Freedom of Expression and the Administration of Justice in Germany

Ulrich Karpen*, Nils Mölle** and Simon Schwarz***

A. Introduction

According to Art. 20(1) of its constitution, the Basic Law (*Grundgesetz* – GG), Germany shall be committed to the principles of federalism, the rule of law and representative democracy as a social state.[1] Legislative power is shared between the federation (*Bund*) and sixteen states (*Länder*). If it is not explicitly delegated to the *Bund*, it remains on the level of the *Länder* (Arts. 70, 30 GG). This being the case with press, media and public security legislation, there are sixteen distinct press and media laws in Germany.

Art. 1(3) GG stipulates that the provisions enshrining the human and fundamental rights, i.e., Arts. 2 through 19 GG, are directly binding on all state powers. Therefore, the legislation, the execution of federal or state statutes by executive authorities and the decisions of the courts, must meet the requirements of these provisions. One example of such provisions is the freedom of expression embodied in Art. 5 GG. Since, safeguarding the integrity of the constitution comes under the jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), legislation and execution of legislative acts are subject to the interpretation of the constitution by this court which is highest in the hierarchy. According to Art. 93(1) GG, there is a possibility of individual complaints addressed to the Federal Constitutional Court if fundamental rights are violated by a public authority. Thus, in 50 years of its existence, the Federal Constitutional Court has produced what can be regarded as a comprehensive constitutional case law system.[2]

Against this background, this article examines the mechanisms by which German constitutional law gives effect to freedom of expression and whether and

* Prof. Dr. iur., Universitätsprofessor at the Faculty of Law, University of Hamburg, Germany.
** Research Assistant at the Faculty of Law, University of Hamburg, Germany.
*** LL.M. (Cantab), Research Assistant at the Max Planck Institute for Comparative and International Private Law, Hamburg, Germany.

[1] For a survey on the Basic Law *cf.* U. Karpen, The Constitution of the Federal Republic of Germany (1988).

[2] For an overview *see* Members of the Federal Constitutional Court (Eds.), *Decisions of the Bundesverfassungsgericht* (1992) and the collection of translated leading cases available at the website of the Institute for Transnational Law, University of Texas at Austin, http://www.utexas.edu/law/academics/centers/transnational/work/.

European Journal of Law Reform, Vol. IX, no. 1, pp 63-90.

to what extent the need for an impartial and smoothly functioning judicial system has an impact on this fundamental human right. To this end, the paper is organised as follows: It starts by describing the core constitutional provisions relating to this topic (B.) before exploring the possibilities of the media to comment on current legal proceedings (C.) and the legitimacy of criticism of judges and courts (D.). The paper further discusses the restrictions on the freedom of expression within the courtroom (E.) and finally deals with the rights of judges to freely express their opinion (F.).

B. Pertinent Constitutional Provisions

Freedom of press and speech are guaranteed by Art. 5(1) GG:[3]

> 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.

Thus, freedom of expression and freedom of the press are constitutional fundamental rights.[4] In reaction to the Nazi time (1933-1945), the founding fathers of the German constitution wanted to provide legal mechanisms that ensure plurality and public discourse on political issues. Since, according to Art. 1(3) GG, fundamental rights are binding on all state powers, freedom of expression is superior to federal and state legislation, executive and judicial decisions. Therefore, laws have to be interpreted in accordance with Art. 5 GG. According to paragraph 2, however, both guarantees are restricted by 'general laws'. This term refers to all kinds of norms that are not aimed at the ideas and the content of the speech but rather regulate matters that might be pertinent to freedom of speech, as well as to other rights and matters.[5]

In its *Lüth* judgment,[6] the Federal Constitutional Court stated that freedom of expression is a basic constituent element of the free democratic order[7] and that there is a presumption for the freedom of speech.[8] It further held that, due to this fundamental importance of freedom of expression for the free democratic state, 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. Therefore, general laws which have the effect of limiting a basic right must be read in the light of the significance of the right. It should 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

---

[3] An English translation can be found in Karpen, *supra* note 1, at 223 *et seq.* and on the website of the German Law Archive, www.iuscomp.org.

[4] *See* Karpen, *supra* note 1, at 91 *et seq.*

[5] BVerfGE 7, 198, 209 *et seq.*; Karpen, *supra* note 1, at 97.

[6] BVerfGE 7, 198 *et seq.*

[7] BVerfGE 7, 198, 208.

[8] *Id.*

which 'general laws', by their terms, set limits to the basic right. The relationship must, rather, be seen 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.[9] Thus, general laws limiting the freedom of speech have to be interpreted restrictively.[10] In any case, the limitation by general laws must stand the proportionality test:[11] it must be sufficient and necessary[12] as to the achievement of the intended goal and, in balancing the interest to be protected by the general law and the freedom of speech, the former must prevail.[13] In effect, convergence of the constitutionally guaranteed freedom of expression and the administration of justice is always a matter of balancing both interests affected under the Art. 5 mechanism with a presumption for the freedom of expression.

The pertinent constitutional provisions concerning the administration of justice are laid down in section IX. of the Basic Law (Artt. 92 *et seq.*). According to Art. 97(1) GG, judges shall be independent and subject only to the law. The provision shall ensure a functioning judicial system which meets the requirements of the constitutional principles of the rule of law. These principles are complemented by several individual rights such as the right to a fair trial,[14] the presumption of innocence[15] and the right to a fair and public hearing in accordance with the law (Art. 103(1) GG, Art. 6(1) ECHR). As far as criminal and private law statutes specify these individual rights they are 'general laws' in terms of Art. 5(2) GG. Thus, any legal act – prohibitions as well as imposed penalties – must balance the freedom of expression and the individual rights of defendants in accordance with Art. 5(1) and (2) GG.

C. Commenting on Legal Proceedings[16]

When considering the restrictions on the commenting on legal proceedings under German law, one has the bear in mind that traditional juries have been

---

[9] BVerfGE 7, 198, 208 *et seq.*

[10] *Id.*

[11] *Cf.* F. E. Schnapp, *Art. 20*, *in* I. von Münch & P. Kunig (Eds.), Grundgesetz-Kommentar II, at para. 27 (2001).

[12] In this context, the term 'necessary' means that there are no means causing less harm to the freedom of expression.

[13] *See* R. Wendt, *Art. 5*, *in* I. von Münch & P. Kunig (Eds.), Grundgesetz-Kommentar I, at para. 75 (2000).

[14] Art. 6(1) ECHR.

[15] Explicitly mentioned by Art. 6(2) ECHR; constitutionally embodied in the principle of the rule of law.

[16] On this *see* Bundesregierung, *Bericht der Bundesregierung zum Thema 'Öffentliche Vorverurteilung' und 'faires Verfahren'*, BT-Drucksache 10/4608, 1 *et seq.* (1986); Y. Braun, Medienberichterstattung über Strafverfahren im deutschen und englischen Recht (1998); J. Bornkamm, Pressefreiheit und Fairneß des Strafverfahrens (1980); C. H. Soehring, Vorverurteilung durch die Presse (1999); A. Nothelle, *Freie Presse und faires Strafverfahren – ein Fall für den Gesetzgeber? Zur Problematik der Übernahme angelsächsischer Rechtsinstitute*, 1985 AfP 18; C. Roxin, *Strafprozeß und Medien*, *in* Münchner Juristische Gesellschaft (Ed.), Einheit und Vielfalt der Rechtsordnung, Festschrift zum 30jährigen Bestehen der Münchener Juristischen Gesellschaft,

abolished in the German judicial system in 1924.[17] Even though courts are still composed of up to two lay judges, there is always at least one professional judge chairing the bench[18] and the courts are obliged to give comprehensive reasons for their decision.[19] As a consequence, the role of lay judges in Germany differs fundamentally from the role of the jury in the common law system.[20] The Federal Court (*Bundesgerichtshof* – BGH) has already held in 1968 that the mere fact that a judge has read a press report prejudging the outcome of a case in which he is involved is no reason to question his impartiality.[21] Accordingly, despite the theoretical danger of a manipulation, German legal proceedings are regarded as not susceptible to any influence by biased publications.[22] However, this view is not substantiated by any empiric research.[23]

Given this background, the German legislator has combined two concepts of solving the conflict between the guarantees of Art. 5(1) GG on the one hand and the requirement of a fair and efficient trial on the other hand.[24] The first approach is reflected by a few, very narrow penal provisions which prohibit the publication of particular information on judicial hearings (see below section II.).[25] Despite some initiatives of the past,[26] however, there is no comprehensive body of law aiming at a broad protection of legal proceedings comparable to the common law concept of contempt of court including its special procedural rules.[27] Instead, the general laws on the protection of the parties' right to personality constitute the

97 (1996); C. Roxin, *Strafrechtliche und strafprozessuale Probleme der Vorverurteilung*, 1991 NStZ 153; J. Soehring, *Presse, Persönlichkeitsrechte und 'Vorverurteilungen'*, 1986 GRUR 518; F. Stapper, *Von Journalisten, der Gerichtsberichterstattung und dem Strafrecht*, 1995 ZUM 590; M. Löffler & R. Ricker, *Handbuch des Presserechts*, ch. 16, at paras. 1 *et seq.* (2005); E. Steffen, *§ 6 LPG*, *in* M. Löffler *et al.* (Eds.), Presserecht, at paras. 205 *et seq.* (2006); J. Soehring, Presserecht, at paras. 16.23 *et seq.*, 19.24 *et seq.* (2000).

[17] Bundesregierung, *supra* note 16, at 20; Braun, *supra* note 16, at 49; Nothelle, *supra* note 16, at 19, 20.

[18] *Cf.* §§ 29, 76(1) of the Judiciary Act (*Gerichtsverfassungsgesetz* – GVG) for criminal courts, §§ 16(2), 35(2), 41(2) of the Labour Court Act (*Arbeitsgerichtsgesetz* – ArbGG) for labour courts and §§ 93, 105 GVG for the optional chambers of commercial affairs.

[19] *Cf.* § 267 of the Criminal Procedure Code (*Strafprozeßordnung* – StPO) for judgements of criminal courts, § 60 ArbGG for judgements of labour courts, § 313 of the Civil Procedure Code (*Zivilprozeßordnung* – ZPO) for judgements of civil courts.

[20] Braun, *supra* note 16, at 186.

[21] BGHSt 22, 289, at 294.

[22] *Cf.*, *e.g.*, Bundesregierung, *supra* note 16, at 20; Bornkamm, *supra* note 16, at 207 *et seq.*; Nothelle, *supra* note 16, at 21.

[23] Roxin (1996), *supra* note 16, at 100; Roxin (1991), *supra* note 16, at 153; Braun, *supra* note 16, at 3 *et seq.*; Bundesregierung, *supra* note 16, at 20; Löffler & Ricker, *supra* note 16, ch. 16, at para. 10b.

[24] On different approaches as to this problem *see* in a comparative perspective J. Meyer, *Rechtsvergleichendes Gutachten des Max-Planck-Instituts für ausländisches und internationales Strafrecht in Freiburg im Breisgau zum Thema Öffentliche Vorverurteilungen im Strafverfahren – Rechtsvergleichender Querschnitt*, BT-Drucksache 10/4608, 34, at 38 *et seq.*, 42 (1986).

[25] Löffler & Ricker, *supra* note 16, ch. 16, at para. 13.

[26] The latest proposal dates from 1962; on the several proposals *see* Bundesregierung, *supra* note 16, at 13 *et seq.*; Roxin (1991), *supra* note 16, at 154 *et seq.*; Braun, *supra* note 16, at 176-189.

[27] Bundesregierung, *supra* note 16, at 15, 33; J. Soehring (1986), *supra* note 16, at 525; Nothelle, *supra* note 16, at 20; Braun, *supra* note 16, at 56.

most important limitations in this context (see below section I.).[28] This regime applies generally, i.e., at any time, irrespective of current or forthcoming legal proceedings. As a consequence, the legitimacy of a particular statement has to be determined according to the general procedural rules, thus, in a regular judicial hearing, and not within framework of the legal proceeding to which the offending statement was referred. Finally, there is a self-monitoring system organized by the press (see below section III.).

I. The General Right to Personality

1. Basic Concept

In Germany, media reports normally concentrate on criminal proceedings while private law or public law trials attract far less public interest.[29] The problem of (prejudging) reports on ongoing proceedings is regarded as a question of balancing the right to personality of the affected person with the right to information of the public and the freedom of the media.[30] Hence, legal proceedings are protected somewhat indirectly as a kind of a legal reflex.[31] This concept was initiated by the Federal Constitutional Court in its *Lebach* judgement in 1973. It held that reports on a crime which name, depict, or represent the culprit will normally interfere with his general right to personality.[32] This right is embodied in Art. 1(1) in conjunction with Art. 2(2) of the constitution. It safeguards "for everyone the sphere of autonomy in which to shape his private life by developing and protecting his individuality."[33] "This includes the right to one's likeness and to one's utterances and, in particular, to the right to dispose of pictures of oneself. Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof."[34] Since reports on a criminal proceeding which identify the suspected person publicly show the misdeeds of this person and, thus, characterise him in a negative way, such reports constitute a severe intrusion upon his personal sphere.[35]

---

[28] Bornkamm, *supra* note 16, at 247; J. Soehring (2000), *supra* note 16, at para. 12.5; on the antimony of freedom of expression and protection of the honour under German and English law *cf.* G. Gounalakis & H. Rösler, Ehre, Meinung und Chancengleichheit im Kommunikationsprozess (1998).

[29] BVerfG, 1986 NJW 1239, at 1241; J. Soehring (1986), *supra* note 16, at 522.

[30] *Cf.* BVerfGE 35, 202, at 220 *et seq.*, 230 *et seq.*; BGH, 1998 NJW 3047, at 3049; BGHZ 143, 199, at 203; BGH, 2006 NJW 599, at 600 *et seq.*

[31] Bornkamm, *supra* note 16, at 246 *et seq.*; Braun, *supra* note 16, at 71; Nothelle, *supra* note 16, at 19.

[32] BVerfGE 35, 202, at 226 *et seq.* ; *cf.* also, *e.g.*, BVerfG, 1986 NJW 1239, at 1240; 2000 NJW 1859, at 1860.

[33] BVerfGE 35, 202, at 220; translation by F. H. Lawson & B. S. Markesinis, available at http://www.iuscomp.org/gla/index.html.

[34] *Id.* For an overview of the general right to personality in German law *cf.* H. Stoll, *The General Right to Personality in German Law: An Outline of its Development and Present Significance*, *in* B. S. Markesinis (Ed.), Protecting Privacy, at 29-47 (1999).

[35] BVerfGE 35, 202, at 226, 230; BVerfG, 1986 NJW 1239, at 1240; 2000 NJW 1859, at 1860.

These principles may be applied *mutatis mutandis* to reports on proceedings in areas other than criminal law as far as these reports pillory one of the parties for their personal behaviour.[36]

As mentioned above, the Federal Constitutional Court established in its *Lüth* decision the view that the Basic Rights are constituent parts of a system of objective values. This system applies as a constitutional axiom throughout the whole legal system. Each rule – even private law – has to be interpreted in the light of the Basic Rights.[37] In this way the theory of the horizontal effect of the Basic Rights was developed (so-called *Drittwirkung*). It states that the Basic Rights do not only constitute defences of the citizen against the state but apply indirectly to legal relations between individuals as well.[38] For these reasons there is a 'protective duty' of the state to prevent the media from exposing individuals to public view.[39] The decisive question is whether the affected person can be identified and, if so, how easily he can be identified.[40] Even more important is the question of to what extent the publication of the offending report could actually harm the development of his personality.[41]

2. Elements of the Provisions Protecting the Right to Personality and their Application.

As far as criminal law is concerned, the main limitations to the freedom of the media are constituted by the pertinent provisions of the Criminal Code (*Strafgesetzbuch* – StGB), viz. §§ 185, 186, 192 StGB, which aim at the protection of the honour and reputation of the affected person. They read as follows:[42]

> § 185 (Insult). Insult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine.
>
> § 186 (Malicious Gossip). Whoever asserts or disseminates a fact in relation to another, which is capable of maligning him or disparaging him in the public opinion, shall, if this fact is not demonstrably true, be punished with imprisonment for not more than one year or a fine and, if the act was committed publicly or through the dissemination of writings (§ 11(3)), with imprisonment for not more than two years or a fine.

---

[36] Löffler & Ricker, *supra* note 16, ch. 16 at para. 10; *cf.*, *e.g.*, BGH, 1988 NJW 1984, at 1985; BAG, 1999 1988 NJW, at 1989 concerning reports on proceedings before labour courts and BGH, 1999 NJW 2893, at 2894 concerning a report dealing with the divorce of a celebrity; *see also* BVerfGE 35, 202, at 333.

[37] BVerfGE 7, 198, at 205; BVerfG, 1999 NJW 1322, at 1323; constant case law.

[38] For an survey of the theory of *Drittwirkung see* B. S. Markesinis, Always on the Same Path, Essays on Foreign Law and Comparative Methodology II, at 131-173, 175-218 (2001).

[39] BVerfG, 1987 NJW 239; 1998 NJW 1381, at 1382; 1999 NJW 1322, at 1324.

[40] *Cf.* BVerfG, 2000 NJW 1859, at 1850; BGH, 1994 NJW 1950, at 1952; BGHZ 143, 199, at 207; OLG Nürnberg, 1996 NJW 530, at 531; OLG München, 2002 NJW-RR 404.

[41] BVerfG, 1998 NJW 2889, at 2891; 2000 NJW 1859, at 1860.

[42] An English translation of the Criminal Code provided by the Federal Ministry of Justice is available at: www.iuscomp.org/gla/index.html.

> § 192 (Insult Despite Proof of Truth). The proof of the truth of the asserted or disseminated fact shall not exclude punishment under § 185, if the existence of an insult results from the form of the assertion or dissemination or the circumstances under which it occurred.

As to private law, § 823 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) is the chief restriction on the freedom of expression.

> § 823. (1) A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom. (2) The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault can be imputed to the wrongdoer.[43]

§§ 185, 186, 192 StGB constitute so-called 'protection statutes' in terms of § 823(2) BGB so that their infringement regularly entails civil liability as well.[44] Yet, the most important provision is § 823(1) BGB. This is due to the fact that the Federal Court already held in 1954 in its *Schacht* decision that the general right to personality qualifies as an 'other right' in terms of § 823(1).[45] The scope of this right goes far beyond the simple protection of the honour. It may be described as a general clause granting a broad and comprehensive protection of all aspects of the personal sphere. As a consequence, press reports may infringe the general right to personality even though the publications do not affect the honour in the narrow meaning of the criminal provisions.[46] This broad interpretation has been upheld several times by the Federal Constitutional Court.[47] This may be one reason why the vast majority of actions questioning the lawfulness of emanations of the media are brought before civil courts today. The result is a shift of the protection of the honour from criminal to private law.[48] In the words of *Markesinis:*

> On closer examination, the conflict may well be between the civil liberties of two individuals – speech against privacy. Seen from this perspective, the question is not whether private individuals should be subjected to public law obligations, but how a legal system ought to balance the basic right of individual autonomy from state intervention against the rights of other individuals including their right of expression.[49]

When determining whether a statement is admissible or not, German law basically distinguishes between the expression of an opinion and the assertion of a fact.[50] Opinions are characterized by the element of taking a position and of making a

---

[43] Translation taken from B. S. Markesinis, The German Law of Obligations II, at 12 (1997).

[44] *Cf.* BVerfG, 1999 NJW 1322, at 1323; BGHZ 90, 113, at 117; J. Hager, *Der Schutz der Ehre im Zivilrecht*, 196 AcP 170, at 172 (1996).

[45] BGHZ 13, 334, at 338 *et seq.*; constant case law; Hager, *supra* note 44, at 172.

[46] BVerfGE 54, 148, at 154; BVerfG, 1998 NJW 1381, at 1383; BGHZ 90, 113, at 117; Steffen, *supra* note 16, at paras. 55 *et seq.*, 74.

[47] BVerfGE 34, 269, at 280 *et seq.*; BVerfG, 1991 NJW 95; 1998 NJW 1381, at 1383; 1999 NJW 3326, at 3327.

[48] C. H. Soehring, *supra*, note 16, at 86; J. Soehring (2000), *supra* note 16, at para. 12.49.

[49] Markesinis, *supra* note 38, at 132; *cf. also* Hager, *supra* note 44, at 175 *et seq.*

[50] BGH, 1998 NJW 3047, at 3048; J. Soehring (1986), *supra* note 16, at 520.

personal judgement, i.e., by the subjective relation of the individual to the content of his statement. By contrast, assertions of fact can be examined with respect to their content of truth.[51] Even though this delimitation is quite difficult and ambiguous in practice,[52] it is of considerable practicable importance: According to the case law of the Federal Constitutional Court, solely opinions are directly covered by the guarantee of Art. 5(1) GG while assertions of truth are only protected insofar as they are the prerequisite for the formation of opinions.[53]

Media reports on legal proceedings aim at providing information, in other words: facts, in order to enable the addressees to form an opinion on the subject.[54] § 186 StGB stipulates that the dissemination of defamatory assertions of facts shall be punished if the facts are not demonstrably true. As mentioned above, reports on criminal or investigation proceedings characterise the depicted person as a (potential) culprit so that they potentially interfere with his honour. Consequently, such reports may easily fall within the scope of § 186 StGB.[55] Thus, the crucial point is whether the report corresponds to the truth or not.[56] In this respect, § 186 StGB shifts the burden of proof to the reporting journalist. He has to provide evidence for the truth of his assertion; he takes the risk.[57] When reporting on ongoing proceedings or even simply on suspicious fact patterns, however, the precise facts will normally not have been established yet.[58] Accordingly, it is very likely that the journalist will not be in a position to proof the truth.[59] Thus, § 186 StGB constitutes *de facto* an exception to the *in dubio pro reo* principle.[60] For this reason (court-)journalism in Germany has been described as a hazardous employment.[61]

---

[51] BVerfGE 7, 198, at 210; 61, 1, at 8; 90, 241, at 247; 93, 266, at 289; BGH, 1998 NJW 3047, at 3948.

[52] *Cf.* the examples given by Steffen, *supra* note 16, at paras. 83 *et seq.*; J. Soehring (2000), *supra* note 16, at paras. 14.3 *et seq.*

[53] BVerfGE 54, 208, at 219; 61, 1, at 8; 90, 241, at 247; 94, 1, at 8; BGH, 1998 NJW 3047, at 3048.

[54] J. Soehring (2000), *supra* note 16, at para. 12.10.

[55] For details on § 186 StGB *see* T. Lenckner, *§ 186*, *in* A. Schönke & H. Schröder (Eds.), Strafgesetzbuch, at paras. 1 *et seq.* (2006); K. Kühl, *§ 186*, *in* K. Lackner & K. Kühl, Strafgesetzbuch, at paras. 1 *et seq.* (2001).

[56] Bundesregierung, *supra* note 16, at 12; Stapper, *supra* note 16, at 596.

[57] Löffler & Ricker, *supra* note 16, ch. 53, at para. 19; J. Soehring (2000), *supra* note 16, at para. 12.12.

[58] A special rule of evidence is provided for by § 190 StGB (Judgment of Conviction as Proof of Truth):

> If the asserted or disseminated fact is a crime, then the proof of the truth thereof shall be considered to have been provided, if a final judgment of conviction for the act has been entered against the person insulted. The proof of the truth is, on the other hand, excluded, if the insulted person had been acquitted in a final judgment before the assertion or dissemination.

[59] BVerfGE 97, 125, at 149; BVerfG, 1999 NJW 1322, at 1324.

[60] Lenckner, *supra* note 55, at para. 10; Kühl, *supra* note 55, at para. 7a; Stapper, *supra* note 16, at 597; C. H. Soehring, *supra*, note 16, at 91.

[61] J. Soehring (2000), *supra* note 16, at para. 12.12; *see also* Stapper, *supra* note 16, at 597.

Even if a report corresponds to the facts, it can infringe the culprit's right to personality. This holds true for cases in which the published statements either cause social exclusion and isolation or if the personality of the culprit threatens to be harmed disproportionately compared to the public interest in disseminating the truth.[62] Normally, these types of cases (merely) give rise to liability under private law.[63] Theoretically, however, such publications could also attract criminal responsibility. The public pillorying of a bagatelle (so-called 'excess of publication'), for instance, or the inappropriate proclamation of a misdeed committed long ago in the past (so-called 'reactualisation') may qualify as insult in terms of §§ 192, 185 StGB.[64] In practice, however, these provisions have not been applied in such a way since the 1950s.[65]

Offending expressions of *opinion* may be punished when they constitute an insult in terms of § 185 StGB. However, according to the case law of the Federal Constitutional Court, opinions are always protected by Art. 5(1) GG, irrespective of their quality or their correctness. Therefore, they can only be prohibited in very exceptional cases when they can clearly be classified as insulting or reviling so that the defamation of the person seems to be their chief objective.[66] As a consequence, the dissemination of opinions regularly has to be tolerated by the affected person.[67] Some scholars have criticised this very liberal approach as being an exaggerated protection of the freedom of expression at the expense of the individual honour.[68]

Basically, criminal offences require that the offender acted at least with *dolus eventualis* as to all elements of the particular crime (§ 15 StGB). Yet, the element of § 186 StGB requiring that the assertion is not demonstrably true is construed as a purely objective criterion of the offence (*objektive Bedingung der Strafbarkeit*) meaning that it is not necessary that the reporter's will actually encompasses the falsity of the fact. Thus, even a dissemination of an untrue assertion which was made in good faith as to its truth may constitute an offence.[69] Moreover, civil

---

[62] BVerfG, 1998 NJW 2889, at 2891; 2000 NJW 1859, at 1860.

[63] *Cf., e.g.*, BVerfGE 35, 202, at 224 *et seq.*; 2000 NJW 1859, at 1860 *et seq.*

[64] Braun, *supra* note 16, at 87; K. Kühl, *§ 192, in* K. Lackner & K. Kühl, Strafgesetzbuch, at para. 2 (2001).

[65] Braun, *supra* note 16, at 89.

[66] BVerfGE 61, 1, at 12; 82, 272, at 283 *et seq.*; 93, 266, at 293 *et seq.*; 97, 391, at 293 *et seq.*; BVerfG, 1999 NJW 1322, at 1324; for further details *see* D. Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, 1995 NJW 1697.

[67] BVerfGE 97, 391, at 393; BVerfG, 1999 NJW 1322, at 1324; J. Soering (2000), *supra* note 16, at paras. 20.7 *et seq.*

[68] *See, e.g.*, M. Kriele, *Ehrenschutz und Meinungsfreiheit*, 1994 NJW 1897; F. Ossenbühl, *Medien zwischen Macht und Recht*, 1995 JZ 633; H. Sendler, *Liberalität oder Libertinage?*, 1993 NJW 2157; for an approval of the liberal approach *cf., e.g.*, Gounalakis & Rösler, *supra* note 28, at 110-142.

[69] Lenckner, *supra* note 55, at para. 10; Kühl, *supra* note 55, at para. 10. If the person knows that the fact is untrue § 187 StGB (Defamation) may apply reading as follows:

> Whoever, against his better judgment, asserts or disseminates an untrue fact in relation to another, which maligns him or disparages him in the public opinion or is capable of endangering his credit, shall be punished with imprisonment for not

liability for damages already arises in cases of negligence; rights to forbearance and to revocation even occur without any fault provided that the report in question was illegitimate.[70]

Regarding the question of which persons can actually be held liable if an emanation of the press interferes with §§ 185-192 StGB, the Federal Court decided that an offence by publication is committed by each person who deliberately supports its offending content as his own statement and significantly contributes to the dissemination of the offending content.[71] Consequently, the author of the publication and the responsible editorial journalist are regularly regarded as offenders[72] while the editor and the publisher are normally considered as mere assistants,[73] unless they did not only tolerate but initiated the dissemination.[74] In some exceptional cases even the printer has been regarded as an assistant.[75] §§ 185, 186, 192 StGB provide for a penalty of up to one year imprisonment or a fine. In the case of § 186 StGB, even up to two years imprisonment may be imposed under qualified circumstances. In practice, however, courts hardly ever order imprisonment in the context of press releases.[76] If a person is punishable under criminal law he can be held liable under private law as well (§§ 823, 830, 840 BGB).[77] In the context of private law, the case law of the Federal Court has additionally developed a comprehensive obligation of the publisher as the 'master of the press company' to check on each published contribution as to its correctness in substance and its legal admissibility and to ensure that the content does not infringe any right of third parties.[78] As far as civil liability is concerned, the tortfeasor may be confronted with claims of omission, of revocation, and with actions for damages in pecuniary and non-pecuniary loss (see also below section D. II.).[79]

---

more than two years or a fine, and, if the act was committed publicly, in a meeting or through dissemination of writings (§ 11(3)), with imprisonment for not more than five years or a fine.

[70] Löffler & Ricker, *supra* note 16, ch. 41, at para. 6; Steffen, *supra* note 16, at paras. 252, 260; approved by BVerfG, 1998 NJW 1381, at 1382 *et seq.*

[71] BGH, 1990 NJW 2828, at 2830; 1997 NJW 2248, at 2250 *et seq.*; J. Soehring (2000), *supra* note 16, at para. 26.4.

[72] Löffler & Ricker, *supra* note 16, ch. 49, at para. 16; K. Kühl, *§ 20 LPG, in* M. Löffler *et al.* (Eds.), Presserecht, at paras. 83, 86, 87 (2006).

[73] Löffler & Ricker, *supra* note 16, ch. 49, at para. 18; Kühl, *supra* note 72, at paras. 89 *et seq.*

[74] BGH, 1990 NJW 2828, at 2830 *et seq.*

[75] BGH, 1981 NJW 61; Kühl, *supra* note 72, at para. 92.

[76] J. Soehring (2000), *supra* note 16, at para. 26.1,

[77] For details on the liability under civil law *see* J. Soehring (2000), *supra* note 16, at paras. 28.1 *et seq.*; Löffler & Ricker, *supra* note 16, ch. 41, at paras. 19 *et seq.*

[78] BGHZ 14, 163, at 178; 39, 124, at 130; 99, 133, at 136; 1980 NJW 2810, at 2811; J. Soehring (2000), *supra* note 16, at para. 28.3; Steffen, *supra* note 16, at para. 221.

[79] For details *see* J. Soehring (2000), *supra* note 16, at paras. 29.1 *et seq.*; Löffler & Ricker, *supra* note 16, chs. 41 *et seq.*; Steffen, *supra* note 16, at paras. 230 *et seq.*

3. Possible Defences

As explained in the previous section, laws restricting the freedom of expression must be interpreted restrictively in order to ensure that the freedom of expression is safeguarded adequately (*Wechselwirkungslehre*, 'reciprocal effect'). The mechanism by which the *Wechselwirkungslehre* enters the system of protection of honour and personality is the defence of 'safeguarding legitimate interests' in terms of § 193 StGB which applies to provisions of private law as well.[80]

> § 193 StGB (Safeguarding Legitimate Interests). Critical judgments about scientific, artistic or commercial achievements, similar utterances which are made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrances and reprimands of superiors to their subordinates, official reports or judgments by a civil servant and similar cases are only punishable to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it occurred.

§ 193 StGB emphasizes the importance of freedom of expression and the right to information. These values have to be balanced in each particular case against the legitimate interests of the affected person with a view to the crucial importance of Art. 5(1) GG.[81] In other words, § 193 StGB is a direct result of the importance of the Basic Right granted by Art. 5(1) GG.[82] In its *Lebach* judgement the Federal Constitutional Court highlighted that freedom of the press, of expression and of information is a basic constituent element of a liberal-democratic order so that the limitations drawn by the general right to personality in turn have to be applied restrictively.[83] Within this balancing operation one has to consider in particular whether the report corresponds to the journalistic duty of care and whether it deals with a matter of public concern entailing a sufficient interest in broadcasting the information.[84]

As to true reports on criminal proceedings, the Federal Constitutional Court has stressed that crimes form part of contemporary history and, consequently, that there is a considerable public interest in information on their committing and on the facts which led to them.[85] In addition, reporting on legal proceedings assures the control of the administration of justice and thereby benefits the culprit

---

[80] BVerfGE 12, 113, at 125 *et seq.*; 93, 266, at 290 *et seq.*; BVerfG, 1999 NJW 1922, at 1923; 1999 NJW 2262.

[81] Special rules concerning the publication of pictures are laid down in §§ 22, 23 of the Copyright in Works of Art and Photography Act (*Kunsturhebergesetz* – KUG). They require a balancing of the competing values which is comparable to § 193 StGB. An English translation of the §§ 22, 23 KUG is published in Markesinis, *supra* note 38, at 377. For details on this provision *see* Steffen, *supra* note 16, at paras. 118 *et seq.*; Löffler & Ricker, *supra* note 16, ch. 43, at paras. 1 *et seq.*; J. Soehring (2000), *supra* note 16, at paras. 21.1 *et seq.*; Braun, *supra* note 16, at 71-85.

[82] *Cf.* BVerfGE 12, 113, at 125 *et seq.*; 93, 266, 290 *et seq.*; BVerfG, 1999 NJW 1922, at 1923; 1999 NJW 2262, at 2262; 2000 NJW 1859, at 1860; 2000 NJW 3196, at 3197.

[83] BVerfGE 35, 202, at 221, 224 *et seq.*

[84] *Cf., e.g.*, BGH 143, 199, at 203 *et seq.*; 2006 NJW 599, at 600 *et seq.*; Löffler & Ricker, *supra* note 16, ch. 41, at para. 10.

[85] BVerfGE 35, 202, at 230; BVerfG, 2000 NJW 1859, at 1861.

indirectly.[86] Moreover, someone who arouses public interest by committing a crime, as matter of principle, has to accept public reporting provided that the information corresponds to the truth. Consequently, as far as current reporting on crimes is concerned, the public interest in receiving information normally prevails the culprit's right to personality.[87] Yet, this is not an absolute rule. The culprit's right to personality exceptionally prevails if the report has the potential of seriously harming the development of the culprit's personality.[88] This is the case if the offending statement concerns the intimate, confidential or private sphere and if it cannot be justified by a legitimate public interest in information.[89] Furthermore, the media has to account for the culprit's legitimate interest in reintegration into society.[90] However, the Federal Constitutional Court explicitly disapproved of a right of the culprit which would shield him from any reference to former crimes once he has served the corresponding sentences.[91]

Basically, § 186 StGB also forbids reports which turn out to be untrue only after they have been published. However, such publications are not totally precluded since they may be justified on the bases of § 193 StGB. Only an assertion of fact known or proved to be untrue *ex ante* is not covered by the guarantee laid down in Art. 5(1) GG.[92] According to the Federal Constitutional Court, incorrect information does not constitute an interest which is worthy of protection from the viewpoint of the freedom of expression and the process of communication.[93] As for the remainder, one has to consider that the truth will often be uncertain at the time of the assertion. Normally, the establishment of the facts will only be the result of a following process of discussion or of an examination by a court.[94] Given this background, only incontestable facts could be disseminated without any risk if each report whose facts turn out to be untrue was subject to punishment.[95] As a result, commenting on suspicious facts would be impossible. This consequence would clearly be irreconcilable with the public interest in reporting on current legal proceedings. Therefore, the Federal Constitutional Court held that the duty of care enshrined in § 186 StGB must not be exaggerated because otherwise a restriction and paralysis of the process of communication would threaten.[96] Hence, the extent to which a statement corresponds to the truth is just one element which has to be considered within the balancing of the competing interests.[97] For

---

[86] BVerfGE 35, 202, at 232.

[87] BVerfGE 35, 202, at 231; BVerfG, 2000 NJW 1859, at 1861.

[88] BVerfG, 1998 NJW 2889, at 2890 *et seq.*; 2000 NJW 1859, at 1860.

[89] BVerfGE 34, 269, at 281 *et seq.*; 66, 116, at 129; BVerfG, 1999 NJW 1322, at 1324; 2000 NJW 1859, at 1860.

[90] BVerfGE 35, 202, at 235; BVerfG, 2000 NJW 1859, at 1860.

[91] BVerfG, 2000 NJW 1859, at 1860 *et seq.*

[92] BVerfGE 61, 1, at 8; 90, 241, at 247, 254; BVerfG, 1999 NJW 1322, at 1324; 1999 NJW 3326, at 3327.

[93] BVerfGE 54, 208, at 219; 61, 1, at 8; 85, 1, at 15; BVerfG, 1999 NJW 1322, at 1324.

[94] BVerfGE 97, 125, at 149; BVerfG, 1999 NJW 1322, at 1324.

[95] BVerfGE 43, 130, 136; BVerfG, 1999 NJW, at 1322, 1324.

[96] BVerfGE 43, 130, at 136; 54, 208, at 220; 61, 1, at 8; 85, 1, at 15, 22; BVerfG, 1999 NJW 1322, at 1324; 1999 NJW 3326, at 3327 *et seq.*; *see also* BGHZ 132, 13, at 24; 143, 199, at 204.

[97] BVerfGE 94, 1, at 8; 97, 391, at 403; BVerfG, 1999 NJW 1322, at 1324.

this reason, the burden of proof within the scope of § 193 StGB shifts again: The press merely has to establish that it acted in safeguarding legitimate interests but it does not have to prove the truth of the assertion.[98]

Pursuant to these principles, reporting on current suspicious fact patterns is admissible provided that there is a sufficient amount of indicators leading to the assumption that the information is true; otherwise there is no public interest in broadcasting the information.[99] The corresponding duty of care depends on the possible impact of the publication on the right to personality of the affected person – the greater the potential for harm, the stricter the duty of care.[100] Furthermore, the report must not contain any statement which causes the addressees to think that the suspected person has already been convicted of the crime.[101] In this respect, the press has to account for and give effect to the presumption of innocence (Art. 6(2) ECHR).[102] In any case, a sensational, intentionally one-sided, or misleading report is inadmissible. Moreover, also the facts and arguments speaking in the favour of the suspected person have to be considered.[103] Additionally, publicising the name of the accused requires a qualified public interest of considerable importance. This may be the case if the occurrences are of particular cruelty, e.g. a homicide, or if they have a reference to contemporary politics or concern a public person.[104]

4. Procedural Aspects

The criminal offences relating to a person's honour can only be prosecuted if the person explicitly requests a prosecution by making a 'criminal complaint' to the public prosecutor's office (*Strafantrag*, § 194(1) StGB). However, the complainant may be referred to the so-called 'private prosecution' (*Privatklage*) based on §§ 374, 376 of Criminal Procedure Code (*Strafprozeßordnung* – StPO)[105] meaning that the affected person himself rather than the public prosecutor has to charge the offender and has to proof his guilt. Furthermore, according to the press laws of the *Länder* the prosecution of an offence committed by a press publication is already time-barred after six or twelve months respectively while the normal limitation period would last at least three years (§ 78(3) StGB). The short period

[98] BGH, 1985 NJW 1621, at 1622; 1987 NJW 2225, at 2227; 1993 NJW 525, at 528; Hager, *supra* note 44, at 187; Stapper, *supra* note 16, at 597.

[99] BGHZ 143, 199, at 203; OLG München, 2002 NJW-RR 186.

[100] BGHZ 143, 199, at 203; OLG München, 2002 NJW-RR 186.

[101] BGHZ 143, 199, at 203; OLG München, 2002 NJW-RR 186; 1996 NJW-RR 1487, at 1488; 1996 NJW-RR 1493, at 1494; OLG Brandenburg, 1995 NJW 886, at 888; OLG Frankfurt, 1990 NJW-RR 989, at 990.

[102] BVerfG, 1986 NJW 1239, at 1240; OLG Köln, 1989 AfP 683, at 685; OLG München, 2002 NJW-RR 404; Löffler & Ricker, *supra* note 16, ch. 16, at para. 10; Bornkamm, *supra* note 16, at 254 *et seq.*; C. H. Soehring, *supra* note 16, at 57 *et seq.*; against the applicability of Art. 6(2) ECHR J. Soehring (2000), *supra* note 16, at paras. 19.32 *et seq.*; Steffen, *supra* note 16, at para. 205.

[103] BVerfGE 35, 202, at 232; BGHZ 143, 199, at 203; OLG München, 2002 NJW-RR 186.

[104] BGH, 1994 NJW 1950, at 1952; 1998 NJW 3047, at 3049; BGHZ 143, 199, at 207; OLG München, 2002 NJW-RR 404; BGH, 2006 NJW 599, 600.

[105] An English translation of the Criminal Procedure Code provided by the Federal Ministry of Justice can found on www.iuscomp.org/gla/index.html.

shall privilege the press because of its importance in the light of Art. 5(1) GG.[106] Due to the difficulties to enforce the criminal law provisions, most of the disputes arising from media reports are settled in the context of private law.[107]

As a conclusion, it can be stated that reporting on legal proceedings and on suspicious facts is basically allowed – even desirable – provided that some minimum requirements regarding the public interest as well as the carefulness and sincerity of the press's investigations are met.[108]

II. Forbidden Communications about Judicial Hearings (§ 353d StGB)

Under the heading 'Forbidden Communications about Judicial Hearings' § 353d StGB provides for three special limitations to the freedom of press. It represents the only provision directly prohibiting publications of the media concerning current legal proceedings.[109]

1. Elements of § 353d nos. 1-2 StGB and their Application

The provision reads as follows:

> § 353. Whoever:
> 1. publicly makes a communication contrary to a statutory prohibition about a judicial hearing from which the public was excluded or about the content of an official document which concerns the matter;
> 2. without authorization and contrary to a duty of silence imposed by the court on the basis of a statute, discloses facts which came to his attention in a non-public judicial hearing or through an official document which concerns the matter; [...]
> shall be punished with imprisonment for not more than one year or a fine.

§ 353d no. 1 StGB has to be read together with § 174(2) of the Judiciary Act (*Gerichtsverfassungsgesetz* – GVG) because the latter is the only 'statutory prohibition' in terms of the former.[110] § 174(2) GVG stipulates that press and broadcasting (radio and television) must not publicise reports on judicial hearings if the public has been excluded for the benefit of national security. Since the general public is excluded from the proceedings, § 353d no. 1 StGB can only apply to information which had been conveyed to the press by one of the parties

---

[106] For details *see* K. Kühl, *§ 24 LPG, in* M. Löffler *et al.* (Eds.), Presserecht, at paras. 1 *et seq* (2006).

[107] *Cf., e.g.*, C. H. Soehring, *supra*, note 16, at 86 *et seq.*; with further references.

[108] BVerfG, 1998 NJW 1381; 1999 NJW 1322, at 1324; 1999 NJW 3326, at 3328; BGHZ 143, 199, at 204; 2006 NJW 599, at 601; Braun, *supra* note 16, at 305 *et seq.*

[109] Braun, *supra* note 16, at 61; Roxin (1991), *supra* note 16, at 155; Roxin (1996), *supra* note 16, at 106.

[110] Stapper, *supra* note 16, at 591; T. Lenckner & W. Perron, *§ 353 d, in* A. Schönke & H. Schröder (Eds.), Strafgesetzbuch, at para. 2 (2006); K. Kühl, *§ 353 d, in* K. Lackner & K. Kühl, Strafgesetzbuch, at para. 2 (2001) ; J. Soehring (2000), *supra* note 16, at para. 12.77.

involved in the dispute.[111] Number 2 refers to § 174(3) GVG[112] which enables the court to impose confidentiality on the participants of a non-public judicial hearing in cases in which the public had been excluded to protect a state, business or private secret (§§ 171b, 172 nos. 1-3 GVG). Therefore, the significance of that offence is limited to very rare cases in which, on the one hand, the court has excluded the general public, but, on the other hand, allows the participation of the press and imposes confidentiality.[113] The purpose of § 353d nos. 1 and 2 is the protection of the interest in the nondisclosure of the protected information.[114] Under this regime, a report is only offending if its content concerns information for whose sake the public has been excluded. Consequently, the communication of general, non-confidential information on the proceeding is still admissible.[115] Furthermore, the conditions of § 353d no. 1 StGB are solely met if the offender publicises the report in a way that is typical for press, radio or television publications and, additionally, works in this special type of media. Therefore, for example, a journalist employed by a newspaper has to publish his contribution in a newspaper.[116] Finally, number 2 can only be fulfilled by persons to whom the duty of silence has been explicitly imposed by the court.[117]

There is no special defence like safeguarding legitimate interests or acting in the public interest in the context of § 353d StGB. However, one has to take into consideration that the provision only applies if the public has exceptionally been excluded based on the statutory provisions of §§ 171b, 172 GVG. When the court determines whether the public should be excluded the court has to duly balance the competing values particularly accounting for the principle of the publicity of the jurisprudence (§ 169 GVG). This question has to be discussed with the involved parties in a special hearing and the court has to give reasons for its decision (§ 174(1) GVG), which are subject to re-examination by a superior court.[118] In practice, courts use the possibility of excluding the public restrictively and adequately in order to safeguard the transparency of the administration of justice.[119] As a result, § 353d nos. 1 and 2 are very narrow in scope and rarely applied in practice.[120] Thus, they do not seriously interfere with the possibility of commenting on legal proceedings in general.

---

[111] J. Soehring (2000), *supra* note 16, at para. 12.77.

[112] Kühl, *supra* note 110, at para. 3; J. Soehring (2000), *supra* note 16, at para. 12.78; Lenckner & Perron, *supra* note 110, at para. 22.

[113] J. Soehring (2000), *supra* note 16, at para. 12.78.

[114] Lenckner & Perron, *supra* note 110, at para. 23.

[115] Stapper, *supra* note 16, at 593; Lenckner & Perron, *supra* note 110, at paras. 15/16, 18; Löffler & Ricker, *supra* note 16, ch. 58, at para. 9.

[116] Stapper, *supra* note 16, at 592; Lenckner & Perron, *supra* note 110, at paras. 9 *et seq.*; Löffler & Ricker, *supra* note 16, ch. 58, at para. 9.

[117] Stapper, *supra* note 16, at 593; Lenckner & Perron, *supra* note 110, at para. 26; Löffler & Ricker, *supra* note 16, ch. 58, at para. 10

[118] *Cf.* P. Hartmann, *§ 174 GVG, in* A. Baumbach *et al.*, Zivilprozessordnung, at paras. 3 *et seq.* (2007); Stapper, *supra* note 16, at 592.

[119] Lenckner & Perron, *supra* note 110, at para. 4.

[120] *Cf.*, *e.g.*, Stapper, *supra* note 16, at 599.

2. Elements of § 353d no. 3 StGB and their Application

The provision stipulates:

> § 353 d. Whoever: [...]
> 3. publicly communicates, verbatim, essential parts or all of the accusatory pleading or other official documents of a criminal proceeding, a proceeding to impose a civil penalty or a disciplinary proceeding, before they have been argued in a public hearing or the proceeding has been concluded,
> shall be punished with imprisonment for not more than one year or a fine.

This prohibition wants to prevent official documents from becoming prematurely the object of public discussion (or even purposeful tempering) in order to safeguard the impartiality of the parties concerned, in particular of the lay judges and witnesses.[121] Therefore, § 353d no. 3 StGB is the only provision of criminal law which directly protects legal proceedings against biased media reports.[122] At the same time, its purpose is to protect the accused person from being prematurely compromised in the public.[123] The prohibition applies as soon as investigation proceedings have been initiated by the competent authority (police, prosecution office, finance office) or once a criminal complaint has been received.[124] It continues to apply until the content of the document has been presented in a public hearing or the proceeding has been concluded. The corresponding element 'argued in a public hearing' is understood in a large sense. It is already met if the content of the document had been argued in its general sense, a literal introduction of the text into the hearing is not required.[125] As to the criterion 'conclusion of the proceeding', it is not yet settled whether it means the conclusion in one instance[126] or its absolute conclusion.[127] Pursuant to the wording of § 353d no. 3 StGB, the substantive scope is very limited as well since the documents must be published entirely or at least in essential parts which is interpreted restrictively.[128] Furthermore, solely a verbatim publication of the documents is punishable while reports changing their wording and communicating them in their general sense are not offending.[129] For this reason, the compatibility of § 353d no. 3 StGB with the constitution has been questioned from the angle of the proportionality test: Due to its limited scope it

---

[121] BVerfG, 1986 NJW 1239, at 1240; OLG Köln, 1980 JR 473; OLG Hamburg, 1990 NStZ 283, at 284; LG Mannheim, 1996 NStZ-RR 360, at 361; Bundesregierung, *supra* note 16, at 11; Nothelle, *supra* note 16, at 20; Kühl, *supra* note 110, at para. 1; Lenckner & Perron, *supra* note 110, at para. 40; Braun, *supra* note 16, at 61.

[122] Roxin (1991), *supra* note 16, at 155; Roxin (1996), *supra* note 16, at 106.

[123] BVerfG, 1986 NJW 1239, at 1240; LG Mannheim, 1996 NStZ-RR 360, at 361; Kühl, *supra* note 110, at para. 1; *contra, e.g.*, Lenckner & Perron, *supra* note 110, at para. 40.

[124] Lenckner & Perron, *supra* note 110, at para. 53; Löffler & Ricker, *supra* note 16, ch. 58, at para. 8.

[125] Kühl, *supra* note 110, at para. 4; Lenckner & Perron, *supra* note 110, at para. 55.

[126] In this sense, *e.g.*, Bundesregierung, *supra* note 16, at 11; Lenckner & Perron, *supra* note 110, at para. 57; with further references.

[127] Prevailing opinion; *cf.*, *e.g.*, OLG Köln, 1980 JR 473; Kühl, *supra* note 110, at para. 4; with further references; *see also* Stapper, *supra* note 16, at 594.

[128] *Cf.*, *e.g.*, OLG Hamm, 1979 NJW 967; OLG Köln, 1980 JR 473; Stapper, *supra* note 16, at 593; Löffler & Ricker, *supra* note 16, ch. 58, at para. 7.

[129] BVerfG, 1986 NJW 1239, at 1240, 1241; Roxin (1991), *supra* note 16, at 159.

would not be capable to achieve its objective at all and thus would constitute a disproportional restriction on the freedom of expression.[130] According to the Federal Constitutional Court, however, the legislator did not exceed its legislative discretion when drafting such a narrow provision. On the contrary, the Federal Constitutional Court stated that the legislator had to elaborate a clear and narrow wording in order to assure legal certainty for the media and to avoid severe intrusions upon the Basic Rights granted by Art. 5(1) GG.[131]

As a result, the significance of the provision as a restriction on reporting on legal proceedings is far less than it may appear at first sight. The limited scope of § 353d no. 3 StGB results from the fact that it interferes with the freedom of expression, press and information.[132] Hence, the press is basically allowed to convey comprehensive information on current legal proceedings as well as on the content of corresponding official documents as long as they avoid citing the documents literally before they have been introduced into a public hearing or the proceeding has been concluded.[133] Thus, no information is withheld from the public.[134] Consequently, the limitations drawn by § 353d no. 3 StGB do not constitute a severe interference with the guarantees embodied in Art. 5(1) GG.[135] Yet, if a publication actually matches the prerequisites of § 353d no. 3 StGB, again, there is no special defence like safeguarding legitimate interests. The Federal Constitutional Court explicitly emphasized that, in such a case, the guarantees of Art. 5(1) GG cannot be invoked as a defence even if the offending communication concerns proceedings of highest importance.[136]

For the time being, there is no case law of the Federal Court dealing with the scope of § 353d no. 3 StGB. Therefore, the restrictive interpretation of the element 'verbatim' as described in the previous paragraphs is not approved by any decision of the Federal Court. The Superior Court of Hamburg (*Oberlandesgericht Hamburg*) deduced from the fact that the legislator forecloses even the publication of 'essential parts' of the respective documents that a communication which changes the wording of the original text only insignificantly still falls within the scope of § 353d no. 3 StGB; otherwise, the protective function of the offence could be undermined too easily and the provision would become superfluous.[137] It is unclear how the Superior Court of Hamburg wants to define the element 'insignificant change of the text'. Obviously, such an interpretation contravenes the clear wording of § 353d no. 3 StGB which explicitly seeks to promote legal certainty. Furthermore, it seems to be contrary to the mentioned decision of the

---

[130] *Cf.* AG Hamburg, 1984 NStZ 265 requesting a decision by Federal Constitutional Court according to Art. 100(1) GG.

[131] BVerfG, 1986 NJW 1239, at 1240 *et seq.*

[132] BVerfG, 1986 NJW 1239, at 1240 *et seq.*; Roxin (1991), *supra* note 16, at 156; Kühl, *supra* note 110, at para. 4; Löffler & Ricker, *supra* note 16, ch. 58, at para. 4.

[133] BVerfG, 1986 NJW 1239, at 1240 *et seq.*; J. Soehring (1986), *supra* note 16, at 523; J. Soehring (2000), *supra* note 16, at para. 12.79; Löffler & Ricker, *supra* note 16, ch. 58, at para. 4.

[134] BVerfG, 1986 NJW 1239, at 1241.

[135] BVerfG, 1986 NJW 1239, at 1241.

[136] BVerfG, 1986 NJW 1239, at 1241; Lenckner & Perron, *supra* note 110, at para. 58.

[137] OLG Hamburg, 1990 NStZ 283, at 284.

Federal Constitutional Court.[138] As a result, the precise substantive scope of this provision has not been clarified yet.[139] Despite this questionable decision, however, the provision has hardly ever been applied in practice.[140] In this context, a conference of the German Lawyers Association (*Deutscher Juristentag*) in 1990 may be mentioned. It dealt with possible reform options regarding the general duties of the media. During this conference, a resolution was adopted by a large majority of the participants suggesting the abolishment of § 353d no. 3 StGB because it was considered to be superfluous.[141] A similar provision has already been abolished in Austria.[142] However, the German legislator has not reacted yet.

III. Section 13 of the German Press Code[143]

Finally, in the context of limitations to the freedom of press explicitly referring to legal proceedings, section 13 of the German Press Code should be mentioned.

> Section 13. Reports on investigations, criminal court proceedings and other formal procedures must be free from prejudice. For this reason, before and during legal proceedings all comment, both in reports and headlines, must avoid being one-sided or prejudicial. An accused person must not be described as guilty before final judgment has been passed. Court decisions should not be reported before they are announced unless there are serious reasons to justify such action.[144]

The German Press Code enshrines basic journalistic principles defining the professional ethics of the press. It is elaborated by the German Press Council. This is a private organisation supported by several publishers' associations and the journalists union.[145] It was founded in 1956 following the example of its British counterpart.[146] The Press Council has established a complaint committee to which any individual can appeal to in order to complain on a particular publication or

---

[138] *Cf.* Stapper, *supra* note 16, at 594, 599; Lenckner & Perron, *supra* note 110, at para. 49; Löffler & Ricker, *supra* note 16, ch. 58, at para. 7; the view of the OLG Hamburg is shared by Braun, *supra* note 16, at 70.

[139] Stapper, *supra* note 16, at 599.

[140] C. H. Soehring, *supra*, note 16, at 96.

[141] Resolution 11 a) of the section for media law, published *in* Deutscher Juristentag, Verhandlungen des achtundfünfzigsten Deutschen Juristentages II, Part K, at K 219 (1990); *see also* Stapper, *supra* note 16, at 595.

[142] Meyer, *supra* note 24, at 38, 42.

[143] On this *see* C. H. Soehring, *supra* 16, at 119-237; H. Münch, *Der Schutz der Privatsphäre in der Spruchpraxis des Deutschen Presserats*, 2002 AfP 18; Bundesregierung, *supra* note 16, at 29 *et seq.*; Löffler & Ricker, *supra* note 16, ch. 40. General information in English on the history and the tasks of the German Press Council and a translation of the Press Code as available at: www.presserat.de.

[144] These general rules are specified by corresponding guidelines which are available at: www.presserat.de. The wording of Section 13 has slightly been altered as of 1 January 2007: The 2nd and 3rd sentence have been replaced by a single phrase: "The principle of presumption of innocence also applies to the press", *see* http://www.presserat.de/uploads/media/Synopse_01.pdf.

[145] J. Soehring (2000), *supra* note 16, at para. 34.2.

[146] Münch, *supra* note 143, at 18; Bornkamm, *supra* note 16, at 226.

any other occurrences in the press.[147] If the complaint committee learns about a contravention of the Press Code – which is in fact anything but rare[148] – the strictest sanction it can impose is a public reprimand[149] which has to be published according to rules elaborated by the Press Council.[150] However, the Press Council and its complaint committee are institutions of press's self-monitoring based on voluntary participation and thus do not exercise binding force.[151] This is due to the fact that all press laws of the *Länder* prohibit compulsory membership of the press in professional organisations having a binding jurisdiction.[152] As a result, the affected individuals have no means to enforce the press's obligation to publish the public reprimand; in other words: the infringement of this obligation has no legal consequences.[153] It follows that precisely those press companies permanently refuse to print the reprimands which tend to publish extremely sensational and biased reports.[154]

To conclude, the German Press Code actually does not impose binding restrictions on the freedom of reporting on current legal proceedings.[155] Moreover, such an institution of self-control only exists with respect to the press; there is no equivalent for other types of mass media.[156] As far as legal reforms are concerned, it my be hinted at the fact that, in 1990, the German Lawyers Association voted for the adoption of a statutory obligation to publish the reprimands issued by the Press Council.[157] Until today, however, there have not been any corresponding efforts by the legislator. This may be explained by the fact that such a binding obligation encounters doubts with regard to its constitutionality given the importance of the press within the framework of Art. 5(1) GG.[158]

---

[147] § 1 of the Complaint Regulations.

[148] Roxin (1991), *supra* note 16, at 153, 156; *cf.* the statistics available at the website of the Press Council, www.presserat.de; several cases including its facts are documented by C. H. Soehring, *supra* note 16, at 157-191, 232; *see also* Münch, *supra* note 143, at 18 *et seq.*

[149] § 12(3) of the Complaint Regulations.

[150] Section 16 of the Press Code in conjunction with § 15 of the Complaint Regulations.

[151] J. Soehring, (2000), *supra* note 16, at para. 34.2; Münch, *supra* note 143, at 18.

[152] M. Bullinger, *§ 1 LPG, in* M. Löffler *et al.* (Eds.), Presserecht, at para. 183 (2006).

[153] J. Soehring (2000), *supra* note 16, at para. 34.3; Bornkamm, *supra* note 16, at 226; Braun, *supra* note 16, at 59; Münch, *supra* note 143, at 21. Even the German Press Council often do not adhere properly to its own Press Code when he decides a case, *cf.* C. H. Soehring, *supra* note 16, at 226-231; Münch, *supra* note 16, at 20, 22.

[154] Münch, *supra* note 16, at 21.

[155] Bornkamm, *supra* note 16, at 226; Braun, *supra* note 16, at 59

[156] Bundesregierung, *supra* note 16, at 29; Roxin (1991), *supra* note 16, at 156.

[157] Resolution 11 a) of the section for media law, *cf.* Deutschen Juristentag, *supra* note 141, at K 221.

[158] Bundesregierung, *supra* note 16, at 29; J. Soehring (2000), *supra* note 16, at para. 34.3.

D. Criticism of Judges and Courts

I. Basic Concept

Unlike the common law of Anglo-Saxon countries, German law does not know a specific law of contempt by scandalising courts for two major reasons. First of all, the structure of the German legal order as a civil law system formulating rather abstract rules that do not consider certain states of fact directly but only as part of major aspects. German procedural rules concentrate on the proceedings before courts but do not take public discourse into consideration.[159] Thus, the criticism of judges is subject to public administrative law as well as criminal and private law – depending on the legal effect it is to be considered under. The second reason is the constitutional status of free communication. As already mentioned, the individual freedom of expression, as guaranteed by Art. 5 GG, is a basic constituent to the free democratic order according to the Federal Constitutional Court,[160] which means that there is a constitutional presumption for the freedom of speech. There is no such legal aspect as public confidence in the administration of justice as far as external criticism is concerned.[161] Therefore, specific contempt legislation beyond general criminal and private laws is not considered to be necessary.[162] With these facts in mind it is understandable that restrictions on the criticism of judges and courts are rather few under the bottom line. The topic is commonly discussed in the context of officials like judges or attorneys involved in legal proceedings criticising court decisions.[163] This context shall be examined in sections E. and F. below.

II. Elements of the Restrictions on Criticism of Judges and Courts and their Application

As far as expressions by private persons are concerned, laws establishing restrictions can be divided into two major groups: general laws setting up restrictions regarding the content of an expression or publication and laws setting up formal restrictions such as the extension of liability to certain persons. With regard to the interpretation of Art. 5 of the Basic Law as described in the previous sections, one can say that legal regulations establishing material restrictions must meet the requirements of the *Wechselwirkungslehre*[164] meaning that they are to be interpreted restrictively.

There are only two criminal provisions dealing explicitly with the criticism of judges. According to § 90b(1) StGB, criminal penalties may be imposed on

---

[159] *See infra* section E.

[160] BVerfGE 7, 198, at 208.

[161] As to internal criticism through expressions of judges *see infra* section F.

[162] *Cf.* Bornkamm, *supra* note 19, at 228 *et seq.*

[163] For an overview *see* R. Wassermann, *Zulässigkeit und Grenzen der Urteilsschelte*, 1999 NJW 411; R. Mishra, Zulässigkeit und Grenzen der Urteilsschelte (1997).

[164] BVerfGE 7, 198, at 209.

anyone disparaging the Federal Constitutional Court or the constitutional court of one of the *Länder* in a manner endangering respect for the state.[165] However, the expression must reveal the intention not just to oppose the opinion of the court but to undermine the constitutional free democratic order.[166] Convictions are rather few under this provision. According to § 106(1) no. 2(c) StGB, penalties may be imposed on those coercing members of a constitutional court to exercise them in a particular manner.[167]

Besides these rules, criminal legal restrictions are set up only by general provisions such as the law of defamation (§§ 186 *et seq.* StGB) which applies to the defamation of judges and courts like it applies to any individual.[168] In this context, one has to differentiate between the expression of facts and the expression of opinions. As far as opinions are concerned, there is a constitutional presumption for the freedom of expression. However, they are also subject to § 185 StGB stating that "the insult shall...be penalised". Judges may be subject to insults both in their personal and official capacities. From the normative text of § 194(3) StGB[169] it is deduced that public authorities such as courts are protected as well as individuals. In any case, the culpability of opinions expressed is limited by § 193 StGB. This provision sets up a proportionality test, meaning that the

---

[165] § 90b(1) StGB reads as follows:

> Whoever publicly, in a meeting or through the dissemination of writings (Section 11 subsection (3)) disparages a constitutional organ, the government or the constitutional court of the Federation or of a Land or one of their members in this capacity in a manner endangering respect for the state and thereby intentionally gives support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles, shall be punished with imprisonment from three months to five years.

[166] *See* H. Fischer, *§ 90b*, *in* H. Fischer & T. Tröndle, Strafgesetzbuch und Nebengesetze, at para. 4 (2003).

[167] § 106(1) StGB reads as follows:

> Whoever, by force or threat of appreciable harm, unlawfully coerces:
> 1. the federal president; or
> 2. a member:
> a) of a legislative body of the Federation or a Land;
> b) of the federal assembly; or
> c) of the government or the constitutional court of the Federation or a Land,
>
> not to exercise their powers or to exercise them in a particular manner, shall be punished with imprisonment from three months to five years.

[168] For details *see supra* section C.I.

[169] § 194(3) StGB reads as follows:

> If the insult has been committed against a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces while discharging his duties or in relation to his duties, then it may also be prosecuted upon complaint of his superior in government service. If the act is directed against a public authority or other agency, which performs duties of public administration, then it may be prosecuted upon complaint of the head of the public authority or the head of the public supervisory authority. The same applies to public officials and public authorities of churches and other religious societies under public law.

prohibition of the certain expression must be likely to achieve the intended goal, i.e., the protection of personal honour, and that in a direct balancing of both rights affected the personal honour must prevail. The expression of facts is subject to §§ 186, 187 StGB.

As explained above, a person offended may also seek compensation under private law.[170] The private law of defamation may also apply to judges if they are offended in their personal or official capacity. In this context, the general mechanism of the weighing of interests as prescribed by Art. 5 of the Basic Law is applicable. The right to compensation is complemented by the provision of § 1004 BGB stating that, if the interference of a right continues, the affected person may seek restitution. This means, for instance, that if an expression is made publicly which injures another person's honour, the person making the expression is bound to revoke it if, in the weighing of both rights, the personal honour prevails.[171] Additionally, most media and press laws provide for regulations that oblige press and media to publish replies if untrue facts have been published.

Besides these general provisions, there are only 'soft restrictions' such as the Press Code of the German Press Council. According to guideline 13.1(5), the criticism of judgments and any comments shall be separated from the reports on legal proceedings so that the reader or viewer may differentiate between the official judgment and personal opinions. However, this rule does not have the status of binding law.[172]

As to *formal* restrictions to the criticism of courts, meaning regulations determining liability, generally the person making the statement is found liable by the law. But press- and media laws extend responsibility to editors and publishers if they neglect their obligations to watch the editing and publication of print media.[173]

Currently, there are no considerations of legal reform as far as the criticism of courts is concerned. In 1934, a criminal law was considered imposing penalties

---

[170] *See supra* section C.I.2.

[171] The general weighing mechanism as prescribed by Art. 5 GG applies; *see, e.g.*, § 11(1) of the Press Law for the City of Hamburg reading as follows:

> The responsible journalist or editor and the publisher of a periodical Press organ are obliged to publish a counter-version or reply by the person or party affected by an assertion of fact printed in the organ in question. This obligation extends to all subeditions of the organ in which the assertion of fact has been made.

[172] *See supra* section C.III. The guideline concerning criticism of judgments has been deleted as of 1 January 2007, *see* http://www.presserat.de/uploads/media/Synopse_01.pdf.

[173] *See supra* section C.I.2. and § 19 of the Press Law for the City of Hamburg:

> (1) Culpability for criminal offences perpetrated by means of published material is determined by the terms of general criminal law. (2) If, through published matter, an offence is constituted under the terms of a criminal law and if
>
> 1. in the case of periodical publications, the responsible editor or journalist or,
> 2. in other publications, the publisher
>
> knowingly or negligently violates his duty to maintain published matter free of punishable content, he shall be liable to punishment or imprisonment for up to one year or a fine insofar as he is not already punishable as perpetrator or participant under the terms of at para. 1.

on "everyone bringing German jurisdiction or a judge to contempt seriously."[174] It has never been implemented, and, since the end of World War II and the birth of the Basic Law, there have been no recommendations as to the restriction of the present liberal attitude of the legal system towards the criticism of courts.

III. Procedural Aspects

Basically, there is no specific procedure dealing with the criticism of judges and courts and its consequences. However, a judge may be criticised for not being impartial or for being likely to decide a case in a certain way even before the beginning of legal proceedings because of his personal or political background. All procedural laws provide for special proceedings that may lead to the rejection of judges in these cases. The regulations have in common that they require the "concern that the judge rejected will take a stand which is likely to influence his impartiality."[175] However, courts are rather reluctant to reject judges based on these grounds.

Under the bottom line, the individual freedom of expression prevails in most cases of the criticism of courts under the general laws: criticism is not restricted as long as it does not constitute a personal offence.[176]

E. Expression in Court

I. Basic Concept

Expression in court and its limitation is subject to the Judiciary Act (*Gerichtsverfassungsgesetz* – GVG). It empowers the chairing judge to take all actions which are necessary to maintain and ensure the functioning of the proceeding before court and prevent interference with the process of the court (*Sitzungspolizei*, § 176 GVG).[177] It is different from the right of a public authority to ensure domestic authority within their buildings (*Hausrecht*) since it extends the powers of the judge to the prohibition or prevention of such behaviour (expressions) which is not personally offensive but interferes with the process of the court.

II. Elements of the Restrictions on the Expression in Court and their Application

By functioning of the proceedings (*Ordnung*) the law means "to preserve or restore a state which enables the judge and the parties to fulfil their legal tasks,

---

[174] *See* Bornkamm, *supra* note 16, at 227 *et seq.*, 228.

[175] BVerfGE 32, 288, at 290.

[176] H. Fischer, *§ 193*, *in* H. Fischer & T. Tröndle, Strafgesetzbuch und Nebengesetze, at paras. 8, 27 (2003).

[177] *Cf.*, *e.g.*, P. Greiser & H. Artkämper, Die gestörte Hauptverhandlung (2001).

ensures the attention of other persons present, and a proper process".[178] The regulations extend and limit the *Sitzungspolizei* to the whole duration of the process.[179] Since the authorisation contains a 'may'-clause, the empowered judge is obliged to balance all individual rights affected when deciding whether or not a particular measure should be imposed[180] meaning that all action taken must stand the proportionality test as prescribed by the constitution.[181] For example, if a person involved in the proceedings permanently commits offences and the judge considers banning the person from court, the judge has to balance both the individual freedom of expression and the personal right of the offended person[182] as well as the good of the functioning of the proceedings. The *Sitzungspolizei* both applies to those involved in the proceeding as well as to those present in the courtroom. Yet, it does not include actions against media commentators working outside this sphere, especially editors of newspapers or other media.[183] An addressee is only bound by measures which stand the proportionality test. If an action considered by the judge is disproportional, it may not be taken. Thus, the *Sitzungspolizei* regime executes the constitutional mechanism of the freedom of expression and its limitations. Generally and according to the constitutional presumption for the freedom of speech, judges are rather reluctant to make use of the norm.[184] Since the *Sitzungspolizei* aims at direct prevention of interferences with the process of the court, it does not require any special intentions such as negligence. However, if fees are imposed, the intentions of the offender may be taken into consideration when the amount of the fee is determined. Penalties that may be imposed can vary from fees up to € 1000 or the exclusion from the further proceedings (§ 177 GVG), to custody up to one week in case of contempt (§ 178 GVG).

There has been a discussion in Germany in the late 1990s as to whether the criticism of court decisions by attorneys, professors and judges involved in the proceedings is not only a moral issue but is also prohibited by constitutional civil service law (see Art. 33 GG).[185] However, it is commonly regarded as being in accordance with what can be called a constitutional right to the criticism of judgments.[186] Since these principles are discussed mainly in the context of the expression of judges, this topic will be dealt with in the following section.

---

[178] BVerfGE 28, 21, at 31.

[179] *See* O. R. Kissel & H. Mayer, Gerichtsverfassungsgesetz, § 176, at paras. 8 *et seq.* (2005).

[180] BGH, 1962 NJW 260, at 261; BGHSt 17, 201, at 204; 27, 13, at 15.

[181] *See supra* section B.; BVerfGE 28, at 21; OLG Karlsruhe, 1977 NJW 309, at 310.

[182] *Cf.* Kissel & Mayer, *supra* note 179, at paras. 13 *et seq.*, 36.

[183] *See* Kissel & Mayer, *supra* note 179, at paras. 39, 47.

[184] *Cf.* Kissel & Mayer, *supra* note 179, at para. 47.

[185] *Cf.* K. Redeker, *Von der Unsitte des Schreibens in eigener Sache*, 1983 NJW 1034; W. Habscheid, *Urteilskritik durch am Verfahren beteiligte Rechtsanwälte, Professoren und Richter*, 1999 NJW 2230.

[186] *See* Habscheid, *supra* note 185; O. R. Kissel, *Urteilskritik, in* H. Tilch (Ed.), Münchener Rechtslexikon, Vol. 3 (1987).

F. Expression of Judges[187]

I. Basic Concept

As far as the freedom of expression of judges is concerned, one has to differentiate between expressions made in the judge's official and those made in his personal capacity.[188] If a judge makes an expression in his official capacity, he exercises public authority and, therefore, may not invoke the freedom of expression guaranteed by Art. 5(1) GG.[189] Even though Art. 97(1) GG states that judges shall be independent and subjected only to the law, this provision does not grant any individual rights to judges by using the term of independence. Instead, it seeks to ensure an effective, impartial, and fair judicial system in conformity with the idea of the rule of law and the separation of powers as embodied in Art. 20(2) and (3) GG.[190] However, it is commonly accepted today that judges, in their capacity as citizens, benefit from the freedom of expression just as any other individual.[191] By they same token, they are subjected to the same restrictions, in particular to the provisions protecting the honour and the general right to personality. Being civil servants, however, judges are additionally bound by the general restrictions established by the rules of civil service law.[192]

II. Elements of the Special Restrictions on the Expression of Judges and their Application

The general duties of judges regarding their personal behaviour are specified by § 39 of the German Judges Act (*Deutsches Richtergestz* – DRiG). The provision has been approved by the Federal Constitutional Court as a general law in terms of Art. 5(2) GG and thus qualifies as a constitutional limitation to the freedom of expression.[193] It reads as follows:

---

[187] On this *see* H. Sendler, *Was dürfen Richter in der Öffentlichkeit sagen?*, 1984 NJW 689; G. Schultz, *Meinungsfreiheit des Richters*, 1984 MDR 191; M. Göbel, *Die missbrauchte Richterablehnung – Zum Verhältnis von § 42 ZPO, § 39 DRiG und Art. 5 GG*, 1985 NJW 1057; W. Rudolf, *Meinungs- und Pressefreiheit in der 'verwaltungsrechtlichen Sonderverbindung' der Soldaten, Beamten und Richter*, *in* P. Selmer & I. von Münch (Eds.), Gedächtnisschrift für Wolfgang Martens, 199 (1987); G. Hager, *Freie Meinung und Richteramt*, 1988 NJW 1694; F. Hufen, *Allgemeinpolitische Äußerungen von Beamten und Richtern, Rechtsprechungsübersicht*, 1990 JuS 319; R. Wassermann, *Aktuelles zur Freiheit richterlicher Meinungsäußerung*, 1995 NJW 1653; R. Wassermann., *O si tacuisses ... Was Richter nicht sagen sollten*, 2001 NJW 1470; I. von Münch, *Gesprächige Richter*, 1998 NJW 2571.

[188] Rudolf, *supra* note 187, at 210.

[189] BVerwG, 1988 NJW 1748, at 1749; Hager, *supra* note 187, at 1695; Hufen, *supra* note 187, at 319.

[190] BVerwG, 1988 NJW 1748, at 1749, Hager, *supra* note 187, at 1695; Hufen, *supra* note 187, at 319.

[191] BVerfG, 1983 NJW 2691; 1989 NJW 93; BVerwG, 1988 NJW 1748, at 1749; *cf. also* the references in note 187.

[192] BVerfG, 1983 NJW 2691; G. Schmidt-Räntsch & R. Schmidt-Räntsch, Deutsches Richtergesetz, § 39, at para. 16 (1995).

[193] BVerfG, 1983 NJW 2691; 1989 NJW 93.

> § 39 (Preservation of independence). In and outside their office, as well as in political activities, judges have to conduct themselves in a manner not endangering the confidence in their independence.

Within the framework of this provision, the term 'Independence' does not refer to independence from the parties in terms of the procedural provisions dealing with the challenge of biased judges but rather refers to a much broader notion of independence.[194] It derives from the principle of the rule of law that a judge has to exercise his tasks "politically neutral and as a servant of the law."[195] Therefore, his professional conduct has to conform to the ideas of objectivity, dispassion, justice, rule of law and public welfare.[196] This requires balance and openness as to different arguments, ideals and ideologies.[197] This form of impartiality is of crucial importance given that judges often have to decide issues which are subject to current public and political debate.[198] Against this background, § 39 DRiG ensures that the citizen's confidence in the independence of judges and in the impartiality of the judiciary in terms of Art. 97(1) GG is not threatened by the personal behaviour of individual judges.[199] Therefore, an individual conduct only contravenes § 39 DRiG if it induces the impression that the judge will possibly decide a case not strictly according to the law and to a balanced argumentation but will rather apply his personal political opinion or private ideals.[200] The question whether a particular conduct is admissible under § 39 DRiG must be determined from an objective angle so that it is irrelevant whether the judge deems himself to be open-minded.[201] Yet, by inserting the words "as well as in political activities" into § 39 DRiG, the German legislator has additionally established the picture of the 'political judge'.[202] Consequently, judges are basically allowed to engage in political matters and to freely express their political opinion.[203] The law explicitly welcomes such an engagement: It takes the view that judges are not merely neutral officials but also citizens socially integrated having own opinions and ideals corresponding to a free and pluralist society.[204] The Federal Administrative Court (*Bundesverwaltungsgericht* – BVerwG) stated in this context explicitly that there cannot be any public interest in uncritical judges.[205]

Given this background, the chief objective of § 39 DRiG is to remind the judge to distinguish between the exercise of his official tasks and his private activities.[206] Again, the question whether the judge has actually exceeded the boundaries

---

194 BVerwG, 1988 NJW 1748, at 1749; Hager, *supra* note 187, at 1696.
195 BVerfG, 1983 NJW 2691.
196 BVerfG, 1989 NJW 93.
197 BVerwG, 1988 NJW 1748, at 1749.
198 BVerfG, 1983 NJW 2691; Rudolf, *supra* note 187, at 212.
199 BVerfG, 1989 NJW 93; BVerwG, 1988 NJW 1748, at 1749.
200 NdsDGH, 1990 NJW 1497, at 1499; Hager, *supra* note 187, at 1696 *et seq.*; Hufen, *supra* note 187, at 319.
201 BVerwG, 1988 NJW 1748, at 1749.
202 Schmidt-Räntsch & Schmidt-Räntsch, *supra* note 192, at para. 15.
203 BVerfG, 1983 NJW 2691; 1989 NJW 93; BVerwG, 1988 NJW 1748, at 1749.
204 Hager, *supra* note 187, at 1698; Hufen, *supra* note 187, at 319.
205 BVerwG, 1988 NJW 1748, at 1749; Sendler, *supra* note 187, at 690 *et seq.*
206 BVerwG, 1988 NJW 1748, at 1749; KG, 1995 NJW 883, at 884; Rudolf, *supra* note 187, at 211.

established by § 39 DRiG has to be determined in balancing the competing values accounting for each element of the particular case.[207] In weighing the competing interests one has to consider, *inter alia*, whether the assertion concerns a matter of a current or forthcoming legal proceeding in which the judge is involved.[208] Furthermore, it might be relevant in this respect whether the judge intentionally combines the expression of his opinion with a reference to his public position so as to use the reputation of the office to stress his private viewpoint and to strengthen his arguments.[209] In such cases, the public confidence in the judiciary is likely to be endangered.[210] In particular, the judge must not cause the impression of an official statement when expressing his private opinion. Therefore, judges should express their point of view in a rather moderate way.[211]

As a result, judges can say nearly everything they want within the framework of § 39 DRiG as long as they express it moderately[212] and show that they are open to a fair balancing of the competing arguments in their function as judges.[213] This is also true if the judge expresses his legal opinion on an issue he has to decide before the proceeding is concluded. The law even wants the judge to argue the legal aspects that he deems to be decisive with the parties,[214] provided that he makes it clear that his opinion still is preliminary.[215] In the past, some scholars have appealed to judges to be more cautious when expressing their opinion publicly in order to enhance public confidence in their independence. However, this debate is explicitly limited to questions of professional ethics and does not concern the adoption of further binding restrictions. In the opinion of these authors, the judges just should not exhaust the existing freedoms.[216]

III. Procedural Aspects

The control of the conduct of the judges is subjected to internal supervision (*Dienstaufsicht*)[217] which is organised by the administration of the courts.[218] The

---

[207] BVerfG, 1983 NJW 2691; 1989 NJW 93; BVerwG, 1988 NJW 1748, at 1749.

[208] BVerwG, 1988 NJW 1748, at 1749; Sendler, *supra* note 187, at 694.

[209] BVerfG, 1983 NJW 2691; 1989 NJW 93, at 94; Sendler, *supra* note 187, at 697; Wassermann (1995), *supra* note 187, at 1654.

[210] *Id.*

[211] BVerwG, 1988 NJW 1748, at 1749.

[212] BVerwG, 1988 NJW 1748, at 1749.

[213] BVerfG, 1989 NJW 93; Rudolf, *supra* note 187, at 211; Sendler, *supra* note 187, at 698; for several cases *see* Schmidt-Räntsch & Schmidt-Räntsch, *supra* note 192, § 26, at paras. 19 *et seq.*, 23 *et seq.*; J. Albers, *§ 39 DRiG*, *in* A. Baumbach *et al.* (Eds.), Zivilprozessordnung, at para. 3 (2002).

[214] *Cf.*, *e.g.*, §§ 278 II 2, 279 III German Civil Procedure Code.

[215] Sendler, *supra* note 187, at 690; Wassermann (1995), *supra* note 187, at 1653; Rudolf, *supra* note 187, at 210.

[216] *Cf.*, *e.g.*, Sendler, *supra* note 187, at 690; von Münch, *supra* note 187, at 2572 *et seq.*; Albers, *supra* note 213, at para. 4; *see also* Wassermann (1995), *supra* note 187, at 1654; Wassermann (2001), *supra* note 187, at 1471.

[217] Schmidt-Räntsch & Schmidt-Räntsch, *supra* note 192, § 26, at para. 19, and § 39, at para. 24; Göbel, *supra* note 187, at 1060 *et seq.*

[218] Albers, *supra* note 213, at para. 3

sanctions it can impose are limited in two ways. Firstly, the measures taken must not interfere with the independence of the judge embodied in Art. 97(1) GG (§ 26(1) DRiG).[219] Secondly, only a remonstrance or an exhortation can be expressed as sanctions (§ 26(2) DRiG).[220] If the supervision authority wants to impose a stricter sanction it has to initiate a formal disciplinary procedure against the judge (§§ 63, 64 DRiG).[221] The possible sanctions in a disciplinary procedure vary from a reprimand in writing to the dismissal from the judiciary as strictest sanction.[222] According to §§ 30(1), 64(1) DRiG, the latter can only be imposed by an independent disciplinary court. Based on an infringement of § 39 DRiG, however, all the most reprimands have been imposed for the time being.[223]

G. Conclusions

The German legal system can be regarded as rather liberal towards expressions made on courts and their proceedings as pointed out in the preceding sections. This might be due to the fact that German constitutional law is subject to a historical discontinuity which created a constitutional guarantee of individual freedom. Therefore, any act of public authority, be it a legislative, executive or judicial act, must stand the proportionality test as it is prescribed by Art. 5 GG. The jurisdiction of the Federal Constitutional Court safeguards this guarantee in a comprehensive manner and the decisions clearly express the idea of a constitutional presumption in favour of the individual freedom (*in dubio pro libertate*).

[219] For details *see* H.-J. Papier, *Die richterliche Unabhängigkeit und ihre Schranken*, 2001 NJW 1089; Schmidt-Räntsch & Schmidt-Räntsch, *supra* note 192, § 26, at paras. 1 *et seq.*; P. Hartmann, *§ 26 DRiG*, *in* A. Baumbach *et al.*, Zivilprozessordnung, at paras. 1 *et seq.* (2007).

[220] BGH, 1984 NJW 2534, at 2535; Göbel, *supra* note 187, at 1061.

[221] Göbel, *supra* note 187, at 1061.

[222] For federal officers, *cf.*, *e.g.*, § 5 of the Federal Disciplinary Act (*Bundesdisziplinargesetz* – BDG).

[223] Schmidt-Räntsch & Schmidt-Räntsch, *supra* note 192, § 39, at paras. 27 *et seq.*