

GERMAN PUBLIC LAW

concerning § 12 II, § 14 VI and § 15 of the course

Case 2
(facts of the case)

After finishing their studies at a university in their home town, Mrs. A and Mrs. B, two devout muslima from a Muslim country with strong religious tradition, continue their studies in an international postgraduate study program in a city in the Land L in the southeast of Germany. Since they have only focused on the quality of the study program when preparing their stay in Germany, they are not aware that the Land L is known for its problems with right-wing extremism, xenophobia and islamophobia - and the ignoring or playing down of it by the state authorities. One evening, when they are enjoying a walk in the beautiful pedestrian area in the city centre, three local men stop them, insult them and demand them to take off their hijab [headscarf], threatening to beat them if they do not. When Mrs. A and Mrs. B refuse to take off their hijab for religious reasons, the local men grab them at their backside and try to touch their breasts and to tear their hijabs down. Two policemen patrolling nearby have noticed that. They approach but do not talk with Mrs. A and Mrs. B but only with the three local men. Finally, they order Mrs. A and Mrs. B to take off their hijab. They explain that Mrs. A and Mrs. B have the right to wear the hijab in Germany but that the police needs to take measures to protect the public security and order ["öffentliche Sicherheit und Ordnung"] if the wearing of the hijab triggers anger among the locals which may result in public disorder.

You are pursuing postgraduate studies in German public law in another German university town where this problem does not exist. When you meet Mrs. A and Mrs. B at the next weekend, they ask you if the order they received from the policemen was legal and if they can take legal action against it before the administrative court. What will be your (correct) answer?

Legal provisions relevant for the case:

Excerpt from the Basic Law for the Federal Republic of Germany [= BL] (German Constitution)

Art. 4(1,2) [freedom of religion]

- (1) Freedom of faith, of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
- (2) The undisturbed practice of religion is guaranteed.

Art. 19(4) [guarantee of recourse to the courts against rights violations]

- (4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. ...

Excerpt from the Administrative Procedure Act [=APA]

§ 28: Hearing of participants

- (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.
- (2) This hearing may be omitted when not required by the circumstances of an individual case, in particular when
 1. an immediate decision appears necessary because of imminent danger or in the public interest ...
- (3) A hearing shall not be granted if it conflicts with imperative public interest.

Excerpt from the Police Act of the Land L [= LPolA]

Sect. 2: Tasks of the Police

The Police has the task to avert dangers for the public security or order (averting of dangers). The Police ... ensures the unhindered exercise of fundamental rights. ... The Police only intervenes, if the averted danger by the [competent authorities] appears impossible or not possible in time.

Sect. 12(1): General powers

The Police may adopt the necessary measures to avert a danger for the public security or order, unless the powers are specifically regulated.

Sect. 6(1): Responsibility for one's own behaviour

If a person causes a danger [for public security or order], the measures must be directed against this person.

Excerpt from the Code of Administrative Court Procedure [= CACP]

Sect. 40(1): [Recourse to the Administrative Courts]

(1) Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. ...

Sect. 42: [Actions for annulment and for the issue of an administrative act]

(1) The annulment of an administrative act (action for annulment), as well as sentencing to issue a rejected or omitted administrative act (action for the issue of an administrative act) can be requested by means of an action.

(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his rights have been violated by the administrative act or its refusal or omission.

Sect. 113(1) phrase 4: [establishment of the unlawfulness of an administrative act settled during the court proceedings] (applied analogously)

(1) ... If the administrative act has been settled previously by withdrawal or otherwise, the court shall declare on request by judgment that the administrative act was unlawful if the plaintiff has a justified interest in this finding.

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Case 2
(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; elements of German admin. law: legality of an administrative act [decision], legality in form and substance, hearing of the participant in the admin. procedure, discretion [Ermessen], choice of the right addressee for admin. measures; fundamental rights: freedom of religion, state's duty of protection; admissibility of a legal action against a (settled) administrative act

OUTLINE OF THE CASE SOLUTION:

A. The Legality of the order of the policemen

My correct answer to the first question of Mrs. A and Mrs. B will be that the order which they received from the German policemen was legal - if it meets all requirements of (I.) legality in form [formelle Rechtmäßigkeit] and (II.) legality in substance [materielle Rechtmäßigkeit].¹

I. Legality in form

The order needs to be legal in form, that is, the competent authority must have acted and there must be no procedural or formal errors.

1) The police authorities must have been the competent authorities to act in this case. According to sect. 2 of the Police Act of the Land L (LPolA) the police has the task and, thus, competence to avert dangers for the public security or order [Gefahrenabwehr]. This includes the task to prevent and stop violence, harassments and other offences on the streets, as they were happening in the given case, and, expressly, to ensure the unhindered exercise of fundamental rights. Under sect. 2 LPolA the police is only competent if the otherwise competent local authorities (here: the commune) cannot intervene in time. This was the case on that evening. Concerning the local jurisdiction of the patrolling policemen, there is no doubt. So the policemen were acting as competent authority.

2) There must be no procedural errors. The procedural requirements for the administrative procedure are stipulated in sect. 9 et seq. of the federal Administrative Procedure Act (APA), which is applicable in the Land L according to Land legislation. In the given case, the hearing of participants, as required by sect. 28(1) APA, is missing, since the policemen did not talk with Mrs. A and Mrs. B before ordering them to take off their hijab but only talked with the three local men harassing them. In the given case, none of the exceptions under sect. 28(2, 3) APA allowing to omit the hearing applied, since it would only have taken one minute to talk first with Mrs. A and Mrs. B, there was no imminent danger or public interest demanding an immediate decision (cf. sect. 2) and it would not have conflicted with the public interest to talk with Mrs. A and Mrs. B before addressing orders to them (cf. sect. 3). So this procedural requirement has not been met.

3) There are no indications for formal shortcomings in the given case. A special form (e.g. written form) is not required for administrative acts issued by the police. Concerning the obligation of the admin. authority to issue a statement of reasons for the administrative act (cf. sect. 39 APA), it only applies to written or electronically confirmed admin. acts. Moreover, in the given case the policemen have explained orally to Mrs. A and Mrs. B the reasons for their decision.

Thus, it shall be noted as *partial result* that the order of the policemen is *illegal in form for default of hearing of participants* (violation of sect. 28(1) APA).

¹ See on the various requirements of the legality of an administrative act Diagram 4 from this course.

II. Legality in substance

The order of the policemen to Mrs. A and Mrs. B to take off their hijabs in the public needs to be legal in substance, that is, its contents must not be contrary to the law.

1) Legal basis

The policemen may need a legal basis for issuing such an order. In this case, the order is only legal, if a legal basis exists, is valid and applicable and the preconditions set in the legal basis are fulfilled.

a) According to the principle of legal reservation [Gesetzesvorbehalt], which derives from the principles of the rule of law and democracy (art. 20(1, 3) BL), a legal basis is needed if an admin. act interferes with the fundamental rights of the citizen. In the given case, the police order to two religious muslim women to take off their hijab in the public constitutes an *encroachment on* the fundamental right of freedom of religion under art. 4(1, 2) BL (the German Constitution), since the wearing of a hijab is part of practicing Islam as required by this religion (according to many muslims). The freedom of religion does not only include the right to have and express a faith but also the right to act in accordance with the faith, in particular to align one's lifestyle to the rules of the faith (for example, eating only certain foods or wearing certain clothes). In this context, the question is irrelevant if Islam really does require to wear a hijab or does not, since not the rules of the (abstract) religion are decisive but the personal belief of the concerned citizen. If Mrs. A and Mrs. B think that it is a religious rule to wear a hijab in the public, the order to take it off encroaches on their freedom of religion. Such an encroachment may be justified by the limits of this freedom but in any case a basis in a statutory law, adopted by the legislator in the democratic process of legislation, is required.

b) In the given case, sect. 12(1) LPolA, the general clause on the police powers [polizeiliche Generalklausel] may serve as legal basis. This traditional clause in the Police Laws, common in the law of many countries, is valid and applicable, since it is not contrary to the Constitution or to European Union law. The risk that the wide discretionary power it grants may lead to unproportional (excessive) encroachments on the fundamental rights of the citizens is avoided by the obligation of the authorities to interpret and apply it in the light of (strictly in line with) the fundamental rights. Since the concerned kind of police measures (the order to take off the hijab) is not regulated specifically in other norms, this norm applies in the given case.

c) The order of the policemen can only be based on sect. 12(1) LPolA if the preconditions set in this clause are fulfilled. This means that the measure must serve to avert a danger for the public security or order (the question if the measure is necessary for this purpose, is not a question of the legal basis but of the proportionality of the measure²). In the given case, the threats and the harassment of Mrs. A and Mrs. B by the three local men, which even constitute criminal offences, represent a disturbance of public security (here: the aspect of the inviolability of the legal order - prevention of criminal offences and other illegal activities). So the preconditions set in the legal basis are fulfilled. The Police is entitled under sect. 12(1) LPolA to take measures to end this disturbance. The order of the policemen to Mrs. A and Mrs. B serves this purpose and therefore can be based on sect. 12(1) LPolA.

So there is the necessary legal basis for the order of the policemen.

2) Choice of the right addressee

The police measures must be directed against the right addressee. This is a question of the correct exercise of discretion [Ermessen] and it is also important for an effective protection of the fundamental rights. If a threat to or disturbance of public security is caused by the behaviour of a person, according to sect. 6(1) LPolA, the measure must be directed against this person. So the police is not free in its decision when an aggressor attacks a victim. The ***police must not take measures against the victim but against the aggressor.*** This applies ***in particular in cases of sexual harassment of women by men:*** The public authorities are not allowed to punish the woman (who is the victim) or to restrict her freedom but they *must* intervene against the man who is the aggressor - even if this is embarrassing or more difficult. Otherwise, they would violate their duty of protection, which derives from the victim's fundamental rights.

In the given case, Mrs. A and Mrs. B acted in a legitimate way, just exercising their constitutional right of freedom of religion. It is irrelevant if this causes anger among the locals - they have the right to do so. Other citizens who do not like their behaviour or their religion may talk with them

² Note: The opposite view is also reasonable. Those who follow that view need to discuss the question if it was "necessary" to order Mrs. A and Mrs. B to take off their hijab at this place.

and have the right to criticise them or their religion but are not allowed to take physical action to hinder them from exercising their freedom. However, the three intolerant men tried to stop them, thus encroaching on the fundamental rights of Mrs. A and Mrs. B. Furthermore, they grabbed the women at their backside and tried to touch their breasts (without their consent) - a classical sexual harassment. Under these circumstances, only the three local men and not Mrs. A and Mrs. B could be the right addressee of an order of the two policemen to restore public security.

In exceptional cases, if there is an imminent danger and the police is not able to end the disturbance by measures against the responsible persons (e.g. if there are too many aggressors and the police is physically not able to fight them), the police may also consider measures against the victim (as "non-responsible person") in order to calm down the situation and reduce the danger for the health or life of human beings. Under these circumstances, such a measure can be "necessary", as required in sect. 12(1) LPolA and by the principle of proportionality. However, this was not the situation in the given case: There were only three aggressors and the two policemen - professionally educated, psychologically skilled and physically well-trained - can be expected to cope with this situation, take measures against the three aggressors as responsible persons and enforce these measures, even by the exercise of physical force, if necessary.

So the order of the policemen was not directed against the right addressee.

3) No violation of fundamental rights

In case of discretionary power, as in police matters, the public authorities must exercise their discretion without any violation of fundamental rights. Since Mrs. A and Mrs. B were hindered to exercise their freedom of religion by following the Islamic practice of women wearing a hijab in the public, this fundamental right under art. 4(1, 2) BL may be violated in the given case. As all freedom rights, the freedom of religion is not unlimited. According to the doctrine of the German Federal Constitutional Court [Bundesverfassungsgericht] and most scholars, it can be restricted in the event of a *collision with fundamental rights of other citizens or other constitutional values*, if in the concrete case, thoroughly weighed, the freedom of religion proves to be subordinate (so-called inherent limits).³ Public security, in particular the prevention of violence and criminal offences in the streets, is such a constitutional value whose protection can justify restrictions of this fundamental right. If there was no other way to stop the violence and harassments and to avert dangers for health and life (e.g. if the two policemen were facing a huge and well-trained violent mob), when thoroughly weighed, public security could indeed prevail and, thus, justify an order to take off the hijab in the special situation in the public. However, as already discussed above (see *supra*, A.II.), this was not the case and in principle the public authorities must restore public security by measures against the aggressor and not against the victims.

In the given case, the freedom of religion is violated under two aspects: First, the two policemen were obliged to take measures against the three local men in order to protect the free exercise of religion by Mrs. A and Mrs. B. By refraining from such measures, they *passively* violated the state's duty of protection [grundrechtliche Schutzpflichten] and, furthermore, disregarded their task under sect. 2 phrase 2 LPolA. However, this does not affect the legality of the order they addressed to the women. Second, by this order, the policemen *actively* violated the women's freedom of religion, since this encroachment on their right under art. 4(1, 2) BL was not justified by the fundamental right's limits.

So the order violates fundamental rights.

So it shall be noted as *second partial result* that the order of the policemen is *illegal in substance* for the *choice of the wrong addressee* (violation of sect. 6(1) LPolA) and for *violation of the fundamental right of freedom of religion* (art. 4(1, 2) BL).

My (correct) answer to the first question of Mrs. A and Mrs. B will be that the order, which they received from the German policemen, was not legal.

³ See on the limits of the freedom of religion *Thomas Schmitz*, Freedom of Religion (workshop material) 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_FRGermany_freedom-of-religion.pdf, p. 2. Those who understand German may find a more thorough discussion of this problem in my practical training case "Crucifix", www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Grundrechtsfall_Kruzifix.pdf, p. 5 ff.

B. The option of a legal action before the administrative court

My correct answer to the second question of Mrs. A and Mrs. B will be that they can take a legal action against the order of the policemen before the administrative court if the *requirements for the admissibility* of such an action are met.⁴

I. *Recourse to the administrative courts*

The recourse to the administrative courts needs to be available in their case. In Germany, art. 19(4) of the Basic Law guarantees to anyone whose rights are violated by public authority the recourse to the courts. Where the jurisdiction of other courts is not particularly established, the recourse shall be to the ordinary courts. In the given case, however, it is established by sect. 40(1) of the Code of Administrative Court Procedure [= CACP]. Under this general clause the recourse to the administrative courts is available *in all public-law disputes of a non-constitutional nature* not explicitly allocated to other courts. The dispute about a police order is a classical public-law dispute. It is also of a non-constitutional nature, although the question of the violation of the constitutionally guaranteed freedom of religion plays an important role: Sect. 40(1) CACP only aims to exclude specific constitutional disputes between constitutional actors about their constitutional competences, rights and duties. As in any state based on the rule of law, the effective protection of the fundamental rights of the citizen in the daily life is the mission of *all* courts. Concerning the administrative courts, it is even in the main focus of their work. So this requirement is met.

II. *Form of action*

In the second step the relevant form of action needs to be determined because under the German administrative court procedural law the requirements for the admissibility of a legal action largely depend on it. Usually, the legal action against an administrative act (here: the police order to take off the hijab) would be an action for annulment [Anfechtungsklage] under sect. 42(1) CACP. However, in the given case the admin. act is already settled (the incident in the pedestrian area is over) and therefore does not have any effect and cannot be annulled anymore. The legal action would rather aim to prevent similar orders in the future. There is a form of action to seek a court order prohibiting a certain administrative action: the action for prohibitory injunction [Unterlassungsklage]. It can even be filed preventively. Yet, it is not suitable against possible future administrative acts.

However, Mrs. A and Mrs. B may file an action for the establishment of the unlawfulness of a settled administrative act [Fortsetzungsfeststellungsklage], seeking the declaration of the court that the already settled police order was illegal. This form of action is not expressly regulated in the Code of Administrative Court Procedure but derives from an analogous application of sect. 113(1) phrase 4 CACP which provides that in the case of an admin. act settled during the court proceedings the court shall declare that it was unlawful if the plaintiff has a justified interest in this finding. Like that, a gap in legal protection is avoided.

III. *Special admissibility requirements for the action for establishment of the unlawfulness of a settled administrative act*

An action for the establishment of the unlawfulness of an already settled admin. act is only admissible if some special requirements are met:

1) The plaintiff must have a *right to bring proceedings* like for an action for annulment (sect. 42(2) CACP applied analogously): He must *claim a violation of his own rights* by the settled admin. act. In the given case, this requirement is met, since Mrs. A and Mrs. B can claim that their fundamental right of freedom of religion (art. 4(1, 2) BL) has been violated (see supra, A.II.3).

2) The deadline of one month for a possible administrative review of the admin. act in the objection proceedings (cf. sect. 70 APA) must not have expired before the admin. act was settled. This is the case, since the police order was, as usual for such measures, settled immediately.

3) Finally, an action for the establishment of the unlawfulness of a settled admin. act requires a special declaratory interest (a special interest of the plaintiff in the finding, although the decision does not have any effect anymore). This is essential to avoid overloading the administrative courts. There are four recognised case groups of a declaratory interest: the risk of repetition, the vindication (restoration of the reputation of the citizen), the preparation of state liability suit and cases where a

⁴ See on the requirements for the admissibility of a legal action before the administrative court Diagram 5.

short-term settlement preventing regular judicial review is typical.⁵ In the given case, two of these groups are relevant: First, there is an imminent *risk of repetition*: There may be more intolerant locals harassing Mrs. A and Mrs. B in the future and the police may again order the women to take off the hijab instead of intervening against the aggressors. Second, police orders which need to be followed ad hoc are typical cases where an admin. act is settled before the citizen has the chance to initiate judicial review. So Mrs. A and Mrs. B have the required special declaratory interest.

IV. General admissibility requirements

Regarding the general requirements for legal actions before the administrative court, there are no doubts that they are met. However, Mrs. A and Mrs. B need to make sure that they file their action properly and to the administrative court with local jurisdiction.

My (correct) answer to the second question of Mrs. A and Mrs. B will be that under sect. 113(1) phrase 4 CACP applied analogously, they can take a legal action for the establishment of the unlawfulness of the police order before the administrative court.

FURTHER READING:

See on the structure of the examination of the legality of an administrative act [decision] in German admin. law *Schmitz*, The requirements of the legality of the administrative decision in German and European law (conference material), 2013, www.thomas-schmitz-hanoi.vn/Downloads/ZDR-Conference_admin-decision_Schmitz2-en.pdf, p. 2, 4 f.

See on the freedom of religion under the German Basic Law *Schmitz*, Freedom of Religion (workshop material), 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_FRGermany_freedom-of-religion.pdf; *Schmitz*, Freedom of Religion and Tolerance in a Pluralistic Society - illustrated by the Example of Germany, guest lecture at UNDIP, 04.06.2021, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Freedom-of-religion-tolerance-pluralism_UNDIP2021.pdf.

See on the methods and techniques of legal case-solving *Schmitz*, Introduction to legal case-solving, http://www.thomas-schmitz-hanoi.vn/Downloads/Schmitz_Case-solving_introduction.pdf (materials from the course Introduction to legal case-solving and mootng, Hanoi, Semester 1, 2013/14).

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⁵ C.f. *Ferdinand Kopp; Wolf-Rüdiger Schenke*, Verwaltungsgerichtsordnung [Code of Administrative Court Procedure],

24th edition 2018, § 113 no. 136 ff. with further references.

A. The legality of the order of the policemen

I. Legality in form

1) Competence: (+)

- in particular subject-matter jurisdiction of the police to avert dangers for public security or order (sect. 2 LPolA)

2) No procedural errors: (-)

- no hearing of the participants (cf. sect. 28(1) APA)

3) No formal errors: (+)

II. Legality in substance

1) Legal basis: (+)

a) Necessity of a legal basis: (+)

- because encroachment on [interference with] freedom of religion (art. 4(1, 2) BL)

b) Existence, validity and applicability of a legal basis: (+)

- sect. 12(1) LPolA (general clause on police powers)
- wide discretionary power not contrary to fund. rights but sect. 12(1) LPolA must be interpreted and applied in the light of (in line with) fundamental rights

c) Fulfilment of the preconditions of the legal basis: (+)

- threats and harassments of Mrs. A and Mrs. B a danger for public security (here: aspect of inviolability of the legal order - prevention of criminal offences and other illegal activities)

2) Choice of the right addressee: (-)

- authorities must *take measures against the aggressor, not against the victim*
- also and in particular in cases of *sexual harassment*
- cf. sect. 6(1) LPolA; duty of protection of fundamental rights
- no exceptional situation where police cannot protect victim otherwise

3) No violation of fundamental rights: (-)

- *passive* violation of freedom of religion by not taking measures against aggressors irrelevant for question of legality of order to Mrs. A and Mrs. B
- *active* violation of freedom of religion by order to Mrs. A and Mrs. B which is not justified by the freedom's limits (here: the need to protect public security)

B. The option of a legal action before the administrative court

- only if such a legal admission is *admissible*

I. Recourse to the administrative courts: (+)

- under sect. 40(1) CACP

II. Form of action

- 1) Action for annulment (sect. 42(1) CACP): (-)**
 - order of the policement cannot be annulled anymore because it is already settled
- 2) Preventive action for prohibitory injunction: (-)**
 - not possible against danger of future admin. acts
- 3) Action for establishment of the unlawfulness of an already settled administrative act (sect. 113(1) phrase 4 CACP analogously): (+)**

III. Special admissibility requirements for the action for establishment of the unlawfulness of a settled administrative act

- 1) Right to bring proceedings (claim of violation of own rights): (+)**
 - here: of the *freedom of religion* (art. 4(1, 2) BL) of Mrs. A and Mrs. B
- 2) Deadline for objection proceedings not expired before admin. act was settled: (+)**
- 3) Special declaratory interest: (+)**
 - here: *risk of repetition*
 - here also: typically short-term settlement which prevents judicial review before admin. act is settled

IV. General admissibility requirements: (+)

- proper filing of the action before the right administrative court
(only needs to be mentioned briefly)