

## Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision

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### Abstract

The second decision of the German Federal Constitutional Court on the Islamic headscarf declares a general ban on headscarf to be unconstitutional and, in particular, a violation of freedom of religion. This case note examines whether this decision is an ill-conceived weakening of a religiously neutral state or, to the contrary, an encouraging manifestation of a liberal constitutional order that takes its aspirations in a highly contested area of law seriously.

### A. Two Questions of Political Civilization

One of the great questions of our time is whether peace between different religions has a future. The full meaning of this question is spelled out in open wars of geo-strategic importance involving major external powers and in what is called asymmetrical terrorist action with organizational backgrounds or driven by individual deadly fanaticism, as in the recent attacks on Charlie Hebdo. This problem not only concerns world religions but is also—as it has been for much of history—fueled by intrareligious sectarianism. The conflicts in Syria, Iraq, and now Yemen serve as a bloody and devastating testimony to this fact.<sup>1</sup>

Liberal constitutional orders have a particular responsibility in this situation to show ways that such tragedies can be avoided and how it is not only possible but also can be experienced as a great cultural and social privilege to live in a society where many ways of interpreting human existence, of whatever religion or secular outlook, coexist and even more often than not—despite all differences and conflicts which should not be glossed

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<sup>1</sup> For a recent reminder on the different potential and aspiration of the revolutionary movement in the Middle East, see CHIBLI MALLAT, *PHILOSOPHY OF NON-VIOLENCE* (2015).

over by pluralist romanticisms—are capable of enriching each other. Given this responsibility, there are good reasons to reflect very carefully on how to strengthen the many already-existing practices of understanding, tolerance, and mutual respect in liberal constitutional orders. In the European context, the relation of the Christian and secular majority towards Muslims is of particular importance, given the number of Europeans of Islamic faith—though there are other crucial issues as well—not the least because of the many forms of xenophobia and anti-Semitism.<sup>2</sup> In the last few years, there has been a symbolic representation of the problems of this relationship: the Islamic head scarf and, more precisely, the question of under what circumstances women are allowed to wear it.

A second question of great importance for the contemporary political world concerns the political and cultural resilience of the liberal democratic constitutional order under the rule of law—the normative identity of which is defined by fundamental and human rights. The question is: How deeply is this piece of political and legal civilization actually rooted in the political culture and, ultimately, the bedrock convictions of the people who establish, maintain, and protect it? How fragile is this order? It is after all a very precious asset indeed, as not only the conflicts in the Middle East vividly illustrate through the suffering caused by political anomy every day.

The question of the resilience of modern constitutional orders has many facets. Some of the dangers for these orders stem from within the core of their political institutions. An example of this is the attacks on their basic tenets in the framework of the War on Terror seeking to curtail fundamental liberal rights, with far-reaching effects for the project of democratic self-governance.<sup>3</sup> Other threats are formulated by new forms of political populism—often from the far right—that are quite successful in various European states, e.g. in Hungary. And there are perils originating in the religious sphere because of radical challenges that are formulated by religious movements pursuing political ideas that are the opposite of the democratic constitutional political order bound by fundamental rights. This danger is not abstract and remote but concrete and alive, as epitomized by the success of a political monstrosity like ISIS, which is even able to recruit people in Europe, or by the hatred behind the slaughter in Paris and the political ramifications that it may have.

These two problems are intertwined. One view of their relationship is that protection of the liberal constitutional order and religious tolerance is not easily—if at all—reconcilable. It is maintained that, to the contrary, intolerance against certain religious manifestations is not only justified but necessary to protect the constitutional order that European states and others enjoy. This intolerance includes—and this is the central point of the issue discussed herein—opposition to symbolic manifestations of certain religious beliefs,

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<sup>2</sup> See, e.g., the series of murders claimed by the neo-fascist terror cell NSU.

<sup>3</sup> David Cole, *Must Counterterrorism Cancel Democracy?*, THE NEW YORK REVIEW OF BOOKS, available at <http://www.nybooks.com/articles/archives/2015/jan/08/must-counterterrorism-cancel-democracy/>.

primarily those of Islam. The contention is that, in order to protect the liberal constitutional order, not only a political and cultural containment, but also a roll-back of the cultural—including the symbolic—presence of Islam in Europe is the order of the day. This is necessary, it is argued, to defend democracy, fundamental rights—not the least the equality of men and women—and the secular constitutional order in general.<sup>4</sup>

To underline this thrust of the debate, it is crucial to calibrate the discussion correctly, as no one doubts that intolerance against certain kinds of (religiously motivated) actions is manifestly justified. For example, there is no discernable reason to tolerate action that curtails the freedom of women by coercing them into ways of life they do not want to pursue. The same is true for any violent action that is directed against the democratic constitutional state and its order, with the usual caveats applying to the concreteness of the danger, among others that apply in such cases. Additionally, there is no question that the minds of all people united in a constitutional order normatively defined by fundamental rights and democracy have to be won again and again for this crucial political project of our time and that correspondent efforts have to be made to accomplish this goal. That such efforts are successful is far from evident, given the victories of other forces and of religious obscurantism, authoritarianism, and hatred against out-groups, as is witnessed daily. The question is, therefore, whether—beyond these evidently necessary measures to protect democratic constitutional orders against their enemies—a fight in the realm of symbols and their meaning has to be undertaken to truly counter the threat against this order and to increase its necessary and precious resilience against its many enemies. The headscarf is perhaps the prime example of this problem.

### **B. The Second Head Scarf Decision**

The cases decided now by the German Federal Constitutional Court<sup>5</sup> are useful illustrations of the political content of these discussions and the possible legal answers a constitutional order may formulate. Let us first consider what the German Federal Constitutional Court decided and put the decision that has already stirred an intensive debate in a wider perspective. The decision concerns two constitutional complaints directed against sanctions, confirmed by the German Labor Courts and the Federal Labor Court,<sup>6</sup> that were

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<sup>4</sup> The prohibition of Minarets in Switzerland was, among others, driven by the argument that more than the four existing Minarets in Switzerland would give Islam too much room in the symbolic space of religious faith.

<sup>5</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10, [http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127\\_1bvr047110.html](http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html).

<sup>6</sup> See Bundesarbeitsgericht [BAG] [Federal Labor Court], Aug. 20, 2009, Case No. 2 AZR 499/08, <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20AZR%20499/08>; Bundesarbeitsgericht [BAG] [Federal Labor Court], Dec. 10, 2009, Case No. 2 AZR 55/09, <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20AZR%2055/09>.

imposed on the complainants because they insisted on wearing a head scarf or a substitute as an expression of their religious faith. Both cases concerned the area of schools; one complainant was a social worker who was engaged in mediation in case of school conflicts; the other was a school teacher.

In the first case, the woman—a German citizen—substituted an off-the-shelf woolen hat covering her ears and a garment covering her neck, e.g. a polo turtleneck, for the headscarf she had worn since she was seventeen after being reprimanded by school authorities. The German school authorities nevertheless maintained that this hat and turtleneck were still a display of the Islamic faith and—more concretely—a symbol of an attitude hostile to human dignity, the equality of the sexes, the fundamental liberties of the German Constitution, and the liberal-democratic basic order of Germany.<sup>7</sup> The same reasoning was applied to the second case in which the teacher wore a traditional Islamic headscarf.<sup>8</sup>

On the basis of a recently-promulgated regulation in the North Rhine-Westphalia Education Act,<sup>9</sup> the first complainant was reprimanded and the second one dismissed because they were not prepared to remove the hat or the headscarf while performing their professional duties.

The North Rhine-Westphalian Education Act prohibits the expression of political, religious, ideological, or similar views, which are likely to endanger or interfere with the neutrality of the state with regard to pupils and parents or to endanger or disturb the political, religious, or ideological peace at school.<sup>10</sup> The Act contains a further regulation that provides conduct that might create the impression amongst pupils or parents that a teacher advocates against human dignity, the principle of equal treatment, fundamental freedoms, or the free democratic order is prohibited.<sup>11</sup> Finally, the regulation provided that carrying out an educational mandate in accordance with the Constitution of the *Land*, presenting both Christian and occidental education and cultural values accordingly, does not contradict the prohibition set out in the previous sentences of this norm.<sup>12</sup>

The latter regulation had been interpreted by federal courts in Germany as not allowing differentiation between religions with the consequence that, according to this

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<sup>7</sup> BVerfG, Case Nos. 1 BvR R 471/10 & 1 BvR 1181/10 at para. 8.

<sup>8</sup> *Id.* at para. 26ff.

<sup>9</sup> Education Act of North Rhine-Westphalia § 57 Sec. 4, sent. 1 (Jun. 13, 2006).

<sup>10</sup> *Id.* at § 57 Sec. 4, sent. 1.

<sup>11</sup> *Id.* at § 57 Sec. 4, sent. 2.

<sup>12</sup> *Id.* at § 57 Sec. 4, sent. 3.

jurisprudence, any visible religious symbol was prohibited in North Rhine-Westphalia.<sup>13</sup> These rules applied to social and educational staff.<sup>14</sup> Both complainants worked without problems for several years in their respective workplaces.<sup>15</sup> The sanctions against the two women were upheld by the German Labor Courts, including the German Federal Labor Court,<sup>16</sup> which argued that it was permissible to ban such a visible religious symbol in schools because of the danger of interfering with other constitutional protected values, not the least with the (negative) freedom of religion of pupils, the rights of parents to educate their children, and the neutrality of the state. This jurisprudence was informed by the 2003 decision of the German Federal Constitutional Court, which accepted an abstract ban of visible religious symbols in schools as a constitutionally admissible regulation of that issue, but left it to the *Länder* (States) to decide whether they would pursue such a course or to continue to allow such symbols as had been the practice in the past.<sup>17</sup> It is important to note that in several German *Länder*, no such ban on religious symbols, such as the headscarf, exists, and from all that is reported, there are no substantial problems connected with this more liberal practice.

The Federal German Constitutional Court was invited to reconsider its own jurisprudence and came to new conclusions.<sup>18</sup> It decided that an *abstract* ban on headscarves and other visible religious symbols for teachers at a state school is not compatible with the

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<sup>13</sup> Bundesarbeitsgericht [BAG] [Federal Labor Court], Aug. 20, Case No. 2 AZR 499/08; Bundesarbeitsgericht [BAG] [Federal Labor Court], Dec. 10, 2009, Case No. 2 AZR 55/09; Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 116 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 359 (on a parallel provision in Baden-Württemberg and the comments by Böckenförde JZ 2004, 1181, 1183). The Bavarian Constitutional Court took a different position. *Compare* Bayerischer Verfassungsgerichtshof, Jan. 15, 2007, Vf. 11-VII-05, with MAHLMANN, DIFFERENZIERUNG UND NEUTRALITÄT IM RELIGIONSVERFASSUNGSRECHT, MYOPS 39 (2007).

<sup>14</sup> Education Act of North Rhine-Westphalia § 58, sent. 2.

<sup>15</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10, para. 7f, [http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127\\_1bvr047110.html](http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html).

<sup>16</sup> See Bundesarbeitsgericht [BAG] [Federal Labor Court], Aug. 20, 2009, Case No. 2 AZR 499/08, <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20AZR%20499/08>; Bundesarbeitsgericht [BAG] [Federal Labor Court], Dec. 10, 2009, Case No. 2 AZR 55/09, <https://dejure.org/dienste/vernetzung/rechtsprechung?Text=2%20AZR%2055/09>.

<sup>17</sup> See 108 BVerfGE 282, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 56 (Sept. 24, 2003); Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN L.J. 1099 (2003).

<sup>18</sup> The Second Senate decided the older case, while the first the newer. This raises questions under Section 16.1 Bundesverfassungsgerichtsgesetz: The plenary of the Federal German Constitutional Court has to decide if one Senate wants to decide a matter differently than another Senate.

Constitution because it is disproportionate.<sup>19</sup> It held that this ruling does not exclude the possibility of prohibiting religious symbols in the case of a *concrete* danger to the peace at school or the neutrality of the state. The Constitutional Court argued that such a danger had to be qualified, manifest, and substantial enough to justify a prohibition. In this case, under qualified circumstances that make it proportional to do so, the state is allowed to prohibit expressions of religious beliefs for a certain amount of time at a certain school or a certain school district if that is the only solution to prevent considerable conflict.<sup>20</sup> The threshold is a sufficiently specific danger to the peace at school or the state neutrality in a substantial amount of cases.<sup>21</sup> Additionally, the state is under a duty to accommodate the interests of the person concerned, for example by employing the person in another educational environment.<sup>22</sup>

The Court came to this conclusion by narrowly interpreting the relevant provision of the Education Act and by declaring one of its provisions unconstitutional. It accepted the general rule contained in this Act outlining the duty not to publicly express views of political, religious, ideological, or of a similar nature that are likely to endanger or interfere with the neutrality of the State regarding pupils or parents or to endanger or disturb the political, religious and ideological peace at school.<sup>23</sup> The Court argued, however, that this rule must be interpreted narrowly to meet the standards of the German Constitution. Central to this argument is the freedom of faith and freedom to profess ideological beliefs. Pursuant to Article 4, Sections 1 and 2 of the German Basic Law, this provision guarantees the right of teachers at interdenominational state schools not only to hold religious beliefs but also to adopt behaviors according to the rules of their particular religious outlook.<sup>24</sup> In that respect, as in other cases, the particular self-perception of the religious community and the individual concerned is regarded to be central to determining the content of religious duties. State authorities are not to judge the content of religious belief.<sup>25</sup> The Court holds that an Islamic headscarf can reasonably be regarded as a mandatory religious duty despite the fact that there are many discussions about its compulsory role within Islam.<sup>26</sup>

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<sup>19</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10, para. 77ff, [http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127\\_1bvr047110.html](http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html).

<sup>20</sup> See *id.* at paras. 80, 113.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at para. 113.

<sup>23</sup> See *id.* at para. 103.

<sup>24</sup> See *id.* at para. 83.

<sup>25</sup> See *id.* at para. 86.

<sup>26</sup> See *id.* at para. 87ff.

The Court took the action of the public authorities to be of sufficient gravity to interfere with the complainants' freedom of religion. It concerned matters of their personal identity, and thus the right of personal development (Article 2, Section 1 in conjunction with Article 1, Section 1 German Basic Law).<sup>27</sup> The Court held the interference to be disproportionate. It confirmed that the legislator of North Rhine-Westphalia pursued a legitimate aim in prohibiting the expression of religious beliefs. In the view of the Court it is manifestly a legitimate aim to preserve the religious peace at school and the neutrality of the state, and to safeguard the educational mandate of the state to protect other fundamental rights of pupils and parents, and to prevent conflicts.<sup>28</sup>

The Constitutional Court's decision held that, as such, wearing visible religious symbols does not interfere with the pupils' negative freedom of faith and freedom to profess a belief.<sup>29</sup> The mere fact of being confronted by such a symbol does not mean—in the view of the Court—that the right not to be indoctrinated is being interfered with.<sup>30</sup> These symbols demand nothing but acknowledgement that the teacher is of a particular faith and imply no proselytizing behavior, be it verbal or in other forms. In addition, regarded in context, such symbolism is relativized and put into perspective by the other faiths or religions adhered to by other staff members.<sup>31</sup> The variety of symbolism thus serves as an example of a pluralist society within state schools. A symbol worn by an employee of the state is to be distinguished from a symbol displayed on the initiative of the state. The state does not identify with this symbol in the former case, only in the latter.<sup>32</sup> Therefore only in the latter case would the display of such a symbol be attributable to the state. The Court consequently regarded an abstract ban to be disproportional in the narrow sense, leaving open whether such a ban is necessary to achieve the legitimate aim pursued.<sup>33</sup>

The rights of the parents to educate their children<sup>34</sup> also fails to provide a justification of a different solution as it does not entail the right to shield pupils from a confrontation with

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<sup>27</sup> See *id.* at para. 95f.

<sup>28</sup> See *id.* at para. 99.

<sup>29</sup> See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] art. 4, *translation at* [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf).

<sup>30</sup> See BVerfG, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10 at para. 104f.

<sup>31</sup> See *id.* at para. 105

<sup>32</sup> See *id.* at para. 104.

<sup>33</sup> See *id.* at para. 100.

<sup>34</sup> See GG art. 6, § 2, *translation at* [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf).

educational staff members that visibly adhere to a certain religion.<sup>35</sup> The same holds for the State's educational mandate,<sup>36</sup> which has to be carried out in accordance with the State's duty to religious and ideological neutrality, as this mandate encompasses only the prohibition of conduct that can be regarded as a sufficiently specific danger to the peace at school or the neutrality of the State.<sup>37</sup>

The Constitutional Court followed its consistent case law and defined the neutrality of the state as an open form of neutrality, one that is comprehensive and encourages freedom of faith equally for all beliefs. The mere visibility of religious symbols is not taken as a violation of this principle of the open neutrality of the state. The Court held that an identification of the headscarf—irrespective of other factors—as a manifestation of contempt for democracy, the rule of law, and fundamental rights was implausible.<sup>38</sup> It underlined that, especially in the case of the hat and turtleneck, such an interpretation was particularly far-fetched.<sup>39</sup> The Court made explicit that this reasoning applied to other visible religious symbols as well, such as the nun's habit or a kippa.<sup>40</sup>

In addition to these considerations stemming from the religious freedom of the complainants, the Court argued that another interpretation would cause problems under Article 3, Section 2 of the German Basic Law, which prohibits discrimination on the ground of sex.<sup>41</sup> It held that, despite the respective regulation of the Education Act's being formulated without explicit differentiation according to sex, it still applied disproportionately to women, as Muslim women are the largest group concerned by this prohibition under the circumstances. The abstract ban of a religious symbol such as the headscarf, the court held, would thus constitute a factual or—as one might say in common legal terminology—indirect discrimination on the grounds of sex.<sup>42</sup> Only under the narrow interpretation of the Education Act formulated by the Court could such a violation of Article 3, Section 2 of the German Basic Law be avoided. The Court argued that, in addition, this interpretation is reconcilable with Article 12 of the German Basic Law on

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<sup>35</sup> See BVerfG, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10 at para. 106.

<sup>36</sup> See GG art. 7, § 1, *translation at* [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf).

<sup>37</sup> See BVerfG, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10 at para. 108ff.

<sup>38</sup> See *id.* at para. 118.

<sup>39</sup> See *id.* at para. 121.

<sup>40</sup> See *id.* at para. 115. It is noteworthy in this context that the Central Council of German Jews in their *amicus curiae* held the general ban on religious vestimentary symbols to be unconstitutional. See *id.* at para. 75.

<sup>41</sup> See *id.* at para. 142ff

<sup>42</sup> See *id.* at para. 143ff



Freedom of Profession and other legal regimes, such as Article 9 of the European Convention of Human Rights and the Federal General Equal Treatment Act, which prohibits discrimination amongst others on the grounds of religion or sex.<sup>43</sup>

The regulation in Section 57 Section 4, sentence 3 Education Act, which states that such rules do not apply to an education based on Christian and occidental cultural values, was taken to be unconstitutional because it violated the prohibition of discrimination on grounds of faith and religion.<sup>44</sup> The Court held that the legislative history of the regulation showed that the legislator intended this norm to establish a privilege for Christian and Jewish symbols.<sup>45</sup> The Court took the jurisprudence interpreting this regulation as providing a provision for any kind of visible symbol without privileging any particular religious group as overstepping the boundaries of justified legal interpretation.<sup>46</sup> In the view of the Court, there are no tenable reasons to discriminate between certain forms of religious beliefs given the principle of equal treatment of religions espoused by the Basic Law.

### C. The Dissenting Opinion

The balanced and interesting dissenting opinion confirmed the previous jurisprudence of the Federal Constitutional Court, stating that the ban of a visible religious symbol was constitutional, even in the case of only an abstract danger.<sup>47</sup> The opinion held that only such an interpretation of the German Basic Law paid due respect to the principle state neutrality. The dissenting opinion further argued that employees always represent the state and that a differentiation between symbols worn by the employee and symbols displayed otherwise (e.g. Crucifixes in schools) is thus not admissible.<sup>48</sup> The opinion maintained that the constitutional complaint of the first complainant (who wore the hat and turtleneck) could have been regarded as well-founded given the rather implausible interpretation of state authorities of that garment.<sup>49</sup>

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<sup>43</sup> See *id.* at para.148ff.

<sup>44</sup> See GG art. 3, § 3, sent. 1, translation at [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf); *id.* at art. 33, § 3; BVerfG, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10 at para. 123ff.

<sup>45</sup> See BVerfG, Case No. 1 BvR R 471/10 & No. 1 BvR 1181/10 at para. 127.

<sup>46</sup> See *id.* at para. 132ff.

<sup>47</sup> See *id.* at para. 2ff (dissenting opinion by justices Schluckebier and Hermans).

<sup>48</sup> See *id.* at para. 17 (dissenting opinion by justices Schluckebier and Hermans).

<sup>49</sup> See *id.* at para. 30 (dissenting opinion by justices Schluckebier and Hermans).

In the second case, the dissenting judges considered the possibility as well that the complaint may be well-founded due to the circumstances of the case—despite being more skeptical about it—given the need to protect the trust of the second complainant in continuing to wear her headscarf.

#### D. Constitutional Freedom of Religion Made Concrete

The decision raises many questions, several of which will be highlighted here. The first concerns the parameters for determining the meaning of a religious symbol and, more concretely, the meaning of a headscarf. Can this meaning be abstractly defined, or is context relevant? This problem had already occupied other courts, including the European Court of Human Rights.<sup>50</sup> The Federal German Constitutional Court denied that such an abstract definition of the meaning of the headscarf exists and insisted that a concrete interpretation is necessary. In particular, the Court doubted that the headscarf is a symbol of hostility towards human rights, democracy, and the rule of law. This is a rather convincing stand because it is indeed impossible to attach to many symbols any fixed meaning while disregarding context, in particular the context provided by the comportment of an individual. That is especially the case for those symbols worn by a person that have an intimate meaning to this particular person, and not to others, and their potentially different interpretation of the symbol. By being independent, educated working women, the complainants already defy a certain kind of interpretation of the headscarf they wear. It is consequently implausible that all women who wear headscarves endorse the meaning initially ascribed to the headscarf by the German school authorities. This is vividly illustrated by Tawakkol Karman, who received the Nobel Peace Prize for her activism in Yemen, amongst others for women's rights and presented her Nobel Prize lecture with a covered head.<sup>51</sup> The same is true for Malala Yousafzai, who was shot by Taliban for her struggle for girls' educational rights and also wore a headscarf when accepting her Nobel Peace Prize.<sup>52</sup> This point of view does not deny that there are obviously contexts where a headscarf is in fact connected to such a message, but it does deny that this is necessarily so and that the behavior of a person is not of central importance for that interpretation. There may be symbols whose meaning, at least in wider given contexts, is hard to change—say the meaning of a swastika in Europe. But a headscarf does not belong to this category of symbols.

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50 See *Vajnai v. Hungary*, App. No. 33629/06, (July 8, 2008), <http://hudoc.echr.coe.int/>.

<sup>51</sup> See *Tawakkol Karman—Facts*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2011/karman-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2011/karman-facts.html).

<sup>52</sup> See *Malala Yousafzai, Nobel Lecture* (Dec. 10, 2014), available at <http://www.nobelprize.org/mediaplayer/index.php?id=2424>.

The second problem concerns state neutrality. The first sub-question is whether the neutrality of the state is conceptualized as an open neutrality that encompasses the possibility of a religious display within the public sphere or rather takes the form of laicism. The Federal Constitutional Court confirmed its previous case law on the matter, endorsing an open interpretation of state neutrality. This confirmation is laudable from a liberal point of view because it provides for the possibility to live one's faith in the public sphere—even while working for the state—within the limits that particular duties may impose. This decision does not question the jurisprudence of the Court in other cases, including the placement of a Crucifix on school walls. The Court argued rightly that there is a difference between a symbol worn by a person and a symbol displayed by the state. A symbol displayed by the state is evidently one that can be legitimately attributed to the state. In the case of a symbol worn by a person, such an endorsement is not possible because there is no reason to assume that the state identifies with all of the personal displayed convictions of state employees. That no such identification of personal convictions of employees and of the state is justified is clear for a much more important example than vestimentary symbols, namely the opinions a teacher holds. This is particularly evident in a pluralist environment where persons may display very different religious thoughts. It is not clear what ramifications the decision will have and what it concretely means for other sphere of public service—e.g. the police, judges, prosecutors etc. Be that as it may, it clearly applies to all visible religious symbols. It is hard to believe that a German pupil confronted with a math teacher wearing a headscarf, a Sikh French teacher wearing a turban, a chemistry teacher wearing a kippa, and a Geography teacher wearing no symbol at all would consider the appearance of these teachers as a state endorsement of Islam, Sikhism, Judaism and Agnosticism respectively.

This leads to the next and most important problem: the effect of such a symbol on pupils. This is a serious matter, because children are particularly vulnerable and there are many reasons to protect them against any form of indoctrination.

It is important to put into perspective what the effects of religious symbols actually are. It is clear that pupils often do know the opinions and religious orientation of their teacher. Therefore, the headscarf adds little to what the students know and what they are confronted with anyway. One may ask questions, such as whether one should differentiate according to the age of pupils, but even then it is not obvious that a religious symbol otherwise alters the impact a teacher will have. The central point is, therefore, that nothing in the behavior of the teacher crosses the threshold of indoctrination. There is no reliable evidence that the effects of a visible symbol alone have such impact.

It is a remarkable fact of the jurisprudence of these cases that not too much effort was made by the courts to establish what the empirically-substantiated consequences of the exposure to such religious symbols on pupils actually are. A notable exception is the German Federal Constitutional Court which, in its prior decision, did try to establish what knowledge in psychology, educational science, and sociology is available in this respect,

with the result being that there is no hard evidence on the detrimental effects of religious symbols on pupils.<sup>53</sup> The empirical studies are, however, limited in their explanatory power. The fact that the complainants worked for years—as other teachers in other *Länder* did—without causing any problems is therefore decisive and reverses the burden of proof. It seems thus to mirror the realities of a pluralist society well to state that merely being confronted with the fact that a teacher has a different faith is not as such interfering with pupils' freedom of religion.

Another valuable point of the judgment is the consideration of gender issues. Such consideration is important because the discussions about religious symbols in Germany (as elsewhere) mostly concern symbols worn by women. That could be otherwise if there were a comparable presence of Jewish teachers wanting to wear a kippa at school, for example, a situation that may change the terms of the discussion considerably given Germany's past.

The qualification of the ruling allowing public authorities to prohibit symbols in the case of concrete danger seems reasonable, too, because there are certainly imaginable situations where religious conflict is of such intensity that the visibility of such symbols would only intensify already-existing problems. In that case it seems acceptable to demand believers to adapt their behavior accordingly or to be open to employment in a different environment, which the Court proposed as a measure of reasonable accommodation.

The dissent provided important arguments. These arguments, however, are not as convincing as the conclusions of the majority of the Court. Given what has been said, the dissent indicated an important aspect of the decision by its differentiated approach to concrete cases: The harsh attitude towards Islamic headscarves that was manifested in some of the actions of state authorities in North Rhine-Westphalia found no echo within the Court.

### **E. *Soumission à l'allemande?***

Germany has recently contributed to the history of political farce with its so called *PEGIDA* (*Patriotische Europäer gegen die Islamisierung des Abendlandes; Patriotic Europeans Against the Islamization of the Occident*) movement, a succession of organized demonstrations that found considerable participants in Dresden and, to a lesser degree, elsewhere in Germany. These demonstrations often were accompanied by counter-demonstrations and other protests,—e.g. turning off the lights on the Cologne Cathedral,

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<sup>53</sup> See 108 BVerfGE 282 (306), 56 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] (Sept. 24, 2003). The European Court of Human Rights in its decision in the *Dahlab v. Switzerland* case did not consider existing empirical studies but rather stated a detrimental effect of visible symbols as evident, despite the fact that the teacher concerned taught without problems for three years. See *Dahlab v. Switzerland*, ECHR App. No. 42393/98 (Feb. 15, 2001), <http://hudoc.echr.coe.int/eng?i=001-22643#%22itemid%22:%22001-22643%22>].

to show that the church did not want to have anything to do with the *PEGIDA*-demonstrators. Behind the *PEGIDA* movement were rather amorphous fears within the population originating in a region that has a very small percentage of people with immigration backgrounds. This is a recent example of the kind of discussions that manifest an increasingly hostile attitude towards Islam in Europe. The background of these movements is, among others, an identification of Islam with some of its fanatic adherents that shocked the world with barbaric acts, from 9/11, to Charlie Hebdo, to the cruelties of the Islamic State (ISIS).

In such an environment, Michel Houellebecq's most recent novel, titled *Soumission*, enjoyed considerable success in Europe and other countries. The novel tells the story of the submission of the French people under the authoritarian rule of an Islamic party, epitomized by the protagonist of the novel, who is partly motivated by sadomasochistic tendencies and who lost every direction, preferring a comfortable life within an authoritarian structure to the demands of a more autonomous pursuit of happiness. Some commentators consider this novel an important statement about the situation in Europe. This is surprising, given that it seems not too far-fetched to think that the real danger in Europe (and elsewhere) is the submission of the liberal order under a new democratically-camouflaged authoritarianism, if not of the extreme right wing, at least profoundly colored by the latter's political agenda. The many forms of populist right-wing movements and their success and influence on mainstream policy illustrate this. After all, the *Front National*, not an Islamist party, competes for the French presidency.

Given this real danger, the decision of the Federal Constitutional Court must be regarded as highly welcome. It is the product of an intense political and legal debate, one in which many have argued for years for a differentiated solution—like the one now endorsed by the Court.<sup>54</sup> The judgment enforces the central principle that all religions must be treated equally. It displays sensitivity towards the importance of religious faith and a differentiated approach to the impact religious symbols may have. The consequence of the judgment is—though not spelled out in these terms—that it is not outward appearance but rather human substance that counts when individuals' religiously-motivated comportment is to be evaluated. This is important because it is the central lesson taken from religious

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<sup>54</sup> See, e.g., a) for the constitutionality of such a solution: Böckenförde, „Kopftuchstreit“ auf dem richtigen Weg?, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 723 (2001); C. WALTER & A. VON UNGERN-STERNBERG, *Verfassungswidrigkeit des nordrhein-westfälischen Kopftuchverbots für Lehrerinnen*, DIE ÖFFENTLICHE VERWALTUNG 488 (2008); S. Koriath in *Maunz/Dürig*, GG, 72. Aufl., 2014, Art. 140/136 WRV, Rn.62; M. Morlok/J. Krüper, *Die „Kopftuch-Entscheidung“ des BVerwG*, NJW 2003 (1020–1021); Mager in v. Münch/Kunig, GG, 6. ed. 2012, Art. 4 Rn. 50 (if children are mature enough to determine their religion (religionsmündig)); Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 4 GERMAN L.J. 1099 (2003); b) against the constitutionality of such a solution: Kokott in SACHS, GRUNDGESETZKOMMENTAR, Art. 4 Rn. 64; Jarass in Jarass/Pieroth, GG, 13. Aufl. 2014, Art. 4 Rn. 36; Dollinger/Umbach in *Umbach/Clemens*, GG, 2002, Art. 33, Rn.52; F. Hufen, *Der Regelungsspielraum des Landesgesetzgebers im „Kopftuchstreit“*, NVwZ 2004, 575.

conflicts formulated by many in the crucial period of the Enlightenment,<sup>55</sup> including Lessing,<sup>56</sup> his friend Mendelssohn,<sup>57</sup> and his correspondent Kant<sup>58</sup>: Namely that one must perceive the individual beyond his religious appearance to gain common human ground, the ultimate foundation of the construction of religious freedom and peace in Europe after centuries of barbaric wars.

The decision will be criticized, perhaps even as a symptom for the submission of a liberal culture to extremist forces that Houellebecq describes. But such criticism threatens to lead one astray. The decision is rather the confirmation of the strength and great attractiveness of a constitutional order that guarantees human rights and curtails liberty only if there are concrete dangers to the values that a liberal order is made to protect. It thus is not a symbol of the weakness but an example of the self-affirmation of a liberal constitutional order that is, after all, best defended against its foes—religiously motivated or not—by living up to the promise of equal freedom that is at the very heart of its appeal.

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<sup>55</sup> For additional commentary on the subject, see Mahlmann, *Freedom and Faith—Foundation of Freedom of Religion*, 30 CARDOZO L. REV. 2473 (2009); see generally FORST, *TOLERANZ IM KONFLIKT* (2003).

<sup>56</sup> See the classical “parable of the ring” of Gotthold Ephraim Lessing, in *NATHAN DER WEISE* (NATHAN, THE WISE) (1779).

<sup>57</sup> See MENDELSSOHN, *JERUSALEM ODER ÜBER RELIGIÖSE MACHT UND JUDENTUM* (1783).

<sup>58</sup> At least this is what is plausible to conclude from Kant’s attack on the relevance of outward appearance in religious matters. See KANT, *DIE RELIGION INNERHALB DER GRENZEN DER BLOSSEN VERNUNFT* [RELIGION WITHIN THE LIMITS OF REASON ALONE] Akademie Ausgabe Vol. 6 (1902).