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FLASH REPORT

Country:	Germany
Title:	Ban on headscarves for legal trainees
Date:	21 April 2020
Expert:	Matthias Mahlmann
<u>Context</u>	
Issue at stake:	Ban on headscarves for legal trainees admissible
Grounds of discrimination:	Religion or belief, Sex
Field of application:	Employment, Education
Source:	National court decision
Applicable law:	Articles 1, 2, 3, 4, 12 Basic Law

Content

Case: The case concerns a ban on wearing a headscarf for legal trainees. The complainant was a legal trainee in the Land Hessen. The legal traineeship in Germany is monopolised by the state (*Referendariat*). The complainant wears a headscarf in public because of her Muslim faith. The Higher Regional Court as the responsible authority instructed her prior to her traineeship that legal trainees wearing a headscarf were not allowed to perform any tasks in which she may be perceived as a representative of the justice system or of the state.

Decision of the court: The Federal German Constitutional Court¹ decided that the relevant legal provisions, Section 27.1, second sentence of the Hesse Act on Legal Training (*Hessisches Juristenausbildungsgesetz – JAG*) in conjunction with Section 45, first and second sentence of the Hessen Civil Service Act (*Hessisches Beamtenengesetz – HBG*) form a sufficient constitutional statutory basis for such a ban. The Court considered whether such a ban violates the freedom of religion, Art. 4 Basic Law, the right to freely choose their place of training, Article 12.1 Basic Law, the right of personality, Article 2.1. in conjunction with Article 1.1. Basic Law, and the question whether such a ban would form an indirect discrimination on the ground of sex or gender, violating Art. 3 Basic Law.

The Court argued that there was an interference in the right to the free exercise of religion, the right to freely choose the place of training and the general right of personality. The interference in these rights, however, is justified according to the Court by considerations of the neutrality of the state especially in the judiciary, the proper functioning of the judiciary and the negative freedom of religion of those who are facing a member of the judiciary displaying visible religious symbols. It did not answer the question whether there was an indirect discrimination on the ground of sex or gender because it argued that in any case such indirect discrimination would be justified on the same reasons as the interference in the other fundamental rights mentioned. It did not consider an indirect discrimination on the ground of religion nor did it discuss EU anti-discrimination law.

¹ Federal German Constitutional Court (*Bundesverfassungsgericht*), 14 January 2020, 2 BvR 1333/17, ECLI:DE:BVerfG:2020:rs20200114.2bvr133317.

The Court argued that the legislator enjoys a margin of appreciation and is not prevented from allowing the wearing of headscarves in the courtroom. It is the choice of the legislator which solution it prefers. Certain provisions in the respective norms provided for the following: The occidental tradition of the Land Hessen which is taken to be shaped by Christianity and humanism has to be adequately taken into account when determining the content of neutral conduct. The Court held that these provisions are not violating the principle of the neutrality of the state. The Court argued that, given the specific traditions of the Land, such a regulation could be justified without specifying exactly the legal consequences. It did state, however, that a ban on Christian symbols would be permissible, too.

The dissenting opinion argued that the interference is unconstitutional. It is disproportionate because the legal trainee is visibly performing other tasks than other members of the judiciary. The freedom of religion and the right to freely chose training of the trainee should therefore prevail over other considerations.

Key points of analysis: The decision of the Federal German Constitutional Court adds yet another element to the continuing legal efforts to find an equitable regime for the wearing of Islamic headscarves in the public. It is more restrictive than the latest decision of the Federal German Constitutional Court by a different Senate of the court on the impermissibility of a general ban of headscarves in schools for public teachers.² It leaves, however, the possibility open that a legislator decides *not* to ban headscarves for legal trainees. The decision has considerable practical importance because, given the number of Germans with Muslim faith and an increasing level of higher education including in the law in this group, there is a practical need for women wearing an Islamic headscarf to be able to finish their legal training. The Court argued that the trainees are not prevented from finishing this training because the ban concerns only a small number of specific tasks. The dissenting opinion, however, points out that especially these tasks, quasi-judicial as they are, have a particular training effect, not the least to acquire the ability for a neutral exercise of judicial functions.

Internet link source:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rs20200114_2bvr133317.html.

² Federal German Constitutional Court (*Bundesverfassungsgericht*), 27 January 2015, 1 BvR 471/10. ECLI:DE:BVerfG:2015:rs20150127.1bvr047110.