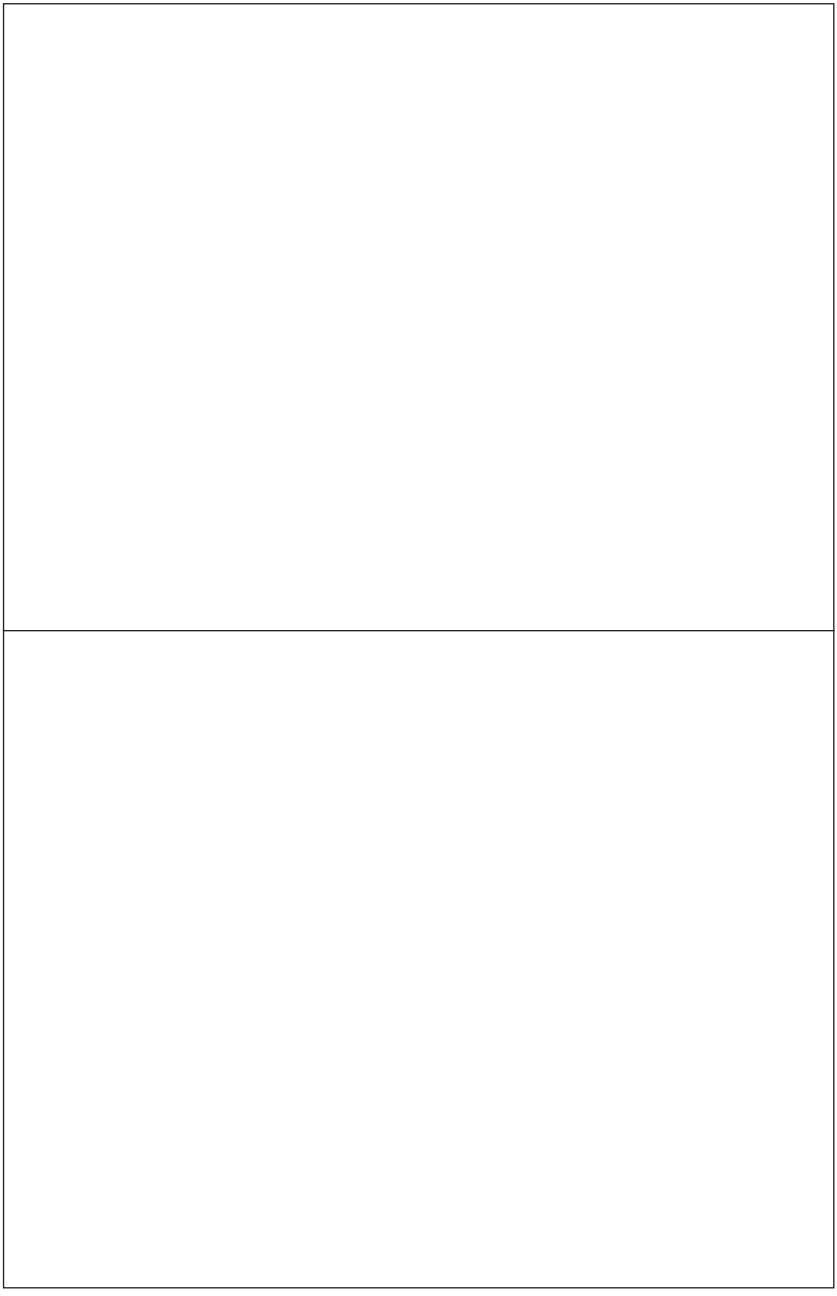
Decisions of the Federal Constitutional Court

Volume 6:
General right of personality

Nomos



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Volume 6:
General right of personality

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PREFACE

Continuing the series of Federal Constitutional Court decisions in English translation, this sixth volume is devoted to the general right of personality and thereby addresses one of the cornerstones of the Basic Law's fundamental rights architecture.

The current wording of Article 2(1) of the Basic Law stems from the well-known formulation that appeared in the Basic Law's original draft following the Constitutional Convention at Herrenchiemsee in 1948: "Every person shall be free, within the limits of the legal order and morality, to do anything that does not harm others." As the legislative history shows, this fundamental right guarantees freedom of individual action in a broad sense. This means that there is no area of life that does not fall under the fundamental rights protection afforded by the Basic Law. Where the Basic Law's more specific freedoms are not directly applicable, the general freedom of action may thus be invoked. But constitutional protection reaches even further. Building on Article 2(1) of the Basic Law in conjunction with the guarantee of human dignity enshrined in Article 1(1), it protects the free development of one's personality. Like all fundamental rights in the Basic Law, the general right of personality is not guaranteed without limitation. But because of its foundation in the right to human dignity as well, there are especially high hurdles to take. Due to the seamless nature of fundamental rights protection, any state activity that curtails individual freedoms must be justified. It is a key achievement of the state based on freedom and bound by fundamental rights that in conflicts with the individual, it is the *state* that must justify its actions, not the individual.

The general right of personality is also open to new developments, the extent of which can be seen in the decisions chosen for the present volume. The Federal Constitutional Court has derived various manifestations of this right from the Basic Law, each one defining its particular substance and significance in a different type of case. The best known of these manifestations is probably the right to informational self-determination – the core fundamental right pertaining to data protection in Germany. This is accompanied by rights of the individual to protection against false, distorting or unsolicited portrayals by others – including the right to one's own image, the right to one's own speech and a right of reply. Beyond that, the private sphere is itself protected in a manner comparable with the right to privacy under Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union – this being relevant in cases involving the use of diary-like notes as criminal evidence, the monitoring of postal correspondence, or the interception of communications in private spaces used for retreat and refuge, for example. The general right of personality furthermore guar-

antees the individual's right to self-determination in the most private aspects of personal life. It also guarantees criminal offenders a right to social reintegration and it ensures that individuals cannot be subjected to medical treatment against their will. The rapid progress of technological development and the possibilities for monitoring and surveillance arising therefrom are reflected in the right to protection of the confidentiality and integrity of information technology systems – sometimes known as the 'computer fundamental right'.

Technological advances and the resulting global interconnectivity – which make practically all the information about an individual that has ever been published anywhere on the Internet readily available at all times from anywhere on the planet – are amongst the most salient new challenges facing the general right of personality. The same can be said regarding new technical possibilities for state surveillance. In our globally interconnected world, these challenges no longer affect individual states alone but also arise in the European Union or at the international level.

It is therefore immensely gratifying both for the Federal Constitutional Court and for me personally that the Court's case-law on the general right of personality is being made more easily accessible to an international audience with this English-language volume. International cooperation is now more important than ever for tackling global challenges such as data protection. Given the need for concerted action, effective communication within the multi-level cooperation of European constitutional courts and clear dialogue with academia have a vital role to play in facilitating the development of common approaches.

May this volume contribute to the international fundamental rights discourse on the protection of personality rights.

Professor Dr. Stephan Harbarth, LL.M. (Yale)

President of the Federal Constitutional Court Karlsruhe, November 2021

ACKNOWLEDGMENTS

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All texts have been abridged. The paragraph numbers refer to the numbering used in the *juris* database.

* *longer version available on the Court's website at* www.bundesverfassungsgericht.de/EN

TABLE OF ABBREVIATIONS

A-Drucks	*Ausschussdrucksache*	*Bundestag* committee document
ARD	*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland*	ARD broadcasting corporation
AVR	*Archiv des Völkerrechts*	(law journal)
BAG	*Bundesarbeitsgericht*	Federal Labour Court
BGBl	*Bundesgesetzblatt*	Federal Law Gazette
BGH	*Bundesgerichtshof*	Federal Court of Justice
BGHSt	*Entscheidungen des Bundesgerichtshofes in Strafsachen*	Decisions of the Federal Court of Justice in Criminal Matters
BGHZ	*Entscheidungen des Bundesgerichtshofes in Zivilsachen*	Decisions of the Federal Court of Justice in Civil Matters
BND	*Bundesnachrichtendienst*	Federal Intelligence Service
BR	*Bayerischer Rundfunk*	BR broadcasting corporation
BTDrucks	*Bundestagsdrucksache*	*Bundestag* document
BTPlenarprotokoll	*Plenarprotokoll des Bundestags*	Plenary minutes of the *Bundestag*
BVerfG	*Bundesverfassungsgericht*	Federal Constitutional Court
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts*	Decisions of the Federal Constitutional Court
BVerwGE	*Entscheidungen des Bundesverwaltungsgerichts*	Decisions of the Federal Administrative Court
CDU	*Christlich Demokratische Union Deutschlands*	(German political party)

CJEU	*Gerichtshof der Europäischen Union*	Court of Justice of the European Union
CMLR	--	Common Market Law Review
CRPD	*Übereinkommen über die Rechte von Menschen mit Behinderungen (VN)*	Convention on the Rights of Persons with Disabilities (UN)
DM	*Deutsche Mark*	(former German currency)
ECtHR	*Europäischer Gerichtshof für Menschenrechte*	European Court of Human Rights
ERPL	--	European Review of Private Law
EU	*Europäische Union*	European Union
EuGRZ	*Europäische Grundrechte-Zeitschrift*	(law journal)
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*	(law journal)
FDP	*Freie Demokratische Partei*	(German political party)
GDR	*Deutsche Demokratische Republik*	German Democratic Republic
GVBl HH	*Gesetz- und Verordnungsblatt Hamburg*	Hamburg Law and Ordinance Gazette
GVBl NRW	*Gesetz- und Verordnungsblatt Nordrhein-Westfalen*	North Rhine-Westphalia Law and Ordinance Gazette
GVBl RLP	*Gesetz- und Verordnungsblatt Rheinland-Pfalz*	Rhineland-Palatinate Law and Ordinance Gazette
HR	*Hessischer Rundfunk*	HR broadcasting corporation
HRLR	--	Human Rights Law Review
IDPL	--	International Data Privacy Law
MDR	*Mitteldeutscher Rundfunk*	MDR broadcasting corporation

MHP	*Milliyetçi Hareket Partisi*	(Turkish political party)
NDR	*Norddeutscher Rundfunk*	NDR broadcasting corporation
NJW	*Neue Juristische Wochenschrift*	(law journal)
NRW	*Nordrhein-Westfalen*	North Rhine-Westphalia
OJ L	*Amtsblatt der Europäischen Union, Reihe L*	Official Journal of the European Union, L series
ORB	*Ostdeutscher Rundfunk Brandenburg*	ORB broadcasting corporation
PKK	*Partiya Karkerên Kurdistanê*	(Kurdish political party)
RDP	*Revue de droit public*	(law journal)
RTDE	*Revue trimestrielle de droit européen*	(law journal)
SDR	*Süddeutscher Rundfunk*	*SDR broadcasting corporation*
SPD	*Sozialdemokratische Partei Deutschlands*	(German political party)
SWR	*Südwestrundfunk*	SWR broadcasting corporation
UN	*Vereinte Nationen*	United Nations
WDR	*Westdeutscher Rundfunk*	WDR broadcasting corporation
ZDF	*Zweites Deutsches Fernsehen*	ZDF broadcasting corporation

TABLE OF COURT NAMES CITED

Federal Constitutional Court	*Bundesverfassungsgericht*	BVerfG
Local Court	*Amtsgericht*	AG
Regional Court	*Landgericht*	LG
Higher Regional Court	*Oberlandesgericht* (in Berlin: *Kammergericht*)	OLG
Federal Court of Justice	*Bundesgerichtshof*	BGH
Administrative Court	*Verwaltungsgericht*	VG
Higher Administrative Court	*Oberverwaltungsgericht*	OVG
Federal Administrative Court	*Bundesverwaltungsgericht*	BVerwG
Supreme Court of Bavaria	*Bayerisches Oberstes Landesgericht*	BayObLG

Accompanying Act to the Telecommunications Act	*Begleitgesetz zum Telekommunikationsgesetz*	BegleitG
Act Amending the Basic Law (Article 13)	*Gesetz zur Änderung des Grundgesetzes (Artikel 13)*	--
Act Criminalising Assisted Suicide Services	*Gesetz zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung*	--
Act Improving Hospice and Palliative Care in Germany	*Gesetz zur Verbesserung der Hospiz- und Palliativversorgung in Deutschland*	--
Act on Administrative Offences	*Ordnungswidrigkeitengesetz*	OWiG
Act on Consent by a Custodian to Coercive Medical Treatment	*Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme*	--
Act on the Surveillance of Foreign Telecommunications by the Federal Intelligence Service	*Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*	--
Act Revising Parental Care Law	*Gesetz zur Neuregelung des Rechts der elterlichen Sorge*	--
Act to Amend Civil Status Law	*Personenstandsrechts-Änderungsgesetz*	PStRÄndG
Act to Reform Civil Status Law	*Personenstandsrechtsreformgesetz*	PStRG

Art Copyright Act	*Kunsturhebergesetz*	KunstUrhG
Article 10 Act	*Artikel-10-Gesetz*	G 10
Atomic Energy Act	*Atomgesetz*	AtG
Bankruptcy Code	*Konkursordnung*	KO
Basic Law	*Grundgesetz*	GG
Census Act	*Volkszählungsgesetz*	VZG
Civil Code	*Bürgerliches Gesetzbuch*	BGB
Civil Partnerships Act	*Lebenspartnerschaftsgesetz*	LPartG
Civil Status Act	*Personenstandsgesetz*	PStG
Code of Civil Procedure	*Zivilprozessordnung*	ZPO
Code of Criminal Procedure	*Strafprozessordnung*	StPO
Counter-Terrorism Database Act	*Antiterrordateigesetz*	ATDG
Courts Constitution Act	*Gerichtsverfassungsgesetz*	GVG
Criminal Code	*Strafgesetzbuch*	StGB
Custodianship Act	*Betreuungsgesetz*	--
DNA Identification Act	*DNA-Identitätsfeststellungsgesetz*	DNA-IFG
Equal Rights Act	*Gleichberechtigungsgesetz*	--
European Convention on Human Rights	*Europäische Menschenrechtskonvention*	ECHR
Federal Constitutional Court Act	*Bundesverfassungsgerichtsgesetz*	BVerfGG
Federal Criminal Police Office Act	*Bundeskriminalamtgesetz*	BKAG

Federal Data Protection Act	*Bundesdatenschutzgesetz*	BDSG
Federal Intelligence Service Act	*Gesetz über den Bundesnachrichtendienst*	BNDG
Federal Police Act	*Bundespolizeigesetz*	BPolG
Federal Statistics Act	*Bundesstatistikgesetz*	BStatG
Fight Against Organised Crime Act	*Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität*	--
Fight Against Crime Act	*Verbrechensbekämpfungsgesetz*	--
Framework Act on Civil Registration	*Melderechtsrahmengesetz*	--
Hamburg Act on the State Treaty of the *Länder* on the North German Broadcasting Corporation	*Hamburgisches Gesetz zum Staatsvertrag über den Norddeutschen Rundfunk*	--
Hamburg Press Act	*Hamburgisches Pressegesetz*	--
Introductory Act to the Courts Constitution Act	*Einführungsgesetz zum Gerichtsverfassungsgesetz*	EGGVG
Joint Databases Act	*Gemeinsame-Dateien-Gesetz*	--
Lower Saxony Public Security and Order Act	*Niedersächsisches Gesetz über die öffentliche Sicherheit und Ordnung*	--
Microcensus Act	*Mikrozensusgesetz*	MZG
Narcotics Act	*Betäubungsmittelgesetz*	BtMG

North Rhine-Westphalia (NRW) Constitution Protection Act	*Verfassungsschutzgesetz Nordrhein-Westfalen*	VSG-NRW
NRW Police Act	*Polizeigesetz des Landes Nordrhein-Westfalen*	PolG NRW
Ordinance on the Competences of the Federal Police Authorities	*Verordnung über die Zuständigkeit der Bundespolizeibehörden*	BPolZV
Prevention of Sexual Offences and Other Dangerous Criminal Offences Act	*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*	SexualdelBekG
Prison Act	*Strafvollzugsgesetz*	StVollzG
Residence Act	*Aufenthaltsgesetz*	AufenthG
Rhineland-Palatinate Act on Psychiatric Confinement of Criminal Offenders	*Rheinland-Pfälzisches Landesgesetz über den Vollzug freiheitsentziehender Maßregeln*	MVollzG
Road Traffic Act	*Straßenverkehrsgesetz*	StVG
Statistics Act *see Federal Statistics Act*		
Telecommunications Act	*Telekommunikationsgesetz*	TKG
Telecommunications Surveillance Revision Act	*Gesetz zur Neuregelung der Telekommunikationsüberwachung*	--
Transsexuals Act	*Transsexuellengesetz*	TSG
Treaty on European Union	*Vertrag über die Europäische Union*	TEU

Treaty on the Functioning of the European Union	*Vertrag über die Arbeitsweise der Europäischen Union*	TFEU
Vehicle Registration and Licensing Ordinance	*Straßenverkehrs-Zulassungs-Ordnung*	StVZO
Weimar Constitution	*Weimarer Reichsverfassung*	WRV
Youth Courts Act	*Jugendgerichtsgesetz*	JGG

INTRODUCTORY REMARKS

What is a 'general right of personality'? Constitutional and human rights catalogues traditionally address liberty and integrity of the person, often explicitly guaranteeing political freedoms such as free speech or assembly as well as privacy interests like those associated with the home or communication. But how does constitutional law handle conflicts around deeply personal issues? How does it handle the individual's interest in being and living the way they define themselves? And how does constitutional law address data privacy and protect the integrity of one's data devices in a world that framers of constitutions did not even imagine? In German constitutional law, the Federal Constitutional Court has developed a doctrine – based on general provisions on dignity and freedom in the Basic Law – to protect a 'right of personality' in order to meet these challenges. This volume presents the leading cases in English.

The Issue

The German doctrine of the right of personality is legally complex as such, and also presents the translator with significant challenges, for several reasons. The development of this right is a rather recent phenomenon, as it is not based on long-standing, centuries-old tradition in many jurisdictions. It does not always have equivalents in other legal systems, and unlike rights like freedom of assembly or freedom of the press, the essence of the right of personality is not intuitively obvious. Even where aspects of the right of personality are recognised in national, international or European law, as in Article 8 of the European Convention on Human Rights or in Articles 7 and 8 of the Charter of Fundamental Rights of the EU, the English terminology may invoke notions of 'privacy' or a 'private life' which do not convey what is covered by the general right of personality under the German Basic Law.

Against this backdrop, translating a thematic collection of decisions offers a major advantage. With consistent terminology and the presentation of distinct lines of case-law within a broader context, it allows the reader to see the otherwise hidden DNA that informs this jurisprudence, in terms of overarching principles, themes and doctrine. The collection furthermore illustrates how legal concepts evolve over time. For instance, the notion of 'informational self-determination' emerged to address a classic conflict around census data, balancing the state's interest in collecting data against privacy interests of citizens. Today, it is a key point of reference in decisions on digital data, especially in the balancing of privacy and

security, concerning a broad range of state powers from profiling and data retention to transnational surveillance practices. As such, what seems to be a fairly recent topic can actually be traced back to much earlier lines of legal argument. Today, the general right of personality confers upon individuals the authority to decide for themselves to what extent and to whom they wish to disclose aspects of their personal life.

Translating Law

The present volume not only presents the leading cases on a foundational theme in German constitutional law. It is also a result of a formative phase in the translation work undertaken by the Federal Constitutional Court. Faced with growing interest in translations of landmark decisions, the Court initially relied almost exclusively on freelance translators. Yet to ensure consistency and to contextualise doctrinal developments in a comparative understanding of constitutionalism, the Court created a translation unit. Here, trained translators and lawyers work together and liaise closely with the Justices and their judicial clerks. The unit also meets regularly with two Justices, from both Senates of the Court, in a working group that plays a pivotal role in conceptualising translation projects. This group has produced a glossary on terminology of constitutional law that is now used in translations by the Court and beyond, since the Court actively networks with translation units of other courts, parliaments and government institutions.

One important element of the Court's efforts to translate its work into English are thematic collections of its decisions. In 1992, European and international law was an obvious choice for the first volume of a series catering to an international audience, and it proved all the more timely the year in which Germany and other European countries signed the Treaty of Maastricht establishing the European Union. Just two years earlier, in 1990, Germany had achieved national unity based on then Article 23, which thus became obsolete. In 1992, when a new Article 23 was inserted into the Basic Law to affirm the commitment to a united Europe and lay down a constitutional basis and requirements for Germany's participation in the development of the European Union, it also became clear that doctrine shapes constitutional law in many ways. Today, the wording of Article 23 reflects the principles laid down in the *Solange I* and *II* landmark decisions, both to be found in the first volume of translations published by the Court.

The subsequent volumes of thematic compilations focused on freedom of expression (volume 2, 1998), constitutional issues arising from German reunification (volume 3, 2005), freedom of religion and the law on state-church relations (vol-

ume 4, 2007) and constitutional aspects of family matters (volume 5, 2013). With its focus on the general right of personality, the sixth instalment circles back to a central notion informing the Federal Constitutional Court's mandate as a citizens' court: protecting individual self-determination and the free development of one's personality.

Mapping Personality

This volume presents 45 decisions to map the right of personality as a fundamental guarantee in constitutional law. It covers a variety of issues, requirements and standards arising from the general right of personality. Again, all decisions have been abridged in order to highlight seminal parts of the Court's reasoning, and cross-references are indicated by case names in italics (e.g. BVerfGE 65, 1 – *Census*; BVerfGE 100, 313 – *The Article 10 Act*). Yet slightly different from its predecessors, this volume does not present the translated decisions in strict chronological order. Instead, it is organised into **chapters** dedicated to a specific aspect and manifestation of the right of personality. This is not an exhaustive categorisation. As readers will quickly realise, a rigid approach would not be compatible with the Court's doctrinal concept of the general right of personality itself. Rather, the decisions each touch on several aspects of the right of personality yet are assigned to one specific chapter to best illustrate a particular issue. For instance, the three decisions concerning transsexual persons (*Transsexuals I, V, VIII*) are presented in different chapters because of their respective focus. Also, in *Caroline III*, the applicable standards regarding the protection of celebrities' private life vis-à-vis the media are consolidated on the basis of other decisions rendered by this Court as well as by the German Federal Court of Justice and by the European Court of Human Rights, interpreting Article 8 of the Convention. Overall, the chapters aim to provide a more systematic way of accessing the case-law, and guide further research.

The Starting Point: Foundations

The first chapter, entitled **Foundations**, traces the origins of the general right of personality. It derives from two fundamental rights expressly guaranteed in the German Constitution, the Basic Law. There is the general freedom of action, in Article 2(1) of the Basic Law, which is then read in conjunction with the guarantee of human dignity in Article 1(1) of the Basic Law. The underlying notion is that these guarantees interact, that they are interconnected. Indeed, such a holistic reading of the Constitution, rather than an approach that treats rights as isolated guarantees, is

a staple of constitutional interpretation by the Federal Constitutional Court, which has repeatedly recognised that fundamental rights intersect and can be mutually reinforcing. As such, the doctrine of a right of personality is a case in point.

In addition, both human dignity and the general freedom of action are central pillars of the Basic Law's fundamental architecture. Human dignity is declared inviolable in Article 1(1) of the Basic Law, meaning that it is absolutely, unequivocally and unconditionally protected. Already the message of placing this guarantee at the very beginning of the Constitution is remarkable – before laying out what the state *can* do in terms of its powers, competences and authority, the Basic Law spells out what the state *cannot* do under any circumstances: violate human dignity. While dignity is sometimes seen as just a principle, or a black box for fundamental precepts, the decisions in this volume show that it is a right, yet one of specific dimensions.

The constitutional promise behind the general freedom of action under Article 2(1) of the Basic Law provides quite the contrast. As a catch-all fundamental right, the general freedom of action in principle protects any kind of human behaviour, no matter how trivial, random, undesirable or irrational, according to an early decision by the Court which also established its power to accept challenges to any law that at least potentially violates this general right (*Elfes*). Yet as a subsidiary right, it is only applicable in cases that do not fall within the scope of the more specific freedoms listed in the Basic Law. And very much unlike human dignity, this freedom does not enjoy absolute protection. Generally speaking, limitations may derive from the constitutional order, which in this context refers to the entirety of laws and rules that make up the legal order, and from the rights of others or moral law. Nevertheless, this right to freedom of action ensures that no area of human life is excluded from fundamental rights protection per se, and that the burden of justification rests firmly with the state. The Federal Constitutional Court combined these two rights to conceptualise the general right of personality. It is based on the notion that human dignity and the free development of one's personality lie at the centre of the Basic Law's system of values. As an additional, 'non-listed' freedom, the general right of personality affords protection to certain domains of personal life not covered by the specific guarantees in the fundamental rights norms beyond Article 2.

This rationale underpinning the relevant case-law is outlined in the **Foundations** chapter. The Court held early on that the Basic Law recognises, for each individual, an inviolable part of private life that is beyond the reach of public authority (*Micro-census*). This inviolable core of private life reflects the human dignity dimension.

As summarised in *Eppler*, the general right of personality further guarantees the personal sphere close to the core of private life, as well as its basic conditions, which are not entirely protected by the traditional and 'listed' specific freedoms. Most notably, the Court saw the need for more comprehensive protection with regard to developments in media and technology that pose new risks to one's personality. The link to human dignity implies that the domains protected are defined more narrowly than those covered by the general freedom of action. As protected domains, the Court recognised the private and intimate sphere (*Transsexuals I*), one's own image and one's own speech (*Secret Tape Recordings*) as well as one's portrayal in public and the protection against false or fabricated statements being attributed to one's person (*Eppler*, *Soraya*). Moreover, the risks associated with data processing have led the Court to recognise the right to 'informational self-determination'. In its *Census* decision of 1983, the Court held that the almost unlimited potential of data processing technologies must not result in the unlimited registration, cataloguing and profiling of one's personality or life; and this caveat still stands today.

Titled **Self-Determination and Limits to Personal Choice**, the second chapter focuses on how the right of personality protects interests that are specifically essential to the free development of one's personality. To begin with, every person has a right to be valued and respected as a person in society. Based on the idea of dignity, the individual may not be turned into a mere object of state action, and no one may be treated in a way which calls into question their quality as a conscious subject – a human being (*Life Imprisonment, Assisted Suicide*). Moreover, every person is guaranteed an autonomous domain of private life. This includes the right 'to be left alone', 'to be oneself' and to be free from intrusion or inspection by others. Yet at the same time, the individual is always connected to and bound by the community, since the development of one's personality takes place within the social community and through interaction with others. Therefore, and from the very start, tension may arise between the right to self-determination on the one hand and the interests of the community or the rights of others on the other hand. The decisions selected for the second chapter illustrate how the Court strikes a balance to reconcile these interests.

One seminal decision is the *Lebach* case, which concerns a TV documentary on a violent crime that had attracted an unusual amount of public attention. The documentary was scheduled to air shortly before one of the offenders, convicted on a charge of accessory to murder, was set to be released on probation. Was this compatible with his fundamental rights? The Court had to balance his rights against the freedom of broadcasting and the public's interest in information. It held that

the offender has a right to reintegration into society, derived from the general right of personality, given that living in liberty goes beyond the freedom of action, as dignity has to be taken into account, too.

As another seminal case, the decision on *Life Imprisonment* illustrates how high-ranking constitutional interests are actually capable of justifying very severe restrictions of personal liberty, self-determination and freedom, but can never strip anyone of their right to be recognised as a human being. The Court argued that where the actions of individuals bring danger and harm to others or the community, society has a right to protect itself. Yet the human dignity guaranteed to *every* person demands that even those convicted of the most serious crimes must retain at least the chance of regaining liberty at some point.

Beyond imprisonment and its limits, other decisions in this chapter touch on the difficult question of whether and to what extent coercive measures such as involuntary medical treatment may be administered against a patient's will. This is especially controversial in cases of persons who have limited capacity for insight and self-determination, and the Court again emphasised that no one ever loses the right to respect for their dignity (*Coercive Medical Treatment*, *Coercive Treatment in Psychiatric Confinement under Criminal Law*). In the recent decision on *Assisted Suicide*, the Court held that the general right of personality also encompasses the right to a self-determined death, which includes the freedom to take one's own life and to use assistance freely offered by others for this purpose. The Court also emphasised that where an individual decides to end their own life, based on an informed decision taken of their own free will, this decision must in principle be respected by state and society as an act of personal autonomy and self-determination. Thus, the state must take measures to protect life and personal autonomy, yet it may not impose restrictions that would effectively vitiate the right to a self-determined death in certain constellations.

The third chapter on **Name and Identity** explores the right of personality in relation to respect for and protection of one's personal identity. Where does the right to assert one's identity within society start, what are its limits? In *Sexual Abuse Allegations*, the Court held that a survivor of sexual abuse has the right to state their own name when they decide to tell their story in public. This includes a right to use their name on TV, even though disclosure of a family name could allow identification of the alleged abuser. In other instances, legal categorisations may impede or conflict with one's personal identity, and a right to one's chosen name may be a constitutional issue, as *Transsexuals V* regarding the official change

of name and *Third Gender Option* on the civil register entry for intersexual persons illustrate.

The fourth and fifth chapters cover **Image** and **Speech** respectively. They take a closer look at the right of individuals to determine their public portrayal. Basically, individuals do in fact have the freedom to decide how they wish to present themselves to third parties or the public, and thus how they wish to define their social image. In turn, they also have a right to define whether and to what extent third parties may disclose aspects of their personality or life, including personal information, statements or images, with some limits already mentioned above and others covered in these chapters. In addition, individuals may also want to decide whether or not to be the subject of public discussion, especially on platforms with extensive reach such as mass media or social media. In these contexts, constitutional and human rights law is increasingly concerned with the conduct of private, non-state actors. Overall, in these cases, the Court must reconcile and balance conflicting fundamental rights related to communication, information and artistic creation with the right of personality, based on freedom and dignity of all.

Such conflicts arise in many settings. Specifically, the selected decisions illustrate the protection of the right of personality in relation to audio-visual recordings produced by broadcasting media in court proceedings (*Honecker*, *TV Broadcasting from the Courtroom*) and in relation to images published as part of entertainment media coverage regarding celebrities' private and everyday life (*Caroline III*). In addition, the chapter includes a seminal decision on conditions for exercising a *Right of Reply,* and cases on the right of individuals to defend themselves against alleged group membership that affects their public image (*Helnwein/Scientology*), against ambiguous and possibly defamatory statements (*Stolpe/Stasi Dispute*) and against the portrayal of intimate personal matters in literary fiction (*Esra*).

Privacy and Intimacy are the focus of the sixth chapter. The intimate sphere is where the right of personality is strongest – but what matters must be considered intimate? According to the Court, these are matters related to one's sexuality, as well as expressions of one's inner self and innermost thoughts or feelings. Therefore, protection extends to conversations with close family members or trusted confidants, which may set limits for police surveillance, including in the context of counter-terrorism-measures. In this manifestation, the significance of recognising a right of personality based on human dignity, with its absolute protection of the inviolable core of private life, is particularly telling: An interference is generally impermissible and cannot be justified, not even on the basis of proportionality, not even when balanced against exceptionally significant interests like national

security. Yet this also means that delimiting the scope of the inviolable core is extremely difficult. The Court thus emphasises that not every measure that is unlawful, harmful or despicable amounts to an attack on human dignity. Similarly, not every matter that individuals might understandably wish to keep private and confidential falls within the innermost domain of one's private life. This is discussed in *Surveillance of Private Homes*, where the Court had to specify the inviolable part of private life with regard to a constitutional amendment of Article 13 of the Basic Law that curtailed the inviolability of the home. Since the human dignity core of fundamental rights is protected under the eternity clause in Article 79(3) of the Basic Law, it is beyond the reach of constitutional amendment.

Regarding **Privacy and Intimacy**, there is also the question of what protection is afforded private messages and diaries. In *Diary-Like Notes,* the Court discussed whether personal notes can be introduced as criminal evidence if written, on the suggestion of a therapist, as a personal diary, documenting violent-aggressive impulses. In *Monitoring of Correspondence*, the issue was whether private letters sent by the sister of a prison inmate containing derogatory remarks about prison staff may be grounds for a conviction on insult charges. In *False Paternity*, the question arose whether the mother of a child can be compelled to disclose information on her sexual relations to enable the legal father to seek compensation for child support payments from the biological father. Finally, the protection of intimacy extends to one's gender identity and sexual orientation (*Transsexuals VIII*). In a series of decisions, the Court explained that if a transsexual person's felt gender is lastingly in conflict with the official sex assigned to them, the fundamental right to one's personality requires that their self-determination be taken into account, and that their internally felt gender identity be officially recognised. The Court stated that the legal order must be designed in a manner that allows individuals to live in accordance with their felt gender, which requires measures to ensure that their intimate sphere is not exposed when the felt gender and the legal status collide. In *Transsexuals VIII*, the Court added that the right of personality also protects transsexuals with a homosexual orientation from a requirement to undergo surgery before seeking legal recognition of their relationship with a partner.

Finally, three chapters on **Health Data**, **Data Protection and Virtual Identity**, **Informational Self-Determination and Security** explore the risks and vulnerabilities arising from the increased availability, recording and sharing of personal data. To begin with, the Court emphasises that the general right of personality imposes strict limits on data access by the state. Notably, it is not sufficient that state authorities deem certain data to be useful, helpful or 'worth having just in case'. Even where the state pursues legitimate aims, such as law enforcement or public

security, it must strictly adhere to the principle of proportionality. Therefore, data access by the state is limited to what is suitable and necessary for achieving a legitimate aim, based on specific reasons, and appropriate in the individual case. Yet neither the right to informational self-determination nor conflicting rights take general precedence. Data access is only impermissible where it would affect the inviolable core of private life or result in disproportionate impairments.

Health Data is a particularly sensitive area. The cases presented in this chapter concern access to information like treatment and therapy records relating to one's health, biology, physiological and psychological condition. In *Addiction Counselling Agency*, the Court discusses the seizure of client records from a drop-in centre for counselling and treatment of persons struggling with drug addiction. In another case, the focus is on *Mandatory Medical-Psychological Assessment* and the obligation to disclose the findings to road traffic authorities in order to prove fitness to drive. In *DNA Fingerprinting*, the Court deals with the conditions under which DNA samples may be collected from criminal offenders in order to create and store DNA profiles in a law enforcement database.

Another key issue is **Data Protection and Virtual Identity.** Drawing on the early *Census* case presented in the first chapter, the Court continues to specify basic data protection requirements deriving from fundamental rights. Namely, the 'right to informational self-determination' requires that the individual be protected against the unlimited collection, storage, use and sharing of their personal data. In particular, this serves to prevent a 'chilling effect': it could impair the exercise of other fundamental rights if individuals were no longer able to tell who has obtained what kind of personal information about them and when. The Court argues that this could greatly impede one's freedom and self-determination and that such a deterrent effect would affect the common good, since self-determination is a fundamental prerequisite for the functioning of a free and democratic society, which relies on agency and active participation of its citizens. Against this backdrop, the general right of personality, together with privacy guarantees regarding telecommunications (Article 10 of the Basic Law) and the inviolability of the home (Article 13 of the Basic Law), forms part of a comprehensive framework of protection. In addition, the Court understands the collection, storage, use and sharing of personal data as each constituting separate (new) interferences with self-determination. Thus, every measure of this type requires a statutory basis and must be justified in each individual case, again measured against the principle of proportionality, and the inviolable part of private life must always be respected (*Divorce Files*).

This is particularly relevant in light of new technical possibilities, such as the automatic processing and linking of data, and is thus reflected in an increased level of fundamental rights protection. For instance, it is not permissible for law enforcement authorities to seize a law firm's entire digital records and storage devices in a criminal investigation against one of the law firm's partners (*Seizure of Electronic Data*). Unrestricted state access to the law firm's data records would be excessive and jeopardise the right of clients to informational self-determination and to a fair trial, violating the rule of law. Therefore, authorities must take reasonable measures to prevent access to data that is not relevant, and procedural safeguards must be in place to prevent violations. Such safeguards may include a prohibition to share data with other authorities or use data as evidence in criminal proceedings (*Bankruptcy Proceedings*).

Moreover, the chapter on **Data Protection and Virtual Identity** addresses impairments of the right of personality in the context of Internet communication. In *Right to Be Forgotten I* and *II*, both also known for the Court's new concept of fundamental rights protection in the European Union, conflicts arose around old press articles and a broadcast segment stored in online archives that may, with the help of search engines, lead to new and much larger exposure of an individual to the public than the original publication. Therefore, fundamental rights require a balance between personality interests on the one hand and the interests of media, publishers, search engine operators, Internet users and the general public on the other. Again, these cases concern relationships between private actors, which is why constitutional protection differs from the direct effect of fundamental rights vis-à-vis the state. Yet even in such cases, fundamental rights do not leave the individual without protection. Where such conflicts arise between private actors, the general right of personality provides the individual with the possibility of influencing the context and manner in which their data is accessible to and can be used by others. This is not a right to demand that all information relating to one's person be deleted from the Internet. Yet in *Right to Be Forgotten I* and *II*, the Court acknowledges that the possibility of matters being forgotten is a temporal dimension of freedom. Therefore, the legal order must protect the individual against the risk of being indefinitely confronted in public with their past, as this would deprive them of the chance to start afresh. This notion was already recognised by the Court in the *Lebach* case presented in the second chapter, which exemplifies how doctrine evolves over time.

The decisions on **Informational Self-Determination and Security** trace an important line of case-law dealing with the protection of individuals against particularly intrusive and often covert state action. The decisions selected here deal with the use

of targeted surveillance in domestic criminal investigations (*Telecommunications Surveillance, The Telecommunications Surveillance Revision Act*) and with the much broader surveillance of international and foreign telecommunications by the intelligence services (*The Article 10 Act*, *Surveillance of Foreign Telecommunications*). When the Court was called upon to assess new powers of the Federal Criminal Police Office to fight international terrorism (*The Federal Criminal Police Office Act*), it clarified the relevant constitutional standards, and later applied them in its decisions on remote searches of private computers (*Remote Searches*), on the creation and use of databases for facilitating electronic profiling and search measures (*Profiling*) and on inter-agency data sharing, a sensitive issue in a country which in the past has seen the abuse of police powers in collusion with security forces (*The Counter-Terrorism Database Act I*). Like many courts in other jurisdictions, the Court also assessed the constitutionality of the precautionary retention of telecommunications traffic data (*Data Retention*) based on the specific protection afforded by intersecting fundamental rights, namely dignity and freedom, as well as those expressly listed in the Basic Law, privacy of telecommunications (Article 10) and the inviolability of the home (Article 13). These decisions also demonstrate how new risks have led to the recognition of a right to informational self-determination, and how protection was eventually extended to the integrity and confidentiality of information technology systems like computers or smartphones (*Remote Searches*).

While the powers of the state at issue are considered necessary to address security threats, and while new powers may be needed in order to allow law enforcement to adapt to new technologies and globalisation, the Court has also emphasised the fact that new security and surveillance powers expose the individual to unprecedented risks and intrusions. Constitutional law requires the Court to reconcile these interests. But since the inviolability of human dignity is at stake, even the pursuit of exceptionally significant aims – such as the protection of life, limb and liberty or the existence and security of the state – does not give authorities carte blanche. Here as well, limitations set by constitutional and human rights law must be respected, including in relation to foreigners abroad (*Surveillance of Foreign Telecommunications*). Stringent requirements apply to any covert collection and use of personal data and the sharing of such data with domestic and foreign bodies, which presupposes procedural safeguards and oversight regimes.

Introductory Remarks

Towards Consensus on Fundamental Rights

The world we live in has changed in many ways since the adoption of the Basic Law in 1949 and the establishment of the Federal Constitutional Court in 1951. The decisions presented in this volume are testimony to this – with a marked contrast between cases from an era of print publications as the dominant source of information and more recent decisions that address the Internet and global telecommunications. The Court's mandate has remained the same: to uphold the Basic Law and give effect to its guarantees, most notably the fundamental rights enshrined therein. The evolution of the general right of personality may thus serve to illustrate how fundamental rights can be interpreted in a manner that preserves established principles while adapting to changed circumstances. The case-law presented in this book shapes the interpretation and application of fundamental rights today. We hope that others will benefit from the translations provided and that the present volume, like its predecessors, will invite and promote a broader dialogue on fundamental rights, shared legal traditions and future challenges.

Prof. Dr. Susanne Baer, LL.M. (Michigan), Justice of the First Senate
Vice-President Prof. Dr. Doris König, Justice of the Second Senate
and the Legal Translation Unit of the Federal Constitutional Court

Karlsruhe, November 2021

No. 1

BVerfGE 27, 1 – Microcensus

HEADNOTE

to the Order of the First Senate of 16 July 1969
1 BvL 19/63

On the constitutionality of a representative statistical survey conducted by the state (microcensus).

FEDERAL CONSTITUTIONAL COURT
- 1 BvL 19/63 -

IN THE NAME OF THE PEOPLE

In the proceedings
for constitutional review of

§ 2 no. 3 of the Act on Conducting a Representative Statistical Survey on Population and Occupation (Microcensus Act) of 16 March 1957 – BGBl I, p. 213 – in the version of the Act of 5 December 1960 – BGBl I, p. 873

– Order of Suspension and Referral of the Fürstenfeldbruck Local Court of 30 October 1963 - Gs 168/63 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Müller,
Stein,
Haager,
Rupp-von Brünneck,
Böhmer,
Brox,
Zeidler

held on 16 July 1969:

§ 1 and § 2 no. 3 of the Microcensus Act of 16 March 1957 (BGBl I, p. 213) in the version of the Act of 5 December 1960 (BGBl I, p. 873) [no longer in force] were compatible with the Basic Law insofar as they provided that the survey pursuant to § 1 of the Act contained questions on holiday and recreational travel.

REASONS:

A.

1-6 […]

B.

I.

7 1. The plaintiff in the initial proceedings lives in a region […] where all residents were to be surveyed under the Microcensus Act. She refused […] to answer all 60 questions […]. At the request of the Bavarian Statistical Office (*Bayerisches Statistisches Landesamt*), the Fürstenfeldbruck Administrative District Office (*Landratsamt*) […] imposed a fine of DM 100 […], against which she sought recourse to the courts. By Order of 30 October 1963 - Gs 168/63 - the Fürstenfeldbruck Local Court suspended the proceedings and referred to the Federal Constitutional Court the question whether Art. 1(2) no. 2 of the Amending Act of 5 December 1960 was compatible with the Basic Law.

8 2. The Local Court submitted the following reasons for the referral: Art. 1(2) no. 2 of the Amending Act of 5 December 1960 contradicted Art. 1 and Art. 2 of the Basic Law to the extent that the survey subjects were obliged to disclose information on holiday and recreational travel. […]

9 3. The questions on holiday and recreational travel that the plaintiff in the initial proceedings refused to answer read as follows:

10 Who has travelled for holiday and recreational purposes for 5 or more days, including in connection with business travel,

a) during the period from 1 October 1961 through 30 September 1962 and/or

b) before 1 October 1961?

Which members of the household participated in the travel?
What kind of travel was it? (individual trip (privately organised), package tour for single traveller, organised group tour, health retreat)
When did the travel begin, and how long did it last?

Where did the traveller primarily stay (in Germany or abroad)? (in Germany: indicate city; abroad: indicate country)
What means of transport were primarily used for the outbound and inbound journey?
What type of accommodation was primarily used? (tourist accommodation, private rental, free accommodation (provided by relatives, acquaintances), health resort or sanatorium, holiday retreat or resort, children's home, campground, youth hostel).

II.

The Federal Minister of the Interior considers the challenged provision to be constitutional. 11
[…] 12-13

C.

I.

The referral is admissible. 14
[…] 15-16

II.

The questions on holiday and recreational travel as part of the representative survey pursuant to the Microcensus Act violated neither Art. 1(1) and Art. 2(1) of the Basic Law nor any other provisions of the Basic Law. 17
1. a) According to Art. 1(1) of the Basic Law, human dignity is inviolable and must be respected and protected by all state authority. 18
Human dignity is the highest value within the system of values of the Basic Law (BVerfGE 6, 32 <41>). This commitment to human dignity informs all provisions of the Basic Law, including Art. 2(1) of the Basic Law. The state may not violate human dignity through any measure, not even a law, or otherwise infringe on the essence (*Wesensgehalt*) of personal freedom beyond the limits established in Art. 2(1) of the Basic Law. Thus, the Basic Law recognises, for each citizen, an inviolable part of private life which is beyond the reach of public authority (BVerfGE 6, 32 <41>, 389 <433>). 19
b) In light of this conception of human nature, all persons, as members of the community, enjoy a right to be valued and respected as a person in society (*sozialer Wert- und Achtungsanspruch*). Treating a person as a mere object of the state would 20

be a violation of human dignity (cf. BVerfGE 5, 85 <204>; 7, 198 <205>). It would be incompatible with human dignity if the state claimed for itself the power to subject the individual to compulsory registration and cataloguing of their entire personality, thereby treating them as a commodity that can be analysed in every respect; this applies even in the context of statistical surveys where data is rendered anonymous.

21 […]

22 c) However, not every statistical survey of personality-related or biographical data violates the dignity of one's person or affects the right to self-determination within the innermost domain of private life. As a citizen connected to and bound by the community (cf. BVerfGE 4, 7 <15 and 16>; 7, 198 <205>; 24, 119 <144>), everyone must to a certain extent tolerate necessary statistical surveys collecting personal data, for example for census purposes, as a prerequisite for planning government action.

23 A statistical survey on one's personal circumstances may be perceived as degrading, and as a risk to the right to self-determination, where it captures the domain of personal life that is secret by its very nature, thus turning this innermost domain into a matter that can and must be analysed by means of statistics. In this regard, the state in a modern industrial society must respect limits to administrative 'depersonalisation'. However, where a statistical survey only relates to a person's conduct in the outside world, it does not typically affect one's personality to an extent that amounts to a 'capturing' of the inviolable part of private life. This applies at least if the collected data is stripped of its connection to an individual person through anonymous data processing. This in turn requires sufficient safeguards ensuring that the data is indeed rendered anonymous. […]

24 d) Based on this, the survey questions on holiday and recreational travel did not violate Art. 1(1), Art. 2(1) of the Basic Law.

25 While this survey did concern a certain part of private life, it did not compel the survey subjects to disclose information from their intimate sphere, nor did it grant the state access to individual relationships that would not normally be disclosed to the outside world, and that are by their very nature secret. […]

26 2. With regard to the principle of the rule of law, the survey does also not raise constitutional concerns. In particular, it neither violated the requirement of legal clarity (cf. BVerfGE 20, 150 <158 and 159>; 21, 245 <261>) nor the principle of proportionality (cf. BVerfGE 17, 306 <313>; 19, 342 <348 and 349>).

27 a) § 2 no. 3 of the Microcensus Act satisfies the constitutional requirement of legal clarity regarding the questions on holiday and recreational travel. […]

28 b) According to the official explanatory memorandum to the Microcensus Act, the documentation of data concerning holiday and recreational travel was intended to

provide information about the economic and social significance of such travel, and about the means of transport used. […]

Given that the results of the representative survey could already be undermined if only a few survey subjects refused to provide information, it did not amount to an excessive burden on the individual that the Microcensus Act in conjunction with § 10(1) and § 14 of the Statistics Act made answering the questions mandatory, with non-compliance punishable by sanctions. […] 29

3. Finally, there are no constitutional objections regarding the design of the microcensus as a representative survey with a sampling rate of 1% of the total population of the Federal Republic of Germany, as laid down in § 1 of the Microcensus Act. 30

In particular, a representative survey for statistical purposes in which only a group of persons determined by a randomised procedure is subjected to the obligation to provide information does not violate the right to equality. The right to equality bars the legislator from treating citizens unequally only in cases where a provision must ultimately be considered arbitrary because, in light of the requirement of fairness, no reasonable grounds for the statutory differentiation are ascertainable; such grounds may derive from the inherent nature of the matter at hand or from other objective factual reasons (cf., e.g., BVerfGE 1, 264 <276>; 18, 121 <124>). Therefore, the legislator has wide latitude in determining which group of persons to subject to the legal framework (cf. BVerfGE 9, 20 <32>; 11, 245 <253>; 17, 1 <33>; 23, 12 <28>). 31

§ 1 of the Microcensus Act did not exceed these limits. The fact that the burden on citizens resulting from statistical sampling varies randomly is inherent in such a representative survey. Moreover, the legislative decision to conduct a representative survey, rather than a census of the entire population, can be justified by objective factual reasons. In comparison to a full census, a representative survey provides information to the state in a cost-efficient and quick manner, while affecting only a small share of the population. 32

Justices: Müller, Stein, Haager, Rupp-von Brünneck, Böhmer, Brox, Zeidler

No. 2

BVerfGE 34, 238 – Secret Tape Recordings

HEADNOTES

to the Order of the Second Senate of 31 January 1973
2 BvR 454/71

1. The fundamental right under Article 2(1) of the Basic Law also protects legal interests that are essential to the development of one's personality. Subject to certain limitations, this fundamental right also includes the right to one's own speech, just as it includes the right to one's own image. Therefore, every person may, in principle, determine for themselves who may record their speech, and for whom, if at all, their voice recorded on a sound recording device may be played.
2. However, this does not rule out that in cases where overriding public interests imperatively require it, the interest – meriting protection – of the accused to have secret tape recordings excluded from use as evidence at trial must stand back.

FEDERAL CONSTITUTIONAL COURT
- 2 BvR 454/71 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

Mr V...,

– authorised representative: …

against the Order of the Osnabrück Regional Court of 3 May 1971 - 12 Qs 86/71 -
the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President Seuffert,
Rupp,
Geiger,
Hirsch,
Rinck,
Rottmann,
Wand

held on 31 January 1973:

The Order of the Osnabrück Regional Court of 3 May 1971 - 12 Qs 86/71 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. The decision is reversed insofar as the court dismissed the complaint against the judicial order to use the tape recording handed over to the police as evidence (record entry no. 10319/70). To this extent, the matter is remanded to the Osnabrück Regional Court.

[…]

REASONS:

A.

I.

The constitutional complaint concerns the admissibility as evidence of a secretly made private tape recording in the criminal investigation of the complainant on suspicion of tax evasion, fraud and the falsification of documents. 1

1. In essence, the facts of the case are as follows: 2

a) On 11 May 1970, Mr and Mrs B. sold to the complainant a residential and commercial building in the city of Osnabrück. […] 3

b) On 14 December 1970, Mr B. brought criminal charges against the complainant. He explained that the parties had verbally agreed on a sales price of DM 495,000 for the building and DM 20,000 for fixtures. At the complainant's request, in order to reduce the amount of real property transfer tax due, a sales price of only DM 425,000 had been attested by the notary. On 11 May 1970, at 6:45 p.m. and before the attestation of the sales contract, the complainant had paid him the difference of DM 70,000 in cash 'under the table', and had asked him and his wife to sign a prepared receipt. According to Mr B., this document stated the following: 4

5 Receipt

6 We hereby confirm having received an interest-free loan of DM 70,000 – seventy thousand – in cash from Herbert V.

7 Mr B. said that he was the only one to sign this receipt. They had agreed that the complainant would destroy it upon conclusion of the notarised contract. On the evening of 11 May 1970, the complainant had, in his presence, torn a document to pieces. But Mr B. was not sure whether it had been the original receipt. There were fragments of the receipt's text on the scraps of paper that the complainant had handed him, but not his signature.

8 The day the last instalment was due, the complainant showed him a receipt for a loan of DM 70,000 and said he would set off this sum against the remaining balance of DM 70,000. This receipt, which is included in the case file, reads as follows:

9 Receipt

10 We hereby confirm having received an interest-free loan of DM 70,000 – seventy thousand – in cash from Herbert V. The loan can be terminated with 3 months' notice. Set-off = upon payment of balance of sales price/fixtures at the latest.

11 Next to the date, 11 May 1970, it bears the signatures "Erwin B." and "Anni B.".

12 However, Mr B. claims that neither he nor his wife signed a loan document in this form and that the document is a forgery.

13 During his interrogation by the police, the complainant stated that the sales price attested by the notary was the price the parties had in fact agreed upon. He claimed not to know anything about a verbal agreement on a payment 'under the table'. At the request of Mr B., he had supposedly granted him an interest-free loan of DM 70,000 in cash on 11 May 1970, at 8:00 p.m. in Mr B.'s flat. The receipt on file was issued in this context, he claimed.

14 c) The relevance of the tape recording mentioned above is as follows:

15 Purportedly, the tape recording is of a conversation between the complainant and Mr and Mrs B. in August 1970, i.e. after the attestation of the building purchase, and was made without the complainant's knowledge. Mr B. claims that at the time of the recording, he was not yet aware of the existence of the loan receipt that was presented to him later. The recorded conversation had taken place because the complainant had indicated that he wanted to pay a lower price due to a mortgage rate increase. In the recorded conversation, they had, among other things, discussed

the adequacy of the sales price, 'under the table' payments and a corresponding receipt.

On 23 February 1971, Mr B. handed the tape recording over to the police for investigation. […] 16

2. On 10 March 1971, at the request of the public prosecution office, the Osnabrück Regional Court ordered, pursuant to §§ 94, 98 and 110 of the Code of Criminal Procedure, the seizure of some of the documents secured during a search of the complainant's flat on 3 March 1971. In addition, it ordered the use of the tape recording handed over to the police as evidence, on the grounds that it might be of significance for the investigation. 17

The complaint filed by the complainant against that order was only partially successful. […] In its order, the Regional Court observed the following on the admissibility of the tape recording as evidence: 18

While the use of a secretly made tape recording as evidence is, in principle, impermissible because the secret nature of the recording violates the speaker's right to the free development of their personality (Art. 2(1) of the Basic Law), […] in the absence of other appropriate evidence, the recording is potentially the only proof that the complainant has committed a criminal offence. […] 19

II.

1. The constitutional complaint is directed against this order. The complainant claims a violation of his fundamental right under Art. 2(1) of the Basic Law […]. 20

[…] 21-22

2. The Federal Minister of Justice, who submitted a statement on behalf of the Federal Government, considers the constitutional complaint to be admissible and well-founded. 23

[…] 24

B.

I.

The constitutional complaint, lodged within the statutory time-limit, is admissible. 25

[…] 26-27

II.

The constitutional complaint is well-founded. 28

29 By allowing, without the complainant's consent, the use of the secret tape recording in the criminal proceedings against him, the challenged order violates the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

30 1. In its established case-law, the Federal Constitutional Court has affirmed that the Basic Law recognises, for each citizen, an inviolable part of private life which is beyond the reach of public authority (BVerfGE 6, 32 <41>, 389 <433>; 27, 1 <6> – *Microcensus*; 27, 344 <350 and 351> – *Divorce Files*; 32, 373 <378 and 379>; 33, 367 <376>). The constitutional requirement to respect this core that encompasses the intimate sphere of the individual is based on the right to the free development of one's personality, as guaranteed by Art. 2(1) of the Basic Law. When determining the content and scope of this fundamental right under Art. 2(1) of the Basic Law, it must be taken into account that, according to the fundamental precept in Art. 1(1) of the Basic Law, human dignity is inviolable and must be respected and protected by all state authority. Moreover, under Art. 19(2) of the Basic Law, the essence (*Wesensgehalt*) of the fundamental right under Art. 2(1) of the Basic Law may also not be infringed upon (BVerfGE 27, 344 <350 and 351> – *Divorce Files*; 32, 373 <379>). The core of private life enjoys absolute protection, and even overriding public interests cannot justify an interference; this protection is not subject to a balancing of interests under the principle of proportionality.

31 However, not the entire domain of private life enjoys the absolute protection afforded by the fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law (BVerfGE 6, 389 <433>; 27, 1 <7> – *Microcensus*; 27, 344 <351> – *Divorce Files*; 32, 373 <379>; 33, 367 <376 and 377>). Rather, as a citizen connected to and bound by the community, every person must tolerate state measures that serve overriding public interests and that strictly adhere to the requirement of proportionality, unless these infringe upon the inviolable part of private life. In this respect, the principles which the Federal Constitutional Court has developed in its case-law on the constitutional permissibility of interferences with physical integrity apply accordingly (BVerfGE 16, 194 <201 and 202>; 17, 108 <117 and 118>; 27, 211 <219>; 27, 344 <351> – *Divorce Files*; 32, 373 <379>).

32 2. Art. 2(1) of the Basic Law guarantees every person the right to the free development of their personality, insofar as they do not infringe the rights of others or violate the constitutional order or moral law. This fundamental right also protects legal interests that are essential to the development of one's personality. Subject to certain limitations, this fundamental right also includes the right to one's own speech, just as it includes the right to one's own image. Therefore, every person may, in principle, determine for themselves who may record their speech, and for whom, if at all, their voice recorded on a sound recording device may be played.

On a tape recording, a person's speech and voice are detached from this person and become objects at the disposal of others. The inviolability of someone's personality would be seriously curtailed if others could freely use words spoken in private, without the consent of the person concerned or even against the person's will. Human communication free from fear or worry would be largely impossible if everyone were aware that one's every utterance – a remark that might be unreflected or intemperate, a tentative opinion expressed in an unfolding conversation, or an expression comprehensible only in this context – could be brought up on another occasion and in a different context to bear witness against the person using the content, expression, or tone of the statement. Every person should be able to conduct a private conversation without the suspicion or fear that a secret recording of it could be used without their consent or even against their declared will. § 298 and § 353d of the Criminal Code for substantive criminal law, […] and the case-law of the Federal Court of Justice on the general right of personality for private law, […] have long reflected this concern. 33

3. The conversation between Mr and Mrs B. and the complainant was confidential. It was recorded secretly. The complainant opposed the use of the recording as evidence. Under these circumstances, such use in the criminal investigation constitutes an interference with the constitutionally guaranteed right to one's own speech. 34

There are indeed cases in which a tape recording made without the speaker's knowledge does not fall within the scope of protection of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law from the outset because, in such situations, it is generally agreed that the right to one's own speech is inapplicable. […] But this is not the case here. The conversation took place between three persons. They were discussing a contractual agreement. The complainant did not have to expect that his words were being recorded. He is therefore entitled to invoke the right to one's own speech guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 35

4. Whether a secret tape recording affects the absolutely inviolable part of private life or merely the part of private life where state interference may be permissible under certain circumstances is difficult to determine in the abstract. This question can be answered satisfactorily only on a case-by-case basis, taking into account the particularities of each situation. 36

The present case concerns a business conversation. Partners to a transaction were discussing their differences in respect of the purchase of a building and the adequacy of the agreed price. They did not discuss any highly personal matters that could be attributed to their inviolable intimate sphere. 37

5. Since this is not a matter of an intrusion of public authority into the absolutely protected part of personality, the use of the tape recording would be permissible if it were justified by an overriding public interest. This is, however, not the case. 38

39 a) The Basic Law attributes high standing to the right to the free development of one's personality. State measures that impair it are, if at all, allowed only if the requirement of proportionality is strictly observed. However, the Basic Law also attaches particular importance to the effective administration of justice. […]

40 There are many ways in which the constitutionally guaranteed right to the free development of one's personality and the effective administration of justice can come into conflict with one another. A fair balance to resolve these tensions can only be found if the protection requirement under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law is used as an ongoing corrective to the interferences that seem necessary for the effective administration of justice (cf. BVerfGE 19, 342 <347>; 20, 45 <49>, 144 <147>). This means that it must be determined in every case which of these two constitutionally significant principles carries greater weight.

41 b) In such a balancing, the interest – meriting protection – of the accused is taken into account by the Code of Criminal Procedure, by way of its protection *inter alia* against self-incrimination (§ 136(1) second sentence of the Code of Criminal Procedure). Beyond this specific safeguard, the accused also requires protection when a statement recorded on tape without their knowledge is used against them in criminal proceedings.

42 c) However, this does not rule out that in cases where overriding public interests imperatively require it, even the protected interest of the accused to have secret tape recordings excluded from use as evidence must stand back.

43 Thus, generally, constitutional objections will not arise in cases involving serious crime – be it against life and limb, against the existential foundations of the free democratic basic order, or against other legal interests of comparable magnitude – where the law enforcement authorities, as a last resort, have used tape recordings secretly made by a third party to establish the identity of offenders or to exculpate persons wrongly accused of a criminal offence. […]

44 Yet here – as in all cases – it is crucial that such an interference be compatible with the principle of proportionality in a balancing that takes all the circumstances of the case into account. This means that on the one hand, it must be determined how seriously the intended use of a specific tape recording – in view of its content and form – would interfere with the right to the free development of the personality of the affected person. On the other hand, when balancing the thus determined severity of the interference with the right to the free development of one's personality against the legitimate requirements of the criminal justice system, the focus must be not only on the charged offence in its abstract constituent elements, but on the specific wrongdoing considered in the case at hand. Otherwise, a proper and fair

balancing would be impossible, given the multitude of possible acts that may in fact be constituent elements of many offences.

In addition, it is relevant to consider, when all other legally permissible possibilities have been exhausted, whether the use of the tape recording is the only means of convicting the offender of a serious crime or of exculpating the accused. 45

Finally, it is important to take into account whether and to what extent there is a legal and factual guarantee that knowledge of the statements recorded on the tape, which may possibly not be relevant to the criminal proceedings, will be restricted to those persons that are directly involved in the proceedings – e.g. through a non-public hearing to discuss the contents of the tape recording (cf. BVerfGE 32, 373 <381>). 46

6. The challenged order does not meet these constitutional standards. The order to use the tape recording upheld by the Regional Court allows the investigating law enforcement authorities to listen to the secretly made tape recording without the complainant's consent, and to use its contents against him. This interference cannot be justified by the interest in investigating the offences referred to by the Regional Court. The challenged order does not demonstrate that the offence is so serious, or that public interests are affected to such an extent, that the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law must stand back. Therefore, the order is reversed. 47

III.

[…] 48

The decision was taken with 6:1 votes. 49

Justices: Seuffert, Rupp, Geiger, Hirsch, Rinck, Rottmann, Wand

No. 3

BVerfGE 34, 269 – Soraya

HEADNOTE

to the Order of the First Senate of 14 February 1973
1 BvR 112/65

The case-law developed by the civil courts according to which financial compensation may also be claimed for non-material damage is compatible with the Basic Law.

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 112/65 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

1. *Die Welt* publishing company, represented by its Managing Director..., 2. Mr V...,

- authorised representative: …

against a) the Order of the Federal Court of Justice of 8 December 1964
- VI ZR 201/63 -,

b) the Order of the Karlsruhe Higher Regional Court of 3 July 1963
- 1 U 7/63 -,

c) the Order of the Mannheim Regional Court of 24 August 1962
- 7 O 73/61 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Benda,
Ritterspach,
Haager,
Rupp-v. Brünneck,

Böhmer,
Faller,
Brox,
Simon

held on 14 February 1973:

The constitutional complaint is rejected.

REASONS:

A.

1. Pursuant to § 249 of the Civil Code, a person liable for damages must restore the injured person's position to the position that would have existed had the circumstances giving rise to such liability not occurred. This principle of 'natural restitution' (restitution in kind) also applies to the compensation of non-pecuniary, 'non-material' damage. In the case of violation of a person's honour, for instance, the insulted person's loss of reputation may be redressed by retraction or by publication of a judgment requiring retraction of the insulting statement. 1

However, restitution in kind requires that restoration to the former position is possible. If, for factual reasons, such restoration leads to no or to insufficient compensation for damage, the injured party may request financial compensation pursuant to § 251(1) of the Civil Code. In respect of non-material damage, however, this principle is limited by § 253 of the Civil Code: According to this provision, financial compensation may only be requested in the cases specified by law, which are mainly damages for pain and suffering (*Schmerzensgeld*) […]. Beyond the scope of the Civil Code, specific grounds for non-material damage are set out in other legislation […]. 2

2. […] 3

3. […] 4-5

There was […] general approval in 1954 when the Federal Court of Justice first recognised the general right of personality (BGHZ 13, 334 <337 and 338>). The court held that the right to human dignity and to the free development of one's personality protected by Arts. 1 and 2 of the Basic Law is also a right under private law, which must be respected by everyone in private legal transactions. According to the court, the general right of personality is protected under § 823(1) of the Civil Code [which lists the rights and interests whose injury can lead to liability for damages]; however, the assessment of whether this right was violated requires a thorough and detailed balancing of the legal interests involved. In its later deci- 6

sions, the Federal Court of Justice sought to specify the blanket-clause-like scope of the general right of personality (cf. BGHZ 15, 249; 20, 345; 26, 52; 27, 284; 31, 308).

7 4. While the general right of personality as such was quickly accepted by courts and legal scholars, the question whether applicable law allowed affected persons to claim financial compensation for non-material damage in case of violation of the right of personality remained controversial.

8-11 […]

12 5. The courts did not wait for the legislator to enact statutory provisions on the protection of one's personality. In 1958, the Federal Court of Justice first granted financial compensation to a person whose right of personality had been violated through non-pecuniary damage in the so-called *Dressage Rider* judgment (*Herrenreiter-Urteil*) […]. […]

13 In a number of further decisions, the Federal Court of Justice confirmed and developed the standards laid down in that judgment. […]

14 […]

15 6. The civil courts and legal scholarship largely followed the view of the Federal Court of Justice […]. The Federal Labour Court and the Federal Finance Court also adopted it.

16 […]

B.

17 1. The complainant in the present proceedings is the publishing company *Die Welt*, which is part of the Axel Springer Group. In the past, it also published the weekly magazine *Das Neue Blatt mit Gerichtswoche*, which was sold all over Germany. Until June 1961, complainant no. 2 was the managing editor of that magazine, which mainly entertained readers with its sensational reporting on societal matters. In 1961 and 1962, the magazine repeatedly ran illustrated articles on the Shah of Iran's divorced wife, Princess Soraya Esfandiary-Bakhtiary. On the first page of the 29 April 1961 issue, a so-called special report was published […], which included an 'exclusive interview' that Princess Soraya was supposed to have given to a journalist. The report contained statements by the princess about her private life. The interview had been sold to the magazine by a freelancer; it was purely fictional. In its 1 July 1961 issue, the magazine published a brief correction by Princess Soraya, indented within a new report […]. In this correction, she stated that the interview had in fact not taken place.

18 The Regional Court granted Princess Soraya's action for damages on the basis of the violation of her right of personality and declared the complainants jointly

and severally liable for DM 15,000. The complainants' appeals were unsuccessful. The Federal Court of Justice held the dissemination of the fictional interview on Princess Soraya's private life to be an unlawful violation of her right of personality. […]

Based on its earlier decisions (BGHZ 35, 363 and 39, 124), the Federal Court of Justice set out that financial compensation could be demanded in respect of severe violations of personality rights if there were no other way to properly redress the non-material damage caused by the interference. According to the court, these requirements were met here. When assessing the interference with the right of personality, the fact that the fictional interview had been disseminated widely and the fact that it had been published in pursuit of purely commercial interests carried particular weight. The court held that publishing the correction did not redress the damage inflicted. 19

2. In their constitutional complaint, the complainants claim a violation of their fundamental rights under Art. 2(1) in conjunction with Art. 20(2) and (3), Art. 5(1) second sentence and (2) and Art. 103(2) of the Basic Law; as a "precautionary" challenge, they also claim a violation of their fundamental rights under Arts. 3, 12 and 14 of the Basic Law. […] 20

[…] 21-22

C.

The constitutional complaint is unfounded. 23

I.

1. The court case that led to the challenged decisions is a private law case. It is not for the Federal Constitutional Court to review the interpretation and application of private law as such. However, the objective system of values enshrined in the fundamental rights provisions of the Constitution also guide the interpretation of private law; as fundamental decisions enshrining constitutional values they are applicable to all areas of law. It is incumbent upon the Federal Constitutional Court to ensure that this permeating effect of fundamental rights on other areas of law (*Ausstrahlungswirkung*) is observed. Therefore, the Court reviews whether the civil courts' decisions are based on a fundamentally incorrect understanding of the scope and impact of a fundamental right or if the outcome of a decision violates the fundamental rights of one of the parties (in this regard, cf. in general BVerfGE 7, 198 <205 *et seq*.>; 18, 85 <92 and 93>; 30, 173 <187 and 188, 196 and 197>; 32, 311 <316>). 24

25 In the case at hand, the complainants not only object to the outcome of the civil court decisions; they primarily challenge the method the courts used to reach that outcome. The complainants dispute that judges, being bound by law, are allowed to grant financial compensation in such cases. […].

26 2. In the private law case at hand, the statutory basis for the claim was § 823(1) of the Civil Code. The Federal Court of Justice also includes the "general right of personality" in the rights listed in that provision, citing its established case-law, in particular the detailed reasons given in its decision of 25 May 1954 (BGHZ 13, 334); it holds the complainants' behaviour to be a violation of this right. It is not for the Federal Constitutional Court to evaluate the 'correctness' of this case-law insofar as its reasons and development adhere to private law doctrines. It is sufficient to establish that the general right of personality – still rejected by the drafters of the Civil Code – has asserted itself over the course of decades of debate in legal scholarship, finally attaining recognition in the above-mentioned decision of the Federal Court of Justice, which has allowed it to become an integral part of private law […].

27 There is no reason for the Federal Constitutional Court to object to this case-law of the Federal Court of Justice on constitutional grounds. The free development of human personality within the social community and its dignity lie at the core of the system of values of the fundamental rights (BVerfGE 6, 32 <41>; 7, 198 <205>). It must be respected and protected by all state authority (Arts. 1 and 2(1) of the Basic Law). In particular the individual's private sphere is afforded such protection. This is the domain in which individuals wish to be left alone, make their own decisions for themselves and not be disturbed by interferences of any kind (BVerfGE 27, 1 <6> – *Microcensus*). In private law, the general right of personality also serves to ensure this kind of protection; it fills gaps in the protection of one's personality, which have persisted despite the recognition of individual personality rights and have become ever more noticeable over time for different reasons. Therefore, the Federal Constitutional Court has never objected to the recognition of a general right of personality in the case-law of the civil courts (see especially BVerfGE 30, 173 <194 *et seq*.>; 34, 118 <135 and 136> and BVerfGE 34, 238 <246 and 247> – *Secret Tape Recordings*).

28 3. § 823(1) of the Civil Code is a general law within the meaning of Art. 5(2) of the Basic Law (BVerfGE 7, 198 <211>; 25, 256 <263 *et seq*.>). Given that the general right of personality, according to the interpretation that is not objectionable under constitutional law, is to be included in the rights listed in that provision, the Constitution affords it the ability to restrict the fundamental right to freedom of the press invoked by the complainants. The potential impact of the general law is constitutionally reinforced, as established above, by the mandate of protection

under Arts. 1 and 2(1) of the Basic Law. However, the fundamental importance of freedom of the press for the free democratic order must not be ignored. It retains its weight in the balancing that is required in case of conflict between the parties' constitutionally protected interests in a private law relationship (BVerfGE 25, 256 <263>; 30, 173 <196 and 197>). When balancing these interests, the general right of personality cannot claim precedence *per se*; depending on the specific case, freedom of the press may have a restrictive effect on the right of personality (BVerfGE 7, 198 <208 and 209>).

4. The challenged decisions gave precedence to the protection of the personal sphere of the initial proceedings' plaintiff over freedom of the press This approach does not raise any constitutional concerns, given the established facts of the case. According to these, the complainants published a fictional interview with the initial proceedings' plaintiff in an entertainment magazine in which events from the plaintiff's private life were depicted as though she had described them herself. The courts considered this an unauthorised interference with the plaintiff's private life, given that it is for her to decide whether and how she wishes to disclose parts of her private life to the public. 29

Indeed, in this situation, the complainants cannot invoke freedom of the press to justify their actions. It would be going too far if the entertainment and sensational press were generally denied the protection of this fundamental right, as decided by the Regional Court based on individual views in legal scholarship. The term 'press' must be interpreted broadly and formally; irrespective of which standards are applied, it must not hinge upon an assessment of the individual press product. Freedom of the press is not limited to the 'serious' press ([…]; see also BVerfGE 25, 296 <397> and – for radio – BVerfGE 12, 205 <260>). However, this does not mean that the protection derived from the fundamental right must be granted to any press medium in any legal context and for any statement in the same way. When balancing freedom of the press against other constitutionally protected legal interests, it can be taken into account whether the press discusses a public interest matter in a serious and fact-based way in a specific case, thus satisfying the readership's need for information and contributing to the formation of public opinion, or whether it merely satisfies the need of a more or less broad readership for superficial entertainment. 30

In the case at hand, the need for protection of the private sphere of the plaintiff in the initial proceedings was not countered by an overriding public interest in public discussion on the matters covered in the interview. Readers do not have a right to be 'informed', by way of fictional reports, about the private life of a person who has been of public interest at some point. And even if such an interest were recognised as justified in this area, a fabricated interview cannot contribute to true 31

opinion-forming. Ultimately, the protection of the private sphere must thus take precedence over press statements of this kind.

II.

32 If a general law potentially restricts freedom of the press, the manner in which such a restriction applies is solely determined by the content of that specific law. This primarily means that only sanctions authorised by the law may be imposed on the press and effectively restrict its freedom. On that basis, the complainants claim there was no general law that provides for financial compensation for non-material damage when the right of personality is violated and that in fact, § 253 of the Civil Code even explicitly excluded such a claim. According to the complainants, when the courts granted such compensation claims, they thus crossed the boundary within which it was constitutionally permissible to restrict freedom of the press; furthermore, the courts imposed a sanction that violated freedom of the press in substantive terms, because it was directed one-sidedly against the press and imposed an unpredictable risk which would threaten its existence in the long run. This, they claim, fundamentally failed to recognise the essence and significance of freedom of the press in a free and democratic state.

33 As regards these submissions, too, it must be highlighted that the Federal Constitutional Court is not competent to decide whether the legal consequence that the Federal Court of Justice derived from the presumed violation of the general right of personality can be justified on grounds of private law doctrine, i.e. whether it was possible and advisable, from a private law perspective, to pursue the recognition of the general right of personality thus far, and to grant this right the protection provided by similar constituent elements set out in § 847 of the Civil Code by granting a claim for compensation.

34 In respect of this question, too, the Federal Constitutional Court must limit itself to reviewing the constitutional aspects of the case-law. In doing so, the following questions arise: First, does the substantive outcome of the decisions as such already violate the fundamental right to freedom of the press? Secondly, is it compatible with the Basic Law to bring about this outcome by way of judicial decision despite the lack of an unequivocal basis in written law?

35 An assessment of both questions does not raise any constitutional concerns in relation to the case-law of the Federal Court of Justice insofar as it forms the basis for the decisions challenged here.

III.

It is only natural that violations of the general right of personality are mainly committed by press organs as they possess the technical means for obtaining and disseminating information, which makes it relatively easy for them to intrude into the private sphere of individuals. However, examples from the case-law show that the civil courts also apply the rules they developed for the protection of the general right of personality to areas other than the press (cf., e.g., BGHZ 26, 349; 30, 7; 35, 363). For that reason alone, this is not a case of "special rights against the press". 36

Imposing excessively strict sanctions, including unpredictably large claims for damages, would indeed restrict freedom of the press in an unconstitutional manner, in particular if the legal requirements for such claims were not clearly defined. However, this is not the case here. Financial compensation for non-material damage is not a sanction that is generally alien to our legal order, as demonstrated by § 253 of the Civil Code. It is laid down in § 847 of the Civil Code for a violation of other legal interests specified in § 823 of the Civil Code, as well as certain other statutes. Over the course of the development of the relevant case-law, the groups of cases in which compensation must be paid for non-material damage have taken clear shape. The claim for compensation is subsidiary in nature; the courts only grant financial compensation if natural restitution, for instance in the form of injunctive relief or an order of retraction, is not possible or not sufficient in light of the facts of the case; it is out of the question to see a "commercialisation of honour" in this matter. Given the prerequisites of serious impairment to the personal sphere and serious misconduct, it is ensured that the duty of care imposed on a responsible press organ is not too strict and that liability is not incurred for any inaccuracy or objectively incorrect information. Finally, the relevant case-law shows that – just like in the case at hand – compensation payments granted remain within reasonable limits, particularly when taking into account that the press behaviour leading to the claims for compensation is usually guided by commercial interests. The risks faced by the press due to this case-law thus do not exceed the limits of what is reasonable (*zumutbar*). In the case at hand, this is particularly evident; the degree of care necessary to prevent a fabricated interview from being disseminated is never unreasonable. 37

IV.

1. Judges are traditionally bound by the law; this is an integral part of the principle of the separation of powers, and thus the rule of law. This principle is modified in the Basic Law, at least in respect of its wording, in that the judiciary is bound 38

by “law and justice” (Art. 20(3) of the Basic Law). The general view is that this indicates a rejection of narrow legal positivism. The wording makes it clear that law and justice are generally but not necessarily always aligned. Justice is not identical to the entirety of written laws. Beyond the positive statutes adopted by state authority, there may exist further law that finds its source in the constitutional legal order as a meaningful whole and may act as a corrective to written law; it is the judiciary’s duty to find and implement it in its case-law. Under the Basic Law, judges are not obliged to apply legislative instructions within the limits of their literal meaning to individual cases. Such an obligation would require there to be no gaps in the positive legal order of the state, which may be defensible as a postulate of legal certainty in principle, but is unattainable in practice. Judicial activity does not merely consist in identifying and pronouncing legislative decisions. In particular, judicial activity may require that values inherent in the constitutional legal order but which are not, or only incompletely, expressed in written law be brought to light and manifested in decisions in an act of evaluative assessment, which does not lack elements of will. In doing so, judges must remain free from arbitrariness; their decisions must be based on rational argument. It must be reasonably laid out how the written law at issue does not serve its function of solving a legal problem justly. The judicial decision then closes this gap in accordance with the standards of practical reason and “the community’s established general notions of justice” (BVerfGE 9, 338 <349>).

39 A judge’s responsibility and authority for “constructive development of the law” has never been called into question in principle – in any case not under the Basic Law […]. The highest federal courts have claimed this authority from the beginning (cf., e.g., BGHZ 3, 308 <315>; 4, 153 <158>; BAG 1, 279 <280 and 281>). The Federal Constitutional Court has always recognised it (cf., e.g., BVerfGE 3, 225 <243 and 244>; 13, 153 <164>; 18, 224 <237 and 238>; 25, 167 <183>). The legislator itself has expressly assigned the task of “development of the law” to the Grand Senates of the highest federal courts (cf., e.g., § 137 of the Courts Constitution Act). In some areas of the law, such as labour law, judicial development of the law has taken on particular significance as legislation has lagged behind social developments.

40 It is only the limits of such constructive development of the law that may be controversial, considering the principle that the judiciary be bound by law, which is indispensable for rule-of-law reasons. These limits cannot be standardised for all areas of law or all legal relationships arising from or governed by these.

41 2. For the purposes of this decision, the relevant issue can be limited to the area of private law. In this area, judges have at their disposal the grand codification of the Civil Code, which has been in force for more than 70 years. This is important in

two respects: Firstly, the more "codifications age" […], that is to say the more time has elapsed between the adoption of a law and the judicial decision on an individual case, the more a judge's freedom for constructive development of the law must necessarily grow. The interpretation of a legal provision cannot forever hold on to the meaning assigned to it when it was drafted. It must be considered what reasonable purpose it may serve at the time of its application. The provision is always situated in the context of the social conditions and the socio-political views upon which it is to have an effect; its content can, and possibly must, change as they do. This applies in particular when living conditions and legal views have changed as profoundly between the time of drafting and the application of a law as they have in this century. If a conflict arises between a provision and the substantive ideas of justice of a changed society, judges cannot withdraw from it by pointing to the unaltered wording of the law; they must handle legal provisions more freely in order not to fail at their task of administering justice. Secondly, experience has shown that legislative reforms encounter particular difficulties and obstacles when they attempt to change one of the grand legislative works that characterise the legal order as a whole, the way the codification of the Civil Code has impacted private law.

3. As stated above, the question that is the subject of the case-law challenged here 42
was already controversial during the preparatory work on the Civil Code […]. The criticism that immediately followed the legislative solution – initially without taking into consideration constitutional aspects – did not die down with time. Critics invoked the development of the law in other Western countries, which, to a far greater extent, recognise the option of financial compensation for non-material damage, too […]. Thus, the critics could argue that nowhere in the West did an unlawful act remain without private law sanctions as frequently as in Germany on the grounds that it 'only' caused non-material damage. The limitation of financial compensation for non-material damage to a few explicitly specified particular cases – with a certain "lack of clear direction" – was characterised as "legislative failure" […]. This criticism became harsher once the civil courts proceeded to recognise the general right of personality under the influence of the "power of the Basic Law in shaping private law" […]. This recognition revealed a gap in view of the sanctions to be imposed when the right of personality was violated. The significance of this problem was not foreseeable at the time of development of the Civil Code, but it urgently required a solution when changed legal views and the moral concept of the new Constitution emerged; no such solution could be derived from statutory law given the enumeration clause in § 253 of the Civil Code [listing non-material damage in respect of which compensation can be claimed].

43 The judiciary was faced with the question of whether to close this gap with available means or to wait for the legislator to intervene. When courts chose the former option, their decisions were affirmed by important voices in the legal discourse […]. Relevant decisions by the Federal Court of Justice and other courts thus met with broad approval in legal scholarship from the outset […]. This reveals that the case-law was in line with general notions of justice and was not considered an unacceptable restriction of freedom of expression or freedom of the press. Deliberations at the 42nd and 45th (1957 and 1964) German Jurists' Convention (*Deutscher Juristentag*) as well as the explanatory memorandum to the draft act by the Federal Government (BTDrucks III/1237) show how strongly the need for effective protection of one's personality under private law, and specifically by way of awarding non-material damages, was perceived. Therefore, the criticism was not directed so much against the outcomes of the judicial decisions as against the methodological and doctrinal considerations used by the courts to justify the chosen approach. To the extent that methods of private law are concerned, it generally does not fall to the Federal Constitutional Court to review the validity of objections presented in that context. However, it cannot be overlooked that the majority of scholars in private law apparently also do not see a problem with the courts' considerations in doctrinal terms […]. In the context of the negotiations of the Expert Group for Comparative Private Law of the Society for Comparative Law (*Fachgruppe für Zivilrechtsvergleichung der Gesellschaft für Rechtsvergleichung*) in Mannheim in 1971 (*Arbeiten zur Rechtsvergleichung*, vol. 61 (1972)), the case-law of the Federal Court of Justice was seen as having brought about a legal situation largely in line with international legal developments […]. An outcome resulting from an approach that is at least acceptable in private law, and which in any case does not obviously run counter to the rules of private law hermeneutics, is not objectionable under constitutional law if it serves to enforce and effectively protect a legal interest which the Constitution itself regards as the centre of its system of values. This outcome reflects 'justice' within the meaning of Art. 20(3) of the Basic Law – not in contradiction to written law, but as a supplement and further development of it.

44 As things stand, the alternative option – to wait until the legislator settles the matter – cannot be considered to be required by constitutional law. […]

45 Furthermore, the method of developing the law applied by the Federal Court of Justice is not objectionable under constitutional law given that it edges away from written law only to the degree that is indispensable for manifesting justice in the specific case. The Federal Court of Justice neither held that § 253 of the Civil Code is non-binding in its entirety, nor did it seek to designate it as unconstitutional (an option that would have been available to the court, given that the provision is pre-constitutional). The court left the principle of enumeration expressed in the

provision untouched and merely added another case to those in respect of which the legislator had already mandated compensation for non-material damage; the development of social realities, but also *jus superveniens* of higher rank, namely Arts. 1 and 2(1) of the Basic Law, urgently required this addition. In recognising this addition, the Federal Court of Justice and the courts following it have not abandoned the legal order or imposed their own will regarding legal policy; rather, they have merely resorted to means inherent in the system to further develop fundamental notions of the legal order shaped by the Constitution […]. The legal principle thus discovered is therefore a legitimate component of the legal order and, as a general law within the meaning of Art. 5(2) of the Basic Law, it serves as a limitation to freedom of the press. Its goal is to guarantee, also in private law, effective protection of human personality and of human dignity, which are at the centre of the system of values of the Basic Law, and thus strengthen the applicability of fundamental rights in one area of law. For these reasons, the complainants' constitutional objections are without merit.

V.

[…] 46-47

Justices: Benda, Ritterspach, Haager, Rupp-v. Brünneck, Böhmer, Faller, Brox, Simon

No. 4

BVerfGE 49, 286 – Transsexuals I

HEADNOTE

to the Order of the First Senate of 11 October 1978
1 BvR 16/72

Article 2(1) in conjunction with Article 1(1) of the Basic Law requires that a transsexual's male sex entry in the birth register be corrected, at least in cases where transsexualism is irreversible according to medical findings and gender reassignment surgery has been undergone.

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 16/72 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

H…,
– authorised representatives: …

against the Order of the Federal Court of Justice of 21 September 1971
- IV ZB 61/70 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Benda,
Haager,
Böhmer,
Simon,
Faller,
Hesse,

Katzenstein,
Niemeyer

held on 11 October 1978:

The Order of the Federal Court of Justice of 21 September 1971 - IV ZB 61/70 - violates the complainant's fundamental right under Article 2(1) in conjunction with Article 1(1) of the Basic Law. It is reversed. The matter is remanded to the Federal Court of Justice.

[…]

REASONS:

The complainant is one of the persons who were assigned male at birth because of their visible sexual characteristics, but later felt they belonged to the female gender in every respect and – after adjusting their appearance – now live as women, but are legally treated as men (male transsexuals). With his constitutional complaint, he challenges the refusal to change his official sex entry in the birth register from 'male' to 'female'. 1

A.

I.

On the basis of current findings, as set forth in a publication published by the German Society for Sexology (*Deutsche Gesellschaft für Sexualforschung*) from 1974, the key characteristic of transsexualism is the complete psychological identification with the other gender, i.e. the gender that contradicts that of one's body. […] 2

[…] 3-4

According to the scientific findings at hand, attempts to change the basic psychosexual structure of transsexuals by means of psychotherapy or hormone treatment have failed so far. According to scientific opinion, the only effective and helpful treatment is to adapt the transsexual's body to the gender identity they experience as far as possible. Only this way can the danger of self-mutilation and suicide, to which transsexuals are always exposed, be averted. However, the medical experts argue that for a transsexual full recognition of the new gender role is only achieved when their first name and civil status are changed. 5

II.

6 Pursuant to § 1(2) of the Civil Status Act in the version officially published on 8 August 1957 (BGBl I, p. 1125), the registrar is responsible for keeping a birth register. In this respect, the law provides in its current version:

§ 21

7 (1) The following information is entered in the birth register:
1. - 2. (...)
3. the child's sex
4. the child's first and last name
5. (...)

(2) (...)

8 Entries may be amended or corrected by the registrar.
9-11 […]
12 The registrar is also authorised to enter margin notes.
13 […]

14 § 47

(1) For the rest, a final entry may only be corrected by a court order. The same applies if a registrar has doubts as to whether they can correct an entry.
(2) (...)

III.

15 1. The complainant, who was born out of wedlock as the son of a seamstress, was raised first by foster parents, and later grew up in an orphanage in Silesia led by nuns. […]
16 The complainant married in 1953. His marriage ended in divorce in 1964. In 1961, his wife had a baby. Following the complainant's action for annulment, a judgment was issued in 1965 declaring that it was not his legitimate child. From about 1960, serious disturbances to the complainant's general well-being became apparent, as he increasingly identified with the female gender. Already in 1962, his left testicle was removed because of a contusion. In 1963, his right testicle was removed as an undescended testicle. After having been treated with female sex hormones, the complainant underwent gender reassignment surgery at a German university hospital in 1964.

Today, the complainant works as a nurse at a university hospital. 17

2. In 1968, the Berlin-Schöneberg Local Court granted the complainant's request to officially recognise him as a woman under civil status law, and instructed the responsible registrar to correct the complainant's entry in the birth register with the following margin note: "The child designated here is female." The court order was based on several medical reports, each of which diagnosed the complainant with an irreversible case of transsexualism. It also pointed out that a refusal to change the civil status could lead to unpredictable contradictions and interpersonal and social difficulties for the complainant. 18

3. Following the complaint of the *Land* Minister of the Interior, the Regional Court reversed the Local Court's order and rejected the application for correction of the entry in the birth register. […] 19

4. The complainant immediately filed a further complaint against this decision. The Higher Regional Court referred this complaint to the Federal Court of Justice for decision: 20

The Higher Regional Court argued that assigning the male sex was correct at the time of the entry. However, according to the court, it should now be considered established medical fact that gender is not determined by the sexual organs and characteristics alone, but also by the human psyche. […] 21

[…] 22-23

5. The Federal Court of Justice did not concur with the Higher Regional Court and rejected the immediate further complaint […]. According to the court, certain basic experiences have been taken for granted so far when assigning persons to the respective sex categories. The court held that in addition to the finding that there are no sexless persons, but that all persons can be assigned to the alternative categories of 'male' and 'female', there is the experience that a person's sex may be and must be determined based on physical sexual characteristics, which are innate and unchangeable. This principle not only governs all of social life, but the entire legal order. Occasional difficulties when assigning hermaphrodites to a sex cannot be considered a disruption of these principles. 24

The court held that this was not a failure to recognise that a transsexual who by fate has an irresistible urge to convert to the other gender may have a recognisable need to also be officially assigned to this sex. It held, however, that this was not possible without the corresponding legal provisions. […] 25

IV.

1. The treatment of transsexuals under civil status law has repeatedly been debated in the German *Bundestag*. […] A draft "Act on Changing Officially Assigned Sex 26

in Certain Cases" […] provides for a 'small' and a 'big' solution. According to this draft, transsexuals of legal age who are unable to reproduce and have felt compelled to belong to the other gender for at least three years may assume a first name corresponding to this gender, if their identification with the other gender is highly likely to no longer change. […]

27 2. In order to at least somewhat accommodate the difficult situation of transsexuals even before legislation is put in place, and in order to avoid causing undue hardship, the *Länder* and the Federation have agreed that transsexuals may assume a so-called gender-neutral first name […] in addition to the first name they have had so far. This new first name may then be stated on their identity card as their only first name without any additional gender markers. Accordingly, the complainant's male first name was changed to Helge.

V.

28 With his constitutional complaint, the complainant claims a violation of Art. 1(1) and (3) and of Art. 2(1) of the Basic Law. […]

VI.

29 1. The Federal Minister of Justice considers the constitutional complaint to be admissible, but unfounded. […]

30 […]

31 2. The President of the Federal Administrative Court stated that the court merely decided that a person who could be considered as transsexual may not have a female first name as long as they have a male sex entry in the birth register. […]

B.

32 The constitutional complaint is well-founded.

33 The challenged decision violates the complainant's fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

I.

34 1. According to the medical reports submitted, the complainant is female in psychological terms and his physical appearance was adapted to this gender as far as medically possible by way of hormone treatment and surgery. Legally, however, the complainant is treated as a man against his will. He is thus denied the opportunity

of leading an ordinary and assimilated life as a woman. The inconsistency between appearance and civil status is illustrated by the simple fact that he cannot legally have a female first name. Given that the Civil Status Act clearly assumes that the first name must indicate the sex of the name bearer […], the complainant can only change his name once the sex entry in the birth register has been changed. In this respect, even a gender-neutral first name does not entirely rule out contradictions for the complainant. The sphere affected by these belongs to the most intimate part of personality, which is in principle beyond the reach of the state and where in any case interference is only permissible if special public interests exist (cf. BVerfGE 47, 46 <73>).

2. a) Art. 1(1) of the Basic Law protects human dignity, the way persons understand themselves as individuals and become aware of themselves. This includes the right to determine one's own being and to take one's destiny into one's own hands. Art. 2(1) in conjunction with Art. 1(1) of the Basic Law guarantees the free development of the abilities and strengths inherent in a human being. Therefore, human dignity and the fundamental right to the free development of one's personality require assigning persons the civil status of the gender they identify with on the basis of their psychological and physical constitution. In this context, our legal order and our social life are based on the precept that humans are either male or female, independent of possible anomalies in the genital area. However, it is doubtful whether the hypothesis of an unchangeable identity based on sex, as determined at birth by way of external sexual characteristics, is still tenable in the absolute terms described by the Federal Court of Justice in its challenged decision. Science shows that there are various forms of somatic intersexuality. Based on studies on hermaphrodites, medical research has also pointed out that dissociation between body and psyche may occur, which is particularly pronounced in transsexuals according to established scientific findings. 35

The "basic experience" that a person's gender is determined by their physical sexual characteristics, and that it is innate and unchangeable, is seriously challenged by the medical findings concerning psychosexual development as the product of hereditary and external environmental factors […]. In any case, irrespective of remaining doubts as to the origins and causes of transsexualism, the transsexual complainant does not identify as a man, and according to the submitted medical reports, there are no external indications of male sex. In addition, his social behaviour is adapted to that of a woman, as his work as a nurse also indicates. 36

b) However, the right to the free development of one's personality is only guaranteed within the limits of moral law. Yet moral law is not violated in the case at hand. It is not within the scope of the current proceedings to decide whether gender reassignment surgery that is not required from a medical perspective would be con- 37

trary to moral law. According to the medical reports submitted here, surgery was medically indicated. Based on established scientific findings, transsexuals do not seek to manipulate their gender. Their focus is not sexuality, but rather achieving an alignment of body and psyche, and thus surgery must be considered necessary for realising this goal. The suffering of transsexuals described in the medical literature is strikingly confirmed by the medical reports regarding the complainant. Based on these reports, the complainant's process of gender change cannot be considered immoral. In the order challenged by the constitutional complaint, the Federal Court of Justice also denied the immorality of genital corrective surgery that aims to avoid severe psychological and physical damage.

38 The fact that the complainant, as a result of the correction of the complainant's sex entry, is able to marry a person of his former sex is not contrary to moral law either.

39 No further consideration is needed regarding the fact that a man's reproductive capacity and a woman's ability to give birth are not a precondition for marriage. Under the Basic Law (Art. 6(1) of the Basic Law) marriage is the union of a man and a woman in a partnership that is in principle inseparable (BVerfGE 10, 59 <66>). It is up to the spouses to shape this partnership according to their wishes. […]

40 c) According to the case-law of the Federal Constitutional Court, restrictions to an individual's exclusive right to determine their domain of private life may follow from their co-existence with others, insofar as this domain does not belong to their inviolable innermost domain (BVerfGE 35, 202 <220> – *Lebach;* with further references). Yet in the complainant's case, no public interest in refusing to change his sex entry in the birth register is apparent which might justify an interference with the fundamental right of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law.

II.

41 Since the refusal to correct the sex entry in the birth register is therefore incompatible with Art. 2(1) in conjunction with Art 1(1) of the Basic Law, the obligation of the courts to act in a manner compatible with fundamental rights cannot be denied merely because a legal provision is lacking.

42 1. […] Of course, the legislator is free […] to create a legal basis for correcting transsexuals' sex entries in the birth register. However, as long as it has not specified the requirements for such a correction, the obligation that follows directly from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law can be met by means of an interpretation of § 47(1) of the Civil Status Act in conformity with the Constitution.

43 2. […]

a) It is true that case-law and legal scholarship have developed the view that § 47(1) of the Civil Status Act only allows for the correction of entries in the birth register that were false from the outset. […] The Federal Court of Justice concurred with this view in the challenged decision. 44

b) However, the term 'correction' does not necessarily require information to have been false originally. It may also refer more generally to the subsequent rectification of incorrect information. […] 45

As far as the legislator's intent is concerned, it must be taken into account that § 47(1) of the Civil Status Act […] not only […] does not preclude corrections to transsexuals' sex entries, but also stipulates the procedural conditions for making such corrections. 46

3. The Federal Court of Justice is of the opinion that the legal problems associated with gender reassignment cannot be solved by way of judicial development of the law. This view fails to recognise that while there may be a legal gap in this respect, this gap cannot be considered a general lack of legal regulation in light of the constitutional law described above, according to which the fundamental right of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law directly results in an obligation upon the courts. In the interest of legal certainty, it is indeed for the legislator to resolve the civil status issues arising from gender reassignment and its consequences. However, as long as such legislation is not in place, the task incumbent upon the courts is the same as it was in the case of equality between men and women before the Equal Rights Act entered into force (BVerfGE 3, 225 <239 *et seq*.>, cf. also BVerfGE 37, 67 <81>). The courts cannot be denied this responsibility, given that the judiciary is directly bound by the fundamental rights (Art. 1(3) of the Basic Law). 47

Moreover, the complainant's case does not raise most of the legal problems which, according to the Federal Court of Justice, can only be solved by the legislator itself. The complainant is divorced, does not have any children, underwent gender reassignment surgery as early as 1964, and is 46 years old. Insofar as it is necessary to determine the time at which gender reassignment attains legal validity, the view that entries in the birth register are merely declaratory does not have to be upheld given the applicable constitutional law. For instance, a solution that is not objectionable under constitutional law would be giving *ex nunc*, and thus constitutive effect, to the margin note of a change of a person's sex entry after birth. 48

However, it is not for the Federal Constitutional Court to decide on this matter. Therefore, the matter is remanded to the Federal Court of Justice. 49

Justices: Benda, Haager, Böhmer, Simon, Faller, Hesse, Katzenstein, Niemeyer

No. 5

BVerfGE 54, 148 – Eppler

HEADNOTES

to the Judgment of the First Senate of 3 June 1980
1 BvR 185/77

1. The general right of personality, as constitutionally guaranteed by Article 2(1) in conjunction with Article 1(1) of the Basic Law, also protects individuals from having statements falsely attributed to them that impair their right to maintain a self-defined social image.
2. As long as the defendant has a procedural obligation to cooperate, there is no constitutional requirement to deviate, in cases of this nature, from the general rule of civil procedure that the plaintiff must provide proof of the factual circumstances giving rise to their claim [for injunctive relief].

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 185/77 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaint of

Dr. E…,

– authorised representatives: …

against the Judgment of the Stuttgart Higher Regional Court of 9 February 1977
- 4 U 117/76 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Benda,
Böhmer,
Simon,

Faller,
Hesse,
Katzenstein,
Niemeyer,
Heußner

held on 3 June 1980:

The constitutional complaint is rejected.

REASONS:

A.

I.

1. The complainant is the chairperson of the Baden-Württemberg regional branch of the *Sozialdemokratische Partei Deutschlands* (SPD political party); the defendant in the initial proceedings was the Baden-Württemberg regional branch of the *Christlich-Demokratische Union* (CDU political party). As a campaign service for the 1976 state parliament elections […], the defendant provided a model speech to its district speakers titled "The Socialist Agenda", excerpts of which read as follows: 1

> "It is particularly disastrous that the social and economic policy ideas of the SPD are clearly informed by Socialist ideology, framing *economic policy and social policy as polar opposites.* Given such a political narrative, demands for the *nationalisation* of banks and key industries flourish, as do calls for state control over *economic investments,* and for *co-determination,* which in reality is nothing other than *external control*. The intention here is ultimately – as E. and S. have put it – to test the economy's resilience, as though industry were an engine which could be pushed until it chokes, and then re-started at will". 2

2. The complainant contended that this violated his right of personality and lodged an application for injunctive relief; he claimed that he had never said, either verbatim or in spirit, that the economy's resilience should be tested. The Regional Court rejected the application; the appeal on points of fact and law (*Berufung*) to the Higher Regional Court was unsuccessful. The Higher Regional Court gave the following reasons for its decision: 3

It was not possible for the court to determine whether the complainant had in fact said that one should test the economy's resilience. The court also affirmed that it 4

would generally be for the defendant to bear the consequences of this procedural *non liquet* (inconclusive evidence) […]. However, the court held that this rule of evidence [placing the burden of proof on the defendant] was not applicable in the case at hand on the grounds that the defendant could invoke the defence of having pursued legitimate interests. It thus concluded that the burden of proof fell on the complainant, who was not able to demonstrate that he had not made the disputed statements. […]

5 The court also concluded that the assertion challenged by the complainant did not amount to defamation in any case […]. […]

II.

6 1. With his constitutional complaint, the complainant challenges a violation of his fundamental rights under Art. 1(1), Art. 2(1), Art. 3(1) and Art. 3(3), Art. 4 and Art. 5 of the Basic Law. […]

7 2. The Ministry of Justice of the *Land* Baden-Württemberg considers the constitutional complaint to be unfounded. […]

B.

8 The constitutional complaint is unfounded.

I.

9 The constitutional complaint is directed against a court decision in civil proceedings regarding a claim for injunctive relief under private law. It is incumbent upon the ordinary courts to interpret the applicable legal provisions, taking into account the influence of fundamental rights on private law in their decisions. The Federal Constitutional Court is only called upon to ensure that the ordinary courts observe fundamental right guarantees and standards; in this respect, the Court must review whether a challenged decision shows any errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right, in particular of its scope of protection, and whether these deficits are of considerable weight in the case at issue (BVerfGE 42, 143 <147 *et seq*.> with further references). […]

II.

Having regard to these limits of constitutional review, the challenged judgment cannot be held to violate fundamental rights. 10

1. The complainant claims a violation of his right of personality, which he asserts is guaranteed by Art. 1(1) and Art. 2(1) of the Basic Law; in addition, he invokes the specific fundamental rights set out in the constitutional complaint. It is correct to assume that within their respective scope, the specific fundamental rights also serve the protection of one's personality. However, neither the complainant's submissions nor other evidence provides any indication of a violation of the specific fundamental rights under Art. 3(1) and (3), Art. 4 or Art. 5 of the Basic Law. […] 11

2. a) Given that a violation of specific fundamental rights can thus be ruled out, the applicable basis for review is the general right of personality, which is constitutionally guaranteed by Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 12

While the specific ('listed') freedoms of the Basic Law, such as freedom of conscience or freedom of expression, also protect fundamental aspects of one's personality, the general right of personality supplements these guarantees as a 'non-listed' freedom. Affirming "human dignity" (Art. 1(1) of the Basic Law) as the supreme constitutive principle, the general right of personality serves to guarantee the personal sphere that is closer to the core of private life (*engere persönliche Lebenssphäre*) as well as its basic conditions, which cannot be entirely protected by the traditional specific freedoms guaranteed in the Constitution; most notably, this need for more comprehensive protection arises with regard to modern developments that pose new risks to the protection of one's personality. As the link to Art. 1(1) of the Basic Law reveals, the general right of personality under Art. 2(1) of the Basic Law comprises an element of "free development of one's personality", which manifests as a right to respect for a certain protected domain, and that differs from the 'active' element of this development guaranteed in the form of general freedom of action (cf. BVerfGE 6, 32). Accordingly, the constituent elements of the general right of personality must be defined more narrowly than those relating to the general freedom of action: the former may only come to bear on interferences that are capable of impairing one's closer personal sphere (cf. BVerfGE 34, 238 <247> – *Secret Tape Recordings*; BGHZ 24, 72 <81>; 27, 284 <287>). 13

Given the particularities of the general right of personality set out above, neither the case-law of the Federal Constitutional Court nor the case-law of the Federal Court of Justice has exhaustively defined the substance of this protected right; rather, the various manifestations of this right have been developed on a case-by-case basis. Legal interests that have thus been recognised as protected by the general right of personality include the private sphere, the secret sphere and the intimate sphere 14

(cf., e.g., BVerfGE 27, 1 <6> – *Microcensus*; 27, 344 <350 and 351> – *Divorce Files*; 32, 373 <379>; 34, 238 <245 and 246> – *Secret Tape Recordings*; 47, 46 <73>; 49, 286 <298> – *Transsexuals I*), personal honour, the right to determine the portrayal of one's person (BVerfGE 35, 202 <220> – *Lebach*), the right to one's own image and to one's own speech (BVerfGE 34, 238 <246> – *Secret Tape Recordings*) and, under certain circumstances, the right to be protected against fabricated comments attributed to one's person (cf. BVerfGE 34, 269 <282 and 283> – *Soraya*). These manifestations of the constitutionally protected right of personality must be observed by the courts when they assess conflicting interests under provisions of private law in their decisions (cf. BVerfGE 35, 202 <221> – *Lebach*).

15 b) The factual circumstances underlying the constitutional complaint do not fall within any of the manifestations of the right of personality protected by Art. 2(1) of the Basic Law that have been recognised in case-law so far. Neither the complainant's private sphere nor his secret or personal sphere are affected. The assertion challenged by the complainant also does not constitute an attack on his honour; […]. Calling for the economy's resilience to be tested does, by itself, not amount to dishonourable conduct; nor does it constitute incitement to unconstitutional action […]. […] Finally, the complainant cannot directly invoke the right to one's own speech (cf. in this regard BGHZ 13, 334 <338 and 339>). The case at hand specifically concerns a statement that has been attributed to, yet – according to his own submission – was never made by the complainant [and thus does not qualify as his own speech]; the statement in dispute also does not result in an incorrect portrayal of the complainant's personality by way of misquoting comments he made in the past.

16 The general right of personality guaranteed by Art. 2(1) of Basic Law may, however, also be invoked where statements are falsely attributed to one's person. This requires the challenged conduct to amount to a violation of a legal interest that has been recognised as protected by the right of personality, such as the private sphere; this is the case, for instance, where a fabricated interview is spread that concerns the private life of the affected rights holder (BGH, NJW 1965, p. 685; cf. also BVerfGE 34, 269 <282 and 283> – *Soraya*). Even if the impairment of a protected interest is not ascertainable, an interference with the general right of personality may be found where statements attributed to a person who did not actually make these statements impair that person's right to maintain a self-defined social image (*selbst definierter sozialer Geltungsanspruch*). This follows from the notion of self-determination, which underlies the protection of the general right of personality: individuals should generally – not just in relation to their private life – be afforded the right to decide how they wish to present themselves vis-à-vis third

parties or the public, and whether and to what extent third parties may determine or control aspects of their personality; this particularly includes the decision on whether and how the individual wishes to share their own statements with others. […] In this context, it is only for the individual person to determine what should constitute their self-defined social image; to this end, the substance of the general right of personality is primarily informed by the self-perception of the rights holder (cf. for freedom of worship BVerfGE 24, 236 <247 and 248>).

Thus, it would be incompatible with Art. 2(1) of Basic Law if the assessment of whether a statement falsely attributed to a person impaired their general right of personality were based on how the person is – justifiably or not – perceived by others, instead of giving consideration to the self-perception of the rights holder. […] 17

3. a) Seen this way, the constitutional guarantee of the general right of personality could only be significant for the assessment of the merits in the initial proceedings if the complainant did not make the statement about testing the economy's resilience. If the Higher Regional Court had considered this to be true but nonetheless found no interference with the complainant's right of personality, it would not only have failed to give sufficient consideration to the substance of this right as set out above, but the court itself would have violated Art. 2(1) of the Basic Law by setting its own perception of the complainant's personality as the relevant standard for assessing whether the statement that was attributed to the complainant distorted the portrayal of his personality. In that scenario, the social image of the complainant would have been defined not by the complainant himself, but by the court. Despite the fact that the court did refer to comments made by the complainant in different contexts, such an approach is incompatible with Art. 2(1) of the Basic Law. 18

b) These considerations, however, would only have been relevant for the challenged judgment if it had been established as fact that the complainant did not make the statement in dispute. In this regard, the Higher Regional Court concluded that the evidence was inconclusive with regard to establishing the truth of the defendant's assertions. The evaluation of the evidence presented that led to this conclusion is not subject to review by the Federal Constitutional Court. […] 19

[…] The Higher Regional Court correctly assumed that the statement in dispute was not capable of disparaging the complainant or negatively affecting public opinion of him. The only open question is whether the Higher Regional Court's view that it was incumbent upon the complainant to demonstrate and prove the alleged unlawful violation of his right of personality resulted in a violation of constitutional law. Ultimately, this view is not objectionable under constitutional law. 20

A facet of constitutional law that would require a deviation from the general evidentiary rules of civil procedure applicable in cases of this kind is not discernible. 21

The rules of evidence provide that the burden of proof regarding the elements of the claim rests with the injured party; in this regard, evidence might indeed be difficult to obtain if the injured party must prove that it did not make a disputed statement. However, this does not impose an undue burden on the injured party, given that the defendant is under an obligation to cooperate: the defendant must substantiate the contention that the plaintiff made a certain statement; thus, the defendant must specify, in particular, when and how the statement was made and to whom it was addressed. These assertions may be refuted by the plaintiff. In the case at hand, the defendant had indeed specified the relevant circumstances, and the information provided in this regard was thoroughly examined and assessed. […] In a case like this, constitutional law does not require […] a departure from the general rules of civil procedure in respect of the burden of proof.

22 c) Based on the factual findings of the Higher Regional Court, which were established without any violation of constitutional law, it is not ascertainable that a statement was falsely attributed to the complainant in violation of his right to a – self-defined – social image. In order to assert an interference with the complainant's right of personality, it would have been necessary for the complainant to first establish that a statement had been falsely attributed to him. […]

Justices: Benda, Böhmer, Simon, Faller, Hesse, Katzenstein, Niemeyer, Heußner

No. 6

BVerfGE 65, 1 – Census

HEADNOTES

to the Judgment of the First Senate of 15 December 1983
1 BvR 209, 269, 362, 420, 440, 484/83

1. In the context of modern data processing, the general right of personality under Article 2(1) in conjunction with Article 1(1) of the Basic Law encompasses the protection of the individual against the unlimited collection, storage, use and sharing of their personal data. This fundamental right confers upon the individual the authority to, in principle, decide themselves on the disclosure and use of their personal data.
2. Restrictions of this right to 'informational self-determination' are only permissible if they serve an overriding public interest. They require a statutory basis that must be constitutional and must satisfy the requirement of legal clarity under the rule of law. In the design of the statutory framework, the legislator must furthermore observe the principle of proportionality. It must also provide for organisational and procedural safeguards that counter the risk of violating the general right of personality.
3. As for the constitutional requirements applicable to such restrictions, a distinction must be made between personal data that is collected and processed as individualised information and not rendered anonymous, and data intended for statistical purposes.
   Where data is collected for statistical purposes, requiring a strict and specific purpose limitation would not be feasible. However, to compensate for the lack of such a purpose limitation, the collection and processing of such information must be subject to other adequate limitations within the relevant information system.
4. The data collection provided for under the 1983 Census Act (§ 2 nos. 1 to 7, §§ 3 to 5 of the Act) does not amount to the registration and cataloguing of the data subjects' personality in a manner that would be incompatible with human dignity; the relevant provisions also satisfy the requirements of legal clarity and proportionality. However, it is imperative that additional

procedural safeguards be put in place in order to ensure that the right to informational self-determination is respected in the implementation and organisation of the census data collection.

5. The legal provisions governing the transfer of data under § 9(1) to (3) of the 1983 Census Act (including the comparison of census data with civil registry records) violate the general right of personality. However, the sharing of data for scientific purposes (§ 9(4) of the 1983 Census Act) is compatible with the Basic Law.

FEDERAL CONSTITUTIONAL COURT
- 1 BvR 209, 269, 362, 420, 440, 484/83 -

IN THE NAME OF THE PEOPLE

In the proceedings
on the constitutional complaints of

a) Mr von M…,
- 1 BvR 209/83 -,

b) 1. Dr. W…, 2. Ms S…,
– authorised representative: …,
- 1 BvR 269/83 -,

c) Prof. Dr. M…,
- 1 BvR 362/83 -,

d) 1. Prof. Dr. B…, 2. Prof. Dr. Dr. P…, 3. Prof. Dr. S…, 4. Ms W…,
– authorised representative: …,
- 1 BvR 420/83 -,

e) 1. Dr. H…, 2. Mr B…, 3. Mr F..., 4. Mr G…, 5. Ms M..., 6. Mr O..., 7. Mr S…, 8. Mr S..., 9. Mr W..., 10. Ms W..., 11. Ms B..., 12. Ms B…, 13. Mr D..., 14. Ms H…, 15. Mr J…, 16. Ms K…, 17. Ms M…, 18. Mr R…, 19. Ms S…, 20. Ms S…, 21. Ms Z…,
– authorised representative: …,
- 1 BvR 440/83 -,

f) Ms F…,
– authorised representative: …,
- 1 BvR 484/83 -

directly against the Act on a Census Surveying Population, Occupation, Housing and Workplaces of 25 March 1982 (BGBl I, p. 369)

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Benda,
Simon,
Hesse,
Katzenstein,
Niemeyer,
Heußner,
Niedermaier,
Henschel

held on the basis of the oral hearing of 18 and 19 October 1983:

JUDGMENT

1. § 2 nos. 1 to 7 and §§ 3 to 5 of the Act on a Census Surveying Population, Occupation, Housing and Workplaces (1983 Census Act) of 25 March 1982 (BGBl I, p. 369) are compatible with the Basic Law; however, the legislator must ensure that additional organisational and procedural rules for the census be put in place in accordance with the reasons set forth in this judgment.
2. § 9(1) to (3) of the 1983 Census Act is not compatible with Article 2(1) in conjunction with Article 1(1) of the Basic Law, and is thus void.
3. To the extent set out in nos. 1 and 2 above, the Census Act violates the complainants' fundamental rights under Article 2(1) in conjunction with Article 1(1) of the Basic Law.

For the rest, the constitutional complaints are rejected.

[…]

REASONS:

A.

The constitutional complaints directly challenge the Act on a Census Surveying Population, Occupation, Housing and Workplaces (1983 Census Act) of 25 March 1982 (BGBl I, p. 369). 1

2 The data collection prescribed by the challenged Act has sparked concern among the general public, even among law-abiding citizens who recognise the power and duty of the state to gather the information necessary for rational and well-planned government action. In part, this may be attributable to wide-spread misconceptions regarding the scope and purposes of the survey; due to new developments in automatic data processing, the general perception of such measures has changed significantly since the microcensus data collections from 1956 to 1962 were carried out (cf. BVerfGE 27, 1 – *Microcensus*). It was not recognised early enough that it would be necessary to provide reliable information to the census subjects concerning the envisaged collection of their data. Nowadays, only experts can fully grasp the possibilities of modern data processing, which may prompt citizens to fear that personality profiles are being compiled beyond their control, even if the legislator limits their obligation to provide information to what is necessary and reasonable (*zumutbar*). [...]

I.

3 1. The 1983 Census Act, in its §§ 1 to 8, specifies the data collection framework and its implementation. § 9 further specifies the regime governing the use and sharing of the collected data. The key provisions read:

4-5 […]

§ 2

6 The population and occupation census shall record:

7 1. given names and surnames, address, telephone number, sex, date of birth, marital status, legal membership (or lack thereof) in a religious community, nationality;

8 2. use of dwelling as exclusive, primary or secondary residence (§ 12(2) of the Framework Act on Civil Registration);

9 3. primary source of income;

10 4. participation in the workforce, status as housewife, pupil or student;

11 5. professional qualifications, duration of vocational training, highest qualification obtained in general education, highest qualification obtained in vocational or higher education, including the major field of study in which the most recent qualification was obtained;

6. regarding the working population, pupils and students: name and address of the workplace or training facility, primary means of transport used and time spent getting to and from work or education; 12

7. regarding the working population: line of business of employer, professional position, type of occupation carried out, working hours, secondary occupations (agricultural and non-agricultural); 13

8. regarding detention facilities and institutions: status as inmate or staff member or staff family member. 14

§ 3

(1) The building-related survey shall record the address, type and year of construction as well as ownership information for residential buildings or buildings in permanent residential use [...]. 15

(2) The dwelling-related survey shall record: 16

1. type, size, fixtures and fittings, intended use, type of heating and heating supply, year of taking up residence, living arrangements, subsidies received under affordable housing programmes as well as number and usage of individual rooms; 17

2. regarding rented apartments: amount of monthly rent; 18

3. regarding vacant apartments: duration of vacancy. 19

§ 4

The workplace census shall record: 20

1. regarding non-agricultural workplaces and companies: 21

   a) name, designation, address, telephone numbers and number of telephone stations, type of establishment, type of activities or tasks performed at the workplace or company, start of business operations (year), information on (new) establishments or relocation, the responsible body for workplaces in facilities or institutions of public authorities or of social insurance providers, as well as of churches, associations or other organisations, 22

23 b) number of staff disaggregated by sex, company position, number of part-time employees as well as number of foreign employees disaggregated by sex,

24 c) total amount of gross wages and salaries paid in the preceding calendar year;

25 2. regarding main establishments and single-location establishments:

26 a) registration of the company in the register of craft businesses,

27 b) legal form of the company;

28 3. regarding main establishments, in addition to nos. 1 and 2 above, information for each branch establishment on:

29 a) names, designation, address, type of activities or task performed,

30 b) number of staff,

31 c) total amount of gross wages and salaries paid in the preceding calendar year.

32-46 [§§ 5-7…]

§ 9

47 (1) Census data collected pursuant to § 2 nos. 1 and 2 may be compared with the civil registers and used for the purposes of correcting the latter. The information obtained from this data may not be used for taking measures against the individual census subject.

48 (2) In relation to the census elements listed in §§ 2 to 4, the statistical offices of the Federation and the *Länder* may transfer individual data, excluding names, to the competent highest federal and *Land* authorities pursuant to § 11(3) of the Federal Statistics Act of 14 March 1980 (BGBl I, p. 289) to the extent that the relevant information is necessary for the lawful exercise of functions conferred upon the respective authorities. With the exception of information on legal membership (or lack thereof) in a religious community collected pursuant to § 2 no. 1, and on the census elements listed in § 4 no. 1 lit. c and § 4 no. 3 lit. c, the first sentence of this subsection also applies to the transfer of data to authorities designated by the competent highest authorities of the Federation or the *Länder* and to other public and non-public bodies, to the extent that the data transfer is necessary for the lawful exercise of functions conferred upon the

competent highest authorities of the Federation or the *Länder*. In this regard, the second sentence of subsection 1 applies accordingly.

(3) With the exception of information on legal membership (or lack thereof) in a religious community collected pursuant to § 2 no. 1, and on the census elements listed in § 4 no. 1 lit. c and § 4 no. 3 lit. c, the statistical offices of the *Länder* may transfer to municipalities and municipal associations individual data, excluding names, of the census subjects residing in the relevant jurisdiction for purposes relating to regional planning, surveying, municipal planning and environmental protection. […] 49

(4) For scientific purposes, the statistical offices of the Federation and the *Länder* may transfer individual data, excluding names and addresses, on the census elements listed in §§ 2 to 4, with the exception of information on legal membership (or lack thereof) in a religious community collected pursuant to § 2 no. 1, and on census elements listed in § 4 no. 1 lit. c and § 4 no. 4 lit. c, to public officials and persons of equivalent status. 50

(5) Individual data transferred pursuant to subsections 2 to 4 may only be used for the purposes for which it was transferred. 51

(6) Individual data contained in statistical results and concerning information on legal membership (or lack thereof) in a religious community pursuant to § 2 no. 1 disaggregated by age and sex, and on the census elements listed in § 4 no. 1 lit. b disaggregated by the type of activity carried out by the workplace or company, as well as on the census elements listed in § 4 no. 3 lit. b, may be disclosed by the statistical offices of the Federation and the *Länder*. 52

[(7)-(8)…] 53-54

[…The Federal Statistics Act is also applicable to the proposed type of statistical data collection. Relevant provisions are:] 55

§ 10

(1) All natural persons and legal persons incorporated under private law, commercial partnerships, and bodies, institutions and foundations incorporated under public law, and authorities and other public bodies of the Federation, the *Länder*, the municipalities and municipal associations, as well as their subordi- 56

nate bodies, institutions and foundations incorporated under public law over which they exercise regulatory oversight, are obliged to answer lawfully submitted questions except where answering is expressly declared optional.

57 (2) The obligation of census subjects to provide the requested information applies vis-à-vis the bodies and persons officially tasked with carrying out federal statistical surveys.

58 (3) Answers must be provided in a truthful and complete manner, within the stipulated time period and free of charge (including postal fees).

59 (4) Where official survey sheets to be filled in by the census subjects are provided, the requested information must be submitted on these forms. If indicated on the survey sheet, the accuracy of the information provided must be confirmed by signature.

§ 11

60 (1) In the absence of provisions to the contrary, individual data on personal and material circumstances provided for federal statistics purposes must be treated confidentially by the public officials, or persons of equivalent status, that are tasked with carrying out federal statistical surveys, unless the persons concerned expressly consent, in the individual case, to the sharing and disclosure of their personal data. […]

61 (2) The sharing of individual data between persons and bodies tasked with carrying out federal statistical surveys is permissible to the extent that is necessary for the purposes of compiling the federal statistics in question.

62-65 [(3)-(6)…]

66 (7) Data collected for the purposes of identifying the respective census subjects, especially names and addresses, shall be deleted as soon as knowledge of such data is no longer necessary for carrying out the relevant tasks pertaining to statistics compiled for federal purposes. Names and addresses must be stored separately from the rest of the data, and must be subject to special confidentiality protection.

[… The Federal Data Protection Act also applies in the absence of more specific provisions. Relevant provisions are:] 67

§ 5

Data confidentiality 68

(1) Without authorisation, persons employed in data processing pursuant to § 1(2) of this Act or acting under instruction of the persons and bodies listed in § 1(2) of this Act are prohibited from processing, disclosing, providing access to or using protected personal data for purposes other than the designated purpose pertaining to the lawful exercise of their respective functions. 69

[(2)...] 70

§ 13

Information to be provided to the data subject 71

(1) Upon request, the data subject concerned shall be provided with information on personal data stored about them. The request should specify the type of personal data on which information is sought. The body controlling the relevant data shall exercise due discretion in determining the applicable procedure and, in particular, the manner in which the requested information is to be provided. 72

(2) (...)

(3) The request by the data subject shall not be complied with if 73

1. providing the information sought would jeopardise the lawful performance of tasks for which the body controlling the data is responsible, 74
2. providing the information sought would pose a danger to public security and order, or otherwise impair legitimate interests of the Federation or a *Land*, 75
3. a legal provision or the nature of the data requires that the personal data in question, or the fact that it is stored, be kept confidential, especially on grounds of overriding legitimate interests of third parties, 76
4. (...) 77

(4) (…)

78 2. After the initial attempt to introduce draft legislation on a census failed during the 8th legislative period, due to disagreement regarding costs, the Federal Government re-submitted essentially the same census draft law in early 1981. The key considerations put forward in the explanatory memorandum attached to the draft can be summarised as follows (BTDrucks 9/451, p. 7 *et seq*.):

79 Population, occupation and workplace censuses are integral to collecting statistical data. Data on updated population figures, including on regional distribution, demographic composition and social indicators as well as economic activity, is vital to decision-making on social and economic policies at the level of the Federation, the *Länder* and the municipalities. Various legal provisions make reference to census results. Similarly, political parties, trade unions and employers' organisations, business and professional associations, science and research, and other relevant groups of public life rely on census results. Moreover, census results serve as the basis for updating information on ongoing developments and as the selection basis for random sample surveys provided for in other legislation. The results of the last census, which took place on 27 May 1970, are outdated. The Federation, *Länder* and municipalities, but also numerous social and business organisations believe that their work may be seriously impaired in the foreseeable future, and fear miscalculations in planning and investment decisions. The data to be collected for the purposes of updating existing records is limited to what is absolutely necessary, in order to ease the burden on the census subjects and to minimise costs.

80 The population and occupation census will provide a comprehensive overview of population structures, including a detailed regional breakdown. The results of the census will be used for numerous administrative purposes. Population figures, for example, are significant for determining the votes allocated to each *Land* in the *Bundesrat*, for delimiting constituencies for *Bundestag* elections, for determining the size of municipal councils and for many other matters. The Free State of Bavaria counted more than one hundred legal provisions that make reference to population figures. Comparing the residential address data collected in the census with the data of the civil registers will ensure that the population figures produced by the census, and updated continuously on its basis thereafter, will largely be identical to the content of the civil registers.

81 The building-related survey is primarily needed for the purposes of analysing regional and urban development, which is relevant for the entire federal territory, and will serve as a basis for the statutorily required update of housing stock records. The dwelling-related survey aims to provide a detailed regional

breakdown of the volume and structure of the housing stock. This serves to establish essential indicators for evaluating the housing stock regarding, for instance, occupancy levels, or information on vacant apartments and rent to income ratios. At the same time, such data provides the basis for statutorily required updates of housing stock records.

As an umbrella survey, the workplace census covers all economic sectors, except for the agricultural sector. Breaking down the data by sector and region, the census will provide an overview of the number and size of workplaces and companies and their respective legal forms. The results of the census will provide valuable information, most notably in relation to spatial, *Land* and regional planning, as well as in relation to structural, labour and transport policies. 82

[…] 83-86

[Upon receiving the legislative draft adopted by the *Bundestag*], the *Bundesrat* requested, firstly, that § 5(2) of the 1983 Census Act be inserted into the draft law; according to this provision, neither an objection in administrative proceedings nor a rescissory action before the administrative courts (*Anfechtungsklage*) upon receiving the official demand to provide information has suspensive effect. In its reasoning, the *Bundesrat* submitted that the costs of the census would only be justified if complete data were available within the shortest time possible. This objective would be jeopardised if legal remedies were to have suspensive effect. It would be difficult to establish sufficient grounds for issuing orders for immediate execution in each individual case [in accordance with the general rules of administrative procedure]. The *Bundesrat* stated that this uncertainty could be avoided if the law itself prescribed that the suspensive effect of legal remedies did not apply. 87

In addition, the *Bundesrat* submitted that it was necessary to include, in its entirety, all data obtained pursuant to § 2 nos. 1 and 2 of the 1983 Census Act in the envisaged comparison of census data with civil register records. […] 88

[…] 89-91

II.

The complainants claim a violation of their fundamental rights under Art. 2(1) in conjunction with Art. 1(1), Art. 4(1), Art. 5(1), Art. 13 and Art. 19(4) of the Basic Law as well as a violation of the principle of the rule of law (Art. 20(3) of the Basic Law). [...] 92

93-100 […]

III.

101 […]

102 In respect of the constitutional complaints and the questions posed by the Federal Constitutional Court in these proceedings, the Federal Minister of the Interior submitted a statement on behalf of the Federal Government; further statements were submitted by the *Land* Government of Baden-Württemberg, the Government of the Free State of Bavaria, the Government of the Free and Hanseatic City of Hamburg, the *Land* Government of Lower Saxony, the *Land* Government of North Rhine-Westphalia, the *Land* Government of Rhineland-Palatinate and the *Land* Government of Schleswig-Holstein. In addition, statements were submitted by the Federal Data Protection Officer as well as by the Data Protection Officers of the *Länder* Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hesse and North Rhine-Westphalia and by the Data Protection Commission of the *Land* Rhineland-Palatinate.

103-123 […]

IV.

124 The complainants [and the other parties to the proceedings as well as experts] were heard in the oral hearing.

125 […]

B.

126 The constitutional complaints are, for the most part, admissible.

127 In accordance with established case-law, a universally applicable legal provision may be challenged directly by individual citizens only in the event that the relevant legal provision affects them individually, presently and directly with regard to their

fundamental rights (BVerfGE 40, 141 <156>; 43, 291 <385>; 50, 290 <319>; 58, 81 <104>; 59, 1 <17 and 18>; 60, 360 <370>).

I.

[…] 128-130

II.

To the extent that the complainants are individually affected by the 1983 Census Act, they are also directly and presently affected. 131

According to the case-law of the Federal Constitutional Court, a complainant is not directly affected by a challenged law if implementation of the law requires specific measures to be taken by the administrative authorities. This is because the interference with the citizen's legal sphere only occurs through the relevant implementation measure; legal recourse against this interference also allows for a challenge of the constitutionality of the law on which the measure was based (BVerfGE 58, 81 <104>; cf. BVerfGE 59, 1 <17>; 60, 360 <369 and 370>). 132

In order to implement the 1983 Census Act, a demand to provide information would have had to be issued; the legal sphere of the complainants would only have been affected upon receiving such a demand […]. At that point, recourse to the administrative courts against this implementation measure would have become possible. Yet this does not rule out the admissibility of the constitutional complaints in the current proceedings. 133

In certain constellations, the Federal Constitutional Court has, by way of exception, accepted constitutional complaints directly challenging a law as admissible even though specific implementation measures had yet to be taken; this requires that the law itself already compels the persons concerned to presently make decisions that cannot be reversed at a later date, or to make arrangements with consequences that cannot be undone once the implementation measures provided for under the relevant law have been carried out (BVerfGE 60, 360 <372> with further references). Accordingly, the constitutional complaints that directly challenge the 1983 Census Act are admissible by way of exception even though specific implementation measures have yet to be taken. 134

Notably, the Act was supposed to be enforced vis-à-vis all citizens within a very short period of time. […] 135

C.

136 To the extent that they are admissible, the constitutional complaints are in part well-founded.

I.

137 Insofar as § 5(1) of the 1983 Census Act directly imposes an obligation upon the complainants to provide information on specific subject matters enumerated in §§ 2 to 4 of the Act, there is no violation of the complainants' fundamental rights under Arts. 4, 5 and 13 of the Basic Law.

138 1. The obligation to provide truthful information [...] on legal membership (or lack thereof) in a religious community [...] does not violate the complainants' fundamental right to freedom of faith (Art. 4(1) of the Basic Law). Freedom of faith encompasses not only the right to profess one's religious beliefs, but also the right not to disclose one's beliefs, as is specifically recognised in Art. 140 of the Basic Law in conjunction with Art. 136(3) of the Weimar Constitution. The negative freedom not to profess a belief is limited, however, by the exception set forth in Art. 136(3) second sentence of the Weimar Constitution: according to this provision, authorities have the right to inquire about a person's membership in a religious community to the extent that citizens' rights or duties depend on it or that a statutorily mandated statistical survey so requires. Given that the census constitutes a statutorily mandated statistical survey for federal purposes (Art. 73 no. 11 of the Basic Law), the prerequisites of a permissible exception are met in the present case.

139 […]

140 2. Moreover, the 1983 Census Act does not violate the fundamental right to the inviolability of the home (Art. 13(1) of the Basic Law).

141 Contrary to what some of the complainants submitted, the obligation imposed on them to disclose information on their private housing situation, as provided for in § 3(2) in conjunction with § 5(1) no. 3 of the 1983 Census Act, does not violate this fundamental right. For the purposes of Art. 13 of the Basic Law, the term 'home' refers only to the sphere of private space within one's home (BVerfGE 32, 54 <72>). This fundamental right subjects public authority to a general prohibition barring officials from entering a private home, and from being present there, against the will of the resident. This prohibition covers, for example, the installation or use of listening devices within private homes; however, it does not extend to collecting or requesting information where such information is obtained

without entering or being present in the home. In such cases, Art. 13 of the Basic Law is not applicable. [...]

3. The obligation to provide information on the subject matters listed in §§ 2 to 4 of the 1983 Census Act also does not violate the fundamental right to freedom of expression (Art. 5(1) first sentence of the Basic Law). 142

[…] 143

For determining whether a statement qualifies as an opinion and thus falls within the scope of protection guaranteed by that fundamental right, the decisive issue is whether the statement contains elements of taking a position, of condoning or of opining as part of an intellectual discourse; the value, accuracy or reasonableness of the statement in question is irrelevant. [...] By contrast, information provided for statistical purposes such as the collection of data under the 1983 Census Act contains mere factual statements that bear no relation to the formation of opinions. 144

II.

The applicable standard of review here derives primarily from the general right of personality protected under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law. 145

1. a) The value and dignity of the person, acting in free self-determination as a member of a free society, are at the centre of the Basic Law. In addition to the constitutional guarantees laid down in specific freedoms, the general right of personality, guaranteed in Art. 2(1) in conjunction with Art. 1(1) of the Basic Law, serves to protect these interests; this protection may gain even more significance in light of modern developments that pose new risks to one's personality (cf. BVerfGE 54, 148 <153> – *Eppler*). The different dimensions of the right of personality that have so far been recognised in the Court's case-law do not exhaustively define the substance of this right. In the *Eppler* decision (BVerfGE 54, 148 <155>), which draws on earlier cases (BVerfGE 21, 1 <6>; 27, 344 <350 and 351> – *Divorce Files*; 32, 373 <379>; 35, 202 <220> – *Lebach*; 44, 353 <372 and 373> – *Addiction Counselling Agency*), it was already implied that, based on the notion of self-determination, the general right of personality confers upon the individual the authority to, in principle, decide themselves whether and to what extent to disclose aspects of their personal life (cf. also BVerfGE 56, 37 <41 *et seq*.> – *Bankruptcy Proceedings*; 63, 131 <142 and 143> – *Right of Reply*). 146

Given the present and future realities of automatic data processing, this authority conferred upon the individual merits special protection. Most notably, risks arise because decision-making processes that in the past required records and files to be compiled manually can now rely on automatic data processing. As a result, specific information concerning the personal or material circumstances of an identified or 147

identifiable individual (i.e. personal data, cf. § 2(1) of the Federal Data Protection Act) can be stored indefinitely, from a technical perspective, and retrieved at any time within seconds, without distance being an issue. In addition, the data in question can be compared with data collected from other sources, especially by creating integrated information systems, and can be compiled into partial or practically complete personality profiles, leaving the person concerned without sufficient control over the accuracy or use of the data stored on them. This has expanded possibilities of gaining and influencing information to unprecedented levels, so that even the mere psychological pressure created by public perception may potentially impact individual behaviour.

148 Yet it is a prerequisite for individual self-determination – especially in light of modern information technology – that the individual be afforded the freedom to decide whether to take or refrain from certain actions, including the possibility to actually conduct themselves in accordance with this decision. If individuals cannot, with sufficient certainty, determine what kind of personal information is known to certain parts of their social environment, and if it is difficult to ascertain what kind of information potential communication partners are privy to, this could greatly impede their freedom to make self-determined plans or decisions. A societal order, and its underlying legal order, would not be compatible with the right to informational self-determination if citizens were no longer able to tell who knows what kind of personal information about them, at what time and on which occasion. Individuals who worry that non-conformist behaviour could be recorded at any time and that such information could permanently be stored, used or shared will try not to draw attention to themselves by not engaging in such behaviour. If individuals anticipate that participation in an assembly or a citizens' initiative, for instance, was going to be recorded by the authorities and could thus expose them to certain risks, they might decide to forgo the exercise of their respective fundamental rights (Arts. 8 and 9 of the Basic Law). Not only would this impair opportunities of personal development for the individual, it would also affect the common good because self-determination is a fundamental prerequisite for the functioning of a free and democratic society which relies on the agency and participation of its citizens.

149 In the context of modern data processing, the free development of one's personality therefore requires that the individual be protected against the unlimited collection, storage, use and sharing of their personal data. Consequently, the fundamental right of Art. 2(1) in conjunction with Art. 1(1) of the Basic Law encompasses such protection. In this regard, the fundamental right confers upon the individual the authority to, in principle, decide themselves on the disclosure and use of their personal data.

b) The right to ‘informational self-determination’ is not, however, guaranteed without limitation. It does not afford the individual absolute or unlimited control over ‘their’ personal data; rather, the individual develops their personality within the social community, and is dependent on communication with others. Any information, including personal data, mirrors social reality and thus cannot be attributed exclusively to the person concerned. As repeatedly emphasised in the Court’s case-law, the Basic Law resolves the tension between the individual and the community by endorsing the notion that the individual is connected to and bound by the community (BVerfGE 4, 7 <15>; 8, 274 <329>; 27, 1 <7> – *Microcensus*; 27, 344 <351 and 352> – *Divorce Files*; 33, 303 <334>; 50, 290 <353>; 56, 37 <49> – *Bankruptcy Proceedings*). The individual must therefore accept that the right to informational self-determination is, in principle, subject to restrictions serving overriding public interests. 150

Pursuant to Art. 2(1) of the Basic Law […] such restrictions require a (constitutional) statutory basis specifying the prerequisites and scope of the restrictions in a manner that is clear and recognisable to citizens in accordance with the principle of legal clarity deriving from the rule of law (BVerfGE 45, 400 <420> with further references). Furthermore, when enacting restrictions, the legislator must observe the principle of proportionality. This principle, which enjoys constitutional status, derives from the essence of fundamental rights; it is a manifestation of the general claim to freedom that citizens have vis-à-vis the state; public authority may only restrict such freedom to the extent that is absolutely necessary for protecting public interests. In view of the risks arising from the use of automatic data processing outlined above, it is incumbent upon the legislator to provide for organisational and procedural safeguards that counter the risk of violating the right of personality (cf. BVerfGE 53, 30 <65>; 63, 131 <143> – *Right of Reply*). 151

2. In the present constitutional complaint proceedings, there is no need to discuss the right to informational self-determination in an exhaustive manner. The Court is only called upon to decide on the scope of this right in relation to interferences that arise when the state demands that citizens disclose personal data. In this context, it is not sufficient to simply assess what kind of information is being demanded. The decisive factor is how the data may be used, and for what purposes. On the one hand, this depends on the purposes for which the data is collected; on the other hand, the unique possibilities created by information technologies with regard to the processing and linking of data must be taken into account. Therefore, data that by itself appears insignificant may gain new relevance; in the context of automatic data processing, it can therefore no longer be assumed that any data is insignificant. 152

Qualifying data as sensitive is not solely dependent on whether the relevant data concerns intimate matters. Rather, knowledge of the relevant context in which 153