Bavarian constitutional protection law ruled largely unconstitutional

Justus Leicht
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The German Supreme Court ruled on April 26 that the Bavarian Constitutional Protection Law of 2016 is largely unconstitutional, almost five years after a constitutional complaint was filed against the law.

The Bavarian Constitutional Protection Law (BayVSG) was considered the state law with the most far-reaching surveillance powers. As such, it was the model for similar regulations in other states.

The ruling will not significantly restrict the work of the Secret Service. Nevertheless, it is politically damning: the agency that is supposed to protect the Constitution is itself a danger to it and tramples elementary fundamental rights underfoot in its work.

The constitutional complaint had been initiated by the Society for Freedom Rights (*Gesellschaft für Freiheitrechte*, GFF) in 2017 and was directed against a number of regulations contained in the BayVSG. The case was heard orally in Karlsruhe on December 14, 2021.

The GGF filed the constitutional complaint on behalf of three plaintiffs, all of whom are members of the Association of Victims of the Nazi Regime (*Vereinigung der Verfolgten des Naziregimes*, VVN-BdA), an association that was placed under surveillance by the Bavarian *Verfassungsschutz* (Office for the Protection of the Constitution, Secret Service) for a long time. The decision by a Berlin tax office to strip the VVN-BdA of its non-profit status, which threatened the organisation's financial existence, was based upon this surveillance.

Among the powers in the Bavarian Constitutional Protection Law which the GFF declared disproportionate and therefore unjustifiable under constitutional law are the collection of telecommunications data (Article 15(3)), large-scale eavesdropping (Article 9), online searches (Article 10) and the use of undercover agents and informants (Articles 18 and 19).

The Bavarian *Verfassungsschutz* was the only state intelligence agency allowed to access data retention records, which are reserved for investigating police authorities. The Supreme Court declared this regulation not only unconstitutional, but also null and void with immediate effect. The norm violated "Article 10 (1) of the Constitution [secrecy of correspondence, post and telecommunications] because it authorises data retrieval without the service providers concerned being obliged or entitled under federal law to transmit this data to the state office."

The regulation on widespread snooping attacks ("acoustic and optical surveillance of living quarters") was also not compatible with the Constitution. According to the judges in Karlsruhe, Article 13 (4) of the Constitution (restrictions on the inviolability of the home) only allows acoustic or optical surveillance of living quarters to avert urgent dangers. The measure had to be definitively aimed at "averting" the danger. The BayVSG did not contain such a limitation. Moreover, the constitutional requirements for the "protection of the core area of private life" were not fully met in the case of home surveillance.

An online search may only be permitted to "avert" a danger that is at least concrete in a police sense. However, the measures permitted by the BayVSG were not limited to this purpose.

The regulations on "undercover agents" and "confidential informants" are unconstitutional because there were no sufficient thresholds for intervention and there was no provision limiting the circle of permissible surveillance addressees, provided that the use is specifically directed against certain persons. In other words, it is up to the discretion of the Secret Service to

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determine when and against whom it uses informants and provocateurs. In addition, there was a lack of the "necessary independent prior control."

The regulation on "surveillance outside the home," which allows the state office to observe a person covertly for longer than 48 hours or on more than three days within a week, also using technical means, violated the fundamental right to informational self-determination. The regulation also "does not contain sufficient thresholds for intervention."

Finally, the Supreme Court judges criticised the fact that according to Article 25, the Secret Service is allowed to pass on the information it obtains to other state agencies, including police authorities, practically without limit. This largely abolished the separation of police and the secret services, a lesson learned from the Nazi regime with its powerful Secret State Police (Gestapo).

When the new law on the Bavarian *Verfassungsschutz* was enacted in 2016, the *World Socialist Web Site* had warned:

> This same authority has now been freed from further parliamentary scrutiny and is receiving expanded powers. It is clear that the issue is not about the protection of the population, but rather the build-up of an apparatus with close ties to the far-right terrorist scene which can be used against future social opposition.

It would be illusory to expect the judges in Karlsruhe to provide fundamental protection against the Secret Service. The restrictions imposed on the *Verfassunschutz* are not critical. Rather, the court declared that it should work more systematically, in a more targeted manner and more effectively. In addition, the agency, which has been deeply discredited by the NSU scandal, is to receive a renewed basis of legitimacy.

Karlsruhe has not banned surveillance of living quarters, online searches, observations, mobile phone tracking, the use of undercover agents and informants or the passing on of intelligence, but only stipulated when and how. The *Legal Tribune Online* commented:

> For the work of the intelligence authorities, the Karlsruhe ruling brings further legalisation in an area that has so far been characterised by loopholes, internal guidelines, and case-by-case examinations.

The Bavarian State Interior Minister, Joachim Herrmann, who had campaigned in 2016 for the then most far-reaching powers of "his" *Verfassungsschutz*, was pleased that the ruling strengthened the Secret Service in Germany overall. It made clear that the court considers the activities of the intelligence authorities "fundamentally important and correct and necessary."

In addition, the Police Tasks Law (PAG), which was amended in 2018, contains similarly far-reaching powers for the Bavarian police. Lawyers describe it as the toughest German police law since 1945. Four years ago, 40,000 people took to the streets against it in Munich. The Society for Civil Liberties and the #noPAG alliance have also filed a constitutional complaint against it.

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