Headnotes

to the Order of the Second Senate of 14 January 2020

– 2 BvR 1333/17 –

1. **When performing duties where they are or could be perceived as representatives of the state, legal trainees have been obligated [by the *Land* Hesse] not to allow their affiliation with a religious community to become visible through observing a religious dress code. This obligation interferes with the freedom of faith of the individual guaranteed in Art. 4(1) and (2) of the Basic Law.**

2. **Constitutional interests that might conflict with freedom of faith and could justify an interference with freedom of religion in the present context are the principle of the state's ideological and religious neutrality, the principle of the proper functioning of the justice system and a potential conflict with the negative freedom of religion of others protected by fundamental rights. By contrast, neither the requirement of judicial impartiality nor the aim of ensuring an ideologically and religiously peaceful environment can justify restrictions on freedom of religion.**

3. **The state's duty of neutrality necessarily also entails a duty of neutrality for public officials since the state can only act through individuals. However, the exercise of their fundamental rights by public officials as private individuals when performing their duties cannot be attributed to the state in every case. Yet it can potentially be attributed to the state particularly in cases where the state specifically influences the visible character of an official act – as it does in the justice system.**

4. **The proper functioning of the justice system as a whole is one of the essential elements of the state under the rule of law and is firmly rooted in the values enshrined in the Basic Law. This is because every court decision ultimately serves to safeguard fundamental rights. The proper functioning of the justice system requires that society not only place trust in individual judges, but also in the justice system as a whole. It is true that it will not be possible to achieve "absolute trust" among the entire population. However, it falls to the state to optimise levels of trust.**

5. **In contrast to the context of interdenominational state schools, which are meant to reflect society's pluralism in religious matters, public authority exercised in the justice system gives rise to more serious impairments, as the state exercises public authority vis-à-vis the individual in the classic hierarchical sense.**

6. **The use of religious symbols when performing judicial duties cannot in itself raise doubts as to the objectivity of the judge in question.**

7. **It falls primarily to the democratic legislator to resolve the normative tensions between the conflicting constitutional interests, taking into account the requirement of tolerance; in the public process of the formation of the political will the legislator must find a compromise that is reasonable (*zumutbar*) for everyone. The legislator has a prerogative as to the assessment of factual circumstances and developments; the assessment determines whether values with constitutional status justify provisions that impose a duty on the judicial service to exercise the utmost restraint in their use of symbols related to religion, regardless of belief.**

8. **In view of the specific design of the ban at issue in these proceedings, none of the conflicting legal interests outweigh the others to such an extent that it would be absolutely necessary under constitutional law to either prohibit or allow the wearing of religious symbols by the complainant in the courtroom. From a constitutional-law perspective, the legislator's decision to establish a duty of neutral conduct for legal trainees with respect to ideological and religious matters must therefore be respected.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 1333/17 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Dr E …,

– authorised representatives: 1. … ,

2. … -

1. directly against

   the Order of the Higher Administrative Court of the *Land* Hesse (*Hessischer Verwaltungsgerichtshof*) of 23 May 2017 – 1 B 1056/17 –,

2. indirectly against

   § 45 of the Hesse Civil Service Act (*Hessisches Beamtengesetz* – HBG) – and the Ministerial Order of the Ministry of Justice of the *Land* Hesse of 28 June 2007 – 2220-V/A3-2007/6920-V –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on 14 January 2020:

The constitutional complaint is rejected.

The application for reimbursement of expenses is rejected.

R e a s o n s:

A.

[*Excerpt from Press Release No. 13 of 27 February 2020*]

The complainant was a legal trainee in the *Land* Hesse. She wears a headscarf in public. Prior to her traineeship, the Higher Regional Court (*Oberlandesgericht*) instructed her that, as the law stands in Hesse, legal trainees have a duty to conduct themselves neutrally as regards religion and that, when wearing a headscarf, she would thus be barred from performing any tasks in the course of which she might be perceived as a representative of the justice system or the state. The complainant lodged an application for preliminary legal protection before the Administrative Court (*Verwaltungsgericht*), which was rejected at the appeal stage by the Hesse Higher Administrative Court (*Verwaltungsgerichtshof*). The complainant also filed an action before the Administrative Court; these proceedings are currently suspended.

[*End of excerpt*]

[…] 1

I.

[…] 2-5

II.

[…] 6-21

III.

With her constitutional complaint received on 14 June 2017, the complainant claims 22
a violation of her fundamental rights under Art. 12(1), Art. 4(1) and (2), Art. 2(1) in conjunction with Art. 1(1), and Art. 3(1) and (3) of the Basic Law (*Grundgesetz* – GG). She requests that the Order of the Higher Administrative Court of the *Land* Hesse of 23 May 2017 be reversed, the Ministerial Order of the Ministry of Justice of the *Land* Hesse of 28 June 2007 be repealed, and the ban, imposed on her, on wearing a headscarf when exercising official duties that are visible to the public within the context of her legal traineeship be lifted and that necessary expenses incurred in the course of the constitutional complaint proceedings be reimbursed. […]

[…] 23-35

IV.

Statements regarding the proceedings were submitted by the State Chancellery of the *Land* Hesse, the *Land* Government of Lower Saxony, the Government of the Free State of Bavaria, the Humanist Association of Germany (*Humanistischer Verband Deutschlands*), the Umbrella Organisation of Free Ideological Communities (*Dachverband Freier Weltanschauungsgemeinschaften*), the International League of Non-Religious and Atheists (*Internationaler Bund der Konfessionslosen und Atheisten*), the Alliance of Muslim Women in Germany (*Aktionsbündnis muslimischer Frauen in Deutschland*), the Evangelical Church in Germany (*Evangelische Kirche in Deutschland*), the Central Council for Muslims in Germany (*Zentralrat der Muslime in Deutschland*), the Central Council of Ex-Muslims (*Zentralrat der Ex-Muslime*), the Islamic Council for the Federal Republic of Germany (*Islamrat für die Bundesrepublik Deutschland*), the New Association of Judges (*Neue Richtervereinigung*), the German Association of Judges (*Deutscher Richterbund*), and the Association of German Administrative Court Judges (*Bund Deutscher Verwaltungsrichter und Verwaltungsrichterinnen*). 36

[…] 37-73

B.

Insofar as it is indirectly directed against the Ministerial Order of the Ministry of Justice of the *Land* Hesse of 28 June 2007, the constitutional complaint is inadmissible. […] 74

For the rest, the constitutional complaint is admissible. In particular, the complainant continues to have a recognised legal interest in bringing an action, even after completing the practical stages of her legal traineeship during which the ban in dispute had effect. A recognised legal interest in bringing an action exists in particular where a constitutional issue that is of general significance will not be clarified otherwise and where the interference with fundamental rights claimed in these proceedings appears to be particularly intrusive (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 81, 138 <140>; 99, 129 <138>; 119, 309 <317>; 139, 148 <171 para. 44>). That is the case particularly where – as in this case – the direct impact of the challenged act of public authority is limited to such a short period of time that it would hardly be feasible, given the regular course of proceedings, for the party concerned to obtain a timely decision from the Federal Constitutional Court (cf. BVerfGE 81, 138 <140 and 141>; 107, 299 <311>; 110, 77 <85 and 86>; 117, 244 <268>; 146, 294 <308 *et seq*. para. 24>; 149, 293 <316 para. 59>; established case-law). Otherwise, the protection of fundamental rights of the party concerned would be curtailed to an unreasonable extent (cf. BVerfGE 34, 165 <180>; 41, 29 <43>; 49, 24 <51 and 52>; 81, 138 <141>; 149, 293 <316 para. 59>). 75

C.

Insofar as it directly challenges the Order of the Higher Administrative Court of the *Land* Hesse of 23 May 2017 and indirectly challenges the duty of neutrality under the Hesse Civil Service Act (*Hessisches Beamtengesetz* – HBG), the constitutional complaint is unfounded. The challenged order is based on an interpretation in conformity with the Basic Law of § 27(1) second sentence of the Hesse Act on Legal Training (*Hessisches Juristenausbildungsgesetz* – JAG) in conjunction with § 45 HBG. The order violates neither the freedom of religion (I.) nor the freedom of training (II.) nor the general right of personality (III.) of the complainant and does not discriminate against her on the basis of her gender (IV.) either. § 45 sentence 3 HBG can be interpreted in conformity with the Basic Law, so that it has not been necessary to declare the provision unconstitutional (V.). 76

I.

1. When performing duties where they are or could be perceived as representatives of the state, legal trainees have been obligated [by the *Land* Hesse] not to allow their affiliation with a religious community to become visible through observing a religious dress code. This obligation interferes with the freedom of faith of the individual guaranteed in Art. 4(1) and (2) GG. It compels the complainant to choose between either performing the required tasks or adhering to a religious clothing requirement that she considers imperative. 77

Art. 4(1) and (2) GG contains a coherent fundamental right that must be understood to be comprehensive (cf. BVerfGE 24, 236 <245 and 246>; 32, 98 <106>; 44, 37 <49>; 83, 341 <354>; 108, 282 <297>; 125, 39 <79>; established case-law). It extends not only to the inner freedom to believe or not to believe – i.e. to have a faith, conceal such a faith, renounce one's faith and turn to a new one – but also to the outer freedom to express, spread and promote one's faith, and to turn others away from their faith (cf. BVerfGE 12, 1 <4>; 24, 236 <245>; 105, 279 <294>; 123, 148 <177>). Thus, it encompasses not only acts of worship and the practise and observance of religious customs, but also religious education and other expressions of religious and ideological life (cf. BVerfGE 24, 236 <245 and 246>; 93, 1 <17>). This includes the right of the individual to align their entire behaviour with the teachings of their faith and act in accordance with this belief, i.e. live a life guided by their faith; this applies to more than just imperative religious doctrines (cf. BVerfGE 108, 282 <297>; 138, 296 <328 and 329 para. 85>). 78

Even in her role as a legal trainee in a public training relationship, the complainant can rely on her fundamental right in Art. 4(1) and (2) GG nonetheless. The fact that she takes on state duties does not put into question, neither from the outset nor in principle, whether she holds this fundamental right (cf. on civil servants BVerfGE 108, 282 <297 and 298> and on employees in the public service BVerfGE 138, 296 <328 para. 84>; see also Federal Constitutional Court, *Bundesverfassungsgericht* – BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 79

354/11 –, para. 58).

When assessing something that, in a specific case, is considered an act of practising a religion or an ideological belief, it cannot be disregarded how the religious or ideological communities concerned and the individual holder of the fundamental right understand themselves (cf. BVerfGE 24, 236 <247 and 248>; 108, 282 <298 and 299>; 138, 296 <329 para. 86>). Muslims who wear a headscarf in a manner typical for their faith can invoke the protection of the freedom of faith and the freedom to profess a belief under Art. 4(1) and (2) GG in the context of their legal traineeship as well. It is irrelevant that differing views on the requirement to cover oneself (*Bedeckungsgebot*) are advanced in Islam ([…]), as it is sufficiently plausible that the choice of clothing, both in terms of spiritual significance and outer appearance, is rooted in religion (cf. BVerfGE 108, 282 <298 and 299>; 138, 296 <330 para. 87 *et seq*.>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 59). 80

2. The interference with freedom of religion is justified under constitutional law. 81

Freedom of religion under Art. 4(1) and (2) GG is not subject to an express limitation clause and therefore, restrictions of this fundamental right must be based on limitations inherent in the Constitution itself. The fundamental rights of third parties and community values that are afforded constitutional status constitute such limitations inherent in the Constitution (cf. BVerfGE 28, 243 <260 and 261>; 41, 29 <50 and 51>; 41, 88 <107>; 44, 37 <49 and 50, 53>; 52, 223 <247>; 93, 1 <21>; 108, 282 <297>; 138, 296 <333 para. 98>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 61). In addition, any restriction must be based on a sufficiently specific statutory provision (cf. BVerfGE 108, 282 <297>). 82

a) It is not objectionable under constitutional law that the Higher Administrative Court – which is initially competent for the interpretation of ordinary law (cf. BVerfGE 138, 296 <331 para. 91>) – relied on § 27(1) second sentence JAG in conjunction with § 45 first and second sentence HGB as the formal legal basis for restricting freedom of religion. 83

[…] 84

Furthermore, the Higher Administrative Court presumed, in a manner not objectionable under constitutional law, that the statutory provision is sufficiently specific. […] 85

b) Constitutional interests that might conflict with freedom of faith and could justify an interference with freedom of religion in the present context are the principle of ideological and religious neutrality (aa), the principle of the proper functioning of the justice system (bb) and a potential conflict with the negative freedom of religion of others protected by fundamental rights (cc). By contrast, neither the requirement of judicial impartiality (dd) nor the aim of ensuring an ideologically and religiously peaceful environment (ee) can justify restrictions of freedom of religion. 86

aa) In Art. 4(1), Art. 3(3) first sentence, Art. 33(3) GG as well as Art. 136(1) and (4) and Art. 137(1) of the Weimar Constitution in conjunction with Art. 140 GG, the Basic Law establishes a duty for the state, as the home of all its citizens, to maintain ideological and religious neutrality. It prohibits introducing any legal entity of the nature of a state church as well as privileging any particular denomination or excluding persons of other beliefs (cf. BVerfGE 19, 206 <216>; 24, 236 <246>; 33, 23 <28>; 93, 1 <17>). The state must ensure that the treatment of the various religious and ideological communities is guided by the principle of equality (cf. BVerfGE 19, 1 <8>; 19, 206 <216>; 24, 236 <246>; 93, 1 <17>; 108, 282 <299 and 300>; 138, 296 <339 para. 109>) and must not identify with a particular religious community (cf. BVerfGE 30, 415 <422>; 93, 1 <17>; 108, 282 <300>; 138, 296 <339 para. 109>). The free state under the Basic Law is characterised by openness to the diversity of ideological and religious beliefs and bases this on a notion of human beings informed by dignity and the free development of one's personality through self-determination and personal responsibility (cf. BVerfGE 41, 29 <50>; 108, 282 <300 and 301>; 138, 296 <339 para. 109>). 87

However, the ideological and religious neutrality incumbent on the state is not to be understood as detachment in the sense of strict separation of state and church; instead it must be understood to be open and comprehensive, encouraging freedom of faith equally for all beliefs. Under Art. 4(1) and (2) GG, it is also required that space for the active exercise of religious beliefs and the realisation of one's autonomous personality in the ideological and religious sphere is actively ensured (cf. BVerfGE 41, 29 <49>; 93, 1 <16>). The state is only prohibited from undertaking targeted influence to serve a specific political or ideological view or identifying, expressly or implicitly, with a specific faith or ideology through a measure that originates from or is attributable to it, and thus endanger religious peace within society of its own accord (cf. BVerfGE 93, 1 <16 and 17>; 108, 282 <300>; 138, 296 <339 para. 110>). Additionally, the principle of ideological and religious neutrality prevents the state from evaluating beliefs and teachings of a religious community as such (cf. BVerfGE 33, 23 <29>; 108, 282 <300>; 137, 273 <305 para. 88>; 138, 296 <339 para. 110>). 88

The state's duty of neutrality necessarily also entails a duty of neutrality for public officials (BVerfGE 138, 296, 359 <367 para. 14> separate opinion Hermanns/Schluckebier) since the state can only act through individuals ([…]). However, the exercise of their fundamental rights by public officials as private individuals when performing their duties cannot be attributed to the state in every case. Both Senates of the Federal Constitutional Court have emphasised this, in particular in the context of a teacher wearing an Islamic headscarf. The state does not embrace the religious statement tied to the wearing of a headscarf by a single teacher or member of educational staff simply by tolerating it and neither does the state have to accept that this conduct is attributed to it as an intentional act (on this BVerfGE 138, 296 <336 and 337 para. 104>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 65 in reference to the interference with the negative freedom of faith of students; see also, in distinction to the state ordering the dis- 89

play of religious symbols in schools, BVerfGE 108, 282 <305 and 306>). Nevertheless, both the First and the Second Senate assume that the state's educational mandate, which is subject to the requirement of neutrality, can be adversely affected when educational staff introduce religious aspects into teaching and the school (cf. BVerfGE 108, 282 <303>; 138, 296 <335 para. 103>). In this context, the specific circumstances are relevant ([…]).

For example, where the state specifically influences the visible character of an official act, acts of individual state officials that differ from it are more likely to be attributable to the state. This is the situation in the case at hand. To strengthen the trust in the neutrality and impartiality of the courts, the Federation and the *Länder* have enacted detailed provisions – not just with regard to the procedure of oral hearings – in the respective procedural laws. The duty of judges to wear official dress ([…]) and the adherence to traditional elements – such as the unique way judges enter the courtroom, standing up during important situations in the proceedings, or the layout of the courtroom – all form part of the image of the state ([…]). This distinguishes the formalised situation at court, which imparts a clearly defined role that emphasises detachment and personal evenness on an individual state official, from the educational sphere, where state schools are designed to promote openness and plurality (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 8, 151 <155>; […]). In this respect, from the point of view of an objective observer, the wearing of an Islamic headscarf during proceedings by a judge or public prosecutor can be seen to adversely affect ideological and religious neutrality and be attributed to the state ([…]). Whether, in view of the affected fundamental rights of the state official, such an adverse effect needs to be tolerated by the public, can only be decided by weighing the interests (see C. I. 2. C below); […]). 90

bb) Freedom of religion can be subject to a further constitutional limitation inherent in the Basic Law: the proper functioning of the justice system as a whole, which is one of the essential elements of the state under the rule of law (cf. BVerfGE 34, 238 <248 and 249>; 77, 65 <76>; 80, 367 <375>; 106, 28 <49>; 107, 104 <118>; 113, 29 <54>; 117, 163 <186 and 187>; 118, 1 <17>; 122, 190 <207>; 135, 90 <115 para. 65>; 141, 82 <90 para. 24>; 141, 121 <134 and 135 para. 44>; […]) and is firmly rooted in the values enshrined in the Basic Law (Art. 19(4), Art. 20(3), Art. 92 GG). This is because every court decision ultimately serves to safeguard fundamental rights (cf. BVerfGE 33, 23 <32>). The proper functioning of the justice system requires that society not only place trust in individual judges, but also in the justice system as a whole ([…]). Such trust is necessary beyond and irrespective of the dispute at hand and can be strengthened or adversely affected by a number of factors. It is true that it will not be possible to achieve "absolute trust" among the entire population. However, it falls to the state to optimise levels of trust. Currently, one of the ways in which the state attempts to bring this about is – as highlighted above – by way of strict provisions on formalisation. 91

When deciding on improvement measures the state has a margin of appreciation. Particularly when aiming to increase acceptance of the justice system among the population, the state has to ensure that any lack of acceptance it has identified is based on objectively comprehensible circumstances. The task of administering justice and enforcing values on which the Basic Law is based involves the risk that the justice system as a whole and individual judicial decisions may be met with resistance in parts of society. This must be tolerated. The state is allowed to take measures in response to this that are intended to emphasise the neutrality of the justice system from the viewpoint of objective third parties. A ban on expressions of religion or the use of religious symbols by the state and its officials can – if it includes all expressions and symbols in the courtroom equally (cf. BVerfGE 108, 282 <313>; 138, 296 <346 *et seq*. para. 123 *et seq*.>) – be a legitimate manifestation of such a concept ([…]). Even if the expression of religion by an individual state official alone does not prevent them from properly exercising their duties (see C. I. 2. b) dd) below), an individual judge identifiably distancing themselves from personal religious, ideological and political beliefs when exercising their duties can contribute to the overall strengthening of trust in the neutrality of the justice system. Conversely, a public expression of religiousness can adversely affect the image of the justice system as a whole, which is characterised particularly by the personal restraint of state officials responsible for making decisions. 92

cc) In the present case, the negative freedom of religion of parties to legal proceedings is also an argument in favour of the ban on wearing a headscarf. 93

The freedom to refrain from participating in acts of worship of a faith one does not share corresponds to the right to participate in acts of worship prescribed by a faith or through which a faith is expressed that is guaranteed under Art. 4(1) and (2) GG. This freedom also extends to symbols by which a faith or religion is represented. Art. 4(1) GG leaves it to the individual to decide which religious symbols they choose to recognise and worship and which they choose to reject. Within a society that allows for differing religious beliefs, the individual does not have a right to be spared any confrontation with expressions of faith, acts of worship and religious symbols in which they do not believe. However, this must be distinguished from a situation that has been created by the state in which the individual is exposed to a specific faith, the actions through which it manifests, and the symbols by which it is represented, without any possibility of avoiding this (BVerfGE 93, 1 <15 and 16>; 108, 282 <301 and 302>; 138, 296 <336 para. 104>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 64). 94

The courtroom is such a space where exposure to religious symbols in the previously mentioned sense can be unavoidable if the state does not ban their use. This can place a burden on individual parties to the proceedings that amounts to an impairment of fundamental rights ([…]). In contrast to the context of interdenominational state schools , which are meant to reflect society’s pluralism in religious matters, public authority exercised in the justice system gives rise to more serious impairments, 95

as the state exercises public authority vis-à-vis the individual in the classic hierarchical sense (cf. BVerfGE 138, 296 <337 para. 105>) ([…]). This is also the case, where the use of a religious symbol – as in the case of a headscarf – is based on a personal decision of the official acting on behalf of the state. Only the state is able to prevent the otherwise unavoidable confrontation with a headscarf as a religious symbol in the courtroom ([…]).

dd) The guarantee of judicial impartiality derives from Art. 20(2) second sentence and Art. 20(3) GG as well as from the provisions concerning the justice system in Art. 92, Art. 97 and Art. 101(1) second sentence GG. The principle that no one can be a judge in their own case is a fundamental principle in accordance with the rule of law. It is part of the essence of judicial activity that it is carried out by an uninvolved third party; this requires neutrality and detachment vis-à-vis the parties to the proceedings. Art. 101(1) second sentence GG guarantees that, in the specific case, an individual is brought before a judge who satisfies these requirements (cf. BVerfGE 3, 377 <381>; 4, 331 <346>; 14, 56 <69>; 21, 139 <145 and 146>; 82, 286 <298>; 89, 28 <36>; 148, 69 <96 para. 69>). On the one hand, protection of judicial independence, which indirectly also serves to protect impartiality, concerns the general position and activity of judges and is aimed at keeping away external influences unrelated to the relevant law or facts. Impartiality, on the other hand, concerns the requirement of objectivity in regard to the relationship of the judge to the parties to the proceedings and the subject matter in the specific case (BVerfGE 148, 69 <96 and 97 para. 69>). 96

This standard is in accordance with Art. 6(1) of the European Convention on Human Rights (ECHR) and the applicable case-law of the European Court of Fundamental Rights (ECtHR) (cf. BVerfGE 148, 69 <97 para. 71>). Impartiality within the meaning of Art. 6(1) ECHR amounts to an absence of prejudice and partiality. This has to be reviewed from a subjective viewpoint but the judge's personal beliefs and actions must be taken into account. Furthermore, objective aspects must be reviewed. It needs to be considered whether structural or functional reasons hinder impartiality. The relevant consideration is whether the court sufficiently guarantees, particularly through its composition, that no reasonable doubt as to its impartiality can arise (BVerfGE 148, 69 <98 and 99 para. 74>; cf. ECtHR, *Fey v. Austria*, Judgment of 24 February 1993, no. 14396/88, para. 27 *et seq*.; *Pullar v. The United Kingdom*, Judgment of 10 June 1996, no. 22399/93, para. 30; *Morel v. France*, Judgment of 6 June 2000, no. 34130/96, para. 40 *et seq*.; *Wettstein v. Switzerland*, Judgment of 21 December 2000, no. 33958/96, para. 42; ECtHR <GC>, *Micallef v. Malta*, Judgment of 15 October 2009, no. 17056/06, para. 93; ECtHR, *Oleksandr Volkov v. Ukraine*, Judgment of 9 January 2013, no. 21722/11, para. 104). 97

The legislator is obligated to create procedural rules that make it possible to ensure that the judge in the individual case is neutral and detached (cf. BVerfGE 21, 139 <146>; 30, 149 <153>; 148, 69 <97 para. 70>). This aim is served by procedural law provisions allowing that judges be barred or challenged on the grounds of possible 98

bias. In the latter case, it is sufficient that objectivity appears to be lacking, which then adversely affects the trust in the judicial office from an external viewpoint (cf. BVerfGE 20, 1 <5>; 82, 30 <38>; established case-law). The task of solving conflicts and the resulting function of ensuring peace in a democratic society can only be fulfilled by judges whom the parties and society as a whole can trust (cf. BVerfGE 148, 69 <97 para. 70, 99 para. 75>; „Justice must not only be done, it must also be seen to be done“, cf. ECtHR, *Delcourt v. Belgium*, Judgment of 17 January 1970, no. 2689/65, para. 31; *Oleksandr Volkov v. Ukraine*, Judgment of 9 January 2013, no. 21722/11, para. 106, both referencing High Court of Justice, *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256).

99 The use of religious symbols when performing judicial duties cannot in itself raise doubts as to the objectivity of the judge in question ([…]). A judge's membership of a political party cannot substantiate concerns of judicial bias in itself (cf. BVerfGE 2, 295 <297>; 11, 1 <3>; 43, 126 <128>) and equally, affiliations with a religion or faith cannot do so either (BVerfG, Order of the Third Chamber of the First Senate of 3 July 2013 – 1 BvR 782/12 –, para. 6). Lawyers that have been successful in the selection process for judicial positions can be expected to abide by the law irrespective of their ideological, religious and political attitudes ([…]). Generally, they have shown that they are capable of handling a legal case impartially during the selection process and their prior education. There is no reason to deny that individuals who allow their religious beliefs to be identifiable by third parties through the use of symbols have this capability. If individuals cannot satisfy this indispensable fundamental requirement when performing their duties, the laws on judicial office provide for procedures on removing judges from office, particularly during their probationary period (cf. § 22 of the German Judiciary Act, *Deutsches Richtergesetz* – DRiG). The display of religious symbols on the judicial bench may give rise to concerns of judicial bias in the individual case if, exceptionally, the religious beliefs of a party to the proceedings at hand are of decisive importance – e.g. when recognising reasons for flight in asylum cases. However, in such cases, the possibility of challenging a judge can ensure access to an objective judge, to which anyone seeking justice is entitled.

100 ee) According to the principle of ideological and religious neutrality, the state is prohibited from jeopardising, of its own accord, the religiously peaceful situation within a society by undertaking targeted influence to serve a specific ideological view or identifying with a specific faith or ideology (cf. BVerfGE 93, 1 <16 and 17>; 108, 282 <300>; 138, 296 <339 para. 110>). However, a general entitlement, which is independent of state actions, to the protection of religious peace in society in the sense of a duty to guarantee this peace in all aspects of life cannot be derived from the duty of neutrality ([…]). Other provisions of the Basic Law do not provide for such an extensive obligation either. Such a duty on part of the state to offer protection from third parties disturbing the ideologically and religiously peaceful situation is only conceivable insofar as interests enshrined in the Constitution are affected. For example, a duty on the state to guarantee a peaceful environment at schools, also in ideological

and religious respects, derives from the state's educational mandate set out in Art. 7(1) GG (cf. BVerfGE 108, 282 <303>; 138, 296 <333 and 334 para. 99, 335 and 336 para. 103, 338 para. 108>; Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 141, 223 <235 *et seq*. para. 41 *et seq*.>; cf. Constitutional Court of the *Land* Hesse, Judgment of 10 December 2007 – P.St. 2016 –, juris, para. 96). There is no comparable rule that concerns the justice system. Thus, the fact that an individual merely is or could take issue with religious expressions in the courtroom is not an adequate reason to prohibit such expressions.

c) It falls primarily to the democratic legislator to resolve the normative tensions between the conflicting constitutional interests, taking into account the requirement of tolerance; in the public process of the formation of the political will (*öffentlicher Willensbildungsprozess*) the legislator must find a compromise that is reasonable (*zumutbar*) for everyone. The applicable provisions of the Basic Law must be considered as a whole; their interpretation and scope of effect must be brought into accordance (cf. BVerfGE 108, 282 <302 and 303>; 138, 296 <333 para. 98>). However, particularly where a prohibition of external religious expressions that has a largely preventive effect is concerned, the state must maintain an adequate balance between the weight and significance of the fundamental right to freedom of faith and freedom to profess a belief and the severity of the interference on the one hand and the importance of the reasons justifying the interference on the other hand (cf. BVerfGE 83, 1 <19>; 90, 145 <173>; 102, 197 <220>; 104, 337 <349>; 138, 296 <335 para. 102>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 62). In this respect, the freedom of faith of the affected public official is accorded a high value, particularly given that this freedom is closely linked to human dignity as the highest value within the system of fundamental rights and that it must be interpreted broadly because of its great importance (cf. BVerfGE 24, 236 <246>; 35, 366 <375 and 376>). Thus, whether the legislator's decision is tenable must be determined via thorough judicial review (cf. BVerfGE 45, 187 <238>). However, the legislator has a prerogative as to the assessment of factual circumstances and developments; the assessment determines whether values with constitutional status justify provisions that impose a duty on the judicial service to exercise the utmost restraint in their use of symbols related to religion, regardless of belief (cf. BVerfGE 108, 282 <310 and 311>; 138, 296 <335 para. 102>). 101

Based on these considerations, the challenged order of the Higher Administrative Court and its interpretation of § 27(1) second sentence JAG in conjunction with § 45 HBG is not objectionable under constitutional law. In view of the specific design of the ban at issue in these proceedings, none of the conflicting legal interests outweighs the others to such an extent that it would be absolutely necessary under constitutional law to either prohibit or allow the wearing of religious symbols by the complainant in the courtroom. From a constitutional-law perspective, the legislator's decision to establish a duty of neutral conduct for legal trainees with respect to ideo- 102

logical and religious matters must therefore be respected ([…]).

aa) In support of the complainant's position, it must be taken into consideration that, to her, the headscarf is not only a sign of affiliation with a certain religious group that could be removed at any time – for example like a cross worn on a necklace ([…]). Rather, to her, wearing the headscarf means adhering to a requirement that she considers imperative. As there is no similarly widespread, equivalent requirement in the Christian faith, a general ban on manifestations of religious belief has a stronger impact on the complainant than on other religious public officials, particularly Christian ones ([…]). Furthermore, civil servants and judges have generally decided to take on a job in public service deliberately and voluntarily, in full knowledge of the existing rules. However, law graduates who wish to take the Second State Examination (*Zweites Staatsexamen*) have no other option than to complete legal traineeship. 103

bb) Meanwhile, the constitutionality of the ban is supported by the fact that the ban is restricted to few, individual tasks where the state has given priority to the requirements of neutrality under constitutional law ([…]). It applies where legal trainees perform judicial tasks, represent the public prosecution office in trial hearings and take on quasi-judicial roles such as, in the present case, presiding over a committee conducting hearings under administrative law. In this respect, legal trainees – like civil servants of the public prosecution office or, in this special situation, of the general administration – must represent the values that the Basic Law lays down for the justice system. The fact that legal trainees are in training and might, upon its completion, take up a profession to which the constitutional-law standards set out above do not apply does not lead to a different conclusion. This is because legal trainees cannot always be identified as such by the individuals involved in legal proceedings. Moreover, the individuals concerned are entitled to the same basic conditions in the justice system even if the state delegates tasks for training purposes. 104

These tasks only make up a comparatively small part of the traineeship. Although the provisions on legal traineeship attribute great importance to them (cf. § 28(1) second sentence JAG according to which the legal trainee should undertake practical tasks ideally mostly independently and, as far as the nature of the task permits, with little supervision), there is no legal entitlement to perform these tasks. In particular, representing the public prosecution office in trial hearings – which in practice is likely to be the most common task performed by legal trainees that is visible to the public – is expressly not designated as a "standard task in the narrow sense" in the relevant training plan, given that, in general, the training supervisor cannot specifically evaluate the performance of this task ([…]). In the end, as the law currently stands, failure to perform the required standard tasks may not have an impact on the evaluation of the complainant. Thus, it remains possible for her to properly complete her legal traineeship without performing those tasks. 105

Against this background, the decision of the Administrative Court is based on an application of § 27(1) second sentence JAG in conjunction with § 45 HBG that is in 106

conformity with the Constitution.

II.

There also is no violation of the complainant's freedom of training under Art. 12(1) GG. 107

Pursuant to Art. 12(1) first sentence GG, all Germans are guaranteed the right to freely choose their place of training. This guarantee is closely linked to the right to freely choose one's profession, given that training is usually the preliminary stage of taking up a profession. Thus, both are integral elements of an interrelated part of life (cf. BVerfGE 33, 303 <329 and 280>. Cf; 134, 1 <13 f. Rn. 37>). If taking up a profession requires specific training – as is the case for fully trained lawyers (cf. § 5(1), § 9 no. 3, § 122(1) DRiG, § 4 first sentence no. 1 of the Federal Lawyers' Act, *Bundesrechtsanwaltsordnung* – BRAO) –, not being admitted to this type of training rules out the possibility of taking up the profession later (cf. BVerfGE 33, 303 <330>; 147, 253 <306 para. 104>). 108

Beyond the right of access to an educational facility, which is not in question here, Art. 12(1) GG protects those tasks which are necessary during training (cf. in general BVerfGE 33, 303 <329>; on the participation in exams during training BVerfGE 84, 34 <45>; 84, 59 <72>). In this case, this includes the performance of tasks in proceedings and hearings at the court, the public prosecution office and administrative authorities. As set out above, there is no entitlement during legal traineeship to actually perform such tasks. However, the applicable provisions on legal training show that the legislator views such tasks to, at least regularly, form part of the required legal training. 109

The ban on wearing a headscarf when performing such tasks in proceedings and hearings that was imposed on the complainant and upheld in preliminary proceedings before the administrative courts amounts to an interference with the contents of this guarantee. However, freedom of training does not afford more extensive protection than freedom of religion, which is guaranteed without any express limitation. Even if it were assumed that, where a religious requirement considered imperative is at issue, the freedom to choose one's profession (Art. 12(1) GG) is affected in the individual case, the aims pursued by the *Land* legislator – ideological and religious neutrality of the state, the proper functioning of the justice system and the protection of negative freedom of religion of others – are particularly weighty community interests that justify the ban (cf. BVerfGE 119, 59 <83>; 138, 296 <353 para. 141>). 110

III.

Wearing a headscarf is a manifestation of the complainant's personal identity, which is an element of the general right of personality and is thus afforded protection under Art. 2(1) in conjunction with Art. 1(1) GG (cf. BVerfGE 138, 296 <332 para. 96>; BVerfG, Order of the Second Chamber of the First Senate of 18 October 2016 – 1 BvR 354/11 –, para. 60). In this manifestation, the general right of personality pro- 111

tects the right to determine the portrayal of one's personal life and character in particular ([…]). Individuals have the right to decide for themselves how they wish to present themselves publicly or towards others and to determine their social image (*sozialer Geltungsanspruch*) (BVerfG, Order of the Second Chamber of the Second Senate of 3 November 1999 – 2 BvR 2039/99 –, para. 15; cf. BVerfGE 35, 202 <220>; 54, 148 <155 and 156>; 63, 131 <142>; […]).

However, an interference with this right is justified by the reasons set out above. 112

IV.

There is no need to decide whether the duty of neutrality under § 27(1) second sentence JAG in conjunction with § 45 HBG leads to the indirect disadvantaging of the complainant on the basis of her gender (Art. 3(2) first sentence, Art. 3(3) first sentence GG). It is true that a prohibition of specific items of clothing, particularly with a religious connotation, can be inferred from § 45 second sentence HBG and that, in reality, this prohibition is likely to predominantly affect Muslim women who wear a headscarf for religious reasons (cf. BVerfGE 138, 296 <354 para. 143>). However, § 45 second sentence HBG is set up to merely be a specification of the basic provision in § 45 first sentence HBG ("in particular"; see also the explanatory memorandum to the law, *Landtag* document, *Landtagsdrucksache* – LTDrucks 16/1897 new version, p. 4) that places a duty upon all civil servants equally to act in a politically, ideologically and religiously neutral manner. Thus, the duty of neutrality as a whole is not restricted to the wearing of items of clothing. Additionally, unlike the Ministerial Order of the Ministry of Justice of the *Land* Hesse of 28 June 2007 – 2220-V/A3-2007/6920-V –, the most recent ministerial order of 24 July 2017 – 2220-II/E2-2017/7064-II/E – that is now applicable does not expressly refer to headscarves but instead creates a general duty to act in a neutral manner. Insofar as the provisions were considered to be indirectly discriminatory, however, such indirect discrimination could be justified by the same reasons as an interference with Art. 4 GG (cf. BVerfGE 138, 296 <354 para. 145>). 113

V.

The decision of the Administrative Court does not expressly rely on § 45 third sentence HBG, which is explicitly challenged by the complainant, but the provision is closely linked to § 45 first and second sentence HBG in a regulatory context (cf. BVerfGE 138, 296 <346 para. 123> with reference to the provision that was reviewed in that case § 57(4) third sentence Education Act of the *Land* North Rhine-Westphalia, *Schulgesetz für das Land Nordrhein-Westfalen* – SchulG NW). § 45 third sentence HBG is in accordance with the provisions of the Basic Law, as long as it is applied in a manner ensuring conformity with the Constitution. 114

Pursuant to § 45 third sentence HBG, the occidental tradition of the *Land* Hesse, which is shaped by Christianity and humanism, must be adequately taken into account when deciding whether the requirements under § 45 first and second sentence 115

HBG are met, i.e. whether the duty of neutral conduct within the meaning of the provision is fulfilled in the individual case. The application of this provision can lead to the favouring of Christian civil servants in particular, which would not be justifiable under constitutional law (1.). However, the provision can be interpreted restrictively in a manner that is in conformity with the Constitution (2.).

1. Art. 3(3) first sentence GG requires that nobody is disadvantaged or favoured on the basis of their faith or their religious views. This provision strengthens the general guarantee of the right to equality under Art. 3(1) GG and freedom of faith protected by Art. 4(1) and (2) GG (BVerfGE 138, 296 <347 para. 125>). An interpretation of § 45 third sentence HBG that entirely exempted Christian symbols from the scope of the duty of neutrality would not be compatible with this (cf. BVerfGE 138, 296 <348 para. 127, 371 para. 21>). § 57(4) third sentence SchulG NW, which was reviewed in the Order of the First Senate of 27 January 2015 (BVerfGE 138, 296), could be understood in this manner insofar as it provided that there was no conflict of the "presentation of Christian and occidental educational and cultural values or traditions with the duty of [neutral] conduct". 116

2. However, § 45 third sentence HBG does not contain such an unambiguous exemption clause (cf. Constitutional Court of the *Land* Hesse, Judgment of 10 December 2007 – P.St. 2016 –, juris, Rn. 120; […]). Rather, when applying the provision, the occidental tradition of the *Land* Hesse, which is shaped by Christianity and humanism, is merely one interest that must be adequately taken into account when deciding whether the duty of neutral conduct has been breached. The provision still requires an assessment of whether a manifestation of (Christian) religious belief can be reconciled with the principle of the state's ideological and religious neutrality in the individual case. This makes it possible to treat situations with different religious backgrounds alike where it is necessary under constitutional law – such as in the justice system. In the present case, it does not have to be determined whether there is any area within the sphere of the state where different treatment might be justified. 117

Such an interpretation is within the limits of interpretation (cf. BVerfGE 138, 296 <350 para. 132> with further references), as it is covered by the wording of the provision and does not contradict any clearly identifiable legislative intent. The legislator may have considered it possible to privilege manifestations of Christian faith; yet it made public authorities responsible for the decision as to which symbols are permissible in any specific case and doing so showed that it also considers a ban on Christian symbols to be permissible (cf. LTDrucks 16/1897 new version, p. 4). 118

D.

The decision on expenses is based on § 34a(3) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). There are no reasons that support reimbursement of the complainant's expenses in spite of the rejection of the constitutional complaint. 119

E.

This decision was taken with 7:1 votes. 120

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski Langenfeld

Separate Opinion of Justice Maidowski to the Order of the Second Senate of 14 January 2020 – 2 BvR 1333/17 –

The Senate is of the opinion that, on the basis of § 27(1) second sentence JAG in conjunction with § 45 HBG, a Muslim legal trainee can be banned from wearing a headscarf in the context of her legal traineeship with the *Land* Hesse when performing specific tasks characterised by direct contact with individuals seeking legal protection and with the public. Neither in its reasoning nor in its conclusion can I support this opinion. I do not find the Senate's majority justifying the severe interference with fundamental rights which is inherent in such a ban to be tenable under constitutional law, as the justification provided does not sufficiently take into account the unique situation of legal traineeship – in distinction to permanent employment in the justice system or with the public prosecution office. Therefore, the order of the Higher Administrative Court of the *Land* Hesse that is at issue violates the complainant's fundamental rights under Art. 12(1) as well as Art. 4(1) and (2) GG. 1

The Senate's majority bases its decision on the presumption that, in principle, the strict requirements regarding political, religious and ideological neutrality and impartiality, which have to be satisfied by judges and public prosecutors performing their duties, must also apply in their entirety to individuals who have completed the First State Examination (*Erstes Staatsexamen*) and have been placed within the justice system for training purposes (§ 5 DRiG). The approach this presumption takes is not implausible, as the state's duty of neutrality can only take effect through state officials practising neutrality. However, it ignores the particular features that characterise the role of legal trainees and that are of decisive importance to the constitutional review of a ban on wearing a headscarf imposed on legal trainees (see I. below). Taking into account these particular features, it follows that the interference with the affected legal trainee's fundamental rights caused by a ban on wearing a headscarf cannot be justified, as, at any rate, it does not satisfy the principle of proportionality (see II below.). Even the approach taken by the Senate's majority would lead to the same conclusion because less intrusive means than a strict ban on religiously motivated items of clothing would be available (see III. below). However, as the underlying statutory provisions – in the present context – can be interpreted and applied in conformity with the Constitution, they do not have to be declared unconstitutional on the grounds that the challenged decision of the legislator violates the complainant's fundamental rights under Art. 12(1) GG and Art. 4(1) and (2) GG (see IV. below). Finally, if identifiably religious individuals were to be excluded from parts of the training that prepares for the Second State Examination and is essential for jobs both with the state and not with the state, this would not (anymore) satisfy the requirements of the principle of ideological and religious neutrality of the state (see V. below). 2

I.

The focal point of the constitutional complaint is the ban, imposed on the complainant, on wearing a headscarf when performing specific tasks in the context of her legal traineeship or the exclusion from those specifically named tasks should she not 3

be willing to remove her headscarf. The Second Senate focuses on those tasks – presiding over a hearing in court, taking evidence, representing the public prosecution office in a hearing, and presiding over a committee conducting hearings under administrative law – that are mentioned explicitly in the amended ministerial order of 24 July 2017 which has already been applied to the complainant's situation. The Senate's majority relies on three aspects to justify the ministerial order: the duty of ideological and religious neutrality incumbent on judges and public prosecutors, the proper functioning of the justice system, which is supposedly strengthened by "an individual judge identifiably distancing themselves from personal religious, ideological and political beliefs when exercising their duties", as well as the negative freedom of religion of parties to legal proceedings. However, it is already doubtful whether this list, taken from the ministerial order, accurately captures the scope of § 27(1) second sentence JAG in conjunction with § 45 HBG (see 1. below). In any case, the assumption that the requirements imposed on judges and public prosecutors can simply be applied to legal trainees is not based on adequate reasoning (see 2. below).

1. It is doubtful whether restricting the ban on wearing a headscarf to the four tasks named above captures the reality of legal traineeship in its entirety, as the underlying provision on civil service law, § 45 first sentence HBG, requires political, ideological and religious neutrality "when performing duties" and extends the ban on religiously motivated items of clothing, symbols or other features to the entire scope of application of this sentence (§ 45 second sentence HBG). The provision does not contain any restriction to specific official duties or situations; only the ministerial order that specifies the provision provides for such a restriction. The reference to "objective" suitability to adversely affect the trust in the neutral performance of duties does not contain such a restriction either. This approach that focuses on the danger of a loss of trust, which is linked to breaches of the duty of neutrality, is consistent: The danger of a loss of trust presupposes the existence of a counterpart – persons seeking legal protection, or the public. However, the impression, created solely by the external appearance of a legal trainee, that loyalties to the religiously neutral state are divided or insufficient can arise regardless of whether the legal trainee takes on an active role in a specific situation. If the legislator or judicial administration decided that religiously motivated items of clothing could be worn when performing official duties and if this then became publicly known, it could already, in its own right, create such an impression. The ministerial order mentioned above is based on such an understanding. The order is not subject to review in the present proceedings; as an interpretation of § 45 HBG guiding the actions of the complainant's superior, it does, however, apply the principle of neutrality to any conduct "towards citizens" in general and expressly prohibits the mere presence of a legal trainee with a headscarf on the judicial bench during court hearings, regardless of whether they take on an active role (e.g. taking minutes). As a consequence, the ministerial order of 24 July 2017 – which is not binding upon this Court – does not restrict the ban on wearing a headscarf to situations where the legal trainee is acting actively and independently and § 45 HBG does not contain such a restriction either. Such a wide scope of application of a ban on wearing a 4

headscarf must not be ignored.

2. In essence, the Second Senate provides two lines of reasoning for applying the requirements imposed on judges and public prosecutors to legal trainees: Firstly, the public and parties to the proceedings cannot always identify that a legal trainee is still in training. Secondly, the individuals affected in such a situation are entitled to the same basic conditions in the justice system even where the state delegates tasks for training purposes. However, neither of these two aspects can provide a basis for the position put forward by the Senate's majority. The former aspect may be factually accurate – particularly in situations where a legal trainee is wearing official dress –, but in any practical situation it would easily be possible and necessary (see paras. 14, 21 and 22 below) to unmistakably identify a person acting for the court or the public prosecution office as a legal trainee to the public and parties to the proceedings. It reflects modern judicial practice anyway that representatives of the court or the public prosecution office introduce themselves to the parties to the proceedings with their official title and thus indicate in which capacity they are performing their duties. 5

Ultimately, the same holds true for the entitlement of parties to the proceedings that representatives of the justice system concerned with the parties' case exercise their duties in a fully neutral and impartial manner. This entitlement has been emphasised by the Senate's majority for good reason. However, the existence of such an entitlement does not change the fact that, with regard to this – demanding – attitude, legal trainees still are supervised and assessed by their training supervisors even when they have been assigned tasks that are to be performed independently. Compliance with the requirements imposed on judges and public prosecutors with regard to the performance of their duties is the sole responsibility of the supervisor rather than that of the legal trainee. The performance of any task in the course of legal traineeship will be assessed – unlike, for example, the way in which an independent judge performs their duties. If tasks are performed incorrectly, for example when taking evidence, the training supervisor is obligated to remedy potential deficiencies by repeating or adding to the inadequately performed taking of evidence or by taking such deficiencies into account when assessing the evidence. The same applies to representing the public prosecution office in a hearing; the court can – and will – react to potential deficiencies in the exercise of duties. 6

The purpose of traineeship is to prepare legal trainees for the Second State Examination and thus for their future role as fully trained lawyers in a variety of professional contexts. On the one hand, it is aimed at allowing legal trainees to "practise" the tasks of judges and public prosecutors, and at making the legal trainees aware of the strict duty of neutrality and impartiality inherent in these positions, not only theoretically but as a result of personal experience. On the other hand, in any stage of legal training, the tasks assigned to legal trainees must continuously be supervised – in distinction to judges still in their probationary period or public prosecutors still in the early stages of their career – especially where they are afforded a certain degree of independence and personal responsibility. Legal trainees are not required to adhere to the principle 7

of judicial independence and the full responsibility placed on the public prosecution office is not placed on them (cf. § 10, § 142(3) of the Courts Constitution Act, *Gerichtsverfassungsgesetz* – GVG). Therefore, sound reasons are required for any approach that applies the requirements tied to such independence and responsibility to legal trainees who have not completed their training. The reasoning provided by the Senate's majority lacks such reasons and it would be difficult to think of any. What needs to be justified is why legal trainees can be measured against a role which they may not (yet) take on and which they may not choose in the future or which will not be available to them – e.g. due to inadequate qualifications or lacking suitability. Even if only the external appearance of a lack of neutrality were concerned – comparable to the principles of the law on judicial bias –, a ban on wearing a headscarf could be justified only if firstly, the person addressed by the publicly perceivable task performed during legal traineeship were simply unable to discern whether they were dealing with an independent judge or a future lawyer still in training and secondly, if no aspects with greater weight than this one arose during the assessment of proportionality, which is required for the review of an interference with fundamental rights.

II.

In accordance with the Senate's majority, it is to be assumed that the ban on wearing a headscarf when performing specific tasks during legal traineeship or otherwise refraining from performing these tasks constitutes an interference with the legal trainee's freedom of training (Art. 12(1) GG) and freedom of faith (Art. 4(1) and (2) GG) and that this interference carries great weight, not least because of its close connection with freedom of faith which is guaranteed without any express limitation and human dignity as the highest value within the system of fundamental rights. This interference cannot be justified under constitutional law. Based on the applicable standard of review (see 1. below) and while taking into account all relevant aspects (see 2. below), the interests that conflict with a ban on wearing a headscarf during legal traineeship outweigh any others (see 3. below). In its manifestation in the case at hand, the ban on wearing a headscarf is disproportionate. 8

1. Art. 12(1) GG and Art. 4(1) and (2) set the standard for the question which constitutional interests must be considered when reviewing whether the interference with fundamental rights at issue were justified; they complement each other and are both equally relevant to the case at hand. An isolated review only against the standard set by Art. 4(1) and (2) GG would disregard the fact that the training aspect of legal traineeship decisively characterises the weight and scope of the relevant interests; an isolated review only against the standard set by Art. 12(1) GG would be deficient, as it would struggle to accurately account for the weight of the fundamental rights guarantees in Art. 4(1) and (2) GG. In any case, the fact that freedom of faith is guaranteed without any express limitation, while freedom of training is not, does not support the approach taken by the Senate's majority of transferring the conclusions drawn in the context of Art. 4(1) and (2) GG to the justification of the interference with Art. 12(1) GG without further, sufficiently nuanced consideration. It is correct that, as 9

a guarantee without any express limitation, Art. 4(1) and (2) GG is afforded particular importance; in this light, the Senate's assumption that freedom of training cannot guarantee greater protection than freedom of faith is accurate. However, what is of greater importance to the review of the challenged interference with fundamental rights is the fact that the protection by these two fundamental rights is not aimed at the same interests and that, according to her submission, the complainant assumes that primarily her freedom of training has been violated. Thus, the same considerations that would apply in the context of a review of Art. 4(1) and (2) GG cannot be relied on for the justification of an interference with Art. 12(1) GG.

2. When reviewing whether the interference with fundamental rights caused by a ban on wearing a headscarf is justified, two aspects must be considered in addition to those which the Senate's majority considers to be the relevant constitutional interests. Namely, that affected legal trainees have to tolerate the exclusion from specific training situations during legal traineeship and the consequences this might have for them. 10

The state has a monopoly on legal traineeship. According to § 5(1) DRiG, legal traineeship and the subsequent Second State Examination is a requirement not only for qualification to hold judicial office but also for other legal professions including those beyond public or civil service (cf. § 122(1) DRiG, § 4 first sentence no. 1 BRAO, § 5 first sentence of the Federal Code for Notaries, *Bundesnotarordnung* – BNotO; see also European Court of Justice (CJEU), Judgment of 10 December 2009 – C-345/08 –, juris, para. 27). […] 11

Access to legal traineeship or the Second State Examination is not rendered impossible for legal trainees who, like the complainant, feel personally obligated to wear a headscarf for religious reasons. Ever since the amendment to the ministerial order of 28 June 2007 by the ministerial order of 24 July 2017, her refusal to remove the headscarf in certain situations during legal training should not affect her marks for that part of training or the results of her examination. In practice, this will mean that missing training tasks will not be assessed negatively, but linked to this is the fact that the affected legal trainees will not have an opportunity to make a positive impression through their performance of these tasks. They are denied the opportunity to learn and gain experience in certain parts of legal training through practice for which there is no equivalent alternative. The fact that the aforementioned tasks only make up a segment of legal traineeship and that there possibly is no legal entitlement to perform these tasks does not diminish the weight of this shortcoming. The question of how important the tasks denied to the complainant are for the training purposes of legal traineeship has been subject to debate during the administrative and court proceedings. If reference is had to these tasks – in spite of the previously expressed doubts as to the accuracy of the restriction to the four named tasks by the Senate's majority –, it is true that, quantitatively speaking, they make up only a small part of the entirety of tasks that arise during legal traineeship and that performance of them is frequently limited in time or sometimes not even required at all. However, qualitatively 12

speaking, presiding over a hearing, taking evidence, conducting hearings under administrative law, representing the public prosecution office in a hearing and similar tasks differ from other tasks performed during legal traineeship as they require a greater level of independence and thus provide a unique opportunity to become acquainted with the everyday practice of legal professions “through one’s own experience”. Out of all tasks, these are particularly important, since the practical tasks in particular are at the centre of legal traineeship that follows a law degree. § 28(1) second sentence JAG sets out that the legal trainee should ideally undertake practical tasks mostly independently and, as far as the nature of the task allows, with little supervision. The tasks to which the ban at issue extends also are tasks that closely correspond to this aim (cf. § 32(2) no. 2 and 4, § 33(2) no. 4, § 34(2) no. 4 JAG).

3. An assessment of proportionality conducted on the basis of these considerations leads to the conclusion that the ban on wearing a headscarf imposed on the complainant is not tenable under constitutional law. This is because the interests emphasised by the Senate’s majority – ideological and religious neutrality of the state, proper functioning of the justice system, negative freedom of religion of parties to proceedings – are of significantly less weigh in the context of Art. 12(1) GG than the Senate assumes, while at the same time, the effects of the measure at issue on the complainant’s freedom of training must be afforded much greater weight. Therefore, there is no need to decide whether the following considerations also cast doubt on the suitability and necessity of the ban on wearing a headscarf for achieving the legislator’s aim. Two points need to be assessed: Legal trainees who wear a headscarf for religious reasons could, through this alone, violate the duty of neutrality that is also imposed on them and harm the trust in the proper functioning of the state under the rule of law. Alternatively, by visibly expressing their religious affiliation, they could cause the public or parties to the proceedings to conclude that judges of a court or public prosecutors in permanent positions also tolerate or even identify with the departure from the duty of neutrality. 13

The interests referred to by the Senate’s majority constitute legitimate legislative aims. However, when it comes to justifying the restriction of the free exercise of religion and the freedom of training of a legal trainee, they do not carry the weight afforded to them by the Senate’s majority. This is because, as perceived by objective persons affected, legal trainees who express their religious affiliation by wearing clothing with a religious connotation and thus make their belief identifiable by others can adversely affect the interests set out above to a much lesser extent than independent judges or representatives of the public prosecution office could through similar conduct. According to the principle of ideological and religious neutrality, the state is prohibited from jeopardising the religiously peaceful situation within society of its own accord by undertaking targeted influence to serve a specific political or ideological view or identifying, expressly or implicitly, with a specific faith or ideology through a measure that originates from it or is attributable to it. Such an identification would be conceivable where a judge or public prosecutor used their external appearance to 14

indicate close ties to a specific religion in the – as the Senate remarked correctly – particularly heavily formalised field of legal proceedings that is characterised, for example, by the requirement to wear a robe and its deindividualising effect (in contrast, regarding public schools BVerfGE 138, 296 <340 para. 112>). From the perspective of the public or parties to the proceedings it would seem to require an explanation if, on the one hand, the state designed court proceedings in such a way that the personality of judges or public prosecutors stood back to make way for their procedural role, but if, on the other hand, “conspicuous” clothing could cast doubt on the ideological and religious neutrality that is expressed in this design as well as the protection of negative freedom of religion. Where legal trainees are concerned, the situation is not comparable. On the condition that they can unequivocally be identified as law graduates looking to complete the Second State Examination who are in training and only temporarily part of the justice system and that this role is explained if need be (on the possibilities of establishing the necessary transparency in practice, see III. below), it seems far-fetched to assume that the state identifies with their affiliation with a religion displayed by them. In other words, they pose virtually no danger to ideological and religious neutrality to which great value is attached. Furthermore, legal trainees do not voluntarily become part of the justice system – like judges or public prosecutors –but must do so to complete their education that, to them, is indispensable and therefore, they even are entitled to a place in legal traineeship under certain conditions.

15 The same applies to the aim – which also is legitimate – of preserving the trust in the proper functioning of the justice system. The Senate points out that this trust could be strengthened by a Muslim judge refraining from publicly displaying her religiousness when performing her duties, just as trust could be lost if a judge chose not to distance themselves in such a manner. It cannot be assumed, however, that the public or parties to the proceedings might attach equal weight to the conduct of a legal trainee who is only temporarily part of the justice system for training purposes as they would to the conduct of a judge or public prosecutor. This is because, tied to the fact that the individual is merely in training with the court or public prosecution office – it must be emphasised again: which is identifiable by everyone present –, is the awareness that each candidate who has passed all previous examinations must undertake legal traineeship if they wish to practise as a fully trained lawyer later on – even if they will not work for the state. The fact that none of the tasks assigned to a legal trainee are judicial tasks as such reflects the fact that they are merely in training. Responsibility for these tasks remains – like responsibility for the conduct of legal trainees assigned to them for training – with the lawful judge of the relevant proceedings at all times.

16 Ultimately, something similar with only minor differences also applies to the aspect of negative freedom of religion referred to by the Senate’s majority. In regard to this, it is to be assumed, that, due to the duty of neutrality which, in principle, is also imposed on her, a legal trainee wearing a headscarf must refrain from actively promot-

ing her religion in a way that goes beyond her mere external appearance; thus her religious orientation is only identifiable because of her decision to wear a headscarf, to which she feels compelled. The effect this has on the public or parties to the proceedings barely goes beyond mere protection from confrontation. Yet negative freedom of religion does not give anyone in society the right to be completely spared from any confrontation with expressions of faith, acts of worship and religious symbols in which they do not believe. The state does not embrace the religious statement tied to the wearing of a headscarf by a single teacher or member of educational staff simply by tolerating it and neither does the state have to accept that this conduct is attributed to it as an intentional act.

17 What carries much greater weight in comparison is the affected legal trainees' individual decision as to their belief as well as their entitlement to training, comprehensive in regard to its contents, that conveys a realistic image of the professions for which they are qualified with the Second State Examination, including those within the justice system. The decision to wear certain religiously motivated clothing, to which persons feel individually compelled, is protected by the freedom of religion and is to be afforded significant weight, as the Senate's majority points out as well. For the reasons previously set out, the same also applies to the interest in training that contains and offers all that is also available to legal trainees whose affiliation with their religion does not become visible to others. Regardless of the fact that it should not have a negative impact on the assessment, the exclusion from parts of training brings about a noticeable drop in its quality, as it deprives the affected individuals of the practical elements and aspects of independence that distinguish legal traineeship from the previously completed degree.

18 The interest in adhering to a religious requirement and in being able to complete, in full, the necessary training that is monopolised by the state prevails over the comparatively minimally affected interests which have been afforded decisive weight by the Senate's majority. However, as stated, the plausibility and practicability of the outcome of this balancing is dependent on the fact that it is easily identifiable that a legal trainee wearing a headscarf is still in practical training and that the public and parties to the proceedings can understand the meaning of this.

III.

19 Regardless of the aforementioned considerations, a review guided mainly or exclusively by freedom of faith – an approach which is supported by the Senate's majority – would also lead to the conclusion that the ban on wearing a religiously motivated headscarf in certain situations during legal traineeship is disproportionate and thus that the interference with freedom of faith inherent in it is not justified under constitutional law. This is because, instead of an extensive and strict ban, less intrusive means are available to achieve the desired aim, thus making a ban unnecessary.

20 The Senate's majority fears that taking on a legal trainee who wears a religiously motivated headscarf during their legal traineeship has negative effects on the princi-

ple of the state's ideological and religious neutrality, on the principle of the proper functioning of the justice system and on the negative freedom of religion of others. It appears to be likely that these negative effects instead arise from ignorance on behalf of the public or parties to the proceedings. The impression – which is certainly problematic for the justice system – that the state departs from its constitutional duty to maintain religious and ideological as well as political neutrality in the context of the administration of justice, arises, as the Senate's majority sets out, mainly due to an act of attribution: "In this respect, from the point of view of an objective observer, the wearing of an Islamic headscarf during proceedings by a judge or public prosecutor can be seen to adversely affect ideological and religious neutrality and be attributed to the state." In other words, if, based on a misconception – mistaking an independently acting legal trainee for a judge or public prosecutor –, the public or parties to the proceedings presume that, because of identifiable religiousness, individual judges or public prosecutors feel less compelled to observe the principles of neutrality and impartiality than is required of them according to the rule of law, this may very well cast doubt on or destroy their trust in the justice system.

21 Leaving aside the fact that a ban on wearing a headscarf imposed on legal trainees may only be of limited suitability for preventing this effect, as it does not extend to judges and public prosecutors, it is primarily not necessary. This is because less intrusive means are available to reliably prevent such a misconception on part of the public or parties to the proceedings. A potential identification of the state with a Muslim legal trainee's religious beliefs can be effectively prevented. In every individual case, the legal position of the trainee wearing a headscarf within the justice system and thus their training relationship can be pointed out expressly, and if necessary, the associated problems can be explained to the public or parties to the proceedings. The training supervisor can make such an indication where the legal trainee presides over a hearing or conducts the taking of evidence under supervision, or where the legal trainee merely sits on the judicial bench next to the judges delivering the decision. In practice, this is usually done already anyway whenever a legal trainee is assigned tasks that involve immediate contact with parties to the proceedings, whereas in situations where a legal trainee is acting independently, without a supervisor being present, they themselves have to inform the public or parties to the proceedings about their role. The judge presiding over the hearing can make such an indication in cases where supervision by an attending public prosecutor while representing the public prosecution office in trial hearings is not required or omitted in practice. In all other cases, there are other practical possibilities for pointing out the training relationship without leaving any room for doubt.

22 As a result of such an indication, it is clear to the attending public and parties to the proceedings that they are not facing an independent judge or public prosecutor who is plainly displaying their religious affiliation but instead a training situation that is under the supervision and responsibility of the court and public prosecution office. By unambiguously instructing everyone present as to the legal trainee's role in the spe-

cific situation in the proceedings, the “objective observer” cannot be misled to believe that the state identifies with the expression of a certain religious affiliation or that the appearance of a legal trainee wearing a headscarf can be attributed to the state.

IV.

Consequently, according to my understanding, these considerations give rise to the finding that the challenged order of the Higher Administrative Court of the *Land* Hesse violates the complainant’s fundamental rights under Art. 12(1) as well as Art. 4(1) and (2) GG. However, the case does not give cause to declare the provisions on which the administrative courts based their decisions – § 27(1) second sentence JAG as well as § 45 HGB – unconstitutional. Pursuant to § 27(1) second sentence JAG, the provisions concerning civil service candidates apply “accordingly”, with only few exceptions, to legal trainees in a public training relationship. Thus, when determining the scope of this reference, § 27(1) second sentence JAG allows for adequately taking into account the particular features of the situations that are to be regulated – particularly the characteristic of legal traineeship as the only access to any profession requiring qualification to hold judicial office. § 27(1) second sentence JAG refers to § 45 HBG, which applies to all civil servants. § 45 second sentence HBG only refers to such items of clothing, symbols or other features that are “objectively suited” to adversely affect the trust in the neutral exercise of duties or elicit an effect that could pose a danger to political, religious or ideological peace. Unlike the complainant assumes, this wording allows for an application of the provision in a manner that is less intrusive with regard to fundamental rights. The provision can be applied without having regard to the subjective special characteristics or sensitivities of parties to the proceedings or interested third parties. Instead, such application would focus on persons with “average sensitivity” as objective observers. In the individual case and based on comprehensible considerations, the legal trainee’s external appearance might cause such persons to develop mistrust of the way legal trainees exercise their duties or perceive the contact they have with the justice system to amount to a disturbance particularly of the religiously and ideologically peaceful situation. 23

Additionally and independently from this, the previous considerations lead to the conclusion that an interpretation of § 45 second sentence HBG in conformity with the Basic Law is possible and necessary, as the Second Senate correctly considered to be required in regard to § 45 third sentence HBG. Taking into account the fundamental rights protections of freedom of training set out in Art. 12(1) GG, there is an overwhelming number of reasons in favour of a restrictive interpretation of the provision in regard to persons who are in state-monopolised training. The provision would be interpreted to the effect that, because any training is limited in time, a ban imposed on these persons cannot be permissible at all or only on the basis of a particularly strict assessment of proportionality. However, where it is possible to make the training context of tasks performed by a legal trainee clear in some way, a ban on religious clothing or equivalent symbols or features is out of the question. As a conse- 24

quence, a ban like the one imposed on the complainant must usually be ruled out.

By interpreting the provision in such a manner, no preliminary decision has been made on how to decide on the use of religiously motivated clothing or equivalent symbols or features by judges appointed either for a probationary period, temporarily or for life, by public prosecutors, or by lay judges. The case at hand does not give cause for any comment on this issue. It also does not raise any questions that can receive the same answer in relation to both legal traineeship and the office of judges or public prosecutors. This is not changed by the fact that legal traineeship is of course characterised by the particularly strict and constitutionally significant duties of neutrality and of impartiality that characterise the position of judges. The Senate's majority is right to emphasise the importance of these requirements for the rule of law, but assigns them a level of significance that goes far beyond the case that has been decided and thus draws conclusions that should have been reserved for later cases. 25

V.

The state's ideological and religious neutrality requires an open, tolerant attitude that promotes freedom of faith for all beliefs equally. This attitude is not to be seen as a static one. An essential element of this attitude must also be the willingness to remain open to societal and political developments, to allow firmly established positions to be put into question, and to adequately react to novel problems in a way that is within the framework of the Constitution. The fact that this can be difficult in everyday practice has been shown not least by the longstanding debate on how to handle religiously motivated clothing and symbols in the public sphere. Whether, in a quantitatively minor area of the justice system, i.e. the training of legal trainees, identifiably religious individuals have to tolerate the exclusion from parts of training, which is important to themselves but also to society as a whole, is a question that can – as the present case illustrates – be answered in different ways. However, there often is a lack of established empirical findings on the nature and probability of third parties being influenced by religious clothing or symbols (see already BVerfGE 108, 282 <306>). It is becoming increasingly doubtful whether the concern at the core of ideological and religious neutrality – practising an open attitude that promotes freedom of faith for all beliefs equally – is still fully satisfied by the interpretation of the applicable legal bases and by administrative practice which can take effect, to a significant degree, as a restriction rather than an expansion of fundamental rights spheres. This aspect also supports the conclusion that legal trainees, who identifiably display their commitment to their religion in manner that is in conformity with the Constitution, should be given space and not be restricted with regard to their training to become fully trained lawyers. 26

Maidowski

Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 14. Januar 2020 - 2 BvR 1333/17

Zitiervorschlag BVerfG, Beschluss des Zweiten Senats vom 14. Januar 2020 - 2 BvR 1333/17 - Rn. (1 - 26), http://www.bverfg.de/e/rs20200114_2bvr133317en.html

ECLI ECLI:DE:BVerfG:2020:rs20200114.2bvr133317