



Statewatch Analysis

Germany

The Federal Republic's security services from the Cold War to the "new security architecture"

Norbet Putter

Every step on the route to sovereignty taken by the West German constituent state, the Federal Republic of Germany (FRG), after the fall of the Third Reich was also a step towards the creation and extension of the security services. In 1949 the Allied Forces set up "an authority to collect and disseminate intelligence regarding subversive [...] activities" (i.e. an internal intelligence service that was to become the Office for the Protection of the Constitution, *Verfassungsschutz*).

In preparation for "rearmament", a military intelligence service was developed from 1951, which became the Military Defence Service (*Militärischer Abschirmdienst*, MAD) followed by the creation of the German Armed Forces in 1956. That same year the German government, equipped with renewed sovereign powers laid down in the Germany Treaty, gained control over "Organisation Gehlen" from the Allies. It has acted as the foreign intelligence service (*Bundesnachrichtendienst*, BND) ever since. In 1968, the intelligence services gained more powers through emergency decrees permitting the intercept of telecommunications with the aim of increasing the German authorities' autonomy. After 1990, the re-united Germany made efforts to shake off the last remnants of the war and become a "normal" state, whose intelligence potential would not lag behind that of other western states.

However, the West German starting position was far from normal and the Gestapo had clearly shown what the security services were capable of. But, the Allies - as well as German politicians - were convinced that the emerging democratic state had to be protected from its enemies. The contemporary Weimar doctrine (which maintained that the Republic had failed not because of a lack of democracy and political-economic problems but because of a lack of state instruments), articulated the concept of "defensive" democracy which became the ideological foundation of the security services [1].

The "separation of powers", which Allied military governors laid down as a precondition for authorising the constitution, was intended to mitigate the political danger of a German intelligence service. The creation of a central authority to collect intelligence was granted to the federal government on condition that it would not gain police powers. Article 3 of the Internal Secret Service Act (1950) transposed this provision to the German federal law by laying down that the Office for the Protection of the Constitution (*Bundesamt für*

Verfassungsschutz, BfV), had no “police or control powers” and could not be integrated into existing police authorities [2]. The separation was also enshrined in the naming of the German services. It is commonly accepted that Germany has “secret intelligence services” rather than “secret services”, as the latter could imply police powers or covert actions beyond merely gathering intelligence [3]. That the German services are engaged solely in collecting and processing information is a long-standing myth that legitimises their existence.

Three services - one enemy

While the first generation of the internal security service was concerned with the role of Nazis in the young Federal Republic, the intensification of the Cold War resulted in a new enemy: politically left-wing and located east of the River Elbe. Directly after the end of the war, Reinhard Gehlen, chief of the Wehrmacht department *Fremde Heere Ost* (Foreign Armies East, a military intelligence agency focusing on the Soviet Union and eastern Europe during the Nazi era), successfully offered his services to the Americans. With his knowledge of, and informant network in Eastern Europe, Gehlen’s organisation was an important asset for the USA. The organisation was financed by the US army, or rather the CIA, until 1955. The fact that it was awash with Nazis was not seen as a hindrance because anti-Communism formed the ideological basis for cooperation [4].

Internally, the regional *Verfassungsschutz* offices were in charge. The 1950 Federal Law instructed the federal states (*Länder*) to set up intelligence authorities targeting those who were suspected of forming Moscow’s “fifth column”. They included the early peace movement, campaigns against rearmament, the Communist party (KPD) and, after it was banned in 1956, all those suspected of continuing links to the party. [5] The belief that the “enemy resides on the left” determined the viewpoint of the German security services until the end of the Federal Republic in 1989. When federal state ministers introduced a standard request for information from the federal and regional intelligence services on all public service applicants, this was also directed at the Left with the intention of stopping their declared “march through the institutions”. Until the 1980s, the security services were spying on collectives, citizens’ initiatives, the Green party and even parts of the Social Democratic Party [6]. Only the large-scale and violent right-wing extremism of the early 1990s forced the authorities to abandon their one-sided obsession with the Cold War, although without dropping their favourite surveillance targets. These continued to include diverse communist splinter parties but also the “new” social movements. The infiltration of the Berlin Social Forum by undercover security service officers or the year-long surveillance of civil rights activist, Rolf Gössner, are two examples of many [7]. Islamic terrorism became a third focal point after 1972 and the surveillance of extremist foreign groups has gained pace ever since.

Compared to the other two services, the military service (MAD) led a shadowy existence until recently [8]. Notwithstanding a few scandals, this special service, which falls within the remit of the Federal Ministry of Defence, has rarely been in the spotlight. As a secret army intelligence department it enjoys double secrecy, so to speak. Considering the political state of affairs in the old Federal Republic, it might be assumed that its main function was to protect the army from infiltration by the Left.

Necessity and successes

No doctrine has found more support in recent German security-political discourse than that which stipulates that every state, including Germany, has to have intelligence services. This is a startling position when considering the 50-year history of “our” services, and one

that is certainly not justified by their achievements. Even if the numerous scandals are ignored, their success rate remains low.

Before the fall of the Berlin Wall, East Germany and Eastern Europe were at the centre of all surveillance operations by the foreign intelligence service (BND). Its aim was to inform the government, in a timely fashion, on developments in the east to enable it to act on an informed basis. The collapse of East Germany should have been a good moment to present the service's successes, but there is no evidence that the BND predicted the building of the Berlin Wall (1961) or its collapse (1989). The service was equally surprised by the Soviet invasion of Afghanistan (1979) as it was to hear of the imposition of Marshall law in Poland (1981) or the attempted coup against Mikhail Gorbachev (1991) [9]. They were even ignorant of the fact that several Red Army Faction members had gone into hiding in East Germany.

There may be examples from international secret service history that show how intelligence provided by secret agencies enables governments to take better decisions [10]. This evidence is lacking for the Federal Republic. It is therefore doubtful that Germany would have lost its sovereignty, or the ability to act in the international arena, if it had not had a foreign intelligence service.

The covert nature of the internal security service's actions means that there are no public successes. In applying the measure of "defensive" democracy, their successes fade with key decisions. The ban of the Communist Party of Germany (KPD) in 1956 was largely based on intelligence gathered by the internal services, but by then the party had become small and politically ineffectual (receiving 2.2 percent of the vote at the 1953 general election) posing no threat to the Federal Republic [11]. The ban led to increased foreign secret service surveillance and to the extension of police security powers and related criminal trials [12]. Twelve years later the German Communist Party was tolerated by the state to rid itself of the political problems created by the KPD-ban [13].

The right-wing National Democratic Party of Germany (NPD) was spared the fate of the KPD. The Federal Government's (Lower and Upper Houses of Parliament) motion to ban the party failed in 2003 after its interior ministers refused to disclose evidence on the extent of the party's infiltration by their internal security services to the Federal Constitutional court [14]. It perceived a threat to the service's ability to act, and its non-disclosure meant that the court could not establish whether evidence came from "authentic" NPD officers or from informants paid by the state. The instruments of "defensive" democracy left democracy defenceless. (From a democratic viewpoint, this is exacerbated by the fact that right-wing ideology, networks and activities would not have been contained by the ban, not to mention the social causes of right-wing extremism).

According to the official narrative, intelligence agencies represent an "early warning mechanism" to detect activities threatening the constitution. They should illuminate shady activities so that the instruments of a "defensive" democracy (party bans, withdrawing certain basic rights, etc.) can be applied and/or the relevant persons prosecuted. However, homeland security statistics (on acts that pose a threat to the democratic state, espionage and terrorist organisations) demonstrate that the intelligence services' role in initiating criminal procedures is insignificant. From 1974 to 1985, between 2.6 and 0.2 per cent of all German homeland security investigations were instigated on the basis of intelligence information [15].

Mere “information gathering?”

German intelligence agencies claim that they are not security services because they merely collect, analyse and disseminate information. This depiction is inaccurate for two reasons. Firstly, because - as the NPD infiltration case shows - their intelligence gathering methods do not only collect information (such as intercepting a conversation) but also co-produce it. This is clear in the example of the *agent provocateur*, the agent who initiates actions at the order of - and whilst being paid by - the state. There are numerous examples of this practice from the internal security service alone, and they are only the few that have become public [16]. The services are not mere observers and by behaving as informants, spies and undercover agents they become actors. To an extent this is unknown to the public. Furthermore, passive surveillance is more than mere information gathering, because suspicious behaviour is often triggered by the suspicion of being watched.

Secondly, German services have always done more than trade information. For decades, the Berlin federal internal intelligence services (LfV) prevented access to a murder weapon by keeping it classified. A Lower Saxony LfV agent bombed a prison wall to create an escape route (an incident that became known as the Celle hole [17]). The foreign intelligence service attempted to export arms to Israel under the cover of agricultural products, facilitated arms exports to Africa, supported intelligence services from Syria to South Africa and helped with the CIA-supported coup against the Congolese prime minister, Patrice Lumumba (1961). The examples are extensive [18].

The activity profile of the services as a whole gives the impression that they are predominantly focused on problems that they have created. Field espionage is an opaque adventure playground in which operations and counter-operations, double agents and defectors, informants and disinformation sometimes have deadly consequences for the participants. In interactions between states, the services are instruments of an undercover foreign policy in the grey zone between authorised and independent action. Resources are largely spent on countering or infiltrating foreign services, which worsens relations between states instead of improving them. The legitimacy of “internal” surveillance is built on the concept of the “enemy of the state” and it is no surprise, therefore, to find that this enemy is sought in all areas of life. In domestic politics, the services encourage the state-supported culture of suspicion, infiltration and misinformation that violates the basic principles of a liberal democracy.

New remits

The traditional task of the services is the protection of the state. The German version of this homeland security is the protection of the German constitution. By gathering and analysing information, the BND should “learn intelligence about foreign [states]” which “from a foreign and security policy perspective is of importance for the Federal German Republic” [19]. According to the original wording, the federal internal secret service (BfV) should collect intelligence on activities geared towards the “annihilation, change or disruption of the constitutional order [...] or an unlawful interference with the administration of members of constitutional institutions” [20]. These remits were extended in 1972 with a constitutional amendment (Article 73(10)) and parallel amendment to the law regulating the internal security services. The prime task of homeland security was extended to include the protection of the “free legal democratic order” and of “the existence or the security of the State or a federal state”. The extensions merely legitimised existing practices: the BfV had always engaged in espionage and since the late 1960s had been monitoring the “activities of foreigners that threatened security”.

Alongside these three primary tasks, the internal services were instructed to take part in security checks of persons who had access to sensitive data or those who worked in “institutions important for life and defence matters”. The services were also charged with the technological protection of sensitive information.

Only with the anti-terror legislation introduced after 11 September 2001, were the remits extended to include the observation of activities that violated “the spirit of international understanding [...] in particular against the peaceful co-existence of peoples”. The services were now empowered to demand personal information from credit and financial institutions, postal and telecommunication providers as well as airline companies [21].

By the 1990s, an additional extension of remits had been announced for the regional internal security services (LfV). During that decade, the (presumed) threat of “organised crime” (OC) entered the public discourse. Because the services had lost their external (Eastern Block) and internal (left-wing extremism) functions, it became clear that they would be allocated the task of creating an early warning system for OC. Initially in Bavaria, and then in four more federal states governed by the Christian Conservative Party (CDU), the regional security services were allocated the task of monitoring OC. This was justified by the argument that it had always engaged in covert intelligence gathering and therefore had the relevant know-how to uncover clandestine organised crime structures. As far as can be discerned from publicly available information, the work of the regional intelligence services has not contributed to exposing OC structures. Besides democratic concerns (see below), the broader remit of the Saxon LfV has led to a scandal that threw light on the working methods of the federal authority [22].

Whether the LfV’s monitoring of OC had any criminal or police relevance remains unknown. In 2003 and 2004, the Thuringia secret service was working on 38 cases and in early 2005 the LfV was still working on 19 of them. The authority had passed five cases to the regional crime police authority and another five were, according to the LfV, not OC but “common” criminal cases. In nine cases preliminary procedures were dropped because of a lack of evidence proving criminal acts [23]. Considering that 17 of the 38 cases were drug-related, the figures lead to the conclusion that the Thuringian secret service “investigates” in the broad field of general crime and follows vague rather than hard leads in the process.

In 1994, the BND was also instructed to fight OC. It gained increased powers in the so-called “strategic surveillance of telecommunication” which the service had engaged in since 1968. This entails the surveillance of all international telecommunications to or through Germany. This total surveillance was justified by the alleged danger posed by the Cold War as it was supposed to uncover leads on a possible attack against Germany. It would have been logical to end this comprehensive surveillance when the threat of war ended. Instead, legislators extended surveillance areas to include illegal trade with arms and proliferation-relevant goods, the international drugs trade as well as counterfeit money and money laundering abroad. The goal of this extended remit was the same as that for the internal services: uncovering leads on covert OC structures so as to instigate preliminary or criminal police investigations. However, there is no evidence that the “intelligence” gained from strategic surveillance has led to positive results concerning Germany’s safety. In 2007, 2,913,812 “communications” were registered in the BND’s surveillance computers that “qualified” as relevant to “international terrorism”, to use the wording of the report of the parliamentary secret service oversight committee (*Parlamentarisches Kontrollgremium für die Geheimdienste*). There were more than 2.3 million entries concerning proliferation. Even if we assume as the report does that 90 percent of these entries are Spam, there are more than half a million communications for the BND to follow up. Only four communications were thought to have “foreign intelligence relevance” in the area of terrorism, 370 were deemed relevant in the area of proliferation.

Not one of them was forwarded to the law enforcement agencies [24]. It is unknown whether the intelligence gathered contained any leads on criminal activities, whether it was relevant to the BND's situation reports or other BND activities or whether it was passed on to the police in the framework of preventive crime fighting.

Law of separation or cooperation?

Separating the secret intelligence agencies from the police force was a means by which the Allies prevented the creation of another German "secret state police". Every single regional and national law on the secret services passed since 1950 includes the stipulation that the relevant service cannot be affiliated to a police authority. None of these laws grants the services police enforcement powers. Despite this, the development of the security services has reversed the spirit of the law of separation. Precisely because the services and police are separate authorities, goes the argument, they have to cooperate more closely [25].

In the old FRG, the law of separation was not interpreted as a ban on cooperation. Mutual assistance and exchange between police and intelligence services in homeland security issues have existed since the 1950s. For instance, police and intelligence officers worked together in the Klaus Traube [26] interception case and the Celle prison bombing (see above); the MAD helped police in the search for the kidnapers of industrialist, Hanns-Martin Schleyer, and the BND granted technical assistance for a large-scale surveillance operation in Baden [27]. Besides case-related mutual assistance, the different authorities cooperated from an early date. Since 1952, the Federal Border Guards (BGS) - the current Federal Police Force - supported the Federal Intelligence Service (BfV) in "radio technology". This not only entails the surveillance and analysis of internal telephone and radio communications (which is protected by the privacy Article 10 of the German constitution) but also the surveillance of international telecommunication traffic involving foreign security services or other BfV "targets". The fact that this task is carried out by a police unit is justified by the German government with practical arguments: because the Border Guards provide the same service for the customs office and the Federal Crime Police Authority, the allocation of the surveillance task amongst separate authorities would not allow for the "flexible, needs-based and effective deployment of personnel and equipment" [28].

In 1976, the "Special decree on the collection of specific intelligence during border controls" instructed the BGS to pass information on travellers to the BfV (internal) and the BND (external). The police officers could refer to a list of 239 organisations and 287 printed materials that were classified as "left-wing extremist of influence". When the decree became public it was suspended and from 1981 onwards substituted by relevant departmental instructions [29]. All three services are able to make a "request for mutual assistance in border matters" to the BGS. The data gathered ranges from personal details and traveller's destination to comments and details on co-travellers [30].

The sharing of secret service intelligence with the police was further standardised in the 1954 *Unkelner guidelines*, the *Cooperation Guidelines* (1970) and the secret service laws from 1990 onwards (Article 19(1) VfS-G, and 9(1) BND-G). This information sharing was initially conceived for concrete cases and in the discretionary powers of the services (which "could" pass on information).

With the Common Database Act (2006) a permanent information alliance between the police and secret service was created in the area of terrorism. The Act created the basis for the Anti-Terror Database to which police, secret services and customs all have access as well as for so-called common project databases, which combines the intelligence of all

authorities on a project (that is issue-, person- or object-related) basis [31]. Indirectly, the Act belatedly made legal the Common Anti-Terrorism Centre, created in 2004. This is the most recent step in the “networking” of security and police agencies, thereby weaving the strategy and practice of “preliminary investigation” into an opaque and uncontrollable network [32].

While security services increasingly focused on surveillance and the detection of regular crime from the 1970s onwards, police working methods came to resemble those of secret services: the unrelenting increase in telecommunications surveillance, the systematic deployment of covert investigators and informants, and better technical standards of covert surveillance have equipped police forces with a considerable repertoire of secret service instruments. The fact that the intelligence services and police forces systematically cooperate is therefore an almost inevitable result of prior developments, namely, the steady approximation of “targets” (crime), strategic approach (investigations before a crime has been committed) and instruments (covert methods).

The fiction of the rule of law

The German secret services have been integrated into the legal democratic order of the Federal Republic. Officially, this is to guarantee their democratic and constitutional standards. However, the legal basis for the three services remains weak. Whilst the internal security service is mentioned in Article 73(10) and Article 87(1) of the constitution (*Grundgesetz*, GG), the remits of the BND and MAD derive from the federal state in the areas of foreign and defence policy (Article 73(1) GG) and until 1990 both services worked without a clear legal basis [33]. They were initially set up by a secret Federal Cabinet decree (BND) and a ministry of defence organisational decree (MAD). In 1990, seven years after the Population Census Judgement (*Volkszählungsurteil*, [34]) and 35 years after their foundation, both services were finally subjected to legal control.

Since 1950, the legal basis for the BfV has consisted of six Articles. These concerned the delineation of remits and repeated the principles laid down in the Allied police letter [35]. The law was a *carte blanche* for executive action rather than its limitation. This became apparent in the services’ handling of privacy in telecommunications. Despite the fact that Article 10 of the constitution had declared in no uncertain terms (until 1968) that privacy in postal and telecommunication was “inviolable”, whilst no law existed that would qualify this right, the internal secret service used a provision in a treaty between the Federal Republic and western Allies on mutual assistance from 1955 to intercept communication domestically. A report initiated by the Federal Interior Ministry investigated at least 82 bugging cases that took place between 1955 and 1963 [36].

In 1972, the Federal Law on Security Services was amended. For the first time, the service was given the power to apply “intelligence methods” to carry out its tasks (Article 3(3) in version 1972 of the law). However, legislators failed to define more precisely what those measures entailed. This ambiguity was deliberate, to ensure flexibility in the services’ operations. It allowed for the interior minister of Saxony to justify the Celle prison bomb attack as an “intelligence method” with the court’s acceptance [37]. The far-reaching 1990 legal overhaul left this ambiguity intact; the expression “intelligence methods” was replaced by “methods...of covert intelligence gathering”, which were described by example but not comprehensively defined (Article 8(2) BVerfSchG [38]). In guidelines, however, one can detect a significant difference to police law - secret service law demonstrates a higher degree of legal ambiguity, creating space to manoeuvre with regard to surveillance, infiltration and operational powers.

Some regional governments held the principle of legal clarity more seriously and provided additional guidelines on what their regional services should understand as an “intelligence method”. This explains the legal challenge against online raids that were introduced in North-Rhine Westphalia’s secret service law. The court ruled [39] that all other regional secret services had to end this form of surveillance until their respective laws had been amended.

The biggest democratic achievements in relation to secret service laws, can be attributed to the constitutional courts, (and this not only due to the court’s decision on online raids). With the Population Census Judgement of 1983 (see footnote 34), the same court ensured that the BND and MAD would be legally regulated in the first place. In 1998, the Court restricted the BND’s “strategic interception of telecommunications”. In 2005, the Lower Saxony regional constitutional court limited the regional services’ OC surveillance to cases that represented a threat to the constitution [40]. Of course, none of these judgements led to the halting of a service, method, or strategy. Moreover, legislators always used the courts’ opinions as a basis for the next legal reform - forever anxious to test the limits of the constitution.

Alongside fading constitutional standards, the services’ operations are characterised by the fact that, contrary to police forces, they are not obliged to act on knowledge of a criminal offence (*Legalitätsprinzip*, the principle of mandatory prosecution for an offence). Although the police service can suspend mandatory prosecution in certain areas of policing, the security services are generally free to decide on when, and in what form, they pass on information that they have gathered about criminal acts to the police. Because they are concerned with gaining and maintaining access to target groups (and in particular not losing informants), the relaying of intelligence is shaped by their interests - it either does not occur or is filtered. The fact that the police end up investigating the criminal behaviour of security service informants [41] is a consequence of this one-sided intelligence policy. At the same time, if filtered intelligence shared with the police leads to a prosecution, the defence is weakened by the opacity of the secret service’s source of information [42].

The illusion of control

The constitutional legitimacy of the German security services emphasises the claim that they are subjected to exemplary control. The services portray themselves as a tight-knit control mechanism that functions at various levels: from parliament, data protection officers and courts to the media and public eye [43].

A special emphasis is placed on the parliamentary control that exists at federal level for all three services (internal, external and military) and at the regional level for the regional internal security services. Parliamentary control should compensate for the fact that due to the clandestine nature of the services, their actions are difficult to monitor by the courts and the general public. The system of parliamentary control has been implemented in various stages at the federal level. In 1956, the Parliamentary Committee of Ombudsmen was set up but it lacked a legal basis. It was succeeded by the Parliamentary Control Commission in 1979, which in turn became the Parliamentary Control Committee in 1999. In the most recent legislative period, the committee was not only enshrined in the constitution (Article 45d) but also given new powers. It can demand the disclosure of original files; its members can be supported in their work by parliamentary assistants and with a two-thirds majority it can decide that expert contributions sought by the Committee be presented to parliament. If the Committee decides - also with a two-thirds majority - to evaluate a procedure in public, any committee member can issue a dissenting opinion [44]. However, strict confidentiality requirements remain, which, together with

the two-thirds majority clause, ensures that events detrimental to state and government are not disclosed to the public through this procedure.

The toughest measure the Committee can apply is the power to institute parliamentary investigation committees. This power has been frequently used in Germany's history [45]. The BND Investigation Committee (*BND-Untersuchungsausschuss*) is an example from the last legislative period. It was instituted to investigate the BND's surveillance of journalists and its involvement in the Iraq war. Beyond the (limited) evidence gathering in the various areas under investigation [46], the committee has had two significant results. Firstly, BND actions led to the above-mentioned reforms of the Parliamentary Control Committee. The investigation committee was only instituted because the government's information policy towards the Committee was deemed inadequate even by parliamentarians who were loyal to the government. However, the extension of Control Committee powers was also because the Committee wanted to avoid public and uncomfortable investigation committees.

Secondly, the government's restrictive information policy led to a minority within the Committee lodging a complaint with the Federal Constitutional Court. The Court ruled that government had significantly exceeded its right to refuse to give evidence and to the non-disclosure of files. The government's arguments concerning the "core of executive responsibility", the interests of other states or "public weal" were too "sweeping", not "substantiated" or not sufficiently "specific", according to the court [47]. The fact that on the 60th anniversary of the German constitution, the Court had to remind the government that it, but also parliament, was indebted to "public weal" reveals the democratic self-image of the rulers. Although the Judgement strengthened parliament's control powers, the fact that the President of Germany (*Bundespräsident*) refused to grant a special hearing of the investigation committee and that a new committee was not instituted, show the limited practical relevance of these increased powers [48]. On the other hand, it does mean that future government refusals to provide evidence will necessitate more verbal efforts on their part.

Power with potential

On reviewing the history of the secret services one could conclude that they have become autonomous. They redefine their political instructions in a bureaucratic and covert manner, act independently, exaggerate threats and enemies, etc. But this is only one side of the coin. The services are also assigned a very generous constitutional leeway. Despite the fact that they are normally aimed at protecting the constitution or serving the interests of the state, in practice they are instruments of the relevant government. In a mix of the current government's orders and their own self-serving interests, they conduct a parallel foreign policy based on reciprocity - with the methods of covert intelligence work and illegal methods. Domestically, they annul protection from arbitrary surveillance and interception, devalue regulations that should protect citizens from state intervention and surveillance and create a climate of intimidation.

The only comprehensive solution to the secret services' congenital defects is not improved control but their abolition. A first step in this direction would be to uncover their history - from before 1989 onwards - and disclose the surveillance files and data to those affected and to researchers and the media. Then the country would have a chance not only to learn to deal with the legacy of East German secret service history, but also that of the three West German secret services.

(from *Bürgerrechte & Polizei/CILIP* 93, 2/2009)

Footnotes

- [1] Buschfort, W.: *Geheime Hüter der Verfassung. Von der Düsseldorfer Informationsstelle zum Ersten Verfassungsschutz der Bundesrepublik (1947-1961)*, Paderborn 2004, pp 38 ff.
- [2] See Roewer, H.: *Nachrichtendienstrecht der Bundesrepublik Deutschland*, Köln 1987, p 135 (Police letter) and p 7 (Law from 1950).
- [3] Ritter, F.: *Die geheimen Nachrichtendienste*, Heidelberg 1989, p 14.
- [4] See Reese, M.E.: *Organisation Gehlen*, Berlin 1992.
- [5] Brüneck, A.v.: *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland 1945-1968*, Frankfurt/M. 1978, pp 217-221.
- [6] See *Beobachtungsobjekt Verfassungsfeind*, in: *Bürgerrechte & Polizei/CILIP* 28 (3/1987), pp 97-104.
- [7] *Socialforum berlin: Dokumentation der Überwachung des Berliner Sozialforums durch den Verfassungsschutz*, Berlin 2007; *Frankfurter Rundschau*, 19.11.08.
- [8] See Ritter *ibid.* (Fn. 3); pp 100-103; Gusy, Chr.: *Der Militärische Abschirmdienst*, in: *Die Öffentliche Verwaltung* 1983, issue 2, pp 60-66. For recent development see Gose, S.: *MAD: uniformierte Schnüffler ziehen ins Ausland*, in: *antimilitarismus-information* 2002, pp 5-11
- [9] Schmidt-Eenboom, E.: *Der BND. Schnüffler ohne Nase*, Düsseldorf u.a. 1993, insbes. pp 74 ff and pp 290 ff.
- [10] Krieger, W.; Weber, J.: *Nutzen und Probleme der zeitgeschichtlichen Forschung über Nachrichtendienste*, in: Dies. (ed.): *Spionage für den Frieden*, München, Landesberg am Lech 1997, pp 9-22 (p 17 ff).
- [11] *Bundesverfassungsgericht: KPD-Verbot. Judgement from 17.8.1956, Entscheidungen des Bundesverfassungsgerichts Vol. 5*, pp 89 ff.
- [12] See Wagner, P.: *Ehemalige SS-Männer am „Schilderhäuschen der Demokratie“? Die Affäre um das Bundesamt für Verfassungsschutz 1963/64*, in: Fürmetz, G.; Reinke, H.; Weinbauer, K. (eds.): *Nachkriegspolizei: Sicherheit und Ordnung in Ost- und Westdeutschland 1945-1969*, Hamburg 2001, pp 169-198 (p170 f).
- [13] Mensing, W.: *Wie wollen unsere Kommunisten wiederhaben ...: demokratische Starthilfen für die Gründung der DKP*, Zürich, Osnabrück 1989
- [14] *Bundesverfassungsgericht: Judgement from 18.3.03 (www.bvergl.de/entscheidungen/bs20_03318_2bvb000101.html)*. The interior ministers merely informed the court that on three key dates between April 1997 and April 2002, the representation of informants in leading NPD positions was less than 15%. Because of fluctuations in personnel, at this time around 500 NPD functionaries were active in the party's management board, that implies more than 75 informants were active in the board as well (*ibid.*, note 32).
- [15] Werkentin, F.: *Staatsschutz' statistisch gesehen*, in: *Bürgerrechte & Polizei/CILIP* 42 (2/1992), pp 47-51 (51).
- [16] For examples in the area of right-wing extremism, see cases described in Gössner, R.: *Geheime Informanten. V-Leute des Verfassungsschutzes: Kriminelle im Dienst des Staates*, München 2003
- [17] *The Celle Hole* was an attempt by the regional secret service (LfV) to infiltrate the Red Army Faction. An informant claimed responsibility for the staged and unsuccessful breakout attempt to gain the trust of the group. The incident was revealed in 1986 to be a plot by the government.
- [18] See the contribution by O. Diederichs in *Bürgerrechte & Polizei/CILIP* 93 (2/2009); on the BND see Schmidt-Eenboom *ibid.* (Fn 9), pp 179-203 and Schmidt-Eenboom: *Der Bundesnachrichtendienst. Stichworte zur geheimen Außenpolitik der Bundesrepublik Deutschland*, in: *Archiv für Sicherheits- und Entwicklungspolitik* 1994, August, pp 7-18.
- [19] This is the wording in the BND Law (Article 1(2)), since 1990, BGBL. I, p 2979

- [20] Article 3(1) of the Internal Security Service Law from 1950, see Roewer *ibid.* (Fn. 2), p 7.
- [21] Anti-Terror Law (Terrorismusbekämpfungsgesetz) from 9.1.02, BGBl. I, p 361 ff. These powers, however, have not been applied often: in six years, only 56 information requests have been made by the federal services to banks and 137 to telecommunications providers, two were made to airline companies and none to the postal services, see Lower House publications BT-Drs. 16/2550 (7.9.2006), 16/5982 (5.7.2007) and 11560 (5.1.09).
- [22] Regional Lower House Sachsen publication 4/15777 (19.6.09). The events could not be clarified due to the government's refusal to provide information. The service's activities, however, were deemed by the majority of the committee to be based on rumours and vague leads, *ibid.* p 46.
- [23] See L.: Der Verfassungsschutz als neues Instrument im Kampf gegen die Organisierte Kriminalität, in: *der kriminalist* 2005, issue 4, pp 172-174 (173)
- [24] BT-Drs. 16/11559 (5.1.09); between 1998-2007 law enforcement authorities received 71 leads from the BND, of which only one led to the initiation of a criminal procedure.
- [25] E.g. Werthebach, E.: Die Zusammenarbeit von Polizei und Nachrichtendiensten bei der Terrorismusbekämpfung, in: *der kriminalist* 2003, Issue 9, pp 326-329; Rupperecht, R.: Die Kunst, Aufgaben sinnvoll zu teilen. Zur Aufklärung von Strukturen Organisierter Kriminalität durch Nachrichtendienste, in: *Kriminalistik* 1993, Issue 2, pp 131-136.
- [26] Klaus Traube, a German engineer and former manager in the German nuclear power industry, was the victim of an illegal eavesdropping operation by the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV) because he was falsely suspected of passing on secret information to the Red Army Faction. The BfV planted a number of wiretaps in Traube's apartment and informed his employer who, as a result, fired him. This illegal operation was uncovered in 1977 by the newspaper *Der Spiegel* and led to the dismissal of the then minister of the interior Werner Maihofer one year later. Traube was cleared of all charges.
- [27] See Gössner, R.: Polizei und Geheimdienste: Sicherheitspolitische „Wiedervereinigung“?, in: *Bürgerrechte & Polizei/CILIP* 27 (2/1987), pp 38-62 (p 44 f).
- [28] Busch, H.: Horchposten Bundesgrenzschutz, in: *Bürgerrechte & Polizei/CILIP* 47 (1/1994), pp 25-27; on the legal justification, see Droste, B.: *Handbuch des Verfassungsschutzrechts*, Stuttgart et al. 2007, pp 572-575.
- [29] Gössner *ibid.* (Fn 27), p 50 f.; Droste *ibid.* (Fn 28), p 480.
- [30] *ibid.*, p 482
- [31] See Busch, H.: Es wächst zusammen ... Zum Gemeinsame-Dateien-Gesetz, in: *Bürgerrechte & Polizei/CILIP* 85 (3/2006), pp 52-59.
- [32] See Wörlein, J.: Unkontrollierbare Anziehungskraft, in: *Bürgerrechte & Polizei/CILIP* 90 (2/2008), pp 50-61 (55-58).
- [33] Not taking into account the powers also created for the BND and MAD by the G10 Law from 1968.
- [34] In December 1983, the German Federal Constitutional Court declared unconstitutional (as an infringement of the Basic Law) some provisions of the act concerning the census adopted the same year, and with this decision produced a global effect on data protection policy and law. The court ruled that the "basic right warrants [...] the capacity of the individual to determine in principle the disclosure and use of his/her personal data". (The so-called right to informational self-determination, or privacy). The fact that the judgement also laid down that an infringement of the right to privacy by the state would have to be justified by corresponding legal acts explains the passing of series of laws in following years to enable such infringements.
- [35] The Allied military governors laid down principles for police and secret service activities of the federal government, which became constitutional.

[36] Wagner *ibid.* (Fn 12), pp 174 f. The police also practiced this unconstitutional method, see Foschepoth, J.: *Postzensur und Telefonüberwachung in der Bundesrepublik Deutschland (1949-1968)*, in: *Zeitschrift für Geschichtswissenschaft* 2009, Issue 5, pp 413-426.

[37] According to conservative (CDU) interior minister Wilfried Hasselmann, after the scandal became public in 1986, see *Frankfurter Rundschau*, 6.9.86.

[38] Droste *ibid.* (Fn 28), pp 264 f.

[39] Federal Constitutional court Judgement from 27.2.08, www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html

[40] Regional Constitutional Court of Sachsen: Judgement from 21.7.05, www.justiz.sachsen.de/esaver/internet/2004_067_II/2004_067_II.pdf

[41] Ranging from the Celle Hole, (because the Lower Saxony police had also not been informed of the staged breakout attempt) to the case involving a neo-Nazi from Brandenburg, see Pütter, N.: *Strafvereitelung im Amt*, in: Müller-Heidelberg, Till et al. (ed.): *Grundrechte-Report 2006, Frankfurt am Main 2006*, pp 158-162.

[42] See the interview with lawyers Elfferding and Weyers in *Bürgerrechte & Polizei/CILIP* 93 (2/2009); also exemplary: Beck, M.: *Das Dickicht der Dienste. Der Einfluss des Verfassungsschutzes in § 129a-Verfahren*, in: *Bürgerrechte & Polizei/CILIP* 2008, Issue 1 (89), pp 58-63.

[43] E.g. *Bundesminister des Innern: Bundesamt für Verfassungsschutz. Aufgaben. Befugnisse. Grenzen*, Bonn 1990, pp 83 ff.

[44] Law from 29.7.09, *BGBI. I*, p 2346.

[45] See Diederichs. O.: *Die 'Parlamentarischen Untersuchungsausschüsse' zu Polizei und Geheimdiensten in der Bundesrepublik Deutschland*, in: *Bürgerrechte & Polizei/CILIP* 1995, Issue 3 (52), pp 48-58.

[46] Parliamentary publication BT-Drs. 16/13400 (18.6.09).

[47] Federal Constitutional Court Judgement from 17.6.09 (<http://www.bverfg.de>)

[48] *Berliner Zeitung*, 30.7.09; *Frankfurter Rundschau*, 21.8.09

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