

HP protest: Police counted more than 2500 tractors at the Nuremberg fairground on January 12, 2024, during a demonstration against the planned abolition of agricultural subsidies.



PURE FREEDOM

TEXT: NINA SCHICK



PHOTO: NEWS / MERZBACH

Farmers' protests, democracy demonstrations, and pro-Palestinian assemblies: Germany is experiencing a wave of demonstrations like never before. At the same time, surveys show that many people feel they are not free to express their opinions. Wrongly so, says legal expert Ralf Poscher of the Max Planck Institute for the Study of Crime, Security and Law.

Large and green, a farmer's John Deere tractor sits at the on-ramp to the A10 highway near Berlin. "If the farmer dies, the country dies," reads a wooden pallet mounted on the radiator. It is allowed to stay here, the Berlin-Brandenburg Higher Administrative Court has ruled, and does not have to move after half an hour, as the police wanted. But it does have to make way for emergency vehicles. Next to and behind it, more tractors with protest slogans – green, huge and powerful. For days and weeks, they and others like them have blocked Germany's freeways, city centers and country roads.

75 years of freedom

"Freedom of speech (Article 5 of the Basic Law) and freedom of assembly (Article 8) are among the cornerstones of democracy," says Ralf Poscher, director of the Max Planck Institute for the Study of Crime, Security and Law in Freiburg. "Article 5 is intended to guarantee free intellectual debate – not only intellectual debate in the political sphere, but of course especially that," explains the professor of public law. The fact that both articles found their way into the Basic Law 75 years ago is still an achievement today.

- 36 Despite the constitutional guarantee of freedom of speech and assembly, both are increasingly perceived as restricted. As far as freedom of speech is concerned, a survey by the Allensbach Institute for Public Opinion Research and Media Tenor from December 2023 provides evidence: 44 percent of respondents said that it is better to be cautious when speaking in public, especially when it comes to conservative or right-wing populist views. Only 40 percent felt free to express their political opinion. Values have shifted significantly in the space of a few years. In 2017, a clear majority of 63 percent believed that they could speak freely. In 1990, the figure was actually at 78 percent.

"You have to distinguish between two things: on the one hand, what actions the state takes against expressions of opinion and assemblies, and on the other hand, what social sanctions you can expect if you hold certain views," says legal expert Poscher. As a fundamental right, freedom of speech is first and foremost a defensive right against the state and protects against state interference. Nobody is arrested for their opinions in this country.

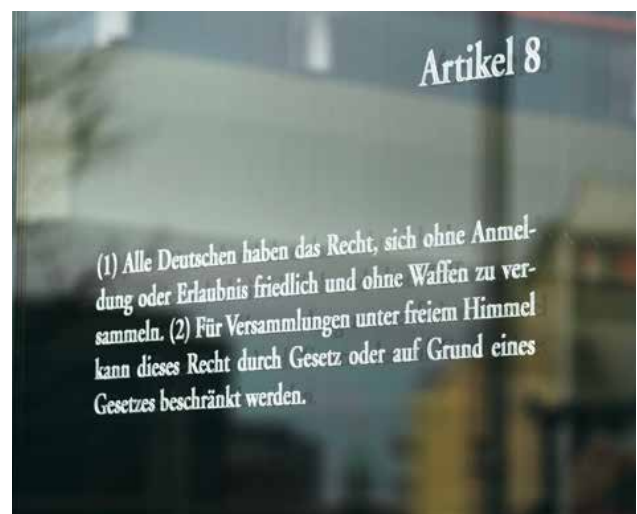
Samuel Salzborn, a political scientist at the University of Gießen, observes that populist parties in particular continuously rail against a lack of freedom of speech: "Freedom of speech is a constitutional right, so almost all the 'debates' that the far right instigates on this issue have absolutely nothing to do with questions of freedom of speech. It is a rhetorical ticket to delegitimize and destabilize democracy." If freedom of speech were seri-

ously restricted in Germany, no one could complain about it without risking state persecution.

The Federal Constitutional Court has repeatedly made clear in its rulings how highly it values freedom of speech. This also affects lower courts and law enforcement agencies, as in 2018 when a defamatory statement by the then AfD parliamentary leader Alexander Gauland against the Integration Commissioner was deemed to be covered by freedom of speech.

Freedom of speech also extends far into the political sphere. "As long as speech is focused on trying to convince others with arguments, positions, and opinions, we are free to debate," Poscher explains. "Even things that are not constitutional can be advocated. As long as you are simply presenting a personal opinion, you can even argue for the restoration of the monarchy."

The broad scope of this fundamental right is explained by history. The experience of the Weimar Republic, which was abolished not by a coup but in accordance with the constitution, influenced the Basic Law. Although Article 118 of the Weimar Constitution provided for freedom of speech, it was not – like today's fundamental rights – guaranteed in perpetuity, but could be suspended temporarily or permanently by emergency decrees, as it happened in 1933 after the Reichstag fire. This should not be possible with the Basic Law: democracy should offer freedom but be defensively resilient. It should, as the Social Democrat Carlo Schmid put it in a



Guaranteed: The right to protest is a cornerstone of democracy.

Professor Ralf Poscher in Freiburg is investigating how far the right to freedom of speech and protest extends.

PHOTO: BASCHI BENDER



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“Assembly bans are always the last resort.”

RALF POSCHER

speech to the Parliamentary Council in September 1948, “have the courage to be intolerant of those who want to use democracy to kill it.” For freedom of expression, what this means is: the leash is long when it comes to individual opinions. There is great confidence that the democratic framework is stable and that individual opinions will be smoothed out in discourse. Intervention takes place when this constitutional expectation is disappointed. “The idea that can be derived from the Basic Law’s provisions on bans on associations and parties, and also on the revocation of fundamental rights, is: democracy can defend itself against unconstitutional views if they become institutionally entrenched, especially in associations and parties,” explains legal expert Ralf Poscher.

Individual gatherings do not yet constitute such an entrenchment of an unconstitutional view. To return to the example of the monarchy: one could also demonstrate peacefully for the reintroduction of the monarchy. The Federal Constitutional Court gives freedom of assembly the same high value as freedom of speech. According to the Basic Law, assemblies do not even have to be registered. The fact that this must be done in practice – with the exception of spontaneous demonstrations – is intended to protect the assembly and ensure that the event runs smoothly. Ralf Poscher says: “The right of assembly is a right to enable assembly.”

However, the obligation to register does not equate to an obligation to approve. For example, if the authorities do not react to a registration, the assembly can still take place. Where the assembly must be registered varies from state to state. It could be the police or the municipal authority. If the authorities see a danger associated with the demonstration, they must try to mitigate it by imposing conditions – such as a change of route, a ban on the attendance of specific individuals, or time restrictions, as was the case with the recent farmers’ protests. “A permit to assemble can have a dozen conditions,” Poscher explains. “A ban is always the last resort.”

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The rule of law does not take assembly bans lightly. If the assembly authority issues a ban, there are legal remedies and a decision is made quickly. Organizers can appeal to the administrative court, and from there possibly to the higher administrative court or the administrative court of appeal, depending on the state. For example, many blanket bans on pro-Palestinian assemblies following the Hamas terrorist attack on Israel on October 7 did not survive the first and second instances. In Frankfurt, only two days elapsed between the ban and the decision of the Hessian Administrative Court.

Courts as guardians

Where does the impulse to ban demonstrations come from? “Politicians are sometimes tempted to restrict the freedoms guaranteed by fundamental rights,” observes Poscher, co-author of the *Handbuch des Polizeirechts* (Handbook of Police Law). “Basic rights are also there to prevent such overreactions.” According to Poscher, who studies the history and dogmatic structures of public security law, it is crucial to rely on the courts in times of multiple crises: “They are the ones who subsequently weigh, correct, and restore the relationship between citizen and state.”

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Many of the decisions on the recent protests will be taken afterwards. The coronavirus crisis has recently shown how the rule of law must prove itself in a crisis situation with serious violations of basic rights – both during the acute situation and afterwards. Should judges decide, as they did in 2023, that the general ban on assemblies during the first phase of the coronavirus pandemic in spring 2020 was disproportionate, the demonstration cannot be made up for – but the ruling clarifies the legal position of those affected and can provide the basis for a better decision in a future case.

Freedom is not boundless. The Basic Law itself refers to limits on freedoms as restrictions, naming them in Article 5 paragraph 2: “These rights shall be subject to the restrictions imposed by the provisions of the general laws, the legal provisions for the protection of young people and the right to personal honor.” Public statements become legally relevant when they advocate serious crimes or incite hatred or violence, or fall under the offense of inciting hatred against sections of the population. This includes the use of prohibited symbols and slogans. Recently, the slogan “From the river to the sea,

Palestine will be free” has come to the fore. The river referred to is the Jordan, and the sea is the Mediterranean – with the State of Israel in between. Many therefore interpret the slogan as a denial of Israel’s right to exist. In early November 2023, Interior Minister Nancy Faeser issued a ban on the terrorist organization Hamas. In this order, she also banned the slogan – almost unnoticed at first – as a symbol of the terrorist organization.

The result: what is banned cannot be displayed. The police can confiscate posters bearing the slogan. In cases of multiple criminal acts, assemblies can even be broken up. Holding up signs saying “Kill XXX,” as seen in Wiesbaden during the farmers’ protests, is liable to prosecution (Section 111 of the Criminal Code, public incitement to commit a crime). The threat of hanging, as is often seen, falls into a legal gray area. “Context is always everything. But if it’s meant to signal: ‘We’re coming to hang you,’ that’s unacceptable,” says the lawyer Poscher. Even dung heaps on public roads can be a matter for the public prosecutor’s office. Weapons are expressly forbidden at assemblies, according to the Basic Law. The

Assemblies Act (*Versammlungsgesetz*) also prohibits the wearing of uniforms. “Assemblies must not intimidate others to the extent that they can no longer freely express or form their opinions. That’s why there is a ban on uniforms,” says Poscher. Ultimately, this also can apply to tractors; they must not be used as a means of intimidation.

It remains to be seen how the courts will subsequently assess the blockades of highway off-ramps, country roads, or squares by thousands of tractors in January. What is crucial is the conditions the protesters had to fulfill. For example, Legal Tribune Online reports that farmers in Saxony were only allowed to temporarily block on-ramps, while farmers in Mecklenburg-Western Pomerania were only allowed to stand by on-ramps and not directly on them. The judges of the Berlin-Brandenburg Higher Administrative Court, on the other hand, allowed unlimited blockades. The argument: highways can be avoided. The judges attributed greater importance to the expression of opinion.

So how do we explain the prosecution and conviction of “Klimakleber” (climate protesters gluing themselves to roads), which also paralyzed traffic in many places? According to legal experts, these were often individual actions which, because they were unannounced, did not

SUMMARY

Freedom of speech and freedom of assembly are essential elements of democracy. The Federal Constitutional Court considers them to be of paramount importance.

The limits of these freedoms must be constantly tested. Prohibitions and their revocation, controversial judgments, and subsequent findings of illegality are not signs of a restriction of freedom or arbitrariness, but evidence of a functioning constitutional state.

Eccentric, uncomfortable, and extreme opinions are protected, even if they are unpopular with the majority. However, criminal liability is the limit.

provide the police with a point of contact for coordinating security policies in advance. In Bavaria, climate activists were even taken into custody preemptively – an approach that Poscher, in a joint blog post with doctoral researcher Maja Werner, described as legally questionable, both in terms of its legal basis and its application. “This is also political,” Poscher comments.

However, the situation is different for the farmers, who, through their association, coordinated their protest with the security authorities in advance and used their work vehicles to get to the rally – and are allowed to use them. “If a street or a square is permitted as a place of assembly, the Road Traffic Act does not apply,” says

Ralf Poscher. Pedestrians and cyclists are also allowed on highways.

It was not only the tractors that dominated the cityscape for days, but also the millions of people who stood up for democracy and freedom – not only in the west, but also in the east of the country – that showed how impressive demonstrations can be. Powerful symbols for the 75th anniversary of a democracy that should always be aware of its freedom. “Assembly depends on physicality. Despite all that social media can offer today, nothing is as effective as people physically standing up for their opinion,” says legal expert Ralf Poscher.

www.mpg.de/podcasts/unfreiheit (in German)

Prosecuted: “Klimakleben”
(gluing yourself to the road to protest climate change by disrupting traffic)
has often been punished as coercion.

