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

*By Winfried Brugger*

[Editors' Note: Prof. Brugger's article will appear in *German Law Journal* in two parts, the first in this month's issue and the second in Vol. 4, No. 1 (1 January 2003). The article originally appeared in *Stocktaking in German Public Law* 117 (Bullinger and Starck eds., 2002). It is republished here with the kind permission of NOMOS Verlag, Baden-Baden.]

## 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.

https://doi.org/10.1017/S2071832200015716 Published online by Cambridge University Press

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 judicature.
[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.

https://doi.org/10.1017/S2071832200015716 Published online by Cambridge University Press

## 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.

https://doi.org/10.1017/S2071832200015716 Published online by Cambridge University Press

*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 looses 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 lead 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 Code[42] (*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/PIEROTH, 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.

https://doi.org/10.1017/S2071832200015716 Published online by Cambridge University Press

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 to145 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.

https://doi.org/10.1017/S2071832200015716 Published online by Cambridge University Press