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

Grooming Codes in the German Army: Personhood, Identity, and Hair

Question(s) at stake:

Whether an army regulation prohibiting a Goth soldier from wearing his desired long hair violates his right to free development of his personality.

Outcome of the ruling:

The German Army's regulation prohibits male soldiers from wearing long hair. This prohibition interferes with the applicant's fundamental freedom to shape his external appearance without the corresponding statutory provision. Thus, it violates the applicant's right to free development of his personality pursuant to Article 2(1) of the Basic Law. Despite that, the current legislation should continue to apply until the Parliament regulates the relevant issue.

Topic(s):

- Employment
- The Human Body

Keywords:

- Corporate image
- Equality between men and women
- Military service
- Non-discrimination
- Physical characteristics and body markings

Tag(s):

- Hair discrimination
- Gothic culture

- Military regulations

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Country:

Germany

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Link to the decision:

https://www.bverwg.de/de/310119B1WB28.17.0

ECLI:

ECLI:DE:BVerwG:2019:310119B1WB28.17.0

Date:

31 January 2019

Jurisdiction / Court / Chamber:

Federal Administrative Court/ First Military Affairs Senate

Remedy / Procedural stage:

Decision

Previous stages:

- None

Subsequent stages:

- None

Branches / Areas of law:

Public law; Administrative law; Public law; Constitutional law

Facts:

The complaint was submitted by a soldier working as a non-commissioned officer (*Stabsfeldwebel*) at the IT department. He was a follower of the Gothic culture and wanted to wear long hair.

The 2016 Joint Service Regulation on "The External Appearance of Female and Male Military Personnel of the *Bundeswehr*" (henceforth Hair and Beard Decree) stipulated that male soldiers must have short haircuts. Female soldiers, however, are allowed to wear long hair if they completely plait it at the back of their heads. As a result, the applicant was prohibited from having long hair while working in the Army.

On 17 January 2017, the applicant submitted a complaint of discrimination to the Ministry of Defence. According to the applicant, provisions 106, 202, and 204 of the Hair and Beard Decree constituted discrimination against men, violating Article 3(2) of the German Basic Law (henceforth *Grundgesetz* or Basic Law) – equality before the law; and paragraph 1 of the Act on Equal Opportunities for Military Personnel. Furthermore, the applicant alleged a violation of the right to the free development of his personality pursuant to Article 2(1) of the Basic Law.

The Federal Ministry of Defence's analysis of the applicant's complaint concluded that this was ill-founded. The gender-based double standards regarding hair were necessary to promote women's inclusion in the German Army.

After an internal inquiry, the Federal Ministry of Defence decided to submit the complaint for judicial review and forwarded the matter to the Federal Administrative Court.

Ruling:

The Hair and Beard Decree interfered in the applicant's exercise of his freedom to shape his external appearance without the corresponding statutory provision. Thus, it violated the applicant's right to free development of his personality

pursuant to Article 2(1) of the Basic Law.

The Court’s reasoning relied on the case law of the German Constitutional Court, especially the principles of *Wesentlichkeit* and *Gesetzesvorbehalt* developed within it*.* The rule of law required essential restrictions to fundamental rights to be: established by law, for the sake of public interest, and proportional. Those requirements were met in the case of restrictions on the freedom to individually shape one’s external appearance pursuant to Article 2(1) of the Basic Law.

The Hair and Beard Decree restricted the exercise of fundamental freedoms, such as those enshrined in Article 2(1) of the Basic Law. Even when off-duty, the decree indirectly modified the applicant’s appearance as he had to keep a short haircut. He could not adequately express his individuality or his lifestyle preferences, which were associated with a particular cultural group, through his hair. Therefore, the regulation interfered significantly with the applicant’s private sphere and fundamental rights. It shaped the applicant's corporeal identity in private and at work.

The Hair and Beard Decree encroached upon fundamental rights without a corresponding statutory provision. This all-in-one decree regulated several aspects of soldiers’ external appearance. However, according to the 2017 Soldier’s Law (§4 Abs.3 Satz 2, *Soldatengesetz*), the president or an entity authorized by him could only regulate a soldier’s uniform and the pieces of clothing worn with it. “Uniform” was related to the shape, colour, and material of military clothing and did not include a haircut. Put differently, the said Soldier’s Law did not authorize an executive or administrative regulation of soldiers’ general external appearance that included dispositions about their hairstyles and facial hair. Therefore, the Hair and Beard Decree ruled on issues outside the legally authorized scope.

There was a violation of the applicant’s right to free development of his personality pursuant to Article 2(1) of the Basic Law. Nevertheless, the Hair and Beard Decree application must be accepted for a transitional period. Otherwise, severe impairments of the Army’s function would occur. Given sufficient legal

basis, the German Army's hair regulations are acceptable under constitutional law.

Therefore, the Hair and Beard Decree did not violate the principle of equality before the law pursuant to Article 3 of the Basic Law. The differentiation between male and female soldiers' hairstyles was a permissible measure for promoting women's participation in the *Bundeswehr*.

Main quotations on cultural or religious diversity:

"In a letter – not signed by hand – of 17 January 2017 to a head of a Federal Ministry of Defence unit, the applicant lodged a 'complaint of discrimination.' He argued that nos. 106, 202, and 204 ZDv A-2630/1 raised discrimination against men in violation of Article 3(2) of the Basic Law and §1(1) of the Act on Equal Opportunities for Military Personnel. He wants to wear his hair just as women are allowed to wear their hair. The obligation to wear short hair should be only prescribed for tasks related to dangerous equipment or sanitary reasons. The army is a modern employer and wants to promote a culture of diversity. Thus, it should not reproduce outdated societal views that foster inequality. Wearing long hair may be an expression of femininity for women. It may also mean an expression of virility for men. Allowing men to have long hair could increase the number of applications to the army, especially among IT specialists." (para. 4)

"The requirements for soldiers' hairstyles in no. 202 ZDv A-2630/1 directly interfere with the applicant's right to free development of his personality pursuant to Article 2(1) of the Basic Law [...] On the one hand, they restrict the applicant's right to determine his external appearance, when on duty (section 6 SG). On the other hand, they restrict the applicant's right to shape his external appearance while off-duty, including the hairstyle – an expression of his identity and part of his personal lifestyle. The rules force soldiers to wear short haircuts even in their leisure time, thus impacting their privacy. They have an extraordinary impact on those affected – as for the applicant in this case – who wish to wear long hair in their free time for fashionable aesthetic reasons or as an expression of a cultural practice or personal affiliation to a group linked by

common attitudes towards life." (para. 18)

"This means that the essential basic decisions (*die wesentlichen Grundentscheidungen*) for this regulatory model are assigned to the parliamentary legislature. The legislature not only has the fundamental authority to decide how much individuality each soldier may express in parallel to the homogeneous appearance, which is a characteristic of the armed forces. The public debate on whether the different treatment of male and female soldiers regarding their hairstyles is justified by the aim of reducing discrimination against women has also to take place in a pluralistic parliament [references omitted]." (para. 34)

Main legal texts quoted in the decision:

Domestic law

- Articles 2(1), 3(2) of the Basic Law
- Sections 4(3), 6 of the Legal Status of Military Personnel Act
- Sections 1, 4 of the Act on Equal Opportunities for Military Personnel
- Sections 1, 2 of the Joint Service Regulation "The External Appearance of Female and Male Military Personnel of the Bundeswehr"

Cases cited in the decision:

Relevant German case law:

- Judgment of the Federal Constitutional Court no 1 BvR 394/56, 29 July 1959
- Judgment of the Federal Constitutional Court no 2 BvR 531/68, 18 February 1970
- Judgment of the Federal Constitutional Court no 1 BvR 455/82, 28 January 1987
- Judgment of the Federal Constitutional Court no 1 BvR 921/85, 6 June 1989
- Judgment of the Federal Constitutional Court no 2 BvR 550/90, 10 January 1991
- Judgment of the Federal Constitutional Court no 2 BvL 43/92, 9 March 1994

- Judgment of the Federal Constitutional Court no 2 C 3.05, 2 March 2006

Relevant Court of Justice of the European Union case law:

- Judgment of 11 January 2000*, Kreil*, C-285/98, EU:C:2000:2

Commentary

Grooming Codes in the German Army: Personhood, Identity, and Hair

This decision demonstrates the challenges judicial bodies face in addressing the ever-evolving individualization of lifestyles (Foblets and Vetters 2020: 78). In the present case, this challenge is demonstrated by a Goth male wishing to express his cultural background at the workplace by wearing a particular hairstyle. Lawsuits concerning similar issues have been filed in other jurisdictions and have contributed to developing particular hair policies, such as the US Department of Defence Instruction 1300.17 of 1 September 2020 on religious liberty in the military service. Military regulations on hair raise legal controversies worth including under the umbrella term of multicultural jurisprudence, *i.e.*, complaints drawing upon cultural factors.

Hair – including haircuts, headgears, beards, and moustaches – is central to how a person exercises freedom. It has critical importance for human dignity, subjective expression, and group identity (Cusack 2015: v; Lowe 2016: 1-2). Indeed, it raises complex legal issues, such as how relations between minority and majority groups and their particular values ought to be ordered (Sherrow 2006: 271).

The German Court used a cautious approach in the case at hand. The applicant's claims challenged widespread conceptions of hair and external appearance (see above in the quotations). However, the Court did not scrutinize them and avoided engaging in essential debates regarding the accommodation of diversity or multiculturalism in the German society. It left those issues to be decided by the Parliament (para. 34) and thus, upheld the doctrine of the separation of powers.

Such a cautious approach might also have a positive consequence. Gauseweg (2019) has noted that a future parliamentary debate on military hair regulations

will represent a beacon of hope. It will be up to the people's representatives – not the executive or military staff – to make decisions about soldiers' corporeal identities. This debate might lead to a new solution to the issue of external appearance in the army, one that may be more in line with the applicant's claims and bring more progressive conceptions of gender.

Notably, the Court placed order above accountability. The decision ruled that the current legislation should continue to be applied until its modification by the Parliament. As of March 2021, no such law was enacted, allowing for an ongoing encroachment on the fundamental freedoms of dozens of German soldiers. The Court's approach can be related to the conservative *culture juridique* of legal organs (Cusack 2015: vi). Significantly, two military officials participated as volunteer judges in the legal proceedings of the present case.

The case at hand is a landmark decision on hair regulation in the German army. Similar to this case, there is German case law that deals with the issue of hair length among male members of the country's security forces. For instance, see the decision of the Federal Administrative Court no. I WB 127.72, 25 July 1972 (*BVerwG, Entscheidung vom 25. Juli 1972 – I WB 127.72*). Such case law typically deals with alleged violations of the right to the free development of one's personality (Article 2(1) of the Basic Law) and the principle of equality before the law (Article 3 of the Basic Law). Despite restrictions on how members of the armed forces exercise certain fundamental rights, Articles 2 and 3 of the Basic Law remain applicable to their situation pursuant to Article 17a of the Basic Law.

In 2021, the Hair and Beard Decree turned 50. According to Skiba (2021), in 1971, Defence Minister Helmut Schmidt issued the first decree allowing for the use of long hair by male soldiers. For this reason, the German Army gained a reputation at the North Atlantic Treaty Organization (NATO) as the "German Hair Force." Because of the public outcry in 1972, Schmidt issued a new decree establishing that male soldiers ought to wear short hair – a provision that would be reproduced in the following decrees.

Hair, from the perspective of religious freedom, has also given rise to unique German case law. For instance, the German Federal Constitutional Court decided that a prohibition on using a headscarf by a school teacher in the state of Baden-Württemberg lacked a sufficiently defined statutory basis. Therefore, it was ruled to be illegal (Judgment of the Second Senate of the Federal Constitutional Court no. 2 BvR 1436/02, 24 September 2003, often referred to as *Kopftuchurteil*, ECLI:DE:BVerfG:2003:rs20030924.2bvr143602). A few years later, the Constitutional Court dealt again with a similar case and declared that a general ban on headscarves for teachers at state schools was not compatible with the Basic Law (Order of the First Senate of the Federal Constitutional Court no. 1 BvR 471/10, 27 January 2015, ECLI:DE:BVerfG:2015:rs20150127.1bvr047110). In contrast, the Constitutional Court has recognized that it is legal to prohibit state legal trainees from observing religious dress codes when performing judicial duties Order of the Second Senate of the Federal Constitutional Court no. 2 BvR 1333/17, 14 January 2020, ECLI:DE:BVerfG:2020:rs20200114.2bvr133317.

The German case law is related to the European case law on hair and headgear use in educational settings and at the workplace. In Europe, controversies regarding religious female clothing and male facial hair touch upon substantive equality in plural societies. Notable examples are the judgments by the European Court of Human Rights on veil bans (*Sahin v Turkey* (2005) *[GC],* App no 44774/98; *SAS v France* (2014) *[GC]*, App no 43835/11; *Dakir v Belgium* (2017), App no 4619/12; *Belcacemi and Oussar v Belgium* (2017), App no 37798/13) as well as by the Court of Justice of the European Union (Judgment of 14 March 2017, *Achbita*, C-157/15, EU:C:2017:203; Judgment of 14 March 2017, *Asma Bougnaoui, ADDH,* C-188/15, EU:C:2017:204).

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

Case relevant:

- Gauseweg, Simon. 2019. “Die Rückkehr der alten Zöpfe?”. *Legal Tribune Online*, available at <https://www.lto.de/recht/hintergruende/h/bverwg-1wb2817-haar-bart-erlass-lange-haare-soldaten-alte-zoepfe/> accessed 31

May 2022.

- Redaktion Beck-Aktuell. 2019. “BVerwG: Für Haar- und Barterlass der Bundeswehr fehlt gesetzliche Ermächtigung”. *Heute im Recht.*
- Skiba, Thomas. 2021. “Vor 50 Jahren – der liberale Haar- und Barterlass der Bundeswehr”. *Bundeswehr Website*, available at <https://www.bundeswehr.de/de/organisation/luftwaffe/aktuelles/luftwaffe-der-liberale-haar-und-barterlass-der-bundeswehr-5033324> accessed 31 May 2022.

General literature:

- Cusack, Carmen. 2015. *Hair and Justice: Sociolegal Significance of Hair in Criminal Justice, Constitutional Law, and Public Policy.* Springfield: Charles C. Thomas Publisher
- Foblets, Marie-Claire and Larissa Vetters. 2020. “The Pluralization of European Societies and the Role of the Judiciary”. *Justice and Culture: Theory and Practice Concerning the Use of Culture in Courtrooms*, 77–98. Napoli: Editoriale Scientifica.
- Relaño Pastor, Eugenia. 2019. “Religious Discrimination in the Workplace: Achbita and Bougnaoui”. *EU Anti-Discrimination Law beyond Gender*, 183–202. Oxford: Hart.

Interdisciplinary literature:

- Lowe, Scott. 2016. *Hair*. New York: Bloomsbury Academic
- Schmitt, Caroline. 2015. *Migrantisches Unternehmertum in Deutschland: Afro Hair Salons zwischen Ausgrenzung und Inkorporation*. Bielefeld: De Gruyter
- Sherrow, Victoria. 2006. *Encyclopedia of Hair: A Cultural History*. Westport: Greenwood Press
- Tarlo, Emma. 2016. *Entanglement: The Secret Lives of Hair*. England: Oneworld Publications

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