The Consequences of Counterterrorism

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Chapter 8

Germany's Response to 9/11: The Importance of Checks and Balances

Giovanni Capoccia

> The Federal Government has devoted itself with the strongest determination to improving protection from terrorism, extremism and religious fundamentalism. We are conscious that these extreme forms of intolerance pose a new threat to the fundamental liberal-democratic order of the Republic. Therefore, we cannot afford any hesitation in implementing the new legal instruments against anti-constitutional and violent organizations with necessary firmness.
>
> Otto Schily, Social Democrat (SPD), Minister of Interior Affairs, January 16, 2003, Plenary Session of the Bundestag[1]

The post-9/11 counterterrorism policies enacted in different countries display important differences. In the United States, the emergence of an international terrorist threat on an unprecedented scale has led to a great increase in the power of the executive (see, for example, Heymann 2003; Ackerman 2004a, 2004b; Scheppele 2004). By contrast, other countries that are potentially exposed to the same threat and are certainly aware of the danger, such as Germany, have retained tighter limits on the power of the executive. What explains these differences? A large literature has

emphasized that even in the presence of common external shocks such as 9/11, the foreign and domestic security policies of different countries are the result of the "filtering" of external shocks through the prism of the existing domestic political environment (see, for example, Katzenstein 1996a, 2003). These accounts generally criticize "realist" approaches in international relations, and rightly stress that the "domestic origins of state preferences and their perceptions of the international system . . . cannot be answered by perspectives that focus solely on a state's position in the international system" (Berger 1996, 319). Special emphasis is generally placed on the failure of realist approaches to attribute the appropriate weight to the cultural norms (values, identities, ideologies) that shape the response of countries to security threats (Katzenstein 1996b, 1996c; Jepperson, Wendt, and Katzenstein 1996; Berger 1998). For example, in his interpretation of the changes in German and Japanese counterterrorism policy following 9/11, Peter Katzenstein maintains that a "situational" analysis focused on domestic and international material conditions—such as the number of Muslim immigrants in a country, its geopolitical position, and so on—should be strengthened by an appropriate analysis of the impact of the constitutive and regulatory norms that guide reactions to terrorist threats. According to this view, security policy operates in a normatively "deep" social environment as it ultimately confronts the state with the "enemy within." Thus, in security policymaking, strategic action to pursue certain ends is embedded in thick layers of institutionalized norms (Katzenstein 2003). This position resonates with a large literature in sociological institutionalism: security policymaking is mostly shaped by cultural and social factors that influence the very identity of political actors and decisionmakers and that also define "appropriate" responses to external threats (see, for example, March and Olsen 1989, 2004; Powell and Di Maggio 1991).

This chapter, which analyzes domestic security policymaking in Germany after 9/11, argues that the analysis of cultural norms should be integrated with the analysis of internal institutional dynamics.[2] Domestic institutions—in particular "counter-majoritarian" ones such as federalism and the judiciary—can have an important impact on policy outcomes, in domestic security as well as other areas. In fact, as the literature emphasizes, even the most strongly embedded cultural norms are generally contested (Katzenstein 1996c). Such contestation is not always solved by public deliberation: on the contrary, in some cases it leads to institutional friction between the government and the counter-majoritarian institutions. Post-9/11 Germany offers an example of how a system of checks and balances

can limit the expansion of national executive power in matters of internal security and counterterrorism.

Of course, cultural norms inherited from recent history have informed the German public debate on national security. However, counter-majoritarian institutions such as the federal system (and the prerogatives of the Länder in it) and the judicial system (in particular the Federal Constitutional Court) have exerted an important influence on which interpretation of the fundamental cultural norms underlying the 1949 Basic Law has ultimately prevailed in shaping security policy. This has happened even in areas where a different interpretation of inherited norms was accepted by the majority of the political elites and the population. In fact, the range of feasible initiatives in security policy may not be just limited and directed by norms that are diffuse in the population at large (see, for example, Berger 1996). On the contrary, the German case shows that counter-majoritarian institutions may impose interpretations of inherited norms that prevail even over other interpretations that are supported by an overwhelming majority of the political elites and the public. To be sure, the very existence of counter-majoritarian institutions is not exogenous to the fundamental normative concerns characteristic of the Basic Law: the prerogatives of the Länder and the judiciary were designed exactly to enforce those norms in the new Federal Republic. Yet, the limits to government policies provided by such institutions, once they are in place, may be more immediate and constraining for the government than the limits imposed on decision-makers by codes of ideological appropriateness, either directly through cultural scripts (see, for example, March and Olson 2004), or indirectly, through popular pressure (see, for example, Berger 1998).

The analysis shows that, thanks mainly to the actions of counter-majoritarian institutional actors, the pre-2001 normative and institutional framework of the 1949 Basic Law has remained firmly in place, despite the sweeping reforms and policy changes advocated by both political elites and the public in the wake of the 9/11 attacks. Of course, some important policy changes have been introduced, but either they have remained within the rather strict limits imposed by the Basic Law or they represent the continuation of incremental changes that were already under way before 9/11. Most importantly, the powers of the federal executive have not grown significantly. The German security apparatus is still marked by functional fragmentation and federal decentralization, notwithstanding recent calls for centralization to respond more effectively to the new threat of international Islamic terrorism. In those instances in which the central executive has tried, since September 2001, to expand its security powers by supporting

an extensive interpretation of the constitutional limits to its action, the judiciary has intervened to stop it, either preventively or ex post facto—that is, by revoking or annulling government decisions and setting clear limits to future governmental action in those spheres. Similarly, the entrenched nature of the federal system has frustrated proposals for the outright centralization of power, making enhanced *coordination* between levels of government the only viable strategy to step up counterterrorism activity.

It is important to note that the literature has given due consideration to the impact of internal political dynamics on the evolution of the normative debate on national security in Germany before 9/11 (see, for example, the excellent analyses in Jepperson, Wendt, and Katzenstein 1996; Katzenstein 1997; Berger 1998). The situation after 9/11 is different for two reasons. First, while it is beyond doubt that security policy has always involved a foreign as well as a domestic dimension (see, for example, Katzenstein 2003), the relative importance of domestic security has grown. The nature of the new international terrorist threat has focused attention on several spheres of domestic policy that earlier had at best a marginal relevance for national security. Post-9/11 security debates involve not only police powers and the regulation of states of emergency but also issues such as asylum, immigration, the rights of minorities, and freedom of religion and religious expression (Chebel d'Appollonia and Reich 2007). Second, as a consequence of this state of affairs, the judiciary is now more likely to intervene on security issues (in the new areas) and to play an important role in enforcing the relevant constitutional norms. By the same token, the federated subunits are likely to resist encroachment on their policy-making powers in these new areas. Thus, given the extended conception of security, the general normative concerns highlighted by several culturalist interpretations of German foreign policy (for example, Banchoff 1999; Markovits and Reich 1997) no longer offer a sufficient basis for understanding security policy as a whole. The friction between the government and the political majority, on the one hand, and counter-majoritarian institutions such as the Länder and the courts, on the other, needs to be taken into account more systematically. Indeed, the German case shows that on important occasions the federal system and the Federal Constitutional Court have gone against the current of the German public and elites, vetoing policies or limiting reforms that enjoyed widespread public support and that were backed by the overwhelming majority of the political class.

In sum, in post-9/11 Germany some changes in the bureaucratic structure of the security institutions have been introduced, new laws have been passed that increase police power against terrorist groups and individuals, and the intensity of investigative activities has been stepped up. The correct way to interpret such innovations, however, is to see them as examples of incremental change in the context of a rather unchanged normative and institutional framework of national security policy.

The first section outlines the key aspects of the normative and institutional context of security policy in Germany. The second section analyzes public opinion on relevant matters in Germany after 2001. The central part of the chapter analyzes continuity and change in different areas of legislation, the institutional structure of the security agencies, and security policy following 9/11. The concluding section draws out the implications of the analysis for the possibility of future reforms in German security policy.

The Normative and Institutional Context of German Security Policy

The question of which norms among the many values and principles that drive political action in a pluralist democracy should be considered fundamental and which should be seen instead as more expendable is obviously debatable (see, for example, Garrett and Weingast 1992). The identification of such "basic principles" is often left to the interpretation of the analyst. In the specific case of national security in the Federal Republic of Germany, however, the risk of subjectivity in this matter can be substantively reduced. In fact, the national security sector underwent a total ideological overhaul in Germany after the defeat in World War II. Indeed, it was clear since its approval in 1949 that some of the principles and norms included in the Grundgesetz (Basic Law), and the institutional arrangements that entrenched and protected them, were more important than others to the ideological foundations of the re-created democratic West German state.

The whole German constitutionalist doctrine is virtually at one in considering the 1949 Basic Law a "double reaction" to the Weimar Republic and its failure, on the one hand, and to the totalitarian Nazi regime, on the other (see, for example, Dürig 1988, 12). These normative bases of the Grundgesetz and the institutional embodiment of such norms were clearly articulated by the founding fathers (and the occupying Allies) during the constitution-making process (see von Doemming, Füsslein, and Matz 1951).[3] To reach this objective, the Basic Law designed a democratic system in which two main normative and institutional principles coexist. The Weimar Republic's foundering against the Nazi challenge led to the immunization and protection of

the democratic system from the action of antidemocratic forces. The Basic Law endows the political authorities of the German Federal Republic with the constitutional and legal means to repress the challenges to the constitutional order that emerge from society. And rejection of the Nazi past has led to the establishment of a system in which fundamental rights are universal, constitutionally entrenched, and nonmodifiable—and guaranteed by judicial review exerted by a powerful system of constitutional courts at the federal and state levels. Power is neither actually nor potentially concentrated in a single constitutional organ, and a system of checks and balances is always operational, both within and across territorial levels of government (Dürig 1988; see also, for example, Stern 1977, 416; Karpen 1983, 1988; Weber-Fas 1983; Klein 1983; Starck 1983; Mussgnug 1987; Zieger 1988; Currie 1994; Katzenstein 1996d, 2003).[4]

This "double negative" heritage of the Weimar Republic and the Nazi regime has been visible in most aspects of German postwar constitutional life. Put differently, the historical heritage of the Weimar Republic, on the one hand, and of the Nazi dictatorship, on the other, not only provides the normative "national lenses" through which international crises and their domestic consequences are filtered (Katzenstein 2003, 732; see also Markovits and Reich 1997), but is also at the basis of the institutional framework through which internal threats to the "fundamental liberal-democratic order" (as mentioned in the Basic Law and defined by the Federal Constitutional Court as early as 1952) are viewed and approached in Germany today.[5] In other words, these basic normative principles are made effective by specific institutional arrangements.

The determination to defend the "fundamental liberal-democratic order" of the Federal Republic from its enemies informs the principle of "streitbare Demokratie" (militant democracy), which is one of the defining characteristics of the 1949 Basic Law (see, for example, Jesse 1980; Boventer 1985; Sajò 2004). The prohibition on abusing one's fundamental rights against the constitutional order is not just asserted, however: the Basic Law includes specific rules and attributes powers to limit fundamental rights in case of their abuse. According to article 18, individuals can be stripped of their basic rights if these are used to undermine the "fundamental liberal-democratic order". Articles 9 and 21, respectively, allow for the legal dissolution of political associations and political parties if these are opposed to the fundamental liberal-democratic order. Although the rules on the forfeiture of individual rights have been interpreted narrowly by the Federal Constitutional Court and have not yet been implemented to date (see, for example, Foster and Sule 2002, 202), several

political parties and many associations have been banned since 1949 to "defend the Constitution."[6] Apart from the activity of federal and state executives and courts in these respects, the Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz), which has a federal office and sixteen regional branches, is in charge of monitoring extremist groups and individuals and disseminating information on them to the authorities and the public.

The concern about avoiding excessive centralization of power and the risk of authoritarianism is embodied by the constitutionally entrenched, unmodifiable nature of the federal system (article 79[3] of the Basic Law), but also by the particularly powerful position granted to the Länder vis-à-vis the federal level of government and by the strength and independence of the court system at both the state and federal levels (see Currie 1994). In other words, the basic normative principles of reaction against the institutional vulnerability of Weimar and the authoritarianism of the Nazi period have consciously been translated into "institutionalized norms" (Katzenstein 1996c, 20–21), not only "weakly" by simply solemnly asserting them in the text of the Constitution, but also "strongly" by endowing constitutional bodies with powers and prerogatives to enact such principles in German political life.

In the years following 9/11, the determination to defend the fundamental liberal-democratic order of the Federal Republic from its enemies according to the "streitbare Demokratie" principle has constantly been clear in the words and actions of national politicians, and it has also been used to frame the security reforms proposed. In fact, although moments of intense partisan debate on these issues have punctuated German postwar history, the three main German parties, the Social Democrats (SPD), the Christian Democrats (CDU/CSU), and the Liberals (FDP), have for a long time held roughly similar positions on topics of security and law and order.[7] Things have not substantially changed in the post-9/11 period: in its 2002 election manifesto, for example, the SPD talked about security as a citizen's right and a central aim of the Rechtsstaat, a position not essentially different from that of the Liberals and the Christian Democrats. Only the ex-Communist PDS (now the Left Party) has openly criticized the new antiterrorism legislation, stating (in its 2002 manifesto) that it results in discrimination against foreigners and an increase in xenophobia and anti-Muslim sentiments. The party has permanently been in opposition since its creation in 1990, however, and has as yet no serious prospect of being accepted by the moderate left-wing parties as a coalition partner at the federal level.[8] All other parties have supported the new legislation:

even the Greens—who before entering the government in coalition with the Social Democrats in 1998 tended to reject radically any stricter law-and-order measure—played an important part, as members of the governing coalition until 2005, in drafting the new antiterrorism legislation.[9] The Greens stressed that any restrictions of civil liberties should be kept to a minimum (in their 2002 party platform they emphasized the importance of sunset clauses), but did acknowledge that internal security is a legitimate aim of the state and that coercive measures are legitimate to ensure security. In this spirit, for example, they supported the controversial airspace security law (discussed later).[10] Some further disagreements emerged on the occasion of the approval of specific policies, but they were rather limited.

At the same time, however, the limits to such defensive policies against the anticonstitutional forces of terrorism and extremism have proved resilient. Fundamental rights were upheld by the courts, which ruled against the governmental policy on several occasions (discussed later). Moreover, the federal principle still molds the institutional structure of the security apparatuses, despite widespread advocacy for centralization in the public debate. Security institutions present a double kind of fragmentation: the division of responsibility between the federal government (Bund) and the states (Länder) and between different federal agencies. In general terms, internal security and policing are mainly in the hands of the Länder, while areas such as border controls (including security measures at airports and railway stations) and others have been in the remit of the federal government for a few decades now (see, for example, Currie 1994; Glässner 2003).

In fact, the general tendency since the 1950s has been one of slow, incremental centralization in a system that began as almost entirely regionalized, with the federal agencies acquiring some new responsibilities in response to the internal terrorist challenges of the 1970s and 1980s (Busch et al. 1985; Katzenstein 1996d). Yet, despite the renewed pressures for centralization that emerged after 9/11, the territorial and functional fragmentation described earlier still largely exists: on the one hand, federal agencies still have to rely on the Länder police to carry out most of their tasks. On the other hand, the institutional response to the inefficiencies lamented by many in the public debate deriving from the functional fragmentation between federal security bodies has been mainly to improve the coordination mechanisms between agencies rather than to centralize tasks in a single body.

In sum, the fundamental normative principles informing the Basic Law are embodied in specific institutions. The pressure to increase executive powers and to limit rights and guarantees following 9/11, although consistent with the important principle of the "defense of the Constitution" against its enemies, led to overall limited reform. This outcome was mainly due to the counter-majoritarian action of the judiciary and the inertial force of the federal system, both of which have constrained governmental action against terrorism. In fact, the legislative and institutional innovations introduced over the past few years, while enlarging the scope of police action, have largely stayed within the traditional terms of reference set by the Basic Law, despite widespread support among the political elites, the community of policy experts, and the population at large for broader reforms.

The Perception of the Threat: Counterterrorism and Public Opinion in Germany Since 9/11

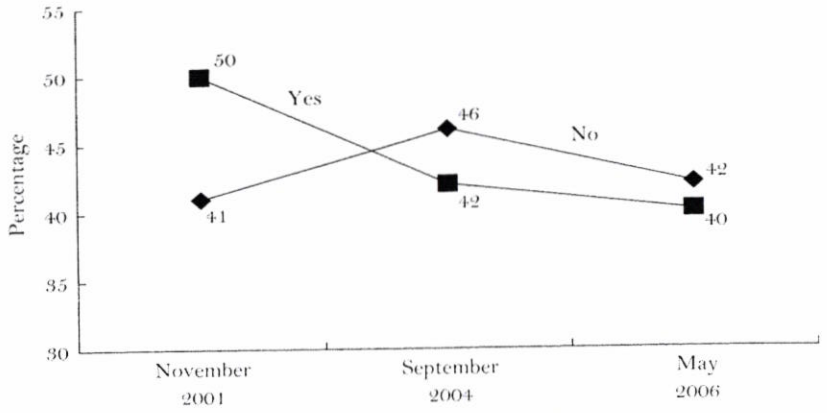
A great deal of empirical evidence shows that in Germany the threat of international Islamic terrorism was fully perceived by opinion leaders, mainstream politicians, and the public. Later sections describe various moments of the public debate on these issues. Here I present data that show that, in the context of a general deterioration of the attitude toward the Muslim community, the majority of the German public supported the new antiterrorism measures and would have supported even stricter ones.

The Changing Attitude Toward Islam

Although data on the perception of the Muslim community by the German majority before 9/11 are not available, it is an easy guess that the events of 9/11 had a negative effect on that perception. It is interesting to note, however, that this perception has deteriorated even further *since* 9/11. Several surveys show that since the end of 2001 an increasing number of Germans perceive Muslims as a threat and associate them with terrorism. This is particularly worrying given the large number of Muslims residing in Germany (3.5 million, according to the last census). The Office for the Protection of the Constitution reported that fewer than 1 percent of the Muslim resident population are thought to be members of Islamic organizations with extremist ties. Yet the view that some larger Muslim fringe groups harbor extremist views and could constitute a recruiting ground for terrorists is held by an increasingly larger share of the population.

The data show a rather unequivocal picture: Islam is increasingly perceived as a threat and is increasingly associated with terrorism and violence. For example, the "Politbarometer" survey of the renowned German survey agency Forschungsgruppe Wahlen shows that the percentage of

FIGURE 8.1 Association Between Muslims and Terrorism

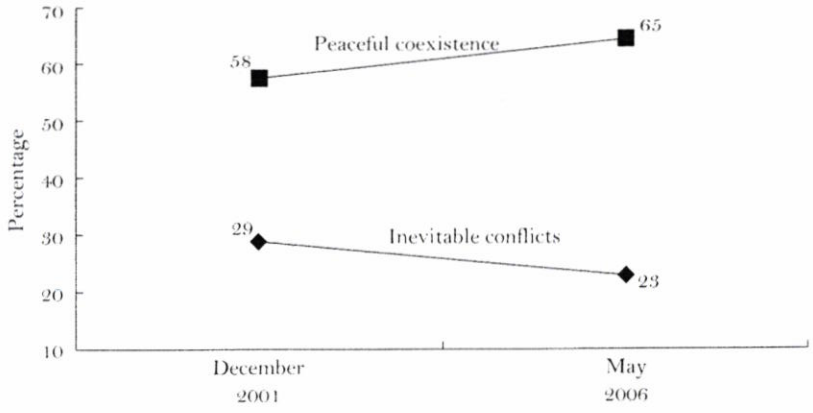


Source: Author's compilation based on Allensbach Survey 265 (November 14, 2001); Survey 215 (September 15, 2004); and Survey 114 (May 17, 2006).
Note: Responses to the Question: "If someone says: 'There are so many Muslims living in Germany. Sometimes I am really afraid that there might be many terrorists among them.' Do you agree?"

respondents perceiving Islam as a threat to Western democracy increased from 36 to 45 percent between 2001 and 2004, while the percentage of those holding the opposite view decreased from 58 to 48 percent in the same period.[11] A similar survey conducted by a different research institute (Allensbach) reveals a similar trend, shown in figure 8.1: while the percentage of those who associate Muslim minorities with terrorist groups has remained stable (and well over 40 percent) since November 2001, the percentage of those who clearly deny such an association has clearly and steadily declined, from 50 percent to 40 percent.

Other public opinion data show a clear decrease over the past five years in the number of those who believe in peaceful coexistence between the Islamic and Western worlds, even if this datum is compared with the same observation *immediately after* 9/11. In May 2006, the percentage of Germans who denied the possibility of peaceful coexistence between the two cultures was observed at 65 percent (it had been 58 percent in December 2001), while a mere 23 percent (29 percent in December 2001; see figure 8.2) believed in the possibility of peaceful coexistence.

FIGURE 8.2 Potential for Peaceful Coexistence Between Islamic and Western Cultures



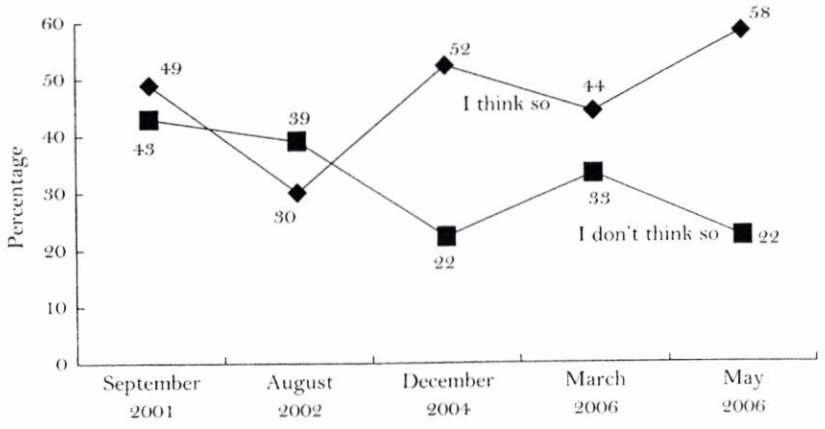
Source: Author's compilation based on: December 2001 question: Allensbacher Jahrbuch der Demoskopie 1998 to 2002, 998; May 2006 question: Allensbach Survey 114 (May 17, 2006).
Notes: Responses to the questions: "Do you think that despite the differences in beliefs and cultural values, a sustained peaceful coexistence between the Western culture and the Arabic-Muslim culture is possible, or that these differences will lead to repeated conflict in the future?" (December 2001) and "What do you think: can the Western and Islamic worlds coexist peacefully, or are these cultures too different, and because of this, severe, repeated conflicts are inevitable?" (May 2006).

These recent trends in German public opinion show an increasingly negative perception of Muslims and of Islamic culture in general. More specific surveys that ask directly about the likelihood of tensions between the larger German population and Muslim minorities show the connection of the deteriorating image of the Muslim community in the eyes of Germans and the possibility that this deteriorating image would lead to actual tensions between the two groups. The trend, shown in figure 8.3, is again very clear: there has been a marked increase (from 49 percent in 2001—after 9/11—to 58 percent in 2006) in the number of those who believe such tension will materialize, and a steady decrease in the number of those who hold the opposite view (from 43 percent in 2001 to 22 percent in May 2006).

Support for Stricter Antiterrorism Measures

In the context of this deterioration of the perception of Muslim minorities, there is clear support in the German public for stricter antiterrorism

FIGURE 8.3 The Likelihood of Tensions Between German Majority and Muslim Minority in Germany

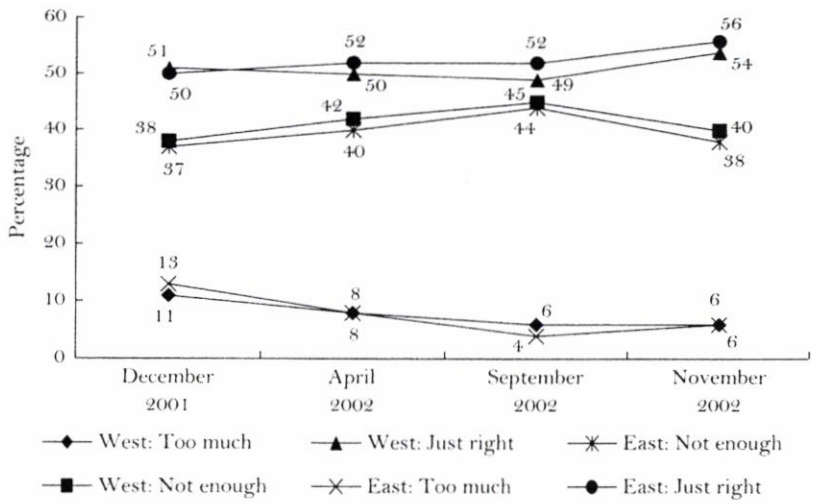


Source: Author's compilation based on Allensbach Survey 114 (May 17, 2006).
Note: Responses to the question: "Do you think that in the near future, tension toward the Muslim population will materialize, or are such developments unlikely in Germany?"

measures. Particularly interesting here are the data for the period between the end of 2001 and the end of 2002, when most of the new antiterrorism legislation was passed. Figure 8.4 shows that there was broad support in the population for stricter counterterrorism policies: an absolute (and growing) majority of respondents considered the new measures adequate, while around 40 percent thought that even more should be done. Many fewer considered the measures excessive, and their number dwindled to a mere 6 percent by November 2002 (data are reported separately for East and West Germany).

No longitudinal survey data are available to detect public opinion trends on the specific question of the equilibrium between security and civil liberties. Several one-off surveys show, however, that the population offered broad support for tightening security even when this was presented as a trade-off with civil liberties. In this respect, the state of German public opinion is broadly comparable to the situation of the 1970s, when the (West) German public was being asked similar questions in the face of terrorist attacks coming from the Rote Armee Fraktion (RAF, or the Red Army Faction). In response to an explicit question asked in 2004 by the survey institute Allensbach, for example, 62 percent of respondents declared themselves ready to accept a restriction of their individual rights in order

FIGURE 8.4 The Adequacy of the Counterterrorism Measures Adopted



Source: Author's compilation based on Politbarometer West and Politbarometer Ost 2001, "Variable 197: Innere Sicherheit"; Politbarometer West and Politbarometer Ost 2002, "Variable 239: Innere Sicherheit."
Notes: Responses to the question: "After the terror attacks in the United States, stricter security measures were adopted in Germany to guarantee internal security. Do you think that what was done was too much, not enough, or just right?" This picture seems to have remained stable over the years and to not have been an effect of "novelty" brought about by the introduction of the new reforms. In a survey conducted by the Forschungsgruppe Wahlen in March 2004 after the Madrid bombings, 46 percent of people responded that enough was done in Germany to guarantee protection against terrorist attacks, while 44 percent did not think so and 10 percent did not answer. See Politbarometer March II 2004.

to strengthen the fight against terrorism, while only 25 percent said that they would reject any such restriction.[12] The figures for a similar question asked in 1977 were 62 and 26 percent, respectively.[13]

Analyses conducted by the survey institute Emnid in the months immediately following 9/11 also show solid support for tighter security measures, even as a trade-off for freedoms. In November 2001, 61 percent of the respondents answered that they valued "security more than freedom" (against 32 percent who did not), the percentage of those who thought that "security in Germany can only be guaranteed with tighter security measures" was 69 percent (against 29 percent who were of the opposite opinion), and 86 percent (against 13 percent) approved of includ-

TABLE 8.1 Support for Stricter Security Measures

Measure	Respondents Approving
Asylum-seekers should be deported more easily if they are thought to be involved in terrorist activities.	79%
Public places, such as airports, train stations, and shopping malls, should be placed under increasing video surveillance.	78
Organizations that are thought to be supporting terrorist groups should be prohibited from collecting money (donations).	72
The Bundeswehr should be deployed internally, for the protection of people and property.	59
Fingerprints should be recorded in passports.	59
The fingerprints of everyone entering Germany should be collected.	55
Passports should contain biometric data (about the shape of the hands and the face).	51
Those under suspicion of terrorist activity may be taken into custody without proof.	46

Source: Author's compilation based on Allensbach Survey 215 (September 15, 2004).
Note: Responses to the question: "Here is a list of different measures for the fight against terrorism. Please tell me all measures for which you would say: 'Yes, I am happy if something like this should be introduced in Germany.'"

ing fingerprints in passports.[14] Three years later, as the Allensbach survey results reported in table 8.1 show, this situation had not changed substantially.

The most illiberal proposal—taking into custody without proof anyone suspected of terrorism (not a part of the German legal system)—received the lowest rate of approval, but it was still higher than 40 percent. Support for including fingerprints in passports seems to have gone down as well from the high level it reached immediately after 9/11, but it is still close to 60 percent. The overwhelming support for easier deportation of asylum-seekers who are suspected to be terrorists was most likely influenced by the difficulties encountered in expelling the head of the Muslim fundamentalist group Kalifatstaat (Caliphate State; discussed later); that support suggests that the public sees the current system as offering too many hiding places to potential terrorists. Moreover, the datum about donations to suspected supporters of terrorist groups also reveals the worries about the Muslim minorities in Germany and the perception of insufficient controls

on existing barriers between legitimate immigrants and terrorist cover-ups. The reform of the asylum and immigration laws passed before 2004 (discussed later) could therefore be seen as still insufficient by large sections of the population. In fact, the data reported in the table are from 2004—that is, *after* most reforms to counterterrorism had been introduced. Finally, the data about the deployment of the Bundeswehr for internal emergencies show great support (59 percent) for this kind of measure, later declared unconstitutional by the Federal Constitutional Court in its official ruling striking down the law on airspace security. Such a measure is unlikely to be revived in the future.[15]

In sum, the analysis of public opinion since 9/11 shows that the German public would largely be in favor of substantially increasing the possibilities for the government to intervene more incisively against terrorism. As emerges from the following analysis, while the federal government has undoubtedly increased its powers to counter international terrorism, it has largely fallen short of acquiring the more incisive powers that would have been supported by the majority of the public and many politicians. This outcome is mainly due to the resilience of the federal arrangement of the security apparatuses and the active interventions of the Federal Constitutional Court. The next section illustrates the legislative, organizational, and policy changes introduced in Germany after September 2001 to counter Islamic terrorism.

Counterterrorism Policies, New Regulations, and Incremental Change

The rules and practices aimed at the "protection of the Constitution" have been fundamental to the institutional architecture of the Federal Republic (probably more so than in any other Western democracy) and were mainly intended to curb the right-wing and left-wing extremism of the fascist/Nazi and Communist traditions, respectively. In the 1970s and 1980s, those principles were invoked against domestic terrorism, which was mainly of leftist origin (see Braunthal 1989).[16] Thus, the new challenge of international Islamic terrorism posed an unprecedented complication to German authorities: the (partial) connection between the "enemies of the Constitution" and the members of ethnic and religious minorities. In fact, German asylum and immigration laws and other institutions affecting religious and ethnic minorities were traditionally relatively generous; moreover, religious associations were exempted by law from the constitutional limits imposed on extreme-right and extreme-left groups.

The post-9/11 reforms of domestic security policy fall into three categories: reforms that expanded and adapted existing rules to the repression of international Islamic terrorism, including the rules on the crime of terrorist associations, police access to social data, and so on, most of which had been introduced in the 1970s and the 1980s to fight domestic terrorism; reforms that addressed relatively new and less-regulated areas, such as money laundering and aviation security; and reforms passed in areas (such as immigration and asylum regulations) that, while bearing an important connection to the new terrorist threat, could have a much greater social impact.

Adapting Existing Rules: The "Antiterror Packages" and the Reform of the Criminal Code

The German government was very swift in its first reactions to the 9/11 events: only eight days after the attacks the cabinet issued plans for a response to terrorist activities. By December 2001, the parliament had already approved two antiterrorism packages.[17]

The End of "Religions Privilege" The first antiterror measure approved by the German parliament was to withdraw the legal statutory provision, dating back to 1964, that exempted religious groups from the conditions the law imposed on all other associations.[18] The new law extended to religious associations the rules that allow the government to ban all associations that break criminal law or attack the fundamental liberal-democratic order of the Federal Republic.[19] Owing to the excesses of some Muslim associations that openly propagated fundamentalist and radical ideas, this measure had been considered explicitly by the parliamentary Commission of Inquiry in 1998—since it had become increasingly clear that fundamentalist religious groups were pursuing terrorist objectives while hiding under the cloaks of religious organizations—but in the end was not approved. Now the new law was supported by all parties, with the exception of some PDS representatives. In supporting the new measures, the government stressed that they were not intended to restrict religious freedoms but were targeted only at groups that pursued "anti-constitutional goals that are allegedly based on religious beliefs." In other words, the law explicitly aimed to curb the possibility that anticonstitutional organizations could pursue their goals undisturbed by simply defining themselves as "religious" (Glässner 2003, 49).[20] A particular target of this law was the Cologne-based group Kalifatstaat (Caliphate State), led by the cleric Metin Kaplan, who had already repeatedly made national headlines in the previous years for his extremist and fundamentalist statements. The government immediately used the new law to ban the Caliphate State and, after several court trials, to expel Kaplan.[21]

Using the measure against Kaplan found virtually no significant opposition across the political spectrum: the minister of the interior at the time, Otto Schily, a Social Democrat, evoked the principle of "streitbare Demokratie" to justify the new law and its implementation and found a good deal of consensus on this point. The center-right opposition of the time, the FDP and the CDU/CSU, was completely behind the new measure, and even the Greens—at the time the governing partner of the SPD—supported the expulsion despite some internal disagreements.[22] The new law also found widespread support among the population at large: 70 percent of those asked in a survey conducted June 1–3, 2004, agreed that those who, like Kaplan, advocated violence should be expelled even though they risked torture or capital punishment in their home countries.[23] The normative principle of defending the Constitution against its enemies could be applied rigorously against religious fundamentalist organizations after the new law was passed: the government moved immediately against twenty other religious organizations (most of them operating at the regional level) and conducted more than two hundred raids (Katzenstein 2003, 749).[24]

The Law to Fight International Terrorism This law amended more than one hundred regulations in seventeen other laws and five administrative decrees (Katzenstein 2003, 750), with the common objective of strengthening the government's powers of prevention vis-à-vis international terrorism.[25] The law's stated purposes included giving the security services enhanced legal responsibilities; improving the necessary information-sharing between the authorities; preventing the entry of terrorists into Germany and improving border controls; creating the legal basis for the inclusion of biometric data in passports and ID cards to identify extremists; enhancing security checks for workers in security-sensitive installations, including not only governmental agencies but also TV, energy, postal, and telecommunication services; and granting the government access to further social data, including individuals' telephone, banking, employment, and university records, to allow for more-encompassing "profiling" activities—a method of investigation (or rather of preventive identification of potential suspects) that had already been used in the 1970s and 1980s to fight domestic terrorism (see, for example, Katzenstein 1996d). This law also broadened the set of criteria on the basis of which the state could restrict the basic freedoms of individuals and groups for security purposes: reasons for intervention now included not only breaches of

criminal law and threats to the fundamental liberal-democratic order but also advocacy of the goal of "undermining the idea of international understanding and world peace."[26]

The bill leading to this law was the subject of internal debate in the two parties supporting the government at the time, the Social Democrats and the Greens (see Glässner 2003, 52), but in the end the law found broad support in the parliament, by the government majority as well as the main opposition party, the Christian Democrats. Only the PDS continued to oppose it on grounds of substance, while the FDP expressed some reservations mainly for the haste with which the law was pushed through parliament, cutting the debate short. Criticisms of the law were voiced in the Bundesrat (the upper chamber of the German parliamentary system composed of representatives of the regional governments) and by the Datenschutzbeauftragten (Federal and Regional Independent Authorities for Data Protection and Freedom of Information). The concerns voiced in the Bundesrat were more about the financial implications of the law for the Länder, whose police forces would be burdened with more tasks as they enforced the substantive limitations of freedom that the law introduced. The Datenschutzbeauftragten had more substantive concerns about some of the new measures being used not to fight terrorism but for other purposes, such as identifying clandestine immigrants, for which a restriction of civil liberties of the kind allowed by the new law was hardly justifiable (Glässner 2003, 52; Gusy 2004, 219).[27] The main outcome of this debate was the inclusion of a five-year sunset clause in the law; the original substance of the bill was not significantly amended. The law was renewed in January 2007.[28]

The Reform of the Criminal Code The new section 129(b) included in the Criminal Code allows prosecution in cases of creation of, participation in, and recruitment and support for foreign criminal and terrorist associations.[29] In particular, it prohibits support for a foreign organization that "contradicts a state order which guarantees the dignity of people, or the peaceful coexistence of the peoples" (Katzenstein 2003, 741). The new section builds on preexisting, connected rules: section 129 of the Criminal Code (on "criminal" associations) had already been supplemented in 1976 with section 129(a), which introduced specific norms aimed at counteracting the activities of "terrorist" associations specifically. Section 129(a) gave exclusive responsibility for prosecuting terrorist organizations to the Federal Prosecution Office (Bundesstaatsanwalt), which was allowed to use data from telecommunications tapping and statistical profiling. These powers have been used to repress Islamic terrorism as well (Wache 2003, 145).

The new section 129(b) simply extends the applicability of sections 129 and 129(a) to criminal and terrorist organizations that are based abroad but whose members carry out their activities in Germany.[30]

Thus, the new section 129(b) hardly represents a radical departure from the pre-9/11 situation:[31] the rationale for its introduction was the inadequacy of the existing section 129(a)—as interpreted by the Federal High Court (Bundesgerichtshof)—which had led to paradoxical situations. The court had clarified that for section 129(a) to apply, a group had to be composed of at least three people who had been associated for a certain time period, who were pursuing common goals, and who perceived themselves as members of an association (Wache 2003, 145).[32] This interpretation had been effective against the domestic terrorist organizations of the 1970s and 1980s but proved insufficient for the prosecution of Islamic terrorist organizations, mainly because it was difficult to prove that an Islamic terrorist cell displayed the requirement of minimum duration deemed necessary for the section to apply (Hirschmann 2003, 395). In fact, an Islamic terrorist cell typically consisted of three or four people who were associated for a very short time in order to prepare one specific attack, after which they would disband and normally leave the country. Section 129(b) eliminated the loophole in the law by making it possible for the courts to apply the law to an "association" based outside of the national territory and to punish individuals' support for such an association even if the prerequisites for a domestic association are lacking.[33]

Countering the New Terrorism: Money Laundering and Aviation Security

Money Laundering To cut off the terrorists' access to financial resources, the parliament amended the law on money laundering in August 2002.[34] The reform introduced a central register of all accounts registered with bank branches or other financial service providers in Germany; the register would store the name, date, and place of birth of the account holder, the type of account, and the date of opening.[35] In addition, the law instituted a central task force within the federal police agency, the Federal Criminal Police Office (Bundeskriminalamt, BKA), called the Financial Intelligence Unit (FIU, Zentrale Analyse- und Informationsstelle für Verdachtsanzeigen), which was specifically responsible for the investigation of money laundering and terrorism financing. The FIU's main task—apart from enhancing awareness of these problems among other institutional actors and the general public—is collecting and examining reports by financial insti-

tutions of suspected cases of money laundering and terrorism financing. If the FIU finds evidence of either, the Regional Criminal Offices (Landeskriminalämter, LKÄ) involved can start the actual investigation, under the coordination and supervision of the FIU.

While the new reform does give the FIU (and therefore the BKA) a relatively prominent position, it does not achieve full centralization, as most voices in the debate had advocated. Like the approval of section 129(b), this reform rationalized an underregulated situation that had led to inefficiencies and dysfunction, but without really changing the general institutional framework. In fact, before the reform, absent clear guidelines, these matters had been dealt with rather erratically: financial institutions indiscriminately reported suspected cases of money laundering or terrorism financing to different institutions: the BKA, the LKÄ, the Federal Securities Supervisory Office (Bundesaufsichtsamt für den Wertpapierhandel), the Federal Banking Supervisory Office (Bundesaufsichtsamt für das Kreditwesen), public prosecutors, and others. As a consequence, it was impossible to establish the larger picture of money laundering and terrorism financing and to map the complex networks through which money was transferred, a goal that the new reform is set to achieve.[36]

Aviation Security and the Domestic Role of the Military An important policy area for reacting to the current brand of international terrorism is aviation and border security. The second antiterror package granted the Federal Border Police (Bundesgrenzschutz, BGS) increased responsibility for stopping, interrogating, and identifying people at the national borders. In particular, airport security was stepped up, and the new law introduced the possibility of BGS officers being employed as air marshals (Flugsicherheitsbegleiter). Although these measures were relatively uncontroversial, more wide-ranging reform that would have given the government a freer hand to resort to the military in the event of an internal emergency—in particular the power to decide to shoot down hijacked aircraft threatening to crash into buildings—proved substantially more complicated and ultimately failed. The main obstacle to reform was the opposition of the Federal Constitutional Court.

In the Weimar Republic, the police, though formally separated from the army, had essentially a military character (Katzenstein 1996d, 5–6), and the army played a role in keeping internal security and order (Bisanz and Gerstenberg 2003, 323). Eager to build a different system, the drafters of the 1949 Basic Law differentiated clearly between the functions of the military and those of the police; among other things, they firmly excluded the Bundeswehr from intervening in internal matters. Only in 1968 did constitutional amendments on states of emergency (Notstandgesetzen) designate a very restricted and controlled role for the Bundeswehr in case of internal emergency. Since then, the Basic Law (article 87[a]) allows the use of the army in domestic security only to support the police and the BGS in the protection of civil objectives when the existence of the Federal Republic, of one of the Länder, or of their fundamental liberal-democratic order is threatened. Article 35 of the Basic Law allows the federal or state governments to ask for the help of the army to respond to a natural catastrophe or a grave accident, but in support of local police forces should these be insufficient to the task. Even in these limited cases, soldiers must behave like police officers and submit to police law, including the general principle of "proportionality" of reaction to disturbers of public peace (Bisanz and Gerstenberg 2003, 324; see also Leggemann 2003).

The new scale of terror attacks demonstrated by the events of 9/11 posed the problem of the intervention of the military in case of internal emergency in rather urgent terms. After, in January 2003, a deranged person flew over the city center of Frankfurt am Main in a small airplane, threatening to crash it into one of the banking district's skyscrapers, the government drafted a bill proposing to authorize military aviation to shoot down any hijacked plane that could be used for a terrorist attack. Although some circles within the government majority and the FDP from the opposition rejected the proposal on the basis of the strict constitutional separation of the police and military (but not the much larger CDU/CSU, which supported the proposal), the government managed to get the new Law on Airspace Security (Luftsicherheitsgesetz) approved in Parliament on January 11, 2005. The law was immediately challenged, however, before the Federal Constitutional Court—a course of action recommended also by the federal president, a bipartisan figure in the German constitutional structure.

In July 2005, while the court's judgment was pending, a man committed suicide by crashing his airplane between the Parliament and Chancellery buildings in Berlin. This incident turned the public debate on the law into a more general debate on the powers of the military in counterterrorism, particularly the possible use of the Bundeswehr to *prevent* a terrorist attack—such as shooting down a hijacked plane.[37] Not even the support for the new regulations from the majority of the government and the opposition, and the public emotion caused by the two incidents involving airplanes crashing or threatening to crash in urban centers, prevented the Federal Constitutional Court from striking down part of the new Law on Airspace Security in February 2006. In particular, the court considered

section 14.3 of the law, which allowed shooting down hijacked planes when they were likely to be used as weapons, both procedurally and substantially incompatible with the Basic Law.[38] With respect to the more general issue of the deployment of the Bundeswehr for antiterrorism purposes, the court did remark that the "grave accidents" mentioned in the Basic Law as a possible reason to resort to the military might also include calamities brought about intentionally as well as ongoing actions for which a disastrous outcome can be predicted with certainty. Although this seems to leave some space for the possible deployment of the military against terrorism, the court reiterated that, when acting domestically, the Bundeswehr must not use weaponry that is beyond the equipment of the police.[39]

Given the gravity of the threat, the issue stayed on the nation's political agenda: the "Grand Coalition" (CDU/CSU and SPD) government that took office in 2005 produced a white paper on the topic. While the government committee was working on the white paper, public debate on the issue continued: for example, the CDU/CSU publicly insisted on a change to the Basic Law that would allow greater scope of action for the Bundeswehr in a situation in which, as Chancellor Angela Merkel (Christian Democrat) herself remarked, the distinction between internal and external threat "has become blurred."[40] The new interior minister, Wolfgang Schäuble (Christian Democrat), announced plans to change the Basic Law during the current Parliament (elected in 2005), with the purpose of explicitly including "terrorist attacks" among the situations that would justify the resort to the Bundeswehr for reasons of internal emergency.[41] Although generally more cautious, the SPD nevertheless did not do much to distance itself from this position.

The white paper—which was published in October 2006 and had not yet been turned into a bill at the time of writing—hardly seems to have made significant progress on the thorniest issues.[42] On the possibility of deploying the Bundeswehr for internal emergencies, the white paper states that fighting terrorism is mostly still the task of "federal and Land administrations" and that the Bundeswehr can be employed whenever "such a situation can only be managed with its help." Thus, despite the intentions declared by several leaders of the parties in government (which is now supported by a majority of about three-quarters of the Parliament) and the general approval of the public for a larger use of the military to respond to domestic terrorist attacks, the opposition of the Federal Constitutional Court constituted the real obstacle to reform, thus reasserting the constitutional principle of the limits to executive power even when this is directed against "enemies of the constitution."

Controlling Borders: Asylum, Immigration, and Visa Policy

Several of the 9/11 terrorists were foreign citizens living in the Federal Republic (some of them as students) and one of them, Mohamed Atta, entered the country with three different falsified passports. The connection between asylum, immigration, and visa procedures, on the one hand, and terrorism, on the other, was therefore immediately clear in the eyes of both German legislators and the German public.

Germany has traditionally had a very liberal asylum and immigration policy. Probably more than elsewhere, changes in the German asylum and immigration regulations call into question delicate issues of constitutional and national identity that bear a heavy burden of historical memory. As Britta Walthelm (n.d., 19–20) appropriately puts it, "Against the backdrop of Germany's national-socialist past, the treatment of foreigners and the status of immigrants have always been a sensitive issue in the Federal Republic." The protection of the right of individuals to political asylum is included in article 16(a) of the Basic Law. Traditionally, the courts have interpreted the rights of foreigners and refugees in Germany in an expansive fashion.[43]

This is probably the area of legislation in which prima facie the most radical changes have been introduced post-9/11. A closer look at the data, however, reveals that even in this area the break with the past is less marked than the analysis of formal regulations would indicate. The practical effects of the new reforms, in fact, have been less drastic than the effects of the immigration and asylum reforms introduced in the early 1990s, when constitutional amendments limiting the (until then absolute) right to asylum were introduced.[44] Whereas the 1990s reforms mainly aimed to differentiate between political refugees and economic immigrants in order to prevent the latter from using the "asylum" route to enter Germany, the essence of the 2004 reforms is to allow the government to expel individuals who are suspected terrorists or otherwise represent a threat to the constitutional order and to endow the authorities with new technological instruments to do this.

The main changes introduced in 2004 can be grouped under three headings.[45] First, the new regulations introduced further grounds for the expulsion of immigrants. Section 54, subsections 5 and 5(a), of the new Residence Act (Aufenthaltsgesetz) allows the expulsion of foreigners who are or were members or supporters of an association that supports terrorism, threaten the fundamental liberal-democratic order or the security of the Federal Republic of Germany, participate in violent actions with political aims, pub-

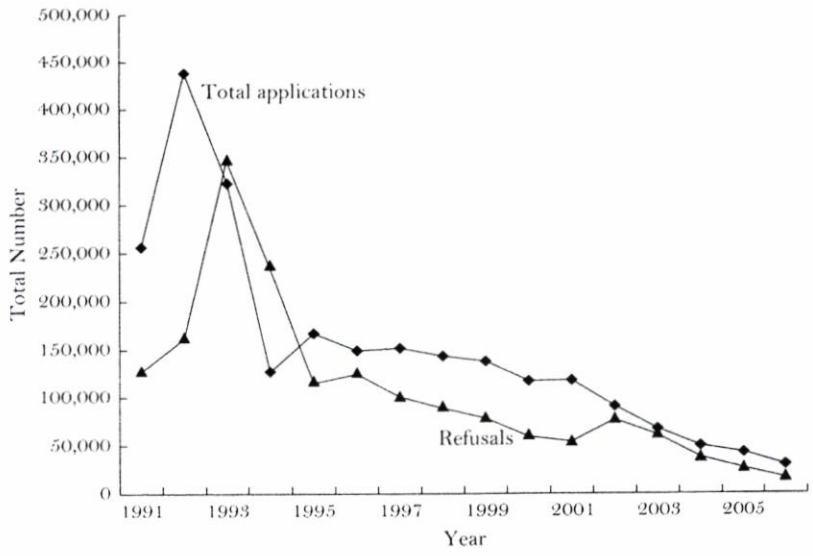
licly call for the use of force, or publicly threaten the use of force. Subsection 6 of the same section allows expulsion if a foreigner makes false or incomplete statements on his or her connections to persons or organizations suspected of supporting international terrorism. Expulsion can also happen (section 55) if an alien resident knowingly gives false information in order to extend their residence permit. Those affected by an expulsion order have the right to an appeal before a court, but while judicial decisions are pending they must register with the police on a weekly basis.

Second, the police now have more power—in cooperation with the German consulates—to conduct background checks on applicants for visas and asylum. This can lead to the refusal of a visa or residence permit to any person considered a possible threat to the fundamental liberal-democratic order or suspected of engaging in or supporting terrorism or acts of violence (Glässner 2003, 50).

Third, the technological profile of identification procedures has also been stepped up, and the data collected during immigration procedures are now integrated with larger police information systems. Fingerprinting is now part of the visa procedure, and identity cards for long-term visas have been made forgery-proof (Walthelm, n.d.). Voice-recording has been introduced as part of the asylum-seeking procedure: this technique allows the identification of an immigrant's country of origin, which in turn helps in establishing his or her identity. After the reforms, the identity-establishing information obtained in connection with the asylum procedure can be stored for ten years. The data collected while implementing these stricter personal identification measures can therefore be cross-checked with other data in the possession of the police for the identification of possible terrorists. For example, the fingerprints of asylum-seekers are automatically matched with those taken by the police at crime scenes, and they are stored by the BKA for further matching. Finally, the Federal Immigration Office (Bundesamt für Migration und Flüchtlinge) is now obliged to give the police access to the Central Alien Register (Ausländerzentralregister).[46] The police are thus able to establish immediately whether a foreigner is lawfully residing in Germany. The register now also includes integrated "visa files" with all of the information related to each person (Glässner 2003, 51).[47]

These legislative changes were explicitly driven by the intention of curbing the "misuse of asylum" and making Germany "a less desirable space for terrorists and 'sleepers.'" Like other post-9/11 reforms, measures similar to those introduced in 2004 had been discussed in previous years, albeit with largely different purposes—for example, to identify illegal residents—but

FIGURE 8.5 Asylum Applications and Refusals, 1991 to 2006



Source: Author's compilation based on official Data from the Bundesamt für Migration und Flüchtlinge (2006, 2007).

in the end they had not been approved because, to many observers, the purposes did not seem to justify the restrictions being advocated. In the new threat environment following 9/11, however, these very same measures have been much less controversial, even though it remains possible that these new police powers could be used for purposes other than the repression and prevention of terrorism (Glässner 2003, 51). In any case, even though after the approval of the new rules the number of applications for asylum went down—in tandem with a stable proportion of rejections—the practical impact of the 2004 legislation has been limited. In fact, if data from the early 1990s are brought into the picture, it becomes clear that the post-2004 changes have simply been the continuation of a trend started more than ten years ago. As illustrated in figure 8.5, the total number of applications for asylum showed a sharp drop in 1993–94 (immediately after the introduction of the reforms of the early 1990s) and has been steadily decreasing since then (Bundesamt für Migration und Flüchtlinge 2006, 2007).[48]

In sum, the data graphed in figure 8.5 show that the 2004 reforms of immigration and asylum regulations simply reinforced a decreasing trend in asylum applications that has been in place since the early 1990s.

Substantially, the new legislation makes it possible for German authorities to refuse asylum to persons who represent a danger from a *political* point of view. Whether the German courts will allow an extensive interpretation of the new norms is still an open question.

The Effect of Federalism: Limited Reform of the Security Agencies

Strictly speaking, the Federal Republic of Germany has never had *one* police organization: what is commonly called "the police" consists in fact of several organizations; operating at different territorial levels, they are connected with each other and coordinate to achieve common goals. The Basic Law gives responsibility for the police to the Länder, and the police force of each Land (all formally independent from each other) is what constitutes the bulk of "the police" in the Federal Republic (Bayley 1985; Busch et al. 1985, 81). Originally, the federal police bodies had only a subordinate and complementary character. Over the postwar era, the federal police bodies have gradually grown in importance and size, without, however, altering the nature of the police system in the Federal Republic as a "decentralized system with multiple, coordinated police forces" (Bayley 1985, 58–59). Seen from this perspective, the last wave of post-9/11 reform of the security agencies—limited in scope overall—is part of a longer trend: again, the reforms introduced do not represent a radical break with the past.

Despite the emphasis that the new laws put on the need for the effectiveness and rapidity of investigative and intelligence actions against terrorists, the reform of the relevant bureaucratic structures was only partial. Five specialized agencies have traditionally dealt with terrorism issues at the federal level: the Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV), plus the regional LfVs (Landesämter für Verfassungsschutz); the Federal Criminal Police Office (Bundeskriminalamt, BKA), plus the regional LKÄ (Landeskriminalämter); the Federal Intelligence Service (Bundesnachrichtendienst, BND); the Federal Border Police (Bundesgrenzschutz, BGS); and the Military Counterintelligence Service (Militärischer Abschirmdienst, MAD). Centralizing security structures and rethinking the federal division of powers were common concerns in many of the reform proposals aired in the public debate by academics, journalists, and policy experts: many shared the view that a new single federal office to supervise all counterterrorism activities would certainly increase the rapidity and coordination of the actions of the various government agencies (see, for example, Bisanz and Gerstenberg 2003; Hirschmann 2003; Werthebach 2004). It would be impossible to render here the complexity of the public debate on these matters. The general emphasis of most proposals, however, was on the need for better integration and coordination of the different agencies dealing with security in Germany; the "double fragmentation" described earlier seemed to be broadly perceived as the main inadequacy of the German security system (see, for example, Weidenfeld 2004).[49]

Although the power of federal agencies to coordinate their regional branches was increased in some cases (for example, the BKA vis-à-vis the LKÄ in matters of money laundering and terrorism financing), the objective of full centralization was never reached—and is nowhere in sight. Indeed, coordination and information exchange rather than centralization has been the answer to the fragmentation problem: traditionally, the work of the different agencies dealing with internal security was coordinated by a high-ranking official in the Federal Chancellery who convened weekly meetings with representatives of the different intelligence organizations (Katzenstein 1996d, 14). More recently, an "Information Board" was established for the systematic exchange and evaluation of information between the BND, the MAD, the BfV, and the BKA (Wache 2003, 148–49). The rest of this section briefly analyzes the changes introduced or proposed in two important institutions for Germany's internal security policy: the BKA and the Office for the Protection of the Constitution (BfV), as well as their regional counterparts, the LKÄ and the LfV.

The key task of the Office for the Protection of the Constitution, at both the federal and regional levels, is to protect the fundamental liberal-democratic order from groups and individuals that threaten it. This charge translates mainly into collecting information (for which the BfV cooperates with the civilian and military intelligence services) and providing intelligence on extremist groups and their members to the federal and regional governments as well as the courts: the BfV and the LfV have no power of arrest (Glässner 2003, 54). Under the new security legislation, the BfV and the LfV can also target groups and individuals whose activities are directed against the "idea of understanding among peoples and the peaceful coexistence of peoples." Crucially, this new provision allows for the investigation of individuals and groups that prepare terrorist attacks abroad. Moreover, the BfV can also request specific information from banks, financial services, aviation, and telecommunications companies.[50] It can locate cell phones in order to reconstruct terrorist networks and share these data with other security agencies (Glässner 2003, 54–55).[51]

Until the end of the 1960s, direct responsibility for police matters in the Federal Republic (apart from the coordination of the Bereitschaftspolizei) came only through the limited remit of the Federal Criminal Police Office.[52]

When it was established in 1951, the BKA had two main functions: being a loosely coordinating agency of the regional police and, more importantly, acting as a common source of information for the various police agencies. In 1973 the BKA took on a more important role: it was given the power to directly investigate cases of terrorism, international arms traffic, drug-related criminality, and money forgery. During the 1970s, the BKA gained additional prominence because its original mission—storing and elaborating information relevant for police activities—grew significantly in importance: large data sets for preventive identification of possible terrorists were established, and for the same reason, access to existing data sets (of utilities, car registration, and so on) was granted to the police (Busch et al. 1985, 83). The last pre-9/11 reform of the BKA, passed in 1997, slightly extended the agency's brief in collecting information and advising regional police agencies.

The new post-9/11 legislation has continued the trend of incremental extension of the responsibilities of the BKA, some of which have been discussed earlier. In addition to those, section 10 of the Law to Fight International Terrorism gives the BKA the power to collect information on suspected criminal activities *directly*, without first having to go through the regional police agencies. The new law allows the BKA to collect data from public and nonpublic organizations, foreign authorities, and international organizations for the purpose of amending or evaluating essential facts in the execution of its duty to support regional polices in preventing and prosecuting crimes that have a cross-Länder or international nature or are otherwise extremely important. For these crimes, the law simply removed the obligation for the BKA to ask regional police agencies in advance. Additional reforms aimed at further increasing the power of the BKA vis-à-vis regional agencies were discussed in 2007 as part of the general reform plans of the new Grand Coalition government, which aimed to reduce the overall weight of the Länder in various policy areas, but at the time of writing these discussions had not given rise to new legislation.

Police Action and Judicial Control

In response to the domestic terrorist threat of the 1970s and 1980s, the German police decisively abandoned its obsolete, quasi-military approach and mentality and adopted a completely different way of working, one characterized by prevention and massive use of technological methods of investigation (Busch et al. 1985; Katzenstein 1996d). In 1972 the first integrated information database, called INPOL, was created. For each

individual investigated by the police, it combined data from different sources—identity data, the investigation folder, convictions, and so on (Dietl 2003). Integrated electronic databases combining social data on large numbers of individuals were a hotly debated police tool in the investigation and repression of domestic terrorism during the 1970s and 1980s: especially in the 1970s, great use was made of statistical "profiling," for the preventive identification of potential terrorists, through resort to the so-called Rasterfahndung (dragnet investigation). In enacting the Rasterfahndung, the police used computer matching of large amounts of statistical data (from utility companies, car registrations, social security agencies, and so on) in the effort to identify clusters of suspicious traits in specific groups. "In brief, preventive or 'intelligent' police work . . . was informed by abstract social categories that the police had defined. It was not informed by any evidence that a targeted individual had engaged in criminal behavior" (Katzenstein 2003, 742). The success of the Rasterfahndung at that time was mixed (Katzenstein 1996).[53] But the same technique was revived after 2001, with even larger and more complex data sets, for use against Islamic terrorists.[54]

The analysis of the resort to profiling-based investigative techniques after 9/11 shows that, despite modern technology's potential to intrude into the personal sphere of citizens, the use of these techniques was never unchecked and the courts did not shy away from ruling against the government counterterrorism policy. In other words, state and federal courts have exerted an effective vigilance toward possible violations of civil rights for reasons of security, preventing the balance between freedom and security from tilting too much in favor of the latter, even in the presence of the new antiterrorism norms introduced after 9/11.

The Resort to Statistical Profiling: The Rasterfahndung

As explained earlier, the introduction in 1976 of section 129(a) of the Criminal Code permitted the state to repress criminal intent as well as criminal behavior. Security legislation approved in the 1970s also gave law enforcement authorities access to social data in general and the data necessary for conducting computer-aided profiling in particular. The post-9/11 antiterrorism legal reforms expanded these possibilities, and so arose the possibility of resorting, as in the 1970s, to the large-scale statistical profiling of entire sectors of the population with the purpose of identifying potential terrorists. The method of the Rasterfahndung was therefore revived in the investigations against Islamic terrorism. Because three of the four pilots involved in the 9/11 attacks had lived legally and incon-

spicuously in Germany for some time, the technique looked particularly appropriate to identify so-called sleepers—individuals affiliated with Al Qaeda who might be living under the cover of a perfectly legal life.

The federal police authorities cannot, by law, enact a *preventive* dragnet investigation: only the Länder police have this power. Despite the many voices raised in the debate in favor of greater centralization of police activities in matters of counterterrorism, this legal prohibition persisted, and the Länder proved quite jealous of their constitutional prerogatives in police matters. Achieving the necessary coordination between the police forces of the sixteen Länder has been quite arduous at times.[55] The initiative for a coordinated Rasterfahndung came formally from the Standing Committee of the Regional Interior Ministers (Innenministerkonferenz, IMK) in September 2001, when two states, Berlin and Hamburg, had already decided separately to conduct similar dragnet investigations in their territory. The IMK decided that each Land would initiate its own investigation, and in order to achieve comparable and reliable results, it impaneled the Coordination Group on International Terrorism (Koordinierungsgruppe Internationaler Terrorismus, KIT), which brings together two IMK subcommittees with representatives from the Federal Intelligence Service, the Office for the Protection of the Constitution, the Federal Border Police, the army, and the Federal Prosecution Authority. The KIT is headed by a representative of the Federal Criminal Police Office.

The KIT suggested a standard profile for the Rasterfahndung that would be implemented in all the Länder and was largely based on the social characteristics of the known perpetrators of 9/11: male, eighteen to forty years old, current or former student, Islamic, legal resident of Germany, and originating from one of a list of twenty-six Muslim countries (see Kant 2005, 14). These recommendations were followed in fifteen of the sixteen Länder. (North Rhine–Westphalia deviated from them.)[56] The technical difficulties of integrating different regional databases did not take long to emerge: data coming from Länder authorities was occasionally incomplete (birth dates, for example, were not collected in all states), and different Länder used different software and formatted the data differently.

The Landeskriminalämter screened the records of residents' registration offices and universities and the Central Foreigners' Register (Ausländerzentralregister) to identify individuals who matched the defined profile. The results were then passed on to the BKA, whose "sleepers database" subsequently had thirty-two thousand entries (Kant 2005, 15).[57] The BKA then determined how many of these individuals belonged to

certain categories of people (ninety-six categories in total, for a total of more than 4 million individuals) who could possess the relevant knowledge to carry out a terrorist attack or who were familiar with places that could constitute possible terrorist targets. These categories included, for example, individuals who had a piloting license or were attending a course to obtain it, members of sporting aviation associations, employees of airports, nuclear power plants, chemical plants, the rail service, laboratories, and other research institutes, and also students of the German language at the Goethe Institutes. The comparison of these two databases, in March 2002, yielded 1,689 potential sleepers.[58] Those individuals were then investigated by the police of their Land, but after one year not one sleeper had been identified. Seven individuals suspected of being members of a terrorist cell in Hamburg were arrested, but they did not fit the statistical profile (Katzenstein 2003, 751). The databases were deleted in June and July 2003. In the whole process, data were collected and analyzed on about 8.3 million individuals (Kant 2005). Hence, the large effort put into the Rasterfahndung did not, in the end, lead to any substantial results (Glässner 2003; Kant 2005).

The Intervention of the Courts

The resort to the Rasterfahndung enjoyed broad support in all parties, even that of the Datenschutzbeauftragten (Authorities for Data Protection), which, in an official conference held in 2002, supported the effort provided the data was deleted once the procedure had been completed. In the political debate, only the PDS and some circles within the Greens emphasized the twofold risk of violating the principle of the presumption of innocence and the right to "informational self-determination" (individuals about whom data are collected in the Rasterfahndung are not notified), as well as the danger of alienating Muslim minorities. Again, the main opposition to the Rasterfahndung came from the judiciary, at both the regional and the federal level.

Some state courts got in the way of the new investigation, either delaying it or forcing the authorities to change the legal framework under which the Rasterfahndung could be implemented. At the beginning of 2002, regional courts in Berlin and Hesse declared the Rasterfahndung illegal, since no "imminent threat" of a terrorist attack (as prescribed by the regional police laws of those Länder) was present, and the "mere possibility" of a terrorist attack was not sufficient to justify the encroachment on individual rights that this kind of investigation would entail. Follow-

ing these rulings, the police authorities of each Land had to suspend the investigation. In Berlin, the LKÄ appealed the decision, and in April 2002 the regional Court of Appeal sustained its case, hence giving the green light to resume the investigation. In Hesse, the regional parliament had to quickly change the regional police law (in March 2002) to justify a more flexible resort to the Rasterfahndung, which could then be resumed in that Land too. The tribulations of the Rasterfahndung in Hesse did not end there, however, as further complaints were brought to the administrative courts of that Land: in November 2002, the lower Administrative Court in Giessen ruled against the Rasterfahndung. Again, the case went to appeal, and only in February 2003 did the Regional High Administrative Court confirm the legality of the Rasterfahndung in Hesse.

After the Rasterfahndung was completed, the final opposition to it came from the Federal Constitutional Court, which in its ruling of April 4, 2006, declared it unconstitutional.[59] While reasserting the constitutionality of the regional laws on which the Rasterfahndung was based, the court considered that the actual decision to carry out the investigation had unduly misinterpreted the law, which required the existence of a "concrete danger."[60] The court maintained that a Rasterfahndung constitutes a significant interference with the right to privacy and data protection. A violation of that right could be justified only in the presence of concrete leads to a planned attack or information about the presence of suspected terrorists in Germany. A simple general perception of a threat of a terrorist attack is not enough, the court argued, since there will always be international crises in whose context terrorist attacks can occur, and therefore such a threat can never be entirely eliminated.[61] This decision of the Federal Constitutional Court is likely to have consequences for the future, especially for the behavior of regional courts. In the ruling, the Federal Constitutional Court urged them to assess more carefully each time whether the conditions for a Rasterfahndung are present.

The reactions to the decision of the Federal Constitutional Court show the different views held by most of the political forces and by the highest representative of the judiciary on this matter—thus indirectly confirming the independent influence of courts in dictating the interpretation of the constitutional principles that should guide security policy. In fact, the court's decision was heavily criticized by many CDU/CSU national politicians for tying the hands of the police in the face of national danger. The SPD was not as vocal, but it should be kept in mind that the party dominated the federal government at the time of the implementation of the Rasterfahndung and that the Rasterfahndung was first started in SPD-

ruled Länder. Indeed, regional SPD politicians criticized the ruling, even suggesting publicly that the government should try to find ways to revive the Rasterfahndung, while formally respecting the court's decision. FDP representatives such as the former justice minister Sabine Leutheusser-Schnarrenberger approved the court's decision as upholding the rule of law. Their position, however, seems to reveal a partisan intent rather than a principled disagreement. In fact, no substantial opposition came from the FDP *while* the Rasterfahndung was being carried out by regional governments, some of which were supported by the FDP.[62]

Conclusion

The German case shows that institutions—and in particular countermajoritarian institutions—matter in domestic security policy. To be sure, inherited norms are important too.[63] For example, the notion of "streitbare Demokratie," a normative order that requires the defense of democracy against its enemies, was explicitly articulated in the political debate in Germany as the normative justification for the special antiterrorism legislation approved after 9/11. The extent to which this principle has penetrated German political culture is also shown by the broad support in opinion polls for strong governmental action against extremists and terrorists. However, this popular support did not influence the judiciary, which intervened to veto several important security policies, nor was it sufficient to generate wide-ranging reform of the territorially and functionally fragmented security apparatus. The complex division of responsibilities in domestic security policy was criticized by many as the possible cause of inefficiencies and delays in the face of crises. Centralizing police responsibilities was widely debated, and there were attempts to enhance the central government's power to intervene in various matters of internal security. Whenever the political authorities tried to overstep the constitutional mark, however, the courts—and in particular the Federal Constitutional Court—acted as very effective watchdogs over the existing division of responsibilities between the federal government and the Länder in matters of national security. The institutional safeguards incorporated into the Basic Law to avoid "excessive" centralization of power—such as federalism, the separation between police and security services, and the many restrictions on the use of the Bundeswehr in internal emergencies—are still firmly in place, mainly thanks to the action of the courts. Thus, institutional vetoes ensured the prevalence of the fundamental constitutional principle of the safeguards against excesses in the

exercise of executive power, even when executive action is justified with the principle—also enshrined in the Basic Law—of defending the constitution against its "enemies".

The discussion here should not conceal the fact that some changes have indeed been introduced: for example, the powers of the police have been increased, more data are now available for investigations, and immigration and asylum have been restricted. As shown in the analysis, however, these trends were mostly already under way before 9/11. They were intended to adapt institutions and policies to the needs of a country that was turning into a country of immigration to an extent unprecedented in its history. The political shock of 9/11 simply removed some of the political obstacles to their approval. Finally, some reforms—such as the regulatory reforms related to money laundering—were induced by the country's international commitments and could generally be carried out within the existing constitutional framework.

Whether the new norms and actions have been successful is still an open question. A natural yardstick of comparison for the post-9/11 situation is the antiterrorism legislative reforms and police activities of the 1970s and the 1980s: then as now, new ad hoc laws, tailored to the characteristics of the terrorist threat, were passed and new police methods were introduced (see, for example, Horbatiuk 1979–80; Katzenstein 1996d). The post-9/11 reaction to Islamic terrorism has been built on those rules and experiences, innovating where it was appropriate, given the new threat environment, and where it was politically and constitutionally possible. Katzenstein (2003, 757), among others, has highlighted the relative lack of success of the police actions undertaken since 9/11. Although this is true insofar as visible effects are concerned, perhaps more credit should go to the ability of the recent reforms and police initiatives to prevent public pro-terrorist activity. In other words, police activity targeting the Islamic associations and communities that breached the new laws, as well as individual suspects, has probably restricted the field of action of potential terrorists, who would normally find refuge in these circles and use them as cover for their activities. It is obviously difficult to substantiate this counterfactual argument with hard evidence, but the argument in question has been made by some commentators. For example, Hirschmann (2003, 396) writes, "Many police actions against suspects have sent extremists the message that they can no longer carry out their activities undisturbed."[64]

This leads to another question: how likely is it that further reforms will be introduced, and how far-reaching will they be? The majority of security experts hold the view that the current system is far from ideal. In the current situation, inefficiencies in the distribution of information and duplication of work are still frequent problems, despite all the reforms devoted to increasing coordination and encouraging a smoother flow of information between security agencies. A reform to give the BKA further proactive responsibilities in counterterrorism activities is being discussed at the time of writing, but even the reformed BKA would still be far from this ideal. Similarly, proposals for the reform of the Office for the Protection of the Constitution have been put forward (see, for example, Hirschmann 2003; Werthebach 2004), but they have not been turned into formal proposals for institutional rearrangement by the federal government.

Be that as it may, this chapter has shown that the decisive element in the success of these proposals will be their capacity to overcome the likely opposition of the courts and the resistance of some aspects of the federal system. The record after 9/11 is quite clear: change has been possible only within the existing allocation of responsibilities in the context of the existing federal system, and the courts have managed to impose their own interpretation (less favorable to extending executive powers, even those used against enemies of the constitution) of the Basic Law's fundamental principles. At this stage, for example, overcoming the likely opposition of the Federal Constitutional Court on key issues such as the deployment of the military for internal terrorism emergencies would take amending the Basic Law; such a proposal is not on the agenda at the time of writing, and it is unlikely to be in the near future.

In sum, security policy certainly represents a "norm-intense" social environment, since in principle it deals with the "enemy within" (Katzenstein 2003, 736–37). And norms have undoubtedly shown their importance in the case of Germany. Even the most resilient norms, however, are always at least partially contested, and the resolution of this contestation is often the outcome of clashes between different institutions. In Germany, counter-majoritarian institutions such as the federal system and the judiciary have proved their vitality even in the atmosphere of political urgency following 9/11.

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Notes

1. Reported in Hirschmann and Leggemann (2003, 10); translation by the author.
2. For a more general analysis of both foreign and domestic security policies in post-9/11 Germany, see Katzenstein (2003).
3. The German constitutional doctrine has emphasized the importance of other institutional arrangements intended to realize the same constitutional principles: the important responsibilities given to the Länder in the implementation of federal policies, or in the legislative process at the federal level (see, for example, Weber-Fas 1983); and the rejection of the direct election of the head of state (see, for example, Mussgnug 1987), as well as of any institution of direct democracy (see, for example, Greifeld 1983; Böckenförde 1985), to avoid any plebiscitarian temptation, which doomed the Weimar Republic. Others mention the constitutional provision of the constructive vote of no confidence (by which the executive cannot be replaced if another coalition is not ready to take its place) and the corrections to proportionality in the federal and state electoral systems, both of which are supposed to increase government stability (see, for example, Hübner 1984; Nohlen 1986; Zieger 1988).
4. As a German constitutional lawyer put it, "The democratic principle, which can be translated in very many different ways, found in the *Grundgesetz* a characteristically liberal and representative normative connotation. This is particularly clear in the existing parliamentary system as well as in the constitutional principle of the 'fundamental liberal-democratic order' . . . this system is also characterized by the specificities of a democracy which is federal, 'social' and 'protected'" (quoted in Weber-Fas 1983, 51–52). Virtually the same description can be found in the whole German postwar constitutional doctrine.
5. The court has defined the fundamental liberal-democratic order as including "the rule of law (responsible government, legality of administration, and judicial independence); separation of powers; popular sovereignty and democratic decision-making based on the majority principle; guaranteed human rights; and a multi-party system granting equal opportunities to all parties, including the right to form a parliamentary opposition"; see BVerfGE 2, 1–79, translated in Braunthal (1989, 310).
6. Only the Federal Constitutional Court can ban a political party, while political associations, which unlike parties do not participate in elections, can be disbanded by a decree of the executive.
7. Most of the repressive antiterrorism laws and reforms of the 1970s, for example, were passed by a center-left Social Democrat–Liberal majority, with the agreement of the Christian Democratic opposition of the time (Braunthal 1989).

8. In an official statement, the party accused the SPD/Green coalition of exacerbating fear and mistrust in society with its domestic security policies. See Die Linke im Bundestag—Service Newsletter, available at: http://www.linksfraktion.de/newsletter_view.php?newsletter=1980535644 (accessed October 2006).
9. Although they have backed the rest of the antiterrorism measures, the Greens initially opposed the creation of biometric passports, which were introduced in 2005. The Liberals (FDP) were in a similar position (although the FDP did not oppose the collection of DNA data for criminals). It should be noted, however, that the FDP has been in opposition as of 1998, and its position could change should it again become part of the government.
10. See, for example, Matthias Geis, "Die Staat lieben lernen," *Die Zeit*, February 3, 2005.
11. Question: "What do you think about Islam? Do you think that Islam represents a threat to Western democracy, or don't you think so?" See Politbarometer 2001, "Variable 200: Islam als Bedrohung" (April 1, 2004), summary available at: http://www.forschungsgruppe.de/Umfragen_und_Publikationen/Politbarometer/Archiv/Politbarometer_2004/PB_April_I_2004/(accessed June 2008). Disclaimer: The Politbarometer Surveys quoted in this chapter were conducted by the Forschungsgruppe Wahlen Mannheim and made available by the Zentralarchiv für empirische Sozialforschung, University of Köln, Germany. Responsibility for the analysis and interpretation of these data is entirely the author's.
12. Allensbach Survey 215, September 15, 2004. The exact wording of the question was: "If in the fight against terrorism, the influence of the state and the police must be strengthened, would you accept a curbing of your personal rights through measures such as surveillance and searches, or would you reject this?"
13. See ibid., which compares data from 1977 and 2004 for the following question: "If in the fight against terrorism, the influence of the state and the police must be strengthened, would you accept a curbing of your personal rights through measures such as surveillance and searches, or would you reject this?" Data available from Allensbach.
14. See "Wahlen in Deutschland—Sicherheit 2001" available at: http://www.ailly acum.de/Dt/Wahlen-Deutschland/2001/Sicherheit11.html (accessed March 2007). The exact wordings of the questions were: "As a citizen, do you value security more than freedom?"; "Can security in Germany only be guaranteed with tighter security measures?"; and "In the future, should passports contain the fingerprints of their holders?" Data from Emnid (November 2, 2001).
15. This datum seems to be quite robust. A separate survey conducted by Allensbach at about the same time ("Some have suggested that to fight terrorism, the mandate of the Bundeswehr should be extended, so that it is

able to act internally and fulfil police tasks or border security. Do you think this is right or not right?") shows a figure of 61 percent in support of the engagement of the Bundeswehr in internal emergency situations, versus a mere 23 percent against the idea. Allensbacher Berichte Survey 7, "Mehr als jeder zweite befürchtet einen Terroranschlag in Deutschland" (2004), available at: http://www.ifd-allensbach.de/news/prd_0407.html (accessed November 2006).

16. The literature (especially in German) on the terrorist threat in Germany during the 1970s and 1980s is vast. Examples of English-language analyses of the terrorist movements are Della Porta (1995), Kolinsky (1988), and Corves (1978); for state responses, see Horbatiuk (1979–80), Thomaneck (1985), Finn (1991), and Katzenstein (1996d). The most encompassing study on the organization of the German police forces, including the reforms passed to counter domestic terrorism, is Busch et al. (1985).
17. It should be noted that important existing repressive provisions could be invoked *unchanged* against Islamic terrorists. This was the case, for example, with the Radikalenerlass ("radicals' decree"), famously introduced in 1972 to screen left- and right-wing extremists from the civil service. The decree was applied quite extensively (and controversially) in those years: about 3.5 million people were investigated as potential political extremists after 1972; about 10,000 were unable to enter or remain in the civil service; and 130 were fired—see, for example, Histor (1992). After 9/11, the decree was used only once—against a Muslim teacher who wore a head scarf in the classroom. See Jochen Leffers, "Lehrerin darf vorerst mit Kopftuch unterrichten," Spiegel Online (September 24, 2003), available at: http://www.spiegel.de/jahreschronik/0,1518,275907,00.html (accessed October 2006); Thomas Darnstädt and Caroline Schmidt, "Stuttgarter Leitkultur," *Der Spiegel*, November 3, 2003, 50; Dietmar Hipp, "Nonnen retten den Islam," Spiegel Online (July 8, 2006), available at: http://www.spiegel.de/schulspiegel/0,1518,425678,00.html (accessed October 2006). Another example, as the federal justice minister made publicly clear in May 2004, is that of the controversial restrictions to the rights of defense counsel: introduced in criminal procedure law during the 1970s, these restrictions in certain cases allow detainees to be excluded from the trial room or barred from any contact with their lawyers (see Finn 1991; Grönewold 1993). See Federal Minister of Justice Brigitte Zypries, "Freedom, Democracy, and the Rule of Law Against the Background of International Terrorism," speech given May 10, 2004, Washington, D.C., available at: http://www.fesdc.org/Speeches%204%20Papers/zypries051004.html (accessed June 2006).
18. The law (Erstes Änderungsgesetz zum Vereinsgesetz, December 4, 2001), approved by both chambers in November 2001, has been called the "first security package," or the "first antiterror package," in public debate. It came into force on December 8, 2001.

19. Another counterterrorism law extended the possible reasons for an association ban to include the existence of a "threat to the idea of international understanding and world peace" as one of the association's goals.
20. The federal government identified three groups that might be affected: "fundamentalist Islamic groups" that did not disavow the possibility of violence; groups that used the "religion privilege" to circumvent the provisions of the law; and groups (as yet unknown in Germany) that prophesied the end of the world and encouraged mass suicide. See Bundestag, *Blickpunkt Bundestag* (September 2001), available at: http://www.bundestag.de/bp/2001/bp0109/0109033a.html (accessed August 2006).
21. Although the ban of the Caliphate State was finally upheld by both the Federal Administrative Court and the Federal Constitutional Court, lower courts substantially delayed Kaplan's expulsion by opposing the government's act on the basis of potential violation of human rights. For a reconstruction of the facts, see "Im Labyrhint des Kalifen," *Der Spiegel*, June 7, 2004.
22. Ibid.; see also "Kaplan erwartet Hochverrat-Prozess," *Der Spiegel*, October 13, 2004.
23. The exact wording of the question was "Should persons such as Metin Kaplan, who advocate violence in Germany, be expelled even when they face persecution, torture or death in their home country?" (translated by the author). The result across the sample of about one thousand interviewees was 70 percent "yes," 20 percent "no," and 5 percent "don't know." Broken down by party preference (without reporting the "don't know" data), the split was 66 percent "yes" to 27 percent "no" among SPD voters, 75 percent "yes" to 22 percent "no" among CDU/CSU voters, and 82 percent "yes" to 14 percent "no" among FDP voters. The Greens' electors showed more division, with 49 percent in favor and 43 percent against, but the party expressed no official disagreement with Kaplan's expulsion. See "TNS Infratest," *Der Spiegel*, June 7, 2004.
24. The Servant of Islam, an important Muslim association, was banned along with the Caliphate State. In August 2002, the interior minister used the new legislation to ban Al-Aqsa, an Islamic organization accused of collecting donations for Hamas in order to support the families of suicide bombers in Israel. (Three years later, the successor organization, Yatim Children's Aid, was also banned.) In September 2002, the police searched about one hundred mosques, apartments, and public venues. Many arrests were made, and the minister of the interior banned sixteen Islamic associations that had been active mainly at the local or regional level. In January 2003, the Hizb ut-Tahrir al-Islami (HuT) was also banned throughout the Federal Republic. December 2003 saw one of the largest police operations in the history of the Germany: 5,500 officers searched 1,170 properties in 13 states. See *Süddeutsche Zeitung*, December 12, 2003; *Frankfurter Rundschau*, October 18, 2003,

and December 12, 2003; and the list of forbidden Islamist organizations at Bundesamt für Verfassungsschutz: http://www.verfassungsschutz.de/de/arbeitsfelder/af_islamismus/zahlen_und_fakten_islamismus/zafais_3_verbotene_islam_org.html (accessed October 2006).

25. Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz; January 9, 2002), called the "second security package," or the "second antiterror package," in public parlance. The second antiterror package, approved by both chambers in December 2001, came into force in January 2002.
26. The law specifies this concept as follows: "1. Limiting or endangering the political process, the peaceful living together of Germans and foreigners or of different groups of foreigners in the Federal Republic, public security or order, or other significant interests of the Federal Republic of Germany. 2. Running counter to the obligations of the Federal Republic of Germany under international law. 3. Supporting tendencies outside the Federal Republic, the aims or means of which are incompatible with a state order that respects the dignity of humanity. 4. Supporting, encouraging or calling for the use of violence as a means of achieving political, religious or other aims. 5. Supporting associations inside or outside the Federal Republic which carry out, support or threaten attacks on people or goods." See Terrorismusbekämpfungsgesetz, sect. 9.
27. *Süddeutsche Zeitung*, October 27–28, 2001, 5, quoted in Glässner (2003, 52). In 1983 the Federal Constitutional Court had established that public institutions could collect and share individuals' personal data for purposes established by the law (BVerfGE 65, 1, 44).
28. Gesetz zur Ergänzung des Terrorismusbekämpfungsgesetz (Terrorismusbekämpfungsergänzungsgesetz), Bundesgesetzblatt, 2007, part 1, no. 1, published in Bonn (January 10, 2007), available at: www.cilip.de (accessed November 2007).
29. Thirty-fourth Strafrechtsänderungsgesetz (August 22, 2002).
30. Prosecution has no limits if the group is based in another EU member state. For nonmember states, the section applies if the activities of the group are carried out in Germany, if the perpetrator or the victim is German, or if either of them is in Germany at the time of the crime. Furthermore, to safeguard diplomatic relations, prosecution in these cases is submitted to the federal government for approval (Wache 2003, 151).
31. The extension of the applicability of sections 129 and 129(a) was accompanied by a tightening of their wording: a newly punishable offense was not just "advertising" (Sympathiewerbung) terrorist organizations but, more specifically, advertising "with the end of recruiting members and supporters" (um Mitglieder oder Unterstützer werben). A later proposal of the CDU/CSU to reinsert "Sympathiewerbung" was not accepted. See Tröndle and Fischer (2004, §129a, no. 20).

32. The "integrative" interpretation of the court was necessary because section 129(a) describes what in German legalese is called a Vorfelddelikt ("run-up crime"), which allows the prosecution of individuals if they belong to an organization whose goals include committing crimes of a certain gravity (such as murder) even *before* those crimes are committed or even planned (Katzenstein 2003).
33. The urgency of this problem became clear when the Oberlandesgericht (Regional High Court) in Frankfurt am Main was called upon to judge the four members of an Islamic terrorist cell who (while in Germany) organized a bomb attack on the Christmas Market in Strasbourg in 2000. The police arrested them in December 2000, just before they could carry out their plans, and the prosecutor charged them with, among other things, forming a terrorist association on the basis of section 129(a) of the Criminal Code. The court in 2003 finally condemned the defendants to prison sentences of between ten and twelve years; it also ruled, however, that section 129(a) could not be applied to the case (even though the new legislation had been passed in the intervening time, the principle of favor rei was applied) and that therefore the individuals could not be considered as having formed a terrorist organization, since there was evidence that they had not planned further attacks and some of them had already bought airline tickets to leave the country (Wache 2003, 146).
34. Geldwäschebekämpfungsgesetz (August 8, 2002).
35. The law does not allow the collection of data on an account's balance, transactions, or returns on interest. The Datenschutzbeauftragten and financial institutions opposed these changes during the debate before the law was passed; in fact, one of the most controversial issues considered was whether data could also be used to identify tax evaders.
36. This reform could also be framed in terms of multilateralism in foreign policy, another principle derived from the Basic Law (Katzenstein 2003). Until this reform, in fact, Germany had been a laggard in this respect vis-à-vis other countries. Despite being one of the founding members of the Financial Action Task Force (FATF), an intergovernmental body founded by the G-7 in 1989 in response to the increased threat posed by international money laundering (since 2001, the FATF has also dealt with international terrorism financing), Germany had not yet fully implemented the relevant recommendations that accompanied its creation. One of these recommendations was to establish a central register of suspected cases of money laundering and terrorism financing. The main obstacle to the establishment of such a central body was the resistance of the Länder to giving up their responsibilities in this area. Now fourteen officials work in the central FIU, while about three hundred officials work on money laundering and terrorism financing across all Länder. The FIU is staffed by federal police officers, like the rest of the BKA, and it uses external consultants for more technical matters. See *Welt am Sonntag*, September 30, 2001.

37. Several experts proposed an enhanced role for the Bundeswehr in both external and internal tasks (see, for example, Weisser 2004; Naumann 2004). For very detailed proposals on how the Bundeswehr could support the actions of other security agencies beyond military intervention (for example, by providing know-how, technology, reserved information, or logistical support), see, for example, Gusy (2004).
38. In the ruling, the court first made clear that the Basic Law does not allow the federal government to pass such a law: article 35 of the Basic Law allows the armed forces to help the Länder in case of natural disasters and severe casualties, but it prohibits the use of specific military armament for these purposes, and it allows the employment of the armed forces only as "police-like" forces. Since section 14.3 of the Luftsicherheitsgesetz provided for a military deployment of the armed forces, the court judged that the federal government had overstepped its powers as established by the Basic Law. From a substantial point of view, the court held that section 14.3 of the new law clashed with articles 1.1 and 2.2 of the Basic Law, which protect the basic rights to human dignity and life. The new law would have been in compliance with the Basic Law if it had allowed shooting down only pilot-less aircraft or aircraft carrying persons planning to use the plane as a weapon against other individuals. The new law, however, allowed shooting down airplanes carrying innocent crew or passengers. BVerfG, 1 BvR 357/05, February 15, 2006, available at: http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html (accessed November 2006).
39. BVerfGE, 1 BvR 357/05, February 15, 2006, para. 105–9. The court also explicitly stated that its ruling did not aim to evaluate criminal liability in the case of an actual shooting; that ruling dealt exclusively with the constitutionality of the Luftsicherheitsgesetz. This may hint at the possibility that a military commander could make an illegal decision in an emergency situation and be tried for it in a criminal court afterward.
40. *Süddeutsche Zeitung*, February 18, 2006.
41. *Süddeutsche Zeitung*, April 5, 2006.
42. See Bundesministerium der Verteidigung, *Weissbuch 2006 zur Sicherheitspolitik Deutschlands und zur Zukunft der Bundeswehr*, available at: http://merln.ndu.edu/whitepapers/Germany_Weissbuch_2006_mB_sig.pdf (accessed September 2009). Throughout its text, the white paper is consistent with the normative framework of the Basic Law (such as multilateralism; see Katzenstein 2003) and with reforms introduced well before 9/11, such as the possibility of deploying the army in international missions under very strict conditions. See Severin Weiland, "Weissbuch zwischen Wehrpflicht und Weltpolitik," Spiegel Online (October 25, 2006), available at: http://www.spiegel.de/politik/deutschland/0,1518,444354,00.html (accessed November 2007).
43. For example, the consolidation of the rights of the Gastarbeiter (the guest workers who entered Germany mainly between the 1950s and the 1970s) with those of permanent residents was greatly helped by judicial interpretation of the laws rather than by new legislation. The courts also kept their expansive interpretation of the rights of foreigners in the later phase, when most economic immigrants went the "asylum" route rather than the old route of "imported labor" (Walthelm, n.d.).

44. The Gesetz zur Änderung des Grundgesetzes (Law Amending the Basic Law) of June 28, 1993, added article 16(a) to the Basic Law, which subjected the concession of political asylum to a series of conditions, mainly having to do with the effective violation of human rights in the applicant's country of origin.
45. More specifically, a new Zuwanderungsgesetz (Immigration Act) was passed on July 30, 2004, to go into force on January 1, 2005. Among other things, section 1 of the new law replaced the old Ausländergesetz (Foreigners Act) with the Aufenthaltsgesetz (Residence Act). Section 2 of the same law introduced the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on the General Freedom of Movement of EU Citizens), newly regulating migration within the EU and replacing the 1980 Aufenthaltsgesetz/EWG (Residence Act/EEC). Section 3 changed the Asylverfahrensgesetz (Act on Asylum Procedures).
46. The Ausländerzentralregister is an official database that stores personal information on all foreigners who have or have had a residence permit, who are seeking or have sought asylum, or who are admitted asylum-seekers.
47. The new Aufenthaltsgesetz also introduced new integration measures such as integration courses and programs (sects. 43–45).
48. Data for 2007, available only for the period of January to September at the time of writing, show that even the decreasing trend in asylum applications may now have reached the bottom: 23,206 applications were filed in the first nine months of the year. Assuming that the trend remained stable for the remaining quarter, this would yield about 29,000 applications, against the 30,100 filed in 2006. Furthermore, based on the same data and assumptions, the percentage of refusals may have been slightly declining between 2006 and 2007: 13,864 applications were rejected in the first nine months of 2007. This might yield a total of about 17,000 refusals at the end of the year against the 21,029 in 2006 (Bundesamt für Migration und Flüchtlinge 2007).
49. For example, the authoritative Bertelsmann Foundation proposed, among other things, to increase the centralization of power for the BfV and the BKA against their respective regional branches (Weidenfeld 2004, 17). More cooperation in various forms—from the swap of functionaries to the integration of different agencies into a "network" scheme between the BKA, BND, BGS, and BfV—was also advocated, especially in the access and evaluation of information through the establishment of a general database on

"international terror" and agreements on evaluation procedures (Gusy 2004). Security reforms were sometimes seen as part of more-encompassing schemes to reform the German federal system. For example, Kai Hirschmann proposed to turn the sixteen LfVs into nine regional branches of the national BfV. This reform would have to be carried out in the context of a prospective general reduction of the number of Länder from sixteen to nine and would follow the example of the reform of the Bundesbank (the Federal Central Bank) and the Landesbanken (reduced to nine and turned into regional branches of the Bundesbank) introduced after the European Monetary Union (Hirschmann 2003, 398).

50. The same right has been granted to the civilian Federal Intelligence Service (BND), which can now request information on account-holders and monetary transactions and investments. The Military Counterespionage Service (MAD) has also benefited from the extension of the protected constitutional objects to "understanding between peoples and peaceful coexistence of peoples," being now entitled to gather information on any member of the armed forces or any civilian working in the Ministry of Defense whose activities may be directed against such understanding and coexistence. The MAD cannot, however, request financial information on the same people (Glässner 2003, 55).
51. The problem of data sharing and the common evolution of information between different agencies was a long-standing one in German security policy and goes back at least thirty years, but it has been made substantially more urgent by the increased amount of data now available owing to the enhanced technological possibilities in telecommunications (the Internet, satellites, and so on) and consequently in data collection (Wache 2003, 147).
52. Established in 1950 and coordinated by the Federal Interior Ministry, the Bereitschaftspolizei is an integral part of the Länderpolizeien. Its primary functions are crowd control and assisting the Länderpolizeien in cases of riots, civil disturbances, or catastrophes.
53. The 1970s use of the Rasterfahndung led to the arrest of only one terrorist, RAF member Rolf Heissler, in 1979 (Katzenstein 1996d).
54. For this purpose, new data storage systems had to be created from scratch: attempts to update the INPOL system to adapt it to post-9/11 requirements have encountered the technical and political difficulties associated with the integration of the different standards and procedures of each Land and thus have been unsuccessful. Dietl (2003, 195) reports, for example, that for the crime of car theft, each of the Länder insisted that its own form be integrated into the system, making for sixteen different standards.
55. A Rasterfahndung at the federal level, on the basis of section 98(a) of the Code of Criminal Procedure, is possible only for the purpose of tracking an offender; thus, it would have a repressive rather than preventive purpose. Having decided to carry out a Rasterfahndung with preventive purposes, the Conference of the Regional Ministers of Interior Affairs chose to ground the initiative in regional police laws, which allow a preventive Rasterfahndung. Regional police laws vary, however, between Länder. For example, in some Länder, carrying out a Rasterfahndung requires prior judicial approval, while in others there is no such need. Moreover, the laws define the circumstances justifying a resort to this kind of investigation differently, variously prescribing the "imminence" of a threat or the presence of "concrete leads" to a future threat or allowing a Rasterfahndung on the mere basis of the "perception" of such a threat by the authorities. Finally, in three Länder (Bremen, Schleswig-Holstein, and Lower Saxony), a Rasterfahndung was not possible at all, and police laws had to be quickly amended.

56. In North Rhine–Westphalia, the authorities collected information on *all* men (German as well as non-German) age eighteen to forty and justified this procedure by pointing to the possibility of sleepers who held German citizenship. Moreover, universities in that Land did not have information on the religious affiliation and national origin of their students. As a result, the authorities in North Rhine–Westphalia collected information on 5 million individuals. This was later challenged before the Regional High Court, which ruled that while the use of the Rasterfahndung itself was justified given the threat coming from Islamic terrorism, collecting data on all ("non-profiled") citizens of a certain age group was not legal.
57. The legal basis for this procedure was provided by BKA-Gesetz, sects. 7 and 28 (BT-Drucksache 14/7249, p. 3).
58. The process of data cleaning was long and complicated. The first comparison of the databases resulted in more than 101,000 relevant matches. This result, however, contained false identities (different individuals with the same name) and double matches (individuals in the sleepers database who were featured more than once in the comparison database). To clear the result of these false matches, the BKA returned all matches to the respective LKÄ, which cleared up the data manually. The number of potential suspects was thus reduced to 3,450. Further screening reduced the number of potential suspects to 1,689 (Kant 2005).
59. BVerfGE, 1 BvR 518/02, April 4, 2006; see http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html (accessed August 2006). The case was brought to the court by a student of Moroccan origin who complained about the inappropriate use of his personal data by his university.
60. BVerfGE, 1 BvR 518/02, April 4, 2006, para. 154.
61. BVerfGE, 1 BvR 518/02, April 4, 2006, para. 147.
62. On the political debate on the court's ruling, see "Sicherheitspolitik: Kippt Karlsruhe die Rasterfahndung?" Spiegel Online (May 22, 2006); "Grundsatzurteil: Verfassungsrichter schränken Rasterfahndung ein," Spiegel Online (May 23, 2006); "Analyse: Karlsruhe dezimiert das Arsenal der Terror-Fahnder," Spiegel Online (May 23, 2006); "Reaktionen: 'Besorgnis

erregende Entscheidung,'" Spiegel Online (May 23, 2006); and "Angriff auf Karlsruhe," *Der Spiegel*, August 28, 2006.

63. The pattern of continuity and limited change in counterterrorism policies after 9/11 is not exclusive to Germany but can be observed in other European countries as well. See, for example, Martin Schain's (2007) analysis of France and the United Kingdom; see also Haubrich (2003) and Foley (2007).

64. These considerations echo parts of the debate in the 1970s and early 1980s. For example, Geoffrey Pridham (1981, 50–51), evaluating the police preventive and repressive action against the RAF in 1981, wrote that the German security system "clearly has had an impact in helping to reduce terrorist activities in the Federal Republic despite the well-publicized cases of inefficiency and in some respects rigidity."

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Chapter 9

The Consequences of Counterterrorist Policies in Israel

Ami Pedahzur and Arie Perliger

Violent attacks against civilians for the purpose of terror constituted an integral part of the strategies carried out by both Jewish and Arab factions in Palestine during the years of the British Mandate, especially after 1936 (Kimmerling and Migdal 2002; Lachman 1982; Lustick 1995). The founding of the Israeli state on May 14, 1948, led to a war between Israel and its neighboring Arab countries that lasted for more than a year. By the end of the war, the new State of Israel controlled much more land than was initially allocated in accordance with the United Nations partition plan.[1] A Palestinian state in fact was never established. Israel, Jordan, and Egypt annexed sections of land that had initially been offered to the Palestinians by the United Nations, and approximately 900,000 Palestinians became refugees.[2]

The first decade after the war was marked by a relative decline in the levels of violence on both sides. The terrorist attacks perpetrated against Israeli civilians were carried out by the fedayeen—groups of Palestinian refugees most of whom were armed by the Egyptian regime and served its interests (Yaari 1975). These attacks were the precipitating factor in the formation of the official Israeli counterterrorism policy (Goren, August 16,