Praying at school? “Anyplace, anywhere, anytime!”

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That’s how you could characterize the unsettling decision rendered by the German Federal Administrative Court. A Berlin high school student performed his ritual Islamic prayer on the school corridor, outside class hours. The school found that was not ok. The German Federal Administrative Court confirmed. So what’s unsettling?

No balancing…

All major premises formulated by the Administrative Court (which are completely in line with the Federal Constitutional Court’s case-law) consistently lead to the following statement: “With regard to the freedom of religion enshrined in Article 4.1, 4.2 of the German Constitution, the student…is entitled to do his prayers at school outside of class hours” (First Premise). Nonetheless, the appeal was not successful because “this entitlement is subject to limitations necessary for preserving school peace” (Second Premise). The result: “The restrictions to the fundamental right pursue an aim that is to be valued higher than the constraints on the fundamental right…preserving school peace takes precedence over exercising one’s freedom of religion.”

In the realm of fundamental rights, it is actually quite common that although a specific conduct is generally covered by a basic right, an individual claim to that conduct might not be granted because the legal interests protected through the restrictions to the basic right prevail. Quite common? For the past 50 years, didn’t interpreting the constitution require “practical concordance”, that is to arrange the legal interests protected by the Constitution in such a way as to avoid realizing one interest at the expense of another? So as to materialize all of them? Even more: to give optimal effect to each legal interest? In this spirit, the Federal Administrative Court subscribed to the “principle of careful balance” in its major premise, but then lost sight of it. While rhetorical appraisal of the pros and cons might be important communicatively, words are not sufficient; from a constitutional standpoint, much more needs to be “delivered”. But let’s leave it at this as an introductory obiter dictum – unfortunately, we all got used to the ABBA-principle that in the end, someone wins and the other looses: „the winner takes it all.“ None of this has actually much to do with the fine arts of legal reasoning. That’s unsettling.

… because the school can’t be „schooled“

So what news on school peace? It’s not doing so well. In fact, it’s doing so badly that we cannot really speak of school peace anymore, but rather of school strife. Just a few examples: amongst students, “there have been conflicts, some of which were rather violent, because some students accused others of disrespecting certain rules of conduct flowing from a specific interpretation of the Qur’an. Those rules included wearing a headscarf, fasting, doing prayers, not eating pork meat, and avoiding ‘indecent behavior’ and ‘indecent clothes’ as well as personal contacts to ‘impure’ fellow students”. This resulted in “mobbing, insults, in particular with anti-Semitic intentions, threats and sexist discrimination.” The overall climate was such that “displaying religious conduct, or openly distancing oneself from religious precepts could easily fuel conflict, even if the conduct was rather insignificant.” That’s unsettling. The Federal Administrative Court (and the Berlin-Brandenburg Administrative Court as Court of Lower Instance) deserve credit for describing the situation at the school in unsparing detail. What is irritating in this context is the need felt by the Federal Administrative Court to repeat time and again that it is bound by the Berlin-Brandenburg Court’s state-

ments. While this is correct from a legal point of view, it is also common knowledge and does not need to be repeated more than ten times. On the one hand, this creates an impression of distance – as if the Berlin judges had to decide the case, and not the judges in Leipzig. On the other hand, it seems as if the Federal Administrative Judges wanted to get rid of the case as quickly as possible – either through appeal to the Constitutional Court, or by putting an end to it.

Fate of the circumstances

On the whole, the Federal Administrative Court is portraying a school where classes may still be held, but where genuine school life does not happen anymore. How did it get to this point? And what measures are taken to remedy this? Those questions are important, as they build the basis for the Court's knockout argument: because things are as bad as they are, praying is not allowed, or things are going to get worse. In other words: the circumstances seal the claimant's fate. Well, something is wrong with that! First: the claimant argued that he did not contribute to the oppressive conditions; his prayers did not cause any irritation. From a regulatory law point of view, he is a "non-disturber" and not liable – the others bear the liability. Max Steinbeis provided a straightforward and accurate analysis on this issue (in reaction to the Court of Lower Instance's decision); the Federal Administrative Court formulates more subtly: "It is not the student exercising his freedom of religion, promised (sic!) to him by the German Basic Law, who disturbs the peace of the school, but the others who take offense by this in a way incompatible with tolerance."

Second: there is a school, and there is a state. The state has an educational mandate. (So that we learn how to treat our freedom and the freedom of others well.) The state is also neutral, i.e. it does not privilege or discriminate against a specific religion or faith, but is open to all beliefs. That's why everyone is coming! But not everyone treats his or her freedom or the freedom of others well. So what options does the state have? "Where the school has been able to bring students involved in conflicts together to talk, these talks did not yield any results." Step 1: They tried to have students talk to each other. Unfortunately without any results. Step 2: negative! Steps 3, 4, 5 (and so on): negative! Didn't happen! Reason: "the school's possibilities of solving religiously motivated conflicts through educational measures are limited", especially in an environment where "dealing with single incidents does not seem very promising in view of the effort that each incident requires." I am not in the education business, but I can think of more options once talks have failed. The school also has the possibility of applying disciplinary measures. Then, there is the law of administrative offences. And lastly, the decision spoke of "insults, in particular with anti-Semitic intentions". That's where (juvenile) criminal law comes into play. There are differentiated means on all levels, but they need to be applied, too!

So what is the state doing? It doesn't do anything! It surrenders and thus denies protection to those who wanted to do what the state "wanted" them to do, and what they have a right to. And it leaves the disturbers undisturbed. From a regulatory law point of view, the state thus transforms into a disturber: "disturber by status"[1]. The Federal Administrative Court's decision means exactly that: what's right is yielding to what's wrong.[2] That's unsettling. In fact, that's state bankruptcy of quite a unique nature!

"Anyplace, anywhere, anytime"

So what's left for the claimant in view of the circumstances? He could change schools, because he does have a right to pray in a healthy school environment. Just not at his school. Can this be right?

The Federal Administrative Court's decision might enter legal history as the "Nena-decision": You can pray – "anyplace, anywhere, anytime".

(Translation: Hannah Birkenkötter)

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[1] German regulatory law differentiates between two types of "disturbers" ("Störer"; a disturber is a person who is liable for violation of a regulatory provision [tortfeasor, but in regulatory terms]), namely "disturber via action" ("Handlungsstörer", a person who violates regulatory norms by his or her actions) and "disturber via status" ("Zustandsstörer", a person

who is responsible for a specific situation which does not comply with regulatory norms by his or her legal status, e.g. the owner of a contaminated property)

[2] This is a variation of the phrase "What is right does not have to yield to what is wrong", a modern translation of "Vim vi repellere licet" used in (German) criminal law to explain the concept of self-defense.

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