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Internal security and the fight against terrorism in Germany

Nearly periodically the topic of internal security appears on the public agenda of the Federal Republic. Election Campaigns are held and elections have been won with the promise of more security [cp. 30, p. 13; 33, p. 10; 2¹]. The subjective feeling of a lack of security in different dimensions of life is omnipresent. The latest security- and monitoring-acts interfere deeply – and at the same time nearly unnoticed – with the daily life of every single citizen. The debate on crime and internal security is dominated by very emotional and ideological-normative arguments [cp. 18, p. 151]. Objective arguments and evaluations of proportionality are hard to find.

I. The German understanding of “Internal security” and its historical roots

The term “Innere Sicherheit” – internal security – appeared for the first time in the 1960s. From then onwards it has always played an important role in political discussions. Since 1969 the Federal Ministry of the interior periodically published a report on „Innere Sicherheit“ (for the last time in 1994). Since then the term has been established in the political and administrative language. In 1972 the policy of internal security became the quasi status of law by the introduction of the “Schwerpunktprogramm Innere Sicherheit” (programme of emphasis internal security) [25, p. 16]. However, what is covered by the term internal security and what it has to guarantee for has not been precisely defined yet in legal terms. In the first instance the term is used in a penologic context. It describes a preventive aim of the legislator. The measures under internal security are aimed to prevent crime in all possible fields of society. Therefore, from a traditional national state centred point of view internal security is seen as another element of national security, beside foreign security. This traditional distinction between internal security and foreign security had an impact on the insti-

¹ All Citations were translated by the author of this text and were originally in German (except 32).

tutional organisation of the security agencies of Germany until today. By the way, the term “public security”, which is ensured by Article 13 of the Basic Law (also Article 35, 73 Basic Law) would be more precise. However, in the political and scientific use of language the term “internal security” has been established.

At the same time the main focus in the policy field of “internal security” has changed several times. However, the ways of solution as intended by politicians remained the same. Landmark events for this development are certainly the massacre of Israeli athletes at the Munich Olympics² in 1972, the German Autumn 1977, as well as the German reunification 1989/1990. By the end of the East-West-Conflict – as an important determinant of security- and defence-political strategy [cp. 13, p. 16] – the new, re-unified Germany became a central state in a Europe, which is continuously growing closer. And since the opening of the (Eastern-) borders it has been – at least the impression, which is successfully communicated by the majority of the opinion leaders in politics, in the media and in society – increasingly exposed to organised crime and terrorism. Although the knowledge of the real spread of organised crime is very vague in the Federal Republic [cp. 15, p. 21; 34, p. 51], the framework for politicians and the security agencies has changed dramatically. Especially for the security agencies the question of new fields of activity is closely linked to the institutional right to exist.

In the 1970s and early 1980s the main focus of the German “security-producers” was on the fight against the primarily domestically motivated leftwing-terrorism of the Red Army Fraction (RAF: Rote Armee Fraktion), Movement 2. June (Bewegung 2. Juni) and the Revolutionary Cells (Revolutionäre Zellen). The central measures used here were the so-called “Kontaktsperregesetz” – the contact ban act, as well as three anti-terrorism-acts (Anti-Terror-Gesetze), “which criminalised the formation of terrorist organisations, widened the powers of the prosecution authorities, and restricted the rights of the defence” [32, pp. 313-314]. These acts were very controversial, politically as well as legally. However, in August 1978 the Federal Constitutional Court approved the compatibility of the acts with the Basic Law (BVerfGE 49, 24 et seq.).

In the mid 1980s the emphasis of security policy shifted towards the so-called organised crime – “organisierte Kriminalität” [cp. 11, p. 433]. Temporarily it concentrated on extreme right neo-Nazi extremist movements and since about 2000, it has concentrated on the fight against (now international) terrorism again. Thereby 9/11 does not show a redirection of security-political considerations, but it rather is crucial for the enforceability of aggravated supervision- and prosecution-

² Which is, like the bombing of the La Belle – discoteque on 5th April 1996, foreign rooted terrorism taking place in Germany.

measures. Many measures which were initially aimed against organized crime are by now used against international terrorism.

It successfully worked out for the relevant actors strategically to expound the problems of internal security over and over again. Especially recently investigating agencies and the federal prosecutors rely on spectacular prevention [cp. 27]. In public awareness the threat of security is seen as an important social problem of today [cp. 30, p. 9]. And in the political-social debate a non-existing but pretended “basic right of security” has been established. Security became a basic requirement of society.

Thereby the political conflict is always focused on the contradiction between security and freedom. Recently the animadversion on an almighty state arose, especially in jurisprudence, but also in political science and in the media, as an arena of public discourse. The main argument is that the state not only manifests its claim of exercising the monopoly of force, but also tries – by an increasingly connected security-network – to work towards an at least partial combination of police, intelligence and military. The performance of the “fight against terror” already seems to affect the chance of a fair court proceeding negatively – the German constitutional state becomes jeopardised [cp. 22, p. 38].

II. Actors of the policy of “internal security”

As already suggested we can find many “security-producers” in the federal system of Germany. The central legislative competence is located at the federal level. That means that relevant definitions and penalty options are carried out by federal legislation. Other provisions can be found in European legislation.

On the federal level the Federal Ministry of the Interior is responsible for anti-terrorism activities. This includes the work of the Federal Criminal Police (BKA) and the Federal Office for the Protection of the Constitution, legislation relating to foreigners, i.e. asylum, visa and immigration policy, and border control. The principles for airport security checks of passengers and baggage are developed within the Federal Ministry of the Interior and carried out by the Federal Border Police. Civil protection and disaster management policy also falls within the responsibility of the Federal Minister of the Interior.

However, all in all there are 37 federal and regional authorities involved in averting danger and the fight against organised crime and terrorism. The federal system of Germany causes, that the competences are vertically divided between the federation and the states, which is complemented by an additional horizontal differentiation of competences: the Federal Criminal Police Office, 16 State

Criminal Police Offices, Federal Office for the Protection of the Constitution, 16 State Offices for the Protection of the Constitution, the Federal Border Police, the Office for investigation of toll crimes, the Federal Intelligence Service and the Military Screening Service work side by side, together and against each other to ensure internal security. The professional supervision and the political accountability is located at the different ministries. Because of historical experiences internal and foreign security are in the same way officially separated, which applies to tasks of the police and the intelligence.

Since the foundation of the Federal Republic the competences of the police and security authorities have been enlarged continuously. Only Constitutional Court curbed the steady expansion of the scope of the state with different judgments.

Because of massive criticism in recent times the security architecture, as it was constituted in the 1950s, seems to change dramatically after decades of stability.

III. Measures of national security policy

Since the 1990s it has been possible to notice a change of policy in other European states towards prevention. [cp. 8, p. 182; 32, p. 361]. At the same time the most important instrument of securing freedom – the principle of proportionality – has become increasingly suspended by this kind of policy [cp. 19]. Actually the increasing legislative action since the beginning of the 1990s in the field of domestic and legal policy has reduced central basic rights – as they are guaranteed in Article 20 Basic Law (rule of law) in connection with Article 79 (eternity clause) – with the aim to reach airtight solutions in the field of internal security [cp. 20]. Again and again the Constitutional Court had to correct the legislator. Later rulings of the Federal Constitutional Court on unconstitutionality of parts of legislation point out the partly missing consideration of the free basic order of the Basic Law by the legislator [cp. 3].

The public discussion has been mostly reduced to nation state centred aspects and logics of action: Up to then, only well known claims for new and even more far reaching intervention competences have been demanded to prevent and to fight against dangers. New approaches for the combat of the “new” threat³ are still missing. Also a European perspective did not play an important role in a perception and discussion level recently. The assaults in the USA in September 2001 just accelerated this general development [cp. 23, p. 77; 14; 35]: Since then internal security has been *the* permanent

³ In this context “new” means primarily the ideological justification and respectively the motivation of terrorist offences. In the categories of organisation sociology, as Mayntz [29] describes, the organisation specific differences between “old” and “new” terrorism are contrary to the popular posits less selective to prove.

dominating topic and the justification basis of many massive changes of legislation. “The terrorist threat“, citing Hoffmann-Riem [24], “leads the state into temptation, to do now what it has always wanted to do, but was not allowed to do until now due to constitutional reasons.”⁴ It seems that the government and the legislator meanwhile took the bait to a large extent.⁵ Last but not least that can be seen in the suspected unconstitutionality of some legislation in this field. Actually the Constitutional Court has already ruled against some of the bills. [cp. e.g. 32, p. 361].

For the analysis of security policy the change of government in 1998 is a landmark – however, against one’s expectations no turning point. Normally one would assume that a centre-left government in the field of internal security would carry on a more liberal orientated policy – however, the opposite is the case in this policy field. Thereby security policy was not the prior aim of the red-green government under chancellor Schröder [cp. 10, p 305f.]. The red-green coalition treaty of 1998 for example did not contain any relevant suggestions of a European cooperation in judicial and domestic affairs. In the field of organised crime and the fight against terrorism was no urgent call for action. The essential intervention competences and requests of preliminary proceedings of the security authorities were already introduced before 1998 with a general cross-party and cross-government majority, but without the support of the Green Party. After 1998 further measures were not politically enforceable – especially not with the left-liberal coalition partner, Alliance 90 / The Greens. Therefore in the sphere of domestic and legal policy rather small – although absolutely important – international cooperation agreements were worked out, which were aimed to improve the increasing networking of the daily business on the European and international level. Furthermore the intrastate cooperation of the prosecution and enquiry authorities was developed.

In the wake of the terrorist attacks in the USA on September 11 the situation changes dramatically for the German government, too, because three out of four Arab highjackers had been living in Hamburg and had presumably been involved in the planning of the attacks.⁶ The Federal Minister of the Interior had been hoping for a more restrictive policy for some time - now the attacks helped him to succeed with his plans. At the same time, however, some steps in the catalogue of actions as planned by the EU from September 21, 2001 were deliberately postponed, because they would have

⁴ „Die terroristische Bedrohung führt den Staat in Versuchung, jetzt das zu tun, was er schon immer tun wollte, aber aus rechtsstaatlichen Gründen bisher nicht tun durfte.“

⁵ Even by the selling of the tickets for the football world cup 2006 – actually a state distanced space under private law –on demand of the organisation committees and the security authorities broad personal data have been collected. Despite massive critique of the data protection officers of the Federation and the Länder [cp. 12] data like date of birth and identity card numbers have been collected, recorded and forwarded. But also in other, complete different areas for example life is kept charged up against life: in the air-security act only the Federal President clearly expressed constitutional concerns [cp. 17].

⁶ Thereby it becomes apparent in the still open criminal procedure against the possible accomplices that the criminal prosecution does not fail because of the German Law, but rather by the insufficient cooperation of the US-American security authorities [cp. 16].

affected national sovereignty, e.g. the decision on the implementation of the European arrest warrant, determined by the Council of the EU on June 13, 2002 [Rahmenbeschluss 2002/584/JI, see 1]. In June 2004 the German Bundestag took a personal vote on the acceptance of this law [31], which still awaits confirmation from the Constitutional Court.

As a reaction to September 11 two so-called “safety packets” were passed with great majority (from all parties), in quick succession after only short discussions in Parliament. I will give a quick survey of the most important results of these laws [for greater detail see 32].

Already on September 19th, 2001, only eight days after the terrible attacks, the German government agreed on a new set of emergency measures, known as the first security package.

The first packet contained mainly repressive steps and was supplemented by the law concerning the funding of operations against terror, which enabled the German government to spend another 1.5 billion Euro on the fight against terrorism in 2002. In 2002 fully 60% (2.1 billion Euro) of the total budget of the Federal Ministry of the Interior went toward domestic security. The very short span of time between the attacks and the presentation of the bill show that no new ideas were being published- the time had suddenly become ripe for an old idea.

The main issue in the so-called first security packet of November 2001 was the abolition of the privilege of religion⁷, planned as early as January 2001. Membership in a *foreign* terrorist group became illegal (§ 129b StGB: „Kriminelle und terroristische Vereinigungen im Ausland“). With this decision the Bundestag went further than the EU in general and enabled the authorities to chase down potential criminals in Germany, if they were members of unspecified criminal groups outside Germany. After lengthy discussions between the coalition parties the Bundestag passed the law with a majority of the coalition in late April 2002. A compromise had only been possible after the Al-Quaida- attack on Djerba from April 11, 2004, where 14 Germans died.

Further changes are stricter action against money laundering, introduction of biometric identity cards, massive expansion of bugging, preventive as well as repressive, and the virtual abolition of banking secrecy as from April 2005. No evidence or proof of criminal actions are needed anymore for these steps to be taken [cp. 9]. And the person against whom the bugging (or other steps) is directed does not have to be informed of the procedure after this is finished.

The second, comprehensive package of anti-terrorism legislation went into effect on January 1st, 2002, introducing a number of amendments that have significantly improved the efforts of security authorities to combat international terrorism, as the Federal Ministry of the Interior says. This second security packet contains preventive laws and changes of laws mainly. Here the government re-

⁷ “Privilege of religion” describes the position of denominations and similar groups, which do not have to follow the common law for groups and congregations.

ferred to the international situation and community, especially UN-resolution 1373 [cp. 21, pp. 147-151].

Thus Germany follows in the footsteps of other nations and tightens its laws and regulations- perhaps not as much as other states, but nevertheless quite considerably.

It is to be noted, that laws which are relevant for security have been and still are passed with great majority in Germany. Only a few issues which are of high symbolic value are controversial, such as the question of deployment of the army in security matters in Germany itself which has been illegal so far. The war against organised crime, foreign crime, juvenile delinquency, violence, petty crime, white-collar crime and last but not least terror is waged in the name of home security. [cp. 8, p. 194]. Especially in the fight against terror preventive methods have taken the place of repression.

It is particularly remarkable, that this change in strategy towards a stricter surveillance has taken place before September 11. The attacks only made the implantation of these ideas possible⁸ and then a long chain of reactions in the media and in politics followed [cp. 4, p. 26].

A government which called itself left-wing thus made stricter and more radical cuts in the net of civil freedoms and at a time when there was little threat and danger for the system than the right-wing government did in the 70s, when there was a real threat from left-wing terrorists. And all this at a time, when it turned out that a planned attack on the Christmas Fair in Strasbourg could be successfully prevented by existing means and laws.

The most important change of policy of the red-green German government, however, can be seen in foreign politics. The fight against terrorism does no longer stop at the borders; it is no longer a national issue. Social democrat Struck, Minister of Defence, maintains that “the safety of Germany is defended as far away as the Hindukusch”. In this way the German government follows suit to a decision made by NATO in 1999. The German army is being transformed into a unit that can be deployed worldwide, given a UN or NATO mandate. This fundamental change, however, is not being discussed in public any more. The German government also makes no mention of soldiers killed in action while abroad.

⁸ One can confidently assume that real threats against Germany have decreased. The planned attack in Strasbourg and the attacks from Madrid on March 3, 2004 prove as much. Attacks, however, are possible in Germany, too; statements from the suspects in Düsseldorf Al-Tawhid-case show as much. (see <http://www.justiz.nrw.de>; Die Zeit 49/2003). The commensurability of measures, however, is not always granted; Federal and State Ministers and even the Ministries of the Interior show a tendency towards exaggeration.

IV. Evaluation of the security packets

Due to an intervention from the Greens, partners in the coalition, the main regulations in the two packets are limited to a duration of five years. Article 22, paragraph 2 and 3 state this. (Bundesgesetzblatt Jahrgang 2002 Teil I Nr. 3: 395)

The evaluation was presented in May 2005. Strangely enough, those who were to be evaluated organised the evaluation themselves. The Federal Office for the Interior itself is responsible for the evaluation process, even though the minister, Otto Schily, was the one to initiate and press forward the stricter regulations. Therefore the evaluation, which was made public in parts only, has to be regarded with great caution, critics of Schily's position maintain. And it does not come as a surprise that the Home Office approves of the effects of the security packets and demands the limitation in duration to be repealed.

Looking at the situation more closely one will notice that not much use has been made of the new surveillance possibilities. During 2002 - 2004, only 99 cases of inquiries (mainly bank affairs or telecommunication surveillance) were carried out, 134 persons were registered as being under surveillance. In consequence of the new surveillance mission (§ 3 Abs. 1 Nr. 4 BVerfSchG, § 1 Abs. 1 Satz 2 MADG), six islamic organisations were controlled by the Federal Office for the Protection of the Constitution and the Military Defence Service (MAD). The "charity" "Al Aqsa e.V." was declared illegal on August 5, 2002 by the Federal Ministry; in addition to that the anti-Jewish Hizb ut-Tahrir was forbidden on January 15, 2003.

Also a possible attack on Iraqi Prime Minister Allawi is said to have been discovered and prevented; two people who were members of "Ansar al Islam" and who were suspected of planning suicide attacks, were detected by the security checks which were made possible in greater detail by Art 5 "Law concerning the fight against terror" [cp. 5; 6]. Priority was given to security checks in military fields; here 12000 checks were carried out, that is 80% of the total. A real threat to security was only posed in a very small number of cases.

Both security packets primarily provide new knowledge; prevention of real and planned crime comes as a side effect. Federal Minister Schily claims that "declaring institutions and certain practices illegal has proved to prevent crime successfully" [cp. 7].

Yet, it is difficult to really prove how successful the new laws are, because a lot of evidence is kept secret. One may assume that little real threat was posed. No trials, arrests or convictions became known, the same results may have been obtained with the old (less restrictive) procedures. It is not clear yet, if the Federal Minister of the Interior can find a majority for his idea of unlimited duration of the security packets. At the moment representatives of both Social Democrats and the Greens favour another limited period of 3 - 5 years.

V. Further prospects

The Federal Ministry of the Interior demands a third security packet, even though there might be General Elections and a change in government in autumn 2005. A first reading is to be held in the Bundestag before the summer break. "Better preventive competence of the Federal Criminal Police Office (BKA), new data bases for the fight against terrorism, and the improvement of communication and co-operation between security forces are the main issues" [cp. 28].

A bone of contention will probably be the expansion of data storage and the additional power to be given to the Federal Criminal Police Office. Especially the first point meets with string disapproval, based on constitutional rights. There is no doubt, however, that there will be no dramatic change in the basic strategies of the fight against terrorism. Core elements of security are the expansion of prevention and surveillance, supported by a massive effort to achieve a European network of security and data exchange. Since September 2001 the European aspect of the matter has been increasingly noticed and used by the politicians to give more weight to their bills. The reason for this is the growing criticism of parts of the German public: they doubt the necessity of the new laws and criticise openly. Referring to the European Union makes the situation for German politicians easier. All in all, in the course of the past few years Germany has changed dramatically from a liberal constitutional state to a closely monitored state. An end of this development cannot yet be seen.

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