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Data protection in Germany I: The population census decision and the right to informational self-determination

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ABSTRACT

This year, the population census decision of the German Federal Constitutional Court (Bundesverfassungsgericht) will celebrate its 25th anniversary. The celebration is a good reason to take a look back at this groundbreaking decision, which has lost none of its topicality and validity. It is also an occasion to examine the wave of new Bundesverfassungsgericht decisions, stemming from the beginning of 2008, on governmental surveillance and data protection, in particular the "online-searching" decision, the decision on license plate scanning, and the interim injunction to partly stop the enactment of the European data retention directive in Germany. This article is an attempt at helping overcome the language barrier that has prevented much of the world from understanding the depth and value of German legal theory on data protection (This article is thus following an appeal made by J. A. Cannataci, "Lex Personalitatis & Technology-driven Law", *scripted*, Volume 5, Issue 1, April 2008, p. 3, via http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/editorial.asp). In this first part, we will examine the population census decision and the German concept of informational self-determination. The second part, to be published in the next issue of CLSR, deals with the aforementioned new decisions.

1. Introduction

In 1983, the German federal government planned to conduct a general population census. However, there was a lot of resentment within the German population because of a fear of surveillance and the feeling that such a statistical census was an unjust invasion of privacy.[1] These feelings led to a heated public debate, which resulted in pleas for a boycott and in the filing of a lawsuit at the Bundesverfassungsgericht.[2] On the eve of the highly symbolic year of 1984, the Bundesverfassungsgericht decided that the Population Census Act was partly

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* The authors are researchers at the University Kassel/Germany and members of the "Project group for constitutionally compatible technology design (provet)". Disclaimer: The authors were among the 34,000 citizens that filed the lawsuit against data retention in Germany which led to the third decision of the Bundesverfassungsgericht described in part II of this article.

1 On the political debates, see e.g. J. Taeger, *Die Volkszählung*, 1983.

2 The position of the Bundesverfassungsgericht within the constitutional framework is unusually strong, compared to other European constitutional courts, and includes the power to annul federal acts as well state acts.

unconstitutional and thus it was annulled, temporarily putting an end to the population census.[3]

In this decision, the Bundesverfassungsgericht "invented" the new basic right of informational self-determination, which is the legal anchor for data protection in the German constitution. The decision is, to this date, the most important decision in the history of German data protection and the

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Bundesverfassungsgericht still frequently refers to it in new decisions. Understanding this decision and the right to informational self-determination is the very key to the German view on data protection. The right is based on both sociological and legal considerations, which follow the nature of the German constitution (Grundgesetz). In order to understand the full scale of the right to informational self-determination, all considerations must be examined.

2. The population census decision and the right to informational self-determination

2.1. Background of the population census and outcome of the case

In 1982, the German federal parliament (Bundestag) passed an Act on a Population Census to be conducted in the following year. Remarkably, the Act was adopted by unanimous vote, and the few statements in the parliamentary debate did not address data protection issues, but rather dealt with issues on financing the census.

In contrast to the absence of any controversial discussions in the Bundestag, there was a huge societal debate about the data protection risks and the usefulness of the population census. The opponents formed a broad counter-movement but could not convince the government to abandon or even alter the plans. Besides a general scepticism towards the possibilities of central planning, the arguments of the opponents focused on data protection problems. There were fears that the data could be linked back to the individuals, as there were more than 160 questions to be answered in the questionnaire. In addition, the forms contained code numbers and were to be kept for a considerable length of time. The data was to be collected, under the supervision of local authorities, by 600,000 collectors. Importantly, the data was not only to be used for statistical purposes, but also for comparison with and correction of resident registers.

The plans of the government happened to meet a public opinion which was characterised by general resentment against growing surveillance and data processing. The negative opinion was partly interlinked with antipathies to public authorities and so-called "computerisation" in general.

Besides the political debate, the Census Act was also challenged before the Bundesverfassungsgericht. On December 15, 1983, the court delivered its decision.[4] The general aim of the population census was upheld, but the judges demanded further procedural and organisational safeguards to protect citizens' fundamental rights. Additionally, the data transfer to the local authorities was considered unconstitutional as it blurred the boundaries between data collection for anonymous statistical purposes and the processing of personal data by those authorities.

Even though the result of the decision was considered a great victory for the plaintiffs and the counter-movement in general, the population census was not stopped, but only delayed. A

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[3] The population census was conducted in 1987 (see below).

[4] Bundesverfassungsgericht, decisions volume 65, p. 1 ff.

new Act of Parliament, which took into account the ruling of the Bundesverfassungsgericht, was passed in 1985, and the population census took place on May 25, 1987. The new Act was equally challenged before the court, but the judges considered it constitutional. To this date, however, this was the last population census in Germany.[5]

From today's point of view, the reasoning of the court is by far more important than the concrete outcome of the case. In developing the fundamental right of informational self-determination, the court laid the foundations of both constitutional and sub-constitutional German data protection law.

2.2. Informational self-determination

Important parts of the reasoning of the Bundesverfassungsgericht are based on ideas from the sociological systems theory, particularly the works of the late German sociologist Niklas Luhmann. In his works on fundamental rights, Luhmann explains that such rights have the function of guarding the differentiation of society into sub-systems.[6] The role of privacy, in particular, is to protect the consistency of the individuality of the individual, and consistent self-expressions rely heavily on the separation of societal sub-systems.[7] Privacy and informational self-determination guard these separation lines, as they prevent sensitive information from one context (e.g. the working world, medical treatment, family life, etc.) from proliferating into other ones. The protection of personal data is essential for a free and self-determined development of the individual. At the same time, the self-determined development of the individual is a precondition for a free and democratic communication order.[8] If citizens cannot oversee and control which or even what kind of information about them is openly accessible in their social environment, and if they cannot even appraise the knowledge of possible communication partners, they may be inhibited in making use of their freedom. If citizens are unsure whether dissenting behaviour is noticed and information is being permanently stored, used and passed on, they will try to avoid dissenting behaviour so as not to attract attention. They may

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even abstain from making use of their basic and human rights. In a potentially all-knowing state, freedom of speech and freedom of choice are virtually impossible.[9]

Hence, the German concept of informational self-determination is very disparate from the idea of privacy as a "right to be let alone".[10] Rather, informational self-determination and data

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5 There are plans by the government to take part in the EU-wide population census scheduled for 2011. This census will however be based on registers. According to the Federal Statistical Office (Statistisches Bundesamt), "This means that basically only those data will be collected from the people in Germany which cannot be obtained by evaluating existing administrative registers (mainly population registers and registers of the Federal Employment Agency)", see http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Navigation/Census/Census.psml.

6 N. Luhmann, *Grundrechte als Institution*, 1965; see also B. Rössler, *Der Wert des Privaten*, 2001, pp. 127 ff., 136 ff., 201 ff. et passim; P. K. Donos, *Datenschutz – Prinzipien und Ziele*, 1998; for a different approach see M. Albers, *Informationelle Selbstbestimmung*, 2005, pp. 151 ff., 353 ff. et passim, who is rather critical of the reasoning of the Bundesverfassungsgericht.

7 N. Luhmann, *Grundrechte als Institution*, 1965, pp. 60 ff.

8 Bundesverfassungsgericht, decisions volume 65, p. 1 (pp. 42 ff.); for the effects of governmental surveillance on a democratic communication order cf. A. Podlech, "Aufgaben und Problematik des Datenschutzes", *Datenverarbeitung im Recht 5* (1976), pp. 23 ff.; H.-H. Trute, "Verfassungsrechtliche Grundlagen", in: A. Roßnagel (ed.), Handbuch Datenschutzrecht, 2003, pp. 156 ff.

9 C. Gusy, "Der Schutz der Privatsphäre in Art. 8 EMRK", *Datenverarbeitung im Recht* 13 (1984), p. 289 (p. 295).

10 As understood by S. D. Warren/L. D. Brandeis, "The Right to Privacy", *Harvard Law Review* 4 (1890), pp. 193 – 220.

protection have two corresponding effects:[11] The individual is shielded from interferences in personal matters, thus creating a sphere in which he or she can feel safe from any interference. At the same time, data protection is also a precondition for citizens' unbiased participation in the political processes of the democratic constitutional state. The democratic constitutional state relies to a great extent on the participation of all citizens and its legitimacy is based on respecting each person's individual liberty. As said before, the right to informational self-determination is not only granted for the sake of the individual, but also in the interest of the public, to guarantee a free and democratic communication order. Therefore, it is primarily possible to justify interferences in the right to informational self-determination if a consideration of both principles shows that the public interest outweighs the legitimate interests of the individual. However, the basic idea is always the same: the data subject is to maintain control of his/her own data.

Neither the right to informational self-determination nor a general right to privacy are explicitly mentioned in the Grundgesetz. However, the Bundesverfassungsgericht had recognised a general right of personality as part of the Grundgesetz long before the population census decision. The legal basis for this right is provided by two separate provisions of the constitution, namely the protection of human dignity (Article 1, para. 1) and the protection of general personal liberty (Article 2, para. 1). Together they form the general right of personality which guarantees each individual the possibility to develop his/her own personality. To achieve this, the fundamental right has several implementations, of which the right to informational self-determination is arguably one of the more important ones.[12]

It is thus misleading to state that German data protection law is based solely on the human dignity recognition right. Rather, informational self-determination forms a sub-group of the general right of personality, which overlaps several other sub-groups.[13] As the general right of personality itself is based partly on the protection of human dignity, there is indeed a link between human dignity and data protection, although it is much more indirect than one might think.

3. Legal conclusions

The reasoning of the Bundesverfassungsgericht and the development of the right to informational self-determination led to consequences for Germany's interpretation of data protection and the safeguards which had to be implemented into the Data Protection Acts.[14]

In the German understanding, the right to informational self-determination, as the constitutional anchor for data protection, is a part of the general personality right. It is therefore closely connected to and serves the idea of giving every person the possibility to develop a free and self-determined personality. Based on this, the right to informational self-determination has always been restricted to natural persons and cannot be invoked by legal entities.

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[11] S. Simitis, "Datenschutz – Rückschritt oder Neubeginn?", *Neue Juristische Wochenschrift* 1998, p. 2473 (p. 2475).

[12] Other sub-rights include such diverse rights as the right to one's own image and word, the right to counterstatement, the right to know one's biological parents, and the right to sex change.

[13] P. Kunig, in: I. von Münch / P. Kunig (eds.), *Grundgesetz*, 5th ed. 2000, Article 2 para. 38; a new, and different, understanding is provided by M. Albers (above n. 6), pp. 353 ff.

[14] Germany already had a Federal Data Protection Act before the population census decision. It was enacted in 1977, but had to be completely revised after the population census decision. The new Data Protection Act entered into force in 1990. After the Data Protection Directive 95/46/EC was enacted in 1995, it took the German federal legislator six years to transpose this directive into a new Data Protection Act. The Commission is of the opinion that Germany has to this date not transposed the directive completely. By way of comparison: the Data Retention Directive 2006/24/EC was transposed within two years.

The Bundesverfassungsgericht developed a series of safeguards to protect citizens from disproportionate intrusions into their right to informational self-determination. Since the right has the status of a constitutional fundamental right, interventions are only possible to further a general legal interest (Rechtsgut*)* of constitutional status. In addition, acts intervening with the citizen's right to informational self-determination must be based on an enabling act, which itself must meet high standards of clarity and certainty.[15] These demands are due to the fact that the right to informational self-determination should enable citizens to freely develop their personality.

If interventions into their rights are deemed necessary, citizens must be put in a position where they can assess the risks for their personality which are connected with a processing of their personal data. Thus, the scope, intensity, and purpose(s) of the data processing have to be transparent. Consequently, the Bundesverfassungsgericht considers secret interventions to have an even bigger impact on informational self-determination. Since nobody can absolutely rule out the possibility that he/she has been subject to a secret act of data collection, the intimidating effect of such measures is much higher, which in turn leads to a strong negative effect on the democratic communication order as a whole. Therefore, the constitutional requirements for secret interventions are much stricter.

Another issue to which the Bundesverfassungsgericht has paid a lot of attention is that of personality profiles. From a legal point of view, profiling differs from other extensive data collections like data warehouses. Within a profile, the data is to be linked purposefully to gather additional information which goes beyond that which can be obtained from

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the original data.[16] This additional information is based on conclusions drawn from the linking of the data. The way in which the additional information is gathered bears substantial risks for the individual, because through the combination and the linking of seemingly harmless information, new and maybe even sensitive data can be generated.[17] If this happens, the data processor may be able to gather information about the individual which he/she never disclosed.[18] This may pose a threat to the individual's right to informational self-determination, which is supposed to put the individual in the position to, in principle, decide for him/herself which personal information is to be disclosed in his/her social environment. Even before the population census decision, the Bundesverfassungsgericht ruled that:

> "*It would be contradicting the constitutional guarantee of human dignity for the government to claim the right to compulsorily register and index an individual's complete personality even in the anonymity provided by a statistical census, since the individual would be treated as an object accessible to an inventory in every way.*"[19]

It repeated this way of reasoning in the population census decision and then linked it with the newly-found right to informational self-determination, which is in part based on the guarantee of recognition of one's dignity.[20]

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[15] Bundesverfassungsgericht, decisions volume 65, pp. 1 (44).

[16] A. Moscibroda / C. Schnabel et al., *SPICE: Legal and Regulation Issues*, June 2008, pp. 35 ff, via http://www.ist-spice.org/documents/SPICE_D1.6_FINAL_CC.pdf; P. Scholz, *Datenschutz beim Internet-Einkauf*, 2003, p. 95.

[17] J. Hladjk, Online-Profiling und Datenschutz, 2007, p. 37.

[18] Cf. A. Breinlinger, "Datenschutzrechtliche Probleme bei Kunden- und Verbraucherbefragungen", *Recht der Datenverarbeitung* 1997, p. 247 (p. 252).

[19] Bundesverfassungsgericht, decisions volume 27, p. 1 (p. 6) "Mikrozensus-Decision".

[20] Bundesverfassungsgericht, decisions volume 65, p. 1 (pp. 42, 48, 52, 53, and 57).

To further the ban on personality profiles, the Bundesverfassungsgericht also prohibited the introduction of a unique personal identifier for every citizen. The court sees the introduction of a unique personal identifier, in any form, as an enabling step to collecting and compiling all personal data related to an individual. There are of course occasions in which a unique identifying number for every citizen or at least the majority of citizens is necessary (like tax numbers or ID card numbers), but in such cases an explicit legal provision exists that forbids the use of these numbers as a unique personal identifier.[21] In contrast, the collection of all official data with the intention of creating a complete personality profile would violate the guarantee to have one's dignity recognised.[22]

Another "invention" the Bundesverfassungsgericht made in the population census decision was the concept of informational separation of powers.[23] The court decided that the state was not to be considered as a single entity as far as the collection and use of personal data is concerned. Due to the principles of purpose specification and proportionality, the purpose for which data is processed must be specified at the time of collection and there must never be more data collected than absolutely necessary for achieving the specified purpose. As the purpose is defined by the specific competence of the respective public authority, organisational measures must be in place to separate the corresponding processes. This leads to the conclusion that the state as a whole cannot be considered as one data processor. Rather there has to be an informational separation of powers, which means that the state consists of different entities which are all considered to be single data processors. Any data transfer from one state entity to another is thus an act of data processing which must be based on a legal provision which meets the high standards of clarity and certainty. Ideas to grant power to the Secretary of State "to remove or modify any legal barrier to data-sharing" between state agencies as they are recently being discussed in the UK[24] could never be constitutional in Germany.

In the population census decision, the Bundesverfassungsgericht adopted a number of principles of data protection which can now be considered the key principles of data protection in all of Europe, since they are all fixed in the Data Protection Directive 95/46/EC.[25] This also includes, next to the data minimisation principle,[26] obligations of the data controller and rights of the data subject,[27] as well as the above mentioned principles of purpose specification[28] and proportionality.[29] Based on the ideas of purpose specification and proportionality, the Bundesverfassungsgericht developed an extensive prohibition of data retention.[30] According to the court, the collection of non-anonymised data for unspecified purposes or purposes to be specified later would be a violation of these principles. An exception can only be made for anonymised data which is collected for means of statistics,

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[21] See e.g. section 4 para 2, 3 of the German Identification Card Act (Personalausweisgesetz).
[22] Bundesverfassungsgericht, decisions volume 65, p. 1 (p. 53).
[23] Bundesverfassungsgericht, decisions volume 65, p. 1 (p. 69).
[24] R. Thomas / M. Walport *Data Sharing Review Report*, 11 July 2008, Recommendation 8a p. 4, via http://www.justice.gov.uk/docs/data-sharing-review.pdf.
[25] This is not to say that the Bundesverfassungsgericht invented all those principles, since it could resort to the works of scholars, but it made those principles mandatory even for the legislator.
[26] Not expressively mentioned in Directive 95/46/EC, but, rather, considered to be a result of the principles of purpose specification and proportionality. However, in Germany it has been incorporated expressly in Section 3a of the German Federal Data Protection Act.
[27] Articles 10, 11, 12, 14, 18 of the Directive 95/46/EC.
[28] Article 6 para 1 (b) of the Directive 95/46/EC.
[29] Article 6 para 1 (c) of the Directive 95/46/EC.
[30] Bundesverfassungsgericht, decisions volume 65, pp. 1 (pp. 46 f.).

since it lies in the very nature of statistics that not all of the purposes the data are to be used for can be known at the time of collection.[31]

4. Conclusion

The population census decision seems to stem from another age. Although the level of surveillance citizens were submitted to was much less intense than today, there was

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a high level of consciousness about the negative effects surveillance might have on democracy as a whole. Due to the limited processing speed of computers and the fact that data transmission required truckloads of punch cards to be moved from one computer system to another, the threat for citizen's privacy cannot even be compared to the situation today. In contrast to the growing possibilities for technical surveillance, citizens lost interest in the issue of data protection during the late 1980s and all through the 1990s. However, plans of German security politicians for a stricter surveillance of suspects and the extension of surveillance measures against unsuspected citizens recently lead to a renaissance of data protection issues in the German public debate.

The threat the German population is facing now is different from the population censuses of 1983 and 1987 in terms of intensity, ubiquity and transparency. However, the Bundesverfassungsgericht made the wise decision in 1983 to react to the population census not only with a decision which corrected single details of the planned census, but instead created the right to informational self-determination and, in addition, demanded a democratic communication order which could resist the state and private data collectors' hunger for data.

The cornerstones of this democratic communication order ordered by the court in 1983 are still valid and form the basis for the most recent decisions from the beginning of 2008. Although these decisions deal with highly advanced technologies, such as the online searching of computers, automatic number plate recognition and the retention of telecommunication data, the underlying considerations of these decisions were already part of the population census reasoning. Even where the Bundesverfassungsgericht saw the necessity to create a new fundamental right of "confidentiality and integrity of information technology systems" in 2008, it did so by referring to the "gap-closing function of the general personality right" which was already causative for the invention of the right to informational self-determination in 1983. Analysis of the recent decisions will be the subject of part II of this article.

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[31] Bundesverfassungsgericht, decisions volume 65, pp. 1 (pp. 54, 61).