Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Balancing the Freedom of Religion of an Association Campaigning Against Abortion with a Woman's Right to Respect for Private Life

Question(s) at stake:

Whether a private association campaigning against abortion can, in view of its right to freedom of religion, be ordered not to address women who are about to enter a pregnancy counselling centre.

Outcome of the ruling:

To protect the rights to respect for private life of women who are about to enter a pregnancy counselling centre, it is justified to order a private association campaigning against abortion not to address them in a way that makes it impossible for them to avoid the confrontation.

Topic(s):

- Public Space and Institutional Sphere
- The Human Body

Keywords:

- Abortion
- Healthcare and medical interventions
- Legal toolbox
- Right to respect for private life
- Rights and freedoms
- Freedom of thought, conscience and religion

Tag(s):

- Pregnancy-conflict-counselling-centre

- Anti-abortion

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Country:

Germany

Official citation:

Higher Administrative Court Baden-Württemberg, Decision of 10 June 2011, 1 S 915/11 (VGH Baden-Württemberg, Beschluss vom 10. Juni 2011, 1 S 915/11)

Link to the decision:

http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=14457

ECLI:

ECLI:DE:VGHBW:2011:0610.1S915.11.0A

Date:

10 June 2011

Jurisdiction / Court / Chamber:

administrative court Baden-Württemberg

Remedy / Procedural stage:

Appeal

Previous stages:

- Administrative Court Freiburg (Breisgau), 4th chamber, 04 March 2011, 4 K 314/11, (VG Freiburg (Breisgau), 4. Kammer, 04. März 2011, 4 K 314/11)

Subsequent stages:

- None (decision is final)

Branches / Areas of law:

Public law; Administrative law; Constitutional law

Facts:

A private association campaigning against abortion posted its members in front of a pregnancy counselling centre – a facility tasked under German law with providing and certifying mandatory counselling prior to an abortion (*anerkannte Schwangerschaftskonfliktberatungsstelle* in German) – and approached women who were seeking to enter the centre, especially those evincing visible signs of pregnancy. The association addressed the women about conflicts associated with an unwanted pregnancy and gave them unrequested brochures, pictures, etc., on abortion. Though the brochures appeared to be merely informative material, they in fact contained pictures of foetuses and parts of foetuses.

The private association received a prohibition order from the competent administrative body banning them from approaching women in front of the centre in this manner. The association took legal action against the prohibition order but its claim was denied by the *Verwaltungsgericht* (Administrative Court) of Freiburg. The association lodged an appeal against the court's decision with the *Verwaltungsgerichtshof* (Higher Administrative Court) of Baden-Württemberg.

Ruling:

1. The court held that the prohibition order was an interference with the association's freedom of religion and belief, in addition to its freedom of expression. It also held that by confronting the women in the described manner, the association violated the women's rights to respect for private life.

It noted that when the freedom of religion and belief (Art. 4 of the Basic Law for the Federal Republic of Germany [hereafter Basic Law]) conflicts with other constitutional values, like the right to respect for private life (Art. 1 I in conjunction with Art. 2 I Basic Law), those conflicting constitutional values are to be balanced in such a way that they become as effective as possible for all parties involved.

2. Firstly, the court looked at the basic rights separately. It elaborated that the right to respect for private life protects a space where one is safe from interferences. In the court's view, the confrontation of the women by the association and the tactics used were a major interference with the women's right to respect for private life because the decision to have an abortion or not is highly personal. Concerning the freedom of religion and belief, the court noted that those freedoms include the freedom to express one's religious or ideological convictions and that the freedom of religious expression is, from a constitutional point of view, a particularly privileged form of communication.

When balancing the conflicting interests, the court took several aspects into account. For example, it noted that the association was only banned from appearing on the street where the centre was located and was not otherwise prohibited from communicating their beliefs in other parts of the city. Also, only the chosen manner of communication was forbidden by the authorities – i.e., addressing women about conflicts arising in connection with an unwanted pregnancy and giving them unrequested brochures, pictures, etc., on abortion. The ban did not affect the right to express general criticism against the possibility of abortion, provided that the women weren't targeted individually. Therefore, the court held the interference with the association's freedom of religion and belief to be minor. It also noted that the women had to cross the area adjacent to the centre to leave it and therefore could not evade the confrontation. The court ruled that the interference with the women's right to respect for private life had been severe.

3. When confronted with the argument that the state’s duty to protect unborn life should be considered in favour of the plaintiff’s position, the court didn’t elaborate on the controversial topic of abortion itself. Instead, it responded by referring to the legal regulations on conflicts arising from an unwanted pregnancy.
4. The court concluded that the women’s right to respect for private life outweighed the association’s freedom of religion and belief, and the prohibition order was therefore justified to protect the women’s right to respect for private life. The court found the appeal to be admissible but unfounded.

Main quotations on cultural or religious diversity:

- “The plaintiff’s freedom of belief and confession, which is protected by Article 4 I Basic Law […] does not require that the conduct prohibited in the order be given priority over the right to respect for private life of the women concerned”. (recital 32)
- “Freedom of confession is the freedom to express religious and ideological convictions. It is a particularly privileged form of communication […]; according to the prevailing view, it is a special case of freedom of opinion.” (recital 33)
- “When Article 4 Basic Law collides with another constitutional norm, a balancing process is necessary. The balancing […] with the right to respect for private life of the women affected by the consultation [see facts] leads to a predominance of the [right to respect for private life].” (recital 34)

Main legal texts quoted in the decision:

- Article 4 of the Basic Law for the Federal Republic of Germany
- Article 1 (1) in conjunction with Article 2 (1) of the Basic Law for the Federal Republic of Germany

Cases cited in the decision:

- BVerfG, Urteil vom 28. Mai 1993, 2 BvF 2/90
- BVerfG, Kammerbeschluss vom 08. Juni 2010, 1 BvR 1745/06

Commentary

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1. The present case shows how the state's obligation to protect one's right to respect for private life can function as a limit on religious and ideological freedom of expression when the exercise of that freedom takes on an unacceptably offensive form. (Germann 2023: Art. 4 recital 50.7). The court's ruling determines the limits of the freedom of religion and belief and the freedom of expression claimed by the association for its anti-abortionist campaign by balancing it against the state's obligation to protect the women's right to respect for private life.
2. The court gave particular consideration to the emotional state of the women visiting a counselling centre in cases of an unwanted pregnancy. It argued, that in the early stages of pregnancy, women may experience extreme emotional distress and therefore have a right to be left alone. It also looked closely at the specific way the anti-abortion organization was operating, what kind of material it used, and whether or not it confronted the women in a way that made it impossible for them to avoid the confrontation.

While focusing on the interests of the association and of the women, whose interest the contested ban intended to protect, the court barely addressed the controversial topic of abortion in general and did not have to. Instead, it referred to the legislator's decision to fulfil the state's duty to protect unborn life, including, in particular, counselling. Furthermore, when weighing the association's freedom of expression, it took into account that the concern was a matter of public interest. So, the issue of cultural and religious diversity in attitudes towards

abortion translates into how they are expressed within the public sphere.

3. The present decision is in line with other rulings on similar events in Germany and many other jurisdictions. Different rulings were rendered when the confrontation took a less offensive form and was addressing the women sensitively and taking into account their special situation – e.g., Verwaltungsgericht (Administrative Court) München, 12.5.2016, M 22 K 15.4369.

Literature related to the main issue(s) at stake:

- Germann, Michael. 2023. “Kollidierendes Verfassungsrecht”. In Volker Epping and
- Christian Hillgruber (eds), Becksche Online-Kommentar zum Grundgesetz, Art. 4 para 50.7. 54th ed. Munich: C.H. Beck.

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Suggested citation of this case-law comment:

Müller, Adina; Germann, Michael (2025): Balancing the Freedom of Religion of an Association Campaigning Against Abortion with a Woman’s Right to Respect for Private Life, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI047DE003, https://doi.org/10.48509/CUREDI047DE003.