

**Freedom of Speech under the Shadow of the Third Reich:
On the Evolution of German Federal Constitutional Court's
Decisions regarding Extreme Right-wing Speech**

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Abstract

On the basis of different historical contexts and legal issues, the evolution of theory of freedom of speech in Germany has a different starting point and path in comparison with that in the USA. In a nutshell, the German jurisprudence of freedom of speech has been struggled, under the dark shadow of the Third Reich past, to achieve the balance between conflicting values such as the rule of law and anti-Nazism or free marketplace of ideas and transitional justice.

Like their US-American colleagues, decisions of the German Federal Constitutional Court (FCC) play an important role in shaping the theory of freedom of speech in Germany. It is therefore reasonable to explain the development of the FCC's opinions regarding the protection of freedom of speech by virtue of analyzing its decisions on extreme right-wing speech, when the Court usually issues critical decisions in such cases.

This article divides the development of the FCC's opinions on theory of freedom of speech and protection of extreme right-wing speech into four phases: formulation of basis theories in the 1920s, the Lüth-Standard for assessing the "generality" of legal regulations in 1958, enactments of anti-Nazi regulations and distortion of Lüth-Standard since 1960s, and the Wunsiedel-decision in 2009 which, for the very first time, engages itself theoretically in the delicate dilemma between rule of law and transitional justice. The comprehensive analysis here not only reveals sophistication of the German FCC's argumentation about

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freedom of speech over time, but also reflects the close connection of abstract legal theories to concrete time-space context: Certainly, the German Basic Law would entrust the civil society to self-defense more in the process of time, those deep historical wounds that constitute the national identity still remain to be untouchable communicative taboos nowadays.

Keywords: freedom of speech in Germany, extreme right-wing speech, neutrality of the state, general law (allgemeines Gesetz), doctrine of special law (Sonderrechtslehre), doctrine of reciprocal effect (Wechselwirkungslehre), prohibition of viewpoint discrimination (Standpunktdiskriminierungsverbot), national identity