

VERFASSUNGSGERICHTSHOF

G 4/2020-27

11 December 2020

IN THE NAME OF THE REPUBLIC!

The Constitutional Court,

chaired by President
Christoph GRABENWARTER,

in the presence of Vice-President
Verena MADNER

and the members

Markus ACHATZ,
Wolfgang BRANDSTETTER,
Sieglinde GAHLEITNER,
Andreas HAUER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Michael RAMI,
Johannes SCHNIZER, and
Ingrid SIESS-SCHERZ

as voting members, in the presence of the recording clerk
Andreas Stefan HUBER

decided today pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the applications filed by 1. *****, by 2. ***** and by 3. minor *****, all *****, *****, and by 4. *****, by 5. ***** and by 6. minor *****, all *****, all represented by RIHS Rechtsanwalt GmbH, Kramergasse 9/3/13, 1010 Vienna, to repeal as unconstitutional section 43a of the School Education Act, Federal Law Gazette *BGBl. 472/1986* (republished), as amended by Federal Law Gazette *BGBl. I 54/2019*, and pronounced the following:

- I.
 1. Section 43a of the Federal Act on the Organization of Teaching and Education in Schools Governed by the School Organization Act (School Education Act) (*Schulunterrichtsgesetz – SchUG*), Federal Law Gazette *BGBl. 472/1986* (republished) as amended by Federal Law Gazette *BGBl. I 54/2019* is repealed as unconstitutional.
 2. Previous legal provisions shall not re-enter into force.
 3. The repealed provision shall no longer be applied.
 4. The Federal Chancellor is obliged to publish these sentences without delay in Federal Law Gazette I.
- II. The Federation (Federal Minister of Education, Science and Research) is liable to refund the applicants for the court fees assessed at EUR 3,640.80, payable to their legal representatives within 14 days, failing which such payment shall be enforced.

Reasoning

I. Application

Based on Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*Bundes-Verfassungsgesetz, B-VG*), the applicants ask to repeal section 43a of the Federal Act on the Organization of Teaching and Education in Schools Governed

by the School Organization Act (School Education Act) (*Schulunterrichtsgesetz – SchUG*), Federal Law Gazette *BGBI. 472/1986* (republished), as amended by Federal Law Gazette *BGBI. I 54/2019*, in its entirety as unconstitutional.

II. The law

1. The relevant provisions of the Federal Act on the Organization of Teaching and Education in Schools Governed by the School Organization Act (School Education Act) (*Schulunterrichtsgesetz – SchUG*), Federal Law Gazette *BGBI. 472/1986* (republished) as amended by Federal Law Gazette *BGBI. I 80/2020* – reproduced in excerpts – including headings, read as follows (section 43a of the School Education Act, as amended by Federal Law Gazette *BGBI. I 54/2019*, which was challenged in its entirety, is highlighted):

"Scope

Section 1. (1) This Federal Act applies to public schools and private schools with public status of the school types governed by the School Organization Act (*Schulorganisationsgesetz – SchOG*), Federal Law Gazette *BGBI. 242/1962*, with the exception of special school types, the school year of which is divided into semesters.

(2) [...]

SCHOOL RULES

Duties of the pupils

Section 43. (1) Pupils are obliged to contribute to the fulfilment of the tasks of Austrian schools (section 2 of the School Organization Act) through active participation in classroom work, integration into the community of the classroom and the school, and an attitude supporting effective teaching (section 17). They have to attend classes (and the day-care programmes they are registered for in all-day schools) regularly and punctually, bring the necessary teaching materials and observe the school rules and house rules. Furthermore, they have to follow instructions and orders within the framework of individual learning support and comply with arrangements made within the framework of the early warning system pursuant to section 19 paragraph 3a.

(2) Upon instruction by the principal, a department head, a section head or a teacher, the pupil is obliged to repair any damage or soiling wilfully caused to

school property and school facilities, provided such action can be reasonably expected of a pupil.

Section 43a. (1) In order to ensure the best possible personality development of all pupils, they are forbidden to wear ideologically and religiously connoted clothing associated with the covering of the head until the end of the school year in which they reach the age of ten. This ban serves to promote the social integration of children in accordance with local customs, respect of the fundamental values of constitutional law, and the attainment of the educational aims laid down in the Constitution, as well as the equality of men and women.

(2) In case of non-observance of the prohibition pursuant to paragraph 1, the principal has to notify the competent Directorate of Education without delay. The latter has to summon the parents/legal guardians without delay, i.e. within four school days, for an obligatory discussion. In the course of this conversation, the reasons for non-compliance are to be discussed. To avoid further non-compliance, the parents/legal guardians are to be informed about their responsibility, which is to be documented in writing and brought to the knowledge of the principal of the school.

(3) If another breach of the prohibition pursuant to paragraph 1 occurs after the discussion, or if the parents/legal guardians do not follow the obligatory summons after a repeated reminder, this constitutes an administrative offence by the parents/legal guardians punishable with an administrative fine of up to EUR 440.00 to be imposed by the district administrative authority; in the event of default, a prison term of up to two weeks is to be imposed as an alternative sanction.

[...]

The school's role in education

Section 47. (1) Within the framework of the school's role in the education of the pupils (section 2 of the School Organization Act), teachers, in performing their teaching and educational functions, have to apply personality- and community-building means of education appropriate to the respective educational situation, in particular through recognition, order or reprimand. Such measures can also be imposed by the head teacher and the principal (head of department) or, in special cases, by the competent school authority. The first sentence also applies to educators and pedagogues providing after-school care for pupils of all-day schools.

(2) If deemed necessary for educational reasons or for the maintenance of order, the principal may transfer a pupil to a parallel class or, in the case of course-based vocational schools, to another course. If such measure proves to be insufficient, the school conference (the department conference in schools with

specialized departments) can announce its intention to apply for the pupil's expulsion from the school (section 49 paragraph 2).

(3) Corporeal punishment, insults and collective punishment are prohibited.

(4) Within the framework of the school's role in education, the pupil's behaviour outside school may be taken into account; the only measures permitted in this context are those pursuant to paragraph 1 and section 48. Punishing pupils for conduct giving rise to measures taken by parents/legal guardians, child and youth welfare institutions, other administrative authorities or the courts is not permitted.

The school's duties of notification

Section 48. If a pupil's educational situation so requires, the head teacher or the principal (the head of department) have to coordinate their actions with the pupil's parents/legal guardians. If parents/legal guardians are apparently unable to fulfil their duties or disagree on important questions, the principal has to inform the competent youth welfare institution thereof pursuant to section 37 of the Federal Child and Youth Welfare Act 2013 (*Bundes-Kinder- und Jugendhilfegesetz 2013*), Federal Law Gazette *BGBI. I 69/2013*.

Expulsion of a pupil

Section 49. (1) If a pupil seriously violates his/her duties (section 43) and if educational means pursuant to section 47 or measures taken in accordance with the house rules remain without success, or if a pupil's behaviour permanently endangers other pupils or other persons working in the school in terms of their morality, physical safety or property, the pupil is to be expelled from the school. Expelling a pupil from a general compulsory school is permitted only if the pupil's behaviour permanently endangers other pupils or other persons working in the school in terms of their morality, physical safety or property, and if compulsory schooling of the pupil concerned is otherwise guaranteed.

(2) If the requirements of paragraph 1 are met, the school conference (the department conference in the case of schools divided into specialized departments) has to submit an application for expulsion of the pupil to the competent school authority. Before the decision to submit such application is taken, the pupil is to be given a chance to justify his/her behaviour. Moreover, the pupil's parents/legal guardians are to be invited to comment. In its deliberations, the school conference has to consider the arguments in favour and against the pupil's expulsion and justify its application accordingly. A copy of the application is to be delivered to the pupil.

(3) In the event of imminent danger, the competent school authority has to declare the pupil's suspension from further school attendance. The suspension must not last for more than four weeks; as soon as it turns out in the course of

the proceedings that the requirements of paragraph 1 do not or no longer apply, the suspension is to be lifted without delay. The pupil has the right to regularly obtain information on the material taught during his/her suspension. At the end of the school year, the pupil is to be given the opportunity to take an examination to assess his/her level of attainment (*Feststellungsprüfung*) pursuant to section 20 paragraph 2, if an evaluation would otherwise be impossible on account of the duration of the pupil's suspension.

(4) Upon completion of the investigation, the competent school authority has to declare the end of the expulsion proceedings, if the requirements for expulsion within the meaning of paragraph 1 are not met. At the same time, it can reprimand the pupil or order a measure pursuant to section 47 paragraph 2 if the pupil's behaviour does not justify his/her expulsion, but constitutes a violation of his/her duties in other ways. Otherwise the competent school authority has to declare the pupil's expulsion by way of an administrative decision.

(5) A pupil can be expelled from the respective school or from all schools within a perimeter to be defined in detail. Of the various forms of expulsion, only the form of expulsion most appropriate to reach the intended purpose in the meaning of paragraph 1 is to be declared.

(6) [...]

(7) In the event of expulsion, admission of the pupil by a school covered by the expulsion is permitted neither as an ordinary nor as an extraordinary pupil. Admission to examinations as an external pupil (*Externistenprüfung*) (section 42) is not affected by this provision.

(8) Upon the pupil's application, expulsion can be restricted in scope or repealed by the school authority having expelled the pupil by final decision if and to the extent to which the reasons for expulsion cease to exist or the purpose of safeguarding order in the school can be reached by other means.

(9) Should the measures pursuant to paragraph 1 be inappropriate for pupils of general compulsory schools, expulsion shall be replaced by a measure pursuant to paragraph 3 (suspension) and the initiation of proceedings pursuant to section 8 of the Act on Compulsory Schooling 1985 (*Schulpflichtgesetz 1985*).

[...]

Teachers

Section 51. (1) Teachers have the right and the duty to participate in the organization of school life. Their main task is to teach and educate pupils in accordance with the provisions of section 17. They have to thoroughly prepare their lessons.

(2) In addition to their teaching, educational and administrative tasks (e.g. carrying out standard reviews (*Standardüberprüfungen*), teachers (except for external lecturers), if necessary, also have to exercise the functions of head teacher, workshop or yard manager, supervisor, and specialized coordinator and, if necessary, attend the corresponding further training programmes. Moreover, teachers have to serve as members of examination commissions and participate in teachers' conferences.

(3) Depending on their duty rosters, teachers also have to supervise the pupils in the school 15 minutes before the beginning of lessons, during breaks – except during the time between morning and afternoon classes – and immediately after the end of classes when the pupils are leaving the school, and during all school events and school-related events within and outside the school building, to the extent to which such supervision is required on account of the age and intellectual maturity of the pupils. In particular, teachers have to watch over the physical safety and health of the pupils and protect them from danger as far as possible. This also applies, *mutatis mutandis*, to after-school care provided for pupils of all-day schools offering after-school care instead of classes in the afternoon."

2. Section 2 of the Federal Act of 25 July 1962 on the Organization of Schools (*Schulorganisationsgesetz – hereinafter SchOG*), Federal Law Gazette *BGBl. 242/1962*, as amended by Federal Law Gazette *BGBl. I 38/2015*, reads as follows:

"Section 2. The tasks of Austrian schools

(1) It shall be the task of Austrian schools to foster the development of the talents and potential abilities of young persons in accordance with ethical, religious and social values and their appreciation of that which is true, good, and beautiful, by giving them an education corresponding to their respective stages of development and their respective courses of study. Schools shall provide young people with the knowledge and skills required for their future lives and occupations and educate them to acquire knowledge on their own initiative.

Young people shall be educated to become healthy, capable, conscientious and responsible members of society and citizens of the democratic and federal Republic of Austria. They shall be encouraged to develop an independent judgment and social understanding, lead active lives and engage in sports, be open-minded to the ideological and political thinking of others, and they shall be enabled to participate in the economic and cultural life of Austria, Europe and the world, and to contribute their share, in love of freedom and peace, to the common tasks of mankind.

(2) The special tasks of the individual school types are laid down in the provisions of the Second Chapter.

(3) Education in boarding houses for pupils and during after-school care in all-day schools shall contribute to the performance of the tasks of Austrian schools pursuant to paragraph 1."

3. Section 11 of the Federal Act on Compulsory Schooling (*Schulpflichtgesetz 1985 – SchPflG*), Federal Law Gazette *BGBI. 76/1985* (republished), as amended by Federal Law Gazette *BGBI. I 35/2018*, reads as follows:

"C. Compliance with the duty of compulsory school attendance through participation in equivalent forms of teaching

Attendance of private schools without public status or home schooling

Section 11. (1) Notwithstanding section 12, the duty of compulsory school attendance can also be fulfilled through attendance of a private school without public status, as long as the teaching provided there is at least equivalent to that of a school referred to under section 5.

(2) Furthermore, the duty of compulsory school attendance can also be met through home schooling, as long as the teaching provided is at least equivalent to that of a school referred to in section 5, except for pre-vocational polytechnic schools.

(2a) Paragraphs 1 and 2 do not apply to pupils required to attend additional support classes to learn the German language pursuant to section 8h paragraph 2 or courses in German pursuant to section 8h paragraph 3 of the School Organization Act. Such pupils have to fulfil their duty of compulsory school attendance at public schools or schools with public status designated as a legally regulated school types as long as they require such special language support in German.

(3) Prior to the beginning of the school year, parents or other legal guardians have to notify the Directorate of Education that their child will attend a form of teaching specified in paragraphs 1 or 2. The Directorate of Education has the right to prohibit participation in such form of teaching if there is a high probability that the equivalence in teaching required by paragraphs 1 or 2 does not exist or if, pursuant to section 2a, attendance of a public school or a school with public status designated as a legally regulated school type is obligatory.

(4) Proof of sufficient success of teaching as specified in paragraph 1 or 2 has to be provided annually before the end of the school year through an examination at a school specified under section 5, provided the pupils of such schools are also assessed at the end of the year. If such proof is not provided, the Directorate of Education has to demand that the child fulfils his/her duty of compulsory school attendance within the meaning of section 5."

4. Sections 1 and 8 of the Regulation of the Federal Minister of Education and Art of 24 June 1974 on school rules, Federal Law Gazette *BGBI. 373/1974*, as amended by Federal Law Gazette *BGBI II 256/2020* (hereinafter: *Schulordnung* – School Rules) read as follows:

"Section 1. (1) The pupils have to contribute to effective teaching through their behaviour and their active participation in classwork at school and during school events.

(2) In the community of the classroom and the school, the pupils have to be helpful, willing to understand others and polite.

[...]

Section 8. (1) Within the framework of section 47 paragraph 1 of the School Education Act (*Schulunterrichtsgesetz*), the following means of education are to be applied:

a) In the case of pupils behaving well:

Encouragement

Recognition

Praise

Reward

b) In the case of pupils misbehaving:

Request

Reprimand

Orders to retroactively perform duties missed

Advice and instruction given in conversation with the pupil

Advice and instruction given in conversation with the pupil in the presence of the parents/legal guardians

Advance warning

The aforementioned means of education may be applied by the teacher, the head teacher and the principal and, in special cases, by the competent school authority.

(2) Educational measures should be taken without delay and relate meaningfully to the pupil's behaviour. They should be comprehensible for the pupil and have an effect that is conducive to the pupil's education."

III. Application and preliminary proceedings

1. The applicants presented their concerns as follows:

1.1. In their application, the applicants first described their respective family situations.

1.1.1. The first and second applicants state that they are Austrian citizens, married, and the parents of the third applicant and another daughter. The first applicant is a Roman Catholic and does not wear a headscarf herself. She works as a teacher. The second applicant is a teacher of religion of the Islamic Religious Community in Austria (*Islamische Glaubensgemeinschaft in Österreich – IGGÖ*). Based on a consensual decision taken by the parents, i.e. the first and second applicants, the third applicant, who is also an Austrian citizen, receives a religious education in line with the Sunni school of Islamic law. They are far from demanding that their daughters wear a headscarf. However, the third applicant has a strong will of her own and occasionally wishes to wear a headscarf (hijab) fully covering her hair according to the traditions of her father's country of origin. Her parents, i.e. the first and second applicants, would not want to deny her the right to do so. In their opinion, restricting children's freedom in the choice of their clothing is incompatible with the principles of a democratic state under the rule of law committed to fundamental rights. However, as they both work in the field of education, they respect the provisions of the School Education Act, including the prohibition to "cover one's head". Nevertheless, they find this ban hard to reconcile with their liberal values and their decision to raise their daughter in conformity with the principles of the Islamic religion.

1.1.2. The fourth and fifth applicants state that they, too, are married and the parents of the sixth applicant. The fourth applicant is an Austrian citizen, adheres to the Shiite school of Islamic religion, and works as a teacher in a private school. The fifth applicant is an Iranian national holding a residence permit under the title of "Long-term resident – EU"; he also adheres to the Shiite school of Islamic law. Based on a consensual decision by the parents, i.e. the fourth and fifth applicants, the sixth applicant receives a religious education in conformity with the Shiite school of Islamic law. The sixth applicant has a strong will of her own and occasionally wears a headscarf (hijab) fully covering her hair both in her free time and in school. Her parents, i.e. the fourth and fifth applicants, do not exert any pressure on their daughter to wear a headscarf. It is their daughter's own wish to do so. However, they regard their daughter's wearing of a headscarf as a manifestation and an expression of their own freedom of religion and their

daughter's freedom of religion. Therefore, they do not want to forbid their daughter to wear a headscarf.

1.1.3. In principle, Islamic doctrine commands that women wear a headscarf covering the head. The Shiite school of Islamic law is firmly convinced that girls having reached the age of 9 lunar years, i.e. the age of 8 years, 8 months and about 23 days, are to cover their hair by means of a headscarf. As stated by her parents, the sixth applicant is being raised according to the Shiite school of Islamic law and reaches the age of 9 lunar years on 23 June 2020.

1.1.4. What the parents, i.e. the first, second, fourth and fifth applicants, have in common is that they each agreed to provide their daughters, i.e. the third and sixth applicants, with a religious education in the sense of Islamic teachings (in the case of the third applicant in accordance with the Sunni school of Islamic law; in the case of the sixth applicant in accordance with the Shiite school of Islamic law). They want their children to be instructed and educated in conformity with the religious commandments of Islam. The second, fourth and fifth applicants are Muslims themselves and live in accordance with the religious commandments of their respective schools of law. They are tolerant and open to the world. They hold that the prohibition addressed to their daughters not to wear any headgear "associated with the covering of the head" until they have reached the age of ten contradicts, on the one hand, their religious principles and, on the other hand, their efforts to educate their daughters in a spirit of tolerance and openness to the world. In their opinion, the normative content of section 43a of the School Education Act (*SchUG*) leads to conflicts of conscience for the applicants and is difficult for them to understand. According to the parents, it is incompatible with their decision to educate their daughters on the basis of religious principles and, at the same time, raise them in a spirit of openness and tolerance if they have to explain to the third and sixth applicants that they are now forbidden by law to wear a headscarf.

1.2. As regards the admissibility of their application, the parents, i.e. the first, second, fourth and fifth applicants, state that they have each agreed to raise their children in conformity with the religious principles of Islam. Furthermore, they state that the third and sixth applicants are of compulsory school age, have not yet reached the age of ten, and attend primary school.

...

2. The Federal Government submitted a written statement countering the concerns raised in the application as follows:

2.1. As to the concerns raised in respect of the right to freedom of belief and freedom of conscience, the Federal Government states that this right is guaranteed in Austria through Article 14 of the Basic State Law (*Staatsgrundgesetz – StGG*) and Article 9 of the European Convention on Human Rights (ECHR). Moreover, the free exercise of any religion or belief is guaranteed in Article 63 paragraph 2 of the State Treaty of St. Germain. According to the case law of the Constitutional Court, these three constitutional provisions are to be regarded as a coherent whole, given that Article 14 of the Basic State Law (*StGG*) is supplemented by Article 63 paragraph 2 of the State Treaty of St. Germain and that the limitations mentioned there are further specified in Article 9 paragraph 2 of the ECHR (*VfSlg. 15.394/1998, 19.349/2011*).

The Federal Government further holds that, according to the established case law of the Constitutional Court, the essence of the freedom of belief and the freedom of conscience, on the one hand, consists in the preclusion of "coercion by the State in matters of religion" (*VfSlg. 3220/1957, 13.513/1993, 14.978/1997*). In matters of religion, everyone is to enjoy full and unrestricted freedom (*VfSlg. 799/1927, 800/1927, 19.349/2011*). On the other hand, in conformity with the aforementioned, Article 9 of the ECHR and Article 14 of the Basic State Law (*StGG*) protect not only the (active) manifestation of religion, but also the right not to profess any religion and, in particular, not to be forced to perform religious rites or participate in such rites (cf. *VfSlg. 19.349/2011*). For the exercise of the right to freedom of religion, a corresponding power of discretion is required, as regulated in the Federal Act on the Religious Instruction of Children (*Bundesgesetz über die religiöse Kindererziehung*), Federal Law Gazette *BGBl. 155/1985* (republished), as amended by Federal Law Gazette *BGBl. I 191/1999*, through the specification of certain age limits for a child's ability to decide on his/her religious status (*Grabenwarter/Holoubek, Verfassungsrecht – Allgemeines Verwaltungsrecht*⁴, 2019, point 519).

...

3. The applicants replied to the statement by the Federal Government in a supplementary submission. Moreover, the applicants submitted a legal opinion in support of their arguments to the Constitutional Court.

IV. Considerations

1. On the admissibility of the application

1.1. Pursuant to Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*B-VG*), the Constitutional Court decides on the unconstitutionality of laws upon application by a person claiming that their rights are directly violated by such unconstitutionality, provided the law took effect for that person without a court decision or an administrative decision having been rendered.

The requirement for an application to be admissible pursuant to Article 140 paragraph 1 subparagraph 1 point c) of the Constitution (*B-VG*) is that, on the one hand, the applicant claims that his/her rights have been directly violated by the challenged law on account of its unconstitutionality and that, on the other hand, the law actually took effect for the applicant without a decision having been rendered by a court or an administrative authority. The fundamental requirement for an application to be admissible is that the law interferes with the legal sphere of the applicant to the latter's disadvantage and, if found to be unconstitutional, violates the applicant's legal sphere.

However, not every individual addressed by a legal provision has the right to challenge it. A further requirement is that the law itself actually interferes directly with the legal sphere of the applicant. Such interference is to be assumed only if it is unambiguously determined by the law itself, if the (legally protected) interests of the applicant are impaired not only potentially but in actual fact, and if no other reasonable way of rejecting the allegedly unlawful interference is available to the applicant (*VfSlg. 11.868/1988, 15.632/1999, 16.616/2002, 16.891/2003*).

1.2. The contested section 43a of the School Education Act (*SchUG*) forbids pupils to wear ideologically or religiously connoted clothing associated with the covering of the head until the end of the school year in which they reach the age

of ten (paragraph 1 *leg.cit.*). In the event of a pupil's breach of this prohibition, the competent Directorate of Education has to summon the parents/legal guardians to an obligatory discussion during which the parents/legal guardians are to be informed about the ban and their responsibility for ensuring compliance (paragraph 2 *leg.cit.*). If non-compliance with the ban continues after the informative discussion, a penalty of up to EUR 440.00 is to be imposed upon the parents/legal guardians; in the event of default, a prison term of up to two weeks is to be imposed as an alternative sanction (paragraph 3 *leg.cit.*).

1.3. The third and sixth applicants, who were previously allowed to wear a headscarf in school and who, according to their application – regarded as plausible by the Constitutional Court – wish to continue this previously permitted conduct, are directly and actually affected by this ban in their legal sphere determined by Article 9 of the ECHR (cf. *VfSlg. 17.731/2005, 18.096/2007, 18.305/2007, 19.662/2012*).

1.4. The first, second, fourth and fifth applicants, i.e. the parents responsible for the education of the minor third applicant and the minor sixth applicant, are also directly and actually affected by section 43a of the School Education Act (*SchUG*) in their legal sphere determined by Article 9 of the ECHR (cf. *VfSlg. 19.349/2011*). Moreover, the parents/legal guardians are explicitly addressed by the contested provision, as they are affected by the consequences provided for in section 43a paragraphs 2 and 3 of the School Education Act (*SchUG*) in the event of their children's breach of the ban.

1.5. The applicants have had no other reasonable way of bringing their concerns regarding the constitutionality of the challenged provision to the Constitutional Court. In its established case law, the Constitutional Court holds that nobody can reasonably be expected to provoke penal administrative proceedings in order to challenge the lawfulness of the ban (cf. *VfSlg. 14.260/1995, 19.954/2015, 20.191/2017*).

1.6. The applicants demand that the challenged section 43a of the School Education Act (*SchUG*) be repealed in its entirety. As the provisions of section 43a paragraphs 2 and 3 of the School Education Act (*SchUG*) are inseparably linked with the prohibition contained in paragraph 1 *leg.cit.*, the scope of the provision

to be repealed, as stated in the application, is appropriately circumscribed (cf. *VfSlg. 14.068/1995, 18.305/2007*).

1.7. The application is therefore found to be admissible.

2. On the merit

2.1. In proceedings initiated upon submission of an application to review the constitutionality of a law pursuant to Article 140 of the Constitution (*B-VG*), the Constitutional Court has to limit itself to deliberations on the concerns raised (cf. *VfSlg. 12.691/1991, 13.471/1993, 14.895/1997, 16.824/2003*). Hence, it has to exclusively assess if the challenged provision is unconstitutional for the reasons set out in the application (*VfSlg. 15.193/1998, 16.374/2001, 16.538/2002, 16.929/2003*).

2.2. The application is well-founded:

2.3. The Constitutional Court bases its assessment on the following interpretation of the prohibition of section 43a of the School Education Act (hereinafter referred to as *SchUG*):

2.3.1. Pursuant to section 43a paragraph 1, first sentence, *SchUG*, pupils are forbidden to wear ideologically or religiously connoted clothing associated with the covering of the head until the end of the school year in which they reach the age of ten. In the event of a pupil's non-compliance with this prohibition, the competent Directorate of Education has to summon the parents/legal guardians to an obligatory discussion during which the parents/legal guardians are to be informed about the ban and their responsibility for ensuring compliance. If non-compliance with the ban continues after the informative discussion, a penalty of up to EUR 440.00 is to be imposed upon the parents/legal guardians; in the event of default, a prison term of up to two weeks is to be imposed as an alternative sanction.

According to section 43a paragraph 1, second sentence, *SchUG*, the purpose of this prohibition is to promote the social integration of children in accordance with local customs and traditions, respect for the fundamental values of consti-

tutional law and the educational objectives laid down in the Constitution, as well as the equality of men and women.

2.3.2. The wording of the prohibition laid down in section 43a paragraph 1, first sentence, *SchUG* is such that it permits several interpretations. The prohibition pursuant to section 43a paragraph 1, first sentence, *SchUG* does not explicitly refer to the wearing of an Islamic veil. The personal scope of the provision comprises female as well as male pupils. The factual scope concerns the "wearing of ideologically or religiously connoted clothing associated with the covering of the head".

2.3.3. The preparatory documents for section 43a of the School Education Act (*SchUG*) reflect a restrictive interpretation (private member's bill 495/A 26th legislature, 2). In this context, the Committee on Education of the National Council explicitly stated (Committee review 612 *BlgNR* 26th legislature, 3):

"Within the meaning of section 43a paragraph 1 of the School Education Act, ideologically or religiously connoted clothing associated with the covering of the head is understood to include any kind of headgear that covers the pupil's hair fully or in large parts. Therefore, the Jewish kippah or the patka worn by Sikh boys of that age are not covered by this provision."

2.3.4. This shows that the legislator's intention in adopting the provision of section 43a paragraph 1, first sentence, *SchUG* was to specifically forbid the wearing of an Islamic headscarf (cf. on the relevance of the preparatory documents, e.g. *VfSlg.* 19.665/2012, 20.241/2018; *Constitutional Court* 5.3.2020, *G 178/2019*). The Constitutional Court therefore interprets the phrase "covering of the head" as a limitation of the provision to headgear covering the head according to Islamic tradition, in particular by means of the hijab. Within the meaning of the preparatory documents, it can be inferred from the further limitation of the provision to "the wearing of ideologically or religiously connoted clothing" that covering the head for medical reasons, e.g. with bandages, or to protect it from the cold, is not prohibited. The prohibition in section 43a paragraph 1, first sentence, *SchUG* is therefore aimed at the wearing of ideologically or religiously connoted clothing according to Islamic tradition and, hence, primarily aimed at the Islamic veil.

2.3.5. The provisions of the School Education Act (*SchUG*), pursuant to section 1 paragraph 1 *leg.cit.*, apply to public schools and private schools with public status designated as a school type regulated by law. The School Education Act (*SchUG*) does not apply to private schools that do not have public status or do not correspond to a public school type (*Hauser, Schulunterrichtsgesetz, 2014, 48; Jonak/Kövesi, Das österreichische Schulrecht*¹⁴, 2015, Note 2 on section 1 *SchUG*). Hence, the scope of section 43a *SchUG* is limited to public schools and private schools with public status designated as a school type regulated by law.

2.3.6. Based on this interpretation, section 43a paragraph 1, first sentence, *SchUG* forbids female pupils of public schools and private schools with public status designated as a school type regulated by law to cover the head in compliance with Islamic tradition, in particular by means of the Islamic veil, until the end of the school year in which they reach the age of ten. This is also clearly stated in the circular of the Federal Minister of Education, Science and Research issued after the entry into force of the legal provision with a view to the practical enforcement of the prohibition laid down in section 43a *SchUG* (Circular No. 17/2019, implementation of section 43a *SchUG* ["Headscarf ban"], BMBWF-12.940/0006-II/3/2019).

2.4. The applicants express their concerns that the provision of section 43a *SchUG* violates Article 9 of the European Convention of Human Rights (ECHR), Article 14 of the Basic State Law (*StGG*) and Article 63 paragraph 2 of the State Treaty of St. Germain, respectively, Article 7 of the Constitution (*B-VG*) and Article 2 of the Basic State Law (*StGG*), Article 10 of the ECHR and Article 18 of the Constitution (*B-VG*). Essentially, they justify their concerns as follows:

They hold that neither the school's regular operation nor peace in school is impaired by pupils wearing a headscarf. Furthermore, the Constitutional Court in *VfSlg. 19.349/2011* stated that the presence of religious symbols in educational institutions is permitted. In their opinion, the principle of parity and equal treatment of religions demands that this case law also be applied to the Islamic veil. The freedom not to practice a particular religion of adherents of other beliefs or other schools of thought therefore cannot be referred to as justification for a ban. Furthermore, they hold that section 43a *SchUG* also violates the constitutionally guaranteed right of parents to educate their children. In their opinion,

the parents' wish to educate their children with the symbol of the headscarf is protected by Article 9 of the ECHR.

They further hold that the legislator superficially justifies the prohibition of section 43a *SchUG* by invoking considerations of equal rights. At the same time, however, the explanatory notes on the private member's bill exclusively refer to "adherents of some Islamic schools of thought or traditions". In its report, the Committee of Education explicitly emphasizes that "the Jewish kippah and the patka worn by Sikh boys of that age do not come under this provision". Thus, the legislator itself differentiates between different pieces of religiously connoted clothing without factual justification. If the legislator actually intended the challenged provision to ensure a free decision on the exercise of a religion and to promote successful integration, other visible religious symbols or pieces of clothing, such as the kippah or the patka, would also have to be forbidden. The latter are also suited or serve to identify the wearer as an adherent of a certain religious creed. In the applicants' opinion, it makes no difference which parts of the "head" are covered.

2.5. In summary, the Federal Government counters these concerns as follows:

From the Government's point of view, the provision of section 43a *SchUG* is necessary in order to ensure the subjective rights of children and adolescents to the best possible intellectual, spiritual and physical development in school, to safeguard their positive and negative freedom of religion, prevent early gender-based inequality of treatment, and avoid stigmatization of the human body.

Owing to the significance attributed to the wearing of the headscarf at such early age in fundamentalist interpretations of Islam, such stigmatization is almost unavoidable. In most Islamic traditions requiring that the head be covered, this rule applies to women who have had their first menstrual period and thus are of reproductive age, as their physical features might be attractive to men. According to the Federal Government, the presence of girls of primary school age wearing the headscarf results in an "unnecessary sexually charged atmosphere", which cannot be perceived as corresponding to the generally accepted standards of civil society. The Federal Government holds that any headscarf, which is recognizably worn on account of the view that female hair must be covered

because of its potential sexual attractiveness to men, also "marks" its wearer as a "potential sexual object". In children this is entirely inappropriate. Through early sexual objectification, a girl is pushed into the role of a woman; this results in gender-based segregation, which in turn counteracts the educational aim of successful social integration. In this respect, the Islamic veil differs from the Jewish Kippah or the Sikh patka. Moreover, the Federal Government regards the provision as necessary in order to protect the female pupils concerned against often massive pressure exerted in school by male pupils to abide by allegedly religious veiling rules.

2.6. Having concluded its deliberations, the Constitutional Court shares the concerns expressed by the applicants in respect of section 43a *SchUG*:

2.6.1. The principle of equality limits the legislator's scope of action by forbidding any non-objective differentiation that cannot be justified by factual differences and any non-objective equal treatment of what is unequal (cf. *VfSlg. 17.315/2004, 17.500/2005*) as well as the adoption of legal provisions that cannot be objectively justified (cf. *VfSlg. 14.039/1995, 16.407/2001*). However, within these limits and based on the Constitution, the principle of equality does not prevent the legislator from pursuing its political aims in a manner it considers appropriate (cf. e.g. *VfSlg. 16.176/2001, 16.504/2002*).

2.6.2. According to Article 9 paragraph 1 of the European Convention on Human Rights (ECHR), everyone has the right to freedom of thought, conscience and religion. This right includes the freedom of the individual to change their religion or ideology and the freedom, either alone or in community with others and in public or private, to manifest their religion or belief in worship, teaching, practice and observance of religious traditions. Article 9 paragraph 1 of the ECHR protects any action or conduct guided by a religious or ideological belief (*VfSlg. 15.394/1998*; cf. *Grabenwarter*, Art. 9 EMRK, in: Korinek/Holoubek et al [Ed.], Österreichisches Bundesverfassungsrecht, 6. Lfg. 2003, point 17 et seq.). Such beliefs must be based on a certain degree of commitment, seriousness, conclusiveness and importance (ECtHR 7 December 1976, case of *Kjeldsen et al.*, Appl. 5095/71 et al. [point 54]; 25 February 1982, case of *Campbell and Cosans*, Appl. 7511/76 [point 36 et seq.]; 25 May 1993, case of *Kokkinakis*, Appl. 14.307/88 [point 31]; 18 December 1996, case of *Valsamis*, Appl. 21.787/93

[points 27 and 31]; cf. *Grabenwarter*, Art. 9 EMRK, in: Korinek/Holoubek et al [Ed.], Österreichisches Bundesverfassungsrecht, 6. Lfg. 2003, point 27; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention⁶, 2016, paragraph 22 point 118).

2.6.3. The principle of equality, enshrined in Article 7 of the Constitution (*B-VG*) and Article 2 of the Basic State Law (*StGG*), in conjunction with Article 9 paragraph 1 of the ECHR and Article 14 paragraph 2 of the Basic State Law (*StGG*), provides the foundation for the State's duty of religious and ideological neutrality (cf. *Lienbacher*, Religiöse Rechte, in: Merten/Papier/Kucsko-Stadlmayer [Ed.], Handbuch der Grundrechte, Grundrechte in Österreich², 2014, paragraph 12 point 50; *Kalb/Potz/Schinkele*, Religionsrecht, 2003, 42 et seq.; also *VfSlg. 1430/1932; 19.349/2011*).

In organizing the system of education, the legislator is called upon to meet the requirement of religious and ideological neutrality by treating different religious and ideological convictions in consistence with the principle of equality. The educational mission of the school, as enshrined and expressed in concrete terms in Article 14 paragraph 5a of the Constitution (*B-VG*), is to convey to pupils the ability to be open-minded vis-à-vis the religious and ideological thinking of others. Hence, the school is based, *inter alia*, on the fundamental values of openness and tolerance.

Ensuring compliance with these constitutional requirements in school may even justify restrictions of the rights of pupils and their parents/legal guardians guaranteed by Article 9 of the ECHR, if such restrictions are proportionate and based on objective facts. A provision which selectively singles out a certain religious or ideological conviction by selectively granting it preferential treatment or discriminating against it, therefore demands special objective justification with a view to the requirement of religious and ideological neutrality.

2.6.4. Against the background of the case law of the European Court of Human Rights (ECtHR), the prohibition of covering the head in school according to Islamic tradition, as provided for by section 43a *SchUG*, constitutes an interference with the legal sphere of the pupils concerned and their parents/legal guardians guaranteed by Article 9 of the ECHR (ECtHR 4 December 2008, case of

Dogru, Appl. 27.058/05 [Z 48]; 10 January 2017, case of *Osmanoğlu and Kocabaş*, Appl. 29.086/12 [Z 90]; cf. VfSlg. 799/1927, 800/1927, 1206/1929, 5583/1967; on Article 2, second sentence, First Additional Protocol to the ECHR, furthermore ECtHR 7 December 1976, case of *Kjeldsen et al.*, Appl. 5095/71 et al. [points 51 and 54]; 18 December 1996, case of *Valsamis*, Appl. 21.787/93 [points 27 and 31]). Contrary to the statements by the Federal Government, the existence of different views regarding the duty of Muslim women to cover their head, such as the question as of what age a headscarf must be worn, is of no relevance. For an assessment of whether a religiously or ideologically motivated act or conduct is protected by Article 9 of the ECHR, differences of opinion within a religious or ideological community are irrelevant (*VfSlg.* 15.394/1998).

Section 43a *SchUG* selectively forbids the covering of the head according to Islamic tradition, in particular by means of the Islamic veil. With this provision, the legislator singles out a specific form of religiously or ideologically connoted clothing, which is comparable, in one way or another, to other religiously or ideologically connoted clothing habits not subject to a ban.

2.6.5. This selective ban needs to be particularly justified on objective grounds:

2.6.5.1. According to section 43a paragraph 1, second sentence, *SchUG*, the prohibition serves to foster "the social integration of children in accordance with local habits and traditions, the respect of constitutionally guaranteed fundamental rights and the educational aims laid down in the Constitution, as well as the equality of men and women". As stated in the explanatory documents on section 43a *SchUG*, it is common practice for female adherents to certain Islamic groups, schools of thought or traditions to cover the head once they have reached reproductive age. Veiling the head is a sign of sexual maturity that is visible to everyone. Against this background, the provision of section 43a *SchUG* is to prevent gender-based segregation (private member's bill 495/A 26th legislature). Taking up this point, the Federal Government justifies the provision of section 43a *SchUG* by arguing that wearing the Islamic veil in primary school age results in premature sexualization of female pupils and, hence, undesirable gender-based segregation, which runs counter to the educational aim of successful social integration and gender equality.

2.6.5.2. A provision intended to counteract undesirable gender-based segregation and, thus, to promote the educational aim of social integration and gender equality, serves an important goal enshrined in the Constitution in general (Article 7 paragraph 2 *B-VG*) and to be pursued in school in particular (Article 14 paragraph 5a *B-VG*). However, such provision must be proportionate and objective and, in particular, consistent with the other fundamental values of the school.

First of all, it is important to note that wearing the Islamic veil is a practice observed for various reasons. The interpretations which wearers of a headscarf attribute to this piece of clothing against the background of their specific religion or ideology and, hence, to the practice of wearing it, are diverse (for details *Sahin*, *Die Bedeutung des muslimischen Kopftuchs*, 2014, 123 et seq. and 400 et seq.). By wearing a headscarf, they may simply wish to manifest their affiliation with Islam or the orientation of their lives towards the religious values of Islam. Furthermore, wearing the headscarf may be interpreted as a sign of belonging to the Islamic culture or a wish to keep up the traditions of the society of origin. Hence, the Islamic veil cannot be interpreted in unambiguous and unmistakable terms. However, when it comes to questions of freedom of religion and ideology, in particular, the Constitutional Court does not have the right to adopt one out of several possible interpretations of a religious or ideological symbol and use it as a basis for its assessment of whether the presence of such symbols in public educational institutions is permissible in terms of fundamental rights (*VfSlg. 19.349/2011*).

The selective ban pursuant to section 43a *SchUG*, which only addresses girls and forbids them to wear an Islamic veil until the end of the school year in which they reach the age of ten, is *a priori* not appropriate to achieve the aim set by the legislator itself. In fact, the selective ban pursuant to section 43a *SchUG* may even have an adverse effect on the inclusion of the female pupils concerned and result in their being discriminated against, as it involves a risk of making access to education more difficult for Muslim girls or of marginalizing them in society (*European Commission against Racism and Intolerance*, ECRI Report on Austria, sixth monitoring cycle, 2020, point 17). The provision of section 43a *SchUG* effectively marginalizes Islamic origin and tradition as such. The prohibition of

the Islamic veil, which singles out a particular religiously or ideologically founded clothing rule, selectively stigmatizes a certain group of people.

Moreover, it is to be noted that pursuant to section 11 paragraphs 1 and 2 of the Compulsory Schooling Act (*SchPflG*) pupils can also fulfil their duty of compulsory school attendance through home schooling or by attending a private school without public status. However, the scope of section 43a *SchUG* is limited to public schools and private schools with public status designated as a school type regulated by law. It is therefore possible for pupils to evade the prohibition pursuant to section 43a *SchUG* by changing over to a private school not within the scope of the School Education Act (*SchUG*) or by being home-schooled. For this reason, too, the prohibition pursuant to section 43a *SchUG* has the potential to promote social marginalization and to prevent the girls concerned, who, for whatever reason, wear a headscarf, from gaining access to other ideological conceptions within the meaning of the educational mandate laid down in the section 14 paragraph 5a of the Constitution (*B-VG*). In particular, home schooling excludes the girls concerned from participation on equal terms in the life of Austrian schools, which are committed to the pluralistic goals and fundamental values of Article 14 paragraph 5a of the Constitution (*B-VG*) and section 2 of the School Organization Act (*SchOG*) in the performance of their tasks.

2.6.5.3. According to the explanatory documents on section 43a *SchUG*, the prohibition is also intended to protect Muslim girls who, by personal conviction, do not wear the Islamic veil, and to ensure their right to decide freely on the practice of religion (private member's bill 495/A 26th legislature, 2). In its statement, the Federal Government argues that the provision of section 43a *SchUG* is also necessary to protect female pupils from social pressure exerted by classmates who in school abide by the religious rules demanding the covering of the head.

The Constitutional Court does not fail to recognize that ideologically and religiously founded conflicts may also arise in schools (cf. e.g. the activity report of the Office of the Ombudsperson for Value Issues and Cultural Conflicts of the Federal Ministry of Education, Science and Research, as at December 2019, 24, 78 et seq.). However, this circumstance does not justify the selective ban as set out in section 43a *SchUG*. For the Constitutional Court, there is no objective

justification for not attempting to resolve such conflict by addressing those who exert pressure on the female pupils concerned through hostilities, denigration or social exclusion. On the contrary, the prohibition referred to in section 43a *SchUG* affects those pupils who do not disturb the peace in school.

It is up to the legislator to create appropriate instruments of conflict resolution, with due consideration given to the principle of neutrality and the educational mandate laid down in the Constitution, and to make available the necessary resources, in case the educational and disciplinary measures provided for by law are insufficient to ensure observance of the School Rules (see sections 47 and 49 *SchUG*, section 8 of the School Rules) in order to resolve such conflicts and put an end to any form of gender-based or religiously motivated mobbing.

2.6.6. The selective ban set out in section 43a *SchUG* exclusively affects female Muslim pupils, thus differentiating them from other female and male pupils in a discriminatory manner. As a matter of principle, enforcing the principle of religious and ideological neutrality of the State may justify restrictions of individual legal spheres. However, a ban aimed at a certain religion or ideology and its specific manifestation through a particular (and no other) form of clothing, which is even comparable, in one way or other, to other clothing habits that are not forbidden, is incompatible with the principle of neutrality. A provision which only affects a certain group of female pupils and remains selective in its effort to ensure religious and ideological neutrality as well as gender equality fails to meet the intended aim and proves to be objectively unjustified. Hence, section 43a *SchUG* violates Article 7 of the Constitution (*B-VG*) and Article 2 of the Basic State Law (*StGG*) in conjunction with Article 9 paragraph 1 of the ECHR and Article 14 paragraph 2 of the Basic State Law (*StGG*).

V. Result

1. Section 43a of the School Education Act (*SchUG*), Federal Law Gazette *BGBl. 472/1986* (republished), as amended by Federal Law Gazette *BGBl. I 54/2019*, is repealed as unconstitutional for violation of Article 7 of the Constitution (*B-VG*) and Article 2 of the Basic State Law (*StGG*) in conjunction with Article 9 paragraph 1 ECHR and Article 14 paragraph 2 of the Basic State Law (*StGG*). Given this

result, there is no need to elaborate on the other concerns raised in the application.

2. The sentence that previous legal provisions are not to re-enter into force is based on Article 140 paragraph 6, first sentence, of the Constitution (*B-VG*).

3. The Constitutional Court finds itself compelled to use the power granted to it by Article 140 paragraph 7, second sentence, of the Constitution (*B-VG*) to decide that the repealed provision must no longer be applied.

4. The obligation of the Federal Chancellor to publish the repeal and the other sentences related to it without delay derives from Article 140 paragraph 5, first sentence, of the Constitution (*B-VG*) and section 64 paragraph 2 of the Constitutional Court Act (*Verfassungsgerichtshofgesetz – VfGG*) in conjunction with section 3 point 3 of the Federal Law Gazette Act (*Bundesgesetzblattgesetz – BGBIG*).

Vienna, 11 December 2020

The President:
GRABENWARTER

Recording clerk:
HUBER