Headnotes

to the Order of the First Senate of 27 January 2015

– 1 BvR 471/10 –

– 1 BvR 1181/10 –

1. **The protection afforded by the freedom of faith and the freedom to profess a belief (Art. 4 secs. 1 and 2 of the Basic Law) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf.**

2. **A statutory prohibition on expressing religious beliefs at the *Land* level (in this case, pursuant to § 57 sec. 4 of the North Rhine-Westphalia Education Act) by outer appearance in an interdenominational comprehensive state school based on the mere abstract potential to endanger the peace at school or the neutrality of the state is disproportionate if this conduct can be plausibly attributed to a religious duty perceived as imperative. An adequate balance between the constitutional interests at issue – the educational staff's freedom of religion, the pupils' and parents' negative freedom of religion, the fundamental right of parents and the educational mandate of the state – can only be struck via a restrictive interpretation of the prohibitive provision, i.e. that there must be at least a sufficiently specific danger to the protected interests.**

3. **Should there be a sufficiently specific risk of danger to or impairment of the peace at school or the neutrality of the state in certain schools or school districts in a substantial number of cases due to considerable situations of conflict in specific areas with respect to correct religious conduct, there might be a constitutionally recognised need to generally prohibit expressions of religious beliefs by outer appearance for certain schools or school districts for a certain time, and not only in a specific individual case.**

4. **If expressions of religious belief by outer appearance made by educators in interdenominational comprehensive state schools are prohibited by law for the purposes of protecting the peace at school and the neutrality of the state, in principle, this must apply to all religions and ideologies without distinction.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 471/10 –

– 1 BvR 1181/10 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Ms A(…),

– authorised representative: Prof. Dr. Christian Walter,
Prof.-Huber-Platz 2, 80539 Munich –

1. directly against

a) the judgment of the Federal Labour Court (*Bundesarbeitsgericht*) of 20 August 2009 – 2 AZR 499/08 –,

b) the judgment of the Düsseldorf Higher Labour Court (*Landesarbeitsgericht*) of 10 April 2008 – 5 Sa 1836/07 –,

c) the judgment of the Düsseldorf Labour Court (*Arbeitsgericht*) of 29 June 2007 – 12 Ca 175/07 –,

2. indirectly against

§ 57 sec. 4, § 58 sentence 2, case 1 of the North Rhine-Westphalia Education Act (*Schulgesetz für das Land Nordrhein-Westfalen* – SchulG NW) of 15 February 2005 (*Gesetz- und Verordnungsblatt für das Land Nordrhein-Westfalen* – GV.NRW. p. 102), as amended by the First Act Amending the North Rhine-Westphalia Education Act (*Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen*) of 13 June 2006 (GV.NRW. p. 270)

– 1 BvR 471/10 –,

II. of Ms A(…),

– authorised representatives: Wieland Rechtsanwälte GbR,
Rheinweg 23, 53113 Bonn –

1. directly against

a) the judgment of the Federal Labour Courtof 10 December 2009 – 2 AZR 55/09 –,

b) the judgment of the Hamm Higher Labour Court of 16 October 2008 – 11 Sa 572/08 –,

c) the judgment of the Hamm Higher Labour Court of 16 October 2008 – 11 Sa 280/08 –,

d) the judgment of the Herne Labour Court of 21 February 2008 – 6 Ca 649/07 –,

e) the judgment of the Herne Labour Court of 7 March 2007 – 4 Ca 3415/06 –,

2. indirectly against

§ 57 sec. 4 of the North Rhine-Westphalia Education Act of 15 February 2005 (GV.NRW. p. 102), as amended by the First Act Amending the North Rhine-Westphalia Education Act of 13 June 2006 (GV.NRW. p. 270)

– 1 BvR 1181/10 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Hermanns,

Baer,

Britz

held on 27 January 2015:

1. **§ 57 section 4 sentence 3 of the North Rhine-Westphalia Education Act of 15 February 2005 (*Law and Ordinance Gazette for the* Land *North Rhine-Westphalia*, *Gesetz- und Verordnungsblatt für das Land Nordrhein-Westfalen*, page 102), as amended by the First Act Amending the North Rhine-Westphalia Education Act of 13 June 2006 (*Law and Ordinance Gazette for the* Land *North Rhine-Westphalia*, page 270) is incompatible with Article 3 section 3 sentence 1 and Article 33 section 3 of the Basic Law (*Grundgesetz* – GG) and is void.**

2. **§ 57 section 4 sentences 1 and 2 and § 58 sentence 2 of the aforementioned Act are compatible with the Basic Law, to the extent indicated in the reasons below, insofar as they concern expressions of religious belief through outer appearance and conduct.**

3. **The fundamental rights of complainant I under Article 4 sections 1 and 2 of the Basic Law are violated by the judgment of the Federal Labour Court of 20 August 2009 – 2 AZR 499/08 –, the judgment of the Düsseldorf Higher Labour Court of 10 April 2008 – 5 Sa 1836/07 – and the judgment of the Düsseldorf Labour Court of 29 June 2007 – 12 Ca 175/07 –. The judgments of the Federal Labour Court and Higher Labour Court are reversed. The matter is remanded to the Düsseldorf Higher Labour Court.**

4. **The fundamental rights of complainant II under Article 4 sections 1 and 2 of the Basic Law are violated by the judgment of the Federal Labour Court of 10 December 2009 – 2 AZR 55/09 –, the judgments of the Hamm Higher Labour Court of 16 October 2008 – 11 Sa 572/08 – and – 11 Sa 280/08 – and the judgments of the Herne Labour Court of 21 February 2008 – 6 Ca 649/07 – and 7 March 2007 – 4 Ca 3415/06 –. The judgments of the Federal Labour Court and Higher Labour Court are reversed. The matter is remanded to the Hamm Labour Court.**

5. **The *Land* North Rhine-Westphalia must reimburse each of the complainants for three quarters of their necessary expenses; the Federal Republic of Germany must reimburse each of them for one quarter of those expenses.**

Reasons:

A.

The constitutional complaints concern court decisions on sanctions under labour law (warning notice and dismissal) issued by the complainants' employer, the *Land* North Rhine-Westphalia, against the complainants because as employees at state schools, they refused to remove what is known as an "Islamic headscarf" or a woollen hat worn as a replacement for that scarf, while on duty. Both complainants are Muslims. Complainant I is employed as a social educator, and complainant II was em- 1

ployed as a teacher, both under employment contracts under private law. The constitutional complaints also indirectly challenge the legislative provision on the permissibility of and limitations on expressions of religious belief by persons employed in the school system, as adopted in North Rhine-Westphalia following the decision of the Second Senate of the Federal Constitutional Court of 24 September 2003 (Decisions of the Federal Constitutional Court *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 108, 282). That provision is the basis for the labour-law measures reviewed by the regular courts in the initial proceedings.

I.

[…] 2-6

II.

[Excerpt from press release no. 14/2015 of 13 March 2015]

The constitutional complaints are directed against sanctions, as confirmed by the labour courts, imposed on the complainants after they refused to remove the headscarf worn at school for religious reasons, or the woollen hat worn as a replacement. Indirectly, they also challenge § 57 sec. 4 and § 58 sentence 2 of the *Schulgesetz für das Land Nordrhein-Westfalen* (North Rhine-Westphalia Education Act – SchulG NW) in the version of 13 June 2006.

Under § 57 sec. 4 sentence 1 SchulG NW, at school, teachers may not publicly express views of a political, religious, ideological or similar nature which are likely to endanger or interfere with the neutrality of the *Land* with regard to pupils and parents, or disturb the political, religious and ideological the peace at school. Under sentence 2, conduct that might create the impression among pupils or parents that a teacher advocates against human dignity, the principle of equal treatment, fundamental freedoms or the free democratic order is prohibited. Pursuant to sentence 3, carrying out the educational mandate in accordance with the Constitution of the *Land* and accordingly presenting (*Darstellung*) Christian and occidental educational and cultural values or traditions do not contradict the prohibition set out in sentence 1. Under § 58 sentence 2 SchulG NW, these provisions apply to other educational staff, including socio-educational staff, employed by the *Land*.

Both complainants are Muslims of German nationality. The complainant in proceedings 1 BvR 471/10 has been employed in a state comprehensive school in North Rhine-Westphalia as a social educator since 1997. She complied with the request by the school authority to remove the headscarf while on duty, but substituted it by an off-the-shelf pink-coloured beret with a knit band and a polo-neck pullover of the same colour to cover her neck. Following this, the school authority issued a warning. Her lawsuit brought in the labour courts was unsuccessful at all levels of jurisdiction. The complainant in proceedings 1 BvR 1181/10 entered into a private employment contract with the *Land* North Rhine-Westphalia in 2001 as a teacher. She taught the Turkish language for native speakers at several schools. After the complainant had

refused to discard the headscarf while on duty, the *Land* first issued a warning and then dismissed her. Her lawsuits in the labour courts against these measures were unsuccessful.

[End of excerpt.]

[…] 7-37

III.

The complainants direct their constitutional complaints at the labour courts' decisions against them, and indirectly against the underlying provision of the *Land* Education Act. 38

1. Proceedings 1 BvR 471/10 (complainant I)

Complainant I claims that the indirectly challenged provisions violate Art. 3 secs. 1 and 3 and Art. 33 secs. 2 and 3 GG, also in conjunction with Art. 9 and Art. 14 of the European Convention on Human Rights (ECHR). In addition, she claims that the challenged court decisions violate Art. 4 secs. 1 and 2 in conjunction with Art. 12 sec. 1, Art. 33 secs. 2 and 3 GG and her general right of personality. She furthermore objects to the judgment of the Federal Labour Court, claiming a violation of her right to a lawful judge (Art. 101 sec. 1 sentence 2 GG) because it failed to request a preliminary ruling from the Court of Justice of the European Union. 39

[…] 40-48

2. Proceedings 1 BvR 1181/10 (complainant II)

Complainant II complains that the indirectly challenged provisions and the challenged court decisions violate Art. 2 sec. 1 in conjunction with Art. 1 sec. 1, Art. 3 secs. 1 and 3, Art. 4 secs. 1 and 2 in conjunction with Art. 12 sec. 1, as well as Art. 33 secs. 2 and 3 GG and Art. 9 and Art. 14 ECHR. Furthermore, she asserts that the judgment of the Federal Labour Court violates Art. 101 sec. 1 sentence 2 GG. 49

[…] 50-55

IV.

Statements on the constitutional complaints were submitted by the North Rhine-Westphalia Ministry of Schools and Continuing Education (*Ministerium für Schule und Weiterbildung des Landes Nordrhein-Westfalen*) on behalf of the *Land* government, the Lower Saxony State Chancellery (*Niedersächsische Staatskanzlei*) on behalf of the *Land* government, the Federal Administrative Court (*Bundesverwaltungsgericht*), and by the Umbrella Organisation of Independent Ideological Communities (*Dachverband Freier Weltanschauungsgemeinschaften e.V.* – DFW), the Coalition of Muslim Women (*Aktionsbündnis muslimischer Frauen e.V.* – amf), the Alevi Congregation of Germany (*Alevitische Gemeinde Deutschland e.V.*), the Training and Education Association (*Verband Bildung and Erziehung e.V.* – VBE), the International League of 56

Non-Religious Persons and Atheists (*Internationaler Bund der Konfessionslosen and Atheisten e.V.* – IBKA), the Turkish-Islamic Union for Religious Affairs (*Türkisch-Islamische Union der Anstalt für Religion e.V.* – DITIB) and the Central Council of Jews in Germany (*Zentralrat der Juden in Deutschland K.d.ö.R.*).

[…] 57-76

B.

The constitutional complaints are admissible and for the most part well-founded. 77

In cases of educational staff's expression of religious belief by outer appearance and conduct, the provisions under § 57 sec. 4 sentences 1 and 2 and § 58 sentence 2 SchulG NW are compatible with the Basic Law only when interpreted restrictively in a manner consistent with the [freedom of religion and belief, which includes both the] freedom of faith and freedom to profess a belief (*Glaubens- und Bekennntnisfreiheit*) (Art. 4 secs. 1 and 2 GG). The labour courts' decisions challenged by the complainants are not consistent with these requirements and therefore violate the complainants' fundamental freedom of faith and freedom to profess a belief. § 57 sec. 4 sentence 3 SchulG NW, which is designed to privilege Christian and occidental educational and cultural values or traditions, is not consistent with the prohibition on disadvantaging persons on religious grounds (Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG). However, this does not impair the validity of the remainder of the provision, or the possibility of interpreting sentences 1 and 2 of § 57 sec. 4 SchulG NW in conformity with the Constitution. 78

I.

The constitutional review concerns the challenged decisions of the labour courts and the prohibition on which those decisions are based, under § 57 sec. 4 sentence 1 SchulG NW, insofar as the decisions relate to educational staff's expressions of religious beliefs through their outer appearance. The review must also extend to sentences 2 and 3 of § 57 sec. 4 SchulG NW, even though the labour courts expressly based their decisions only on the prohibition of expressions of belief in sentence 1. The provision is based on a single, unified concept. […] 79

II.

The judgments of the labour courts issued in the initial proceedings are based on statutory provisions requiring a restrictive interpretation in conformity with the Constitution. These judgments do not meet the requirements of such an interpretation. A prohibition of the expression of religious belief by outer appearance, on the basis of a mere abstract danger to the peace at school or to the neutrality of the state, is in any case not appropriate and therefore disproportionate in light of the educational staff's freedom of faith and freedom to profess a belief, if the expression of that belief can plausibly be traced to a religious duty perceived as imperative. A sufficiently specific danger is required instead. Under constitutional law, such a prohibition extending 80

over a region or possibly even over an entire *Land* is possible, with regard to interdenominational state schools, only if there is a sufficiently specific danger to the aforementioned legal interests throughout the area to which the prohibition applies.

In both initial proceedings, the Federal Labour Court held – as the lower courts had previously done – that the complainants' conduct had the potential, within the meaning of § 57 sec. 4 sentence 1 SchulG NW, to endanger the neutrality of the state towards pupils and parents, as well as the religious peace at school. These courts held that the prohibition does not cover only those expressions that specifically endanger or even disturb the neutrality of the state or the religious peace at school; it is intended to avert even an abstract danger, so that specific dangers are not able to arise. 81

In cases of the present kind, such a far-reaching understanding of the provision results in a serious interference with the educational staff's fundamental right to the freedom of faith and freedom to profess a belief. Such an interference cannot be justified constitutionally in this generalised form because it is disproportionate. 82

1. The protection of the fundamental right to freedom of faith and freedom to profess a belief (Art. 4 secs. 1 and 2 GG) also guarantees educational staff in interdenominational state schools the freedom to comply with the rules of their faith that require them to cover themselves, as may for example be done by wearing an Islamic headscarf, if this is based on sufficiently plausible reasons. 83

a) As employees in the civil service, the complainants can also invoke their fundamental right under Art. 4 secs. 1 and 2 GG (as is also the case for civil servants, BVerfGE 108, 282 <297 and 298>). The complainants' status as holders of fundamental rights is not automatically or generally called into question by their becoming part of the state's carrying out of its educational mandate. Moreover, the state is still bound by fundamental rights even if it makes use of the instruments of private law in carrying out a mandate, as was done here by entering into employment contracts under private law with the educational staff that it hired to carry out its educational mandate (Art. 1 sec. 3 GG; cf. BVerfGE 128, 226 <245>). 84

b) In its section 1, Art. 4 GG guarantees the freedom of faith and of conscience, and freedom to profess a religious or ideological belief; in section 2 it guarantees the right to the undisturbed practice of religion. The two sections of Art. 4 GG contain a single fundamental right that is to be understood as all-encompassing (cf. BVerfGE 24, 236 <245 and 246>; 32, 98 <106>; 44, 37 <49>; 83, 341 <354>; 108, 282 <297>; 125, 39 <79>; German Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Second Senate of 22 October 2014 – 2 BvR 661/12 –, juris, para. 98). It extends not only to the inner freedom to believe or not to believe – i.e., to have a faith, to keep it secret, to renounce a former faith, and to turn to a new one – but also the outer freedom to profess and disseminate one's faith, to promote one's faith and to proselytise (cf. BVerfGE 12, 1 <4>; 24, 236 <245>; 105, 279 <294>; 123, 148 <177>). Therefore, it includes not only acts of worship and the practice and observance of religious customs, but also religious instruction and other forms of expression of reli- 85

gious and ideological life (cf. BVerfGE 24, 236 <245 and 246>; 93, 1 <17>). This also includes the right of individuals to align their entire conduct with the teachings of their faith, and to act in accordance with this conviction, and thus to live a life guided by faith; and this applies to more than just imperative religious doctrines (cf. BVerfGE 108, 282 <297> with further references; BVerfG, Order of the Second Senate of 22 October 2014 – 2 BvR 661/12 –, juris, para. 88).

When assessing what qualifies as an act of practising a religion or an ideological belief in a given case, one must not disregard what conception the religious or ideological communities concerned, and the individual holder of the fundamental right, have of themselves (cf. BVerfGE 24, 236 <247 and 248>; 108, 282 <298 and 299>). However, this does not mean that all conduct by a person must be viewed as an expression of freedom of faith in the same way that the person views it subjectively. The authorities may analyse and decide whether it has been sufficiently substantiated, both in terms of its spiritual content and its outer appearance, that the conduct can in fact plausibly be attributed to the scope of application of Art. 4 GG; in other words, that it does in fact have a motivation that is to be viewed as religious. However, the state may not judge its citizens' religious convictions, let alone designate them as "right" or "wrong". This is especially the case when divergent views on such points are advanced within a religion (cf. BVerfGE 24, 236 <247 and 248>; 33, 23 <29 and 30>; 83, 341 <353>; 104, 337 <354 and 355>; 108, 282 <298 and 299>). 86

c) The protection of the freedom of faith and the freedom to profess a belief under Art. 4 secs. 1 and 2 GG, can be invoked by Muslim women for the wearing of a headscarf tied in a manner typical of their faith, including when they exercise their profession in interdenominational state schools, but can also be invoked with regard to the wearing of other clothing that covers the hair and neck if this is done for plausibly religious reasons (cf. BVerfGE 108, 282 <298>). 87

In their constitutional complaints, the two complainants claim a religious reason for wearing their head coverings. They refer to wearing them as an imperative religious duty, and as a fundamental component of an Islamically oriented lifestyle. 88

This religious basis of the choice of clothing is sufficiently plausible both in terms of spiritual content and outer appearance even in light of the different interpretations of the requirement to cover oneself in public that are advanced in Islam. It does not matter that the exact content of the rules of female clothing is indeed in dispute among Islamic scholars. It is sufficient that this interpretation exist in different schools of Islam and can be traced back to two verses in the Quran in particular (Sura 24, verse 31; Sura 33, verse 59) (cf. Asad, Die Botschaft des Koran – Übersetzung und Kommentar, 2009, pp. 676 and 677, 810; cf. also Heine, Kleiderordnung, in: Handbuch Recht und Kultur des Islams in der deutschen Gesellschaft, 2000, pp. 184 <186 and187>). In some schools of Islam, the requirement to cover oneself is also categorised as an imperative duty (cf. Khoury, Das islamische Rechtssystem, in: Handbuch Recht und Kultur des Islams in der deutschen Gesellschaft, 2000, p. 37 <52>). Under these cir- 89

cumstances, it does not matter that other schools of Islam do not consider it imperative for women to cover themselves in public (cf. BVerfGE 108, 282 <298 and299>).

2. In light of the religious requirement to cover themselves, which the complainants perceive as imperative, the prohibition of wearing the head coverings in question, based on § 57 sec. 4 (in conjunction with § 58 sentence 2, in the case of complainant I) SchulG NW and upheld by the challenged court decisions, proves to be a serious interference with their fundamental right of freedom of faith and freedom to profess a belief. 90

a) The categorisation of the wearing of articles of clothing as an expression of religious beliefs by outer appearance or conduct within the meaning of § 57 sec. 4 sentence 1 SchulG NW is based on an interpretation of ordinary law incumbent, first, upon the regular courts that is *per se* unobjectionable under constitutional law. 91

An “expression of belief by outer appearance or conduct” (“*äußere Bekundung*”) within the meaning of the statutory basis for the interference in § 57 sec. 4 sentence 1 SchulG NW is not limited to verbal expressions. In this respect, the Federal Labour Court reasonably holds that any “deliberate profession of a religious conviction directed to the outer world” is sufficient, and in determining the declaratory value of an expression, relies on those possibilities of interpretation that immediately suggest themselves for a significant number of observers. This understanding of the norm that focuses on the communicative nature of an “expression of beliefs by outer appearance or conduct” within the meaning of § 57 sec. 4 sentence 1 SchulG NW and on the point of view of an objective observer is consistent with the chain of effects assumed in that provision between the outer expressions mentioned there, on the one hand, and on the other hand, the legally protected interests that they affect, meaning the neutrality of the state and the peace at school. 92

However, head coverings and other articles of clothing do not automatically take on the meaning of a nonverbal means of communication within the meaning of § 57 sec. 4 sentence 1 SchulG NW. Rather, based on the point of view of an objective observer, this is the case only if, in virtue of its nature, the article of clothing *per se* is typically the expression of a political, ideological, religious or similar belief, or if after an overall assessment of the specific accompanying circumstances, an intrinsically neutral article of clothing can be understood, without a reasonable doubt, as such an outer expression. 93

A headscarf, specifically, is not as such a religious symbol. It can exert a comparable effect only in combination with other factors (cf. BVerfGE 108, 282 <304>). To that extent, for example, it differs from the Christian cross (cf. on this point BVerfGE 93, 1 <19 and 20>). Even if an Islamic headscarf serves only to fulfil a religious requirement and the wearer does not attribute symbolic character to it, and merely views it as an article of clothing prescribed by her religion, this does not change the fact that, depending on social context, it is widely interpreted as a reference to the wearer’s adherence to the Muslim faith. In that sense it is an article of clothing with religious con- 94

notations. If it is understood as an outer indication of religious identity, it has the effect of an expression of a religious conviction without any need for a specific intent to make this known or any additional conduct to reinforce such an effect. The wearer of a headscarf tied in a typical way will usually also be aware of this. Depending on the circumstances of the individual case, this effect may also occur for other forms of coverings for the head and neck.

b) The interference that is inextricably linked with the ban on wearing an Islamic headscarf or some other covering for the head and neck in fulfilment of a religious requirement is serious. 95

The complainants do not merely invoke a religious recommendation that individual adherents of the faith may dispense with or postpone obeying. Rather, they have plausibly demonstrated that in their case – and in accordance with the self-perception of some Islamic schools of thought (on this see the North Rhine-Westphalia Ministry for Employment, Integration and Social Affairs, *Ministerium für Arbeit, Integration und Soziales des Landes Nordrhein-Westfalen* <ed.>, Muslimisches Leben in Nordrhein-Westfalen, 2010, pp. 95 et seq.) – covering themselves in public constitutes an imperative religious duty, which, in addition, as has been plausibly shown, touches upon their personal identity (Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG). Therefore, a ban on covering the head when teaching or working as an educator at state schools may even block their access to that profession (Art. 12 sec. 1 GG). At the same time, there is a state of tension between the fact that at present this effectively means that mainly Muslim women are being kept away from qualified professions as teachers or other educational staff, and the requirement to achieve real equality of women in practice (Art. 3 sec. 2 GG), and the tension is in need of justification. Against this background, even though it is limited in time and space to the school environment, the statutory prohibition on expressing their faith constitutes a considerably more severe interference with the complainants' fundamental right to freedom of faith and freedom to profess a belief than would be the case for a religious practice that had no plausible claim to being imperative. 96

3. On the basis of the labour courts' interpretation of the legal norm, this interference with the complainants' freedom of faith and freedom to profess a belief proves to be disproportionate and is therefore unjustified. 97

a) Restrictions to this fundamental right can only be derived from the Constitution itself, because Art. 4 secs. 1 and 2 GG does not contain a requirement of a specific enactment of a statute. Such limitations inherent in the Basic Law include the fundamental rights of third parties, along with those community values of constitutional status (cf. BVerfGE 28, 243 <260 and 261>; 41, 29 <50 and 51>; 41, 88 <107>; 44, 37 <49 and 50, 53>; 52, 223 <247>; 93, 1 <21>; 108, 282 <297>). Among the constitutionally protected interests that might come into conflict here with the freedom of faith are not only the state's educational mandate (Art. 7 sec. 1 GG), which must be fulfilled in observance of the duty of ideological and religious neutrality, but the par- 98

ents' right to the upbringing of their children (Art. 6 sec. 2 GG), and the pupils' negative freedom of faith (Art. 4 sec. 1 GG) (cf. BVerfGE 108, 282 <299>). Resolving the normative tension among these constitutionally protected interests in consideration of the principle of tolerance is a task for the democratic legislature, which, within the public process of policy formulation, must seek a compromise that all can reasonably be expected to comply with. The above requirements of the Basic Law must be viewed together, and their interpretation and fields of application must be coordinated with one another (cf. BVerfGE 108, 282 <302-303>).

b) In prohibiting religious expression through outer appearance or conduct by introducing § 57 sec. 4 sentence 1 SchulG NW, the legislature that enacted the North Rhine-Westphalian Education Act was pursuing legitimate aims. This also applies to the legislature's intention to include clothing that has religious connotations, and particularly the Islamic headscarf if worn in the typical manner. Its aims were to preserve the peace at school and the neutrality of the state, and thus to safeguard the educational mandate of the state, to protect conflicting fundamental rights of pupils and parents, and thereby to prevent conflicts from the outset in the sphere of the state schools under the legislature's responsibility (cf. *Landtag* document*, Landtagsdrucksache* – LTDrucks 14/569, pp. 7 et seq.). These aims are clearly not objectionable under constitutional law. They can easily be related to the educational mandate of the state, the principle of neutrality, the pupils' negative freedom of faith, and parents' rights to the upbringing of their children, and thus to restrictions on educational staff's freedom of faith and freedom to profess a belief that are inherent in the Constitution. 99

c) It already seems doubtful whether the prohibition in § 57 sec. 4 sentence 1 SchulG NW is necessary, as, in its interpretation by the regular courts, the mere abstract capability of external religious expression, in the form of wearing a head covering with religious connotations, is sufficient to endanger legally protected interests. However, there is no need to decide here whether, in view of how widespread the Islamic headscarf has now become in German society, and the common understanding of its meaning, and also in view of the very different possible interpretations of why women are moved to wear it, especially in such an extensive and heavily populated *Land* as North Rhine-Westphalia, the mere abstract danger to the legally protected interests of the school peace and the neutrality of the state must be prevented without exception in all interdenominational state schools and with regard to all pupil age groups, so as to keep specific dangers to these protected interests from arising in the first place. This is because, after all, the requirements that a provision of law be proportionate in the strict sense call for a restrictive understanding of the element of the "capability to endanger legally protected interests" required by the statute. 100

d) In any case, the prohibition throughout an entire *Land* on religious expression through outer appearance, and particularly by wearing clothing that has a religious connotation, merely on the grounds that this has the abstract capability to endanger the peace at schools or the state's neutrality at an interdenominational school, proves to be disproportionate in the strict sense if such conduct can be plausibly attributed to 101

a religious requirement that is understood as imperative. In the present instance, an appropriate balancing of conflicting interests protected under the Constitution, taking adequate account of the freedom of faith of educational staff who invoke a religious requirement to cover themselves in public, requires a restrictive reading of the ban that is intended to preserve the peace at schools and the state's neutrality, such that there must be at least a sufficiently specific danger to these protected interests.

aa) The legislature possesses a prerogative of evaluation concerning facts and new developments, so as to decide whether conflicting fundamental rights of pupils and parents or other values of constitutional rank justify a provision that requires educational staff of all faiths to exercise extreme restraint in using symbols with a religious reference (cf. BVerfGE 108, 282 <310-311>). However, especially in the case of a largely preventive prohibition of external religious expressions, the legislature must strike a fair balance, taking into account the weight and importance of the educational staff's fundamental freedom of faith and freedom to profess a belief, and must respect the limit that reasonableness imposes in its overall balancing of the weight of the interference against the weight of the reasons that justify it (cf. BVerfGE 83, 1 <19>; 90, 145 <173>; 102, 197 <220>; 104, 337 <349>). 102

bb) If educational staff bring religious or ideological references into the school and classes, this may interfere with the requisite neutrality of the state's educational mandate, parents' right to bring up their children, and the pupils' negative freedom of faith. It opens up at least the possibility of influencing children and of conflicts with parents, potentially disrupting the peace at school and endangering the school's fulfilment of its educational mandate. Religiously motivated clothing worn by educational staff, intended as an expression of a religious conviction, may also have these effects (cf. BVerfGE 108, 282 <303>). However, none of the opposing interests enshrined in the Constitution is of such weight that the mere abstract danger that they might be interfered with can justify a ban, if on the other side the wearing of clothing or symbols with religious connotations is plausibly demonstrated to be attributable to a religious requirement that is perceived as imperative. 103

(1) Pupils' negative freedom of faith (Art. 4 secs. 1 and 2 GG) guarantees the freedom to stay away from the acts of worship of a faith they do not share. This also refers to rites and symbols through which a belief or religion present themselves. However, in a society that holds space for different religious convictions, individuals have no right to be spared from ever being confronted with expressions of faith, rituals and religious symbols that are alien to them. But this must be distinguished from a situation created by the state in which the individual is subjected, with no possibility of avoidance, to the influence of a specific faith, the acts in which that faith is manifested, and the symbols through which it presents itself (cf. BVerfGE 93, 1 <15 and16>). It is true that pupils also find themselves in an unavoidable situation when, because of the general requirement of compulsory education, they are faced during a class, with no possibility of avoidance, with a state-employed teacher who wears an Islamic headscarf. However, in view of the effect of religious means of expression, one must 104

distinguish here whether the symbol concerned is being used on the school authorities' initiative or due to a personal decision of individual educational staff. The latter may invoke the individual freedom under Art. 4 secs. 1 and 2 GG in this respect. If a state allows the religious expression associated with wearing a headscarf on the part of a single teacher or educational staff member, it does not adopt that expression as its own simply by so allowing, and also does not have to accept that the expression is attributed to it as having been intended by it. (cf. BVerfGE 108, 282 <305 and 306>).

105 It is true that the teacher's freedom of faith invoked in order to wear an Islamic headscarf at school does impact the pupils' negative freedom of faith (cf. BVerfGE 108, 282 <301-302>). Yet wearing an Islamic headscarf, a comparable covering of the head and neck or other clothing with religious connotations is not *per se* apt to interfere with the pupils' negative freedom of faith and freedom to profess a belief. As long as members of the teaching and educational staff only display such an outer appearance and do not verbally promote their position or faith, or attempt to influence the pupils apart from their outer appearance, the pupils' negative freedom of faith as a rule remains unimpaired. The pupils are only confronted with the positive freedom of faith as exercised by educational staff in the form of wearing clothing in compliance with their beliefs, which, furthermore, is usually relativized and counterbalanced by the conduct of other members of staff who adhere to other faiths or ideologies. In this respect, religiously pluralistic society is mirrored in interdenominational schools.

106 (2) Nor can anything else be derived from the fundamental right of parents. Art. 6 sec. 2 sentence 1 GG guarantees parents the care for and the raising of their children as a natural right and, in conjunction with Art. 4 secs. 1 and 2 GG, also includes religion- or belief-based education; for that reason, it is first and foremost a matter for parents to convey to their children those convictions in matters of faith and belief that they consider right (cf. BVerfGE 41, 29 <44, 47 and 48>; 52, 223 <236>; 93, 1 <17>). This corresponds with the right to keep children away from religious convictions that the parents consider wrong or harmful (cf. BVerfGE 93, 1 <17>). However, Art. 6 sec. 2 GG does not include an exclusive right for parents to bring up their children. The state, to which the responsibility for supervising the entire school system is assigned under Art. 7 sec. 1 GG, carries out its educational mandate in the schools independently and, within its sphere [of responsibility], with equal rank alongside parents (cf. BVerfGE 34, 165 <183>; 41, 29 <44>; 108, 282 <301>).

107 Accordingly, the fundamental right of parents does not entail an entitlement to keep pupils away from the influence of educational staff who follow a widespread religious rule to cover the head, as long as this does not impair the pupils' negative freedom of faith and freedom to profess a belief. Nor does the parents' negative freedom of faith, which, in conjunction with the parents' rights to raise their children, can have an impact in this context, guarantee to be spared from being confronted with clothing with religious connotations worn by educational staff that merely permits a conclusion about those persons' adherence to another religion or belief, but otherwise exercises no deliberate influencing effect. In cases of the present type, this applies precisely be-

cause these situations do not concern faith-based conduct attributable to the state, but a recognisably individual exercise of a fundamental right.

(3) Moreover, the state's educational mandate (Art. 7 sec. 1 GG), which has to be carried out in accordance with the state's duty to maintain religious and ideological neutrality, does not as such conflict with female educational staff members' exercising their positive freedom of faith by wearing an Islamic headscarf. If such outer conduct has plausibly been shown to be based on a religious duty perceived as imperative, the state's mandate can justify a prohibition only if there is a sufficiently specific danger to the peace at school that is necessary for the fulfilment of the educational mandate, or to the neutrality of the state. 108

The Basic Law establishes an obligation for the state, as the home of all its citizens, to maintain religious and ideological neutrality in Art. 4 sec. 1, Art. 3 sec. 3 sentence 1, Art. 33 sec. 3 GG, as well as Art. 136 secs. 1 and 4 and Art. 137 sec. 1 of the Weimar Constitution (*Weimarer Reichsverfassung*) in conjunction with Art. 140 GG. It prohibits the introduction of any legal entity of the nature of a state church and bars privileging any particular denomination, or excluding persons of other faiths (cf. BVerfGE 19, 206 <216>; 24, 236 <246>; 33, 23 <28>; 93, 1 <17>). The state must ensure that the treatment of the various religious and ideological communities is guided by the principle of equality (cf. BVerfGE 19, 1 <8>; 19, 206 <216>; 24, 236 <246>; 93, 1 <17>; 108, 282 <299-300>), and must not identify itself with a particular religious community (cf. BVerfGE 30, 415 <422>; 93, 1 <17>; 108, 282 <300>). The free state under the Basic Law is characterised by openness to the diversity of religious and ideological convictions, and bases that openness upon a concept of humanity characterised by human dignity and the free development of one's personality in self-determination under one's own responsibility (cf. BVerfGE 41, 29 <50>; 108, 282 <300-301>). 109

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. Art. 4 secs. 1 and 2 GG also requires the state, in the positive sense, to ensure that there is room for an active exercise of religious convictions and a realisation of one's autonomous personality in the religious and ideological sphere (cf. BVerfGE 41, 29 <49>; 93, 1 <16>). The state is only barred from exerting a targeted influence in the service of a specific political, ideological or philosophical direction, or, through measures originating from the state or being attributable to it, from identifying itself with a specific faith or a specific ideology and thus on its own initiative endangering religious peace in a society (cf. BVerfGE 93, 1 <16 and17>; 108, 282 <300>). The principle of religious and ideological neutrality also prohibits the state from judging the faith and doctrine of a religious community as such (cf. BVerfGE 33, 23 <29>; BVerfG, Order of the Second Senate of 22 October 2014 – 2 BvR 661/12 – juris, para. 88). 110

This also applies in the sphere of schools, for which the state has taken responsibili- 111

ty, where religious and ideological concepts have always been relevant by virtue of schools' very nature (cf. BVerfGE 41, 29 <49>; 52, 223 <241>). Accordingly, for example, to allow for or permit Christian references in the state schools is not precluded; however, the school must also be open to other religious and ideological content and values (cf. BVerfGE 41, 29 <51>; 52, 223 <236 and 237>). As references to various religions and ideologies are possible in organising a state school, the mere visibility, apparent in their outer appearance, of the religious or ideological affiliation of individual members of educational staff – irrespective of what religion or ideology is concerned in the specific case – is not precluded as such by the neutrality required of the state in religious and ideological matters. It is through this openness that the free state under the Basic Law preserves its religious and ideological neutrality (cf. BVerfGE 41, 29 <50>).

(4) (a) On that basis, a strict *Land*-wide prohibition of the expression of religious beliefs by outer appearance or conduct, for which – according to the interpretation by the labour courts in the challenged decisions – a mere abstract danger to the legally protected interests mentioned in § 57 sec. 4 sentence 1 SchulG NW is deemed sufficient, cannot reasonably be imposed on the holders of fundamental rights, at any rate in cases such as these. It suppresses their fundamental right to freedom of faith in a manner that is not appropriate. If individual members of educational staff wear a headscarf, this does not entail identification of the state with a particular faith – quite different from the case of a cross or crucifix in the classroom that has been installed by state authorities (cf. BVerfGE 93, 1 <15 et seq.>). Nor does the employer's toleration of the educational staff's faith-based conduct imply that the school endorses such conduct as exemplary, and that the peace at school or the neutrality of the state could be endangered or disturbed for that reason alone. In addition, the complainants follow a commandment of faith which they have plausibly shown to perceive as imperative. Thus, in the process of balancing the pupils' and parents' fundamental rights that the religiously and ideologically neutral state must also protect within the school environment with the complainants' freedom of faith, the latter attains much higher weight than would be the case if the matter related to a non-imperative rule. 112

(b) The situation is different if the outer appearance of educational staff constitutes a sufficiently specific danger to, or impairment of, the peace at school or state neutrality, or contributes significantly to such a danger or impairment. This might be conceivable, for example, in a situation where very controversial positions on the question of correct religious conduct were promoted and introduced into the school – particularly by older pupils or parents – in a way that seriously interfered with school processes and the fulfilment of the state's educational mandate, if the visibility of religious convictions and clothing practices were to generate or fuel this conflict. If a sufficiently specific danger exists that is based on such facts, it would be reasonable to expect that the educational staff, as holders of fundamental rights, would refrain from following the rule to cover their heads that they plausibly perceive as imperative, in consideration of all the constitutionally protected interests that are involved and possibly in 113

conflict, so as to ensure an orderly fulfilment of the state's educational mandate that in particular protects the pupils' and parents' fundamental rights as well as the neutrality required of the state. But even in such a case, in the interest of protecting the fundamental rights of those concerned, the employer will have to first consider whether it would be possible to employ the person concerned in other educational environments.

(c) In addition, there might be a constitutionally relevant legal interest in prohibiting religious expression by outer appearance or conduct not merely in a specific individual case, but for a certain amount of time in a more general way at certain schools or in certain school districts if, due to considerable situations of conflict regarding correct religious conduct in those schools or districts, the threshold of a sufficiently specific danger to the school peace or to state neutrality has been reached in a substantial amount of cases in a specific area. In this respect, the legislature may also take due account of such a situation preventively (cf. BVerfGE 108, 282 <306 and 307>) with area-specific solutions. In so doing, especially in large *Laender,* it must provide for differentiated solutions, for example limited in place and time, possibly with the aid of a sufficiently specific authorisation to issue regulations (*Verordnungsermächtigung*). Also in the case of such a regulation, in the interest of the fundamental rights of those concerned, it would have to be considered at first whether it would be possible to employ the person concerned in other educational environments. 114

As long as the legislature has not established a more differentiated regime, a restriction on the freedom of faith of educational staff can only be an appropriate result of the balancing of the relevant constitutionally protected legal interests if it can be shown that there is at least a sufficiently specific danger to the neutrality of the state or to the peace at school. This is particularly true when considering that it is precisely the task of "interdenominational" (*"bekenntnisoffen"*) schools to convey to pupils the idea of tolerance also with regard to other religions and ideologies, because school must be open to Christian, Muslim and other religious and ideological content and values. It must also be possible, in the interest of a balancing and effective exercise of fundamental rights at an interdenominational school, to lead a life according to this ideal. By logical extension, this also pertains to wearing clothes with a religious connotation, such as – apart from the headscarf – the Jewish kipah, the nun's habit, or symbols such as a cross worn visibly. 115

4. Because of the weight of educational staff's freedom of faith and freedom to profess a belief at interdenominational schools, a restrictive interpretation of § 57 sec. 4 sentence 1 SchulG NW in conformity with the Basic Law is needed, at least for the cases concerned here, insofar as that provision prohibits expressions of religious belief by outer appearance or conduct. For this purpose, the characterising feature of the ability to endanger or impair the peace at school or the state's neutrality must be restricted in that the expression of religious belief through outer appearance or conduct must represent not merely an abstract danger, but a sufficiently specific danger to the legally protected interests indicated in § 57 sec. 4 sentence 1 SchulG NW. The 116

existence of that specific danger must be proven and substantiated. In general, wearing an Islamic headscarf does not substantiate a sufficiently specific danger. Wearing such a head covering as such does not have the effect of promoting a belief, still less proselytising for one. Even if a majority of Muslim women do not wear an Islamic headscarf, this is not uncommon in Germany (cf. Federal Office for Migration and Refugees <ed.>, Muslimisches Leben in Deutschland – im Auftrag der Deutschen Islam Konferenz, 2009, pp. 194 and 195; North Rhine-Westphalia Ministry of Labour, Integration and Social Affairs <ed.>, Muslimisches Leben in Nordrhein-Westfalen, 2010, p. 93). It is often reflected in everyday social life and within student bodies. Its being merely visually perceptible, as a consequence of the individual exercise of fundamental rights, must be accepted in the schools just as there is also generally no constitutional right to be spared from being exposed to other religious or ideological convictions.

A restrictive interpretation of § 57 sec. 4 sentence 1 SchulG NW is possible and mandated by the Constitution. It serves to prevent voiding the law, and is therefore required from the point of view of preserving the legislation so far as possible. It respects the fact that the norm has other applications that diverge from the case at hand. These may involve verbal expressions, for example, or openly promotional conduct. In such cases, the prohibition may also have significance in an interpretation that even includes an abstract danger. It does not stand to oppose this restrictive interpretation that in the legislative history, the legislature contemplated a prohibition of wearing a headscarf as a typical application of the provision. The norm is merely accorded a less far-reaching application. 117

5. These interpretive standards apply accordingly with regard to § 57 sec. 4 sentence 2 SchulG NW. The presupposed ability of outer conduct to give pupils and parents the impression that an educator advocates against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free democratic order, can be affirmed in the case of outer appearance alone only if the presence of sufficiently specific grounds can be affirmed from the point of view of an objective observer. However, with respect to the guarantees of fundamental rights under Art. 4 secs. 1 and 2 GG, it is wrong to assume that the mere wearing of an Islamic headscarf or another head covering indicating affiliation with a belief is in itself already conduct that would readily create the impression among pupils or parents, under § 57 sec. 4 sentence 2 SchulG NW, that the person wearing it advocates against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free democratic basic order. This generalisation is impermissible. If wearing the headscarf, for example, appears as the expression of an individual clothing decision, tradition or identity (cf. BVerfGE 108, 282 <303 et seq.>), or identifies the wearer as a Muslim who complies strictly with the rules of her faith, particularly the requirement to cover herself which she perceives as imperative, this cannot be interpreted as a distancing from the constitutional principles mentioned in § 57 sec. 4 sentence 2 SchulG NW, unless further circumstances are present. Nor can it be assumed that those 118

schools of Islam that require a headscarf to be worn to fulfil the requirement to cover oneself, but also consider this sufficient, are requiring, expecting or even merely hoping that believers will advocate against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free and democratic basic order.

6. The requirement of a restrictive reading of sentences 1 and 2 of § 57 sec. 4 SchulG NW also exists insofar as under § 58 sentence 2 SchulG NW they are to be applied accordingly to other educational staff, including socio-educational staff. Because other educational and socio-educational staff are comparable to teachers in everyday school life, and are comparably involved in the fulfilment of the state's educational mandate, no other interpretation can apply here. 119

7. The challenged decisions of the regular courts, particularly of the Federal Labour Court, do not meet the requirements of the necessary restrictive interpretation in conformity with the Constitution; in their view, such an interpretation was not necessary. The legal assessment of the Federal Labour Court is based on the assumption that the ban on the expression of religious belief under § 57 sec. 4 sentence 1 SchulG NW already applies in the case of an abstract danger. The assumption that even parents' "justified concern" about an undesirable religious influence on their children endangers the peace at school does not take due account of the educational staff's freedom of faith and freedom to profess a belief at an interdenominational school. It neglects the weight of the educational staff's positive freedom of faith in connection with a plausibly explained imperative religious requirement to cover oneself. The findings to date, moreover, provide no indication that the complainants' appearance at their schools constitutes a sufficiently specific danger to the peace at school or the state's neutrality. 120

In neither of the initial proceedings did the regular courts adopt a correct understanding of the legal provision, sufficiently taking into account the complainants' fundamental freedom of faith. Neither the findings of the labour courts in the proceedings on the facts nor the assessment in law by the Federal Labour Court reveal any circumstances that might illustrate a sufficiently specific danger to the legal interests protected by the norm. On the contrary, complainant II had even applied for her position with a photograph showing her in a headscarf. Her employment contract, initially for a fixed term, was later changed to a permanent position. By her account, which has not been contradicted, she always performed her work wearing a headscarf covering her hair, without this causing any objections. Under these circumstances, the warning notice upheld by the labour courts, and the dismissal of complainant II on the stated grounds, together with the underlying understanding of § 57 sec. 4 SchulG NW, are constitutionally untenable. In the initial proceedings for complainant I as well, there is not the slightest indication of how wearing a woollen hat and a polo-neck sweater could represent a sufficiently specific danger to the peace at school or the state's neutrality. 121

Therefore, the challenged decisions infringe the complainants' fundamental right 122

under Art. 4 secs. 1 and 2 GG.

III.

The further constitutional objection that the complainants raise against sentence 3 of § 57 sec. 4 SchulG NW is well-founded. The partial requirement under section 3 of the provision, which is intended by the legislature to confer a privilege on presenting Christian and occidental educational and cultural values or traditions, constitutes a disadvantaging on the grounds of faith and religious beliefs that is contrary to equal treatment (Art. 3 sec. 3 sentence 1, Art. 33 sec. 3 GG). This violation of the Constitution is reflected in the challenged decisions. It is true that these decisions are not based on sentence 3 of § 57 sec. 4 SchulG NW, because sentence 3 does not apply to the two Muslim complainants. However, it is precisely the exclusion from the privilege provided in sentence 3 that leads to the unconstitutional disadvantaging of the complainants by the very two decisions to be reviewed here too. If the complainants enjoyed this privilege, they would not have been exposed to the labour-law sanctions under § 57 sec. 4 sentences 1 and 2 SchulG NW. However, the provision under § 57 sec. 4 sentences 1 and 2 SchulG NW and the challenged decisions are not affected by this; § 57 sec. 4 SchulG NW, in the interpretation in conformity with the Constitution adopted here, is not unconstitutional as a whole. 123

1. § 57 sec. 4 sentence 3 SchulG NW results in the disadvantaging of followers of religions other than the Christian and Jewish faiths that cannot be justified under constitutional law. 124

a) Art. 3 sec. 3 sentence 1 GG requires that no one may be placed at a disadvantage or favoured because of his or her faith or religious views. The norm reinforces the general principle of equality under Art. 3 sec. 1 GG and the freedom of faith protected by Art. 4 secs. 1 and 2 GG. 125

Under Art. 33 sec. 3 sentence 2 GG, no public employee (*Träger eines öffentlichen Amtes*) may be placed at a disadvantage by reason of adherence or non-adherence to a particular religious denomination or ideological creed. The concept of public employment as used in Art. 33 sec. 3 GG must be understood in the same sense in which it is used in Art. 33 sec. 2 GG; it therefore also includes persons employed in the civil service who are not civil servants (cf. […]). The provision also includes a ban on disadvantaging in the civil service above and beyond the question of admission to public employment (cf. on this § 57 sec. 6 SchulG NW), which is addressed in sentence 1 of the provision. The provision forbids barring persons from admission to public employment on grounds that are incompatible with the freedom of faith protected in Art. 4 secs. 1 and 2 GG (cf. BVerfGE 79, 69 <75>). This does not exclude establishing official duties that interfere with the freedom of faith of employees and applicants for civil service, and that thus impede or even exclude applicants who are adherents of a certain faith from having access to civil service. Any such duties, however, are subject to the strict justification requirements that apply for restrictions on the freedom of faith, which is guaranteed without reservation; moreover, the re- 126

quirement of strict equal treatment of different faiths must be observed in both the establishment and the practice of enforcing such official duties (cf. BVerfGE 108, 282 <298>).

b) According to the ideas that became apparent in course of the legislative process (cf. LTDrucks 13/4564, p. 8; 14/569, p. 9), the overall design of § 57 sec. 4 SchulG NW was meant to provide for an exemption, in sentence 3, from the prohibition on the expression of religious beliefs by outer appearance or conduct under sentence 1, and thereby to bring about direct unequal treatment on religious grounds. The complainants plausibly argue that the provision of § 57 sec. 4 SchulG NW is aimed at treating the head-covering of a Muslim woman, worn for religious reasons, differently than clothing with religious connotations worn by adherents of Christian faiths and of Judaism. This assessment is supported by the aforementioned background materials from the legislative process (see d below). 127

c) This unequal treatment cannot be justified under constitutional law. If expressions of religious belief by the outer appearance or conduct of educational staff at school are to be prohibited, this must, as a general rule, be done without distinctions. 128

There are no apparent nor sound reasons to justify disadvantaging those expressions of religious belief by outer appearance or conduct that cannot be traced back to Christian-occidental cultural values and traditions. If a certain outer appearance or conduct can have a particularly indoctrinating suggestive power, the ban in sentence 1 of § 57 sec. 4 SchulG NW in its constitutionally required restrictive interpretation readily takes that into account. If some legal scholars argue that an objective observer would perceive women wearing an Islamic headscarf as proponents of a far-reaching unequal treatment of men and women, including in the legal sphere, and that therefore this conduct would cast doubts on such a person's suitability to practise educational professions (cf., for example, Bertrams, Deutsches Verwaltungsblatt – DVBl 2003, pp. 1225 <1232 et seq.>; Hufen, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2004, p. 575 <576>; Kokott, Der Staat, 2005, pp. 343 <355 et seq.>; Rademacher, Das Kreuz mit dem Kopftuch, 2005, p. 24), such a general assumption is impermissible (see B. II. 5. above). In addition, such a purported justification must fail, as, under a generalising perspective, it can by no means provide a reason for treating all non-Christian-occidental cultural values and traditions differently. 129

Likewise, there are no tenable justifications for favouring expressions relating to Christian or Jewish faith. The educational mandate of the state, as described in Art. 7 sec. 1 and Art. 12 sec. 3 of the North Rhine-Westphalian Constitution, cannot justify favouring office holders of a certain denomination when establishing official duties. Insofar as such provisions of the constitutions of the *Laender* may be interpreted to contain references to Christian values in the state school system, this should refer to secularised values of Christianity. Furthermore, under what is presumably the predominant interpretation, the educational objective stated in Art. 7 sec. 1 of the North Rhine-Westphalia Constitution ("respect for God") does not refer solely to the Christ- 130

ian faith; it must remain open to a personal understanding of God – and must therefore include not only a Christian one, but also the Islamic one, as well as polytheistic or impersonal concepts of God (cf. Ennuschat, in: Löwer/Tettinger, Kommentar zur Verfassung des Landes Nordrhein-Westfalen, 2002, Art. 7 para. 23 with further references, Art. 12 para. 22; Dästner, Die Verfassung des Landes Nordrhein-Westfalen, 2nd ed. 2002, Art. 7 para. 3; Söbbeke, in: Heusch/Schönenbroicher, Die Landesverfassung Nordrhein-Westfalen, 2010, Art. 12 para. 10; Häberle, in: Festschrift für Wolfgang Zeidler, vol. 1, 1987, p. 3 <14>). After all, the provisions of the *Land* Constitution referred to in § 57 sec. 4 sentence 3 SchulG NW pertain primarily to the organisation of instruction and its general framework, but do not constitute a viable basis for a differentiated regulation of educational staff's official duties. For that reason, in this case it is not relevant that Art. 31 GG likewise sets limits on *Land* constitutions' restricting of the rights of religious equality guaranteed by the Basic Law (see also Art. 142 GG; BVerfGE 96, 345 <364 and 365>).

d) It is not possible to interpret § 57 sec. 4 sentence 3 SchulG NW restrictively in conformity with the Constitution in the way the Federal Labour Court has done in its decisions in order to avert an unconstitutional disadvantaging on religious grounds. This would overstep the limits of an interpretation of the law in conformity with the Constitution, and would be incompatible with the principle that the judiciary is bound by the law (Art. 20 sec. 3 GG). 131

The limit to an interpretation in conformity with the Constitution is where contradiction with the wording and the clearly recognisable intent of the legislature arises. Respect for the democratically legitimated legislature forbids attributing an opposite sense to a law that is clear in its purpose and wording, or fundamentally redefining the normative content of a provision (cf. BVerfGE 90, 263 <274 and 275>; 119, 247 <274>; 128, 193 <209 et seq.>; 132, 99 <127 et seq.>). 132

The Federal Labour Court has held that "presenting" (*"Darstellung"*) Christian and occidental educational and cultural values in the sense of sentence 3 cannot be considered identical with "expressing" (*"Bekundung*") an individual faith in the sense of sentence 1. Furthermore, it held that the word "Christian" referred to a set of values dissociated from Christian beliefs stemming from the tradition of Christian-occidental culture and upon which the Basic Law was also evidently based and which laid claim to validity irrespective of its religious foundation. 133

It is true that the difference in language between sentence 1 ("expressing") and sentence 3 ("presenting") offers a foothold for the interpretation reached by the Federal Labour Court. The *Land* legislature was also aware of a possible restrictive interpretation in this sense during the further course of the legislative project: even before the *Landtag* (state parliament) cast the final vote on the legislation, the Federal Administrative Court had already arrived at a similar interpretive result on a comparable *Land* legislative provision in Baden-Württemberg (§ 38 sec. 2 Baden-Württemberg Education Act, *Baden-Württembergische Schulgesetz* – SchulG BW) (cf. Decisions of the 134

Federal Administrative Court*, Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 121, 140 <147, 150>). In a statement submitted to the *Landtag*, the North Rhine-Westphalian government argued at the time that the Federal Administrative Court's decision should not be understood to mean that there were doubts about the constitutionality of the draft act as a whole. The only question concerned the issue on how to interpret the provision in conformity with the Constitution (*Landtag* Bill – *LT-Vorlage* 14/463, p. 2).

Nevertheless, just as in the drafting of the Act, the intention not to pass a law that would, for example, prohibit teachers from teaching in the habit of a religious order, or from wearing a Jewish kipah, was maintained in the further course of the legislative process (LTDrucks 14/569, p. 9). Consistent with that sense, the provision of § 57 sec. 4 sentence 3 SchulG NW expressly refers to the ban on "expression" in sentence 1 and is constructed, in terms of legislative technique, as an exception. This is further reinforced by the fact that while the wording of sentence 3 does indeed mention the educational mandate under the *Land* Constitution as a whole, it then exempts only the corresponding "presentation" of Christian and occidental educational and cultural values or traditions from the ban on conduct under sentence 1. Meanwhile, the openness to other religious and ideological convictions that is in addition expressly mentioned in the wording of Art. 12 sec. 3 sentence 1 of the North Rhine-Westphalian Constitution is disregarded and omitted. All this makes it clear that the restrictive interpretation of the provision reached by the Federal Labour Court factually redefines its normative content and thus also no longer coincides with the legislative intent that became clearly evident in the legislative process. This intention was not changed by the discussion of a possible different interpretation before the conclusion of the legislative process; that discussion merely shows that the *Landtag* was aware of the risk of the Act's incompatibility with constitutional law. 135

Under the interpretation chosen by the Federal Labour Court, the provision of § 57 sec. 4 sentence 3 SchulG NW takes on a clarifying function at the most. In this interpretation, the presentation of Christian and occidental cultural values is something that is already inherently different from the outer expression of an individual religious view as prohibited in sentence 1. But if that interpretation were correct, there would have been no need for the exception stated in sentence 3 that such a presentation does not contradict the ban on conduct under sentence 1. The statutory establishment of the permissibility of such a mere "presentation" of instructional content dissociated from belief-related content does not fit systematically into the regulatory context of sentence 1. In the interpretation given by the Federal Labour Court, sentence 3 no longer appears to have any meaningful regulatory content within the given normative context. Irrespective of that aspect, this interpretation allows a provision to remain in force which, under a possible broad reading of its wording, could be understood as leaving an opening for discriminatory administrative practices, and whose vagueness in this regard was deliberately retained in the legislative process. 136

But if the approach by the Federal Labour Court thereby fails to adhere to the limits of interpretation in conformity with the Constitution, then § 57 sec. 4 sentence 3 SchulG NW appears to result in a disadvantaging on religious grounds that is contrary to the principle of equal treatment and therefore cannot be justified. 137

2. Therefore, § 57 sec. 4 sentence 3 SchulG NW is to be declared void due to its incompatibility with Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG. The challenged decisions are based on that provision (see III., preceding 1.). 138

IV.

Under the interpretation that is required here by constitutional law, the provision of § 57 sec. 4 SchulG NW (in conjunction with § 58 sentence 2 SchulG NW where applicable), insofar as it concerns expressions of religious belief by outer appearance or conduct on the part of educational staff, does not violate other fundamental rights or other federal law (Art. 31 GG); in particular, it is compatible with the relevant terms of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG) and the European Convention on Human Rights (ECHR). 139

1. Provided the ban on expressing religious beliefs by outer appearance or conduct is interpreted as required in light of educational staff's freedom of faith and freedom to profess a belief, the provision indirectly under review (§ 57 sec. 4, § 58 sentence 2 SchulG NW) raises no further effective constitutional concerns. 140

a) Other fundamental rights confer no further protection here than proceeds from Art. 4 secs. 1 and 2 GG and from Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG. Even assuming that the freedom to choose an occupation (Art. 12 sec. 1 GG) might be affected in a specific case if a religious requirement perceived as imperative were concerned, the objectives pursued by the *Land* legislature by a ban that is limited to a sufficiently specific danger to the peace at school or state neutrality would still constitute particularly weighty community interests that would justify the ban (cf. BVerfGE 119, 59 <83>). 141

b) Under the requisite restrictive interpretation, § 57 sec. 4 sentence 1 SchulG NW does not violate the principle of equal treatment on grounds of gender. However, under the challenged interpretation of the Federal Labour Court, the provision would not have been compatible with the equal treatment requirement insofar as it would have affected the expression of religious beliefs by outer appearance or conduct as was the intention that determined the legislature's choice. 142

Insofar as § 57 sec. 4 sentence 1 SchulG NW – in the challenged interpretation of the Federal Labour Court – already prohibits on duty educators in schools from expressing religious beliefs by outer appearance or conduct, irrespective of any specific danger, the provision disadvantages women, because it makes educational activity in the schools contingent on requirements that in fact quite predominantly cannot be met by women. Although it is true that the provision's wording is gender-neutral, the intended meaning of § 57 sec. 4 sentence 3 SchulG NW is to exempt the wearing of 143

clothing that corresponds to Christian and occidental educational and cultural values or tradition from the ban on expression. But on that basis, at present, the ban on expression, if it applies irrespective of any specific danger, affects men only in vanishingly small numbers, such as in the case of Sikhs wearing turbans. On that basis, in Germany, at present, the challenged provision *de facto* quite predominantly affects Muslim women who wear a headscarf for religious reasons.

The Basic Law also offers protection against *de facto* disadvantaging on the grounds of gender (cf. BVerfGE 97, 35 <43>; 104, 373 <393>; 113, 1 <15>; 121, 241 <254-255>; 126, 29 <53>; 132, 72 <97 and 98, para. 57>). It is true that, as a rule, *de facto* disadvantaging may be justified. But with regard to the challenged provision in the interpretation also intended by the legislature (cf. LTDrucks 13/4564, p. 8; 14/569, p. 9; see, already, C. III. above), no adequate justifying reason is apparent here. In light of both the protection against *de facto* disadvantaging and the educational staff members' religious freedom (B. II. 3. d above), the reasons given for a ban on expression (B. II. 3. a above) offer no justification for such a ban that applies irrespective of any specific danger. Nor does the argument hold up that a ban on headscarves protects women against the discrimination that is already inherent in a religious requirement to cover oneself, because in fact this protection proves to place the persons concerned at a disadvantage (cf. BVerfGE 85, 191 <209>). Nor, again, can the disadvantaging be justified by the argument that the headscarf signals a rejection of the equal treatment of men and women, because this is neither automatically nor consistently the case (on this see B. II. 5. above). 144

By contrast, insofar as under the required restrictive reading the norm does result in the *de facto* disadvantaging of women, this can be justified by the reasons that can also justify an interference with Art. 4 GG (B. II. 3. d bb 4 above). 145

c) […] 146

d) Under the interpretation constitutionally required here, § 57 sec. 4 SchulG NW (in conjunction with § 58 sentence 2, where applicable), as a provision of *Land* law, is compatible with other federal law, and is therefore also not constitutionally objectionable from that point of view (Art. 31 GG; cf. BVerfGE 80, 137 <153>). There is thus no further violation of the complainants' fundamental rights in that respect. Under this interpretation, the provision is consistent both with Art. 9 and Art. 14 ECHR and with § 7 sec. 1 and § 8 sec. 1 AGG. 147

aa) There is no violation of the rights guaranteed under the European Convention on Human Rights. 148

(1) Within the German legal system, the European Convention on Human Rights and its Protocols – insofar as they have entered into force for the Federal Republic of Germany – have the rank of federal law (cf. BVerfGE 74, 358 <370>; 120, 180 <200>; 128, 326 <367>). This attribution of rank means that German courts must observe and apply the Convention just as other federal statutory law if such an interpretation is 149

methodologically tenable. Furthermore – so far as is methodologically tenable – the European Convention on Human Rights must also be consulted as a guide to interpretation in interpreting the fundamental rights and principles of the rule of law under the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 and 296>; BVerfG, Order of the Second Senate of 22 October 2014 – 2 BvR 661/12 – juris, paras. 128 and 129). Statutes as well must be interpreted and applied in accordance with the obligations of international law under the Human Rights Convention (cf. BVerfGE 74, 358 <370>; 127, 132 <164>). However, in the German legal system, the guarantees under the European Convention on Human Rights and its Protocols do not constitute a directly applicable standard for constitutional review (cf. Art. 93 sec. 1 no. 4a GG, § 90 sec. 1 Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). Therefore, in a constitutional complaint to the Federal Constitutional Court, a complainant cannot directly assert a violation of human rights contained in the European Convention on Human Rights (cf. BVerfGE 74, 102 <128>; 74, 358 <370>; 82, 106 <120>; 111, 307 <317>). However, the situation is different if a constitutional complaint indirectly also challenges *Land* law. The Convention, since it ranks as federal law, takes precedence over *Land* law. It is therefore included in the standard of review by way of Art. 31 GG (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 10, 234 <239>).

(2) The freedom of religion guaranteed under the Convention (Art. 9 ECHR) and the prohibition of discrimination (Art. 14 ECHR), as interpreted in the relevant case-law of the European Court of Human Rights (ECtHR), are evidently not violated. The ECtHR has allowed the Contracting States a considerable margin of appreciation in connection with rules on clothing for educational staff, particularly with regard to the prohibition of wearing an Islamic headscarf, in view of the principle of ideological and religious neutrality applicable in the particular country and the protection of third parties' negative freedom of religion, which the Court has held are part of maintaining public security and public order (Art. 9 sec. 2 ECHR) (cf. ECtHR, Dahlab v. Switzerland, decision of 15 February 2001, no. 42393/98, Neue Juristische Wochenschrift – NJW 2001, p. 2871 <2873>; ECtHR <Grand Chamber>, Sahin v. Turkey, judgment of 10 November 2005, no. 44774/98, NVwZ 2006, pp. 1389 <1392 et seq.>, § 107 et seq.; ECtHR, Kurtulmus v. Turkey, decision of 24 January 2006, no. 65500/01; on the limits of this margin of appreciation, see ECtHR, Eweida *et al.* v. UK, judgment of 15 January 2013, no. 48420/10 *et al.*, NJW 2014, p.1935 <1940 para. 95>). The Court has also emphasised the Contracting States' margin of appreciation in respect to allowing a possible ban on "headscarf substitutes" (*"Kopftuchsurrogate"*) to encompass what it calls attempts to evade the ban (cf. ECtHR, Aktas v. France, decision of 30 June 2009, no. 43563/08). 150

A prohibition of religious symbols that is not specifically directed against adherence to a particular religion is also unobjectionable in the light of the ban on discrimination under Art. 14 ECHR, at least on those grounds that could also justify interfering with 151

Art. 9 ECHR (cf. ECtHR <Grand Chamber>, Sahin v. Turkey, judgment of 10 November 2005, no. 44774/98, NVwZ 2006, p. 1389 <1396>, § 165). That is the case here, because the prohibition applies to all religious expressions equally, and goes far beyond those expressed through outer appearance or conduct, and in particular also includes verbal expressions.

On the basis of this case-law of the Court of Human Rights, which must form the starting point for the assessment here (cf. BVerfGE 111, 307 <319>; 128, 326 <368 et seq.>), it must be found that the provisions of the *Land* Education Act underlying the challenged decisions, in the above-mentioned restrictive interpretation that is required by the Constitution, does not give rise to any further concerns proceeding from the European Convention on Human Rights. 152

bb) […] 153-155

2. The question of whether the Federal Labour Court, as the final regular court of appeal, deprived the complainants of their lawful judge (Art. 101 sec. 1 sentence 2 GG) by failing to request a preliminary ruling of the Court of Justice of the European Union under Art. 267 sec. 3 TFEU need not be addressed in any further detail. The decisions of the Federal Labour Court already prove to be incompatible with the Basic Law on other grounds. 156

V.

Accordingly, § 57 sec. 4 sentence 3 SchulG NW is void because it is incompatible with Art. 3 sec. 3 and Art. 33 sec. 3 GG (§ 95 sec. 3 BVerfGG). The challenged decisions of the labour courts violate each of the complainants' fundamental right under Art. 4 secs. 1 and 2 GG. The decisions of the Higher Labour Courts and of the Federal Labour Court must be reversed. This Senate remands the matters to the relevant Higher Labour Courts (§ 95 sec. 2 BVerfGG). This allows the judges of fact to establish further facts which may then be newly assessed by the regular courts on the basis of an interpretation of § 57 sec. 4 SchulG NW in conformity with the Constitution. 157

C.

[…] 158

The decision was reached by a majority of 6 votes to 2. 159

Gaier Eichberger Schluckebier

Masing Paulus Hermanns

Baer Britz

Separate Opinion of Justices Schluckebier and Hermanns

to the Order of the First Senate of 27 January 2015

– 1 BvR 471/10 –

– 1 BvR 1181/10 –

We are unable to concur with large parts of the results of the decision and its reasoning. 1

The restrictive interpretation that the Senate requires for § 57 sec. 4 sentence 1 SchulG NW, to the effect that only a sufficiently specific danger to the peace at school and to state neutrality can justify a ban on the expression of religious beliefs by outer appearance or conduct on the part of educational staff, when compliance with a religious requirement perceived as imperative is concerned, gives too little weight in its assessment of proportionality to the constitutionally protected legal interests that oppose the educational staff's individual fundamental rights. Thus, it neglects the importance of the state's educational mandate, which is to be fulfilled under the duty of ideological and religious neutrality, as well as the protection of the parents' right to bring up their children and pupils' negative freedom of faith. Thus the Senate also unacceptably curtails the *Land* legislature's margin of appreciation in structuring the multipolar fundamental rights situations that are particularly typical of interdenominational state schools. Thus, the Senate also departs from the criteria and guidelines developed in what is known as the Headscarf Decision pronounced by the Second Senate on 24 September 2003 (BVerfGE 108, 282). In that decision, the Second Senate held that the *Land* legislature, legislating on the school system, has the task, specifically with regard to state schools, of defining by law to what extent religious references are permitted in schools or must be kept out of schools due to a stricter understanding of the principle of neutrality. In our opinion, there is no constitutional objection to the ban which the North Rhine-Westphalian legislature, legislating on the school system, intended with regard to those expressions by education staff of religious belief by outer appearance or conduct that are able, even in the abstract, to endanger the peace at schools and state neutrality. However, in order for an expression by means of clothing with religious connotations to be able to endanger the protected interests, those expressions must be strong religious statements (see I.). 2

Sentence 3 of § 57 sec. 4 SchulG NW provides that fulfilling the educational mandate of the schools under the North Rhine-Westphalian Constitution and the associated presentation of Christian and occidental educational and cultural values or traditions does not conflict with the requirements for conduct under sentence 1. Contrary to the Senate's opinion, the Federal Labour Court's interpretation of sentence 3 is unobjectionable under constitutional law. That interpretation, which draws on the case-law of the Federal Administrative Court, remains within the limits of the principle that the judiciary is bound by the law (Art. 20 sec. 3 GG). But if this does not constitute an exemption for Christian and Jewish religions from the ban on expression under sen- 3

tence 1 in § 57 sec. 4 SchulG NW, and therefore does not privilege them – which we too believe would be contrary to the principle of equality – then there is also no reason to declare sentence 3, which constitutes one part of the legal framework as a whole, unconstitutional and void (see II.).

Consequently, there are also no convincing objections against the challenged provision in § 57 sec. 4 SchulG NW on the basis of other fundamental rights of the complainants, the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the federal General Equal Treatment Act (on that point see III.). As a result, at most, the constitutional complaint of complainant I should have been viewed as well-founded, because, within the given environment of a school, the head covering she wore (a woollen cap and a polo-neck pullover of the same colour) is not easily interpretable as an expression of religious belief. The constitutional complaint of complainant II, by contrast, appears unfounded in application of the above standards (on that point see IV.). 4

I.

The prohibition intended by the North Rhine-Westphalian legislature under § 57 sec. 4 sentence 1 SchulG NW against expressions of religious belief made by way of the outer appearance and conduct of educational staff if those expressions are able to endanger or disturb the peace at school or the state's neutrality, is constitutionally unobjectionable if the effect of the expression is sufficiently strong. From a constitutional point of view, the restrictive interpretation of the provision, according to which the prohibition in the instant situation requires a sufficiently specific danger to the legally protected interests, is not necessary. On the contrary: it attaches too little weight to parents' right to raise their children and the pupils' negative freedom of faith, as well as the state's educational mandate, which is to be fulfilled under a duty of ideological and religious neutrality, relative to the educational staff's freedom of faith within the multipolar fundamental rights situations in schools, which must be brought into careful balance ("schonender Ausgleich") [*translator's note: a balance by which all fundamental rights concerned are affected as little as possible*], and it also curtails the legislature's leeway to design. With this leeway, the legislature is free to prohibit such expressions even if they represent only an abstract danger to the legally protected interests. 5

1. An interdenominational state school is characterised by the encounter of different religious convictions of the educational staff, pupils and parents, whose fundamental rights guarantees also include wearing clothing with religious connotations in everyday life. In regard to educational staff who exercise their individual freedom of faith at a school, defining the educational mandate of the state, which it must fulfil while promoting a benevolent neutrality towards various religious and ideological inclinations, requires an appropriate and considerate balancing of the constitutionally protected legal interests involved. The essential issues in this balancing must be decided on by the legislature. In accordance with the case-law of the Federal Constitutional Court 6

until now, it could be assumed that the Basic Law allows for broad leeway to design of the *Laender* within the school system; accordingly, Art. 7 GG also concerns the substantial autonomy of the *Laender* and, under their educational sovereignty, the generally free organisation of compulsory education, including with regard to the ideological and religious characteristics of the state schools (thus most recently, BVerfGE 108, 282 <302, 310 et seq.>; see also BVerfGE 41, 29 <44-45>; 52, 223 <242-243>). According to the Second Senate's judgment of 24 September 2003 (BVerfGE 108, 282), this broad leeway to design with regard to the school system, as hitherto accorded to the *Laender,* includes, in formulating the educational mandate, the possibility of attributing a stricter and more distancing meaning than before to the state's neutrality in the school environment, and accordingly also the possibility of generally keeping pupils away from the religious references evoked by the outer appearance of a member of the educational staff, so as to avoid conflicts with pupils, parents or other members of the educational staff right from the start (cf. BVerfGE 108, 282 <310>). Accordingly, it is first of all a matter for the *Land* legislature to decide how to reach a considerate balance in defining the educational mandate within the multipolar fundamental rights situation at school. In doing so, it may broadly permit religious references at interdenominational schools (cf. BVerfGE 52, 223 – School Prayer); but – apart from the guarantee of religious instruction (Art. 7 sec. 3 GG) – it may also largely keep them out of schools. If the *Land* legislature decides – for example in view of rising cultural and religious diversity – to restrict the permissible scope of religious references at interdenominational schools, then – particularly with respect to the educational staff's conduct – the legislature is free to act even preventively against possible influences on the pupils, so as to avert from the very start any conflicts, which are not unlikely to arise, between educational staff and pupils, as well as their parents, and also within the student body (cf. BVerfGE 108, 282 <307, 309, 310>).

These standards, which were at least strongly implied in the Second Senate's decision cited here, even if the First Senate that is called upon to decide here tacitly views them now as not having been essential to the decision, should in our opinion have been adopted as a basis for the constitutional assessment, also in the interest of maintaining predictable constitutional case-law. After all, the legislatures, legislating on the school system, have proceeded from precisely this understanding of that decision, as in the present case in North Rhine-Westphalia where they took the Second Senate's decision dating from 2003 (BVerfGE 108, 282) as an occasion for adopting a corresponding statutory provision. […] 7

The legislature's intended understanding of the norm, which the Federal Labour Court adopted in its interpretation in the proceedings below and according to which even an abstract danger to the peace at school and the state's neutrality is sufficient to prohibit an expression of religious belief, is also consistent with the case-law of the European Court of Human Rights (ECtHR). That court has allowed the Member States a considerable margin of appreciation, and with regard to what is known as headscarf bans, has emphasised that, because of the special status of members of 8

the teaching staff as “representative[s] of the state”, their freedom of religion takes on less weight in balancing the relevant rights and values. In the ECtHR’s opinion, it is irrelevant whether the situation in the specific case gives rise to specific indications to believe that the pupils’ rights are endangered. Instead, it held, it is sufficient that such effects cannot be ruled out. With reference to wearing religious symbols, it held that this can be assumed if strong external symbols are involved (cf., e.g., ECtHR, Dahlab v. Switzerland, decision of 15 February 2001, no. 42393/98, NJW 2001, p. 2871 <2873>).

2. We consider the assessment on which the present Senate bases its review of proportionality, and specifically its appraisal of the Second Senate’s judgment of 24 September 2003 (BVerfGE 108, 282), to be unconvincing. Rather, the legislature deciding on school matters can lay claim to good and sound reasons to deem even an abstract danger to the peace at school and the neutrality of the state sufficient to justify the general prohibition at issue against expressions of religious belief, including those made by way of one’s outer appearance. Choosing such a solution to pursue this legitimate aim determined by the legislature must be considered both appropriate and reasonable. 9

a) The Senate assumes that if educational staff wear clothes with a religious connotation, which is perceived as an expression of religious belief in the social environment, this would be understood to be an individual exercise of a fundamental right. It holds that seeing them does not amount to more than visual perception and does not *per se* impair the pupils’ negative freedom of faith and the fundamental right of parents. It also holds that educational staff’s wearing a garment such as an Islamic headscarf cannot be viewed as serving as a role model. Furthermore, in its opinion, there is no right to be spared from exposure to others’ exercise of their individual fundamental rights, so long as that exercise does not involve any deliberate influencing effect. 10

We believe that this analysis only inadequately grasps and weighs the effects on the negative freedom of faith of both pupils and parents, as well as the fundamental right of parents, and that is not in line with reality. It neglects the fact that the relationship between educational staff and pupils is one of specific dependency to which pupils and parents are subjected more than merely briefly, and without the possibility of avoiding it. The extent to which they are affected differs fundamentally from what occurs in the encounter between various religious faiths and expressions in everyday social life, which people in a pluralistic society must deal with and tolerate even if, in specific cases, for example in public space, they can avoid it only to a limited degree. In any case, such contacts as a rule are only occasional and of no noteworthy duration. All by itself, this already distinguishes them from the encounter and confrontation in the school, which a pupil cannot avoid and where refusal to participate in a class is even sanctioned. Consequently, pupils cannot avoid the educational staff and their convictions at school. Furthermore, it is the task of the educational staff to instruct pupils and to educate, advise, assess, supervise and look after them (§ 57 sec. 1 11

SchulG NW). This also explains the special relationship of dependency between pupils and educational staff, who are involved in decisions on promotions to the next class and awarding a school-leaving qualification. Educational staff are therefore not comparable to random persons from society whom the pupils merely look at and whose views they must tolerate; rather, they appear as persons of authority at school. This also applies to social educational staff who are entrusted with resolving school conflicts (cf. § 58 sentence 2 SchulG NW). This results in a far more extensive exposure to expressions of religious belief than is the case in everyday social encounters. The two are not comparable.

b) Furthermore, at school, the members of the educational staff interacting with the pupils serve as a role model for these. The desired educational effect usually triggers some form of reaction in pupils, and indirectly among their parents. Expressions of religious belief by wearing clothing with a religious connotation – depending also in part on the age of the pupils concerned – may, not necessarily although it cannot be ruled out, also exert a certain suasive effect, whether in the sense that this conduct is perceived as exemplary and worthy of following, and adopted, or whether it is firmly rejected. In this context, it must be borne in mind that education at school serves not merely to convey fundamental cultural techniques and develop cognitive capabilities. It is also intended to help pupils develop their emotional and affective predispositions. School is intended to support the development of their personalities comprehensively, especially including their social conduct. It is the task of the educational staff to implement this (cf. § 57 sec. 1 SchulG NW). The staff's conduct, including their adherence to certain religious rules of clothing, is perceived by persons who, due to their youth, have not fully established their beliefs, who have yet to acquire the ability to think critically and to develop their own points of view, and who therefore are particularly open to mental influence (as the Senate held in BVerfGE 93, 1 <20> – Crucifix; cf. also BVerfGE 52, 223 <249>). A truly open discussion on adhering to religious rules of clothing and practices in cases where members of educational staff are personally concerned in the specific context of the relationship of dependency established at schools is only possible to a limited extent, if at all. 12

Finally, educational staff's wearing clothing with a religious connotation may ultimately trigger or promote conflicts among pupils or parents, especially if the persons concerned might belong to schools of faith that are similar but that diverge with respect to certain religious rules – such as the requirement to cover oneself – on which views on "correct" faith-based conduct differ. Even if such expressions of belief need not necessarily lead to an impairment of negative freedom of faith and the fundamental right of parents, there is still a considerable risk in this regard. In its balancing process, the legislature may therefore give substantial weight to protecting these fundamental rights. 13

c) Members of educational staff are entitled to enjoy their freedom of faith as individuals. However, at the same time they are holders of public employment and are therefore bound by the principle of promoting neutrality of the state in religious mat- 14

ters as well. This is due to the fact that the state cannot act as an anonymous entity, but only through its holders of public employment and the members of its educational staff. These are its representatives. Therefore the state's duty of neutrality cannot be different from the duty of neutrality incumbent on its holders of public office. For members of educational staff at a school, as individuals, unlike for an individual in exclusively social contexts, it is therefore necessary to be reticent about expressions of religious belief if the member's conviction may collide with the fundamental rights of others in the course of carrying out the state's educational mandate. […]

d) When deciding on the largely preventive ban at hand, the legislature was able to base its decision, *inter alia*, on the largely concordant assessments given by teachers and other members of educational professions consulted – following the Second Senate's headscarf decision (BVerfGE 108, 282) – during hearings in various *Landtage*. […] This [*translator's note: one such assessment*] is also reported to have had the content that the problem should by no means be "unloaded" onto the individual schools, but rather the legislature should find a general solution (Rainer Mack, 13th *Landtag* of Baden-Württemberg, Committee on Education *et al.*, 12 March 2004, pp. 101 et seq.). This point of view was consistent with statements from the Schleswig-Holstein Association of Head Teachers and the Association of School Supervisors of the *Land* Hesse, in the legislative procedures in those federal states. […] In the same way, statements have been made in the hearings in the *Landtag* of North Rhine-Westphalia that particularly point out the problems at primary and secondary schools with respect to the various directions and attitudes of Islamic pupils and parents in relation to the educational staff. It was said that specifically these pupils and their parents engaged in discussions about "correct piety". […]. 15

These statements illustrate the importance of a general, even uniform *Land*-wide prohibition of the expression of religious beliefs even in the case of a merely abstract danger to the peace at school and the neutrality of the state. Additionally, it is clear that limiting the application of the prohibition to cases in which there is a sufficiently specific danger to the protected interests will result in greater difficulties in school practice when it comes to collecting evidence and proving such a case. Those difficulties will necessarily have to be resolved by the school administration with the participation of pupils and parents and will reinforce a personalisation of a possible conflict, which is more likely to be detrimental to the fulfilment of the educational mandate. Given this background, one must acknowledge the legislature's endeavour to establish a uniform, general rule so as to keep ideological and religious conflicts out of schools as far as possible and to establish the permissible degree of expression of religious belief in a predictable form, independently of any potential for conflict related to an individual case. 16

e) The specific situation in schools, as has already been explained, is characterised first of all by the fact that it cannot be avoided, and second by the especially suasive nature of suitably strong expressions of religious belief, as well as a special relationship of dependency. In this situation, it is not merely a remote possibility that pupils 17

and parents may come to feel doubt about the requisite neutrality of the educational staff concerned. These conditions support the legislature's assessment that in a diverse society, where extensive religious homogeneity can no longer be taken for granted, it is necessary and appropriate, for protecting pupils' positive and negative freedom of faith as well as the corresponding fundamental rights, and for maintaining the requisite neutrality of the state in carrying out its educational mandate, to prohibit educational staff at school from engaging in any form of expression of religious belief with strong effect, if that expression represents a danger, even if only in the abstract, to the aforementioned protected interests. The Senate holds that this is appropriate and reasonable only if the educational staff are allowed, when fulfilling the state's educational mandate in a school context, to exercise their individual fundamental right to freedom of faith to an extent that stops only at the threshold of exercising a deliberate influence and creating a sufficiently specific danger to the peace at school and the state's neutrality. But this assessment neglects to take into consideration the specific situation in schools. The state requires pupils and parents to participate in the "public event that is school" ("*Veranstaltung Schule*") for the development and education of young persons. The pupils are thus entrusted to the state for education. Participation is very largely mandatory. This entails a status of the state as a guarantor. Basing an assessment only on the view that the state merely tolerates the individual exercise – not directly attributable to the state – of the educational staff's fundamental rights, and that pupils merely have to look at certain clothing of educational staff that is obviously based on those staff members' individual decisions, therefore falls short of the mark. Such a simplified differentiation between symbols attributable to the state, on the one hand, and individual clothing with a religious connotation worn by educational staff, on the other hand, negates the *influence* that even an individual exercise of fundamental rights by educational staff might exert on pupils.

3. To sum up, in our opinion, it is not constitutionally objectionable to prohibit expressions of religious belief by the outer appearance of educational staff even if there is only an abstract danger to the peace at school and the neutrality of the state. In accordance with the case-law of the European Court of Human Rights, however, it is necessary to limit the prohibition of wearing clothing with religious connotations to cases in which the clothing constitutes a strong statement in this sense. However, the *Land* legislature deciding on school matters is constitutionally also free to allow references to religions to a broad extent, for example if it considers this to be appropriate in the interest of teaching tolerance and understanding. However, it is under no constitutional obligation to do so. 18

4. An extension of the constitutional review to include sentence 2 of § 57 sec. 4 SchulG NW was not called for. It is true that the school administration also cited this provision in the initial cases. But the challenged decisions of the labour courts were not based on it. All the same, we must concur with the Senate that the mere wearing of a so-called Islamic headscarf is no basis for concluding that the requirements for this prohibition have been fulfilled. 19

II.

The Federal Labour Court's interpretation of § 57 sec. 4 sentence 3 SchulG NW, which stipulates that fulfilling the educational mandate of the school in accordance with the Constitution of the *Land* North Rhine-Westphalia and the corresponding presentation of Christian and occidental educational and cultural values or traditions do not contravene the rule on conduct pursuant to sentence 1, is in line with the principle that the judiciary is bound by the law (Art. 20 sec. 3 GG) and under this interpretation is not objectionable under constitutional law. This part of the provision should therefore not have been held unconstitutional. 20

[…] 21-25

III.

On the basis of our constitutional assessment under the standard of Art. 4 secs. 1 and 2 GG and for the reasons listed above (under I.), one also cannot find any violation of any further fundamental rights, the European Convention on Human Rights, or the General Equal Treatment Act, as federal law (cf. Art. 31 GG). There is no need to explain this point further in this separate opinion. […] 26

[…] 27-29

IV.

In our opinion as well, the constitutional complaint of complainant I should ultimately have been deemed well-founded. The covering she wore, a woollen hat and a polo-neck pullover of the same colour, does not as such have a religious connotation and is not automatically open to interpretation as a strong religious statement even in the given context of a school. In this regard, the challenged decision does not contain any tenable, sound reasons. Such reasons would have be all the more necessary following her change of head covering from a typically tied headscarf to a woollen hat, because this connotation gradually fades as time goes on. 30

By contrast, the constitutional complaint of complainant II does not appear to be well-founded according to the standards explained under I. through III. above. At most, in light of the protection of legitimate expectations required under the rule of law (Art. 20 sec. 3 GG), it would have been conceivable to ask for a more differentiated statutory solution for old cases [such as hers] because she had been employed in the school system long before the provisions in question were promulgated and had disclosed her faith-based clothing practice at that time, and because of her long-standing teaching activity that had gone without objection with regard to the protected interests concerned. 31

Schluckebier Hermanns

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 27. Januar 2015 - 1 BvR 471/10, 1 BvR 1181/10

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