Alexander von Humboldt
INSTITUT FÜR INTERNET
UND GESELLSCHAFT

HIIG Discussion Paper Series

Discussion Paper 2012-09

Constitutions Going Online – Internet-related Dynamics in Constitutional Law?

7 October 2011

Katharina Berner
kath_berner@yahoo.de
Humboldt University Berlin

Electronic copy available at: http://ssrn.com/abstract=1940346

Abstract

The internet is not merely a social phenomenon, it is more than that, it is of constitutional importance. Various academic disciplines have acknowledged this innovation‘s significance and selective internet-related issues have already been discussed from a legal perspective. But while these legal discussions have remained predominantly selective, no one has recently and comprehensively focused on the interrelationship between internet-related developments and the development of constitutions, i.e. the political and legal frameworks of states and societies within states. This gap shall be closed step-by-step. By way of example, it will be discussed at the first stage how German constitutional case-law as a major instrument for keeping pace with changing social and technical conditions has responded to internet-related challenges to the German Constitution. Simultaneously, it will be illustrated how the Court’s jurisprudence has provided a framework within which the internet may operate and further develop. It will be shown that the Constitutional Court has managed to cope with the development of the internet. Nonetheless, its way of addressing internet-related challenges may provoke further criticism and questions. Hence, assessing the Court’s response will not be an end in itself but also provide the basis for further research on internet-related dynamics in constitutional law of various states.

Keywords

Constitution, Internet, Interpretation, Dynamics, Development

Electronic copy available at: http://ssrn.com/abstract=1940346

Contents

1.	INTRODUCTION	1
2.	EMPIRICAL STUDY	2
2.1	The German Constitutional Court and its case-law	2
2.2	Basic terms and concepts explained	3
2.2.1	The internet	3
2.2.2	Internet-related developments	4
2.2.3	The difference between interpreting existing rights and creating new ones	4
2.3	Methodological approach	5
2.3.1	Object of study	5
2.3.2	What is excluded from this study	5
2.4	Exemplary case-law categorised according to fundamental rights	6
2.4.1	The internet's constitutional repercussions high on the Court's agenda	7
2.4.2	The internet's constitutional repercussions low on the Court's agenda	20
3.	EVALUATION	26
3.1	Does the internet have challenging implications on the German Constitution?	26
3.2	How has the German Constitutional Court coped with "the internet"?	28
3.3	Is the German practice satisfying?	30
3.4	Outlook	31
4.	REFERENCES	32
4.1	Jurisprudence	32
4.2	Literature	35

Electronic copy available at: https://ssrn.com/abstract=1940346

1. Introduction* **

While the internet and internet-related developments have been the objects of much research so far in various disciplines, one aspect is still left to be elucidated: how this unique technological development impacts on constitutions as a whole, i.e. the overall legal and political frameworks of states.[1] In particular regarding the German Basic Law (*Grundgesetz – GG*), no one has recently conducted a thorough, reliable and comprehensive legal research on how it has been influenced by the internet.[2] While constitutional amendments are difficult to accomplish politically,[3] there is nonetheless much room for dynamic interpretation of constitutional provisions.[4]

Potential challenges resulting from the development of the internet are particularly evident in the case of constitutions, among them the German one.

---

* Ref. iur.; Research Fellow at Humboldt-University Berlin, Faculty of Law, Chair for Public Law, Public International Law and European Law (Prof. Georg Nolte); contact: kath_berner@yahoo.de. The author wishes to thank Ingolf Pernice, Rüdiger Schwarz and Steffen Hindelang for fruitful comments on earlier drafts. Suggested citation: Berner, Katharina, Constitutions Going Online – Internet-related Developments in Constitutional Law? (October 7, 2011). Available at SSRN: http://ssrn.com/abstract=1940346.

** This paper attempts to address two different groups of prospective readers whose background knowledge and way-of-thinking considerably differ. German lawyers, esp. those with an interest in legal aspects of communication and constitutional issues, certainly do constitute one group. Nonetheless, this paper decidedly addresses readers from a non-legal and non-German back-ground, too. Accordingly, (German constitutional) legal terminology and concepts will be applied, yet accompanied by short explanations where necessary. Moreover, basic internet-related terms will be defined as well.

[1] In Germany, the Basic Law is the supreme law of the land binding on all state actors and establishing requirements which must be met by all state action, be it judicial, legislative or executive. Thus, the Basic Law not only determines the state's structure as such, for example, but influences and impacts on everyone's daily life.

[2] So far, the existing studies have tended to focus on particular constitutional issues raised by the internet. Either, they examine how particular rights should be interpreted in the light of some new development such as frequently anonymous expression of opinion, the use of names for internet domains or the operation of internet forums where others may disseminate their opinion; or they discuss how particular internet-related questions should be regulated in order to comply with constitutional requirements. These studies have in common that they do not look at internet-related developments from a holistic constitutional perspective, esp. not one based on existing constitutional case-law. Thus, there is no general examination of constitutional dynamics as such. See e.g. M Bullinger, 'Private Rundfunkfreiheit auf dem Weg zur Pressefreiheit – Über den Einfluss von Digitalisierung und Internet' 2007 *Zeitschrift für Urheber- und Medienrecht* 337; V Karavas, *Digitale Grundrechte – Elemente einer Verfassung des Informationsflusses im Internet* (Nomos, Berlin 2007); T Böckenförde, 'Auf dem Weg zur elektronischen Privatsphäre' (2008) 19 *JuristenZeitung* 925; F Bronsema, *Medienspezifischer Grundrechtsschutz der elektronischen Presse – Darstellung des Grundrechtsschutzes in der Europäischen Union und Entwicklung eines Lösungsansatzes für den Grundrechtsschutz aus Art. 5 Abs. 1 GG* (LIT, Berlin 2008); D Heckmann, 'Staatliche Schutz- und Förderpflichten zur Gewährleistung von IT-Sicherheit – Erste Folgerungen aus dem Urteil des Bundesverfassungsgerichts zur „Online-Durchsuchung"', in: H Rüßmann (ed.), *Festschrift für Gerhard Käfer* (Juris GmbH, Saarbrücken 2009) 129; HP Bull, 'Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen'(2011) *Neue Zeitschrift für Verwaltungsrecht* 257; C Degenhart, 'Verfassungsfragen der Internetkommunikation – Wie die Rundfunkfreiheit in die Online-Welt hineinstrahlt' (2011) *Computer & Recht* 231 .

[3] As regards Germany, see Art. 79.2 GG, pursuant to which amendments to the GG require consent of two-thirds of the members of both Parliament (*Bundestag*) and Federal Council (*Bundesrat*). This qualified majority is regularly obstructed by different majorities in Parliament and Federal Council.

[4] In this context, the term "constitutional provisions" is used to denote constitutional provisions in a formal sense, i.e. only provisions of the GG itself.

Electronic copy available at: https://ssrn.com/abstract=1940346

On the one hand, constitutions are meant to be long-lasting and to create legal certainty.[5] On the other hand, constitutions must, up to some point, be able to adapt and react to changes in society in order to still fulfil their designated tasks.[6] These conflicting demands can to some extent be reconciled by minor and gradual (sometimes even major) adaptations by way of dynamic constitutional interpretation,[7] done e.g. by the respective constitutional court or other constitutional actors. In Germany, this task of ensuring that the German Constitution does not lag behind modern developments is primarily exercised by the German Constitutional Court (*Bundesverfassungsgericht – BVerfG*). Among the various different courts in different states of Europe and even beyond, the BVerfG occupies a special position: it frequently serves as a point of reference whose judgments are anticipated, read and cited by other courts. And while the German constitution-amending legislature, the *pouvoir constituent*, has only once become active with regard to the internet,[8] the German Constitutional Court has taken numerous decisions on this subject.

For these reasons, it will be worthwhile to assess the jurisprudence of the BVerfG first. Against this background, it might then be easier to proceed with researching other states to get an idea of how constitutional courts and constitutions themselves may be influenced by and react to internet-related developments.

2. Empirical study

2.1 The German Constitutional Court and its case-law

The German Constitutional Court is vested with a number of important competences. Among others, it may consider constitutional complaints brought by any natural or legal person who believes that her constitutional rights have been infringed by a public authority.[9] Subject-matter of such a complaint may

[5] R Wassermann, 'Das Grundgesetz', in: C Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 18 f.

[6] Wassermann (n 5) 18 f.

[7] J Bizer, 'Grundrechte im Netz', in: C Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 22; A Roßnagel et al., *Digitalisierung der Grundrechte?* (Westdeutscher Verlag, Opladen 1990) 2 f.

[8] The German constitution-amending legislature has enacted Art. 91c GG, which deals with the competences of the federal state and the *Länder* with regard to information technology systems. This provision has entered into force on 1 August 2009.

[9] Art. 93.1 no. 4a GG.

Electronic copy available at: https://ssrn.com/abstract=1940346

be any measure of the executive, a court decision or a statutory provision, even one enacted by Parliament.[10] If the Court finds that a public authority has indeed violated the Constitution, it may set aside the respective judicial or executive decision or invalidate the respective statute.[11] As the Court's decisions are final and binding on all other institutions of government,[12] it wields enormous power for a judicial body.

2.2 Basic terms and concepts explained

Before turning to the German Constitutional Court's case law, it is necessary to define basic terms and concepts employed by this study in order to understand the ensuing analysis.

2.2.1 The internet

First of all, it is essential to define what is meant with the term "internet". As an abbreviation, this term stands for "interconnected networks". According to the German Constitutional Court, the term "internet" refers to electronically connected systems of computer networks.[13] This definition, however, is insufficient since it is so general that it may also encompass what is generally not associated with this term, neither colloquially nor in legal or technical terminology, e.g. home-based, internal networks between only two personal computers; besides, an all-encompassing understanding like the one apparently employed by the Court would inevitably cover technical developments which do not give rise to serious interpretative constitutional discussions or which do not entail substantial threats to constitutionally protected interests. A more suitable definition would refer to the internet as a worldwide net consisting of multitudinous computer networks through which data is exchanged and which forms the basis for internet services.[14] Thus, as is illustrated by the fact that the internet is often written with a capital "i", i.e. as "the Internet" or short "the Net", it is a network of networks.

---

[10] Id.

[11] § 95.2 and 4 of the Law of the German Constitutional Court (*Bundesverfassungsgerichtsgesetz – BVerfGG*).

[12] § 31.1 BVerfGG.

[13] BVerfG, *Online Searches (Online-Durchsuchung)*, Judgment of 27 February 2008, Cases 1 BvR 370/07 et al., para. 4.

[14] See http://de.wikipedia.org/wiki/Internet and Gabler Verlag (ed.), 'Internet', in: *Gabler Wirtschaftslexikon* available at http://wirtschaftslexikon.gabler.de/Archiv/9169/internet-v9.html, last visited on 14 September 2011.

Electronic copy available at: https://ssrn.com/abstract=1940346

2.2.2 Internet-related developments

Developments "relate" to the internet if they can be linked somehow to the internet in the sense outlined above by being situated on the internet, dependent on or facilitated by the internet or part of the internet's infrastructure. This definition would, for instance, cover: communication via emails which are sent by utilising the internet; internet presences which are established presences on the internet; conducting discussions by posting entries on internet forums; or offering sexually offensive videos online. The noun "development" implies that there must have been some form of innovation or progress, changing the status quo hitherto prevailing. The element which is referred to as a "development" in this sense must not be intended but may be the accidental, purely factual consequence of something else which must not relate to the internet at all.

2.2.3 The difference between interpreting existing rights and creating new ones

In the following, much will be said about "interpreting" the German Basic Law and separate fundamental rights entailed therein. As a matter of fact, the Court cannot amend the Constitution, thus speaking of "creating new rights" should appear ill-suited. Nonetheless, one should bear in mind that the catalogue of fundamental rights is drafted in general terms and may be applied to highly diverse contexts. By interpreting the Constitution in the light of these contexts, the Court may opt for "identifying" new manifestations of fundamental rights – sub-categories so to speak – which are characterised by responding to particular challenges to constitutionally protected interests or by imposing particular requirements on justifying interferences.[15] When doing so, the Court's reasoning tends to be couched in terms of new "rights" – like the right to informational self-determination.[16] Strictly speaking only an illustrating way of interpretation, this identification of new "rights" is qualitatively different and therefore to be distinguished from ordinary interpretation.

[15] Until now, the Court has identified new "rights" mainly under the heading of the general right of personality; this, however, by no means prevents the Court from identifying new "rights" under the heading of other fundamental rights someday.

[16] See BVerfG, *Population Census (Volkszählung)*, Judgment of 15 December 1983, Cases 1 BvR 209/83 et al.

Electronic copy available at: https://ssrn.com/abstract=1940346

2.3 Methodological approach

2.3.1 Object of study

Aiming at empirically founded conclusions, this paper will mainly rely on primary sources, namely more than 188,000 judgments and decisions of the BVerfG.[17] A total of 41 judgments and decisions were identified as relevant to the topic under consideration. This number will appear rather smallish at first sight. However, one must bear in mind several things: first, the Court took up its work as early as 1951 whereas the internet is a comparatively recent development; and second, due to admissibility requirements, it takes some time until new issues come before the Court.[18] Furthermore, it is important to notice that constitutional complaints make up a large amount of the Court's work, only 2.4% of which actually succeed; a large number already fails at the admissibility stage. Besides, not all cases dealing with internet-related developments in one way or the other actually raise interpretative problems concerning which the internet has been central to the final outcome. Keeping these factors in mind, one must consider the number of relevant cases in a different light. Most of the cases identified as relevant to the topic under consideration are actually mentioned in this study; those merely reiterating previous jurisprudence, however, are either excluded or only shortly referred to.

2.3.2 What is excluded from this study

As indicated above, this study will be limited to the jurisprudence of the German Constitutional Court to gain a first impression of how internet-related developments may cause dynamics in constitutional law. At the same time, this study will neither cover the jurisprudence of ordinary or administrative courts nor of the constitutional courts of the German "*Länder*". Furthermore, it will exclusively focus on primary, not on secondary sources. This paper will not contain a study on how constitutional provisions should be interpreted or which new provisions should be enacted because of internet-related developments. Instead, it "merely" identifies and analyses relevant existing constitutional jurisprudence. In consequence, it will necessarily appear

[17] Until 31 December 2010, see http://bundesverfassungsgericht.de/organisation/gb2010/A-I-1html, last visited on 14 September 2011.

[18] According to the principle of subsidiarity enshrined in § 90 BVerfGG, a complainant must first exhaust judicial remedies before he can file a complaint with the Court.

Electronic copy available at: https://ssrn.com/abstract=1940346

fragmentary to those who are familiar with constitutional issues and/ or legal aspects of internet-related developments; they may wonder why certain issues they consider important are not addressed while other, seemingly marginal issues are. This, however, will be due to constitutional case-law, the object of this study, being fragmentary itself. Having said this, despite or even because of being fragmentary, it may present an opportunity to look at constitutional case-law in a more neutral and unbiased way, in order to take stock of how the Constitutional Court handles "the internet".

2.4 Exemplary case-law categorised according to fundamental rights

When now analysing relevant case-law, this paper will direct attention to the following guiding questions:

- Which fundamental right[19] is or which rights[20] are concerned?[21]
- Who initiated the constitutional proceedings?
- In which context are internet-related developments discussed?
- How exactly do internet-related developments influence the Constitution?
- And finally, how are internet-related developments perceived from a German constitutional perspective?
-

These questions serve as an analytical frame and have been identified as being most promising to give an idea of how, why and in which manner constitutional jurisprudence may have been influenced by internet-related developments. Besides, these questions shall help to structure the analysis of constitutional jurisprudence in a way which may be transferred to other states at subsequent stages of research.

---

[19] It is intended to substitute (German) fundamental rights by constitutional issue areas in subsequent research. The latter, which are yet to be defined, shall have autonomous meanings instead of relying on a single state's understanding. This will facilitate comparing diverse legal systems. Cf. S Hindelang's research on constitutional issue areas affected by internet-related norms outlined in his paper *Refocusing on Constitution – Approaching Internet Legislation and Regulation through the Eyes of Constitution* (Berlin 2011).

[20] Quite often, the internet not only touches upon one single right but on two or more rights which must then be balanced against each other.

[21] As hardly any internet-related case raised basic interpretative question in respect of basic principles of state structure (with one exception, see p. 28), this paper inevitably focuses on fundamental rights. Cf. p. 27.

Electronic copy available at: https://ssrn.com/abstract=1940346

2.4.1 The internet's constitutional repercussions high on the Court's agenda

Of course, internet can become relevant in virtually every context. But examining existing case-law, one can identify a number of constitutional rights regarding which internet-related developments seem to be high on the Constitutional Court's agenda – either in terms of quantity or quality, the latter meaning that internet-related developments have raised intricate and complex interpretative questions. Among these rights there are the general right of personality (*Allgemeines Persönlichkeitsrecht*), the right to freedom of expression (*Meinungsfreiheit*), the right to privacy of telecommunications (*Fernmeldegeheimnis*) and the right to property (*Eigentumsgarantie*).[22] These rights will be examined first.

2.4.1.1 General right of personality, Art. 2.1 in conjunction with Art. 1.1 GG

The general right of personality, which is enshrined in Art. 2.1 in conjunction with Art. 1.1 GG, aims at safeguarding a human being's most intimate sphere of life and at ensuring this sphere's preconditions.[23] Thus, it protects all elements of someone's personality as long as they are not sufficiently protected by other rights.[24] Owing to this purpose, this right is particularly open to respond to new threats to constitutional interests.[25] The general right of personality encompasses among others the right to informational self-determination (*Recht auf informationelle Selbstbestimmung*),[26] the right to protection of one's honour (*Recht auf Schutz der persönlichen Ehre*),[27] the right to privacy (*Recht auf Selbstbewahrung*)[28] and the right to the guarantee of the

[22] As a matter of fact, this list does not claim to be exhaustive but may be adapted as jurisprudence develops. Besides, it does not encompass all rights which may be directly affected by the internet but only refers to those actually mentioned in the Court's case-law.

[23] BVerfG, *Eppler*, Decision of 3 June 1980, Case 1 BvR 185/77, para. 13. This right, mainly based on Art. 2.1 GG but strongly influenced by and closely related to Art. 1.1 GG, encompasses several manifestations. These manifestations are not separate fundamental rights but illustrate different and distinct aspects of the general right of personality.

[24] BVerfG, *Acoustic Surveillance (Mithörvorrichtung)*, Decision of 9 October 2002, Cases 1 BvR 1611/96 et al., para. 31.

[25] BVerfG, *Caroline-Decision (Caroline-Entscheidung)*, Judgment of 15 December 1999, Case 1 BvR 653/96, para. 66.

[26] BVerfG, *Questions Relating to the State Security Service (Stasi-Fragen)*, Judgment of 8 July 1997, Cases 1 BvR 2111/94 et al., para. 38.

[27] BVerfG, *Heinrich Böll*, Decision of 3 June 1980, Case 1 BvR 797/78, paras. 23 f.

[28] BVerfG, *Correspondence Surveillance (Briefüberwachung)*, Decision of 26 April 1994, Case 1 BvR 1968/88, para. 18.

Electronic copy available at: https://ssrn.com/abstract=1940346

confidentiality and integrity of information technology systems (*Recht auf Vertraulichkeit und Integrität informationstechnischer Systeme*).[29]

Since the internet is a vast pool of information, it is often deliberately used for spreading information as widely as possible. On the one hand, the public may have a (legitimate) interest in receiving this information; on the other, the information may contain details touching upon the general right of personality and those to whom this information refers may have an interest in non-disclosure.[30] Therefore, one may ask how to balance these opposed interests in a constitutionally satisfying way. This problem became apparent in an application for abstract judicial review of the Federal Genetic Engineering Act of 2008 (*Gesetz zur Regelung der Gentechnik*).[31] The challenged act contained a provision on a genetically modified organisms location register; one section of the register was accessible to the public and could also be accessed on the internet. Thus, an undefined number of users could easily identify the object of the data contained therein, i.e. find out where genetically modified organisms were e.g. cultivated and by whom they were cultivated. Consequently, publishing such data on the internet leads to a new quality of encroachment on, among others, the right to informational self-determination.[32] Notwithstanding this new quality, the Court gave preference to the state's indirect interest in freely available information.[33] Before drawing general conclusions, two aspects must however be noted: First, the Court did not refer to privately published information conflicting with private interests in non-disclosure of certain data. Instead, it was the state itself that deliberately disseminated the pertinent information. Second, the state deliberately did so in order to comply with legitimate interests[34] in being informed about highly sensitive issues (here: genetically manipulated organisms). Consequently, one cannot predict whether the constitutional assessment would have been the same if the state had not been involved directly and not pursued a purpose like the present one.[35] This in

[29] BVerfG, *Online Searches* (n 13) para. 183.

[30] In the very least, those to whom the information refers have an interest in retaining the right to control existence and use of "their" information.

[31] BVerfG, *Federal Genetic Engineering Act (Gesetz zur Regelung der Gentechnik)*, Judgment of 24 November 2010, Case 1 BvF 2/05.

[32] Id., para. 163.

[33] Id., para. 168. Indirect since by making this information freely available, the state complied with the public's legitimate interest in receiving this information.

[34] Arguably, under certain circumstances such dissemination may even serve to comply with a constitutional right to be informed.

[35] Of course, constitutional rights may have "third party effects" and thus become indirectly relevant between non-state actors, e.g. when courts are called on to interpret general clauses of civil law. Nevertheless, the constitutionally required weighing of interests would presumably be

Electronic copy available at: https://ssrn.com/abstract=1940346

mind, one can observe that the Court is well aware of the dangers associated with publishing data on the internet; nevertheless, there may be instances in which such publication is not only justified but even warranted to achieve conflicting and overriding purposes. This becomes most pertinent in the event of informing the public, because the internet appears predestined to do so.

In respect of the right to one's own name one may ask how using a particular name for an internet domain[36] is to be dealt with from a constitutional perspective.[37] This question came before the Court in a constitutional complaint lodged by the owner of a second-level domain.[38] The very name used for his domain happened to be identical with the family name of another who had therefore successfully sought judicial injunction. Traditionally, names are only protected for expressing a person's identity and individuality, albeit irrespective of being a person's real name or only a pseudonym.[39] Distinguishing this traditional purpose from the protection sought by the complainant the Court declared that, as a rule, a name being part of an internet address did not affect a person's identity and individuality.[40] Thus, it rejected the claim that a name only used to technically address a specific content, as is the case with homepages, for instance, can profit from protection under the right to one's own name.[41] In sum, the Court grants only limited protection to using internet domains under the general right to personality, while in most cases the "traditional way" of using a name will prevail.[42]

---

different if it did not involve the public's legitimate interest in disclosure but only one single individual's trivial interest in disclosure of information typically contained in the yellow press, for instance.

[36] Put simply, domain names are names used for identifying IP addresses. In URLs (Uniform Resource Locators; used to address resources on the World Wide Web), they are used to identify particular websites. The last part of a domain (de, co.uk, gov etc.) is the so-called top-level domain. See http://www.webopedia.com/search/domain, last visited on 14 September 2011. To give an example: Can someone else rely on the general right to personality if he intends to operate a website like www.katharinaberner.de? What about my interest in not having someone else using my name for operating his website?

[37] Cf. R Kazemi/ A Leopold, 'Die Internetdomain im Schutzbereich des Art. 14 Abs. 1 GG' (2004) *Multimedia und Recht* 287 f.

[38] BVerfG, *Domain-Name*, Decision of 21 August 2006, Case 1 BvR 2047/03. The name used for the domain had not been the complainant's real name but only an alias used for communicating in various networks and several email addresses. The term "second-level domain" refers to the domain below the top-level domain. Take, for example, the fictional internet address www.katharinaberner.de. *De* would be the top-level domain and *katharinaberner* would be the second-level domain.

[39] Id., paras. 14 f.

[40] Id., para. 19. However, the Court is prepared to make an exception where a certain name is actually used in order to identify and individualise on the internet.

[41] Id., para. 17. This is especially the case where there are other ways to use an intended name, e.g. by adding additional characters to it. Here, the Court merely conceived an interference with the general freedom to act, albeit this interference was held to be justified as it would in most cases, see paras. 22 f.

[42] For an assessment under Art. 14 GG see p. 26.

Electronic copy available at: https://ssrn.com/abstract=1940346

As has been implied above, the general right of personality is particularly open to encompass new developments. Therefore, it is under this right's heading that one may speak of a veritable development of the Constitution caused by the internet. The underlying constitutional complaint had been lodged by a journalist, lawyers and a member of the "Left Party" (political party *Die Linke*). They challenged several acts which authorised various forms of searching systems of information technology.[43] These acts were meant to respond to challenges to detecting criminals and investigating crimes when communication, planning and execution of crime move to the internet.[44] Having first underlined the growing importance of computers for everyone's daily life and for the free development of the individual, the Court then ascribed the same importance to the internet in particular.[45] These observations were however contrasted with new and severe threats to constitutionally protected interests as being the flipside of these new opportunities.[46]

Discussing how these threats could be dealt with from a constitutional perspective, the Court concluded that other constitutional rights and its own traditional jurisprudence afforded insufficient protection.[47] This deficiency results from the fact that the right to privacy of telecommunications only applies to on-going telecommunication. Equally, the scope of protection offered under the right to inviolability of the home and under the other sub-categories of the general right of personality is rather limited and does not cover every sensitive context. For these reasons, the Court finally identified a new manifestation of the general right of personality, namely the right to the guarantee of the confidentiality and integrity of information technology systems.[48] Information technology systems within this meaning are systems

> *…which alone or in their technical networking can contain personal data of the person concerned to such a degree and in such*

[43] The various forms were: secret observation and other forms of receiving information from the internet, and secret access to systems of information technology.

[44] BVerfG, *Online Searches* (n 13) para. 9. These new forms of investigation have some advantage over traditional ones: First, presumptive criminals are not pre-warned as these forms take place secretly; second, they may provide access to unencrypted data, see para. 11 of the judgment.

[45] Id., paras. 152 f.

[46] Id., para. 159 f.: The more people use systems of information technology, the more data is created and the more information may be obtained about someone's personality if these data are accessed. Besides, individuals are hardly capable of fending off such access. Cf. H Garstka, 'Informationelle Selbstbestimmung und Datenschutz', in: C Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 50 f.

[47] Cf. BVerfG, *Online Searches* (n 13) paras. 173 f., 178 f.

[48] Id., para. 183.

Electronic copy available at: https://ssrn.com/abstract=1940346

diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of the personality.[49]

This definition not only refers to someone's personal computer but also, for instance, to mobile phones. Special characteristic of the new manifestation is the following: in contrast to hitherto existing rights, it protects the personal and private sphere of a person's life against state access even if a system of information technology as such is accessed and not only a single process of communication or specific data.[50] Thus, this new manifestation offers, so to speak, precautionary protection.[51] Although this new manifestation admits interferences under certain conditions, one may nonetheless argue that its identification has indeed enhanced constitutional protection in the face of internet-related developments. To make it clear once again: The Court did, of course, not draft a new fundamental right.[52] However, it made out such an intense challenge to the general right of personality that it perceived it necessary to introduce a new manifestation of this right; yet, one may argue, it would have been equally conceivable to address this challenge by relying on established rights and manifestations and merely making adaptations on the level of justification.[53]

2.4.1.2 Freedom of expression, Art. 5.1 GG

As the internet is, among others, a medium to express and take note of multitudinous opinions, it comes as no real surprise that there is indeed some jurisprudence of the Court relating to the right to freedom of expression.

---

[49] Id., para. 185: '... Systeme erfasst, die allein oder in ihrer technischen Vernetzung personenbezogene Daten des Betroffenen in einem Umfang oder in einer Vielfalt enthalten können, dass ein Zugriff auf das System es ermöglicht, einen Einblick in wesentliche Teile der Lebensgestaltung einer Person zu gewinnen oder gar ein aussagekräftiges Bild der Persönlichkeit zu erhalten.'

[50] Id., para. 183. Cf. A Luch, 'Das neue "IT-Grundrecht" – Grundbedingungen einer "Online-Handlungsfreiheit" '(2011) *Multimedia und Recht* 76.

[51] To give an example: Some people may keep a diary or store photographs of their last holiday on their personal computer. Both diary and photographs may provide a picture of someone's personality. Being directed against access of a personal computer, the new manifestation identified by the Court offers protection before the threat becomes acute, i.e. before the state has taken note of the diary's content or the photographs, simply because a personal computer (or any other information technology system) may contain such constitutionally sensitive data.

[52] One may also ask whether there is any form of constitutional protection against the state merely using data stored by private companies etc. without the state having ordered this storage. Consistently, such "indirect" encroachment would have to meet the same constitutional requirements as a direct one.

[53] Arguably, one may, depending on the concrete circumstances of each case, have applied the right to privacy, the right to informational self-determination, the right to privacy of telecommunications or the right to inviolability of the home and then imposed higher requirements for justifying interferences.

Electronic copy available at: https://ssrn.com/abstract=1940346

Freedom of expression under the German Basic Law essentially protects every kind of expressing one's own opinion.[54] An opinion in this sense is not open to a judgment of "right" or "wrong".[55] In addition, the right to freedom of expression also applies to communicating certain facts, if and to the extent that these facts provide the basis for forming one's opinion.[56] As to the quality of value judgments covered by Art. 5.1 GG, it is immaterial whether the respective opinion is "useful" or "valueless", "prudent" or "imprudent" or what it aims to achieve.[57]

Although one cannot make out major changes to the traditional reading of the right to freedom of expression, one can in fact observe changes in weighing constitutional interests. This is illustrated by a constitutional complaint of a company that published a so-called "*Schuldnerspiegel*[58]" on the internet.[59] Being enjoined by a lower instance court from publishing a particular debtor in this "*Schuldnerspiegel*", the company argued that its right to freedom of expression had been violated. Although eventually dismissing the company's constitutional complaint, the BVerfG vividly set out the (constitutional) dangers resulting from this kind of publication:[60] internet publications may severely denounce those concerned; operating worldwide, publications on the internet address undefined and virtually unlimited numbers of users; pieces of information can be linked to each other and are easily accessible; and finally, information on the internet does not have a definite "expiry date". The Court did not take a decision on the merits but its decision is central to comprehend the internet's influence on constitutionally protected interests. It acknowledged that domain owners may invoke the right to freedom of expression;[61] their interest in publishing their own opinion notwithstanding, the Court emphasised that the necessity to protect those affected by this new dimension of public denunciation had remarkably increased.[62] Thus we can see that the development of the internet may result in tilting the balance in favour of those

[54] BVerfG, *Election Campaign (Wahlkampf)*, Judgment of 22 June 1982, Case 1 BvR 1376/79, paras. 13 f.
[55] Ibid.
[56] BVerfG, *DGHS*, Decision of 13 February 1996, Case 1 BvR 262/91, para. 25.
[57] BVerfG, *Election Campaign* (n 54) paras. 13 f.
[58] In this "*Schuldnerspiegel*", the company continuously publishes a list of named "debtors" merely because of being the debtor and not the creditor in a financial transaction.
[59] BVerfG, *Disclosing Debtors on the Internet (Schuldnerspiegel im Internet)*, Decision of 9 October 2001, Case 1 BvR 622/01.
[60] Id., paras. 30 f.
[61] Id., para. 32.
[62] Id., paras. 30 f.

Electronic copy available at: https://ssrn.com/abstract=1940346

passively affected by it, although constitutional interests as such remain unchanged.

As regards several technical innovations brought about by the internet, it is debatable if, and if answered in the affirmative, to what extent they may be constitutionally protected. Regarding internet presences as a medium for expressing opinion, the Court takes it for granted – without much ado about it – that they may well be covered by the right to freedom of expression.[63] This can be seen, for instance, in a constitutional complaint lodged by a physician who had been prohibited, inter alia, from advertising certain vitamin preparations on his website.[64] Hyperlinks on websites are another internet-related innovation.[65] This innovation, however, fell short of actually being discussed by the Court in a constitutional complaint.[66] The complaint had been lodged by a press agency that had been convicted for integrating a hyperlink into its editorial coverage.[67] The lower courts had held that integration of hyperlinks into websites was not protected by the right to freedom of expression: in their opinion, freedom of expression could not be applied to a mere service as was the integration of a link.[68] Unfortunately, the Constitutional Court declared the complaint inadmissible and did not take a decision on the merits; hence, it still remains to be seen whether, in the opinion of the Court, any of the Basic Law's fundamental rights can be read to encompass protection for hyperlinks.

2.4.1.3 Privacy of telecommunications, Art. 10 GG

Naturally, internet-related developments have significant impact on the right to privacy of telecommunications. This right protects immaterial transmission of information by telecommunications devices.[69] Thus, it aims at ensuring private communication over geographical distance.[70] Naming no special kind of

---

[63] Internet presences are established presences on the World Wide Web such as websites, emails, blogs etc. See http://www.webopedia.com/TERM/P/presence.html, last visited on 14 September 2011.

[64] BVerfG, *Vitamin Preparations (Vitaminpräparate)*, Decision of 12 July 2007, Case 1 BvR 99/03, para. 23.

[65] Hyperlinks are elements in electronic documents used to either link this element to another element in the same document or to an element in another document. See http://www.webopedia.com/TERM/H/hyperlink.html, last visited on 14 September 2011.

[66] BVerfG, *AnyDVD*, Decision of 3 January 2007, Case 1 BvR 1936/05.

[67] This link led to a website from which users could download software making it possible to circumvent copy protection features on DVDs.

[68] Id., para. 5.

[69] BVerfG, *Acoustic Surveillance* (n 24) paras. 21 f.

[70] BVerfG, *Interception Circuit (Fangschaltung)*, Decision of 25 March 1992, Case 1 BvR 1430/88, para. 46.

Electronic copy available at: https://ssrn.com/abstract=1940346

telecommunications device, the right is in principle open to apply to new developments, too.[71]

As is the case with other forms of telecommunication, it is not only the content of communication via the internet that is constitutionally protected but also the data resulting from it, i.e. traffic data. Regarding the content itself, the internet brings about special risks to privacy. These two points are illustrated in a constitutional complaint challenging statutes which authorise the state to supervise telecommunication in order to prevent serious offences.[72] Although dealing with telecommunication in general, the judgment contains some important aspects relating to our topic.[73] Firstly, the Court pointed out that even data resulting from communication via email were as worthy of constitutional protection as the content of communication itself since these data could reveal highly sensitive information about the process of communication (e.g. when, where and how long has been communicated between whom etc.).[74] Secondly, the Court stressed that persons communicating via email normally believed that they were communicating confidentially. Hence, when affected by supervisory measures, they may involuntarily reveal even highly personal information.[75]

These conclusions were further elaborated in a subsequent complaint lodged by a judge. His flat and office had been searched during criminal investigations in order to access data contained in the terminals of his telecommunications devices.[76] Outlining the scope of the right to privacy of telecommunications, the Court accepted that it was

> *...open to encompass new developments and [was] not restricted to those means of communication already known when the Basic*

[71] BVerfG, *Acoustic Surveillance* (n 24) para. 21.

[72] BVerfG, *Supervision of Telecommunication I (Telekommunikationsüberwachung I)*, Judgment of 27 July 2005, Case 1 BvR 668/04.

[73] Communication via email is mentioned only en passant.

[74] BVerfG, *Supervision of Telecommunication I* (n 72) para. 141. Cf. BVerfG, *Disclosure of IP address (Auskunft über IP-Adresse)*, Decision of 13 November 2010, Case 2 BvR 1124/10, where the Court expressly held that IP addresses were part of the data protected under Art. 10 GG (para. 12 of the decision).

[75] Id., paras. 143, 163.

[76] BVerfG, *Supervision of Telecommunication II (Telekommunikationsüberwachung II)*, Judgment of 2 March 2006, Case 2 BvR 2099/04. As to the outcome of the case, the Court eventually rejected a violation of the right to privacy of telecommunications. Instead, it held that Art. 2.1 in conjunction with Art. 1.1 GG and Art. 13.1. GG were violated, mainly because the court ordering the searches had failed to properly balance the low degree of suspicion with the severity of the searches, paras. 123 f. of the judgment.

Electronic copy available at: https://ssrn.com/abstract=1940346

Law was drafted, but [could] also be applied to new forms of transmission technologies.[77]

Since the particular way of communication and the way of expressing communication was immaterial, the right to privacy of telecommunications could easily be applied to modern forms of telecommunication, such as communication via the internet.[78] Then the Court classified the data resulting from digital communication: as long as these data had not entered into the personal sphere of those participating in the communication, i.e. as long as the communication had not ended, the right to privacy of telecommunications would apply.[79] This case clearly reveals the Court's serenity in coping with internet-related developments; in the eyes of the Court, the text of the Basic Law is broad and general enough to encompass new developments. While identifying and addressing new threats to constitutional interests, the Court easily approaches them by applying traditional constitutional principles and assessments.[80]

The internet also becomes constitutionally relevant when emails which have been stored on a provider's server are seized by public authorities. In a constitutional complaint challenging such seizure,[81] the Court clarified that even these emails were protected under the right to privacy of telecommunications.[82] In doing so, the Court mainly based its argument on the

---

[77] Id., para. 68: 'Das Grundrecht ist entwicklungsoffen und umfasst nicht nur die bei Entstehung des Gesetzes bekannten Arten der Nachrichtenübertragung, sondern auch neuartige Übertragungstechniken.'.

[78] Id., para. 68.

[79] BVerfG, *Supervision of Telecommunication II* (n 76) paras. 71-74. Once the communication is over and the data have entered into the personal sphere, Art. 10 GG no longer applies as there is no longer a higher risk due to geographical distance. This, however, does not imply that there is no constitutional protection. Here, the right to informational self-determination may apply, which is otherwise superseded by Art. 10 GG.

[80] I.e. traffic data are highly constitutionally sensitive since the may convey a detailed picture of someone's personality. The more traffic data is accrued, the more detailed the picture. Constitutional requirements imposed on justifying interferences depend on how severe the interference is. The severity may i.a. depend on whether the interference has taken place in secrecy, whether it affected any third parties and whether the individual affected by the interference had already been able to delete the data.

[81] BVerfG, *Seizure of Emails (E-Mail-Beschlagnahme)*, Decision of 16 June 2009, Case 2 BvR 902/06. This constitutional complaint was preceded by an application for provisional order, see BVerfG, *Supervision of Emails (E-Mail-Überwachung)*, Decision of 29 June 2006, Case 2 BvR 902/06. The term "online service provider" refers to everyone who provides online services, see http://www.webopedia.com/TERM/O/online_service_provider.html, last visited on 14 September 2011. A server is a single computer or a device in a network that manages resources of the computer or the network, see http://www.webopedia.com/TERM/S/server.html, last visited on 14 September 2011.

[82] In the Court's opinion, this right, where applicable, superseded the application of the right to informational self-determination, the right to inviolability of the home and the right to the guarantee of the confidentiality and integrity of information technology systems, see paras. 49 f. of the decision. Nonetheless, encroachments on the right to privacy of telecommunications must also meet the requirements imposed by the latter if personal data are affected, see para. 60.

Electronic copy available at: https://ssrn.com/abstract=1940346

protective purpose of this right. In its opinion, this right aims at protecting different forms of telecommunication characterised by enhanced threats to privacy because of being more exposed to state access than face-to-face communication.[83] For a seizure to be proportionate there must be a sufficiently strong suspicion of a sufficiently severe crime; besides, public authorities must not seize more data than necessary.[84] Most importantly, the investigating authorities must take measures to protect data relating to the most personal core of a person's life.[85] Often users are also constitutionally entitled to be notified of a seizure of their emails.[86] This entitlement, however, is not peculiar to an internet-related context but already encompassed by the right to privacy of telecommunications.[87] In sum, this decision once again explains how the Court integrates internet-related constitutional issues into the existing constitutional framework. By referring to the general purpose of constitutional provisions or the principle of proportionality, the Court seems to make out no peculiarity of internet-related developments that cannot be handled.[88]

A major problem concerns limiting state access to traffic data of telecommunications on the one hand and ensuring effective state action on the other. One landmark judgment in this context was prompted by a constitutional complaint challenging statutory provisions imposing several duties on providers of publicly accessible telecommunications devices.[89] Among others, they were ordered to store traffic data of telecommunications for six months by way of precaution; in addition, authorities may demand information as to the user to whom a particular IP address was allocated. At the outset, the Court

---

[83] BVerfG, *Seizure of Emails* (n 81) para. 46. In this regard, it was immaterial that users may try to protect their communication against access by others by means of passwords etc.; still, they were eventually unable to prevent the provider and thus also the state to access their communication. For the same reason, it was irrelevant whether emails were only cached or to remain permanently on the provider's server or whether users have already taken note of the content of their mails. Besides, outsourcing emails on a provider's server must not be taken as a user's general consent to access by others. Cf. paras. 46 f. and 53 of the decision.

[84] Id., paras. 79 f.

[85] Id., para. 90. A person's diary, sexuality or conversation with very close relatives will regularly touch upon this most personal core.

[86] Id., para. 93 f.

[87] See Art. 10.2 GG.

[88] Cf. e.g. BVerfG, *Interception Circuit* (n 70). The Court generally remarked that the accompanying circumstances of a communication process via telephone are protected just like the content of such communication, see para. 47. Already when taking this decision, the Court noticed that a means of telecommunication (here: telephone) may be abused for illegal purposes; therefore, the Court accepted interferences in order to protect conflicting interests, see para. 60.

[89] BVerfG, *Preventive Data Retention (Vorratsdatenspeicherung)*, Judgment of 2 March 2010, Cases 1 BvR 256/08 et al. The complaint had been lodged by different members of society, including lawyers, academics, tax accountants, journalists, students, MPs and others. Preceding this judgment were applications for provisional orders which had also been granted by the Court (Provisional Orders of 11.03.2008 and of 28.10.2008). The pertinent data may, inter alia, accrue from using internet-phones, sending emails or merely accessing the internet.

Electronic copy available at: https://ssrn.com/abstract=1940346

stressed that the confidential nature of emails and their corresponding need for protection were not questioned merely because they were particularly prone to various forms of technical interception.[90] It further clarified that accessing the internet as such was protected by the right to privacy of telecommunications:

> *It is impossible to distinguish between individual and mass communication without considering the content of the transmitted information, which would, however, be contrary to the protective purpose of this fundamental right. Therefore, even storing data concerning the internet access as such encroaches on this right…*[91]

Notably, the Court did not declare preventive data retention for a certain period as unconstitutional per se.[92] Instead, it acknowledged, on the part of the state, the need to adapt investigative instruments to new forms (of planning and realising) of crime,[93] notwithstanding the seriousness of the encroachment on constitutionally protected interests. Instead, the state was under a constitutional duty to provide for compensatory protective measures in terms of e.g. exactly defining the purpose for using data, preventing direct state access, data protection, transparency and legal protection.[94] In sum, the more serious the encroachment is, the higher is the state's duty to take precautionary measures against an aggravation of the encroachment.

Under a separate point in the same judgment, the Court referred to the obligation to provide information on IP addresses. In this context, it rejected an absolute right to anonymity on the internet;[95] although IP addresses could be more informative than a telephone number, state authorities may nonetheless have a constitutionally legitimate interest in allocating a certain IP address to a

---

[90] BVerfG, *Preventive Data Retention* (n 89) para. 192.

[91] Id., para. 192: 'Da eine Unterscheidung zwischen Individual- und Massenkommunikation ohne eine der Schutzfunktion des Grundrechts zuwiderlaufende Anknüpfung an den Inhalt der jeweils übermittelten Information nicht möglich ist, ist bereits in der Speicherung der den Internetzugang als solchen betreffenden Daten ein Eingriff zu sehen…'.

[92] Id., paras. 204 f.

[93] Id., paras. 206.

[94] Id., paras. 210 f. Granting the complaint, the Court focused on exactly these aspects, holding that the challenged provisions did not comply with the standards in terms of data protection, transparency, judicial review etc., which rendered the interferences disproportionate and thus unconstitutional.

[95] Id., para. 254. Cf. in contrast BVerfG, *Evaluation Portal (Spickmich)*, Decision of 16 October 2010, Case 1 BvR 1750/09. The complaint had been lodged by a teacher challenging a decision of the German Federal Supreme Court in which it had confirmed the legality of anonymous evaluation portals on the internet. The Constitutional Court declared the complaint inadmissible, without however giving any reasons. The mere fact of not deciding on the merits was in turn interpreted by some authors as actually confirming a right to anonymous or pseudo-anonymous use of the internet, see e.g. F Höhne, 'Anmerkung – Verfassungsrechtliche Zulässigkeit des BGH-Urteils zu Lehrerbewertungen im Internet' (2011) *juris PraxisReport IT-Recht* Comment no. 6.

Electronic copy available at: https://ssrn.com/abstract=1940346

certain user.[96] Once again, the Court took into account that internet-related developments entailed various new opportunities for committing crimes and violating legally protected interests.[97] Explicitly pointing out that the internet must not be a legal vacuum,[98] the Court accepted that the state may under certain conditions have a right to information from service providers with regard to owners of particular IP addresses which are already known. In doing so, the Court imposed less stringent constitutional standards than it did when deciding on the precautionary storage of data.[99] For instance, the state may request information on IP addresses on any statutory basis, i.e. there is no need for limiting catalogues of legally protected interests or of certain serious categories of crimes. Besides, there is no need to seek judicial order before requesting this information.

2.4.1.4 Right to property, Art. 14 GG

One of the urgent constitutional questions raised by the development of the internet is which – if any – internet-related developments may be encompassed by the right to property. To put it simply, the right to property protects all legal positions having a net asset value.[100] Thus, it not only encompasses property in a legal sense but also e.g. other rights in rem[101] or contractual rights.[102] In contrast, a person's fortune as such – which is affected by the duty to pay taxes, e.g. – is not protected.[103]

Firstly, one may ask, for example, whether the right to use a domain constitutes property within the meaning of Art. 14 GG; if this were the case, the obligation to delete a domain would amount to depriving someone of his constitutionally protected right. This question was partly answered by the Court in a constitutional complaint lodged by an IT-and-Online-Service-Provider.[104] The complainant had registered a particular domain name with the respective registry for internet domains. Based on trademark law, he was subsequently enjoined by court to continue using the domain for his homepage and ordered

---

[96] BVerfG, *Preventive Data Retention* (n 89) paras. 259 f.
[97] Id., para. 260.
[98] Id., para. 260.
[99] Id., paras. 261 f.
[100] BVerfG, *Refunding of Wage Tax (Lohnsteuererstattung)*, Judgment of 8 October 1985, Cases 1 BvL 17/83 and 1 BvL 19/83, para. 22.
[101] The term "rights in rem" refers to rights "against a thing or against property".
[102] BVerfG, *Dental Technicians' Guild (Zahntechnikerinnung)*, Decision of 31 October 1984, Cases 1 BvR 35/82 et al., para. 77; BVerfG, *Option Rights (Vorkaufsrecht)*, Decision of 9 January 1991, Case 1 BvR 929/89, paras. 35 f.
[103] BVerfG, *Investment Aid (Investitionshilfe)*, Judgment of 20 July 1954, Cases 1 BvR 459/52 et al., para. 34.
[104] BVerfG, *ad-acta.de*, Decision of 24 November 2004, Case 1 BvR 1306/02.

Electronic copy available at: https://ssrn.com/abstract=1940346

to consent to deleting the domain. Notably, the Court first pointed out that this case did not pose any fundamental constitutional questions but could be (easily) decided by applying already existing case-law.[105] Then it clarified that the contractual right to use a registered internet domain was in fact protected by the right to property as was, in principle, the order of characters constituting the second level domain. After that, however, it expressly distinguished the right to use an internet domain from rights amounting to a kind of ownership such as intellectual property rights.[106] Therefore, the right to use a domain depends on and is circumscribed by the underlying treaty authorising the use. For instance, this treaty may be terminated for special reasons and such termination will extinguish the right to use the domain. Besides, the Court added, the right to use an internet domain could, as every other interest protected under the right to property, be interfered with in accordance with the law.[107] In sum, the Court clarified that the German Basic Law does afford some protection to the use of internet domains but that this protection does not differ or even exceed the protection of other interests falling under the right to property.

It is also debatable whether digital exploitation rights are protected by the right to property.[108] This question was raised, albeit not answered, by a constitutional complaint lodged against a judicial decision denying the payment of a reprographic levy for reproduction of digital work.[109] The said levy serves to compensate copyright holders for reproduction of their work. The lower court had held that authors publishing their work on the internet without taking any protective measures against reproduction can be taken to have consented to such reproduction and therefore to have forfeited their right to remuneration.[110] While the BVerfG granted the complaint due to arguments based on European Union law,[111] it can arguably be read to interpret the right to exploitation, which is encompassed by the right to property, as also applying to reproduction of digital material.[112] Nevertheless, an express clarification of the Court in this

[105] Id., para. 6.
[106] Id., para. 9.
[107] Id., para. 11.
[108] Cf. D Kröger, 'Geistiges Eigentum im Netz', in: C Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 216 f.
[109] BVerfG, *Reprographic Levy (Geräteabgabe)*, Decision of 30 August 2010, Case 1 BvR 1631/08.
[110] Id., para. 15.
[111] Id., para. 45.
[112] Id., paras. 60 f.

Electronic copy available at: https://ssrn.com/abstract=1940346

regard is still due. Equally due is an express decision of the Court as to whether the production of digital private copies have an expropriating effect of such degree as to impose a constitutional duty on the legislature to take protective measures to mitigate this effect.[113]

2.4.2 The internet's constitutional repercussions low on the Court's agenda

As outlined above, constitutional questions caused by the internet may arise in many contexts; nonetheless, the Court does not necessarily address every one of them regarding a particular fundamental right in detail. Often, the internet is only mentioned en passant while dealing with unrelated constitutional issues not directly affected by the internet as such. Some questions may not relate to the interpretation of a fundamental right's scope of protection but merely relate to the level of justifying interferences, for instance. Likewise, some questions are rather discussed under the heading of another superseding fundamental right. Besides, it may be the case that the Court has simply refrained from addressing certain issues at length so far. A number of cases relating to these different categories of "low on the Court's agenda" will be discussed below.

2.4.2.1 Freedom of broadcasting, Art. 5.1 sentence 2 GG

Under the German Constitution, public broadcasting is particularly protected for ensuring plurality of opinion. Presumably, one would have guessed that such protection cannot remain unaffected by the development of the internet. This guess, however, seems to be misguided. As regards freedom of broadcasting, the Court has instead repeatedly reiterated that the legal framework for ensuring this freedom is the same as ever, despite the development of new technologies such as the internet.[114]

An example of this repeated dictum is an application for abstract judicial review made by Members of Parliament belonging to the "Social Democrats" against an act prohibiting political parties from directly and indirectly participating in broadcasting activities.[115] In this regard, the Court conceded that there were

[113] BVerfG, *Private Digital Copies (Private Digitalkopie)*, Decision of 7 October 2009, Case 1 BvR 3479/08, esp. paras. 7 f.

[114] Cf. BVerfG, *Radio Licence Fee (Rundfunkgebühren)*, Judgment of 11 September 2007, Case 1 BvR 2270/05, esp. para. 122.

[115] BVerfG, *Hesse Law on Private Broadcasting (Hessisches Privatrundfunkgesetz)*, Judgment of 12 March 2008, Case 2 BvF 4/03.

Electronic copy available at: https://ssrn.com/abstract=1940346

enlarged transmission capacities e.g. due to broadcasting on the internet; but although these developments did constitute a challenge to the legislator, the general requirements for securing freedom of broadcasting remained unchanged.[116] Despite these clear statements, however, it may be doubted whether the need to secure diversity of opinion by ensuring freedom of broadcasting in its present form is not somehow diminished in the internet age.

2.4.2.2 Freedom of assembly, Art. 8 GG

Although not every constitutionally protected right is situated in a context which lends itself to be easily affected by the internet, there are nonetheless various ways in which internet-related developments may find entrance into constitutional assessment. This is illustrated by an application for provisional order alleging a violation of the right to freedom of assembly.[117]

This application, filed in conjunction with a constitutional complaint, challenged a prohibition of assembly which had been based, inter alia, on publications and proclamations made by autonomous nationalists on the internet. These publications and proclamations, however, did not directly refer to the planned assembly. Although accepting that publications on the internet may be relied on in order to justify encroachments on the right to freedom of assembly if related to a specific assembly, the Court rejected relying on such general publications.[118] As the authorities involved had even failed to take note of internet publications directly referring to the assembly and in favour of the complainants, the provisional order was granted. In addition to exemplifying the various ways in which the internet can become constitutionally relevant, this decision can be read as reminding authorities to exercise due care when referring to internet publications in order to justify interfering with constitutionally protected rights. Like any other source, arguably even more, internet publications must be checked for their relevance and accuracy.

[116] Id., para. 91.
[117] BVerfG, *Autonomous Nationalists (Autonome Nationalisten)*, Provisional Order of 4 September 2009, Case 1 BvR 2147/09.
[118] Id., paras. 11 f.

Electronic copy available at: https://ssrn.com/abstract=1940346

2.4.2.3 Freedom of occupation, Art. 12.1 GG

One constitutional right – not directly related to the internet but nevertheless often indirectly affected by it – is the right to freedom of occupation. This right not only protects choosing one's profession but also the exercise of it, which in turn includes advertising one's profession and professional services.[119]

A characteristic question is whether the state may impose stricter limits on advertising on the internet than on using traditional media of publication. In numerous decisions, the Court has rejected stricter limits as being incompatible with Art. 12.1 GG.[120] One of these decisions is a constitutional complaint against a judicial decision enjoining operators of a hospital to continue advertising their hospital on the internet.[121] While freedom of occupation does not protect every kind of advertisement for certain professional groups such as doctors, it does cover advertisement not being exaggerated or blatant. These requirements are fulfilled as long as the advertisement meets the interests of potential clients and is comprehensible so as not to upset them.[122] In this context, the Court pointed at the special character of advertisement on the internet: homepages are rather "passive platforms"; therefore, such kind of advertisement is generally noticed by users actively searching information.[123] Owing to this, the Court eventually rejected any special treatment of advertisement on the internet – be it positive or negative discrimination. In a similar case, brought by a dentist, the Court again refrained from treating advertisement on the internet any differently just because it offers ways of presentation different from traditional forms of advertisement; instead, the Court assessed the case against the background of traditional constitutional principles.[124]

---

[119] BVerfG, *Medical Specialists (Facharztbezeichnung)*, Decision of 29 October 2002, Case 1 BvR 525/99, para. 43; BVerfG, *Advertising Pharmacies (Apothekenwerbung)*, Decision of 22 May 1996, Cases 1 BvR 744/88 et al., paras. 82 f.

[120] Cf. BVerfG, *Advertising Dental Services on the Internet I (Zahnarztwerbung im Internet I)*, Decision of 26 August 2003, Case 1 BvR 1003/02 and BVerfG, *Advertising Dental Services on the Internet II (Zahnarztwerbung im Internet II)*, Decision of 8 December 2010, Case 1 BvR 1287/08.

[121] BVerfG, *Advertising Hospitals on the Internet (Klinikwerbung im Internet)*, Decision of 17 July 2003, Case 1 BvR 2115/02.

[122] Id., para. 9.

[123] Id., para. 20. The Court apparently acts on the presumption that internet users are "mature" and autonomous citizens, in contrast to the internet being considered as a rather "passive platform".

[124] BVerfG, *Third-party Advertising on the Internet (Fremdwerbung im Internet)*, Decision of 1 June 2011, Case 1 BvR 233/10GCC, paras. 57 f. In particular, the Court referred to using photos and hyperlinks which highlight the advertised goods and services more than traditional forms of advertisement would.

Electronic copy available at: https://ssrn.com/abstract=1940346

Internet-related developments can, even in a context not directly affected by the internet, put a new complexion on formerly justified encroachments. To give an example, a certain act provided that lawyers admitted to a certain higher regional court (*Oberlandesgericht*) must not also be admitted to another court.[125] Underlying purpose of this provision was to ensure, among others, that lawyers are able to constantly communicate, coordinate their appointments and can be contacted by their clients. This provision was challenged by a lawyer,[126] arguing that the corresponding restriction of the right to freedom of occupation can no longer be justified in the light of modern technologies such as the internet. The Court shared this point of view:[127] It emphasised that at a time when everyone could send emails from virtually everywhere and resort to various other telecommunications devices, it was no longer required to restrict a lawyer's place of work to a particular local area.[128] In another context, however, the Court upheld restrictions despite relevant internet-related developments and dismissed a constitutional complaint against the duty to list all German lawyers associated in one firm in the firm's letterhead.[129] The complainant had argued that there were less severe means to comply with clients' legitimate interest in knowing the other lawyers' names; one alternative was to refer clients to the internet as an equally suitable source of information. Rejecting this alternative, the Court instead considered it inappropriate to demand clients to inform themselves actively despite having a legitimate interest in receiving the above-mentioned information.[130]

E-commerce raises questions both in respect of the right to freedom of occupation and the principle of equality before the law. Surprisingly, the Court has not yet dealt with this issue in detail; instead, it dismissed these questions rather short-spoken in a constitutional complaint against statutory restrictions for opening hours of shops.[131] Although the restrictions did not apply to other forms of commerce such as e-commerce, the Court could make out neither

---

[125] This restriction was referred to as the so-called "*Singularzulassung*". Cf. § 25 of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung, BRAO*), which ceased to be in force.

[126] BVerfG, *Limiting Admission of Lawyers (Singularzulassung von Rechtsanwälten)*, Judgment of 13 December 2000, Case 1 BvR 335/97.

[127] Id., para. 61.

[128] Id., para. 61.

[129] BVerfG, *Transparency on Letterheads (Benennungsgebot für Kanzleibriefbögen)*, Decision of 13 June 2002, Case 1 BvR 736/02.

[130] Id., para. 14.

[131] BVerfG, *Restriction of Opening Hours (Ladenschluss)*, Judgment of 9 June 2004, Case 1 BvR 636/02.

Electronic copy available at: https://ssrn.com/abstract=1940346

disproportionate conditions for competition[132] nor an unconstitutional unequal treatment.[133] The availability of the internet may also challenge other forms of restrictions. One is exemplified in a constitutional complaint against the monopoly of the Free State of Bavaria to organise and facilitate bets and against the corresponding ban on private betting companies.[134] While the Court accepted that the state monopoly legitimately pursues the objectives, among others, of preventing addiction to gambling, preventing fraud and generally ensuring consumer protection and preventing related crimes,[135] one may have doubted whether the monopoly was in fact suitable to achieve the above-mentioned objectives. The Court however held that it was immaterial to the question of suitability that bets could be organised worldwide on the internet – just as it was, in its opinion, immaterial that the state was unable to prevent these bets being accessible in Germany, too.[136] Similarly, in a complaint against restrictions to the publication of pornographic performances on the internet, the Court considered it immaterial that there was plenty of pornographic material on the internet originating from outside Germany.[137] In the view of the Court, it was sufficient that the interference at least promoted the stipulated aim of protecting minors – as the prohibition reduced the amount of (German) material accessible by (only German speaking) minors, this requirement was fulfilled.[138]

2.4.2.4 Inviolability of the home, Art. 13 GG

Although the internet itself is not bound to a certain place, it occasionally affects the right to inviolability of the home, albeit only indirectly. Under the German Constitution, the right to inviolability of the home aims at protecting

---

[132] Id., para. 150.

[133] Id., paras. 169 f.; cf. BVerfG, *Berlin Opening Hours (Berliner Ladenöffnungszeiten)*, Judgment of 1 December 2009, Cases 1 BvR 2857/07 et al., para, 171.

[134] BVerfG, *Monopoly on Sports Bets (Sportwettenmonopol)*, Judgment of 28 March 2006, Case 1 BvR 1054/01.

[135] Id., paras. 97 f.

[136] Id., para. 114; cf. BVerfG, *Treaty on Gambling (Glücksspielvertrag)*, Decision of 14 October 2004, Case 1 BvR 928/08, esp. para. 48. Cf. BVerfG, *Advertising Gambling on the Internet (Glücksspielwerbung im Internet)*, Decision of 30 March 2011, Case 1 BvR 426/10, esp. para. 8, where the Court dismissed a constitutional complaint among others because the lower courts were yet to decide whether it was feasible to limit the ban on advertisement on the internet to the territory of one federal state. Also cf. J Dietlein, 'Illegales Glücksspiel und staatliche Gefahrenabwehr – Herausforderungen an die staatliche Gefahrenabwehr im Internetzeitalter' (2005) *Gewerbearchiv* 89 f. In his article, Dietlein illustrates (i.a. constitutional) problems associated with preventing illegal gambling on the internet and presents a number of technical instruments for achieving this aim.

[137] BVerfG, *Pornography on the Internet (Pornographisches Internetangebot)*, Decision of 24 September 2009, Cases 1 BvR 1231/04 et al., esp. paras. 5, 16.

[138] Id., para. 5.

Electronic copy available at: https://ssrn.com/abstract=1940346

privacy in its spatial dimension.[139] Hence, the term "home" refers to all rooms which are sealed off from public access and in which people live their private lives.[140] One example of internet-related developments indirectly interfering with this right relates to cybercrimes, which challenge traditional ways of investigation.[141]

This is illustrated by a constitutional complaint lodged by a lawyer against searches of his flat and his office.[142] These searches were prompted by investigations of possession of child pornography: German authorities had succeeded in establishing a link between U.S. providers of websites containing such material and clients of such material resident in Germany, the complainant perhaps being one of them. The Court, accepting that cybercrimes were highly complicated to prosecute, nonetheless pointed out that vague suspicions could not justify serious encroachments on fundamental rights. A similar constitutional complaint was lodged against searches of a flat due to being remotely suspected of having committed fraud on the internet platform "ebay".[143] As the culprit had used an email address, the Court pointed out that there were less severe means of investigation such as first contacting the internet provider to try identifying the culprit this way.[144] Put differently, one may well accept that the emergence of the internet may confront the state with hitherto unknown problems. Nevertheless, the standard of constitutional protection cannot be lowered by simply referring to difficulties e.g. associated with investigating cybercrimes. Instead, the state itself must seek to keep pace with internet-related developments in order comply with requirements for justifying encroachments on fundamental rights.

---

[139] BVerfG, *Rented Flat as Property (Mietwohnung als Eigentum)*, Decision of 26 May 1993, Case 1 BvR 208/93, para. 34.

[140] BVerfG, *Population Census* (n 16) para. 141.

[141] Cf. BVerfG, *Searches Relating to Internet Forum (Durchsuchung wegen Internetforums)*, Decision of 8 April 2009, Case 2 BvR 945/08, esp. paras. 15 f. Here, it was the operator of an internet forum whose flat was searched. Some pages of the forum contained hyperlinks to pages from which users could download content protected by intellectual property rights. Granting the complaint, the Court admonished investigatory authorities to first take other investigatory measures before interfering with constitutionally protected rights.

[142] BVerfG, *Investigating Cybercrime (Ermittlung gegen Internetkriminalität)*, Decision of 18 December 2002, Case 2 BvR 1910/02.

[143] BVerfG, *Searching a Flat (Wohnungsdurchsuchung)*, Decision of 13 November 2005, Cases 2 BvR 728/05 et al.

[144] Id., paras. 24 f.

Electronic copy available at: https://ssrn.com/abstract=1940346

2.4.2.5 Remainder

Apart from the above-mentioned contexts, the Court tends to address constitutional issues relating to the internet only sporadically, e.g. as part of the factual circumstances or as one argument among others. Here, the internet does not give rise to major interpretative questions. At the same time, a number of constitutional questions relating to the internet virtually thrusting themselves upon a legal mind have, so far, not been addressed by the Court. Among them are, for instance, questions relating to e-democracy and online-elections.[145] Other potential constitutional questions prompted by internet-related developments which have not been discussed in detail are, for example whether digital rights of trade unions are protected under Art. 9.3 GG.[146] Whether there should be a provision with basic supply regarding the internet similar to that regarding broadcasting.[147] Or whether Art. 8 GG applies to virtual assemblies and online demonstrations.[148] Equally surprisingly, for instance, the Court has not yet discussed whether the right to freedom of information, Art. 5.1 sentence 1 GG, can be interpreted as encompassing a right to internet access.[149] This list could, of course, be extended even further.

3. Evaluation

3.1 Does the internet have challenging implications on the German Constitution?

In order to reply to a – carefully posed – question like 'Is it necessary to amend, revise or rewrite the German Constitution because of internet-related

[145] Cf. B Ewert/ N Fazlic/ J Kollbeck, 'E-Demokratie – Stand, Chancen und Risiken', in: Christiane Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 227 f.

[146] JT Lelley, 'Die Grenzen digitaler Gewerkschaftsrechte im Betrieb' (2002) *Der Betriebsberater* 252 f.

[147] W Mecklenburg, 'Internetfreiheit' (1997) *Zeitschrift für Urheber- und Medienrecht* 531.

[148] Cf. Bizer (n 7) 28, and A Medosch, 'Demonstrieren in der virtuellen Republik', in: C Schulzki-Haddouti (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 297 f.

[149] Cf. however BVerfG, *Passenger Transport Act (Personenbeförderungsgesetz)*, Decision of 8 December 2009, Case 2 BvR 758/07. This case shortly addresses the question to what extent participatory rights of MPs can be influenced by the development of the internet. Reviewing the formal constitutionality of an amended act, the Court found that a particular working paper underlying the amendment did not comply with the bylaws of Parliament since the paper had not been correctly disseminated until Parliamentary debate, paras. 61 f. Although the paper had been available on the internet when the pertinent debates were held, the Court found that such dissemination could not substitute ordinary dissemination; aside from not being in accordance with the law, the Court believed that it was not suitable to ensure that MPs are sufficiently briefed to be able to take part in the debate, paras. 59 and 70. The fact that the contentious document was already discussed publicly, e.g. in the press, and that it was common knowledge that it could be found on the internet, did not matter to the Court.

Electronic copy available at: https://ssrn.com/abstract=1940346

developments?', one must ask whether there has been any challenge at all. First of all, one needs to define what the adjunct "challenging" shall refer to. For the purpose of this paper, it shall apply to a sliding scale of implications on the Constitution. There is already a "challenge" if the Court is called on to decide issues not envisaged when the Constitution's provisions were drafted. There is a challenge if Constitutional provisions must be interpreted (quite) extensively to encompass internet-related developments. And there is a challenge if it becomes apparent that no extensive interpretation of Constitutional provisions seems fit to respond to internet-related developments in a way compatible with the Constitution's general object and purpose. A first, spontaneous impression after considering the relevant case-law would be 'No, the internet does not have any profoundly challenging implications on the German Basic Law'. There has been a number of cases in which the Court was confronted with internet-related developments, but on the whole, as the case-law shows, these developments could be met by applying established constitutional principles.[150] Upon closer examination, however, one needs to issue some caveats and to reconsider this first impression First, a consideration of constitutional case-law alone is inapt to justify formulating general remarks about "the Constitution". On the one hand, a number of important issues are not brought before the Court (and may remain unsolved). On the other, a number of important issues may be solved by other actors such as lower courts and the legislature. Second, even the existing case-law does raise questions in terms of investigating cybercrimes and ensuring data protection which are crucial from a constitutional perspective, too; they have not, however, been completely resolved yet.

Undeniably, the emergence of the internet has entailed various new phenomena in need of constitutional assessment. The fact that there have been, so far, ways to handle some (or even most) of these new phenomena by the Constitutional Court when brought before it does not imply that there has been no challenge. Quite to the contrary, one may say that because of various decisions responding to these phenomena, there must have been some

[150] Cf. Roßnagel (n 7) 253 f. Holding on to established principles and case-law is facilitated by the fact that most fundamental rights apply more or less irrespective of the technical context, cf. Bizer (n 7) 21.

Electronic copy available at: https://ssrn.com/abstract=1940346

challenge in fact. This conclusion, does not, however, say anything about the degree of this challenge.

In sum, one daresay that the internet has moderately challenged the German Constitution which can in fact be supported by existing case-law.[151] It may however well be that this challenge is only a foretaste of what is to come if the development of the internet continues in that way and already existing problematic issues are not resolved.

3.2 How has the German Constitutional Court coped with "the internet"?

When trying to assess how the German Constitutional Court has coped with "the internet", one must first admit that the Court has not turned a blind eye on the emergence of the internet. To put it in a nutshell, it has chosen to respond to internet-related problems by interpreting existing constitutional provisions and established rights thereunder in an extensive, dynamic way.

Thus, it has for instance clarified that there is only limited protection for internet domains under the general right to personality;[152] that the state may under certain conditions publicly disseminate information affecting individuals on the internet;[153] that internet presences are protected by the right to freedom of expression;[154] that communication via emails is protected under the right to privacy of telecommunications[155] and that there is some protection for the use of internet domains under the right to property.[156] Although one may assume that the drafters of the Basic Law did not envisage internet domains, homepages and hyperlinks, the fundamental rights of their Constitution have been drafted in such a (general) way so as to enable the Constitutional Court to adapt them without struggling with the words to be interpreted or even exceeding the textual boundaries of constitutional provisions. Only on one occasion, in the case of the *Online Searches*,[157] has the Court decided that established constitutional categories do not suffice to respond to a hitherto unknown scale of threat; in this case, the Court pointed out that confidentiality

[151] Cf. S Baer, 'Braucht das Grundgesetz ein Update? – Demokratie im Internetzeitalter' 1 (2011) *Blätter für deutsche und internationale Politik* 91.
[152] BVerfG, *Domain-Name* (n 38).
[153] BVerfG, *Federal Genetic Engineering Act* (n 31).
[154] BVerfG, *Vitamin Preparations* (n 64).
[155] BVerfG, *Seizure of Emails* (n 81).
[156] BVerfG, *ad-acta.de* (n 104).
[157] BVerfG, *Online Searches* (n 13)

Electronic copy available at: https://ssrn.com/abstract=1940346

and integrity information technology systems as such is worthy of constitutional protection.[158] One may, of course, question whether merely identifying a new manifestation of the general right of personality is enough or whether, at some point, none of the existing rights and established interpretations will be adequate any longer.[159] But once this is the case, finding an adequate solution is no longer up to the Court but to the legislature.[160] In fact, one may take this exceptional judicial creativity as an indication that the Court does not completely underrate the new challenges.

Admittedly, there are a number of issues not yet dealt with by the Court. But as a matter of fact, constitutional case-law is no panacea. First of all, the Court is bound to wait until a particular issue is brought before it and until admissibility requirements are fulfilled before it can take a decision on the merits.[161] Thus, to some extent, it is up to other actors such as individual persons to identify constitutionally relevant issues and enable the Court to decide on them. Secondly, while fundamental rights may become indirectly relevant via general clauses of civil law (so-called "third-party effect of fundamental rights" – *Drittwirkung*), fundamental rights are, in principle not directly applicable between private parties.[162] Therefore, a number of constitutionally sensitive issues arise in an area where there is no direct applicability of fundamental rights; this, in turn, reduces the likelihood that these issues will be brought before the Court anyway. Thirdly, a court is just a court, with its designated task being of a judicial nature. While it may judge a subject-matter against existing constitutional provisions, it may neither amend the Constitution nor enact all those statutory provisions which are necessary to shape the legal framework of the internet in accordance with constitutional requirements and to comply with the state's constitutional duty to protect against infringements of fundamental rights.

---

[158] Idem.

[159] Cf. by way of contrast C Degenhart, 'Verfassungsfragen der Internetkommunikation' (2011) *Computer und Recht* 235 f., rejecting a constitutional need for a new right to "freedom of internet", and B Holznagel/ P Schumacher, 'Die Freiheit der Internetdienste', in: W Kleinwächter (ed.), 1 *Multistakeholder Internet Dialog, Co:llaboratory Discussion Paper Series – Grundrecht Internetfreiheit* 14 f.

[160] One possible solution may be amending the Constitution to encompass a separate right to internet freedom. Cf. for example already Mecklenburg (n 147) 532 f.

[161] Cf. Roßnagel et al. (n 7) 251 f., where they stress that the Court addresses constitutional issues only on a case-by-case basis although these issues are part of an "incremental development".

[162] See M Herdegen, 'Art. 1 Abs. 3 GG', in: T Maunz/ G Dürig (eds.), 61 (2011) *Grundgesetz* 31 f . A "third party effect of fundamental rights" will become increasingly important the more e.g. powerful private actors collect and use data. The answer to this question will be even more complicated if it is not a private actor but foreign states encroaching on fundamental rights by collecting data etc.

Electronic copy available at: https://ssrn.com/abstract=1940346

3.3 Is the German practice satisfying?

This in turn leads to the question whether the German practice, taken as a whole, is satisfying or whether it provokes criticism and requires improvement. Satisfying in which way and for whom, one may, of course ask. Satisfying from the perspective of those meant to be protected by fundamental rights? From the state's perspective? Or from the perspective of "the internet"?[163] Furthermore, it would be mere hubris to dare judging "the German perspective" by looking at nothing more than constitutional case-law.

While it appears that the Court has managed to consolidate the German Constitution with internet-related developments, one may nonetheless make a few careful observations based on the existing case-law, both positive and negative ones. First, as to the former, it is remarkable that the internet has largely been discussed with negative connotations. Most cases relating to the internet were constitutional complaints in which fundamental rights were relied on as a defence against internet-related developments.[164] While the debate about "internet and constitution" in other states frequently focuses on the chances which the development of the internet may offer to further constitutional rights,[165] German constitutional case-law seems to discuss how rights may be protected against the consequences of this development. Neither is the Court completely hostile towards the internet nor is it short-sighted when it comes to the chances offered by internet-related developments. Nevertheless one may wonder why there has been no occasion, so far, to concentrate on positive effects of the internet.[166] Second, some of the case-law raises questions about the effective exercise of state power in a digitalised world.[167] It remains to be seen whether the state simply needs (and is able to) keep pace with internet-related developments or whether internet-related developments will call for coordinated reactions (whichever form they may take) beyond the borders of

---

[163] As a matter of fact, these perspectives and the respective interests may and do overlap. "The internet" encompasses a multitude of actors, all of which have interests relating to one or the other fundamental right.

[164] I.e. the complainants tend to invoke basic rights in their "negative dimension" as "*Abwehrrechte*" (rights constituting a defence against something). For an exception, see p. 31.

[165] As has been revealed by initial probes in respect of Chile and Kenya.

[166] The Court's silence in this respect may be due to various factors: First, unless a complainant links the internet to a "positive dimension" of constitutional rights, there is hardly any reason or even a chance for the Court to do so. Second, one may presume that a certain (high) quality of social conditions for furthering constitutional values may inhibit potential complainants from relying on new developments in a constitutional context.

[167] A related and increasingly important question is how the task of public authorities to protect individuals and infrastructure from attacks may be fulfilled if these attacks originate from or take place in a digital world.

Electronic copy available at: https://ssrn.com/abstract=1940346

one single state.[168] As to the latter, i.e. positive observations, and risking some optimism for once, one may speculate that there has been no flood of complaints caused by the development of the internet simply because there has been no need to since, all in all, the German practice has in fact been reasonably satisfying so far.

To give a valid reply to the above question, it will be necessary to greatly expand the object of research at a next step. This would include the jurisprudence of lower courts in Germany as well as, by way of contrast, the jurisprudence of courts in other states. Furthermore, one needs to compile and analyse pieces of legislation relating to the internet;[169] thus, one may assess if the legal framework beyond the constitutional level already responds to internet-related pressure and provides solutions rendering an additional constitutional reply obsolete.

3.4 Outlook

As indicated, this paper may only give preliminary results concerning the German Constitution. In respect of future research this paper hopes to convey ideas of potentially relevant questions such as:

- What can we say about the reactions of the German constitutional order to the present development of the internet when we extend our research to cover not only constitutional decisions? The necessary broader approach will encompass decisions from lower courts as well as legislative and executive measures.
- Which (further) challenges (positive and negative ones) does the development of the internet cause for which constitutional system?
- How have constitutional systems in different states responded to the development of the internet? Here, one may among others ask whether there are differences between industrial, newly industrialised and developing countries.

[168] Cf. Bizer (n 7) 22. According to him, states are less interested in creating "digital human rights" than in enabling international coordination of enforcement powers.

[169] Cf. e.g. S Hindelang's research on constitutional issue areas affected by internet-related norms outlined in his paper *Refocusing on Constitution – Approaching Internet Legislation and Regulation through the Eyes of Constitution* (Berlin 2011).

Electronic copy available at: https://ssrn.com/abstract=1940346

- Is it possible to identify certain common denominators between the various constitutional systems' reactions to internet-related challenges? The answer to this question hopes to build on the results to the previous questions.
- Does the development of the internet by and by change the balance of constitutional players? This question may be discussed from an intra-state as well as from an inter-state perspective. It may also cover the role of powerful non-state actors as well as that of foreign states.

These questions lend themselves to be answered one after the other. Naturally, they are far from being complete – neither for the present nor, all the more, for the future. Although the preliminary conclusions based on constitutional jurisprudence, arrived at for the case of Germany, must of course not be generalised and applied to every other state, they may perhaps illustrate that the development of the internet is not only relevant from a social, philosophical, technical etc. perspective but also and especially from a constitutional one.

4. References

4.1 Jurisprudence

BVerfG *Investment Aid (Investitionshilfe)*, Judgment of 20 July 1954, Cases 1 BvR 459/52 et al.

BVerfG *Eppler*, Decision of 3 June 1980, Case 1 BvR 185/77

BVerfG *Heinrich Böll*, Decision of 3 June 1980, Case 1 BvR 797/78

BVerfG *Election Campaign (Wahlkampf)*, Judgment of 22 June 1982, Case 1 BvR 1376/79

BVerfG *Population Census (Volkszählung)*, Judgment of 15 December 1983, Cases 1 BvR 209/83 et al.

BVerfG *Dental Technicians' Guild (Zahntechnikerinnung)*, Decision of 31 October 1984, Cases 1 BvR 35/82 et al.

BVerfG *Refunding of Wage Tax (Lohnsteuererstattung)*, Judgment of 8 October 1985, Cases 1 BvL 17/83 and 1 BvL 19/83

Electronic copy available at: https://ssrn.com/abstract=1940346

BVerfG *Option Rights (Vorkaufsrecht)*, Decision of 9 January 1991, Case 1 BvR 929/89

BVerfG *Interception Circuit (Fangschaltung)*, Decision of 25 March 1992, Case 1 BvR 1430/88

BVerfG *Rented Flat as Property (Mietwohnung als Eigentum)*, Decision of 26 May 1993, Case 1 BvR 208/93

BVerfG *Correspondence Surveillance (Briefüberwachung)*, Decision of 26 April 1994, Case 1 BvR 1968/88

BVerfG *DGHS*, Decision of 13 February 1996, Case 1 BvR 262/91

BVerfG *Advertising Pharmacies (Apothekenwerbung)*, Decision of 22 May 1996, Cases 1 BvR 744/88 et al.

BVerfG Questions Relating to the State Security Service (Stasi-Fragen), Judgment of 8 July 1997, Cases1 BvR 2111/94 et al.

BVerfG *Caroline-Decision (Caroline-Entscheidung)*, Judgment of 15 December 1999, Case 1 BvR 653/96

BVerfG *Limiting Admission of Lawyers (Singularzulassung von Rechtsanwälten)*, Judgment of 13 December 2000, Case 1 BvR 335/97

BVerfG *Disclosing Debtors on the Internet (Schuldnerspiegel im Internet)*, Decision of 9 October 2001, Case 1 BvR 622/01

BVerfG *Transparency on Letterheads (Benennungsgebot für Kanzleibriefbögen)*, Decision of 13 June 2002, Case 1 BvR 736/02

BVerfG *Acoustic Surveillance (Mithörvorrichtung)*, Decision of 9 October 2002, Cases 1 BvR 1611/96 et al.

BVerfG *Medical Specialists (Facharztbezeichnung)*, Decision of 29 October 2002, Case 1 BvR 525/99

BVerfG *Investigating Cybercrime (Ermittlung gegen Internetkriminalität)*, Decision of 18 December 2002, Case 2 BvR 1910/02

BVerfG *Advertising Hospitals on the Internet (Klinikwerbung im Internet)*, Decision of 17 July 2003, Case 1 BvR 2115/02

BVerfG *Advertising Dental Services on the Internet I (Zahnarztwerbung im Internet I)*, Decision of 26 August 2003, Case 1 BvR 1003/02

BVerfG *Restriction of Opening Hours (Ladenschluss)*, Judgment of 9 June 2004, Case 1 BvR 636/02

Electronic copy available at: https://ssrn.com/abstract=1940346

BVerfG *Treaty on Gambling (Glücksspielvertrag)*, Decision of 14 October 2004, Case 1 BvR 928/08

BVerfG *ad-acta.de*, Decision of 24 November 2004, Case 1 BvR 1306/02

BVerfG *Supervision of Telecommunication I (Telekommunikationsüberwachung I),* Judgment of 27 July 2005, Case 1 BvR 668/04

BVerfG *Searching a Flat (Wohnungsdurchsuchung)*, Decision of 13 November 2005, Cases 2 BvR 728/05 et al.

BVerfG *Supervision of Telecommunication II (Telekommunikationsüberwachung II),* Judgment of 2 March 2006, Case 2 BvR 2099/04

BVerfG *Monopoly on Sports Bets (Sportwettenmonopol)*, Judgment of 28 March 2006, Case 1 BvR 1054/01

BVerfG *Supervision of Emails (E-Mail-Überwachung)*, Decision of 29 June 2006, Case 2 BvR 902/06

BVerfG *Domain-Name*, Decision of 21 August 2006, Case 1 BvR 2047/03

BVerfG *AnyDVD*, Decision of 3 January 2007, Case 1 BvR 1936/05

BVerfG *Vitamin Preparations (Vitaminpräparate)*, Decision of 12 July 2007, Case 1 BvR 99/03

BVerfG *Radio Licence Fee (Rundfunkgebühren)*, Judgment of 11 September 2007, Case 1 BvR 2270/05

BVerfG *Online Searches (Online-Durchsuchung)*, Judgment of 27 February 2008, Cases 1 BvR 370/07 et al.

BVerfG *Hesse Law on Private Broadcasting (Hessisches Privatrundfunkgesetz),* Judgment of 12 March 2008, Case 2 BvF 4/03

BVerfG *Searches Relating to Internet Forum (Durchsuchung wegen Internet-forums),* Decision of 8 April 2009, Case 2 BvR 945/08

BVerfG *Seizure of Emails (E-Mail-Beschlagnahme)*, Decision of 16 June 2009, Case 2 BvR 902/06

BVerfG *Autonomous Nationalists (Autonome Nationalisten)*, Provisional Order of 4 September 2009, Case 1 BvR 2147/09

BVerfG *Pornography on the Internet (Pornographisches Internetangebot)*, Decision of 24 September 2009, Cases 1 BvR 1231/04 et al.

Electronic copy available at: https://ssrn.com/abstract=1940346

BVerfG *Private Digital Copies (Private Digitalkopie)*, Decision of 7 October 2009, Case 1 BvR 3479/08

BVerfG *Berlin Opening Hours (Berliner Ladenöffnungszeiten)*, Judgment of 1 December 2009, Cases 1 BvR 2857/07 et al.

BVerfG *Passenger Transport Act (Personenbeförderungsgesetz)*, Decision of 8 December 2009, Case 2 BvR 758/07

BVerfG *Preventive Data Retention (Vorratsdatenspeicherung)*, Judgment of 2 March 2010, Cases 1 BvR 256/08 et al.

BVerfG *Reprographic Levy (Geräteabgabe)*, Decision of 30 August 2010, Case 1 BvR 1631/08

BVerfG *Evaluation Portal (Spickmich)*, Decision of 16 October 2010, Case 1 BvR 1750/09

BVerfG *Disclosure of IP address (Auskunft über IP-Adresse)*, Decision of 13 November 2010, Case 2 BvR 1124/10

BVerfG *Federal Genetic Engineering Act (Gesetz zur Regelung der Gentechnik),* Judgment of 24 November 2010, Case 1 BvF 2/05

BVerfG *Advertising Dental Services on the Internet II (Zahnarztwerbung im Internet II),* Decision of 8 December 2010, Case 1 BvR 1287/08

BVerfG *Advertising Gambling on the Internet (Glücksspielwerbung im Internet),* Decision of 30 March 2011, Case 1 BvR 426/10

BVerfG *Third-party Advertising on the Internet (Fremdwerbung im Internet),* Decision of 1 June 2011, Case 1 BvR 233/10GCC

4.2 Literature

Baer, Susanne: 'Braucht das Grundgesetz ein Update? – Demokratie im Internetzeitalter'. In: 1 (2011) Blätter für deutsche und internationale Politik 91.

Bizer, Johann: 'Grundrechte im Netz'. In: Schulzki-Haddouti, Christiane (ed.), *Bürgerrechte im Netz* (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 21.

Böckenförde, Thomas: 'Auf dem Weg zur elektronischen Privatsphäre'. In: (2008) 19 JuristenZeitung 925.

Bronsema, Frauke: Medienspezifischer Grundrechtsschutz der elektronischen Presse – Darstellung des Grundrechtsschutzes in der Europäischen

Electronic copy available at: https://ssrn.com/abstract=1940346

Union und Entwicklung eines Lösungsansatzes für den Grundrechtsschutz aus Art. 5 Abs. 1 GG (LIT, Berlin 2008).

Bull, Hans P.: 'Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen'. In: (2011) Neue Zeitschrift für Verwaltungsrecht 257.

Bullinger, Martin: 'Private Rundfunkfreiheit auf dem Weg zur Pressefreiheit – Über den Einfluss von Digitalisierung und Internet'. In: 2007 Zeitschrift für Urheber- und Medienrecht 337.

Degenhart, Christoph: 'Verfassungsfragen der Internetkommunikation – Wie die Rundfunkfreiheit in die Online-Welt hineinstrahlt'. In: (2011) Computer & Recht 231.

Dieltlein, Johannes: 'Illegales Glücksspiel und staatliche Gefahrenabwehr – Herausforderungen an die staatliche Gefahrenabwehr im Internetzeitalter'. In: (2005) Gewerbearchiv 89.

Ewert, Burkhard/ Fazlic, Nermin/ Kollbeck, Johannes: 'E-Demokratie – Stand, Chancen und Risiken'. In: Schulzki-Haddouti, Christiane (ed.), Bürgerrechte im Netz (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 227.

Garstka, Hansjürgen: 'Informationelle Selbstbestimmung und Datenschutz'. In: Schulzki- Haddouti, Christiane (ed.), Bürgerrechte im Netz (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 48.

Heckmann, Dirk: 'Staatliche Schutz- und Förderpflichten zur Gewährleistung von IT- Sicherheit – Erste Folgerungen aus dem Urteil des Bundesverfassungsgerichts zur „Online-Durchsuchung"'. In: Rüßmann, Helmut (ed.), Festschrift für Gerhard Käfer (Juris GmbH, Saarbrücken 2009) 129.

Herdegen, Matthias: 'Art. 1 Abs. 3 GG'. In: Maunz, Theodor/ Dürig, Günter (eds.), 61 (2011) Grundgesetz.

Hindelang, Steffen: Refocusing on Constitution – Approaching Internet Legislation and Regulation through the Eyes of Constitution (Berlin 2011).

Höhne, Focke: 'Anmerkung – Verfassungsrechtliche Zulässigkeit des BGH-Urteils zu Lehrerbewertungen im Internet'. In: (2011) juris PraxisReport IT-Recht Comment no. 6.

Holznagel, Bernd/ Schumacher, Pascal: 'Die Freiheit der Internetdienste'. In: Kleinwächter, Wolfgang (ed.), 1 Multistakeholder Internet Dialog,

Electronic copy available at: https://ssrn.com/abstract=1940346

Co:llaboratory Discussion Paper Series – Grundrecht Internetfreiheit 14.

Karavas, Vagias, Digitale Grundrechte – Elemente einer Verfassung des Informationsflusses im Internet (Nomos, Berlin 2007).

Kazemi, Robert/ Leopold, Anders: 'Die Internetdomain im Schutzbereich des Art. 14 Abs. 1 GG'. In: (2004) Multimedia und Recht 287.

Kröger, Detlef: 'Geistiges Eigentum im Netz'. In: Schulzki-Haddouti, Christiane (ed.), Bürgerrechte im Netz (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 210.

Lelley, Jan T.: 'Die Grenzen digitaler Gewerkschaftsrechte im Betrieb'. In: (2002) Der Betriebsberater 252.

Luch, Anika: 'Das neue "IT-Grundrecht" – Grundbedingungen einer "Online-Handlungsfreiheit" '. In: (2011) Multimedia und Recht 75.

Medosch, Armin: 'Demonstrieren in der virtuellen Republik'. In: Schulzki-Haddouti, Christiane (ed.), Bürgerrechte im Netz (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 261.

Mecklenburg, Wilhelm: 'Internetfreiheit' . In: (1997) Zeitschrift für Urheber- und Medienrecht 525.

Roßnagel, Alexander: Digitalisierung der Grundrechte? (Westdeutscher Verlag, Opladen 1990).

Wassermann, Rudolf: 'Das Grundgesetz'. In: Schulzki-Haddouti, Christiane (ed.), Bürgerrechte im Netz (Bundeszentrale für politische Bildung, Vol. 382, Bonn 2003) 13.

Electronic copy available at: https://ssrn.com/abstract=1940346