

Freedom of Expression in the Federal Republic of Germany

OLIVIER JOUANJAN*

Article 5 of the German Basic Law forms a whole jurisprudential concept; however, it is a complex and differentiated concept.¹ The general aim of Article 5 is to guarantee a set of “communicational” rights that lay the groundwork for the democratic process. The first section protects several distinct liberties: free expression and diffusion of one’s opinion by spoken words; freedom of opinion (written words and images); freedom of access to public information; freedom of the press; freedom of audiovisual broadcasting; and freedom of cinema. The last sentence of the section—“there shall be no censorship”—does not articulate a fundamental right, but rather a “restriction on restrictions” (*Schranken-Schranke*). Whatever the ends or methods, censorship is a prohibited restriction on the exercise of these liberties.

* Member of L’Institut universitaire de France; Professor at the University of Strasbourg (France) and at the Albert-Ludwig University of Freiburg-im-Breisgau (Germany). This Article was originally written in French and delivered as a conference paper at a symposium held by the Center for American Law of the University of Paris II (Panthéon-Assas) on January 18–19, 2008. For the French version of this Article, see Olivier Jouanjan, *La liberté d’expression en République fédérale d’Allemagne*, in *LA LIBERTÉ D’EXPRESSION AUX ÉTATS-UNIS ET EN EUROPE* 137 (Élisabeth Zoller ed., 2008). Many thanks to Erin A. Sipe, B.A. Franklin & Marshall College, M.A. Indiana University — Bloomington, for her translation and to Vicky Voueli for her revision. To avoid the proliferation of footnotes, I have provided a brief bibliography here and I will not refer again to these general studies in subsequent notes. It should be noted, however, that they constituted the primary sources of information necessary to the composition of this contribution. Credit is also due to the extraordinarily precious Internet resource, which includes research about the rulings of the German Federal Constitutional Court, now organized in the Web site constructed by Professor Tschentscher of the Université de Bern. *See generally* Projektinformationen, <http://www.verfassungsrecht.ch>.

Bibliography: *See generally* CHRISTIAN BUMKE & ANDREAS VOBKUHLE, *CASEBOOK VERFASSUNGSRECHT* (5th ed. 2008); BODO PIEROTH & BERNHARD SCHLINK, *GRUNDRECHTE* (22d ed. 2006); INGO VON MÜNCH, *STAATSRECHT II* (5th ed. 2002); Roman Herzog, *Artikel 5*, in 1 *GRUNDGESETZ KOMMENTAR* art. 5, §§ 1–2 (Theodor Maunz & Günter Dürig eds., 52d ed. 2008); Edzard Schmidt-Jortzig, *Meinungs-und Informationsfreiheit*, in 6 *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 635, 635–66 (Josef Isensee & Paul Kirchof eds., 2d ed. 2001); Helmuth Schulze-Fielitz, *Artikel 5*, in 1 *GRUNDGESETZ KOMMENTAR*, art. 5, §§ 1–2 (Horst Dreier ed., 5th ed. 2005); Christian Starck, *Artikel 5*, in 1 *DAS BONNER GRUNDGESETZ KOMMENTAR*, art. 5, §§ 1–2 (Christian Starck ed., 4th ed. 1999); Rudolf Wendt, *Artikel 5*, in 1 *GRUNDGESETZ KOMMENTAR*, art. 5 (Ingo von Münch & Philip Kunig eds., 5th ed. 2000).

1. It is useful to cite Article 5 in full:

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and 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 honour.
- (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 5 (F.R.G.).

Section 3 supplements these basic rights with the freedom of art and science. These two additional rights differ from those of the first section as much by their content as by their practice. On this last point, it is noteworthy that in 1971, the Federal Constitutional Court ruled in the famous *Mephisto* decision that the language of Article 5, Section 2, which provides that “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 honour,” applies to the rights guaranteed in the first section, but not to the rights in Section 3.² Those rights are guaranteed without reservation of law. Freedom of art and freedom of science (including both freedom of research and freedom of instruction) are not simply particular cases of the larger right to the freedom of opinion. Rather, they are distinct and specific guarantees.³

Thus, one could find in Article 5 seven specific rights organized into two distinct constitutional practices: qualified reservation of law on the one hand, and absence of reservation on the other hand. Nevertheless, it is still true that these seven rights work together to guarantee the conditions of a democratic practice of communication. They protect not only purely political or social commentary, which are essential to public debate, but also private content or simple entertainment.⁴

Although these rights form a whole concept, this Article will adopt a more limited scope. It will focus only on the restrictions of the ability to express and disseminate thought content. Therefore, it will set aside problems related to the freedom of access to information. Likewise, this Article will not address the more technical questions related to the quality of the medium in question (audiovisual, press, cinema, Internet) or the environment of dissemination (institutions of research and instruction). Instead, it will address the protection of the very act of expression and dissemination of ideas, regardless of the medium or institutional environment. In so doing, the acts of expression and dissemination may, as a function of the concrete conditions around them, find protection in one of two sources: the first section’s general guarantee of freedom of opinion or in a special guarantee of freedom in artistic expression that must be understood (in relation to the freedom of opinion in the first section) as a *lex specialis*. For example, it is clear that the freedoms of the press and of art include, as one of their substantial elements, the protection of the freedom of opinion. Moreover, a press organization may, by way of the special freedom that protects it, invoke the general freedom of opinion of a third party whose words it publishes, even if it comes in the form of an advertisement.⁵ Furthermore, outside of this subjective function to protect individuals from the public authorities, the basic rights have an objective function. The principal objective function is the “effect of extended influence,” which demands that any individual disposing of power of decision—and notably the courts of

2. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (191) (F.R.G.) (*Mephisto* decision).

3. See *id.*

4. As discussed later in this Article, opinions that contribute to a controversy of general interest benefit from reinforced protection. See *infra* text accompanying note 18.

5. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 102 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 347 (359) (F.R.G.) (stating the “shock advertising” decision regarding the famous and controversial Benetton advertisements).

law—should account for and give full effect to the basic rights in the ordinary interpretation of the law.⁶

Finally, like all of the “communicational rights” of Article 5, the general freedom of expression is a right of all people, not just German citizens. It is one of the principal modifications to the earlier Article 118 of the Weimar Constitution, which only formally recognized rights for “Germans.”⁷ All beneficiaries of fundamental rights are equally protected, whether they are German or foreign citizens. But legal persons of public law are not protected by the whole of these communicational liberties. They are not (in principle) titleholders of fundamental rights, with a few exceptions. For example, the same section of Article 5 provides public establishments in the audiovisual sector the same protection as private operators regarding the protection of the freedom of audiovisual broadcasting.⁸ Moreover, the higher education establishments can assert the liberties of science and research.⁹

Therefore, without attempting to address all of the problems posed by a general dogmatism of “freedom of expression,” this Article will address more precisely the questions linked to the determination of the actual scope of application of the freedom of opinion as described above. Part I will delineate the protected domain of this basic right. Part II will then examine the justification of the restrictions placed on the freedom of expression. It will examine not only cases in which “freedom of opinion” was applied, but also those invoking other guaranteed liberties in the first and third sections of Article 5. Many of these cases concern the problem of expression and dissemination of messages, to the exclusion of other concrete problems likely to arise in the practical application of the communicational rights.

I. THE DOMAIN PROTECTED BY THE FREEDOM OF OPINION

A. *The Notion of Opinion*

The first sentence of Article 5, Section 1 guarantees the freedom to express and disseminate one’s opinion through speech, writing, and images. At first glance, the notion of “opinion” circumscribes the domain protected by this basic right. The basic right of Section 1 also protects expression and dissemination of opinions. An opinion differs from a declaration of fact in the extent to which it includes a value judgment.¹⁰

6. Like all basic rights, the liberties of Article 5 are *prima facie* subjective, but the provisions also contain objective norms that extend into the entire legal order. This “objective function” of the basic rights has been considered a decisive element, as affirmed by the famous *Lüth* decision. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (205) (F.R.G.).

7. REICH UND LÄNDER 512 (Hans Boldt ed., 1987) (providing the historical text of Article 118).

8. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 27, 1971, 31 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 314 (321) (F.R.G.).

9. See generally Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1973, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 79 (F.R.G.).

10. The distinction between opinion and fact is equally important in the jurisprudence of the European Court of Human Rights. See *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 20 (1986).

“In contrast to declarations of fact (*Tatsachenbehauptungen*), opinions are characterized by a subjective point of view adopted by the one who expresses it regarding the thing expressed. Opinions contain a judgment of facts, ideas, or persons.”¹¹ At first blush, this distinction between opinion and declaration of fact defines the scope of practical application of the freedom of opinion: it is sometimes argued that the pure judgment of fact falls outside of the protection offered by Article 5, Section 1.¹² In truth, the distinction is complex. On the whole, the distinction of fact and value does not allow for a clear delimitation of the domain of freedom of opinion.

Very early on, referring to the Weimar doctrine,¹³ the Federal Constitutional Court judged that the protection of Article 5, Section 1 relates “in the first place” to the “adoption of a position of the speaker who expresses himself in a judgment of value, by which he wishes to act on others.”¹⁴

Value judgments—that is, “evaluations of facts, behaviors, and situations”—are therefore the prerogatives protected first and foremost by the freedom of expression:

Such a value judgment is necessarily subjective. The question of knowing whether that judgment is “right” or “wrong,” if it is rationally or emotionally founded does not play a decisive role The protection offered by Article 5, Section 1 could not exclude the expression of such opinions only on the basis that this right exclusively protects opinions “of value,” that is, opinions that have a certain ethical quality.¹⁵

Opinions “without value” are therefore just as much protected as opinions “of value”: it is not up to the state, at least in principle, to evaluate opinions because it must observe relative neutrality.¹⁶ Likewise, an opinion vehemently expressed, which may be hurtful to others, does not escape the protection of Article 5, Section 1. The art critic’s statements expressing his or her contempt for the positions defended by a professor of

11. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (289) (F.R.G.) (“Soldiers are Murderers” decision).

12. See Stefan Huster, *Das Verbot der “Auschwitzlüge,” die Meinungsfreiheit und das Bundesverfassungsgericht*, 49 NEUE JURISTISCHE WOCHENSCHRIFT 487, 487–91 (1996).

13. See Kurt Häntzschel, *Das Recht der freien Meinungsäußerung*, in 1 HANDBUCH DES DEUTSCHEN STAATSRECHTS, 651, 654–75 (Gerhard Anschütz & Richard Thoma eds., 1932).

14. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (210) (F.R.G.) (discussing call to boycott a film by the director of *Juif Süß*); see also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1982, 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (8) (F.R.G.) (providing a statement by a candidate in the election to European Parliament that the “CSU [Christian Social Union] is the NPD [German National Democratic Party] of Europe”).

15. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 14, 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (14) (F.R.G.) (regarding the letter of a prisoner that contained violent critiques of the personnel and the management of the penitentiary, which falls under the protection of freedom of expression).

16. “Relative” because democracy is itself a value that the state undertakes to defend in accordance with the principle of the “militant democracy” (*streitbare Demokratie*). The state is therefore not a completely neutral authority from an axiological perspective.

fine arts, calling him a “provincial demagogue,” “narrow-minded teacher,” and “dialectic garden gnome” fall under the protection of freedom of expression. The only question is whether they go beyond the limits placed on that freedom in order to protect personal honor. In other words, such statements do not pose a problem for the scope of practical application in the domain of protection. But they do test the limits of that freedom and the justified restrictions on the exercise of that right.¹⁷

Thus, the notion of opinion must be understood in its broadest sense. Banal or uninteresting opinions, like opinions crudely or vehemently expressed, are not excluded, or treated as relative. They are apparently as worthy of protection as those which help to feed democratic debate, that is, publicly expressed opinions regarding public affairs and social issues, which feed the “controversy of general interest.” Likewise, private opinions, of particular or individual significance and without value for the community, also enjoy protection. As the Federal Constitutional Court puts it: the freedom of opinion is a fundamental element of the democratic process and consequently constitutes a right of democratic society; but it is also guaranteed in a purely individual interest, inasmuch as this right contributes to the personal development of the individual considered, even in his or her purely private dimension.¹⁸

B. The Problem of the Protection of Declarations of Fact

Does the simple statement of a fact then escape all protection to the extent that Article 5 expressly targets only the expression of opinions? The question was asked in the most searing way with respect to the dissemination of revisionist theses relative to the Shoah (Holocaust). The important *Auschwitzlüge* (Holocaust Denial) decision of April 13, 1994 responded:

In the strict sense, declarations of fact are not the expression of opinions. Unlike in the latter, the objective relationship between statement and reality is in the foreground. For this reason, they are subject to be verified as to the truth of their content. However, declarations of fact do not fall purely and simply outside of the scope of protection by Article 5, Section 1, Sentence 1. Because opinions generally rest on factual hypotheses or relate to factual situations, these declarations of fact are in any case protected to the extent that they are a condition of formation of the opinions guaranteed by Article 5, Section 1 in its entirety.¹⁹

Consequently, unlike statements of opinion, statements of fact enjoy protection only to the extent that such statements promote the formation of opinions. Indeed, according to the court, “the protection of declarations of fact ceases the moment that they are not in

17. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 129 (135) (F.R.G.) (“Art Criticism” decision).

18. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 82 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 272 (281) (F.R.G.).

19. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 19, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (247) (F.R.G.); see also Michel Fromont & Olivier Jouanjan, *République Fédérale D’Allemagne* [Federal Republic of Germany], 10 ANNUAIRE INT’L DE JUST. CONSTITUTIONNELLE, 743, 744–58 (1994) (Fr.).

a position to contribute to the formation of an opinion. From this point of view, false information is not an item worthy of being protected.²⁰ Assertions of fact whose falsehood is recognized at the moment that they are expressed do not benefit from the protection of Article 5.²¹

The court adds that the truth requirement should not be placed so high as to impair the function served by freedom of opinion by discouraging speakers from expressing certain *lawful* remarks out of fear of sanctions.²² Here, the complexity of applying this rule in practice is obvious. It is necessary, however, to go a step further to understand the application of this rule:

The distinction between the expression of an opinion and the affirmation of a fact may be truly difficult to make, to the extent that both are often found mutually interconnected to form the meaning of a statement. One can only, in that case, legitimately separate the elements of fact and the elements of evaluation if, in so doing, the meaning of the statement does not become falsified. When such an operation is not possible, in the interest of an effective protection of basic rights, the statement should be considered, on the whole, an expression of an opinion, for in the opposite case, one would greatly risk substantially reducing the protection of the right to freedom of expression.²³

Moreover, the form of the statement may itself convey an opinion. Likewise, an opinion in the form of a question can also constitute a statement protected by freedom of opinion. Recognizing the opinion thus proves to be a difficult task because of the absence of superimposition or purely homothetic relationship between the syntactic and semantic dimensions of the statements.

The revision of the Shoah is a statement of fact of demonstrated falsehood. The statement cannot therefore contribute to the formation of opinions: it does not enter into the scope of application of Article 5, Section 1 and it is not protected by it.²⁴ The court was careful to distinguish the different conclusion it reached in an earlier decision regarding the statement that Germany was not responsible for the triggering of the Second World War.²⁵ Since the statement had to do with attributing fault or

20. See BVerfG Apr. 19, 1994, 90 BVerfGE 241.

21. On the other hand, statements of fact linked to an opinion (*Meinungsbezug*) are protected if their falsehood is subsequently revealed. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998, 99 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 185 (197) (F.R.G.).

22. See *id.*; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 9, 1991, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (22) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1982, 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (8) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 208 (220) (F.R.G.).

23. BVerfG Apr. 19, 1994, 90 BVerfGE 241 (248).

24. Revisionism constitutes a penal infraction specifically provided for in section 130 of the German penal code.

25. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 11, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.) (discussing a statement protected by Article 5); see also Fromont & Jouanjan, *supra* note 19, at 746.

responsibility, complex historical assessments of an evaluative nature were necessarily involved. Thus, the statement could be classified as an opinion. The great difficulty of distinguishing between opinions and statements of fact is obvious and the latter, notably useful for reporting historic events, are rarely pure of any evaluation.

C. Additional Remarks

To conclude this discussion of the problems related to the definition of the domain protected by freedom of opinion, it is useful to mention three points.

First, the mode of expression of an opinion is hardly important. Article 5, Section 1 mentions speech, writing, and images, but these are only examples and not a complete list of protected methods of expression. Article 118 of the Weimar Constitution expressed it more clearly: after having listed “spoken word,” “written word,” “printed word,” and “image,” it added “or in any other form.”

Second, the Federal Constitutional Court makes another perilous distinction: although freedom of opinion protects those who use speech, writings, or images to feed public opinion, it does not protect those who use these media to put pressure on others. Thus, the day after the construction of the Berlin Wall, an influential press group addressed a letter to newspaper sellers in which it called for the boycott of stations that broadcasted and distributed East German television programs, on the grounds that such programs were nothing but a form of propaganda against Western democracy. Because the letter was intended to sway people dependent upon this press group, and because of the notably commercial goal of eliminating smaller competitors, the court denied the protection of freedom of opinion to that letter, even if, as the *Lüth* affair shows, the call to boycott is not in principle excluded from the scope of Article 5. This decision is unique and introduces into the doctrine of freedom of opinion an additional level of complexity in the form of a subtle and particularly awkward delimitation.

Finally, the positive freedom of opinion—the right to express an opinion—is flanked by a negative freedom: the right to withhold an opinion. The Federal Constitutional Court judged, however, that the requirement that tobacco companies print certain cautionary messages on packs of cigarettes did not infringe the companies’ freedom of expression because it was clearly indicated that the messages were not issued by the industries but by public authorities. It was perfectly explicit to the reader that the messages did not represent the opinion of the enterprises themselves.²⁶ This ruling implies that commercial or advertising discourse is not excluded in principle from the scope of freedom of expression.

II. JUSTIFICATION OF RESTRICTIONS PLACED ON THE EXERCISE OF FREEDOM OF OPINION

Interference in the domain protected by the freedom of opinion must be justified. This justification is analyzed in light of the stipulation in Article 5, Section 2, which states: “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 honour.”

26. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 22, 1997, 95 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (182) (F.R.G.).

This stipulation creates a qualified limitation on each of the rights guaranteed in the first section, which include the freedom to express and disseminate one's opinion, freedom of access to information, freedom of the press, and freedom of audiovisual broadcasting and cinema. This qualified limitation does not apply, on the other hand, to the Section 3 protections of freedom of arts and sciences. These freedoms are guaranteed without stipulation. However, the protection of young persons and the right to reputation and personal honor are constitutionally protected values likely to justify infringements upon the freedoms of Section 3. The absence of an explicit limitation does not mean that a right may be "absolutely" guaranteed.

A. The Limits to Freedom of Opinion Derived from the Provisions of General Laws

This limit has its origin in Article 118 of the Weimar Constitution, which guaranteed the freedom of opinion "in the framework of the general laws." During the plenary meeting, the constituent assembly vigorously debated the significance of adding the adjective *allgemeine* (meaning universal or general), as the initial document simply referred to a "framework of the laws."²⁷

In a May 24, 1930 ruling, the fourth criminal chamber of the Reichsgericht (Court of the German Empire) summarized the majority doctrine as follows: "Any law not directed against an opinion as such, that does not forbid an opinion as such, should be considered a general law in the sense of Article 118 of the Constitution."²⁸ Therefore, contrary to what the Supreme Court of Prussia first held,²⁹ "general law" does not refer simply to a law formulated in general and abstract terms. This doctrine, said to belong to "*Sonderrecht*" (special law, or the law of exception), thus interprets the antonym of "general law." "Special law" prevents, forbids, or renders especially difficult the expression of a particular opinion. At the time, this law applied in large part to communist and fascist opinions. According to this doctrine, general law, which permits restrictions on freedom of opinion, can only be law that does not, directly or indirectly, take aim at any specific opinion. Freedom of opinion therefore guarantees total freedom of the mind, and is only limited, beyond any intellectual effects that it creates, when an opinion is translated into actions or material consequences that damage legally protected benefits such as public order or personal safety.³⁰

Rudolf Smend—who endeavored to construct a material and axiological theory of basic rights and constitutional law—considered the doctrine of the *Sonderrecht* to be purely formalistic and therefore insufficient. According to Smend's approach, the word "*Allgemeinheit*" must be understood in the way the Enlightenment thinkers intended it,

27. On this debate, see VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, KARL ROTHENBÜCHER, RUDOLF SMEND, HERMANN HELLER & MAX WENZEL, *DAS RECHT DER FREIEN MEINUNGSÄUSSERUNG: DER BEGRIFF DES GESETZES IN DER REICHSVORFASSUNG* (1928). For a summary of the entire discussion, see Häntzschel, *supra* note 13, at 657–75.

28. Reichsgericht [RG] [Federal Court of Justice] May 24, 1930, 59 JURISTISCHE WOCHENSCHRIFT [JW] 263 (268) (F.R.G.) (incorporating a formula proposed by Anschütz during the discussion that followed the reports related to freedom of opinion at the convention in Munich of 1928); see VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER ET AL., *supra* note 27, at 74–75.

29. See Häntzschel, *supra* note 13, at 658.

30. See, e.g., *id.* at 660.

as the set of conditions under which community life of free individuals is possible; that is, “[v]alues of [the] society, public order and safety, [and] concurrent rights and liberties of others.” The “general laws” are thus basic norms that make up the community and protect collective values. They have a “value greater than that of the basic rights” and, therefore, greater than that of freedom of opinion, since these values are the very foundation of civil and political society. Under this view, it is appropriate to weigh the individual interest against the collective interest in each case to determine which of the two should prevail. This balancing doctrine, or *Abwägungslehre*, is connected with Smend’s general theory of constitutional law known as integration.³¹

It is useful to discuss, if only briefly, these two positions of German doctrine from before 1933. After 1949, general consensus held that the expression “general laws” would not refer to the single criterion of generality in the formulation of the law, but rather it would assume a certain quality of the law in regard to its content. Today, this quality, which the Federal Constitutional Court started to clarify in the *Lüth* decision, combines the *Sonderrecht* doctrine with Smend’s axiological theory.³² General law, in the spirit of Article 5, Section 2, should not be able to take aim, directly or indirectly, at any specific opinion. It may, however, preserve a preponderant public interest by “defend[ing] a common good which takes priority over the exercise of [the] freedom of opinion.”³³ Law is general insofar as it does not comprise any discrimination of opinions (*Sonderrechtslehre*), and insofar as it limits freedom of expression and dissemination only to the extent that countervailing public interests so require (*Abwägungslehre*). Such general laws include, for example, statutory legislative provisions applicable to employees of the state, including the judiciary and the military, which oblige them with a certain duty of reserve. In practice, the court adopted a method of qualification of “general laws” so loose that it became almost impossible to distinguish between this type of law and the simple general norm, which is impersonal and abstract, and risked transforming that qualified reservation into an exception that swallowed the rule. To deal with this recurrent criticism, it seems that the court has forced itself for several years to refocus its interpretation around the idea of the undiscriminating character of general law. A general law should be neutral, which means that its object is not to prohibit the expression of a particular opinion, but to protect society from the effects that certain forms of expression could have.³⁴

31. See VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER ET AL., *supra* note 27, at 74–75.

32. See BODO PIEROTH & BERNHARD SCHLINK, *GRUNDRECHTE* 144 (22d ed. 2006) (discussing the *Lüth* decision and its cited references).

33. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (209) (F.R.G.).

34. For example, a demonstration by an extremist right party cannot be prohibited on the basis of the content of the opinions being disseminated (as long as the group holds party status, is not forbidden, and provided that denial of the genocide of the Jews is not being propagated), but the demonstration may be prohibited on the basis of the aggressive and provocative conditions in which it is expected to take place (wearing of uniforms, flags, drums, marching). See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 23, 2004, 111 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 147 (157) (F.R.G.). A similar tendency involving restrictions on the freedom of the press can be found in the *Cicero* decision. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 27, 2007, 16 NEUE

In any case, the relationship between the law of limitation and the fundamental right is not purely and simply unilateral. There exists what the court called an “interaction” (*Wechselwirkung*). The applicable general law may restrict the freedom of expression, while freedom of expression imposes a restrictive interpretation on the law itself.³⁵ This interpretation, true to the freedom of opinion and of the restrictive law of that freedom itself, is particularly imposing when the opinion in question is not a simple private judgment, but a true contribution to the public forum. In this case, it is necessary to lay down “a presumption in favor of the admissibility of free discourse.”³⁶

Thus, this interpretation of “general law” affects the liberties of Article 5, Section 1 by a complicated, “qualified” reservation of law. But “general law” is not the only possible justification for interference. Section 2 also permits restrictions to protect young persons or the right to respect of personal honor.

B. Restrictions Justified by the Protection of Young Persons

“Qualified” reservations of law occur when the Basic Law gives competence to the legislature to make provisions for specific restrictions on the exercise of a basic right, while also assigning the aims that alone may justify such limitations. To the extent that it is interpreted as seen before, invoking the prescriptions of “general laws” is one such qualification. The protection of young persons and personal honor are more ordinary clauses of qualification of a reservation of law. Concrete problems linked to these two classes of restrictions essentially involve questions of proportionality. Obviously, the fact that the law was intended to protect young persons or personal honor will not suffice to justify each restriction applied under that law. It is also necessary to prohibit specific behavior or impose civil or penal sanctions to weigh the basic right in the German legal system. Otherwise, individual protection of the subjective right that the Basic Law guarantees would be weakened.

In matters of basic rights, the judge’s control wholly revolves around the aim of the restrictive law—the construction as well as the application—which must conform to the Basic Law and thus strike the right balance between the public interest protected by the law and the interest protected by the basic right. The limitations drawn from the protection of young persons belong almost exclusively to the specific domains of liberties of the press, audiovisual broadcasting, and cinema. This Article will consider two examples taken from the case law.

First, in its ruling on February 20, 2002, the Federal Administrative Court upheld the total ban on the broadcast of pornography under the interregional broadcasting agreement, which is on the same level, and carries the same weight, as law. Thus, the administrative decision prohibiting even an encrypted pay channel from broadcasting pornography at any hour of the day or night is legal. The legal provision and the administrative measure were justified on the basis that the provision was aimed at protecting young persons. The court verified the proportionality of the ban to the Basic Law’s goal of protecting the young persons under its standard three-part test: (1) is absolute prohibition without dispensation likely to target the legitimate goal

JURISTISCHE WOCHENSCHRIFT [NJW] 1117 (F.R.G.).

35. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 129 (137–39) (F.R.G.).

36. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (294) (F.R.G.).

(*Geeignetheit*); (2) is it necessary (*Erforderlichkeit*); and (3) is it tolerable (*Zumutbarkeit* or *Verhältnismäßigkeit im engeren Sinne*)? In the assessment of this proportionality, the legislature has a certain margin of appreciation (*Einschätzungsprärogativ*), the limits of which, according to the court, were not transgressed. The court, however, left open the question of whether this ban would still be proportionate in the hypothetical situation where, beyond encryption, there existed a mechanism that blocked access to programs and allowed parents to strictly control viewable content.³⁷ In that situation, an absolute ban might be unnecessary, but the court gave no clear indication of the direction in which it would rule if this situation did arise.

The second example is the freedom of art, which is guaranteed in Article 5, Section 3. As a result, the qualified reservation of law stated in Section 2 does not apply. As Section 3 includes no other reservation concerning the power of the legislature, this freedom is guaranteed without reservation of law. The regimen of basic rights guaranteed without reservation of law is distinct. These basic rights are not immune to any restriction, but the public authority may only restrict these rights in pursuit of an objective of constitutional value. The Federal Constitutional Court found that the protection of young persons constituted such an objective, as did the right to free development of one's personality³⁸ and the right of parents to educate their children.³⁹ In a controversial decision, the court regarded a lower tribunal's decision to put the novel *Josefine Mutzenbacher*⁴⁰—which described the tribulations of a Viennese prostitute at the beginning of the twentieth century—on the list of writings dangerous for youth, with related consequences for the novel's dissemination. The court first judged that the sole fact that a work might have a pornographic nature did not exclude it from the category of works of art benefitting from the protection of Article 5, Section 3.⁴¹ On the other hand, the protection of young persons established a constitutional limitation to the freedom of artistic expression that justifies the restrictions on dissemination and promotion. Those restrictions must respect the strict requirements of proportionality. In the case in question, the Federal Constitutional Court quashed the lower court's ruling that admitted the legality of listing the book as dangerous for youth. The legislation that provides for the establishment of a list of writings dangerous for youth is not in itself unconstitutional. However, the list should be interpreted and applied case-by-case, to avoid systematically relegating the freedom of artistic expression to the background, making it inferior to the protection of young persons. The court criticized the tribunal for employing a rationale that would result in systematically privileging the protective objective to the detriment of freedom. The tribunal ignored the necessity of "practical conciliation" (*praktische Konkordanz*) which requires, in case of conflict between a basic right and another norm of

37. See Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] Feb. 20, 2002, 116 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 5 (23) (F.R.G.).

38. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 2, § 1 (F.R.G.).

39. *Id.* art. 6, § 2.

40. FELIX SALTEN, JOSEFINE MUTZENBACHER: DIE LEBENSGESCHICHTE EINER WIENERISCHEN DIRNE, VON IHR SELBST ERZÄHLT (1906).

41. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 27, 1990, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 130 (F.R.G.).

constitutional value, that the optimal concrete equilibrium be carefully worked out between the values protected by the two norms.

C. Restrictions Justified by the Right to Respect of Personal Honor

It remains to specify the manner in which the Federal Constitutional Court settles the conflict between freedom of expression and the right to protection of personal honor. This Article will examine three examples from case law. The first case, the “Soldiers are Murderers” ruling rendered by the Federal Constitutional Court on October 10, 1995, concerns the guarantee of general freedom of opinion in Article 5, Section 1 and the problem of collective libel. The second case, taken from a decision announced on June 26, 1990, may be used to draw the line between invective and insult (*Schmähung*).⁴² Finally, the third case, which is quite recent and elicits strong reactions, touches on the freedom of art protected in Article 5, Section 3. This case is the *Esra* decision of June 13, 2007.⁴³

1. Soldiers are Murderers

This decision joined many appeals against penal sentences for insult pronounced against pacifist activists who, through writing or speech, publicly expressed the opinion that “soldiers are murderers,” or at least “potential murderers.” This phrase belongs to the German pacifist tradition. It is a quotation taken from a brief article by Kurt Tucholsky, *Der Bewachte Kriegsschauplatz*, published under the pseudonym Ignaz Wrobel in the weekly cultural and political journal of the German pacifist Left, *Die Weltbühne*, on August 4, 1931.⁴⁴ Leaders of the *Reichswehr*’s (the German national defense, or the German militia) lodged a complaint for insult against the individual responsible for the publication, the journalist Carl von Ossietzky, who had just been charged with divulging military secrets. This famous episode of the declining Weimar Republic was resolved by Ossietzky’s discharge. Because the phrase was considered too vague and because it was not aimed at anyone in particular, nor even particularly at the *Reichswehr*, it was not considered an insult against the German militia.⁴⁵ In the early 1990s, on the other hand, this same phrase led to several convictions that were deferred to the Federal Constitutional Court.⁴⁶

42. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 82 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 272 (F.R.G.).

43. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 13, 2007, 2007 Europäische Grundrechte Zeitschrift [EuGRZ] 592 (F.R.G.).

44. Ignaz Wrobel, *Der Bewachte Kriegsschauplatz*, DIE WELTBÜHNE, Aug. 4, 1931, at 191.

45. The phrase continues to cause debate to this day in Germany. See SOLDATEN SIND MÖRDER: DOKUMENTATION EINER DEBATTE 1931–1996 (Michael Hepp & Viktor Otto eds., 1996).

46. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (F.R.G.) (“Soldiers are Murderers” decision); Michel Fromont & Olivier Jouanjan, *Chronique de Jurisprudence Constitutionnelle Allemande*, 11 ANNUAIRE INT’L DE JUST. CONSTITUTIONNELLE 955, 972 (1995) (Fr.). The 1995 Soldiers are Murderers decision was preceded by a 1994 decision that granted appeals formed on similar grounds. In that case, the ruling authority was an appeals admission

This phrase must be understood in the context of German pacifist discourse. The question of which meaning to give to this expression largely governs the solution. The court has made this point clearly, stating: “The condition of every juridical evaluation of a statement is that the meaning of it be correctly understood.”⁴⁷ However, to establish the meaning of the statement, one must keep to his “objective sense.”⁴⁸ That is to say, neither the intention of the speaker, nor the understanding of the individual who feels hurt or affected by the speaker’s statement, may determine the meaning. Instead, it is better to research the meaning that the statement can have to an impartial public and use common sense. If it is apparently necessary to depart from the literal sense, the context in which the statement is made plays an equally decisive role. If the text and the context permit an interpretation that cannot be regarded as hurtful to the reputation or honor of those who feel that the statement is directed at them, and if the judge has not even considered such a possibility, then his or her judgment is ill-founded. In such a case, he or she dismisses, without justification, a potential meaning compatible with the respect of the honor of others, and thus has not properly determined whether the speaker stayed within the limits imposed by this right to honor. Thus, the court found that the tribunals did admit that the word “murderer,” in context, could have a common and ordinary meaning other than its purely technical meaning in penal law. The judges considered and even adopted that meaning, but they did not go any farther. Indeed, the implicated phrase does not necessarily assign to militiamen and women, individually, the quality of murderers and a certain disposition to kill. One may understand, in the word “soldier,” not so much the individuals as the military institution itself. Therefore, the phrase does not say that soldiers are men who have a disposition for killing, but that the military institution is a harmful system as it incites, pushes, or obliges acceptance of the possibility of killing others. The tribunals did not consider this possible meaning, so the judgments were not permissible restrictions on the right to freedom of opinion.

The second interesting point about the decision, other than the scrupulous attention to the interpretation of the contested declarations, resides in the fact that, in principle, the penal sanction of collective insult is not unconstitutional. An insult directed toward a clearly defined group may legitimately make individuals feel affected in their reputation or their personal honor. In any case, it is good to introduce degrees of evaluation:

Regarding depreciative statements aimed at a group . . . the boundary can only rarely be clearly delineated between . . . the attack on the personal honour of the members of the group and . . . the criticism addressed to certain social facts, [to] certain public or social institutions, to certain social expectations; Article 5, Section 1, Sentence 1 of the Basic Law precisely intends to protect a space of freedom to the benefit of this type of criticism.⁴⁹

In this case, the expression of the opinion, even in the form of an invective, directly contributed to the public debate and debates of general interest. Its protection should therefore be particularly reinforced. If purely private opinions without obvious

commission. See Fromont & Jouanjan, *supra* note 19, at 748.

47. BVerfG Oct. 10, 1995, 93 BVerfGE 266 (278).

48. *Id.*

49. *Id.* at 285–86.

relevance to social and political debate are not excluded from the domain protected by Article 5, then the existing relationship between opinions of general interest and the “liberal and democratic fundamental order”—which forms the foundation and the supreme principle of the German constitutional system—justifies a reinforced protection of these opinions.⁵⁰

Only the reputation and the honor of individuals create a constitutional limit to the freedom of expression. As a result, when the alleged insult is aimed at a group, for the personal honor of the group’s members to be considered as sufficiently, directly affected, the insult must apply to all the individual members of the group. Thus, the characteristic that is the object of the deprecation must apply to all individual members of the group, not to certain members, or even to the majority of members. It is obvious that under these conditions the greater the group, the lesser the chances that this condition will be fulfilled.

In this case, the incriminated phrase is aimed at soldiers and therefore all militia, not only those of the German army (*Bundeswehr*). This phrase may be understood as aiming above all at the entire institution of the army. The tribunals, therefore, erred by failing to consider these two elements in the balance that they established between freedom of opinion and personal honor.

2. The Coerced Democrat

In 1990, the Federal Constitutional Court decided a case concerning the statements of a journalist who saw the former Minister-President of Bavaria, Franz-Joseph Strauss, then already deceased, as a “coerced democrat.”⁵¹ The journalist also accused Strauss of having continued to propagate a sort of “cult of the Führer.” A civil court sentenced the journalist and the Federal Constitutional Court reaffirmed, taking a traditional position. Criticism that is purely insulting by its violence (*Schmähkritik*) undermines the credibility of its own value and impact. Even if it is not purely and simply beyond the scope of the freedom of opinion, it does not weigh heavily in the balance that must be made with respect to the reputation of others: “[Such criticism] yields in principle before the requirements exacted by the right to personal reputation and personal honour.” However, in political combat, the debate would be poor and inconsistent if sharp statements and even insults were precluded. Additionally, in this case, the court does not conclude that it must consider the statements as simple insults

50. Here, there is an influence of the “institutional theory” of fundamental rights, which, from the point of view of the intensity of juridical protection and control, distinguishes between protected behaviors and activities by way of their respective functions in the constitutional and political order. See Ernst-Wolfgang Böckenförde, *Théorie et Interprétation des Droits Fondamentaux*, in *LE DROIT, L’ÉTAT ET LA CONSTITUTION DÉMOCRATIQUE: ESSAIS DE THÉORIE JURIDIQUE, POLITIQUE ET CONSTITUTIONNELLE* (Olivier Jouanjan ed., Olivier Jouanjan, Willy Zimmer & Olivier Brand, trans., 2000); see also Olivier Jouanjan, *La Théorie Allemande des Droits Fondamentaux*, 1998 *L’ACTUALITÉ JURIDIQUE: DROIT ADMINISTRATIF (SPECIAL ISSUE)* 44, 49–51 (Fr.).

51. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 82 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 272 (F.R.G.); Michel Fromont, *République Fédérale D’Allemagne La Jurisprudenc Constitutionnelle En 1990 Et 1991*, 109 *REVUE DU DROIT PUBLIC* 1547, 1564 (1993) (Fr.).

whose protection should be forgone in favor of the memory of the deceased politician. Consistent with the doctrine of the European Court of Human Rights, the tolerable level of vivacity of criticism clearly varies according to whether the subject is an ordinary individual, a public individual, a politician, or the government itself.⁵²

3. *Esra*

The freedom of art, which is guaranteed without reservation of law, is limited in part by the “general right to the respect of personhood” (*allgemeines Persönlichkeitsrecht*), which follows from the combination of the right to respect of dignity and the right to free (personal) development in Articles 1 and 2.⁵³ A recent decision of the Federal Constitutional Court revisited the difficulties and controversy that the famous *Mephisto* decision raised in 1971. In *Mephisto*, the court considered Klaus Mann’s novel, which portrayed the dishonest compromise of Gustaf Gründgens, a famous actor of the 1930s, with the Nazi regime.⁵⁴

The court decided *Esra* on June 13, 2007, and for the second time in its history, effectively confirmed a judiciary ruling prohibiting the publication of a novel. This decision obviously provoked strong feelings.⁵⁵ *Esra* considered an “autofiction” novel in which the author described his intimate relationship with an actress, as well as the behavior of her mother. The civil trial, until the decision of the Federal Court of Justice, had acceded to the claims of the actress and her mother and prohibited the reproduction, publication, or distribution of the novel entitled *Esra*. For the most part, the Federal Constitutional Court upheld the decisions of the civil jurisdiction. The decision was sufficiently controversial even within the first chamber, where three judges opposed the court’s justification as well as the solution.

However, in the general elements of its reasoning, the court sought to modify and rectify the facts of the *Mephisto* decision. In his dissent, Judge Hoffmann-Riem emphasized:

The decision of the chamber better takes into account freedom of art than the *Mephisto* decision. The latter required without a doubt that the evaluation of the effects of a work of art, the specifically artistic aspects of the work, be sufficiently taken into consideration without . . . sufficiently following up on this requirement.⁵⁶

52. The leading case is again *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at para. 42 (1986).

53. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 1984, 67 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 213 (228) (F.R.G.). This case involved a large Mardi Gras-esque parade in which the Minister-President at the time, Franz-Joseph Strauss, was grossly caricatured and associated with Germany’s Nazi past. This parade made reference to a poem by Berthold Brecht, composed in 1947, which evoked, in an image of just such a parade, the political continuity of Nazism in Germany and the postwar devastation.

54. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (191) (F.R.G.).

55. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 13, 2007, 2007 Europäische Grundrechte Zeitschrift [EuGRZ] 592 (F.R.G.) (stating the ruling and the dissenting opinions).

56. *Id.* at 605–06.

In 1971, the court specified:

The solution to the conflict between the protection of personhood and the right to artistic freedom may not be found by relying solely on the effects that a work produces in the social sphere outside of its artistic dimension; the solution must, on the contrary, account for specifically artistic aspects.⁵⁷

The two opposing opinions formulated at that time by Judges Stein and Rupp-von Brünneck specifically insisted that, in the evaluation of the case, the court had ignored the aesthetic aspect in order to unilaterally insist on the work's effect upon the social image of its subjects.

In 2007, the court admitted that it must presume the fictional nature of the book's subject, which, in principle, makes it harder to show that the work describes actual people. The court specified that it is not enough that a person be "recognized" in one of the novel's characters and that the author attributed negative traits to that character. Otherwise, this fact alone would create a violation of the right to respect of personhood. Rather, to overcome the presumption, a party must demonstrate that the author gives the reader the impression that the reported events or the qualities of the represented characters can be attributed to the "recognizable" persons.⁵⁸

But the new decision contains a similar sort of discrepancy to the one already encountered in *Mephisto*, that is, between the general and abstract rationale of the decision on the one hand, and its concrete rationale on the other. The guarantees of artistic freedom stated abstractly are not actually practiced. This discrepancy between theory and reality guided the court, in this case, to give relative preference to the right to respect of personhood, even while insisting on the equivalence in principle of the two constitutional values.

Beyond this discrepancy, the dissenting opinions rely on another point, which is particularly illustrated in the opinion of Judges Hohmann-Dennhardt and Gaier. The general justification of the court concludes with the statement of the principles that must govern the balance between opposing interests:

Between the extent to which the author creates an aesthetic reality detached from actual reality and the intensity of the violation of the right to respect of personhood, there exists a relationship of interaction. The more the representation (*Abbild*) corresponds to the model (*Urbild*), the more heavily the offense against the right to personhood weighs. The more the aesthetic presentation touches on particularly protected dimensions of the right to personhood, the more important the fictionalization of the discourse should be for any violation of the right to personhood to be excluded.⁵⁹

As the two opposing judges summarized, these principles are as follows: on the one hand, the greater the departure from reality, the more there is art and therefore freedom of artistic expression; on the other hand, the more the characters are recognizable, the greater the offense against personhood. Moreover, the more the work touches on

57. BVerfG Feb. 24, 1971, 30 BVerfGE 173 (195).

58. See BVerfG June 13, 2007, 2007 EuGRZ 592.

59. *Id.* at 600 (discussing justification ninety).

intimate domains, which are particularly protected by the right to personhood, the greater the distancing required. But, as the court elsewhere affirms, if artistic activity consists of the capacity to transform the actual reality into other emotional, intellectual, or abstract realities, then these principles precisely contradict this vision of art by assuming a clear separation between the real and the aesthetic, because the transformative activity assumes a more complex and subtle relationship between the two dimensions as they overlap and mutually enrich each other. In short, categorizing a work of art does not cease to be problematic for the judge, as he or she necessarily is confronted with questions that are probably inextricable from aesthetic theory—in this case, the theory of the novel—which appear to govern the solution to the strictly juridical problem.

CONCLUSION

Since 1949, the Federal Constitutional Court and German Basic Law doctrine have developed an impressive, complex, and dense dogmatism of fundamental rights. It may be said, not without fair reasons, that the theory of fundamental rights has been and is still one of the most considerable intellectual productions of twentieth-century German jurisprudence. If the general theory of fundamental rights is deployed via strong structuring notions—the protected field, interference, reservation of law, and proportionality in its three forms—the more specific the theory becomes. Rights move from special dogma for each of the guaranteed rights to the concrete expression of each case in point. Moreover, this movement reveals a great complexity, perhaps to the point of aporia. This is apparent in the fundamental operation in each concrete case of *Abwägung*, that is, the weighing and conciliation of the conflicting claims supported by different fundamental rights. Moreover, the procedures of *Abwägung* have often been denounced as pure staging of superficial judicial rationality. Whatever the case may be, the complexity is readily apparent in the length of the constitutional decisions, which oddly adjudicate in a French manner, but less obviously, with the wording of American decisions. This quite incomplete exposé aimed only to show a little of the complexity through the example of freedom of expression. Freedom of expression is a cardinal right in every liberal and democratic constitutional order; it is “one of the most precious rights of man,” according to the Declaration of the Rights of Man and of the Citizen.⁶⁰ United States Supreme Court Justice Cardozo said it is “the matrix, the indispensable condition, of nearly every other form of freedom.”⁶¹ The German Federal Constitutional Court cited both of these passages in the *Lüth* decision. Both passages perhaps justify, in this Franco-American symposium, giving the floor to German jurisprudence and doctrine concerning the freedom of expression.

60. THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (1789) (Fr.).

61. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

