

The Treatment of Hate Speech in German Constitutional Law (Part I)

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A. Introduction

The way legal systems should deal with hate speech is a contested matter. The term "hate speech" itself suggests that it is a form of speech, and speech is generally protected in liberal states. However, this "speech" is either motivated by hatred or expresses hate, and such communication might not rise to the level of discourse that merits constitutional protection at all.

One strong argument for very broad protections of hate speech is that such freedom of speech has traditionally been important to minorities wishing to express opinions seen by the majority as absurd or offensive. Voltaire, a prominent representative of the French Enlightenment, considered protection of offensive speech to be a moral duty. His oft-cited philosophy was, "I might disapprove of what you say, but I will defend to the death your right to say it."¹ This would seem to be an argument supporting a permissive attitude toward hate speech. However, by arguing in favor of limiting hate speech, one could also deny freedom of speech to those who would use this right to abolish the rights of others.² This view would

¹ LEE, p. 3 (pointing out that this is not, as often assumed, a direct quote from Voltaire, but a line invented later by Evelyn Beatrice Hall as a summary of Voltaire's attitude). See also BRACKEN, p. 32 (quoting British philosopher Bertrand Russel as saying, "It is an essential part of democracy that substantial groups, even majorities, should extend toleration to dissentient groups, however small and however much their sentiments may be outraged. In a democracy it is necessary that people should learn to endure having their sentiments outraged").

² A key phrase supporting this view is "No freedom to the enemies of freedom," which is the justification for establishing a militant democracy. See *infra* notes 14 f. and a classic quotation to that effect by the French revolutionary Antoine Saint-Just in ROELLECKE, p. 3309.

mean that one could not freely use speech to silence another. Therefore, plausible arguments regarding the proper level of protection to afford hate speech range from advocating full and strong protection to advocating no protection at all.

On the whole, neither modern constitutional law nor international law consistently permits or consistently prohibits hate speech. However, within this framework, two distinct tendencies in the law's treatment of hate speech can be observed.³ One can loosely identify a group of countries that prioritize freedom of speech over most countervailing interests, even when the speech is filled with hatred. This group of nations generally follows doctrines reminiscent of the constitutional law of the United States, so this approach will be referred to as the American position. The opposing view, shared by Germany, the member states of the Council of Europe, Canada, international law, and a minority of U.S. authors,⁴ views hate-filled speech as forfeiting some or all of its free-speech protection.⁵ This group of nations assigns a higher degree of protection to the dignity or equality of those who are attacked by hate speech than to the verbally aggressive speech used to attack them. Under this system, hate speech is not only unprotected, it is frequently punishable under criminal law, and individuals or groups who are the victims of hate speech frequently prevail in court. This article will focus on German constitutional law with occasional comparative observations of the American position.

There are several good reasons for using Germany as a model and point of departure for this study. First, the Federal Republic of Germany was formed following the end of the Second World War to differentiate the government from the previous regime that had "distinguished" itself not only by its hate speech, but also by its horrendous hate crimes. Second, Germany's new constitution, the Basic Law (*Grundgesetz* or BL),⁶ and Germany's Federal Constitutional Court have gained great international respect.⁷ This international acclaim extends to Germany's treatment of hate speech,⁸ which, on the whole, exemplifies the position taken by

³ See the comparative overviews by APPLEMAN; DOUGLAS-SCOTT; FOGO-SCHENSUL; GREENSPAN/LEVITT; KRETZMER/HAZAN; MINSKER; NIER; STEIN; WEISS; WANDRES, pp. 142 ff.

⁴ See DELGADO/STEFANIC; MACKINNON; MATSUDA ET AL.

⁵ See FOGO-SCHENSUL, pp. 247, 276; WALKER, p. 159; SULLIVAN p. 9; WEINSTEIN, p. 146; JONES, p. 42, 153; and ROTH, p. 186 (pointing out that this is the dominant approach in liberal democracies outside of the United States and claiming that for this reason the United States is "out of step," "differs notably," and plays an "unusual" role).

⁶ Quoted here after the 1998 English-language edition of: Basic Law for the Federal Republic of Germany (Christian Tomuschat and David Curry trans., Press and Information Office of the Federal Government).

⁷ See BRUGGER, *Verfassungsstaat*; KOKOTT.

⁸ See WHITMAN, pp. 1282, 1303, 1313, 1337; APPLEMAN, pp. 422, 428, 434, 438 f.; MINSKER, pp. 117, 155 f., 162 ff.

most European countries and by international law—hate speech must be effectively eliminated.⁹

Section B. of this essay is an overview of pertinent constitutional norms, and Section C. follows with a description of the theories and functions of communicative freedom that are the underpinning of these norms. Section D. describes the doctrinal approach followed by the Federal Constitutional Court and the prevailing opinion among legal scholars with regard to the standard range and definition of these norms and their limitations. Then follows, in Section E., a critical analysis of particularly relevant examples—defamation of individuals, group libel, Holocaust denial, and Holocaust lie.

B. Freedoms of Communication in German Constitutional Law

Freedoms of communication are guaranteed by several articles in the Basic Law,¹⁰ with Art. 5 providing the most important of these norms. Art. 5 (1) BL covers the freedoms of speech, information, press, and broadcasts and films and also bans censorship. The article reads, “Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.” Art. 5 (2) BL lists three limitations to the general rights provided in Art. 5 (1): “These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.” Art. 5 (3) BL provides for specialized communicative rights that are not subject to an explicit limitation clause: “Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.” Consequently, scholarship and art may be restricted only by immanent constitutional limitations, such as competing basic rights of

⁹ See WANDRES, pp. 139, 234; HOFMANN, S. 162; WEISS, pp. 900 ff. and *infra* note 108.

¹⁰ Many standard textbooks on constitutional law and commentaries on the Basic Law provide detailed information about these rights. See, e.g., the commentaries on the Basic Law edited by DREIER and ISENSEE/KIRCHHOF, especially volume VI. For insightful English-language commentary on German constitutional law in general and free speech issues in particular, see CURRIE, ch. 4; EBERLE; FOSTER; GOERLICH; KARPEN; TETTINGER. For hate speech commentary by German authors, see GÜNTHER; KÜBLER. See also the comparative literature cited *supra* note 3. The decisions of the Federal Constitutional Court are cited according to their official collection (BVerfGE) as well as according to their English translations in Decisions of the Bundesverfassungsgericht (Federal Constitutional Court) of the Federal Republic of Germany: 2 Freedom of Speech (1958-1995), 1998. Many of the seminal decisions of the Federal Constitutional Court are also available in English translations from the Institute of Global Law, at http://www.ucl.ac.uk/laws/global_law/cases/german_cases.html, and KOMMERS.

other persons or constitutionally protected values that deserve, in specific cases, priority over the freedoms afforded by Art. 5 (3) BL.

There are three dimensions to the rights granted by Art. 5 BL: an internal dimension (the formation of opinion and artistic or scholarly ideas), a communicative dimension (the expression of opinion and creation of works of art or science), and an external dimension (the effect of opinions, art, or science on the addressee or the audience).¹¹ All of these dimensions come into play in the context of hate speech. Furthermore, when hate speech is motivated by religious considerations, Art. 4 (1) BL becomes applicable. It reads, "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable." Like Art. 5 (3) BL, Art. 4 BL has no explicit constitutional limitations, so restrictions may only occur in the form of immanent constitutional limitations. Similar to all the rights listed in Art. 5 BL, Art. 4 BL includes both the internal dimension of the formation of one's conscience or faith and the external dimension of reaching others through religious practice and religious speech.

When messages are expressed not by individuals but by groups of people, the right to assembly guaranteed by Art. 8 (1) BL or the right to free association guaranteed by Art. 9 (1) BL applies. Art. 8 (1) and (2) BL states: "All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. In the case of outdoor assemblies, this right may be restricted by or pursuant to a law." This article is intended to protect demonstrations, and because communication by demonstrators is frequently via banners and posters and by the actual physical presence of the group itself, this form of expression is protected as what American parlance would term "symbolic speech" or "speech plus."¹² Anticipating that the freedom of groups to assemble en masse might expose bystanders to dangers, Art. 8 (1) limits constitutional protection to those demonstrators who act peacefully and without weapons.

Coming together as associations is protected by Art. 9 (1) BL, which reads, "All Germans have the right to form corporations and other associations." For purposes of the German Basic Law, an association differs from an assembly by virtue of its higher degree of organizational structure. To be recognized as an association, a group must be comprised of several individuals or juridical persons who unite for a

¹¹ The easily memorized German terms are *Schutz von Werkbereich und Wirkbereich* (the protection of work and its external effect). See *infra* note 26.

¹² For a description of the definitional coverage of freedom of assembly and association in the Brokdorf Demonstration Case, see BVerfGE 69, 315, 342 f., Decision of 14 May 1985 = Decisions 284, at 292 ("This freedom...protects assemblies and processions...[It] is not confined to events where there is argument and dispute, but covers a multitude of forms of joint action, including non-verbal forms of expression...for instance slogans, addresses, songs or banners....")

common purpose and for an extended period of time and who submit to the formation of an organizational will. As with the freedom of assembly, the constitutional protection of associations is not explicitly dependent on their purpose, and members of an association may freely specify their purpose without fear, but important exceptions apply. Due to their higher degree of organization, associations pose a threat to the interests of third parties at least equal to the typical threat posed by assemblies. Therefore, Art. 9 (2) BL provides a limitation clause which reads, "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited."

Political parties represent a special category of association beyond that encompassed by Art. 9, so they are covered by the auspices of Art. 21 (1) BL. That article reads, "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles..." Art. 21 (2) BL limits these rights by stating, "Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." Art. 21 contains both special obligations and special rights that derive from the proximity of political parties to the authority of the State. Since the authority of the German state is based on both freedom and democracy, the Constitution obligates parties who wish to form a government to establish an appropriate internal organization. Due to the obvious danger that political parties critical to the government might be suppressed by the established majorities, the power to prohibit political parties is reserved by the Federal Constitutional Court. Absent being banned by the Court, political parties remain legal and enjoy the protection of the Constitution even if they advocate reprehensible political opinions.¹³ However, depending upon the message, the political speech of the party may come into conflict with hate speech limitations.

The main limitation of Art. 21 (2) BL is founded on the concept of the free and democratic state based on the rule of law (*freiheitlich-demokratische Grundordnung* or *fdGO*). This concept is based on the possibility that freedom of any kind, even

¹³ Radical political parties have been banned twice in the history of the Federal Republic of Germany. The first to be banned was the extreme right-wing Socialist Empire Party (*Sozialistische Reichspartei* or SRP) in 1952, and second was the extreme left-wing Communist Party of Germany (*Kommunistische Partei Deutschlands* or KPD) in 1956. See BVerfGE 2, 1; 5, 85, and the case excerpts and comments in KOMMERS, pp. 217 ff., and CURRIE, pp. 207 ff., 215 ff. Currently, the Federal Constitutional Court is considering banning the extreme right-wing National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* or NPD). The ruling is expected in 2002.

constitutional freedom of expression, could be abused for the purpose of abolishing freedom. The framers of the Basic Law wanted to prevent that from recurring in Germany by enabling government to protect the foundations of the political order.¹⁴ This makes the German polity a “militant democracy”¹⁵ and distinguishes it from the relativistic concept of democracy tolerating the expropriation and suppression of minorities by majorities espoused by U.S. Supreme Court Justice Oliver Wendell Holmes. Justice Holmes said, “If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they be given their chance and have their way.”¹⁶ Following the events of the Second World War, eminent German legal thinkers crafting the Basic Law saw no such virtue in unrestrained “proletarian dictatorships.”

C. The Concept and Functions of Communicative Rights

The constitutional provisions described in Section II form a distinct cluster of rights, ranging from individual to group rights but also comprising different actors: those who utter opinions and those who receive messages or information. German communicative freedoms protect not only the expression of opinions, religious views, and statements of science and art, but also the impact that expression has on others. German jurisprudence has developed three theories to elaborate on the architecture of communicative freedom within the Basic Law: a procedural, or holistic, theory of these liberties; a theory based on a function-based analysis of these liberties; and a theory emphasizing the interdependence of speaker and audience.

I. The Process of Communicative Freedom

Expressive rights do not exist independently of one another; rather, they form a holistic system aimed at the successful communication of information.¹⁷ The Federal Constitutional Court notably clarified this goal in conjunction with its interpretation of the liberties guaranteed to the mass media (i.e., press, radio, and television). The Court held that,

¹⁴ See references to the free and democratic state order in Arts. 9 (2), 18, and 21 (2) BL and CURRIE, pp. 213 ff.

¹⁵ For a comparative analysis of “militant democracies,” see FOX/ROTH, especially ch. 12 by FOX/NOLTE.

¹⁶ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Justice Holmes, dissenting). For a detailed discussion, see STEINBERGER, pp. 185 f., 196 ff., 332 ff.; BRUGGER, *Kampf*.

¹⁷ See TETTINGER, pp. 116 f., 120 ff.; BRUGGER, *Rundfunkfreiheit*, pp. 31 ff.

*Freedom of broadcasting serves the same goal as all the other guarantees of Art. 5 (1): ensuring free individual and public formation of opinion, and this in a comprehensive sense, not limited to mere reporting or to propagation of political opinions but rather every propagation of information and opinion....Free formation of opinion takes place in a process of communication. On the one hand, this presupposes the liberty to express and disseminate opinions and on the other, the liberty to take note of opinions once expressed, to inform oneself. Since Art. 5 (1) guarantees the freedom to express and disseminate opinions and freedom of information as human rights, it also seeks to protect this process constitutionally....[Thus, broadcasting] is a "medium" and a "factor" of this constitutionally protected process of free formation of opinion....*¹⁸

II. The Functions of Communicative Liberties

Implied in these procedural considerations are the individual functions that underlie the communicative rights guaranteed by the Basic Law. The Federal Constitutional Court advocates a dual justification of communicative freedom based both on the autonomy of the speaker as a constitutional value and on an appraisal of the consequences of what was uttered. The Court said,

*The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all....For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible....It is in a certain sense the basis of every freedom whatsoever, "the matrix, the indispensable condition of nearly every other form of freedom" (Cardozo).*¹⁹

In the Court's view, the autonomous communicative development of one's personality merits protection because it is a constitutive expression of human existence independent of the effect of these utterances on the addressees. But the Court also takes account of the consequences, good and bad, of the speech, as the latter part of the quotation indicates. The consequentialist, or process, function of free speech points to several rationales for protection of open communication that are well-known from American discussions.²⁰ Concerning matters of fact, finding the truth should be encouraged, so speech is strongly protected. Similarly, when politics or other issues of general interest are involved, open public debate is called for to arrive at well-considered decisions, so free speech is prioritized. Finally, free

¹⁸ BVerfGE 57, 295, 319, Decision of 16 June 1981, Third Broadcasting Case = Decisions 199, at 208 with additional references.

¹⁹ BVerfGE 7, 198, 208, Decision of 15 January 1958, Lüth = Decisions 1, at 6 f. Constant jurisprudence.

²⁰ See, e.g., STONE ET AL., ch. VII A; BRUGGER, *Freiheit*, pp. 197 f.

exchange of ideas is strongly valued when it serves to stabilize society by fostering open discussion of disputed issues and thereby reducing the probability of recourse to violence. The Court has said,

[The] stabilizing function of the freedom of assembly for the representative system is rightly described as allowing dissatisfaction, discontent and criticism to be brought out openly and worked off, and as operating as a necessary condition for the political early-warning system that points to potential disruption, making shortfalls in integration visible and thus also allowing course corrections by official policy....²¹

Three different relationships can form between these functions of communicative freedom: they can strengthen one another, they can be indifferent to one another, or they can contradict one another. Depending on the relationship, the importance of the corresponding speech will either increase or decrease. In the case where these functions mesh and are mutually strengthening, the level of protection for the resulting speech will be particularly high. For example, expressing political criticism that stems from a deep inner conviction is the classic example of "preferred speech" in the United States, or "high-value speech" in Germany.²² Consequently, any infringements on this speech must be examined closely. In cases where the two justifications are indifferent to each other, the basic right of speech could be said to carry normal weight, i.e., its importance will be equal to that of any other constitutional right.²³ When tensions or contradictions exist between the autonomy-based argument and arguments about consequence,²⁴ the speech in question may be less protected and considered to be "speech minus" or "low-value speech." It is also possible that the expression in question will not even be considered speech in the constitutional sense at all. Legally speaking, such expression would amount to "non-speech," unworthy of constitutional protection and easily restricted by government. An illustration of such non-speech is the Holocaust denial, to be discussed later.²⁵

III. The Interrelationship between Speaker and Audience

One the one hand, arguments based on autonomy and arguments based on consequences can and should be kept analytically separate because they represent two different schools of thought for or against protection of specific kinds of

²¹ BVerfGE 69, 315, 347, Decision of 14 May 1985, Brokdorf Demonstration Case = Decisions 284, at 295.

²² See infra notes 64 f.

²³ On the distinction between free speech as a "regular" or a "preferred" right, see KRETZMER, pp. 454 f.

²⁴ Of course, it is also possible that tensions arise within the several categories of consequentialist arguments.

²⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (illustrating the classic American formulation of this approach).

speech. On the other hand, and in real life, these positions are intertwined because the Constitution protects not only the utterance per se, but also its effect on the audience.²⁶ This audience includes individuals and groups against whom the utterance is directed or who are particularly affected by it, and the protected interest is typically individual or collective dignity, honor, or reputation. The term “audience” may also include the collective interest of all citizens in conditions such as public peace and may be inclusive of minorities’ and society’s interest in civility of discourse. The more inflammatory the utterance, the greater the danger that the interests and rights of third parties will be affected. The framers of the Basic Law took this into account by explicitly establishing limits for the communicative rights granted in Art. 5 (1), (8), and (9) and Art. 21. Communicative rights such as those provided in Arts. 4 and 5 (3) BL are without explicit limitation clauses but are subject to so-called immanent constitutional limitations, i.e., competing basic rights of third parties or other objects of constitutional protection that may merit priority over speech in a given case. The Federal Constitutional Court must, in given cases, decide whether the right to state opinion takes priority over competing constitutional interests such as dignity (Art. 1 (1)), honor (Art. 5 (2)), equality (Art. 3 (1)), the protection of young people (Art. 5 (2)), public peace, and civility. All of these rights and liberties complement one another or compete with each other, both actively and passively, so prioritization becomes important.

IV. Steps and Standards of Judicial Review

Whenever a violation of a constitutional right is alleged, the Federal Constitutional Court follows a multi-level analysis, as do most other constitutional and human rights courts.²⁷ The first question regards the definitional coverage of the right and whether it embraces the activity or sphere of life threatened by the state action. In a hate speech context, this leads to the question of whether hate speech counts as “speech” (or “assembly,” “association,” or “artistic” or “scholarly” expression). If the answer is that the hate message is indeed speech, then the activity is in principle protected, but nevertheless possibly subject to regulation or prohibition based on

²⁶ Regarding the liberty of the arts covered by Art. 5 (3) BL, the Federal Constitutional Court speaks of *Werkbereich* and *Wirkbereich*. “The guarantee of artistic freedom affects the ‘working sphere’ and ‘sphere of influence’ of artistic creation equally. Both areas constitute an indissoluble unity.” See BVerfGE 30, 173, 189, Decision of 24 February 1971, Mephisto = Decisions 147, at 154. The same holds true for the act and the effect of communicative opinions and facts. In the Soldiers-are-Murderers Case, BVerfGE 93, 266, 289 = Decisions 659, at 677, the Court speaks not only of “the right to express an opinion at all, but [also the right to]...choose the circumstances likely to bring the widest dissemination or strongest effect of the proclamation of an opinion.”

²⁷ See BRUGGER, Book Review, pp. 588 f. The European Court of Human Rights uses this approach in interpreting Art. 10 of the European Convention of Human Rights, which addresses the freedom of speech. The Canadian Supreme Court used this approach in its most famous hate speech case, *Regina v. Keegstra et al.*, 3 Supreme Court Reports 697 (1990).

the Court's further analysis. Following a finding that the hate message is governed by a right to speech, the Court must next ask if the state action "encroaches" on the right in the technical sense and whether that is permissible under an explicit or implicit clause limiting the right. If the state action is allowed under a limitation clause, the Court must still question whether the limitation to the right is "proportional." While the principle of proportionality is not explicitly mentioned in the German Constitution, it forms an implicit standard gleaned from the general prioritization of personal liberty over governmental regulation. For a state action to be found proportional, the Court must be satisfied of the following three elements: (i) the means used by government (i.e., regulation or prohibition) are suitable to further a legitimate objective of governmental action; (ii) there is no equally effective but less restrictive means available to further the same public purpose; and (iii) there is an appropriate, defensible relationship between the importance of the public good to be achieved and the intrusion upon the otherwise protected right.

The way that constitutional courts use these steps of judicial review depends upon the text of the relative constitution, e.g., does the constitution distinguish between "speech," "art," and "scholarship," as does the Basic Law, or are these terms not separated, as in the U.S. Constitution. But beyond the textual confines, the above-mentioned meta-reflections on process theory, functions of expressive freedoms, and interrelationship of competing individuals rights and interests are also at work. When weighing arguments for strongly favored kinds of speech, like political speech, courts will tend to opt for a wide definitional coverage (e.g., including even symbolic speech), a low threshold for the acknowledgement of an intrusion (e.g., letting harmful effects suffice), and a strict scrutiny test for proportionality (e.g., requiring a close fit between the means chosen and the furtherance of the end and imposing the burden of proof on the government). When weighing arguments for non-favored kinds of speech, such as, possibly, hate speech, courts might opt for a very narrow definitional coverage (e.g., not counting the communication as speech in the constitutional sense at all, as is done with Holocaust denial in Germany).²⁸ Alternately, the Court could choose to consider such communication as "speech" but apply a more forgiving proportionality test to the government's actions to limit it. This approach can prioritize the competing rights of those harmed by the hate speech, insofar as their dignity, honor, or status as equal members of the community has been impugned. This approach can also lead to prioritizing collective goods such as civil discourse or public peace, and it can lead to a reversal of the burden of proof, requiring the speaker to persuade the Court that the benefit of permitting this "speech minus" or "low-value speech" outweighs the presumed public good in limiting it.

²⁸ See *infra* notes 34 f.

D. German Free Speech Doctrine and Hate Speech

I. The Standard Range and Definition of Speech and the Inclusion of Hate Speech in Art. 5 (1) of the Basic Law

Central to Art. 5 (1) BL is a citizen's "right freely to express and disseminate his opinions in speech, writing, and pictures...." According to the Federal Constitutional Court,

*[opinions] are marked by the individual's subjective relationship to his statement's content (cf. BVerfGE 33, 1 [14]). Opinions are characterized by an element of taking a position and of appraising (cf. BVerfGE 7, 198 [210]; 61, 1 [8]). To this extent, demonstration of their truth or untruth is impossible. They enjoy the basic right's protection regardless of whether their expression is judged to be well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless (BVerfGE 33, 1 [14 ff.]). The basic right's protection also extends to the statement's form. An expression of opinion does not lose this protection by being sharply or hurtfully worded (BVerfGE 54, 129 [136 ff.]; 61, 1 [7]).*²⁹

Whether hate speech enjoys the protection of Art. 5 (1) BL depends on a more precise definition of the term. Hate speech refers to "utterances which tend to insult, intimidate or harass a person or groups or utterances capable of instigating violence, hatred or discrimination."³⁰ Prime examples of such speech are aggressive utterances directed at individuals or groups on account of their race, nationality, ethnic origin, gender, or religion. In international law, comparably broad interpretations of what constitutes hate speech can be found. For instance, hate speech can fall under Art. 1 of the *United Nations Convention on the Elimination of Racial Discrimination*, which uses the highly inclusive term "race discrimination." The article reads,

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise,

²⁹ BVerfGE 90, 241, 247, Decision of 13 April 1994, Holocaust Lie Case = Decisions 620, at 625. See also BVerfGE 61, 1, 7, Decision of June 22, 1982, Election Campaign Case = Decisions 244, at 247: "[The] point of expression of opinion is to produce mental effects on the environment, to act, to mould opinion and to persuade. Accordingly, value judgments, which always seek to secure a mental effect, namely to persuade others, are protected by the fundamental right of Art. 5 (1), first sentence, GG. The protection of the fundamental right relates primarily to the speaker's own opinion...It is immaterial whether his utterance is 'valuable' or 'worthless', 'right' or 'wrong', emotionally or rationally justified...."

³⁰ ZIMMER, p. 17. For similar definitions, see COLIVER, p. 363 note 1; DOUGLAS, pp. 311, 317; APPLEMAN, p. 422; HOFMANN, p. 169; ROTH, p. 194; § 130 (2) Penal Code, *infra* notes 49, 55.

*on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.*³¹

In Germany, hate speech is considered to be an “opinion” in the constitutional sense. It does not matter if the utterance is valuable or worthless. Even aggressive, repulsive value judgements regarding third parties, indeed even statements implying their complete worthlessness, fall under Art. 5 (1) BL. Of course, such value judgements may be painful to the persons or groups at whom they are directed, and these people may feel that their dignity and right to be respected and treated equally is being violated. Nevertheless, the argument that the words in question are “words that wound”³² is not strong enough to deprive hate speech of the constitutional protection of Art. 5 (1) BL. The Federal Constitutional Court has held that opinionated speech loses the protection of Art. 5 (1) BL only in instances when the speaker’s “conduct” overpowers his “speech” and “coercion” replaces or trumps “persuasion.”³³

Art. 5 (1) BL protects “opinions,” but often these are interwoven with stated “facts” that may be true or false, or whose truth may be disputed. In some cases, a speaker may make simple assertions of fact or the factual element of his espoused opinion may clearly be separable. To what extent does Art. 5 (1) protect assertions of fact? The answer to this question in the hate speech context is provided by the Holocaust Denial Case. In that case, the Court held that,

[Factual] assertions are not, strictly speaking, expressions of opinion. Unlike such expressions, most prominent in factual assertions is the objective relationship between the utterance and reality. To this extent their truth or falsity also can be reviewed. But this does not mean that they lie outside the protective scope of Art. 5 (1), first sentence. Since

³¹ See also Art. 20 (2) of the International Convention on Civil and Political Rights (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”) and the related provisions on suspect or discriminatory classifications in Art. 2 (1) of the same pact, and in Art. 2 (1) of the International Convention on Economic and Social Rights, Art. 14 of the European Convention of Human Rights, and Art. 2 of the Banjul Charta on Human Rights and the Rights of Peoples. See also ZIMMER, pp. 24, 33, 55, 62 ff., 69 ff., 104 ff. As to the duty to criminalize hate speech and racial discrimination, see Arts. 2 and 4 of the U.N. Race Convention.

³² For an interesting discussion of the topic, see MATSUDA ET AL.

³³ Cases where individuals call for a boycott illustrate this dividing line. In the Lüth Case, the call for boycott was mainly based on oral persuasion, which led the Federal Constitutional Court to find the speech protected by the free speech clause of Art. 5 BL. See BVerfGE 7, 198, Decision of 15 January 1958, Lueth = Decisions 1. See also Landgericht (LG) Mainz, Decision of 9 November 2000, Neue Juristische Wochenschrift 2001, p. 761 (where a TV station’s call for a boycott of the right-wing NPD party was considered protected speech). See note 69 *infra*. Compare BVerfGE 25, 256, Decision of 26 February 1969, Blinkfüer = Decisions 117 (where the Federal Constitutional Court concluded that a strong element of economic coercion was present in the tactics used by the party advocating the boycott and such conduct placed the speech beyond the protection of the free speech clause).

*opinions usually rest on factual assumptions or comment on factual relationships, the basic right protects them in any event to the extent that they are a prerequisite for the formation of opinion, which Art. 5 as a whole guarantees (cf. BVerfGE 61, 1 [8]). Consequently, protection of factual assertions ends only where such representations cannot contribute anything to the constitutionally presupposed formation of opinion. Viewed from this angle, incorrect information is not an interest that merits protection. The Federal Constitutional Court has consistently ruled, therefore, that protection of freedom of expression does not encompass a factual assertion that the utterer knows is, or that has been proven to be, untrue (cf. BVerfGE 54, 208 [219]; 61, 1 [8]).*³⁴

Holocaust denial falls under this category. The Court has said, “The prohibited utterance, that there was no persecution of the Jews during the Third Reich, is a factual assertion that has been proven untrue according to innumerable eyewitness accounts and documents, to court findings in numerous criminal cases, and to historians’ conclusions. Taken on its own, therefore, a statement having this content does not enjoy the protection of freedom of expression.”³⁵

The situation changes, however, when the denial of the Holocaust is connected to normative value judgements (e.g., the claim that the assertion of genocide against Jews is being used for political purposes to blackmail Germany). As noted by the Court, “Then the prohibited statement does...[enjoy] the protection of Art. 5 (1), first sentence.”³⁶ Encroachments by the State on this speech must be justified by a pertinent limitation clause. The same holds true when, for instance, a speaker denies Germany’s responsibility for the Second World War. The Court has said, “Utterances concerning guilt and responsibility for historical events are always complex evaluations that cannot be reduced to factual assertions, whereas denial of an event itself normally will have the character of a factual assertion.”³⁷

In summary, the definitional coverage of “opinion” in Art. 5 (1) BL comprises all value judgements, even if they are aggressive, based on views such as race or gender, or injurious to the people targeted by them or to collective interests such as the public order. Thus, hate speech falls under the protection of Art. 5 (1) and the other communicative liberties mentioned in Section II. This protection extends to cases in which value judgements are tied to factual assertions. In general, these hybrids of fact and opinion are to be summarily protected as opinion in the sense of

³⁴ BVerfGE 90, 241, 247, Decision of 13 April 1994, Auschwitz Lie Case (Holocaust Denial Case) = Decisions 620, at 625.

³⁵ Id. 249 = Decisions, at 627.

³⁶ Id. 250 = Decisions, at 627.

³⁷ Id. 249 f. = Decisions, at 627. More precisely, the Court could have said “mere or clearly separable assertions of fact.” Here, reference is made to the Historical Falsification Case of the Federal Constitutional Court, BVerfGE 90, 1, Decision of 11 January 1994 = Decisions 570.

Art. 5 (1). This protection may not extend to cases where a value judgement and the assertion of fact underlying it can be separated without marginalizing or falsifying the message contained in the utterance. In such cases, it is possible to decide separately on the fact element and the normative element.³⁸ According to the Federal Constitutional Court and most commentators, denial of the Holocaust does not fall under Art. 5 (1) because it obviously and clearly represents a lie.³⁹ Such a claim is not protected as an opinion or as an assertion of fact for the purpose of forming an opinion; rather, it falls only under the omnibus provision of Art. 2 (1) BL, the right to the free development of one's personality and the limitation clauses of that right.⁴⁰

II. Encroachments on the Freedom of Opinion in Hate Speech Cases

Intrusions on activities that fall under Art. 5 (1) BL or the other communicative liberties of the Basic Law are constitutionally suspect but are not always found to be violative of the Constitution. Governmental intrusion may be justified by explicit limitation clauses or by implicit competing constitutional rights or requirements. Germany has enacted many legal provisions that regulate or criminalize hate speech. Some prominent restrictions on hate speech in criminal, administrative, and civil law will now be reviewed before the question of whether these restrictions can be justified under the Basic Law is examined.⁴¹

Part 14, §§ 185 to 200 of the German Federal Penal Code⁴² (*Strafgesetzbuch* or StGB) contains provisions punishing individual and collective defamation or insult (*Beleidigungsdelikte* or *Delikte gegen die persönliche Ehre*).⁴³ Insult constitutes "an illegal attack on the honor of another person by intentionally showing disrespect or no respect at all."⁴⁴ According to §185 of the Penal Code, "Insult will be punished

³⁸ Another example is inaccurately attributing a libelous quotation to a person, which is not protected by the Basic Law. See BVerfGE 54, 208, Decision of 3 June 1980, Böll Case = Decisions 189 headnote 2: "[Art. 5 (1)] does not protect inaccurate quotation."

³⁹ The German courts view the Holocaust as a judicially known fact, which is beyond contest. Thus, motions by defendants in Holocaust denial cases to present witnesses supporting the nonexistence of the Holocaust will be denied. See WANDRES, pp. 87, 105; STEIN, pp. 290 f.

⁴⁰ See WANDRES, p. 189 together with footnote 147; JARASS/PIEROOTH, Art. 5, marginal note 5.

⁴¹ See also APPLEMAN, pp. 431 ff.; WETZEL, pp. 86 ff.; ZULEEG, pp. 54 ff.; MINSKER, pp. 138 f., 143; WHITMAN, pp. 1292 ff.; TETTINGER, pp. 115 f.; GÜNTHER, pp. 52 ff.; KÜBLER, pp. 340 ff.; WEISS, pp. 925 ff.; NIER, pp. 255 ff.; HUMAN RIGHTS WATCH, pp. 72 ff.; HOFMANN, pp. 162 ff.; STEIN, pp. 281 ff.

⁴² The translations are taken from HARFST, German Criminal Law, apart from § 130 of the Criminal Code which was amended in 1994. See KÜBLER, pp. 342 ff.

⁴³ "Insult" and "defamation" here are used in a wide sense (covering all criminal offences against honor) as well as in their narrower sense. In the narrow sense, "insult" refers to the provision of § 185 only, whereas § 186 covers calumny and § 187 covers defamation. As will be mentioned later, the American notion of defamation is narrower than the broad German notions of insult or defamation.

⁴⁴ Reichsgericht, Entscheidung in Strafsachen (RGSt), Volume 40, 416, quoted in WANDRES, p. 186.

by imprisonment not exceeding one year or by a fine....” This provision is applicable to cases in which disparaging value judgments amounting to an “insult” are leveled against a person in front of others. If the insult further involves defamatory assertions of facts attacking the honor of a person, an important consideration is whether the recipient of the abuse was insulted in private or whether third parties were also made aware of the occurrence. In the first case, § 185 of the Penal Code applies; §§ 186 and 187 apply to the latter case. Both provisions deal with factual assertions capable of reducing esteem for the insulted party, made in the presence of third parties. § 186 of the Penal Code (Calumny) reads, “Whoever in relation to others asserts or disseminates a fact likely to cause him to be held in contempt or to suffer loss in public esteem, if this fact is not probably true, [will] be punished by imprisonment not exceeding one year or by a fine....” In cases where the offender purposely disseminates untrue facts, § 187 of the Penal Code (Defamation) applies. It reads, “Whoever, contrary to better knowledge, asserts or disseminates in regard to another an untrue fact likely to cause him to be held in contempt, to suffer loss in public esteem or to endanger his credit, will be punished by imprisonment not exceeding five years or by a fine.”⁴⁵

Even disseminating true facts may constitute criminal defamation, as § 192 shows. It reads, “Proof of the truth of the alleged or disseminated fact does not preclude punishment pursuant to § 185 if the existence of an insult arises from the form of the assertion or dissemination or from the circumstances under which it occurred.” Finally, the preservation of legitimate interests as defined by § 193 may preclude punishment of critical or negative judgments. It reads, “Critical judgements concerning scientific, artistic, or commercial services, likewise statements made in the exercise of or in defense of rights or for the preservation of legitimate interests, as well as reproofs and reprimands of subordinates by superiors, official complaints or judgements on the part of a civil servant and similar cases are punishable only insofar as the existence of an insult arises from the form of the statement or from the circumstances under which it occurred.”

The object of legal protection in these provisions is, as will be explained in greater detail in the next Section, the right to one’s social worth (i.e., one’s reputation or external honor) and also the right to be respected as a human being (i.e., for one’s internal worth or integrity).⁴⁶ These provisions are applicable to hate speech if an individual is insulted on account of his or her sharing characteristics, such as race or ethnicity, with a group that is insulted due to these features.

⁴⁵ See also § 188 of the German Penal Code, which specifically protects public figures (*Slander and Defamation of Public Figures*), and § 189 (*Defiling the Memory of the Deceased*), which can be applied to cases of Holocaust denial.

⁴⁶ See WANDRES, p. 184; LACKNER/KÜHL, Vorbemerkung zu § 185, marginal note 1.

More frequently, hate speech cases involve the defamation of entire groups of people, and such collective insults may fall under the mentioned provisions.⁴⁷ Two subgroups can be distinguished. Collective defamation (*Kollektivbeleidigung*) occurs when the defamatory statements are directed at organizations performing recognized social tasks that are capable of forming a common will on account of their organizational structure and existing independently of any change in membership. For example, the Board of Daimler-Chrysler A.G. or the Central Council of Jews in Germany could suffer this type of insult. However, typical forms of group defamation do not attack organizations as such but rather members of groups with unifying traits (*Sammelbeleidigung* or *Beleidigung von Einzelpersonen unter einer Kollektivbezeichnung*). Such insults include overarching statements such as “soldiers are murderers” and “Jews use the Holocaust to extort money from Germany.” According to the courts, groups such as these can be targets of defamation if they are clearly set apart from the general population and if there is no doubt that each individual member of the group is an intended target. It is disputed in German criminal law whether groups can be insulted collectively if the group is large and not clearly identifiable. It is undisputed, however, that a group can be insulted if it represents a social minority with alleged negative characteristics that are supposed to be irreversibly typical of its individual members.

Some provisions of the German Penal Code protect collective goods that exceed individual and collective defamation. The Penal Code’s section on “Threats to the Democratic Constitutional State” (§§ 84 to 91) contains provisions forbidding the dissemination and use of propaganda by unconstitutional and National Socialist organizations (§§ 86 and 86a). This prohibits, for instance, displaying National Socialist “flags, badges, uniform parts, passwords, and salutes” (§ 86 a (2))—particularly the Nazi salute and the swastika. These are all symbolic acts of hate speech punishable under criminal law.⁴⁸ In addition, in its section on “Crimes Against the Public Peace” (§§ 123 to 145 d), § 130 proclaims incitement to hatred and violence against minority groups to be a punishable offence.⁴⁹ § 130 reads,

(1) Whosoever, in a manner liable to disturb public peace, (No. 1) incites hatred against parts of the population or invites violence or arbitrary acts against them, or (No. 2) attacks

⁴⁷ See WANDRES, pp. 201 ff.; ZULEEG, pp. 55 ff. and infra after note 74.

⁴⁸ In American constitutional law, the display of these symbols and even public neo-Nazi demonstrations are protected under the free speech clause of the First Amendment. For an enlightening discussion of the controversy surrounding the neo-Nazi march proposed in Skokie, Illinois, see STONE ET AL., pp. 1071 ff.

⁴⁹ See also §§ 126, 130 a, 131, and 220 a of the German Penal Code. The translation of § 130 is taken from KÜBLER, pp. 344 f.

the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished with imprisonment of no less than three months and not exceeding five years.

(2) Imprisonment, not exceeding five years, or fine will be the punishment for whoever (No. 1) (a) distributes, (b) makes available to the public, (c) makes available to persons of less than 18 years, or (d) produces, stores or offers for use as mentioned in letters (a) to (c) documents inciting hatred against parts of the population or against groups determined by nationality, race, religion, or ethnic origin, or inviting to violent or arbitrary acts against these parts or groups, or attacking the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population or such a group, or (No. 2) distributes a message of the kind described in No. 1 by broadcast.

(3) Imprisonment, not exceeding five years, or a fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in § 220 a (1) committed under National Socialism, in a manner which is liable to disturb the public peace.⁵⁰

In sum, these provisions in the Penal Code establish a far-reaching criminalization of hate speech that is directed against individuals and groups and that is further secured by norms protecting public peace and the constitutional order. In enacting these provisions, Germany satisfied its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁵¹

The prohibition of hate speech also affects administrative law. For instance, the right to assemble is protected in Art. 8 BL. Nevertheless, assemblies may be banned if they are organized by political parties that have been declared unconstitutional by the Federal Constitutional Court pursuant to Art. 21 (2) BL on account of their use of hate speech (§ 1 (1), No. 2 and 3, of the Public Meetings Act or *Versammlungsgesetz*⁵²). Assemblies may be prohibited or dissolved if authorities reasonably suspect that they will violate specific prohibitions on hate speech (§ 5, No. 4, of the Public Meetings Act).⁵³ Associations whose actions violate the prohibition of incitement to hatred can be banned pursuant to Art. 9 (2) BL. According to trade and industry law, hate speech and racial discrimination in a commercial establishment may lead to the suspension of the owner's business

⁵⁰ Section 220 a of the German Penal Code criminalizes all forms of genocide.

⁵¹ See especially Arts. 2 and 4 of the U.N. Race Convention, which include wide-ranging state obligations to eliminate all forms of racial discrimination in the broad sense mentioned supra note 31, and to criminalize such acts. For a discussion of these obligations, see WOLFRUM.

⁵² Reference to this statute is made in the Brokdorf decision of the Federal Constitutional Court, BVerfGE 69, 315 = Decisions 284, at 286 f. Discussed in detail in HUMAN RIGHTS WATCH, pp. 71 ff.

⁵³ This was the case in the Holocaust Denial Case, BVerfGE 90, 241 = Decisions 620, at 621 f., infra notes 95 ff.

license (§ 4 (1), No. 1, of the Restaurant Licensing Act, or *Gaststättengesetz*, and Art. 35 (1) of the Trade and Industry Act, or *Gewerbeordnung*). According to § 1 of the Act Concerning the Dissemination of Publications that Endanger Youths (*Jugendschutzgesetz*), written material capable of morally endangering children and young people (including writings that are immoral; brutal; glorify war; or incite others to violent acts, crimes, or racial hatred) must be placed on a restricted list.⁵⁴ German broadcasting law, which regulates the legal status of public and private radio and television companies, prohibits racial expressions or hate speech that violate a person's dignity. For example, Art. 3 (1) of the 1991 Broadcasting Interstate Agreement (*Rundfunkstaatsvertrag*), as amended by all federal states concerned, prohibits programs "which incite hatred against parts of the population or against a group which is determined by nationality, race, religion, or ethnic origin, or which propagate violence and discrimination against such parts or groups, or which attack the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population."⁵⁵ Under the Armed Forces Act (*Soldatengesetz*), hate speech may prompt disciplinary measures against members of the armed services who make such statements. In a recent decision, the Federal Administrative Court stated that, "A member of the Armed Services who propagates statements against foreigners or advocates violent acts inspired by Nazi ideology demonstrates a lack of loyalty toward the State and its constitutional organs and impairs the function of the Armed Services without being able to claim his right to free speech pursuant to Art. 5 (1). Such a neglect of duty calls for the most severe punishment possible under considerations of general prevention."⁵⁶

The German Civil Code (*Bürgerliches Gesetzbuch*) contains several norms that bear on hate speech. If criminal law provisions against insult and defamation apply, civil liability can often also be established under § 823 (2) of the Civil Code in combination with §§ 185 ff. of the Penal Code or by relying on § 823 (1) of the Civil Code, which provides for the protection of "other rights," including the right to one's personality (*allgemeines Persönlichkeitsrecht*). Remedies for tort liability include compensation for material damages, retraction of false assertions of facts, and, in cases based on § 847, compensation for pain and suffering. § 824 also requires the payment of damages when the speaker is convicted of disseminating false

⁵⁴ For a discussion of this requirement, see the *Mutzenbacher Case* of the Federal Constitutional Court, BVerfGE 83, 130, 131, Decision of 27 November 1990 = Decisions 474, at 475 f., and KOMMERS, pp. 424 ff. Material appearing on the list may only be made available to adults and must be kept only in commercial spaces off-limits to children and young people. In addition, the Act imposes a ban on advertising.

⁵⁵ Cited in KÜBLER, p. 347. The text is modelled on § 130 (1) and (2) of the German Penal Code, *supra* notes 49 f.

⁵⁶ Headnotes in the ruling by the Bundesverwaltungsgericht (BVerwG) of 22 January 1997, in *Neue Juristische Wochenschrift* 1997, p. 2338.

assertions of fact about another person that subsequently damage that person's credit worthiness. According to § 826, the obligation to pay damages may arise if hate speech is used to inflict harms considered to be against good morals (*gute Sitten*). If the assertions of fact are indeed false, then the victim can seek an injunction (*Unterlassung*) or demand a retraction (*Widerruf*) under § 1004; however, this does not apply in cases where a person disseminates harmful value judgements, because the categories of true and false cannot be readily applied to opinions.⁵⁷ Finally, the state press and media laws give a person the right to reply (*Gegendarstellung*) if assertions of fact that are harmful to them appear in a newspaper or on the radio or television.⁵⁸

III. Abstract Justifications of Intrusions on Free Speech and Concrete Balancing Rules of the Federal Constitutional Court

According to the Federal Constitutional Court, the aforementioned provisions in the Penal Code, administrative law, and Civil Code act as legitimate limitations on the communicative liberties enumerated by Arts. 4, 5 (1), 5 (3), 8, 9, and 21 BL. The norms permitting or requiring encroachment on these rights are seen as being justified by either explicit constitutional limitations, e.g., personal honor, protection of youth, and general laws in Art. 5 (2) BL, or by other values protected by the Basic Law. Especially important in hate speech cases are the duty of all state entities to respect and protect the right to human dignity (Art. 1 (1) BL), the right to the free development of one's personality (Art. 2 (1) BL), the right to the inviolability of one's person (Art. 2 (2) BL), and the right to equality before the law (Art 3 (1) BL). These provisions are supported by the opening up of the German Constitution to international concerns via the requirements to support human rights (Art. 1 (2) BL) and international understanding (Arts. 9 (2) and 26 BL). Frequently, the statutory norms that curtail communicative freedoms contain provisions prohibiting unilateral restriction of these liberties or requiring competing constitutional norms to be taken into consideration.⁵⁹

The most significant limitations of communicative freedom are the "provisions of the general laws" of Art. 5 (2) BL, which limit the Art. 5 (1) BL freedoms of opinion, press, and reporting by means of broadcasts and films. Laws restricting speech can

⁵⁷ See *supra* notes 29, 34.

⁵⁸ See, e.g., § 11 of the Press Act and § 9 of the Media Act of the State of Baden-Württemberg.

⁵⁹ See §§ 86 (3); 86 a (3); 130 (5); 130 a (3); and 193 of the German Penal Code and Decisions 570, at 571 with a representative formulation regarding the Youth Protection Act, *supra* note 54. According to § 1 (1) of the Act, written material inciting to hatred can be placed on a special shelf and may then be sold to adults under certain conditions. But according to Subsection 2 of § 1: "Written materials must not be placed on the list: 1. owing solely to its political, social, religious or philosophical content; 2. if it serves art or science, research or teaching; 3. if it is in the public interest, unless the means of presentation offer reasons for complaint."

be general by not being directed against speech as such or not being directed against particular opinions; such laws are content and viewpoint neutral and are deemed to be constitutional as long as they are otherwise proportional. However, laws restricting hate speech are effectively, even intentionally, directed against specific viewpoints held by citizens (*Sonderrecht gegen Meinung*), making such intrusion constitutionally suspect.⁶⁰ Nevertheless, according to German jurisprudence, even content-based restrictions such as these may fall under the concept of “general laws” pursuant to Art. 5 (2) BL. This is the case when the regulation protects a constitutional interest that is viewed as being equal to, or more important than, the right to express one’s opinion freely. Most prominent among those competing constitutional values are the rights to dignity, personality, equality, and honor and the protection of youth.⁶¹ Unlike the U.S. Supreme Court and the dominant American approach, the German Federal Constitutional Court does not assign general priority to freedom of speech or the other communicative rights. Instead, the Court focuses on the special significance of communicative freedom within the framework of actual cases. This leads to an institutional and normative question: to what extent may the Federal Constitutional Court in its role as a special constitutional court review interpretations of civil, administrative, and criminal law provisions given by regular courts, which in Germany are specialized courts?⁶²

In principle, the Federal Constitutional Court is permitted to make final rulings only with regard to “constitutional issues,” while the regular courts have the ultimate responsibility for interpreting parliamentary statutes. However, as soon as infringements on communicative freedom are at issue, the Federal Constitutional Court takes a closer look. Such infringements can occur when the regular courts overlook the applicability of a constitutional liberty or clearly misread its reach or importance. Because of the significance of free speech to the autonomy of the speaker, to democratic self-governance, to rational discourse, and to the stability of the body politic, the Federal Constitutional Court strictly scrutinizes interpretations by other courts. The greater the infringement, the higher the degree of constitutional review. Thus, criminal laws forbidding certain activities will be subjected to meticulous scrutiny. The review covers not only the construction of the

⁶⁰ In American free speech doctrine, such viewpoint discrimination by the state is heavily disfavored or even seen as cardinal sin, even if it is directed against evil points of view. See *R.A.V. v. City of St. Louis*, 505 U.S. 377 (1992) and *SULLIVAN*, p. 9.

⁶¹ See BVerfGE 7, 198, 209, Decision of 15 January 1958, Lüth = Decisions 1, at 7 f.: “[General laws are] to be seen as meaning all laws that do not prohibit an opinion as such, are not directed against the utterance of the opinion as such, but instead serve to protect an object of legal protection that is to be protected as such, without regard to a particular opinion, to protect a communal value taking priority over the exercise of the freedom of opinion....” The last part of the quotation refers to content-based restrictions on free speech.

⁶² See Arts. 92 and 95 BL.

pertinent norms and the balancing of competing constitutional interests, but also the interpretation of the restricted utterance. Government authorities must not interpret utterances one-sidedly in order to find them forbidden when alternatives exist; rather, government officials must keep the importance of free speech in mind and consider the choice of words and the context in which they were spoken so as to give the statement the most free-speech friendly interpretation possible.⁶³

The stringency of the judicial review is based on the functions that free speech serves in a given context. Doctrinally, this is illustrated by the so-called seesaw theory of reciprocal effect (*Wechselwirkungstheorie*), which the Court developed for the interpretation of the “general laws” of Art. 5 (2) BL, but which comes into play every time government curtails one of the liberties of expression. Accordingly, all forms of encroachment on communicative freedom, but particularly content-based restrictions, must not only conform to the principle of proportionality in general, but must also consider the special importance of these rights.⁶⁴ A representative formulation of this reciprocal effect reads like this: “[Any] interpretation and application of statutes that have a limiting effect on freedom of expression must take account of that freedom’s significance (cf. BVerfGE 7, 198 [208 ff.]). This usually requires case-specific balancing, undertaken within the bounds set by the norm’s elements, of the thus limited basic right against the legal interest served by the statute that effects the limitation.”⁶⁵

The Court has also developed working rules for the task of case-specific balancing. Under these rules,

[Freedom] of opinion by no means always takes precedence over protection of personality.... Rather, where an expression of opinion must be viewed as a formal criminal insult or vilification, protection of personality routinely comes before freedom of expression (BVerfGE 66, 116 [151]; 82, 272 [281, 283 ff.]). Where expressions of opinion are linked to factual assertions, the protection merited can depend on the truth of the underlying factual assumption. If these assumptions have been proven untrue, freedom of expression will routinely yield to personality protection (cf. BVerfGE 61, 1 [8 ff.]; 85, 1 [17]). Otherwise, the issue is which legal interest deserves protection in that specific case. Even then, it must

⁶³ See, e.g., BVerfGE 82, 272, 280 f., Decision of 26 June 1990, Stern-Strauß Case (Coerced Democrat Case) = Decisions 463, at 469 f.; BVerfGE 93, 266, 292 ff., 313 ff., Decision of 10 October 1995, Soldiers-are-Murderers Case = Decisions 659, at 679 ff., 694 ff., *infra* note 82.

⁶⁴ In German doctrine, the seesaw theory is mostly viewed as a separate—the fourth—element of the proportionality test described earlier which comes into play every time government restricts constitutional rights. The seesaw theory can also be seen as call for especially strict application of the third element of proportionality.

⁶⁵ BVerfGE 90, 241, 248, Decision of 13 April 1994, Holocaust Denial Case = Decisions 620, at 626.

be recalled that a presumption in favour of free speech applies concerning issues of essential importance to the public (cf. BVerfGE 7, 198 [212]).⁶⁶

In American parlance, one can summarize these guidelines this way: the assertion of wrong facts without connection to opinions is viewed as “non-speech”—as illustrated by the simple Holocaust denial. All opinions and value judgments are protected “speech,” but if such speech attacks the dignity of persons or groups of persons or constitutes formal vilification of such persons or groups, it only counts as “speech minus” or “low-value speech.” Such speech will be outweighed by other constitutional interests even if it touches on public issues that normally would put it in the category of “high-value speech.”

⁶⁶ BVerfGE 90, 241, 248 f., Decision of 13 April 1994, Holocaust Denial Case = Decisions 620, at 626. For another statement of these rules, see BVerfGE 93, 266, 294 f., Decision of 10 October 1995, Soldiers-are-Murderers Case = Decisions 659, at 680 f.

The Treatment of Hate Speech in German Constitutional Law (Part II)

by Winfried Brugger

E. Analysis and Critical Evaluation of Specific Cases

As pointed out by the Federal Constitutional Court, a specific determination of the appropriateness of hate speech prohibitions can be based only on the circumstances of individual cases. Some particularly prominent cases are now reviewed.

I. Insult of Individuals

Hate speech is commonly directed at groups of individuals on the basis of such unalterable shared characteristics as race, ethnicity, and gender. However, such speech can also be directed against lone individuals and still be punishable under criminal law if the verbal attack meets the definition of insult in § 185 of the Penal Code. If such an insult is made in public and involves assertions of fact that sully the honor of a person, then §§ 186 and 187 of the Penal Code apply. To what degree is honor guaranteed protection in such cases? What degree and what type of criticism must one tolerate without recourse to law? To better answer these questions, it is useful to divide the concept of honor into three levels.

(A) In its most basic sense, honor describes the status of a person who enjoys equal rights and who is entitled to respect as a member of the human community irrespective of individual accomplishments (*menschlicher Achtungsanspruch*). Thus, even lazy or dumb persons and criminals deserve this level of respect. The constitutional point of reference for this level of honor is the protection of the dignity of all human beings found in Art. 1 (1) BL. Honor in this sense is violated, and an insult occurs, when, for example, a human being is called subhuman or worthless or when a verbal attack is based on assertions of racial inferiority.

(B) A second level of honor is concerned with the preservation of minimum standards of mutual respect in public—the outward show of respect for people irrespective of one's feelings about them (*sozialer Respekt* or *Achtungsanspruch*). This level of honor is rooted in the constitutional protection of the personality as provided by Art. 2 (1) BL. Instances of disrespect and insult that violate the law include accusing another person of possessing severe moral or social character

faults or having intellectual shortcomings—for instance, by calling the person a “swine” or a “jerk” or by making obscene gestures, such as “giving a person the finger.”⁶⁷

(C) A third level of honor covers defamation. Respect for this level of honor prohibits making factual assertions that tend to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him. Most of these violations of honor fall under §§ 186 and 187 of the Penal Code. Constitutionally, they are based on the right to the free development of the personality in Art. 2 (1) and the meaning of “honor” in Art. 5 (2) BL. The provision of Art. 12 BL, assuring the liberty to choose and work in a profession, provides additional strength to these interests insofar as damage to social reputation may result in professional and financial harms.⁶⁸

According to the Federal Constitutional Court, political criticism may be robust, aggressive, explicit, sharp, and even exaggerated, particularly when sharp repartees are involved,⁶⁹ but less aggressiveness is generally allowed in private feuds. As stated by the Federal Constitutional Court:

The spontaneity of free speech...is a precondition for the force and variety of public debate, which is in turn a basic condition for coexistence in freedom. If that force and variety are to be generally upheld, then in individual cases harshness and excess in the public clash of opinion or a use of freedom of opinion that can contribute nothing to appropriate opinion-

⁶⁷ For many other examples, see WHITMAN, pp. 1292 ff.; for a discussion of insult as an outward display of disrespect, see pp. 1288 f., 1290, 1292 f., 1382, 1337. A subcategory of this level is the failure to acknowledge the status of the person addressed. Speaking to another in the familiar (*Du*) instead of the formal (*Sie*) form of address may be considered a violation of a person’s honor and be punishable under § 185 of the Penal Code. Such cases are brought before the criminal courts and are occasionally successful. The courts often, but not always, dismiss mere rudeness as nonpunishable behavior. See *id.*, at 1295, 1297, 1299, and SCHÖNKE/SCHRÖDER, § 185 marginal notes 12 f. Whitman observes that in the United States this second level is usually not protected by law; American “defamation” law is largely confined to the third level of honor, but in fact it is preservation of reputation that lies at the core of American defamation law. See *supra* note 43 and *infra* note 68. As to the first level, American law does not protect against hate speech based on racial theories of superiority or inferiority. See *supra* note 48 discussing the Skokie controversy and note 87 discussing the R.A.V. Case.

⁶⁸ American law mostly addresses defamation (libel and slander) suits as described in category three, but not violations of honor as described in categories one and two, as indicated by the cases mentioned in the text above. On this divergence, see WHITMAN, pp. 1282 f., 1292 ff., 1344, 1372 ff.

⁶⁹ See BVerfGE 12, 114, Decision of 25 January 1961, Schmid-Spiegel Case = Decisions 21 and, recently, Landgericht Mainz, Decision of 9 November 2000, *Neue Juristische Wochenschrift* 2001, p. 761. In this case, a TV station used strong words in its call for a boycott of banks that had provided services to the right-wing *Nationaldemokratische Partei Deutschlands*. The court stated: “A political party that, like the NPD, enters the arena of political debate must tolerate derogatory criticism and even polemics; it must be prepared to engage in sharp and drastic intellectual rebuttal.” Headnote provided by *Neue Juristische Wochenschrift*.

formation must be accepted into the bargain (cf. BVerfGE 30, 336 [347]; 34, 269 [283] — Soraya). The fear of being exposed to severe judicial penalties because of an evaluative statement brings with it the danger of crippling or narrowing all debate and thereby bringing about effects that run counter to the function of freedom of expression of opinion in the order constituted by the Basic Law....⁷⁰

Legitimate political criticism, however, does not include formal vilification or contemptuous criticism marked by strictly derogatory statements unrelated or entirely marginal to any political message (*Schmähkritik*). The Strauß Caricature Case⁷¹ presents an illustration of such illegal criticism in violation of human dignity in the sense of the first level of honor. In that case, a satirical magazine had portrayed Franz-Josef Strauß, then the state prime minister of Bavaria, as a pig engaged in sexual activity. The pig bore the facial features of Strauß and copulated with another pig wearing a judge's robe. As a satire, the caricature was covered by the freedom-of-art provision of Art. 5 (3) BL, which contains no explicit limitation clause. Despite acknowledging that satire and caricature characteristically resort to exaggeration, distortion, and alienation, the Federal Constitutional Court reasoned that, in this case, the rights to human dignity and personality found in Art. 1 (1) and Art. 2 (1) BL trumped the right to artistic freedom. As stated by the Court in that case:

[What] was plainly intended was an attack on [the] personal dignity of the person caricatured. It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked "bestial" characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being...a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayal].⁷²

That this case would have been decided differently in the United States can be gleaned from the outcome of *Hustler Magazine v. Falwell*.⁷³ In that similar case, a public figure, Jerry Falwell, a nationally known preacher, was depicted in a parody

⁷⁰ BVerfGE 54, 129, 139, Decision of 13 May 1980, Römerberg Speech Case = Decisions 181, at 187 f.

⁷¹ BVerfGE 75, 369, Decision of 3 June 1987, Strauß Caricature Case = Decisions 420.

⁷² *Id.*, 379 f. = Decisions at 425. See also BVerfGE 82, 272, Stern-Strauß Case (Coerced Democrat Case) = Decisions 463. There, the Bavarian state prime minister Strauß was characterized in a publication as a coerced democrat who did not genuinely believe in democracy. The Federal Constitutional Court acknowledged in principle that, taken as a personal attack, such a characterization would be a "belittlement" and that Strauss' being portrayed as a Nazi sympathizer would go beyond the legitimate scope of political criticism. But because the lower courts had not adequately demonstrated that this interpretation was necessary and appropriate, the case was remanded.

⁷³ 485 U.S. 46 (1988). For a detailed discussion of these differences and the two cases, see NOLTE.

advertisement in *Hustler Magazine* as having had a drunken sexual rendezvous with his mother in an outhouse. As in the *Strauß Case*, this parody was obviously not intended as an assertion of fact, but as a normative judgement. A lower court awarded Falwell \$ 150,000 in damages on a tort action for “intentional infliction of emotional distress,” a cause of action that does not require a showing that the alleged facts are false (although Falwell certainly denied them). The Supreme Court struck down the damage award against the magazine due to Falwell’s status as a public figure.

The differences between the German and American approaches are seen when extreme or vicious value judgements attack honor at the first two levels described above. In such cases, insults are either voiced without related factual assertions or any factual assertions made are overshadowed by the sheer vitriol of the criticism. One reason for the different outcomes in the two judicial systems lies in the fact that Germany’s constitution does not give the right to free speech higher status than the rights to dignity, personality, and honor. A second reason is that Germany, due to its recent past, is especially sensitive to threats to human dignity and is determined to prevent attacks on the equal status of all human beings. A third reason for the different treatment of this category of insults is that Germany, unlike the United States, has a tradition of state-sponsored civil discourse.⁷⁴

II. Collective Insult and Hate Speech

The rules underlying political debate also apply to other cases of public affairs. Opinions may be robust and exaggerated and even diminish regard for others; however, in view of the protections afforded by Art. 1 (1) and Art. 2 (1) BL, criticism must stop short of defamation or degradation of individuals’ human dignity. According to the Federal Constitutional Court, this limitation is exceeded in cases where hate speech is directed at individuals and, in some cases, even when it is directed at groups. Thus, individual and collective defamation⁷⁵ can fall under §§ 185 ff. of the Penal Code. According to the Federal Constitutional Court, only “a delimitable, graspable group”⁷⁶ can collectively be insulted. In addition, the attacked feature,

[must be] present in all members of the collective, whereas association with features applying to some but obviously not all members does not...diminish the personal honour of each individual member. Since [to] every addressee of such a statement [it] is clear that not

⁷⁴ See the preceding citations to WHITMAN.

⁷⁵ As to the wide and the narrow meanings of “insult” and “defamation” and the narrow American notion of “defamation,” see *supra* notes 43, 67 f.

⁷⁶ BVerfGE 93, 266, 300, Decision of 10 October 1995, *Soldiers are Murderers* = Decisions 659, at 685.

*all can be meant but particular persons are not named, no one is defamed by such a statement.*⁷⁷

Large groups, such as all Germans, Americans, women, Catholics, etc., could possibly be considered identifiable groups susceptible to insult; however, insults directed at such large groups rarely satisfy the requirement for individualization. As stated by the Federal Constitutional Court, “The larger the collective to which a disparaging statement relates, the weaker the personal involvement of the individual member can be....”⁷⁸ The situation changes as soon as minorities are involved, in which case the courts tend to lean more toward finding collective insult. However, there is a strong requirement that in each case the utterance must clearly implicate all, rather than most or some, of the members of the group. The Federal Constitutional Court is more likely to find that all members of a group are the target of the defamation in cases where the collective criticism refers to criteria that are commonly tied to hate speech, and it specifically mentions “ethnic, racial, physical or mental characteristics from which the inferiority of a whole group of persons and therefore simultaneously each individual member is deduced.”⁷⁹ Such characteristics are usually immutable and are often the result of external ascription rather than internal identification.

In sum, collective insult can be punished as an attack on human dignity pursuant to §§ 185 ff. of the Penal Code under the following conditions: (1) a small, rather than a large, group is attacked; (2) the group’s characteristics differ from those of the general public; (3) the defamatory statement assaults all members of the group rather than single or typical members; and (4) the criticism is based on unalterable criteria or on criteria that are attributed to the group by the larger society around them instead of by the group itself.

The Federal Constitutional Court developed these criteria most recently in the Soldiers-are-Murderers Case (or Tucholsky Case). In that case, posters and leaflets accusing soldiers of being murderers were distributed to the public. After active members of the German armed forces complained to the police, the individuals who had distributed these materials were arrested, tried, and sentenced for collective insult under § 185 of the Penal Code. The criminal courts ruled that every active member of the German armed forces had been publicly accused of being the worst of criminals and that the group affected could be sufficiently identified. The convictions were set aside and the case was remanded to the lower courts after the

⁷⁷ Id., 300 f. = Decisions, at 685.

⁷⁸ Id., 301 = Decisions, at 686.

⁷⁹ Id., 304 = Decisions, at 687. For a more detailed analysis of group insult in criminal law, see SCHÖNKE/SCHRÖDER, Vorbemerkung zu §§ 185 ff., marginal notes 3 ff.; LACKNER/KÜHL, Vorbemerkung zu § 185, marginal notes 3 f., and WANDRES, pp. 201 ff.

Federal Constitutional Court held that the accusations did not constitute an attack on human dignity, but rather represented a severe and harsh form of criticism regarding a matter of public interest, i.e., the role played by soldiers and the German armed forces. In balancing the interests involved, the Court acknowledged that the personal honor of the soldiers had been severely attacked by the group that called them “murderers.” However, the Court ruled that it was not entirely clear whether every German soldier, only certain German soldiers, or every soldier in the world was the target of the attack.⁸⁰ The words chosen by the defendants were not the only relevant issue—the specific circumstances of the case and the linguistic context also mattered. As stated by the Constitutional Court, “The decisive thing is...neither the subjective intention of the utterer nor the subjective understanding of those affected by the utterance, but the meaning it has for the understanding of an unbiased, reasonable audience.”⁸¹ The Federal Constitutional Court held that the criminal courts must sort out the reasonable meaning of the speaker’s criticism prior to sentencing the accused for collective insult. In other words, the State’s interest in the freedom of opinion in public affairs requires that critical utterances be limited only when they are clearly defamatory. According to the Court, “If...[the] wording or [the] circumstances allow an interpretation that does not affect honour, then a penal judgement that has overlooked this violates [freedom of speech].”⁸²

In addition to §§ 185 ff. of the Penal Code, § 130⁸³ also punishes cases of collective insult if the facts suggest hateful attacks on “sections of the population,” especially if they are based, as listed in paragraph 2 of that provision, on criteria such as “nationality, race, religion, or ethnic group origin.” However, the legal interest protected by § 130 is different.⁸⁴ This provision of the Code aims to preempt the climate conducive to hate crimes that can be created by collective verbal attacks. It is important to note that incitement of others to hatred and violence against minority groups becomes punishable well before the conduct would be considered concrete incitement to a specific criminal act, which is punishable under different provisions of the Penal Code.⁸⁵ § 130 (1) and (2) of the Penal Code expresses

⁸⁰ If it had been evident that each and every active German soldiers was meant, and no one else, then “the criminal courts [would not have been] constitutionally prevented from seeing the (active) soldiers of the Bundeswehr as an adequately graspable group, so that a statement referring to them may also insult each individual member of the Bundeswehr, if it is associated with a feature that manifestly or at least typically applies to all members of the collective.” *Id.*, 302 = Decisions, at 686.

⁸¹ BVerfGE 93, 266, 295, Decision of 10 October 1995, Soldiers are Murderers (Tucholsky Case) = Decisions 659, at 681.

⁸² *Id.*, 296 = Decisions, at 682.

⁸³ For the text of this section, see *supra* note 49.

⁸⁴ See WANDRES, pp. 210 ff.

⁸⁵ See §§ 26 and 30 of the German Penal Code (Instigation and Attempted Instigation) and § 111 of the German Penal Code (Public Encouragement to Commit Criminal Acts).

legislative determination that incitement to hatred and violence need not result in provable immediate heightened endangerment of a specific minority in order to be punishable. Instead, incitement to racial hatred is viewed by the legislature as heightening the general danger of disruption of the public peace, including violations of the dignity and honor of minority groups and the occurrence of hate crimes.⁸⁶

This provision constitutes a far-reaching limitation on public speech that would be considered overly broad by American jurisprudence. In America, hateful messages can only be prohibited if (i) they directly lead to a clear and present danger of an illegal act being committed, (ii) they constitute “fighting words,” or (iii) they advocate the imminent use of wrongful force or illegal conduct and they are likely to succeed in producing such action.⁸⁷ If one wanted to limit the range of § 130 (1) and (2) of the Penal Code in favor of freedom of opinion, then it would be reasonable to only prohibit assaults on human dignity that are aimed at denying basic equality. Another speech-friendly possibility would be a restrictive interpretation of what constitutes likely endangerment of the public peace. A third area in which “incitement to hatred” could be interpreted narrowly in the interest of free speech is in cases where forceful and severe verbal attacks made against groups concern matters of public concern.

The interpretation by the criminal courts of the poem *The Fraudulent Asylum-Seeker in Germany* illustrates that the latter approach is not always used. This poem includes exaggerated assertions about the misuse of the right to asylum. The author calls Germans stupid for tolerating and financing abuses of the system by asylum seekers. According to the poem, asylum seekers bring AIDS and drugs to Germany. Writing poems and making them public falls under the freedom of the arts protected by Art. 5 (3) BL, and disseminating an existing poem is covered by Art. 5 (1) BL. The criminal courts nevertheless insisted that the creation and distribution of the poem was an incitement to hatred for purposes of § 130 of the Penal Code, which rightfully restricts the constitutional rights provided by Art. 5 BL. In the Court’s opinion, the poem attacked the human dignity of asylum seekers irrespective of the existence or nonexistence of their right to asylum, “because the people concerned are generally and therefore without justification accused of

⁸⁶ The technical legal term is *abstraktes Gefährdungsdelikt*—criminal law provisions prohibiting acts that in general heighten the danger that some person will commit a specified category of crimes. See WANDRES, pp. 224 ff. and LACKNER/KÜHL, Vorbemerkung zu § 13, marginal note 32. In part, § 130 is thought to require something between concrete and abstract danger to the public peace. See Bundesgerichtshof (BGH), Decision of 12 December 2000, in *Neue Juristische Wochenschrift* 2001, p. 624, which, in principle, lets an abstract endangerment of public peace suffice but allows the defendant to argue that the conduct could not have led to concrete danger.

⁸⁷ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

spreading AIDS; of seducing children into taking drugs; of being particularly despicable, ungrateful parasites; and of, morally speaking, not even reaching the lowest level of human existence."⁸⁸

Such an assault on human dignity is not as clear as the Court suggests. Nothing in the poem explicitly attacks asylum seekers' status as human beings. While it is possible that, as found by the Court, the author of the poem placed asylum seekers on the lowest level of human existence, this reading is not the only one possible. The text of the poem indicates only a severe moral rebuke and harsh criticism of asylum seekers. In addition, it is unclear that the attack is directed at all asylum seekers, in the sense of every one of them without exception. The poem uses the definite article in its reference to its subject (*The Fraudulent Asylum Seeker*), but that term could refer to all, or many, or typical asylum seekers or simply to "too many" in the author's view. An interpretation favoring freedom of expression would assume that not each, and therefore not every, individual asylum seeker was concerned. Under this interpretation, the poem would still be hyperbole; however, because public policy toward asylum seekers is a highly political matter, such declarations of opinion would be allowed to contain strong, exaggerated, and extreme value judgements, if common criteria of interpretation applied.⁸⁹ Considering the Court's decision in the Soldiers-are-Murderers Case, even the fact that the word "deceiver" (*Betrüger*) is used in the poem need not mean that the author was alleging criminal fraud.⁹⁰ Finally, a free-speech-friendly interpretation could assume that the primary reason for the exaggeration was not to be intentionally derogatory, and thus defamatory, but rather to discuss a concrete political concern supported by existing or perceived facts and backed up by the author's real indignation.⁹¹ At the time the poem was written, it was commonly known that the approval rate of asylum claims in Germany was well below 10 percent, that some or even many asylum seekers did in fact sell drugs, and that asylum seekers were more likely to commit certain crimes in greater numbers than citizens. The accuracy and interpretation of these numbers were and are still

⁸⁸ Bayerisches Oberstes Landesgericht (BayObLG), Decision of 31 January 1994, *Neue Juristische Wochenschrift* 1994, pp. 952, 953. The text of the poem is on p. 952. See also Bundesverwaltungsgericht (BVerwG), Decision of 23 January 1997, *NJW* 1977, p. 2341.

⁸⁹ See supra note 29 and the Soldiers-are-Murderers Case, Decisions, at 680: "[Exaggerated] or even downright rude criticism does not in itself yet make a statement vilificatory. Instead, it must also be that in the statement it is no longer discussion of the issue but defamation of the person that it is to the fore....For this reason, vilificatory criticism will only exceptionally be present in statements on a matter that affects the public...."

⁹⁰ See *id.* at pp. 682 f.

⁹¹ American jurisprudence acknowledges and accepts that strong evaluative judgments are often combined with strong emotions and that strong emotions often lead to exaggerated claims or the use of stereotypes which, in the interest of an unfettered exchange of opinions about public issues, should not be interfered with. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

debatable, and the poem can certainly be shown to contain distinct exaggerations, but one cannot stipulate that it was composed without real concerns. So viewed, the poem would have to be considered as more than a simple hateful assault on the human dignity of every asylum seeker in Germany and could not be perceived as nothing more than a work of defamatory criticism.

Another example illustrates a similar tendency. According to German postal law, every person has a right to use the postal service for shipping through the mail, but the postal service is permitted to deny service if such denial is in the public interest. The administrative court in Frankfurt affirmed such a public interest in a case involving the shipment of printed materials belonging to the right-wing National Democratic Party of Germany.⁹² Among other questions, the printed materials asked, "Should criminal foreigners be deported? Or should we, as [the other parties] demand, allow even more foreigners to enter our country in order to turn Frankfurt into a multi-cultural and multi-criminal metropolis?" One of several responses to the question read, "I am definitely in favor of putting an end to the immigration of foreigners. Already two-thirds of all criminal acts in Frankfurt are committed by foreigners and 80 percent of all drug dealers are asylum seekers...." The administrative court considered these utterances to be in violation of the criminal prohibition of incitement to hatred—specifically incitement to racial hatred. The Court supported its conclusion by referring to Arts. 1 and 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*, which in the Court's opinion forbid such acts of verbal hostility against foreigners.

In terms of protecting free speech, this decision is even more problematic than the judgement in the Fraudulent Asylum-Seeker Case. Here, the speaker had a clear and specific cause for concern (the extent of criminal conduct among foreigners), and the issue is evidently political in nature (the State's policy on foreigners). The statement may be exaggerated as far as actual statistics are concerned, but these inaccuracies could be corrected during the course of a public debate. Not every foreigner was characterized as a criminal, and human dignity was not clearly affected in the narrow sense of denying the basic right to life or equal respect.

Not all decisions handed down addressing these issues stretch the concepts of "incitement to hatred," "assault on human dignity," or "defamatory criticism" in similar fashion.⁹³ However, there is a sufficient number of rulings to demonstrate

⁹² Verwaltungsgericht (VG) Frankfurt, Decision of 22 February 1993, *Neue Juristische Wochenschrift* 1993, p. 2067.

⁹³ See the references in this ruling to decisions by other courts on p. 2069. For a critique of this ruling, see ROELLECKE, pp. 3306 ff. The Federal Constitutional Court's ruling in the Historical Falsification Case, BVerfGE 90, 1 = Decisions 570, also favors the freedom of opinion. In this ruling, the Federal Constitutional Court emphasizes the enlightening power of the marketplace of ideas, where erroneous

that the possibility of criminal punishment does have a chilling effect on robust, fierce, or exaggerated criticism in areas such as Germany's policies concerning foreigners. In terms of international law, such restrictions of free speech often make sense, given the extensive definition and prohibition of hate speech in the *International Convention on the Elimination of all Forms of Racial Discrimination*. In terms of German constitutional law, the extensive protections afforded human dignity, personal honor, and the right to personality may be read as supporting such free speech restrictions. Nevertheless, if, as the Federal Constitutional Court consistently claims, free speech is constitutive for the speaker and necessary for open debate, democracy, and stable society, then this right should be protected accordingly, even in (or especially in) cases where we do not like the speaker's message.

III. Simple Holocaust Denials and Qualified Holocaust Lies

The German rules concerning collective insult and incitement to hatred assume special significance in Holocaust cases. Therefore, these cases will be discussed separately, but first a distinction ought to be made between simple and qualified Holocaust lies.

Advocates of the "simple" Holocaust lie (or simple Holocaust denial) insist that no genocide took place during the years of the Third Reich or that, if Jews were killed, this did not happen in the magnitude reported or by means of a massive gassing campaign. Proponents of this view might say, "The Holocaust never happened," or "Reports about the Holocaust are greatly exaggerated."

A simple denial of the Holocaust becomes "qualified" as soon as it is accompanied by additional normative conclusions or calls to action. For instance, additional conclusions are drawn when a speaker alleges that interested parties or the Jews themselves maliciously falsify history in order to enrich themselves by keeping Germany susceptible to extortion. Holocaust denial can also be tied to a general call to action or to ideological support of Nazi beliefs. One holding such a view might say, "Something ought to be done about the use of extortion as a political tool against Germany by Jews spreading lies about Auschwitz."

facts or one-sided interpretations are commonly ironed out by argument and counterargument. See *id.* 20 = Decisions, at 585: "As a rule, the democratic state trusts that an open debate between varying opinions will result in a multifaceted picture, against which one-sided views based on a falsification of facts generally cannot win out." For more recent speech-friendly decisions of the Federal Constitutional Court, see First Chamber of the First Senate rulings dated 24 March 2001, 7 April 2001, 12 April 2001, and 1 May 2001 in *Neue Juristische Wochenschrift* 2001, pp. 2069 ff., and the analysis of these decisions by BATTIS/GRIGOLEIT.

These variations of Holocaust lies are all punishable under the Penal Code: simple denial of the Holocaust constitutes a criminal offence under § 130 (3), and qualified Holocaust lies can be punished under §§ 130 and 185 ff.⁹⁴ The Federal Constitutional Court considers these provisions to be justified limitations of the freedom of opinion. Simple Holocaust denial is not protected as speech under Art. 5 (1) BL because, as pointed out by the Federal Constitutional Court, "...a factual assertion that the utterer knows is, or that has been proven to be, untrue [is not covered by the freedom of opinion]."⁹⁵ The reasoning behind such a view is that the State's interest in promoting the discovery of truth is not furthered by permitting the spread of clearly false statements.

The rationale used to refuse simple Holocaust denial the character of "opinion" under Art. 5 (1) BL is not convincing.⁹⁶ Statements such as these are not individual facts that can be clearly isolated from the formation of opinions or the development of complex views of historical events, as if they were quotations or pieces of statistical information. Denial of the Holocaust is usually based on selective interpretation of many data. Such a process supports placing the simple denial of the Holocaust under the protection afforded by the free speech clause. It would then count as an "opinion" as does the qualified Holocaust lie.⁹⁷ Thus, all variations of the Holocaust lie would fall under the definitional coverage of Art. 5 (1) BL.

What about justifying the criminalization of simple Holocaust denial in terms of the goals served by free speech? It is doubtful that free speech rationales support criminalization. Why should we presume that truth finding would suffer if such lies were propagated? Public denial of the Holocaust would certainly meet with loud rejection in Germany, and the ensuing discussion might serve to educate the ignorant or even some neo-Nazis. A public discussion would undoubtedly guarantee that the terrible events of the Second World War would not sink into historical oblivion. Therefore, the consequentialist arguments are not persuasive. If

⁹⁴ In American constitutional law, none of these statements would be punishable, provided they did not reach the limits described supra notes 3, 60, 87. See, e.g., the Skokie controversy, supra note 48. One of the reasons for this permissiveness is that the United States did not experience a Holocaust on their soil. Another reason is that there is no set of American collective defamation laws to speak of. This can be explained by the fact that offensive or hate speech has occasionally had liberating effects in the United States, for example in the civil rights movement and in the protest against the Vietnam War, whereas Europe in general and Germany in particular have experienced mainly bad consequences of hate speech. See SULLIVAN, p. 4. The contrast is striking. In Germany, hate speech is prohibited as early as possible, in the United States as late as possible.

⁹⁵ See supra notes 34 f., BVerfGE 90 241, 247, Decision of 13 April 1994, Holocaust Denial Case = Decisions 620, at 625.

⁹⁶ For a similar assessment, see HUSTER.

⁹⁷ See supra note 36.

this speech were permitted, more good things than bad things might happen in the long run.

Furthermore, the autonomy interest of the speaker must not be forgotten. Barring clear evidence to the contrary, and using traditional free speech doctrine, one must assume that the utterer of the Holocaust denial speaks his mind, and being able to develop one's self through speaking one's mind irrespective of consequences is an important value associated with the freedom of expression. In terms of standard free speech doctrine and rationales, simple Holocaust denial should count as protected free speech in Germany.

However, the fact that such expression should be considered speech for constitutional purposes does not mean that the right to this speech must outweigh all the other constitutional rights served by speech-prohibitive laws. Which constitutionally protected rights are impaired by simple denial of the Holocaust? It cannot be a right to know the truth about this historical event, because the lie does not obliterate the ample proof of what actually happened. Moreover, it would be difficult to comprehend why criminal law should protect "historical truths" with sanctions against dissent, other than to enforce the specific duties of witnesses to tell the truth about facts relevant to particular judicial proceedings. Thus, again, it must be a concern about individual and collective insult and incitement to hatred that justifies this infringement of free speech. Indeed, both the German courts and prevailing German opinion assume that freedom from personal or collective insult and freedom from incitement to hatred each deserve more protection than freedom of opinion: young people are to be protected from being misguided by the falsification of history or by fallacious racial ideologies. Individual Jews and German Jews collectively must be able to rely on their dignity as human beings as well as on their right to personality. Public peace is essential for broad communities of people and necessarily bans racial doctrines questioning the equality of all human beings. It has been said that, "The horrors of hate speech [prohibited in § 130 of the Penal Code] are 'pogrom', 'massacre' and 'genocide.'"⁹⁸

Some scholars have been critical of the criminalization of the simple Holocaust lie.⁹⁹ One of the questions asked is whether the Jews are really insulted collectively by denial of the Holocaust. The limitations to collective defamation were mentioned earlier: a collective group must be clearly identifiable, and it should be a minority; the criticism must refer to every member of the group; and an attack on the honor of each and every member must be present. The Federal Constitutional Court has

⁹⁸ WANDRES, p. 212.

⁹⁹ See WANDRES, pp. 140 ff., and the references in the Holocaust Denial Case of the Federal Constitutional Court, BVerfGE 90, 241, 252 = Decisions 620, at 629.

affirmed all these conditions in cases dealing with the denial of the Holocaust. It emphasizes that

The historical fact alone that human beings were singled out according to the criteria of the "Nuremberg Acts" and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special relationship vis-à-vis their fellow citizens; the past is still present in this relationship today. It is part of their personal self-perception and their dignity that they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic. Whoever seeks to deny these events denies to each one of them the personal worth to which they are entitled. For the person affected this means the continuation of the discrimination against the group to which he belongs as well as against himself (BGHZ 75, 160 [162 ff.])¹⁰⁰. . . . [Nor is anything changed] when one considers that Germany's attitude to its Nazi past and the political consequences thereof. . . is a question of essential concern to the public. It is true that in that case a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification, of if the offensive utterance is based on factual assertions that have been proven untrue.¹⁰¹

In summary, this means that every person who denies, minimizes, or approves of the Holocaust assaults the dignity and violates the honor of all Jews living in Germany. These utterances can therefore be punished as insults pursuant to §§ 185 ff. and as hate speech under § 130 of the Penal Code. By following this policy, Germany has effectively succeeded in suppressing such statements and thereby taken a major step toward leaving its National Socialist past behind. Furthermore, with this far-reaching ban, Germany is in agreement with pertinent international norms and with many other countries who have made denial of the Holocaust punishable under criminal law.¹⁰²

However, it should be noted that making even the simple denial of the Holocaust punishable under criminal law is in tension with some accepted functions and doctrines of free speech. The Federal Constitutional Court chooses to selectively emphasize the dignity interests of the addressee, leaving the dignity interest of the speaker untouched. In addition, the full range of consequentialist possibilities is deliberately shortchanged by the premise that false statements cannot contribute to the truth. The Court also makes no effort to interpret such expressions of denial in ways that would allow the speech to escape sanctions as insult or racially

¹⁰⁰ Id., 251 f. = Decisions, at 628 f.

¹⁰¹ Id., 254 = Decisions, at 630.

¹⁰² See WANDRES, pp. 142 ff.; ZIMMER, Part III.

motivated hate speech. However, the Court would have to do exactly that if it were to follow its own prescription to lower courts, namely to not specifically select the punishable interpretation of a statement if reasonable alternative interpretations are found to exist after mandatory careful analysis. Instead of following this policy, the Court uses four arguments to actually stretch the interpretation of the simple Holocaust lie into prohibited speech: (1) due to the Holocaust, there exists a special moral relationship between Germans and Jews; (2) this moral duty can be transformed into a positive legal obligation to acknowledge the Holocaust through use of the criminal law; (3) the Holocaust even now is a constitutive part of the collective self-perception and dignity of the Jews; and (4) denial of the Holocaust attacks the dignity and security of all Jews in Germany and is a form of discrimination.

Whereas the first argument seems reasonable, the second is problematic. At least when the criminal law, as *ultima ratio*, is applied in an effort to acknowledge a terrible historical fate, additional arguments regarding the necessity of the means and the protected interest should be raised. Regarding the third argument, a collective application of the dignity argument to all Jews, on the one hand, makes sense, given the group terror of the Nazi regime. On the other hand, it may turn out to be counterproductive if dignity is seen as protecting mainly the individual Jewish persons living in Germany, but not Jews collectively. In the fourth argument, the Court bundles past experiences and present life, and construes "denial" as an "attack" on the life, liberty, dignity, and equality of Jews living in Germany. The problem with these interpretations is not that they could not be viewed as tenable or plausible by many listeners or readers, but the fact that the Federal Constitutional Court does not exclude, in every individual case, other, non-punishable interpretations based, for example, on ignorance. In addition, the Court does not examine other, less restrictive ways of preserving the memory of the Holocaust and securing peace and security for Jews in Germany.¹⁰³ Instead, the Court chooses the punishable variant of the statement, and does so quite elaborately, without hardly developing free speech arguments supporting the speaker's side. This imbalance and divergence from its own free speech doctrines becomes especially striking during a comparison between the treatment of the Holocaust denial with the Soldiers-are-Murderers Case, in which the Court took great pains to come up with a non-punishable reading of the message "Soldiers are Murderers." Whatever the interpretation of this message may mean, it certainly

¹⁰³ Germany commemorates the Holocaust in many ways, and the Nazi past is a regular subject of school curricula and discussions in the mass media. The best political guarantee to protect the lives of everybody, majority and minority alike, is a spirit of liberty and tolerance, and the best legal guarantees are police regulations and sanctions that effectively deter or at least punish violations of physical integrity. See HUMAN RIGHTS WATCH, pp. 70 f.

represents more of an “attack” on honor than the assertion that “The Holocaust never happened,” and the addressees are easier to identify as well.

All of this supports the conclusion that the criminalization of simple denial of the Holocaust can be justified only against the background of the singular significance of the Holocaust to the self-image of all Germans.¹⁰⁴ Millions of Jews and other minorities were killed in the Nazi era; for German identity, this is still a traumatic event that is best expressed in the famous words, “Never Forget, Never Again!”¹⁰⁵ Based on this maxim, the use of criminal law to encroach upon the freedom to deny the Holocaust is considered justified, even if the usual doctrinal safeguards to the freedom of opinion are substantially skirted in the process.

Constitutional qualms abate or vanish concerning the prohibition of qualified Holocaust lies. When calls for action based on theories of racial superiority and inferiority are aired, hate speech approaches hate crime, consequentialist arguments point to harmful results, and the autonomy argument applies equally well to the addressee as to the speaker.¹⁰⁶ Punishment of such speech under § 130 or §§ 185 ff. of the Penal Code is justified. Offenders are viewed as having violated the right to human dignity and honor of the group attacked and as having threatened its members’ rights to life and physical integrity, even though the offender’s conduct may fall short of criminal instigation and no clear and present danger to public peace resulted. Another group of cases concerns normative assessments and conclusions in conjunction with denying or minimizing the Holocaust. What should be the government’s response when a person states, “Special interest groups and Jews use the Holocaust lie to extort money from Germany”? Although these statements are also criminally punished in Germany, the threat to the life and liberty of the verbally attacked minority is not as clear as in the call-for-action cases, and, as long as no reference to racial inferiority or superiority is made, the insult to dignity or honor is less evident. Considering the admonishment of the Federal Constitutional Court to give opinions a free-speech-friendly interpretation rather than immediately focusing on the punishable meaning, these cases are not easily resolved.

In general, apart from the Holocaust cases, interest groups and politicians often take advantage of the moral failures and political mistakes of others for their own benefit, and this may be justified or contradict moral and political values. It may lead, for example, to reparations and apologies – as illustrated most recently at the

¹⁰⁴ See WANDRES, pp. 35 ff., 240.

¹⁰⁵ See MINSKER, p. 157 with note 297.

¹⁰⁶ This argument is supported by Art. 1 (1) BL, which requires government to respect the human dignity of the speaker as well as the human dignity of the addressee.

anti-racism conference in Durban, South Africa by resolutions to apologize to former slaves. However, open and robust discussion should prevail whenever consequences of political mistakes or harmful actions in the past or in the present are at stake. Why then punish allegations about the way the Holocaust has been treated? Maybe because in these cases, heavily disliked extremists make ideological use of historical events and falsify them? If so, is there really a significant difference between their interpretation of history and other instances of one-sided portrayals of historical events by mainstream politicians or less despicable extremists? I do not think so. After all, distinctions made between different kinds of extremism often reflect more the *Zeitgeist* or political correctness than principled differentiation. Simply assuming that all right-wingers are die-hard neo-Nazis who are either unwilling or unable to change their world view would amount to constitutionally suspect stereotyping.

Moreover, it is usually as difficult to disprove as it is to prove accusations of historical falsification or ideological manipulation of statistics and events. Also, the assumption that only neo-Nazis resorting to qualified Holocaust lies give historical events an ideological slant, while other groups or politicians do not, is highly improbable.

Finally, the presumption that all criticisms directed against “the Jews” refer to each and every individual Jew may not be accurate, as such general assertions are commonly directed at “many,” “typical,” or “too many” of the group, from the speaker’s point of view, instead of “all.” Such a more selective insult would not meet the usual requirement that collective insults be directed against every member of the group. The presumption that the insult in such cases is directed at all Jews is valid only when these assertions are viewed not as empirical, but rather as stereotypical, attributions of negative characteristics against which individuals cannot defend, there being no proof or counterproof possible.¹⁰⁷ German jurisprudence, which criminalizes such speech as a category of Holocaust lie, may be justified under this rationale.

F. Concluding Remarks

Particular hate speech messages often form part of more complex ideologies such as theories of racial superiority. While Germany, Europe, and many non-European modern democracies are determined to effectively fight such ideologies by prohibiting them as early as possible, dominant American constitutional doctrine is equally determined to allow propagation of such messages. Not until there is a call to immediate illegal action or fistcuffs is the American government permitted to

¹⁰⁷ See WANDRES, p. 206 (referring to Nazi literature claiming that all Jews are liars and parasites).

step in. As long as only ideas, even destructive ideas, are advocated, United States constitutional law requires the State to remain neutral. For the State to lose its neutrality is considered a cardinal sin.

Germany, many other countries, and international law all view hate speech and the spread of fallacious racial ideologies as sufficiently harmful to justify their prohibition. The broad definition of what may be prohibited found in the pertinent United Nations agreement illustrates that, in this context, racial discrimination includes prejudiced acts based on nearly any unalterable and invariable criterium that is likely to be of personal importance, such as gender, religion, or ethnic affiliation. According to the United Nations agreement, uttered opinions as well as physical acts of discrimination may be punished. That is exactly what Germany has done in §§ 185 ff. and 130 of its Penal Code.

Similar to applicable provisions of international law, German statutes specifically refrain from requiring that racist messages lead to a clear and present danger of imminent lawless action before becoming punishable. A distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself. Having viewed the horrors of the Second World War as well as more recent racial conflicts on the Balkan peninsula, in Rwanda, and elsewhere, countries following this legal theory collectively believe that tolerating fallacious racial ideologies has the potential for severe consequences. In these legal systems, there need not be any certainty, nor even a particular likelihood, of violence—the spectre of future racial strife suffices. Although the dangers of hate speech are concededly abstract, they are nevertheless seen as being real enough to warrant management by the government, whose task in this area can be termed as control of the political climate.¹⁰⁸ Admittedly, even in these countries, there are certain restrictions on the prohibition of hate speech that favor the freedom of opinion: the hate utterance must be made in public, the hate utterance can occasionally be defended by a showing that it poses no danger, and hate utterances that are considered artistic or scholarly are often permitted.¹⁰⁹ However, hate speech is generally prohibited—it is “speech minus” or “low-value speech,” even if it addresses issues of high political importance. The right to speech is limited by the perceived higher value of eliminating all kinds of racism in the broadest sense. In Germany, many other countries, and international law, this control of racism is considered the preferred duty of governments—a “duty plus.”

¹⁰⁸ The word *Klimakontrolle* (control of the political climate) is used. See ZIMMER, in which this term often occurs, and further references in LACKNER/KÜHL, § 130, marginal note 1.

¹⁰⁹ See supra notes 31, 59, 86. But see also the Strauß Caricature Case, supra notes 71 f.

Common rallying cries in Germany are “Nip it in the bud” (*Wehret den Anfängen*) and “Never again” (*Nie wieder*). These slogans were initially directed only against a recurrence of the Nazi regime of terror but are now used to condemn hate speech writ large. Although no person of good will could dispute the wisdom of these admonishments, constitutional scholars must be concerned that they not be used to support undue encroachment upon free speech. Otherwise, the abstract dangers of hate speech might be replaced by the concrete danger of minimizing speech, that “most direct expression of human personality in society” which is “one of the foremost human rights of all...‘the matrix, the indispensable condition of nearly every other form of freedom.’”¹¹⁰

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¹¹⁰ See *supra* note 19.

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