German Constitutional Court legalizes use of army inside Germany

Justus Leicht
22 August 2012

Six years after ruling that the use of the military for domestic purposes was unconstitutional, Germany's highest court has now made a spectacular turnaround. In a July 3 ruling, published last Friday, the Supreme Court in Karlsruhe allowed the use of weapons during army deployments inside Germany.

The decision came as a surprise for many observers. The trigger for the ruling was the so-called Aviation Security Act, adopted in 2006 at the initiative of the social democratic (SPD)-Green government of the time. The Act legalized the shooting down of civil passenger aircraft kidnapped by terrorists, should the kidnappers threaten to use the plane as a weapon. The act was passed after the September 11, 2001 attacks in the US.

The First Senate of the Federal Constitutional Court then overturned this ruling, declaring it incompatible with the fundamental right to life and human dignity. In its judgement the court also generally opposed army deployments inside Germany.

It declared that the army could be called upon during "especially serious accidents" or to support the police in natural disasters or against an impending terrorist attack. But the judges ruled that the use of military force beyond those authorized for police was unconstitutional.

The German states of Hesse and Bavaria, led by conservative Christian Democratic administrations which favour domestic deployment of the army, then appealed the Aviation Security Act in Karlsruhe. Their goal was to render the Aviation Security Act null and void and then legalize domestic army deployments via a constitutional amendment.

The federal Constitutional Court has now spared the two states the trouble—a constitutional amendment would require a two-thirds majority vote in both houses of parliament—by arbitrarily reinterpreting and effectively changing the constitution.

The full court, consisting of the first and second senate which meet together only exceptionally, issued the ruling. The plenum was called after the second senate made clear in 2010 that it would make a different decision to that of the first senate in 2006. With its latest ruling the second senate, headed by chief justice Voßkuhle, largely achieved its objective.

The fifteen judges rely primarily on Article 35 of the constitution (Basic Law), which states: "If the natural disaster or accident endangers the territory of more than one state, the Federal Government, insofar as is necessary to combat the danger, may instruct state governments to place police forces at the disposal of other states, and may deploy units of the Federal Border Police or the Armed Forces to support the police."

In the roundabout style typical of German lawyers, the court interpreted this passage to permit the armed forces to intervene in any case involving "damage of catastrophic dimensions." This vague formulation, which is incompatible with the constitutional text, clearly echoes the 2006 decision.

In contrast to the initial decision, however, the armed forces may now use military force. The judges justified this by citing the phrase "insofar as is necessary to combat the danger" in Article 35. This means "damage" need not have occurred; it need only be "imminent".

Any other interpretation, according to the judges, is "no longer suitable given the nature of contemporary threats." This gives a free hand to the military.

The judges knew they had opened the floodgates and inserted all sorts of qualifications to try to cover this up. They said army deployments should only be undertaken as a "last resort," in "exceptional circumstances," and limited to what is "required." In particular, "danger to persons and property rising from or within a protesting crowd, any grave accident in the sense of Article 35 of the Basic Law, do not justify the use of the armed forces on the basis of this ruling."

Süddeutsche Zeitung lead columnist Heribert Prantl, usually an avid admirer of Germany's Constitutional Court, commented quite aptly that such assurances are not worth the

paper they are printed on: “It may be that the Supreme Court sought only to make a small step towards introducing the policy of domestic military deployments demanded in vain for the past twenty years. But we all know how this ends.”

Army representatives and politicians from the conservative parties, including the current interior and the defence ministers, welcomed the court's decision. Their only criticism was that the ruling calls for domestic army deployments to be agreed by the entire government, not just a single minister.

The SPD, the Greens, and the Pirate Party defended the judgment, citing the limits imposed by the court on use of the army.

A significant criticism came from the ranks of the federal Constitutional Court itself. One of its sixteen members, Reinhard Gaier, dissented and drew up an opposing minority opinion. Gaier is the senior judge on the Constitutional Court and the only one whose service stretches back to the decision of 2006.

Gaier begins his dissenting opinion as follows: “The Basic Law is also a repudiation of German militarism, which was the cause of unimaginable horror and deaths of millions in two world wars.” He demands “assurances that the armed forces will never again be used as internal instrument of political power.”

Gaier himself is a defender of bourgeois state power. Citing the constitution, he maintains that “combat missions of the armed forces in Germany” are permissible, but only in “exceptional cases of a state of emergency,” as a last resort “for combating organized armed insurgents.” In all other cases, “the maintenance of internal security is solely the task of the police.”

Combat missions of the armed forces on the other hand are “aimed at the destruction of the enemy, thereby requiring the appropriate military armaments,” Gaier continues. “Both tasks must be strictly segregated. On this basis our constitution draws the necessary consequences from past experience and makes the exclusion of the armed forces from internal operations in Germany a fundamental state principle.”

Gaier adds that this principle could only be eliminated by constitutional amendment, but that even grand coalitions of the social democrats and conservatives could not obtain a majority for such a step, i.e. that the measure was unenforceable in the framework of parliamentary democracy. “Even if one feels it to unbearable that the armed forces remain idle and stand by as spectator in the event of terrorist attacks, it is not the job and function of the Constitutional Court to intervene,” he concludes.

Gaier also gives a historical account of the repeated incidents of public opposition to the re-emergence of German militarism, going back to the first attempts by the German parliament to change existing laws in 1960.

Gaier criticizes the phrase “occurrence of damage of catastrophic dimensions,” which the court made a condition for domestic military operations. It refers, he writes, to a “totally vague category, incapable of proper control by a court, that … permits all manner of subjective judgments, personal preferences and uncertain, if not premature prognoses.”

The background to the abrupt reversal undertaken by the Constitutional Court is the economic and social crisis, which has worsened dramatically since its decision in 2006. The euro crisis and rapidly growing social polarization will inevitably lead to fierce class struggles, which cannot be contained by Germany’s discredited political parties and trade unions.

The *Bundeswehr* has dramatically changed its character in recent years. From a conscript army, whose role was limited to defending NATO territory against external attacks, it has been transformed into a professional army active around the globe and accustomed to using military force against civilians in Afghanistan.

It is against this background that the German ruling elite has decided to dump the anti-military protections enshrined in the Constitution as a result of the crimes of the Third Reich.