Note — Ways of Making You Talk: Germany's Judicial Determinations that the Executive Must Answer Parliamentary Questions Properly

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Abstract

Information is the lifeblood of government and it is also the lifeblood of governmental accountability. In Australia, insufficient enforcement mechanisms mean that the executive often gets away with not providing information to Parliament which it is legally obliged to provide and has thus impoverished public debate and thwarted accountability. In Germany, the Federal Constitutional Court has stepped into the breach and given itself the power to determine when refusal of information by the executive is justified. Case law has developed on the topic, the system has been generally accepted and it has enhanced accountability. However, there is one major drawback: the practical one of delay in procuring a decision of the Court.

I INTRODUCTION

It hardly needs to be demonstrated that enforcing the executive's accountability to Parliament, and thus the public, is one of the biggest challenges to constitutionalism in all manner of countries, nor that the provision of information by the executive is extremely important in the process of holding it to account. While Parliaments in the Westminster tradition may possess theoretically impressive powers to hold the executive to account, in practice the domination by the executive of at least the lower House too often means that parliamentary powers remain unused even in egregious cases of refusal by the executive to co-operate with parliamentary investigations and where there is no real legal or other argument (such as public interest immunity or personal privacy) on the executive's side.

In Australia such issues have been a constant apple of discord — mostly, if not wholly in relation to demands for information from upper Houses (whether documents or witnesses). While formal responses, at least, are invariably given to questions, far too often governments have declared

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themselves immune from answering questions or complying with parliamentary orders for information on the basis of claims of public interest immunity in general or Cabinet or commercial confidentiality in particular. The executive, having declared themselves the winner on such a basis, have thereafter essentially refused to discuss the matter further and dared the upper House to do something about it.

It would scarcely be possible here even to survey all the cases that have arisen, but three recent outstanding cases will give a flavour of the acrimony that such questions can produce.[1] In 2016 in Victoria, the matter escalated beyond the limits of constitutional propriety: after a government minister was suspended from the upper House for six months for refusing to provide documents, the government struck back by refusing to allow the holding of a joint sitting of Parliament to fill a casual vacancy in the Opposition's ranks in the Legislative Council.[2] Tasmania saw a long-running controversy relating to documents concerning the sale of the Tamar Valley Power Station in 2017, with an inconclusive result: the Legislative Council contented itself with calling for an independent arbiter to be appointed to adjudicate on the claim of privilege or confidentiality and took no further action.[3] In New South Wales in June 2018, another exercise in brinkmanship occurred: after a government member of the Legislative Council crossed the floor to support an order for the production of documents which the government had long resisted and sanctions against the leader of the government in the Legislative Council including suspension for non-compliance were then mooted, the government gave in at virtually the last minute and provided the documents, some redacted or on a confidential, not-for-publication basis only.[4] This possibly averted '[a] constitutional crisis and landmark litigation'.[5] In Western Australia the Auditor-General, acting under s 82 of the *Financial Management Act 2006*

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1 References to further cases may be found in, for example, Anne Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23(1) *Australasian Parliamentary Review* 257; Anthony Walsh, 'Orders for Documents: An Examination of the Powers of the Legislative Council of Victoria' (2010) 25(1) *Australasian Parliamentary Review* 193. On ministerial advisers, see most recently Lorraine Finlay, 'The McMullan Principle: Ministerial Advisors & Parliamentary Committees' (2016) 35(1) *University of Tasmania Law Review* 69.

2 Nick Economou, 'Political Chronicles — Victoria, January to June 2016' (2016) 62 *Australian Journal of Politics and History* 620, 621f; Nick Economou, 'Political Chronicles — Victoria, July to December 2016' (2017) 63 *Australian Journal of Politics and History* 297, 300. Greg Taylor, 'Victoria's Parliament and Constitution: The Bracks/Brumby Legacy' (2016) 6(1) *Victoria University Law and Justice* Journal 36, 42.

3 Tasmania, *Parliamentary Debates*, Legislative Council, 23 May 2017, 9–28. According to Votes & Proceedings of the Legislative Council, 15 August 2017, 895, a letter was provided by the Treasurer in response to the debate, but it does not appear to be on the public record.

4 New South Wales, *Parliamentary Debates*, Legislative Council, 5 June 2018, 9–12, 23–41; 6 June 2018, 1 (and see subsequent questions on the same day); 19 June 2018, 5, 65.

5 David Clune, 'New South Wales July to December 2017 (Political Chronicles)' (2018) 64 *Australian Journal of Politics and History* 662, 663.

(WA) and s 24(2)(c) of the *Auditor-General Act 2006* (WA), regularly reports to Parliament that the government has wrongly refused parliamentary demands for information, although the effectiveness of this procedure both politically and in terms of ensuring that the information is actually provided would need to be the subject of further research.[6]

In Germany, however, the Federal Constitutional Court has developed a doctrine which enables it to declare, at the suit of individual members of the *Bundestag*, that the executive's answers to parliamentarians' questions seeking information about government activities are insufficient and/or that the alleged need for secrecy about certain governmental activities does not outweigh Parliament's rights to seek information. Thus, the Court has somewhat strengthened the hand of the *Bundestag* against the executive and made a substantial contribution towards keeping the executive accountable. At the same time, the Court is aware of the fact that not every piece of information in the government's possession is suited for publication and has had to make difficult decisions in individual cases.[7]

Paradoxically, in developing the doctrine under discussion here the German legislature has been aided by the lack of a full-blown doctrine of parliamentary sovereignty. In most Commonwealth countries, Parliament possesses an array of means of enforcing its demands for information which look impressive, not to say intimidating on paper — powers available often include the power to imprison at the discretion of the chamber — but the powers available are too often unused in practice because of political realities. Most obviously, there is little point in an appeal by the Opposition to Parliament's powers in a House dominated by the executive's supporters. Thus, suspension of ministers in lower Houses — where most ministers sit — is usually practically unavailable, the sanction of imprisonment seems too extreme, and a censure motion in an upper House can be safely ignored. Yet because Parliament is expected to be its own enforcer and has the theoretical powers needed for that purpose, the courts will not come to its aid and are reluctant even to declare for the guidance of parliamentarians what the law requires, let alone lend their aid to its enforcement.[8] It is otherwise in Germany, as we shall see.

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6 See, for one brief case study, Alex Hickman, 'The Western Australian parliament's relationship with the executive' (2017) 32(2) *Australasian Parliamentary Review* 39, 47–50.

7 Comparable doctrines have been developed in Germany at State level but reasons of space do not permit their consideration here. See, eg, Jürgen Lennartz and Günther Kiefer, „Parlamentarische Anfrangen im Spannungsfeld von Regierungskontrolle und Geheimhaltungsinteressen" DöV 2006, 185; Hans-Heinrich Trute, „Parlamentarische Kontrolle in einem veränderten Umfeld — am Beispiel der Informationsrechte der Abgeordneten" in Verfassungsgerichte der Länder Brandenburg et al (eds), *20 Jahre Verfassungsgerichtsbarkeit in den neuen Ländern* (Berliner Wissenschaftsverlag, Berlin 2014).

8 See, eg, *Barber v Victoria* [2012] VSC 554. A partial exception is, however, constituted by *Canada v MacPhee* (2003) 221 Nfld & PEIR 164, although, in that case, no question

The purpose of this note is to bring the development in Germany to the attention of the English-speaking world and to analyse its degree of success or failure. What does a system look like in which the courts are involved in determining disputed questions relating to parliamentary access to information? That is not to imply that this innovation could be transplanted with ease, or even at all, despite the encouraging example of the remarkable degree of success enjoyed by another German doctrine — that of proportionality — in courts around the world, including our own. There are drawbacks to the monitoring by German courts of compliance with the provision of information by the executive to Parliament, and there could well be sundry constitutional difficulties in Australia connected with the separation of powers.

II DOCTRINE

In Germany, the Federal Constitutional Court has developed its doctrine enabling it to declare[9] a requirement for answers, or better answers, by the executive to parliamentary questions on the basis of Articles 38(1) (second sentence) and 20(2) (second sentence) of the Basic Law.[10] These run as follows:

> Members of the German *Bundestag* […] shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their consciences.
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> All state authority […] shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.[11]

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was answered beyond that of the existence of the broad power. Cases such as *Egan v Willis* (1998) 195 CLR 424 are the exceptions that prove the rule, for there the legal action was initiated by a suspended minister against officers of Parliament.

9 In 2017 the Court stated that procedural laws do not permit to it directly to order the executive to answer, merely to declare what the law requires of it: BVerfGE 147, 50, 121f.

10 BVerfGE 147, 50, 126, confirming earlier case law (some of which is cited later). (As is usually so in Germany, this case has no name but is referred to by its citation only.) Previously, the basis of this doctrine was a matter of dispute, but it is now regarded as settled: Jürgen Lennartz and Günther Kiefer (n 7) 185.

11 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 38(1) and 20(2). The translations used in the text are to be found at <https://www.gesetze-im-internet.de/englisch_gg/>. (All other translations in this note are the author's own.) For those with some German, the original paragraphs run in full as follows:

38(1) Die Abgeordneten des Deutschen Bundestages werden in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt. Sie sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihrem Gewissen unterworfen.

20(2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.

These provisions are the basis for the obligation on the executive that the Court enforces to provide answers to parliamentary demands for information. As is sometimes the case, the Court has derived a very specific obligation from principles of the highest generality in a manner which can leave those of us who are used to a more text-bound approach feeling somewhat breathless. The Court, could, of course, have declared simply that the Basic Law has nothing to say on this matter and any action must be taken by Parliament; that it does not do so shows its recognition of the vital role of accountability in the life of the democratic polity.

It is important to recall that the *Bundestag* is the sole directly elected body at federal level in Germany. As the Court has stated in its most recent decision on this point, it follows that 'only the Parliament elected by the people can lend democratic legitimacy to the organs and functionaries of the administration at all its levels'[12] and thus do justice to the constitutional command that all state authority should proceed from the people. While it is not sovereign in the British sense, there is therefore an important sense in which Parliament enjoys constitutional primacy. The Court continued, quoting earlier case law:

> The separation of powers principle […] requires – precisely because of the strong position of the government, and especially given the lack of means by which Parliament could intervene in the executive's realm of directly initiating action and applying the law – an interpretation of the Basic Law that results in parliamentary oversight actually being effective. Without sharing in the knowledge of the government, Parliament cannot exercise its rights to oversee the government. For that reason Parliament's interest in receiving information has a particularly high importance to the extent that it concerns the revelation of possible breaches of the law and comparable shortcomings in the government and administration.[13]

In addition, it is recognised that, independently of the function of governmental oversight, parliamentary work necessarily requires access to information for strictly legislative tasks — in order, for example, to legislate in an informed way and consider whether amendments to existing laws are needed.[14]

The Court enjoys making the paradoxical pronouncement that 'the principle of separation of powers is […] at once the reason for and a limitation upon the rights to information possessed by Parliament *vis-à-vis*

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[12] BVerfGE 147, 50, 128.

[13] BVerfGE 147, 50, 127, quoting earlier case law such as BVerfGE 67, 100, 130 and BVerfGE 139, 194, 224.

[14] Kai Hamdorf, „Auskunftsrechte des deutschen Bundestages gegenüber der Bundesregierung" in Fabian Scheffczyk and Kathleen Wolter (eds), *Linien der Rechtsprechung des Bundesverfassungsgerichts* (Walter de Gruyter, Berlin 2017) vol 4, 471f; Heinrich Wolff, „Der nachrichtendienstliche Geheimnisschutz und die parlamentarische Kontrolle" JZ 2010, 173, 176.

the government'.[15] This is because, in the German system, the separation of powers is not a strict one as in the United States of America, but one based on complementarity and mutual oversight rather than entirely separate fields of action. This is a point that is familiar in Westminster systems in which the government is formed from the majority in the lower House and remains responsible to it, in theory at least.

Hence the paradox: on the one hand, Parliament's functions as the sole directly elected body cannot be carried out in the absence of information. On the other hand, the executive has its own role and functions and the claims for information made on the part of Parliament must not go so far as to result in co-government by the *Bundestag*[16] or make it unduly difficult for the government to run its internal processes of decision-making, which, the Court concedes, require some degree of secrecy.

In resolving this unavoidable tension, the Court has recognised four possible classes of cases in which it may be permissible for the government to refuse to answer questions:

- the matter lies outside governmental responsibility;
- the separation of powers principle indicates that the question invades the core area of executive functioning;
- basic rights of third parties are affected;[17]
- the welfare of the state could be endangered, for example, by the revelation of state secrets.[18]

In each case it is for the government to establish its case for an exception — the burden of proof lies with it.[19] It must state, in detail and not merely formulaically, any reasons for refusing access to Parliament.[20] These exceptions will now be dealt with in turn as a means of illustrating how courts can go about the process of determining questions of an internal parliamentary nature.

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15 For example, BVerfGE 143, 101, 136f; BVerfGE 147, 50, 138.

16 Cf Greg Taylor, 'Executive Privilege in Response to a Demand for Documents by the Legislature in Germany' (2010) 21 *King's Law Journal* 399, 403.

17 There is much detail on this limb in Lennartz and Kiefer (n 7) 188–90.

18 BVerfGE 146, 1, 40; Hamdorf (n 14) 474, 482. In addition to these exceptions of principle there is also a practical exception for cases in which the extent of research required to answer the question is excessive: Thomas Harks, „Das Fragerecht der Abgeordneten" JuS 2014, 979, 981. However, the hurdle for this is high and the government is expected to conduct internal enquiries to find answers and provide partial answers if that is all that can be reasonably done: BVerfGE 124, 161, 197f; BVerfGE 147, 50, 160.

19 Sigrid Emmennegger, „Die Stärkung des Parlaments in der neueren Rechtsprechung des Bundesverfassungsgerichts" in Sigrid Emmennegger and Ariane Wiedmann (eds), *Linien der Rechtsprechung des Bundesverfassungsgerichts* (Walter de Gruyter, Berlin 2011) vol 2, 458.

20 BVerfGE 124, 161, 196; BVerfGE 137, 185, 244; BVerfGE 147, 50, 150.

III RECENT CASE LAW

Perhaps the least controversial of the four exceptions entitling the government to refuse to answer questions arises when they fall outside of its area of responsibility. That does not occur very often, but in 2015 the 'Left' Party tabled various questions relating to police action during the annual commemorations in Dresden of its destruction by bombing in the Second World War, which always attract extreme right-wing demonstrations and counter-demonstrations from the left, sometimes spilling over into violence on the streets. Allegations of police violence against the latter to protect the former were made. Similar allegations existed in relation to recent May Day demonstrations, another notorious occasion for disorder. The Federal Constitutional Court held that the federal government was required to answer for the actions of its own police force, but those of the States fell outside its area of responsibility.[21] On the other hand, the objection failed in a case[22] in which the parliamentary questions sought historical information about the practice of subjecting parliamentarians to surveillance. The federal government argued that the information sought was not about current practices for which it was responsible, and also that some of the information requested related to the States' surveillance authorities. In relation to the second objection, the Court referred to the fact that State information might have been provided to the federal authorities, and in relation to the first it said that 'essentially it is for members of Parliament or the parliamentary parties to decide what information they need'.[23]

In 2014 a case arose which turned in large part on the second exception — that for the core area of executive responsibility — but also raised the two remaining grounds for refusal, the basic rights of third parties and the welfare of the state itself. It involved the granting of approvals for arms exports, a matter which is always particularly controversial in Germany for obvious historical reasons. Indeed, it is the Basic Law itself, in Article 26(2), which requires the federal government's permission for arms production and sales. A committee of federal Cabinet, the Federal Security Council, deals with more significant applications for approval, an official annual report is published on the topic and there are ordinary statutes on the matter under Article 26(2) also. In the case in question, the controversy revolved around the proposed export of Leopard tanks to Saudi Arabia, which in the view of some could be used oppressively by the regime there; the so-called 'Arab Spring' of 2010 was then still fresh in memories. (At the time of writing, the matter was still one involving lively controversy as exports to Saudi Arabia had not stopped and the civil war in Yemen was

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21 BVerfGE 139, 194. Of course, in State Parliaments questions could be asked about the State police forces (see Lennartz and Kiefer (n 7)), but the 'Left' Party did not have representatives in all affected State Parliaments.

22 BVerfGE 124, 161.

23 BVerfGE 124, 161, 198.

raging with Saudi participation.) The government pleaded secrecy and refused to answer questions on the topic tabled by Greens Party members.

The Federal Constitutional Court held that, while the deliberations of the Federal Security Council were secret,[24] the federal government was obliged to inform the *Bundestag* of the final results of those deliberations after the decision was made. At that point, internal governmental processes had finished and accordingly there would be no impermissible co-government and consequent intrusion into the executive government's sphere on the part of the *Bundestag* if it knew the result alone. In 'exceptional'[25] cases, it was held, further, that the welfare-of-the-state exception might allow secrecy to be maintained even longer — if, for example, third countries might attempt to exert pressure if they knew of a proposed deal or other suppliers might attempt to undercut the German price. Trade secrets of the arms suppliers would also usually be protected under the rights-of-third-parties banner, particularly those going beyond the basic data relating to the sale.[26] Under these principles some of the questions asked by the members of the *Bundestag* did not have to be answered, but it was necessary for the federal government to state whether the Federal Security Council had approved the sale of the tanks in question to Saudi Arabia. On the whole, then, it was a qualified affirmation of the *Bundestag*'s rights to have access to information, and the procedural rules of the Federal Security Council, which are published, have been amended to incorporate reporting requirements in line with the Court's decision.[27] Long and detailed answers were recently given to parliamentary questions on the topic of arms exports to Saudi Arabia, this time against the background of the war in Yemen.[28] In the case relating to surveillance of parliamentarians referred to earlier, a comparable objection based on alleged infringement of the executive's field of responsibility failed wholly. The Court held that the events concerned were so serious that parliamentary interest in the topic had a very substantial weight which it would require a strong justification to override — and the government had not provided one.[29]

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24 As Robert Glawe, „Der Geheimrat: Zum Informationsrecht von Parlamentariern über Beratung und Beschlußfassung im Bundessicherheitsrat" NVwZ 2014, 1632, 1632 points out, the Council meets not merely behind closed doors, but secretly: meeting dates and agendas are not published.

25 BVerfGE 137, 185, 255.

26 BVerfGE 137, 185, 261.

27 *Bundestag* printed paper 18/5773 (13 August 2015) para 8(1) contains an exception for 'individual cases in which constitutionally protected interests preclude publication' — a reference to the 'exceptional' cases (n 25). Otherwise, the type and number of approved exports, the destination country, the name(s) of the exporting firm(s) and the value of the exports must be stated. As the explanatory notes state, the procedural rules had been amended shortly before the Court's decision to incorporate some reporting requirements but they were updated and extended as a result of the decision.

28 *Bundestag* printed paper 19/7967 (20 February 2019).

29 BVerfGE 124, 161, 195.

The run of partial or complete victories for Parliament was ended in 2016 by the controversial *NSA Decision* of 13 October 2016.[30] 'NSA' refers to the US National Security Agency. The *Bundestag* set up an investigatory committee to look into intelligence activities of the 'Five Eyes' states relating to Germany. Over the opposition of the 'Left' Party and the Greens, the committee and the federal Cabinet appointed a retired administrative Judge, Dr Kurt Graulich, as its trusted expert to carry out the actual inspection of the files including the NSA's search terms ('selectors') it used for internet surveillance. The unclassified version of his report was eventually published online[31] and a classified version provided to the committee. The government's argument was that, given that it had appointed the expert reporter, there was no breach of its international undertakings because the sensitive knowledge remained within the government and was not shared with outsiders; and of course the government majority on the committee was happy to go along with this reasoning. The 'Left' Party and the Greens thereupon commenced proceedings claiming that the investigatory committee had a right to the information itself without the filter of a special reporter.

The Court dismissed the suit and held that the claim attempted to 'shift to a considerable extent political power away from the executive to the *Bundestag* in a field of activity which, looked at functionally, is not legislative within the meaning of art 20(2)2 of the Basic Law'.[32] However, this was asserted rather than proved, and the reference to 'legislative' is at least unfortunate, suggesting that the general oversight functions of the *Bundestag* had been forgotten and it was being treated solely as an organ of legislation in the narrow sense.[33]

Furthermore, the Court continued, without the agreement of the USA the provision of the selectors list 'would, in the constitutionally unobjectionable view of the first defendant [the federal government], significantly compromise the ability of the [German] intelligence services to function and undertake co-operation and thus also the ability of the federal government to undertake foreign and security policy'.[34] Judicial restraint was justified in assessing the conclusions of the federal

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30 BVerfGE 143, 101. An earlier decision had denied standing to the 'G10 Commission', a parliamentary oversight body for communications surveillance, and is not noted here: BVerfGE 143, 1. In addition to the discussions of this case to be cited shortly, see Paul Glauben, „Minderheitenrechte im Untersuchungsausschuß und staatlicher Geheimnisschutz mit Verfassungsrang", NVwZ 2017, 129; Bertold Huber, „Selektorenlisten und Sonderermittler", NVwZ 2015, 1354.

31 Graulich, *Nachrichtendienstliche Fernmeldeaufklärung mit Selektoren in einer transnationalen Kooperation* (2015) <https://www.bundesregierung.de/Content/DE/_Anlagen/2015/10/2015-10-30-bericht-svp.pdf?blob=publicationFile&v=1>.

32 BVerfGE 143, 101, 141.

33 Cf Heinrich Wolff (n 14) 176.

34 BVerfGE 143, 101, 150.

government in relation to foreign affairs given that so much of what occurs in that field is independent of the Federal Republic's desires.[35]

This decision has been the subject of much criticism, most obviously on the ground that it does not fall into one of the four exceptional categories justifying the denial of information: the welfare-of-the-state category would require, at least, consideration beyond that of the wishes of Germany's intelligence partners, which did not occur to a sufficient extent. Instead, the Court is accused of inventing a fifth category of exceptions.[36] On the other hand, security is an especially sensitive area, and the occasional discovery of further categories of cases as the case law progresses — if this really is a new category, as distinct from a generous application of the welfare-of-the-state exception — should occasion no surprise.

In the following year, 2017, the Court again confirmed its restrictive approach to security matters, but, encouragingly, made an exception in the case actually before it.[37] This involved the Oktoberfest bombing of 1980, in which twelve people were killed; many people suspect wider neo-Nazi involvement in it than is officially conceded. Parliamentarians asked various questions about this incident after police investigations were resumed at the end of 2014, mostly concentrating on the role of the intelligence services and whether they had any agents in the neo-Nazi scene at the time. Repeating a point that had been somewhat obscured in the previous case, namely that the legitimacy of the executive government is derived from the elected Parliament,[38] the Court pointed out that information about the work of named individuals for the security forces could be refused if either the welfare of the state or their own basic rights could be endangered — which would frequently be so in the case of agents who might still be active or with regard to comparatively recent events.[39] However, such dangers could not merely be abstract ones, but would need to involve some non-trivial likelihood — which, given the many decades that had passed since, was no longer the case.[40] On the other hand, it drew

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35 BVerfGE 143, 101, 152f. Reference should also be made, and was made by the Court to s 6 of the *Law on Parliamentary Supervision of Federal Intelligence Activities* (Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Kontrollgremiumgesetz — PKGrG) 2009 BGBl I 2346), which stated that the federal government need only provide information to the Parliamentary Supervision Committee if entitled to deal with it thus; otherwise, and if requested by the committee, it should take necessary measures to seek to obtain permission for it to be released.

36 Jelena von Achenbach, Case Note, JZ 2015, 96; Christoph Möllers, „Von der Kernbereichsgarantie zur exekutiven Notstandsprärogative: zum B.N.D.-Selektoren-Beschluß des BVerfG" JZ 2017, 271, 275f; Benjamin Rusteberg, „Die Gewährleistung einer funktionsgerechten und organadäquaten Aufgabenwahrnehmung als Schranke des parlamentarischen Untersuchungsrechts" DöV 2017, 319, 320f.

37 BVerfGE 146, 1.

38 Ibid 39f.

39 Ibid 55.

40 Ibid 66.

the line at requiring the revelation of the number of agents in State police offices, given that such a level of detail might enable the individual operatives to be identified.[41] In short, the Court considered each question tabled in great detail and provided a balanced and well-reasoned account of why some were permissible and others not.

The most recent case involved questions asked on behalf of the Greens Party in late 2010 on a very large variety of matters involving the German Railways.[42] Topics included planning meetings, lack of punctuality and the controversial huge new railway station project 'Stuttgart 21'; the case also dealt with otherwise unrelated parliamentary questions about the activities of the Federal Financial Supervisory Authority before, during and after the global financial crisis in rescuing troubled banks. In refusing to answer all these questions, the federal government pleaded, depending on the precise topic, the excessive amount of resources required,[43] the fact that the Railways were a nominally independent corporation (although wholly owned by the federal government) and the need to respect the banks' privacy rights. In some cases, the government also provided the information stipulating that it must remain confidential.

The Court affirmed that public answering of questions should be the general rule in dealing with parliamentary questions, because that enables the answers to contribute to public debate and informs the true sovereign, the people.[44] The Court also dismissed the argument from the third exception, that for basic rights, on the grounds that public-law corporations as well as private-law corporations 'which are completely or mostly dominated by the state'[45] cannot take advantage of such rights. While conceding that the official oversight of banks along with the protection of business secrets could in theory raise questions about the applicability of the welfare-of-the state exception, it found no evidence that the welfare of the state would be affected in the case at hand by revealing the information requested about the activities of the Federal Financial Supervisory Authority, especially given that the difficulties of the banks in question were well known and the matter was now some years old.[46] Even information about salaries and bonuses of individual employees could not be refused: although there was some danger that individual employees' privacy could be compromised, the public interest outweighed that as it was public money that went to the institutions in question during the crisis

41 Ibid 69.
42 BVerfGE 147, 50.
43 See generally n 18.
44 BVerfGE 147, 50, 131f.
45 Ibid 142f. Corporations can sometimes take advantage of the basic rights under art 19(2) of the Basic Law, but it is settled that this does not apply to public-law corporations (with exceptions in some cases such as for Universities and public broadcasters).
46 Ibid 174.

and thus financed the salaries; their remuneration was, moreover, not a matter relating to their most personal affairs, but rather their work life.[47]

IV Analysis

Germany provides us with a working model of the supervision of executive responses to parliamentary questions by the courts. It can be seen that the German Federal Constitutional Court has had considerable success in the endeavour of ensuring that parliamentary demands for information have some teeth and Parliament is not simply fobbed off. Executive responsibility to Parliament has been enhanced by this development. Even with respect to information of the greatest sensitivity, the Court has proved itself able to manage the task of balancing the executive's need for a certain level degree of secrecy and its obligations of accountability, although not everyone will be satisfied with the answer it has given in every case. That, however, is inevitable.

That is not to say that the solution found by the Germans is ideal. Most obviously a great deal of time is involved while court proceedings are started and heard, and during that time it is quite possible that the issue concerned will cease to be a live one. In the case relating to the export of Leopard tanks to Saudi Arabia, for example, over three years elapsed between the tabling of the questions and the Court's decision that they had to be answered. Delays of four or five years are not unknown.

Another restriction that is probably inherent in the nature of things is that the Court's procedures are not adapted to dealing with complaints beyond the simple non-answering of questions seeking information. The Court has recently dismissed a suit based on the alleged inaccuracy of the government's answers and referred the questioner to the possibility of asking further parliamentary questions[48] — something which also serves the laudable purpose of keeping the Court itself out of political controversies. It would also be hard, for example — not to say constitutionally embarrassing — to compel any member of the government to express a personal view about something under compulsion from the Court. Even questions seeking value judgments or assessments of states of affairs would be hard to bring under this case law, for who is to say when the answer to such a question is sufficient? It is certainly possible to decide whether, for example, statistics sought have been provided, but it could hardly be suggested that the Court could assess the genuineness, correctness or completeness of the expression of a view about, for example, American foreign policy or the likelihood of a fall in the price of housing over the coming decade. That is something that a parliament not under the thumb of parties could sensibly be expected to do, but hardly a court.

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47 Ibid 182.
48 BVerfGE 147, 31.

What about corporations that are — to use the words of the Court — 'mostly dominated by the state'[49] but are not wholly owned by it, unlike the German Railways in issue in that case which is wholly owned by the government? The question has been quite sensibly raised whether private minority shareholders will find that the value of their investments will be diminished if confidential information is revealed in Parliament. That may in turn reduce the willingness of investors to invest in companies with majority state ownership.[50] Here too some fine-tuning of the Court's jurisprudence on the third-party rights front may be required.

Despite all these problems, constitutionalism in Westminster countries would also certainly be enhanced if there were an independent arbiter of executive claims to confidentiality. Experience suggests that treating this question as a legal one rather than a political one — a question of reason, not of power — is a great leap forward. In New South Wales, the Legislative Council (the upper House) has found the appointment of an independent legal arbiter, usually a retired senior judge, a fruitful way of dealing with disputes about the extent to which documents must be provided or, once provided, can be published[51] — although it was not sufficient to avoid the *contretemps* of June 2018 mentioned in the introduction. This procedure is also much faster than court proceedings and does not threaten to involve the judiciary in day-to-day political questions, although these benefits come at the cost of losing the great prestige of the judiciary and the administrative support of court staff.

Again it is paradoxical that a legal anomaly — the fact that, alone among the States', the Parliament of New South Wales enjoyed no express conferral of Westminster powers upon itself — meant that the Council's powers to call for documents were a legally live issue and needed to be referred to the courts for a decision,[52] and that it is to the existence of that decision, largely confirming the existence of the disputed power, that we owe the reform mentioned in the previous paragraph. Had the Council's powers been undoubted from the start, as those of Westminster Parliaments usually are, no court decision would have been necessary and it is conceivable that no progress would have resulted!

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49 BVerfGE 147, 50, 142f.

50 Martin Schockenhoff, „Geheimnisschutz bei Aktiengesellschaften mit Beteiligung der öffentlichen Hand" NZG 2018, 521, 528.

51 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) ch 17; Lynn Lovelock, 'The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On' (2009) 24(2) *Australasian Parliamentary Review* 199. As we saw above (n 3), a similar step has also been advocated in Tasmania. For a critical analysis of the present situation and suggestions for its improvement, see, however, Sharon Ohnesorge and Beverly Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council' (2018) 29(2) *Public Law Review* 118.

52 *Egan v Willis* (1998) 195 CLR 424.

In Australia, too, it is a regrettable fact that constitutional difficulties might arise with the conferral of comparable powers on courts under separation-of-powers principles. Courts are used to deciding whether executive privilege applies, but only in the context of litigation, and it would almost certainly be going too far to ask them to apply wider-ranging principles on the admissibility of parliamentary questions such as whether they fall within the government's responsibility or intrude too far into the executive's realm. While we have recently seen the High Court of Australia determine, under Division 2 of Part XXII of the *Commonwealth Electoral Act 1918* (Cth), numerous questions of the membership of legislative bodies that could constitutionally be determined by the bodies themselves but are not because Parliament is too partisan[53] — the very same reasons why it also often cannot legitimately determine the questions in issue here — the argument that the courts have traditionally not interfered with parliamentary proceedings (as distinct from membership)[54] could be built up into a respectable claim that separation-of-powers principles would be infringed if courts pronounced on whether a parliamentary demand for information is permissible. What courts can do with ease in Germany is to at least some extent, it would seem, beyond their remit in Australia — something which might cause us to reflect again on whether our separation-of-powers doctrine is too restrictive and sometimes a hindrance to good government. Perhaps we should at least have this option available. Nevertheless, the broader lesson, from both Germany and New South Wales, is clear: constitutional government benefits from having a neutral third party adjudicate on disputes of this nature between the executive and Parliament. They should not be left to fight it out alone as a question of power rather than reason.

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[53] See, eg, *Re Gallagher* (2018) 263 CLR 460; see also s 47 of the *Australian Constitution* and, for an examination of the whole question, Kristen Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?' (1997) 20(2) *University of New South Wales Law Journal* 257.

[54] At the very least, judicial determination of parliamentary membership pre-dates Federation: the jurisdiction was created by the *Parliamentary Elections Act* 1868 (UK).