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Abstract

Second Chamber of the First Senate
Order of 7 July 2020
1 BvR 479/20

Headnotes (non-official):

1. The Basic Law contains no general anti-Nazi principle that would permit a ban on the dissemination of right-wing extremist or even Nazi ideas merely on the basis of the beliefs and opinions thus expressed. Rather, Article 5.1 and 5.2 of the Basic Law guarantees the freedom of opinion as freedom of thought, regardless of whether the content of an opinion is correct or dangerous.
2. Restrictions of the freedom of opinion are permissible under constitutional law where statements amount to an infringement or a specific endangerment of legal interests. This can be the case, for example, if they incite hatred against certain persons or groups and thereby violate the peacefulness of public discussion.

Summary:

I.

A TV broadcast had reported that the official gazette of a municipality in North Rhine-Westphalia was published by a publishing house whose owner also distributed publications with a right-wing extremist background through another publishing house. In light of this fact, the chairperson of a Jewish community in the region had requested that the municipality change the publisher of its official gazette. Thereupon, the applicant, who was the leader of a local branch of the party DIE RECHTE at that time, published an article on the party's website. The article contained derogatory statements on Jewish persons in general and the chairperson of the Jewish community in particular, criticised the alleged influence of Jewish organisations on German politics, and called for a general boycott of the community in question.

Because of these statements, the criminal courts convicted the applicant, who had relevant previous convictions, of incitement to hatred and insult and sentenced him to six months in prison without probation. The applicant challenged the conviction claiming that it violates his freedom of expression under Article 5.1 of the Basic Law.

II.

Based on the considerations below, the Federal Constitutional Court did not admit the constitutional complaint for decision.

The decisions rendered by the criminal courts are not objectionable under constitutional law even though they are based in part on an imprecise understanding of the exception to the requirement of a general law pursuant to Article 5.2 of the Basic Law. This exception was recognised by the Federal Constitutional Court in its Wunsiedel decision; it applies to the glorification of the Nazi reign of violence and terror (§ 130.4 of the Criminal Code). Contrary to the assumption of the Regional Court, this exception relates solely to the formal requirement that laws inhibiting the freedom of opinion must not be directed against a particular opinion (standpoint neutrality). It allows the legislator to create provisions that are not abstract but directed specifically against the glorification of

the Nazi reign of violence and terror. However, this case does not concern a criminal provision that focuses specifically on the Nazi regime, but rather the general offence of incitement of hatred as defined in § 130.1 of the Criminal Code.

Freedom of opinion prohibits state interference with an individual's beliefs; interferences with this fundamental right can only be permissible where statements no longer merely reflect inner attitudes and beliefs, and instead turn into violations of or dangers to legally protected interests. The latter is the case when statements threaten public peace, specifically the peacefulness of public debate, and thus mark the transition to aggression or a breach of the law.

However, when courts assess statements, their specific effects in the respective context must be taken into account. In this context, the particular and unique experiences of German history – especially the disenfranchisement and systematic murder of the Jewish population of Germany and Europe, which was initiated and accompanied by the targeted and systematic incitement to hatred and calls for boycotts – call for increased sensitivity in dealing with calling someone a “Jew” in a derogatory manner. In this respect, it is relevant whether the statement contains an aggression that goes beyond the limits of peacefulness. Depending on the individual case, especially if the person making the statement is aiming to instigate hatred against the Jewish population or if the statement endorses the Nazi ideology of race, it may be a form of inhuman stigmatisation of Jewish persons and, implicitly, an invitation for others to discriminate against and harass them. However, it is the expression itself and its immediate context that remains decisive, not the inner attitude or the party programme that may form the background for an expression.

In light of these standards, the challenged decisions are not objectionable under constitutional law. In particular, the courts considered the statements to amount to an incitement of hatred against the Jewish population not because of the general ideological orientation of the applicant and his party, but because of the statements themselves. The courts point out that the applicant's goal of inciting hatred against the Jewish population was made clear in particular by the use of terms used by the Nazi's anti-Semitic propaganda (“cheeky Jew”), by the positive emphasis on the “men of the Waffen-SS” and by the call to boycott the Jewish community whose chairperson was targeted by the statements. The fact that the statement was aimed at inciting hatred against the Jewish population also becomes clear due to the fact that it is embedded in an accusation of an allegedly particularly pronounced influence of Jewish organisations on German politics, which takes up the theme of an alleged “Jewish world conspiracy”. Finally, the criminal courts aptly point out that, given its militancy, the announcement that the applicant's political party wants to “reduce the influence of Jewish organisations on German politics to exactly zero in the shortest possible time” is linked to the Nazi rhetoric of extinction. Given the historical experience and reality of the attempted extinction of the Jewish population of Germany and Europe, making such a verbal statement that draws on Nazi ideology, particularly where it is directed against the Jewish population, constitutes a specific threat, carries the danger of turning the political debate into a hostile one and thus jeopardises its fundamental peacefulness. The offence of incitement under § 130.1 of the Criminal Code serves to protect from this very danger.