Liberty, Security, and Terrorism: The Legal Position in Germany

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A. The new quality of terrorist threats as a legal problem

Just one day after the attacks of September 11, 2001, the German minister of the interior, Otto Schily (SPD), demanded a new security concept. Immediately the existing security laws and precautions were placed under special scrutiny in search for any sorts of deficiencies. The results of these reviews were two legislative initiatives, termed "security packages" or "anti-terror packages," which changed or altered numerous existing statutes. The new security laws contain a number of infringements into fundamental civil rights and liberties. The legislative process thus had to raise the issue of the relationship between security and civil liberties and weigh the balance between the protection of individual rights and collective security. This, however, does not constitute a new challenge for the German legislature. The collision of security interests with individual civil liberties has caused a legal problem in Germany for some time. September 11 might constitute a political watershed, but in the context of civil liberties in Germany, this date does not represent an important mark. The current measures have to be understood within the context of an at least thirty-year-long period of continuous weighing between security and freedom.[1] Important decisions were made in the 1970s in reaction to terrorist activities by the *Rote Armee Fraktion* (RAF) with its zenith in the autumn of 1977. Subsequent statutes restricting personal freedom caused an intense debate about the acceptable amount of restrictions on personal liberties in order to avoid future terrorist attacks.[2] The legislature made principal decisions during that time, which were

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[1] *See generally* Winfried Brugger & Christoph Gusy, *Gewährleistung von Freiheit und Sicherheit im Lichte unterschiedlicher Verfassungsverständnisse*, 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 101, 151 (2004); MARKUS MÖSTL, DIE STAATLICHE GARANTIE FÜR DIE ÖFFENTLICHE SICHERHEIT UND ORDNUNG (2002); PETER-TOBIAS STOLL, SICHERHEIT ALS AUFGABE VON STAAT UND GESELLSCHAFT (2003).

[2] *See* TERRORISMUS CONTRA RECHTSSTAAT (Rudolf Wassermann ed., 1976); Hans-Jochen Vogel, *Strafverfahrensrecht und Terrorismus – eine Bilanz*, *in* NEUE JURISTISCHE WOCHENSCHRIFT 2117 (1978); Uwe Ber-

examined and approved by the German federal constitutional court.[3] In other words, the fundamental problems of the violation of constitutional rights through various terrorist statutes have already been discussed in the 1970s. The following decade saw a debate over the existence and scope of a "basic right to security."[4] While security was seen as antagonistic to civil liberties in the 1970s, in the 1980s their relationship changed and was seen as more equal. Security was named a "basic right" and became a "state duty" (*Staatsaufgabe)*.[5] Because of the antagonistic viewpoint of the previous decade, security now achieved a more equal, if not even a higher constitutional justification. In the 1990s, a new security debate arose over the gradual dismantling of border controls under the Schengen agreement of the EU leading to a new set of statutes enhancing security. Border controls were moved – functionally – into the interior of the country and were justified with a higher need for security due to cross-border organized crime.[6]

At the end of the year 2001, there was no doubt among the public and in political circles that the attacks of September 11 warranted immediate legislative measures. This view was supported by the widely shared belief that the existing legal frame-

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lit/Horst Dreier, Die *legislative Auseinandersetzung mit dem Terrorismus*, *in* PROTEST UND REAKTION 223 (F. Sacke & H. Seinert eds., 1984); WERNER KLUGHARDT, DIE GESETZGEBUNG ZUR BEKÄMPFUNG DES TERRORISMUS AUS STRAFRECHTLICH-SOZIOLOGISCHER SICHT (1984); Hans-Joachim Rudolphi, *Gesetzgebung zur Bekämpfung des Terrorismus*, *in JURISTISCHE ARBEITSBLÄTTER* 1 (1979); SICHERHEIT DURCH GESETZ? (Hans-Peter Bull ed., 1987); MARTINA JUNKER, ANALYSE AND KRITIK DER STRAFVERFAHRENSRECHTLICHEN TERRORISMUSGESETZGEBUNG (1996).

[3] German Constitutional Court, BVerfGE 46, 1 (4.10.1977) (prohibition of contact, no interim order); BVerfGE 46, 160 (16.10.1977) (Schleyer kidnapping); BVerfGE 49, 29 (1.8.1978) (statute of the prohibition of contact); BVerfGE 65, 1 (15.12.1983) (census).

[4] JOSEF ISENSEE, DAS GRUNDRECHT AUF SICHERHEIT (1983); Josef Isensee, *Gemeinwohl und Staatsaufgaben im Verfassungsstaat*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, BAND III para. 59 (1988); GERHARD ROBBERS, SICHERHEIT ALS MENSCHENRECHT (1987); Christoph Gusy, *Grundpflichten und Grundgesetz*, *in* JURISTENZEITUNG 657 (1982); Christoph Gusy, *Rechtsgüterschutz als Staatsaufgabe – Verfassungsfragen der, Saatsaufgabe Sicherheit*, *in* DIE ÖFFENTLICHE VERWALTUNG 573 (1996). For critical assessments of the basic right to security, see PETER-ALEXIS ALBRECHT, DIE VERGESSENE FREIHEIT, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG 125 (2003); JUTTA LIMBACH, IST DIE KOLLEKTIVE SICHERHEIT DER FEIND DER INDIVIDUELLEN FREIHEIT? 5 (2002).

[5] For a brief overview of the development with specific regard to environmental law, see OLIVER LEPSIUS, BESITZ UND SACHHERRSCHAFT IM ÖFFENTLICHEN RECHT 420 (2002).

[6] *See* Erhard Denninger, *Schleierfahndung im Rechtsstaat?*, *in* FESTSCHRIFT FÜR EKKEHART STEIN 15 (2002); Christoph Gusy, *Vom Polizeirecht zum Sicherheitsrecht*, *in* STAATSWISSENSCHAFT UND STAATSPRAXIS 5 187 (1994); Christoph Möllers, *Polizeikontrollen ohne Gefahrenverdacht*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 382 (2000); Volkmar *Götz*, *Die Entwicklung des Polizei-und Ordnungsrechts (1994-1997)*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 679 (1998); Hans Lisken, *Verdachts- und ereignisunabhängige Personenkontrollen zur Bekämpfung der grenzüberschreitenden Kriminalität?*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 22 (1998).

work contained considerable security problems and deficiencies. The suggestive powers of the images of the terrorist attacks channeled the development of political opinion and fuelled legislative activism. Time pressure, hence, became a predominant element in the ensuing legislative process. Whether a need for legislative regulation existed was never in doubt; the question of the 'if' had been answered by the evidence and needed no justification. The question of the "how" was determined by the immediate presentation of the two "security packages" by the department of the interior. An analysis of which measures could possibly have prevented the attacks and which legislative changes would have been necessary to create these measures, was never attempted, not the least because of the urgency to act quickly.

Legislative reaction was triggered by the events of September 11, 2001, but not necessarily motivated by them. The attacks were not seen as a deed of individual terrorists but as a de-individualized phenomenon, constituting a new form of terrorist threat. This novel threat did not seem to arise from individual terrorists, but from a general development in a globalized world in which individuals are merely exchangeable tools in the hands of powers that work in the background and can be assured the protection of some states. The legislative initiatives were not meant to address the specific deeds of September 11, 2001, rather they are aimed at what is perceived as an ever present threat by Islamic terror organizations. Only this perspective explains why in the immediate aftermath of September 11 legislative changes were seen as unavoidable, even before the terrorist attacks were connected to possibly inappropriate behavior by German authorities.

The "security packages" are thus not reactions to the attacks as such but constitute a political symbolic act, associated with the actual events. The lawmakers were not motivated by the actual threat, rather by the imagination of a new and rather vague or unknown threat. This is evident, for example, in the reasoning brought forward by the minister of the interior, Schily, during the debate about the so-called "second security package":

We have to be aware what place was attacked: New York is the most international city in the world. The United Nations has its headquarters there. More than eighty nations had citizens among the victims. New York – a symbol for the desire for freedom in this world, for democracy in this world – was the chosen point of attack. Many of those that were persecuted under the terror regime of the National socialists or under the rule of other totalitarian systems sought refuge in New York. This is deeply rooted in the historical consciousness of humanity. This is reflected in its immense importance.[7]

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[7] Otto Schily in the German Bundestag, 14th electoral period, session number 209, December 12, 2001, *BT-Plenarprotokoll* 14/209, p. 20758 (B).

One thing is especially evident in his remarks, which are indicative of many others: Freedom in general, democracy in general and the "consciousness of the Western world" were seen as threatened. The lawmakers reacted less to the actual dangers to life as to the symbolic threat to the value system of the entire Western world.

This perception of the events is important in order to explain the ensuing legislative reaction. On the one hand, this view explains why a development of opinion about the "if" of legislative action was absent and why the "how" was only marginally and under intense time pressures dealt with. On the other hand, this perception highlights the manner in which the new initiatives addressed fundamental civil rights and liberty issues. Important is that the level of threat was not attributed to individual terrorists, but was seen as the consequence of a qualitatively new danger, which did not emanate from the individual attackers themselves but rather from an intangible network of terror. Terrorism was not perceived as the summation of individual deeds but rather as the result of collective, evil structures. The principally new aspect of these attacks, which also determined the legislative balancing of security and freedom, could only be discerned by not recognizing the individual as the one responsible for the crimes committed.

Consequently, the legislative initiative by the governing coalition concluded that nobody could ensure that Germany would not become the victim of such attacks as well.[8] This perception is surprising given that terrorism is not a new phenomenon for Germany and for Europe in general. The European public has exhibited a certain degree of normalcy about the terrorist attacks in Northern Ireland and the Basque region. The fact that terrorism in certain regions of the EU is part of everyday life, had previously not led to public pressure for action. Characterized as regional conflicts, these situations were not perceived as constituting a general threat. In contrast to these forms of terrorism, the September 11 attacks were seen as a global threat, not simply a regionally restricted conflict. Thus, the terrorist attacks of the RAF during the 1970s were regarded as qualitatively different from the new form of terrorism: responsibility for the old attacks could be assigned to a limited circle of people. The dangers arose from specific, known perpetrators and their limited surroundings. It was possible to individualize terrorism; this was deemed no longer possible after September 11. The relatively quickly identified perpetrators were seen as the tools of a network of terror. The source of danger is no longer the individual perpetrator but rather impersonal networks and organizations harbored in the diffusion of Islamic fundamentalism.

[8] BT-Drs. 14/7386 (new), p. 35 – Entwurf der Fraktionen SPD und Bündnis '90/ Die Grünen eines Gesetzes zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz).

Thus, the novel quality of terrorist threats since September 11 can be narrowed down to two aspects: The elimination of a local context and the diffusion of an individual context of terrorist actions. Terrorism has become de-personalized and de-regionalized. The new threat is global and can no longer be limited to a few perpetrators. Only on the basis of this fundamental perception can one comprehend why this was declared to be a qualitatively new level of threat and why certain legislative measures were taken. The evaluation of the relationship between civil liberties and security has to be seen in this context.

B. The Measures of the Two "Security Packages"

I. The "first security package"

The "first security package" was passed by the cabinet only eight days after the attacks, on September 19, 2001, and contains three main points.

Section 129a of the Criminal Code sanctions the creation of terrorist organizations. This section is complemented by section 129b which encompasses the creation of foreign organizations and even punishes demonstrations of support.[9] This is intended to close a legal loophole since sections 129 and 129a of the Criminal Code are only applicable to organizations that are represented within Germany in at least the form of a partial organization.[10] Prior to the enactment of s. 129b Criminal Code members of a foreign criminal organization operating in Germany could only be prosecuted subject to the limiting condition in paragraph 129.[11] Section 129a was added to the Criminal Code in reaction to the terrorist attacks of the RAF in the 1970s. Its purpose is to protect "public safety" and the "order of the state" by declaring the planning stage as part of the illegal activity. This section has not been without controversy in recent years; the parliamentary factions of Bündnis '90/ Die Grünen[12] and the PDS[13] have both demanded its elimination. However, the introduction of section 129b of the Criminal Code can only be partially explained as a reaction to the attacks of September 11. Already in December of 1998, the EU member states placed themselves under an obligation to prosecute the participation in a

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[9] *See* legislative initiative of the government, Entwurf eines Strafrechtsänderungsgesetzes – paragraph 129b Criminal Code, BT-Drs. 14/7025 4 October 2001.

[10] *See* Federal High Court of Justice, decisions in criminal law, BGHSt 30, 328 (329).

[11] BT-Drs. 14/7025, p. 6.

[12] BT-Drs. 13/9460 of 11 December 1997. Endorsing this position: Rupert v. Plottnitz, section 129a StGB: Ein Symbol als ewiger Hoffnungsträger, *Zeitschrift für Rechtspolitik* 2002, p. 351.

[13] BT-Drs. 14/5832 of 5 April 2001.

criminal organization on EU territory, irrespective of the location at which the organization has its operational basis or where it perpetrates its criminal deeds.[14] Thus, the enactment of s. 129b Criminal Code was primarily motivated by the fight against cross border, regional terrorist activity in Europe (for example, the Basque region).

Another aspect of the "first security package" was to abandon the *Religionsprivileg* (religious privilege) in the *Vereinsgesetz* (statute concerning associations).[15] According to section 3 of the *Vereinsgesetz*, all associations can be prohibited if their goals contravene existing laws or the constitutional order or the spirit of understanding among the peoples of the world. This prohibition clause is an expression of the *Gesetzesvorbehalt* (limitation clause) of the constitutional right to form associations, as expressed in Art. 9 II *Grundgesetz* (German Basic Law). Pursuant to the so-called "religious privilege" under section 2 subsection 2 number 3 of the Vereinsgesetz, the provisions including the prohibition clause in section 3, are not applicable to religious communities and organizations, which promote the common cultivation of a faith. Prior to its amendment the statute thus did not allow for the prohibition of extremist religious communities. With the elimination of the "religious privilege" this is now possible. The amendment primarily intended to restrict extremist Islamic groups. Although this measure was taken on the occasion of the events of September 11th 2001 it was not primarily motivated by them. To abandon the "religious privilege" had previously been discussed in the context of specific cases in Germany, in which organizations used the observation of their faith as a cover for pursuing extremist goals. The elimination of the "religious privilege" passed into law on December 8, 2001.[16]

In addition, the "first security package" contained the announcement that airport security was to be enhanced by a mandatory security check of all airport personnel. Its legal implementation was the object of the "second security package."

The measures of the "first security package" can thus be seen in a chronological and political context, but not a material context with the attacks of 11 September 2001.

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[14] Reasoning, BT-Drs. 14/7025, p. 6.

[15] Legislative initiative of the federal government – Entwurf eines Gesetzes zur Änderung des Vereinsgesetzes, BT-Drs. 14/7026 of 4 October 2001.

[16] BGBI. I 2001, p. 3319.

II. The "second security package"

The "second security package" contains further regulations..[17] It consists of a so called *Artikelgesetz* (article law) that changes and amends several regulations in a number of different statutes. Nearly 100 regulations in 17 different statutes and 5 statutory orders were amended by the "article law". The term "package" is thus fitting. The "second security package" or "anti-terror package" embodies the answer to what is perceived as a global threat by Islamic terrorism. The purpose of the act is the early detection of terrorist activities by the security authorities. While the "first security package" focuses on repressive measures, the "second security package" emphasizes preventive protection. After less than an hour of debate in the second and third reading stage, the Act was passed into law on December 14, 2001; the second chamber followed suit on December 20. On January 1, 2002 the Act finally came into force.[18]

The main purpose of the new regulations was to increase the powers and to enlarge the range of activities of security authorities such as the *Bundesamt für Verfassungsschutz* (Federal Office of the Protection of the Constitution - *BfV*), the *Militärischer Abschirmdienst* (Military Counterespionage Service - *MAD*), the *Bundesnachrichtendienst* (Federal Intelligence Services – *BND*), and the *Bundeskriminalamt* (Federal Criminal Police Office – *BKA*). In addition, the exchange of data information between various authorities has been facilitated. Other important changes concern the *Ausländerrecht* (alien law) and the *Asylverfahrensrecht* (asylum rules).[19] The entry into Germany of perpetrators of terrorist activities is to be prevented, measures to secure identities with Visum procedure and border controls are to be improved, and the use of armed Air Marshals from the Federal Border Guard on German flights is made possible. Further, the law contains regulations for the security checks on personnel in defense or other necessary installations, to allow for the

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[17] Legislative initiative of the governing coalition of SPD and Bündnis 90/ Die Grünen – Entwurf eines Gesetzes zur Bekämpfung des Terrorismus (Terrorismusbekämpfungsgesetz), BT-Drs. 14/ 7386 (new) of 8 November 2001.

[18] BGBI. I 2002, p. 361. Critical assessments of the law by Helmuth Schulze-Fielitz, Rainer Hamm, *Innere Sicherheit: Terrorismusbekämpfung auf Kosten der Freiheit?*, *in* SICHERHEIT DURCH RECHT IN ZEITEN DER GLOBALISIERUNG 25, 45 (ADOLF ARNDT-KREIS ed., 2003); Martin Nolte, *Die Anti-Terror-Pakete im Lichte des Verfassungsrechts*, *in* DEUTSCHES VERWALTUNGSBLATT 573 (2002); Susanne Rublack, *Terrorismusbekämpfungsgesetz: Neue Befugnisse für die Sicherheitsbehörden*, *in* DATENSCHUTZ UND DATENSICHERHEIT 202 (2002); ERHARD DENNINGER, FREIHEIT DURCH SICHERHEIT? 96 (Strafverteidiger 2002); Manfred Baldus, *Präventive Wohnraumüberwachung durch Verfassungsschutzbehörden der Länder*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1289 (2003).

[19] Further information furnished by Dominik Bender, *Verpolizeilichung des Ausländerrechts? Die ausländerrechtlichen Maßnahmen des Gesetzgebers nach dem 11 Sept. 2001*, *in* KRITISCHE JUSTIZ 130 (2003).

inclusion of biometric features in identity cards in order to facilitate identity checks, and to allow for the redesign of the grid search through the inclusion of certain social information. The regulations concerning the tasks and powers of the security authorities have been limited to a five-year period. They will seize to be in effect on December 31, 2006, unless they are extended beyond this point by the legislature.

C. Constitutional means for the protection of freedom

The new legal rules have great impact on individual civil liberties. In what manner do they conflict with constitutional limits? Before I will focus on specific changes in existing statutes, that is to say more generally on the reformulation of security interests, I find it best to briefly summarize and explain the importance of the constitutionally guaranteed freedoms. That is the starting point from which I will proceed to examine the relationship between civil liberties and (national) security more closely.

I. The autonomy of the individual

Individual freedom is a constitutionally recognized superior good. The constitutional order serves the autonomy of the individual; at the same time, autonomy is a prerequisite for the constitutional order, since the constitution declares (autonomous) human beings to be the legitimating subjects of the constitution. The constitutional protection of freedom does not only aim at the protection of the individual, but also constitutes a command of the democratic constitutional order, which needs free individuals to form the democratic community. The protection of individual liberties thus not only supports individual development but also enhances democratic participation and hence the existence of a plural and open society. The constitution does not solely protect the autonomy of the individual out of respect for human individuality. Autonomy or individual freedom constitutes a prerequisite for a democratic polity. Further, it is a precondition for serving as a constitutional source of legitimation. The centrality of the individual human being the source of the entire legal system, as well as its addressee, is expressed in the first article of the German constitution, the Basic Law, which reads: "Human dignity is inviolable. To respect and protect it is the duty of all state authority." I highlight these rather fundamental aspects to indicate why for some time now, irrespective of the security statues, a process has begun that modifies the principal position of the individual in the constitution. I will discuss this in greater detail later in the paper.

II. Basic rights

The constitution protects individual liberties primarily through the basic rights which are intended to ensure the comprehensive protection of the individual. With

respect to the enactment of the so-called security statutes the following basic rights are of special relevance: Art. 10 Basic Law (concerning the secrecy of mail and telecommunications), Art. 2 I Basic Law (general freedom of action), Art. 2 I Basic Law (rights of informational self-determination) and Art. 16 Basic Law (the rights to asylum). The constitution does allow in principle for the statutory limitation of basic rights if the limitation can be justified in constitutional terms.[20] The basic rights are subject to a system of constitutional limitation-clauses ("legislation-reservation-clauses") that allow the legislatures to infringe on basic rights as long as the infringement can be justified within the terms of the limitation clause. In deciding whether the limitation of a right or freedom is justified a court will usually need to weigh and assess the competing values at stake through the use of the proportional test, the so-called *Abwägung*. Whether a limitation of a right or freedom is justified primarily depends upon whether or not the statutory limitation of the basic rights is proportional, i.e. whether or not the infringement is useful and necessary to achieve the desired objective, and whether it is in a deeper sense proportionate to the achievement of purpose (so-called proportionality-principle, *Verhältnismäßigkeitsgrundsatz*). The purpose has to be legitimate and must serve a higher legally protected right than the basic right that is protected in the concrete case. A few specific basic rights contain a *qualifizierte Gesetzesvorbehalte* ("qualified legislation-reservation–clause") requiring an increased level of justification. In deciding whether the limitation of a right or freedom is justified a court will usually need to weigh and assess the competing values at stake, e.g., a civil liberty of one individual is balanced against a conflicting civil liberty of a different individual. This weighing is meant to achieve an acceptable compromise between the competing constitutional positions concerned. Apart from conflicting basic rights, an infringement of a fundamental right can be justified not only by recourse to conflicting basic rights but also to predominant community rights, i.e. a common good. These rights do not necessarily have to be anchored in civil rights. Differing opinions exist as to whether the *grundgesetzliche Kompetenzvorschriften* (constitutional enumeration of powers) or the functioning of state institutions and organs are sufficient to legitimize and justify the limitation of fundamental rights.[21] However, it is

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[20] *See* Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35-37, 305, 366 (Durham 2d ed. 1996) (1989); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 20, 179-181, 194, 307-310 (1994); W. Cole Durham, *General Assessment of the Basic Law – An American View*, *in* GERMANY AND ITS BASIC LAW 37 (P. Kirchhof & D. Kommers eds., 1993); BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE STAARTSRECHT II para. 6 (16th ed. 2000); Peter Lerche,*Grundrechtsschranken*, in *Handbuch des Staatsrechts, Volume V* para. 122 (J. Issensee & P. Kirchhof eds., 1992); Konrad Hesse *Grundzüge des Verfassungsrechts der Bundesrepublic Deutschlands* para. 10 (20th ed. 1995).

[21] Authorized by the German federal constitutional court BVerfGE 69, (1); opposed by judges Mahrenholz and Böckenförde, German federal constitutional court BVerfGE 69, 57 (64): "If enumeration of legislative powers or organizations regulations that have been materially elevated are used as counter

generally accepted that while the rights that are to be reconciled have to possess constitutional status, they do not necessarily have to originate from basic rights.[22]

In the end, the protection of individual liberties is thus very much influenced by the terms of the limitation clauses contained in the constitution (i.e. the justification requirements, which the constitution has created for the infringement of basic rights,) and by the value that is assigned to the protected rights that are weighed against each other. The German constitutional dogma is characterized by a highly differentiated infringement and barrier system, which has led to a high standard of effective and comprehensive basic rights protection. At any rate, it is impossible to state (as a rule) that community rights -in general- trump individual liberties. The preeminence of either one can not be decided in general but has to be decided on a case to case basis in context with a specific constitutional question.

III. Recourse to the court and judicial review

Another instrument in the protection of liberties is the "legal protection guarantee" of Art. 19 IV Basic Law. While this article is – systematically- considered part of the basic rights and is generally understood as such, it deserves special mentioning with regard to the regulations stipulated in the "second security package." According to Art. 19 IV Basic Law every individual has the right to bring a suit to the courts if the individual's rights have been injured by public authorities.[23] An important exception is made for the secrecy of mail and telecommunications (Art. 19 IV 3, Art.10 II 2 Basic Law).[24] In such cases, in which the infringement of basic rights serves the protection of the liberal democratic order, the maintenance of the Federal State, its security or the security of any of the *Länder*, the empowering law can stipulate that the claim for judicial review is replaced by an examination of a parliamentary committee. A typical example of this is to be found in the area of the

positions in the weighing process, nearly all limitations imposed on basic rights can be legitimized in the framework of constitutional interpretation."

[22] German federal constitutional court BVerfGE 28, 243 (260): "Only the conflicting basic rights of third persons and other legal norms that enjoy constitutional rank can, in consideration of the unity of the constitution and the normative order supported through it, in exceptional cases limit even absolute basic rights in specific relations. Conflicts that arise in such a context can only be solved through an analysis of which constitutional condition enjoys more weight in the consideration of the question at hand. The weaker norm is only allowed to be pushed back to such a degree as is logical and systematically necessary; its factual context has to be respected."

[23] See Eberhard Schmidt-Aßmann, *Kommentierung von Artikel 19 Absatz 4 GG*, *in* T. MAUNZ/G. DÜRIG GRUNDGESETZ (24th ed. 1985).

[24] See Christoph Gusy, *Kommentierung von Artikel 10, Rdnr. 92-99*, *in* I GRUNDGESETZ (H.v. Mangold et al. eds., 4th ed. 1999).

intelligence services. In addition, the infringement does not have to be brought to the attention of the individual concerned, i.e. the individual will be unaware that his or her telephone communications were under surveillance. As a consequence, he or she cannot apply for judicial review of the action or decision in question.[25] The parliamentary commission which has been established under Art.10 II 2 Basic Law assumes a supervisory function in order to compensate for the loss of control of the courts and the individual; it is meant to ensure effective control while also guaranteeing secrecy.

IV. Separation of powers

The constitution protects individual liberties primarily through the basic rights, as well as through the horizontal and vertical separation of powers, i.e. the separation of powers on the federal level and between the Federal State and the *Länder*. In contrast to the United States, the implementation of federal law is in principle the task of the *Länder*. Federal administration is only allowed in a few, constitutionally determined exceptions. The division of public authority between the Federal State and the *Länder* serves the protection of freedom. It is meant to prevent that jurisdiction and competences are concentrated on one level.

An example of this kind of liberty securing measure is the separation between the intelligence services on the one hand, and the prosecuting authorities on the other. Criminal prosecution and the police powers are the responsibility of the *Länder*; the federal level does not have jurisdiction in these areas. In Art. 73 I Nr. 10, Art. 87 I 2 Basic Law the federal level is only given the authority to regulate the cooperation between the federal level and the *Länder* in the areas of criminal police and the protection of the constitution. The separation of intelligence services and criminal prosecution is not only to be understood on an organizational level. It also prevents that the authorities responsible for the protection of the constitution hold police powers.[26] This is meant to prevent that a centralization and accumulation of powers at the federal level would lead to an infringement by federal authorities on the jurisdiction of the *Länder* in areas such as defense against dangers (police powers) and criminal prosecution. Likewise the creation of an *Reichssicherheitshauptamt* (imperial security authority) is to be constitutionally prevented. The German federal

[25] *See* BVerfGE 100, 313 (361, 364): Article 10 of the constitution arranges for a claim to be informed about surveillance within the framework of effective constitutional protection. This cannot be limited to the judicial protection of the law as expressed in article 19, section 4 of the Basic Law. Even the notification requirements underlie the legal conditions of article 10, section 2, sentence 2 of the Basic Law.

[26] Erhard Denniger, *Die Trennung von Verfassungsschutz und Polizei*, *in* ZEITSCHRIFT FÜR RECHTSPOLITIK 231 (1981); Christoph Gusy, *Das verfassungsrechtliche Gebot der Trennung von Polizei und Nachrichtendiensten*, *in* ZEITSCHRIFT FÜR RECHTSPOLITIK 45 (1987).

constitutional court has stated that the central authorities cannot be combined with an implementing police force for the purposes of protection of the constitution and the intelligence services.[27] According to the German federal constitutional court, the separation of powers is founded on the *Rechtsstaat* (rule of law), federalism and the protection of the basic rights.[28]

The protection of freedom is guaranteed in the constitution through substantive safeguards (basic rights), through procedural safeguards (recourse to the courts) and through organizational and jurisdictional safeguards (enumerated powers on the federal level, separation of powers). Furthermore, the constitution emphasizes the central role of the individual within the constitutional order, being the source and end of the entire system of law. To enhance individual autonomy and freedom is the prime responsibility of the constitutional state.

D. Limits on freedom through the "counter-terrorism law"

The counter-terrorism law (second security package), which came into effect on January 1, 2002, impacts on the protection of freedom on all four previously discussed levels.[29] The new law includes regulations that severely infringe upon basic rights, it affects judicial review, the recourse to the courts and it alters the organizational and jurisdictional safeguards. Most problematic are fundamental changes in the position of the individual as an autonomous liberal being.

I. Basic rights infringements

Several new infringements upon basic rights have been created. The *Bundesamt für Verfassungsschutz* (Federal Office for the Protection of the Constitution - *BfV*) and the *Bundesnachrichtendienst – BND* (Federal Intelligence Service – *BND*) have been given the competence to demand information about accounts and account holders from banks and other financial institution.[30] In addition they can request informa-

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[27] BVerfGE 97, 198 (217).

[28] Apart from German federal constitutional court BVerfGE 97, 198; *See also* BVerfGE 30, 1 (17); BVerfGE 67, 157 (178, 181); BVerfGE 100, 313 (358).

[29] Critical assessments by: Thomas Groß, *Terrorbekämpfung und Grundrechte. Zur Operationalisierung des Verhältnismäßigkeitsgrundsatzes*, *in* KRITISCHE JUSTIZ 1, 8 (2002); Erhard Denninger, *Freiheit durch Sicherheit*, *in* STRAFVERTEIDIGER 96 (2002); Jutta Limbach, *supra* note 4, at 8-10; Burkhard Hirsch, Der attackierte Rechtsstaat. Bürgerrechte und „innere Sicherheit" nach dem 11. September, 159 *vorgänge* 5 (2002), Heinz Düx, Globale Sicherheitsgesetze und weltweite Erosion von Grundrechten, *Zeitschrift für Rechtspolitik* 2003, 189.

[30] Counter-terrorism law, Art. 1 BVerfSchG; Art. 2 MADG; Art. 3 BNDG; Art. 10 BKAG.

tion from the post office, telecommunications and airline companies in order to gather information about the financial flows, account movements and communication paths of various groupings. According to the new regulations, banks and airline companies are required to present detailed information about their customers to the BfV and the BND without compensation. The customers in question cannot be informed about these requests in order to prevent investigations from being compromised.

In accordance with the limitation clause contained in Art.10 Basic Law, which ensures the protection of post and telecommunication traffic, as well as in Art. 2 I Basic Law, which protects the general freedom of action, BFV and BND are empowered to request personal data. Despite the right to informational self determination such data may be stored. Thus, several statutory limitations of basic rights are created that need a constitutional justification.

Similar infringements upon basic rights follow from the enlarged competences granted to the *Militärischer Abschirmdienst* (Military Counterespionage Service – *MAD*) and the *Bundesnachrichtendienst* (Federal Intelligence Service – *BND*), which is the branch of the intelligence services that is responsible for foreign intelligence gathering. The MAD is concerned with the gathering and analyses of data collected about members of the federal army and the department of the defense within the context of whether these people are participating in acts, which run counter to international understanding and the peaceful cohabitation of peoples. The new regulations also empower the MAD to gather information from telecommunications and telephone services. The basic right as expressed in Art. 10 Basic Law (the secrecy of mail and telecommunications) is affected. The BND is given the same competences as the BfV. This is meant to enable the BND to examine the cash flow of persons that reside in a foreign country using German bank accounts.

These intrusions into civil liberties also affect persons that while living in a foreign country are nevertheless entitled to the protection granted in Art. 2 and Art. 10 Basic Law.

II. Judicial review and recourse to the courts

The secrecy surrounding these various data gathering activities not only constitutes an infringement upon basic rights but also limits the scope of the legal protection granted in Art. 19 IV Basic Law. Because of the exception mentioned in Art. 10 II 2 Basic Law, the gathering of data and information in the telephone services is not placed under judicial control but rather under the scrutiny of a parliamentary

committee and the so-called G 10 commission, (named after the "article 10 law").[31] The parliamentary committee will be informed about measures limiting the secrecy of mail and telephone communications and has to annually report to parliament about the enforcement as well as the scope and method of these measures. Limitations on international communications (for example, automatic telephone surveillance with certain search terms) require the permission of the committee.

In addition there is, as has been mentioned above, the G 10 commission. It consists of four members of parliament, which have been selected by the parliamentary committee. The commission decides about the legitimacy and necessity of these measures, on the basis of both the commission's constitutional function and individual complaints. The commission has to be informed about any limiting measures taken. The two committees are intended to ensure an independent review of surveillance measures. As such they are a replacement for the constitutionally guaranteed judicial review. But since the surveillance measures are not known by those affected by it, their control function remains hidden as well and is made public only through their annual report. As such the control function while internally tied to specific cases, externally remains anonymous and offers the public only a very abstract picture of the measures taken. The controls guaranteed in the "article 10 law" thus take the place of judicial review, not without modifying it considerably. People under surveillance are not informed and thus cannot protest against the measures but have to trust that the parliamentary committees will objectively examine their case.

The enlarged competences in information gathering in the area of telephone communications affect those under surveillance not only substantively but also change their procedural rights, especially the possibility of recourse to the courts. A factually limited area of regulation is passed to a special control regime and thus removed from regular constitutional control mechanisms. Therefore, it is important that the area subject to these exemptions remains small and tied to conditions, which are precisely predetermined.[32] As a corollary to the enlarged competences of the security authorities, recourse to the courts is limited.

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[31] Paras. 14, 15 of the law dealing with the limitations on secrecy of letter, mail and telephone communications, in the version from June 26, 2001, BGBl I S.1254–2298. The earlier version of this law contained these provisions in article 9. For more information on these regulations, see Christoph Gusy, *Der Schutz vor Überwachungsmaßnahmen nach dem G-10*, *in* NEUE JURISTISCHE WOCHENSCHRIFT 1581 (1981); Kay Waechter, *Geheimdienstkontrolle – erfolglos, folgenlos, umsonst?*, *in* JURA 520 (1991).

[32] See the restrictive interpretation of article 10, section 2 of the constitution through the German federal constitutional court BVerfGE 30, 1 (17); The interpretation of Art. 8, European Convention of Human Rights in the verdict of the European High Court of Human Rights in NEUE JURISTISCHE WOCHENSCHRIFT 1755 (1979).

Importantly, the new law requires the intelligence services to report to the parliamentary committee, which needs the transfer of data and facts on the specific cases in order to fulfill its monitoring function. However, the "counter-terrorism law" does not require that the committee be informed in all cases.[33] There are certain areas, which remain outside the parliamentary control simply because of the lack of knowledge about the amount and kind of surveillances taking place. The elimination of the parliamentary committee from the control function might be explained by the fear that secrets could be leaked by the members of parliament. In these cases it is the G-10 commission alone that maintains the monitoring function. In general, though, oversight through a system of law comes at the cost of a certain amount of publicity. The new regulations thus create an area of infringements upon basic rights that the public remains unaware of.

III. Separation of powers and the organization of public agencies

Moreover, civil liberties are limited by new regulations concerning organizational competences. A number of new regulations are worth mentioning.

The federal agency for the protection of the constitution *(Bundesamt für Verfassungsschutz - BfV)* has been entrusted with the responsibility to observe attempts to disturb the international understanding or the peaceful cohabitation of peoples. Up to now, the responsibilities of the BfV were limited to the domestic setting according to section 3 of the relevant statute (BVerfSchG). The redesigned regulations no longer include the domestic limit, which enlarges the jurisdiction of the BfV and allows it to engage in investigations not limited to the actual area of concern. The new responsibilities and competences have recreated the BfV as an independent investigative authority. It is becoming increasingly difficult to differentiate between purely preventative measures of investigation and repressive criminal prosecution. This leads to a relativization of the protection of individual rights.

The freedom protecting aspect of the horizontal and vertical separation of powers is dispensed with under the new regulations of the security inspection law, *Sicherheitsüberprüfungsgesetz* (SÜG).[34] The law requires that all personnel that works in defense related or other vital institutions have to submit to a security check. This, from now on, includes airport personnel, i.e. people that work in an area that is characterized by a high fluctuation of workers with predominantly low qualifications and payment. So far, only bearers of secrets had to undergo security checks; the checks were based on an annex to the special federal competences of the secu-

[33] *See* para. 8, sections 6, 8; and para. 9, section 4, BVerfSchG.

[34] Counter-terrorism law, article 5 (SÜG).

rity authorities. The federal authorities, however, lack the legislative competences to remodel security checks into a preventive instrument of defense against threats, since the *Länder* hold the jurisdiction in this regard.

IV. The de-individualization in the law of security

Finally, the new regulations also touch upon an area of individual liberties that can hardly be anchored in the constitution. According to established police and security law a person who causes a danger by the way in which he or she behaves (or is in control of an object from which a danger arises), is responsible. The existence (or reasonable presumption) of a danger is a prerequisite for police intervention. Duties can only be placed on those persons that through their own behavior cause the implementation of defensive measures. Responsibility thus has to be individualized. He or she has to be distinguishable from society as a whole by his or her deeds, through his or her own actions. He or she has to have caused potential danger. Only in this case a duty to act can be placed upon him or her. Otherwise her or she would not be the appropriate addressee of security measures; since, how is a person to behave, how can a person do his or her part in averting a menacing threat if there is no specific capability that distinguishes him or her from anybody else?

1. Police controls without suspicion

In recent years, the police law doctrine of individual liability has slowly been abrogated in favor of new security laws which empower the police to control people without prior suspicion *(Schleierfahndung)*.[35] According to these laws, any person can be subjected to an identity establishing inspection by the police of the *Länder* or the Federal Border Guard while traveling in trains or at airports and train stations and in some instances also within a 30- kilometer radius of the federal borders. These regulations represent a reaction of the lawmakers on the federal and *Länder* level to the opening of the borders. They were intended to compensate for the loss of border controls by enlarging the competences for domestic control within the borders. The *Polizeipflicht* (police duty) is directed towards individuals and can easily be fulfilled by the presentation of valid identification papers. Nevertheless, these new police competences constitute a problem for individual freedom: Police controls without prior suspicion address the individual who has not given any reason for the control by his or her behavior. The individual to be controlled has neither caused a danger, nor given a reason for suspicions to arise. The citizen cannot contribute to the elimination or prevention of danger through his or her ab-

[35] Concerning the Federal Border Guard, see para. 22, section 1a and para. 23, section 1, No. 2, 3 BGSG. Similar regulations can be found in the police law of the various *Länder*.

sence,[36] since his or her presence at the train station or within a 30 kilometer range from the border is as such without danger. The new police controls' purpose is the fight against cross border crimes. The defense against a diffuse criminal environment is directed toward the individual who himself cannot contribute to the defense. The individual does not hold responsibility as a single person, rather as a member of society, which exists in general at certain places or close to the federal borders. The person in question is not addressed as an individual human being to whom individual responsibility can be assigned. Rather, the person is perceived as an exchangeable member of society whose presence at certain locations is deemed potentially dangerous. The individual is neither actor nor disturber of the status quo; his responsibility derives from being part of the general public. As yet, police law did not know such competences for interference.[37]

The same regulatory technique of controls without prior suspicion, which possibly affects anybody's civil liberties regardless of his or her behavior, were used in the "combat against crime law" from October 28, 1994.[38] This statute enabled the BND to observe the international radio telephone traffic without prior concrete suspicion in order to learn about the planning or implementation of certain offences in time to prevent them. This also constituted intrusions into the telephone traffic without prior suspicion. A grid search with specific search terms is intended to individualize the threat. Similar to the presence near the federal borders, the use of telephones is here seen as a potentially threatening behavior, which in principle needs to be observed. In a lengthy, new decision the German federal constitutional court did not close the door on the possibility of such controls without suspicion, but it mentioned a number of conditions that need to be fulfilled. The court placed high justification demands on the usage of the gained data, less on the gathering of the data itself. [39]

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[36] This constitutes the difference with the so-called 'dangerous places,' such as areas heavily frequented by drug users and dealers, at which even prior to the introduction of the new regulations police inspections were possible without individually raised suspicions. The mere presence at such locations constitute the suspicion.

[37] See the critical analysis of Hans Lisken, *supra* note 6; Christoph Möllers, *supra* note 6. The constitutionality of such state laws was decided differently by *Länder* Constitutional Courts. It was partially denied in Mecklenburg-Vorpommern, *see* LVerfG M-V, *Deutsches Verwaltungsblatt* 2000, 262 (with the comment by Christoph Möllers); *Thüringer Verwaltungsblätter* 41 (2000); approved in Bavaria, *see* BayVerfGH, *Bayerische Verwaltungsblätter* 545, 560 (2003) (with the comment by Hans-Detlef Horn).

[38] BGBl. I S. 3186; *See also* Jürgen Seifert, *Die elektronische Aufklärung des Bundesnachrichtendienstes (BND), in Pflicht und Verantwortung. Festschrift für Claus Arndt* 175 (Bernd M. Kraske ed. 2002).

[39] German federal constitutional court BVerfGE 100, 313 (358) (14.7.1999). On this decision, see Claus Arndt, *Zum Abhörurteil des BVerfG*, *in* NEUE JURISTISCHE WOCHENSCHRIFT 47 (2000); Bertold Huber, *Post aus Pullach – Das G 10-Urteil des BVerfG*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 393 (2000).

2. Biometric data

This trend proceeds with enlarged competences for the *Bundesgrenzschutz* (Federal Border Guard – *BGS*) .[40] The area of operation for the BGS is extended in coastal areas from 30 to 50 kilometers and now also includes airplanes. Officers for the BGS are now allowed to travel as so-called "Sky Marshals" on board German airplanes, having the authority of controlling identification papers. Within this context is the intention[41] to include biometric features (such as fingerprints and DNA information) in passports and to codify the data to such an extent that it can not be decoded by the owner of the passport. This is meant to increase the forgery proof nature of passports and to simplify the identification procedure.

This proposal has been removed from the law package after parliamentary consideration and has not been passed into law yet. According to the new proposal, a further biometric characteristic besides photo and signature may be included in passports. The details for this change are left to a special federal law. Up to now the gathering of biometric data was seen as a *erkennungsdienstliche Maßnahme* (police records measure) within the context of criminal prosecution. This measure was triggered through an individual action (a suspect in a criminal trial, an important witness). An individualization, however, would have been missing in the new passport law. If every German has to be biometrically registered, then this constitutes a general suspicion against everybody. The individual (similar to the police controls) is not seen as an individual that has raised suspicions through his or her actions, but rather as part of an abstractly dangerous society. Thus, human behavior in general is considered suspicious, leaving the individual helpless to prevent this perception.

3. Grid search

The same problem emerges, even more radically, in the context of amendments to the "code of social law" *(Sozialgesetzbuch SGB X)*.[42] The *Sozialversicherungsträger* (social security agencies) are required to pass all information to the security authorities, in so far as this information is necessary to perform a grid search, which is admissible either under federal or *Länder* law. Again, individual persons are not selected due to their behavior; rather they have been associated with certain societal groups on the basis of gathered data.

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[40] Counter-terrorism law, Art. 6 BGSG.

[41] Counter-terrorism law, Art. 7 PassG; Art. 8 (passport law).

[42] Counter-terrorism law, Art. 18.

Some legal aspects of the new grid search have already been examined by various courts.[43] A general suspicion, based solely upon one's nationality or membership in specific religious communities, was held to be unconstitutional.[44] In North Rhine Westphalia all residents' registration offices, universities, technical schools and the central registration office for foreigners were required to pass on data on all male individuals born between the years of 1960 and 1983 to police headquarters in Düsseldorf. The court of appeal in Düsseldorf held that, in search of so-called "sleepers" of Islamic terror organizations, the circle of persons that has to submit to a grid search has to be definable and restricted. Only personal data of citizens of suspicious countries or of a specific religious group (e.g. Muslim persons) are allowed to be passed on, not data of German citizens, that are neither Muslim nor born in a suspicious country.[45]

4. Laws governing Aliens

Further changes were made in the areas of *Vereinsrecht* (association law) and especially *Ausländerrecht* (alien law) and *Asylverfahrensrecht* (asylum law). Alien and asylum law are the areas of law that have experienced the most changes. The new rules provide enlarged identification and data exchange possibilities, new grounds to repeal residence permits and new grounds for deportation. These measures had been discussed in legal and political forums for some time; as such they cannot be seen to be a direct consequence of the September 11 attacks. However, these measures use the same idea of de-individualizing responsibilities, which has been explored more thoroughly above. Foreigners who want to travel to Germany face a general suspicion of being dangerous. Only by undergoing the security check such a suspicion can be rebutted on a case to case basis.

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[43] OVG BREMEN, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1530 (2002); OVG Koblenz, *op. cit*., 1528; VG HAMBURG, DATENSCHUTZ UND DATENSICHERHEIT 370 (2002); VG Mainz, *op.cit*. 303. For a critical discussion of these and further decisions, see Christoph Gusy, *Ratserfahndung nach Polizeirecht?*, *in* KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG 474, 479-481, 488-491 (2002). Further critical accounts: Rolf Gössner, Computergestützter Generalverdacht, 159 *vorgänge* 41 (2002); Hans Lisken, *Zur polizeilichen Rasterfahndung*, *in* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 490 (2002); Wilhelm Achelpöhler & Holger Niehaus, *Rasterfahndung als Mittel zur Verhinderung von Anschlägen islamischer Terroristen in Deutschland*, *in* DIE ÖFFENTLICHE VERWALTUNG 49 (2003). Positively assessed by Winfried Bausback, *Rasterfahndung als Mittel der vorbeugenden Verbrechensbekämpfung*, *in* BAYERISCHE VERWALTUNGSBLÄTTER 713, 7127-722 (2002); Hans-Detlef Horn, *Vorbeugende Rasterfahndung und informationelle Selbstbestimmung*, *in* DIE ÖFFENTLICHE VERWALTUNG 746, 752 (2003).

[44] Decisions of LG Wiesbaden, *Datenschutz und Datensicherheit* 240 (2002); LG Berlin, *op. cit*., 175.

[45] Decisions of OLG Düsseldorf, *Neue Zeitschrift für Verwaltungsrecht* 629 (2002), with different reasoning OLG Frankfurt, *op. cit*., 626-627.

E. On the development of balancing freedom and security

As outlined at the beginning, September 11, 2001 was perceived as an expression of a novel dimension of terrorism – i.e. as de-individualized terror of global networks. As a consequence numerous legal measures were taken, leading to the infringement of a number of civil liberties. Do these measures merely represent a quantitative increase in the number of fundamental rights violations or does this development herald a qualitative change in the relationship of freedom and security? In other words: Does the new perception of terrorism mirror a principle change in the adjustment of freedom and security?

I. The de-individualization of freedom

The constitutionally most delicate development is the new form of de-individualization of liability, which no longer treats the individual person as an individual but rather as an exchangeable element in a principally dangerous environment.[46] The individual is no longer perceived as a principally law abiding citizen, rather as a potential threat.[47] Behind this new understanding lies a change in the perception of human nature. This change is the decisive factor in the reorganization and justification of the new security competences. The modified idea of man, i.e. human beings seen as interchangeable, de-individualized elements of society, voids the constitution of its control mechanisms concerning basic rights.

In this aspect one can find a manifestation of a fundamental development in the relationship between freedom and security. While the first counter-terrorism laws from the 1970s still addressed individual threats, with the result that the measures were targeted at certain circles; the connection between individualizable dangers and individually attributable measures has lessened in later years. Meanwhile, the change in perception has consolidated: The danger is no longer regarded as emanating from individual culprits, rather from a diffuse level of threat that has to be

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[46] For a critical assessment of a general development of de-individualisation in the legal system, especially triggered by new forms of risk regulation, see Oliver Lepsius, *Risikosteuerung durch Verwaltungsrecht*, *in* 63 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 264, 283-290 (2004); Erhard Denninger, *Vom Rechtsstaat zum Präventionsstaat?*, *in* SICHERHEIT DURCH RECHT IN ZEITEN DER GLOBALISIERUNG 9 (Adolf-Arndt-Kreis ed., 2003); Dieter Grimm, *Verfassungsrechtliche Anmerkungen zum Thema Prävention*, *in* DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG 197, 218 (1991).

[47] The development is characterized by ERHARD DENNINGER & FREIHEIT DURCH SICHERHEIT, KRITISCHE JUSTIZ 467, 472 (2002). Because risks prevail everywhere, dangerous circumstances become the standard. A situation without danger then remains an exceptional state under a particular burden of proof.

dealt with by way of preventive measures.[48] The dissociation of danger and individual acts has negative consequences for individual freedom.[49] It is no longer individual civil liberties that have to be balanced against individual infringements on basic rights. Now the focus is on collective security interests, which are weighed against collective rights of the society. The weighing ratio has shifted away from the weighing of individual, subjective-legal positions to a weighing of objective-legal perspectives. Individual rights are replaced by collective interests.

Individual freedom in this constellation is no longer individually protected; its protection now merely represents a reflex of the liberty of society. The individual is part of society and shares its liberal status. Since the freedom of society is threatened, the individual has to accept possible limitations on his or her individual liberties, if they serve the purpose of securing societal freedom. The protection of freedom no longer means the protection of the individual, rather a protection of society, in which the individual can participate. His or her specific individual interests, which might not be generally recognized in society, are no longer sufficiently protected. Individual freedom has become a freedom subject to society purposes.

The relationship between security and freedom has thus been fundamentally altered. But this change has not been triggered by the events of September 11, 2001, rather they are part of a continuous development that was merely catalyzed yet not caused by the latest terrorist acts.

II. Affirmative duties ("Duties of protection" Schutzpflichten)

This de-individualization or collectivization of rights and the accompanying loss of subjective-legal rights can also be seen in the constitutional justification for the statutory limitation of basic rights. As previously explained,[50] the basic rights are limited by constitutionally enshrined "limitation-clauses" (legislation-reservation-clauses) that can justify infringements upon said rights. For a violation to be justified within the terms of the limitation-clause, the infringement must serve a good that enjoys a higher legal status than the right infringed. Furthermore, the violation

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[48] How diffuse threats lead to a loss of legal standards is analyzed by WOLFGANG HOFFMANN-RIEM & FREIHEIT UND SICHERHEIT IM ANGESICHT TERRORISTISCHER ANSCHLÄGE, ZEITSCHRIFT FÜR RECHTSPOLITIK 497, (2002).

[49] *See* Lepsius, *supra* note 46, 264, 293; DIETER KUGELMANN & DER POLIZEILICHE GEFAHRENBEGRIFF IN GEFAHR? DIE ÖFFENTLICHE VERWALTUNG 781, 783 (2003); KAY WAECHTER & ZUR AKTUELLEN SITUATION DES POLIZEIRECHTS, JURISTENZEITUNG 854, 857 (2002); HANS-HEINRICH TRUTE, DIE EROSION DES KLASSISCHEN POLIZEIRECHTS DURCH DIE POLIZEILICHE INFORMATIONSVORSORGE, FESTSCHRIFT JEAND'HEUR 403, 406-412 (1999); DIETER NEUMANN, VORSORGE UND VERHÄLTNISMÄßIGKEIT 18-30 (1994).

[50] *supra* C. II.

of a basic right must not be disproportionate. Since the enactment of counter-terrorist laws in the 1970ies a particular constitutional theoretical construction has been used in order to justify basic rights infringements, i.e. the so-called *Schutzpflichten* ("duties of protection"). In 1975 the German federal constitutional court decided in its first abortion that Art. 2 in combination with Art. 1 I 2 Basic Law declare a comprehensive duty of the state, that each human life has to be protected, especially from illegal interference by others.[51] With the help of this duty to protect human life, a basic right equal to the right for freedom was created, which could be used in the judicial balancing process. Statutory limitations of basic rights could now not only be justified with colliding interests concerning freedom, but also with a constitutional "duty of protection", which separated itself from individual civil liberties and weighed in on the side of the state. The state was given a duty based on basic rights to protect the legal good of life. This led to a transformation of basic rights, changing from individual rights to collective duties. Moreover, they were supplemented with so-called "objective-legal" functions.[52] With the help of the "duties of protection" it was now possible to place non-individualized legally protected goods on the same level with individual civil liberties and balance them against each other. The German federal constitutional court used this justification nearly immediately to uphold the anti-terrorist *Kontaktsperregesetz* (prohibition of contact law) in 1978.[53] The "general-abstract" protection against terrorist attacks could be used as justifications for "individual-concrete" infringements upon basic rights, in this case the procedural rights of the accused and their legal council. The "duties of protection" have been reinterpreted from their "subjective-legal" origin to an "objective-legal" principle.[54]

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[51] German Federal Constitutional Court, 39 BVerfGE 1.

[52] *See* HORST DREIER, DIMENSIONEN DER GRUNDRECHTE (1993); Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen, in* STAAT, VERFASSUNG, DEMOCRATIE, 159 (1991); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 880-882 (1986); W. Cole Durham, *supra* note. 20 at 45; The German approach is fundamentally more sympathetic to a conception in which the state plays a role in facilitating the actualization of freedom. Rather than being the key power that needs to be constrained if liberty is to be preserved, the state is seen as the vehicle for achieving freedom.

[53] German Federal Constitutional Court 49 BVerfGE 24, at 53.

[54] The development of the affirmative duties has led to a lasting scientific debate. The duties are partially accounted for by subjective legal reasoning and partially by objective legal reasoning. *See* Josef Isensee, *Das Grundrecht als Abwehrrecht und als Staatliche Schutzpflicht, in* HANDBUCH DES STAATSRECHTS, BAND V(J. Isensee & P. Kirchhof ed., 1992); GEORGE HERMES, DAS GRUNDRECHT AUF SCHUTZ VON LEBEN UND GESUNDHEIT: SCHUTZPFLICHT UND SCHUTZANSPRUCH AUS ARTIKEL 2 ABSATZ 2 GG (1987); Christoph Enders, *Die Privatisierung des Öffentlichen durch die grundrechtlichen Schutzpflichten und seine Rekonstruktion aus der Lehre von den Staatszwecken, in* 35 DER STAAT 351 (1996); Rainer Wahl/ Ivo Appel Prävention und Vorsorge. Von der Staatsaufgabe zur rechtlichen Ausgestaltung, in Rainer Wahl (ed.) *Prävention und Vorsorge* 1 (1995); Peter Unruh *Zur Dogmatik der grundrechtlichen Schutzpflichten*, 1996.

The development of the "protection duties" is of central importance for the extended justification of basic rights infringements. Individual liberties tend to be overridden by collective duties when balanced against each other. This is particularly the case when these duties are meant to serve the protection of life.. Affirmative duties lead in principle to a disequilibrium in the balancing process.[55] The collective interest in being protected is not matched by a collective interest in not being interfered with one's civil liberties. Civil liberties presuppose the functioning of the legal system. They cannot be thought of in a purely negative sense but assume that laws shape and promote freedom. This is why the doctrine of "duties of protection" threatens to level civil liberties. As a consequence, the weighing process now contains positive and negative components of freedom in general rather than subjective rights. "Duties of protection" shift the balance in the weighing process from positions of individual basic rights to systematic constitutional decisions. The weighing does no longer take place between individually ascribable rights but rather between public interests. The protection duties thus not only foster a certain de-individualization, they also support a certain de-legalization of the dogma of basic rights.

III. The balancing of public interests and individual rights

The de-legalization and de-individualization can be exemplified with the previously mentioned ruling of the German federal constitutional court concerning the control over international non-service related telephone traffic.[56] This decision represents the current perception of the way in which constitutionally guaranteed freedoms are balanced against international security interests. Thus it constitutes the current guideline for the new measures taken after September 2001. For these reasons, I will briefly discuss this judgment.

There is no doubt that the new competences of the BND contained in the *Verbrechenbekämpfungsgesetz* (anti-crime law) of 1994 violates the secrecy of telecommunications.. According to the basic rights approach illustrated above, the infringements can be justified under Art. 10 II 2 Basic Law, as long as the "anti –crime law" passes the proportionality test, i.e. has a purpose that serves a higher legally protected common good and is proportionate in the pursuit of said purpose.

Whereas in previous years the justifying objective of a statute had to be constitutionally established in a rather time-consuming and complicated manner (via basic

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[55] *See* Peter Preu, *Freiheitsgefährdung durch die Lehre von den grundrechtlichen Schutzpflichten, in* JURISTENZEITUNG 265 (1991).

[56] German, Federal Constitutional Court 100 BVerfGE 313 (1999), *see supra* D. IV.

rights, "duties of protection" or competencies), the German federal constitutional court, in its latest decision upon this matter, on July 14, 1999 simply stated without further justification that the legislative measures pursued a constitutionally anchored objective. Security seems to have become a self- evident public interest that does not need a normative, constitutionally rooted justification. Its legitimacy is presupposed and security is presented as a legitimate purpose.

This decision considerably affects the relationship between freedom and security. According to this reasoning, two unequal goods face off against each other during the balancing process. On the one hand there is a subjective right, e.g, the secrecy of telephone communications, on the other hand there is an objective interest, e.g., the protection against the danger of armed attacks or international terrorism. The weighing of civil liberties no longer faces legally developed or justification requiring interests. In its judgment the German federal constitutional court put it as follows:[57] "In the new areas of surveillance dangers have risen because of the increase in internationally organized crime, especially in the area of illegal arms dealing and drug smuggling or money laundering. Even if these activities cannot be seen as equal to an armed attack, nevertheless, the security interests of the Federal Republic are severely affected. The dangers in the marked areas are not a distant possibility. In the area of proliferation the federal government has brought forth sufficient and well-known examples for the presence of these dangers. These dangers, which primarily originate abroad and which are to be detected with the help of the competences in question, carry great weight."

The justifying purpose is supported by a factual understanding only. Apparently, the court considered a normative anchoring of the regulations unnecessary. The aspect of "security" has become independent as an objective fact. One can no longer speak of the "weighing" of two legally protected rights. The relationship between freedom and security now represents a disproportionality of normative and empirical (factual) aspects. This does not mean that security concerns could not possibly be based on some normative justification. By not even attempting to put forward normative arguments, "security" cannot be understood in a normative sense and thus becomes (normatively) untouchable. Security purposes are no longer subject of normative justifications based on the constitution, rather they enter into the weighing process as self evident fact; this no longer allows for the common constitutional "balancing-principles" to function. Facts cannot be balanced. Constitutional control in a legal sense has to transform itself into a political control, since the

[57] German Federal Constitutional Court 100 BVerfGE 313 (1999), at 382.

relevant criteria are no longer based on the supremacy of law but on factual conditions.[58]

F. Can security be balanced at all?

As outlined above, all three developments in the balancing of security and freedom point in the same direction: the balancing process has become one-sided. Security concerns tend to override civil liberties. Legally this result is fostered by 1) the creation of de-individualized duties which do not fit into the system of individual civil liberties, 2) basic rights being enriched with an objective component, i.e. "protection duties", leading to a predetermined inferiority of individual rights vis-à-vis collective rights, and 3) by dispensing with a normative justification for security objectives. The weighing of freedom and security tends to work in favor of the latter because individual civil liberties 1) no longer constitute a relevant legal position within the balancing process, 2) can be leveled with "protection duties", and 3) find themselves in a situation of disproportionality where factual (empirical) evidence overrides normative validity.

A particular problem associated with the balancing of security and freedom lies in the fact that in contrast to the quite precisely defined civil liberties, the public good of security is rather diffuse and non-determined. Thus, security does not constitute a weighable position. Security cannot be positively, but only negatively defined in the sense of defense against dangers. Therefore, the definition of said dangers, including their individual assignment, is important. In the case of international terrorism this is no longer possible. Dangers can no longer be individualized; they arise from transnational organizations and networks.

If security, as has been illustrated in recent cases, is primarily considered as a collective good, security no longer represents an "individualizable" obligation or right of legal subjects. If, however, security does not convey subjective rights or duties, it ceases to be a *Rechtsgut* (legal good). Security has changed from being a "legal good" to a *Staatsaufgabe* (state purpose), which allows for basic rights infringements in a rather undefined dimension. Based on this reasoning security no longer constitutes a weighable position. To speak of "balancing" freedom against security is thus misleading. Security has become ambiguous in its meaning: As an empowering objective security constitutes a so-called "state purpose", as a legal term it describes - in its respective definition - a legal good.

[58] 100 BVerfGE 313, at 360, 372.

But this double meaning has to be strictly separated: the positive *Staatsaufgabe* (state purpose) of security must not be exchanged with the negative legally protected right of defense against danger. Otherwise the different levels get confused. This might either lead to security demands the state is not able to fulfill or indicate the failure of the legal system. As such it is important that in the political legal debate as well as in constitutional argumentation, security is understood as a "state purpose". To declare security to be the objective of the legal system is just as plausible as to declare justice to be its goal. Just as justice is not a weighable concern in legal system, neither is security. The system of law in its entirety serves the pursuit of justice as well as security. Security and justice as ideas stand above positive law and must not be used as argumentative tools on the level of positive law. Otherwise an unbalanced situation is created, in which positive law can always be trumped by the hyper-positive idea (of e.g. security). If a legal system wants to realize the "idea of security", it has to further define and outline this hyper-positive idea on a lower, more tangible, level. Security is, after all, also security in law.

The dangers of such an approach, where precise definitions of "security" and "danger" are neglected in favor of a diffuse scenario of threat, risks and networks, lie in the loss of individual freedom and, more importantly, in a loss of legal rationality.

This development has nothing to do with September 11, 2001. It began in the seventies, but acquired a new quality in recent years. The new quality is found in the de-individualization, which inevitably leads to a de-standardization, and thus invokes the threat of de-legislization. From this development one can conclude that the rationality of law is tied to the assignment of legal positions to the individual. If this foundation is lost, e.g. because it is placed in principle below society or under system concerns or if the foundation in principle succumbs to security interests, then we are menaced by the loss of legal standards. Constitutional law is then limited to the restating of political thinking for which it can no longer maintain safeguards. As a consequence, the protection of individual civil liberties can no longer be achieved through legal means, but only through political means.