

concerning § 3 of the workshop

Current problems of the freedom of opinion

Art. 5(1, 2) Basic Law¹ (excerpt)

- (1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures ... There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in statutory provisions for the protection of the youth and in the right to personal honour.

I. Introduction

- Freedom of opinion, as the other communicative freedoms, is *constitutive for the free and democratic constitutional order* and therefore of particular importance - even when balanced with other constitutional values.
- In the early years of the Federal Republic of Germany, freedom of opinion needed to be forced through by the Federal Constitutional Court against the sometimes persistent resistance of other state institutions and society. The *Liith decision* of 1958² was an important step forward. It clarified that the fundamental rights make up an *objective system of values* of the constitution, which is binding for all fields of law, and that any limitations of a fundamental right must be limited for their part in the light of the fundamental right.

II. The sphere [scope] of protection of the freedom of opinion

- *Opinions* are *all value-judgements* regardless of their content, including those that appear irrational, harmful, immoral or shocking. They are characterized by the element of personal valuation.
- Example: even sharp and excessive criticism of the state, the government, the employer or a religion.
- Statements of facts are protected because and insofar as they are a prerequisite for the formation of opinions. *Proven false or deliberately untrue allegations of facts* are *not* protected since they cannot contribute constructively to this process. A "right to lie" only exists under the general freedom of action (art. 2(1) BL), which can be restricted much more easily.
- Every form of expression and dissemination is protected, including those in the medium internet.

III. The limits of the freedom of opinion

- Freedom of opinion finds its limits in the *general laws*. Besides, it may be limited by statutory provisions for the protection of the youth or of the personal honor (e.g. against insults and abusive [defaming] criticism). The idea of additional "inherent limits" is controversial.
- According to the jurisprudence of the Federal Constitutional Court, which wrongly combines the opposed opinions of different scholars, general laws are those statutes which do not forbid an opinion as such and are not directed against the expression of opinion as such, but rather serve to protect a superior legal interest which deserves protection without regard to any particular opinion.³
- There is an interaction between the freedom of opinion and the general laws. On one hand the latter limit the freedom, but on the other hand they must be interpreted in the light of the importance of the fundamental right for a free and democratic constitutional state based on the rule of law and thus, be limited themselves in their freedom-limiting effect (so-called *doctrine of reciprocal effect* [*Wechselwirkungslehre*]).

IV. Recent problems

1) "Soldiers are murderers" (BVerfGE 93, 266⁴)

- In the early 1990s, pacifists were prosecuted for insult and incitement of the masses (sedition) because they criticised the profession of the soldier citing the famous dictum of the writer KURT TUCHOLSKY in one of his oeuvres that "Soldiers are murderers". After that there was a public debate if such citing was protected by the freedom of opinion.

¹ Underlined text passages contain links to additional Internet resources. These can be called up directly in the PDF file for this introduction (downloadable on my website).

² BVerfGE 7, 198 (Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 7, p. 198 ff.); English translation at <http://germanlawarchive.iuscomp.org/?p=51>.

³ BVerfGE 7, 198 (209 f.); ever since established jurisprudence.

⁴ English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=620>.

- The Federal Constitutional Court made clear that the *criminal court must recapitulate and assess the expression of opinion correctly* in the given context. Concerning expressions from the controversial public debate it is not allowed to simply conceive them in the technical legal sense if a different interpretation is possible. The pacifists had not accused each individual soldier of committing a murder in the sense of sect. 211 of the German Criminal Code, but reproached the soldiers in general of unreflective willingness to unethical behavior. In a democracy with freedom of opinion, such criticism is permissible. The Army is not sacrosanct against criticism. However, the pacifists are neither: When criticizing in my courses from the perspective of human rights protection the non-intervention of the international community against the massacres in the wars in Bosnia and Syria, which has caused hundreds of thousands of lives that could have been saved, I also use the dictum: "Pacifists are murderers".

2) Denial of holocaust and of German war guilt (BVerfGE 90, 241⁵, BVerfGE 124, 300⁶)

- The free-democratic constitutional state based on the rule of law must react appropriately to radical right-wing propaganda without violating the freedom of opinion.
- The public denial of the persecution of the Jews in the Third Reich (so-called *Holocaust denial!* [Auschwitzlüge]) is a proven untrue allegation of facts, as such not protected by the freedom of opinion and therefore can be punished without any problems.
- The assertion that Germany is not to blame for the outbreak of the Second World War (so-called *German war guilt lie*) is based on personal assessments and valuations, is therefore an expression of opinion and, consequently, cannot be generally prohibited.
- If the denial of holocaust is inextricably interwoven as an opinion-forming element in the expression of opinion on another topic (e.g. criticism of the "guilt complex" of the Germans), the expression is protected as a whole by the freedom of opinion but subject to the limits of the freedom in the general laws (art. 5(2) BL, see above, III.). Usually, this will lead to a thorough weighing in the context of the application of the law. In this weighing the truth content of the interwoven statement of facts may be decisive so that the expression as a whole may be prohibited resp. punished.
- In order to justify the *criminal prosecution of the approval of the National Socialist regime of terror* (sect. 130(4) of the German Criminal Code), the Federal Constitutional Court, contrary to art. 5(2) BL, also has accepted a statute, which is not a general law, as the fundamental right's limit:

"In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an *exception to the ban on special legislation for opinion-related laws* is inherent in Article 5(1) and 5(2) of the Basic Law for provisions which impose boundaries on the propagandistic endorsement of the National Socialist tyranny and despotism. ... The Basic Law does [however] not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas ..."

Many constitutionalist scholars are not convinced by this solution, since art. 5(2) is meant to regulate the limits of the freedom of opinion exhaustively...

3) Dissemination of fake news

- Fake news, as proven false allegations of facts, are not covered by the freedom of opinion. Even their dissemination by well-meaning followers can be stopped without further ado.
- The problem lies rather in the question to what extent the *state must protect the integrity of the democratic process of the formation of political will against manipulation* by fake news. Various different measures have been taken by different countries. The introduction of a general civil and criminal responsibility, including the redistributors, social media and platform operators, would be proportional and therefore possible, but must not hinder the general political dispute. Another instrument would be to allow disciplinary warning notices and other legal measures by citizens' associations.

4) Hate posts in the internet

- Hate posts in the internet, as any hate speech, violate the right to personal honour and therefore are usually indictable as insult, incitement of the masses (sedition) or other criminal offences. The problem of the *toxication of the internet* does not reside in the freedom of opinion but in the totally inadequate practical enforcement of the fundamental right's limits in this medium (the internet as a "legal vacuum"?). In Germany, the *Network Enforcement Act* [*Netzwerkdurchsetzungsgesetz*] is the first step to combat hatred and agitation more effectively in social networks. Besides, the legislator should consider the introduction of a special, easy to enforce claim for compensation with an element of punitive damages of the victim against the author of the hate post, the online platform and any potential redistributor.

5) Manipulation of the public discourse by social bots

- The automated mass dissemination of opinions in the internet by propaganda robots (social bots) is an expression of opinion and therefore covered by the freedom of opinion. Only the wrong information about the author and the pretending of individuality represent untrue allegations of facts and, as such, are not protected.
- However, the use of social bots can be easily prohibited or restricted by a *general law for the protection of the integrity of the public opinion-forming process against manipulations* and, thus, of pluralism and democracy as higher-ranking constitutional values. In order to maintain a real, undistorted public discourse in the future, a total ban of social bots, even under criminal law, may become necessary.

(Datei: Freedom of opinion (FRGermany))

⁵ English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621>.

⁶ English translation at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html.