DEVELOPMENTS

Report on the *Bundesverfassungsgericht's* (Federal Constitutional Court) Jurisprudence in 2005/2006

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A. Introduction

The *Bundesverfassungsgericht* (Federal Constitutional Court) is a constitutional body charged with the task of ensuring that all state institutions, i.e. the legislator as well as the judiciary and executive branches, obey the constitution of the Federal Republic of Germany.[1] Its review standard is the *Grundgesetz* (Basic Law).[2] Since its foundation in 1951, the Court has helped to secure respect and effectiveness for the free democratic constitutional order. The decisions have far-reaching repercussions, which becomes particularly clear when the Court declares a law unconstitutional. Given the large number of cases handed down every year – at present nearly 5,000 constitutional complaints come before the Federal Constitutional Court annually[3] – it is nearly impossible to give a representative summary of the comprehensive case law. Therefore, the report will concentrate on a selection of four decisions that have drawn the most attention over the course of the years 2005 and 2006.

Beginning with an analysis of the Federal Constitutional Court's *Görgülü* decision, in which the relationship between national and international law was reviewed, the report will continue with a discussion of the prominent decision on the *dissolution of the Bundestag* and the *Rasterfahnung* case. Finally, the report concludes with a

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[1] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2d ed., 1997); Donald P. Kommers, *An Introduction to the Federal Constitutional Court*, 2 GERMAN LAW JOURNAL (GLJ) No. 9 (2001), at http://www.germanlawjournal.com/article.php?id=19 for an introduction to the function and jurisprudence of the Federal Constitutional Court.

[2] The *Grundgesetz* is Germany's constitution.

[3] The total number of proceedings in the year 2005 ran up to 5105, available at http://www.bverfg.de/organisation/gb2005/A-II-2.html (last accessed 31 January 2008).

https://doi.org/10.1017/S2071832200006362 Published online by Cambridge University Press

consideration of the *Luftsicherheitsgesetz* decision (Aviation Security Act), in which the court declared a central provision of the Aviation Security Act, which authorised the armed forces to shoot down aircraft that are intended to be used as weapons, unconstitutional.

B. The *Görgülü* Case (BVerfGE 111, 307)

This case drew much attention in the mass media[4] and was highly anticipated by German lawyers[5] because the Federal Constitutional Court explained for the first time how to implement the rulings of the European Court of Human Rights (ECHR) into national proceedings.[6] Though decided in October 2004, the decision is still worthy of comment several years later, because the Federal Constitutional Court's approach was a very fundamental one: It made very fundamental remarks on the relationship between international law, especially laid down in decisions by the ECHR, and national law, especially with respect to the sovereignty of the Federal Republic of Germany.[7] Much attention has been drawn to this decision in the course of the year 2005.

I. Statement of the facts

On 25 August 1999, a mother gave birth to a child born illegitimately which she gave up for adoption only one day after it was born. The child was raised by foster parents, who were willing to adopt the child, and the mother had given her consent to an adoption by the foster parents. The father of the child, who had had no contact with the mother since July 1999, heard of the birth and the impending adoption in October 1999, at which point he attempted to adopt the child himself. Prior to a ruling of the *Amtsgericht Wittenberg* (AG Wittenberg – Wittenberg Local Court) in 2000, his paternal rights were not recognised. Later on, in 2001, the AG

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[4] SÜDDEUTSCHE ZEITUNG, 20 October 2004, 1; DIE WELT, 20 October 2004, 4, 8; TAZ – DIE TAGESZEITUNG, 20 October 2004, 7.

[5] Hans-Joachim Cremer, *Zur Bindungswirkung von EGMR-Urteilen*, 31 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ) 683 (2004); Jens Meyer-Ladewig & Herbert Petzold, *Die Bindungswirkung deutscher Gerichte an Urteile des EGMR – Neues aus Straßburg und Karlsruhe*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 15 (2005); Marten Breuer, *Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?*, 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 412 (2005); Matthias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, 6 GLJ 869 (2005).

[6] BVerfGE 111, 307, 2 BvR 1481/01, 14 October 2004.

[7] HARTWIG (note 5), 874.

Wittenberg ruled he be given sole parental custody. The foster parents and the Wittenberg Youth Welfare Office (serving as the child's official guardian) appealed together to the *Oberlandesgericht Naumburg* (OLG Naumburg – Higher Regional Court Naumburg), which reversed the Local Court's decision. Additionally, the father was denied visitation rights in the best interests of the child. Against this, the father initiated a constitutional complaint, which was found inadmissible.[8]

In the meantime, the father had commenced a new proceeding at the Local Court and made repeated efforts to contact the boy, all of which failed – as the father stated – due to the unwillingness of the foster parents to cooperate. On 22 July 2003, the Local Court appointed a (procedural) guardian in both the visitation and the custody proceedings, and on 30 September 2003, the OLG Naumburg dismissed the father's temporary injunction on the grounds of continuing tensions between the parties and an unclear legal situation.

Meanwhile, the foster parents themselves had applied to adopt the boy. On 28 December 2001, the AG Wittenberg substituted the father's missing consent to their adoption. In October 2002, the Family Court of the *Landgericht Dessau* (LG Dessau – Dessau Regional Court) dismissed the father's petition for the adoption proceedings to be suspended pending the final decision in the custody and visitation proceedings. The OLG Naumburg reversed this decision upon the father's appeal. It refused to suspend the foster parents' adoption proceedings, but emphasized that the domestic courts are obliged to take judgments of the ECHR – such as the one the father had filed in 2001 (see below) – into account if applicable. Instead, the OLG Naumburg suspended the appeal of the adoption proceedings until a final decision in the new custody trail, pending at the same court, could be reached.

In September 2001 the father filed an individual application at the ECHR, in which he complained that a forced adoption against his will was a violation of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), which protects the right to respect for private and family life. The ECHR found a violation of the rights of custody, as the German courts disregarded the father's will and ability to take care of his child when they did not examine all possible ways to solve the problem.[9] Concerning the right of visitation, the ECHR

[8] BVerfG, docket no. 1 BvR 1174/01, 31 July 2001

[9] Case of *Görgülü v. Germany*, App. No. 74969/01, (26 February 2004), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=G%F6rg%FCl%FC%20%7C%20v.%20%7C%20Germany&sessionid=5117622&skin=hudoc-en, last accessed 31 January 2008.

concluded that the grounds on which the OLG Naumburg based its decision were not sufficient to justify the encroachment into the father's family life. In this case, the ECHR stated, the father must at least have access to his child.
With respect for decision of the ECHR, the AG Wittenberg transferred the parental custody to the father in a parallel custody proceeding in March 2004. Additionally, it issued a temporary injunction on its own motion setting aside its previous ruling on the father's visitation rights, which stated he was allowed access to his son for two hours a week.

This injunction was appealed by the court-ordered guardian and the children's guardian and finally quashed by the OLG Naumburg in June 2004. The OLG Naumburg stated that this order would have required a petition by the father that it did not have, and, furthermore, the requirement of urgency was lacking. The court also held that the Federal Republic of Germany was only bound by the decision of the ECHR as a subject of international law, but that its bodies, authorities and bodies responsible for the administration of justice, independent under Article 97 para. 1 of the Basic Law, are not. A decision of the ECHR could therefore not be binding for any domestic court as neither the Convention nor the Basic Law established such an obligation. Functionally, the ECHR was not a higher-ranking court in relation to the domestic courts, because the Convention was ordinary statute law.

This decision was challenged by the father in another constitutional complaint. He specifically asserted a violation of Art. 6 of the Basic Law[10], which protects marriage and family life.

II. The Ruling of the Federal Constitutional Court

1. The status of international law and the Convention in particular

The Federal Constitutional Court first made comments on the status of the Convention, which it considered to be an international treaty.[11] The Basic Law

[10] Art. 6 of the Basic Law reads: "(1) Marriage and family are under the special protection of the state. (2) Care and upbringing of children are the natural right of the parents and primarily their duty. The state supervises the exercise of the same. (3) Against the will of the persons entitled to their upbringing, children may only be separated from the family, pursuant to a statute, where those so entitled failed or where, for other reasons, the children are endangered to become seriously neglected. (4) Every mother is entitled to protection by and care of the community. (5) Children out of wedlock, by legislation, have to be provided with the same conditions for their physical and mental development and for their place in society as are legitimate children."

[11] BVerfGE 111, 307, 316.

considers international law and domestic law as two different systems of law. Thus, to become legally binding for all German legal bodies, international law has to be "transformed" into national law.[12] By a formal statute, the court decided, it has been incorporated into German law (Art. 59 para. 2 of the Basic Law) and therefore has the status of a federal German statute[13], so that it has to be observed and applied by German Courts.[14] However, the Convention does not establish a constitutional standard. On the constitutional level, the Convention and the decisions of the ECHR serve as interpreting aids for determining the content and scope of a fundamental right or constitutional principle granted by the Basic Law.[15] The Federal Constitutional Court backed this decision with the commitment of the Basic Law to international law[16], which means that if possible, the Basic Law has to be interpreted in such a way that no conflict with international law arises.[17] However, this cannot rule out the sovereignty of the Basic Law: if a breach of the constitution cannot be avoided by the legislator except by a breach of international law, it lies within the scope of the commitment of the Basic Law to international law when the former, exceptionally, does not comply with the latter.[18] However, the decisions of the ECHR are particularly important to the law of the Convention.[19] Every member state of the Convention agreed that in all legal matters to which they are party[20], they will follow the directives of the ECHR. According to the Federal Constitutional Court, the declaratory judgment[21] of the ECHR imposes an obligation on all legal bodies to end a violation of the Convention, as long as this does not violate the binding effect of statute or law as laid down in Art. 20 para. 3 of the Basic Law.[22] Thus, the Federal Constitutional Court concluded that even

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[12] See Jarass, *Art. 25 GG*, in GRUNDGESETZ KOMMENTAR, margin number 1a (Hans D. Jarass/Bodo Pieroth ed., 8th ed. 2006).

[13] BVerfGE 111, 307, 316-317.

[14] BVerfGE 111, 307, 317.

[15] BVerfGE 111, 307, 317.

[16] Art. 24 and Art. 25 of the Basic Law prove that the Basic Law is committed to international cooperation and European Integration; see BVerfGE 111, 318.

[17] BVerfGE 111, 307, 317-318.

[18] BVerfGE 111, 307, 318-319.

[19] BVerfGE 111, 307, 319.

[20] The decisions of the ECHR are only binding on the parties in the proceedings.

[21] The ECHR does not revoke the challenged measure.

[22] BVerfGE 111, 307, 320-322.

German Courts are obliged to consider decisions of the ECHR.[23]

2. The scope of the binding effect of international law – guidelines for all legal bodies

The Federal Constitutional Court then argued that the binding effect of an ECHR-decision depends on the sphere of expertise of the state bodies and the sphere of relevant law.[24] Administrative bodies or courts are bound by the principle of the rule of law in Art. 20 para. 3 of the Basic Law, which includes the duty to consider the provisions of the Convention and the decisions of the ECHR, as long as the consideration still lies within the scope of methodologically justifiable interpretation of the law.[25] The law of international agreements therefore applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.[26] The Federal Constitutional Court stated that both a strict application of international law in the reading of the ECHR and a failure to consider the decision of the ECHR may violate a fundamental right granted by the Basic Law in conjunction with the principle of the rule of law in Art. 20 para. 3 of the Basic Law.[27] Courts are obligated to apply a decision of the ECHR in a case that concerns their own judgment when it is possible to start a retrial[28] without a violation of procedural law and when the material law allows the implementation.[29] However, while considering a decision of the ECHR, all legal bodies have to take into account the effect of that decision on the national legal system, especially when it is a well-balanced part of the system that tries to establish a state of equilibrium between different fundamental rights.[30] So, national courts have to find a way to carefully implement ECHR-decision into the area of law affected.

3. The role of the Federal Constitutional Court and individual legal protection

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[23] BVerfGE 111, 307, 323.

[24] BVerfGE 111, 307, 323.

[25] BVerfGE 111, 307, 323.

[26] BVerfGE 111, 307, 319.

[27] BVerfGE 111, 307, 323-324.

[28] See § 359 Nr. 6 of the German Code of Criminal Procedure (Strafprozessordnung), which allows a retrial after a decision of the ECHR.

[29] BVerfGE 111, 307, 325-326.

[30] BVerfGE 111, 307, 327.

The Federal Constitutional Court has to prevent or correct a violation of international law by national courts in the manner outlined above, i.e. the incorrect application and the non-compliance with international law. As the Convention contributes to an enhancement of a joint European development of fundamental rights, the Federal Constitutional Court observes the compliance with rights of the Convention in particular.[31] In a case where the national court has discretion, it therefore has to prefer the interpretation that complies with the Convention.[32] The provision of the Convention has to be taken into account; the court must at least duly consider it.[33] A violation of this duty can lead to a constitutional plaintiff, in which the complainant may challenge the decision of the national court as a violation of the affected fundamental right in conjunction with the principle of the rule of law.[34] Thus, an effective judicial control of the compliance with the Convention is guaranteed.

4. How to deal with the ECHR-decision at hand

The Federal Constitutional Court ruled that in the case at hand that the decision of the OLG Naumburg violated Art. 6 of the Basic Law in conjunction with the principle of the rule of law.[35] The Federal Constitutional Court held that the OLG Naumburg had not considered how to interpret Art. 6 of the Basic Law in a manner that complied with Art. 8 of the Convention and the decision of the ECHR.[36] In this case, the decision of the ECHR clearly concerned the OLG Naumburg as concerned a matter that the OLG Naumburg had to consider in a retrial. Furthermore, it has to be taken into account that the complainant still did not have access to his child, which constitutes an enduring violation of international law, especially of Art. 8 of the Convention.[37]

The Federal Constitutional Court fully rejected the reasons the OLG Naumburg had for not considering the decision of the ECHR. It held that the constitutionally guaranteed independence of the courts was not affected by the duty to consider

[31] BVerfGE 111, 307, 328-329.

[32] BVerfGE 111, 307, 329.

[33] BVerfGE 111, 307, 329.

[34] BVerfGE 111, 307, 329-330.

[35] BVerfGE 111, 307, 330.

[36] BVerfGE 111, 307, 330.

[37] BVerfGE 111, 307, 330.

decisions of the ECHR.[38] It also reasoned that national courts do not have to enforce decisions of the ECHR without reflection, as they only have to implement international law carefully.
Thus, the OLG Naumburg is not legally bound by the ECHR's decision for the upcoming retrial.[39] It has to weigh the conflicting fundamental rights: the rights of the father, those of the foster parents, and especially those of the child; furthermore, its decision has to fit in the overall context of family-law cases concerning the law of visitation.[40]

III. The reception of the ruling by German lawyers

The most innovative aspect of this ruling is to derive the obligation to consider decisions of the ECHR from the principle of the rule of law. This allows international law in general and decisions of the ECHR in particular to be implemented into different areas of German law. The Federal Constitutional Court explained for the first time how individual legal protection against a court which is unwilling to consider a decision of the ECHR can be granted: the plaintiff has to lodge a constitutional complaint and claim a violation of a fundamental right of the Basic Law in conjunction with the principle of the rule of law. This enables the plaintiff to argue a violation of the Convention in front of the Federal Constitutional Court and can therefore almost be entitled to "a new constitutional right"[41] of the Basic Law.

The ruling, however, also raised fears that it could lead to a weaker protection by the Convention, as the Federal Constitutional Court clearly indicates the bounds of a decision of the ECHR[42], but the extent to which ECHR-decisions do not apply to international law is still very narrow, as only a violation of substantive constitutional law can justify non-compliance with international law by the legislator.[43] A court is only able to diverge from international law in the case of a conflict with a well-balanced part of the legal system that tries to establish a state of equilibrium between different fundamental rights. This latter aspect is seen rather

[38] BVerfGE 111, 307, 331.

[39] BVerfGE 111, 307, 331-332.

[40] BVerfGE 111, 307, 331.

[41] BREUER, *supra* note 5, at 412.

[42] MEYER-LADEWIG & PETZOLD, *supra* note 5, at 16, 19.

[43] MEYER-LADEWIG & HERBERT PETZOLD, *supra* note 5, at 16.

warily by the legal community as it opens the door for a national court not to follow the decision of the ECHR.[44] Nevertheless, one has to take into account that according to the decision of the Federal Constitutional Court, even the legislator is generally bound by decisions of the ECHR. If there is no possible way for the judiciary to interpret the law in a methodologically justifiable manner and in compliance with international law, it is the task of the legislator to prevent a violation of international law.[45] Thus, an enduring violation of international law is almost unimaginable.

Some German lawyers also considered this case to be a political one and described it as a "dispute" between the ECHR and the Federal Constitutional Court.[46] They reasoned that the fundamental statements of the Federal Constitutional Court were not necessary in order to decide the case at hand.[47] Therefore, the statements in this judgment were seen as the Federal Constitutional Court's "answer" to two rulings of the ECHR ("*von Hannover v. Germany*" and "*Görgülü v. Germany*"), which could be considered an interference with German dogmatics of law by the ECHR.[48] In the decision concerning the case "*Hannover vs. Germany*"[49], the ECHR found a violation of the right to the protection of Caroline von Hannover's private life (Art. 8 of the Convention) by the Federal Republic of Germany, when she was constantly hounded by paparazzi who followed her every move and the domestic courts could not ensure an effective protection.[50] The Federal Constitutional Court did not consider this a breach of her right to the protection of privacy under the Basic Law, as it attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the plaintiff behaved in the public.[51]

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[44] BREUER, *supra* note 5, at 413, 414. See also CREMER, *supra* note 5, at 683-700.

[45] MEYER-LADEWIG & PETZOLD, *supra* note 5, at 17; BREUER, *supra* note 5, at 414.

[46] HARTWIG, *supra* note 5, at 869.

[47] HARTWIG, *supra* note 5, at 877.

[48] Mark D. Cole, *„They did it their way" – Caroline in Karlsruhe und Straßburg, Douglas und Campbell in London – Der Persönlichkeitsrechtsschutz Prominenter in England*, 20 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 184-185 (2005); MEYER-LADEWIG & PETZOLD, *supra* note 5, at 15-16.

[49] Case of *von Hannover v. Germany*, App. No. 59320/00, 22 June 2005, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=59320/00&sessionid=7846104&skin=hudoc-en (German translation in 31 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (EuGRZ), 404 (2004)).

[50] *Id.*, at para. 76-81.

[51] BVerfGE 101, 361, 395.

IV. Further Developments

After the matter in the *Görgülü*-case was referred back to the OLG Naumburg in order to consider the relevant provision of the Convention more precisely, the OLG did not take the provision into account in a manner that would have satisfied the Federal Constitutional Court. The OLG Naumburg denied the plaintiff even the right of visitation that a lower court had granted him before. The plaintiff therefore challenged the ruling of the OLG again in another constitutional complaint.[52] This time, the First Chamber of the First Senate cited a violation of Art. 6 of the Basic Law in conjunction with the principle of the rule of law in Art. 20 para. 2 of the Basic Law, determining that the OLG Naumburg did not duly consider the decision of the ECHR that grants the plaintiff visitation rights.[53] Instead of trying to work towards an order for a right to visitation, the OLG Naumburg, without being competent to decide, voided the visitation that had been ordered by the Local Court and therefore ended a situation that was in compliance with the Convention and the decision of the ECHR.[54]

This decision underlines once again how deadlocked the entire case remains.

C. The Dissolution of the *Bundestag* (BVerfGE 114, 121)

The case that played the most prominent role in 2005 concerned the dissolution of the *Bundestag* (German Federal Parliament). The *Bundeskanzler* (Federal Chancellor) Gerhard Schröder tried to impose elections one year before legislative term was scheduled to end in September 2006; it fell to the Federal Constitutional Court to decide whether new state elections could go fourth in Autumn 2005.[55] Apart from the difficult judicial problems that arose from this situation, it was thus also clearly a higly political case.

I. Statement of the Facts

In May 2005, Schröder announced that he intended to ask the *Bundestag* for a vote

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[52] See BVerfG, Beschluss vom 10. Juni 2005, 1 BvR 2790/04, http://www.bverfg.de/entscheidungen/rk20050610_1bvr279004.html. (Not in the official reporter)

[53] BVerfG, Beschluss vom 10. Juni 2005, 1 BvR 2790/04, margin number 33.

[54] BVerfG, Beschluss vom 10. Juni 2005, 1 BvR 2790/04, margin number 38.

[55] BVerfGE 114, 121, 2 BvE 4/05, 25 August 2005.

of confidence[56], expecting to lose it, which would then make it possible for the *Bundespräsident* (Federal President) to dissolve the *Bundestag*. This kind of motion has to be distinguished from a motion with which the *Bundeskanzler* really seeks the confidence of the Bundestag, which is called a true motion for a vote of confidence.

1. The preceding dissolutions of the Bundestag in 1972 and 1983 and the Ruling of the Federal Constitutional Court in 1983

A dissolution-oriented vote of confidence, as the one in 2005 is properly called, had only twice before been sought in the Federal Republic of Germany: first, in 1972, Willy Brandt was not sure whether he still had the confidence of the majority in the *Bundestag*. After a so-called *konstruktives Misstrauensvotum* (constructive vote of no confidence) had failed before and a budget proposal did not gain a majority in the *Bundestag*, Brandt chose to ask for a vote of confidence with the intention of dissolving the *Bundestag* and calling for new elections. Only one day this vote of confidence Gustav Heinemann, at this time the *Bundespräsident*, dissolved the *Bundestag*. Brandt's party, the SPD, received an overwhelming majority in the subsequent elections and for the first time ever, it became the largest faction in the *Bundestag*.

In 1982, Helmut Kohl of the Christian Democratic Union (CDU) was elected the new German Chancellor by a majority of the *Bundestag* after the former chancellor, Helmut Schmidt of the SPD, lost a constructive vote of no confidence. During the coalition negotiations, Kohl announced new elections because the coalition partner of the CDU, the Free Democratic Party (FDP, the German liberal party), had defected from a coalition with the SPD to join a coalition with the CDU, leading to a controversial political discussion. On 17 December 1982 he asked for a vote of confidence intending to call for new elections. On 7 January 1983, *Bundespräsident* Karl Carstens dissolved the *Bundestag*.

In this situation, the Federal Constitutional Court had to decide whether or not it is constitutional to use a vote of confidence as a means of dissolving the *Bundestag*. In a very controversial decision[57], the Federal Constitutional Court demanded a *materielle Auflösungslage* (material condition to dissolve parliament); thus, in order to so dissolve the *Bundestag*, the Federal Constitutional Court stated that there must

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[56] Art. 68 para. 1 of the Basic Law reads: "Where a motion of the Chancellor for a vote of confidence is not carried by the majority of the member of the Bundestag, the President may, upon the proposal of the Chancellor, dissolve the Bundestag within twenty-one days. The right of dissolution lapses as soon as the Bundestag elects another Chancellor with the majority of its members."

[57] BVerfGE 62, 1.

exist a political crisis through which the Chancellor is not longer able to continue governing, i.e. the Chancellor's party no longer has a majority in the *Bundestag* or the majority's hold is very insecure.[58] This avoids situations that occurred in the years during the Weimar Republic, in which the President had been allowed to dissolve Parliament without the requirement of a *materielle Auflösungslage*; this power led to political instability.[59] Upon the proposal of the *Bundeskanzler*, the *Bundespräsident* must judge whether all requirements for the dissolution are present in the case at hand, including the *materielle Auflösungslage*. As the *Bundespräsident* is not allowed to substitute for the judgment of the *Bundeskanzler*, the latter requirement is quite stringent. Thus, the opinion of the *Bundeskanzler* is binding as long as an obvious misjudgment cannot be found. And even if the requirements are present, the dissolution is left in the *Bundespräsident's* discretion, as he may choose *not* to dissolve the *Bundestag*. According to the Federal Constitutional Court, its own scope of judicial review is limited to the *Bundespräsident's* scope of review. Using this restricted scope, the Federal Constitutional Court in 1983 reasoned that, although Kohl held a majority in the Bundestag, no obvious misjudgment could be found. Kohl, the Federal Constitutional Court stated, had good reasons for fearing he would lose his majority, because the coalition agreements with the FDP were only temporary ones. Therefore, the *Bundespräsident* had not misused his discretion and the dissolution was deemed constitutional by the majority of the Federal Constitutional Court[60].

2. The dissolution of the Bundestag in 2005

When Schröder announced his dissolution-oriented vote of confidence in 2005, his Social Democratic Party (SPD) had just lost an election in Germany's largest[61] *Bundesland* (state) North Rhine-Westphalia. In addition, there had been serious quarrels with the SPD's partner in the government coalition, the Green Party (Bündnis 90/Die Grünen), about the Agenda 2010, a social system and labor market reform. The reforms were reviewed controversially outside the coalition as well; Schröder also lacked the support of the German people as polls revealed dramatic losses of popularity for the SPD. Additionally, Schröder no longer held a majority

[58] BVerfGE 62, 1, 42.

[59] Simon Apel, Christian Körber & Tim Wihl, *The Decision of the German Federal Constitutional Court of 25 August 2005 Regarding the Dissolution of the National Parliament*, 6 GLJ 1244 (2005).

[60] There also were two dissenting opinions of judges *Rinck* (BVerfGE 62, 1, 70) and *Rottmann* (BVerfGE 62, 1, 108) who both could not see a situation of a political crisis.

[61] Concerning the population density.

in the *Bundesrat* (Federal Council of Germany) anymore, which has the authority to block certain laws (not all laws but those which infringe the rights of the *Bundesländer*), all of which made governing difficult.

Although Schröder still held a narrow majority in the *Bundestag* and could therefore pass all laws that did not require the consent of the *Bundesrat*, he decided to call for early elections. He argued that he had serious doubts about the coalition's ability to work under pressure and its capacity to act, making it impossible for him to be sure he had the steadfast confidence of the majority of the *Bundestag*. Additionally, he pointed out that any future laws would be constantly blocked by the *Bundesrat*, so that he felt he needed the renewed mandate of the German people. So on 27 June 2005, he asked for a vote of confidence. As intended, the *Bundestag* responded with a vote of no confidence on 1 July 2005.

On 21 July 2005, *Bundespräsident* Horst Köhler decided to dissolve the *Bundestag*. He reasoned that enormous reforms still had to be carried out, which would be very difficult with his coalition's narrow majority of only three votes. As he could not find an obvious misjudgment in Schröder's view of the political situation, he decided to dissolve the Bundestag. Against this decision, two members of the *Bundestag* filed a constitutional complaint at the Federal Constitutional Court.

II. The Ruling of the Federal Constitutional Court

The majority of the Federal Constitutional Court approved the decision of the *Bundespräsident*.[62] There was also one dissenting[63] and one concurring[64] opinion.

1. The decision of the majority

With regards to the decision of the majority in 1983[65], the majority of the Federal Constitutional Court pointed out that the three conditions had been fulfilled. The *Bundeskanzler* had asked the *Bundestag* for a vote of confidence. Subsequently, the *Bundeskanzler* had lost the confidence of the Bundestag. The *Bundespräsident* had then dissolved the *Bundestag*. As in 1983, the problem was whether there had to be

[62] BVerfGE 114, 121.

[63] BVerfGE 114, 121, 170-181. by judge Jentsch.

[64] BVerfGE 114, 121, 182-195. by judge Lübbe-Wolff.

[65] BVerfGE 62, 1.

a *materielle Auflösungslage*[66] as a last condition. Although the Federal Constitutional Court adhered to the existence of this condition, it extended the judicial self-restraint concerning the decision of the *Bundeskanzler* to a test of plausibility. The reason for a further restraint was, as the majority of the court explained, that the question of whether there is a situation of a political crisis is a political one, which lies with the *Bundeskanzler* to decide. Thus, it can only be reviewed in a limited way by the *Bundespräsident*, whose decision is reviewed by the Federal Constitutional Court. Additionally, the Federal Constitutional Court stated that three German federal constitutional organs (the *Bundestag*, the *Bundeskanzler* and the *Bundespräsident*) participate in the dissolution-process, so the Federal Constitutional Court had to trust the system of mutual political control. With regards the arguments above, the Federal Constitutional Court firstly examined some facts the *Bundeskanzler* had already pointed out, e.g. the conflicts with Bündnis 90/die Grünen, the conflicts inside the SPD concerning the Agenda 2010 etc.[67] This made them conclude that the view of the *Bundeskanzler* was plausible, meaning his assertion was not evidently wrong.[68] Even the fact that the allegedly unstable coalition passed several laws and therefore proved its capacity to act did not necessarily demand a different judgment, because these laws were not controversial.[69] In a second step, the Federal Constitutional Court reviewed the decision of the *Bundespräsident*, and found it also not to be an abuse of his discretion. In the end, the majority held that the dissolution of the *Bundestag* could not be seen as a breach of the Constitution.

2. The dissenting and the concurring opinion

The two "*Sondervoten*"[70] both deal with the requirement of the *materielle Auflösungslage*. While the concurring opinion of Judge Lübbe-Wolff plead for dispensing with this requirement, Judge Jentsch wanted to limit the discretion of the *Bundeskanzler* and the *Bundespräsident* in order to more closely enforce this requirement and therefore rigorously examine the existence of a "political crisis".

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[66] See above, B. I. 1.

[67] BVerfGE 114, 121, 162-166.

[68] BVerfGE 114, 121, 166-169.

[69] BVerfGE 114, 121, 168-169.

[70] § 30 para. 2 of the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act) states that each judge of the BVerfG has the right to issue dissenting or concurring opinions. If attached to the published judgment, it is called a "Sondervotum".

a) The concurring opinion of Judge Lübbe-Wolff

Although Judge Lübbe-Wolff agreed with the majority that the dissolution was constitutional, she did not see any factors to control a *materielle Auflösungslage*, i.e. a situation of a political crisis. She reasoned that answering the vote of confidence is in the hands of the *Bundestag* and that its voting cannot be controlled. By pretending to control the material requirement, she stated, the Federal Constitutional Court creates a mere *Kontrollfassade* (façade of control)[71], while the existence of the *materielle Auflösungslage* could never be controlled by the court. In the end, such a façade would be useless or even detrimental to the actors' credibility.[72]

b) The dissenting opinion of Judge Jentsch

While Lübbe-Wolff concurred with the majority's judgment, Judge Jentsch declared the dissolution unconstitutional. He reasoned that the majority was incorrect in ruling that the judicial self-restraint permits the court only to control whether the *Bundespräsident* misused his discretion, because this voids the *materielle Auflösungslage*. For this reason, Jentsch took a closer look at the reasoning of Schröder and Köhler without restraining his judicial review to obvious mistakes. In his eyes, Schröder could not prove there had been a loss of the majority in the Bundestag as he had never lost a vote before and could therefore not claim he lacked the ability to govern.[73] Jentsch stuck to the position of the Federal Constitutional Court in 1983, where they stated that a de facto right of self-dissolution was clearly against the will of the constitution. He also reasoned that the decision of the majority weakened the status of the *Bundestag* and allowed a kind of plebiscite on the policy of the *Bundesregierung* (Federal Administration or Government).[74]

III. Remaining problems and further developments

The outcome of the ruling has found widespread approval[75]; nevertheless, it has

[71] BVerfGE 114, 121, 195.

[72] BVerfGE 114, 121, 188.

[73] BVerfGE 114, 121, 171-172.

[74] BVerfGE 114, 121, 178.

[75] See APEL, KÖRBER & WIHL, *supra* note 59, at 1252.

been criticized by several constitutional lawyers.[76]

1. The judicial self-restraint

The further development of judicial self-restraint has been received with concern.[77] Some of the critics have made the 1983 ruling out to be the real cause of the problems: by linking the decision of the *Bundespräsident* to that of the *Bundeskanzler* and then leaving to judicial control only the question of whether the *Bundespräsident* must come to a decision that is "clearly preferred," an effective judicial control is almost impossible.[78] If this ruling were transferable to all political decisions with a predictive element, this could threaten the viability of supreme federal bodies to solve disputes with the procedural means of the so-called *Organstreitverfahren* (Art. 93 para. 1 No. 1 of the Basic Law).[79] By some, the increasing judicial self-restraint was even labeled a "kowtow" to the *Bundesregierung*,[80] because the Federal Constitutional Court did not intervene into the political sphere by ruling on a political decision.[81]

On the other hand, there are good reasons for judicial self-restraint: the *Bundestag* is the only directly elected federal body. If the Federal Constitutional Court enters the political sphere by controlling political decisions, the danger arises that it becomes a political actor itself. Since the Court controls the highest federal organs with regards to the principles of democracy, it should execute its powers very carefully.[82]

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[76] See Ute Mager, *Die Vertrauensfrage – Zu Auslegung und Justitiabilität von Art. 68 GG*, 28 JURISTISCHE AUSBILDUNG (JURA) 295-296 (2006); Christian Pestalozza, *Art. 68 GG light oder Die Wildhüter der Verfassung*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2817-2820 (2005); Ernst Gottfried Mahrenholz, *Die Vertrauensfrage des Kanzlers nach Art. 68 GG kann entfallen – Die Richter haben sich diesmal zu sehr aus der politischen Sphäre herausgehalten*, 20 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 245-246 (2005).

[77] Pestalozza, *supra* note 76, at 2817-2820; Mager, *supra* note 76, at 290-296; Andreas Buettner & Marc Jäger, *Bundestagsauflösung und Vertrauensfrage*, 59 DIE ÖFFENTLICHE VERWALTUNG (DÖV), 408-417 (2006). See also an interview with the former Constitutional Judge Ernst Gottfried Mahrenholz, *supra* note 76, at 245-246.

[78] PESTALOZZA, *supra* note 76, at 2819.

[79] PESTALOZZA, *supra* note 76, at 2820.

[80] Schneider, *Der Kotau von Karlsruhe. Zur Kapitulation des Bundesverfassungsgerichts vor der Politik*, 53 ZEITSCHRIFT FÜR POLITIK (ZfP) 123-142 (2006).

[81] MAHRENHOLZ, *supra* note 76, at 246

[82] Ulrike Heckötter & Christoph Spielman, *An Expression of Faith in the German Public*, EUROPEAN CONSTITUTIONAL LAW REVIEW (EuConst) 15 (2006).

2. Elements of a plebiscite?

Judge Lübbe-Wolff's concurring opinion, although praised for its "honesty"[83], nevertheless leads to the problem that there is no longer judicial control over the (mis)use of a vote of confidence merely to reinforce earlier elections. It even allows the *Bundeskanzler* to take advantage of high approval ratings for the *Bundesregierung* or for his policies and strengthen his position: whenever there is a favorable situation for new elections, the *Bundeskanzler* could ask for a vote of confidence and instruct his fellow parliamentarians to vote against him. If the *Bundespräsident* does not intervene, this would ultimately lead to new elections. So, one could say that elections after a no confidence vote constitute a referendum on the policy of the *Bundeskanzler*.[84] The German Basic Law mainly sets out a representative democracy with very few elements of a direct democracy.[85] Referenda are only specifically mentioned in Art. 29 of the Basic Law, and other referenda are unconstitutional as long as they are not implemented into the Basic Law.[86]

Although Schröder linked the vote of confidence to his Agenda 2010 and therefore suggested the new elections be a vote on his policy, the German people obviously were voting for people, not issues. In a technical sense, a vote of confidence does not strengthen direct democracy in the way Schröder used it.[87]

3. The shift from a parliamentary to a so-called "Kanzlerdemokratie"

By critics, the ruling of the Federal Constitutional Court was considered the evolving development of an interpretation of Art. 68 of the Basic Law that strengthened the position of the *Bundeskanzler*.[88] With the right to ask for a vote of confidence and a strong prerogative with regard to the political situation, the *Bundeskanzler* plays a dominant role in the process of dissolving the *Bundestag*. The *Bundeskanzler* always has a majority in the *Bundestag* and thus, it is easy for him to intentionally lose a vote of confidence. This weakens the position of smaller

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[83] MAGER, *supra* note 76, at 295.

[84] HECKÖTTER & SPIELMAN, *supra* note 82, at 17.

[85] Christoph Degenhart, *Staatsrecht I*, 21st ed. (2005), margin number 12-13.

[86] DEGENHART, *supra* note 85, at 62.

[87] HECKÖTTER & SPIELMAN, *supra* note 82, at 17.

[88] MAGER, *supra* note 76, at 295.

parliamentary parties. It is then up to the *Bundespräsident* to stop the process – a person who is in a rather weak position concerning his political powers.[89] Under public pressure, e.g. if the majority of the German population is for new elections, it is doubtful whether the *Bundespräsident* would stop the process of dissolution.

Worries about abuse of the vote of confidence may be legitimate. But a scenario in which the *Bundeskanzler* only dissolves the *Bundestag* in order to strengthen his position and force minorities out of the *Bundestag* is a rather unrealistic one. It has to be considered that a *Bundeskanzler* who obviously abuses his powers will have a low standing in the upcoming elections.[90]

4. Further developments

As in 1983, discussions about a change of the Basic Law arose as a result of this ruling. Some called for the Bundestag to be allowed self-dissolution.[91] This step might be a very honest one, but in light of the low hurdles that the Federal Constitutional Court set up for a no-confidence vote in the latest ruling, an explicit right to self-dissolution seems unnecessary.[92] A change of the Basic Law is even more unrealistic given the required majority of two thirds of the *Bundestag* and the *Bundesrat* (Art. 79 para. 2 of the Basic Law).

D. The *Rasterfahndung* Case (BVerfGE 115, 320)

In its 4 April 2006 decision, the Federal Constitutional Court limited the possibility to preventively screen Muslims suspected to be terrorist sleepers.[93] A "general threat situation", as existed after the terrorist attacks on the World Trade Centre on 11 September 2001 is not sufficient to justify this procedure. According to the

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[89] Helge Sodan & Jan Ziekow, *Grundkurs Öffentliches Recht (2005)*, para. 14, margin number 2.

[90] HECKÖTTER & SPIELMAN, *supra* note 82, at 18.

[91] Volker Busse, *Auflösung des Bundestages als Reformproblem*, 20 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 257-260 (2005), who recommends an amendment of Art. 39 of the Basic Law. Heckötter & Spielman, *supra* note 82, at 19-20.

[92] HECKÖTTER & SPIELMAN, *supra* note 82, at 19-20.

[93] BVerfGE 115, 320, 1 BvR 518/02, 4 April 2006.

Federal Constitutional Court, at least a concrete danger has to exist, which requires more than the mere assumption of a future threat.

I. Statement of the facts

Shortly after the events of 9/11 it became clear that some of the terrorists involved had attended German universities without attracting the attention of federal authorities. For that reason, police and intelligence agencies tried to identify further unrecognized Muslim fundamentalists by a so called *Rasterfahndung* (dragnet investigation).
A dragnet investigation can be used as a preventive profiling instrument when some characteristic information of future assassins or other criminal offenders have been discovered. It is then possible to collect unsuspicious information from different institutions in order to compare it with other unsuspicious information from other institutions. In the 1970s, authorities tried to discover terrorists of the left-wing terrorist organisation *Rote Armee Fraktion* (RAF – Red Army Fraction) by this data screening method. At that time, police noticed that RAF terrorists paid their electricity bills in cash. Power companies then handed over the names of those consumers who paid in cash, which were further compared to registry office data in order to find persons with a false identity, whose names remained after all those correctly registered, were sorted out. The police could then search the houses and apartments of these remaining persons. Although the dragnet investigation in the 1970s was carried out for a significant period of time, it only led to the arrest of a single member of the RAF.

In the case at hand, the police headquarters of Düsseldorf applied for a dragnet investigation according to § 31 of the *Polizeigesetz des Landes Nordrhein-Westfalen* (PolG – police law of the state North Rhine-Westphalia)[94] before the *Amtsgericht Düsseldorf* (AG Düsseldorf – Düsseldorf Local Court). On 2 October 2001 the application was approved because the Court could identify the present threat required by § 31 PolG, although a terrorist attack could not be predicted with absolute certainty. According to the Local Court, the degree of damage threatened by the hypothetical attacks had to be taken into account while considering a present

[94] § 31 para 1 at that time read: "The police is allowed to demand the transfer of individual-related data of certain groups of persons out of data-files from public and non-public institutions in case it is necessary for the defense from a present threat for the existence or the safety of the state or the federal state or for the physical condition, life or freedom of a person." Para 2 stated, which data could be demanded, para 3 ruled that data had to be deleted after the purpose was served or after it became futile. In para 4, the need for a Local Court's ruling was determined, while para 5 ruled the conditions of the information of the persons concerned.

threat. The greater the perceived threat, the lower the probability of damage has to be.[95]

Thus, data could be collected at universities, colleges, registry offices and the central register of immigrants. Data sets that matched with certain criteria[96] were automatically filtered out and then forwarded to the *Bundeskriminalamt* (Federal Criminal Police Office), which instituted the nationwide data file *Schläfer* (sleeper). This file was compared with other files the *Bundeskriminalamt* had already collected, among them files that listed those with flying licences, and those whose backgrounds had to be verified[97] against the misappropriation or significant emission of radioactive substances. The results were integrated in another data file that was handed back to Criminal Police Offices of the federal states. In the end, the dragnet investigation did not result in a sleeper's disclosure or arrest. In July 2003, the last remaining data files resulting from the screening were deleted.
A Moroccan citizen of Islamic faith, who was a student at the Duisburg University, challenged the decision of the AG Düsseldorf. The *Landgericht* (Regional Court) dismissed the complaint and upheld the ruling of the Local Court. Also the *Oberlandesgericht* (Higher Regional Court) confirmed the existence of a present threat by lowering its standards in the situation at hand, because the feared degree of damage was so high.[98] After losing in all appeals, the complainant filed a constitutional complaint against the courts' decisions, especially asserting a violation of the fundamental right of informational self-determination according to Art. 2 para 1 in connection with Art. 1 para 1 of the Basic Law.

II. The Ruling of the Federal Constitutional Court

The majority of the Federal Constitutional Court followed the argumentation of the complainant by declaring the Civil Courts' decisions incompatible with the fundamental right of informational self-determination.[99] However, Judge Haas could not agree with the majority of the Court and reasoned similarly to the Civil

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[95] See BVerfGE 115, 320, 328.

[96] The police searched for persons matching with the following criteria: male, aged 18 to 40, (former) student, of Islamic Religion, native country or nationality of certain countries with a predominantly Islamic population, see BVerfGE 115, 320 (323).

[97] See § 12b of the *Atomgesetz* (Nuclear Facilities Act).

[98] OLG Düsseldorf, Beschluss vom 8.2.2002, 3 Wx 351/01, 21 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 629-631 (2002).

[99] BVerfGE 115, 320, 341-370.

Courts.[100]

1. The decision of the majority

The majority of the First Senate of the Federal Constitutional Court pointed out that a dragnet investigation like in the case at hand is a serious infringement of the fundamental right of informational self-determination.[101] Prima facie, one might not agree with the majority, because usually the individual information affected by data screening has little personal relevancy.[102]

a) Intensity of the infringement of fundamental rights

Therefore, the majority describes in detail what impact such a screening can have on the targeted persons. With § 31 PolG, the police can apply a broad scope of data screening measures and combine data sets in many ways, so that the relevance of an infringement also depends on the kind of content of the information and of its personality relevance.[103] According to the majority of the Court, all the information collected in the course of the dragnet investigation was individual-related, e.g. religious affiliation, citizenship/nationality, marital/family status, field of study etc.[104], so that, together with the broad scope of possible measurements and in combination with other data sets of information, new information with a very intense personality relevance could be created.[105] Also, the Court warned against such pools of information and the resulting danger of being able to develop personality profiles.[106] Bearing this in mind, it does not seem farfetched that a person targeted fears disadvantages like being the subject of state investigations.[107] In case these screened persons become known to the public, the screening method could also have a stigmatising impact.[108] This becomes particularly relevant when

[100] BVerfGE 115, 320, 371-381.

[101] BVerfGE 115, 320, 347-357.

[102] See e.g. Gabriele Kett-Straub, *Data Screening of Muslim Sleepers Unconstitutional*, 7 GLJ 971 (2006).

[103] BVerfGE 115, 320, 347-348.

[104] BVerfGE 115, 320, 349.

[105] BVerfGE 115, 320, 349.

[106] BVerfGE 115, 320, 350-351.

[107] BVerfGE 115, 320, 352.

[108] BVerfGE 115, 320, 352-353.

data is screened by criteria such as those mentioned in Article 3 para 3 of the Basic Law, i.e. criteria against which persons should not be discriminated.[109] A dragnet investigation amongst Muslim people, the Federal Constitution Court held, could lead to a broadening of stereotypes that stigmatises a whole population group in the public perception.[110] Furthermore, most of the screened persons were never informed about their involvement. This secrecy was also criticised by the majority of the Court.[111] Finally, the majority remarked that a wide array of people who were absolutely innocent was screened: Those people never even aroused any suspicion, and thus there was no reason for the police's distrust.[112]

b) The need for a concrete threat

Because the infringement of fundamental rights was found to be grievous, the majority of the Court demanded a "concrete threat" before future dragnet investigation can be carried out. Such a concrete threat, a concept of law originally created by the majority of the Court in this decision[113], is required to keep an adequate balance between freedom and security.[114] The Federal Constitutional Court demanded a certain degree of danger or suspicion and remarked, that the Basic Law does not allow in any circumstances investigations "*ins Blaue hinein*" (out of the blue).[115] Instead, there have to be concrete facts in a concrete or convincingly threatening situation.[116] In this case, the Federal Constitutional Court could not find that such a concrete threat existed. Lowering the standard for a present threat in way the Düsseldorf Higher Regional Court did it was ruled unconstitutional.[117] Particularly, the majority criticised the fact that there were no indications that a terrorist attack was imminent.[118]

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[109] BVerfGE 115, 320, 352-353.

[110] BVerfGE 115, 320, 353.

[111] BVerfGE 115, 320, 353-354.

[112] BVerfGE 115, 320, 354-356.

[113] BVerfGE 115, 320, 357-366; explicitly pointed out and criticised by Judge Haas in her dissenting opinion, BVerfGE 115, 320, 377-378.

[114] BVerfGE 115, 320, 358.

[115] BVerfGE 115, 320, 361.

[116] BVerfGE 115, 320, 364.

[117] BVerfGE 115, 320, 368.

[118] BVerfGE 115, 320, 369-370.

2. The dissenting decision of Judge Haas

Judge Haas could not concur with the opinion of the majority.[119] Although she also found an infringement of the right of informational self-determination, she refused to describe it as a grievous one. For her, a data screening in general is an infringement of minor intensity.[120] The collected data had already been disclosed, so that an alignment of data files could not be a serious infringement of fundamental rights.[121] Also, the stigmatising impact was nil, because usually the data screening was carried out in public.[122] Haas then emphasized the responsibility of the state for public safety.[123] As a dragnet investigation is a complicated procedure, Haas argued for a lower standard for a "present threat" when a serious degree of damage is feared.[124] Thus, she found the decision of the Düsseldorf Higher Regional Court constitutional[125] and cautioned against the missing judicial self-restraint of the majority of the Court[126], whose judgement had made the state widely defenceless in the protection from existential fundamental rights.[127]

III. Further developments

Some critics agreed with the fears expressed by Judge Haas who proclaimed that the majority's opinion ended the use of preventive dragnet investigations to fight terrorism.[128] As a matter of fact, with the requirements set up by the Federal

[119] BVerfGE 115, 320, 371-381.

[120] BVerfGE 115, 320, 371-374.

[121] BVerfGE 115, 320, 372.

[122] BVerfGE 115, 320, 373.

[123] BVerfGE 115, 320, 374-376.

[124] BVerfGE 115, 320, 377-378.

[125] BVerfGE 115, 320, 379.

[126] BVerfGE 115, 320, 381.

[127] BVerfGE 115, 320, 381.

[128] See e.g. Christoph Schewe, *Das Ende der präventiven Rasterfahndung zur Terrorismusbekämpfung?*, 26 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 174-177 (2007); Michael P. Robrecht, *Die präventive Rasterfahndung im Lichte der aktuellen Verfassungsrechtsprechung – Straftatenvorsorge ade?*, 15 SÄCHSISCHE VERWALTUNGSBLÄTTER (SächsVBl.) 80-88 (2007).

Constitutional Court, a dragnet investigation is no longer a feasible method of detecting Muslim sleepers. Regardless, its suitability in general is suspect, since, in the case at hand, where the Düsseldorf Higher Regional Court decided in an unconstitutional manner, data screening was not even able to contribute to the detection of sleepers.[129] The use this dragnet investigation was – according with the majority of the Court – criticized as a symbolic act of the police, driven by the need to be seen by the public to be working to prevent terrorism.[130] However, some details of the decision were nevertheless criticized: The introduction of the requirement of a concrete threat was found by some to be senseless, since a dragnet investigation is no longer needed when the danger is sufficiently concrete.[131] In general, however, most lawyers concurred with the outcome of the ruling of the majority of the Federal Constitutional Court.[132]

E. Unconstitutionality of the Aviation Security Act (BVerfGE 115, 118)

One of the most prominent decisions of the Federal Constitutional Court in 2006 was the court's move to declare section 14 para. 3 of the *Luftsicherheitsgesetz* (Aviation Security Act) unconstitutional.[133] With its judgment of February 15, 2006 the court's first senate expressed that the Aviation Security Act was incompatible with the Basic Law and hence void. Although the outcome of the case was by no means unexpected, the court's decision attracted considerable public and academic attention.[134]

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[129] GABRIELE KETT-STRAUB, *supra* note 102, at 974.

[130] Schewe, *supra* note 128, at 175-176.

[131] See e.g. Uwe Volkmann, *Die Verabschiedung der Rasterfahndung als Mittel der vorbeugenden Verbrechensbekämpfung*, 29 JURISTISCHE AUSBILDUNG (JURA) 137 (2007); Schewe, *supra* note 128, at 176.

[132] Uwe Volkmann, *Die Verabschiedung der Rasterfahndung als Mittel der vorbeugenden Verbrechensbekämpfung*, 29 JURISTISCHE AUSBILDUNG (JURA) 138 (2007); Christoph Schewe, *Das Ende der präventiven Rasterfahndung zur Terrorismusbekämpfung?*, 26 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 177 (2007); GABRIELE KETT-STRAUB, *supra* note 102, at 974.

[133] BVerfGE 115, 118, 1 BvR 357/05, 15 February 2006.

[134] Torsten Hartleb, *Der neue § 14 III LuftSiG und das Grundrecht auf Leben*, 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1397 (2005); Gerd Roellecke, *Der Rechtsstaat im Kampf gegen den Terror*, 61 JURISTENZEITUNG (JZ) 265 (2006); Daniela Winkler, *Die Systematik der grundgesetzlichen Normierung des Bundeswehreinsatzes unter Anknüpfung an die Regelung des LuftSiG*, 59 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 149 (2006); Daniela Winkler, *Verfassungsmäßigkeit des Luftsicherheitsgesetzes*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 536 (2006); Friedhelm Hase, *Das Luftsicherheitsgesetz: Abschuss von Flugzeugen als „Hilfe bei einem Unglücksfall"?* 59 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 213 (2006); Wolfram Höfling & Steffen Augsberg, *Luftsicherheit, Grundrechtsregime und Ausnahmezustand*, 60 JURISTENZEITUNG (JZ) 1080 (2005); Jens Kersten, *Die Tötung von Unbeteiligten*, 24 NEUE ZEITSCHRIFT FÜR

I. Statement of the facts

In the aftermath of the 11 September 2001 terror attacks on New York City and Washington D.C., issues of air security were put forward for discussion in Germany. German officials had repeatedly pointed out that the country lacked any statutory basis to deal with situations comparable to the attacks on the USA. In the course of the ensuing debate on terrorist threats, different scenarios were explored in which hijacked planes could be used to crash into nuclear power plants, sold-out football stadiums, or other populated places. After a mentally confused sport pilot threatened to crash his plane into a skyscraper of the city of Frankfurt am Main in January 2003 ,[135] the German legislature passed the *Luftsicherheitsgesetz* (Aviation Security Act)[136] which was aimed at enabling German military forces to legally intercept so-called renegade-aircraft.[137] In its crucial provision, the Aviation Security Act (section 14, paragraph 1) stipulated that in order to prevent the occurrence of a *besonders schwerer Unglücksfall* (severe incident), the armed forces should be authorised to compel aircrafts out of German airspace, to force down aircrafts and to threaten the use of force by firing warning shots. Section 14 para. 3 provided that the direct use of force of arms against aircrafts was only permissible

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VERWALTUNGSRECHT (NVwZ) 661 (2005); Wolfgang Melzer, Christian Haslach & Oliver Socher, *Der Schadensausgleich nach dem Luftsicherheitsgesetz*, 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1361 (2005); Anton Meyer, *Wirksamer Schutz des Luftverkehrs durch ein Luftsicherheitsgesetz?*, 20 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 203 (2004); Michael Pawlik, *§ 14 III Luftsicherheitsgesetz – ein Tabubruch?*, JURISTENZEITUNG (JZ) 1045 (2004); Wolf-Rüdiger Schenke, *Die Verfassungswidrigkeit des § 14 III Luftsicherheitsgesetz*, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 736 (2006); Arndt Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, 24 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 585 (2004); Peter Wilkesmann, *Terroristische Angriffe auf die Sicherheit des Luftverkehrs*, 21 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1316 (2002); Marcus Schladebach, *Sky Marshals im Luftverkehrsrecht*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 430 (2006); Dieter Wiefelspütz, *Sicherheit vor den Gefahren des internationalen Terrorismus durch den Einsatz der Streitkräfte?*, 45 NEUE ZEITSCHRIFT FÜR WEHRRECHT (NZWehrr) 45 (2003); Karsten Baumann, *Das Grundrecht auf Leben unter Qualifizierungsvorbehalt?* 57 DIE ÖFFENTLICHE VERWALTUNG (DÖV), 853 (2004); Bodo Pieroth & Bernd J. Hartmann, *Der Abschuss eines Zivilflugzeugs auf Anordnung des Bundesministers für Verteidigung*, 28 JURISTISCHE AUSBILDUNG (JURA) 729 (2005); Christopf Gramm, *Der wehrlose Verfassungsstaat? Urteilsanmerkung zur Entscheidung des BVerfG zum LuftSiG*, 121 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 653 (2006).

[135] Karsten Baumann, *Das Urteil des BVerfG zum Luftsicherheitseinsatz der Streitkräfte*, 28 JURISTISCHE AUSBILDUNG (JURA) 447 (2006).

[136] Luftsicherheitsgesetz (Aviation Security Act), BGBl I, p. 78.

[137] A so-called "Renegade Case" is a situation in which a civil (non military) aircraft is used by hijackers as a weapon against human lives. See Christoph Gramm, *Bundeswehr als Luftpolizei – Aufgabenzuwachs ohne Verfassungsänderung?* 45 NEUE ZEITSCHRIFT FÜR WEHRRECHT (NZWehrr) 89 (2003).

if the respective aircraft was intended to be used as a weapon against human lives and the use of direct force was the only and ultimate means of preventing a severe incident. Section 13 of the Aviation Security Act empowered the defence minister to order the downing of a civilian aircraft if "in the circumstances, it can be assumed" that the aircraft was to be used against human life. The Aviation Security Act came into effect in January 2005 and was immediately challenged by four lawyers, a patent attorney, and a flight captain, who successfully lodged a constitutional complaint against it.[138]

The complainants, all of whom were frequent flyers,[139] argued that the Aviation Security Act violated fundamental rights guaranteed by the Basic Law. They asserted that because they were frequent flyers they ran the risk of becoming involved in a renegade case.[140] They held that under the applicability of the Basic Law, it was absolutely unconscionable to intentionally kill the innocent passengers on board a hijacked plane on the basis of a statutory authorisation. According to the plaintiffs, the assumption that someone boarding an aircraft as a crew member or a passenger, in the case of the aircraft becoming involved in an aerial incident, would presumably consent to its being shot down, and thus be complicit in his or her own killing, was an unrealistic fiction.[141] Moreover, the assumption that the passengers affected were doomed anyway was repudiated by the complainants. They held that the opinion, advanced on some occasions, that the passengers held on board have become part of a weapon and must be treated as such, baldly expressed that the victims of such an incident were no longer perceived as individual human beings with fundamental rights.[142]

Critics of the law pointed out that while the Aviation Security Act was restricted to hijacked planes, it had far broader implications. They stressed that the law widely expanded the latitude for using the armed forces within Germany without heeding constitutional directives that strictly restrict the deployment of armed forces.[143]

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[138] According to Article 93 para. 1 No. 4-a of the Basic Law, the Federal Constitutional Court decides on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights has been violated by public authority.

[139] BVerfGE 115, 118, 126.

[140] BVerfGE 115, 118, 126-128.

[141] BVerfGE 115, 118, 127.

[142] BVerfGE 115, 118, 126-127.

[143] BVerfGE 115, 118, 134-135.

Additionally, critics wondered what would prevent the state from being permitted to torture suspects in situations of imminent danger, assuming the state were allowed to kill innocent people if it assumed there was a danger to the general public.[144] As a consequence, the authorisation of the Aviation Security Act to legally shoot down aircrafts with innocent persons on board was considered overstepping the threshold of constitutionality.

The Federal Constitutional Court also raised objections and expressed its reservations about the constitutionality of the Aviation Security Act. This led the court's First Senate in its judgment of 15 February 2006 to declare section 14 para. 3 of the Aviation Security Act, incompatible with the Basic Law and hence void.

II. The Ruling of the Federal Constitutional Court

The court's ruling was two-pronged. First, the court considered questions of legislative authority to enact a law like the Aviation Security Act. Second, the court scrutinized whether the Aviation Security Act violated fundamental rights guaranteed by the Basic Law.

1. The lack of legislative authority to enact the Aviation Security Act

As a result of Germany's bitter historical experience, the deployment of the armed forces is strictly limited by the Basic Law. Therefore, Article 87a para. 2 of the Basic Law provides that, apart from defence, the armed forces may only be used as explicitly permitted by the Basic Law. The Federal Constitutional Court began its ruling by commenting on whether Article 35 of the Basic Law could be considered a provision permitting the use of armed forces.[145] Article 35 para. 2 of the Basic Law provides that in order to maintain or restore public security or order, a state (*Land*) may, in cases of particular importance, call upon forces and facilities of the Federal Border Guard to assist its police if without this assistance the police could not, or could only with considerable difficulty, fulfil a task. In order to deal with a natural disaster or an especially severe accident, the state may request the assistance of the police forces of other states (*Länder*), forces and facilities of other administrative authorities, the Federal Border Guard, or the Armed Forces (*Streitkräfte*).

The court conceded that Article 35 of the Basic Law indeed allows the armed forces to be deployed within Germany to support the police in extraordinary

[144] BVerfGE 115, 118, 134-135.

[145] BVerfGE 115, 118, 140.

circumstances like "particularly serious accidents" or natural disasters.[146] It even held that such accidents could include an anticipated terrorist plane crash with devastating consequences.[147] However, the Federal Constitutional Court cautioned that in such a case the armed forces would not be permitted to deploy any specifically military weapons, such as fighter aircraft or anti-aircraft missiles. On the contrary, the armed forces would be strictly limited to make use only of such means that the police forces of the *Länder* are also permitted to use. The use of military weapons represented in the Aviation Security Act, the court concluded, would be incompatible with the text of Articles 35 and 87a of the Basic Law as well as the origins of Germany's post-war constitution.[148] As a consequence, the Federal Constitutional Court emphasized that the federal legislature lacked the legislative authority to issue the regulation laid down in section 14 para. 3 of the Aviation Security Act. The court stressed that the incompatibility of section 14 para. 3 of the Aviation Security Act with Article 35 of the Basic Law did not result from the mere fact that the deployment was to be ordered *after* a major aerial incident (hijacking of an aircraft) had already happened but *before* the especially severe accident (intended air crash) itself had not yet occurred. The court also stressed that the concept of an "especially severe accident" within the meaning of Article 35 para. 2 of the Basic Law also includes disasters expected to happen with near certainty.[149] However, a military operation involving the direct use of armed forces against an aircraft does not respect the boundaries of Article 35 of the Basic Law, because this provision under no circumstances permits an operational mission of the armed forces with specifically military weapons for the control of natural disasters or in the case of especially severe accidents.[150] The court indicated that the term "assistance" referred to in Article 35 para 2 of the Basic Law was rendered to the *Länder* to enable them to effectively fulfil the task, incumbent on them in the context of their police power, to deal with natural disasters or especially severe accidents.[151] Because the "assistance" was provided to bolster the police power of the *Länder*, the court held that this also necessarily limited the kinds of resources that could be used when the armed forces were deployed in assistance. The equipment and measures used could not be of a kind that were characteristically completely

[146] BVerfGE 115, 118, 142-143.

[147] BVerfGE 115, 118, 143.

[148] BVerfGE 115, 118, 146.

[149] BVerfGE 115, 118, 143-144.

[150] BVerfGE 115, 118, 146.

[151] BVerfGE 115, 118, 146-147.

different from those at the disposal of the *Länder* police.[152]

Moreover, the court found the Aviation Security Act incompatible with Article 35 para. 3 of the Basic Law. Article 35 para. 3 provides that where a natural disaster or accident endangers a region larger than a state (*Land*), the Federal Government may, insofar as this is necessary to effectively deal with such danger, instruct the state governments to place their police forces at the disposal of other states (*Länder*), and may use units of the Federal Border Guard or the Armed Forces to support the police forces. The court held that this provision explicitly authorises the Federal Government to order the deployment of the armed forces only in the case of an interregional emergency. The judges of the First Senate took the view that the regulations in the Aviation Security Act did not take sufficient account of this, because section 13 provided that the Minister of Defence, in agreement with the Federal Minister of the Interior, shall decide to deploy the armed forces when a decision of the Federal Government was not possible in time.[153] In view of the fact that the time available when a hijacked plane is threatening human lives will consistently be very short, the Federal Constitutional Court concluded that the government ministers would, pursuant to the provisions of the Aviation Security Act, substitute regularly for the entire federal government when it comes to deciding on the deployment of the armed forces in interregional emergencies.[154] In the view of the court this clearly showed that it would not be possible to deal with measures of the kind regulated in section 14 para. 3 of the Aviation Security Act in the manner provided under Article 35 para. 3 of the Basic Law. As a consequence, the authorisation to shoot down aircrafts was found unconstitutional, because it lacked a legislative authority in the Basic Law.

2. Violation of fundamental rights

Besides the lacking legislative authority, the Aviation Security Act also was found to violate the fundamental rights of the innocent passengers aboard a hijacked plane. However, the court distinguished between two different scenarios: in the first scenario, a hijacked plane with innocent passengers and crew members is shot down in order to prevent a terrorist attack on sensitive targets. In the second scenario, a plane with only terrorists on board is shot down in order to keep the plane from being crashed. While the court considered the first scenario to be a

[152] BVerfGE 115, 118, 147-148.

[153] BVerfGE 115, 118, 147-148.

[154] BVerfGE 115, 118, 149.

violation of fundamental rights, the latter was assessed to be within the constitutional limits.

a) Use of force against aircraft with passengers and crew members on board

The Federal Constitutional Court held that Section 14 para. 3 of the Aviation Security Act was also not compatible with the right to life (Article 2 para. 2 sentence 1 of the Basic Law) in conjunction with the guarantee of human dignity (Article 1 para. 1 of the Basic Law) to the extent that the use of armed force affects innocent persons on board a hijacked aircraft. Article 2. para. 2 of the Basic law provides that everyone has the right to life and to physical integrity. Article 1 para. 1 Basic Law stipulates that human dignity is inviolable and that it is the duty of all state authorities to respect and to protect human dignity. With reference to its earlier rulings, upon which the so-called *Objektformel* (object-formula) was established,[155] the Court deduced that the state treated the innocent passengers as mere objects by accepting their killing as a means to save others, thereby denying them the value that is due a human being for his or her own sake.[156]

The court emphasised that the passengers and crew members who are exposed to such a mission were in a desperate situation. Their survival, the court noted, was dependent on decisions made by others with the result that the passengers and crew are unable to individually determine the fate of their own lives.[157] The court argued that this made them pawns not only of the perpetrators of the crime, but also of the state's rescuers who, in order to save others from a terrorist attack, resort to the use of armed force provided by section 14 para. 3 of the Aviation Security Act. The flight crew and passengers, the court explained, could not evade this action by state actors due to conditions outside their control, but were helplessly and defencelessly at their mercy, with the consequence that they would be deliberately shot down and they would almost certainly be killed.[158] The court concluded that the hopelessness and inability of the victims aboard the aircraft to take evasive action must have some bearing on those who ordered and carried out the shooting down of the aircraft.[159] The judges held that such an action ignored the

[155] BVerfGE 27, 1, 6; BVerfGE 30, 1, 26; BVerfGE 87, 209, 228; BVerfGE 96, 375, 399.

[156] BVerfGE 115, 118, 151-152.

[157] BVerfGE 115, 118, 153.

[158] BVerfGE 115, 118, 153-154.

[159] BVerfGE 115, 118, 154-155.

status of the persons affected as subjects endowed with dignity and inalienable fundamental rights. By virtue of their killing being used to save others, they were treated as mere objects and at the same time deprived of their fundamental rights.[160] Given that their lives were disposed of unilaterally by the state, the persons onboard the aircraft were themselves victims in need of protection and were denied the valuation which is due every human being.[161]

The Federal Constitutional Court recalled that under Article 1 para. 1 of the Basic Law (guarantee of human dignity) it was absolutely inconceivable to enact a statutory authorisation legalising the intentional deaths of those in such a helpless situation.[162] The court reacted sharply against the assumption that someone boarding an aircraft as a crew member or as a passenger would presumably consent to its being shot down, and thus consent to his or her own killing, in the case of the aircraft becoming involved in an aerial incident.[163] The court also added that the assessment that the persons affected were doomed anyway could not change the fact that the killing of innocent people is by nature an infringement of these people's right to dignity.[164] Under the Basic Law, human life and human dignity enjoy the same constitutional protection regardless of the length of the life of the individual human being.[165] Moreover, the court repudiated the opinion that the persons who were held on board had become part of a weapon and must bear being treated as such, because this opinion expressed in a virtually undisguised manner that the victims of such an incident were no longer perceived as human beings.[166] The idea that the individual was obliged to sacrifice his or her life in the interest of polity if this were the only possible way of protecting the community from attacks aimed at its destruction was also rejected by the Federal Constitutional Court.[167] The court further noted that the judgement as to whether a plane had actually been hijacked and could be used as a weapon was often based on pure assumptions. Since it was not uncommon for a passenger plane to deviate from its

[160] BVerfGE 115, 118, 157.

[161] BVerfGE 115, 118, 157.

[162] BVerfGE 115, 118, 156-157.

[163] BVerfGE 115, 118, 157.

[164] BVerfGE 115, 118, 158.

[165] BVerfGE 115, 118, 158.

[166] BVerfGE 115, 118, 158-159.

[167] BVerfGE 115, 118, 159.

prescribed route or lose radio contact, there was a considerable danger of making rash, and potentially incorrect, decisions.[168]

In conclusion, the court came to the decision that section 14 para. 3 of the Aviation Security Act was incompatible with the concept within the Basic Law that humans by their nature have the prerogative to freely determine things for themselves and therefore may not be made the mere object of state actions.

b) Use of force against aircrafts with only hijackers on Board

Unlike the use of armed force against hijacked aircrafts containing innocent bystanders, the Federal Constitutional Court held that the use of armed force against aircrafts with solely hijackers on board was permissible.[169] The court conceded that the shooting down of an unmanned plane, or one with only terrorists on board, would be compatible with the Basic Law, so long as the powers of the armed forces were extended appropriately, which they were not in the law as passed.[170]

The court explained that, in order for a terrorist to be held liable for an attack, the consequences of his or her actions must be attributable to him or her personally, and the attacker must be held responsible for the incidents that he or she initiated.[171] The court held that the goal of saving innocent human lives was of such weight that it could justify the grave encroachment on the perpetrators' fundamental right to life. Moreover, the gravity of the encroachment upon the terrorists' fundamental rights was reduced by the fact that the perpetrators themselves brought about the necessity of state intervention and that they could easily avert such intervention at any time by halting their criminal plan.[172] However, this argument was rendered practically unimportant, as the court held that the Aviation Security Act was void from the outset since the Federation lacked legislative authority in the first place.[173]

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[168] BVerfGE 115, 118, 156.

[169] BVerfGE 115, 118, 160-165.

[170] BVerfGE 115, 118, 160-161.

[171] BVerfGE 115, 118, 163-164.

[172] BVerfGE 115, 118, 164.

[173] BVerfGE 115, 118, 165.

3. Remaining legal uncertainties and recent developments

The Federal Constitutional Court's decision met general approval by academics, who pointed out that the scenario of a terrorist threat was a exaggerated and far-fetched assessment of the actual security situation.[174] The court's call for a halt to the hysteria and the tendency to limit fundamental rights for "reasons of national security" was widely praised.[175] However, the court was sharply criticised by politicians because it had failed to make any suggestions on how a hijacked passenger plane *could* be legally shot down in case of emergency. Indeed, the court did not cut the Gordian knot and provide any legal guidance as to how to proceed in situations comparable to the terrorist attacks of September 11. As a result, critics accused the Federal Constitutional Court of endangering domestic security because terrorist threats would fall into a legal void, rendering the government incapable of reacting to terrorist air attacks.[176] Based on the Federal Constitutional Court's decision, there remains a need to adapt the constitution to the present threat level. In response to the court's decision the Federal Government announced it would consider the possibility of a constitutional amendment making it possible to enact a law like the Aviation Security Act.[177] The Basic Law provides that any statute amending the constitution requires the consent of two thirds of the members of the

House of Representatives (*Bundestag*) and two thirds of the votes of the Senate (*Bundesrat*).[178] However, it remains unclear whether an amendment put to the vote of the *Bundestag* and *Bundesrat* would find this quorum.

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[174] BAUMANN, *supra* note 95, at 447; HARTLEB, *supra* note 94, at 1397; ROELLECKE, *supra* note 94, at 265; HÖFLING & AUGSBERG, *supra* note 94, at 1080; KERSTEN, *supra* note 94, at 661; SCHENKE, *supra* note 94, at 736; SINN, *supra* note 94, at 585; BAUMANN, *supra* note 94, at 853; PIEROTH & HARTMANN, *supra* note 94, at 729; GRAMM, *supra* note 94, at 653.

[175] BAUMANN, *supra* note 95, at 447; HARTLEB, *supra* note 94, at 1397; ROELLECKE, *supra* note 94, at 265; HÖFLING & AUGSBERG, *supra* note 94, at 1080; KERSTEN, *supra* note 94, at 661; SCHENKE, *supra* note 94, at 736; SINN, *supra* note 94, at 585; BAUMANN, *supra* note 94, at 853; PIEROTH & HARTMANN, *supra* note 94, at 729; GRAMM, *supra* note 94, at 653.

[176] Manfred Baldus, *Streitkräfteeinsatz zur Gefahrenabwehr im Luftraum - Sind die neuen luftsicherheitsgesetzlichen Befugnisse der Bundeswehr kompetenz- und grundrechtswidrig?*, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1278 (2004).

[177] FRANKFURTER ALLGEMEINE ZEITUNG, 27.5.2006, p. 1, 4.

[178] Article 79 para. 2 Basic Law.