

# GERMAN CASE LAW: A COHERENT SET OF PRINCIPLES FOR CHALLENGING ANTI-BDS RESOLUTIONS

In recent years, activists for Palestinian human rights in Germany have had to turn to the courts to defend their constitutional rights to freedom of expression and assembly against their cities, which seek to impose the [anti-BDS resolutions](#) adopted by local and regional parliaments, as well as the German Bundestag.

To date, at least seven German courts have consistently upheld the right of activists to use public facilities for BDS-related events. In eight decisions, the [Munich Regional Court](#), the administrative courts of [Lower Saxony](#), [Cologne](#), [Hesse](#), [Bavaria](#) and, most recently [Leipzig](#), have convicted the cities of Oldenburg, Bonn, Frankfurt and Munich for violating the constitutional rights to equality, freedom of expression and assembly, and instructed the cities to provide the requested public facilities. In addition, the [Constitutional Court of North-Rhine Westphalia](#) has confirmed that the legality of the anti-BDS resolutions that underpin the unlawful denial of premises by German cities may be challenged in German constitutional courts.

This paper provides an overview of this growing body of jurisprudence. We will demonstrate that German courts have confirmed that: I) anti-BDS resolutions are not legally binding for anyone; II) anti-BDS resolutions directly violate fundamental rights and can be legally challenged; III) the decisions of public bodies implementing anti-BDS resolutions violate fundamental rights; IV) BDS is a legitimate human rights movement.

## I. ANTI-BDS RESOLUTIONS ARE NOT LEGALLY BINDING FOR ANYONE

German courts have consistently held that anti-BDS resolutions “*are not legislative acts*”,<sup>1</sup> lack the “*quality of a legal norm*”,<sup>2</sup> and thus cannot “*have any legal consequences*”.<sup>3</sup> In other words, these resolutions are not hard law instruments: they do not create any legal rights or obligations for individuals or entities. Instead, anti-BDS resolutions fall into the category of soft law: they are “*expression[s] of will*”<sup>4</sup> that may

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<sup>1</sup> [Cologne Administrative Court](#), 14 L 1765/19, 12 September 2019, para. 25.

<sup>2</sup> [Bavarian Administrative Court](#), 4 B 19.1358, 17 November 2020, para. 54.

<sup>3</sup> [Constitutional Court of North Rhine-Westphalia](#), 49/19.VB-2, 22 September 2020, p. 10. See also n 1, [Cologne Administrative Court](#), para. 25.

<sup>4</sup> See [Cologne Administrative Court](#), *supra*, para. 25.

emanate from a legislative body, but that have no binding force.<sup>5</sup> As such, public bodies are not legally bound to comply with the call in these resolutions to deny the use of premises to supporters of BDS and for BDS-related events.

## II. ANTI-BDS RESOLUTIONS DIRECTLY VIOLATE FUNDAMENTAL RIGHTS AND CAN BE LEGALLY CHALLENGED

German courts have confirmed that despite their non-legally binding nature, anti-BDS resolutions must comply with the fundamental rights enshrined in Germany's Basic Law. The Hessian Administrative Court, for example, stated that, "*The restriction on the right of use [of a public space] by the resolution of the City Council is not compatible with overriding law and is therefore invalid*".<sup>6</sup>

Against this background, German courts have found that anti-BDS resolutions may directly violate three separate rights:

- **The general principle of equality (Article 3 of the German Basic Law).**<sup>7</sup>  
This principle posits that all persons are equal before the law; and that, hence, no person shall be favoured or disfavoured because of political opinions, among other reasons. Accordingly, the difference in the treatment "*between events dealing with the contents, topics and aims of the BDS campaign and all other political events lacks a constitutionally viable reason*".<sup>8</sup>
- **The right to freedom of expression (Article 5(1) of the German Basic Law).**<sup>9</sup>  
Ruling that the City of Munich was responsible for violation of this right, the Federal Administrative Court recently confirmed that. "*[the City's anti-BDS resolution] links an adverse legal consequence – the exclusion from the use of public facilities – to the expected expression of opinions about the BDS campaign or its contents, goals and topics*".<sup>10</sup>
- **The right to freedom of association (Article 9(1) of the German Basic Law).**

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<sup>5</sup> ECCHR, [Glossary: Hard law/soft law](#).

<sup>6</sup> See [Hessian Administrative Court](#), 8 B 3012/20, 4 December 2020, para. 8. See also [Bavarian Administrative Court](#), *supra*, para. 48.

<sup>7</sup> See [Bavarian Administrative Court](#), *supra*, para. 48; [Hessian Administrative Court](#), p. 8.

<sup>8</sup> See [Bavarian Administrative Court](#), para. 60.

<sup>9</sup> *Supra*, para. 49. See also, [Hessian Administrative Court](#), p. 8.

<sup>10</sup> Federal Administrative Court, [Press Release Nr. 6/2022](#) about Judgment 8 C 35.20 of 20 January 2022.

The Constitutional Court of North Rhine-Westphalia held that, insofar as a resolution contains univocal “*defamatory, discriminatory or distorting statements by the government*”, it can violate the right to freedom of association.<sup>11</sup>

The Constitutional Court of North Rhine Westphalia confirmed, moreover, that – irrespective of their legally non-binding nature – anti-BDS resolutions can be subjected to judicial review by a constitutional court when procedures have been exhausted in administrative courts.<sup>12</sup> The Court also explained that, in challenging an anti-BDS resolution, a complainant must “*sufficiently demonstrate that the alleged violation of a fundamental right [by the resolution] is possible*”.<sup>13</sup> This is primarily the case if the complainant is the target of the resolution. It may, however, also be the case when the resolution is *addressed to third parties – such as local authorities [...] – and there is a sufficiently close relationship between the complainant’s fundamental rights and the measure [of the third party]*”.<sup>14</sup>

### III. THE DECISIONS OF PUBLIC BODIES IMPLEMENTING ANTI-BDS MOTIONS VIOLATE FUNDAMENTAL RIGHTS

Anti-BDS resolutions rely on public bodies to carry out the intended exclusion of BDS activists from public facilities. Courts, however, have confirmed that public bodies, just like anti-BDS resolutions themselves, are required to comply with overriding general legal norms.<sup>15</sup> Accordingly, German administrative courts have ruled consistently that public bodies, with their decisions to implement anti-BDS resolutions by denying the use of public facilities, have breached the law and are responsible for violation of the following fundamental rights:

- **The principle of equality (Article 3(1) of the German Basic Law).**  
The Cologne Administrative Court, for example, clarified that since the complainant was eligible to use communal facilities, a retroactive restriction of that use to all eligible groups and societies except for supporters of the BDS movement “*constitutes an unequal treatment [...] that is not even rudimentarily*

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<sup>11</sup> See [Constitutional Court for the State of North Rhine-Westphalia](#), *supra*, p. 10. See also, ELSC, [Executive Summary](#), “Regional German Constitutional Court Rules Anti BDS Motion Infringes on Fundamental Rights”, p. 3.

<sup>12</sup> *Supra*, [Constitutional Court for the State of North Rhine-Westphalia](#), p. 5; ELSC [Executive Summary](#), p.3.

<sup>13</sup> [Constitutional Court for the State of North Rhine-Westphalia](#), pp. 5-6.

<sup>14</sup> *Supra*, p. 6.

<sup>15</sup> [Lower Saxony Higher Administrative Court](#), ME 10 48/19, 27 March 2019, para. 10. See also, [Cologne Administrative Court](#), para. 19; [Bavarian Administrative Court](#), paras. 48, 54.

*justified*”; it is “incompatible with Article 3 (1) of the Basis Law and, therefore, unlawful.<sup>16</sup>

– **The right to freedom of opinion and expression (Article 5(I) of the German Basic Law).**

Courts have consistently confirmed violations of the constitutional right to freedom of opinion and expression.<sup>17</sup> The Bavarian Administrative Court, for example, ruled that a public body is “*not entitled to deny applicants access to its public facilities solely because of expected undesirable expressions of opinion*”.<sup>18</sup> The Court thus found combined violations of the principle of equality and the right to freedom of expression, explaining that, “*Such unequal treatment [...] constitutes a serious violation of the constitution because it has a unilaterally disadvantageous effect on the exercise of the freedom of opinion protected by fundamental rights*”.<sup>19</sup>

#### IV. BDS IS A LEGITIMATE HUMAN RIGHTS MOVEMENT

No German court has found a valid reason for designating the BDS movement as antisemitic.<sup>20</sup> The Bavarian Administrative Court, for example, concluded that there are no tangible indications that the activities of the boycott movement targeting the state of Israel in Germany could also include incitement to hatred targeted at the Jewish population in Germany.<sup>21</sup>

Moreover, German courts have also rejected the claim that the BDS movement would violate the “basic liberal democratic order”.<sup>22</sup> The Higher Administrative Court of Lower Saxony clarified in this regard that those making such allegations must “*present suitable evidence that decisively refutes the assumption that the [BDS] applicant stands up for the liberal and democratic order.*”<sup>23</sup> By rejecting the claims of

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<sup>16</sup> See [Cologne Administrative Court](#), paras 20, 21, 25; [Bavarian Administrative Court](#), paras 60, 61.

<sup>17</sup> See [Cologne Administrative Court](#), para. 24; [Bavarian Administrative Court](#), paras 48-55; [Hessian Administrative Court](#), p. 8. Federal Administrative Court, [Press Release Nr. 6/2022](#).

<sup>18</sup> [Bavarian Administrative Court](#), para. 58.

<sup>19</sup> *Supra*, paras 60-61.

<sup>20</sup> See for example, [Lower Saxony Higher Administrative Court](#), para. 14. See also [Cologne Administrative Court](#), para. 21; [Constitutional Court for the State of North Rhine-Westphalia](#), pp. 9-10.

<sup>21</sup> [Bavarian Administrative Court](#), para. 59. See also, [Cologne Administrative Court](#), para. 21: “*there are no indications that the applicant or its members and supporters will engage in anti-Semitic activities to a legally relevant extent*”. See also [Munich District Court](#), 12 O 12183, 23 September 2019, p. 5.

<sup>22</sup> See [Cologne Administrative Court](#), para. 27; [Lower Saxony Higher Administrative Court](#), para. 11, 13-15; [Bavarian Administrative Court](#), para. 56.

<sup>23</sup> [Lower Saxony Higher Administrative Court](#), para. 13.

antisemitism and/or violation of the free democratic order German courts have implicitly recognized the legitimacy of BDS as a human rights movement.

## V. CONCLUSION

German case law on the matter of anti-BDS resolutions coalesces around a coherent set of principles. The Federal Administrative Court's recent judgment in Leipzig upheld this jurisprudence when it ruled that a municipality violated the fundamental right to freedom of expression and general laws by denying the use of a municipal facility for a BDS-related event.<sup>24</sup> This judgment acknowledges what lower instance courts throughout Germany have already laid out. It further strengthens the case for challenging anti-BDS resolutions, such as the legal challenge of the German Bundestag's resolution of 17 May 2019 that is tackled by the [initiative BT3P](#).

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<sup>24</sup> See Federal Administrative Court, [Press Release Nr. 6/2022](#).