ought at least to have laid down a reasonable period of time for the *Land* legislature within which the legislature was able to take account of the requirement of the specific enactment of a statute by creating a provision that, in the opinion of the majority of the Senate, does justice to the situation under constitutional law. In earlier decisions, the Federal Constitutional Court recognised this problem and when it made a new demand for the specific enactment of a statute it made it possible for the executive for a transitional period to make a decision encroaching upon fundamental rights without a corresponding statutory provision. In this way, for example, in the interest of the prison regime and schools, the monitoring of prisoners' letters was declared to be provisionally permissible because there was insufficient authorisation below the level of a statute (cf. BVerfGE 33, 1 (12-13); 40, 276 (283)) as was expulsion from school that was not governed by a parliamentary statute (cf. BVerfGE 58, 257 (280-281)). 137

5. A reasonable transitional period would not only have been needed by reason of respect for the legislature, but would also have taken seriously the requirement of the specific enactment of a statute that was assumed by the majority of the Senate and given the *Land* legislature the possibility of creating an effective statutory basis for the present case. The Federal Administrative Court is also left by the reasoning of the majority of the Senate in a state of uncertainty, in a manner that is constitutionally questionable, as to how it is to proceed in future with regard to the proceedings that have been referred back. For if – as the majority of the Senate assume – the decision challenged by the complainant is unconstitutional, then at present the Federal Admin- 138

istrative Court should find in favour of the plaintiff. Since the dispute related only to the question of the religious symbol, therefore, the complainant would have to be appointed a civil servant by the *Land* Baden-Württemberg. In this way, under civil-service law, a *fait accompli* would be created, which the legislature could scarcely correct. The alternative, not excluded even by individual elements of the grounds given by the majority of the Senate, of suspending the proceedings before the administrative courts until the *Land* parliament has created a statutory basis in the law relating to teachers who are civil servants, should have been clearly stated.

(signed) Jentsch Di Fabio Mellinghoff

Bundesverfassungsgericht, Urteil des Zweiten Senats vom 24. September 2003 - 2 BvR 1436/02

Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 24. September 2003 - 2 BvR 1436/02 - Rn. (1 - 138), http://www.bverfg.de/e/rs20030924_2bvr143602en.html

ECLI ECLI:DE:BVerfG:2003:rs20030924.2bvr143602