Bundeskriminalamt

60 Years of the BKA:
The Field of Contention between Freedom and Security

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The Bundeskriminalamt in focus – constitutional developments and discourse relating to the contention between freedom and security

Abstract

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New risk and threat scenarios are giving rise to new questions with respect to the balance between freedom and security. When setting standards for powers of intervention, the legislative body is not necessarily bound to the traditional definition of threat as laid down in police law and to associated intervention limits. In view of new or altered risk and threat situations the legislative body has the right to further develop traditional obligations arising from the rule of law, provided that constitutional limits are observed. When evaluating and assessing such new situations, the legislative body has also a certain degree of discretion and prerogative.[1] "The legislative body is entitled to readjust the balance between freedom and security, however, it is not allowed to shift the focus fundamentally".[2]

The Basic Law recognises the state's primary task to provide security, especially in the interest of the citizens´ fundamental rights, and is thus based on the idea that the state has an obligation to protect. At the same time, the Basic Law stipulates that legislation, administration and jurisdiction continuously have to consider civil liberties which are to be defended by these institutions and to establish and maintain an appropriate balance. However, the Basic Law does not allow for all legally guaranteed rights to be weighed up or even to be "ignored" after having been weighed up. The guarantee of human dignity and human dignity provisions inherent in specific civil liberties are among the core elements which enjoy absolute protection.

Beyond the core of human dignity protection, however, there is a range of possible alternatives. Within the framework set by the constitution, solutions – including solutions for balancing freedom and security – are not predetermined by practical constraints, technical progress or historically developed principles. Not everything which is technically feasible, is necessarily also permitted by law. It would be a "naturalistic fallacy" to derive normative statements or postulates from technical possibilities, i.e. to come from an "is" statement, to an "ought" statement (Böckenförde)[3].

Instead, solutions must be elaborated by weighing up and respecting the principle of proportionality. In a parliamentary democracy like ours, this is realised first and foremost by way of parliamentary legislation. The conflict between the individual and society has always been a challenge for the legislator. However, especially with respect to the conflict between security and individual freedom, it is impossible to apply standardised problem-solving strategies in each individual case as the respective underlying facts and situations are subject to constant change. The requirements of a globalised world, including those pertaining to European and international law, have to be taken into consideration.

[1] BVerfGE 115, 320 (360).

[2] BVerfGE 115, 320 (360).

[3] *Böckenförde*, Menschenwürde als normatives Prinzip – die Grundrechte in der bioethischen Debatte, in: ders., Recht, Staat, Freiheit, erweiterte Ausgabe 2006, p. 389 ff. (392).

The requirements stipulated by the Basic Law are challenging – not least due to historical experience. A concept providing for the exclusion of people – even offenders or suspects – from the legal community and to declare them outlaws due to their being regarded as enemies of the legal community, would represent a capitulation of the constitutional state. Risks to the constitutional state and impairments to the principles governing a free and democratic system must be countered by using constitutional instruments. We will have to continue facing up to this challenging requirement of the constitution in the future; otherwise we ourselves will pose a threat to the very thing which should be protected. In this respect, the legislator is deemed to be the "prime interpreter" of the constitution (Paul Kirchhof)[4]. However, it is also an inherent element of our constitutionalism that the limits which are prescribed by the constitution and have to be adhered to by the legislator are ultimately interpreted with binding effect by the Federal Constitutional Court and that compliance with these limits is enforced, if necessary. Not only the awareness of this phenomenon but also its acceptance by political circles and society, apparently represent a decisive factor for state integration and unity building in Germany.

(text is taken from: Papier, in: Festschrift Schenke, 2011)

[4] *Kirchhof*, in: Badura/Scholz (Hrsg.), Verfassungsgerichtsbarkeit und Gesetzgebung, 1998, p. 5 (16).