

FREEDOM OF EXPRESSION UNDER GERMAN LAW

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Abstract

This contribution seeks to provide an overview of the current state of constitutional standards relating to freedom of expression under German law. To that effect, the specifics of freedom of expression protected under Article 5(1) of the Basic Law will be presented within the framework of the general constitutional system of fundamental rights.

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1. Introductory remarks

Article 5 of the Basic Law for the Federal Republic of Germany (the 'Basic Law') provides constitutional protection for a number of fundamental rights and reads as follows:

“(1) Every person shall have the right freely to express and disseminate her 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.

(2) 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 honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.”

Alongside the “cultural rights” mentioned in Article 5(3), Article 5(1) of the Basic Law protects so-called “communication rights”. These rights may be divided in freedom of expression (first phrase), freedom of information (first phrase), and media freedoms (second phrase), more specifically freedom of the press and freedom of reporting by means of broadcasts and films. It should be noted that these rights are not necessarily mutually exclusive.

The following comments, which focus on the freedom of expression as guaranteed under the first phrase of Article 5(1) of the Basic Law¹, are based primarily on the interpretation of this provision by the Federal Constitutional Court (the 'FCC'). In fact, the scope of freedom of expression has to a very large extent been shaped by the FCC's case-law. Without any claim to completeness, some of the most notable cases are:

- Judgment of 15 January 1958, 1 BvR 400/51 (*Lüth*): Scope of general laws within the meaning of Article 5(2) of the Basic Law (doctrine of interaction);

- Order of 25 January 1984, 1 BvR 272/81 (*Springer/Wallraff*): Freedom of opinion also covers the dissemination of unlawfully obtained information;

¹ This contribution draws on research conducted as part of a research project limited to certain aspects of freedom of expression and focusing on national constitutional traditions.

- Order of 13 April 1994, 1 BvR 23/94 (*Auschwitz-Lüge*): Freedom of expression does not include manifestly untrue statements of facts;
- Order of 10 October 1995, 1 BvR 1476/91 et al. (*Soldaten sind Mörder*): The scope of the concept of opinion has to be interpreted largely;
- Judgment of 12 December 2000, 1 BvR 1762/95, 1 BvR 1787/95 (*Benetton*): Shock advertising is in principle protected by freedom of expression;
- Order of 4 November 2009, 1 BvR 2150/08 (*Wunsiedel*): Restrictions to freedom of expression with regard to Germany's Nationalist Socialist past.

2. Constitutional standards with regard to legal scrutiny for freedom of expression

In accordance with general standards under German constitutional law, legal scrutiny for freedom of expression as enshrined in Article 5(1) of the Basic Law is systematically carried out in three consecutive steps: i) Applicability (scope *rationae personae* and *rationae materiae*); ii) Interference; iii) Justification.

Any interference may be subject to justification under the conditions laid down in Article 5(2) of the Basic Law, which provides that freedom of speech finds its limits: i) in the provisions of general laws; ii) in provisions for the protection of young persons, and; iii) in the right to personal honour.

In order to be justified under German constitutional law, any limitation of a fundamental right must be proportionate and therefore meet the following requirements: i) the interference must pursue a legitimate aim and constitute a legitimate means to that effect; ii) the interference must be suitable for achieving that aim; iii) the interference must be necessary to that effect, i.e. no less intrusive measure may exist; iv) it must be appropriate to give priority to achieving the above-mentioned aim over the protection of the fundamental right at stake. The FCC has shaped this proportionality test with regard to freedom of expression and its limitation by general laws by requiring that any interference to freedom of expression has to be subject to an intensified proportionality test under the so-called "doctrine of interaction" (*Wechselwirkungslehre*). Under this test, the interaction between a general law and the right to free expression itself must be taken into

account specifically. Both the conditions laid down in a provision which qualifies as a general law and the application of said provision itself, in the circumstances of a specific case, must be assessed in the light of freedom of expression on a **strict case-by-case basis**. Therefore, the proportionality test constitutes a strict counter-limitation ("*Schranken-Schranke*") to any interference in Article 5(1) of the Basic Law.² The same also applies to the prohibition of censorship mentioned in this provision, which prohibits any state-conducted interfering measures prior to the production or dissemination of an intellectual work, in particular any measures requiring an official preliminary examination and the approval of its content.³

3. Scope of freedom of expression

3.1. Scope *ratione personae*

Both German and foreign nationals may rely on freedom of expression under Article 5(1) of the Basic Law, as well as legal persons, since freedom of expression is by its nature applicable to them.⁴ However, public officials may not invoke this provision if they are acting in an official capacity.⁵

3.2. Scope *ratione materiae*

3.2.1. Concept of "opinion"

The constitutional protection of opinions provided under Article 5(1) of the Basic Law is based on the distinction between value judgments and statements of facts. The concept of opinion within the meaning of said provision must be interpreted broadly and includes value judgments, irrespective of whether they are true or false, reasoned or not, emotional or rational, valuable or worthless, dangerous or harmless.⁶ In principle, even insults and slurs are included.⁷

² FCC, Judgments of 15 January 1958, 1 BvR 400/51, and of 4 November 2011, 1 BvR 2150/08. For example, criminal liability for an ambiguous statement is excluded if this statement may somehow be understood in a way that is exempt from punishment (FCC, Order of 29 July 1998, 1 BvR 287/93).

³ FCC, Order of 20 October 1992, 1 BvR 698/89.

⁴ FCC, Order of 28 July 2004, 1 BvR 2566/95.

⁵ Federal Administrative Court, Judgment of 18 April 1997, 8 C 5/96.

⁶ FCC, Order of 22 June 2018, 1 BvR 2083/15.

⁷ FCC, Order of 10 October 1995, 1 BvR 1476/91 et al. (a criminal conviction for disparaging remarks about soldiers - "Soldiers are murderers" - was overturned).

Article 5(1) of the Basic Law also protects, in principle, statements of facts, because and insofar they constitute the basis of independent opinion⁸, unless they prove to be clearly untrue and therefore cannot add whatsoever to the process of opinion making.⁹ Contrary to value judgments, statements of facts are amenable to proof.

When balancing the freedom of expression on the one hand and the legal interest protected by a general law within the meaning of Article 5(2) of the Basic Law, a presumption in favor of free expression applies to opinions, whereas this does not apply in the same way to statements of facts.¹⁰ This approach is based on the well-established finding that freedom of expression aims to protect not only individuals but also the democratic order and the shaping of public opinion.¹¹

Freedom of expression also covers the dissemination of unlawfully obtained information.¹²

Whether Article 5(1) of the Basic Law protects a specific opinion or statement has to be determined on a strict case-by-case analysis.¹³ Therefore, hate speech is not, as such, excluded from the area of constitutionally protected speech. It may however be punishable as a criminal offence, in particular under Section 126 (Disturbing public peace by threatening to commit offences), Section 130 (Incitement of masses)¹⁴, and Section 130a (Instructions

⁸ FCC, Order of 22 June 1982, 1 BvR 1376/79.

⁹ FCC, Orders of 13 April 1994, 1 BvR 23/94, and of 22 June 2018, 1 BvR 2083/15. To that effect, it must be possible to establish the accuracy or not of the statement within a very short period of time.

¹⁰ FCC, Order 13 April 1994, 1 BvR 23/94.

¹¹ FCC, Orders of 26 June 1990, 1 BvR 1165/89, and of 9 October 1991, 1 BvR 1555/88.

¹² FCC, Order of 25 January 1984, 1 BvR 272/81.

¹³ FCC, Order of 10 October 1995, 1 BvR 1476/91 et. al. The question whether freedom of expression prevails over minority rights depends on the circumstances of the specific case and the balancing of competing rights the context of an assessment of proportionality. The same applies with respect to the interplay between freedom of expression and the principle of equality before the law under Article 3 of the Basic Law.

¹⁴ Paragraph 1 of Section 130 of the Criminal Code reads: "(1) Whoever, in a manner which is suitable for causing a disturbance of the public peace, 1. *incites hatred* against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or 2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the

for committing criminal offences) of the Criminal Code. In particular, hate speech may be punishable as insult under Sections 185 et seq. of the Criminal Code.

For a defamatory statement to no longer being protected under Article 5(1) of the Basic Law, therefore amounting to insult without any balancing, it has to amount to i) a violation of human dignity¹⁵; ii) to a willful insult entirely disconnected from any opinion making process (*Formalbeleidigung*)¹⁶; or to defamatory criticism (*Schmähkritik*). These categories, which are to be interpreted most strictly, may in some cases overlap. Defamatory criticism in that sense is a statement which, taking into account the occasion and context, is beyond polemical and exaggerated criticism because the focus is no longer on the substance of the matter but solely on defamation of a specific person.¹⁷ As rare examples, calling a member of the German resistance during the Nazi era a “traitor to the country”¹⁸ or considering the chairman of the Central Council of Jews in Germany as belonging to a “foreign ethnic minority” or can be mentioned.¹⁹ Within those limits, statements are, therefore, constitutionally protected regardless whether they are ethical or not. Due to the particularities of German history, statements related to the holocaust and the Jewish community in Germany are, however, a case apart.²⁰

In this context, the issue of distinguishing satire from insult has found itself at the centre of public debate in Germany, as Turkish President Erdoğan was granted a prohibitory injunction against a German television presenter for spreading a satirical diatribe, entitled “defamatory criticism” (*Schmähkritik*), which consisted of mainly sexually connoted abuses and political

aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population.”

¹⁵ FCC, Orders of 3 June 1987, 1 BvR 313/85 (depiction of a well-known person as a copulating pig), and of 24 September 2009, 2 BvR 2179/09 (election poster of a far-right party warning of allegedly greedy Polish immigrant workers).

¹⁶ FCC, Order of 19 May 2020, 1 BvR 2397/19 (in particular the use of scatological language).

¹⁷ FCC, Order of 14 June 2019, 1 BvR 2433/17; Federal Labour Court, Judgment of 5 December 2019, 2 AZR 240/19.

¹⁸ Federal Court of Justice, Judgment of 6 May 1958, 5 StR 14/58.

¹⁹ Higher Regional Court of Celle, Judgment of 18 February 2003, 22 Ss 101/02.

²⁰ See below under “Apology of a crime”.

assertions about Mr Erdoğan (“Böhmermann Affair”).²¹ The civil court hearing the case held that freedom of expression in general and freedom to express satirical contributions in particular protect the expression of criticism in a pointed, polemical and exaggerated way. This protection presupposes, however, that the utterance really does constitute a criticism, and that it contains elements that are related to the object of the criticism. The further the content of an utterance is removed from the object of criticism and focuses, without reference to it, on the mere defamation of the person in question, the lower the weight of freedom of opinion in dispute for the utterer in relation to the weight of the general right of personality of the person affected by the utterance.²² The public utterance of several parts of the diatribe was thus considered illegal. This judgment was upheld by the FCC.²³

3.2.2. Forms of communication and anonymity

Constitutional protection under Article 5(1) of the Basic Law is granted without consideration to a specific form of communication. Many issues linked to new technologies and media, often with regard to the protection of personality rights or net neutrality, remain unsolved. However, the general rules do apply and so far, there seems to have been no structural impact of new technologies on the scope of freedom of expression. Yet, there is no doubt that the number of cases involving new technologies and media and relating to freedom of expression is likely to increase. Several Higher Regional Courts have ruled that the rights and obligations of the private-law operator of a social network toward its users are, in principle, to be balanced against freedom of expression of the users under Article 5(1) of the Basic Law. Such an operator may therefore be obliged to delete posts containing hate speech or block the user account, in accordance with relevant community standards.²⁴

²¹ The presenter explicitly distanced himself from the content presented and, for the purpose of satire, specified that he only wanted to show what kind of speech would be considered illegal.

²² Higher Regional Court of Hamburg, Judgment of 15 May 2018, 7 U 34/17.

²³ FCC, Order of 26 January 2022, 1 BvR 2026/19.

²⁴ Higher Regional Court of Karlsruhe, Orders of 25 June 2018, 15 W 86/18, and of 28 February 2019, 6 W 81/18; Higher Regional Court of Dresden, Order of 19 November 2019, 4 U 1471/19.

It may nevertheless be of interest that, in 2017, the German legislator reacted to the increasing spread of hate crime and other punishable content, especially in social networks, and passed the Network Enforcement Act of 1 September 2017²⁵, which imposes a number of obligations on telemedia service provider, in particular social networks. Providers must keep track of and report complaints about illegal contents. Illegal contents within the meaning of this act are defined as contents which meet the criteria of certain criminal offences, *inter alia*, Section 86 (Dissemination of propaganda material of unconstitutional organisations) and Section 130 (Incitement of masses) of the Criminal Code. One particular interest of the Network Enforcement Act is that providers must remove or block access to illegal content under its Section 3(2) No 2 and No 3.²⁶

Article 5(1) of the Basic Law also protects **anonymous speech**, because the obligation to express a particular opinion by name would create the risk that individuals might choose not to express their opinion for fear of reprisals or other negative consequences, which would amount to self-censorship.²⁷ Although the extent to which anonymous communication is thus protected, in particular with regard to the protection of personality rights of persons concerned by such statements, remains largely open, it is settled constitutional case-law that state measures must not lead to a self-restriction of freedom of expression through intimidation ('chilling effect').²⁸

It should be noted that, according to Section 19(2) No 2 of the Telecommunications Telemedia Data Protection Act²⁹, telemedia service providers must enable the use of telemedia anonymously or under a pseudonym. This provision is based on the assumption that the success of the Internet is based, *inter alia*, on the possibility of anonymous use and payment. In addition to concretizing the data avoidance requirement, it explicitly serves the protection of freedom of expression.

²⁵ Netzwerkdurchsetzungsgesetz (BGBl. I 2017, p. 3352), as amended.

²⁶ Manifestly illegal content must be removed within 24 hours, other illegal content immediately, normally within seven days of receipt of the complaint.

²⁷ Federal Court of Justice, Judgment of 23 June 2009, VI ZR 196/08.

²⁸ FCC, Order of 13 May 1980, 1 BvR 103/77.

²⁹ Telekommunikation-Telemedien-Datenschutz-Gesetz (BGBl. I 2021, p. 1982), as amended.

3.2.3. Specific categories of speech

3.2.3.1 Political speech

Political speech made during the exercise of a political mandate and within Parliament does not fall within the scope of freedom of expression under Article 5(1) of the Basic Law, but enjoys enhanced protection because parliamentary freedom of speech does not protect individuals against the State, but directly serves to fulfill the latter's constitutional duties. Parliamentary freedom of speech therefore falls exclusively within the scope of Article 38(1) of the Basic Law, which provides, *inter alia*, that Members of the *Bundestag* shall not be bound by orders or instructions and be responsible only to their conscience.³⁰ In order to ensure parliamentary freedom of speech, Article 46 of the Basic Law grants parliamentary immunity and provides that, at no time, a Member of the *Bundestag* may be subjected to court proceedings or disciplinary action or otherwise called to account outside the *Bundestag* for a vote cast or a remark made by him in the *Bundestag* or in any of its committees. Parliamentary immunity does however not prevent Members of the *Bundestag* to be subject to disciplinary measures under the Parliamentary Rules of Procedure. In addition, parliamentary immunity is not granted for defamatory insults, i.e. acts punishable under Section 187 (Defamation) or Section 188 (Malicious gossip and defamation in relation to persons in political life) of the Criminal Code. The same applies to acts of physical violence.³¹

3.2.3.2 Commercial speech

Commercial speech and advertising are covered by freedom of expression under Article 5(1) of the Basic law (or freedom of the press under paragraph 3), provided it has a judgmental, opinion forming content and may therefore be regarded as an opinion within the meaning of this provision.³² In addition, freedom the press enables press organisations to publish adverts in their advertising section.³³

Limitations to commercial speech may be justified under general laws within the meaning of Article 5(2) of the Basic Law,

³⁰ FCC, Order of 8 June 1982, 2 BvE 2/82.

³¹ Federal Administrative Court, Judgment of 23 April 1985, 2 WD 42/84.

³² FCC, Judgment of 12 December 2000, 1 BvR 1762/95, 1 BvR 1787/95 (graphic pictures showing a shocking content).

³³ FCC, Order of 26 February 2008, 1 BvR 1602/07 et al.

e.g. rules and regulations on unfair competition or on advertising of a medicinal product, which must, in turn, be interpreted in the light of freedom of speech.

Recent attention has been drawn to the criminal liability of medical practitioners for advertising abortion under Section 219a of the Criminal Code.³⁴ Following a legislative reform in March 2019, the mere reference to the fact that a practitioner terminates pregnancies according to the law or to information about terminating a pregnancy provided by competent public authorities is not punishable any more. As of July 2022, criminal liability for detailed references to the medical procedures used by the practitioner has also been abolished.

4. Limitations to freedom of expression

4.1. General principles

As already stated above, any interference in Article 5(1) of the Basic Law must be justified according to Article 5(2) on a case-by-case approach, in particular based on the provisions of a general law within the meaning of the latter provision. Such provisions must aim to protect either a sufficiently important public interest or rights and interests of third parties that are worthy of appropriate protection.³⁵ They are to be determined according to formal criteria and must not prohibit an opinion and its intellectual consequences as such, but aim to protect a higher legal interest while keeping a strict neutrality towards specific opinions.³⁶ In other words, a general law cannot target specific opinions.³⁷

In addition to the above-mentioned private law rules and regulations on unfair competition and on advertising, the following provisions may be of interest regarding criminal liability under the German Criminal Code:

³⁴ This provision is aimed at whoever publicly, in a meeting or by disseminating material, for a pecuniary benefit or in a grossly offensive manner, offers, announces or extols i) their own or others' services for terminating pregnancies or supporting such terminations or ii) the means, objects or procedures which are suitable for terminating pregnancies, making reference to this suitability.

³⁵ FCC, Order of 11 March 2003, 1 BvR 426/02. The right to personal honour mentioned in Article 5(2) of the Basic Law falls under the latter category.

³⁶ FCC, Judgments of 15 January 1958, 1 BvR 400/51, and of 4 November 2009, 1 BvR 2150/08.

³⁷ Any special legislation (*Sonderrecht*) would be unconstitutional. For a notable exception, see below under "Apology of a crime".

- Dissemination of propaganda material of unconstitutional organisations (Section 86);
- Use of symbols of unconstitutional organisations (Section 86a);
- Disparagement of the Federal President (Section 90);
- Disparagement of the state and denigration of its symbols (Section 90a);
- Anti-constitutional disparagement of constitutional organs (Section 90b);
- Disparagement of symbols of the European Union (Section 90c)
- Desecration of flags and state symbols of foreign states (Section 104);
- Disturbing public peace by threatening to commit offences (Section 126);
- Incitement of masses (Section 130);
- Instructions for committing criminal offences (Section 130a);
- Revilement of religious faiths and religious and ideological communities (Section 166);
- Disturbance of exercise of religion (Section 167);
- Insult (Section 185);
- Malicious gossip (Section 186);
- Defamation (Section 187);
- Malicious gossip and defamation in relation to persons in political life (Section 188);
- Defiling memory of dead (Section 189).

Other justified limitations may be found in regulations on professional secrecy (violations are punishable under Section 203 of the Criminal Code as violation of private secrets).

Protection of young persons within the meaning of Article 5(2) of the Basic Law is provided, *inter alia*, under Section 18 of the Youth Protection Act³⁸, which prescribes the indexation of certain media considered as harmful for young persons.

4.2. Specific aspects

4.2.1. Crimes of opinion

German law provides a number of criminal offenses related to crimes of opinion, targeting specific categories of opinions or statements (but not specific opinions or statements as such), in

³⁸ Jugendschutzgesetz (BGBl. I 2002, p. 2730), as amended.

particular disparagement, incitement of masses, insult and defamation.

Chapter 11 of the second part of the Criminal Code covers offences relating to religion and ideology and contains, *inter alia*, Section 166, which punishes “Revilement of religious faiths and religious and ideological communities”. This provision applies to whoever publicly, in a manner that is suitable for causing a disturbance of the public peace, either reviles the religion or ideology of others or reviles a church or other religious or ideological community in Germany or its institutions or customs. It must however be noted that this provision does not protect religious beliefs or individual feelings, but public peace. Although Section 166 of the Criminal Code must be interpreted strictly in the light of freedom of expression, a specific statement may be punishable under this provision if, from an objective point of view, it merely aims to express malicious contempt towards a religious belief.³⁹

Furthermore, Section 167 of the Criminal Code punishes “Disturbance of exercise of religion” and is aimed at whoever either intentionally and seriously disturbs a religious service or an act of religious worship of a church or other religious community in Germany or commits defamatory mischief in a place which is dedicated to the religious worship of such a religious community.

With regard to the offence of insult or similar offences under Sections 185 et seq. of the Criminal Code, it should also be noted that Article 193 of said Code (Safeguarding legitimate interests) states that critical opinions about scientific, artistic or commercial achievements, similar statements which are made to exercise or protect rights, or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors against their subordinates, official reports or judgments by a civil servant and similar cases only entail criminal liability to the extent that the existence of an insult results from the form of the statement or the circumstances under which it was made.

4.2.2. Apology of a crime

³⁹ District Court of Cologne, Judgment of 10 August 2016, 523 Ds 154/16; Regional Court of Münster, Judgment of 29 March 2017, 13 Ns - 81 Js 3303/15 - 15/16, 13 Ns 15/16.

In line with the general requirement that limitations to freedom of expression may not target specific opinions, apology of a crime is not, as such, punishable under German Law.⁴⁰

Due to the particularities of German history, one important exception exists, however, with respect to holocaust denial and, more generally, offences related to Germany's National Socialist past, which are punishable as incitement of masses under Article 130 of the Criminal Code. In this very specific context, interferences in freedom of expression may rely on provisions that do not meet the threshold of a general law under Article 5(2) of the Basic Law.⁴¹ The FCC has explicitly underlined the exceptional nature of this approach and has stressed that it is not transposable to situations others than those related to Germany's Nationalist Socialist past. It also stressed that the Basic Law does not prevent the dissemination of Nationalist Socialist ideas as such. The European Court of Human Rights has accepted this position and confirmed that references to the Holocaust must be assessed in the specific context of the German past.⁴²

Hence, Section 130(3) of the Criminal Code punishes whoever publicly or in a meeting approves of, denies or downplays acts of genocide committed under the rule of National Socialism in a manner which is suitable for causing a disturbance of the public peace. This offence specifically includes holocaust denial and may be committed, for example, by publicly exhibiting a tattoo reminding of concentration camps⁴³ or uploading videos denying the holocaust.⁴⁴ The act of denying is generally defined as disputing established historic facts that are considered to be true.⁴⁵ In this specific context, the National Socialist genocide of European Jews is deemed a manifest historic fact, without there being any need to consider more evidence. Therefore, Holocaust denial as a manifestly untrue statement of fact does not fall, as such, within the

⁴⁰ Criminal prosecution may however be considered under Section 111 (Public incitement to commit offences) of the Criminal Code.

⁴¹ FCC, Orders of 4 November 2009, 1 BvR 2150/08, of 22 June 2018, 1 BvR 673/18, and of 22 June 2018, 1 BvR 2083/15. In other words, such circumstances allow for special legislation targeting a specific opinion.

⁴² ECtHR, Judgment of 8 November 2012, no 43481/09, PETA Deutschland v. Germany.

⁴³ Higher Regional Court of Brandenburg, Order of 12 April 2017, (1) 53 Ss 17/17 (13/17).

⁴⁴ Federal Court of Justice, Order of 6 August 2019, 3 StR 190/19.

⁴⁵ Federal Court of Justice, Order of 3 May 2016, 3 StR 449/15.

scope of freedom of expression under Article 5(1) of the Basic Law. If however the person's statement is based on her own research and conclusions thereof, criminal liability must be assessed in the light of freedom of expression and the principle of proportionality. In both situations, the FCC has deemed criminal liability under Article 130(3) of the Criminal Code compatible with Article 5(1) of the Basic Law.⁴⁶

Furthermore, Article 130(4) of the Criminal Code punishes whomever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.

Certain statements may also be punishable under Section 186 (Malicious gossip) and Section 189 (Defiling memory of dead) of the Criminal Code. Displaying National Socialist items or symbols may be punishable under Section 86a (Use of symbols of unconstitutional organisations) of the Criminal Code.

4.2.3. Desecration of state symbols

Burning of the **national flag** is punishable under Section 90a of the Criminal Code (Disparagement of state and denigration of symbols). Section 90a(2) of the Criminal Code punishes whoever removes, destroys, damages, renders unusable or defaces, or commits defamatory mischief on a flag of the Federal Republic of Germany or of one of its *Länder* which is on public display or a national emblem which has been mounted in a public place by an authority of the Federal Republic of Germany or of one of its *Länder*.

Moreover, Section 90a(1) No 2 of the Criminal Code punishes whoever publicly, in a meeting or by disseminating relevant material, denigrates the colours, flag, coat of arms or the anthem of the Federal Republic of Germany or of one of its *Länder*. Denigration within that meaning is understood as an act of particular contempt, notably acts which qualify as insult or similar offences under Sections 185 et seq. of the Criminal Code. However, on account of their constitutionally guaranteed freedom of expression, citizens remain free to question fundamental appraisals of the constitution or to demand the amendment of fundamental principles.⁴⁷

⁴⁶ FCC, Order of 22 June 2018, 1 BvR 673/18.

⁴⁷ FCC, Order of 15 September 2008, 1 BvR 1565/05.

As for foreign state symbols, Section 104 of the Criminal Code punishes whoever removes, destroys, damages or defaces, or commits defamatory mischief on a flag of a foreign state which has been put on public display as required by legal provisions or a recognised custom or a national symbol of such a state which has been mounted in a public place by a recognised mission of such a state. Since 2020, disparagement of symbols of the European Union is punishable under Section 90c of the Criminal Code.

The issue of insult to foreign heads of state was intensively discussed in the context of the above-mentioned Böhmermann Affair, as the presenter in question was also prosecuted under Section 103 (Insult to organs and representatives of foreign states) of the Criminal Code. The proceedings were however discontinued and, owing to severe public criticism related to the case, this criminal offence was repealed in 2017.

4.2.4. Display of religious symbols

Although some forms of display of religious symbols may also fall within the scope of freedom of expression, this issue is mostly assessed with regard to freedom of faith and conscience, protected under Article 4 of the Basic Law.⁴⁸ Whereas freedom of expression may be restricted, notably, by general laws within the meaning of Article 5(2) of the Basic Law, interferences to freedom of faith under Article 4 of the Basic Law may only be justified by other provisions of the Basic Law itself, in particular conflicting fundamental rights of third parties, or other constitutional interest, such as the State's educational mission. In such a case, freedom of faith and other conflicting rights or interests must be carefully balanced by means of practical concordance (*praktische Konkordanz*).

In both public and private sectors, the freedom of faith of persons wishing to wear religious symbols in the workplace generally takes precedence over conflicting interests. Recent constitutional case law tends towards a liberalization of the right to wear religious symbols, allowing a ban only when there is a concrete risk of harm to significant interests, determined on a case-by-case basis.

Therefore, in the civil service, a ban on wearing religious symbols, adopted on a sufficiently precise legal basis, is possible in

⁴⁸ According to Article 4(1) and (2) of the Basic Law, freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable and the undisturbed practice of religion shall be guaranteed.

the presence of a concrete risk of harm either to the neutrality of the State or to other significant interests linked to the civil service concerned, such as peaceful coexistence in schools. This approach stems from an appropriate balancing of the teacher's positive freedom of faith, on one side, and the students' negative freedom of faith, the right of parents to raise their children, and the educational mission of the State, which must be exercised with respect for confessional neutrality, on the other. Thus, the FCC has deemed unconstitutional several provisions banning teachers from wearing headscarves in state schools⁴⁹ or day-care centres⁵⁰. Even though there is no settled case-law on this issue yet, similar decisions can be found concerning a pupils who was ordered to remove her niqab in school.⁵¹ In contrast, the ban on wearing headscarves on trainee lawyers while performing official duties in court was upheld on the basis of the principles of ideological and religious neutrality of the state and the functioning of the administration of justice as well as the negative freedom of faith of third parties.⁵² In the same vein, the state-ordered affixing of crosses or crucifixes in state compulsory schools is incompatible with the principle of religious neutrality stemming from Article 4 of the Basic Law.⁵³

As regards private employment relationships, the wearing of religious symbols may be prohibited by an employer only in the presence of a proven economic risk constituting an effective infringement of entrepreneurial freedom.⁵⁴ This is not the case in an enterprise with a religious leaning, which may require compliance with rules of dress on the basis of a specific obligation of loyalty.

4.2.5. Conscientious objection

The right to conscientious objection is granted under Article 4(3) of the Basic Law, which guarantees the freedom of faith and conscience, and provides that no person shall be compelled against her conscience to render military service involving the use of arms.

⁴⁹ FCC, Judgment of 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.

⁵⁰ FCC, Judgment, 18 October 2016, 1 BvR 354/11

⁵¹ Superior Administrative Court of Hamburg, Order of 29 January 2020, 1 Bs 6/20.

⁵² FCC, Judgment of 14 January 2020, 2 BvR 1333/17.

⁵³ FCC, Judgment, 16 May 1995, 1 BvR 1087/91.

⁵⁴ Federal Labour Court, Judgment of 24 September 2014, 5 AZR 611/12.

5. Conclusive remarks: Are there legal traditions in the area of freedom of expression?

In the absence of a clear definition of what can be considered a legal tradition, it is difficult to differentiate between situations of settled case-law on the sole basis of the Basic Law of 1949, and situations which may be linked to legal traditions, a concept that is not to be found, as such, in the Basic Law.⁵⁵

A connecting factor may be a certain degree of constitutional continuity in the area of free speech, since freedom of expression, freedom of press, prohibition of censorship as well as freedom of art, science and teaching can be traced back to the Constitution of the German Empire of 1848 and the Weimar Constitution of 1919, although the precise content of these rights under the Basic Law has been solely defined by the FCC and other national courts. In this context, it may be of interest that the concept of general laws within the meaning of Article 5(2) of the Basic Law already existed in the Weimar Constitution of 1919, so that the concept of limitations to freedom of expression under this provision could be considered a legal tradition of German constitutional law.⁵⁶ To a certain extent, this reasoning could also apply to the FCC's approach towards Germany's Nationalist Socialist past, which allows for an exception to the overall system regulating limitations to freedom of expression.

More generally, under the FCC's case-law, the principle of proportionality has become a decisive substantial requirement in the area of the constitutional principle of the rule of law and a cornerstone of German law as a whole.

⁵⁵ A notable exception can be found in Article 33(5) of the Basic Law, which refers to traditional principles of the professional civil service (according to the FCC, this refers to the core of structural principles that have been generally or predominantly recognized and upheld as binding over a longer, tradition-building period, at least under the Weimar Constitution of 1919, Order of 2 December 1958, 1 BvL 27/55).

⁵⁶ But without there necessarily being a connection in terms of substantive content of these rights, as it is the case for instance in the area of state-church law, where the Basic Law directly refers to several provisions of the Weimar Constitution.