German high court rules: Parliament cannot challenge domestic use of the military

Andreas Kunstmann
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Parliament cannot challenge domestic deployments by the German army in court—even when such military actions violate the German constitution (Basic Law). This is the sweeping decision reached by the Second Senate of the Federal Constitutional Court in its appraisal of the intervention by the German army during the 2007 G8 summit in Heiligendamm. The recent court judgment has received little coverage in the press.

Together with 17,000 police, approximately 1,100 soldiers were involved in the massive security operation that ended with the wide-scale intimidation and suppression of protests by G-8 opponents in Heiligendamm, a northern German resort on the Baltic Sea.

The military intervention involved the use of helicopters, boats, reconnaissance tanks and two Tornado airplanes, which thundered about 70 meters over the heads of the demonstrators in order to take photos of the protests. The German army took over responsibility for securing access to the G-8 conference area and carried out searches of the sea-bridge to Heiligendamm. The deployment had been agreed by the German government at that time, the grand coalition of the Social Democratic Party (SDP), the Christian Democratic Union (CDU) and Christian Social Union, led by Angela Merkel (CDU).

The Green parliamentary group in the *Bundestag* (parliament) appealed to the Federal Constitutional Court (BVG) to determine whether the army operation in 2007 violated constitutional decrees that forbid the use of the German army for domestic purposes. Article 87a paragraph 2 of the Basic Law states: “Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law”.

The issue therefore was whether the German army mission in Heiligendamm contravened the constitution. The BVG considered the matter, but made no ruling. Instead the judges rejected the complaint, arguing that the issues of constitutionality were not relevant to the military deployment.

In its nitpicking and at times cynical commentary, the BVG declared that there was no legal basis upon which it could reach a decision. The judges explained that it is impossible for the country’s highest court to take sides in this concrete question between the interests of the government and those of parliament. De facto, however, this is precisely what the court has done and in so doing has handed the government a blank check for future domestic mobilizations of the army.

According to the Basic Law, the *Bundestag* is the organ responsible for the introduction of laws, but cannot function as a comprehensive “organ of legal supervision” over the government. Therefore, on the basis of the Basic Law, “the German *Bundestag* has no right of its own to prevent any materially or formally unconstitutional action by the Federal Government”. In other words: the members of the *Bundestag* elected every four years, who self-servingly describe themselves as “representatives of the people”, have no actual right to control the activities of the government. Elections therefore are merely a means of confirming the program that the government plans to carry out in the following four years.

The Federal Constitutional Court went on to argue, quite perniciously, that any involvement of the German *Bundestag* in the judgment would only serve to underscore the claim made by the plaintiffs rather than facilitate a resolution. In its argumentation, the court was evidently intent on ensuring that the Germany army intervention in Heiligendamm would not lead to a debate in parliament, which in turn would have precipitated a public debate—and, inevitably, widespread public opposition—about the use of the army for domestic interventions.

Instead the eight judges of the Second Senate explain that any decision regarding the unconstitutionality of the

German army mission would “necessarily” require “a constitutional amendment”. Such amendments, however, cannot take place merely “through a simple vote by parliament”.

Although not addressed directly, the subject of the complaint and also the judgment were determined by the German Emergency laws introduced in 1968, which permit the German army to intervene in a domestic function in accordance with the Basic Law, given certain conditions. The 1968 Emergency laws permit the federal government, in accordance with Article 87a, to deploy the armed forces to support the police and Federal Police in the “fight against organized and militarily armed insurgents”. The BVG obviously was reluctant to address the question of whether the federal government regarded the overwhelmingly peaceful demonstrators at the G8 summit as “organized and militarily armed insurgents”.

The Emergency laws were introduced on May 30, 1968 by a grand coalition of the CDU and SPD to combat a growing radicalization of the working class and broad layers of students. Previous efforts to introduce similar laws had failed in 1958, 1960 and 1963, due to mass popular opposition. The main purpose of the laws was to permit the mobilization of the army for internal counter-insurgency operations. At the same time, the government argued that its Emergency laws drew on lessons from the Weimar Republic period when weak laws helped leverage Hitler into power. The government stressed at the time that the 1968 Emergency laws did not represent a suspension of the constitution and that therefore any government rule on the basis of emergency decrees as in the Weimar Republic would be avoided.

The opposite is now the case. The latest judgment by the BVG actually limits the possibilities of challenging in court any violation of the constitution by the government. At the same time, it prevents the German parliament from acting against plans to deploy troops on a domestic basis. Instead parliament can only move to stop the “fight against organized and militarily armed insurgents” i.e., after an intervention by the army has already taken place.

In the event, while the German Bundestag was not informed in advance of the plans to mobilize the army in Heiligendamm, the 31-strong parliamentary defense committee was informed. It had been informed about the planned deployment of the German army, but according to statements by committee members, was left in the dark about details of the Tornado aircraft deployment.

Alongside delegates of the SPD, CDU/CSU and Free Democratic Party in June 2007, the defense committee also included representatives from the Greens and the Left Party, at that time the Party of Democratic Socialism (forerunner to the present Left Party). The PDS delegates were Paul Schäfer, Inge Höger and Hakki Keskin, while Winfried Nachtwei and Omid Nouripour represented the Greens.

The PDS and Green delegates evidently saw no need to raise publicly the issue of the imminent deployment of the German army. The Greens only lodged their complaint at a later stage. The result is an undermining of democratic rights by the Federal Constitutional Court.

Officially the decision affects “only” the right of parliamentary factions and individual members of the *Bundestag*, but in fact it has broad implications for democratic rights and is ultimately directed against the working class.

At present there is nothing which could be regarded as either a serious parliamentary or extra-parliamentary opposition. Social tensions, however, are mounting as austerity measures are imposed on a hostile population. The growing financial and economic crisis is to be resolved at the expense of the working class. This will inevitably provoke broad opposition. Under conditions of intensified social conflict, democratic and constitutional rights—in particular those pertaining to war, peace and civil war—are a thorn in the government’s side.

This is why a vigorous debate is currently taking place within the German ruling elite over the inherent deficiencies of democracy and the advantages of authoritarian forms of rule.

A precondition for the formation of police-state regimes is the systematic strengthening of the powers of the government over parliament as well as the ability of government to deploy troops against its own population. The latest decision by the Federal Constitutional Court represents a significant step towards realizing both of these aims.