

# Articles

## Cloaked Identities and Forbidden Shields - Is Sec. 17 (1) VersG NRW Unconstitutional?

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*As of the 07th of January 2022 the Assembly law of North Rhine Westphalia ("VersG NRW") entered into force. Contrary to the ambitions of the legislator to overcome the deficiencies of the former Assembly law (the "VersG"), numerous constitutional doubts arose. Consequently, the VersG NRW has been challenged in front of the constitutional court of North Rhine Westphalia (the "VerfGH NRW"). The decision is pending.*

*Topic of this article are the punitive prohibitions set out in Sec. 17 VersG NRW. Based on Sec. 17 (1) Nr. 1 VersG NRW it is prohibited to wear or carry objects that can objectively be used to and are subjectively aimed at covering up one's identity to prevent identification by law enforcement for prosecution. Additionally, Sec. 17 (1) Nr. 2 VersG NRW prohibits wearing or carrying objects that can be used and are subjectively aimed at preventing enforcement measures by law enforcement. Evaluating the constitutionality of these regulations is of high practical relevance, not only because North Rhine Westphalia is the federal state with the highest population, but because other federal states are adopting their own assembly laws as well. These include prohibitions similar to Sec. 17 VersG NRW (for instance Sec. 18 of Hesse's Freedom of Assembly Act ("HVersFG") or Sec. 9 (1), (2) of the assembly law of lower saxony ("NVersG")).*

*To properly assess the constitutionality, the affected fundamental rights have to be compiled, after which it can be examined if they protect the now prohibited behaviours. However, just because the behaviours are protected, it does not mean that the regulations are unconstitutional. They can still be justified.*

*It has to be paid attention to the question of whether the regulations are proportionate. It also needs to be established if the regulations are phrased clearly enough. When coming to the result that Sec. 17 VersG NRW is either unproportionate or phrased too unclearly, it has to be asked whether these flaws can be overcome by interpreting the VersG NRW in such a way that it aligns with the constitution.*

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## **A. Freedom of Assembly, Art. 8 (1) of the German Constitution (“GG”)**

One of the affected fundamental rights is the freedom of assembly, Art. 8 (1) GG. It grants the right to assemble peacefully and unarmed to contribute to public opinion making.<sup>1</sup> Part of this freedom is the choice over the location, timing, contents and way of expression.<sup>2</sup> This includes the freedom to wear masks or protective equipment. However, it can be argued that Art. 8 (1) GG only protects assemblies that are peaceful and unarmed and that people who wear masking are unpeaceful or people who wear protective equipment are armed.

### **I. Peaceful and unarmed**

An assembly is peaceful if it does not take a violent or incendiary course.<sup>3</sup> To be unpeaceful, aggressive behaviour of some dangerousness has to exist.<sup>4</sup>

Objects for covering up one’s identity are such that can objectively be used to cover one’s identity up and are subjectively aimed at covering up one’s identity to prevent law

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<sup>1</sup> cf BVerfGE 104, 92,104; Heinrich Amadeus Wolff and Dieter Hömig, *Grundgesetz für die Bundesrepublik Deutschland Handkommentar* (13<sup>th</sup> edn, Nomos 2022) Art. 8 para 2; Jörn Ipsen, *Staatsrecht II* (24<sup>th</sup> edn, Vahlen 2021) § 12 para 562.

<sup>2</sup> BVerfGE 69, 315, 343; Jens-Peter Schneider, ‘Art. 8’ in Volker Epping and Christian Hillgruber, *BeckOK GG* (54<sup>th</sup> edn, C.H. Beck Verlag 2023) para 17.

<sup>3</sup> BVerfGE 69, 315, 361; Hans Jarass and Martin Kment, *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (17<sup>th</sup> edn, C.H. Beck Verlag 2022) art 8 para 8.

<sup>4</sup> BVerfGE 104, 92, 106.

enforcement from identifying oneself for the purpose of prosecution. This term aligns with the former regulation (Sec. 17a VersG).

Contrarily the term protective gear (“*Schutzrüstung*”) deviates from Sec. 17a VersG. There it was formulated as “*Schutzwaffe*”, which means protective weapon. Instead it relies on the sample design for assembly law (“*ME-VersG*”). Still, most scholars use the definition set forth for Sec. 17a VersG, because there are no cases in which a protective weapon is not simultaneously protective equipment.<sup>5</sup>

Therefore, every object that is produced for the purpose of protecting the body in a violent encounter is protective equipment.<sup>6</sup> Additionally, objects that are not built for this purpose, but can be used as protective equipment, fall under the definition of Sec. 17 (1) Nr. 2 VersG NRW. As for Sec. 17 (1) Nr. 1 VersG NRW, a subjective component needs to be fulfilled. Namely, that the object is aimed at preventing enforcement measures by law enforcement.

Returning to the question if people who wear such objects are unpeaceful: wearing these objects is not itself an aggressive behaviour of some dangerousness. This can only result from following actions by the protestors. It can be argued that people who wear these objects show an aggressive attitude and increase the probability of the assembly becoming violent.<sup>7</sup> Nevertheless, this cannot justify exclusion from Art. 8 (1) GG.

Firstly, the Freedom of assembly is constitutive of any liberal and democratic order of state.<sup>8</sup> Without the freedom of assembly, there is no democracy. Given this high value, every regulation has to be viewed sceptically. Hence, it is not convincing to deny protestors the protection of Art. 8 (1) GG. The regulation can still be justified.

Secondly, it cannot be possible that the legislator is able to determine the reach of the Constitution by simple laws. Fundamental rights are meant to protect individual freedom from state intervention.<sup>9</sup> If the state could now determine the level of protection, it is completely up to him whether protection is granted at all.

Consequently, wearing the objects, is not unpeaceful. As for the notion to interpret protective equipment as weapons, it needs to be referred to the legislator’s choice to

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<sup>5</sup> cf Tobias Herbst, ‘§ 17 VersG’ in Markus Möstl and Dieter Kugelmann (eds), *BeckOK Polizei- und Ordnungsrecht Nordrhein-Westfalen* (24<sup>th</sup> edition, C.H. Beck Verlag 2023) para 18; Frank Braun and Peter Roitzheim, ‘§ 17’ in Norbert Ullrich, Frank Braun and Peter Roitzheim (eds), *Versammlungsgesetz Nordrhein-Westfalen* (1<sup>st</sup> edn, Richard Boorberg Verlag, 2022) para 16f.; Klaus Schönenbroicher, *Versammlungsgesetz Nordrhein-Westfalen Kurzkommentar* (1<sup>st</sup> edn, Verlag Reckinger 2022) § 17 para 3.

<sup>6</sup> Braun and Roitzheim (n 5) para 17; Oliver Jitschin, *Handbuch Versammlungsrecht* (1<sup>st</sup> edn, Kohlhammer 2021) ch 5 para 1270.

<sup>7</sup> Otto Depenheuer, *Grundgesetz Kommentar Band 2* (99<sup>th</sup> edn, C.H. Beck Verlag 2022) art 8 para 44; Jarass and Kment (n 3) para 9.

<sup>8</sup> BVerfGE 69, 315, 344-45; BVerfGE 128, 226, 250.

<sup>9</sup> Friedhelm Hufen, *Staatsrecht II Grundrechte* (10<sup>th</sup> edn, C.H. Beck Verlag 2023) § 5 para 1; Gerrit Manssen, *Staatsrecht II Grundrechte* (19<sup>th</sup> edn, C.H. Beck Verlag 2022) § 3 para 52.

distance himself from the word weapon. Further, by definition of protective equipment, it cannot be used to harm other people or destroy objects. Therefore, protective equipment cannot be interpreted as a weapon. Both behaviours enjoy the protection of Art. 8 (1) GG.

## **II. Is Sec. 17 (1) VersG NRW proportionate?**

Given that the behaviours are protected by the constitution and that Sec. 17 (1) VersG NRW affects protestors in their rights, it has to be asked whether the state intervention can be justified. Generally, Art. 8 GG sets different standards for restrictions based on the location of the assembly. Outdoor assemblies may be restricted by or pursuant to a law (see Art. 8 (2) GG). Indoor assemblies may only be restricted by colliding fundamental rights or constitutional goods.<sup>10</sup> Sec. 17 (1) VersG NRW explicitly focusses on outdoor assemblies. Therefore, the VersG NRW suffices formally to restrict the freedom of assembly.

Contentwise as a measure for justification, the principle of proportionality is applied frequently. It is rooted in the rule of law (Art. 20 (3) GG) and states that every state intervention has to be proportionate, which means that a legitimate cause has to exist and that the state measures have to be suitable, necessary and adequate to fulfil the cause.<sup>11</sup> If the state intervention is unproportionate, it is unconstitutional. For a precise analysis it has to be differentiated between Sec. 17 (1) Nr. 1 and Nr. 2 VersG NRW.

### **1. Sec. 17 (1) Nr. 1 VersG NRW**

#### **a. Legitimate cause**

The cause of the prohibition is to enhance prosecution.<sup>12</sup> Additionally the legislator assessed that covering up one's identity is dangerous in the way that it makes violence much more probable. The same logic also underlies Sec. 17a VersG.<sup>13</sup> Both the prosecution and the prevention of violence are legitimate.

#### **b. Is Sec. 17 (1) Nr. 1 VersG NRW suitable to fulfil the legitimate cause?**

The regulation is suitable if it is not unfitting from the start to fulfil the cause. Any contribution is sufficient.<sup>14</sup> Concerns arise for the prevention of violence. It can be assumed that covering up one's identity creates a threatening appearance and

<sup>10</sup> cf BVerfGE 28, 243, 261; BVerfGE 143, 161, 190.

<sup>11</sup> cf BVerfGE 19, 342, 348-49; Bernd Grzeszick (n 8) art 20 para 109; Lothar Michael and Martin Morlok, *Grundrechte* (8<sup>th</sup> edn, Nomos 2023) § 23 para 608; Hufen (n 9) § 9 para 14.

<sup>12</sup> LT-Drs 17/12423, p 76.

<sup>13</sup> BT-Drs 11/4359, p 14.

<sup>14</sup> Heinrich Lang and Heinrich Wilms, *Staatsrecht II Grundrechte* (2<sup>nd</sup> edn, Kohlhammer 2020) § 7 para 272; Hufen (n 9) § 9 para 20.

communicates a violent attitude.<sup>15</sup> But it can be questioned whether violent people abstain from violence just because they can't cover their identity or see other people whose identity is covered. This is viewed by some as more of an unsubstantiated speculation instead of a valid prognosis.<sup>16</sup>

Anyhow, the legislator has a wide margin of assessing the factual basis of the situation.<sup>17</sup> Ruling out any contribution extends the barriers to suitability. Sec. 17 (1) Nr. 1 VersG NRW is suitable to achieve the causes.

### c. Is Sec. 17 (1) Nr. 1 VersG NRW necessary?

More problematic is the question if it is necessary. A measure is necessary if there is no less invasive method that is as suitable to achieve the causes.<sup>18</sup> A few options can be discussed: isolating troublemakers, video surveilling the assembly, using specific prohibitions, seizing the objects which are used to cover up the identity and finally linking the punishment to a prior administrative act.

#### aa. Isolation of troublemakers

Detaining protestors is generally inadmissible.<sup>19</sup> If the protestor is not detained, there is a principle called "*Polizeifestigkeit*" of the assembly law.<sup>20</sup> The police can only take measures against protestors if there are specific authorizations within the VersG NRW or if the VersG NRW offers no protective measures against current dangers, Sec. 9 VersG NRW. There is a blocking effect of the VersG NRW to the PolG NRW.<sup>21</sup> Looking into the VersG NRW, the police could make use of Sec. 14 VersG NRW to approach troublemakers or

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<sup>15</sup> cf Christian Baudewin, *Der Schutz der öffentlichen Ordnung im Versammlungsrecht* (2<sup>nd</sup> edn, PL Academic Research 2014) 294-95 paras 699-700.

<sup>16</sup> Michael Kniesel, '§ 27' in Alfred Diete, Kurt Gintzel and Michael Kniesel (eds), *Versammlungsgesetze - Kommentierung des Versammlungsgesetzes des Bundes und der Versammlungsgesetze der Länder* (18<sup>th</sup> edn, Carl Heymanns Verlag 2019) para 11.

<sup>17</sup> cf Hufen (n 9) § 9 para 20; Michael and Morlok (n 10) § 23 para 619.

<sup>18</sup> Lang and Wilms (n 13) § 8 para 274; Ipsen (n 1) § 3 para 191.

<sup>19</sup> Johannes Dietlein and Johannes Hellermann, *Öffentliches Recht in Nordrhein-Westfalen* (9<sup>th</sup> edition, C.H. Beck Verlag 2022) § 3 para 315.

<sup>20</sup> BVerwG, NVwZ 2007, 1439; para 30; Christoph Enders, 'Maßnahmen gegen Versammlungen [2020] JR 569, 570; Dietlein and Hellermann, (n 18) § 3 para 314.

<sup>21</sup> cf Kathrin Bünnigmann, 'Polizeifestigkeit im Versammlungsrecht' [2016] JuS 695; Thomas Kingreen and Ralf Poscher, *Polizei- und Ordnungsrecht mit Versammlungsrecht* (12<sup>th</sup> edn, C.H. Beck Verlag 2022) § 19 para 17.

exclude them from the assembly.

Fulfilling Sec. 17 (1) Nr. 1 VersG NRW, the protestor also commits a crime punishable by up to two years in prison (Sec. 27 (7) Nr. 1 VersG NRW), so the police can use the measures of the code of criminal procedure (the “StPO”). They can for example arrest the protestor provisionally to identify him, Sec. 127 (1) in conjunction with Sec. 163b (1) S. 1 StPO. The ins and outs of the StPO will be examined in further detail later. For now, it suffices to note that even though the VersG NRW blocks the PolG NRW, the police has options to isolate troublemakers. Isolating troublemakers individually is less invasive than issuing a general prohibition.

However, if the police isolates troublemakers, two problems result. Firstly, the police has to be cooperative and assembly-friendly.<sup>22</sup> Taking measures against individuals can escalate the situation. Especially assemblies of the political edges have a high probability of escalation and violence.

Secondly, it may not be possible for the police to isolate individuals or the prohibited behaviour only becomes apparent after the assembly. Hence, the legislator does not overextend his margin of assessment relating to the necessity of the prohibition.

#### **bb. Video surveillance of the assembly**

According to Sec. 16 (5) Nr. 1 VersG NRW the police can monitor the assembly. But monitoring the whole assembly affects not only the individual who violates Sec. 17 (1) Nr. 1 VersG NRW, but simultaneously every other protestor. The mere possibility of area-wide video surveillance can cause anxiety over being registered by law enforcement and deter individuals from participating in the assembly.<sup>23</sup> Therefore video surveillance is not a less invasive measure.

#### **cc. Seizing the objects**

Seizing the objects is a less invasive measure. However, removing Sec. 17 (1) Nr. 1 VersG NRW and Sec. 27 (7) Nr. 1 VersG NRW meets technical difficulty. For every invasive measure the state needs a legal basis.<sup>24</sup> Typically for the seizure of objects, this is Sec. 111b (1) S. 1, 2 StPO in combination with Sec. 29 S. 1 VersG NRW. If the punitive character no longer exists, Sec. 111b (1) S. 1, 2 StPO can no longer be applied due to Sec. 3 (1) EGStPO (introductory law to the Code of Criminal procedure). Seizing the objects would then only be possible if covering up one’s identity would constitute a misdemeanour

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<sup>22</sup> BVerfGE 69, 315, 355; Hufen (n 9) § 30 para 4; Schneider (n 2) para 33.

<sup>23</sup> BVerfG, NVwZ 2007, 688; VG Berlin, NVwZ 2010, 1442.

<sup>24</sup> Steffen Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht* (21<sup>st</sup> edn, C.H. Beck Verlag 2021) § 7 para 259; Annette Guckelberger, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht und Staatshaftungsrecht* (11<sup>th</sup> edition, Nomos 2023) § 8 para 3.

(Sec. 22ff. OWiG in combination with Sec. 29 S. 1 VersG NRW). But the federal legislator viewed the former conception as a misdemeanour as insufficient.<sup>25</sup> This follows that a conception as a misdemeanour is not intended.

As a result, seizing objects highly depends upon Sec. 27 (7) Nr. 1 VersG NRW. Replacing Sec. 27 (7) Nr. 1 VersG NRW by seizing the objects is not possible. It cannot be as suitable.

#### **dd. Specific prohibitions**

Another possibility is to specify the prohibitions to certain individuals or assemblies. This shrinks the scope of application and is less invasive. Reducing the scope of application would also need to be as suitable to fulfil the causes.

There are assemblies and individuals where law enforcement cannot estimate whether they become violent. Identifying those who then violate the specific prohibitions is extremely difficult if not impossible. Following the rationale of the legislator, the protestors would also increase the probability of violence and an incendiary course, just by wearing the objects.

#### **ee. Link to administrative act**

##### **(1) Basics**

For a proper understanding of this concept, the modus operandi of Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW has to be illustrated. Triggering a punitive action depends upon the protestor wearing or carrying the objects.<sup>26</sup> It does not depend upon the protestor having full knowledge that the objects fall under Sec. 17 (1) Nr. 1 VersG NRW. There is no option for law enforcement to order him to remove the object prior to his prosecution. Instead the punishment could be linked to the violation of such an order by law enforcement.

##### **(2) Interim injunction referring to the assembly law of Bavaria (“*BayVersG*”) – BVerfGE 122, 342**

In this context the interim injunction by the Federal Constitutional Court (the “*BVerfG*”) – relating to the assembly law of Bavaria is especially noteworthy.

In this decision the court overruled certain fine regulations. This happened via an interim injunction and not at the end of the main proceedings. To overrule regulations via interim injunction is exceptionally rare because the court only makes use of this possibility with biggest reluctance and applies very strict benchmarks.<sup>27</sup> Mainly it laid out that penalising

<sup>25</sup> BT-Drs 11/4359, p 14.

<sup>26</sup> Norbert Ullrich, ‘§ 27’ in Ullrich, Braun and Roitzheim (n 5) para 38; Schönbroicher (n 5) § 27 para 7.

<sup>27</sup> cf BVerfGE 122, 342, 361; 3, 41, 44.

protestors for violations against assembly laws shifts the responsibility for the knowledge of the rights and responsibilities onto them and punishes them if they miscalculate the scope of those.<sup>28</sup> Yet, the interpretation of unclear legal terms requires legal knowledge or adequate situational awareness.<sup>29</sup> This cannot be expected by the protestors.

Penalising them with a fine constitutes a state reprimand and insistent disapproval and a repressive sanction.<sup>30</sup> Additionally, imposed fines would be considered for danger forecasts of future assemblies.<sup>31</sup>

All in all, penalising the protestors would create an unpredictable risk of punishment, whose “chilling-effect”, or in other words: effects of intimidation, can keep citizens from using their freedom of assembly.<sup>32</sup> It would be preferable to establish responsibilities and prohibitions via administrative law, because it can be determined what is mandatory for every individual.<sup>33</sup> That can be challenged in front of a court, creates certainty, without accusing the protestor and diminishes the risk of miscalculating the scope of the rights and responsibilities by a huge amount.<sup>34</sup>

### **(3) Applicability to Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW**

The question at hand is whether these findings apply to Sec. 17 (1) Nr. 1 and Sec. 27 (7) S. 1 VersG NRW. One could argue that fining the prohibitions of covering up one’s identity or wearing protective equipment was also part of the BayVersG and was not overruled (Art. 23 Nr. 16 BayVersG in combination with Art. 16 (2) Nr. 2 BayVersG).

Yet, any violation against Sec. 17 (1) Nr. 1 VersG NRW will not only be fined, but can lead to incarceration (Sec. 27 (7) S. 1 VersG NRW). The accusation that underlies jail-time is much greater than the accusation that comes with a misdemeanour and a fine.<sup>35</sup> The only case in which a fine is applied in the context of Sec. 17 (1) Nr. 1 VersG NRW is the carrying of the objects (Sec. 28 (1) Nr. 7 VersG NRW). Therefore, based upon the much greater accusation and legal consequences, the statements of BVerfGE 122, 342 can be applied to Sec. 17 (1) Nr. 1 VersG NRW.

### **(4) Conclusion: Are Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW necessary?**

Applying the statements of the interim injunction, Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG

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<sup>28</sup> BVerfGE 122, 342, 363.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.* 365.

<sup>33</sup> *ibid.* 364.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.* 363; BVerfGE 27, 18, 33.



NRW are unnecessary. The police can prevent violence just as well and the protestors are less restricted.

Arguing that law enforcement could not effectively meet the dynamics of the assembly if Sec. 17 (1), Sec. 27 (7) S. 1 VersG NRW is linked to Sec. 17 (2) VersG NRW, turns out to be incorrect. Law enforcement does not have to individually approach protestors and ask them to remove the object. They can achieve this approach by issuing a general order (Sec. 35 S. 2 of the administrative procedure act of North Rhine Westphalia – “*VwVfG NRW*”), for example by posting a sign with the prohibited items.

#### **d. Would Sec. 17 (1) Nr. 1 VersG NRW be adequate?**

If one does not follow this line of argument, it would have to be established how intensely the protestors are affected by Sec. 17 (1) Nr. 1 VersG NRW and set this in relation to how effectively the legislator can achieve his goals. Analysing the intensity a few markers have to be viewed in further detail. Namely the consequences that arise from the scope of Sec. 17 (1) Nr. 1 VersG NRW, the consequences of the applicability of Sec. 27 (7) S. 1 VersG NRW and the individually felt intensity by the protestors (see: chilling effect).

##### **aa. How intensely are the protestors affected?**

#### **(1) Consequences from the scope of Sec. 17 (1) Nr. 1 VersG NRW**

Objectively there is no limit for the number of items that can be interpreted as objects in the sense of Sec. 17 (1) Nr. 1 VersG NRW. Only the objective aptitude to be used as an item to cover up one’s identity is required. But compared to Sec. 17a VersG the subjective component has changed. In applying Sec. 17a VersG it was not necessary to evaluate the intention of the protestors, the fact that their identity was covered up sufficed for punishing them.<sup>36</sup> This – as noted by some courts – normative imbalance<sup>37</sup>, is not to be expected in the application of Sec. 17 (1) Nr. 1 VersG NRW. Not only artistic and illustrative covers<sup>38</sup>, but every item is allowed that is not aimed at preventing the identification by law enforcement for the sake of prosecution.

To assess when an item is aimed at preventing this, the scientific literature has proposed the criteria if there are valid reasons for wearing these items.<sup>39</sup> If the weather is bad there

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<sup>36</sup> OLG Zweibrücken, NStZ 2022, 243; OLG Karlsruhe, NStZ 2022, 621; OLG Dresden, BeckRS 2015, 6938; KG Berlin, NStZ 2012, 455.

<sup>37</sup> LG Hannover, BeckRS 2009, 7119; AG Rotenburg (Wümme), NStZ 2006, 358.

<sup>38</sup> BVerfG, NVwZ 2008, 414, 415.

<sup>39</sup> Herbst (n 5) para 14.

is a valid reason for wearing coats, scarfs or jackets. If protestors fear repression by other states or political opponents, they have a valid reason to cover up their identity.

Still, the legal terms remain uncertain and it depends upon the interpretation of those terms by the courts. But even if the court decides that the protestor has not violated Sec. 17 (1) Nr. 1 VersG NRW, law enforcement still has taken measures against him and pulled him out of the assembly.

Adding to this is the legal character. The legislator underlines that such identity concealments should not be captured by Sec. 17 (1) Nr. 1 VersG NRW that are aimed at avoiding negative consequences (e.g. in their personal or professional life).<sup>40</sup> Actually covering up the identity is still not necessary for triggering punishment.<sup>41</sup>

From that, we can derive that the scope of Sec. 17 (1) Nr. 1 VersG NRW already creates a high intensity. It creates a situation where the citizen has to justify and potentially end up in front of a criminal court.

## **(2) Consequences of the applicability of Sec. 27 (7) S. 1 VersG NRW**

The criminalisation has to be further examined. It can be punished without an actual danger for people or objects. It is a criminalisation of a preliminary stage. This is especially debatable given the *ultima-ratio-principle*. The *ultima-ratio-principle* states that criminal law is the sharpest and therefore always only the last mean of a state.<sup>42</sup> Hence, the legislator has to carefully evaluate the situation and consider if there are any other means to apply beforehand.

Besides the criminalisation of a preliminary stage, another consequence is the application of the StPO. This lowers the barrier for law enforcement to act. It is – for example – not permitted to detain protestors. If law enforcement now suspects a crime (e.g. Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW) they can arrest the suspect for the purpose of identification (Sec. 127 (1) S. 1, Sec.163b (1) S. 2 StPO). The suspicion of a crime in the sense of Sec. 27 VersG NRW practically imposes itself due to the openness and unclarity of the legal terms and the fact that the punishment is triggered without prior administrative law order (see above).

Supplementary, the legal consequences for policemen have to be considered. According to Sec. 163 (1) S. 1 StPO, the principle of legality applies. That means that they are obligated

<sup>40</sup> LT-Drs 17/12423, p 76.

<sup>41</sup> OLG Hamm, NStZ-RR 2017, 390, 391; cf Rudolf Rengier, *Strafrecht Allgemeiner Teil* (14<sup>th</sup> edn, C.H. Beck Verlag 2022) § 10 paras 11 and 16.

<sup>42</sup> Heribert Ostendorf and Janique Brüning, *Strafprozessrecht* (4<sup>th</sup> edn, Nomos 2021) § 2 para 1; Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil - Die Straftat und ihr Aufbau* (52<sup>nd</sup> edn, C.F. Müller 2022) § 1 para 15.

to prosecute every suspect.<sup>43</sup> They have to take all measures which may not be deferred in order to prevent the concealment of facts (Sec. 163 (1) S. 1 StPO). It is not up to their discretion whether to act or not.<sup>44</sup> If they do not act, they may commit a crime themselves (see Sec. 258, 258a StGB).<sup>45</sup> They can also be liable to pay damages (Art. 34 S. 1 GG in combination with Sec. 839 (1) BGB – German Civil Code). The only choice of the policemen is when or in which order they are taking actions against the suspects.<sup>46</sup> But in the context of Sec. 17 (1) Nr. 1 VersG NRW, this freedom does not really exist. Given that a person's identity is covered up, the policemen can only take actions immediately and not in the aftermath of the assembly, where the person can no longer be approached to be identified.<sup>47</sup> This means that the policemen have to act, even though that increases the likelihood of violence and an incendiary course of the assembly.<sup>48</sup>

Critics might point out that this is not a particularity of Sec. 17 (1) Nr. 1 VersG NRW and that this applies to every punitive regulation concerning assemblies. What is particular about Sec. 17 (1) Nr. 1 VersG NRW is that it is very difficult to grasp and creates many practical problems where policemen simply do not know if Sec. 17 (1) Nr. 1 VersG NRW applies or not. In contrast it is very easy to apply Sec. 27 (1) VersG NRW – here a host of an assembly gets punished because he executes an assembly even though it was forbidden. Given that however it is only consequent to apply these ideas to every punitive regulation which concern assemblies and are unclearly phrased or provide law enforcement with extreme practical difficulty.

To conclude, the criminalisation of identity concealment allows the application of the StPO, which lowers the barrier of taking measures against protestors significantly. These measures are no options, but obligations for law enforcement if they suspect a violation of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW. If they do not take these measures, the policemen commit a crime and can be liable to pay damages. This leads to the conclusion

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<sup>43</sup> BVerfG, NStZ 1982, 430; Bertram Schmitt, '§ 152' in Lutz Meyer-Goßner and Bertram Schmitt (eds), *Strafprozessordnung mit GVG und Nebengesetzen* (65<sup>th</sup> edn, C.H. Beck Verlag 2022) para 2.

<sup>44</sup> Silke Noltensmeier von Osten, *Kommentar zur Strafprozessordnung Band 3: §§ 131-211* (108<sup>th</sup> edn, Carl Heymanns Verlag 2021) § 163 para 7; Rainer Griesbaum, *Karlsruher Kommentar Strafprozessordnung mit GVG, EGGVG und EMRK* (8<sup>th</sup> edn, C. H. Beck Verlag 2019) § 163 para 1.

<sup>45</sup> Marcus Köhler, '§ 163' in Meyer-Goßner and Schmitt (n 43) para 1a.

<sup>46</sup> Wolfgang Wohlers, *Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK: SK StPO, Band III* (4<sup>th</sup> edn, Carl Heymanns 2010) § 163 para 6.

<sup>47</sup> Karl Heinz Kunert and Klaus Bernsmann, 'Neue Sicherheitsgesetze – mehr Rechtssicherheit? Zu dem Gesetz zur Änderung des Strafgesetzbuchs, der Strafprozeßordnung und des Versammlungsgesetzes und zur Einführung einer Kronzeugenregelung bei terroristischen Straftaten vom 9.6.1989 (BGBl I, 1059)' [1989] NStZ 449, 454.

<sup>48</sup> *ibid.*

that policemen will practice an extensive interpretation and understanding of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW.

### **(3) Subjective Intensity: The chilling effect of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW**

Despite the narrower scope of application of Sec. 17 (1) Nr. 1 VersG NRW in comparison to Sec. 17a VersG, there are practical problems. Most relevant for the subjective intensity is the unclearness of the legal terms. Using such is common in the area of administrative law to enable authorities to make quick decisions. The use of those is very uncommon in a criminal law setting, where it cannot be expected of the citizens to comprehend and interpret the legal terms in a proper way.<sup>49</sup> Taking this uncertainty of legal layman as well as the punishment for miscalculation into account, it is to be expected that Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW intimidates the citizens and can keep them away from using their freedom of assembly.<sup>50</sup>

### **(4) Conclusion: how intensely are the protestors affected by Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW?**

These regulations create a necessity for justification for the protestor and will be followed by criminal prosecution in many cases. At the end of it, there can be a sentence of up to two years in prison. That invokes questions if the legislator lives up to the *ultima-ratio-principle*. Aside from this, the criminal procedure law has impressive consequences. By the architecture of the regulations, policemen are pushed to an extensive understanding and interpretation of Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW. Again, the uncertainty about the interpretation of the legal terms and the direct punishment without the option of orders in an administrative law sense, impose themselves. The protestors are affected very intensely by the regulations.

#### **bb. How effectively can the legislator achieve his legitimate causes?**

The prohibition of covering up one's identity and the video surveillance of the assembly work together. They give law enforcement a first reference point for identification. Police-known offenders could already be registered and can be prosecuted this way. If the people were masked, the video surveillance would not be of much help. In this regard the prohibition of covering one's identity is a very effective mean of enhancing prosecution.

Regarding the other cause of the legislator, the prevention of violence, it has to be recurred on the understanding of the legislator that people would be more peaceful if they cannot cover up their identity. If these psychological effects actually exist goes beyond the scope

<sup>49</sup> cf BVerfGE 122, 342, 364; Kunert and Bernsmann (n 47).

<sup>50</sup> BVerfGE 122, 342, 365.

of this article. It can however be referenced to some scientific literature that doubts this.<sup>51</sup> All in all, the legislator can achieve his legitimate causes moderately.

### **e. Overall assessment of the proportionality of Sec. 17 (1) Nr. 1 VersG NRW**

Considering both the very high intensity for the protestors and the fact that the legislator can only achieve his goals moderately, Sec. 17 (1) Nr. 1 VersG NRW is unproportionate to enhance prosecution and to ensure public safety. Having taken all factors into account, the most crucial one is the punitive character as stipulated by Sec. 27 (7) S. 1 VersG NRW.

## **2. Sec. 17 (1) Nr. 2 VersG NRW**

### **a. Legitimate cause**

Similar to Sec. 17 (1) Nr. 1 VersG NRW, behind Nr. 2 is also the idea of preventing violence and ensuring public safety. Again, it could be asked if protestors are actually more peaceful when they cannot wear protective equipment. Again, it is to refer to the wide margin of assessment by the legislator.

### **b. Suitability**

In terms of suitability the decision only underlies a plausibility check.<sup>52</sup> It is not entirely implausible that people who cannot protect themselves against policemen act more peacefully. Also similar to Sec. 17 (1) Nr. 1 VersG NRW the psychological effects cannot be quantified.

### **c. Necessity**

As in the case of Sec. 17 (1) Nr. 1 VersG NRW the causes of the legislator can be achieved just as well if the punishment is linked to a prior order (Sec. 17 (2) VersG NRW). Sec. 17 (1) Nr. 2 VersG NRW is unnecessary. Again, if this line of argument is not followed, the adequateness has to be examined.

### **d. Adequateness**

#### **aa. How intensely are protestors affected by Sec. 17 (1) Nr. 2 VersG NRW?**

At first glance it seems convincing to judge Sec. 17 (1) Nr. 2 VersG NRW inadequate,

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<sup>51</sup> Kniessel (n 16) para 11; Matthias Krauß, 'Übersicht § 125' in Gabriele Cirener and others (eds), *Leipziger Kommentar Strafgesetzbuch, Band 8: §§ 123 bis 145d* (13<sup>th</sup> edn, De Gruyter 2021).

<sup>52</sup> Ralf Poscher, *Handbuch des Verfassungsrechts, Darstellungen in transnationaler Perspektive* (1<sup>st</sup> edn, C.H. Beck Verlag 2021) § 3 para 62.

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therefore unproportionate, hence unconstitutional out of the same reasons that apply to Sec. 17 (1) Nr. 1 VersG NRW.

### **(1) Consequences from the applicability of Sec. 27 (7) S. 2 VersG NRW**

The only difference to Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW is that carrying protective equipment cannot constitute a misdemeanour, but is always a crime. This and the assessments from above lead to a very high intensity in which the protestors are affected.

### **(2) Worthiness of protection and subjective intensity**

Contrary to the prohibition of covering one's identity, there are not many everyday items that can be interpreted as protective equipment in the sense of Sec. 17 (1) Nr. 2 VersG NRW. Likewise, it must be asked whether people who wear equipment to protect themselves against enforcement measures by law enforcement are worthy of protection.

By applying the same criteria as in Sec. 17 (1) Nr. 1 VersG NRW – the existence of a valid reason for wearing the object – it appears that there are little to no reasons for taking part in an assembly in such protective equipment. Protective shields, iron helmets or gas masks offer little room for interpretation other than they are intended for violent encounters.<sup>53</sup>

There can only be two arguments. Firstly, that these objects are carried to protect themselves against violent others (i.e. political opponents). Secondly, that police violence is expected.

Referring to the first argument it has to be stated that such objects do not fall under Sec. 17 (1) Nr. 2 VersG NRW. The only objects that fall under Sec. 17 (1) Nr. 2 VersG NRW are such that are intended to prevent enforcement measures by law enforcement. If they are however interpreted as such, it is a problem that we already discussed: the missing link of the punishment to a prior (administrative law) order.

Referring to the second argument: the pretence that one fears police violence cannot undermine Sec. 17 (1) Nr. 2 VersG NRW on a factual level. Against police violence there are own appeals (e.g. an internal affairs complaint or administrative court proceedings). There is also the possibility of charging the policemen with a criminal complaint (Sec. 340

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<sup>53</sup> Braun and Roitzheim (n 5) para 18.

(1) StGB in combination with Sec. 158 (1) S. 1 StPO). In exceptional cases wearing the protective equipment can also be justified via necessity as a defence (Sec. 34 S. 1 StGB).

### **(3) Conclusion**

All in all, there is no overwhelming intensity resulting from the prohibition of wearing/carrying protective equipment. This follows a lack of worthiness in protection. However, the criminal law implications, as laid out for Sec. 17 (1) Nr. 1 VersG NRW, are the exact same. Therefore Sec. 17 (1) Nr. 2 VersG NRW also affects the protestors greatly.

#### **bb. How effective is the prohibition to achieve the causes of the legislator?**

Again, there is the main problem if people are more peaceful if they can't wear protective equipment. For the purposes of this article we assume that it cannot be clarified. What is left is the wide margin of assessment of the legislator. We remain with moderate effectiveness.

#### **cc. Conclusion: Would Sec. 17 (1) Nr. 2 VersG NRW be adequate?**

Contrarily to Sec. 17 (1) Nr. 1 VersG NRW, Sec. 17 (1) Nr. 2 VersG NRW in itself is not inadequate. What makes it inadequate is its punitive character, triggered by Sec. 27 VersG NRW.

#### **e. Is Sec. 17 (1) Nr. 2 VersG NRW proportionate?**

All in all, Sec. 17 (1) Nr. 2 VersG NRW is unnecessary and – due to its punitive character – inadequate, therefore unconstitutional.

### **III. Are Sec. 17 (1) Nr. 1 and Nr. 2 VersG NRW phrased clearly enough?**

As already pointed out, the legal terms leave a lot of room for interpretation and are phrased unclearly. But according to Art. 103 (2) GG, an act may only be punished if it was defined by a law as a criminal offence before the act was committed (*nulla poena sine lege*). They are defined enough if the reach and scope of application can be understood by the wording or can be interpreted.<sup>54</sup> So, it has to be obvious for the individual which

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<sup>54</sup> BVerfGE 117, 71, 112; Georg Nolte and Helmut Philipp Aust, 'Art. 103' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 3* (7<sup>th</sup> edn, C.H. Beck Verlag 2018) para 139a.

behaviour violate Sec. 17 (1) Nr. 1, 2 VersG NRW and which consequences are linked to the violation.<sup>55</sup> The law becomes more defined if court decisions emerge.<sup>56</sup>

In analysing if Sec. 17 (1) Nr. 1, 2 VersG NRW are phrased clearly enough they have to be divided into their parts. Firstly, it has to be established if the objects for covering up one's identity and those that constitute protective equipment are denoted. It has to be analysed what role the subjective component plays in the sense of Art. 103 (2) GG and the spatial and factual applicability have to be considered.

### 1. Objects for covering up one's identity, Sec. 17 (1) Nr. 1 VersG NRW

As elaborated above it is difficult to establish which objects fall under Sec. 17 (1) Nr. 1 VersG NRW. One understanding is that it depends whether the items can be used to change or veil the face to make the person unrecognizable.<sup>57</sup> Motorcycle helmets, hooding or face masks come to mind. But this understanding does not really help to limit the scope or understand the reach of Sec. 17 (1) Nr. 1 VersG NRW. It would also mean that wigs and carnival articles, pullovers, scarfs, religious clothing, Theatre masks, medical masks or too much make-up fall under Sec. 17 (1) Nr. 1 VersG NRW.<sup>58</sup>

Another understanding is that it would depend upon how many sensory organs are still visible. If the chin was covered there should be three sensory organs visible. If it is not covered, there should be two sensory organs visible.<sup>59</sup>

Another understanding tries to differentiate between those objects that can cover up the identity and those that only complicate the identification.<sup>60</sup>

These completely different understandings of Sec. 17 (1) Nr. 1 VersG NRW show that the scope cannot be interpreted based on the wording only. One has to take the purpose of the prohibition into account.

The lack of clarity could be corrected by the subjective component. The objects have to be targeted at preventing the identification by law enforcement for prosecution. Otherwise the protestors cannot be punished.

But, as also mentioned earlier, how should a legal layman be able to properly assess the situation and interpret it under the lens of Sec. 17 (1) Nr. 1 VersG NRW? It is not obvious

<sup>55</sup> cf Henning Radtke, 'Art. 103' in Epping and Hullgruber (n 2) para 26; Philipp Kunig and Frank Salinger, 'Art. 103' in Hermann von Mangold, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 2* (7<sup>th</sup> edn, C.H. Beck Verlag 2021) para 45

<sup>56</sup> Helmuth Schulze-Fielitz, 'Art. 103 Abs. 2' in Horst Dreier (ed), *Grundgesetz Kommentar Band III* (3<sup>rd</sup> edn, Mohr Siebeck 2018) para 40.

<sup>57</sup> Herbst (n 5) para 12; Michael Kniesel, '§ 17a' in Diете, Gintzel and Kniesel (n 16) para 30f.

<sup>58</sup> Herbst (n 5) para 12.

<sup>59</sup> Kniesel (n 57) para 31.

<sup>60</sup> Herbst (n 5) para 12.



which objects fall under Sec. 17 (1) Nr. 1 VersG NRW and when law enforcement will assume that these objects are being worn to prevent identification for the purpose of prosecution. The purpose of the principle *nulla poena sine lege*, giving the citizens a clear orientation, which behaviour is punishable and which is not, cannot be fulfilled by Sec. 17 (1) Nr. 1 VersG NRW. It is phrased too unclearly.

## 2. Spatial and factual applicability of Sec. 17 (1) Nr. 1, 2 VersG NRW

The second main deficiency of Sec. 17 (1) Nr. 1 and 2 VersG NRW lies in spatial and factual applicability. Sec. 17 (1) VersG NRW does not only apply to assemblies as defined earlier, but also in connection to the assembly or other public events.

As a consequence, the arrival phase (i.e. the way to the assembly or event) and the ending phase (i.e. the way from the assembly to another location) can fall under Sec. 17 (1) VersG NRW.<sup>61</sup>

Conversely, “in connection” can also mean that people in close proximity to the assembly fall under Sec. 17 (1) VersG NRW, even though they do not want to be a part of it.<sup>62</sup>

A different understanding is that the people who organize and prepare the protest can fall under Sec. 17 (1) VersG NRW.<sup>63</sup>

Given these different understandings which diverge in their reach a lot, it is not clear from the wording what is meant with “in connection”. This cannot be interpreted by looking at Sec. 17a VersG NRW or Sec. 17 ME-VersG, because they either have a different wording (Sec. 17a VersG NRW) or do not explain how it should be understood (Sec. 17 ME VersG).

## 3. Conclusion: Are Sec. 17 (1) Nr. 1, 2, Sec. 27 (7) S. 1, 2 phrased too unclearly?

The scope of Sec. 17 VersG NRW is phrased too unclearly in three different regards. It is unclear when a person is on an assembly or event that falls under Sec. 17 (1) VersG NRW. And it is also unclear which objects fall under it and when law enforcement assumes that they are aimed at preventing identification. This does not suffice the requirements of Art. 103 (2) GG.

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<sup>61</sup> Herbst (n 5) paras 6-9.

<sup>62</sup> cf Braun and Roitzheim (n 5) paras 7-8.

<sup>63</sup> Herbst (n 5) para 6.

#### IV. Can Sec. 17 (1) VersG NRW be applied constitutionally?

Based on the drawn conclusions, Sec. 17 (1) VersG NRW is unproportionate and phrased too unclearly. However, it must not be ruled unconstitutional if it can be applied in a way that aligns with the constitution.<sup>64</sup> The limits of interpretation in this way lay in the wording and in the fundamental assessment of the legislator.<sup>65</sup>

To be interpreted in a constitutional way the spatial and factual applicability would have to be determined. Furthermore, law enforcement would need discretion in applying Sec. 17 (1) VersG NRW. Finally, the punishment would have to be linked to a primer (administrative law) order, for example Sec. 17 (2) VersG NRW.

Interpreting discretion and linking the punishment to a prior order meet technical concerns.

Sec. 27 (7) S. 1 VersG NRW is unequivocal in that sense that the punishment is linked to a violation of Sec. 17 (1) VersG NRW and not to a violation of Sec. 17 (2) VersG NRW. The violation of Sec. 17 (2) VersG NRW is governed by Sec. 28 (1) Nr. 6 VersG NRW. Any interpretation that links Sec. 27 (7) S. 1 VersG NRW to Sec. 17 (2) VersG NRW exceeds the wording of the regulations.

Concerning the principle of legality: it is the sharp contrast to the principle of opportunity and specifically offers no discretion. This is because criminal procedure law guarantees a fair trial on a simple-law basis. It should rule out arbitrariness. Therefore, interpreting discretion into Sec. 17 (1) VersG NRW is not in accordance with the fundamental assessment of the legislator.

In conclusion, the constitutional deficiencies of Sec. 17 (1) VersG NRW cannot be overcome by interpreting it in a way that aligns with the constitution. It cannot be interpreted constitutionally.

#### B. Freedom of faith, Art. 4 (1), (2) GG

Lastly, the freedom of faith could be violated by Sec. 17 (1) Nr. 1 VersG NRW. Art. 4 (1) and (2) GG guarantee a uniform fundamental right to the freedom of faith.<sup>66</sup> Part of this

<sup>64</sup> BVerfGE 2, 266, 282; BayVerfGH, NJW 1951, 455, 456; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6<sup>th</sup> edition, Springer Verlag 1991) 339.

<sup>65</sup> BVerfG 63, 131, 147-48; 69, 1, 55; 102, 254, 327; Klaus Schlaich and Stefan Koriath, *Das Bundesverfassungsgericht, Stellung, Entscheidungen, Verfahren, ein Studienbuch* (12<sup>th</sup> edn, C.H. Beck Verlag 2021) ch 5 para 449; Christian Walter, 'Art. 93' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar. Band 2* (100<sup>th</sup> supp, C.H. Beck January 2023) para 113.

<sup>66</sup> BVerfGE 24, 236, 245; Manssen (n 9) § 14 para 352; Emanuel V Towfigh and Alexander Gleixner, *Smart-book Grundrechte, ein hybrides Lehrbuch mit 67 Lernvideos* (1<sup>st</sup> edn, Nomos 2022) § 10 para 2.

freedom is the freedom to excise one's beliefs. There are religions where it is mandatory to wear headscarves. These can now fall under Sec. 17 (1) Nr. 1 VersG NRW.

### **I. Does Sec. 17 (1) Nr. 1 VersG NRW include religious clothing?**

There are no doubts that religious headscarf's can objectively be used to cover up one's identity (i.e. Burkhas). Given the religious background, the subjective component has to be rejected in most of the cases. People who wear a headscarf to exercise their religion do not wear it to prevent law enforcement from identifying them for prosecution.

What is problematic is if people who are not religious wear headscarves to commit crimes and stay unidentified. How should the police distinguish between believers and non-believers who only intend to commit crimes? Even more problematic is the case when religious people wear headscarves to commit crimes and stay unidentified. In these cases, it is impossible for the police to distinguish between religious reasons and the aim to stay unidentified to commit crimes.

### **II. Is it unconstitutional to prohibit religious clothing with Sec. 17 (1) Nr.1 VersG NRW?**

Assuming that the police interpret religious clothing as objects that fall under Sec. 17 (1) Nr. 1 VersG NRW, a fundamental dispute comes up. Namely if Sec. 17 (1) Nr. 1 VersG NRW can be used to prohibit religious clothing.

This is only possible if Sec. 17 (1) Nr. 1 VersG NRW fulfils the formal requirements that Art. 4 GG sets for restrictions (i.e. a limitation proviso). Which formal requirements result from Art. 4 GG, is in dispute.

#### **1. Is it up to the legislator to restrict religious freedoms?**

One understanding is that due to the lack of specification, Art. 4 GG will be granted unconditionally and can only be restricted by colliding fundamental rights and constitutional goods.<sup>67</sup> This position gets embellished by some in its relation to the constitution of the Weimar Republic ("WRV"), but remains the same in its core.<sup>68</sup> Enhancing prosecution and ensuring public safety are legitimate causes, but aren't explicitly rooted in the constitution. Hence, following this understanding,

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<sup>67</sup> BVerfGE 108, 282, 297; 52, 223, 246f-47; Thomas Kingreen and Ralf Poscher, *Grundrechte Staatsrecht II* (38<sup>th</sup> edn, C.F. Müller 2022) § 12 para 753; Michael Germann, *BeckOK GG Art. 4* para 48; *Hufen* (n 9) § 22 para 27f.; Michael Germann, 'Art. 4' in Volker Epping and Christian Hillgruber (eds), *Grundgesetz Kommentar* (3<sup>rd</sup> edn, C.H. Beck Verlag 2020) para 47.3.

<sup>68</sup> BVerfGE 33, 23, 30-31; Michael and Morlok (n 9) § 9 para 188; Manssen (n 9) § 14 para 371.

Sec. 17 (1) Nr. 1 VersG NRW does not fulfil the formal requirements and cannot be used to prohibit religious clothing.

Another understanding is that simple laws can be used to restrict Art. 4 GG, because of the relation to the WRV, especially Art. 136 (1) WRV in combination with Art. 140 GG.<sup>69</sup> Today it is legal consensus that Art. 136 (1) WRV is fully valid constitutional law in the federal republic of Germany.<sup>70</sup> Art. 136 (1) WRV states: “civil and civic rights and duties are neither conditioned nor limited by the exercise of religious freedom”. Reversing this sentence, civil and civic rights and duties are apt to limit the exercise of religious freedom. Essentially, there would only be the requirement for a simple law to restrict Art. 4 GG. Sec. 17 VersG NRW is a simple law.

For this understanding it is argued that the wording of Art. 140 GG is unequivocal and that the historical development of Art. 4 GG would indicate the lower barrier for restrictions.<sup>71</sup> The parliamentary council assumed that general laws were an unwritten barrier of Art. 4 GG.<sup>72</sup> This would correspond to the legal understanding at the time.<sup>73</sup> Additionally it should be noted that state-church law including religious freedoms developed together and should therefore also be viewed together today.<sup>74</sup>

In the end, these arguments are still not convincing. Above all, the prohibition lowers the barrier to restrict religious freedoms significantly. And that despite Art. 4 GG being an expression of human dignity and core elements of personality.<sup>75</sup> The historical argumentation is also not persuasive. At the end of the consultations of the parliamentary council, Art. 135 WRV was explicitly not embedded into Art. 140 GG, despite it setting a formal requirement for the restriction of religious freedom.<sup>76</sup> This indicates that the legislator did not intend to make it possible to restrict Art. 4 GG on the basis of a simple law.<sup>77</sup> This makes sense given the impressions of national socialism and the possibility to

<sup>69</sup> BVerwG, NJW 2001, 1225, 1226-27; Stefan Muckel, *Handbuch der Grundrechte in Deutschland und Europa, Band IV: Grundrechte in Deutschland: Einzelgrundrechte I* (1<sup>st</sup> edn, C.F. Müller 2011) § 96 para 94-98; Martin Heckel, ‘Zur Zukunftsfähigkeit des deutschen „Staatskirchenrechts“ oder „Religionsverfassungsrechts“’ [2009] AöR 134, 309, 377-78; Jarass (n 3) art 4 para 32.

<sup>70</sup> BVerfG, NJW 1966, 147; Till Patrik Holterhus and Nazli Aghazadeh, ‘Die Grundzüge des Religionsverfassungsrechts’ [2016] JuS 19; Germann (n 67) para 47.3; Heinrich de Wall, ‘§ 111’ in Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund. Band 4: Die einzelnen Grundrechte* (2<sup>nd</sup> edn, C.H. Beck Verlag 2022) para 93.

<sup>71</sup> Muckel (n 69) § 96 para 95; Stefan Muckel, *Berliner Kommentar zum Grundgesetz Band 1* (1<sup>st</sup> edn, Erich Schmidt Verlag 2021) art 4 para 52.

<sup>72</sup> Muckel (n 69) § 96 para 95.

<sup>73</sup> Muckel (n 69) § 96 para 95.

<sup>74</sup> Muckel (n 71) art 4 para 52.

<sup>75</sup> BVerfGE 33, 23, 28-29; Jarass (n 3) art 4 para 4.

<sup>76</sup> Hans Michael Heinig and Martin Morlok, ‘Von Schafen und Kopftüchern: Das Grundrecht auf Religionsfreiheit in Deutschland vor den Herausforderungen religiöser Pluralisierung’ [2003] 15-16 JZ 780; Germann (n 67) para 47.3.

<sup>77</sup> Heinig and Morlok (n 75).

undermine religious freedoms by law.<sup>78</sup> Systematically, Art. 136 (1) WRV is meant to repeat and strengthen Art. 4 GG.<sup>79</sup> In turn it is not convincing to interpret a restriction out of it.<sup>80</sup>

Be that as it may, a possible way around this problem is to derive public safety from the right to physical integrity (Art. 2 (2) S. 1 GG). Public safety contains the protection of individual rights and goods, the protection of the integrity of the legal order (*“Unversehrtheit der objektiven Rechtsordnung”*) and the protection of state institutions.<sup>81</sup> As outlined earlier, the legislator prohibits identity concealment due to the probability of violent encounters. Therefore, the prohibition’s target of ensuring public safety can be specified to the protection of individual rights, namely the right to physical integrity. This right is part of the constitution (Art. 2 (2) S. 1 GG). Hence, it is apt, to restrict religious freedoms.

## **2. Would the breach of religious freedoms be proportional?**

The breach would still need to be proportional in order to protect the right to physical integrity.

### **a. Legitimate cause**

The protection of the right to physical integrity is of utmost importance and part of the constitution. It is undoubtably a legitimate cause.

### **b. Suitability**

Due to the margin of assessment, the restriction of Art. 4 GG is suitable (see p. 86).

### **c. Necessity**

Regarding the necessity of the prohibition in relation to Art. 4 GG, an administrative law order can achieve the same result as the criminalisation (see p. 89-90). The criminalisation (Sec. 27 (7) S. 1 VersG NRW) is unnecessary.

### **d. Adequateness**

As done before, the adequateness of Sec. 17 (1) Nr. 1 VersG NRW can additionally be assessed. This is especially useful given the context of the breach. Even if there were to be

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<sup>78</sup> Heinig and Morlok (n 75); cf Saul Friedländer, *Das Dritte Reich und die Juden: die Jahre der Verfolgung 1933-1939* (C.H. Beck Verlag 2007) ch 5.

<sup>79</sup> Germann (n 67) para 47.3.

<sup>80</sup> Germann (n 67) para 47.3.

<sup>81</sup> Dietlein (n 19) § 3 paras 50-54.

an administrative law order prohibiting to wear religious headscarves, this administrative law order could be in violation of Art. 4 (1), (2) GG due to its inadequateness.

#### **aa. Intensity of the prohibition**

A persistent theme is the criminalisation of identity concealment. As for the freedom of assembly, Sec. 27 (7) S. 1 VersG NRW is of major importance concerning the intensity of the prohibition. Again, the consequences have to be underlined (see p. 91-93).

For religious people, the prohibition to wear religious headscarves is even more intense. Taken to the extreme, they would have to decide whether they want to exercise their religious beliefs or participate in the political process through protesting.

On the contrary, the use case of Sec. 17 (1) Nr. 1 VersG NRW does not include every person that wears headscarves. The identity is only concealed by wearing burkas. Regular headscarves typically do not prevent identification. Additionally, the headscarves would have to be aimed at covering up one's identity for the purpose of preventing identification by law enforcement.

Broadly speaking there are three categories for which Sec. 17 (1) Nr. 1 VersG NRW is relevant: 1) Non-religious people wearing headscarves to commit crimes and stay unidentified, 2) religious people wearing headscarves to exercise their beliefs *and* stay unidentified committing crimes, 3) religious people only wearing headscarves to exercise their beliefs.

Group 1) is not protected by Art. 4 (1), (2) GG. Group 3) does not fall under the scope of Sec. 17 (1) Nr. 1 VersG NRW. Hence, there is no implication for the constitutionality of the regulation by these groups. Accordingly, the intensity is lowered.

A more difficult assessment is to be made for group 2). They enjoy protection of Art. 4 GG. On the other hand, the state is obligated to protect its citizens.

Taking this obligation as well as the intention to commit crimes into account, the protestors of group 2) are not worthy of protection.

Subsequently, the intensity of the prohibition is not all too high. Not only can people wear headscarves, only burkas are apt to prevent identification, but the main group that is targeted is the one that commits crimes. Still it has to be seen if this academic distinction holds up to the reality and if policemen can distinguish the different groups. Due to the risk of wrongful categorisation and the applicable consequences (Sec. 27 (7) VersG NRW in conjunction with StPO-regulations), a moderate intensity has to be assumed.

**bb. Effectiveness**

As for the freedom of assembly, the prevention of violence can be achieved moderately (see p. 93-94).

**cc. Conclusion**

Potentially criminalising wearing religious clothing is unnecessary as the same result can be achieved through an administrative law order. Sec. 17 (1) Nr. 1, Sec. 27 (7) S. 1 VersG NRW are in violation of Art. 4 (1), (2) GG.

Yet, evaluating the regulation on its merits in relation to Art. 4 (1), (2) GG; Sec. 17 (1) Nr. 1 VersG NRW is not unproportionate to protect the right to physical integrity.

**III. General remarks on the implications of Sec. 17 (1) Nr. 1 VersG NRW on the freedom of faith**

To conclude, there are different rationales for restricting religious freedoms. But not any target of the legislator suffices. They have to be based on the constitution. Sec. 17 (1) Nr. 1 VersG NRW can be viewed as protecting the right to physical integrity (Art. 2 (2) S. 1 GG). In turn, it is up to the legislator to restrict religious freedoms in this case.

If religious freedoms are breached by Sec. 17 (1) Nr. 1 VersG NRW depends upon the intent of the protestors, which is assessed by law enforcement. Clearly this assessment can be criticised and is to be specified. However, the use case of Sec. 17 (1) Nr. 1 VersG NRW is restricted and does not target religious people in general. Those who are targeted want to commit crimes and are therefore not worthy of protection.

Still, the principles of BVerfGE 122, 342 have to be applied. In consequence, the breach of Art. 4 (1), (2) is unnecessary. Therefore Sec. 17 (1) Nr. 1 VersG NRW is unconstitutional due to a violation of Art. 4 (1), (2) GG.

Deviating from the assessment of the freedom of assembly, Sec. 17 (1) Nr. 1 VersG NRW does not generally violate Art. 4 (1), (2) GG. If the criminalisation was to be linked to the disregard of an administrative law order, the constitutional concerns arising from Art. 4 (1), (2) GG have no merits.

### **C. Conclusion**

The prohibitions outlined in Sec. 17 (1) Nr. 1 and 2 VersG NRW are unconstitutional. Their main deficiency is the criminalisation through Sec. 27 (7) VersG NRW. In its specific modalities this is unnecessary. But even if one does not agree with that assessment, the breach of Art. 8 (1) GG by Sec. 17 (1) Nr. 1 VersG NRW is unproportionate.

Further, it is not obvious for protestors when they fall under Sec. 17 (1) VersG NRW. The wording is unclear in both the objective and subjective scope, as well as the applicability.

Taking these failures into account, the only way Sec. 17 (1) VersG NRW could remain is if it can be interpreted constitutionally. Such an interpretation does not seem possible without extending the wording or breaking with fundamental assessments of the legislator.

A different assessment has to be conducted for the breach of the freedom of faith. The only one's where a violation of Art. 4 (1), (2) GG can be suspected are those who are religious and use the headscarf simultaneously to protect themselves from identification by law enforcement. The legislator does not have to accept that crimes get committed under the protection of religious freedom. If it weren't for the unnecessary criminalisation, Sec. 17 (1) Nr. 1 VersG NRW would not be in violation of Art. 4 (1), (2) GG.

Similarly, Sec. 17 (1) Nr. 2 VersG NRW is, in general, proportional. It still is unnecessary and inadequate due to the criminalisation.

All in all, Sec. 17 (1) VersG NRW fails to live up to the constitutional standards of Art. 8 (1) GG, Art. 4 (1), (2) GG and Art. 103 (2) GG. The legislator of North Rhine Westphalia could not resolve the constitutional doubts that adhered to Sec. 17a VersG. In light of this analysis, a quick and clear decision of the VerfGH NRW is to be awaited.