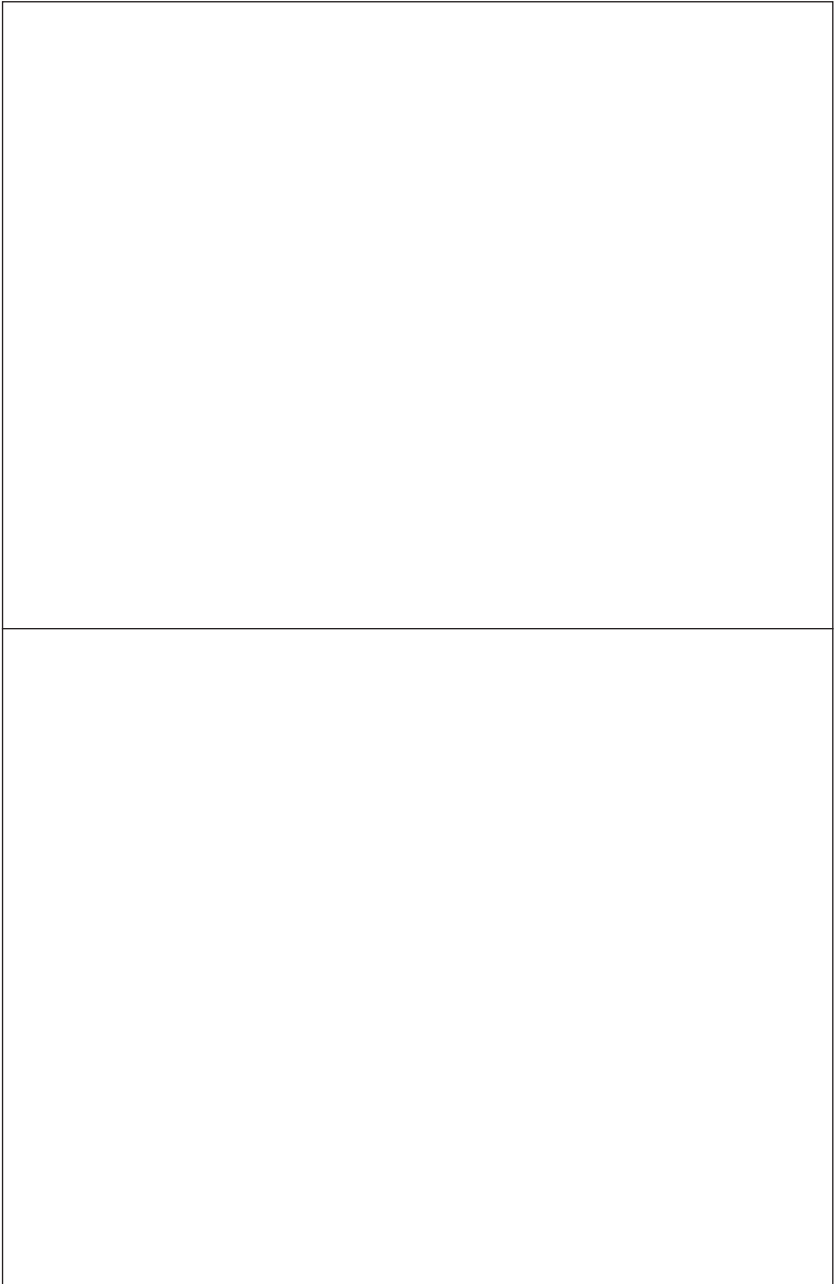


Decisions of the Federal Constitutional Court

Volume 6:
General right of personality



Nomos



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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-

Preface

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

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