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Naming the Violence

The role of law and legal reasoning in the repression of the Palestine-solidarity movement in Berlin since October 2023

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Abstract

Since October 2023 Berlin authorities have responded to protest and expressions of solidarity with Palestine with extensive restrictions. These measures are often implemented through legal instruments, particularly in the fields of criminal law, assembly law and immigration law. This thesis examines the role of law and legal reasoning in the repression of the pro-Palestinian movement in Berlin. For this, it draws on a theoretical framework constructed around Walter Benjamin, Judith Butler and Robert Cover, who critically engage with legal violence and its obscuring function. The analysis considers the case as situated within the context of German Staatsräson, understood as a political commitment to Israel that enters the legal discourse at the constitutional boundaries and operates through the conflation of anti-Zionism and antisemitism. It analyzes a corpus of publicly accessible court rulings from the Berlin case-law database, to understand the mechanisms underlying the doctrinal construction.

The findings show that legal reasoning in administrative decisions restricting Palestine-solidarity in many cases translate contested political meaning into security-relevant danger through doctrinal constructions and prospective assessments, thereby authorizing state intervention. Judicial review sometimes disciplines these measures, e.g. by correcting weak prognoses or disproportionality, but it does not fully address the deeper classificatory premises and thus leaves the underlying framing of danger intact for future cases.

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Finally, I would like to recognize the activists who continue to advocate for justice and Human Rights for the Palestinian people in the streets of Berlin, despite the challenging conditions they face.

Table of abbreviations

AG	Amtsgericht (District Court)
BDS	Boycott, Divestment, Sanctions
FreizügG/EU	Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on the General Freedom of Movement for EU Citizens Freedom of Movement Act/EU)
FRTS	From the River to the Sea
GG	Grundgesetz (German Constitution)
IHRA	International Holocaust Remembrance Alliance
KG	Kammergericht (Regional Appellate Court)
LEA	Landesamt für Einwanderung (State Immigration Office)
LG	Landgericht (Regional Court)
StAG	Staatsangehörigkeitsgesetz (Nationality Act)
StGB	Strafgesetzbuch (Criminal Code)
VersFG	Versammlungsfreiheitsgesetz (Assembly Law)
VG	Verwaltungsgericht (Administrative Court)

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If those accused of doing violence while engaging in no violent acts seek to dispute the status of the accusation as unjustifiable, they will have to demonstrate how the allegation of violence is used – not just “what it says” but “what it is doing with what is said”.

– Judith Butler, The Force of Nonviolence

Introduction

On May 15, 2025, demonstrators gathered in Berlin to commemorate the 77th anniversary of the Nakba, the displacement of Palestinians in 1948. The assembly, first restricted to a stationary gathering in urgent proceedings before the Higher Administrative Court¹, was met with extensive policing. Authorities kettled the crowd and made 56 arrests before the assembly was dissolved. The police reported that an officer had been deliberately injured by protesters; a later investigation by the group *Forensis*² attributed the injury instead to the officer's own beating of a protestor on the ground, which the authorities still dispute.

This is one instance of many restrictive and escalating measures directed at the Palestine-solidarity movement in Berlin. Measures of this kind predate October 2023, but since the attacks of October 7 and the war on Gaza that followed, the number of pro-Palestinian demonstrations and with it the extent of restrictions placed on them have risen significantly. In the days after the attack, Germany declared its solidarity with Israel, endorsed its right to self-defense and its ‘right to exist’ and reiterated that Israel's security is part of German *Staatsräson* (raison d'état, see chapter I.C.).³

The restrictions have come in several forms at once. In the weeks after October 7 most pro-Palestinian protests, and protests expressing solidarity with civilians in Gaza were prohibited.⁴ Slogans and symbols were criminalized, and people have been arrested and charged on this basis.

¹ OVG Berlin-Brandenburg, ‘Pressemitteilung: Versammlung „Nakba77“ nur ortsfest zulässig’ (*berlin.de*, 15 May 2025).

² ‘Forensis’ <<https://counter-investigations.org/>>.

³ Deutscher Bundestag, Entschließungsantrag: Historische Verantwortung wahrnehmen – Jüdisches Leben in Deutschland schützen 2023 [Drucksache 20/9149] 2.

⁴ Abgeordnetenhaus Berlin, ‘Antwort Auf Schriftliche Anfrage Des Abgeordneten Ferat Koçak (LINKE): Palästina Solidarische Versammlungen Und Repression, Oktober 2023’.

The German domestic intelligence services classified organizations such as *Boycott, Divestment, Sanctions* (BDS), and the Jewish organization *Jüdische Stimme für gerechten Frieden in Nahost* as “gesichert extremistisch” meaning established to be extremist.⁵ Assemblies are banned, dissolved or heavily restricted, in one instance through a ban on the use of languages other than German or English.⁶ Through the adoption of the IHRA working definition of antisemitism,⁷ which human rights organizations⁸ and academics⁹ have sharply criticized, criticism of Israel can be treated as antisemitic. A reform of the nationality law added a requirement for applicants to acknowledge and uphold *Germany’s special historical responsibility*, which the government ties to the security and existence of Israel.¹⁰

These developments have drawn scrutiny from outside Germany. The Council of Europe Commissioner for Human Rights, Michael O’Flaherty, wrote to the German government to raise concerns about excessive police force against protesters and about restrictions on freedom of expression.¹¹ The UN Special Rapporteur on freedom of expression has critically commented on the situation as well.¹² *CIVICUS*, which tracks the state of civic space, downgraded Germany from ‘open’ to ‘narrowed’ in 2023 and to ‘obstructed’ in 2025.¹³

In reaction to this, the German state explains these restrictions in the language of the rule of law. It affirms its commitment to fundamental rights while pointing to the grounds on which those rights may be limited, namely public security and the threat of terrorism, and has used this

⁵ Kai Ambos and Jonathan Stelter, *Staatsräson Nach Gaza: Das Deutsch-Israelische Verhältnis Und Das Völkerrecht* (Campus Verlag 2026) 42; Bundesministerium des Innern, ‘Verfassungsschutzbericht 2024’ 280 by now redacted, following interim decision VG Berlin, 27.04.2026, 1L787/2.

⁶ Tabea Nalik, ‘Das vergessene Grundrecht: Gericht bestätigte Sprachverbot auf Palästina-Demo’ (*Legal Tribune Online*, 29.03.2025).

⁷ ‘What Is Antisemitism? | IHRA Working Definition’ (*IHRA*).

⁸ Amnesty International and others, ‘Stellungnahme zum Entschließungsantrag “Nie wieder ist jetzt: Jüdisches Leben in Deutschland schützen, bewahren und stärken”’ (2024).

⁹ Kai Ambos and others, ‘Die Implementation der IHRA-Arbeitsdefinition Antisemitismus ins deutsche Recht – eine rechtliche Beurteilung’ [2023] *Verfassungsblog*; Samir Abdallah and others, ‘Palestinian Rights and the IHRA-Definition of Antisemitism’ *The Guardian* (29 November 2020).

¹⁰ Bundesministerium des Innern, ‘Anwendungshinweise des BMI zum Staatsangehörigkeitsgesetz (StAG)’ (01.05.2025), see further chapters I.C.d. and III.C.

¹¹ Michael O’Flaherty Commissioner for Human Rights, ‘Letter to the Federal Minister of the Interior’.

¹² Irene Khan, ‘Visit to Germany’ (Human Rights Council 2026) A/HRC/62/67/Add.1.

¹³ Civicus, ‘Germany’ (*Civicus Monitor*, 12 September 2025).

framing in its reply to O’Flaherty and a series of Bundestag resolutions and statements.¹⁴ In contrast, the organizations subjected to the restrictions describe their aims as directed against violence, concretely against the Israeli military occupation of Palestinian land and the war crimes committed in the course of it, against German political and military support for Israel, and against the silencing of Palestinian voices in Germany.¹⁵

The restrictions operate through different mechanisms depending on the institutional context. In the arts and academia, for example, they frequently take the form of deplatforming.¹⁶ More broadly, however, they are often implemented through legal measures. This legal dimension is particularly significant, as the repression of protest movements in liberal democracies often takes legal form, which gives it legitimacy and fends off the criticism that more openly coercive measures would attract. In liberal democracies the tendency is for repression to run through legal and bureaucratic measures rather than open force.¹⁷ This thesis therefore asks how the law and legal reasoning operate in restricting the Palestine-solidarity movement in Berlin since October 2023.

It pursues this through two research questions. First, *which legal categories have authorities used to restrict pro-Palestinian assemblies and speech, and how have courts constrained, accepted, or reproduced those restrictions?* And second, *how do administrative and legal reasoning make these restrictions appear necessary, lawful and non-violent?*

This is not a purely doctrinal analysis of the legal mechanisms. Such an analysis would not be possible here, given the limited access to case-law. More importantly, it would remain within the legal order’s own terms. It is precisely within those terms that the violence embedded in the legal order – and the way its legal form obscures that violence – tends to be overlooked. The theoretical framework adopted in this thesis makes it possible to examine those underlying

¹⁴ From Alexander Dobrindt, ‘Reply to Mr. O’Flaherty, Commissioner for Human Rights CoE’ (23 June 2025); Deutscher Bundestag, ‘Antwort Der Bundesregierung: Herabstufung Deutschlands Im Civicus-Monitor’ [Drucksache 21/5301].

¹⁵ Palästina Spricht, ‘Über uns’ (*Palästina Spricht*); Jüdische Stimme, ‘Über Uns’ (*Jüdische Stimme für gerechten Frieden in Nahost*); ELSC, ‘About Us’ (*European Legal Support Center*).

¹⁶ Cf. Donatella della Porta, ‘Moral Panic and Repression: The Contentious Politics of Anti-Semitism in Germany’ (2024) 17 *Partecipazione e Conflitto – The Open Journal of Sociopolitical Studies* 276; Schirin Amir-Moazami, ‘Staatsräson Und Die Versicherheitlichung von Wissensproduktion’ in Anna Sabel and Mehmet Arbag (eds), *Verunsicherung* (transcript Verlag 2025).

¹⁷ Michael Hamilton, ‘The Management of Protest and Dissent’ *Handbook of Illiberalism* (1st edn, 2021) 395f; Christian Davenport, ‘State Repression and Political Order’ (2007) 10 *Annual Review of Political Science* 1, 12.

dynamics. It is built around Walter Benjamin, Judith Butler, and Robert Cover, three Jewish scholars who critically engage with legal violence and its obscuring function. I will analyze the case-law sensitized to what this framework makes visible that doctrinal analysis does not.

The thesis is divided in four parts. In Part I, I build the theoretical argument in three steps, asking first what violence is and how it relates to law, and second how this violence legitimates itself. Finally, I turn to the constitutional structures meant to contain it and examines whether the German *Staatsräson* and its commitment to Israel can be reconciled with them. Part II sets out the methodology and the data corpus, an analysis of publicly accessible case-law on restrictive measures in three fields of law: criminal law, assembly law and immigration law. In a further section, police violence is introduced as a related but methodologically distinct problem, since it leaves fewer judicial traces and appears instead through legal inaction and failures of accountability. In Part III I analyze the case corpus in view of the two research questions and discuss the case-specific findings, Part IV draws the conclusions.

This thesis does not question the necessity of protecting Jewish life or the legitimacy of considering security concerns. It focuses instead on how German institutions deploy the notion of Israel's safety to treat Palestine-solidarity as a security threat, with the result that this protection is denied in relation to Palestinian life. Given that what many human rights organizations call a genocide¹⁸ is still ongoing, and in light of the fact that Germany is a liberal democracy formally committed to fundamental rights and freedoms, this research is of especially high relevance right now. While existing research on these restrictions have focused on the scale of the measures and their formal legality¹⁹, I am taking a different angle. The movement at the center of the restriction understands its own activity as directed against violence, and is nonetheless cast as the violent party, as extremist, as a threat to public security, as antisemitic. Contesting a charge of this kind, as Judith Butler argues, means attending to how the allegation

¹⁸ 'Amnesty International Concludes Israel Is Committing Genocide against Palestinians in Gaza' (*Amnesty International*, 5 December 2024); UN Secretary General, 'Situation of Human Rights in the Palestinian Territories Occupied since 1967' (UN General Assembly 2025) A/80/492; 'B'Tselem and Physicians for Human Rights Israel: Israel Is Committing Genocide in the Gaza Strip' (*The Israeli Information Center for Human Rights in the Occupied Territories*, 28 July 2025).

¹⁹ Among others: Ambos and Stelter (n 4); Florian Meinel, 'Die Idee Der Staatsräson Im Neuesten Deutschen Recht: Ein Fehlurteil Des Verwaltungsgerichts Regensburg Zu Den Bekenntnisklauseln Im Reformierten Staatsangehörigkeitsrecht' [2025] *Verfassungsblog*.

of violence is used, “*not just ‘what it says’ but ‘what it is doing with what is said’*”²⁰. This is what the thesis attempts by analyzing the legal reasoning that carries the restrictions. While I do not mean to draw attention away from what is happening in Palestine, which is where I believe the focus belongs, I think the way a liberal democracy suppresses solidarity with Palestinians through its own law is part of how that situation is sustained and is worth understanding on its own terms.

Part I: Theoretical Framework

In Part I, I develop the theoretical framework that guides the empirical case analysis. It proceeds in three steps: (A) defining violence and using Benjamin to dismantle the paradox through which law claims to be the opposite of violence; (B) analyzing how legal violence legitimates itself and its targets, drawing on Martel’s reading of Benjamin, as well as Butler and Cover; and (C) moving to constitutional structures that are meant to contain legal violence, before introducing *Staatsräson* as a commitment positioned at their edge.

A. Violence, Law, and the State

This chapter develops the basis for the first foundational claim of the thesis, that the legal and administrative measures directed at the pro-Palestinian movement in Berlin cannot be adequately analyzed as either legitimate exercise of public authority or a deviation from it. Both assessments rest on the same premise, that law stands apart from violence, and that premise does not hold. The argument proceeds in three steps. It begins with the concept of state violence, tracing the dominant definitions and identifying their analytical limits for this thesis. It then turns to Walter Benjamin’s *Critique of Violence*, whose account of law-making and law-preserving violence grounds an understanding of legal order as structurally entangled with *Gewalt* rather than opposed to it. Finally, it examines Benjamin’s analysis of the police, the institutions where this entanglement becomes most visible and where the line between the legal authorization and the legal production of violence cannot be clearly drawn. The chapter concludes by asking what

²⁰ Judith Butler, *The Force of Non-Violence: An Ethico-Political Bind* (Verso Books 2020) 3.

follows. If law is not the antidote to violence but one of its forms, the question becomes how it operates, through what mechanisms it renders its own coercion invisible and necessary.

a. Defining State Violence

The idea of state monopoly on force refers to the state's claim that the authority to use physical force, or to authorize others to use it, is reserved to the state alone. In his 1919 lecture *Politics as a Vocation*, the German sociologist Max Weber canonically identified the monopoly on the legitimate use of physical force as one of the defining characteristics of the modern state.²¹ Importantly, he talks about *legitimate* force; the state's monopoly does not imply that it is the only actor to exercise force in practice. Instead, it signifies that the state alone possesses the authority to legitimize its use. This legitimacy of force, however, is not a natural or universal property of the force itself but it rather depends on its social recognition as rightful by those subject to the political order.²² Weber's account is a necessary starting point for thinking about state violence, but it leaves a decisive prior question unresolved: What exactly is violence?

That this is not a straightforward question is shown by the various texts written about the meaning of violence and the broad academic debate about its definition. Some stay close to the physical element of violence and understand the term as direct bodily force and injury; others include structural and symbolic forms. These two different approaches can be categorized as *violence as force* and *violence as violation*.²³

The former camp defends its narrow restriction on grounds of analytical precision, holding that a term stretched too far stops distinguishing violence from injustice in general. It concentrates on interpersonal force that inflicts physical injury, where force becomes violence once it produces harm rather than a legitimate end.²⁴ As Dewey put it, violence is force "when the dynamite charge blows up human beings instead of rocks".²⁵ Some accounts add that the harm must be deliberate and unwanted, which separates a punch from a surgical incision.²⁶ The difficulty is

²¹ Max Weber, *Politik als Beruf* (Duncker & Humblot 1926) 8.

²² Pauline Trouillard, 'Repressing the Protests through Law, Police and Discourse: The Example of the Yellow Vests' Movement in France' (2022) 30 *Journal of Contemporary European Studies* 506, 508.

²³ Vittorio Bufacchi, 'Two Concepts of Violence' (2005) 3 *Political Studies Review* 193.

²⁴ CAJ Coady, 'The Idea of Violence' (1986) 3 *Journal of Applied Philosophy* 3, 4.

²⁵ John Dewey, *The Middle Works of John Dewey*, 10: 1916-17 (2008) 246.

²⁶ Bufacchi (n18) 195f.

that this leans on the victim's recognition of harm. Where social conditions normalize suffering, people stop registering harm as violence at all,²⁷ and the narrow definition loses sight of exactly the erasure that concerns this thesis. That makes it both analytically thin and politically convenient, since it keeps normalized violence out of view.

The wider conception treats violence as violation rather than as physical force, often as a violation of rights. Galtung coined "structural violence" in his 1969 article *Violence, Peace and Peace Research*, defining violence as "the cause of the difference between the potential and the actual."²⁸ He has in mind avoidable social, political and economic conditions that keep people from realizing their capacities, the harm built into institutions and unequal distributions of power.

The usual objection is that this is too broad, however, this criticism does not fully capture the analytical distinction relevant here. Galtung's attention stays on socioeconomic deprivation and unrealized potential, and not on the legal and administrative mechanisms that suppress political expression and silence claims it makes possible.

This thesis therefore works with a conception that sits between the two, broader than direct bodily harm but narrower than Galtung's. The object of study, state measures against the pro-Palestinian movement in Berlin, involves direct physical force at protests, while the wider pattern of state action runs well beyond overt assault. A narrow definition would miss the legal and administrative mechanisms that restrict protest and leave it legally precarious. From Galtung the analysis keeps the insight that violence can be built into structures rather than attributed to a single act. To that it adds physical coercion, legal restrictions, administrative prohibitions, and the naming practices through which some uses of force count as violence while other vanish into the language of order and security. That last element – the classificatory dimension – is what neither the narrow definition nor Galtung theorizes.

Alongside these dominant approaches to violence as force/violation, some other conceptions have also emerged in the literature. One of these is what C. A. J. Coady identifies as a

²⁷ Evan Simpson, 'Social Norms and Aberrations: Violence and Some Related Social Facts' (1970) 81 *Ethics* 22, 29f.

²⁸ Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167, 168.

‘legitimist’ definition, on which force becomes violence only when it lacks lawful authorization, so that what counts as violence depends entirely on political authority and legality.²⁹ Cody develops this mainly through Robert Wolff³⁰, whom he faults for writing a political judgment into the definition itself. This thesis does not take up the legitimist definition as its own framework; doing so would be to reproduce the state’s own classificatory logic and place its coercive measures outside of critical scrutiny from the start. What makes it worth examining is that it describes a recurring state practice, the move of presenting one’s own force as lawful and necessary while casting dissent as violence. Who draws that line, and with what institutional consequences, is central to what this thesis investigates.³¹

Hannah Arendt sits somewhat apart from the definitional debate above, and her separation of power from violence is useful, precisely because it is limited in a way that is instructive. In *On Violence*, she describes power as relational, resting on a shared consensus, while violence is an instrument.³² By her definition, a movement taking to the streets – *acting in concert* – exercises power, while the state’s attempt to quell such a movement can amount to violence. Violence, she argues, can destroy power but never create it, and tends to signal the decline of political power rather than its strength.³³

This refuses the automatic coding of collective assembly as violent.³⁴ Its limit shows up in the setting this thesis examines. Arendt treats violence as fairly clear and observable and power as legible in the capacity to act together, so she says little about how the state names some acts violent and other not, or how legal and administrative practice produces the very violence it claims to respond to. She says little, too, about how law itself becomes a vehicle for violence, or how the state’s coercion can disappear into the neutral language of “public safety”. What is needed is a framework that treats law as one of violence’s primary forms rather than its opposite. Benjamin’s critique of violence offers that.

²⁹ Coady (n4) Which is reminiscent of Weber’s account of the state’s monopoly of legitimate force.

³⁰ Robert Paul Wolff, ‘On Violence’ (1969) 66 *The Journal of Philosophy* 601.

³¹ Judith Butler also engages critically with this phenomenon, as discussed in the chapter I.B.b. below

³² Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich Publishers 1970) 44ff.

³³ *ibid* 53ff.

³⁴ Which is a move that, as will be discussed later, is central to how the state responds to Pro-Palestinian protest in Berlin.

b. Benjamin's Critique of Violence

Subject of Walter Benjamin's 1921 essay *Critique of Violence*³⁵ (original title: *Zur Kritik der Gewalt*) is neither the common understanding of violence as physical force or harm nor the more comprehensive conception of violence as structural. For him violence is a relational concept. It only comes into existence when an act enters a certain kind of relationship; specifically, a relationship with law and justice. Outside of that relationship, the same act carries no specifically legal or juridical significance for Benjamin; simply is not violence in the meaningful sense he wants to examine. To him, law and violence are therefore inherently related.³⁶ The German word *Gewalt* can mean violence, but it can also refer to public force or the legitimate (coercive) power of a state (*Staatsgewalt*). Unlike Hannah Arendt, he deliberately uses the ambiguity between power and violence to show that legal authority (*Rechtsmacht*, i.e. the power of law) and the violence through which law instates and preserves itself are not cleanly separable.³⁷

Means-end critique

Benjamin contends that the way legal tradition approaches violence is confined to an instrumentalist framework. It is conventionally asked whether violence is justified, whether it serves a good end, or whether it is proportional. In the tradition of *natural law*, violent means would be employed for just ends; legitimate authority is regarded as possessing a natural right to employ coercive force (*ius coercendi*), making such violence unproblematic in itself when exercised by that authority, except when it is misused for unjust purposes.³⁸ The legitimate aim of a legal order is to establish a state free of violence; accordingly, the question is whether violence constitutes an appropriate means to achieve this end. According to Benjamin, natural law evaluates violence solely on the basis of its instrumental appropriateness. It claims to

³⁵ Walter Benjamin, 'Critique of Violence' in Marcus Bullock and Michael W Jennings (eds), *Walter Benjamin: Selected Writings, 1: 1913-1926* (The Belknap Press of Harvard University Press 1996).

³⁶ Walter Benjamin, 'Critique of Violence' in Marcus Bullock and Michael W Jennings (eds), *Walter Benjamin: Selected Writings, 1: 1913-1926* (The Belknap Press of Harvard University Press 1996) 236.

³⁷ Derrida's reading of Benjamin in „Force of Law“ (1989/1990) makes the *Gewalt* ambiguity central to his argument that law's authority rests on what he calls a “mystical foundation” – a founding moment that cannot itself be legally legitimated. While his reading has been enormously influential, particularly in critical legal studies, the present analysis follows Benjamin's own framework more closely rather than the Derridean reception, which shifts the emphasis from Benjamin's categories of mythical and divine violence towards questions of undecidability and conditions of justice

³⁸ Benjamin (n17) 236f.

constrain violence in the name of justice, but by treating it as a natural right it ends up entrenching it; the means – end schema inherent in it thus leads to a “paradoxical naturalization of violence”.³⁹

The *positive law* tradition works in the same means-end framework but tends to presuppose the legitimacy of the ends pursued, treating them as politically settled and focuses its evaluative work on the means; violence is therefore legitimate if it authorized by law. In similar fashion as in the above-mentioned conception of ‘legitivist’ violence, it is the state that decides which violence is legitimate; this does not eliminate violence, it just monopolizes it.⁴⁰ Benjamin, however, questions why we assume that violence must be judged in terms of means and ends at all. This framework already predetermines how we understand violence: as a neutral tool that can be applied legitimately when justified. The relevance of this for the present thesis becomes clear when one considers legal proportionality analysis operates within precisely this schema. It asks whether a restrictive measure is suitable, necessary, and proportionate to the end pursued, but it does not ask whether the framing of the situation as one requiring a response in the first place was itself a political choice. This question Benjamin’s critique makes possible to raise.

Law-making and law-preserving violence

Benjamin’s central claim is that violence is not external to law. Violence founds the legal order and preserves it, which means that law cannot be understood as simply a restraint on violence but must be seen as one of its forms. All violence within the legal order, he argues, is either *law-making* or *law-preserving*.⁴¹

Law-making violence is the violence that creates, founds or replaces the legal order. It is the kind of coercive action through which a new set of rules becomes authoritative, i.e. through which “law” is established as law. Benjamin treats this as a structural feature of legal history. New law never simply emerges through itself, from the logic of an existing legality, it is always inaugurated through some kind of coercion.

Law-preserving violence, on the other hand, is violence that maintains an existing legal order. It

³⁹ Axel Honneth, ‘Zur Kritik Der Gewalt’ *Benjamin-Handbuch* (Lindner, Burkhardt 2006) 199.

⁴⁰ The means-end framework of the positive law tradition differs from the legitimist definition insofar as it is an evaluative claim, rather than a definitional one; it accepts that state force is violence but says that violence is *justified* when legally authorized.

⁴¹ Benjamin (n31) 241, 243.

is the coercive enforcement that keeps the current regime of law in place and subjects citizens to the laws established by law-making violence. This happens through punishment, policing, and other mechanisms that ensure that the law continues to operate.

The interplay between these two types of violence that Benjamin observes is an eternal dialectical oscillation: the founding act establishes a boundary which creates the conditions for transgression, and law-preserving violence exists to defend against the counter-violence that this boundary makes possible.⁴² The cycle continues until the counter-violence is either suppressed entirely or overwhelms the existing order through new law-making (i.e. a new polity/sovereignty), thus starting the whole cycle again.⁴³

Something rotten in the law

This cycle is not a temporary condition that law might eventually overcome, it is a permanent state that is built into its structure. It can be exposed by asking the simple question: why is law binding? The answer to this would be because it was enacted by a legitimate authority. If one asks why that authority is legitimate the answer is: because the legal order recognizes it as such. It is in this circular logic where Benjamin diagnoses something “rotten (in German: *morsch*) in the law”⁴⁴, meaning that the law cannot explain or justify its own violence. It describes the gap between what law claims to be (legitimate, reasonable, just) and what actually holds it up, which is the founding violence it can never fully justify or escape. Because the founding act is unjustifiable on its own terms the authority derived from it is always contingent, never absolute. The boundary between legitimate and illegitimate violence is therefore unstable in law. Law claims to regulate violence, but in the end depends on it itself: violence is legitimized through law, and law is preserved through violence. This brittle structure leads Benjamin to the conclusion that law can never be fully just, as there is always a moment of arbitrariness at law’s foundation.⁴⁵

⁴² *ibid* 251.

⁴³ William Watkin, ‘Agamben, Benjamin and the Indifference of Violence’ in Brendan Moran and Carlo Salzani (eds), *Towards the Critique of Violence - Walter Benjamin and Giorgio Agamben* (Bloomsbury Publishing PLC) 143.

⁴⁴ Benjamin (n31) 242.

⁴⁵ Matthew Abbott, ‘The Creature before the Law: Notes on Walter Benjamin’s “Critique of Violence.”’ (2008) 16 *Colloquy* 80, 84ff.

Mythic violence and the anxiety of law

Benjamin calls this founding violence *mythic*.⁴⁶ What makes it mythic is the way it operates. It presents contingent, constructed violence as necessary and inevitable. To illustrate this, Benjamin turns to the Ancient Greek myth of Niobe who boasted that she surpassed the goddess Leto by virtue of having more children. In response, Apollo and Artemis killed all of Niobe's children, leaving her to turn into a weeping rock as a permanent monument to the boundary the gods created; a *fossilization* of law. Benjamin's point is that the gods did not act to punish a crime in a legal sense; they acted to establish a boundary between the divine and the human and then presented that boundary as eternal and self-evident.

As the James Martel explains, mythic violence is entirely a product of the human world, it "seems to come out of nowhere and has no source besides humanity's own conception".⁴⁷ The law it founds therefore rests on nothing beyond its own positing, which is precisely what the rottenness describes.⁴⁸ Benjamin places it in a state of "mythic ambiguity"⁴⁹, always vulnerable to exposure and change. To conceal this, the law disguises itself as inevitable fate, though the disguise is never total. The law knows what it is, which is why Martel describes it as eternally insecure and anxious.⁵⁰ Its authority is a substitute for a legitimacy it does not possess, which means it must continuously re-assert itself through violence. But this re-assertion cannot solve the problem; no amount of violence can settle the matter, so it remains trapped in the endless cycle described above. The only thing that can break this cycle is what Benjamin calls *divine violence*.⁵¹

This concept is notoriously difficult and heavily contested but can be understood as a form of violence that, in contrast to mythical violence, does not instantiate truths (myths) in the world and is directed not at the people but against law itself.⁵² Martel reads it, in a secular register, as a

⁴⁶ Benjamin (n31) 248f.

⁴⁷ James R Martel, *The One and Only Law: Walter Benjamin and the Second Commandment* (University of Michigan Press 2014) 27.

⁴⁸ Gabriela Azevedo, Ludmila Franca-Lipke and James Martel, 'Benjamin Still Makes Sense: Forum on the Actuality of Benjamin's "Critique of Violence" at Its Centenary, Introduction - Why We Need Benjamin More than Ever' (2023) 45 *Contexto Internacional* 1, 6f; Brad Evans, 'Walter Benjamin's The Critique of Violence. A Conversation with James Martel' (2024) 112 *The Philosopher* 62, 64.

⁴⁹ Benjamin (n 36) 249.

⁵⁰ Azevedo, Franca-Lipke and Martel (n43) 7f; Evans (n 43) 64.

⁵¹ Benjamin (n31) 249f.

⁵² James R Martel, *Divine Violence: Walter Benjamin and the Eschatology of Sovereignty* (Routledge 2012) 52.

kind of anarchism, an ongoing resistance to the falsehoods mythic violence imposes.⁵³ While I find this debate fascinating, phenomena of law-making and -preserving violence seem more relevant to this thesis, which is why I will not further engage with divine violence in this work.⁵⁴ What is interesting to this thesis is not so much what might break the cycle but the institution that keeps it running: the police.

Police

Before developing Benjamin's account further, a short engagement with how protest policing is analyzed in sociological literature helps clarify what his framework makes visible that others do not. In contemporary protest research, policing strategies are frequently analyzed through the distinction developed by Donatella della Porta and Herbert Reiter between *Staatspolizei* (state policing) and *Bürgerpolizei* (citizen policing).⁵⁵ The *Staatspolizei* refers to a state-centered, order-oriented model of policing, in which the police understand themselves primarily as an instrument of state authority, institutional protection, and social control. *Bürgerpolizei*, by contrast, is grounded in a broader service-oriented understanding of policing, according to which the police are meant to facilitate public rights and maintain public order through cooperation rather than confrontation. Within this second model, one of the defining operational features is *negotiated management*, a proactive dialogue with demonstrators intended to facilitate the exercise of fundamental rights and prevent violence through de-escalation.⁵⁶ Theoretically, this shift marks a transition from confrontational control towards a consensus-based accompaniment of public protest. The typology assumes that police can move along a spectrum between the two models, but Benjamin's account suggests this distinction is structurally unavailable.

⁵³ *ibid* 131ff; Evans (n43) 66.

⁵⁴ One might nevertheless ask whether certain protest movements could, in a limited sense, resemble what Benjamin calls divine violence, not by founding a new legal order, but by exposing its contingency and disrupting its claim to inevitability. Martel himself gestures in this direction when discussing moments of collective political rupture such as Tahrir Square. Whether pro-Palestinian solidarity movements could partially fit this logic is an intriguing question, but there are reasons for caution. Many of Martel's paradigm cases concern events that directly transform a society's own political structure, whereas solidarity-movements oriented toward events elsewhere may not possess equivalent transformative potential. The ambiguity and controversy around Benjamin's divine violence is a further reason not to pursue this line here.

⁵⁵ Donatella Della Porta and Herbert Reiter, *Policing Protest: The Control of Mass Demonstrations in Western Democracies* (University of Minnesota press 1998) 189f; Martin Winter, *Politik der Polizei: Macht und Funktion der Polizei in der Bundesrepublik Deutschland* (Lit 1998) 189f.

⁵⁶ Della Porta and Reiter (n50) 51, 190f.

To him, the police are a very peculiar subject because they subvert the separation between law-making and law-preserving violence within their assigned competences.⁵⁷ The police's evident role is the implementation of laws, prevention of danger and maintenance of order, which are classic law-preserving qualities. Benjamin observes, however, that the police often act in situations where the law is not definitively clear. They work with vague legal terms (such as “for security reasons”⁵⁸), are tasked to intervene pre-emptively and authorized to make decisions at their own discretion; they effectively create law in the moment of its application. This discretion is a technical necessity within modern legal systems, as the law has to regulate more general situations that need to be subsumed in individual cases.⁵⁹ Benjamin's critique, however, goes further than that. He argues police appear *where law cannot go*, e.g. because it is too rigid or slow.⁶⁰ It is therefore not bound by the law in the way it claims but is rather legitimizing itself. This poses, as Benjamin argues, a particular problem for democratic states governed by the rule of law, compared to monarchic systems.⁶¹ To him, the attempts of the liberal constitutional state to rein in police discretion through principles such as proportionality, rule of law, judicial review, are in vain. It is precisely within police use of force where it becomes clear to him that this containment is never fully successful. Structurally, the police operate in an area that one might today describe as a grey zone of preventive security law. The more a democratic state insists on the rule of law as its legitimating principle, the more it needs to conceal what the police actually are – an institution that exercises law-making violence in the name of legal preservation, structurally beyond the reach of the accountability mechanisms designed to contain it.⁶²

It is here that Benjamin's observation about something “rotten in the law” becomes directly relevant to the police, and where his analysis goes beyond what della Porta and Reiter's typology can capture. The rottenness Benjamin identifies is not a contingent, avoidable defect in the way a particular police force operates, meaning that it would depend on the individual officer, but one

⁵⁷ Benjamin (n31) 242ff.

⁵⁸ *ibid* 243.

⁵⁹ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 309.

⁶⁰ Benjamin (n31) 243.

⁶¹ *ibid*.

⁶² *ibid*.

structurally built into it.⁶³ What makes the police a prominent case for this is that it routinely shows that the establishment and enforcement of the law are not clearly separated, and that violence operates under the guise of the law without being fully bound by it. The rot is the practically effective blurring of the line between legitimate and illegitimate force. In everyday operation of the police, one can no longer always tell whether something they do is applying existing law or creating it. In comparison to the death penalty, which Benjamin names as the most legible site of mythic violence, routine police enforcement produces “a less visible, but not less violent violence”⁶⁴.

Benjamin’s critique allows this thesis to ask whether the coercion directed at the Palestinian movement in Berlin should be understood not as a deviation from legality, but as one of the ways legality operates. Law-making and law-preserving violence, the rottenness the legal structure conceals, the anxiety beneath law’s self-assertion, and the police as the institution where these dynamics gather most visibly together demonstrate that what presents itself as neutral legal administration is always entangled with *Gewalt*. So, if legal violence is present in the repression of the movement, the question that follows is how it produces and legitimizes its restrictions.

B. Legitimizing Legal Violence: Idolatry, Naming, and Interpretation

While the previous chapter established that legal and administrative action is structurally entangled with violence, this chapter asks how that violence produces itself as lawful, necessary, and even non-violent. The question must not simply be why the state uses coercive force, but how it manages the appearances of that force; how legal and administrative reasoning classifies certain assemblies as threatening, strips certain subjects of political legibility, and attributes the violence of the state’s response to the conduct it is responding to.

The chapter develops this through three theorists. James Martel’s account explains how sovereignty converts contingency into an appearance of inevitability. Judith Butler clarifies how

⁶³ Abbott (n40) 84f.

⁶⁴ Anselm Haverkamp, ‘How to Take It (and Do the Right Thing): Violence and the Mournful Mind in Benjamin’s Critique of Violence’ (1991) 13 1159, 1165.

the practice of *naming* constitutes subjects by withdrawing their eligibility to appear and discharging violence onto those it targets. Robert Cover shows how legal interpretation institutionalizes this through jurispathic practice, destroying competing normative worlds while presenting the result as neutral legal determination. Together, these accounts allow the following empirical chapters to ask not only what decisions were made, but how legal and administrative documents perform the work of idolatry, naming, and violence through legal interpretation.

a. Idolatrous sovereignty and the phantasmagoria

The previous chapter has established how mythical violence obscures its own violence and produces its own necessity. In this chapter, I discuss how Martel takes Benjamin's account and uses it to theorize sovereignty as a specific political form that mythical violence takes; a connection that will be used here diagnostically, to explain the mechanisms behind administrative restrictions, rather than simply describe those restrictions as violent. Even though I do not follow him to his normative anarchist conclusions, his conception of phantasmagoric realities is of substantial relevance to this thesis. For Martel, mythic violence is not to be understood as a description of specific acts but an explanation of how and why power operates the way it does.⁶⁵ As stated above, one of Martel's central contributions is the connection he draws between mythic violence and sovereignty.⁶⁶ Benjamin does not use the term sovereignty explicitly. What can be reconstructed from his argument is the state's claim to hold the monopoly on legitimate law-making violence, a claim that, for him, itself has no foundation apart from its own assertion. For Martel, sovereignty is "a kind of idol or fetish"⁶⁷, the projection of meaning onto an object and then treating this projection as the objective truth. The environment that such fetishism and idolatry create is what Martel and Benjamin call the *phantasmagoria*.

The term phantasmagoria comes from a type of horror theatre performed in the nineteenth century, using an early type of image projector called *lanterna magica* to project ghostly images

⁶⁵ James Martel, 'Why Is Benjamin the Right Thinker for Our Political Moment?' in Nathan Ross (ed), *The Palgrave Walter Benjamin Handbook* (Springer Nature Switzerland 2024) 482.

⁶⁶ Martel, *Divine Violence* (n47) 11f, 47ff.

⁶⁷ *ibid* 11.

of the dead, meant to create séance-like illusions.⁶⁸ In political theory, phantasmagoria refers to an illusory, dream-like world that hides the underlying conditions of what it's made of.⁶⁹ To Benjamin, the phantasmagoria means the cumulative environment that such projections produce; what passes for reality in each moment, experienced as self-evidently true because it is so pervasive.

Whereas Benjamin originally uses this term to describe the destructive effects of commodity fetishism⁷⁰, developing further on Marx's original use of the word, Martel transfers it to the workings of mythical violence and sovereignty.⁷¹ In his work, he illustrates this with an analogy of a water fountain: sovereignty is like the spectacle of the fountain, the animated and cascading water, and the political is the water that composes it. The two seem inseparable, but they are not identical. At the periphery of the fountain, the water is visible as itself – “distinct if banal and barely noticed”⁷². What gets obscured is the contingent political character of sovereign decisions. When the fountain is running its spectacle, the water looks like it exists only as part of the display, you cannot easily see it as something with its own properties and directions. What sovereignty does, as argues Martel, is to convert its own political character into an appearance of necessity. It does not present itself as one possible arrangement among others but as the only possible ground of legitimate political life. Martel makes clear in *Divine Violence* that he believes sovereignty is a particularly resilient phantasmagoria, one that even liberal thinkers treat as necessary and synonymous with politics.⁷³ He develops this argument toward a normative claim about de-centering sovereignty and non-idolatrous politics. That normative agenda lies outside the scope of this thesis. What the framework does provide, however, is an account of how sovereign authority produces an appearance of necessity, and it is this diagnostic dimension that the following chapters apply to the German context.

Establishing that sovereign authority produces an appearance of necessity explains the structural condition within which restrictions on Palestinian solidarity operate. What it does not yet explain

⁶⁸ Nele Wynants, ‘Spectral Illusions: Ghostly Presence in Phantasmagoria Shows’ in James Frieze (ed), *Reframing Immersive Theatre* (Palgrave Macmillan UK 2016).

⁶⁹ Tom Gunning, ‘Illusions Past and Future: The Phantasmagoria and Its Specters’ 7ff.

⁷⁰ *ibid* 11ff.

⁷¹ Martel, *Divine Violence* (n47) 51f.

⁷² *ibid* 12.

⁷³ *ibid* 5.

is the specific mechanism through which that condition is enacted; how particular acts, assemblies and expressions come to be named as threatening and violent within the legal-administrative framework. To answer this question, this thesis draws on Judith Butler in the following chapter.

b. Naming of Violence and Production of Subjectivity

Judith Butler's reading of Benjamin's "Critique of Violence" is especially relevant here because of Butler's own positionality. In *Parting Ways*, Butler draws on Benjamin, to argue that criticism of Zionism can emerge from within Jewish ethical and intellectual traditions and challenges the equation of criticism of Israel with antisemitism.⁷⁴ Reading Benjamin from inside a Jewish tradition critical of state power is what makes their⁷⁵ account particularly useful for this thesis, especially given how central the antisemitism charge is to the repression this thesis examines.

This section traces Butler's account of "naming violence" in three steps. It begins with what is at stake when assemblies are classified as violent, which Butler approaches through the *right to appear*. It then turns to the framework that gives such naming authority and renders legal violence invisible. It ends with Butler's reading of Niobe, showing how legal classification produces the threatening subject rather than finding one already there

For this thesis, Butler's account of "naming violence" is particularly useful because it shows how the term 'violence' is not a neutral, monolithic concept with a clear definition. Instead, its meaning is politically contested and produced through competing acts of naming and framing. They demonstrate the phenomenon of states and institutions "calling 'violent' any number of expressions or political dissent, or of opposition to the state."⁷⁶ Particularly demonstrations, assemblies or boycotts are subject to this practice, even when they rely on disruption rather than physical force.⁷⁷

⁷⁴ Judith Butler, *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press 2012) 1ff. See in this regard also among others Yesayah Leibowitz: Sara Ivry, 'Revisiting Yeshayahu Leibowitz' (*JSTOR Daily*, 18.10.2023).

⁷⁵ Butler uses they/them pronouns, which are used throughout this thesis accordingly.

⁷⁶ Butler, *The Force of Nonviolence* (n20) 2f.

⁷⁷ *ibid.*

Before explaining the details of how this takes place on a legal-administrative level, it is worth examining what is withdrawn through such acts of naming. When an assembly is designated as violent or threatening, it loses its status as a legitimate political act, and with it, the claim of those assembled to appear in public as recognized political subjects. Butler gives us a useful term for this: the *right to appear*.⁷⁸ When people gather in the streets for a collective cause, their assembly expresses indignation and shows, in Butler's words, that *they are not disposable*, meaning that their presence in public space asserts a claim to recognition that resists being pushed out of political visibility.⁷⁹ What they mean by the 'right to appear' is not primarily a positive legal entitlement, such as the freedom of assembly or freedom of opinion in a legal sense. It is closer to what Arendt called "the right to have rights"⁸⁰, so the condition of possibility for having any rights at all, and names the more basic condition under which bodies can appear in public as politically legible subjects.⁸¹ To Butler, this is also performative, meaning it is not granted by a prior legal framework and then exercised, but rather enacted through the act of appearing itself. The codified freedoms of opinion and assembly, such as Article 5 or 8 of the German Basic Law (*Grundgesetz, GG*), can be read, for the purposes of this thesis, as doctrinal forms through which this more basic political claim is partially protected. This distinction is relevant, because Butler further qualifies the right to appear by the factor of eligibility. They argue that the right to appear is not actually a universal right, as it is propagated to be. It is "tacitly supported by regulatory schemes that qualify only certain subjects as eligible to exercise that right."⁸² The "universal" right to appear turns out to apply only to those whose mode of appearing conforms to what the dominant framework considers acceptable public presentation.⁸³ The significance of the concept of the right to appear is, therefore, that the legal right can formally protect a right while the regulatory eligibility structure effectively withdraws it from certain, often marginalized, populations.

Butler observes a similar dynamic in the process of determining what is made out to be 'violent' and what is not. They agree with Benjamin on the idea that one cannot accept 'violence' as a

⁷⁸ Judith Butler, *Notes towards a Performative Theory of Assembly* (Harvard University Press 2015) 24f.

⁷⁹ *ibid* 25.

⁸⁰ Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft: Antisemitismus, Imperialismus, Totalitarismus* (Piper 2023).

⁸¹ Butler, *Notes towards a Performative Theory of Assembly* (n74) 48f.

⁸² *ibid* 50.

⁸³ As an example, they name the wearing of religious symbols across different religions and their different treatment.

neutral term and only talk about it in terms of justification. What we understand as ‘violence’ is always defined by the framework it is embedded in.⁸⁴ This framework can be understood as determined by who has the authority to name something as ‘violence’ and what counts as baseline or default state against which ‘violence’ is measured. Legislators, courts, the police, all operate within a framework that grants them definitional authority. The status quo – meaning existing law, state power etc. – is treated as a neutral baseline; anything that disturbs it appears as an intrusion, a threat, something potentially violent. The violence already built into the status quo, as Benjamin shows, becomes invisible precisely because it is the baseline and not a deviation from it. Legal violence therefore gets occluded and not recognized as violence; it can even rename its own violent actions as justifiable or legitimate.⁸⁵ Butler calls this distortion a process of *discharging and externalizing* of violence onto non-violent action⁸⁶, which means that the framework takes something non-violent and calls it violent, so the violence of the framework’s own response appears as mere reaction to a prior threat. Designating a movement as ‘violent’ comes with a repertoire of responses that are thereby legitimized and would otherwise be perceived as violence, such as surveillance, bans, prosecutions or deportations.⁸⁷

In this context, Butler also makes use of the term *phantasmagoria*, although with slightly different meaning. As discussed above, Martel uses phantasmagoria to describe the way sovereign power projects an image of permanence and necessity that conceals its own contingency and violence. What Butler means by that term is the construction of a political reality within which something that is directed against violence gets reclassified as itself being violence. As an example, they name the Palestinian critique of colonial violence, or the struggles for equality and freedom by the Black Lives Matter-movement.⁸⁸ What these two accounts share is a mechanism of inversion and particularly the function of concealment. Both describe a form of misrecognition that makes violence appear as something other than what it is.

⁸⁴ Butler, *The Force of Nonviolence* (n72) 136.

⁸⁵ *ibid* 132.; with this, they are directly opposing the ‘legitivist’ conception of violence laid out in Chapter A. In *The Force of Nonviolence*, they state clearly that not starting by interrogating the justificatory framework and its historical exclusions, one risks reproducing the very legitimacy structures that make institutional violence look non-violent.

⁸⁶ *ibid* 139 Meaning no physical force.

⁸⁷ *ibid* 5.

⁸⁸ *ibid* 23f.

Butler's account mostly takes place on the level of public discourse and perception. What was laid out in this chapter so far provides the analytical tools to understand that when, for example, an assembly is dispersed, the event is already framed in a certain way as it enters public discourse. Their reading of Benjamin's Niobe tale and its connection to mythical violence, however, helps us understand as well how the naming practice can operate on a legal-administrative level through legal subject-production. For Butler, the gods' violence toward Niobe establishes law, but crucially, it does so by making her believe she caused her own punishment. Before the gods intervene, Niobe is just someone who made a hubristic claim. There is no law she has broken, because the law does not yet exist.⁸⁹ The gods' violent response does not punish a pre-existing offense against a pre-existing rule; it establishes the rule retroactively and simultaneously constitutes Niobe as the guilty party who deserved it. The violence is then attributed back to her own action; she is made to appear as the cause of her suffering. Through this, argues Butler, she becomes a legal subject.⁹⁰ They explain,

“[t]o be a subject within these terms is to take responsibility for a violence that precedes the subject and whose operation is occluded by the subject who comes to attribute the violence she suffers to her own acts”.⁹¹

What Butler points to with this argument is the reversal of the commonly expected logic, or rather the obscuring of that reversal.⁹² Beyond the myth of Niobe, this provides an important step in understanding how Butler's naming practice functions within the legal-administrative context. It is a schematic account of how legal authority can simultaneously establish a rule, designate a subject as having violated it, and attribute the violence of its own response back to the subject's conduct. The same logic can operate wherever legal classification does more than describe an existing state of affairs and instead produces the subject it names.

An assembly ban can illustrate this. The sequence is expected to be in the following way: there is an assembly, the assembly is perceived as threatening, a ban is issued as a protective response – according to the legal logic, the threat comes prior to the consequence. However, when

⁸⁹ Butler's reconstruction seems to operate within a legal-positivist rather than natural framework, in which normative order is understood as produced through legal and political acts rather than pre-existing them.

⁹⁰ Judith Butler, 'Walter Benjamin and the Critique of Violence' *Parting Ways: Jewishness and the Critique of Zionism* (Columbia University Press 2012) 78f.

⁹¹ *ibid* 79.

⁹² *ibid*.

authorities designate an assembly as a threat to public order, e.g. before it has taken place, there is, strictly speaking, no prior offense; the assembly has not yet happened, and the threat it supposedly poses is a projection rather than a demonstrated fact. This is not to say that pre-emptive danger assessments per se are invalid or incapable of being justified. But what Benjamin and Butler show is a structural possibility within certain political contexts to reverse this sequence. In such instances, the legal and administrative act of classification *produces* the threatening subject; the assembly becomes a threat through the interpretive act that names it as one. The law's response then appears as a justified reaction to a danger. The violence of the ban is attributed to the assembly's threatening character, which the ban itself brought into legal existence.

Understanding the violence that legal interpretation carries is a crucial and necessary bridge for the endeavor of applying the theoretical framework laid out in this and the previous chapters to judicial documents and administrative reasonings. Butler acknowledges this as well and refers to the works of legal scholar Robert Cover.⁹³ The next chapter will turn to his account of legal interpretation and jurispathy to examine how this violence is institutionally reproduced within judicial and administrative documents, how courts and authorities, in determining what counts as law, systematically suppress competing normative frameworks, and how this suppression is concealed within the form of neutral legal determination.

c. Legal Interpretation and Jurispathy

While Robert Cover does not directly reference Walter Benjamin, he also engages with the violence of law. As a legal scholar, he developed a framework for reading judicial documents that takes seriously their legal form while simultaneously showing that this form conceals something, by pointing not at what they *say*, but what they *do*. In his 1986 work *Violence and the Word*, he argues that legal interpretation is inseparable from the violence it authorizes. Judicial (and institutional)⁹⁴ interpretations do not merely produce meaning but function as mandates for the coercive action that follows. He sets up this argument with his opening line:

⁹³ Butler, *The Force of Nonviolence* (n72) 130ff.

⁹⁴ Cover speaks about legal interpretation generally but focuses on the role of judges. My analysis will not remain limited to judicial decision

“Legal interpretation takes place in a field of pain and death”.⁹⁵ I.e. when a judge interprets law, it frequently results in the imposition of organized legal violence; it is connected to prisons, police, evictions, deportations, forced compliance, etc. Cover observes that the relationship between legal word and violent deed is mediated by what he calls a structure of ‘social cooperation’, which describes the coordinated functioning of persons within the institutional structure of law and enforcement.⁹⁶ In his words, legal interpretation is *bonded*, meaning it is always bound to the *deeds* it implies and to the institutional structures required to carry those deeds out.⁹⁷ The coercive result of this interpretation is what makes it *law* rather than a textual or intellectual commentary. What this means for the analysis of protest policing is that a court ruling or an administrative ban exist not separately from police violence in the streets, but at different moments of an institutional chain. The legal form is not incidental to the repression, but rather organizes, authorizes and legitimates it.

However, this does not mean legal interpretation produces a common and coherent meaning shared by everyone involved. In *Nomos and Narrative*, Cover rejects the idea that ‘law’ is only what courts say it is. Creation of legal meaning – *jurisgenesis* – can take place outside of official state institutions, wherever communities attach normative meaning to something, and thus generate their own understanding of what is lawful and unlawful (their own *nomos*).⁹⁸ To Cover, there is therefore not “one law”, but multiple legal meanings and interpretations. This plurality of normative worlds that *jurisgenesis* produces is routinely misread as a sign that the law is unsettled, a gap to be closed by an authoritative ruling, as if there were one law whose correct meaning was waiting to be identified.⁹⁹ For Cover this is misdescribing the process. When a court is speaking on a legal question it is not simply clarifying law but destroying the competing legal meanings generated by communities whose normative worlds diverge from the state’s. This is what Cover calls the *jurispathic* function of courts.¹⁰⁰ They suppress the normative plurality in favor of one authoritative version, and they do it through organized legal violence.¹⁰¹ This suppression conceals its own character as an act of political power by presenting itself as neutral

⁹⁵ Robert Cover, ‘Violence and the Word’ (1986) 95 The Yale Law Journal 1601, 1601.

⁹⁶ *ibid* 1617f.

⁹⁷ *ibid*.

⁹⁸ Robert Cover, ‘Nomos and Narrative’ (1983) 97 Harvard Law Review 4, 11ff.

⁹⁹ *ibid* 42.

¹⁰⁰ *ibid* 40ff.

¹⁰¹ Cover (n91) 1629.

legal determination. In contrast to the previous chapters which addressed this obscuring function on a systemic level, Cover's account operates at the level of institutions themselves. For the analysis of judicial and administrative decisions, it allows us to look for a systemic suppression of a communities' normative world behind the form of neutral legal interpretation, one that presents itself as necessary rather than a choice.¹⁰²

Cover wants legal interpreters to confront their complicity in violence. He argues that legal texts tend to preserve the perspective of justification, not the perspective of the suffering that interpretation can set in motion. Violence is translated into legal language, and in that translation its experiential reality is often diminished and obscured.¹⁰³ While Cover discusses this mainly in the realm of criminal law, the underlying point reaches further. He asserts in a footnote that his framework does not require every interpretive act to carry the immediate impact of a criminal trial. It is enough, on his account, that where people care strongly about an outcome and are prepared to act on it, state officials are willing and able to respond with force to control their conduct.¹⁰⁴

As flagged at the outset of this chapter, this thesis treats administrative as well as judicial decisions. The move beyond Cover's primary focus on judges is not a departure from his argument but an application of its own logic. Cover anticipates it himself in the opening footnote of *Violence and the Word*, where he writes that "the violence judges deploy as instruments of [the state] necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence."¹⁰⁵ Legal interpretation itself is therefore not limited to judges; anyone who interprets law, gets implicated in the structure of judicial violence. In addition to the institutional line between judges and the administrative apparatus, Sarat and Kearns draw a qualitative distinction. Judges, on their reading of Cover, can be jurisgenerative, able to resist the violence of administration and keep open the plurality that jurispathic law forecloses, administrative authorities structurally lack this capacity, given their deference to hierarchical command and their political position within the state.¹⁰⁶ For the

¹⁰² Austin Sarat and Thomas R Kearns, *Law's Violence* (University of Michigan Press 1998) 230.

¹⁰³ Cover (n91) 1608, 1629.

¹⁰⁴ *ibid* 1607, fn 16.

¹⁰⁵ *ibid* 1601, fn 1.

¹⁰⁶ Sarat and Kearns (n89) 230, fn. 88, referencing Cover *Nomos and Narrative*, 59.

argument of this thesis this distinction is not an obstacle. This capacity that Sarat and Kearns point at, comes from the specific position that judges hold within the structure of a democratic rule-of-law state, that is accompanied by certain institutional authority. The reason a judge's act seems separate from violence is because they are seen as an interpreter of law rather than a participant in the force that follows from it. Cover's argument is aimed precisely at this apparent separation between interpretation and violence. This position that judges hold is one of three constitutive elements of legal interpretation that Cover lays out: word (the interpretive act), deed (the violent consequence it authorizes or resists), and role (the institutional position from which the interpreter acts).¹⁰⁷ This role-specificity that is built into the framework allows one to analyze also administrative interpretation on its own terms rather than as a deficient version of judicial interpretation. The administrative officer has a different role, a different word-deed relationship, but is nevertheless entangled in the violence.

The different role and word-deed relationship is visible in the structure of the administrative jurisdiction in most liberal democracies. The first authority to speak on an issue is the relevant authority or agency; the court's involvement is often secondary via review or appeal, compared to criminal law where it is a judge who issues the first authoritative ruling. A decision by an immigration officer is itself an act of legal interpretation. The officer reads the relevant rules, applies them to a case, and issues a determination. That determination then functions as a mandate for deeds carried out by others.¹⁰⁸ A deportation is processed on the basis of that initial assessment and is executed through later institutional steps, within the wider chain of "social cooperation". The officer who interprets and the officer who removes the person are not the same people, and they act at different points in the chain.

Cover's framework shows that the wider the word-deed gap grows, the less visible the connection between interpretation and violence becomes. When the person who interprets is institutionally and physically removed from the people who apply force, the causal line from the one to the other recedes from view, even though it is the interpretation that authorizes the deed.

Police work sits at the other end of this range. The officer who interprets is the officer who acts, and the two occur in immediate proximity. The decision that a conduct counts as criminal, that

¹⁰⁷ Cover (n91) 1617.

¹⁰⁸ Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 72.

force is needed, that an arrest is warranted, is enacted as bodily action. In this setting the word-deed gap that Cover analyses all but disappears, and the connection between legal interpretation and violence needs no framework to be seen.¹⁰⁹ For that reason Cover's framework is less central to the police section of this thesis than to the analysis of courts and administrative authorities, where the violence is concealed behind legal form and institutional distance.

C. Constitutionalist Ideals and *Staatsräson*

Coming just before Part II, this chapter uses a different register from the sections before it. It sets out the normative self-understanding of the German constitutional order and contextualizes the invocation of *Staatsräson* in casu. I argue that *Staatsräson*, in the form it has taken in Germany's post-Holocaust relationship to Israel, cannot be accommodated within this framework without straining its own principles. In a first step, the chapter reconstructs the *Rechtsstaatsprinzip* as the normative baseline of the German constitutional order, a system in which public power is constrained by rights, proportionality, and judicial review. The second step introduces *Staatsräson* as a political-moral commitment that operates at the edge of this constitutional architecture, shaping how it functions in practice without being legible within it as an ordinary constitutional doctrine.

a. The Rule of Law / *Rechtsstaatlichkeit*

The constitutional order in modern democratic states establishes an integrated structure of rules, principles, and practices designed to limit the concentration and abuse of government power.¹¹⁰ Through separation of powers, "checks and balances", and the protection of fundamental rights, it both restricts the exercise of power and defines the conditions under which that exercise is legitimate.¹¹¹ In Germany, this structure was built under the particular impact of the National Socialist regime's systematic destruction of the legal and political order. With that experience in mind, the authors of the Grundgesetz placed the protection of individual fundamental rights at the center of the new constitutional framework.¹¹² Article 1 para. 3 GG makes fundamental rights

¹⁰⁹ Similarly, Benjamin sees a collapse of law-making and law-preserving violence in the police.

¹¹⁰ cf. Wil Waluchow and Dimitros Kyritsis, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Summer, 2023).

¹¹¹ Sajó and Uitz (n54) 13.

¹¹² Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press USA 2016) 164f.

directly binding on all branches of state power, establishing them as constraints on public authority.¹¹³ This provision forms the substantive core of the *Rechtsstaatsprinzip*, which requires that all state action be grounded in and consistent with the constitution and statutory law.¹¹⁴ Every measure taken by a state official must have a legal basis,¹¹⁵ and that basis must itself withstand constitutional scrutiny.

The American legal scholar Ronald Dworkin articulates the strongest version of the liberal rights-protection claim; he theorized rights as “political trumps held by individuals”¹¹⁶ that can override utilitarian collective goals, which dictates that the state cannot violate an individual’s rights simply because doing so would benefit the majority. In most European constitutional system, such as in Germany, however, individual fundamental rights are not treated as absolute in this sense but can be weighed against other constitutional or public interests in a structured balancing and proportionality analysis.¹¹⁷ That balancing structure is itself a constitutional principle, defining how competing interests are to be adjudicated. What this thesis is concerned with is what happens when a political commitment shapes the baseline assumptions against which proportionality assessment takes place, in ways that may not themselves be subject to proportionality review.

Staatsräson creates this kind of complication. As a political doctrine rather than a constitutional norm, it puts pressure on legal reasoning and interpretation without being subject to procedural constraints that the *Rechtsstaatsprinzip* regularly imposes. The following sections outline what *Staatsräson* is, examine the condition under which it has been held compatible with the rule of law, and then turn to the specific form it has taken in Germany’s relationship to Israel, which this thesis argues differs structurally from the forms that constitutional frameworks have developed means to accommodate.

¹¹³ *ibid* 165; Grundgesetz für die Bundesrepublik Deutschland 1949 (BGBl S 1) art. 1 para. 3.

¹¹⁴ Grimm (n108) 345.

¹¹⁵ Grundgesetz Art 20 para. III as the formal core of the *Rechtsstaatsprinzip*.

¹¹⁶ Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ Press 2001) 13.

¹¹⁷ Sajó and Uitz (n 59) 408f.

b. The concept of Staatsräson

The idea of a *raison d'état* or 'national interest' came up in the 16th century. Niccolò Machiavelli conceptualized the idea that the state may require rulers to act according to considerations of necessity and state interest, even when those consideration conflict with ordinary moral or legal expectations.¹¹⁸ His conception is often associated with the unscrupulous use of power, hypocrisy, and deceit. In response, Giovanni Botero developed a more statesmanlike, moralized account and coined the term 'ragione di stato'.¹¹⁹ He argued that the ruler's recourse to state necessity should be compatible with religion, ethic, and the preservation of the common good.¹²⁰ The debate Botero opened ran through the political theory of subsequent centuries, shaping discussions of sovereignty, emergency, and the limits of legal obligation. In contemporary usage, the term implies a primacy of the state's interests over others in cases of conflict, as well as a dispensation from ordinary rule-of-law and moral constraints on the means.¹²¹

c. Staatsräson and Rechtsstaatlichkeit

This definition already suggests a tension with a constitutional legal order where every state action requires a formal legal basis. Contemporary legal scholarship is generally in agreement that a Staatsräson in this strict form is incompatible with the rule of law and the liberal democratic order.¹²² While some maintain that a Staatsräson can only take non-binding political-directional character,¹²³ others, among them Helmut Rumpf, argue that there are defensible versions of it that are not only compatible with but even potentially inherent in any constitution. Rumpf's account is interesting as he formulates the conditions under which Staatsräson could be reconciled with the rule of law, which can be tested against the present case. He argues that the Rechtsstaat does not eliminate the underlying goal of Staatsräson, which is the state's interest in its own preservation. Through a juridification of means – meaning defined offenses, limited authorizations granted to specific organs, judicial oversight – the classic Staatsräson logic of self-

¹¹⁸ Niccolò Machiavelli, *Il Principe* (W Grützmacher tr, L Heimann 1870).

¹¹⁹ Robert Bireley and Giovanni Botero, *The Reason of State* (Cambridge University Press 2017).

¹²⁰ Rüdiger Voigt (ed), *Staatsräson: Steht die Macht über dem Recht?* (Nomos 2012) 11.

¹²¹ Friedrich Meinecke, *Die Idee Der Staatsräson in Der Neueren Geschichte* (3., Oldenburg 1929); Helmut Rumpf, 'Die Staatsräson im demokratischen Rechtsstaat' (1980) 19 *Der Staat* 273 referring to Helmut Quaritsch's definition.

¹²² Meinecke (n107) 5; Ralf Michaels, 'Israels Sicherheit und Existenz: zwischen Staatsräson und Rechtsstaatsprinzip' 201; Rumpf (n 107) 280, 287; Voigt (n 106) 15.

¹²³ Michaels (n106).

preservation becomes absorbed into the constitutional order as legal relationship.¹²⁴ A clear historical example of an accomplished such conversion is, argues Rumpf, the *streitbare Demokratie* (militant democracy). This concept was developed postwar in light of the totalitarian movements that showed that a procedurally neutral democracy, one where any ideology could compete for power under the same rules, was vulnerable to being dismantled from within. It describes a militant, defensive model of democracy in Germany that holds that the free democratic order may protect itself with legal measures against persons that actively seek to undermine it.¹²⁵

d. *Deutsche Staatsräson*

This section traces the development of Germany's Staatsräson commitment to Israel and examines its relationship to the constitutional order analyzed above. It begins with the emergence of the commitment and the scholarly debate about its constitutional grounding, before turning to the academic consensus that the commitment is compatible with the Rechtsstaat as long as it remains a non-binding political guideline. It then argues, through the BDS-resolution and the post-October 2023 developments, that this consensus position is structurally unstable, and that the commitment cannot be juridified in the mode Rumpf's compatibility thesis requires. The section concludes by identifying what follows from these structural features and how the remainder the thesis approaches them.

The first impactful articulation of the protection of the state of Israel as German Staatsräson came from former chancellor Angela Merkel, in her 2008 speech in front of the Knesset.¹²⁶ In this speech, she emphasized Germany's particular historical responsibility towards Israel and expressed Israel's safety to be German Staatsräson.¹²⁷ The exact nature of this pledge was not conclusively stated until a parliamentary request in 2012 where it became clear that it was meant

¹²⁴ Rumpf (n105) 286f.

¹²⁵ Hans-Gerd Jaschke, *Streitbare Demokratie und Innere Sicherheit: Grundlagen, Praxis Und Kritik* (Westdeutscher Verlag 1991) 62f; in practice, this is reflected in tools like the possibility of banning unconstitutional parties (art. 21(2) GG), the forfeiture of basic rights (art. 18 GG) the "eternity clause" (art 79(3) GG) which prohibits any amendment to the Constitution that would abolish the core democratic principles.

¹²⁶ Merkel has mentioned something similar in the UN General Assembly 2007 ('Speech of Chancellor Dr. Angela Merkel at the UN General Assembly' (*Bulletin der Bundesregierung*, 25 September 2007) 5), and in the newspaper *Die Welt* (Margaret Heckel, Christoph Keese and Jacques Schuster, 'Warum sollen unsere Soldaten in den Libanon, Frau Merkel?' (*DIE WELT*, 20.08.2006), but these instances were not as impactful.

¹²⁷ 'Speech of Chancellor Dr. Angela Merkel at the Knesset' (*Bulletin der Bundesregierung*, 18 March 2008) 7.

merely as a political, deriving from the chancellor's power to determine general policy guidelines.¹²⁸ Nevertheless, the reach and practical effect of this statement has been debated since Merkel's speech, with scholars pulling in two different directions. Until the 2019 resolution on the BDS-movement, discussed below, the dominant understanding appeared to frame the commitment primarily as a matter of foreign policy and solidary collaboration with Israel, rather than on domestic affairs.¹²⁹

Regarding the legal root of this declaration of Staatsräson, there is, on one side, a plausible moral-historical basis for understanding Germany's relationship to the Jewish community as foundational rather than merely political. Michaels argues it is defensible to hold that Germany could only claim a legitimate existence as a post-fascist state insofar as it not only acknowledges its historical responsibility retrospectively but actively advances the safety of Jewish people going forward.¹³⁰ The connection is not only moral but also historical and practical; the Federal Republic's re-admission into the international community of states was substantially conditioned on a form of reconciliation, and for Israel that reconciliation was a prerequisite for accepting financial support from Germany after world war II.¹³¹ On a constitutional level, Michaels also grounds this commitment in the human dignity guarantee of article 1 GG.¹³² This reading deserves to be taken seriously: the claim is not merely a foreign policy preference, but something that carries moral-historical significance rooted in Germany's specific origins as a democratic polity.

However, this moral-historical account does not sit cleanly alongside the self-interest dimension. Ambos argues that Germany also acts, even if not primarily, in its own interest in invoking this Staatsräson, namely the interest in absolution from the guilt of the Shoah and in a form of historical whitewashing.¹³³ The self-interest dimension, however, is more layered than absolution alone. Scholars of German culture of remembrance have traced how the post-*Historikerstreit* consensus around Holocaust singularity and unconditional German responsibility

¹²⁸ German Bundestag, 'Reply of the State Secretary Dr. Emily Haber' (2012), [Drucksache 17/10050_2].

¹²⁹ Voigt (n104); Michaels (n106).

¹³⁰ Michaels (n106) 204.

¹³¹ *ibid* 202; Dan Diner, *Rituelle Distanz: Israels deutsche Frage* (1. Auflage, Deutsche Verlags-Anstalt 2015).

¹³² Michaels (n106) 204.

¹³³ Ambos and Stelter (n4) 25.

became the foundation of a national identity that generates, paradoxically, a mode of moral authority through which Germany's own process of historical reckoning positions itself as the authoritative arbiter of antisemitism.¹³⁴ These two interpretations are complementary accounts rather than mutually exclusive.

Neither the moral-historical weight of the commitment nor its complex motivations settle the constitutional question. Voigt points out that the Grundgesetz contains no formulation indicating that the authors intended Israel's security to be a constituent element of German Staatsräson.¹³⁵ A political commitment of this scope would require, if it were to have substantive legal effects, either constitutional anchoring or an explicit democratic mandate. The provisions on *streitbare Demokratie* differ significantly from this on a structural level; they acquired their constitutional status through the text of the Grundgesetz and through jurisprudence of the Federal Constitutional Court that developed reviewable criteria over decades. The Israel-Staatsräson has no equivalent grounding. For some time, this gap between moral commitment and constitutional grounding was not treated as a serious problem because the prevailing position was that Staatsräson in this context operated solely as a non-binding political guideline. The academic consensus, articulated most clearly by Michaels in 2022, held that a Staatsräson that does not claim legal force – i.e. orients political decision-making without purporting to authorize or require specific legal consequences – is compatible in fact with the constitutional order.¹³⁶

To understand how the doctrine evolved from a largely foreign-policy commitment into a principle with increasingly visible domestic implications, it is necessary to consider the 2019 parliamentary resolution on the BDS-movement, which shows paradigmatically that the distinction between political and legal is unstable. This resolution – adopted on May 15, 2019,

¹³⁴ Esra Özyürek, *Subcontractors of Guilt: Holocaust Memory and Muslim Minority Belonging in Post-War Germany* (Stanford University Press 2023); Michael Rothberg and Yasemin Yildiz, 'Memory Citizenship: Migrant Archives of Holocaust Remembrance in Contemporary Germany' (2011) 17 *Parallax* 32; A Dirk Moses, 'The German Catechism' [2021] *Geschichte der Gegenwart*; Redaktion, 'Bad Memory' *Jewish Currents*. The genocide-scholar Dirk Moses describes the underlying logic as a "German catechism", in which the Holocaust functions as a sacred trauma whose redemption value depends on it remaining singular and beyond comparison.

¹³⁵ Voigt (n106) 22f, Michaels's argument via Article 1 GG is a moral-constitutional claim at a general level: the human dignity guarantee can be read to ground a commitment to protecting Jewish life and existence. That is an argument about what Article 1 GG implies normatively, not a claim that the Grundgesetz explicitly constitutes Israel's security as Staatsräson.

¹³⁶ Michaels (n103) 207.

which is also commemorated as Nakba Day¹³⁷ – declared the methods and argumentation of the BDS movement antisemitic, affirmed Israel’s security as part of German Staatsräson, and called on public bodies at all levels to deny funding and facilities to organizations supporting BDS or questioning Israel’s ‘right to exist’.¹³⁸ In this, the Bundestag affirmed the working definition of antisemitism of the International Holocaust Remembrance Alliance as hatred towards Jews, manifested in rhetorical and physical attacks against Jewish or non-Jewish individuals, their property, Jewish community institutions and religious facilities.¹³⁹ The parliament further expanded by the following wording: “[...] the State of Israel, understood in this context as a Jewish collective, may also be the target of such attacks.”¹⁴⁰ In formal terms, the resolution was a simple parliamentary statement (‘*schlichter Parlamentsbeschluss*’) carrying no legal binding force, which, on the consensus view, would mean it produces only political effects and leaves the constitutional order intact. The Research Services of the Bundestag noted that a statutory implementation of the resolution’s recommendations would face serious constitutional objections under article 5 GG.¹⁴¹

What followed does not support the consensus reading. Public bodies across Germany adopted concrete measures in reliance on the resolution, denying funding and facilities to BDS-affiliated organizations and individuals. Administrative courts in several cases overturned those measures.¹⁴² The resolution was generating downstream legal consequences that were themselves unlawful – a result the consensus view considers impossible within a non-binding political register. At the same time, the resolution itself remains largely insulated from judicial review mechanisms that apply to binding legal norms, exactly because by its formal nature, it is not binding legal norm that can have direct effect on an individual. An effort to challenge the resolution was rejected by the Oberverwaltungsgericht Berlin-Brandenburg on precisely these

¹³⁷ United Nations, ‘About the Nakba’ (*Question of Palestine*).

¹³⁸ Deutscher Bundestag, Resolution: ‘Der BDS-Bewegung entschlossen entgegenzutreten – Antisemitismus bekämpfen’ 2019 [Drucksache 19/10191].

¹³⁹ ‘What Is Antisemitism? | IHRA Working Definition’ (n6).

¹⁴⁰ ‘IHRA-Definition’ (*Beauftragter der Bundesregierung für jüdisches Leben und den Kampf gegen Antisemitismus*); Crucially, the IHRA-definition continues as follows: “However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic.”, which is rarely repeated when German institutions invoke its definition.

¹⁴¹ Wissenschaftliche Dienste, ‘Ausarbeitung: BDS-Beschluss Des Deutschen Bundestages (Drucksache 19/10191)’ (2020) 5f.

¹⁴² among others *Decision of 21.02.2022 VG Stuttgart 7 K 3169/21*; *Decision of 12.09.2019 VG Köln 14 L 1765/19*; *Ruling of 20.01.2022 BVwerG 8 C 35.20*.

grounds. The distinction between political guideline and legal consequence thus has proven to be difficult to maintain in practice, even before October 2023.

The parliamentary response to the events of October 2023 intensified this dynamic considerably. The legislative chambers passed several resolutions affirming their efforts to combat antisemitism and protect Israel's 'right to exist'¹⁴³, among them the November 2024 resolution "Never Again is Now"¹⁴⁴. Now, the scope¹⁴⁵ seemed to have expanded from foreign policy measures – meaning arms-transfer cooperation and Israel-oriented positioning at the international level – to internal measures regulating speech and protest movements. The period also saw an effort to give the commitment a more explicitly juridical form. The reform of the German Nationality Act (*Staatsangehörigkeitsgesetz StAG*) in 2024 introduced a requirement that applicants affirm Germany's special historical responsibility for the crimes of the NS-regime and their consequences, including in particular the protection of Jewish life.¹⁴⁶ At the time of the adoption there seemed to be no consensus on whether or not the new provision is to be interpreted to include a commitment to Israel's 'right to exist'¹⁴⁷, a guideline-document issued by the Federal Ministry of the Interior, however, stipulated that it should be understood as included.¹⁴⁸ Since the law passed, there have been two media-effective cases where the naturalization was denied¹⁴⁹ and even revoked¹⁵⁰ based on an alleged denial of Israel's 'right to exist'. This gap between statutory text and administrative application is itself illustrative; the

¹⁴³ Deutscher Bundestag, Resolution: 'Antisemitismus und Israelfeindlichkeit an Schulen und Hochschulen entschlossen entgegnetreten sowie den freien Diskursraum sichern' 2025 [Drucksache 20/14703]; Federal Council, Entschließung des Bundesrates 'Antisemitismus effektiv bekämpfen - Existenzrecht Israels schützen' 2024 [Drucksache 647/23].

¹⁴⁴ Deutscher Bundestag, Resolution: 'Nie wieder ist jetzt – Jüdisches Leben in Deutschland schützen, bewahren und stärken' 2024 [20/13627].

¹⁴⁵ Moritz Rhades, 'Waffenlieferungen als Staatsräson?' [2024] Verfassungsblog.

¹⁴⁶ Staatsangehörigkeitsgesetz (StAG) 2025 (102-1) § 10 Abs 1a, the legislative proposal brought forward by the Christian-conservative party CDU makes explicit that the goal of this reform is to combat the so-called 'imported antisemitism' (Deutscher Bundestag, Drucksache 20/9311).

¹⁴⁷ Deutscher Bundestag, Recommendation for a Resolution (Drucksache 20/9044) The CDU lamented the absence of an explicit reference to Israel's 'right to exist' as indicating that such an interpretation was not intended. The FDP, by contrast, stated that their reading of the commitment to protecting Jewish life also includes Israel's 'right to exist'.

¹⁴⁸ Bundesministerium des Innern, 'Anwendungshinweise des BMI zum StAG (01.05.2025). This document further holds that also actions with reference to the State of Israel that cannot clearly be classified as motivated by antisemitism may still be incompatible with the obligation to acknowledge and uphold Germany's historical responsibility under §10(1) Nr. 1a StAG, 70.

¹⁴⁹ *VG Regensburg* [2024].

¹⁵⁰ *VG Berlin*, 39 L 150/26; Hanno Hauenstein, 'Abdallah A., a Nonperson Because of His Instagram Posts' [2026] *JACOBIN*, see analysis Chapter III.B.

Staatsräson commitment enters the legal framework not through parliamentary statute but through the ministerial interpretation that fills the space between a general formulation and its concrete application. Further, since spring 2026 the German legislative chambers discuss a proposed bill by the state of Hesse to criminalize the denial of the Israel's 'right to exist'¹⁵¹, which has been met with constitutional criticism.¹⁵²

The structure in these examples differs from the mode of juridification of Staatsräson that Rumpf describes. Rumpf serves here not as an authority whose conclusion settles the question of compatibility, but as the proponent who states most explicitly the conditions under which a Staatsräson could be reconciled with the rule of law. The system he writes about is reflexive, meaning what gets juridified is the state's self-preservation. His compatibility thesis depends on the protected *good* being a structural principle of the free democratic order understood as a complex of equally ranked principles whose equilibrium is to be secured and within which no single principle may be over-extended.¹⁵³ This thesis argues that the commitment to Israel's 'right to exist' is not a *good* of that kind. Rather than reflexive it is a transitive commitment, as it is a substantive proposition about the legitimacy of a particular foreign state and its actions.

This generates a dilemma the juridification cannot resolve. Either the commitment is treated as a structural principle of the German constitutional order, in which case it fails at the threshold, since the existence of a foreign state is not a principle of how the German polity governs itself and is named in no account of the democratic constitutional order. Or it is imported as a substantive value of constitutional rank through the responsibility arising from National Socialism. To reason this would require a derivation in four steps: anti-Zionist critique of the state of Israel equals antisemitism equals an attack on human dignity equals an attack on the free democratic order. The later steps are comparatively secure within German constitutional doctrine, since the Constitutional Court has placed human dignity under Art. 1 GG at the core of the free democratic order, so that an assault on the one can be construed as an assault on the

¹⁵¹ Bundesrat, Draft Proposal of the State of Hesse: Strafbewehrung der Leugnung des Existenzrechts des Staates Israel 2026 [Drucksache 227/26].

¹⁵² Wissenschaftliche Dienste des deutschen Bundestages, 'Verfassungsrechtliche Zulässigkeit Einer Strafbewehrung Öffentlicher Leugnungen Des Existenzrechts Des Staates Israel' (2026); Kai Ambos, 'Staatsräson als Strafgrund' [2026] Verfassungsblog.

¹⁵³ Rumpf (n105) 286f.

other. The weight of the derivation therefore rests on its first step, and this is the disputed one. Its difficulty is related to the term ‘right to exist’. Recognized statehood is a matter of fact under international law – Israel *does* indisputably exist; what the derivation relies on, however, is the further claim that the legitimacy of the state, as a normative proposition, may not be contested, and it then treats contestation of that proposition as antisemitism.¹⁵⁴ Whether anti-Zionist critique amounts to antisemitism is itself an open question, as the divergence between the IHRA-definition and the Jerusalem Declaration-definition on Antisemitism¹⁵⁵ shows. Even if this derivation held, however, it would mean a disproportional over-extension of one constitutional value over another. The values that are thereby suppressed – open democratic formation and expression of opinion – are themselves part of the democratic order that gives each value equal status.

What this analysis establishes is a commitment that operates at the edge of the constitutional order.¹⁵⁶ It produces real restrictive effects without resting on a ground that order can account for. It is neither a binding legal norm nor a merely political statement, and the preceding discussion shows that it cannot be made into the former without straining the order’s own principles. The question this raises is therefore not anymore whether the commitment is properly grounded, but how it nevertheless exerts the force it does. This thesis approaches that question through the concept of phantasmagoria as developed earlier by Martel through Benjamin, as well as by Butler. I argue that Staatsräson operates as a phantasmagoric foundation of the legal and administrative response to Palestine-solidarity, presenting itself as a moral and historical necessity that allows no deviation, and is being experienced as self-evident and thus real precisely because its status between democratically legitimated law and political presumption beyond the genuinely constitutionally founded realm is difficult to locate.

Within this appearance the perception of violence is reordered. Following Butler, within phantasmagoria expression and protest directed against state violence can be reclassified as

¹⁵⁴ Ambos and Stelter (n119), the question of whether or not there is something like a state's *right to exist* in public international law aside.

¹⁵⁵ ‘Jerusalem Declaration on Antisemitism’ <jerusalemdeclaration.org> .

¹⁵⁶ Rumpf also hints to this by arguing that Staatsräson is not found in the text of the constitution, yet it is inherent to them as an existential principle; a structure sitting at the edge and is tamed by being drawn inside through defined forms. German Staatsräson in this case stays at the edge and influences the order from there, Rumpf (n105) 285.

themselves violent, so that solidarity with Palestinians and criticism of Israeli policy come to appear not as protected speech but as something the order must defend itself against. The chapters that follow test this lens against the concrete measures underlying the case corpus.

Part II: Data and methodological approach

Data corpus

This thesis is aiming to do an interpretative analysis of a purposively constructed corpus of legal and administrative documents connected to the pro-Palestine movement in Berlin since October 2023. ‘Pro-Palestine movement’ here serves as a collective term for any manifestation of solidarity with Palestinians, in Gaza, West-Bank, Israel or elsewhere in the world, as well as for critique of both Israel’s military and political course of action and of Germany’s military, political, and other support of the state of Israel. These are not separate phenomenon but the forms the solidarity most often takes in the cases this thesis examines, and the forms that German legal and administrative measures have most directly targeted.

The scope of the research is limited to Berlin, home to the largest Palestinian diaspora community in Europe and a large Jewish population.¹⁵⁷ The city is known for strong public mobilization in response to societal injustice,¹⁵⁸ more recently, also for one of the harshest enforcement measures against the Palestinian movement within Germany, both in number and force.¹⁵⁹ The choice to limit the scope to measure after October 2023 does not intend to imply that such measure did not exist before; rather, that the situation has intensified since then.

The analysis focuses on interferences with the freedoms of assembly and speech, the two arenas in which the theoretical concerns developed above become legally operative. It is in assembly and criminal proceedings the naming practice, the construction of danger, and the foreclosure of competing political meaning take their concrete legal form, as bans, conditions, and criminal

¹⁵⁷ Sa’ed Atshan and Katharina Galor, *The Moral Triangle: Germans, Israelis, Palestinians* (Duke University Press 2020) 4f.

¹⁵⁸ *ibid* 5.

¹⁵⁹ European Legal Support Center (ELSC), ‘Index of Repression’ Michael O’Flaherty Commissioner for Human Rights, ‘Letter to the Federal Minister of the Interior’; Josephine Solanki, ‘Solidarity under Siege: Germany’s Repression of the Palestine Movement’ (Deborah Eade ed, Transnational Institute 2025); PAllies and others, ‘Repression of Palestine Solidarity in Germany’ (2025) among others.

liability. A third legal field follows from the nature of the issue. Activism and speech are not limited to German citizens, and for non-citizens the consequences extend further, since measures under immigration and residence law are brought against them in connection with the same conduct. This field is not a separate matter but the point at which the same expression carries the gravest consequence, the loss of residence or citizenship, and at which the Staatsräson commitment enters the reasoning most explicitly. The case selection therefore covers the following three complexes: (I.) the criminal liability of the slogan “From the River to the Sea”, (II.) bans and restrictions imposed on pro-Palestinian assemblies, and (III.) proceedings related to immigration status.

The dataset consists of two tiers of sources. The first tier consists of court rulings by Berlin courts, particularly administrative and criminal courts. This case-law will be accessed through the database of the *Berliner Vorschriften- und Rechtsprechungsdatenbank* (gesetze.berlin.de/bsbe/) filtered by search terms, courts and date. The terms searched were “Palästina”, “Israel”, “Nahost-Konflikt” “From the River to the Sea”, “antisemitisch”, “Staatsräson”, “Existenzrecht”. An overview of the selected case-law can be found in fig. 1; concrete information about why particular cases were selected is provided in each chapter respectively.

It is important to note that in Germany court rulings are not being published automatically. In Berlin, only 3.5% of judgments appearing the public database.¹⁶⁰ Among first-instance administrative courts which adjudicate assembly-related claims, 5.1% of judgments are published nationwide, compared with 67.3% of the Higher Administrative Courts.¹⁶¹ For the Amtsgerichte, which hear criminal matters at the district level, no comparable figure exists. Requests to get access to specific unpublished court rulings that I put forward through the official pathways remained unanswered. A comprehensive analysis of the entire body of judicial practice is therefore not possible.

¹⁶⁰ SWR DataLab, ‘Keine Transparenz bei Gerichten? Teilweise nicht mal 2 Prozent der Urteile öffentlich’ (*SWR Aktuell*, 5.02.2026).

¹⁶¹ *ibid.*

Category	Case name (abbr.)	Case identifier + date	Facts of the case	Outcome
Criminal Law	AG case	426 Ds 1053/24jug, 28.10.2025	FRTS-slogan on flyer	Acquitted under §140 StGB
Criminal Law	LG case	502 Kls 13/25, 17.12.2025	FRTS-slogan chanted at demonstration	Convicted under §86a StGB
Criminal Law	KG case	3 ORs 50/25, 3 ORs 50/25 - 121 SRs 125/25, 20.01.2026	FRTS-slogan chanted at demonstration	Convicted under §86a StGB
Assembly Law	VGB1-ban	1 L 428/23, 11.10.2023	Assembly ban following danger prognosis	Ban upheld
Assembly Law	VGB2-hugs	1 L 507/23, 20.12.2023	Assembly ban following danger prognosis	Ban lifted, motto banned
Assembly Law	VGB3-trans	1 L 761/25, 20.11.2025	Restriction on route following danger prognosis	Restriction overturned
Assembly Law	VGB4-cong	1 K 187/24, 26.11.2025	Dissolution of indoor-assembly and prohibition of continuation	Measures found disproportional
Immigration Law	VGB5a-mov	24 L 91/25, 10.04.2025	Loss-of-status determination following alleged participation in sit-in at university presidium	Interim legal protection granted
Immigration Law	VGB5b-mov	21 K 158/25, 06.05.2026	Loss-of-status determination following alleged participation in sit-in at university presidium	Measure found unlawful
Immigration Law	VGB6-nat	39 L 150/26, 20.05.2026	Withdrawal of naturalization following social media posts	Rejection of interim legal protection a

fig. 1: case-law overview

The second tier of data concerns administrative decisions, concretely decision of the police as the assembly authority, as well as from the Berlin immigration office LEA in conjunction with the Berlin Senate Department of the Interior. These decisions, such as assembly bans or conditional orders, as well as immigration decisions, are not publicly accessible. Efforts to procure such decisions and gain access to their legal reasoning through contacts to lawyers, NGOs and activists have proven unsuccessful due to confidentiality and lack of resources for anonymization. I will therefore try to reconstruct the reasoning through the following sources: press releases on their activities published by the Berlin police on berlin.de/polizei/polizeimeldungen, responses to parliamentary inquiries through pardok.parlament-berlin.de/, internal documents accessed through fragdenstaat.de, as well as through how courts characterize and quote the administrative decision they are viewing.

Moreover, the analysis will draw on political documents, such as parliamentary resolutions and official statement of parties in parliament as background normative infrastructure and political sentiment that lay out the environment in which these cases happen. Additionally, the analysis is informed by an interview with Berlin-based lawyer Alexander Gorski, held in April 2026, who

specializes on criminal and immigration procedure in the context of pro-Palestine speech.¹⁶² The interview serves as an expert background-interview and provides context and insights.

Research questions and approach

The aim of this thesis is to examine how law and legal reasoning operate in restricting the Palestine-solidarity movement in Berlin since October 2023. The first sub-question that follows from this is about the legal categories authorities use to restrict pro-Palestinian assemblies and speech or sanction activists, and how courts have constrained, accepted or reproduced these restrictions. I approach this question in the first step by reconstructing the doctrinal argumentation in the case-law. For each decision, I establish the measure imposed, the legal category invoked, the structure of the reasoning, and the outcome, and how courts responded to underlying administrative acts. This step stays doctrinal, mapping out what follows from the chosen legal categorization, without assessing whether the reasoning is legally correct.

The second analytical step is aimed at answering the second research question about how the administrative and legal reasoning make these restrictions appear necessary, lawful and non-violent, and works as a critical legal analysis. To stay open to unexpected findings, I have decided against a fixed set of theory-derived questions, which would risk only showing what those questions are built to find. Likewise, I did not, *ex ante*, define a list of concrete expected reasonings in the judgments. Instead, I analyze the case-law sensitized to what the theoretical framework makes visible that the doctrinal analysis does not show, and what interpretative perspectives to the material it suggests. I do not expect each part of the framework to be equally applicable to the cases. While Butler allows me to attend more directly to how ‘danger’ is constructed and treated and to how the state’s own coercive responses are presented as necessary and lawful reaction to this prior danger at the legal discourse-level, Benjamin’s contribution works more at a theoretical level might therefore provide a less direct engagement with the

¹⁶² ‘Alexander Gorski’ (*Amigo Kanzlei*).

empirical material. Rather, his account enables me to call the apparatus violent in the first place and understand how this violence gets naturalized and obscured through its legal form. Methodologically, I follow his means-end critique in that I am critically reflecting on the concrete structure as a whole rather than assessing whether the applied violence was proportionate. Further and more concretely, his theory directs attention to where an act of legal positing is carried out under the description of merely applying existing law, and where the violence within the legal structure becomes visible. Cover invites consideration of the connection between legal interpretation and violence as well as the foreclosure of competing political meaning behind the form of neutral legal determination. Finally, the chapter on Rechtsstaat lets me trace constitutional and structural implications Staatsräson and its juridification.

I will investigate whether these theories are able to explain the mechanisms present in the case-law and will examine if and how the impact of Staatsräson is traceable in administrative and legal decision. The framework is a way of reading, not a template applied to each case alike; the three legal fields differ in structure, and each decision engages different parts of the framework, so the reading follows what each decision actually does, which also leaves room for features the framework does not account for.

Limitations

The case corpus is rather limited, due to the above-mentioned restraints. Therefore, it is not possible to give a complete picture of the repression, also because a lot of the repressive acts happen in other non-judicial forms, such as police treatment¹⁶³, silencing and deplatforming in academia and culture¹⁶⁴ and are thus not analyzable through case-law. However, a comprehensive picture of every repressive act is not what this thesis and its theoretical

¹⁶³ A short section on police violence can be found below.

¹⁶⁴ see Schirin Amir-Moazami, 'Staatsräson Und Die Versicherheitlichung von Wissensproduktion' in Anna Sabel and Mehmet Arbag (eds), *Verunsicherung* (transcript Verlag 2025) and Donatella della Porta, 'Moral Panic and Repression: The Contentious Politics of Anti-Semitism in Germany' (2024) 17 *Partecipazione e Conflitto – The Open Journal of Sociopolitical Studies* 276.

framework are set out to show in the first place. I deliberately focus on the forms of restriction that become visible through legal and administrative reasoning, as I am interested in how certain actions gain legitimacy because they are carried out in legal form. For this, the limited case corpus is suitable.

Further, the data triangulation of first-level administrative decisions is itself an interpretive act that has limitations. Courts quote administrative reasoning selectively, which may not capture the full structure of the administrative argument. In this context, it is important to note that a judgment that contradicts the underlying decision will, by its very nature, examine the specific reasoning behind the decision more closely than a judgment that upholds the decision's reasoning; as a result, readers learn more about the decisions that were overturned than about those that were upheld. Press releases and responses to parliamentary inquiries can also contain shortened and simplified versions of the full reasoning. This should not be understood solely as a methodological obstacle to accessing the "real" administrative reasoning but can itself be an analytical opportunity by shedding light on how the legal system processes and potentially legitimizes these decisions.

Positionality

As a researcher of neither Jewish nor Muslim belief, it is important that I reflect on my own position when writing about this topic. The Palestine-movement is, as any global movement, not one homogenous thing, and I do not treat it as unified or hold it up as beyond reproach. I have participated in many demonstrations such as the ones I write about, and this has shaped both how I think about the situation in Palestine and about Germany's response to Palestine-solidarity. That involvement is not incidental to the work, but part of why the subject came into my focus at all. In my role as a researcher, however, it is necessary that I acknowledge my standpoint and ensure that my beliefs do not enter the analysis as neutral findings.

Excursus: Police violence

Excessive police force at pro-Palestine protests is among the most pervasive elements of the state response to the Palestine-movement. Videos of violent arrests¹⁶⁵, punching protestors in the face¹⁶⁶, or dragging a female protester by her hair¹⁶⁷ circulate on social media. Authorities and politicians state the deployed force to be proportionate and necessary to secure the democratic order and public safety¹⁶⁸, while activist groups speak of intimidation and quickly escalating resort to forceful dispersal, use of batons and pepper spray excessively disproportionate to the alleged infractions, as well as countercharges in case of reported violence.¹⁶⁹

While this is a substantial aspect of the state action against the Palestine-movement, it generates almost no legal documents that could form the basis of analysis in this thesis. There have been reports about ongoing investigations against a police officer who got caught on camera hitting an Irish citizen in the face twice at a pro-Palestine protest in Berlin.¹⁷⁰ The case-law database, however, contains no judicial decisions on the matter, reports on relevant convictions of officers are not found either.¹⁷¹ The absence of accountability proceedings appears itself as symptomatic.¹⁷² Court rulings that do not exist cannot be analyzed, however, this thesis's framework allows for cautious analytical observations based on that absence.

Benjamin's framework helps explain why such an absence can occur in the legal record. He argues that the police exercise a form of law-making violence under the appearance of law-

¹⁶⁵ 'Ireland Intervenes after Gaza Activist National Beaten by German Police' (*Al Jazeera*, 9 February 2025); abdallahxbn, 'Post from 27.07.2025' (*instagram.com*); eye.on.palestine, 'Post from 24.07.2025' (*instagram.com*); sana_aljamal82, 'Post from 12.10.2025' (*instagram.com*); middleeasteye, 'Post from 08.12.2025' (*instagram.com*).

¹⁶⁶ eye.on.palestine, 'Post from 07.10.2025' (*instagram.com*); derxberger030, 'Post from 28.05.2025' (*instagram.com*); ryad.aref, 'Post from 03.07.2026' (*instagram*).

¹⁶⁷ abdallahxbn (n 165).

¹⁶⁸ dpa, 'Nahost-Konflikt: Propalästinensische Demonstration – Polizei mit Wasserwerfer' *Die Zeit* (Hamburg, 15.05.2025); from Alexander Dobrindt, 'Reply to Mr. O'Flaherty, Commissioner for Human Rights CoE' (23 June 2025).

¹⁶⁹ PAllies and others (n 159) 36f; Solanki (n 159); 'About 3ezwa' (*3ezwa.de*) <<https://3ezwa.de/en/about/>> accessed 5 July 2026. On police violence in Germany and the tactic of counter-charges see further WDR Doku, *Polizeigewalt Und Rassismus - Wer Kontrolliert Die Polizei?* | *WDR Doku* (2020); Laila Abdul-Rahman and others, 'Übermäßige Polizeiliche Gewaltanwendung Und Ihre Aufarbeitung' [2023] Goethe Universität 8.

¹⁷⁰ Deborah Cole and Rory Carroll, 'Berlin Police Investigate after Officer Punches Irish Activist at Protest' *The Guardian* (9 January 2025).

¹⁷¹ Also corroborated anecdotally by 'Interview with Lawyer Alexander Gorski' 00:18:36.

¹⁷² Abdul-Rahman and others (n 152) 2, 6ff; Sarah Praunsmändel, 'Perspektiven Auf Übermäßige Polizeiliche Gewalt Und Ihre Aufarbeitung' [2025] *Kriminologisches Journal* 152.

preservation, and that they operate beyond the reach of the accountability mechanisms the constitutional state relies on to contain them.¹⁷³ By being allowed to act at their own discretion, in the name of public security, the police themselves decide on the necessity and proportionality of a measure. While there are accountability mechanisms in place, Benjamin regards police violence as never fully containable and the *Rechtsstaat*-instruments such as judicial review grasp at nothing.¹⁷⁴

Following Haverkamp¹⁷⁵, I described *routine* police enforcement as a less visible though not less violent form of violence. In the present case the physical violence is visible; it is recorded circulated, and in some instances reported in mainstream outlets. What is missing is its conversion into a legal fact that would allow contestation within this thesis' case-law framework. Where police violence never becomes such a legal document, it remains hard to contest in legal terms. The 2025 Nakba-protest incident exemplifies this. According to an investigation by *Forensis* the authorities' account¹⁷⁶ that an officer had been deliberately injured by protesters was false. Forensis instead found that the injuries were likely self-inflicted while the officer repeatedly struck a protester lying on the ground.¹⁷⁷ What the official account does is shift the direction of the violence in that situation. The officer's own force is presented as an injury suffered in the course of law-preservation, and the protester, who was the one that got beaten, is repositioned as the violent source. Force exercised where the law's authorization is at best unclear, which is law-making violence in Benjamin's sense, is redescribed after the event as the lawful defense of order and security against an attack. By sticking to their version of the facts after Forensis' investigation, the police and the city government destroy the normative claims of the protesters by refusing to help translate them into legal facts.¹⁷⁸

Police violence therefore falls outside the case-law corpus of this thesis. Nevertheless, an analysis of the repressive measure against the Palestine-movement in Berlin would have been

¹⁷³ See Chapter I.A.b.

¹⁷⁴ Benjamin (n 36) 243.

¹⁷⁵ in Chapter I.A.b. Haverkamp (n 64) 1165 set against the violence of the death penalty.

¹⁷⁶ 'Video – Ein Schwerverletzter bei eskalierter Nakba-Demo – „Polizist wurde niedergedrampelt“' (*DIE WELT*, 15.05.2025).

¹⁷⁷ Forensis, 'Police Violence And Misinformation At The 2025 Nakba Day Protest, Berlin' (*counter-investigations.org*, 7 November 2025).

¹⁷⁸ 'Videoauswertung widerspricht Darstellung der Polizei' *Der Spiegel* (7 November 2025)

incomplete without at least indicating why police violence is difficult to capture in this analysis. The following chapters focus on restrictions that do leave judicial traces.

Part III: Analysis

The analysis is split into three case complexes, covering the criminal liability of the slogan “From the River to the Sea...” (I), restrictions on assembly (II) and immigration-related proceedings (III). Every case chapter is split into a short introduction to the case corpus, a doctrinal reconstruction of the judgments and the theory-informed interpretative analysis. A fourth section further develops the role of Staatsräson as the phantasmagoric foundation of the state restrictions against the Palestine-movement as a whole. As this dimension does not rely on specific case-law, it merits its own section.

A. Case complex I: From the River to the Sea (FRTS)

The first cluster of cases concerns the criminal liability attaching to the slogan “From the River to the Sea” (FRTS), sometimes extended by the addition “Palestine will be free” in whichever language it appears. I selected it in particular¹⁷⁹ because it is attributed competing normative meaning by different communities yet is the most heavily contested slogan and the one of the most frequently prosecuted¹⁸⁰, with early attempts at its criminalization.¹⁸¹

The analysis looks at three cases from three different courts.¹⁸² The first is a ruling from the district court Amtsgericht Tiergarten of 28 October 2024, case number 426 Ds 1053/24jug

¹⁷⁹ The database contains five criminal cases related to Israel-Palestine, out of which four concerned the FRTS-slogan. One of them was very short and merely procedural and provided no analyzable data. The fifth case concerned a conviction under §130 StGB for a poster demanding lessons to be drawn from the Holocaust and mourning the civilian deaths in Gaza. Because of the prevalence of the FRTS-slogan, the choice was made to not include this judgment in the analysis.

¹⁸⁰ There exists no separate statistic on the exact number of proceedings: Abgeordnetenhaus Berlin, Antwort der Bundesregierung: Strafrechtliche Verfolgung von Wortfolgen [Drucksache 21/4577]; For further information, see the following sources among others: Iris Sayram, ‘Ist die Parole “From the river to the sea” zwangsläufig strafbar?’ *tagesschau.de* (07.01.2024); Max Kolter and Peymann Khaljani, “‘From the River...’: Berlin hält an Strafverfolgung fest’ *Legal Tribune Online (LTO)* (08.07.2025).

¹⁸¹ Verbot der Vereinigung „HAMAS“ 2023 6; see also ‘Interview with Lawyer Alexander Gorski’ 00:06:37 who refers to a blanket criminal prosecution of the slogan compared to other forms of expression in the same context.

¹⁸² These three cases are all the cases within a criminal law context that are publicly available on the Berlin case-law data base that concern the words “from the river to the sea...”, so the selection did not follow any additional criteria.

(hereinafter *AG case*).¹⁸³ It concerned the distribution of flyers four days after the attack of October 7. The flyers carried the slogan in German and described the attack as a “historic moment for all liberation struggles worldwide”.¹⁸⁴ The court held the slogan itself not to be punishable, while convicting the defendant of condoning criminal offences under §140 of the German Criminal Code (StGB) for the statement about the attack. It is worth mentioning that the defendant was not the author of the flyer but merely distributed them at a protest.

The second case is a judgment of the Landgericht Berlin (regional court; hereinafter: *LG case*), 502 KLs 13/25 of 17 December 2025.¹⁸⁵ It addressed the criminal liability of the FTRS slogan as a symbol of a terrorist organization under §86a StGB, together with social media posts depicting fighters of the Al-Aqsa Martyrs’ Brigades, charged as dissemination of propaganda materials of terrorist organizations under §86 StGB.¹⁸⁶ The LG convicted the defendant on both accounts.

The third is an appeal before the Kammergericht Berlin (Berlin Higher Regional Court; hereinafter: *KG case*), of 20 January 2026, case number 3 ORs 50/25, 3 ORs 50/25 - 121 SRs 125/25.¹⁸⁷ The KG reviewed a judgment of the AG Tiergarten that had held the slogan “From the River to the Sea – Palestine will be free!” not to constitute a symbol of Hamas and therefore not punishable under §86a StGB. Departing from the lower court’s findings and from the expert opinion it had relied on, the KG overturned the judgment and remanded the matter to a different division of the Amtsgericht for new decision.

a. Doctrinal reconstruction

All three cases address the criminal liability of the FRTS-slogan but follow two different argumentations. The first step is to determine the stage of the doctrinal analysis at which each court processes the ambiguity of the slogan, and the consequence this placement has for the outcome.

¹⁸³ *AG Tiergarten* (426 Ds 1053/24 jug).

¹⁸⁴ *ibid* para. 4ff.

¹⁸⁵ *LG Berlin* (502 KLs 13/25).

¹⁸⁶ As the offenses were committed in real concurrence and by way of multiple acts, jurisdiction lay with the Regional Court under § 74 Courts Constitution Act (GVG).

¹⁸⁷ *KG Berlin* (3ORs 50/25, 3ORs 50/25 - 121 SRs125/25).

The AG case addressed the ambiguity at the stage of determining the meaning of the utterance. Adjudicating the slogan under §140 Nr. 2 StGB (public endorsing of criminal offenses), the court applied the constitutional standard for ambiguous expressions, under which a court that wishes to base a conviction on one interpretation of an ambiguous expression must rule out the non-criminal interpretations with tenable reasons and otherwise construe the expression in the manner most favorable to the speaker.¹⁸⁸ The court found the slogan open to several plausible meanings, from a demand for freedom from occupation to a call for a violent expulsion of the state of Israel and its population.¹⁸⁹ Because the ambiguity enters at the level of the examination of the meaning of the slogan, it determines the result directly and produces an acquittal on the slogan as protected speech under Art. 5 GG. The court convicted on separate sentence of the flyer that referred to the October 7 attack as a “historical moment of liberation struggles worldwide”, where it found the meaning unambiguous.¹⁹⁰

The LG case and the KG case adjudicate the slogan under §86a StGB (use of symbols of an unconstitutional or terrorist organizations) and consider the ambiguity at a later stage. Both acknowledged that the phrase carries several meanings and is used in contexts, unrelated to Hamas.¹⁹¹ Both, however, held that this has no bearing on the *actus reus*, the question whether the phrase constitutes a symbol of Hamas.¹⁹² On their construction, ambiguity of meaning and the absence of a concrete situational reference to the organization are removed from the symbol determination and reserved for the subsequent stages of examining the protective purpose of the norm, social adequacy¹⁹³, and intent.¹⁹⁴ These categories, however, are very restrictive; both courts, hold that only cases where a symbol is visibly distorted or used as explicit critique of the associated organization would be excluded from the criminal liability.¹⁹⁵

¹⁸⁸ *AG Tiergarten* (n48) para. 18.

¹⁸⁹ *ibid* para. 20ff.

¹⁹⁰ *ibid* para. 19.

¹⁹¹ *LG Berlin* (n150) para 102f; *KG Berlin* (n152) para. 23f.

¹⁹² *KG Berlin* (n152) para 24; *LG Berlin* (n150) para. 98f, 102.

¹⁹³ In German criminal law, social adequacy or *Sozialadäquanz* is a limiting doctrine that treats conduct (often speech or behavior) as socially appropriate and therefore not criminally relevant, even if it could otherwise fit the wording of a statutory offence. Courts use it to exclude criminal liability for actions or statements that are customary or tolerated in normal social life, because their social meaning is not that of the prohibited wrongdoing.

¹⁹⁴ *KG Berlin* (n152) para 24; *LG Berlin* (n150) paras 90, 102ff.

¹⁹⁵ *LG Berlin* (n150) para 103; *KG Berlin* (n152) para 23.

The argumentation in the LG case is based on a commissioned expert opinion which elaborated on the formal act of designation and consistent practice of the slogan by Hamas. It drew on para. 20 of Hamas's 2017 Policy Document, which articulated "the full and complete liberation of Palestine, from the river to the sea" as its stance on the Israeli occupation.¹⁹⁶ The court treats this as the most important foundational text of the organization, and concludes that the phrase was deliberately adopted as an identifying slogan in English for international circulation¹⁹⁷, and it rejected defense requests for counter-expert opinion on the slogan's meaning as immaterial to the classification.¹⁹⁸

The KG overturns the AG's acquittal not by deciding the slogan is a symbol but by faulting the AG's reasoning as flawed. On the substance, the KG holds that a phrase older than the organization and used by others, including its opponents, is not for that reason excluded as a symbol, since an organization can adopt an already-current phrase so that it appears at least also as its sign.¹⁹⁹ Finally, it holds the AG misapplied Art 5, since under Art 5 Abs 2 GG § 86a is an statutory law, so that "even harmless or democratically desirable expression"²⁰⁰ is not protected once it is a symbol, with ambiguity and missing situational reference relevant only at the later stages, as seen above.²⁰¹

The core difference between the AG case on one side and the LG and KG cases on the other is the choice of provision under which the slogan is charged. The prosecution of the slogan under §86a is development that emerged after October 2023 and rests on a prohibition order issued by the Federal Ministry of the Interior on 2 November 2023, banning Hamas and designating the slogan, in all languages, their symbol.²⁰² The provisions applicable for the slogan before that

¹⁹⁶ A Document of General Principles & Policies 2017 para 20.

¹⁹⁷ *LG Berlin* (n150) para 92ff; A divergent opinion was adopted by the LG Mannheim, which argued the mere use of the wording in the policy document does not amount to an appropriation by Hamas, and the external designation through means of the decision of the ministry does not suffice to fulfill this objective element; *LG Mannheim 5 Große Strafkammer* (5 Qs42/23).

¹⁹⁸ *LG Berlin* (n150) para 70f.

¹⁹⁹ *KG Berlin* (n152) para 16f.

²⁰⁰ *ibid* 22ff.

²⁰¹ *ibid*.

²⁰² Verbot der Vereinigung „HAMAS“ 6; Such an order, however, is not constitutive of the classification of an expression as a symbol. Courts may independently determine whether a particular expression qualifies as a symbol

were commonly §140 and, where applicable, §130 StGB (incitement of the people), which required a discernible connection to criminal conduct of Hamas or comparable organizations.²⁰³ Under §140 and 130 respectively, the dangerousness of the utterance of the slogan is an element the court must establish, whereas under §86a it follows from the classification as a symbol and is not separately assessed against the act.

The consequences of this shift are far-reaching. Even where surrounding conduct might suggest culpable use – the LG defendant was separately charged with supporting the Al-Aqsa Martyrs’ Brigade²⁰⁴ – the §86a conviction does not rest on it. The LG rejected the additional §140(2) charge for lack of proven endorsement,²⁰⁵ and convicted under §86a solely on the slogan’s status as a symbol of Hamas. As such, it falls under a “communicative taboo”²⁰⁶, the removal of the symbol from all means of communication in general. The reach of this reasoning extends well beyond a defendant of that profile. Because the speaker’s meaning and intent have no bearing on the physical elements of the offense, the same construction applies in identical terms to a speaker who carries none of that background and who means the phrase as a demand for an end to the occupation. What was previously a case-by-case assessment of meaning and context becomes a blanket criminalization of the phrase, under which the sense intended by the speaker no longer bears relevance.

This reading does not claim that §86a is illegitimate, that removing the symbols of terrorist or unconstitutional organizations from public communication is objectionable in principle, or that the slogan is not used by Hamas. The point is narrower: the slogan’s status as a symbol is contested and both the LG and KG concede this before overriding it.²⁰⁷ What follows from treating an unsettled determination as settled differs from the case of an uncontested symbol such

of a terrorist organization, irrespective of whether it has been designated as such in a prohibition order. They may therefore recognize an expression as a symbol even in the absence of a prohibition order, and, conversely, are not bound by a designation contained in such an order; see: *LG Mannheim 5. Große Strafkammer* (n162); the AG judge nevertheless made explicit reference to the fact that the flyer distribution happened before the issuance of the prohibition order when ruling out §86a: *AG Tiergarten* (n148) 29.

²⁰³ Max Kolter, “‘From the River to the Sea’ wird Fall für den BGH” *Legal Tribune Online* (14.11.2024); Thomas Fischer, ‘Ist Jubel Über Terror Strafbar?’ *Legal Tribune Online* (16.10.2023).

²⁰⁴ listed as terrorist organization by the EU: Council Decision on specific restrictive measures directed against certain persons to combat terrorism 2005 (L340/64) para 2(2).

²⁰⁵ *LG Berlin* (n150) para 109ff.

²⁰⁶ *ibid* 102.

²⁰⁷ *ibid* 88; *KG Berlin* (n152) para 23.

as the swastika, where no movement claims a peaceful use and innocent and educational use is caught by the statutory exceptions. The FRTS-slogan differs on both counts: its status is in dispute, and the body of speakers who use it without culpable meaning is not marginal.²⁰⁸ The KG is explicit that the reach is intended, holding that even harmless and democratically desirable expression is unprotected once the phrase counts as a symbol.²⁰⁹ The expectations are too narrow to keep such expression out of reach of criminal sanction, and the only protected position is that of the recognizable opponent of Hamas, e.g. when the wording is used to express the call for an Israeli state between the River Jordan and the Mediterranean.²¹⁰

Having reconstructed how the courts reach criminal liability for the slogan, the next section pursues why the reasoning takes the shape it does, and what that shape conceals.

b. Interpretative analysis

The analysis proceeds in four steps, derived from the theoretical framework developed in the previous chapters. It first reads the courts' treatment of ambiguity as a production of danger as a legal fact. It then analyzes the foreclosure of other normative meanings and subsequently shows how the convictions own violence is rendered invisible through Cover's and Butler's accounts. Finally, it considers who is eligible to utter the slogan.

The production of danger

Section a. established that the two provisions stand in different relations to danger: under §140 the dangerousness of the utterance is an element the court must demonstrate against the context, which is why the AG's determination of meaning can defeat it, whereas under §86a danger follows from the classification of the phrase as a symbol and is (almost) never separately

²⁰⁸ As the courts concede themselves but immediately neutralize: *LG Berlin 2. Große Strafkammer* (n148) paras 49, 65f, 101f; *KG Berlin 3. Strafsenat* (n150) paras 16f, 24; Outlining the different meanings and the historical origin of the slogan lies outside of the scope of this thesis, for more information, see among others: Robin DG Kelley, 'From the River to the Sea to Every Mountain Top: Solidarity as Worldmaking' (2019) 48 *Journal of Palestine Studies* 69; Karoun Demirjian and Liam Stack, 'In Congress and on Campuses, "From the River to the Sea" Inflames Debate' *The New York Times* (9.11.2023); Max Kolter, 'Hamas-Verbot: "From the River to the Sea" nun strafbar?' *Legal Tribune Online* (15.11.2023).

²⁰⁹ *KG Berlin* (n152) para 23.

²¹⁰ *ibid* 24; *LG Berlin* (n 150) para 105 The broader constitutional critique directed at the breadth of the symbol construction itself lies outside the scope of this thesis; for further information consult: VGH Kassel NJW 2024, 1831; Petersen, NSW 2025, 187; Enders, *SächsVBl.* 2025, 65; Schäfer, *DÖV* 2025, 600; Ambos, *JZ* 2025, 620 mit Replik Ladeur, *JZ*2025, 932 and Duplik Ambos *JZ*2025, 935].

assessed against the act. Read through the framework, that structural difference allows us to analyze something that the doctrinal description leaves implicit. Adjudicating the slogan under §86a does not merely raise the evidentiary bar or shift the stage at which the meaning is considered; it produces the danger of an utterance as an established legal fact without ever establishing it. The conviction carries the full weight of a criminal sanction for a dangerous act, while the dangerousness of the particular act is precisely what the offense type relieves the court of showing.²¹¹ The danger enters the legal record as a finding, when it was only presupposed.

The internal evidence for this is the LG case itself. As shown above, in the same procedure the defendant was acquitted under §140 because the endorsement of the October attack could not be proven while convicting under §86a for use of a terrorist symbol. The slogan is at once too ambiguous to count as endorsement and unambiguous enough to count as a symbol. This is not a contradiction the court stumbles into but a function of which danger-regime the charge selects, and it is the clearest demonstration that the danger attaches to the framing rather than to the words.

This danger the courts invoke is not founded in the courtroom but established by the prohibition order of the Interior Ministry which banned Hamas and thus posits the slogan as their symbol.²¹² Court and prosecution do law-preserving work, enforcing a communicative taboo a prior sovereign act had already set.

Legal interpretation and the foreclosure of plural meaning

Section a. established that the FRTS-slogan carries competing normative attachments held by different communities: a demand for an end to occupation, a call for equal rights across the territory, a two-state or one-state vision, or the eliminatory meaning the courts link to Hamas. In Cover's terms this is jurisgenesis – normative meaning generated outside the state by communities whose understanding of the phrase diverge. The slogan does not arrive in court as a settled sign awaiting correct identification, but as a site of plural and conflicting nomoi.

When the LG and KG fix the slogan as a symbol of Hamas under §86a, they remove meaning from the determination altogether. The competing readings are not weighed and found

²¹¹ See *LG Berlin* (n150) para 116 where the non-occurrence of any concrete danger is named and declared irrelevant.

²¹² Verbot der Vereinigung „HAMAS“ 6.

unpersuasive; they are declared irrelevant to the *actus reus*, reserved at most for the later and narrowly drawn stages of protective purpose, social adequacy, and intent. This is the jurispathic function of courts in a particularly complete form. The court does not merely select one *nomos* and subordinate the others, which any authoritative ruling does; it forecloses the question of plural meaning as a matter of law, so that the rival meanings never enter the analysis that decides on liability. The LG states this openly in the shape of the communicative taboo: the sign is to be removed from all means of communication, whatever meaning a given speaker attaches to it.

The contrast with the AG should not be mistaken for a contrast between a court that preserves plurality and one that destroys it. The AG is jurispathic in the same sense; it too issues an authoritative ruling and convicts on the count of §140, foreclosing other readings of the sentence on the October 7 attack as a “historical moment” it found unambiguous. The difference lies only in the frame. Because §140 required the court to determine the meaning of the expression, the plurality was registered in its reasoning and consequently produced an acquittal on the slogan. The § 86a construction reaches the jurispathic result without the plurality ever becoming legally relevant. The suppression is not more severe under §86a; it is more complete, because the competing meanings are foreclosed before they can be considered.

The foreclosure presents itself as neutral classification. The court appears to identify what the slogan already is, rather than to extinguish the normative worlds that hold it to mean otherwise.

How the violence is concealed

That the §86a conviction is itself an exercise of violence is not visible on the face of the decisions, and the framework explains why through two distinct mechanisms.

The first is Cover’s, which explains why the coercive character of the judgment itself becomes invisible. The violence the judgment authorizes is real: it is not only the fine but the withdrawal of the freedom to speak, the criminal record, as well as the chilling effect on everyone else who would voice a wish for a free Palestine in the region.²¹³ Cover lets us see this as violence because his account refuses the separation on which the invisibility depends. The judge who convicts is seen as merely interpreting the law, not participating in the force that follows from the interpretation; it is this apparent gap between word and deed that renders the coercion invisible.

²¹³ Possible to achieve by various different means as holds *AG Tiergarten* (n 183) para 22.

§86a is in this respect an exemplary legal text in Cover's sense: it preserves the perspective of justification rather than the perspective of those on whom the interpretation's consequences fall, and in translating the matter into the language of symbols and protective purposes it diminishes the experiential reality of what the conviction does.²¹⁴

The second mechanism is Butler's, and it operates at the point where the state's own action is coded as non-violent in the first place. As established in, legal violence is occluded because existing law is treated as a neutral baseline; anything that disturbs the baseline appears as intrusion or threat, while the violence already built into the baseline goes unrecognized because it is the baseline and not a deviation from it.²¹⁵ This allows the framework to rename its own coercion as justified, and to perform what Butler calls a *discharging and externalizing* of violence onto non-violent action: it takes a non-violent act, names it as violent or dangerous, so that the framework's own response appears as mere reaction to a prior threat. The §86a construction enacts exactly this inversion. Designed as a near-blanket prohibition that permits almost no deviation, it casts the utterance of the slogan as the dangerous act and its own sweeping restriction of expression as the necessary defensive response; necessary because directed against terrorism. The cost to freedom of expression is thereby made to disappear, and the state's restriction is made to appear not as violence but as protection.

Who is eligible to speak

Both concealment mechanisms still leave open a question the courts themselves raise: the slogan is not prohibited absolutely since each court names a position from which it may lawfully be used. Reading that permitted position through Butler's account of the right to appear clarifies what this accomplishes in practice.

Butler argues that the right to appear, though propagated as universal, is in fact qualified in advance: it is "tacitly supported by regulatory schemes that qualify only certain subjects as eligible to exercise that right,"²¹⁶ so that the right turns out to apply only to those whose mode of appearing conform to what the dominant framework treats as acceptable. The permitted speaker-position the courts construct is such an eligibility filter. The slogan is sayable, but only by a

²¹⁴ Cover (n79) 1608.

²¹⁵ Butler, *The Force of Nonviolence* (n60) 132.

²¹⁶ Butler, *Notes towards a Performative Theory of Assembly* (n62) 50.

speaker who occupies the right relation to it: the AG protects the speaker who makes no endorsing connection to the October 7 attack²¹⁷; the LG exempts only use that visibly distorts the symbol, parodies it, or plainly criticizes the organization and its aims, and it reads the defendant's presence at a demonstration critical of Israel as showing he did not distance himself from Hamas;²¹⁸ the KG reserves protection for the recognizable critic or opponent of Hamas²¹⁹. Exemptions therefore exist, but they are open only to a speaker who appears in the shape the framework already accepts – the recognizable opponent of Hamas.

This relocates rather than removes the burden, and it raises the question the courts do not: what must a speaker do, or be, to be recognized as a critic or opponent of Hamas? The exemption presupposes that the speaker legibly makes an oppositional stance, and it places the work of producing that legibility on the speaker. The demand has a specific resonance where the speakers are predominantly Muslim or of Middle Eastern background. As Todd Green, who has written extensively on Islamophobia and anti-Muslim prejudice, argues, the expectation that Muslims continually condemn terrorism functions less as a genuine question than as a marker of suspicion: given how routine such condemnations already are, the relevant question is what it says about the interlocutor who still demands one, and why opposition to violence is assumed absent until separately performed.²²⁰ A speaker to lawfully use the slogan must pre-emptively perform a distance from Hamas that is not required of others, and eligibility to appear is conditioned on a self-presentation the dominant framework is willing to accept.

Read together, the four steps describe a single operation. Adjudicating the slogan under §86a rather than §140 produces its dangerousness as an established legal fact without establishing it against the act; the foreclosure of the slogan's competing meanings is presented as neutral classification; the violence of the resulting conviction is concealed behind the form of legal determination and recoded as defensive protection; and the narrow exemption left open places the burden of eligibility on the speaker. None of this requires the courts to depart from ordinary

²¹⁷ *AG Tiergarten* (n149) para 23.

²¹⁸ *LG Berlin* (n151) paras 103, 105.

²¹⁹ *KG Berlin* (n153) para 24.

²²⁰ Todd H Green, *Presumed Guilty: Why We Shouldn't Ask Muslims to Condemn Terrorism* (Fortress Press 2018); In the context of Israel-Palestine, this demand has become ubiquitous enough that the phrase 'do you condemn Hamas' has its own Wikipedia entry https://en.wikipedia.org/wiki/Do_you_condemn_Hamas%3F.

doctrine. The repression operates through the unremarkable application of an ordinary criminal provision, which is what makes its violence difficult to see and difficult to contest.

Whether this choice and its consequences are deliberate is not open to proof, resting as it would on an intent the judgments themselves do not disclose. What the analysis can show is the effect the choice has. And on the account developed in Part I, the intent question is beside the point in any case. Benjamin's law-preserving violence does not operate through anyone's conscious decision; it operates through the structure reproducing itself in the ordinary application or ordinary norms. Martel's contribution lets us read legal documents for what the apparatus does, independently of whether any actor intends it. The claim is therefore about the §86a construction and not the prosecution's motive. The construction reframes Palestine-solidarity as a proscribed symbol whether or not anyone set out to produce that result.

This is what makes the finding more difficult than a charge of deliberate targeting would be, rather than weaker. Deliberate targeting could be located in the intentions of particular actors and dismissed as misconduct, leaving the order itself intact. The reframing shown here is produced by the Rechtsstaat operating as designed, through the unremarkable application of an ordinary criminal provision, measured against its own standards, with no rule broken. That the repression requires no exceptional act, and no author, is precisely what makes its violence difficult to see and difficult to contest.

B. Case Complex II: Assembly

The field of assembly law is the most extensive one out of the three, with regards to publicly available caselaw. Eight judgments on assembly restrictions and bans in the pro-Palestine context are provided on the database, out of which I will look at four more closely.²²¹

²²¹ Out of the four not selected for analysis, one concerns an assembly ban for Nakba Day in May 2023 and thus falls outside my scope. Two concern the relocation of a protest camp but deal primarily with legal detail of assembly law and are therefore of limited relevance to the present analysis. The fourth concerns the restriction of the motto „From the River to the Sea, Palestine will be free“ as a potentially criminal slogan under §86a StGB, but its analysis would add little to the discussion in the preceding chapter.

The first case, VG Berlin, 1 L 428/23, 11.10.2023 (hereinafter: VGB1-ban)²²² is a request for interim legal protection against an administrative decision banning an assembly. The danger prognosis relied on incidents from previous demonstrations associated with the same organizer.

The second case, VG Berlin, 1 L 507/23, 20.12.2023 (hereinafter: VGB2-hugs)²²³ concerns the administrative ban of an assembly scheduled for 21 December, which was conceived around offering hugs to anyone left stressed or anxious by the conflict.²²⁴ In the proceedings for interim relief, the court did not uphold the ban on the assembly as such; instead, it restored the suspensive effect of the objection with the restriction that the motto “From the river to the sea, you will get the hug you need”, was prohibited from being used, holding that the modified wording (the “hug” add-on) does not eliminate concerns under §86a.

The third case, VG Berlin, 1 L 761/25, 20.11.2025 (hereinafter: VGB3-trans)²²⁵ relates to a route restriction for a march on the Trans Day of Remembrance in 2025. The police had restricted the route and the end-rally based on a forecast of dangerous conduct allegedly expected from pro-Palestinian groups joining the event. The court restored the suspensive effect against the restrictive measure, holding that the risk forecast and the proportionality of the restriction were not sufficiently justified.

The fourth case, VG Berlin, 1 K 187/24, 26.11.2025 (hereinafter: VGB4-cong) is one of the most media-effective cases in the context of Berlin’s restrictions against Palestine-solidarity and concerns the dispersal and subsequent ban of the “Palästina-Kongress 2024” which the court found to have been unlawful.

The next section will reconstruct and categorize the four judgments more closely.

a. Doctrinal reconstruction

The freedom of assembly, codified in Article 8 GG, can be regulated and restricted only on the basis of statutory law, and the legislative competence for this fall to the federal states. The legal basis for assembly law in Berlin is therefore the *Versammlungsfreiheitsgesetz VersFG*.²²⁶ The

²²² *VGB1-ban* (VG Berlin 1 Kammer, 1 L 428/23).

²²³ *VGB2-hugs* (VG Berlin 1 Kammer, 1 L 507/23).

²²⁴ Stadt Berlin, ‘Pressemitteilung Vom 26.11.2025’.

²²⁵ *VGB3-trans* (VG Berlin 1 Kammer, 1 L 761/25); *VGB4-cong* (VG Berlin 1 Kammer, 1 K 187/24).

²²⁶ *Versammlungsfreiheitsgesetz Berlin 2021* (2180-4).

provisions regulating restrictions, prohibition and dispersal of assemblies are found in §14 and §22 VersFG for open-air and indoor assemblies respectively, listing concrete fundamental legal interests that justify interferences. The measures imposed must be based on a danger assessment specific to the assembly in question, and the authorities are required to give precedence to less restrictive means, such as imposing conditions, before resorting to a prohibition.²²⁷

In three out of four cases, the courts overturned the underlying administrative decision, at least to a certain extent. In the following step, I will look at where the court located the defect or the strength in the administrative decision.

In **VGB3-trans** the court found the police's grounds for rerouting a Trans Day of Remembrance assembly untenable on two independent grounds. The march was planned to pass through Neukölln with a closing rally at Hermannplatz, in a district that is also to Berlin's largest Arab and Palestinian diaspora.²²⁸ From this, together with social-media mobilization carrying "pro-Palestinian references", the police inferred that an "emotionally charged", "angry", and "combative" atmosphere was to be expected.²²⁹ They pointed to earlier assemblies in the nearby area that have led to arrests, and two large queer assemblies in July 2025 at Hermannplatz with strong pro-Palestinian participation.²³⁰ On this basis they argued that "solidarity-effects" were likely and that the assembly could be attractive to supporters of Hamas, Hezbollah or other proscribed organizations.²³¹

The court held that these connections were asserted rather than reasoned, and the prognosis could not rest on past event or assumptions not concretely tied to this assembly. It was particularly unpersuaded by the last inference, noting that these groups do not stand for queer-friendly politics and cannot be assumed to support the applicant's concern.²³² Independent of the prognosis, the court found the rerouting disproportionate: the choice of location falls within the

²²⁷ Sebastian Müller-Franken, 'Art. 8 GG, Versammlungsfreiheit' in Hans Hofmann and Hans-Günter Henneke (eds), *Grundgesetz-Kommentar* (16th edn, 2025) 557.

²²⁸ Dorothea Kolland, "'Kiez International'" in Der "Contact Zone": Interkulturelle Konzepte in Berlin-Neukölln' *Jahrbuch für Kulturpolitik* (2002) 253.

²²⁹ *VGB3-trans* (n191) para 13.

²³⁰ *ibid.*

²³¹ *ibid* 14.

²³² *ibid.*

core of the freedom of assembly in Art. 8, and barring it was out of proportion to any gain in averting danger.²³³

In the administrative decision underlying **VGB2-hugs** the police prohibited the assembly in total. As far as can be reconstructed from the ruling, the ban rested merely on the fact that the same organizer had already held three pro-Palestinian assemblies in the preceding weeks, without any closer account of why this should constitute a danger.²³⁴ The court held that the authority had shown neither “an anti-Israel atmosphere” nor criminal conduct at those earlier assemblies, so there were no events from which a danger for the announced one could be derived.²³⁵ It noted that the gathering involves only about 50 expected participants and is a stationary event that could be policed without significant effort. The feared uncontrolled influx of “highly emotional and violence- or conflict-ready attendees” was not supported by the organizer’s past assemblies, and the mere fact that the location is well connected to public transport is not sufficient to indicate such a danger.²³⁶

The court did, however, follow the authority on the assembly motto. It held that the line “From the river to the sea, you will get the hug you need” carried an immediate danger for public security, because there was sufficient suspicion that the modified slogan was punishable. It reasoned that “From the river to the sea” already points, for an outside observer, to the full slogan, and that the organizer’s altered second half does not constitute a “clear distancing of the anti-Israeli content of the expression”.²³⁷ On that basis a reasonable suspicion remains under §86a (see previous chapter), as argued the court. This danger, it held, could be met by a condition prohibiting the motto rather than by a total ban.

VGB4-cong differs from the other assembly cases, as it is a decision on a *Fortsetzungsfeststellungsklage*, in which the court declares after the fact that the police’s oral dissolution of the “Palästina-Kongress 2024” on 12 April and the ban on its continuation over the following two days were unlawful. The congress was an indoor event, broadcast by livestream and organized by *Jüdische Stimme für gerechten Frieden in Nahos*.²³⁸ The police had already

²³³ *ibid* 16f.

²³⁴ *VGB2-hugs* (n189) para 11.

²³⁵ *ibid* 12.

²³⁶ *ibid* 13.

²³⁷ *ibid* 14.

²³⁸ ‘Jüdische Stimme Für Gerechten Frieden in Nahost’.

imposed conditions before it began, among them the prohibition to burn any flags, or similar items,²³⁹ bans on glorifying violence, on slogans negating Israel's existence, and on showing the symbols of Hamas, Samidoun and others, basing their assessment on statements allegedly made during "issue-related" outdoor assemblies since October 7 2023.²⁴⁰ During the event the police registered a video contribution by researcher Salman Abu Sitta²⁴¹, against whom a political-activity ban with regards to the congress had been issued on the same day,²⁴² they cut the power to stop the livestream and then dissolved the assembly 1,5 hours after it started and prohibited its continuation.²⁴³

The video contribution was the police's central reason for stopping the event, according to the court's reconstruction²⁴⁴ and the police's social media posts.²⁴⁵ The police stated they feared that the video would provoke criminal utterances from "emotionalized participants", wanted to prevent chants such as the FRTS-slogan and expressions denying Israel's 'right to exist', and doubted that the organizer could keep the participants under control, referring to the markedly anti-police atmosphere in the hall.²⁴⁶ Separately, they publicly declared that the dissolution had served to prevent the dissemination of antisemitic offences and Islamist incitement, which received extensive media coverage²⁴⁷ and was subsequently taken up by political actors.²⁴⁸

The court left expressly open whether the danger prognosis underlying the dissolution was tenable and decided instead on proportionality. The dissolution and ban were, first not necessary: the conditions were read out at the start, no punishable utterances or expressions had in fact been heard before the dissolution, and against any that might occur the police could have proceeded against individual participants or barred the specific video, since an indoor event of this size with controlled access was far easier to keep under control than an open-air assembly.²⁴⁹ They were,

²³⁹ Abgeordnetenhaus Berlin, 'Antwort auf Schriftliche Anfrage des Abgeordneten Ferat Koçak (LINKE): Polizeilicher Umgang mit dem Palästina-Kongress' 2.

²⁴⁰ *ibid*; *VGB4-cong* (n191) para 8.

²⁴¹ Named 'X' in the judgment, see Max Kolter, 'VG Berlin: Auflösung des "Palästina-Kongresses" rechtswidrig' *Legal Tribune Online* (26 November 2025).

²⁴² *VGB4-cong* (n191) para 9, later declared unlawfull (VG Berlin, Az. 24 K 493/24, 14.07.2025).

²⁴³ *ibid* 10.

²⁴⁴ *ibid* 28.

²⁴⁵ Polizei Berlin Einsatz [@PolizeiBerlin_E], 'Post on x.com from April 12 2024, 16:07'.

²⁴⁶ *VGB4-cong* (n191) paras 19, 28.

²⁴⁷ 'Palästina-Kongress in Berlin aufgelöst: Polizei erwartet Proteste am Samstag' *Berliner Zeitung* (13 April 2024); '»Palästina-Kongress«: Zentralrat der Juden verteidigt Auflösung' *Der Spiegel* (14 April 2024).

²⁴⁸ Nancy Faeser [@NancyFaeser], 'Post on x.com from 12.04.2024, 18:17'.

²⁴⁹ *VGB4-cong* (n191) para 32ff.

second, disproportionate: a total dissolution presupposes that the holding or tolerating of punishable views is the assembly's defining purpose, which could not be assumed here, and opinions short of the threshold of criminal liability may not be suppressed merely because they run against mainstream views.²⁵⁰

VGB1-ban is the only case in my selection where the administrative ban was upheld by the court. It concerns an assembly scheduled for October 11, 2023, and thus falls within the wave of prohibitions issued in the weeks after October 7, 2023.²⁵¹ *In casu*, the court confirmed the police's prognosis that a constellation of similar to four previous assemblies by the same organizer in 2021, 2022 and 2023 could be expected. At those assemblies, participants reportedly engaged expression calling for the bombardment of an Israeli city or wishing death upon Jewish people, conduct that the court treated as capable of conveying a willingness to use violence and thereby exerting an intimidating effect, as well as disturbing the public peace pursuant to §14(1) and (2) VersFG.²⁵² That these utterances fall outside the protection of Art. 5 GG and are punishable under §111 (public incitement to commit criminal offences) as well as §130 StGB²⁵³ is not in dispute here, and the court's adoption of that classification is doctrinally unremarkable. What the judgment does not supply are the details of the reasoning that ties those earlier incidents to the assembly at issue. This is a structural feature, due to the fact that the court ruling upholds the underlying administrative decision. An affirming court carries a lighter justificatory burden than a reversing one, it can adopt the prognosis rather than reconstruct and test it, and what reaches the reader of the judgment is the deferential formula, "no compelling grounds for challenging the respondent's risk assessment"²⁵⁴, "the risk assessment is not open to objection".²⁵⁵

²⁵⁰ *ibid* 36f.

²⁵¹ A parliamentary request from early November 2023 records that of the about 24 registered assemblies in Berlin between 7 and 26 October that were framed as pro-Palestinian or as showing solidarity with Gaza's civilian population, at least 17 were banned, against the uniform justification of expected antisemitic utterances and violent disturbances. This number is derived from the list of all registered assemblies within this timeframe, classifying as 'pro-Palestinian' or 'in solidarity with civilians in Gaza' only those whose registered title allowed such classification to be inferred directly. Assemblies expressing solidarity with Israel or with the Jewish community in the same weeks were, by contrast, generally held; Abgeordnetenhaus Berlin, 'Antwort auf Schriftliche Anfrage des Abgeordneten Ferat Koçak (LINKE): Palästina-solidarische Versammlungen und Repression, Oktober 2023' 2ff.

²⁵² *VGB1-ban* (n188) para11.

²⁵³ *ibid* 10.

²⁵⁴ *ibid* 9.

²⁵⁵ *ibid*10.

Taken together, the four judgments form a consistent pattern despite their different outcomes. In the three reversals the courts faulted either the danger prognosis for resting on attribution too loosely tied to the specific assembly, the proportionality of the measure, or both. The more the authorities derived the danger from third-party attribution, as in VGB3-trans, the readier the court was to overturn the measure; where the danger was traced to the assembly's own or previous expression, the restriction held, fully in VGB1-ban and for the motto in VGB2-hugs.

b. Interpretative analysis

The analysis of this case complex proceeds in three steps. First, it examines how the authorities infer the danger of the assemblies and how, in doing so, they construct a *dangerous subject*. Second, it assesses how this process affects protester's eligibility to manifest their right to appear. Lastly, it considers the extent to which the conflation of anti-Zionism and antisemitism, embedded in Germany's doctrine of Staatsräson, influences administrative and judicial reasoning.

Production of the dangerous subject

In the previous case complex, I examined the doctrinally produced danger of a speaker of the FRTS-slogan, through the choice of offense under which it is prosecuted. In the assembly cases, a similar production occurs but rather than being built into the structure of the legal provision, it happens discursively, through a prospective assessment in the shape of the danger prognosis.

This prognosis proceeds by extrapolation from a population usually and previously participating at relevant assemblies; what assemblies of this kind and in this place are assumed to do. In VGB3-trans the prognosis is drawn from the district and its diaspora, from social-media mobilization and from earlier assemblies the applicant had not organized; the danger is transferred onto the announced assembly by association. In VGB2-hugs it is drawn from three prior assemblies by the same organizer, without any account of what about those assemblies would justify it. The courts name precisely this operation, if in doctrinal language, by holding

that the prognosis rests on assumption not concretely tied to this assembly²⁵⁶, asserted rather than reasoned.²⁵⁷ The reversal thus make visible that the danger was a construction of the reasoning and not a property of the assembly.

The recurring figure through which this extrapolation is legitimated is the “emotionalized participant”.²⁵⁸ The characterization of the crowd as “highly emotionalized” across the decisions is also accompanied by an attribution of a readiness to resort to violence and engage in conflict.²⁵⁹ This relocates the danger from what people say or do to the affective state attributed to them. This attribution carries the extrapolation because it provides the image of an unstable, uncontrolled crowd guided by emotion, and therefore a dangerousness that requires no concrete event to have occurred. The Niobe tale, as Butler tells it in Chapter I.B.a, is thus constructed on the administrative level: the classification does not find a threatening subject already there, rather it actively participates in producing one and then the restriction seems like a response to the threat it has named itself.

The same anticipatory naming is visible in the conditions imposed on the congress in VGB4 before it began. The administrative decision lists in advance a detailed catalogue of specific speech offences the assembly is instructed not to commit, from the glorification of violence under §140, to utterances attacking the human dignity of or inciting hatred against ethnic or religious groups under §130, to the prohibition of burning flags or effigies under §104 StGB²⁶⁰. The justification draws on a generally held prognosis based on “issue-related” assemblies in the past.²⁶¹ Of course, criminal law already applies to every assembly as a matter of general legal constraint. Framing a list of offences that are anyways prohibited as assembly-specific conditions, treats this particular event in advance as potentially criminal and dangerous, rather than responding to specific risks arising from conduct that the organizers or the participants have set themselves.

The courts’ reversal in VGB2-4 rejects the danger-production – at least partially. In overturning the administrative decisions, they impose a real constraint on the executive apparatus and restore

²⁵⁶ *VGB2-hugs* (n189) para13; *VGB4-cong* (n191) para 34.

²⁵⁷ *VGB3-trans* (n191) para13.

²⁵⁸ *ibid*; *VGB3-trans* (n191) para 13; *VGB4-cong* (n191) para 7f.

²⁵⁹ *VGB2-hugs* (n189) para 13; *VGB3-trans* (n191) para 13; *VGB4-cong* (n191) para 8,19.

²⁶⁰ A rather curious restriction as the event was held indoors.

²⁶¹ *VGB4-cong* (n191) para8.

the lawful position, and to that extent they amount to genuine judicial review. This suggests a counter-pattern in this case to a more totalizing version of what the theoretical framework could lead one to expect: the administrative decisions reflect the predicted dynamics, but the courts (partially) eliminate them. Within the limits of a small case selection, this shows that the rule of law does provide judicial review and does hold the executive apparatus to account. Whether this reversal is capable of fully undoing the subject-production in the discursive sense cannot be established from the judgments themselves.

In two cases, the reversals leave certain effects of the administrative decision intact. In VGB4-cong the declaration of unlawfulness came after the fact and could not undo the dissolution or the prohibition that followed it. A pre-emptive ban can still be challenged in urgent proceedings before the assembly takes place and a potential Art. 8 interference prevented, in VGB4-cong the harm had already occurred by the time the court ruled. In VGB2-hugs, the partial reversal upholds the restriction on the motto, and in doing so it perpetuates the dangerousness constructed around the FRTS-slogan, as established in case complex I. This case is exemplary in showing the strain in the §86a-inference. The assembly was announced as an occasion to offer hugs to anyone left anxious by the conflict, and in light of this purpose, reading the altered line as a Hamas symbol, and with it a violent call for the elimination of Israel, becomes hard to sustain. The court sustains it regardless, which shows how far the slogan's established dangerousness reaches, without regard to the setting in which the words are used.

The right to appear for Palestine

For Butler, assembly is the setting where the right to appear is exercised most directly, bodies gathering in public to make a claim to political existence. The danger-prognoses examined above work against this. By naming the crowd as emotionalized and treating that emotionality as the ground of its dangerousness, the authorities make eligibility to appear conditional. What disqualifies an assembly is not something it has done but a disposition attributed to it in advance, and this attribution is not neutral. Emotionality and anger are frequently marked and pathologized as gendered and racialized dispositions²⁶² that discredit the speaker, and the

²⁶² cf. Sue Kim, *On Anger: Race, Cognition, Narrative* (University of Texas Press 2013).

attribution attaches readily to a movement that is visibly diverse and includes many people of Arab descent.

In VGB3-trans, this eligibility-filter becomes visible at the administrative level before it gets overwritten by the court. The assembly was not a pro-Palestinian march but a demonstration for queer and trans rights. The authority nonetheless treated it as a Palestinian-associated danger, drawing the inference from the demographic composition of the district and from a mobilization it read as carrying pro-Palestinian reference. From this, it inferred that an “emotionalized, angry and combative mood” was to be expected.²⁶³ The emotionality is not attributed to the trans assembly directly but is derived from the imputed proximity to the Palestine movement, and this emotionality creates the danger. The affinity the authority draws on is not invented since there is real solidarity between the queer movement and the Palestine movement. What the eligibility-filter does is treat the connection as a source of danger, so that the assembly is unobjectionable as a queer rights demonstration and becomes suspect at the point where it meets Palestine-solidarity.²⁶⁴ Its right to appear is made conditional on staying separate from the movement, which the authorities try to enforce through the re-routing.

The logic of conflation

In Chapter II.C.d. I have established the argument that German Staatsräson operates through conflating Israel-critique with antisemitism, because Germany’s commitment to Israel can only enter the constitutional order through that conflation. This conflation appears in this case complex at the level of administrative and judicial danger-assessment, though without Staatsräson being named.

Across VGB1-ban, VGB2-hugs as well as the conditions issued on the Palästina-Kongress use the same recurring formula, stating “*die Vernichtung des Staates Israel und/oder seiner Bewohner*”²⁶⁵, which translates to the annihilation of the state of Israel and/or its population. The term “annihilation” undoubtedly carries a violent connotation; however, it is worth looking more closely at what this phrasing does. If “Vernichtung des Staates Israel” is read under this violent

²⁶³ VGB3-trans (n218) para 13.

²⁶⁴ Interestingly, this mirrors the dynamic from an example Butler raises to deconstruct the universalism of the right to appear, on solidarity between queer-feminists and Muslims, cf. Butler, *Notes towards a Performative Theory of Assembly* (n62) 49.

²⁶⁵ VGB1-ban (n188) para11; VGB2-hugs (n189) para 12; Abgeordnetenhaus Berlin (n205) 2.

connotation, as the physical destruction of the state, understood as its territory and population, the second half of it “und/oder seine Bewohner” forms a rhetorical pleonasm, as the population is already included. If it, however, refers to the ending of the state as a political and legal entity, the dissolution of a particular sovereign order, it is a claim about legitimacy and constitutional arrangements and is not in itself a call to harm anyone. In this case, the conjunction with “und/oder seine Bewohner” rhetorically pairs it with an obviously morally reprehensible call for the killing of the civilian population. The “and/or” construction implies a continuity between the two and thus affirms their conflation in meaning. The formulation in VGB1-ban goes on to draw a gradient from “anti-Israeli” to “antisemitic, right up to negating Israel’s ‘right to exist’”²⁶⁶ placing Israel’s existence at the top of the scale.

In VGB4-cong the police named the prevention of existence-negating chants among their stated reasons for the dissolution.²⁶⁷ They invoked public-security under the assembly law’s general danger clause in a setting where the status of the expression remains unsettled, given that denying Israel’s ‘right to exist’ is not, by itself, an offense.²⁶⁸ Benjamin’s framework suggests that the policing of this boundary may, in effect, treat law-preserving and law-making violence as less distinct than their separation would imply. They present themselves as enforcing existing law, yet they intervene where the legal boundary is not settled, and through their ordinance they posit what the law forbids and demands as a consequence. The conflation traced above supports it in passing as law-preservation. When the denial of a state’s legitimacy is read as continuous with antisemitism its prohibition appears as the enforcement of an existing rule that warrants the assembly’s dissolution rather than a decision taken by the authorities. The commitment entailed by German Staatsräson is premised on the judgment that the expression is dangerous, and the police act carries that judgment out.

While the court held that the exclusion of criminally punishable expressions cannot be given absolute priority over the protection guaranteed by the fundamental rights Art 5 and 8²⁶⁹, it did not speak about what expression would amount to be criminally punishable, and thus avoids to resolve the very ambiguity the police exploited, leaving the conflation intact for next time.

²⁶⁶ *VGB1-ban* (n188) para11.

²⁶⁷ *VGB4-cong* (n191) para28.

²⁶⁸ For plans to criminalize it see I.C.d.

²⁶⁹ *VGB4-cong* (n218) para34.

C. Case Complex III: Immigration

The last complex concerns the effects pro-Palestinian activism has on residence and immigration status. Berlin-based lawyer Alexander Gorski sees an instrumentalization of immigration law as a repressive tool against pro-Palestinian voices, where it is being used in cases where criminal convictions are not given.²⁷⁰

The analysis examines three judgments which are connected to two different procedures.²⁷¹ The first two rulings, VG Berlin, 24 L 91/25 of 10.04.2025²⁷² (hereinafter: VGB5a-mov) and VG Berlin, 21 K 158/25 of 06.05.2026²⁷³ (hereinafter: VGB5b-mov), are part of the procedure against the so-called *Berlin-4*, a group of four people accused of having participated in the sit-in at the presidium of the Freie Universität Berlin in October 2024.²⁷⁴ As none of them are German citizens – three of them European, one US citizen – their freedom of movement were revoked, based on prognosed danger to the society and peace under §6 FreizügG/EU.²⁷⁵ VGB5a-mov is a preliminary ruling granting interim legal protection against the deportation order, that was issued effective immediately. VGB5b-mov is the substantive decision in the case, overturning the decision of the Immigration Office (*Landesamt für Einwanderung, LEA*) and the Berlin Senate Department of the Interior as unlawful.

The third ruling, VG Berlin, 39 L 150/26 of 20.05.2026²⁷⁶ (hereinafter VGB6-nat), is the aforementioned case that withdrew naturalization under the provision that set an explicit commitment to Germany's special responsibility towards the Jewish people as a pre-requisite for the citizenship, newly introduced to the Nationality Act § 10(1) Nr. 1a & §11 Nr. 1a in 2024 (see Chapter I.C.d.). The claimant is a stateless Palestinian, who has lived in Germany since he was

²⁷⁰ Gerhan Osseili, “Staatsräson” vs. Rechtsstaat – Alexander Gorski Über Die Grenzen von Strafrecht, Ausweisung Und Versammlungsfreiheit’ (*Deutsche JuristInnen für das Völkerrecht*, 22 October 2025); ‘Interview with Lawyer Alexander Gorski’.

²⁷¹ The database contains seven judgments, four of which fall outside this thesis because the underlying administrative decisions predate the set timeline, even though the rulings were issued after October 2023.

²⁷² *VGB5a-mov* (VG Berlin 24 Kammer, 24 L 91/25).

²⁷³ *VGB5b-mov* (VG Berlin 21 Kammer, 21 K 158/25).

²⁷⁴ Max Kolter, ‘VG: Irische Gaza-Aktivistin darf in Deutschland bleiben’ *Legal Tribune Online (LTO)* (5 June 2026).

²⁷⁵ Both available judgments concern European citizens.

²⁷⁶ *VGB6-nat* (VG Berlin 39 Kammer, 39 L 150/26).

two months old.²⁷⁷ He received the citizenship in October 2025, a few months later Berlin authorities – LEA and the Senate²⁷⁸ – revoked it. They argued that content the claimant had posted on his Instagram stories in the past demands the conclusion that his commitment to the democratic order and Germany’s responsibility towards the Jewish People constituted malicious deceit. This judgment is not a substantive decision but an answer to the urgent request for suspensive effect, as also this decision was subject to immediate enforcement. The VG confirmed the Senate’s decision and did not grant suspensive effect.

The analysis is set up as above.

a. Doctrinal reconstruction

On the face of it, the two cases concern quite different legal scenarios, yet they invoke the same normative substance in different legal forms – the Staatsräson.

In **VGB5-mov** the underlying Senate decision invokes Staatsräson expressly, holding that the claimant’s behavior runs against the democratic order and against Germany’s historical responsibility to protect Israel’s ‘right to exist’.²⁷⁹ The court did not engage with this substantively; it found merely that the Senate had left the claim unsubstantiated and overturned the decision on the danger threshold. An express invocation of this kind is uncommon,²⁸⁰ and because the court resolved the case on substantiation it never had to confront the prior question, of whether a commitment said to be merely political could carry a binding legal decision at all.²⁸¹

In **VGB6-nat** the same substance is present but unnamed, at least as far as the reconstruction of the administrative decision permits one to say. It works through § 10 Nr. 1a and §11 Nr. 1a StAG, provision that are themselves a juridification of the German Staatsräson (see Chapter I.C.d.). What appeared in the first case as a free-standing political benchmark has, in the second, become an ordinary element of the statutory test. The law now expects the commitment in codified form, and the authorities and the court concluded that in this instance the commitment

²⁷⁷ Hauenstein (n131).

²⁷⁸ The administrative review process routes the decision from the LEA to the Senate and only then to the court.

²⁷⁹ *VGB5b-mov* (n191) para 6.

²⁸⁰ as reveals a search in the caselaw database, see also ‘Interview with Lawyer Alexander Gorski’ (n 171) 00:05:56.

²⁸¹ See Chapter I.C.d

was insincere.²⁸² They relied on two Instagram posts, one showing fighters in green headbands captioned “Heros [sic] of Palestine” and one showing Sheikh Ahmad Yassin, a founding member of Hamas, captioned with a Palestine-flag and a heart,²⁸³ together with a conviction for insulting a police officer at a 2024 protest, which the court read as a further indication of disregard for the human rights that underpin the democratic order.²⁸⁴

The way the decision is built is worth a closer look. A possible objection to revoking citizenship over the content of the posts is that opinion is protected under Art. 5 GG, and the court does not deny this. It accepts that the posts may well fall within the freedom of expression.²⁸⁵ This shifts the grounds on which the court bases its reasoning, as we have seen it in the case of the FRTS-slogan. The wrong it sanctions is not the holding of these views but the alleged deceit, the false avowal under §35(1) StAG. On this framing, the posts are not the offense, they are the evidence that the commitment signed during the naturalization procedure did not match the applicant’s actual conviction. The free-speech concession is thereby rendered irrelevant, because the protected expression supplies the entire basis for the unprotected lie. To explain why more may be demanded of an applicant here than the ordinary exercise of basic rights would allow, the court points to the particular bond of loyalty between state and citizen.²⁸⁶ In balancing the interests, the court held that the public interest was particularly weighty; it found there to be a significant interest in restoring lawful conditions. Without immediate enforceability, argues the court, the applicant could remain in the federal territory as a German national for a longer period and, as a Union citizen, freely move within the EU and invoke rights reserved to German nationals and EU citizens.²⁸⁷ Moreover, immediate enforceability also serves the public interest in that the applicant may potentially harm Germany’s reputation at home and abroad.²⁸⁸

²⁸² The requirement sits particularly awkwardly in this case. The commitment under §10(1) Nr1a StAG is derived from Germany’s specific responsibility as the German Reich’s successor state. The claimant is a stateless Palestinian, whose relation to that history, and to Israel, is not the same as the German from which the obligation is drawn. This is not to say what he can or should hold, but to note that Israel’s ‘right to exist’ means something entirely different for a Palestinian than for a German NS-descendant.

²⁸³ *VGB6-nat* (n194) para 4.

²⁸⁴ *ibid* 52f.

²⁸⁵ *ibid* 64.

²⁸⁶ *ibid*. It bears saying that the posts are not innocuous, and that the question here is the legal construction rather than whether the court’s reading of them is sound. The analysis concerns how the decision moves from a protected expression to a sanctionable deception, not the truth of the inference it draws in its argumentation.

²⁸⁷ *ibid* 73.

²⁸⁸ *ibid* 74.

Turning to the other case-pair, the measure under review in the **VGB5-mov** cases is the loss-of-freedom-of-movement determination under §6(1) FreizügG/EU, from which the deportation and entry ban follow as dependent decisions. The legal question is whether the person's individual conduct constitutes a real, present and sufficiently serious danger to a fundamental interest of society.²⁸⁹ A criminal conviction is neither required nor sufficient on its own; where a conviction is absent the authority must point to consistent, objective and specific indications substantiating the suspicion, and must conduct a thorough examination of the person's conduct accordingly.²⁹⁰

The two decisions reach the same result through different procedural roles. Reconstructed through the rulings, the decision under review is the position of the Senate, which imposed on the LEA after the latter's responsible official had formally objected through an internal remonstrance process because she found the determination untenable absent a real threat.²⁹¹ On the merits both courts found the reasoning insufficient. It rested exclusively on discontinued proceedings, most of them concerning offences of petty criminality whose maximum sentences place them outside the danger threshold.²⁹² Because all proceedings had been discontinued, the claimant may rely on the presumption of innocence as to every allegation.²⁹³ On one offence grave enough in principle to ground a determination, the §86a allegation tied to the FRTS-slogan, both courts held that the slogan's legal meaning is so contested that it cannot establish dangerousness.²⁹⁴ The administrative bodies never requested the investigation files; VGB5a-mov found that this interfered with the court's duty to investigate *ex officio*.²⁹⁵ VGB5b-mov particularly scrutinized the state criminal police (*LKA*) report, holding that it reproduces the discontinued proceedings without adding independent findings, characterized the claimant as guided by "political and religious ideologies" without specification and attributed her a tendency to resolve conflicts through violence, and yet state that no prognosis of her violence potential is possible, a conclusion the court found to contradict its own premise.²⁹⁶

²⁸⁹ *VGB5b-mov* (n191) para 25; *VGB5a-mov* (n 190) para 10.

²⁹⁰ *VGB5b-mov* (n191) para 26.

²⁹¹ 'LEA Remonstrance Ausweisung' (*FragDenStaat*).

²⁹² *VGB5b-mov* (n191) para 30.

²⁹³ *ibid* 33.

²⁹⁴ *VGB5a-mov* (n190) para 17; *VGB5b-mov* (n 191) para 35, with this not following the court in LG and KG above.

²⁹⁵ *VGB5a-mov* (n190) para 12.

²⁹⁶ *VGB5b-mov* (n191) para 34.

b. Interpretative analysis

This section makes three moves. It first reads the production of the dangerous subject in the VGB5-mov cases and asks what the court's reversal does and does not undo. It then turns to the law-preserving state interests at work in VGB6-nat. Finally, it examines the treatment of the Staatsräson-commitment across the three decisions.

Production of the dangerous subject

As the doctrinal reconstruction showed an administrative reasoning that failed to meet the danger threshold in VGB5-mov, the interpretive question is what that reasoning was doing where it lacked proof. Read through Butler, the administrative act here is less a finding about the claimant than a production of her. Across the LEA decision and the LKA-report she is assembled as a particular kind of subject, a person “guided by political and religious ideologies”, showing “a tendency to resort to violence as an expression of political conviction” and through this set apart from the rest of society.²⁹⁷ None of this is based on concrete conduct established in the reasoning. Every proceeding against her had been discontinued, several for lack of even the suspicion needed to bring to a charge. The dangerous subject is thus constituted in language first, and the danger finding then treats that constituted person as though it were a demonstrated fact. The production of the dangerous subject appears as substitute for proof.

The LKA report shows this plainly, because it undercuts its own conclusion. It reproduces a list of discontinued proceedings, draws from them the portrait of an increasingly violent person, and then states that a prognosis of her actual violence potential is not possible. What is claimed to be an assessment of danger is, on its own terms, an act of naming that has detached itself from anything it could be measured against, and the naming is left to do the work the evidence does not.

Similar to VGB2-4, however, the courts reject this production which suggests a functioning Rechtsstaats-mechanism. They decline to take the assembled figure as established and insist instead on the concrete facts. The rejection of the administrative decision offers a genuine judicial review in that it produced a real constraint on the executive apparatus: by invoking and

²⁹⁷ *ibid.*

emphasizing the individual-conduct standard, the presumption of innocence and the demand for substantiation. By granting interim legal protection, VGB5a-mov minimized the time the claimant was held in the position of a dangerous subject under the threat of deportation. Similar to above, the question whether the reversal can also fully undo the subject-production in the discursive sense remains open from the case-law analysis, what becomes more relevance in this case is also to what extent the administrative measure deters other people from protected activity in the context of Palestine-solidarity.

What the reversal cannot undo is that the determination was issued at all, with immediate effect, on a record its own issuing authority had been warned would not hold. The remonstrations of the LEA officer who raised the legal objection was overruled by the Senate's instruction, and the decision was issued regardless. This is the structural limitation Sarat and Kearns, reading Cover, locate in the administrative apparatus: bound to hierarchical command, it cannot resist the violence of administration from within, and the correction had to come from the court, which exercised the capacity the apparatus lacks. The two reversals by VGB5a and VGB5b that followed confirm how thin the reasoning was. On that ground, the burden of contesting the measure fell on the claimant from the moment of issuance. Having to litigate an enforceable loss-of-status determination out of effect is itself a cost, and here it was a cost imposed by measure unlikely to survive review from the start. This is what distinguishes it from the ordinary burden of any administrative dispute: not that the claimant had to go to court and won, but that the measure was issued and enforced despite the serious legal objections brought against it by an apparatus that could not correct itself and only by a court that could.

State interests and the rot

In weighing the immediate enforcement of the revocation in VGB6-nat, the court treats three interests as the weightiest. One is the concern for Germany's reputation in light of the claimant's online activity, should his naturalization stand.²⁹⁸ This connects to the argument about Germany's self-interest in shedding its historical guilt and claiming and asserting its leading position in the fight against antisemitism.²⁹⁹

²⁹⁸ *VGB6-nat* (n269) para 74.

²⁹⁹ See Chapter I.C.d.

The other two concern the public interest in restoring the lawful state of affairs and the interest in not leaving the claimant the advantages of German citizenship, among them residence in Germany for an unlimited period and free movement within the EU.³⁰⁰ Against these it sets the claimant's position and holds that the resulting statelessness does not stand in the way of the denaturalization.³⁰¹

What is worth examining is what the state's interests are directed towards. In VGB5-mov the coercion was being justified by an external danger, the figure of the dangerous person, which the courts tested and rejected. Here, this external justification is absent. Once the wrong has been recast as the deceit, no danger to public security is being averted and no competing fundamental right is being protected. What remains is the legal order's interest in its own consistency, that a status granted potentially unlawfully should not be left in place. The absence of this external justification makes the law-preserving character of the measure easier to see. Read this way, and without judging the substantive correctness of the measure, the coercion is justified by reference to the legal order itself, its interest in remaining consistent with itself. On Benjamin's terms, this is the circular structure of legal authority becoming visible – law is binding because a legitimate authority enacted it, and that authority is legitimate because the legal order recognizes it. When the enforcement *in casu* points at nothing outside the law, that circularity is what is left holding it up. This is what Benjamin means by the rottenness of the law, and the case allows it to be seen.

Staatsräson in practice

These two cases provide insight into how the commitment underlying German Staatsräson can operate in practice. In the decision underlying VGB5-mov Staatsräson is expressly named, the court overturned it without ruling on whether this can legitimately be named as a ground. My hypothesis, established in Chapter I.C. that a measure cannot stand when it expressly invokes Staatsräson can therefore not be definitively confirmed from this case. By not speaking on it, however, it also does not refute that it can be named as a ground. Similar to what I found in complex II, the reversal in VGB5-mov does not rule out the underlying logic but leaves it open for the next cases.

³⁰⁰ VGB6-nat (n269) para 73.

³⁰¹ *ibid* 65.

In VGB6-nat the Staatsräson-commitment is not directly named. As established above, the reformed StAG provision does not explicitly mention a commitment to Israel's 'right to exist', this interpretation was provided by the ministerial guidelines and administrative practice.³⁰² *In casu* the court concedes that the relevant expression may be protected under Art. 5 GG; correspondingly, the academic consensus likewise treats the denial of Israel's 'right to exist' as falling within the scope of Art. 5.³⁰³ Had it been the expression that was being sanctioned in VGB6-nat, the court would have hit a constitutional wall. The deceit construction allows to circumvent this wall, because what is sanctioned is relabeled as the insincere avowal and not the opinion. The Staatsräson-commitment therefore becomes legally enforceable only through a construction that avoids the direct constitutional confrontation.

D. Cross-case synthesis

In the previous three chapters I analyzed and discussed the mechanisms and dynamics specific to each case complex. In this last section, I will synthesize the findings in order to answer the two research questions of this thesis.

The *legal categories used by authorities in restricting the Palestine-movement* differ in the three legal fields, but in each field, they are argued within the framework of public safety and the prevention of terrorism, as the case analysis has shown. In the fields of assembly and immigration, the courts are shown to constrain these measures, where the link of danger prognosis to the concrete case is too thin, or where the restriction was found disproportional. These findings stay within the publicly accessible corpus and are not a complete inventory of every category used beyond the cases in the thesis.

A cross-cutting pattern can be observed throughout the reasoning structures, even though it differs in the respective legal fields. Restrictions are presented as justified responses to danger rather than as political choices. This works through doctrinal constructions that assume the dangerousness (FRTS-complex) or through a prognosis. Importantly, a distinction needs to be drawn here between legitimate prognoses and danger-production, since administrative and criminal law both require forward-looking assessments. The decisive difference under the

³⁰² See Chapter I.C.d.

³⁰³ Wissenschaftliche Dienste des deutschen Bundestages (n132) 12; Ambos (n132).

framework is whether the prognosis can be grounded in specific, contestable facts linked to the concrete assembly or person. Where courts describe the risk as resting on association, extrapolation, character attributions, or contested classifications, as it was in cases VGB2-5, the assessment shifts from empirically predicting conduct to constituting a subject whose “dangerousness” then authorizes restriction.

This production of the ‘dangerous subject’ is the basis for *how the legal reasoning makes the restrictions appear necessary, lawful and non-violent*, the analysis found these three categories to be closely linked to each other.

As the dangerousness enters the legal reasoning as a finding, the restrictions are read as the **necessary** consequence in order to avert this danger. In complex I, for example, it is the *necessity* to keep away what is labelled a terrorist symbol from any social discourse; in complex II, it is the *necessity* to restrict an assembly to preserve public peace or prevent crimes being committed.

Further, the legal form of the restrictions can convert coercion into something that can be justified using the internal standard of the legal order, rather than an arbitrary act, rendering it **lawful**. Cover’s account of jurispathy posits the court decision to function as the neutral identification of the truth rather than a choice. VGB6 also showed how the constitutional limits were being successfully sidestepped through an internal construction that makes the coercion appear legally grounded.

On the notion of **non-violence**, case complex I showed how the court’s authority also obscures the violent result of its decision, appearing as only interpreting the law. Butler’s account shows that ‘violence’ is always defined by the framework it is embedded in. The state – holding the authority to say what counts as violence – and its own actions can therefore appear as the neutral baseline, and in contrast is anything that disturbs it is cast as violence that the state responds to. In complex I, this was exemplified through the 86a-construction that casts any utterance of the slogan as dangerous so the cost to expression disappears and its own restriction appears as protection rather than violence. In VGB6-nat the court’s balancing focuses on restoring lawful conditions and legal consistency. Coercion is then justified by reference to the legal order’s own coherence; the coercion is explained as lawful administration and non-violent order-repair.

Further, the analysis found that *through judicial review, some of these three categories are being reproduced by the courts while some are rejected*. The case material thus shows an important limit to more far-reaching implications that might follow from the theoretical framework. As shown above, courts corrected the administrative restrictions where it found the prognosis to be too weak or the restrictions disproportional to the demonstrated danger. At the same time, the reversals do not break the deeper logic of the danger production. The figure of the emotionalized crowd or the conflation of Israel-critique with antisemitism remains unexamined even where the measure invoking them is struck down. Similarly, in VGB5-mov where Staatsräson was cited by name, the court does not speak on its validity as a legal ground, rather state that the claim was held too general.

This constitutes an important separate finding: *the judicial correction disciplines the administration in the particular decisions but does not amount to a check of these patterns as such*, and nothing in these judgments gives the authorities reason to stop reaching for the same categories next time. This unresolved space is where the Staatsräson reconstruction and its moral-historical weight become relevant. It accounts for the environment in which that state coercion can keep appearing as necessary, lawful and non-violent.

In Chapter I.C., I argued that Staatsräson functions as the phantasmagoric foundation of the legal and administrative response to Palestine-solidarity; here I can only support this insofar as the premises that are embedded in the Staatsräson-commitment are left unrefuted in the court reasoning. What phantasmagoric foundation does is invert the perception of violence. A movement whose own demands are directed against violence – an end to occupation, to apartheid, to arms transfers implicated in conduct under the Rome Statute – comes to appear as something the state must defend itself against. What sustains this inversion in the cases above is not itself law in the ordinary sense. In my reconstruction, the institutional premises it is founded on are Bundestag-resolutions, pledging unconditional support with Israel and adopting the IHRA-definition, conflating critique and antisemitism. As such, they are neither legally binding, nor held to constitutional standards.³⁰⁴ Subsequent instruments hold the climate in place, such as classifications in the report of the intelligence services or ministerial interpretation-guidelines,

³⁰⁴ See Wissenschaftliche Dienste (n136) holding that the BDS-resolution would not survive constitutional scrutiny if it carried binding force.

and legal constructions that avoid constitutional conflict, as discussed in VGB6-nat. They further shift the baseline perception through the authority that they hold. Courts and authorities operate within this environment, whether or not or to what extent their decisions are shaped by it cannot reliably be found by my analysis. What can be observed, is that the conflation of anti-Zionism with antisemitism, which is what allows Staatsräson to be argued into compatibility with the constitutional order in the first place, is never resolved in the judgments in this thesis themselves. Whether denying Israel's right to exist is protected expression is a question every one of these cases comes close to and none decides.

Part IV: Conclusion

The repression of the Palestine-solidarity movement in Berlin and Germany has been ongoing for over 2.5 years. In light of the immediacy of these events and the continuing developments, this thesis aimed at examining the role of law and legal reasoning in the repression of the Palestine-solidarity movement in Berlin since October 2023. To do this I analyzed a corpus of ten publicly accessible court rulings and their underlying administrative decisions in the fields of criminal law, assembly law, as well as immigration law. For the interpretation of the legal reasoning, I drew on a theoretical framework constructed around Walter Benjamin, Judith Butler and Robert Cover, whose accounts shed light on how law is entangled with violence, how violence is produced through acts of naming and how legal interpretation institutionalizes that violence through jurispathic practice.

Based on my analysis, I argue that in Berlin, the repression of Palestine-solidarity is carried out through law and legal reasoning that translate contested political meaning into security-relevant “danger”, so that restrictions can appear necessary, lawful, and non-violent.

Concretely, the analysis showed that this is done through doctrinal constructions that circumvent the scrutiny of freedom of expression codified in article 5 GG, and through forward-looking assessments that are not sufficiently grounded in concrete, qualified facts linked to the specific person or assembly. Judicial review is able to discipline and (partially) correct these restrictions in individual cases, for example when the prognosis is too weakly linked to the case or when the threshold of proportionality is not met. Yet the analysis found that it does not fully dismantle the deeper classificatory logic that keeps the framing of dangerousness available. By not addressing

the substantive legitimacy of these patterns, the reversals do not necessarily alter the boundaries of what administrative authorities may legitimately do in this regard. The environment created from the German Staatsräson can thus continue to function as a phantasmagoric foundation, where the perception of violence gets inverted and state coercion can be experienced as defensive rather than violent.

This thesis contributes to the literature by shifting the level at which repression is analyzed. Much of what has been written on Germany's post-October 2023 restrictions focuses on the scale of measures and on whether individual actions are lawful. My findings suggest a pitfall in approaches that concentrate on the formal legality of each decision without asking what the reasoning leaves unexamined for the next case. If the main mechanism is the production of "danger" through legal classification, it becomes necessary to scrutinize not only whether a measure is proportionate, but also how the reasoning builds its basis. My thesis offers an account of how the foundation for the repression is built inside doctrinal structures and legal reasoning.

While the theoretical framework around Benjamin, Butler and Cover can be abstracted for most other sites of repression and legal violence, my findings on Germany cannot be treated as an interchangeable case. The mechanisms described here are closely tied to Germany's historical position and its Staatsräson framework, which are of high significance for the perception of legitimation and compatibility of measures with the rule of law.

Given the limited access to court rulings and administrative decisions with only 3.5% of all Berlin court rulings being published, this analysis cannot claim to represent the full picture of legal proceedings in Berlin or Germany in this field. Its findings are drawn from, and bound to, the corpus publicly accessible through the case-law database.

During this research I approached lawyers and NGOs working directly on these proceedings to gain access to a wider set of decisions. Given their caseload, they did not have the capacity needed to secure client consent and anonymize the material for this purpose. Should that capacity become available, through dedicated funding, a longer research timeline, or institutional collaboration, extending the analysis to this larger, unpublished corpus would be a natural next step, and would test directly whether the patterns identified here hold beyond the cases published at the time of this research.

Further research could examine whether, and to what extent, the Staatsräson commitment to

Israel could undergo a similar juridification process as the notion of *streitbare Demokratie*. It could also trace more precisely how this commitment operates in legal discourse beyond its official presentation as merely political.

Declaration of LLM usage

For this thesis, LLMs were used through an OpenAI API (platform.openai.com/chat) for language editing and translating German legal terminology. I retain full authorship for the content of this thesis.

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