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The Limits of Freedom of Expression in the *Wunsiedel* Decision of the German Federal Constitutional Court

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A. Introduction

On 4 November 2009, the First Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) handed down its decision in the *Wunsiedel* case.[1] In this decision, the Court held that § 130(4) of the Criminal Code[2] does not violate the fundamental right of freedom of expression as it is protected by Article 5 of the Basic Law.[3] § 130(4) of the Criminal Code—in concordance with § 15(1) of the Assembly Act[4]—provides the legal basis for prohibiting certain National Socialist assemblies, particularly those taking place on dates and at locations with a high symbolic meaning for supporters of National Socialism. Therefore, the decision is of the highest importance for the fight against neo-Nazism and other supporters of National Socialist ideologies. Beyond this specific context, the decision has a significant impact on the doctrine of freedom of expression in general.

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[1] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 2150/08, paras. 1–110, 4 Nov. 2009, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20091104_1bvr215008.html [hereinafter *Wunsiedel*]. A press release in English is available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-129en.html.

[2] Strafgesetzbuch [StGB - Criminal Code], 15 May 1871, Reichsgesetzblatt [RGBl.] at 127, § 130(4).

[3] Grundgesetz für die Bundesrepublik Deutschland [GG - Basic Law], 23 May 1949, Bundesgesetzblatt [BGBl.] 1, *available at* http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg.html. An English version is available at https://www.btg-bestellservice.de/pdf/80201000.pdf.

[4] Gesetz über Versammlungen und Aufzüge [VersammlG - Assembly Act], 24 July 1953, Bundesgesetzblatt, Teil I [BGBl. I] at 684, § 15(1).

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B. Background and Facts of the Case

The complainant in the case was Jürgen Rieger, a lawyer with a longstanding involvement with neo-Nazi organizations and with the right-wing National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* or NPD). Starting in 2001 and continuing until 2010, Rieger annually gave advance notice of his intention to organize an open-air event in memory and honor of Rudolf Heß, a prominent political figure in Nazi Germany and temporary deputy to Adolf Hitler. The assemblies took place from 2001 to 2004 in the Bavarian city of Wunsiedel where Rudolf Heß is buried. Between approximately 1,000 and 5,000 Nazi-supporters marched through the streets of Wunsiedel, and lawyers and courts debated whether the police authorities could prohibit the assemblies.

In 2004—partly as a reaction to the Wunsiedel demonstrations—the German legislature adopted an amendment to the sedition prohibition of the Criminal Code. In its amended version, § 130(4) of the Criminal Code reads:

> Any person who, publicly or in an assembly, disturbs the public peace by approving, glorifying or justifying the National Socialist rule of violence and arbitrariness in a manner violating the dignity of the victims shall be punished with imprisonment for up to three years or a fine.

In the context of public assemblies, this provision becomes important in conjunction with § 15 of the Assembly Act, which prohibits public assemblies that endanger public safety or order. Since the anticipation of a violation of a criminal provision is recognized as a danger to public safety,[5] these provisions provide a legal basis for prohibiting certain kinds of assemblies that demonstrate support for National Socialism in a manner that is particularly offensive to the victims of Nazi-Germany.

In 2005, the announced assembly was banned on the basis that it constituted a danger to public security.[6] The lawsuits brought by the complainant were dismissed by the Administrative Court of Bayreuth,[7] the Bavarian Administrative Court[8] and the Federal Administrative Court of Germany.[9] On 6 August 2008, Rieger filed an individual complaint

[5] *Wunsiedel*, *supra* note 1, at para. 6.

[6] *Id.* at paras. 7–22.

[7] Verwaltungsgericht Bayreuth [VG – Local Administrative Court], Case No. B 1 K 05.768, 9 May 2006.

[8] Bayerischer Verwaltungsgerichtshof [BayVGH – Bavarian Administrative Court of Appeals], Case No. B 1 K 05.768, 26 Mar. 2007.

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with the Federal Constitutional Court, claiming a violation of his fundamental rights.[10] The Constitutional Court dismissed several motions for an injunction.[11] On 29 October 2009, one week before the Constitutional Court handed down its decision, the complainant died after he suffered a stroke during a NPD executive committee meeting.

C. Decision of the Constitutional Court

On 4 November 2009, the Court handed down its decision, despite the death of the complainant. The Court emphasized that a constitutional complaint generally becomes obsolete with the death of the complainant.[12] However, according to the Court, there are exceptions to this rule. In the *Wunsiedel* case, the complainant had sought redress before numerous courts without success, and the proceedings before the Constitutional Court had almost come to an end. The justices had deliberated the case and were ready to decide it. The decision was not only of interest to the complainant but was also significant because it provided clarity with regard to the expression of opinions at a potentially large number of future assemblies and public demonstrations. Therefore, the Constitutional Court once again emphasized that the function of the constitutional complaint was not only to safeguard the constitutional rights of personally affected individuals but also to provide the Court with an opportunity to preserve, interpret and develop constitutional law.

The Court held, however, that the constitutional complaint lacked merit. It held that § 130(4) of the Criminal Code was compatible with the Basic Law and that it had been applied in a constitutional manner by the Federal Administrative Court. The Court first and foremost dealt with the question of whether § 130(4) of the Criminal Code violated the fundamental right of freedom of expression under Article 5 of the Basic Law.[13] Article 5 of the Basic Law reads:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and

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[9] Bundesverwaltungsgericht [BVerwG – Federal Administrative Court], Case No. 6 C 21.07, 25 June 2008, 131 BVerfGE 216.

[10] *Wunsiedel*, *supra* note 1, at paras. 23–27. The complainant also argued a violation of his rights under the European Convention on Human Rights but the Constitutional Court found the complaint to be unsubstantiated and therefore inadmissible in this regard. *See id.* at para. 46.

[11] *See* BVerfG, Case No. 1 BvQ 34/09, 10 Aug. 2009; BVerfG Case No. 1 BvR 2102/08, 13 Aug. 2008; BVerfG, Case No. 1 BvR 2075/07, 13 Aug. 2007; BVerfG, Case No. 1 BvQ 25/06, 14 Aug. 2006; BVerfG, Case No. 1 BvQ 25/05, 16 Aug. 2005.

[12] *Wunsiedel*, *supra* note 1, at paras. 43–44.

[13] *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 360–442 (2d ed. 1997) for an overview of freedom of speech doctrine under the German Basic Law.

> pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
>
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor . . . .

The Court held that Article 5 generally protects every kind of opinion, even "worthless" opinions and opinions which can be dangerous or in conflict with the fundamental values underlying the Basic Law.[14] While the Basic Law was grounded on the expectation that the citizens accept and implement the values underlying the constitution, the Basic Law could not enforce such loyalty. The protection of Article 5 therefore also applied to opinions that aim at fundamentally changing the political order and to the dissemination of National Socialist ideas. As a result, § 130(4) of the Criminal Code interfered with the constitutionally guaranteed right to freedom of expression by making the approval, glorification, or justification of the National Socialist rule—with additional elements of crime—a punishable crime.[15]

According to the Court, however, this interference with freedom of expression was justified. Article 5(2) of the Basic Law provides for three alternative ways to justify an interference with the freedom of expression: the provisions of general laws, the provisions for the protection of young persons, and the right to personal honor. Among these alternatives, the provisions of general laws are the most relevant in constitutional practice.[16] The interpretation of the requirement of a "general law" has been subject to academic dispute since the Weimar Republic. According to one classical approach, tracing back to Kurt Häntzschel, a general law is a law that is not directed against a particular opinion (*Sonderrechtslehre*).[17] Rudolf Smend, on the other hand, has most prominently argued that the requirement of a "general law" demands balancing the freedom of expression against the legally protected interest that is pursued by interfering with the freedom of expression (*Abwägungslehre*).[18] The Constitutional Court, consistent with its

[14] *Wunsiedel*, *supra* note 1, at paras. 49–50.

[15] *Id.* at para. 51.

[16] *See, e.g.*, VOLKER EPPING, GRUNDRECHTE 105 (4th ed. 2010).

[17] Kurt Häntzschel, *Das Recht der freien Meinungsäußerung*, *in* 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 651, 661 (Gerhard Anschütz & Richard Thoma eds., 1932).

[18] RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE 98 (3d ed. 1994); Rudolf Smend, *Das Recht der freien Meinungsäußerung*, *in* 4 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 44, 52 (1928).

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previous jurisprudence,[19] does not regard the two theories as mutually exclusive. According to the Court, a general law is a law that does not prohibit an opinion or the expression of an opinion as such but a law that aims at the promotion of a legally protected interest, meaning an interest that is protected regardless of any specific opinion.[20] The interest that is pursued by the constraint on freedom of expression must generally be protected, regardless of whether it can be violated through the expression of an opinion or in a different manner. A law that explicitly prohibits the expression of an opinion must be content-neutral in order to qualify as a general law and it must be neutral with regard to different political beliefs and ideologies. The prohibited form or content of expression must potentially be attributable to different political, religious, or ideological views. Laws that aim at prohibiting a specific political or ideological form of expression are therefore not general laws in the sense of Article 5(2) of the Basic Law. The Court also draws on the principle embodied in Article 3(3) of the Basic Law that prohibits discrimination on the basis of political opinions.[21]

Measured against this standard, the Court held that § 130(4) of the Criminal Code does not qualify as a general law.[22] While the statute aims at protecting public peace—a public interest that is protected by the legal order in general—it does not pursue this protection in a content-open, general manner. To the contrary, the statute specifically prohibits the public expression of opinions that enunciate a specific attitude towards National Socialism. It does not provide protection for the victims of totalitarian regimes in general but is limited to the approval, glorification, or justification of National Socialism. The motivation of the legislature supports this view because the statute was explicitly designed as a reaction to specific utterances in the public discourse by supporters of National Socialism. § 130(4) therefore is not a neutral restriction on freedom of expression and cannot be regarded as a "general law" in the sense of Article 5(2) of the Basic Law.

Turning to the other two alternatives for a constitutional justification under Article 5(2) of the Basic Law, the Court held that neither the provisions for the protection of young persons nor the right to personal honor provide a basis for justifying the interference of § 130(4) with the freedom of expression.[23] Statutes under these two alternatives could justify an interference with the right to freedom of expression only when they were drafted in a neutral and open way and not directed at specific convictions. The Court

[19] *See* EPPING, *supra* note 16, at 103–4.

[20] *Wunsiedel*, *supra* note 1, at paras. 54–60.

[21] *See* GG, 23 May 1949, BGBl. Art. 3(3) ("No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.")

[22] *Wunsiedel*, *supra* note 1, at para. 61.

[23] *Id.* at paras. 62–63.

thereby extends the scope of application of the generality requirement to all three alternatives for a justification under Article 5(2) of the Basic Law.

Nevertheless, although the three written grounds for justification of an interference with the right to freedom of expression did not provide a constitutional basis for § 130(4) of the Criminal Code, the Court found that the statute was compatible with Article 5 of the Basic Law even though it was not a "general law."[24] The Court held that Article 5(1) and 5(2) of the Basic Law encompassed an inherent exception to the general law requirement due to the historical dimension of injustice and horror that the National Socialist rule brought over Europe and large parts of the world. Therefore, the generality requirement would not apply to provisions that aim at preventing propagandistic affirmations of the violent and arbitrary National Socialist rule between 1933 and 1945. The Basic Law and the constitutional order of the Federal Republic of Germany had to be understood, to a large extent, as a reaction to the totalitarian regime of National Socialism. The rejection of this regime was among the determining factors in the development of the German constitutional order, the design of the Basic Law, and the integration of Germany in Europe and in the international community. Against this background, the propagandistic affirmation of the violent and arbitrary National Socialist rule would have effects beyond the general battle of opinions and could not be captured by the general limitations of freedom of expression. The affirmation of the National Socialist regime constituted an attack on the identity of the German community and could evoke profound concerns abroad. Article 5(2) of the Basic Law would not attempt to prohibit the specific regulation of this exceptional historical constellation so that the generality requirement would not apply.

However, this would not mean that the Basic Law encompassed a general anti-National Socialist principle that would allow for the categorical prohibition of right-wing extremist or National Socialist opinions.[25] On the contrary, the Basic Law relied on the force of public deliberation and granted freedom of expression also to the enemies of freedom. Other provisions of the Basic Law reflected the general principle that the constitutional limits of public political discourse are not exceeded by the dissemination of anti-constitutional ideas but only by the active and aggressive attitude against the free and democratic basic order.[26] As a result, Article 5 of the Basic Law would allow the state to interfere with the freedom of expression only when the expression of an opinion goes beyond the intellectual sphere and turns into a danger to legally protected interests.

[24] *Id.* at paras. 64–68.

[25] *Id.* at para. 67.

[26] *See* GG, 23 May 1949, BGBl. Arts. 9(2), 18, 21(2).

Furthermore, the Court held that § 130(4) of the Criminal Code meets the requirements of the constitutional principle of proportionality. Under the proportionality principle, any interference with fundamental rights has to serve a legitimate purpose and has to be suitable, necessary and appropriate as a means to that end.[27] In the context of freedom of expression, the state's intention to prevent statements with detrimental or harmful content does not constitute a legitimate objective.[28] On the other hand, it would be constitutionally permitted to interfere with the freedom of expression when the expression of an opinion threatens to violate legally protected interests of an individual or the general public.[29] The state may restrict the external effects of the expression of an opinion, but it may not interfere with the subjective and intellectual belief and ethos of the individual.[30]

As a result, the Court recognized that the protection of public peace constitutes a ground that can justify an interference with the freedom of expression.[31] But the requirement of a "disturbance of public peace" in § 130(4) of the Criminal Code had to be interpreted in light of the freedom of expression. Against this background, it would not be justified to prohibit the expression of opinions only because they might disturb or trouble other people. The freedom of expression would not allow interferences merely to ensure the "peacefulness" of the public discourse or to prevent a "poisoning of the intellectual climate."[32] Interferences with the freedom of expression to prevent a "disturbance of public peace" would only be constitutional when the expression of opinions passed the threshold to aggression or a breach of law.[33] Against this background, § 130(4) of the Criminal Code prohibits approving, glorifying or justifying the National Socialist rule of violence and arbitrariness because the expression of such an attitude is understood as an act of aggression and as an attack against those who once again find their personal value and rights called into question.[34] In light of the historical realities, the expression of such an attitude constitutes more than just a confrontation with an ideology hostile to democracy and freedom. § 130(4) of the Criminal Code is suitable, necessary and proportionate to prevent disturbances of public peace. As a result, the Constitutional

[27] *See, e.g.*, 109 BVerfGE 279, 335; 115 BVerfGE 320, 345.

[28] *Wunsiedel*, *supra* note 1, at paras. 71–72.

[29] *Id.* at para. 74.

[30] *Id.*

[31] *Id.* at paras. 76–79.

[32] *Id.* at paras. 77.

[33] *Id.* at paras. 78.

[34] *Id.* at paras. 81.

Court did not find a violation of the complainant's right to freedom of expression and dismissed the constitutional complaint as unfounded.[35]

D. Assessment of the Decision

Right-wing extremist National Socialist ideologists and their followers pose a difficult challenge for an open society that is based on the principles of democracy, freedom and fundamental rights. Political and legal institutions continually struggle with the insights embodied in the two truisms that a democracy must often fight with one hand tied behind its back and that a constitution is not a suicide pact.[36] Within the German constitutional order, the former insight is embodied in the concept of fundamental rights which, as a matter of principle, also protect groups and individuals that strive for the abolishment of the constitutional order. The latter idea is embodied in the concept of militant democracy, the idea that a constitutional order must be able to defend itself against its enemies.[37] The *Wunsiedel* decision of the Federal Constitutional Court reflects the conflict between these antagonistic principles. On the one hand, the Court was careful not to generally exclude National Socialist opinions from the scope of fundamental rights protection and from the freedom of expression in particular. It explicitly did not stipulate a general anti-National Socialist principle under constitutional law. On the other hand, it emphasized the Basic Law's particular historical context and recognized the exceptional character of National Socialist propaganda. In trying to strike an appropriate balance, the Court raised a number of significant issues that have to be assessed not only with regard to their effect on the doctrine of freedom of expression but also with regard to their policy implications.

I. Freedom of Expression and Anti-Constitutional Opinions: A Liberal Starting Point

From the perspective of American constitutionalism, the standard of protection under Article 5 of the Basic Law is significantly lower than under the First Amendment to the U.S. Constitution.[38] Nevertheless, even scholars of comparative constitutional law have

[35] The Court further held that § 130(4) of the Criminal Code did not violate Article 3(3) of the Basic Law which prohibits discrimination on the basis of political opinions. It also found no violation of Article 103(2) of the Basic Law which demands that criminal convictions have to be based on a concrete statutory prohibition. Finally, it held that the application of § 130(4) of the Criminal Code in the concrete case did not raise any doubts with regard to its constitutionality. *Id.* at paras. 86–110.

[36] *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (discussing the truism that a constitution is not a suicide pact).

[37] *See* Markus Thiel, *Germany, in* THE "MILITANT DEMOCRACY" PRINCIPLE IN MODERN DEMOCRACIES 109 (Markus Thiel ed., 2009). For an early elaboration of the concept of militant democracy, see also KARL LOEWENSTEIN, VERFASSUNGSLEHRE 348–357 (2d ed. 1969); Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638 (1937).

[38] *See* Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 49 (Georg Nolte ed., 2005)

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difficulty evaluating precisely how high the level of protection in the German constitutional order is. While Donald Kommers comes to the conclusion that the protection of free speech is among the highest values of the Basic Law,[39] Ronald Krotoszynski highlights the manifold limitations that apply to freedom of speech in Germany.[40] The concept of freedom of speech in the German constitutional order is complex and does not allow for easy characterizations or comparisons. This is equally true for the *Wunsiedel* decision of the Federal Constitutional Court. At first glance, the decision seems to reflect a rather restrictive approach to freedom of expression. The Court, after all, affirms the power of the legislature to prohibit and penalize the expression of a certain National Socialist ideology, at least under certain circumstances. Nevertheless, the decision also encompasses a decisive commitment to a broad understanding of the freedom of expression.

First, the Court emphasizes the generally broad scope of application of the freedom of expression.[41] It explicitly recognizes that even opinions—like the dissemination of National Socialist ideology—which challenge the values of the German constitutional order and aim at fundamentally changing the political order of the Federal Republic of Germany are not categorically excluded from constitutional protection under Article 5 of the Basic Law. The Court thereby rightly rejects approaches that try to limit the scope of protection from the outset by excluding anti-constitutional opinions. It is therefore a misconception when Krotoszynski concludes that "speech which has as its aim the destruction of democratic self-government enjoys absolutely no constitutional protection under the Basic Law."[42] To the contrary, even speech that is deemed "worthless" or that explicitly aims at overthrowing the constitutional order is generally protected under the Basic Law. This does not mean that the state cannot regulate or restrict anti-constitutional speech, but rather that every attempt of the state to regulate or restrict this kind of speech has to be constitutionally justified and is itself restricted by the principle of proportionality.

Second, the Court's approach with regard to the limits of free speech that are enumerated in Article 5(2) of the Basic Law shows that the Court takes text and doctrine seriously. The Court unambiguously rejects the claim that § 130(4) of the Criminal Code could be

(comparing American and European approaches to freedom of expression); GEORG NOLTE, BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE (Springer 1992) (comparing the different treatment of defamation laws).

[39] KOMMERS, *supra* note 13, at 360.

[40] Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004).

[41] *Wunsiedel*, *supra* note 1, at paras. 49–50; *see also* Lothar Michael, *Die wehrhafte Demokratie als verfassungsimmanente Schranke der Meinungsfreiheit*, 3 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM 155, 157 (2010) (appraising the broad approach of the Court).

[42] Krotoszynski, *supra* note 40, at 1554.

understood as a "general law" in the sense of Article 5(2) of the Basic Law. This determination has to be welcomed in light of the well-established jurisprudence of the Court that a "general law" has to be a law that does not prohibit an opinion or the expression of an opinion as such.[43] § 130(4) on its face does not meet the neutrality requirement embodied in this doctrine. As the Court points out, the provision does not protect victims of totalitarian regimes alike but is specifically limited to appraisals of the National Socialist regime. The Constitutional Court therefore rightly rejects the holding of the Federal Administrative Court, which characterized § 130(4) as a "general law" because it aimed at protecting "public peace," a legal interest that was protected by the German legal order not only against violations through the expression of opinions but against violations in general.[44] This approach of the Federal Administrative Court ignores the fact that § 130(4) as the "law" in question does not generally prohibit violations of the public peace but only violations that are caused by expressions with a specific right-wing, National Socialist content.

Third, the Constitutional Court is to be praised for not circumventing the generality requirement through applying the other alternatives that Article 5(2) of the Basic Law offers as justifications for an interference with freedom of expression.[45] One can argue that the prohibition of National Socialist appraisals and glorification could be based on the "right to personal honor" that is codified as a ground for restricting freedom of expression in Article 5(2) of the Basic Law. Also, the text of Article 5(2) suggests that the generality requirement does not apply to this ground for justification. Grammatically it refers only to the first alternative of Article 5(2)—the general laws—and not to "the right to personal honor." The Court understands the generality requirement as a prohibition against discriminating between specific opinions and political ideologies and draws a parallel to Article 3(3) of the Basic Law that prohibits discrimination on the basis of political opinions. Against this background, and notwithstanding legitimate doctrinal skepticism,[46] it is only consistent to apply the generality requirement to all forms of justification that Article 5(2) of the Basic Law opens for restricting freedom of expression.

II. The Constitutionally Inherent Exception to Freedom of Expression

These general observations of the Court's reasoning reflect and confirm a generally broad and open approach to freedom of expression as a constitutional right. However, they are

[43] *See* Christoph Degenhart, *Anmerkung*, 65 JURISTENZEITUNG 306, 310 (Mar. 2010).

[44] BVerwG, Case No. 6 C 21.07, 25 June 2008, 131 BVerwGE 216.

[45] *See* Jan Philipp Schaefer, *Wie viel Freiheit für die Gegner der Freiheit? Zum Wunsiedel-Beschluss des Bundesverfassungsgerichts*, 9 DIE ÖFFENTLICHE VERWALTUNG 379, 384–386 (2010) (providing a critical view).

[46] *See, e.g.*, Roman Herzog, *Article 5(2)*, *in* KOMMENTAR ZUM GRUNDGESETZ para. 245 (Theodor Maunz & Günther Dürig eds., 1973).

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rather harshly contrasted by the Court's holding that the freedom of expression guaranteed by Article 5 of the Basic Law encompasses an inherent exception for propagandistic affirmations and glorifications of the violent and arbitrary National Socialist rule. The acknowledgement of such an exception is not only doctrinally illogical, but also difficult to apply in practice, and therefore problematic from the perspective of a liberal approach to fundamental rights.

The *Wunsiedel* decision has to be evaluated within the context of a long-lasting struggle between the Constitutional Court and some administrative courts about the question of whether assemblies and demonstrations of neo-Nazis can be prohibited in a constitutional manner. Most prominent is the judicial exchange of blows that have taken place between the Federal Constitutional Court and the Higher Administrative Court of Münster (*Oberverwaltungsgericht*) since 2001. The Higher Administrative Court has repeatedly held that the right to assemble is limited by the violation of "public order" and therefore allowed for the prohibition of Nazi-assemblies and manifestations.[47] Conversely, the Constitutional Court has continually denied that there is a constitutionally inherent constraint on right-wing extremist speech.[48]

In the *Wunsiedel* decision, the Constitutional Court again explicitly refuses to accept the existence of a general anti-National Socialist principle within the Basic Law. It acknowledges, on the other hand, an inherent exception in Article 5 of the Basic Law with regard to the propagandistic affirmation of the National Socialist rule. From a doctrinal or methodological perspective, this holding is problematic. The Court is certainly right that the Basic Law has to be understood as a counter-approach to the totalitarian National Socialist regime.[49] However, it is far from clear how this historical and conceptual insight might entail concrete legal consequences.[50] The Basic Law is a counter-approach to Nazi-Germany primarily through its written provisions. The pivotal importance of human dignity in Article 1 of the Basic Law, the fundamental rights provisions in general, the structure of the democratic process and institutions as envisioned by the Basic Law— all of these provisions are evidence of an intentional rejection of the totalitarian regime and of an affirmation of fundamental values such as democracy, the rule of law and constitutional rights. These provisions may and should be interpreted in light of this historical context. However, it is doctrinally unsatisfactory to simply assert that this historical context

[47] *See, e.g.*, Oberverwaltungsgericht Nordrhein-Westfalen [OVG NRW] [North Rhine-Westphalia Administrative Court of Appeals], *Neue Juristische Wochenschrift* [NJW] 90 (2004); OVG NRW, NJW 2814 (2004); OVG NRW, NJW 1577 (2003); OVG NRW, NJW 2111 (2001); OVG NRW, NJW 2113 (2001); OVG NRW, NJW 2114 (2001).

[48] *See, e.g.*, BVerfG, Case No. 1 BvQ 19/04, 23 June 2004, 111 BVerfGE 147, 157.

[49] *See, e.g.*, Hans Dieter Jarass & Bodo Pieroth, *Article 139*, *in* KOMMENTAR ZUM GRUNDGESETZ para. 1 (Hans Dieter Jarass & Bodo Pieroth eds., 10th ed. 2009).

[50] *See* Degenhart, *supra* note 43, at 309.

immediately translates into a concrete and inherent constitutional exception within one provision of the Basic Law. It is unclear to what extent this exception can justify interferences with fundamental rights.[51] The Court's holding also raises the question of why the exception should only apply to Article 5 of the Basic Law and not to other provisions. If the historical context is able to override a textual and doctrinal interpretation of Article 5, why should it not also be able to override or influence the interpretation of other constitutional provisions? Based on the reasoning of the Court, it seems as if there actually was a general anti-National Socialist principle within the Basic Law. Although the Court explicitly rejects this assumption, it is not clear how exactly the Constitutional Court's approach is different from the approach taken by the Higher Administrative Court of Münster.[52]

However, even if one accepted that the historical context could have the effect of overriding the text and doctrine of a constitutional provision, the Court's holding is assailable with regard to its substance. While it is true that the Basic Law has to be understood as a rejection of National Socialism, it is also a rejection of other competing ideologies and has to be considered in the context of the rise of communism in Eastern Germany.[53] And even if one regards the rejection of National Socialism as the predominant theme of the Basic Law, it does not necessarily follow that the expression of National Socialist ideologies should be easier to restrict. In light of the violent suppression of political opposition and freedom of expression under the National Socialist regime between 1933 and 1945, one might also argue that the Basic Law embraces a strong liberal ideal that allows the free expression of all kinds of political ideologies alike. Viewing the Basic Law as a rejection of National Socialism therefore allows one to argue in favor of, as well as against, a stronger restriction of National Socialist freedom of expression.

Beyond this doctrinal illogicality, the approach of the Constitutional Court exhibits significant shortcomings with regard to its practical applicability. The Constitutional Court tries to draw a line between constitutionally legitimate and illegitimate interferences with the freedom of expression. While it is unconstitutional to prohibit or prevent statements that contain detrimental or harmful content, it is constitutional to interfere with freedom of expression to prevent the violation of legally protected interests and to protect public peace.[54] The Court tries to distinguish mere nuisances, such as the poisoning of the intellectual climate, from concrete violations of legally protected interests. This distinction is intangible and does not allow for a definite ascertainment with regard to the

[51] *See* Schaefer, *supra* note 45, at 386–387.

[52] *See* Uwe Volkmann, *Die Geistesfreiheit und der Ungeist – Der Wunsiedel-Beschluss des BVerfG*, NEUE JURISTISCHE WOCHENSCHRIFT 417, 419 (2010) (expressing similar doubts).

[53] *See* Schaefer, *supra* note 45, at 386.

[54] *Wunsiedel*, *supra* note 1, at paras. 72–73.

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constitutionality of restricting National Socialist assemblies and manifestations. The criteria developed by the Court are rather vague and abstract. When exactly does the expression of an opinion go beyond the intellectual sphere and turn into a danger for legally protected interests? When exactly does the expression of a National Socialist opinion only disturb or trouble other people, and when does it pass the threshold to a disturbance of public peace, to aggression or to a breach of law? Doesn't every manifestation of support for National Socialism constitute an attack against those who once again find their personal value and their rights called into question? Turning to the text of § 130(4) of the Criminal Code, when does a general ideological support for National Socialism turn into "approving, glorifying or justifying the National Socialist rule of violence and arbitrariness?" Already on a high level of abstraction, these criteria do not allow for a clear distinction between constitutional and unconstitutional limitations of freedom of expression. It will be even more difficult to draw this distinction in the practical application of these criteria to concrete cases.[55]

The case at hand illustrates this uncertainty. The annual assembly of neo-Nazis in Wunsiedel in honor of Rudolf Heß might disturb and trouble other people as well as foreign countries. However, the Court has difficulties describing what exactly distinguishes this neo-Nazi assembly from other neo-Nazi assemblies, and what exactly causes the Wunsiedel assemblies to pass the threshold to a disturbance of public peace.[56] On the basis of the *Wunsiedel* decision, it is difficult to determine which neo-Nazi assemblies can be prohibited and which must be tolerated. It is therefore easy to predict that administrative agencies and administrative courts will apply the *Wunsiedel* standards in divergent ways, making further clarifications by the Federal Constitutional Court necessary.

E. Conclusion

There are no easy answers to the question of how a liberal democracy should deal with anti-constitutional speech and the expression of National Socialist opinions. Within Germany, manifestations of support for the National Socialist regime raise particular concerns and regularly lead to public demands for a general prohibition. Provisions such as § 130(4) of the Criminal Code and the continuing call for a prohibition of the right-wing National Democratic Party are intuitively understandable, but they are based on the misconception that anti-constitutional ideologies can effectively be curtailed with the repressive instruments of the state.

The *Wunsiedel* decision unfortunately fuels and legitimizes this belief. The Constitutional Court is noticeably concerned with finding a compromise between the liberal ideal of a constitution that tolerates and protects even anti-constitutional speech and the Basic

[55] *See* Degenhart, *supra* note 43, at 310; Volkmann, *supra* note 52, at 419–420.

[56] *See* Volkmann, *supra* note 52, at 420.

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Law's recognizable rejection of the National Socialist ideology. This compromise is doctrinally unsatisfactory. The Court does not develop the inherent anti-National Socialist exception to Article 5 of the Basic Law in a doctrinally convincing way. Nor does the Court succeed in developing general criteria which would allow for a clear distinction between those National Socialist assemblies that can be constitutionally prohibited and those manifestations that have to be tolerated. Administrative courts should therefore apply the *Wunsiedel* standards in a restrictive way and take into consideration the liberal pledge of Article 5 of the Basic Law.

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