Special Section
The Constitutional Court's Headscarf Case

One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10

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Abstract

The First Senate of the German Constitutional Court held in its decision on 27 January 2015 on the ban of headscarves that a blanket ban on religious statements for teachers in public non-denominational schools—that does not require a sufficiently *concrete* threat to the peace at the schools or the state's neutrality—is unconstitutional. The Court further nullified a discriminatory clause that privileged Christian-occidental educational and cultural values and traditions *vis-à-vis* other religions. By doing so, Karlsruhe made a strong plea in favor of understanding the German State's neutral role in religious matters as one of openness and inclusion of a plurality of religions and worldviews, rather than that of a laizistic polity. It brought its jurisprudence in line with the United Nations Human Rights Committee's approach in similar matters. Though, arguably, the case would have required a referral to the Joint Senate of the Constitutional Court, as it marks a deviation from the Second Senate's decision from 2003, the findings of the Court on the substantive law are to be welcomed.

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A. Introduction

In its landmark headscarf decision,[1] the First Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) held that a blanket ban on religious statements for teachers in non-denominational public schools—that does not require a sufficiently *concrete* threat to the peace at the schools (*Schulfrieden*) or the state's neutrality—is unconstitutional. It further nullified a provision that privileged Christian-occidental educational and cultural values and traditions. By doing so, the Court made a strong plea in favor of understanding the German State's neutral role in religious matters as one of openness and inclusion of a plurality of religions and worldviews, rather than that of a laizistic polity. This decision further, arguably, marks a considerable—though not open—change of direction in the jurisprudence of the Court, as the First Senate's ruling contradicts the decision of the Second Senate from 24 September 2003,[2] which left it to the legislature to decide on bans of religious symbols and clothing in public schools. The decision, moreover, brings with it two interesting outcomes from the perspective of international human rights protection. Within the wide margin of appreciation that is granted by the European Court of Human Rights (ECtHR) towards member states in matters of religious symbols and clothing in public schools, the First Senate brings its jurisprudence into conformity with the rather restrictive approach of the United Nations Human Rights Committee (UNHRC). Further, the Senate made clear that the European Convention on Human Rights (ECHR)[3] is—through the prism of Article 31 of the Basic Law (*Grundgesetz - GG*)[4] and by virtue of the German law implementing the convention—directly part of the applicable law when reviewing *Land* legislation.

[1] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10, http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html; *see also Press Release No. 14/2015*, BUNDESVERFASSUNGSGERICHT, Ein Pauschales Kopftuchverbot für Lehrkräfte im Öffentlichen Schulen ist mit der Verfassung Nicht Vereinbar, Case No. 1 BvR 471/10, 1 BvR 1181/10 (Mar. 13, 2015), *available at* https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2015/bvg15-014.html.

[2] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 24, 2003, Case. No. 2 BvR 1436/02, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html.

[3] Eur. Consult. Ass'n, *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature Nov. 4, 1950 and entered into force Sept. 3, 1953), ETS No. 5, 213 UNTS 222, *amended by* Protocol No. 14 (entered into force June 1, 2010), UNTS No. A 2889, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

[4] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] art. 31, *translation at* http://www.gesetze-im-internet.de/englisch_gg/.

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B. Facts of the Case

The constitutional complaint concerned sanctions against the complainants due to their refusal to abstain from wearing a headscarf, or in the case of one complainant, a woolen hat as a substitute, when carrying out their duties as teachers in public non-denominational schools.[5]

In 2006 the North Rhine-Westphalian legislature enacted Section 57(4) of the North Rhine-Westphalian education act (*Nordrhein-Westphälisches Schulgesetz*).[6] The first sentence prohibits teachers of non-denominational public schools from professing political, religious, or philosophical creeds that may pose a threat to the neutrality of the state *vis-à-vis* pupils and parents or that may threaten the political, religious, or philosophical peace at school.[7] The second sentence stipulates that any conduct that may bring about the impression for pupils and parents that a teacher opposes human dignity, equality before the law, constitutional rights, or free democratic order is particularly prohibited.[8] However, pursuant to the third sentence of Section 57(4), the state's educational mission enshrined in the North Rhine-Westphalian constitution and the corresponding presentation of Christian-occidental educational- and cultural values and traditions is not to be considered a violation of the prohibition contained in the first sentence of Section 57(4).[9]

Both complainants are German citizens of Muslim faith that worked in non-denominational public schools in North Rhine-Westphalia. The first complainant followed the school authority's order not to wear a headscarf in school and instead wore a hat and a polo-neck sweater, leading the school authority to issue a warning to her.[10] The second complainant was removed from office after she did not follow a warning that prohibited her from wearing a headscarf in school.[11] Their actions against the sanctions were dismissed by the German labour courts.[12] The constitutional complaints were directed against the sanctions and the decisions by the German labour courts, as well as—indirectly—against the underlying North Rhine-Westphalian legislation. Both complainants asserted *inter alia*

[5] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 1–17.

[6] SCHULGESETZ FÜR DAS LAND NORDRHEIN-WESTFALEN (SCHULG NW) p. 102 (Feb. 15, 2005) in der Fassung des ersten Gesetzes zur Änderung des Schulgesetzes 270 (Jun. 13, 2006).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] For more on the factual and procedural background with regard to the first complainant, see BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 7–25.

[11] *See id*. at paras. 26–37.

[12] *See id.* at paras. 11–25, 30–37.

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violations of their rights under Article 4 in conjunction with Articles 12 and 33 of the Basic Law, Articles 3 and 33 of the Basic Law in conjunction with Articles 9 and 14 of the ECHR, as well as Article 101 of the Basic Law.[13]

C. Summary of the Judgment

The Court held, by a 6–2 majority, that the constitutional complaints were well-founded in substance.

I. Restrictive Interpretation of Section 57(4) of the Education Act

In the Court's opinion, the first two sentences of Section 57(4) of the North Rhine-Westphalian Education Act are only constitutional if interpreted in conformity with the German constitution to the effect that a profession of religious belief has to pose a sufficiently *concrete* threat to the peace at the schools or the state's neutrality; an *abstract* threat was not deemed sufficient by the Court.[14] Therefore, it declared the decisions of the German labor courts that did not apply such a restrictive constitutional interpretation unconstitutional.

The Court began by ascertaining that the complainants' wearing a headscarf reflecting their following of religious precepts fell under the scope of the freedom of faith and freedom to profess a religious or philosophical creed protected under Article 4(1) and (2) of the Basic Law.[15] The Court noted that the complainants had demonstrated with sufficient plausibility that their wearing of headscarves was religiously motivated, that different branches of Islam believe in such precepts, and that support for wearing headscarves can arguably be found in two *Surah* in the Koran.[16] According to the Court, the interference with the complainant's rights under Article 4 is of a severe nature.[17] The intrusion into the complainants' rights was, in the Court's view, particularly severe due to the fact that the complainants did not merely invoke a religious recommendation but an imperative precept.[18] The restriction also touched upon the complainants' personal identity—protected under Article 2(1) in conjunction with Article 1(1) of the Basic Law—and may pose an entrance barrier to the job market at schools (which constitutes an

[13] *See id.* at paras. 39–55.

[14] *See id.* at paras. 80–122.

[15] *See id.* at paras. 83–89.

[16] *See id.* at paras. 86–89.

[17] *See id.* at paras. 90–96.

[18] *See id.* at paras. 95–96.

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interference with Article 12 Basic Law), that may cause a negative *de facto* effect on the women's equality (which is protected by Article 3(2) Basic Law).[19]

The Court continued its reasoning by adjudging that the interference would be disproportional if one interprets Section 57(4) of the Education Act to the effect that an *abstract* threat to the peace at schools or to the state's neutrality is sufficient for a prohibition on professing religious belief.[20] As the start of the proportionality analysis, the Court held that the North Rhine-Westphalian legislature pursues a legitimate aim: Namely the preservation of peace at schools, the state's neutrality, the realization of the public educational mandate of the state, and the protection of the colliding basic rights of pupils and their parents.[21] Due to the general diffusion of headscarves in the public, the Court appeared skeptical as to whether a prohibition on the basis of *abstract* threats was necessary in the first place.[22] However, the Court left this question open, as it considered the general prohibition on basis of *abstract* threats as disproportional *stricto senso*.[23] It reasserted that—despite the legislature's wide discretion in assessing the factual developments regarding the threats that religious professions of teachers may pose—the legislature must take into account the weight and relevance of religious freedom under Article 4 of the Basic Law.[24]

In the view of the Court, wearing clothing with a religious connotation is not encroaching upon the negative religious freedom of pupils—that is, the freedom not to be exposed to symbols, rites, and cultic activities—as it does not give a right not to be confronted with religious activities that are inherent in a pluralistic society.[25] With regard to schools, an environment in which pupils are inevitably exposed to religious symbols, one has to differentiate between the individual exercise of religious freedom of teachers and acts of religious manifestations that are attributed to the school.[26] Individual professions by teachers only constitute an interference with the pupils' negative freedom of religion if they contain verbal promotion and attempted influence.[27] Such displays do not *per se*

[19] *See id.* at para. 96.

[20] *See id.* at paras. 97–122.

[21] *See id.* at para. 99.

[22] *See id.* at para. 100.

[23] *See id.* at paras. 100–07.

[24] *See id.* at para. 102.

[25] *See id.* at paras. 103–105f.

[26] *See id.* at para. 104.

[27] *See id.* at para. 105.

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implicate an identification of the state with one specific religion—in contrast to a crucifix in classrooms.[28] In general, the religiously-connoted appearance of one teacher will be offset by the appearance of other teachers with different religions or world-views.[29] Due to this balance of views, the Court saw non-denominational public schools as mirrors of a religiously-pluralistic society.[30] For these reasons, the Court concluded that there was no violation of the parents' rights under Article 6(2) of the Basic Law.[31]

The Court continued by holding that the educational mandate of the state under Article 7(1) of the Basic Law—which prescribes that the state shall carry out its educational mandate neutrally with regard to religion and world-views—only justifies a prohibition the of expression of religious or philosophical creeds if a sufficiently *concrete* threat to the peace at school or the state's neutrality exists. [32] The Senate ascertained that the neutrality of the state is not to be understood as a strict division between state and religion, but rather as an open and all-embracing stance, which supports the plurality of world-views equally.[33] It is worthwhile to directly quote the 2003 decision—here in its English translation—reiterated by the Senate at this point:

> The free state of the Basic Law is characterised by openness towards the variety of ideological and religious convictions and bases this on an image of humanity that is marked by the dignity of humans and the free development of personality in self-determination and personal responsibility…[T]he 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.[34]

The Court emphasized that the very ideal of schools that bear the name "non-denominational" must be taken into account: It is the goal of these schools to impart on their pupils tolerance *vis-à-vis* other religions and world views, and their expression by

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[28] *See id.* at para. 112. On crucifixes in classrooms, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 16, 1995, Case No. 1 BvR 1087/91, para. 1, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%2093,%201.

[29] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 105.

[30] *See id.*

[31] *See id.* at paras. 106–07.

[32] *See id.* at paras. 108–22.

[33] *See id.* at paras. 109–10.

[34] *See* 108 BVerfGE 282 (paras. 42–43); *see also* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 109–10.

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wearing religiously-connoted clothes and symbols, such as—alongside headscarves—the Jewish Kippa, the nun's habit, and the Christian cross.[35]

Under exceptional circumstances—such as fundamental conflicts in a considerable number of cases—temporal bans may also be permitted on grounds of mere *abstract* threats. The Court underlined that this requires differentiated regulation that is so far not at hand and that school authorities are obliged to find other preferential solutions for affected teachers (such as other working possibilities) than the sanctions in question.[36]

Against this background the Constitutional Court found that wearing a headscarf does not *per se* constitute a *concrete* threat to school peace and the state's neutrality, as it does not by its nature serve the purpose of promoting religion or have a missionary effect.[37]

II. Nullification of the Discriminatory Clause Contained in the Third Sentence of Section 57(4) of the Education Act

The Court further declared the third sentence of Section 57(4) of the Education Act—which contains an exception for Christian-occidental educational and cultural values and traditions to the general ban of expression of religious creeds—void, as it violates the right against discrimination based on religion enshrined in Articles 3(3) and 33(3) of the Basic Law.[38] The Court denied the possibility of a restrictive interpretation of this provision in accordance with the constitution— such as that carried out by courts of lower instance—due to the discriminatory intent of the legislature that was clearly expressed in the legislative process.[39] The Court further clarified that there were no viable reasons to justify the unequal treatment of religions and held the argument that wearing a headscarf is objectively a sign for support of the unequal treatment of men and women untenable.[40]

III. A Restrictive Interpretation of Section 57(4) of the Education Act is in Conformity with the ECHR

The Court further found that the restrictive interpretation of Section 57(4) is in conformity with the ECHR.[41] The Court began its analysis of this argument by following up on its

[35] *See id.* at para. 115.

[36] *See id.* at paras. 113–15.

[37] *See id.* at para.116.

[38] *See id.* at paras. 123–38.

[39] *See id.* at paras. 131–37.

[40] *See id.* at paras. 128–30.

[41] *See id.* at paras. 147–52.

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established jurisprudence on the relationship between the German Constitution and the Convention. Namely, the latter has the status of federal law (*Bundesrecht*) and is not, as such, to be applied by the Court as a "direct constitutional standard of review" but rather constitutes a guide to interpretation that must be taken into account.[42] Be that as it may, the Court maintained that the conventional law becomes a direct standard by virtue of the federal law implementing the Convention into the German legal system before the Constitutional Court when the constitutionality of the law of a *Land* (State) is to be examined through the prism of the primacy rule under Article 31 of the Basic Law.[43] When assessing a violation of conventional rights (Articles 9 and 14 of ECHR) through Article 31, the Court referred to the margin of appreciation granted by Strasbourg with regard to states' neutrality in religious matters and concluded that there was no violation of the convention.[44]

IV. No Violation of the German General Equal Treatment Act and No Decision on Violation of Article 101(1) Basic Law

The Court also denied a violation of the German General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*) if a restrictive interpretation of Section 57(4) North Rhine-Westphalian Education Act is applied. [45] Finally, the Constitutional Court left open the question of whether the non-referral for a preliminary ruling to the Court of Justice of the European Union by the German Federal Labour Court constituted a violation of Article 101(1) of the Basic Law, due to the other violations of the Basic Law that were found.[46]

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[42] *See id.* at para. 149. On the status of the convention within the German legal system, see Bundesverfassungsgericht [BVerfG]BVerfG [Federal Constitutional Court], Mar. 26, 1978, Case Nos. 2 BvR 589/79; 2 BvR 750/81; 2 BvR 284/85, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%2074,%20358 (on the presumption of innocence – *Unschuldsvermutung*); BVerfG, Feb. 26, 2008, Case Nos. 1 BvR 1602/07, 1 BvR 1606/07, & 1 BvR 1626/07, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%20120,%20180 (*Caroline III*). On the convention as a "guide to interpretation", see the famous *Görgülü* decision, see BVerfG, Oct. 14, 2004, Case No. 2 BvR 1481/04, http://dejure.org/dienste/vernetzung/rechtsprechung?Text=BverfGE%20111,%20307; *see Further e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 4, 2011, Case Nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, & 2 BvR 571/10, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%20128,%20326 (*Sicherungsverwahrung*).

[43] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 149.

[44] *See id.* at paras. 151–52.

[45] *See id.* at paras. 153–55.

[46] *See id.* at para. 156.

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D. Dissenting Opinion by Justices Schluckebier and Hermanns

In their dissenting opinion,[47] Justices Schluckebier and Hermanns[48] argued that the majority was mistaken in holding that a restrictive interpretation of the first sentence of Section 57(4) North Rhine-Westphalian Education Act is constitutionally required and that an *abstract* threat would be sufficient to trigger the prohibition on religious clothing.[49] In their view, the majority vote does not attach enough value to the public educational mandate of the state, the parental right of childcare and education, and the negative religious freedom of pupils.[50] The majority's appraisal does not meet reality when assuming that wearing religiously-connoted clothes does not interfere with the pupils' negative freedom of faith, as well as with parental rights. It ignores the special relationship between teachers and pupils, to which the latter are unavoidably exposed to more intensely than in other everyday life situations.[51] In the dissenting justices' opinion, the State's neutrality necessarily encompasses the obligation that public officials be neutral in their public function, as the State cannot act as an anonymous entity independent of its public officials.[52]

The dissenters further criticized that the Senate deviated from the 2003 Second Senate judgment,[53] which gave the legislature the discretion to regulate the wearing of religious clothing on public non-denominational schools.[54] This, they argued, is inconsistent with the requirement of predictability.[55] They contended that the majority of the Senate

[47] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10, Appendix to the Order, http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html (dissenting Opinion of Justice Wilhelm Schluckebier and Justice Monica Hermanns).

[48] Justice Hermanns is a member of the Second Senate, not the first. She only happened to sit on the bench in this case due to the partiality of vice-president Ferdinand Kirchhof, who was involved in prior judicial proceedings on prohibitions of headscarves before German courts, as well as the drafting of legislation on a ban of headscarf in Baden-Württemberg. *See* BVerfG, *Kopftuchverbot (Ban on Headscarves),* Feb. 26, 2014, Case Nos. 1 BvR 471/10 & 1 BvR 1181/10, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/02/rs20140226_1bvr047110.html.

[49] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 2, 5–19.

[50] *See id.* at paras. 2–19.

[51] *See id.* at paras. 11–12.

[52] *See id.* at para. 14.

[53] *See* BVerfGE, Case. No. 2 BvR 1436/02.

[54] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 2, 6–7.

[55] *See id.* at para. 7.

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unacceptably interferes with the discretion of the *Land* legislature to regulate multi-polar basic rights relations, which characterize non-denominational public schools.[56] Furthermore, the dissenters advocated that the restrictive interpretation of the third sentence of Section 57(4) of the North Rhine-Westphalian Education Act that was applied by courts of lower instance is to be upheld.[57] Finally, Justices Schluckebier and Hermanns argued that the constitutional complaint concerning the wearing of a woolen hat and a turtleneck sweater is well-founded because these clothes do not on their own terms have a religious connotation.[58]

E. Critique and Impact of the Decision on the Law

I. On Substance

The majority of the First Senate chose a feasible way to deal with the complex and politically sensitive questions concerning the relationship of the state concerning religions and worldviews in a pluralistic society. It is convincing to shift the focus of the constitutional analysis from the question of which behavior may constitute a threat to the neutrality of the state and school peace—an approach supported by Schluckebier and Hermanns[59]—to the question of the concrete impact assessment now imposed on the German authorities. Through this approach, the Court circumvents fruitless debates on the threshold of neutrality and the delimitation of when clothes and symbols overstep this threshold—such as the discussion on when a woollen hat would turn into a religious profession. Further, it is to be welcomed that the Court did not mingle the concept of state's neutrality with laizism but followed up on its settled case law by reiterating that "[t]he free state of the Basic Law is characterised by openness towards the variety of ideological and religious convictions," which is not to be understood as a "distancing attitude in the sense of a strict separation of state and church."[60] By this the Court makes clear that the German Basic Law does not postulate secularism but rather embraces a neutrality of a state that is open and inclusive towards religions and worldviews of its citizens.[61] By drawing the line of state partisanship with respect to specific religions

[56] *See id.* at paras. 2, 6.

[57] *See id.* at paras. 3, 20–25.

[58] *See id.* at para. 30.

[59] *See id.* at para. 30.

[60] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 109–10; BVerfGE, Case. No. 2 BvR 1436/02, paras. 42–43.

[61] *See also* Hans Michael Heinig, *Kurswechsel in der Kopftuchfrage: Nachvollziehbar, Aber mit Negativen Folgewirkungen* (2015), *available at* http://www.verfassungsblog.de/kurswechsel-in-der-kopftuchfrage-nachvollziehbar-aber-mit-negativen-folgewirkungen/#.VdX5Iflv9SM (welcoming the Court's reasoning).

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between behavior of teachers in their individual capacity and those acts that are clearly attributable to the state—such as crucifixes on the wall of classrooms— the Court found a balanced adjustment of the individual rights of teachers and the role of the state. This perspective strengthens the individual freedoms of teachers and provides relief to those who are affected by irreconcilable inner moral conflicts.[62] Further, such an understanding of the state's roles in religious matters ensures that schools mirror the religiously pluralistic society, which the students must be prepared to enter.

The nullification of the discriminatory clause contained in the third sentence of Section 57(4) of the Education Act is to be welcomed without restrictions.[63] Contrary to what was suggested by the Federal Labour Courts, some commentators'[64]—and the dissenting Justices'[65]—blatant discrimination cannot be overcome by an interpretation in accordance with the Constitution.[66] An interpretation that stands in contrast to the wording of the provision, its systematic position, and the discriminatory intent that was openly revealed in the legislative process would go beyond acceptable interpretative means.

II. On Two Voices

Good arguments support the view that the order from 27 January 2015 marks a jurisprudential turnaround by the Court, as it constitutes a deviation from the Second Senate's judgment of 2003.[67]

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[62] *But see* Necla Kelek, *Gefährlicher Stoff,* FAZ-NET, http://www.faz.net/aktuell/feuilleton/debatten/necla-kelek-ueber-das-kopftuchurteil-und-selbstbestimmung-13516184.html (expressing a critique of the decision).

[63] *See also* Michael Wrase, *Kopftuch Revisited - Karlsruhe ebnet Weg für Religiöse Vielfalt in der Schule* (2015), http://www.juwiss.de/15-2015/; Christoph Möllers, *A Tale of Two Courts* (2015), http://www.verfassungsblog.de/a-tale-of-two-courts/#.VdX5bflv9SM.

[64] *See* Heinig, *supra* note 61.

[65] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at paras. 3, 20–25.

[66] For the convincing arguments of the Court, see BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 131–37.

[67] This point is discussed further on www.verfassungsblog.de. *See* Heinig, *supra* note 61; *Von Tragenden Gründen und Abstrakter Gefahr*, http://www.verfassungsblog.de/von-tragenden-gruenden-und-abstrakter-gefahr/#.VdX5lvlv9SM; Möllers, *supra* note 63; *See also* Christoph Möllers, *Geht es Nicht um Verfassungsrecht?* (2015), http://www.verfassungsblog.de/und-ich-dachte-es-waere-ein-verfassungsgericht/; Georg Neureither, *Über Kopftücher, Segelanweisungen und das Pech, zur Falschen Zeit am Falschen Ort und vor dem Falschen Senat zu Sein* (2015), http://www.verfassungsblog.de/ueber-kopftuecher-segelanweisungen-und-das-pech-zur-falschen-zeit-am-falschen-ort-und-vor-dem-falschen-senat-zu-sein/#.VdX6Fflv9SM (arguing that in fact the First Senate's order is a deviation from the 2003 decision). *See also* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 7 (dissenting opinion).

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In its 2003 decision, the Second Senate left it to the discretion of the *Länder* legislatures to decide on bans of religious symbols and clothes for teachers when adjudicating the constitutionality of the Baden-Wurttemberg legislation.[68] It held that the neutrality of the state in religious matters and its openness to the plurality of religions allows for both a prohibition as well as an allowance of religious symbols and clothes.[69]

Some commentators argue that the question of whether an *abstract* or *concrete* threat to school peace and the State's neutrality is the threshold for the constitutionality of a prohibition on religious clothes and symbols was not dealt with by the Second Senate in its reasoning, as the judgment mainly concerned the requirement of a legal basis for the prohibition. [70] Also, the majority of the First Senate seems to have implicitly based its reasoning on this line of argumentation.[71] This view, however, is not convincing. Contrary to what is suggested, the reasoning of the Second Senate specifically addressed the requirement of a legal basis for *abstract* threats to the state's neutrality and peace at school.[72]

In view of this discrepancy between the judgments of both senates, it is argued that the First Senate was, pursuant to Section 16(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*),[73] obliged to refer the decision to the joint plenary of both Senates. Though the opinion that the 2015 judgment does not constitute a deviation from the 2003 ruling is difficult to defend, the non-referral must be viewed against the background of the general restrictive practice of both Senates when it comes to references to the Joint Senate.[74]

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[68] BVerfGE, Case. No. 2 BvR 1436/02.

[69] *See id*. at paras. 64–66.

[70] *Cf.* Michael Wrase, *supra* note 63; Mathias Hong, *Two Tales of Two Courts: Zum Kopftuch-Beschluss und dem "Horror Pleni,"* http://www.verfassungsblog.de/two-tales-of-two-courts-zum-kopftuch-beschluss-und-dem-horror-pleni/#.VdX6O_lv9SM; Matthias Hong*, Sicher, es Geht um Verfassungsrecht: zu Obiter Dicta und "Stare Decisis"* (2015), http://www.verfassungsblog.de/sicher-es-geht-um-verfassungsrecht-zu-obiter-dicta-und-stare-decisis/.

[71] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 7 (dissenting opinion) (indicating that the majority based its non-referral on such a reasoning).

[72] *See* BVerfGE, Case. No. 2 BvR 1436/02 at para. 49. *See* Heinig, *Kurswechsel in der Kopftuchfrage*, *supra* note 61 (acknowledging a certain ambivalence with regard to the reasoning of the Second Senate on this point).

[73] Bundesverfassungsgerichtsgesetz in der Fassung der Bekanntmachung, Aug. 11, 1993, BGBL. I at 1473; Article 1 des Gesetzes, Aug. 29, 2013 BGBL. I at 3463. section 16(1) (stating "[w]ill ein Senat in einer Rechtsfrage von der in einer Entscheidung des anderen Senats enthaltenen Rechtsauffassung abweichen, so entscheidet darüber das Plenum des Bundeverfassungsgerichtes.").

[74] To date only five cases have been referred to the joint senate. *See.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 20, 1954, Case No. 1 PBvU 1/54, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%204,%2027; BVerfG, June 11, 1980, Case

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III. On Consequences

Furthermore, this decision will have far-reaching consequences for other *Länder* legislation on the prohibition of religious symbols and clothing. Aside from North Rhine-Westphalia, seven other German *Länder* have enacted bans on religious symbols and clothing worn by teachers.[75] Five of these laws also include a provision similar to the third sentence of Section 57(4) of the North Rhine-Westphalian Education Act, which privileges Christian-occidental educational and cultural values and traditions.[76] Although the present decision only has—directly—binding effect with regard to North Rhine-Westphalian law, the ball is now in the court of the other *Länder* that have similar laws to adjust their legislation to the constitutional requirements in order to avoid follow-up proceedings against their legislation in Karlsruhe.[77] Despite the uncertainty due to the divergent decisions of 2003 and 2015 for the legislatures with regard to the requirement of *concrete* threats[78]—which should not be overestimated as another turnaround by Karlsruhe seems to be rather unlikely—the decision of the First Senate, at least, provides for clear guidance when it comes to the unconstitutionality of the discriminatory clause.

IV. On the International Perspective

The Court's view that a restrictive interpretation of Section 57(4) of the Education Act is in conformity with the ECHR is to be concurred in light of the wide margin of appreciation that is granted by the ECtHR to the Member States of the Convention.[79] Arguably, even a

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No. 1 PBvU 1/79, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%2054,%20277; BVerfG, Apr. 8, 1997, Case No. 1 PBvU 1/95, http://dejure.org/dienste/vernetzung/rechtsprechung?Text=BverfGE%2095,%20322; BVerfG, Apr. 30, 2003, Case No. 1 PBvU 1/02, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%20107%2C%20395&Suche=BVerfGE%20107%2C%20395; BVerfG, July 3, Case No. 2 PBvU 1/11, http://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20PBvU%201%2F11&Suche=2%20PBvU%201%2F11.

[75] See the overview of the laws on the University of Trier's homepage at http://www.uni-trier.de/index.php?id=24373#c48119. Among these states are: Baden-Wurttemberg Bavaria, Berlin, Bremen, Hesse, Lower-Saxony, and Saarland.

[76] Among these are Baden-Wurttemberg, Bavaria, Hesse and Saarland.

[77] On the effect of the decision for other *Länder* and the uprising political resistance in the Bavarian Government, see Helmut Philipp Aust, *Bayern auf dem Sonderweg? Nachwirkungen der Kopftuch-Entscheidung des BVerfG* (2015), *available at* http://www.verfassungsblog.de/bayern-auf-dem-sonderweg-nachwirkungen-der-kopftuch-entscheidung-des-bverfg/.

[78] *See* Heinig, *Kurswechsel in der Kopftuchfrage*, *supra* note 61.

[79] *See* Dahlab v. Switzerland, App. No. 42393/98 (Feb. 15, 2001), http://hudoc.echr.coe.int/eng?i=001-22643#{%22itemid%22:[%22001-22643%22]}; Sahin v. Turkey, App. No. 44774/98 (Nov. 10, 2005), http://hudoc.echr.coe.int/eng?i=001-70956#{%22itemid%22:[%22001-70956%22]}; Kurtulmus v. Turkey, App. No.

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prohibition of mere *abstract* threats to the neutrality of the state and peace at schools as a prerequisite for non-discriminatory bans of religious symbols in schools would have been in conformity with the convention.[80] Although there is no discussion in the decision of the First Senate on the views adopted by the United Nations Human Rights Committee (UNHRC) on religious freedom in public schools, the order is also in accordance with the—in comparison with the ECtHR's approach on the ECHR—more restrictive approach of the Committee[81] when it comes to interferences with religious freedom under the International Covenant on Civil and Political Rights.[82] In a view that was adopted by the UNHRC, which dealt with an expulsion of a pupil of Sikh faith from a public school in France who refused to abstain from wearing the *keski,*[83] the Committee also found that there must be compelling evidence that the author of the communication (the "complainant") would himself have posed a *concrete* threat to the rights of others—a burden the authorities did not meet within that case.[84] Thus, the decision is to be welcomed from an international human rights perspective, as it brings the courts' jurisprudence in line with the jurisprudence of the UNHRC.

Another interesting aspect of the decision that is worth mentioning concerns the relationship between the German constitutional system and the ECHR. The Constitutional Court directly examines violations of conventional rights when reviewing decisions of the *Landesrecht* through the lens of Article 31 of the Basic Law, according to which federal legislation takes precedence over *Land* law. This is due to the fact that the conventional law has, by virtue of its implementation into the German legal system, the status of German federal law.[85] From this it follows, quite remarkably, that every international

65500/01 (Jan. 24, 2006), http://hudoc.echr.coe.int/eng?i=002-3518#{%22itemid%22:[%22002-3518%22]}. On the limits of the margin of appreciation, see Eweida and Others v. United Kingdom, App. Nos. 48420/10, 59842/10 and 36516/10 (Jan. 15, 2013), http://hudoc.echr.coe.int/eng?i=001-115881#{%22itemid%22:[%22001-115881%22]}.

[80] This is also assumed by Justices Schluckebier and Hermanns in their dissenting opinion. *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 8 (dissenting opinion)

[81] *See, e.g.*, Bikramjit Singh v. France, U.N. Doc. CCPR/C/106/D/1852/2008 IHRL 1852 (UNHRC 2008), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/407/94/PDF/G1340794.pdf?OpenElement.

[82] *International Covenant on Civil and Political Rights*, U.N. G.A. Res. 2200A (XXI), 21 U.N. GOAR Supp. (No. 16), 52 U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), 999 UNTS 171 (ICCPR), https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en.

[83] A *keski* is—as explained in the view of the UNHRC—a "small light piece of material of a dark colour, often used as a mini-turban, covering the long uncut hair considered sacred in the Sikh religion," *Singh* at para. 2.3.

[84] *Id.* at para. 8.7.

[85] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 149; *see also Kammerentscheidungen des Bundesverfassungsgericht* [BVerfGK] [Decisions of the Chambers of the German Federal Constitutional Court], Feb. 1, 2007, Case No. 2 BvR 126/04, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGK%2010,%20234.

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agreement that has been transformed by enactment of a formal statute under Article 59(2) of the Basic Law into the German System becomes through Article 31 of the Basic Law part of the constitutional judicial review of law of the *Länder*.

F. General Conclusion

With regard to the substance of the law, the First Senate's order is to be welcomed, as it defines the role of the state as inclusive when it comes to the worldviews of its citizens—including those citizens that are employed by the state—while at the same time underlines the obligation of those working in the public sector to process their religious creeds as a private matter. As Justices Schluckebier and Hermanns rightly point out, the State cannot act independently of its public officials as an anonymous entity.[86] Regardless—and contrary to their conclusion—is the fact that unavoidable tension between the individual personality of teachers and their functions as state officials cannot be resolved at the expense of teachers alone. A plenary decision of both Senates, arguably, would have been preferable from the viewpoint of legal predictability for the legislature and those who are affected, but also as a venue to avoid future friction within the Court. Be that as it may, whether a plenary decision would have brought about the welcomed change of jurisprudence remains doubtful.

[86] *See* BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 14 (dissenting opinion).

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