chapter 4

Human Rights and the Protection of Personality Rights in Europe: Comparative Reflections

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1 Comparative Survey

Today, the protection of personality rights is by a common European principle, which is, however, put into effect in quite different ways. For more than 200 years – since 1811 – the Austrian provision of § 16 of the General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) states: 'Every person has inherent rights, which are evident by nature.' This very provision is anything but a pure declaration as some and even famous Austrian scholars in the 19th century had taught.1 Quite the contrary – § 16 ABGB is a legal rule of paramount importance for Austrian law.2 Nonetheless, the Austrian Supreme Court recognized the general personality right enshrined in § 16 ABGB for the first time as late as 1978.3 Astonishingly enough, it took almost 170 years to bring § 16 ABGB to life and to awake this crucial provision from a deep sleep.

Another path was taken by the French Code civil from 1804, which is the second codification from the age of the so-called natural law still in force today. Contrary to the Austrian Civil Code (ABGB), the French Code civil does not include a general rule for the protection of personality rights. However, relatively quickly, French doctrine managed to deduce from art 1382 Code civil – a provision according to which every culpable action resulting in harm leads to damages – a comprehensive protection of single personality rights including compensation for non-pecuniary loss.4 On this basis a right to one's image was

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1 J Unger, System des österreichischen allgemeinen Privatrechts 1 (1856) 71 fn 16.
2 J Aicher in: P Rummel (ed), ABGB (3rd edn 2000) § 16 no 3 with further references.
3 Austrian Supreme Court (Oberster Gerichtshof, OGH) 4 Ob 91/78 = SZ 51/146 = Recht der Arbeit (RdA) 1979/24 with cmt by R Reischauer = Zeitschrift für Arbeitsrecht und Sozialrecht (ZAS) 1979/24 with cmt by F Marhold.
recognized in the famous *Rachel* case as early as 1858: the proliferation of the picture of the once famous actress *Rachel* lying on her deathbed, which was undertaken without prior agreement, was thus forbidden and the surviving dependants were granted damages;\(^5\) also, an early example of a post-mortem protection of personality rights.

In the quite similar *Bismarck* case, the German Court of the Reich (*Reichsgericht*) had, by contrast, to refer to *trespass*, specifically to an invasion of one’s home. This was the only way to justify the destruction of illegally taken photographs of the deceased Chancellor of the Reich.\(^6\) Likewise, the protection of personality rights was left untackled in the deliberations over the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). As a consequence, the German *Reichsgericht* stated as late as 1908: ‘The civil law in force today does not recognize a general subjective personality right.’\(^7\) It was not until the midst of the 20th century that a remarkable change of court practice took place: referring to arts 1 and 2 of the German Constitution (*Grundgesetz*), which enshrines human dignity and free development of the personality, the German Federal Supreme Court (*Bundesgerichtshof*, BGH) developed a general personality right (*allgemeines Persönlichkeitsrecht*).\(^8\) Since the famous *Herrenreiter* decision from 1958, damages include compensation for non-pecuniary loss if the infringement of personality is severe.\(^9\)

With this change of court practice German law achieved the level of protection provided for by Swiss law. Like the modern German law, Swiss law recognizes a general personality right. Furthermore, damages for non-pecuniary loss, which are called *Genugtuung für die erlittene Unbill*, are granted according to art 49 of the Swiss Law of Obligations (*Obligationenrecht*, OR) in case of a severe infringement of one’s personality. The solution provided by Swiss law was adopted by the Greek Civil Code.\(^10\) German jurisprudence in turn influenced the Portuguese *Código civil* and Italian court practice.\(^11\) All in all these transnational interactions serve as a beautiful example of a spontaneous

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\(^5\) Tribunal Civil Seine, 16 June 1858, Dalloz 1858, 3, 62.

\(^6\) Court of the Reich (*Reichsgericht*, RG) in RGZ (Decisions of the RG in Civil Matters) 45, 170; Brüggemeier (fn 4) 297 f.

\(^7\) RG in RGZ 69, 401, 403 (*Nietzsche*-letters).

\(^8\) Federal Supreme Court (*Bundesgerichtshof*, BGH) in BGHZ (Decisions of the BGH in Civil Matters) 13, 334, 338.

\(^9\) BGH in BGHZ 26, 349.
