

International Association of Judges (IAJ/UIM)

3rd Study Commission – 2022

Topic: Restrictions by the Criminal Law on the Freedom of Speech

1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.

Freedom of speech is protected under Art. 5 of the German Constitution, which stipulates that every person has the right to express and disseminate their opinion freely in speech, writing and image and to inform themselves freely from generally accessible sources. It furthermore lays down that the freedom of press is guaranteed without censorship.

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.

Hate speech can be penalized in accordance with the German Criminal Code. If the statement affects the personal honour of another person, it may be punishable in accordance with sections 185 ff. StGB (e.g. slander and defamation). Section 130 StGB penalizes expressions and acts that cause hatred against a person or group due to their nationality, race, religion or background (“incitement of the people”). Possible sentences range from fines to prison sentences up to five years.

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like?

See above question 2.

Including

- Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions

No. Everyone has to be treated equally under German law.

- Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics

No. Generally, all topics abide by the same rules.

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

An assessment of the right to the freedom of speech on the one hand, and the public interest respectively the interest of the person or group concerned on the other hand, must be done by the courts which evaluate whether a statement is punishable as slander, defamation or incitement of the people.

However, in certain areas freedom of speech can weigh more heavily, e.g. where freedom of the press or freedom of the arts are concerned.

- Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category.

This applies to all groups likewise.

- In cases where the freedom of speech and the restrictions are to be weighed against each other –

- are there then guidelines on how the balancing should be done?

There are no guidelines. There is extensive case law, including decisions of the Federal Constitutional Courts, on how to refine the definitions of the terms used under criminal law, e.g. slander or defamation.

- if yes, which of the two parameters weighs heaviest,

a) the protection of freedom of speech or b) the category that is protected by the legislation? And does this differ from category to category?

It has to be evaluated case by case.

- And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?

There is quite some discretion. However, cases are taken to higher courts in order to establish precedent and definitions.

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

The German Constitution is clear in that the freedom of speech is guaranteed to everybody. However since every case has to be evaluated individually, there is some uncertainty for the lay citizen. E.g., one might be allowed to speak more freely in closed rooms than in the public; an artist might be able express his views more harshly because of the freedom of art.

- If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?

Since the legislation in question has been in place for numerous decades, no such doubts are known. From time to time, however, the treatment of individual cases by courts are subject of public discussion. Depending on the individual case and decision, criticism can be uttered from both perspectives (protection of free speech vs. protection of personal honour).

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and

comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

The stipulation of freedom of speech is a high prerogative under the German Constitution. In that, it is as clear as the stipulations in the Criminal Law. However, every case is subject to interpretation of the individual statement and has to be examined in the context of the circumstances. This can be challenging, but also gives room to do justice to the individual case.