



IN THE NAME OF THE PEOPLE

**In the proceedings
on
the constitutional complaint**

of Mr S (...),

– authorised representative: Rechtsanwalt Klaus Kunze,
Lange Straße 28, 37170 Uslar –

against a) the Order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 21 July 2015 – III-4RVs 76/15 –,

**b) the Judgment of the Paderborn Regional Court of 12
March 2015 – 03 Ns-40 Js 81/13-178/14 –**

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

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Vice-President Kirchhof,

Masing,

Paulus

decided unanimously on 22 June 2018:

- 1. The Judgment of the Paderborn Regional Court (*Landgericht*) of 12 March 2015 – 03 Ns-40 Js 81/13-178/14 – and the Order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 21 July 2015 – III-4RVs 76/15 – violate the complainant’s fundamental right under Article 5(1) first sentence of the Basic Law.**
- 2. The decisions are reversed. The matter is remanded to the Paderborn Regional Court for a new decision.**
- 3. The *Land* North-Rhine Westphalia must reimburse the complainant for necessary expenses.**

4. The amount in dispute for legal representation in connection with the constitutional complaint proceedings is fixed at EUR 25.000 (in words: twenty-five thousand Euros).

R e a s o n s:

The constitutional complaint lodged by the complainant is directed against criminal court decisions. He was convicted for inciting hatred and violence against segments of the population (*Volksverhetzung*) pursuant to § 130(3) alternative 3, (5) of the Criminal Code (*Strafgesetzbuch – StGB*) in connection with a spoken text published on his YouTube channel and his website.

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I.

[Excerpt from Press Release no. 66/2018 of 3 August 2018

The complainant published an audio file on his website and on his YouTube account; on the file another person can be heard criticising the first “*Wehrmacht* exhibition” (on the armed forces of Nazi Germany) which was touring Germany a few years ago, on the grounds that photographs of *Wehrmacht* soldiers were, in part, presented in an inaccurate manner. In the audio file, the persons responsible for the exhibition are accused of falsifying and manipulating the material and inciting hatred and violence against segments of the population, and the allied forces are accused of “mendacious propaganda”. It is alleged that the dissemination of historical truths were prosecuted and punished and that persons had voluntarily followed the Nazi-*Schutzstaffel* (SS) into the concentration camps. Survivors of the Holocaust are accused of making profits from giving lectures on the mass killings; furthermore, the view is promoted that persons who fought the Nazi regime in the resistance and witnesses who testified in the court proceedings on Nazi-era crimes had given false accounts.

The local court convicted the complainant for incitement to hatred and violence against certain segments of the population to a fine of 70 daily rates in the amount of EUR 30.00 each. The Regional Court rejected the complainant’s appeal on points of law and fact and convicted him for incitement to hatred and violence against certain segments of the population to a fine of 100 daily rates in the amount of EUR 30.00 each. The appeal on points of law before the Higher Regional Court was unsuccessful.

[End of excerpt]

1. [...]	2
2. [...]	3
3. [...]	4-6
4. [...]	7
5. In his constitutional complaint the complainant challenges the decisions of the Regional Court and the Higher Regional Court; accordingly, he claims – among other things – a violation of his right to freedom of expression under Art. 5(1) of the Basic Law (<i>Grundgesetz</i> – GG).	8
6. [...]	9
II.	
1. To the extent that the complainant claims a violation of his rights under Art. 5(1) first sentence GG by the challenged judgment of the Regional Court and the challenged order of the Higher Regional Court, the Chamber admits the constitutional complaint for decision, because it is appropriate in order to enforce the rights of the complainant referred to in § 90(1) of the Federal Constitutional Court Act (<i>Bundesverfassungsgerichtsgesetz</i> – BVerfGG) (§ 93a(2) letter b BVerfGG).	10
The judgment of the Regional Court and the order of the Higher Regional Court violate the complainant’s fundamental right under Art. 5(1) GG.	11
a) The standard to be applied is the freedom of expression under Art. 5(1) first sentence GG.	12
aa) 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>).	13
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 61, 1 <8>; 90, 241 <247>).	14
bb) However, the fundamental right to freedom of expression is not guaranteed without reservation. 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	15

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.

However, with regard to the formal requirement that limitations of the right to freedom of expression be based on general laws, 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.>).

The substantive content of the freedom of expression, however, remains unaffected by this exception. In particular, the Basic Law does not contain a general 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 peoples' minds. Rather, Art. 5(1) and (2) GG guarantees 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>).

cc) 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 also 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, 300 <332, 342>).

b) The decision of the Regional Court as the last trial court does not meet these standards. In applying § 130(3) StGB, the Regional Court did not demonstrate in a tenable manner that the statements of the complainant were capable of endangering public peace with regard to its constitutionally required understanding as peacefulness of the public discourse.

aa) The statements that gave rise to the criminal conviction fall within the scope of protection of the fundamental right of freedom of expression as they constitute hazy factual claims that are inherently linked to value judgments. It is not objectionable under constitutional law that the Regional Court held the complainant responsible for

statements made by a third party and published on the complainant's website.

bb) The criminal punishment for the dissemination of the read text in dispute constitutes an interference with this fundamental right. The Regional Court based the conviction on § 130(3) and (5) StGB, which provides the legal basis for the interference. The fact that § 130(3) StGB is not a general law but instead specifically criminalises statements in relation to the Nazi regime does not rule out a conviction based on the aforementioned standards. The legal provision is exempted from the formal requirement of a general law – which is applicable in other cases of interferences pursuant to Art. 5(2) GG – as it seeks to prevent a propagandistic affirmation of the Nazi reign of violence and tyranny during the years 1933 to 1945. 21

cc) The interference with the freedom of expression does not meet its substantive requirements. The criminal courts did not sufficiently take into account the requirements of Art. 5(1) GG. 22

(1) § 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”. A criminal conviction pursuant to § 130(3) StGB with all its variations – i.e. including the act of trivialisation – can therefore only be based on such statements that are capable of endangering public peace in the sense of the requirements of Art. 5(1) GG. Where this is not clearly ascertainable on the basis of the other constituent elements, the element that a statement is capable of endangering public peace must be established independently. In contrast to the acts of denial and approval, which generally evince a disturbance of the public peace, it appears that such an independent assessment is necessary with regard to the act of trivialisation. 23

(2) In light of Art. 5(1) GG further constitutional requirements arise regarding the assessment of whether a statement is capable of endangering public peace. 24

First of all, consideration must be given to freedom of expression in its formation as freedom of mind. Interferences with Art. 5(1) GG must not be aimed at taking measures against the purely intellectual consequences of certain statements of opinion. Neither the aim to prevent the dissemination of anti-constitutional views nor the qualification of certain opinions as worthless or even dangerous constitute sufficient reasons for imposing restrictions on these opinions. It is, however, legitimate to prevent the violation of legal interests (cf. BVerfGE 124, 300 <332 and 333>). 25

Based on these standards, the concept of public peace must be interpreted in a 26

strict manner. It is not tenable to apply an understanding of public peace that seeks to protect citizens against subjective worries caused by being confronted with provocative opinions and ideologies. The possibility of being confronted with disconcerting opinions is part of living in a free state; this may also include opinions with dangerous intellectual consequences and even opinions that aim to fundamentally transform the existing state order. Neither the aim to prevent a “poisoning of the public mind” nor the aim to protect the public against affronts to shared legal values arising from totalitarian ideologies or a manifestly wrong interpretation of history provide a reason for interference (BVerfGE 124, 300 <334>). The trivialisation of the Nazi ideology or an offensive historic interpretation of this time period as such are not sufficient to establish criminal liability (cf. BVerfGE 124, 300 <336>).

However, public peace in terms of its understanding as peacefulness constitutes a legitimate legal interest. In this case, the objective pursued is to protect against statements which, in substantive terms, are clearly geared towards acts that threaten protected legal interests. In this context, the protection of public peace refers to the external effects brought about by certain statements of opinion, for instance by means of calls for action or emotionalised statements that incite willingness to take action among its addressees, lower inhibitions, or directly intimidate third parties (cf. BVerfGE 124, 300 <335>). A statement of opinion may provide a sufficient basis for a criminal conviction where it, beyond the mere influencing of opinions, indirectly aims to bring about real life consequences that directly threaten recognised legal interests, e.g. by way of calling for unlawful action, resorting to aggressively emotionalised statements or lowering inhibitions (cf. BVerfGE 124, 300 <333>).

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(3) The challenged decisions do not meet these requirements. The Regional Court held that the statements in question were capable of endangering public peace; this finding was primarily based on the consideration that the statements undermined public trust in legal certainty and they were effectively expressing an unacceptable level of contempt. Factually, this finding only suggests a poisoning of the public mind and an affront to the shared legal values of the general public and does not cross the threshold of endangering peacefulness. The same holds true for the unsubstantiated claim that the statement was capable of impairing the peaceful coexistence of different ethnic groups – a claim which was obviously solely based on the right-wing content of the statement. The fact that the website’s target audience is the extreme right of the political spectrum does not, by itself, support a finding that there was a danger to public peace in terms of the peacefulness of public discourse.

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Nor do the assessments of the statements as such by the regular courts indirectly show that the statements amount to a disturbance of public peace. In this regard, the Regional Court finds that the statements glossed over and downplayed the acts of violence committed by the Nazi regime. Yet, the court does not accuse the complainant of stirring aggression nor does it find that the statements amount to a denial or approval of the crimes against humanity committed by the Nazis. Rather, the court concludes that the statements provide a one-sided, euphemistic account of the Nazi

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era. It holds that by accusing contemporary records of history of collectively blaming the Germans for the Nazi crimes and of telling lies, the statements, which neither mention nor recognise the victims of the Nazi era, insinuated that the mass murder that took place in Auschwitz and in other places had not been committed in the scope recognised by history. This is not sufficient to establish that the threshold at which a statement is capable of disturbing public peace in terms of jeopardising a peaceful discourse has been reached as is the case for the glorification of violence, incitement to hatred and violence against certain segments of the population or also for an emotionalised presentation. A statement does not fall outside freedom of expression, however, solely because it fails to give adequate consideration to the commonly accepted records of history or to the victims. Freedom of expression also covers manifestly offensive, repugnant and intentionally provocative statements that are scientifically unfounded and seek to discredit the fundamental values of our society.

However, the fact that such statements are protected by the freedom of expression does not entail that their contents should be regarded as acceptable and treated with indifference in the public discourse. Instead, the free order of the Basic Law provides that such statements – which a democratic public may find difficult to tolerate – be countered, in principle, not by imposing prohibitions but by engaging in public debate. Criminal sanctions as a limit to the freedom of expression may only be imposed where the statements can no longer be considered non-violent in nature. The challenged court decisions do not contain sufficient findings in this regard.

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c) [...]

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d) The judgment of the Regional Court and its upholding by the order of the Higher Regional Court denying the appeal are based on a failure to recognise the importance and scope of the fundamental right to freedom of expression under Art. 5(1) first sentence GG. It is possible that the courts would have come to a different conclusion if they had taken the fundamental rights requirements into account.

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2. Accordingly, the judgment of the Regional Court and the order of the Higher Regional Court are reversed pursuant to § 93c(2) in conjunction with § 95(2) BVerfGG and the matter is remanded to the Regional Court for a new decision.

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Kirchhof

Masing

Paulus

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 22. Juni 2018 -
1 BvR 2083/15**

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 22. Juni 2018 - 1 BvR 2083/
15 - Rn. (1 - 34-35), [http://www.bverfg.de/e/
rs20180622_1bvr208315en.html](http://www.bverfg.de/e/rs20180622_1bvr208315en.html)

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