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Artistic Expression and Pornography.

German constitutional law has largely bypassed the thorny ground of pornography, avoiding the dilemmas of American jurisprudence with its tangle of rules and multipart tests. The problems involved in the regulation of pornography in Germany are both simpler and more complicated than in the United States: simpler because Article 5 (2) allows for the limitation of the right to free expression "in the provisions of general laws, in statutory provisions for the protection of youth, and in the right to respect for personal honor "; more complicated because Article 5 (1) extends the right of free expression to writing and pictures. The Federal Constitutional Court, however, has never defined the legislature's right to regulate pornography. 147 Most laws of this nature have been

147 . Adult Theatre Case, 47 BVerfGE 109 (1978). See also Mathias Reimann, "Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the U.S.," University of Michigan Journal of Law Reform 21 (1987– 88): 201– 53. The discussion in this section relies heavily on this article.

aimed at the protection of youth. 148 Before 1974, West German pornography laws virtually outlawed commercial pornography. These laws were challenged in several state courts and sustained. In 1974, the Bundestag liberalized antipornography laws on its own initiative, with the result that making and selling most "hard-core" pornography became legal. The new law did prohibit the sale of pornography to minors; the public display, broadcasting, or unsolicited mailing of advertisements containing pornography (as a way of protecting the rights of those who do not wish to be confronted with pornography); and the production and sale of pornography involving sexual violence and children and depictions of sex between humans and animals . The first prohibition, intended to prevent children's exposure to pornography, entailed the prohibition of the distribution of pornography through the mails or in general movie theaters, since effective age control of patrons is virtually impossible in these areas.

148 . See Nudist Colony Case, 7 BVerfGE 320 (1958) (sustaining the Youth Protection Act but vindicating the right of parents to educate their children in a nudist culture); Heinrich Case, 11 BVerfGE 234 (1960) (upholding the right of the Federal Censorship Office to list materials morally harmful to children); and Nudist Magazine Case, 30 BVerfGE 336 (1971) (invalidating the application of the Youth Protection Act to a magazine promoting nudism).

Pornography is similarly regulated under provisions of the Act on the Publications Harmful to Young People. 149 This statute provides for publications deemed dangerous to the morals of children to be listed by the Federal Assessment Office. Materials so listed cannot be distributed to children, disseminated outside business premises, or advertised. One should note that the German youth

protection statute is much broader in its sweep than the American practice of denying protection to material deemed obscene. The German statute is meant to protect children from writings that are "immoral, have a brutalizing effect , encourage violence, crime, or racial hatred, and those that glorify war." Thus, German courts have largely ignored the problem of defining obscenity. Rather, in the course of statutory interpretation, German judges have developed a concept of pornography that views it in the light of the Basic Law's primary injunction to protect human dignity. In a case that centered on the infamous Fanny

149 . BGBl. I: 377 (1953). This statute was at issue in the Historical Fabrication Case (1994).

Hill, the Federal Court of Justice declined to pronounce the book pornographic since it presented sexuality in the broader context of human life. Rather than deploying a subjective standard that attempts to determine the extent to which a particular work offends the viewer or reader, 150 the German court analyzed the presentation of sexuality in its human context. Mathias Reimann summarized the characteristically Kantian German approach: The court essentially asks whether the material presents the characters truly as human beings with a value in and of themselves. If the material does, the court will find the sexual explicitness acceptable because sex forms a natural part of life. If, on the other hand, the material basically employs its characters only as objects for other purposes, notably sexual stimulation, the court will find the depiction of sex unacceptable because the work treats the characters not as humans, but only as objects. Such a work denies the characters their human individuality and personhood. The approach of the German court thus

150 . This was the approach of the U.S. Supreme Court in Memoirs v. Massachusetts, 383 U.S. 413 (1966).

concerns itself not with the viewer's prurient interest but—ultimately— with human dignity. 151 The regulation of pornography, then— whether done under the limited provisions of the criminal law or the somewhat broader provisions of the youth protection statute— is, like so much else in German constitutional law, centered on the protection of dignity under Article 1. The Mutzenbacher Case (1990) 152 illustrates these general principles as well as an increasing judicial commitment to freedom of expression. In Mutzenbacher, the Court found the Federal Administrative Court's ban on the pornographic novel Josefine Mutzenbacher: The Life of a Viennese Prostitute as Told by Herself to be in violation of the Basic Law. The First Senate rejected the ban because the administrative court had inadequately considered the book's artistic merit. Article 5 (3) protects artistic expression. Unlike Article 5 (1), this provision is not

151 . Reimann, supra note 147, at 229.

152 . 83 BVerfGE 130 (1990).

subject to a reservation clause and, thus, can be limited only by competing constitutional values. These competing values are to be found in the human dignity (Article 1 (1)) and personality (Article 2 (1)) clauses of the Basic Law as well as in Article 6 (2), which affirms the natural right of parents to the care and upbringing of their children and includes, according to the Court, "the right to determine what children can and cannot read." 153 The Court rejected the complainant's view that government must base its judgment on empirical proof that certain publications are harmful to youth; in view of the lack of consensus in this area, value judgments are inevitable and permissible. On the other hand, the Court noted that "pornography and art are not mutually exclusive," and it can be plausibly argued that the disputed novel, while containing graphic descriptions of sexual encounters, is a work of art. 154 As the materials in the next section show, artistic expression is subject to regulation. At the same time,

153 . Ibid.

154 . In this connection the Court noted that "the heroine could be viewed as the incarnation of every man's sexual fantasy which is presented here as a response to an upbringing whose objective was the suppression of sexual matters. There is even evidence of parody." Ibid.

however, artistic expression warrants a heavy presumption in its favor. Accordingly, ordinary courts are not at liberty to ignore the artistic merits of a creative work in deciding whether it has been validly indexed under the Youth Protection Act. According to the Court, when such "artistic expression collides with other constitutional rights, the merits of both must be appropriately weighed in an effort to achieve an optimal compromise between them." 155 Administrative courts were found to have erred in failing to follow this interpretive principle of concordance. There is even some suggestion in the case that these courts failed to sufficiently consider whether in banning the Mutzenbacher novel the government had interfered with the right of parents under Article 6 to monitor the reading habits of their children. 156

155 . Ibid.

156 . Horror Film is a related case in which free speech was vindicated. Horror Film involved the seizure under the Youth Protection Act of an American film because of its excessive violence. The Court acknowledged that the state is permitted to safeguard the dignity of youth by shielding them against films exhibiting excessive or gratuitous violence, but in this instance the seizure was nullified because it occurred prior to being listed as "harmful" under the act's rating guidelines. This, said the Court, is prior restraint in violation of the censorship clause of Article 5 (1). See 87 BVerfGE 209 (1992).

CONCLUSION

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Freedom of speech enjoys wide protection under the Basic Law, particularly when political speech is implicated. Apart from principles of political obligation that require allegiance to the existing

constitutional order, the uncommon protection accorded political speech is fully consistent with the Basic Law's commitment to representative democracy and universal suffrage. The general rights to speech and press, however, cannot be interpreted in isolation from other constitutional provisions. Article 5 (1) is bound by the reservation clauses in Article 5 (2), but in addition, the principle of the constitution's unity and its incorporation of a hierarchical order of values, the highest of which is human dignity, compels a contextual— that is, systematic— approach to constitutional interpretation. The structures and values prescribed in the Basic Law are numerous and complex, and they result in the delicate balancing that typifies many of the cases featured in this chapter. And yet, when viewed comparatively, the German Court's record in defense of freedom of speech , particularly in recent years, easily rivals that of the world's advanced constitutional democracies.