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**FORUM**

## FÓRUM

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# Constitutional law around the globe: fundamental rights and the freedom of speech in Germany

## *Direito constitucional ao redor do globo: direitos fundamentais e liberdade de expressão na Alemanha*

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**Abstract:** This paper exploring the Freedom of Speech in German Constitutional Law is part of the series “Constitutional Law Around the Globe”. This chapter of the series focuses on “Fundamental Rights and Freedom of Speech” in contemporary democracies. Third in the row, this paper analyses the Freedom of Speech in German Constitutional Law and how it has been shaped by the German Constitutional Court. A final paper will approach the legal systems composing the series in a comparative perspective.

**Keywords:** Fundamental rights. Freedom of speech. German Constitutional Court. German Basic Law. Democracies.

**Resumo:** Este artigo, analisando a liberdade de expressão no direito constitucional alemão, faz parte da série “Direito Constitucional ao Redor do Globo”. Esta parte da série tem por foco “Direitos Fundamentais e a Liberdade de Expressão” em democracias da atualidade. Segundo da série, este artigo analisa a liberdade de expressão no direito constitucional alemão e como ela tem sido delineada pelo Tribunal Constitucional ao longo do tempo. Um artigo final abordará os sistemas jurídicos componentes da série em uma perspectiva comparada.

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**Palavras-chave:** Direitos fundamentais. Liberdade de expressão. Corte Constitucional alemã. Lei Fundamental Alemã. Democracias.

**Summary:** Introduction – **1** Freedom of speech and legal framework in Germany – **2** The German Federal Court. Landmark cases – Conclusion – References

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## Introduction

This paper exploring the Freedom of Speech in a comparative perspective is part of a series named “Constitutional Law Around the Globe”.<sup>2</sup> This chapter of the series focuses on Fundamental Rights and their interpretation and enforcement by Supreme and Constitutional Courts. In other words, the aim is to scrutinize how the Apex Courts shape Constitutional and Fundamental Rights in jurisdictions around the world.

Third in the row, this paper focuses on Freedom of Speech in Germany, following a first paper on Freedom of Speech in the United States and a second one on the same legal subject in Canada. In the sequence, there will be upcoming articles exploring the theme in other legal systems, culminating on the analysis of the Freedom of Speech in Brazilian Constitutional Law in a comparative perspective with the other legal systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20<sup>th</sup> century on (in the U.S., since the 19<sup>th</sup> century), courts have gained power in deciding constitutional and even political cases, such as in Canada, South Korea, South Africa, New Zealand, U. S., Germany, the European Court of Justice and the European Court of Human Rights.<sup>3</sup>

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted

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<sup>2</sup> ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the “writ of certiorari”. *Revista de Investigações Constitucionais*, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020; ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: selection of justices for the Supreme Court of Canada. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 22, n. 89, p. 57-73, jul./set. 2022; ARAÚJO, Luiz Henrique Diniz. Constitutional Law Around the Globe: Fundamental Rights, the Freedom of Speech and “Hate Speech” in Canada. *Revista de Investigações Constitucionais*, Curitiba, vol. 10, n. 2, e243, maio/ago. 2023; ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in Canada and the “leave to appeal” to the Supreme Court. *Revista de Investigações Constitucionais*, Curitiba, vol. 11, n. 3, e274, set./dez. 2024.

<sup>3</sup> KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. *Consequential Courts*. Judicial Roles in Global Perspective. New York: Cambridge University Press, 2013, p. 1.

(Chile in 1981; Colombia in 1991; Peru in 1993; Ecuador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.<sup>4</sup>

Certainly, the notion of a Constitution comprises the interpretation and enforcement of rights. Therefore, a Constitution is not only a solemn declaration of rights. In fact, the content of a Constitution derives also from the actual interpretation and enforcement by a specific institution. In modern democracies, this role of interpreting and enforcing constitutional provisions are courts that end up shaping constitutional rights.<sup>5</sup>

In parallel, the use of new interpretative constitutional methods has made possible the shape of meaning of constitutional norms, with no need to rewrite the text by means of constitutional amendments.<sup>6</sup> This is a reality in many jurisdictions, including U.S., Canada, Germany and Brazil.

In this broad picture, Supreme and Constitutional Courts (and also the lower courts and judges) have been playing a very important role in the democratic process. In several jurisdictions, this has led to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, freedom of speech, equal clauses, among many others.

Among all these legal issues, free speech one of the basic pillars for democracies.<sup>7</sup> One of the first measures authoritarian regimes adopt when in power is the suppression or severe restriction of this basic right. Nevertheless, differences among nations can be spotted on how free expression is protected when the speech is questionable or controversial. This is the case of hate speech, understood as the speech that degrades others as a consequence of race, ethnicity, gender or religion matters.<sup>8</sup>

In this respect, it is acknowledged that the United States, on one side, belongs to a small group of countries that broadly protect speech. On the other

<sup>4</sup> COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. *Cultures of Legality. Judicialization and Political Activism in Latin America*. Cambridge University Press, 2010, NY, p. 142.

<sup>5</sup> ROUSSEAU, Dominique. *Droit du contentieux constitutionnel*. Montchrestien, Paris, 2010, p. 540.

<sup>6</sup> BONAVIDES, Paulo. *Curso de Direito Constitucional*. Malheiros. 2007. São Paulo, p. 458.

<sup>7</sup> BAKIRCIOGLU, Onder. Freedom of Expression and Hate Speech. *Tulsa Journal of Comparative & International Law*, v. 16, n. 1. p. 1-50, Fall 2008, p. 2.

<sup>8</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 265.

side, Canada and Germany, as well as the rest of the European Union, adopt more restrictive positions towards speech that can be hateful or harm personal dignity or personality rights of others. These approaches can be classified as the “American approach” (broadly protection to speech) and the “German approach” (protection of speech is constrained by other basic rights).<sup>9</sup>

The *problem* under scrutiny is how Fundamental Rights are shaped by courts in a set of democratic jurisdictions in comparative perspective. Freedom of speech is deemed a Basic Constitutional Right in many democracies. However, its actual content varies from one legal system to another depending on how it is shaped by courts.

The *aim* of the chapter Fundamental Rights of the Series Constitutional Law Around the Globe is to analyse how Fundamental Rights are shaped in democracies in a comparative perspective. This will shed light on their content in order to compare the different legal systems.

The *hypothesis* of the series is that Fundamental and Constitutional Rights in many democracies are shaped by courts and their content considerably varies from jurisdiction to jurisdiction. Understanding those differences and nuances allows the comprehension of Basic Rights in democracies around the world.

The *methodology* used is consultation of references (primary and secondary sources – books, papers and judicial decisions).

## 1 Freedom of speech and legal framework in Germany

The freedom of speech is strongly based on the marketplace of ideas. According to it, the more the speech is free, the more ideas can appear and circulate, with evident gains to democracy and society as a whole. However, the marketplace approach may be too narrow because it attends only to instrumental effects of free speech. Another doctrine contends that freedom of speech has an independent value linked to dignity and development of individuals as such. Free participation in public discourse, in accordance with this doctrine, potentially values every persons’ speeches and ideas.<sup>10</sup>

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<sup>9</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 266.

<sup>10</sup> FEINMAN, Jay M. Law 101. *Everything you need to know about American Law*. Fifth Edition. New York: Oxford University Press, 2018, p. 61.

Another set of arguments contend that free speech is essential as a check on government power, because it sheds light on abuses of state power and its eventual occupants. Besides, free speech, allowing the free flow of ideas and opinions, is a means of preventing a government from entrenching itself. It can also be conceived as a prevention from violence in political dissent, allowing it to be manifested rather by words.<sup>11</sup>

Certainly, in a free and democratic society, great value is placed on the freedom to express oneself. This freedom is regarded as enabling the discovery of truth, as an instrument to achieve personal fulfillment and as a vital characteristic of a democratic society. The freedom to exchange ideas, express religious beliefs and speak out against government action is fundamental to permit citizens to be active participants in a healthy and vibrant democracy.

The first underlying assumption of freedom of speech is that truth will prevail in a free and open encounter with falsehood. Furthermore, the freedom to exchange opinions and views in a spirit of tolerance is necessary to secure and develop the democratic system. The second premise holds that it is necessary to reach a balance between the right to freedom of expression and the harms that might result from certain speeches, as that the right to exercise free expression does not include the right to unjustifiably harm others. The third premise relates specifically to the harms of some kind of speech and the price society is required to pay when it tolerates such speech forms, including hate speech.<sup>12</sup>

It is also broadly accepted that if government is in many situations not allowed to regulate content of speech, it can regulate time, place and manner of speeches. For instance, is a person allowed to turn on her loudspeaker at midnight in a residential neighbourhood to express her views on whatever issue? Can a group parade in the middle of street during rush time to protest traffic policies?<sup>13</sup> There seems to be a broad consensus that government may sometimes limit the freedom of speech in order to prevent disturbance of others, violence or other grave harm. The question is when and how deeply speech can be constrained.<sup>14</sup>

<sup>11</sup> REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. *California Law Review*, Berkeley/Cal, n. 82, p. 341-388, 2009, p. 351.

<sup>12</sup> COHEN-ALMAGOR, Raphael. Ethical Considerations in Media Coverage of Hate Speech in Canada. *Review of Constitutional Studies*, v. 6, no. 1. p. 79-100, 2001.

<sup>13</sup> FEINMAN, Jay M. Law 101. *Everything you need to know about American Law*. Fifth Edition. New York: Oxford University Press, 2018, p. 65-66.

<sup>14</sup> DORF, Michael C.; MORRISON, Trevor W. *The Oxford Introductions to U.S. Law. Constitutional Law*. New York: Oxford University Press, 2010, p. 167/8.

The very idea of opinion is very broad and applicable to a wide range of contents. Opinion is about points of view, conceptions, judgments, convictions, valuations, prognostics and postures relating to any person or thing including judgments on judgments. The protection covers content as well as the form of the speech, including the controversial, offensive, sharp or hurtful speech.<sup>15</sup>

Absent freedom of speech, the development of public and collective life, the protection of minorities, liberties and formation of popular political will would be deeply damaged. The freedom of speech keeps an intimate relation to the legitimacy of decisions taken by political and administrative powers in a democracy. Freedom of speech is necessary to the electoral and political processes that value open and fluid communication between people and political power.<sup>16</sup>

Limits to the freedom of expression cannot void its core and substantial content. As a consequence it is no reasonable cause to constrain freedom of expression because of psychological effects or discomfort it may cause eventually. Such a restriction would harm its fundamental content and therefore would be undue.<sup>17</sup>

As it has been shown in previous articles composing this series, these limitations can be entrenched in constitutions and/or statutes subject to the interpretation of courts, whether higher Courts or lower Courts. So it is in Germany,<sup>18</sup> as we will demonstrate in the following chapter.

## 2 The German Federal Court. Landmark cases

In order to understand the German Constitutional Court's rulings concerning hate speech, we should start by a brief overview of German Basic Law. In 1949, the German Basic Law (in other words, the German Constitution) was passed by a two-thirds majority of the German Länder (*i.e.*, German States). Its text begins with the Basic Rights that impose negative and positive duties on the state,

<sup>15</sup> ESPINOZA, Alexander; RIVAS, Jhenny. The Symbolic Speech and the Freedom of Expression. Comparative Study of Spain, Germany and the European Court of Human Rights. *Journal of Contemporary Public Law (RDPC)*, v. 2020, n. 1, p. 202-240, January-June 2020, p. 224-225.

<sup>16</sup> ESPINOZA, Alexander; RIVAS, Jhenny. The Symbolic Speech and the Freedom of Expression. Comparative Study of Spain, Germany and the European Court of Human Rights. *Journal of Contemporary Public Law (RDPC)*, v. 2020, n. 1, p. 202-240, January-June 2020, p. 227.

<sup>17</sup> ESPINOZA, Alexander; RIVAS, Jhenny. The Symbolic Speech and the Freedom of Expression. Comparative Study of Spain, Germany and the European Court of Human Rights. *Journal of Contemporary Public Law (RDPC)*, v. 2020, n. 1, p. 202-240, January-June 2020, p. 230.

<sup>18</sup> HARFF, Graziela; DUQUE, Marcelo Schenk. Discurso de ódio nos contextos alemão e brasileiro. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 21, n. 84, p. 199-225, abr./jun. 2021.

therefore commanded not to infringe basic rights by inaction as well as by means of affirmative duties destined to the guarantee of a fundamental right.<sup>19</sup>

Article 5 of the German Basic Law protects the freedom of speech, with limitations set by paragraph 5(2) of the article and by hierarchy among fundamental rights entrenched in the Basic Law.<sup>20</sup> The freedom of speech also suffers a limitation by paragraph 2 of Article 21, that states that political parties who “seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional”.<sup>21</sup>

The basic right to freedom of speech in Germany operates within the constitutional system of values and is intertwined with other fundamental rights, for instance, the protection of human dignity.<sup>22</sup> As a consequence, the freedom of speech should yield if, for instance, particular minorities are substantially insulted. Therefore, racist utterances can be a criminal offence as “Kollektivbeleidigung” (group defamation). The Criminal Code (“Strafgesetzbuch”) rules that in the case of criminal prosecution for group defamation of Holocaust victims, there is no need for a complaint to be first lodged with the Public Prosecutor.<sup>23</sup>

In this topic, we will be analyzing a set of the Germany Constitutional Court decisions in order to explore the constitutional shape of limitations on freedom of speech in that jurisdiction.

## 2.1 Mephisto<sup>24</sup>

This 1971 case involved a novel written by author Klaus Mann depicting a central character after the actor Gustaf Gründgens, renowned by playing the role of Mephisto in Goethe’s *Faust*. In the novel, the character based on Gründgens had renounced his own political and humanitarian beliefs to associate his name to the Nazis in order to gather benefits for his career.

<sup>19</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 268/9

<sup>20</sup> GERMANY. Basic Law for the Federal Republic of Germany. Available at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0034](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034). Access March 1st, 2021.

<sup>21</sup> GERMANY. Basic Law for the Federal Republic of Germany. Available at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0034](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034). Access March 1st, 2021.

<sup>22</sup> NIEUWENHUIS, Aernout. Freedom of Speech: USA vs. Germany and Europe. *Netherlands Quarterly of Human Rights*, v. 18, n. 2, p. 195-214, June 2000, p. 203.

<sup>23</sup> NIEUWENHUIS, Aernout. Freedom of Speech: USA vs. Germany and Europe. *Netherlands Quarterly of Human Rights*, v. 18, n. 2, p. 195-214, June 2000, p. 208.

<sup>24</sup> GERMANY. *Mephisto*, 30 BVerfGE 173. Available at <https://germanlawarchive.iuscomp.org/?p=56>. Access on March the 8<sup>th</sup>, 2021.

The claim alleged that anyone at all familiar with German theatre in the 1920s and 1930s would link Höfgen with Gründgens. However, the fiction helped to give a false and highly derogatory picture of Gründgens' character. The plaintiff then sought an injunction forbidding the reproduction, distribution, and publication of *Mephisto* on pain of punishment.

The claim was rejected by the Landgericht Hamburg. However, in September 1965, the complainant published the novel with the following foreword: "All characters in this novel are types, not portraits. K.M."

On 23 November 1965 the plaintiff obtained an interlocutory injunction from the Hanseatic Oberlandesgericht in Hamburg and a foreword was included stating that "While there are undeniable resemblances to actual figures of the day, the characters are primarily creatures of the author's imagination".

Three Constitutional Court Justices of the First Senate upheld the lower court rulings and stated the discrepancies between the novel character and the real actor violated the late actor's dignity:

6. The courts below were right in this connection to invoke Art. 1(1) GG in their appraisal of its protective effect on the area of personality of the late actor Gustaf Gründgens. It would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death. Accordingly an individual's death does not put an end to the state's duty under Art. 1(1) GG to protect him from assaults on his human dignity.<sup>25</sup>

A split 3-3 Constitutional Court then decided in favor of human dignity when it balanced Article 1, the protection of human dignity, against Article 5(3), that protects liberty of artistic expression.<sup>26</sup> According to the ruling, this result speaks to the hierarchical nature of the Basic Law as well as the privileged position of human dignity over artistic free expression.<sup>27</sup>

<sup>25</sup> GERMANY. *Mephisto*, 30 BVerfGE 173. Available at <https://germanlawarchive.iuscomp.org/?p=56>. Access on March the 8<sup>th</sup>, 2021.

<sup>26</sup> GERMANY. *Basic Law for the Federal Republic of Germany*. Available at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0019](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019). Access March the 15<sup>th</sup>, 2021.

<sup>27</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 272-273.

## 2.2 Soraya<sup>28</sup>

Two years later, in Soraya (1973), the Constitutional Court balanced free expression against another basic right, this time the right to free development of personality. According to the reasoning of the Court, as it had previously done in Mephisto, another fundamental right could limit free expression.

In Soraya, the periodical Die Welt published a fictional interview with Princess Soraya, the ex-wife of the Shah of Iran, in which she would reveal details of her private life. It appears that the entire interview was a fiction.

Soraya sued Die Welt for invasion of privacy culminating in a Constitutional Court decision that acknowledged that Soraya's free development of personality, provided for under Article 2, had been violated by the article.<sup>29</sup> The opinion considered that the interview damaged the personality and dignity of the Princess:

The plaintiff's need for protection in the private sphere was not offset by an overriding general interest in the public discussion of the matters dealt with in the interview. There is no right granted to the reader to be "informed" by false representations about the private life of a personality who has come into the public eye. A fictional interview does not contribute to the formation of a real opinion. The protection of privacy deserves priority over press releases of this kind.<sup>30</sup>

In Soraya, the German Constitutional Court decided once more that freedom of speech could be limited by other basic rights. In the case, the decision argued that the personal sphere must be protected against fictitious claims that add nothing to the public's interest in being informed.

## 2.3 Lebach<sup>31</sup>

In Lebach, the German Constitutional Court continued the trend of limiting freedom of speech based on other basic right. In 1973, months before Lebach's

<sup>28</sup> GERMANY. *Soraya*, 34 BVerfGE 269. Available at <https://www.servat.unibe.ch/dfr/bv034269.html>. Access on March the 8<sup>th</sup>, 2021.

<sup>29</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*. V. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 272-273.

<sup>30</sup> GERMANY. *Soraya*, 34 BVerfGE 269. Available at <https://www.servat.unibe.ch/dfr/bv034269.html>. Access on March the 8<sup>th</sup>, 2021. Free translation.

<sup>31</sup> GERMANY. *Lebach*, 35 BVerfGE 202. Available at <https://germanlawarchive.iuscomp.org/?p=62>. Access on March the 8<sup>th</sup>, 2021.

release from prison, a T.V. program would show his participation in an armed robbery of an arsenal of the German armed forces in the course of which several soldiers on guard duty were killed or severely wounded.

The program intended to give account of his participation in the crime, as well as details about his homosexual life. Lebach filed a complaint under Article 2 of the Basic Law arguing that his right of personality was being infringed upon.<sup>32</sup>

The Constitutional Court held that both the right of personality, protected under Article 2, along with the right of human dignity, protected under Article 1, were in conflict with the right to free expression, protected under Article 5. The Constitutional Court also stated that none of these basic rights is automatically superior to the others, but that they have to be balanced in order to solve a legal case.

4. The reflex effect of the constitutional guarantee of personality does not, however, allow the media of communication, apart from contemporary reporting, to deal indefinitely with the person of the criminal and his private sphere. Instead, when the interest in receiving information has been satisfied, his right 'to be left alone' gains increasing importance in principle and limits the desire of the mass media and the wish of the public to make the individual sphere of his life the object of discussion or even of entertainment. Even a culprit, who attracted public attention by his serious crime and has gained general disapproval, remains a member of this community and retains his constitutional right to the protection of his individuality. If with the prosecution and conviction by a criminal court the act attracting the public interest has met with the just reaction, of the community demanded by the public interest, any additional continued or repeated invasions of the personal sphere of the culprit cannot normally be justified.

One more time, the German Constitutional Court decided that freedom of speech could be limited by other basic rights in certain situations. In the specific case, the public's interest in being informed by a crime long committed should yield to the criminal's vital interest in social rehabilitation.

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<sup>32</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 274.

## 2.4 Böll<sup>33</sup>

In Böll, the German Constitutional Court issued a decision in 1980 similar to Soraya. In this case, the prominent author Heinrich Böll, who was critical of the German government, was characterized in a televised editorial concerning the murder of the president of the Berlin Court of Appeals. According to the commentator, Böll had laid the groundwork of political terrorism, by harsh criticisms he would have made on the German State.

The comentator would have quoted Böll as having described the German State as a “dung heap defended by ratlike rage by the remnants of rotten power”. Böll denied having made these comments or even if he had made them, they had been removed from context. The author ended up filing a complaint within the Constitutional Court claiming that he had been damaged in his honor by false statements that were prohibited by Article 1 and Article 2 of the Basic Law. The Constitutional Court found that Boll’s complaint was valid, stating:

The one who cites the statements of another person as evidence of a criticism that disparages the personality of another has to reproduce them correctly as a matter of principle. Whether the quotation does justice to this is to be judged according to how the average reader or listener understands what has been said by the criticized and by the quotation. The one who quotes should not allow criticism to flow into the quotation misrepresenting the content of what has been said.<sup>34</sup>

The Constitutional Court therefore considered that quotations made as political commentary are not protected by the freedom of speech if they are not accurate or if they are taken out of the original context. Also in this case the German Constitutional Court decided that protection to human dignity and the free development of personality can set constraints on the freedom of expression.

## 2.5 Strauß<sup>35</sup>

In this 1987 case, Franz Josef Strauß, Bavaria’s Prime Minister, was depicted as a copulating pig in a drawing. In the first of the drawings this pig copulates with

<sup>33</sup> GERMANY. *Böll*, 54 BVerfGE 208. Available at <https://www.servat.unibe.ch/dfr/bv054208.html>. Access on March the 8<sup>th</sup>, 2021.

<sup>34</sup> GERMANY. *Böll*, 54 BVerfGE 208. Available at <https://www.servat.unibe.ch/dfr/bv054208.html>. Access on March the 8<sup>th</sup>, 2021.

<sup>35</sup> GERMANY. *Strauss*, 75 BVerfGE 369. Available at <https://www.iurastudent.de/leadingcase/die-strauss-entscheidung-bverfge-75-369>. Access on March the 10<sup>th</sup>, 2021.

another pig wearing judicial attire. A second caricature displayed both pigs during different sexual activities. In a third drawing, four pigs are displayed. The pig in front is ridden by the other three.

The GCC considered that:

Basically, the intention of B was to express criticism of the judiciary depicting Franz Josef Strauss in the form of a pig. In this regard, there must be no control, as this exaggerated form of representation is inherent in satire. This is all the more true when the representation relates to public figures.

This represents an invasion on Franz Josef Strauss's intimacy, which cannot be justified even by artistic freedom. Sexual behavior falls into the protected core content of intimate life even if the person is a public figure.<sup>36</sup>

The Constitutional Court found that the images were classified as art and as such were protected under article 5(3). However, one more time, the GCC decided that this protection should yield to the protection of human dignity entrenched in Article 1, because depicting a person as a copulating animal represented an attack against the person's dignity.<sup>37</sup>

## 2.6 Lüth<sup>38</sup>

In 1958, Erich Lüth, a peace activist and at the time Hamburg's Director of Information, organized as a citizen a boycott of Veit Harlan's film *Immortal Lover*, because of Harlan's work as a popular director of anti-Semitic films during the Nazi regime. Harlan filed a civil complaint against Lüth and the civil court found Lüth's actions to be in violation of the civil code. As a consequence, the civil court enjoined Lüth from continuing the boycott.

Lüth filed a complaint with the Constitutional Court claiming his freedom of expression, protected under Article 5(1), had been abridged. The Court decided in favor of Lüth, stating that:

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<sup>36</sup> GERMANY. *Strauss*, 75 BVerfGE 369. Available at <https://www.iurastudent.de/leadingcase/die-strauentscheidung-bverfge-75-369>. Access on March the 10<sup>th</sup>, 2021.

<sup>37</sup> GERMANY. *Strauss*, 75 BVerfGE 369. Available at <https://www.iurastudent.de/leadingcase/die-strauentscheidung-bverfge-75-369>. Access on March the 10<sup>th</sup>, 2021.

<sup>38</sup> GERMANY. *Lüth*, 7 BVerfGE 198. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/1958/01/rs19580115\\_1bvr040051.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/1958/01/rs19580115_1bvr040051.pdf?__blob=publicationFile&v=1). Access on March the 10<sup>th</sup>, 2021.

(...) The Federal Constitutional Court came to the conclusion that in its assessment of the complainant's behavior the Regional Court failed to recognize the special importance that the fundamental right to freedom of expression enjoys when it collides with the private interests of others. The judgment of the regional court fails to meet fundamental legal standards and therefore violates the complainant's fundamental right entrenched in the Article 5, Paragraph 1, Clause 1 of the Basic Law. It is therefore to be canceled.<sup>39</sup>

In *Lüth*, the GCC established three important doctrines of German Basic Law: first, concerning the Basic Law, the Court established an "objective order of values" which require balancing; second, the Court stated that Basic Laws apply to all legal disputes both public and private; third, the Court established the position of speech rights in relation to other legally protected concerns, stating that free expression can be limited when in contrast with other fundamental rights. The GCC also established that expression that criticizes "undesirable" groups (e.g., the Nazi party) is protected, while expression that promotes "undesirable" groups is prohibited.<sup>40</sup>

## 2.7 Auschwitz Lie<sup>41</sup>

The 89-year-old complainant was convicted several times for inciting hatred and violence against segments of the population (*Volkserhetzung*) for denying the persecution of Jews by the Nazis. Indeed, she published various articles arguing that the mass murder of Jews by the Nazi regime did not actually take place.

On the basis of these statements of the complainant, the Local Court convicted her of seven counts of *Volkserhetzung* and one count of attempted *Volkserhetzung*, and imposed an aggregate prison sentence (*Gesamtfreiheitsstrafe*) of two years and six months. The complainant appealed to the Verden Regional Court, that reduced the aggregate prison sentence to two years without parole, and rejected the appeal for the rest.

<sup>39</sup> GERMANY. *Lüth*, 7 BVerfGE 198. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/1958/01/rs19580115\\_1bvr040051.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/1958/01/rs19580115_1bvr040051.pdf?__blob=publicationFile&v=1). Access on March the 10<sup>th</sup>, 2021.

<sup>40</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. University of Baltimore Journal of Media Law and Ethics. V. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 280.

<sup>41</sup> GERMANY. *Auschwitz Lie*, 90 BVerfGE 241. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622\\_1bvr067318en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622_1bvr067318en.html). Access March the 11<sup>th</sup>, 2021.

The complainant then challenged these decisions in her constitutional complaint of 12 March 2018, claiming that the decisions violated her fundamental rights to freedom of expression and freedom of research and teaching under Art. 5(1) first sentence and (3) of the Basic Law (*Grundgesetz* – GG) and her right to a fair trial. She also held that her conviction violated the principle of specificity under criminal law pursuant to Art. 103(2) GG.

On the merits, the GCC decided that the constitutional complainant was unfounded because the challenged decisions did not violate the complainant’s fundamental rights. The court considered that value judgments fall within the scope of protection of the freedom of expression, but “deliberately untrue factual claims or such statements that are proven to be untrue are excluded from the scope of protection of Art. 5(1) first sentence GG because they do not contribute to the constitutionally guaranteed opinion-forming process (cf. BVerfGE 54, 208 <219>; 61, 1 <8>; 90, 241 <247>)”.<sup>42</sup>

The GCC considered that the statements made by the complainant were “in essence based on factual claims, which by themselves do not fall within the scope of protection of Art. 5(1) first sentence GG”. These untrue factual claims “do not contribute to the constitutionally guaranteed opinion-forming process and their dissemination does not fall within the freedom of expression”.<sup>43</sup>

## 2.8 Esra<sup>44</sup>

In Esra, the German Constitutional Court revisited the controversies that the famous Mephisto decision had raised in 1971. The 1971 case involved a novel written by author Klaus Mann depicting a central character after the actor Gustaf Gründgens, renowned by playing the role of Mephisto in Goethe’s Faust. In the novel, the character based on Gründgens had renounced his own political and humanitarian beliefs to associate his name to the Nazis in order to gather benefits for his career. Three Constitutional Court Justices of the First Senate upheld the lower court rulings and stated the discrepancies between the novel character and

<sup>42</sup> GERMANY. *Auschwitz Lie*, 90 BVerfGE 241. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622\\_1bvr067318en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622_1bvr067318en.html). Access March the 11<sup>th</sup>, 2021.

<sup>43</sup> GERMANY. *Auschwitz Lie*, 90 BVerfGE 241. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622\\_1bvr067318en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rk20180622_1bvr067318en.html). Access March the 11<sup>th</sup>, 2021.

<sup>44</sup> GERMANY. *ESRA*, 1 BVerfGE 1783/05. Available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/06/rs20070613\\_1bvr178305.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/06/rs20070613_1bvr178305.html). Access on March the 8th, 2021.

the real actor violated the late actor's dignity and therefore did not fall within the constitutionally protected speech.

The court decided *Esra* on June 13, 2007, and for the second time in its history, confirmed a judiciary ruling prohibiting the publication of a novel, provoking strong feelings.<sup>45</sup>

The constitutional complaint filed in the GCC was directed at the judgments of the Munich Regional Court, the Munich Higher Regional Court and the Federal Court of Justice, which prohibited the publication, distribution and dissemination of the novel "Esra", written by the author B. and published by the complainant. According to the complaint's reasons, the novel violated the general right of personality of the plaintiffs in the original proceedings.

The novel was published by the complainant's publishing house in 2003. It tells the story of the love affair between Adam, an author, and Esra, an actress. The love affair is plagued by all sorts of obstacles: Esra's family, in particular her domineering mother, Esra's daughter from her first failed marriage, the daughter's father, and Esra's fatalistic and passive personality.

The author and the complainant claim the characters of the novel are fictitious. However, both conceded in the original proceedings that the author had been inspired by his love affair with the first plaintiff. The author even sent the following dedication in a copy of the book to the first plaintiff:

Dear A..., this book is for you. I wrote it only for you, but I can understand that you might be afraid to read it. Perhaps you will read it when we are old – and will again see how much I loved you. Maxim.  
Berlin, 22 February 2003.

The book's epilogue contains the statement: "All of the characters in this novel are fictitious. Any similarity to persons living or dead is purely coincidental and unintentional".

The first plaintiff is the winner of the 1989 Federal Film Prize Award. She married at the age of seventeen and conceived a daughter from this relationship. After the failure of her first marriage, the first plaintiff had an intimate relationship with the author during one and a half years. The second plaintiff is the mother of the first plaintiff, owns a hotel in Turkey and is the winner of the 2000 Alternative Nobel Prize.

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<sup>45</sup> JUANJAN, Olivier. Freedom of Expression in the Federal Republic of Germany. *Indiana Law Journal*, v. 84, no. 3, p. 867-884, Summer 2009, p. 881.

The novel character Esra is a helpless woman, dependent on her mother's wishes, who in the version of the novel last challenged has won the "Fritz Lang Prize" for her role in a film. Her relationship with the first-person narrator is characterised by an ongoing shift between affection and rejection and the disappointed love of the first-person narrator.

The relationship is destined to fail because Esra is not able to free herself from the stranglehold of her mother, her seriously ill daughter Ayla and her daughter's father. The first-person narrator's relationship with Esra is described in great detail, covering Esra's thoughts of aborting her second child and sexual acts between Esra and the first-person narrator.

Esra's mother (Lale in the novel) owns a hotel in Turkey and wins the Alternative Nobel Prize in the original version of the book for her work as an environmental activist; in the version of the novel which was revised following the settlement efforts between the parties, she earned the "Karl Gustav Prize". There are clear similarities between her biography (number of marriages and children, places where she lived and places where things happened) and that of the second plaintiff. In the novel, the main responsibility for the failure of the relationship between Adam and Esra is attributed to the Lale, who is depicted in an extremely negative light (depressed, psychologically ill alcoholic, who tyrannises her daughter and her family).

The decisions challenged in the constitutional complaint encroach on the complainant's fundamental right to artistic freedom under Article 5.3 sentence 1 of the Basic Law. In its ruling, the GCC considered that all rights of freedom (including artistic freedom) are directed primarily against the state and represent an objective decision in favour of artistic freedom, that must also be taken into account in the relationship between private parties, in particular where state courts seek to ban artistic works by reference to private rights.

However, the GCC stated that the rights of personality of the plaintiffs in the initial proceedings are affected, as the challenged decisions found that the plaintiffs were recognisable as the models for the novel characters Esra and Lale. Therefore, the GCC granted the complainant and the author the opportunity of publishing a version of the novel that does not violate the first plaintiff's identifiability by removing parts of the novel that violate her personally rights.

## Conclusion

It was asserted in the introduction that this text is part of a series of articles that analyzes Constitutional and Fundamental Rights around the globe, specially

focusing on how Supreme Courts shape them in contemporary democracies. The aim of this paper was to bring the German Basic Law and the German Constitutional Court's decisions on freedom of speech to the center stage.

In 1948, an assembly of German representatives drafted a Basic Law beginning with the listing of nineteen articles recognizing a set of Basic Rights including the supreme right of human dignity. The intent by adopting these fundamental rights was to put a shield against the atrocities of the past related to the Nazi Regime.<sup>46</sup>

Since 1949, the Federal Constitutional Court under the German Basic Law has developed a complex and dense dogmatism of fundamental rights. Some scholars claim that the theory of fundamental rights has been one of the most remarkable production in twentieth-century German jurisprudence. In the GCC decisions, abstract rights move from special dogma to the concrete expression of each case, revealing a great complexity.<sup>47</sup>

The paper sheds light on how the German Constitutional Court over time shaped the freedom of speech, contrasting it with other basic rights. In this search for a balance among basic rights, the GCC has in many occasions decided that freedom of speech is not an absolute right and must yield to other fundamental rights, such as the right to dignity and personality rights. This would reassure a necessary harmony among basic rights without depriving freedom of speech of its central core.

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<sup>46</sup> TODD, Michael. Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany. *University of Baltimore Journal of Media Law and Ethics*, v. 1, n. 3-4, p. 265-290, Summer/Fall 2009, p. 287.

<sup>47</sup> JOUANJAN, Olivier. Freedom of Expression in the Federal Republic of Germany. *Indiana Law Journal*, v. 84, no. 3, p. 867-884, Summer 2009, p. 883.

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