

Taming Transnational Solidarity: Gaza and Protest Bans in Germany

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PRIF Annual Conference
Far Away, Yet So Close: Armed Conflict in the Transnational Constellation
Frankfurt/M, October 10, 2024

Freedom of Speech and Assembly in Germany

Article 5 German Constitution (*Grundgesetz*)

Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures (...).

These rights shall find their limits in the provisions of **general laws** (...)

Art. 8 German Constitution

All **Germans** shall have the right to assemble peacefully and unarmed without prior notification or permission.

In the case of **outdoor assemblies**, this right may be **restricted** by or pursuant to a law.

The Public Prosecutors Perspective

*One year after the Hamas terror attack on Israel, the **Berlin Public Prosecutor's Office** has counted almost **3.200 cases** in the context of the Gaza war; about **5.000 police investigations** have been started by police. **More than 1.000 cases** relate to crimes committed during the approx. **700 demonstrations** on the Middle East conflict. The authorities have so far classified **103 cases as anti-Semitic hate crimes**.*

*More than 360 cases have been charged or sentenced to a fine by summary penalty order. According to the spokesperson for the public prosecutor's office, **only 20 perpetrators have been legally convicted**.*

(see LTO Newsletter 7.10.2024/Tagesspiegel 9.10.2024)

Freedom of Speech 'Test' in Germany

*In order to assess whether a statement is to be understood as a **criminal act**, its objective meaning must first be determined from the **perspective of an unbiased and reasonable average public**, taking into account the **circumstances of the individual case**. In doing so, it must be interpreted in the light of Article 5 paragraph 1 1 GG, no meaning may be attributed to it that it does not objectively have, and in the case of ambiguity - as explained above - the interpretation leading to the **conviction** may only be assumed **if other, non-punishable interpretations can be excluded with convincing reasons**.*

(VGH Kassel Beschl. v. 22.3.2024 – 8 B 560/24)

HAMAS Ban of November 2, 2023

Bundesministerium des Innern und für Heimat
Bekanntmachung eines Vereinsverbots gemäß § 3 des Vereinsgesetzes
Verbot der Vereinigung „HAMAS (Harakat al-Muqawama al-Islamiya)“
Vom 2. November 2023

1. Die Tätigkeit der Vereinigung HAMAS (Harakat al-Muqawama al-Islamiya) läuft den Strafgesetzen zuwider und *richtet sich gegen den Gedanken der Völkerverständigung. Zudem beeinträchtigt und gefährdet die Tätigkeit der HAMAS sonstige erhebliche Interessen der Bundesrepublik Deutschland.*
2. Die Betätigung der HAMAS ist im räumlichen Geltungsbereich des Vereinsgesetzes verboten.
3. Es ist verboten, *Kennzeichen der HAMAS* für die Dauer der Vollziehbarkeit öffentlich, in einer Versammlung oder in Schriften, Ton- oder Bildträgern, Abbildungen oder Darstellungen, die verbreitet werden können oder zur Verbreitung bestimmt sind, zu verwenden. Das Verbot betrifft insbesondere folgende Kennzeichen:

(...)

„Sowie die Parole „Vom Fluss bis zum Meer“.“

From the River to the Sea – An “illegal” Slogan ?

*“When classifying the slogan under **criminal law**, it must be taken into account that it **expresses the desire for a free Palestine** from the (Jordan) river to the Mediterranean, i.e. in an area in which Israel lies within its current borders.*

*However, the slogan as such **says nothing about how** this - politically highly controversial - **goal is to be achieved**. In principle, there are various politically conceivable ways and means of achieving this abstract goal, for example through international treaties, a two-state solution, a unified state with equal civil rights for Israelis and Palestinians or by means of armed struggle. Whether the alternative paths outlined are politically realistic is irrelevant.*

*In any case, the **slogan as such does not contain a compelling call for armed struggle against Israel**. The [relevant authority] has not presented any concrete evidence that the use of the slogan (...) is to be understood as a compelling call for violence and terror against Israel, nor is this evident to the court.”*

(VGH Kassel, Beschl. v. 22.3.2024 - 8 B 560/24)

“Pro Palestine” on October 7 – A No Go ?

*According to the High Administrative Court Kassel, a **ban** on the reported **assembly** could not be justified by the fact that October 7 was the **anniversary of Hamas' attack on Israel**. In view of the **symbolic content of a particular day**, a ban on assembly could **only** be considered (...if there was a link to the **National Socialist reign of violence and despotism**. The city of Frankfurt had also not sufficiently demonstrated that the implementation of the notified assembly would lead to the **direct threat to public safety** that is **solely relevant for a ban**, which could only be effectively countered by banning the assembly. On the contrary, in the recent past, the organizer of the assembly had largely carried out peaceful and disruption-free assemblies. Finally, it was not apparent that, in the event of **isolated criminal acts**, the **police** would not be able to **sufficiently counter these during the assembly by preventing or prosecuting them**. (VGH Kassel Beschl. v. 07.10.2024 - 8 B 1898/24)*

“Freedom of Speech” and the Middle East

*There is a fear of criticizing Israel, even a fear of supporting Jews who criticize Israel. The discourse in Germany is very united on this issue. From the right to the left, people here support nationalist policies in Israel instead of standing up for justice and equality. The space for discussion is shrinking. There is a **rage of surveillance against language and terms**. Instead, Germany could have been a space in which an exchange takes place that is not possible in the Middle East.*

(Eyal Weizman, Forensic Architecture, in: Zeit Online 3.10.2024)

Israel and the German “Reason of State”

*„Jede Bundesregierung und jeder Bundeskanzler vor mir waren der besonderen historischen Verantwortung Deutschlands für die Sicherheit Israels verpflichtet. Diese **historische Verantwortung** Deutschlands ist Teil der **Staatsräson** meines Landes. Das heißt, die Sicherheit Israels ist für mich als deutsche Bundeskanzlerin niemals verhandelbar.“*

(Chancellor Merkel at the Knesset 18.3.2008; see also Coalition Agreement of current Federal Government, 2021 p. 123)

The German “Staatsräson”

*Reason of state is a genuinely **political category**, as such subject to the law. A political interest of the state can only assert itself in practice where and to the extent that the **law leaves scope for politics**. Reason of state only comes into play when the state is challenged to assert itself. Its real interests can only be asserted to the extent that the law makes this possible*

In the German Bundestag in earlier years, the inviolability of human dignity and the preservation of peace were emphasized by others than Chancellor Helmut Kohl to constitute the German “Staatsräson”.

(See Josef Isensee, FAZ 18.09.2024)

Freedom of Assembly (and Speech) in a Nutshell

- Art. 8 German Constitution of 1949
- Federal Assembly Act of 1953
- Assembly Acts in half of the States (*Länder*)
- Landmark Decision by German Constitutional Court in 1985 (*Brokdorf Case*)
- (In principle) Fast access to Justice against bans and limitations by relevant authorities (*Versammlungsbehörde*)
- Law and Order Policing under Police Acts is different from Policing Freedom of Assembly, which provides for specific legal protection against governmental/state interference

Freedom of Assembly before Corona

- For decades since the *Brokdorf* Case in 1985, the (total) **ban** of an assembly was the “rarest of the rare cases”
- **Restrictions** instead of bans are legally considered to be a more proportionate (*verhältnismäßig*) means with regards to freedom of assembly
- The **Dissolution** of an assembly legally is considered to be proportionate only in the rare case that **restrictions are not sufficient** to protect other constitutionally protected rights of the same importance compared to freedom of assembly

Freedom of Assembly after Corona

- All this changed with the pandemic
- Preventive, long term and state- or city-wide **preventive bans** became the means of the day to fight the pandemic
- After month bans were substituted by very **restrictive limitations** of number of participants, place, time, modalities etc. applied
- Executive branch and police often adopted new (factual) **framework** eagerly and made broad use after the pandemic as well
- While bans and strict limitations were the exception before Corona, it became the rule against some kind of protest in context of Gaza and the Nakba

Berlin: Freedom of Assembly

- Approx. 7.000 notified demonstrations in 2023
- For many years protest policing in Berlin was rather “restrained”
- De-escalation strategies were applied to the police themselves
- (Preventive) Bans of assemblies rarely used instrument for many years
- Since outbreak of Corona, the Ministry of Interior and police try to ‘regain’ a role of ‘moderating’ protest and public speech according to their understanding of acceptability
- This was supported by the change to a conservative government (*Senat*) in April 2023

Berlin: Freedom of Assembly ?

- **New approach** became evident during Corona, climate protest and on broad scale with regards to *Nakba* and October 7, 2023
- Almost 700 notified demonstrations on Gaza/Israel since October 7, 2023
- 21 out of 45 were prohibited in the 4 weeks after October 7, 2023
(in detail: <https://pardok.parlament-berlin.de/starweb/adis/citat/VT/19/SchrAnfr/S19-20132.pdf>)
- **Threat analysis** in part based on racist stereotypes of perceived (muslim) behavior
- It seems that authorities/police themselves were rather surprised of low rate of successful law suits against bans of assemblies in Berlin

Berlin and the German „Staatsräson“

- Only after **courts in other German States** declared bans and restrictive practices to be illegal, Berlin authorities and police changed approach to dissolving demonstrations due to slogans “hostile” to police, Israel and/or a breach of criminal law
- Are Berlin Government (*Senat*) and Administrative Courts (*VG/OVG*) reluctant in protecting freedom of assembly of such protest that might get **international attention** ?


„Fanwalk is no Place for Political Messages“, Berlin Police

SPIEGEL Sport

2 Min

Polizei Berlin Einsatz
@PolizeiBerlin_E - Folgen

Während des #Fanwalks der türkischen Fans wurde massiv der #Wolfsgruß gezeigt. Einsatzkräfte haben diesen deshalb angehalten und die Fans aufgefordert, das Zeigen dieses Zeichens zu unterlassen. Ein #Fanwalk ist keine Plattform für politische Botschaften. #b0607 #EURO2024... Mehr anzeigen



Zuletzt bearbeitet 4:33 nachm. · 6. Juli 2024

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Der Wirbel um den »Wolfsgruß« des türkischen Nationalspielers Merih Demiral hatte die Lage vor der EM-Partizip in Berlin zusätzlich aufgeheizt. Demiral hatte die Gäste im Achtelfinale gegen Österreich nach seinem zweiten Treffer gezeigt und war von der Uefa deshalb für zwei Spiele gesperrt worden.

Mehr zum Thema

Clemens Arti-Grazand Detect Fans in Germany - DRIF Annual Conference, October 10-11, 2024

More on this topic

- *Sind Versammlungsverbote bald der Normalfall? Von Corona über »Klimakleber« zum Krieg in Gaza*, in: Grundrechte-Report 2024, 120-124
- *Pro-Palästina als unmittelbare Gefahr? Zur Aushöhlung des Versammlungsrechts in aufgeheizten Zeiten*
<https://verfassungsblog.de/pro-palastina-als-unmittelbare-gefahr/>
- *Klimaproteste und die letzte Generation - Versammlungsfreiheit geht vor*
Vorgänge 1/2023 (241), 113 ff.
- *Versammlungsfreiheit durch Gesetz? Zum Entwurf eines Versammlungs'freiheits'gesetzes in Hessen*
<https://verfassungsblog.de/versammlungsfreiheit-durch-gesetz/> (2023)
- *COVID-19-Pandemie und Versammlungsfreiheit - Ein Schönwetter-Grundrecht (?) vor Gericht*, in: Die Gewährleistung der Versammlungsgarantie unter pandemischen Bedingungen, Rothenburger Beiträge 111, Schwier (Hg.), 2023, 5-32
- *Versammlungsfreiheit unter Druck: Verwaltungsgerichtlicher Schutz des Art. 8 GG in der Corona-Pandemie*
<https://verfassungsblog.de/versammlungsfreiheit-unter-druck> (2022)
- *COVID-19-Pandemie: Versammlungsfreiheit vor Gericht - Ein Verlaufsprotokoll in drei Phasen*
NK Neue Kriminalpolitik 2021, 420 ff.