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**THE RELATIONSHIP BETWEEN
SECURITY AND CIVIL LIBERTIES
IN THE FEDERAL REPUBLIC OF
GERMANY AFTER SEPTEMBER 11**

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THE RELATIONSHIP BETWEEN SECURITY AND CIVIL LIBERTIES IN THE FEDERAL REPUBLIC OF GERMANY AFTER SEPTEMBER 11

Oliver Lepsius¹

I. INTRODUCTION

The attacks of September 11 were seen in the Federal Republic of Germany as a new dimension of terrorism. On September 12, 2001, just one day after the attacks occurred, the Minister of the Interior, Otto Schily (SPD), called for a new security concept, with the existing security laws and precautions checked immediately for any deficiencies. The result of these reviews were two legislative initiatives, termed “security packages” or “anti-terrorist packages,” which changed or altered numerous existing statutes (for more see part III). The new security laws contain a number of encroachments 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. The following is an attempt to analyze in what manner the relationship between security and civil liberties in Germany has undergone changes in the aftermath of September 11. My analysis will show a principally unchanged relationship between civil liberties and security needs in Germany with no significant legal redefinitions. September 11 might constitute a political watershed, but in the context of civil liberties in Germany, this date does not represent an important mark as far as this can be assessed at this point in time.

The collision of security interests with individual civil liberties has caused legal problems in Germany for some time. The current measures have to be understood within the context of an at least thirty-year-long period of continuous weighing of security against freedom. Important decisions were made in the 1970s in reaction to terrorist activities by the *Rote Armee Faktion* (Red Army Faction, or RAF) with its zenith in the autumn of 1977. The subsequent statutes that placed restrictions on personal freedom caused an intense debate about the acceptable amount of restrictions on personal liberties in order to avoid future terrorist attacks.² Lawmakers made fundamental decisions during that time, all of which were examined by the German federal constitutional court.³ The problems of the intrusion into constitutional rights through various anti-terrorist statutes were the focus of discussion in the 1970s but the following decade saw a debate over the

¹ Professor for Public Law, University of Heidelberg, Dr. jur., University of Munich; LL.M. University of Chicago.

² See Uwe Berlit/ Horst Dreier „Die legislative Auseinandersetzung mit dem Terrorismus“, in F. Sacke/ H. Seinert (eds.) *Protest und Reaktion*, Opladen 1984, p. 223ff; Rudolf Wassermann (ed.) *Terrorismus contra Rechtsstaat*, Frankfurt 1976; Martina Junker *Analyse and Kritik der strafverfahrensrechtlichen Terrorismusgesetzgebung*, Frankfurt 1996; Werner Klughardt *Die Gesetzgebung zur Bekämpfung des Terrorismus aus strafrechtlich-soziologischer Sicht*, Munich 1984; Hans-Joachim Rudolphi “Gesetzgebung zur Bekämpfung des Terrorismus“, in *Juristische Arbeitsblätter* 1979, p. 1ff; Hans-Peter Bull (ed.) *Sicherheit durch Gesetz?*, Baden-Baden 1987; Hans-Jochen Vogel „Strafverfahrensrecht und Terrorismus – eine Bilanz“, in *Neue Juristische Wochenschrift* 1978, p. 2117ff.

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

“basic right to security.”⁴ While security was seen as antagonistic to civil liberties in the 1970s, in the 1980s the relationship was seen as more equal. Security was named a basic right and a priority of the state (e.g. *Staatsaufgabe Umweltschutz*). Not least because of the antagonistic viewpoint of the previous decade, security now achieved a more equal, if not a higher constitutional justification (see part VI). In the 1990s, a new security debate arose over the gradual dismantling of border controls under the European Union’s (EU) Schengen agreement, a debate later codified in new legal statutes. Border controls were moved – functionally – into the interior of the country in the context of cross border organized crime and were justified given the greater need for security.⁵ I will show that the current laws only support the existing balance of the earlier decisions. The laws passed in the aftermath of September 11 constitute a quantitative restriction on civil liberties, but they are not founded on a new qualitative change.

II. THE QUALITATIVELY NEW THREAT AS A LEGAL PROBLEM

There was no doubt among the public and in political circles that the attacks of September 11 warranted immediate legislative action. The attacks thus started a legislative process; there was no doubt that the state had to pass counter-terrorist measures of various kinds, among them legislative ones. The symbolism of the attacks was seamlessly transformed into what was deemed a necessary and unavoidable legislative activity, supported by the widely shared belief that the existing legal framework contained security problems and deficiencies. This fundamental agreement over the existence of deficiencies and the necessity of changes in statutes highlights the deep sadness that was widely felt in the aftermath of the attacks; the need for legislative activity was seen as self-evident and needed no justification. The powerful images of the terrorist attacks channeled political opinion and infused it with an urge to act. As to whether a need for legislative regulation existed, the “if” had been answered by the evidence. The question of “how” was answered with the quick presentation of the two “security packages” by the Ministry of the Interior. An analysis of which measures could possibly have prevented the attacks and which legislative changes would be required to create these measures was never attempted, not least because of the urgency to act quickly.

The reaction of the lawmakers was triggered by the events of September 11 but not necessarily motivated by them. The attacks were not seen as the action of individual terrorists but as a de-individualized phenomenon, a new form of terrorist threat. Thus, the

⁴ Josef Isensee *Das Grundrecht auf Sicherheit*, Berlin 1983; Josef Isensee „Gemeinwohl und Staatsaufgaben im Verfassungsstaat“, in J. Isensee/ P. Kirchhof (eds.) *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band III*, Heidelberg 1988, paragraph 59; Gerhard Robbers *Sicherheit als Menschenrecht*, Baden-Baden 1987; Christoph Gusy „Grundpflichten und Grundgesetz“, in *Juristenzeitung* 1982, p. 657ff; Christoph Gusy „Rechtsgüterschutz als Staatsaufgabe – Verfassungsfragen der Staatsaufgabe Sicherheit“, in *Die Öffentliche Verwaltung* 1996, p. 573 ff.

⁵ See Christoph Gusy ‘Vom Polizeirecht zum Sicherheitsrecht’, in *Staatswissenschaft und Staatspraxis* 5 1994, p. 187ff; Christoph Möllers „Polizeikontrollen ohne Gefahrenverdacht“, in *Neue Zeitschrift für Verwaltungsrecht* 2000, p. 382 ff; Volkmar Götz „Die Entwicklung des Polizei- und Ordnungsrechts (1994-1997)“, in *Neue Zeitschrift für Verwaltungsrecht* 1998, p. 679 ff; Hans Lisken „Verdachts- und ereignisunabhängige Personenkontrollen zur Bekämpfung der grenzüberschreitenden Kriminalität?“ in *Neue Zeitschrift für Verwaltungsrecht* 1998, p. 22ff.

threat arose not 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; rather, they are aimed at what is perceived as an ever-present threat by Islamic terrorist 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 the possibly inappropriate behavior of the German authorities.

The “security packages” are thus not reactions to September 11 itself but to the symbolism that is associated with the actual events—i.e. the lawmakers were not motivated by the actual threat but by the possibility of a new and unknown threat. This is evident, for example, in the reasoning put forward by the Interior Minister 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 who were persecuted under the terror regime of the National Socialists or under the rule of other totalitarian systems had sought refuge in New York. This is deeply rooted in the historical consciousness of humanity. This is reflected in its immense importance.”⁶ One thing is especially evident in his remarks: 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 Western world.

This perception of the events is important to explain the legislative reaction. On the one hand, this perception explains why a development of opinion about the “if” of legislative action was absent and why the “how” was only marginally addressed under intense time pressure. On the other hand, this perception highlights in what manner the new initiatives addressed fundamental civil rights and liberties (see part IV). It is important to remember that the level of threat was not attributed to individual terrorists but was seen as the consequence of a qualitatively new danger, a danger that did not emanate from the individual attackers themselves but from the network of terror in the background. Terrorism was not perceived as the summation of individual deeds but as the result of collective, evil structures. Only in such a way could terrorism acquire a qualitatively new dimension, since the rights associated with democracy and freedom had been targets prior to the September attacks. The new aspect of these attacks, which also determined the legislative balancing of security and freedom, could only be found by not recognizing the individual as the party responsible for the crimes committed.

A qualitatively new level of threat demands qualitatively new powers. The reasoning for the legislative initiative of the “second security package” starts with the presentation of this new threat level. The attacks of September 11 present a new global dimension of the terrorist threat. “The planning and execution of the attacks are characterized by an unprecedented level of brutality, contempt for human life and fanaticism. Responsible for the attacks are a transnational web of logistical contacts and operative structures.” As such, the new dimension of terrorism and its international reach present security

⁶ Otto Schily in the German Bundestag, 14th electoral period, session number 209, December 12, 2001, *BT-Plenarprotokoll* 14/209, p. 20758 (B).

authorities with new, difficult tasks. Herta Däubler-Gmelin (SPD), Minister of Justice, spoke in the German parliament of new challenges—terrorism not just directed against the United States but against all open societies.⁷ The legislative initiative by the governing coalition summarized 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. That terrorism in certain regions of the EU is part of everyday life such as in Northern Ireland and the Basque region had not led to much 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 contained conflict. The terrorist attacks of the RAF during the 1970s was also seen as qualitatively different from the new form of terrorism—responsibility for these attacks could be assigned to a limited number of people, with dangers arising from specific, known perpetrators and their limited surroundings. Then, it was possible to individualize terrorism; however, this was deemed no longer possible after September 11. The relatively quickly identified perpetrators were seen as the tools of a network of terror, which presented the actual dangers. The source of danger is no longer the individual perpetrator but impersonal networks and organizations harbored within the diffusion of Islamic fundamentalism.

What, then, qualitatively differentiated the September 11 attacks from earlier terrorist attacks? It was not the infringements on legally protected rights. Although the number of victims of terrorist attacks reached a new dimension, the challenge to a liberal and democratic constitutional state as such was not qualitatively new when viewed against the background of German terrorism in the 1970s and the continued terrorist activities in various European regions. The new threat was grounded in two aspects: The elimination of a local context and the diffusion of an individual context of terrorist actions. The terrorism of the networks was de-personalized and de-regionalized; the threat was global and could no longer be limited to a few perpetrators. Only on the basis of this fundamental perception can one understand 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 must be seen in this context. Nevertheless, the attacks were perceived as single acts of terror. In Germany the term “war” was not used in the context of the attacks, unlike in the United States, where the war analogy dominated the debate. The American usage of the term was seen as exaggerated in Germany, and it led to a general feeling of unease. In Germany the attacks were perceived as a qualitatively new type of an act of terrorism, not as an act of war. For Germans a dividing line between terrorism and war was maintained. This differentiation can be seen as a result of the greater experience that Europeans have with forms of domestic insecurity, a familiarity with the fear of violent activities and civil wars as well as with threats of a more general nature, threats that cannot be attributed to specific causes and sources, such as cross border organized crime or human smuggling. These are everyday occurrences for Europe and Germany and do not exist in comparable form in

⁷ See Herta Däubler-Gmelin, head of the Justice department, in the German Bundestag, 14th electoral period, session No. 192, *BT-Plenarprotokoll* 14/192, p. 18698(D) – 18699(B).

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*).

the United States. The fact that the United States did not have similar experiences dealing with terrorist threats from both domestic and foreign sources could explain why the external threat that emanated from the September 11 attacks was seen as tantamount to a declaration of war, a reaction that was seen by Europeans as an overreaction.

With regard to the relationship between civil liberties and security, the measures decided upon after September 11 had to work within a normal legal framework. Reliance on a state of emergency or wartime powers was not possible. The constitutional reasoning for the measures had to be found within a regulated framework of reference and could not resort to emergency measures. While in the United States the association with a wartime situation allowed for the use of special powers, Europe was unable to do so given its different interpretation of the situation.

III. THE MEASURES OF THE TWO “SECURITY PACKAGES”

1. The “first security package”

The “first security package” was passed by the German cabinet on September 19, 2001, only eight days after the attacks. It contained three parts: Paragraph 129a of the Criminal Code, which punishes the creators of terrorist organizations, expanded with the inclusion of paragraph 129b, which widens the prohibition to include foreign organizations and even punishes declarations of sympathy.⁹ This is intended to close a legal loophole, since paragraphs 129 and 129a of the Criminal Code are only applicable to organizations with some legal representation in Germany.¹⁰ Members of a foreign criminal organization operating in Germany can be legally approached only under this limiting condition of paragraph 129.¹¹ Paragraph 129a, added to the Criminal Code in reaction to the terrorist attacks of the RAF in the 1970s, protects public safety and the order of the state by including the planning stages of illegal activities within the legal statute. This statute has not been without controversy in recent years. The parliamentary factions of Bündnis '90/ Die Grünen¹² and the PDS¹³ have both demanded its elimination. But the introduction of paragraph 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 obligated themselves to punish any participation in a criminal organization on their territory, independent of the location at which the organization has its operational basis or where it perpetrates its criminal deeds.¹⁴ The prime motivation for this statute can be found in the fight against cross border, regional terrorist activity in Europe (for example, in Basque region). The second chamber in the German lawmaking process, the *Bundesrat*, passed the new statute on the September 27, 2001. The *Bundestag* has yet to pass the legislation.

⁹ See legislative initiative of the government, Entwurf eines Strafrechtsänderungsgesetzes – paragraph 129b Criminal Code, BT-Drs. 14/7025 v. 4.10.2001.

¹⁰ See Federal High Court of Justice, decisions in criminal law, 30 BGHSt 328 at329f.

¹¹ BT-Drs. 14/7025, p. 6.

¹² BT-Drs. 13/9460 v. 11.12.1997.

¹³ BT-Drs. 14/5832 v. 5.4.2001.

¹⁴ Reasoning, BT-Drs. 14/7025, p. 6.

Another aspect of the “first security package” was the elimination of the religious principle in the statute concerning organizations.¹⁵ According to paragraph 3 of the statute concerning organizations, organizations can be prohibited if their goals are contrary to the existing laws or to the constitutional order or to the spirit of understanding among the peoples of the world. This law transforms the legislation-reservation-clause (*Gesetzesvorbehalt*) of the constitutional right to form organizations, as expressed in article 9, part 2 of German Basic Law. The statute concerning organizations, and with it their prohibition, according to paragraph 2, part 2, number 3 of the law concerning organizations, are not applicable to religious communities and organizations that promote public religious practices. The statute thus did not allow for the prohibition of extremist religious communities. With the elimination of the said statute this is now possible, and was intended primarily for extremist Islamic groups. The passing of this measure was not caused by September 11—it had been discussed previously in the context of specific cases in Germany when organizations used the observation of their faith as a cover for extremist goals. The elimination of the religious principle was passed into law on December 8, 2001.¹⁶

In addition, the “first security package” stated that airport security was to be enhanced by a mandatory security check of all airport personnel. The legal implementation of this pronouncement was the focus of the “second security package.” The measures of the “first security package” can thus be seen in a chronological and factual context, but not a political context, with the attacks of September 11.

2. The “second security package”

The “second security package” contains a number of regulations.¹⁷ It consists of an article in which several regulations in a number of different statutes were changed and amended. The parliamentary debate and vote concerned the article, not the various provisions that are changed. Nearly 100 regulations in 17 different statutes and 5 statutory orders are affected by the changes contained in the article. The term “package” is thus fitting. The “second security package” or “anti-terrorist package” reflects the conclusions that were drawn from a perceived global threat through Islamic terrorism. The goal of the law is the early detection of such activities by security authorities. While the “first security package” focuses on repressive measures, the “second security package” emphasizes prevention and protection. The German parliament passed the law under intense time pressure after only an hour-long second and third reading on December 14, 2001; the second chamber followed suit on the December 20 and the law came into effect on January 1, 2002.¹⁸

The main emphasis of the new regulations concerns the enlarged tasks and powers of the security authorities: the Federal Office of the Protection of the Constitution (*Bundesamt für Verfassungsschutz, BfV*), the Military Counterespionage Service (*Militärischer Abschirmdienst, MAD*), the Federal Intelligence Services

¹⁵ Legislative initiative of the government – Entwurf eines Gesetzes zur Änderung des Vereinsgesetzes, BT-Drs. 14/7026 v. 4.10.2001.

¹⁶ BGBl. I 2001, p. 3319.

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) v. 8.11.2001.

¹⁸ BGBl. I 2002, p. 361.

(*Bundesnachrichtendienst, BND*) and the Federal Criminal Police Office (*Bundeskriminalamt, BKA*). In addition, the exchange of data information between various authorities was made easier. Important new rules concerning the alien law and the asylum rules were implemented. The entry into Germany of terrorist perpetrators is to be prevented, measures to secure identities with the Vismu 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. In addition, the law takes precautions to allow for security checks of personnel in defense or other critical installations, for the inclusion of biometric features in personal documents for the establishment of identity, and for the redesign of the grid search by including certain social data. The regulations, which concern directly the tasks and powers of the security authorities, have been limited to a five-year period. These regulations will cease to be in effect on December 31, 2006, unless they are extended beyond this point through a legislative initiative.

IV. CONSTITUTIONAL MEANS FOR THE PROTECTION OF FREEDOM

The new legal regulations have numerous consequences for individual civil liberties. In what manner do they conflict with constitutional limits? Before I can focus on the changes in legal rules, on the reformulation of security interests, it would be best to briefly summarize and explain the importance of the constitutionally guaranteed freedoms. With that foundation I can then examine the relationship between civil liberties and security more closely.

1) The autonomy of the individual

Individual freedom is a constitutionally valued superior good. The constitutional order serves the autonomy of the individual; at the same time, the constitutional order also enables individual autonomy by declaring human beings to be the legitimate subject of the constitution. The constitutional protection of freedom not only aims at the protection of the individual but also commands a democratic constitutional order, which needs free individuals to constitute the democratic polity. The protection of individual liberties thus not only supports individualized development but also supports democracy and hence the existence of a plural and open society. The constitution not only protects the autonomy of the individual through respect for individuality; it is also a precondition for a democratic polity and a precondition for constitutional subjects of legitimation. The centrality of the individual human being the point of origin for the system of laws as well as the goal and assignment of the system of laws is expressed in the first article of the German constitution, the Basic Law, concerning human dignity. "Human dignity is inviolable. To respect and protect it is the duty of all state authority." I highlight these rather fundamental aspects show that a process to modify the principal position of the individual in the constitution has been underway for some time now and is not only a result of current security concerns. I will discuss this in greater detail later in the paper.

2) Basic rights

The constitution protects individual liberties primarily through the basic rights that are intended to ensure the complete protection of the individual. Especially relevant for security statutes are the basic rights expressed in Article 10 of the Basic Law (concerning

the secrecy of mail and telecommunications), Article 2, Section 1 of the Basic Law (general freedom of action), as well as the also in Article 2 mentioned basic right of informational self-determination, as laid out by the German Federal Constitutional Court; as well as Article 16a of the Basic Law (the right to asylum). The constitution does allow in principle for the statutory limitation of basic rights if the limitation can be justified in constitutional terms.¹⁹ The basic rights are subject to a system of constitutional legislation-reservation-clauses that allow the lawmakers to encroach upon the basic rights in the creation of new statutory obligations. Their constitutional justification depends primarily upon whether or not the statutory limitation of the basic rights is proportional, i.e. whether or not the intrusion is useful and necessary to achieve the desired goal, and whether it is in a deeper sense proportionate to the achievement of that purpose (so-called proportionality-principle). 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 are protected by the constitution with higher hurdles for justification (qualified legislation-reservation-clauses). The constitutional justification of statutory limitations of basic rights is often preceded by a balancing of the legally protected rights, in which the right to individual freedom is weighed against the conflicting right to freedom by a different individual. This weighing is meant to achieve an acceptable compromise between the constitutional positions in question. Apart from conflicting basic rights, the justification for statutory limitations of basic rights can also be based on immensely important rights of the community, which do not necessarily have to be anchored in the constitution. Differing opinions exist as to whether the enumeration of powers or the ability to function of state institutions and organs are acceptable as justifications for encroachments upon basic rights.²⁰ It is generally accepted that while the balanced legal rights need to be of constitutional rank, they do not necessarily originate from basic rights.²¹

The protection of individual liberties is thus very much influenced by the justification requirements that the constitution has created for encroachments upon basic rights, and by the value that is assigned to the protected rights that are weighed against each other.

¹⁹ See Donald P. Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham 1989, p. 35-57, 305ff, 366ff, 2d ed. 1996; David P. Currie *The Constitution of the Federal Republic of Germany*, Chicago 1994, p. 20, 179-181, 194, 307-310; W. Cole Durham, General Assessment of the Basic Law – An American View, in P. Kirchhof/D. Kommers (eds.) *Germany and Its Basic Law*, Baden-Baden 1993, p. 37ff; B. Pieroth/ B. Schlink *Grundrechte Staatsrecht II*, 16th edition, Heidelberg 2000, paragraph 6; Peter Lerche ‚Grundrechtsschranken‘ in J. Issensee/ P. Kirchhof (eds.) *Handbuch des Staatsrechts, Volume V*, Heidelberg 1992, paragraph 122; Konrad Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschlands*, 20th edition, Heidelberg 1995, paragraph 10.

²⁰ Authorized by the German Federal Constitutional Court 69 BVerfGE 1; opposed by judges Mahrenholz and Böckenförde, German federal constitutional court 69 BVerfGE 57 at 64: “If enumeration of legislative powers or organizations regulations that have been materially elevated are used as counter positions in the weighing process, nearly all limitations imposed on basic rights can be legitimized in the framework of constitutional interpretation.”

²¹ German Federal Constitutional Court 28 BVerfGE 243 at 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.”

The German constitutional doctrine is characterized by a highly differentiated encroachment and barrier doctrine, which has led to in general qualitatively high and effective protection of the basic rights. It is impossible to state that in principle the rights of the community trump individual liberties.

3) Recourse to the Court and Judicial Review

Another instrument in the protection of liberties is the legal protection guarantee of article 19 section 4 of the Basic Law. While this article is systematically considered part of the basic rights and is generally understood as such, it deserves special mention with regard to the regulations stipulated in the “second security package.” According to Article 19 Section 4, every individual has the right to bring a suit to the courts if the individual’s rights have been injured by public authorities.²² An important exception is made for the secrecy of mail and telecommunications (Article 19 Section 4 Sentence 3, Article 10 Section 2 Sentence 2 of the Basic Law).²³ If the encroachment upon the basic rights serves the protection of the liberal democratic order or the maintenance or security of the Federal state or any of the *Länder*, then the empowering law can determine that an examination by a parliamentary committee assumes the place of the judicial review. Typically, the judicial examination is replaced by special parliamentary committees in the area of the intelligence services. In addition, the encroachment upon basic rights does not have to be mentioned to the individuals in question; i.e. the individual will be unaware that his or her telephone communications were under surveillance and, as such, he or she cannot request a review.²⁴ The parliamentary commission established as a result of Article 10, Section 2, Sentence 2 of the Basic Law assumes the right to control both in the place of the courts and the individual; it is meant to ensure effective control while also guaranteeing secrecy.

4) 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 level and the *Länder*. In contrast to the United States, the implementation of federal law is, in principle, the task of the *Länder*. A federal administration is only allowed in a few, constitutionally determined exceptions. The division of public authority between the federal level and the *Länder* serves the protection of freedom. It is meant to prevent the concentration of jurisdiction and competences.

One aspect of this protection of freedom 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

²² See Eberhard Schmidt-Aßmann, „Kommentierung von Artikel 19 Absatz 4 GG“, in T. Maunz/G. Dürig *Grundgesetz*, 24th edition, Munich 1985.

²³ See Christoph Gusy „Kommentierung von Artikel 10, Rdnr. 92-99“ in H.v. Mangoldt/ F. Klein/ C. Starck (eds.) *Grundgesetz*, Volume I, 4th edition, Munich 1999.

²⁴ See German federal constitutional court 100 BVerfGE 313 at 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.

does not have jurisdiction in these areas. In Article 73 Section 1 Number 10, Article 87 Section 1, Sentence 2 of the 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, but it also prevents that the authorities responsible for the protection of the constitution hold any police powers.²⁵ This is meant to prevent the undesirable consequences of the centralization and accumulation of powers of encroachment at the federal level, namely, federal authorities infringing on the jurisdiction of the *Länder* in areas such as defense against dangers (police powers) and criminal prosecution. Likewise, the creation of an “imperial security authority” (*Reichssicherheitshauptamt*) such as was established under Nazi rule is forbidden by the constitution. The German federal 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.²⁶ According to the German federal constitutional court, the separation of powers is founded on an understanding of the rule of law (*Rechtsstaat*), federalism, and the protection of the basic rights.²⁷

The protection of freedom is guaranteed in the constitution through substantive safeguards (basic rights), through constitutional safeguards (recourse to the courts), and through organizational and jurisdictional safeguards (enumerated powers on the federal level, separation of powers). In addition, the constitution emphasizes the centralized position an individual human being holds as the goal and point of origin of the system of law. Individual autonomy and freedom are the general purpose of the constitutional state.

V. LIMITS ON FREEDOM THROUGH THE “COUNTER-TERRORISM LAW”

The counter-terrorism law (second security package) that came into effect on January 1, 2002 has important consequences for the protection of freedom on all four previously discussed levels. The new law includes regulations that have important consequences on the encroachment upon basic rights. It affects judicial review, the recourse to the courts, and it alters the organizational and competence safeguards. Most problematic are fundamental changes in the position of the individual as an autonomous, liberal being.

1) Encroachments upon basic rights

Several new encroachments upon basic rights have been created. The Federal Office for the Protection of the Constitution (BfV) and the Federal Intelligence Service (BND) have been given the competence to demand information about accounts and account holders from banks and other financial institutions.²⁸ In addition, they can request information from the post office, telecommunications, and airline companies in order to

²⁵ Erhard Denniger „Die Trennung von Verfassungsschutz und Polizei“ in *Zeitschrift für Rechtspolitik*, 1981, p. 231ff; Christoph Gusy „Das verfassungsrechtliche Gebot der Trennung von Polizei und Nachrichtendiensten“ in *Zeitschrift für Rechtspolitik*, 1987, p. 45ff.

²⁶ German federal constitutional court 97 BVerfGE 198 at 217.

²⁷ Apart from German federal constitutional court 97 BVerfGE 198, see also 30 BVerfGE 1 at 17ff; 67 BVerfGE 157 at 178ff, 181ff, as well as 100 BVerfGE 313 at 358ff.

²⁸ Counter-terrorism law, article 1 (BVerfSchG), article 2 (MADG); article 3 (BNDG); article 10 (BKAG).

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 information from leaking and investigations from being compromised.

The BfV and BND can request and collect personal data in the area of postal and telecommunications traffic, protected under Article 10 of the Basic Law, and in the area of general freedom of action, protected under Article 2 Section 1 of the Basic Law. The storage of this data concerns or pertains to the right to self-regulation of information that falls under Article 2 Section 1 of the Basic Law. Thus there are several intrusions upon basic rights that have been triggered that require some kind of constitutional justification. Similar encroachments upon basic rights are contained within the enlarged competences granted to the military counter-espionage service (MAD) and the BND, which is the branch of the intelligence services that is responsible for foreign intelligence gathering. The MAD is concerned with the gathering and analysis of data collected by members of the federal army and the Ministry of Defense when there is a question of whether these people are participating in acts that run counter to international understanding and the peaceful cohabitation of peoples. With the new regulations, the MAD can gather information from telecommunications and telephone services. The basic right as expressed in Article 10 of the Basic Law (the secrecy of mail and telecommunications) is thus affected. The BND is given the same competences as the BfV. This is meant to enable the BND to examine the capital flow of persons that reside in a foreign country through the use of German accounts. This intrusion on civil liberties affects primarily persons who, while living in a foreign country, are nevertheless entitled to the protection granted in Articles 2 and 10 of the Basic Law. The general freedom of action as well as the secrecy of mail and telecommunications are basic rights that are granted to everyone, not only German citizens, in contrast to the so-called “German basic rights,” for example, the freedom of assembly and the freedom of association.

2) **Judicial Review and Recourse to the Courts**

The secrecy surrounding these various data gathering activities not only constitutes an encroachment upon basic rights but also limits the legal protection granted in Article 19 Section 4 of the Basic Law. Because of an exception named in Article 10 Section 2 Sentence 2 of the Basic Law, the gathering of data and information in the telephone services is not under judicial control but, rather, under a parliamentary committee and the so-called G-10 commission, named after the Article 10 law.²⁹ The parliamentary committee is informed about limitations on the secrecy of mail and telephone communications and has to report annually to the parliament about the implementation as well as the scope and method of these measures. Limitations on international communications (for example, an automatic telephone surveillance with certain search

²⁹ Paragraphs 14 and 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, p. 1254 to p. 2298. The earlier version of this law contained these provisions in article 9. For more information on this regulations see Christoph Gusy, „Der Schutz vor Überwachungsmaßnahmen nach dem G-10“ in *Neue Juristische Wochenschrift* 1981, p. 1581ff; Kay Waechter, „Geheimdienstkontrolle – erfolglos, folgenlos, umsonst?“ in *Jura* 1991, p. 520ff.

terms) require the permission of the committee. The G-10 commission consists of four deputies selected by the parliamentary committee. The commission decides about competence and the necessity of these limitation measures on the basis of both the commission's constitutional function and individual complaints. The commission has to be informed about any ordered limitations. The two committees are intended to ensure an independent review of any surveillance measures. As such, they take the place of guaranteed judicial review. But since the surveillance measures are not known by those affected by it due to demands for secrecy, the control function remains hidden as well and is made public only through the 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 substantially affect those under surveillance and also change their process 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 normal legal possibilities of control. As such it is important that the area subject to these exemptions remains small and tied to conditions, which are precisely predetermined.³⁰ The widening of the competences of the security authorities is accompanied by corresponding limitations upon recourse to the courts. Importantly, the new law requires the intelligence services to report to the parliamentary committee, which needs the transfer of data and facts for the specific cases in order to fulfill its oversee function. But the counter-terrorism law does not require that the committee be informed in all cases.³¹ There are certain areas that remain outside the parliamentary control simply because of the lack of knowledge about the amount and kind of surveillance taking place. The G-10 commission is in these cases the only form of oversight. The elimination of the parliamentary committee from the control function might be explained by the fear that secrets could be leaked by the deputies. In general, though, oversight through a system of law comes at the cost of a certain amount of publicity. Internal administrative controls through special committees have to be left behind in the pursuit of this level of oversight. The new regulations thus create an area of encroachments upon basic rights of which the public remains unaware.

3) **Separation of powers and the organization of agencies**

Limitations on freedom are also caused by new regulations concerning organizational competences. A number of new regulations have to be mentioned. The responsibilities of the federal agency in charge of the protection of the constitution (BfV) have been enlarged. The BfV has been entrusted with the responsibility to observe attempts to disturb the international understanding or the peaceful cohabitation of peoples. Up until

³⁰ See the restrictive interpretation of Article 10 Section 2 Sentence 2 of the constitution through the German Federal Constitutional Court 30 BVerfGE 1 at 17ff, as well as the interpretation of Article 8 European Convention of Human Rights in the verdict of the European High Court of Human Rights in *Neue Juristische Wochenschrift* 1979, p. 1755.

³¹ See paragraph 8 Sections 6 and 8 and Paragraph 9 Section 4 BVerfSchG

now, the responsibilities of the BfV were limited to the domestic arena according to Paragraph 3 of the relevant statute (*Bundesverfassungschutzgericht*). The redesigned regulations no longer include the domestic limitation, 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. To differentiate between the purely preventive character of the investigations and the repressive criminal prosecution is becoming more difficult. The protection of individual rights through the division of competences and federal structures is thus qualified.

Similarly, the areas of competence of the federal criminal investigative authorities (BKA) have been widened,³² granting the BKA investigative competence with regard to data network crime (computer sabotage, paragraph 303b criminal code). Up to now, the investigative jurisdiction of the BKA was limited to internationally organized offences. With the expansion to include paragraph 303b of the criminal code, an original jurisdiction for domestically organized offences would have been created, which would have conflicted with the constitutionally set limit in Article 87 Section 1 Sentence 2 of the Basic Law, which grants the federal authorities only the power to create a central office for police coordination. The new competences would have risen above the functions of a coordinating central office. The suggestion by the Ministry of the Interior originally included further investigative competences regardless of suspicion, which caused strong criticism and were not part of the final draft.

The protection of freedom aspect in both the horizontal and vertical separation of powers is also triggered by the new regulations of the security inspection law, *Sicherheitsüberprüfungsgesetz* (SÜG).³³ The law requires that all personnel working in defense related or other vital institutions have to undergo a security check. This is intended to prevent acts of sabotage by insiders. The term “security sensitive work” is enlarged for this purpose and is extended to include such vital institutions, whose loss or destruction would constitute a considerable threat to the health or life of large segments of the population, whose tasks are elemental for the functioning of society. This definition does not only include federal institutions but also institutions at the *Länder* level. Required to undergo security checks are airport personnel, an area that is characterized by a high turnover of workers with low qualifications and salaries.

Up until now, only bearers of secrets had to undergo security checks; the checks were an addendum to the special federal competences of the security authorities. Security checks now are no longer an addendum attached solely to the protection of secrets; rather, they now also serve as a preventive defense against threats in general. The federal authorities lack the legislative competences for this redesign of security checks to an instrument of general defense against threats, since the *Länder*, and not the federal authorities, hold the jurisdiction in these questions.

4) **The de-individualization in the security law**

Finally, the new regulations also touch upon an area of individual liberties that can be constitutionally anchored only with difficulty. According to the previous policy and security law, only that individual, who through his or her behavior caused the danger, or

³² Counter-terrorism law, Article 10 (BKAG)

³³ Counter-terrorism law, article 5 (SÜG).

who was in control over an object from which that danger stemmed from, can be held responsible for an offense. Police involvement presupposes the presence or at least the suspicion of danger. Only those persons who, through their own behavior, have triggered the implementation of defensive measures can be held responsible. Responsibility thus has to be individualized. The individual has to be distinguishable from society as a whole through his or her own actions, and the individual has to have caused potential danger. Only then can the responsibility of an action be placed on him or her. If this is not the case, the person in question would not be an appropriate target to apply security measures to how is this person to act, when there is no specific capability or capacity to act that differentiates him or her from other people when putting forward an article of empowerment to act.

a) Police controls without suspicion

This fundamental understanding of police authority had been qualified in recent years through the introduction of police laws that have allowed for the control of people without prior suspicion.³⁴ According to these laws, any person can be subjected to an identity check by the police of the *Länder* or the Federal Border Guard while traveling in trains or through airports and train stations and, in some instances, also within a 30-kilometer radius of the federal borders. With these regulations, the lawmakers on the federal and *Länder* level attempted to compensate for the loss of control over borders when they were opened by enlarging their area's competence for control within the border areas. The police's duty is directed towards individuals, and it can be satisfied by the individual through the presentation of valid identification papers. Nevertheless, these new police competences constitute a problem for individual freedom. Such police controls target the individual who has neither aroused prior suspicion by his or her behavior, nor caused any danger. The citizen cannot contribute to the elimination of danger through his or her absence,³⁵ since his or her presence at the train station within 30 kilometers of the border as such does not constitute danger. Whether an individual is present or not is not important in trying to eliminate the threat. The purpose of the new police controls without prior suspicion is the fight against cross-border crimes. The defense against diffuse criminal surroundings is directed toward the individual who himself cannot contribute to the defense. The individual does not hold responsibility as a single person but as a member of society, which exists in general at certain places, including those 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 diffusion of cross border crime in police terms is directed towards society, not the individual, while liability continues to be assigned to the individual. This liability is de-individualized because it affects all people at all train stations, airports and highways, and, as such, can no longer be fulfilled with specific individual contributions to threat elimination. The individual is neither an actor

³⁴ Concerning the Federal Border Guard see paragraph 22 section 1a and paragraph 23 section 1 number 2, 3 BGS. Similar regulations can be found in the police law of the various *Länder*.

³⁵ 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. A mere presence at such locations aroused suspicion.

nor disturber of the status quo; his responsibility derives from being part of the general public. Up until now, police law did not include such competences for intrusion.³⁶

The same regulatory technique of controls without prior suspicion, which can affect anyone's civil liberties, regardless of his or her behavior, went into action in the "crime-fighting law" from October 28, 1994.³⁷ This statute enabled the BND to observe the international radio telephone traffic without prior concrete suspicion in order to recognize 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 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 must be fulfilled. The court placed high justification demands on the usage and utilization of the gained data and less on the gathering of the data itself.³⁸ The court did not acknowledge the principal danger of telephone surveillance without prior suspicion, which would intrude upon the understanding of basic rights. The domestic telephone communication as well as the international service related telephone traffic was not affected by the law.³⁹ Enough technical possibilities remained for the use of such kinds of communications, which are not under surveillance. If one applies this logic to police controls within a 30 km radius of federal borders, it would mean that enough areas far from the border remain that are not susceptible to police inspection. The German Federal Constitutional Court did emphasize that the constitution did not permit a "global and general surveillance" even for the purpose of counter-espionage.⁴⁰ An inhabitant of Aachen, which borders Belgium, will hardly be calmed by the knowledge that he would not incur police inspections in Cologne.

Surveillance without suspicion has legal consequences, not in conjunction with the gathering of data, the primary encroachment upon basic rights, but with the following analysis of the gathered data, which constitutes an encroachment upon basic rights in the areas of data transfer and analysis. Only at the second step does the German federal constitutional court recognize a primary importance of security interests in the balancing of rights—if the data generates specific facts that harden the concrete suspicion of the planning or implementation of a criminal offense.⁴¹ Only at this step does the protection of civil liberties either prohibit the transfer of data or order the elimination of the data.⁴²

b) Biometric data

This trend continues with enlarged competences for the Federal Border Guard (BGS).⁴³ The area of operation for the BGS is extended in coastal areas from 30 to 50

³⁶ See the critical analysis of Hans Lisken (Fn 5); Christoph Möllers (Fn 5).

³⁷ BGBl. I, p. 3186.

³⁸ German federal constitutional court 100 BVerfGE 313 at 358ff, decision of 14.7.1999.

³⁹ See German federal constitutional court 100 BVerfGE 313 at 376.

⁴⁰ German federal constitutional court 100 BVerfGE 313at (376, with quotation from 67 BVerfGE 157 at 174.

⁴¹ See German federal constitutional court BVerfGE 100, 313 (373ff); BVerfGE 93, 181 (191) – rejection of a temporary order against the law

⁴² German federal constitutional court BVerfGE 100, 313 (387ff)

⁴³ Counter-terrorism law, article 6 (BGSG)

kilometers and now also extends to airplanes. Officers for the BGS are now allowed to travel as so-called Sky Marshals on board German airplanes where they are allowed to control identification papers. Within this context is the intention⁴⁴ to include biometric characteristics (such as fingerprints and DNA information) in passports and to codify the data to such an extent that it is not understandable to the owner of the passport. This is meant to increase the forgery-proof nature of passports and to simplify the identification procedure. This suggestion has been removed from the law package by parliamentary consultation and has not been passed into law as of yet. According to the new regulations, apart from photographs and signature, a further biometric characteristic can be included in passports. The details for this change are left to a special federal law. Up until now the gathering of biometric data was seen as a measure relating to police records within the context of a 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 who has raised suspicions through his or her actions, but rather as part of an abstract, dangerous society.

The original suggestion, which did not become law but is still under consideration for a later date, is constitutionally questionable because the basic rights do not offer any protection. No specific liberties are at issue; instead, the focus is on a general expression of social duty. No infringement upon basic rights can be claimed. Since the order is not directed towards individual behavior, no encroachment upon basic rights is triggered. Human behavior in general is suspicious, without any individual behavior being able to alter that perception--preventive defense becomes the rule. This stands for a standardization of potentially suspicious situations, which are completely independent from individual characteristics and acts.

c) Grid search

The same problem surfaces in the changes for Book 10 of the social law code.⁴⁵ The Department of Social Security is required to pass on information to the security authorities, insofar as this information is necessary to enforce a grid search, which is admissible under both federal and *Länder* law. Again, individual persons are not selected due to their behavior but because of their association with certain societal groups on the basis of gathered data.

Parts of the new grid search have already been examined by various courts.⁴⁶ A general suspicion, based upon membership in specific religious communities or nationalities, is unconstitutional. The District Court Wiesbaden and the District Court Berlin both declared the grid search for Islamic students at German universities to be unconstitutional. The Court of Appeal in Düsseldorf declared parts of the grid search unconstitutional. 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 Appeals in Düsseldorf has now decided that to aid the search for "sleepers" of Islamic terror organizations, only the

⁴⁴ Counter-terrorism law, article 7 (PassG), article 8 (passport law)

⁴⁵ Counter-terrorism law, article 18

⁴⁶ See German press agency (DPA) article from February 12, 2002.

personal data of citizens of suspected countries or Muslim persons is allowed to be passed on, not the data of German citizens. The current level of threat concerning German citizens is seen as too small to allow for the comprehensive grid search.

d) **Laws governing Aliens**

More changes were made in the areas of association law, especially the alien law and asylum law. The area of alien and asylum law, in general, is the area of law that has experienced the most changes. The new rules concern enlarged identification possibilities, data exchange, new reasons to repeal residence permits, and new reasons 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. But these measures use the same idea of de-individualized responsibilities, which had previously been discussed in connection with the domestic population and German citizens. Foreigners who want to travel to Germany face the general suspicion of being dangerous. This fundamental danger can be eliminated for each individual through security checks.

VI. ABOUT THE DEVELOPMENT OF BALANCING FREEDOM AND SECURITY

In summary, the new rules will affect and limit individual liberties in many areas. The “second security package” widens the responsibilities and competences of security authorities and interferes on several levels and in different forms with civil liberties. Basic rights are affected, especially the basic right of the secrecy of mail and telephone communication, the general freedom to act and the right to informational self determination, as well as the asylum law. Affected as well are the guarantee of the recourse to the courts and the protection of freedom through vertical and horizontal separation of powers.

1) The de-individualization of freedom

Constitutionally, the most suspicious aspect 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 dangerous environment. Safety valves within area of the basic rights cannot balance this encroachment, and the individual is no longer perceived to be principally a law-abiding citizen but as a potential threat. Behind this new understanding lies a change in the perspective on human nature, a change that cannot be addressed constitutionally with concrete measures, and a change that is the decisive factor in the reorganization and justification of the new security competences.

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 to certain circles, this connection between individualizable dangers and individually attributable measures lessened in later years. The danger no longer emanates from individual culprits but from a diffuse level of threat that has to be addressed in a preventive fashion. This de-individualization of danger has negative consequences for individual freedom. It is no longer individual civil liberties that have to be balanced out with individual encroachment into basic rights. Now, the focus is on collective security interests that are weighed against collective rights. The balance in the weighing ratio has shifted away from the

weighing of individual, subjective-legal positions to a weighing of objective-legal perspectives. Individual freedom in this constellation is no longer individually protected; its protection now merely rests on the reflex of a liberal 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 freedom for the society. The protection of freedom then becomes no longer the principal protection of the individual, but, rather, the protection of society (of which the individuals are constituents). The specific individual interests that might not be generally recognized in society are no longer sufficiently protected. Individual freedom is a freedom constrained by society. This collectivization especially threatens the rights of minorities. The single person is no longer seen as an autonomous individual who engages in self-determined and responsible actions and who is legally protected. Instead, the individual is seen as an anonymous part of society and, as such, he or she reflexively partakes in collective security as the basis for general freedom. The de-individualization of danger leads to a de-individualization of responsibilities and duties, but also of rights, which are transferred in their protection and defense function from the individual to the collective.

The relationship between security and freedom has thus been fundamentally altered. But this change has not been triggered by the events of September 11; they are part of a continuity that the latest terrorist acts merely accelerated but did not cause.

2) Affirmative duties

This de-individualization or collectivization of rights and the accompanying loss of subjective-legal rights for protection can also be seen in the constitutional justification for the statutory limitation of basic rights. The basic rights are constitutionally trumped by legislation-reservation-clauses that can justify encroachments upon the said rights. For this justification one has to rely on a good that enjoys higher legal protection; in addition, the encroachment must not be disproportionate. Since the counter-terrorist laws of the 1970s, the justification for the encroachment upon basic rights in the context of security concerns has primarily relied on a particular constitutional theoretical construction, the so-called protection duties. In 1975 the German Federal Constitutional Court in its first abortion ruling, combined Article 2 with Article 1 Section 1 sentence 2 of the Basic Law to declare a comprehensive, and as regards the value of human life, an especially serious duty of the state to protect human life, particularly from illegal encroachment by others.⁴⁷ With the help of this protective duty of human life, a basic right equal to the right for freedom was created that could be used in the judicial balancing process. Statutory limitations of basic rights could now not only be justified vis-à-vis colliding interests in freedom, but also with a constitutional protection duty, 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 legally protect the value of life. This transformed the basic rights from individual rights for protection into collective duties, and the basic rights were amended with so-called objective-legal functions.⁴⁸ The reliance on the affirmative

⁴⁷ German federal constitutional court 39 BVerfGE 1 at 42.

⁴⁸ See Horst Dreier „Von der Wertordnungsjudikatur zu den objektiv-rechtlichen Grundrechtsgehalten“ in *Dimensionen der Grundrechte*, Hannover 1993; Ernst-Wolfgang Böckenförde „Grundrechte als Grundsatznormen“ in *Staat, Verfassung, Demokratie*, Frankfurt 1991, p. 159ff; David P. Currie „Positive

duty is only needed in cases where no conflicting individual interests exist. Given the comprehensive protection of individual liberties through the constitution, such a case is hardly imaginable, since a legislative measure always affects some individual's freedom in some form, even if only the general freedom to act as expressed in Article 2 Section 1 of the Basic Law. As such, the development of the affirmative duties was not really necessary. In one particular case, though, could one not rely – in a constitutional theoretical sense – on conflicting individual liberties in the abortion debate. The fetus needs constitutional protection. A general freedom to act cannot be assigned to it; it is limited to the protection granted in Article 2 Section 2 of the Basic Law. This protection, which originally was individually derived, must be guaranteed by the state. The German Federal Constitutional Court referred to a commitment by the state to protect the developing life.⁴⁹ But from this individualized anchoring of the protection duty, which in the exceptional case of abortion had been used to maintain the idea of conflicting freedom rights, the debate about the protective duty soon moved on. Only a few years later, the same protection duties were used explicitly to anchor collective goods. With the help of the protection duties, it was now possible to place non-individualized, legally protected goods in an equalized balancing with individual civil liberties. The German Federal Constitutional Court used this justification nearly immediately to uphold the anti-terrorist “prohibition of contact law” (*Kontaktsperregesetz*) in 1978.⁵⁰ The general-abstract protection against terrorist attacks—could be used as justifications for individual-concrete encroachments upon basic rights, in this case the criminal procedure rights of the defendants and their legal counsel. The affirmative duties have been altered from their subjective legal origin to an objective legal principle.⁵¹

The development of the protection duties is of central importance for the enlarged justification of encroachments upon basic rights. In a consideration of legal goods on the protection of life-based protection duties, individual liberties seem to succumb to collective liberties. Affirmative duties lead to a principal unevenness in balancing processes.⁵² The collectively protected interest is not met by a similarly collectively anchored defense against encroachments upon basic rights. Because every individual liberty presupposes the functioning of a system of law, and thus cannot be thought of in

and Negative Constitutional Rights“ 53 *University of Chicago Law Review* 864 at 880-882 (1986); W. Cole Durham (Fn. 19) 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.“

⁴⁹ German federal constitutional court 39 BVerfGE 1 at 1.

⁵⁰ German federal constitutional court 49 BVerfGE 24 at 53.

⁵¹ 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 J. Isensee/ P. Kirchhof (eds.) *Handbuch des Staatsrechts*, Band V, Heidelberg 1992, paragraph 111; George Hermes *Das Grundrecht auf Schutz von Leben und Gesundheit: Schutzpflicht und Schutzanspruch aus Artikel 2 Absatz 2 GG*, Heidelberg 1987; Christoph Enders „Die Privatisierung des Öffentlichen durch die grundrechtlichen Schutzpflichten und seine Rekonstruktion aus der Lehre von den Staatszwecken“ in *Der Staat* 35 (1996), p. 351ff; Rainer Wahl/ Ivo Appel „Prävention und Vorsorge. Von der Staatsaufgabe zur rechtlichen Ausgestaltung“ in Rainer Wahl (ed.) *Prävention und Vorsorge*, Bonn 1995, p. 1ff; Peter Unruh *Zur Dogmatik der grundrechtlichen Schutzpflichten*, Berlin 1996.

⁵² See Peter Preu „Freiheitsgefährdung durch die Lehre von den grundrechtlichen Schutzpflichten“ in *Juristenzeitung* 1991, p. 265ff.

purely negative terms, and, because it always presupposes the liberty enhancing and supporting effects of the law, affirmative duties threaten to equalize civil liberties. One weighing process now contains positive and negative components of freedom in general, rather than subjective rights. Protection duties shift the weight from positions of individual basic rights to systematic constitutional decisions. The balancing no longer occurs between individually ascribable rights but, rather, between public interests. Thus the protection duties not only foster a certain de-individualization, they also support a certain de-legalization of the doctrine of basic rights.

3) 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 control over international non-service related telephone traffic. Since this new verdict corresponds to the current position of constitutional balancing of guaranteed freedoms with international security interests, and so far as being the actual measuring stick for the new measures taken after September 11, I will briefly discuss it here. There is no doubt that the new competences of the BND contained in the anti-crime law of 1994 constitute encroachments into the telephone communication law. According to the basic rights doctrine explained above, they can be justified with Article 10 Section 2 Sentence 2 of the Basic Law insofar as the legislative regulation has a purpose that serves a higher legally protected good and is proportionate in the pursuit of said purpose. In previous years, opinions differed about in what way the justifying purpose had to be constitutionally anchored, whether it had to be mentioned as a basic right or merely as a competence in the constitution. The problem caused by the protective duty doctrine was whether the purpose had to originate with the protection of life and the absence of bodily harm (Article 2 Section 2 of the Basic Law). In the latest decision upon this matter, from July 14 1999, the German Federal Constitutional Court argued that the legislative measures constitute the pursuit of a constitutionally anchored purpose. The court gave no indication as to how they developed the constitutional justification for this ruling. Security seems to have become a self-evident public interest that does not need a normative constitutional development. Security is presented as a legitimate purpose. Given this reasoning, two unequal goods face off against each other. On the one hand there is a subjective right, in this case the secrecy of telephone communications; on the other hand there is an objective interest, in this case the protection against the danger of armed attacks or international terrorism. The consideration of civil liberties now no longer faces legally developed or justification requiring interests. In the decision of the court, it is phrased in this manner⁵³: The constitutional limits serve the protection of important public goods. “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 foreign and security political 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

⁵³ German federal constitutional court 100 BVerfGE 313 at 382.

primarily originate abroad and which are to be detected with the help of the competences in question, carry great weight.”

The justifiable purpose was established by the court in purely factual terms. A normative anchoring of the regulations was deemed unnecessary by the court. The weighed 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 stands in factual-normative disproportionality. This does not mean that security concerns also cannot be normatively reasoned and justified. The normative reasoning of security has to be based upon specific legal foundations; it could be based, for example, on the protection of basic rights, or the protection of state institutions. By not even attempting a more normative derivation, “security” cannot be understood normatively and thus becomes normatively untouchable. The legal construction of security is entrusted to legislative interpretation. Through the level of threat, the lawmaker creates a constitutionally protected good. The lawmaker is limited in his creativity by actually occurring international dangers, but not in a normative sense by the constitution. It is laudable that the court insisted that lawmakers had to determine the purpose to which the intrusions upon the secrecy of telephone communication were allowed, in an area-specific and detailed manner.⁵⁴ This secures the legal determinacy, but not the supremacy of the constitution in the area of security relevant laws. Security purposes are no longer subject to constitutionally normative justifications; rather, they enter into the weighing process as self-evident factually important purposes; this no longer allows for the usual constitutional balancing principles to function. Facts cannot be balanced. The constitutional control has to transform itself into political control, since the criteria are no longer based on the supremacy of law but on factual conditions. The ruling of the court in the case of the BND-ordered telephone surveillance highlights this flaw. Constitutional limits could only be included by the court on the “second level of intrusion,” during the analysis and spreading of the gathered data. For the control of the gathering itself there are no longer any constitutional requirements.

4) Assessment

All of the three developments mentioned here in the balancing of security and freedom point in the same direction: it has become one-sided. Security concerns tend to trump civil liberties. Legally this result is fostered by: 1) the reasoning of de-individualized duties that are not realizable with individual civil liberties; 2) basic rights being enriched with an objective component, i.e. protection duties, to which individual rights have to take the backseat to collective rights; and 3) by renouncing normative constitutional justifications for balancing relevant purposes. The weighing of freedom and security tends to work in favor of the latter because individual civil liberties 1) no longer justify a legal position within the balancing process, 2) can be equalized with protective duties, and 3) find themselves in disproportional factual evidence vis-à-vis normative validity. This development has nothing to do with September 11. This development began in the 1970s but has acquired a new quality in recent years. The new quality is found in the de-individualization with which perforce a de-standardization occurs that threatens a de-legalization. From this development one can surmise that the rationality of law is tied to the individual establishment of legal positions. If this is lost, if

⁵⁴ German federal constitutional court 100 BVerfGE 313 at 360, 372.

for example this foundation is placed in principle below society or system concerns, or if the foundation in principle succumbs to security interests, then we are threatened with the loss of a legal measuring stick. Constitutional law is then limited to the restating of political thinking for which it can no longer maintain safeguards. The protection of individual civil liberties can then no longer be achieved through legal means, but only through political means.

VII. FREEDOM AND SECURITY IN THE CURRENT POLICY DEBATE

Given this background of the legal development, I now want to shift my attention to the policy debate after September 11. How was the relationship between freedom and security perceived in the public? Did the desire for new security laws at all costs prevail, or were there some reservations about the new regulations and their limitations on liberties?

1) Parliamentary debate

The legislative process of the ‘second security package’ is characterized by a rapidity never before witnessed. The bill,⁵⁵ based on a submission by the Interior Ministry, was introduced by the governmental factions of the SPD and Bündnis ’90/Die Grünen on November 8, 2001, and it passed the *Bundestag* after a second and third reading on December the 12, 2001, against the votes of the FDP and the PDS. The *Bundesrat* passed it on December 20, and the law came into effect on January 1, 2002. For the second and third reading of the bill, only one hour of debate was scheduled. During the consultations, party-political differences in the assessment of the relationship between freedom and security became apparent. Representative Dieter Wiefelspütz justified the law for the SPD, emphasizing its legality.⁵⁶ Concerning the legality, he said, there was not a single point of criticism. Combating crime can only occur in and with a state under the rule of law. The governing coalition guarantees the rule of law and an effective combating of crime. During the first reading, the Federal Justice Minister, Herta Däubler-Gmelin (SPD), still declared with retrospect to the experiences gained during the terrorist attacks of the 1970s, that terrorism had been defeated without injuries to the rule of law or freedom and without unbalancing the societal relationship between security and freedom.⁵⁷ The fixation on the concept of the rule of law (*Rechtsstaat*) and not on the actually affected basic rights and civil liberties is remarkable. *Rechtsstaat* is a term not mentioned in the Basic Law.⁵⁸ It derives from German constitutionalism of the nineteenth century and at that time had the function, during the rule of a parliamentary underdeveloped monarchy, to protect the civil liberties of citizens through laws against encroachments by the executive. Historically, the term “state under the rule of law” is a substitute for democracy; as such, the term constitutes a specifically German constitutional category, a category that is absent in the constitutional law of other

⁵⁵ BT-Drs. 14/ 7386 (new), 14/ 7727, 14/ 7754

⁵⁶ BT-Plenarprotokoll 14/ 209, p. 20748(B) – 20750(A)

⁵⁷ BT-Plenarprotokoll 14/ 192, p. 18700(C)

⁵⁸ The term “state under the rule of law” (*Rechtsstaat*) is used in articles 23 and 28 of the constitution regarding the relationship both with Europe and with the *Länder*. The constitution also uses the term to distinguish the exclusively German setting from the supranational and state level, but the constitution does not use the term in reference to the direct area of validity of the constitution.

countries.⁵⁹ What constitutes the specific constitutional content of the principle of *Rechtsstaat* remains unclear. On the one hand, the term summarizes certain constitutional norms, in particular Article 20 Section 3 of the constitution (“Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice”). But at the same time, the term is used to refer to other elements, and particularly in its material components, it is in danger of being misinterpreted by a non-positivist constitutional evaluation of it. A closer reasoning and determination, in particular a clear understanding of its formal and material components, has not been achieved.⁶⁰ The term “state under the rule of law” (*Rechtsstaat*) is a substitute with a positive connotation for constitutional basic principles that are not supposed to be formulated in more detail. The category does not contribute to the understanding of the relationship between freedom and security and, instead, only expresses a general harmlessness.

The parliamentarian Erwin Marschewski defended the laws for the CDU/ CSU. In his argumentation, the justification is based less on an understanding of a state under the rule of law and more on the harmony of security and freedom. While the term “*Rechtsstaat*” still resonates with an idea of securing freedom, there no longer is any recognizable goal conflict in his argumentation. Nobody is setting out to limit citizens’ rights. The state has only to be a state capable of defending itself and a state that recognizes that those who try to play freedom against security threaten to lose both.⁶¹ A similar argument was presented by the parliamentarian Wolfgang Bosbach of the CDU/CSU during the first reading: security and freedom do not constitute opposites. Without sufficient security there can be no true freedom. Less security never means more freedom but, rather, less protection against all kinds of crimes.⁶² The CDU/CSU party apparently had a different understanding: freedom and security are goals that point in the same direction; as such there is no longer a need for balancing the two.

Harsh criticism arose from the ranks of the FDP. Parliamentarian Max Stadler argued that the bill intrudes upon basic rights in a fashion never before seen.⁶³ He rejected the use of customer data, he criticized the lack of a notification of those under surveillance and he lamented the expansion of the domestic competences of the BND. The PDS representative Petra Pau was even more direct in her rejection. She saw freedom and security not in a principal harmony (as the CDU/CSU did) but, rather, in principal discord.⁶⁴ The legislative proposal constitutes the greatest intrusion into the constitutionality of the Federal Republic of Germany, all in defense of internal security. The citizen is tricked into believing that he or she is about to receive something if, in reality, something is being taken away that was supposed to be defended against any act

⁵⁹ The assessments of a state under the rule of law vary. See on the one hand Ingeborg Maus „Entwicklung und Funktionswandel der Theorie des bürgerlichen Rechtsstaats“ in *Rechtstheorie und politische Theorie des Industriekapitalismus*, Munich 1986, p. 11ff; for a different perspective see Eberhard Schmidt-Aßmann „Der Rechtsstaat“ in J. Isensee/ P. Kirchhof (eds.) *Handbuch des Staatsrechts, Band I*, Heidelberg 1987, paragraph 24.

⁶⁰ See on the one hand Philip Kunig *Das Rechtsstaatsprinzip*, Tübingen 1986, in which the author argues for the utilization of concrete constitutional norms instead of the unformed term of ‘state under the rule of law’; for a different perspective see Katharina Sobota *Das Prinzip Rechtsstaat*, Tübingen 1997, in which the author recognizes the innate value of the term.

⁶¹ BT-Plenarprotokoll 14/ 209, p. 20750(A).

⁶² BT-Plenarprotokoll 14/ 192, p. 18701(D).

⁶³ BT-Plenarprotokoll 14/ 209, p. 20755(B).

⁶⁴ BT-Plenarprotokoll 14/ 209, p. 20756(C).

of terrorism. The anticipated gain in security of the state is accompanied by the cost of a significant loss of protection against the state, i.e. freedom.

The Bündnis '90/ Die Grünen representative Volker Beck declared the relationship between security, a state under the rule of law, freedom and citizens' rights to be well balanced.⁶⁵ He articulated the limitations on civil liberties and emphasized the problem of intrusions without prior suspicion, and he summarized those regulations of the bill that had been intended but had not been realized: the deportation of foreigners on suspicion, certain preventive investigative competences of the BKA, and competences of the BfV for the surveillance of apartments. In addition, the transfer of data by the BfV had been significantly limited. For the new information competences of the BfV, Parliament had established sufficient control and report obligations. And finally, the introduction of biometric material in the passport laws was subjected to a special federal law.

The expert hearing, part of a public hearing of the committee of the interior of the German Parliament on November 30, 2001, highlighted several doubts.⁶⁶ To summarize, the parliamentary debate, exemplified by the second and third reading of the bill, indicates an intense debate over security goals and the dangers attached to them. The substance of the debate does not suggest a one-sided overemphasis or the preferential treatment of security interests. The German Parliament addressed individually the various dangers for civil liberties (in the area of basic rights, in the area of the separation of powers, in the organization of authorities, in recourse to the courts and judicial review, as well as in the problematic controls without prior suspicion). A significant amount of intended regulations were taken out of the bill because of a concern over their effect on civil liberties. This confirms the conclusion drawn in the previous section that effective control of civil liberties from security competences cannot be achieved with constitutional means or through the rulings of the Federal Constitutional Court but primarily through political action. The Parliament is the most effective forum for this purpose. But the debate and the control takes time. As indicated by the experiences with the "second security package," the parliamentary ability to control rises with the time allotted for consultation. To take away this time through executive action or public pressure would mean to render useless the most effective protection of freedom. The extraordinary hastiness of the legislative process with the "second security package" forces the Parliament to react to the bill submitted by the Interior Minister without being able to act itself. Many of the intended measures (such as the preventive investigative competences of the BKA, the biometric passport characteristics and the deportation of foreigners without suspicion) seemed to have been added on to the bill by the Interior Minister. Since constitutional control over the security-enhancing measures is viewed as minimal, it is especially important that lawmakers remain in control of the process and that the legislative process is not hurried. Because of the need to act and the belief that one should act quickly in the aftermath of terrorist attacks, there is a danger to civil liberties that cannot be constitutionally ameliorated at a later point.

⁶⁵ BT-Plenarprotokoll 14/ 209, p. 20752(B)-

⁶⁶ See Blickpunkt Bundestag 11/ 2001, p. 51

2) The vote within the government

The “second security package” bill was thoroughly examined by the Ministry of Justice (BMJ) in the context of the vote within the government coalition.⁶⁷ The BMJ laid out a number of significant problems seen from the limitations on basic rights, the lack of any basis of authority, and insufficient contextual clarity. The BKA was reprimanded for its—unimplemented—investigative authority that was independent of any suspicion and outside the jurisdiction of federal prosecuting authorities, separate from prosecuting authorities, because it would have fundamentally questioned the system that underlies the protection of the defendant, moved the work of the police closer to the intelligence services, thereby violating the separation of powers. The BMJ also demanded that in the case of data transfer from banks, telecommunication companies and airlines to the BfV, a certain level of suspicion has to exist in order to ensure proportionality. The federal government lacks the legislative authority to organize security checks in the common institutions of the federal government and the *Länder*, because it constitutes a regulation in the area of common defense against dangers. Also rejected was the introduction of biometric passport characteristics.

In this case as well, it is not possible to think of a fixation on security interests. The bill was examined for the constitutional protection of civil liberties and in some instances criticized for it. Many of the problems flagged by the BMJ have been addressed in the legislative process.

3) Reactions of associations and the press

The reactions to the original bill by associations and the press ranged from skeptical to negative. There was no security euphoria but a concerned mood that the regulations would be pushed too far. Partly responsible for the muted reaction are the experiences with the counter-terrorism laws of the 1970s that resulted from momentary panic but have remained in force ever since. I want to highlight the mutual press declaration by the German Association of Judges (*Deutscher Richterbund*), the Chamber of Attorneys for Federal Law (*Bundesrechtsanwaltskammer*), the German Association of Attorneys (*Deutscher Anwaltverein*) and the Associations of Defense Councils (*Strafverteidigervereinigungen*), dated October 24, 2001. They appeal to the federal government and the Interior Minister, “with urgency and keenness,” to drop the plan to hand the BKA the authority to take the initiative in investigations. This plan crosses the constitutionally set barrier between police and intelligence services, violates the constitutionally anchored separation and turns the BKA into a secret service. Negative reactions under the titles “The Wrong Answer to September 11: the Surveillance State”⁶⁸ came from grass root organizations and Amnesty International. This debate was followed and commented on in the press. Critical voices did not remain in the minority.⁶⁹ No

⁶⁷ Letter of the department of justice to the department of the interior from October 17, 2001.

⁶⁸ Press statement from the October 24, 2001, signed by the Humanistic Union (*Humanistischer Union*), Association of republican female and male attorneys (*Republikanischer Anwältinnen und Anwälteverein*), International League for Human Rights (*Internationale Liga für Menschenrechte*), and others.

⁶⁹ See the media coverage in the *Frankfurter Rundschau*, for example, Martin Kutscha „Mit Riesenschritten auf dem Weg in den Überwachungsstaat“, 7/11/2001; Erhard Denniger „Die Stunde der Executive“, 14/11/2001; Gerhart Baum „Die Gunst der Stunde“, 6/12/2001; Wilhelm Heitmeyer „Die autoritäre Versuchung“, 17/12/2001; Karl-Heinz Baum „Neue Sicherheitsgesetze in Kraft“, 21/12/2001.

article could touch the importance of the warnings issued in William Safire's piece in the *New York Times*,⁷⁰ because the debate in Germany did not occur in a one-sided security euphoria.

4) Assessment

The political-legal debate was full of variety and sufficiently addressed the legal and political concerns. The "counter-terrorism law" was not welcomed by all sides. As the distance to the events of September 11 increased, so did the doubts about the bill, in particular in the case of the "second security package." The dangers against basic rights, the horizontal and vertical separation of powers and the legal protection were articulated in more detail. Only because of the increased time pressure was the federal government able to push through a significantly watered down yet still quite radical security package. Many of the measures implemented merely reflect long-standing wishes of the security authorities; September 11 provided the impetus for these wishes to garner interest and to be passed into law, but they were not motivated as such by the events of that day. In contrast to the United States, the debate in Germany was quite controversial and assigned increasing importance to the interests of civil liberties.

VIII. CONCLUSION

In the aftermath of September 11, the relationship between security and civil liberties shifted quantitatively in the direction of security, but with the passage of time, the direction shifted back towards civil liberties. The passing of the "security package" law on the December 14, and 20, of 2001 constitutes a break in this balancing process, one that favored security. But a qualitative change in the relationship between security and freedom cannot be assigned to the "counter-terrorism law," since the legal changes in favor of security interests originated long before September 2001. The "second security package" continues this development and accelerates it. Only political decisions can affect this acceleration, allowing the interests of civil liberties to once again gain in importance. A particular problem in the balancing of security and freedom is found in the fact that in contrast to the defined civil liberties of the individual, security as a public good is rather diffuse and non-determinant. As such, security is something that cannot be weighed. As shown by the "counter-terrorism law," security cannot be formulated as a set of facts. It cannot be positively, but only negatively defined, in the sense of constituting a defense against dangers. As such, the definition of said dangers is important, and its replacement through diffuse terms such as "threat" or "risk" has to be avoided. In the case of international terrorism, this is no longer possible. Danger can no longer be individualized; they arise from transnational organizations and networks. As such, it becomes nearly impossible to legally define the prerequisites and goals of counter-terrorist measures, even though such a definition would be legally useful.

The dangers of an action that renounces a closer determination of security and danger cannot only be found in the loss of personal freedom of the individual but also in a loss of legal rationality. Security as a positive goal (in contrast to defense against dangers as a negatively defined goal) is a value that crosses beyond what is permissible in determining the possibilities for legal regulation. Since the time of the European religious wars, security has been defined as the oldest purpose of the state. The state owes its origins to

⁷⁰ William Safire "Seizing Dictatorial Power" in *The New York Times*, 15/11/2001, p. A31.

the abatement of civil wars and the maintenance of peace. In the current debate, security comes up again and again, and that harbors certain dangers. Security in the positive sense can be a state purpose and at the same time in its negative sense a legally protected right. But this double meaning has to be strictly separated: the positive state purpose of security must not be exchanged with the negative legally protected right of defense against danger. Otherwise the levels get confused, which either allows for the existence of the state to become virulent or for the failure of the system of law. The basic rights presuppose someone being obligated to them: the constitutionally legitimized public authority. If the state, as the one obligated to uphold the basic rights, becomes dependent on its role as guarantor of security, then a validity gap emerges between security and basic rights. In that context, security would always trump basic rights. As such, it is important that in the political and legal debate as well as in constitutional argumentation, security is understood as a state purpose. To declare security to be the goal of a system of law is just as plausible as to declare justice to be its goal. Just as justice is not a weighable concern in a system of law, so is security. The system of law in its totality serves the goal 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. If the system of law is to turn the idea of security into reality, then it has to further define and determine the idea. Security is, after all, also security in law.