Observations in the cases
1 BvR 471/10 and 1 BvR 1181/10

Before the Federal Constitutional Court of Germany

concerning the application of the EU Framework Directive 2000/78/EC, the EU Gender Equality Directive 2006/54/EC, the EU Racial Equality Directive 2000/43/EC and the European Convention on Human Rights to the prohibition against wearing Islamic religious clothing as a teacher or social pedagogue in public schools in North Rhine-Westphalia

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OPEN SOCIETY
JUSTICE INITIATIVE

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I. INTRODUCTION

1. This submission from the Open Society Justice Initiative to the Federal Constitutional Court of Germany evaluates the legal issues surrounding legislation in North Rhine-Westphalia that prohibits Muslim female teachers from wearing headscarves at school, among others. This submission presents information to assist the Court in its consideration of the cases of 1 BvR 471/10 and 1 BvR 1181/10.

2. Legislation and subsequent litigation surrounding the headscarf issue have attracted wide publicity in the media, in politics, and with the public in Germany. The law forbids teachers in North Rhine-Westphalia (NRW) from wearing clothing attributed to religions, though teachers are permitted to wear clothing connected with Western faiths, such as Christianity and Judaism. Given the significant Muslim population in Germany and NRW, this overwhelmingly impacts upon female teachers of the Islamic faith.[1] While the law might also affect adherents to other non-Western religions such as Sikhs and Buddhists, the parliamentary debate in NRW leading to the introduction of the law explicitly makes clear that the purpose was to prevent Muslim female teachers from

[1] See *inter alia* Human Rights Watch, "Discrimination in the Name of Neutrality, Headscarf Bans for Teachers and Civil Servants in Germany", February 2009, report no. 1-56432-441-9, pp. 52-53. cited below.

wearing the Islamic headscarf in schools.[2] The same ban on clothing of "non-Western" religions exists in Baden-Württemberg, Saarland, Hesse and Bavaria.

3. This submission will discuss whether this prohibition is discriminatory and whether or not it effectively singles out clothing associated with the Islamic faith which would amount to special, invidious treatment of the affected group of Muslim women. In this respect, it is noted that the law at issue is different from (i) laws in other European countries and other *Länder* such as Berlin, Bremen and Lower Saxony which seek to promote secularism in schools by banning all religious clothing, and (ii) laws in other *Länder* which permit all religious clothing.

Interest of the Justice Initiative

4. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Justice Initiative staff are based in Abuja, Almaty, Amsterdam, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, and Washington, D.C.

5. Among other activities, the Justice Initiative makes legal submissions before national and international courts on questions of law in which it has specialized expertise, including questions concerning the compatibility of State practices with equality and citizenship guarantees recognized by international and regional human rights law. As such, the Justice Initiative has particular interest and expertise in the questions raised by this case.

6. The Justice Initiative has acted for applicants and as a third party intervenor in landmark discrimination cases before international tribunals, including:

- *D.H. and Others v the Czech Republic*, judgment of 13 November 2007, European Court of Human Rights, Grand Chamber (educational segregation of Roma Children).
- *Rosalind Williams v Spain*, decision of 30 July 2009, United Nations Human Rights Committee (Ethnic profiling, discriminatory identity checks).
- *Makuc and Others v Slovenia*, European Court of Human Rights, Grand Chamber, No. 26828/06 (discriminatory denial of citizenship, case ongoing).
- *Sejdic and Finci v Bosnia and Herzegovina*, European Court of Human Rights, Grand Chamber, Nos. 27996/06 and 34836/06, decision of 23 December 2009 (denial of voting rights to ethnic minorities).
- *Nachova and others v. Bulgaria*, European Court of Human Rights, Grand Chamber, judgment of 6 July 2005 (discrimination in policing/police violence against Roma).

[2] See, "Schulgesetz für das Land Nordrhein-Westfalen SchulG NRW – Schulgesetz NRW – vom 15. Februar 2005, zuletzt geändert durch Gesetz vom 24. Juni 2008", Gewerkschaft Erziehung und Wissenschaft NRW, Essen 2008, pp 9-10 (www.nds-verlag.de); "Landtagswahlen NRW - CDU setzt auf Kopftuchverbot", http://www.igmg.de/index.php?id=15&no_cache=1&tx_ttnews[tt_news]=4901&tx_ttnews[backPid]=605&type=98; "Kopftuchverbot für Lehrerinnen" http://www.spd-fraktion.landtag.nrw.de/spdinternet/www/startseite/Themen/AK_05/500_-_Religion/100_-_Kopftuch/index.jsp.

- *Yean and Bosico v. Dominican Republic*, judgment of 8 September 2005, Inter-American Court of Human Rights, No. 130 (discriminatory denial of citizenship).

7. The Open Society Justice Initiative is an operational program of the Open Society Institute which has consultative status with the United Nations Economic and Social Council and with the Council of Europe. The Justice Initiative also has the status of an organization entitled to lodge complaints with the European Social Charter Committee of the Council of Europe.

Relevant Background Information

8. On 13 June 2006, NRW passed a law amending the existing School Act of 2005. The amendment came into force on 29 June 2006.[3] The new provisions of the law, commonly known as the "neutrality rule," prohibit teachers from engaging in "political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the *Land* of NRW towards pupils or parents or the political, religious or ideological peace of the school" but expressly exempts from this ban the "exhibition of Christian and occidental educational and cultural values or traditions" (see Section III below). Among politicians and among the general public this amendment is generally known as the "headscarf ban" law.

9. The legislative history of the development of the new law in NRW as well as similar laws in other *Länder* demonstrates the discriminatory intent that is behind the language of the law. Both the Committee that drafted the law and the explanatory notes to the law itself make clear that the purpose is to prohibit the Islamic headscarf. A study by Human Rights Watch explains this:[4]

> "The intention of legislators is demonstrated in the accompanying explanations in 2004 to the draft laws in Bavaria and Saarland, and in 2005 to the draft law in North Rhine-Westphalia. **The latter explain that the headscarf must not be allowed during teaching "because at least a not insubstantial part of its proponents link it to an inferior position of women in society, state and family or a fundamentalist statement for a theocratic political system in contradiction to the constitutional values." Furthermore, the North Rhine-Westphalia explanation characterizes the headscarf as a political symbol** (as was also done by Christian conservative politicians in Baden-Württemberg), and points to the jurisprudence of the European Court of Human Rights (as was also mentioned during the parliamentary debate in Hesse) [**emphasis added**].
>
> [...]
>
> The debate over the law in the North Rhine-Westphalia parliament featured the following positions from the committee behind the draft: "The headscarf has meantime become worldwide a symbol of Islamic fundamentalism. … [It] can be regarded as political symbol of Islamic fundamentalism, which expresses the dissociation from values of the western society like individual self-determination and emancipation of women. …according to the federal constitutional court … it does not depend out of which motive the teacher is wearing the headscarf but how concerned parents and pupils perceive it."

Relevant Domestic Law

10. The NRW Regional Constitution, which sets out the educational foundation for North Rhine-Westphalia, firstly puts religion at the forefront of educational objectives and secondly provides that mainstream public education is taught on the basis of

[3] Gesetz und Verordnungsblatt (GV. NRW.), Ausgabe 2006 Nr.15, p. 270.
[4] Human Rights Watch, "Discrimination in the Name of Neutrality, Headscarf Bans for Teachers and Civil Servants in Germany," February 2009, report no. 1-56432-441-9, at pages 52-53.

Christianity, whilst being open to 'other religions'(before constitutional change entered into force on October 29, 2011):

> Article 7
>
> (1) The aim of education shall first and foremost be to instill reverence for God, respect for human dignity and readiness for social interaction**.**
>
> (2) Young people shall be brought up in a spirit of humanity, democracy and freedom; to be tolerant, to respect the beliefs of others, to act responsibly towards animals and to preserve the fundamental principles of a natural way of life, with love for people and home, in a commonwealth of nations and in a spirit of freedom.
>
> Article 12
>
> (6) Community schools [*Gemeinschaftsschulen*] shall teach and educate children together **on the basis of Christian educational and cultural values and shall be open to Christian denominations and to other religions and ideological convictions** [emphasis added]. Denominational schools [*Bekenntnisschulen*] shall teach and educate children of the Catholic or Evangelic [Lutheran] faith or of any other religious community in accordance with the principles of the denomination concerned. Ideological schools, including non-denominational schools, shall teach and educate children in accordance with the principles of the ideology concerned.

11. Section 57 subs. 4 of the NRW School Act prohibits religious manifestations that may "endanger or disturb the neutrality" of any school. However, it explicitly states that "exhibition of Christian and occidental educational and cultural values or traditions" does not disturb neutrality:

> "Teachers are not allowed to exercise political, religious, ideological or similar manifestations in school, that may endanger or disturb the neutrality of the *Land* towards pupils or parents or the political, religious or ideological peace of the school. Particularly illegitimate is a behaviour that can appear to pupils or parents to be a teachers' demonstration against human dignity, non-discrimination according to Article 3 of the Basic Law, the rights of freedom or the free and democratic order. The exercise of the task of education according to Articles 7 and 12 sec. 6 of the Constitution of the Land of North Rhine-Westphalia and **the respective exhibition of Christian and occidental educational and cultural values or traditions does not contradict the duty of behaviour according to sentence 1** [emphasis added]. The duty of neutrality according to sentence 1 does not apply within religious instruction and for religious or ideological schools."

II. SUBMISSIONS

12. It is submitted that the legislation prohibiting female Muslim teachers from wearing headscarves is contrary to both European Union law and the European Convention on Human Rights.

- *European Union Law.* The rule which bans religious clothing whilst protecting Christian and occidental religious clothing amounts to religious and gender discrimination in employment, contrary to both the EU Framework Directive, the EU Gender Equality Directive as well as indirectly the EU Racial Equality Directive. Additionally, if necessary, the question of whether the ban is a permitted exception under EU law should be referred to the CJEU in Luxemburg for a clear statement of the permissible exceptions to gender and religious discrimination.
- *European Convention on Human Rights.* The ban which affects visible signs of Islam while permitting visible signs of Christianity and other occidental religions amounts to an unjustified difference in treatment violating Article 14 of the

European Convention on Human Rights (ECHR) taken with the right to religion under Article 9 ECHR. There must be concrete evidence to objectively justify the different treatment. The Constitutional Court is requested to view the present cases from its perspective of "Interpretation of the Basic Law in a manner that is open to international law" *(völkerrechtsfreundlich).*[5]

A. VIOLATIONS OF EUROPEAN UNION LAW

13. It is submitted that the prohibition of religious clothing excludes women observing the Islamic faith from teaching in public schools, but not those of Christian or occidental faiths. As a result this also disproportionately affects women from minority ethnic groups, the larger part of whom do not adhere to Christian or other occidental faiths. In its application, the "religious neutrality" provision of the NRW School Act leads to discrimination on grounds of religion, gender and ethnic origin. In particular:

- *EU Framework Directive.* This violates the EU Framework Directive 2000/78/EC (prohibiting discrimination on grounds of religion) because: teachers wearing headscarves are discriminated against in that they are treated less favorably than other teachers on the basis of their religion, and none of the exceptions which permit a non-discriminatory difference in treatment apply.
- *EU Gender Equality Directive.* As the ban on head-coverings primarily applies to Muslim women, it also amounts to a violation of the EU Gender Equality Directive 2006/54/EC, in that women are disproportionately affected by the ban, and there is no reasonable and objective justification for this disproportionate effect upon Muslim women.
- *EU Racial Equality Directive.* In addition, the ban predominantly affects women of non-German or migrant origin, and in particular those of Turkish ethnic origin, amounting to indirect discrimination on grounds of ethnic origin, in violation of the EU Racial Equality Directive 2000/43/EC.

14. Article 2 of the Treaty on European Union (TEU) sets out the fundamental values of the Union, which include non-discrimination:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." [6]

15. The scope of the prohibition of discrimination is set out in Article 10 of the TEU, which includes discrimination on the basis of someone's religion:

> "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

[5] See paragraph 78 below.

[6] *Treaty Amending the Treaty on European Union* and the *Treaty establishing the European Community*, 13 December 2007 Official Journal C 306, 17.12.2007 P. 1 – 271, resulting in the *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* (OJ C 83, 30.3.2010)'.

Religious Discrimination: Violation of the EU Framework Directive

16. A ban on religious clothing that targets only one religion amounts to direct discrimination on grounds of religion, violating the EU Framework Directive 2000/78/EC, for which there is no objective justification.

17. The EU Directive "Establishing a general framework for equal treatment in employment and occupation" entered into force in 2003, and prohibits discrimination based on religion or belief. Germany was required to transpose the EU Framework Directive on 2 December 2003, and did so in 2006.[7] The Directive applies to "all persons, as regards both the public and private sectors, including public bodies" (Article 3). The Directive prohibits discrimination on grounds of religion or belief, disability, age, and sexual orientation in employment. It defines and prohibits direct and indirect discrimination and provides that once a claimant has demonstrated a difference of treatment, the burden of proof lies with the employer to establish that discrimination did not occur.

18. The EU Framework Directive permits exceptions to the general prohibition of discrimination. Firstly, where a measure is strictly necessary for public security, for the maintenance of public order or for the protection of the rights and freedoms of others (Article 2(5)). Secondly, where there is a genuine occupational requirement to a particular position in view of a public organization's religious ethos (Article 4).

Less Favourable Treatment

19. Article 2(2) provides that "direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation," on grounds that include "religion or belief." A report to the European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities by the European Network of Legal Experts in non-discrimination, describes direct discrimination on religious grounds as follows:

> "Direct discrimination involves less favourable treatment on grounds of religion or belief. Factual examples will include where employers refuse to employ religious staff altogether, or employ some religious staff, but refuse to employ those of a particular religion. For example, an employer may have Christian staff, but refuse to employ a Scientologist. *Direct discrimination will also arise where religious organizations refuse to employ those who do not share the faith of the organization* (although in some cases such cases may be covered by the genuine occupational requirement exception)."[8]

20. While the CJEU has not yet had occasion to interpret the scope of the protection against religious discrimination under the EU Framework Directive, it has interpreted similar language in the area of gender-based discrimination. Principles from this case law are pertinent to the present issues.[9]

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[7] On 23 February 2006 the CJEU condemned Germany for having failed to transpose the Framework Directive within the set deadline (apart from discrimination on grounds of age for which Germany had requested an extension of the deadline), judgment C-43/05. The transposition ultimately took place by „Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung", Bundesgesetzblatt Teil I (BGBl. I), no: 39, 17/08/2006, p.: 01897-01910, Entry into force: 18/08/2006; Reference: (MNE(2006)55438)

[8] "Religion and Belief Discrimination in Employment - the EU law," European Network of Legal Experts in the non-discrimination field, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, 2006 at page 12 (footnote omitted; emphasis added), available at http://ec.europa.eu/social/BlobServlet?docId=2013&langId=en

[9] Dr. S. Burri, University of Utrecht, The Netherlands, argues that "It is likely that this jurisprudence [on gender equality], which to some extent has already been integrated into the new provisions of Directives 2000/43/EC, 2000/78/EC […] will also be used to interpret these clauses [concerning

21. In order to place the issue in context, the Commission against Racism and Intolerance (ECRI) of the Council of Europe has highlighted the particular vulnerability of Muslim women to discrimination:[10]

> "Convinced that the peaceful co-existence of religions in a pluralistic society is founded upon respect for equality and for non-discrimination between religions in a democratic state with a clear separation between the laws of the State and religious precepts; …
>
> Strongly regretting that Islam is sometimes portrayed inaccurately on the basis of hostile stereotyping the effect of which is to make this religion seem a threat;
>
> Emphasising that the principle of a multi-faith and multicultural society goes hand in hand with the willingness of religions to co-exist within the context of the society of which they form part; …
>
> [r]ecommends that the Government of member states:
>
> ensure that public institutions are made aware of the need to make provision in their everyday practice for legitimate cultural and other requirements arising from the multi-faith nature of society;
>
> [p]ay particular attention to the situation of Muslim women, who may suffer both from discrimination against women in general and from discrimination against Muslims; …"

22. The aforementioned report by Human Rights Watch refers to the way in which the exception for Western religions was introduced into the law in NRW and elsewhere, leading to the difference in treatment:

> "[a]s noted in Chapter IV, the laws in Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia contain explicit exceptions for Christian and Western values and traditions, and in Bremen and Lower Saxony the explanatory documents and parliamentary debates for the legislation stated that Christian traditions do not breach the neutrality requirement relied on to justify the restrictions. Consequently, the laws allow states to treat members of certain (popular) religious groups differently from otherwise similarly situated members of other (less popular) religious groups. In practice, this means that school authorities in those states can legally ban headscarf-wearing Muslim public school teachers while continuing to allow Christian nuns who are teachers to wear religious clothing and symbols."[11]

23. Accordingly teachers wearing a headscarf in observance of the Muslim faith are treated less favorably than a Christian teacher who wears or may want to wear clothing that manifests their religion, such as a nun's habit or a Jewish kippa, to be worn in the school.[12] The justification for the prohibition from working at the school while wearing a headscarf, even if in a style that is not explicitly religious, is because it would still be a manifestation of religious beliefs and would violate the school's "neutrality and peace."

Lack of Reasonable Justification or Exceptions Permitting Different Treatment

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genuine occupational requirements]." 'How to interpret the concept of genuine occupational requirements?' Trier, 31 October 2006, pp 4-5, www.era.int.

[10] ECRI, General Policy Recommendation No. 5 of 2000 "On Combating Intolerance and Discrimination against Muslims".

[11] HRW, "Discrimination in the Name of Neutrality", above, pages 28-29.

[12] See "16.10.2008, Türkischlehrerin scheitert vor Landesarbeitsgericht Kopftuch-Verbot in NRW erneut bestätigt"available at www.rp-online.de/nachrichten/Kopftuch-Verbot-in-NRW-erneut-bestaetigt_aid_626722.html

24. In limited circumstances, European Union law allows for a difference in treatment to be justified so as not to amount to unlawful discrimination, where there is an objective and reasonable justification. In this case however (a) there is no evidence that the behaviour of a teacher wearing a headscarf actually threatens the neutrality of the school, (b) it is not a proportionate response to the purported threat of Islam to impose a blanket ban all head-coverings, and (c) it cannot be a genuine occupational requirement that women are not able to teach while wearing a religious head-covering where the ban does not apply to Western religions.

a) Need for evidence that a teacher wearing a headscarf actually threatens school neutrality and peace

25. There must be an individual consideration of any evidence to support the supposed threat to school neutrality and peace that a teacher wearing a headscarf is said to represent.

26. EU law forbids blanket exceptions from non-discrimination and requires strict scrutiny of individual cases, and that there is evidence to support the claim. In assessing such claims a court should avoid considering the purported threat to neutrality in only abstract terms, and rather examine whether there is any evidence that the actual behavior of the teacher wearing the headscarf threatens neutrality. The Court would thus have to consider evidence, such as the teacher's actual conduct, teaching track record, and the alleged concrete impact of wearing the headscarf on the pupils and school environment. However, the prohibition cannot merely be based on general negative assumptions and stereotypes about Islam and its followers.

27. Turning to the cases at issue, where there is nothing to suggest that teachers wearing headscarves, either by behavior or attempts to indoctrinate students with religious ideology, actually threaten the neutrality of the school, the prohibition of the wearing of headscarves is not a proportionate response to any perceived threat.

28. The relevant and decisive factor in light of this legislation can only be specific facts of a case which should determine whether there is a breach of neutrality of the school, and whether there are problems with the teacher's interaction with the students, or when teaching while wearing a headscarf. The legally relevant questions are whether a teacher is properly carrying out her job, and whether she imposed her religious views on her pupils to determine if there is a violation. If not, there is no evidence upon which to assert a violation of the principle of neutrality. The result in a situation such as this is that a Muslim teacher wearing a headscarf is denied the right to teach at school solely because she wears a piece of clothing associated with her religious belief, whereas similarly situated persons of Christian or Jewish faith are permitted to teach. The application of domestic law in such a way violates EU law.

29. Tellingly, in the case of *Brigitte Maryam Weiss v. Bezirksregierung Düsseldorf*, the Düsseldorf Court held that:

> "[t]he manifestation in the form of the head cover the plaintiff was wearing is also capable of endangering or disturbing the neutrality of the *Land* towards pupils and parents, or the political, religious and ideological peace in the school. The prohibition set out in § 57 subs. 4 of the NRW School Act ties in with an **abstract element of endangerment**. Not only manifestations which concretely endanger or disturb the neutrality of the *Land* and school peace are prohibited. The prohibition is aimed foremost at avoiding abstract dangers in order not to allow for concrete endangerment of the neutrality of the *Land* and school peace to occur. In the wording of law this is stated in such a way that the respective conduct is already prohibited when it is 'capable' of endangering the mentioned 'protected interests'. No consideration of the concrete situation in individual schools, and its assessment is provided for. Such an abstract endangerment, particularly of the ideological and

religious neutrality of the school and of the religious peace of the school emanates from a teacher wearing a headscarf noticeably motivated by Islamic religious clothing prescriptions" [emphasis added]."[13]

30. Section 57 subs. 4 of the NRW School Act suggests that the purpose of the ban on Islamic headscarves is to preserve the neutrality of the school, including religious neutrality. However, this meaning becomes blurred in light of the fact that teachers may wear Christian and other Western religious clothing, including head-coverings. It has not been demonstrated how wearing a headscarf "may endanger or disturb the neutrality of the country towards pupils or parents or the political, religious or ideological peace of the school" as Section 57 subs. 4 states.

31. If, as the Düsseldorf Court concluded in the *Weiss* case, the real threat to the neutrality of the school is not the headscarf itself (i.e., the conduct by which she manifests her religion), but the fact that the pupils might know that Ms. Weiss is a Muslim (i.e., an adherent to the religion itself), then justification for the ban is blurred, and the ban could be characterized as stating that women who are known to be Islamic threaten neutrality and should be forbidden from teaching.

32. The School Administration argues that where the employer is the State, employees represent the State and so the wearer of a headscarf infringes school neutrality. However, the [German] Constitutional Court has already held that while wearing a headscarf might disturb the tranquility of the school, it is only a remote risk. In the *Lüdin* case this Court held:[14]

> "[49] If teachers introduce religious or ideological references at school, this may adversely affect the state's duty to provide education, which is to be carried out in neutrality, the parents' right to educate their children and the pupils' negative freedom of religion. At least, it opens up the possibility of influencing the pupils and of conflicts with parents, which may lead to disturbing the peace of the school and may endanger the carrying out of the school's duty to provide education. <u>These effects could also result from teachers' wearing clothing which is religiously motivated and to be interpreted as a manifestation of a religious belief. Those, however, are only abstract dangers.</u> <u>If even such mere possibilities of endangerment or conflict, arising from the appearance of the teacher, rather than his or her concrete behaviour which would amount to an attempt to influence or even proselytize the children entrusted to his or her care, were to be determined to amount to a breach of his or her duties under civil-service law or as a lack of aptitude preventing appointment as a civil servant, such determination would,</u>

[13] Düsseldorf Court judgment (Verwaltungsgericht Düsseldorf, 2 K 1752/07, 14.08.2007) § 32.
[14] Judgment of the German Constitutional Court, 24 September 2003 (2 BvR 1436/02).
Human Rights Watch, in its Report "Discrimination in the Name of Neutrality" analyzed the judgment as follows: "The Constitutional Court ruled that any prohibition must be based on a clear statutory foundation. The Court outlined that state 'neutrality' in public schools could mean 'open inclusive neutrality' which permits all religions-accepting the increasing variety of religions at school and using it as a means for practising mutual tolerance and in this way making a contribution to the attempt to achieve integration. Or it could mean 'strict distanced non-religious neutrality.' If the state were to tolerate a teacher's being in religious dress at school by their personal decision, this cannot be treated in the same way as a state order to display religious symbols at school (for example, Christian crosses in school buildings). The court made clear that permitting individual 'religious' statements by teachers through their clothing should not necessarily be considered as endorsement by the state…. The mere potential that in-school conflicts may arise between the competing constitutional interests of the teachers, parents, and students is insufficient to resolve constitutional balancing of interests. However, if states wish to eliminate even such abstract dangers, it concluded, they must do so by regulating the problem in the applicable School Act or similar specific laws….However, any regulation as well as its justification and the practice of enforcing it, the court also pointed out, must strictly treat all religions and religious communities equally, in law and in practice."

because it would entail restricting the unconditionally granted fundamental right pursuant to Article 4 paragraphs 1 and 2 GG [Grundgesetz - German Basic Law], require a sufficiently specific statutory basis which would permit such restriction.."[emphasis added].

b) A blanket ban of headscarves is not a proportionate response

33. A ban that prohibits any head-covering worn by Muslim women is not a proportionate response to the supposed danger emanating from radical or fundamentalist Islam. Even if there is a genuine purpose for the less favorable treatment which is supported by evidence in the individual case, the principle of proportionality must still be observed. This means that less restrictive measures which achieve the same result must be considered if it is found to be disproportionate.

34. The CJEU has emphasized that where there is less favorable treatment, the principle of proportionality must be respected in each case. In the *Sirdar* case, for example, the CJEU found:[15]

> "In determining the scope of any derogation from an individual right such as the equal treatment [of men and women], the principle of proportionality, one of the general principles of Community Law, must also be observed (…) That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of [public security] which determine the context in which the activities in question are to be performed."

35. There must be substantial consideration on an individual basis of the manner in which a teacher wearing a headscarf does or does not endanger school peace and neutrality, and also in evaluating the proportionality of the response. A blanket ban is not, by its very nature, proportionate, unless, as the Constitutional Court held in the Lüdin case, the school or educational authorities present evidence that the teacher had actually threatened the neutrality in the way that she behaved.

c) Genuine Occupational Requirements do not Justify the Ban on Islamic headscarves

36. A requirement for teachers not to wear Islamic religious head-coverings while teaching is not a genuine occupational requirement in the sense of EU Framework Directive 2000/78/EC. Article 4(1) of the Directive provides for an exception to the general rule in that where the difference of treatment is necessary for a specific reason related to the job itself this will be not considered discriminatory:

> "Notwithstanding Article 2(1) and (2), [the general prohibition of discrimination] Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [which include "religion or belief"] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

37. The claim that women from religious traditions other than those which are Christian or occidental are unable to teach in a public school without disturbing peace and neutrality only if they do not wear religious clothing is without foundation. If such a claim was a genuine occupational requirement, the ban should also affect all religions, not just non-

[15] CJEU, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, C-273/97, 26 October 1999, European Court Reports 1999, page I-7403.

Western religions, and the State would have presented evidence demonstrating how the women were unable to teach because of their headscarves.

38. The above quoted provision implies that a requirement not to belong to a certain religion and to hide any signs that might possibly reveal association with that religion cannot be a genuine occupational requirement for teachers in public education. To the extent that it is argued that because of the Christian basis of education in NRW,[16] schools are "public organizations, the ethos of which is based on religion and belief," the only relevant occupational requirement of a religious nature is that teachers do not *impose* their religious views and personal behavior on their pupils, and do not in any way claim superiority of their beliefs, jeopardizing the plurality of education and indeed peace in the school. For generations nuns have taught at schools wearing their habits in the classroom with no effect on their ability to be good teachers. Indeed, the NRW School Act to date permits them to do so.

39. To the extent that it is suggested that there is an occupational need for teachers to remain entirely religion-neutral if they are employed by the State (which is not accepted, given the exemptions for Western religions), it is submitted that even if employees do represent the State, they should be permitted – or even encouraged – to reflect the diversity of the communities of which the State consists. The employment of staff adhering to different religions will thus reflect the State's respect of religious freedom and non-discrimination.

40. In conclusion, the NRW School Act creates less favorable treatment on religious grounds and amounts to direct discrimination on the basis of religion, contrary to Article 2 of the EU Framework Directive 2000/78/EC.

Gender Discrimination: Violation of the EU Gender Equality Directive

41. While the neutrality rule does not expressly target women, its application disproportionately affects them. This is illustrated by the fact that while there are no known cases where male teachers of non-Western religions such as Muslims or Sikhs have requested and/or been prohibited from wearing traditional male religious clothing including a head cover, there have however been numerous cases against women teachers who have chosen to wear the headscarf in observance of their faith, rather than in manifesting it to others.[17] Furthermore, because there are more women than men in the teaching profession at primary and secondary level, women are considerably more likely to be affected by the measures.[18]

42. European Law provides for gender equality in employment through the Gender Equality Directive 2006/54/EC.[19] Article 1, stating the Directive's purpose provides:

[16] See above Article 7 and 12 of the NRW Constitution as well as Section 57 subs. 4 of the NRW School Act.

[17] Currently there are at least 5 other cases pending or in preparation in NRW on behalf of female teachers prohibited to wear the headscarf: 110-06/1311Oberverwaltungsgericht für das Land Nordrhein-Westfalen; 7 K 4509/08 - Verwaltungsgericht Gelsenkirchen; 3 K 2630/07 - Verwaltungsgericht Köln; 11 Sa 280/08 - Landesarbeitsgericht Hamm; 11 Sa 280/08 - Landesarbeitsgericht Hamm; 4 Ca 1077/08 - Arbeitsgericht Wuppertal.

[18] As of 2010, 82% of primary school teachers and 59% of secondary school teachers in Germany were female. See World Economic Forum, Gender Gap Index 2008: Education and Training, at http://www.weforum.org/reports/global-gender-gap-report-2010

[19] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

> "The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
>
> To that end, it contains provisions to implement the principle of equal treatment in relation to:
>
> (a) access to employment, including promotion, and to vocational training;
>
> (b) working conditions, including pay;
>
> (c) occupational social security schemes.
>
> It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.
>
> Article 2 - Definitions
>
> 1. For the purposes of this Directive, the following definitions shall apply:
>
> (a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
>
> (b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary"

43. The Federal Republic of Germany was required to implement the provisions of this Directive in its domestic law by 15 August 2008.[20]

Indirect discrimination: The effects of the "neutrality rule" on women

44. One of the questions before this Court is whether the restriction on religious dress has a disparate disadvantageous effect on and therefore indirectly discriminates against women of Islamic faith. The case-law of the CJEU provides a framework for the manner in which such disparate effect is established. In the case *Seymour-Smith*, the CJEU held that to establish indirect discrimination, "the first question is whether the measure in question has a more unfavourable impact on women than on men."[21]

45. In interpreting the notion of indirect discrimination, the CJEU has ruled that it is not necessary to show which proportion of the group concerned would actually be affected by the impugned law, policy or measure, but merely to demonstrate that the measure makes it more likely or creates a risk of disproportionate impact. In the case of *Commission v. Belgium* concerning the application of the notion of discrimination against migrant workers in employment the CJEU held: [22]

> "[I]t must be borne in mind that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect."

[20] See Article 33 of the Gender Equality Directive on Implementation. Germany has not made a specific transposition of this Directive since the Government considers it unnecessary to explicitly and formally transpose the Recast Directive due to the fact that the obligations arising out of the directives have already been met. The General Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz,* or AGG, which entered into force in August 2006) covers numerous issues contained in the Recast Directive, but was not intended as a transposition of that Directive.
[21] CJEU, Case C-167/97, 9 February 1999, *Seymour-Smith and Perez*, at paragraph 58.
[22] CJEU, Case C-278/94, 12 September 1996, European Court Reports 1996, page I-04307, point 20.

46. The report by Human Rights Watch explains the ways in which the law does in fact affect women more than men, in that in practice it has only been applied against Muslim women, and that it only theoretically might apply to men:

> "The laws in all eight of the states discriminate on the grounds of gender and on the grounds of religion. Women's religious freedom is being violated, as these restrictions have been applied in practice exclusively against women wearing the headscarf. By such a clear negative distinction between men and women, they violate anti-discrimination provisions of international human rights law…. For Muslim women who consider the wearing of the headscarf to be an obligation of their beliefs, the laws require them to choose between their deeply held beliefs and their employment as teachers in public schools or other civil servants.
>
> It has been argued by state officials and politicians that men could fall under the restrictions if they were to wear typical Muslim clothing or if there were to be cases of teachers wearing traditional clothing of the Indian Bhagwan movement (there had indeed been a few cases of teachers employed by state schools in Germany who began to wear the highly visibly reddish-colored clothing of the Bhagwan in the 1980s). But there have in fact been no such cases since the laws have been enacted, and in practice it has affected only women who wear the headscarf, leading to double discrimination on the grounds of gender and religion [footnotes from report omitted]."[23]

47. Similarly, the UN Special Rapporteur on freedom of religion or belief, illustrated the issues at stake clearly:[24]

> "51. Indirect or de facto discrimination based on religion or belief has been encountered in the context of legislation regulating the wearing of religious symbols in education institutions. […] Although the scope of the law applied equally to all religious symbols, it turned out to disproportionately affect young Muslim women wearing the headscarf, thereby constituting a form of indirect discrimination."[25]

<u>The disproportionate adverse effect upon Muslim women cannot be justified</u>

48. As established above, the impugned requirement by its nature places women at a disadvantage compared to men. This constitutes indirect discrimination in violation of Article 2 1(b) the EU Gender Equality Directive "unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

49. The CJEU has explained what an objective justification may be. In the case of *Wippel v. Peek & Cloppenburg* it held:[26]

> "55. [i]n accordance with the settled case-law [cited at paragraph 43 hereof concerning Articles 2(1) and 5(1) of Directive 76/207], national provisions discriminate indirectly against women where, although worded in neutral terms, they operate to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex."

[23] HRW, "Discrimination in the Name of Neutrality", pages 52-53.
[24] UN Human Rights Council, "Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir", 6 January 2009, UN Doc A/HRC/10/8.
[25] This comment concerned Turkey, but the legal notion and application of indirect discrimination against Muslim women is equally applicable here.
[26] CJEU, 12 October 2004, 313/02.

50. The CJEU has adopted the principle that any justification of provisions that apply differential treatment, together with the appropriateness of a specific form of differential treatment, should be assessed according to the rule of *strict scrutiny*. This narrows considerably the circumstances under which an exemption from the general principle of equal treatment is permissible.

51. According to the CJEU's case law, proportionality and strict scrutiny requirements are central to determining the validity of exceptions to the principle of equal treatment of men and women. In the *Johnston* case the CJEU ruled that any derogation from an individual right to equal treatment must be interpreted strictly.[27] It emphasized that a derogation which is general in its scope, rather than being related to particular occupational activities or their nature or the context in which they are carried out, made on the sole ground that the discriminatory measure in question was adopted for the purpose of safeguarding national security or protecting safety or public order, is not permitted by Article 2(2) of the Gender Equality Directive.

52. In the *Kreil* case,[28] which concerned the exclusion of women from almost all military posts of the Bundeswehr in the Federal Republic of Germany, the CJEU adopted the same approach. Such exclusion, the CJEU explained, could only be justified by the specific nature of the posts in questions or by the particular context in which the activities in question were carried out.[29]

53. The CJEU has emphasized that the principle of proportionality, one of the general principles in EU law that governs interpretation of the directives related to equality, must be respected in each case. In the *Sirdar* case, for example, the CJEU found that:[30]

> "26. In determining the scope of any derogation from an individual right such as the equal treatment [of men and women], the principle of proportionality, one of the general principles of Community Law, must also be observed (…) That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of [public security] which determine the context in which the activities in question are to be performed."

54. In conclusion, the neutrality provision linked to the exception for Christian or Western religions in the NRW School Act also creates disparate and less favorable treatment on grounds of gender. The authorities have yet to adduce a compelling objective justification for the disadvantage which particularly affects Muslim women as set out above, failing which the impugned rules amounts to indirect discrimination on grounds of gender, contrary to Articles 1 and 2 (b) of the EU Gender Equality Directive.

Ethnic Discrimination: Violation of the EU Racial Equality Directive

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[27] CJEU, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, 15 May 1986, European Court Reports 1986, p. 01651 (case concerning the carrying of fire-arms exclusively by male police officers in the performance of their police duties in Northern Ireland).

[28] CJEU, *Tanja Kreil v Bundesrepublik Deutschland*, C-285/98, 11 January 2000, European Court Reports 2000, Page I-00069.

[29] The CJEU concluded: "Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services."

[30] CJEU, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, C-273/97, 26 October 1999, European Court Reports 1999, page I-7403.

55. The ban on headscarves for Muslim women also causes indirect discrimination against minority ethnic groups, who are almost the only group affected.

56. Article 2(2)(b) of the Directive provides a definition of indirect discrimination in similar terms to the other two EU Directives:

> "b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

57. The phrase "apparently neutral" encompasses provisions which make distinctions that are on their face unrelated to race or ethnicity, including religious distinctions, but which in practice have a disparate impact on various racial or ethnic groups—a point addressed further below.

58. Indirect discrimination stands in contrast to direct or *overt* discrimination. The decisive element is the impact on the affected group in view of the characteristics of the group to which the individual belongs, not—as in the case of direct discrimination—an intentional and direct difference in treatment.

59. In Germany, excluding faith-observing Muslim women from exercising their profession as a teacher means that those women predominantly affected are of non-German ethnic origin, primarily of Turkish origin, and also from other populations originating from Islamic countries. But for a few exceptions, the ethnic Turkish population of Germany—which constitutes the largest ethnic and religious minority in Germany[31]—does not adhere to Christianity.

60. It is well established that religion and ethnicity can be inextricably intertwined. Thus in the United Kingdom, before religious discrimination was explicitly proscribed, cases were brought arguing successfully that certain instances of discrimination on the basis of religion constituted indirect ethnic discrimination. The way the test was formulated is explained in a United Kingdom Home Office report:

> "[T]he Race Relations Act 1976 (RRA), which prohibits discrimination on "racial grounds", defined as "colour, race, nationality, or ethnic or national origins", makes no express reference to religious discrimination. However, ways have been found to provide limited protection under the Act to some religious groups which have the characteristics of an ethnic group. In this way protection has been offered to Sikhs and Jewish people. The recognition of a religious community as an ethnic group provides them with protection from both direct and indirect discrimination. In the case of *Mandla v Dowell Lee* the House of Lords accepted that ethnic origin is a wider concept than race and identified several characteristics relevant to identifying an ethnic group .
>
> […]
>
> A second way of bringing religious groups within the ambit of the RRA has been through the concept of indirect discrimination. Actions taken by an employer causing detriment to Muslims as a class, such as refusal to allow time off work for

[31] As of April 2006, the Turkish population constituted 1.87 million out of a total of 82.5 million German residents, i.e. 2.27% of the total population of Germany. See Institut für Gerontologie an der Universität Dortmund, http://www.ffg.uni-dortmund.de

religious holidays, might be held to constitute indirect racial discrimination against those from an ethnic or national origin that is predominantly Muslim."[32]

61. By definition, intentions are irrelevant as far as indirect discrimination is concerned, as opposed to direct discrimination.[33] Only the likely results of a policy or requirement are relevant, insofar as a discriminatory effect has already occurred, or can potentially occur.[34] Intention to discriminate therefore does not have to be established.[35]

62. The CJEU made this point, among many others, in the *Halliburton* case:

> "15. [T]he rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."[36]

63. The relevant question is therefore not whether there is any intention to discriminate against the claimants on the basis of their ethnic background but whether the prohibition of Islamic religious garments, and not those belonging to a Christian church or other Western religion would or does disproportionately affect the ethnic group to which the claimant belongs.

No Objective Justification for Indirect Differential Treatment on Ethnic Grounds

64. As noted earlier, a requirement that by its nature places persons of a particular ethnic origin at a disadvantage compared with other persons constitutes indirect discrimination in violation of the Racial Equality Directive "unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[37]

65. For the sake of completeness and to the extent that the State may seek to adduce the same justification of a "genuine occupational requirement" that it put forth in respect of its direct discrimination against headscarf wearing Muslim women, the justification for indirect discrimination set out in the Racial Equality Directive is not exactly the same as that for direct discrimination (see discussion of genuine occupational recruitments, *supra*.)

66. The CJEU described the legal test for justification of indirect discrimination in the case of *Bilka-Kaufhaus*. Under that test, a provision, criterion or practice that indirectly and adversely affects an ethnic group is valid only if it:

- corresponds to a real need on the part of the employer;
- is appropriate with a view to meeting that need; and
- is necessary to meet that need.[38]

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[32] B. Hepple and T. Choudhury, "Tackling Religious Discrimination: Practical Implications for Policy Makers and Legislators", London, Home Office Research, Development and Statistics Directorate, February 2001.

[33] See Sedler, Robert A. (1999) The Role of 'Intent' in Discrimination Analysis. In Titia Loenen, Peter R. Rodrigues, eds., Non-Discrimination Law: Comparative Perspectives (The Hague: Kluwer Law International, 1999), pp. 91–107.

[34] CJEU, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, Case 170/84, point 31, European Court Reports 1986, p 1607. See also CJEU, Case 96/80, J.P. Jenkins v Kingsgate (Clothing Productions) Ltd, 31 March 1981, European Court Reports 1981, p. 911.

[35] "Concepts of direct and indirect discrimination", Michel Miné, Associate Professor in Private Law at the University of Cergy-Pontoise, www.era.int.

[36] CJEU, *Halliburton Servs. BV v. Staatssecretaris van Financien*, Case C-1/93, 12 April 1994, European Court Reports 1994, p. I-1137, curia.europa.eu.

[37] Article 2 (2)(b) of the Racial Equality Directive.

[38] *Bilka-Kaufhaus*, supra para 37.

67. This test includes considering whether the justifications provided by the employer (*in casu* the State) demonstrated a real need. If such a need is established, further explicit consideration of the seriousness of the disproportionate impact of the policy on the group affected must be undertaken, followed by an explicit evaluation of whether the state's public order and neutrality needs are sufficiently weighty to trump the interests of the adversely affected group.[39] All of this is lacking in the State's justification of the differential treatment to which the claimants were subjected.

Conclusion As Regards Indirect Discrimination On Grounds Of Ethnicity

68. It light of the above discussion we conclude that that the impugned provisions also amount to indirect ethnic discrimination. The impugned prohibition for school teachers to wear religious clothing and in particular female Islamic clothing, while exempting Christian and Western religions amounted to discrimination against the claimants indirectly on grounds of ethnic origin as well as directly on grounds of religion and indirectly on grounds of Gender.

Referral to the Court of Justice of the European Union

69. This case raises significant questions of European Union law that would benefit from being clarified by a reference to the Luxembourg Court.

70. The Court of Justice has established in its case-law the principle of primacy (supremacy) of European Union law in EU Member States.[40] This means that when a national court is faced with a conflict of laws, European Union law prevails over national law.

71. Under Article 267 TEU the CJEU has the jurisdiction to give preliminary rulings on questions of EU law where references are made by the national courts. These may concern the interpretation of the treaty, the validity of acts of EU institutions and the interpretation of EU statutes.

72. In the *Feryn* case, the CJEU explained its power to provide national courts with interpretations of EU law:[41]

> "19. It should be noted, at the outset, that Article 234 EC [now Article 267 TFEU] does not empower the Court to apply rules of Community law to a particular case, but only to rule on the interpretation of the EC Treaty and of acts adopted by European Community institutions. The Court may, however, in the framework of the judicial cooperation provided for by that Article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of one or other of its provisions."

73. The CJEU has not yet decided a case on the permissible exceptions to the prohibition of discrimination on religious grounds under the Framework Directive. The benefit of referral to the CJEU is that this case rests on the proper application or interpretation of the pertinent European Union non-discrimination law discussed above. In particular, the Federal Constitutional Court must decide whether a national law correctly implements standards established by EU Directives.[42] Also, requesting guidance on the

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[39] Taken *mutatis mutandis* from http://www.equalityhumanrights.com, E.O.C. Legal Advisers, "The legal test for justification in indirect discrimination cases".
[40] See e.g. CJEU in Case 6/64 *Costa v. ENEL* [1964] ECR 585 and Case 148/78 Pubblico Ministero v. *Tullio Ratti* [1979] ECR 1629.
[41] CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*, judgment of the Second Chamber of 10 July 2008.
[42] See: Who's Afraid of the European Court of Justice? A Guide to the Preliminary Ruling Procedure for national courts, Dr. Klaus Bertelsmann, Issue No.2, October 2005 European Anti-Discrimination Law Review, p. 29.

interpretation of the EU Directives will ensure enforcement of individual claims beyond the individual case.

74. Given that the question has never been considered by the CJEU, the facts are not in dispute, and given that similar laws also apply in other *Länder*, there would be an advantage in having a clear statement of EU law from the CJEU on the question of whether the NRW School Act is in conformity with European Union law. The Constitutional Court has emphasized the need to refer a case to the CJEU when "there is neither confirmed case-law of the ECJ, nor is the correct application of European Union law obvious."[43]

75. A preliminary ruling by the CJEU will therefore ensure a uniform interpretation of what can amount to a permissible exception to the prohibition of direct religious discrimination and indirect gender discrimination. This court is therefore invited to refer the case to the CJEU in Luxembourg pursuant to Article 267 TEU for a preliminary ruling regarding questions of interpretation and application of European Union law.

76. We suggest the following questions for referral to the CJEU:

EU Framework Directive 2000/78 (religious equality in employment)

(1) Is it direct discrimination on the grounds of religion or belief, within the meaning of article 2(1) of Council Directive 2000/78/EC, for a Member State to adopt a law or practice which, in the case of persons teaching at a public school, prohibits the wearing of clothing considered by the authorities of that Member State to exhibit the values and traditions of Islam when no such prohibition is imposed upon clothing considered by those authorities to exhibit the values and traditions of "Christian and occidental" values and traditions?

(2) Is it relevant for the answer to question 1 that the practice of the Member State is to prohibit the wearing of the clothing in question without consideration of the other circumstances of the teacher in question?

(3) By what criteria is it to be determined whether measures such as those referred to in Question 1 are "laid down by national law and which are, in a democratic society, necessary for public security, for the maintenance of public order and/or for the protection of the rights of freedoms of others" within the meaning of article 2(5) of Council Directive 2000/78/EC and, in particular:

(4) May such a determination be based solely upon the fact that the wearing of the clothing in question can appear to some pupils or parents, but not to others, to be a demonstration against human dignity, non-discrimination, the rights of freedom and/or the national constitutional order?

(5) Is it relevant that the national law in question precludes the application of those measures to the exhibition of "Christian and occidental" values and traditions?

(6) Is it relevant, in particular to whether the measures are "laid down by law", that the state practice under the national law in question is not to apply the measure in question to the exhibition of e.g. Jewish values and traditions?

(7) Is a requirement not to wear the clothing in question capable of constituting an "occupational requirement", within the meaning of article 4(1) of Council Directive 2000/78/EC?

(8) By what criteria is it to be determined whether an occupational requirement is "genuine and determining", within the meaning of article 4(1) of Council Directive 2000/78/EC?

[43] cf. Constitutional Court Order of 30 August 2010 – 1 BvR 1631/08.

EU Gender Equality Directive 2006/54

(9) Does the practice adopted under Section 57(4) of the NRW School Act amount to indirect discrimination on grounds of sex, and is it thus contrary to Directive 2006/54, article 14(1)(a) and (c)?

EU Racial Equality Directive 2000/43

(10) Is the practice adopted under Section 57(4) of the NRW School Act one of indirect discrimination on grounds of racial or ethnic origin, and thus contrary to Directive 2000/43, article 3(1)(a) and (c)?

77. Should the Constitutional Court decide that it is not in a position to refer the case to the CJEU itself, it is requested to refer the case back to the last instance courts which dealt with the cases with a finding that the cases should be referred to the CJEU as elaborated above.[44]

B. VIOLATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

78. If international law is used to assist in the analysis of the application of Section 57 subs. 4 of the NRW School Act, the European Convention on Human Rights (ECHR) would prohibit the singling out of a particular religion for specific treatment as amounting to discrimination in the exercise of religion, in breach of Article 14 of the Convention taken with Article 9 ECHR. Singling out a particular race or gender in a similar fashion would also violate the Convention.[45]

79. When considering the implication of the Convention in the current proceedings, of relevance is the judgment of the Constitutional Court of 4 May 2011,[46] in which it held:

> "2. a. It is true that at national level, the European Convention on Human Rights ranks below the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law (*völkerrechtsfreundlich*). At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpretation aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law."

80. The European Court of Human Rights ("ECtHR)" has found that there is a duty to provide a pluralistic education, because "the possibility of pluralism in education … is essential for the preservation of the 'democratic society' as conceived by the Convention." Rather than considering other religions to be a threat, the ECtHR considers such diversity to be an integral part of democracy:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[47]

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[44] *Ibid*.

[45] *East African Asians v the United Kingdom*, ECommHR, Decision of 14 December 1973, finding that "publicly to single out a group of persons for differential treatment on the basis of race" amounted to degrading treatment as a special form of affront to human dignity (at para. 207); *D.H. and Others v the Czech Republic*, ECtHR (Grand Chamber) judgment of 13 November 2007, finding that assigning children to special schools on the basis of their ethnicity was discriminatory; and *Abdulaziz, Cabales and Balkandali v the United Kingdom*, ECtHR, judgment of 25 May 1985, applying the "very weighty reasons" test to gender discrimination.

[46] Judgment of 4 May 2011, Preventive Detention I, 2 BvR 2365/09, 2 BvR 740/10, Preventive Detention II, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10.

[47] *Folgerø and Others v. Norway*, ECtHR, Judgment of 29 June 2007, at para. 84.

81. In particular, the ECtHR has emphasized that while children should be protected from preaching or proselytizing, they should be encouraged to experience different religions at school so they receive a broad education:

> "the school should not be an arena for preaching or missionary activities but a meeting place for different religious and philosophical convictions where pupils could gain knowledge about their respective thoughts and traditions."[48]

82. Further more, in the case Lautsi v Italy, the Grand Chamber of the ECtHR has, e.g. ruled permissible the display of the crucifix in front of the classroom in public schools, considering at the same time the t the reference to Christianity or even Catholicism associated with it was – and therefore should be - balanced by the fact that other religions have full access and are treated on an equal footing in (Italian) schools.[49] Accordingly, art. 57(4) NRW School Law where it privileges or exempts Christianity and occidental religions is at odd with these principles pronounced by highest authoritative body of the ECtHR.

83. In sum, while the ECtHR has upheld bans on <u>all</u> religious clothing in schools in order to protect constitutions that guarantee secularity, the Convention does not permit a ban on wearing clothing of one religion while allowing that of another. Similarly, singling out a specific religion as posing a threat to the neutrality of society and the peace of a school is also an impermissible difference of treatment.

Analysis under Article 14

84. Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. Article 14 ECHR "has no independent existence" and has effect "solely in relation to the 'enjoyment of the rights and freedoms' safeguarded by these provisions." At the same time, it is not necessary for there to have been an actual breach of another ECHR provision in order for there to have been a breach of Article 14 ECHR. So long as the substantive right is engaged, the ECtHR can consider whether there has been discrimination, as long as there is a nexus between the substantive right and the discriminatory act.

> "As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter." [50]

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[48] *Folgero,* at paragraph 88.

[49] *Lautsi v. Italy,* ECtHR, GC, Judgment of 18 March 2011, § 74: "[I]taly opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised in schools for "all recognised religious creeds" (see paragraph 39 above). Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions."

[50] *Schalk and Kopf v. Austria,* ECtHR, Judgment of 24 June 2010.

86. In establishing whether there has been discrimination, the Court first considers whether the right is engaged, and whether there is a difference in treatment on the basis of that right. The Court then asks whether the interference with that right pursues a legitimate aim, and assesses whether the interference is proportionate to the aim pursued.

The Right to Religion is Engaged

87. In a considering a prohibition on wearing headscarves, the right in relation to which discrimination is alleged is Article 9 ECHR, the right to freedom of religion and belief:

> "1. Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance.
>
> 2. Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

88. State-sponsored activities which "cast a negative light over a particular form of religion or belief" [51] fall within the ambit of Article 9 and so need to be justified in order to avoid violating Article 14 ECHR.

89. The prohibition on wearing a headscarf brings the case within the ambit of Article 9 ECHR, as the targeting of only non-"Christian" or non-"occidental" religions amounts to a difference of treatment based on religious grounds. This is sufficient to engage Article 14 ECHR.

Difference in Treatment under Article 14 ECHR

90. Discrimination under the Convention is defined as a "difference of treatment of persons in similar situations without an objective and reasonable justification". Any justification must pursue a "legitimate aim" and there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."[52] As noted above, the Court has on numerous occasions found that unjustified differences of treatment on the basis of race or gender amounts to discrimination. The Court has also found a violation of the Convention where there was an unjustified difference of treatment based on religious grounds. In the *Hoffmann* case, in which the applicant challenged her differential treatment in relation to access to her children on the basis of her affiliation with Jehovah's Witness, the ECtHR held:

> "that there has been a difference in treatment and that that difference was on the ground of religion […] Such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realized".[53]

91. The *Hoffman* case shows that an exception to the general prohibition of differential treatment on grounds of religion must be applied in a limited way, under strict criteria of proportionality and necessity. This requires that there is detailed consideration of the individual case, rather than a general prohibition of religious symbols worn in observance of a religion apparently seen as *ipso facto* hostile and proselytizing.

The Interference must pursue a Legitimate Aim

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[51] See Evans, *Manual on the Wearing of Religious Symbols in Public Areas.* page 37.
[52] *Andrejeva v. Latvia*, ECtHR [GC], Judgment of 18 February 2009, at para. 81.
[53] *Hoffmann v Austria*, ECtHR, Judgment of 23 June 1993, at para. 33.

92. Any justification for a difference in treatment must pursue a legitimate aim if it is not to violate the Convention. In this case, the NRW government claims, with reference to the impugned statutory school act provision, that the aim is the preservation of *neutrality and peace*.

The effects of the interference must be proportionate to the aim pursued

93. The next test under Article 14 ECHR is the extent to which the State has a "margin of appreciation" in assessing whether and how differences in otherwise similar situations justify differential treatment. Here the scope of a State's margin of appreciation varies according to the circumstances and depending on the subject matter and ground used for the differential treatment.[54]

94. In the context of a school, it is accepted that the State enjoys a considerable margin of appreciation in determining the balance to be struck between the right of the individual to manifest her religion or belief and the need to protect the rights and freedoms of others, to avoid schools becoming places of indoctrination rather than of education.[55]

95. However, in cases involving discrimination the ECtHR has held that Contracting States are entitled to varying degrees of margin of appreciation depending on the grounds on which differential treatment is applied to the persons concerned. Where the difference of treatment is on the basis of religion, the Court has held that there is no margin of appreciation, finding that "Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."[56]

Evaluation of Evidence to Support the Neutrality Claim

96. The ECtHR has held that if the government seeks to rely on the negative impact of a manifestation of religion in order to justify a ban then there must be concrete evidence as to that impact, rather than to rely on assumptions. In the *Palau-Martinez* case (concerning a Jehovah's Witness' parental access) the ECtHR, while acknowledging the margin of appreciation of the State, took a clear stance rejecting assumptions about a religion's presumed negative impact on a child, without concretely adduced evidence to that effect:[57]

> "42. The Court notes firstly that the Court of Appeal, in the two paragraphs of its judgment cited above, asserted only generalities concerning Jehovah's Witnesses.
>
> It notes the absence of any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life and, in particular, of the reference which the Government alleged was made in the Court of Appeal's judgment to the fact that the applicant took her children with her when attempting to spread her religious beliefs. In this context, the Court cannot accept that such evidence is constituted by the Court of Appeal's finding that the applicant "does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion."
>
> …. the Court considers that the Court of Appeal ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests. Although relevant, that reasoning was not in the Court's view sufficient."

97. As in the *Palau-Martinez* case, in the situation where a female teacher wears a headscarf, the school and education authorities must present evidence to justify their

[54] Ibid, at paragraphs 38-47.
[55] See, "Manual on the Wearing of Religious Symbols in Public Areas" Malcolm D. Evans, p. 103, Council of Europe Publishing, 2009.
[56] *Hoffmann*, supra, at para 36.
[57] *Palau-Martinez v. France*, ECtHR, Judgment of 16 December 2003, Reports 2003-XII.

assertion that the teacher is a presumed threat to the neutrality of the state and the peace of the school. The School Administration's reasoning must not be limited to general assumptions about the teacher's faith and the presumed indoctrination of students, without any consideration of her personal behavior, expressed views, teaching methods, or any complaints about her teaching methods.

Distinguishing features from previous ECtHR headscarf cases

98. The ECtHR has upheld a ban on all religious symbols in schools in the interests of maintaining the secularism and neutrality of the State where that applies. In *Dahlab v Switzerland* a complete ban on religious clothing was justified on the basis of the need to protect the freedom of others and on the basis of the principle of denominational neutrality in schools.[58] In *Layla Sahin v Turkey* the ECtHR upheld the secularist principles of Turkey as a reason to permit a ban on headscarves. [59] In *Dogru v France* the ECtHR upheld the secularism / religious neutrality of the French state in allowing a ban on the ostentatious display of religion by children wearing headscarves.[60]

99. The present situation in North Rhine-Westphalia explicitly contrasts with the cases *of Dogru* and *Dahlab*, which involved the prohibition of religious clothing without exception, or the case of *Layla Sahin*, which prohibited headscarves, the symbol of the religion of the overwhelming majority, in order to maintain absolutely the principle of secularity of the State and the strict separation of State and religion. The situation at hand, the prohibition of teachers wearing headscarves in schools, presents a different situation insofar as it expressly exempts from its application the "exhibition of Christian and occidental educational and cultural values or traditions."

100. In North Rhine-Westphalia, visible signs of belonging to the Islamic faith are automatically banned under the assumption of endangering neutrality and peace without any consideration of the facts of the individual case, while visible signs of Christianity and other occidental religions are accepted as "neutral." Diversity and pluralism appear to be regarded as a threat rather than as an educational objective.

101. In the recent case of *Siebenhaar v. Germany*, the ECtHR held that there had been no violation of Article 9 where the applicant was dismissed from her position as an assistant at a Protestant kindergarten for simultaneously playing an active role in the Universal Church while offering primary lessons.[61] It is important to note here that the ECtHR considered only an alleged violation of Article 9, i.e. the right to adhere to another religious community while working in a religiously affiliated (denominational) school rather than the public school setting. It did not deal with a discrimination claim which Ms. Siebenhaar had not raised in substance before the German courts.

102. Thus, while the ECtHR found that Ms. Siebenhaar had breached her duty of loyalty to the Protestant Church, the facts surrounding this case limit its holding to affect denominational schools, which by their nature cannot be neutral, and clearly distinguishable from public schooling. The ECtHR highlighted that the autonomy of religious communities was protected against undue interference by the State under Article 9 read in the light of Article 11 (freedom of assembly and association), making the case one of clashing religious ideologies, and indeed genuine occupational requirements[62] for a teacher in a Protestant school. In addition, the Court's ruling centered on the Protestant Church's interest in preserving its credibility, which was found to have been adequately evaluated by the German courts in light of the applicant's right to have her dismissal reviewed for lawfulness.

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[58] *Dahlab v Switzerland*, ECtHR, Judgment of 15 January 2001.
[59] *Layla Sahin v Turkey*, ECtHR, Judgment of 29 June 2004, at para. 165.
[60] *Dogru v France*, ECtHR, Judgment of 4 December 2008.
[61] *Siebenhaar v. Germany*, ECtHR, Judgment of 3 February 2011.
[62] *Ibid*, at paragraph 46.

103. In sum, the cases under review by this court are different from the Strasbourg cases where the neutrality rule was upheld, in that the differential treatment by the State discriminates against those observing *certain* religions in public employment while explicitly favoring others. Furthermore, the cases at issue here do not concern a specifically claimed right to manifest one's religion but rather focus on unjustifiable differential treatment in access to employment on grounds of religion. Subjecting a teacher to such differential treatment on religious grounds lacks an objective and reasonable justification and violates Article 14 in conjunction with Article 9 ECHR.

III. CONCLUSIONS

104. In conclusion, we invite the Federal Constitutional Court to consider the following, in applying its Interpretation of the Basic Law in a manner that is open to international law.

105. As regards EU Law:

- to conclude that the NRW School Act is not in conformity with Germany's obligations under the EU Framework Directive 2000/78/EC, the EU Gender Equality Directive and the EU Racial Equality Directive, due to the distinction made between permitted manifestations of Christian and occidental religions by school teachers, and non-permitted manifestations of other religions such as the wearing of a headscarf, and should therefore be disapplied;
- in the alternative, should this Court not directly conclude on such incompatibility, to refer the cases to the CJEU for an interpretation of the application of the Directives in light of the questions presented above;
- in the alternative conclude that the last instance court in the present cases has wrongly failed to refer the cases to the CJEU and should do so after the cases are sent back to it;

106. As regards the European Convention on Human Rights:

- to conclude that Section 57 subs. 4 of the NRW School Act is in violation of Article 14 taken in conjunction with Article 9 ECHR.