The ‘transparent man’—
a nightmare in the constitutional state under the rule of law

1. ‘omniscent’ and ‘omnipotent’ state
   e.g.
   • computer surveillance
   • ‘dragnet investigation’
   • tax investigation

2. Private institutions, esp. enterprises
   e.g.
   • data collection/trade
   • RFID (radio-frequency-identification)
   • Paparazzi (clandestine photographers)
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**Privacy**

**subjective dimension**
- self-preservation
- self-determination
- self-development

**objective dimension**
- free process of shaping the public opinion

society of ‘transparent individuals’: indiscreet, illiberal, infernal

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Human Rights

German constitution of 1949: Basic Law (BL)

**Basic Rights**

- Art. 13 para. 1 BL
  - ‘The home is inviolable.’

- Art. 10 para. 1 BL
  - ‘The privacy of correspondence, posts and telecommunications is inviolable.’
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Basic right of data protection

Problem: not in the written text of the BL

Art. 1 para. 1 BL

‘Human dignity shall be inviolable.’

Art. 2 para. 1 BL

‘Every person shall have the right to freely develop his personality.’

combination: general right of personality

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General right of personality

= ‘unwritten’, ‘unnamed’ basic right

- Right to privacy
- Right to personal word and image
- Right to informational self-determination
  Right to data protection
Defensive function of a basic right
(= freedom from the state)

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Constitutional justification of interferences

a) limitation: special clause in Art. 2 para. 1 BL
   ‘constitutional order’
   i.e. any statute passed by Parliament
   e.g. acts empowering the police to
   ‘dragnet investigation’

b) limits to limitation
   principle of proportionality
**Principle of Proportionality**

- **purpose** (‘ends’) ➔ **reasonable relation** ➔ **measure = interference** (‘means’)

1. (1) **legitimate purpose**
2. (2) **measure** = interference to reach the legitimate purpose
   a. **suitable**
   b. **necessary** (= least restrictive measure)
   c. **reasonable** = appropriate
      (= proportional in the narrower sense)

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**Basic rights: no direct horizontal effect**

- **objective duty** of the state to protect the individual...
- **State**
- ... against other persons
- **Citizen 1** — NO! — **Citizen 2**

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The ‘transparent man’

Consequence of protective duties:

German Federal Data Protection Act (et al.)

- Data economy
- Transparency (‘spirit of openness’)
- Requirement of prior consent of the person concerned
- Limited use of personal data: connection to the original purpose of collection (no modification)

Thank you for your kind attention!
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