Case:

BVerfGE 30, 173
Federal Constitutional Court (First Division)

Date:

24 February 1971

Translated by:

J. A. Weir

Reasons:

The complainant seeks constitutional review of the injunction obtained by the adopted son and sole heir of Gustaf Gründgens, actor and theatre director, against the printing, distribution, or publication of a book by Klaus Mann entitled Mephisto, a Novel, or How to Get on in the World.

The author left Germany in 1933 and published the novel in Amsterdam in 1936 (Querido Verlag). Seven years after his death in 1949 it was published in East Germany.

The novel portrays the rise of Hendrik Höfgen, a talented actor who in order to make a career for himself as an artist in collusion with Nazi powers, is false to his true political leanings and rides roughshod over all human and ethical considerations. The psychological, intellectual, and sociological factors which made such a career possible are all laid out.

The model for Hendrik Höfgen was the actor Gustaf Gründgens, one of the Hamburger Kammerspieler in the 1920s, when he was a friend of Klaus Mann and briefly married to his sister Erika. Gründgens and his career are reflected in numerous characteristics of Hendrik Höfgen, including his physical appearance, the plays he acted in, and his appointments as State Councillor and Director-General of the State Theatre of Prussia.

Of the relationship between the fictional Höfgen and the real Gründgens Klaus Mann wrote in The Turning Point (New York, 1942):

I visualize my ex-brother-in-law as the traitor par excellence, the macabre embodiment of corruption and cynicism. So intense was the fascination of his shameful glory that I decided to portray Mephisto-Gründgens in a satirical novel. I thought it pertinent, indeed, necessary to expose and analyse the abject type of the treacherous intellectual who prostitutes his talent for the sake of some tawdry fame and transitory wealth.

Gustaf was just one among others—in reality as well as in the composition of my narrative. He served me as a focus around which I could make gyrate the pathetic and nauseous crowd of petty climbers and crooks.

In the revised version which appeared in Germany in 1948 (Der Wendepunkt), we find at p. 334:

The third book published during my exile, in 1936, Mephisto, deals with an unsympathetic character. Why did I write it? The actor I portray has talent, but not much else going for him. He has none of those moral qualities which form what is commonly spoken of as ‘character’.

Instead of ‘character’ Hendrik Höfgen has only ambition, vanity, passion for publicity and desire for effect. He is not a man but a posturer.

Was such a figure worth writing a novel about? Yes, indeed. For the posturer represents and symbolises the regime, posturing, false and unrealistic. In a state run by liars and dissemblers the actor has a triumphant role. Mephisto is the story of a career in the Third Reich.

In a perceptive review in Das Neue Tagebuch in 1937 Herman Kesten rightly suggested that perhaps the author wanted to show a real actor among the bloody amateurs in the horror play. He went on: ‘The author goes further: he gives us a paradigm of the “fellow-traveller”, one of the millions of petty crooks who themselves commit no grand crime but sup with murderers, not principals but accessories after the event; they do not kill but conceal the corpse, and in order to get more than they deserve lick the blood of the innocent from the boots of the mighty. This host of petty toadies and bootlickers are the prop of the powerful.’

This is exactly the type I wanted to draw: I couldn’t have stated my intentions better myself. Mephisto is not, as some people have maintained, a roman-à-clef. The infamously brilliant and cynically ruthless go-getter, who is the central figure of my satire may have certain traits in common with a certain real actor still allegedly with us. Is my character Councillor and Director-General Höfgen a portrait of the friend of my youth, Councillor and Director-General Gründgens? Not entirely. There are many differences between Höfgen and my erstwhile brother-in-law. But even if the character were closer to the original than it is, Gründgens is not the ‘hero’ of my tract for the times, since it is not about an individual at all but about the type. Others could have served as a model just as well. My choice fell upon Gründgens not because he was outstandingly awful (indeed he was rather better than many another idol of the Third Reich) but simply because I happened to know him well. It was precisely our earlier acquaintance which led me to make a novel out of the incredible, fascinating and fantastic story of his rise and fall.

II.

1. In August 1963 the complainant announced the publication of Mephisto, and suit was brought by the adoptive son and sole heir of Gustaf Gründgens, who died in October 1963. The claim alleged that anyone at all familiar with German theatre in the 1920s and 1930s would link Höfgen with Gründgens; that in addition to many recognizable facts the novel contained many hurtful fictions which helped to give a false and highly derogatory picture of Gründgens’s character. The novel was not a work of art but a roman-à-clef written to avenge Gründgens’s marriage to Mann’s sister Erika, which he believed dishonourable.

The plaintiff sought an injunction forbidding the reproduction, distribution, and publication of Mephisto on pain of punishment.

The claim was rejected by the Landgericht Hamburg. Thereupon, in September 1965, the complainant published the novel with a foreword stating ‘All characters in this novel are types, not portraits. K.M.’ On 23 November 1965 the plaintiff obtained an interlocutory injunction from the Hanseatic Oberlandesgericht in Hamburg and the following foreword was included:

to the reader

Klaus Mann wrote this novel in Amsterdam in 1936, having left Germany voluntarily on grounds of conscience. In it he gives a critical view, animated by his hatred of Hitler’s dictatorship, of contemporary conditions in the German theatre. While there are undeniable resemblances to actual figures of the day, the characters are primarily creatures of the author’s imagination. This is especially true of the principal character, whose conduct and

beliefs are at any rate largely imaginary. That is why the author prefaced the book with the explanation: ‘All characters in this work are types, not portraits.’

…

This Court must determine whether in applying the rules of private law the judicial decisions under attack misconceived the meaning of the basic rights of whose infringement the complainant complains or infringed the basic rights themselves [references]. Such constitutional ‘fall-out effects’ depend principally on the scope of the right to artistic freedom (Art. 5 III, 1 GG) and the right to freedom of expression (Art. 5 I GG), and especially on the relationship between these rights and the protection afforded by these decisions to the human personality of the late Gustaf Gründgens under Art. 1 I and 1 II, 1 GG.

III.

Art. 5 III, 1 GG declares that along with science, research, and teaching, art is free. By its terms and intention the guarantee in Art. 5 III, 1 is an objective value-laden basic norm regulating the relationship between art and the state. It also guarantees the individual freedom of the artist.

1. The field of ‘art’ must be determined by the distinctive structural features of the artistic enterprise. The essence of artistic endeavour lies in the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced. Artistic activity involves both the conscious and the unconscious, in a manner not rationally separable. Intuition, imagination, and knowledge of the art all play a part in artistic creation; it is not so much communication as expression, indeed the most immediate expression of the artist’s individuality.

The freedom guaranteed covers the artistic creation as regards both the work produced and the effect produced by it. The two form an indissociable unity. The exhibition and dissemination of the work are as important as its creation for art as the specifically artistic enterprise; indeed, the ‘area of effect’, public access to the work of art, is the ground in which Art. 5 III GG is rooted. A glance back at the artistic policy of the Nazi regime shows that to guarantee merely the individual rights of artists cannot ensure the freedom of art: the basic right would prove hollow unless it extends from the personal zone of the artist to the area of impact.

2. It is not here possible to give an exhaustive definition of the scope of the constitutional guarantee of freedom of art in all its various forms. Nor is it necessary for the case in hand, since it is common ground in the courts below, between the parties and probably all experts, that the novel in question ranks as a work of art. We may therefore concentrate on factors relevant to the appraisal of an example of the narrative art which by dealing with actual events courts the risk of conflicting with the rights and interests of the persons portrayed.

In putting real events in a work of art the artist ‘recreates’ them for he sunders them from their actual context and places them in a novel setting dominated by his concern for striking presentation rather than by their own actuality. Artistic unity may, and sometimes must, prime the truth of the occurrence.

The role and purpose of Art. 5 III, 1 GG is above all to give protection against encroachment by the public power on any specifically artistic undertakings, actions, and decisions. One cannot without inhibiting the free development of the creative artistic endeavour prescribe how the artist should react to reality or reproduce his reactions to it. The artist is the sole judge of the ‘rightness’ of his response. To this extent the guarantee of artistic freedom means that one must not seek to affect the manner in which the artist goes about his business, the material he selects, or the way in which he treats it, and certainly not seek to narrow the area in which he may operate or lay down general rules for the creative process.

As to narrative works of art the constitutional guarantee means that the artist must be free to choose and treat his topic free from attempts by the state to limit the area of specifically artistic judgment by rules or binding value-judgments. This applies also, indeed especially, when the artist is dealing with actual events: 'committed art' is not excluded from the constitutional guarantee.

3. Art. 5 III, 1 GG is a comprehensive guarantee of the freedom of artistic activity. Thus where intermediaries are needed in order to establish relations between the artist and the public they too are protected by the constitutional guarantee. As a product of the narrative art needs to be reproduced, distributed, and published in order to have any effect on the public, the publisher's function as intermediary is indispensable, so the constitutional guarantee extends to his activity as well. Thus, as publisher of the novel, the complainant may invoke the basic right contained in Art. 5 III, 1 GG (see also BVerfGE 10, 118, (121); 12, 205 (260) on the freedom of the Press).

4. Art having its special nature and rules, its guarantee by Art. 5 III, 1 GG is absolute. The clear terms of that provision foredoom any attempt to limit it, whether by narrowing the idea of art in the light of one's value-judgments or by extending or invoking the limitations applicable to other constitutional provisions.

The Bundesgerichtshof was quite right to state that Art. 5 II GG which limits basic rights under Art. 5 I is inapplicable here. The different guarantees in Art. 5 GG are systematically separated, and this shows that the limitations in Art. 5 II are inapplicable to matters covered by Art. 5 III, since Art. 5 III is a lex specialis in relation to Art. 5 I. Nor is it acceptable to sever parts of a narrative work of art, call them expressions of opinion under Art. 5 I and then apply to them the limitations laid down in Art. 5

II. Nor do the travaux préparatoires of Art. 5 III support the view that the authors of the Constitution regarded freedom of art as a subspecies of freedom of expression or opinion.

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Nor can one accept that the freedom of art is limited under Art. 2 I, 2 GG by the rights of others, by the constitutional order or by the moral law. Such a view would be incompatible with the constant holding of this Court that Art. 2 I GG is subsidiary and the individual freedoms special [references] in a manner which bars the extension of the community priority of Art. 2 I, 2 GG in the light of the use of Art. 2 I GG. Nor are these limitations applicable to the area of effect of works of art.

5. Yet there are limits to this freedom. The freedom incorporated in Art. 5 III, 1 GG, like all basic rights, is rooted in the Constitution's conception of man as a responsible person free to develop within society [references]. The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself. The freedom of art is not subject to mere statute, it cannot be qualified by the general legal system or be at the mercy of any vague clause about essential interests of state and society which lacks constitutional basis and is uncontained by the rule of law. If the guarantee of artistic freedom gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law and in line with the unitary system of values which underlies it. As part of this system of basic rights the freedom of art is co-ordinate with the dignity of man as guaranteed by Art. 1 GG, the supreme and controlling value of the whole system of basic rights (BVerfGE 6, 32 [41]; 27, 1 [6]). Given the effect which a work of art may have on the social plane, the guarantee of artistic freedom may come into conflict with the area of human personality, equally protected by the Constitution.

A person's claim to respect and value may be affected by an artist's use of details of character and career of actual people as in addition to being an aesthetic reality, such a work also has existence in the realm of social facts and the social effects are not dissipated by

being artistically transmuted. Such social effects while taking place beside the artistic effects must nevertheless be appraised with regard to the scope of the guarantee of Art. 5 III, 1 GG, since in the work of art the 'real' and 'aesthetic' worlds are unified.

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

In addition the Bundesgerichtshof and Oberlandesgericht held that Art. 2 I GG also had radiant protective effects in private law for Gründgens, though to a degree diminished by his death. However, only a living person is so entitled: the right of personality cannot survive death. An essential precondition of the basic right under Art. 2 I GG is the existence of at least a potential or a future person. It is irrelevant that a person may be affected during his lifetime by what the legal situation will be after his death, though this weighed with the Bundesgerichtshof. It is no derogation from the freedom of action and self-determination guaranteed by Art. 2 I GG to hold that the protection of the personality expires on death.

7. The resolution of the tension between the protection of the personality and the right to the artistic freedom cannot turn solely on the 'social' effects of a work of art but must also take account of specifically aesthetic considerations. The conception of man which underlies Art. 1 I GG is as much infused with the guarantee of freedom in Art. 5 III, 1 GG as the latter is influenced by the value implicit in Art. 1 I GG. The individual's claim to social respect and value is not superior to artistic freedom, but neither can art simply ignore the individual's claim to proper respect.

Only by weighing all the circumstances of the given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his personality. One consideration must be whether and how far the artistic treatment of the material and its incorporation into the work as an organic whole have made the 'copy' independent of the 'original' by rendering objective, symbolical, and figurative what was individualized, personal, and intimate. If such an aesthetic appraisal reveals that the artist has indeed produced, or even intended to produce, a 'portrait' of the 'original', the outcome will depend on the extent of the artistic alienation and how seriously the 'falsification' damages the reputation or memory of the subject.

IV.

This Court must therefore decide whether in balancing the protection afforded by Art. 1 I GG to the personality of the late Gustaf Gründgens and his adopted son against the guarantee of artistic freedom under Art. 5 III, 1 GG the courts below have upheld the principles just stated. However, in this Court the opinions on that matter are equally divided, so it cannot hold that the decisions under attack infringed the Constitution (§ 15 II, 4 BVerfGG).

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3. This Court has always held that a Verfassungsbeschwerde empowers it to review judicial decisions only within narrow limits, and that in particular it cannot review the facts as found and evaluated, the construction of mere law or its application in the individual case, which are matters for the regular courts [references]. These principles apply equally when review is sought of the balancing of the protection afforded to the parties to a civil suit by Art. 1 I of Art. 5 III, 1 GG.

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This Court is not, like a court of appeal, empowered to substitute its own opinion of the case for that of the proper judge. In cases like these it can only hold that the basic right of the losing party has been infringed if the judge has either failed to recognize that it is a case of balancing conflicting basic rights or has based his judgment on a fundamentally false view of the importance, and especially the scope, of either of those rights.

When the judgements under attack are so tested, it emerges that the Oberlandesgericht and the Bundesgerichtshof recognized that a balancing act was required in order to resolve the tension between the rights emanating from Art. 1 I GG and Art. 5 III, 1 GG, and that the judgments as a whole do not seem to be based on a fundamentally erroneous view of the importance or scope of the two basic rights.