

concerning § 7 X of the course

Case 1
(facts of the case)

During the Covid-19 pandemic, severe Covid-19 restrictions are imposed on the citizens, and not everyone likes them. In a German city, at a time when a Covid-19 wave has just subsided somewhat, discontent German citizens stage a demonstration against the restrictions. The demonstrators keep a proper distance from each other and from other people. However, there are some small groups among the demonstrators who refuse to wear face-masks, as prescribed by the Coronavirus Prevention Regulation and also ordered by the authorities for this demonstration. When the organisers of the demonstration and the police remind them that they are obliged to wear face-masks, they persistently refuse to follow. Finally, the police end the demonstration and order the demonstrators to leave. The decision is based on the Law on Assemblies, which authorises the police to terminate a public assembly in case of threat or violation of public security.

1. The organisers of the demonstration consider the decision of the police excessive and consider their freedom of assembly under the Basic Law violated. Are they right?
2. What if it is a huge demonstration at a peak time of the pandemic, the demonstrators do not keep their distance but crowd densely together in a small space, and ca. 25 % of them do not wear a face-mask?

concerning § 7 X of the course

Case 1

(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; how to examine the possible violation of a defensive fundamental right; fundamental rights limits and limits of limits; freedom of assembly

OUTLINE OF THE CASE SOLUTION

A. Answer to question 1

The organisers of the demonstration against the Covid-19 restrictions are right that their freedom of assembly (art. 8 BL) has been violated, if (I.) the sphere [scope]¹ of protection of the freedom of assembly is concerned, (II.) the decision of the police to end the demonstration and order the demonstrators to leave the place represents an encroachment on [interference with]² this freedom and (III.) this encroachment was not justified by the freedom of assembly's limits.³

I. *Sphere of protection* [Schutzbereich]

The sphere of protection of the freedom of assembly was concerned if the decision of the police concerned (1.) a holder (protected person) of this fundamental rights (personal sphere of protection) and (2.) an activity protected by it (material sphere of protection⁴).⁵

1) Personal sphere of protection [persönlicher Schutzbereich]

Under the Basic Law, the freedom of assembly is reserved to Germans,⁶ but according to the facts of the case, the organisers of the demonstrations were German citizens. So the personal sphere of protection of the freedom of assembly was concerned.

¹ In English, both terms and also the terms "area of protection" and "protected area" are common.

² In English, both terms are common. Note that they do not necessarily mean "violation" (= "infringement"). Only an encroachment/interference that is not justified by the freedom's limits is considered as a violation of the freedom.

³ Note: This *introductory sentence* is important because it is indicative of the dogmatic structure of the freedom of assembly as a fundamental right and it presents without unnecessary explanations the structure of the following examination. Such introductory sentences may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers, head of departments ...).

There are two possible structures for the examination of a violation of a defensive fundamental right: Strictly dogmatically, there are two steps with each several substeps: (I.) Encroachment on the sphere of protection of the fundamental right (that means that the right in question is affected) and (II.) Unconstitutionality of this encroachment (no constitutional justification by the right's limits). However, it has become a more common practice to split the first step into two steps and follow a three steps pattern: (I.) Sphere of protection, (II.) Encroachment, (III.) No justification by the fundamental right's limits. Although the first alternative is more accurate, both ways are appropriate.

⁴ In English, some authors use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

⁵ Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of the examination of complex, important or difficult aspects. However, the general context must always be clear (here: this is not the start of a new examination but 1. and 2. are sub-aspects of I.).

⁶ Foreign citizens also enjoy the freedom to demonstrate, but it is only guaranteed under the general freedom of action (art. 2(1) BL), a fundamental right which can be restricted more easily in the public interest.

2) Material sphere of protection [sachlicher Schutzbereich]

The termination of the demonstration must have impacted an activity that is protected under the freedom of assembly. Holding a demonstration in public is a classic activity that falls under this freedom. Art. 8(1) BL only guarantees the right to demonstrate peacefully and unarmed, but there are no indications that this was not the case. So the material sphere of protection was concerned too.

The sphere of protection of the fundamental right under art. 8 BL was concerned.⁷

II. *Encroachment* [Eingriff]

The decision of the police can only have violated the freedom of assembly of the organisers of the demonstration if it encroached on [interfered with] this freedom, that means actually affected it. The decision to end the demonstration and the order to leave the place meant the *prohibition* to continue to assemble. The prohibition of a protected activity is a classical kind of encroachment. So the freedom of assembly was not only concerned but also affected in the given case.

III. *Unconstitutionality of the encroachment (no justification by the fundamental right's limits)*

The encroachment on the freedom of assembly must not have been justified by the freedom's limits [Schranken]. An encroachment on a fundamental right does not yet signify a violation. Despite its negative impact, such a measure is constitutional if the encroachment is justified by the fundamental right's limits. Since some demonstrators refused to wear face-masks, this could be the case.

1) The limits of the freedom of assembly: the statutory reservation

As any freedom, the freedom of assembly is not unlimited. Art. 8 BL does not only guarantee the freedom (art. 8(1)) but also contains a *special limitation clause* [Schrankenklause], under which the right to assemble outdoors is subject to restrictions by or pursuant to statutory law (art. 8(2), so-called *statutory reservation* [Gesetzesvorbehalt]). In the given case, the freedom of assembly has been restricted based on the Law on Assemblies, which authorises the police to terminate a public assembly in case of threat or violation of public security. This law serves a public interest that in some cases may outweigh freedom of assembly.

When some participants at the demonstration did not wear face-masks in spite of the obligation to do so under the Coronavirus Prevention Regulation and the order of the authorities, this constituted a regulatory offence and also posed a risk to the health of other participants and, thus, threatened and violated public security in two ways. So the conditions under which the Law on Assemblies could in principle authorise to terminate a public assembly were given.

2) Respect of the "limits of limits" ["Schranken-Schranken"], here: the principle of proportionality

However, even if the preconditions for a measure under statutory law are met, the measure may only be taken if the so-called "limits of limits", i.e. principles that prevent excessive, unreasonable or unjust fundamental rights restrictions, are met. In particular, the requirements of the *principle of proportionality* must be met, i.e. the measure must be suitable, necessary and proportional in the strict sense (in reasonable proportion) to achieve a legitimate aim. In the given case this is questionable, since the police ended the whole demonstration, although only small groups among the demonstrators refused to wear a face-mask.

a) The legitimate aim of the decision of the police

The measure must have served a legitimate aim. Its objective was to stop the violation of public security by the regulatory offences of some demonstrators who ignored their obligation to wear face-masks, and to prevent the threat for public security (here: the risk of infections and thus the health of other persons) caused by this. So the measure served a legitimate aim under the Law on Assemblies.

b) The suitability of the decision of the police to achieve this aim

The measure must have been suitable to achieve this aim, i.e. *conducive to its purpose*. This was the case, since the breaking up of the demonstration and the order to leave the place dispersed the crowd, stopped demonstrators from staying at the place without face-masks and thus ended the risks of Covid-19 infections in the crowd.

⁷ Note: Every major part of the examination *must* be finished by a *concluding sentence* that indicates clearly, which sub-question has been answered (in which context) with which result. This is crucial for the orientation of the reader. Without such concluding sentences at the end of major parts, the reader will soon lose his bearings.

c) The necessity of the decision of the police to achieve this aim

The measure must have been necessary to achieve its aim. It must have been the *least intrusive act* of intervention that was equally conducive, i.e. there must *not* have been a *milder alternative*. In the given case, breaking up the demonstration and ordering everyone to leave rather was the ultima ration. There was a milder, less intrusive alternative: The police could have ordered off specifically those demonstrators who did not wear face-masks. Where necessary, the police could have enforced this order by going into the crowd and removing those persons forcibly, if necessary accompanied by imposing fines. Since *only small groups* of the demonstrators were not wearing face-masks and causing the threat/violation of public security, and there are no indications that they would have resisted with violence, this would have been possible. It was *not necessary to end the whole demonstration* and, thus, to force even the law-abiding citizens who lawfully exercised their freedom of assembly, to leave. So this measure was not necessary.

Since the decision of the police was not necessary, it does not meet the requirements of the principle of proportionality. It does not comply with the "limits of limits" who in their turn limit the restrictions of freedom rights.

The encroachment on the freedom of assembly of the organisers could in principle be based on the Law on Assemblies but did in the given case not respect the "limits of limits" - here the principle of proportionality - and thus was not justified by the freedom of assembly's limits under art. 8(2) BL.

Result: The organisers of the demonstration are right that their freedom of assembly has been violated.⁸

B. Answer to question 2⁹

In this case again, the sphere of protection of the freedom of assembly (art. 8 BL) was concerned, the decision of the police constituted an encroachment on this freedom, and the question is if this encroachment was justified by the freedom's limits. The Law on Assemblies can in principle authorise to terminate a public assembly during Covid-19 times if its participants defy their obligation to wear face-masks, but such a step must be *proportional* in the given situation.

In this case again, the measure pursued a legitimate aim and was suitable for this purpose. Unlike in the original case, it was *also necessary*: If in a huge demonstration every fourth demonstrator does not wear a face-mask, the police cannot have the manpower to address all perpetrators individually and, where necessary, fine and remove them, even by physical force. The police forces would have been overchallenged, especially since the demonstrators crowded densely, what made it difficult to isolate a high number of individuals. So the measure that represented a milder alternative in the original case was out of question here.

The measure also needs to be *proportional in the strict sense*, i.e. the burden imposed on the citizen must be in reasonable proportion (not excessive, not out of proportion) to the legitimate aim in view. Although the *termination of a public demonstration* by the police is a *serious fundamental rights encroachment*, having regard to the special importance of the freedom of assembly for democracy, this was here the case: Unlike in the original case, the demonstration did not take place at a time when the pandemic subsided but at a peak time of the pandemic. So the risk of spreading the coronavirus was particularly high. Moreover, the demonstration was huge and the participants crowded densely. If under these circumstances every fourth demonstrator refused to wear a face-mask, this did not only represent a strong defy of the authority of the state and the law, but also constituted an extremely high risk of spreading the infection in the society. With regard to this serious threat, the decision to end the demonstration and order the participants to leave the place was not excessive.

So in this case, the requirements of the principle of proportionality as an important "limit of limits" to fundamental rights restrictions were met and the decision of the police actually justified by the freedom of assembly's limits (cf. art. 8(2) BL). In this case, the organisers of the demonstration are not right: their freedom of assembly is not violated.

⁸ Note that at the end of your analysis you may not just need one but a series of concluding sentences, until you conclude the whole examination.

⁹ Note: Since question 2 is only about a case variant and logically big parts of the case solution will be the same as in the original case, the answer to this question can be confined to summarise these parts in keywords and then focus on those aspects where the case is different.

FURTHER READING:

On the principle of proportionality as a limit to the restriction of fundamental rights, see *Gertrude Lübbecke-Wolff*, The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court, HRLJ 34 (2014), p. 12 ff., www.researchgate.net/publication/326782433_The_Principle_of_Proportionality_in_the_Case-Law_of_the_German_Federal_Constitutional_Court; *Luka Anđelković*, The elements of Proportionality as a Principle of Human Rights Limitations, Law and Politics 15 (2017), no. 3, p. 235 ff., DOI 10.22190/FULP1703235A.

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

(Date: Case 1 (GermanPublicLaw))

A. Answer to question 1

I. Sphere of protection [Schutzbereich]

- 1) Personal sphere of protection** [persönlicher Schutzbereich]
- 2) Material sphere of protection** [sachlicher Schutzbereich]

II. Encroachment [Eingriff]

III. Unconstitutionality of the encroachment (no justification by the fundamental right's limits)

- 1) The limits of the freedom of assembly** [Schranken]: **the statutory reservation**
 - see the Law on Assemblies
- 2) Respect of the "limits of limits"** ["Schranken-Schranken"], **here: the principle of proportionality**
 - a) The legitimate aim of the decision of the police**
 - b) The suitability of the decision of the police to achieve this aim**
 - c) The necessity of the decision of the police to achieve this aim**
 - the milder alternative: ordering off those demonstrators who do not wear face-masks and going into the crowd and removing them

B. Answer to question 2

- the necessity of the decision of the police
 - no feasible milder alternative
- the proportionality in the strict sense of the decision of the police