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Justice Dr. Suzanne Baer
April 2012

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The Basic Law at 60 – Identity and Change

By Dieter Grimm*

A. Constitutional Change

The Basic Law, whose 60th anniversary we celebrate today, is not identical with the Constitution that was enacted on 23 May 1949. In the sixty years of its existence, it has been amended fifty-four times. Further amendments are under way. Many amendments concerned more than just one article. A little more than half of the 146 articles of the original text still read as they were framed in 1949. However, twenty-six of these unchanged articles are part of the “Transitional and Concluding Provisions.” A number of them were limited to one singular act of application, such as Art. 136 I (“The Bundesrat [Federal Council] shall convene for the first time on the day the Bundestag [national parliament] first convenes.”), and lost their normative value with the completion of the given act. A little less than half of the original articles, and the Preamble, have been subject to amendments; some of them several times. The forerunner is Art. 106 (apportionment of tax revenue), with six amendments. In addition, forty-seven articles have been added to the original text, some of which were repealed later.

If the identity of a constitution depends on whether its text has remained the same over time, then Germany today has a constitution different from the one adopted in 1949. However, it seems doubtful whether this would be a notion of identity adequate to a constitution. Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place. Yet constitutions are themselves not immune to challenges, in particular if the text of the constitution is as detailed as is the case with the Basic Law. Constitutions that resist such adaptations are in danger of losing their legal relevance and of being circumvented. This is why the possibility of change must be recognized when the identity of constitutions is considered.

This is not to say, however, that amendments to a constitution are always identity-neutral. The Weimar Constitution was not abolished after the National Socialists took over in 1933.

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It was partly suspended and partly changed according to the conditions the Constitution itself had laid down for amendments. But these amendments left little of what had been the Weimar Constitution. The changes, radical in substance but legal in form, were possible because the Weimar Constitution had refrained from establishing substantive barriers to constitutional amendments, and the majority of constitutional law scholars had interpreted the provision as an unlimited mandate, provided an amendment reached a two thirds majority. The Basic Law reacted to this in Art. 79 III, which protects the fundamental principles of the Constitution from abolition. Art. 79 III thus guarantees the identity of the Basic Law. If “Identity” refers to the core of the Constitution as secured by Art. 79 III, we still live under the same Basic Law although much has changed in the penumbra.

It would be insufficient, however, to limit the notion of constitutional change to formal amendments to the text. Constitutional change occurs outside textual change as well. This is the case when a different or a new meaning is attributed to the text by way of interpretation. Constitutions as well as laws in general are drafted under certain historical circumstances to which they explicitly or implicitly refer. Therefore, a legal provision cannot be fully understood if isolated from this context. It is in this context where the legal norm shall reach its purpose. The context is, however, not immune against change - technological change, economic change, demographic change, value change, etc. Contextual change may have an impact on the ability of the norm to reach its purpose. If interpreted regardless of the change it may miss the purpose or produce dysfunctional results. Hence, when we ask how the Basic Law of 2009 differs from the one enacted in 1949, changes by interpretation have to be taken into account in addition to changes by amendments.

B. Changes by Amendments

The many amendments that have changed the text of the Basic Law are unevenly distributed among the various parts of the Constitution.

I. Basic Principles

The basic principles in Art. 1 and Art. 20, which are protected from abolition or diminution by Art. 79 III, have remained almost unchanged. The consensus as to the foundational value of human dignity and the commitment to republicanism, democracy, rule of law, and the social state never eroded, and only federalism met criticism from time to time. A right to resistance against attempts to overthrow the constitutional order was added to Art. 20 along with the introduction of emergency provisions in 1968. A new state obligation concerning the protection of the environment (Art. 20a) was enacted after long controversies in 1994.
II. Fundamental Rights

The number of amendments concerning the Bill of Rights has been small. No completely new right was introduced, but some of the rights existing from the beginning were subject to change. Some amendments extended, some curtailed the constitutional protection. An extension of the scope took place in the equal protection clause of Art. 3. Gender equality, guaranteed from the beginning, was supplemented by a duty of the state to promote factual equality among men and women, and a prohibition to discriminate against disabled persons was added, both in 1994. Restrictions sometimes concerned the scope of the right, sometimes the limitation clause. A restriction of scope occurred when the right to asylum was reformulated after long and severe controversies in 1993. The power of the legislature to limit fundamental rights was enlarged in Art. 10 (privacy of correspondence, mail and telecommunication) in 1968 and in Art. 13 (inviolability of the home) in 1998. How sensible these amendments were can be seen from the fact that they were challenged as unconstitutional amendments under Art. 79 III. Yet, the Federal Constitutional Court did not find a violation of Art. 79 III, while a minority of the justices saw the constitutional limits to amendments transgressed.

III. Governmental Structure

The vast majority of the amendments concerned the structural parts of the Basic Law. Out of the total of fifty-four amendment laws, five can be called major interventions into the original structure of government. Two of them filled gaps in the Constitution which resulted from the fact that in 1949 West Germany was still under the control of the allied powers who had reserved some sovereignty rights for themselves. The disarmed country did not need rules concerning war powers and armed forces. When West Germany’s rearmament was decided, amendments to the Basic Law became necessary and were adopted in 1956. The second amendment that filled a gap in the original text introduced emergency rules and was adopted during the short period of the first Grand Coalition in 1968. Both amendments were heavily contested: the rules concerning rearmament because of fear that this might cement the division of the country and create a situation where Germans would have to fight against Germans; the emergency rules because the memory of the detrimental role the emergency powers had played in the Weimar Republic was still vivid, and many were afraid that new emergency provisions might be the first step to turn West Germany into an authoritarian system.

Three further amendments of major impact did not complete the Basic Law but changed its organizational structure. The first one of 1969 concerned the federal system and the financial relations between the Federation and the Länder (German states). It transformed the original dualistic federalism into a cooperative federalism. The second package of amendments came as a consequence of Germany’s reunification in 1990. Some amendments were necessary to prepare this event. Others followed, among them a provision that was not directly related to unification but reacted to the progress of
European integration. The new Art. 23 laid down the conditions under which Germany can participate in further integration steps and regulated the internal decision making process regarding European affairs. A big package of amendments followed in 1994. It can be understood as a substitute for the new constitution that Art. 146 in its original form had promised for the historical moment of unification - a promise that the majority of West German politicians were unwilling to keep. The last of the major constitutional reforms was another shift in the federal structure adopted under the second Grand Coalition in 2006 (and meanwhile - 2009 - completed by a reform of the financial system).

Between the adoption of the Basic Law and Germany's reunification, an unsuccessful attempt to a total revision of the Constitution was made. In 1970, the Bundestag established a commission composed of politicians and experts to work out recommendations. Yet, when the commission after six years presented its report, two volumes of recommendations, a need for a total revision was no longer felt. The veneration of the Basic Law in the West German society had begun. Three years later, Dolf Sternberger coined the term "constitutional patriotism."

Most of the amendments within the organizational parts of the Basic Law concerned the relationship between the Federation and the Länder, while the institutions and procedures on the federal level remained almost untouched. The division of powers between the Federation and the Länder had already been an object of deep controversy in the Parliamentary Council that drafted the Basic Law. Likewise, it was this part of the draft constitution that caused interventions by the allied forces, who were in favour of a system more friendly to the Länder, whereas the majority of the Parliamentary Council would have preferred a more unitary state. The pressure on the drafters was mainly exercised by the two allied powers that showed no interest in federalism at home: France and Great Britain. In their view, a federal state was a weak state, and the more federal it was, the weaker it would be. Federalism was intended as a means to prevent a strong West German state from emerging.

However, the development of German federalism went in a different direction. The federal structure as designed by the Parliamentary Council soon entered into conflict with the social and economic dynamics. Rapid economic recovery and technological progress resulted in an increase of problems that could not be solved within the narrow framework of the Länder, but required national (if not international) solutions. Yet, even in policy fields where uniformity of the law was not required, the post-war population showed more interest in equal conditions of life everywhere in the Federal Republic than in maintaining regional diversity. The fact that the majority of the Länder were artificially created entities may have contributed to this attitude, as well as the mobility caused by the war and even more so by the expulsion of millions of Germans from their homes in the Eastern provinces after World War II. An additional factor was the development of political parties. The national organizations soon took the lead over the party structure in the Länder.
Thus, long before the first major reform of the constitutional system in 1968, the federal structure had deeply changed. The Federal Republic made ample use of its power to regulate the subject matters within the category of concurrent legislation, with the effect that the Länder were barred from legislating in these fields. A number of new legislative powers were attributed to the Federation, such as environmental law or the rules concerning the use of atomic energy. The Federal Republic contributed to financing certain tasks of the Länder and thereby gained influence on the fulfilment of tasks that the Constitution had reserved for the Länder. Finally, the Länder themselves entered into agreements for uniform legislation and administration in subject matters within their competency, the most conspicuous example being education. As early as 1962 Konrad Hesse could characterize West Germany in the title of his influential book as a “Unitary Federal State” (Der unitarische Bundesstaat).

Yet, a need for thorough constitutional reform was felt only when West Germany faced its first economic crisis in 1966/67. The fact that this crisis led to the fall of Chancellor Ludwig Erhard and to the formation of the first Grand Coalition facilitated the constitutional reform. Together the coalition parties disposed of the necessary majority. It was a general assumption that a successful crisis management required an active counter-cyclical policy which in turn seemed possible only if the national and the regional governments acted in concert. The consequence was a transformation of the federal system. The Länder gave up a considerable part of their independence and accepted a large number of constitutional amendments in 1969 that introduced more cooperative forms of government. No other year saw more amendment laws than 1969, eight altogether. The Länder lost their fiscal autonomy and had to coordinate their budgets with the federal budget. Since the planned boost in public investment exceeded the resources of the Länder, a new category of joint tasks was established, accompanied by a cost sharing system.

The downside of this reform later became apparent. Already before 1969, the Federation had paid a price for the transfer of legislative powers to the national level: the number of federal laws that required the consent of the Bundesrat, the representation of the Länder governments, increased as well. The constitutional reform of 1969 once more augmented the power of the Bundesrat. After this reform almost two-thirds of all federal laws depended on the approval of the Bundesrat. This created a particular problem in periods where divergent majorities existed in the Bundestag and the Bundesrat. The Bundesrat, whose decisive role in the legislative process had originally been limited to federal laws that affected the interests of the Länder directly, now became an instrument in the hands of the opposition parties at the federal level. As a consequence, the elected majority in the Bundestag was no longer able to carry out its political program. It needed the consent of the opposition that formed the majority in the Bundesrat.

The consequence was a tacit transformation of the political system from a deliberative into a negotiating democracy. This entailed a lack of transparency. Negotiations are conducted behind closed doors. It delayed, often prevented and always diluted reforms that
everybody regarded as being necessary. In addition, it made it impossible to attribute the responsibility for success or failure of a measure to the government. Government and opposition claimed a success for themselves and blamed the other side for every failure. This in turn devaluated elections. In retrospect, it was difficult to judge the accomplishment of the government. Prospectively, the voter no longer decided who would govern with which agenda. Joint tasks were by their very nature designed for negotiation. The necessity to reach unanimity among, at that time, eleven Länder and the Federation, made the decision making process cumbersome. Solutions were mostly reached according to the least common denominator. If they turned out to be ill-designed, it was almost impossible to reverse them. The costs in terms of democracy and efficiency were obvious.

All this was well known after Fritz Scharpf had published his analysis “Politikverflechtung” in 1976. However, no consequences arose. Each of the two major political parties complained about the system when forming the national government, and each party made use of the possibility to blockade government measures as soon as it found itself in the minority. A willingness to consider changes grew only after the pressure for reform had dramatically increased because of the globalization tendencies after the end of the East-West divide. The inability of the political parties to cope with the challenges began to threaten their legitimacy. The public was put into a mood of expectation because of constant evocations about a need for action by the parties. Subsequently, they were not able to satisfy the expectations they themselves had aroused because the high barriers prevented a consensus. As such, the parties surpassed each other with accusations on who was responsible for the blockades. Eventually, the final result, if any, was a compromise that nobody found helpful. In the end, none of the parties profited from the mutual accusations, but the whole political system was discredited. Such was the situation at the turn of the 20th to the 21st century.

This is the rare case of a problem that has its roots in the Constitution. It was therefore much easier to solve than those problems whose source lies in external conditions. Thus, a constitutional amendment was necessary. Still, until 2001 the problem was not taken up. Since the main reason for the difficulties lay in the increase of legislative powers vested in the Bundesrat and in the joint tasks of Federation and Länder, a reduction of these powers and dissolution of joint tasks was offered for adoption in order to re-establish efficiency and accountability. The fact that it nevertheless became difficult to find a solution was due to the decision not to include the financial question into the agenda, and in the attitude of the Länder to request a compensation for the abandonment of every single legislative power of the Bundesrat. One possibility would have been to strengthen the legislative powers of the Länder. But in the deliberations of the commission it soon turned out that it was not easy to find enough subject matters that could reasonably be left to regional legislation. The way out was a new type of legislation that did no longer require the consent of the Bundesrat, but, in compensation for the loss, entitled the Länder to deviate from federal laws. In addition, a new case of mandatory Bundesrat approval was introduced for those federal laws that create tasks of the Länder for which fulfillment costs
money. The compromise failed in the last meeting of the commission, but was later revived with minor changes when the Christian Democratic Union (CDU) and the Social Democratic Party (SPD) formed a second Grand Coalition.

It is too early for an evaluation of this new change of the federal structure. The problems that the amendment may entail remain latent as long as the Grand Coalition, with its comfortable majority in Bundestag and Bundesrat, exists. My presumption is, however, that old mistakes have been cured by new ones, so that a reform of the reform will soon become necessary.

C. Amending the Amendment Process

Before turning to changes by interpretation I would like to leave my subject for a moment in order to insert a brief remark about the practice of constitutional amendments in Germany. One feature is obvious: The amendments have made the Basic Law more voluminous. Art. 13 is now four times as long as before the amendment. The new provision on asylum, Art. 15 a, is forty times as long as its predecessor. Art. 106, which underwent already six amendments, grew from about ninety to about seven-hundred and fifty words. Political actors confronted with this development easily concede that most amendments did not enhance the beauty of the text. But this is not the point. To discuss the development in terms of constitutional aesthetics is to play it down. Rather, it affects the function of the constitution. A constitution determines the principles and procedures for political decisions. It does not contain these decisions, which would make politics superfluous. Political decisions are made on the basis and within the framework of the constitution on a day-to-day-basis, and according to the preferences of those who have won elections. If the citizenry is dissatisfied with the result, it gives the opposition a chance in the next election.

This shows that constitutionalism lives on a differentiation between the constitutional level and the level of ordinary law. Fundamental rights can illustrate this. They describe which individual behaviour or which social function ought to be free, and determine under which circumstances the freedom may be limited. The limitation itself is the business of ordinary legislation and can be decided by a simple majority. Some of the amendments to fundamental rights mentioned above anticipate ordinary legislation and sometimes even include provisions that one would expect in an ordinance, not in a law. The space for political decisions is thereby reduced. What has been determined on the constitutional level is no longer open for political decision. In the end, policy changes require a prior constitutional amendment. If this cannot be attained, the system ends up in immobility or the constitution is circumvented.

How could this happen? The answer is that the rules for constitutional amendments favour this practice. The power to amend the constitution is vested in the Bundestag and the Bundesrat. These are the same actors that conduct the daily political business.
Amendments are enacted by way of legislation. This also means that the procedure is the same as in the daily business. The only difference consists in the requirement of a two-thirds majority. But this is no longer exceptional. In all cases where the majority can legislate only with the consent of the opposition, a de facto supermajority is required. Again, since no political party in Germany ever disposed of the supermajority, negotiations are the logical consequence. In these negotiations, every side tries to realize as many of its own ideas as possible, and to prevent those of the adversary. The goal is to narrow the political space for the other party, should it win the next election. This is detrimental on the legislative level, but even more so on the constitutional level. In a constitution the people determine the conditions for political action. The people draw the framework in which politics can act. If politicians can decide on the framework in the same way they are allowed to act within the framework, the difference between constitution making and law making, and the difference between the conditions for political decisions and these decisions themselves, disappears. The constitution loses its function.

In order to prevent this from continuing, the Federal Republic should amend its amendment process. Constitution making should differ from law making not only in terms of the quorum, but also in terms of actors and procedures. It would, however, be an illusion to assume that such an amendment could easily be reached, since those who draw a short term profit from the existing rules are the same whose vote is necessary to change them.

D. Changes by Interpretation

The way in which and the degree to which a constitution shapes the political and social structure of a country and influences the behaviour of political actors is not determined with the enactment of the text. The text is in need of application to concrete issues, and the gap between the general and abstract terms of the text and the concrete situation to which it is to be applied is bridged by interpretation. It would be a mistake to understand interpretation as a neutral operation to discover a pre-established meaning of the norm. Interpretation of the general law with regard to a concrete problem always contains an element of constituting the meaning, and this is the more so the older and more abstract the text is, and the more the context has changed since its enactment. Interpretation precedes implementation. Both are not necessarily in the same hands. Implementation depends on the willingness to comply with the order derived from the text by way of interpretation.

This is true for all legal norms, not only for constitutional norms. But there is also a fundamental difference between constitutional law and ordinary law. The laws are made by the state and bind the people. In cases of conflict, the state can enforce them. It disposes of the coercive means to overcome resistance on the part of the addressees of the law. The constitution is made by or attributed to the people and binds the state, in particular the supreme powers of the state. This means that here the addressee of the
rules is at the same time their implementor. This explains the specific weakness of constitutional law. Constitutional courts can only mitigate but not solve this problem, for the coercive means of the state are not in the hands of the judges, but in the hands of the government.

The interpretation does not give the interpreter any power over the text itself but only over the meaning of the text. However, quite often a change in the meaning is just as important as an amendment to the text itself. In this case we speak of constitutional change by way of interpretation. Regarding the Basic Law, one may even come to the opinion that the changes brought forth by interpretation were more important than the changes brought forth by textual amendments.

While the subject of constitutional amendments was mostly the organizational part of the Basic Law, the subject of constitutional change by way of interpretation was predominantly the Bill of Rights. Fundamental rights had long been marginalized in German constitutionalism. The early constitutions that were enacted in the first half of the 19th century had failed to equip the fundamental rights with derogatory force. New laws had to comply with fundamental rights. Old laws did not lose their legal force if they contradicted fundamental rights. The revolutionary assembly that drafted the first constitution for Germany as a whole in 1848 set out to change this situation, but the revolution failed and with it the Paulskirche Constitution, which had given full primacy to the Bill of Rights.

In the second half of the 19th century, a process of liberalization of the legal order began, and with its progress the middle classes gradually lost interest in fundamental rights, fearing that they might serve the working classes as a basis for constitutional claims. The Constitution of the German Empire of 1871 did not contain a Bill of Rights, and the fundamental rights contained in the state constitutions remained without significant importance. The treatment of fundamental rights by the constitutionalists of the Empire is an impressively clear example of how interpretation can have. Since fundamental rights were subject to limitation by law, the legal science concluded that they ranked not above but below the law. Their impact was thus reduced to a prohibition of infringements without a legal basis. However, this was regarded as an essential element of the rule of law, so the constitutionalists concluded that fundamental rights were superfluous. Nothing would change, was the prevailing opinion, if they were completely absent in the text of a constitution.

In spite of this doctrine the drafters of the Weimar Constitution put great emphasis on fundamental rights, and even added a number of social and economic rights to the classical liberties. Regardless of the National Assembly's insistence on fundamental rights, the legal science continued to interpret them in the old manner, placing the liberties below the legislature, and declaring the new social and economic rights as mere proclamations of political intent without any legal value. This is not to say that the Weimar Republic was an
illiberal state, but its liberalism lacked constitutional protection. It was only under the Nazi-regime that individual liberty was completely rejected as a legal bond to state power.

The Basic Law reacted to the historical deficits of fundamental rights as well as to their total neglect between 1933 and 1945. As a symbolic act intended to underscore the importance that the Parliamentary Council wanted to attribute to the Bill of Rights, they were moved from the end - their place in the Weimar Constitution - to the beginning. In addition, all rights contained in the Bill were founded in a new "mother right" in order to prevent once and for all attacks on human beings like those committed by the National Socialists. The constitutional provisions start with the sentence: "Human dignity is inviolable." The text of Art. 1 continues by stating that the fundamental rights bind all state power including the legislature, thereby rejecting the old doctrine that fundamental rights rank below the law. Furthermore, they are declared directly applicable, thus making it impossible to deny certain rights the quality of legal norms. Limitations of fundamental rights are themselves limited. Under no circumstances may the very core of a right be touched by a legal limitation, whereas the earlier doctrine had been of the opinion that fundamental rights were open to whatever limitation the legislature deemed necessary. Finally, the eternity clause of Art. 79 III protected Art. 1 against any abolition, and thus guaranteed a system with fundamental rights, although not every single right in the Bill of Rights.

Much uncertainty about the validity of fundamental rights was thus eliminated, but not all. The rest was addressed step by step by the Federal Constitutional Court, perhaps the most effective innovation of the Basic Law. The way the Court understood, developed and applied fundamental rights is a stunning success story which can be told here only by mentioning the most important steps.

Beginning in 1953, two years after its establishment, the Court developed the idea that the high rank attributed to fundamental rights in the Basic Law required a further limitation to restrictions by the legislature. The result was the principle of proportionality. In addition to what the Basic Law explicitly says regarding the limitation of rights, the Court ruled that only proportional limitations are constitutional. The degree to which fundamental rights protected individual liberty was thereby greatly enhanced. Today, the principle of proportionality carries the main burden of freedom protection, and in addition it has become Germany's most important export article in constitutional doctrine, copied in all parts of the world.

In 1957, the Court closed the gaps between the various fundamental rights by interpreting Art. 2 I, which guarantees everybody the free development of his or her personality, as a residual freedom that covers any individual behaviour not protected by a special guarantee. Fundamental rights protection thus became complete; any state action that prevents a person from acting as he or she chooses can be reviewed from a constitutional perspective.
One year later, in 1958, the Court rendered the most important decision of its existence: the Lüth-judgement. The Lüth case raised the question of horizontal application of fundamental rights, i.e., the question whether they protect the individual only against the state or also against fellow citizens. Before Lüth, fundamental rights were regarded as subjective rights, having vertical application only and functioning as negative rights, meaning that they obliged the state to omit certain actions. In Lüth, the Court ruled that fundamental rights are primarily subjective rights of the individual against the state. But, it added that they are more than this, namely objective principles and as such the highest norms of the whole legal order. If this was true, they could not be limited to vertical application; they also had to play a role in the horizontal dimension. But this role differs from the one in the vertical dimension. Since the Basic Law clearly says that fundamental rights bind all state powers, but only state powers; they cannot directly affect private law relationships. But, they have an indirect effect in so far as private law provisions whose application entails a limitation of a fundamental right are to be interpreted "in the light" of this right. Fundamental rights thus develop a "radiating effect."

Again, the consequences are grave. Before Lüth, the influence of fundamental rights ended when a legal norm was found to be constitutional. The interpretation and application of ordinary law was exclusively a matter of ordinary law and outside the range of constitutional law. Correspondingly, the role of the Constitutional Court ended with the review of a law as to its constitutionality. The rest was the business of the ordinary courts. By way of the radiating effect, the interpretation and application of ordinary law was influenced by the constitution and the decisions of the ordinary courts came under control of the Constitutional Court. The historical effect was a modernization of the legal order whose most important codes still dated from pre-democratic times.

Lüth put an end to the traditional view that fundamental rights are mere subjective rights and have an impact only on the relationship between citizen and state. The question that the Lüth case left open was whether fundamental rights remained purely negative rights. The answer to this question was given in the first abortion decision of 1975, and it was once again derived from the legal nature of fundamental rights as values and objective principles. In this capacity they protected individual freedom not only against menaces emanating from the state but likewise against menaces emanating from fellow citizens or societal forces. But once again, because of the clear formulation in Art. 1 II, this did not mean that fundamental rights were directly applicable among citizens. Yet, the objective content of the right imposed a duty on the state to intervene as soon as a liberty guaranteed by a fundamental right was threatened by a third party.

Here, too, the consequences were grave. The state's duty to respect fundamental rights is fulfilled by omitting certain acts that would constitute a violation of the fundamental right. The duty to protect rights is fulfilled by taking action in favour of the threatened liberty. Consequently, the legislature was no longer free to decide whether or not to legislate. If a fundamental right was threatened, the legislature had an obligation to legislate. Hence, a
law could not only violate the constitution if it went too far in limiting a right, it could also be unconstitutional if it did too little to protect it. This duty is enforced by the Constitutional Court, which, according to this understanding of fundamental rights, gained the power to oblige the legislature to make laws.

There are more consequences of the objective value jurisprudence of the Constitutional Court that cannot be expounded here. Nor do I have the time to show how the scope of the various fundamental rights was expanded, their regulatory force intensified and new rights were derived from existing guarantees by the jurisprudence of the Court. But the examples given suffice to show that the growth in importance of the fundamental rights by way of interpretation can hardly be overestimated.

All this was only possible because the Constitutional Court distanced itself from the method of interpretation that prevailed during the Empire and during the Weimar Republic, namely juridical positivism. Positivism as a methodology starts from a one-dimensional understanding of legal norms. A legal norm is identical with its text. The text is the sole object of interpretation. The only admissible instruments to determine the meaning of a law vis-à-vis a concrete issue are grammar and logic. To the contrary, the Bundesverfassungsgericht (Federal Constitutional Court) understands constitutional rights as legal expressions of values, and these values guide the determination of the meaning of a legal norm. They point the interpreter to the purpose of a constitutional norm or the function it is to fulfill. This is already a two-dimensional understanding of a legal norm. However, the purpose ought to be fulfilled in the real world, and this world is constantly changing. The goal of interpretation is to fulfill the purpose of the norm to the utmost extent under changing conditions. This means that the segment of social reality in which a constitutional norm shall take effect must be taken into account. It becomes an integral part of interpretation. The consequence is a three-dimensional understanding of constitutional norms: text plus purpose plus context. Analysis of the social reality to which a norm applies is part of the determination of its meaning. All this gives constitutional interpretation its dynamic character. The Court is able to react to changing conditions of the realization of freedom, and it uses this ability in the creation of new fundamental rights.

E. Changes by EU Law

Constitutional Interpretation as practised by the Federal Constitutional Court has almost invariably enlarged and intensified the influence of the Basic Law. Restrictions of its claims are rare. But there is also a countermovement that increasingly limits the impact of the Basic Law. This movement does not have an internal, but an external source. It is a consequence of Germany's membership in the European Union. It therefore does not only affect the Basic Law, but the constitutions of the member states in general. Yet, it may be more noticeable in Germany than elsewhere since no other member state has attributed a
similar level of importance to its constitution. "Constitutional Patriotism" is a German phenomenon.

When the European Communities were established more than fifty years ago, the repercussion on national constitutions was neither intended nor foreseen. The Community was created by an International Treaty, just as other International organizations, although from the very beginning the European Communities had more powers and a much denser organizational structure than ordinary International organizations. Yet, it was not meant to reduce the importance of the member states' constitutions. The basis for this effect was laid down when the European Court of Justice (ECJ) ruled in the famous decision Costa v. ENEL in 1964, that Community law enjoys primacy over national law including the highest law of the member states - their constitutions - and that the citizens can invoke the primacy vis-à-vis their national government. With this judgement, a development started that was later described as the "constitutionalization" of Community law.

In the context of this lecture, the question is neither whether the judgment of the ECJ was justified nor whether the development initiated by it deserves applause or criticism. What matters is that it gave a new legal quality to European Community Law and thereby diminished the impact of domestic law. In the beginning this effect was not clearly visible. As long as the European Treaties were interpreted narrowly and as long as the enactment of secondary European Law required a unanimous decision of the member states' governments, which in turn were bound by their domestic constitutions, no member state was subjected to rules without its consent. This changed, however, when the majority vote was accepted by the Single European Act of 1987. From that moment on, legal rules which a member state has rejected and which are not in compliance with the requirements of its domestic constitution can nevertheless claim validity on its territory. The consequence is that the domestic constitution can no longer fulfil its claim to comprehensively regulate acts of public authority on domestic territory. The national constitutions are still relevant when a state transfers powers to the EU, but once they are transferred, their exercise is no longer determined by the national constitution.

Moreover, because of the primacy of EU law, the domestic constitution, and its agent, the Constitutional Court loses its exclusive power to determine the validity of domestic law. In the Basic Law, the power to determine whether a law is unconstitutional and therefore null and void is vested in the Constitutional Court (Art. 100). It has the so-called Verwerfungsmonopol (monopoly over rejection of acts and norms). According to the Basic Law, no ordinary court and certainly no administrative agency is entitled to refuse the application of a domestic law because its constitutionality is doubtful. Art. 100 BL no longer holds true. Every judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law.

The consequence for domestic constitutions would be less grave if EU law and national constitutional law were guided by the same values and principles. This is the case on a
rather abstract level. On a more concrete level, the harmony is shrinking. The mechanism at work here does not always get the attention it deserves. In the EU, the Treaties fulfill the function fulfilled in member states by their constitutions. They are higher law. Yet they differ from the national constitutions in an important respect. While the national constitutions content themselves with setting the rules and principles according to which ordinary law is made, the European Treaties contain complete regulations of whole legal areas, such as competition law, that would be left to ordinary law within the member states. Consequently, these rules participate in the quasi-constitutional rank and can be enforced by the Commission without the involvement of the Council and the European Parliament.

After the completion of the Common Market, the Commission has achieved this by interpreting the Treaties in favour of liberalization and deregulation. This deprives the member states of the right to decide which activities they leave to market regulation and which they reserve for the public service. Of course, the member states can sue the Commission for an untenable interpretation of the Treaties or even a transgression of its powers. But the Commission can usually count on the backing by the ECI. It is in this context that the value differences become apparent. For the EU the four economic freedoms enjoy the highest priority, whereas in the Basic Law and in the constitutions of many other member states, economic rights are the weakest. The Basic Law regards human dignity as an absolute right, and personal, communicative and cultural rights usually prevail over mere economic interests. This is different on the European level. While the national constitutions give much leeway for regulating the economy in the interest of other constitutionally protected values, the Treaties - as interpreted by the Commission and the Court - impose strict limits on the domestic parliaments. The ECI even requires that human dignity be balanced against entrepreneurial freedom. Since there is hardly any legal matter that does not have an economic aspect, the EU has a tool to extend its powers into fields that, according to national constitutional law, should not be guided by economic rationality. It is through this backdoor that national constitutions such as the Basic Law are most endangered.
Federal Constitutional Court - Press office -

Press release no. 5/2009 of 9 February 2010

Judgment of 9 February 2010 - 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 -

Standard benefits paid according to the Second Book of the Code of Social Law ("Hartz IV legislation") not constitutional

I. Facts of the case

1. With effect from 1 January 2005, the Fourth Act for Modern Services on the Labour Market (Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt) of 24 December 2003 (the so-called "Hartz IV legislation") merged the (long-term) unemployment assistance (Arbeitslosenhilfe) and the social assistance benefits existing to date in the newly created Second Book of the Code of Social Law (Sozialgesetzbuch Zweites Buch - SGB II) in the shape of a uniform, means-tested basic provision for employable persons and the persons living with them in a joint household (community of need). Accordingly, employable needy persons receive unemployment benefit II, and the non-employable dependants living with them in a joint household, in particular children before completing the age of 15, receive social allowance. These benefits are essentially made up of: (1) the standard benefit paid to secure one's livelihood, which is determined in §§ 20 and 28 SGB II; and (2) benefits for accommodation and heating. The benefits are only granted where no sufficient means of one's own, especially income or property, exist. Upon its entry into force, the SGB II fixed the standard benefit for singles living in the old West German states including East Berlin at €345. It determines the standard benefit for the other members of the joint household as percentages of this amount. This resulted as from 1 January 2005 in a rounded amount of €311 (90 per cent) for spouses, civil partners and live-in partners, in a rounded amount of €207 (60 per cent) for children before completing the age of 14 and in an amount of €276 (80 per cent) for children from the beginning of their 15th year of age.

In contrast to the provisions under the former Federal Social Assistance Act (Bundessozialhilfegesetz - BSHG) the standard benefit according to SGB II is largely paid as a lump sum; an increase for everyday need is ruled out. Non-recurring assistance is only paid in exceptional cases for a special need. To meet a need that recurs irregularly, the standard benefit has been increased so that benefit recipients can save the corresponding amount.

2. a) When fixing the standard benefit, the legislature took the social assistance law, which has been regulated since 1 January 2005 in the
Twelfth Book of the Code of Social Law (*Sozialgesetzbuch Zwölftes Buch - SGB XII*) as an orientation. Pursuant to the SGB XII and the Standard Rate Ordinance (*Regelsatzverordnung*) issued by the competent Federal Ministry, the assessment of the standard rates under social assistance law is carried out according to a statistical model which had been developed in a similar fashion when the BSHG was in force. The basis of the assessment of the standard rates is a special evaluation of the sample survey on income and expenditure which is conducted every five years by the Federal Statistical Office. What is relevant for the determination of the basic standard rate, which also applies to singles, is the expenditure, compiled in the different divisions of the sample survey, of the lowest 20 per cent of the single-person households stratified according to their net income (lowest quintile) after leaving out the recipients of social assistance. When assessing the basic standard rate, this expenditure, however, is not fully considered; only certain percentages of it are taken up as expenditure that is relevant to the standard rate.

The Standard Rate Ordinance which has been in force since 1 January 2005 is based on the 1998 sample survey on income and expenditure. When determining the expenditure that is relevant to the standard rate in § 2.2 of the Standard Rate Ordinance, division 10 of the sample survey on income and expenditure (*Education*) has not been taken into account. Further reductions were made for instance in division 03 (*Clothing and shoes*) e.g. for furs and tailor-made clothes, in division 04 (*Housing etc.*) with the expenditure item *Electricity*, in division 07 (*Transport*) due to the costs of motor vehicles and in division 09 (*Leisure, entertainment and culture*) e.g. for gliders. The amount calculated for 1998 was projected to 1 January 2005 according to the provisions that apply to the annual adaptation of the standard benefit pursuant to the SGB II and of the standard rates pursuant to the SGB XII, according to the development of the current pension value in the statutory pensions insurance scheme (see § 68 SGB VI).

b) When fixing the standard benefit for children, the legislature deviated from the percentages that were in force under the BSHG by creating only two age groups (0 to 14 years and 14 to 18 years). At first, the expenditure behaviour of married couples with one child was not studied, as had been done under the BSHG.

3. The special evaluation of the sample survey on income and expenditure from 2003 resulted in changes concerning the expenditure that is relevant to the standard rate pursuant to § 2.2 of the Basic Rate Ordinance as from 1 January 2007 but not in an increase of the basic standard rate and the standard benefit for singles. A new special evaluation conducted regarding the expenditure behaviour of married couples with one child resulted in the legislature’s introducing a third age group of children from the age of 6 until they complete the age of 14 living in the same household. As from 1 July 2009, they receive, pursuant to § 74 SGB II, 70 per cent of the standard benefit of a single person. Pursuant to § 24a SGB II, school-age children have received since 1 August 2009, apart from this, additional benefits for school to the amount of €100 per school year.

4. On 20 October 2009, the First Senate of the Federal Constitutional Court conducted an oral hearing about a case submitted by the Higher Social Court of Hesse (*Hessisches Landessozialgericht*) (1 BvL 3/09) and about two cases submitted by the Federal Social Court (*Bundessozialgericht*) (1 BvL 3/09 and 1 BvL 4/09) on the question of whether the amount of the standard benefit for securing the livelihood
of adults and children until completing the age of 14 in the period between 1 January 2005 and 30 June 2005 according to § 20.1 to 20.3 and according to § 28.1 sentence 3 no. 1 alternative I SGB II is compatible with the Basic Law. Detailed information about the original proceedings on which the submissions are based is contained in the German press release on the oral hearing (no. 96/2009 of 19 August 2009).

II. The Federal Constitutional Court’s decision

The First Senate of the Federal Constitutional Court has decided that the provisions of the SGB II which concern the standard benefit for adults and children do not comply with the constitutional requirement following from Article 1.1 of the Basic Law (Grundgesetz – GG) in conjunction with Article 20.1 GG to guarantee a subsistence minimum that is in line with human dignity. The provisions remain applicable until the legislature enacts new provisions, which it is ordered to do until 31 December 2010. The legislature is also ordered to make provision, when enacting the new provisions, for securing an irrefutable current special need which is not non-recurring for those entitled to receive benefits according to § 7 of the Second Book of the Code of Social Law, a need which has not yet been covered by the benefits pursuant to §§ 20 et seq. of the Second Book of the Code of Social Law but must mandatorily be covered to guarantee a subsistence minimum that is in line with human dignity. It is ordered that until the legislature enacts new provisions, this claim can be asserted directly, taking into account the grounds of the decision, on the basis of Article 1.1 GG in conjunction with Article 20.1 GG, with the costs being borne by the Federation.

In essence, the decision is based on the following considerations:

1. a) The fundamental right to guarantee a subsistence minimum that is in line with human dignity, which follows from Article 1.1 GG in conjunction with the principle of the social state under Article 20.1 GG, ensures every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life. Beside the right from Article 1.1 GG to respect the dignity of every individual, which has an absolute effect, this fundamental right from Article 1.1 GG has, in its connection with Article 20.1 GG, an autonomous significance as a guarantee right. This right is not subject to the legislature’s disposal and must be honoured; it must, however be lent concrete shape, and be regularly updated, by the legislature. The legislature has to orient the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life. As regards the types of need and the means that are necessary to meet such need, the extent of the constitutional claim to benefits cannot be directly inferred from the constitution. It is for the legislature to lend it concrete shape; it has latitude for doing so.

In order to lend the claim concrete shape, the legislature has to assess all expenditure that is necessary for one’s existence consistently in a transparent and appropriate procedure according to the actual need, i.e. in line with reality.

b) The legislature’s latitude for assessing the subsistence minimum corresponds to a cautious review of the provisions in non-constitutional law by the Federal Constitutional Court. As the Basic Law itself does not admit of exactly quantifying the claim, substantive review is restricted, as regards the result, to ascertaining whether the benefits
are evidently insufficient. Within the material range which is left by the review of evident faultlessness, the fundamental right to guaranteeing a subsistence minimum that is in line with human dignity cannot provide any quantifiable guidelines. It requires, however, an examination of the bases and of the assessment method of the benefits to ascertain whether they do justice to the objective of the fundamental right. In order to ensure a traceability of the extent of the statutory assistance benefits that is commensurate with the significance of the fundamental right and to ensure the review of the benefits by the courts, the assessment of the benefits must be viably justifiable on the basis of reliable figures and plausible methods of calculation.

The Federal Constitutional Court therefore examines: (1) whether the legislature has taken up and described the objective of ensuring an existence that is in line with human dignity in a manner that does justice to Article 1.1 GG in conjunction with Article 20.1 GG; (2) whether it has, within the boundaries of its latitude, chosen a fundamentally suitable method of calculation for assessing the subsistence minimum; (3) whether in essence, it has completely and correctly ascertained the necessary facts; and finally (4) whether it has kept within the boundaries of what is justifiable within the chosen method and its structural principles in all stages of calculation, and with plausible figures. To make this review by the Federal Constitutional Court possible, the legislature is obliged to plausibly disclose the methods and stages of calculation employed in the legislative procedure. If the legislature does not sufficiently meet this obligation, the ascertainment of the subsistence minimum is no longer in harmony with Article 1.1 GG already due to these shortcomings.

2. The standard benefits of €345, 311 and 207 cannot be regarded as evidently insufficient to secure a subsistence minimum that is in line with human dignity. With regard to the amount of the standard benefit of €345, it cannot be established that it is evidently below the subsistence minimum because it is at least sufficient to secure the physical aspect of the subsistence minimum and because the legislature’s latitude is especially broad as regards the social aspect of the subsistence minimum.

This also applies to the amount of €311 for adult partners in a joint household. The legislature was allowed to assume that living in a joint household reduces expenditure and that therefore, two partners living together have a financial minimum need that is lower than twice the need of a person living alone.

It also cannot be established that the amount of €207 which uniformly applies to children before completing the age of 14 is evidently insufficient to secure a subsistence minimum that is in line with human dignity. In particular, it is not apparent that this amount is not sufficient to cover the physical subsistence minimum, especially the need for food, of children between 7 and 14 years of age.

3. The statistical model which applies to the assessment of the standard rates under social assistance law and which according to the will of the legislature is also the basis for the assessment of the standard benefit is a justifiable, and hence constitutionally permissible, method for realistically assessing the subsistence minimum for a single person. Moreover, it is based on suitable empirical data. The sample survey on income and expenditure reflects the expenditure behaviour of the population in a statistically reliable manner. The choice of the lowest 20 per cent of the single-person households stratified according to
their net income after leaving out the recipients of social assistance as the reference group for ascertaining the standard benefit for a single is constitutionally unobjectionable. The legislature could also justifiably assume that the reference group on which the evaluation of the 1998 sample survey on income and expenditure was based was situated above the social assistance threshold in a statistically reliable manner.

It is also constitutionally unobjectionable that the expenditure of the lowest quintile ascertained in the different divisions of the sample survey on income and expenditure is not fully considered but that only a certain percentage of it is considered, as expenditure that is relevant to the standard benefit, for assessing the standard benefit. The legislature, however, has to take the decision as to which expenditure is part of the subsistence minimum in an appropriate and justifiable manner. The reduction of expenditure items in the divisions of the sample survey on income and expenditure require an empirical basis for their justification. The legislature may only regard expenditure which the reference group incurs as not relevant if it is certain that it can be covered otherwise or if it is not necessary to secure the subsistence minimum. To ascertain the amount of the reductions, an estimate is not ruled out if it is performed on a sound empirical basis; estimates conducted “at random” are, however, not a realistic way of ascertaining the amount.

4. The standard benefit of €345 has not been ascertained in a constitutional manner because the structural principles of the statistical model have been abandoned without a factual justification.

a) The expenditure that fixed in § 2.2 of the Standard Rate Ordinance 2005, which is relevant to the standard rate and thus at the same time to the standard benefit, is not based on a viable evaluation of the sample survey on income and expenditure 1998. For with regard to some expenditure items, percentage reductions for goods and services which are not relevant to the standard benefit (e.g. furs, tailor-made clothes and gliders) were made without it being certain whether the reference group (lowest quintile) has incurred such expenditure at all. With regard to other expenditure items, reductions were made which are justifiable on the merits, but which were not empirically substantiated as regards their amount (e.g. a 15 per cent reduction for the item “Electricity”). Other expenditure items, e.g. division 10 (Education), were completely left out of account, without any reasoning for this being provided.

b) Apart from this, the projection of the amounts ascertained for 1998 to the year 2005 on the basis of the development of the current pension value constitutes an inappropriate change of standard. While the statistical method of ascertainment focuses on net income, consumer behaviour and cost of living, the projection according to the current pension value is based on the development of gross wages and salaries, on the contribution rate to the general pensions insurance and a demographic factor. These factors, however, show no relation to the subsistence minimum.

5. The ascertainment of the standard benefit to the amount of €311 for partners living together in a joint household does not meet the constitutional requirements because the shortcomings which have become apparent with regard to the ascertainment of the standard benefit for singles are continued for the standard benefit for partners was ascertained on the basis of the standard benefit or singles. However,
the assumption that an amount of 180 per cent of the corresponding need of a single is sufficient to secure the subsistence minimum of two partners has indeed a sufficient empirical basis.

6. The social allowance of €207 for children before completing the age of 14 does not meet the constitutional requirements because it is derived from the standard benefit to the amount of €345 which has already been objected to. Furthermore, its determination is not based on any justifiable method of determining the subsistence minimum of a child before completing the age of 14. The legislature has not ascertained the specific need of a child in any way, which, in contrast to that of an adult, has to take a child’s stages of development and a development of personality that is appropriate for children into account. Its reduction of 40 per cent from the standard benefit of a single is set freely without an empirical and methodical foundation. In particular, the necessary expenses for schoolbooks, exercise books, calculators etc., which are part of the existential need of a child, are left out of account. For without these costs being covered, children in need of assistance are under the threat of being excluded from chances in life. What is missing as well is a differentiated survey of the need of younger and older children.

7. These infringements of the constitution have neither been eliminated by the evaluation of the sample survey on income and expenditure 2003 and the new determination of the expenditure that is relevant to the standard rate as from 1 January 2007 nor by § 74 and § 24a SGB II, which came into force in the middle of 2009.

a) The amendment of the Standard Rate Ordinance, which has entered into force as from 1 January 2007, has not eliminated essential shortcomings such as for instance the fact that the expenditure recorded in division 10 (Education) was not taken into account, or the projection of the amounts ascertained for 2003 according to the development of the current pension value.

b) The social allowance paid to children from the beginning of their 7th year of age until they complete the age of 14 to the amount of 70 per cent of the standard benefit of a single, which was introduced by § 74 SGB II, does not comply the constitutional requirements already because it is derived from this standard benefit, which had been incorrectly ascertained. It is true that by introducing a third age group and by using the determination that is based on § 74 SGB II, the legislature will probably have come closer to realistically ascertaining the necessary benefits for school-age children. In spite of this, it has, however, not complied with the requirements placed on ascertaining the child-specific need because the statutory provision continues to be based on the expenditure of an adult single.

c) The provision of § 24a SGB II, which provides for a non-recurring payment of €100.00, does not fit into the need system of the SGB II from a methodological perspective. Furthermore, the legislature did not empirically ascertain the school-related need of a child when enacting § 24a SGB II. Obviously, the amount of €100 per school year was based on a free estimate.

8. Furthermore, it is incompatible with Article 1.1 GG in conjunction with Article 20.1 GG that the SGB II lacks a provision which provides for a claim to receive benefits for securing a current special need which is not non-recurring and which is irrefutably necessary to cover the subsistence minimum that is in line with human dignity. Such a claim
is necessary for the need which is not covered by §§ 20 et seq. SGB II for the sole reason that the sample survey on income and expenditure on which the standard benefit is based only reflects the average need in usual situations of need but not a special need arising due to atypical need situations that goes beyond it.

It is in principle permissible to grant a standard benefit as a fixed rate. If the statistical model is used in accordance with the constitutional requirements and if in particular the lump sum has been determined in such a way that it is possible to balance out the different need items, the person in need of assistance will, as a general rule, be able to organise his or her individual expenditure behaviour in such a way as to manage with the fixed rate; in case of special need, he or she will, above all, have to resort to the potential for saving up that is contained in the standard benefit.

As, due to its concept, a lump-sum standard benefit amount can only cover the average need, a need arising in special cases is not convincingly reflected by the statistics. Article 1.1 GG in conjunction with Article 20.1 GG requires, however, to cover also this irrefutable current special need which is not non-recurring if this is necessary in an individual case for a subsistence minimum that is in line with human dignity. This need has not as yet been covered without exception in the SGB II. Due to this gap in the coverage of the vital subsistence minimum, the legislature is to provide for a hardship arrangement in the shape of a claim to assistance benefits to cover this special need for those entitled to receive benefits pursuant to § 7 SGB II. However, this claim only arises if the need is so considerable that the total amount of the benefits granted to the person in need of assistance - including benefits paid by third parties and taking into account the possibilities of saving of the person in need of assistance - no longer ensures the subsistence minimum that is in line with human dignity. In view of the narrow and strict requirements placed on this constituent element, this claim will probably be considered only in rare cases.

9. The unconstitutional provisions remain applicable until the legislature enacts new provisions, which it is ordered to do until 31 December 2010. Due to the legislature’s scope for action, the Federal Constitutional Court is not competent to determine a certain amount of benefits on its own on the basis of its own assessments and evaluation. As it cannot be established that the standard benefit amounts which are fixed by statute are evidently insufficient, the legislature is not directly obliged under the constitution to fix higher benefits. Instead, it must, according to the instructions given, conduct a procedure to ascertain the benefits necessary for securing a subsistence minimum that is in line with human dignity which is realistic and takes account of the actual need, and it has to anchor the result of such procedure in the law as a claim to benefits.

Article 1.1 GG in conjunction with Article 20.1 GG does not oblige the legislature to retroactively fixing the benefits anew. Should the legislature, however, not have complied with its obligation to enact a new provision until 31 December 2010, a law enacted, contrary to this obligation, at a later date, would have to be declared applicable by 1 January 2011.

Apart from this, the legislature is obliged to create a provision in the SGB II until 31 December 2010 at the latest which ensures that an irrefutable current special need which is not non-recurring is covered. Those entitled to receive benefits according to § 7 SGB II which have
such a need must however receive the necessary benefits in kind and cash even before the new provision is enacted. To avoid the danger of a violation of Article 1.1 GG in conjunction with Article 20.1 GG in the transitional period until a corresponding hardship arrangement is introduced, the unconstitutional gap must be closed for the time from the pronouncement of the judgment onwards by an order of the Federal Constitutional Court to this effect.

This press release is also available in the original German version.

Zum ANFANG des Dokuments
D.1. TRANSSEXUALS

TRANSSEXUALS CASE I
Federal Constitutional Court (Germany)
49 BVerfGE 286 (1978)*

[The complainant had undergone surgery changing sex from male to female and so requested a change of birth certificate.]

B. 1. According to the medical opinion before the court, the complainant is psychologically a woman. ** 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. **

2. (a) [The Constitution] 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. [The Constitution also] guarantees the free development of a person’s abilities and strengths. Human dignity and the constitutional right to 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 genital 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 lower court decision, which denied the change of the birth certificate]. ** Various forms of biological intersexuality are known to modern medicine. **

(b) The right to 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. ** [Because medical opinion deemed it necessary,] the sexual change secured by the complainant cannot be considered immoral. **
Press releases

Federal Constitutional Court - Press office -

Press release no. 7/2011 of 28 January 2011

Order of 11 January 2011 - I BvR 3295/07 -

Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional

To enter into a marriage, the spouses must be of different genders, while according to § 1 of the Civil Partnerships Act (Lebenspartnerschaftsgesetz), it is only possible for persons of the same gender to enter into a civil partnership. What is decisive in both cases is the gender under the law on civil status, i.e. the gender registered in public records.

The Transsexuals Act (Transsexuellengesetz - TSG) provides two procedures intended to make it possible for transsexuals to live in their perceived gender. What is known as the “small solution” allows changing one’s first name without surgical gender reassignment operations having to take place before. For this, § 1.1 TSG essentially requires that the person, due to his or her transsexual orientation, feels that he or she belongs to the other gender, has been under the compulsion to live according to his or her perceptions for at least three years, and that it can be assumed with a high degree of probability that the person’s perceived affiliation to the other gender will not change again. Evidence that these prerequisites are met must be provided by two expert opinions delivered independently of each other.

However, only what is known as the “big solution” according to § 8 TSG results in the perceived gender being recognised under the law of civil status, with the consequence that the rights and obligations of the person concerned that depend on the person’s gender will fundamentally depend on the new gender. Apart from the requirements under § 1.1 TSG, the “big solution” additionally requires according to § 8.1 nos. 3 and 4 TSG that the person concerned is permanently infertile (no. 3) and has undergone surgery which has changed his or her external sexual characteristics and which has resulted in clearly approaching the person’s appearance to that of the other gender (no. 4). In the case of a male-to-female transsexual, this requires the amputation of the penis shaft and of the testicles and the surgical formation of external primary female genitals; in the case of a female-to-male transsexual, the surgical removal of the uterus, the ovaries and the oviducts and frequently breast reduction surgery are required.

The complainant, who is 62 years old now, was born with male external genitals. However, she perceives herself as belonging to the female gender. Her sexual orientation is that of a female homosexual, and she
is living in a partnership with a woman. In accordance with § 1 TSG, she has changed her male first name into a female one. No change of civil status (big solution) has taken place because the necessary surgery has not been performed. Together with her partner, she made an application for the registration of a civil partnership, which was refused by the registrar on the grounds that a civil partnership was exclusively reserved to two parties of the same gender. The Local Court (Amtsgericht) confirmed the decision arguing that the only possibility open to the parties concerned was that of entering into a marriage because the complainant's recognition as a woman under the law of civil status required gender reassignment surgery. Her complaint against this decision before the Regional Court (Landgericht) and her further complaint before the Higher Regional Court (Kammergericht) were unsuccessful.

By means of her constitutional complaint lodged in December 2007, the complainant essentially challenges a violation of her general right of personality in its manifestation as the right to sexual self-determination. The complainant argues that she wants to enter into a civil partnership as a perceived woman whose partner is a woman. She further argues that it is unreasonable to expect of her to enter into a marriage because as a consequence, she would legally be regarded as a man. Furthermore, her female first name would disclose that one of the two women in the partnership is transsexual, which would make it impossible to live an inconspicuous life free from discrimination in the new role. Due to her age, gender reassignment surgery would involve incalculable health risks.

The First Senate of the Federal Constitutional Court has decided that the prerequisites of the recognition of transsexuals under the law of civil status for entering into a civil partnership as set out under § 8.1 nos. 3 and 4 TSG are not compatible with the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG) and with the right to physical integrity under to Article 2.2 GG. The provisions are inapplicable until a new legislation has entered into force. As the decisions of the non-constitutional courts, which are indirectly based on § 8.1 nos. 3 and 4 TSG, violate the complainant's fundamental rights, the ruling of the Higher Regional Court has been reversed and referred back there for a new decision.

In essence, the decision is based on the following considerations:

1. The constitutional complaint is admissible. The fact that the complainant has entered into a marriage in the course of the constitutional complaint proceedings because in view of her age and of the length of the proceedings, she did not want to wait any longer to legally secure her partnership does not render her need for legal protection invalid. For it was unreasonable to expect of her and her partner to further disregard their need for mutual protection and support in this respect. Apart from this, even after having entered into a marriage, she continues to be affected with regard to her own perception of her identity as a woman; she is also confronted with the fact that due to the marital union with her partner, her transsexuality has become apparent.

2. It is a violation of the general right of personality in its manifestation as the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 GG that to legally secure their partnership, transsexuals with a homosexual orientation either have to enter into a marriage or undergo gender reassignment surgery that results in infertility for their perceived gender to be recognised.
and for themselves to be able to enter into a registered civil partnership that corresponds to their relationship, which they perceive as a homosexual one.

a) It is unreasonable to refer to a transsexual person with a homosexual orientation who merely complies with the requirements for a name change according to § 1 TSG to the possibility of entering into a marriage to secure a partnership. On the one hand, marriage as a union of partners of different genders assigns this person, from the legal perspective and externally visible, a gender role which contradicts the one perceived by him or herself. This infringes the constitutional precept of the recognition of the gender identity perceived by a person him or herself. On the other hand, entering into a marriage makes it apparent that the person him or herself or the partner he or she has married is transsexual because the person’s name change and his or her outer appearance, which has been approached to the perceived gender, reveals the homosexual nature of the relationship. This means that the protection of the person’s intimate sphere against unwanted disclosure, which is protected by constitutional law, is not ensured.

b) Furthermore, it is not compatible with the right to sexual self-determination and physical integrity that to secure a same-sex partnership, transsexuals can only enter into a registered civil partnership if they have been recognised under the law of civil status because they have undergone gender reassignment surgery and are permanently infertile.

It is constitutionally unobjectionable that the legislature deems the gender which has been recognised under the law of civil status the relevant criterion for the access to a registered partnership also in the case of transsexuals with a homosexual orientation, and that it makes the gender determination under the law of civil status contingent on objectifiable prerequisites in order to render the civil status permanent and unambiguous and to avoid a divergence of biological and legal gender affiliation. The legislature can therefore specify, even beyond the prerequisites set out in § 1.1 TSG, how evidence of the stability and irreversibility of transsexual persons’ perception and life in the other gender is to be provided. However, by unconditionally and without exception requiring them under § 8.1 nos. 3 and 4 TSG to undergo surgery that modifies their genitals and leads to infertility, the legislature places excessive demands on such evidence which are unreasonable to expect of the persons concerned.

Gender reassignment surgery constitutes a massive impairment of physical integrity, which is protected by Article 2.2 GG, and it involves considerable health risks and side effects for the person concerned. However, according to the current state of scientific knowledge, it is not always indicated even in the case of a diagnosis of transsexuality that is certain to a large extent. The permanent nature and irreversibility of transsexual persons’ perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8.1 no. 4 TSG constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.

The same applies with regard to the permanent infertility which is required under § 8.1 no. 3 TSG for the recognition under the law of civil status to the extent that its permanent nature is made contingent.
on surgery. By this prerequisite, the legislature admittedly pursues the legitimate objective to preclude that persons who legally belong to the male sex give birth to children or that persons who legally belong to the female sex procreate children because this would contradict the concept of the sexes and would have far-reaching consequences for the legal order. Within the context of the required weighing, however, these reasons cannot justify the considerable impairment of the fundamental rights of the persons concerned because the transsexual persons’ right to sexual self-determination safeguarding their physical integrity is to be accorded greater weight. Here, it has to be taken into account that in view of the fact that the group of transsexual persons is small, cases in which the legal gender assignment and the role of procreators, or person bearing a child, diverge will only rarely occur. Furthermore, this predominantly affects the existing children’s assignment to their father and mother. In this context, however, it can be ensured by the law that the children concerned will, in spite of a parent’s legal gender reassignment, always be legally assigned a father and a mother. § 11 TSG provides that the relationship of legally recognised transsexuals to their descendants shall remain unaffected; this provision can be interpreted in such a way that it also applies to those children who are born only after the gender reassignment of a parent under the law of civil status has taken place.

This press release is also available in the original German version.

Zum ANFANG des Dokuments
Press releases

Federal Constitutional Court - Press office -

Press release no. 121/2009 of 22 October 2009

Order of 7 July 2009 - -

Unequal treatment of marriages and registered civil partnerships concerning survivor’s pensions under an occupational pension scheme (VBL) unconstitutional

The constitutional complaint relates to the unequal treatment of marriages and registered civil partnerships concerning survivor’s pensions under an occupational pension scheme for employees in the civil service according to the rules of the Supplementary Pensions Agency for Federal and Länder Employees (Vorsorgungsanstalt des Bundes und der Länder - VBL). Unlike the statutory pension scheme, the VBL’s supplementary pension scheme does not pay a survivor’s pension for registered civil partners. The complainant, who lives in a registered civil partnership, unsuccessfully challenged this before the civil courts.

The First Senate of the Federal Constitutional Court decided that the challenged court rulings violate the complainant’s fundamental right to equal treatment under Article 3.1 of the Basic Law (Grundgesetz - GG). The last-instance ruling of the Federal Court of Justice (Bundesgerichtshof) was overturned in this respect, and the matter was referred back to the Federal Court of Justice.

In essence, the decision is based on the following considerations:

1. The general principle of equality (Article 3.1 GG) demands that all people be treated equally before the law. It also prohibits the exclusion of a favourable treatment that is contrary to equality in which a favourable treatment is granted to a group of persons while it is denied to another group of persons. Irrespective of its private-law nature, the VBL’s rules are to be measured directly against the precept of equality of Article 3.1 GG because as a corporate body under public law, the VBL performs a public function.

2. The provisions on survivor’s pensions in the VBL’s rules (§ 38 VBLS) result in an unequal treatment between insured persons who are married and those who live in a registered civil partnership. A married insured has, as part of his or her own position under supplementary pensions law, a claim on his or her spouse receiving a survivor’s pension in the case of the insured person’s death. An insured person who has established a registered civil partnership does not acquire such a claim
for his or her civil partner.

3. This unequal treatment of marriages and registered civil partnerships is not constitutionally justified.

a) The unequal treatment of married persons and registered civil partners under § 38 VBLs requires a strict standard for reviewing whether a sufficiently weighty reason of differentiation exists. A special need for justification follows from the facts that the unequal treatment of spouses and registered civil partners concerns the personal characteristic of sexual orientation and that the provision concerning survivor’s pensions in the VBL’s rules largely follows the provision of the Sixth Book of the Code of Social Law (Sozialgesetzbuch VI – SGB VI) concerning widow’s and widower’s pensions but abandons this link to the detriment of the registered civil partnership.

b) Making reference to marriage and its protection under the constitution (Art. 6.1 GG) is not sufficient here for justifying the unequal treatment. Viable factual reasons for an unequal treatment in the area of survivor’s pensions in company pension schemes do not exist and in particular do not result from an inequality of the life situation of married couples and civil partners.

According to Article 6.1 GG, marriage and the family enjoy the special protection of the state. It is in particular the duty of the state to refrain from everything that damages or otherwise adversely affects marriage, and to promote marriage by suitable measures. In principle, the legislature is not barred from treating marriage more favourably than other ways of life. The provisions that treat marriage more favourably with regard to maintenance and pensions as well as under tax law can find their justification in the spouses’ jointly shaping their path through life and in the responsibility for the partner which they have assumed in a permanent and legally binding manner.

Where giving marriage favourable treatment goes along with disadvantaging other ways of life even though they are comparable to marriage as regards the life situation that is regulated and the objectives pursued by the regulation, the mere reference to the requirement of protecting marriage does not justify such a differentiation. For the authority of giving favourable treatment to marriage does not give rise to a requirement contained in Article 6.1 GG to disadvantage other ways of life in comparison to marriage. It cannot be justified constitutionally to derive from the special protection of marriage a rule that such partnerships are to be structured in a way distant from marriage and to be given lesser rights. Beyond the mere reference to Article 6.1 GG, a sufficiently weighty factual reason is required here which, measured against the respective object and objective of regulation, justifies the unfavourable treatment of other ways of life.

c) No differences can be identified under non-constitutional law or factually which justify treating registered civil partners less favourably than spouses with regard to the VBL’s survivor’s pension.

The VBL’s survivor’s pension is a benefit from an occupational pension scheme and as such forms part of the remuneration. As regards the objective of granting remuneration, no differences can be identified between married employees and employees who live in a civil partnership. The same applies with regard to the pension character of the benefits from occupational pension schemes. The legislation concerning the
obligations to provide maintenance within marriages and registered civil partnerships is almost identical, so that the same standards apply for measuring the maintenance requirement of a person entitled to maintenance and the maintenance gap arising upon the death of a person liable for maintenance.

A reason for differentiating between marriage and registered civil partnership can also not be found in the fact that married couples typically have a different pension requirement than civil partners because of gaps in their employment biography due to their bringing up of children. Not every marriage has children. Not every marriage is oriented towards having children. It cannot be assumed either that the role allocation in marriages is such that one of the spouses is considerably less occupation-oriented. Consequently, the image of the "breadwinner marriage", in which one of the spouses maintains the other, which no longer determines typical reality in society, cannot be regarded any longer as the yardstick for assigning survivor’s benefits.

On the other hand, it also cannot be excluded that in registered civil partnerships the roles are allocated in such a way that one partner is more strongly oriented towards his or her occupation and the other partner more strongly towards the domestic sphere, including childcare. Children live in a large number of registered civil partnerships, especially in those of women. It is true that the proportion of registered civil partnerships with children is far lower than that of married couples; it is, however, by no means negligible.

In addition, possible child-raising periods or another individual pension requirement can be taken into account in a more specific manner irrespective of marital status, as is done in the law of the statutory pension system as well as in the VBL’s rules.

4. Where general conditions of insurance, as in this case the VBL’s rules, infringe Article 3.1 GG, this results, according to the civil courts’ case-law, which is constitutionally unobjectionable, in the ineffectiveness of the terms concerned. Gaps in the regulation which arise thereby can be filled by way of a supplementary interpretation. The infringement of the principle of equality cannot be eliminated by the merely not applying § 38 VBLS because this would exclude survivor’s pensions also for spouses. The regulation plan pursued with the survivor’s pension scheme pursuant to § 38 VBLS can only be completed in such a way that the provision for spouses will, with effect from 1 January 2005, also be applied to registered civil partners.

This press release is also available in the original German version.

Zum ANFANG des Dokuments
Federal Constitutional Court - Press office -

Press release no. 63/2010 of 17 August 2010

Order of 21 July 2010 - 1 BvR 611/07, 1 BvR 2464/07 -

Unequal Treatment of Marriage and Registered Civil Partnerships in Gift and Inheritance Tax Act Unconstitutional

Pursuant to the provisions in §§ 15, 16, 17, and 19 of the Gift and Inheritance Tax Act in the version dated 20 December 1996 from the 1997 Annual Tax Reform Act (Erbchaftsteu- und Schenkungsteuergesetz a.F. (a.F. - alte Fassung - former version) - ErbStG a.F.) registered civil partners after creation of the legal institution of civil partnerships in 2001, were significantly more burdened than spouses under inheritance tax law.

While pursuant to §§ 15.1 and 19.1 ErbStG a.F. spouses were subject to the most beneficial Tax Class 1 and, depending upon the amount of the inheritance, were subject to a tax rate between 7 and 30 %, civil partners were classified as "other recipients" and placed in Tax Class III, which provides for tax rates of between 17 and 50 %. Moreover, § 16.1 no. 1 ErbStG a.F. granted spouses a personal exemption in the amount of DM 600,000/€ 307,000 and § 17.1 ErbStG a.F. granted a special exemption for retirement benefits in the amount of DM 500,000/€ 256,000. On the other hand, registered civil partners, because of their placement in Tax Class III, were only entitled to an exemption in the amount of DM 10,000/€ 5,200 (§ 16.1 no. 5, § 15.1 ErbStG a.F.). They were completely excluded from the benefit of the tax exemption for retirement benefits.

In the Inheritance Tax Reform Act (Erbshaftsteuerreformgesetz) of 24 December 2008, the provisions described above in the Gift and Inheritance Tax Act were amended to the benefit of registered civil partners to the extent that the personal exemption and the exemption for retirement benefits are determined in the same way for both inheriting civil partners and spouses. Nevertheless, registered civil partners continue to be treated like distant relatives and unrelated persons and taxed at the highest tax rates. Pursuant to the Federal Government’s draft legislation for the 2010 Annual Tax Reform Act of 22 June 2010, complete equality for civil partners and spouses in the gift and Inheritance tax law - also in regard to tax rates - is intended.

Complainant no. 1 is the sole heir of his male civil partner who passed away in August 2001; complainant no. 2 is the heir of her female civil partner who passed away in February 2002. In both cases the tax office set the inheritance tax in accordance with a tax rate from Tax Class III and granted the minimum exemption pursuant to § 16.1 no. 5 ErbStG a.F.. The lawsuits filed by the complainants against these decisions were
unsuccessful in the finance courts.

As to their constitutional complaints, the First Senate of the Federal Constitutional Court decided that the inheritance tax law discrimination against registered civil partners in comparison to spouses regarding the personal exemption and the tax rate, as well as their exclusion from the exemption for retirement benefits, is incompatible with the general principle of equality (Article 3.1 of the Basic Law (Grundgesetz - GG)). The orders by the Federal Finance Court (Bundesfinanzhof) have been reversed and the matters have been referred back to it for new decisions. The legislature has until 31 December 2010 to enact a new rule for those old cases affected by the Gift and Inheritance Tax Act, former version, that removes the infringement on equality from the time period between the effective date of the Act on the Termination of the Discrimination of Same-Sex Couples (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften) of 16 February 2001 until the effective date of the Inheritance Tax Reform Act of 24 December 2008.

In essence, the decision is based on the following considerations:

As to discriminating against registered civil partners in comparison to spouses there is no difference that is of such weight that it could justify the disadvantage to civil partners in the Gift and Inheritance Tax Act in the version pursuant to the 1997 Annual Tax Reform Act. This applies to the personal exemption pursuant to § 16 ErbStG a.F., to the exemption for retirement benefits pursuant to § 17 ErbStG a.F., and to the tax rate pursuant to § 19 ErbStG a.F.

Granting a privilege to spouses and not to civil partners under the law regarding the personal exemption cannot be justified solely by reference to the state’s special protection of marriage and the family (Article 6.1 GG). If the promotion of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage under Article 6.1 of the Basic Law does not justify such a differentiation. The authority of the state to become active for marriage and the family in fulfilment of its duty of protection as set forth in Article 6.1 GG remains completely unaffected by the question of the extent to which others can assert claims for equal treatment. Only the principle of equality (Article 3.1 GG), in accordance with the principles of application developed by the Federal Constitutional Court on this, determines whether and to what extent others, in this case registered civil partners, have a claim for treatment equal to the statutory or actual promotion of married spouses and family members.

This press release is also available in the original german version.
Bundesverfassungsgericht - Pressestelle -


Zum Judgment of 15. February 2006 - 1 BvR 357/05 -

Authorisation to shoot down aircraft in the Aviation Security Act void

§ 14.3 of the Aviation Security Act (Luftsicherheitsgesetz - LuftSiG), which authorises the armed forces to shoot down aircraft that are intended to be used as weapons in crimes against human lives, is incompatible with the Basic Law and hence void. This was decided by the First Senate of the Federal Constitutional Court in its judgment of 15 February 2006. The Federal Constitutional Court held that the Federation lacks legislative competence to issue such regulation in the first place. According to the Court, Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law (Grundgesetz - GG), which regulates the employment of the armed forces for the control of natural disasters or in the case of especially grave accidents, does not permit the Federation to order missions of the armed forces with specifically military weapons. Moreover, § 14.3 of the Aviation Security Act is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime. By the state’s using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake.

Thus, the constitutional complaint lodged by four lawyers, a patent attorney and a flight captain, who had directly challenged § 14.3 of the Aviation Security Act, was successful.

The decision is essentially based on the following considerations:

1. The Federation lacks the legislative competence to issue the regulation laid down in § 14.3 of the Aviation Security Act. It is true that Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law directly provides the Federation with the right to issue regulations that provide the details concerning the use of the armed forces for the control of natural disasters and in the case of especially grave accidents in accordance with these provisions and concerning the cooperation with the Länder (states) affected. The armed forces’ authorisation to use direct armed force against an aircraft which is contained in § 14.3 of the Aviation Security Act is, however, not in harmony with Article 35.2 sentence 2 and 35.3 of the Basic Law.

a) The incompatibility of § 14.3 of the Aviation Security Act with
Article 35.2 sentence 2 of the Basic Law (regional emergency situation) does, however, not result from the mere fact that the operation is intended to be ordered and carried out at a point in time in which a major aerial incident (hijacking of an aircraft) has already happened but in which the especially grave accident (intended air crash) itself has not yet occurred. For the concept of an "especially grave accident" within the meaning of Article 35.2 sentence 2 of the Basic Law also comprises events in which a disaster can be expected to happen with near certainty. The reason why an operation involving the direct use of armed force against an aircraft does not respect the boundaries of Article 35.2 sentence 2 of the Basic Law is, however, that this provision does not permit an operational mission of the armed forces with specifically military weapons for the control of natural disasters or in the case of especially grave accidents. The "assistance" referred to in Article 35.2 sentence 2 of the Basic Law is rendered to the Länder to enable them to effectively fulfil the task, which is incumbent on them in the context of their police power, to deal with natural disasters or especially grave accidents. Because the assistance is oriented towards this task which falls under the police power of the Länder this also necessarily determines the kind of resources that can be used where the armed forces are employed for rendering assistance. They cannot be of a kind which is, with regard to their quality, completely different from those which are originally at the disposal of the Länder police forces for performing their duties.

b) § 14.3 of the Aviation Security Act is also not compatible with Article 35.3 sentence 1 of the Basic Law. This provision explicitly authorises only the Federal Government to order the employment of the armed forces in the case of an interregional emergency situation. The regulations in the Aviation Security Act do not take sufficient account of this. They provide that the Minister of Defence, in agreement with the Federal Minister of the Interior, shall decide in cases in which a decision of the Federal Government is not possible in time. In view of the fact that generally, the time available in such a context will only be very short, the Federal Government will, pursuant to this provision, be substituted not only in exceptional cases but regularly by individual government ministers when it comes to deciding on the employment of the armed forces in interregional emergency situations. This clearly shows that as a general rule, it will not be possible to deal with measures of the kind regulated in § 14.3 of the Aviation Security Act in the manner that is provided under Article 35.3 sentence 1 of the Basic Law. Moreover, the boundaries of constitutional law relating to the armed forces under Article 35.3 sentence 1 of the Basic Law have been overstepped above all because also in the case of an interregional emergency situation, a mission of the armed forces with typically military weapons is constitutionally impermissible.

2. § 14.3 of the Aviation Security Act is also not compatible with the right to life (Article 2.2 sentence 1 of the Basic Law) in conjunction with the guarantee of human dignity (Article 1.1 of the Basic Law) to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime.

The passengers and crew members who are exposed to such a mission are in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. Such a treatment ignores
the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake. In addition, this happens under circumstances in which it cannot be expected that at the moment in which a decision concerning an operation pursuant to § 14.3 of the Aviation Security Act is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly then.

Under the applicability of Article 1.1 of the Basic Law (guarantee of human dignity) it is absolutely inconceivable to intentionally kill persons who are in such a helpless situation on the basis of a statutory authorisation. The assumption that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus in his or her own killing, in the case of the aircraft becoming involved in an aerial incident is an unrealistic fiction. Also the assessment that the persons affected are doomed anyway cannot remove from the killing of innocent people in the situation described its nature of an infringement of these people’s right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being. The opinion, which has been advanced on some occasions, that the persons who are held on board have become part of a weapon and must bear being treated as such, expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings. The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction also does not lead to a different result. For in the area of application of § 14.3 of the Aviation Security Act the issue is not the defence against attacks aimed at abolishing the body politic and at eliminating the state’s legal and constitutional system. Finally, § 14.3 of the Aviation Security Act also cannot be justified by invoking the state’s duty to protect those against whose lives the aircraft that is abused as a weapon for a crime is intended to be used. Only such means may be used to comply with the state’s obligations to protect as are in harmony with the constitution. This is not the case in the case at hand.

3. § 14.3 of the Aviation Security Act is, however, compatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground. It corresponds to the attacker’s position as a subject if the consequences of his or her self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started. The principle of proportionality is also complied with. The objective to save human lives which is pursued by § 14.3 of the Aviation Security Act is of such weight that it can justify the grave encroachment on the perpetrators’ fundamental right to life. Moreover, the gravity of the encroachment upon their fundamental rights is reduced by the fact that the perpetrators themselves brought about the necessity of state intervention and that they can avert such intervention at any time by refraining from realising their criminal plan.
All the same, the regulation is void also in this respect because the Federation lacks legislative competence in the first place.

This press release is also available in the original German version.

Zum ANFANG des Dokuments
Federal Constitutional Court - Press office -

Press release no. 11/2010 of 2 March 2010

Judgment of 2 March 2010
- BVR 256/08, BVR 263/08, BVR 586/08 -

Data retention unconstitutional in its present form

The constitutional complaints challenge §§ 113a, 113b of the Telecommunications Act (Telekommunikationsgesetz - TKG) and § 100g of the Code of Criminal Procedure (Strafprozessordnung - StPO) to the extent that the latter permits the collection of data stored pursuant to § 113a TKG. The provisions were introduced by the Act for the Amendment of Telecommunications Surveillance (Gesetz zur Neuregelung der Telekommunikationsüberwachung) of 21 December 2007.

§ 113a TKG provides that the providers of publicly accessible telecommunications services have a duty to store virtually all traffic data of telephone services (fixed network, mobile communications, fax, SMS, MMS), email services and internet services without occasion, by way of precaution. The duty of storage essentially extends to all information that is necessary in order to reconstruct who communicated or attempted to communicate when, how long, to whom, and from where. In contrast, the contents of the communication, and consequently the details of what Internet pages are visited by users, are not to be stored. At the end of the six months in which the duty of storage exists, the data are to be deleted within one month.

§ 113b TKG governs the possible purposes for which these data may be used. This provision is a linking provision: it does not itself contain an authorisation of data retrieval, but merely broadly designates intended uses that are possible in general; these are to be put in concrete terms by provisions of specific branches of law passed by the Federal Government and the Länder (states). In sentence 1, half-sentence 1, the possible purposes of the direct use of the data are listed: the prosecution of criminal offences, the warding off of substantial dangers to public security and the performance of intelligence tasks. Half-sentence 2 permits in addition the indirect use of the data for information under § 113.1 TKG in the form of a claim to information from the service providers in order to identify IP addresses. This provides that if authorities already know an IP address - for example from a criminal complaint or from their own investigations - they may demand information as to the user to whom this address was allocated. The legislature permits this for the purposes of the prosecution of criminal offences and regulatory offences and the warding off of danger.
independently of more specific definitions; in this connection, there is neither a requirement of judicial authority nor a duty of notification.

§ 100g StPO putting § 113b sentence 1 half-sentence 1 no. 1 TKG into specific terms governs the direct use for criminal prosecution of the data stored by way of precaution. But taken as a whole, the provision is broader and governs all access to telecommunication traffic data whatsoever. It therefore permits – and originally only permitted – access to connection data that are stored by the service providers for other reasons (for example in order to carry out business transactions). The legislature has decided not to differentiate in this respect between the use of the data stored by way of precaution under § 113a TKG and other traffic data. It permits even the retained data to be used independently of an exhaustive list of criminal offences of substantial weight, and in addition to this – pursuant to an examination of proportionality based on the individual case – also to be used generally to prosecute criminal offences that are committed by the means of telecommunications. There must be a prior judge’s decision, and the Code of Criminal Procedure also provides for duties of notification and subsequent judicial relief in this connection.

The challenged provisions implement Directive 2006/24/EC of the European Parliament and the Council on the retention of data of the year 2006. This Directive provides that the providers of telecommunications services must be put under an obligation to store the data described in § 113a of the Telecommunications Act for a minimum of six months and a maximum of two years and to keep them available for the prosecution of serious criminal offences. The Directive contains no more detailed provision on the use of the data; the data protection measures are also largely left to the Member States.

Under the temporary injunctions of the First Senate of the Federal Constitutional Court (Press Releases nos. 37/2008 of 19 March 2008 and 92/2008 of 6 November 2008), the data stored under § 113a TKG were initially permitted to be communicated by the telecommunications service providers to the requesting authority, for the purpose of criminal prosecution under § 113b sentence 1 no. 1 TKG, only subject to the provisos contained in the temporary injunction; to ward off danger ($ 113b sentence 1 no. 2 TKG), the data stored under § 113a TKG were permitted to be communicated to the requesting authority only subject to restrictive conditions.

The complainants are of the opinion that data retention above all infringes the secrecy of telecommunications and the right to informational self-determination. They regard the storage of all telecommunications connections without occasion as disproportionate. They assert in particular that the stored data could be used to create personality profiles and track people’s movements. One complainant, who offers an Internet anonymisation service, submits that the costs of the data storage disproportionately disadvantage the freedom of occupation of telecommunications service providers.

The First Senate of the Federal Constitutional Court held that the provisions of the TKG and of the StPO on data retention are not compatible with Article 10.1 of the Basic Law (Grundgesetz – GG). Admittedly, a duty of storage to the extent provided is not automatically unconstitutional at the outset. However, it is not structured in a manner adapted to the principle of proportionality. The challenged provisions guarantee neither adequate data security nor an adequate restriction of the purposes of use of the data. Nor do they in
every respect satisfy the constitutional requirements of transparency and legal protection. The provision is therefore as a whole unconstitutional and void.

The decision is essentially based on the following considerations:

Admissibility:

The constitutional complaints are not inadmissible where the challenged provisions were promulgated in implementation of Directive 2006/24/EC. The complainants seek a referral by the Federal Constitutional Court to the European Court of Justice, in order that the latter may make a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (formerly Article 234 of the Treaty Establishing the European Economic Community) declaring the Directive void and thus opening the way for a review of the challenged provisions by the standard of German fundamental rights, the complainants having been unable to assert this before the non-constitutional courts because their constitutional complaints directly challenged the implementing Act. In this way, at all events, a review of the challenged provisions by the standard of the fundamental rights of the Basic Law as sought by the complainants is not excluded at the outset.

Whether the complaint is well-founded:

1. No proceedings for a preliminary ruling before the European Court of Justice

A referral to the European Court of Justice is out of the question, since a potential priority of Community law is not relevant. The validity of Directive 2006/24/EC and a priority of Community law over German fundamental rights which might possibly result from this are not relevant to the decision. The contents of the Directive give the Federal Republic of Germany a broad discretion. Its provisions are essentially limited to the duty of storage and its extent, and do not govern access to the data or the use of the data by the Member States’ authorities. With these contents, the Directive can be implemented in German law without violating the fundamental rights of the Basic Law. The Basic Law does not prohibit such storage in all circumstances.

2. Area of protection of Article 10.1 GG

The challenged provisions even with respect to the storage of Internet access data and the authorisation to give information under § 113b sentence 1 half-sentence 2 TKG - encroach on the area of protection of Article 10.1 GG (secrecy of telecommunications). The fact that the storage is effected by private service providers does not prevent this, since the service providers are merely used by the state authorities as helpers to carry out their duties.

3. Possibility of storage of telecommunications traffic data without occasion

Storage of telecommunications traffic data without occasion for six months for strictly limited uses in the course of prosecution, the warding off of danger and intelligence service duties, as is provided by §§ 113a, 113b TKG, is not in itself incompatible with Article 10 of the Basic Law. If legislation is drafted in a way that takes sufficient account of the encroachment contained in this, storage of telecommunications traffic data without occasion is not as such
automatically subject to the strict prohibition of data retention within the meaning of the case-law of the Federal Constitutional Court. If storage is integrated into a legislative structure which is appropriate to the encroachment, it is capable of satisfying the proportionality requirements.

Admittedly, such storage constitutes a particularly serious encroachment with an effect broader that anything in the legal system to date. Even though the storage does not extend to the contents of the communications, these data may be used to draw content-related conclusions that extend into the users’ private sphere. In combination, the recipients, dates, time and place of telephone conversations, if they are observed over a long period of time, permit detailed information to be obtained on social or political affiliations and on personal preferences, inclinations and weaknesses. Depending on the use of the telecommunication, such storage can make it possible to create meaningful personality profiles of virtually all citizens and track their movements. It also increases the risk of citizens to be exposed to further investigations without themselves having given occasion for this. In addition, the possibilities of abuse that are associated with such a collection of data aggravate its burdensome effect. In particular since the storage and use of data are not noticed, the storage of telecommunications traffic data without occasion is capable of creating a diffusely threatening feeling of being watched which can impair a free exercise of fundamental rights in many areas.

Nevertheless, such storage can under specific conditions be compatible with Article 10.1 GG. The first relevant factor is that the intended storage of the telecommunications traffic data is realised not directly by the state, but by imposing a duty on the private service providers. In this way, the data are not yet combined at the point of storage itself, but remain distributed over many individual enterprises and are not directly available to the state as a conglomerate. Nor does storage of the telecommunications traffic data for six months appear to be a measure directed towards total recording of the citizens’ communications or activities as a whole. Instead, it takes up, in a limited manner, the special signification of telecommunication in the modern world and reacts to the specific potential danger associated with this. For effective criminal prosecution and warding off of danger, therefore, a reconstruction of telecommunications connections is of particular importance.

For storage of telecommunications traffic data without occasion by way of precaution to be constitutionally unobjectionable, this procedure must remain an exception to the rule. It is part of the constitutional identity of the Federal Republic of Germany that the citizens’ enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections. Precautionary storage of telecommunications traffic data also considerably reduces the latitude for further data collections without occasion, including collections by way of European Union law.

4. Proportionality of the legislative formulation of the provision (standards)

In view of the particular weight of precautionary storage of telecommunications traffic data, such storage is compatible with Article 10.1 GG only if its formulation satisfies particular constitutional requirements. In this respect, there must be sufficiently sophisticated legislation with well-defined provisions on data security, in order to
restrict the use of data, and for transparency and legal protection.

**Demands of data security:**

In view of the scope and the potential probative strength of the retained data gathered by such storage, data security is of great importance for the proportionality of the challenged provisions. There is a need for legislation which provides for a particularly high degree of security, whose essential provisions are at all events well-defined and legally binding. In this connection the legislature is free to entrust a regulatory agency with the technicalities of putting the prescribed standard into concrete terms. In this process, however, the legislature must ensure that the decision as to the nature and degree of the protective precautions to be taken does not ultimately lie without supervision in the hands of the respective telecommunications providers.

**Requirements of the direct use of data:**

In view of the importance of data storage, a use of the data comes into consideration only for paramount tasks of the protection of legal interests.

From this it follows for the prosecution of crimes that if the data are to be retrieved, there must at least be the suspicion of a criminal offence, based on specific facts, that is serious even in an individual case. Together with the obligation to store data, the legislature must provide an exhaustive list of the criminal offences that are to apply here.

For warding off danger, it follows from the principle of proportionality that a retrieval of the telecommunications traffic data stored by way of precaution may only be permitted if there is a sufficiently evidenced concrete danger to the life, limb or freedom of a person, to the existence or the security of the Federal Government or of a Land (state) or to ward off a common danger. These requirements apply in the same way to the use of the data by the intelligence services, since this is also a form of prevention of danger. This means, admittedly, that in many cases the intelligence services will probably not be able to use the data. However, this results from the nature of their tasks in advance intelligence and does not create a constitutionally acceptable occasion to relax the requirements for an encroachment of this kind that arises from the principle of proportionality.

As a product of the principle of proportionality, it is also constitutionally required that there should be a fundamental prohibition of transmission of data, at least for a narrowly defined group of telecommunications connections which rely on particular confidentiality. These might include, for example, connections to persons, authorities and organisations in the social or ecclesiastical fields which offer advice in situations of emotional or social need, completely or predominantly by telephone, to callers who normally remain anonymous, where these organisations themselves or their staff are subject to other obligations of confidentiality in this respect.

**Requirements of the transparency of data transmission:**

The legislature must pass effective transparency provisions in order to counteract the diffuse sense of threat which may be conveyed to citizens by the storage and use of data which in itself is not perceptible. These include the principle that the collection and use of personal data
should be open. The data may be constitutionally used without the knowledge of the person affected only if otherwise the purpose of the investigation served by the retrieval of data would be frustrated. The legislature may in principle assume that this is the case for warring off danger and carrying out the duties of the intelligence services. In contrast, in criminal prosecution there is also the possibility that data may be collected and used openly. There may only be a provision for secret use of the data here if such use is necessary and is ordered by a judge in the individual case. Insofar as the use of the data is secret, the legislature must provide for a duty of information, at least subsequently. This must guarantee that the persons to whom a request for data retrieval directly applied are in principle informed, at least subsequently. Exceptions to this require judicial supervision.

Requirements of legal protection and on sanctions:

Transmission and use of the stored data must in principle be subjected to judicial authority. Where persons affected had no opportunity before the measure was carried out to defend themselves against the use of their telecommunications traffic data, they must be given the possibility of subsequent judicial control.

A legislative formulation that is not disproportionate also requires effective sanctions for violations of rights. If even serious breaches of the secrecy of telecommunications were ultimately to remain without sanction, with the result that the protection of the right of personality atrophied in view of the immaterial nature of this right, this would contradict the duty of the state to enable individuals to develop their personality and to protect them against third-party threats to the right of personality. However, in this connection the legislature has a wide legislative discretion. In this respect it may also take account of the fact that in the case of serious violations of the right of personality, the current law may already provide for prohibitions of use on the basis of a weighing of interests, and for liability for intangible damage, and it may therefore initially consider whether applicable law possibly takes sufficient account of the particular severity of the violation of personality which the unjustified acquisition or use of the data in question here usually constitutes.

Requirements of the indirect use of the data to identify IP addresses:

Less stringent constitutional standards apply to a use of the data stored by way of precaution which is only indirect, in the form of official rights to information from the service providers with regard to the owners of particular IP addresses which are already known. In this process, it is important on the one hand that the authorities do not themselves acquire any knowledge of the data to be stored by way of precaution. In connection with such rights of information, the authorities do not themselves retrieve the data that have been stored by way of precaution without occasion, but are merely given personal information on the owner of a particular connection, who is determined by the service providers by recourse to these data. It is not possible to carry out systematic investigation over a long period of time or to prepare personality profiles and track people's movements on the basis of such information alone. It is also crucial that for such information only a small section of the data, which is determined in advance, is used; the storage of these particular data is not a serious encroachment in itself and it could therefore be ordered subject to far less strict requirements.
However, creating official rights to information in order to identify IP addresses is also of substantial importance. In doing this, the legislature influences the conditions of communication in the Internet and limits its anonymity. On this basis, in conjunction with the systematic storage of Internet access data for previously established IP addresses, it is possible to a great extent to establish the identity of Internet users.

Within the legislative discretion it has in this connection, the legislature may also allow such information to be given, even independently of the limits imposed by specific offences or by lists of legal interests, for the prosecution of criminal offences, for the warding off of danger and for the performance of duties of the intelligence services on the basis of general authorisations to encroach provided by specific branches of law. Admittedly, with regard to the threshold of interference, it must be ensured that information is not obtained at random, but only on the basis of a sufficient initial suspicion or of a concrete danger on the basis of facts relating to the individual case. For information of this kind, it is not necessary to provide for a requirement of judicial authority; however, the persons affected must be informed when such information is obtained. Such information may also not be admitted in general and without restriction in order to prosecute or prevent any regulatory offence whatsoever. For anonymity in the Internet to be lifted, there must at least be an adverse effect on a legal interest, and the legal system must accord particular significance to this adverse effect in other contexts too. This does not completely exclude such information to be given to prosecute or prevent regulatory offences. But they must be regulatory offences that are particularly serious - even in an individual case - and they must be expressly named by the legislature.

Responsibility for drafting the provisions:

The constitutionally required guarantee of data security and of a limitation of the use of the data in well-defined provisions that satisfy the requirements of proportionality is an inseparable element of an order imposing a duty of storage and is therefore the duty of the Federal legislature, under Article 73.1 no. 7 GG. These include not only the provisions on the security of the stored data but also the provisions on the security of the transmission of the data, and the guarantee that confidential relations are protected when this is done. In addition, the Federal legislature must also ensure that there is a sufficiently precise limitation of the purposes of data use served by the storage which satisfies constitutional requirements. In contrast, the responsibility for creating the retrieval provisions themselves and for drafting the provisions on transparency and legal protection is governed by the fields of expertise of those involved. In the area of warding off danger and of the duties of the intelligence services, the responsibility is thus largely with the Länder.

5. The individual provisions (application of the standards)

The challenged provisions do not satisfy these requirements. § 113a TKG is not unconstitutional simply because the scope of the duty of storage might be disproportionate from the outset. But the provisions on data security, on the purposes and the transparency of the use of data and on legal protection do not satisfy the constitutional requirements. in consequence, the whole legislation lacks a structure complying with the principle of proportionality. §§ 113a, 113b TKG and § 100g StPO, insofar
as the latter permits the retrieval of the data to be stored under § 113a TKG, are therefore incompatible with Article 10.1 GG.

**Data security:**

Even the necessary guarantee of a particularly high standard of data security is missing. The Act essentially refers only to the care generally needed in the field of telecommunications (§ 113a.10 TKG) and in doing so qualifies the security requirements in a way that remains undefined by introducing general considerations of economic adequacy in the individual case (§ 109. 2 sentence 4 TKG). Here, putting the measures in more specific terms is left to the individual telecommunications service providers, which in turn have to offer the services subject to the conditions of competition and cost pressure. In this respect, the persons with a duty of storage are neither required in a manner that can be enforced to use the instruments suggested by the experts in the present proceedings to guarantee data security (separate storage, asymmetric encryption, the four-eyes principle in conjunction with advanced authentication procedures for access to the keys, audit-proof recording of access and deletion), nor is a comparable level of security otherwise guaranteed. Nor is there a balanced system of sanctions that attributes no less weight to violations of data security than to violations of the duties of storage themselves.

**Direct use of the data for criminal prosecution:**

The provisions on the use of the data for criminal prosecution are also incompatible with the standards developed from the principle of proportionality. § 100g.1 sentence 1 no. 1 StPO does not ensure that in general and also in the individual case only serious criminal offences may be the occasion for collecting the relevant data, but - independently of an exhaustive list - merely generally accepts criminal offences of substantial weight as sufficient. § 100g.1 sentence 1 no. 2, sentence 2 StPO satisfies the constitutional standards even less, in that it accepts every criminal offence committed by means of telecommunications, regardless of its seriousness, as the possible trigger for data retrieval, depending on a general assessment in the course of a review of proportionality. This provision makes the data stored under § 113a TKG usable with regard to virtually all criminal offences. As a result, in view of the increasing importance of telecommunications in everyday life, the use of these data loses its exceptional character. Here, the legislature no longer confines itself to the use of data to prosecute serious criminal offences, but goes far beyond this, and thus far beyond the objective of data storage specified by EU law.

Nor does § 100g StPO comply with the constitutional requirements, in that it permits data retrieval not merely for individual cases to be sustained by a judge, but as a general rule even without the knowledge of the person affected (§ 100g.1 sentence 1 StPO).

In contrast, the judicial control of data retrieval and data use and the provisions for the duties of notification are essentially guaranteed in a manner that satisfies the constitutional requirements. Under § 100g.2 sentence 1, § 100b.1 sentence 1 StPO, the collection of the data stored under § 113a TKG requires a judicial order. In addition, under § 101 StPO there are differentiated duties of notification and the possibility subsequently to arrange a judicial review of the lawfulness of the measure. It is not apparent that these provisions do not, as a whole, guarantee effective legal protection. However, the lack of judicial
monitoring of a failure to inform under § 101.4 StPO is constitutionally objectionable.

Direct use of the data to ward off danger and for the tasks of the intelligence services:

The very structure of § 113b sentence 1 nos. 2 and 3 TKG does not satisfy the requirements of sufficient limitation of the purposes of use. In this provision, the Federal legislature contents itself with sketching in a merely general manner the fields of duty for which data retrieval in accordance with later legislation, in particular legislation of the Länder, is to be possible. In this way it does not satisfy its responsibility for the constitutionally required limitation of the purposes of use. Instead, by giving the service providers a duty of precautionary storage of all telecommunications traffic data, at the same time combined with the release of these data to be used by the police and the intelligence services as part of virtually all their tasks, the Federal legislature creates a data pool open to manifold unlimited uses to which - restricted only by broad objectives - recourse may be had, in each case on the basis of decisions of the Federal and Länder legislatures. The supply of such a data pool with an open purpose removes the necessary connection between storage and purpose of storage and is incompatible with the constitution.

The formulation of the use of the data stored under § 113a TKG is also disproportionate in that no protection of confidential relations is provided for the transmission. At least for a narrowly defined group of telecommunications connections which rely on particular confidentiality, such a protection is fundamentally required.

Indirect use of the data for information of the service providers:

§ 113b sentence 1 half-sentence 2 TKG also does not satisfy the constitutional requirements in every respect. Admittedly there are no objections to the fact that this provision permits information independently of a list of criminal offences or legal interests. However, it is not compatible with the constitution that such information is also made possible for the general prosecution of regulatory offences, without further limitation. In addition, there are no duties of notification following the provision of such information.

6. Compatibility with Article 12 GG

In contrast, the challenged provisions do not give rise to any constitutional objections with regard to Article 12.1 GG, to the extent that a decision has to be made in these proceedings in this respect. The imposition of a duty of storage is not typically excessively burdensome for the service providers affected. In particular, the duty of storage is not disproportionate with regard to the financial burdens incurred by the enterprises as a result of the duty of storage under § 113a TKG and the duties consequential on this, such as the guarantee of data security. Within its discretion, which is broad in this connection, the legislature is not restricted to engaging private persons only if their occupation can directly cause dangers or they have direct liability for these dangers. Instead, it is sufficient in this connection if there is a close relationship in terms of subject-matter and in terms of responsibility between the person's occupation and the duty imposed. There are therefore no fundamental objections to the cost burdens incurred by the persons with a duty of storage. In this way, the legislature shifts the costs associated with the storage as a whole onto
the market, corresponding to the privatisation of the telecommunications sector. Just as the telecommunications enterprises can use the new opportunities of telecommunications technology to make profits, they must also assume the costs of containing the new security risks that are associated with telecommunications and must include them in their prices.

7. Voidness of the challenged provisions

The violation of the fundamental right to protection of the secrecy of telecommunications under Article 10.1 GG makes §§ 113a and 113b TKG void, as it does § 100g.1 sentence 1 StPO insofar as traffic data under § 113a TKG may be collected under this provision. The challenged norms are therefore to be declared void, their violation of fundamental rights having been established (see § 95.1 sentence 1 and § 95.3 sentence 1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz).

The decision was unanimous as regards its result with regard to the questions of EU law, of formal constitutionality and of the fundamental compatibility of precautionary storage of telecommunications traffic data with the constitution. With regard to the assessment of §§ 113a and 113b TKG as unconstitutional, it was passed by seven votes to one as regards its result, and with regard to further questions of substantive law it was passed by six votes to two, to the extent shown in the dissenting opinions.

The Senate decided by four votes to four that the provisions are to be declared void under § 95.3 sentence 1 of the Federal Constitutional Court Act, and not merely incompatible with the Basic Law. Accordingly, it is not possible for the provisions to continue in effect in a restricted scope; instead, the statutory consequence is an annulment.

Dissenting opinion of Judge Schluckebier:

1. The storage of the traffic data by the service providers for a period of six months is not an encroachment on the fundamental right of Article 10.1 GG of such weight that it could be classified as "particularly serious" and thus equivalent to a direct encroachment by the state on the contents of communications. The traffic data remain in the sphere of the private service providers on whose servers, for technical reasons, they are recorded and of whom the individual telecommunications user can expect by reason of their contractual relationship that the data are treated with strict confidence in the providers' sphere and protected. If state of the art data security is guaranteed, there is therefore also no objectifiable basis for the assumption that the citizen could feel intimidated as a result of the storage. The storage does not extend to the contents of the telecommunications. When the encroachment is weighed, therefore, a perceptible distance must be observed to particularly serious encroachments such as those that occur in the acoustic surveillance of living quarters, in monitoring of the contents of telecommunications or in what is known as online search of IT systems by the direct access of state bodies; in the case of these, there is a particular risk that the core area of private life, which enjoys absolute protection, is affected. Here, a particularly invasive encroachment is not the mere storage of the traffic data by the service provider, but the actual retrieval and the use of the traffic data by state agencies in the individual case on the legal bases that permit this; this, and also a judge's order for traffic data to be collected, are in turn subject to the strict requirements of proportionality.
2. The challenged provisions are fundamentally not inappropriate, and they are reasonable for the persons affected and thus proportionate in the narrow sense. In legislating for the duty to store telecommunications traffic data for a period of six months, for a provision as to the purpose of use and a criminal-procedure provision for collection of data, the legislature has remained within the legislative limits accorded to it constitutionally. The state's duty to protect its citizens includes the duty to take suitable measures in order to prevent injury to legal interests or to investigate such injury and to attribute responsibility for injuries to legal interests. In this sense, guaranteeing the protection of citizens and of their fundamental rights and the foundations of the community, and the prevention and investigation of serious criminal offences, are all among the requirements for peaceful coexistence and the citizens' untroubled enjoyment of their fundamental rights. The effective investigation of crimes and effective warding off of danger are therefore not in themselves a threat to the freedom of citizens.

In the conflicting relationship between the state's duty to protect legal interests and the individuals' interest in the safeguarding of their rights guaranteed by the constitution, it is the initial task of the legislature to proceed in an abstract manner and achieve a balance between the conflicting interests. In doing this, it has latitude for assessment and drafting. In this connection it was the goal of the legislature to take account of the irrefutable needs of an effective, constitutional administration of criminal justice in view of a fundamental change in the possibilities of communication and of the communicative behaviour of people in recent years. This goal cannot be achieved unless the facts necessary for the investigation can be ascertained. In this connection, the legislature assumed that telecommunications traffic data above all, because of the technical development towards more flat-rate connections, either are not stored at all or are deleted before a judge's order for the issuing of information can be obtained, or even before the information necessary for an application for such an order has been obtained. The majority of the Senate, in the review as to whether the storage of traffic data is suitable and necessary, does take into account that virtually all areas of life have been invaded by electronic or digital means of communication and therefore in certain areas this hinders the prosecution of criminal offences and also the warding off of danger; but in the review of proportionality in the narrow sense it does not attach sufficient weight to them in under the aspect of appropriateness and reasonableness.

In this way, the majority of the Senate virtually completely restricts the legislature's latitude for assessment and drafting, which would permit it to pass appropriate and reasonable provisions in the field of the investigation of crimes and the warding off of danger for the protection of the population. In this way it also fails to take sufficient account of the requirement of judicial self-restraint with regard to conceptual decisions of the democratically legitimated legislature. The judgment finds that a storage duration of six months - that is, the minimum period called for by the EC Directive - is at the upper limit and at best capable of being constitutionally justified, dictates to the legislature the technical rule that the provision on the purpose of use must at the same time contain the requirements for access, restricts the legislature to reliance on a list of offences in criminal law, excludes the possibility of using the traffic data even to solve criminal offences that are difficult to investigate and were committed by use of the means of telecommunication, and extends the
duties of notification in a specific manner. Following this, the legislature no longer has an appreciable discretion to legislate on its own political responsibility.

In particular, the Senate refuses the legislature the right to retrieve the traffic data stored under § 113a TKG to investigate criminal offences that are not contained in the present list of § 100a.2 StPO but that are of considerable importance in the individual case, and offences that are committed by means of telecommunications (§ 100g.1 sentence 1 nos. 1 and 2 StPO). With regard to the last-named offences, insufficient weight is given to the fact that the legislature in these cases has substantial difficulties in investigation. Since it is the duty of the legislature to guarantee effective criminal prosecution and not to permit any substantial gaps in protection, the legislature may not be prevented from also giving access to the traffic data in the case of offences that may not be particularly serious but that injure important legal interests, because in its estimation this is the only way to prevent de facto legal vacuums and a situation where investigation is largely ineffective. In addition, when the legislature drafted the provisions on authorisation for access in criminal procedure, it was guided by criteria which the Senate approved in its judgment of 12 March 2003 (Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 107, 299 (322)) on the release of connection data for telecommunications.

3. In the pronouncement on legal consequences, on the basis of the constitutional assessment of the majority of the Senate, having recourse to established case-law of the Federal Constitutional Court, consideration might well have been given to fixing a time limit for the legislature to pass new legislation and holding that the existing provisions could provisionally continue in effect in conformity with the stipulations of the temporary injunctions granted by the Senate, in order to avoid considerable shortcomings, in particular in the investigation of criminal offences, but also in warding off danger.

Dissenting opinion of Judge Eichberger:

The dissenting opinion essentially follows the criticism of Judge Schluckebier in the assessment of the intensity of the encroachment of storage of telecommunications traffic data as a violation of Article 10.1 GG. The legislative drafting on which §§ 113a, 113b TKG are based, creating a sliding scale of legislative responsibility for the order of storage on the one hand and the retrieval of data on the other hand, is fundamentally in conformity with the constitution. This applies in particular to the use of the data stored under § 113a TKG, which is governed by § 100g StPO, for purposes of criminal prosecution. The legislature is not obliged to measure the proportionality of the provisions on retrieval solely by the greatest possible encroachment of a comprehensive form of data retrieval which ultimately aims to create a social profile of the citizen affected or to track his or her movements; instead, it may take account of the fact that many instances of data retrieval have far less weight, and the competent judge must decide in the individual case on their reasonableness.

This press release is also available in the original German version.
THE GERMAN CONSTITUTIONAL COURT JUDGMENT ON DATA RETENTION: PROPORTIONALITY OVERRIDES UNLIMITED SURVEILLANCE (DOESN'T IT?)

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1. Introduction

On 15 March 2006, the Data Retention Directive, demanding the retention of telecommunications data for a period of six months up to two years, was adopted. Since then, this seemingly straightforward directive has ‘generated’ quite an impressive number of court judgments. They range from the European Court of Justice (ECJ) to the administrative (e.g. Germany and Bulgaria) and constitutional courts (e.g. Romania) of some Member-States.

In particular, the judgment of the German Federal Constitutional Court, delivered on 2 March 2010, has already caught the attention of several commentators, from civil society, lawyers, journalists and politicians (cf. infra, section 4). In the judgment, the Court annuls the German implementation laws of the Data Retention Directive.

This paper has two main goals. On the one side, it aims at offering a first critical overview of this important judgment, highlighting some of the key features of the ruling and its main similarities and divergences with other similar judgments. On the other side, given the relevance of the issues at stake, it aims at contextualizing the judgment in the wider framework of European data processing and protection debates, assuming a critical posture on the increasing emphasis on proportionality as the “golden criterion” to assess and limit surveillance practices.

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1 Earlier versions of this article have been published on the 23<sup>rd</sup> of March 2010 at the TILT Weblog for Law and Technology (http://vortex.eur.nl/TILT/2010/hp/110) and on the 18<sup>th</sup> of May 2010 in the CEPS Liberty and Security in Europe - publication series (http://www.ceps.be/book/proportionality-overrides-unlimited-surveillance). The authors want to thank Patrick Breyer (AK Vorratsdatenspeicherung: German Working Group against Data Retention) and Caspar Bowden (Microsoft) for their salient comments.


2. The 2 March 2010 judgment

2.1. Background

In its judgment of 2 March 2010 the German Federal Constitutional Court abrogated the national implementation of the data retention directive: Art.113a and 113b of the Telekommunikationsgesetz\(^5\) (TKG), i.e., the Telecommunications Law, and Art. 100g, paragraph 1 sub 1, of the Strafprozeßordnung\(^6\) (StPO), i.e., the Criminal Procedural Code, in combination with the aforementioned Art 113a TKG. This legislation, which was originally passed by the Bundestag on 9 November 2007 and entered into force on 1 January 2008, imposed the retention of information about all calls from mobile or landline phones for six months, including who called whom, from where and for how long. In 2009, the law was extended to include the data surrounding e-mail communications as well. This being said, the law did forbid authorities from retaining the contents of either form of communication.

Since its adoption, the German national implementation law had met considerable resistance. On 31 December 2007 on the eve of its entry into force, the German privacy group Arbeitskreis Vorratsdatenspeicherung (AK Vorrat: Working group on data retention) filed a constitutional complaint with the German Federal Constitutional Court. The complaint was backed by more than 30,000 people, and requested, *inter alia*, the immediate suspension of the law.\(^10\) The judgment of 2 March 2010 is the outcome of this complaint.

2.2. The main findings: a proportionality check

The case could have been tricky and threatening for EU law, but the German Court did not criticize the EU directive itself, arguing that the problem lay instead with how the German Parliament chose to interpret it. The German legislation was found to breach art. 10 paragraph 1 of the German Constitution (*Grundgesetz*\(^11\)) which ensures the privacy\(^12\) of correspondence and telecommunications (the so-called "Fernmeldegeheimnis" or "Telekommunikationsgeheimnis"). The text of the German Constitution protects communication in what might be termed an old-fashioned way. Article 10 of the German Basic Law seems to suggest that we still communicate by writing letters, but through the activity of the Court the protection goes well beyond the paper medium. All forms of (tele)communications are in fact protected, and this protection does not only cover the content of the communication, but it reaches out to the data about this communication.\(^13\) In the judgment of 2 March 2010, the Court stated that: "the protection of communication does not only the content but also the secrecy of the circumstances of the communication, including especially if, when and how many times some person (...) contacted another or attempted to." (section 189)

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\(^5\) Available in German at the "Juristische Informationsdienst": [http://juris.org/gesetz/TKG/113a.html](http://juris.org/gesetz/TKG/113a.html), and [http://juris.org/gesetz/TKG/113b.html](http://juris.org/gesetz/TKG/113b.html).

\(^6\) Available at [http://juris.org/gesetz/STPO/100a.html](http://juris.org/gesetz/STPO/100a.html), *ibid.*


\(^11\) Available in German at the website of the German Bundestag: [http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/ges_01.html](http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/ges_01.html).

\(^12\) Privacy is not mentioned in the German Constitution, but the German Court has developed a broad right to privacy and "informational self-determination" ("das Recht auf informationselle Selbstbestimmung") as tenets of the right to human dignity in Article 1 of the Constitution in its famous 1983 "Census Decision", BVerfG [Judgments of the Federal Constitutional Court] 15 December 1983, (Vollzugspraxis), BVerfGE 65, 1. The plaintiffs in the German data retention case also claimed that the national implementation law infringed both their right to informational self-determination and their privacy of telecommunication (Art 10 GG), but the annulment of the Court was only based on the infringement upon the latter.

\(^13\) This is indeed fully in line with the case law of the Strasbourg Court: *ECtHR, Malone v. UK, 2 August 1984*. 

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Hence, the German Constitution also applies to the data that are the object of the retention measures. But this does not necessarily mean that the implementation law is unconstitutional. So how did the German Court come to the conclusion that the implementation law, doing no more than implementing EU legislation, breaches Article 10 of the Constitution?

As also remarked by Mohini, the Court bases its analysis on a "privacy test" similar to the one developed by the European Court of Human Rights.\textsuperscript{14} From Strasbourg’s point of view, the “privacy test” as contained in the second paragraph of Article 8 of the European Convention on Human Rights (ECHR),\textsuperscript{15} not only requires a check of the quality of the legal basis,\textsuperscript{16} but also of the legitimate aim and proportionality of the proposed initiative. We will see in the following that the German Court follows this scheme and carries out a check of the three requirements. It is however useful to observe that the European Court sees minimum safeguards with regard to data (e.g., safeguards on duration; storage conditions; usage, access by third parties and preserving the integrity of data) as being part of the first requirement (legality requirement),\textsuperscript{17} whereas the German Court sees these safeguards as elements of the third requirement (proportionality). We will come back to this. Now let us turn to the privacy check by the German Court in the judgment of 2 March 2010.

As all the transposition laws were made with the proverbial German accuracy, the first requirement (legality) was not the problem. With regard to the second (legitimacy) the German Court found that a six-month retention period can be legitimate in principle: firstly because under the current laws the data are stored in a dispersed manner by private actors (section 214). Secondly, such data retention is in accordance with the challenges posed by the current era:

"Storage of telecommunication traffic data for the period of six months is also not a measure which aims at the complete interception ("eine Totalerfassung") of the communication and activities of citizens as a whole. Much more it ties in, in a rather restrained manner, to the special significance of telecommunications in the modern world and it reacts to the specific potential danger which it brings along. The new means of telecommunication overcome time and space in a way which is incomparable to other forms of communication and basically exclude public observation. Thus these new means make it easier for criminals to communicate and act in a hidden way and enables dispersed groups of a few persons to find each other and effectively collaborate with each other [...] Thus precisely the reconstruction of connections by means of telecommunication is of special significance for effective criminal prosecution and the prevention of dangers". (section 216)


\textsuperscript{15} Article 8 of the European Convention on Human Rights states: “Everyone has the right to respect for his private and family life, his home and his correspondence" (first paragraph); "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (second paragraph).

\textsuperscript{16} The legality principle is expressly laid down in Articles 2, 5, 6 and in the second paragraphs of Articles 8 to 11. Interferences by the executive with the rights and freedoms of the individual should not be permitted unless there is a clear legal basis to do so. By the same token, individuals should be able to predict with reasonable certainty when and under what conditions such interferences may occur. Hence the need for a legal basis to be accessible and foreseeable are key features of the first requirement of the privacy check.

\textsuperscript{17} The Court recalls in its well established case-law that the wording “in accordance with the law” requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise” (ECHR, Case of S. and Marper versus the United Kingdom, Application nos. 30562/04 and 30566/04, Strasbourg, 4 December 2008, § 95 with ref. to ECHR Malone v. the United Kingdom, 2 August 1984, Series A no. 82, §§ 65-68; ECHR Rotta v. Romania [GC], no. 28341/95, ECHR 2000-V, § 55; and ECHR, Anani v. Switzerland [GC], no. 27798/95, ECHR 2000-II, § 56).
However, while the Court holds that the current legislation is in principle legitimate and not contrary to the German Constitution, it also notes that this would not be the case for more all-encompassing and intrusive legislation:

"In contrast the retention of telecommunication traffic data should not be understood as a stepping stone towards a legislation which aims at a potentially blanket measure of preventive data retention which stores all data which could be useful for the prosecution of crime or prevention of dangers. Such legislation would be, irrespective of the regulations concerning its usage, would be a priori incompatible with the Constitution". (section 218)

Yet, even though the Court deemed the contested national data retention laws not to be unconstitutional in principle, it did acknowledge that these measures do constitute a heavy infringement ("schwerwiegender Eingriff", section 212). Such measures:

"largely increase the risk of citizens to be the subject of further investigations, although they did not do anything wrong. It is enough to be at a wrong time (...) contacted by a certain person (...) to be under an obligation to provide justifications”, [and further in the judgment that the preventive collection of data] which "can establish a feeling of permanent control" [and] "diffuse threat" ("diffuse Bedrohlichkeit"). (sections 212 and 242)

Because of the heavy infringements that such data retention can bring along, the major problem with the German implementation laws was that they did not satisfy the third requirement of proportionality. This requirement involves, at least in the German Court's understanding, that the transposition laws should contain regulations that are in accordance with all requirements of legality ("normenkäre Regelungen"). Thus, contrary to Strasbourg's interpretation, proportionality is not directly discussed as part of the more sensitive criterion of necessary in a democratic society. Following the proportionality check the Court concludes that, while the idea underlying data retention is not “absolutely incompatible with Art.10 of the German Constitution (protecting the privacy of telecommunications)” (section 205), its application in national law did not meet the constitutional need for proportionality, which can be subdivided into four criteria:

(i) proportional data security standards. Given that data retention is a very heavy infringement, the threshold for those standards should be set very high;

(ii) proportional purpose limitation. When direct use of data is sought, and thus the possibility to create very detailed behavioral profiles is at stake, these standards should be very high (only in case of "schwerwiegende Straftaten", i.e. heavy crimes). However, the Court assesses indirect use (as in the case of requests to a service provider for the identifying information that belongs to an IP-address) as a less intrusive practice, and thus the standards concerning purpose limitation can be more lenient (no need for an exhaustive catalogue);

(c) transparency. This criterion aims at counter-acting the feeling of "diffuse threat" (discussed in section 242); using data without knowledge of the involved should only be allowed if the purpose of the investigation would become jeopardized otherwise, and if the involved people are at least notified afterwards. This criterion applies both to direct and indirect use of the data;

(d) judicial control and effective legal remedies. Proportionality requires that in case of direct use there should be judicial control, while in the case of indirect use this is not necessary.

None of these requirements were met. Seven out of eight judges (section 308) therefore agreed that the national transposition laws infringed upon art. 10, paragraph 1, of the German Constitution. After suspending the law several times during interim proceedings, the Court
annulled\textsuperscript{18} it in its final judgment. All data already collected by carriers and providers had to be deleted.

2.3. The German Court on access and use and the role of private companies

According to the Constitutional Court it is important to distinguish between the mere retention and the actual access and use of data. In practice this difference is expressed by the fact that the data are not directly accessible as they are stored by a multiplicity of private companies (telecommunications services and providers). Although the complaints concerning the excessive economic burden of data retention on these companies were not accepted, their remarkable consolation prize was that the court assigned them the constitutionally pertinent and important role of incorporators of the distinction between storage and access. The private and dispersed nature of the collection and retention of data was thus welcomed by the German Federal Constitutional Court as something very positive. The fact that the obligation to retain data rests with private service-providers even became a “decisive element” for the assessment of the “non-constitutionality” of the principle of data retention. In fact, “when the data are stored, they are not gathered in one place, but they are scattered over many private companies and thus they are not at the State’s disposal as a total collection. More importantly the State does not have (…) direct access to the data” (section 214 of the judgment).

Thus, while clearly stating that “the retention of telecommunication traffic data should not be understood as a step towards a legislation that aims at a potentially blanket measure of preventive data retention” (section 218), the Constitutional Court seems to identify a fundamental guarantee in the two-step procedure: a general but dispersed retention by private actors followed by a justified direct or indirect use by public actors. However, following up on the judgment of the German Federal Constitutional Court, the German Federal Commissioner for Data Protection, Peter Scharf, said in an interview with the Focus magazine that the data retention practised by private companies such as Google and Facebook should also be limited: “After all, private data collections of large companies, such as Google, are much more precise, extensive and more meaningful than that what is captured by a retention that was ordered by a state”.\textsuperscript{19} This raises not only the question of how large private actors can be without endangering the dispersed character of the retention, but also of the relativity of the notion of “dispersion” given the existence and availability of powerful data mining and aggregative software tools.

Another important elaboration by the German Federal Constitutional Court with regards to the use of the retained data is the distinction between ‘direct’ and ‘indirect’ use of data by law enforcement authorities and secret services. On the one hand, direct use is particularly sensitive and needs stronger safeguards, because it can lead to the construction of behavioural and mobility profiles. In particular, stricter rules have to apply to secret services. On the other hand, indirect use, namely the possibility for officials to request of service providers that they inform them of the holders of connections with specific IP addresses, requires “less strict guidelines”. Because the Court deems the indirect use of data to be a relatively light infringement, the purpose limitation for such requests is proportionally light: “the production of such requests for

\textsuperscript{18} Judge Schluckebier wrote an extensive dissenting opinion in which he argues that the retention of mere location and traffic data, particularly when executed by private companies and not by the state itself, does not infringe upon art. 10.1, Gd. According to Schluckebier data retention cannot be compared to truly intrusive infringements such as the acoustic surveillance of private premises or remote searches of information technical systems (section 314). Moreover he points at the need for judicial self-restraint in order to give the legislator more room to create regulations which it deems necessary. However, while the majority of the judges agreed that the transposition laws infringed upon the German Constitution, the question whether the law should be declared nullified (which implied that all stored data had to be erased immediately) or whether the legislator should get the opportunity to adapt the laws during a set period of time in which the data would be kept, was a harder question: with four out of eight judges in favor of the latter (section 309), it was a close call that the transposition laws were completely nullified.

\textsuperscript{19} Online Focus (2010, 06.03.2010), Bundesdatenschutzbeauftragter: Google, Facebook & Co. Reglementieren. Online Focus, from http://www.focus.de/digital/internet/bundesdatenschutzbeauftragter-google-facebook-und-co-reglementieren_id_387099.html
information is independent of an exhaustive catalogue of legal interests or criminal offences, and can be allowed more widely than the request and the use of telecommunication traffic data themselves.” (section 254)

2.4. Other important findings

As widely discussed by journalists, the German Federal Constitutional Court stresses that what should be prevented at all costs is the creation of an opaque, blanket and centralised data retention that can engender a ‘feeling of unease’ with the citizens. In the words of the Court:

“a preventive general retention of all telecommunications traffic data (…) is, among other reasons, also to be considered as such a heavy infringement because it can evoke a sense of being watched permanently (…). The individual does not know which state official knows what about him or her, but the individual does know that it is very possible that the official does know a lot, possibly also highly intimate matters about him or her” (section 241).

This is why such a “diffuse threat” should be “counteract[ed] (…) by effective rules of transparency” (section 242). The Court’s posture on “unease” is quite a strong official acknowledgment of the potential pervasive effects of wide, even if soft, surveillance measures on individuals’ lives. 20

The Constitutional Court also underlines (section 238) that “as a product of the principle of proportionality” there has to be “a fundamental prohibition of transmission of data, at least for a narrowly defined group of telecommunications connections which rely on particular confidentiality”21. The Court continues that these “might include, for example, connections to persons, authorities and organisations in the social or ecclesiastical fields which offer advice in situations of emotional or social need, completely or predominantly by telephone, to callers who normally remain anonymous, where these organisations themselves or their staff are subject to other obligations of confidentiality in this respect”.

Notwithstanding the attempt of the German Constitutional Court to keep national and EC matters separate from each other (cf. infra, section 3.1), the judgment also provides some reflections that can give food for thought on the EC level. In particular this is the case with regard to the question of whether location and traffic data that have to be stored according to the Data Retention Directive (2006/24/EC) should be considered personal data as defined in Art. 2(a) of the Data Protection Directive 95/46/EC:

“personal data’ shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”.

Although the German Federal Constitutional Court does not make any explicit reference to the notion of personal data in the Data Retention Directive, it recognises that location and traffic data also deserve protection, because technologies can extract from their processing important, and sometimes even sensitive, personal data. Because the Court was reluctant to pose a preliminary question to the ECJ and underlined the importance of Germany’s constitutional identity, it also let the opportunity pass to take a stance with regard to how its judgment relates to similarly important questions within the EU directive. Even though it is understandable that


the court did not want to get its fingers burned, it would have been interesting if the Court had taken the debates on the European level into consideration more explicitly. Thus, for instance, it could have been interesting if the Court would have taken into account the Working Party (WP) 29 Opinion (2007) on the definition of personal data. In this, not uncontested, opinion the Working Party stated that dynamic IP addresses should be treated as personal data, unless the ISP can establish with “absolute certainty that the data correspond to users that cannot be identified”: but in practice this is almost impossible to ascertain. Also, the Court did not take into account Directive 2002/58/EC, the so-called e-Privacy Directive, that provides for a distinctive protection of traffic and location data. The rationale of this protection is that these data can threaten privacy even if they are not personal data (which implies that “privacy” and “data protection” cannot be reduced one to the other, although they do surely overlap).

3. The German Constitutional Court judgment and Europe

3.1. Fundamental rights and data retention

In order to get to the ‘core of the problem’ the plaintiffs who addressed themselves to the German Federal Constitutional Court had hoped that the Court would pose a preliminary question about the constitutionality of the Data Retention Directive to the ECJ. However, the Constitutional Court did not deem such a preliminary question necessary. The questions we want to consider here are the following: When is the constitutionality of the data retention legislation part of the jurisdiction of the German Federal Constitutional Court and when is it part of the powers of ECJ? And what is the difference between mere retention and actual access to the data?

The German Court has on several occasions shown a reluctance to accept an unconditional and full supremacy of EC law. In the Solange II case it famously stated that “as long as” (“so lange”) the EC “ensured an effective protection of fundamental rights” that were “substantially similar” to that of the fundamental rights safeguarded by the German Constitution, the German Court would “no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation”. Recently, in the complex and controversial Lisbon Judgment, the German Court took an even more outspoken stance and showed its constitutional teeth towards EC law. In this judgment it held that the primacy of Community law could never infringe upon the constitutional identity of the Member-States (identity review, section 240) and should not transgress its competences (ultra vires review, section 240). Even though it is difficult to say whether the judgment should be characterised as a triumph of nationalist euroscepticism or of constitutionalism, it has in any case become clear once more that the relationship between EC law and the German Constitutional Court C is far from an unequivocal given.

If we keep this in mind, and return to the data retention judgment of 2 March 2010, it is noteworthy to stress how the German Federal Constitutional Court avoids referring the case to

26 Ultra vires review is a concept that has already been around for a while in the case law of the German Court, the identity review was a new concept which was forwarded in the Lisbon judgment.
the ECJ with a preliminary question. In the sections 80-83 the Court briefly discusses the European legal context: it gives some bibliographical references to articles that raise doubts about the compatibility of Directive 2006/24 with European fundamental rights and refers to case C-301/06, 10 February 2009. In this case the ECJ rejected the claims that the Directive should be annulled because of its adoption within the first pillar (i.e., Art. 95 EC Treaty) instead of the more appropriate third pillar: according to the ECJ the first pillar is the correct legal basis. The way in which the German Court uses this judgment as an argument to avoid and circumvent a preliminary question to the ECJ is ingenious. After the general observation that Directive 2006/24 only ordains the storage of data for a period of at least six months, and does not give any prescriptions regarding the access and use of the data (section 186) it points out that this leaves a large margin of appreciation ("einen weiten Entscheidungsspielraum") to the national legislator. Looking at the ECJ judgment, this large margin of appreciation seems only natural to the German Court: after all, if the Directive has rightly been construed as a first pillar measure its main object is the establishment and functioning of the internal market, whereas its applicability with regards to the detection, investigation, and prosecution of crime has to be considered as the responsibility of individual Member-States. Henceforth, the regulations of the Directive do

"neither harmonise the question of access to data by the competent national law enforcement authorities nor the question of the use and exchange of this data between these authorities (cf. ECJ, C-301/06, 10 February 2009, section 83). Based on the minimal requirements of the Directive (Articles 7 and 13 of Directive 2006/24/EC), the Member States are the ones who have to take the necessary measures to ensure data security, transparency and legal safeguards" (section 186).

Even more telling is section 218 of the 2 March 2010 judgment, wherein the Court refers again to the notion of "constitutional identity" of its own Lisbon Judgment:

"That the free perception of the citizen may not be completely captured and subjected to registration, belongs to the constitutional identity of the Federal Republic of Germany (cf. on the constitutional proviso with regard to identity, Judgment of the second senate, 30 June 2009 - 2 BvE 2/08 etc. -, section 240) and the Federal Republic has to devote itself to guarantee this in a European and international context. By a preventive retention of telecommunications traffic data the room for other blanket data collections, also by means of the European Union, becomes considerably smaller".

Thus, especially when read together, the ECJ judgment of 10 February 2009 and the German judgment of 2 March 2010 seem to indicate the emergence of a very important demarcation within data retention: on the one hand there is the question of the storage and retention of data, which is regulated by Directive 2006/24/EC, and on the other there is the question of the use of and access to these data, which fall under the competency of the individual Member-States. It is striking that the UK Home Office uses the same distinction to brush aside the human rights concerns that the UK implementation law of the Data Retention Directive could lead to a disproportionately large "acquisition of communications data by the police, law enforcement agencies the security and intelligence agencies". According to the Home Office, the critics overlook the difference between mere retention and access: "It is important to state that access to communications data is governed by the Regulation of Investigatory Powers Act 2000 (RIPA) and no changes to the safeguards set out in that Act are planned".

In the judgment of the German Federal Constitutional Court this distinction between retention and access is further elaborated upon by the importance that is assigned to the fact that the

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28 Ibid., p. 27.
retention is carried out by private companies instead of governmental organs and by the introduction of the notions of ‘direct’ and ‘indirect use’ (cf. supra, section 2.3).

3.2. Affinities and differences among judgments

As said before, the German judgment is not the first to rule on the topic of data retention. Apart from the ECJ ruling on the legal basis of the directive itself, it is important to note that two other important judgments were formulated by the Romanian Constitutional Court, on 8 October 2009, and by the Bulgarian Administrative Court, on 11 December 2008. It is interesting to compare these two judgments, which are relatively concise, with the much more elaborated 2 March 2010 judgment of the German Federal Constitutional Court. Though certain similar elements can be discerned in the three judgments, in the Romanian case the differences are most striking, while in the Bulgarian case a focus on similarities is more enlightening.

First, we will take a closer look at the differences between the German and the Romanian decisions. The question that differentiates these judgments is whether, given that there are enough legal and technological safeguards, constitutional data retention could be possible, or whether such an idea is a categorical contradiction in terms. Is ‘constitutional data retention’ as unthinkable as a square circle? Both the German and the Romanian judgments subject the national implementation of Directive 2006/24 to similar tests, which concern the legality, the legitimate purpose, and proportionality of the measures. Yet, the criticisms forwarded by the German Court focus on the use and access of the data. It does not deem the data retention in itself, as required by the Directive, to be necessarily unconstitutional (section 205). On the other hand, the Romanian Court underlines that the use of data can be lawful and proportional in certain circumstances:

"the Constitutional Court does not deny [...] that there is an urgent need to ensure adequate and efficient legal tools, compatible with the continuous process of modernization and technical upgrading of the communication means, so that the crime phenomenon can be controlled and fought against. This is why the individual rights cannot be exercised in absurdum".

However, while there might be circumstances wherein the use may be justified, the Court considers the blanket retention of data to be disproportional by nature:

"The Constitutional Court underlines that the justified use, under the conditions regulated by law 298/2008, is not the one that in itself harms in an unacceptable way the exercise of the right to privacy or the freedom of expression, but rather the legal obligation with a continuous character, generally applicable, of data retention. This operation equally addresses all the law subjects, regardless of whether they have committed penal crimes or not or whether they are the subject of a penal investigation or not, which is likely to overturn the presumption of innocence and to transform a priori all users of electronic...

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29 The Bulgarian, Romanian and German judgments discussed in this section are not the only constitutional challenges which have been raised against the implementation of the Retention Directive. A decision regarding a constitutional complaint directed towards Hungarian Telecom Data Retention Regulations is still pending before the Hungarian Constitutional Court: \(\text{http://www.hoz.hu/en/data-protection/constitutional-complaint-filed-against-hungarian-telecom-data-retention-regulations}\). In a similar case (Record No. 2006/3785P) pending before the High Court of Ireland the presiding judge decided on the 5th of May 2010 to refer the case to the ECJ. This means the ECJ will finally have a substantive decision on the constitutionality of Directive 2006/24/EC. We will return to this important development later in this paper.


communication services or public communication networks into people susceptible of committing terrorism crimes or other serious crimes”.

Contrary to the German Court, the Romanian Court considers the use of the data to be a less radical threat than the blanket storage as such, as only the latter creates a situation where the infringement on “the right to private life and freedom of expression, as well as processing personal data” is no longer the exception but the rule:

“The legal obligation that foresees the continuous retention of personal data transforms though the exception from the principle of effective protection of privacy right and freedom of expression, into an absolute rule. The right appears as being regulated in a negative manner, its positive role losing its prevailing role”.

Because the focus of the German Constitutional Court is on access and use, its criticisms are mainly aimed at the national implementation law. Moreover its criticisms are a matter of proportionality. Given the right safeguards not only retention, but also use and access can be constitutional. The Romanian focus, on the other hand, is on data retention as such and therefore the judgment is not only a frontal attack on national law 298/2008, but also on the Directive itself. Clearly, the Court considers ubiquitous and continuous retention for a period of six months to be intrinsically in opposition with Art 8 ECHR (right to respect for private and family life). Thus, the Romanian Court takes a particularly strong stance, and states that:

“the obligation to retain the data, established by Law 298/2008, as an exception or a derogation from the principle of personal data protection and their confidentiality, empties, through its nature, length and application domain, the content of this principle”.

In Bulgaria the Supreme Administrative Court (judgment of 11 December 2008) annulled Art. 5 of Regulation # 40 on the categories of data and the procedure under which they would be retained and disclosed by companies providing publicly available electronic communication networks and/or services for the needs of national security and crime investigation, which partially transposed Directive 2006/EC, for being unconstitutional. Article 5 stated that “the data would be retained by the providers and a directorate within the Ministry of Interior (MoI) would have a direct access via a computer terminal” and specified not only that the MoI would have “passive access through a computer terminal” but also that “security services and other law enforcement bodies” would have access “to all retained data by Internet and mobile communication providers” without needing court permission. The constitutional aversion to centralised storage and direct access without any court control is very similar to the reasoning found in the German judgment. In 2009, the Bulgarian government tried to reintroduce a law that would give direct access to the Ministry of Interior Affairs to all data held by the providers, but the law was rejected by Bulgaria’s Parliament. On 17 February, Parliament “approved the second reading of amendments to the Electronic Communications Act, but only after serious concessions”. One of the concessions made by the Ministry of Interior was that it had to renounce to its

“demand to have permanent, direct access to personal communication data. From now on, mobile phone and internet operators will have to supply requested communication data within 72 hours and not, as Interior Minister Tsvetan Tsvetanov wanted, in two hours. The Interior Minister, or his representative, would have the right to set a different

4. The politics “around” the judgment of 2 March 2010

4.1. The reactions to the German judgment

It is noteworthy that the German judgment attracted much more attention than either the Bulgarian or Romanian one. This is probably due to a set of different reasons, among which are: the strong civil society participation behind the plaintiffs, namely 34,000 persons which were mostly mobilised by the Arbeitskreis Vorratsdatenspeicherung\(^\text{26}\) (Working Group on Data Retention); and the timing of the very extensive and substantial judgment, just in the midst of EU debates on transatlantic data-sharing agreements.

In Germany, the reactions to the judgment came from three types of actors in particular: the privacy group that promoted and supported the complaint; the Federal Criminal Police and the government. It is particularly interesting that in the aftermath of the publication of the Court’s decision, several international media focused on the contrast between the respective positions of the Justice Minister and the Interior Minister.\(^\text{27}\) On the one side, the Justice Minister, an FDP party member of the opposition at the moment of the adoption of the German legislation and amongst the plaintiffs as a private citizen, publicly welcomed the judgment. On the other side, the Interior Minister, member of the CDU, expressed a thinly veiled criticism, and underlined the need for a quick redrafting of the law to fill the “legislative gap” created by the Court’s judgment. A similar posture has been taken by the Federal Criminal Police\(^\text{28}\) which not only urged German politicians to come up with new legislation as soon as possible, but also sent out an open letter to Chancellor Angela Merkel wherein it reproaches the German Constitutional Court their naïve outlook.\(^\text{29}\)

The reaction of the AK Vorrat deserves particular attention. First, they criticised the reasoning of the Court, and one of their members stated in a press release that:

"[the Court’s] decision proclaiming the recording of the entire population’s behaviour in the absence of any suspicion compatible with our fundamental rights is unacceptable and opens the gates to a surveillance state".\(^\text{30}\)

Then, in the same press release, they already announced a double move: the continuation of the “legal fight” against data retention in Germany to avoid the re-enactment of the implementation law;\(^\text{31}\) as well as a sort of “Europeanization” of their fight at the EU level, planning an EU-wide campaign based on the preparation of a European Citizens’ Initiative concerning data

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\(^{28}\) Online Focus (2010, 02.03.2010). BKA will schnell ein neues Gesetz. Online Focus, from http://www.focus.de/politik/deutschland/vorratsdatenspeicherung-bka-will-schnell-ein-neues-gesetz-aid_486404.html


\(^{30}\) Arbeitskreis Vorratsdatenspeicherung (2010), After data retention ruling: Civil liberties activists call for political end to data retention. Available at http://www.vorratsdatenspeicherung.de/content/view/355/79/lang/en/

retention. This double move reflects their focus on the linkage between the national and the European (and even international) level. Indeed, they also invited the German government to refrain from agreeing to a new international agreement on data exchange, and they advised the Justice Minister to liaise at EU and international level with the EU Commissioner of Justice, Fundamental Rights and Citizenship and with the other Member-States that have not yet passed data retention implementation laws, in order to repeal data retention.

Finally, it is noteworthy that the telecom and internet providers, while playing such a crucial role in data retention, have not been a subject of much attention in the reactions of the first commentators. However, according to some news sources, both Deutsche Telekom and Vodafone immediately complied with the German Constitutional Court’s order to delete all already stored data.45

4.2. From the EU perspective

As stated above, the interest and impact of the German judgment at European level are also due to the timing of the decision. Indeed, the judgment arrived in the midst of European and international debates on the next moves in data-sharing and protection, and, in particular, just weeks after the rejection of the so-called ‘SWIFT agreement by the European Parliament’.46 The judgment brought back emphasis on the issue of the implementation of the data retention directive. In fact, several Member-States have still not implemented the directive or are still in the course of passing the relative implementation law.47 The slowness of the process is partly due to several and different layers of resistance (national political and juridical debates) and partly due to other less direct reasons (e.g. election schedules). Two months after the decision of the German Court, the High Court of Ireland has finally done what everybody has been hoping for: in its decision of the 5th of May 2010 (Record No. 2006/3785P) it refers the case to the ECJ. This is an important breakthrough because it means getting to the core of the matter, which is the constitutionality of Directive 2006/24/EC itself, rather the constitutionality of the national implementation legislation.

At present, the most official reaction from the Commission has been the decision to schedule a “Proposal for a review of [the Data Retention] Directive” in the Commission Work Programme 2010.48 Indeed, the official motivation of this decision states that:

“If following an evaluation of the existing Data Retention Directive and recent judgments of MS constitutional courts, a review of the Directive is aimed at better matching data retention obligations with law enforcement needs, protection of personal data (right to privacy) and impacts on the functioning of the internal market (distortions)”.49

47 AK Vorratsdatenspeicherung is lobbying to get directive 2006/24/EC rejected or at least amended, so that Member-States can opt out of data retention: http://www.vorratsdatenspeicherung.de/content/view/362/794/lang/en/ and http://www.vorratsdatenspeicherung.de/images/antworten_kommission_vdc_2009-11-13.pdf


49 Among the main reasons behind the massive rejection of the now “Swift Interim Agreement” were the European Parliament’s requests for increased data protection guarantees and further inter-institutional cooperation to ensure proper parliamentary control. See European Parliament website: http://www.europarl.europa.eu/news/expert/background_page/019-68350-052-02-06-502-20100203RBC668527-01-02-2010-2010-files/de/datap.pdf_en.htm

50 In particular, Belgium and Luxembourg have not yet passed the implementation laws.

51 European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2010 – Time to act.

52 Idem, p. 18 (annex).
In fact, the said evaluation was already planned in the very text of the Data Retention Directive itself. According to the directive, such evaluation is supposed to be released to the public not later than 15 September 2010. It has been already planned in the Action Plan Implementing the Stockholm Programme, which also mentions the possibility, if “necessary”, of following the evaluation with a “proposal for revision”.

Apart from the issues concerning the future of the Data Retention Directive itself, the German judgment will probably prove to be very important in the numerous debates surrounding data protection and processing. The analysis of the German Constitutional Court judgment takes a position on important issues such as the definition of personal data; the recourse to commercial data for security purposes (and thus the relations with private entities, and the legal framework to adopt); the adoption of technological instruments to limit data use and abuse; the effects of diffuse surveillance on personal and social behaviour, even when surveillance takes the form, or relies, on the “mere” retention of data.

5. Provisional conclusions

Even if it is still completely uncertain what the future will bring, and what will be the effective contribution of the German judgment to the evolution and solution of the current tensions and issues, it is already possible to advance some final considerations. In particular, it seems important to advance a more critical approach to the increasing emphasis on proportionality.

(i) The “proportionality check” approach of the German Constitutional Court confirms the relevance of this bundle of criteria in assessing the acceptability of privacy and data protection derogations for the benefit of security measures. It not only enriches the case-law on privacy and data protection, but also pays specific attention to the technological features of the measures and the need for adequate technological solutions (data security, control against misuse, encryption).

(ii) However, even an enhanced “proportionality test” of this kind does not substitute political and social choices concerning data retention, or data processing for security purposes at large. The reaction of the AK Vorrat, as well as the tensions within the German government, seem to confirm the increasing request for having “politics” back into these debates, and not merely “around” them. The posture taken by the European Parliament in the discussions concerning transatlantic data sharing and processing could be partially read in this sense.

(iii) Moreover, there is no unanimous vision of what “the” proportionality test is, since the methods and criteria do not only vary from jurisdiction to jurisdiction, but also from case to case. The German Federal Constitutional Court, the European Court of Human Rights and the European Court of Justice, to name just these three, have a distinct understanding of what a proportionality test should comprise, and they all seem to apply the test in a strict and in a more lenient way, depending on the case. In his study on the use of the proportionality principle by the European Court on Human Rights, Sébastien van Droogenbroeck deplores the lack of reflexivity from the side of the judges. There are no leading cases and very little can be distilled about the scope and impact of the

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49 A draft version of this document has recently been leaked (https://docs.google.com/fileview?id=0B2h75YXyF3KNTZINTJ0NDAz7jgWMS99YzRlWFIoDS8sMDo2NTUxMjE3MTEz&hl=en). See also: Katrin Lillington “Leaked report reveals big surge in cell data requests”, Irish Times, 14 May 2010, online available at: http://www.irishtimes.com/newspaper/finance/2010/0521/12342793571547.html
requirement. It is clear that the European Court of Human Rights reaches a similar result through acknowledging to state authorities a ‘margin of appreciation’. This margin and the standard of scrutiny will vary according to the context of the case. However, there is no guidance in case law about this margin. Looking back at the Court’s case law on security issues, one can observe that the Court is prepared to accept the legitimacy of the fight against crime and terrorism as well as to acknowledge the need to take effective measures. Without going as far as to say that the Court gives full discretion to Member States it is clear that almost always less strict scrutiny of the proportionality requirement is applied, especially when the bulk of the litigation is (only) on privacy, and not on other human rights enshrined in the Convention. This careful approach of sensitive issues by the European judges explains, so we believe, a tendency to concentrate on the first requirement (legality) of the privacy check. This explains why the European Court studies the presence of safeguards to avoid abuse of data as elements of the legality requirement, rather than elements of the proportionality requirement, as the German Court in its judgment of 2 March 2010. There might be good reasons for both approaches. Like the German Court, Sébastien van Droogenbroeck, seems to consider that safeguards against abuse are part of the proportionality requirement, but they are, and this deserves some emphasis, to be considered as the more formal aspects of this requirement. The other half of the requirement of proportionality, the substantive part, consists of balancing the interests at stake. A fixation on the formal requirements of proportionality by the judges, might allow them to avoid the more sensitive, but necessary, substantive proportionality test. A bit of this is lurking in the German judgment and raises the question whether this judgement is really to be understood as a break-through in the European case law.

(iv) The foregoing shows that the existence as such of a proportionality test is not automatically a warrant for a strong protection of human rights and liberties. It all depends on the strictness of the test applied by the judges. Will the judges address the substantive issues of the requirement or will they only concentrate on the formal issues? Even when they do address substantive questions regarding proportionality, it remains to be seen how this is done. A weak proportionality test, consisting of a mere balancing of a fundamental right and another interest – for example: privacy and crime control – does in fact not offer any guarantee for the preservation of that fundamental right, since the

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53 On the nature of the Court’s review see, e.g., ECtHR, Handside, Series A-24, §§ 49-50 and ECtHR, Olson, Series A-130, §§ 57-69 Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned. If the Court finds that one or more of these factors are present, e.g. the right at stake is crucial to individual’s effective enjoyment of intimate or key rights, then the state has a narrow margin of action. If they are not the state’s action will be assessed against a wider margin of appreciation. See E. Guild, ‘Global Data Transfers: The Human Rights Implications’, interpolicy brief no. 9, May 2009, 10p., (http://www.ccpes.eu/ccps/download/3400)
approach itself assumes that preserving the one per definition implies weakening the other, and vice versa. It excludes the possibility that both interests can be fostered and protected together. Such a proportionality test is doomed to weigh one interest against the other, and makes impossible the search of a composition in which the different interests at stake are all preserved in an optimal way. Such criticisms however do not apply to stronger proportionality tests that include the possibility to decide that some measures are unacceptable from a constitutional point of view — an exercise known to the Strasbourg court as the “necessary in a democratic state” test — since they encompass the possibility to refuse a measure because it harms the essence of a fundamental right or of the constitutional order, even if it can be shown that this measure can effectively realise another legitimate interest. The issue at stake then is not a “balancing” between two values, but an answer to the questions “How much erosion of a fundamental right is compatible with the democratic constitutional state in which fundamental rights are a constitutive element?” or “In which society do we want to live?”. Another aspect of a stronger proportionality test is indeed the obligation to explore if there are alternative measures that allow for the realisation of the legitimate interest in a way that does not affect the fundamental rights in the same way as the proposed measure. That is, in other words, answering the question: “Is there a way to protect and enforce both values without loss at the fundamental rights’ side?”

(v) Also noteworthy is the growing interest of national civil liberties groups to articulate their campaign at European level, and take advantage of the capacity to operate on different layers. This seemed to be mainly a prerogative of other actors, and in the field of security measures, of Interior Ministries and, to a certain degree, data protection authorities.57

(vi) In the context of a debate already underway on the possible revision of the Data Protection Directive, the German Constitutional Court judgment’s concern for traffic and location data is particularly precious. In particular, the decision to assess the level of data protection on the base of data processing technology has to be welcomed. This should offer some guidance when discussing the possible, and most adequate, regulations for ‘data mining’ and other ‘risk assessment’ tools.

(vii) The German Constitutional Court judgment highlights the idea that even ‘mere’ data retention is not a trivial measure, but a measure that has concrete consequences on societies and thus must undergo a severe check. This echoes the Strasbourg Court decision on the so-called Marper case, that criticized the ‘mere’, but not time-limited, retention of personal data of acquitted or discharged people.58 This posture is particularly important in the face of a continuous shift in the nature of security and surveillance measures, heading towards systems based on the ‘proactive’ or random accumulation of commercial and non-commercial data of a great number of people.59


58 European Court of Human Rights, Case of S. and Marper vs the United Kingdom, Application nos. 30562/04 and 30566/04, Strasbourg, 4 December 2008.

(viii) Finally, the German Constitutional Court judgment takes an interesting stance on the role of private companies, praising their participation in data retention as an important guarantee against possible excess of state surveillance. However, the role and the responsibilities of private actors in the setting of security measures based on data processing is still far from being clear, or from achieving political consensus. The principle that crime fighting and guaranteeing public security by means of legitimate restrictions of fundamental rights and liberties is the exclusive prerogative of the democratic constitutional state certainly deserves to be reanimated during this debate. Given the aforementioned modifications to the nature of security systems, the issue of the "privatisation" of security and crime-fighting deserves crucial attention.
The German Constitutional Court addressed this issue in *Solange I*. Dealing with a potential conflict between secondary, non-treaty European law to be implemented by German administrative authorities and fundamental rights as protected by the German Basic Law, the court specified:

[19] 2. This Court—in this respect in agreement with the law developed by the European Court of Justice—adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source; for the Community is not a State, in particular not a federal State, but a *sui generis* community in the process of progressive integration, an 'inter-State institution' within the meaning of Article 24 (1) of the Constitution.

[20] It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Constitution, nor can [the GEC] rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance.***

[22] 3. Article 24 of the Constitution deals with the transfer of sovereign rights to inter-State institutions.*** But Article 24 of the Constitution limits this possibility in that it nullifies any amendment of the Treaty which would destroy the identity of the valid Constitution of the Federal Republic of Germany by encroaching on the structures which go to make it up. And the same would apply to rules of secondary Community law made on the basis of a corresponding interpretation of the valid Treaty and in the same way affecting the structures essential to the Constitution.***

[23] 4. The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by
the standard of the Constitution with regard to fundamental rights.

[24] Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

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Twelve years later the GCC found that the EU had instituted sufficient fundamental rights guarantees as to eliminate the potential for conflict addressed in Solange I in Re the Application of Wunsche Handelsgesellschaft [also known as Solange II], 73 BVerfGE 339 (1986). In so doing, the Court observed:

[A] measure of protection of fundamental rights has been established [since Solange I] within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Constitution. All the main institutions of the Community have since acknowledged in a legally significant manner that in the exercise of their powers and the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the constitutions of member-States and by the European Convention on Human Rights.

[36] (aa) This standard of fundamental rights has in the meantime, particularly through the decisions of the European Court, been formulated in content, consolidated and adequately guaranteed.

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[38] The European Court took the essential step (from the viewpoint of the Constitution) in its judgment in the Nold case where it stated that in relation to the safeguarding of fundamental rights it had to start from the common constitutional traditions of the member-States: 'it cannot therefore allow measures which are incompatible with fundamental rights recognized and guaranteed by the constitutions of those States'.

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[40] The European Court has generally recognized and consistently applied in its decisions the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in reaching a balance between the common-interest objectives of the Community legal system and the safeguarding of the essential content of fundamental rights.

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[44] (e) Compared with the standard of fundamental rights under the Constitution it may be that the guarantees for the protection of such

rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognized by the Constitution or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court. What is decisive nevertheless is the attitude of principle which the Court maintains at this stage towards the Community’s obligations in respect of fundamental rights, to the incorporation of fundamental rights in Community law under legal rules and the legal connection of that law (to that extent) with the constitutions of member-States and with the European Human Rights Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court’s application of Community law.

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[48] (f) In view of those developments it must be held that, so long as the European Communities, and in particular in the case of law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.


5. As the EU has become more politically integrated through a series of treaties, the concern from the standpoint of member state national constitutions tends to shift from fundamental rights to structural, sovereignty, and democracy issues. Moreover, concern over the latter would presumably have intensified had the TCE entered into force and will undoubtedly persist upon implementation of the Lisbon Treaty. Can a veritable EU constitution be envisaged without the member states becoming the equivalent of federated entities?

Consider the following cases.

**MAASTRICHT TREATY CASE**
Federal Constitutional Court (Germany)
89 BVerfGE 165 (1993)

[The German federal government signed the amendments of the European treaties and legal instruments at Maastricht in 1992, in order to achieve further integration on the social, monetary, and political levels of the European Community in a then-to-be European Union. Professors and politicians brought constitutional challenges to Germany’s participation in the EU under the German Basic Law.]
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[The constitutional right to vote] forbids the weakening of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the Federal Parliament, to the extent that the principle of democracy is violated.

The principle of democracy does not prevent the Federal Republic of Germany from becoming a member of an inter-governmental community which is organised on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States.

If a community of States assumes sovereign responsibilities and thereby exercises sovereign powers, the peoples of the Member States must legitimate this process through their national parliaments. Democratic legitimation derives from the link between the actions of European governmental entities and the parliaments of the Member States. To an increasing extent in view of the degree to which the nations of Europe are growing together, the transmission of democratic legitimation within the institutional structure of the European Union by the European Parliament elected by the citizens of the Member States must also be taken into consideration.

The important factor is that the democratic foundations upon which the Union is based are extended concurrent with integration, and that a living democracy is maintained in the Member States while integration proceeds.

If the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities. The German Federal Parliament must retain functions and powers of substantial importance.

[The reasons for this are the following. Political rights are] violated if a law which subjects the German legal system to the direct validity and application of the law of the supranational European Communities does not give a sufficiently precise specification of the assigned rights to be exercised and of the proposed program of integration. This also means that any subsequent substantial amendments to that program of integration provided for by the Maastricht Treaty or to its authorizations to act are no longer covered by the Act of Accession to this Treaty. The German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds.***

[The Federal Republic of Germany is not, by ratifying the Maastricht Treaty, subjecting itself to an uncontrollable, unforeseeable process which will lead inexorably towards monetary union; the Maastricht Treaty simply paves the way for gradual further integration of the European Community as a community of laws. Every further step along this way is dependent either upon conditions being fulfilled by the parliament which can already be foreseen, or upon further consent from the Federal Government, which consent is subject to parliamentary influence.]
1. The right granted in the Constitution to participate, by means of elections, in the legitimation of State power and to influence the implementation of that power, precludes, within the scope of application of [the constitutional provision on European integration], such right being weakened by reassignment of the functions and the authority of the Federal Parliament in such a way that the principle of democracy declared inviolable *** is infringed.

2. It is an inviolable element of the principle of democracy that the performance of State functions and the exercise of State power derive from the people of the State and that they must, in principle, be justified to that people. This sequence of responsibility may be created in various ways, not just in a single specific way. The crucial factor is that a sufficient proportion of democratic legitimation, a specific level of legitimation, is achieved.

a) If the Federal Republic of Germany becomes a member of a community of States which is entitled to take sovereign action in its own right, and if that community of States is entrusted with the exercise of independent sovereign power (both of which the German Constitution expressly permits for the realisation of a unified Europe ** *), then democratic legitimation cannot be effected in the same way as it can within a State regime which is governed uniformly and conclusively by a State constitution. If sovereign rights are granted to supranational organisations, then the representative body elected by the people, i.e., the German Federal Parliament, and with it the enfranchised citizen, necessarily lose some of their influence upon the processes of decision-making and the formation of political will. Access to an inter-governmental community has the consequence that any individual member of that community is bound by decisions made by it. Of course, a State, and with it its citizens, which is a member of such a community also gains opportunities to exert influence as a consequence of its participation in the process of forming political will within the community for the purpose of pursuing common (and with those, individual) goals. The fact that the outcome of these goals is binding upon all Member States necessarily assumes that each Member State acknowledges the fact that it is bound.

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b) The principle of democracy does not, therefore, prevent the Federal Republic of Germany from becoming a member of an inter-governmental community which is organised on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States.

*** As the functions and powers of the Community are extended, the need will increase for representation of the peoples of the individual States by a European Parliament that exceeds the democratic legitimation and influence secured via the national parliaments, and which will form the basis for democratic support for the policies of the European Union. The common Union citizenship established by the Maastricht Treaty forms a legal bond between the citizens of the individual Member States which is designed to be lasting; it is not characterised by an intensity comparable to that which follows from common membership in a single State, but it does lend legally binding expression to that level of existential community which already exists. The influence which derives from the citizens of the Community may develop into democratic legitimation of European institutions, to the extent
that the following conditions for such legitimation are fulfilled by the peoples of the European Union.

If democracy is not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject.

*** State power in each of the States emanates from the people of that State. The States require sufficient areas of significant responsibility of their own, areas in which the people of the State concerned may develop and express itself within a process of forming political will which it legitimates and controls, in order to give legal expression to those matters which concern that people on a relatively homogenous basis spiritually, socially, and politically.

All of this leads to the conclusion that the German Federal Parliament must retain functions and powers of substantial import.***
LISBON TREATY CASE
Federal Constitutional Court (Germany)
Judgment of 30 June 2009
2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08,
2 BvR 1239/08, 2 BvR 182/09

[The German Act Approving the Treaty of Lisbon and the accompanying Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in EU Matters ("The Extending Act"), elaborated with a view to Germany's ratification of the Lisbon Treaty, were challenged as unconstitutional under the German Basic Law. In a unanimous decision, the Second Senate of the GGC held that the first of these acts was constitutional but that the second was not as it did not accord the Bundestag and the Bundesrat sufficient rights of participation in EU lawmaking procedures or treaty amendment procedures.]

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59. The Treaty of Lisbon establishes additional competences of the EU, extends the content of existing competences and supranationalises areas which have been subject to intergovernmental cooperation.

60. (1) In the former "First Pillar" [relating to the economy], the Treaty of Lisbon establishes new competences of the EU *** neighbourhood policy (Article 8 TEU Lisbon), services of general economic interest (Article 14 TFEU), energy (Article 194 TFEU), tourism (Article 195 TFEU), civil protection (Article 196 TFEU) and administrative cooperation ***

61. (2) Concerning the common foreign and security policy of the former "Second Pillar" [the Treaty of Lisbon] "will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy". Decisions shall be taken in principle by the European Council and the Council acting unanimously (Article 31.1 TEU Lisbon). Via the special bridging clause in Article 31.3 TEU Lisbon, however, the European Council may unanimously adopt a decision stipulating that the Council may act by a qualified majority in [many] cases. Decisions having military or defence implications are excluded (Article 31.4 TEU Lisbon). The
adoption of legislative acts shall be excluded (Article 24.1(2) sentence 2, Article 31.1(1) sentence 2 TFEU Lisbon). The European Parliament is consulted and informed on the essential issues and developments; it is to be ensured that its views are duly taken into consideration (Article 36 TFEU Lisbon). ** *

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63. (3) The field of police and judicial cooperation in criminal matters, which was the only one remaining in the former “Third Pillar” after the Treaties of Amsterdam and Nice, is incorporated into the area of application of the Treaty on the Functioning of the EU, which now comprises the entire field of justice and home affairs] by the Treaty of Lisbon. ** *

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72. Declaration no. 17 on Prinicity annexed to the Final Act of the Treaty of Lisbon reads as follows:

73. The Conference recalls that, in accordance with well settled case law of the Court of Justice of the EU, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.***

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78. *** [T]he ** Bundestag [and the Bundesrat] adopted the Act Approving the Treaty of Lisbon **

79. Furthermore, the ** ** Bundestag [and Bundesrat] ** ** adopted the accompanying laws, the Act Amending the Basic Law (Articles 23, 45 and 93) ** ** and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in [EU] Matters ** *

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81. Pursuant to Article 1 no. 1 of the Amending Act, Article 23.1a of the Basic Law, new version, has the following wording:

82. The Bundestag and the Bundesrat shall have the right to bring action before the Court of Justice of the EU on account of a legislative act of the EU infringing the principle of subsidiarity. ** *

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87. [T]he Extending Act ** ** is intended to create the national preconditions for the exercise of the rights of participation that are granted to the Bundestag and to the Bundesrat ** **. These are the right to give a reasoned opinion (“subsidiarity objection”) pursuant to Article 6.1 of the Subsidiary Protocol (Article 1 § 2 of the Extending Act), the right to bring action pursuant to Article 8 of the Subsidiary Protocol (“subsidiarity action”), via the Federal Government, on account of a legislative act of the EU infringing the principle of subsidiarity (Article 1 § 3 of the Extending Act), and the right to make known its opposition to a draft legislative act of the EU pursuant to Article 48.7(3) TFEU Lisbon and Article 81.3(3) TFEU (Article 1 § 4 of the Extending Act).

88. In its paragraph 1, Article 1 § 2 of the Extending Act essentially provides that as regards draft legislative acts of the EU, the Federal Government shall submit to the Bundestag and the Bundesrat detailed information
at the earliest possible date", at the latest, however, two weeks after the beginning of the eight-week period. Paragraph 2 grants the Bundestag and the Bundesrat powers to regulate in their rules of procedure the adoption of decisions concerning subsidiarity objections.

89. Article 1 § 3 of the Extending Act regulates the procedure of the subsidiarity action. The Bundestag is obliged, in particular pursuant to its paragraph 2 in analogy to Article 44.2 sentence 1 and Article 93.1 no. 2 of the Basic Law, new version, to bring action upon the application of one fourth of its Members; pursuant to paragraph 3, the Bundesrat can regulate in its Rules of Procedure how to bring about the adoption of a decision on a subsidiarity action. Pursuant to paragraph 4, the Federal Government sends the action on behalf of the body that adopted the decision of bringing such action "without delay" to Court of Justice of the EU.* * *

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207. The Extending Act does not contain provisions which are required and is unconstitutional to that extent. * * *(T)here are no decisive constitutional objections to the Act Approving the Treaty of Lisbon and the Act Amending the Basic Law (Articles 23, 45 and 93). * * *

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225. The constitutional mandate to realise a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law wants European integration and an international peaceful order. Therefore not only the principle of openness towards international law, but also the principle of openness towards European law applies.

226. It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the EU. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.

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244. The shape of the EU must comply with democratic principles as regards the nature and the extent of the transfer of sovereign powers and also as regards the organisational and procedural elaboration of the Union authority acting autonomously (Article 23.1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law). European integration may neither result in the system of democratic rule in Germany being undermined (a) nor may the supranational public authority as such fail to fulfil fundamental democratic requirements (b).

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246. The election of the Members of the German Bundestag by the people only fulfils its central role in the system of the federal and supranational intertwining of power if the German Bundestag, which represents the people,
and the Federal Government borne by it, retain a formative influence on the political development in Germany. This is the case if the German Bundestag retains responsibilities and competences of its own of substantial political importance or if the Federal Government, which is answerable to it politically, is in a position to exert a decisive influence on European decision-making procedures (see BVerfGE 89, 155 <207>.

247. Inward federalisation and outward supranationalisation can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better chances of a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and they make the peaceful balancing of interests easier. At the same time, they make it more difficult to create a will of the majority that can be asserted and that directly goes back to the people (Article 20.2 sentence 1 of the Basic Law). The transparency of the assignment of decisions to specific responsible actors decreases, with the result that the citizens can hardly take any tangible contexts of responsibility as an orientation for their vote. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not result already from the inalienability of the constituent power and of state sovereignty. ***

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249. European unification on the basis of a union of sovereign states under the Treaties may *** not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens’ circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology. ***

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251. Even if due to the great successes of European integration, a joint European public that engages in an issue-related cooperation in the rooms of resonance of their respective states is evidently growing ***, it cannot be overlooked, however, that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-state, language, history and culture. The principle of democracy as well as the principle of subsidiarity, which is
structurally demanded by Article 23.1 sentence 1 of the Basic Law as well, therefore require to factually restrict the transfer and exercise of sovereign powers to the [EU] in a predictable manner particularly in central political areas of the space of personal development and the shaping of the circumstances of life by social policy. ** *

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262. *** An increase of integration can be unconstitutional if the level of democratic legitimisation is not commensurate to the extent and the weight of supranational power of rule. As long as, and to the extent to which, the principle of conferral is adhered to in an association of sovereign states with marked traits of executive and governmental cooperation, the legitimisation provided by national parliaments and governments, which is complemented and carried by the directly elected European Parliament is, in principle, sufficient (see BVerfGE 89, 155 <184>). ** *

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264. A structural democratic deficit that would be unacceptable pursuant to Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action and the degree of independent formation of opinion on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for instance the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union. If an imbalance between character and the extent of the sovereign powers exercised and the degree of democratic legitimisation arises in the course of the development of the European integration, it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the [EU]. ** *

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266. With a view to compliance with democratic principles on the part of the [EU], Article 23.1 sentence 1 of the Basic Law, however does not demand "structural congruence" or even the correspondence of the institutional order of the [EU] to the order that the principle of democracy of the Basic Law prescribes for the national level. What is required, however, is a democratic elaboration which is commensurate to the status and the function of the Union ** *

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271. The [EU] itself acknowledges this democratic core concept as a general European constitutional tradition by placing corresponding structural requirements on the Member States and declaring their factual continued existence a precondition for participating in the European integration (Article 6.1 TEU; Article 2 TEU Lisbon ** *). As and to the extent that the [EU] itself only exercised derived public authority, it need not fully comply with the requirements. On the European level, the Council is not a second chamber as it would be in a federal state but the representative body of masters of the Treaties; correspondingly, it is not constituted according to proportional representation but according to the image of the equality of states. As a representative body of the peoples that is directly elected by the citizens of the Union,
the European Parliament is an additional independent source of democratic legitimisation (see BVorFGE 89, 155 <184–185>). ***

272. As long as the European order of competences according to the principle of conferral in cooperatively shaped decision-making procedures, exists taking into account the states' responsibility for integration, and as long as a well-balanced equilibrium of the competences of the Union and the competences of the states is retained, the democracy of the [EU] cannot, and need not, be shaped in analogy to that of a state. Instead, the [EU] is free to look for its own ways of democratic supplementation by means of additional, novel forms of transparent or participative political decision-making procedures. It is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule—their direct involvement in the discussions of the institutions competent for the binding political decisions—cannot replace the legitimising connection which goes back to elections and other votes. Such elements of participative democracy can, however, complement the legitimisation of European public authority. ***

273. The Treaty of Lisbon and the Act Approving the Treaty of Lisbon comply—taking into account the provisos that are specified in the grounds—with the constitutional requirements that have been explained (1.). The Act Amending the Basic Law (Articles 23, 45 and 83) is also constitutionally unobjectionable (2). The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters does not comply with the requirements under Article 38.1 in conjunction with Article 23.1 of the Basic Law and must be reformulated in a constitutional manner before the ratification of the Treaty (3). ***

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279. The democratic fundamental rule of the equality of opportunities of success ("one man, one vote") only applies within a people, not in a supranational body of representation, which remains a representation of the peoples linked to each other by the Treaties, even if the citizenship of the Union is particularly emphasised now.

280. Measured against requirements in a constitutional state, the [EU] lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people. What is also lacking in this connection is a system of organisation of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral decisions and a genuine competition between government and opposition which is transparent for the citizens, can come about. Even after the new formulation Article 14.2 TEU Lisbon, and contrary to the claim that Article 10.1 TEU Lisbon seems to make according to its wording, the European Parliament is not a body of representation of a sovereign European people. This is reflected in the fact that it, as the representation of the peoples in their respectively assigned national contingents of Members, is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality. ***

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298. As regards its competences and its exercising these competences, the EU, as a supranational organisation, must comply as before with the principle of conferral that is exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further expansion of competences, the principle of conferral is retained. The provisions of the Treaty can be interpreted in such a way that the constitutional and political identity of the fully democratically organised Member States is safeguarded, as well as their responsibility for the fundamental direction and elaboration of Union policy. Even after the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will remain a sovereign state and thus a subject of international law. The substance of German state authority, including the constituent power, is protected (aa), the German state territory remains assigned only to the Federal Republic of Germany (bb), there are no doubts concerning the continued existence of the German state people (cc). ***

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301. (a) The principle of conferral is a mechanism of protection to preserve the Member States' responsibility. The [EU] is competent for an issue only to the extent that the Member States have conferred such competence on it. Accordingly, the Member States are the constituted primary political area of their respective polities, the [EU] has secondary, i.e. delegated, responsibility for the tasks conferred on it. The Treaty of Lisbon explicitly confirms the current principle of conferral. "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" (Article 5.1 sentence.1 and 5.2 TEU Lisbon; see also Article 1.1, Article 3.6, Article 4.1, Article 48.6(3) TEU Lisbon; Article 2.1 and 2.2, Article 4.1, Article 19, Article 32, Article 130, Article 132.1, Article 207.6, Article 387 TFEU; Declaration no. 18 in Relation to the Delimitation of Competences; Declaration no. 24 Concerning the Legal Personality of the [EU]).

302. A mechanism of protection with a formal approach is the categorisation and classification of the [EU]'s competences according to exclusive competences, competences shared with the Member States, and competences to carry out actions to support, coordinate or supplement the actions of the Member States, which is performed for the first time. ***

303. ***[T]he common foreign and security policy and the coordination of economic and employment policies are outside the three competence categories and what is known as the open method of coordination is not mentioned. However, these derogations from the systematising fundamental approach do not affect the principle of conferral, and their nature and extent also does not call the objective of clear delimitation of competences into question.

304. (b) Additionally, mechanisms of protection under substantive law, in particular provisions concerning the exercise of competences, are intended to ensure that the powers conferred to the European level are exercised in such a way that the competences of the Member States are not affected. The provisions concerning the exercise of competences include the precept of respecting the Member States' national identities (Article 4.2 TEU Lisbon), the principle of loyal cooperation (Article 4.3 TEU Lisbon), the principle of
subsidiarity (Article 5.1 sentence 2 and 5.3 TEU Lisbon) and the principle of proportionality (Article 5.1 sentence 2 and 5.4 TEU Lisbon). These principles are confirmed, and partly rendered more precise as regards their content, by the Treaty of Lisbon.

305. Additionally, the principle of subsidiarity is procedurally strengthened by Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality (Subsidiarity Protocol). This is done by involving the national Parliaments through what is known as an early warning system (Article 12 lit b TEU Lisbon; Articles 4 et seq. of the Subsidiarity Protocol) in the monitoring of adherence to the principle of subsidiarity, and by extending the group of those entitled to bring an action to have declared an act void before the [ECJ] to include the national parliaments and the Committee of the Regions. ***

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316. Pursuant to the general and the special bridging clauses, the European Council *** may adopt a decision authorising the Council to act by a qualified majority and not by unanimity in a certain area or in a specific case (Article 48.7(1) sentence 1 TEU Lisbon; Article 31.3 TEU Lisbon; Article 312.2(2); Article 333.1 TFEU) ***. Decisions with military or defence implications are explicitly excluded from the possibility of passing over to qualified majority voting in the Council (Article 31.4, Article 48.7(1) sentence 2 TEU Lisbon). The European Council *** shall adopt a decision on the Treaty amendment by unanimity and—in the area of application of the general bridging clause—after obtaining the consent of the European Parliament (Article 48.7(4) TEU Lisbon). Additionally, the *** bridging clause[s] *** provide for the participation of the national parliaments in the area of family law with cross-border implications. Every national parliament can make known its opposition to a decision proposed by the European Council or the Council within six months after its being notified of it, with the consequence that the decision may not be adopted on the European level (Article 48.7(3) TEU Lisbon; Article 81.3(3) TFEU).

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318. The loss of German influence in the Council which goes along with the exercise of the *** bridging clauses must be predictable at the point in time of the ratification of the Treaty of Lisbon by the German legislature also as regards individual cases. Only if this is the case, the approval given in advance by a Member State to a later Treaty amendment is sufficiently democratically legitimised. The unanimity in the European Council *** that is required by the bridging clauses for the amendment of the procedural provisions is not a sufficient guarantee for this because it may not always be sufficiently ascertainable for the representatives of the Member States in the European Council *** to what extent the Member States' possibility of veto in the Council is thereby waived for future cases. ***

319. To the extent that the general bridging clause under Article 48.7 TEU Lisbon makes possible the transition from the principle of unanimity to the principle of qualified majority in the decision-making of the Council *** this is a Treaty amendment under primary law, which is to be assessed pursuant to Article 28.1 sentence 2 of the Basic Law. In its judgment on the Treaty of Maastricht, the Federal Constitutional Court pointed out as regards the chal-
leage made there concerning the loss of statehood in the area of Justice and Home Affairs, an area central to the subject of fundamental rights, that in the "Third Pillar", decisions were only adopted unanimously and that by these decisions no law was passed that would be directly applicable in the Member States and would claim precedence there (see BVerfGE 89, 155 <178>). The Treaty of Lisbon now transfers exactly this area to the supranational power of the Union by providing that by decisions adopted in the European Council in the general bridging procedure, areas can be transferred, with a right of opposition of the national parliaments but without a requirement of ratification in the Member States, from unanimity to qualified majority voting. This affects the core of the justifying line of argument of the judgment on the Treaty of Maastricht that has been cited. The national parliaments' right to make known their opposition (Article 48.7(3) TEU Lisbon) is not a sufficient equivalent to the requirement of ratification; therefore the approval by the representative of the German government always requires a law within the meaning of Article 23.1 sentence 2, and if necessary sentence 3, of the Basic Law. It is only in this way that the German legislative bodies exercise their responsibility for integration in a given case and also decide on the question of whether the level of democratic legitimisation is still high enough in the given case to accept the majority decision. The representative of the German government in the European Council may only approve a Treaty amendment brought about by the application of the general bridging clause if the German Bundestag and the Bundesrat have adopted within a period yet to be determined a law pursuant to Article 23.1 of the Basic Law which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation.

320. A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon. Also in these cases, however, it is incumbent on the Bundestag and, to the extent that the legislative competences of the Länder are affected, on the Bundesrat, to comply with the responsibility for integration in another suitable manner. The veto right in the Council may not be waived without the participation of the competent legislative bodies even as regards subject-matters which have already been factually determined in the Treaties. The representative of the German government in the European Council or in the Council may therefore only approve an amendment of primary law through the application of one of the special bridging clauses on behalf of the Federal Republic of Germany if the German Bundestag and, to the extent that this is required by the provisions on legislation, the Bundesrat, have approved this decision within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation. It would be incompatible with the constitutional requirement of a parliamentary decision if the concrete elaboration of the requirement of a time-limit would construe the possible silence on the part of the legislative bodies as their approval. If this requirement is complied with, the corresponding provisions of the Treaty of Lisbon may be applied in Germany.

322. Finally, the Treaty of Lisbon does not vest the [EU] with provisions that provide the [EU] of integration with the competence to decide on its own competence (Kompetenz-Kompetenz). Article 311.1 TFEU (aa) as well as Ar-
article 352 TFEU (bb) can be construed in such a way that the integration programme envisaged in the provisions can still be predicted and determined by the German legislative bodies.

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328. As regards the ban on transferring blanket empowerments or on transferring Kompetenz-Kompetenz, the provision meets with constitutional objections because the newly worded provision makes it possible to substantially amend Treaty foundations of the [EU] without the mandatory participation of legislative bodies beyond the Member States’ executive powers (see on the delimitation of competences: Laeken Declaration on the Future of the European Union of 15 December 2001, Bulletin EU 12-2001, I.27 <Annex>). The duty to inform the national parliaments set out in Article 352.2 TFEU does not alter this; for the Commission need only draw the national Parliaments’ attention to a corresponding lawmaking proposal. With a view to the undetermined nature of future cases of application of the flexibility clause, its use constitutionally requires ratification by the German Bundestag and the Bundesrat on the basis of Article 23.1 sentences 2 and 3 of the Basic Law. The German representative in the Council may not declare the formal approval of a corresponding lawmaking proposal of the Commission on behalf of the Federal Republic of Germany as long as these constitutionally required pre-conditions are not fulfilled.

329. *** The Treaty makes the existing right of each Member State to withdraw from the [EU] visible in primary law for the first time (Article 50 TEU Lisbon). The right to withdraw underlines the Member States’ sovereignty and shows apart from this that the current state of development of the [EU] does not transgress the boundary towards a state within the meaning of international law. If a Member State can withdraw on account of decision made on its own responsibility, the process of European integration is not irreversible. The membership of the Federal Republic of Germany depends instead from its lasting and continuing will to be a member of the [EU]. The legal boundaries of this will depend on the Basic Law.

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331. (4) With Declaration no. 17 Concerning Primacy annexed to the Treaty of Lisbon, the Federal Republic of Germany does not recognise an absolute primacy of application of Union law, which would be constitutionally objectionable, but merely confirms the legal situation as it has been interpreted by the Federal Constitutional Court.

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333. (a) The European instruments have assigned the interpretation of primary and of secondary law to their own European jurisdiction. *** Consequently, the law under the Treaties makes the case-law of the European Courts, especially that of the [ECJ], binding on the courts of the Member States via the orders to apply the law given through the national Acts approving the respective Treaty.

334. From the continuing sovereignty of the people which is anchored in the Member States and from the circumstance that the states remain the masters of the Treaties, it follows *** that the member states may not be deprived of the right to review adherence to the integration programme.
335. *** The law which is established supranationally does not have *** a derogating effect that annuls law. The primacy of application of European law does not affect the claim to validity of conflicting law in the Member States; it only forces it back as regards its application to the extent required by the Treaties and permitted by them pursuant to the order to apply the law given nationally by the Act approving the Treaty (see BVerfGE 73, 339 <375>). Community law and law of a Member State that is contrary to the [EU] is rendered inapplicable merely to the extent required by the content of regulation under [EU] law that is contrary to it.

336. This construction, which is rather theoretical in everyday application of the law because it often does not result in practical differences as regards its legal effects, has, however, consequences for the relation of the Member States' jurisdiction to the European one. Bodies of jurisdiction with a constitutional function may not, within the limits of the competences conferred on them—this is at any rate the position of the Basic Law—he deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inalienable constitutional identity.***

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339. The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This connection of derivation is not altered by the fact that the institution of the primacy of application is not explicitly provided for in the Treaties but has been obtained in the early phase of European integration in the case-law of the [ECJ] by means of interpretation. It is a consequence of the continuing sovereignty of the Member States ***

340. The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements—accepting, however, corresponding consequences in international relations—provided this is the only way in which a violation of fundamental principles of the constitution can be averted (see BVerfGE 111, 307 <317–318>). The [ECJ] based its decision of 3 September 2008 in the Case of Kadi on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (ECJ, Joined Cases C-402/05 P and C-415/05 P, RuR 2009, p. 80 <100 et seq.>). The [ECJ] has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal figure is not only familiar in international legal relations as reference to the ordre public as the boundary of commitment under a treaty; it also corresponds, at any rate if it is used in a constructive manner, to the idea of contexts of political order which are not structured according to a strict hierarchy. Facts that at any rate, it is no contradiction to the objective of openness towards European law, i.e. to the participation of the Federal Republic of Germany in the realisation of a united Europe (Preamble, Article 23.1 sentence 1 of the Basic Law), if exceptionally, and under spe-
cial and narrow conditions, the Federal Constitutional Court declares [EU]

law inapplicable in Germany (see BVerfGE 31, 145 <174>; 37, 271 <280 et seq.>; 73, 339 <374 et seq.>; 75, 223 <235, 242>; 89, 155 <174–176>; 102, 147 <162 et seq.>). ** *

343. [I]n Germany, the primacy of Union law only applies by virtue of
the order to apply the law issued by the Act approving the Treaties. As
regards public authority exercised in Germany, the primacy of application only
reaches as far as the Federal Republic of Germany approved this conflict of
law rule and was permitted to do so. This at the same time establishes that
the aspect of the primacy of application of ** Union law, cannot serve to
obtain a compelling argument in favour of a waiver of sovereign statehood or
to constitutional identity upon the entry into force of the Treaty of Lisbon.

344. The Act Approving the Treaty of Lisbon does not abandon the state
territory of the Federal Republic of Germany. It is true ** that international
treaties amending and supplementing existing primary law have, in
particular, created the internal market (Article 14.2 ECT) and have abolished
border controls in what is known as the Schengen area. The Treaty of Lisbon
further decreases the importance of the limiting element by introducing an
integrated management system for "external borders" (Article 77.1 lit c and
77.2 lit d TFEU). The EU, however, exercises public authority in Germany
on the basis of the competences transferred to it in the Act Approving the
Treaty of Lisbon, and thus not without express permission of the Federal Repu-
tic of Germany. A territory-related state authority ** continues to exist
unchanged under the changed conditions of cross-border mobility.

345. This is not countered by the fact that the "area without internal fron-
tiers" (Article 14.2 ECT, Article 154.1 ECT) and the "area of freedom, security
and justice", which has been supranationalised by the Treaty of Lisbon (Arti-
cles 67 et seq. TFEU), also reduces territorial sovereignty as an element of
the state territory. Pursuant to the Treaty of Lisbon, the EU does not have com-
prehensive territorial authority which replaces that of the Federal Republic
of Germany. That it does not claim such authority even after the entry into force
of the Treaty of Lisbon is shown by the fact that the Treaty only makes refer-
ence to a "territorial scope" of the Treaties (Article 52 TFEU Lisbon; Article 355
TFEU). The territorial scope is accessory to the state territory of the Member
States, which in its sum determines the area of application of Union law (Arti-
cle 52 TFEU Lisbon; Article 355 TFEU). There is no territory belonging directly
to the Union which would be free from this accessory nature **

346. After the ratification of the Treaty of Lisbon, the Federal Republic
of Germany will continue to have a state people. The concept of the "citizen of
the Union", which has been more strongly elaborated in Union law, is exclu-
sively founded on Treaty law. The citizenship of the Union is solely derived
from the will of the Member States and does not constitute a people of the
Union, which would be competent to exercise self-determination as a legal
entity giving itself a constitution.

347. In particular, the introduction of the citizenship of the Union does
not permit the conclusion that a federal system has been founded. ** After
the realisation of the principle of the sovereignty of the people in Europe, only
the peoples of the Member States can dispose of their respective constituent
powers and of the sovereignty of the state. **
348. *** The citizenship of the Union, which has been incorporated into primary law by past treaty amendments, is a derived status which shall be additional to national citizenship (Article 17.1 sentences 2 and 3 ECT; Article 9 sentence 3 TEU Lisbon). This status is also not altered by the rights connected with the citizenship of the Union even though the Treaty of Lisbon extends these rights. The citizens of the Union are granted a right to participate in the democratic life of the Union (Article 10.3, Article 11.1 TEU Lisbon), which emphasises a necessary structural connection between the civic polity and public authority. ***

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351. With the Treaty of Lisbon the Member States extend the scope of competences and the political possibilities of action of the European association of integration. After the entry into force of the Treaty of Lisbon, the existing and newly conferred competences will be exercised by the [EU] ***. Particularly the newly conferred competences in the areas of judicial cooperation in criminal (aa) and civil matters (bb), external trade relations (cc), common defence (dd) and with regard to social concerns can, and must, be exercised by the institutions of the [EU] in such a way that on the level of the Member States, tasks of sufficient weight as to their extent as well as their substance remain which legally and practically are the precondition of a living democracy.*** What is decisive for the constitutional assessment of the challenge is not the quantitative relations but whether the Federal Republic of Germany retains substantial national scope of action for central areas of statutory regulation and areas of life. ***

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358. Due to the fact that democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and law of criminal procedure, the corresponding foundations of competence in the Treaties must be interpreted strictly ***. This is explicitly recognised by the Treaty of Lisbon where it equips the newly established competences in the administration of criminal law with a so-called emergency brake which permits a member of the Council, which is ultimately responsible to its parliament, to prevent directives with relevance to criminal law at least for its own country, invoking "fundamental aspects of its criminal justice system" (Article 83.3 TFEU). ***

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370. [T]he Treaty of Lisbon amends the provisions on the common commercial policy. This especially concerns foreign direct investment as well as the trade in services and the commercial aspects of intellectual property (Article 207.1 TFEU).

371. The common commercial policy, i.e. the external trade-policy representation of the internal market worldwide, has already been an exclusive area of activity of the European Community according to current Community law (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, I-5267 marginal nos. 22 et seq.). ***

372. *** [T]reaties inter alia in the framework of the World Trade Organization (WTO) such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) fall under the exclusive competence of the Union. This abolishes the
basis of the current case-law of the [ECJ], according to which, due to the mixed competence in this area, the [WTO Agreement] of 15 April 1994 (OJ 1994 no. L 356/3), as a so-called mixed agreement, had to be concluded and ratified by the European Community and by the Member States (ECJ, opinion 1/94 of 15 November 1994, ECR 1994, p. 1-5267, marginal nos. 98 and 105; on the mixed-agreement status of an international agreement see also ECJ, opinion 1/78 of 4 October 1978, ECR 1979, p. 2871 marginal no. 2; ECJ, opinion 2/91 of 19 March 1993, ECR 1993, p. 1-1061, marginal nos. 13 and 39). ***

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374. With the exclusive competence presented, the Union attains the sole power of disposition of international trade agreements which may result in essential reorganisations of the internal order of the Member States. The shift of competences by the Treaty of Lisbon that has been presented concerns the Member States beyond the loss of their competence for concluding international trade agreements—and the elimination of the legislative participation of the Bundestag and the Bundesrat pursuant to Article 59.2 of the Basic Law that goes with it—also to the extent that it might reduce the status of the Member States' membership in the [WTO] to a merely formal one. The right to vote in the bodies of the World Trade Organization could solely be exercised by the [EU]. Furthermore, the Member States would lose their formal entitlement to be a party in the dispute settlement procedures of the [WTO]. Additionally, the Member States would be excluded from the global negotiations on new or amended agreements in the context of the extended common commercial policy, the so-called rounds of world trade talks.

375. It may remain open whether and to what extent the membership of the Member States of the [EU] in the [WTO] would no longer exist on the substantive level but only on the institutional and formal level. The Treaty of Lisbon may at any rate not force the Member States to waive their member status. This especially applies to the negotiations on multilateral trade relations within the meaning of Article III.2 of the WTO Agreement whose possible future content is not determined by the law of the [EU], and for which therefore a competence of the Member States may therefore emerge in the future, depending on the course of future trade rounds. Therefore an inadmissible curtailment of the statehood presupposed and protected by the Basic Law and of the principle of the sovereignty of the people due to a loss of viability in not insignificant areas of international relations cannot occur. The [WTO] remains the central forum for the world-wide dialogue on trade issues and the negotiation of corresponding trade agreements. Even if the Member States will, in practice, normally be represented by the Commission, their legal and diplomatic presence is also the precondition for participating in the discourse on fundamental sociopolitical and economic policy issues and to then explain and discuss the arguments and the results on the national level. When the Federal Government informs the German Bundestag and the Bundesrat of the topics of the rounds of world trade talks and the negotiation directives adopted by the Council (Article 218.2 TFEU), thereby permitting them to review adherence to the integration programme and the monitoring of the Federal Government's activities, this is not only the normal exercise of its general task of information (see BVerfGE 57, 1 <5>; 70, 324 <365>; 105, 279 <301 et seq.>; 110, 199 <215>); it is constitutionally obliged to do so with a view to the joint responsibility for integration and the differentiation of tasks.
among the constitutional bodies under the separation of powers.

376. The idea that the Member States' own legal personality status in external relations gradually takes second place to a [EU] which acts more and more clearly in analogy to a state does not is not at all reflected in a predictable tendency, made irreversible by the Treaty of Lisbon, in the sense of a formation of a federal state that would factually be necessary at any rate. The development to date of a membership that is cooperatively mixed and is exercised in parallel might, on the contrary, be a model for other international organisations and other associations of states. To the extent that the development of the [EU] in analogy to a state would be continued on the basis of the Treaty of Lisbon, which is open to development in this context, this would be in contradiction to constitutional foundations. Such a step, however, has not been made by the Treaty of Lisbon.***

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384. The wording of the Treaty of Lisbon does not oblige the Member States to provide national armed forces for military deployments of the [EU].***This ***is not countered by Article 42.7(1) sentence 1 TEU Lisbon, which for the first time introduces an obligation of mutual assistance of the Member States. In the case of armed aggression on the territory of a Member State, "the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter". ***

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392. The Treaty of Lisbon does not restrict the democratic possibilities of the German Bundestag of shaping social policy in such a way that the principle of the social state (Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law) would be impaired in a constitutionally objectionable manner and that the democratic scope for action which is necessary in this context would be inadmissibly curtailed.***

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401. The Act Amending the Basic Law (Articles 23, 45 and 93), which is a constitution-amending Act ***is ***constitutional. ***

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404. The insertion of a subsection 1a into Article 23 of the Basic Law does not meet with constitutional objections also as regards the quorum of one fourth of the Members of the German Bundestag. It is true that the obligation of the Bundestag to bring a subsidiarity action if one fourth of its Members demand this step (Article 23:1a sentence 2 of the Basic Law, new version) derogates from the majority principle set out in Article 42.2 of the Basic Law. This is, however, unobjectionable for the sole reason that these are not decisions with a regulatory effect but the power to take recourse to a court (see Article 93.1 no. 2 of the Basic Law).***

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406. The Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in [EU] Matters (Extending Act) infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as rights of participa-
tion of the German *Bundestag* and the *Bundesrat* have not been elaborated to the extent required.

407. a) The *Extending Act*** is intended to create the national preconditions for the exercise of the rights of participation that are granted to the *Bundestag* and to the *Bundesrat***. The Act regulates the exercise of the rights granted in the context of the procedure for monitoring adherence to the subsidiarity principle (Article 1 § 2 and § 3 of the Extending Act) and the right, explicitly provided for in the Treaty of Lisbon, to reject treaty-amending instruments of the [EU] (Article 1 § 4 of the Extending Act) via the bridging procedure pursuant to Article 48.7(3) TEU Lisbon and Article 81.3(3) TFEU.***

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413. (3) In the area of application of the general bridging procedure pursuant to Article 48.7 TEU Lisbon and the special bridging clauses, the legislature may not by the Extending Act waive its necessary and mandatory approval of an initiative of the European Council *** for passing over from unanimity to qualified majority voting as regards the adoption of decisions in the Council and for passing over from a special legislative procedure to the ordinary legislative procedure; it may also not give its approval “in reserve”, i.e. in abstract anticipation. With the approval of a primary-law amendment of the Treaties in the area of application of the general bridging clause and the special bridging clauses, *Bundestag* and *Bundesrat* determine the extent of the commitments which are based on an international agreement and bear political responsibility for this vis-à-vis the citizen ([see BVerfGE 104, 151 <209>; 118, 244 <260>; 121, 135 <157>]). In this context, legal and political responsibility of Parliament is, even in the case of European integration, not restricted to a single act of approval but extends to its further execution. Silence on the part of the *Bundestag* and the *Bundesrat* is therefore not sufficient for exercising this responsibility.

414. (a) To the extent that *** Article 48.7(3) TEU Lisbon and *** Article 81.3(3) TFEU grant the national parliaments a right to make known their opposition, this is not a sufficient equivalent to the requirement of ratification. It is therefore necessary that the representative of the German government in the European Council or in the Council may only approve the draft Resolution if empowered to do so by the German *Bundestag* and the *Bundesrat* within a period yet to be determined, which takes the purpose of Article 48.7(3) TEU Lisbon as an orientation, by a law within the meaning of Article 23.1 sentence 2 of the Basic Law.
Federal Constitutional Court - Press office -

Press release no. 55/2011 of 7 September 2011

Judgment of 7 September 2011
2 BvR 987/10
2 BvR 1485/10
2 BvR 1099/10

Constitutional complaints lodged against aid measures for Greece and against the euro rescue package unsuccessful - No violation of the Bundestag's budget autonomy

In today's judgment, the Federal Constitutional Court has rejected as unfounded three constitutional complaints which are directed against German and European legal instruments and other measures in connection with the aid to Greece and with the euro rescue package.


The Second Senate of the Federal Constitutional Court has decided that the Monetary Union Financial Stabilisation Act (Währungunion-Finanztänilisierungsgesetz), which grants the authorisation to provide aid to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus), hereinafter: Euro Stabilisation Mechanism Act (Euro-Stabilisierungsmechanismus-Gesetz), which relates to the euro rescue package, do not violate the right to elect the Bundestag under Article 38.1 of the Basic Law (Grundgesetz - GG). By adopting these Acts, the German Bundestag did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments.

However, § 1.4 of the Euro Stabilisation Mechanism Act is only compatible with the Basic Law if it is interpreted in conformity with the constitution. The provision is to be interpreted to the effect that the Federal Government is obliged to obtain prior approval by the Budget Committee before giving guarantees within the meaning of the Act.

Furthermore, the Senate determines the boundaries under constitutional law for authorisations to give guarantees for the benefit of other states in the European monetary union.
In essence, the judgment is based on the following considerations:

I. Scope of review / admissibility
The Senate regards the constitutional complaints which have been lodged as admissible only to the extent that the citizens, invoking their right to elect the Bundestag, which is protected by Article 38 GG, challenge a loss of substance of their power to rule, as it is organised in a constitutional state, by a far-reaching, or even comprehensive, transfer of duties and authorities of the Bundestag. Article 38.1 GG protects competences of the present or of a future Bundestag from being undermined, which would make the realisation of the citizens’ political will legally or practically impossible. In principle, there is a threat of the act of voting being devalued in such a way if authorisations to give guarantees are granted in order to implement obligations which the Federal Republic of Germany incurs under international agreements concluded in order to maintain the liquidity of currency union member states. The Senate was permitted to leave undecided under what preconditions constitutional complaints lodged against a supplementation of primary Union law by measures outside the Treaty structure may rely on Article 38.1 sentence 1 GG. In this respect, the complainants have not presented a concrete context which indicates a supplementation of primary Union law by measures outside the Treaty structure that is due to the impugned measures. Also with regard to a possible violation of the fundamental right to property (Article 14 GG), the complainants have not sufficiently presented facts from which it follows that the challenged measures might result in objectively impairing the euro’s purchasing power to a considerable extent. To the extent that the constitutional complaints impugn not only the two pertinent Acts of the German Bundestag, they are inadmissible because they lack a suitable object of complaint.

II. Standard of review
Article 38 GG demands, in connection with the tenets of the principle of democracy (Article 20.1 and 20.2, Article 79.3 GG), that the decision on revenue and expenditure of the public sector remain in the hand of the German Bundestag as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions in a system of intergovernmental governance as well. When establishing mechanisms of considerable financial importance which can lead to incalculable burdens on the budget, the German Bundestag must therefore ensure that later on, mandatory approval by the Bundestag is always obtained again. In this context, the Bundestag, as the legislature, is also prohibited from establishing permanent mechanisms under the law of international agreements which result in an assumption of liability for other states’ voluntary decisions, especially if they have consequences whose impact is difficult to calculate. Every larger scale aid measure of the Federation taken in a spirit of solidarity and involving public expenditure at international or European Union level must be specifically approved by the Bundestag. Sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with.

The Senate, which, with a view to the procedural setting of the proceedings, was barred from reviewing the impugned Acts against provisions of Union law, nevertheless points out that the existing European Treaties are not contrary to an understanding of the national budget autonomy as an essential, inalienable competence of the directly
democratically legitimised parliaments of the Member States but that they, on the contrary, require the existence of such competence. Strict observance of the European Treaties guarantees that the actions of the institutions of the European Union have a sufficient democratic legitimation in Germany and for Germany. In this context, the Senate also points out that the conception under the Treaty of the currency union as a stability-oriented community is the basis and the object of the German Act approving the Treaty, as the Senate has already made clear by its Maastricht ruling (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 89, 155 <205>.

III. Subsumption
When establishing a prohibited relinquishment of budget autonomy, the Federal Constitutional Court cannot put itself in the place of the legislature with an expertise of its own. With regard to the extent of the assumption of guarantees, it has to restrict its review to evident transgressions of ultimate boundaries. In this context, the legislature has a margin of appreciation with regard to the probability of having to make payments in a guarantee event, which the Federal Constitutional Court has to respect. Something similar applies to the assessment of the future sustainability of the federal budget and of the economic performance of the Federal Republic of Germany. Taking this legislative priority of appreciation into account, and measured against the constitutional standards that have permissibly been applied, both the Monetary Union Financial Stabilisation Act and the Euro Stabilisation Mechanism Act prove to be compatible with the Basic Law. The Bundestag did not deplete its right to adopt the budget and control its implementation by the government and did not disregard the essential content of the principle of democracy.

It cannot be established that the amount of the guarantees given exceeds the limit of budget capacity to such an extent that budget autonomy would virtually be rendered completely ineffective. The legislature’s assessment that the authorisations to give guarantees to the amount of a total of approximately EUR 170 billion are within the capacity of the federal budget does not transgress its margin of appreciation and is therefore constitutionally unobjectionable. The same applies to the legislature’s expectation that even in the case of the complete realisation of the guarantee risk it would still be possible to refinance the losses through revenue increases, cuts in expenditure and longer-term government bonds. At present, there is also no reason to assume an irreversible process with consequences for the German Bundestag’s budget autonomy.

The German Act Approving the Treaty of Maastricht in the version of the Treaty of Lisbon still guarantees in a manner that is sufficiently definite under constitutional law that the Federal Republic of Germany is not subjecting itself to an incalculable automatism of a liability community which follows a course of its own that can no longer be steered.

Neither of the two impugned Acts establishes or consolidates an automatism by which the Bundestag would relinquish its right to adopt the budget and control its implementation by the government.

The Monetary Union Financial Stabilisation Act restricts the authorisation to give guarantees with regard to their amount, it indicates the objective of the guarantee, provides, to a certain extent, for the payment modalities and makes certain agreements with Greece the
basis of the giving of guarantees. Thus, the content of the authorisation to give guarantees is defined to a large extent.

The Euro Stabilisation Mechanism Act lays down not only the objective and the fundamental modalities but also the amount of possible guarantees. The giving of guarantees is only possible during a certain period of time, and it is made contingent on agreeing an economic-policy and finance-policy programme with the Member State affected. The programme requires mutual agreement of the euro currency area states, which secures a determining influence to the Federal Government.

However, § 1.4 sentence 1 of this Act merely obliges the Federal Government to strive to reach an agreement with the Bundestag’s Budget Committee before giving guarantees. This is not sufficient. Instead, guaranteeing parliamentary budget autonomy requires an interpretation of this provision in conformity with the constitution to the effect that the Federal Government is in principle obliged to always obtain prior approval by the Budget Committee before giving guarantees.

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Zum ANFANG des Dokuments