The *Sozialer Rechsstaat* as a reference for privacy right and data protections laws in German jurisprudence

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Abstract: Privacy right is generally based on individualistic arguments, however the solidarity principle must apply, providing privacy right a social approach. This paper argues that such understanding is found in the rulings of the Federal Constitutional Court of Germany and analysis relevant evidence in that regard. It concludes that the right of information self-determination in Germany is set within its proper social place, where the person must be able to maintain his/her autonomy in a context defined socially, and remain responsible for the general good.

Keywords: constitutional court; privacy; solidarity; autonomy; German law; technology.

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1 The role of the solidarity principle

1.1 Introduction

1.1.1 Privacy and information self-determination

Privacy right, as well as the use of information technology systems guaranteeing confidentiality and information integrity[1] are both components of the right of personality in German jurisprudence. The protection of a person's identity, information, ideas, feelings, emotions and, particularly, the way to communicate them[2] is likewise considered essential to human dignity.[3] Clearly, the extent of the treatment given to these issues, their pursuit and influence show they have become a central concern of legal research in Germany, as in most other modern constitutional democracies.

Article 1(1) of the *Grundgesetz* (Basic Law) expressly "imposes an affirmative obligation upon the State to protect human dignity and not merely to refrain from abusing it by its own actions."[4] Likewise, the Basic Law includes the right to free development of personality Art. 2(1). Regarding data protection, Germany was amongst the earliest countries in the world to enact a national law protecting data. In fact, the Hesse Federal State passed in 1970 the first data protection law in the world and the first federal data protection act came into force in 1979.

The German approach to privacy right is very clear. The Constitutional Court has ruled to include within the right of personality and privacy anything the individual might wish to do; only able to be restricted by law, satisfying all substantive and procedural requirements set by the Constitution. Thus, "Every burden imposed on the citizen by the State has become to be considered an invasion of a fundamental right, and, therefore, the affected citizen may invoke the interest of third parties and may raise questions of federalism and separation of powers as well".[5]

In the realm of data protection, the Constitutional Court has also developed the right to informational self-determination, by which personal data in Germany are constitutionally protected. In 1990, the legislature adopted a new data protection law following the German Constitutional Court criteria.

At the same time, Article 20 of the Basic Law declares (1): The Federal Republic of Germany is a democratic and *social* federal State, essentially committed to social welfare and to the promotion of solidarity.

1.1.2 Solidarity

Current philosophical discussions in Germany have emphasised the importance of solidarity[6] in connection with every mayor social, legal, scientific and technological breaking point. It is particularly the case for health and biomedicine, as well as genetic engineering of humans,[7] but also for information technology, digital universal inclusion[8] and, as argued here, privacy right and data protection.

The idea behind every such claim is that solidarity may serve as a corrective to the currently prevalent emphasis placed on individual choice and autonomy in socio-political and legal trends, with the ensuing high cost to the wider social grouping.

Collaborative behaviour and trust mechanics are not only moral and legal trends but also technological phenomena of the highest current importance. Technology spontaneously moves individuals to *share*, *link*, *group*, *save*, *collaborate*, *torrent* and *join* in spaces and ways not previously thought of. Every time someone engages any of these actions he or she is joining in the collective process of communication. Every individual talent sees its value multiplied when shared in the internet. Every action leaves a trail, a mark, which cannot be deleted and may actually be followed to generate trends, consumption preferences and all kind of profiles helpful to the system's transparency. The information revolution is changing the world profoundly and irreversibly at breathtaking pace and in an unprecedented scope.[9]

Whoever agrees to participate in the information system allows reciprocal interaction and implicitly admits mutually corresponding effects and interference. There is no other way to conceive the information era, and, for that matter, human society. Therefore, solidarity is necessarily present in the fabric of technology and should also be incorporated in the concepts of privacy right and data protection laws.

German legal tradition has elaborated the idea of solidarity primarily on behalf of the State. So, it is the German State who is to watch for social needs and equality. Likewise, constitutional law and jurisprudence have developed the notion of solidarity among the different German *Länder*. The idea of solidarity examined here, however, has a slightly different approach: it explores the role of individuals as agents of solidarity and responsible for the needs of others, not the State.

2 Purpose of this research work

The central issue developed here concerns the principle of solidarity and poses the need for it to govern the content of privacy right and data protection laws, particularly regarding the urgent need of security, health planning and government transparency. In this respect, the main line of research seeks to determine which elements of solidarity ought to apply among citizens regarding privacy right and data protection laws, and to what extent these elements become normative.

Furthermore, this paper attempts to elicit, on the one hand, the implicit rationale followed by the *Bundesverfassungsgericht* (Federal Constitutional Tribunal) in recent rulings concerning this issue and, on the other, the position of the Tribunal concerning the application of the proper justification of privacy right and data protection along with the duty of the German State to promote solidarity among citizens.

3 Theoretical framework and methodology

3.1 Changes in the structure of the law

Balancing privacy right and data protection laws with the solidarity principle is important in order to justify certain legal solutions which can anticipate and solve problems stemming from societal developments and crucial changes in the structure of the law. Such changes include, among other matters, "the need for a transition from a vertically structured society to a more horizontal one, i.e. from a pyramid-like formation to a cluster-and-network-like legal and political system";[10] the transformation of purely individualist concepts of the law to others based on a community of interests, objectives, and standards; and inclusion of the notion of a "future beyond the market's rationale … based on trust amongst its citizens, geared towards the specific aspirations of its generations, and capable of forging a public discourse on its trajectory".[11]

An underlying idea in the present research work is that *justification* is not a linear process but rather a complex conglomerate of criteria coming together to legitimice a system of beliefs. It draws from the argument that "the totality of our so-called knowledge or beliefs, -- from the most casual matters of geography or history to the profoundest laws of atomic physics or even pure mathematics and logic -- is a man-made fabric which impinges upon experience only along the edges".[12] So much for those sciences, even more for the science of law, which, as a socio-political phenomenon builds on and derives its conclusions from facts and premises. It is hence a requirement that the study of the "decision-making function and normative nature of its object of inquiry -- the law -- be based largely on legal practice and that legal scholarship be aiming to promote trust through the unity and consistency of legal norms".[13]

Likewise, this research work follows the legal research tradition started by Gretchem Helmke and followed in Argentina by Jorge Bercholc. Both these authors recommend to "study the decisions of tribunals thoroughly" so as to surpass pure speculative legal analysis.

The conclusions of the present research work are based, therefore, on empiric evidence.[14]

3.2 Private law and public law

The present research work draws from both private and public law. Civil law, as a branch of the law, has its own subject of regulation and its own mechanisms for such regulation. "Such mechanisms, however, are not contrary to and even reinforce the fundamental rights values, such as private autonomy, which stems from the constitutional freedom of free development of one's own personality. The right of privacy, deduced from the constitutional provisions on human dignity and freedom of a person is duly reflected in private law as well, for example, in a provision of a civil code on liability for intentional, negligent or unlawful injuries to life, body, health, freedom, etc."[15]

Modern states intervene into private law through democratically legitimated statutes. Some of the clearest examples of this intervention are competence and consumer protection laws. Thus, private law has changed its substance, abandoning the idea of State neutrality in otherwise purely private conflicting interests. Its new structure is built to include social changes. "When in the course of the 20th century the law of obligations in West Germany became more social, the prevailing explanation was that law had (more or less directly) echoed social and cultural change".[16]

The solidarity principle is not only a matter of public law; in fact, it is and is becoming more and more important in private law as well. Public interest in flourishing markets and in healthy, safe and sustainable environments has always guided private law rules. More liberal or social, private law has proven once and again to be involved in social change with great autonomy from government intervention. It is sound legal reasoning to hold that transparency in the decision-making process and other forms of participation in legal debate is more influential on the content of private law than in other areas of the law. Private law does adapt pragmatically to social change, government intervention being in fact a hindering element of its change.

It is the task of legal scholarship and jurisprudence to interpret not only the law, but also the signs of time, to anticipate up-coming events and conflicts.

3.3 Legal principles

The solidarity principle is a constitutive element of Western law, not frequently used however to solve concrete matters. General laws address a finite set of relevant circumstances, but law has, conceptually, a limited ability to offer complete solutions to all factual situations emerging in reality.[17] Therefore, it is necessary to provide the system with a set of criteria capable of solving situations not raised by general rules; principles provide such criteria. It is likely that some of these 'new reasons' may be questioned. However, in order to be valid, they ought to be new logical deductions from earlier reasoning based on other premises, which are themselves legal principles. Any attempt to link privacy right and data protection law with the solidarity principle must arise from existing legal reasoning. Legal principles are an essential element of jurisprudence

because they help systematisation, comprehension and further development of the legal order.[18] The solidarity principle is among such helpful principles.

3.4 The importance of the solidarity principle

Consensus on core values such as solidarity, among others, is essential to the promotion of human dignity. Solidarity is one of the basic human experiences, since it is general acknowledge that membership in a group affords greater protection. Children, the weak and ill, the poor and the elderly have always depended on solidarity and support from the immediate or extended family, as well as from their neighbours.[19] Communities of solidarity have been the long-standing answer to communal dangers.

However, the concept is not always clear and its role remains frequently quite obscure. Scholars throughout history have addressed it in different ways, but, if considered from a modern point of view, it is easy to see that fraternity is its synonym and that it is directly related to personal freedom and equality. A person is supportive of another as long as this other is considered worthy, equal and free. Solidarity holds, therefore, the same value and status than freedom and equality.[20]

Solidarity is one of the founding values of the European Bill of Basic Rights, and is considered to be an essential ethical value because it is an expression of support, assistance and cooperation with peers, that is, with people full of merit, worthy and respected. Solidarity is a central value in Western civilisation and springs from core civil structures, constitutions and bills of rights, which are the foundation of human peaceful coexistence.

The *Merriam Webster's* dictionary defines solidarity as a "union that produces or is based on community of interests, objectives, and standards". Durkheim's model of mechanical solidarity and organic solidarity, in which different types of social solidarity actions correlate with specific types of societies, contains the idea that an orderly functioning of modern societies requires social solidarity.[21]

Max Ferdinand Scheler, a highly sought-after philosopher of our times, also developed, together with his phenomenology theory, the idea of solidarity. Arguably, he set forth the idea of solidarity to its widest dimension, defining it as the reciprocal relationship between the whole and its parts. For Scheler,[22] no conflict belongs just to someone else.[23] "He rejects the presumed starting point of the so-called other minds, a starting point positing one mind over and against another, assuming we are first alone and then enter into relations with others". For him, "the consciousness of oneself as a self and as a person is always experienced within the context of a 'member of a totality'."[24] Scheler distinguished the principle of solidarity found in communities from the principle of summation found in societal relationships. He formulated his idea of solidarity as the principle uniting social groups according to their members' qualitative degree of participation. This formulation is in sharp contrast to the societal *gesellshaflichl* principle of preserving the happiness of a maximum number of human beings.[25] Scheler's approach of solidarity is central to the conclusions of this work.

3.5 Different types of solidarity

Old and new formulations of solidarity have been widely studied, such as 'democratic solidarity', 'network solidarities', 'cosmopolitan solidarity' and so on. They are all stated in connection with morality and with the necessary social conditions for moral communities to exist.[26]

3.6 Legal solidarity

Solidarity is also studied from the legal point of view as a genre with two species, one of them being spontaneous solidarity, exercised without a legal obligation, and generally regulated by law to encourage certain philanthropic causes; the other being legal solidarity, which is based on ethical values and is regulated by statutes. The valid pattern of this form of solidarity is, in most cases, the equation resulting from the intersection of need with possibility.[27] Such cooperation is possible because of the commonality of the individuals composing a society, the result being an orderly coexistence made possible through solidarity as a required element. In legal solidarity there is a social and spontaneous element and still another imposed by the legitimacy of the State. The process of authority and obedience combines with cooperation and solidarity to provide the system with an indispensable element. Legal solidarity assumes the feelings, concerns and interests of the individuals turning them normative.

While it is true that some conceptions of the law identify legal solidarity only with coercion, power and violence, such visions do not entirely fit the principles in Western legal systems.

Referring to the Western legal system, Justice Anthony Kennedy noted: "in 1978, Alexander Solzhenitsyn gave a puzzling speech that first shocked me because he attacked the West for being too devoted to the law".[28] After a few days of careful thought, Kennedy concluded that the way the East understands law is different from ours. For Solzhenitsyn, the concept of law is related to orders, to an *ukase*, a cold threat, and a decree. For the American judge, "the law is not an obstacle, but an instrument of progress, not a command to be feared, but an accepted aspiration, not a threat, but a shared promise". It fulfils human inclinations and aspirations and therefore the cooperative factor of the law has precedence over the authoritative implication.

Organised societies are strategically based on cooperation as a natural and spontaneous behaviour of human beings. Legal systems include solidarity within their normative order, describing, classifying, and endowing it with legal consequences. The legal order as a whole relies hence on solidarity as one of its essential foundations, the paradigm being family solidarity,[29] where members remain obligated by law to provide for one another should they become in need.[30]

3.7 The importance of German scholarship and jurisprudence

German debates on constitutional and fundamental rights doctrines as well as civil law trends are further examples of legal discourses closely followed internationally and capable of being transferred to other contexts. They have found recognition notably in Asia, South America and Eastern Europe.

From another point of view, and concerning the pertinence of an analysis of German jurisprudence carried out in the English language, it should be pointed out that the discipline of law directs its inquiry to an object constituted by language, and therefore always partly shaped by the cultural context of the language."[31] Without a proper translation and interpretation it would be however impossible for the wider global community to fully understand the German societal and legal makeup.

In this respect, German jurisprudence, as Roman classical, is known for its sense of simplicity and harmony. The choice of words denote a correct use of the language, rendering rulings plain and intelligible, with simple vocabulary yet using words by their technical meanings. "It is language directed to the mind rather than to the heart".[32] Such elegance plays along with smart reasoning, *subtiliter disputare*,[33] focusing on the argument and on the efficient application of the law.

However, it is not always easy to understand what courts mean and certain specific rulings are not necessarily the only possible and rational solution to a case, constitutional courts not being an exception. The legitimacy of differing views on difficult constitutional questions seems to be widely accepted.[34] This being said, the authority of the German Constitutional Court turns the study of its doctrine into a rich and worthy source of inspiration.

One of the purposes of the present paper is to make specific German legal terminology on privacy and solidarity accessible to international scholars in the context of the globalisation of the academic discourse. Furthermore, there is a growing international demand for German legal scholarship to publish its results in non-German media so as to ensure that German scholarship is adequately understood at the European and international level.[35]

As what concerns the methodology used in this research work, it should be said that it concentrates on what is enacted, explicit, in order to be certain of what the law is, and of its interpretation, based on the facts resulting from actual rulings of the *Bundesverfassungsgericht*. Decisions of the Constitutional Court, a key element of the German legal system, are mostly declaratory in form, binding for all organs of government, and many of them having the force of law. However, the Court has developed a subtle and pragmatic style deserving high prestige and helping towards reducing the friction inherent in the exercise of judicial review.[36]

Much of what distinguishes German Constitutional Court's decisions is indeed an attitude of judicial restraint, developing the principle of deference, not only towards the legislature but also towards the other courts.[37]

This being said, a prominent part of the Court's rulings find in the Basic Law provisions that allow more than a simple right to be free from official interference. "Building upon the text of Article 1(1) of the *Grundgesetz*, which affirmatively requires the State to protect human dignity, and upon the argument that certain fundamental rights would be worthless without affirmative government support, the Court has developed the notion of an "objective order of values" which permeates the entire legal system and has significant consequences even for the relation of one citizen to another".[38]

In doing so, the Constitutional Court develops a system of coherent concepts which structures legal material, stabilises the decision-making process, fosters predictability and facilitates the evolution of the law.[39] Hence, the study of the *Bundesverfassungsgericht* rulings serves, as proposed in this research, to analyse sound, influential and prudent legal criteria of the highest importance.

Another venue informing the present work is relevant literature focusing on step-by-step arguments and rational conclusions. Certain key concepts such as social justice, the *Sozialstaad* and information technology theory, all of them, in constant transformation, are analysed in the first section. This section also addresses polemic conceptual problems such as dangers posed by the Surveillance State, the need to reframe the value of privacy, the law of confidentiality, and the extraterritoriality of the internet.

Relevant rulings of the Constitutional Court are analysed one by one in the second section, including specific cases related to privacy and data protection, as well as other rulings addressing related topics such as regulation of property rights, copyright and legal duties.

The conclusion sums up the reasons the Constitutional Court uses to tackle sociological and technological change. The findings of this research prove that, in a very pragmatic manner, the Court's, reasoning concerning questions of social and technological change evolves, frequently taking the position of those who are disadvantaged or oppressed and using claims of individualised entitlement as a point of departure.[40]

Regarding the matters specifically addressed in this research, i.e., privacy right, data protection and solidarity, there seems to be tension between the two first ones and solidarity. Apparently, privacy right and data protection work mainly on the construction of individual identities. The latter, solidarity, generally expresses State-endorsed collective goals.

However, the Court, at the same time, acknowledges the specific dynamics of information technology as a powerful tool of identity building and promotes structural changes encouraging the development of solidarity through ongoing interaction. The sums of these essential and contextual factors allow a reframing of privacy right and data protection laws and open an speculative and normative space were solidarity, and not individuality, takes the standing position.

4 Section 1

4.1 Social justice

Every country shapes the relationship between social justice and the law differently; nonetheless, it is generally conceived to protect certain weaknesses arising in otherwise equal parties. In Germany, social justice has been historically outside the content of the *Bürgerliches Gesetzbuch* (German Civil Code), which arguably mainly rules the normal progression of the capitalist society based on its logic of individuality, property right and profit-making activity.

However, private law has also been an efficient instrument of major developments of social justice. Good examples are labour law, which addresses the needs of workers, and consumer law which balances inequalities in the market of goods and services.[41]

There has been another slow but constant incorporation of social justice into private law through the process known as 'constitutionalization of the law'. In this process, the *Bundesverfassungsgericht* has been a key agent, allowing further applications of social concepts and of new ways to conceive what really counts as social justice in a social State.

It is a fair claim to say that since the term 'social' allows for different interpretations, the existing welfare State principle included in the Basic Law poses the "danger of politically opportunistic claims", claims which could justify all sorts of demands on the State, bringing about a questionable 'demanding attitude' and 'a lack of responsibility' from individuals or entire groups.[42]

This being said, this principle also allows for the development of the solidarity principle within the system of private law, generating a compensation for certain deficiencies of civil-law practices based on liberal commercial law.

4.2 The Sozialstaad

The German democratic and *social* federal State, the *Sozialstaat*, is based on two constitutional clauses. On one hand, art. 20 of the *Grundgesetz* define Germany as a social federal State and art. 28.1 requires the *Länder* (states) to adopt a constitutional regime faithful to the principles of republican, democratic and social government based on the rule of law. Simply put in German: *sozialer Rechsstaat*.

Rechtsstaat and *Sozialstaat* thus join in a higher unity under the Basic Law.[43]

Likewise, within the meaning of the Basic Law, the constitutional order in the *Länder* must conform to the principles of a republican, democratic and *social* state governed by the rule of law.

The *Sozialstaad* nature of the German State reflects the conviction to affirmatively promote a sound, healthy and prosperous society. Such character is also stated in several of the individual *Länder*, some of them, having actually chosen to list their social obligations. The State Constitution of the Free Hanseatic City of Bremen is a case in point, where Article 8 grants the right to work, Article 14 confers the right to housing and Article 49 rules on unemployment assistance. Furthermore, Article 57 addresses the issue of social insurance and Article 58 rules the assistance for those unable to work (*Landesverfassung der Freien Hansestadt Bremen*, 1947). Likewise, the Constitution of Brandenburg in Article 29 grants education rights, in Article 45 social insurance and public assistance and other articles rule on housing and employment (Verfassung des Landes Brandenburg, 1992). The Constitution of the State of Saxony-Anhalt on Articles 34 to 40 contain a list of State purposes including gender equality, housing and full employment, all of which the State must strive within its ability to attain and towards which it must direct its actions.[44]

The Basic Law is largely silent on the content of what it should be understood by a social State at the federal level. However, it has two very important and stimulating provisions: Art. 6 establishes a special State protection over marriage, family, and the upbringing of children, as well as over every mother "who shall be entitled to the protection and care from the community". Also, art. 15 grants that "Land, natural resources and means of production may, for the purpose of socialization, be transferred to public ownership or other forms of public enterprise by a law determining the nature and extent of compensation".

The Constitutional Court has a long-standing tradition on *Sozialstaad* matters, constantly upholding the State's duty to establish a just social order and observing the legislatures wide-ranging discretion on what regards the nature and extent of the social welfare, as well as the means of its promotion and delivery.[45]

The State does take as its own business the well-being and affairs of its citizens, proving thus the supportive nature of the German State. These obligations are required from the three branches of government and particularly form judges who, within their jurisdictional power, and when having to explain the meaning of the law and to apply it in particularly complex cases, must consider that solidarity has a special importance in the making of the German social State.[46]

The German political, social and economic system is often described as a "social market economy" – *soziale Marktwirtschaft* – where free markets work together with a socially conscious State assuming the individual is in permanent relationship with the larger society.

However, it is argued here that in a *social* State individuals are also responsible for the well-being of their fellow members of society, frequently being legitimate to require of them responsibility for the general welfare.

4.3 Information technology theory

To understand the working forces involved in the dynamic triangle privacy-solidarity-technology it is important to understand first the complexity of computational systems. Technology has two basic resources, time (the number of steps in a computation) and space (amount of memory used). The availability of these two elements determines, in principle, the solution of many technological problems.[47] The World Wide Web is a complex open computer network of autonomous spaces (hosts, routers, gateways, etc.) self-organising themselves with no intervention from any central devices. It works in a autonomous self-organising learning and adapting fashion according to the information added and retrieved. There are more or less intelligent virtual organisms (agents) learning, self-organising themselves, and adapting to information preferences set by the users. The real power of this technology does not come from any one of these single devices; it comes from the collective interaction of all of them. In fact, processors, chips and displays of these smart devices do not need a user interface, but just a pleasant and effective place to get things done.[48] That space is now located in cyber space and has become ever more invisible to the user as technologies become ubiquitous and more diffused. Such 'cloud computing' networking means that, information contents and programs are run and retrieved from many computers connected at the same time. Information technology assigns resources from where are available to where are needed. As with solidarity, the valid pattern is the equation resulting from the intersection of need with possibility.

Regulation of 'the web' is an ongoing debate as it entails crucial issues for democratic societies. As 'privacy', it is a developing notion. Technology can both guarantee and threaten privacy. Some sophisticated users may prefer programs allowing almost total privacy, but ordinary users are far from being aware of the extreme to which their actions have become transparent, letting the world know about their habits and interests.

At any rate, internet is the reign of freedom. Fencing digital content may threaten to undermine public information, a democratic right, and even the very idea of science as accumulation of knowledge.[49]

Far from borders and fences, there is an opposite alternative, that is, to consider technological knowledge as a public good.[50]

4.4 The Surveillance State

Technology has made it possible to collect data and all types of information. Since data storage has become inexpensive, it is no longer necessary to decide if it will be kept or deleted, so some IT corporations just keep it all forever.[51]

It is a well known fact that intelligence agencies around the world store all information. Examples of this would be certain computer programs such as PRISM, a mass electronic surveillance data mining program, used by the US National Security Agency (NSA) under Section 702 of the FISA Amendments Act of 2008, to which telecommunication and internet providers must turn over any data matching court-approved search terms.[52] XKeyscore (XKS) is another computer system allegedly used by the US NSA to search and analyse internet data about foreign nationals across the world. According to *Der Spiegel*, XKS, which also has the ability to retroactively import several days' worth of queued metadata, plus the content itself of communications, has been used by Germany's foreign intelligence service, the BND, and its domestic intelligence agency, as well as by the Federal Office for the Protection of the Constitution.[53] There are other known programs such as Cybertrans, Double Arrow and Skywriter. In July 2013, the German Government announced a review of Germany's intelligence services.[54]

The fact that "wholesale blanket surveillance"[55] can and is being carried out is no argument to admit it. Intelligence agencies around the world are capturing every conversation, search or e-mail sent anywhere. The NSA in the USA is (lawfully) collecting and storing almost 200 million messages a day all over the world.[56]

Two main aspects of privacy in the technology realm are: confidentiality, as in privacy of content, and anonymity, that is privacy of identity.[57] Technology allows for confidentiality and anonymity to be possible, although absolute privacy is a considerable risk to law enforcement. Likewise, complete lack of anonymity and confidentiality may breach basic human rights. To regulate privacy in order to allow proper law enforcement is actually a most urgent debate. As both of these extreme options are unacceptable, some sort of balance between privacy and public safety is needed. An adequate solution would be to ensure that individuals may enjoy privacy and confidentiality, while law enforcement may effectively operate there where society considers it appropriate.[58] And here appears the solidarity principle as a correct balance of both.

4.5 Reframing the value of privacy

In the era of information, privacy has become an important concern. The two key elements involved here are dissemination and concealment. The Basic Law – and as a matter of fact, most positive law – considers privacy as valuable in itself, not as an intermediate good. However, certain authors, most notably Posner, argue that the will of privacy is, at the bottom line, the will to manipulate by misrepresentation other people's opinions about themselves (Posner, 2001). At some point, non-disclosure becomes fraud, and concealment is related to discreditable information. Viewed from the angle of an economic analysis of the law, Posner argues that people should not have a right to conceal material about themselves and that reticence to let other people access personal information comes from fear that others may gain some kind of benefit from or over them.

In a debate with Bloustein, Posner denies value to his argument about people not being able to be different if privacy is not granted. He offers historical evidence of flourishing and creative cultures where no or very little sense of privacy existed. Likewise, he refuses to grant value to Charles Fried's arguments regarding privacy as indispensable for love, friendship and trust. The latter, as defined by Fried, implies ignorance about the doings of the one trusted: "if all is known, there is nothing to take on trust". For Posner, trust is only lack of information, a non-valuable state in itself. As for friendship and love, he also offers historical and empirical evidence of both existing without privacy.[59]

The relationship between privacy and social values is another highly complex issue, as it is tied to a very specific conception of humankind, impossible to state given its universal status.

In a non-legal approach, IT leaders such as Scott McNealy (CEO and co-founder of Sun Microsystems, Inc.), Eric Schmidt (ex. CEO of Google), and Mark Zuckerberg (co-founder of Facebook) have repeatedly stated that there is zero privacy in the technology age. Search engines retain all information and privacy is an outdated concept, no longer a social norm.[60]

However, privacy is still highly valued even by its detractors in areas and circumstances where sensitive State issues appear. In this case, it is considered an intermediate good, by no means the backbone of democracy.

Such arguments are incompatible with the right to personality, the right to privacy and to data protection as expressed by the German Basic Law. However, such points of view help to give the topic a wider scope and perspective, opening the door to further discussion and debate on its content.

4.6 The law of confidentiality

The concept of a relationship between two individuals based on confidence has been established since long ago and it may be enforced by equity, whether it is contractual or not. Moreover, such enforceable confidence is also transferred to whoever happens to be informed on the contents of that relationship. An English Court went even further, removing the need of a prior confidence relationship. Lord Goff stated on the Spycatcher case[61] that a broad principle such as the duty of confidence arises when confidential information comes to the knowledge of a person having received notice or having agreed on the confidential character of such information.[62]

The key notion to this principle is whether the person in question has a reasonable expectation of privacy regarding the disclosed facts. Or, in other words, if the person who disclose the said information knows or ought to know that the other person can reasonably expect his privacy to be protected.

It is interesting to mention here a German case addressed by the European Court of Human Rights:[63] 'Van Kück v. Germany'. The applicant, Ms Van Kück, born male in 1948 and living in Berlin changed her first name to Carola Brenda in December 1991. German courts refused to order reimbursement of transsexual's gender re-assignment treatment costs on the grounds that such expense could not reasonably be considered necessary medical treatment as she had caused the disease herself. The appeal to the Constitutional Court was unsuccessful.

The European Court considered that "what mattered was not the entitlement to reimbursement as such, but the impact of the Court's decisions on the applicant's right to sexual self-determination to be respected. Without hearing further expert medical evidence, both the Regional Court and the Court of Appeal questioned the medical gender re-assignment need. The Court of Appeal concluded, additionally, on the basis of general assumptions as to male and female behaviour, that the applicant had deliberately caused her condition of trans-sexuality. Since gender identity is one of the most intimate aspects of a person's private life, it appeared disproportionate to require Ms Van Kück to prove the medical necessity of the treatment. No fair balance was struck between the interests of the insurance company on the one hand and the interests of the individual on the other".

In other words, the intimate aspects of a person's sexuality are confidential matters, which no one has the right to disclose and, certainly, no one can be forced to disclose such matters. German courts failed to acknowledge the legitimate expectation of privacy Ms. Van Kück had, and the European Court ruled in her favour.

The argument can be built to say: confidential information (all private data) must be treated confidentially, meaning it may be treated to fight crime, to enforce the law, to plan health and security and other socially valuable interests. In the information age individuals are aware that communication and internet data are used, tracked, shared, and stored.

The issue of confidentiality among parties is disputed in Germany. For instance, in the absence of an express confidentiality term in the arbitration agreement, during the arbitration process there might not be a general duty of confidentiality.[64] However, it is widely accepted that all parties involved in the arbitration proceedings are under an obligation to maintain the expected confidentiality.

In any case, confidentiality does not prevent from complying statutory duties of information, particularly those of regulatory, administrative and penal proceedings and requirements. Another exception to the duty of confidentiality is the issue of 'public interest'. Should there be a public interest involved, confidentiality yields to the social good.

4.7 Extraterritoriality

There is another factor encouraging an approach based on legal principles: the tendency to extraterritoriality of data privacy laws. In fact, European regulations suggest that EU residents are protected worldwide simply by residing in the European Union.[65] However, actual enforcement of the said protection is very difficult to carry out. Some authors offer different solutions to this problem, such as the 'layered approach' by which those difficulties created by the extraterritorial application of data privacy laws could be addressed by introducing a sophisticated description of the extraterritorial scope of such laws.[66]

Clearly, the multifaceted nature of data privacy law requires new approaches. This article puts forward one such option considering that difficulties created by the extraterritorial application of data privacy laws be addressed by incorporating the solidarity principle as a reference for privacy and data protection laws.

4.8 Solidarity as a common standard

Technological solidarity makes information available for technical reasons; legal solidarity requires it to be available for various social needs. There is no reasonable expectation for it not to be available. There is, however, a reasonable expectation for it not be used for purposes other than those previously established by law and by authorised judicial (or equivalent) request.

This conceptualisation of solidarity makes it a legal instrument compatible with the plurality of legal systems while guaranteeing at the same time minimal common standards in that plural and multilevel level.

The solidarity principle as stated by the German Constitutional Court is, arguably, extraterritorial and can be a helpful element to incorporate in the interpretation of uniform statutes around the world.

5 Second section

5.1 Background of the German legal system

German judges are bound by the law, an inherent element of republican governments based on the separation of powers. Legislatures are the lawmaking authorities, and the law is basically understood as "a close system of logically arranged and internally coherent rules; all legal disputes must be resolved in reference to such rules; courts of law, independent of the legislature, are the proper agencies interpreting law; courts should interpret the law literally and in strict accordance with the legislator's will, their function being, therefore, to administer law as written".[67]

However, Art. 20 of the Basic Law has added some complexity to the system stating that judges are bound by 'law and *justice*', suggesting thus that justice might not always be identical to the written law. In fact, the Constitutional Court has interpreted in this regard that "under certain circumstances, law can exist beyond the positive norms enacted by the State; a law which has its source in the constitutional legal order as a meaningfull, all-embracing system, and which functions as a corrective of the written norms. The task of the courts is to find this law and make it a reality in binding cases".[68]

The judge's freedom to creatively develop the law is limited, but it "grows with the aging of codifications" as "a norm always remains bound to the context of social conditions and socio-political views it affects".[69] The *Bundesverfassungsgericht* is the main agent of such process and it is therefore relevant to study its logic regarding new social events.

5.2 The Constitutional Court

The *Bundesverfassungsgericht* is the custodian of the Constitution. As such, it is unique in German constitutional history. Niether the *Bismarck Reich* nor the Weimar Republic had a court with such powers. "Decisions of the Constitutional Court, which are mostly declaratory in form, are binding on all organs of government, and many of them are given the force of law. But the Court has developed a panoply of pragmatic tools to reduce the friction inherent in the exercise of judicial review".[70] Indeed, much of what distinguishes the Court's decisions is an attitude of judicial restrain, developing the principle of

deference not only towards the legislature but also to the other courts, refusing to substitute their judgements for its own. Building upon Article 1(1) of the *Grundgesetz*, which affirmatively requires the State to protect human dignity, and upon the argument that certain fundamental rights would be worthless without affirmative government support, the *Bundesverfassungsgericht* has developed the notion of an 'objective order of values' permeating the entire legal system and having significant consequences even for the relations between one citizen and another.[71]

Based on the work by Bökenförde and Alexy, Kommers develops five normative theories that German constitutionalists usually use to interpret the law and the content of basic rights: liberal, institutional, value-oriented, democratic and social. The liberal theory emphasises negative individual rights against the State. The institutional approach focuses on guaranteed rights associated with organisations and communities, religious institutions, the media, universities, marriage and family. Value-oriented rulings base their rationale on human dignity and democratic basic rights on certain political functions incident to speech rights, the role of elections and political parties. Finally, there is the social theory, which works with the idea of social justice, cultural rights, economic security and, specifically, on the solidarity principle.

Legal scholarship does elaborate each of these theories insomuch as they are dominant in German jurisprudence. However, this is not the purpose of the case-by-case analysis following below. Rather, the purpose here is to show that it is possible to find elements in jurisprudence leading to the elaboration of a theory of legal solidarity instrumental to up-coming situations related to privacy right and data protection laws which, otherwise, may miss the actual requirements posed by the information technology era.

5.3 The Bundesverfassungsgericht decisions

The following section analyses decisions taken by the *Bundesverfassungsgericht* on issues related to privacy, data protection laws and the *Sozialer Rechsstaat*. The analysis undertaken here is meant to help understand the Court's rationale regarding these topics, so as to establish an argumentative thread on the solidarity principle as a reference for privacy right and data protections laws. Certain traditional cases are included as well as pertinent recent rulings.

The analysis starts with the 'The Iron and Coal Fund' case, where the Court sets the *Grundgesetz'* image of the human being. It continues with the 'Volkswagen Denationalization case', where the Court addresses the idea of *sozialer* State; the 'Hamburg Flood Control case' and the 'Groundwater case' both contain decisions where the main issue is the Basic Law's concept of private property and public goods; and, finally, decision '84 BVerfGE', by which an exception is introduced to the restitution policy of certain property in the former East Germany. This last decision is based on the need to consider higher constitutional goals and it is discussed here because it helps understand the Court's ability to contextualise.

Furthermore, the 'Mephisto', the 'Esra' and the 'Schoolbook' cases are analysed because they address the relationship artistic freedom/privacy right in an illuminating way. The "Obligation of the mother to carry her unborn child" case is also studied, as it is key to understanding the reasoning of the Court regarding fundamental rights.

Also analysed here are further key Court decisions regarding data protection in cases such as the "Automatic Plate Numbers Recognition"; "Precaution Storage of Data"; "Acoustic Surveillance of Housing Space"; "Admission of personal information in criminal proceedings collected unlawfully" and the "Protection of the North Rhine-Westphalia Constitution Act". All the above are leading decisions of the Court regarding data protection.

Finally, the 'Hannover' and the 'Standard benefits paid according to the Second Book of the Code of Social Law' cases are analysed due to their importance regarding privacy right and the solidarity principle.

6 Case analysis

6.1 The Iron and Coal Fund and the Grundsgesetz image of the human being

6.1.1 4BVerfGE7

The Federal Legislature passed a statute creating a fund to benefit the iron and coal industries and made up by compulsory contributions from manufactures and traders.

The First Senate considered the statute to be directing and regulating branches of the economy in a way compatible with the *Grundsgesetz*. To do so, the Court outlined the Basic Law's image of the human being.

Complainants alleged a violation of the constitutional guarantee of free development of personality because of an alleged limitation on their free entrepreneurial initiative. The Court considered it not to be so, as "the image of the human being in the *Grundsgestez* is not that of an isolated, sovereign individual". On the contrary, the Basic Law resolved the tension between individuals and society in favour of a coordination and interdependence with the community, without touching however the intrinsic value of the individual. Interpreting comprehensively several articles of the Basic Law, the Court's doctrine considers that the individual has to accept certain limits to his/her freedom of action. It is up to the legislature to reasonably establish the scope of such limitations. "No charged debtor is prevented from developing his personality in this sense, even if the law temporarily limits his autonomy to dispose of the means of production and forces him to enter a legal relationship with certain entrepreneurs".

Regarding specific economic and productions models, the Court considers not to be authorised to judge the wisdom of the legislation establishing certain policies, because "although the present economic an social order is… consistent with the Basic Law, it is by no means the only possible order". The job of the Constitutional Court is to verify if the legislature has observed the limits of its discretional power or abused that power. It is within the State responsibility to pass laws aiming at public welfare, not neglecting interests that are worth protecting.

In the specific case of the Iron and Coal Fund, charged debtors received bonds for the amount of their contributions; bonds that yielded interests and even dividends. Thus, the economic interests of the charged debtors were taken care of and not arbitrarily impaired, even if their own demands for investment were deferred.

6.2 Volkswagen denationalisation case: an authorisation to socialise

6.2.1 12BVerfGE354

Similar arguments were made when the Federal Parliament, with the consent of the Lower Saxony state, decided to denationalise the Volkswagen Company. The Court considered that it is within the discretion of the federation's political organs to decide on the economic and production model, "as long as its implementation does not violate constitutional law and, in particular, basic rights". It also stated that "Political compromise is probably inevitable in a modern State forced to intervene in social life, and it should not be disapproved for constitutional reasons".

Art 15 of the Basic Law provides that "Land, natural resources and means of production may, for the purpose of socialization, be transferred to public ownership or other forms of public enterprise by a law determining the nature and extent of the compensation". Nonetheless, the Court pointed out that such article does not actually ordain the socialisation of the economy, it is only an authorisation for the legislature to do so.

In the reasoning of the *Bundesverfassungsgericht*, the legislature is allowed to broadly establish different political and economic systems, as long as they are compatible with the set of objective values included in the Basic Law.

6.3 Hamburg flood control case

6.3.1 24BVerfGE367

The Hamburg city-state passed the Dikes and Embankments Act in 1964, converting all grassland classified as *dikeland* in the land register into public property. Several owners complained alleging a violation of their private property.

Art. 14 (1) establishes that "Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws". In reference to the content and limits of rights, art. 19 (2) provides that the State "may not encroach upon the essential content of a basic right" but only by or pursuant to a particular law, applied generally and not solely to an individual case. Furthermore, the naming of the basic right involved is also required.

There are other limitations to the right of property, such as the social duty associated with ownership: "Its use should also serve the public weal";[72] as it would be the case for example of an expropriation law for the purpose of public interest, establishing the nature and extent of the compensation.

Nonetheless, property is widely protected. The Constitutional Court established that "The property guarantee under art. 14 (1) 2 must be seen in relationship to the personhood, i.e. the owner's condition of human being, that is, in relation to the extent of freedom within which people engage in self-defining, responsible activity. Property right is not primarily a material but rather a personal guarantee. The basic right protects the individual against every unjustified infringement of the entire range of protected goods".

Property is an autonomous legal institution, that is to say an objective constitutional value that the State is bound to protect, preserve and foster.

Now, the balance between private ownership and public weal has been a topic of jurisprudence and academic dispute. There are two principles at work: individual sacrifice and regulatory intensity. If the burden of regulation affects individual ownership, the State must compensate, but if an uniformly imposed regulation confers benefits on all owners while exacting limited costs from all for the sake of the common good, no compensation is required.[73]

6.4 Groundwater case

6.4.1 58BVerfGE 300

The Federal Supreme Court questioned the validity of a federal statute, The Water Resources Act (WRA) of 1976 limiting the right of landowners to dispose of groundwater. The purpose was to preserve public water supplies from contamination or other uses damaging the public welfare. The WRA established that every person affecting the quantity or quality of groundwater needed a permit sanctioned by law, granted for limited periods and specific purposes.

The Federal Court based its questioning on the concept of property set in the Civil Code where "The right of the owner to a piece of land extends to the space above the surface and to the soil portion under the surface." To that, the Constitutional Court declared: "The concept of property as guaranteed by the Constitution must be derived from the Constitution itself. The concept of property in the constitutional sense cannot be derived from legal norms (ordinary statutes) lower in rank than the Constitution, nor can the scope of the concrete property guarantee be determined on the basis of private law regulations".

For the Constitutional Court, the legal view (sanctioned, by the way, under the Weimar Constitution) by which the right of property conferred by section 903 of the Civil Code takes precedence over regulations of public law contradicts the Basic Law. The Court also stated "The Basic Law assigns to the legislature the task of defining property law in such a way as to protect the interests of the individual and the public. The legislature has a twofold responsibility: first to create the rules of private law governing the protection and transfer of property and, second, to safeguard public interest –in which every citizen has a stake– mainly through the regulation of public law. Both private and public law contribute equally to the determination of the constitutional legal position of the property owner". "The totality of regulations on property existing at a particular point in time determine which rights the property owner concretely enjoys. If these regulations divest the property owner of a certain control over his property, then this control is not included in his right of property".

In a most interesting reasoning process, the Court defined the content and limits of property right:

- Property right does not permit the owner to make use of it in any way he desires.
- The legislature is not bound to adhere to a concept of ownership which would emanate from the 'nature of things' when enacting a set of regulations pertaining to property rights in accordance with the Basic Law.
- "The definition of property is not the exclusive domain of private law".

- "The institutional guarantee is not adversely affected when public law intrudes to protect and defend aspects of property vital to the well-being of the general public".
- "Property ownership does not result in the loss of usufruct simply because the owner's right to use groundwater is subject to governmental approval".
- "The right to dispose of property is in many ways subject to constitutional restrictions".
- "The constitutional guaranteed right to property does not permit the owner to make use of exactly that which promises the greatest possible economic advantage".
- "It would be incompatible with the content of the Basic Law if the government were authorized, abruptly and without any transitional period, to prevent the continuation of property rights whose exercise had required substantial initial investments".
- "The constitutional guarantee of ownership exercised by the plaintiff does not imply that a property interest, once granted, would have to be preserved in perpetuity or that it could be taken away only by way of expropriation".
- "The legislature may restructure individual legal positions by issuing an appropriate and reasonable transitional rule whenever the public interest merits precedence over some justified confidence secured by the guarantee of continuity, in the continuance of the vested right".

6.5 Exception to the policy restitution

6.5.1 84BVerfGE

Among the set of agreements established during the reunification of Germany is the Joint Declaration on the Settlement of Open Property Issues, by which expropriated property in the German Democratic Republic would be returned to its original owners or heirs. This concerned all property except the property seized during the Soviet occupation (May 8, 1945 to October 6, 1949). Former owners questioned the treaty exceptions.

On 1991, the Constitutional Court accepted the validity of the exception clauses acknowledging the government's argument about the necessity of achieving the higher constitutional goal of reunification.

6.6 The Mephisto case

6.6.1 BVerfGE30, 173

The Mephisto case is a mayor German leading case addressing the concept of 'work of art' and 'artistic freedom'. It is relevant to bring it up here because artistic freedom is an element of the right to free development of personality [Art. 2 (1) *Grundgesetz*]. *Mephisto*, the novel by Klaus Mann, portrays a fictional character, actually an actor who built his carrier around the role of Goethe's Mephisto. It was admitted that the character was based on the real-life actor Gustaf Gründgens. The civil courts concluded that the novel defamed the memory of the deceased actor by portraying him more disreputable than he had actually been.

The Constitutional Court considered the piece was a work of art, and therefore had to be judged by the very specific provision concerning guarantee of artistic freedom, which determines that "art and science, research and teaching shall be free". Notwithstanding, expressed the Court, this does not mean there are no limits on artistic or academic freedom. Each constitutional provision is to be understood in conjunction with other provisions, such as human dignity and free development of personality. Since neither human dignity nor artistic freedom is automatically entitled to precedence in case of conflict, it is the duty of the courts to balance both, under the specific circumstances of each case. The doctrine established here by the Constitutional Court is important for our analysis because, like with the right to privacy and the right to information self-determination, artistic freedom is an explicit right granted in the Basic Law. As such it must, according to the Constitutional Court, be addressed together with other rights in each case.

6.7 The Esra case

6.7.1 1BvR1783/05

The Esra case contains a particularly interesting ruling of the Constitutional Court addressing the balance between competing rights, namely, artistic freedom and privacy right.

At this respect, the Court established: "The right to artistic freedom includes the right to use real-life models and there is a correlation between the degree to which an author creates an aesthetic reality divorced from the actual facts and the severity of the violation of the right of personality. The greater the similarity between the copy and the original, the more serious the impairment to the right of personality. The more the artistic depiction touches on aspects of the right of personality, which are afforded special protection, the greater the fictionalisation must be in order to rule out violations of the right of personality".

The Court considered relevant that the banned novel *was a novel*. In this way, it deals with the relationship between privacy right and the context where privacy is set. Descriptions of real events allowing identification of certain characters with actual people may affect privacy rights. However, the Court stated, the intimate sphere of a person cannot be violated by descriptions of conduct, which have not actually occurred. Even so, the decision to limit artistic freedom so as to protect the general right of personality is not necessarily constitutionally objectionable, the ban on the dissemination of the novel in its entirety, however, violates the proportionality principle. Consequently, in such cases there is no need for a total ban.

This case is relevant because the Court establishes, by means of the proportionality principle, intermediate stages in order not to confer anyone the fundamental right of precedence they do not have.

The Court elaborated on the concept of 'art' regarding the novel *Esra*, taken as a work of art, namely a free creative process whereby the artist, in his chosen medium, – in this case the novel –, gives form to what he has felt, learnt or experienced.[74] After doing so, the Court included protection not only to the work produced but also to its effects. Thus, the Court considered: "This must ensure that individuals whose rights are impaired by artists are also able to defend their rights and, even taking into account artistic freedom, are able to enjoy effective protection". In these situations, the State courts are

obliged to uphold the fundamental rights of both sides equally. Encroachments on artistic freedom in reaction to private lawsuits are not cases of State 'censorship of art'. They must be examined to see whether they do justice equally to the fundamental rights of both the artists and those affected by the work of art.

As stated above, the present research aims to establish a relationship between privacy right, data protection laws and the solidarity principle. The underlying assumption is that privacy and data protection compete with other social values and needs, the solidarity principle being a valuable instrument to take into account in the resolution of the conflict. In the Esra case being analysed here, where privacy rivals with artistic freedom, the solution to the problem is found in a middle-ground compromise between competing rights, balanced not only by the proportionality principle, but also by solidarity.

In this particular case, the Court describes the scope of privacy right, which "has not been generally and conclusively elaborated". Among its most important features, privacy right is recognised as covering the right to dispose of depictions of oneself, the right to social recognition and protection of personal honour, all as a guarantee against statements detrimental to somebody's reputation and image and, in particular, anything threatening the development of one's own personality.[75] Children receive a special protection.[76]

Nonetheless, the Court considers artistic freedom imposes limits on the right of personality. In order to identify these limits in a specific case, it is not sufficient to determine in court an actual impairment to the right of personality without due consideration of artistic freedom.

The Court considered that "if it is clear in a case that the exercise of artistic freedom by the author impairs the right of personality of another person, then adequate consideration must be given to artistic freedom when deciding the civil-law action based on the general right of personality, against such impairment". Thus, the key element is to clarify whether the impairment is so serious as to result in artistic freedom having to take a second place.

In view of the high significance of artistic freedom, a slight impairment or the mere possibility of serious impairment is not sufficient grounds to decide a dispute. Whereas, if it is possible to determine with certainty serious impairment of the right of personality, artistic freedom cannot be justified.[77]

In a brilliant paragraph, the Constitutional Court stated: "It is a feature of narrative art forms (to which the novel belongs) that they are often, if not normally, based on reality, from which the artist creates a new aesthetic reality. This makes it necessary to apply standards specific to art in order to determine what connection with reality the novel suggests to the reader in each situation, to proceed only then to assess the seriousness of the impairment to the general right of personality".

Therefore, artistic depictions cannot be measured according to the standards of the real world, but only by aesthetic standards specific to art.[78] This means that the solution to the tension between the right of personality and artistic freedom cannot refer solely to the effects of a work of art in the non-artistic social sphere, but must also take into account considerations specific to art. A decision on whether there has been a violation of the right of personality can only be taken, therefore, by weighing all the circumstances of the individual case. In this connection, "one consideration must be whether and how far the artistic presentation of the material and its incorporation into the work of art as an organic whole has made the 'copy' become independent of the 'original' by rendering objective, symbolical, and figurative what was individualized, personal, and intimate".[79]

The Constitutional Court considered lower courts did not take sufficiently into account the fact that the starting point of a novel is that it is actually fiction. Nonetheless, it is understandable that the inclusion of a disclaimer stating that similarities with real people are purely coincidental and unintentional not be considered by the Federal Court of Justice to be sufficient reason for a text to be fictitious. In fact, this must instead be evaluated on the basis of the text itself. If according to this evaluation a literary text turns out to be intended as a mere retaliation against or denigration of another person, the right of personality may well prevail.

It is evident from the aforementioned considerations that the complainant and the author must have an opportunity to establish a constitutionally unobjectionable situation by publishing a version of the novel which does not violate the first plaintiff's right of personality.

This ruling clearly establishes, in fact, the constitutional doctrine regarding the transcendental role of context. Transferred to the subject matter of the present work, current technological facts and social needs, as well as privacy right and data self-determination, cannot be addressed as rights with no circumstances pondering their content and limit.

6.8 The schoolbook case

6.8.1 31BVerfGE229

German law allows for already-published literary and musical works of small extent, single artistic work or single photographs to be published in compilations for religious, school or institutional use. It clearly states, however, that this purpose should be clarified on the title page and authors notified by registered mail before reproduction and distribution.[80] Certain musicians who considered their property right violated, complained.

In this case, as in other copyright cases, the Court treated the property right in tandem with the personality right and artistic freedom stating that "copyright protects the author in his intellectual and personal relations to his work and in the utilization given to it". However, it granted that the legal relationship between the two aspects of copyright, plus the question of the proper constitutional rights which should govern the issue needed further elaboration.

In doing so, in this particular case and quoting the Mephisto case, the Court shed some light on the question of artistic freedom as not being the issue, because the law rules out any official attempt to influence the tendency or content of artistic activity, as well as any attempt to narrow the field of artistic activity or to prescribe universal binding rules for the creative process. Here, the critical fact is the economic utilisation of an intellectual creation, in other words and more specifically, whether the statutory limitation on the economic rights of authors is compatible with the Constitution.

The Court, consistent with its own doctrine, stated: "Because there is no preexisting and absolute definition of property, and because both the content and function of property need to be adjusted to social and economic change, the Constitution vests the legislature with the authority to define its content and limits. The economic rights of authors, like tangible property rights, are not excluded from being shaped by the legal order. Bound by the Constitution, however, the legislature is not totally free to dispose of such rights. In

determining the content of the right, the legislature must ensure the essential core of the right is preserved and conforms to all other constitutional provisions".

While copyrights are property rights, the fundamental freedom of the author to dispose of the economic rights associated to his work does not mean he is constitutionally entitled to *every conceivable* use of his own property. Authors' rights are limited by the extent to which public good is secured. The validity of this provision depends on its justification in terms of public interest.

Most importantly, the Court considered that "when a protected work has been published it is no longer at the exclusive disposal of the individual for, at that point, it simultaneously enters the social sphere and thus becomes thereafter an independent factor contributing to the cultural and intellectual spirit of the time".

Education of the youth and position of the churches in society reasonably justify, in the view of the Court, a restriction to the author's property right. However, the author should not be the only one to support the burden of the social interest in education.[81]

6.9 The obligation of the mother to carry her unborn child

6.9.1 2BvF5/92

Decided on May 28, 1993, this ruling establishes the legal obligation of the mother to carry her unborn child to be constitutional. The rationale of the ruling is clearly based on the solidarity principle, as the judges considered the Basic Law requires protection of human life, including that of the unborn. Based on Article 1, (1) and on Article 2, (2) of the Basic Law, the unborn human life is acknowledged human dignity, beyond the mother's acceptance of the unborn. "The unborn is entitled to legal protection even vis-à-vis the mother. Such protection is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term. The prohibition on pregnancy termination and the fundamental obligation to carry the child to term are two integrally connected elements of the protection mandated by the Basic Law".[82]

Legal solidarity is imposed on the mother based on the legal value itself of the child's life and on the competition of legal values of child and mother. The legal values affected by the right to life of the unborn are

1 the right of the pregnant woman to protection of and respect for her human dignity [Article 1, (1) of the Basic Law]

2 her right to life and physical inviolability [Article 2, (2) of the Basic Law] and the right to free development of her personality [Article 2, (1) of the Basic Law].

However, in order to fulfil the obligation to protect unborn human life, the State must provide effective preventive mandatory protection. In doing so, the imposition of legal solidarity on third parties, namely the mother, is legitimated.

Women's constitutional rights do not extend far enough so as to set aside, in general, their legal obligation to carry the child to term (BVerfG, 05/28/1993). Having said this, the Court considers it is up to the legislature to establish detailed exceptional situations under which the mother must not be subject to burdens which demand such a degree of sacrifice of her own existential values that one could no longer expect her to continue with the pregnancy.[83]

In an interesting manner, the Court considered the State's mandate to protect human life requires preservation and reviving the public's general awareness of the unborn's right to protection, bearing the State full responsibility for implementation of the counselling procedure for the mother and other parties involved.

This case is relevant here because it is established by the Constitutional Court that it is legitimate for the legislature to impose solidarity obligations on people, even when conflicting rights may exist.

6.10 Automatic plate numbers recognition

6.10.1 1BvR 2074/05; 1BvR 1254/07

The First Senate of the Federal Constitutional Court upheld the complaints lodged by several registered motor vehicles holders against provisions under police law in Hesse and Schleswig-Holstein authorising automatic recognition of vehicles number plates.

The Court considered such automatic process violates the information self-determination right all individuals enjoy. The provisions lack the required definition and clarity, the Court stated, as they do not establish neither the cause nor the purpose of such recognition and ulterior data matching they are intended to serve. By not doing so, the provisions do not comply with the constitutional precept of proportionality.

Should the data collected be deleted right after they are matched, without further evaluation, the process would not necessarily violate constitutional standards. What is considered a thread to the personality right is the automatic collection and retention of such personal information for possible further use.

Data recognition by itself does not constitute a dangerous act. An interference with the fundamental right exists, however, when number plates having been recognised are kept and can become the basis for further measures.

Interference with the fundamental right to information self-determination must have a constitutional statutory basis. To be so, it is necessary that the authorisation be pondered upon the gravity of the interference, which is especially influenced by the nature of the collected information, the cause and the circumstances of the collection, the affected groups and the way in which the data will be used.

This ruling is relevant to us here because the Constitutional Court establishes the circumstances in which data collection is compatible with the Basic Law.

6.11 Precaution storage

6.11.1 BvR 256/08; 1BvR 263/08; 1BvR 586/08

The Amendment of Telecommunications Surveillance Act (*Gesetz zur Neuregelung der Telekommunikationsüberwachung*) of 21 December 2007 was conceived to implement the European Union directive on data retention in German law. For this purpose, Article 2 of the Act contains amendments to the Telecommunications Act (*Telekommunikationsgesetz – TKG*). The constitutional complaint challenged the provisions ruling the duty of data storage.

The challenged provision orders that, in the case of individuals who in their business capacity provide telecommunication services or assist in providing such services, data should be stored by way of precaution. Additionally, such information providers shall in the individual case supply, without delay, information to the competent agencies, upon

their request, on the data collected pursuant to && 95 and 111. And this to the extent this particular information is necessary either for the prosecution of criminal or regulatory offences, to ward off dangers to public security or to perform the statutory duties of Federal and Länder authorities concerning protection of the Constitution, as well as for the use by the Federal Intelligence Services and the Military Counterintelligence Service.

To the constitutional complainants' argument that the provision violates articles 1.1 and 2.1 in conjunction with articles 1.1, 10.1 and 19.2 of the *Grundgesetz,* the Court stated, "It is part of the constitutional identity of the Federal Republic of Germany that the exercise of freedom of its citizens may not be totally recorded and registered.[84]

Furthermore, the Court stated that Art. 10.1 guarantees the secrecy of telecommunications, thus protecting the incorporeal transmission of information to individual recipients by means of telecommunication traffic against the taking of notice by State authority and beyond State authorities bearing. This protection not only relates to the contents of the communications undertaken, but also covers confidentiality of the immediate circumstances where the process of telecommunication is taking place, in particular whether, when and how often telecommunication traffic occurred or was attempted between which specific persons or telecommunication equipment.

The Court considered that an encroachment upon fundamental rights includes every taking notice, recording and evaluation of communication data, and every analysis of their content or other use by State authorities. This was stated as a specific provision, which overrides the general right arising from art. 2.1 in conjunction with art. 1.1.

Likewise, the Constitutional Court considered such encroachments upon the secrecy of telecommunications to be substantively constitutional if their purpose is the public interest and if they comply with the principle of proportionality, i.e., they are suitable, necessary and appropriate to fulfil the purposes. Thus, as an exception to the rule, storage of telecommunications traffic data without cause for six months, for qualified uses in the course of prosecution, to insure warding off danger and for intelligence service duties, as provided by && 113a, 113b TKG, is therefore not in itself incompatible with art. 10 of the *Grundgesetz*.

The Court also considered legitimate for the legislature to order such six-month storage as a way to create detection possibilities otherwise not possible.

By Case law of the Constitutional Court it is strictly forbidden for the State to collect personal data by way of precaution and to retain it for purposes which are not determined or cannot yet be determined. The Court considered such requirement was not matched by the contended provisions because the data were not yet combined in one single base at the time of storage, but distributed among many private providers.

The Court considered storage for six months takes up, in a manner still limited, the special significance of telecommunications in the modern world and reacts to the specific potential danger associated with this. "The new means of telecommunication transcend time and space in a way not comparable with other forms of communication, fundamentally excluding public awareness. In this capacity, they also facilitate concealed communications and actions by criminals and enable scattered groups to get organized and cooperate effectively".

Data retention alone does not entail particularly serious or irreversible damage to justify suspending the provision by a temporary injunction in exceptional cases. It is true that retention of sensitive data, comprehensive and without purpose on virtually everyone, for government uses that cannot be foreseen in detail at the time of storage may

have a considerable intimidating effect. The above statement by the Constitutional Court is of mayor importance: data storage is not by itself a threat to privacy. Arguably it is, for a limited period of time, a kind of common good, available to all.

That stated, the Court considered however that the challenged provisions did not meet the particular high standards of data security required by the proportionality principle.

In order to meet constitutional requirements, data retrieval must be subject to substantial justified judicial authority. Additionally, the prosecution of crimes requires at least the suspicion of a serious criminal offence listed specifically by the legislature. As for the use of stored data for purposes related to warding off danger, the legislature must refer directly to the legal interests of those whose protection it is aiming at and to the degree of that danger. The enabling statute must also require actual evidence of a concrete danger in an imminent individual case related to specific individuals who are likely to cause the damage.

Additionally, the Court considered the use of data stored by precaution for six months should have certain transparency requirements, such as: being open or, if not, that the persons affected be informed, at least subsequently. Non-notification requires a specific judicial decision.

Likewise, delivery of data to State authorities must be filtered by the telecommunication enterprises, who act as third parties, without direct access to the data.

Finally, the legislative provision must include effective sanctions for violators of rights. Such requirements were not met by the challenged provisions, and therefore they were declared void.

German legislation was found to breach art. 10 paragraph 1 of the German Constitution (*Grundgesetz* 10), which ensures the privacy of correspondence and telecommunications (the '*Fernmeldegeheimnis*' or '*Telekommunikationsgeheimnis*').

6.11.2 Solidarity principle

In contrast to the above, and on the issue of imposed agents to perform the task of storage and delivery, the Court considered the challenged provisions did not raise any constitutional objections. The duties required and the financial burden associated with them do not compromise occupational freedom, not even in the case of the person who operates a publicly accessible *anonymisation* service, who may continue offering such service. The anonymity is lifted *vis a vis* the State authorities, only if a retrieval of data is permitted under the strict circumstances stated above.

The solidarity principle establishes responsibilities on private individuals in proportion to their ability to perform specific tasks. This is precisely what the Court considered at this respect. The burden of data storage for six months is proportionate to the technical and financial abilities of the storing enterprise and to public interest.

The duties of storage and transmission are proportionate to the aim, that is, either to efficient criminal prosecution, warding off danger and of securing secret services duties. They are, thus, based on those rational general welfare reasons they are suitable to promote.

The Court considered the technical effort storage entails is proportionate to the high-level technological know-how the people involved have in the collection, storage and processing of telecommunication data. Besides, the duty of storage is not disproportionate with the financial burden they have in doing so.

The Court stated on this issue that the legislature has broad discretion as to what duties will be imposed on private persons to ensure public interests.

6.12 Acoustic surveillance of housing space

6.12.1 1BvR 2378/98

On March 3, 2004, the Constitutional Court decided that some provisions included in the Code of Criminal Procedure concerning acoustic surveillance of housing space partly violate the Basic Law. Unlike Article 13.3 of the Basic Law itself which allows acoustic surveillance of housing for reason of prosecution of severe crimes defined individually by law and other means are out of proportion.

The Bundesverfassungsgericht in its decision of March 3, 2004 partly rejected the constitutional complaints to the degree that they asserted that Article 13 of the Basic Law constituted a violation of the following provisions of the Basic Law as they allow supervision in a way compatible with human dignity.

The Court considered confidentiality of communication is secure in private rooms, therefore acoustic surveillance of housing space should not be allowed in this sphere of privacy. Even predominant public interests cannot justify such encroachment. However, not all acoustic supervision violates human dignity, as there are certain conversations which do not integrate such intimate space, i.e., those concerning committed criminal offences. In this way, the Court introduced a flexible method to distinguish between constitutional and unconstitutional acoustic surveillance of conversations in private rooms.

Some provisions of the Code of Criminal Procedure were considered unconstitutional because they do not fulfil certain requirements, such as the need to hold a judicial order concerning surveillance of housing space, which in turn would include a required description of the type of surveillance to be undertaken, plus details of the duration and extent of the measures. In this case, they did not include the required notification to the person affected, at least after the beginning of the trial.

6.13 Admission of personal information collected unlawfully in criminal proceedings and the issue of life insurance policies

6.13.1 2BvR2500/09, 2BvR 1857/10

The Constitutional Court considered certain provisions contained in the Code of Criminal Procedure regarding acoustic monitoring of dwellings are incompatible with the Basic Law because they do not contain any precautions to protect the core area of private life.

The complainants, convicted for being members of and supporting terrorist activities, applied for life insurance policies in 28 cases, nine of which were concluded. The complainants were apprehended before being able to further enact their planned offence. The conviction evidence was collected from preventive dwelling police monitoring carried out during several months in 2004, prior to starting the criminal investigation proceedings against the complainants suspected of planning terrorist attacks.

The required judicial order for preventive surveillance in cases of imminent risk of public security was carried out lawfully according to Rhineland-Palatinate Police and Regulatory Authorities Act (*Rheinland-Pfälzisches Polizei- und Ordnungsbehördengesetz* – POG RP).

The Federal Court of Justice (*Bundesgerichtshof*) confirmed the information obtained by preventive police monitoring of dwellings could be admitted, but amended the guilty verdict to distinguish complete fraud where life insurance had been concluded and attempt of fraud in the other cases.

The Constitutional Court remitted the case considering the guilty verdict for completed or attempted fraud violates the principle of determinedness set in Article 103.2 GG. However, it upheld the Federal Court's criteria by which the admission of information from the monitoring of dwellings does not violate the complainants' fundamental rights or rights equivalent to fundamental rights.

According to the Constitutional Court, it is decisive that preventive police monitoring of dwellings not be an inadmissible measure across the board according to the Basic Law and that its actual implementation complies with the protection of the core area of private life.

Regarding personal information obtained by monitoring dwellings, the Court considered it did not violate the complainants' general right of personality. The legal foundation was to consider that admission of personal information handed down by a criminal court is constitutional. In particular, it is consistent with the proportionality principle when it serves purposes having constitutional status, such as the State obligation to guarantee the administration of criminal law. The admission of information is hence also proportional, in principle, if – as in the original proceedings – the information originally collected for another purpose and further used in criminal proceedings.

The Constitutional Court considered the Federal Court of Justice's presumption that the complainants committed a criminal offence –complete fraud– by concluding life insurance policies and attempted fraud by applying for life insurance is, by contrast, not compatible with the principle of determinedness set in Article 103.2GG.

6.14 Protection of the Constitution in the North Rhine-Westphalia act

6.14.1 1BvR 595/07

The Constitutional Court considered some aspects of this Act (*Gesetz über den Verfassungsschutz* in *Nordrhein-Westfalen* as of 20 December 2006) to be null and void, particularly various instances of data collection and handling by information technology systems incompatible with Article 2.1 in conjunction with Article 1.1, Article 10.1 and Article 19.1 sentence 2 of the Basic Law.

This provision allows the Constitution protection authority to carry out two types of investigative measures: first, secret monitoring and other internet reconnaissance (alternative 1), and second, secret access to information technology systems (alternative 2).

The Land provision was the first explicit empowerment of a German authority to engage in 'online searches'.

The Constitutional Court considered that the general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) includes the fundamental right to confidentiality and integrity of information technology systems.

"Secret infiltration of an information technology system to monitor the use of that system and read its storage is constitutionally permissible only if factual indications of a concrete danger to a predominantly important legal interest exist. Predominantly

important are a person's life, limb and freedom or the threat to certain public interests affecting the basis or continued existence of the State or of human existence".

The measure seems to be justified since, even if it is difficult to ascertain with sufficient probability, this danger may arise in the near future insofar as certain facts indicate a risk posed to the legal interest by specific individuals.

The Court went on to state: "Secret infiltration of an information technology system is in principle to be placed under the reservation of a judicial order. The statute granting powers to perform such an encroachment must contain precautions in order to protect the core area of private life".

Insofar as empowerment is restricted to a State measure by means of which the contents and circumstances of ongoing telecommunication are collected in the computer network, or the data related thereto is evaluated, the encroachment is to be measured against Article 10.1 of the Basic Law alone.

If the State obtains knowledge of communication contents publicly accessible on the internet, or if it participates in publicly accessible communication processes, in principle there is no encroachment on fundamental rights.

6.15 Von Hannover v. Germany (No. 2)

Princess Caroline von Hannover and Prince Ernst August von Hannover's case is also interesting as it addresses specific issues concerning privacy. Both princes had been trying for a long time to prevent publication in the press of photos about their private life. Their efforts produced a string of cases going from local German courts to the Constitutional Court and to the European Court of Human Rights, in particular, certain leading judgements of the Federal Court of Justice on 19 December 1995 and of the Federal Constitutional Court on 15 December 1999 dismissing their claims.

The European Court of Human Rights in von Hannover v. Germany judgement of 24 June 2004 (No. 59320/00, ECHR 2004 VI) considered the German Courts had infringed the applicants' right to respect their private life, a right guaranteed by Article 8 of the Convention.

The European Court argued that German courts, by considering the applicants to be public figures 'par excellence', but who 'can only rely on protection of their private life in a secluded place' granted very limited protection to that very private life and to the right to control the use of their image. Likewise, it asserted there should be a clear distinction between 'public figures', 'relatively private figures' and 'private individuals' so people would have precise indications as to the behaviour they should adopt, this being the key element of a State governed by the rule of law.

Relying on the European Court's judgement, the applicants brought thereafter several sets of proceedings in the civil courts seeking an injunction against any further publication of photographs having been published in German magazines.

These proceedings reached the Federal German Court first and then the Constitutional Court. At this point, the Federal Court had considered there could be no exception to the obligation to obtain the consent of the person involved, unless the report in question concerned an important event of contemporary society.

"Whilst the freedom of the press and the prohibition of censorship required the press to be able to decide for itself which subjects it intended to report on and what it intended

to publish, the press was not exempt from the duty to weigh its interest in publishing the information against the protection of the privacy of the person concerned".

The greater the information value for the general public, the more the right to protection had to yield. Conversely, where the interest in informing the public decreased, the importance of protecting the person concerned carried correspondingly greater weight.

The Federal Court of Justice concluded that, "in those circumstances and having regard to the context of the report as a whole, the first applicant had no legitimate interest to oppose publication of the applicants' photograph out in the street. There had been nothing about the photograph itself constituting a violation (*eigenständiger Verletzungseffekt*) and thus justifying a different conclusion; nor was there anything to suggest that the photograph had been taken surreptitiously or using secret technical devices capable to render its publication unlawful".

The First Senate of the Federal Constitutional Court dismissed thereafter constitutional appeals against the Federal Court of Justice's judgement on the following grounds:

1 There are limits to the protection afforded to privacy right and to freedom of the press.

2 It is relevant to weight the importance of an encroachment or trespass on privacy, against the value of such information for public opinion.

3 In order to determine the weight of the personality rights affected, certain elements must be considered, such as the circumstances in which the photograph was taken (taken surreptitiously or as a result of persistent hounding by photographers), the situation in which the person concerned was photographed and the manner in which he or she was portrayed.

4 The right to protection of personality rights thus carry more weight when "details of a person's private life not normally subject of public discussion" are displayed.

5 Other important elements are the legitimate expectations of privacy of the person concerned in given circumstances, and special locations.

The Federal Constitutional Court observed it is the task of the civil courts to apply and interpret the provisions of civil law in the light of the fundamental rights at stake. Likewise, it considered its own role is to examine whether the lower courts had sufficient regard to the impact of fundamental rights when interpreting, applying the law and balancing the competing rights.

In a very interesting manner, and consistent with its own doctrine, the *Bundesverfassungsgericht* stated: "The fact that the court's balancing exercise of the various rights in complex and multi-polar disputes – that is, disputes involving the interests of several different individuals – could result in different outcomes is not sufficient reason to require the Federal Constitutional Court to correct a court decision".

Applying those principles to the case submitted, the Federal Constitutional Court observed the Federal Court of Justice and the criteria established were constitutionally unobjectionable.

The applicants took the case again to the European Court of Human Rights, which unanimously considered there had been no violation of Article 8 of the European Convention and this time upheld the German rulings.

6.16 Standard benefits paid according to the Second Book of the Code of Social Law

6.16.1 1BvL1/09, 1BvL3/09, 1BvL4/09

According to German law, employable needy people receive unemployment benefit as well as non-employable dependents living with them in a joint household. Benefits, which are calculated on statistical basis, are only granted when there are no sufficient means of one's own, especially income or property. Once into force, the Fourth Act for Modern Services on the Labor Market fixed the standard benefits for single individuals living in the old West German states, including East Berlin, at €345.

The First Senate of the Federal Constitutional Court conducted in 2009 an oral hearing on the question of whether the amount of the standard benefit meant to secure the livelihood of adults and children is compatible with the Basic Law.

After careful consideration the First Senate decided "the provisions concerning 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 in line with human dignity".

The reasoning of the Court was that "the fundamental right to guarantee a subsistence minimum 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 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 honored; it must, however, "be lent concrete shape, and be regularly updated, by the legislature".

7 Conclusions

7.1 Human condition and privacy

The core area of an individual's private life is inviolable and enjoys absolute protection owing to its particular proximity to human dignity. This has been consistently the stance of the *Bundesverfassungsgericht*.[85]

All possible interpretations of the Court's reasoning (liberal, institutional, value-oriented, democratic and social) agree human dignity is an absolute value for the Court. Thus, any instance marking a distinction between a life being not worthy or less worthy is void of legitimacy.

Protection of human dignity and fundamental rights allows the legislature to impose restrictions on other rights or to assign solidarity duties to the community or individuals as long as certain constitutional provisions are taken care of. And here, proportionality is of paramount importance.

7.2 Adaptating to new technological circumstances

The success technology has reached in providing ever-new ways of human interaction has required from the Court new precisions in certain legal categories and demanded from judges a wide-open mind. Old legal categories have been considered frequently inappropriate to provide protection of basic human rights. Therefore, the German Constitutional Court has developed traditional civil-law categories, adapting them first to the Basic Law and to new social needs and modern life. In so doing, it has reshaped legal guarantees.

The Court has addressed issues concerning gender, property, private and public life concerns, technological problems, as well as matters concerning the new role of State sovereignty. In the specific field of privacy right it has set forth the notion that it is not defined by private law.

The Court has furthermore heightened the idea of free development of personality beyond cultural or social limitations, and based on the concept of equality. This development necessarily sets the Court at the forefront of social events, as individual initiative in search of identity is what shapes the path of society. In responding to such demands, the Court has established and defined new dimensions of property, privacy and internet, departing from self-centred and egoistic conceptions. Arguably it has evolved towards the idea of global public goods, limiting property and privacy when the proportionality principle calls for such limitations on the basis of social good. In so doing, the Court has found a balance in the moving grounds of personality right and democratic government.

Likewise, the rulings of the Constitutional Court analysed above show that in giving proper protection to fundamental rights the Court is pragmatic and acknowledge the different scopes of State, legislature, lower courts, as well as international and supranational jurisdictions.

7.3 The affirmative role of the State

Another axiomatic principle the German Constitutional Court advances is the affirmative obligation of the State to further human dignity and to encourage solidarity among its citizens. In doing so, protection of freedom and security becomes one of its first duties. Respect for private and family life, marriage, home and communications, as well as protection of personal data is always present in the Court's doctrine. Special consideration has been given to fair processing of such data and to the consent required for its use in view of public good. Other forms of legitimate administration of data are considered to be constitutionally possible, provided the intervention of proper legal provisions and judicial o equivalent independent authority.

The Court has proven to be open to a complete re-design of legal structures if required by current social life. It is open to redefine what is public and what is private, what is identity and what is 'otherness'. It has outlined the condition of the individual as being in reciprocal relationship with others and with the State. For the Court, no problem belongs just to the 'other' and rejects the idea that the human being is first alone only to enter into relations with others later. In fact, the doctrine for the German Constitutional Court can clearly be systematised as considering fundamental rights as part of the whole of human condition, in which solidarity is what unites the group according to the qualitative degrees of participation of its members.

Examples of the above are the Court's rulings establishing that privacy rights depend not on the condition of certain individuals but rather on those authentic privacy expectations such person might have and on the nature of the information under analysis. Contribution to public debate is, for the Court, a key element in the objective set of values laid out by the Basic Law and the legal system as a whole.

The Court rulings analysed here frequently deal with the notion that although rights are not divisible they belong, not to abstract individuals but to actual everyday people. Proportionality and balance are criteria the Court frequently uses. Rights of first, second, and third generation are granted by the Court together with those of fourth and fifth generation, namely rights to information self-determination, copyright, artistic, scientific and technological freedom.

The question of indivisibility of rights frequently caused the Court to depart from economic and market logic, and to build from *Sozialer Rechsstaat* creative solutions to actual social problems. It clearly did so in the case of social assistance of unemployed citizens and their dependents, considering specific provisions partially unconstitutional. Human dignity is inviolable, considered the Court, and the German State is a democratic and social State according to the *Grundgesetz*. Both provisions require the State to guarantee a *menschenwürdiges Existenzminimun*, that is, a minimum of circumstances befitting a human being and not considering anybody unworthy.

7.4 Fundamental rights and democracy

The Constitutional Court has been particularly careful to affirm the republican division of powers, upholding whenever necessary the legislature's power. At the same time, it has developed a doctrine with a core of objective values presented with such a legitimate strength that all other considerations seem to give way. Based on the original democratic constitutionality of the Basic Law, the Court focuses primarily on the legal dimension and presents itself in ways seeming to escape the procedures of representative democracy. The result is a balance reached between fundamental rights and popular sovereignty.

Regarding the relation between private law and constitutional law, the Court considers the autonomous capacity of individuals to establish the content of their contracts and to freely create the conditions of their relationships must be interpreted as an intrinsic part of a system governed by the principles of the Constitution. Likewise, it has often expressively stated that contractual activities cannot take place if in conflict with social utility, nor if they affect national security, or human dignity.

It is possible to state that the Court's reasoning changed regarding what counts as key elements of the legal system. There is a transition from the old supremacy of specific legislation to a system in which legal principles are of the most and highest importance; the proportionality principle being one frequently used by the Constitutional Court.

Based on the right to personality development, the *Bundesversfassungsgericht*, created ulterior important specific rights such as the right to information self-determination, which is key to data protection, as well as corporal and psychological integrity non-discrimination; and solidarity among all citizens, particularly the unemployed, children, the elderly and the handicapped.

Notwithstanding, the Court does not view the *Grundgesetz* projects an idea of an unassailable individual. Thus, property, the right of personality, privacy and artistic freedom are not without limitations. The principle of solidarity, for instance, entails certain restrictions to privacy and on informative self-determination. Likewise, social security, health planning, national security and certain requirements regarding democratic transparency call for and allow some restrictions on privacy. Private actions fostering public debate, artistic and scientific development, and storage of data for certain amount of time are also some of the legitimate irruptions on privacy accepted by the Court as well as collective rights such as the right to knowledge, which radically limits traditional concepts of copyright and patent law.

The rulings of the Constitutional Court regarding property rights imply a revision and a variation of that concept. The use of goods is no longer a purely personal concern and certainly not exclusive; on the contrary, they must be accessible to all, due to their social function. Specifically regarding information technology, data and the internet, the Court has admitted it is now possible to have access without being the owner. It has also acknowledged the possibility to hold property rights without being an exclusive user. Current technological circumstances have led the Court to move from a discourse of exclusiveness to one of accessibility.

The ruling of the Constitutional Court regarding temporary data storage by internet and communication providers may be interpreted as opened to the idea of common goods. There is a point in which data does not belong to anyone, as in a web, with no centre, everyone sharing its property and, as such, available for different social needs. Protection of individual rights is not related to exclusiveness, but to the way that particular good is used. Thus, at least for six months in the German case, data is a collective good accessible to all those who have a legitimate interest.

Common goods have a diffuse and non-concentrated ownership; belonging to all and to no one at the same time, they are accessible to all and none can pretend exclusiveness. They must be managed, consequently, by the solidarity principle.[86]

It is pertinent to assert that, among others, knowledge is a common good. Likewise, technological innovation, cultural and artistic goods are also common goods. The Court has stated that the greater the information value of a fact for the general public, the more the right to protection has to yield. Conversely, where the interest in public information decreases, protection of the person concerned carries greater weight. It is relevant, considered the Court, to weight the importance of an encroachment or trespass on privacy against the information value of an issue for the makeup of public opinion.

Arguably there is a new classification going beyond private and public goods, i.e., private, public and common goods. The basic character of the latter is its capacity to further the social bond. Its very existence certainly challenges the model based on the individual concern, but the Court has been very careful to specify the conditions under which individual freedom and privacy ought to be granted, allowing thus for the expansion and fulfilment of the fundamental rights.

7.5 Final considerations

The right to personality in Germany has turned considerably towards data protection, as it is through this means that privacy is mostly violated.

The *Bundesverfassungsgericht* legal concept of the person entitled to privacy and data protection, in consonance with the German tradition, does not concern an abstract subject but rather a person inserted in the material (and technological) environment of everyday life. The Court addresses the specific circumstances in which somebody's life evolves, requiring different treatment for different situations so as to make of equality not just a legal declaration. The reasoning of the Court reveals that "the fundamental right that guarantees a subsistence minimum, in line with human dignity, is not subject to disposal by the legislature".

The right of information self-determination is also set within its proper social place, where the person must be able to maintain his/her autonomy in a context defined socially, and remain responsible for the general good.

The Constitutional Court has crafted the legal categories by which fundamental rights ought to be protected. The Basic Law sets an objective group of values, the legislature enjoys constitutional authorisation to regulate the specific circumstances in which those rights are actually exercised and the *sozialer Rechsstaat* is a key element in the equation. Therefore, the solidarity principle is a resourceful criterion able to bind the different actors involved.

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Notes

1 1BvR370/07.

2 Warren, S. (1890) 'The right to privacy', *Harvard Law Review*, Vol. 4, Cambridge.

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