

The Enemy Within Us

German security reforms in the aftermath of September 11 and their implications for constitutional human rights protection

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Whoever makes a pact with the means of violence for whichever purposes is completely and utterly at the mercy of violence's consequences – Max Weber¹

In the aftermath of the terror attacks on 11 September 2001, Germany like many other states joined what came to be called the 'global war on terror'.² After participating in the intervention in Afghanistan, Germany has reacted to the increased threat level in Europe by successively moving the battlefield to their own territory. A new counter-terrorism law was passed marking the starting point of a series of far reaching security reforms, resulting in an ever growing polarization between efficient crime prevention and the protection

¹ Weber, Max, *Politics as Vocation*, i Waters, Tony. & Waters, Dagmar. (red.) (2015). *Weber's Rationalism and Modern Society; New Translations on Politics, Bureaucracy, and Social Stratification*. Basingstoke: Palgrave Macmillan, s. 181

² Bush, George, State of the Union Address: September 11 2001, Special Report: Terrorism in the US, *The Guardian*, Friday 21 September 2001.

of individual human rights. With the threat of terrorism as a motive, the process of passing new laws has accelerated without any satisfying public debate on the political and legal consequences. This article examines the propositions, the final legal text and the political context of three comprehensive legal reforms in Germany during the period of 2001-2018, to shed light on how they affect constitutional rights and freedoms.

Security reforms have gradually become more autonomous, resulting in uncontrolled limitations on individual privacy and integrity by the state, aided by the fact that the majority of the population remains unaffected, while the security machinery is developing an unchecked internal dynamic in a relentless hunt for an enemy within.

The analysis shows that the security sector has started directing the measures against its own territory as more and more terrorists are considered 'home grown'. As a result, Germany has become a hunting ground for a presumed internal enemy. This article contributes to a more enlightened discussion of extensive surveillance powers enjoyed by the German police force, how this influences the constitution and hence the individual freedoms and rights protected by it.

Historical background

Forty-two years have passed since paragraph 129a was introduced to the German Penal Code. It criminalizes membership in terrorist organizations and financial support of terrorism.³ The new law was a reaction to the terror attacks of the leftist extremists Red Army Faction (RAF). After the terror attack at the Olympic games in Munich 1972 and the failure to intervene, the hybrid special force GSG9 (Grenzschutzgruppe 9) was set up and a couple of years later succeeded in preventing another terror attack. During this time

³ Strafgesetzbuch (StGB) in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 1 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist", § 129a

West Germany security policies focused on countering leftist terrorism while East Germany tried to combat political opposition by spying on its own population. Until this day there are enormous amounts of personal files in the archives. In relation to its population the East German intelligence service was the largest in modern history and is a prime example of a state's power abuse.⁴

Germany has ever since the end of the second world war (hereinafter WW2) been dealing with counterterrorism and intelligence. The paragraphs today are the same as forty-two years ago but Germany's political landscape has changed and the enforcement capacities of the executive authorities have been gradually widened. Digitalisation has led to new dimensions of intelligence methods and access to personal data. This contributes on the one hand to effective evidence gathering but at the same time gives rise to moral questions about the right to privacy.

The threshold for preventive and repressive enforcement measures has been gradually lowered, with lasting impact on the constitutional protection of human rights. The narrowing of legal thresholds in combination with the digital development enables a new level of state surveillance risking systematically disadvantaging innocent individuals. These aspects are invisible, meaning that investigation by infiltration of digital devices often happens unrecognized by the affected. Tightening of legislation does have an impact on the extent to which our privacy is protected – but the public majority does not feel it yet, which explains why it has not been met by more public resistance.

The somewhat ambitious aim of this article is to highlight the danger of permissive public consent when giving away parts of our freedoms and leaving it to the state. Ideally this contributes to an informed discussion already before everyone is affected by the sneaky deprivation of privacy. Parts of the analyzed reforms have been regularly criticized and dismissed by the German

⁴ Karsten Duemmel und Melanie Piepenschneider (Hrsg.): Was war die Stasi? Einblicke in das Ministerium für Staatssicherheit der DDR, Konrad-Adenauer-Stiftung (2014), s. 68.

Constitutional Court (hereinafter BVerfG) but at the same time basic rights were limited by the same court's case law which is interesting to examine from a human rights perspective.

Since September 11, German legislators have been amending the constitution. Far reaching trade-offs were made between individual and national interests, which in Germany is and has been a very sensitive issue ever since the end of WW2.⁵ From 1950 onwards, secret law enforcement has been reintroduced step by step, amounting to fifteen extensive legal reforms by 2001, despite public protests.⁶ Supporters argued that the state needed to regain its decisiveness, suspect profiling was discussed and the federal system criticized because of its obstructive impact on effective law enforcement. Crime prevention was already back then a controversial topic but September 11 marked a manifest turning point: between 2001 and 2018, fifty new reforms were pushed through, all of them giving executive authorities far-reaching intelligence capacities, limiting privacy and integrity.⁷

Safeguarding national security in a human rights conform manner is often portrayed as a constant dichotomy between liberty *or* security. This article applies a multidimensional perspective, combining legal and political aspects on these questions. From a security perspective, effective law enforcement is necessary to protect society and the state while respect for privacy and

⁵ Anarchisten, mit dem Terror Leben, 10.03.1975, *Der Spiegel*, Heft 11/75; Ausbruch in Berlin: Das ist eine Riesensache, *Der Spiegel*, 12.07.1976.; Wen Suchen Wir Eigentlich?, *Der Spiegel*, 46/1977, 07.11.1977.

⁶ Mühlenmeier, Lennart, Sicherheitsgesetze in Deutschland – Chronik des Überwachungsstaates, 20.09.2017, netzpolitik.org, besökt 21-05-2018.

⁷ Rath, Christian, Chronik der Sicherheitsgesetze: Der Weg zum Überwachungsstaat, TAZ, 20-04-2010, senast hämtad 21-05-2018; Sicherheitsmaßnahmen in Deutschland: Im Namen der Sicherheit, 11.08.2016, Tagesschau.de/Inland, senast hämtad 21-05-2018; Mühlenmeier, Lennart, Überwachung: Chronik des Überwachungsstaates, 20.09.2017, Netzpolitik.org, senast besökt 21-05-2018; Verfassungsschutz – Wo steht der Feind?, *Der Spiegel* 15.11.1993.

individual freedoms is higher prioritized by human rights defenders. The challenge is to find a balance.

The research question central to this article is to examine the way the extension of executive powers has altered the constitutional protection of freedoms and rights in Germany in the period after September 11. The material consists of three security reforms: the counterterrorism-law in 2002 (TBG-reform), the law on the prevention of terrorism by the police in 2009 (BKA-reform) and the law on improving law enforcement in 2017 (TKU-reform).⁸ The reforms are analysed in comparison with each other and with rulings from the BVerfG to highlight their impact on the freedoms and rights protected by the constitution.⁹

The German constitution

Before turning to the analysis, a short explanation of the character of the German Constitution seems appropriate. The Constitution is very much a product of its time, i.e. the aftermath of WW2, with a profound emphasis on parliamentary checks and balances to safeguard democracy.¹⁰ Germany is a federal state meaning that the regions (hereinafter: *Bundesländer*) enjoy primary governing responsibility and the central government has only a secondary say. Legislative proposals can be initiated by three independent bodies: the central government (*Bundesregierung*), the council of the regions

⁸ Gesetz zur Bekämpfung des Internationalen Terrorismus (Terrorismusbekämpfungsgesetz), G-SIG: 140119814), Bundesregierung, ikraft sedan 01.01.2002 , Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das BKA, ikraft sedan 2009, Bundesregierung, Gesetz zur effektiveren und praxistauglicheren Ausgestaltung des Strafverfahrens, ikraft sedan 24.08.2017, Bundesregierung der 18. Wahlperiode, Archivsignatur XVIII/535.

⁹ BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. (1-29).

¹⁰ Collings, Justin, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001*, Oxford University Press, 2015, s. 2.

(*Bundesrat*) and the parliament (*Bundestag*). Together they form the legislative authority.¹¹

The Constitutional Court (*Bundesverfassungsgericht*) is the watchdog, monitoring law-making and ensuring that it does not infringe on the constitutional rights.¹² The main provisions of the Basic Law (hereinafter: GG) are article 1, the protection of human dignity which is superior to all other legislation, article 2 on freedom of expression and article 3 that forbids discrimination on the basis of gender, ethnicity, language, origin and religious and political preferences. Article 10 and 13 are targeting the restriction of executive powers such as secret surveillance and infringing on privacy rights. These provisions are important to keep in mind when analysing the new security laws.

Political context

September 11 gave way to a new era of security policies. The United Nations (UN) passed security resolution 1373 only nineteen days after the attacks. The resolution called upon all members states to join the international ‘war on terrorism’.¹³ This resulted in an increase of international troops sent to Afghanistan and in a closer cooperation between all EU member states, the US and Russia.¹⁴ Terrorism was perceived as an ‘imported problem’ to be solved on other states’ territories. This changed successively in the years to

¹¹ Grundgesetz für die Bundesrepublik Deutschland, vom 23.05.1949 (BGBl.) zuletzt geändert durch Gesetz vom 13.07.2017 (BGBl. I S. 2347) m.W.v. 20.07.2017, Artikel 76.

¹² Voßkuhle in FS für Thomas Würtenberger, 2013, 1101 ff. unter Hinweis auf Grimm, Die Freiheit sichern! Ohne starke Bürgerrechte bleibt Sicherheit wertlos, in: Zypries (Hrsg.), Die Renaissance der Rechtspolitik, 2008, s. 25 (26).

¹³ United Nations. S/RES/1373 (2001). Security Council. Distr. General. 28 September 2001.

¹⁴ Deutscher Bundestag, Stenografischer Bericht, 144. Sitzung. Plenarprotokoll 14207, 12.12.2001, s. 17-68.

come. The perceived threat moved to the home-front simultaneously as attacks by so called ‘home-grown terrorists’ increased within the European borders.¹⁵

Germany reacted like many other states by tightening the laws and widening the scope of law enforcement measures. In 2002 *preventive* suspect profiling was legalised, in 2004 a joint centre for terror-defence (GTAZ) was established, in 2006 biometrical passports and the anti-terror database (ATD) were introduced. In 2009, a law was passed to give the criminal police general permission to carry out covert intrusions into data-systems to *prevent* terror attacks.¹⁶ In 2016, a new counterterrorism strategy was adopted, making identification when buying SIM-cards obligatory.¹⁷ In 2017, video surveillance of public places was expanded and the migration agency got permission to monitor the mobile phones of foreigners. The entire Penal Code was amended, legalising covert surveillance of information- and communication-systems.¹⁸ In all reforms, but especially the last one, the enforcement mechanisms are directly linked to the foreigner- and asylum act.

In 1949–2001, thirteen extensive security reforms were passed. In contrast to that, forty-six were passed between 2001–2018, a significant increase.¹⁹ According to the German government it was necessary to adjust their own

¹⁵ Bundesministerium des Inneren, Bundesministerium der Justiz, Regierungskommission zur Überprüfung der Sicherheitsgesetzgebung in Deutschland, vom 28-08-2013, s. 30-31.

¹⁶ Bundesrat, Stenografischer Bericht, Plenarprotokoll 853, Berlin den 19. Dezember 2008, uttalande: Geert Mackenroth, s. 13.

¹⁷ Inledande bestämmelser (Inhalt) Gesetzgebung, Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das BKA, Inkrafttreten 2009, Ausserkrafttreten 2020, Bundesregierung.

¹⁸ Gesetz zur effektiveren und praxistauglicheren Ausgestaltung des Strafverfahrens, (BGBl 2017) Teil 1, Nr. 58, Herausgegeben zu Bonn, 23.08.2017.

¹⁹ ”Übersicht deutscher Sicherheits- und Überwachungsgesetze”, <http://www.datenspeicherung.de/index.php/ueberwachungsgesetze/>, senast hämtat 17-12-2018.

methods to the ones of the terrorists.²⁰ However, the urgency of the new laws can be questioned from a constitutional point of view since the Basic Law (GG) itself is intentionally vague in its formulations, so the paragraphs could have been interpreted extensively without the need for enacting new laws.²¹

National reactions

Both the left-wing party (PDS) and the liberals (FDP) opposed the law on counter-terrorism (TbG) passed in 2002. PDS criticized the insufficient constraints on state interference into citizens' privacy, while the main concern for FDP was data- and consumer protection. The centre-right conservatives CDU/CSU and the government coalition of Greens and social democrats (SPD) voted in favour of the law. The government wanted to increase security and so did the CDU/CSU even if they wanted to widen enforcement capacities even more. The SPD stressed the fact that every citizen had a right to security and that the law therefore was necessary. It should be noted that they were explicitly talking about "citizens", not human beings in general, meaning security for Germans, not all individuals on German territory.

Being a NATO-member, Germany immediately declared its solidarity with the US after September 11.²² Chancellor Schröder stressed that Germany would have the US's back no matter what they or the other NATO

²⁰ Bundesministerium des Inneren, Bundesministerium des Inneren, Regierungskommission zur Überprüfung der Sicherheitsgesetzgebung in Deutschland, vom 28-08-2013, s. 33.

²¹ Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz), Bundesgesetzblatt Jahrgang 2002 Teil I, Nr. 3, ausgegeben zu Bonn am 11. Januar 2001, Avsnitt "Inhalt".

²² NATO, Treaty (1949) 34 UNTS 234, article 5; "Collective self-defence – article 5", 22.05.2017, senast hämtad: 25.05.2018; Deutscher Bundestag, Stenografischer Bericht, 14. Wahlperiode, 186. Sitzung, Berlin, Mittwoch, den 12. September 2001, s. 7.

members needed.²³ He said that the attacks should be seen as a ‘declaration of war against democratic values and the civilized states’ and that Germany needs to show loyalty with ‘other countries in the free world, especially EU-Countries, USA and Russia’.²⁴ Schröder’s definition of security seems to exclude citizens of what he defines as ‘undemocratic’ and ‘uncivilized states’. Cooperation on counter-terrorism includes only states with the same values as ‘us’. September 11 could thus be seen as a pretext for differentiating oneself from the ‘uncivilized’ while widening state authority beyond what was prescribed by the Constitution.²⁵ Schröder’s statements imply that he submitted to whatever the US required Germany to do. However, to join a war and to invoke stricter laws without any explicit public consent or democratic process contradicts the very democratic values he pretends to care so much about.

The security reforms

The promotion and protection of human rights for all and the rule of law is essential (...) recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing. (UNSC Resolution 1373)

Despite disputes among the parties, there is consensus on stricter security laws. The TBG reform was initiated and unanimously adopted only some

²³ Deutscher Bundestag, Stenografischer Bericht, 14. Wahlperiode, 207. Sitzung, Berlin, Mittwoch, den 12. Dezember 2001 (14/207), s. 20438.

²⁴ Deutscher Bundestag, 144. Sitzung, 2001, s. 5.

²⁵ Deutscher Bundestag, Stenografischer Bericht, 14. Wahlperiode, 207. Sitzung, Berlin, Mittwoch, den 12. Dezember 2001 (14/207), s. 20438.

weeks after September 11.²⁶ TBG establishes a legal basis for several constitutional amendments for the first time since WW2 and affects several laws and institutions such as the migration agency, the police force, the intelligence service, the constitutional defense service, telecommunication providers, the national defense unit and the national agency for statistics. The final legal act grants the executive authorities increased enforcement capacities, introduces a biometrical data chip for all passports and ID cards, improves the data exchange among national and foreign intelligence services, reinforces border controls and establishes several registers and databases.²⁷ The originally temporary law remains in force until today.²⁸

The TBG marks the beginning of a normalization of an insidious deprivation of privacy and integrity. Human rights organizations were criticizing its violations of articles 3 and 10 of the basic law (GG) since it lowers the protection of personal integrity and discriminates against foreigners or nationals with foreign appearance or name.²⁹ By upgrading the national

²⁶ Gesetz zur Bekämpfung des internationalen Terrorismus

(Terrorismusbekämpfungsgesetz), Bundesgesetzblatt Jahrgang 2002 Teil I, Nr. 3, ausgegeben zu Bonn am 11. Januar 2001.

²⁷ Passgesetz vom 19. April 1986 (BGBl. I S. 537), zuletzt geändert durch Artikel 1 des Gesetzes vom 1. Mai 2000 (BGBl. I S. 626) sowie durch Artikel 25 des Gesetzes vom 3.12. 2001 (BGBl. I S. 3306), Das Vereinsgesetz vom 5.08.1964 (BGBl. I s. 593) zuletzt geändert durch das Gesetz vom 4.12. 2001 (BGBl. I S. 3319), Bundesgrenzschutzgesetz vom 19. oktober 1994 (BGBl. I S. 2978, 2979) zuletzt geändert durch Artikel 6 des Gesetzes vom 18. Mai 2001 (BGBl. I S. 904), BND-Gesetz vom 20. Dezember 1990 (BGBl. I S. 2954, 2979), zuletzt geändert durch Artikel 2 des Gesetzes vom 26. Juni 2001 (BGBl. I S. 1254)

²⁸ Gesetz zur Bekämpfung des internationalen Terrorismus

(Terrorismusbekämpfungsgesetz), BGBl: Jahrgang 2002 Teil I, Nr. 3, Artikel 18, Änderung des Zehnten Buches Sozialgesetzbuch, §68 Uebermittlung von Sozialdaten; s. 378.

²⁹ The TBG (law on combatting terrorism) provisions are linked to the law on foreigners (AuslG) which, according to §103 AuslG, exempts foreign citizens

databases with biometrical data, the state's ability to categorize individuals by their physical appearance is enhanced as well. The registration of biometrical data opens up for the usage of an individual's legal status in society whenever the protection of national security interests is invoked. TBG contains extensive amendments of freedoms and rights that once were untouchable due to the provisions in the Constitution.

In the following years, attacks within Europe became more frequent. Madrid in 2004, London in 2005, Oslo in 2011, Paris in 2015, Nice in 2016, Brussels in 2016, Berlin in 2016, Stockholm in 2017 and Manchester in 2017 are just some examples.³⁰ As the attacks increased, states shored up their security networks, both in Germany and in the rest of the western world.³¹ According to a Human Rights Watch report, 140 states passed new counter-terrorism legislation. Common to all of them is a prohibition of membership in terror-organizations, limitations of the freedom of association and expression as well as extended executive capacities such as hidden surveillance measures.³²

What distinguishes Germany from other countries is its internal inter-institutional checks and balances, especially when it comes to amending the Constitution. The Constitutional Court (BVerfG) has thus frequently

from the constitutionally protected right to bodily integrity and personal freedom. Foreign nationals are therefore more affected by the TBG-law than German citizens are. See: Foreigners Act - AuslG vom 09.01.2002, BGBl. 1 S. 361, §§ 4, 39, 40, 41, 41a, 59, 74, 75, 76, 78, 80, 103; also Act to Combat International Terrorism (Counterterrorism Act), BGBl: Year 2002 Part I, no. 3, Article 11.

³⁰ Wissenschaftliche Dienste des Deutschen Bundestages, Terrorismus: Definitionen, Rechtsgrundlagen und Maßnahmen zur Terrorismusbekämpfung, Ausarbeitung WD 3 – 417/09, s. 5.

³¹ Hanrahan, Mark, Wang, Jessica, Number of fatal terror attacks in western Europe, World News 12 July 2017; Human Rights Watch Report In the Name of Security: Counterterrorism Laws Worldwide (2012), s. 5.

³² In the Name of Security: Counterterrorism Laws Worldwide, Human Rights Watch, (2012), s.5

dismissed and criticized parts of the security laws passed since September 11.³³ A reappearing critique is the profiling regulation that is contrary to the principle of anti-discrimination. BVerfG decided that preventive profiling violates the rights as protected by the Basic Law as long as there is no immediate threat to national security. Being targeted has far reaching consequences and is thus not proportional as a preventive act, according to the ruling.³⁴ BVerfG decisions are binding on all legislative bodies in Germany and is therefore highly relevant for the security reforms to come.³⁵

The next comprehensive reform, passed in 2009, grants the national criminal police (BKA) more efficient tools for the purpose of fighting and preventing international terrorism. The law grants the BKA permission to secretly tap electronic devices and bug apartments of suspects and close contacts to suspects.³⁶ For the first time since WW2, the police is given preventive – not only repressive – capacities.

By this law, the BKA does not only gain decision making power but even military competencies. Contrary to the military, the BKA is permitted to use its powers not only against foreign threats but against the country's own civilian population.³⁷ Compared to the TBG in 2001, this reform further increases the state's executive authority and limits individual privacy. The threshold for constitutional amendments is thus being lowered significantly.

³³ BVerfG, Urteil v. 15.12.1983, Az. 1 BvR 209, 269, 362, 420, 440, 484/83.

³⁴ BVerfG, Urteil v. 15.12.1983, Az. 1 BvR 209, 269, 362, 420, 440, 484/83

³⁵ BVerfG, 2008 - 1 BvR 370/07 - Rn. s. 28.

³⁶ Deutscher Bundesrat, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt, Drucksache, 404/08, 05.06.08; s. 28.

³⁷ Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 13. Juli 2017 (BGBl. I S. 2347) geändert worden ist, "Innerer Notstand" Art 87 a IV.

In 2016, doctors, journalists and lawyers filed a constitutional complaint against the BKA reform.³⁸ Their critique is directed at the security provisions that now include the long term storage of personal data, centralization of executive authority and international intelligence cooperation. BVerfG agrees, stating that the reform is partly too vague and that a sufficient guarantee of legal certainty (Rechtssicherheit) is missing. However, in its final decision BVerfG rules that counter-terrorism and protection from threats against the free and democratic society generally justifies the usage of qualified law enforcement methods such as preventive surveillance. National security is said to have the same status as other constitutional values as long as human dignity is safeguarded.³⁹

This statement marks a distinct policy shift compared to previous judgments where the protection of privacy was valued higher than the protection of national security.⁴⁰ In other words: until now it was not permissible to set aside privacy for the sake of security and this is significant because digital surveillance today goes much deeper than any conventional investigation method.

Since we share more private information with digital devices than ever before, our online behavior is extremely revealing. In order to maintain the constitutional protection of privacy, the most rational reaction to digitalization would have been stronger protection of privacy. But while it becomes gradually easier to collect digital data, the constitutional protection of privacy is being limited – instead of increased. As a result, integrity and privacy are twice as vulnerable to State interference than before.

³⁸ BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. (1-29).

³⁹ BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. (1-29).

⁴⁰ BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. (1-29), s. 43-62.

Despite the court's critique, the most comprehensive security reform was yet to come. Only some months later a huge reform of the entire Penal Code was initiated, including extended competencies for the regional and national authorities.⁴¹ The most controversial part is the extension of secret intelligence methods for all police and security forces. The notion 'secret surveillance' appears first in the final proposition and is never really up for public debate. The controversial intelligence regulations were inserted only one month prior to the adoption of the final legal act.⁴²

In contrast to the previous reforms, the emphasis lies no longer on the prevention of international terrorism, and their impact on the constitution is discussed to a lesser extent. Instead, the reform is said to be necessary for efficient law enforcement in general. Even the BVerfG itself has been changing its position leading to amendments in the Basic Law. The constitutional protection the BVerfG offers is thus fairly weak.

Experts have been pointing out that investigating the available official data of suspects' online behavior offers comprehensive insights into the personality, making any further legal reform redundant. The new legal provisions for secret surveillance are adopted despite these kinds of statements. The only explanation for that seems to be that the interest in political power and control is so strong that no consideration of maintaining constitutional core principles is made anymore.

⁴¹ Deutscher Bundestag, Drucksache 18/12785, s. 47.

⁴² Deutscher Bundestag, Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur effektiveren und praxistauglicheren Ausgestaltung des Strafverfahrens, Drucksache 18/11277, 22.02.2017; Deutscher Bundestag, Stenografischer Bericht, 240. Sitzung, Plenarprotokoll 18240, 22. Juni, s. 128.

Conclusion

The German security and intelligence legislation has successively been tightened since 2001. First, it was all about implementing the provisions of UN Security Council resolution 1373 and showing solidarity in the ‘war against terror’. By the time of 2009, it was about providing the national criminal police with capacities similar to a secret service, making law enforcement more efficient. With the reform of the Penal Code in 2017, intelligence capacities were extended to all law enforcing authorities. The judgments of the BVerfG concerning the protection of individual privacy have been taken into consideration but since the BVerfG itself has adjusted its position to the current legal and political situation, it did not have any restraining impact on the increasingly widening scope of executive authority. Accordingly, the judicial body, the legislative power and the executive powers have a mutual impact on each others actions, despite their formal independence.

The gradual process of limiting privacy went fairly unnoticed due to its progressive character. Taken one by one, all changes seem to be marginal. However, when looking at it from a distance and with the development from 2001 until today in mind, the difference is profound. Secret surveillance has been evolving from an exclusively purposive tool to being a standardized method, available to basically all government agencies that in some way participate in law enforcement.

The motivations for the new legal provisions have undergone change as well. In 2001 there was talk about ‘fighting international terrorism’, in 2009 it was ‘preventing terrorism and organised crime’ and finally in 2017, it was for the sake of ‘crime prevention and law enforcement’ in general.⁴³ Terrorism seems to have served as a rhetorical tool for portraying intrusions into

⁴³ Gesetz zur effektiveren und praxistauglicheren Ausgestaltung des Strafverfahrens, in kraft getreten am 24.08.2017, Bundesregierung der 18. Wahlperiode, Archivsignatur XYIII/535, artikel 4.

individuals privacy as the only way to effectively maintaining national security. This narrative functioned so well that there was no longer a need for it when the Penal Code was amended. By then, the German society gave away parts of their freedom with naiveté or maybe resignation without even requiring politicians to convince them that the reform was the right way to go.

The constitutional rights and freedoms as laid down by article 3, 10 and 13 have been limited step by step over the years. The BVerfG dismissed and criticised parts of the reforms but it never dismissed an entire law. In fact, the BVerfG itself has gradually deviated from the constitution. If it was not for the sake of secret surveillance – the most efficient tool for keeping society in check – BVerfG might have judged differently. But even the BVerfG is, despite its formal neutrality, part of the establishment and has therefore a legitimate interest in maintaining the state institutions. Weakening the state would mean weakening the institutions. The BVerfG is an institution itself and has therefore an existential interest in the protection of them. The development of the examined reforms shows that strategic and political stakes are high and that they shape the interpretation of the values protected by the constitution.

Despite the fact that Germany has recently been witnessing and actively participating in different forms of governmental power abuse, the warning bells have not been ringing yet. This could be due to the fact that the majority of the population has not been exposed to the negative consequences of the reforms. Being deprived of freedoms and rights becomes inevitable only to those who are in a vulnerable position and in need to claim these rights – and the majority of the population isn't in such a position.

The failure to imagine oneself in need of the constitutional protection of one's rights leads to short-sighted misjudgments. The rules of today might function today, with the government we have and the problems we deal with right now. But to make rules that only protect in a certain political context are fragile, easily exploitable and offer weak constitutional protection. It was

a weak constitution that paved the way for the NS-regime's takeover in 1933, which de facto was entirely legal. It is astonishing how this legacy has not led to a much more restrictive approach to constitutional amendments in Germany.

In the long run, the political power elites profit from the widened executive capacities. The German sociologist Max Weber once said that the biggest mistake for a good politician to make, is to lose himself in the irrational striving for power.⁴⁴ In the case of the security reforms, the politicians seem to do exactly that. They lost themselves in a meaningless striving for power, where the recommendations of experts on how to prevent crimes without violating individual privacy is not even being taken into consideration.

The laws are passed despite rational arguments against it. The purpose of the constitution is to formally safeguard freedoms and rights that are considered crucial and should therefore by no means be breached, limited or restricted. If the constitution only protects freedoms and rights as long as stakeholders benefit from it, it is no longer a constitution but as fragile and versatile as any other law.

⁴⁴ Weber, Max, *Politics as Vocation*, i: Waters, Tony. & Waters, Dagmar. (red.) (2015). *Weber's Rationalism and Modern Society; New Translations on Politics, Bureaucracy, and Social Stratification*. Basingstoke: Palgrave Macmillan, s. 181.

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