

## Calibrating Liberty and Security: Federal Constitutional Court Rules on Freedom of Speech in PKK Case

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[1] In a recently published decision the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) was concerned with the basic right of free speech of PKK sympathizers. The decision draws a fine line between, on the one hand, preventative measures which aim to inhibit radical associations and, on the other hand, the protection of free speech which lies at the core of democracy. The Court's decision touches upon the debate about security triggered by the events of September 11th and Germany's proactive stance towards right-wing radicalism, characterized by the Court's present consideration of an application to ban the extreme right-wing *National demokratischen Partei Deutschlands* (NPD – National Democratic Party of Germany).

[2] The ruling is part of a package of three constitutional complaints, each of which the Court refused to admit for decision by the full senate. (1) All three complaints were directed against criminal convictions based on a violation of a ban on the activities of the Kurdish Workers' Party (PKK) in Germany. (2) In 1993, the German Minister for the Interior issued a ban against the activities of the PKK and its affiliated organization, the National Liberation Front of Kurdistan (ERNK). (3)

[3] In the leading case, (4) the complainant, a Turkish citizen of Kurdish ethnic heritage, plastered some posters to the wall of a bus stop on the occasion of the Kurdish *Newroz-Fair*. The posters depicted the leader of the PKK, Abdullah Öcalan, gathering his followers around him, some of them armed. In the left center of the image, the flag of the ERNK was depicted. In the right foreground of the poster the remains of a destroyed barbed wire fence were depicted. Across the top of the poster the words "We will meet at the *Newroz-Fair*" were written. Across the bottom of the poster the words "We will be victorious, We will be victorious" were written. Both sentences were in Turkish. On the poster's bottom margin the letters "ERNK" were printed.

[4] The trial court acquitted the complainant, concluding that placing posters could not be regarded as a cause of the ongoing activities of the ERNK. Pursuant to an appeal of the public prosecutor, the *Bundesgerichtshof* (BGH -- Federal Court of Justice) quashed the trial court's judgment of acquittal and remanded the matter for further proceedings consistent with the BGH's detailed reasoning in a comparable case. (5) In its previous judgment the BGH held that all such behaviour constitutes a violation of Sec. 20.1 Sentence 1 No. 4 of the *Vereinsgesetz* (*VereinsG* -- Association Act) which refers to the banned domestic activities of the concerned organization and which is beneficial for them. It is sufficient, the BGH explained, that the actions of the offender were concretely suited to favourably affect the banned activity.

[5] Having regard to the BGH's previous decision, on remand the trial court convicted the complainant and imposed a fine as a penalty. The trial court held that placing posters was, indeed, concretely suited to favourably affect the forbidden activity of the PKK/ERNK. The trial court based this judgment particularly on the statements on the poster in their context. The trial court held that the images depicted and the text obviously and clearly pointed towards the leading role of the PKK/ERNK in the Kurdish struggle. Therefore, the poster served to support the propaganda of those associations, both of which are affected by the ban. The complainant's appeal against this judgment was rejected by the BGH as obviously unfounded.

[6] In his constitutional complaint, the complainant challenged the decisions of the criminal courts and argued, especially, that his fundamental right to freedom of speech under article 5.1 of the *Grundgesetz* (GG – Basic Law) had been violated. (6)

[7] The First Chamber of the Constitutional Court's First Senate refused to admit the complaint for review by the full Senate because the Chamber found that the complaint lacked substantial prospects for success. (7) The Chamber held that the decisions of the ordinary courts did not infringe the complainant's right of free speech.

[8] First, the Chamber noted that this right is not guaranteed without limitations. To the contrary, article 5.2 of the Basic Law explicitly limits the right to free speech with the provisions of the general laws. This limitation applies to all laws that do not prohibit an opinion as such and are not directed against the utterance of an opinion as such, but serve an object of legal protection without regard to any particular opinion. (8) Indeed Sec. 20.1 Sentence 1 No. 4 of the *VereinsG* qualifies as a general law within this meaning. According to Secs. 15.1 and 14.1 of the *VereinsG*, bans on activities can be directed against a foreign association in order to protect the legal interests identified in Sec. 9.2 of the *VereinsG*. Such a ban can also be imposed in the event that the political activities of the association violate or

threaten the internal or external security, the public order or other relevant concerns of the Federal Republic. These interests enjoy protection, without regard to the kind of danger posed, and therefore protection applies as well in cases when they are endangered by other means than by utterance.

[9] The interpretation and application of the criminal laws are a matter for the criminal courts. When these laws involve the restriction of freedom of opinion, then in accordance with the Constitutional Court's precedent, the fundamental right restricted must be taken into consideration so that its value-setting significance is maintained at the level of the law's application. (9) The Constitutional Court's Chamber concluded that the ruling of the BGH, on which the complainant's conviction was based, meets the requirements of article 5.1 of the Basic Law.

[10] The Constitutional Court's Chamber reasoned that the BGH's interpretation does not forbid individuals from supporting certain political goals, but only prohibits the pursuit of these goals through the activities of the banned association. The Chamber noted that the limiting-effect of Sec. 20.1 Sentence 1 So. 4, Sec. 18 Sentence 2 of the *VereinsG*, with regard to the fundamental right of free expression, is restricted in a twofold manner. First, only those actions which are relevant, especially from the point of the concrete reasons of prohibition, are implicated. Second, the individual's behaviour must be taken with reference to the activities of the association, that is, a reference to the organization is required. The Court drew a parallel to violations on the ban of a political party. In that context, the Court has held that article 5.1 continues its protective force when someone holds the same opinion as the banned organization. Article 5.1 only loses its force when an objective observer can conclude that actions taken pursuant to those beliefs are directly in favour of the banned party itself. (10) The Constitutional Court's Chamber held that there is no constitutional objection in extending this principle to bans imposed pursuant to Secs. 14.1, 15.1 of the *VereinsG*.

[11] The Chamber further explained that it is also not constitutionally objectionable when the BGH stated that the offender's actions need not serve as a measurable promotion of the association. (11) The Chamber endorsed the BGH's conclusion that it is sufficient that the actions are concretely suited to favourably affect the banned activities. This interpretation takes account of the lack of domestic organizational structures, as far as foreign associations are concerned, and thereby recognizes the special conditions for the implementation of a ban on activities associated with such an organisation. It remains necessary, however, that the offender's behaviour must objectively refer to the activity of the association. The ban on activities aims to prevent such dangers which result from the pursuit of ideas in an organized form. Therefore, in case of utterances, the intention to promote the association must be clearly perceptible. Content and form must indicate that the act of expression is taken in favour of the association. This can be the case when the offender adopts, in his expression, the manner and style of presentation of the banned association or its kind of agitation. In contrast, the required reference to the organization cannot be assumed when it is pointed to the banned association and its activities in any form. It would be an unreasonable encroachment on the area protected by the basic right to freedom of speech if an utterance is prohibited just because someone makes some unassociated effort towards the same goals as those promoted by the organization. (12) Thus, the individual is free to hold the same position in public as the banned organization does and to sympathize with it. Under these conditions, the Court concluded, no one has to withhold the expression of his political opinion for fear of punishment, unless it supports the activity of the banned organization.

[12] The Chamber concluded that the criminal courts also recognized the particular value of the fundamental right guaranteed in article 5.1 of the Basic Law at the level of application. The Court found that the ordinary courts interpreted the meaning of the poster in accordance with the demands of the basic law. (13) The Chamber held that the ordinary courts constitutionally unobjectionably concluded that an unbiased, reasonable audience can only interpret the poster in the incriminating way, seeing in it a clear effort to win support for the PKK/ERNK's armed struggle on the occasion of the *Newroz-Fair*. The alternative interpretation that would have led to an acquittal, that the poster simply sought to win support for the Kurds' struggle for autonomy, would only be tenable if the elements of the poster are assessed in isolation. The criminal courts instead recognized that they had to consider the interplay of the statements on the poster, their linguistic and pictorial context, in order to determine the meaning of the poster. Directly tackling the interpretation of the original trial court (which acquitted the complainant), according to which the significance of the reference to the ERNK on the poster was diminished because it was located on the margin and would remain in the background, the BGH and the second trial court comprehensibly substantiated their own interpretation by stressing that the symbolic figure of the PKK, Abdullah Öcalan, had the most prominent place on the poster. Moreover the poster points explicitly to PKK/ERNK and its armed struggle, both by displaying its emblem and also by showing armed persons and the characters "ERNK." From these findings, the ordinary courts concluded, the unbiased observer would infer that the poster tries to win support especially for the struggle of ERNK. The Constitutional Court held that this meaning at the same time remains the only possible interpretation of the poster not being remote, since the initial interpretation of the trial court was comprehensibly ruled out. Each alternative interpretation would lead to punishment, too, because it would have to regard the content of the poster as authored by the ERNK and would have to assess the postering as forbidden propaganda action of the ERNK. Therefore it would be unobjectionable that the criminal courts did not consider any further interpretations.

[13] Significantly, the Court concluded that there was – different than usual in cases concerning freedom of speech – no reason for weighing the right to freedom of speech against the conflicting legal assets by taking all circumstances into account. For the utterance would meet all the elements of the (constitutional) criminal statute in the abstract. The banning order legally requires that the activity of the association shows its general and permanent dangerous objective. The association represents a threat to the criminal laws, the idea of international understanding, and the national security of the Federal Republic of Germany which can grow into a concrete danger for these legal assets at any time. (14) Freedom of speech withdraws where it exclusively serves the realization of prohibited objectives of the association.

[14] The Chamber's decision is based in two contexts. At first it explicitly refers to an earlier ruling of the FCC, in which the court had to review convictions of former members of the *Kommunistische Partei Deutschlands* (KPD – Communist Party of Germany). This ultra left wing political party was banned by the Constitutional Court in 1956. (15) But the followers of the KPD did not stop their political activities. For instance, the complainant in a case brought before the Constitutional Court in 1969 presented himself as an independent candidate for the then upcoming federal election. (16) His comments on current political questions, however, corresponded to the platform of the KPD at that time. He used the same slogans and catchphrases as the KPD, which were widely recognizable as positions of this party. Furthermore he still called himself a communist in public without making any effort to distance himself from the banned party. Therefore, the criminal courts found him guilty of failing to abide by the ban on the KPD and sentenced him in accordance with sec. 42 and 47 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act). (17) The Constitutional Court dismissed the constitutional complaint brought against these convictions and set forth the main criterion by which the relevant criminal laws can be restricted in the light of the importance and value of the right to freedom of speech. The purpose of the criminal laws here is to protect the basic order of freedom and democracy against specific dangers caused by threatening organizations. The actions of an individual become dangerous due to the effects caused by the organization. Thus, according to the Court, the individual is not affected as far as he pursues certain political goals himself. The pursuit of one's personal political goals is only forbidden to the degree that such efforts serve to promote an anticonstitutional organization and its particular effectiveness. (18) Hence the connection between the individual's behaviour and the organization appears to be the decisive element. In the present case, the Chamber has reaffirmed this standard and adapted it to the characteristics of foreign organizations which are characterized by the fact that their headquarters and principal organizational structures are located abroad. However, the Chamber's approval of the criteria set forth in the ruling on the enforcement of the KPD ban could be of importance if the Constitutional Court has to decide future cases in which complainants violate the ban of a political party. This could especially become relevant if the Constitutional Court bans the NPD.

[15] The second context concerns the aftermath of September 11th. In response to those terrible events the German parliament enacted the *Terrorismusbekämpfungsgesetz* (Law to Combat International Terrorism) on 9 January 2002. (19) Part of this statute amended the *VereinsG* including Sec. 14 *VereinsG*. The catalogue of reasons justifying a ban on an association of foreigners (*i.e. Ausländervereine* [domestic associations consisting predominately of foreigners]) was expanded. For instance, such associations can now be banned if their objectives or activities support groups inside or outside German territory which induce, approve of or threaten attacks against persons or things. According to the reference in Sec. 15.1 *VereinsG* this also applies to associations like the PKK which have their seat abroad, but which extend their organization or activity to Germany (*ausländische Vereine*). It remains to be seen whether bans will be imposed pursuant to the added reasons and how they will be enforced.

[16] Beyond these connections, the decision touches one of the most intricate political and constitutional problems: the relation between security and liberty. In the wake of September 11th much of the political discussion has pivoted around the idea that there can be no liberty without security. One might call this the Hobbesian answer to the problem. According to Hobbes the objective of the State is to overcome the *status naturalis* in favour of a *status pacis*, which guarantees the individual's security, especially protection for his life and body. Hobbes concluded that this is accomplished by a virtual contract: everybody abandons his right of self-determination and transfers it to the State on the condition that all others do the same. The Leviathan results. Due to the authority and power invested in it, the State is able to impose peace on and for all citizens. After the monopoly on power and violence had been concentrated in the hands of the absolute ruler, during the period of the monarchistic State, its legitimacy shifted to the rule of the democratic law in the wake of the democratic developments of the 19th Century. Yet the core idea of security as the precondition of free co-existence remained unchanged. Today, as before, the state derives its legitimacy from its ability to provide security for the people.

[17] But modern democracy is not trapped by Hobbes's dialectic of protection and fear. Within a constitutional democracy the State can only exercise its power within the bounds of constitutional laws and restrictions marked out by the guarantees of basic rights. Therefore, every State under the rule-of-law has a double mission: to animate and to restrain State action at the same time. The tasks can be in conflict, but they need not be because the objective dimension of the basic rights can oblige the State to take effective measures to protect these rights. Without question the present terroristic threats call in mind this function of the fundamental rights.

[18] The Constitutional Court is perfectly aware of both elements of the modern constitutional State. When the Court had to review the *Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz* from 30 September 1977 (GVGEG – popularly referred to as the *Kontaktsperregesetz* [Obstruction to Organizing Act]) at the time Germany was in the grip of regular terrorist attacks from the *Rote Armee Fraktion* (RAF – Red Army Fraction) in the 1970s, the Court emphasized that the security of the State and the security of its population which the State has to guarantee are constitutional values which are not only of equal importance as others but also are indispensable because the State as an institution derives its true and ultimate justification from them. (20) On the other hand, the members of the Court always have recognized the necessity of limiting the protective measures the constitutional State may pursue. In this respect, a strong dissenting opinion to another Constitutional Court decision declared, in the unparalleled, clear words of Gladstone: "It is liberty alone which fits men for liberty." (21)

[19] Although security need not necessarily conflict with liberty, but can be regarded as a prerequisite for its implementation, it should be recognized that the extent of the realization of both of them depends on the kind of logic the State follows in security policy. The line between a State under the rule of law and a preventive State is nearly imperceptible. Yet, both models respond to the rules of a specific form of functional logic: the first follows those of liberty and autonomy, the latter those of the maximization of security and instrumental efficiency. (22) So the task is to find the ideal combination where a maximum of liberty is maintained along with an optimal guarantee of security.

[20] In terms of systems theory, an approach advocated by the German Sociologist Niklas Luhmann, the phenomenon could be reformulated as a manifestation of different intrinsic logics of social subsystems (e.g. economy, law, politics, religion, science, art). From that point of view it is possible to see the conflict between liberty and security as, not least of all, a clash between the intrinsic logic of politics and the intrinsic logic of the law. So the problem is also one of the relation between these two functional systems. Their structural link is the constitution. Here the political output is x-rayed according to the standards of the law. That underscores the important role of the Constitutional Court in the socio-political process of determining the amount of liberty and security.

[21] However, in this process we should not underestimate the self dynamism of instrumental efficiency. At first glance its straightforwardness tends to be very plausible and engaging. In contrast, strictly maintaining the standards of the rule of law quite often is difficult and strenuous. We should, nevertheless, be ambitious in that pursuit!

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(1) 1 BvR 98/97, 1 BvR 2180/98, 1 BvR 289/00.

(2) Sec. 20.1 Sentence 1 No. 4, Sec. 18 Sentence 2 VereinsG.

(3) Secs. 15.1, 14.1 VereinsG.

(4) 1 BvR 98/97. Published at NSTZ-RR 2002, 120; DVBl. 2002, 469.

(5) BGHSt 42, 30.

(6) Article 5 [freedom of expression]

1. Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

2. These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.

3. Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

(7) Sec. 93a.2 BVerfGG.

(8) BVerfGE 7, 198 (209).

(9) BVerfGE 7, 198 (208 and following).

(10) BVerfGE 25, 44 (58 and following).

(11) Unfortunately the printing in the German lawjournals reads verbatim that it is also not constitutionally objectionable when the BGH states that the offender's actions need (!) to serve as a measurable promotion of the association. Obviously the negation „not“ is missing here.

(12) BVerfGE 25, 44 (58).

(13) For details of constitutional requirements on the interpretation of disputed statements, see, e.g., BVerfGE 82, 272 (282 f.); BVerfGE 93, 266 (295 f.).

(14) BVerwGE 55, 175 (183).

(15) BVerfGE 5, 85.

(16) BVerfGE 25, 44.

(17) Now, Sec. 84 StGB.

(18) BVerfGE 25, 44 (57).

(19) BGBl. I, p. 361.

(20) BVerfGE 49, 24 (56 f.).

(21) BVerfGE 33, 52 (86).

(22) Denninger, StV 2002, p. 97.