DEVELOPMENTS

Freedom, Security and (the) Public(ity): Notes on the 2008 Heidelberg Conference of German-speaking Public Law Assistants

By Matthias Koetter[*]

A. Introduction

In the last week of February 2008, the University Assistants of Public Law from Germany, Austria, and Switzerland came together in Heidelberg for their annual conference to discuss "Security, Freedom and (the) Public(ity)."[1] A better date for the meeting could not have been chosen; on the day the conference started, the German Constitutional Court declared online searches by German intelligence agencies to be unconstitutional and came up with a new dimension of human rights protection for the privacy of computer network systems.[2] This pathbreaking jurisprudence was omnipresent at the conference; it had already been in the opening-speech by Justice Brun-Otto Bryde (Gießen), a member of the First Senate of the Constitutional Court, which was to render its decision the very next day. It was brought up in numerous discussions during the conference and it was the main topic on the panel discussion with Paul Kirchhof (Heidelberg), a former Justice in the same Senate who was known as the "Professor from Heidelberg" during Angela Merkel's 2006 election campaign, and Fredrik Roggan, a Berlin lawyer and chairman of the civil rights association "Humanistische Union," who

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[1] *See* Assistententagung Öffentliches Recht *available at* www.assistententagung.de (containing the program of the conference and for abstracts of the contributions. The conference proceedings will be published this summer). For notes on earlier conferences, *see* Daniel Thym, *The European Constitution: Notes on the National Meeting of German Public Law Assistants,* 6 GERMAN LAW JOURNAL 793 (2005), *available at* www.germanlawjournal.com/article.php?id=593; Marten Breuer, *Law and Medicine: Notes on the Meeting of German-Speaking Public Law Assistants in Vienna (2006),* 7 GERMAN LAW JOURNAL 445 (2006), *available at* www.germanlawjournal.com/article.php?id=722; and Lukas Bauer and Konrad Lachmayer, *Networks in Public Law: Notes on the 47th Meeting (2007) of German-Speaking Public Law Assistants in Berlin*, 8 GERMAN LAW JOURNAL 1069 (2007), *available at* www.germanlawjournal.com/article.php?id=872.

[2] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 1 BvR 370/07 and 1 BvR 595/07 (Feb. 27, 2008), at http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html.

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argued the case before the Court. Perhaps it was all a coincidence, but questions of freedom and security have remained on the everyday agenda, in a political context as well as constitutional debates, ever since September 11, 2001.

B. The Current Period of Constitutional Self-ascertainment

In the case of online searches, once again, the Constitutional Court took the opportunity to review its jurisprudence on the protection of privacy and to adapt to the challenges of recent technical advances in the field of computer and network technology. The Court has had to constitutionally evaluate a number of anti-terrorism instruments in the recent past, always referring to and elaborating its epoch-making 1983 articulation of the individual right to informational self-determination with respect to the proliferation of personal data.[3] By approving the relevance of the personal computer for everybody in everyday life, by protecting it against the access of the state and the police and thus by stressing individual autonomy even in times of diffuse threats, the Court managed to balance seemingly contradictory issues by requiring good reasons for the publication of private information.

The developments in the years since 2001 have led to a set of questions that mirror the irritation of fundamental consensus. The cases the Constitutional Court has had to decide were complemented by rather fundamental political and moral debates: the consideration of torture in ticking-time-bomb situations; the identification of dangerous individuals as enemies and their preventive detention; and military operations for domestic security made it necessary to review fundamental, freedom-guaranteeing (legal) principles. Discussions on constitutional certainty, human dignity, the limits of autonomy as self-determination in a social context and even the idea and the image of man were activated by the presumed terrorist threats.[4] The conceptual concurrence of freedom and security in these "uncertain times" became the borderline discourse in western societies, touching the liberal and humanistic fundament of the constitutional state.

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[3] BVerfGE 109, 279 (Mar. 3, 2004) (Acoustic surveillance of private living space); BVerfGE 113, 348 (July 27, 2005) (Preventive surveillance of telecommunications); BVerfGE 115, 118 (Feb. 15, 2006) (Air Security Code); BVerfGE 115, 320 (April 4, 2006) (Data Profiling); Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1345/03 (Aug. 22, 2006), at http://www.bundesverfassungsgericht.de /entscheidungen/rk20060822_2bvr134503.html (Imsi-catcher); and Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 1 BvR 2074/05 and 1 BvR 1254/07 (Mar. 11, 2008), at http://www.bundesverfassungsgericht.de/entscheidungen/ rs20080311_1bvr207405.html (License plate scan).

[4] *See* MATTHIAS KOETTER, PFADE DES SICHERHEITSRECHTS (PATHS OF SECURITY LAW ARGUMENTATION) 281-352 (2008)

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In order to disturb the bipolarity of this classical approach and to indicate and stress the social context, the Heidelberg conference supplemented the contrast of freedom and security by another constitutional principle: the German *Öffentlichkeit* that combines two meanings. First, the public as the actor and recipient of state action, and second, publicity in the sense of transparency that is a precondition for the legitimacy of collectively binding state decisions. Against the background of this terminology, the presented and discussed legal questions always reflected an essentialist dimension and led to the permanent constitutional self-ascertainment that has been so characteristic of recent legal debates. In this sense, the contributions to the Heidelberg conference and the discussions can be read as a reflection on the basic components of our legal self-conception: fundamental "norms" like the state governed by the rule of law, or the civic individual, and constitutional functions like the provision of certainty as well as legally guaranteed freedom were challenged and confirmed or abolished.

C. The State of Law and its Other

Facing extraordinary threats, state agencies responsible for public security seem to demand extraordinary – i. e. in this context extra-legal – competences. The "*Rechtsstaat*" of German provenance, however, is characterized by the absence of extra-legal state power: based on the German *Grundgesetz* (Basic Law or constitution) all state organisation is constituted and all state action has to be shaped by law. In this sense, Steffen Augsberg (Köln) analysed recent academic postulations of unwritten last resort competences of the state, that remain in the theoretical tradition of Carl Schmitt's "state of exception" (*Ausnahmezustand*) and "temporary dictatorship."[5] Augsberg opposed their "thinking from exception" by emphasizing the legal basis of state power and by "thinking from normality" which is typical for German constitutional legal construction.

As far as the violation of the constitution is accepted as an option in certain exceptional situations, the "other" of the state of law becomes a normative standard and the total outcome of constitutional argumentation will be varied. In this same sense, Justice Bryde in his opening speech pointed out the consequences of accepting the "War on Terror" as a normative premise in political and constitutional debates. As Augsberg referred, the essential extra-constitutional competence is one popular topic not only in security matters but also in the debates on bio-politics and even in budget debates when it is proposed to maintain the state

[5] *See* CARL SCHMITT, DIE DIKTATUR (DICTATORSHIP) (1921). For the update of these conceptions, *see* GIORGIO AGAMBEN, STATO DI ECCEZIONE (STATE OF EXCEPTION) (2003).

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capacity to act despite a grave situation of public debt. The proposal of extra-legal state action is put to the test, if the requested means not only lack the specific legal foundation that could be provided by law-making at any time, but if an accordant legislation would have to fail due to its substantial violation of constitutional principles. The latter was the case in Germany when the air security code was complemented by a competence to shoot down renegade aircraft by military force. The Constitutional Court not only demanded the alteration of the *Grundgesetz* in order to deploy military forces in domestic police matters, but it declared that avoidable killings of innocent passengers would always violate the inalienable right of human dignity and, for this reason, could never be constitutional.[6]

As Augsberg put it, normality is both precondition and a product of normativity. Competences for state authority interventions always apply for irregular situations but still do not necessarily require or even legitimate extra-legal action. The dynamics of social changes are no reason for extra-legal competences but can cause a change of normality that leads to a new and more contemporary understanding of certain norms. However, the permanent gentle discursive change of the constitution is limited by its rationality and by what society is willing to consent at any given time. In this sense, the invention of a new human right may be acceptable as a consequence of technical advances, but still, approved legal concepts may not be recoded. Thus, terrorist attacks will remain a "normal" criminal threat and not be understood as war that would require the military to protect instead of permitting ordinary police action.

A similar terminological problem in the field of international humanitarian law was presented in the last conference presentation by Fabian Steinhauer (Frankfurt/ Main) who spoke on "private wars" and asymmetrical warfare.[7] In his linguistically inspired approach, Steinhauer sought to reconstruct the language-games of law and the feedback-loops that bind together social structure and law semantics. The dissolution of the meanings of established dualisms in the debates on domestic security – terrorist threat vs. state of war, interior vs. exterior and private vs. public matters – calls for the revision of the necessary terminology. In international humanitarian law the applicability of the law of war and the difference between combatants as actors of war and other persons rely on this difference. From a national point of view, private military companies that are bound by contract to

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[6] See Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 7 GERMAN LAW JOURNAL 761 (2007), *available at* www.germanlawjournal.com/article.php?id=756.

[7] From a political science perspective *see* MARY KALDOR, NEW AND OLD WARS: ORGANISED VIOLENCE IN A GLOBAL ERA (1999); HERFRIED MÜNKLER, DIE NEUEN KRIEGE (The New Wars) (2002).

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one warring state and that act under that state's command are a phenomenon of privatization, the product of outsourcing. From an international law point of view, their participation in an armed conflict marks the normative state of exception with no legal equivalent.

In Steinhauers opinion, to regard private military companies as partisans or mercenaries in terms of Article 47 (2) of the First Protocol additional to the Geneva Conventions,[8] and thereby to deny them the status of combatants and prisoners of war under Article 44 is to ignore reality since it is these actors who actually lead the war, with or without the support of a state. Not calling this war in a strict international law sense would rather abolish the regime of international law than bring an end to armed conflicts like these. However, Steinhauer seemed optimistic and to believe in the adaptability of the international law regime rather than in its retarding momentum to conserve terminological clarity. The law would have to react to the new wars cognitively and normatively. In this sense, Steinhauer pointed at the specific "double talk" of international law discourse that systematically couples law and society and allows the addition of graduations to binary codes.[9] Unfortunately, the solution of a "hybrid regime" was named without further conceptual concretion.[10]

However, both speakers argued for further belief in the capacities of the law to rationalize and thereby limit political scopes, to avoid extra-legal state power in the national context of constitutional law as well as to preserve the ordering structures of international humanitarian law. The new phenomena challenge jurisdiction and jurisprudence, in this sense they require the extension of the legal order by legislation or by interpretation.

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[8] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *available at* www.unhchr.ch/html/menu3/b/93.htm

[9] *See* DAVID KENNEDY, OF LAW AND WAR (2006) (on the fuzzy games of linguistic warfare); and Alexandra Kemmerer, *Law as an Anagram of War*, GLOBAL VIEW No. 4, pp. 24-25 (2006); Silja Vöneky, *The Fight against Terrorism and the Rules of International Law: Comment on Papers and Speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department*, 8 GERMAN LAW JOURNAL 747 (2007), *available at* http://www.germanlawjournal.com/article.php?id=841; and John B. Bellinger III, *Legal Issues in the War on Terrorism: Reply to Silja Vöneky*, 8 GERMAN LAW JOURNAL 871 (2007), *available at* http://www.germanlawjournal.com/article.php?id=856.

[10] *See* Claus Kreß, *Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater? (Third Generation International Criminal Law against the Transnational Violence by Private Actors?), Die Macht und das Recht. Beiträge zum Völkerrecht und Völkerstrafrecht*, *in* POWER AND THE LAW. ESSAYS ON THE INTERNATIONAL AND INTERNATIONAL CRIMINAL LAW 323, 397-413 (Gerd Hankel ed., 2008) (Conceptual conturs are sketched).

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D. The Civic Self and its Other

Security in the sense of constitutional and civic certainty – i. e. the reasonable individual confidence in the harmlessness of socializing – requires the unreserved confidence in one's fellow citizen.[11] Here, the discourse on freedom and security overlaps with the question of the constitution of the citizen as the civic self in difference to the other: we trust our fellow citizens and expect their normatively correct behaviour. In this sense, the question of the civic self appears to be one of the premises in security debate; in Heidelberg it was the topic of three conference contributions. It is the subtext of judicial discussions about ways to deal with immigration, the status and chances of immigrated people and actions to be taken to prevent people from coming. It is a subtext that reveals much about civic self-understanding and the fears of strangers within the society.

First, Alexandra Tryanowski (Gießen) spoke on the legal duties for integration according to the German residence law (§§ 43-45 *Aufenthaltsgesetz*) of 2004. The new law does not define the social goal to be aimed at with integration, Tryanowski complained, but contains formal requirements like the duty to participate in integration classes that shall impart language skills and cultural competence, and rules on the consequences of non-participation or failure. In this sense, the allocation of risk within the process of integration seems to be badly balanced on the account of the immigrant: The duty to integrate is not adequately corresponded by the right to improve the residence status, e. g. by receiving further residence titles up to naturalisation. In Tryanowski's opinion, besides a number of titles that open up the future perspective of permanent residence, the new law still admits too many other varieties of status, and it is being dominated by the security concern whereas the immigrant is primarily seen as a "social risk" that can only be reduced to a socially adequate minimum by integration efforts. Truly, integration in terms of the residence law is merely a catalogue of duties imposed on immigrating people and is thus depreciated to a means of police action. But residence law is above all security law. Integration instead, as Tryanowski pointed out correctly, presupposes a long lasting social process relating to the established residents as well as to the new ones. The greater part of this process takes place beyond the law and without detailed regulation. Therefore, a pure legal perspective will never meet up to this process adequately.

However, which goal of the social process of integration could be reasonably aimed at with the means of the law? The question remained unanswered in Heidelberg.

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[11] *See,* ANDREAS ANTER, DIE MACHT DER ORDNUNG (THE POWER OF ORDER) 100-108 (2004) (discussing *Ordnungsvertrauen* (order confidence) and *Ordnungssicherheit* (order certainty)).

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Here, a reference to the 2003 Luzern (Switzerland) conference of German-speaking public law assistants would have been helpful. Back then, the search for such a goal and finality was one of the main questions to be discussed under the topic heading of "Integration and the Law." As I proposed in my presentation then, the loyalty duties imposed on immigrants have to be derived from those imposed on citizens in general: in Germany, it is to obey the law, nothing more and nothing less.[12] No surplus loyalty expectations are legitimate, neither on the grounds of the *Grundgesetz* nor of any other norm, as the Constitutional Court conceded in a ruling on the equal treatment of Jehovah's Witnesses.[13] The immigrant's duty to integrate corresponds with the state's duty to provide the necessary means for integration, i. e. adequate legal status as well as the infrastructure for integration classes.

The reluctance to participate in integration efforts is one – but not the only – reason for a possible expulsion from Germany according to the residence law. Expulsion has increasingly become a matter of European law, as Daniel Thym (Berlin) stated in his presentation on different legal and theoretical grounds for this instrument. In contrast to a traditional police and security law perspective that focused on the protection of the public from dangerous persons and emphasized state sovereignty, Thym stated a human rights perspective that focuses rather on the legally provided freedom of the individual than on public needs. This human rights perspective has been eminently advanced lately by European and international law that increasingly tend to structure national laws.

Thym related to seven decisions of four different courts within the last nine months that complement the regulatory structures of expulsion: While the European Court of Human Rights has declared the member states of the European Convention of Human Rights self-responsible for their interpretation of the Convention, the German Constitutional Court has obliged the lower administrative courts to acknowledge the Convention and relate to it when ascertaining the lawfulness of an expulsion, and to strictly adhere to the principle of proportionality. It is still undecided if the European Court of Justice (ECJ) will transfer its jurisdiction on EU

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[12] *See* Matthias Koetter, *Integration durch Recht? Die Steuerungsfähigkeit des Rechts im Bereich seiner Geltungsvoraussetzungen (Integration through law? The governance potentials of law in the range of its impact preconditions)*, *in* INTEGRATION UND RECHT (INTEGRATION AND THE LAW) 31-52 (Konrad Sahlfeld et al. eds., 2004).

[13] BVerfGE 102, 370 (Dec. 19, 2000) (Status of Jehovah's Witnesses). *See* Peer Zumbansen , *From the Outside Looking In: The Jehovah's Witnesses' Struggle for Quasi-Public Status under Germany's Incorporation Law*, 2 GERMAN LAW JOURNAL No. 1 (2001), *available at* www.germanlawjournal.com/-past_issues.php?id=47.

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citizenship onto the case of expulsion.[14] Now, it is the German Federal Administrative Court in the key position to balance these different aspects and concretise them for residence law. In Thyms' opinion, three of its decisions from late 2007 show that the national court is willing to perform this function in a pro-active manner, e. g. when it demands a discretionary decision of the administration even in cases in which the law states a binding decision for police reasons.

As far as the legal status of all residents in Europe are increasingly equalized by European minimum standards for the consolidation of the status according to the EC directive on long-term residents,[15] the question of how to efficiently protect the external EU border arises.[16] In the only conference presentation on the institutional structures of the provision of legal security and freedom, Timo Tohidipur (Frankfurt/ Main) spoke on the European border security agency FRONTEX that was founded in 2004 for such prevention purposes.[17] Based on Article 308 of the EC Treaty, European agencies were originally constituted as information networks without competences; today 23 such agencies exist 23. Based on the communal competence to secure the Union's external border (esp. Articles 62, 66 EC Treaty) FRONTEX shall coordinate the protection of the external border, compile risk analysis and technical and operative support.

In 2007, Rapid Border Intervention Teams (RaBIT)[18] with 5-600 persons and their own vehicles and equipment were added. Until now, these border agency officials

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[14] According to Directive 2004/38/EC of the European Parliament and of the Council of Apr. 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 Nr. L 158 at 77.

[15] Council Directive 2003/109/EC of Nov. 25 2003, (concerning the status of third-country nationals who are long-term residents).

[16] For the characterisation of the European Union as a "fortification ," *see* Katja Ziegler, *Integration und Ausgrenzung im Lichte der Migrationspolitik der Europaeschen Union – die „Festung Europa"? (Integration and social exclusion in the light of EU migration politics – the fortification Europe?), in* INTEGRATION UND RECHT (INTEGRATION AND THE LAW), *supra* note 12, at 127-179.

[17] According to Council Regulation 2004/2007/EC of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 Nr. L 349 at 1-11. *See also* Andreas Fischer-Lescano/Timo Tohidipur, *Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX (European Border Control Regime. The Legal Framework for the European Border Police Agency FRONTEX)*, 67 ZAÖRV 1219-1276 (2007).

[18] According to the Regulation 2007/863/EC of the European Parliament and of the Council of July 11, 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation 2004/2007/EC as regards that mechanism and regulating the tasks and powers of guest officers EC regulation, OJ 2007 Nr. L 199 at 30–39.

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are being deployed only on extraterritorial missions, on the basis of agreements of cooperation with neighbouring states. However, the border regime can be understood as a step towards an operational European police force – it already has full access to the Europol data - and with a rapid deployment force. The former German border police agency (*Bundesgrenzschutzamt*) can be seen as a prototype of the kind of police force that is constituted by FRONTEX. After the loss of its fields of action on the eastern German border, the *Bundesgrenzschutz* was given more and more competences for domestic functions and was so developed into the German Federal Police Agency (*Bundespolizei*). Thus, the question of the future development of FRONTEX turned out to be the focal point of the discussion following Tohidipur's presentation. Another issue was the question of legitimacy, which is always precarious in cases of EU agencies. Institutional autonomy and a global budget, paired with vague judicial control competences, represent the European dilemma: more effectiveness is often achieved only at the expense of publicity.

The question of citizenship and the civic self-understanding has been shifted to a European level, the rights of residence, the conditions of expulsion and of integration are increasingly overlaid by European policy. However, the delimitation against strangers is not the only discourse on the identity of Europe's peoples that has become more and more Europeanized in itself. The problem of genetic engineering and the ethical debates about its limits bring up complementary questions, not so much on the identity of the civic self but of the human being and its dignity. But such questions only arise in the field of "red" genetic engineering, whereas, in Heidelberg, Yvonne Schmidt (Graz) focused her presentation on "green" genetic engineering that pertains to nutrition and agriculture. Her contribution, however, led to a further bundle of questions on decisions of risk-administration under the conditions of nescience.

E. Certainty and its Other

Schmidt asked for the interrelation of constitutionally bound politics as in legislation and the scientifically generated knowledge of the public. How does society deal with insecure knowledge, and how does it protect itself against hidden risks? These questions can be situated in the broader discourse on genetic engineering, since the application of the principle of prevention requires the plausible presumption of a scientifically determinable danger. In this sense, prevention becomes a principle of the allocation of the burden of proof. Schmidt illustrated this by contrasting two relevant decisions: on the one side, the French Government's prohibition on the cultivation of genetically modified corn MON 810 due to serious doubts concerning the safety for the environment, and on the other side, the ECJ decision of September 13, 2007 that overturned the Upper Austrian prohibition on such crops. The ECJ noted that Austria had not been able to refute

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the Commission's argument that the ban could not be justified by new and "uniquely local" scientific evidence. It also ruled that governments had no right to deprive individual farmers of the choice to grow biotech crops approved for commercial cultivation in the EU.[19]

The question of how to determine knowledge and risks in the debates on genetic engineering points to the questions of rationality or irrationality of public deliberations in which scientific standards commonly are introduced only as strategies of argumentation. In this manner, Schmidt's presentation led over to two further conference contributions: *first*, the question of how to obtain a certain factual base for legal decisions without the influence of inappropriate consideration; and, *second*, the regulation of possible damages that occur in case the risk is being realized.

The generation of a robust factual base for decisions does not only challenge political actors, but also law professionals, such as court judges who must decide on a vague base of facts. The presentation by Markus Kern (Fribourg) exemplified the problems of judicial decisions with relation to social psychology: on an individual scale he discussed heuristics, alarmist bias, stereotypes, and prejudice, and, on a collective scale, information cascades that distort the factual base. The more complex the factual base turns out to be, the more difficult the legitimation of the diagnosis and the decision on top of its base. However, on a limited scale covering structures are possible through proceedings like requirements of transparency, participation and substantive grounds. Thus, legal regulation provides standards and generates area specific rationalities.

In case of damage, the socialisation or publication of risk can be a reasonable solution, at least for generally accepted risky behaviour. Ulrich J. Schroeder (Münster) pointed at the bankrupt bank as an example to illustrate different models of the allocation of risk: individual liability, fund models, and public liability insurance models. The result of the latter is the solidarisation of risk: the mutual solidarity association – in most cases the general public – takes the responsibility for one individual's malpractice. Even more than in the case of fund models with their smaller communal extension, here the liability is being socialised. But why should the public stand in, why should the state regulate? Because of the corporative structures of the social market economy that establishes area-specific mutual solidarity associations in order to protect the public, which is a political problem rather than a legal one. Risk administration means not only that the

[19] European Court of Justice, decision of Sept. 13, 2007 (C-439/05 P and C-454/05 P) *available at* http://eur-lex.europa.eu/LexUri Serv/LexUriServ.do?uri=CELEX:62005J0439:DE:HTML

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government has to deal with uncertainties, but also that the ideal solution has not been found yet. Financial compensation reduces the individual risk and extends the freedom of action. As long as it works out, for the general's good, once it does not it's on the general's expense.

The examples show: rational decisions depend on rational decision criteria. The function of the law is to provide rational standards, and thus to structure discourses. Prognoses have to be based on plausible assumptions and generally accepted norms, e. g. police interventions that affect human rights demand the diagnosis of facts that will possibly cause harm for any legally protected good like the integrity of the body, property goods or public facilities. But how possible does the harm have to seem to legitimate police action? It is approved that the need of knowledge about the possible danger relates to the value of the threatened good. The more valuable the good, the less requirements the diagnosis has to comply with. However, purely imagined threats like unjustified terror or crime fears cannot legitimate police intervention, no matter how much they actually reduce the freedom to act. To extend police competences in order to protect civic certainty (*Sicherheitsgefühl*) – as was proposed in the presentation by Stefan Meyer (Erfurt) – would fundamentally challenge the systematics of German police law.[20]

Still, civic certainty has become an important conception in recent security debates. Since the late 1990s several public security programs – like e.g. community policing – were based on it.[21] Civic certainty is part of the political fundament of a democratic society in which the citizens are free in the motive on which they base their vote in elections, and therefore the acceptance of their political representatives is much dependent on the seemingly irrational bias of emotions. As Christoph Gusy put it in his presentation for the Conference of the Association of German Public Law Teachers in the year 2003: The maintenance of civic certainty "is no self-dependant state function, but to be understood as the result of otherwise acceptable and legal state activities, e. g. intervention competences. However, the protection of civic certainty is not appropriate to justify self-contained competences for interventions into individual rights."[22] Neither can the proper diagnosis of facts that account for danger be subjected and substituted by the imagination of facts,

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[20] *See* RALF POSCHER, GEFAHRENABWEHR. EINE DOGMATISCHE REKONSTRUKTION (DANGER PREVENTION LAW. A DOGMATIC RECONSTRUCTION) 146 (1999).

[21] *See* KOETTER, *supra* note 4, at 241-249.

[22] Christoph Gusy, *Gewährleistung von Freiheit und Sicherheit im Lichte unterschiedlicher Verfassungsverständnisse (The Provision of Freedom and Security in the Light of different Conceptions of Constitution)*, *in* VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTLEHRER (PUBLICATIONS OF THE ASSOCIATION OF GERMAN PUBLIC LAW TEACHERS), 63 VVDStRL 60, 81 (2004) (translation by M. K.).

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nor can the objective prognosis be substituted by a feeling of dangerousness of causalities, nor can the necessary danger for legally protected goods be expanded onto individual certainty. Which police means should be reasonable and proportional in order to re-establish individual certainty, and who should be its addressee?

German police law shall repel dangers, unlike criminal law it does not follow any generally preventive purpose. In order to guarantee the legal freedom of the addressees of police interventions, the specific rationality of police law requires strict application of the law and proportionality. The law can be the manifestation of a compromise between different constitutional objectives that lead to a conflict of aims. In this sense, the relation between security – as a form of collective order – and freedom – as the individual freedom to diverge from expectations – represent the fundamental discourse in liberal constitutional societies. It is called the "liberal dilemma": The collective public generates the state to optimize the scope of individual freedom, but also to adjust and balance the freedom spheres of the citizens to one another as the legitimate public moderator, and therefore to socialise the public risk that derives from individual freedom.

F. Constitutionally Guaranteed Freedom and its Other

The constitutional protection of human rights does not encourage socially inadequate behaviour, but it makes such behaviour possible. Tensions arise either between the freedom of action and the duty to tolerate harassing behaviour, or between the freedom of individual choice of legally protected goods and the duty to respect this choice. Exemplary for this kind of tension, Antje von Ungern-Sternberg (Münster/ Karlsruhe) spoke on the problem of the harassment of religion and the limits to freedom of speech as it was brought up in the debates on cartoons of Mohammed in Danish newspapers.[23] Comparing the German legal situation with the United States, von Ungern-Sternberg reflected how the prohibition of harassment and hate speech could be justified with the provision of security and legal equality by the state, with the individual right of the integrity of the personality and with the preservation of the public peace. The German Constitutional Court has accepted at least regulations that reduce the freedom of speech in order to protect human dignity.

As in many cases of public law comparisons, von Ungern-Sternberg did not intend to transfer the American policy to German constitutional law, instead, her

[23] *See also* ANDREAS VON ARNAULD, GRUNDRECHTSFREIHEIT ZUR GOTTESLÄSTERUNG? (A CONSTITUTIONAL RIGHT TO BLASPHEMY?), IN: JOSEF ISENSEE (ED.): RELIGIONSBESCHIMPFUNG. DER RECHTLICHE SCHUTZ DES HEILIGEN (HARASSMENT OF RELIGIONS. THE LEGAL PROTECTION OF THE SACRED) 63-104 (2007).

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comparison was rather intended to convey some cultural knowledge of the other legal culture. This method can be interesting from a general knowledge point of view, but from a judicial perspective its benefit remains disputable. And regularly, comparing one constitutional institution without carefully considering the normative context fails the aim, since functional equivalents sometimes come up at unexpected places where they were formed on their historically contingent paths. In this sense e.g., in Germany the harassment of religion can be encompassed and protected by the freedom of religious exercise, (Article 4 *Grundgesetz*) which advances the normative demands to be met by the intervening state compared with the protection as an expression of the freedom of speech. Considering only the latter would lead to incorrect evaluation.

As human rights describe constitutionally protected action spheres that have historically evolved in a certain normative context, today each right is an end in itself, i.e. its specific protection does not depend on any further purpose and does not have to be reflected in the light of its specific function. This is true also for the right of general protection of the individual personality (*allgemeines Persönlichkeitsrecht*) that was created by German judiciary and that was localized in Article 2 (1) of the *Grundgesetz* in combination with the human dignity by the Constitutional Court. Since the early 1980s also the data or privacy protection right is constitutionally rooted there: everybody has the right to autonomously dispose with personal information and any public access to any personal data requires a specific and proportional legal competence.[24] In this sense, data protection is a specific forming of self-determination.

But data protection rules can already be found much earlier in history, as Kai von Lewinski (Berlin) pointed out in his conference presentation. Before the individual right was approved – i.e., before self-determination became the motive for legal norms that regulate data handling in the 20th century – such rules included mainly competence delimitations. These rules allocated and thus limited data power of different state agencies, but regularly did not intend to have this effect. In most cases, the motive was to avoid competence conflicts within state organisation and effectuate data power. Until the 1983 Constitutional Court decision that made change the focus from complying with competence to protecting individual rights, only very small isles of personal secrecy had already been approved, like e.g. the privacy of correspondence that seemed to be necessary for the functioning of the royal postal services.

[24] BVerfGE 65, 1 (Dec. 15, 1983) (Census of population law).

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Today, every personal data is protected by the Constitution, there is no constitutionally irrelevant personal data. The Constitutional Court has developed a complex scheme for evaluating state action that affects personal data, regulations as well as interventions: legitimate purpose, concrete and clear competence, procedure, proportionality, and later added specifics like the absolute protectorate of the core matters of privacy, i.e. communications with one's closest people of personal trust.[25] The decisions about new dimensions of the protection of the personality like in the case of privacy of computer network systems follow this jurisdiction and still elaborate it.

The substantial relation of the protectorate of the core matters of privacy based on the untouchable guarantee of human dignity (Article 1 of the *Grundgesetz*) and of the untouchable guarantee of the substantive essence of each of the human rights (Article 19 (2) of the *Grundgesetz*) was discussed by Jochen von Bernstorff (Heidelberg). In order to reduce the complexity of decisions that have to optimize contrary human rights by case-like individual balancing, von Bernstorff pled for the (re-) activation of Article 19 (2), and for a general commitment to an absolutely protected core of each human right. Neither in jurisprudence nor in the decisions of the Constitutional Court the rule has obtained normative relevance for itself. Whenever the Court approves the essence of human dignity as a core of the human rights and relates it to Article 1, it does without citing Article 19 (2).

Still, the essence of human dignity could be seen as a specification of the guarantee of the substantive essence, like it is done in the commentary books. Relating to Article 1 the Constitutional Court has named a normative criterion for absolute protection, an important aspect that von Bernstorff's proposal lacks when he solely points to the respective "core substance" of the human right. Human rights protect different aspects of individual autonomy, thus the autonomy guaranteeing function of each right is contained by its core protection. In this sense, the reference to human dignity and Article 1 – the constitutional guarantee of individual autonomy – is of particular self-evidence. But there can be further aspects besides human dignity that absolute protection in terms of the Article 19 (2) guarantee of the substantive essence of the human rights could be based on: e.g., the protection of a core of the freedom of speech that secures its constitutive function for the democratic society – as the Constitutional Court has put it many times[26] – would be such an aspect that relates to the guarantee of autonomy only indirectly.

[25] BVerfGE 109, 279 (March 3, 2004) (Acoustic surveillance of private living space).

[26] BVerfGE 7, 198 (Jan. 15, 1958) (Lüth); most recently BVerfGE 102, 347 (Dec. 12, 2000) (Benetton).

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The constitutional provision of individual autonomy has formed different kinds of protection modules that interrelate in order to provide the expected extent of freedom. Their specific institutionalisation within the constitution is historically contingent and dependent on the discursive paths. Rather than building up antagonistic relations, constitutional principles shall complement to build the desired and legitimate normative framework for the social being. In this sense, freedom's other is not security, just as security's other is not freedom. Still, the crime-related debates on security and freedom represent a broad spectrum of possible overlaps and interferences. Thus, freedom-purposes cohabit with security-purposes and have to be adjusted by equal consideration: the freedom of socially relevant action is put under the reserve of social adequacy. Where individual freedom is considered a collective risk, civic certainty requires a high standard of homogeneity and trust, and, as a result, "horizontal legitimacy."[27] Perspectives that focus on difference and plurality challenge such collective self-conceptions. However, more elaborate notions of "the public" and "publicity", as discussed for European contexts could provide new guidance. Supplementing the pretended contradiction of freedom and security by *Öffentlichkeit* and thus broadening the scope and shifting the focus of the well-worn debate to some related topics, the Heidelberg conference added some new insights to an established, but still hot and burning debate. Discussing a variety of challenging questions, first steps on new discursive paths were taken, often more than appropriate and even necessary ones.

[27] On the approval of the fellow citizens in the society that share the same scarce goods and obey the same laws, *see* Cord Schmelzle, *Governance und Legitimität (Governance and Legitimacy),* in GEMEINSAME BLICKE HINTER DEN STAAT. "GOVERNANCE IN RÄUMEN BEGRENZTER STAATLICHKEIT" ALS TRANSDISZIPLINÄRES FORSCHUNGSPROJEKT (LOOKING BEYOND THE STATE TOGETHER. "GOVERNANCE IN AREAS OF LIMITED STATEHOOD" AS A TRANSDISCIPLINARY RESEARCH PROJECT) (Sybille De La Rosa, Ulrike Hoeppner, Matthias Koetter eds., forthcoming 2008).

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