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A Return to Luth

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A Return to *Lüth*[1]

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In a complex constitutional system that relies on enforcement by courts, a single judicial decision may well present several different aspects for analysis. Thus, to take a well-known example, the famous American case of *New York Times v. Sullivan*[3] may be viewed from a number of different perspectives. It might be analyzed, for example, as a tort case, a First Amendment case, an essay on the implications of popular sovereignty, or as a significant step in the history of the American Civil Rights Movement. In a single study of a particular decision, however, it may not be possible to do justice to all significant aspects of the case; moreover, the importance of one of these various perspectives may become evident only over time. After writing about a particular decision, therefore, an author might feel drawn to revisit the case at a later point – perhaps after some years – and seek to approach it from a new or different perspective. I would like to do that today with the famous *Lüth*[4] case, decided in 1958 by the German Constitutional Court – one of the landmarks of German constitutional law.

Over the years, the complex opinion in the *Lüth* case has been

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1. An earlier version of this essay was delivered at the 2009 Annual Meeting of the American Society of Comparative Law, and the colloquial tone of that presentation has been retained to the extent possible. Several of the points contained in this article have been discussed by the author -- but with a rather different focus -- in Peter E. Quint, *60 Years of the Basic Law and its Interpretation: An American Perspective*, 57 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 1, 3-9 (2009). Unless otherwise noted, all translations in this article are those of the author.

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3. 376 U.S. 254 (1964).

4. 7 BVerfGE 198 (1958).

the subject of considerable doctrinal analysis. *Lüth* is the *locus classicus* of the German doctrine that the Constitution "influences" German private law, and thus it is an important early source for contemporary debates on the "horizontal" application of constitutional rights among private citizens.[5] Moreover, the *Lüth* case mapped out a (non-textual) means by which the constitutional guarantee of the freedom of expression could play a significant role in German constitutional law, and it was the first case that emphasized the freedom of expression as a central concern in German constitutionalism. The Court's views on these subjects (still somewhat controversial in Germany today) continue to be worthy of analysis by German scholars and by comparativists from other constitutional traditions. In addition to these primarily doctrinal approaches, others have contributed more theoretical discussions of *Lüth*, which have sought to discover the philosophical origins of the opinion in the writings of the notable Weimar theorist Rudolf Smend or in the post-War legal theory of the eminent constitutionalist Günter Dürig.[6]

In an article published over twenty years ago, I undertook a doctrinal analysis of *Lüth*, along with some comparative remarks – one among several doctrinal analyses of *Lüth* that have been published by various writers over the years.[7] In the present essay, however, I do not intend to discuss the *Lüth* case from a doctrinal or theoretical perspective. Rather, I would like to approach the decision somewhat differently – as an historical

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5. *See, e.g.*, *Du Plessis v. De Klerk*, 1996 (3) SA 850 (S. Afr.); Jacco Bomhoff, Lüth's *50th Anniversary*: *Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 GERMAN L.J. 121 (2008).

6. *See* UWE WESEL, DER GANG NACH KARLSRUHE 131, 138 (2004); Wolfgang Graf Vitzthum, *Zurück zum klassischen Menschenwürdebegriff! Eine Erinnerung an Lüth, Dürig und Kant*, *in* DAS LÜTH-URTEIL AUS (RECHTS-) HISTORISCHER SICHT 349 (Thomas Henne & Arne Riedlinger eds., 2005) [hereinafter Henne & Riedlinger]; Stefan Ruppert, *Geschlossene Wertordnung? Zur Grundrechtstheorie Rudolf Smends*, *in* Henne & Riedlinger at 327-48.

7. Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989). For recent discussions of *Lüth*, *see, e.g.*, Bomhoff, *supra* note 5; Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution - The Lüth Revolution 50 Years Ago in Comparative Perspective*, 23 TUL. EUR. & CIV. L. F. 1 (2008). The Henne & Riedlinger collection, see *supra* note 6, presents a wealth of historical information on the *Lüth* case and contains numerous doctrinal reflections on the decision as well.

artifact in what might broadly be called the denazification of German law and society after World War II.

First, let me sketch the facts of the case. During World War II, the well-known German actor Veit Harlan directed a film entitled *Jud Suess*, which is generally acknowledged to have been the most vicious anti-Semitic film of the Nazi era. Working under Nazi propaganda minister Joseph Goebbels, Harlan was also a co-author of the screenplay. Veit Harlan became a "leading representative" of the film industry in the "Third Reich," and *Jud Suess*, which was seen by twenty-two million viewers, was the greatest commercial success of the Nazi period.[8] Many observers believe that this anti-Semitic film was intended by Nazi officials to prepare the way for the coming of the Holocaust.[9]

After the War, Harlan faced prosecution as a result of his work on *Jud Suess*. A criminal court ultimately found that Harlan's work on the film did indeed constitute a crime against humanity, but he was acquitted on the grounds that he was acting under Goebbels' orders. He was also exonerated in denazification proceedings.

In 1950, Veit Harlan made his post-War debut as a director with a new film entitled "Immortal Beloved." Erich Lüth, a city official in Hamburg who had worked for the post-War reconciliation of Christians and Jews in Germany, was incensed that the notorious director of *Jud Suess* could simply re-emerge on the scene, apparently unscathed. Accordingly, Lüth issued public statements calling for a boycott of Harlan's new film, and these statements accelerated a protest movement against the film throughout Germany.[10] In response, the distributors of *Immortal Beloved* filed a civil action against Lüth, and the civil courts – invoking Article 826, one of the famous "general clauses" of the German Civil Code – issued an injunction prohibiting Lüth from repeating his call for a boycott. After an unsuccessful appeal in the civil court system, Lüth filed a complaint in the Constitutional Court, asserting that the civil courts had violated his

8. PETER REICHEL, VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND: DIE AUSEINANDERSETZUNG MIT DER NS-DIKTATUR VON 1945 BIS HEUTE 131 (2001); WESEL, *supra* note 6, at 133.

9. *Id.* at 132-33.

10. Arne Riedlinger, *Vom Boykottaufruf zur Verfassungsbeschwerde, in* Henne & Riedlinger, *supra* note 6, at 149.

constitutional rights of free expression.

In what has been called the "most important" decision of the Constitutional Court with respect to constitutional rights,[11] the Court ultimately found that the injunction against Lüth violated his constitutional rights of free expression. More specifically, the justices found that constitutional rights exercised a very great "influence" on cases of private law and that, in the process of balancing that the Court required for cases of this type, Lüth's rights of free expression outweighed the countervailing interests of the film distributors.

The Constitutional Court today is one of the most important of all German institutions. But at the time of *Lüth*, it was still an experiment that did not evoke universal approbation or respect. Moreover, beyond the Constitutional Court, there was a populace which just a few years earlier – as one German scholar has put it – would have elected Hitler overwhelmingly "even in a free and secret election."[12]

No doubt there were many unreconstructed Nazis within German society of the early post-War era, but such views were rarely disclosed in public discourse.[13] Rather, two particularly pronounced trends seem to be discernable in the mentalities of the divided West German society of the 1950s. Certainly, there were many intermediate views, but I think a description of the two polar positions captures something quite important about the period.

In the first group were people who sought continuity with the past, including even aspects of the Nazi past, and were willing either to forget the more painful aspects of that past, or to say that what had happened was really not so bad – that in many ways the Nazi state had been a "normal" state – and the great sweep of German history was more important.[14] An ingrained

11. WESEL, *supra* note 6, at 131.

12. Norbert Frei, *Hitlers Eliten nach 1945-eine Bilanz, in* NORBERT FREI *et al.*, KARRIEREN IM ZWIELICHT: HITLERS ELITEN NACH 1945 at 303 (2001).

13. "[A]s a major force in political life, [Nazism] had been and remained defeated and discredited." Jeffrey Herf, *Multiple Restorations: German Political Traditions and the Interpretation of Nazism*, 26 CENT. EUR. HIST. 21, 24 (1993).

14. *See, e.g.*, JOACHIM PERELS, DAS JURISTISCHE ERBE DES "DRITTEN REICHES" 19 (1999) (criticizing the view of many German jurists in the 1950s that, in its general tendency, the Nazi regime was a "normal" state); FRITZ

nationalism often lay behind this position, and it was sometimes accompanied by authoritarian political views. For lack of a better term, we could adopt a widely employed (albeit controversial) term in the historical literature and call this complex of ideas the "Restorationist" view.

The opposing view – which we can call the "Reconstructionist" view – was frequently held by persons who had long opposed the Nazis, and it paralleled the evident goals of the western occupation forces. According to this view, a completely new beginning was necessary. The crimes and aggressions of the Nazi regime – and the complicity of the populace – showed that German politics and society must be broadly reconstructed in order to mark a complete break from the past.[15] As time went on, a movement of "Americanization" in Germany, which was already evident in the 1950s, seemed to reinforce these Reconstructionist views by impelling even traditional structures to develop in a more open and democratic direction.[16]

Of course, decisions of courts may often reflect tendencies of thought in society; it is perhaps no surprise that in its early years the Constitutional Court appeared to reflect aspects of each of these polar views at different times. These cases may suggest that in severely split societies courts can hold opposing positions in a kind of equipoise – until perhaps, eventually, one view prevails.

Certainly, in its first seven years leading up to *Lüth*, the Constitutional Court adopted views that seemed to fall on both sides of this divide. In a strong Reconstructionist decision in 1952, for example, the Court banned the SRP, a neo-Nazi group whose large crowds and (relatively modest) electoral successes had alarmed the occupying Allies.[17] In its influential opinion in this case, the Court developed the concept of the "free democratic basic

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STERN, FIVE GERMANYS I HAVE KNOWN 197-98, 211 (2006) (noting the "collective amnesia" of many Germans in the early post-War years).

15. *See, e.g.*, KONRAD H. JARAUSCH, AFTER HITLER: RECIVILIZING GERMANS, 1945-1995, at 6 (Brandon Hunziker trans., 2006).

16. *See* Diethelm Prowe, *The "Miracle" of the Political-Culture Shift*, *in* THE MIRACLE YEARS: A CULTURAL HISTORY OF WEST GERMANY, 1949-1968, at 451-57 (Hanna Schissler ed., 2001).

17. 2 BVerfGE 1 (1952); *see* NORBERT FREI, ADENAUER'S GERMANY AND THE NAZI PAST: THE POLITICS OF AMNESTY AND INTEGRATION 251-76 (Joel Golb trans., 2002).

order" (*freie demokratische Grundordnung*), the irreducible elements of constitutionalism that must be protected against political parties that seek to impair or abolish the constitution. The governing documents of the SRP apparently did not expressly advocate National Socialist doctrine, and the Court reached out to find convincing parallels between statements, structures, and rituals of the SRP and those of Hitler's Nazi party itself.

In contrast, the Constitutional Court seemed to adopt Restorationist views in 1957, when it found – rather surprisingly – that Hitler's Concordat with the Vatican (which had helped stabilize the Nazi regime in 1933) was actually still in effect under the law of the Federal Republic – although federalism somewhat limited the treaty's reach.[18] In the course of this opinion, the Court – also surprisingly – accepted the validity of the Enabling Law (*Ermächtigungsgesetz*) of 1933, under which the remnants of the Weimar parliament transferred dictatorial powers to Hitler.[19] In the same opinion, however, the Court emphasized that the federalism of the Basic Law represented a sharp break from the "unitary state" of the Nazi dictatorship.[20]

In the famous *KPD* case of 1956,[21] the Court banned the West German Communist Party, under the principles of the *SRP* case. In the *KPD* decision, the Court adopted the Restorationist doctrine that the "German Reich" – a somewhat mystical overarching construct of German statehood – had not disappeared with the surrender at the end of World War II but rather continued on in international and domestic law.[22] The doctrine of the "continuing Reich" was accepted by the great majority of the German professors of public law – many of whom had remained in their positions under the Nazis and continued on undisturbed in

18. 6 BVerfGE 309 (1957). On the history of the Concordat, *see* HAJO HOLBORN, A HISTORY OF MODERN GERMANY 1840-1945, at 743 (1969).

19. 6 BVerfGE at 330-31. The validity of the Enabling Law was arguably necessary as a prerequisite for the validity of the Concordat, because the Enabling Law removed any requirement of parliamentary approval of the treaty (an authorization that was not sought or obtained). *Id.* at 331. Although the Enabling Law was not consistent with the Weimar Constitution, the Court found that it was valid "as a step in the revolutionary founding of the national-socialist rule of force." *Id.*

20. *Id.* at 360-61.

21. 5 BVerfGE 85 (1956).

22. *Id.* at 126-27.

the Federal Republic.[23] Writing from exile, the great legal philosopher Hans Kelsen was one of the few to assert the Reconstructionist doctrine that the German state had disappeared at the end of the War and that any new German state would be a completely new entity.[24]

A particularly dramatic battle between the Restorationists and the Reconstructionists focused on the fate of the Nazi civil service.[25] According to the Restorationist view, the civil service survived the Nazi period intact, and therefore Nazi civil servants were constitutionally entitled to employment, pensions, and related benefits in the Federal Republic. In contrast, the Reconstructionist view was that the civil service had been so debased that it was nothing more than an arm of the Nazi regime, and thus it came to an end upon that regime's demise – with the result that Nazi civil servants possessed no entitlements under the Basic Law.

In its great *Civil Service* decision in 1953,[26] the Constitutional Court strongly adopted the Reconstructionist position, cutting off any constitutional claims of Nazi civil servants. Interestingly, this decision might seem to be inconsistent with the doctrine of the continuing German "Reich", expressed in the (slightly later) *KPD* opinion as noted above, but the decision rested primarily on the Court's understanding of the special nature of the German civil service, rather than on any broader doctrines of continuity or discontinuity of the state itself.

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23. *See, e.g.*, Joachim Perels, *Zur Rechtslehre vor und nach 1945*, *in* KONTINUITÄTEN UND ZÄSUREN: RECHTSWISSENSCHAFT UND JUSTIZ IM "DRITTEN REICH" UND IN DER NACHKRIEGSZEIT 135-36 (Eva Schumann ed., 2008); Michael Stolleis, *Die Staatsrechtslehre der fünfziger Jahre*, *in* Henne & Riedlinger, *supra* note 6, at 298.

24. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L. L. 518 (1945); Hans Kelsen, *The International Legal Status of Germany to be Established Immediately upon Termination of the War*, 38 AM. J. INT'L L. 689 (1944).

25. This story has been cogently recounted in Hans W. Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 J. POL. 421, 430-48 (1961); Hans W. Baade, *Hoggan's History-A West German Case Study in the Judicial Evaluation of History*, 16 AM. J. COMP. L. 391, 398-401 (1968). *See also* Jörg Menzel, *Vergangenheitsbewältigung in der frühen Judikatur des Bundesverfassungsgerichts: Beamten- und Gestapo-Urteil*, *in* Henne & Riedlinger, *supra* note 6, at 225-35.

26. 3 BVerfGE 58 (1953); *see also* 3 BVerfGE 288 (1954) (*Soldiers Case*).

The German constitutionalists almost unanimously opposed the *Civil Service* decision.[27] Moreover, in a strong Restorationist opinion, the highest civil and criminal court (the BGH) challenged the Constitutional Court on this issue.[28] In the famous *Gestapo* case,[29] however, the Constitutional Court responded to this judicial "test of power" (*Machtprobe*)[30] with a stern rebuke to the BGH. In this decision, the Court also took the occasion to emphasize that the Nazi civil service had been directly implicated in carrying out wide-spread measures of oppression against Jews and other groups.[31] Thus, in the Constitutional Court, the Reconstructionist view clearly prevailed on this issue. But, in the country at large, the Restorationists had the last laugh, because the German parliament had passed a statute that restored many rights to former members of the Nazi civil service and eased the return of many former party members into bureaucratic positions.[32]

Against this background, therefore, we can see that the *Lüth* case also posed an important struggle between the Restorationists and the Reconstructionists.[33] Veit Harlan himself was a prime Restorationist figure: in his effort to reestablish his career in post-War Germany, he was drawing upon his fame as director of the notorious film *Jud Suess* and other works of the Nazi period. The implied message of Harlan's re-emergence was that his activity in the "Third Reich" – his key participation in the anti-Semitic propaganda machine – was really not so bad and could be forgotten or, even worse, was commendable and should count in

27. Baade, *Social Science Evidence*, *supra* note 25, at 442-43. A few Reconstructionist voices defended the opinion. One noted article called it "a German Magna Carta of self-reflection," which "tears away" the "veil of forgetting" that covers the Nazi era. Reinhold Kreile, *Eine Deutsche Magna Charta der Selbstbesinnung*, 9 FRANKFURTER HEFTE 83, 85-86 (1954).

28. 13 BGHZ 265 (1954).

29. 6 BVerfGE 132 (1957).

30. Menzel, *supra* note 25, at 227.

31. *See* FREI, ADENAUER'S GERMANY, supra note 17, at 63. For a highly interesting discussion of the *Civil Service* and *Gestapo* decisions as forerunners of *Lüth* in the Court's effort to confront the Nazi past, see Menzel, *supra* note 25, at 232-35. Menzel notes that the *SRP* case could also be included in this context. *Id.* at 235 n.35.

32. FREI, ADENAUER'S GERMANY, *supra* note 17, at 41-66; *see* GRUNDGESETZ [GG] (Constitution) Art. 131 (Ger.).

33. *See, e.g.*, Riedlinger, *supra* note 10, at 151-56.

his favor.[34] Of course, it was precisely this "Restoration" that Lüth was trying to prevent in his call for a boycott of Harlan's new film.

In this light, the decision of the Constitutional Court, protecting Lüth's call for a boycott, was a victory for the Reconstructionist point of view. Indeed, it was a Reconstructionist decision of the first magnitude.

Perhaps most important was the simple historical fact that Lüth (the fighter for reconciliation between Jews and Christians in Germany) prevailed over the director of a notorious anti-Semitic film under the Nazis. This fact had tremendous symbolic value in a period still not far removed from the end of the Nazi regime and, indeed, the Court's opinion pointedly emphasized Lüth's activities toward reconciliation. Indeed, by reversing a decision that favored Veit Harlan, "one of the propagandists of the Holocaust," the Court overturned a judgment that otherwise would have stood as "a posthumous insult and disparagement of the victims of persecution."[35]

Moreover, the *Lüth* opinion is replete with other messages of a new constitutional beginning. First, the opinion in *Lüth* clearly recognized the authority of constitutional law over the ordinary civil law. In the United States today, such a conclusion seems almost self-evident[36] – but it was far from self-evident in Germany at the time. The German Civil Code (with its Roman law origins) had a deep tradition, and Lüth's opponents argued that the constitution – as a form of "public law" – was simply inapplicable to disputes of private law. In a nuanced argument of profound importance for the future of German constitutional law, the Court rejected this retrograde position.

In a second crucial argument for the future, the Court took pains to establish the freedom of speech as a serious and enforceable constitutional right – a step that also marked a dramatic turning away from the Wilhelmine, Weimar and (of

34. Public protests against Harlan's new film were frequently met by anti-Semitic responses from onlookers. *Id.* at 153, 170-72, 174; *see also* WESEL, *supra* note 6, at 135.

35. Friedrich Kübler, *Lüth: eine sanfte Revolution*, 83 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 313 (2000).

36. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

course) the Nazi past. Moreover, this step required a heroic re-writing of the Basic Law. The Basic Law indeed protected the freedom of expression, but it also appeared to declare that a "general law" of Parliament could ordinarily remove that protection.[37] In a highly inventive interpretation (actually, a revision) of the text, the Court found that a "general law", which might seem to limit the freedom of expression, is itself limited by that constitutional right. In the Court's view, the result of this reciprocal limitation was that even a "general law" could not limit the freedom of expression if, under the circumstances, the values of speech prevailed in a general balancing of relevant interests. Notably, as an introduction to this adoption of constitutional balancing, the Court quoted (in English) the words of Justice Cardozo declaring that the freedom of expression is "the matrix, the indispensable condition of nearly every other form of freedom."[38] In perhaps another sign of adherence to western constitutional values, the Court also quoted relevant language from the French Declaration of Rights of 1789.

In undertaking the required balancing in *Lüth*, the Court also sounded the theme of a new beginning – endorsing Lüth's desire to exclude Harlan's film as an appropriate sign to the world that Germany had turned away from the Nazi past, and declaring that Lüth's work in seeking reconciliation between Christians and Jews gave legitimacy to his words.[39]

In the 1950s the Restorationist view probably remained the majority position in German politics and society. If so, the Constitutional Court, with its mixture of Restorationist and Reconstructionist opinions – with the balance falling on the Reconstructionist side – can be seen as a generally progressive force of that period. But ambivalence remained, for example, in the famous *Spiegel* case of 1966, in which the Court upheld – by an equally divided vote – a highly intrusive police raid on a

37. Art. 5 (1), (2) GG. Under Art. 19 (2) GG, protection could not be removed if the "essential content" of the right would be impaired. But, as Professor Currie notes, Art. 19 (2) seems to have had only a minor impact. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 178-81 (1994).

38. 7 BVerfGE at 208 (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

39. 7 BVerfGE at 216-18.

journal's editorial offices, which evoked memories of the Nazi past.[40]

The upheavals of 1968, and the advent of the first Social Democratic government a year later, seemed to mark a turn to "more democracy" in West German political life. But, swinging to the right, the Constitutional Court struck down several Social Democratic reforms.[41]

Even the doctrinal foundations and historical meaning of *Lüth* were called into question in 1971 when the Court (again by an equally divided vote) upheld a judgment banning a novel by an author who had fled the Nazis, on the grounds that it defamed a noted collaborator with the Nazi regime.[42] The author was Klaus Mann, son of the great writer Thomas Mann. The novel was *Mephisto*, a thinly-veiled criticism of Gustaf Gründgens, a famous actor of the Weimar era who continued his eminent career under the Nazis as a protégé of Luftwaffe commander Hermann Göring.[43]

Like Harlan, Gustaf Gründgens was a major Restorationist figure who, notwithstanding his intimate collaboration with the Nazis, seamlessly assumed a leading role in the post-War German theater. But in *Mephisto*, in contrast with *Lüth*, the interests of the Restorationist figure prevailed, and the work of an opponent of the Nazi regime, who had been forced into exile, was not protected. The result was that an important contemporary critique of artists and intellectuals who had collaborated with the Nazi regime was banned in post-War Germany for several years.

Moreover, as far as constitutional doctrine was concerned, the prevailing position in the *Mephisto* case seemed, in comparison

40. 20 BVerfGE 162 (1966). In German constitutional procedure, an equally divided vote of the Constitutional Court results in upholding the governmental action that was challenged as unconstitutional.

41. *See* 48 BVerfGE 127 (1978) (striking down liberalized procedure for claiming conscientious objector status); 39 BVerfGE 1 (1975) (striking down abortion reform law); 35 BVerfGE 79 (1973) (striking down aspects of university reform).

42. 30 BVerfGE 173 (1971) (*Mephisto*). *See* Menzel, *supra* note 25, at 234.

43. The novel's protagonist, the Nazi collaborator "Hendrik Höfgen," was recognizably a portrait of Gründgens. The novel was found defamatory because Höfgen was portrayed as performing certain discreditable acts that Gründgens apparently had not performed. As both Gründgens and Klaus Mann died before the Constitutional Court litigation, the actual parties in the case were Gründgens' adopted son and the publishers of *Mephisto*.

with *Lüth*, to depreciate the importance of freedom of expression (here characterized as artistic freedom).[44] The prevailing opinion also depreciated the strength of constitutional law in comparison with the ordinary private law, by deferring substantially to the ordinary private law courts in the balancing of constitutional and private law interests. This deference contrasted sharply with *Lüth*, in which the Court fully reviewed the private law judgment and reversed on the grounds that Lüth's constitutional rights had not been adequately protected.[45]

More recently, the change of generations has heralded a liberalizing trend in expanding rights of speech and religion in the Constitutional Court.[46] Yet, even today, there seem to be some remnants or, one might say, vestiges of Restorationist views – for example, in the Court's assertions of the inviolability of "German statehood" (cast in terms of protection of democracy) in the *Maastricht* and recent *Lisbon Treaty* decisions.[47] Indeed, these ideas may well be related to the ethnic definition of German citizenship, one of the most Restorationist aspects of the original Basic Law.[48]

Comment on the *Maastricht* and *Lisbon* decisions brings us essentially to the present. A retrospective view of this 60-year sweep of history shows – as we would expect – that, in general the Constitutional Court has largely turned away from Restorationist views and something like Reconstructionist doctrine has prevailed. Yet the occasional persistence of what seem like distinct echoes of old Restorationist doctrine remains a possible cause for concern. In the Constitutional Court, it seems, the book

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44. *See* Art. 5 (3) GG.

45. In another contrast with *Lüth*, the Court in *Mephisto* seems to have ignored the fact that Klaus Mann had been forced into exile by the Nazis and then had been a vigorous opponent of the Nazi regime. In *Lüth*, in contrast, the Court had given significant weight to Lüth's rejection of the Nazi past – his efforts toward reconciliation of Christians and Jews. *See generally*, 30 BVerfGE at 224-27 (dissenting opinion of Justice Rupp-v. Brünneck); Menzel, *supra* note 25, at 234.

46. *See, e.g.*, 93 BVerfGE 266 (1995) (constitutional protection for slogan "Soldiers are murderers"); 93 BVerfGE 1 (1995) (Crucifix in public school classrooms violates rights of dissenting parents); *see also, e.g.*, 109 BVerfGE 279 (2004) (expansion of rights against electronic surveillance).

47. 89 BVerfGE 155 (1993) (*Maastricht*); 123 BVerfGE 267 (2009) (*Lisbon*).

48. *See* Art. 116 GG.

is not yet completely closed on these questionable doctrines of the past.