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Tolerance and the Limits of Criminal Law

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"Freiheit ist immer die des Andersdenkenden."
"Freedom is always the freedom dissent."
(*Rosa Luxemburg*)

I. Introduction

Corpus Christi is the name of a city in Texas, on the border with Mexico. Corpus Christi is also the deliberately ambiguous title of a play by *Terence McNally*. The play takes up the New Testament depiction of life, work and suffering of Jesus, whereby a particularly large space is dedicated to the Lord's Supper. However, the story is set in the city of Corpus Christi in the 1950s and 1960s. Jesus appears under the name Joshua as a homosexual and uses a crude and obscene language. While public protests in some southern German cities (e.g. Karlsruhe, Ulm, Pforzheim) led to the play being cancelled, other theatre directors (e.g. in Tübingen) stuck to their schedule.

Such creations are not isolated cases, as other examples prove, such as the rock musical "The Maria Syndrome"[1] or a T-shirt offered for sale on the Internet with the image of a cross to which a pig was nailed.[2] That their creators were seriously concerned with Christian content can rarely be claimed. Rather, the desire for provocation and scandal is in the foreground and also regularly leads to the required result, an outraged outcry of those, who would rather bear

[1] See also OVG Koblenz, Neue Juristische Wochenschrift (NJW) 1997, p. 1174 et seqq.; BVerwG, NJW 1999, p. 304 et seqq.

[2] See also OLG Nürnberg, Neue Zeitschrit für Strafrecht – Rechtsprechungsreport (NStZ-RR) 1999, p.

a personal injury than let contents of faith that are sacred to them be dragged through the mud. Whoever then takes up his pen and protests publicly, runs the additional risk of being accused by the sharp-tongued advocates of breaking the taboo of narrow-mindedness and intolerance. The laughing third party in this debate is often the author, whose work, which is in itself quite weak-breasted, receives welcome publicity and whose box office is ringing richly due to the numerous encouragement of all those who, if only because it is "in", attend the corresponding performances.

The understandable desire for criminal prosecution is only rarely satisfied, which is expressed in mass criminal charges. Most of the preliminary proceedings concerning sec. 166 German Criminal Code (Revielement of relgious faiths and religious and ideological communities) have already been discontinued by the public prosecutor's offices. If there is nevertheless a trial, the perpetrator may hope for leniency,[3] since the act of "insulting" as well as the "suitability for disturbing the peace" in sec. 166 German Criminal Code opens a wide scope for subjective evaluation by the judge.

In order to remedy the alleged persecution deficit, a change in the law has already been proposed several times. For example, the amendment of criminal law "Entwurf eines Strafrechtsänderungsgesetzes (Stärkung des Toleranzgebotes durch einen besseren Schutz religiöser und weltanschaulicher Überzeugungen gemäß § 166 StGB) " of the CDU/CSU parliamentary group of 7 November 2000 suggested deleting the suitability clause in paragraphs 1 and 2.[4] A later initiative of the Free State of Bavaria via the Bundesrat proposed in a new paragraph 3 an "interpretation aid" for the disturbance of peace.[5] The opportunity for this may have been provided by the Muhammad cartoons, which were printed in the

239 et seqq.

3 The number of convictions under sections 166, 167 has been below 20 persons for years. In 2017 10 persons were sentenced. (See Statistisches Bundesamt Wiesbaden, Strafverfolgung, Tab. 2.1).

4 BT-Drucks. 14/4558; Previously, precursors with largely identical contents had not been successful, cf. BR-Drucks. 367/86, see critical *Fischer,* Die Eignung, den öffentlichen Frieden zu stören, Neue Zeitschrift für Strafrecht (NStZ) 1988, p. 159 et seqq. – trigger at that time was the feature film "Das Gespenst" of Herbert *Achternbusch* from 1983, – and BR-Drucks. 460/98; BT-Drucks. 13/10666 – unsuccessful.

5 BR-Drucks. 683/07.

Danish daily newspaper Jyllands-Posten in September 2005 and then caused outrage worldwide, including among Muslims in Germany, in 2006.[6]

A comparative legal analysis shows that similar offences are applied in Austria and Switzerland. Sec. 188 of the Austrian German Criminal Code punishes the "vilification of religious teachings", Art 261 of the Swiss Criminal Code punishes the disturbance of freedom of belief and worship, but with a significantly lower penalty. In 2005, the European Court of Human Rights considered the criminal conviction of a publisher in Turkey for insulting the Prophet to be compatible with Article 10 ECHR (guarantee of freedom of opinion).[7] On the other hand, Portuguese criminal law does not provide for a comparable criminal offence without chaos and revolt having broken out there.

The demands for stricter punishment of blasphemous utterances are regularly justified by recourse to a general principle of tolerance derived from Article 4 (2) of the Basic Law.[8] However, this does not yet answer the question of when the limits of tolerance are exceeded. This question seems to lead to a paradox: If the transgression of the limits is supposed to result in the use of criminal law, and thus intolerance towards those who stand beyond these limits and are marked by them as "intolerant", there is no "genuine" tolerance at all. Rather, the concept of tolerance turns into intolerance.[9] On closer inspection, however, it is not a specific problem of tolerance, but a general phenomenon of every legislation. Since rights are only appear on paper if they are not secured by state-organized coercion, their limitation is already immanent to every right: "Thus, the right is at the same time a power to force those who violate it, according to the principle of contradiction."[10] It is decisive whether the mutual

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6 However, the draft law only emphasizes the protection of Christian confessions.

7 ECHR, Judgment 13.9.2005 – 42571/98 (I.A. c Turkey), sections 23-32, however, with a narrow majority of 4 : 3 judge´s votes.

8 Cf. BT-Drucks. 14/4558, p. 4; BR-Drucks. 683/07, p. 2 refers without constitutional foundation to a draft criminal law from 1962 and thus proves to be a grip in the moth box of criminal policy.

9 Cf. *Fish* There´s No Such Thing as Free Speech and it´s a Good Thing, Too, 1994, p. 134 et seqq.

10 *Kant,* Metaphysik der Sitten (1797), in: Kants gesammelte Schriften. Published by Königlich Preußischen Akademie der Wissenschaften. Erste Abteilung, Band 6, Berlin 1907, p. 203 (231): "Mithin ist dem Rechte zugleich eine Befugnis, den, der ihm Abbruch tut, zu zwingen, nach dem Satze des Widerspruchs verknüpft." Before this, it says: "If a certain use of freedom is itself a hindrance to freedom according to the

limits of the law have been drawn in a legitimate way.

Thus, the first question that arises is what idea of tolerance was the basis of the proposals to tighten sec. 166 German Criminal Code (II.). It must also be clarified whether intolerant statements may also be reacted to with intolerance (III.). The answers to these questions finally lead to a more precise definition of the legal interest protected by sec. 166 German Criminal Code and the expression of public peace (IV.), whereby the final question arises, however, whether this norm is necessary at all (V).

II. Four Concepts of Tolerance

Three elements are essential for tolerance:[11] Firstly, there must be a dissent between a tolerating and a tolerated group with regard to a particular value. Secondly, the tolerating group must consider the opposite position to be negative in some sense. Therefore tolerance does not mean indifference. Those who are indifferent to another view do not practice tolerance. Therefore, the renunciation of criticism is not a characteristic of a tolerant attitude. The limit is only crossed when not only the content of the statement is disputed, but also the right itself to express a certain meaning. Thirdly, the tolerating group must be able to express its rejection, because otherwise it is not a matter of (justified) acquiescence, but of simple submission.

In addition to this general characterization, several concepts of tolerance can be

general laws (which is in the wrong), the compulsion, which is opposed to it, as the prevention of a hindrance to freedom is consistent with freedom according to general laws, which is in the right." – "... wenn ein gewisser Gebrauch der Freiheit selbst Hindernis der Freiheit nach allgemeinen Gesetzen (d.i. unrecht) ist, so ist der Zwang, der diesem entgegengesetzt wird, als Verhinderung eines Hindernisses der Freiheit mit der Freiheit nach allgemeinen Gesetzen zusammenstimmend, d.i. recht." See more *Ripstein*, Hindering a Hindrance to Freedom, Jahrbuch für Recht und Ethik 16 (2008), p. 227 (232 et seqq.).

11 Cf. *Teichert*, Toleranz, in: Mittelstraß (Publisher), Enzyklopädie Philosophie und Wissenschaftstheorie, Bd. 4, 1996.

distinguished.[12] First of all, tolerance can denote the relationship between a majority or authority and a minority. Although the majority has the power to take action against the minority position and to enforce at least external conformity, it refrains, for whatever reason – possibly because the minority cannot seriously endanger the power position of the majority – from enforcing its convictions by force. While in this first "permission concept"[13] there can be no talk of equal rights for the competing positions, this is different in the second, the "coexistence concept".[14] Here the power relations between the competing groups are more or less equally distributed. The tolerance relation is thus reciprocal: Those who tolerate are simultaneously tolerated. In contrast to the first two concepts of tolerance, which primarily justify tolerance with pragmatic-instrumental considerations, the third, the "concept of respect",[15] assumes that the changing respect of tolerating persons is morally justified. The different groups recognize each other as autonomous and equal members of a society based on the rule of law. Despite considerable differences in their ethical convictions, the others are accepted as morally and legally equal, so that the legal order of society should not favour any ethical position over the other. Finally, the fourth concept is the "concept of appreciation",[16] the most demanding form of mutual recognition. It goes beyond respecting other convictions as legally and politically equal and demands that opposing positions be valued as ethically valuable.[17] But in order to be able to speak of tolerance here at all with regard to the rejection component, the appreciation must be limited in the sense that the other way of life is not considered as good as one's own.

The demand for a tightening of sec. 166 German Criminal Code might be closest to the

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12 See more to the following *Forst,* Toleranz, Gerechtigkeit und Vernunft, in: same (Publisher), Toleranz, 2000, p. 119 (123 et seqq.).

13 Ibid., p. 124.

14 Ibid., p. 125.

15 Ibid., p. 127.

16 Ibid., p. 129.

17 See also in this sense *Arthur Kaufmann,* Rechtsphilosophie, 1997, p. 329; Cf. also *Goethe* Maximen und Reflexionen, in: Werke, Bd. 6, 1981, p. 507: "Toleranz sollte nur eine vorübergehende Gesinnung sein; sie muß zur Anerkennung führen. Dulden heißt beleidigen." – "Tolerance should only be a temporary attitude; it must lead to recognition. To tolerate is to insult."

"concept of esteem", since an insulting reduction of the counter position is incompatible with the evaluation as ethically valuable. According to the "concept of respect", on the other hand, even a strongly recorded and derogatory statement does not yet violate the duty of tolerance, since the recognition as legally-politically equivalent is not yet called into question or the others are denied the realisation of their conviction. Unfairness and intolerance are not identical.

Which concept of tolerance is most appropriate for a liberal society? Materially founded conceptions are preferable to purely pragmatically founded conceptions, since they do not lead to a stable condition in which mutual trust can develop. For as soon as the suppression of an opposing position is possible without disadvantages or the balance of power has changed in favour of a group, the essential reasons for tolerance cease to exist. It is questionable, however, whether the ethically densest concept of mutual appreciation should be chosen. Even if it is morally preferable, because it is one of the conditions that make pluralist democracy possible, it should not be made the object of the legal system, because the law is content with the external legality of an act, regardless of the internal attitude of the actor:[18] "The mere conformity or non-conformity of an act with the law, regardless of its motive, is called legality; but the one in which the idea of the duty under the law is also the motive of the act, is called morality."[19] In this respect, however, it is sufficient, in accordance with the principle of the greatest possible equal freedom,[20] that the contracting parties grant each other their different views, regardless of their valuation.

Even if a statement – regardless of the concept of tolerance – is to be assessed as intolerant, the question is still open how to react to it legitimately.

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18 Also *Höffe,* Toleranz: Zur politischen Legitimation der Moderne, in: *Forst* (Fn. 12), p. 60 (74 et seqq.).

19 *Kant* (Fn. 10), p. 219: "Man nennt die bloße Übereinstimmung oder Nichtübereinstimmung einer Handlung mit dem Gesetze, ohne Rücksicht auf die Triebfeder derselben, die Legalität (Gesetzmäßigkeit); diejenige aber, in welcher die Idee der Pflicht aus dem Gesetze zugleich die Triebfeder der Handlung ist, die Moralität (Sittlichkeit) derselben."

20 See *Kant* (Fn. 10), p. 230: "Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann." – "Every action is right, which, or according to its maxim the freedm of arbitrariness of everyone can exist together

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III. Locke – Mill - Rawls

The question of whether intolerance can be rewarded with intolerance[21] is to be investigated – *pars pro toto* – by taking a look at three legal philosophers who are representatives of the idea of tolerance.

It is a small irony of history that one of the great enlighteners and pioneers of tolerance, *John Locke,* thought just towards Catholics no tolerance was possible. So churches could not be tolerated in the state whose members were at the same time obliged by their faith to a foreign sovereign – the Pope.[22] *Locke's* argument is admittedly directed against his position itself, because with the same reason Anglicans in a Catholic state might be refused tolerance. In this way *Locke* cannot develop a general duty of tolerance. The question of the deeper reason for the lifting of tolerance commandment is of greater interest for our context. According to *Locke,* no practical opinion that contradicts the possibility of human or civil existence is to be tolerated.[23] Freedom is thus restricted because of assumed negative consequences for public order. In contrast, state coercion is inadmissible in the face of behaviour that does not violate the rights of others and is not aimed at dominating others.[24]

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with everyone´s freedom according to a general law."

21 For it see *Jaspers,* Der philosophische Glaube, 1948, p. 73; *Radbruch,* Der Mensch im Recht, 3rd ed. 1969, p. 86.

22 *Locke* A Letter concerning Toleration (1689), in: The Works of John Locke, London 1823, Vol. VI, S. 46: "Again: That church can have no right to be tolerated by the magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby, *ipso facto,* deliver themselves up to the protection and service of another prince." *Rousseau,* Du Contrat social ou principes du droit politique, 1762, chapter 8, wanted to go even further; he will not tolerate a religion according to which there is no salvation outside the church.

23 *Locke* (Fn. 22), p. 45: "No opinions contrary to human society, or those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate." Thus also atheists hope for tolerance, because unbelief in God is tantamout to the denial of all human expedience – a consequence of his assumption that the moral law is based on the will of God (see the same, 6th Essay On the Law of Nature).

24 *Locke* (Fn. 22), p. 47: "As for other practical opinions, though not absolutely free from all error, yet if they do not tend to establish domination over others (...), there can be no reason why they should not be tolerated."

This classically liberal view is expanded in particular by *John Stuart Mill*. He considers restrictions of freedom of speech through coercion only legitimate in order to "prevent harm to others."[25] *Mill* considers the damage to legitimate, legally protected interests to be relevant.[26] This already anticipates the punch line of the discussion of legal interests that began in the 30s of the 19th century.[27] *Mill* is against allowing freedom of speech only under the condition that the limits of fair discussion are not exceeded.[28] In his view, the limits of fairness are difficult to define, which is why there is a danger that they will be set by the majority at the expense of the minority. This idea can also be applied to sec. 166 German Criminal Code. The customary definition of insult as any crude expression of disregard, particularly offensive in form or content, through the assertion of an insulting fact or a derogatory value judgement,[29] certainly cannot be taken as a model of how the subject matter of prohibition is predictably clear and unambiguously defined for everyone, especially when the circumstances of the individual case are to be decisive.[30] However, a different consideration seems to be more important. According to *Mill,* the correct reaction to unfairness is to make the manner of the debate a public issue.[31] Behind this, there is the recognition of each individual as a responsible citizen, which is constitutive for a free society. It can therefore be trusted that the discourse will expose the unfairness as such and thus discredit the offensive assertion itself.

The short foray through the history of ideas of tolerance is to be concluded with *John Rawls*. In his opinion, the intolerant should not complain if he himself is treated intolerantly.[32] But intolerance as such does not yet justify its suppression. Rather, the restriction of freedom

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25 *Mill,* On Liberty, 1859, p. 22.

26 Ibid., p. 134 f.; see also *Lohmann,* Liberale Toleranz und Meinungsfreiheit. Prinzipielle und wertbezogene Argumentationen, in: *Matthias Kaufmann* (Publisher), Integration oder Toleranz, 2001, p. 88 (92 et seqq.).

27 The creator of the term is *Birnbaum,* Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, Archiv des Criminalrechts 1834, p. 149 et seqq.; see more to the history of dogma: *Amelung,* Rechtsgüterschutz und Schutz der Gesellschaft, 1972.

28 *Mill* (Fn. 25), p. 95 et seqq.

29 Cf. OLG Celle, NJW 1986, p. 1275 f.; OLG Nürnberg, NStZ-RR 1999, p. 239.

30 OLG Karlsruhe, NStZ 1986, 363 (364).

31 *Mill* (Fn. 25), p. 97 f.

of speech must be just, i.e. compatible with the principle of the greatest possible equality of freedom.[33] Only a threat to the freedom of others, or to the liberal constitution itself, legitimises the restriction of the freedom of intolerant persons.[34] In a society in which public discourse functions – here: in which blasphemous utterances meet with public criticism – these conditions will regularly not yet exist.

However, the liberal emphasis on the freedom of the individual and the resulting requirement for tolerance is countered by the fact that no society can survive with merely formal criteria of justice – and tolerance was also determined here in a purely formal way. Rather, liberal democracy also lives from the agreement of its citizens on final matters.[35] Consequently, the ideological neutrality of the state embodied in Article 4 of the Basic Law must be rejected as an error. Corresponding voices for the use of (criminal) law for the protection of fundamental values are particularly loud in times in which a general decline in values is thought to be evident. What education and socialisation have not achieved is now to be achieved by state pressure. But the debate on the "Leitkultur" has shown that a corresponding basic consensus is not easily reached and that such questions are excellently suited to be the subject of political propaganda.

Surprisingly, this criticism seems to be compatible with the principle of damage stressed by *Mill,* because according to her premises the community is threatened with damage if the value convictions that constitute it dissolve. According to the principle of damage, this danger should then be countered with the means of legal compulsion. In such a conception, however, a naive overestimation of the possibilities of the legal system is revealed. Criminal law in

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32 *Rawls,* A Theory of Justice (1971), reprint 2005, p. 190 f.

33 For *Rawls* (Fn. 32), p. 47 et passim, one of the two principles of justice.

34 Ibid., p. 193; also *Arthur Kaufmann* (Fn. 17), p. 334 f.

35 Cf. *MacIntyre,* Is Patriotism a Virtue?, 1984, p. 8 et seqq.; Taylor, Cross-purposes: The Liberal-Communitarian debate, in: Rosenblum (ed.), Liberalism and the Moral Life, 2013, p. 159 (165 et seqq.).84 (90 et seqq.). The criticism of the human image of liberalism and the individualistic approach to the justification of the right can already be found at *Hegel,* Grundlinien der Philosophie des Rechts, published by Eduard Gans, 2nd ed. 1840, sections 144 et seqq.

particular has no moral force. Rather, it ties in with already existing social values.[36] As the development of sections 218 et seq. of the German Criminal Code shows, disappearing values cannot be kept artificially alive over a long period of time by means of the law. Rather, a legal system that seeks to enforce its standards against the widespread conviction of citizens puts its authority at risk. Furthermore, the pluralistic state refrains from controlling its own conditions of existence precisely for the sake of freedom, on the one hand because this high regard for freedom determines its self-image, and on the other hand out of the hope of convincing people of the advantages of a liberal constitution precisely because of this.

IV. The Limits to Freedom of Expression

These considerations give rise to the limits of freedom of expression. They are initially exceeded where others are disparaged in their person. Without mutual respect as persons, living together in a society is not possible. Mutual recognition as persons – and thus as discussants – is also a prerequisite for open competition of opinions. The required tolerance is therefore violated if the other is no longer taken seriously as a partner in this dispute. This aspect of human dignity is covered by the criminal offences for the protection of honour (sections 185 ff. German Criminal Code).[37]

The problem with sec. 166 German Criminal Code, however, is that the incriminated statement in the concrete situation lacks any reference to specific living persons. Tasteless distortions of religious or ideological content do not regularly constitute a disparagement of individuals or groups[38] who follow the conviction in question. This objective reference is expressed in the peace protection clause, which, however, needs to be concretised. Thus it is

36 *Günther,* Die Genese eines Straftatbestandes, Juristische Schulung 1978, p. 8 (11).

37 To the protected property of sections 185 et seqq. See instead of many *Eisele/Schittenhelm* in: Schönke/Schröder, Strafgesetzbuch, 30th ed. 2019, before sect. 185 et seqq. marginal no. 1 with further ref.

38 On the insulting ability of communities of persons see BGHSt 36, p. 83 (88); *Eisele/Schittenhelm* (Fn. 37), before sect. 185 et seqq. marginal no. 3 with further ref.

not convincing when, usually with reference to the wording of the law, public peace is regarded as the legal good protected by sec. 166 German Criminal Code.[39] Public peace is usually defined as the state of general legal certainty and the peaceful coexistence of citizens (objective element) as well as the confidence of the population in the continuation of this state (subjective element).[40] Thus, however, the special feature of sec. 166 German Criminal Code remains in the dark. Understood as an objective assurance by law, public peace is disturbed by every breach of law. Sec. 166 would therefore be superfluous.[41] The conventional conception leads furthermore into an antinomy, comparable to "*Russell's* antinomy": Just as little as the quantity of all quantities can be represented,[42] the legal system can be represented as an interest legally protected by itself.[43] The impairment of the subjective trust in legal certainty as a possible socio-psychological effect of a norm violation is a secondary phenomenon, but not the norm violation itself.[44]

There is no way out if the contents of religious and ideological confessions are regarded as social conditions that are to be assigned to the core area of personal dignity and freedom, the respect of which is a prerequisite for peaceful coexistence in a society. Even if the confessor experiences them as directly constituting his personality,[45] a general legal duty to exercise restraint with regard to things that are sacred to others[46] is not to be recognised. The same reasons speak against it as were already put forward above against the narrow concept of the value of tolerance. If the protection against punishment is to be reduced to a socially

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39 Cf. OLG Köln, NJW 1982, p. 657; *Bosch/Schittenhelm* (Fn. 37), before sect. 166 et seqq. marginal no. 2 with further ref.

40 See BGHSt 16, p. 49 (56); *Sternberg-Lieben/Schittenhelm* (Fn. 37), before sect. 126 marginal no. 1 with further ref.

41 Rightly critical *Fischer*, NStZ 1988, p. 161 f.

42 See *Levy*, Basic Set Theorie, 1979, p. 6 f.

43 See more *Renzikowski*, Notstand und Notwehr, 1994, p. 81 f.

44 *Stratenwerth*, Zum Begriff des Rechtsguts, Festschrift für Lenckner, 1998, p. 377 (386).

45 In this sense, for a right to recognition *Pawlik*, Der Strafgrund der Bekenntnisbeschimpfung, Festschrift für Küper, 2007, p. 411 (421 et seqq.); *Stübinger*, Der Tatbestand der Bekenntnisbeschimpfung (§ 166 StGB) als Herausforderung der Rechtsgutslehre, Festschrift für Kargl, 2015, p. 573 (584 f.).

46 See also E 1962, BT-Drs. IV/650, p. 342, whose idea has just not become law; See BT-Drs. V/4094, p. 28 et seqq.

acceptable minimum of respect and tolerance,[47] it remains open from where this minimum can be derived.

After all this, all that remains is the reference to an – equally indeterminable – control of punishability?[48] The key to the explanation of sec. 166 German Criminal Code lies in the liberal justification of tolerance. In the pluralistic society, in which nobody can claim the monopoly on truth, mutual tolerance is the constituent of the open discourse of everyone with everyone else. A statement can then no longer be accepted as part of the public discourse if the discrimination of the opposing position is intended to exclude its representatives and thus to silence them.[49] The number of people who follow the reviled conviction is irrelevant[50] – tolerance is intended above all to protect minorities – as is the possibility that the adherents of the attacked confession could become violent,[51] because the state must protect freedom of speech against violence if necessary. The public peace in sec. 166 German Criminal Code thus describes the conditions of plurality. A disturbance of the peace is therefore to be assumed when people have to fear discrimination and disadvantages in their environment because of their convictions. For (only) then there is the danger that they no longer dare to live their world view publicly and to stand up for it. Sec. 166 German Criminal Code thus wants to prevent the destruction of plurality itself and in this way ultimately serves the freedom of religion and ideology of Article 4.1 of the Basic Law itself.

On the other hand, anyone who wants to delete the peace disturbance clause without substitution calls into question the only legitimate protective purpose of sec. 166 German Criminal Code. Significantly, the supporters of the increase of penalty admitted that the amended provision was also intended to protect religious sensibilities – although, as they

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47 Cf. *Bosch/Schittenhelm* (Fn. 37), before sect. 166 et seqq. marginal no. 2; *Steinbach,* Die Beschimpfung von Religionsgesellschaften gemäß § 166 StGB – eine Würdigung des Karikaturenstreits nach deutschem Strafrecht, Juristische Rundschau 2006, p. 495 (496).

48 See *Fischer* NStZ 1988, p. 163.

49 Cf. also OLG Karlsruhe, NStZ 1986, p. 365 with note *Ott;* as well as – in the end doubtful – OLG Celle, NStZ 1986, 1276; OLG Nürnberg, NStZ-RR 1999, 240.

50 See, however *Bosch/Schittenhelm* (Fn. 37), sect. 166 marginal no. 12.

51 Ibid.

stated, Article 4.1 of the Basic Law does not grant the individual any claim against the state to protection against "religious insecurity".[52] That does not fit together. Could not instead the – lamented – practical insignificance of sec. 166 German Criminal Code be a positive sign that in our society plurality is not yet endangered?

Instead of an increase in penalties, there is much more to be said for the opposite, i.e. the deletion of the norm. For one can certainly ask oneself whether the equal participation in social communication, which has been identified here as a legitimate reason for punishment, is not already much better covered by other offences (e.g. sec. 130 German Criminal Code: Volksverhetzung).[53] Portuguese criminal law also manages quite well without such a provision.

V. Conclusion

In an open society, in which many religions and world views compete with each other, sec. 166 German Criminal Code has to absorb different sensitivities. The fatwa imposed on the writer Salman Rushdie impressively proves that other religions and world views have lower tolerance thresholds. However, the idea is oppressive that the "Satanic Verses" could trigger a criminal case in Germany. Mill rightly emphasizes that heretical thoughts do not disappear by their punishment, but by dealing with them and refuting them.[54] Restraint in limiting public speech is a sign of a self-conscious society that dares to put those who overstep the boundaries of good taste in their place in public debate.

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52 See *Herzog* in: Maunz/Dürig, GG, 89. Ergänzungslieferung: Oktober 2019, Art. 4, marginal no. 74.

53 So *Hörnle,* Bekenntnisbeschimpfung (§ 166 StGB): Aufheben oder Ausweiten?, Juristenzeitung 2015, p. 293 et seqq.

54 *Mill* (Fn. 24), p. 47 f.