

THE NETZDG AND THE AVIA LAW: HOW TWO DIFFERENT LEGAL SYSTEMS CREATED TWO DIFFERENT OUTCOMES FROM SIMILAR LAWS

MARCO LEWIS*

Introduction: Different Constitutional Theories and Social Factors Lead to Broader Free Speech Protections in France Compared to Germany.....	491
I. Background: A History of the NetzDG and the Avia Law.....	493
A. History and Passage of the NetzDG.....	493
B. History of the Avia Law.....	497
II. Constitutional Law and How Each Country has Interpreted Free Speech Protection.....	502
A. German Constitutional Theory and Case Law.....	502
B. French Constitutional History.....	506
III. Comparison of the Two Systems.....	510
A. Different Legal Systems Between the Two Countries Produced Different Results.....	510
B. Cultural Reasons Influencing Legal Systems.....	512
C. European Union Implications.....	516
IV. Conclusion.....	517

INTRODUCTION: DIFFERENT CONSTITUTIONAL THEORIES AND SOCIAL FACTORS LEAD TO BROADER FREE SPEECH PROTECTIONS IN FRANCE COMPARED TO GERMANY.

After years of battling hate speech,¹ Germany passed the *Netzwerkdurchsetzungsgesetz*, or the “NetzDG,” in 2017 in an effort to

* J.D. Candidate 2023, University of Wisconsin Law School. I would like to thank my friends and family for supporting me, the University of Michigan Germanic Languages Department for inspiring me, and everyone on Wisconsin International Law Journal who helped me throughout the entire process.

¹ See Janosch Delcker, *Germany’s Balancing Act: Fighting Online Hate While Protecting Free Speech*, POLITICO (Oct. 1, 2020, 10:00 AM), <https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation/> [https://perma.cc/4VL3-X4JF]. Dan Glau, *Germany’s Laws on Hate Speech, Nazi Propaganda, & Holocaust Denial: An Explainer*, PBS

combat online hate speech.² The law, aimed at telemedia service providers, requires the providers to delete harmful content from their pages within twenty-four hours of the content being flagged.³ Service providers,⁴ politicians,⁵ and independent watchdog organizations criticized this law,⁶ cautioning that the NetzDG law could severely hamper free speech in Germany. Despite challenges to its constitutionality,⁷ the NetzDG remains good law in Germany today.

While Germany was criticized for its broad law on online content, France was crafting its own law based on the NetzDG.⁸ The Avia Law, named after the parliament member who introduced the law, Laetitia Avia, closely mirrored the language and goals of the NetzDG.⁹ Much like in Germany, there was a strong outcry by politicians and watchdog organizations that the Avia Law was overly broad and could limit free

(July 1, 2021), <https://www.pbs.org/wgbh/frontline/article/germanys-laws-antisemitic-hate-speech-nazi-propaganda-holocaust-denial/> [https://perma.cc/P93Z-992W].

² *Netzwerkdurchsetzungsgesetz [NetzDG]* [Network Enforcement Act], Sept. 1, 2017, BUNDESGESETZBLATT, TEIL 1 [BGBL I] at 3352 (Ger.) [hereinafter NetzDG].

³ *Id.*, § 3 (“The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content. . . The procedure shall ensure that the provider of the social network. . . removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint.”).

⁴ *E.g.*, Constanze Kurz, *Facebook lehnt das NetzDG ab: Unbestimmt, unwirksam und verfassungswidrig*, NETZPOLITIK (May 29, 2017, 7:12 PM), <https://netzpolitik.org/2017/facebook-lehnt-das-netzdg-ab-unbestimmt-unwirksam-und-verfassungswidrig/> [https://perma.cc/2HSJ-4NK8].

⁵ *E.g.*, Mark Hallam, *AfD Seeks to Profit From ‘Censorship’ Online*, DEUTSCHE WELLE (Jan. 2, 2018), <https://www.dw.com/en/germanys-populist-afd-seeks-to-tum-online-censorship-to-its-advantage/a-42004730> [https://perma.cc/QNV3-D8X2].

⁶ *E.g.*, Courtney Radsch, *Proposed German Legislation Threatens Broad Internet Censorship*, COMM. TO PROTECT JOURNALISTS (Apr. 20, 2017, 9:53 AM), <https://cpj.org/2017/04/proposed-german-legislation-threatens-broad-intern/> [https://perma.cc/YM7F-6HEH].

⁷ *E.g.*, BVerfG 1 BvR 16/13, Nov. 27, 2019, http://www.bverfg.de/e/rs20191106_1bvr001613en.html [https://perma.cc/LT8G-9SQN].

⁸ Angelique Chrisafis, *French Online Hate Speech Bill Aims to Wipe out Racist Trolling*, THE GUARDIAN (June 29, 2019, 12:00 AM), <https://www.theguardian.com/world/2019/jun/29/french-online-hate-speech-bill-aims-to-wipe-out-racist-trolling> [https://perma.cc/7FQQ-E8Y8].

⁹ *Loi 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet* [Law 2020-766 of June 24, 2020 Aimed at Combating Hateful Content on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2020, p. 1 [hereinafter Avia Law] (“[A]n online public communication service based on connecting multiple parties for the purposes of sharing public content or based on classifying or referencing content by means of computer algorithms, which is offered or placed online by third parties, where this activity on French territory exceeds thresholds determined by decree, shall be required. . . to render inaccessible, within 24 hours of notification by one or more persons of any content manifestly constituting one of the offences mentioned in paragraph 3 of Article 6(I)(7).”).

speech,¹⁰ and the constitutionality of the law was challenged. Unlike in Germany, the French *Conseil constitutionnel*, France's constitutional court, ruled the law unconstitutional,¹¹ stating that the law "infringe[s] upon the exercise of freedom of expression and communication in a way that is not necessary, suitable, and proportionate."¹² While France has since passed a new version of the Avia Law in compliance with the *Conseil constitutionnel* ruling,¹³ it is much less stringent than its German counterpart.¹⁴

This comment aims to address why these two similar laws have had varied levels of success in neighboring countries. Part I examines the backgrounds of both the NetzDG and Avia Law, as well as the court decisions interpreting them, while Part II examines the constitutional free speech protections in each country. Part III engages in a synthesis of each country's constitutional case law and theory in order to show that free speech within France has been interpreted in a broader scope than in Germany and to address potential causes as to why the countries interpret this fundamental right differently.

I. BACKGROUND: A HISTORY OF THE NETZDG AND THE AVIA LAW.

A. HISTORY AND PASSAGE OF THE NETZDG

In 2015, Germany, along with other European nations, opened its doors to millions of displaced peoples fleeing the violent conflicts in

¹⁰ See *France: Analysis of Draft Hate Speech Bill*, ARTICLE 19 (July 3, 2019), <https://www.article19.org/resources/france-analysis-of-draft-hate-speech-bill/> [<https://perma.cc/3FDF-XE9K>] ("We warn that the [AviaLaw] entrenches private censorship of a wide range of illegal content at the expense of the courts, the 24 hour-time limit on content removals is too short and the sanctions meted out to eradicate online 'hatred' are disproportionate.").

¹¹ *Conseil constitutionnel* [CC] [Constitutional Court] decision No. 2020-801DC, June 18, 2020, (Fr.).

¹² Aurelien Breeden, *French Court Strikes Down Most of Online Hate Speech Law*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/world/europe/france-internet-hate-speech-regulation.html> [<https://perma.cc/FRG9-FUCB>].

¹³ *France's Watered-Down Anti-Hate Speech Law Enters into Force*, UNIVERSAL RTS. GRP. (July 16, 2020), <https://www.universal-rights.org/blog/frances-watered-down-anti-hate-speech-law-enters-into-force/> [<https://perma.cc/HU2M-DXW2>].

¹⁴ *Id.*

Afghanistan and Syria.¹⁵ It did not take long after Germany welcomed these people for the government and technology companies to see a sharp uptick in hate speech in Germany directed towards migrants.¹⁶ In response to growing levels of hate speech, German Justice Minister Heiko Maas commissioned a task force to investigate and prosecute illegal hate speech online.¹⁷ The task force was also intended to address complaints by users of Facebook who said that hate speech was left up on the site even after the speech was reported.¹⁸ In addition, Maas wrote an open letter to Facebook in 2015 asking it, along with other tech companies, to act in curbing online hate speech on their platforms.¹⁹

Heiko Maas's task force found that tech companies rarely deleted what they deemed as "criminal content" from their sites, with Twitter deleting 1 percent of all hate speech reported by users.²⁰ Links between social media and hate speech have been found by outside studies as well, noting that right-wing groups often use social media as "echo chambers" for their hateful content.²¹ Growth in hate speech on social media also correlated with an uptick in hate crimes against migrants in Germany.²²

¹⁵ Matthew Holehouse, *Germany Drops EU Rules to Allow in Syrian Refugees*, THE TELEGRAPH (Aug. 25, 2015, 8:28 PM), <https://www.telegraph.co.uk/news/worldnews/europe/germany/11821822/Germany-drops-EU-rules-to-allow-in-Syrian-refugees.html> [<https://perma.cc/N434-R7Q2>].

¹⁶ See, e.g., Anthony Faiola, *Germany Springs to Action Over Hate Speech Against Migrants*, WASHINGTON POST (Jan. 6, 2016), https://www.washingtonpost.com/world/europe/germany-springs-to-action-over-hate-speech-against-migrants/2016/01/06/6031218e-b315-11e5-8abcd09392edc612_story.html [<https://perma.cc/5Q9F-WXFP>]; Sünje Paasch-Colberg, Joachim Trebbe, Christian Strippel & Martin Emmer, *Insults, Criminalization, and Calls for Violence: Forms of Hate Speech and Offensive Language in German User Comments on Immigration*, in CYBERHATE IN THE CONTEXT OF MIGRATION (Angeliki Monnier, Axel Boursier & Annabelle Seoane eds., 2021).

¹⁷ Ben Knight, *Germany to Force Facebook, Twitter to Delete Hate Speech*, DEUTSCHE WELLE (Mar. 14, 2017), <https://www.dw.com/en/germany-to-force-facebook-twitter-to-delete-hate-speech/a-37927085> [<https://perma.cc/8GBV-XRAV>].

¹⁸ *Fighting Hate Speech on Facebook*, DEUTSCHE WELLE (Sept. 14, 2015), <https://www.dw.com/en/german-justice-minister-to-set-up-task-force-on-internet-hate-speech/a-18714334> [<https://perma.cc/E53J-NEVL>]; Nicole Goebel, *Enforcing Community Standards, Facebook Told*, DEUTSCHE WELLE (Aug. 27, 2015), <https://www.dw.com/en/facebook-must-ban-abusive-content-says-german-justice-minister-maas/a-18676705> [<https://perma.cc/7T4L-MST3>].

¹⁹ Joachim Huber, *Facebook: "Kein Ort für Rassismus,"* DER TAGESSPIEGEL (Aug. 27, 2015, 2:24 PM), <https://www.tagesspiegel.de/gesellschaft/medien/antwort-auf-brief-von-heiko-maas-facebook-kein-ort-fuer-rassismus/12238614.html> [<https://perma.cc/4CHJ-R69S>].

²⁰ Knight, *supra* note 18.

²¹ Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime*, 19 J. EUR. ECON. ASS'N 2131, 2132 (2021). Echo chambers work to reinforce similar ideas through interactions with others who have similar ideologies. *Id.*

²² *Id.* at 2133.

Social media platforms' inactivity against fighting hate speech helped people find like-minded individuals who held hateful views against migrants and, subsequently, act on those views against the migrant community.²³

After back-and-forth discussions within the German Parliament, the NetzDG was officially enacted on June 30, 2017.²⁴ The NetzDG required telemedia service providers to delete any "hateful content" within twenty-four hours of the content being reported to the service provider.²⁵ The NetzDG did not create a new category of illegal speech, but rather sought to enforce laws in the German Penal Code that prohibited certain kinds of speech.²⁶ This banned language includes insults,²⁷ malicious gossip,²⁸ defamation,²⁹ and incitement to crime or hatred.³⁰ The NetzDG also sought to enforce Germany's Holocaust denial laws,³¹ known as the *Volksverhetzung*.³²

The NetzDG requires telemedia providers to "produce half-yearly German-language reports on the handling of complaints about unlawful content on their platforms. . .and shall be obliged to publish these reports in the Federal Gazette and on their own website no later than one month after the half-year concerned has ended."³³ The NetzDG also imposes heavy fines for service providers who violate any provisions of the NetzDG, with economic sanctions ranging from 500,000 to 5 million

²³ See *id.* at 2134.

²⁴ Philip Oltermann, *Tough New German Law Puts Tech Firms and Free Speech in Spotlight*, THE GUARDIAN (Jan. 5, 2018, 6:36 AM), <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight> [<https://perma.cc/E49G-KJWM>].

²⁵ NetzDG, *supra* note 2. The NetzDG defines a "telemedia service provider" as one which, for profit-making purposes, operate[s] internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (social networks). *Id.*

²⁶ *Id.* § 1 (3).

²⁷ Strafgesetzbuch [StGB] [Penal Code], § 185, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/4AVH-JKDR>] (Ger.).

²⁸ *Id.* § 186.

²⁹ *Id.* § 187.

³⁰ *Id.* § 111; *Netzwerkdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt, Teil 1 [BGBl I] at § 1(3) (Ger.).

³¹ *Facebook Must Adhere to German Holocaust Denial Laws, Says Berlin*, REUTERS (July 19, 2018, 8:20 AM), <https://www.reuters.com/article/us-facebook-germany-holocaust/facebook-must-adhere-to-german-holocaust-denial-laws-says-berlin-idUSKBN1K91XF> [<https://perma.cc/YQ4N-RCDL>].

³² Strafgesetzbuch [StGB] [Penal Code] § 130, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/969W-GU57>] (Ger.).

³³ *Netzwerkdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt, Teil 1 [BGBl I] at § 2(1) (Ger.).

euros.³⁴ Recently, German lawmakers have worked to amend the NetzDG to require telemedia service providers to report suspected illegal contact to the *Bundeskriminalamt*, the federal criminal police.³⁵

Before and after passage, the NetzDG was heavily criticized by people inside and outside Germany.³⁶ The most critical complaints were centered around how the NetzDG would affect free expression within Germany and the NetzDG ultimately leading to the “over-removal” of otherwise legal content. The German Constitution expressly guarantees freedom of expression and freedom of speech.³⁷ Specifically, Article 5 says, “every person shall have the right freely to express and disseminate his opinions of speech, writing and pictures.”³⁸

Legal observers argued that the law was overly broad, and would ultimately lead to private companies aggressively censoring free speech to avoid fines.³⁹ There were also concerns that the NetzDG would essentially force these companies to make legal determinations on what is – and is not – prohibited speech.⁴⁰ Critics felt the NetzDG would turn “private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal.”⁴¹ This shift in enforcement from courts to private companies led many scholars at the time of the law’s passing to agree that the NetzDG was “not really an exemplar of methods for fighting hate speech online.”⁴²

The bi-yearly reports produced by companies in accordance with the NetzDG have shown the clear effects of the law.⁴³ The first round of

³⁴ *Id.* § 4(2).

³⁵ Igor Bonifacic, *Germany’s Updated Hate Speech Law Requires Sites to Report Users to Police*, ENGADGET (June 19, 2020, 1:15 PM), <https://www.engadget.com/germany-netzdg-update-171502170.html> [<https://perma.cc/AX92-YHYJ>].

³⁶ Compare Hallam, *supra* note 5; with Radsch, *supra* note 6.

³⁷ Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/ [<https://perma.cc/X2KS-ELWL>].

³⁸ *Id.*

³⁹ *Germany: Flawed Social Media Law*, HUMAN RIGHTS WATCH (Feb. 14, 2018, 12:01 AM), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [<https://perma.cc/XLM3-RMFE>]; Federico Guerrini, *The Problems With Germany’s New Social Media Hate Speech Bill*, FORBES (Mar. 3, 2020, 2:24 PM), <https://www.forbes.com/sites/federicoguerrini/2020/03/03/the-problems-with-germanys-new-social-media-hate-speech-bill/?sh=3b7371e592ad> [<https://perma.cc/NS8T-XNNJ>].

⁴⁰ Heidi Tworek & Paddy Leerssen, *An Analysis of Germany’s NetzDG Law* (Transatlantic Working Group, Working Paper No. 3, 2019).

⁴¹ *Id.* at 3.

⁴² Amelie Heldt, *Reading Between the Lines and the Numbers: An Analysis of the First NetzDG Reports*, 8 INTERNET POL’Y REV. 1, 4 (2019).

⁴³ *See, e.g., id.*

reports submitted by Facebook, YouTube, and Twitter showed that the companies were more likely to moderate content based on their own community guidelines than the provisions of the NetzDG law.⁴⁴ Researchers investigating the content of social media community standard guidelines found that “social media platforms tend to use terms and tonalities in their community guidelines that are very similar to the vocabulary used in the NetzDG.”⁴⁵ Companies ran into problems where speech in Germany was illegal due to the NetzDG law, yet would be legal and permitted in other countries.⁴⁶ To simplify the process, many companies updated the language of their community guidelines to reflect that of the NetzDG, allowing internet censors to enforce rules with more consistency.⁴⁷

While many companies are fully compliant with the NetzDG requirements, some sites have run into issues fully moderating the content⁴⁸ Further, some companies, like Telegram, argued that they are not telemedia service providers as defined under the NetzDG and, therefore, do not need to follow their strict guidelines.⁴⁹ While there have been court cases in Germany challenging the constitutionality of the law,⁵⁰ it remains good law.

B. HISTORY OF THE AVIA LAW

France also passed its own version of the NetzDG after a tumultuous history regarding free speech. Starting in 2004, France passed

⁴⁴ Tworek & Leerssen, *supra* note 42, at 5.

⁴⁵ Heldt, *supra* note 44, at 8 (citing Edoardo Celeste, *Terms of Service and Bills of Rights: New Mechanisms of Constitutionalism in the Social Media Environment?*, 33 INT'L REV. L. COMPUTERS & TECHNOLOGY 122 (2019)).

⁴⁶ *See id.* at 10.

⁴⁷ *Id.*

⁴⁸ *See NetzDG Violations: Facebook has Paid Five Million Euros in Fines*, MKT. RSCH. TELECAST (Sept. 4, 2021), <https://marketresearchtelecast.com/netzdg-violations-facebook-has-paid-five-million-euros-in-fines/147139/> [<https://perma.cc/8BR2-PNH3>].

⁴⁹ *See* Mark Scott, *Ahead of German Election, Telegram Plays Radicalizing Role*, POLITICO (Sept. 22, 2021, 9:16 AM), <https://www.politico.eu/article/german-telegram-election-misinformation/> [<https://perma.cc/XU79-GEAA>].

⁵⁰ *See* BVerfG, 1 BvR 16/13, Nov. 6, 2019, http://www.bverfg.de/e/rs20191106_1bvr001613en.html [<https://perma.cc/GS3T-79FL>] (requiring online press archives to protect against the dissemination of news publications containing information relating to and individual); BVerfG, 1 BvR 276/17, Nov. 6, 2019, http://www.bverfg.de/e/rs20191106_1bvr027617en.html [<https://perma.cc/A2BM-5M95>] (supplements BvR 16/13 by requiring courts to take into account the freedom of expression afforded to publishers of online contents when reviewing claims for injunctive relief against online press archives and search engine operators).

their digital economy law, which established liability protections for “any person carrying out the activity of transmission of content on a telecommunications network.”⁵¹ This law mirrored language in the 2000 European Union E-commerce directive 2000/31/EC.⁵²

After the Charlie Hebdo attack in 2015,⁵³ France began seriously considering, and passing, legislation to restrict speech online, starting by forcing internet service providers to delete websites promoting terrorism within 24 hours of being reported.⁵⁴ The 2015 decree also sought to “mandate. . . certain platforms operating in French territory [to] take down, within 24 hours of a user’s flagging it, ‘manifestly’ illegal speech that falls under an umbrella of criminal conduct much broader than that covered by the terror incitement or child pornography statute.”⁵⁵ The French court, however, did not agree with this expansion of internet service providers requirements to remove hateful content, noting that it amounted to “an attack on the exercise of the freedom of expression and communication that is not necessary, appropriate, and proportional.”⁵⁶

After a pointed discussion between French president Emmanuel Macron and tech bosses, including Mark Zuckerberg,⁵⁷ French parliament member Laetitia Avia introduced what later became known as the Avia Law.⁵⁸ After facing hate speech online herself, Laetitia Avia set out to “stop [internet] trolls [from] feeling they have ‘total impunity’ for saying

⁵¹ Loi 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique [Law 2004-575 of June 21, 2004 For Confidence in the Digital Economy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 2004.

⁵² Jacob Schulz, *What’s Going on with France’s Online Hate Speech Law?*, LAWFARE BLOG (June 23, 2020, 10:20 AM), <https://www.lawfareblog.com/whats-going-frances-online-hate-speech-law> [<https://perma.cc/JXK4-J3DG>].

⁵³ In January 2015, two French Muslims stormed the offices of the satirical newspaper Charlie Hebdo, killing 12 people and injuring 12. E.g., Adam Withnall & John Lichfield, *Charlie Hebdo Shooting: At Least 12 Killed as Shots Fired at Satirical Magazine’s Paris Office*, THE INDEPENDENT (Jan. 7, 2015, 12:12 PM), <https://www.independent.co.uk/news/world/498harli/498harlie-hebdo-shooting-10-killed-shots-fired-satirical-magazine-headquarters-according-reports-9962337.html> [<https://perma.cc/B7WN-BC9T>].

⁵⁴ Amar Toor, *France Can Now Block Suspected Terrorism Websites Without a Court Order*, VERGE (Feb. 9, 2015, 6:01 AM), <https://www.theverge.com/2015/2/9/8003907/france-terrorist-child-pornography-website-law-censorship> [<https://perma.cc/Q2HQ-W9M6>].

⁵⁵ Schulz, *supra* note 54.

⁵⁶ *Id.*

⁵⁷ Angeliqe Chrisafis & Jennifer Rankin, *‘No Free Lunch’, Macron Tells Zuckerberg and Other Tech Bosses*, THE GUARDIAN (May 23, 2018, 8:54 AM), <https://www.theguardian.com/technology/2018/may/23/mark-zuckerberg-to-face-tax-questions-in-macron-meeting> [<https://perma.cc/UZ8E-PFYM>].

⁵⁸ Chrisafis, *supra* note 8.

online what would be more easily prosecuted as hate speech on the street.”⁵⁹ The Avia Law also fit into Macron’s larger plan to make France one of the world leaders in regulation of social media platforms.⁶⁰

Much like the NetzDG, the Avia Law faced fierce criticism from all sides. Article 19, a nonprofit organization, criticized the draft law for removing enforcement of hate speech law from the courts and giving it to private companies, and expressed the opinion that the law was an affront to free speech.⁶¹ Companies and organized labor also responded negatively to the bill, with Tech in France, a union representing software and internet companies, stating that “the harder the task is made for [social media platforms], the more the question of the effectiveness of the means arise.”⁶² Members of the opposition party also opposed the bill on the basis that it threatened online freedom of speech within France.⁶³ Like the NetzDG, the Avia Law passed despite the sharp criticisms.

The Avia Law required all “operators of online platforms. . .offering an online public communication service” to delete any hateful content within 24 hours of being notified by any persons.⁶⁴ The language specifically targeted by the Avia Law included language that violated “human dignity” along with language that incited hatred, violence, or discrimination based on ethnicity, religion, gender, sexual orientation, or disability.⁶⁵ The Avia Law also required that all content deemed illegal be preserved for up to a year “for the purposes of investigating, identifying and prosecuting criminal offenses.”⁶⁶ Additionally, the Avia Law sought to enforce Article 33 of the Law on the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ ARTICLE 19, *supra* note 10.

⁶² Ibtissem Guenfoud, *Proposed French Law Would Slap Social Media Platforms with Hefty Fines for Toxic Content*, ABC NEWS (May 14, 2020, 3:49 PM), <https://abcnews.go.com/International/proposed-french-law-slap-social-media-platforms-hefty/story?id=70686558> [<https://perma.cc/8QZB-T6SA>].

⁶³ Théo Boucart, *Freedom of Speech: A New Case of France’s Fragile Democracy?*, NEW FEDERALIST (Mar. 29, 2021), <https://www.thenewfederalist.eu/freedom-of-speech-a-new-case-of-france-s-fragile-democracy?lang=fr> [<https://perma.cc/2HTJ-2HA5>].

⁶⁴ Loi 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet [Law 2020-766 of June 24, 2020 Aimed at Combating Hateful Content on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2020, § 1.

⁶⁵ *Id.*

⁶⁶ *Id.*

Freedom of Press,⁶⁷ which sought to prohibit defamation, insult, and racist propaganda.

The Avia Law also forced companies to collaborate with the *Conseil supérieur de l'audiovisuel*, France's audiovisual administrative body, to create a standardized notification system for hateful content.⁶⁸ Companies were required to inform the author of the hateful content and of its justification to take down the content and to create an internal process for the author to dispute any decisions made by the company.⁶⁹ Similar to the NetzDG, the Avia Law increased monetary penalties against companies for failing to follow the provisions in the law, with a maximum fine of 250,000 euros.⁷⁰

Unlike the NetzDG, there was no opportunity to examine the impact and implications of the Avia Law, as the law was quickly struck down by France's constitutional court.⁷¹ The law was challenged by senators who had opposed the bill, saying the bill overstepped constitutional bounds.⁷² The senators further argued that the Avia Law "provisions impose on all publishers and hosts constraints that are impossible to satisfy and, in doing so, disregard the principle of equality before public charges."⁷³

The constitutional court first noted that,

Under the terms of article 11 of the Declaration of the Rights of Man and of the Citizen of 1789: "The free communication of thoughts and opinions is one of the most precious human rights: any citizen can therefore speak, write, print freely, except to answer for the abuse of this freedom in the cases determined by the law."⁷⁴

The court went on to say that, in today's society, online communication is just as important for democracy as normal speech, and the rights in the Declaration of the Rights of Man "impl[y] the freedom to access and

⁶⁷ Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 29, 1881.

⁶⁸ Loi 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet [Law 2020-766 of June 24, 2020 Aimed at Combating Hateful Content on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2020, § 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801DC, June 18, 2020, (Fr.).

⁷² *Id.*

⁷³ *Id.* ¶ 3.

⁷⁴ *Id.* ¶ 4.

express yourself [online].”⁷⁵ The court ultimately determined that key aspects of Article 1 of the Avia Law, establishing the responsibility of online communication service providers to remove content from their sites, were unconstitutional.⁷⁶

The ruling by the court was deemed to be a “death blow” for the Avia Law, as it stripped away the key provisions that mandated companies to police speech on their sites.⁷⁷ The French Court’s decision to strike down key provisions of the law surprised many on the international level given how close it mirrored the NetzDG.⁷⁸ The ruling, however, did not prohibit social media companies from expanding their community guidelines to effectively have the same effect as the stricken provisions from the Avia Law.⁷⁹

There were also questions from the international community as to how striking down the Avia Law would affect free speech at the European Union level.⁸⁰ The European Union, under pressure from France and Germany, had hastily proposed legislation to prevent the dissemination of terrorist content on social media sites, and with the *Conseil constitutionnel* striking down large portions of the Avia Law, it put broader legislation in jeopardy as the ruling weakens pro-censorship arguments.⁸¹

The Avia Law is a shell of the law that was initially envisioned by French lawmakers. But while France looks for alternative ways to effectively prohibit hate speech online,⁸² Germany continues to force social media companies to rigorously police potentially hateful content. The next part of this comment focuses on the differences in each country’s constitution and case law to determine why one law was struck down and the other was not.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., Breeden, *supra* note 13.

⁷⁸ UNIVERSAL RTS. *Grp.*, *supra* note 14.

⁷⁹ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801DC, June 18, 2020, (Fr.).

⁸⁰ See *French Avia Law Declared Unconstitutional: What Does This Teach us at the EU Level?* EUR. DIGIT. RTS. (June 24, 2020), <https://edri.org/our-work/french-avia-law-declared-unconstitutional-what-does-this-teach-us-at-eu-level/> [<https://perma.cc/7STC-V9YQ>].

⁸¹ *Id.*

⁸² France has recently proposed a law that would force social media platforms to “designate a single point of contact for cooperation with judicial and administrative authorities, and the conservation of reported and removed content.” Mathieu Pollet, *French Law on Content Moderation Risks ‘Fragmenting’ EU Digital Market, Says Commission*, EURACTIV FRANCE (July 5, 2021), <https://www.euractiv.com/section/digital/news/commission-new-french-bill-risks-fragmenting-eu-digital-market/> [<https://perma.cc/V8Q8-TBSQ>].

II. CONSTITUTIONAL LAW AND HOW EACH COUNTRY HAS INTERPRETED FREE SPEECH PROTECTION

A. GERMAN CONSTITUTIONAL THEORY AND CASE LAW.

German constitutional law regarding free speech starts with the influential *Lüth* case.⁸³ The *Lüth* case dealt with Erich Lüth, a Hamburg press official, who called for a boycott of an upcoming film directed by Veit Harlan, who had produced anti-Semitic films under the Nazi regime.⁸⁴ The producer and distributor of the film were able to obtain an injunction against Lüth to prohibit his calls for boycotts of the film under the theory that Lüth's calls for boycotts violated Section 826 of the German Civil Code, which prohibited injury to one's business interests.⁸⁵ Lüth appealed the case to Germany's Constitutional Court, the *Bundesverfassungsgericht*, who ultimately overturned the injunction under an elaboration of the freedoms under Article 5 of the German Constitution.

The Court began its opinion by stating that the basic rights in the constitution are first and foremost to protect an individual's "sphere of freedom" against the encroachment of public power.⁸⁶ The court, in the early years in post-Nazi Germany, was fully aware that one of the most dangerous threats to basic rights was excessive government power. Because of this, the court expanded these basic rights beyond the relationship of citizen and government and said the protection of basic rights also applies in the relationship between citizens.⁸⁷ The court framed this decision by stating that the basic rights are "objective" values, or that they are so important that they exist beyond any specific legal relationship.⁸⁸

The idea that constitutional rights also apply to the relationship between third parties, commonly known as *Drittwirkung*,⁸⁹ was, and still

⁸³ BVerfGE, 1 BvR 400/51, Jan. 15, 1958, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1958/01/rs19580115_1bvr040051.html;jsessionid=4CEC050D4D2C3237B921BF9F39A6C650.1_cid506 [<https://perma.cc/55EF-4YMZ>].

⁸⁴ *Id.* ¶¶ 3–4.

⁸⁵ *Id.* ¶¶ 14–15.

⁸⁶ *Id.* ¶ 24.

⁸⁷ *Id.* ¶ 27.

⁸⁸ *Id.* ¶ 28.

⁸⁹ "*Drittwirkung*" roughly translates to "*third-party effect*" and is sometimes also known as the "*indirect horizontal effect* of fundamental rights." Matthias C. Kettemann & Torben Klaus,

is, the key argument against the NetzDG. Because these constitutional rights must be applied to the interactions between private actors, it is not hard to see why people argued the NetzDG was unconstitutional; companies like Facebook and Twitter have no more right to restrict one's freedom of expression than the government does. The Constitutional Court addressed this argument in their 2019 decision,⁹⁰ where the court said, "if private companies move into a dominant position similar to that of the state or, for example, take over the provision of the framework conditions for public communications themselves, the fundamental rights of private individuals may, in the end, be similar or even equal to those of the state."⁹¹

When it comes to issues where constitutional rights are in tension with one another, German courts look to the *Mephisto* case.⁹² In 1936, Klaus Mann, who fled Germany during the ascension of the Nazi Party, wrote *Mephisto, Portrait of a Career*.⁹³ The novel's main character was based primarily on Mann's childhood friend, Gustaf Gründgens, a German actor who stayed in Germany during the Nazi reign and served as the protégé of Hermann Göring.⁹⁴ In 1963, a West German company announced plans to republish *Mephisto*. As a result, Gründgens' adopted son to file a civil action,⁹⁵ seeking an injunction against publication of the book.⁹⁶

The Constitutional Court first noted that Article 5, Section 3, of the Basic Law protects art against intrusions by the government.⁹⁷ While Section 2 lays out qualifications on the right to expression,⁹⁸ these qualifications limit only Article 1, which deals specifically with the freedom of expression, and do not affect Article 3. The Court specifically made this distinction that Article 2 has no implication on Article 3, "art, in its independence and autonomy, is protected in Article 5 Section 3, without

Regulating Online Speech: Ze German Way, LAWFARE BLOG (Sept. 20, 2021, 8:01AM), <https://www.lawfareblog.com/regulating-online-speech-ze-german-way> [<https://perma.cc/HS7A-4NRN>].

⁹⁰ BVerfG 1 BvR 16/13, Nov. 6, 2019, http://www.bverfg.de/e/rs20191106_1bvr001613en.html [<https://perma.cc/6BAY-P54W>].

⁹¹ *Id.* ¶ 88.

⁹² BVerfGE 1 BvR 435/68, Feb. 24, 1971.

⁹³ *Id.* at 174.

⁹⁴ *Id.*

⁹⁵ Gründgens had passed away, also in 1963, before announcement of the publication. *Id.* at 174–76.

⁹⁶ 30 BVerfGE 173, 174 (Ger.).

⁹⁷ "Art and scholarship, research and teaching are free." Grundgesetz [GG] [Basic Law] art. 5, §3, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034.

⁹⁸ "These rights [of expression] shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor." *Id.* § 2.

reservation.”⁹⁹ This interpretation of Section 3 provides artistic expression greater protection than political speech under Article 1, which can be limited by the general laws of Germany.

The Court, however, did not stop its analysis there. The Court stated that the right of artistic freedom must also be viewed within the larger context of the entire body of constitutional rights. In cases where there are other constitutional guarantees that conflict with artistic freedom, the right to artistic freedom may be limited to an extent.¹⁰⁰ Because the work was based on personal information attributable to Gründgens, the Court looked at Article 1, Section 1, of the Basic Law which provides for the protection of human dignity. The Court noted that the protection of dignity also encompasses the right of reputation which in turn falls under the law against defamation.¹⁰¹ The solution the Court asserted to handle these two rights in tension was to employ a balancing test by weighing the right of artistic expression against the right of human dignity and protection of one’s personality.¹⁰²

The *Mephisto* case is important for understanding how Germany’s constitutional rights interact with one another, and how the NetzDG has survived constitutional challenges. Even though the German Constitution protects the freedom of expression in speech and writing,¹⁰³ these rights must still be balanced in accordance with *Mephisto* against people’s right to human dignity. This balancing test gives courts broad discretion in determining if a certain law or provision is unconstitutional. This broad discretion strengthened by the *Mephisto* court’s statement that the Constitutional Court will only find a constitutional violation if the lower court judge, “has not recognized that a weighing of values of countervailing Basic Rights is necessary or if his decision rests on a fundamentally incorrect view of the Basic Rights—particularly, an incorrect view of the extent of the area protected by the Basic Right.”¹⁰⁴ Given that a court would have to have a “fundamentally incorrect view of

⁹⁹ 30 BVerfGE 173, 191 (Ger.).

¹⁰⁰ *Id.* at 193.

¹⁰¹ *Id.* at 193–94.

¹⁰² *Id.* at 195. The Court further explained that the balancing test should “take into account, if and to what extent, the image [of some figure] seems to have become so independent of the original by means of artistic shaping and incorporation into and subordination to the complete organism of the work of art, that the individual and personal have been objectified into the general and symbolic aspects of the figure.” *Id.*

¹⁰³ “Art and scholarship, research and teaching are free.” Grundgesetz [GG] [Basic Law] art. 5, § 3, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034.

¹⁰⁴ 30 BVerfGE 173, 197 (Ger.).

the Basic Rights” and that *Mephisto* already shows a form of deference to the right of dignity, the Constitutional Court had a strong footing in declaring the NetzDG constitutional.

While the Criminal Code is not part of the “general law” in Germany, German courts have held that the Criminal Code is compatible with Article 5, Sections 1 and 2, as limits on the right of expression.¹⁰⁵

The *Mephisto* decision also provides some insight into what the Constitutional Court could have weighed as factors in its decision in holding the NetzDG constitutional. The right protecting reputation, which is included in the law against defamation, is considered part of one’s right of dignity.¹⁰⁶ Because of this, the NetzDG could be framed as a protection of one’s right of dignity, as one of the categories of “hateful content” included defamatory statements.¹⁰⁷ Not only could the court weigh this against people’s Article 5 rights when considering the constitutionality of the NetzDG, the court was also free to look at Article 5, Section 2, which allows for Section 1 rights to be limited by “provisions of general laws.”¹⁰⁸ Since defamation was already prohibited under general law,¹⁰⁹ the inferior court ruling that the NetzDG was constitutional was a rational decision, making it difficult for the Constitutional Court to determine that it was a “fundamentally incorrect” decision.

German courts have continued to use the *Mephisto* balancing test in modern cases involving freedom of expression.¹¹⁰ In a 2018 case, the appellant was charged with disparaging the memory of a recently deceased individual on their website and was charged with a violation of Section

¹⁰⁵ BVerfG, 1 BvR 2150/08, Nov. 4, 2009, ¶ 29, https://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html. “The encroachment on freedom of opinion is justified. . . the Criminal Code constitutes a statutory basis which in a constitutionally permissible manner can justify an encroachment on freedom of opinion.” *Id.*

¹⁰⁶ 30 BVerfGE 173, 193 (Ger.).

¹⁰⁷ Strafgesetzbuch [STGB] [Penal Code], § 187, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

¹⁰⁸ “Art and scholarship, research and teaching are free.” Grundgesetz [GG] [Basic Law] art 5, §3, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034.

¹⁰⁹ Strafgesetzbuch [STGB] [Penal Code], § 187, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.). “Whoever, despite knowing better, asserts or disseminates an untrue fact about another person which is suitable for degrading that person or negatively affecting public opinion about that person or endangering said person’s creditworthiness. . .” *Id.*

¹¹⁰ See BVerfG, 1 BvR 2465/13, Jan. 24, 2018, https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungsuche_Formular.html?nn=5403310&facettedYear=2022&language_=en.

189 of the Criminal Code.¹¹¹ On appeal, the appellant argued that this law violated their basic right to the freedom of expression under Article 5, Section 1, of the Basic Law.¹¹²

The Constitutional Court first noted that, while this type of activity is one that falls under Section 1, it can be limited by Section 2 and the criminal code.¹¹³ When specifically looking at statements “made primarily to form public opinion and to contribute to public discussion” the Court determined that the statement must be interpreted carefully in the context it was made.¹¹⁴ Further, the Court said that, the more a statement affects the legal interest of another when it is made in contribution to an issue that concerns the public, as opposed to a private self-serving goal, then the affected legal interest deserves less protection.¹¹⁵

This case draws a distinction between speech that is intended to inform the public on issues and speech related to a “private self-serving goal.” The types of speech that the NetzDG is designed to prohibit are those that deal with what the court would deem as “private self-serving goals” as they are either generally untruthful or do not concern an issue that the public should be informed about.¹¹⁶ Because the speech that was prohibited under the NetzDG is of a private self-serving nature, the protection of the affected legal rights of free speech is not lessened, creating a stronger argument under the *Mephisto* balancing test that this type of expression is outweighed by other basic rights.

B. FRENCH CONSTITUTIONAL HISTORY.

Like most other European nations, France had a long history of not permitting judicial review.¹¹⁷ France was insistent on remaining with a system of parliamentary supremacy, not instating a form of judicial review

¹¹¹ *Id.* ¶ 1. “Whoever defiles the memory of a deceased person incurs a penalty of imprisonment for a term not exceeding two years or a fine.” Strafgesetzbuch [STGB] [Penal Code] §189, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

¹¹² 1 BvR 2465/13 ¶ 14.

¹¹³ 1 BvR 2465/13 ¶ 18.

¹¹⁴ *Id.*

¹¹⁵ *Id.* ¶ 24.

¹¹⁶ See Strafgesetzbuch [STGB] [Penal Code] §§ 185–87, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

¹¹⁷ See, e.g., Alec Stone Sweet, *Why Europe Rejected American Judicial Review – And Why it May Not Matter*, 101 MICH. L. REV. 2744 (2003); Louis M. Aucoin, *Judicial Review in France: Access of the Individual Under French and European Community Law in the Aftermath of France’s Rejection of Bicentennial Reform*, 15 B.C. INT’L & COMP. L. REV. 443 (1992).

until 1958.¹¹⁸ Because of this, there is little constitutional jurisprudence in France regarding freedom of speech. In fact, there has never been a case in France dealing with an individual challenging a law that violates their constitutional right to free speech.¹¹⁹

Because France still relies heavily on the idea of parliamentary supremacy, it is important to look at the statutes that make up France's protection of speech. The cornerstone document in France's legislative scheme is the Declaration of the Rights of Man and of the Citizen.¹²⁰ Article 10 of the Declaration of Rights states that, "no one may be disturbed on account of his opinions. . . as long as the manifestation of such opinions does not interfere with the established Law and Order."¹²¹ Immediately following, Article 11 states that "the free communication of ideas and opinions is one of the most precious rights of man. Any citizen may therefore speak, write, and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law."¹²² These two articles create strong protections for one's individual freedoms of speech and expression, but also carves out exceptions for the government to limit these rights. Article 11 serves as the basis of the *Conseil constitutionnel* ruling on the Avia Law.¹²³ Because Article 11 provides for the "free communication of ideas and opinions," there was a balancing act between protecting this free opinion, subject to restrictions in the penal code and the desirability to limit what is deemed to be hate speech.

The Law on Freedom of the Press is as equally important to the protection of free speech.¹²⁴ This law helped scale back what the law

¹¹⁸ 1958 CONST. 61 (Fr.).

¹¹⁹ The procedure for an individual to challenge a law violating their constitutional rights is called the *Question Prioritaire de Constitutionnalité* (QPC). This procedure was not introduced in France until the 2008 constitutional reform. Loi 2008-724 du 23 juillet 2008 de modernization des institutions de la Ve République [Law 2008-274 of July 23, 2008 on the Modernization of Institutions of the Fifth Republic] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2020, p. 1.

¹²⁰ Déclaration des droits de l'homme et du citoyen du 26 août 1789 [Declaration of the Right of Man and the Citizen, August 26, 1789].

¹²¹ *Id.* art. 10.

¹²² *Id.* art. 11. The *Conseil Constitutionnel* said that this Article also exists in the online sphere of speech, "in the present state of the means of communication and in view of the generalized development of online communication services to the public..." Conseil constitutionnel [CC] [Constitutional Court] decision 2020-801 DC, June 18, 2020, (Fr.), ¶4.

¹²³ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801 DC, June 18, 2020, Rec. (Fr.).

¹²⁴ See Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 29, 1881.

determined to be a public insult or defamatory speech.¹²⁵ This law was one of the first in France to both enshrine the protection of speech in print media while also seeking to limit its contents. Another important distinction under this law was that, for an offence to be considered defamation, the offence must have been made public, though this was later amended in 2005.¹²⁶ This law also provides protections against racist hate speech, “directed against a class of people based on their race, ethnicity, religion, sex, sexual orientation, or handicap.”¹²⁷ The types of speech prohibited in the Law on Freedom of the Press overlap substantially with what the Avia Law attempted to prohibit online. Because of this wide overlap, the *Conseil constitutionnel* felt as though the Avia Law was superfluous since the types of speech it sought to prohibit were limited anyway.

The largest limitations to free speech in France come from those codified in the criminal code. While the Law on the Freedom of the Press is still the controlling law in France related to defamation, the French penal code also prohibits non-public defamation towards a person and unprovoked non-public insults towards a person.¹²⁸ The penal code also prohibits other forms of speech that are considered undesirable in society, such as child pornography and terroristic speech.¹²⁹ These penal code statutes provide the exceptions to free speech that the door was left open for in the Declaration of Rights. Because The Declaration of Rights left it up to the legislature, and the legislature did exercise that power, to

¹²⁵ Article 33 defines a public insult to be “any offensive expression, scornful word, or invective that does not contain the accusation of a fact.” *Id.* at art. 33. Article 32 defines defamation as “any allegation or imputation of specific facts which damage the honour or reputation of a given person or group of persons on account of their race, religion or membership of a nation or ethnic group, or his true or supposed sexual orientation or gender identity.” *Id.* art. 32.

¹²⁶ *See* Décret 2005-284 du 25 mars 2005 relatif aux contraventions de diffamation, d’injure et de provocation non publiques à caractère discriminatoire et à la compétence du tribunal de police et de la juridiction de proximité [Decree 2005-285 of March 25, 2005 Relating to Non-Public Defamation, Insult, and Non-Public Provocation Contraventions of a Discriminatory Nature and within the Jurisdiction of the Police, Court, and Local Jurisdiction] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 30, 2005, p. 7 of 70. Under this decree, non-public defamation is punishable when committed “[A]gainst a person or a group of persons on account of their origin or their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation or gender identity.” *Id.*

¹²⁷ Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 29, 1881, art. 32.

¹²⁸ *See, e.g.*, Code pénal [C. pén.] [Penal Code] arts. R621-1, R621-2.

¹²⁹ *See, e.g.*, Code pénal [C. pén.] [Penal Code] arts. 227-23, 421-2-5.

determine what types of speech should be restricted, it was inappropriate to allow media companies to exercise wide discretion in removing content from their site. Further, even though the speech that was to be prohibited under the Avia Law was already criminal under other statutes, the determination of whether the speech actually fits into one of the already determined legal categories is not always so cut and dry and may require a legal or technical determination.¹³⁰ These determinations, coupled with stringent timelines and overlap with existing law, led the *Conseil constitutionnel* to decide that the Avia Law was neither appropriate nor necessary.¹³¹

One of the other key targets of the Avia Law, speech in support of or promoting terrorism, was also noted by the *Conseil constitutionnel* as not being appropriate in the ways set out by the Avia law. Because speech supporting or promoting terrorism was already prohibited in France,¹³² the *Conseil constitutionnel* saw no reason to have social media companies required to take down this type of speech within 24 hours of reporting.¹³³ There was also little issue enforcing anti-terrorism speech laws prior to the Avia Law, with French police generally cracking down on this type of speech.¹³⁴ Because this type of speech was not only prohibited, but also enforced, there was no need to further prohibit that form of speech in a way where companies could subjectively and unilaterally remove speech.

¹³⁰ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801DC, June 18, 2020, (Fr.).

¹³¹ *Id.* ¶ 8 (“Consequently, the legislature has infringed freedom of expression and communication which is not appropriate, necessary and proportionate to the aim pursued.”).

¹³² See Loi 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme [Law 2014-1353 of November 13, 2014 Strengthening the Provisions Relating to the Fight Against Terrorism], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 15, 2014.

¹³³ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801DC, June 18, 2020, (Fr.).

¹³⁴ In the wake of the 2015 Paris attacks, French police began cracking down on people for comments made both in public and online that supported terrorism. See, e.g., Lakhdar Belaïd, *Apology for Terrorism: Prison for a Former Soldier from Hem and a Radicalized Lille Resident in Detention*, LA VOIX DU NORD (Sept. 11, 2021), <https://www.lavoixdunord.fr/1067919/article/2021-09-11/apologie-du-terrorisme-la-prison-pour-un-ex-militaire-de-hem-et-un-lillois>.

III. COMPARISON OF THE TWO SYSTEMS

A. DIFFERENT LEGAL SYSTEMS BETWEEN THE TWO COUNTRIES PRODUCED DIFFERENT RESULTS

One of the bigger reasons why Germany's NetzDG law was not struck down as unconstitutional and France's Avia Law was, is the fundamental way in which each country approaches the idea of judicial review and judicial supremacy. While both countries formed new governments after the end of World War II,¹³⁵ each country approached the judiciary differently. Since the establishment of Germany's constitutional court, Germany has not only the power of judicial review but also the power to hear individual challenges of the constitutionality of laws and acts. This was seen early in the *Lüth* case, where private citizens were able to make free speech challenges in their individual capacity, and the Constitutional Court was allowed to make decisions interpreting the law.¹³⁶ This allowed the German court to modify existing laws and shape the free speech laws, creating a judicial system similar to that present in the United States. France, on the other hand, still heavily relies on parliamentary superiority while only allowing the *Conseil constitutionnel* to strike down laws when they are blatantly unconstitutional.¹³⁷ Further, the *Conseil constitutionnel* could not hear cases brought by individuals until 2010.¹³⁸ By not allowing the *Conseil constitutionnel* to hear cases brought by individuals, the court never had the opportunity, until recently, to expand its jurisprudence to apply the constitution to individuals like the German courts did in *Lüth*.¹³⁹

Because France emphasized parliamentary supremacy as opposed to more expansive judicial review, the free speech laws in France were only ever modified by parliament's passage of penal codes. Because the *Conseil constitutionnel* could not interpret free speech on a case-by-case basis like German courts could, it had to rigidly apply the Declaration of

¹³⁵ See, e.g., Hans Rupp, *Judicial Review in the Federal Republic of Germany*, 9 Am. J. Comp. L. 29 (1960); Aucoin, *supra* note 119.

¹³⁶ 7 BVerfGE 198 (1958) (Ger.).

¹³⁷ See Aucoin, *supra* note 119.

¹³⁸ Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Law 2008-274 of July 23, 2008 on the Modernization of Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2020, p. 1.

¹³⁹ See 7 BVerfGE 198 (Ger.).

Rights and could not develop a more common law approach to protections and restrictions of free speech like the courts in Germany.

The lack of a balancing test in French freedom of speech case law helped lead to a different outcome than what German courts reached. The German courts relied on the balancing test developed in *Mephisto* in evaluating the private interests of free speech and the public interests of protecting human dignity.¹⁴⁰ French courts, on the other hand, relied on the existing criminal code within France to determine how much overlap there existed between prohibited speech and speech that was prohibited under the Avia Law.¹⁴¹ By not having to balance the rights of free speech against another countervailing right, the *Conseil constitutionnel* only had to look at whether the Avia Law conformed with their constitutional structure and not whether it violated any other rights guaranteed by their constitution.

At a more foundational level, there is an amount of distrust in the French legal system that does not exist in Germany, and this distrust breeds a highly formalistic system where judges are disinclined to make new rules and rather only interpret the law.¹⁴² France uses a top-down approach in their legal system, meaning there is a greater concentration of power in the higher courts than there is in the lower-level courts.¹⁴³ This top-down model creates a level of distrust by the top courts of the bottom courts, which drives the high level of formalism within the legal system.¹⁴⁴ Further, French judges, due to the separation of powers between the new branches of government, cannot create new legal rules, as “lawmaking is a task for the legislative branch and not for the judicial branch.”¹⁴⁵

Germany, on the other hand, treats law as a form of “science” and does not look at what is considered the fair outcome, but rather what is the “correct” outcome.¹⁴⁶ Germany’s laws are by and large abstract and neutral-looking, heavily influenced by Roman law, while also striving for neutrality and legal correctness as opposed to fairness.¹⁴⁷ Because of this formulaic approach to the legal system, German courts generally develop methods, such as balancing tests, for determining the answer to legal questions or disputes. This institutional difference between France and

¹⁴⁰ See 30 BVerfGE 173 (Ger.).

¹⁴¹ See Code pénal [C. pén.] [Penal Code] art. R621-2.

¹⁴² Gerrit De Geest, LIBER AMICORUM BOUDEWUN BOUCKAERT 4 (J. De Mot ed., die Keure 2012).

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.* at 11.

Germany's legal systems is important to understanding why the two countries reached different decisions. Because French judges are generally opposed to creating new legal rules, there is little chance they would ever sharply move away from the expansive free speech protections, which would have been required for the Avia Law to stand.

B. CULTURAL REASONS INFLUENCING LEGAL SYSTEMS

Another important reason why France and Germany differed in their treatment of hate speech laws are the cultures of each nation that existed at the time their governments were formed. Germany's constitution was formed on the backdrop of the fall of Nazi Germany. Germany's constitution was written in a way to balance free speech against the values of human dignity and personal honor, both of which are codified in the constitution.¹⁴⁸ This idea of balancing freedoms against the value of human dignity can be seen in the *Mephisto* case discussed earlier.¹⁴⁹ The idea of limiting personal freedoms for the benefit of the greater good is also reflected in Germany's criminal code, which has been amended to further quell the resurgence of the neo-Nazi movement.¹⁵⁰

The idea of balancing human dignity with personal freedoms and restricting freedom of speech as a result is part of a larger model in Germany of confronting their nation's past and having protections to ensure it does not happen again.¹⁵¹ This confrontation of the past comes, in part, in the form of restricting speech and expression that invokes symbolism of the Nazi era.¹⁵² The framers of the German Constitution were worried about a potential future resurgence of the kind of misinformation policy seen under the Nazi Regime, and sought to protect free speech as well as prohibit libel.¹⁵³ The idea of reckoning with the past

¹⁴⁸ See Eric Stein, *History Against Free Speech: The New German Laws Against the "Auschwitz" — and other — "Lies"*, 85 MICH. L. REV. 277, 279 (1986).

¹⁴⁹ See generally 30 BVerfGE 173 (Ger.).

¹⁵⁰ Stein, *supra* note 152.

¹⁵¹ See Mattie Kahn, *The German Model for America*, VOX (Oct. 5, 2020), <https://www.vox.com/the-highlight/21405900/germany-holocaust-atonement-america-slavery-reparations>.

¹⁵² *Id.* ("Germans weren't keen to dwell on the atrocities of the Nazi period, let alone to consider what portion of the blame — for the mass murder, the torture, the forced labor — should fall on them. If evidence of the Holocaust couldn't be razed, at least it needn't be emphasized.")

¹⁵³ Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 249–50 (1989).

even has its own word: *vergangenheitsbewältigung*.¹⁵⁴ This has given many Germans a “moral imperative” to both research the country’s past and work to ensure that human dignity is viewed as an essential right, even when it is in conflict with other rights such as speech.¹⁵⁵ When creating the new constitution after World War II, the drafters sought to create a more durable framework that would reject many of the authoritarian facets of the previous constitution.¹⁵⁶ Part of this framework included an expansion of judicial review with the creation of the Constitutional Court and the incorporation of many American jurisprudential ideals.¹⁵⁷

The *vergangenheitsbewältigung* has also extended into the modern political landscape, and online speech, after the rise of alt-right parties and neo-Nazis in Germany.¹⁵⁸ The rise of the *Alternativ für Deutschland* (“AfD”), Germany’s prominent alt-right party, was fueled by its prominence on social media networks.¹⁵⁹ The AfD was one of the first major German political parties to utilize a social media strategy to promote its political message, which ultimately helped the party ascend to the Bundestag in 2017.¹⁶⁰ With the AfD’s message focused on right wing, anti-immigration populism, the AfDs created a large and receptive internet base to fuel its xenophobic message.¹⁶¹ This social media campaign not only fueled the AfD’s ascent to power, but also correlated with a rise of hate speech and misinformation on social media websites,¹⁶² which the NetzDG was passed to combat.

France, on the other hand, has the basis of their constitution and free speech protections grounded in earlier texts from the eighteenth¹⁶³ and

¹⁵⁴ “Struggle to overcome the [negatives of the] past” or “working through the past”. *Vergangenheitsbewältigung*, DUDEN (7. Auflage 2001).

¹⁵⁵ Kahn, *supra* note 155.

¹⁵⁶ Quint, *supra* note 157, at 248.

¹⁵⁷ *Id.* at 249.

¹⁵⁸ See, e.g., David Weiss, *Striking a Difficult Balance: Combating the Threat of Neo-Nazism in Germany While Preserving individual Liberties*, 27 VAND. J. TRANSNAT’L L. 899 (1994).

¹⁵⁹ Juan Carlos Medina Serrano, et al, *The Rise of Germany’s AfD: A Social Media Analysis*, in PROC. OF INT’L CONF. ON SOC. MEDIA & SOC’Y (2019).

¹⁶⁰ *Id.* at 214.

¹⁶¹ Bettina Hildebrand, *Rassistisch und Rechtsextrem: Klare Abgrenzung von der AfD Geboten*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE (June 7, 2021), <https://www.institut-fuer-menschenrechte.de/aktuelles/detail/rassistisch-und-rechtsextrem-klare-abgrenzung-von-der-afd-geboten>.

¹⁶² Medina Serrano, *supra* note 163, at 216. Jenny Gesley, *Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech*, Library of Congress (July 6, 2021).

¹⁶³ Déclaration des droits de l’homme et du citoyen du 26 août 1789 [Declaration of the Right of Man and the Citizen, August 26, 1789].

nineteenth¹⁶⁴ centuries. Before those protections were in place, censorship and restrictions of speech in France were prominent, with the strict hierarchy of society driving protection of the honor of the ruling classes at the expense of the freedoms of the rest of society.¹⁶⁵ It was common for speech that was deemed to be libelous and undermined the moral values of society to be deemed a criminal offense, or even treasonous.¹⁶⁶ It was not until the French Revolution and the adoption of the Declaration of the Rights of Man and of the Citizen that freedom of speech and expression was codified.¹⁶⁷ The Declaration of Rights still serves as the basis of the French Constitution in determining what is, and is not, protected under free speech. France never had the same kind of reckoning with free speech that Germany did following World War II, and, therefore, never had to question whether greater restrictions to free speech were appropriate in a more modern society. Instead, France still relies on older ideals of freedom of speech and expression. Because France has not updated the basis of freedom of speech protections, like in Germany, there is also no mention or notion of the protection of human dignity. Without the competing right of human dignity codified in their constitution, the *Conseil constitutionnel* did not have to weigh rights like German courts have done in *Lüth* and *Mephisto*.¹⁶⁸

Much like Germany, France has also struggled with far-right political parties. The National Rally party, formerly known as the National Front,¹⁶⁹ has occupied the far-right political space within France for nearly fifty years while championing an anti-immigrant and xenophobic message.¹⁷⁰ Much like the AfD, the National Rally also made use of social

¹⁶⁴ Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 29, 1881.

¹⁶⁵ See, e.g., Gail Bossenga, Book Review, 41 J. INTERDISC. HIST. 136 (2010) (reviewing Walton, Charles, Policing Public Opinion in The French Revolution: The Culture of Calumny and the Problem of Free Speech (2009)).

¹⁶⁶ See, e.g., Robert J. Goldstein, *Fighting French Censorship, 1815-1881*, 71 Fr. Rev. 785, 787-9 (1998) (listing examples of nineteenth century censorship of speech deemed libelous and criminal).

¹⁶⁷ Déclaration des droits de l'homme et du citoyen du 26 août 1789 [Declaration of the Right of Man and the Citizen, August 26, 1789].

¹⁶⁸ 30 BVerfGE 173 (Ger.).

¹⁶⁹ *Retrouvez le Discours de Marine Le Pen lors du Congrès du Front National*, LE MONDE (June 1, 2018), https://www.lemonde.fr/politique/live/2018/03/11/congres-du-front-national-suivez-en-direct-le-discours-de-marine-le-pen_5269149_823448.html.

¹⁷⁰ See, e.g., Ania Nussbaum, *Extreme Views on Race Still Cling to French Candidate Marine Le Pen*, BLOOMBERG (Sept. 12, 2021), <https://www.bloomberg.com/news/articles/2021-09-13/extreme-views-on-race-still-cling-to-le-pen-and-her-french-team>; see also Jessica Phelan, *How Far Has France's Far-Right National Rally Come in 50 Years?*, RADIO FR. INT'L (Aug. 10, 2022),

media to gain supporters and spread its message, which was often hateful and racist.¹⁷¹ Unlike the AfD, the National Rally has made significant strides in recent years to soften its political message to remain a viable party in France's political conversation.¹⁷² This rebranding focused on using softer language on immigration, and focusing less on the rejection of the "foreigner" and emphasizing the economic repercussions of uncontrolled immigration.¹⁷³ While the language used is still xenophobic, it carries less racialized connotations making it more palatable for potential voters and fitting within the free speech bounds set by France's penal code.¹⁷⁴ By softening its message, the National Rally party was able to portray itself as less extreme, and its supporters mirrored the less extreme language.¹⁷⁵ This change in language among the party and its supporters lessened the apparent need to have stricter laws restricting hate speech on online platforms, as opposed to Germany where the AfD continued its use of hate speech in online platforms.

Another factor that may have informed the differing court decisions was how each country handled the migrant crisis in 2015.¹⁷⁶ During 2015, over one-third of all asylum seekers in Europe applied for asylum in Germany.¹⁷⁷ France, on the other hand, only received six percent of all asylum applications in Europe.¹⁷⁸ This trend continued into the beginning of 2016, with Germany receiving almost two-thirds of all asylum applications and France still receiving only six percent of applications.¹⁷⁹ The reasons for this large disparity of asylum applications

<https://www.rfi.fr/en/france/20221008-how-far-has-france-s-far-right-national-rally-come-in-50-years>.

¹⁷¹ Virginie Martin, *France's Front National and Millennials: When Insecurity and Fear Meet Social Media*, THE CONVERSATION (Apr. 24, 2017, 6:55 AM), <https://theconversation.com/frances-front-national-and-millennials-when-insecurity-and-fear-meet-social-media-76377>.

¹⁷² See, e.g., Rana N. Khoudary, *Populist Strategies in the Political Advertising Discourse of the French National Front*, 3 J. RSCH. INNOV. LANGUAGE 146, 147 (2021).

¹⁷³ *Id.* at 156.

¹⁷⁴ See *id.* (using Speech Act Theory to account for how speakers use language to influence opinion and promote specific action from voters).

¹⁷⁵ *Id.*

¹⁷⁶ The European Migrant Crisis in 2015 was the single largest influx of refugees and migrants, with 1.3 million people moving to Europe to request asylum. See, e.g., Melani Barlai, et al., *THE MIGRANT CRISIS: EUROPEAN PERSPECTIVES AND NATIONAL DISCOURSES* (Ulrike Klinger et al. eds., 2017).

¹⁷⁷ Nicole Koenig, *France and Germany in the Refugee Crisis: United in Diversity?*, JACQUES DELORS INSTITUT BERLIN (Oct. 21, 2016), <https://institutdelors.eu/wp-content/uploads/2020/08/refugeecrisis-koenig-jdib-oct16.pdf>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

is due to a variety of reasons, from then-Chancellor Merkel's welcome policy,¹⁸⁰ to Germany's stronger economy.¹⁸¹ There was also a difference in the attitudes of society which can help shed light on why the courts reached different outcomes. Both countries referred to the crisis in different terms, with Germans emphasizing it as the refugee crisis while French looked at it more as a "migration crisis".¹⁸² This difference not only creates a more empathetic link to the crisis which could drive government pressure to stomp out hate speech online, but it also comes in part from the value that Germany has placed on the right of human dignity that is grounded in their history.¹⁸³ As the number of refugees grew within Germany, the need for greater protections against hate speech, especially within the online realm, grew with it.¹⁸⁴ The NetzDG was passed, in part, to help combat this increase in hate speech against migrants.¹⁸⁵ While hate speech also grew in France with the arrival of migrants,¹⁸⁶ since there were significantly fewer migrants it was not seen as much of a systemic problem as it was in Germany. Greater hate speech, along with a constitutional emphasis on human dignity, created greater drive for the German courts to uphold the NetzDG.

C. EUROPEAN UNION IMPLICATIONS

To date, Germany remains one of two European Union members that have adopted legislation designed to combat hate speech on social media platforms, with Austria being the other.¹⁸⁷ Recently, however, the EU Parliament passed the Digital Services Act, which gave online platforms the authority to scan and filter content posted to their site with

¹⁸⁰ See, e.g., Christoph Hasselbach, *Five Years On: How Germany's Refugee Policy Has Fared*, DEUTSCHE WELLE (Aug. 25, 2020), <https://www.dw.com/en/five-years-on-how-germanys-refugee-policy-has-fared/a-54660166>.

¹⁸¹ Koenig, *supra* note 181.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Patricia Faustini, *Migration, Hate Speech, and Media Ethics*, UNICEF (Nov. 8, 2017), <https://blogs.unicef.org/evidence-for-action/migration-hate-speech-and-media-ethics/>.

¹⁸⁵ Faiola, *supra* note 17.

¹⁸⁶ See, e.g., Angélique Chrisafis, *French Paper Publishes Facebook 'Hate Speech' from Calais Migrant Articles*, GUARDIAN (Nov. 12, 2015), <https://www.theguardian.com/world/2015/nov/12/french-newspaper-le-nord-littoral-publishes-hate-speech-facebook-calais-migrants>.

¹⁸⁷ Kommunikationsplattformen-Gesetz [KoPI-G] [Communication Platform Act] Reichsgesetzblatt [BGBl] No. 151/2020, <https://www.ris.bka.gv.at/eli/bgb1/1/2020/151/20201223> (Austria).

the aim of removing hate speech.¹⁸⁸ The Digital Services Act sought to create a uniform law across all of Europe instead of a patchwork of uneven laws that existed with the NetzDG and the Avia Law.¹⁸⁹ One of the main purposes of the Digital Services Act is to improve the transparency of decisions to remove content from websites while also protecting the fundamental rights of free speech that have previously been guaranteed by other EU legislation.¹⁹⁰ The initial draft, first proposed in December 2020, in some aspects mirrored the NetzDG by allowing internet service providers “to make decisions about the legality of content upon receipt of a substantiated notice of alleged illegality.”¹⁹¹ The version of the law that was passed in December 2021 largely reflect the draft proposal, with very large online platforms, or “VLOPs,”¹⁹² now having an obligation to conduct reviews and assessments on reports of hate speech and removing the speech when appropriate.¹⁹³

A lot is still unknown about how the new Digital Services Act will fit in countries like Germany, who have established much stronger regulations for online hate speech, and for countries like France, who have rejected stronger restrictions in favor of greater free speech protections. The Digital Services Act attempts to take a middle road between the two, but there is still uncertainty as to how each individual country will react to the new changes withing the European Union.

IV. CONCLUSION

Despite the similarities between France and Germany, there has been a large divergence between the two regarding free speech protection. The histories of each country’s society have shaped the emphasis they place on free speech protection: Germany’s history with the Nazi party created an impetus to value human dignity over speech, whereas France’s

¹⁸⁸ 2020 J.O. (L 825).

¹⁸⁹ *At a Glance: Does the EUDigital Services Act Protect Freedom of Expression?*, ARTICLE 19 (Feb. 11, 2021), <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/>.

¹⁹⁰ *Id.*

¹⁹¹ Article 19, *supra* note, 193; *see also* 2020 J.O. (L 825), art. 14.

¹⁹² In the Digital Services Act they are referred to as “very large online platforms” or VLOPs. *See, e.g.,* Natasha Lomas, *Europe Gives Final Sign Off to Rebooted E-Commerce Rules*, TECH CRUNCH (Oct. 4, 2022), <https://techcrunch.com/2022/10/04/digital-services-act-adopted/>.

¹⁹³ Luca Bertuzzi, *MEPs Adopt Digital Services Act in a Key Committee Vote*, EURACTIV (Dec. 17, 2021), <https://www.euractiv.com/section/digital/news/meps-adopt-digital-services-act-in-a-key-committee-vote/>.

free speech protections are rooted in a time where speech was regularly suppressed, creating a greater need for strong speech protections. These societal differences led to different priorities for each court, and therefore led to different outcomes. While it is unclear how each country will proceed with how it values free speech protections, it is clear that Germany's courts have placed a greater restriction on free speech than France's courts.