Rezensionsaufsatz

The German Federal Constitutional Court and Gender Identity

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I. Introduction

America's culture war is intensifying. That unhappy trend is now being fostered and fueled by a secure and emboldened conservative majority at the United States (U.S.) Supreme Court.[1] Still, the Court has not yet been drawn deeply into the flashpoint cultural conflict of the day. So far, the Court has touched on the issue of gender identity in only a few cases. In *Bostock v. Clayton County* (2020), a 6-3 majority (surprisingly led by Justice Gorsuch) ruled that the prohibition on 'sex' discrimination in Title VII of the Civil Rights Act extends to bias linked to sexual orientation or gender identity.[2] More recently, in another surprise, the Court used a brief and unsigned 'shadow docket' opinion to leave in place a lower court order blocking the enforcement of a West Virginia law that prohibits transgendered biological males from participating in women's high school sports.[3]

But no one can doubt that the Court will soon wade into these roiling waters. The West Virginia case will continue to move through federal

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1 It seems everyone can agree on that. See, e.g. David von Drehle, 'Opinion – The Court's Abortion Ruling Pours Gasoline on Our Culture-War Fires', Washington Post, 24 June 2022; Alex Swoyer, 'Supreme Court to Deliver on "Culture War" Issues in Much-watched Cases this Month', The Washington Times, 1 June 2022.

2 140 S. Ct. 1731.

3 *West Virginia v. B.P.J. ex rel. Jackson*, 598 U.S. ___ (2023) (Alito, J., dissenting from denial of application to vacate injunction).

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appeals on its way towards the Supreme Court. By one accounting, another 20 states ban transgender students from participating in sports consistent with their gender identity.[4] Many of those laws will be challenged, with potential Supreme Court review awaiting those cases as well. At the same time, the House of Representatives recently approved a bill (with no prospects for success in the Senate) that would impose a national restriction on the participation of transgender athletes in women's sports.[5] In another case, the Fourth Circuit Court of Appeals is reviewing North Carolina and West Virginia laws restricting access to state funding for procedures typically related to the treatment of gender dysphoria.[6] The politicised policy dump Florida Governor Ron DeSantis authorised days before formally announcing his candidacy for the Republican presidential nomination included a prohibition on gender-affirming medical treatment for children.[7] There is going to be more litigation on gender identity issues and the Supreme Court has shown no interest in sitting on the sidelines of incendiary debates like these.

When the time comes for the Supreme Court to grapple more intensively with gender identity – especially if it will have to decide whether the constitution's substantive due process doctrine provides any protection – the justices might find it useful to consider the related jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*). I argued elsewhere that the Court's conservative majority may be discovering the value of comparative constitutional analysis as a way of reinforcing its positions.[8] The German Constitutional Court is globally respected and it has a deep and sophisticated body of jurisprudence concerned with gender identity. The cases, in the rather literal naming convention used by the German Constitu-

4 See *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, <https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans>.

5 Protection of Women and Girls in Sports Act, H.R. 734, 118th Cong. (2023); Annie Karni, 'House Passes Bill to Bar Transgender Athletes From Female Sports Teams', N.Y. Times, 20 April 2023), available at <https://www.nytimes.com/2023/04/20/us/politics/transgender-athlete-ban-bill.html>.

6 See *Kadel v. Folwell*, 1:19-cv-272, 2022 U.S. Dist. LEXIS 103780, 2022 WL 2106270 (M.D.N.C. 10 June 2022), *reh'g granted en banc*, No. 22-1721 (4th Cir. 12 April 2023); *Fain v. Crouch*, No. 20-cv-0740, 2022 U.S. Dist. LEXIS 137084, 2022 WL 3051015 (S.D.W.Va. 2 August 2022), *reh'g granted en banc*, No. 22-1927 (4th Cir. 12 April 2023).

7 See Andrew Atterbury, 'DeSantis Enacts a Wave of Laws Targeting Gender-Affirming Care, Pronouns in Schools', Politico, 18 May 2023, available at <https://www.politico.com/news/2023/05/17/desantis-gender-affirming-care-education-00097387>.

8 See Russell A. Miller, 'Not A Whisper About Foreign Law', FAZ Einspruch Magazin, 20 April 2023), available at <https://www.faz.net/einspruch/what-is-the-impact-of-the-supreme-court-s-comparative-law-18834792.html>.

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tional Court, include *Transsexuals I* (1978) to *Transsexuals VIII* (2011) as well as the *Third Gender Option Case* (2017).[9]

If comparative interest in Germany's gender identity cases emerges – at the Supreme Court or among advocates and scholars – then it is good fortune that the German Constitutional Court recently published a new collection of English-language translations of its judgements.[10] The sixth volume in this series of red tomes (hinting at the scarlet red robes worn by the justices at the Constitutional Court's infrequent oral hearings) is entitled *Decisions of the Federal Constitutional Court – Volume 6: General Right to Personality*.[11] The new collection presents cases that engage with a broadly-framed constitutional right to human autonomy and self-determination, including four of the Court's gender identity cases.

II. German Constitutional Law in English

We shouldn't take this collection of translations – and the series to which it belongs – for granted. Not very long ago it would have been self-evident that the exclusive function of a national apex court was to interpret and apply national law, in a nation's official languages, largely for the benefit of the 'national' people. In fact, that parochial posture remains the understanding of most of the past and present justices of the U.S. Supreme Court.[12] But the

9 There is some useful English-language commentary on the German Court's gender identity jurisprudence. See, e.g., Peter Dunne and Jule Mulder, 'Beyond the Binary: Towards a Third Sex Category in Germany?', GLJ 19 (2018), 627-648; Gregory A. Knott, 'Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict', St. Louis U. L. J. 54 (2010), 997-1033.

10 There is a growing collection of comparative research on these issues. See, e.g. Isabel Jaramillo and Laura Carlson (eds), *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (Cham: Springer 2021); Leika Aruga, *Comparative Analysis of Gender Recognition Laws* (Viet Nam: UN Women 2019), available at <https://vietnam.un.org/sites/default/files/2022-09/GAL%20tieng%20anh_final_0.pdf>; Marjolein van den Brink and Peter Dunne, *Trans and Intersex Equality Rights in Europe – a Comparative Analysis* (Brussels: European Commission 2018), available at <https://ec.europa.eu/newsroom/just/items/638586/en>; Stefano Osella and Ruth Rubio-Marín, 'Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law', I.CON 21 (2023), 574-602; Aoife M. O'Connor et al., 'Transcending the Gender Binary Under International Law: Advancing Health-Related Human Rights for Trans* Populations', Journal of Law, Medicine & Ethics 50 (2022), 409-424; Peter Dunne and Jens Scherpe, 'Comparative Analysis and Recommendations' in: Peter Dunne and Jens M. Scherpe (ed.), The Legal Status of Transsexual and Transgender Persons (Cambridge: Intersentia 2016), 615-663.

11 Federal Constitutional Court (ed.), *Decisions of the Federal Constitutional Court – Volume 6: General Right of Personality* (Baden-Baden: Nomos 2022), [hereinafter *Volume 6*].

12 Former Justice Stephen Breyer was an exception. See, e.g., Stephen Breyer, *The Court and the World* (New York: Alfred A. Knopf 2015).

Federal Constitutional Court's current president, in a preface to *Volume 6*, explains that the translations are meant to facilitate 'the development of common approaches' to shared constitutional concerns, to support an 'international fundamental rights discourse', and (in a rare alliterative and poetic turn for a German work of *Rechtswissenschaft*) to aid the 'continuation of comparative conversations in constitutional law'.[13] It is a strictly functionalist justification for the Constitutional Court's translation project, even while that approach has its theoretical limits and detractors. Still, it draws on the cosmopolitanism and transnational legal sensibilities that blossomed in the aftermath of the Cold War and fuelled the growth of the field of comparative constitutional law. There are worrying signs, and not just from the usual ramparts of American exceptionalism, that we may have seen 'peak' cosmopolitanism.[14] Maybe that trend will have diminishing consequences for comparative constitutional law as well. If that is the case, and despite the contrary avowals of the Constitutional Court's president, there are some who will argue that the German Constitutional Court made its own contributions to that development.[15] Nevertheless, the announced ambitions for this collection of translations do a fair job of describing the general acceptance and relatively common use of comparative law in the European legal space, especially as the Court of Justice in Luxembourg strives to articulate and enforce 'common European constitutional traditions' and the Court of Human Rights in Strasbourg takes account of a 'European consensus' in constitutional and human rights.[16]

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13 See Stephan Harbarth, 'Preface to Volume 6' (n. 11), v-vi.

14 See, e. g., Adam S. Posen, 'The End of Globalization? What Russia's War in Ukraine Means for the World Economy', Foreign Aff., 17 March 2022, available at <https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization>; 'Has Covid-19 Killed Globalisation?', The Economist, 14 May 2020, available at <https://www.economist.com/leaders/2020/05/14/has-covid-19-killed-globalisation>; 'Drawbridges Up', The Economist, 30 July 2016, available at <https://www.economist.com/briefing/2016/07/30/drawbridges-up>.

15 Some commentators view the last decade of the Constitutional Court's European jurisprudence to be cautious, if not skeptical, towards European Integration. The Court's *Public Sector Purchasing Program III Case* (*Weiss Case*) judgement provides a recent example of that alarm. See BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, <https://www.bverfg.de/e/rs20200505_2bvr085915en.html>. See, also, Pavlos Eleftheriadis, 'Germany's Failing Court', Verfassungs Blog (18 May 2020), available at <https://verfassungsblog.de/germanys-failing-court/>; Franz C. Mayer, To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020, GLJ 21 (2020), 1116-1127, available at <https://www.cambridge.org/core/journals/german-law-journal/article/to-boldly-go-where-no-court-has-gone-before-the-german-federal-constitutional-courts-ultra-vires-decision-of-may-5-2020/7A837C355A29F52CAE46F8CEBB1AE4E7>; Katharina Pistor, 'Germany's Constitutional Court Goes Rogue', Project Syndicate (8 May 2020), available at <https://www.project-syndicate.org/commentary/german-constitutional-court-ecb-ruling-may-threaten-euro-by-katharina-pistor-2020-05>.

16 See, e. g., Sabino Cassese, 'Ruling from Below: Common Constitutional Traditions and Their Role', New York University Environmental Law Journal 29 (2021), 591-618.

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Of course, the Court might have other motives for making its jurisprudence more broadly accessible. Some characterise the multi-level jurisdictional give-and-take between the German Court, the European Court of Justice, and the European Court of Human Rights as a focused but collegial 'dialogue'.[17] Others, however, concede that these courts are in a delicately choreographed competition with one another for jurisprudential priority – within their assigned jurisdictions and beyond.[18] In either case, the German Constitutional Court is severely disadvantaged if its judgements are available exclusively in German.

In response to these aims and interests, alongside the translations published periodically in this book series, the Constitutional Court has developed a number of tools that aim to make its jurisprudence more accessible to a world-wide, non-German-speaking community of jurists and scholars. The Court publishes many of its decisions in English on its extensive, English-language website.[19] Some of these are destined to end up in the published red volumes. A few decisions are also translated into French and Spanish. From time to time, the translated versions of the decisions are published at the same time as the official German-language versions. There are a number of other resources available at the Court's English-language website, including introductory materials surveying the Court (its function, jurisdiction, and history), presenting the biographies of the Court's justices, and making available some of the output of the Court's media relations unit. It is a thorough program aiming to draw non-German speakers into the Court's work.

Other apex courts are making similar efforts. Still, the German Constitutional Court's extensive commitment to English-language accessibility might be rivalled only by the South Korean Constitutional Court. The South Korean Court also has an extensive, English-language online presence, including summaries of recent decisions and a collection of translations of over 180 'major decisions' that are arranged in nine subject areas.[20] The website makes available a digital, open access edition of a handsome, 700-page volume

17 See, e. g., Maria Daniela Poli, The Judicial Dialogue in Europe: Adding Clarity to a Persistently Cloudy Concept, Vienna Journal Of International Constitutional Law 11 (2017), 351-364; Anthony Arnull, 'Judicial Dialogue in the European Union Get Access Arrow' in: Julie Dickson and Pavlos Eleftheriadis (eds), Philosophical Foundations of European Union Law (Oxford: Oxford University Press 2012), 109-133.

18 See, e. g., Giuseppe Martinico, 'Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma', GLJ 8 (2007), 205-230; Filippo Annunziata, 'EU Courts: The Role of EU Banking Legislation', San Diego International Law Journal 23 (2021), 21-69.

19 Bundessverfassungsgericht, <https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html>.

20 Constitutional Court of Korea, <https://english.ccourt.go.kr/site/eng/main.do>.

entitled *Thirty Years of the Constitutional Court of Korea* (2018).[21] The book's lengthy first section provides an introductory survey to Korean constitutionalism and to the history and function of the South Korean Constitutional Court. Considering the growing global force of South Korean culture – from K-Pop to cinema – there is good reason to believe that there will be a readership for these English-language materials on Korean constitutional jurisprudence.[22]

III. The German Constitutional Court's Translations Series: The 'Red Volumes'

The German Constitutional Court's published series of translated cases is organised thematically. The first volume (1992) presented cases involving the 'international law and law of the European communities'.[23] The second volume (1998) covered the Constitutional Court's cases on 'freedom of speech' in the years from 1958-1995.[24] A decade-and-a-half after the fall of the Berlin Wall, in the series' third volume, the Court published a collection of translated cases (2005) concerned with 'questions arising from German unification' covering the years 1973-2004.[25] The fourth volume (2007) included translations of the Court's jurisprudence touching on 'the law of freedom of faith and the law of the churches' decided from 1960-2003.[26] The

21 See Constitutional Court of Korea (ed.), *Thirty Years of the Constitutional Court of Korea* (Seoul: The Constitutional Court 2018), available at <file:///C:/Users/millerra/Downloads/Thirty_Years_of_the_Constitutional_Court_of_Korea.pdf>.

22 'In economics, technology and especially culture [Korea] is now a powerhouse. One government source jokes that soft power – a country's ability to get what it wants through attraction rather than coercion or payment – is the South's nuclear weapon.' 'Opinion – Korean Soft Power: Harder Than It Looks', The Guardian, 28 October 2022, available at <https://www.theguardian.com/commentisfree/2022/oct/28/the-guardian-view-on-korean-soft-power-harder-than-it-looks>.

23 Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany – Volume 1: International Law and the Law of the European Communities 1952-1989* (Baden-Baden: Nomos 1992).

24 Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany – Volume 2: Freedom of Speech, Freedom of Opinion and Artistic Expression, Broadcasting Freedom and Communication Freedom of the Press, Freedom of Assembly (1958-1999)* (Baden-Baden: Nomos 1998).

25 Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany – Volume 3: Questions of Law Arising from German Unification (1973-2004)* (Baden-Baden: Nomos 2005).

26 Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany – Volume 4: The Law of Freedom of Faith and the Law of the Churches (1960-2003)* (Baden-Baden: Nomos 2007).

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fifth volume (2013) collected translations of 'family related decisions' from 1957-2010.[27] After that steady output, it took another decade to produce the newest contribution to the series. The sixth volume (2022) collects cases that are concerned with the 'general right to personality'.

This accounting of the German Court's published translations reveals a profound shortcoming in the series' organisation. Remarkable as the collections are, the decision to organise them thematically raises the risk that they will become remote, historical snapshots of the German Constitutional Court's jurisprudence. For example, very compelling and jurisprudentially complex cases concerned with Germany's participation in the project of European unity have been decided in the years since the first of these collections, focusing on the Court's international law and European cases, was published in 1992. *Volume 1* referred to the 'European Communities', which, just months after the book's publication, had morphed into the 'European Union'. The enduring value of that collection of translations is now diminished because it excludes subsequent landmark decisions such as: the *Maastricht Treaty Case*,[28] the *Adoption of the Euro Case*,[29] the *Banana Market Regulation Case*,[30] the *European Arrest Warrant Case*,[31] the *Lisbon Treaty Case*,[32] the *Honeywell (Ultra Vires EU Law) Case*,[33] the *European Stability Mechanism I Case*,[34] the *Outright Monetary Transaction I Case*,[35] the *European Stability Mechanism II Case*,[36] the *Outright Monetary Transaction II Case*,[37] the *Public Sector Purchasing Program I Case*,[38] the *European Banking Union Case*,[39] the *Public Sector Purchasing Program II Case*,[40] and the *Public Sector Purchasing Program III Case*.[41]

I am sure that my list of the German Court's recent European jurisprudence overlooks some prominent, recent decisions. Still, there are enough

27 Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany – Volume 5 Family-Related Decisions (1957-2010)* (Baden-Baden: Nomos 2007).

28 BVerfGE 89, 155 (1993).

29 BVerfGE 97, 350 (1998).

30 BVerfGE 102, 147 (2000).

31 BVerfGE 113, 273 (2005).

32 BVerfGE 123, 267 (2009).

33 BVerfGE 126, 286 (2010).

34 BVerfGE 132, 195 (2012).

35 BVerfGE 134, 366 (2014).

36 BVerfGE 135, 317 (2014).

37 BVerfGE 142, 123 (2016).

38 BVerfGE 146, 216 (2017).

39 BVerfGE 151, 202 (2019).

40 BVerfGE 154, 17 (2020).

41 BVerfGE 158, 89 (2021).

cases in my accounting to create doubts about whether the Court has done anything but adjudicate Germany's relationship with the European Union in the last decade![42] In light of that critique, one valued insight of the new collection of translations is that it confirms that the Court has been busy with a wide range of other issues alongside its preoccupation with European integration.[43] The main point I intended to make, however, is that the Court might have been better served by a chronological approach to the presentation of the translations of its judgements. In that modus it would have published translations of the Court's most important decisions (whatever the subject matter) at some periodic pace, perhaps every five years. This would have allowed the Court to formally publish the steady stream of translations that otherwise appear on its website. It also would have avoided the problem of the volumes' obsolescence. Alternatively, if the Court was determined to pursue a thematic approach, then alongside the new thematic volumes the Court has periodically published, it might have regularly reissued updated editions of the earlier collections that would be supplemented with translations of new and important cases touching on each volume's respective topic.

IV. Volume 6: General Right of Personality

As it is, the project continues as a series of thematically-organised collections of translations and we now have *Volume 6* presenting the German Constitutional Court's jurisprudence on the general right of personality. The new collection contains two decisions from 2020. But, especially considering the impact pandemic restrictions had on personal autonomy, the volume already feels like it may be receding in the rearview mirror.[44]

Although they have been organised thematically (usually in line with one or two provisions of the *Grundgesetz* or Basic Law), past volumes merely presented the translated cases without commentary. German-trained jurists would not have needed a primer on the right to 'freedom of opinion and artistic expression, broadcasting freedom and communication freedom of the press, freedom of assembly' (*Volume 2*, which covered cases interpreting Article 5 of the Basic Law). But the German-trained jurists also would not need English-language translations of those cases. As the framing of the

42 Most of the Court's European cases were decided by the Second Senate, which has jurisdiction over *Staatsrecht* issues such as separation of powers, institutional competences, and federalism.

43 Most of the judgements collected in *Volume 6* were decided by the Court's First Senate, which has jurisdiction over constitutional complaints asserting violations of basic rights.

44 See, e. g., *Federal Emergency Restrictions Case*, BVerfGE 159, 355 (2021).

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rights issues covered in *Volume 2* suggests, this is a distinctly German version of the 'freedom of expression' that, at least textually, is nothing at all like the guarantee of 'freedom of speech' secured by the First Amendment to the U.S. Constitution or the Universal Declaration of Human Rights.[45] A little historical and doctrinal context would have enhanced the value of the translations in past volumes in the series.[46]

The new *Volume 6* remedies this deficiency as it includes a succinct and insightful introduction to the general right of personality from former Justice Susanne Baer and Doris König.[47] Both are respected public law scholars with impressive comparative law credentials (including LL.M. studies in the United States). The ten-page introduction cannot do much. But it provides some orientation for the uninitiated foreign jurist or scholar to this unique area of German constitutional law. Justices Baer and König explain that the selected cases are systematically arranged in *Volume 6*. The volume begins with a set of translated cases providing a survey of the jurisprudential foundations for the general right of personality.[48] Thereafter, Justices Baer and König explain, *Volume 6* presents clusters of cases from several emblematic topics, including self-determination and personal choice; name and identity rights; rights to one's image; rights to one's speech; privacy and intimacy rights; protection for health data; data protection and virtual identity rights; and the right to informational self-determination. It is an impressive collection of innovative cases touching upon a remarkable range of personal autonomy concerns. In their introduction the justices emphasise the evolving nature of the Constitutional Court's understanding of the general right of personality and express their hope that the translated cases will 'illustrate how fundamental rights can

45 For a sense of the textual differences operating in the sphere of free speech rights, consider the First Amendment to the U.S. Constitution and the text of Article 19 of the Universal Declaration of Human Rights:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

46 There are, of course, useful English-language introductions to German constitutional law and the jurisprudence of the Constitutional Court. See, e.g., Christian Bumke and Andreas Voßkuhle, *German Constitutional Law – Introduction, Cases, and Principles* (Oxford: Oxford University Press 2019, Andrew Hammel trans.); Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Durham NC: Duke University Press 2012); Werner Heun, *The Constitution of Germany: A Contextual Analysis* (London: Bloomsbury / Hart 2010).

47 See Susanne Baer and current Justice Doris König, 'Introductory Remarks to Volume 6' (n. 11), xxii.

48 Baer and König (n. 47), xxiv-xxvi.

be interpreted in a manner that preserves established principles while adapting to changed circumstances'.[49] Baer and König are experts in comparative law and they are familiar with the strict and static original-historical opposition to the 'living constitution' amongst prominent American jurists. That makes it easy to imagine that their remarks about constitutional dynamism (and the volume's progressive rights agenda more generally) are meant to serve as a barely veiled rebuke of the U. S. Supreme Court.

The great triumph of the collection – and the previous volumes in this series – is the mastery of the translation work that has been done to present these complex matters in the English language. With the obvious caveat that these translations should not and cannot stand as the equivalents of the original and official German-language judgements, it is nevertheless extraordinary how the translations manage the requisite degree of accuracy without sacrificing clarity. This marvel involves a mix of literal – word-for-word translation – as well as a significant degree of conceptual and comparative transliteration. The latter effort requires the identification and adoption of common juristic terminology from the Anglo-American tradition as a way of opening-up comprehension for English speaking jurists even where the new English-language terms or phrases are not always exact or precise transpositions of the original German terminology. Far beyond high-level linguistic competence, this conscientious but artful blend requires impressive command of German as well as Anglo-American constitutional law. Not surprisingly, considering the volume and complexity of the material translated and published in *Volume 6*, the Constitutional Court relied on a team of translators and jurists to produce the English-language versions of the cases that appear in this collection. This leads to slight variation in tone and style from one case to the next. But, for the most part, the technical terminology is coherent and consistent across all the translations. In this sense, the translators are building a parallel or shadow English-language basis for German constitutional law. Besides the substance of the case law that they make accessible, *Volume 6* and the other collections in the series are also a rich source for general insight into how German legal concepts can be translated into English. For both of these contributions, foreign and comparative law scholars who have no command of the German language are immensely indebted by this significant effort.

In fact, the cases translated and presented in *Volume 6* might have broad relevance for non-German jurists and comparative law scholars. That is because the right treated in these cases – the general right of personality – is not limited or constrained by some of the context that frames or conditions the meaning of other constitutional rights.

49 Baer and König (n. 47), xxxiii.

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First, the right refers to what is imagined to be a generalised feature of the human condition that transcends the values and perspectives of any single political community. Different societies might have different degrees of respect for autonomy relative to the state and other citizens. But those differences are thought to be of degree, not of kind. It is understood, at least in the so-called Western Tradition, 'that individual autonomy is a basic moral and political value'.[50] In this sense, the book treats the Court's jurisprudence relating to a broadly (if not universally) applicable human right and not a constitutionally (and contextually) anchored German civil right.

Second, the cases published in *Volume 6* do not derive from or depend upon the specifics of the constitutional text. The Constitutional Court and German public law scholars are thoroughly satisfied that the general right of personality is rooted in the intersection of Articles 2(1) and 1(1) of the Basic Law. For this reason, throughout the cases collected in *Volume 6*, the Court refers to the general right of personality grounded in Article 2(1) 'as it is connected with Article 1(1)'. Still, Article 2(1) of the German Basic Law only provides: 'Every person shall have the right to free development of his personality.'[51] And Article 1(1) broadly declares: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.'[52] The soaring breadth of these constitutional values required the Constitutional Court to develop the details of the general right of personality from reasoning and interpretation, not the dogmatic exegesis of concrete constitutional commands that is so typical of the German legal method. So, for example, in the cases translated in *Volume 6*, the Court found and enforces a general right of personality that is distinct from the more clearly-articulated rights to 'physical integrity' and 'freedom' that are codified in Article 2(2) of the Basic Law.[53] The general right of personality is meant to be more open, more dynamic, and more sacrosanct. Personality, autonomy, and dignity. These broad principles leave plenty of room for comparative reflection and engagement, perhaps even at the U. S. Supreme Court.

That also gives the German Court space to broadly imagine and construe the constitutionally protected scope of autonomy.

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50 John Christman, 'Autonomy in Moral and Political Philosophy' in: Edward N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (Stanford: Stanford University 2020), available at <https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/>. See Lucas Swaine, 'The Origins of Autonomy', History of Political Thought 37 (2016), 216-237. But see Raimon Panikkar, 'Is the Notion of Human Rights a Western Concept?', Diogenes 30 (1982), 75-102.

51 Art. 2(1) Grundgesetz [GG] [Basic Law].

52 Art. 1(1) Grundgesetz [GG] [Basic Law].

53 Art. 2(2) GG [Basic Law].

The cases translated and published in *Volume 6* reveal the framework the German Constitutional Court has developed. The general right of personality protects a person's right to be and live the way they define themselves and pursues this especially with respect to freedoms not otherwise addressed by more specifically enumerated basic rights, such as freedom of opinion,[54] freedom of conscience and faith,[55] or the right to choose one's occupation.[56] It has quite a lot to do with ensuring an unburdened domain of private life, but it isn't just a narrow right of privacy or a right to be left alone. The general right of personality involves the right to self-determination (the free development of personality) and the right to determine how one is perceived in the world (the freedom to present oneself). The range of concerns involved has been conceptualised as three distinct spheres of decreasing, concentrically radiating autonomy (what German scholars refer to as the 'sphere-theory' of the right of personality): (i) the core, *intimate sphere* most closely linked to human dignity, which is inviolable and not susceptible to infringements and not subject to a constitutional balancing analysis in its enforcement; (ii) the somewhat removed *private sphere* that may be susceptible to intrusions but only if they advance overriding significant interests assessed in a strict application of a constitutional balancing analysis; and (iii) the outermost *social sphere*, involving a person's social or public existence, which is susceptible to intrusions that can be justified by a less rigorous form of balancing.[57] As with so much else in German constitutional rights, the latter two spheres are adjudicated and enforced through the proportionality principle, which permits the Court to account for the integrity of a particular form of autonomy, the intensity of the intrusion on that protected sphere, and the gravity of the justification for the intrusion.

V. The General Right of Personality and Gender Identity

This framework informs a wide range of rights, many of which are colourfully represented in the cases collected in *Volume 6*. That jurisprudence, covered in this 900-page volume, is very complex and involves the specifics of the challenged state action in each dispute. This review is not meant to be an introduction to the general right of personality and I cannot fairly or

54 Art. 5(1) GG [Basic Law].
55 Art. 4(1) GG [Basic Law].
56 Art. 12(1) GG [Basic Law].
57 See, e. g., Thorsten Kingreen and Ralf Poscher, Grundrechte Staatsrecht II (37th edn, Munich: C. H. Beck 2021), 142-143.

effectively summarise the 45 translated cases here. I have written about some of these cases in English, examining the inspiring – but also the banal or worrisome – dimensions of the general right of personality.[58] And there are excellent, general resources on German constitutional law available in English.[59] But, considering the state of the controversy around gender identity, I would like to conclude this review with a discussion of the gender identity cases included in the collection. They should attract contemporary comparative law interest and they are, in any event, representative of the Court's engagement with the general right of personality. They are conditioned by the details of the underlying statutes or state actions. Nevertheless, they are broadly progressive. And, they exhibit an considerable range of constitutional dynamism and flexibility.

These cases are largely preoccupied with the implications of gender transitions in the gender binary framework enforced by German statutes, especially the laws and regulations involved in civil status registration.

In *Transsexuals I* (1978) the Court found that the legal framework that required a transgender female to retain her male birth-name in official documents was a violation of the general right of personality.[60] Especially problematic was the fact that some records had been adapted to reflect the claimant's gender transition. But the binary gender options – male or female – available on birth records precluded a name change. The Court placed the issue of gender identity in the rigorously protected intimate sphere of autonomy. On the one hand, the Court found that the right to 'determine one's own being' and to take 'one's destiny into one's own hands' intersects with the Basic Law's protection of human dignity. On the other hand, the Court

58 See Russell A. Miller, 'Literature as Human Dignity: The Constitutional Court's Misguided Ban of the Novel Esra', Verfassungs Blog (27 July 2017), available at <https://verfassungsblog.de/literature-as-human-dignity-the-constitutional-courts-misguided-ban-of-the-novel-esra/> (examining the *Esra Case*, BVerfGE 119, 1 [#23 in the *Volume 6* collection]); Russell A. Miller, 'A Pantomime of Privacy: Terrorism and Investigative Powers in German Constitutional Law', Boston College Law Review 58 (2017), 1545-1628 (examining the *Federal Criminal Police Office Act (BKA Act) Case*, BVerfGE 141, 220 [#44 in the Volume 6 collection]); Russell A. Miller, 'The German Constitutional Court Nixes Foreign Surveillance', Lawfare (27 May 2020), available at <https://www.lawfareblog.com/german-constitutional-court-nixes-foreign-surveillance> (examining the *Surveillance of Foreign Telecommunications (BND Act) Case*, BVerfGE 154, 152 [#45 in the Volume 6 collection]); Russell A. Miller, 'Balancing Security and Liberty in Germany', Journal of National Security Law & Policy 4 (2010), 369-396 (examining the *Article 10 Act (G10 Act) Case*, BVerfGE 100, 313 [#37 in the Volume 6 collection]; the *Surveillance of Private Homes (Acoustic Surveillance) Case*, BVerfGE 109, 279 [#25 in the Volume 6 collection]; the *Profiling (Data Mining) Case*, BVerfGE 115, 320 [#39 in the Volume 6 collection]; the *Remote Searches (Online Search) Case*, BVerfGE 120, 274 [#40 in the Volume 6 collection]).

59 See Kommers and Miller (n. 46); Heun (n. 46).

60 See Volume 6 (n. 11), 26.

explained that the development of one's abilities and strengths is part of the development of personality. Insisting that the state find a way to accommodate transitions between the male and female genders in these records, the Court allowed itself to be guided by medical science on the issue. The Court reasoned:

'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 factors.'[61]

Against claims that the general right of personality should not be interpreted in a way that strains 'moral law', the Court insisted that society's moral expectations cannot conflict with medically indicated realities.[62] Where morality involves a choice, the Court reasoned, gender transition does not involve a moral act because it is a prescribed medical therapy.

Even as the *Transsexuals I Case* should be seen as inspiring, humane, and far ahead of its time, it is also a historical document. The Court did not anticipate the way in which language and grammar would become a major front in the struggle for the protection of gender identity interests. For example, the Case casually uses of the word 'hermaphrodite' at the start of the opinion,[63] which, in the meantime has been characterised as a 'stigmatising and misleading word' that should be abandoned and replaced with the word 'intersex'.[64] Similarly, the Court uses the masculine pronoun 'he' throughout the case – certainly not as a specific reference to the transgender woman who is the claimant in the case – but as an expression of the German language's traditional use of male terms and pronouns to refer to people generally.[65]

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61 Volume 6 (n. 11), 31.

62 Volume 6 (n. 11), 31.

63 The term '*Hermaphroditen*' appears in the original German-language version of the case. See BVerfGE 49, 286 (287).

64 On the Word Hermaphrodite, Intersex Society of America, available at <https://isna.org/node/16/>.

65 See, e. g., Nette Nöstlinger, 'Debate Over Gender-Neutral Language Divides Germany', Politico (8 March 2021), available at <https://www.politico.eu/article/debate-over-gender-inclusive-neutral-language-divides-germany/>; Esme Nicholson, 'Germany Debates How to Form Gender-Neutral Words Out of Its Gendered Language', NPR (30 October 2021), available at <https://www.npr.org/2021/10/30/1049603171/germany-gender-neutral-language-german>; Ian P. Johnson, 'Language Group Rails Against Gender Neutral German', Deutsche Welle (7 March 2019), available at <https://www.dw.com/en/gender-neutral-wording-is-making-german-ridiculous-asserts-association/a-47801450>; Philip Oltermann, 'German Academics and Authors Call for End to "Gender Nonsense"', The Guardian (8 March 2019), available at <https://www.theguardian.com/world/2019/mar/08/german-academics-and-authors-call-for-end-to-gender-nonsense>.

Almost three decades passed (and three other 'transsexuals' judgements that are not included in the new collection of translations) by the time the German Court decided *Transsexuals V* (2005).[66] Now gender identity concerns were intersecting with Germany's stumbling and awkward approach to liberalising the institution of marriage. The law stubbornly could not accommodate same-sex 'marriage'.[67] But a new civil, lifetime partnership institution had been established that gave same-sex couples the opportunity to have their relationships officially recognised and extended to them (at least as the institution was first conceived) most of the public and administrative privileges of married, opposite-sex couples.

This compromise introduced troubling wrinkles into the law. For example, following the Court's ground-breaking decision in *Transsexuals I*, the relevant civil status regime was adapted to grant transgender people the right to change their name on their birth records. At the same time, same-sex couples could now enter into civil unions. But the civil union regime included fine print that required a transgender person to revert back to their birth-name when entering into a marriage (which, by definition must be between a man and a woman). The motivation for this subtlety was to ensure that marriage would truly remain an institution reserved for and enjoyed by 'authentic' opposite-sex couples. Without the name-reversion clause it was at least theoretically possible that a person would pursue what the Germans referred to as the 'little solution' (a 'mere' social and cultural gender transition, including a name change thanks to the Court's *Transsexuals I* ruling) in order to enter into marriage as an opposite-sex couple, while nevertheless retaining their physically-ordained birth gender that would qualify the relationship as a (prohibited) same-sex marriage.

Once again, the Court intervened to correct a legal framework that violated the general right of personality. The Court reasserted its conclusion from *Transsexuals I* in which it ruled that Article 2(1) (in conjunction with Article 1(1)) of the Basic Law protects the personal sphere of life that is close to the inviolable, intimate core of human autonomy. This protection, the Court explained, extends to the freedom to determine one's intimate sexual interests. The Court explicitly held that this encompasses recognition of one's sexual orientation and gender identity.[68] In light of this protection,

66 See Volume 6 (n. 11), 175.

67 See, e.g., Anne Sanders, 'When, If Not Now? An Update on Civil Partnership in Germany, GLJ 17 (2016), 487-508; Anne Sanders, 'Marriage, Same-Sex Partnership, and the German Constitution', GLJ 13 (2012), 911-940.

68 See Volume 6 (n. 11), 179. The German Court trailed the U.S. Supreme Court's recognition of constitutional protection for sexual orientation by a couple years. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

the Court once again had to insist that the law do no harm to the important identity-forming function played by a person's name (also with respect to one's gender identity). The Court explained that a person's name contributes significantly to one's gender identity. Once again, the Court pointed to medical science, explaining that it is established that a person's gender status is not based exclusively on physical characteristics.[69] The result was a constitutional mandate that the 'legislator ensure that homosexual transsexuals who have not undergone gender reassignment have the option of entering into a legally binding partnership without having to give up their first name'.[70]

This was not the end of the complications resulting from the Court's insistence on protecting transgender persons' identity rights while the German legal system still required family law to preserve marriage as a union of a man and a woman. With a tone of irony, in the *Transsexuals V Case* the Court wondered why the legislature had not anticipated these problems. It should have given homosexual transsexuals the right to enter into civil unions as well.[71] The Court was forced to return to this issue in the *Transsexuals VIII Case* because the legislation pointed in the opposite direction.[72] On the one hand, the law continued to preclude same-sex couples from marrying. On the other hand, even if a transgender person's chosen name had to be respected (as required by the Court's previous 'transsexuals' cases), it seemed that the law continued to preclude some transgender persons from entering into a same-sex civil union because their gender status in the relevant registration records would not be changed unless they had undergone what Germans refer to as the 'big solution' (physical gender reassignment treatment).

Yes. One acceptable reaction to all of this jurisprudence is to marvel (or perhaps bristle) at the extent and social significance of the bureaucratic registration required of Germans! And, while I've paused for that reflection let me also note the awkwardness arising from the Germans' casual use of the phrases 'little solution' and 'big solution' in this area of the law.[73]

In any case, the Court once again placed these concerns close to the core, inviolable protected sphere of private life, which covers intimate

69 See Volume 6 (n. 11), 179.

70 Volume 6 (n. 11), 184.

71 Volume 6 (n. 11), 184.

72 Volume 6 (n. 11), 338.

73 See, e. g., Gerald Fleming, *Hitler and the Final Solution*, (Berkeley: University of California Press 1987); Mark Roseman, *The Wannsee Conference and the Final Solution: A Reconsideration* (Manhattan NC: St. Martin's Press-3PL 2003); Peter Longerich, *Wannsee: The Road to the Final Solution* (Oxford: Oxford University Press 2021).

sexual matters and sexual self-determination. In *Transsexuals VIII* the Court was called on to extend the protection of the general right of personality to a person's 'felt' or 'social' gender identification because the law seemed to require invasive physical treatments (including even surgery) in order for a transgender person to be able to enter into a same-sex civil union. The Court declared that human dignity and the fundamental right of personality require full, official recognition of one's 'felt' gender and that personal freedom may not be burdened by unreasonable or overly strict requirements.[74] The Court accepted that the law can impose limits and standards as the state registers a person's civil status. But the Court insisted that the law cannot require that a transgender person undergo surgery for gender reassignment in order to permit them to enter into a same-sex civil union.[75]

The Court continued in *Transsexuals VIII* with its progressive and humanising protection of gender identity. There is, however, a troubling feature to the Court's reasoning in the case. In its previous judgements (*Transsexuals I* and *Transsexuals V*) the Court justified its decisions by confidently invoking what it portrayed as the settled conclusions of medical science regarding gender dysphoria and gender identity. But, in *Transsexuals VIII*, the Court based its reasoning on new conclusions and the evolving understanding of experts. Since *Transsexuals V*, the Court explained, 'experts have concluded that gender reassignment surgery is not always recommendable, even if the diagnosis of transsexuality is largely definite'.[76] This conclusion seems self-evident. As the Court says, surgery should be determined on an individual basis. But it exposes the fact that there are risks involved in the Court's categorial resort to science as the essential basis for its reasoning in this area. Even with the assistance of experts, jurists might struggle to grasp the exacting nuances of highly specialised technical and scientific information.[77] At the same time, the very essence of science is that even settled propositions must be subject to re-examination and must continually justify themselves against new understandings and discoveries. Far beyond the conspiracy theories, general scepticism towards science, and the divisiveness and

74 See Volume 6 (n. 11), 342-343.

75 Volume 6 (n. 11), 344-345.

76 Volume 6 (n. 11), 347.

77 Linda Greenhouse, 'The Supreme Court & Science: A Case in Point', Daedalus 147 (2018), 28-40, 'Science and the Supreme Court of the United States are uneasy partners.' (Greenhouse's essay appears in an excellent special issue of *Daedalus* considering 'Science & the Legal System'). See, also, Michael Freeman and Helen Reece (eds), *Science in Courts* (London: Routledge 2018); Kenneth S. Abraham and Richard A. Merrill, 'Scientific Uncertainty in the Courts', Issues in Science and Technology 2 (1986), 93-107.

partisanship that have eroded 'facticity',[78] the Court's evolving understanding of science in these cases is a reminder of the caution and modesty the judiciary should use when characterising the state of science as a prominent – or exclusive – basis for their judicial reasoning.[79] Additionally, the Court's latter portrayal of the science might be read to as an endorsement of the uncertainty around elements of the science of gender dysphoria and transgender health treatments that shadows these debates.[80]

In *Transsexuals VIII* the Court continued to prod German politicians towards resolving all of this by simply allowing consenting adults to be married. 'When marriage is available to opposite-sex and same-sex couples as it is in several European countries', the Court mused, then 'this is not an issue'.[81] It would be another six years, however, before German lawmakers would finally take the Court up on this suggestion.[82] By that time, the gender binary nature of the issues the Court had been grappling with also would be superseded as issues surfaced involving gender-expansive identities.

Anyone who has had an administrative (or possibly even commercial) encounter with Germany in the last years will have seen that, when asked to identify one's gender, three options are offered: *männlich* (male), *weiblich* (female), and *divers* (diverse). This formal rejection of binary understandings of human gender is a consequence of the Court's *Third Gender Option Case*

78 See, e. g., Francis Fukuyama, 'The Emergence of a Post-Fact World', Project Syndicate (12 January 2017), available at <https://www.project-syndicate.org/magazine/the-emergence-of-a-post-fact-world-by-francis-fukuyama-2017-01>; 'The Death of Facts In An Age Of "Truthiness2"', NPR (29 April 2012), available at <https://www.npr.org/2012/04/29/151646558/if-a-fact-dies-in-the-forest-will-anyone-believe-it>.

79 'In other words, a Supreme Court case is not a laboratory experiment, and science does not reside on the Court's docket in a vacuum. It always exists in context.' Greenhouse (n. 75), 29.

80 See E. Coleman et al., 'Standards of Care for the Health of Transgender and Gender Diverse People', Version 8, International Journal of Transgender Health 23 (2020), 1-260. But see Paul W. Hruz, 'Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria', The Linacre Quarterly 87 (2020), 34-42; 'What America Has Got Wrong About Gender Medicine', The Economist (5 April 2023), available at <https://www.economist.com/leaders/2023/04/05/what-america-has-got-wrong-about-gender-medicine>; Debbie Hayton, 'Gender Identity Needs to be Based on Objective Evidence Rather than Feelings', The Economist (3 July 2018), available at <https://www.economist.com/open-future/2018/07/03/gender-identity-needs-to-be-based-on-objective-evidence-rather-than-feelings>.

81 See Volume 6 (n. 11), 344.

82 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, [Law Amending Basic Law], 1 October 2017, BGBl I, 2787 (HGBGBl. I 2017, 2787. See Timothy Jones, 'Germany Approves Same-Sex Marriage', Deutsche Welle (30 June 2017), available at <https://www.dw.com/en/germanys-bundestag-passes-bill-on-same-sex-marriage/a-39483785>; Kate Connolly, 'German Parliament Votes to Legalise Same-Sex Marriage', The Guardian (30 June 2017), available at <https://www.theguardian.com/world/2017/jun/30/germany-poised-legalise-same-sex-marriage-bill-law>.

(2017), which was decided in the same year that that German law was changed to permit same-sex marriage.[83] Like the other gender identity cases, it also had to do with the bureaucratic civil status registration requirements, which, in turn, has manifold legal consequences for a person's day-to-day life in Germany. In this case, the Court insisted that the general right of personality prohibits civil status registration from requiring an entry for 'sex' without providing a 'positive entry' for non-binary or gender-fluid persons, that is, those whose gender development deviates from female or male development and who do not permanently identify as either male or female.[84] In light of the Court's previous judgements, there is little new in the Court's broad claim that the general right of personality protects a person's gender identity, 'even those whose identity cannot be classified as male or female'. The Court used the *Third Gender Option* decision to reiterate and reinforce the general constitutional protection owed to gender identity. The Court explained that the general right of personality guarantees the basic conditions for the development of one's individuality through self-determination. And, while the interests protected under this framework should have the same significance as the interests explicitly preserved by concrete basic rights provisions in the constitution, the Court insisted that they definitely encompass gender identity.[85] Gender, the Court explained, is 'a constitutive aspect of an individual's personality' and it is of paramount importance to one's self-image and other's perception of a person.[86]

The Court regretted the continuing significance placed on 'sex', especially as that practice impacts a person's public and civil affairs. Non-binary persons, the Court suggested, 'might be able to develop their personality more freely if less significance were attributed to sex in general'.[87] But, as long as that is the case, the Court insisted that the Basic Law protects the gender identity of those who cannot be assigned to binary (male or female) categories. The Court noted the particular hazard created for non-binary persons as long as the state officially disregards or neglects their status. That is a result of the fact that the state, in fact, continues to insist on registering gender status. In this sense, the Court explained, it is not enough that a person can freely embrace a non-binary gender identity. Instead, the state has a duty to recognise non-binary status because official acceptance by state institutions has practical consequences (as regards access to state services or entitlements) while also contributing profoundly as an identity-building

83 See Volume 6 (n. 11), 185.
84 Volume 6 (n. 11), 191.
85 Volume 6 (n. 11), 189.
86 Volume 6 (n. 11), 189.
87 Volume 6 (n. 11), 191.

function with important expressive effect.[88] None of this would be necessary, the Court underscored with some frustration, if civil status registration simply did not require an entry for 'sex' in the records. As long as sex is a required part of civil status registration, then the Court demanded that 'the Basic Law does not require that civil status law be exclusively binary, nor does it preclude civil status law from recognising a third gender identity'.[89]

In a sign of the Court's evolving understanding of these issues, it explicitly rejected the portions of its *Transsexual I Case* that suggested that the legal order and social life 'are based on the principle that every person is either male or female'.[90]

VI. Conclusion

The German Constitutional Court possesses the interpretive flexibility to ensure that its jurisprudence remains aligned 'with the social and legal notion of gender prevailing at the time'.[91] The broadly-construed general right of personality permits it to follow science and society to ensure that the constitution tracks with evolving concerns about sexual orientation and gender identity. As other courts in other jurisdictions grapple with those issues, they might cast a comparative side-glance at the jurisprudence of the Constitutional Court, which has offered inspiring and unequivocal statements about the dignity, humanity, and autonomy implicated by one's sexual orientation and gender identity. The world can now consider those achievements – and others touching on self-determination – thanks to the rich collection of translated cases gathered in *Decisions of the Federal Constitutional Court – Volume 6: General Right of Personality*.

88 Volume 6 (n. 11), 191.
89 Volume 6 (n. 11), 192.
90 Volume 6 (n. 11), 192.
91 Volume 6 (n. 11), 192.

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