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Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective

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I. INTRODUCTION

The present Article explains the task of German law to bring a Civil Code that came into force in 1900 as a consequence of nineteenth century legal science in line with the German Constitution of 1949.[1] Fifty years ago, in the year 1958, the highest German court solved this in *Lüth* and gave its most important decision about the reach of constitutional rights and the importance of free speech.

The *Lüth* case, which is about a boycott against a film of a former director of a Nazi film, is not just a fascinating story of law. The German Federal Constitutional Court (*Bundesverfassungsgericht* [BVerfG]) also developed the indirect "horizontal" application of constitutional rights to private law.[2] This represents a new concept of primacy of constitutional law that has been noticed and discussed around the world. Therefore, the constitutional and private law setting of the decision and its consequences will be explained in the following. This will be done by highlighting the differences and commonalties to the U.S. development and by using the general personality right as example of the indirect application of constitutional rights to private actors.

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1. A comprehensive overview of the most important areas of private and public law in Germany is provided by INTRODUCTION TO GERMAN LAW (Joachim Zekoll & Mathias Reimann eds., 2d ed. 2005) (the first edition was INTRODUCTION TO GERMAN LAW (Werner F. Ebke & Matthew W. Finkin eds., 1996)); NIGEL G. FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS (3d ed. 2002); GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 55 et seq., 257 et seq. (Michael Jewell trans., Nomos Verlagsgesellschaft 4th ed. 2006).

2. Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7, 198 (case handed down on Jan. 15, 1958).

II. CONSTITUTIONAL SPHERE OF THE U.S. AND GERMANY IN COMPARATIVE PERSPECTIVE

The following section will contrast the German law with the development of its U.S. counterpart and try to shed a light on why the free speech principle stands at the beginning of the Bill of Rights, as well as at the origin of the "absolutist" interpretation (as some say) of the First Amendment in American constitutional jurisprudence.

A. Grasping Constitutional Moments

The historic circumstances in which the U.S. and German constitutions were drafted stand in contrast. But there were two "constitutional moments":[3] when the thirty-nine delegates to the Philadelphia Constitutional Convention signed their draft on September 17, 1787, and thirteen States ratified it between 1787 and 1790, as well as in the case of West Germany on May 24, 1949, and when the Basic Law (*Grundgesetz* or GG, promulgated on May 23, 1949) for the Federal Republic of Germany was enacted. The West German Constitution was called "Basic Law" to mark its temporary character, as its framers hoped that a new Constitution for a reunited Germany could be outlined soon.[4] But the Basic Law proved to be resoundingly successful, to such an extent that, upon the German Reunion on October 3, 1990, it remained in force.[5]

There are "classical" moments where a constitution can be established. On the one hand it can result from a revolutionary striving for civil liberties and fundamental rights. On the other hand the failure of a political system can serve as an incentive to establish constitutional individual rights and new democratic institutions, and to guarantee them by means of fixed procedures. Examples of the latter are the 1945 collapse of the "Third Reich" or of the socialist regimes in the Eastern and Central European states around 1990.[6] Whereas the historical setting

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3. This expression was coined by Bruce Ackermann and described as "moments of grave crisis." Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476 (1995); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

4. *Cf.* the validity duration of the Basic Law Art. 146: "This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." All quotations from the Basic Law are taken from the official translation. GERMAN BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, TEXT EDITION—STATUS: DECEMBER 2000 (2001).

5. So this constitutional moment was not made use of. However, Dieter Grimm argued in favor of a new constitution in *Das Grundgesetz—eine Verfassung für das geeinte Deutschland?*, 71 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 148 (1990).

6. *See* Dieter Grimm, *Ursprung und Wandel der Verfassung*, *in* HANDBUCH DES STAATSRECHTS, VOL. 1: HISTORISCHE GRUNDLAGEN, § 1 n.55 (Josef Isensee & Paul Kirchhof eds.,

of the American Constitution more closely resembles the first model, the Basic Law for the Western part of Germany was an attempt of moral cleansing through law.[7] The Germans realized that the rise to power of the Nazis could be blamed to a certain degree—among many destabilizing social, political, and economic reasons[8]—on the construction of the Weimar Constitution of August 11, 1919.[9]

This Constitution suffered from a number of significant structural weaknesses, including no minimum vote hurdle for parties to enter the *Reichstag* (allowing for a multitude of splintered parties in a system based on proportional representation) and, laid down in Article 48 of the Weimar Constitution, the possibility of extensive suspension of civil liberties during national emergencies.[10] The Basic Law is therefore

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3d ed. 2003); Ingolf Pernice, *Draft Constitution of the European Union: A Constitutional Treaty at a Constitutional Moment?*, *in* A CONSTITUTION FOR THE EUROPEAN UNION: FIRST COMMENTS ON THE 2003-DRAFT OF THE EUROPEAN CONVENTION 13 (Ingolf Pernice & Miguel Poiares Maduro eds., 2003); HEINZ MOHNHAUPT & DIETER GRIMM, VERFASSUNG—ZUR GESCHICHTE DES BEGRIFFS VON DER ANTIKE BIS ZUR GEGENWART—ZWEI STUDIEN (2d ed. 2002).

7. GEORGE P. FLETCHER, OUR SECRET CONSTITUTION—HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 21-22 (2001) (Fletcher argues further that the Civil War, following Lincoln's Gettysburg Address, created new principles of organic nationhood, equality of all persons, and popular democracy and that the Thirteenth, Fourteenth, and Fifteenth Amendments enacted in 1865, 1868, and 1870 serve as a secret, radically different constitution continuing to guide American thinking today).

8. Established after the First World War and under a cloud of resentment, as the new leaders were blamed for the demise of the Wilhelmine Reich and the commonly perceived humiliating role of Germany after the lost war (especially due to reparation obligations imposed by the Treaty of Versailles signed on June 28, 1919), the Weimarer Republik lacked democratic spirit; *cf.* KURT SONTHEIMER, ANTIDEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK—DIE POLITISCHEN IDEEN DES DEUTSCHEN NATIONALISMUS ZWISCHEN 1918 UND 1933 (1962); KARL DIETRICH BRACHER, DIE AUFLÖSUNG DER WEIMARER REPUBLIK—EINE STUDIE ZUM PROBLEM DES MACHTVERFALLS IN DER DEMOKRATIE (5th ed. 1971); ERICH EYCK, A HISTORY OF THE WEIMAR REPUBLIC, VOL. 1: FROM THE COLLAPSE OF THE EMPIRE TO HINDENBURG'S ELECTION: VOL. 2: FROM THE LOCARNO CONFERENCE TO HITLER'S SEIZURE OF POWER (Harlan P. Hanson & Robert G.L. Waite trans., New York Atheneum 1972); DETLEV J.K. PEUKERT, THE WEIMAR REPUBLIC: THE CRISIS OF CLASSICAL MODERNITY (Richard Deveson trans., Hill & Wang 1992).

9. For how Nazism took over, *see* further Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 671-78 (1990); PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM (1997); ARTHUR J. JACOBSON & BERNHARD SCHLINK, *Constitutional Crisis: The German and the American Experience*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 1 (Belinda Cooper trans., Univ. of Cal. Press 2002) (regarding the lack of an entrenched tradition of constitutionalism in Germany, whereas in the U.S. the Constitution preceded the state); on the other hand, *see* DEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK (Christoph Gusy ed., 2000); Stanley L. Paulson, *The Theory of Public Law in Germany 1914–1945*, 25 OX. J.L.S. 525, 526 (2005) (reviewing MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945 (Thomas Dunlap trans., Oxford Univ. Press 2004)).

10. After the *Reichstag* was burned on February 27, 1933, President Paul von Hindenburg (1847–1934) and Adolf Hitler (1889–1945) invoked this provision. The emergency decree was the prelude for the arbitrary arrest and persecution of all opposition.

strongly shaped in response to the political and social crises of the Weimar Republic and to the horrors of National Socialism. Its aims to strengthen the sometimes thin crust of humanity[11] through legal guarantees and procedures and to render absolute the fundamental value of human dignity, to be respected and safeguarded with the full authority of the state. By anchoring this concept in the first article of the Basic Law, it is—in a hierarchical system of fundamental rights—the highest of all values and the most basic commitment of post-World War II Germany.

B. First Things First: Article 1 Basic Law and First Amendment

The discrepancy in the two "constitutional moments" can—to a certain degree—explain why the U.S. law stresses free speech and favors publication whereas the German law puts more emphasis on human dignity. In order to mark a new start and to prevent even the remotest possibility of recurrence of the Nazi regime (1933–1945), the twelve drafters at the initial conference on the island of Herrenchiemsee in August 1948 and later the 70 representatives of the Parliamentary Council reversed the totalitarian doctrine "you are nothing, your 'Volk' is everything"—under the watchful eyes of the Western allied powers. In placing human dignity at the head of the Basic Law,[12] the drafters laid down the opposite scheme of a mere instrumentalist understanding of the individual as a subordinate: the human being comes first and, only then, the state. Thus, the state serves each individual, while at the same time assuming a supreme role in the sense that it is the duty of the state organs not just to respect, but also to safeguard human dignity with their full

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11. *Cf.* in more sophisticated terms SIGMUND FREUD (1856–1939), CIVILIZATION AND ITS DISCONTENTS 61 (David McLintock trans., Penguin Great Ideas Series 2004) [original title: Das Unbehagen in der Kultur, 1930] supposing that civilization is built upon a renunciation of instinct and that civilization overcomes the aggressivity of each individual: "It is the existence of this tendency to aggression, which we detect in ourselves and rightly presume in others, that vitiates our relations with our neighbour and obliges civilization to go to such lengths", to which, of course, also the law belongs, though Freud rather meant the internal authority that watches over the individual.

12. Note that Art. 1 GG together with Art. 20(1) GG (the latter being much clearer in that respect) and Art. 28(1) GG is the argument for the German commitment to the welfare state (*Sozialstaat*); *see* Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 774 (2003); Keith D. Ewing, *Social Rights and Constitutional Law*, 1999 PUB. L. 104 (1999); Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, *in* EUROPEAN AND US CONSTITUTIONALISM 156 (Georg Nolte ed., 2005).

authority against all infringements, including those of the private sphere.[13]

The German historical setting stands in stark contrast to the circumstances of drafting the U.S. Bill of Rights. In its draft of the Bill, the First Congress proposed a First Amendment intended to serve structural purposes, with no hint of its current meaning.[14] As the draft was narrowly defeated in ratification by the state legislatures, it was James Madison (1751-1836) who inserted the protection of free speech, press, religion, assembly, and petition into the First Amendment as we know it. The philosophy behind these personal liberties—the belief in independence, individual opinion and creed—became a fixed star in the modern U.S. constitutional constellation.[15] As Madison said in his attempt to fight the Sedition Act of 1798, if the British had been more successful in suppressing the American press before 1776, the American States might have remained "miserable colonies, groaning under a foreign yoke."[16] Since in particular the First Amendment has echoed the adverse reaction to the lack of political influence of the Colonies in Great Britain before the American Revolution, Madison judged the new

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13. *See* Hannes Rösler, *Dignitarian Posthumous Personality Rights—An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153 (2008); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004).

14. The not ratified "Article the first" dealt with questions of representation; *see* DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, VOL. 2, 321-22 (1894); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 8 (1998).

15. To use a metaphor by Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by word or act their faith therein" (holding that a State making it compulsory for public school children to salute the American flag and pledge allegiance—declaring: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—violated their First and Fourteenth Amendments rights).

16. James Madison, *Report on the Resolutions, 1799-1800*, *in* THE WRITINGS OF JAMES MADISON, VOL. VI, 386 (Galliard Hunt ed., 1906); the passage from James Madison, *Report on the Virginia Resolutions*, Jan. 1800 dealing with the Sedition Act reads in full:

> Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

The common belief that Americans, however, did not enjoy freedom of speech and the possibility of criticizing the authorities until the eighteenth century is wrong, at least according to LARRY D. ELDRIDGE, A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA (1994) (analyzing over 1,200 seditious speech cases before 1700).

protection of political speech and the abolition of censorship as "the essential difference between the British government and the American constitutions."[17]

As in the German case, there is thus a strong negative reference point: a past order to overcome by means of constitutionalism, specifically by putting into practice a theory of limited government[18] supported by the individual citizen's freedom to engage in open discourse and political criticism. Even though Madison undoubtedly saw the inseparable connection between democracy and freedom of speech,[19] it was only in the twentieth century[20] that the Supreme Court recognized the full weight of this[21] and other aspects of the First Amendment. Hence, the historical rooting of free speech is—one has to admit at closer glance—to a large degree "rhetorical."[22] As Zechariah Chafee (1885–1957) stated, "the framers had no very clear idea as to what they meant by 'the freedom of speech or of the press,'"[23] an opinion perhaps supported by the fact that they approved the Amendment without great discussion or comment.[24]

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17. James Madison, *Report on the Virginia Resolutions* (Jan. 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 141, 142 (Philip B. Kurland & Ralph Lerner eds., 1987).

18. Definition of constitutionalism by LEONARD WILLIAMS LEVY, ORIGINS OF THE BILL OF RIGHTS 4 (2001) (explaining the linkage to the Anglo-American tradition).

19. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 42 (1992); for the Sedition Act, *see id.* at 56-66.

20. *Cf.* the opus magnus of HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988) (analyzing Supreme Court decisions between World War I and the early 1970s); FREEDOM OF EXPRESSION IN THE SUPREME COURT: THE DEFINING CASES (Terry Eastland ed., 2000) (who begins with Schenck v. United States, 249 U.S. 47 (1919)); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 115-25 (1994).

21. *Cf.* LEWIS, *supra* note 19, at 68.

22. FLETCHER, *supra* note 7, at 9.

23. Zechariah Chafee Jr., Book Review, 62 HARV. L. REV. 895, 898 (1949) (reviewing Alexander Meiklejohn, Free Speech and Its Relation to Self Government (1948)).

24. Hugh Stevens, *Responsibility in the Media*, 9 U. FLA. J.L. & PUB. POL'Y 177, 181 (1998): "One of the most stunning but uncontrovertible facts about the concept of freedom of the press is that although it has attracted the attention and energy of countless scholars and commentators during the past 200 years, especially since World War I, the Founders apparently did not devote even five minutes to a discussion of it during the congressional deliberations leading to the Bill of Rights." *Cf.* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

C. Other Provisions of the Basic Law

1. Free Development of One's Personality

The conception of personality rights developed by the West German judiciary mainly rests on Article 2(1) of the Basic Law[25] dealing with the right of self-determination and in particular with free personality development:[26]

> Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

The Basic Law is committed to the ontological idea of living a life of self-realization in an intimate sphere of individual autonomy into which the state must not intrude. Protection from oppressive governmental action, personal independence and freedom of personal development is a prerequisite for freedom of opinion, responsible citizenship, and the capacity to participate in a society of democratic self-rule. The Basic Law's "image of the human being" merges the ideology of individualistic liberalism with a somewhat communitarian view of society.[27] As the German Federal Constitutional Court explained: "The image of man in the Basic Law is not that of an isolated, sovereign individual. The Basic Law resolves the tension between individual and society by relating and binding the individual to society, but without

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25. The extension of the "Grundrecht auf freie Entfaltung der Persönlichkeit" in Art. 2(1) of the Basic Law to all walks of life commenced already in BVerfGE 6, 32—*Elfes* (case issued in 1957); later BVerfGE 80, 137—*Reiten im Walde* (case issued in 1989); as a consequence a balancing of constitutional rights and values has to take place.

26. *Cf.* Rösler, *supra* note 13; Hannes Rösler, *Caricatures and Satires in Art Law: The German Approach in Comparison with the U.S., England and the Human Rights Convention*, EUR. HUMAN RTS. L. REV. (E.H.R.L.R.) (forthcoming 2008, issue 4).

27. Ernst Benda, *Menschenwürde und Persönlichkeitsrecht*, *in* HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 161 (Ernst Benda, Werner Maihofer & Hans-Jochen Vogel eds., 2d ed. 1994); Kurt Sontheimer, *Principles of Human Dignity in the Federal Republic*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE 213, 215 (Paul Kirchhof & Donald P. Kommers eds., 1993): "this implies a departure from classical individualism, but at the same time rejects any form of collectivism."; SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 97 et seq. (1999).

detracting from the intrinsic value of the person."[28] The social aspect of man's dignity in the Basic Law's conception is evident.[29]

2. Freedom of Expression

In order to encourage self-development of citizens who are integrated into society and actively participate in democracy, freedom of expression is essential. Here certainly the drafters of the Basic Law could refer to the Weimar Constitution of 1919, but also to the First Amendment, its interpretation by the U.S. Supreme Court from World War I onward. Article 5 of the Basic Law hence proclaims the freedom of speech, the freedom of the press, and the freedom of academic and artistic expression:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.
> (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

The reservation clause in Article 5(2) touches upon the core problem of all constitutional democracies and shows the same two-stage structure as the European Human Rights Convention (which is binding law in Germany)—that is how to balance the freedom of expression and media with other interests in such a way as to avoid a chilling effect on speech.[30]

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28. BVerfGE 4, 7, 15-6 (case issued in 1954)—*Investment Aid* (translation according to Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1172 (1998)). In original: "Das Menschenbild des Grundgesetzes ist nicht das eines isolierten souveränen Individuums; das Grundgesetz hat vielmehr die Spannung Individuum—Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden, ohne dabei deren Eigenwert anzutasten."

29. Alexander, *supra* note 12, at 744 (referring to BVerfGE 4, 7, 15-16).

30. Art. 10 European Convention on Human Rights (signed in 1950, enacted in 1953):

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of

Like it was in Article 118 of the Weimar Constitution, freedom of expression is guaranteed only within the boundaries of general laws, such as the private and criminal law protecting personal honor and reputation. However, Article 5 does not indicate how narrowly or generously the limits of general laws may be defined in order to still be constitutionally acceptable (i.e., respecting the freedom of expression as a central constitutional value). Striking the appropriate balance is the task of the judicial branch.

D. U.S. Supreme Court as a Model for Setting up the BVerfG?

1. Courts' Authorities

Defining the judges' authority was a difficult task for the drafters of the Basic Law, bearing in mind the severe injustices the Third Reich courts had caused.[31] Of course the U.S. Constitution, also establishing a federal system, was a source of inspiration, as was the draft constitution created by the German National Assembly at Frankfurt's Paulskirche in 1849,[32] Bismarck's Reichsverfassung of 1871 establishing a

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> health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Cf. Reinhard Ellger, *The European Convention of Human Rights and Fundamental Freedoms and German Private Law*, *in* HUMAN RIGHTS IN PRIVATE LAW 161 (Daniel Friedmann & Daphne Barak-Erez eds., 2001); for a comparative account, *cf.* Thomas Giegerich, *Schutz der Persönlichkeit und Medienfreiheit nach Artt. 8, 10 EMRK im Vergleich mit dem Grundgesetz*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 471 (1999); regarding the EU, *cf.* Benjamin L. Apt, *On the Right To Freedom of Expression in the European Union*, 4 COLUM. J. EUR. L. 69 (1998).

31. That the anti-formalist or anti-positivist attitude of Nazi Germany's judiciary and its predecessor was to blame in Germany was stressed by BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS (6th ed. 2005); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (Thomas Dunlap trans., Univ. of Chi. Press 1998) (1994); Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COL. L. REV. 1807 (1993) (book review); also regarding the reluctant punishment of judges associated with the Hitler regime, *see* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., Harvard Univ. Press 1991); for not just Nazi Germany, but also Vichy France (1940–1944), *see* Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 103 (2002) (she is, however, correctly pointing out that German judges have enjoyed considerably more interpretive freedom than their French colleagues); for the role of the judge on the Continent, *see* JOHN P. DAWSON, THE ORACLES OF THE LAW (1968).

32. Bernd J. Hartmann, *How American Ideas Traveled: Comparative Constitutional Law at Germany's National Assembly in 1848-1849*, 17 TUL. EUR. & CIV. L.F. 23, 30-34 (2002); *cf. further* BRIAN E. VICK, DEFINING GERMANY: THE 1848 FRANKFURT PARLIAMENTARIANS AND NATIONAL IDENTITY (2002).

constitutional monarchy,[33] and the democratic Weimar constitution of 1919, with fundamental rights and a comparatively weak *Staatsgerichtshof* (National Court of Justice).[34] However, at a closer glance, the U.S. Constitution and its Bill of Rights had their strongest impact not after World War II, but during the unsuccessful attempt to achieve national unity in the federally organized parliamentary system of the Paul's Church Constitution of the 1848/49 revolution. Thus, by comparison the influence of the American law on the creation of a liberal and democratic constitutional order for West Germany was minor.[35]

According to Article 100(1) of the Basic Law, the German Federal Constitutional Court[36] has the power to review the compatibility of laws with the Basic Law and to invalidate them in case of conflict. It is not a proof of direct American influence that Germany does not follow the British model of parliamentary sovereignty, which places responsibility for protecting rights primarily in the hands of the legislature, but rather that of the judicial review developed in the early nineteenth century by the U.S.[37] For a long time German legal thought conventionally

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33. The first Reich was the Holy Roman Empire of the German Nation, a loose bundle of German states that was dissolved in 1806 by emperor Napoleon (1769-1821). When Napoleon was ousted in 1815, the German Confederation (*Deutscher Bund*) was founded, still consisting of mostly autonomous entities until its termination after the Austrian defeat in the Prussian-Austrian war of 1866. In its place, the federally organized "Northern German Confederation" (*Norddeutscher Bund*) under Prussian domination was founded in 1867; it constituted the core for the "Deutsches Reich" later founded in 1871. For constitutional German history, *see* HANNSJOACHIM WOLFGANG KOCH, A CONSTITUTIONAL HISTORY OF GERMANY IN THE NINETEENTH AND TWENTIETH CENTURIES (1984); Arthur B. Gunlicks, *State (Land) Constitutions in Germany*, 31 RUTGERS L.J. 971, 972-74 (2000); THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS (Elmar M. Hucko ed., 1987); WERNER FROTSCHER & BODO PIEROTH, VERFASSUNGSGESCHICHTE 370-401 (5th ed. 2005); JAMES J. SHEEHAN, GERMAN HISTORY 1770-1866 (1993); PETER N. STEARNS, 1848: THE REVOLUTIONARY TIDE IN EUROPE 140-66 (1974); GORDON A. CRAIG, GERMANY, 1866-1945 (1980); HEIKO HOLSTE, DER DEUTSCHE BUNDESSTAAT IM WANDEL (1867-1933) (2002).

34. For its relatively minor role, *cf.* Bernd J. Hartmann, *The Arrival of Judicial Review in Germany Under the Weimar Constitution of 1919*, 18 BYU J. OF PUB. L. 107, 113 (2003).

35. Bodo Pieroth, *Amerikanischer Verfassungsexport nach Deutschland*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1989, 1333; *see further* Helmut Steinberger, *Historic influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review, in Politics, Values and Functions: International Law in the 21. Century*, *in* ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 177 (Jonathan I. Charney, Donald K. Anton & Mary Ellen O'Connell eds., 1997); HELMUT STEINBERGER, 200 JAHRE AMERIKANISCHE BUNDESVERFASSUNG: ZU EINFLÜSSEN DES AMERIKANISCHEN VERFASSUNGSRECHTS AUF DIE DEUTSCHE VERFASSUNGSENTWICKLUNG (1987).

36. Or, in case the constitution of a State (*Land*) is held to be violated, the *Land*'s constitutional court. Note that the German federal government has broader legislative powers than the U.S. government. In further contrast to the U.S., German state officials enforce both state and federal law.

37. Jeffrey Goldsworthy, *Homogenizing Constitutions*, 23 OX. J.L.S. 483 (2003) (reviewing TREVOR R. S. ALLAN, CONSTITUTIONAL JUSTICE, A LIBERAL THEORY OF THE RULE OF

distinguished between constitutional review (*Verfassungsstreitigkeit*) and judicial review (*richterliches Prüfungsrecht*),[38] because the latter has a shorter legal tradition than the first one (although it existed, to a certain degree, in the Holy Roman Empire of the German Nation).[39]

However, as the German Reich Supreme Court (*Reichsgericht*) announced in the 1920s[40] that it possessed the power to strike down national laws[41]—without having constitutional competence to do so[42]—the drafters of the Basic Law could at least refer to a short tradition of judicial review in Germany. Donald P. Kommers summarized the American influence on the drafters of the Constitution at the Herrenchiemsee Conference: "While [the drafters] were familiar with the American system of judicial review and were guided by the American experience in shaping their constitutional democracy, Germany relied mainly on [its] own tradition of constitutional review."[43] So even the most important invention of the U.S. Supreme Court in *Marbury v. Madison*[44]—the bicentennial of this decision in 2003 was widely

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LAW (2001)) (Goldsworthy is describing to what extent the new Canadian and British hybrid models allocate greater responsibility for protecting rights to courts); Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OX. J.L.S. 435 (2003).

38. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 4 (2d ed. 1997); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994); *further* SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES (1999); also useful, HOWARD D. FISHER, GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE (3d ed. 2002). *See* for the development, Werner Heun, *Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth-Century German Constitutionalism*, 16 RATIO JURIS 195 (2003); NADINE E. HERRMANN, ENTSTEHUNG, LEGITIMATION UND ZUKUNFT DER KONKRETEN NORMENKONTROLLE IM MODERNEN VERFASSUNGSSTAAT: EINE VERFASSUNGSGESCHICHTLICHE UNTERSUCHUNG DES RICHTERLICHEN PRÜFUNGSRECHTS IN DEUTSCHLAND UNTER EINBEZIEHUNG DER FRANZÖSISCHEN ENTWICKLUNG (2001) (especially regarding the concrete judicial review (*konkrete Normenkontrolle*); CORNELIUS SIMONS, GRUNDRECHTE UND GESTALTUNGSSPIELRAUM—EINE RECHTSVERGLEICHENDE UNTERSUCHUNG ZUM PRÜFUNGSINSTRUMENTARIUM VON BUNDESVERFASSUNGSGERICHT UND US-AMERIKANISCHEM SUPREME COURT BEI DER NORMENKONTROLLE (1999); Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L.F. 25 (1997). For formalist and anti-formalist tendencies in the Weimar Republic's judiciary and scholarship and its role in opening the law to National Socialist's ideology, *cf. supra* note 31.

39. *Cf. supra* note 33.

40. Especially Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 111, 320, 322-23 (1925).

41. *See* in more detail Hartmann, *supra* note 34, at 123-25.

42. Neither for the *Reichsgericht* nor the *Staatsgerichtshof*.

43. KOMMERS, *supra* note 38, at 7; *cf.*, however, MARCEL KAU, UNITED STATES SUPREME COURT UND BUNDESVERFASSUNGSGERICHT—DIE BEDEUTUNG DES UNITED STATES SUPREME COURT FÜR DIE ERRICHTUNG UND FORTENTWICKLUNG DES BUNDESVERFASSUNGSGERICHTS (2007) (stressing the influence of the U.S. model).

44. Marbury v. Madison, 5 U.S. 137 (1 Cranch 137) (1803).

recognized by the German legal science[45]—is not a proof of direct influence, but rather a sign of a long-term historic influence.[46]

2. Procedural Law

Another piece of evidence indicating that the drafters were by no means just copying another Western constitutional regime—though of course having been exposed to American, British, and French thinking on this subject—is the constitutional procedural law to vindicate basic rights: A citizen, apart from any remedies he may have in the courts of private, criminal, labor, and administrative law, has the *right* to the extraordinary remedy of a "constitutional complaint" (*Verfassungs-beschwerde*) to the Federal Constitutional Court in Karlsruhe,[47] if he

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45. Wolfgang Hoffmann-Riem, *Das Ringen um die verfassungsgerichtliche Normenkontrolle in den USA und Europa*, JURISTENZEITUNG [JZ] 269 (2003); Winfried Brugger, *Kampf um die Verfassungsgerichtsbarkeit: 200 Jahre Marbury v. Madison*, JURISTISCHE SCHULUNG [JuS] 320 (2003); Werner Heun, *Die Geburt der Verfassungsgerichtsbarkeit—200 Jahre Marbury v. Madison*, 42 DER STAAT 267 (2003).

46. Helmut Steinberger, *Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review*, 36 COLUM. J. TRANSNAT'L L. 189 (1997); for the rise of judicial review in Europe, *cf.* Louis Favoreu, *Constitutional Review in Europe*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin & Albert J. Rosenthal eds., 1990); Martin Borowski, *The Beginnings of Germany's Federal Constitutional Court*, 16 RATIO JURIS 155 (2003) (explaining how far constitutional court models from abroad played a role); Bojan Bugaric, *Courts as Policy-makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 251 (2001); ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989); COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS (Norman Dorsen, Michel Rosenfeld, Andras Sajo & Susanne Baer eds., 2003), VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999); MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971); Christian Starck, *Constitutional Review in the Federal Republic of Germany*, 2 NOTRE DAME INT'L & COMP. L.J. 81 (1984); Jörn Ipsen, *Constitutional Review of Laws*, *in* MAIN PRINCIPLES OF THE WEST GERMAN BASIC LAW 107 (Christian Starck ed., 1983); Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 RATIO JURIS 223 (2003); Ernst-Gottfried Mahrenholz, *Richterliche Verfassungskontrolle*, *in* ZWISCHEN KONTINUITÄT UND FREMDBESTIMMUNG: ZUM EINFLUß DER BESATZUNGSMÄCHTE AUF DIE DEUTSCHE UND JAPANISCHE RECHTSORDNUNG 1945 BIS 1950, at 301 (BernhardDiestelkamp et al. eds., 1996) (pointing out two roots of the German Constitutional judicial review: The "Reichskammergericht" and the "Reichshofrat" of the Holy Roman Empire of the German Nation—until 1806—on the one hand and the Constitution of the Austrian Republic of 1919); CONSTITUTIONAL REVIEW AND LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY—AN INTERNATIONAL COMPARISON (Christine Landfried ed., 1988); for a more biographical focus, *see* VERFASSUNGSRICHTER: RECHTSFINDUNG AM U.S. SUPREME COURT UND AM BUNDESVERFASSUNGSGERICHT (Bernhard Großfeld & Herbert Roth eds., 1995); Willi Paul Adams, *German Translations of the American Declaration of Independence*, 85 J. AM. HIST. 325 (1999).

47. Werner Heun, *Access to the German Federal Constitutional Court*, *in* CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 125 (Ralf Rogowski & Thomas Gawron eds., 2002).

claims that one of his basic rights or certain rights similar to them[48] have been violated by a public authority. According to Article 93(1)[4a] GG and § 90 Federal Constitutional Court Act (BVerfGG, *Bundesverfassungs-gerichtsgesetz*) the Federal Constitutional Court then reviews the decision's compatibility with the basic rights.[49] However, the Federal Constitutional Court consistently held that, in contrast to regular appellate courts, it can only review a limited aspect of a ruling by lower courts.[50]

The complaint, however, imposes few formal requirements. No legal counsel or formal paperwork is required at any stage of the process. However, the complaint is only admissible after exhaustion of all other legal remedies or in cases where awaiting judgment by an ordinary court would entail a grave disadvantage for the complainant. The complainant also has to specify which right of his he deems to have been violated, and observe certain deadlines for filing the complaint. Despite these requirements, the procedure is very popular and has become a central aspect of the Federal Constitutional Court's work: More than 96% of cases filed with the Federal Constitutional Court during the time of its existence have been constitutional complaints.[51] Even though only 2.5% were successful,[52] those decisions make up 55% of the published opinions of the Federal Constitutional Court[53]—a testimony to the importance of this legal avenue.

This stands in contrast to U.S. law, where citizens have no right of access to the U.S. Supreme Court. Yet despite this difference, and especially due to the strong role of the Federal Constitutional Court,[54]

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48. Art. 1 to 19 GG or one of the rights named in Art. 93(1) [4a] GG and § 90(1) BVerfGG, namely Art. 20(4), 33, 38, 101, 103 and 104 GG. These latter rights mainly guarantee citizens' rights, such as the right to vote and be elected, the right to fair and public trial by an independent judge, and the right to equal access to employment in the public sector.

49. Other legal aspects, however, are not being dealt with.

50. This is especially true for the finding of the facts, the interpretation of an act and its application to the present case, as they are left to the lower courts (no "*Superrevisionsinstanz*"); *see* BVerfGE 18, 85, 92 (case issued in 1964); 22, 93, 97 (case issued in 1967); 30, 173, 197 (case issued in 1971).

51. Between Sept. 7, 1951 and Dec. 31, 2007, a total of 169,502 cases were brought before the Federal Constitutional Court, of which 163,347 (96.37%) were constitutional complaints. Data according to the Bundesverfassungsgericht's "Jahresstatistik 2007".

52. *See id.*

53. KOMMERS, *supra* note 38, at 14.

54. Note that judges of the two "Senates" of the Federal Constitutional Court, in contrast to ordinary judges, are elected jointly by the Bundestag and the Bundesrat, Art. 94(1) GG. *Cf.* Art. 95(2) GG. For structural aspects, *see* Edward McWhinney, *Judicial Restraint and the West German Constitutional Court*, 75 HARV. L. REV. 5 (1961).

which is alien, e.g., to France)[55] as the ultimate "guardian of the Constitution" (*Hüter der Verfassung*)[56] and distinct from the ordinary judiciary, no doubt both countries belong to the same family of constitutions.[57] All in all, the German Basic Law is in its constitutional history at least a distant mirror of the U.S. Constitution.

III. PRIVATE LAW SPHERE

A. General Aspects of the German Civil Code

German law in general is characterized by a striving for abstraction and systematization.[58] Like nearly all Continental European laws, it has its roots in the work of legal scholars, whereas the Anglo-American law stems primarily from the judiciary branch, and U.S. legal education is strongly attorney-oriented.[59] In practice, the classical common law trusts a piecemeal legal development over generations, rather than a broad codification,[60] which is often regarded as inflexible. That this belief is not entirely accurate will be shown later regarding the juridical creation

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55. However, the French Constitutional Council (*Conseil Constitutionnel*) established under the Constitution of the Fifth Republic of 1958 declared in its decision from July 16, 1971, CConst 71-44 DC, Rec. 29 that it had competence to examine the constitutional conformity of legislative acts; *see* in detail JOHN BELL, FRENCH CONSTITUTIONAL LAW (1992).

56. The Court perceives itself as being in such a position, *cf.* BVerfGE 1, 184, 195 (case issued in 1952): "Aufgabe des Bundesverfassungsgerichts als Hüters der Verfassung" (1952); *see* Gerhard Casper, *Guardians of the Constitution*, 53 S. CAL. L. REV. 773 (1980).

57. Pieroth, *supra* note 35, at 1333; *see further* Paul G. Kauper, *The Constitution of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1091 (1960).

58. This systematization approach is apparent e.g. in the first book of the BGB (§§ 1-240), which serves as a general part to the rest of the Code. *Cf.* Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, *in* INTRODUCTION TO GERMAN LAW 1 et seq. (Joachim Zekoll & Mathias Reimann eds., 2d ed. 2005). *See* generally the four American classics MARY ANN GLENDON, MICHAEL WALLACE GORDON & PAOLO G. CAROZZA, COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL (2d ed. 1999); ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1977); RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, COMPARATIVE LAW: CASES, TEXT, MATERIALS (6th ed. 2001); JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA (1994).

59. RAOUL CHARLES VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS—CHAPTERS IN EUROPEAN LEGAL HISTORY 67 (1987); on the influence of legal scholarship on German law, Stefan Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today*, 26 OX. J.L.S. 627 (2006); Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in Germany Today*, 64 CAMBRIDGE L.J. 481 (2005).

60. For a broad and detailed account, *see* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000); for the challenge of the unity of the codes due to the duty to transpose EU directives into national law, *cf.* Jürgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 EUR. REV. PRIV. L. [ERPL] 35 (2001).

of the general personality right (under IV.C.).[61] Yet for the current purpose, the focus is on the provisional foundation of the personality right in the German Civil Code, i.e., the *Bürgerliches Gesetzbuch* [BGB]. Once political unity had been achieved in 1871, the BGB, enacted on January 1, 1900, served to achieve nationwide legal unity[62] in the German individual states (*Länder*), which previously had had Civil Codes and private law systems of their own.[63] The German Civil Code is a late-born child[64] of classic liberalism and of the study of the Roman *Pandekten*,[65] which shows the profound influence of Roman law tradition

61. Moreover, looking at English law, GUSTAV RADBRUCH (1899–1977) in his well-known book DER GEIST DES ENGLISCHEN RECHTS 39 (4th ed. 1958), claimed that legal inelasticity would be the price to pay for legal certainty as a guiding idea of English law. Perhaps the case *Wainwright & Another v. Home Office*, [2003] UKHL 53, [2003] All ER (D) 279, is a modern example of this.

62. That England lacked such a drive towards nationhood, which on the Continent was one of the reasons for creating codifications, can explain why English law has not been widely codified. *See* Weiss, *supra* note 60, at 493; *see further* RAOUL CHARLES VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988) (explaining the emergence of common law in the 12th century England of the Anglo-Norman kings and the "accidents" why a feudal law of Continental decent has become a symbol of English tradition); JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA (1996).

63. Prior steps to legal unity were, however, the General Exchange Regulations of 1848 (*Allgemeine Wechselordnung*), the General German Commercial Code of 1862 (*Allgemeines Deutsches Handelsgesetzbuch*), the Trade, Commerce and Industry Regulation Act of 1869 (*Gewerbeordnung*), and the Judiciary Acts of 1877 (*Reichsjustizgesetze*) with the Code of Civil Procedure (*Zivilprozessordnung* [ZPO]) and the Constitution of the Courts Act (*Gerichtsverfassungsgesetz* [GVG]).

64. As FRANZ WIEACKER, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, *in* INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG 9, 22 (1974) put it. *See further* MICHAEL JOHN, POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE (1989).

65. In the nineteenth century the Roman-law oriented Pandekten School prepared the ground for a unified law by developing an abstract system of private law concepts. *See* Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990); Susan G. Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 STAN. J. INT'L L. 123 (1982); JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE (1990); JÜRGEN HERBST, THE GERMAN HISTORICAL SCHOOL IN AMERICAN SCHOLARSHIP: A STUDY IN THE TRANSFER OF CULTURE (1965); CARLO ANTONI, FROM HISTORY TO SOCIOLOGY: THE TRANSITION IN GERMAN HISTORICAL THINKING (Hayden White trans., Wayne State Univ. Press 1959); Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science*, 112 L.Q. REV. 576 (1996); Arnald J. Kanning, *The Emergence of a European Private Law: Lessons from 19th Century Germany*, 27 OX. J.L.S. 193 (2007).

on Continental civil law[66]—a distinguishing factor when compared to common law.[67]

Other differences one has to keep in mind are that Germany has a unitary private law (not one varying from State to State), no jury system (*cf.* right to a jury process "in suits at common law", Seventh Amendment (1791)), is based on an inquisitorial model of dispute resolution (*Verhandlungsmaxime* instead of the American adversarial system), has no costly discovery, does not allow for contingency fees,[68] and is much more restrictive in terms of punitive damages. However, it should be noted that in a line of cases involving false press articles about Caroline von Monaco, the courts more recently introduced the notions of prevention and deterrence into the calculation of damages. But the cases involved—as required by the courts in regard to fault and motives—gross negligence and intent to further commercial interests of the tortfeasor.[69]

Apart from this increasing readiness of German judges to award non-pecuniary damages in extreme tabloid press cases, the quantum of compensation remains comparatively low. The difference between awarding compensatory damages and punitive damages is a result of the

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66. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS—ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1996); REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY (2001).

67. ARTHUR VON MEHREN, LAW IN THE UNITED STATES: A GENERAL AND COMPARATIVE VIEW 1 (1989); *see* however HANS PETER, ACTIO UND WRIT—EINE VERGLEICHENDE DARSTELLUNG RÖMISCHER UND ENGLISCHER RECHTSBEHELFE, 1957; WILLIAM WARWICK BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE (1994) (originally published in 1936).

68. For a very detailed description and some comparative observations on German civil procedure law, *cf.* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004); in particular for the court system, *id.* at 60-64; for Constitutional Appeals to the Federal Constitutional Court, *id.* at 408-18 and THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW (Ulrich Karpen ed. 1988).

69. Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 128, 1, 16 (case issued in 1995)—*Caroline von Monaco I*; confirmed in BGH, NJW 1996, 984—*Caroline von Monaco II*; BGHZ 131, 332 (case issued in 1996)—*Caroline von Monaco III*; BGH, NJW 1996, 985—Caroline von Monaco's son; *see* (also explaining the cases of lower instances) Ulrich Amelung, *Damage Awards for Infringement of Privacy—the German Approach*, 14 TUL. EUR. & CIV. L.F. 15, 21 et seq. (1999); Georgios Gounalakis, *Persönlichkeitsschutz und Geldersatz*, ARCHIV FÜR PRESSERECHT [AFP] 1998, 10; VOLKER BEUTHIEN & ANTON S. SCHMÖLZ, PERSÖNLICHKEITSSCHUTZ DURCH PERSÖNLICHKEITSGÜTERRECHTE: ERLÖSHERAUSGABE STATT NUR BILLIGE ENTSCHÄDIGUNG IN GELD 2-3 (1999); Claus-Wilhelm Canaris, *Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts*, *in* FESTSCHRIFT FÜR ERWIN DEUTSCH 85 (Hans-Jürgen Ahrens et al. eds., 1999); ULRICH AMELUNG, DER SCHUTZ DER PRIVATHEIT IM ZIVILRECHT—SCHADENSERSATZ UND GEWINNABSCHÖPFUNG BEI VERLETZUNG DES RECHTS AUF SELBSTBESTIMMUNG ÜBER PERSONENBEZOGENE INFORMATIONEN IM DEUTSCHEN, ENGLISCHEN UND US-AMERIKANISCHEN RECHT 182 et seq. (2002).

nineteenth-century debate on punitive damages. However, recent developments in Germany as well as trends towards capping excessive punitive damages in the U.S. contribute to a partial convergence.[70]

B. Basic Elements of German Tort Law

A good example of the conceptualism of the German Civil Code are its tort provisions in the §§ 823 to 853 BGB. The paragraphs dealing with delictual liability (*Deliktsrecht* or, in the official language of the codification, *Recht der unerlaubten Handlung*), together with the law of contracts constitute the law of obligations, which is in its general aspects also governed by the—more abstract—first two books of the BGB, dealing, e.g., with damages and causation in general.[71] The tort provisions take a midway course between the Roman law with its multitudes of different causes of action and the French *Code Civil* of 1804, which has one tort article and a subsequent cornucopia of case law, both of which the German drafters wanted to avoid.[72] They did not altogether omit general clauses, but tried to keep them restrictive in scope. § 823 BGB on the duty to compensate for damage reads as follows:[73]

> (1) A person who, wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to the law is bound to compensate him for any damage arising therefrom.
> (2) The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If, according to the purview of the statute, infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.

Section 823(1) BGB lists the prerequisites for liability: A (legally responsible)[74] person has to injure one of the enumerated rights of

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70. For details, *cf.* Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105 (2003).

71. HANNES RÖSLER, HAFTUNGSGRÜNDE UND -GRENZEN FÜR FAHRLÄSSIGES VERHALTEN—DIE IDEE EINER JURISTISCHEN KAUSALITÄT IM ENGLISCHEN UND DEUTSCHEN DELIKTSRECHT 71 (1999).

72. PROTOKOLLE DER KOMMISSION FÜR DIE ZWEITE LESUNG DES ENTWURFES DES BÜRGERLICHEN GESETZBUCHS, VOL. 2, 571 (1898); RÖSLER, *supra* note 71, at 76.

73. This translation is based mainly on BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS—A COMPARATIVE TREATISE 14 (4th ed. 2002); THE GERMAN CIVIL CODE (AS AMENDED TO JANUARY 1, 1992) (with an introduction, Simon L. Goren trans., Rothman 1994); a translation of the whole and in the year 2001 reformed BGB can be found on www.gesetze-im-internet.de/englisch_bgb or, like many other German legal texts in English, via www.cgerli.org.

74. According to §§ 827, 828 BGB.

another or "any other right of another". The judicature determines what rights fall under this last, deliberately open element.[75] The courts have ruled that these "other rights" have to be comparable in their nature and importance to the rights expressly listed and have to constitute absolute rights, i.e., be applicable in relation to all other persons (in contrast to rights arising from contracts etc.). A prominent example—and of course the most intriguing one in this context—is the right of personality according to Article 2 of the Basic Law.

Section 823(1) BGB further requires that the injury has to occur through a causal and adequate action or omission, in an unlawful manner (i.e., infringing a duty to take care without justification), with own fault (willful or negligent), and that the action results in damage suffered by the other party.[76] According to § 823(2) BGB, private law liability including the duty to pay damages can also arise when someone infringes a statute intended for the protection of others. The relevant paragraphs in the Penal Code of 1871 concerning the protection of honor and reputation[77] fall under this. But as criminal libel in its application during the recent decades has become quite meaningless in Germany,[78] we will focus on § 823(1) BGB, which has generated an incredibly large body of judge-made law and has become the absolute central norm of German tort law—to a certain extent against the intention of its drafters.[79]

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75. This is also a proof of how common law and civil law methodologies mix, *see* Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 356 (1999); JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS 285 (4th ed. 1990); INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

76. *Cf.* Kwame Opoku, *Delictual Liability in German Law*, 21 INT'L & COMP. L.Q. 230 (1972).

77. § 185 *Strafgesetzbuch* [StGB]: insult; § 186 StGB: malicious gossip; § 187 StGB: defamation; § 188 StGB: malicious gossip and defamation against people in political life; note further: § 190 StGB: judgment of conviction as proof of truth; § 192 StGB: insult despite a proof of truth; and especially § 193 StGB: safeguarding legitimate interests. Note furthermore that § 130 StGB on *Volksverhetzung* penalizes "collective insults" when the remark constitutes a hateful attack on a part of the population, especially if based on nationality, race, religious belief, or ethnic group origin. The denial of the Holocaust is a criminal offence under § 130(3) StGB. *Cf.* VASILIKI E. CHRISTOU, DIE HASSREDE IN DER VERFASSUNGSRECHTLICHEN DISKUSSION—EIN BEITRAG IM LICHTE DES DEUTSCHEN, DES U.S.-AMERIKANISCHEN UND DES GRIECHISCHEN RECHTS (2007); Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—Lies*, 85 MICH. L. REV. 277 (1986).

78. GEORGIOS GOUNALAKIS & HANNES RÖSLER, EHRE, MEINUNG UND CHANCENGLEICHHEIT IM KOMMUNIKATIONSPROZEß—EINE VERGLEICHENDE UNTERSUCHUNG ZUM ENGLISCHEN UND DEUTSCHEN RECHT DER EHRE 90-92 (1998).

79. *See* JUSTUS WILHELM HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSELN: EINE GEFAHR FÜR RECHT UND STAAT (1933) (warning against the judiciary's frequent use of Generalklauseln—just after Hitler came to power; *cf. supra* note 31 and *supra* note 38).

IV. DRAWING THE THREADS OF CONSTITUTION AND PRIVATE LAW TOGETHER

A. How To Bring the Supremacy of the Basic Law to Life

The German Federal Constitutional Court had to address the problem of the interrelation between constitutional law and private law, an issue that the Basic Law had left open. This task also involved clarifying the influence of the new Basic Law on the German Civil Code of 1896, which antedated the former by over 50 years and, though not by any means undemocratic in its nature and rightfully enjoying widespread influence in the civil law world, originated in the completely different time of the Wilhelmine Reich. In addition, the challenges of the altered economic and social conditions (influenced by corporate entities, emerging mass media and mass consumption) had to be met, while the BGB was still characterized by the bourgeois "*Leitbild*" of contracting parties being formally free and equal and also of a social order consisting mainly of craftsmen, provincial and rural citizens.[80]

The entry into force of the *Grundgesetz* meant that the newly established German Federal Constitutional Court had to face a fundamentally changed legal, institutional, and intellectual setting. The Court also had to find its own role in the interplay of the new state organs. The prominent role of the BVerfG and the Basic Law was clear,[81] as, after all, the priority of the Basic Law is an integral part of the primacy of law.[82] All German courts have to follow the rulings of this highest court[83] and interpret statutory provisions, if this seems possible, in light of the Basic Law, so that at the least their application be compatible with higher law and its interpretation as determined by the BVerfG.[84] If such a reading is not feasible, the court must refer the matter to the BVerfG, which has the sole power to declare acts of parliament to be not applicable to the case at hand or to be invalid. Nevertheless, the question

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80. RUDOLF WIETHÖLTER, RECHTSWISSENSCHAFT 198 (1968); TILMAN REPGEN, DIE SOZIALE AUFGABE DES PRIVATRECHTS—EINE GRUNDFRAGE IN WISSENSCHAFT UND KODIFIKATION AM ENDE DES 19. JAHRHUNDERTS (2001); SIBYLLE HOFER, FREIHEIT OHNE GRENZEN? PRIVATRECHTSTHEORETISCHE DISKUSSIONEN IM 19. JAHRHUNDERT (2001).

81. *See* Susan Gluck Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INT'L & COMP. L.Q. 689 (1983); Hasso Hofmann, *Vom Wesen der Verfassung*, 51 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART [JÖR] NEUE FOLGE 1 (2003).

82. HOWARD D. FISHER, GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE (3d ed. 2002).

83. *See* for the pre-eminence, § 31(1) Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* [BVerfGG]). Regarding the role of precedents in German law, *see briefly* Hannes Rösler, *Umgang mit dem Präjudizienrecht*, JUS 2000, 1040.

84. This is the so-called "verfassungskonforme Auslegung."

of how to link the Constitution with the doctrines of private law still remained unanswered.

B. Indirect Horizontal Application of Constitutional Rights to Private Law

1. Conception

To address the question of combining the new constitutional regime with the old private law norms, the Justices relied on Article 1(3) of the Basic Law that binds all branches and organs of the state to the basic rights as directly applicable law.[85] The strict historical and doctrinal distinction drawn by the Continental legal cultures between public and private law,[86] could lead one to assume a separation between the state sphere and an autonomous society/citizen sphere (to which the body of private law, which regulates the legal relations between private groups and individuals, could belong) and that the function of fundamental rights—resulting from their historic origins—is just to protect the private sphere from excessive state power. But the German Federal Constitutional Court, which had been established in September 1951, takes a more extensive approach. On January 15, 1958, the Court ruled in the *Lüth* case[87] that the fundamental rights were not limited to granting

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85. *Cf. further* Art. 8(1) of the South African Constitution: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state."

86. *Cf.* JOHN W.F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (2d ed. 2000) (additionally he is critical of the convergence theory); Duncan Kennedy, *The Status and Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); for the history of the distinction in German law in the *Lüth* context, *see* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 255-58 (1989). It can at least partly be attributed to the influence of the 11th century rediscovery of Justinian's Corpus Iuris Civilis. ALAN WATSON, THE MAKING OF THE CIVIL LAW 144-57 (1981). The first three parts of the Corpus, collected by the order of Eastern Roman Imperator Justinian I (483-565), appeared between 529 and 535 AD. The revival of interest in Roman law in the 11th century made its way from the University of Bologna and laid the basis for the Ius Commune. *Cf.* HERBERT FELIX JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW (1957); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999); ZIMMERMANN, *supra* note 66.

87. BVerfGE 7, 198; for a partial translation, *see* BASIL S. MARKESINIS, *Developing an English Law of Privacy*, *in* ALWAYS ON THE SAME PATH—ESSAYS ON FOREIGN LAW AND COMPARATIVE METHODOLOGY, VOL. II, 320, 416-21 (2001) (the case is trans. by Tony Weir); a translation is also provided by the helpful bilingual book RAYMOND YOUNGS, SOURCEBOOK ON GERMAN LAW 504-59 (2d 2002). For an account, *see* CURRIE, *supra* note 38, at 181-89; Quint, *supra* note 86, at 253-65; for a further boycott case, *see*, however, BVerfGE 25, 256 (1969)—*Blinkfüer* (the Axel Springer Press, after the construction of the Berlin Wall in 1961, threatened newspaper dealers with withdrawal of delivery of its influential papers, e.g., the *Bild Zeitung*, if they continued to offer publications containing East German TV programs; the Federal Constitutional Court, due to the great economic power of the Springer Press, held that the speech rights in Art. 5(1) of the Basic Law did not shield the company from being found in breach of

individuals' rights, but incorporate an objective (i.e., general and abstract) set of values that, as constitutionally determined, applies to the whole legal order.[88]

The substance of the basic rights unfolds in the purview of private law. The impact of constitutional norms is especially strong in the case of mandatory provisions (which are typical of tort law) and is best effectuated by the judiciary's use of general clauses.[89] As such provisions are seldom subject to the private party's will and reflect extra-legal standards, they are functionally close to public law rules. Therefore, non-dispositive legal norms and general clauses serve as "permeation points" for basic rights into the private law level.[90] The result of this line of thought, leading to a constitutionalization of private law, meant in its outcome no more and no less than a "soft revolution," as Friedrich Kübler described.[91] The idea of susceptible private norms leads to the *Drittwirkung der Grundrechte*, i.e., the indirect "horizontal" application of constitutional rights to private law (some translate less precisely "third-party effect of fundamental rights"), where through general clauses every provision of private law must be compatible to the value system of the Basic Law and interpreted in its spirit. In the words of the Court, fundamental rights spread out into all other areas of the law.[92]

2. *Lüth* Case in More Detail (*Lüth* Part I)

In the *Lüth* case,[93] the Federal Constitutional Court had to deal with a call to boycott a screenplay. Erich Lüth (1902–1989), a high official of

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§ 823(1) BGB); *see* GÜNTER WEICK, DER BOYKOTT ZUR VERFOLGUNG NICHTWIRTSCHAFTLICHER INTERESSEN (1971).

88. BVerfGE 7, 198 in the original wording: "in den Grundrechtsbestimmungen des Grundgesetzes verkörpert sich . . . auch eine objektive Wertordnung, die als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gilt".

89. BVerfGE 7, 198, original: "Im bürgerlichen Recht entfaltet sich der Rechtsgehalt der Grundrechte mittelbar durch die privatrechtlichen Vorschriften. Er ergreift vor allem Bestimmungen zwingenden Charakters und ist für den Richter besonders realisierbar durch die Generalklauseln".

90. BVerfGE 7, 198, 206.

91. Friedrich Kübler, *Lüth: eine sanfte Revolution (BVerfGE 7, 198 ff.)*, 83 KritV 313 (2000); *further* Friedrich Kübler, *Kodifikation und Demokratie*, JZ 1969, 645; *see* Udo Di Fabio, *Grundrechte als Werteordnung (Zugleich Anmerkung zu BVerfG, U. v. 15.01.1958—1 BvR 400/51—(Lüth-Entscheidung))*, 59 JZ 1 (2004).

92. *Cf.* Jutta Limbach, *The Protection of Human Rights in Germany*, *in* THE CLIFFORD CHANCE MILLENIUM LECTURES, THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW 153, 158 (Basil S. Markesinis ed., 2000).

93. For a detailed account, *see* DAS LÜTH-URTEIL IN (RECHTS-)HISTORISCHER SICHT—DIE KONFLIKTE UM VEIT HARLAN UND DIE GRUNDRECHTSJUDIKATUR DES BUNDESVERFASSUNGS-GERICHTS (Thomas Henne & Arne Riedlinger eds., 2005).

the City of Hamburg, in his "private" capacity as President of the Hamburg Press Club, gave an address at the opening of the 1950 "German Film Week." In front of film distributors and directors he stated that the person least likely to restore moral integrity to the German film industry, corrupted during the Hitler regime, was Veit Harlan (1899–1964), the man who directed and wrote the script for the anti-Semitic screenplay "Jud Süß." The film, produced under the general supervision and with full support of the Nazi ministry of propaganda, was released in wartime Germany in late September 1940, and to this day is forbidden to be shown to the general public without explanatory comments in Germany.[94]

In his address and later in an open letter to the press,[95] Lüth called on distributors, cinema managers, and the German public to boycott the first post-war movie "Unsterbliche Geliebte" (Immortal Beloved) by that same director, whom Lüth called "Nazi film director number no. 1." The production company and the distributor of the new film obtained a judgment from the District Court (*Landgericht*) Hamburg[96] enjoining Lüth to refrain from further advocating such a boycott, because it held that Lüth's statements were tortious under the invoked provision § 826 BGB.[97] The injunction was also based on § 1004 BGB analog, which gives someone who has suffered harm the right to have the tortfeasor ordered to refrain from the conduct complained of.

By way of constitutional complaint the Federal Constitutional Court decided that the utterance of an opinion in favor of a boycott is—as an effect of constitutional law and depending on the merits of the individual case—not necessarily a willful damage contrary to public morals (*Sittenwidrigkeit*) under the general clause § 826 BGB.[98] According to the Court, the objective value system of the basic law, centering on the individual's freedom to develop in society and on human dignity, must give guidance and impulse to legislation, administration, and judicature. As it also influences private law, all civil law rules must be construed in accordance with the Constitution's spirit. Unlike public law, the basic

94. The distribution of "Jud Süß" would be a criminal offense, *see Entscheidungen des Bundesgerichtshofes*, *in* STRAFSACHEN [BGHSt] 19, 63 (case issued in 1963).

95. The facts of the case are a little simplified. The letter to the public was in fact a reply to the remarks by the challenged production company.

96. LG Hamburg, Nov. 22., 1951, docket number 15 O 87/51.

97. This provision deals, as mentioned, with the willful harm of another contrary to good morals, which requires the tortfeasor to compensate that person for the resulting damage. Clearly a product ban would fall under the wording. The details are here not decisive.

98. BVerfGE 7, 198.

rights have no direct binding effect on private individuals.[99] However, according to the intermediate position taken by the Federal Constitutional Court, since the judge is constitutionally bound, his or her interpretation must be guided by an overriding constitutional aspect, which can entail a modification of content of the private law norm.[100]

So an *indirect* application of constitutional rights to private actors (*mittelbare Drittwirkung*) takes place through the state's interpretation of private law, performed by the individual civil judge. If the judge does not act accordingly, in his role as a public official, he deprives the citizen of his constitutional rights and contravenes the Basic Law. The Federal Constitutional Court concluded that, given its supreme role for safeguarding the basic rights, it must be competent to uphold them against all public organs, including supervising private law court decisions insofar as to reconcile the conflicting tendencies of the basic right and the "general laws."[101] Balancing the interests and rights of the parties involved and especially taking into account the weight of the freedom to express and disseminate opinions freely in speech, writing and pictures[102] as well as the importance of the topic to the public, the District Court in the case before the BVerfG obviously constrained Lüth's basic right to freedom of expression in an unconstitutional way, when it ordered that, pursuant to § 826 BGB, he had to refrain from his boycott call.

In sum, two boundaries are blurred under the order constituted by the Basic Law. First, the spheres of the private and the state mingle, in the sense that the second sphere protects the first one through the application of basic rights. This obligation of protection has two directions: against the state itself and against private actors. At the same time the organs of the state, especially the judiciary, assume the role of mediator in balancing constitutional rights within the conceptual

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99. Even though the (insofar inferior) Federal Labor Court had once assumed otherwise: *see* for the theory of direct effect (meanwhile given up) Entscheidungen des Bundesarbeitsgerichts [BAGE] 1, 185 (193-94) (issued in 1954 concerning the dismissal of an employee for political speech); *also* 24, 438, 441; one of the few legal scholars advocating a direct effect is the private lawyer Johannes Hager, *Grundrechte im Privatrecht*, JZ 1994, 373; for the current state of things, *cf.* CLAUS-WILHELM CANARIS, GRUNDRECHTE UND PRIVATRECHT—EINE ZWISCHENBILANZ (1999); *Grundrechte und Privatrecht*, 184 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 201 (1984); KONRAD HESSE, VERFASSUNGSRECHT UND PRIVATRECHT (1988).

100. BVerfGE 7, 198, 205.

101. BVerfGE 7, 198, 209.

102. This constitutional balancing gets further explained in the section on discovering and cultivating free speech as a fundamental constitutional value by Rösler, *supra* note 13.

framework of private law.[103] Secondly, constitutional law does not just shape the drafting and enactment of private law norms, but extends its content-shaping interpretation and practical application process to real world situations. One also has to bear in mind the advantages for the German legal order, as it solves the problem of harmonizing old concepts of the BGB faced with a radically changed post-war setting. The indirect application of constitutional rights to private actors is now commonly understood as a core element of judicial review and of implementing the principle of the rule of law (*Rechtsstaatsprinzip* according to Article 20(3), 101, 103 GG).[104]

C. General Personality Right

1. Desideratum

Though some German commentators complain that the enhancement of judicial discretion, palpable in many other areas as well, leads to a reduction in the certainty of law, this criticism has also not endangered the general approval of the imaginative creation of the general personality right.[105] The rule-making by the highest German courts to protect this right, from which emanate the individual areas of protection, and which does not differentiate precisely between privacy and defamation,[106] filled a void left open by the BGB. The BGB, drafted during 1874-1896, had not provided for an all-encompassing legal protection of immaterial goods, since the bourgeoisie deemed the personality rights well enough protected through the guarantees of peaceful enjoyment of property and private autonomy within the borders of the law.[107] Some special aspects of the person were already protected before the Basic Law (e.g., through § 12 BGB the right to the use of

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103. The dispute remains nonetheless in substantive and procedural regard one of private law, BVerfGE 7, 198, 205.

104. *Cf. generally* Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT'L & COMP. L.Q. 571 (1968); Hans D. Jarrass, *Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts*, 110 AöR 363 (1985); Christian Starck, *Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court*, *in* HUMAN RIGHTS IN PRIVATE LAW, *supra* note 30, at 97.

105. *Cf.* Friedrich Kübler, *Rechtsvergleichendes Generalreferat*, *in* DIE HAFTUNG DER MASSENMEDIEN, INSBESONDERE DER PRESSE, BEI EINGRIFFEN IN PERSÖNLICHE ODER GEWERBLICHE RECHTSPOSITIONEN 123-24, 137, 145 (Gerald Dworkin et al. eds., 1972).

106. In particular regarding the calculation of damages, Amelung, *Damage Awards*, *supra* note 69, at 27.

107. Andreas Heldrich, *Der Persönlichkeitsschutz Verstorbener*, *in* RECHTSBEWAHRUNG UND RECHTSENTWICKLUNG—FESTSCHRIFT FÜR HEINRICH LANGE 163, 165 (Kurt Kuchinke ed., 1970).

one's name, the rights to your own image according to §§ 22 et seq. Artistic Creations Act of 1907 [*Kunsturhebergesetz*], and the mentioned criminal law provisions).[108] These can be regarded as specific personality rights.[109]

2. Judicial Gap-Filling

But the gaps in protection regarding the invasion of other aspects of the personality, which became obvious in the course of the twentieth century, have been filled with the judicial development of a general right of personality (*allgemeines Persönlichkeitsrecht*). This right can also be the basis for an action for damages in tort. According to the central constitutional provision of Article 2(1) GG, guaranteeing the basic right to self-determination, the state has the duty to protect individuals against infringements of these rights, since everyone has the right to a free development of his personality, it being essential for the proper development of individuals as responsible and civic self-governing people.[110]

The general personality right, based on the guarantees of autonomy within the borders of the law, laid down in Article 2(1) GG, and of human dignity, enshrined in Article 1(1) GG, comprises the right to protection of one's reputation, to control personal information disclosed, and to prohibit the commercial exploitation of one's image, name, voice, and other personality features without consent. The highest level of protection is accorded to the individual's emotions and sexual life (*Intimsphäre*), whereas the less intimate aspects of the person's private life and his or her "public" life receive lower degrees of protection.

The German constitutional commitments to personal freedoms and human dignity strongly influence the way in which the courts interpret the symbiotic relationship between free speech and the development of personality rights. But not only the conceptual embedding and intellectual influence of the Basic Law and the new institutional role of

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108. *See* for this in English language, KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 668-89 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998); for "Kunsturhebergesetz", *see* Arnold Vahrenwald, *Photographs and Privacy in Germany*, [1994] ENT. L.R. 205. For trade mark law, *cf.* HOLGER GAUß, DER MENSCH ALS MARKE—LIZENZIERUNG VON NAME, BILD, STIMME UND IMAGE IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT 76-88 (2005); Anja Steinbeck, *Albertus Magnus als Marke*, JZ 2005, 552.

109. *Cf.* for the difference JÜRGEN HELLE, BESONDERE PERSÖNLICHKEITSRECHTE IM PRIVATRECHT: DAS RECHT AM EIGENEN BILD, DAS RECHT AM GESPROCHENEN WORT UND DER SCHUTZ DES GESCHRIEBENEN WORTES (1991); MARIAN PASCHKE, MEDIENRECHT (2d ed. 2001).

110. Xavier Bioy, *Le libre développement de la personnalité en droit constitutionnel, essai de comparaison (Allemagne, Espagne, France, Italie, Suisse)*, 55 REVUE INTERNATIONALE DE DROIT COMPARÉ 123 (2003).

the Federal Constitutional Court played a role. The German Federal Supreme Court (*Bundesgerichtshof* [BGH]) developed new ways to fill the gaps and new legal concepts, with a significantly larger degree of abstraction from the wording of the Code than its predecessor, the *Reichsgericht*.[111] It demonstrated how flexibly the German Code, drafted in the closing decades of the nineteenth century, can be interpreted under modern conditions.[112] In 1954, accordingly, the Federal Supreme Court was willing to recognize the general personality right as an "other right" protected by § 823(1) BGB in the *Schacht* case. In this case, the court had to assess an invasion of the private sphere, as Dr. Schacht claimed to have been portrayed in a false light through the publication of an abridged letter, whose meaning had changed with editing.[113]

3. Damages for Non-pecuniary Harms

This was only the first step in the gradual evolution of the general personality right. German law had always differentiated between actual damage and non-material damage. However, in case of severe infringements of the general personality rights, compensatory damages for non-pecuniary harms were granted for the first time in the *Herrenreiter* case[114]—due to the importance of Article 1 and 2 GG even then *contra legem*,[115] contrary to the insofar inferior provisions of the unreformed BGB, which did not allow for pecuniary compensation of

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111. The Reichsgericht did not stray from the text in this context; however, they had done so in other situations, such as in their development of the permission to break a contract in case of exceptional hardship (*Wegfall der Geschäftsgrundlage*). *Cf.* Hannes Rösler, *Hardship in German Codified Private Law—In Comparative Perspective to English, French and International Contract Law*, 15 ERPL 483 (2007); John P. Dawson, *Effects of Inflation on Private Contracts: Germany, 1914–1924*, 33 MICH. L. REV. 171 (1934).

112. Interesting that *Max Weber* (1864–1920), VERHANDLUNGEN DES ERSTEN DEUTSCHEN SOZIOLOGENTAGES VOM 19.-22. OKTOBER 1910 IN FRANKFURT 269-70 (1911), argued that a socialist order can be established just by new interpretation, without change of the BGB.

113. BGHZ 13, 334 (case issued in 1954)—*Schacht letters*; *see* for the case ZWEIGERT & KÖTZ, *supra* note 108, at 690-91; Hans Stoll, *The General Right to Personality in German Law: An Outline of Its Development and Present Significance*, *in* PROTECTING PRIVACY 29, 32 (Basil S. Markesinis ed., 1999).

114. The Gentleman-Rider case involved a picture, which was originally taken in a riding tournament, but was then used without consent of the person pictured in an advertisement for a product claiming to improve sexual strength. BGHZ 26, 349 (case issued in 1958)—*Herrenreiter*; *see* for the case, Amelung, *Damage Awards*, *supra* note 69, at 19-20; also BGHZ 35, 363 (case issued in 1961)—*Ginsengwurzel*; BGHZ 39, 124 (case issued in 1963)—*Fernsehansagerin*; approved in BVerfGE 34, 269 (case issued in 1973)—*Soraya*.

115. But since Aug. 1, 2002 a new § 253(2) provides: "If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss." Translation according to www.gesetze-im-internet.de/englisch_bgb; *see* Jörg Fedtke, *The Reform of German Tort Law*, 11 ERPL 485 (2003).

non-material damages.[116] The Court argued that the protection of the human personality would be largely illusory without the possibility of adequate redress, which required, in cases of serious injury, compensation even for non-pecuniary harm. This development allowed for an effective protection against infringements, creating financial risks for companies or individuals violating a person's private sphere. The constitutional general personality right, as developed and shaped by the judiciary, includes classic aspects of defamation law. But it also protects something similar to the U.S. privacy notion[117] in German law, conceptually broken down into intimate, private, or individual personal spheres, which enjoy varying degrees of protection.[118]

Before the appropriate scope of free speech will be addressed briefly,[119] it is proper to discuss the result of the strong influence of constitutional norms on the *Schutzpflichten*-doctrine,[120] which constitutes an affirmative duty of all state organs to preserve constitutional values. As pointed out earlier, the basic norm § 823(1) BGB provides for a compensation in the case of an unlawful intentional or negligent infliction of injuries to the enumerated rights and especially in the case of infringement of the personality right, as juridically developed from personal freedom rights contained in Article 2 of the Basic Law. The right of personality (*Persönlichkeitsrecht*) clusters a great number of aspects of personal life, e.g., the right to one's own picture, spoken word, secrecy of postage, right to parental care, to protection against publishing private matters,[121] but also encompasses protection against the injury of both personal honor and reputation.

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116. The old §§ 253, 847 BGB.

117. Jon A. Lehman, *The Right of Privacy in Germany*, 1 N.Y.U. J. INT'L L. & POL. 106 (1968); Harry Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, DUKE L.J. 481 (1965); Amelung, *Damage Awards*, *supra* note 69, at 15; Rosalind English, *Protection of Privacy and Freedom of Speech in Germany*, *in* DEVELOPING KEY PRIVACY RIGHTS ch 4. (Madeleine Colvin ed., 2002); *cf.* WINFRIED BRUGGER, PERSÖNLICHKEITSENTFALTUNG ALS GRUNDWERT DER AMERIKANISCHEN VERFASSUNG: DARGESTELLT AM BEISPIEL DES STREITS UM DEN SCHUTZ VON ABTREIBUNG UND HOMOSEXUALITÄT (1994); RUPRECHT KAMLAH, RIGHT OF PRIVACY—DAS ALLGEMEINE PERSÖNLICHKEITSRECHT IN AMERIKANISCHER SICHT, UNTER BERÜCKSICHTIGUNG NEUER TECHNOLOGISCHER ENTWICKLUNGEN (1969).

118. Developed by the classic HEINRICH HUBMANN, DAS PERSÖNLICHKEITSRECHT 268 et seq. (2d ed. 1967).

119. This was also part of the *Lüth* decision.

120. *Cf.* for the concept, Christian Starck, *State Duties of Protection and Fundamental Rights*, *in* CONSTITUTION AND LAW III, at 11 (Konrad-Adenauer-Stiftung Johannesburg ed., 1999); JOHANNES DIETLEIN, DIE LEHRE VON DEN GRUNDRECHTLICHEN SCHUTZPFLICHTEN (1992).

121. Note that this aspect of privacy law in France is stronger than in Germany; for French law, *see* Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort Is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219 (1994); ZWEIGERT & KÖTZ, *supra* note 108, at 693-97.

It should be noted that a draft of 1959, codifying the general right of personality,[122] and a further reform attempt in 1967/68[123] failed. That these initiatives proved to be unsuccessful due to hostile press reporting, seems to be the classic fate of reforms in this sensitive field—also true, e.g., in respect to English law.[124] But the validity of the courts' legal innovations was not shaken.[125] They mirror the fact that in Germany there is an incremental and pragmatic tendency to interpret more creatively, a tendency to move away from the mere wording of the constitutional texts and towards striking a balance between competing interests.[126]

4. Balancing with Freedom of Speech (*Lüth* Part II)

In its "second part" of the *Lüth* case the Federal Constitutional Court stressed the right to freedom of expression as being absolutely essential to a free and democratic state, since it alone enables a continuous intellectual debate and the struggle of opinions.[127] The Court then cites the Supreme Court justice Benjamin N. Cardozo's (1870–

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122. Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehrenschutzes, BT-Drucks. III Nr. 1237, p. 2-5 (1959); *cf.* STEFAN GOTTWALD, DAS ALLGEMEINE PERSÖNLICHKEITSRECHT—EIN ZEITGESCHICHTLICHES ERKLÄRUNGSMODELL 261 et seq. (1996); with comparative perspective, Edmund Schwenk, *Das allgemeine Persönlichkeitsrecht in amerikanischer Sicht*, *in* RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG: FESTSCHRIFT ZUM FÜNFZIGJÄHRIGEN BESTEHEN DES INSTITUTS FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVAT- UND WIRTSCHAFTSRECHT DER UNIVERSITÄT HEIDELBERG 233, 238 et seq. (Eduard Wahl, Rolf Serick & Hubert Niederländer eds., 1967).

123. Referentenentwurf eines Gesetzes zur Änderung und Ergänzung schadensersatzrechtlicher Vorschriften (Bundesjustizministerium Jan. 1967); *see* GOTTWALD, *supra* note 122, at 304 et seq.

124. *See* Hannes Rösler, *Das Verhältnis von Parlament, Gerichtsbarkeit und Privilegierung im Ehrenschutz, oder: London, a Town Named Sue—Entscheidung des House of Lords vom 23. März 2000 mit Anmerkung*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEuP] 2003, 155, 173 (on the occasion of Hamilton v. Al Fayed, [2000] 2 All E.R. 224 et seq.); for the Calcutt report, *cf.* Georgios Gounalakis & Rainer Glowalla, *Reformbestrebungen zum Persönlichkeitsschutz in England*, AFP 1997, 771 (part 1), AFP 1997, 870 (pt. 2).

125. *Cf.* BVerfGE 34, 269, 273 (case issued in 1973)—*Soraya*.

126. *Cf.* CURRIE, *supra* note 38, at 340. But it appears that the civil law systems in Europe have better accepted the significance of a shift to a more textual-based legal order and thus formed a community of academics, practitioners, and judges with common interpretory duties and values. This is the point of Glendon, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95 (Antonin Scalia & Amy Gutmann eds., 1997).

127. BVerfGE 7, 198, 208: "Für eine freiheitlich-demokratische Staatsordnung ist es [d.h. das Grundrecht auf freie Meinungsäußerung] schlechthin konstituierend, denn es ermöglicht erst die ständige geistige Auseinandersetzung, den Kampf der Meinungen, der ihr Lebenselement ist." (referring to BVerfGE 5, 85, 205); similar parlance in BVerfGE 12, 113, 125 (case issued in 1961)—*Schmid-Spiegel* and before in the very detailed ruling that banned the extreme left-wing Communist Party of Germany (*Kommunistische Partei Deutschlands* (KPD)) BVerfGE 5, 85, 204 (case issued in 1956).

1938) view that freedom of speech is "the matrix, the indispensable condition of nearly every other form of freedom."[128] Later in the *Mephisto* case, the U.S. position in *New York Times v. Sullivan*[129] is briefly referred to.[130] The BVerfG could draw from the recent American free speech "discovery" or, to put it in modern terms, from the process of constitutionalization, which apart from the well-known opinions of Justice Oliver Wendell Holmes, Jr.'s (1841–1935) in *Schenck*[131] and also Justice Brandeis[132] after World War I,[133] began just before World War II.[134]

Obviously the libertarian "marketplace of ideas" metaphor, used in a dissent by Justice Holmes in *Abrams v. United States*,[135] had its influence on the BVerfG's parlance of a "struggle of opinions".[136]

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128. *See id.*; the original comes from *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969). Perhaps it is no surprise that the Justices of the BVerfG cited Cardozo. In THE NATURE OF THE JUDICIAL PROCESS (1921), he, who succeeded Oliver Wendell Holmes Jr. on the Supreme Court in the midst of the Great Depression (1932), asked the central question, "What is it that I do when I decide a case?" Cardozo helped to recognize the important role of the judiciary to adapt the "written law" to the necessities of modern life.

129. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

130. In the powerful dissenting opinion by Justice Rupp-v. Brünneck BVerfGE 30, 173, 225-26—*Mephisto* (case issued in 1971):

> Ich verweise hierzu auch auf die außerordentlich großzügige Rechtsprechung des Supreme Court, der in bezug auf Personen und Gegenstände des Zeitgeschehens das allgemeine Interesse an der freien öffentlichen Diskussion grundsätzlich immer höher bewertet als die möglicherweise durch eine falsche Information oder polemische Darstellung betroffenen persönlichen Interessen, solange nicht 'actual malice' vorliegt.

In detail regarding the *Mephisto* case, *see* Rösler, *supra* note 13.

131. Schenck v. United States, 249 U.S. 47 (1919); *also* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (dissenting).

132. Whitney v. California, 274 U.S. 357, 372-80 (1927).

133. *See further* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).

134. David Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981); David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); for a different perspective on the development, *see* RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA: EXACTIONS ON THE PRESS FROM COLONIAL TIMES TO THE PRESENT (1994); *further* JUHANI RUDANKO, THE FORGING OF FREEDOM OF SPEECH: ESSAYS ON ARGUMENTATION IN CONGRESSIONAL DEBATES ON THE BILL OF RIGHTS AND ON THE SEDITION ACT (2003).

135. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting): "The ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."; echoed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

136. *Cf. supra* note 127; *cf. further* Hein Kötz, *Der zivilrechtliche Persönlichkeitsschutz im anglo-amerikanischen Rechtskreis*, *in* DAS PERSÖNLICHKEITSRECHT IM SPANNUNGSFELD ZWISCHEN INFORMATIONSAUFTRAG UND MENSCHENWÜRDE 97, 111 (Heinz Hübner et al. eds., 1989).

However, since *New York Times v. Sullivan* U.S. law has taken a strict rule-based free speech approach,[137] while German law gives no simple preference for free speech or for personality laws. It requires a complex weighing approach taking into account all rights and interests at hand. But still, limitations to the freedom of speech have to be done restrictively due to the particular "weight" of this basic right for a liberal democracy.[138] Here again, both legal orders, belong to the same constitutional family.[139] This is true despite the fact that open and explicit judicial balancing is looked at with some skepticism in the U.S. due to fear of ideological influences.[140]

D. Evaluation of Lüth *in the National and International Arena*

The importance of the *Lüth* decision cannot be overestimated. This is not only true as it provides one of the decisive foundations for the power of the BVerfG. It rather initiates the priority of the Basic Law and by that constitutes a substantive turnaround.[141] Firstly, the Basic Rights do not merely serve the citizens as subjective defences against the state (*subjektive Abwehrrechte*). They additionally extend to all social relationships as supreme value principles. Besides the question of constitutionality of legal provisions as such, also the application of the law is matched with the Constitution. Secondly, the fundamental rights are applied by balancing colliding basic rights against one another in a concrete case. Thirdly, the state may not only be bound by the obligation

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137. *See* Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 12, at 49.

138. BVerfGE 7, 198, 209: "Es findet vielmehr eine Wechselwirkung in dem Sinne statt, daß die ‚allgemeinen Gesetze' zwar dem Wortlaut nach dem Grundrecht Schranken setzen, ihrerseits aber aus der Erkenntnis der wertsetzenden Bedeutung dieses Grundrechts im freiheitlichen demokratischen Staat ausgelegt und so in ihrer das Grundrecht begrenzenden Wirkung selbst wieder eingeschränkt werden müssen."

139. *Cf.*, more differentiated, on the balancing between freedom of speech and general personality law, Rösler, *supra* note 13.

140. *Cf.* for this suspicion, Jacco Bomhoff, *Lüth's 50th Anniversary—Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 GERMAN L.J. 121, 122 et seq. (2008); Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161 (Jeffrey Goldsworthy ed., 2006).

141. Further influences of constitutional law on private law in line of the *Lüth*-doctrine are BVerfGE 81, 242—*Handelsvertreter* (case issued on Jan. 7, 1990); BVerfGE 89, 214—*Bürgschaft* (Oct. 19, 1993); BVerfG, NJW 2005, 2363 and 2376 (both case deal with life insurance contracts and were handed down on July 26, 2005). *Cf.* OLHA CHEREDNYCHENKO, FUNDAMENTAL RIGHTS, CONTRACT LAW AND THE PROTECTION OF THE WEAKER PARTY—A COMPARATIVE ANALYSIS OF THE CONSTITUTIONALISATION OF CONTRACT LAW, WITH EMPHASIS ON RISKY FINANCIAL TRANSACTIONS 231 (2007).

to refrain from certain acts but also by the obligation to perform certain protective acts if the liberty of a third party is at stake.[142]

The big bang,[143] this explosion of substantive constitutional law due to *Lüth* and its aftermath, had its impact outside Germany as well. Examples of that can be found when looking at constitution building processes all over the world.[144] *Lüth* has served as a paradigm for the idea of horizontal effect and balancing discourse. It inspired judges, legislators, and scholars worldwide,[145] e.g., the Constitutional Court of South Africa[146] as well as the Supreme Court of Canada.[147] Article 35(3)

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142. Dieter Grimm, *Constitutional Issues in Substantive Law—Limits of Constitutional Jurisdiction*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 277 (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006); Schulze-Fielitz, *Das Lüth-Urteil—nach 50 Jahren*, JURA 2008, 52; *cf.* for an evaluation of the different "levels" and discussions about *Lüth*, MARTIN HOCHHUTH, DIE MEINUNGSFREIHEIT IM SYSTEM DES GRUNDGESETZES 38 et seq. (2007); MATTHIAS RUFFERT, VORRANG DER VERFASSUNG UND EIGENSTÄNDIGKEIT DES PRIVATRECHTS: EINE VERFASSUNGSRECHTLICHE UNTERSUCHUNG ZUR PRIVATRECHTSWIRKUNG DES GRUNDGESETZES (2001); Rainer Wahl, *Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich*, *in* HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA, VOL. I: ENTWICKLUNG UND GRUNDLAGEN (HGR I) 745 (Detlef Merten & Hans-Jürgen Papier eds., 2004); Günter Hager, *Von der Konstitutionalisierung des Zivilrechts zur Zivilisierung der Konstitutionalisierung*, JUS 2006, 769 (briefly mentioning French law).

143. As Robert Alexy, *Verfassungsrecht und einfaches Recht—Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit*, 61 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 7, 9 (2002), calls it.

144. Dieter Grimm, *Die Karriere eines Boykottaufrufs—Wie ein Drehbuchautor Rechtsgeschichte machte—Zum 50. Geburtstag des Bundesverfassungsgerichts*, DIE ZEIT: WOCHENZEITUNG FÜR POLITIK, WIRTSCHAFT, WISSEN UND KULTUR, Sept. 27, 2001, S. 11: "Abwägung oder Verhältnismäßigkeit, Ausstrahlung und Schutzpflicht sind zu verfassungsrechtlichen Exportartikeln geworden."

145. CHANTAL MAK, FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW—A COMPARISON OF THE IMPACT OF FUNDAMENTAL RIGHTS ON CONTRACTUAL RELATIONSHIPS IN GERMANY, THE NETHERLANDS, ITALY AND ENGLAND (2008) (also dealing with e.g. the Italian Corte costituzionale decisions of July 14, 1986, n.184 and July 11, 2003, n.233 on the recognition of non-pecuniary damages as well as with the mixed position in the Dutch law, *see* Hoge Raad decision of Oct. 31, 1969, NEDERLANDS JURISPRUDENTIE [NJ] 1970, 57—*Mensendieck I*, Hoge Raad of June 18, 1971, NJ 1971, 407—*Mensendieck II* and, more importantly in this context, Hoge Raad of April 15, 1994, NJ 1994, 608—*Valkenhorst* accepting a general personality right); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003) (analyzing the Decision of the Constitutional Court of the Czech Republic, May 2, 2000, case I. ÚS 326/99, see BULLETIN OF CONSTITUTIONAL CASE-LAW, 2000, 240; he further argues that the horizontal effect can be regarded as a test of a nation's commitment to a "social democratic" order); for the influence of the German *Drittwirkung* on Spanish law, ASOCIACIONES, DERECHOS FUNDAMENTALES Y AUTONOMÍA PRIVADA (Pablo Salvador Coderch, Ingo von Münch & Josep Ferrer i Riba eds., 1997); for Japan, *see* Keizo Yamamoto, *Die Aufgabe des Privatrechts im Verfassungssystem: Einfluss des deutschen Rechts und Neuansatz im japanischen Recht*, *in* FESTSCHRIFT FÜR CLAUS-WILHELM CANARIS, VOL. 2, 897 (Andreas Heldrich et al. eds. 2007).

146. Du Plessis v. De Klerk, 1996 (3) S.A. 850, especially paras. 40 and 103.

147. RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

of the Federal Constitution of the Swiss Confederation, adopted in 1999, obliges the authorities to ensure that fundamental rights, as far as they are suitable, also become effective among private parties.[148] The Greek Constitution avoids the term "horizontal effect". Yet, since the constitutional reform in 2001, the third sentence of Article 25(1) stipulates that the basic rights also apply to relations between the private individuals to which they pertain.[149]

Furthermore, the horizontal application of fundamental freedoms is intensively discussed on the EU-level. The ECJ in different judgements recognized the horizontal effect of the fundamental freedoms of Articles 43 and 49 EC Treaty, i.e., the freedom of establishment and the freedom to provide services in the EU.[150] An opinion of the Advocate General at the European Court of Justice expressly referred to *Lüth*.[151] Certainly, details and terminology are still far from being harmonized. With respect to that, the Charter of Rights and Fundamental Freedoms,[152] which shall become binding upon the entry into force of the Treaty of Lisboa[153] in 2009, might bring more clarity in the future. Nonetheless, already today, one cannot turn a blind eye on the international truth promoted by *Lüth* that modern private law in general always interacts more or less with constitutional law.

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148. *See* Georg Müller, *Schutzwirkung der Grundrechte*, *in* HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA, VOL. VII/2: GRUNDRECHTE IN DER SCHWEIZ UND IN LIECHTENSTEIN 59 (Detlef Merten & Hans-Jürgen Papier eds., 2007).

149. Philippos Doris, *Die Geltung von Grundrechten in Privatrechtsbeziehungen, für die sich diese Rechte eignen (Art. 25 Abs. 1 S. 3 gr. Verfassung)*, *in* FESTSCHRIFT, *supra* note 145, at 535.

150. ECJ Case 43/75, Defrenne 1976 E.C.R. 455, paragraphs 35 to 37 and 40; *see also* Case 58/80, Dansk Supermarked v Imerco, 1981 E.C.R. 181, para. 12; C-112/00, Eugen Schmidberger v. Austria, 2003 E.C.R. I-5659; recently, ECJ Case C-438/05, Decision of Dec. 11, 2007, The Int'l Transp. Workers' Fed'n & Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, not yet published. *Cf.* Matej Avbelj, *Is There Drittwirkung in EU Law?*, *in* THE CONSTITUTION IN PRIVATE RELATIONS—EXPANDING CONSTITUTIONALISM 145 (András Sajó & Renáta Uitz eds., 2005); *cf.* PHILIPP FÖRSTER, DIE UNMITTELBARE DRITTWIRKUNG DER GRUNDFREIHEITEN—ZUR DOGMATIK DES ADRESSATENKREISES VON PFLICHTEN AUS EG-GRUNDFREIHEITEN (2007).

151. Opinion by Miguel Poiares Maduro of May 23, 2007, in the *Viking* case, *supra* note 150, n.38 (it was a reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division)).

152. 2000 O.J. (C 364), 1.

153. 2007 O.J. (C 306), 1.

V. SOME COMPARATIVE CONCLUSIONS

The wide practical reach and strong effect of constitutional norms[154] on judicial interpretation of private law resulting from *Lüth*'s *mittelbare Drittwirkung*-doctrine might be cause for some raised eyebrows amongst Anglo-American lawyers; and indeed, the subject enjoys—as just indicated—constantly growing attention in the transnational legal literature on comparative public and private law.[155] In Great Britain, the (indirect) horizontal effect of fundamental rights has been a subject of academic debate since the incorporation of the European Convention on Human Rights through the Human Rights Act 1998, which introduced the first catalogue of civil rights into English law;[156] but the British legal system is quite far from acknowledging such a notion.[157] In U.S. law the

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154. The Court in BVerfGE 7, 198, 207 speaks metaphorically of a "radiant effect" (*Ausstrahlungswirkung*).

155. *Cf. furthermore* Kara Preedy, *Fundamental Rights and Private Acts Horizontal Direct or Indirect Effect?—A Comment*, 8 ERPL 125 (2000); Daphne Barak-Erez, *Constitutional Human Rights and Private Law*, *in* HUMAN RIGHTS IN PRIVATE LAW, *supra* note 30, at 29; PRIVATE GOVERNANCE AND DEMOCRATIC CONSTITUTIONALISM (Christian Joerges & Oliver Gerstenberg eds., COST A 7 Publ'n 1998).

156. *Cf.* Basil S. Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47 (1999); Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of "mittelbare Drittwirkung der Grundrechte,"* EUR. HUM. RTS. L. REV. 421 (2001); John Craig & Nico Nolte, *Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort*, EUR. HUM. RTS. L. REV. 162 (1998); for the Ibero-American legal family recently, GRUNDRECHTE UND PRIVATRECHT AUS RECHTSVERGLEICHENDER SICHT (Jörg Neuner ed., 2007).

157. In addition, English law still does not accept a "blockbuster" tort of privacy (*cf.* Secretary of State for the Home Department and Wainwright, [2002] 3 WLR 405, QB 1334, paragraph 57 (CA) per Mummery LJ), but rather extends breach of confidence, which was confirmed by the House of Lords in Campbell v. MGN Ltd [2004] 2 WLR 1232; *cf.* with Douglas and Others v. Hello! Ltd. [2001] 2 All ER 289 (C.A.); *especially* Douglas and Others v. Hello! Ltd. (No 3), [2003] 3 All ER 996 (Ch.)). How far the incorporation of the European Convention on Human Rights 1950 in 2000 will further change this standpoint still remains to be seen. *See* Basil Markesinis, Colm O'Cinneide, Jörg Fedtke & Myriam Hunter-Henin, *Concerns and Ideas about our Developing Law of Privacy (and how knowledge of foreign law might be of help)*, 52 AM. J. COMP. L. 133 (2004) (claiming a right of privacy has to replace the growing, but nonetheless unclear breach of confidence); Birgit Brömmekamp, *The Human Rights Act 1998 in Comparison with the Protection of Privacy and Personality in Germany*, YEARBOOK OF COPYRIGHT AND MEDIA LAW 68 (2000); *cf.* the 28 country reports in INTERNATIONAL PRIVACY, PUBLICITY AND PERSONALITY LAWS (Michael Henry ed., 2001), Germany is covered there by Thomas R. Klötzel, *Germany*, 157 et seq.; Hannes Rösler, *Buchbesprechung*, 71 RABELSZ 196 (2007) (reviewing THE LAW OF PRIVACY AND THE MEDIA—MAIN VOLUME AND FIRST CUMULATIVE UPDATING SUPPLEMENT (*Michael Tugendhat & Iain Christie eds.*, 2004); *see*, however, the recent case McKennitt v. Ash, [2007] 3 W.L.R. 194 (CA) about the right to respect for private and family life and the adjustment of the tort of breach of confidence that comes close to a law of privacy; *see* Angus McLean & Claire Mackey, *Is there a Law of Privacy in the United Kingdom? A Consideration of Recent Legal Developments*, 29 EUROPEAN INTELLECTUAL PROPERTY REVIEW (EIPR) 389 (2007).

state-action formalism limits the application of the Constitution. The decisive question under American law is not if the area of public or private law is affected, but whether the state, e.g., in its regulatory capacity or as a private property owner, has acted in a way that is burdensome to the individual. If it has, the Constitution comes to bear on the case with its full force, whereas outside of state action the constitutional provision is simply not applicable.[158]

Nonetheless, U.S. academia has also been discussing an extended horizontal application of the Bill of Rights under the pressure of privatization and globalization trends.[159] In addition, sometimes private persons or groups have been found to be so closely affiliated with the government that the state must be deemed to have "acted," hence extending the applicability of the relevant constitutional clause.[160] More interestingly for the current purposes, a court ruling in a dispute between private parties can also be regarded as a state action if the policy decision complained of has been created completely by the state, without significant choice of private individuals. Principal examples of such state acts are common law tort claims and related statutory causes of action,[161] as they are generated by the judicature or the legislator. So a court's award of damages in a tort action or a ruling to stop a boycott from a private party[162] can be subject to constitutional limitations.

Otherwise the Supreme Court would not have found the rules of libel law (as formulated by the state) unconstitutional in the two famous

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158. Quint, *supra* note 86, at 267; for the origin and philosophy of the state action doctrine *see* Eric E. Walker, *State Action and Punitive Damages: A New Twist on an Old Doctrine*, 38 CONN. L. REV. 833 (2006).

159. Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063 (2000) (also referring to South African's Constitution of 1996).

160. Marsh v. State of Alabama, 326 U.S. 501 (1946) (company town); Terry v. Adams, 345 U.S. 461 (1953) (pre-primary election); *cf.,* however*,* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

161. Sometimes, and only to a certain degree, also the rules allocating property interests; *cf.,* however*,* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

162. *See e.g.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (a decision violated the First and Fourteenth Amendment rights to speech and free association of trade boycott organizers campaigning for non-discriminatory treatment); *cf., furthermore,* the classic case Shelley v. Kraemer 334 U.S. 1 (1948) (regarding a private agreement that prevented the sale of real property to Afro-Americans; the enforcement of such a racially restrictive covenant by state courts constitutes state action violating the Equal Protection Clause of the Fourteenth Amendment § 1 (1868)). *Cf.* John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569 (2005) (stressing that the state action doctrine serves an analytical function). For some ambiguities *cf.* THOMAS GIEGERICH, PRIVATWIRKUNG DER GRUNDRECHTE IN DEN USA—DIE STATE ACTION DOCTRINE DES U.S. SUPREME COURT UND DIE BÜRGERRECHTSGESETZGEBUNG DES BUNDES (1992).

"private party" disputes *New York Times v. Sullivan*[163] and *Gertz v. Robert Welch*,[164] and the defendants would not have been able to assert their First Amendment rights.[165] So in all these cases, there is a direct effect of the U.S. Constitution on private party relationships, whereas in Germany there is an indirect, but still broader influence of the Basic Law upon the general private law framework,[166] and especially contract law. The German solution might provide a good example of how to overcome the private/public divide in our age of privatization[167] while only moderately influencing the private autonomy that governs relationships between private individuals and entities.

163. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

164. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

165. Quint, *supra* note 86, at 268-69; Todd Howland, *Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere*, 26 DENV. J. INT'L & POL'Y 1 (1997).

166. It should, however, be noted that the difference in result between a direct and indirect application of the Basic Law is seemingly not so great. The difference between U.S. and German Law is rather one of scope. Quint, *supra* note 86, at 273-74. *But see* Mattias Kumm & Víctor Ferreres Comella, *What Is So Special About Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, *in* THE CONSTITUTION IN PRIVATE RELATIONS, *supra* note 150, at 241; *further* Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002); David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333 (1989); for the influences of international law the on the *Lüth* doctrine *see* THILO RENSMANN, WERTORDNUNG UND VERFASSUNG—DAS GRUNDGESETZ IM KONTEXT GRENZÜBERSCHREITENDER KONSTITUTIONALISIERUNG 68 et seq. (2007).

167. E.g. extending to health care, education, welfare, even prisons and military; *see* Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 384 (2006); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).