Statewatch analysis

Germany
Permanent state of pre-emption

By Katrin McGauran

Reform of the Federal Police Authority is the latest in a series of legal, institutional and technological developments underpinning Germany's increasingly authoritarian "security architecture".

It has been widely observed that the security architecture of post-Cold War western Europe is defined by a conflation of the police and security services: political intelligence gathering, that is the tailing, bugging, surveillance, data collection and profiling of citizens, has become part and parcel of the *modus operandi* of police forces. The use of surveillance is not restricted to foreigners or domestic political activists and terrorists, but can now affect the population as a whole. Legally, institutionally and technologically, this development manifests itself in the expansion and merging of databases, 'projects', personnel, remits and police force instruments, with the internal and external security services. One consequence of this conflation of activities is that law enforcement acts in an increasingly repressive and authoritarian fashion towards its own citizens, particularly those who challenge the status quo, such as social movements and investigative journalists. The causalities of this new security architecture are civil liberties and basic democratic rights such as privacy, data protection, the right to protest and freedom of the press, with systematic discrimination against particular groups (political activists and foreigners) profiled as potential terrorist threats. This article traces some of the milestones of Germany's new 'security architecture' [1] before outlining the recent controversial reform of the law regulating the Federal Crime Police Authority (*Bundeskriminalamt*, BKA).

"I would rather have the Communists, than a political police in Germany"

Much has changed since General Clay uttered these words in 1948 [2] in reaction to the conflation of police and intelligence service powers in Germany that resulted in the fascist secret police, *Gestapo* (*Geheime Staatspolizei* - Secret State Police). In a letter to the parliamentary council dated 14 April 1949, the allied military governors gave the green light for the future German government to set up an internal intelligence service to look at activities that aimed to destabilise or overthrow the state. However, they asserted that this agency "shall not have police powers". In an attempt to avert a renewed centralisation of power within the German security apparatus, policing again became a regional affair and policing and political intelligence became the task of different services, whereby the latter was given intrusive, but not coercive powers, and the former was forbidden to employ secret service methods.[3] This so-called *Trennungsgebot* (law of separation) was part of (West) German constitutional law until 1990, but its legal status since unification is contested. Nevertheless, the laws on the different secret intelligence services still forbid their unification with police services at federal or regional level. [4]

The German "security and intelligence community" consists firstly of the internal intelligence services (*Verfassungsschutz*) both at federal and regional level. Secondly, there is a relatively small military intelligence service (*Militärischer Abschirmdienst* MAD), whose functions are legally restricted to investigating "unconstitutional activities" within the army. Thirdly, there is the foreign intelligence agency (*Bundesnachrichtendienst*, BND), which is under the control of the Chancellor's Office and amongst other things engages in wiretapping and electronic surveillance of international

communications to pre-empt attacks by foreign states. On paper, the BND is barred from undertaking domestic operations, although a series of scandals since 2005 have shown that the agency intercepts journalist's communications within Germany as well. [5] The *Trennungsgebot* is unique to Germany, as international comparisons show that this separation is not a given in other western European states with internal intelligence departments located in police authorities in France, Spain, Sweden and Switzerland, for example.[6]

Separation on paper but not in practice

The *Trennungsgebot* has been widely debated in recent years in Germany, as successive Interior Ministers, including the current conservative one, Wolfgang Schäuble, increased security service and police powers and extended their cooperation in gathering, analysing and using political intelligence. The latest example is the reform of the law regulating the Federal Crime Police Authority (BKA), scrutinised below. A series of security law reforms introduced since 1989, and especially during the Social Democratic/Green coalition (1998-2005) under then Interior Minister Otto Schily (*Sozialdemokratische Partei Deutschlands*, SPD), had already eroded this traditional separation, by way of joint databases, bodies and 'think tanks'.[7] A series of "security packages" provided for easier information exchange between the BND, the *Verfassungsschutz* and law enforcement authorities, mainly with regard to the monitoring of the immigrant population and asylum seekers.

The joint anti-terror agency *Koordinierungsgruppe Terrorismusbekämpfung* (KGT), set up 1991, is the first example of a series of bodies in which both the intelligence services and the police work together on a regular basis. These working bodies are not based in law, but typically by ministerial decree, thus formally maintaining the *Trennungsgebot*. The KGT is comprised of representatives of the regional and federal crime police department, internal intelligence services as well as the Federal Prosecutor's Office (*Bundesanwaltschaft*, BAW). A distinctive feature of the expansion and meshing of tasks is the undefined nature of the anti-terror groups' remits and joint projects: the KGT was instructed to meet regularly (in the year of its inception alone there were 29 meetings), whilst its remit (to coordinate the rapid and comprehensive exchange of information, to assess threat scenarios, harmonise measures and maximise the deployment of resources and develop new concepts in the fight against terrorism) remains vague enough to encompass all forms of criminal or preventative activity and cooperation.[8]

Common Database

The same can be said about the Common Databases Act of 2006 [9]. It created an "Anti-Terror Database" holding personal data on terrorist suspects, accessible by regional police offices, the Federal Police (formerly Federal Border Guard), the Federal Criminal Investigation office (*Bundeskriminalamt* - BKA), the internal secret service(s), the BND, the MAD, and last but not least, the Customs Investigation Bureau (*Zollkriminalamt* - ZKA). The data categories include terrorist suspects, those who "support, prepare, endorse or through their doing deliberately generate" violent acts as well as "contact persons", whose personal details could provide information on (*Aufklärung*) the fight against international terrorism. Aside from personal data, associations, objects, bank details and telecommunications traffic data such as addresses, telephone numbers, internet sites and e-mail addresses can be entered, and the 'comments' field remains subject to police or intelligence services' interpretation. The law not only obliges the police and secret services to enter and share data they collect that "relates" to any of the above-named categories, it is also a green light for data collection because of the lack of clearly defined parameters: "Leads" are legitimate when, "according to intelligence or police experience, they justify the evaluation that the findings will contribute to the knowledge on or fight against international terrorism". The widest possible definition was chosen here, which makes anti-terrorism first and foremost a *preventative* activity that does not take a suspect as its starting point but rather internal law enforcement assessments on what, in the eyes of police and secret services, constitutes a threat to security, supporters of terrorism or supporters of the supporters.[10]

The Common Anti-Terror Centre

A series of working groups have been set up since the inception of the KGT, but a new phase of cooperation was introduced with the creation of the common anti-terror centre in 2004 (*Gemeinsames Terrorismusabwehrzentrum*, GTAZ), the "logical consequence" of the increasing volume and scope of informal and ad hoc cooperation between the police and secret service.[11] The GTAZ joins 40 regional and federal authorities which include 19 secret service agencies, 18 police departments, customs and immigration services. They have 229 permanent staff and other resources in a common building in Berlin. Their remit includes Islamic terrorism, internet research and translation, threat

analysis, thematic and case analyses, as well as operational information exchange for the harmonisation of executive measures and investigative approaches. Central to the GTAZ is the analysis of the status of Muslim immigrants in relation to Germany's immigration and asylum law, where immigration, police and security services work together to facilitate the denial or revocation of the status of unwanted foreign groups, in particular Muslims suspected of extremism.[12]

The BKA, a Federal Investigations Bureau

The new BKA law [13] is the most recent, but while only one of many, it is nonetheless an important step in expanding the law enforcement apparatus *vis a vis* civil liberties and the freedom of the press in Germany. After initially being approved by the lower house of parliament (*Bundestag*) it was rejected on 28 November 2008 by the upper house (*Bundesrat*), which represents the 16 regional state governments. The federal government then made an appeal to the conciliation committee and the cabinet agreed to call the committee a few days later. The primary reason for the law's rejection in the *Bundesrat* was the question of whether in "urgent cases" the BKA needed to seek a judge's approval for remote searches of computer hard drives, so-called "cyber patrols"(See article on pp1-2). After a judge's order was added to the otherwise unchanged bill, [14] the upper house approved it on 19 December by a narrow vote of 35-34, a day after the lower house had backed the new version. German President, Hans Köhler, signed and thereby approved the law over Christmas, and it came into force on 1 January 2009.

The BKA, with a staff of 5,500 and an annual budget of 362m euro, functions, firstly, as a central coordinating authority - especially with regard to technology - for the national police departments, secondly, as a contact point for international police cooperation, and finally, since the 1960s, as an investigative authority. [15] Its remit covers organised crime and, under the auspices of the Prosecutor's Office, investigations into internal political threats. Since the 1970s it has targeted the Red Army Faction and political activists under Article 129a of the Criminal Code ("terrorist association"). In this context, the BKA could use a series of secret police powers under the code of criminal procedure, such as long-term surveillance, use of undercover agents, bugging and phone tapping. Due to the fact that anti-terror investigations were - and are - directed against the perpetrators of bomb attacks or other offences that one might call "terrorist", but also against a supposed organisational and political background, the BKA already had *de facto* "preventive" powers in its traditional remit as a law enforcement and prosecution agency.

With the new BKA law, however, the authority will gain official preventative remits which until now were the competences of the *Länder* police forces. Article 4a of the new law entitles the BKA to prevent dangers of international terrorism. The federal government left no doubt that this new competence also includes preventive activities before and beyond specific cases of concrete threats and dangers of terrorist attacks. These new preventative powers lie outside of a specific investigation and thereby outside of any external judicial control mechanisms. [16]

Secret service techniques will now be part of the federal police's working methods, but it is not only the creation of new powers (such as cyber patrols) that makes the law so controversial. After all, existing police powers that were (and still are) part of the regional police remit have merely been transcribed into the BKA law, such as issuing subpoenas, banning individuals from certain public spaces, detaining people, searching persons and places, confiscating and entering and searching private homes. But for the first time these powers are systematically collated under a federal structure within a powerful institution which acts not only as a national but as an international hub for law enforcement's data collection and analysis. Moreover, these methods will be deployed not only against suspects, but - in the name of "prevention" (similar to "pre-emption" in other EU states) - will target anyone who ends up in the authorities' vast data grid. Secret service data, centralised in the Common Anti-Terror Database, includes information collected from credit institutions, airline companies, postal and telecommunication services, taped conversations and fingerprints of foreigners. [17] This, combined with biometric passport data and executive power, creates a state institution beyond parliamentary, let alone civil, control. Far from being a 'neutral' institutional arrangement, the convergence of police and secret services with executive power mirrors, and makes possible, authoritarianism and repressive practices.

Attacking the freedom of the press

Under the new law, only three professions (clerics, criminal lawyers, and politicians) are exempted from surveillance and interception, as well as the right to refuse to give evidence, leaving most lawyers

and journalists and doctors open to state spying and eavesdropping in the name of vague notions of prevention and national security. This will also undermine the confidentiality of their sources/clients and, in relation to investigative journalism, the independence of the press as well as medical confidentiality and ethics. According to the German Federation of Journalists (DJV), raids on press offices and journalist's homes are increasingly being normalised in criminal investigations by applying Article 353 of the Criminal Code (*Strafgesetzbuch* - StGB), on abetting or inciting the disclosure of official secrets. The prosecution uses this clause against journalists if they publish documents marked "confidential" by the authorities. Between 1987 and 2000, the trade union documented 164 cases where journalists' houses were raided, often on grounds of suspicion or incitement to the 'breaching of state secrets' (*Geheimnisverrat*).[18]

Media lawyer, Johannes Weberling, told *SPIEGEL ONLINE* [22] that the BKA law will "rock the very core of what journalism stands for:

> *because investigators would no longer need to show probable cause before initiating surveillance, and sources would therefore think twice before speaking to the press: "One of the media's roles is that of a watchdog. [...] there is a separation of powers in this country and [...] a free press is a vital component of that separation. It is incredibly irresponsible to destroy this watchdog function.*

At this point it is worth remembering the police raids on the offices of the magazine *Cicero* and journalist Bruno Schirra in 2005. The raids were carried out on the basis of an article that appeared in *Cicero* (April 2005) about the Jordanian terrorist Abu Mussab Al Zarqawi, which cited a classified BKA report. The BKA wanted to find the source of the leak. Schirra's and the editorial office's telephones were tapped and traffic data collected prior to the raid; Schirra had also been put under surveillance. [19] The incident triggered widespread criticism from civil liberties groups, press freedom organisations and MPs, who warned of an alarming increase in the criminalisation of investigative journalism by the state. The new law, *SPIEGEL ONLINE* correctly pointed out, could very well accomplish the same goal in a "much less dramatic fashion: remote data mining instead of editorial office raids. Either way [...], the effects will be the same." Similarly, Bascha Mika, editor in chief of the daily *Die Tageszeitung*, points out that "there are many ways to prevent investigative journalism; the easiest is to scare away informants. The planned law will certainly have that effect."[20]

State power meets technology: Online raids, Trojan horses, audio-visual surveillance

Alongside systematising, centralising and enshrining existing secret service practices in law, the new Act introduces an entirely new legal base for online raids (§ 20k BKAG-E), the remote search of personal hard drives [21] - provisionally granted until 2020. The BKA thereby has a legal base to access personal computers and search data stored on them, if concrete facts support the supposition that there is a threat to life, physical integrity or freedom of a person or a threat to the basis or the existence of states or people. In particular, it allows the BKA to use Trojan horses carrying so-called "Remote Forensic Software" that can search through hard drives and send potentially incriminating evidence back to investigators and, for example, track and record Skype conference calls or other services using Voiceover Internet Protocol (VoIP).[22]

The only restriction to these remote searches in Germany is that they are inadmissible if it is suspected that *only* data relevant to someone's personal life would be collected in such a "cyber patrol", an unlikely scenario once an individual has caught the law enforcers' attention. The technical side of such searches or the placing of Trojan horses is not defined at all in the law, leaving a high risk of non-suspects being affected by this extraordinary invasion of privacy. [23]

Audiovisual surveillance of private homes is also enshrined in the new BKA law, requiring no judge's order if the threat is classified by police as urgent. The Green party thinks that this amounts to a "State Peepshow", and has said that it will test the law's constitutionality in court. [24]

Profiling and data mining

Data mining, namely, acquiring personal data held by private and public institutions for comparison, will become a preventative measure rather than forming part of the criminal proceedings following a terrorist attack. Profiling (*Rasterfahndung*) was introduced in the fight against the Red Army Faction and other political activists in the 1970s, to narrow down groups of suspects by way of 'profiles' based on suspicious 'criteria' drawn up by the police and intelligence agencies. Some of today's criteria are: being male, Muslim, between 20 and 40, studying technical subjects at university, originating from

certain 'source' countries, or being linked to certain international bank transactions. The police can force public institutions to disclose the personal data of anyone matching these criteria, to compare and store them in the Anti-Terror Database without the knowledge of those targeted.

The last *Rasterfahndung* was carried out after the attacks of 11 September 2001 and accumulated data on about 8 million people, which were then "matched" by the BKA. At that time, police had to get a judicial warrant in each of the 16 regional states. With the new law only one judicial authorisation will be necessary.

Pre-emptive justice *vs.* democracy

Many commentators have questioned the constitutionality of the law, as it leaves broad remits undefined. [25]

We will be looking for appropriate cases to challenge the constitutionality of the law if it goes through

said media lawyer Weberling, who also represented Bruno Schirra in the Cicero BKA scandal. The Green party faction in the German parliament is also committed to testing the legislation through the courts as is the former regional state interior minister, Gerhart Baum, from the liberal *Freiheitlich Demokratische Partei* (FDP). In particular, the remote searches of computer hard drives and the right to remain silent for doctors and lawyers will be tested to see if a constitutional case can be made.

However, even if the Constitutional Court rules some aspects of the law unconstitutional the fact is that common databases, joint projects and operations, eavesdropping and audio-visual surveillance have become common, rather than exceptional police and intelligence service practices in western Europe and the USA. They are being used not only against terrorist suspects but against ordinary citizens, and in particular, social movements, as the criminalisation of globalisation, migration and labour activists over the past decade have shown. [26] It is not the BKA law but democracy itself that is being tested, because it is clear that the proposed powers engender a very different vision of democracy than that taught in school text books.

Then, two days after the so-called BKA compromise law was narrowly accepted, Schäuble and Justice Minister Brigitte Zypries announced plans to press terrorist charges against people who "make contact or are in regular contact with terrorist organisations" if this contact takes place with the intent of receiving instructions on how to carry out terrorist attacks. Anyone under suspicion of such contact will be subject to the secret service methods described above. [27] Visiting terrorist training camps was used as the most extreme example - one that no parliamentarian dares argue with – and it successfully rallied political support behind the plans. However, even if a journalist could eventually prove that they did not intend to build a bomb while investigating a militant group (that under arbitrary state rule and without legal recourse found itself on the EU or the UN anti-terror list) the fact that their home was raided and computers seized might well suffice to make them think twice before seeking independent information in investigating the wrongs committed in the war against terror. [28]

References

[1] For an overview of legislative changes, see http://www.cilip.de/terror/gesetze.htm

[2] Heiner Busch, Neue "Sicherheitsarchitektur" für Deutschland? Revised version of a speech given at the assembly meeting of the RAV in Berlin on 7 December 2007, http://www.rav.de/infobrief100/Busch.html

[3] Lars Normann, Neueste sicherheitspolitische Reformergebnisse zur Terrorprävention in "Aus Politik und Zeitgeschichte" No 12 (19.03.07), http://www.bundestag.de/dasparlament/2007/12/Beilage/003.html#2

[4] Articles 2(1) and 8(3) of the Act regulating the internal intelligence service (BVerfSchG, http://bundesrecht.juris.de/bverfschg/) explicitly deny the internal security service police powers, any authority over police departments, or an incorporation of its activities into police departments.

[5] See Statewatch News Online (November 2005) and Statewatch bulletin Vol. 16 nos 1-3 (2006) and Vol 17 nos 3/4 (2007).

[6] Heiner Busch, ibid.

[7] For a historical overview of institutional cooperation between police and intelligence, see Jan Wörlein Unkontrollierbare Anziehungskraft. Institutionelle Kooperation von Polizei und Diensten, in Bürgerrechte und Polizei/Cilip, 2/2008, pp 50-61.

[8] Jan Wörlein, ibid

[9] Heiner Busch Es wächst zusammen ... Zum Gemeinsame-Dateien-Gesetz in Bürgerrechte & Polizei/CILIP 3/2006, pp 52-59. In English: See Common database links secret service and the police in Statewatch bulletin Vol. 17 no 1 (January-March 2007), pp 15-16.

[10] Jan Wörlein, ibid.

[11] Mark Holzberger, ... was nicht zusammengehört. Polizei und Geheimdienste kooperieren gegen Ausländer in Bürgerrechte und Polizei/Cilip, 3/2006, pp 60-65

[12] Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt (BKAG-E)

[13] See Helmut Lorscheid Der nächste Schritt zum Überwachungsstaat in Telepolis 18.12.08

*(**http://www.heise.de/tp/r4/artikel/29/29396/1.html**) for a civil liberties critique and party political reception of the 'compromise'.*

[14] Fredrik Roggan, Das neue BKA-Gesetz. Geschäftsgrundlage einer Bundesgeheimpolizei in Bürgerrechte und Polizei/Cilip, 2/2008.

[15] Fredrik Roggan, ibid. pp 13-20

[16] Heribert Prantl Viele Jäger sind der Freiheit Tod in Süddeutsche Zeitung 17.12.2008. See also Süddeutsche Zeitung 7,12 & 13.11.08, 13-16 & 30.12.08.

[17] See Statewatch bulletin Vol. 16 no 1 (2006) for more background information.

*[18] Charles Hauley New Anti-Terror Legislation. Journalists Worry 'Big Brother Law' Will Kill Press Freedom, Spiegel Online 17.12.**08 http://www.spiegel.de/international/germany/0,1518,596807,00.html***

[19] Statewatch bulletin Vol. 16 no 1

[20] Charles Hauley, ibid.

[21] See Statewatch Bulletin, Vol. 18 no 3 (2008)

[22] Big Brother Worries. German Parliament Passes Anti-Terror Law, Spiegel Online 13.11.08,

http://www.spiegel.de/international/germany/0,1518,590198,00.html

[23] Fredrik Roggan, ibid.

[24] Green Party press release 18.12.08. BKA-Gesetz: Letzte Ausfahrt

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[25] For a legal analysis, see Fredrik Roggan, ibid.

[26] For a recent example from Germany, see Crime by association - Terrorist law criminalises critical research, Statewatch bulletin Vol. 17 nos 3/4 (2007), p 16. For a US example, see Gene Ray On the targeting of activists in the war against terror, Statewatch bulletin Vol. 18 no 3, available online at

http://transform.eipcp.net/correspondence/1202292557

[27] For details, see Peter Mühlbauer Zypries und Schäuble wollen "Beziehungen" zu verbotenen Vereinigungen unter Strafe stellen, in Telepolis 20.12.08,

http://www.heise.de/tp/r4/artikel/29/29406/1.html

[28] Peter Mühlbauer, ibid.

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