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The Idea of the European Union as an Area of Freedom, Security, and Justice: Exploring the Europeanization of Germany's Domestic Security Policy

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What tendencies can be observed in Germany's domestic security policy since 9/11?

How has the Europeanization of domestic security policy manifested itself in public discourse?

Introduction

Nearly a decade has passed since the September 11, 2001 (9/11) attacks on the United States and the subsequent increased security measures implemented across the West. Taking a closer look at the impact of 9/11 on Germany's domestic security policy, the quantity of federal legislation in this field indicates that the possible threat of international terrorism has become the main focus of the domestic security agenda in Germany in recent years. However, since 9/11 there is also an ongoing debate about the efficiency of Germany's domestic security architecture on the one hand, and the appropriateness of domestic security legislation on the other hand. Moreover, 9/11—as well as the attacks in Madrid in 2004 and in London in 2005—made it clear that Germany's domestic security cannot be thought of entirely autonomously from the European Union. Thus, the idea of Europe as an area of freedom, security, and justice as it was first conceived in the Treaty of Amsterdam has become even more relevant. Nevertheless, the latest rulings by the German Constitutional Court, declaring the transformation of the European arrest warrant and data retention unconstitutional according to German law, exemplify the challenges Germany's domestic security policy faces within a European framework.

This essay will explore the impact of the idea of the European Union as an area of freedom, security, and justice on Germany's domestic security policy in the context of 9/11 and, therefore, will also explore the Europeanization¹ of Germany's domestic security policy. In examining the phenomenon of Europeanization of German domestic security policy, and in order to identify the cleavages and challenges related to Europeanization, it is essential to look at the developments of German domestic security policy since 9/11 in general. Europeanization of Germany's domestic security policy needs to be seen in the broader context of the developments in this field. Therefore, in addition to exploring actual changes in domestic security policy since 9/11 in general, the political as well as the media discourse² on domestic security policy in Germany will be taken into consideration. The domestic security discourse in Germany reveals that the legislative decisions made after 9/11—in both a national and European framework—caused political, judicial, as well as social cleavages in Germany.

Emphasizing the significant role of language and discourse in the analysis of politics, the consideration of the domestic security discourse in Germany will help analysts look beyond material changes of domestic security politics and will enable them to detect both the cleavages and the challenges facing policymakers and citizens in Germany in the evolving field of domestic security policy within a European framework.

The Idea of the European Union as an Area of Freedom, Security, and Justice

The idea of the European Union as an area of freedom, security, and justice did not play a major role in earlier developments in the European Union; this idea was first manifested in the Treaty of Amsterdam in 1997, entered into force in 1999. Until the middle of the 1980s European integration mainly focused on economic aspects and the development of a single European market.³ With the ratification of the Treaty of Maastricht, cooperation in the field of Justice and Home Affairs was established as the third founding pillar of the EU. The Treaty of Amsterdam, only a few years later, then marked another important step for the in-

tegration of the EU's Justice and Home Affairs. It stated that a general goal of the EU is "to maintain and develop the Union as an area of freedom, security, and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."⁴ With the Treaty of Amsterdam, the third pillar was renamed "Police and Judicial Cooperation in Criminal Matters" (PJCC) after parts of the third pillar became part of the first pillar, the European Community (EC), such as matters on asylum and immigration, etc. The Treaty of Amsterdam formally lifted the aspects related to a common area of freedom, security, and justice from an issue of common interest to the status of one of the main goals of European integration, on an equal footing with Economic and Monetary Union and a Common Foreign and Security Policy.⁵ Eventually, the Treaty of Lisbon, signed in 2007 and entered into force in 2009, once again changed the framework for the area of freedom, security, and justice when it abolished the pillar structure. The Treaty of Lisbon can be seen as providing continuity by formally giving the area of freedom, security, and justice even greater importance as a main goal of the treaty, now listed second rather than fourth, as earlier in the Treaty of Amsterdam.⁶

Germany's Domestic Security Policy since 9/11

The attacks on 9/11 had a major impact on Germany's domestic security policy, insofar that they served as a catalyst for policy change in this field: implementing new legislation and putting counterterrorism policies at the top of domestic security policy agenda. Under both Ministers of the Interior—Otto Schily from the SPD and Wolfgang Schäuble from the CDU—several pieces of legislation with a strong impact on Germany's security architecture were passed between 2001 and 2009. However, it was not only 9/11 that served as a catalyst for policy change, but also the attacks in Madrid in 2004, the London bombings in 2005, the attempted train bombings in 2006 in Germany, and the arrest of the so-called Sauerland Cell. Each event contributed to new policy initiatives.

Trying to depict the outcome of the material changes in this policy field since 9/11, four general tendencies can be observed: centralization, weakening of the separation of intelligence from law enforcement ("*Trennungsgebot*"), tightening of security laws, and more social control.⁷ But even if policies were new, the controversy concerning domestic security policy was not. For instance, there were fiercely debated policies on organized crime in the 1990s, characterized by a controversially discussed piece of legislation in 1998 (*Gesetz zur Bekämpfung der Organisierten Kriminalität*). This legislation also caused then-Minister of Justice Sabine Leutheusser-Schnarrenberger (FDP) to leave office and was ruled partly unconstitutional by the German Constitutional Court in 2004. Therefore, domestic security policy before 9/11 has also been characterized by different foci and recurrent controversies.

While the counterterrorism-related domestic security policies can be polarizing to society, it is clear that rational and appropriate counterterrorism strategies are necessary. However, it is not always clear what is actually rational and appropriate in the context of domestic security. Several judgments of the Federal Constitutional Court on domestic security-related policies in recent years exemplify not only the need for but also the major role this Court plays in regulating domestic security policies at the federal and state levels. The Court ruled several pieces of legislation unconstitutional: On the federal level, the Court deemed the Air Security Act unconstitutional in 2006; on the state level, the Lower Saxony police law in 2005 and the North Rhine-Westphalian law on online investigations in 2008 were also deemed unconstitutional. Moreover, there is still a pending case on the federal level regarding possible online investigations by the Federal Criminal Police Office.

Actual Changes in Germany's Domestic Security Policy since 9/11 within a European Framework

Looking at the impact that the 9/11, Madrid, and London attacks had on the EU's goal of an area of freedom, security, and justice, it becomes obvious that these events triggered even closer cooperation and coordination of the EU's justice and home affairs. However, as of today, Europeanization of domestic security policy does not affect the core of Germany's state sovereignty. Rather, Europeanization of German domestic security policy reaches its limits when it comes to giving up pieces of the state's sovereignty. This view can also be supported by the ruling of the German Constitutional

Court on the Maastricht treaty in 1993, in which the Court stated that the Treaty of Maastricht complied with the German Basic Law, thereby emphasizing Germany's affirmation for European integration. However, on the other hand the Court also clearly stated the limits of European integration when it defined the European Union as a "union of states" (*Staatenverbund*) and not as a federation.⁸

Two pieces of legislation since 9/11 serve as main examples for the actual impact that the idea of the European Union as an area of freedom, security, and justice has had on Germany's domestic security policy and on the European member states' goal of advancing the EU to this policy realm: First, the transformation of the EU data retention directive into German law and second, the conversion of the EU's framework decision on a European arrest warrant into national law. Both pieces of legislation were initiated by the EU and were implemented into national law by the German Parliament. These pieces of legislation are not only good examples of the actual Europeanization of this policy field, but also show the difficulties and controversies that go along with domestic security in a European framework, as both pieces of legislation have raised many questions about the EU's influence on Germany's domestic security policy and, with this, the EU's influence on national fundamental rights. And, in the end, the German Constitutional Court has ruled both pieces of legislation unconstitutional.

While the constitutional complaint (*Verfassungsbeschwerde*) on the European arrest warrant was initiated by a person who was subject to it—arrested in Germany after being accused of involvement in terrorism by Spain—the constitutional complaint on the transformation of the data retention directive was based on a new form of civil engagement that had not been seen before. The constitutional complaint in this case is the largest constitutional complaint ever in the entire history of the Federal Republic of Germany: about 35,000 complainants (*Beschwerdeführer*).

This legislation, as amended by the German Bundestag in November 2007—without the votes of the Free Democratic Party, the Green Party, or the Left Party—implied that the communication providers had to retain various communication data for the duration of six months. The police and the public prosecutor would have access to all collected data for the purpose of terrorism-related investigations. In this context, critics argued that the EU had been used as a backdoor for pushing this legislation that otherwise would not have been easy to initiate on the national level due to data privacy concerns. Others saw the EU intervening in national fundamental rights. Advocates of this legislation emphasized that new security measurements were needed to prevent terrorist activities due to ongoing technological developments in the communications sector. This was also the main argument that had influenced the EU's policymaking process on the data retention directive in the aftermath of the Madrid and London attacks.

Eventually, in March 2010 the German Constitutional Court deemed this data retention legislation unconstitutional arguing that the legislation conflicted with the freedom of telecommunications as it is granted in Article 10 of the German Basic Law. However, the Court did not rule the EU directive itself unconstitutional and also did not address the European Court of Justice.

The Discourse on Domestic Security Policy in Germany since 9/11

To sum up the difficulties related to domestic security policy in Germany it is worth looking at the discourse on domestic security policy.⁹ The discourse reveals the cleavages that are related to the developments in this field and is characterized by four different polarizations that range between foreign and domestic security, the constitutional state and the preventive state, federalism and centralization, and freedom and security.

The first polarization, foreign and domestic security, refers to the tendency, particularly since 9/11, to view domestic security as increasingly related to foreign security; for example, the ongoing debate on the deployment of the federal army (*Bundeswehr*) within Germany as a counterterrorism measure, as well as the ever more important role of the European Union as an area of freedom, security, and justice. The second polarization refers to a shift that is seen by some critics away from the rule of law toward the rule of prevention. This is the case with the argument of the weakening of the separation of intelligence from law enforcement ("*Trennungsgebot*"), for example, which while not

mentioned directly in the German Basic Law, has been a major principle in Germany. The third polarization, federalism and centralization, refers to the fact that Germany's security architecture is characterized by a federal system that divides the competence in the field of domestic security between the federal level and among the sixteen state levels. The purpose of dividing competence and therefore of dividing power is a result of historical lessons Germany has drawn from the Third Reich. One of the criticisms is that domestic security-related policies strengthen the role of the federal government. This is also the case concerning the major role the German government has played within the domestic security policymaking process of the European Union in recent years. With regard to the last polarization, freedom and security, the major criticism is that new legislation tends to promote security at the cost of freedom; for example, the case of online investigations and the case on data retention.

Challenges for Germany's Domestic Security Policy within a European Framework

Evidently, Europeanization of domestic security policy is a complex issue. Looking at the developments within the field of domestic security policy in both a national and a European framework, as well as at the domestic security discourse, it becomes evident that the question of how to strike the balance between security policies and fundamental rights is one of the main challenges. The dimension of the constitutional complaint in the case of the data retention directive shows that fundamental rights concerns, particularly in terms of data privacy, matter. With the German Constitutional Court acting as a corrective in domestic security policy, the Court is obviously rebuking the German federal policymakers. Clearly, this is part of the democratic checks and balances interaction, but it is nevertheless questionable if the back and forth between federal legislation and constitutional rulings is productive for the idea of Europe as an area of freedom, security, and justice in general. However, the Treaty of Lisbon not only upgrades the role of the German Bundestag and of the European Parliament within the EU's policymaking process, but also makes the Charter of Fundamental Rights of the European Union legally binding for the majority of the EU's member states. Taken together, the outlook is much brighter, as the treaty aims to strengthen democratic principles within the European Union.

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NOTES

1 The term Europeanization takes into account that as the process of European integration impacts the nation state, it does so on all three political levels: politics, polity, and policy. See Heinz-Jürgen Axt, Antonio Milososki, and Oliver Schwarz, "Europäisierung – ein weites Feld. Literaturbericht und Forschungsfragen," in: *Politische Vierteljahresschrift*, 48:1 (2007): 136-149. Here p. 136-137. With Radaelli "Europeanization" can be defined as "processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of the EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies." See Claudio M. Radaelli, "The Europeanization of Public Policy," in: *The Politics of Europeanization*, ed. Kevin Featherstone and Claudio M. Radaelli (Oxford: Oxford University Press, 2003): 27-56. Here p. 30.

2 Similar to the term Europeanization, "discourse" as a term in social science is used in various research contexts. With reference to Maarten Hajer discourse is here understood "as an ensemble of ideas, concepts, and categories through which meaning is given to phenomena. Discourses frame certain problems; that is to say, they distinguish some aspects of a situation rather than others. [...] As such, discourse provides the tools with which problems are constructed. Discourse at the same time forms the context in which phenomena are understood and thus predetermines the definition of a problem." See Maarten D. Hajer, "Discourse Coalitions and the Institutionalization of Practice: The Case of Acid Rain in Britain," in: *The Argumentative Turn in Policy Analysis and Planning*, ed. Frank Fischer and John Forester, (Durham and London: Duke University Press, 1993): 43- 76. Here p. 45-46.

3 Hans-Jürgen Lange, *Innere Sicherheit im Politischen System der Bundesrepublik Deutschland. Studien zur Inneren Sicherheit Band 2* (Leske + Budrich: Opladen, 1999): 133.

4 Treaty of Amsterdam amending the treaty on European Union, the treaties establishing the European Communities and related acts, (Official Journal C 340, 10 November 1997), <<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>> (10 November 2010).

5 Jörg Monar, "Der Raum der Freiheit, der Sicherheit und des Rechts," in: *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge. 2., vollständig aktualisierte und erweiterte Auflage*, ed. Armin von Bogdandy and Jürgen Bast (Berlin/Heidelberg: Springer, 2009): 749-797. Here p. 753.

6 Ibid.

7 Hans Jürgen Lange, "Der Wandel des föderalen Sicherheitsverbundes," in: *Vom Rechtsstaat zum Präventionsstaat*, ed. Stefan Huster and Karsten Rudolph (Frankfurt am Main: Suhrkamp, 2008): 64-81. Here p. 65-67.

8 See the Federal Constitutional Court's judgment on the Maastricht Treaty, BVerfGE (Bundesverfassungsgericht) 89, 155 of 12 October 1993, <<http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintText&Name=bv089155>> (10 November 2010).

9 In this case the discourse is based on parliamentary speeches, policy related statements of federal political actors, and commentaries in the leading German newspapers.

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