

German Constitutional Court strikes down Aviation Security Act

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The German Constitutional Court in Karlsruhe has voided the Aviation Security Act passed by the former Social Democratic Party (SPD)-Green Party government.

The law empowered the defence minister to order the shooting down of a civilian passenger plane if “in the circumstances, it can be assumed” that the aircraft was to be used “against human life.”

The court did not issue a ruling in principle against such a shoot-down, nor against the deployment of the armed forces within Germany. Nevertheless, parts of the decision amount to a devastating judgement on a government that described itself “left-wing,” but sought to establish a precedent to enhance the power of the state at the expense of fundamental individual rights and to use the military on the domestic front.

The law, which came into effect in January 2005, departed in two ways from established constitutional norms:

First, by creating a legal basis for the shooting down of a passenger plane, it subordinated “human dignity,” which is protected by the very first paragraph of the German constitution, to what is conceived to be a more general interest. Critics of the law pointed out at the time that while the law was restricted to hijacked planes, it had far broader implications. They posed the question: If the state were allowed to kill innocent people if it assumed there was a danger to the general public, what would prevent it from being permitted to torture suspects if “in the circumstances, it can be assumed” there was an imminent threat to human life?

Second, the law widely expanded the latitude for using the military within Germany. As a result of Germany’s bitter historical experience, the deployment of the armed forces domestically is strictly limited by the German constitution. In the Wilhelmine Empire and the Weimar Republic, the army was regularly used against workers, and as a virtual state within the state it played a major role in bringing Hitler to power.

Even though these issues were widely discussed at the time, the law was rushed through parliament by law-and-

order-politicians such as Interior Minister Otto Schily (SPD), who exploited the political atmosphere in the aftermath of September 11, 2001, terror attacks on New York and Washington, D.C. It was challenged in the high court by a number of members of parliament, led by Free Democratic Party member Burkhard Hirsch.

The judges ruled that, first of all, the federal government does not even have the legal authority to set rules on averting dangers, since this falls under the remit of the police and is thus within the competence of the state governments.

The court conceded that the constitution presently allows the armed forces to be deployed within Germany to support the police in extraordinary circumstances—for example, in the case of “particularly serious accidents” or natural disasters. It even held that such accidents could include an anticipated terrorist attack.

However, the court argued that in such a case the armed forces would not be permitted to deploy any specifically military means—i.e., means that the police are not permitted to use. Such a use of the military, the court concluded, would be incompatible with the text of articles 35 and 87a as well as the origins of Germany’s post-war constitution.

The court went on to argue that sections of the Aviation Security Act not only violated formal provisions of the constitution, but were in conflict with its fundamental content.

Again, it conceded that the shooting down of an unmanned plane, or one with only terrorists onboard, would be compatible with the constitution, if the powers of the armed forces were extended appropriately. What followed in its decision, however, cast a sharply negative light on the SPD-Green Party government and the parliamentary majority that passed the law. The high court judge ruled that the authority to shoot down a hijacked passenger plane violated the human dignity of the victims onboard the aircraft.

The judgement reads: “The hopelessness and inability to take evasive action which marks the situation of the passenger victims on the aircraft also extends to those who order and carry out the shooting down of the aircraft. The

flight crew and passengers cannot evade this action by the state due to conditions outside their control, but are helplessly and defencelessly at its mercy, with the consequence that they and the aircraft will be deliberately shot down and they will almost be certainly killed. Such an action ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By virtue of their killing being used to save others, they are treated as objects and at the same time deprived of their rights. Given that their lives are disposed of unilaterally by the state, the persons onboard the aircraft who, as victims, are themselves in need of protection are denied the valuation which is due to a human being for his or her own sake.”

The court did not accept the arguments employed by the SPD-Green Party government to justify this killing of innocents. It characterised as a “fiction” and “out of touch with life” the supposition that a crew member or passenger, when boarding an aircraft that is subsequently kidnapped, thereby consents to his own shooting down and death.

The court reacted sharply against the claim that those who have been kidnapped with the aircraft have become “part of a weapon.” In the view of the court, this conception “expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings, but are seen as part of an object and are thus themselves objectified.”

This is “incompatible,” the court declared, with the “conception that humans by their nature are disposed to freely determine things for themselves,” and therefore may not be made “the mere object of state actions.”

The court further argued that the judgement as to whether a plane had actually been hijacked and could be used as a weapon was often based on pure assumptions. It was not uncommon for a passenger plane to deviate from its prescribed route or lose radio contact. A fighter jet scrambled to investigate such an incident could find it difficult to assess this authoritatively. The time available was very short. There existed an “immense time pressure” and “the danger of making rash decisions.”

The court then suggested how a passenger plane could be shot down by circumventing the law: “It is not to be decided here how the ordering and implementation of such a shoot-down should be judged legally,” it said.

The intention here was clear: A shoot-down should remain unpunished as an action taken in a so-called “supra-legal emergency.”

While SPD and Green Party spokesmen welcomed the ruling on a law that they themselves had passed under the pressure of their most right-wing representatives, Christian Democratic Union (CDU) and Christian Social Union (CSU) politicians immediately pushed for a constitutional

amendment.

Interior Minister Wolfgang Schäuble, who for more than 10 years has been seeking to sanction the deployment of the armed forces within Germany, CDU parliamentary group Vice Chair Wolfgang Bosbach, Bavarian State Premier and former chancellor candidate Edmund Stoiber of the CSU, and Bavarian Interior Minister Günter Beckstein (CSU) all spoke in favour of establishing, prior to the start of this summer’s World Cup soccer competition, legal conditions for the use of the army at home.

Beckstein described as an “unfortunately realistic scenario” the possibility of the World Cup being threatened with biological weapons or a “dirty” radioactive bomb. He did not, however, provide any concrete evidence as to why such a scenario should be seen as realistic.

Schäuble indirectly accused the constitutional court of endangering domestic security. He declared that following the court ruling, a case like September 11, 2001, would fall into a legal void.

Bosbach articulated the attitudes of right-wing forces within the state apparatus regarding fundamental democratic rights, when he declared, “We must adapt the constitution to the present threat level.”

SPD party chief Peter Struck, who was defence minister in the previous government, indicated that his party would not reject in principle the proposals made by the Christian Democrats and their CSU allies. Although he spoke against a constitutional amendment to allow the domestic use of the armed forces, he criticised the Constitutional Court for not clearly defining a policy to deal with terrorist threats in the air or at sea. The SPD is to analyse the judgement and examine whether further legal steps are needed to counter this threat, Struck indicated.



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