Headnotes:

1. **Even though it is not a general law, § 130.4 of the Criminal Code (Strafgesetzbuch – StGB) is compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on special legislation for opinion-related laws is inherent in Article 5.1 and 5.2 of the Basic Law for provisions which impose boundaries on the propagandistic condonation of the National Socialist rule of arbitrary force.**
2. **The amenability of Article 5.1 and 5.2 of the Basic Law to such special provisions does not rescind the substantive content of freedom of opinion. The Basic Law does not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas already with regard to the intellectual impact of its content.**

Order of the First Senate of 4 November 2009
- 1 BvR 2150/08 -

in the proceedings on the constitutional complaint of the lawyer R…, deceased on 29 October 2009, against the judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 25 June 2008 - BVerwG 6 C 21.07 -.

Ruling:

The constitutional complaint is rejected as unfounded.

Extract from Grounds:

A.

With his constitutional complaint, the complainant opposes a judgment on an appeal on points of law of the Federal Administrative Court which has as its subject-matter the banning under the law on assemblies of a commemorative demonstration for Rudolf Heß in Wunsiedel that had been announced for 20 August 2005. The ruling is based on § 15.1 of the Act on Meetings and Processions (*Gesetz über Versammlungen und Aufzüge*) (in the new version of 15 November 1978, Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 1789 <1791> - Assemblies Act (*Versammlungsgesetz* – VersG)) in conjunction with § 130.4 of the Criminal Code. The complainant opposes both § 130.4 of the Criminal Code itself and its interpretation in the concrete case. 1

I.

The provision contained in § 130.4 of the Criminal Code was inserted into the Criminal Code with the Act Amending the Assemblies Act and the Criminal Code (*Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuchs*) of 24 March 2005 and came into effect as per 1 April 2005 (Federal Law Gazette I p. 969 <970>). It reads as follows: 2

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying the National Socialist rule of arbitrary force shall be liable to imprisonment of not more than three years or a fine. 3

In terms of the law on assemblies, § 130.4 of the Criminal Code becomes significant because of § 15.1 of the Assemblies Act. This reads as follows: 4

(1) The competent authority may ban the meeting or the procession or make it subject to specific conditions if according to the circumstances which are recognisable at the time of the issuance of the order, public security or order would be directly placed at risk if the meeting or the procession were to take place. 5

A danger to public security is to be presumed according to this provision inter alia if the violation of criminal provisions is threatened (Decisions of the Federal Constitu- 6

tional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 69, 315 <352>).

II.

1. The complainant made an advance registration for an open-air event in the town of Wunsiedel which was to recur annually until 2010, including on 20 August 2005, the topic of which was to be: “Commemoration of Rudolf Heß”. Wunsiedel is where the grave of Rudolf Heß is located. The event planned for that year was also to be organised under the motto “His honour meant more to him than freedom”. 7

By order of 29 June 2005, the chief administrative office (*Landratsamt*) banned the event, as well as any form of replacement events in the Wunsiedel municipal area, both in the open air and on closed premises, and ordered immediate enforcement. Applications for injunctions were unsuccessful through all instances. Against the order of 29 June 2005, the complainant lodged an action to the Administrative Court in the main case, which was rejected by judgment of 9 May 2006 (B 1 K 05.768). The appeal on points of fact and law addressed against this was also rejected by the Bavarian Administrative Court (*Bayerischer Verwaltungsgerichtshof*) by judgment of 26 March 2007 (24 B 06.1894, juris, marginal nos. 16 et seq.). 8

2. With the judgment of 25 June 2008, which is impugned in this case, the Federal Administrative Court also rejected the complainant’s appeal on points of law (Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE) 131, 216). 9

a) It was said that the ban could be based on the risk of causing § 130.4 of the Criminal Code to apply. This was said to be a “general law” within the meaning of Article 5.2 alternative 1 of the Basic Law complying with the constitutional requirements. General laws were said to be all laws which did not ban an opinion as such, but served the protection of a legal interest which was to be protected without consideration of a specific opinion which was protected in the legal system generally and regardless of whether it could be violated by expressions of opinion or by other means (reference to BVerfGE 7, 198 <209-210>; 111, 147 <155>; 120, 180 <200>). This was said to be the case with § 130.4 of the Criminal Code. The provision was said to be intended to protect the legal interest described as “public peace”, as well as to protect the human dignity of the victims of the National Socialist rule of arbitrary force. Public peace was said to be protected in the legal system not only against expressions of opinion, but also against other acts of aggression. Furthermore, Article 1.1 of the Basic Law was said to protect human dignity, as the Basic Law’s highest constitutional value and its fundamental constitutional principle, against all kinds of aggression. Therefore, § 130.4 of the Criminal Code was said to be a general law within the meaning of Article 5.2 alternative 1 of the Basic Law, albeit the provision was said to be targeted against specific opinions. 10

General laws also had to be in harmony with the constitutional system. However, 11

human dignity was already said to constitute a limit on freedom of opinion in absolute terms. Public peace was also said to be a weighty interest of the common good which was suited to impose boundaries on freedom of opinion. [...]

b) With regard to the meeting in question, it was said that one could presume with the necessary high degree of probability that an offence against § 130.4 of the Criminal Code would have been committed. The authority responsible for assemblies was said to have adequately taken into account the requirements emerging from Article 5.1 sentence 1 of the Basic Law when interpreting the elements of the offence in question here. [...] 12

The National Socialist rule of arbitrary force was said to be “approved” of by anyone condoning it. Approval by implication was said to be sufficient. Such approval could also exist within the meaning of § 130.4 of the Criminal Code if responsible or symbolic figures of the National Socialist Regime were to be placed in a positive light. This was said to be contingent on the context of the statement making it clear that the person in question was also understood as a symbol of the rule of National Socialism as such. [...] By contrast, positive expressions regarding individual – even leading – National Socialists which only concerned them as individuals and were not linked with approval of the National Socialist rule system or its human rights violations were said not to commit the crime of § 130.4 of the Criminal Code. [...] 13

Had the contentious meeting taken place, the National Socialist rule of arbitrary force would have been approved of in the manner described. [...] 14

With the necessary overall evaluation, it was said to be hence evident that the elevation of Rudolf Heß as an individual would have been perceived as tacit approval of the National Socialist Regime in all its manifestations, and hence also as condonation of the rule of arbitrary force exercised by this regime. [...] 15

III.

With his constitutional complaint submitted on 6 August 2008, the complainant complains of a violation of his fundamental rights and rights equivalent to fundamental rights from Article 3.1 and 3.3, Article 4.1, Article 5.1 sentence 1, Article 8.1 and Article 103.2 of the Basic Law, as well as of a breach of Article 10.1 sentence 1 of the ECHR. 16

His main statement on this is as follows: § 130.4 of the Criminal Code does not constitute a general law within the meaning of Article 5.2 of the Basic Law, since it opposes a specific political tendency. It is not comprehensible why only the victims of the National Socialist rule of arbitrary force are protected under criminal law. Article 1.1 of the Basic Law provides protection for human dignity as a whole. Human dignity is only affected if the core of the personality is affected. That the human dignity of victims of National Socialism is violated in this manner if Rudolf Heß is referred to as a “flier of peace” and a “martyr”, or if a tribute is paid to him overall, is far-fetched. Even if § 130.4 of the Criminal Code were to prove constitutional, it was certainly not to be 17

applied to the case of paying tribute to Rudolf Heß. Furthermore, Article 3 of the Basic Law has been violated because only acts of arbitrary force perpetrated by National Socialism are named, but not for instance also those of Communism. [...]

The complainant further argues that § 130.4 of the Criminal Code also breaches the principle of legal certainty contained in Article 103.2 of the Basic Law. In addition to the acts “approval”, “justification” and “glorification”, in particular the element of the offence of public peace is not adequately determined. These elements of the offence offer scope for endless interpretation. [...] 18

According to the complainant, in questions with a major effect on the public, the presumption applies of the permissibility of free speech. Tribute has been paid to Rudolf Heß at the past events without reference to any persecution measures carried out in National Socialism. This is also planned at future events. [...] 19

The complainant further argues that also the presumption of a violation of human dignity emanating from the meeting is not tenable. The statements of the Federal Administrative Court make it clear that, in contradistinction to the abstract standards, an impermissible link was deduced almost automatically from the approval of the National Socialist rule system to a violation of human dignity. [...] 20

B.

[...] 21

II.

The constitutional complaint is first of all admissible with regard to the complaint based on Article 8.1 in conjunction with Article 5.1 and 5.2 of the Basic Law. As confirmation of a ban on holding a meeting, the impugned ruling may violate the complainant’s right under Article 8.1 of the Basic Law. This can be the case in particular if the meeting is banned in a constitutionally untenable manner because of its content. The content of an expression of opinion, which, in the context of Article 5 of the Basic Law, may not be banned, cannot be used to justify measures which restrict the human right contained in Article 8 of the Basic Law. Here, the breadth taken on by freedom of assembly is orientated in this respect according to the extent of the protection granted by Article 5.1 and 5.2 of the Basic Law (see BVerfGE 90, 241 <246>; 111, 147 <154-155>). There are also no objections with regard to the admissibility of the complaints of a violation of Article 3.3, Article 3.1 and Article 103.2 of the Basic Law. 22

[...] 23

C.

The constitutional complaint is unfounded. § 130.4 of the Criminal Code is compatible with the Basic Law (C I-V), and was applied by the Federal Administrative Court in a manner which is constitutionally unobjectionable (D). 24

I.

§ 130.4 of the Criminal Code encroaches on the area protected by Article 5.1 sentence 1 of the Basic Law. 25

Article 5.1 sentence 1 of the Basic Law guarantees to every person the right to express and disseminate his or her opinion freely. Opinions are characterised by the subjective relationship between the individual and the content of his or her statement (see BVerfGE 7, 198 <210>). The element of taking a position and of appraising/having one's way of thinking is characteristic of them (see BVerfGE 7, 198 <210>; 61, 1 <8>; 90, 241 <247>). In this respect, they also cannot be proven to be true or untrue. They enjoy the protection of the fundamental right without it being a matter of whether the statement is well-founded or groundless, emotional or rational, is evaluated as valuable or valueless, dangerous or harmless (see BVerfGE 90, 241 <247>). Nor are citizens legally obliged to personally share the values on which the Constitution is based. The Basic Law is built on the expectation that citizens accept and realise the general values of the Constitution, but does not bring about loyalty to values by force (see Federal Constitutional Court, Orders of the First Chamber of the First Senate of 24 March 2001 - 1 BvQ 13/01 -, *Neue Juristische Wochenschrift* – NJW 2001, p. 2069 <2070> and of 15 September 2008 - 1 BvR 1565/05 -, NJW 2009, p. 908 <909>). 26

Opinions aiming to fundamentally change the political system regardless of whether and how far they are implementable in the context of the system of the Basic Law are hence also protected by Article 5.1 of the Basic Law. The Basic Law trusts in the power of the free debate as the most effective weapon against the dissemination of totalitarian, inhumane ideologies. Accordingly, even the dissemination of National Socialist ideas as a radical questioning of the valid system does not from the outset fall outside the area protected by Article 5.1 of the Basic Law. Within the free system of the Basic Law, it is primarily civil commitment in the free political debate, as well as state education and upbringing in schools according to Article 7 of the Basic Law which are entrusted with countering the dangers lying therein. 27

By virtue of the fact that § 130.4 of the Criminal Code links to the approval, glorification and justification of the National Socialist rule of arbitrary force and penalises this subject to further preconditions, the provision encroaches on the area protected by freedom of opinion. 28

II.

The encroachment on freedom of opinion is justified. § 130.4 of the Criminal Code constitutes a statutory basis which in a constitutionally permissible manner can justify an encroachment on freedom of opinion. The criminal provision is not a general law within the meaning of Article 5.2 alternative 1 of the Basic Law (1). As a special legislation, it can also not be based on the right to personal honour according to Article 5.2 alternative 3 of the Basic Law (2). In relation to the National Socialist Regime in the years between 1933 and 1945, Article 5.1 and 5.2 of the Basic Law however also per- 29

mits encroachments to be made through provisions which do not comply with the requirements as to a general law. In view of the unique injustice and of the horror which this rule under German responsibility inflicted on Europe and large parts of the world, and of the significance of this past, which characterises the identity of the Federal Republic of Germany, statements approving of this can have impacts which cannot be suitably done justice to solely in categories that are amenable to generalisation (3).

1. § 130.4 of the Criminal Code is not a general law within the meaning of Article 5.2 alternative 1 of the Basic Law. 30

a) According to Article 5.2 alternative 1 of the Basic Law, freedom of opinion finds its limits in the provisions of the general laws. These are to be understood as including laws which do not prohibit an opinion as such, which are not directed against the utterance of the opinion as such, but which serve to protect a legal interest which is to be protected per se without regard to a specific opinion (see BVerfGE 7, 198 <209-210>; 28, 282 <292>; 71, 162 <175-176>; 93, 266 <291>; established case-law). This legal interest must be protected in the legal system generally, and hence regardless of whether it can be violated by expressions of opinion or by other means (see BVerfGE 111, 147 <155>; 117, 244 <260>). 31

aa) A starting point for examining whether a law is a general one is first and foremost the question of whether a provision is linked to the content of opinions. If it covers the conduct in question quite independently from the content of an expression of opinion, there are no doubts with regard to the general nature of the law. If, by contrast, it links to the content of an expression of opinion, one must ask whether the provision serves to protect a legal interest otherwise protected in the legal system. If this is the case, it can be presumed as a rule that the law does not target a specific opinion, but generally aims in an opinion-neutral manner to avert violations of legal interests. In this respect, it is not the case that any linking to the content of opinions as such lends to a law the character of a general law. Instead, content-linking provisions are also to be evaluated as general laws if they recognisably target the protection of specific legal interests and not a specific opinion. On the basis of this presumption, the Federal Constitutional Court (*Bundesverfassungsgericht*), in relation to Article 5.2 of the Basic Law, for instance evaluated as general laws the provisions on the duties of soldiers and civil servants to exercise political moderation (see BVerfGE 28, 282 <292>; 39, 334 <367>), on the punishability of defamation of the state and its symbols according to § 90a of the Criminal Code (see BVerfGE 47, 198 <232>; 69, 257 <268-269>), on insult according to § 185 of the Criminal Code (see BVerfGE 93, 266 <291>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 8, 89 <96>; Federal Constitutional Court, order of the First Chamber of the First Senate of 12 May 2009 - 1 BvR 2272/04 -, NJW 2009, p. 3016 <3017>) or on the predecessor version of the offence of incitement to hatred according to § 130 old of the Criminal Code (see BVerfGE 90, 241 <251>; 111, 147 <155>). 32

Having said that, it cannot be concluded from this case-law, conversely, that any time when a provision protects a recognised legal interest, its generality is per se solely secured by this (see Enders, *Juristenzeitung* – JZ 2008, p. 1092 <1094>). The fact that a law restricting opinions protects a recognised legal interest does not guarantee its generality for each case, but merely constitutes an indication of safeguarding of distance in terms of the rule of law and compliance with the principle of neutrality of opinions. The Federal Constitutional Court has always stressed that the legal interest in question must be protected per se, without regard for a specific opinion (see BVerfGE 111, 147 <155>; 117, 244 <260>), and that links to content must therefore be neutral with regard to the various political currents and ideologies. Accordingly, it was material to the qualification of § 90a of the Criminal Code as a general law that this provision makes punishable the disparagement of the Federal Republic of Germany “regardless of a political conviction” (see BVerfGE 47, 198 <232>). Nothing else applies to §§ 86 and 86a of the Criminal Code, which the Federal Constitutional Court has also judged to be general laws (see BVerfGE 111, 147 <155>). § 86.1 no. 4 in conjunction with § 86a.1 no. 1 of the Criminal Code contains an explicit link to National Socialist organisations. In the context of the overall provision contained in § 86.1 of the Criminal Code, this is however nonetheless not special legislation. The provision does not target the dissemination of National Socialist ideas, but establishes a factually restricted right to punish against the organisation-related continuation of formally banned associations and parties, and extends it to equally cover all organisations affected by it. 33

bb) A law is not general if a content-related restriction of opinion is not sufficiently openly worded and from the outset only targets specific convictions, stances or ideologies. 34

Laws to protect legal interests are only general if, taking the required overall view, they prove to be consistent and abstractly thought in terms of the legal interest and are designed regardless of views which are found to be held in specific instances. This includes a sufficiently generally worded formulation of the act of violation, as well as of the protected legal interests, which ensures that in the political field of powers, the provision appears to be open vis-à-vis various groups and, fundamentally, the expression of opinion that is penalised or banned can emerge from various fundamental political, religious or ideological positions. What is needed is a version of the provision which, distant from concrete exchanges in the political or other type of debate as required by the rule of law, guarantees strict “blindness” vis-à-vis those to whom it is to be ultimately applied. It may be orientated solely towards the legal interest that is to be protected, but not towards a value judgment or condemnation as to the concrete attitudes or positions taken up. 35

Corresponding to the ban on placing at a disadvantage or allotting preference because of political views (Article 3.3 sentence 1 alternative 9 of the Basic Law), the general nature of the law hence guarantees for encroachments on freedom of opinion a specific and strict ban on discrimination vis-à-vis specific opinions. Laws which link 36

to the content of expressions of opinion, and which ban or sanction violations of legal interests caused by such means, are only permissible on proviso of strict neutrality and equal treatment.

The question of whether, according to these principles, a provision is still to be assessed as a general law or as special legislation cannot be schematically answered here. It is rather more a matter of taking an overall view. This should be based in particular on the degree to which a provision is restricted to abstract content-related criteria which are open to various positions or takes as a basis differentiations which are related to a concrete standpoint, and in particular for instance ideology-related differences (see similar discussion in BVerfGE 47, 198 <232>). An indication of special legislation is for instance if it is understood as a response to an existing conflict within the current debate that is going on within public opinion or, linking to content-related positions of individual available groups, is formulated such that it can in the main only be applied vis-à-vis these. The same applies to sanctions of conduct which typically derives from a concrete attitude of mind or from a specific ideological, political, or historical interpretation, or also for provisions which aim exclusively at affiliation to groups which are defined by such attitudes. The more a provision is interpreted in such a way that it is likely to affect solely proponents of specific political, religious or ideological views, and hence has an impact on the debate within public opinion, the more it is suggested that the threshold to special legislation has been overstepped. An indication of special legislation is equally if a law which serves to restrict opinions is linked to certain historical interpretations of events or is restricted to the protection of the legal interests of a group of individuals which is no longer open, but already established. All in all, it is a matter of whether the opinion-restricting provision keeps a fundamental distance in terms of its content from the various concrete positions in the political and ideological debate on opinions. 37

b) On this basis, § 130.4 of the Criminal Code is not a general law. The provision serves the purpose of public peace, and hence the protection of a legal interest which is also protected elsewhere in the legal system in many ways. However, § 130.4 of the Criminal Code does not design this protection in a general manner with open content, but related solely to expressions of opinion where a specific position is taken up towards National Socialism. The provision serves not to protect victims of violence in general terms, and deliberately does not aim at the approval, glorification and justification of the rule of arbitrary force of totalitarian regimes as a whole, but is restricted to statements solely in relation to National Socialism. Also in terms of the manner in which it came about, the provision was materially understood as a response to public meetings and marches held by right-wing radicals whose demonstrations establish a connection to the time of National Socialism - not lastly in particular also targeting the annual commemorative events for Rudolf Heß (see minutes of the session (*Sitzungsprotokoll*) of the German *Bundestag* 15/158 of 18 February 2005, pp. 14818 and 14820; minutes of the Committee on Internal Affairs 15/56 of 7 March 2005, pp. 11 and 22 et seq., 44, 45, 53-54 and 57; *Bundestag* printed paper (*Bundestagsdruck-* 38

sache – BTDrucks) 15/5051, p. 6; minutes of the session of the German *Bundestag* 15/164 of 11 March 2005, p. 15352). In this respect, it is a reaction of the legislature to concrete political views judged as particularly dangerous in the debate within public opinion. The provision penalises expressions of opinion which may result solely from a specific interpretation of history and from a corresponding position. It is hence not blind towards existing fundamental positions but, in its element of the offence, already provides criteria which are related to specific standpoints. Hence, it is not a general law, but special legislation to specifically avert those violations of legal interests which emerge from the expression of a specific opinion, namely the condonation of the National Socialist rule of arbitrary force.

2. As special legislation, § 130.4 of the Criminal Code also cannot be based on the right to personal honour according to Article 5.2 alternative 3 of the Basic Law - here related to the dignity of the victims. The requirement of the general nature of opinion-restricting laws according to Article 5.2 alternative 1 of the Basic Law also covers provisions to protect honour. 39

Article 5.2 of the Basic Law is based on a term of the general law, according to which the threshold to special legislation has not yet been reached if an opinion-restricting law links to opinion contents in general terms, but only when the offence already contains items related to a specific viewpoint and the provision is therefore not designed in a manner which is neutral in terms of opinions. According to this view, the ban of special legislation guaranteed in the requirement of a general law guarantees protection against discrimination linking to specific opinions and political views, as is similarly also contained in Article 3.3 sentence 1 alternative 9 of the Basic Law (“political views”), and hence ensures distance to protection of freedom of opinion as required by the rule of law. In this understanding, the ban on special legislation must however apply across-the-board, and must cover all laws which serve to restrict opinions. Statutory provisions on protection of youth or personal honour are subject to it, as are those to protect other legal interests. Accordingly, the Federal Constitutional Court has for instance also previously regarded the crime of insult as constituting a general law (see BVerfGE 69, 257 <268-269>; 93, 266 <291>; see also BVerfGK 1, 289 <291>). This understanding has also found support in the history of freedom of opinion. Freedom of opinion already found its limits in the general laws according to Article 118 of the Constitution of the German Reich (Weimar Reich Constitution). An additional exception going beyond individual provisions on the prohibition of censorship for protection of youth and honour was not contained in the provision. Rather, such provisions were regarded as being covered by the general laws as a matter of principle, regardless of the various positions regarding the content interpretation of the criterion for a general law between the special-legislation doctrine(see Häntzschel, *Archiv des öffentlichen Rechts* – AöR, Vol. 10, 1926, p. 228 <232>; Häntzschel, in: *Handbuch des Deutschen Staatsrechts*, Vol. 29, 1932, p. 651 <657 et seq.>; Rothenbücher, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL Vol. 4 1928, p. 6 <20>) and the teaching of Smend (see 40

VVDStRL Vol. 4 1928, p. 44 <52>). It is not evident that the legislature handing down the Basic Law wished to make any other fundamental decision in this regard with Article 5.1 and 5.2 of the Basic Law. The explicit inclusion of youth and honour protection in Article 5.2 of the Basic Law was merely intended to ensure that such provisions continue to be permissible. It was however not intended to rescind the requirements to be made of all laws with regard to the distance required by the rule of law through neutrality in terms of opinions.

3. Even though it is not a general law, § 130.4 of the Criminal Code is compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and the horror which National Socialist rule inflicted on Europe and large parts of the world, defying general categories, and of the establishment of the Federal Republic of Germany which was understood as an antithesis of this, an exception to the ban on the special legislation for opinion-related laws is inherent in Article 5.1 and 5.2 of the Basic Law for provisions which impose boundaries on the propagandistic condonation of the National Socialist Regime between the years 1933 and 1945. 41

a) Concerning the requirement of the general nature of laws which impose restrictions on opinions according to Article 5.2 of the Basic Law, an exception is to be recognised for provisions which aim to prevent a propagandistic affirmation of the National Socialist rule of arbitrary force between the years 1933 and 1945. The inhuman regime of this period, which brought immeasurable suffering, death and suppression to Europe and the world, has an antithetical significance characterising the identity of the constitutional system of the Federal Republic of Germany which is unique and cannot be captured solely on the basis of general statutory provisions. The deliberate discarding of the tyrannical regime of National Socialism was historically a central concern of all the powers participating in the establishment and passing of the Basic Law (see Constitutional Committee of the Conference of Minister-Presidents of the Western Occupation Zones (*Verfassungsausschuss der Ministerpräsidenten-Konferenz der Westlichen Besatzungszonen*), Report on the Constitutional Convention at Herrenchiemsee (*Bericht über den Verfassungskonvent auf Herrenchiemsee*), from 10 to 23 August 1948, pp. 18, 20, 22 and 56), in particular also of the Parliamentary Council (see Parliamentary Council (*Parlamentarischer Rat*), Written Report on the Draft of the Basic Law for the Federal Republic of Germany, Annex to the Stenographic Record of the 9th Session of the Parliamentary Council on 6 May 1949, pp. 5, 6 and 9) and forms an internal structure of the order of the Basic Law (see only Article 1, Article 20 and Article 79.3 of the Basic Law). The Basic Law can be largely particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime, and from its structure through to its many details seeks to learn from historical experience and to rule out a repeat of such injustice once and for all. The final overcoming of the National Socialist structures and the prevention of the resurgence of a totalitarian nationalist Germany was a major motive for the re-establishment of the German state by the Allies and – as shown for instance by the Atlantic Charter of 14 August 1941, the Potsdam Agreement of 2 August 1945 and Act no. 2 of the Allied 42

Control Council for the Disbandment and Liquidation of the Nazi Organizations (*Kontrollratsgesetz Nr. 2 zur Auflösung und Liquidierung der Naziorganisationen*) of 10 October 1945 – constituted a major conceptual basis for the Frankfurt Documents of 1 July 1948, in which the military governors commissioned the Minister-Presidents from their occupation zones with the creation of a new constitution. The experience of the destruction of all civilising achievements by National Socialism provided a strong impetus for the creation of the European Communities, as well as of many international agreements, particularly including the European Convention for the Protection of Human Rights and Fundamental Freedoms. It makes a major contribution towards characterising the entire post-War system and the inclusion of the Federal Republic of Germany in the international community to the present day.

Against this background, the propagandistic condonation of the historical National Socialist rule of arbitrary force, with all the terrible factual events for which it is responsible, exerts an impact far beyond the general tensions of the debate within public opinion and cannot be covered solely on the basis of the general rules regarding the boundaries imposed on freedom of opinion. In Germany, favouring this rule constitutes an attack on the internal identity of the community and has a potential to pose a threat to peace. In this regard, it is not comparable with other expressions of opinion, and ultimately it can also trigger profound disquiet abroad. Doing justice to this historically rooted special situation by special provisions is not intended to be ruled out by Article 5.2 of the Basic Law. The need for the general nature of laws imposing restrictions on opinions, with which Article 5.2 of the Basic Law obliges the legislature, linking to long lines of tradition, to guarantee the protection of legal interest over expressions of opinion regardless of specific convictions, stances and ideologies, cannot demand application for this unique constellation which concerns the historically affected identity of the Federal Republic of Germany, which cannot be transferred to other conflicts. § 130.4 of the Criminal Code is accordingly not unconstitutional because it is a special provision which has as its sole subject-matter the evaluation of the National Socialist rule of arbitrary force. 43

b) The amenability of Article 5.1 and 5.2 of the Basic Law to such special provisions which relate to statements on the National Socialism of the years between 1933 and 1945 does not rescind the substantive content of freedom of opinion. In particular, the Basic Law does not have a general anti-National Socialist fundamental principle (see however in rem: Battis/Grigoleit, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2001, p. 121 <123 et seq.>; Münster Higher Administrative Court, order of 23 March 2001 - 5 B 395/01 -, NJW 2001, p. 2111), which permitted a ban of the dissemination of right-wing radical or even National Socialist ideas already with regard to the intellectual impact of its content. Such a fundamental principle emerges in particular neither from Article 79.3 of the Basic Law nor from Article 139 of the Basic Law, in which on the basis of a deliberate decision, only the provisions designated there are removed from the application of the constitution. The Basic Law goes as far as granting as a matter of principle freedom of opinion to the enemies of freedom, trusting in the power 44

of the public debate carried on in freedom. The Parliamentary Council also acknowledged this towards National Socialism, which had only recently been overcome. In Article 9.2, Article 18 and Article 21.2 of the Basic Law, it determined that the mere dissemination of anti-constitutional ideas as such does not constitute the boundary of the political debate carried on in freedom, but only an actively belligerent, aggressive stance vis-à-vis the freedom-based democratic fundamental system (see BVerfGE 5, 85 <141>). Accordingly, Article 5.1 and 5.2 of the Basic Law guarantee freedom of opinion as intellectual freedom, regardless of the evaluation of their content with regard to correctness, legal enforceability or dangerousness (see BVerfGE 90, 241 <247>). Article 5.1 and 5.2 of the Basic Law does not permit the state to encroach on the way of thinking, but only empowers an intervention to be carried out when expressions of opinion leave the purely intellectual domain of opinion and become reflected in violations of legal interests or recognisably turn into danger situations.

Also the exception, which is to be recognised according to Article 5.1 and 5.2 of the Basic Law, to the requirement of the general nature of opinion-restricting laws because of the unique nature of the crimes committed under the historical National Socialist rule of arbitrary force and the resultant responsibility for the Federal Republic of Germany does not open any doors to this, but entrusts the responsibility for the necessary repression of such dangerous ideas to free critical debate. It merely permits the legislature to issue separate provisions for expressions of opinion which have as their subject-matter a positive evaluation of the National Socialist regime in its historical reality, such provisions being connected with the specific impact of such statements in particular and taking these into account. Even such provisions must however comply with the principle of proportionality and in doing so be orientated strictly towards externalised protection of legal interests, but not towards an evaluation of the content of the opinion in question. 45

III.

§ 130.4 of the Criminal Code satisfies the requirements of the principle of proportionality. The provision pursues a legitimate purpose with the protection of the public peace, to achieve which it is suitable, necessary and appropriate. 46

1. § 130.4 of the Criminal Code serves to protect the public peace. This constitutes a legitimate protection purpose which with a proper understanding which is restricted in the light of Article 5.1 of the Basic Law is able to justify the encroachment on freedom of opinion. 47

a) The determination of a legitimate purpose is a prerequisite for an encroachment on Article 5.1 of the Basic Law and is material for its proportionality (see BVerfGE 80, 137 <159>; 104, 337 <347>; 107, 299 <316>). As a matter of principle, any public interest which is not constitutionally ruled out is legitimate. What purposes are legitimate also depends here on the respective fundamental right which is being encroached upon. In particular, the rescission of the freedom principle contained in the respective fundamental right as such is not legitimate. For freedom of opinion this 48

finds its specific expression in the theory of interaction: An interaction takes place between protection of fundamental rights and boundaries on fundamental rights in the sense that the general laws do impose boundaries, but that these in turn must be determined once more in the light of these fundamental rights guarantees (see BVerfGE 7, 198 <208-209.>; 94, 1 <8>; 107, 299 <331>). The boundaries on freedom of opinion may not call into question their substantial content. This applies to the interpretation just as to the restricting law, and to the purposes themselves pursued with it (see BVerfGE 77, 65 <75>).

For encroachments on Article 5.1 of the Basic Law, it ensues that their purpose may not aim to ensure that protective measures are taken towards impacts of specific expressions of opinion that remain purely intellectual. The intention of preventing statements with content that is damaging or dangerous in their conceptual consequence rescinds the principle of freedom of opinion itself and is illegitimate (see already Häntzschel, in: *Handbuch des Deutschen Staatsrechts*, Vol. 29, 1932, pp. 651 et seq.; Rothenbücher, in: VVDStRL Vol. 4 1928, pp. 6 et seq.). The same applies – regardless of Article 9.2, Article 18 and Article 21.2 of the Basic Law – to the concern of preventing the dissemination of anti-constitutional views. Solely the lack of value or indeed dangerousness of opinions as such is not a reason to restrict them (see BVerfGE 90, 241 <247>). Article 5.1 of the Basic Law does not permit subjecting freedom of opinion to a general reserve of weighing up. 49

By contrast, it is legitimate to prevent violations of legal interests. Where the legislature aims to restrict expressions of opinion to the degree that they overstep the threshold to an individually identifiable, concrete, definable danger of a rights violation, it pursues a legitimate purpose. The legislature can in this regard link in particular to expressions of opinion which, beyond the formation of convictions, are indirectly intended to provoke real impacts and can for instance directly trigger consequences placing legal interests at risk in the shape of appeals to violate laws, aggressive emotionalisation or the lowering of inhibitions. 50

For the protection of substantive legal interests, there emerges from this a kind of threshold for interference for warding off danger: dangers which derive solely from the opinions as such are too abstract to justify the state banning them. As long as a risk lies solely in the abstraction of an opinion and the exchange on this, warding off danger is entrusted to the intellectual debate carried on in freedom between the various currents within society. Opinion-restricting measures with regard to the content of statements can, however, be permissible if the opinions recognisably endanger the legal interests of individuals or interests of the general public which are to be protected. Warding off dangers to legal interests is then a legitimate goal of the legislature. The state is hence limited in terms of the rule of law to encroachments serving to protect legal interests in the domain of that which is external. By contrast, it is not entitled to encroach on the subjective, inner individual conviction or on the positions taken up, and in this respect, according to Article 5.1 of the Basic Law, also on the right to impart and disseminate these. 51

Purely intellectual impacts and right-violating impacts of expressions of opinion are not in strict opposition to one another here. They are not definable in purely formal terms, and may overlap. The legislature has some latitude here in the design of opinion-restricting laws in this respect. It must however from the outset restrict itself to pursuing protection purposes which are orientated towards this boundary and do not themselves rescind the principle of the free intellectual debate itself. This setting of boundaries must also be followed by a review of proportionality. The more concretely and directly a legal interest is placed in danger by an expression of opinion, the less stringent are the requirements when it comes to an encroachment; the more indirect and distant the threatening violations of legal interests remain, the greater are the requirements to be made. Accordingly, encroachments on freedom of opinion are more to be accepted when they are restricted to the forms and circumstances of an expression of opinion in the outside world. The more, by contrast, they ultimately result in a content-related suppression of the opinion itself, the higher are the requirements as to the concrete threat of a danger to legal interests. 52

b) The legislature has based § 130.4 of the Criminal Code on the protection of public peace (see *Bundestag* printed paper 15/4832, p. 3; printed paper of the Committee on Internal Affairs 15(4)191, p. 5; *Bundestag* printed paper 15/5051, p. 5). This is constitutionally tenable. Having said that, according to the above standards the term of public peace is to be based on a restrictive understanding. 53

aa) An understanding of public peace which aims to protect against subjective disquiet being caused to citizens through the confrontation with provocative opinions and ideologies or to conserve social or ethical views which are seen as fundamental is not tenable for the justification of encroachments on freedom of opinion. Disquiet which is brought about by intellectual debate in the struggle to form opinions and which follows solely from the content of the ideas and their conceptual consequences is the other side of the coin and unavoidable if one is to have freedom of opinion; it cannot constitute a legitimate goal for the restriction of this freedom. The possible confrontation with disquieting opinions, even if in their conceptual consequence they are dangerous, and even if they aim at a fundamental transformation of the valid order, is part of the state based on freedom. Protection against an impairment of the “general feeling of peace” or the “poisoning of the intellectual atmosphere” constitute no more reason for an encroachment than does the protection of the population against an insult to their sense of right and wrong by totalitarian ideologies or an evidently false interpretation of history. Neither does the goal of establishing human rights in the legal awareness of the population permit the suppression of contrary views. Instead, the constitution trusts that society can cope with criticism, and even polemics, in this regard, and that they will be countered in a spirit of civil commitment, and that finally citizens will exercise their freedom by refusing to follow such views. By contrast, the recognition of public peace as a limit of what is acceptable as against unacceptable ideas solely because of the opinion as such would disable the principle of freedom, which itself is guaranteed in Article 5.1 of the Basic Law. 54

bb) However, public peace, understood as guaranteeing peacefulness, is a legitimate purpose for adhering to which the legislature may limit expressions of opinion which have a public impact. The goal here is to provide protection against statements which, in terms of their content, are recognisably aimed towards acts which place legal interests in peril, that is, they mark the transition to aggression or to law-breaking. The maintenance of public peace relates in this regard to the external impact of expressions of opinion, for instance through appeals or emotionalisation which trigger among those approached a willingness to act or reduce inhibitions or directly intimidate third parties. Here too, the encroachment on freedom of opinion may be connected to the content of the expression of opinion. However, the protection of public peace aims to maintain a peaceful co-existence. It is a matter of upstream legal protection of interests, targeting imminent dangers which assume concrete form in reality. In this sense, public peace is an interest to be protected on which various provisions of criminal law have been based for many years, such as the bans on public incitement to crime (§ 111 of the Criminal Code), threatening to commit offences (§ 126 of the Criminal Code), rewarding and approving of offences (§ 140 of the Criminal Code) or indeed the other offences of the section on incitement to hatred (§ 130.1 to 130.3 of the Criminal Code). 55

c) As is shown by the reasoning of the law, the legislature has based § 130.4 of the Criminal Code solely and tenably on the protection of public peace. The question of whether and in what understanding the provision could also be based on the protection of the dignity of victims of the National Socialist rule of arbitrary force is hence immaterial. 56

2. The design of § 130.4 of the Criminal Code is suitable to protect public peace in its understanding as the peaceful nature of the public debate. 57

§ 130.4 of the Criminal Code defines as punishable acts the approval, glorification and justification of the National Socialist rule of arbitrary force. Hence it is not the condonation of ideas which is punished, but that of real crimes which are unique in history and cannot be overstated in terms of their inhumanity. The law opposes the awakening and approval of the wrongdoings of a regime which strove to eliminate whole population groups and has burned itself into the awareness of the present time as a nightmare of immeasurable brutality. That condonation of the rule of arbitrary force of this time appears to today’s population as a rule as aggression and as an assault on those who regard their value and their rights as being called into question once again, and in view of historical reality has a greater impact than a mere confrontation with an ideology which is inimical to democracy and freedom, is a constitutionally tenable evaluation on the part of the legislature. This is more than merely an offensive intellectual relativisation of the prohibition of violence. Rather, the announcement of a positive evaluation of this tyrannical regime as a rule, firstly, leads to resistance or causes intimidation and, secondly, has an effect on the proponents of such views who are targeted in that it lowers their inhibitions. 58

Related to the historical National Socialist rule of arbitrary force, the offences of approval, glorification and justification are also typically sufficiently intense to endanger the peacefulness of the political debate. The provision does not already penalise a playing down of National Socialism as an ideology or an offensive interpretation of the history of this time, but it does penalise the externally manifested condonation of the real historical rule of arbitrary force as was applied under National Socialism. Regardless of the characteristic additionally inserted by the legislature of the violation of the dignity of the victims, this already constitutes a suitable link to the protection of the public peace within the meaning of peacefulness. In terms of the legislative evaluation, the provision is similarly shaped in this respect as was previously § 140 of the Criminal Code, which penalises the rewarding and approval of specific, particularly serious criminal offences which were actually committed. 59

The design of § 130.4 of the Criminal Code is also not unsuitable to the degree that the punishment covers not only statements made in public, but also those made in closed meetings. The legislature was able to presume that the condonation of this rule of arbitrary force as a rule also causes external reactions from closed meetings. Where this does not apply in individual cases, this can be correctively dealt with via the further element of the offence of disturbing the public peace (see C V 2 b below). 60

3. § 130.4 of the Criminal Code is also necessary for the protection of the public peace that the legislature seeks to achieve. A less incisive means which with regard to the violations of rights in question here can guarantee the protection of the public peace in an equally effective manner is not evident. 61

§ 130.4 of the Criminal Code is also proportionate in the narrower sense in terms of its design. With an interpretation which does justice to Article 5.1 of the Basic Law, the provision gives rise to suitable compensation between freedom of opinion and the protection of the public peace. It is in particular not excessively broad in the sense that it would penalise even the dissemination of right-wing radical views and also those connected to the ideology of National Socialism with regard to their content. It neither bans in general terms an affirming evaluation of measures of the National Socialist regime nor a positive link to dates, places or forms taking on a semantic content reminiscent of this time with considerable symbolic power. The threat of punishment is restricted solely to the condonation of the historically real rule of arbitrary force under National Socialism for which Germany has shouldered a long-term responsibility which has a special historical foundation. Additionally, the definition of the crime demands that this banned confirmation also in fact – as to be anticipated as a rule – takes place in a manner which violates the dignity of the victims and leads to a disturbance of public peace. Atypical situations in which the restriction of freedom of opinion caused by a ban may be unsuitable in individual cases can be taken up by this offence (see C V 2 b below). All in all, § 130.4 of the Criminal Code is designed in a manner that is also proportionate in the narrow sense of the word. 62

IV.

§ 130.4 of the Criminal Code also does not breach Article 3.3 sentence 1 of the Basic Law (ban on placing at a disadvantage because of political views) which protects against encroachments which link solely to merely “holding” a political view. By contrast, the proportionality of encroachments which link to the statement and action of such views in principle depends on the respective fundamental freedom rights (see BVerfGE 39, 334 <368>). This at least applies if special equality guarantees are inherent in the corresponding fundamental freedom rights, as in this case Article 5.1 and 5.2 of the Basic Law. A violation of Article 3.3 of the Basic Law cannot be considered with this. In particular, no further requirements can emerge from Article 3.1 of the Basic Law than those from Article 5.1 and 5.2 of the Basic Law. 63

V.

§ 130.4 of the Criminal Code is also compatible with Article 103.2 of the Basic Law. 64

1. Article 103.2 of the Basic Law obliges the legislature to describe the prerequisites of punishability in such concrete terms that the scope and area of application of the offences can be recognised and can be ascertained through interpretation. This obligation serves a two-fold purpose. On the one hand, it serves the protection of the addressee of the provision in line with the rule of law: Everyone should be able to predict what conduct is banned and punishable. On the other hand, it should be ensured that only the legislature decides on punishability. In this regard, Article 103.2 of the Basic Law contains a strict legal reserve which prevents the executive and legislative powers deciding themselves on the prerequisites for punishment (see BVerfGE 71, 108 <114>). 65

This does not rule out terms being used which particularly require interpretation by the judge. Even in criminal law, the legislature is faced by the need to do justice to the multifarious nature of life. Because of the general and abstract nature of criminal provisions, it is furthermore unavoidable that it can be doubtful in borderline cases whether or not conduct already, or still, falls under the statutory offence. Then it is sufficient if their meaning can be ascertained in a standard case with the aid of the customary interpretation methods, and in borderline cases at any rate the risk of punishment becomes recognisable to the addressee (see BVerfGE 41, 314 <320>; 71, 108 <114-115>; 73, 206 <235>; 85, 69 <73>; 87, 209 <223-224>; 92, 1 <12>). 66

2. The design of § 130.4 of the Criminal Code does justice to these requirements. 67

a) No doubts as to the adequate determinateness according to Article 103.2 of the Basic Law accrue to the terms “approval”, “glorification” or “justification” of the National Socialist rule of arbitrary force, as well as to the offence-related modalities “publicly or in a meeting” and “in a manner that violates the dignity of the victims”. Each of these elements of the offence is already adequately clear and limited in terms of its linguistic wording in order to be amenable to interpretation within the meaning of the requirements of the case-law. The question as to how narrowly or broadly these 68

terms are to be interpreted in the context of the provision is a question of their application. With regard to these characteristics, the provision itself is not open in such a manner that it would place the punishability in the hands of the criminal justice system in this respect without prescribing the degree to which this is possible.

b) The offence of disturbing the public peace is also compatible with the principle of legal certainty in the context of § 130.4 of the Criminal Code. 69

aa) Having said that, recourse by the legislature passing criminal law to “public peace” as an element of the offence is not constitutionally unobjectionable per se. The fact that, with a sufficiently restricted understanding, public peace may constitute a suitable protected interest of criminal law, does not yet state that it is easily possible to also have recourse to this term as an element of the offence. Instead, understood as an element of the offence which has the effect of giving rise to punishment separately, the term of public peace casts doubt on its compatibility with the principle of legal certainty. It is open in many respects to different interpretations which are based on an intangible, subjective and collective feeling of insecurity and which are amenable here to an understanding which does not do adequate justice to the fundamental significance of the freedom rights in the system of the Basic Law. In this respect, it is also no longer possible today to link without a caesura to corresponding regulatory traditions prior to the time of the Basic Law. Correspondingly, the legal literature remains critical of the recourse to public peace under criminal law (see Fischer, *Öffentlicher Friede und Gedankenäußerung*, 1986, pp. 630 et seq.; Enders/Lange, JZ 2006, pp. 105 <108>; Hörnle, *Grob anstößiges Verhalten*, 2005, pp. 90 et seq., 282 et seq.; Junge, *Das Schutzgut des § 130 StGB*, pp. 26 et seq.). As an element of the offence giving rise to punishment by itself, or as a supplementary element of the offence in offences which do not already take on sufficiently limited contours as a result of other elements of the offence which are fundamentally tenable, its compatibility with Article 103.2 of the Basic Law can be subject to reservations. 70

By contrast, there are no reservations against the element of the offence of public peace if the disturbance of public peace by other offences evaluated as punishable by the legislature is described in concrete terms by other offences which in turn are adequately determined and which already per se can uphold the threat of punishment at least fundamentally. If in such a case public peace is consulted as an additional element of the offence, its content can be more closely determined from such a context in terms of content. Public peace is to be understood then as an element of an offence the content of which is determined separately from the respective context of the provision. It has only a corrective function here. Fundamentally, the realisation of the other elements of the offence already gives rise to punishability which when it is complied with can also suggest the disturbance of public peace (or of suitability thereto) which can then be presumed. It only takes on separate significance in atypical situations if this presumption does not hold water because of special circumstances (see D I 1 b below). In this regard, public peace is not an element of the offence giving rise to punishment, but an “evaluation formula to eliminate cases not appearing to be in 71

need of punishment" (see Fischer, *StGB*, 56th ed. 2009, *§ 130*, marginal no. 14b). It is hence a corrective permitting in particular to also create validity in individual cases for fundamental rights evaluations.

bb) According to these standards, there are no constitutional reservations against the determinedness of § 130.4 of the Criminal Code. The legislature was permitted to regard the approval, glorification or justification of the historical National Socialist rule of arbitrary force expressed publicly or in a meeting, at least fundamentally, as a punishable and sufficiently determined disturbance of the public peace. From this context, the disturbance of the public peace can also be determined as an element of the offence: It consists as a rule of reducing the threshold of willingness to engage in violence and in the threatening impact accruing to such statements against the specific background of German history. 72

Such an impact can be fundamentally presumed on realisation of the further elements of the offence. The element of the offence of the public peace according to § 130.4 of the Criminal Code however makes it possible here to do justice to atypical situations within the meaning of freedom of opinion.

D.

The impugned ruling is also constitutionally unobjectionable at the level of the application of the law. The interpretation of § 15.1 of the Assemblies Act in conjunction with § 130.4 of the Criminal Code by the Federal Administrative Court is compatible with Article 8.1 in conjunction with Article 5.1 of the Basic Law. 73

I.

1. a) Fundamentally, the interpretation and application of the criminal law is a matter for the non-constitutional courts. Laws encroaching on freedom of opinion must however be interpreted in such a manner that the fundamental content of this right, which in a freedom-based democracy must lead to a fundamental presumption in favour of freedom of expression in all areas, namely in public life, is retained under all circumstances. An interaction takes place in that the barriers do set boundaries in terms of the wording according to the fundamental right, but in turn must be interpreted from the knowledge of the fundamental significance of this fundamental right in the free democratic state, and hence themselves restricted in terms of their impact of limiting fundamental rights (see BVerfGE 7, 198 <208-209>; established case-law). 74

The constitutional standards regarding the compatibility of § 130.4 of the Criminal Code with Article 5.1 of the Basic Law must, accordingly, also guide the interpretation of the provision. Therefore, the elements of the offence are to be interpreted such that the claim of protection only applies to impairments of public peace in the demonstrated understanding of peacefulness (see C III 1 b bb above). 75

For the question which is material in this regard as to whether the expression of an opinion remains solely at the intellectual level or crosses the threshold to constituting a risk to legal interests, it is a matter in particular of whether the risks which may arise 76

as a consequence of this expression of opinion only pose a threat in terms of a distant effect with the further free formation of conviction, or whether their realisation is already set in motion with the statement. The more the ideas intended with the propagation of an ideology reveal their impact only as an abstract consequence of an ideal construct, the more unambiguously they remain in the intellectual domain, which is protected as a matter of principle. The more, however, they become tangible through the nature of the statement in concrete, direct terms, the more they pose an immanent threat to specific persons, groups of individuals or real situations, the sooner they can be attributed to the real domain. A merely symbolic presentation of convictions, teachings or ways of attaining a sort of salvation will be more likely to be attributed to the intellectual domain than if violations of rights are for instance imagined in the shape of historic events in concrete, direct terms and are depicted as desirable.

b) According to these principles, it is necessary in order to give rise to the application of § 130.4 of the Criminal Code that the condonation covered with this provision is recognisably related to National Socialism in particular as a historically real rule of arbitrary force. Understood as an integral term of the human rights violations that were typical of the National Socialist regime (see Federal Court of Justice (*Bundesgerichtshof* – BGH), judgment of 28 July 2005 - 3 StR 60/05 -, NStZ 2006, p. 335 <337>), and which hence describes historically real arbitrary acts of criminal quality, it designates rights violations the affirmative evocation of which in public or at a meeting create the potential for a repeat to become real and can endanger the peacefulness of the political debate. By contrast, merely concurring with events of this period or condonation of generally National Socialist ideas cannot suffice to give rise to the commission of this offence. For instance, an incorrect historical interpretation or affirmation of National Socialist ideology cannot be adequate for punishment according to § 130.4 of the Criminal Code. 77

The elements of the offence of approval, glorification and justification are also to be interpreted in the light of Article 5.1 of the Basic Law. It is constitutionally unobjectionable here if this is also understood as approval by implication, that is not explicit but emerging from the circumstances. Having said that, this must manifest itself externally. There is a need in this respect for a recognisably active approval which carries its meaning in itself (see also Decisions of the Federal Court of Justice in Criminal Cases (*Entscheidungen des Bundesgerichtshofes in Strafsachen* – BGHSt) 22, 282 <286>). On the other hand, approval in the shape of the mere omission – also in a one-sided manner that falsifies history – to mention historical acts of violence in connection with positive references to events of the National Socialist period does not in principle cross the threshold towards lessening the inhibitions towards the glorification of violence. By contrast, approval may also be constituted in glorifying and paying tribute to a historical figure if it emerges from the concrete circumstances that this individual stands as a symbolic figure for the National Socialist rule of arbitrary force as such. 78

If according to the above standards, approval, glorification or justification of the National Socialist rule of arbitrary force applies, it is constitutionally unobjectionable if 79

the presumption is derived from this that the dignity of the victims is also violated through such statements. The legislature has primarily, and per se tenably, based § 130.4 of the Criminal Code on the protection of public peace, and in doing so has restrictingly added the further element of the offence “in a manner that violates the dignity of the victims” as a modal supplement. There are no constitutional objections to this, regardless of whether or to what degree the protection of the dignity of the victims always falls together with the protection of human dignity according to Article 1.1 of the Basic Law. It is consequently not a matter of the application of the particularly strict prerequisites for the presumption of a violation of human dignity when it comes to the interpretation of § 130.4 of the Criminal Code.

Accordingly, with the element of the offence “condonation of the National Socialist rule of arbitrary force” one may fundamentally presume the existence of a disturbance of public peace. The element of the offence of disturbing the public peace serves primarily to cover non-typical situations in which the presumption of the disturbance of the peace is not tenable because of specific circumstances, and hence freedom of opinion must prevail (see C V 2 b above). This should be considered if impacts causing incitement to violence and intimidation or threat can be ruled out in the concrete case, for instance because statements made in small closed meetings do not achieve any profound or broad impact, if they remain incidental or if they cannot be taken seriously under the specific circumstances. 80

2. For the interpretation of § 130.4 of the Criminal Code, furthermore, the interpretation rules apply which were developed by the case-law of the Federal Constitutional Court in general re Article 5.1 sentence 1 of the Basic Law. Hence, it is a prerequisite of any legal evaluation of expressions of opinion that their meaning has been correctly understood. Material for this is the meaning which the statement has according to the understanding of an objective, discerning public. Here, one should always take the wording of the statement as a basis. This however does not finally determine its meaning. The latter is, rather, also determined by the linguistic context in which the contested statement is embedded and the ancillary circumstances in which it is made, in so far as these were recognisable for the recipients. Judgments which recognisably disregard the meaning of the contested statement and base their legal assessment on this are in breach of the fundamental right of freedom of opinion. The same applies if in the case of ambiguous statements a court takes as a basis the meaning leading to a conviction without having previously ruled out the other possible interpretations with sound reasons (see BVerfGE 93, 266 <295-296>; established case-law). 81

II.

The impugned ruling is not constitutionally objectionable according to these standards. 82

The Federal Administrative Court bases its interpretation of § 130.4 of the Criminal Code on an understanding which is in compliance with Article 5.1 sentence 1 of the 83

Basic Law. It correctly understands § 130.4 of the Criminal Code in the light of Article 5.1 of the Basic Law in that not simply the condonation of measures under the rule of National Socialism as such gives rise to the fulfilment of the element of the offence, but only one which refers particularly to National Socialism as a rule of arbitrary force, this being understood as the systematically committed serious human rights violations as they became historic reality. The Federal Administrative Court explicitly states in view of freedom of opinion that the positive evaluation only of individual aspects of the state and societal order of that time, in which no connection with the National Socialist rule of arbitrary force and the human rights violations typifying it can be created, does not fulfil the element of the offence of § 130.4 of the Criminal Code.

84 It is also not objectionable if the Federal Administrative Court considers approval of the National Socialist rule of arbitrary force by implication to be possible through overtly paying tribute to responsible and symbolic figures of this regime. The ruling is based in this respect on a nuanced view, taking freedom of opinion into account, according to which such approval can only be presumed if the person to whom tribute was paid under the extant circumstances stands as a symbolic figure for the rule of National Socialism as such, but not already if positive statements, or even statements minimising the effects of that rule, refer to – even leading – proponents of National Socialism which only apply to the person as an individual. The evaluation that the unrestricted glorification of a symbolic figure who stands for the National Socialist rule as a whole constitutes at the same time approval of the rule of arbitrary force is not subject to constitutional objections in this instance. Approval which unreservedly relates to the rule of National Socialism in the years between 1933 and 1945 as a whole will undeniably also and above all be understood by an unbiased observer as approval of the human rights violations which characterised this period.

85 The non-constitutional courts' assessment of the concrete case related to this, according to which the meeting planned by the complainant to "commemorate Rudolf Heß" would have signified approval of the National Socialist rule of arbitrary force, does not give rise to any constitutional objections. The Federal Administrative Court correctly takes as a basis the rules for the interpretation of expressions of opinion following from Article 5.1 of the Basic Law, and justifiably reaches the judgment that the unreserved glorification of Rudolf Heß could have been understood from the point of view of an unbiased, discerning public under the concrete circumstances as none other than unreserved approval of National Socialist rule as a whole – and hence in particular also of the human rights violations committed at that time. It materially bases its finding on the fact that, on an overall evaluation of the planned meeting – regardless of individual statements which taken in isolation would also be open to other interpretations – tribute was to be paid to Rudolf Heß as the "Deputy of the Führer" with considerable shared responsibility for the events and hence for the National Socialist Regime as such. In view of the longstanding and for a time particularly close relationship between Adolf Hitler and Rudolf Heß, which had also been reflected in the

extremely prominent function of Rudolf Heß as “Deputy of the Führer” in all party matters, as well as of his personal responsibility for massive human rights violations, the assessment that such an interpretation would have forced itself to the fore at the meeting is within the framework of the evaluation of the specialist courts.

Linking to this, it is also constitutionally not objectionable that the Federal Administrative Court – in interpreting § 130.4 of the Criminal Code as non-constitutional law – has derived from the unrestricted approval of the National Socialist rule system as a rule a violation of the dignity of the victims. It is immaterial here whether, as the Federal Administrative Court presumes, a violation of human dignity is always also linked herewith within the meaning of Article 1.1 of the Basic Law. 86

There are also no constitutional objections against the presumption of a disturbance of public peace by the planned meeting. No indications are evident which should have led to a review of whether, in the case at hand, the disturbance of public peace fundamentally constituted by the approval of the National Socialist rule of arbitrary force was to be ruled out through special circumstances. 87

Papier	Hohmann-Dennhardt	Bryde
Gaier	Eichberger	Schluckebier
Kirchhof		Masing

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