FEDERAL CONSTITUTIONAL COURT

– 1 BvR 673/18 –

In the proceedings
on
the constitutional complaint

of Ms H(...),

– authorised representative: Rechtsanwalt Wolfram Nahrath,
Bizetstraße 24, 13088 Berlin –

1. directly against

a) the Order of the Celle Higher Regional Court (*Oberlandesgericht*) of 30 January 2018 – 3 Ss 50/17 –,

b) the Judgment of the Verden Regional Court (*Landgericht*) of 28 August 2017 – 5 Ns 417 Js 26754/14 (5/17) –,

c) the Judgment of the Verden (Aller) Local Court (*Amtsgericht*) of 21 November 2016 – 9 Ls 417 Js 26754/14 (4/16) –,

2. indirectly against § 130(3) of the Criminal Code (*Strafgesetzbuch* –StGB)

the Third Chamber of the First Senate of the Federal Constitutional Court with the participation of Justices

Vice-President Kirchhof

Masing,

Paulus

decided unanimously on 22 June 2018 pursuant to § 93b in conjunction with § 93a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* –BVerfGG) in the version published on 11 August 1993 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 1473):

The constitutional complaint is not admitted for decision.

R e a s o n s :

The complainant, who was convicted several times for inciting hatred and violence against segments of the population (*Volksverhetzung*), challenges her repeated criminal conviction for denial of the persecution of Jews by the Nazis pursuant to § 130(3) of the Criminal Code (*Strafgesetzbuch* –StGB). 1

I.

[Excerpt from Press Release no. 67/2018 of 3 August 2018]

The 89-year-old complainant has published various articles in which she contends that the mass murder of people of Jewish faith under Nazi rule did not actually take place and that it was impossible, in particular, for mass gassing to have been used in the Auschwitz-Birkenau extermination camp. Several of the articles present this contention as an established fact based on new evidence; as proof, the texts repeatedly refer, *inter alia*, to published written commands, which supposedly show that the exclusive purpose of the Auschwitz-Birkenau camp had been to ensure that the persons detained remained fit for labour in the arms industry. In addition, the articles cite several statements allegedly made by the management board of the Auschwitz-Birkenau Memorial and Museum, various historians, newspaper interviews and statements made by witnesses and eyewitnesses, identified by name, who were purportedly exposed as liars.

On the basis of these statements in the articles, the Local Court convicted the complainant of seven counts of *Volksverhetzung* and one count of attempted *Volksverhetzung,* and imposed an aggregate prison sentence (*Gesamtfreiheitsstrafe*) of two years and six months. On the complainant's appeal on points of fact and law, the Verden Regional Court reduced the aggregate prison sentence to two years without parole, and rejected the appeal for the rest. The subsequent appeal on points of law was unsuccessful.

[End of excerpt]

1. […] 2-12

2. […] 13

3. […] 14

4. […] 15

5. The complainant challenges these decisions in her constitutional complaint of 12 March 2018. She claims that the decisions violate her fundamental rights to freedom of expression and freedom of research and teaching under Art. 5(1) first sentence and (3) of the Basic Law (*Grundgesetz* – GG) and her right to a fair trial. In addition, she holds that the constituent elements of the offence underlying her conviction violated the principle of specificity under criminal law pursuant to Art. 103(2) GG. Imposing a prison sentence of two years without parole for statements made by the complainant who is over 80 years old violated the principle of culpability rooted in the principle of rule of law. The complainant further claims that in view of the Wunsiedel decision of the Federal Constitutional Court, § 130(3) StGB could not be considered a general law. The exception from the requirement of general applicability of a law acknowledged in that decision only referred to § 130(4) StGB and could not be ap- 16

plied to paragraph 3. According to the complainant, it also followed from the decision that interpretations of historical facts contrary to the majority view are protected under the right to freedom of expression and cannot be excluded from its scope of protection as untrue factual claims. At least, this approach ought to be applied to a research activity of the type undertaken by the complainant. In addition, impunity of the denial of the Holocaust followed directly from applying the principles of the Wunsiedel decision. Pursuant to that decision, interferences to maintain a general feeling of peace, to protect the majority population from an insult to its sense of right and wrong or for the protection from evidently false interpretations of history are impermissible.

II.

The constitutional complaint is not admitted for decision because the prerequisites for admission pursuant to § 93a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) have not been met. The constitutional complaint does not have general constitutional significance. Nor is admission for decision appropriate to enforce the rights referred to in § 90(1) BVerfGG (cf. BVerfGE 90, 22 <24 et seq.>; 96, 245 <248 et seq.>). The constitutional complainant is unfounded because the challenged decisions do not violate the complainant's fundamental rights. 17

1. The Federal Constitutional Court has already decided the issues with regard to the scope of protection of Art. 5(1) first sentence GG in general and the punishability of the denial of the persecution of Jews on the basis of § 130 StGB in particular that are relevant in the present case. 18

a) Subject of the scope of protection of Art. 5(1) first sentence GG are opinions, i.e. statements characterised by the element of taking a position and making one's own assessment (cf. BVerfGE 7, 198 <210>; 61, 1 <8>; 90, 241 <247>). They are always within the scope of protection of Art. 5(1) first sentence GG, regardless of whether they turn out to be true or false, whether they are reasonable or without any reason, emotional or rational, or whether they are considered valuable, useless, dangerous or harmless (cf. BVerfGE 90, 241 <247>; 124, 300 <320>). 19

Besides opinions, the scope of Art. 5(1) first sentence GG also includes factual statements because and to the extent that they are or can be the prerequisites for the formation of opinions (cf. BVerfGE 61, 1 <8>; 90, 241 <247>). Whereas deliberately untrue factual claims or such statements that are proven to be untrue are excluded from the scope of protection of Art. 5(1) first sentence GG because they do not contribute to the constitutionally guaranteed opinion-forming process (cf. BVerfGE 54, 208 <219>; 61, 1 <8>; 90, 241 <247>). 20

Whether a statement is mainly of a factual nature or whether it is predominantly a value judgment must be established by interpretation of the respective statement in its overall context (cf. BVerfGE 93, 266 <295>; BVerfG, Order of the Third Chamber of the First Senate of 16 March 2017 – 1 BvR 3085/15 –, www.bverfg.de, para. 13). 21

In this context, it must be ensured that a separation of factual and judgmental parts of a statement does not lead to an alteration of its meaning (cf. BVerfGE 90, 241 <248>). In cases in which this is not possible, the statement must be regarded – in its entirety – as an expression of opinion and included in the scope of protection of the freedom of expression in the interest of effective protection of fundamental rights (cf. BVerfGE 90, 241 <248>).

b) If, according to these requirements, the statement at issue is protected under Art. 5(1) first sentence GG, the fundamental right to freedom of expression is not guaranteed without reservations. Pursuant to Art. 5(2) GG it is explicitly subject to the limitations that are imposed by the general laws. Formally, interferences with the right to freedom of expression must be based on a general law that is not directed against a particular opinion; substantively, interferences must meet the requirements of proportionality since the right to freedom of expression is a basic right of communication that is fundamental for the democratic order. 22

However, with regard to the formal requirement of [a general law], the Federal Constitutional Court recognises one exception for laws that seek to prevent a propagandistic affirmation of the Nazi reign of violence and tyranny in the years 1933 to 1945. The Court thereby takes account of the crucial impact of German history on the national identity and considers it for the interpretation of the Basic Law (cf. BVerfGE 124, 300 <328 et seq.>). 23

The substantive content of the freedom of expression, however, remains unaffected by this exception. In particular, the Basic Law does not contain a general anti-national-socialist principle that would allow prohibiting the dissemination of extreme right-wing or national-socialist ideas merely with regard to the effect their content has on people’s minds. Rather, Art. 5(1) and (2) GG guarantees the freedom of expression as an intellectual freedom independent of the assessment of its content, correctness, legal enforceability or dangerousness. Art. 5(1) and (2) GG does not permit the state to interfere with what a person believes but only authorises an interference once an expression of opinion leaves the purely intellectual sphere of what a person thinks is right and becomes a violation of legal interests or an apparent threat (BVerfGE 124, 300 <330>). This is the case if the statements of opinion endanger public peace in terms of the peaceful public discourse thereby marking the transition to aggression or a violation of law (cf. BVerfGE 124, 300 <335>). 24

The regular courts too must take account of these requirements in the interpretation and application of the laws restricting the freedom of expression, so that its role in defining values is guaranteed at the level of application of the law. An interaction takes place between protection of fundamental rights and restrictions on fundamental rights in the sense that these restrictions impose boundaries on fundamental rights; in turn, however, these restrictions must be interpreted in the light of the principal significance of a fundamental right for a free democratic state and hence be restricted in their limiting effect on the fundamental right (cf. BVerfGE 7, 198 <208 and 209>; 124, 25

300 <332, 342>).

c) § 130(3) StGB focuses on the preservation of public peace. It follows from the wording of the provision that a statement only fulfils the constituent elements of the provision if it is capable of disturbing the public peace. With regard to the requirement of specificity in Art. 103(2) GG the constituent element that a statement is capable of disturbing public peace requires further specification based on the other constituent elements; where the other constituent elements are fulfilled, disturbance of public peace can generally be assumed (cf. BVerfGE 124, 300 <339 et seq.>). This requires, however, that the other constituent elements be interpreted in the light of the notion “disturbance of the peace”. 26

2. Measured against these principles, the statements made by the complainant do for the most part not fall within the scope of protection of Art. 5(1) first sentence GG. For the rest, the challenged decisions are also not objectionable under constitutional law. 27

a) The statements made by the complainant are in essence based on factual claims, which by themselves do not fall within the scope of protection of Art. 5(1) first sentence GG. These factual claims that are demonstrably untrue and – according to the regular courts’ findings – also deliberately false do not contribute to the constitutionally guaranteed opinion-forming process and their dissemination does not fall within the freedom of expression. The fact that factual claims were made in connection with statements of opinion also does not merit a different conclusion. Also in such cases, untrue factual claims as such – unlike value judgments relying on factual claims – are excluded from the protection of Art. 5(1) first sentence GG. 28

With her statements the complainant contests that the Auschwitz-Birkenau camp was a place used for systematic mass killings, she denies the systematic killing of Jewish persons by Nazi Germany in general and in the concentration camp Auschwitz-Birkenau in particular and claims that there is new evidence that there were no mass gassings with zyklon b in Auschwitz. As shown by innumerable eyewitness reports and documents, by historical findings and findings of courts in numerous criminal trials, these statements have proven to be untrue (cf. BVerfGE 90, 241 <249>; for the Auschwitz-Birkenau extermination camp cf. also the findings of the judgment rendered by the Frankfurt am Main Regional Court in the Auschwitz trial of 19 and 20 August 1965, 4 Ks 2/63, p. 37 to 44; […]). 29

b) To the extent that, beyond disseminating untrue factual claims, the complainant bases her denial of the crimes pursuant to § 6 of the International Criminal Code (*Völkerstrafgesetzbuch* – VStGB) on subjective conclusions and appraisals invoking her freedom of expression under Art. 5(1) first sentence GG, the criminal conviction of the complainant does not violate her fundamental rights. The way the criminal courts have interpreted and applied § 130(3) StGB fulfils the requirements under Art. 5(1) first sentence GG with regard an application of this constituent element of the offence in a manner that is compatible with fundamental rights. In particular, the 30

conviction by the criminal court took into account the requirement following from Art. 5(1) first sentence GG that interferences with the freedom of expression must not be directed against the purely intellectual consequences of certain statements of opinion but must serve the protection of recognised legal interests instead. Based on the findings in the challenged decisions, the Regional Court could reasonably assume that in case of the variant of “denial” relevant in the present case, the statements made by the complainant were capable of endangering the public peace.

aa) Based on the aforementioned principles it can be assumed that the constituent elements of the offence of approval and denial generally evince disturbance of the public peace. 31

In case of “approval” this already follows from the identity of this constituent element with the relevant element stated in § 130(4) StGB. Public approval of Nazi crimes pursuant to § 6 VStGB constitutes a form of approval of the Nazi reign of violence and tyranny that crosses the boundaries of peaceful public discourse and evinces a disturbance of the public peace (cf. BVerfGE 124, 300 <344>). 32

The same holds true for the constituent element of “denial” of these crimes. Such an act crosses the boundaries of peacefulness given that, against the background of German history, the denial of the Nazi genocide – in terms of contesting that these commonly known events took place – can only be understood as the trivialisation of these crimes, which leads to the legitimation and approval thereof. Thus, the effect of denying these crimes is similar to that of their approval, which is generally sanctioned under criminal law pursuant to § 140 StGB (cf. BVerfGE 124, 300 <335>); it is furthermore equivalent to the glorification of the Nazi reign of violence and tyranny pursuant to § 130(4) StGB. Against the background of German history, denying the Nazi crimes of genocide is capable of provoking aggression on the part of an audience that thinks favourably of the speaker, and of inciting that audience to take action against those perceived as being the authors of, or responsible for, the purported distortion of an alleged historical truth implicit in such denial. It thus inherently carries the danger that the political discourse will turn hostile and violent. The denial of the Nazi crimes of genocide particularly endangers the peaceful political discourse not least because these crimes particularly targeted certain groups of persons or groups within society, and the denial of these events can and has been used, openly or insidiously, as a code to instigate hostile actions targeting these very groups. Against that background, it is consistent that the explanatory memorandum to the legislative draft qualifies § 130(3) StGB as a specific manifestation of the offence of *Volksverhetzung* traditionally recognised under criminal law. Thus, the regular courts can also assume in this case that denial of Nazi crimes evinces a disturbance of public peace. Special cases in which such effects appear to be unlikely from the outset and in which a disturbance of public peace can thus be ruled out can be dealt with by an adequate interpretation of this constituent element of the offence (cf. BVerfGE 124, 300 <339 et seq.>). 33

bb) Measured by these standards, the findings of the Regional Court provide a sufficient basis for the criminal conviction of the complainant. According to these findings, the complainant has repeatedly and publicly contested the systematic mass killings committed by Nazi Germany, and especially the genocide of Jewish persons. Neither from these findings nor from the complainant's submission is it discernible why, in these cases exceptionally, the denial of these crimes, which constitutes a constituent element of the offence, should not be capable of disturbing the public peace – in terms of peacefulness of the public discourse and of public life – despite the fact that fulfilling the constituent element of the criminal offence evince the contrary. 34

Indeed, in the complainant's articles, the denial of the genocide is embedded in repeated requests directed at members of the Central Council of Jews in Germany (*Zentralrat der Juden*), demanding a rectification of the commonly accepted account of events that took place at Auschwitz; the articles thus exemplify the danger that was recognised by the legislature, namely that denying the genocide could intentionally serve to instigate hostile actions against the very groups of society that had been victims of that genocide. The complainant repeatedly urges only Jewish members of the population and their representatives in Germany to rectify the error that has allegedly been disseminated in their interest. She states that failure to rectify the account of events could lead to "the doom of the Jewry". The denial of the genocide committed against the Jews is used as a means to intentionally and deliberately stir opinion against Jewish members of the population and their representatives. This is punishable because it fulfils the constituent elements of inciting hatred and violence against segments of the population. 35

cc) Sentencing the complainant to an aggregate prison term of two years without parole satisfies the requirement of proportionality, also in this individual case. […] 36

This decision cannot be appealed. 37

Kirchhof Masing Paulus

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 22. Juni 2018 - 1 BvR 673/18

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 22. Juni 2018 - 1 BvR 673/18 - Rn. (1 - 37), http://www.bverfg.de/e/rs20180622_1bvr067318en.html

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