

however, decided a few months later, the Constitutional Court declined to extend the same degree of protection to the testimony of a social worker. The court ruled that while such professionals are personal advisers, they are also agents of the state entrusted with the administration of public assistance.<sup>44</sup> *Tape Recording II* (1973) is yet another landmark in the Constitutional Court's privacy jurisprudence.<sup>45</sup> It barred the use in a criminal proceeding of a secret recording that the victim had made in a conversation with the accused. Again the court noted the importance of balancing the individual's interest in privacy against the public's interest in bringing criminals to justice. The public interest, said the court, might require the admissibility of a secret recording that conveys information not related to the private sphere of an individual's personality. Given the nature of the offense, however, the court balanced the interests in favor of the defendant but appeared at the same time to erect an absolute barrier against the public disclosure of information touching the "inner core" of the human personality.

7.8 Transsexual Case (1979)  
49 BVerfGE 286

[The complainant in this case had undergone a surgical procedure that changed "his" sex from male to female. Subsequent thereto, a local civil court in Berlin allowed "him" to change "his" civil status to that of a woman and ordered that it be so entered in the appropriate birth registry. In a decision affirmed by the Federal High Court of Justice, the Berlin District Court, pursuant to an objection by the secretary of state, reversed, with the complainant's status reverting to that of a male. The complainant appealed to the Federal Constitutional Court, claiming a violation of human dignity and personality rights.]

Judgment of the First Senate. . . .

The decision of the Federal High Court of Justice of September 21, 1971, violates the basic right of the complainant arising out of Article 2 (1) in tandem with Article 1 (1) of the Constitution. We reverse and remand the case to the Federal High Court of Justice.

B. I. According to the medical opinion before the court, the complainant is psychologically a woman. Through hormone treatments and operations modern medicine has made it possible to give him the appearance of a member of the female sex. Yet the complainant is treated as a man in the eyes of the law. The possibility of living a normal, healthy, and socially adjusted life as a woman is thus denied to this person. The lack of conformity between his outward appearance and his personal legal status is manifested by the fact that it is not legally possible for him to bear a first name

normally associated with the female sex. Because the law on civil status is based on the premise that a person's first name must reveal the sex of its bearer, the complainant can change his name only after the entry of his sex is changed in the birth registry. Even where a gender-neutral name is concerned, the possibility of a complainant being brought into a situation of conflict cannot be ruled out; the spheres these situations touch belong to that most intimate realm of personhood, which is protected against state interference and with which government may interfere only in pursuance of special public concerns [citing cases].

2. (a) Article 1 (1) of the Basic Law protects the dignity of a person as he understands himself in his individuality and self-awareness. This is connected with the idea that each person is responsible for himself and controls his own destiny. Article 2 (1), when seen in relation to Article 1 (1), guarantees the free development of a person's abilities and strengths. Human dignity and the constitutional right to the free development of personality demand, therefore, that one's civil status be governed by the sex with which he is psychologically and physically identified. Our law and society are based on the principle that each person is either "masculine" or "feminine," and that this identification is independent of any possible genitalic anomalies. It is doubtful, however, that the theory of gender immutability, determined by sexual characteristics apparent at birth, can be maintained with the absolute certitude reflected in the decision of the Federal High Court of Justice. Various forms of biological intersexuality are known to modern medicine. Medical research into the phenomenon of twin births has revealed a dissociation between body and spirit that manifests itself most sharply, according to reliable medical knowledge, in transsexuals. . . .

(b) The right to the free development of personality is protected only within the limits of the moral law. In the present case the moral law has not been infringed. Whether an operation, not therapeutically necessary, to change a person's sex should be regarded as immoral is not the issue here. According to the available expert opinions, a sex change operation was deemed necessary by the complainant. Current medical research indicates that transsexuals are seeking not to manipulate their sexuality but rather to find some unity of body and spirit. Therefore the operation can be seen as a partial effort to achieve this goal. The anguish of the transsexual described in medical texts has been confirmed by the medical opinions presented in this case. Accordingly, the sexual change secured by the complainant cannot be considered immoral. . . .

Suffice it to say that the ability of a man to conceive a child or of a woman to bear a child is not a prerequisite for marriage. Under Article 6 (1), marriage represents a lifelong union of man and woman in a basically indissoluble community. The marriage partners form this community on the basis of their own ideas and expectations. It may be that many people reject the idea of a marriage between a male transsexual and a man as something deserving of moral condemnation. Such irrational fears, however, may not stand in the way of a marriage. This view is bolstered

by available medical knowledge indicating that male transsexuals do not seek homosexual relationships. Rather, they desire normal relations with a heterosexual partner and expect, in the aftermath of a successful operation on their genitals, to have normal sexual intercourse with a male partner.

(c) According to the decisions of the Federal Constitutional Court, the state may regulate the private life of the individual insofar as his relations with his fellow men are concerned, but it may not encroach on that inviolable and innermost sphere of life. No public interest is served by the state's refusal to allow an official change in the sex identification of the complainant that would justify an encroachment upon the basic right secured by Article 2 (1) in relation to Article 1 (1) of the Basic Law.

NOTE: BODILY INTEGRITY. Article 2 (2) declares: "Everyone shall have the right to life and to the inviolability of his person." This provision is repeatedly invoked in conjunction with the human dignity and personality clauses as a basis for imposing constitutional restraints on criminal procedures. A person may be duty-bound to submit to certain physical interventions if necessary to a judicial investigation, but the action must be specified in precise terms by a judge applying the law in the light of constitutional values.<sup>46</sup> The intervention must, above all, satisfy the principle of proportionality. Thus, in the *Heinrich P.* case (1956), the Constitutional Court sustained the validity of a judicially ordered blood test to determine parentage in a paternity suit.<sup>47</sup> Other federal courts have likewise sustained compulsory vaccination statutes and even corporal punishment in schools.<sup>48</sup> The personal inviolability clause appears to bar all invasions of the body that would result in unusual physical pain, bodily disfigurement, sterilization, impairment of any bodily function, or any injury to a person's health.<sup>49</sup> As the *Spinal Tap* case (1963) shows, the clause also imposes severe limitations on the technical methods that can be employed in any penetration of the body. In the *Pneumoencephalography* case (1963),<sup>50</sup> decided a few weeks after *Spinal Tap*, the court invalidated a court-ordered puncture of a person's vertebral canal for the purpose of testing his personal responsibility for a crime. The Federal Constitutional and Administrative courts have even invalidated the polygraph test in criminal investigations.<sup>51</sup> To attach a person to a machine for the purpose of eliciting the truth, these tribunals have suggested, is an inadmissible invasion of a person's innermost self and a violation of human dignity. In short, the human person cannot be treated, consistent with the image of man advanced earlier in this chapter, as an object of experimentation of any kind.

Efforts to apply the personal inviolability clause outside the criminal field have been less successful. In the *Widow's Child Welfare* case (1951) the Constitutional Court ruled that Article 2 (2) does not confer any subjective right to a specific social welfare benefit.<sup>52</sup> In more recent years, however, particularly in the aftermath of the first *Abortion* case (no. 7.10), constitutional litigators have been able to argue with some plausibility that, as an objective value, the right to personal inviolability places

"all the organs of the State . . . under a duty to promote and protect—that is, by engaging in affirmative action—the legal values of life and of physical integrity."<sup>53</sup> Indeed, as the *Mülheim-Kärlich* case (1979) shows, the Constitutional Court is becoming increasingly sensitive to such arguments when they are advanced in the interest of a safe environment.<sup>54</sup> Since 1983, numerous persons have filed constitutional complaints with the court in defense of a constitutional right to a safe environment under the personal inviolability clause.<sup>55</sup>

#### 7.9 Spinal Tap Case (1963) 16 BVerfGE 194

[The complainant was the manager of an enterprise associated with the Central Chamber of the Munich Knitting Goods Company. He and his eighty-nine-year-old mother, with whom he lived, owned a small number of shares in the parent company. He refused to properly fill out a Board of Trade questionnaire relating to his business, as he was legally required to do. Instead, he returned the questionnaire with a number of frivolous and nonsensical comments on it, whereupon the Board of Trade fined him DM 500 for his failure to cooperate. He refused to pay the fine, claiming that the board lacked jurisdiction over his business. In an action to collect the fine a district court judge, suspecting a disorder of the complainant's central nervous system, ordered him to undergo a medical test requiring the withdrawal of body fluid for the purpose of determining his mental condition pursuant to section 81a of the Code of Criminal Procedure. The court of appeals sustained the order. The complainant challenged these court orders as violative of his right to a hearing in accordance with law under Article 103 (1) and personal inviolability under Article 2 (2) of the Constitution.]

Judgment of the First Senate. . . .

The district court decision of September 11, 1958, and the superior court decision of October 14, 1958, violate the complainant's basic right under Article 2 (2) of the Constitution. They are quashed and the case is remanded to the Munich District Court. . . .

B. We need not decide whether the court of appeals ruling violates Article 103 (1). The constitutional complaint is sustained because the ruling violates the basic right to physical inviolability (Article 2 [2]).

1. The extraction of cerebral and spinal fluid by means of a cannula is not an insignificant surgical invasion of bodily integrity within the meaning of Article 2 (2) of the Constitution. When conducted in accordance with the standards of modern medicine this procedure is not normally dangerous; yet severe pain and nausea are