

Krasemann: Today we are guests of Prof. Adalbert Podlech in Darmstadt. Thank you very much for allowing us to interview you here today for our project. Can you briefly introduce yourself?

#00:00:19-5# Podlech: (laughter) Yes. Adalbert Podlech [pronounced like Albert], was a professor of public law here in Darmstadt until a good 15 years ago. It's perhaps not unimportant for our conversation that I haven't read legal texts for a good 10 years. Before I studied law, I studied philosophy, history and theology, and here in Darmstadt I was lucky enough to be able to continue my old hobbies from the very beginning. In addition to law and economics, I was a member of the Department of History and Social Sciences and regularly gave lectures there. And since my retirement many years ago, I have lectured for a long time in this other department, mainly on the Middle Ages - medieval philosophy, the history of theology, and before Islam became of public interest in Germany, also on the history of Islam and the history of Islamic thought, always limited to the Middle Ages.

#00:01:52-5# Rost: What influences were you subject to? Which philosophers have impressed you?

#00:01:57-4# Podlech: When I was studying existential philosophy. I did my doctorate on Sartre: "The body as a way of being in the world". Later, when I studied law, this direction became problematic for me, and I pursued analytical philosophy, then mathematics, then mathematical logic, and this direction also became important for my legal work later on.

#00:02:32-4# Krasemann: How did you get into law, then?

#00:02:34-8# Podlech: I wanted to become a professor, that was the only career goal I ever had after it became clear that I wasn't going to be a clergyman. And that was actually limited to philosophy, the history of philosophy or the philosophy of history. So the historical dimension was always very, very important to me. I had a good student friend who was a lawyer. I was a tutor in the student hall of residence. And then I started to take an interest in law.

#00:03:11-3# Krasemann: In the fifties there were already

Areas with data protection that you had anything to do with?

#00:03:13-1# Podlech: No. That only began after I was an assistant to Böckenförde in Heidelberg.

#00:03:22-1# Krasemann: When was that?

#00:03:24-0# Ohh, now you're asking a question. At the end of the sixties, I think I came to Heidelberg in 67 or 68. So I spent the whole of '68 in Heidelberg, so to speak.

#00:03:40-6# Rost: What did you experience of the '68 era? Were you right in the middle of it?

#00:03:44-8# Podlech: Yes. Without having made a decision. I was caught in the middle, on the one hand I was in favor of the rule of law, which in the end my legal colleagues no longer believed me, and on the other hand the students, whose reform goals, not in terms of content, but that the reform had to be enforced, I inwardly affirmed. And that led to very difficult situations. And in the end, the lawyers, the public law experts, openly announced that Podlech would not get a call. And I didn't get one either. Even Böckenförde, who liked me and who then became a federal constitutional judge, would have liked to have me as his successor in Bielefeld - I also lectured there - but the situation was hopeless. Then the Technical University of Darmstadt, Professor Draht, also a former federal constitutional judge, chose me as his successor. Interestingly, we were completely opposed to each other, so we had a basic political stance in common, but methodologically we were completely different. At the time, I was working with mathematical methods within law and Draht was a sociologist.

#00:05:20-9# Rost: At the beginning of the seventies, that's when it started, right? the issue of data protection, that, right? (unintelligible) not as a term, but the problems that you could already see from the '68s, we have a peace movement, we have a women's movement, we have an ecological movement, we have a civil rights movement in general, that was a big pot of emancipation movements, data protection as a small weak - or civil rights still as a small weak plant compared to the pompous feminism debates and peace debates and so on

#00:06:05-1# Podlech: (laughter) Yes, well, it was a bit different for me. When I came to Darmstadt, there was the establishment of a

course in legal and administrative informatics. So Draht wanted me for methodological and university policy reasons, because I represented his line, so to speak, also in the student movement, in the reform movement. But in the meantime, I had started to work with computers. There was a very coincidental reason for this: Böckenförde had a brother who worked for the SPD parliamentary group in Bonn. And IBM, then still in Sindelfingen, had invited some people from Bonn to organize a course in data processing, assembler programming and the like in Sindelfingen. And there was a free place. And Böckenförde knew that I was interested in mathematics - for lawyers it's all one thing or was all one thing, dealing with strange things, mathematical logic, yes calculators and (unintelligible) like that - so he asked me if I would like to attend this course. And then I went to Sindelfingen. That was the beginning of my interest in computers. I was immediately fascinated. It was immediately clear to me that this was something of the future - at that time it was still called cybernetics, the term computer science was only coined later. There were opportunities for the future here, so I should get involved. I didn't do much assembler, but then I learned PL/1. And then I programmed in PL/1.

#00:08:05-0# Rost: Administrative informatics? (unintelligible)

#00:08:06-6# Podlech: That was also decided in the department. And then the business economists went on strike for half a year. They wanted to do it themselves. It was either unscientific or superfluous.

#00:08:28-9# Rost Administrative IT superfluous?

#00:08:28-9# Podlech: Yes. Yes. Wedekind was the great matador. Well, that was the case. And then we were left with data protection, because data protection was now - that was now clear in these debates that had taken place here; I was still in contact with Simitis, Steinmüller, Fiedler, the whole crew - we were called the data protection mafia from the outside, that was the IPA draft - even before the Data Protection Act was passed by the federal government, the Interparliamentary Working Group had already produced a preliminary draft with the help of Simitis and Bohelle, and I had also developed an alternative draft, which was published as a book - so it was also clear that data protection should play an important role in the emerging legal and administrative informatics - which was the goal we had in mind. And I gave lectures on data protection (unintelligible) right from the start.

#00:09:37-4# Krasemann: Do you remember what the content of your first data protection lecture was?

#00:09:41-1# Podlech: Ummm. The data protection laws have - fortunately - not fundamentally changed my concept. Not that they were all entirely good, but - partly because we - I have to speak for the majority - were involved in their design.

#00:10:11-0# Rust: Who is "we"?

#00:10:10-8# Podlech: Yes, the data protection mafia, the most famous one is Simitis. We had - I don't even know who financed it, in case of doubt the federal government - before the Federal Data Protection Act was passed, we had a commission that met in Frankfurt, in which yes - who was all involved? so at least I remember Simitis by name was the head, Steinmüller, probably Fiedler, I was involved as a public law expert, there weren't very many of us, certainly not ten. And Simitis had already worked on the IPA draft - Interparlamentarische Arbeitsgemeinschaft - worked with us. I wasn't there at the time. Steinmüller wrote the big report for the Ministry of the Interior, no, for the Bundestag, it was also printed as a Bundestag printed paper, it wasn't supposed to be published at all, Auernhammer didn't like it so much that he campaigned for it not to be published, but then it was printed as a Bundestag printed paper [but according to the printed paper it was written FOR THE Ministry of the Interior]. So that was the grouping. The idea of the rule of law - suitable, necessary, prohibition of excessiveness - the necessity, this formulation is not an invention of the data protectionists, but is the basis of administrative law: An encroachment on property and freedom - and I now only need to develop this into a triad, encroachment on property, freedom, property and information areas are only lawful from the state's point of view if the encroachment is suitable to achieve a permitted objective - this is where the purpose limitation comes in -, it is necessary - if it can be done in a completely different way, then the encroachment is also unlawful - and the prohibition of excessiveness - to achieve a trivial but permitted objective, to carry out a very serious encroachment is also unlawful under the rule of law. First of all, this has nothing at all to do with data protection, it is quite simply constitutional and administrative law. And that's why we thought and tried to interpret it once the laws were in place.

#00:12:48-1# Rost: What does data protection mean now? What are the specific data protection implications now?

#00:12:54-0# Podlech: Yes, there is also the insight into the role of information. Since I was still interested in history, even though mathematics and the like came along later, I did some research: information plays no role at all in ancient law. I didn't find any regulations about it in either Roman law or medieval law, with the exception of confessional secrecy - I once wrote an essay about that - but that's a different topic, it comes from theology. It's interesting that the most important data protection figures in the discussion about the secrecy of the confessional, such as Thomas Aquinas, are also all there, anonymization and all that. But let's leave that out for now. Information has only really played a role since the issue of copyright came up. So information as an entity protected by civil law, prohibition of defamation, prohibition of libel, that plays a role somehow, but the term does not appear, as far as I have been able to determine, and information is not considered a separate category. And now, all of a sudden, through data processing, through EDP and the considerations on data protection, which came to us from privacy in America, it suddenly becomes clear what a fundamental category information is for human behavior, independent of technology, independent of data protection, simply as a category constituting society - and thus also the individual - these were, so to speak, the considerations that underlie it.

#00:14:45-1# Rost: I would like to ask you about that. When you say "privacy from America", Warren/Brandeis and Kamlah, did they play a role?

#00:14:49-1# Podlech: Yes, yes.

#00:14:50-8# Rost: Back then, that was already noticed?

#00:14:52-2# Podlech: That was noticed. Kamlah's work - I don't even know what it's called now, privacy is in the title - he studied in America and came back and wrote the doctoral thesis. And yes. So it was clear that we had to think about it from a constitutional point of view.

#00:15:10-3# Rust: I have to ask again. The Warren/Brandeis character is "leave me alone, I don't even want to communicate about not wanting to communicate about this", so really a Wild West - big landowner, if you will - who already has trouble just setting up a PO box - as a social approach, so to speak -

#00:15:28-7# Podlech: My Home is my Castle.

#00:15:29-4# Rust: Exactly. And that's one variant. And the other variant is now the discovery that the very basic category of information has not yet been adequately defined in law. That is not necessarily a context of coverage? These are two different

#00:15:43-7# Podlech: No, no. For me, Kamlah was also just - so to speak - the possibility of localization. So there is a problem. It should be dealt with legally - I won't say yet. Yes, if so, where? How? Yes, public law is responsible for that. Leaving it to private law, as was originally done in the United States, in the Anglo-Saxon countries, does not work in Germany. If you, yes, besides, nobody wants it. Back then, when I think of the Bavarian information system, that was a horror vision for us, it would be for us today. The blue Siemens volumes. Doesn't mean anything to you?

#00:16:37-0# Rust: No.

#00:16:37-0# Podlech: Bavarian Information Center - all information networks are brought together, municipal and private, initially organized hierarchically in two strands and brought together in the Bavarian Information Center, which is directly subordinate to the cabinet. If I change an address, then my banks, all my business partners, all the authorities are automatically informed - centrally organized by the Bavarian Information Centre, subordinate to the Cabinet. Incidentally, this was the reason why we began to take very intensive legal policy action, i.e. to push for the Data Protection Act in this way. The Bavarian state government of Siemens did this - these are three famous blue volumes, must have been in the mid-seventies at the latest. So, for heaven's sake, this complete networking of all private areas and all public areas without any consideration of data protection must not be allowed. The only objection at the time when we opposed it was that it wasn't possible. The companies that provided the computers - almost 95% of them IBM - said: No, no, you don't need to be afraid.

That's utopian. That's possible, the files - there was no word processor back then, so only formatted files, and they are all incompatible

#00:18:37-6# Rost: May I put you in a nutshell, please? That is

It was not, let's say, an insight into the separation of functions, even if it was only the separation of powers within the administration, it was not this insight that was decisive, but the impossibility, the operational impossibility, of centralizing this. If it hadn't been so badly organized technically, would it have been implemented?

#00:18:58-9# Podlech: Yes, yes, yes. And the key variable was the standardized federal personal identification number, which the Federal Constitutional Court later said was unconstitutional, not realizing that it was technically impossible, because the function of a standardized federal personal identification number is possible without this number as it was assigned at the time. Steinmüller has proven several times that anything can be a federal (incomprehensible) - from a technical point of view, well, the storage effort is greater and the computing time is greater if I take combinations of properties. I once wrote an essay in the DÖV - Zeitschrift für öffentliches Recht - against the author Auernhammer entitled "Adressenverlage und bundeseinheitliches Personenkennezeichen". That was the situation at the time. And the group that opposed it was very small.

#00:20:09-0# Krasemann: You mentioned the Federal Constitutional Court. That's also a relatively interesting development. It actually all started with Article 2, which we then had in the Basic Law on general freedom of action. How did it continue from there? Or where can you also see a development in the Federal Constitutional Court towards more and more data protection, including the census ruling, which is one of the great monuments (unintelligible) of the Federal Constitutional Court?

#00:20:32-1# Podlech: Yes, so here's another point: since politicians can't be persuaded to do everything we think is necessary voluntarily, so to speak, we have to show them that they have to. So it has to be constitutional. So, according to our constitutional law, the only possibility seemed to me to be privacy - and now I have only taken the topos of Kamlah or Brandeis/Warren and not the Anglo-Saxon position in terms of content - we can only do that with Article 2. And that was the basis. And then I developed a system here and developed it in the first edition of the alternative commentary on the Basic Law. Yes, and then something happened. You can talk about it openly today because everyone involved is dead, except me, that is. Heußner - Heußner, the author of the judgment. Heußner was a judge at the Federal Social Court and was responsible for setting up the social database, everything was set up, everything was planned and small,

but at least at the Federal Social Court. I was quite well acquainted with the constitutional lawyer Hirsch. One day Hirsch called me and said there was a vacancy here, so a federal constitutional judge had to be elected. And Heußner is being discussed, Federal Social Court. I heard you know him. Is he a law-and-order man or is he in favor of freedom? I said he's for freedom. The vote of the Federal Constitutional Court - they are asked for their opinion, they don't decide, but it is against fierce resistance, it was just difficult in Bonn at the time - so Heußner became a federal constitutional judge. So we had, or were the first judge in the Federal Constitutional Court who had any idea that IT could play a role. And then came the constitutional complaint. Yes, of course the other colleagues said that Heußner would be the rapporteur. At that time, the judge was Mr. Hesse, one of the most important constitutional dogmatists we had at the time. Yes, Steinmüller quickly became the representative of the two lawyers who had filed the first constitutional complaint and urged me to take part in the process.

Nah, I said, it's not my cup of tea. I don't love it. But we were at home, constructing the constitutional complaint. And then Heußner called me - and that's why I say the people involved are all dead. Which he probably wasn't allowed to do. And said that what matters in the Senate is that Mr. Hesse is convinced. If the complainants present a construction of Article 2 that convinces Hesse that the constitutional complaints are well-founded, then dot dot dot dot you have to appear in court. I don't know whether I had already sent him my comments at that point, but I had one of the countless complainants instruct me to do so and I sent the comments to the court in my brief. The strange thing is that the court made an internal decision not to cite, i.e. not to show citations, because all the citations came either from complainants or from representatives and none were useful from the other side.

As a result, large passages of my commentary from the commentary on the Basic Law were written out verbatim. This was noticed several times and I then documented what I am currently saying to you in an essay, because the commentary appeared a month or two later, but the court already had the text. And Mr. Hesse was convinced. That was one of the highlights of my academic career, so to speak - the open discussion with Badura, who was the representative of the Federal Government, and I still remember one of my final sentences - I was sitting in front on the left and Badura was sitting in front on the right - and I said - of course I was a bit agitated - "Mr. Badura, I have now provided an interpretation,

on the basis of which the constitutional complaints are justified. Now provide one according to which the reverse is the case." Badura said nothing more. That was the end of the trial. I later said - Mr. Badura is still alive, but that's not an insult - that he had paid to lose. The case was hopeless for us on the other side. Then Heußner did something I admire him for - he outdid us. We all, and I in particular, had always argued on the basis of Article 2 paragraph 1 - free development of the personality. Heußner took a case law from his court and inserted something. The Federal Constitutional Court had declared in a decision on a BGH ruling whether the Basic Law guarantees the general right of personality under civil law - that was, I think, the Soraya insult case or the Herrenreiter case; so these were insult cases that went to the BGH, and then the BGH said that the general right of personality, which the Reichsgericht had always rejected on the basis of the BGB, applies in the sense of Section 823 (1) absolute right, which is to be respected by everyone, but the BGH now said: we take Article 2(1) in conjunction with Article 1(1) that the general right of personality in civil law is an absolute right like property. A constitutional complaint was lodged against this - by some revolver newspaper; I don't know who used the Herrenreiter case as advertising - and the Federal Constitutional Court said that there is nothing constitutionally wrong with this case law of the Federal Court of Justice. And Mr. Heußner took the general right of personality as an intermediate stage. For me, or for us - census law - it didn't matter whether directly or indirectly, the result was the same. But! Now the general right of personality and the right to informational self-determination, which originated with Steinmüller, also applied to the entire civil sector, to the economy. Some people howled when we commented on this ruling for the first time: "Yes, Article 2(1) only applies directly to public authorities - you can't invoke it directly in civil law - but the general right of personality, which the court has now recognized as constitutional, applies between civilians, so every commercial enterprise must respect it. That was our own great achievement, we had prepared everything else.

#00:30:22-1# Podlech: And it's no coincidence that we met from different areas. Simitis always - coming from labor law - took this area. I was a public law expert, I always had the administration in mind. And since I was a 1968er and had the experience of that time, the anthropological basis of my data protection considerations was that of the

The collection of data that citizens in the public eye do not even know is being collected, let alone when it can be used against them, can lead to political engagement suffering or even being pushed in certain directions - not all people are fit for martyrdom or very courageous. A minimum of data protection is a prerequisite for political freedom. And if we now take the GDR parallel system, then it's clear what I mean. And I had more memories of the National Socialist era - I didn't experience it as an adult, I was 15 years old at the end, but I still saw what the pressure was like, and then came the revelations and so on. So that was important for me. The sentence that is also in the court ruling was my main sentence in the lectures: "A social order and the legal system that makes it possible, in which someone no longer knows who, when, what and on what occasion knows about them, is not compatible with our constitution." And I wasn't thinking about advertising and the like back then - the considerations then came from the 80s/90s onwards - the strategy of advertising companies that systematically assert their interests through knowledge of the statistical behavior of citizens. If that had been so clear back then, that would of course have been a reason for me too. That's exactly the criticism of capitalism that was in me to disapprove of it. But that didn't play such a role at the end of the 60s and beginning of the 70s. It was IT and the Internet that made such a development possible in the first place. But back then, the political side was (incomprehensible) to me. And I've often turned around and thought about how, if everything politicians say in public is saved, how it would be with U-turns - well, in Hesse we now have the very latest problem

- I say something and then do something else. What justification is there for correcting the past? I already described this in my commentary at the time as the - ha, what is it called? I think I took the expression from Luhmann - that is, the self-presentation, which also includes corrections. I always have to present my past. Well, if it is completely hidden from the public or from relevant sectors - and here we come to your second topic - then the problem of secrecy does not apply. As early as the 18th century, the founder of the Freemasons described secrecy as one of the most important possibilities of society. Well, that was the problem back then - Freemasons were persecuted back then, for example in Prussia before Frederick the Great. So, those were my thoughts. I have to have a way of representing my own past. But if I can never know who knows what, I can't represent my past.

#00:35:05-2# Podlech: I began to study Luhmann intensively in Heidelberg. Böckenförde knew Luhmann from somewhere, who was a harmless councillor in Speyer at the time and had already written important books, but they remained unread, at least among lawyers. Well, the "Grundrechte" then probably, by then I was already in Heidelberg. Or "Functions of Formal Systems". I was mainly fascinated by this in my work on equality, which was largely based on this construction. So anyway, Luhmann, I read those things. I thought his book on fundamental rights was excellent. That then formed the basis of my work on conscience. I got to know him personally later, when he was in Bielefeld. From a certain point onwards, I read the other works - Luhmann was constantly working and the works became more and more voluminous - at some point I didn't like the new ones so much (unintelligible) - I have to admit that I didn't read the "Theory of Society". But the early stuff by Luhmann very much so. And there, of course, the problem of roles, which goes back to Dahrendorf, played a very big role - I don't know whether Luhmann himself called it that. He wrote a little book about roles and introduced this term into sociology. And what you have just outlined - people hardly ever live as people, but always in some kind of communicative role - I am active at work, I am active at home, in the family, I am a lover, I am a musician, I go to the opera - whenever I fulfill a role, I reveal information about myself. And the wandering of information in different role systems is the main problem. Let's take privacy again - I think that's because it used to be the paradigm for jurisprudence, and privacy is the sexual sphere for bourgeois society. Yes, talking about it in certain situations is completely unproblematic: men's jokes, in the past in men's meetings at the regulars' table, yes, that's not a problem. Of course, a 19th century citizen would never have uttered the same phrase in front of his wife. If now or then or nowadays a sentence that is completely unproblematic in a certain situation - a canteen conversation between employees - this information suddenly comes up with the personnel manager, for example about health problems that you recently had, you can briefly report this to a colleague, but it sounds completely different to the personnel manager. In other words, the migration of information from role system to role system is the problem with the ability to present oneself. In my opinion - and this goes back to Luhmann - the self-presentation, in which I become a person, which I am, is not something I am ontologically, so to speak, at birth - Aristotle and Plato would certainly have assumed this, but I certainly don't assume it anthropologically.

You become a person in communication relationships throughout your entire life, whereby you want to remain identical somewhere, but changes and even ruptures also occur. These are conversions - in the history of saints, in the history of religion, we have great ones, whether we take Paul or Mohammed. With all great religious founders - Buddha - there is a moment when his self-portrayal changes. So, you are what you are at that moment only through stages of communication. Sartre described this - my first philosophical work - you change "pour soit" into "en soit". And with death, the totality of who I am - perhaps in all its disintegrations - is finally fixed, so to speak. I can no longer do anything about it. Others can still change it. So that was my basic philosophical or anthropological stance when discussing individual data protection problems.

#00:40:51-9# Rost: What functions does data protection have then? How does data protection come into play? What do you observe as a data protection officer? What is the observational position of data protection? What social function does data protection have?

#00:41:03-9# Podlech: First of all, after what I just said about my anthropology, to prevent information from moving from one role system to another against my will. I am not the master of my information in the sense that I am the owner. This position has also been advocated. But the disclosure of information, what I process internally as information here [points to head], is a different issue, whether that is completely irrelevant, that is not the issue now. In other words, we are not normally dealing with information, but with information processes, i.e. communication. So it's clear that I can't be its owner. In addition, there is information about me that I am not even the owner of. Suppose our conversation here turns out to be disastrous. And you go home and tell your employer or whoever is paying you that the interview with Podlech was completely useless. That is information about me, personal data, or rather: personal information that I am not at all in control of, up to the legal limit of defamation or insult.

#00:42:41-8# Krasemann: Are there also reasons, or would you completely reject the idea that data protection law, modern data protection law should perhaps even go in the direction of protecting people from themselves? Or should that not be in there at all? I'm thinking, for example, of something that is now very modern, such as social networks, where young people also disclose a lot of data about themselves and such networks then

are networked with each other, where the individual is quite generous with his data, but perhaps cannot really monitor what is happening there, so perhaps does not approach it too naively, and therefore perhaps also has his own need for protection - just like perhaps a consumer, where even the stupidest or a rather stupid consumer is also protected. Should we have the same with data protection?

#00:43:21-4# Podlech: To some extent, I would say no. I'm a liberal person from home, so to speak. It's not the state's job to protect me from myself. In my comments, this is controversial when it comes to suicide and things like that. I deny the state the right to intervene here. If a person wants to - for me this is a police law problem - the danger that a suicide or a killing on demand or help through medication and so on, of course, statistically gives the possibility of concealing crimes. And that is a problem under police law. So none of this is unproblematic. But from an anthropological point of view, so to speak, I deny the state the right to say anything about it. Other cultures have not done so - that is a consequence of our Christian past. Monotheistic religions have all held or still hold the position that only God is Lord, and the state took its place at the beginning of the modern era when the church was detached from this problem. And I deeply disapprove of this act and have also explained this in my comments on Article 1 and Article 2, up to the limits of what our constitution allows. And now you suddenly come up with the more harmless problem - not killing or suicide - with protection on the Internet or yes. I would certainly have reacted just as vehemently ten years ago, or a few years ago, and said: under no circumstances! From what I now read in the media - and that's as far as my knowledge goes - I can at least see that there is a problem here. The protected good would first have to be formulated. The state may only intervene if a protected good, a constitutionally permitted protected good, is violated or if there is a significant threat of violation.

#00:45:49-8# Krasemann: Would the census verdict have been decided the same way today, if you look at it, so to speak, if you continue the thoughts from just now, back then people were very upset about what the state actually asked relatively harmless questions from today's point of view, and today, as I said, most people are much more generous with their very intimate information about themselves, which goes far beyond what they wanted to know at the time - how many people are there?

live there, how far the commute is now.

#00:46:19-3# Podlech: That leads back to the topic you [points to rust] just mentioned. The sticking point was that the statistical survey is unproblematic. It is anonymized. Citizens have to put up with that. There are reasonable reasons why the state needs the information. This was already predetermined in the microcensus ruling. The insidious thing about the census law was that, for cost reasons, the federal states demanded that this data, which was collected in accordance with federal law and in conformity with the EC, was available to them. The first link, so to speak, was the perhaps still justifiable of the residents' registration offices. The fact that the data goes to the residents' registration office, well, that was called a problem - misappropriation - but there may still be a justification. But in Baden-Württemberg, for example, residents' registration offices were police authorities. And so the data was accessible to the entire police force. And Ms. Leutze in particular has constructed wonderful examples of how this can work. And it was clear to us that this was illegal! In other words, the transfer of information from a large-scale social, in this case legally regulated area, statistics, to the area of police, danger prevention and criminal prosecution, in an uncontrolled manner, but in a pack, so to speak. That was the main reason why the court declared the law unconstitutional (unintelligible). The other thing that was in there was Heußner and perhaps Hesse, who wanted to take the opportunity to tie things up, so to speak. And Bendas. That was also one of our hopes - not because of personal relationships with Benda - but what was known about him was that it was his last major judgment that he signed as president. He wanted to set another example. Yes, and in the writings - of course we also researched everything that Benda had published academically - that wasn't so bad. If I remember correctly today, Benda had not explicitly published articles on data protection law, but in his writings he had certainly taken up the topic in the vagueness that was discussed at the time and formulated it in line with the later ruling.

#00:49:31-2# Krasemann: What were the consequences of the Federal Constitutional Court's ruling on the census? So for you personally, were your opportunities then greater here in Darmstadt? Did the criticism that people might have had about offering something like this decrease? And how was it generally received? Was it really recognized that it was a very far-reaching and particularly important decision?

of the Federal Constitutional Court?

#00:50:01-1# Podlech: Yes, the last question must definitely be answered in the affirmative. There have been few judgments that have generated such a public response at the time, from angry outcry to positive statements. It didn't affect my personal opportunities, uhh, it didn't improve them. (Laughter) If I'm honest: As a rule, I don't really care about my name and my public position. I say that without self-congratulation or anything. But the fact that I wasn't quoted in the judgment, of all things, has changed me somewhat. If all my colleagues, who of course have now studied the judgment in detail, had repeatedly found my name in the numerous citations, that would have made me a little happy at the time: the Podlech, who was outside and had nothing at all to do with the jurisprudence of law faculties, that, well, okay. But that's just the way it is. My clientele, my field, in which I was very well respected, was social insurance. At that time, my name was quite extensive in the health insurance sector, not so extensive in the pension insurance sector, and I only did one major expert opinion for the agricultural employers' liability insurance association, otherwise I assessed most of the large computer systems. Especially for the pilot health insurance companies. I was able to accompany them completely. The AOK Lindau was the first to use computers at all. And even then, the problem of what was then called data protection started right away. Long before the laws. Because it's clear, of course, that in the health insurance sector, it gets on people's nerves. So.

And then, of course, the ruling was accepted, at least in the area in which I was able to work. And since the health insurance companies or health insurance associations wanted something new and there was always the threat of an objection from the data protection officer, Bull didn't agree with some things, and I had very heated arguments with Bull, who in my opinion had made very problematic decisions, but. That provided the background for my work. When I told a pilot health insurance company that this and that was not possible, they didn't do it either. I always demanded to have full insight. I don't know what it's like for you today. Being able to call any employee at any time or visit them in person without needing the manager's permission first. A complete description of all this. As part of a major project, I took the trouble to write down the entire data stock of the cash register in terms of description, legal basis, purpose, necessity and so on. I am convinced that there is not a single person in any large authority who is able to describe the legal basis for all the data.

information processes. But that should be the case.

#00:54:28-2# Rost: Yes. We demand that too.

#00:54:30-5# Podlech: I had hoped that this book would, on the one hand, provide a

#00:54:34-1# Rust: Which book?

#00:54:35-2# Podlech: "Information budget of the health insurance companies". I went to the limits of interpretation. I admit that quite openly. It was a pilot health insurance fund that was monitoring the activities of SHI-accredited physicians - a lot of embezzlement, incorrect medication, misdiagnoses and all sorts of things had been uncovered - and the fund said to itself: We are a body that can monitor this, but we have to have certain information - SGB V and SGB IX, in other words both books. And I just interpreted them and so on. The book had no consequences. I think it was already under Bull's successor. And the work that went into it, with the health insurance fund, to really find out all the purposes that it has to pursue according to the law, and there are some very strange things - cross-border medical traffic with Holland or something, that's regulated in some regulations, EU law plays a role there - to really write that down completely and describe all the files that this health insurance fund uses. The book (unintelligible) is a diagram of how a larger authority deals with its data. I then have a matrix for each file - there is such a matrix, what may be compared with which file for which reason - and then the problem within the authority - here we are back to the division - I would like to say one more sentence about this - how do I ensure this organizationally? A larger health insurance fund is not a large company like the Bundesanstalt für Angestelltenversicherung [Federal Insurance Institution for Salaried Employees, since 2005: Deutsche Rentenversicherung Bund] - which is, I believe, the largest authority in the world after the Pentagon - everyone says that it is opaque. It's no longer controllable, neither in terms of organizational law nor data protection law, what goes on in there. But well, that's another topic. I once explained in a paper how large an organizational authority can be from a data protection point of view. In my opinion, the Federal Institute for Employee Insurance completely exceeds this limit. That is not acceptable.

#00:57:21-3# Rust: That's also a question of size?

#00:57:23-1# Podlech: It's a question of size. A size and the amount of data and that's

#00:57:30-9# Rost: Better EDP wouldn't - Is transparency possible?

#00:57:36-0# Podlech: I can't answer that question with a simple yes or no. Maybe we can come back to that at the end.

#00:57:42-9# Podlech: In any case, there must also be divisions in such an authority. For example, in the agricultural system [the system of the Landwirtschaftliche BG] - all branches of insurance are in one hand, which is a problem as a result.

And the branch of the agricultural insurance company in a town was usually the farmers' association, the representative in that town. So. The calculation of the contributions is based on hectares and the type of use of the land. Now imagine the representative of the insurance company in a town, who is also the representative of the farmers' association and therefore has an insight into all types of use of agricultural land in his area.

#00:58:43-3# Podlech: Including all health insurance, all old-age insurance, which is somewhat different from normal pension insurance. So that's the problem at the bottom. And then at the top, management. They can take over everything. I don't remember exactly how I solved the problem downstairs, but upstairs I only have the authorities' template (incomprehensible). With the state of the computers at that time - the PCs, it wasn't all like that yet - he wasn't allowed to just go into the computer, because under administrative law he was allowed to see everything, including the activities of his individual employees - how often does someone go into the system, there or there or there, and what does he retrieve? In other words, I have always also assessed the organizational law and organizational sociological structure of the authority concerned in such reports, because this is for the data protection law side - well, you as a practitioner, you understand this immediately - but make it clear to a head of authority that he is not allowed to handle any information available in his authority in any way. I don't know whether this has been complied with. In any case, I only explained it on the condition that it was lawful.

#01:00:25-6# Rost: We wanted to continue talking about the separation of functions within organizations.

#01:00:31-2# Podlech: Yes. Whereby the biggest organizational framework is the state. For me, the state is the organization. The state has no members, apart from the members of its authorities. The other thing I have always called the community. We are the community of Germany. You have to make a legal distinction. The apparatus of the authorities - that is the state, so to speak - the state is (unintelligible), you can use different terms - the state in the sense of international law is something else again. So that's it. And in a federal polity, it is of course a particular problem. But let's just take the state, the federal government or a federal state. Then the principle of the unity of state authority applies in German constitutional and administrative law. And when I drafted my alternative bill on data protection law - because I didn't like the Auernhammer bill - I had reservations. No, from an information point of view, this cannot be upheld. The idea at the time was that information transmission was only possible via the postal service, which had a monopoly and was a public authority, telephone lines and the other lines were already being planned, but at the time they were not yet a reality, fiber optics or something. I don't think satellites played a role at the beginning of the 1970s - at least not in my thinking. So, on the one hand, Swiss Post as the technical substrate of the new technical possibilities and the Ministry of the Interior as the authority that is obliged by its mandate to also use information at the expense of citizens. My thought is always that there are tasks that serve legitimate purposes. That is the problem with data protection: if we disregard crime, which fortunately is less common in the public sector than in civil law, there is actually no misuse of data that cannot serve a justified purpose in another situation. That's the problem. That's the problem. And in this situation, if that is the case, the Ministry of the Interior, via the police and secret services, must interfere with citizens' information in order to fulfill its tasks. This is regulated in detail by administrative law. Yes, how do you put the brakes on that? This is the old idea - I mentioned the Freemasons earlier - the idea that has preoccupied us since Montesquieu: uncontrolled power tends to overstep or not apply its own rules according to laws that are, so to speak, inherent within it. Only controlled power can be rule-governed power. This is the big problem with the secret services, and perhaps we don't want to go into this in depth now as a special problem. Secret services are always a foreign body in constitutional states. Not because they are supposed to fulfill unauthorized purposes, but because they are uncontrolled. And the little control up there, in the Federal Chancellery, well. So, if the information activities of the normal authorities - the paradigm of the Ministry of the Interior - police authority -

Regulatory authority - if they are to be forced to comply with the rules, whereby this does not have to be primarily a problem of the top, the police authority in Frankfurt wants to pursue crime, make it impossible, drug trafficking, trafficking in women and - everything is legitimate and must be. Of course, individual officers may find the rules imposed on them from outside (incomprehensible) an obstacle. It's also completely natural. There is a psychological conflict here. So there must be bodies that are responsible for compliance. And when it comes to the transmission and control of information, if it's done technically, that's the postal service - under the legal and ownership conditions of the time. So, I replaced the principle of the unity of state authority with the principle of competing - I don't think I called it the principle of competing authorities - but so (unintelligible). One of Swiss Post's tasks is to use its technical capabilities to ensure that unauthorized conduct by the secret services and the police, such as telephone tapping, is made impossible wherever possible. Because only the master of the technical substrate of the communication system is in a position to do this. Those affected, the citizens, the superiors, the Minister of the Interior - At best, he doesn't even know what's going on down there - they're not. In other words, the segmentation of these large areas must first be integrated into the unity of state power - that is one of the minimum requirements. You have no idea how my colleagues jumped all over me when I published that.

#01:06:48-7# Rust: Yes.

#01:06:49-0# Podlech: Yes?

#01:06:49-6# Rust: You suspect that?

#01:06:50-5# Podlech: You can guess that now. But only you, because you're probably somehow involved in the problem. For normal lawyers, it's still a mortal sin against the state, so to speak.

#01:07:05-8# Rost: I'd like to put it in theoretical terms once again. Is transparency possible? Does observability of the systems have to be established? Or does it, on the other hand, create a (unintelligible) of intransparency?

#01:07:15-9# Podlech: For which sector? In my reports, I always distinguished between programs and data, which is sometimes problematic in theory, but in practice you can deal with it. I tried to get my clients to explain to me what the systems, i.e. the programs, can do. For example in

of the work there [see above], which types of files can be compared with each other and with which results. I guess there are problems there. It's not possible to say what programs of a certain complexity do and don't do, or can or can't do. And when it comes to large systems like Windows or something like that, the manufacturers can no longer see through everything that's in there. In the beginning, I had planned to write down a precise description for files that are used in the public domain, so that an outsider, such as a non-technically educated data protection officer, can make sure how they work. I guess that's no longer possible.

#01:08:51-2# Rost: Mr. Roßnagel talks about the diffusion of responsibility. I understand this to mean that responsibility can no longer be assigned to certain operations.

#01:09:02-8# Podlech: Right! With programs, it's probably not worth starting to test them when they're already in operation or through an outside agency to see what they can or can't do. Of course, I can test a lot of things, but the time and the situation I put them in, and then I still know that there will be leftovers if necessary. So it's probably not worth it at all, this kind of program transparency. When it comes to the transparency of files, i.e. data assigned to individuals in information systems, I would assume that transparency is technically and organizationally at a good limit (unintelligible). You have to realize in the legal field, which lawyers don't normally do, that I can only ever guarantee compliance with legal rules to a certain degree. Killing is prohibited. It has to be reduced to a socially acceptable level, whereby the socially acceptable level varies greatly from person to person. The socially acceptable remainder in car traffic is very different from that of terrorists. And it is different for terrorists in Germany than for terrorists in England. What if we were to take our German Autumn, with the Buback story, in which I was also involved, not as a perpetrator, but as a terrorist. In the time of Northern Ireland, how many murders happened back then and what kind of challenge to the British community did that cause and how did the much smaller number of deaths? Every single dead person, so not counting dead people, that's not the issue. But if we go from socially acceptable remainders to bans, I would assume that transparency could, if everyone wants it, be pushed to a socially acceptable undecipherable remainder. But we are nowhere near that limit! And probably nobody wants that! Except you! Your authorities!

#01:11:40-2# Krasemann: Because you've already mentioned it twice: In what way were you involved in German Autumn, or Baader-Meinhof?

#01:11:47-6# Podlech: Firstly, through my colleagues. My closest colleague was Azzola. Azzola was Mrs. Meinhof's lawyer and later, after her death, the lawyer for personal matters, not for representing Mrs. - ha, what was the name of the last one who committed suicide - Mrs. Ensslin, yes. As a result, our - we had an office partnership, a secretarial partnership, and that was - that was an exciting time. Then I was involved with the authorities for a long time on another strand, where I was lucky, my first task as the legal prorektor was the patients' collective. In Heidelberg, this was a group of left-wing students under a doctor, assistants, in the psychiatric clinic. And they had some new ideas. This doctor had been dismissed by his boss a few days before I became prorektor. So he could no longer treat them. He didn't have a health insurance license, he just (unintelligible) like that. My first task was to resolve this problem, because on the one hand the clinic had not acted correctly, because you can't simply cut psychiatric relationships. You have to transfer a patient in a critical situation. If you suddenly leave them on their own in the middle of treatment, it's never safe - so that was malpractice. They saw that too and supported me in everything, if I just left the clinic before - well, that was my job. You can guess what (unintelligible). That was my first relationship with health insurance companies again. With health insurance companies, that's when I bought my RVO. Like that. And then they became more and more aggressive, and eventually we stopped supporting them. What I didn't know was that the group had split and one part had already gone underground.

#01:14:43-2# Rost: Which group do you mean now?

#01:14:45-0# Podlech: From the patient collective. They were absorbed into the Baader-Meinhof group. But at that time - I think we're now around 71, 70/71 - it wasn't yet well organized. I don't know when Mrs. Meinhof's arson attack at Kaufhof took place. But it was the beginning of the hot fall, which (unintelligible) wasn't just fall. And it was in this context that I once had a telephone conversation - with someone - and in this context the keyword "arson attack" or something like that must have come up somehow. I couldn't remember the conversation when I was questioned. I probably didn't remember the content of the conversation, they wanted rooms or this or that. Suddenly there was the accusation that I had

not to have reported the arson attack. And even the attempt is punishable. And of course I was in trouble. Fortunately, nothing happened. I also don't have a transcript of the conversation, uhh. But it was immediately clear that the conversations from - I was still in Heidelberg at the time - the conversations would be tapped. And in, that they were then intercepted here in Darmstadt, when Azzola - that's unauthorized, but [derogatory hand gesture]. Just now we didn't get to a topic. Since I have said this publicly in a Bundestag committee, I can also say it here: one motive for my data protection activities of restricting the ability of authorities to obtain or retain information is that I am convinced that the safeguards of the rule of law prevail in dicey situations. I can give you several examples of this from my own experience. This is the issue we just discussed. When police authorities have to pursue important, terrible things, such as the Buback murder, they are prepared to do things that are not permitted under the rule of law. And they have done so. Until I used a blatant formulation. A CDU member of parliament asked me this question in the Bundestag committee.

I don't remember whether I was appointed as an expert by the SPD or the Greens at the time. He asked me why I was so skeptical about leaving these options to the authorities. And I asked him: Do you really want me to tell you that now? He said: Yes. And I replied: Because in critical situations, even in the Federal Republic of Germany, a partial coup d'état is possible and has happened. You can imagine what was going on in the committee. Firstly, he wanted to know which example I was referring to. I said: Yes. I call it a partial coup d'état - fortunately, I always define it that way, it's my business, so when I use such an expression, I know what I mean - I call it a partial coup d'état when a legitimate state organ is able and willing to fulfil its legal duties and is deliberately prevented from doing so by another state organ. And I will give you the Baader-Meinhof trial as an example. After the Buback murder, a defense lawyer was granted permission to visit the prisoner by the investigating judge with sole jurisdiction at the Federal Court of Justice. This lawyer was prevented from visiting his prisoner in Stammheim at the gate on the instructions of the Minister of the Interior, at the request of the Federal Minister of the Interior. In a constitutional state, I call that a partial coup d'état.

#01:19:46-3# Krasemann: And what were the reactions to that?

#01:19:48-3# Podlech: Interruption of the session. Motion by the CDU to exclude me now and forever from acting as an expert for the German Bundestag. The SPD and the Greens have -

probably also the FDP - voted against. The meeting was reopened. And I continued to present my expert opinion.

#01:20:11-6# Podlech: So that's why I'm skeptical. If you give them too much information - of course, I'm putting it in parallel now as a retiree, but as a citizen, what Schäuble's proposals are now - I think some of them are out of the question, with the shooting down, that's nothing real, it doesn't work that way. If it does, it works differently. And I also understand that. Under certain circumstances, you have to accept a conviction, like our case in Frankfurt - the kidnapping. The kidnapped person - well, he was already dead, but - the kidnapped person is threatened with death. Threat of torture to the kidnapper. Of course, my commentary on Article 1: the threat of torture is illegal and unconstitutional. If the police officer does it anyway, then I can understand that. But he must know, firstly, that it is and remains unlawful - and not by any construction - there is no weighing of interests in Article 1. And he must accept the consequences for reasons of conscience - that has happened in history. There are problems that cannot be solved legally - as a problem. However, the constitution is clear and unbreakable on this point, and must not be subject to legal constructions. But anyone who takes this upon themselves, knowing what they are doing and what will happen to them, then I can only say in the abstract - regardless of the situation - hats off.

#01:22:14-3# Podlech: So I don't want to condemn from the outset all the members of the authorities who went to the limit or even beyond. As an outsider, the cabinet that met under Schmidt probably couldn't even have guessed - Schmidt spoke about it later - and this cabinet decision is the basis for what I've just mentioned as an example, and after a few days the Contact Blocking Act was passed as law. Only at that moment it wasn't passed. And the behavior was unlawful. So I don't want to morally condemn the prison warden, nor do I just want to show - and the Americans have given us plenty of examples in recent years - what happened on September 11th is horrible - so I can understand some reactions. But it shouldn't be. And then incorrect information processes and all the files - I'm simply afraid of that. I've often thought about what would have happened under Hitler if we had the files in our authorities that we have today. Well, fortunately there's no danger of us getting a Hitler situation - but I often think about it. I'm still from that era. And that the rule of law prevents it? In critical situations, the rule of law can blow. And you also have to think about that when you're building large-scale systems. And that includes the

EDP.

#01:24:07-0# Rost: Are there any important ideas that we haven't mentioned?

#01:24:12-2# Podlech: No, not really. In the area of public authorities - I think that was the second section - the Federal Data Protection Act at the time - and I can no longer judge the current situation - with interpretation and we provided, Simitis in his commentary, I then broke it down for the social sector in the expert opinion, was easy to apply. This triad - suitability, necessity, purpose limitation - if they are adhered to - the problem lies in adhering to these restrictions. And I would have liked to see a discussion about the case law on necessity in particular. The administrative case law on the prohibition of excessiveness is almost confusing, so it's chopped up, it exists in all areas.

But the necessity of information processes - parallel information that is more harmless, so to speak, and allows the same goal to be achieved - is that seriously examined anywhere? This kind of discussion with the authorities - it is of course clear that an authority that wants something, in some new area or an old one, collects it, uses the information that is always (unintelligible), and if you can now get it better via EDP or via a transmission, yes, that's fine - and the goal is usually also permitted, even very desirable. But are the alternatives seriously being discussed? Can I achieve the same goal in a different way? There is no legal discussion about this, I don't know of any.

Well, as I said, I haven't been following all this for the last ten years anyway. So that's not the fault of the law. I would have liked a different law back then. But today, when I think about it, my draft is too centralized. I haven't read it for years. So I wouldn't say today: take my draft instead of the Auernhammer draft. And especially after the census ruling, it was revised again. It's clear to me that it needs urgent amendment today. But again, I don't know enough about the technical substrate. When the Internet appeared, I gave up my lectures in this field.

#01:27:01-4# Rost: What can you say about the future of data protection?

#01:27:07-5# Podlech: [long pause] Well. [pause] You see, I would put it back to the two - The question would probably have to be for the

The questions in the area of the economy and the behavior of citizens towards each other are answered differently than in the area of public law. In the area of public law, it is actually still simple in principle. The normal tasks remain the same as before. Urgent new matters are being added. In my old area, epidemiology, i.e. in the medical field, the new health card. These are problems that can be mastered. There is the old problem: the laws are made for the permitted area with the desired objectives. How do I prevent these files and their transmission and use options from being used for other purposes? This brings us back to the topic we just discussed. Of course, it would be best if this could be largely mechanized. That's not entirely possible, but you can certainly do more than before. Things are more difficult in the new areas - keyword Schäuble. The (unintelligible) police as hackers in my computer. So me, I waver back and forth. I've never been someone who wants to prevent technology or opportunities, but only abuse. I can imagine that there are situations where you could prevent the worst if you were in a computer. I'm not disputing that. But how do you prevent misuse, firstly of the technical system that is being set up - because that is still supposed to be a bit problematic, but the engineers manage it. That's the wonderful thing you learn at a technical university. They never say never, but if something doesn't work, they work on making it work. That's an attitude that always impressed me as a lawyer. Lawyers give up too often. Engineers never give up, well, practically, it can be too expensive or something. So then there's competence. What about competence? That brings us back to the topic we just mentioned. Secret services are the worst authorities in this respect because they cannot be controlled.

Judges, yes, but do they even apply for a judge? And the head of the authorities never finds out. He doesn't even want to know. He would do well to do so. At most, he knows or suspects that they're doing something. And if he finds out something, like the attack at the station, well, that was prevented due to a technical error. It didn't work. But suppose you can prevent something like that by illegally intercepting information. Are you sure that will never happen? [Pause] Without the judge? [Pause] So, we don't need to answer the question. That's my problem. In Baader-Meinhof's time, I saw that the police were also used for other purposes. How left-wing communities, which had always been on the radar of some authorities, were searched after only an hour, after it had not yet been in the public eye, only on the police ticker.

#01:31:19-5# Rost: OK. Now data protection in the private sector.

#01:31:27-3# Podlech: [long pause] I would like to see sociological studies, empirical studies on why people disclose things and where the dangers lie. If I think about myself, for example - that's also a general (unintelligible) - if I have nothing (unintelligible), you can know a lot. Like this. When I think about it, there's not much about me that I wouldn't keep secret. But I can't know at all what - let's limit ourselves to commercial enterprises - what they actually do and whether there is any impairment on my part. That's not so problematic for me either: I don't buy much, apart from books. That means I'm not very tempted by advertising. Where are the dangers? What is the influence on young people? I don't know if there are any such studies - that's why you're asking me into an empty room, so to speak. I only suspect that there are considerable problems here. That companies today have information that they are not allowed to have under the Federal Data Protection Act and use it for purposes that are already not approved by the current law - which is relatively vague in the private sector - but there is no authority at all that is effectively able to control this in terms of its apparatus. When I was still active, the regional council here had a head of the office, a lawyer and a technician. The regional council here is one of the largest in Germany - it covers the entire Rhine-Main region. Yes, let these three poor fellows - forgive me for calling them that - control these large corporations here in this area.

That's all nonsense! In my opinion, there are dangers, but I can't name them. And that's where I would again answer your question by saying that you can't solve the problem manually, as the Austrians would say. How big should the authority be here to examine the Rhine-Main area for correct behavior? From the banks to God knows where. It would also be necessary to try to use the computers more as an aid to their own abuse. [The correct term here should probably be: as an aid against their own abuse] That was always my idea, hence the research project back then, only in the private sector I don't know the substrate to make a suggestion. But I don't see any other solution.

#01:34:49-4# END, then the credits roll