



## Brief Considerations on the German Constitutional Approach of the Freedom of Expression

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**Abstract:** The process of understanding the concept of freedom of expression is very complex and it implies thorough knowledge of the constitutional values and the analysis of the constitutional tradition of different legal systems. At the same time, a balancing operation is necessary between the value of freedom of speech and other fundamental rights, process that establishes limits of the expression such as criminalizing hate speech or other actions which affect the individual dignity. The human dignity has become a constant component of the constitutional case law of many States that share the same characteristics due to the promotion of fundamental rights. In the absence of a hierarchy of rights and fundamental freedom, freedom of expression is analyzed in many cases as a primary right (Kentridge, 1996, p. 254) that prevails over other fundamental rights. This study aims to analyze the landmarks of the German constitutional interpretation of the concept of freedom of expression, to identify its scope and types of speech excluded from the constitutional protection. The choice of this constitutional legal order was justified by the complexity of this topic and the specificity of the German history and tradition, elements that have contributed to an interesting vision in the matter of conflict between different fundamental rights.

**Keywords:** German Constitution; conflict of rights; freedom of the press; artistic freedom

### 1. Introduction

The German theory on freedom of expression is based on the provisions of the Basic Law (*Grundgesetz*)<sup>2</sup> and its interpretation by the Federal Constitutional Court (*Bundesverfassungsgericht*) which directed, corrected and streamlined legislation. This interpretation was significant and greatly influenced by the concept of human dignity contained in Article 1 of the Constitution (Bognetti, 2005, pp. 92-93).

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<sup>2</sup> *Grundgesetz für die Bundesrepublik Deutschland* adopted at 23rd of May 1949. English translation in Axel Tschentscher, *The Basic Law (Grundgesetz). The Constitution of the Federal Republic of Germany (May 23rd, 1949)*, Jurisprudentia Bern Würzburg.

Article 5 of the German Constitution is the main provision governing freedom of speech and it reads as follows: *“(1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. (2) Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. (3) There may be no censorship. (4) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honour.(5) Art and science, research and teaching are free. (6) The freedom of teaching does not release from allegiance to the constitution.”*

## **2. The Specificity of the German Constitutional Provisions**

The aforementioned provision has a declaratory character and applies to all persons. However, it does not entail a prohibition to the State bodies to limit the exercise of free speech, as contained in the First Amendment to the Constitution of the United States of America. Moreover, it was submitted that this text raises questions regarding the impact of these provisions on individuals but it provides no answer (Kommers, 1997).

The most significant feature of Article 5 is that it does not protect a single right having different components. Instead, it asserts a number of independent rights and fundamental values (Jouanjan, 2009, p. 869): freedom of expression, right to information, press freedom, freedom of broadcasting, freedom of research, academic freedom and free education. By comparison, the European Convention on Human Rights contains in paragraph 1 of Article 10 the term "freedom of expression" which includes a number of components that come to complete the practical exercise of this fundamental right: freedom of expression and opinion, freedom to impart information, freedom to receive information, freedom of the press.

In establishing a balance between freedom of expression and other fundamental rights, in particular a person's right to reputation and dignity, the Federal Constitutional Court has constantly recognized that the provision implies a greater protection for the freedom to express opinions than statements of fact. Moreover, the Court determined that the allegations, even those having a defamatory character, which is made in exercising the right to reply, are covered by the protection of free speech. There has not been developed a universal applicable standard. The early case law originally stated the commitment to freedom of

expression in relation to other rights or interests of individuals, such as personal dignity.

Another specificity of this constitutional vision is the removing of the public-private distinction. As a consequence the provisions of the Basic Law protect not only individual rights against State action, but go further and require the State to act in order to ensure the respect of the fundamental right against violations committed by private persons. This procedure could cause a surprising effect: it could reduce the protection of freedom of expression. The explanation for this phenomenon is given by the State's obligation to protect other constitutional rights including the right to dignity (Alford, 2008).

### **3. Freedom of Expression as an Absolute Fundamental Right**

The *Lüth Case*<sup>1</sup> from 1958 is the first one in a series involving the freedoms of Article 5 of the Basic Law. The central issue concerns the public boycott of a film directed by a notorious anti-Semite and former Nazi supporter. The Federal Constitutional Court held that the right to free speech is an absolute fundamental right: *“The fundamental right to free expression of opinion is the most direct expression of human personality in society, one of the most important rights (...) It is constitutive for a free and democratic state, whereas only through it is possible the constant intellectual debate, the clash of opinions, what is its vital element (...) It is clearly the ground for every freedom, the “matrix”, the indispensable condition for any other form of freedom.”*

*Lüth* has been described as the fundamental case in the analysis of freedom of expression. The Court's interpretation includes some basic elements of German constitutional doctrine: it states that the Basic Law imposes an objective order of values influencing social structure, emphasizes the so-called “radiative effect” of fundamental rights, it sustains a variety of affirmative obligations for the national authorities in order to protect the fundamental rights against acts of individuals. In its jurisprudence, the German Constitutional Court ruled in several cases ruled on the premise that fundamental rights are the principal objectives in the legal order (Limbach, 1999). In this case, the Constitutional Court favoured the protection of communication in accordance with public issues concerned (Haupt, 2005, p. 324)

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<sup>1</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 15, 1958, 1 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 198.

by establishing a presumption in favour of freedom of expression in the context of public discussions to be applied in cases of libel (Barendt, 2005).

#### 4. The Conflict with other Fundamental Rights

The Court's interpretation in the *Mephisto Case*<sup>1</sup> illustrated the balancing process between different constitutional liberties in conflict. In this case, the heir of a deceased German actor tried to prevent publication of a novel allegedly inspired by the actor's life, in which he was accused of collaboration with the Nazi regime and of betraying his political beliefs in order to continue his career. The application was upheld by decisions of ordinary courts stating that the publisher of the novel violated his freedom of artistic expression (*Kunstfreiheit*), guaranteed by Article 5 (3) of the Constitution. It was the publisher's opinion that artistic freedom, unlike freedom of speech was not opposed to the respect of personal honour, as stipulated in Article 5 (2).

By contrast, the Constitutional Court found instead that the artistic freedom must also be interpreted in relation with the right to personal dignity, which is, according to Article 1 of the Basic Law, the supreme constitutional value. Article 1 [Human Dignity] reads as follows: "(1) Human dignity is inviolable. (2) To respect and protect it is the duty of all state authority. (3) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world. (4) The following basic rights are binding on legislature, executive and judiciary as directly valid law."

The Court went further and analyzed in an extensive manner the notion of dignity, by affirming the principle of recognition of its protection even after the death of the person. In finding a balance between this obligation and artistic expression courts must consider the prevalence and severity of the offending publication. The Court's decision concluded that in this case, the dignity and reputation of the actor must be protected against false and distorted impression of the novel, although it was argued in separate opinions that the historical importance of the general theme of the novel overcomes the damage caused to the actor's memory.

By this decision, communication has no longer received preferential status, being given the prevalence to human personality rights. It returned to that status in the

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<sup>1</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 24, 1971, 12 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173.

90s, by the decisions in *Strauss Cases* from 1987 and 1990.<sup>1</sup> The *Mephisto Case* yields very clearly the commitment of German case law to personal honour and reputation in such a manner by which it is preferred to protect these values referring to a deceased person to the detriment of free expression of the living person (Carmi, 2008). In particular, the Court held that due importance must be given to whether speech or publication and the context in which they were issued or printed (Barendt, 2005, p. 215). Expression must be protected from civil or criminal proceedings for defamation when defamatory remarks are made incidentally during a public debate.<sup>2</sup>

## 5. The Status of Press Freedom

The German Basic Law guarantees freedom of press and freedom of information by broadcasting programs and films, in the second sentence of Article 5. This wording suggests that freedom of the press and broadcasting have different content from the freedom of expression guaranteed by the first sentence of the constitutional provision.

The German Constitutional Court has no hesitation in making a distinction between freedom of the press (*Pressfreiheit*) and freedom of broadcasting (*Rundfunkfreiheit*). Their coverage in paragraph 2 of Article 5 of the Basic Law made this conclusion inevitable. The Basic Law protects both branches of the media as institutions. Their independence from State control is essential for a liberal democracy<sup>3</sup>. Institutionalized freedom of the press means, for example, that a newspaper is entitled to protection from economic pressure applied by other media companies when the latter threatens to stop supplies of those distributors who refused to cooperate in the conduct of a newspaper boycott.<sup>4</sup>

In reality, these two freedoms are equivalent. Both have roughly the same meaning, freedom means the right to free speech of the beneficiaries: publishers and

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<sup>1</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 3, 1987 - 1 BvR 313/85, "Strauß Caricature Case", [BVerfGE] 75, 369, Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Volume II/Part. II. Freedom of Speech (Freedom of opinion and Artistic Expression, Broadcasting Freedom and Communication Freedom of the Press, Freedom of Assembly), 1958-1995, pp. 420-427; Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Juni 26, 1990 - 1 BvR 1165/89, [BVerfGE] 82, 272, Stern-Strauß Case, (Zwangsdemokrat Case) op. cit., pp. 463- 473.

<sup>2</sup> Soldiers are murderers Case, 93, BVerfGE 266, 294 (1995).

<sup>3</sup> First Television case, 12 BVerfGE 205, 260 (1961); Spiegel case, 20 BVerfGE 162, 174-6 (1966).

<sup>4</sup> Blinkfuer, 25 BVerfGE 256 (1996).

journalists. The two terms were considered interchangeable in the American approach (Dicey, 1959). One of the drawbacks of the German interpretation is that any constitutional guarantee becomes redundant, since it adds nothing new to the concept of freedom of expression. This view is difficult to accept especially when constitutional provisions provide separate press liberty and freedom of broadcasting (Kumm, 2004, p. 585).

In one case, it has been discussed the obligation of journalists to disclose the sources of information. The complaint to the Constitutional Court argued that, under Article 5 of the Basic Law, the press can fulfill its public function only if the sources of information may, if they wish to remain secret, because otherwise, the information would not be available. The Constitutional Court held that the right not to disclose the source of information is very closely related to freedom of expression of the press, being a part of it in the basis of Article 5. But the Court has not ruled on whether press freedom is a general exemption from the obligation to provide evidences to the court.<sup>1</sup>

The Federal Constitutional Court found that the urge to boycott a press company for political reasons and in order to implement a boycott by means of economic power was not protected by the fundamental right of freedom of expression and constituted a breach of the fundamental right of press freedom. The reasoning of the Constitutional Court's decision includes the principle that a boycott may be a possible mean of expression under Article 5 when it is part of a private or public argument in a political, economic, social or cultural debate. Although the aim to use economic pressure in support of an argument can be unconstitutional if the means are used to suppress the dissemination of news and information, as opposed to expressing an opinion. Moreover, the party urging a boycott should be in a position similar to that of the opponent and in the present case there are quite different positions.<sup>2</sup>

An objection to the recognition of a constitutional guarantee extended to the institutional media is that such a guarantee could be interpreted as allowing actions that are incompatible with freedom of expression itself or even in a manner detrimental to the values and interests of freedom of expression. As such, one of the implications of a separate freedom of the press is that a newspaper owner would have an absolute right to determine its content. He could exploit his right to

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<sup>1</sup> BVerfG Beschluss v. 11.3.1969.

<sup>2</sup> *Current Legal Developments*, International and Comparative Law Quarterly, Vol 19, Jan. 1970, p. 158.

the detriment of readers by jeopardizing their right to pluralistic information - one of the contemporary values that emphasize freedom of expression - by imposing a certain political line of the newspaper editors or by the arbitrary refusal to publish replies of readers with respect to false allegations printed in the newspaper. Another conflict may arise if "media barons" preclude application of competition rules with the argument that they would violate press freedom. In these circumstances it can be argued that the owner actually exercises a wide discretion in determining the use of his property (the newspaper or a business liberty), although he would argue that he was merely exercising his right to free speech. (Barendt, 2005, p. 421).

However, the Court clearly established that freedom of the press does not provide for journalists, individually, special rights of expression. The dissemination of information and opinions in the press and other printed media is covered by the same right to free expression enjoyed by the other beneficiaries: the general right to free speech. Press freedom in general terms is aimed to the protection and organization of general conditions necessary to enable the written media to contribute to the development of public opinion. Within this approach the press freedom is an instrumental freedom protected in such a way as to promote the values of free expression (Barendt, 2005, p. 423).

## **6. Final Considerations**

The German approach offers no clear answer on freedom of expression. The Federal Constitutional Court is caught in a complex balancing process for which has not found a universally applicable solution that could be used to solve the dilemma of the relationship between freedom of expression and other fundamental rights such as dignity. The German Court affirmed the protection of the dignity against freedom of expression in almost absolute terms in case of anti-Semitic discourse, German commitment to protect the sensibilities of Jews being particularly deep (Haupt, 2005, p. 333). In case of other types of groups, the analysis focuses on individuals, not on the group and the German doctrine considers such attacks against each member individually and not as an attack against the group itself (Whitman, 2000, pp. 1279, 1281, 1312).

Unlike other approaches (United States, Australia, New Zealand), German case law makes few attempts to formulate precise rules under which to balance free speech and the right to reputation. There are clear lines drawn, for example, between

defamatory statements made in political discourse or, more precisely, discourses on the one hand and politicians on the allegations made in public discourse in general. Rather, the Constitutional Court has set guidelines on which the ordinary civil and criminal courts are called in some circumstances to give priority to the reputation or free speech, while in other cases to balance between the two, depending on the specific data (Portelli, 1999, p. 28).

The Federal Constitutional Court has experienced the anxiety of the conflict on fundamental rights by emphasizing the presumption in favour of expression that should be applied in those cases where defamatory statements are made during a real contribution to public discourse. The Court stressed that too many and too burdensome requirements for plaintiffs to sustain the truth of defamatory statements can have a stifling impact on the exercise of freedom of expression. The German Basic Law recognizes that honour is one aspect of constitutional rights to dignity and personality. Therefore, it would not be fair for courts to recognize automatically the predominance of free speech in any situation of conflict between it and the right to reputation. From this perspective it is better explained and justified the German balancing approach (Barendt, 2005, pp. 218-219).

Despite all the criticism against German constitutional vision, it must be taken into account that no fundamental right enjoys absolute coverage and few are those who have absolute rigor (Schauer, 2005, p. 25).

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