

Legal Limits of a Permissible Criticism of Religion

By Christian Hillgruber*

Abstract

In its present state, Article 166 StGB does not satisfactorily achieve its purpose of ensuring the effective enforcement of the ban on insulting of religious beliefs and religious communities. This is largely because of the difficulty satisfying the “disturbance of the public peace” requirement. In this paper, I first refer to the legal limits of the freedom of opinion in consideration of religion and then argue with regard to Article 166 StGB that the disturbance of peace criterion ought to be eliminated because abuse of religion, in itself, already disturbs the public peace.

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A. No Guarantee of Freedom Without Boundaries

All civilized people condemn the Paris attacks carried out by Islamic fanatics and mourn the victims. But, whether they are editors, journalists, caricaturists, policemen, or simply citizens of Paris, not everybody wants to identify with the affected satire magazine, *Charlie Hebdo*.¹ Not everybody wants to “be Charlie.” Many of the caricatures in the magazine—not just the caricatures of Mohammed—are both provocatively critical of religion and, to a considerable extent, contemptuous of religion in a crude, even vulgar manner.

Whether or not someone finds the caricatures amusing is a question of good taste; whether or not someone considers them a suitable method of religious criticism is a question of what one considers good style in a dispute. Whether or not the caricatures can be published, however, is a legal question. It is a question of the legal boundaries of freedom of opinion, freedom of press, and artistic freedom with regards to religion: Can satire, verbal, or visual, actually do anything? Can—or must—the state, in the interest of public peace, set legal limits that have to be respected even by an areligious and antireligious vanguard? And if so, which ones?

Legal limits on freedom of communication indisputably exist and, among lawyers, this is undisputed. No freedom is without restriction, not even the freedom of opinion and the freedom of press, despite their undoubtedly constitutive importance in a liberal democracy. In the *Grundgesetz* (GG),² the freedom of opinion is subject to general legislation, general youth protection provisions, and the law of personal honor.³ In accordance with the European Convention on Human Rights,

[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

¹ *Charlie Hebdo* is a French satire magazine that describes itself as secular, political, and jubilant. Its editorial department was the target of terrorist attacks on January 7, 2015. For more information on *Charlie Hebdo*, see CHARLIE HEBDO, <https://charliehebdo.fr/en/> (last visited Mar. 27, 2016).

² The *Grundgesetz* is the Basic Law for the Federal Republic of Germany. It is the German constitution including fundamental rights and articles on state organization. It was approved on May 8, 1949 in Bonn and came into effect on May 23, 1949. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

³ GG, *supra* note 2, at art. 5(2).

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴

Even constitutional rights without explicit reservations of law—such as artistic freedom in Article 5(3) GG—can be limited for the sake of the freedom of others, but also to promote constitutional concerns for the greater common good.

After the Paris attacks, certain parties claimed that freedom of opinion, freedom of press, and artistic freedom are absolute and cannot be limited; this is clearly incorrect. Yet, what exactly are the limits concerning religion and religious feelings? There are great legal uncertainties in Germany, too, as seen in the demonstration of Islam-opponents (“Legida”) in Leipzig, where showing Mohammed caricatures was first banned by an administrative decision that was shortly after annulled.⁵

The question is: What are the limits that the state—as constituted by the GG—can set on public expressions of opinion or artistic presentations of religion-critical, or even antireligious, communication by its secular legal system, without violating the constitutionally guaranteed freedom of opinion, freedom of press, artistic freedom, and the necessity of religious and ideological neutrality of the state?

B. Legal Limits of Freedom of Opinion in Consideration of Religion

I. No Control of Quality and Level

The protection of freedom of opinion, freedom of speech, and artistic freedom guaranteed by the GG does not depend on the quality of an opinion, the press medium, or the artwork.⁶ This is because this protection does not focus on the result of the exercise of

⁴ European Convention on Human Rights, Nov. 4, 1950, art. 10(2) [hereinafter ECHR], http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁵ For more information, see *Mohammed-Karikaturen bei “Legida”—Demo doch erlaubt*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 12, 2015), <http://www.faz.net/aktuell/politik/inland/leipzig-erlaubt-mohammed-karikaturen-bei-legida-demo-13365659.html>; *Leipzig Lifts PEGIDA Charlie Hebdo Caricature Ban*, DW.COM (Jan. 12, 2015), <http://www.dw.com/en/leipzig-lifts-pegida-charlie-hebdo-caricature-ban/a-18186190>.

⁶ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 23, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 336 (347) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 14, 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (14 f.) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 22, 1982, 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (7) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 9, 1991, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (15) (Ger.);

freedom, the expressed or disseminated opinion, or the art created, but rather on the exercise of freedom itself—the freedom to form and articulate an opinion or to engage in art. The state is not permitted to assess this expression of freedom as right or wrong. The recognition of this freedom must be independent from state-run regulation or control of content.

As an unavoidable consequence of any constitutional guarantee of freedom, the constitutional freedom of opinion, freedom of press, and artistic freedom protect inferior—even worthless and incorrect—exercise of the respective freedom.⁷ Wherever freedom is guaranteed, it cannot be restricted to the good and beautiful, in whatever way defined.

The state must not restrict freedom of opinion, freedom of press, or artistic freedom because of the inadequate quality, the moral abjection, or the blasphemous character of the product. But, the state can—and must—intervene if the expression of opinion, the press product, or the artwork is either actually harmful to third-party rights or the public good, or if there is a reasonable probability of such harm.⁸ Acts that are aesthetically repulsive or merely leave a harmful mental impact, however, are relatively immune from restriction.⁹ Thus, according to the definition above, the exercise of the freedoms of communication must not be socially damaging or peace disturbing.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (289) (Ger.).

⁷ It is irrelevant whether the expressed opinion is wrong or right, worthless or absurd, rational or emotional, unfounded or even derogatory. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 14, 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (15) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 11, 1976, 42 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 163 (171) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 9, 1991, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (15) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (289) (Ger.).

⁸ Freedom of opinion as guaranteed by Article 5(1) GG finds its limits according to Article 5(2) GG in general legislation, general youth protection provisions, and the law of personal honor. Additionally, constitutional limits inherent in the Basic Law may also restrict the freedom of opinion. For the concept of practical concordance, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 25, 1984, 66 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 116 (136) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 23, 2004, 111 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 147 (157) (Ger.).

⁹ For the freedom of opinion, compare with Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 300 (320 f.) (Ger.) For the artistic freedom, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 3, 1987, 75 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 369,(377) (Ger.).

II. Protection of Religious Feelings?

There is no doubt that the religious freedom of others can also limit artistic freedom. The question to consider is: Is the freedom of religion affected, or even violated, if religious feelings are hurt by blasphemous expressions of opinion or art? If so, is the freedom of religion then affected and can the freedom of speech under these circumstances be restricted to ensure freedom of religion?

Religious sentiment per se is not a legal asset constitutionally protected from violation by private third parties. Article 4 GG contains a guarantee of the freedom of religion—not a guarantee of protection of religion itself.¹⁰ Under a constitutional order, where the state provides space for different religious beliefs and ideologies by a constitutionally guaranteed freedom, there can—in principle—be no right of theists or religious people to be spared from confrontation with atheism. That also applies to the artistic expression of such opinions. No one can constitutionally claim that one's religious conviction and moral beliefs remain verbally and visually unchallenged and unaffected, and therefore that they must not be questioned or negated by artistic interpretation and representation. Regarding this, the *Bundesverfassungsgericht* (the Federal Constitutional Court of Germany) stated:

Disquiet which is brought about by intellectual debate in the struggle to form opinions and which follows solely from the content of the ideas and their conceptual consequences is the other side of the coin and unavoidable if one is to have freedom of opinion; it cannot constitute a legitimate aim for the restriction of this freedom.¹¹

The freedom of belief and religious denomination, therefore, does not shield personal religious feelings from provocations by foreign opinions or art. The constitutionally guaranteed freedom of religion and ideology generally also gives a right to challenge, if not disrespect, foreign beliefs one considers superstitious or plainly incorrect. For example, that is why non-Muslims are not bound by the Islamic command of not portraying the

¹⁰ GG, *supra* note 2, at art. 4.

¹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 300, para. 54.

Prophet.¹² Mohammed cartoons, just like other opinions or artworks that supposedly negate god or criticize religion, do not trigger constitutionally guaranteed state protection from attacks on religious beliefs.

Religious feelings are subjective, and therefore, providing legal protection would subjectivize the abstract, general, and objectivized imperatives of legal order in an unacceptable way. If one focused on the degree by which someone feels affected by anti-religious speech, the need for, and the grant of, protection would more or less depend on the affected person's own degree of religious sensibility and sensitivity.

III. Protection of the Religious Identity?

No one has to tolerate his or her own personal disparagement. The general right of personhood gives the individual a social claim to validity and respect that has to be accepted by third parties. If a human being's dignity is encroached—which can also occur through a caricature—this limit is absolute. As already noted in an injunctive process, the photomontage on the front page of *Titanic*, a satirical magazine, in 2012 showing Pope Benedict XVI as incontinent and stained with feces, was evidently degrading and, thus, dishonoring, regardless of his position as the head of the Catholic Church.¹³ Such a violation of the right of personhood through artistically embellished insults requires an actual reference to an individual person, her characteristics, and a resulting vilification. According to the traditional reading of the right of personhood, the impersonal defamation of a religion is not included.¹⁴

Now, it could also be considered whether the disparagement of a confession always has effect on the believer as a person, because many human beings' identities are shaped by their religion. In this case, the defamation of their faith would affect the single believer; the religious identity in itself, thus, would deserve an indirect "protection of honor" by prohibiting the abuse of religious denominations. After all, a human being's religious beliefs are the specific expression of his dignity, which the constitution declares inviolable.¹⁵ The basis for this approach of a religious identity protection is an idea already

¹² The freedom of religion also includes the so-called negative freedom, meaning that everyone can decide not to have a religious belief and not to follow religious or ideological rituals. See Martin Morlok, *Artikel 38—Wahlrechtsgrundsätze/Abgeordnete*, in 1 GRUNDGESETZ KOMMENTAR (Horst Dreier ed., 2013), art. 4, para. 69.

¹³ RECHTSPRECHUNG DER OBERLANDESGERICHE IN ZIVILSACHEN [OLGZ] [Higher Regional Court], July 10, 2012, 324 O 406/12 (Ger.).

¹⁴ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (concerning the defamation of all soldiers as murderers, which was not necessarily to be understood as a personal defamation of all soldiers).

¹⁵ GG art. 1(1) declares human dignity inviolable.

stated by Rousseau, who said that the person who insults his religion also insults himself.¹⁶ This assumption is not far-fetched.

Insulting collective groups is also conceivable under other circumstances. In principle, the Federal Constitutional Court of Germany has acknowledged the possibility that a disparaging remark, not naming or relating to specific persons but rather referring to a collective, can, under certain circumstances, be an offense to the personal honor of the group members of the collective.¹⁷ The larger the insulted group, the weaker is the personal concern for the individual members. Generally, reproaches addressed to large collectives do not concern individual inappropriate behavior or individual features of members; rather, it devalues the group as a whole and its social functions from the criticizer's perspective. Insulting the group as a whole, thus, is not necessarily a personal insult against its members.

IV. The Protection of Religious Peace as an Objective Task of the State

Even if an individualizing breakdown of the overall concept of religious defamation into individual facts—a violation of the personal rights of individual believers—is impossible because of the sheer number of believers, the basic idea of the state protecting the religious identity of its citizens against slander or libel is still valid, even if an individual's claim to respect the integrity of individual religious persuasions is excluded. This, however, does not release the state from its objective duty of securing public peace and, as a part of the same concept, of preserving religious peace. This is the task, and, in fact, a central and pressing role, of the modern state, and especially of a state that guarantees religious freedom and other basic rights. Considering the historical developments from which the early modern state in Europe originated, the preservation of religious peace up until today absolutely appears to be the role of the state. Moreover, the preservation of religious peace serves as a mirror-image obligation of a state, which as a neutral power originally only guaranteed denominational freedom, but nowadays guarantees the general religious and secular freedoms of plurality. Fulfillment of this task by the state is indispensable,

because it makes the free intellectual debate appropriate for the frequently quoted pluralist society possible at all, and safeguards it by virtue of the basic rights of religious freedom, freedom of religious belief, freedom of speech, and artistic and scientific freedom;

¹⁶ JEAN-JACQUES ROUSSEAU, *SCHRIFTEN* 135 (Henning Ritter ed., 1978).

¹⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (299) (Ger.).

no subject is excepted from this debate, and it can only function at all by following certain elementary rules of play.¹⁸

A ban on insulting religious or secular beliefs, and insults of communities sharing a common belief, is one of these “elementary rules of play.” This demands no more from the individual than is already proper on the grounds of decency, which includes a minimal level of consideration for the identity of others. Such a moderate reciprocal obligation to the consideration of others may be demanded by a religious or secularly neutral state from all its citizens for the sake of public peace. According to this obligation, everyone must apply this minimum level of respect, even for religious convictions they do not themselves share and may even firmly reject. Only by this means does a peaceful coexistence in religious diversity become, and remain, possible. Whoever disregards this minimum level of respect, maliciously disparaging what others find sacred and hold to be the core of their religious conviction and way of life, is disturbing the religious peace, and with this, the public peace of the state. Using this legitimate reasoning, the German criminal legislature has already made insulting of beliefs, religious societies, and groups with a common world-view, punishable offenses.¹⁹

In fact, freedom of speech, freedom of the press, and artistic freedom do experience a restriction in this way, but it is a reasonable one. The argument that these restrictions will chill legitimate religious criticism—because believers could assert that they were themselves challenged and belittled by a disparaging expression, whether personally or through joint membership of the disregarded religion constituting a collective—is not convincing. The danger that the intellectual battle of religious opinions could be suppressed in this way does not pose a threat if the statutory requirements for religious slander or libel—which must be eliminated in the interest of public peace—are formulated in a sufficiently restrictive manner. Sharp, even polemic and exaggerated criticism of religions—such as criticism of Islam or Christianity—is, and remains, possible if ill-mannered and belittling expressions or portrayals are forbidden as verbal or visual excesses.

C. The Ban on Insulting of Religious Beliefs and Religious Communities

A disruption to religious peace presupposes a suitable insult towards a religious belief or the religious community representing this belief. Not every detrimental statement is included here; rather, a particularly offensive statement of contempt is required through its form or content, in which case the particular offense could lie either in the roughness of

¹⁸ WOLFGANG KNIES, *SCHRANKEN DER KUNSTFREIHEIT ALS VERFASSUNGSRECHTLICHES PROBLEM* 268 (1967).

¹⁹ STRAFGESETZBUCH [STGB] [Penal Code], Nov. 13, 1998, REICHSGESETZBLATT [RGL.] I, § 166 (Ger.).

expression or in the unjustified reproach of an insulting behavior or condition.²⁰ Excluding these particular statements from frequently conducted religious debates cannot seriously be considered as improperly intruding on freedom of speech. If it was, laws against slander and libel would also be violations of freedom of speech because that freedom reputedly includes the unrestricted right to “give it to somebody straight,” even with the inclusion of invective conduct. Rightly, no one suggests this.

The existence of verbal abuse is decided on a case-by-case basis. However, certain guidelines may be defined: Breach of public peace requirements are met when an opinion is hostile to religious beliefs and is expressed with grossly disparaging character, form, and circumstances, such as when a statement contains the use of evil swearwords.²¹ The same rule must apply to the sexualized presentation of religious content and cultic actions. This is the most objectionable form of profanation of a saint who is holy to the believer, and thus sexualizing that saint constitutes an abuse. In contrast, with regard to content, the expression of a religion-critical opinion generally deserves the protection of the freedom of speech. Freedom of speech protections apply unless the factual substance of the criticism of a religious belief or a confessional community clearly stands back behind an obvious vilification.

Exaggeration, distortion, and alienation are imminent to satire and caricature. Thus, their legal assessment requires the divestiture of the “satirical gown, chosen in words and pictures.”²² The core message and its presentation are examined separately to determine whether it contains an expression of serious disdain toward the concerned religious belief. The circumstances turning a religious-critical or even hostile opinion into satire can reduce, increase, or establish its grossly offensive character: The higher the alienation from real events, situations, or institutions object to the pungent satire is, the weaker is the relation to the respective religious belief or the confessional community, and the lower is the offense. Conversely, the shameless exaggeration in the assessment of a criticizable behavior of a religious community, as well as a verbal insult, may just as well establish an otherwise non-existent abuse.

²⁰ VERWALTUNGSGERICHTSHOF [VGH] [Higher Administrative Court] Koblenz, Dec. 2, 1996, *Neue Juristische Wochenschrift* [NJW] 1174 (1176) 1997 (Ger.); OBERLANDESGERICHT [OLG] [Higher Regional Court], Nov. 11, 1981, *Neue Juristische Wochenschrift* [NJW] 657 (657) 1982 (Ger.); OBERLANDESGERICHT [OLG] [Higher Regional Court], Oct. 17, 1985, 1986 *Neue Zeitschrift für Strafrecht* [NStZ] 363 (365) 1986 (Ger.).

²¹ OBERLANDESGERICHT [OLG] [Higher Regional Court], Mar. 16, 1984, *Zeitschrift für Urheber- und Medienrecht* [ZUM] 595 (595) 1984 (Ger.); OBERLANDESGERICHT [OLG] [Higher Regional Court], Oct. 8, 1985, *Neue Juristische Wochenschrift* [NJW] 1275 (1276) 1986 (Ger.); OBERLANDESGERICHT [OLG] [Higher Regional Court], June 23, 1998, *Neue Zeitschrift für Strafrecht Rechtsprechungs-Report* [NStZ-RR] 238 (240) 1999 (Ger.).

²² REICHSGERICHT [RG] [SUPREME COURT OF THE GERMAN REICH], June 5, 1928, *Entscheidungen des Reichgerichts in Strafsachen* [RGSt] 62 (183 ff.) (Ger.).

It would be inappropriate to downplay the exposed core message of a religion-contemptuous satire on the grounds of it being “just” satire. This is all the more so because satire is brought to life in the form of pun and pictorial humor but, content-wise, still wants to be taken seriously. Certainly, in each case it can be doubtful whether the threshold of an abuse is reached. However, such balancing difficulties also appear in other situations where protected rights conflict and the difficulty of case-by-case analysis should not deter the legal assessment. These difficulties are characteristic of a differentiated legal system and can be managed.

An impermissible abuse of a religion is in itself a disturbance of the religious peace of the state community. Such a disturbance of peace does not only occur with the creation of an open or latent hostility, but already when the community allows religious beliefs to be publicly degraded and believers consequently have to fear that they will be degraded because of their faith. The religiously and ideologically neutral state, being the home of all citizens regardless of their religious or ideological orientation, needs to react resolutely against developments which threaten its own basis of existence by illegalizing abuse of religion.

One could assume that the public peace would only be endangered by the specific danger of violent quarrels. As a reaction to the abuse, either the people whose religion is insulted could resort to violence or it could incite violence towards the insulted religion. Under this assumption, however, state protection against religious defamation would depend on the aggression of those who feel challenged by it. This response is obviously inappropriate because the aggression that should be prevented by the prohibition of religious abuses needs to occur before the state can intervene.

Therefore, the present application of Article 166 StGB is completely unsatisfactory. It condemns the criminal offense to virtual insignificance. The statute’s excessive requirements for factual abuse as well as the additional restrictive disturbance of the peace criteria make it incredibly difficult to prosecute abusive speech. Even abuses of the worst kind concerning different religions are tolerated because of improper considerations for the freedom of speech. The requirement of disturbance of the peace could and should be deleted because the abuse in itself already disturbs the public peace. In view of the underlying high community value, a more extensive restriction of the elements of the crime is inappropriate.

D. Minimal Amount of Respect for Religion as Requirement for Successful Integration

God does not need protection from the state legal system, but a peaceful and religiously tolerant society, uniting religious people and non-believers, does. Proof of this is given by the after-effects of the events in Paris—especially the reactions of Muslim adolescents at French schools.²³ Surely, the glorification of terrorism is repulsive, if not criminal. It is just as obvious, however, that the slogan “Je suis Charlie” and its associated identification with a satirical magazine that often insults Muslim religion, makes it very difficult for Muslims to distance themselves from the unjustifiable mass murders. Thus, the toleration of religious defamation proves to be a first-rate obstacle to integration. The mutual renunciation of abuses concerning the confession is more than just a requirement of decency; it is the indispensable requirement for a peaceful coexistence of various religious and ideological beliefs in the state community. It can, and should, be a legally binding obligation.

²³ For further information, see Michaela Wiegel, *Zwischenfälle an Schulen während Schweigeminute*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 12, 2015), <http://www.faz.net/aktuell/politik/ausland/europa/terror-in-frankreich-zwischenfaelle-an-schulen-waehrend-schweigeminute-13366059.html>.