Tendencies in Public Civil Security Law

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Abstract Civil Security Law is emerging as a new comprehensive area of legal studies. The talk explores the causes of this development, systemizes different tendencies and addresses the challenges of this development. One of the causes for the civil security becoming a central issue also in the legal discourse can be traced back to a connection between a heightened sense of vulnerability, the ever more networked character of contemporary societies and the informational technologies which drive this development. The resulting tendencies are the internationalization and centralization of civil security measures as well as the blurring of several institutional and legal boundaries. These developments pose challenges for our collective and individual autonomy, which public civil security law has to continue to protect.

Keywords Security law · Constitutional law · Fundamental rights

1 Emergence of a Field

The first noteworthy tendency in European civil security law is its emergence as a separate field. Whereas there are fairly rich doctrinal traditions in criminal, police and—to a lesser extent—national disaster law, civil security law comprising all these areas seems to be much more recent. In addition, new is the scope and importance of the issues discussed under the civil security heading. These range from security regimes for critical infrastructure to reporting obligations for enterprises with respect to electronic security threats (for example Schulman et al. 2004; Dunn Cavelty and Kristensen 2008; Gusy 1994, 2010; Kaufmann 2010; Roggan and Kutscha 2006). It seems that an increasing number of issues are viewed

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from a security perspective. This tendency has important institutional ramifications and catalysts. It is evident in the growing importance of legal research in European and German civil security research programs,¹ in the literature (as in a German project for a Handbook of Civil Security Law, Gusy et al. 2016) and even large legal database providers offering new security law modules and security law becoming one of the major legal conference topics.

How can we explain this emergence and rise of security law? At least in public law tendencies seem to reflect the spirit of their time. German public law in the 70s and 80s was dominated by planning law, reflecting the still strong political belief in state-run planning. The 90s saw the rise of regulatory law after the fall of the wall and the general trends towards privatization and liberalization (Bieling 2008). Now civil security law seems to be taking the lead. An increasing number of topics that used to be regarded as planning or regulatory issues are now seen at least partly through the lens of security law. Take infrastructure: in the 70s, public law in Germany was concerned principally with infrastructure planning regulations and planning procedures; in the 90s the focus shifted towards regulatory law concerned with establishing market conditions in the wake of the privatization of previously state-run infrastructures like telecommunications or energy grids. Today these infrastructures are regarded as “critical” (see Schulman et al. 2004; Dunn Cavelty and Kristensen 2008) and the main legal concerns address the related security issues: discussions center around data retention obligations for telecom enterprises, on reporting obligations for cyber attacks on all critical infrastructure providers and other security obligations for companies running water, electricity or communications networks. On the level of constitutional law, there is even a discussion on whether there is something like a security constitution as a specific partial constitutional law (see Tanneberger 2014).

How can we explain this remarkable securitization trend in public law? The focus on security seems to be connected to a heightened sense of vulnerability in contemporary western societies. Infrastructure is no longer regarded as only a means to economic and cultural development, but also as a potential risk not only to their flourishing, but also to their very existence. Disruption, breakdowns and the cascading effects of attacks or natural disasters come to the fore when the law addresses infrastructure now regarded as “critical” (see Schulman et al. 2004; Dunn Cavelty and Kristensen 2008). There are probably many reasons for this heightened sense of vulnerability. It might be connected to the breakdown of the international order after the fall of the Berlin wall (see Buzan 1997), which has not yet created an equilibrium like the dualism of the cold war. It might be connected to new forms of international terrorism, which—though relatively small in number for western societies—aim to break down our sense of security (see for example deGoede 2008). However, a structural reason lies in the technological advances mainly of computer and telecommunications technologies leading to an ever more interconnected world and ever more connected infrastructures with the internet as a super-infrastructure that renders every other infrastructure vulnerable to hard- and

¹ For example the research program of the German Government „Forschung für die zivile Sicherheit 2012–2017“, <https://www.bmbf.de/de/sicherheitsforschung-forschung-fuer-die-zivile-sicherheit-150.html>. Accessed 11 December 2015.

software attacks. With every new technological revolution like ubiquitous computing, the internet of things, self-driving cars or industry 4.0, our societies seem to become increasingly vulnerable and open to ever new threats from increasingly remote and unpredictable sources. China complains about the reluctance of German companies to embrace industry 4.0 due to security issues with respect to intellectual property.² Connected and automated cars have already been manipulated³ and it has even been speculated that they were used in assaults of their drivers.⁴ The implementation of the internet of things will open the floodgates for personal data mining and processing. Ensuring data protection will be key to any implementation of smart grids, smart cars, smart washing machines, refrigerators and the like. The smart city will be not only highly interconnected and efficient, but also highly vulnerable.

Carl Schmitt coined the famous phrase: “The enemy is the own question as Gestalt.” (Schmitt 2006, p. 87). In a similar vein, the technologies responsible for many new vulnerabilities are also those research turns to combat them. The large civil security research programs of the European Union in SP 7 and Horizon 2020⁵ are very much technology-driven. It seems to be a natural process to counter risks created by technology with technological fixes. Security research is in large part security technology research (Geiger 2010). Legal civil security research often steps in when the irony comes full circle. Much legal security research deals with the unintended consequences of security technologies like new scanners, surveillance and data harvesting technologies. Alongside primary security issues, legal security research is also spurred by the secondary security issues raised by security measures. Technology renders modern societies more vulnerable, these vulnerabilities are remedied with security technologies, and security technologies create new vulnerabilities, particularly, but not exclusively with respect to fundamental rights. As the discussion on cryptography shows,⁶ backdoors not only can give security agencies access, but also create new vulnerabilities in the systems they are meant to protect.

One logical thread that seems to explain the rise of legal civil security research seems to run from the development of mainly information- and communication-technologies to ever expanding and interconnecting networks to the acute sense of vulnerability of modern western societies to attacks and man-made or natural disasters. This line of reasoning seems to be at least one of the driving forces of the rise of civil security law as an emerging legal field. If civil security law is really to become the next field of reference for the development of public law, the challenge for doctrinal research will lie in the development of principles, doctrinal structures and procedural guidelines to structure this diverse field that spans everything from

² <https://owc.de/2015/12/03/vision-und-wirklichkeit-deutsch-chinesische-zusammenarbeit-im-rahmen-von-industrie-4-0/>. Accessed 11 December 2015.

³ <http://www.handelsblatt.com/auto/test-technik/manipulierte-autoelektronik-hacker-greifen-nach-dem-steuer/6920056.html>. Accessed 11 December 2015.

⁴ See <https://www.rt.com/usa/michael-hastings-car-neighbor-853/>.

⁵ See <http://ec.europa.eu/programmes/horizon2020/>. Accessed 11 December 2015.

⁶ See for example <http://www.theguardian.com/technology/2015/nov/18/us-europe-reignite-debate-back-door-encryption-paris-attacks>. Accessed 18 January 2016.

classic police law to the law of intelligence services to disaster and emergency law. Are there structures, concepts and issues common to all these areas of the law that are worth developing doctrinally or at least in a systematizing sense? As will become apparent in the following sections there are some developments at least in the different areas of civil security law that seem to suggest a positive answer, also because police and secret service, preventive and repressive law are merging with each other.

2 Tendencies

There are at least six tendencies in civil security law that accompany the securitization of contemporary Western societies and that make up some of their legal characteristics.

2.1 Internationalization

When the networks that connect our societies and the networks of terrorists and organized crime become global, it is no surprise that one of the tendencies in civil security law is internationalization. What is surprising, though, is the highly exceptional form to which this internationalization of security law has made recourse. The most spectacular legal innovations are the anti-terrorist resolutions of the United Nations Security Council.⁷ After the 9/11 attacks, the UN Security Council issued resolutions which took up some core measures of the US Patriot Act and made their implementation in national law obligatory for all its member states (see Scheppele 2006). They pertained to the criminalization of terrorism and its support as well as to the so-called smart sanction regime (see Stöckel 2014), which required, e.g., the freezing of assets of individuals and organizations placed on a terrorist list by the UN Security Council. For the first time, these resolutions gave the UN Security Council the role of a worldwide legislator prescribing legislation for almost every state on the planet. That this highly unusual measure cannot be discounted as a one-off exception due to exceptional circumstances became apparent not only in numerous resolutions that modified the regime. It also became clear with the next set of legislative resolutions pertaining to incoming and outgoing jihadists, which obliged every member state of the United Nations to pass laws making it a crime for their nationals to join jihadist groups such as the Islamic State or the al-Nusra Front. According to resolution 2178,⁸ all member states have to stop and ban funding or facilitating such individuals and must prosecute, rehabilitate and reintegrate returning foreign fighters.

The UN Security Council monitors compliance with these resolutions and puts pressure on member states that do not comply due to rule of law concerns. The new

⁷ S/RES/1386 (2001), see http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1386%282001%29. Accessed 11 December 2015.

⁸ S/RES/2178 (2014); see http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29. Accessed 11 December 2015.

legislative regime of the UN Security Council clashed with European rule of law principles in the Kadi-decision of the European Court of Justice⁹ when the court allowed for non-compliance with the smart sanction system because of rule of law concerns. Civil security law is the only domain of law in which the UN Security Council has adopted a legislative approach. One of the questions that remain open is how the UN Security Council can be made to adhere to the fundamental rights and rule of law standards that accompany the role of the legislator of its member states.

For the member states of the European Union, the UN Security Council resolutions trickle down through EU legislative acts that oblige its member states to adopt the prescribed measures.¹⁰ The member states then amend their law accordingly. The regulations on abiding and abating terrorism have thus been introduced into German criminal law¹¹ and have led to a considerable extension of criminal liability in the forefront of actual crimes, giving penal law a preventive dimension that is structurally alien to its repressive character.

In the courts, this international interconnection of different security law levels has led to an interesting reception cycle with respect to rule of law standards. In its decision on the smart sanction regime,¹² the European Court of Justice justified its power to control the rule of law status of the implementation of the Security Council resolutions with the same argument that the German Federal Constitutional Court had applied to European Union law when it still lacked a solid fundamental rights basis.¹³ The European Court of Justice ruled that as long as the UN legislative system does not provide for basic rule of law safeguards, it asserts the power to give European law priority over UN obligations, if the latter violate fundamental principles of European Union law. In the background of this decision lurked the tenet of the so-called “Solange”-rulings of the Federal Constitutional Court.¹⁴ In these rulings, it asserted its power to give national constitutional law priority over European law if systematic violation of fundamental rights would occur on the European level. A systematic denial of legal protection against smart sanctions could have well triggered a response from the German Federal Constitutional Court in accordance with this “Solange”-doctrine. The European Court of Justice must have been aware of this potential backlash and might have adopted the “Solange” approach with respect to the UN Security Council at least also in light of it. The receptions came full circle when the German Federal Constitutional Court in its Lisbon decision cited the Kadi-decision of the European Court of Justice to

⁹ ECJ, C-402/05P and C-415/05P, 03.09.2008, Kadi and Al Barakaat International Foundation v Council and Commission, 2008 I-06351, recital 326.

¹⁰ EU framework decision 2008/919/JI, 28.12.2008.

¹¹ See §§ 89a, 89b German Criminal Code (Strafgesetzbuch).

¹² ECJ, C-402/05P and C-415/05P, 03.09.2008, Kadi and Al Barakaat International Foundation v Council and Commission, 2008 I-06351, recital 326.

¹³ BVerfG (Federal Constitutional Court)—29.05.1974—BvL 52/71—BVerfGE (law reports) 37, 271.

¹⁴ BVerfG (Federal Constitutional Court)—29.05.1974—BvL 52/71—BVerfGE (law reports) 37, 271; BVerfG (Federal Constitutional Court)—22.10.1986—2 BvR 197/83—BVerfGE (law reports) 73, 339.

corroborate the necessity of its own reserve powers with respect to acts of the European Union.¹⁵

The European Union, however, does not just act as a mediator with respect to global security legislation, but plays an increasing role by internationalizing security law through supranational acts. The data retention directive¹⁶ might be the—albeit faltering—most prominent example, but the Schengen Agreements (see for example Winkelmann 2010) and the Treaty of Prüm (see Hummer 2007) install entire security systems with centralized databases, practices of coordination and support. Prüm even allows for the sharing of operative powers, as when foreign police forces are allowed to operate on foreign territory. So it was only consequential when the Treaty of Lisbon integrated collaboration in security matters into the general system of European Union law.¹⁷ In the face of these dynamic developments, the Federal German Constitutional Court felt it necessary to point out that the exercise of police powers belongs to the monopoly of force of the German state and sets upper limits for the European integration permitted by the German constitution.¹⁸

European efforts to internationalize civil security law are also of importance, because they can serve as models that reach beyond the European Union. Thus, the regulatory provisions developed in the context of the European Union are sometimes taken up in bilateral agreements as, for example, is apparent in the treaty between Germany and the United States on the prevention and repression of serious crime of 2009.¹⁹

Though civil security law is—as the Federal Constitutional Court reminded us—at the heart of state sovereignty, there is a remarkable tendency to internationalize it on almost every level.

2.2 Centralization

At the national level, the internationalization of civil security law is mirrored, at least in Germany, by a process of centralization. In Germany, not least because of the horrific role that the national police service played under National Socialism, police powers have been organized at the state level—at least in principle. But since the 90s, the former federal border patrol service has become a federal police service, not with general police powers, but by bundling and extending border, airport and railway security and branding it the Federal Police. In numerical terms it is now the

¹⁵ BVerfG (Federal Constitutional Court)—30.06.2009—2 BvE 2, 5/08—BVerfGE (law reports) 123, 267.

¹⁶ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

¹⁷ Art. 42 EUV.

¹⁸ BVerfG (Federal Constitutional Court)—30. June 2009—2 BvE 2, 5/08—BVerfGE (law reports) 123, 267.

¹⁹ “Gesetz zu dem Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Vereinigten Staaten von Amerika vom 1.10.2008 über die Vertiefung der Zusammenarbeit bei der Verhinderung und Bekämpfung schwerwiegender Kriminalität“, BGBl. (Bundesgesetzblatt—Federal Law Gazette) II, 1010.

second largest police force in Germany.²⁰ Further, since 2008 the Federal Bureau of Criminal Investigation has been entrusted by constitutional amendment²¹ with the power not only to prosecute, but also to prevent international terrorism.²² There were even plans to combine the Federal Police and the Federal Bureau of Criminal Investigation in a single agency thus forming a federal police agency,²³ much larger in terms of organizational and man power than any state police service.

The reasons for this development seem threefold: First, it is in part a direct consequence of the internationalization of civil security law since internationalization depends on national cooperation partners and could hardly cope with multiple state-level players—16 in the case of Germany.

Second, the internationalization of threats transcending a fortiori internal federal borders seem to make it necessary to organize policing powers at least on a national level. The coordination costs involved in fighting these threats with numerous state agencies are considered too high, though there are advantages to more decentralized approaches not only because of the division of police powers that it entails, but also the greater effectiveness of more localized and smaller bureaucracies. But, centralization seems to be an easier fix than an approach requiring the development of effective modes of cooperation.

Third, centralization efforts are also driven by technological development. The protection of electronic infrastructure and the development of electronic surveillance and infiltration tools require a level of technical expertise and resources that can hardly be met on a sub-national level. Further, the protection of the electronic infrastructure of the government networks requires a degree of standardization that can be more easily achieved on a national level. Thus, in 2009 the German federal constitution was again changed to allow the federal government to develop secure electronic infrastructures for the administration of the states as well.²⁴ Further, a federal administrative agency took over the task of technically implementing all telecommunication surveillance measures.²⁵ Whereas previously, when the state still owned telecommunications infrastructure and services, it just had to tap its own phone lines or intercept the mail carried by state-run postal services, things have become much more complex in our new world of electronic communication. This is not only because of the new forms of communications media—email, chat, Voice over IP, satellite, telephone—but also because of the mostly private structure of the services and new counter-strategies such as those offered by easily accessible

²⁰ The federal police has 41.000 officers (http://www.bundespolizei.de/Web/DE/05Die-Bundespolizei/01Unser-Auftrag/Unser-Auftrag_node.html), the police in NRW has 50.000 (https://www.polizei-nrw.de/artikel_89.html), in Baden-Wuerttemberg ca. 30.000 (<https://www.polizei-bw.de/UeberUns/polbw/Seiten/default.aspx>), Bayern 41.000 (<http://www.polizei.bayern.de/wir/organisation/index.html>. Accessed 11. December 2015).

²¹ Art. 73 I Nr. 10c GG (Grundgesetz—Basic Law for the Federal Republic of Germany).

²² See „Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt“, BGBl. (Bundesgesetzblatt—Federal Law Gazette) I, 3083.

²³ See <http://www.zeit.de/politik/deutschland/2011-03/polizei-reform-bka>. Accessed 11. December 2015.

²⁴ See Art. 91 c GG (Grundgesetz—Basic Law for the Federal Republic of Germany).

²⁵ <http://www.heise.de/tp/artikel/30/30271/1.html>; <http://www.sueddeutsche.de/digital/telekommunikation/sueberwachung-feind-hoert-mit-1.28782>. Accessed 11 December 2015.

cryptography. The surveillance of an encrypted mobile phone contact using a foreign mobile network in an Arab dialect requires considerable technical and staffing resources, not available at least in the smaller German states. So again, technology plays a major role in one of the newer tendencies in civil security law.

2.3 Blending of Prevention and Repression

The internationalization and development of technology also have a major impact on the third tendency I wish to describe: new terrorist threats have taken Western societies by surprise and their new forms of sleeper cells and homegrown terrorists who blend into the general population have increased interest in preemptive strategies that intervene long before attacks become imminent (see Bonner 2007). The aforementioned UN Security Council resolutions thus focused on planning and support activities not necessarily connected to concrete planned attacks, like the collection of money, providing or studying instructions for explosive devices, or visits to recruitment or training camps of terrorist organizations. The development of data collecting, harvesting, and analyzing technologies support these efforts because they make it possible to identify suspicious patterns in otherwise unsuspecting behaviors. In essence, these efforts are preventive in nature. They aim to apprehend potential perpetrators before they have even planned a concrete attack. Despite their preventive nature, they have been inserted into a legal order, usually by penal law that criminalizes activities that may lead to terrorist or otherwise criminal acts that then impact the life, property or freedom of citizens. Thus, under the guidance of the UN Security Council resolutions, preventive and repressive law blends into these new penal regulations. In German law, this inspires another feedback loop: preventive police law regulations permit security measures even if there is only a danger that a crime may be committed (see Poscher 1999), which leads to an even further extension of security measures into the forefront of actual crimes when applied to the criminalization of these new forefront extension of the penal code.

2.4 Blending of Police and Secret Services

The relation and degree of separation between regular police forces and secret services are unique in each country. Because of the horrific history of their collaboration under National Socialism, the division between police and secret services has been particularly strong in Germany after the Second World War. But, though in this sense Germany belongs to the extreme end of the spectrum, even here a blending of regular police and secret services can be observed. On the institutional side, there are now shared databases, which are shared by all police and all secret service institutions.²⁶ Further, police services and secret services run an anti-

²⁶ This database was implemented on grounds of “Gesetz zur Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder“, BGBl. (Bundesgesetzblatt—Federal Law Gazette) I, 3409.

terrorism center where they cooperate and coordinate in an informal fashion.²⁷ For the aforementioned technical reasons, it has also been suggested that the secret services should share the expertise used by the central agency that operates surveillance technology for the police forces.²⁸ Materially, the scope of their functions merged when the German police codes broadened the scope of police powers to cover not only—as was traditionally the case—the prevention of concrete dangers, but also precautionary measures that can build a basis for data preventive action.²⁹ The strategic and precautionary collection of data, however, overlaps with the traditional function of the secret services. It also goes without saying that some of the new informational powers of the regular police forces are interchangeable with those traditionally assigned to the secret services.

2.5 Blending of Police and Military Powers

The internationalization of threats also makes it more difficult to draw a clear distinction between police and military powers. In post-conflict missions, the employment of police or military forces sometimes seems interchangeable. In some cases, the internal order of foreign states is helped by police missions, in other cases by the military taking up policing tasks (see Baldus 2007). In the fight against pirates on the high seas, the military basically takes over policing tasks, too (Braun and Plate 2010).

At least in Germany, the very strict conditions under which the military can be employed domestically have become blurred around the edges. After a more restrictive decision of one of its senates,³⁰ in a rare plenary decision the Federal Constitutional Court has even permitted the use of military weapons in the event of catastrophes including terrorist acts³¹—a ruling in tension with the much more restrictive constitutional regulations on the use of military force in the event of insurgencies.

2.6 Expansion of Security Powers

Institutional and functional shifts in the security architecture are accompanied by an expansion of security powers. At the forefront of these expansions is new data collection and processing powers resulting from new technical challenges on the one hand and the new technical possibilities offered by the accelerating electronic revolution on the other. Police, secret services, and prosecutors were given powers

²⁷ Gemeinsames Terrorismusabwehrzentrum (GTAZ), see <https://www.verfassungsschutz.de/de/arbeitsfelder/af-islamismus-und-islamistischer-terrorismus/gemeinsames-terrorismusabwehrzentrum-gtaz>. Accessed 11 December 2015.

²⁸ <http://www.tagesspiegel.de/politik/deutschland/polizei-und-geheimdienste-scharfe-kritik-an-schaeubles-plaenen/1238176.html>. Accessed 15 December 2015.

²⁹ See for example § 22 police act of Baden-Wuerttemberg.

³⁰ BVerfG (Federal Constitutional Court)—15.02.2006—1 BvR 357/05—BVerfGE (law report) 115, 118.

³¹ BVerfG (Federal Constitutional Court)—03.07.2012—2 PBvU 1/11—BVerfGE (law report) 132, 1.

to carry out electronic dragnet measures,³² online searches, source-based telecommunication surveillance, GPS tracking, IMSI-based localization, automatic license plate recognitions, (intelligent) video surveillance, and providers of telecommunication services are still obliged to ensure the retention of their customers' metadata in at least some countries of the European Union,³³ despite the decision of the European Court of Justice on the data retention directive.³⁴

In part, these extensions of powers are a simple necessity to compensate at least in part for the fact that criminal and terrorist operations and organizations rely heavily on new technologies and media, which would put them out of reach of security forces if they were not equipped with new powers in the new digital domain. On the other hand, at least some of these powers take the surveillance of citizens to a new level. This is true both quantitatively and qualitatively. Quantitatively, the data retention strategy puts every citizen, in all those electronic communications that are an ever expanding part of their lives and integrated into each and every activity, under total surveillance, despite the fact that virtually none of them are connected to let alone engaged in criminal or terrorist activities. Mass surveillance is used on a new historic scale that not even the totalitarian regimes of the 20th century could have dreamt of. Qualitatively, online searches of computers that provide access to all kinds of personal electronic information, or the confiscation of email accounts, offering access to entire communication histories, are different in kind from their traditional analog predecessors. Like many of the other tendencies, this qualitative and quantitative expansion of security powers is technologically driven in its causes and its means.

3 Challenges

The challenges raised by these tendencies in public civil security can be centered around the concept of autonomy. At some level, all these tendencies pose a challenge to the collective autonomy of democratic societies and to individual autonomy protected by fundamental rights and rule of law principles. These challenges are in some ways interdependent, but also quite distinct.

3.1 Civil Security Law and Collective Autonomy

The expansion of civil security administration, the broadening of secret service powers and the expansion of secret police measures and tactics poses a structural problem for democratic societies. On the one hand, democratic societies rely on the accountability of their government and administration. Accountability, however,

³² See BayVerfGH (Bavarian Constitutional Court)—28.3.2003—Vf. 7-VII-00—Neue Zeitschrift für Verwaltungsrecht 2003, 1375; BVerfG (Federal Constitutional Court)—04.04.2006—1 BvR 518/02—BVerfGE (law report) 115, 320.

³³ For example in the United Kingdom, see <http://www.out-law.com/en/articles/2014/july/new-uk-data-retention-laws-come-into-force/>. Accessed 18 January 2016.

³⁴ ECJ, C-293/12 and C-594/12, 08. 04. 2014, Digital Rights Ireland Ltd. v. Minister of Communication, Marine and Natural resources and Others and Kärntner Landesregierung and Others.

presupposes information and knowledge about and transparency of its agencies. For secret security measures, all the usual accountability mechanisms fail: judicial control usually fails because citizens subject to secret measures are generally unaware of them and thus cannot challenge them in court. Political checks fail for the same reason. The public or parliament is able to establish political responsibility only if they are made aware of secret practices. As the recent revelations about the NSA have made only too clear—again—the lack of accountability tends to leave security agencies to their own functional logic and exposes them to the risk of ignoring legal, political and ethical boundaries and rationales (see Glaßner 2003; Denninger 2004). On the other hand, secret services and secret police measures cannot be made fully transparent without them losing their effectiveness. Democratic societies seem to be presented with a conundrum: in the face of ever new security challenges, from international terrorism to organized crime, democratic societies must rely on secret security measures to protect their citizens; but secret security practices seem to undermine the collective autonomy and trust they are designed to protect.

One of the major challenges of public civil security law is to find ways out of this conundrum. This task is now facilitated by heightened public and political awareness of the challenge and some first steps seem to have been taken to address it. The discussion could further profit from the insight that measures to enhance the democratic control of secret civil security measures do not have to be antagonistic to their purpose. Secrecy of government operation is not only a source of distrust, but also of sometimes overblown fears and speculation or even conspiracy theories. At least some of the measures that aim at greater transparency can also serve to counter fears and speculations and thus enhance public trust in the services and police forces, which is one of their main assets when it comes to human intelligence as their most valuable source. When the public became aware of online searches there was a widespread fear that computer systems might be infiltrated by the security agencies. When the parliamentary evaluation of German anti-terror legislation revealed that some of the most intrusive surveillance powers like that licensing online searches were used only in a handful of cases,³⁵ it helped to put the debate on a more realistic footing. On the other hand, when the public register of telecommunication surveillance measures by prosecutors showed a dramatic north south discrepancy,³⁶ it was picked up by the press and forced the governments of the southern states to justify their figures or adopt a more moderate approach.³⁷

³⁵ http://euro-police.noblogs.org/files/2011/11/KA_17_7104.pdf; See also <http://www.heise.de/newsticker/meldung/BKA-hat-in-sieben-Faellen-Online-Durchsuchungen-durchgefuehrt-1384255.html>. Accessed 11 December 2015).

³⁶ See https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Uebersicht_Verkehrsdaten_2011.pdf?__blob=publicationFile&v=2 (Accessed 11 December 2015).

³⁷ Baden Württemberg for example reduced its telecommunication surveillance measures, http://www.focus.de/regional/stuttgart/justiz-im-land-werden-deutlich-weniger-telefongespraeche-abgehoeert_aid_1020747.html (Accessed 11 December 2015).

There is a widespread sense that current mechanisms of parliamentary control over security agencies are insufficient (Dietrich 2014; Gusy 2008).³⁸ The parliamentary committees or special bodies entrusted with supervision are often understaffed, lack the necessary powers for thorough checks and often have only limited potential to make political use of their findings due to secrecy requirements largely determined by the executive. Strengthening parliamentary oversight by providing more resources, the right not only of parliamentarians, but also their staff or special rapporteurs to inspect the operations of the agencies and more lenient rules about making their findings public in a way that does not hinder the work of the agencies alongside judicial control of their application seem obvious remedies to counter these grievances. But, probably the obvious will not be sufficient. Many of the new security measures involve the mass processing of large data sets that cannot be controlled in traditional ways. Big-data technologies need big-data control technologies. The technologies have to be set up in a way that ensures automated control with regard to irregularities and the overstepping of legal boundaries. At best, legal provisions should be programmed into surveillance systems; overrides must raise red flags and be justified to an independent oversight. The effective control of mass data processing by security agencies involves the development of information technologies as much as the law that can then prescribe them as a prerequisite for the implementation of surveillance measures.

Yet another approach might be the further involvement of independent control bodies like data protection agencies or ombudspersons. Along with the vast expansion of security powers France recently created the Commission Nationale De Contrôle Des Techniques De Renseignement (CNCTR) which has the task of controlling the use made by the French security agencies of their new powers.³⁹ There is probably no silver bullet able to mitigate the conflict between democracy and secrecy. Rather, we will need a whole range of adjustments to moderate it and we will probably have to accept that some tension will remain. But, any advances are an opportunity not only to enhance our collective autonomy, but also our security by increasing public trust in our security agencies.

3.2 Civil Security and the Rule of Law

The rule of law and fundamental rights challenges that accompany the tendencies in public civil security law are structural. Traditional safeguards against over-intrusive security measures seem to falter. Concepts like the German police measure threshold of a “concrete danger”⁴⁰ or the clear and present danger doctrine in Anglo-American law (Lowe 2005) must be abandoned if precautionary measures are to be taken. They cannot be upheld, because the security threats are not of an everyday nature, but of a scale and severity that does not allow us to risk them

³⁸ Recently, members of the German parliament brought forward a motion for a better control system, see BT-Drs 18/6645 (<http://dipbt.bundestag.de/dip21/btd/18/066/1806645.pdf>. Accessed 11 December 2015).

³⁹ Loi n°2015-912 du 24 juillet 2015—art. 2.

⁴⁰ See the police acts (Polizeigesetze) of the German federal states, for example § 23 a Abs. 1 Polizeigesetz Baden-Württemberg.

becoming concrete or present. If attacks like that on 9/11 in New York or on 7/7 in London or on 3/10 in Madrid or on 13/11 in Paris are to be prevented, the security services cannot wait until the terrorists have passed the gates. But, if the traditional thresholds for fundamental rights infringements no longer hold, what will take their place? Are abstract dangers or mere hunches enough? Or should they be taken without any threshold at all, as in the case of data retention mechanisms.

The principle of proportionality, which is not only deeply rooted in the German tradition, but has risen to international stardom as a one-size-fits-all fundamental rights standard (see for example Barak 2012; Huscroft et al. 2014; Pache 1999; Neumann 1994), is also drawn into the erosion of rule of law standards in public civil security law. The precautionary principle creates a dynamic in public national security law against which the proportionality principle offers no resistance. For an effective precaution as much information as possible is not only apt, but also necessary to strengthen its effectiveness. And how can the mere collection, storage, and processing of data be disproportionate when it comes to preventing attacks like those in New York, London, Madrid or Paris? The dynamic of the precautionary principle has even led some authors to call for not only the proportionality principle, but also its operability to be made a constitutional standard. Precautionary measures could then be “unconstitutional, not because they are disproportionate, but because they are always proportional” (Enders 2005, p. 47). In a historical perspective, it is not without tragic irony that the proportionality principle seems to be being eroded in public security law though it was developed by the Prussian administrative court of appeal in the 19th century to curb police powers and hence moved into administrative, constitutional and now international law (Barak 2012, 178–205).

For the development of rule of law standards, be it on a constitutional, supranational or international level, it is anything, but a trivial task to develop appropriate doctrinal structures that take the new security environment and threats into account, whilst not abandoning the idea of rule of law limitations, controls, and structure for civil security measures.

There seem to be three elements to a civil security rule of law framework, also adopted by the German Federal Constitutional Court: procedural safeguards, relative and absolute limitations to security measures.

3.2.1 *Procedural Safeguards*

When material standards are difficult to uphold or determine, there is a general tendency in law to revert to procedural regulation (Albers 2001, p. 335; Kutscha 2003; Schoch 2004, p. 367; Middel 2006 p. 356). Procedural regulations do not establish a threshold that guarantees the appropriateness of a measure, but rely on the belief that an appropriate outcome will be ensured by the design of the procedural steps to be followed before and after a measure is taken. From an operational perspective, they have the advantage of material flexibility, but entail the costs of further bureaucratization and red tape. Thus, the German Federal Constitutional Court has demanded prior judicial review for highly intrusive

security measures like online searches⁴¹ and data retention regimes.⁴² It has further demanded a whole set of measures to protect the most intimate core of privacy from surveillance measures⁴³ and notices to those who have been subject to covert operations to give them a chance to challenge them in court.⁴⁴

In much the same vein, the European Court of Justice has invalidated the data retention guideline in part on the grounds of the lack of procedural safeguards. This is not surprising given their general tendency to substitute material with procedural safeguards.⁴⁵ However, it is out of keeping with the regulatory character of EU guidelines, designed as partial regulations that leave member states all the room they need to establish procedural safeguards to ensure that their implementation of the guideline conforms to fundamental rights exigencies. It seems to turn the instrument of the EU guideline on its head if they are invalidated for their lack of completeness, given that they are meant to be incomplete. Be this as it may, the decision shows that the European Court of Justice also tends to proceduralize fundamental rights requirements with respect to civil security measures (see also Backer 2014).

3.2.2 *Relative Material Thresholds*

Given the overwhelming weight of security concerns, it is difficult to develop relative material thresholds for security measures. Nevertheless, attempts have been made to systematize relative material fundamental rights standards. The German Federal Constitutional Court has resorted to relating different forms of danger to the intensity of security measures. Thus, it has upheld that more intrusive surveillance tactics, which either affect the individual more severely or may have a detrimental effect on the exercise of liberties in general, are permitted only if there is a concrete danger to public safety. Thus, it has required concrete dangers for the online infiltration of computer systems,⁴⁶ automatic license plate recognition,⁴⁷ and dragnet investigations.⁴⁸ In some critiques of these decisions, however, the exigencies of proving a concrete danger have been exaggerated (Bausback 2006;

⁴¹ BVerfG (Federal Constitutional Court)—27.02.2008—1 BvR 370/07—BVerfGE (law report) 120, 274, 3. Leitsatz (3. headnote).

⁴² See BVerfG (Federal Constitutional Court)—02.03.2010—1 BvR 256/08—BVerfGE (law report) 125, 260, recital 243.

⁴³ BVerfG (Federal Constitutional Court)—03.03.2004—1 BvR 2378/98, 1084/99—BVerfGE (law report) 109, 279; BVerfG (Federal Constitutional Court)—27.07.05—1 BvR 668/04—BVerfGE (law report) 113, 348, 391–2.

⁴⁴ BVerfG (Federal Constitutional Court)—14.07.1999—1 BvR 2226/94, 2420, 2437/95—BVerfGE (law report) 100, 313, 361.

⁴⁵ ECJ, C-293/12 and C-594/12, 08.04.2014, *Digital Rights Ireland Ltd. v. Minister of Communication, Marine and Natural resources and Others and Kartntner Landesregierung and Others*, recital 62.

⁴⁶ BVerfG (Federal Constitutional Court)—27.02.2008—1 BvR 370/07—BVerfGE (law report) 120, 274.

⁴⁷ BVerfG (Federal Constitutional Court)—11.03.2008—1 BvR 2074/05—BVerfGE (law report) 120, 378.

⁴⁸ BVerfG (Federal Constitutional Court)—04.04.2006—1 BvR 518/02—BVerfGE (law report) 115, 320.

Bäcker 2015, 113–116). Understood correctly, a concrete danger requires in disjunctive sense concrete evidence on either the temporal, local, or personal side of an expected harm or perpetrator. It does not demand that the police already knows the facts that the measures are designed to discover—as some critiques implied.

An even more systematic approach has been developed in fundamental rights theory with Robert Alexy's so-called weight formula (Alexy 2002, p. 408), adapted to the evaluation of security measures in the European SURVEILLE research project.⁴⁹ The formula breaks down different aspects of security measures, such as the abstract weight of the affected fundamental right, the intensity of an intrusion into it through surveillance and the security benefits (usability) and assigns different numerical weights to each. The weights are then calculated in a modified weights formula, which delivers a score that puts the measure into a green category for fundamental rights clearance, an orange category for revision, and a red category for invalidation. In its resolution 2015/2635 the European parliament referred to the SURVEILLE standard as a recommendable method for security measure evaluation.

3.2.3 Absolute Material Thresholds

Fundamental rights, however, do not just set relative thresholds, but also absolute ones. Most prominent are those connected to the protection of human dignity. German and European courts have stood firm against the use of torture even in the most challenging kidnapping situations. German courts sentenced a police officer who threatened to use torture to extract the whereabouts of a kidnapped child from the apprehended perpetrator to save the child's life.⁵⁰ Nothing can justify even the threat of torture by the state. The European Court of Human Rights has doubled down in this decision by convicting Germany of a violation of Art. 8 ECHR, because it regarded the sentence as insufficiently severe.⁵¹

The guarantee of human dignity in the German constitution also served as the basis for the German Federal Constitutional Court to invalidate a statute that would have allowed the military to bring down hijacked passenger planes used as weapons in a 9/11 fashion. The court regarded it as a violation of human dignity to weigh the lives of the kidnapped passengers against the higher death toll on the ground to justify military intervention. For the court, the guarantee of human dignity does not permit a numerical calculation with human lives.⁵²

The court has further developed a core area of privacy out of the dignity guarantee which has to be respected by any kind of surveillance measure and devised a whole operational system for its protection to be put into effect in scenarios like telecommunications or home surveillance. Systems must be shut

⁴⁹ See <https://surveille.eu.eu/>. Accessed 11 December 2015.

⁵⁰ LG (Landgericht—district court) Frankfurt—20.12.2004—5/27 KLs 7570 Js 203814/03 (4/04)—Neue Juristische Wochenschrift 2005, 692; European Court of Human Rights—01.06.2010—22978/05—Neue Juristische Wochenschrift 2010, 3145.

⁵¹ European Court of Human Rights—01.06.2010—22978/05—Neue Juristische Wochenschrift 2010, 3145, 3147.

⁵² BVerfG (Federal Constitutional Court)—15.02.2006—1 BvR 357/05—BVerfGE (law report) 115, 118. For critics of this adjudication see Hase (2006) and Hillgruber (2007).

down as soon as the security services become aware that the core area of privacy is involved, automatic surveillance records must be checked by an independent judge, and accidental records concerning the core area of privacy must be deleted.⁵³ The court, however, only regards the most intimate aspects of the private sphere to belong to the core area, such as the expression of private emotions, or emanations of intimacy and sexuality. By definition, contents with direct social relevance such as those relating to crimes are excluded.⁵⁴

In the past, the German Federal Constitutional Court also formulated an absolute threshold for security measures in that it considered unconditional mass surveillance as unconstitutional in principle. From this absolute stance, it backpedaled in its decision on the German law implementing the EU data retention guideline and allowed for exceptions to this absolute principle.⁵⁵ It was then left to the European Court of Justice to reaffirm this principle and invalidate the EU data retention guideline, because it regarded the unconditional mass surveillance it called for as a violation of the right to privacy and the right to data protection in the European Charter of Fundamental Rights.⁵⁶

4 Résumé

Structural changes in the security architecture are by no means complete. The tendencies illustrated above are exactly that: tendencies. The internationalization and integration of different security frameworks will proceed and the call for new security powers will be renewed in the wake of every new security crisis. The challenges for public security law will thus not cease. Strengthening collective autonomy and safeguarding individual autonomy by upholding and developing adequate rule of law and fundamental rights standards and increasingly establishing these on a supra and international level will remain one of the foremost tasks of public civil security law.

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⁵³ BVerfG (Federal Constitutional Court)—27.02.2008—1 BvR 370/07—BVerfGE (law report) 120, 274, recital 280–283.

⁵⁴ BVerfG (Federal Constitutional Court)—03.03.2004—1 BvR 2378/98, 1084/99—BVerfGE (law report) 109, 279.

⁵⁵ BVerfG (Federal Constitutional Court)—02.03.2010—1 BvR 256/08—BVerfGE (law report) 125, 260.

⁵⁶ ECJ, C-293/12 and C-594/12, 08.04.2014, Digital Rights Ireland Ltd. v. Minister of Communication, Marine and Natural resources and Others and Kärntner Landesregierung and Others.

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