

Sentimental Constitutionalism? Testing András Sajó's Theory in German Constitutional Law

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Abstract

This paper explores the relationship between law and emotions in German constitutional law through András Sajó's theory of constitutional sentiments. It examines how emotions shape constitutional design, how German public law regulates public emotions, and what these findings reveal about law's role in fostering democratic resilience. The paper contributes to Law and Emotion scholarship, tests Sajó's framework against a concrete legal system, and addresses law's function in maintaining democratic stability. The analysis demonstrates both the emotional foundations of German constitutional design and the emotional dimensions of militant democracy instruments, such as party bans. I argue that Sajó's theory provides valuable explanatory insights into the German case. Constitutional law is not emotionally neutral; yet in a liberal democracy its capacity to strengthen democratic life is limited. Its strength lies in preserving the framework for politics without attempting to substitute for it.

1 Introduction

Law has often been portrayed as a purely rational, objective system, but this view has increasingly been challenged.¹ Scholarship in *Law and Emotion* shows that emotions are not external to law but shape legal reasoning, institutions and legitimacy.² In constitutional theory this perspective remains underdeveloped. The assumption of law's rationality is particularly pronounced in constitutional law scholarship in democratic constitutional states, where democracy is often characterised by its strong emphasis on enlightenment and rationalisation.³ Against this common narrative, András Sajó's theory of *constitutional sentiments* suggests that constitutions not only arise from collective emotions but also regulate them through doctrine and institutional design.⁴

This paper evaluates that claim by analysing the German constitutional system as a particularly illustrative case. The Basic Law⁵ of 1949 was drafted in the emotional aftermath of National Socialism and the Second World War (WW2). Its architecture as a *defensive democracy* was profoundly shaped by the trauma of Weimar's collapse and the National Socialist takeover. At the same time, the enlightenment philosophical tradition and post-war scepticism toward political emotionalism fostered a constitutional culture of rational restraint and institutional sobriety.⁶ This duality makes Germany an exemplary site to assess whether Sajó's claim holds true.

I proceed in three steps, moving from the theoretical foundations of Sajó's framework to its application in the German case, examining how shame and fear became embedded in the Basic Law and how militant democracy functions as emotion regulation, before evaluating the

* Author's note: Unless otherwise indicated, all translations of German quotations, court decisions, and legal texts are the author's own. For German legal sources, statutes are cited by section (§§) or article (Art.), while court decisions are cited by court name (or abbreviation), date, and file number.

¹ András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dmitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023); Sophie Schönberger, 'Noch Einmal Mit Gefühl' (2024) 63 DS 91; Johannes Eichenhofer, Eyk Lenschow and Leonie Schmidt, 'Emotionen Im Recht' (2024) 63 DS 63; András Sajó, *Constitutional Sentiments* (Yale University Press 2011).

² Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field.' (2006) 30(5) LHB 119.

³ Sophie Schönberger, 'Noch Einmal Mit Gefühl' (2024) 63 DS 91.

⁴ András Sajó, *Constitutional Sentiments* (Yale University Press 2011); András Sajó, 'Emotions in Constitutional Law' in Mark Tushnet and Dmitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).

⁵ Basic Law (Grundgesetz, hereinafter: GG).

⁶ Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023); András Sajó, 'Constitutional Sentiments' (2006) 47(1) AJH 1; Sophie Schönberger, 'Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft' (2024) 63 DS 91.

broader implications for democratic resilience and the limits of law as an instrument of emotion control. The analysis concludes that Sajó's theory provides important explanatory insights into the German case, but its prescriptive value is limited. Constitutional law is not emotionally neutral, yet its ability to regulate emotions or cultivate counter-emotions remains fragile. Its role should therefore remain one of securing the framework for democratic politics without substituting for it.

2 Theoretical Framework

2.1 The Emotion-Reason Relation

For much of modern legal and political thought, reason and emotion were treated as “entirely different beasts.”⁷ Emotion was cast as subjective, irrational, and volatile, whereas reason was identified with neutrality and restraint.⁸ This dichotomy underpinned both liberal constitutionalism and legalism, which prided themselves on rational objectivity.⁹

The classical view in psychology reinforced this divide. Emotions were conceived as universal forces of nature, triggered by biological mechanisms with fixed, necessary and sufficient features. Crucially, they were regarded as categorically distinct from cognition, which was assumed to play only a regulatory role in emotional processes.¹⁰

Contemporary Constructivist approaches emphasise that emotions are not fixed reactions but culturally shaped and socially learned.¹¹ They draw on collective repertoires of meaning: *what*

⁷ Terry A Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30(5) LHB 119, 120.

⁸ Kathryn Abrams and Hila Keren, ‘Who’s afraid of law and the emotions (2010)’ in Susan A Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021).

⁹ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023); Sophie Schönberger, ‘Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungswissenschaft’ (2024) 63 DS 91; Terry A Maroney, ‘Emotion and Reason in Judicial Decision-Making’ in Sigrid G. Köhler et al (eds), *Recht fühlen* (Brill 2017).

¹⁰ Maria Gendron, ‘The evolving neuroscience of emotion: challenges and opportunities for integration with the law’ in Susan A Bandes et al (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021), 31-35; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 1-19; Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 14-19.

¹¹ Terry A Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30(5) LHB 119, 120, 123; Susan A Bandes et al., ‘Introduction’ in Susan A Bandes et al (eds), *Research Handbook on Law and*

people feel and *how* they express it depends on cultural scripts and historical experience. Neuroscience supports this: Emotions are closely integrated with cognitive operations, emerging through neural networks shaped by learning. They are not confined to isolated brain modules but emerge through neural networks shaped by lifelong learning.¹² Barrett describes them as “constructed emotions,” highlighting that people actively model their own affective life.¹³ Sajó stresses that “Emotion and cognition, though often treated correctly as having functionally separate features and influences are interactive and integrated or mingled in the brain”.¹⁴ The dichotomy is not simply an oversimplification but untenable in light of modern science.¹⁵

If the separation between reason and emotion cannot be maintained empirically, its persistence in law must be understood as normative: the claim that law *ought* to be governed by reason alone.¹⁶ Even as such, this exclusion has been increasingly challenged.¹⁷ Yet since all human behaviour is shaped by affect, legal systems are necessarily built on assumptions about emotions, whether acknowledged or not. Legal theory cannot disregard the affective dimension.¹⁸ How much normative weight should be assigned to such findings, however, remains an open question.

Emotion (Edward Elgar Publishing Limited 2021); Ute Frevert, ‘Introduction: Powerful Emotions in German History’ in Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge: Cambridge University Press 2023).

¹² Maria Gendron, ‘The evolving neuroscience of emotion: challenges and opportunities for integration with the law’ in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021); Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 1-19; Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 14-19.

¹³ Lisa Feldman Barrett, *How Emotions Are Made the Secret Life of the Brain* (Mariner Books 2017), 25f; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 2-5.

¹⁴ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70.

¹⁵ András Sajó, ‘Constitutional Sentiments’ (2006) 47 AJH 1, 3; Maria Gendron, ‘The evolving neuroscience of emotion: challenges and opportunities for integration with the law’ in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021), 31-35.

¹⁶ Johannes Eichenhofer et al., ‘EMOTIONEN IM RECHT. Eine rechtstheoretische und -dogmatische Annäherung am Beispiel der Grundrechte’ (2024) 63, 77; Terry A Maroney, ‘Emotion and Reason in Judicial Decision-Making’ in Sigrid G. Köhler et al (eds), *Recht fühlen* (Brill 2017), 152.

¹⁷ See (2.2).

¹⁸ Susan A Bandes et al., ‘Introduction’ in Susan A Bandes et al. (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021); András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 80.

2.2 Law and Emotions

Sajó's theory mainly draws on two traditions that recognized this: the eighteenth-century moral sentiment tradition and contemporary Law and Emotion scholarship.

David Hume and Adam Smith established the idea that sentiments are constitutive of normativity.¹⁹ For Hume, moral judgment rests on sympathy, the human capacity to resonate with the feelings of others. Smith, in turn, emphasised the “impartial spectator” (the internalised gaze of others) through which individuals regulate their conduct.²⁰

Montesquieu argued that forms of government rest on guiding sentiments: political virtue, “a love of the republic” in republics, fear in despotisms.²¹ He saw emotions as the foundations of political order, shaping both the stability and the legitimacy of regimes.²²

Despite such early insights, liberal constitutionalism long upheld the normative claim that law should be insulated from emotion.²³ Since the 1990s, however, legal scholars such as Bandes, Maroney and Nussbaum have explored how emotions influence judicial reasoning, legal actors and public perceptions of law.²⁴ Research has increasingly shifted toward treating emotions as social and institutional processes shaped by culture and context, though limited work exists directly on emotions in constitutional law.²⁵

¹⁹ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 73; David Hume, *A Treatise of Human Nature* (Clarendon Press 1896).

²⁰ Adam Smith, *The Theory of Moral Sentiments* (Cambridge University Press 2002); Bastian Ronge, ‘Sympathetisches Recht. Zur Rechtsphilosophie von Adam Smith’ in Hilge Landweer and Fabian Bernhardt (eds), *Sphären Der Verletzlichkeit* (Verlag Karl Alber 2017), 79f; David Hume, *A Treatise of Human Nature* (Clarendon Press 1896).

²¹ Charles Montesquieu, *The Spirit of the Laws* (Montesquieu 1748), Book 5 Chapter 2.

²² Ibid.

²³ András Sajó, ‘Constitutional Sentiments’ (2006) 47 AJH 1, 3.

²⁴ Susan A Bandes, *The Passions of Law* (New York University Press 1999); Susan A Bandes et al., *Research Handbook on Law and Emotion* (Edward Elgar Publishing Limited 2021).

²⁵ Susan A Bandes and Jeremy A Blumenthal, ‘Emotion and the Law’ (2012) 8 ARLSS 161.

2.3 Introduction to Sajó's Theory

Sajó's theory of constitutional sentiments fits into this gap. Drawing on the moral sentiment tradition while engaging with modern law-and-emotion scholarship, he argues that constitutions are both products of collective emotions and instruments for regulating them.

Sajó proposes a “partial descriptive” theory of liberal constitutionalism highlighting the role of collective emotions in institutional design.²⁶ His research hypothesis is:

Emotions, through complicated mechanisms, do have an actual impact on constitutional design and law. At the same time, constitutional design is a half-conscious venture of emotion management, and constitutional law and politics have unintended consequences in the emotional culture. By improving our knowledge regarding emotions, we can improve constitutional design.²⁷

He acknowledges that constitutional design always reflects multiple factors, and that his framework offers only a partial explanation of constitution-making, acceptance, and interpretation.²⁸

2.3.1 Key Concepts and Terminology

Sajó introduces the term sentiment to highlight the social interpretation and normative significance of emotions in public discourse.²⁹ Constitutional sentiments are therefore not private feelings but socially mediated and publicly recognisable patterns of expectation, which legitimise constitutional arrangements and shape institutional development.³⁰ Sajó adopts a broad understanding of the term “constitution,” encompassing formal texts, jurisprudence,

²⁶ András Sajó, ‘Emotions in Constitutional Design’ (2010) 8 *International Journal of Constitutional Law* 354; András Sajó, *Constitutional Sentiments* (Yale University Press 2011); András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dmitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).

²⁷ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 4.

²⁸ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 11; András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dmitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70.

²⁹ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 4f; András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dmitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 71.

³⁰ *Ibid.*

conventions, and symbolic practices, but limits his analysis to liberal democratic orders.³¹ The table below defines key terms used throughout this paper.

Key Concepts and Terminology

Feeling	A subjective, affective experience
Emotion	An individual or collective affective response with motivational force and social meaning
Moral intuition	A pre-reflective, emotionally grounded sense of right and wrong, shaped by culture and history
Moral judgement	A more reflective, often reasoned evaluation of normative rightness or wrongness
Public sentiment	Socially shared emotion with normative significance
Constitutional sentiment	Public sentiment oriented toward constitutional norms, principles, or institutions

2.3.2. From Emotions to Institutions

Emotions become constitutionally relevant when they are socially reinforced and morally interpreted as public sentiments. Which sentiments enter constitutional design depends on cultural legitimacy, historical context, and the influence of relevant actor (e.g. political elites). Sajó illustrates this with the shift in public attitudes toward cruelty in the eighteenth century, which culminated in the legal prohibition of torture and with the presumption of innocence, reflecting empathy for the wrongly accused.³² Such sentiments are not static: in different contexts, concern about impunity may instead generate punitive sentiments.³³ In short, persistent and morally endorsed sentiments act as a bridge between individual/collective emotions and institutional choice.

³¹ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 5.

³² Ibid, 36, 41-42.

³³ Ibid.

2.3.3 Public Sentiment and Institutional Feedback

Sajó highlights the reciprocal relationship between public sentiment and constitutional design. Once encoded into law, constitutional arrangements in turn shape public emotions—both directly, through cultural norms and “display rules,” and indirectly, through institutional structures.³⁴ Cultural norms define appropriate behaviour within a community, while display rules regulate the expression of emotion.³⁵ The figure below illustrates the dynamics between collective sentiments and institutional design.

³⁴ Ibid, 52.

³⁵ Ibid; American Psychological Association, ‘APA Dictionary of Psychology’ (*dictionary.apa.org* 19 April 2018) <<https://dictionary.apa.org/display-rule>>accessed 5 June 2026.

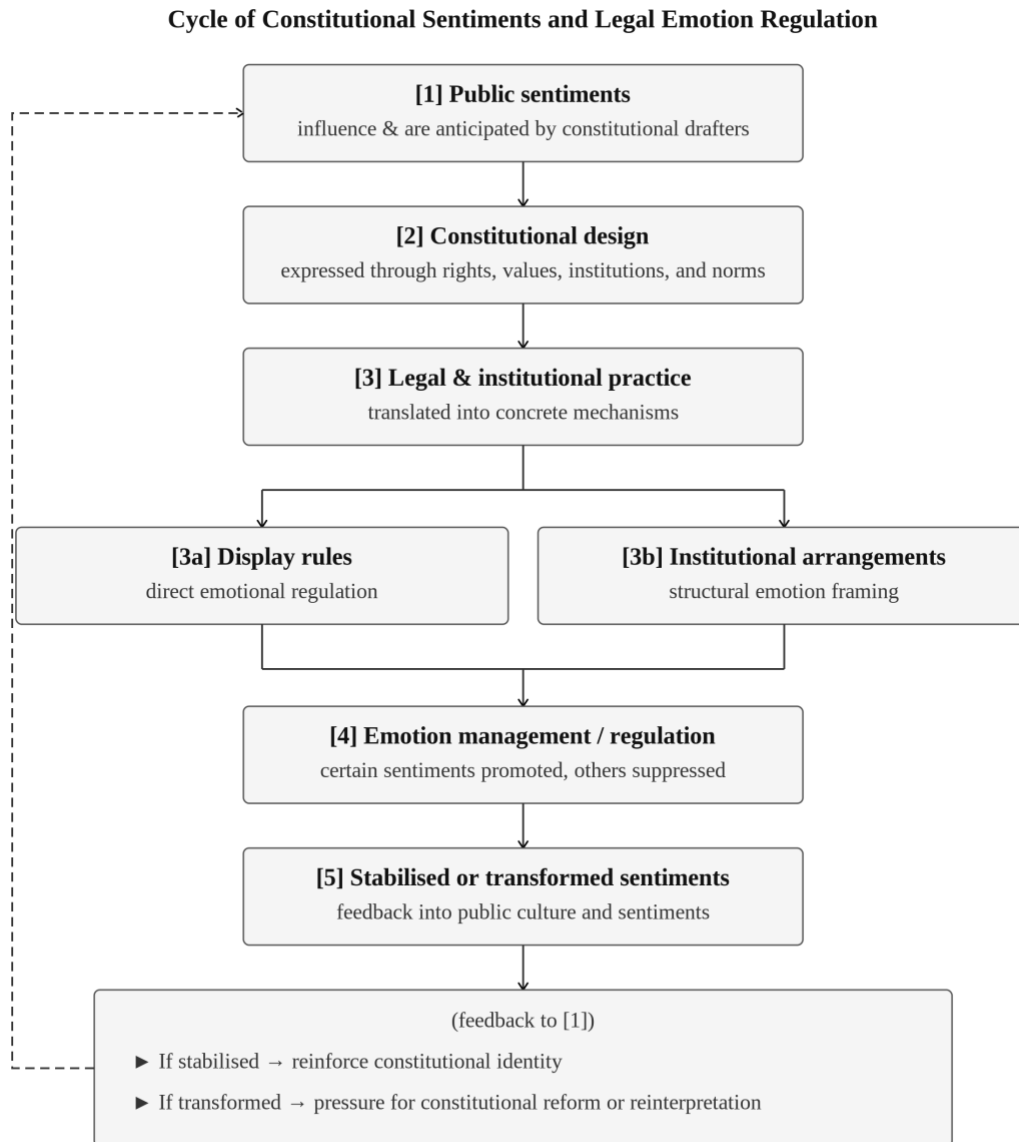


Figure 1 Cycle of Constitutional Sentiments and Legal Emotion Regulation: presents the interaction between collective sentiments and constitutional design

The paper focuses on two central aspects:

1. The Role of Emotions in Constructing Constitutional Orders: How foundational sentiments (e.g. fear (of tyranny), (collective) shame) shape constitutional texts, principles, and structures.
2. The Regulation of Emotions through Constitutional Law: How legal norms and doctrine are used to manage and reshape public emotion.

Sajó's theory is descriptive and social constructivist.³⁶ Public sentiments emerge from specific historical and cultural constellations, and their influence on legal systems can therefore only be understood in context.³⁷ The subsequent analysis traces how such sentiments have operated within the German constitutional tradition, testing the applicability of Sajó's framework within a specific legal order.

3 Emotions in German Constitutional Law & Doctrine

3.1 The Basic Law: a provisional constitution

Key emotional drivers behind German constitutionalism need to be situated within Germany's constitutional history. Germany's post-war constitutional history began with the division into four occupation zones and the creation of two states. The Basic Law was adopted in West Germany with the approval of the Western Allied powers in 1949. That same year, the German Democratic Republic (GDR) enacted its own constitution.

After the fall of the Berlin Wall in 1989, the GDR's *Volkskammer* voted to join the Federal Republic under Article 23 (old version) of the Basic Law in 1990 with the Unification Treaty of 31 August 1990 formalising the process³⁸

The FCC, established in 1949, quickly emerged as the Basic Law's guardian and primary interpreter.³⁹ Through the constitutional complaint individuals may challenge state action directly before the Court. Its powers are extensive, as it may review acts of all three *branches of government* for their constitutionality.⁴⁰ Smend famously remarked that "the Basic Law now applies in practice as the FCC interprets it."⁴¹

3.2 Constitutional Sentiments in German Constitutional Culture

³⁶ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 41.

³⁷ *Ibid.*, 9, 14-33.

³⁸ Treaty between the Federal Republic of Germany and the German Democratic Republic on the establishment of German Unity (as amended) (BGBl 1990 II S 889); Grundgesetz für die Bundesrepublik Deutschland Präambel (1990).

³⁹ Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 63-66.

⁴⁰ GG, Art. 93 in conjunction with Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz herinafter BVerfGG).

⁴¹ Lothar Michael, 'Rudolf Smend (1882–1975): Die Verfassung Als Integrationsordnung' (2023) 3 ZJS 444 <https://www.zjs-online.com/dat/artikel/2023_3_1747.pdf> accessed 5 June 2026.

The sentiments embedded in the Basic Law were largely those prioritised by political elites, since the drafting process involved no public participation and was carried out by the Parliamentary Council, a body elected by the Länder parliaments.⁴² However, drafters must also anticipate sentiments that will secure compliance and legitimacy (of the people).⁴³

In the immediate aftermath of WW2, German society found itself in what Sajó aptly describes as a “depressed mental state.”⁴⁴ Public morale was low, the future uncertain, and trust in political institutions virtually absent.⁴⁵

This section examines shame and fear as the two central collective emotions in post-war West Germany and how they developed into public sentiments.⁴⁶

3.2.1 Post war shame and fear

*Germans must not forget what, in those shameful years, was committed by people of their own nation. (...) Nobody, absolutely no one, will relieve us from that shame*⁴⁷

—Theodor Heuss, 1952

Sajó argues that German constitutional law reflects the lived experience of collective shame after the Nazi era.⁴⁸ Shame, as a deeply moral emotion, arises from a perceived failure to uphold shared norms and values.⁴⁹ Of particular importance in this context is “social shame”: the fear of exposure and loss of standing in the eyes of others.⁵⁰ Social shame, as part of the broader “shame family” of emotions, is adaptive: It preserves social acceptance and self-esteem and is especially significant in post-totalitarian contexts.⁵¹

⁴² Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 21.

⁴³ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 77.

⁴⁴ Ibid, 74.

⁴⁵ Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 130-133.

⁴⁶ Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 123f; András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 115f; Frank Biess, *German Angst: Fear and Democracy in the Federal Republic of Germany* (Oxford University Press 2020), 25–65.

⁴⁷ Theodor Heuss, ‘Memorial Speech at Bergen-Belsen’ (Opening of the Bergen-Belsen Memorial 30 November 1952) <<https://www.ardaudiothek.de/episode/urn:ard:episode:f081236bd82e9d57/>> accessed 5 June 2026.

⁴⁸ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 269f.

⁴⁹ Rosa Maria Puca, ‘Scham Im Dorsch Lexikon Der Psychologie’ (*Hogrefe.com* 2025) <<https://dorsch.hogrefe.com/stichwort/scham>> accessed 5 June 2026.

⁵⁰ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 271.

⁵¹ Ibid, 269-273.

Starting in 1945, British and American forces confronted Germans with film footage from liberated concentration camps to provoke shame.⁵² Public appeals to shame were not unusual: in June 1945, the German Communist Party urged that “in every German, the shame must burn” over complicity in Nazi atrocities, while intellectuals described shame as the purgatory needed to cleanse national disgrace.⁵³

In 1949, Federal President Theodor Heuss introduced the term *Kollektivscham* (collective shame) as an alternative to *Kollektivschuld* (collective guilt), which he considered an oversimplification. For Heuss, shame was an unavoidable legacy that could be transformed into constructive counteraction.⁵⁴ Revealingly, Heuss framed shame as something imposed: Hitler had “forced us into shame.”⁵⁵

Frevert points out that this echoes psychological patterns of shame avoidance: turning away, falling silent, or deflecting/shifting responsibility. These reactions were mirrored in society at large.⁵⁶ From 1949 through the early 1970s, collective shame was unevenly distributed, often suppressed, and accompanied by silence and denial.⁵⁷ As Möllers notes, the “political guilt consciousness” still palpable in the Parliamentary Council quickly dissipated in wider society.⁵⁸

From Sajó’s perspective, this indicates that the Basic Law did not simply mirror a broadly shared collective emotion. Rather, it institutionalised specific moral judgments articulated by political elites and linked them to fragmented societal feelings. In Sajó’s words “Germany built up its shame politically and judicially”.⁵⁹ In doing so, sentiments that were fragile and contested in society were stabilised through constitutional form, granting them durability and

⁵² Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 309.

⁵³ Ibid, 309-312.

⁵⁴ Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 311.

⁵⁵ Deutschlandfunk.de, ‘Heuss-Rede Vor 70 Jahren - Nazi-Verbrechen Und Deutsche Kollektivscham’ (*Deutschlandfunk* 7 December 2019) <<https://www.deutschlandfunk.de/heuss-rede-vor-70-jahren-nazi-verbrechen-und-deutsche-100.html>> accessed 5 June 2026.

⁵⁶ Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 311.

⁵⁷ Ibid, 312-313.

⁵⁸ Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 121.

⁵⁹ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 291.

normative force. Moreover, shame also had a political function: it served to signal moral reckoning both to domestic victims and to the international community, whose approval was essential for Germany's reintegration.⁶⁰ The cultivation of shame thus worked simultaneously as internal moral orientation and external legitimation.

Fear was an even more evident emotion in the post-war context.⁶¹ Frevert identifies "deep-seated collective fears rooted in social, economic and political experiences," above all a lasting "fear of war and destruction" after two world wars.⁶² Added to this was the anxiety of political elites about both a return of Weimar-style instability and a resurgence of National Socialism.⁶³ Even before the Basic Law was adopted, political theorist Sternberger described the widespread anxiety about authoritarianism as a kind of "public illness," and labelled the Basic Law a "fear-built constitution".⁶⁴ He argued that this fear was driving members of the Parliamentary Council to draft a primarily defensive "counter-constitution," one grounded in fear and mistrust of the citizens rather than constructive democratic vision.⁶⁵

These emotional dynamics decisively shaped the constitutional moment of 1949. Both, shame over National Socialism and fears of renewed tyranny and instability, were anticipated and perpetuated by the drafters.

3.2.2 Constitutional Embedding of Shame and Fear

The Parliamentary Council drafted the Basic Law under intense international scrutiny, and Germany's reintegration into the post-war order depended on the perceived sincerity of its moral transformation or "disavowal of past injustice."⁶⁶ The constitution had to signal both an inner break with the Nazi past and reliable safeguards against authoritarian relapse.

⁶⁰ Ibid, 289.

⁶¹ Frank Biess, *German Angst: Fear and Democracy in the Federal Republic of Germany* (Oxford University Press 2020), 25-65; Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 123-139.

⁶² Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 127.

⁶³ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 146.

⁶⁴ Dolf Sternberger, 'Demokratie der Furcht oder Demokratie der Courage?' (1949) 4(1) DW, 8.

⁶⁵ Ibid.

⁶⁶ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 289.

The Preamble sets the tone, invoking “responsibility before God and man” and affirming a commitment to peace.⁶⁷ It reflects collective memory, expressing the longing for reintegration into the European community of states, arising from historical guilt and shame.⁶⁸

Article 1 GG famously declares:

Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Placed deliberately at the beginning of the Basic Law, this provision was intended “to demonstrate the entire spirit of the new state order in contrast to the state order destroyed in May 1945.”⁶⁹ The Parliamentary Council regarded the dignity guarantee as a repudiation of National Socialism’s moral transgressions.⁷⁰ It was further elevated by the *eternity clause* in Article 79(3) GG, which rendered it unamendable. As Möllers noted, “Where human dignity begins, democratic self-determination ends and whatever touches human dignity in the hands of the [FCC] turns to stone.”⁷¹

The dignity clause’s emotional dimension is twofold: on the one hand, the shame of past violations and the determination to demonstrate moral transformation to international and domestic audiences; on the other, the fear of renewed tyranny and the determination to keep dignity beyond political reach.

The same protective logic extends to the system of fundamental rights in Articles 1–19 GG, conceived primarily as defensive rights against the state.⁷² This is reinforced by Article 19(4) GG, which guarantees judicial recourse to anyone whose rights are violated by public authority.

⁶⁷ Basic Law (GG), Preamble.

⁶⁸ Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* (Rupert Scholz and others eds, Werkstand: 107th edn, March 2025, CHBECK 1958) <<https://beck-online.beck.de/>> accessed 5 June 2026. Preamble, paras. 3–5.

⁶⁹ Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar* 107, GG Art. 1 Abs. 1 paras 14–16.

⁷⁰ Christoph Möllers, ‘Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law’ (2009) 42 ILR 416.

⁷¹ *Ibid.*, 417.

⁷² Ralf Poscher, *Grundrechte Als Abwehrrechte* (Mohr Siebeck 2003), 42–47; BVerfG, Urteil des Ersten Senats vom 15. Januar 1958 - 1 BvR 400/51 -, Rn. 1–75, <https://www.bverfg.de/e/rs19580115_1bvr040051> accessed 5 June 2026.

The subsequently added Article 94(1) no. 4a GG allows constitutional review of all three branches of government.⁷³

Article 20 GG, often described as the normative core of the constitution, defines Germany as a federal, democratic, (and social state)—a deliberate reaction against the dangers of centralised authoritarianism.⁷⁴

Article 20(2) affirms that state authority emanates from the people, but only through institutionalised, representative mechanisms, explicitly rejecting plebiscitary forms of democracy partially associated with Weimar’s instability. President Heuss (himself a member of the Parliamentary Council) warned that referenda were a “*prize for every demagogue*”, a view that met with broad approval among the Council’s members.⁷⁵

Finally, Article 20(4) enshrines a right to resist attempts to overthrow the constitutional order, thereby constitutionalising the fear of democratic collapse.⁷⁶

Together, Articles 1 and 20 form the highest principles of the constitutional order and are shielded from amendment by Article 79(3) GG.

Alongside this, the Basic Law introduced the instruments of militant democracy⁷⁷, which can also be understood as tools of emotional regulation.⁷⁸

These are illustrative examples; the list does not claim to be exhaustive. The Basic Law embedded sentiments of shame and fear in its design, but constitutional text alone could not fix their orientation toward constitutional norms. Over time, public discourse and jurisprudence reinterpreted and stabilised these sentiments, translating them into enduring constitutional commitments.

⁷³ Jörn Ipsen, ‘G. Justizgrundrechte’ in Jörn Ipsen *Staatsrecht II* (24th edn, CHBECK 2021) <<https://doi.org/10.15358/9783800658312>> accessed 5 June 2026, 249 – 268.

⁷⁴ Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar*, GG Art. 20 paras 3-6.

⁷⁵ Speech before the Parliamentary Council (9 September 1948) in Theodor Heuss and Jutta Limbach, *Theodor Heuss - Vater Der Verfassung* (Walter de Gruyter 2009) 63.

⁷⁶ Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar*, GG Art. 20 Rn. 3-12.

⁷⁷ E.g. GG Art. 9(2), GG 21(2), GG Art. 18.

⁷⁸ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 70, 79-83.

3.2.3 Shift from shame to historical responsibility

One significant transformation was the reframing of shame into the notion of *historical responsibility*. In his 1985 speech marking the 40th anniversary of the end of WWII, President Weizsäcker stated: “The young are not guilty of what happened back then. But they are responsible for what becomes of it in history.”⁷⁹ This went alongside a broader change in society and reframed the emotional posture toward the past from internalised shame to a forward-looking sense of civic duty.⁸⁰

This transition did not erase shame but retained it as the underlying emotional foundation.⁸¹ Responsibility became the more socially acceptable face of shame, allowing it to be articulated in public without the paralysing associations of guilt.⁸²

That same year, the Bundestag criminalised “Insults as well as the disparagement of deceased persons that are connected with their persecution by the National Socialist regime or another regime of violence and arbitrary rule” prosecutable *ex officio*.⁸³ This was a response to growing public unease about the emerging international phenomenon of Holocaust denial and can be read as evidence that the sense of historical responsibility was not only imposed from above but was increasingly present within society.⁸⁴

While the Basic Law’s structure had embedded sentiments of fear and signalled shame, it was in constitutional jurisprudence that the FCC actively preserved and reinterpreted the sentiment of responsibility. According to Sajó, in post-totalitarian contexts, reappearance of some component elements of the foundational injustice can trigger insecurity and shame.⁸⁵ The FCC

⁷⁹ Der Bundespräsident, ‘Gedenkveranstaltung Im Plenarsaal Des Deutschen Bundestages Zum 40. Jahrestag Des Endes Des Zweiten Weltkrieges In Europa’ (*Der Bundespräsident*) <https://www.bundespraesident.de/SharedDocs/Reden/DE/Richard-von-Weizsaecker/Reden/1985/05/19850508_Rede.html?nn=129626#Start> accessed 5 June 2026.

⁸⁰ Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 315f.

⁸¹ Ibid, 316.

⁸² Ibid, 315-316.

⁸³ German Criminal Code (Strafgesetzbuch, hereinafter: StGB) § 194, as amended by the 21st Criminal Law Amendment Act (21. Strafrechtsänderungsgesetz, 21. StrÄndG), officially promulgated in BGBl. I 1985, Nr. 29 (15 June 1985) <https://www.bgbl.de/xaver/bgbl/start.xav#/switch/tocPane?_ts=1756640997408> accessed 5 June 2026.

⁸⁴ Bundeszentrale für politische Bildung, ‘25. April 1985: Verabschiedung Des Gesetzes Gegen Die “Auschwitz-Lüge”’ (*bpb.de* 22 April 2025) <<https://www.bpb.de/kurz-knapp/hintergrund-aktuell/561391/25-april-1985-verabschiedung-des-gesetzes-gegen-die-auschwitz-luege/>> accessed 5 June 2026.

⁸⁵ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 290.

played a vital role in reinforcing this process by embedding such sentiments into its jurisprudence.⁸⁶

3.2.4 Historical Responsibility in the Jurisprudence of the FCC

This is particularly evident in the Court's freedom of expression jurisprudence under Article 5(1) GG. While the Basic Law guarantees freedom of opinion, speech, and press, it also requires the state to protect the historically charged principle of human dignity.⁸⁷ Restrictions of freedom of speech are permitted only under so-called "general laws", laws that do not target specific opinions as such.⁸⁸

The early *Lüth* case illustrates this interplay.⁸⁹ Erich Lüth had called for a boycott of a film directed by a filmmaker closely tied to Nazi propaganda, but the Hamburg Regional Court prohibited him from urging cinemas or the public to comply. Notably, the FCC gave weight to his concern that the director's return could signal abroad that German cultural life had not changed, thus valuing notions of historical shame and responsibility.⁹⁰ The Court used the case to develop the doctrine of the *objective value order*, holding that all restrictions on freedom of expression must be interpreted in its light.⁹¹ This order, constituted by the Basic Law, is not value-neutral reflecting substantive constitutional values.⁹²

This tension re-emerged in 1994 when the Federal Court of Justice ruled that Holocaust denial did not in itself constitute incitement to hatred, provoking widespread public outrage that reflected the continuing sensitivity of questions linked to the Shoah.⁹³

One month later, in the context of an unsuccessful constitutional complaint concerning restrictions imposed on a demonstration where Holocaust denial was expected, the FCC

⁸⁶ Ibid, 25f, 281.

⁸⁷ GG, Art. 1.

⁸⁸ GG Art. 5(2) (permitting restrictions only through general laws, provisions for the protection of minors, and the right to personal honour); See also The Federal Constitutional Court (Bundesverfassungsgericht hereinafter BVerfG), Judgement of the first senate, 15. January 1958 - 1 BvR 400/51, [34] (*Lüth*).

⁸⁹ BVerfG Judgement of the first senate, 15. January 1958 - 1 BvR 400/51, [1]-[75] (*Lüth*).

⁹⁰ Ibid, [50].

⁹¹ Ibid, Headnotes.

⁹² Ibid, [25].

⁹³ Federal Court of Justice (Bundesgerichtshof, hereinafter: BGH), Judgment of 15 March 1994, 1 StR 179/93, interpreting the scope of StGB § 130 (incitement to hatred); For public reactions see taz, '„Freibrief“ Für Leugner Des Holocaust? Reaktionen Auf Das BGH-Urteil' taz. die tageszeitung Ausgabe 4266 (17 March 1994).

clarified that Holocaust denial is not protected under Article 5(1) GG (freedom of expression).⁹⁴ It found such denial to be a demonstrably false factual claim, therefore falling outside the scope of protected opinion.⁹⁵ While the reasoning was still formally limited to falsity, the decision prepared the ground for later jurisprudence which rests on Germany's special historical responsibility.

That same year legislature introduced § 130(3) StGB to criminalise Holocaust denial as a distinct offence.⁹⁶ In 2005, § 130(4) StGB followed, banning public approval, glorification or justification of the National Socialist tyranny and arbitrary rule.⁹⁷

In the 2009 *Wunsiedel* decision, the FCC upheld the constitutionality of § 130(4) StGB.⁹⁸ In a notable departure from its own dogmatics on “special laws”, the Court acknowledged that the law did in fact target a particular ideological position.⁹⁹ However, it justified this exception by invoking Germany's “long-term (special historical) responsibility”.¹⁰⁰ The Court argued that approval, glorification or justification of the Nazi regime strike at the very foundation of the Basic Law, which had been conceived as a direct antithesis to the injustice and horror of the Nazi regime.¹⁰¹ The reference to special responsibility thus functioned as a constitutional value, justifying restrictions on speech that would otherwise be impermissible.

Two further decisions in 2018 reaffirmed the constitutionality of § 130(3) StGB, using the same rationale.¹⁰²

⁹⁴ BVerfG, Decision of the First Senate, 13 April 1994 - 1 BvR 23/94, <https://www.bverfg.de/e/rs19940413_1bvr002394> accessed 5 June 2026, [1]-[52].

⁹⁵ Ibid, [34].

⁹⁶ Act Amending the Criminal Code, the Code of Criminal Procedure and Other Acts (Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze), promulgated in BGBl. I 1994, Nr. 76 (4 November 1994).

⁹⁷ Act Amending the Criminal Code 24 March 2005 officially promulgated in BGBl. 2005 I S. 969 (31 March 2005).

⁹⁸ BVerfG, decision of the First Senate of 4 November 2009 - 1 BvR 2150/08 -, [1]-[87], (*Wunsiedel*) <https://www.bverfg.de/e/rs20091104_1bvr215008en> accessed 5 June 2026.

⁹⁹ Ibid, Headnotes.

¹⁰⁰ Ibid, [62] (English version).

¹⁰¹ Ibid, Headnote 1.

¹⁰² BVerfG, decision of the Third Chamber of the First Senate of 22 June 2018 - 1 BvR 673/18 -, [1]-[37], <https://www.bverfg.de/e/rk20180622_1bvr067318en> accessed 5 June 2026; BVerfG, decision of the Third Chamber of the First Senate of 22 June 2018 - 1 BvR 2083/15 -, [1]-[34], <https://www.bverfg.de/e/rk20180622_1bvr208315en> accessed 5 June 2026.

This line of reasoning has provoked considerable scholarly criticism. It has been described as a doctrinal shift “with the effect of a constitutional amendment”, a “singularity” within German constitutional law, a non-transferable deviation, justified solely by the exceptional moral weight of the Nazi past.¹⁰³

From the perspective of Sajó’s theory, however, this singularity can be understood as an illustration of constitutional sentiments at work. The emotion of shame, transformed into a sense of historical responsibility stabilised by the moral repudiation of the Nazi past—remains embedded in the constitutional identity of the Federal Republic. The judgment provoked public ambivalence,¹⁰⁴ underscoring both the durability and the contestability of shame/responsibility as constitutional sentiments. They make exceptional doctrinal steps acceptable, but at the price of ongoing debate. Therefore, the Court acts not only as a legal guardian, but as a guide of public sentiment, maintaining the moral boundaries of the constitutional order.

Seen this way, restrictions of freedom of speech function not only as protectors of public peace and human dignity but also as “sentiment stabilizers”. They feed back into public culture by reinforcing collective boundaries through public signalling and, in effect, something like constitutional “shaming.”¹⁰⁵

3.3 The Regulation of (Public) Emotions in German Constitutional Law

Building on the preceding analysis, this section turns to the question of whether German public law operates as a form of emotion regulation in Sajó’s sense. He sees law as a “*social regulatory system (which) participates in emotion regulation by providing uniform (and hence biased) scripts*”.¹⁰⁶

¹⁰³ Mathias Hong, ‘Holocaust, Meinungsfreiheit Und Sonderrechtsverbot – BVerfG Erklärt § 130 III StGB Für Verfassungsgemäß’ (*Verfassungsblog* 5 August 2018) <<https://verfassungsblog.de/holocaust-meinungsfreiheit-und-sonderrechtsverbot-bverfg-erklaert-%C2%A7-130-iii-stgb-fuer-verfassungsgemaess/>> accessed 5 June 2026.

¹⁰⁴ Dietmar Hipp, ‘Germany’s Nazi Exception: Constitutional Court OKs Curtailing of Free Speech’ (*Spiegel.de* 18 November 2009) <<https://www.spiegel.de/international/germany/germany-s-nazi-exception-constitutional-court-oks-curtailling-of-free-speech-a-662031.html>> accessed 5 June 2026; Deutsche Welle, ‘Nazi Ban Upheld’ (*dw.com* 18 November 2009) <<https://www.dw.com/en/german-constitutional-court-upholds-law-banning-neo-nazi-march/a-4905614>> accessed 5 June 2026.

¹⁰⁵ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 278.

¹⁰⁶ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 79-83.

Following the “mad emotionality” of the Nazi regime, the early Federal Republic developed a deep-rooted scepticism toward political emotionalism.¹⁰⁷ Federal President Heuss urged the population to remain “sober and free of illusions” and to liberate themselves from “the shackles of buzzwords and ideologies”.¹⁰⁸ This reflects the postwar effort to contain political passions through institutional restraint, rational legalism and moral distancing from previous emotional excess.¹⁰⁹

However, this scepticism did not translate into a rejection of all emotion, as Heuss’s own appeals to *Kollektivscham* demonstrate. What was at stake was not emotion as such, but particular kinds of emotional mobilisation (associated with nazi propaganda).¹¹⁰

As Sajó notes, some of the actions of the Nazis aimed to increase group cohesion around irrational values, foster in-group solidarity, and incite hatred against the out-group. Others, relying on aggressive self-presentation, marches, and actual violence, sought to intimidate and silence opponents by provoking fear and a sense of helplessness.¹¹¹

Postwar German constitutional law therefore responds not with a purely emotionless model of democracy, but by steering emotional expression away from such dynamics and toward forms of civic engagement that support constitutional acceptance.

(a) Emotions encouraged

Positive law can generate “new motives for compliance with legal norms by producing shared identification”.¹¹²

¹⁰⁷ Theodor Heuss as cited in Ute Frevert, *The Power of Emotions: A History of Germany from 1900 to the Present* (Cambridge University Press 2023), 5-7.

¹⁰⁸ Ibid.

¹⁰⁹ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 81.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid, 74.

Since (national) patriotism as a form of emotional attachment was discredited after 1945, German intellectuals turned to the idea of identity formation through law.¹¹³ In the early years, the population's attitude toward the Basic Law was characterised largely by indifference, directed not only toward the Basic Law but toward politics more generally.¹¹⁴

It was in this context that Sternberger proposed *Verfassungspatriotismus* (constitutional patriotism). First formulated in the 1960s as Staatsfreundschaft (friendship with the state), he later described it as a form of “passionate rationality” that would ground loyalty in the democratic state and constitutional values.¹¹⁵ Schönberger sees the original conception as explicitly emotional: a blend of love, loyalty, and pride directed at constitutional values.¹¹⁶

Though Habermas later shifted this from an emotional to a rational framework, even he acknowledged that principles must enter the “denser web of cultural value orientations”, what Frevert reads as requiring “emotional appropriation”.¹¹⁷

In practice, the state promotes a modest “constitutional patriotism light”, visible in citizenship law, civic education, and party foundation financing, though emotional expectations remain minimal, requiring only a basic consensus around democratic values.¹¹⁸ Historical responsibility has been reinforced through limits on free speech,¹¹⁹ as well as a 2024 reform which requires applicants for citizenship to explicitly affirm it.¹²⁰ Future-oriented solidarity is emphasised in the FCC's Climate Verdict.¹²¹

¹¹³ Sophie Schönberger, ‘Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft’ (2024) 63 DS 91, 95.

¹¹⁴ Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 161.

¹¹⁵ Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007), 24.

¹¹⁶ Sophie Schönberger, ‘Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft’ (2024) 63 DS 91, 95.

¹¹⁷ Jürgen Habermas and Joseph Ratzinger, *Dialektik Der Säkularisierung* (Verlag Herder 2018), 22-25; Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 229; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press 2007), 36; Sophie Schönberger, ‘Noch Einmal Mit Gefühl Für Einen Emotive Turn in Der Verfassungsrechtswissenschaft’ (2024) 63 DS 91, 95.

¹¹⁸ Judith Froese, ‘Verfassungspatriotismus als Bürgerpflicht’ (2024) 79(1) JZ 426.

¹¹⁹ Under GG Art. 5 and StGB § 130.

¹²⁰ Act on the Modernization of Nationality Law (StARModG) 22 March 2024, officially promulgated in BGBl. 2024 I No. 104, (26 March 2024).

¹²¹ BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, [1]-[270] <https://www.bverfg.de/e/rs20210324_1bvr265618en> accessed 5 June 2026.

(b) Emotions Discouraged

Sajó aptly notes that “constitutional democracies, because of their liberal orientation, are reluctant to directly proscribe specific emotions or emotion displays, except hate (and increasingly certain forms of disrespect).”¹²² In Germany this is visible in restrictions on hate speech.

A more specific form of regulation targets the emotions associated with particular groups and specific forms of mobilisation.¹²³ Sternberger’s idea of “friends of the constitution” presupposes “enemies”, and it is precisely against these enemies that German constitutional law directs its restrictive measures.

3.3.1 Militant Democracy as Emotion Regulation

The most systematic expression of this logic is the doctrine of militant democracy. The term originally referred to a state’s ability to defend itself militarily against external threats.¹²⁴

This understanding shifted with Loewenstein’s writings, which focused on the necessity for democracies to defend themselves internally specifically against fascism, which had “declared war” on democratic systems.¹²⁵ An inward-looking reading has since prevailed in Germany, where the FCC today regards this concept as “defensive democracy” and as one of the constitution’s core principles.¹²⁶

The FCC highlights several constitutional provisions as expressions of this principle: the ban on unconstitutional associations,¹²⁷ the possibility of party bans,¹²⁸ the forfeiture of basic

¹²² András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 81.

¹²³ Ibid.

¹²⁴ Gertrude Lübke-Wolff, ‘Wehrhafte demokratie Demokratie’ (*Verfassungsblog* 13 October 2023) <<https://verfassungsblog.de/wehrhafte-demokratie/>> accessed 5 June 2026.

¹²⁵ Ibid; Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31 APSR 417.

¹²⁶ Gertrude Lübke-Wolff, ‘Wehrhafte demokratie Demokratie’ (*Verfassungsblog* 13 October 2023) <<https://verfassungsblog.de/wehrhafte-demokratie/>> accessed 5 June 2026; BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [418] <https://www.bverfg.de/e/bs20170117_2bvb000113en> accessed 5 June 2026.

¹²⁷ GG Art. 9(2).

¹²⁸ GG Art. 21(2).

rights,¹²⁹ and the right of resistance.¹³⁰ More recently, Article 21(3) GG was added to allow the exclusion of anti-constitutional parties from state funding.¹³¹ Further instruments include the use of domestic intelligence services and the loyalty obligation of civil servants.¹³²

In practice, some of these provisions are more relevant than others. The forfeiture of basic rights article has played almost no role in practice and was described as a “functionless fear clause”.¹³³ In contrast, the association ban continues to be actively applied.¹³⁴

The party ban mechanism was introduced as a direct response to the collapse of the Weimar Republic. As the FCC stated, the provision reflects the legislator’s intent “to create structural preconditions to prevent a repetition of the catastrophe of National Socialism and a development of the party system as in the final phase of the Weimar Republic.”¹³⁵

A party can be declared unconstitutional if its goals or behaviour are directed against the “free democratic basic order” or the “existence of the Federal Republic.”¹³⁶ The FCC clarified that this order rests on three core principles human dignity, democracy, and the rule of law, with human dignity forming the foundation for the latter two.¹³⁷

However, mere ideological opposition is not sufficient: the party must actively and aggressively seek these goals, and there must be concrete indications that success is not entirely implausible (*Potentialität*).¹³⁸

¹²⁹ GG Art. 18.

¹³⁰ GG Art. 20(4); BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, paras. 1-1010; Gertrude Lübke-Wolff, ‘Wehrhafte demokratie Demokratie’ (*Verfassungsblog* 13 October 2023) <<https://verfassungsblog.de/wehrhafte-demokratie/>> accessed 5 June 2026.

¹³¹ Act Amending the Basic Law (Article 21) (Gesetz zur Änderung des Grundgesetzes (Artikel 21)), (13 July 2017), officially promulgated in <BGBI. 2017 I S. 2346 19. Juli 2017> accessed 5 June 2026; See also BVerfG, Judgement of the second senate 23. January 2024 - 2 BvB 1/19 -, Rn. 1- 510 <https://www.bverfg.de/e/bs20240123_2bvb000119> accessed 5 June 2026.

¹³² Gertrude Lübke-Wolff, ‘Wehrhafte demokratie Demokratie’ (*Verfassungsblog* 13 October 2023) <<https://verfassungsblog.de/wehrhafte-demokratie/>> accessed 5 June 2026.

¹³³ Klaus Ferdinand Gärditz, ‘Religionsfreiheit Unter Dem Vorbehalt Der Verwirkung?’ (*Verfassungsblog* 30 September 2018) <<https://verfassungsblog.de/religionsfreiheit-unter-dem-vorbehalt-der-verwirkung/>> accessed 5 June 2026.

¹³⁴ List of banned associations: Federal Ministry of the Interior: BMI, Vereinsverbote <<https://www.bmi.bund.de/DE/themen/sicherheit/extremismus/vereinsverbote/vereinsverbote-artikel.html>> accessed 22 June 2026.

¹³⁵ BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [1]-[1010], [512].

¹³⁶ GG Art. 21 (4) and 21(2) and §§ 43 ff. BVerfGG.

¹³⁷ BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [529]; Judith Froese, ‘Verfassungspatriotismus als Bürgerpflicht’ (2024) 79(1) JZ 426.

¹³⁸ BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13.

Only the Bundestag, Bundesrat, or Federal Government can initiate proceedings. The Court first reviews admissibility in a preliminary stage before potentially proceeding to the main proceedings, where a two-thirds majority is required to dissolve the party and ban any successor organisations. If a party is declared unconstitutional, it must be dissolved and any substitute or partial organisations banned.¹³⁹ Members of a prohibited party lose their Bundestag mandates and successors their eligibility. For direct mandates, a repeat election is held.¹⁴⁰

In the history of the federal republic, two parties were successfully banned: the Socialist Reich Party (SRP) in 1952 and the Communist Party of Germany (KPD) in 1956.¹⁴¹ Later attempts to ban the far-right extremist National Democratic Party (NPD) in 2001-2003 and again between 2013–2017 failed.¹⁴² But in 2024, the party Die Heimat (formerly NPD) was excluded from state party financing for a period of six years.¹⁴³

In both successful cases, the FCC’s reasoning addressed not only the political program of the parties but also their emotional methods of mobilisation.

In the case of the SRP, the Court argued that the party’s public presence was deliberately designed to “strongly appeal to romantic feelings,” an effect further amplified through modern techniques of mass persuasion.¹⁴⁴ Central to its messaging was the *Reichsidee*, the idea of a unified German order transcending regional divisions, which the court noted a “special emotional value” as an expression of the longing for national unity.¹⁴⁵ The party’s “propaganda” followed Hitler’s model: authentic emotions were exploited, resentments manufactured, and hatred deliberately incited.¹⁴⁶ By obscuring the true causes of Germany’s

¹³⁹ BVerfGG § 46(3); §§ 32 f. Political Parties Act (Parteiengesetz, PartG).

¹⁴⁰ Federal Federal Elections Act (Bundeswahlgesetz, BWahlG) § 46(4) s. 1 BWahlG; § 46(4) s. 2; § 44(2)–(4) BWahlG.

¹⁴¹ BVerfG, Judgment of 23 October 1952 - 1 BvB 1/51; BVerfG, Judgment of 17 August 1956 - 1 BvB 2/51.

¹⁴² BVerfG, Decision of 18 March 2003 - 2 BvB 1/01 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2003/03/bs20030318_2bvb000101.html?nn=68080> accessed 5 June 2026; BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [1]–[1010] <https://www.bverfg.de/e/bs20170117_2bvb000113en> accessed 5 June 2026.

¹⁴³ BVerfG, Judgment of 23. 01. 2024 - 2 BvB 1/19, Press Release - No. 9/2024 of 23 January 2024.

¹⁴⁴ BVerfG, Judgment of 23.10.1952 - 1 BvB 1/5, [21].

¹⁴⁵ Ibid, [235].

¹⁴⁶ Ibid, [248].

hardship and shifting blame onto those working for the country's recovery, the SRP sought to erode critical judgement and prepare listeners for allegiance.¹⁴⁷

Similarly, in the KPD proceedings the Court paid close attention to the emotional strategies. It was pointed out the party had deliberately exaggerated "grievances, or even trivial incidents of no real significance" and presented them as proof of the illegitimacy of the entire constitutional system.¹⁴⁸ According to the Court, this rhetoric was aimed at provoking "emotional agitation and unclear emotions" rather than rational critique, thereby undermining the trust on which the democratic order depended.¹⁴⁹

The Court further noted that the KPD's methods involved a "vulgarisation" of its political ideas, an adaptation to the "emotional needs of the masses" using slogans and appealing to sentiment. Such techniques, it stressed, were not unconstitutional in themselves, so long as the party continued to demonstrate an awareness of its role within a democratic framework.¹⁵⁰

From the mobilisation techniques reminiscent of the Nazi regime in the SRP and KPD cases, the Court's focus shifted in the 2017 NPD decision to the deliberate creation of "an atmosphere of fear" that undermines equal participation in democratic will-formation.¹⁵¹ Although in that case the required *Potentialität* could not be established, the reasoning shows that party bans are directed not only against concrete threats to institutions, but also against the deliberate cultivation of destabilising emotions. The Court has thus treated political strategies of emotional mobilisation and specific emotions as dangers to the democratic order that justify recourse to the defensive mechanisms of Article 21(2) GG.

Two emotional dynamics are at work here. On the one hand, certain forms of mobilisation are restricted to prevent the rise of anti-constitutional emotions. By doing so, the Court seeks to preserve the emotional preconditions of democracy: excessive emotionalisation is to be contained, the spread of certain emotions prevented, and an overall climate maintained in which democratic will-formation and participation can take place without intimidation or fear. The "enemies of the constitution" are therefore defined not only by their political/ideological

¹⁴⁷ Ibid, [249].

¹⁴⁸ BVerfG, Judgment of 17 August 1956 - 1 BvB 2/51, [1463].

¹⁴⁹ Ibid, [1464].

¹⁵⁰ Ibid, [1468].

¹⁵¹ BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13, Headnotes.

content but also by their emotional style of engagement. On the other hand, party bans are themselves shaped by the emotional pressures of their time. The SRP ban was justified by the Interior Minister with reference to public “alarm” and “disappointment” at the re-emergence of totalitarian movements.¹⁵²

3.3.2 Steering Public Emotion through Law

The preceding analysis confirms Sajó’s second claim that public law functions as a “social regulatory system.” While Attempts of fostering positive attachments that could sustain constitutional stability have remained comparatively abstract and restrained, post-war institutions actively sought to contain destructive passions in response to the emotional excesses of Nazism. Defensive democracy makes this explicit: party bans openly aim to neutralise destructive emotional mobilisation.

The application of these instruments depends, in turn, on the emotional pressures of their time. In Sajó’s framework, this underscores the link between foundational sentiments and emotion regulation. Defensive democracy in Germany emerged largely from the post-war fear of authoritarian relapse. When authoritarian movements resurface within the constitutional system, they also reactivate the sentiment of shame tied to the Nazi past. In moments of crisis, these emotions return as constitutional memories, prompting renewed efforts at emotion control. Party bans can therefore be understood not only as products of such sentiments, but also as their reenactment.

This observation raises the question of what these dynamics imply for democratic resilience: Can constitutional law actively stabilize democracy through emotion regulation and help prevent democratic backsliding, or does it risk reinforcing it, or perhaps both at once?

¹⁵² Annette Wilmes, ‘Staatsfeindlich, Verfassungswidrig - Parteiverbote in Der Deutschen Geschichte’ (*Deutschlandfunk Kultur* 2 March 2016) <<https://www.deutschlandfunkkultur.de/staatsfeindlich-verfassungswidrig-partieverbote-in-der-100.html>> accessed 5 June 2026.

4. Implications of Sajó's Theory for German Law

4.1 Sajó Confirmed: Constitutional Sentiments in Today's Germany

The analysis above shows that Sajó's framework can be usefully applied to the German case. Although transformed over time, sentiments of fear and shame decisively shaped the constitutional design of 1949 and have left a lasting imprint on the jurisprudence of the FCC.

Survey data indicates their continued resonance, with a significant percentage of respondents affirming that the Nazi era still shapes national self-understanding and Germany's special responsibility for peace and international cooperation.¹⁵³ This is most evident in moments of disruption. Following the 2019 Halle synagogue attack, President Steinmeier spoke of a day of "shame and disgrace," echoing President Heuss's invocation of *Kollektivscham* in the republic's founding years.¹⁵⁴ Open expressions of antisemitism regularly provoke strongly shame-laden reactions in the German public.

Fear, too, persists: In 2024, a significant majority of respondents stated that they believe democracy is currently endangered.¹⁵⁵ The rise of the AfD has been widely perceived as a threat, sparking the largest civil protests in the history of the federal republic. The protests united under the slogan "*Nie wieder ist jetzt*" ("Never again is now"), a phrase that has long been associated with the lessons of the Shoah.¹⁵⁶ In parliamentary debates on a potential party ban, parliamentarians explicitly invoked Germany's "historic responsibility to open the door to Karlsruhe",¹⁵⁷ and the Bundestag's recent decision to strengthen the FCC was likewise

¹⁵³ SINUS Institut, '80 Jahre Nach Kriegsende: Deutschland Zwischen Sorge, Erschütterung Und Ermüdung' (80 Jahre nach Kriegsende: Deutschland zwischen Sorge, Erschütterung und Ermüdung 1 May 2025) <<https://www.sinus-institut.de/media-center/presse/80-jahre-ende-zweiter-weltkrieg>> accessed 5 June 2026.

¹⁵⁴ Der Bundespräsident, 'Federal President Frank-Walter Steinmeier Gives a Statement on the Attack on the Synagogue in Halle (Saale) on 10 October 2019' (*desbundespraesident.de* 10 October 2019) <https://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2019/10/191010-Statement-Halle-Englisch.pdf?__blob=publicationFile&v=2> accessed 5 June 2026.

¹⁵⁵ SINUS Institut, '80 Jahre Nach Kriegsende: Deutschland Zwischen Sorge, Erschütterung Und Ermüdung' (80 Jahre nach Kriegsende: Deutschland zwischen Sorge, Erschütterung und Ermüdung 1 May 2025) <<https://www.sinus-institut.de/media-center/presse/80-jahre-ende-zweiter-weltkrieg>> accessed 5 June 2026.

¹⁵⁶ tagesschau, 'Demos Gegen Rechtsextremismus: Der Bundesweite Protest Geht Weiter' (*tagesschau.de* 27 January 2024) <<https://www.tagesschau.de/inland/innenpolitik/demonstrationen-gegen-rechts-110.html>> accessed 5 June 2026.

¹⁵⁷ Deutscher Bundestag, 'Deutscher Bundestag - Hitziger Schlagabtausch Zu AfD-Verbotsanträgen' (*Deutscher Bundestag* 2025) <<https://www.bundestag.de/dokumente/textarchiv/2025/kw05-de-afd-1042014>> accessed 5 June 2026.

justified by reference to Weimar's failure to defend democracy, a direct continuation of the fear that originally shaped the Basic Law's defensive architecture.¹⁵⁸

These examples illustrate how constitutional law continues to interact with public emotions in the feedback loop that Sajó describes: founding sentiments are stabilised, reframed, and continuously shape public life, while at times gaining renewed force in response to contemporary crises. They also confirm Sajó's observation that in a post-totalitarian society, signs of foundational systemic injustice can trigger renewed waves of shame and fear.¹⁵⁹

As Sajó emphasises, public sentiments are in constant formation.¹⁶⁰ In Germany, fear of the state being overwhelmed by migration has crystallised into one of the population's dominant anxieties, with surveys showing that a relative majority call for immigration to be restricted. This illustrates that collective emotions such as migration anxiety are not merely social moods but are translated into legal demands, confirming Sajó's insight that constitutional law is continuously shaped by shifting sentiments and their regulation.

German constitutional acceptance has long rested on sentiments of fear and responsibility. Yet this foundation is not fixed; shifts in public sentiment require constant attentiveness to ensure that institutions and doctrines retain their societal resonance.

4.2 The Limits of Law as Emotion Regulation

As for the second aspect of Sajó's theory put to the test in this paper, the central question is whether law can effectively regulate emotions to protect the constitutional democratic order. The analysis in 3.3. shows that German public law engages in emotion control, especially through party bans. Yet it is what eludes law's control, that proves Sajó's theory most illuminating: The unintended emotional "side-effects" of regulation. Instruments designed to suppress destructive passions often provoke new ones (such as anger, alienation, resentment) or enforce existing ones in the targeted group, which may ultimately undermine the democratic resilience they were meant to secure.

¹⁵⁸ tagesschau.de, 'Bundestag: Bundesverfassungsgericht Wird Besser Geschützt' (*tagesschau.de* 19 December 2024) <<https://www.tagesschau.de/inland/innenpolitik/bundestag-verfassungsgericht-schutz-100.html>> accessed 5 June 2026.

¹⁵⁹ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 290.

¹⁶⁰ Ibid, 36, 41-42.

The ongoing debate about banning the AfD illustrates this dilemma directly. Momentum grew dramatically after an investigative report revealed that AfD members had met to discuss a “remigration” plan, triggering the largest civil protests since 1945.¹⁶¹

By January 2025, the Bundestag debated formal motions to initiate proceedings before the FCC.

Despite this, the AfD has become the second-strongest party in Germany, which makes any ban politically explosive.¹⁶² Germany’s domestic intelligence service (BfV) designated the AfD as a confirmed right-wing extremist organisation in 2025.¹⁶³

Central to the party’s strategy is mobilisation through a long-cultivated victimhood narrative: the party consistently portrays itself as the silenced representative of the “Volk,” allegedly persecuted by “the establishment” and the media.¹⁶⁴ A ban procedure potentially feeds into this narrative as delaying a ban or an unsuccessful procedure could further erode trust in democratic institutions.¹⁶⁵

What is meant to defend democracy could instead strengthen the party’s emotional grip on its supporters, deepening feelings of betrayal, persecution and exclusion. The reactions to BfVs

¹⁶¹ Marie Bröckling and Bianca Poersch, ‘Wie Die Debatte Um Ein AfD-Verbot Ins Rollen Kam – Eine Chronik’ (*correctiv.org* 6 May 2025) <<https://correctiv.org/aktuelles/debatte-um-afd-verbot/2025/05/06/afd-verbot-zeitstrahl/>> accessed 5 June 2026 ; Marcus Bensmann et al, ‘Secret Plan against Germany’ (*correctiv.org* 15 January 2024) <<https://correctiv.org/en/top-stories/2024/01/15/secret-plan-against-germany/>> accessed 5 June 2026; Ute Frevert, *Verfassungsgefühle* (Wallstein Verlag 2024), 236.

¹⁶² Deutschen Bundestag, ‘Sitzverteilung des 21. Deutschen Bundestages’ <<https://www.bundestag.de/sitzverteilung>> accessed 5 June 2026.

¹⁶³ Paul Kirby, ‘AfD Classified as Extreme-Right by German Intelligence’ *BBC* (2 May 2025) <<https://www.bbc.com/news/articles/cwy6zk9wkrdo>> accessed 5 June 2026; Maik Baumgärtner and others, ‘Compendium of Extremism: A Look inside the Report Documenting the AfD’s Right-Wing Radicalism’ (*Spiegel.de* 14 May 2025) <<https://www.spiegel.de/international/germany/compendium-of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-addb-d1e44c298305>> accessed 5 June 2026.

¹⁶⁴ Damien McGuinness, ‘Germany’s Far-Right AfD: Victim or Victor?’ *BBC* (2 September 2019) <<https://www.bbc.com/news/world-europe-49549670>> accessed 5 June 2026; Fabian Reinbold, ‘Politische Debatte Über Die AfD: Und Täglich Grüßt Die Opferrolle’ (*DIE ZEIT* 20 May 2025) <<https://www.zeit.de/politik/deutschland/2025-05/politische-debatte-afd-opferrolle-umgang-cdu-5vor8>> accessed 5 June 2026; Anne Siebelhoff, ‘Ethnischer Volksbegriff: Was Ist so Schlimm Daran?’ (*FAZ.NET* 28 May 2025) <<https://www.faz.net/aktuell/politik/inland/ethnischer-volksbegriff-was-ist-so-schlimm-daran-110504389.html>> accessed 5 June 2026.

¹⁶⁵ Marie Bröckling, ‘AfD-Verbot: Pro Und Contra’ (*correctiv.org* 7 May 2025) <<https://correctiv.org/aktuelles/debatte-um-afd-verbot/2025/05/07/pro-und-contra-afd-verbot/>> accessed 5 June 2026.

2025 report illustrate this dynamic. Party leaders denounced the decision as “clearly politically motivated” and a “severe blow to German democracy,” claiming they were being “discredited and criminalised”.¹⁶⁶ They have also responded with legal action.¹⁶⁷

It follows that when law operates as an emotion-regulating tool, its effectiveness depends not only on legal design but also on legitimacy within the emotional landscape of society. When regulation is perceived as repressive or overly top-down, it may fuel precisely the emotions it seeks to suppress. Therefore, initiatives such as party bans may diffuse short-term escalation, but they risk contributing to long-term polarisation and democratic distrust.

4.3 Counter-emotions

The preceding analysis indicates that destructive emotions cannot simply be “banned away”, just as one may prohibit a party but not its voters. Sajó therefore argues that “to protect some of the values of constitutionalism that are threatened by emotional fanaticism and fanatics’ emotion (...), one can rely on other emotions or other combinations of emotion”.¹⁶⁸ The question is whether such counter-emotions can be identified and mobilised.

4.3.1 Constitutional patriotism

One influential German response has been constitutional patriotism. However, while most Germans view the Basic Law positively, it remains abstract for many: fewer than half consider it important in their everyday lives, and only one in three support an annual holiday in its honour.¹⁶⁹ Scholars have voiced scepticism. Möllers concludes that “there is no constitutional

¹⁶⁶ Paul Kirby, ‘AfD Classified as Extreme-Right by German Intelligence’ *BBC* (2 May 2025) <<https://www.bbc.com/news/articles/cwy6zk9wkrdo>> accessed 5 June 2026.

¹⁶⁷ Maik Baumgärtner et al, ‘Compendium of Extremism: A Look inside the Report Documenting the AfD’s Right-Wing Radicalism’ (*Spiegel.de* 14 May 2025) <<https://www.spiegel.de/international/germany/compendium-of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-addb-d1e44c298305>> accessed 5 June 2026; For recent developments see: Paulin Kola ‘AfD hails court injunction on ‘extremist’ label as victory’ *BBC* (26 February 2026) <<https://www.bbc.com/news/articles/clyg10ek7r7o>> accessed 5 June 2026; Verwaltungsgericht Köln, Beschluss vom 26.02.2026-13 L 1109/25 <https://nrwe.justiz.nrw.de/ovgs/vg_koeln/j2026/13_L_1109_25_Beschluss_20260226.html> accessed 5 June 2026.

¹⁶⁸ András Sajó, ‘Emotions in Constitutional Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023), 74.

¹⁶⁹ SINUS Institut and YouGov, ‘SINUS-Studie Anlässlich „75 Jahre Grundgesetz“’ (2024) <<https://www.sinus-institut.de/media-center/presse/75-jahre-grundgesetz>> accessed 5 June 2026.

patriotism in the Federal Republic”.¹⁷⁰ Schönberger calls it an “elite concept” and “overrated,” insufficient to produce the broad affective identification that democratic resilience requires.¹⁷¹ Among AfD voters, support for adopting an entirely new constitution is higher than in any other group, and trust in constitutional organs is likewise lowest.¹⁷² This suggests that constitutional patriotism resonates least where a counter-emotion would be most needed.

4.3.2 Democratic/Undemocratic Emotions

If constitutional patriotism proves insufficient as a counter-emotion, this raises the broader question: are there specifically democratic or undemocratic emotions? Heidenreich proposes three criteria for distinguishing democratic from undemocratic emotions: by their content, by their origin (top-down versus bottom-up), and by their status in the public sphere. He considers the last criterion decisive: emotions can be considered democratic when they remain open to justification and transformation in public debate, and undemocratic when they close off contestation by claiming undeniability.¹⁷³

Accordingly, most emotions cannot be categorised as democratic or undemocratic in themselves. As the analysis above has shown, fear may safeguard democracy by motivating vigilance, just as shame can reinforce responsibility for past injustice, thereby strengthening democratic norms. The same applies to anger: while Nussbaum sees it as a threat to democratic institutions, Srinivasan highlights its potential as a valuable political driver for marginalised groups.¹⁷⁴ In Germany, Specht has suggested that anger at attempts to erode the “Brandmauer” (“firewall against the far-right”) can be a healthy sign of democratic attachment.¹⁷⁵ Anger, shame or fear can thus serve democratic functions—when they remain open to justification and contestation.

¹⁷⁰ Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 121.

¹⁷¹ Peter Neumann, ‘Interview with Sophie Schönberger: “Der Verfassungspatriotismus Wird Maßlos Überschätzt”’ (*DIE ZEIT* 3 June 2023) <<https://www.zeit.de/kultur/2023-05/sophie-schoenberger-demokratie-verfassungsrecht>> accessed 5 June 2026.

¹⁷² Hans Vorländer et al., ‘75 Jahre Grundgesetz. Einstellungen Zu Verfassung Und Demokratie in Deutschland MIDEM Studie 2024-2’ (*Mercator Forum Migration und Demokratie (MIDEM)* 7 May 2024) <<https://forum-midem.de/studie-75-jahre-grundgesetz/>> accessed 5 June 2026.

¹⁷³ Felix Heidenreich, ‘Gefühle Ins Recht Setzen: Wann Sind Politische Emotionen (Noch) Demokratisch?’ (2014) 23 JZP 575.

¹⁷⁴ Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press 2016); Amia Srinivasan, ‘The Aptness of Anger’ (2018) 26 JPP 123.

¹⁷⁵ Jule Specht as cited in Paul Blickle and others, ‘Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist’ (*DIE ZEIT* 13 May 2025) <<https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima>> accessed 5 June 2026.

Yet one emotion stands out as problematic: resentment.¹⁷⁶ Unlike other emotions, which are ambivalent, resentment¹⁷⁷ tends to erode rather than sustain democratic contestation.¹⁷⁸

As Koncewicz argues, resentment turns “agonistic politics”, where disagreement aims at the betterment of the system through contestation, into “antagonistic politics”,¹⁷⁹ where outcomes are rejected by denying the legitimacy of liberal democracy. In agonistic politics, disagreement improves the system through contestation. In antagonistic politics, outcomes are rejected by denying the legitimacy of liberal democracy. Resentful dissent thus instrumentalises democratic procedures to erode them from within. He insists, resentment plays a central role in democratic backsliding. It is fuelled by anger and anxiety and, at the same time, reinforces them. This creates a cycle that populist actors can exploit to consolidate power and undermine democratic institutions.¹⁸⁰

This dynamic is visible in the mobilisation strategies of the AfD. No other party emotionalises voters as strongly.¹⁸¹ It systematically cultivates resentment by portraying itself as the silenced representative of the “true people” while delegitimising opponents. The BfV’s report on the AfD, originally classified as confidential, was made public by several media outlets. It provides a textbook case of antagonistic politics, citing remarks by AfD officials such as: “The cartel parties are dissolving our Germany like a bar of soap under a stream of warm water!” or “If we have a government that is waging war against us, then we will wage war against this government. We have come to drive these people out of their seats.”¹⁸² The reaction to the

¹⁷⁶ Tomasz Tadeusz Koncewicz and Logan Strother, ‘The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research’ (*Verfassungsblog* 21 March 2019) <<https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/>> accessed 5 June 2026.

¹⁷⁷ Used here to mean the “indignation deriving from the perception of having been treated unfairly”.

¹⁷⁸ Tomasz Tadeusz Koncewicz and Logan Strother, ‘The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research’ (*Verfassungsblog* 21 March 2019) <<https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/>> accessed 5 June 2026.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Paul Blickle et al, ‘Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist’ (*DIE ZEIT* 13 May 2025) <<https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima>> accessed 5 June 2026; Einstein Foundation Berlin and Humboldt University Berlin, ‘How Civil Society Fosters Social Cohesion Coping with Affective Polarization’ (*Coping with Affective Polarization* 20 August 2025) <<https://affective-polarization.hu-berlin.de/>> accessed 5 June 2026 .

¹⁸² Maik Baumgärtner and others, ‘Compendium of Extremism: A Look inside the Report Documenting the AfD’s Right-Wing Radicalism’ (*Spiegel.de* 14 May 2025) <<https://www.spiegel.de/international/germany/compendium->

report itself further illustrates this antagonistic dynamic, as the AfD portrayed its publication as proof of political persecution.

Research shows that many AfD supporters perceive themselves as excluded by the establishment, while in practice they reject other groups just as intensely.¹⁸³ Here emotions no longer sustain disagreement but harden antagonism.

This points to a broader phenomenon identified in political science as *affective polarisation*.¹⁸⁴ It arises when emotions become bound to group identities. In such a climate, groups cease to engage in dialogue. Emotions that might otherwise sustain democratic contestation are transformed into markers of belonging, and disagreement shifts into outright rejection of pluralism and democratic procedures.¹⁸⁵

Strongly polarised citizens display significantly greater mistrust of institutions, and, in extreme cases, hostility and violence toward political opponents. This weakens social cohesion and corrodes a society's democratic self-understanding.¹⁸⁶ In Germany, affective polarisation is on the rise, though the trend has developed more slowly than in countries such as the United States.¹⁸⁷

This analysis shows why Sajó's proposal of cultivating counter-emotions proves difficult: while fear, anger, or shame may under certain conditions sustain democracy, resentment pushes politics from agonism to antagonism, leading to affective polarisation. The central challenge, then, is not to cultivate counter emotions, but to prevent destructive ones from closing contestation which leads to the question of what law can and cannot, contribute.

[of-extremism-a-look-inside-the-report-documenting-the-afds-right-wing-radicalism-a-de2ab5b5-623e-4100-addb-d1e44c298305](https://assets.cicero.de/2025-05/Geheimgutachten_Teil%20A.pdf)> accessed 5 June 2026. For the full report see: https://assets.cicero.de/2025-05/Geheimgutachten_Teil%20A.pdf> accessed 5 June 2026.

¹⁸³ Paul Blickle and others, 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <<https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima>> accessed 5 June 2026.

¹⁸⁴ Swen Hutter et al., 'Dynamics of Political Systems Center for Civil Society Research Coping with Affective Polarization: A Research Program' (2025) <<https://bibliothek.wzb.eu/pdf/2025/zz25-602.pdf>> accessed 5 June 2026, 4f.

¹⁸⁵ Ibid.

¹⁸⁶ Paul Blickle et al., 'Polarisierung: Wie Tief Deutschland Emotional Gespalten Ist' (*DIE ZEIT* 13 May 2025) <<https://www.zeit.de/politik/deutschland/2025-05/gesellschaftliche-spaltung-polarisierung-ideologisch-affektiv-asyl-klima>> accessed 5 June 2026.

¹⁸⁷ Ibid.

4.5 What Law Can Do, What It Cannot Do—and What It Ought to Do

The collapse of the reason–emotion dichotomy does not by itself indicate normative conclusions. The fact that law is inevitably intertwined with emotion does not mean that it should be used as a tool of emotion control. Any normative claim must therefore take account of the Basic Law’s structural limits and the liberal commitment to pluralism.

The Basic Law itself sets clear limits on how far public law may regulate emotions. As the FCC emphasised in the 2017 NPD judgment and again in 2024 on party financing, exclusion from democratic competition is permissible only where what is “indispensable for guaranteeing free and democratic coexistence is denied.”¹⁸⁸ The constitution rests on a minimal consensus around human dignity, democracy, and the rule of law.¹⁸⁹ These are deliberately abstract principles that provide a common basis for conflict or “agonistic politics” rather than prescribing harmony.¹⁹⁰ This boundary derives, not least, from the primacy of human dignity: the Basic Law reverses the National Socialist dictum that the individual is nothing and the state everything, affirming instead that the individual precedes the state.¹⁹¹

Within these limits, law can support efforts to counter polarisation: above all by emphasis on fair procedure, transparency, accountability, and civic equality protections to counter mistrust, feelings of exclusion and unfairness. Militant democracy can serve as a last resort, but its severity and potential side effects underscore the need for caution. Whether and how law can play a more active role in countering affective polarisation remains an open question for future research. Since law reaches its limits here, the task lies with politics: Political actors must address fear, anger, and resentment directly by acknowledging grievances while preventing their capture by anti-democratic narratives. Some argue that fostering empathy could serve as a corrective, helping to sustain trust and dialogue.¹⁹²

¹⁸⁸ BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 -, [515].

¹⁸⁹ Ibid., [529].

¹⁹⁰ Judith Froese, ‘Verfassungspatriotismus als Bürgerpflicht’ (2024) 79(1) JZ 426; Tomasz Tadeusz Konciewicz and Logan Strother, ‘The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research’ (*Verfassungsblog* 21 March 2019) <<https://verfassungsblog.de/the-role-of-citizen-emotions-in-constitutional-backsliding-mapping-out-frontiers-of-new-research/>> accessed 5 June 2026.

¹⁹¹ Hans D Jarass, Martin Kment and Bodo Pieroth, *Grundgesetz Für Die Bundesrepublik Deutschland* (18th edn., CHBECK 2024), Art. 1(1)–(5).

¹⁹² Swen Hutter and others, ‘Dynamics of Political Systems Center for Civil Society Research Coping with Affective Polarization: A Research Program’ (2025) <<https://bibliothek.wzb.eu/pdf/2025/zz25-602.pdf>> accessed 5 June 2026.

In this sense, constitutional law cannot substitute for politics. Its strength lies in rationalising stabilising and preserving space for political debate, or as Möllers has put it, constitutional law should open spaces (for politics) rather than close them.¹⁹³

There is irony in reaching this conclusion after a paper devoted to emotions in constitutional law. Yet, it is precisely the close study of their interplay that makes the limits of law's role visible. Without acknowledging law's embeddedness in emotion, this outcome could not have been reached.

Finally, there remains the concern of legal manipulation.¹⁹⁴ This should not be overlooked, yet it is precisely the absence of knowledge that creates the greatest vulnerability. Ignoring the emotional dimension of law does not neutralise it; it only leaves the terrain open to those willing to manipulate it. The far right and populist movements have long understood the power of emotions in mobilising supporters and undermining trust in institutions.¹⁹⁵ Better knowledge of how emotions and law interact can therefore serve as a safeguard.

5 Conclusion

Building on András Sajó's theory of constitutional sentiments, this paper examined the relationship between law and emotions in German constitutional law. The German case confirms Sajó's descriptive claims while also exposing their limits. Foundational sentiments of fear and shame shaped the Basic Law and continue to resurface in moments of crisis, while other emotions such as anxiety about migration press for legal adaptation. Yet attempts to regulate emotions through instruments like party bans reveal clear limits, as such measures risk fuelling resentment and promoting affective polarisation which erode democratic self-understanding and trust in institutions. Neutralising anti-constitutional or anti-democratic emotions with counter-emotions proves difficult to realise, since even their categorisation is not always clear. The Basic Law's strength lies not in manufacturing harmony but in preserving

¹⁹³ Christoph Möllers, *Das Grundgesetz - Geschichte Und Inhalt* (4th edn., CH BECK 2024), 125.

¹⁹⁴ András Sajó, *Constitutional Sentiments* (Yale University Press 2011), 9.

¹⁹⁵ Tomasz Tadeusz Konieczny and Logan Strother, 'The Role of Citizen Emotions in Constitutional Backsliding – Mapping out Frontiers of New Research' (*Verfassungsblog* 21 March 2019); Philip Faigle and Anaïs Kaluza, 'Jule Specht: "Wer Emotional Polarisiert Ist, Hält Andere Für Dumm, Herzlos, Böse"' (*DIE ZEIT* 13 May 2025) <<https://www.zeit.de/gesundheit/2025-05/jule-specht-polarisierung-meinung-empathie-psychologie>> accessed 5 June 2026.

space for contestation through dignity, pluralism, and procedural fairness. It cannot substitute for politics, but it can help stabilise democratic coexistence and guard against manipulation.

Three central insights follow. First, awareness of emotions is crucial for understanding constitutional acceptance. Shifts in public sentiment affect the societal acceptance of constitutional principles and institutions.

Second, the emotional layer of measures such as party and symbol bans highlights the risk of side effects. More regulation is not always better: attempts to suppress emotions can backfire. The AfD ban debate illustrates this dilemma: such a measure could only achieve its intended effect if embedded in broad societal support. Legal Scholarship should clarify these stakes rather than substitute for political decision-making.

Third, and most importantly, since emotions cannot be banned away, they must be addressed politically. The role of constitutional law is to preserve open democratic contestation; its strength lies in rationalising and stabilising political conflict through fair procedure, transparency and accountability. Politics, by contrast, must address resentment, fear and anger more directly to prevent further affective polarisation.

Hand's reminder that liberty "lies in the hearts of men and women" remains relevant.¹⁹⁶ No constitution or court can preserve democracy if its emotional foundations erode. How citizens can be brought to take democracy to heart remains an open and urgent question. What is clear is that this cannot be achieved through top-down regulation; in Germany's democratic order, the task ultimately lies with the people themselves, from whom all state authority derives.¹⁹⁷

Recognising constitutional law's emotional dimension is not a call for more assertive intervention, but for a jurisprudence attentive to its social embeddedness. By making explicit the interplay between constitutional institutions and collective emotions, legal scholarship can strengthen democratic resilience and help prevent constitutional mechanisms from becoming instruments of emotional manipulation.

¹⁹⁶ Learned Hand, "The Spirit of Liberty" (1944) <<https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944>> accessed 5 June 2026.

¹⁹⁷ GG Art. 20(2).