Case:

BVerfGE 90, 1-22 Book about war guilt Decision of the First Senate 1 BvR 434/87 [Summary of issues omitted]

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Note:

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Facts:

The complainant is the author and publisher of the book "Truth for Germany - The Question of Guilt in the Second World War". In the book the complainant takes the view that the Second World War was forced on the German Reich by its wartime enemies and seeks to support this with numerous references. On the application of a youth welfare department, the Federal Examination Office for Literature endangering Young People placed the book, in accordance with § 1 (1) sentence 1 of the Dissemination of Literature Endangering Young People Act (GjS), on the list of literature endangering young people. This resulted in a ban on the dissemination of the work to children and young people, a ban on its dissemination outside business premises, and a ban on advertising (§§ 3-5 GjS). The administrative court dismissed the complainant's application for annulment of this decision. An appeal against this was successful. The Federal Administrative Court restored the decision of the administrative court of First Instance [reference omitted]. The complainant's constitutional complaint led to the quashing of the judgment of the Federal Administrative Court and of the decision of the Federal Examination Office.

Reasons:

I.

The opinion of the Federal Administrative Court and the Federal Examination Office that the listed book does not fall within the area of protection of academic freedom according to Art 5 (3) sentence 1 GG [Constitution of 1949] is certainly not open to objection.

1. Art 5 (3) sentence 1 GG declares the freedom of scholarship, research, and teaching. This does not only establish an objective norm of principle for the academic realm. Nor is the basic right limited to a guarantee, related to academic institutions and professions, of the conditions for the functioning of professionally managed scholarship. Instead, as protective law, it assures freedom from restriction by the state to everyone who is academically active [reference omitted]. The subject matter of this freedom is principally the processes, behaviour, and decisions, which are based on academic rules, in the search for knowledge,

its meaning and transmission. In order that academic activity can arrange itself without hindrance in its characteristic striving for the truth, it has been declared to be a realm of autonomous responsibility, free from state heteronomy [references omitted]. Everyone who is academically active therefore enjoys protection from state influence in the process of obtaining and imparting of academic knowledge.

But Art 5 (3) sentence 1 GG does not provide protection for a particular academic view or a particular academic theory. That would be irreconcilable with the principle that academic activity is unfinished and incomplete, in spite of its constitutive relationship to truth [references omitted]. The protection of this basic right depends, neither on the rightness of the methods and results nor on the soundness of the argumentation and reasoning or the completeness of the points of view and references which form the basis of an academic work. Good and bad academic activity, and truth or falseness of results, can only be the subject of academic judgement [reference omitted]; opinions which have gained acceptance in academic discussion remain subject to revision and change. Academic freedom therefore also protects minority opinions as well as research attempts and outcomes which show themselves to be incorrect or faulty. In the same way unorthodox or intuitive activity enjoys the protection of the basic right. The only prerequisite is that it is a question of academic activity; within this comes everything which by its content and form is to be regarded as a serious attempt to ascertain the truth [references omitted].

It does not however follow from the openness and variability of academic activity, on which the concept of academic activity in the Basic Law is based, that a publication has to be regarded as academic simply because its author regards or describes it as academic. This is because classification under academic freedom (which is not subject to the reservation of Art 5 (2) GG [reference omitted]) cannot depend only on the judgement of that person who claims the basic right for himself. The authorities and the courts are also authorised to test whether the work fulfils the characteristics of the concept – widely understood - of academic activity. This is the case whenever the permissibility of a restriction for the purpose of protection of the young [reference omitted] or any other interest protected by constitutional law [reference omitted] is at stake.

It is true that a work cannot be denied the character of an academic work simply because it reveals bias and gaps or pays insufficient regard to contrary opinions. All this may reveal a work to be defective in the sense of the definition of academic standards by the academic world itself. It will only be withdrawn from the academic realm if it fails to meet the claims of scholarship not only in particulars or according to the definition of certain schools but systematically. That is in particular the case if it not directed towards knowledge of the truth, but lends to preconceived opinions or results the appearance of being academically obtained or proved. The systematic omission of facts, sources, views and results, which call the opinion of the author into question, can be an indication of this. On the other hand, it does not suffice for the academic quality of a work to be contested within the academic world by controversies between different schools of thought about content or methods.

2. In accordance with these principles, there is no objection in constitutional law to the fact that the Federal Administrative Court denied that the complainant's book had an academic character - as the Federal Examination Office had done.

The concept of academic activity on which that court based its judgment corresponds to the requirements of the Basic Law. The Federal Administrative Court recognised that a work is not non-academic simply because it contains mistakes or misleads. Instead, it took into account whether the work involves a serious attempt to find the truth. In this connection it does not matter that the Federal Administrative Court did not reach a conclusion about the academic character of the work simply because its outward appearance was academic, but further inquired whether it could qualify as academic according to the method of obtaining its results.

It is true that in this connection the Federal Administrative Court did not fully avoid the danger of forming a judgement itself about the truth content of the book. This is, in principle, not an issue in assessing the academic character of a work [reference omitted] and reaching conclusions from this about the lack of endeavour in searching for the truth. However, the decision does not rest on this. This is because the court came to the conclusion, relying on the expert's report obtained by the Federal Examination Office and the findings of the administrative court, that the book wishes to propagate a certain view of political history and does not endeavour to discover the truth.

This view is in particular supported by the reasoning of the Federal Administrative Court that the complainant completely omitted the literature that contradicted his thesis. In fact he could have gone back to a wealth of academic investigations, based on authorities as well as documentation, diaries, and monographs which contain statements about Hitler's desire for war and his responsibility for the outbreak of the Second World War. There is not even a reference to these in the list of sources for the book.

II.

The decisions that are being challenged do, however, violate the basic right of freedom of opinion.

1. The book falls within the area of protection of Art 5 (1) sentence 1 GG.

a) This guarantees to everyone the right to state his opinion freely: everyone should be able to say freely what he thinks, even if he neither gives nor can give verifiable grounds for his judgement. It is also the purpose of expressions of opinion to send out into the world around an intellectual effect that forms opinions and convinces. Accordingly, value judgements are protected without any question as to whether the statement is valuable or valueless, right or wrong, emotional or rational [references omitted].

In any event the basic right of freedom of expression also protects assertions of fact insofar as they are a prerequisite for the formation of opinions. Only the assertion of fact which is known to be untrue from the outset falls outside the protective area of the basic right because it cannot contribute to the formation of opinion as required by the Constitution [references omitted].

The dividing line between value judgements and assertions of fact can be difficult in the individual case, principally because the two forms of statement are often linked to each other, and only together do they make up the sense of the statement. In such cases, the concept of opinion is to be understood widely in the interest of an effective protection of the basic right. Provided a statement in which facts and opinions are mixed bears the imprint of the elements of comment, of judgement, and of thinking, it is protected as opinion by the basic right. This applies especially where a division of the evaluating and the factual content would nullify or falsify the sense of the statement. If in such a case the factual element were to be regarded as decisive, the basic right protection of freedom of opinion could be substantially reduced [reference omitted].

b) The complainant's book is shaped by his opinion on the question of war guilt. It cannot be reduced to an untrue assertion of facts. In particular, it does not follow from the possibility of condensing its content to a core statement about a historical event that in its totality it only contains factual assertions. The complainant supports the view that no blame for the outbreak of the Second World War applies to the national socialist regime and in particular Hitler. Even if the concept of guilt is only understood in the sense of causation, questions of this sort are not open to an answer in terms of pure factual assertions, but require an evaluating assessment. That applies all the more for an explanation of a certain historical picture, which is always the result of an interpretation of complex historical facts and interrelations.

2. An intrusion is made into the protected area of Art 5 (1) sentence 1 GG by the listing of the book. It has as its result the ban on dissemination to young people, and besides this leads to restrictions on advertising and dissemination by which sales to adults are substantially impeded [references omitted].

a) It is true that freedom of opinion is not guaranteed without reservation. It finds its limits, amongst other things, in the statutory provisions for the protection of young people. On the enactment of such provisions the legislator must however take into account the importance of the basic rights guaranteed in Art 5 (1) sentence 1 GG.

§ 1 para 1 GjS is reconcilable with these constitutional law requirements insofar as it relates to works witha political content. The provision is enacted with the purpose of protecting young people from moral danger.The legislator has determined the boundaries drawn to the freedom of opinion sufficiently precisely, andcarried out the balancing required between its importance in a democracy on the one hand and the likewise importantinterest of the protection of young people on the other.

It is true that the question of whether a work should be entered on the list cannot be answered without more from the wording of § 1 para 1 GjS. A significant lack of distinctness arises principally from falling back on moral norms, which show few contours and in addition are subject to continual change. Doubts can also arise in relation to a possible endangering of young readers as the effects of offensive reading material cannot be readily assessed and in addition are disputed by experts [reference omitted].

On the other hand, a more exact conceptual description of the criteria for listing is scarcely possible. In such a situation the legislator can in principle fall back on general clauses. The requirement of certainty is satisfied if problems of interpretation can be overcome with conventional juristic methods [references omitted]. That is the case here, especially as the statute gives clues for a more precise determination of the criteria for listing by the enumeration by way of example of certain types of works in § 1 para 1 sentence 2 GjS. The fact that works which have the effect of brutalising or which incite to acts of violence, crime or racial hatred or glorify war are to be included in the list illustrates over and above these examples the content of the concept "moral danger". The examples also reveal that listing should only be considered when there is a clear degree of risk and a substantial intensity of danger, and the legislator has therefore carried out a balancing between the importance of freedom of opinion and the interest in an effective protection of the young.

Further indications of the more precise content of the criteria for listing are revealed from the statutory material. [These are set out].

The criteria for listing are further narrowed down by the "tendency" protection clause of § 1 para 2 no.1 GjS. When this says that works should not be put on the list merely because of their political, social, religious or philosophical content, the paragraph makes clear that the statute does not intend to protect young people from being confronted with those tendencies even if, for whatever reasons, they may not be commendable. There is in this not only a further concretising of the criteria for listing but also a more detailed determination of the limits that are set to freedom of opinion for the sake of protecting the young. By the "tendency" protection clause, the legislator has in addition taken account of the special importance of freedom of opinion for political debate.

The interpretation and application of § 1 para 1 GjS by the Federal Examination Office and the Federal Administrative Court meet with no objections in constitutional law. There is certainly no objection to the view that an enhancement and rehabilitation or playing down of the "totalitarian national socialist ideology" can morally endanger young people, and that a work of this content does not fall under the "tendency" protection clause. But the assumption that it suffices for the application of the provisions for the protection of young people restricting freedom of opinion that the complainant's book enhances national socialist

ideology by a false historical portrayal of the question of war guilt is irreconcilable with Art 5 (1) sentence 1 GG.

The interest in undisturbed development of young people, which is important in constitutional law, is amongst other things directed towards preventing racial hatred, lust for war and antagonism to democracy from emerging [reference omitted]. The national socialist ideology is substantially shaped by such elements. To glorify it, rehabilitate it or play it down in a work can therefore completely justify restricting the dissemination of that work for the protection of young people. § 1 para 1 sentences 1 and 2 GjS also make it sufficiently clear that the statute will include those works whose effect is described by the Federal Examination Office, the administrative courts and part of the literature with the concept of "socio-ethical" confusion.

There are also no constitutional law objections to the Federal Administrative Court not applying the "tendency" protection clause to such works. This clause serves to clarify that in the realm of political opinion formation amongst other things protection of the young must take second place because in this core area of Art 5 (1) sentence 1 GG the protection of free communication is of special importance. Whether the thesis supported by the Federal Administrative Court in this connection that the statutory "tendency" protection does not apply for all political views disapproved by the Basic Law does justice to the importance and scope of Art 5 (1) sentence 1 GG seems certainly to be doubtful. But that can be left alone, because it is not at issue.

bb) The assumption of the Federal Examination Office and - following it - of the Federal Administrative Court, that the complainant's book could be listed simply because it enhanced national socialist ideology by a false historical account does not however take sufficient account of the importance of the basic right in Art 5 (1) sentence 1 GG.

The Federal Examination Office and the Federal Administrative Court do not proceed on the basis that in his book the complainant incites to racial hatred, glorifies war or supports other theses endangering young people in the sense set out above. In fact the complainant avoids justifying the national socialist ideology, glorifying war or denying or defending the murder of millions of Jews. An endangering of young people by the propagation of ideas which would obviously be irreconcilable with the basic principles of human dignity and freedom, on which the Constitution is based, cannot therefore be established. According to the view of the Federal Examination Office and the Federal Administrative Court, the danger posed by this book arises from the fact that the complainant seeks to absolve Hitler and the other rulers of the National Socialist regime from blame or even shared blame for the outbreak of the Second World War. Worse still, - in a footnote – it regards the murder of the Jews as the consequence of a war caused by others and the previous war crimes of others.

It is certainly understandable to assert that a danger for young people can arise simply because the complainant makes the national socialist ideology appear harmless insofar as he denies the most serious misdeeds of Naziism or portrays them as the consequence of developments for which the regime is not responsible. In testing whether this justifies the intrusion which is associated with a listing of the work, it must however be born in mind that the stated considerations only concern indirect effects of the work, the potential dangers of which are especially difficult to estimate. But it must principally be remembered in this connection that statements on historical interpretation, especially those which refer to more recent German history, fall, as a contribution to the formation of political opinion, within the core area of the protection which Art 5 (1) sentence 1 GG guarantees. That applies independently of whether they lie within the spectrum of common opinions or far outside them; or whether they appear well founded or - as here, with the central issue of the book, about war guilt - concern debatable statements.

The democratic state relies on principle on the fact that in open argument between different opinions a multifaceted picture will arise against which one-sided opinions based on

falsification of the facts cannot in general gain acceptance. Free discussion is the real foundation of the free and democratic society. Young people can only become mature citizens if their capacity to criticise is strengthened in discussions based on differing opinions. That applies to a special degree to debate about recent German history. Providing information about historical events and critical debate between differing opinions can protect young people very much more effectively from susceptibility to distorted presentations of history than a listing, which could even confer on such opinions an unjustified power of attraction.

The decisions of the Federal Examination Office and the Federal Administrative Court do not take these principles sufficiently into account. They fail to recognise first of all that the complainant's book cannot be reduced to a single assertion of facts which can simply be regarded as refuted; it contains the exposition of a certain view of events of contemporary history, which combines a multitude of factual assertions and value judgements. But what is principally lacking is a balancing between the aim pursued by the listing and the seriousness of the intrusion into freedom of opinion. In this connection the Federal Examination Office and the Federal Administrative Court should have in particular examined whether it serves the development of young people in a democratic state to withhold from them extreme positions in a discussion of contemporary history.

The decisions under challenge are therefore to be quashed. Whether the authority can reach the same conclusion following a new examination is not a matter to be decided here.

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