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Case:
BVerfGE 90, 241-255 "Auschwitz lie" [Summary of issue omitted] Decision of the First Senate in accordance with § 24 Federal Constitutional Court Act - 1 BvR 23/94 -
Date:
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Note:
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Facts:

The complainant was a district association of the NPD. It invited the historian David Irving, widely seen as a revisionist of the extreme right wing, to a lecturing event. Pursuant to § 5 no.4 of the Meetings Act, the competent authority imposed on the complainant the condition that it ensured, by appropriate measures, that nothing was said at the meeting about the persecution of the Jews in the Third Reich that would deny or call into question that persecution. The criminality of such spoken contributions was to be pointed out at the beginning of the event, and possible relevant spoken contributions were to be immediately prevented. If necessary, the meeting was to be interrupted or brought to an end, by using the [appropriate] rights of the person in possession of the premises. The authority regarded itself as obliged to take such measures because grounds existed for the assumption that there would be criminal acts in the sense of §§ 130, 185, 189 and 194 StGB [Criminal Code] at the planned event. Proceedings in the administrative courts against this edict were unsuccessful. The Federal Constitutional Court rejected the constitutional complaintas obviously unfounded for the following

Reasons:

II

The decisions under challenge do not violate Art5 (1) sentence 1 GG [Constitution of 1949].

1. Art 5 (1) sentence 1 GG guarantees to everyonethe right to express and disseminate his opinions freely.

The decisions are to be measured primarily against this basic right. It is true that the condition that the complainant challenges refers to a meeting. Its object however is certain statements which were not to be either made or tolerated by the complainant as organiser of the meeting. The assessment of the condition on the basis of constitutional law is above all dependent on whether these kinds of statements are allowed or not. A statement that cannot be prevented on constitutional grounds, can also not be a cause for a measure restricting meetings in accordance

with § 5 no.4 of the Meetings Act. But the standards for the answering of this question do not arise from the basic right of the freedom ofassembly (Art 8 GG) but from that of freedom of opinion.

The object of the basic right protection of Art 5 (1) sentence 1 GG is opinions. It is to them that the freedom to make statements and disseminate them refers. Opinions are characterised by the subjective relationship of the individual to the content of his statement [reference omitted]. For them the element of taking a position and making a judgement is typical [references omitted]. In this respect they cannot be proved true or untrue. They enjoy the protection of the basic right without any question of whether the statement is well founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless [reference omitted]. The protection of the basic right also extends to the form of the statement. A statement of opinion does not lose the basic right protection by being formulated sharply or hurtfully [references omitted]. In this respect the question can only be whether and to what extent limits to the freedom of opinion arise according to the standard of Art 5(2) GG.

Assertions of fact are on the other hand in the strict sense not statements of opinion. In contrast to such statements, the objective relationship between the statement and reality predominates. In this respect they are also open to an examination of their truth content. But assertions of fact do not, for this reason, automatically fall outside the area of protection of Art 5 (1) sentence 1 GG. Since opinions are, as a rule, based on factual assumptions, or take a position in relation to factual circumstances, they are in any case protected by the basic right insofar as they are the prerequisite for the formation of opinions which Art 5 (1) GG in itstotality guarantees [reference omitted].

Consequently, the protection of assertions of fact ends at the point where they cease to contribute anything to the formation of opinion that is presupposed in constitutional law. From this point of view, incorrect information is not an interest worthy of protection. The Federal Constitutional Court has thus consistently held that an assertion of fact known or proved to be untrue is not covered by the protection of freedom of opinion [references omitted]. The requirements for a duty to be truthful may nevertheless not be laid down in such a way as to harm the functioning of freedom of opinion so that even permissible statements are not made becauseof the fear of sanctions [references omitted].

The distinguishing of statements of opinion from assertions of facts can certainly be difficult because both are frequently connected with each other and can only together determine the sense of a statement. In this case a division of the factual and evaluating components is only permissible if the sense of the statement is not thereby falsified. Where that is not possible, the statement must in the interest of an effective protection of the basic right be, as a whole, regarded as an expression of opinion and be included within the protected area of freedom of opinion. Otherwise, there would be a threat of a substantial reduction in the protection of the basicright [references omitted].

(c) Freedom of opinion is nevertheless not guaranteed unconditionally. According to Art 5 (2) GG it is subject to limitations which arise from general laws as well as provisions of law for the protection of the young and personal honour. But in the interpretation and application of statutes which have a limiting effect on the freedom of opinion, account must be taken of the importance of freedom of opinion (see BVerfGE 7, 198 [208 f.]). That, as a rule, requires a balancing

exercise related to the case in question, to be undertaken within the framework of the features of definition in the relevant norm, between the basic right which has been restricted and the legal interest which the statute restrictingthe basic right serves.

The Federal Constitutional Court has developed some rules for this balancing exercise. According to these, freedom of opinion is by no means always entitled to priority over protection of the personality, as the complainant thinks. Instead the protection of the personality will, as a rule, prevail over freedom of opinion in relation to statements of opinion which are to be regarded as “insult” in the formal sense [of the Criminal law] or abuse [references omitted]. In relation to statements of opinion which are connected with statements of fact, whether they are worthy of protection can depend on the truth content of the factual assumptions on which they are based. If these are proved to be untrue, freedom of opinion as a rule takes second place to protection of the personality [references omitted]. In other respects, what matters is which legal interest deserves the preference in the individual case. But at the same time it has to be taken into account that in questions, which substantially affect the public, there is a presumption in favour of free speech (see BVerfGE 7, 198 [212]). This must always be borne in mind as well in the balancing betweenthe legal positions of the persons involved.

2. Measured against this, a violation of Art 5 (1) sentence 1 GG is obviously not present. The condition imposed on the complainant as the organiser of the meeting that it must ensure that the persecution of the Jews in the Third Reich is not denied or doubted in the meetingis reconcilable with this basic right.

a) The complainant has not challenged the prediction made by the Meetings Authority and confirmed by the administrative courts that there was a danger that in the course of the meeting statements of the kind would be made. Instead it argues that it should be able tomake such assertions.

b) The prohibited statement that there was no persecution of Jews in the Third Reich is an assertion of fact which is proved to be untrue according to innumerable eye witness reports and documents, the verdicts of courts in numerous criminal proceedings, and the findings of history. Taken by itself, an assertion of this content does not, therefore, enjoy the protection of freedom of opinion. In that respect there is significant difference between the denial of persecution of the Jews in the Third Reich and the denial of German guilt at the outbreak of the Second World War, which was the issue in the decision of the Federal Constitutional Court of the 11th January 1994 - 1 BvR 434/87 (BVerfGE 90, 1). In relation to statements about guilt and responsibility for historical events it is always a question of complex judgements which cannot be reduced to an assertion of facts, whilst the denial of an event itself will, asa rule, have the character of an assertion of facts.

c) But even if the statement to which the condition refers is not taken by itself but is considered in connection with the subject of the meeting, and is regarded in this respect as a prerequisite for formation of opinion as to the "blackmailability" of German politics, the decisions challenged stand up to examination in constitutional law. The prohibited statement then admittedly enjoys the protection of Art 5 (1) sentence 1 GG. But the limitation of it is not open to objection on constitutionallaw grounds.

aa) The limitation has a statutory basis which accordswith the Constitution.

The authorities and administrative courts have based the condition limiting expression of opinion on § 5 no.4 of the Meetings Act. According to this provision a meeting in closed rooms can be forbidden if facts are established from which it follows that the organiser or his followers will defend views or tolerate statements which amount to a crime (Verbrechen), or an offence (Vergehen) of the kind which is to be pursued by the state. This provision is reconcilable with the BasicLaw.

In particular such a prohibition does not violate Art 8 (1) GG. It is true that the right to hold meetings in closed rooms is guaranteed unconditionally. But that does not mean that expressions of opinion in meetings are protected beyond Art 5 (1) and (2) GG. Expressions of opinion which are threatened with punishment by a norm which is permissible according to Art 5 (2) GG remain prohibited even at such meetings. In the light of Art 8 (1) GG there is also no objection in principle to the fact that the legislator seeks to prevent criminal acts, which are with high probability to be expected at a meeting, before they are committed. The limitation of the grounds of prohibition to crimes and offences of the kind which are to be pursued by the state, as well as the principle of proportionality, which must be observed in relation to all measures by which the freedom of assembly is limited, provide protection from an excessive restriction of the freedom of assembly.

Likewise, no violation of Art 5 (1) sentence 1 GG exists. § 5 no.4 of the Meetings Act does not contain an independent restriction of the freedom of opinion but is linked to the restrictions that are contained in the Criminal Code. Measures restricting meetings in accordance with § 5 no.4 of the Meetings Act may therefore only be taken if in a meeting statements are threatened which are made punishable anyway and are to be pursued by the state. Nevertheless, the provision does not operate in the realm of ex post facto sanctions by the courts but in the realm of preventative prohibitions by the authorities. The dangers for freedom of opinion connected with this can however be met by placing strict requirements on the extent to which the danger must be predictable and the criminality of the statementsmust not, according to case law, be in any doubt.

No doubts exist as to the proportionality of the criminal provisions on which the condition here has been based. The definitions of “insult” protect personal honour, which is expressly named in Art 5 (2) GG as a legal interest that justifies the restriction of the freedom of opinion. With § 130 StGB it is a question of a general statute in the sense of Art 5 (2) GG which serves the protection of humanity [reference omitted] and in the end finds its support in constitutional lawin Art 1 (1) GG.

bb) The interpretation and application of § 5 no.4 of the Meetings Act in combination with § 185 StGB by the decisions which are being challenged are likewisereconcilable with Art 5 (1) sentence 1 GG.

(1) The administrative authorities and courts have based their decisions on the interpretation of the criminal norm, which the ordinary courts have given to them. According to this, Jews living in Germany, on the basis of the fate to which the Jewish population was exposed under National Socialist rule, form a group capable of being insulted; the denial of persecution of the Jews is judged as an insult inflicted on this group.The Bundesgerichtshof has stated on this subject that:

"The historical fact that human beings were separated in accordance with the descent criteria of the so-called Nuremberg laws and were robbed of their individuality with the objective of their extermination gives to the Jews living in the Federal Republic a special personal relationship to their fellow citizens; in this relationship the past is still present today. It is part of their personal self-image that they are seen as attached to a group of persons marked out by their fate, against which group there exists a special moral responsibility on the part of everyone else and which is a part of their dignity. Respect for this personal self-image is for each of them really one of the guarantees against a repetition of such discrimination and a basic condition for their life in the Federal Republic. Whoever seeks to deny those events denies to each of them individually this personal worth to which they have a claim. For those affected, this means the continuation of discrimination against the group of human beings to which he belongs, and with it against his own person" (BGHZ 75, 160 [162 f.].

The legislator has made a link with this case law and inserted an exception from the requirement for a complaint (Antrag) for such insults in § 194 (1) sentence2 StGB [reference omitted].

The opinion of the Bundesgerichtshof has, it is true, encountered criticism in the criminal law literature. It is partly seen as over-stretching the definition of insult [references omitted]. However, the Federal Constitutional Court does not test whether an interpretation of the Criminal Code is correct in ordinary law or whether other opinions would be tenable as well. The only thing that is decisive for the constitutional law assessment is whether the interpretation rests on a failure toappreciate the basic rights. That is not the case here.

There is no objection to the fact that the decisions that are challenged have seen, in the wake of this case law, a serious violation of the right of personality in the denial of the persecution of the Jews. The basic interrelation established by the Bundesgerichtshof between the denial of the racially motivated extermination of the Jewish population in the Third Reich and the attack on the claim to respect and human dignity of Jews living today is not open to objection in constitutional law. The denial of the persecution of the Jews also differs in this respect from the denial of German war guilt (see BVerfGE, decision of the 11th January 1994 - 1 BvR 434/87 (BVerfGE 90, 1)). The last named opinion, apart from being historically dubious, does not in anycase interfere with legal interests of third parties.

Neither does the objection of the complainant that the conditions were supported by an understanding of § 185 StGB which was based on the draft of § 140 StGB in the 21st Criminal Law Amendment Act [reference omitted], which was not passed by the German Bundestag, make this interpretation unconstitutional. The fact that the legislature refrained from introducing a special definition with a more severe punishment for the denial of the persecution of the Jews does not allow the conclusion that the action is not punishable under the more general norm of § 185 StGB, especially as the legislature - as explained - has made a link with the case law whichsees an insult in the denial of the persecution.

(2) The balancing between the injury to honour on the one hand and the limitation of the freedom of opinion on the other does not reveal any substantial error in constitutional law. The severity of the relevant interference plays a decisive role in this balancing. In the case of expressions of opinion injurious to honour, which contain an assertion of facts, weight must be given to the question of whether the assertion of facts is true or not. Assertions of facts proved to be incorrect

are not an interest worthy of protection. It is true that if they are inextricably connected with opinions, the protection of Art 5 (1) sentence 1 GG will benefit them, but an invasion will be weighted from the outset less heavily than in the case of statements of factsnot shown to be untrue.

That is the state of affairs here. Even if the statement which was prohibited for the complainant at its meeting is, in connection with the subject of the meeting, regarded as an expression of opinion, that changes nothing as to the proven incorrectness of its factual content. The interference relating to this is not on that account to be weighted particularly heavily. In the face of the weight to be given to the injury to honour, there is no objection to the fact that the decisions under challenge have given the protection of the personalitypriority over freedom of opinion.

Nor is anything changed by consideration of the fact that the attitude of Germany to its national socialist past and its political consequences, which was the concern of this meeting, is a question substantially affecting the public. It is true that in this case there is a presumption in favour of free speech. But this does not apply for statements which are insults in the formal sense or abuse, nor when a hurtful statement is basedon factual assertions which are proved to be untrue.

There need be no fear of an excessive requirement for a duty of truth, which would be irreconcilable with Art 5 (1) sentence 1 GG, in relation to the factual kernel of the statement from this outcome of the balancing exercise. The Federal Constitutional Court proceeds in the interest of free communication as well as of the functions of criticism and control by the media on the basis of a limitation of a duty of care. But this refers to factual assertions the correctness of which is still uncertain at the point in time of the statement and which cannot be cleared up within a very short period of time. It does not however take effect where the incorrectness of a statement has already beenestablished, as is the case here.

(3) As the condition which is being challenged is not open to objection with regard to § 185 in combination with § 194 (1) sentence 2 StGB, it no longer matters whether this also applies for the assessment of criminality in accordance with §§ 130 and 189 StGB.

III.

The same considerations apply for a testing of the decisions that are being challenged by the standard of Art 8 (1) GG. No other outcome can therefore follow fromthis basic right.