

REGIONAL GERMAN CONSTITUTIONAL COURT RULES ANTI BDS MOTION INFRINGES OF FUNDAMENTAL RIGHTS

Background

On 20 September 2018, the State Parliament of the German State of North-Rhine Westphalia (Hereafter: NRW) approved a motion through which it declared the Boycott, Divestment and Sanctions (Hereafter: BDS) movement as “unequivocally anti-Semitic”. With this motion, which is not legally binding, the Parliament called upon every NRW State institution to refuse to provide facilities to BDS groups, support events by the BDS campaign or of any groups supporting the BDS movement.

As a result of the Parliament motion, the City Council of Bonn, on 14 May 2019, adopted a similar motion equating BDS to a form of Antisemitism and invited all municipality institutions not to support the BDS campaign or its affiliated groups. This motion had immediate consequences for two German-Palestinian associations, the Palestinian Community of Bonn and the German Palestinian Women’s Association, which were excluded from the cultural festival “Vietfalt” held in Bonn in May 2019. After the organisations filed an application against their exclusion, the Administrative Court of Cologne delivered an *interim* injunction ordering that the applicants be granted admission to the festival.

Nonetheless, this decision only offered a temporary solution, whereas the impacted organisations still sought to solve the root of the problem. Due to the absence of case law on this matter and the ambiguities regarding a legal challenge for a soft act of non-binding nature such as the Parliamentary motion, the associations – assisted by the Berlin-based Attorney Ahmed Abed and the European Legal Support Center (ELSC) - filed a complaint against the Parliamentary motion before the Constitutional Court of the NRW State.

Set out below is the ELSC’s Executive Summary of the final decision of the Constitutional Court of the State of NRW, delivered on 22 September 2020. While the Constitutional Judges declared the complaint inadmissible on procedural grounds, they recognized the complainants’ claims under the law and stressed the correct procedural steps to follow. Notably, the Court stated that: i) The Parliamentary motion is suitable for judicial review notwithstanding its non-legally binding nature; ii) The complainants are “*largely affected by the motion in their fundamental rights*” and, thus, they are “*entitled to file complaints against the Parliamentary motion*” (see pages 5, 6 and 8 of the judgment); iii) The motion may infringe the complainants’ constitutional rights.

Accordingly, the ELSC believes that this decision sets an important precedent as a result of successful strategic litigation. Through this Executive Summary, the ELSC intends to highlight this meaningful decision and make it more widely accessible to those interested.

Executive Summary

The Court started its analysis by assessing the legal nature of the challenged motion. The Judges clarified that the motion is an act of the public authority of the State of the NRW and, therefore, is a “*valid subject of complaint*”. To this effect, the Court specified that the term “*public authority*” covers the legislative power and, therefore, its acts might be a subject of complaint, including non-legislative measures such as the challenged motion (see page 5 of the judgment).

The Court then found that the complainants are entitled to file a complaint against the Parliamentary motion. In reaching this outcome, the Court highlighted that the complainants are “*for certain largely affected by the challenged motion*” (see page 6), distinguishing between the direct and the indirect interferences that the motion causes upon the complainants’ rights.

Regarding the **direct negative impacts**, the Court stressed that since the motion describes the BDS movement as antisemitic in itself, it exercises an immediate and direct “*defamatory effect*” upon the complainants, entailing “*a possible loss of reputation*” and “*directly affecting the complainants’ fundamental rights*”. Furthermore, the Court added: “*the fact that the motion is not legally binding is irrelevant*” (see pages 8 and 9). Although the Parliament pointed out that the motion never referred to the complainants but to the BDS campaign as a whole, (see page 4), the Court noted that “*BDS has no legal personality but is a political movement whose supporters want to achieve common goals through certain measures*” (see page 7). Accordingly, the Court stated that “*the judgment of antisemitism does not only concern the campaign itself, but it affects negatively also the people and organisations behind it*”, and it occurs particularly “*when a person or associations consider themselves to belong to the movement and are perceived as such externally*” (see page 7). The Court pinpointed that, undoubtedly, this is the case of the complainants, who are listed on the campaign's website under the heading “Supporting Groups and Organisations in Germany”. Furthermore, the Court highlighted that “*the fact that [the complainants] are externally perceived as belonging to the BDS campaign is also evident by their exclusion from the city festival in Bonn, where the city of Bonn referred to the motion challenged here*” (same page 7).

Moreover, the Court noted that also through the **indirect impacts** “*the complainants are affected by the challenged motion*” (see page 8). In this regard, the Court specified that, even though the motion does not directly deny BDS groups access to public spaces, it calls on public and private third parties, including State institutions to do

so. As a result, the motion has progressive restrictive effects which infringe the complainants' interests and fundamental rights. It is clear that the exclusion of the complainants from the festival in Bonn resulted from the local authority applying the Parliament's motion.

Finally, the Court upheld that "*as far as the complainants are directly concerned, there is also the possibility of a violation of their rights under the state constitution*" (see page 9 of the judgment). Accordingly, the Court acknowledged that:

I) due to the univocal "***defamatory, discriminatory and distorting statements in the motion***", the complainants may suffer: a) violations of their **fundamental right to freedom of association**, under Article 4 (1) of the NRW State Constitution (Hereafter: Constitution), in conjunction with Article 9 (1) of the Basic Law; b) unlawful interferences with their possibility to gain new members; II) due to the influence that the motion potentially exercises on third – public and private actors -, even more significant abuse may result, creating an even greater prejudice on complainants' fundamental rights.

The Court concluded its assessment with procedural remarks. Although the complainants are entitled to file complaints against the motion since it negatively impacts their fundamental rights, the Court declared the constitutional grievance inadmissible on the grounds of the procedural principle of subsidiarity. Pursuing Article 54, sentence 1, of the Constitution, the Court indicated that the complainants must first file the claim before the administrative courts. The Court finally pinpointed that a general action aimed at bringing the Parliament to revoke the adverse value decisions does not appear unfounded or inadmissible *a priori*.

Final Remarks

The ELSC believes that this decision of the Constitutional Court represents an essential outcome for BDS groups; not only in the NRW State but also in European countries where National Parliaments passed similar resolutions, such as Germany and Austria.

By emphasising the fact that this motion causes immediate defamatory consequences for the complainants, and thus infringes their fundamental rights, the NRW's Highest Court firmly refused the idea that the BDS campaign is antisemitic in itself. Accordingly, the Court further shed light on the legal consequences that can be imposed on State institutions if they conflate criticism towards Israel with antisemitism, even if doing so using soft-law mechanisms. From this, the Court established a precedent in protecting the fundamental rights of the groups supporting BDS in the NRW State, particularly if public authorities attempt to unlawfully restrict their rights.

This landmark judgment could have significant deterrent effects on institutions which unlawfully target the BDS campaign as antisemitic in itself. It represents a win for BDS groups in terms of state institutions recognizing their fundamental rights to freedom of expression and assembly.