



Opinion

It's all about balancing-handling free speech issues under the German Basic Law

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Introduction

The first Articles of the German basic law contain the so-called basic rights. As Art. 1 para. 3 states they bind the legislature, the executive and the judiciary and therefore all state authority as directly applicable law. At first glance this sounds familiar and very similar to the bill of rights respectively the first ten amendments to the United States Constitution. But a closer look reveals that the German approach—especially handling free speech issues—is in many ways different from the situation in the United States [1].

In a first step I will explain the fundamental mechanism of balancing basic rights under German constitutional law and the role of the Federal Constitutional Court in this process (II). I will then outline the content of Art. 5 para. 1 and 2 as the legal basis of the freedom of opinion and speech and its limitations (III). And in the last part I will apply these general rules on the special situation on university campuses (IV). These remarks will show that under German law a situation where free speech could be jeopardised as it is discussed in the American context is not only very unlikely but almost impossible.

Balancing basic rights under german constitutional law

The role of the federal constitutional court

During the early years of the German Federal Republic in the 1950's the specific status of the Federal Constitutional Court was not quite clear. Nonetheless the court defined its role in one of its earlier judgments in 1958 as follows:

The Constitutional Court must determine whether the reach and effect of the basic rights [...] has been correctly ascertained by the regular courts. But this is also the limit of its investigation: it is not for the Constitutional Court to check judgments of civil courts for errors of law in general; the Constitutional Court simply judges of the 'radiant effect' of the basic rights [...] and implements the values inherent in the precept of constitutional law. [...] The Federal Constitutional Court is certainly not to act as a court of review, [...] but neither may it [...] leave uncorrected any instance which comes to its notice of the misapplication of the rules of basic rights [2].

So the Constitutional Court leaves it up to the regular courts to interpret and apply federal or state law in general. It doesn't define itself as a court of appeal – which sounds at first glance like an act of restraint. Instead the court claims the right to finally and exclusively interpret the Constitution. So if the extent of any right or its connection to other rights in the Basic law are doubtful then it is in the authority of the Court to set the outlines with binding effect on all legal proceedings.

This has proven to be necessary especially regarding the freedom of opinion and speech as stated in Art. 5 para. 1. Frequently, the conclusions of the court became very specific as one can see e.g. in its jurisprudence defining the structure of the broadcasting system in Germany. But the court has gone much further by virtually "inventing" basic rights that were not literally stated in the Constitution. For instance the judges developed and bit by bit differentiated a general right of privacy that especially includes the protection of one's honour and personality by deriving it from Art. 1 para 1. –The utmost



important provision on human dignity [3]- and Art. 2 para. 1 which guarantees every person [4], the right to freely develop his or her personality [5].

So the Federal Constitutional Court and its jurisprudence are crucial for understanding the content of the German basic law.

Obliging state authorities and third-party effects

As stated above the Federal Constitutional Court reviews decisions of regular courts solely based on the violation of basic rights. For those regular courts this means vice versa that they have to respect those rights in the meaning given by the Constitutional Court. But not only are the courts bound by the basic laws. Pursuant to Article 1 para 3 [6]. Of the German basic law, they bind the legislature, the executive and the judiciary as directly applicable law.

Primarily the basic rights address state bodies or organizations. Yet they shall apply not only to certain areas, functions or forms of action of the state but comprehensively bind all state authority in its entirety. Accordingly the term “state authority” has to be construed broadly: Every decision, expression and action which has been made in the name of and with the authority of all citizens is subject to the binding force of the basic rights.

So the basic rights are mainly intended as defensive mechanisms against the state, e.g. in criminal prosecution. Or, as the Constitutional Court puts it, as “citizen’s bulwark”. Notwithstanding this initial purpose the Constitutional Court also has acknowledged—for the first time in the *Lüth*-decision [7], from 1958—an indirect effect between private parties. In this case the defendant *Erich Lüth* had called for a boycott of the theatrical movie “*Unsterbliche Geliebte*” (Immortal Beloved), directed by the plaintiff *Veit Harlan*, referring to *Harlan’s* national socialist background. *Harlan* based his claim on section 826 of the civil code, which states that

“A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage”.

So the civil courts had to decide, whether such a behavior can be considered as “*in a manner contrary to public policy*” or not. What the Federal Constitutional Court said, is that if a court decides a case and therefore it becomes necessary to interpret the meaning of certain clauses e.g. of the German civil code the judges have to take the parties’ basic rights into account – in this case especially *Lüth’s* freedom of opinion and speech under Art. 5 para. 1. Otherwise the court itself violates its obligation under Art. 1 para. 3. Or as the court puts it:

“The judge is constitutionally bound to ascertain whether the applicable rules of substantive private law have been influenced by basic rights [...]; if so, he must construe and apply the rules as so modified. This is what is meant by saying that the civil judge is bound by the basic rights (Art. 1 para. 3). If he issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes [...] the

Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary” [8].

It is very often misjudged that this so-called third-party effect does not mean that basic rights apply between individuals or that private entities are bound by those rights. It merely is a necessary consequence of the above mentioned impacts of Article 1 para. 3 on a court’s decision. However, this does not mean that such indirect implications of basic rights are less far-reaching. On the contrary, depending on the specific content of the constitutional guarantee in question and the circumstances of the case, the indirect effects on private persons may come closer to or even be as severe as the original binding force on the state. So the key difference is less how far the particular impact of the involved basic rights reaches but rather the necessity for the courts to balance two or more conflicting rights of equal rank when there are individuals on either side of a lawsuit. This is due to the fact that any unbalanced decision in favor of one party can lead to a violation of the other parties’ basic rights by the court itself [9].

Concerning free speech this becomes relevant in many scenarios. Besides the wide sector of media coverage these issues are of particular interest when private entities assume tasks which were previously allocated to the state as part of its services of general interest—such as the provision of postal and telecommunications services or in the case of schools or universities.

Written and unwritten limitations

The German Basic law provides a whole bunch of different rights. A violation of these right shall be stated as unconstitutional. But that does not mean that these rights were limitless. No one is entitled to prejudice interests of others who deserve protection against the excessive use of basic rights. So for instance the right to express an opinion must yield if its exercise infringes legitimate interests of others.

But how to define those limits? In any case a restriction of basic rights requires a formal and material legal law. This so-called “reservation of the law”-principle states that there can be no constitutional action of any state authority without legal basis. Nonetheless not every legal basis is sufficient to restrain certain basic rights. The particular requirements are determined by the code of basic law itself. While some of the basic rights can be restricted by any proportionate and reasonable law passed by the legislative (see Art. 2 para. 2), others require more specific regulation. For instance, according to Article 5 para. 2 alternative 1 of the basic law, freedom of opinion and speech finds its limits in the provisions of the so-called “general laws” (see in the following). At the other end of the scale freedom of sciences, research and teaching provided by Art. 5 para. 3 or the freedom to profess a religious or philosophical creed provided by Art. 4 para. 1 have to face no stated limitations at all.

Nonetheless even the latter mentioned rights can be restrained, when it is necessary to ensure the use of other basic rights or at least other values of constitutional status [10]. This



is because all basic rights are equal, so there is no order of priority. Therefore any action of an individual can be protected under a specific basic right and at the same time restrict the guaranteed freedoms of others. Especially actions protected under Art. 5 para. 1 such as public speeches or news stories very often conflict with the right of privacy of the individuals affected by the coverage. Same is for some conviction-based practices. So whether the legislative establishes certain rules e.g. to ensure an admissible form of reporting, or courts have to decide a specific case, the basic rights in question have to be balanced by state authorities and therefore become the limits of each other [11]. The only exception is Art. 1 para. 1. The provision on human dignity cannot be restricted at all, neither by other basic rights [12].

The freedom of opinion and speech and its limitations

Content of Art. 5 para. 1: Art. 5 para. 1 sentence 1 of the Basic Law guarantees to every person the right to express and disseminate his or her opinion freely. Opinions are characterized by the personal relation between the individual and his or her statement – the individual's position on a certain topic is paramount. In this respect, opinions cannot be proven to be true or false [13].

The Constitutional Court held that this right is crucial to a free and democratic society. It is essential because it facilitates continuous intellectual controversy, or as the court puts it, a “clash of opinions” [14]. This is why the Constitutional Court understands the right of freedom of opinion and speech in a very wide sense. The court held that such statements must be protected whether they are well-founded or groundless, emotional or rational, evaluated as valuable or valueless, dangerous or harmless [15]. Especially in a political context one must have the right to express even most severe criticism. Even fundamental constitutional values and the political order itself can be questioned in the opinion of the court.

While opinions in that sense are protected in almost every possible manner, the Constitutional Court strictly differentiates between the expression of an opinion and the claim of facts. The court argues that the extensive protection under Art. 5 para. 1 is solely justified for statements which have a legitimate impact on the intellectual controversy mentioned above. Even though facts might have such an influence in principle, not every factual statement is legitimate. This is why – although not every rash or carelessly researched factual statement falls out of the scope – a deliberate lie shall not be protected under Art. 5 para. 1 [16].

Limitations of free speech

General laws: According to Art. 5 para. 2 [17], freedom of opinion and speech finds its limits in the provisions of the general laws. The concept of ‘general’ law has always been controversial and is unique as written limitation. Whereas other basic rights can be restrained by any law that is proportional, laws that shall restrain the freedom of speech additionally have to be ‘general’. The freedom of opinion and speech has already been enshrined in the Weimar Constitution of 1919 likewise limited by “general laws”.

It was then construed to include any law which do not forbid an opinion as such and do not envisage the expression of opinion as such, but rather serve to protect a legal interest which deserves protection without regard to any particular opinion’, and protect ‘a community value superior to the activity of freedom of opinion [18]. The Federal Constitutional Court changed this definition a little bit in the famous *Wunsiedel* decision [19]. Since then the court include “any law which ‘do not forbid an opinion as such and do not envisage the expression of opinion as such’ but rather protect a legal interest which deserves protection without regard to any particular opinion” [20].

This understanding is consistent regarding the mentioned purpose of Art. 5 para. 1. The content of an opinion must never be the reason to restrain the freedom of those who make use of this freedom. Holding and expressing an opinion is – considered by itself – essential part of a democracy. Any attempt to subdivide statements into categories of quality or even worse legitimacy is dangerous for a free society.

So why freedom of speech and opinion isn't guaranteed limitless? As mentioned before, any actual exercise of freedom can conflict with the rights of others. This why in some cases it is necessary to restrain the freedom of speech to protect those other rights. The difference between ‘regular’ and ‘general’ laws is therefore less the need to be proportionate but the scope of its application. While ‘regular’ laws can address a specific behavior and therefore restrain the underlying basic right a ‘general’ law has to fit every opinion equally. So if a specific opinion falls within the scope of such a law it's rather a ‘reflex’ than an intended and targeted regulation.

There is only exception where the Constitutional Court recognized a ‘non-general’ law as a valid basis to restrain freedom of speech. In its so-called *Wunsiedel*-decision [21], (named after the city where *Rudolf Heß*, minister of the German Reich under *Adolf Hitler*, is buried) the Court had to evaluate whether section 130 para. 4 of the German Criminal Code is constitutional or not. It states that

“Any person who [...] disturbs the public peace in a manner that violates the dignity of the victims by approving, glorifying or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.”

As mentioned before, the question whether an opinion falls under the scope of Art. 5 para. 1 or not does not depend on its content. Any opinion shall be protected in principle – and so are national socialist ideas. So the question for the court was: Is section 130 para. 4 a ‘general’ law and therefore a constitutional basis to restrain the freedom of speech? The judges’ answer was quite clear: It is not a ‘general’ law. The court held that

“The provision serves the purpose of public peace, and hence the protection of a legal interest which is also protected elsewhere in the legal system in many ways. However, § 130.4 of the Criminal Code does not design this protection in a general manner with open content, but related solely to expressions of opinion where a specific position is taken up towards National



Socialism. The provision serves not to protect victims of violence in general terms, and deliberately does not aim at the approval, glorification and justification of the rule of arbitrary force of totalitarian regimes as a whole, but is restricted to statements solely in relation to National Socialism” [22].

But even though section 130 para. 4 can't be considered as a 'general' law the court held that it is compatible with Art. 5 para. 1 and therefore constitutional. The court stated that there has to be an exception for provisions which aim to prevent a propagandistic affirmation of the National Socialist rule of arbitrary force between the years 1933 and 1945. This is because the German basic law could be particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime. Such unwritten limitations are immanent to the constitution (see above, II.3) and therefore of equal rank as the basic rights in question. They are always a valid basis to restrain these rights [23].

But even if there is such a justifiable reason to restrain freedom of speech (no matter whether it's based on a 'general' law or a constitution-immanent limitation) it solely follows that there are two conflicting interests that need to be balanced. Taking into account all circumstances of the specific case a court has to decide which one is superior. By doing so the judges have to be aware of how important the possibility a freedom of speech is [24].

Conflicting basic rights of others-the 'general right to privacy': As mentioned before, any restriction of basic rights requires both formal and material law in order to be constitutional. This is true whether a limitation results from a 'general' law or is constitution-immanent. Conflicting basic rights frequently provide a legitimate basis for such regulations. Regarding possible limitations of Art. 5 para. 1, the so-called 'general right to privacy' [25], derived from Art. 1 para. 1 and Art. 2 para. 1 is certainly the most important one. It provides a comprehensive guarantee of the 'narrower area of privacy and the maintenance of its basic conditions' [26]. Therefore, the content of the right cannot be described in final terms, but rather comprises an enormous variety of specific rights, such as, for example, certain data protection rights, the right to be socially rehabilitated as well as copyrights or portrait rights. Beyond that, section 185 of the German Criminal Code makes insults punishable and therefore protects another aspect of the 'general right to privacy': Personal honor.

Especially the latter shows that actions which are per se protected under Art. 5 para. 1 are particularly well-suited to endanger privacy rights and therefore have to be balanced. But where to find the dividing line between permitted criticism that needs to be protected and an unlawful insult? The Constitutional Court held that the expression of an opinion in the sense outlined before can solely be prohibited in the event of so-called 'abusive criticism' [27], which can be defined as pure humiliation without any further intention [28]. Such a statement does not have any legitimate impact on a social debate at all and is therefore punishable as an insult under section 185 of the German Criminal Code.

Conversely, factual statements must stand a much more differentiated test. Although they can hardly be seen as insults under section 185, a prohibition remains possible under civil law. Whether this is the case or not depends on the intimacy of the facts in question. Even if a statement is based on true facts it may be prohibited if it involves intimate details of the affected person's life, such as severe diseases, sexual practices or orientation. At the other end of the scale, incidents occurring in public may become the subject of a public debate under almost any circumstances [29]. Furthermore, it is the prominence of the affected person which is of paramount interest. Although even celebrities and politicians have a right to privacy, such 'public figures' have to face a different standard. These people can often be seen as role models and therefore even their private life can be discussed publicly-provided that there is more than sensation-mongering [30]. Needless to say that stating false facts is never a superior claim.

Strengthening effects on basic rights

Many actions are not merely protected under one specific basic right. For instance an artwork can be protected as 'arts' under Art. 5 para. 3 and, at the same time, be seen as an expression of an opinion under Art. 5 para. 1-Especially when it comes to political art. The same holds true for incidents related to a person's life. As shown above, such events can generally be protected under the 'general right to privacy'. Beyond that, an additional protection under Art. 6 para. 1-Which states a special protection of the family - comes into question when the relationship between parents and their children is affected. Such a combination of protection clauses results in a strengthening effect on the underlying basic rights.

Of particular interest for the debate whether free speech could be jeopardized on campuses by implementing 'codes of conduct' and other restrictions is the earlier mentioned Art. 5 para. 3, which also provides the 'freedom of sciences, research and teaching [31]'. Since this freedom is understood in a very wide sense, it protects every aspect related to the mentioned elements. Owners of the right are both institutions, such as schools and universities, as well as teaching or researching individuals, such as teachers, professors or even students. This freedom is guaranteed without any limits, except, of course, for constitution-immanent limitations such as conflicting basic rights.

In Germany there is only a small number of private schools and an even smaller count in private universities since traditionally, research and teaching takes place in public institutions. So, it is unnecessary to emphasize that students and professors can claim the mentioned rights against these institutions. Nonetheless and bearing in mind the before discussed third party effects of basic rights, even in private institutions the 'freedom of sciences, research and teaching' has to be considered.

Especially in legal, economic, political or social sciences and in humanities in general, teaching and research is all based on a competition of ideas, or in other words the mentioned 'clash of opinions'. Therefore, all related aspects are protected



under the ‘freedom of sciences, research and teaching’ as well as under the ‘freedom of opinion and speech’. Restrictions of any kind are thus legitimate solely in extremely rare cases.

Conclusion

The situation on university campuses

It became clear that the ‘freedom of opinion and speech’ protected under Art. 5 para. 1 of the German Basic Law is one of the most important rights for a democratic society while the same holds true for the ‘freedom of sciences, research and teaching’ under Art. 5 para. 3. Both provide the ‘intellectual backbone’ of any democratic society. Any restriction of these rights faces high demands in general and has to prove its legitimacy in every single case. These assumptions are applicable to both public institutions and private schools or universities.

In addition to that any restriction of basic rights requires both formal and material law to be constitutional. The ‘freedom of sciences, research and teaching’ includes the right to autonomously determine the organisation of schools and universities. It could therefore be argued that such ‘ordinance law’ constitutes a valid basis to restrict basic rights. However, it is already questionable whether simple ‘codes of conduct’ meet these requirements. Even if one was to agree on that, any restriction of the ‘freedom of opinion and speech’ has to form a ‘general law’. It would therefore be unconstitutional to address a certain opinion per se. In addition to that an act of balancing still remains necessary provided that the expression of an opinion – and most parts of a scientific debate have to be considered as such – can solely be restricted upon crossing the line to ‘abusive criticism’.

So in the end dealing with ethically questionable behaviour in schools or universities – as long as it does not cross the lines of the criminal law – is more or less not a question of the law – it is in fact already questionable if legal prohibitions can solve the underlying problems at all. Such behaviour has to be discussed in public as well in the class itself. Because this is where these issues belong to in a democratic society.

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