Case:

BVerfGE 7, 198
Federal Constitutional Court (First Division)

Date:

15 January 1958

Translated by:

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1. Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution (GG) they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system.

2. The substance of the basic rights is expressed indirectly in the rules of private law, most evidently in its mandatory provisions, and is best effectuated by the judges' use of the general clauses.

3. Basic rights may be infringed by a judicial decision, which ignores the effect of basic rights on private law (§ 90 Act on Constitutional Court Procedure (BVerfGG)). Judicial decisions on private law are subject to review by the Constitutional Court, only in respect of such infringements of basic rights, not for errors of law in general.

4. Rules of private law may count as 'general laws' which may restrict the basic right of freedom of expression under Art. 5 II GG.

5. Such 'general laws' must be interpreted in the light of the especial significance in a free democratic state of the basic right to freedom of expression.

6. The basic right in Art. 5 GG protects not only the utterance of an opinion as such, but also the effect it has on others.

7. The expression of an opinion favouring a boycott does not necessarily infringe proper conduct (boni mores) under § 826 BGB; depending on all the circumstances such an expression may be justified as a matter of constitutional law.

Disposition: The decision of the Landgericht Hamburg of 22 November 1951 infringes the complainants' basic right under Art. 5 I, 1 GG and is therefore vacated. The matter is remitted to the Landgericht Hamburg.

Reasons:

At the opening of 'German Film Week' on 20 September 1950 the complainant, then a Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office, gave an address, in his capacity as President of the Hamburg Press Club, to an audience of film distributors and directors. He said, inter alia:

The person least likely to restore the claim to morality which the German film forfeited during the Third Reich is the man who directed 'Jud Süss' and wrote the script for it. If this very man is chosen to represent the German film industry, who can tell what harm we may suffer throughout the world? True he was acquitted in a formal sense in Hamburg, but substantially the judgment was a condemnation. We must call on the distributors and cinema owners to show character—not cheap, but worth the price. And I want the German film to show character as well. If it shows character in its imagination, visual daring and sterling craftsmanship, it will merit every assistance and achieve what it needs in order to survive: success with the public here in Germany and abroad.

Domnick-Film-Produktion GmbH immediately challenged the complainant to justify these charges against Veit Harlan, under whose direction and with whose screen-play they were making 'Unsterbliche Geliebte'.

On 27 October 1950 the complainant released an 'open letter' to the Press by way of reply which contained the following:

The court did not gainsay the fact that for much of the Hitler régime Veit Harlan was the 'Nazi film-director no. 1' or that his film 'Jud Süss' showed him to be a committed exponent of the Nazis' murderous purge of the Jews. Some businessmen here and abroad may not be opposed to Veit Harlan's re-emergence, but the moral integrity of Germany must not be destroyed by hard-faced money-makers. Harlan's return can only reopen wounds barely healed, and resuscitate diminishing distrust fatal to German reconstruction. For all these reasons it is not only the right but the duty of all decent Germans to protest against, and even to boycott, this ignominious representative of the German film industry.

Domnick-Film-Produktion GmbH and Herzog-Film GmbH (the dis-tributor of 'Unsterbliche Geliebte' in the Federal Republic), obtained an interlocutory injunction from the Landgericht Hamburg . . . and the Oberlandesgericht dismissed the complainant's appeal. At the complainant's request the two film companies were required to bring suit within a certain time. They did so, and on 22 November 1951 the Landgericht Hamburg issued the following judgment:

The defendant is ordered, on pain of fine or imprisonment as determined by the court, to refrain (1) from calling on theatre managers and film distributors not to programme the film 'Unsterbliche Geliebte' and (2) from calling on the German public not to go to see the film . . .

B.

I.

The complaint is admissible since the preconditions for the application of § 90 II, 2 BVerfGG are satisfied (decision before exhaustion of legal remedies).

II.

The complainant alleges that the Landgericht's judgment infringes his basic right to free expression of opinion as laid down in Art. 5 I, 1 GG.

The judgment of the Landgericht, an act of the public power of judicature, could infringe the complainant's basic right by its content only if the court was bound to take account of the complainant's basic right.

By enjoining the complainant from making statements apt to lead others to endorse his views about Harlan's re-emergence and to follow him in discriminating against Harlan's films, the judgment clearly restricts the complainant's freedom of expression of opinion. The Landgericht granted the injunction as a matter of private law order on the basis that the complainant's statements were tortious under § 826 BGB. Thus the public power has restricted the complainant's freedom of expression on the basis of the plaintiff's private law claim. This can constitute an infringement of the complainant's basic right under Art. 5 I, 1 GG only if the applicable rules of private law are so substantially affected that they can no longer support the judgment.

The question whether basic rights affect private law, and if so in what manner, is much debated [references]. The extreme positions are, on the one hand, that basic rights constrain only the state, and, on the other, that basic rights (or at any rate the most important of them) prevail against everyone in private legal relations. Previous decisions of this Court support neither of these extreme positions, the conclusions drawn by the Federal Labour court in its decision of 10 May 1957 (NJW 1957, 1688) from our decisions of 17 and 23 January 1957 (BVerfGE 6, 55 and 6, 84) being unwarranted. Nor is it necessary today to deal with all aspects of the debated question of the 'effect on third parties' (Drittwirkung) of basic rights. The matter can be properly resolved by the following considerations:

1. There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerges from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history: it is true also of the basic rights in the Basic Law, which emphasizes the priority of human dignity against the power of the state by placing the section on basic rights at its head and by providing that the constitutional complaint (Verfassungsbeschwerde), the special legal device for vindicating these rights, lies only in respect of acts of the public power.

But far from being a value-free system [references] the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights [references]. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

The legal content of basic rights as objective norms informs private law by means of the rules which directly control this area of law. Just as new rules must conform to the value-system of the

basic rights, so existing and older rules receive from it a definite constitutional content which thereafter determines their construction. From the point of view of substantive and procedural law a dispute between private citizens on the rights and duties that arise from rules of conduct thus influenced by the basic rights remains a dispute of private law. It is private law which is interpreted and applied even if its interpreters must follow the public law of the constitution.

The influence of the value-system of the basic rights is clearest in those rules of private law which are mandatory (zwingendes Recht) and form part of ordre public in the wide sense, i.e. those rules which in the public interest apply to private legal relations whether the parties so choose or not. Such provisions, being functionally related and complementary to public law, are especially exposed to the influence of constitutional law. 'General clauses', such as § 826 BGB, by which human conduct is measured against extralegal standards such as 'proper conduct' (gute Sitten), allow the courts to respond to this influence since in deciding what is required in a particular case by such social commands, they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as 'points of entry' for basic rights into private law [references].

The judge is constitutionally bound to ascertain whether the applicable rules of substantive private law have been influenced by basic rights in the manner described; if so, he must construe and apply the rules as so modified. This is what is meant by saying that the civil judge is bound by the basic rights (Art. 1 III GG). If he issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by his judgment, in his capacity as a public official, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary. Quite apart from any remedies he may have to correct this error in the courts of private law, the citizen can invoke the Federal Constitutional Court by means of a Verfassungsbeschwerde.

The Constitutional Court must determine whether the reach and effect of the basic rights in private law has been correctly ascertained by the regular courts. But this is also the limit of its investigation: it is not for the Constitutional Court to check judgments of civil courts for errors of law in general; the Constitutional Court simply judges of the 'radiant effect' of the basic rights on private law and implements the values inherent in the precept of constitutional law. The function of the Verfassungsbeschwerde is to test all acts, whether of the legislature, the executive or the judiciary, for 'compatibility with the Constitution' (§ 90 BVerfGG). The Federal Constitutional Court is certainly not to act as a court of review, much less overreview, for the civil courts, but neither may it abjure consideration of such judgments entirely or leave uncorrected any instance which comes to its notice of the misapplication of the rules of basic rights.

2. The basic right to freedom of expression of opinion (Art. 5 GG) seems to pose special problems with regard to the relationship between basic rights and private law. As in the Weimar Constitution (Art. 118), this right is constitutionally guaranteed only within the limits of 'general laws' (Art. 5 II GG). Before inquiring what laws are 'general laws' in this sense, one might suppose that the constitution's reference to such laws must be to such laws as judicially

construed, with the result that no judicial construction of such a law which limited the basic right could be regarded as a 'breach' of the basic right.

This is not, however, the sense of the reference to 'general laws'. The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man (Declaration of the Rights of Man and Citizen (1789) Art. 11). It is absolutely essential to a free and democratic state, for it alone permits that constant spiritual interaction, the conflict of opinion, which is its vital element (BVerfGE 5, 85 (205)). In a certain sense it is the basis of freedom itself, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo).

Given this fundamental importance for the free democratic state of freedom of expression of opinion, it would be illogical for a constitution to make its actual scope contingent on mere statute (and thus necessarily on the holdings of courts construing it). What was said earlier about the relationship between basic rights and private law applies here also: general laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech in all areas, and especially in public life. We must not see the relationship between basic right and 'general laws' as one in which 'general laws' by their terms set limits to the basic right, but rather that relationship must be construed in the light of the special significance of this basic right in a free democratic state, so that the limiting effect of 'general laws' on the basic right is itself limited.

In its function as ultimate guardian of the basic rights through the medium of the Verfassungsbeschwerde, the Federal Constitutional Court must therefore have the power to supervise the decisions of courts whose application of a general law in this area may unduly restrict the scope of the basic right in the individual case. This Court must be competent to uphold as against all organs of public power, including the civil courts, the special value it represents for a free democracy, and thus to reconcile, as required by constitutional law, the conflicting restrictive tendencies of the basic right and the 'general laws'.

3. The concept of 'general' law has always been controversial. Leaving on one side the question whether the concept may not be due to an error in the drafting of Art. 118 of the 1919 Constitution [reference], we may note that it was then construed to include all which 'do not forbid an opinion as such and do not envisage the expression of opinion as such', but rather 'serve to protect a legal interest which deserves protection without regard to any particular opinion', and protect 'a community value superior to the activity of freedom of opinion' [reference]. Exponents of the Grundgesetz agree with this [reference: 'laws which do not inhibit the purely intellectual effect of a mere expression of opinion'].

If the term 'general laws' is so understood, we may state the protection of the basic right as follows:

It is unacceptable to hold that the Constitution protects only the expression of opinion, and not its inherent or intended effect on others, for the whole point of an expression of opinion is to have 'an effect on the environment of ideas' [reference]. Thus value-judgments, which always have an

intellectual aim, namely to persuade others, are protected by Art. 5 I, 1 GG; indeed it is the stance of the speaker as expressed in the value-judgment by which he hopes to affect others which is principally protected by this basic right. To protect the expression and not to protect its effect would be a nonsense.

In this sense the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which deserve protection against freedom of opinion. There has to be a 'balance of interests'; the right to express an opinion must yield if its exercise infringes interests of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.

4. From this point of view the rules of private law may perfectly well be ranked as 'general laws' in the sense of Art. 5 II GG. If this has not been done by commentators hitherto [reference], that is simply because basic rights have been considered good only as against the state, so it was natural to consider as 'general laws' having limiting effect only those laws which regulated state activity vis-à-vis the individual, that is, laws of a public law nature. But if the basic right to free expression of opinion affects relations of private law as well and favours free expression of opinion against the fellow-citizen also, then rules of private law which operate to protect superior legal interests must also be taken into account as possibly limiting the basic right. After all, if provisions of criminal law designed to protect honour or other essential aspects of human personality can set limits to the exercise of the fundamental right to freedom of expression, it is not obvious why similar provisions of private law should not equally do so.