

# **LIBERTIES RULE OF LAW REPORT 2022**

**GERMANY**



## **Foreword**

This country report is part of the Liberties Rule of Law Report 2022, which is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2022 Report was drafted by Liberties and its member and partner organisations and covers the situation in 2021. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2022 Report includes 17 country reports that follow a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-two member and partner organisations across the EU contributed to the compilation of these country reports.

Building on the country findings, the 2022 Report offers an overview of general trends on the rule of law in the EU and compiles a series of recommendations to national and EU policy makers, which suggest concrete actions the EU institutions and national governments need to take to address identified shortcomings.

**[Download the full Liberties Rule of Law Report 2022 here](#)**

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# Germany

## About the authors



**GFF (Gesellschaft für Freiheitsrechte / Society for Civil Rights)** is a Berlin-based not-for-profit NGO founded in 2015. Its goal is to establish a sustainable structure for successful strategic litigation for human and civil rights (HCR) in Germany, bringing together plaintiffs and excellent litigators to challenge infringements of HCR in court. GFF's initial cases focused on protecting privacy, freedom of information and freedom of the press against state intrusion, and on defending equal freedom for all.

## Key concerns

Germany has failed to implement the EU Whistleblowing Directive in time, negatively affecting the **anti-corruption framework**.

The **enabling framework for civil society** in Germany continues to raise rule of law concerns regarding the freedom of assembly and the financing framework for civil society groups. Tax law and jurisprudence continue to severely restrict and sanction political and critical engagement as well as advocacy work of civil society organisations. State practice and

newly adopted legislation disproportionately restrict the freedom of assembly in several ways.

### State of play

- N/A Justice system
- ⊖ Anti-corruption framework
- N/A Media environment and freedom of expression and of information
- N/A Checks and balances
- ⊖ Enabling framework for civil society
- N/A Systemic human rights issues

### Legend (versus 2020)

- Regression: ↓
- No progress: ⊖
- Progress: ↑

## Anti-corruption framework ⊖

### Key recommendations

The federal government should present a draft bill for the implementation of the EU Whistleblowing Directive. The legislation should provide comprehensive protection for whistleblowers, regardless of whether they report violations of EU law or other serious

misconduct. The legislation should be passed as quickly as possible, while ensuring sufficient time for parliamentary consultation and civil society participation.

the requirements of the directive and include reports of significant violations of national laws or other significant misconduct in the scope of the future Whistleblower Protection Act.<sup>4</sup>

## ***Framework to prevent corruption***

### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

Germany has failed to implement the EU Whistleblowing Directive<sup>1</sup> by the deadline of December 17, 2021. A draft bill<sup>2</sup> from the Federal Ministry of Justice was not submitted to parliament. This failure was criticised by GFF and other civil society organisations.<sup>3</sup> Thus, for the time being, the existing law, which essentially consists of case law, will remain in place. The few existing protective regulations for whistleblowers are incomplete, confusing and subject to great uncertainty.

It is therefore urgently necessary that the EU Whistleblowing Directive be implemented in a uniform Whistleblower Protection Act. It is a positive development that the new coalition government has agreed to go beyond

## ***Enabling framework for civil society*** –

### ***Key recommendations***

State legislation that regulates the freedom of assembly should focus on enabling, facilitating and protecting the exercise of the freedom of assembly. Provisions that lead to more legal uncertainty, state surveillance and criminal prosecution, and thereby creating a severe chilling effect, should be reassessed in light of what is strictly necessary in a democratic society.

New forms of protest like climate camps should be recognised as falling under the scope of freedom of assembly and should only be restricted accordingly.

1 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

2 [https://www.whistleblower-net.de/wp-content/uploads/2021/02/2020\\_11\\_26-Referentenentwurf-Whistleblowing-BMJV-1.pdf](https://www.whistleblower-net.de/wp-content/uploads/2021/02/2020_11_26-Referentenentwurf-Whistleblowing-BMJV-1.pdf).

3 Press release of April 29, 2021, by Gesellschaft für Freiheitsrechte, [Whistleblower-Netzwerk](#) and [Transparency Germany](#)

4 Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP, p. 111.

The tax law that is de facto regulating most civil society organisations in Germany must be reformed to allow and protect public participation and advocacy work of civil society organisations.

## **Regulatory framework**

### **Rules regulating the exercise of the right to freedom of peaceful assembly**

In December 2021, despite sharp criticism from civil society,<sup>5</sup> the state parliament of North Rhine-Westphalia passed the state's first law of assembly (VersG NRW), which introduces numerous new restrictions for peaceful assemblies and participants of such. A broad catalogue of provisions imposes penalties on violations of certain prohibitions codified as either misdemeanours or criminal offenses. The penalties range from fines to imprisonment of up to two years. Inter alia, the prohibitions cover legitimate forms of protests (such as counter demonstrations)<sup>6</sup> and raise concerns regarding both the principle of

legal certainty in criminal law and proportionality.<sup>7</sup> Under the new law, participants face serious legal uncertainties as to which activities, conduct, and appearances may be deemed to fall within the scope of such prohibitions – and therefore lead to criminal prosecution. The prospect of potentially being prosecuted under unforeseeable circumstances intimidates and deters participants from exercising their constitutionally guaranteed right to assembly (the so-called chilling effect). Such effects are reinforced by the expanded surveillance competences foreseen by the new law as well as several other restrictive provisions.<sup>8</sup>

While the most pressing challenges to the freedom of assembly in the context of COVID-19 have been resolved from a constitutional point of view,<sup>9</sup> the second prevailing crisis of our time, global climate change, underlies recent rule of law concerns regarding the right guaranteed under Art. 8 of German Basic Law.<sup>10</sup> Climate protest camps organised by civil society organisations like Fridays for Future that involve infrastructures for sleeping, food-supply or debating<sup>11</sup> serve as a central means of expression or even a precondition for the

5 See for example <https://www.nrw-versammlungsgesetz-stoppen.de/>

6 See BVerfG, Beschluß vom 24. 10. 2001 - 1 BvR 1190/90.

7 For an overview of several legal opinions, see <https://www.nrw-versammlungsgesetz-stoppen.de/hintergrund/>.

8 Further examples include the facilitation of security check points by the authorities before and after assembly, or the general ban of assemblies on public highways.

9 See the German Constitutional Court's decisions: BVerfG, decision of April 15, 2020 - 1 BvR 828/20; decision of April 17, 2020 - 1 BvQ 37/20.

10 See <https://verfassungsblog.de/wir-bleiben-bis-ihr-handelt/> for a comprehensive evaluation of the matter.

11 The concept resonates notably well with the German Constitutional Court's framing of the core protected interest of Art. 8 as "participating in the formation of public opinion", see i.e., BVerfG, decision of October 24, 2001 - 1 BvR 1190/90 and BVerfG, decision of June 23, 2004 - 1 BvQ 19/04.

protests, and are currently facing substantial legal uncertainties. In absence of a decision by the Federal Constitutional Court,<sup>12</sup> regional courts rule inconsistently on whether certain infrastructures fall within the scope of protection of Art. 8.<sup>13</sup> This lack of clear legal guidance has led to a highly unpredictable practice by assembly authorities and police. Thus, even infrastructures serving basic needs such as sanitary facilities, weatherproofing<sup>14</sup> or resting facilities have been prohibited,<sup>15</sup> protesters have been harassed by police,<sup>16</sup> and criminal charges have even been filed. Consequently, protesters are deterred from exercising their freedom of assembly and are increasingly limited in their choice of means for protest.

According to the German Constitutional Court, the freedom of assembly is granting its holders a comprehensive right to self-determination regarding content, location, time and form of the assembly.<sup>17</sup> Hence, the state must not evaluate an assembly's objective or effectiveness as a justification for imposing restrictions.

Currently, regional courts do not consistently implement the Federal Administrative Court's jurisprudence on protest camps or non-traditional assemblies.<sup>18</sup> They often disregard the functional and symbolic meaning of infrastructures and consequently prohibit setting up such infrastructure, for instance tents or resting facilities. The authorities therefore neglect the organiser's right to self-determination,<sup>19</sup> which requires them to respect the concept of a protest that the organisers and participants have envisioned and to only limit infrastructure or other means of protests if they pose a concrete threat to other constitutional concerns or public safety. Moreover, this practice has turned the constitutional principle that any peaceful assembly does not require prior permission<sup>20</sup> by the state upside down. In fact, written approval of any infrastructure is now required, as otherwise protesters may face criminal prosecution or the dissolution of their protest.

12 The BVerfG explicitly left the issue undecided in BVerfG, decision of June 28, 2017 - 1 BvR 1387/17.

13 Restrictively, see VG Dresden, decision of September 04, 2020 - 6 L 600/20 or VG Aachen decision of July 04, 2018 - 6 K 1117/18; progressively, see VG Oldenburg, decision of July 12, 2021 - 7 B 2319/21, OVG Bremen decision of May 4, 2021 - 1 B 215/21, or OVG Münster, decision of June 16, 2020 - 15 A 3138/18; diversely, see VG Ansbach decision of October 27, 2021 - 4 S 21.1807.

14 See VG Hamburg, decision of September 4, 2020 - 13 E 3768/20.

15 See VG Dresden, decision of September 04, 2020 - 6 L 600/20, which effectively made the camp impossible.

16 See <https://taz.de/FFF-Klimacamp-am-Hamburger-Gaensemarkt/!5704102/>.

17 See BVerfG, decision of May 15, 1985 - 1 BvR 233/81, 1 BvR 341/81 69, 315 - Brokdorf.

18 See BVerwG, decision of May 16, 2007 - 6 C 23.06.

19 See i.e., OVG Schleswig, Beschluss vom 26.03.2021, 2 B 84/21.

20 See § 14 of the federal Assembly Law (§ 14 VersG).

### **Financing framework for civil society organisations**

The legal uncertainties concerning public participation and political activity of civil society organisations with tax-exempt status (public benefit organizations) have not been resolved,<sup>21</sup> albeit the finance ministries of *Bund and Länder* having promised to do so at least by reforming the administrative decree (*Anwendungserlass der Abgabenordnung*).

In addition, no further legislative reforms have been initiated. This inaction increases the pressure on civil society organisations. Some have increasingly faced legal action and threats by political opponents aiming to prevent them from publicly expressing criticism and generally from continuing their advocacy work.

Anti-democratic actors and the *Alternative für Deutschland* use the legal situation to intimidate unfavourable organisations.<sup>22</sup> They continue to publicly discredit non-profit organisations that work against right-wing extremism and demand that their tax-exempt status be revoked. They argue that tax-exempt civil society organisations are not allowed to publicly criticise a political party or to identify right-wing extremist positions or antisemitism

within the party, basing their arguments on the *Attac* case law of the Federal Fiscal Court.<sup>23</sup>

Many civil society organisations withdraw from public debates because of the legal uncertainties, and because of a case law by the Federal Fiscal Code that only allows tax-exempt civil society organisations to engage in political matters if strictly necessary to pursue the activities included in the Fiscal Code. This chilling effect became especially worrisome during the last year, when many elections in Germany took place, including the election for the federal parliament. Many organisations that traditionally supply information about their issues and warn against anti-democratic and far-right tendencies remained silent during last year's elections.

The legal uncertainties also seem to have influenced administrative proceedings, which take unreasonably long and thus become an additional burden for some organisations. For instance, in the case of *Demokratisches Zentrum Ludwigsburg*, the civil society organisation is still waiting for a decision by the financial authorities on whether their tax status remains withdrawn, inter alia, on grounds of breaching the principle of neutrality by taking a clear stance against right-wing extremism, after the first announcement of withdrawal in

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21 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.; 2021 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 17.

22 See for example the case of “*Fulda stellt sich quer*”

23 Judgment of the Federal Financial Court of 10 January 2019, V R 60/17; Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.



June 2019.<sup>24</sup> The resulting financial insecurity, now lasting more than two years, threatens the very existence of such donation-based local civil society organisations.<sup>25</sup>

Public participation and political activity for civil society organisations are further restricted because, according to the current legal situation, any organisation that is mentioned in the public reports of the internal intelligence services (*Landesämter or Bundesamt für Verfassungsschutz*) is practically automatically deprived of its tax-exempt status. This is due to a reversal of proof in the fiscal code (§ 51 Absatz 3 Satz 2 AO), according to which, organisations – once mentioned in such a report – must prove that they are not extremist in order to uphold the tax-exempt status.<sup>26</sup> In addition, as the sources of the intelligence services are often confidential, the civil society organisations do not have access to the information on which the claims are being made and can hardly rebut it. The possibilities of legal protection are therefore extremely narrowed.

This restrictive financing framework creates chilling effects on civil society organisations that might prevent financially less stable local organisations from engaging in public debates.

Such chilling effects, as well as the generally sanction-like character of the tax law, may amount to an infringement on the right of civil society organisations to pursue political goals (provided that they do so using lawful and democratic means and provided that the aims advocated for are compatible with the fundamental principles of democracy) that is guaranteed to them as freedom of expression and freedom of association under Articles 10 and 11 of the European Convention on Human Rights (ECHR).<sup>27</sup>

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24 For further information, see: <https://freiheitsrechte.org/demoz/>.

25 For another case, in which the decision of the financial authorities took more than two years after the tax declarations was submitted, see <https://freiheitsrechte.org/pm-stellungnahme-changeorg/>.

26 See for instance, the case of *Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten VVN-BdA*, an association founded by Holocaust survivors. For more information, see <https://freiheitsrechte.org/faq-demokratiestaerkungsgesetz/#verfassungsschutzklausel>.

27 See legal analysis by Prof. Dr. Dr. Wiater, <https://freiheitsrechte.org/pm-rechtsgutachten-gemeinnuetzigkeit/>.

## **Contacts**

### ***Gesellschaft für Freiheitsrechte (GFF)*** *Society for Civil Rights*

The GFF is a Berlin-based not-for-profit-NGO founded in 2015. Its goal is to establish a sustainable structure for successful Strategic Litigation for Human and Civil Rights (HCR) in Germany, bringing together plaintiffs with excellent litigators in order to challenge infringements of HCR in court.

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### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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