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„The multi-causal and asynchronous development
of terrorism laws in Germany from the 1970’s
to the present”

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Introduction

Left terrorism in Germany in the 70's and 80's was a polarizing issue and continues to be so. Different narratives compete for dominance in interpreting the acts of the RAF and other terrorist groups. Most of them focus in some form on the dichotomy of terrorist acts and state reaction. One narrative, dominant in major parts of the left and the liberal left since the 70's, has acknowledged and condemned the criminal character of the RAF's terrorist acts, but has put its focus on the state reaction, which it has perceived as being excessive, following an authoritarian political agenda and reducing civil liberties. The dominant narrative on the political right and in important parts of the SPD has portrayed the RAF as an overall threat to the survival of the state, necessitating and justifying a forceful reaction. These two narratives differ not only in regard to their assessment of the state reaction, but also in how they characterize the development of terrorism laws. The "left" narrative has described and continues to describe the development of terrorism laws as an ongoing reduction of civil liberties. The "right" narrative suggests that reductions of civil liberties by terrorism laws are mostly temporary and disappear when the terrorist threat subsides. This concept is often based on the metaphoric assumption that security and liberty are in some sort of balance, as Ronald Dworkin pointed out.¹

By describing the above-mentioned narratives as "left" and "right", I already indicated that they do not merely serve an analytical function, but have been and continue to be employed in public debate to substantiate a political agenda. The concept of "terrorism" – defined by the narrative surrounding it – has a specific discursive function. However, terrorism laws are not merely an appendage to (anti-)terrorism politics, just as the law is not merely an appendage to politics in general. Rather – following Luhmann – politics and the law, although they interact and influence each other, are distinct systems following their own rules of continuity, reproduction and development. Looking at the history of terrorism and state reaction in Germany from this perspective I suggest that not a singular, but a multitude of development patterns are to be discovered. It may be worthwhile to describe the development of terrorism laws as a bundle of (legal, political, social) processes having their own distinctive – sometimes complementing, sometimes competing – histories. By this, I do not wish to suggest that more straightforward, mono-causal narratives (such as the ones outlined above) are less valid than the one that I present. However, I consider it important to be clear about their

¹ Ronald Dworkin: The Threat to Patriotism, in: The New York Review of Books (2002) Vol. 49 No. 3

functions in political discourse. Giving account of an asynchronous and multi-causal development of terrorism laws in Germany shall hint at the great number and the complexity of processes that it has been influenced by.

This thesis aims at providing a systematic analysis of the development of the major terrorism laws enacted during the RAF period and includes both the specific legal developments and the connected general political discourses. Each of the six legal measures is discussed separately. The final chapter attempts to establish common traits in the development of the different anti-terrorism laws. In particular, it analyzes the *Kontaktsperregesetz*, *Kronzeugenregelung*, *Lauschangriff*, *Rasterfahndung* and the terrorism provision in the penal code (§ 129a StGB) and related provisions. Important provisions not covered due to space constraints concern the limitations of defence rights (*Verteidigerausschluss*). Additionally, I included a chapter on the *Radikalenerlass*. While the *Radikalenerlass* does not constitute terrorism legislation per se, I believe that it provides major insights into the de-normalizing structure of the security debate in Germany in general.

So far, very little has been published on the legal dimension of Germany's anti-terrorism efforts from a historic point of view, and no systematic analysis of relevant legal developments has been attempted yet. Therefore, this thesis mostly relies on primary sources. The reconstruction of the legal developments of the researched measures and the connected political debates is mainly based on articles from *Der Spiegel*, a weekly journal that had a left-liberal orientation until the mid-90's. Additionally, I carried out a broad research in a variety of professional legal journals, including the *Neue Zeitschrift für Verwaltungsrecht*, the *Neue Juristische Wochenschrift* and the *Zeitschrift für Rechtspolitik*. Finally, I analyzed two political publications: *Kursbuch*, the major journal for the radical and non-orthodox left in the 70's, and *Blätter für deutsche und internationale Politik*, a political science journal of predominantly social democratic orientation. While the *Spiegel*-research provided the structural backbone of the thesis and was the main source for the reconstruction of the political discourse, the legal research gave an overview of the relevant legal debates. Finally, *Kursbuch* and *Blätter* provided an insight into the critical opinions on the development of terrorism laws in Germany.

Earlier drafts of this thesis included a larger chapter on the theoretical side of the terrorism discourse. However, the number of publications that perform a discourse analysis of

“terrorism” is vast and has – in my view – already comprehensively substantiated the argument that “terrorism” is not a neutral term but has a discursive and political function.² I therefore decided to limit the theoretical part to a minimum and instead fully focus on the analysis of the development of terrorism laws in Germany in an attempt to show how the terrorism discourse plays out in practice. By this, I believe that I have produced a piece of original research instead of merely echoing existing research efforts.

All translations from German sources are my own.

² For a comprehensive overview, see for example Thomas Riegler: Terrorismus. 9/11 im Kontext: Akteure, Strukturen, Entwicklungslinien, Dissertation Wien 2007

Terrorism as discourse

Richard Jackson writes that “terrorism discourse – the terms, assumptions, labels, categories and narratives used to describe and explain terrorism – has emerged as one of the most important political discourses of the modern era (...).”³ The use of the term “terrorism” has always been contested. The struggle to find a scientific definition – referred to invariably by textbooks on terrorism⁴ – reflects the political struggle behind the power of naming somebody or something “terrorist”. Being labelled a terrorist was and is “completely unattractive”⁵ for the denominated person or group and has severe legal and political consequences. The term “terrorism” contains a strong moral judgement.⁶ It is thus highly contested and shifting in its content. Eugene Walter: “Ever since the French Revolution, ‘terrorist’ has been an epithet to fasten on a political enemy. Burke and his followers have said that if you scratch an ideologue, you will find a terrorist. On the other hand, revolutionary radicals have tended to think of terror as a defensive manoeuvre against counterrevolutionary forces. Both points of view are quick to label almost any kind of violence exercised by their opponents as terrorism.”⁷ The academic terrorism debate does not solve the struggle with regard to the denomination by applying a neutral definition, but reproduces the power struggle in definitions within the academic sphere. Noam Chomsky argues that “it is important to bear in mind that the term ‘terrorism’ is commonly used as a term of abuse, not accurate description. There are official definitions of “terrorism”, for example, those of the US and British governments, which are quite similar. But they are not used, because they do not distinguish between good and bad varieties of terrorism. That distinction is determined by the agent of the crime, not its character. It is close to a historical universal that our terrorism against them is right and just (whoever “we” happen to be), while their terrorism against us is an outrage. As long as that practice is adopted, discussion of terrorism is not serious. It is no more than a

³ Richard Jackson: *Constructing Enemies: ‘Islamic Terrorism’ in Political and Academic Discourse*, in: *Government and Opposition* (2007) Vol. 42 No. 3, p. 394

⁴ Jeffrey Addicott: *Terrorism Law. Materials, cases, comments*. Tucson 2007, p. 1; Walter Laqueur: *Terrorismus*, Frankfurt am Main 1987; Eckart Klein: *Die Herausforderung durch den internationalen Terrorismus – Hört hier das Völkerrecht auf?*, in: Josef Isensee (ed.): *Der Terror, der Staat und das Recht*, Berlin 2004, p. 10; Klaus Weinhauer: *Terrorismus in der Bundesrepublik der Siebzigerjahre. Aspekte einer Sozial- und Kulturgeschichte der Inneren Sicherheit*, in: *Archiv für Sozialgeschichte* (2004) No. 44, p. 221

⁵ Thomas Riegler: *Terrorismus. 9/11 im Kontext: Akteure, Strukturen, Entwicklungslinien*, Dissertation Wien 2007, p. 17

⁶ Henner Hess: *Terrorismus und Terrorismus-Diskurs*, in: *Angriff auf das Herz des Staates* (Vol. 1), Frankfurt am Main 1988, p. 55

⁷ Eugene Walter, *Terror and Resistance. A Study of Political Violence*, Oxford 1969, p. 4

form of propaganda and apologetics.”⁸ Historian Charles Townshend argues that terrorism is “a labelling, because ‘terrorist’ is a description that has almost never been voluntarily adopted by any individual or group. It is applied to them by others, first and foremost by the governments of the states they attack. States have not been slow to brand violent opponents with this title, with its clear implications of inhumanity, criminality and – perhaps most crucial – lack of real political support.”⁹ In this sense, the term terrorism serves a particular discursive function of delegitimizing the denoted group or movement.

Many authors point out that “terrorism” as a phenomenon describes a broad set of institutions, including all institutions of state reaction as well. “State and society have not remained unaffected by ‘terrorism.’ [...] ‘Terrorism’ has become an institution on a continuing basis. This institution does not merely encompass a few figures in the underground, but also the impressive apparatus of (police, judicial, legal and media) reaction to it – including the production of printed matters.”¹⁰ Research needs, Klaus Weinhauer argues, to take account of the “close interplay between terrorism and the state.”¹¹

The process of de-legitimization has a political and a legal side. Before turning to the legal aspect, the part below gives two examples of the political de-legitimizing function of the terrorism discourse.

Terrorism discourse: the case of SDS

Terrorism discourse in Germany started back in the 60’s, years before the first terrorist attack by the RAF. Until the mid-60’s, the term “terror” or “terrorism” did not seem to be commonly used in domestic discourse. The term was mainly used to describe the Nazi- and the Stalin-regime and struggles in the decolonialization process, e.g. in Algeria. Additionally, the term was used by the DDR to decry the political system in Western Germany.¹² When, however, student protests erupted in West Berlin in 1967, they were increasingly called “terror” by the right-wing press. After student Benno Ohnesorg was shot by a police officer in June 1967 during a demonstration against the Persian Shah and 24 demonstrators were severely wounded, the *Berliner Zeitung* – part of the Springer media conglomerate – wrote the

⁸ On Israel, the US and Turkey. Noam Chomsky interviewed by Sabahattin Atas, September 2003, online: www.chomsky.info/interviews/200309--.htm (retrieved 24.3.2008)

⁹ Charles Townshend: *Terrorismus*, Stuttgart 2005, p. 3

¹⁰ Henner Hess et al.: *Vorbemerkung, Angriff auf das Herz des Staates* (Vol. 1), Frankfurt am Main 1988, p. 10

¹¹ Klaus Weinhauer (2004), p. 222

¹² Unter Naturschutz, in: *Der Spiegel* 49/1962, 05.12.1962, p. 66

headline: “If they produce terror, they need to accept a tough response.”¹³ Student organizations called the killing a “terror measure by the police of West Berlin.” And *Bild* – also owned by Springer – wrote on the following day: “Yesterday stupid and malicious muddle heads have tried for the first time to bring terror to the free part of Berlin.” Even Rudolf Augstein, editor of the left-liberal journal *Der Spiegel* – called the protests in West-Berlin “organized terror.”¹⁴

When student leader Rudi Dutschke and eight other demonstrators entered a church to demonstrate for peace in Vietnam in late 1967 and Dutschke was injured by a church-goer, the CDU youth wing *Junge Union* called the action – not the attack on Dutschke – “terror.”¹⁵

In 1968, “terror” became the single most important word of the right and the political establishment to fight against student protesters and served as a legitimization of the excessive use of police violence. In January 1968, a demonstration against a rise in ticket prices for public transport in Bremen was dispersed by the massive use of police violence. Hans Koschnick, the SPD Major of Bremen supported tough police measures, arguing that “terror can only be overcome with violence.”¹⁶ Accordingly, the demonstration of about 50 high school students was violently dispersed by the police. This caused a major anti-police demonstration, as *Der Spiegel* reported, leading to the damage of hundreds of buses and trams. When 500 students demonstrated in the FU Berlin and blocked the doors of deanery, Rector Ewald Harndt called it “brutal terror.”¹⁷ The right-wing press compared the student protests with the street terror conducted by the SA between 1930 and 1933, calling the demonstrators “red fascists” and the smashing of windows “stoning democracy to death.”¹⁸

However, the student movement, and in particular its main organization SDS and its most prominent figure Rudi Dutschke, had explicitly opposed the use of violence from the beginning (Wolfgang Kraushaar argues, however, that Dutschke had an “ambivalent” relation to violence). After the first criticism of the student protest’s alleged aggressiveness, the student movement attempted to distinguish between ‘violence against persons’ and ‘violence against objects’. While the first was fully opposed, the second was sometimes deemed

¹³ Knüppel frei, in: *Der Spiegel* 25/1967, 12.06.1967, p. 41

¹⁴ Die Revolution und ihr ABC, in: *Der Spiegel* 32/1967, 31.07.1967, p. 14

¹⁵ Sache der Elenden, in: *Der Spiegel* 01/1968, 01.01.1968, p. 39

¹⁶ Großer Graben, in: *Der Spiegel* 04/1968, 22.01.1968, p. 28

¹⁷ Licht aus, in: *Der Spiegel* 06/1968, 05.02.1968, p. 56

¹⁸ Zahltag, in: *Der Spiegel* 07/1968, 12.02.1968, p. 32

justified by the circumstances. Especially Dutschke clearly opposed the use of violence in Germany. In his famous discussion with Ernst Bloch at the Protestant Academy in Bad Boll¹⁹ Dutschke stated: “In the current state of capitalism violence against persons cannot be justified as revolutionary violence. In the current phase, as far as I can see, I can imagine terror only as an inhuman, uncontrolled machinery, and no longer directed against persons [...] I propose that tyrannicide is still legitimate. But to use such practices against Kiesinger, Brandt or other character masks is wrong, barbarous and counter-revolutionary. They are completely exchangeable, and for us this form of direct violence against character masks is completely inadequate and wrong.”²⁰

In April 1968, Rudi Dutschke was shot and severely injured.²¹ In the following protests (“Osterunruhen”), a photographer and a student were killed, allegedly by rocks thrown by protesters (later evidence suggests that the student, Rüdiger Schreck, was in fact killed by the police).²² The SDS leaders Karl Dietrich Wolff und Frank Wolff, defending themselves against the accusation that they were “anarcho-revolutionary terrorists”, gave the following statement on the use of violence in an interview with *Der Spiegel*: “There have been situations where throwing rocks is justified, for example if you do not want to give yourself up to police who wish to beat you unscrupulously.”²³ Asked what the SDS considered as too much violence, they replied: “The terror of some individuals against the population. In Berlin somebody fought against car owners by randomly slashing tyres of parked cars. This must be called pathological.” In an interview a month after he was shot, Dutschke confirmed his opposition to the use of violence by the student movement: “In our time, terrorist violence against people in Western metropolises is no longer necessary.”²⁴ Some demonstrations in 1968 were, however, accompanied by rocks thrown at police officers – violence clearly directed against persons, not objects.²⁵ The demonstration on occasion of the process against APO-lawyer (and later RAF terrorist) Horst Mahler caused 121 casualties among police officers.

¹⁹ Schwierigkeiten beim Aufrechtgehen, in: *Der Spiegel* 08/1968, 19.02.1968, p. 30

²⁰ Neues in Deutschland, in: *Der Spiegel* 08/1968, 19.02.1968, p. 32

²¹ Sebastian Scheerer: Deutschland: Die ausgebürgerte Linke, in: *Angriff auf das Herz des Staates* (Vol. 1), p. 275

²² Zwei vergessene 68er-Opfer, in: BR-online, 18.3.2008, online: <http://www.br-online.de/kultur/gesellschaft/die-68er-40-jahre-danach-DID1202381431011/68er-osterunruhen-klaus-frings-ruediger-schreck-ID1205848656242.xml> (retrieved 30 June 2008)

²³ „Ohne uns wäre es viel schlimmer gekommen“, in: *Der Spiegel*, 17/1968, 22.04.1968, p. 36

²⁴ Da man sie schlagen wird, kennen sie das Risiko“, in: *Der Spiegel*, 20/1968, 13.05.1968, p. 36

²⁵ Nach vorn geträumt, in: *Der Spiegel* 46/1968, 11.11.1968, p. 67

In 1968, the term “terror” was sometimes employed by student protesters to describe their own actions.²⁶ For the most part, this choice of words should be, I believe, understood as a reaction by the APO to the dominant allegations by the establishment and the right. To some limited extent, it might have served as a genuine attempt to describe the movement’s strategy to disrupt or provoke the public order, especially when street militancy became a more deliberately employed method of APO politics. The SDS also employed the term “terror” as a fighting word against their opponents. A leaflet in Mainz published after the attack on Dutschke read: “If a media conglomerate uses its powers to defame, denunciate and hound minorities, this does not only constitute media dictatorship, but also uses direct terror against these minorities.”²⁷ A leaflet from early 1969 demanded: “terrorize the terrorists.”²⁸ However, the term “terror” was dominantly employed by the political establishment (SPD, CDU/CSU and the right-wing press) to delegitimize the student protest movement.

The rejection of the student movement and its demands and the aggressive use of police violence was to some extent fuelled by a backward, authoritarian belief system. This seems to be the main reason for the fact that demonstrations were “perceived as irresponsible idleness and terror,” as Berlin professor Wilhelm Weischedel argued, according to *Der Spiegel*.²⁹

A growing militancy on the part of the SDS and the APO can be observed from late 1968 on.³⁰ The use of violence was increasingly legitimized in the leftist discourse. Daniel Cohn-Bendit, a student leader, said: “Comrade Martin Luther King is in little demand. We need an offensive of violence.”³¹ The student protest movement had been previously dominated by the concept of “passive violence”, sit-ins, walk-ins and blockades in the style of the student protests in Berkeley and of Martin Luther King’s civil rights movement. Dissent on the use of violence was one of the reasons why the radical left split into a “black line” (anarchists, Maoists) and a “red line” (orthodox communists, labour union youth, socialists and liberals) who continued to reject all forms of violence.

²⁶ Zur Sache, Schätzchen, in: *Der Spiegel* 19/1968, 06.05.1968, p. 67

²⁷ „Gefahr für uns alle“, in: *Der Spiegel* 19/1968, 06.05.1968, p. 42

²⁸ Wann und wie, in: *Der Spiegel* 07/1969, 10.02.1969, p. 23

²⁹ Zur Sonne, in: *Der Spiegel* 26/1968, 24.06.1968, p. 38

³⁰ Wann und wie, in: *Der Spiegel* 07/1969, 10.02.1969, p. 23

³¹ Wann und wie, in: *Der Spiegel* 07/1969, 10.02.1969, p. 23

The arson attack in April 1968 on two warehouses in Frankfurt by the later RAF terrorists Andreas Baader, Gudrun Ensslin, Thorwald Proll und Horst Söhnlein was fully rejected by the SDS leadership.³²

In the election campaign of 1969, the CDU/CSU advocated harsh measures against the APO militancy. Franz-Joseph Strauss (CSU) demanded that “the order of the state needs to be guaranteed by all means of executive power. The terror must be finally broken.”³³

The development of a militant (but non-terrorist) fraction of the APO in the following years is not examined by this thesis. The chapter shows, however, that a “terror discourse” had existed in Germany well before a terrorist group came into existence, as the RAF was founded only in 1970.³⁴ The terror discourse was used by the political establishment –mostly by the CDU/CSU and the right-wing press, but also by the SPD – in order to delegitimize the student movement. This chapter shows that the “terror” allegation was already used in a phase (1967) that was characterized by non-violent protests. Heinz Steinert argues that “it becomes obvious that the whole ‘left’ was seen as illegitimate in Germany, and ‘terrorism’ was an opportune occasion to also de-legalize the ‘sympathizer-swamp’. [...] for this use of ‘terrorism’ and its ‘history’ it is necessary to reconstruct the relation between the ‘student movement’ and ‘terrorism’ in such a form that ‘terrorism’ was only the symptom for something already rooted in the ‘student movement.’”³⁵

Terrorism discourse: sympathizers

Terrorism discourse was employed in the political discourse to discredit political opponents. A key concept to discredit a large swathe of left-liberal intellectuals and leftist groups was the concept of the “terrorism sympathizer.” In its core meaning, “sympathizer” described a group of people helping or willing to help RAF terrorists, e.g. by handing over their passports, providing money, supplies or a place to sleep. However, the term “sympathizer” was employed from the outset to denounce persons who did not distance themselves strong

³² Mord beginnt beim bösen Wort“, in: Der Spiegel 41/1977, 03.10.1977, p. 28; Angriff und Machtkampf, in: Der Spiegel 26/1969, 23.06.1969, p. 54

³³ Von Strauss, Tieren und anderen Menschen, in: Der Spiegel 34/1969, 18.08.1969, p. 16; Knüppel und Hunde, in: Der Spiegel 37/1969, 08.09.1969, p. 62

³⁴ Sebastian Scheerer (1988), p. 293

³⁵ Heinz Steinert: Erinnerung an den „linken Terrorismus“, in: Angriff auf das Herz des Staates (Vol. 1), Frankfurt am Main 1988, p. 17

enough from the RAF or who used arguments – e.g. against police methods – that were allegedly playing down the RAF.³⁶

One of the first prominent victims of the sympathizer-discourse was author and Nobel-prize laureate Heinrich Böll. In January 1972 – before the RAF had started their first major terrorist operation, the bombings of May 1972³⁷ – he published the commentary “Does Ulrike [Meinhof] want mercy or free passage?” in *Der Spiegel*.³⁸ He argued that the RAF hysteria led by the right-wing media, especially the *Bild*, and many politicians was disproportional to the group’s real danger potential and was responsible for extending and prolonging the group’s activities.³⁹ Böll accused the *Bild* of fascism while at the same time rejecting the RAF’s activities, calling them “a war against society.” He argued that – in order to end the group’s activity – it was necessary to offer the right to free passage and to due public process to Meinhof.

Subsequently, Böll was accused by the Springer newspapers, *Bild* and *Welt*, of defending the RAF and demanding impunity for Meinhof.⁴⁰ The *Quick*, a right-wing tabloid, wrote: “The Bölls are worse than Baader-Meinhof.”⁴¹

The campaign against Böll lasted many months.⁴² Right-wing newspapers such as the *Welt* accused the student and protest movement of the 60’s of being responsible for RAF’s terrorism. The *Welt* wrote: “The sympathizers of the gang [RAF, ck] need to be put in the spotlight.”⁴³ The CDU politician Friedrich Vogel claimed that “the terrorists can move like fish in the water of the left-affiliated parties.”⁴⁴ In November 1974, after the murder of court president Günter von Drenkmann, Franz-Josef Strauss argued: “I would like to know how many sympathizers of the Baader-Meinhof crimes are members of the SPD and FDP parliamentary fraction in Bonn. It is quite a bunch.”⁴⁵

³⁶ Balz, Hanno: Der „Sympathisanten“-Diskurs im „Deutschen Herbst“, in: Klaus Weinhauer (ed.): Terrorismus in der Bundesrepublik, Frankfurt am Main 2006, p. 320; Thomas Riegler (2007), p. 377; Sebastian Scherer (1988)

³⁷ Sebastian Scheerer (1988), p. 348

³⁸ Heinrich Böll: „Will Ulrike Gnade oder freies Geleit?“, in: *Der Spiegel* 03/1972, 10.01.1972, p. 54

³⁹ Hermann Vinke: Mit zweierlei Maß. Die deutsche Reaktion auf den Terror von rechts. Eine Dokumentation, Hamburg 1981, p. 93

⁴⁰ Zitate, in: *Der Spiegel* 04/1972, 17.01.1972, p. 118

⁴¹ „Mord beginnt beim bösen Wort“, in: *Der Spiegel* 41/1977, 03.10.1977, p. 28

⁴² Peter Schneider: Der Sand an Baaders Schuhen, in: *Kursbuch* (1978) No. 51, p. 9

⁴³ „Sollen wir mit Blumen kommen?“, in: *Der Spiegel* 27/1972, 26.06.1972, p. 60

⁴⁴ Zucker vor der Hoftür, in: *Der Spiegel* 25/1972, 12.06.1972, p. 31

⁴⁵ „Den Rechtsstaat retten – blödes Zeug“, in: *Der Spiegel* 11/1975, 10.03.1975, p. 19

After the murder of federal prosecutor Siegfried Buback in April 1977, the text “Buback – an obituary” was published in a student magazine in Göttingen under the pseudonym “Mescalero.” The text – written by Klaus Hülbrock, who identified himself as the author 25 years later – became a colossal scandal and sparked a major debate on sympathizers of the RAF terror. In the text, Hülbrock wrote that he “at first felt secret joy after the murder. [...] I have heard [Buback’s] incitements again and again. I know that he played an immense role in the prosecution, criminalization and torture of leftists.” In the second part of the text, the author criticised and distanced himself from the murder: “Our aim, a society without terror and violence [...] does not justify all means, only some. Our path to socialism (or anarchy) cannot cross over dead bodies.”⁴⁶ Calling the murder of Buback an “Abschuss”, a word which suggests the killing of an animal rather than the murder of a person, the text remained deeply ambiguous.

In public debate, politicians and right-wing newspapers were quoting only the first part of the text, without mentioning the criticism and rejection of the murder in the second. The text led to criminal investigations against the student union in Göttingen. In August, 43 university professors jointly published the text.⁴⁷ Their intention was to make the complete text public.⁴⁸ The professors were criticised by most parts of the media for their lack of distance from the text, but were also accused of being sympathizers of terror by the right-wing press.

The dictum of the “secret joy” became the dominant element in the discourse on sympathizers in the following months.⁴⁹ After the kidnapping and murder of Hanns-Martin Schleyer and the hijacking of the Landshut airplane in September 1977, criticism of alleged terrorist sympathizers grew sharply.⁵⁰ The Prime Minister of *Rheinland-Pfalz*, Bernhard Vogel (CDU) said that “somebody may already be a sympathizer when he says Baader/Meinhof-**group** instead of **-gang**.”⁵¹ The SPD Chancellor Helmut Schmidt spoke of “intellectual pioneers [of terrorism, ck] that live in some of the institutions and the media of our society.” The CDU/CSU politicians attempted particularly to include the FDP and the SPD in the group of

⁴⁶ „Andere Gewalt als Al Capone“, in: *Der Spiegel* 34/1977, 15.08.1977, p. 28

⁴⁷ 43 Professoren, in: *Der Spiegel* 34/1977, 15.08.1977, p. 27

⁴⁸ Nur Anstandsregeln verletzt?, in: *Der Spiegel* 34/1977, 15.08.1977, p. 26

⁴⁹ Hans Adamo: Vorgebliche und tatsächliche Ursachen des Terrorismus, in: *Blätter für deutsche und internationale Politik* (1977) No. 12, p. 1436; Gerard Braunthal: Political loyalty and public service in West Germany: the 1972 decree against radicals and its consequences, Amherst 1990, p. 98; „Klammheimliche Freude“, in: *Der Spiegel* 41/1977, 03.10.1977, p. 49

⁵⁰ Sebastian Scheerer (1988), p. 366

⁵¹ Mord beginnt beim bösen Wort I, in: *Der Spiegel* 41/1977, 03.10.1977, p. 28

alleged sympathizers. The CSU parliamentarian Günther Müller claimed that broad parts of the governmental parties “felt not only secret joy that our system is being crushed.”⁵² In October 1977, CDU general secretary Heiner Geißler presented a “terrorism documentation” which contained quotes of (among others) Chancellor Helmut Schmidt, Interior Minister Maihofer and the author Heinrich Böll, all of whom were allegedly playing down terrorism.⁵³ The documentation was criticised even within Geißler’s own party as denunciatory.

Students and university professors were the focus of the sympathizer-debate. Student representative bodies (AStAs) were criticized for their alleged sympathizer role and some of them were shut down, although the German AStAs were almost completely controlled by socialist, liberal and communist student organizations – groups that explicitly opposed the use of violence.⁵⁴ The German Conference of Catholic Bishops warned that “for many years theories of refusal and violence” had been taught at universities, and “terrorists had received their ideological munitions there.”⁵⁵ The conservative “Union Freedom of Science” (*Union Freiheit der Wissenschaft*) claimed that demonstrations for more political rights for student unions already constituted “a preliminary state of the terrorism that emanates from Germany’s universities.”⁵⁶ Especially after the Mescalero affair, attention also turned to the role of leftist professors, accused of creating or legitimizing terrorism.

Der Spiegel analyzed the sympathizer-debate as follows: “Everybody is a sympathizer who is called one. The term is a hollow phrase, full of suspicion and without any precision. This blurred term has become a weapon of language in the political fight. In its inconsistent use, it covers the offender who actively supports crimes, but cannot distinguish him from those who comprehend the pretended political motive without endorsing their actions. And it cannot distinguish between supporters of violence and those who call themselves ‘critics of the system’ or think of themselves as ‘revolutionary’ but oppose violence. And it does not distinguish between those who sympathize with terrorism and those who doubt the legality of how the state reacts to terrorism.”⁵⁷

⁵² Mord beginnt beim bösen Wort I, in: *Der Spiegel* 41/1977, 03.10.1977, p. 28

⁵³ Kohls Hagen, in: *Der Spiegel* 43/1977, 17.10.1977, p. 41

⁵⁴ Mord beginnt beim bösen Wort III, in: *Der Spiegel* 43/1977, 17.10.1977, p. 203

⁵⁵ Mord beginnt beim bösen Wort III, in: *Der Spiegel* 43/1977, 17.10.1977, p. 203

⁵⁶ Mord beginnt beim bösen Wort III, in: *Der Spiegel* 43/1977, 17.10.1977, p. 203

⁵⁷ Mord beginnt beim bösen Wort I, in: *Der Spiegel* 41/1977, 03.10.1977, p. 28

However, especially those intellectuals most ferociously attacked for being sympathizers or at least for being “intellectual pioneers” of terrorism – such as Günther Grass, Heinrich Böll, Kurt Scharf, Helmut Gollwitzer⁵⁸ or Heinrich Albertz – explicitly rejected the use of violence by the left from early on.

After 1972, the group of sympathizer-supporters of the RAF was estimated to be a few thousand at most. They almost exclusively belonged to the anarchist scene or the K-groups.⁵⁹ The first “supporter-generation” had continued to include intellectuals such as Peter Brückner. But after the first terrorist attacks of 1972, this middle-class supporter group completely eroded.⁶⁰ Both the left-liberal establishment and the “red line” of the student movement spoke out against the use of violence and terrorism from early on. However, the existence of a small anarchist scene that sympathized with (or – as in the case of the Mescalero – did not sufficiently reject) terrorist violence was used to denunciate the liberal and the social democratic establishment by the right. In 1978 and afterwards, the use of the sympathizer allegation was strongly reduced.⁶¹

⁵⁸ Peter Schneider (1978), p. 9

⁵⁹ Mord beginnt beim bösen Wort IV, in: Der Spiegel 45/1977, 31.10.1977, p. 36

⁶⁰ Mord beginnt beim bösen Wort V, in: Der Spiegel 46/1977, 07.11.1977, p. 36

⁶¹ Hans Heinz Holz: Hat der Terrorismus eine theoretische Basis?, in: Blätter für deutsche und internationale Politik (1978) No. 3, p. 317

Terrorism laws in Germany enacted during the RAF period

Kronzeugenregelung – the leniency law

A leniency law (*Kronzeugenregelung*) provides that a person charged with a crime who testifies against his or her accomplices may receive a reduced sentence if the testimony leads to a conviction. Germany did not have a leniency law until 1981 (for drug offences) and 1989 (for terrorism charges).

Passing a leniency law was first considered in the mid-seventies, when evidence against the first RAF-generation turned out to be hard to acquire. Critics – such as federal prosecutor and later RAF-victim Siegfried Buback – argued that a leniency law was not necessary from a practical point of view and, more generally, would violate the rule of law.⁶² *Der Spiegel* reported that – after initial excitement – opposition to the *Kronzeugenregelung* within the governing and the opposition parties grew stronger.⁶³ The SPD-FDP government finally decided not to push through the leniency law in early 1976 after a year-long parliamentary debate and three draft bills⁶⁴, not least due to discouraging experiences with RAF witnesses of the past years, e.g. Hans-Peter Konieczny⁶⁵ Gerhard Müller⁶⁶ and Karl-Heinz Ruhland.⁶⁷

Gerhard Müller, who was arrested in 1972 together with Ulrike Meinhof served as the prime witness in the Stammheim trials. The prosecution deemed him essential to reach a conviction, as they had difficulties in proving which RAF member had exactly participated in which crimes.⁶⁸ Being an insider, Müller could provide this information. In return, the prosecution – presumably – dropped parts of the charges, although evidence came up later that connected him to the murder of police officer Norbert Schmid⁶⁹ and to the attack on a US military building in 1972. His testimony led to a number of life sentences for RAF members. Müller had to serve only two thirds of his ten year prison sentence. Afterwards he probably entered a witness-protection program, according to the *Süddeutsche Zeitung*. It is therefore likely that

⁶² Der Rechtsstaat auf dem Hackklotz, in: *Der Spiegel* 8/1976, 16.2.1976, p. 30

⁶³ Umstrittene Figur, in: *Der Spiegel*, 10/1976, 1.3.1976, p. 36

⁶⁴ Heute diene ich mit der reinen Wahrheit, in: *Der Spiegel* 20/1979, 14.5.1979, p. 97

⁶⁵ Lohn der Angst, in: *Der Spiegel*, 41/1976, 4.10.1976, p. 72

⁶⁶ Müller schoss, Schmid fiel, in: *Der Spiegel*, 29/1976, 12.7.1976, p. 28

⁶⁷ Ich würde nie wieder aussagen, in: *Der Spiegel*, 10/1976, 1.3.1976, p. 38

⁶⁸ Mutmaßungen über verschundenes RAF-Mitglied, in: *Süddeutsche Zeitung*, 7.4.2008

⁶⁹ Müller schoss, Schmid fiel, in: *Der Spiegel*, 29/1976, 12.7.1976, p. 28

the federal prosecution applied a leniency arrangement without a legal basis, preventing a murder accusation from being prosecuted.

During the Stammheim trials, the court and the defence lawyers were shown only parts of the protocols of Müller's interrogation, other parts were kept secret. These parts remain lost until today, as recent investigations have shown.⁷⁰ The undisclosed parts of the interrogation protocols were seemingly destroyed in 1996 by the federal prosecution office, more than ten years before they were to be de-classified, and no copies of these documents have been handed to the national archive.

Müller's testimony was one of the reasons that led commentators to the conclusion that the Stammheim trial was "a caricature of a trial and of the rule of law,"⁷¹ *Der Spiegel* argued: "The deal with Gerhard Müller is an intentional breach of the law."⁷² The testimony turned into a veritable source of embarrassment for the federal prosecution and the federal criminal agency (BKA). The BKA and the federal prosecution were accused of holding back information from the court and of hiding crucial evidence.⁷³

Karl-Heinz Ruhland was a former RAF member who testified against other RAF members. He was granted a reduced sentence of two and a half years instead of four as a reward. He later claimed that he had been promised protection, money and a reduced sentence by the police in exchange for his testimony, but had neither received protection nor a new identity after his release from prison.⁷⁴ Ruhland commented publicly that he would have never testified against his accomplices if he had known how little support he would have received from the state, further disavowing the prosecution and the BKA.

While a real *Kronzeugenregelung* did not become law until ten years later, a growing shift in court and prosecution practice can be observed. This included, first and foremost, the use of witness testimony without the possibility of the defence – or even the judge – to interrogate the witness. This practice was established, supposedly, for security reasons. Gerhard Müller's

⁷⁰ Ulf Stuberger: Vertuschen und vernichten. Wie der deutsche Staat mit Gesetzesbrüchen bei der RAF-Fahndung umgeht: Es verschwinden nicht nur Terroristen spurlos, sondern auch deren Akten, in: Frankfurter Allgemeine Zeitung, 5.04.2008, p. 35

⁷¹ Früher hätte man sie als Hexen verbrannt, in: Der Spiegel, 19/1977, 2.5.1977, p. 36; Klaus Weinbauer (2004), p. 227

⁷² Heute diene ich mit der reinen Wahrheit, in: Der Spiegel 20/1979, 14.5.1979, p. 97

⁷³ Heute diene ich mit der reinen Wahrheit, in: Der Spiegel 20/1979, 14.5.1979, p. 97

⁷⁴ Ich würde nie wieder aussagen, in: Der Spiegel, 10/1976, 1.3.1976, p. 38

testimony, for example, was brought by the prosecution in a trial against a Frankfurt professor who had allegedly supported Ulrike Meinhof.⁷⁵ The defence was denied the right to cross-examine Müller. The testimony of ex-RAF members such as Müller, Hans-Joachim Dellwo and Volker Speitel was used in this way in over a half-dozen cases until 1980.⁷⁶

In 1980, the German Federal Court of Justice (BGH) decided that it was legal to deny the right of the defence to cross-examine a witness if justified by security reasons or intelligence interests.⁷⁷ In these cases, the only right of the defence would be to prepare questions in writing that the judge would later ask the witness.⁷⁸ But as the prosecution had the possibility to keep the identity of the witness – an ex-terrorist, a police informer or an undercover agent – undisclosed, this right of defence amounted to very little. Furthermore, the prosecution was given the right to refuse a cross-examination by the defence and to make use of earlier police interrogation protocols or to let police officers testify who had previously interrogated the witness.⁷⁹ This was criticized as a massive reduction of defence laws and as a breach of the constitution by legal scholars.⁸⁰

The decision of the Federal Court of Justice was not only influenced by the RAF-processes, but also by a debate that had started in 1980 on the practice of undercover agents and police informers in drug-related crimes.⁸¹ The early eighties to some extent brought a shift in how security-related laws were sold in public discourse by the government. Terrorism – being the primary issue in the security discourse in the 70's – was partly replaced by the drug discourse.

In early 1981, RAF terrorist Peter Jürgen Boock was arrested. The arrest led to a long-lasting struggle on how to deal with those persons who aimed at disengaging with the RAF. Peter Jürgen Boock – recruited as a teenager by Andreas Baader – was an RAF member from the mid-seventies until 1980, taking part in numerous terrorist actions such as the kidnapping of Hanns Martin Schleyer and the (failed) rocket attack on the office of the federal prosecution in Karlsruhe. Boock left the RAF in 1980. After his arrest, Boock also distanced himself

⁷⁵ Im Hinterstübchen, in: Der Spiegel, 50/1980, 8.12.1980, p. 105

⁷⁶ Im Hinterstübchen, in: Der Spiegel, 50/1980, 8.12.1980, p. 105

⁷⁷ Im Hinterstübchen, in: Der Spiegel, 50/1980, 8.12.1980, p. 105

⁷⁸ Günter Gribbohm: Der Gewährsmann als Zeuge im Strafprozess – Wege der neuern Rechtsprechung zur V-Mann-Problematik, in: Neue Juristische Wochenschrift (1981) No. 7, p. 306

⁷⁹ Gribbohm (1981), p. 306

⁸⁰ Dieter Engels: Konsequenzen der BGH-Rechtsprechung zur Vernehmung von V-Männern, in: Neue Juristische Wochenschrift (1983) No. 28, p. 1530

⁸¹ Klaus Tiedemann, Ulrich Sieber: Die Verwertung des Wissens von V-Leuten im Strafverfahren - Analyse und Konsequenzen der Entscheidung des Großen Senats des BGH, in: Neue Juristische Wochenschrift (1984) No. 14, p. 753

publicly from the RAF, renouncing violence and calling on its members to disengage with the RAF.⁸² However, like the majority of the arrested RAF members he refused to cooperate with the police or the prosecution.⁸³ During 1981, a growing number of leading officials – among them Justice Minister Baum⁸⁴ and BKA President Boge demanded that Boock should receive preferential treatment – such as better conditions of detention – as a visible recognition for his renunciation of violence.⁸⁵ They hoped that this could push other RAF members to disengage with the group as well. The position was supported by the perception in the early 80's that the RAF was weakened and disillusioned. It was argued that only an internal collapse of the organization – not police measures – could lead to an end to terrorist violence. *Der Spiegel* analyzed: “The outer pressure of the intense police activities welds the members of terrorist groups together. It furnishes them with pseudo-legitimacy for their counter-violence, countervails possible disintegrating powers and thus reinforces the groups' potential. In contrast, the debate about those individuals who left the groups made the terrorists insecure and had corroding effects on the terrorist scene. This was not only confirmed by ex-terrorists such as Boock and Hans-Joachim Klein, but also by the angry and defaming reactions of ultra-left publications who called Boock and his helpers ‘traitors’.”⁸⁶

The position was opposed by federal prosecutor Kurt Rebmann, who demanded full and severe prosecution of all the RAF terrorists including those who had already denounced violence unless they cooperated with the prosecution.⁸⁷ Earlier, the federal prosecution had tried to win Boock over as a witness. When Boock refused to testify against his accomplices, the federal prosecution tried to put pressure on him. They requested trial in Stammheim instead of Hamburg in order to isolate Boock from his family and his lawyer, who were all based in Hamburg. The prosecution insisted on relocation despite the fact that the judges in Stammheim objected.

The conflict on how the state should deal with Boock was in fact a conflict between those aiming to find a political solution and those pushing to solve the terrorism problem by police means alone.

⁸² Boock-Aufruf: „Kämpft um jeden“, in: *Der Spiegel*, 9/1981, 23.2.1981, p. 119

⁸³ Gebäude mit Schiefelage, in: *Der Spiegel*, 17/1983, 25.4.1983, p. 50; Neuer Haftbefehl gegen Boock, in: *Der Spiegel*, 43/1990, 22.10.1990, p. 14

⁸⁴ Der Staat darf nicht unversöhnlich sein, in: *Der Spiegel*, 43/1981, 19.10.1981, p. 106

⁸⁵ Falsche Signale an den Untergrund, in: *Der Spiegel*, 36/1981, 31.8.1981, p. 52

⁸⁶ Falsche Signale an den Untergrund, in: *Der Spiegel*, 36/1981, 31.8.1981, p. 52

⁸⁷ Falsche Signale an den Untergrund, in: *Der Spiegel*, 36/1981, 31.8.1981, p. 52

After the murder of diplomat Gerold von Braunmühl in 1986 the leniency law was again proposed by the liberal-conservative government as part of a bigger anti-terrorism package.⁸⁸ After devastating results in the regional elections, the FDP leadership decided to push for stronger security laws.⁸⁹ In an interview, FDP president Martin Bangemann proclaimed a “war” against the RAF and spoke out in favour of the leniency law. The FDP general convention, however, voted against the proposal.⁹⁰ Similarly, an astounding majority of the legal establishments – most notably academics and attorneys – opposed the law. The report of the parliamentary hearing grew to over 400 pages long, and an overwhelming majority of experts spoke out against the measure.⁹¹ Additionally, a solid majority of 59% of the population opposed the leniency law, as polls showed.⁹² The anti-terrorism package was enacted without the leniency law in 1986.⁹³ However, the *Kronzeugenregelung* was enacted only three years later in April 1989⁹⁴ despite the opposition of both the parliamentary justice and the interior committees.⁹⁵

Ten RAF members left the group in the early eighties and sought refuge in East Germany (they were called the “RAF-*Aussteiger*”). They were provided with new identities and – after being interrogated – were allowed to live unbothered by the authorities.⁹⁶ In the early 80’s, especially between 1980 and 1982, East Germany actively supported the RAF by providing training and weapons.⁹⁷ After 1982, East Germany reduced its support to the active RAF as it feared being accused of supporting international terrorism. However, the RAF-*Aussteiger* were allowed to stay.⁹⁸ After the reunification in 1990 they were quickly exposed and arrested. Among those arrested were Susanne Albrecht, Sigrid Sternebeck, Silke Maier-Witt, Henning Beer and Werner Lotze.⁹⁹ It was to these (ex-)terrorists that the *Kronzeugenregelung* was first applied.

⁸⁸ Warum nicht auch Folter? in: Der Spiegel, 45/1986, 3.11.1986, p. 22

⁸⁹ Ein Notstandsgesetz für zwei Jahre?, in: Der Spiegel, 45/1986, 3.11.1986, p. 20

⁹⁰ Auf dem Suppenteller, in: Der Spiegel, 48/1986, 24.11.1986, p. 21

⁹¹ Kristian Kühl (1987), p. 744

⁹² Nun Mitleidseffekt zugunsten der SPD? in: Der Spiegel, 48/1986, 24.11.1986, p. 36

⁹³ Der Rechtsstaat macht sich lächerlich, in: Der Spiegel, 50/1986, 8.12.1986, p. 113

⁹⁴ Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und des Versammlungsgesetzes und zur Einführung einer Kronzeugenregelung bei terroristischen Straftaten vom 9. 6. 1989 (BGBl I, 1059)

⁹⁵ Karl Heinz Kunert: Neue Sicherheitsgesetze - mehr Rechtssicherheit? In: Neue Zeitschrift für Strafrecht (1989) No. 10, p. 449

⁹⁶ Oma im Altkader, in: Der Spiegel, 24/1990, 11.06.1990, p. 86

⁹⁷ Tobias Wunschik: Baader-Meinhof international?, in: Aus Politik und Zeitgeschichte (2007) No. 40-41, p. 28; Helmut Pohl – „Für uns hatte es den Zweck, Fragen zur spreng- und Schießtechnik zu klären“, in: Frankfurter Rundschau, 2.7.1991, p. 7; Thomas Riegler (2007), p. 498

⁹⁸ Tobias Wunschik: Die Bewegung 2. Juni und ihre Protektion durch den Staatssicherheitsdienst der DDR, in: Deutschland Archiv (2007) No. 40, p. 6

⁹⁹ Wie die Wasserfälle, in: Der Spiegel, 33/1990, 13.8.1990, p. 56

For the RAF-*Aussteiger* the leniency law provided a possibility to receive significantly lower prison sentences. Susanne Albrecht, who was the first to make a deal with the prosecution, admitted her participation in the murder of Jürgen Ponto in 1975 and the failed attack on NATO-general Alexander Haig in 1979. She also testified against her former accomplices – one of the criteria for the *Kronzeugenregelung* to apply.¹⁰⁰ The testimony of the RAF-*Aussteiger* was helpful to clear up some of the older terrorist attacks. However, they had left the group a decade earlier, and therefore could not provide any insight into the current structures of the group. *Der Spiegel* analyzed: “The *Kronzeugenregelung* did indeed make the terrorists of before-yesterday talk, but we do not know anything about the RAF of today. The aim of the *Kronzeugenregelung* – preventing future terrorism – has so far failed to materialize.”¹⁰¹

In 1991, the trial against Werner Lotze ended in utter failure for the prosecution. Lotze – who was charged with murder, attempted murder and bank robbery – was sentenced to 12 years in prison, 3 years more than the prosecution had demanded.¹⁰² The court dismissed the prosecution’s argument that a low sentence would likely motivate active RAF-members to surrender, arguing that the court’s task was to put the principle of law into action, and not to consider its political implications. After the prosecution’s failure to secure a low sentence for Werner Lotze, the *Kronzeugenregelung* was considered as unsuitable, because – in the words of *Der Spiegel* – it simply “doesn’t pay off” for RAF-terrorists.¹⁰³ Only two years after it was enacted the *Kronzeugenregelung* was already called “an expiring model.”¹⁰⁴

In early 1992, Siegfried Nonne – who claimed that he had participated in the murder of *Deutsche Bank* president Alfred Herrhausen – was presented as a witness under the *Kronzeugenregelung* by the federal prosecution.¹⁰⁵ “The accuracy of his testimony is proven,” *Der Spiegel* quoted the prosecution office.¹⁰⁶ But only half a year later Nonne retracted his testimony, completely disavowing the leniency law. Nonne claimed that he had been forced by police officers to testify against four RAF members, that he had been bribed and

¹⁰⁰ Wie die Wasserfälle, in: *Der Spiegel*, 33/1990, 13.8.1990, p. 56

¹⁰¹ Es gibt keine glatte Lösung, in: *Der Spiegel*, 51/1990, 17.12.1990, p. 34

¹⁰² Das war das falsche Signal, in: *Der Spiegel*, 7/1991, 11.2.1991, p. 89

¹⁰³ Jetzt ein plotz, in: *Der Spiegel*, 22/1991, 27.5.1991, p. 112

¹⁰⁴ Die Kronzeugenregelung – ein auslaufendes Modell, in: *Der Spiegel*, 7/1992, 10.2.1992, p. 40

¹⁰⁵ Thomas Riegler (2007), p. 723

¹⁰⁶ Ziemlich missmutig, in: *Der Spiegel*, 5/1992, 27.1.1991, p. 84

threatened with death.¹⁰⁷ Later in 1992, the parliament had to vote on renewing the leniency law which had been passed with an expiry date. Despite the Nonne scandal, the law was extended by the conservative-liberal coalition in late 1992.¹⁰⁸ Soon after, the extension of the *Kronzeugenregelung* to the field of organised crime – which had previously been restricted to cases of terrorism and drug-related crime – was demanded by parts of the conservative CDU/CSU¹⁰⁹ as part of its electoral campaign that focused on security issues. The expansion of the law was enacted in 1994, the year of the general election.¹¹⁰

Until the late 90's, the leniency law had not lead to a single conviction of an active RAF member. Apart from the RAF *Aussteiger*-cases, the *Kronzeugenregelung* had been applied only once to a PKK member testifying against other PKK members. In 1999, the newly elected red-green government decided not to renew the *Kronzeugenregelung*, which it considered ineffective and “based on denunciation”.¹¹¹

But the discussion on the leniency law did continue: Less than a year later – and before the attacks of 9/11 – the SPD minister of justice, Däubler-Gmelin, proposed the reintroduction of the provision, a proposal that was blocked by the Greens.¹¹² In the aftermath of the 9/11 attacks, pressure grew to re-enact the provision. A proposal by SPD Interior Minister Otto Schily was again blocked by the Greens.¹¹³ In the following years, the CDU/CSU, the FDP, the federal criminal agency (BKA) and the federal intelligence service (BND) pushed for the re-enactment.¹¹⁴ Finally, eight years after its abolition, the CDU/SPD coalition decided to re-enact the leniency law in 2007. Unlike the old law – which applied only to terrorism and organised crime – the new proposal would cover a wide range of crimes, including counterfeiting of money, money laundering, child pornography and corruption.¹¹⁵

¹⁰⁷ Schlimmes Tief, in: Der Spiegel, 28/1992, 6.7.1992, p. 33

¹⁰⁸ Neues Dreieck, in: Der Spiegel, 51/1992, 14.12.1992, p. 25

¹⁰⁹ Schon bekehrt, in: Der Spiegel 42/1993, 18.10.1993, p. 45

¹¹⁰ Hans Dahs: Das Verbrechensbekämpfungsgesetz vom 28.10.1994 – ein Produkt des Superwahljahres, in: Neue Juristische Wochenschrift (1995) No. 9, p. 553

¹¹¹ Umwelt, Verkehr, Justizwesen, in: Spiegel Online, 31.12.1999, online: <http://www.spiegel.de/wirtschaft/0,1518,58199,00.html> (retrieved 28.3.2009)

¹¹² Krach wegen Kronzeugen, in: Der Spiegel 48/2000, 27.11.2000, p. 20

¹¹³ Scharfes Tempo, in: Der Spiegel 41/2001, 8.10.2001, p. 26

¹¹⁴ BKA und Nachrichtendienste verlangen Anti-Terror-Zentrum, in: Spiegel Online, 2.7.2004, online: <http://www.spiegel.de/politik/deutschland/0,1518,307062,00.html> (retrieved 28.3.2009)

¹¹⁵ Verrat vor Gericht soll sich wieder lohnen, in: Spiegel Online, 16.5.2007, online: <http://www.spiegel.de/politik/deutschland/0,1518,483254,00.html> (retrieved 28.3.2009)

Conclusion

The *Kronzeugenregelung* was employed in terrorism trials without a legal basis for almost 20 years beginning in the early 70's. Right from the beginning, it failed to provide any tangible results in the prosecution of terrorist suspects. Instead, the use of crown witnesses by the prosecution repeatedly turned into scandals, as happened in the case with Gerhard Müller in the Stammheim trials and Siegfried Nonne. Legal experts have unequivocally argued over the past 20 years that the law simply failed to deliver.¹¹⁶ No active RAF member has ever been convicted because of evidence given by a crown witness. Despite its obvious lack of success, the law was repeatedly renewed by the conservative government and reintroduced in 2007 by the SPD-CDU/CSU coalition. In public debate, terrorism served as the primary legitimizing discourse although the range of application was quickly expanded to other crimes. Debates on and reforms of the *Kronzeugenregelung* visibly followed the electoral cycle.

The *Kronzeugenregelung* has received more attention than other terrorism-related laws over the years. A likely reason for this is that it was originally enacted for a limited time period. Arguably, the necessity to renew the law led to more attention by the public and legal experts than for laws enacted for an unlimited period of time.

¹¹⁶ Hans Dahs (1995), p. 553

Lauschangriff – the wiretapping program

A wiretapping operation is the optical or acoustical surveillance of an individual. The surveillance of an individual in a private home (“Großer Lauschangriff”) has always been illegal under the German *Grundgesetz*. The interception of telephone conversations, on the other hand, had been routinely practiced since 1945 and legalized under great protests in 1968.¹¹⁷ The wiretapping program did not become fully legal in Germany until 1998, although it had been routinely employed in the decades before.

Wiretapping operations by German authorities first came to the knowledge of the public in the so-called “Traube-scandal”. The Traube-scandal became public when a high-ranking employee of the *Bundesverfassungsschutz* passed on the files of an illegal wiretap program to *Der Spiegel* in 1977.

Klaus Traube had been a nuclear expert and manager for *Interatom GmbH*, part of the atomic energy division of *Siemens*.¹¹⁸ Traube was targeted by the secret service because he was friends with leftist lawyer Inge Hornischer. Hornischer had been his divorce lawyer many years earlier and had been in contact with the APO movement. Hornischer’s boyfriend was Hans-Joachim Klein, who later participated in the attack on the OPEC Conference in Vienna in December 1975. When Traube first met Klein in April 1975, however, he had not already been involved in terrorist activities.

Because of his acquaintance with Klein, Traube came under police scrutiny. The agency suspected that Traube, as the manager for the development of a new generation of nuclear plants, had access to technological secrets and to radioactive materials. The *Bundesverfassungsschutz* suspected that Traube might pass on or had already passed on information to terrorists.

In January 1976, the *Bundesverfassungsschutz* broke into Traube’s apartment and installed a bugging device.¹¹⁹ Police surveillance of telephone conversations, mail correspondence and of an individual outside his or her home had already been legalized in 1968. But it was limited to

¹¹⁷ Josef Foschepoth: Postzensur und Telefonüberwachung in der Bundesrepublik Deutschland (1949 – 1968), in: *Zeitschrift für Geschichtswissenschaft* (2009) No 5, p. 413

¹¹⁸ Atomstaat oder Rechtsstaat?, in: *Der Spiegel* 10/1977, 28.02.1977, p. 29

¹¹⁹ Der Minister und die „Wanze“, in: *Der Spiegel* 10/1977, 28.02.1977, p. 19

specific bodies – the *Bundesverfassungsschutz* not among them – and to a specific legal procedure laid down in the so-called G-10-law. The inviolability of the home could, on the other hand, only be violated by judicial order in case of danger in delay. Although Traube had been subject to a full G-10-surveillance and a full surveillance in his company, no incriminating details had been found. Additionally, it quickly became clear from files which had been passed on to *Der Spiegel* that Traube could not possibly pose any danger because of new security measures enacted in late 1975 by the nuclear industry restricting access to information and nuclear materials. However, after the OPEC attack the *Verfassungsschutz* initiated the illegal wiretapping of Traube's apartment.

The wiretapping of Traube was, *Der Spiegel* argued, obviously not an isolated incident. It seemed, rather, that the *Bundesverfassungsschutz* had previously been involved in a number of illegal wiretapping operations. The operation against Traube was authorized by the president of the *Bundesverfassungsschutz* Richard Meier, as the documents indicated. The *Bundesverfassungsschutz* and the politically responsible interior ministry had – in the words of *Der Spiegel* editor Rudolf Augstein – violated the constitution in order to protect it.¹²⁰

Over the course of the Traube-scandal the question was raised if the expanding nuclear industry and the risk inherent in the nuclear technology created the necessity to establish a radically expanded security machinery and to limit civil liberties.¹²¹ The *Süddeutsche Zeitung* commented in late January 1977: “The task of securing huge amounts of poisonous and radioactive material against theft, extortion, earthquakes, accidents or war for hundreds or thousands of years necessitates an extreme stability of society and an absolute reasonableness of humanity in an eternal peace based upon fear.”¹²² In February 1977, the British energy minister, Wedgwood Benn, asked his government and the British industry to investigate which civil liberties would need to be restricted if nuclear energy production was to be expanded. In 1975, *Der Spiegel* reported that scientists and officials meeting in Stanford discussed how civil liberties could still be protected given the requirements of nuclear safety.¹²³

¹²⁰ Atomstaat oder Rechtsstaat?, in: *Der Spiegel* 10/1977, 28.02.1977, p. 29

¹²¹ Otto Ulrich: Wieviel Daten braucht die Utopie?, in: *Kursbuch* (1981) No. 66, p. 138

¹²² see Friede aus Angst, in: *Der Spiegel* 11/1977, 07.03.1977, p. 44

¹²³ Vom 1000jährigen Atomreich, in: *Der Spiegel* 11/1977, 07.03.1977, p. 46

Klaus Traube was publicly rehabilitated only weeks after the wiretapping scandal had become public.¹²⁴ Interior minister Maihofer, meanwhile, faced growing criticism as it was suspected that the *Bundesverfassungsschutz* had conducted illegal eavesdropping operations in other cases as well.¹²⁵ Whereas the suspicion against Klaus Traube quickly turned out to be baseless, supporters of wiretapping operations took the opportunity to speak out in favour of such operations. The CDU parliamentarian, Walter Wallmann, declared that no constitutional authorization of wiretapping was necessary, arguing that such a program could be enacted by a discretionary decision of the interior minister on an individual basis.¹²⁶ Some argued that in principle unconstitutional eavesdropping could be justified by an “extra-legal state of exception” (“übergesetzlicher Notstand”).¹²⁷ Government and opposition quickly agreed that Maihofer, the minister, who claimed not to have known about the operation in advance, should remain on in his post.¹²⁸ A year later, when evidence showed that Maihofer had indeed been informed of the operation right from the beginning, he had to step down.

Over the course of the Traube-scandal evidence leaked out that unconstitutional eavesdropping had also been conducted in Stuttgart-Stammheim by the CDU-led interior ministry during the RAF trials. Prison inmates and their lawyers had been wiretapped in 1975 and 1976 (“Abhör-Affäre”). At that point, representatives of all parties, ministers of the *Länder*, the interior ministry, the federal prosecution and the intelligence services were involved in or informed about the illegal wiretapping programmes.¹²⁹ Only in 2007 did it become known that wiretapping on RAF prison inmates had been much more extensive than previously acknowledged.¹³⁰ A year later in 1978, the military intelligence service (*Militärischer Abwehrdienst*, MAD) stumbled over a number of illegal wiretapping operations, most notably on defence minister Georg Leber’s secretary and on a communist group in Bavaria.¹³¹ Although all three intelligence services were publicly caught with being involved in illegal wiretapping, a proposed reform of the services was quickly called off.¹³²

The Federal Court of Justice (BGH) later limited the admissibility of evidence acquired through illegal wiretapping in the process against the alleged whistleblowers of the Traube-

¹²⁴ Die verlorene Ehre der Inge Hornischer, in: *Courage* (1977) No. 4, p. 17

¹²⁵ Fall Maihofer: „Um Kopf und Kragen“, in: *Der Spiegel* 11/1977, 07.03.1977, p. 19

¹²⁶ „Gibt es eine größere Schnüffelei?“, in: *Der Spiegel* 12/1977, 14.03.1977, p. 26

¹²⁷ „Darf man einbrechen – oder gar entführen?“, in: *Der Spiegel* 12/1977, 14.03.1977, p. 24

¹²⁸ Fall Maihofer: „Ohren anlegen und durch“, in: *Der Spiegel* 12/1977, 14.03.1977, p. 21

¹²⁹ Abhör-Affäre: Die Koalition schlingert, in: *Der Spiegel* 13/1977, 21.03.1977, p. 21

¹³⁰ RAF während Flugzeugentführung abgehört, in: *Der Spiegel* 42/2007, 15.10.2007, p. 20

¹³¹ „Wir wissen nicht, was noch kommt“, in: *Der Spiegel* 06/1978, 06.02.1978, p. 24

¹³² Mit Kanonen, in: *Der Spiegel* 07/1978, 13.02.1978, p. 24

scandal, Karl Dirnhofer and Hans Georg Faust. No evidence acquired directly or as a consequence of illegal wiretapping may be admitted before a court.¹³³

After the Traube-scandal, illegal wiretapping was reduced, but not stopped. The *Verfassungsschutz* in Hamburg continued to bug private apartments, though in reduced numbers.¹³⁴ But the majority of wiretapping operations were continued anyway, as they were conducted in public space, in public buildings, offices and with the help of directional microphones – a practice that was considered not illegal by the intelligence services. In the following years illegal wiretapping operations come to the public attention time and again.¹³⁵ The illegal use of bugs that became public did not concern terrorist suspects, but, for example, the illegal reproduction of books.¹³⁶

In December 1983 at the latest it became clear that wiretapping without explicit authorization by law was illegal when the constitutional court proclaimed the “fundamental right of informational self-determination.”¹³⁷ This right holds that citizens have the right to know who is collecting or storing data about them. This was irreconcilable with the intelligence services’ practice and even with eavesdropping on individuals by the police without any legal authorization.

In 1993 *Der Spiegel* reported an incident that showed – in the journal’s opinion – that successful police and intelligence work would not primarily depend on the right to transgress the boundaries of civil liberties and the rule of law, but on careful planning and preparation. An Iranian suspect for the killing of four Kurdish-Iranian politicians in Berlin had been wiretapped for many months before the attack – but no interpreter was found who could understand his conversations.¹³⁸

¹³³ BGH: Umfang des Beweisverwertungsverbots, in: Neue Juristische Wochenschrift (1980) No. 31, p. 1700; Klamotten im Koffer, in: Der Spiegel 25/1980, 16.06.1980, p. 62

¹³⁴ Wanzen – nach Hamburger Art, in: Der Spiegel 52/1978, 25.12.1978, p. 24

¹³⁵ Freund Frieda, in: Der Spiegel 39/1982, 27.09.1982, Seite 124; Wußte zuviel, in: Der Spiegel 6/1985, 04.02.1985, p. 54; „Mauss ist seit langem abgeschaltet“, in: Der Spiegel 7/1988, 15.02.1988, p. 82; „Einige dieser Herren sind Ganoven“, in: Der Spiegel 4/1989, 23.01.1989, p. 82

¹³⁶ Maxi und die Detektive, in: Der Spiegel 1/1988, 04.01.1988, p. 50

¹³⁷ Schwere Schlappe, in: Der Spiegel, 51/1983, 19.12.1983, p. 19; „Es ist besser, die Dienste wissen mal nichts“, in: Der Spiegel 13/1984, 26.03.1984, p. 42

¹³⁸ Erkenntnisse über D., in: Der Spiegel 20/1993, 17.05.1993, p. 130

From the late 80's till the mid-90's, organized crime (and especially drug-related crime) became the primary security concern of Germany's security establishment.¹³⁹ Security agencies and politicians demanding an expansion of wiretapping operations increasingly referred to organized crime as a justification.¹⁴⁰ Advocates of wiretapping argued that only eavesdropping programs could break up the mafia leadership.¹⁴¹ Terrorism, on the other hand, suddenly played only a negligible role in defending the legalization of wiretapping operations. In 1990, the CDU interior minister Wolfgang Schäuble attempted to legalize the wiretapping of private homes by the intelligence agencies even without concrete evidence in certain cases, for example in cases of drug-related crime.¹⁴² Besides, an additional initiative for a law on organized crime and drug traffic should have allowed the criminal police to use all elements of eavesdropping even on unsuspecting individuals without a judicial order and in private homes.¹⁴³ These initiatives failed because of the resistance of the junior coalition partner FDP and of the opposition.¹⁴⁴ But only a year later, a similar initiative was launched, this time including a change of the *Grundgesetz*.¹⁴⁵ The debate dragged on until after the election campaign of 1994, when both the CDU/CSU and the SPD's candidate Rudolf Scharping advocated the expansion of wiretapping competences.¹⁴⁶ The campaign's major issue was criminality,¹⁴⁷ against which wiretapping – among other measures such as the *Kronzeugenregelung* – was presented as a remedy. The SPD and CDU/CSU were, *Der Spiegel* wrote, trying to outgun each other on who was presenting the tougher measures.¹⁴⁸ However, the coalition-agreement of the re-elected CDU-FDP government did not include CDU's long-standing demand for expanding wiretapping operations as a concession to the weakened FDP.¹⁴⁹

The *Lauschangriff*-debate did not, however, wear off. While the public debate continued to focus on the specific issue of bugging a private apartment, major expansions of eavesdropping

¹³⁹ Klaus Weinbauer: „Staat zeigen“. Die polizeiliche Bekämpfung des Terrorismus in der Bundesrepublik bis Anfang der 1980er Jahre, in: Wolfgang Kraushaar (ed.): Die RAF und der linke Terrorismus, Hamburg 2006, p. 934

¹⁴⁰ „Zu ängstlich, zu vorsichtig, zu schüchtern“, in: *Der Spiegel* 13/1988, 28.03.1988, p. 50

¹⁴¹ Neues Dreieck, in: *Der Spiegel* 51/1992, 14.12.1992, p. 25

¹⁴² Volkmart Götz: Die Entwicklung des allgemeinen Polizei- und Ordnungsrechts (1990 -1993) *Neue Zeitschrift für Verwaltungsrecht* (1994) No. 7, p. 652; Bonner Streit um Wanzen, in: *Der Spiegel* 7/1990, 12.02.1990, p. 14

¹⁴³ Alles husch, husch, in: *Der Spiegel* 24/1990, 11.06.1990, p. 32

¹⁴⁴ Die gehen dann spazieren, in: *Der Spiegel* 21/1992, 18.05.1992, p. 20

¹⁴⁵ Neues Dreieck, in: *Der Spiegel* 51/1992, 14.12.1992, p. 25

¹⁴⁶ Ulrich Eisenberg: Straf(verfahrens-) rechtliche Maßnahmen gegenüber „Organisiertem Verbrechen“, in: *Neue Juristische Wochenschrift* (1993) No. 16, p. 1033; Des Kanzlers Haudegen, in: *Der Spiegel* 28/1993, 12.07.1993, p. 26; Taube Ohren, in: *Der Spiegel* 30/1993, 26.07.1993, p. 26

¹⁴⁷ Bürger als Hilfspolizisten, in: *Der Spiegel* 25/1993, 21.06.1993, p. 16

¹⁴⁸ Bonner Kriegsrecht, in: *Der Spiegel* 11/1994, 14.03.1994, p. 32

¹⁴⁹ Zerbrechliches Gebilde, in: *Der Spiegel* 47/1994, 21.11.1994, p. 18

competences were enacted without major opposition or public attention.¹⁵⁰ Yet another process to normalize wiretapping was taking place in the laws of the *Bundesländer*.¹⁵¹ Throughout the long-lasting debate on wiretapping on federal level, the *Bundesländer* allowed eavesdropping on private apartments on the grounds of crime prevention (*Gefahrenabwehr*).¹⁵² This was the case despite the fact that Art 13 of the *Grundgesetz* stipulated the inviolability of the home for both federal and regional authorities. Parts of the wiretapping authorization in the Saxon *Polizeigesetz* were annulled by the Saxon constitutional court in 1996.¹⁵³

The debate on wiretapping continued to be particularly strong within the FDP. In late 1995, party leader Wolfgang Gerhardt and the party's right wing (most notably Hermann Otto Solms, leader of the parliamentary group) conducted a member poll on wiretapping to overrule justice minister Sabine Leutheusser-Schnarrenberger's long-standing opposition and the decision of two party conventions.¹⁵⁴ Leutheusser-Schnarrenberger, one of the last representatives of the left-liberal wing in the government, subsequently resigned. The issue of wiretapping was an instrument for conducting a political reorientation of the FDP towards more right-leaning positions and marginalizing proponents of the left wing.¹⁵⁵ This political reorientation was also mirrored by a change of the composition of the electorate, with the Green party taking over positions traditionally held by the left-liberal wing of the FDP.

In August 1997, the CDU/CSU, the FDP and the SPD agreed on changing the *Grundgesetz* in order to allow wiretapping of private apartments in cases relating to organized crime.¹⁵⁶ As it became obvious when the decision came to its final phase, the "Großer Lauschangriff" legalized only one last element of wiretapping – namely the investigation of crimes already committed (*Strafverfolgung*) by wiretapping of private apartments. Wiretapping of private apartments in case of crime prevention (*Gefahrenabwehr*), on the other hand, had been tacitly

¹⁵⁰ Lauschen auf Firmenkosten, in: Der Spiegel 16/1995, 17.04.1995, p. 14

¹⁵¹ Joachim Sproß: Das Hamburgische Sicherheits- und Polizeigesetz in einer verfassungsrechtlichen Würdigung, in: Neue Zeitschrift für Verwaltungsrecht (1992) No.7, p. 642

¹⁵² Hans Randl: Verfassungsrechtliche Aspekte des neuen Hamburger Polizeirechts, in: Neue Zeitschrift für Verwaltungsrecht (1992) No. 11, p. 1070; Klarer Plan, in: Der Spiegel 47/1995, 20.11.1995, p. 115

¹⁵³ SächsVerfGH: Verfassungsrechtliche Prüfung des Sächsischen Polizeigesetzes, in: Neue Juristische Wochenschrift (1996) No. 30, p. 1953; Nicht vereinbar, in: Der Spiegel 21/1996, 20.05.1996, p. 78

¹⁵⁴ Jetzt bin ich frei, in: Der Spiegel 51/1995, 18.12.1995, p. 26

¹⁵⁵ Lachen unterm Galgen, in: Der Spiegel 51/1995, 18.12.1995, p. 22

¹⁵⁶ „Großer Lauschangriff“ gegen Kriminelle, in: Der Spiegel 54/1997, 17.12.1997, p. 221; Joachim Dittrich: Der „große Lauschangriff“ – Diesseits und Jenseits der Verfassung, in: Neue Zeitschrift für Strafrecht (1998) No. 7, p. 336

legalized through police law reforms (especially of the *Bundesländer*) in the years before.¹⁵⁷ From a civil liberties perspective, however, the latter constituted a much larger intrusion, as it affected the lives of individuals not suspect of having committed a crime.¹⁵⁸ Also, it was wiretapping for crime prevention – not for prosecution – that had actually provoked the Traube scandal and had triggered the debate on wiretapping twenty years earlier. Similarly, the competences of the intelligence services had tacitly been extended to include eavesdropping on private homes.¹⁵⁹ The law was objected to by a major part of legal academics who questioned its constitutionality, especially as it allowed the wiretapping of non-suspect defence lawyers and could be used against a broad number of minor offenses.¹⁶⁰

It is interesting to note, however, that the number of cases where wiretapping of homes was employed was relatively small. In the period between 1990/1991 (when the *Ländergesetze* were enacted) and 1996, the measure was used 106 times – 67 of them alone in Bayern.¹⁶¹ It was argued that the reason for this very limited number might have been that police authorities were insecure about the constitutionality of the measure and therefore used it only in exceptional cases. Others argued that the measure itself was of only very limited use: professional criminals could easily handle the risk of being wiretapped.

In a curious twist, the new interior minister Otto Schily actually defended the “Großer Lauschangriff” with the argument that existing competences in crime prevention were already much more intrusive than the current proposal.¹⁶² Oskar Lafontaine, a leading figure in the SPD, defended his party’s approval of the measure by arguing that “the current practice of wiretapping needs to have a proper constitutional basis.”¹⁶³ Again, this was a curious twist as measures without a constitutional basis are illegal. Here, on the other hand, the (illegal) practice gave legitimization to a constitutional reform.

¹⁵⁷ See, for example: Michael Kniesel: Neufassung des Polizeirechts in Nordrhein-Westfalen, in: *Neue Zeitschrift für Verwaltungsrecht* (1990) No. 8, p. 743; Joachim Sproß (1992) p. 642; Martin Kutscha: Der Lauschangriff im Polizeirecht der Länder, in: *Neue Juristische Wochenschrift* (1994) No. 2, p. 85; Jost Benfer: „Großer Lauschangriff“ – einmal ganz anders gesehen, in: *Neue Zeitschrift für Verwaltungsrecht* (1999) No. 3, p. 237; Frank Braun: Der so genannte „Lauschangriff“ im präventivpolizeilichen Bereich - Die Neuregelung in Art. 13 IV-VI GG, in: *Neue Zeitschrift für Verwaltungsrecht* (2000) No. 4, p. 375

¹⁵⁸ Martin Kutscha (1994), p. 85

¹⁵⁹ Martin Kutscha (1994), p. 85

¹⁶⁰ Joachim Dittrich (1998), p. 336

¹⁶¹ Frank Braun (2000), p. 375

¹⁶² „Die Deutschen neigen zur Hysterie“, in: *Der Spiegel* 4/1998, 19.01.1998, p. 30

¹⁶³ „Lambsdorff ist kein Spieler“, in: *Der Spiegel* 7/1998, 09.02.1998, p. 27

The experience with the fully legalized wiretapping did not lead to the promised successes, as the parliamentary reports on wiretapping showed year after year.¹⁶⁴ Especially gang leaders – who could supposedly only be caught with the help of wiretapping of private homes – could not be successfully targeted. But this had not been the main goal of the proposal’s advocates in any case, as Rudolf Augstein and Marion Gräfin Dönhoff – editors of *Der Spiegel* and *Die Zeit*, respectively – argued in an article. The CDU had primarily used the topic to split and discredit the opposition.¹⁶⁵

In March 2004 the federal constitutional court delivered a staunching rebuke of the *Lauschangriff*.¹⁶⁶ The proceedings had been initiated by three representatives of the FDP’s left wing, ex-ministers of the interior Gerhard Baum and of Justice Sabine Leutheusser-Schnarrenberger and ex-vice-president of the *Bundestag*, Burkhard Hirsch. The law, *Der Spiegel* wrote, would be annulled in large parts and should be repaired within a very short period of 16 months. In reality, the ruling was much more ambivalent.¹⁶⁷ Most notably, the reform of Art 13 *Grundgesetz* limiting the inviolability of the home was considered constitutional. Wiretapping of private homes for reasons of prosecution does not per se violate human dignity. While the court had to overturn the whole law, the court’s real critique concerned only specific issues, such as the lack of rules on the prohibition of the use of certain evidence. The court’s decision also necessitated a limitation of offenses that justified the use of wiretapping. Only crimes with a range of punishment of over five years imprisonment should justify wiretapping of private homes. It is important to specify that the ruling concerned only the investigation (*Strafverfolgung*), but left police competences in danger prevention (*Gefahrenabwehr*) completely intact.¹⁶⁸ An adapted law was enacted by the SPD/Green government later in 2004.¹⁶⁹

¹⁶⁴ Großes Rauschen, in: *Der Spiegel* 7/2002, 09.02.2002, p. 17

¹⁶⁵ Lauschangriff und Internet, in: *Spiegel Online*, 16.3.2002, online: <http://www.spiegel.de/politik/deutschland/0,1518,187459,00.html> (retrieved 30.3.2009)

¹⁶⁶ Erhard Denninger: Verfassungsrechtliche Grenzen des Lauschens- Der „große Lauschangriff“ auf dem Prüfstand der Verfassung, in: *Zeitschrift für Rechtspolitik* (2004) No. 4, p. 101; „Das Recht, in Ruhe gelassen zu werden“, in: *Spiegel Online*, 3.3.2004, online: <http://www.spiegel.de/politik/deutschland/0,1518,288939,00.html> (retrieved 13.2.2009)

¹⁶⁷ BVerfG: Zulässigkeit der akustischen Wohnraumüberwachung (Großer Lauschangriff), in: *Neue Zeitschrift für Strafrecht* (2004) No. 5, p. 270

¹⁶⁸ Günter Haas: Der „Große Lauschangriff“ - klein geschrieben, in: *Neue Juristische Wochenschrift* (2004) No. 43, p. 3082

¹⁶⁹ Kabinett beschließt entschärfte Version des Lauschangriffs, in: *Spiegel Online*, 22.09.2004, <http://www.spiegel.de/politik/deutschland/0,1518,319257,00.html> (retrieved 13.2.2009); Sabine Leutheusser-Schnarrenberger: Der Gesetzesentwurf der Bundesregierung zum „großen Lauschangriff“ – Anmerkung zu § 100c StPO und dem Versuch, verfassungsgerichtlich geforderte Überwachungsverbote zu umgehen, in: *Zeitschrift für Rechtspolitik* (2005) No. 1, p. 1

While the constitutional court's decision did really mark a roll-back to measures intrusive to civil liberties to some extent,¹⁷⁰ far more intrusive measures had been previously enacted in the field of danger prevention – an area not covered by the constitutional court's decision.¹⁷¹ At least five *Bundesländer* had created laws allowing their intelligence services to wiretap unsuspecting third persons before and after 9/11.¹⁷²

In December 2008, the CDU-SPD coalition passed a new BKA law. It assigned the BKA the competence to wiretap private homes.¹⁷³ In particular, the BKA was given the competence for the “preventive fight against crime.” This competence already applies when there is no concrete danger (*Gefahrenabwehr*) – in principle this is a competence of intelligence services.¹⁷⁴

Shortly before, the constitutional court had passed a decision on online-searching (“Online-Durchsuchung”) of private computers.¹⁷⁵ It slammed a law that would have provided the competence for the police to secretly enter private computers and observe all actions and communications pursued. The provision would have been a functional equivalent to the wiretapping of private homes. The court decided, however, that the online-searching violated the privacy rights of individuals.

Conclusion

The phase between 1977, the year when the Traube scandal first brought illegal wiretapping operations to public attention, and 1998, the year when the constitutional change was passed finally authorizing the bugging of private apartments, can be described as a creeping normalization process. In the 70's, there was a general agreement among most politicians, practitioners and academics that eavesdropping on private homes was unconstitutional except in cases of a general threat to the general security. However, illegal wiretapping was routinely performed by the police and the intelligence services.

¹⁷⁰ Totes Pferd, in: Der Spiegel 11/2004, 08.03.2004, p. 48

¹⁷¹ Erhard Denninger (2004), p. 101; Günter Haas (2004) p. 3082

¹⁷² „Das Recht, in Ruhe gelassen zu werden“, in: Spiegel Online, 3.3.2004, online: <http://www.spiegel.de/politik/deutschland/0,1518,288939,00.html> (13.2.2009)

¹⁷³ Rudolf Baum, Peter Schantz: Die Novelle des BKA-Gesetzes- Eine rechtspolitische und verfassungsrechtliche Kritik, in: Zeitschrift für Rechtspolitik (2008) No.5, p. 137; Frederik Roggan: Das neue BKA-Gesetz - Zur weiteren Zentralisierung der deutschen Sicherheitsarchitektur, in: Neue Juristische Wochenschrift (2009) No. 5, p. 257; Bundesrat verabschiedet BKA-Gesetz, in: Spiegel Online, 19.12.2008, online: <http://www.spiegel.de/politik/deutschland/0,1518,597497,00.html> (retrieved 4.3.2009)

¹⁷⁴ Frederik Roggan (2009), p. 257

¹⁷⁵ Walter Leisner: Das neue „Kommunikationsgrundrecht“ - Nicht Alibi für mehr, sondern Mahnung zu weniger staatlicher Überwachung, in: Neue Juristische Wochenschrift (2008) No. 40, p. 2902

A creeping normalization took place when the legal preconditions for wiretapping were increasingly watered down in the police laws of the *Bundesländer* and the laws on the intelligence services in the 80's and early 90's. Wiretapping could only be employed if justified by overriding reasons of danger prevention (*Gefahrenabwehr*). In 1977 there was a common agreement among lawyers and politicians that – in principle – an intrusion into the inviolability of the home could only be justified by the immediate necessity to protect the life of an individual (the core meaning of the concept of *Gefahrenabwehr*). Over the next twenty years, a creeping expansion of the legal concept of danger prevention occurred, so that in the 90's wiretapping operations could be justified by almost any kind of crime and the slightest suspicion.¹⁷⁶ The reforms of 1998 in reality legalized only a tiny area that had remained unregulated, whereas in general wiretapping had been gradually legalized in the years before. At the end of this process, the constitutional changes of the *Grundgesetz* did in fact not limit civil liberties but guaranteed at least fractions of the inviolability of the home by erecting a constitutional limit to yet another expansion of wiretapping.

The general discussion on the right of the state to eavesdrop on its citizens was both defined and limited by the concept of the “Großer Lauschangriff.” The discussion was limited by this concept because major areas of the application of wiretapping – wiretapping justified by reasons of danger prevention, wiretapping outside of the home and wiretapping legalized by the *Bundesländer* – were never subject to public debate over the course of twenty years and were either legal from the beginning or quietly legalized.

Advocates of wiretapping used completely different topoi to justify its employment and legalization over the course of twenty years. In the late 70's, it was terrorism. This changed completely in the late 80's and the 90's, when drugs and organized crime became the dominating figure of justification. After 9/11, the focus again reverted back to terrorism.

¹⁷⁶ Martin Kutscha (1994), p.85

Rasterfahndung

Computers have been employed by the police for criminal investigations since the early 60's.¹⁷⁷ *Bayern* was the first region to employ computers for police work. From the late 60's on computers were used by all major police branches.¹⁷⁸ The term *Rasterfahndung* in its core meaning describes a system where the data of unsuspecting citizens – acquired from non-police databases – is filtered according to specific criteria: a specific combination of different characteristics that are unsuspecting in themselves might lead to criminals. From the early 70's on, computers located in different cities or agencies could electronically exchange information.¹⁷⁹ The first major attempts to centralize criminal data occurred in 1970, when a computerized central register of criminal records was realized.¹⁸⁰

The history of computerized criminal investigation parallels the growth of the federal criminal agency (*Bundeskriminalamt*, BKA).¹⁸¹ Originally, police competences were generally held by the *Bundesländer*, while the BKA had only competences to collect information and data and pass them down to the regional police agencies.¹⁸² The BKA had no executive competences and needed a formal request by one of the regional police agencies to initiate any kind of activity. The BKA grew drastically in competences and personnel over the course of the 70's. Horst Herold, who became BKA president in 1971 and who was responsible for both the expansion of computerized investigation and of the BKA in general,¹⁸³ was one of the most prominent media figures in the 70's with regard to security issues.

The BKA-law was changed in 1973: the agency acquired numerous competences, including the primary responsibility for international crime, organized crime, drug-related crime and arms trade. Most importantly, the BKA could now be directly instructed by the federal prosecution office to start investigations, making the agency much more independent from the regional police agencies. The number of employees of the agency rose from 818 in 1965 to 3339 in 1980;¹⁸⁴ the agency's budget rose from 22 million mark in 1969 to 75 million in

¹⁷⁷ Orakel aus der Tüte, in: *Der Spiegel* 42/1965, 13.10.1965, p. 168

¹⁷⁸ Zu laut, zu langsam, in: *Der Spiegel* 15/1969, 07.04.1969, p. 38

¹⁷⁹ Rund um die Uhr, in: *Der Spiegel* 18/1979, 30.04.1979, p. 21

¹⁸⁰ Bestens gerüstet, in: *Der Spiegel* 19/1970, 04.05.1970, p. 114

¹⁸¹ Thomas Riegler (2007), p. 796; Uwe Backes: *Bleierne Jahre. Baader-Meinhof und danach*, Erlangen 1991, p. 68; Henner Hess (1988) p. 55; Klaus Weinhauer (2004), p. 236; Klaus Weinhauer (2006), p. 932

¹⁸² Kommissar Computer, in: *Der Spiegel* 27/1971, 28.06.1971, p. 53

¹⁸³ Kommissar Computer, in: *Der Spiegel* 27/1971, 28.06.1971, p. 53

¹⁸⁴ Reicht dicke, in: *Der Spiegel* 26/1972, 19.06.1972, p. 32

1972.¹⁸⁵ Two main developments made this centralization of police competences¹⁸⁶ against the interest of the *Bundesländer* possible. First, the perceived threat by the RAF provided a window of opportunity to extend federal competences. Initially, this happened without a legal basis: the BKA gained only factual primacy in the fight against the RAF.¹⁸⁷ Later, these competences were formally established by the BKA law. Second, the BKA was established by Horst Herold as the primary focal point for data collection.¹⁸⁸ The centralization of competences was justified by arguments of efficiency.¹⁸⁹ However, the centralization process was also used to establish completely new competences not previously held by the regional police authorities. Electronic databases, being one of the most important innovations of criminal investigation in the past decades, seemed to be one of the major instruments for centralizing police competences on a federal level in Germany. Again after 9/11, the BKA's competences were greatly expanded in the fight against terrorism. First, investigations on international terrorism came under the sole authority of the agency. Second, the BKA finally received crime prevention competences (*Gefahrenabwehr*); previously, the BKA could only act under criminal investigation competences (*Strafverfolgung*). So, the BKA finally became a "genuine police authority."¹⁹⁰ However, the growth of the BKA is part of a general expansion of police forces. The police forces of the *Bundesländer* grew by 43% between 1970 and 1980, the *Verfassungsschutz* by 64%. The BKA, meanwhile, grew by 176%.¹⁹¹

The introduction of computerized administration of data caused fear about privacy rights and about the state spying on its citizens. In Hessen, which was the first *Bundesland* to introduce comprehensive databases, the first data protection supervisor was also appointed.¹⁹² In 1973, a federal law on the registration of persons (*Meldegesetz*) was proposed, aimed at establishing individual numbers for every citizen that should allow the full interaction of public and private electronic databases.¹⁹³ It was rejected by the legal committee of the parliament which doubted its constitutionality. Nevertheless, a functional equivalent of the personal number was established a few years later.¹⁹⁴ At the same time, a federal law on data protection was enacted. These law proposals sparked the first major debate in Germany on the issue of data

¹⁸⁵ Reicht dicke, in: Der Spiegel 26/1972, 19.06.1972, p. 32

¹⁸⁶ Iring Fetscher: Terrorismus und Reaktion, Frankfurt am Main 1977, p. 81

¹⁸⁷ Reicht dicke, in: Der Spiegel 26/1972, 19.06.1972, p. 32

¹⁸⁸ Kommissar Computer, in: Der Spiegel 27/1971, 28.06.1971, p. 53

¹⁸⁹ Reicht dicke, in: Der Spiegel 26/1972, 19.06.1972, p. 32

¹⁹⁰ Frederik Roggan (2009), p. 257

¹⁹¹ Klaus Weinhauer (2006), p. 935

¹⁹² EDV im Odenwald, in: Der Spiegel 20/1971, 10.05.1971, p. 88

¹⁹³ 100445301111- das Schlimmste von King Kong?, in: Der Spiegel 48/1973, 26.11.1973, p. 66

¹⁹⁴ Wilhelm Steinmüller (1979), p. 189; Richard Albrecht: Datenschutz und Bürgerrechte, in: Blätter für deutsche und internationale Politik (1979) No. 9, p. 1033

collection and data protection. Interior Minister Hans-Dietrich Genscher (FDP) summarized the opposing opinions in *Der Spiegel*: “Growing computerization might theoretically also include the danger that our social state degenerates to a termite state. But the law on data protection will make sure that heavy damage will not occur.”¹⁹⁵ Critics invoked Aldous Huxley’s novel “1984”, arguing that the state would become a “big brother.” Especially the possibility of combining information from different databases caused major criticism.¹⁹⁶

Some critics argued that the major problem of massive data collection and cross linking is not simply the possibility of abuse, about which under normal circumstances the victims would never know and therefore could not intervene, but rather the fact that a great amount of information about all citizens being accessible electronically is totalitarian itself, even though politicians and civil servants might not intend abuse.¹⁹⁷ In the late 60’s and early 70’s, most public institutions started to employ digital databases. At the same time, the intelligence services built their own database, “Nadis”, that already held more than 2 million entries in 1973.¹⁹⁸

Around 1976, a large number of data abuses of private and public institutions became public. Most notably, the *Verfassungsschutz* databases were used for investigations on individuals required under the *Radikalenerlass*. The law on data protection as proposed in 1976 was widely criticised as a rather toothless instrument. In particular, a broad range of databases was excluded completely from control by courts or a data protection supervisor, including the databases of the intelligence services such as the *Verfassungsschutz* and the MAD, of the BKA, the police, the prosecution and the tax authorities.¹⁹⁹ Additionally, “internal data” of private companies or public institutions not intended for external use should be equally excluded from the data protection law. In an interview, a renowned data protection specialist, Spiros Simitis, concluded that the law was the result of opposing interests. A stricter law would have had no chance against the growing interests in data collection.²⁰⁰ However, it was argued by a broad majority of the academic community that these exemptions make the law worthless in practical terms.²⁰¹ Wilhelm Steinmüller, who had been a consultant to the

¹⁹⁵ 100445301111- das Schlimmste von King Kong?, in: *Der Spiegel* 48/1973, 26.11.1973, p. 66

¹⁹⁶ Wilhelm Steinmüller (1979), p. 184

¹⁹⁷ 100445301111- das Schlimmste von King Kong?, in: *Der Spiegel* 48/1973, 26.11.1973, p. 66

¹⁹⁸ 100445301111- das Schlimmste von King Kong?, in: *Der Spiegel* 48/1973, 26.11.1973, p. 66

¹⁹⁹ Datenschutz – „1948 liegt nicht mehr fern“, in: *Der Spiegel* 24/1976, 07.06.1976, p. 110

²⁰⁰ „Computer müssen vergessen können“, in: *Der Spiegel* 47/1977, 14.11.1977, p. 100

²⁰¹ Richard Albrecht: Der total erfasste Bürger, in: *Blätter für deutsche und internationale Politik* (1978) No. 5, p. 595

government on data protection issues some years earlier, called the law “a worn-down beauty who has only a few teeth left.”²⁰² – “Within this immense secret area, almost all kinds of data collection and data exchange are allowed and are not controlled by the citizen, the data protection authorities, the parliament or the judges.”

Meanwhile, six *Bundesländer* (Bremen, Berlin, Bayern, Rheinland-Pfalz, Schleswig-Holstein and Saarland) enacted laws that obliged all public institutions to inform the *Verfassungsschutz* if they receive suspicious information on citizens. These concerned information that indicated terrorist activities or spying, but also “activities aimed against the free democratic order.”²⁰³ This blanket clause had – as will be shown in the chapter on the *Radikalenerlass* – a rather broad scope, potentially catching all kinds of left activism and opinions. In some regions these laws caused a “popular uprising”, as the daily *Süddeutsche Zeitung* wrote, in schools, universities and city administrations, all of which were potentially obliged to inform the intelligence services about many forms of activism.²⁰⁴

From the mid 70’s on, the BKA started to practice what has since then come to be known as “Rasterfahndung”: the search for yet unknown suspects in non-police databases. However, the practice of comparing the entries of police and non-databases goes back to the mid-60’s.²⁰⁵

The earliest database was “Nadis”, established by the intelligence services in 1968 without a legal foundation.²⁰⁶ The list of “lawful” data sources for Nadis included courts, prosecutors, prisons, the police, the car registry, electoral agencies, the public archives, libraries, passport and alien registration offices, the foreign ministry in regard to aliens, social insurances, labour unions, employer associations, chambers of commerce, doctors’ and lawyers’ associations, neighbours, friends and landlords.²⁰⁷

Another database, “Pios”, was employed against the RAF. Pios was less focused on the collection of criminal information (carried out by its big sister network “Inpol”, the police database), but rather on non-criminal information such as hints from the population, addresses

²⁰² Wilhelm Steinmüller: Staatswohl vor Bürgerrecht?, in: Bild der Wissenschaft (1976) No. 7, p. 76

²⁰³ „Eine Art Überbehörde in unserem Land“, in: Der Spiegel 30/1976, 19.07.1976, p. 30

²⁰⁴ „Eine Art Überbehörde in unserem Land“, in: Der Spiegel 30/1976, 19.07.1976, p. 30

²⁰⁵ Stahlnetz stülpt sich über uns (VII), in: Der Spiegel 24/1979, 11.06.1979, p. 34

²⁰⁶ Wilhelm Steinmüller (1979), p. 176

²⁰⁷ Hans Joachim Schwagerl and Rolf Walther: Der Schutz der Verfassung, Köln 1968, p. 9

from notebooks of terror suspects and speculations of the police on sympathizers.²⁰⁸ Pios was involved, BKA president Herold claimed, in the arrest of numerous RAF terrorists, such as Knut Folkerts, Brigitte Mohnhaupt and Peter Jürgen Boock. As the principle of the Pios database depended on the collection of seemingly unsuspecting information, the police collected information in large numbers. In Berlin, *Der Spiegel* reported that police were entering all visitors to the anarchist trials into the database. The police were particularly keen on collecting data and fingerprints from what they suspected to be the scene of RAF sympathizers: residents of communes, people handing out leaflets against nuclear plants, participants of violent demonstrations, youth members of the labour unions, and gays and transsexuals.

The earliest *Rasterfahndungen* in the mid-60's compared electronic police search lists with an electronic register of residents.²⁰⁹ In the following years, more and more databases were digitalized, allowing more complex searches. Among the databases regularly included in BKA searches were vehicle registration registers and the registers of pension insurances. Additionally, it was reported in 1979 that the police had over time tried to acquire all kinds of databases for searches, such as library lists, registers of health insurances and of private companies.

Successes attributed to the *Rasterfahndung* included the uncovering of more than 80 DDR spies.²¹⁰ During the investigations following the Schleyer-kidnapping in 1977 the *Rasterfahndung* was employed for the first time on a major scale. Some years later, the then ex-BKA president, Herold, described its use in an interview with *Der Spiegel*: "In 1979 the RAF apparently had one or more apartment hide-outs in Frankfurt, rented under a false name. It was clear that the terrorists could not pay the electricity bill by bank transfer. Thus it was clear that we would find the false names among the group of people paying the electricity bill in cash. The number of individuals in this group was 18.000. How could we find the false names used by the terrorists in such a group? The answer is easy: we deleted all legal names, and only the false names could be left over: we acquired the names of all cash-payers on a magnetic tape by judicial order, and deleted all names of legal persons: registered inhabitants, registered car-owners, retirees, recipients of student benefits, people with entries in the land

²⁰⁸ Das Stahlnetz stülpt sich über uns (II), in: *Der Spiegel* 19/1979 vom 07.05.1979, Seite 36; Wilhelm Steinmüller (1979), p. 181

²⁰⁹ Stahlnetz stülpt sich über uns (VII), in: *Der Spiegel* 24/1979, 11.06.1979, p. 34

²¹⁰ Stahlnetz stülpt sich über uns (VII), in: *Der Spiegel* 24/1979, 11.06.1979, p. 34

register, those owning a fire insurance, persons with health insurances and so on. In the Frankfurt case we found two false names: one of a drug dealer and one being the wanted terrorist Heißler, who was arrested in his apartment hide-out shortly after. *Rasterfahndung* relies on negative criteria that the perpetrator cannot fulfil. If the perpetrator uses a false name, he cannot be registered, cannot be a car-owner, cannot draw student benefits and so on.”²¹¹

Rasterfahndung was also employed during the hijacking of the airplane *Landshut* in 1979. 70.000 hotel registration forms from Mallorca – the airport of origin of the *Landshut* – were matched with the Pios-database, and three of the four hijackers could be identified.²¹² In 1980, another attempt in Hamburg and other cities to employ the *Rasterfahndung* led to a major scandal. The police tried to seize the magnetic band holding the names of individuals paying their electricity bill in cash just like they did in the Frankfurt case. However, the seizure became public before the data match could be carried through. Heavy public protests forced the police to cancel the action.²¹³ The main criticism concerned the fact that thousands of innocent people were potentially suspected of terrorism and harmed by the police investigations. The *Rasterfahndung* turned the presumption of innocence upside down: whenever individuals fulfilled specific neutral criteria, they were obliged to prove that they were not criminals. An insurance employee was arrested for three weeks in 1977, lost his job and was subsequently observed for another two years for the simple and only reason that he had been a DDR emigrant and was occasionally flying to Berlin.²¹⁴ He was later cleared of all charges. Federal data protection officer Hans Peter Bull demanded at a conference of criminal police officers in 1979: “It is necessary to strictly comply with the rule of law, in order not to give the impression of a surveillance state.”²¹⁵ The police was working without any proper legal basis but on the general principle of administrative assistance (*Amtshilfe*), holding that public institutions had to assist each other.

Terrorism had been the main argument for the development of the *Rasterfahndung*, and proponents of the measure continued to defend it for its allegedly important role in the fight against the RAF – despite the fact that it led to only a single investigative success.²¹⁶

²¹¹ „Die Position der RAF hat sich verbessert“, in: Der Spiegel 37/1986, 08.09.1986, p. 38

²¹² „Die Position der RAF hat sich verbessert“, in: Der Spiegel 37/1986, 08.09.1986, p. 38

²¹³ „Die Position der RAF hat sich verbessert“, in: Der Spiegel 37/1986, 08.09.1986, p. 38

²¹⁴ „Ihr West’ ist rein? Da ist nichts schmutzig? in: Der Spiegel 6/1980, 04.02.1980, p. 36

²¹⁵ „Ihr West’ ist rein? Da ist nichts schmutzig? in: Der Spiegel 6/1980, 04.02.1980, p. 36

²¹⁶ Stahlnetz stülpt sich über uns (VII), in: Der Spiegel 24/1979, 11.06.1979, p. 34

Additionally, proponents of the measure tried to present the *Rasterfahndung* as a completely normal form of investigation. During the years of his presidency, the BKA-president, Horst Herold, continually gave the following story to play down the issue: “if we know that the murderer is a baker, we will need to check every baker in this country.”²¹⁷

Horst Herold was pushed out of office in 1981 by the liberal interior minister Baum. *Der Spiegel* commented: “Over many years *Rasterfahndung* – unscrupulously employed by the BKA-president, Herold, – was a controversial issue in this country. As it became finally known that thousands of completely innocent citizens had been caught in his suspicion trap and that the over bred investigation apparatus was slipping from political control, Herold was stopped and pushed out of office.”²¹⁸ The conservative-liberal successor government did not, however, intend to limit the development and expansion of the electronic investigation technique. Rather, the new government’s interest was to limit restrictions on data use by the police, as was manifested in the CSU interior minister Zimmermann’s fight against the federal data protection supervisor, Hans Peter Bull. Zimmermann’s attacks on Bull were in part motivated by the fact that Bull had been a SPD appointee and was a SPD member. But the conflict also concerned the question of what forms of police use of data should be supervised. The CSU state secretary, Spranger, accused Bull of “misunderstanding his task when he acts as the superior controller of all state action.”²¹⁹ Resistance to the data protection supervisor came not only from conservative politicians, but also from the public administration itself. A number of agencies complained that the control by Bull’s office would impede their work, despite the fact that Bull’s office had a total of 30 employees to control 300,000 federal employees (not counting the employees of the postal service, railways and the army, which – as federal public agencies – were likewise under the supervision of the federal data protection supervisor).²²⁰ After the change in government, some agencies such as the *Verfassungsschutz* curtailed the right of inspection of the federal data protection supervisor.²²¹

The reform of the social law in 1981 brought an explicit and remarkably restrictive regulation of data transmission to the police and the intelligence services, which had not been regulated

²¹⁷ „Da waren die Vögel schon ausgeflogen“, in: *Der Spiegel* 42/1980, 13.10.1980, p. 51

²¹⁸ Auf dem Weg zum Überwachungsstaat, in: *Der Spiegel* 2/1983, 10.01.1983, p. 46

²¹⁹ Man muss vieles löschen und vernichten, in: *Der Spiegel* 4/1983, 24.01.1983, p. 62

²²⁰ Man muss vieles löschen und vernichten, in: *Der Spiegel* 4/1983, 24.01.1983, p. 62

²²¹ Man muss vieles löschen und vernichten, in: *Der Spiegel* 4/1983, 24.01.1983, p. 62

and thus had not been forbidden before.²²² Data transmission to the intelligence services and to the BKA was explicitly restricted to individual cases, thus aimed at rendering a *Rasterfahndung* of social data impossible, as the lawmaker argued in the materials.²²³ This limitation did not apply, however, when the *Rasterfahndung* was ordered by a judge.²²⁴

It seems that the general perception of the development in the field of computerized police investigation in the 70's and especially in the 80's was that a major change in the structure of the rule of law was in the making.²²⁵ This became particularly obvious in 1983 and 1984, when newspapers analyzed the development of police surveillance and the rule of law on the occasion of Huxley's novel "1984". *Der Spiegel* summarized this perceived change as follows: "Today, *Rasterfahndung* is a common instrument of investigation. It has extended the sphere of police action to unsuspecting people and to merely abstract threats. Security agencies tend to define their competences in the field of danger prevention much more broadly than before. They develop an idea of security that is not restricted to the protection of the legal order, but includes the social order as well. Stuttgart police president Stümper argues that 'security comprises different inter-relations, everything is connected: inner security, international security, psychological security, social security, economic and energy safety.' The interest of the police in crime prevention has been transformed into 'an interest in social control', as legal scholar Eckart Riehle argues. 'Security problems are not defined in relation to the legal order, but in relation to disturbances in the social practice.'"²²⁶

Being a criminal investigation tool, *Rasterfahndung* was also conceived as an instrument of a social-technical utopia. In interviews, Herold spoke about the possibility of completely erasing criminality by identifying "causes" of criminality: "The long-term goal is to fight socially damaging behaviour systematically, not only selectively. [...] The available massive amount of data about motives, milieu, the influence of alcohol, drugs, and the relation between city structure, living conditions and criminality help to find rational insights into the characteristics of criminality, and to find objective rules with regard to the development of

²²² Sebastian Cobler: DAZUSY, PSI und MOPPS. Computer auf der Spur von „Risikopersonen“, in: Kursbuch (1981) No. 66

²²³ Otto Mallmann, Stefan Walz: Schutz der Sozialdaten nach dem neuen Sozialgesetzbuch, in: Neue Juristische Wochenschrift (1981) No. 19, p. 1020

²²⁴ Klaus Hümmerich, Peter Gola: Die Entwicklung des Datenschutzrechts in den Jahren 1979 und 1980, in: Neue Juristische Wochenschrift (1981) No. 28, p. 1480

²²⁵ Die neue Welt von 1984, in: Der Spiegel 1/1983, 03.01.1983, p. 19

²²⁶ Auf dem Weg zum Überwachungsstaat, in: Der Spiegel 2/1983, 10.01.1983, p. 46

criminality, its causes and the existence of structural defects of society.”²²⁷ – In later years, Herold also recognized the dystopian elements of his fantasy: “The boundlessness of information processing would allow the individual to be accompanied for his whole life, and to make snapshots and profiles of his personality, in all areas, forms and expressions of life: to observe, control and register, and to have the data present at all times without the grace of forgetting. ‘Big brother’ isn’t just literature any longer. Given the current state of technology, it is real.”²²⁸ Critics argued that the possibility of full control would lead to a pressure to conform²²⁹ and would ultimately lead to a surveillance state.²³⁰ From the police perspective, however, a positive view on the social function of data collection definitely persisted until the 80’s.²³¹

The late 70’s brought growing criticism of the extension of security competences and of the growth of the police by an “audience that has grown suspicious” (data protection officer Bull).²³² The interior minister, Baum, reduced competences of the BKA and finally dismissed Horst Herold. The magazine *Stern* published a cover story called “SOS – Freedom in Germany” in August 1978, and *Der Spiegel* launched an extensive series on the practices and risks of data collection and wiretapping (“Das Stahlnetz stülpt sich über uns”). This growing criticism and the fear of a state excessively controlling its citizens gave impetus to a growing data protection movement. Weinbauer argues that the emergence of new social movements after 1977 and in the 80’s (the creation of the green party in 1980, the establishment of the left newspaper TAZ in 1979, the anti-nuclear movement, the protests against the expansion of the Frankfurt airport, etc.) should be seen as a reaction to what was perceived as an excessive expansion of police and surveillance competences.²³³

Social and political criticism of the seemingly limitless use of data by state authorities found a target in the census of 1983.²³⁴ Although the 1983 census did not fundamentally differ from the census held in 1970, it nevertheless drew major criticism and provoked 500 constitutional

²²⁷ Sebastian Cobler (1981), p. 6

²²⁸ Horst Herold: Polizeiliche Datenverarbeitung und Menschenrechte, in: *Recht und Politik* (1980) No. 2, p. 81

²²⁹ Jürgen Simon, Gundel Simon-Ern, Jürgen Taeger: Wer sich umdreht oder lacht ... Rasterfahndung: Ein Beitrag zur Gewährleistung der Inneren Sicherheit, in: *Kursbuch* (1981) No. 66, p. 31

²³⁰ Hans Peter Bull, in: BKA (ed.): *Möglichkeiten und Grenzen der Fahndung*, Wiesbaden 1980, p. 75; Otto Ulrich (1981), p. 137; Wilhelm Steinmüller (1979), p. 173

²³¹ Klaus Weinbauer (2004), p. 237

²³² Hans Peter Bull: Politik der „inneren Sicherheit“ vor einem misstrauisch gewordenen Publikum, in: *Leviathan* (1984) No 12, p. 155

²³³ Klaus Weinbauer (2004), p. 240

²³⁴ Manfred Güllner: Volkszählung 1983: Ein deutsches Übel, in: *Blätter für deutsche und internationale Politik* (1983) No. 4, p. 603

complaints.²³⁵ There had been, Spiros Simitis argued, a change of consciousness on the handling of personal data. The fact that comprehensive statistical information was not anonymous but could be electronically attributed to individuals was particularly criticised. Critics of the census attempted to organize a boycott.²³⁶

The growing protests against the census also sparked another major debate. For years, it was planned to introduce computer-readable ID-cards. The project had been initiated by the left-liberal coalition and continued by the CDU-FDP coalition. The law on ID cards had been passed unanimously and without debate in parliament. When major critique was voiced against the census and against its inherent control and surveillance function, public attention also turned to the ID-card project, which had been largely ignored before. *Der Spiegel* published a piece on the ID-card project titled “Admission ticket to the surveillance state” in 1983.²³⁷ The president of Hamburg’s *Verfassungsschutz*, the CDU politician Christian Lochte, said that “the federal government infringes upon the principle of proportionality when it imposes a new ID-card system on 30 million citizens while looking for 30 terrorists.”²³⁸ The idea of the ID-card had first been brought up in 1977 by the then BKA-president Herold, who had demanded forgery-proof ID-cards in reaction to the RAF’s use of forged or stolen IDs. It was criticised, however, that especially a well-equipped and highly conspiratorial terrorist group such as the RAF could easily avoid being caught by the new system. Although it was clear that the new system would have little effect on terrorists, the CDU/CSU continued to use the argument against the opponents of the project. The CSU accused adversaries of the system of wanting the “destruction of freedom and the rule of law.”²³⁹ It was reported that the interior ministers’ conference had instructed the police already in 1977 by a secret order to electronically check all individuals that the police had contact with – victims, witnesses, suspects – “in a way that the concerned person does not notice the control.”²⁴⁰

Anti-terrorism ceased to be, however, the main argument of the security agencies in the defence of the ID-cards in the early 80’s. The main interest became the possibility to radically expand secret surveillance (the program was called “beobachtende Fahndung”, later “polizeiliche Beobachtung”): observing individuals not suspicious of a specific crime and

²³⁵ Wo ist denn die Intimität?, in: *Der Spiegel* 13/1983, 28.03.1983, p. 34

²³⁶ Volkszählung: „Lasst 1000 Fragebogen glühen“, in: *Der Spiegel* 13/1983, 28.03.1983, p. 28

²³⁷ Eintrittskarte für den Überwachungsstaat, in: 32/1983, 08.08.1983, p. 17

²³⁸ „Fürs Kabarett bestens geeignet“, in: *Der Spiegel* 32/1983, 08.08.1983, p. 22

²³⁹ „Fürs Kabarett bestens geeignet“, in: *Der Spiegel* 32/1983, 08.08.1983, p. 22

²⁴⁰ Eintrittskarte für den Überwachungsstaat, in: 32/1983, 08.08.1983, p. 17

being able to track their movements with the help of regular ID-controls.²⁴¹ In fact, the “polizeiliche Beobachtung” mainly concerned individuals related to drug-crime and a huge group of left and autonomous groups. While the number of terrorism sympathizers was not growing according to all accounts, the number of individuals registered under the *polizeiliche Beobachtung* was. In 1983, 11,000 individuals were registered, often individuals who were merely friends of other registered people or had travelled in the same train compartment to West Berlin.²⁴² Thus, the main intention was to expand the possibility of identity checks, for example at demonstrations.²⁴³

In December 1983, the constitutional court ruled on the complaints in regard to the census law.²⁴⁴ The court’s decision was and still is perceived as the single most important legal act in regard to data protection and had tremendous impact on the development of data-protection worldwide. The court developed the constitutional “right of informational self-determination” and ruled that the census law was unconstitutional. The court stated that “a societal and legal order is not consistent with the right of informational self-determination if citizens cannot know any longer who knows what about them. If somebody is unsure whether divergent behaviour is registered for all times, used or passed on, he will try not to stand out with such behaviour. [...] This would not only limit personal development, but also the common good, as self-determination is a fundamental precondition of a free and democratic community. From this it follows that the personal development under conditions of modern data handling presupposes the protection of the individual against unlimited data collection, use and dissemination of personal data. This protection is covered by the *Grundgesetz* [...]. This fundamental right holds the right of the individual to decide on the disclosure and use of his personal data.”

The weeks and months after the court’s decision were characterized by a major battle on the interpretation of the verdict.²⁴⁵ Friedrich Zimmermann’s interior ministry called the decision “a piece from the madhouse.”²⁴⁶ Some weeks later it published a statement arguing that the decision had to be interpreted restrictively: “A maximalist interpretation of the verdict would

²⁴¹ „Fürs Kabarett bestens geeignet“, in: Der Spiegel 32/1983, 08.08.1983, p. 22

²⁴² „Fürs Kabarett bestens geeignet“, in: Der Spiegel 32/1983, 08.08.1983, p. 22

²⁴³ Eintrittskarte für den Überwachungsstaat, in: 32/1983, 08.08.1983, p. 17; „Fürs Kabarett bestens geeignet“, in: Der Spiegel 32/1983, 08.08.1983, p. 22

²⁴⁴ BVerfG: Verfassungsrechtliche Überprüfung des Volkszählungsgesetzes 1983, in: Neue Juristische Wochenschrift (1984) No. 8, p. 419

²⁴⁵ Zum Stillstand, in: Der Spiegel 29/1984, 16.07.1984, p. 18

²⁴⁶ Schwere Schlappe, in: Der Spiegel 51/1983, 19.12.1983, p. 19

lead to a standstill of major parts of the public administration.”²⁴⁷ The conservative newspaper *Frankfurter Allgemeine Zeitung* argued that “the court has been taken advantage of.”²⁴⁸ In contrast, outspoken critics of the law, such as the law professors Erhard Denninger and Spiros Simitis, attempted to consolidate a broad interpretation of the decision.²⁴⁹ Denninger argued in a report that the verdict held that every collection and use of data had to be based on an explicit legal authorization. Moreover, the principle established by the court would not only cover the census law itself, but all fields of public administration, including the police. This interpretation of the verdict was especially targeted at the police practice of collecting and using all sorts of data (including that of non-police authorities) for the *Rasterfahndung* that had been practiced until then without any legal authorization.

The constitutional court’s decision contained a specific passage prohibiting the passing on of data by the simple way of administrative assistance (*Amtshilfe*), and abolishing the practice used for the *Rasterfahndung* of routinely acquiring non-police data, e.g. from social insurances, a practice that had been taken for granted by the police for decades. This development shows that developments in the rule of law are not simply a matter of “more or less rights.” The court was not simply taking away police competences that they had illegitimately acquired in the years before with the help of a new technology. Rather, the police practice of simply acquiring and storing all information without an explicit legal basis with the help of computers was a continuation of a much older practice: that the state structures had routinely been based on the assumption that the citizen was a subordinate to the state and had no right to interfere with the actions of state agencies who are working together as a “general authority.” From this perspective, the court’s decision was not simply a going back to the old situation. Nor was it simply an adaptation of the “classic” civil liberties to a new technology. But rather, the court curtailed the century old tradition of the authoritarian state. Similarly, the *Radikalenerlass* – the state having full authority to dispose of its “subordinate” public servants in all aspects – could be seen as reminiscent of a pre-democratic, authoritarian idea of the state that was revived in the 70’s.²⁵⁰

²⁴⁷ Zum Stillstand, in: *Der Spiegel* 29/1984, 16.07.1984, p. 18

²⁴⁸ Schwere Schlappe, in: *Der Spiegel* 51/1983, 19.12.1983, p. 19

²⁴⁹ Spiros Simitis, Rita Wellbrock: Zur Übermittlung von Daten des Verfassungsschutzes, in: *Neue Juristische Wochenschrift* (1984) No. 29-30, p. 1591

²⁵⁰ Edmund Brandt (ed.): *Die politische Treuepflicht. Rechtsquellen zur Geschichte des Berufsbeamtentums*, Karlsruhe 1976

Underneath the conflict on data protection – being tough on crime, on the one hand, the luring danger of the surveillance state, on the other hand, – a structural conflict between different institutions was also observable. The court emphasised the importance of independent control of public administration: “The participation of independent data protection supervisors is of significant importance for an effective protection of the right to informational self-determination, as the use and storage of data under the conditions of automatic data handling remain untransparent for the citizens.”²⁵¹ The role of data protection commissioners had been an issue of constant conflict since their establishment in the 70’s, the different public agencies opposing external control of their activities. The principle that data collection must be explicitly and individually authorized by law only became more and more accepted over the years following the court’s verdict.²⁵² Two parallel developments took place: there was the conflict between state agencies which aimed at extending their surveillance competences, on the one side, and data protection supervisors, on the other side. But there also was a legal conflict between the argument that a general danger-prevention competence was sufficient to legitimize *Rasterfahndung*, on the one hand, and the argument that explicit and individual authorization by law was necessary, on the other.

Another example why it seems necessary to see the census-verdict not only in its data protection dimension but also as a reduction of the authoritarian state is the Kießling-Wörner-affair. Günter Kießling had been a German four-star general working in the NATO headquarters.²⁵³ The military intelligence service MAD had acquired information on Kießling’s alleged homosexuality. The defence minister, Günter Wörner, forced him into early retirement in late 1983, as the general was perceived as being vulnerable to blackmailing. The research by MAD turned out to be based on absurd evidence,²⁵⁴ Kießling was rehabilitated soon after.²⁵⁵ In particular, one detail caught the attention of the critical public: MAD had instructed the police in Köln to investigate Kießling in the gay scene.²⁵⁶ Although this was illegal, this kind of cooperation between the police and the army intelligence service had been common practice for decades. The intelligence services had no executive competences (such as conducting criminal investigations) and were restricted to the gathering of information. In the Kießling affair, however, the police gave administrative

²⁵¹ Schwere Schlappe, in: Der Spiegel 51/1983, 19.12.1983, p. 19;

²⁵² Bernhard Schlink: Datenschutz und Amtshilfe, in: Neue Zeitschrift für Verwaltungsrecht (1986) No. 4, p. 249

²⁵³ Wer mit wem, in: Der Spiegel 2/1984, 09.01.1984, p. 30

²⁵⁴ „Die vier vom Jeneral“, in: Der Spiegel 4/1984, 23.01.1984, p. 24

²⁵⁵ „Hier hat nicht nur einer gelogen“, in: Der Spiegel 13/1984, 26.03.1984, p. 17

²⁵⁶ Kohl: „Das läuft nicht gut“, in: Der Spiegel 3/1984, 16.01.1984, p. 15

assistance to MAD in a field where the intelligence service itself had no competences. However, the (theoretical) separation of police and executive functions, on the one hand, and intelligence functions, on the other, is provided for by the *Grundgesetz*. After the experience of the Nazi secret police, Gestapo, that held both these functions, the separation of these two functions in separate organizations was seen as a prerequisite for a democratic, non-totalitarian society after World War II. The routine cooperation of the intelligence service and the police obviously ran counter to this separation principle and strengthened the image of all state agencies serving the same authoritarian state interest (The guidelines for cooperation of intelligence services and the police enacted in 1970 were kept secret). The Kießling affair was the catalyst for critics to question the legal position of the military intelligence services and their competences on a fundamental level. Neither the MAD nor the other military intelligence services, the BND (*Bundesnachrichtendienst*), were operating on a proper legal basis. They had been established simply by a governmental decree in the 50's and had operated on this basis ever since.²⁵⁷ In the wake of the Kießling affair, this legal basis was finally perceived as shady and insufficient after remaining rather uncontested in the previous 30 years. On the occasion of the Kießling affair the parliament set up an inquiry committee. The functionality of the other intelligence services was questioned as well.²⁵⁸ An inquiry by *Der Spiegel* into the BND gave a picture of a dysfunctional agency that had successfully been blocking attempts of parliamentary or executive control over the years. The BND's political self-conception and its work style were shaped by its first president, Reinhard Gehlen. Gehlen had been the head of spying activity in Eastern Europe for the *Wehrmacht* in World War II. After the war, he built up the BND using the same strategies and the same personnel that he had worked with during the war. In its inquiry into the BND, *Der Spiegel* suggested that the BND in the 80's continued to be shaped by Gehlen's tradition, inspired by World War II.

The census law and the Kießling affair seem to be similar to the extent that both deal with a situation where state agencies wanted unlimited access to the data of citizens without much consideration for what they were legally allowed or prohibited to do. From this perspective, both cases seem to deal with state agencies trying to use an authoritarian, unlimited competence. The court's decision and the public reaction to the Kießling-affair, however, seem to indicate a movement towards a system where state agencies are accountable to the citizens and are only allowed to act on an explicit legal basis.

²⁵⁷ „Es ist besser, die Dienste wissen mal nichts“, in: *Der Spiegel* 13/1984, 26.03.1984, p. 42

²⁵⁸ „Dieser Dilletanten-Verein“, in: *Der Spiegel* 12/1984, 19.03.1984, p. 38

The Kießling affair was only one of a greater number of scandals that struck the Kohl-government in the years after 1983. The minister for economic affairs, Otto Graf Lambsdorff, was involved in a bribery and money laundering scandal, and the subsequent attempt of the government to pass an amnesty law for the politicians and businessmen involved led to Hans-Dietrich Genscher resigning from his post as the FDP president. In the ensuing months, the Kießling affair was perceived as being primarily concerned with the mischievous spread of wrong information about a general, and the legal aspects of the affair got pushed aside, especially the shady cooperation between the police and the MAD. In 1984, a minor reform of the agency was carried out,²⁵⁹ but only in 1990 a law was passed that finally created a proper legal basis for the agency.

The constitutional court's census decision, on the other hand, had an astounding impact.²⁶⁰ In the short run, data protection laws and measures had to be significantly overhauled against the explicit will of the interior minister, Zimmermann.²⁶¹ In the years following the constitutional court's decision two trends are identifiable. On the one hand, the decision boosted attempts to improve and strengthen data protection legislation. On the other hand, attempts can be identified which aim at limiting the decision's material impact as much as possible so as to only follow the formal requirements defined by the court. This was especially obvious in the reform of the intelligence services as developed by the CDU and CSU in 1985.²⁶² The reform should cover a new MAD-law, the law on the *Verfassungsschutz* and a law on the cooperation of police and the intelligence services. The interior ministry argued that impediments to the citizens' rights to informational self-determination (and thus all kinds of collection and use of data by the authorities) were allowed provided that the measures were based on laws. The proposed laws were – generally speaking – turning the principle developed by the constitutional court upside down. The court had proposed a system where data collection and use was forbidden unless explicitly permitted by law. The proposals by CDU/CSU, in contrast, allowed all data collection and use unless explicitly excluded. Moreover, the police authorities and the prosecution were obliged to pass on all personal information that was deemed relevant for the work of the *Verfassungsschutz*.²⁶³ Critics argued that the proposed laws were not adapting the continuing (obviously illegal) police practice – among them the

²⁵⁹ „Der MAD-Auftrag ist nicht mehr durchführbar“, in: Der Spiegel 40/1984, 01.10.1984, p. 30

²⁶⁰ Körbeweise Widerspruch, in: Der Spiegel 17/1984, 23.04.1984, p. 34

²⁶¹ Zum Stillstand, in: Der Spiegel 29/1984, 16.07.1984, p. 18; „Bin ich denn der liebe Gott?“, in: Der Spiegel 28/1985, 08.07.1985, p. 21

²⁶² „Wir brauchen eine wehrhafte Demokratie“, in: Der Spiegel 30/1985, 22.07.1985, p. 17

²⁶³ „Wir brauchen eine wehrhafte Demokratie“, in: Der Spiegel 30/1985, 22.07.1985, p. 17; Tips von Rentnern, in: Der Spiegel 4/1986, 20.01.1986, p. 30

Rasterfahndung – to the principles developed by the constitutional court, but were rather codifying the illegal practice.²⁶⁴ The other potentially more important principles developed in the census decision – the proportionality principle that should limit the flood of data and the principle of limited use of data that should restrict the passing on of data to other institutions – were largely ignored in the law proposals. As soon as data were entered into a police database, it could be subject to *Rasterfahndung* at will.

The growing technical possibilities seemed to lead to an increasing collection and use of data. The Inpol-System, as the centralized police database, registered 1.5 million queries per month in 1986, twenty times the number of queries that had been made via telephone or mail before the computer system was installed in 1972.²⁶⁵ The terrorism database Pios was enlarged from 300 entries in the early 70's to 11000 in the 80's.

Growing protests from the coalition partner FDP,²⁶⁶ the association of judges, the labour union of policemen and by lawyers led to the adoption of only two of the seven proposed laws: the law on the computer-readable ID-cards and the so-called “Schleppnetzfangdung”.²⁶⁷ The latter instrument²⁶⁸ allowed identity control and registration of persons within a specific regional area in case of a crime. Data collected with the help of ID controls was to be screened according to different “suspicious” criteria.²⁶⁹ The concept of the “Schleppnetzfangdung” had been proposed and largely criticised by practitioners back in 1977 during the peak of RAF terrorism. Building up control posts around a crime site would be, the criticism went, much too slow to catch the real perpetrators.²⁷⁰ The real use of the provision – especially in the mid-80's, when the issue of violent demonstrations by environmental activists was a hot topic – seemed to be to allow the police to build up broad control circles around demonstrations. While previously control posts had been erected only in cases of terrorism or of particularly dangerous crimes, the new law allowed ID-controls everywhere and the unlimited storage of the collected data.²⁷¹

²⁶⁴ „Das Tor für die Geheimpolizei steht offen“, in: Der Spiegel 7/1986, 10.02.1986, p. 22

²⁶⁵ „Das Tor für die Geheimpolizei steht offen“, in: Der Spiegel 7/1986, 10.02.1986, p. 22

²⁶⁶ Reißleine gezogen, in: Der Spiegel 6/1986, 03.02.1986, p. 24

²⁶⁷ Klaus Rogall: Frontalangriff auf die Bürgerrechte oder notwendige Strafverfolgungsmaßnahme? - - Zur Regelung der sog. Schleppnetzfangdung in § 163d StPO, in: Neue Zeitschrift für Strafrecht (1986) No. 9, p. 385; „Bauen Sie doch hier keinen Popanz auf!“, in: Der Spiegel 11/1986, 10.03.1986, p. 34; Kristian Kühl: Neue Gesetze gegen terroristische Straftaten, in: Neue Juristische Wochenschrift (1987) No. 13, p. 737

²⁶⁸ § 163d StPO

²⁶⁹ Kristian Kühl (1987), p. 737

²⁷⁰ „Wen suchen wir denn eigentlich?“, in: Der Spiegel 46/1977, 07.11.1977, p. 26

²⁷¹ Bundesbürger im Schleppnetz, in: Der Spiegel 5/1986, 27.01.1986, p. 14

The murder of Gerold von Braunmühl, a high-ranking official in the foreign ministry, by the RAF in October 1986 sparked new attempts to push through the proposed security laws. The interior minister, Zimmermann, himself under major criticism, accused the coalition partner, the FDP, of having obstructed the security package and thus being partly responsible for the murder.²⁷² Excessive data protection laws, Zimmermann argued, had protected terrorists and their sympathizers. At the same time Zimmermann acknowledged that the available instruments – such as the *Rasterfahndung* – had not been successful in the terrorist hunt. The government pushed for a law eliminating all (possible) limits of the *Rasterfahndung* and for the so-called Zevis-law, which would allow police access to the central car registration database.²⁷³

Initially, the security law package was not primarily marketed as an anti-terrorism measure. But with another RAF murder at that time, the new law proposals – consisting of measures from the previous package and some new proposals such as the *Kronzeugenregelung* – were now marketed as anti-terrorism-laws.²⁷⁴

Rasterfahndung remained an unregulated instrument until the 90's. It popped up now and then in legal proposals, for example in the discussion on the expansion of police competences in the fight against organised crime in 1990. Again in 1991 a law was proposed to codify the *Rasterfahndung*, this time for investigations on organized crime.²⁷⁵ The proposal was – as *Der Spiegel* put it – “a surprisingly confidence-inspiring law.” It was the result of a compromise between the CSU hardliners in *Bayern* and more prudent SPD regional interior ministers. *Der Spiegel* described the legal context of the proposal as follows: “The proposal is the result of a debate between security politicians of the regions and the coalition in Bonn that took many years. From now on the criminal procedure law will be amended for the first time with clear rules on the use of delicate investigative methods that have so far been practices in a legal void. The legalization of wiretapping, *Rasterfahndung*, and the use of undercover police officers will give competences to the criminal police that they have been using all along.”²⁷⁶ The new law, *Der Spiegel* suggested, would not change or limit the current police practice, as the police laws of the *Bundesländer* were already directly or indirectly authorized for all of these investigative methods. In fact, *Rasterfahndung* had been allowed by the regional police

²⁷² „Eine Trauerfeier reicht nicht“, in: *Der Spiegel* 43/1986, 20.10.1986, p. 26

²⁷³ Kristian Kühl (1987), p. 737

²⁷⁴ Verbrennung vorm Dom, in: *Der Spiegel* 44/1986, 27.10.1986, p. 132

²⁷⁵ Dumpfes Murmeln, in: *Der Spiegel* 31/1991, 29.07.1991, p. 28

²⁷⁶ Dumpfes Murmeln, in: *Der Spiegel* 31/1991, 29.07.1991, p. 28

laws since the early 80's.²⁷⁷ The police could still easily avoid the limits proposed in the new federal law by simply using the broad competences laid down in the regional police laws.

In 1994, a new *Rasterfahndungs*-competence was introduced on a federal level. The newly-developed electronic alien register, holding information on 8 million people, was tacitly opened to a kind of *Rasterfahndung*:²⁷⁸ The database could be searched for groups of people having the same “suspicious” characteristics.

From the early 90's until 2001, *Rasterfahndung* is not detectable in public discourse (different to the legal academic sphere). However, this changed radically after the attacks of 9/11. The so-called “sleeper cells” became one of the major discursive figures in Germany. Days after the terror attacks, the prime minister of *Nordrhein-Westfalen*, Fritz Behrens, argued that there were no less than 100 sleepers in Germany (the number seems to have been complete speculation).²⁷⁹ Berlin's green justice senator Wolfgang Wieland supported a “small-scale *Rasterfahndung*” in order to uncover connections between pilot trainees or students and radical Islam.²⁸⁰ A few days after 9/11, all *Länder* started a *Rasterfahndung*.²⁸¹

A review of the articles on the *Rasterfahndung* that were published after 9/11 shows a rather distorted picture of the instrument's first application in the 70's. The term *Rasterfahndung* in its core meaning describes a system where data of unsuspecting citizens is filtered according to specific criteria: a specific combination of different characteristics that are unsuspecting in themselves which might lead to criminals. There is only one known example of the successful application of the instrument in the 70's, namely the uncovering of the RAF terrorist Heißler in Frankfurt that was described earlier in this chapter. It is possible – though highly unlikely – that other successful cases have not been brought to the attention of the general public. However, given the fact that there were numerous attempts to completely legalize the instrument in the years which followed, it seems implausible that its proponents would not have happily pointed out these examples if they had existed. In the 80's, the term *Rasterfahndung* became blurred and was often simply used to describe police access to non-

²⁷⁷ Hans-Werner Alberts: Das neue Bremische Polizeigesetz, in: Neue Zeitschrift für Verwaltungsrecht (1983) No. 10, p. 585

²⁷⁸ Angelika Schriever-Steinberg: Das Ausländerzentralregistergesetz, in: Neue Juristische Wochenschrift (1994) No. 50, p. 3276

²⁷⁹ „Das ist Gespensteseherei“, in: Der Spiegel 39/2001, 24.09.2001, p. 32

²⁸⁰ Angriff auf den Staat im Staate, in: Der Spiegel 39/2001, 24.09.2001, p. 28

²⁸¹ Hans Liskan: Zur polizeilichen Rasterfahndung, in: Neue Zeitschrift für Verwaltungsrecht (2002) No. 5, p. 513

police databases or the collection of data by the police without reasonable suspicion. In the articles following 9/11, the question whether *Rasterfahndung* had actually been a successful instrument of investigation was never raised. Rather, the mere fact that *Rasterfahndung* had been employed against terrorists in the past seems to have been taken as an indicator of the instrument's usefulness. Despite its completely unimpressive track record, the BKA president, Ulrich Kersten, defended it as a "well-trying investigative instrument".²⁸²

It seems that the *Rasterfahndung*, enacted after 9/11 in order to uncover "sleepers", was mainly applied to students and was particularly targeted individuals originating from countries with Muslim populations, for engineering students and for frequent travellers (thus, individuals resembling the three 9/11 terrorists who had lived in Hamburg).²⁸³ The Humboldt University in Berlin and three students contested the legality of this measure and won. According to a law of the city of Berlin, the court argued that a current threat against the state or against a person was the precondition for a *Rasterfahndung* – a precondition that the government had not sufficiently substantiated.²⁸⁴ In *Hessen*, a court ruled against the *Rasterfahndung* for similar reasons after a Sudanese student sued.²⁸⁵ In both cases, the courts ruled that the use of the instrument was only permitted if the state could satisfactorily show the existence of a current threat. The decision was harshly criticised by *Hessen's* interior minister, Volker Bouffier (CDU); he refused to delete the student data despite a court order.²⁸⁶ The Düsseldorf appellate court (*OLG Düsseldorf*) decided, however, that the *Rasterfahndung* was illegal only insofar as German nationals were concerned and argued that a current threat did, in fact, exist.²⁸⁷ Similarly, the administrative courts in Mainz, Bremen and Hamburg ruled in favour of the *Rasterfahndung*.²⁸⁸ Protests against the *Rasterfahndung* became big especially at universities. Criticism was particularly levelled against the fact that the

²⁸² Gigantischer Aufwand, in: Der Spiegel 11/2002, 11.03.2002, p. 52

²⁸³ Die Fahnder verlieren sich im Datenwust, in: Spiegel Online, 13.2.2002, online: <http://www.spiegel.de/politik/deutschland/0,1518,182133,00.html> (retrieved 3.3.2009)

²⁸⁴ Ausländische Studenten siegen vor Gericht, in: Spiegel Online, 22.1.2002, online unter <http://www.spiegel.de/unispiegel/studium/0,1518,178452,00.html> (retrieved 3.3.2009)

²⁸⁵ Erneute Blamage für die Ermittler, in: Spiegel Online, 7.2.2002, online: <http://www.spiegel.de/politik/deutschland/0,1518,181231,00.html> (retrieved 2.3.2009)

²⁸⁶ Hessen will die Daten nicht löschen, in: Spiegel Online, 9.2.2002, online: <http://www.spiegel.de/unispiegel/studium/0,1518,181623,00.html> (retrieved 3.3.2009)

²⁸⁷ Rasterfahndung scheitert auch in der zweiten Instanz, in: Spiegel Online, 11.2.2002, online: <http://www.spiegel.de/politik/deutschland/0,1518,181842,00.html> (retrieved 3.3.2009)

²⁸⁸ Im juristischen Wirrwarr steckengeblieben, in: Spiegel Online, 22.2.2002, online: <http://www.spiegel.de/unispiegel/studium/0,1518,183635,00.html> (retrieved 3.3.2009); In Bremen darf gerastert werden, in: Spiegel Online, 27.3.2002, online: <http://www.spiegel.de/unispiegel/studium/0,1518,189284,00.html> (retrieved 3.3.2009)

Rasterfahndung was almost exclusively applied to foreign students.²⁸⁹ Student representatives supported dozens of lawsuits by affected students.

Although the *Rasterfahndung* was stopped in some *Bundesländer*, more than 6 million data records had been examined until March 2002.²⁹⁰ However, *Rasterfahndung* failed to lead to a single new Al-Qaida suspect.²⁹¹ Abdelghani Mzoudi, who was arrested in 2002 and who was presented as the first major investigative success of the instrument, had already been under police observation since September 2001.²⁹² He was found innocent by a court in 2004. While 176 proceedings had been initiated against terror suspects before 2003, all of them were based on “classic” police investigation.²⁹³

Despite this complete lack of success, the *Bundesverfassungsschutz* was granted the competence to carry out *Rasterfahndungen* of databases of banks, telecommunication companies and airlines without judicial order in 2004 by the *Terrorbekämpfungsgesetz*.²⁹⁴ The law also allowed the inclusion of social data in the search.

In 2006, however, the constitutional court delivered an astounding rebuke of the government’s practice.²⁹⁵ The *Rasterfahndung* following the 9/11 attacks had not been legal, the court ruled, as there had not been a current threat in Germany. This was the precondition for employing the *Rasterfahndung*. Thus, the right to informational self-determination had been violated. For the employment of the instrument, the majority of the court argued that an abstract level of threat did not suffice.²⁹⁶ A court minority of two judges dissented, arguing that the situation after 9/11 – two of the terrorists having lived in Germany, and Al-Qaida having threatened to attack NATO-countries – was sufficient to fulfil the conditions stipulated by the law. This was the first time the constitutional court had to deal with the *Rasterfahndung*.

²⁸⁹ Klagen, nichts als Klagen, in: Spiegel Online, 19.9.2002, online: <http://www.spiegel.de/unispiegel/studium/0,1518,214642,00.html> (retrieved 3.3.2009)

²⁹⁰ Gigantischer Aufwand, in: Der Spiegel 11/2002, 11.03.2002, p. 52

²⁹¹ Mit der Schrotflinte, in: Der Spiegel 22/2003, 26.05.2003, p. 44

²⁹² Rasterfahndung „blinder Aktionismus“, in: Spiegel Online, 8.4.2004, online: <http://www.spiegel.de/panorama/0,1518,294808,00.html> (retrieved 3.3.2009)

²⁹³ Mit der Schrotflinte, in: Der Spiegel 22/2003, 26.05.2003, p. 44

²⁹⁴ Eckhart v. Bubnoff: Terrorismusbekämpfung - eine weltweite Herausforderung, in: Neue Juristische Wochenzeitschrift (2002) No. 37, p. 2672; Die Zukunft der Überwachung, in: Spiegel Online, 27.12.2004, online: <http://www.spiegel.de/netzwelt/web/0,1518,333324,00.html> (retrieved 3.3.2009)

²⁹⁵ „Besorgnis erregende Entscheidung“, in: Spiegel Online, 23.5.2006, online: <http://www.spiegel.de/politik/deutschland/0,1518,417778,00.html> (retrieved 4.3.2009)

²⁹⁶ Karlsruhe dezimiert das Arsenal der Terror-Fahnder, in: Spiegel Online, 23.5.2006, online: <http://www.spiegel.de/politik/deutschland/0,1518,417746,00.html> (retrieved 4.3.2009)

Despite the lack of investigative success²⁹⁷ and the limits erected by the constitutional court, *Rasterfahndung* against terrorists remained on the political agenda. In particular, the interior minister, Wolfgang Schäuble (CDU), warned of terror threats and proposed new investigative competences frequently, such as the online-investigation on private computers, the right to shoot down a hijacked airplane, or a new terrorism-database. *Der Spiegel* criticised this, reporting that it would be “minister-alarmism”, a “dangerous game for the democratic state.”²⁹⁸ In December 2008, the CDU-SPD coalition passed a new BKA law that allowed *Rasterfahndung* to prevent danger (*Gefahrenabwehr*).²⁹⁹

Conclusion

Rasterfahndung miserably failed in the fight against terrorism both against the RAF and against Al Qaida. Since it was conceived by Horst Herold in the 70’s, it has had one single and isolated success in 1979. However, it was never conceived solely as an instrument in the fight against terrorism, although it was always marketed as such. In reality, in the 60’s and early 70’s it was believed that only if the police held sufficiently detailed information on the population, could they limit or even completely erase criminality. Thus, *Rasterfahndung* and related measures (such as *Schleppnetzverfahren*) were from the outset employed to document politically and socially deviant behaviour, supposedly the breeding ground for crime and terrorism.

The preceding chapter shows that the development of the *Rasterfahndung* should not be reduced to the fact that from the 60’s on computerized investigative methods were introduced. Structurally, the tool should be understood as a continuation of an existing authoritarian, undemocratic state structure dating back to the 19th century. It was based on complicity between all state authorities routinely acting without any legal basis. In the 80’s, a counter-movement became perceptible, pushing for two main goals: first, every state action should be based on an explicit legal authorization. The legal authorization of intrusive police measures in the 80’s and 90’s therefore does not merely indicate the growth of the surveillance state. It

²⁹⁷ Wolfgang Hoffmann-Riem: Freiheit und Sicherheit im Angesicht terroristischer Anschläge, in: Zeitschrift für Rechtspolitik (2002) No. 12, p. 497; Martin Kutscha: Überwachungsmaßnahmen von Sicherheitsbehörden im Fokus der Grundrechte, in: Landes- und Kommunalverwaltung (2008) No. 11, p. 481

²⁹⁸ Schäuble und Jung spielen mit dem Entsetzen, in: Spiegel Online, 17.9.2007, online: <http://www.spiegel.de/politik/deutschland/0,1518,506169,00.html> (retrieved 4.3.2009)

²⁹⁹ Bundesrat verabschiedet BKA-Gesetz, in: Spiegel Online, 19.12.2008, online: <http://www.spiegel.de/politik/deutschland/0,1518,597497,00.html> (retrieved 4.3.2009)

also (and somewhat contradictorily) indicates the success of the rule of law movement, as persistent police practice finally needed to be put on a proper legal basis. Second, the growing collection and use of computerized data should be balanced with individual and collective rights of data protection.

§ 129a (formation of a terrorist organization) and related changes of the penal and procedural penal code (StGB and StPO)

From the very beginning, RAF members were not only pursued for their individual crimes, but also as members of a criminal organization (§ 129 StGB).³⁰⁰ § 129 does not penalize the criminal act (such as murder) itself, but the membership “in a group aimed at committing criminal acts.” § 129 and its predecessors have all been used exclusively against political organizations, almost never against non-political criminal groups.³⁰¹ (Professional criminals acting in a group were usually convicted under different provisions). § 129 had already been used against social democrats and other left organizations under Bismarck. The advantage of § 129 for the prosecution was that – after proving the existence of an organization planning criminal acts – individuals could be prosecuted solely by proving their membership of the group without the necessity to establish their individual responsibility for a specific crime. Additionally, § 129 established the competence of the federal prosecution whose role of conducting investigations on a federal level was important

After World War II, § 129 was frequently employed in the processes that led to the prohibition of communist organizations from August 1954 to May 1958 (*Hauptausschuss für Volksbefragung, Abteilung Prozeßbetreuung der FDJ, Freie Deutsche Jugend (FDJ), Deutsches Arbeiterkommittee, Gesellschaft für deutsch-sowjetische Freundschaft, Sozialistische Aktion, Zentralrat zum Schutz demokratischer Rechte*).³⁰² § 129 was, however, never used against members of the SS or of the *Einsatzgruppen* which were seen as criminal organizations as well.³⁰³ The 60's brought a liberalization of the political penal law, and § 129 was no longer employed except in two situations: against right extremist bomber Norbert Burger and against two neo-Nazis who had plotted to set fire to the *Zentrale zur Aufklärung von NS-Verbrechen* in Ludwigsburg.

In 1973, § 129 was employed against the maoist “revolutionary KPD” after they had stormed the city hall in Berlin.³⁰⁴ Half a year later, however, the federal court of justice (BGH)

³⁰⁰ Acht Fälle mit „besonderer Bedeutung“, in: Der Spiegel 05/1972, 24.01.1972, p. 32

³⁰¹ Strafbare Hilfe, in: Der Spiegel 08/1972, 14.02.1972, p. 62

³⁰² Strafbare Hilfe, in: Der Spiegel 08/1972, 14.02.1972, p. 62

³⁰³ Uwe Wesel: „Krieg der Justiz gegen die Jugend“, in: Der Spiegel 37/1981, 07.09.1981, p. 40

³⁰⁴ Das blanke Eisen, in: Der Spiegel 21/1973, 21.05.1973, p. 83

declared that the application of § 129 had been a breach of the law.³⁰⁵ Squatters in Hamburg, on the other hand, were convicted by the BGH of forming a criminal organization.³⁰⁶

The first RAF processes in 1974 created a major problem for the prosecution, as the crimes committed by the 34-person-strong RAF could in many cases not be attributed to the RAF's individual members with the necessary certainty.³⁰⁷ Proving the individual responsibility of the suspects was, however, a necessary precondition for a conviction. § 129, on the other hand, could be employed even against those RAF members who could not be connected to a specific crime. However, the maximum penalty under § 129 was 5 years, which was perceived as unsatisfactory by the prosecution.

In 1975, the social-liberal coalition developed an anti-terrorism-package (dubbed *Lex Baader Meinhof* by *Der Spiegel*).³⁰⁸ It included the introduction of the new § 129a, criminalizing the formation of a terrorist organization. § 129a was introduced after an initiative by the CDU-led *Bundesländer Bayern* and *Baden-Württemberg*. It was subsequently supported by the SPD-FDP government that seemingly wanted to prove its tough approach to terrorism.³⁰⁹ The provision was not exclusively directed against terrorists, but also against individuals who supported a terrorist organization. Subsequently, it was frequently employed against people “promoting sympathy” for a terrorist group (*Sympathiewerbung*).

§ 129a was and still is the gateway to a specific procedural and detention system.³¹⁰ The competent institutions were the federal prosecution, the BKA and special judicial tribunals. Special detention rules included: a glass divider between the inmate and his or her attorney (§ 148 Abs 2 StPO); surveillance of written communication between the inmate and the attorney (§ 148a StPO); solitary confinement (*Isolationshaft*); the unconditional obligation to take terrorist suspects into pre-trial custody – this included persons who had only handed out leaflets or participated in a demonstration (§ 112 III StPO);³¹¹ the prohibition on having more than three defence lawyers (§ 137 StPO); and the prohibition for a defence lawyer to defend

³⁰⁵ Viele Schultern, in: *Der Spiegel* 03/1974, 14.01.1974, p. 30

³⁰⁶ „Der Endzweck ist unerheblich“, in: *Der Spiegel* 16/1975, 14.04.1975, p. 22

³⁰⁷ Sprengstoff-Spuren unterm Fingernagel, in: *Der Spiegel* 26/1974, 24.06.1974, p. 29

³⁰⁸ A la Klettermaxe, in: *Der Spiegel* 24/1975, 09.06.1975, p. 30

³⁰⁹ „Das erinnert mich an Vogelfreiheit“, in: *Der Spiegel* 40/1977, 26.09.1977, p. 36

³¹⁰ Rolf Gössner: Politische Justiz im präventiven Sicherheitsstaat, in: Hamburg 1991, p. 37; „Besteht die RAF denn überhaupt noch?“, in: *Der Spiegel* 29/1981, 13.07.1981, p. 51

³¹¹ „Besteht die RAF denn überhaupt noch?“, in: *Der Spiegel* 29/1981, 13.07.1981, p. 51; Rupert von Plottnitz: § 129a StGB: Ein Symbol als ewiger Hoffnungsträger, in: *Zeitschrift für Rechtspolitik* (2002) No. 8, p. 351

more than one defendant accused of the same crime (§ 146 StPO).³¹² Additional police rights stemming from § 129a were the right to search a complete building (not only a specific apartment) in which a suspect is assumed to be (§ 103 StPO); the establishment of checkpoints in the streets (§111 StPO); ID control and body search of unsuspecting passers-by if necessary for the investigation of a crime (§ 163b StPO); and the computerized registration of the so-collected data (*Schleppnetzverfahren* – § 163d StPO);³¹³ These new police competences all had in common the fact that they did not require a reasonably sound suspicion by the police, a criterion which had until then been seen as a prerequisite for all StPO competences.³¹⁴

The new offenses were criticized – especially the “communication” (or “literary”) offenses 88a and 130a – in that they were greatly expanding the areas penalized by criminal law.³¹⁵ § 88a penalized the “anti-constitutional approval of violence” (this provision has since then been repealed); § 130a penalizes the publication of a text that aims to motivate people to commit violent acts; § 131 prohibits the glorification of violence and § 140 the public approval of violence.³¹⁶

In 1977 *Der Spiegel* reported that about 500 proceedings against supporters of the RAF had been initiated or completed. 40 of them concerned an indictment for § 129a.³¹⁷ This partly concerned individuals who had given (intentionally or unintentionally, as many of them claimed) support to terrorists by providing a passport or by lending vehicles or apartments. It also affected individuals who had criticized the imprisonment conditions of the RAF inmates and had revealed sympathy for their cause. A doctor and a psychologist, having handed out leaflets against the imprisonment conditions, were convicted under § 129a.³¹⁸ A social worker was convicted for promoting a terrorist organization because he had sprayed “RAF” on a concrete pillar.³¹⁹ Squatters in Hamburg were convicted of creating a criminal organization in

³¹² Kurt Rebmann: Das Verbot der Mehrfachverteidigung nach § 146 StPO - - Anwendung und Grenzen, in: Neue Zeitschrift für Strafrecht (1981) No. 2, p. 41; Cornelius Nestler-Tremel: Das Verbot der Mehrfachverteidigung gemäß § 146 StPO in aktuellen Verfahren wegen Mitgliedschaft in einer terroristischen Vereinigung, in: Neue Zeitschrift für Strafrecht (1986) No. 12, p. 534

³¹³ Kristian Kühl (1987), p. 737

³¹⁴ Fritz Sack, Heinz Steinert: Protest und Reaktion, Opladen 1984, p. 231

³¹⁵ Fritz Sack, Heinz Steinert (1984), p. 232

³¹⁶ „Der Anwalt würde sofort vor die Tür gesetzt“, in: Der Spiegel 50/1977, 05.12.1977, p. 49

³¹⁷ „Mord beginnt beim bösen Wort V“, in: Der Spiegel 46/1977, 07.11.1977, p. 36

³¹⁸ Oder gar Reue, in: Der Spiegel 47/1977, 14.11.1977, p. 92

³¹⁹ „Besteht die RAF denn überhaupt noch?“, in: Der Spiegel 29/1981, 13.07.1981, p. 51

1975,³²⁰ and in the early 80's the provision was employed against the growing squatter scene in West Berlin. In the first half year of 1981, over 1000 squatters were detained or investigated.³²¹ A librarian carrying posters advertising an authorized demonstration was held in pre-trial custody for over 6 weeks.³²² A medical secretary was sentenced to a year in prison because she had written "war against palaces" and painted a black star on a subway car. A high school student and a photographer standing by were convicted because they had supposedly "shielded" her.³²³ In 1983, activists connected with the anarchist magazine "Radikal" were sentenced to more than two years imprisonment for promoting sympathy for a terrorist organization (§ 129a) by publishing a text written by the *Revolutionäre Zellen*.³²⁴ As the authors in "Radikal" were using false names, the prosecution randomly picked two persons active in the association responsible for editing the journal.³²⁵ Two book sellers were indicted under § 129a for having sold "Radikal", but were later acquitted.³²⁶ Until 1978, 16 RAF defence lawyers had been indicted under § 129a, among them Otto Schily.³²⁷

In 1981 *Der Spiegel* reported that 150 cases of § 129a were pending with the federal prosecution that exclusively concerned people who had handed out leaflets or taken part in demonstrations against the prison conditions of the RAF prison inmates.³²⁸ The federal prosecutor, Kurt Rebmann, declared that in the first half year of 1981 263 cases of alleged advocating sympathy for a terrorist group were investigated.³²⁹

An analysis published by the interior ministry in 1984 argued that these cases would form a "trend of the judiciary to realize the strategy, aims and intentions of the legislature. This partly creates the impression that the judiciary has intentionally sided with the other branches of government in order to signal the effective fight against terrorism. The judiciary did not react to the changing trend in legislative practice with a restrictive application of the new norms that would have led to a gentle implementation into the given dogmatic structure of well-trying

³²⁰ „Der Endzweck ist unerheblich“, in: *Der Spiegel* 16/1975, 14.04.1975, p. 22; Fritz Sack, Heinz Steinert (1984), p. 280

³²¹ Uwe Wesel: „Krieg der Justiz gegen die Jugend“, in: *Der Spiegel* 37/1981, 07.09.1981, p. 40

³²² Spatzen und Sternchen, in: *Der Spiegel* 29/1981, 13.07.1981, p. 47

³²³ Spatzen und Sternchen, in: *Der Spiegel* 29/1981, 13.07.1981, p. 47

³²⁴ Wende zur Pickelhaube, in: *Der Spiegel* 33/1983, 15.08.1983, p. 60; Kurt Rebmann: Strafverfolgung im Bereich terroristischer Publikationen, in: *Neue Zeitschrift für Strafrecht* (1989) No. 3, p. 97

³²⁵ Auf das schärfste, in: *Der Spiegel* 10/1984, 05.03.1984, p. 118

³²⁶ Purer Quatsch, in: *Der Spiegel* 41/1987, 05.10.1987, p. 48

³²⁷ Mach's noch mal, in: *Der Spiegel* 03/1978, 16.01.1978, p. 76

³²⁸ „Besteht die RAF denn überhaupt noch?“, in: *Der Spiegel* 29/1981, 13.07.1981, p. 51

³²⁹ Kurt Rebmann: Inhalt und Grenzen des Straftatbestands - "Werben für eine terroristische Vereinigung" nach § 129a StGB, in: *Neue Zeitschrift für Strafrecht* (1981) No. 12, p. 457

norms. Sometimes the judiciary even functioned as an intensifier, leading to results in excess of what the norms actually said.”³³⁰ Critics of the law such as the Hamburg court president, Helmut Plambeck, argued that the aggressive persecution of real or alleged sympathizers would establish greater solidarity with the terrorists.³³¹

It was reported that § 129a was regularly used against (non-violent) political groups by convicting members of wilful damage to property if they had illegally put up posters.³³² 70% of the §129a-cases in the 70’s did not concern terrorist activities, but merely the support of terrorist groups.³³³ They were predominantly aimed against people campaigning against the prison conditions of RAF terrorists. This trend grew even stronger in the 80’s.

In 1979, § 129a was employed for the first time against neo-Nazis (“Rohwer-Rotte”).³³⁴ In 1984, the prosecution did not, however, prosecute members of the neo-Nazi “Wehrsportgruppe Hoffmann” as members of a terrorist organization – all being of German nationality and living in Germany at the time when the crimes took place – because the group’s leader, Karl-Heinz Hoffmann, had later fled to the Lebanon, which – according to the prosecution – made the application of § 129a impossible.³³⁵ This was particularly disturbing as the Wehrsportgruppe Hoffmann was – as was suspected – involved in the biggest single terrorism attack in Germany after 1945, the bombing of the Oktoberfest in 1981.³³⁶ The huge wave of right-extremist violence in the early 90’s was neither prosecuted under § 129 nor under § 129a.³³⁷ The federal prosecutor, Von Stahl, argued that right extremist violence was not systematically planned and therefore would not qualify for § 129a. In 2004, however, the neo-Nazi group “Freikorps” in Brandenburg was tried under § 129a.³³⁸

³³⁰ Fritz Sack, Heinz Steinert (1984), p. 281

³³¹ „Besteht die RAF denn überhaupt noch?“, in: Der Spiegel 29/1981, 13.07.1981, p. 51

³³² Jürgen Schreiber (1978), p. 404

³³³ Rolf Gössner: Allzweckformel „Terrorismus“. Zum Prozess gegen Ingrid Strobl, in: Blätter für deutsche und internationale Politik (1989) No. 4, p. 401

³³⁴ Haß verstärkt, in: Der Spiegel 13/1979, 26.03.1979, p. 98; Leiche fehlt, in: Der Spiegel 36/1979, 03.09.1979, p. 129

³³⁵ Mit dem Rucksack, in: Der Spiegel 34/1984, 20.08.1984, p. 37; Bei allem Wohlwollen, in: Der Spiegel 28/1986, 07.07.1986, p. 51

³³⁶ Viele offene Fragen, in: taz.de, 7.8.2009, online: <http://www.taz.de/1/politik/deutschland/artikel/1/viele-offenen-fragen/> (retrieved 12.10.2009); Daniele Ganser: Terrorism in Western Europe: An Approach to NATO’s Secret Stay-Behind Armies, in: The Whitehead Journal of Diplomacy and International Relations (2005) Vol. 6 No. 1, p. 81

³³⁷ Rudolf Wassermann: Ist die Justiz auf dem rechten Auge blind?, in: Neue Juristische Wochenschrift (1994) No. 13, p. 833

³³⁸ Terrorismus-Anklage gegen zwölf Rechtsextremisten, in: Spiegel Online, 23.11.2004, online: <http://www.spiegel.de/politik/deutschland/0,1518,329361,00.html> (retrieved 24.3.2009)

Der Spiegel argued in 1980 that § 129 and § 129a were increasingly used by the prosecution, to indict people against whom no sufficient individual evidence had been found: “A simple method has become dominant in political proceedings: if somebody is connected to a terrorist organization, he is responsible for the actions of all the group members. If there is little evidence against individual suspects, all of them are indicted for everything. [...] This breaches the principle of individual responsibility, providing that each person should be tried individually and not as a substitute for the group.”³³⁹ In the period from 1980 to 1989, 2,131 investigations under § 129a had been opened. But only 30 of them – a mere 1.4% of the cases – led to a conviction, a government survey showed.³⁴⁰

In the trial against Fritz Teufel for his alleged participation in the kidnapping of the CDU politician, Peter Lorenz, in 1975 in Berlin the practice of the prosecution was heavily compromised.³⁴¹ Teufel, an APO activist, was presented to the court as one of the prime kidnapers and was held in pre-trial confinement for over four years. Only when Teufel presented evidence that he had been living and working in Bochum during the complete kidnapping, was he subsequently released.

In the coalition talks in 1980, the FDP attempted to reform §129a, but failed due to opposition from the SPD. § 88a and § 130a, however, were eliminated from the penal code.³⁴² In the early 80's, the attention of law-and-order politicians turned to violent demonstrations in the wake of the new social movements. The federal prosecutor, Kurt Rebmann, demanded the prosecution of militant demonstrators as “members of a criminal organization.”³⁴³ As mentioned, the provision was employed against squatters in Berlin in 1980. In 1985, when environmentalists bombed or cut down power poles near nuclear plants and threw Molotov-cocktails at buildings of the chemical industry, the concept of “eco-terrorism” was developed by the federal prosecutor, who subsequently persecuted militant environmentalists as terrorists.³⁴⁴ In *Niedersachsen* the police investigated a citizens' initiative opposing a nuclear plant, considering it tantamount to forming a criminal or terrorist organization due to the fact that anti-nuclear activists had demolished rail tracks and building sites. It was reported that

³³⁹ Einer für alle, in: *Der Spiegel* 23/1980, 02.06.1980, p. 32

³⁴⁰ Gemalt Weihnachten, in: *Der Spiegel* 46/1988, 14.11.1988, p. 64

³⁴¹ Einer für alle, in: *Der Spiegel* 23/1980, 02.06.1980, p. 32

³⁴² Kiefer runter, in: *Der Spiegel* 46/1980, 10.11.1980, p. 28

³⁴³ Falsche Richtung, in: *Der Spiegel* 7/1981, 09.02.1981, p. 27

³⁴⁴ Gegen Rebläuse, in: *Der Spiegel* 30/1985, 22.07.1985, p. 41

the police had registered over 3000 persons as potential eco-terrorists, which amounted to every 25th inhabitant of the area.³⁴⁵

The anti-terrorism package of 1986 brought the re-introduction of § 130a and an expansion of § 129a.³⁴⁶ The minimum penalty was raised to one year, while the maximum penalty was raised to ten years imprisonment. A broad list of crimes, including the “disruption of public enterprises” and the “disruption of telecommunication facilities” could now constitute terrorism.³⁴⁷ The amended provision, critics observed, was primarily aimed at prosecuting militant anti-nuclear activists sabotaging rail tracks and construction sites,³⁴⁸ although the murder of Gerold von Braunmühl by the RAF served as the primary justification.³⁴⁹

In 1989, the radical feminist, Ingrid Strobl, was arrested and tried for supporting a terrorist organization.³⁵⁰ Strobl had bought an alarm clock that had subsequently been used in a bombing attack on the Lufthansa-headquarters in Köln. As Strobl had been publicly campaigning against sex tourism in Thailand that Lufthansa allegedly profited from, the prosecution argued that her support for the *Revolutionäre Zellen* was accordingly established. Strobl was sentenced to five years in prison. The BGH, however, annulled the sentence; the subsequent second trial brought a lighter sentence and she was put on probation. This and other trials in 1989 and 1990 – such as the appellate proceedings concerning the “Radikal” journalists that led to an annulment of their harsh sentences – were seen as a change in the application of § 129a by many commentators. In particular, the application of § 129a on leftist activism was reduced. The Strobl- and the “Radikal”-decisions showed that in the future a higher standard of evidence would be necessary for a conviction.

After the Strobl trial, there are no further media reports on the application of § 129a. It seems that the application of the provision was greatly reduced. In the 80’s and 90’s, the opposition parties attempted to have § 129a repealed: the Green party in 1984, the SPD in 1989, and the PDS/Left party in the 90’s. When again in government in 1998, however, the red-green

³⁴⁵ Möglicherweise finster, in: Der Spiegel 35/1985, 26.08.1985, p. 83

³⁴⁶ Verbrennung vorm Dom, in: Der Spiegel 44/1986, 27.10.1986, p. 132

³⁴⁷ Rupert von Plottnitz (2002), p. 351

³⁴⁸ „Die haben uns den Todesengel geschickt“, in: Der Spiegel 45/1986, 03.11.1986, p. 19

³⁴⁹ „Der Rechtsstaat macht sich lächerlich“, in: Der Spiegel 50/1986, 08.12.1986, p. 113

³⁵⁰ Erst mal wegschließen, in: Der Spiegel 21/1990, 21.05.1990, p. 68

coalition did not repeal § 129a despite the fact that it had not proved to be a useful prosecution tool, as legal commentators argued.³⁵¹ After 9/11, a repeal became impossible.

After 9/11, a new provision (§ 129b) was added to the penal code. It allowed the prosecution of members of foreign criminal or terrorist organizations.³⁵² Similar to § 129a, advocating sympathy for terrorist organizations was also prohibited. Critics argued that conducting a proper inquiry abroad complying with the rule of law was difficult or impossible for the German police and that the distinction between “real” terrorists and for example other organizations persecuted by oppressive governments was sometimes hard to draw.³⁵³ *Der Spiegel*: “What would have happened if Stauffenberg had succeeded in fleeing to the US and if they had had a provision such as § 129b? In the eyes of the Nazis he was a member of a terrorist organization.”³⁵⁴

In 2003, the justice minister, Brigitte Zypries, introduced an amendment – following a UN declaration and a EU directive – that partly reduced the scope of § 129a. Crimes could only constitute terrorism if they aimed at intimidating the population, at illegally coercing a public authority or at damaging the political, legal, economic or fundamental social structures of a state. Plans to expand § 129a were announced in 2007.³⁵⁵ The new § 129c and § 129d shall criminalize the planning of terrorist acts and shall include acts by individuals (not requiring a group of at least three such as the current § 129a).³⁵⁶ Preparatory actions such as collecting money, downloading bomb blueprints and recruiting potential collaborators shall be included as well. Critics voiced concern that everyday activities might already come under § 129c or d.³⁵⁷

In May 2007, a raid involving over 900 police officers in 40 different places took place against individuals planning protests against the G-8-summit in Heiligendamm.³⁵⁸ The razzia

³⁵¹ Rupert von Plottnitz (2002), p. 351

³⁵² Anti-Terror-Paket, in: Spiegel Online, 29.9.2001, online:

<http://www.spiegel.de/politik/deutschland/0,1518,158303,00.html> (retrieved 24.3.2009)

³⁵³ Rupert von Plottnitz (2002), p. 351

³⁵⁴ „Das ist Gespensteseherei“, in: Der Spiegel 39/2001, 24.09.2001, p. 32

³⁵⁵ Regierung feilt an neuem Terror-Paragrafen, in: Spiegel Online, 8.5.2007, online:

<http://www.spiegel.de/politik/deutschland/0,1518,481819,00.html> (retrieved 25.3.2009)

³⁵⁶ Siegfried Kauder: Strafbarkeit terroristischer Vorbereitungshandlungen- Erwiderung zu Deckers/Heusel, in: Zeitschrift für Rechtspolitik (2009) No. 1, p 20

³⁵⁷ Rüdiger Deckers, Johanna Heusel: Strafbarkeit terroristischer Vorbereitungshandlungen - rechtsstaatlich nicht tragbar, in: Zeitschrift für Rechtspolitik (2008) No. 6, p. 169

³⁵⁸ Razzia vor G-8-Gipfel – Linke empört, in: Spiegel Online, 9.5.2007, online:

<http://www.spiegel.de/politik/deutschland/0,1518,482039,00.html> (retrieved 25.3.2009)

was made possible because the police relied on § 129a, and the prosecution subsequently opened investigations against 21 suspects.³⁵⁹ One of the suspects, Fritz Storim, was a lecturer at the University of Bremen. The police confiscated the list of participants of his courses.³⁶⁰ The police and the federal prosecution connected two separate issues: they were looking for a group (“*militante gruppe*”) that had supposedly committed a number of arson attacks in the years before. And they argued that this group was connected to the G-8 protest movement.³⁶¹ In autumn 2007 the federal prosecution arrested three academics for alleged membership in the “*militante gruppe*,” supposedly the successor organization to the RAF. A strong suspicion could never be established, as the BGH decided in November 2007.³⁶² Additionally, the alleged crimes of the “*militante gruppe*” – mostly arson on unmanned police and military vehicles – would not constitute terrorism.³⁶³ In January 2008, the BGH also declared that the police raids on anti-G-8-activists were illegal.³⁶⁴ The federal prosecution later closed all proceedings – in the case of the three alleged members of the “*militante gruppe*” after seven years of investigation.³⁶⁵ In April 2009 the BKA had to admit that evidence allegedly proving the existence of the “*militante gruppe*” had in fact been fabricated by the police.³⁶⁶

Critics argued that the employment of § 129a had led to a criminalization of the protest movement. Especially after the two decisions of the BGH,³⁶⁷ major criticism of the federal prosecution’s frequent application of § 129a was voiced by politicians of all parties.³⁶⁸ The reason for this malpractice of the terrorism provision was, *Der Spiegel* argued, mainly that the prosecution of an alleged § 129a case allowed the employment of a vast number of investigative tools. The disproportionality in the application of § 129a is shown, *Der Spiegel* continued, by the official statistics: only one in five investigations even lead to a formal indictment.

³⁵⁹ Der Duft des Terrors, in: *Der Spiegel* 21/2007, 21.05.2007, p. 32

³⁶⁰ Staatsschutz beschlagnahmt Seminarlisten, in: *Spiegel Online*, 24.5.2007, online: <http://www.spiegel.de/unispiegel/studium/0,1518,484785,00.html> (retrieved 25.3.2009)

³⁶¹ „Wir betreiben keine Willkür“, in: *Der Spiegel* 22/2007, 26.05.2007, p. 40

³⁶² Gebildet, unauffällig, verdächtig, in: *Der Spiegel* 47/2007, 19.11.2007, p. 52

³⁶³ Bundesrichter sehen „*militante gruppe*“ nicht als Terrorvereinigung, in: *Spiegel Online*, 28.11.2007, online: <http://www.spiegel.de/politik/deutschland/0,1518,520245,00.html> (retrieved 25.3.2009)

³⁶⁴ Bundesrichter stützen Harms’ Strategie gegen *militante Linke*, in: *Spiegel Online*, 4.1.2008, online: <http://www.spiegel.de/politik/deutschland/0,1518,526708,00.html> (retrieved 25.3.2009)

³⁶⁵ Lautloses Ende, in: *Der Spiegel* 42/2008, 13.10.2008, p. 86

³⁶⁶ Harald Neuber: *Militante Ermittler*, in: *Telepolis* (1.4.2009), online: <http://www.heise.de/tp/r4/artikel/30/30054/1.html>

³⁶⁷ Markus Bader: Der Straftatbestand der Unterstützung einer terroristischen Vereinigung im Lichte aktueller Rechtsprechung des BGH, in: *Neue Zeitschrift für Strafrecht* (2007) No. 11, p. 618

³⁶⁸ Lautloses Ende, in: *Der Spiegel* 42/2008, 13.10.2008, p. 86

Conclusion

§ 129a was enacted in reaction to the difficulties faced by the prosecution to establish the individual responsibilities of the defendants during the Stammheim trials. However, the provision already had a political past as a tool against left organizations in the 19th and early 20th century. In the 70's and 80's it served as one of the primary legal tools against individuals legally engaged in left radical politics. Especially in the 80's it was used not only against militant environmental and anti-nuclear activists, but against large segments of the non-militant new social movements as well. Thus, a tool initially conceived against RAF terrorism was subsequently expanded to serve against dissident, mostly non-violent and definitely non-terrorist movements. While the application of § 129a against groups campaigning for better imprisonment conditions for the RAF prisoners can to some extent be explained by the assumption that these groups served as a supporting basis for the active RAF, this is not at all the case when it came to environmental and anti-nuclear groups.

The provision is still used regularly against radical and mainstream left movements. The case of § 129 a shows clearly how provisions conceived and defended as tools against (RAF) terrorism were subsequently systematically abused against left political groups.

§ 129a was and remains extraneous to the German penal code from a dogmatic point of view, as it is inconsistent with the principle of individual responsibility. This seems to be at least partly the reason why the law has provided so little help for the prosecutors to achieve convictions. Eventually, individual responsibility for a specific crime still needed and needs to be established. The success of the law from the perspective of the prosecution and the police lies with all the additional procedural and investigative rights that § 129a implies.

Kontaktsperregesetz – the communication ban law

On 5 September 1977 the RAF kidnapped Hanns Martin Schleyer, president of the Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände*), and murdered his four guards.³⁶⁹ The kidnappers demanded the release of eleven RAF prisoners including Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe. The German government, a coalition of the social democrat SPD and the liberal FDP under Helmut Schmidt, the chancellor, reacted by establishing – using the phrase coined by Wolfgang Kraushaar – an “undeclared state of exception.”³⁷⁰ It formed an emergency task force (“großer Krisenstab”) comprising several ministers and the leaders of the conservative opposition parties, the CDU and the CSU. The task force lacked any legal basis and competence, but functioned as the main decision-making body during the weeks of Schleyer’s kidnapping and the subsequent hijacking of the Lufthansa airplane “Landshut.” The task force was willing to act outside constitutional limits, as the minutes from the meeting on 8 September show. Chancellor Schmidt asked the participants to “think the impossible.” Among the ideas subsequently developed was the reintroduction of the death penalty – a proposal dismissed by the group. In an interview in early 1979 Schmidt said, referring to the hijacking of the Landshut: “I want to retroactively thank the German lawyers that they did not scrutinize our actions under constitutional law.”³⁷¹

During the night after the kidnapping the police immediately started to implement a communication ban on about 80 RAF prisoners.³⁷² The communication ban included the prisoners communicating with their lawyers. On the next day, the federal justice minister, Hans-Jochen Vogel, justified the decision by referring to the concept of “rechtfertigender Notstand” in Article 34 of the penal code. Article 34 provides that an individual can legitimately attack the perpetrator in defence of his own or somebody else’s life or property. However, the provision solely authorizes individuals, not the state. As Kraushaar observes, the application of the provision by the state was in effect a supra-legal state of exception. The justice ministers of some of the *Bundesländer* refused to apply the communication ban as they deemed it illegal.

³⁶⁹ Thomas Riegler (2007), p. 385

³⁷⁰ Wolfgang Kraushaar: Der nicht erklärte Ausnahmezustand. Staatliches Handeln während des sogenannten Deutschen Herbstes, in: Wolfgang Kraushaar (ed.): Die RAF und der linke Terrorismus, Hamburg 2006, p. 1011

³⁷¹ Leistung liegt im Deutschen drin, in: Der Spiegel 03/1979, 15.1.1979, p. 32

³⁷² Wolfgang Kraushaar (2006), p. 1015

Most of the prisoners filed complaints against this administrative application of a communication ban. They were successful in some courts³⁷³, but the German constitutional court dismissed the prisoners' complaints: "The Court concedes that the communication ban between attorneys and their imprisoned clients may also affect those lawyers that have not given reason to believe that they have consciously or unconsciously supported terrorist perpetrators or terrorist acts. This effect of the ban cannot be averted, as nobody can say from the outset which attorney will use his rights improperly and who will not. With regard to the necessary protection of a higher-ranking principle – protecting the life of Dr. Schleyer – this effect must be temporarily accepted."³⁷⁴

The government attempted to retroactively legitimize the communication ban by law. It took the parliament only five days to pass the proposal. A year later, Schmidt acknowledged the problematic character of the law in a speech before parliament: "I think that we went to the outer limits of the rule of law. All lawyers know that we had reached the limits by using Article 34. But we haven't crossed the line."³⁷⁵

The main argument of the government defending the communication ban was the alleged threat that the prisoners communicated with the terrorists outside the prison and guided them. But only half a year later, the minister for justice, Vogel, told an Italian TV-station: "No, we never believed it [that the imprisoned RAF-members were guiding the other terrorists, ck], and to date I have not seen proof of it. There is no evidence that any planning or detailed guidance was conducted from the prison cells."³⁷⁶

The government also defended the law by referring to its exceptional character, arguing that it would only be applied in the given historic situation of RAF terrorists. In an interview in December 1977, *Spiegel* journalists accused the minister for justice, Hans-Jochen Vogel, of infringing civil liberties. Vogel responded that until then the law had only been applied once to 68 RAF prisoners during a period of 22 days.³⁷⁷ In an interview in early 1979 Schmidt tried to play down the impact of the communication ban law, saying: "The law was necessary at that time. It was stopped to be used a couple of weeks later. Today, it is a 'fleet in being'

³⁷³; D. Müllerhoff: Untersagung des Verteidigerverkehrs mit einsitzenden Mandanten durch den Justizminister, in: *Neue Juristische Wochenschrift* (1977) No. 47, p. 2177

³⁷⁴ BVerfG: Verbot von Verteidigerbesuchen bei unter dem Verdacht terroristischer Gewalttaten Inhaftierten, in: *Neue Juristische Wochenschrift* (1977) No. 47, p. 2157

³⁷⁵ „Die Deutschen sind irrsinnig geworden“, in: *Der Spiegel* 36/1987, 31.08.1987, p. 106

³⁷⁶ Wolfgang Kraushaar (2006), p. 1017

³⁷⁷ Seid ihr einverstanden, dass wir schießen?, in: *Der Spiegel* 50/1977, 5.12.1977, p. 36

[English in the original, ck]. It needs a formal decision to make it applicable. It shall only prevent contact between terrorists. And nobody of the *Spiegel* editorial staff has suffered, as nobody else in Germany has suffered. Only terrorists have suffered, and this was exactly the goal.”³⁷⁸

The law on the communication ban was heavily criticized by left and liberal commentators, who argued that it would be part of a general reduction of civil rights.³⁷⁹ In 1978, *Der Spiegel* published the case of a female student who – wrongly accused of terrorism charges – would most probably have been found guilty if her defendant had not been able to look for defence witnesses from the first day of her arrest: “Eleonore Poensgen was lucky. Thanks to the prudence of her lawyer she was free after six days, on 7 August 1977. Had she been accused two months later, she probably would still be in custody, as the communication ban law came into effect on 2 October. (...) If Eleonore Poensgen had been subject to the communication ban prohibiting contact with her lawyer, she could neither have convinced her lawyer of her innocence nor could she have given him the facts necessary to develop a defence strategy. In fact, it would have been impossible for her lawyer to look for defence witnesses. The tram conductor – clearly remembering the student after four or five days – would probably have been lost as a witness if he had been asked two months later.”³⁸⁰

Opposition to the law was reduced to a few parliamentarians of the governing SPD. The opposition parties – the conservative CDU and the CSU – supported the communication ban law, while the coalition partners, the SPD and FDP, tried to force their parliamentarians in line. Finally, only four members of parliament voted against the proposal. They were subject to fierce criticism by the SPD leaders. “There is no doubt about the necessity of the law in the steering committee of the party. But there is doubt about the position of some parliamentarians,” the secretary-general, Egon Bahr, said.³⁸¹

According to the law, a communication ban can be ordered if there is a current danger for the life, health or liberty of a person that originates from a terrorist organization and if this danger necessitates the interruption of the contact of a prisoner with the outside world and his or her

³⁷⁸ Leistung liegt im Deutschen drin, in: *Der Spiegel* 3/1979, 15.1.1979, p. 32

³⁷⁹ Sebastian Cobler: Grundrechtsterror, in: *Kursbuch* (1979) No. 56, p. 43; Jürgen Schreiber: Anti-Terror-Gesetze, in: *Blätter für deutsche und internationale Politik* (1978) No. 4, p. 409

³⁸⁰ Nur Objekt, in: *Der Spiegel* 33/1978, 14.8.1978, p. 24

³⁸¹ Wenn hörbar die Gewissen schlagen, in: *Die Zeit* 43/1977, 14.10.1977

attorney. The prisoner must be convicted for or be suspected of terrorist acts.³⁸² The order is given by the executive, not by a court.³⁸³ During the time of the communication ban, the prisoner is not allowed to have oral or written contact with his lawyer.³⁸⁴

Despite heavy criticism, the communication ban law was upheld in a decision by the constitutional court.³⁸⁵ According to the court, the prohibition of contact with the defence lawyer constituted a breach of a fundamental right, which was, however, justified “in the interest of the self-preservation of the state and of its tasks to protect the life, well-being and freedom of its citizens.”³⁸⁶

In the first years after the law was enacted, the issue of abolishing the communication ban law was raised from time to time by the left-leaning media. In 1980 – an election year - parts of the FDP demanded the abolition of the law in an attempt to raise its liberal profile, as *Die Zeit* remarks: “The liberals have discovered the rule of law as an area where they can distinguish themselves most visibly. (...) the FDP wants to drop the communication ban law completely. (...) But they secretly know that the Chancellor will refuse to follow this demand anyway.”³⁸⁷ In autumn 1979, ten FDP parliamentarians attempted to abolish – among other terrorism-related laws – the law on the communication ban. But in an answer to a parliamentary inquiry, the government described the law as having been a successful anti-terrorist instrument – “to the surprise of all legal experts,” as *Die Zeit* put it.³⁸⁸

Journalist Joachim Wagner gave an interesting insight into the political dynamics that led to the normalization of the communication ban law: “When the legal experts of all the parliamentary factions objected to a time limit for the communication ban law, they wanted to avoid that ‘special measures are applied to concrete situations’ (Benno Erhard, CDU) or that a ‘law of exception’ (Ingrid Matthäus-Meier, FDP) was passed. Most of all, it seems that they want to keep up appearances: that the legislator does not react to exceptional circumstances in its fight against terrorism. For a critical observer, this is a pretty obvious attempt to distract, as

³⁸² § 31 EGGVG

³⁸³ § 32 EGGVG

³⁸⁴ § 34 EGGVG

³⁸⁵ BVerfG: Verfassungsmäßigkeit des Kontaktsperregesetzes, in: *Neue Juristische Wochenschrift* (1978) No. 44, p. 2235

³⁸⁶ Wilhelm Krekeler: Änderung des sogenannten Kontaktsperregesetzes, in: *Neue Juristische Wochenschrift* (1986) No. 8, p. 417; Martin Löffler: Die Kommunikationsfreiheit im Einordnungsverhältnis, in: *Neue Juristische Wochenschrift* (1984) No. 21, p. 1206

³⁸⁷ Schlachtordnung für den 5. Oktober, in: *Die Zeit*, 13.6.1980, No. 25

³⁸⁸ Schafft Gesetze auf Zeit!, in: *Die Zeit*, 1.2.1980, Nr. 6

the interior minister, Maihofer, and ministers of justice, Jahn and Vogel, and the chancellor, Schmidt, are touring the country in defence of the anti-terrorism measures. Their argument: the challenge of the state by the terrorists has created an exceptional situation that demands and justifies exceptional measures. (...) There is a great risk that the often ill-prepared anti-terror-laws enacted in times of fear and hysteria will be ‘perpetuated’ in our legal system. All attempts of some SPD- and FDP-parliamentarians to get rid of the most outrageous excesses have been without success so far.”³⁸⁹ From the beginning, the debate on security laws had been the arena for the conflict between the government and the opposition on who was tougher on terrorism. Wagner: “This anti-terrorism legislation can only be justified by one argument: to defang the issue of ‘terrorism’ for the upcoming elections. But this argument will be exactly the reason why the necessary revision of the anti-terror-laws will not take place in the near future. The government will not start to question those laws that they themselves passed. There is no better gift for the opposition. The government will not admit their failures – which is exactly why they cannot support the abolition of the communication ban law.”³⁹⁰

In 1982, a conservative-liberal coalition took over the government. Attempts of some FDP politicians to revise the law in the conservative-liberal coalition had little chances of success against the bigger conservative coalition partner.³⁹¹

The law on the communication ban has never been repealed but it has not been used since 1977. A revision in 1985 (introducing § 34a EGGVG) provided for the appointment of another lawyer for the prisoner as a contact person during the time of the communication ban.³⁹² Legal commentators argued that if a total ban of communication for terrorist prisoners was not necessary and an appointed, “neutral” contact person would not undermine the state’s safety,³⁹³ then the assumptions underlying the communication ban were brought into question. Wilhelm Krekeler: “The lawmaker has not made it clear why communication by the prisoner with the outside with the help of an appointed lawyer may be dangerous, but via the contact person is not. The chance that the appointed lawyer or the contact person transmits messages is – theoretically – the same.”³⁹⁴

³⁸⁹ Schafft Gesetze auf Zeit!, in: Die Zeit, 1.2.1980, Nr. 6

³⁹⁰ Schafft Gesetze auf Zeit!, in: Die Zeit, 1.2.1980, Nr. 6

³⁹¹ Flächendeckend nach außen, Erblast nach innen, in: Die Zeit, 26.11.1982

³⁹² Gesetz zur Änderung der EGGVG vom 4. 12. 1985, BGBl. I, S. 2141

³⁹³ Wilhelm Krekeler (1986), p. 417

³⁹⁴ Wilhelm Krekeler (1968), p. 417

After the red-green coalition came into power in 1998, new attempts were made to repeal the communication ban. Different organisations – among them the Union of German Lawyers (*Deutscher Anwaltsverein*) and the Green party – demanded the repeal of the law, arguing that it neither had any legal significance after 1977 nor that there was any further use for the law.³⁹⁵ But in a response to a parliamentary inquiry of the PDS/Left party, various justice ministries of the *Bundesländer* argued that the law was still necessary. It was, the argument went, justified by the possibility of future terrorist threats.³⁹⁶

Conclusion

The communication ban law has never been repealed. It was only applied once in order to retroactively justify a communication ban executed in September 1977. Without doubt, the law was unacceptable from a fundamental rights perspective, as it took from the prisoners the most basic right of access to legal defence. This was indirectly acknowledged by the reform that defanged the law in 1985.

The law was also completely useless from a practical perspective, as the underlying assumption that the RAF prisoners would in some form guide the operations of the terrorists outside was neither true and nor did the leading politicians ever believe in it. Thus, as an anti-terrorist measure, the law failed completely.

Today, the communication ban is without doubt a dead law. However, the communication ban law is probably the best-known terrorism-related law enacted during the RAF period. When analyzed apart from the other – less known – terrorism-related laws, it might lead to the conclusion that the legislation enacted during the RAF period – though perhaps questionable from a rule of law perspective – has been repealed or at least neutralized and is therefore irrelevant for today. However, this conclusion is misguided as the communication ban is the exception to the rule. As shown in the previous chapters, most terrorism-related laws have not only not been repealed, but have been massively expanded since the 70's.

³⁹⁵ Stefan Schnorr, Volker Wissing: Erneuter Anlauf zur Reform des Strafverfahrens, in: Zeitschrift für Rechtspolitik (2001) No. 5, p. 239

³⁹⁶ Stefan Schnorr et al. (2001), p. 239

Radikalenerlaß

In late 1971 it was reported that some *Bundesländer* had adopted policies to ban members of radical organizations from taking up jobs in public service, the SPD led Hamburg being the first.³⁹⁷ Individuals already in employment would be fired.³⁹⁸ In January 1972, the prime ministers of the *Bundesländer* and the SPD chancellor, Willy Brandt, agreed together to adopt this policy.³⁹⁹ Two declarations – one for the *Bundesländer* and one for federal employees – provided that candidates “pursuing anti-constitutional activities” should not be appointed.⁴⁰⁰ Of the eleven signatory minister-presidents of the *Bundesländer*, six were SPD members, five were from the CDU/CSU. The declarations were formalized in a joint decree on 18 February, 1972.

One of the earliest reported cases concerned Rütger Booß, an applicant for a teaching position in Bonn. Booß was a member of the German communist party (*Deutsche Kommunistische Partei – DKP*) and had been a student representative at the University of Bonn. The new president of the federal *Bundesverfassungsschutz*, Günter Nollau, – ex-member of the NSdAP – warned in an interview that a growing number of radicals (from the left and the right) would aim to infiltrate the public service.⁴⁰¹ In early 1972, the CDU chairman, Rainer Barzel, demanded a constitutional clause that would ban communists from public service.⁴⁰² As the prime ministers’ decision only contained a general principle, the execution was controversial from the outset. In Hamburg, members of the extreme right NPD and the communist DKP were denied entry to the public service, despite the fact that both parties were legal.⁴⁰³ The *Verfassungsschutz* started to routinely check applicants for public service entry.⁴⁰⁴ In the beginning, the practice concerned mainly teachers who had been members of the DKP or some affiliated organization. But soon the *Radikalenerlass* did not only affect individuals with communist or APO affiliations. The political scientist and SPD adviser, Wolf-Dieter Narr, was barred from taking up employment at the University of Hanover because he had been affiliated with a labour union group which campaigned against the emergency laws of 1968

³⁹⁷ Gerard Braunthal: Political loyalty and public service in West Germany: the 1972 decree against radicals and its consequences, Amherst 1990, p. 30

³⁹⁸ Radikale im öffentlichen Dienst, in: Der Spiegel 20/1972, 08.05.1972, p. 38

³⁹⁹ Lockerste Methode, in: Der Spiegel 18/1972, 24.04.1972, p. 44; Wilhelm Steinmüller: Der aufhaltsame Aufstieg des Geheimbereichs, in: Kursbuch (1979) No. 56, p. 173

⁴⁰⁰ Gerard Braunthal (1990), p. 31

⁴⁰¹ „Anarchisten kann man riechen“, in: Der Spiegel 19/1972, 01.05.1972, p. 36

⁴⁰² Giftzahn ziehen, in: Der Spiegel 09/1973, 26.02.1973, p. 32

⁴⁰³ Radikale im öffentlichen Dienst, in: Der Spiegel 20/1972, 08.05.1972, p. 38

⁴⁰⁴ Hamburg slawisch, in: Der Spiegel 11/1973, 12.03.1973, p. 44

and a group which organized the Easter marches against nuclear weapons.⁴⁰⁵ Very soon, not only teachers and professors were affected, but anybody working for a public entity could be rejected.⁴⁰⁶ During the following year, screenings of applicants and of public servants became an all-embracing operation. In October 1973 alone, 64,800 applicants were screened in Baden-Württemberg, and 55 of them were rejected with the agreement of the *Radikalenerlass*.⁴⁰⁷ All in all, 3.5 million persons (applicants and public servants) were screened, 2,250 were barred from application, and 2,000 to 2,100 public servants were subject to disciplinary proceedings, of which 256 were dismissed.⁴⁰⁸ Other authors give higher numbers of victims, based on the numbers published by labour unions and citizens' committees.⁴⁰⁹ From the very beginning, critics complained that in practice leftists were almost exclusively affected.⁴¹⁰ In total, Braunthal reports that at least 92% of the barred applicants were leftists.⁴¹¹

The *Radikalenerlass* was not the first occupational ban to be enacted after 1945. In 1950, the conservative Adenauer government passed a "Decision on political activity by members of the public service directed against the democratic basic order."⁴¹² It provided that membership in thirteen communist groups and three fascist groups would be incompatible with public service. The decision was put into effect by the Adenauer-Heinemann decree and was also applied by the *Bundesländer*. In 1951, the government filed to interdict the KPD, leading to the party's prohibition in 1956. There is no direct statistical data available on the number of civil servants dismissed on the grounds of the decree. However, in light of the government's long-running anti-communist campaign and the high number of arrests and subsequent convictions, the KPD's prohibition arguably points to a rather significant number. Between 1951 and 1961, over 500,000 investigation proceedings were initiated and over 10,000 criminal proceedings were carried out.⁴¹³

⁴⁰⁵ Charakter offenbart, in: Der Spiegel 28/1975, 07.07.1975, p. 21; Gerard Braunthal (1990), p. 49

⁴⁰⁶ Späte Reue, in: Der Spiegel 10/1976, 01.03.1976, p. 27

⁴⁰⁷ Charakter offenbart, in: Der Spiegel 28/1975, 07.07.1975, p. 21

⁴⁰⁸ Gerard Braunthal (1990), Preface p. ix

⁴⁰⁹ Horst Bethge: Ausmaß und Umfang der Berufsverbote in der BRD, in: Horst Bethge et. al (ed.): Die Zerstörung der Demokratie in der BRD durch Berufsverbote, Köln 1976, p. 50

⁴¹⁰ „DKP-Leute gucke ich mir näher an“, in: Der Spiegel 20/1972, 08.05.1972, p. 36; Hamburg slawisch, in: Der Spiegel 11/1973, 12.03.1973, p. 44:

⁴¹¹ Gerard Braunthal (1990), p. 48

⁴¹² Gerard Braunthal (1990), p. 20

⁴¹³ Helmut Stein: Zu einigen Gemeinsamkeiten und einem Unterschied zwischen der politischen Justiz des kalten Krieges in der Adenauer-Ära und der politischen Justiz der Berufsverbote, in: Horst Bethge et. Al (ed.): Die Zerstörung der Demokratie in der BRD durch Berufsverbote, Köln 1976, p. 203

The legal basis for barring individuals involved in radical political activity from public service was usually a very general good conduct clause in public employment law. The federal civil service law of 1950 provided that an applicant for public service must “be able to guarantee that he will defend at any time the free and democratic order [*Freie und demokratische Grundordnung*] in the spirit of the *Grundgesetz*.”⁴¹⁴ Under the same law, a public servant must “through his entire behaviour acknowledge the free and democratic order and be ready to maintain it.”⁴¹⁵ In Hamburg the practice was based on a clause in the law on public servants stating: “Only someone who can guarantee that he will stand up for the free democratic order at all times can be appointed to the public service.”⁴¹⁶ In practice, this line could be crossed rather easily, as the mayor of Hamburg, Hans-Peter Schulz, explained in an interview: “It is not necessary to measure somebody’s hostility against the constitution. The doubt that the applicant is not willing to stand up actively for the constitution is sufficient.”⁴¹⁷ This reversed, critics argued, the principle of the presumption of innocence.

The 1972 *Radikalenerlass* should be understood in conjunction with the government’s new approach towards the DDR, Axel Schildt argued.⁴¹⁸ Brandt and foreign minister Egon Bahr had shifted Germany’s politics towards the DDR from the cold-war inspired, aggressive Hallstein-doctrine to a policy of mutual rapprochement. This was heavily criticised by the CDU/CSU.⁴¹⁹ Brandt’s consent to the *Radikalenerlass*, Schildt argues, was an attempt to appear tough on communists in Western Germany despite the shift in foreign policy.

From early on, critics pointed out that the constitutional court had followed a different, more nuanced line towards radical organizations. Most notably, the court had stated that “nobody can claim the unconstitutionality of a party as long as the constitutional court has not ruled on this issue.”⁴²⁰ The constitutional protection of parties must necessarily also apply to their individual members: “If it were possible to prosecute individual members on account of their membership, the constitutional protection of the parties would be eroded.”

⁴¹⁴ Gerard Braunthal (1990), p. 14

⁴¹⁵ Gerard Braunthal (1990), p. 14

⁴¹⁶ „DKP-Leute gucke ich mir näher an“, in: Der Spiegel 20/1972, 08.05.1972, p. 36

⁴¹⁷ „DKP-Leute gucke ich mir näher an“, in: Der Spiegel 20/1972, 08.05.1972, p. 36

⁴¹⁸ Axel Schildt: „Die Kräfte der Gegenreformation sind in breiter Form angetreten“. Zur konservativen Tendenzwende in den Siebzigerjahren, in: Archiv für Sozialgeschichte (2004) No. 44, p. 467; Frank Fischer: Von der „Regierung der inneren Reformen“ zum „Krisenmanagement“, in: Archiv für Sozialgeschichte (2004) No. 44, p. 398

⁴¹⁹ Bernd Faulenbach: Die Siebzigerjahre – ein sozialdemokratisches Jahrzehnt, in: Archiv für Sozialgeschichte (2004) No. 44, p. 10

⁴²⁰ Staatspension für Revolutionäre?, in: Der Spiegel 15/1973, 09.04.1973, p. 30

The first major public debate on the decree was sparked when Volker Götz, a communist, applied for the position of a judge in *Nordrhein-Westfalen*. Götz was member of the DKP and a DKP district leader in Düsseldorf. The court president refused to appoint Götz, but was overruled by the SPD minister for justice, Diether Posser, causing a coalition crisis.⁴²¹ The conflict, however, only concerned the question as to whether communist activists should always be banned from public service or whether exceptions should be possible in individual cases.⁴²²

The SPD prime ministers were confronted with growing internal criticism over the following year.⁴²³ It was argued that the policy was leading to denunciation. Additionally, the vagueness of the provision was criticised: it was not at all clear on what grounds somebody could be banned from public service, making the decision subject to the will of individual officials.

A direct explanation for the *Radikalenerlass* was the fear of DDR-spies in public service, which was triggered by the regular uncovering of spies. The most notorious case was the Guillaume-affair, where a staff member close to the chancellor, Willy Brandt, was uncovered as a DDR-spy.⁴²⁴ In the late 70's, three DDR agents working as secretaries for CDU leaders such as Kurt Biedenkopf were uncovered.⁴²⁵ However, the decree was from the beginning never intended as a counter-intelligence instrument, and in public discourse this argument never played an important role.

Primarily, the *Radikalenerlass* was a reaction to the student protest movement that erupted in 1968.⁴²⁶ A student leader, Rudi Dutschke, had called for “the long march through the institutions with the goal of destroying and softening the established apparatus.”⁴²⁷ Now parts of the right feared that the ex-student rebels would actually try to realize this goal.⁴²⁸ *Der Spiegel* quoted the mayor of Hamburg, Peter Schulz, saying: “What else does the phrase of the long march refer to but to somebody trying to blow up the system from the safe haven of

⁴²¹ Was Götz darf und was nicht, in: *Der Spiegel* 33/1973, 13.08.1973, p. 24

⁴²² Fragile Lage, in: *Der Spiegel* 35/1973, 27.08.1973, p. 28

⁴²³ Giftzahn ziehen, in: *Der Spiegel* 09/1973, 26.02.1973, p. 32

⁴²⁴ August Leugers-Scherzberg: Herbert Wehner und der Rücktritt Willy Brandts am 7. Mai 1974, in: *Vierteljahreshefte für Zeitgeschichte* (2002) No. 2, p. 303

⁴²⁵ Schärfer ran, in: *Der Spiegel* 16/1979, 16.04.1979, p. 24

⁴²⁶ Sebastian Scheerer (1988), p. 369; Hans Magnus Enzensberger: Unentwegter Versuch, die Geheimnisse der deutschen Demokratie zu erklären, in: *Kursbuch* (1979) No. 56, p. 5

⁴²⁷ Sebastian Scheerer (1988), p. 270; Staatspension für Revolutionäre?, in: *Der Spiegel* 15/1973, 09.04.1973, p.

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⁴²⁸ Axel Schildt (2004), p. 449

public service.”⁴²⁹ Obviously this fear was particularly strong in regard to teaching staff, they having the possibility to influence the young. The *Radikalenerlass* was seen as a rollback of what was perceived as a wave of radicalism in public institutions, mainly the universities.

To contain radical leftists was not only an interest of the conservatives, but it was also an interest of the social democrats when their youth organization (Jusos) grew close to the communists and the APO during the student protests, *Der Spiegel* wrote.⁴³⁰ Similarly, the social democratic leadership of the labour unions felt threatened by a small far left opposition and tried to neutralize it.⁴³¹ Communist activists using the union infrastructure to recruit new members were often thrown out without any formal procedure. Opposition against the *Radikalenerlass* within the governing parties was radically quelled.⁴³²

Some historians point out that since the 70's the concept of “innere Sicherheit” had become a dominant discursive element in Germany, shaping the public and political reaction to perceived security threats, such as terrorism.⁴³³ *Innere Sicherheit* – meaning security inside Germany – described a growing awareness of criminality (partly due to a rise in crime rates) as a result of social movements seen as disruptive to the social order.⁴³⁴ This growing importance of police and security matters in the political discourse from the 70's on was reflected, Weinbauer argues, in the eagerness of the new SPD/FDP-coalition to make fighting crime a major political issue.⁴³⁵ However, Weinbauer continues, crime prevention was seen in the later 60's and early 70's as a measure to enhance social security, and therefore as a matter of the social state in contrast to the law-and-order perspective under which crime prevention is seen today. Security was seen as a core competence of the SPD from the mid-60's to the early 70's, Frank Fischer argues.⁴³⁶ However, the term *innere Sicherheit* was from early on heavily employed as a fighting word by the conservative press and parties.⁴³⁷

⁴²⁹ Staatspension für Revolutionäre?, in: *Der Spiegel* 15/1973, 09.04.1973, p. 30

⁴³⁰ Sebastian Scheerer (1988), p. 370

⁴³¹ Gerard Braunthal (1990), p. 36; Schwört jeden Eid, in: *Der Spiegel* 21/1975, 19.05.1975, p. 49

⁴³² Hinrich Enderlein: Berufsverbote – ein Wendepunkt 1978?, in: *Blätter für deutsche und internationale Politik* (1978) No. 12, p. 1468

⁴³³ Hans-Jürgen Lange: *Innere Sicherheit im Politischen System der Bundesrepublik Deutschland*, Opladen 1999, p. 106; Klaus Weinbauer (2006), p. 932

⁴³⁴ Klaus Weinbauer (2004), p. 221

⁴³⁵ Sofortprogramm zur Modernisierung und Intensivierung der Verbrechensbekämpfung, in: *Bulletin. Presse- und Informationsamt der Bundesregierung* No. 152, 5.11.1970, p. 1605

⁴³⁶ Frank Fischer (2004), p. 398

⁴³⁷ Herbert Kremp: Der Wahn der Epoche, in: *Die Welt*, 15.1.1972; Otto Roegel: Mit dem Terror leben? Was für die innere Sicherheit geschehen muss, in: *Rheinischer Merkur*, 15.9.1972

So, similar to other security laws passed during the time of RAF terrorism, the *Radikalenerlass* was also a tool of party politics. Heinz Kühn, the prime minister of *Nordrhein-Westfalen*, argued in an interview: “You know the evolutionary history: [...]; the attempt to play up the Baader-Meinhof-crisis to a psychosis in order to lure frightened citizens to polls for the law-and-order party CDU.”⁴³⁸

Despite the fact that the *Radikalenerlass* had been in force and could be applied at will by the different *Bundesländer*, the CDU followed the strategy of criticizing the SPD for the restrained application of the measure in some of the SPD-led *Bundesländer*. The chancellor, Willy Brandt, was under pressure to go along with the CDU’s law-and-order approach. Dissent within the party was quelled.⁴³⁹ Brandt tried to regain the initiative by shifting to the right with a proposal that would transform the *Radikalenerlass* into a federal law. The two contradicting principles of the *Grundgesetz* – allegiance of civil servants to the state (Art 33), on the one hand, the right not to be penalized for membership in a non-prohibited party (Art 21), on the other – should, Brandt said, be answered in favour of the former.⁴⁴⁰ The law proposals failed to pass due to CDU/CSU opposition in the second chamber, the *Bundesrat*.

In May 1975 the constitutional court passed a stunning decision on the *Radikalenerlass*.⁴⁴¹ Contrary to its own decision in 1961, it ruled that governments may define a party as “hostile to the constitution” without a formal prohibition of the party by the constitutional court. Thus, being a member of a legal party may be sufficient reason to reject an individual from public service. The allegiance of the civil servant to the state, the court argued, was more important than the right not to be discriminated against as a member of a non-prohibited party. Moreover, this applied not only to civil servants, but also to employees having a private contract with a public entity. The court – usually calming and limiting overzealous activities of the executive in regard to constitutional rights – passed a judgement allowing the ongoing practice to take root.⁴⁴² The government attempted to establish the *Radikalenerlass* as a federal law, but was again blocked by the CDU/CSU in the *Bundesrat* that wanted no limitation of the competences further expanded by the court ruling.⁴⁴³

⁴³⁸ „Ich riskiere doch nicht Brandts Fall“, in: *Der Spiegel* 32/1973, 06.08.1973, p. 22

⁴³⁹ SPD: „Wir haben feste draufgehauen“, in: *Der Spiegel* 38/1973, 17.09.1973, p. 21

⁴⁴⁰ Den Teufel tun, in: *Der Spiegel* 39/1973, 24.09.1973, p. 25

⁴⁴¹ Goldene Worte, in: *Der Spiegel* 31/1975, 28.07.1975, p. 28

⁴⁴² Gerhard Stuby: Das Urteil des Bundesverfassungsgerichtes – ein reaktionärer Kahlschlag, in: Horst Bethge et. Al (ed.): *Die Zerstörung der Demokratie in der BRD durch Berufsverbote*, Köln 1976, p. 231; Jetzt kann das Schnüffeln richtig losgehen, in: *Der Spiegel* 36/1975, 01.09.1975, p. 30

⁴⁴³ Auf dem Weg zur Gesinnungsschnüffelei, in: *Der Spiegel* 50/1975, 08.12.1975, p. 28

In late 1975 it was reported that more and more left SPD and FDP members were now affected by the *Radikalenerlass*.⁴⁴⁴ Members of the SPD student organization, *Sozialistischer Hochschulbund*, had almost no chances of public employment in *Bayern*, *Der Spiegel* wrote. The few limitations enacted by the constitutional court's ruling – no general refusal of members of certain parties and the requirement to assess the individual case – were largely ignored. In 1976, the London newspaper *Times* wrote that the German situation was reminiscent of “McCarthyism.”⁴⁴⁵ Many other Western European newspapers reacted similarly,⁴⁴⁶ and the French president, Mitterrand, campaigned actively against the decree.⁴⁴⁷

By 1975, it seems that the *Radikalenerlass* had acquired a life of its own, independent of immediate political interest of the governing parties in the *Bundesländer*. While some social democratic leaders were openly criticising the decree, some SPD-led *Bundesländer* were applying it with the same ferocity as the CDU-led regions. The reason for this seems to be that the public institutions themselves – sometimes against the explicit will of the political appointees – were eager to execute the decree.⁴⁴⁸

In political discourse, the *Radikalenerlass* was utilized both by the far left and the right. The communist side especially employed protests against what they called the occupational ban (“Berufsverbot”) for mobilization.⁴⁴⁹ The right – especially the CSU – used the threat of communist teachers or police officers to rally followers and to dissuade left-leaning individuals from political activism. It seems that the perceived hegemony of the radicals among the youth in and after 1968 was quickly replaced by a conservative rollback⁴⁵⁰, especially among the young. From the mid-seventies on, the conservative youth organization, *Junge Union*, drew more members than its left and liberal counterparts, *Der Spiegel* reported.⁴⁵¹ Especially the *Junge Union* employed the *Radikalenerlass* in their campaign

⁴⁴⁴ Auf dem Weg zur Gesinnungsschnüffelei, in: *Der Spiegel* 50/1975, 08.12.1975, p. 28; Hinrich Enderlein (1978), p. 1469; Erich Roßmann: Funktion und folgen der Berufsverbote, in: *Blätter für deutsche und internationale Politik* (1982) No. 1, p. 90

⁴⁴⁵ Radikalen-Suche: McCarthy auf deutsch? in: *Der Spiegel* 16/1976, 12.04.1976, p. 52

⁴⁴⁶ Dokumentation zur internationalen Kritik der Berufsverbote und anderer Rechtstendenzen in der BRD, in: *Blätter für deutsche und internationale Politik* (1976) No. 9, p. 1072

⁴⁴⁷ Gerard Braunthal (1990), p. 68

⁴⁴⁸ Das ist politischer Exorzismus, in: *Der Spiegel* 21/1978, 22.05.1978, p. 36

⁴⁴⁹ Rote Hilfe West-Berlin: Staatsgewalt, Reformismus und die Politik der Linken, in: *Kursbuch* (1973) 31

⁴⁵⁰ Sebastian Scheerer (1988), p. 368; Axel Schildt (2004), p. 449; Helmut Gollwitzer: Die Bundesrepublik – Insel der Reaktion in Europa, in: *Blätter für deutsche und internationale Politik* (1976) No. 10, p. 1144

⁴⁵¹ Jugend '76: Lieber Gott, mach mich krumm, in: *Der Spiegel* 15/1976, 05.04.1976, p. 46

against the left, and also attacked liberal-minded teachers.⁴⁵² Correspondingly, the CDU/CSU employed the *Radikalenerlass* in the campaign for the federal elections in 1976. In an interview, the CDU candidate for the interior ministry, Alfred Dregger, tried to link the policy against critical-minded civil servants with a security threat: “It is obviously true that crime cannot be solely contained by police means. Inner security is already affected when young people are not being taught public spirit, duty and respect towards the democratic state and its order, but instead learn to seek conflict and class warfare, to question – and thus to make questionable – all fundamental values of our community, when the orientation of a solid value system is being taken away from them.”⁴⁵³

In 1978 it was reported that applicants for civil service posts who had been rejected on account of the *Radikalenerlass* and who then subsequently sued in court and won, were still not hired by some of the *Bundesländer*. In these cases, the executive was following a policy of ignoring judicial orders on a systematic basis, wiping out the possibilities of effective legal remedy for the affected individuals.⁴⁵⁴ Also in 1978, the first case became public where an applicant for a teaching position was rejected not because of communist ties (which he did not have), but because he “did not distance himself strongly enough from communist goals.” Without sufficient anti-communist sentiments, the court upholding the decision argued that he would not be able to identify and fight communist threats to the free democratic order.⁴⁵⁵ A police officer and SPD-member was denied status as an employee for an indefinite time because he had been handing out flyers against the *Radikalenerlass* in his spare time.⁴⁵⁶

In late 1978 the first prime minister – the mayor of Hamburg, Hans-Ulrich Klose – declared that the obligatory screening of all applicants would be discontinued. Screening would in future be restricted to civil servants working in “security-sensitive” fields such as the police.⁴⁵⁷ The practice of requesting information by the *Verfassungsschutz* from all applicants (“Regelanfrage”) was dropped.

In 1979, it seems that the *Radikalenerlass* ceased to be of primary importance in political discourse. In 1979 news reporting on the decree dropped to less than one third of the number

⁴⁵² Schüler machen Leute, in: Der Spiegel 38/1976, 13.09.1976, p. 76

⁴⁵³ Ziehen sie das nicht ins Lächerliche, in: Der Spiegel 39/1976, 20.09.1976, p. 36

⁴⁵⁴ Allzeit kämpferisch, in: Der Spiegel 05/1978, 30.01.1978, p. 52

⁴⁵⁵ Sog. Verfassungsfeind, in: Der Spiegel 06/1978, 06.02.1978, p. 46

⁴⁵⁶ Auf den Misthaufen, in: Der Spiegel 34/1978, 21.08.1978, p. 80

⁴⁵⁷ „Der politische Ansatz war falsch“, in: Der Spiegel 40/1978, 02.10.1978, p. 30; Um einen Pumperklacks, in: Der Spiegel 41/1978, 09.10.1978, p. 24; Hinrich Enderlein (1978), p. 1468

of articles in 1978, the year that the issue was most dominant in public discussion. The Hamburg initiative was taken up by the SPD-FDP government, which prohibited the *Regelanfrage* within its own sphere.⁴⁵⁸ The new guidelines, enacted in January 1979, stipulated that the hiring process should proceed under the presumption of loyalty of the applicant.⁴⁵⁹ This did not, however, apply to the jurisdiction of the *Bundesländer*. Meanwhile, abolishing the *Radikalenerlass* created heavy opposition within the FDP and especially the SPD, as the decree had ostensibly undergone a strong normalization process. In most *Bundesländer* the practice was continued, and moreover, the principles of the *Radikalenerlass* were still applied in federal fields covered by the government's prohibition, for example in the case of the federal postal service.⁴⁶⁰

While the SPD-FDP coalition was finally attempting to put an end to the *Radikalenerlaß*, the pursuit of alleged extremists in public service continued. Especially the federal disciplinary office (*Bundesdisziplinaranwalt*) continued to pursue communist activists.⁴⁶¹ The courts, on the other hand, sometimes reacted to the government's change of direction. The federal disciplinary court ruled that an employee in the postal service could remain a DKP member as long as he refrained from any political activity.⁴⁶² It seems that the court reacted with this ruling to the minister for post, Kurt Gescheidle, who had argued that non-security related jobs might be held by DKP members who had strongly opposed it in the previous years. However, no general line in judicial decisions can be found: some courts tended to decide in favour of the communists, some against them.

The change from a general screening practice (*Regelanfrage*) to an individual screening practice in the early 80's, Ingrid Kurz and Erich Roßmann argue, was a success of the anti-*Radikalenerlass*-movement.⁴⁶³ However, *Berufsverbote* as an instrument against left activists was continued to be employed by the public administration and upheld by the labour courts. The employment practice in most of the SPD-led *Bundesländer* had not changed; the same was true for areas controlled by the federal government, such as the railways and the postal service.

⁴⁵⁸ Gerard Braunthal (1990), p. 111; Radikalenerlaß entschärft, in: Der Spiegel 02/1979, 08.01.1979, p. 16

⁴⁵⁹ Gerard Braunthal (1990), p. 111

⁴⁶⁰ SPD: „Ende der Ära Stillgestanden“?, in: Der Spiegel 49/1979, 03.12.1979, p. 21

⁴⁶¹ Gerard Braunthal (1990), p. 115; Luft raus, in: der Spiegel 14/1980, 31.03.1980, p. 27

⁴⁶² Luft raus, in: der Spiegel 14/1980, 31.03.1980, p. 27

⁴⁶³ Ingrid Kurz, Erich Roßmann: Berufsverbotspraxis und Liberalisierungslegende, in: Blätter für deutsche und internationale Politik (1980) No. 7, p. 821

The practice not to employ and even dismiss communist civil servants also continued in the years after the election of the CDU-FDP government.⁴⁶⁴ Under the new government, dismissal proceedings rose sharply in numbers.⁴⁶⁵ In 1981, the constitutional court ruled that the dismissal of a communist telephone technician, Hans Peter, who had extraordinarily positive work credentials, was legal, signalling a continuation of the *Radikalenerlass* on the judicial side.⁴⁶⁶ The constitutional court's decision in 1983 in favour of a communist activist who the bar association tried to keep from becoming an advocate exemplifies how many – public, semi-public, private – institutions took the *Extremistenerlass* as some sort of blanket clause to keep left political activists from all kinds of employment, not only in public administration.⁴⁶⁷ While the court ruled that it was unconstitutional to keep somebody completely from (private) occupation, individuals continued to be dismissed under the *Radikalenerlass*. The federal administrative court had – taking a completely different direction – allowed the dismissal of public servants who were candidates for general elections on a DKP list.⁴⁶⁸ The new conservative government used the verdict to pursue a further purge of the public service.⁴⁶⁹

In the second half of the 80's, media reports on the *Radikalenerlass* subsided, signalling an end to the application of the decree in most *Bundesländer*. In those regions where the SPD won a majority (*Nordrhein-Westphalen, Schleswig-Holstein, Hessen, Hamburg, Bremen*), the *Radikalenerlass* was repealed,⁴⁷⁰ and no new cases were opened from the mid-80's on.⁴⁷¹ The government and the CDU/CSU-led regions, on the other hand, were considering expanding the decree to persons who had been employed in the DDR. In 1986, Horst Bethge claims that a reduction of cases was perceptible even in the CDU-led *Bundesländer* as a reaction to the anti-*Radikalenerlass* protest movement.

⁴⁶⁴ Ulrike Hörster Philipps, Erich Roßmann: Rechtsstaat auf schwachen Beinen, in: *Blätter für deutsche und internationale Politik* (1983) No. 11, p. 1488

⁴⁶⁵ Gerard Braunthal (1990), p. 131

⁴⁶⁶ Norman Paech: Legitimität und Unterwerfung. Zum BVG-Urteil gegen Hans Peter, in: *Blätter für deutsche und internationale Politik* (1981) No. 11, p. 1284; Erich Roßmann (1982), p. 92

⁴⁶⁷ Ins Gegenteil, in: *Der Spiegel* 22/1983, 30.05.1983, p. 66

⁴⁶⁸ Wolfgang Däubler: Rechtsstaatlichkeit dritter Klasse. Das Verfahren gegen Hans Meister, in: *Blätter für deutsche und internationale Politik* (1984) No. 6, p. 654

⁴⁶⁹ *Radikalenerlass* gegen Briefträger, in: *Der Spiegel* 40/1984, 01.10.1984, p. 276; Ulrike Hörster Philipps, Erich Roßmann (1983), p. 1493

⁴⁷⁰ Attraktive Damen, in: *Der Spiegel* 27/1990, 02.07.1990, p. 58; Bonbons für Wendehälse, in: *Der Spiegel* 30/1990, 23.07.1990, p. 47

⁴⁷¹ Horst Bethge: Möglichkeiten, das Konzept der Neokonservativen zu durchkreuzen. Von der Abwehr der Berufsverbote zur Bürgerrechts- und Demokratiebewegung, in: *Blätter für deutsche und internationale Politik* (1986) No. 9, p. 1105

The reunification in 1990 led to a revived debate on the *Radikalenerlass*, as a great number of ex-DDR citizens was now facing severe consequences.⁴⁷² German politicians disagreed on how to deal with the communist past of the DDR citizens, and especially with higher functionaries and Stasi spies.⁴⁷³ Conservative voices in the CDU/CSU, such as the minister for the interior, Wolfgang Schäuble, were advocating only limited screening of DDR functionaries, and so breaking with their own approach in Western Germany.⁴⁷⁴

In the Unification Treaty of 1990, again a functional *Radikalenerlass* in connection with a *Regelanfrage* was established for applicants from the ex-DDR, in particular with regard to ex-employees of the ministry of state security (*Ministerium für Staatssicherheit, MfS*).⁴⁷⁵ The number of affected individuals is unknown. The practice was dropped in 2000.

By 1992, all *Bundesländer* had finally repealed the *Radikalenerlass*.⁴⁷⁶ The *Regelanfrage* – a screening of every applicant by the *Verfassungsschutz* – was replaced by the *Bedarfsanfrage* – a screening of an individual applicant if there are concrete signs that he or she opposes the free democratic order. In 1995, the ECHR (European Court of Human Rights) ruled that the *Radikalenerlass* violated the freedom of expression, the freedom of coalition and the principle of proportionality.⁴⁷⁷

Conclusion

The *Radikalenerlass* is an interesting example of how legislation related to terrorism does not necessarily follow either the “left” or the “right” development paradigm. Obviously some resemblance to the “right” paradigm can be argued: the *Radikalenerlass* was one among many security laws passed during the period of public RAF fear, reaching its peak in 1977 and 1978 during the peak of RAF terrorism. It was rolled back in the 80’s and finally repealed in the early 90’s. However, the decree was never intended primarily as an anti-terrorism tool. Rather, it was used right from the beginning to purge the public service from communists.

⁴⁷² Guter Ton, in: Der Spiegel 33/1990, 13.08.1990, p. 32; Auf dem Kohlewagen, in: Der Spiegel 30/1990, 23.07.1990, p. 46

⁴⁷³ Nicht so pingelig, in: Der Spiegel 41/1990, 08.10.1990, p. 31

⁴⁷⁴ Nicht so pingelig, in: Der Spiegel 41/1990, 08.10.1990, p. 31

⁴⁷⁵ Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Cornelia Hirsch, Jan Korte, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/6128 – Haltung der Bundesregierung zur gegenwärtigen und früheren Berufsverbotepraxis, 9.8.2007, online: <http://dip21.bundestag.de/dip21/btd/16/062/1606210.pdf>

⁴⁷⁶ Gründe frei Haus, in: Der Spiegel 3/1992, 13.01.1992, p. 67

⁴⁷⁷ ECtHR decision 17851/91 of 26.9.1995

But while the *Radikalenerlass* initially targeted communists, it quickly affected an extensive range of left-leaning individuals, including peace activists and SPD members. Right-wing extremists, on the other hand, were never seriously targeted by the decree (I found but a few examples), making it a genuine tool against left activists. The decree was enacted and employed both by conservative and social democrat politicians. Major figures in the SPD distanced themselves from the decree after its effects on their own constituency became more visible. However, the decree remained in force for many years, not only because it was continuously supported by the CDU/CSU, but also because it was supported by major parts of the bureaucracy.

Arguably, the decree was fully phased out in the early 90's because it had lost its usefulness after the collapse of East Germany. However, it is also important to emphasize the importance of the political opposition to the decree from the radical left, the left-liberal media (such as *Der Spiegel*), from intellectuals such as Heinrich Böll and Jürgen Habermas and the left factions of the SPD and the FDP. The SPD general convention had already vowed to repeal the decree in 1981, and the SPD-led *Bundesländer* repealed the *Radikalenerlass* in the mid-80's.

The *Radikalenerlass* seems to be a prime example of the security discourse being a de-normalizing discourse. One of its main characteristics was that it never had a clearly defined legal foundation. Rather, it was based on a cryptic commandment of allegiance for public servants, leaving the application completely to the will of the executive. For twenty years, the possibility of legal remedy for an individual depended on the region, on the court, and on the judge. Radicalism and terrorism were mostly little more than a pretence to establish an anti-leftist system based on political arbitrariness. And only three years after the enactment of the decree the system had already been stabilized and normalized to such an extent that it took many years and major political efforts to have it finally repealed.

Today, the *Radikalenerlass* is commonly understood to be an expression of the anti-left sentiments of the political right and parts of the SPD in the wake of a general perceived threat by East Germany, the radical left and from left terrorism in the 70's. It is important to emphasize, however, that the primary function of the decree was to purge the bureaucracy first of communists and then of leftists, and to delegitimize the left movement in general. For the SPD, the instrument that they hoped would target their left opponents quickly backfired.

The fear that public servants might spy for East Germany to some extent triggered the *Radikalenerlass*. However, as critics have frequently argued, the decree has in no way been a functional tool to uncover spies, who abstain from DKP membership for obvious reasons.

It is important to note that the *Radikalenerlass* – in the view of its critics⁴⁷⁸ – was based on a pre-democratic, authoritarian state ideal, where public servants owed total professional and personal allegiance to the state. This view is supported by the fact that the main target of the *Radikalenerlass* was always teachers and not, for example, officials in security-relevant institutions. The real fear was that young civil servants – especially teaching staff – influenced by the anti-authoritarian positions of the student protest movement would subvert the fundamental structures of the state.

⁴⁷⁸ Le monde (5.12.1975), in: Dokumentation zur internationalen Kritik der Berufsverbote und anderer Rechtstendenzen in der BRD, in: Blätter für deutsche und internationale Politik (1976) No. 9, p. 1072; Helmut Stein (1976) p. 203; Gerhard Stuby (1976), p. 235

Conclusion

In the preceding chapter I have attempted to give an account of the development of the major anti-terrorism laws enacted in Germany from the 70's onwards under the assumption that the term "terrorism" has a specific (political- and legal-) discursive function, namely the delegitimization of persons or groups. The technique of recounting the evolution of the different laws one after another aimed to show different trends, developments or influences without subjecting them to a mono-causal narrative. In this chapter, I will attempt to flesh out and systematize these asynchronous and multi-causal developments.

German terrorism laws as a continuation of a pre-democratic, authoritarian tradition

In April 1968, Hans Magnus Enzenberger's leftist quarterly *Kursbuch* published a special issue on the incidences of the summer of 1967⁴⁷⁹ when the demonstration against the Persian Shah was violently dispersed by the police and Benno Ohnesorg, a student, was shot by the police. This analysis is interesting because it articulates the idea that the public authorities, and especially the police, were still dominantly working in a pre-democratic, authoritarian tradition that reached back to the Nazi-time and the decades before.

I will try to substantiate the idea that the state's reaction to the student protest movement and later to terrorism – for example in the form of the terrorism laws – is rooted in this anti-democratic authoritarian tradition. I aim to develop this idea – which was a common argument in the 60's and 70's – against the rival claim that the state's reaction was merely a response to the student protests and to the threat of terrorism, which in my opinion still dominates our view of the 60's and 70's.

In 1967 the police was para-militaristic in its competences, its training and its strategy.⁴⁸⁰ Werner Kuhlmann, president of the union of police officers, argued at a union convention in 1976: "Who would be surprised that a police drilled to do military operations will one day act less civilized than the public expects it to?"⁴⁸¹ Kuhlmann was campaigning against police service regulations such as: "Raiding patrols are the carriers of the battle, which is often

⁴⁷⁹ Peter Damerow, Peter Furth, Odo von Greiff, Maria Jordan, Eberhard Schulz: An der Bürgerkriegsfront oder: Die permanente Notwehr, in: Der nicht erklärte Notstand, *Kursbuch* (1968) No. 12

⁴⁸⁰ Peter Damerow et al. (1968), p. 2

⁴⁸¹ Werner Kuhlmann: Speech on the 17th delegates conference, in: *Gewerkschafts-Spiegel* (1967) No. 21

characterized by close combat with hand grenades, pistols and machine guns.” The police competence of the “exceptional order services” included fighting “civil disturbances”, “disturbers” and “terror actions and sabotage.”⁴⁸² The emergency laws of 1968 allowed the use of the army and the border patrol within Germany in exceptional situations (Art 35 *Grundgesetz*). The riot police (*Bereitschaftspolizei*) was equipped with grenade launchers, machine guns, hand grenades and armoured gun vehicles. The police of West Berlin – responsible for the violent reaction to the demonstrations in 1967 – had a military commando structure. The Berlin police president, Erich Duensig, who was a former *Wehrmachtsgeneralstabs*-officer, declared that he favoured personnel of “a military past, military success and military activity.”⁴⁸³ In particular, the police of West Berlin was modelled upon its predecessor, the authoritarian and all-powerful Prussian police, which was justified by Berlin’s special situation as an exclave within communist territory.

In 5 February 1966, the *FU Berlin* prohibited a conference on Vietnam. The conference was followed by a police-authorized demonstration of 200 persons who marched in front of the *Amerika Haus*. The demonstrators threw eggs and put the US flag at half-mast. In a speech following the incident, the SPD mayor, Heinrich Albertz, declared: “I have clearly instructed the police leadership that every political rally – which in a democratic state like Berlin must of course be allowed – already carries the seed of illegal and rebellious exploitation by the communists. [...] After the experiences of 5 February I have ordered that the police shall fight excesses and criminal actions during public rallies quickly and, if necessary, with the use of tough police coercion right from the beginning.”⁴⁸⁴

The excessive reaction of the police to a – in terms of violence and of its political relevance – completely harmless event that subsequently built up to the bloodbath of 2 June 1967 was in part caused by Berlin’s enclave status and a fear of a communist invasion or takeover, and in part by the para-military and authoritarian structure of the police of Berlin. However, the fact that non-violent demonstrations by a rather small group in a majority of non-communist students were perceived as a fundamental threat to state security indicates the pre-democratic, authoritarian ideology behind the anti-communist fear of the authorities. The *Kursbuch* argued: “It has to be asked why the police fought against the demonstrators as if they were an armed, organized enemy so that they would employ the strategy they had been trained to

⁴⁸² Peter Damerow et al. (1968), p. 3

⁴⁸³ Peter Damerow et al. (1968), p. 3

⁴⁸⁴ Peter Damerow et al. (1968), p. 18

counter a civil war. This was only possible because the police misconceived the spontaneity of the demonstrators. They could not imagine that almost 3000 citizens would spontaneously gather for a rally. They suspected an organization behind the demonstration [...]. They treated the demonstrators like an armed organization that manipulates the spontaneity of the protest.”⁴⁸⁵ As the chief of the police, Duensing, later had to acknowledge before a parliamentary inquiry board, the police had “no hints whatsoever of subversive activities by demonstration groups.”⁴⁸⁶ The police excesses were subsequently fully legitimized by the prosecutors and the judiciary, almost invariably convicting everybody who was truly or falsely identified as a demonstrator by the police. This close cooperation of the police and the judiciary is a characteristic of an authoritarian state structure. The most notable case was the acquittal of Karl-Heinz Kurras, the police officer who had killed Benno Ohnesorg, despite witness evidence.⁴⁸⁷ The court quelled all attempts by the plaintiffs to identify the politically responsible superiors of Kurras.

Some of the terrorism laws discussed above show a rather clear connection to Germany’s pre-democratic, authoritarian state tradition. In particular, this phenomenon becomes obvious with the *Radikalenerlass* and the *Rasterfahndung*. The *Radikalenerlass* was, as I attempted to show, fuelled by a traditional understanding of public servants being subordinates to the state. Public servants had to fully submit to the state, including their private actions and their political beliefs. The *Rasterfahndung* was, as shown, not a completely new development of the 60’s and the 70’s. It was, of course, made possible by new technical innovations in the computer sector, but was also based on a traditional, pre-democratic understanding of the state. Until the 80’s, it was not at all clear that public institutions had to base all their actions on an explicit authorization by law. Rather, there was a somewhat common understanding that all instruments deemed appropriate could be applied unless they were explicitly forbidden by law. This concept of the state also excluded any form of responsibility of the state authorities towards the individual, especially when it came to police and intelligence matters. Public institutions often worked together in the name of state interest, which was exemplified by the extensive use of *Amtshilfe*. This was also true with regard to the judiciary. Especially until the 70’s – most notably in the Stammheim trials – the judiciary often acted not as a check on the

⁴⁸⁵ Peter Damerow et al. (1968), p. 18

⁴⁸⁶ Peter Damerow et al. (1968), p. 18

⁴⁸⁷ In 2009, historian Cornelia Jabs discovered that Kurras had been a secret collaborator of the *Ministerium für Staatssicherheit* (Stasi), the DDR secret service in the 50ies and 60ies. The discovered records suggest that the Stasi had neither ordered nor supported the shooting of Ohnesorg. See Helmut Müller-Enbergs und Cornelia Jabs: Der 2. Juni 1967 und die Staatssicherheit, in: Deutschland Archiv (2009) No. 42, p. 395; available online: http://www.bpb.de/themen/EIRZV5,0,Der_2_Juni_1967_und_die_Staatssicherheit.html (retrieved 4 July 2009)

state authorities but as their allies. Weinbauer argues that the period from 1974 to 1977 was the last phase in post-war history where the political elites attempted to integrate the society with the help of the state from above. Terrorist attacks in 1985 and 1986, he points out, did not lead any more to a similar state mobilization.⁴⁸⁸

The liberalization of the state and of police matters

The 70's and 80's are characterized by a massive liberalization movement in police matters. In particular, I attempted to show this in regard to the *Rasterfahndung*. Especially in the 80's we can see the massive strengthening of the idea that the state cannot treat citizens merely as subordinates, but it is accountable to the individual. This becomes obvious in the growth of legitimization requirements that the police and intelligence apparatus becomes subject to. In the 50's two of the three intelligence services were established without any legal basis. In the 80's, this structure was debated and questioned, and finally a proper legal basis was established.

It was shown in the previous chapter that the police and the intelligence services often employed tools such the *Rasterfahndung* or wiretapping without a proper legal basis. I believe that the introduction of explicit provisions allowing these tools – especially in the late 70's and the 80's – may be to some extent necessitated by a change in how the state is perceived. In particular, the growth of legitimization requirements is identifiable.

The growing data protection movement that evolved in the late 70's and took off in the early 80's was an expression of this liberalization movement. As shown above, it was far from clear until then that police actions – such as the collection of data – would need to be based on explicit authorizing provisions. It was made clear – especially by the constitutional court's decision on the census law – that state authorities increasingly came under this restraint. The same is true with regard to the rights of citizens: in the 70's citizens still had no right whatsoever to access, correct or delete the data that state authorities kept about them – be it old-fashioned record cards or modern computer entries. This right came to be established over the course of the 80's.

⁴⁸⁸ Klaus Weinbauer (2006), p. 932

In short, the development of terrorism laws in the 70's and 80's exhibits an anti-authoritarian, liberal tendency which runs parallel – and conflicts with – the authoritarian tradition and the law-and-order tendencies that were equally present.

Terrorism legislation ineffective against terrorism

By and large, the terrorism legislation analyzed in this thesis has turned out to be a highly ineffective tool to prevent terrorism. As shown, the communication ban law has been completely useless, and *Rasterfahndung* led to one single success in over thirty years. The leniency law has not led to a single arrest or conviction of an active terrorist. Similarly, wiretapping has not led to a single arrest or conviction of a RAF terrorist. Furthermore, I have not found any indication that wiretapping has been successful in recent years against Islamic terrorism, although I have not fully validated this claim. The application of § 129a against the alleged sympathizer scene has had, by and large, the counter-productive result of alienating major parts of the radical left from the state's struggle against the RAF. All successes against terrorists have been achieved by “classic” investigative methods.

Terrorism legislation as a political instrument against the left

I have tried to show in the previous chapters that terrorism legislation has to a great extent been employed as a political tool against the left. Three different processes are distinguishable. First, terrorism legislation has been employed strongly as a tool of party politics. Although all major parliamentary parties – the CDU/CSU, the SPD, the FDP and later the Greens – have passed terrorism legislation when they were in (national and regional) government, it seems that – as a whole – the right has benefited more from the terrorism discourse. Within the SPD and the FDP the terrorism issue has been an important instrument to delegitimize the respective left factions, an example being when the FDP's right wing, represented by Wolfgang Gerhardt and Hermann Otto Solms, conducted a member poll in 1995 to break the opposition by Sabine Leutheusser-Schnarrenberger, the left-liberal minister of justice, to the wiretapping program.

Second, terrorism legislation has been and continues to be frequently employed as a tool against communists, the radical and non-orthodox left and against new social movements. This has become particularly clear with regard to *Rasterfahndung* and the terrorism-paragraph § 129a. Both instruments have been extensively used by the police, the intelligence services

and the prosecution to observe and to criminalize groups that were non-terrorist and by and large non-violent. By contrast, right extremist terrorists and neo-Nazis have generally not been targeted with the tools provided by the terrorism legislation. To some extent, this obvious imbalance may have been caused by an authoritarian, right wing world view of major parts of the public administration and the judiciary. However, it is important to note that security legislation has also been frequently employed by the SPD against the radical and non-conformist left.

Third, in the 60's and 70's a world view prevailed that criminality – and also terrorism – was a symptom of a dysfunctional social structure. Alcoholism, poverty but also insufficient social and moral structures were among the causes identified. It was believed that meticulous social engineering based on detailed social control could solve these problems. For this reason, security- and terrorism-related instruments targeted groups that were perceived as socially deviant and thus a likely breeding ground for criminality and terrorism.

Terrorism laws are almost never repealed

Most of the measures analyzed in this thesis have been subject to a strong normalization process. Measures having entered the legal system mostly became very persistent. Subsequently, attempts to remove the provisions have been largely ineffective or necessitated a major political effort. This finding completely invalidates the argument that terrorism legislation is only made for times of crisis and will be removed once the threat subsides.

Moreover, adopted terrorism measures tend to shape the way people understand or conceptualize terrorism. The communication ban law (*Kontaktsperregesetz*) provides the most obvious (though not the most important) example. Although it has only been employed once, it nevertheless has defied a repeal until this day. The *Kontaktsperregesetz* has continued to shape the public debate, substantiating the argument that civil rights of suspects may be reduced in times of crisis.

It also became obvious in the previous chapter that most instruments initially conceived to counter terrorism were later transformed into general police tools against “regular” crime. A shift that was particularly visible took place in the mid-80's, when the focus of the security debate shifted from terrorism to drugs and then to organized crime. Most of the provisions analyzed in the previous chapters were expanded from the 80's to the 90's to organized crime.

§ 129a was massively expanded in the 80's mainly to criminalize militant groups connected to the new social movements. Another example of the persistency of a security-related provision is the *Radikalenerlass*. Only a few years after its conception Willy Brandt called it a "mistake". However, it took until the 90's to abolish the decree and stop its application.

Institutional conflict and a non-monolithic conception of the state

Another aspect of terrorism legislation that became obvious in the preceding chapters is that there was no monolithic state pushing through its security interests. Rather, the historic development of terrorism legislation and its application is (to some extent) the result of conflicting interests and operating modes within the state. The most obvious institutional conflict is the conflict between the federal government, on the one side, and the opposition (including the *Bundesländer* controlled by the opposition), on the other. Implementing or calling for "tough" anti-terrorism and anti-crime measures was employed in public discourse to show that the government takes care of (or doesn't take enough care of) the population's safety. The political system of Germany – having strong regions with broad competences in police matters – also created specific dynamics: the different federal institutions (the federal prosecutor, the BKA, the *Bundesgrenzschutz*, the federal government) competed with the institutions of the *Bundesländer* (such as the regional police forces and the regional prosecutors) for hegemony. This was shown in the previous chapter with regard to the BKA, a federal agency that could acquire new competences and personnel especially during the peak of anti-terrorism activities in the mid- and late 70's. Another dynamic in the history of terrorism laws caused by the federal structure of Germany was that many new police competences were first developed and applied in one or some of the *Bundesländer*, often going unnoticed by the media and critics who focussed on debates on national level.

I have mentioned that the legal initiatives by the governments and their application by the police and the judiciary were often perceived by the left as being partial. Critics pointed out on numerous occasions that the public agencies exhibited a much lower level of commitment in the investigation and prosecution of crimes committed by right-extremist groups (including crimes committed by the *SS* or the *Einsatzgruppen*) than they did when it came to left and left-extremist groups. I attempted to show that some of the provisions – most notably the *Extremistenerlass* and § 129a – had the effect of criminalizing broad segments of the activist left. To some extent this phenomenon can reasonably be described as an institutional conflict as well. The social movements emerging in the early 80's, that were targeted by the police

and the judiciary, confronted public authorities by rejecting some of their main projects – e.g. the growing use of nuclear power, rearmament, an aggressive policy towards the communist bloc – and by using political instruments circumventing and disempowering the traditional political and economic elites. The continued attempt to quell social movements with the help of anti-terrorism legislation seems to be a power conflict within the broader sphere of democratic politics.

The metaphor of the “monolithic state” has been employed both by advocates and adversaries of the terrorism laws in the past decades. The images of the “strong state” and of “democracy being able to defend itself” (*wehrhafte Demokratie*) were employed to legitimize broad terrorism measures. By contrast, metaphors of the almighty state, of the “surveillance state”, the authoritarian state or of the “fascist state” were employed to rally critics. Both discourses try to create a dichotomy that attempts to legitimize its own position and to force people to take sides. It is reasonable to see these two lines of argument not only as two competing interpretations of terrorism in Germany but as discourses serving a political purpose. I attempted to show that the history of terrorism laws in Germany may be described as the result of the dynamics within a non-monolithic state where different parties and agencies pursue different, sometimes conflicting goals.

Final remarks

The thesis attempts to close a gap in research with regard to the development of terrorism laws and to how this development interacts with the terrorism discourse, the security debate and the political development in Germany in general. However, more research in this field seems to be necessary. On a general level, a further systematization of the history of security-related legislation would seem highly useful.

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Abstract

Die vorliegende Diplomarbeit behandelt die Entwicklung von Terrorismusgesetzen in Deutschland von den Siebzigern bis in die Gegenwart. Die Diplomarbeit basiert auf der Grundannahme, dass die Entwicklung dieses Rechtsgebiets– wie bereits vielfach festgestellt wurde – als Diskurs zu verstehen ist. Dieser Terrorismusdiskurs strukturiert sowohl die öffentliche Diskussion als auch die Rechtsentwicklung. Der Terrorismusdiskurs ist nach wie vor von einer Auseinandersetzung über die Deutungshoheit geprägt.

Gegenstand der vorliegenden Arbeit ist die ausführliche und detaillierte Analyse der Entwicklung der wichtigsten Terrorismusgesetze, die seit den 70ern – also dem Beginn des RAF-Terrorismus in Deutschland – bis zur Gegenwart erlassen wurden. Dies basiert auf der Annahme, dass sich Terrorismusgesetze unterhalb der durch den Terrorismusdiskurs geprägten Ebene vielfach auf Arten entwickeln und verändern, die den herrschenden Deutungsschemen nur bedingt entsprechen.

In der Diplomarbeit werden sechs Regelungsfelder in ihrer Entwicklung analysiert: Kontaktsperregesetz, Kronzeugenregelung, Lauschangriff, Rasterfahndung, das strafrechtliche Verbot der Bildung terroristischer Vereinigungen (§ 129a StGB) sowie der Radikalenerlass.

Im Schlusskapitel wird versucht, die Entwicklung dieser sechs Regelungsbereiche zu vergleichen und breitere Entwicklungsströme zu erkennen. Dabei wird unter anderem herausgearbeitet, dass im Untersuchungszeitraum zwei – sich primär widersprechende – Entwicklungen zu erkennen sind: einerseits die Fortsetzung einer vordemokratischen, autoritären Staatsauffassung, andererseits die Liberalisierung der Hoheitsgewalt, welcher sich etwa im Bereich des Datenschutzes nachweisen lässt.

Lebenslauf

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