

## DEVELOPMENTS

### *Comment - Oliver Lepsius's Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*

By Manuel Ladiges\*

Undoubtly it is to Oliver Lepsius's credit that he summarized the recent decision of the German Federal Constitutional Court in which the Court grappled with § 14 (3) LuftSiG,<sup>1</sup> so English speakers have the opportunity to get access to this important case, which concerns fundamental questions of the deployment of the German Armed Forces and the protection of human dignity and life under extraordinary circumstances. Unfortunately, he has misinterpreted the Court with regards to certain aspects. I would like to correct those misinterpretations in this comment.

Lepsius mentions the discussion concerning the term "defense" in Article 87a (2) of the Basic Law and states that the Court did not accept the argument that "defense" comprises not only the repulsion of attacks by armed forces of a another state, but also attacks by non-state actors. In Lepsius's opinion the Court ascertained a "traditional view" of the meaning of "defense."<sup>2</sup> However, it has to be emphasized that § 14 (3) LuftSiG did not fall within the scope of the term "defense" as used in Article 87a (2) of the Basic Law, but was justified by the express authority in Article 35 (2) and (3) of the Basic Law. The latter provisions cover the deployment of the Armed Forces in a state of emergency (*Katastrophennotstand*). Hence, the decision is silent about the definition of the term "defense" in Article 87a (2) of the Basic Law<sup>3</sup> and cannot be used as an argument against a wider interpretation that also includes

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<sup>1</sup> Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*, 7 GERMAN LAW JOURNAL 761 (2006), at [http://www.germanlawjournal.com/pdf/Vol07No09/PDF\\_Vol\\_07\\_No\\_09\\_761-776\\_Developments\\_Lepsius.pdf](http://www.germanlawjournal.com/pdf/Vol07No09/PDF_Vol_07_No_09_761-776_Developments_Lepsius.pdf).

<sup>2</sup> *Id.* at 765.

<sup>3</sup> Bundesverfassungsgericht (BVerfG), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, 754 (2006).

fighting against non-state actors. Incidentally, nothing in the cases that Lepsius quotes to prove the “traditional view” shows that the Constitutional Court limits the meaning of “defense” to its application of the repulsion of attacks from other states.<sup>4</sup>

Lepsius is further mistaken when he concludes that Article 35 (2) and (3) of the Basic Law would only allow “technical support and assistance.”<sup>5</sup> It is undisputed among German scholars that technical support (*technische Hilfeleistung*), which does not include the use of force, is not a deployment (*Einsatz*) under Article 87a (2) of the Basic Law and, therefore, permissible under the rule of general administrative assistance (*allgemeine Amtshilfe*) in Article 35 (1) of the Basic Law.<sup>6</sup> Consequently, the Armed Forces can be used as police forces in a state of emergency, although they are not allowed to use specific military weapons.<sup>7</sup>

When Lepsius looks at the Court’s engagement with human dignity, he states: “[I]f there are only terrorists on the plane the state may shoot down the aircraft.”<sup>8</sup> This conclusion contradicts the fact that the use of specific military weapons is prohibited in the state of emergency. Although the killing of attackers would not violate the human dignity, it would still be impermissible as long as the constitution is not changed in respect of the authority to employ the armed forces in these circumstances. It has to be emphasized that under applicable constitutional law the federal government has no legal means to shoot down an aircraft, even if it is only occupied by terrorists or other attackers.<sup>9</sup> Hence, the decision leads to the effect that Germany is unable to defend itself against threats stemming from the abuse of aircraft, because the police lack the actual means for appropriate counter-measures and the Air Force, which possesses fighter aircraft, is bound by Article 87a (2) of the Basic Law.

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<sup>4</sup> The Court only uses the term “armed attacks” (“*bewaffnete Angriffe*”), but does not specify if these attacks have to originate from the military of another state.

<sup>5</sup> Lepsius, *supra* note 1, at 766.

<sup>6</sup> JAN-PETER FIEBIG, *DER EINSATZ DER BUNDESWEHR IM INNERN* (2004), 138 *et seq.*; Edzard Schmidt-Jortzig, *Verfassungsänderungen für Bundeswehreinätze im Inneren Deutschlands?*, *DIE ÖFFENTLICHE VERWALTUNG* (DÖV) 773 (2002); Wolfgang Schreiber, *Die Befugnisse der Streitkräfte nach Art. 87a Abs. 3 GG*, *DIE ÖFFENTLICHE VERWALTUNG* (DÖV) 729, 731 (1969); see also Bundestag-Drucksache V/2873, 13.

<sup>7</sup> Bundesverfassungsgericht (BVerfG), 59 *NEUE JURISTISCHE WOCHENSCHRIFT* (NJW) 751, 755 (2006).

<sup>8</sup> Lepsius, *supra* note 1, at 767.

<sup>9</sup> Provided that a terrorist attack from outside Germany does not trigger a defense situation according to Article 87a (2) of the Basic Law.

Furthermore, the Constitutional Court did not disconnect the protection of human dignity and human life, as Lepsius puts it.<sup>10</sup> In fact, the decision clearly shows that, in the Court’s opinion, human dignity and life are connected to each other. This can be proven by several points.

First, the Court does not discuss the violation of human dignity independently, but it states expressly that § 14 (3) LuftSiG infringes the right to life under Article 2 (2) of the Basic Law because the killing of innocent people would violate their human dignity. Thus, the Court understands the guarantee of human dignity as the “core” of human life. The judgment reads:

The limiting law has to be interpreted with regard to the fundamental right to life and with the thereto **closely connected** guarantee of human dignity under Article 1 (1) Basic Law. [...] In regard of this relation the state must not interfere with the human life in a way which violates the human dignity.<sup>11</sup>

Hence, it is not convincing that the Court “practically gave up the long standing connection of life and dignity,” as Lepsius concludes.<sup>12</sup> Rather, the judgment adheres to this connection, which is also shown by the fact that the Court quotes its older decisions about abortion.<sup>13</sup>

Lastly, it has to be noted that individual rights and human dignity do not necessarily benefit from the judgment. In fact, the Court intensifies the motivation of attackers to hijack airplanes with innocent passengers on board, because the attackers can be certain that in such a situation the state has no legal means to shoot

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<sup>10</sup> Lepsius, *supra* note 1, at 768.

<sup>11</sup> Bundesverfassungsgericht (BVerfG), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, 757 (2006) (emphasis added). This passage reads in German:

Das einschränkende Gesetz muss aber seinerseits im Lichte dieses Grundrechts und der damit eng verknüpften Menschenwürdegarantie des Artikel 1 (1) GG gesehen werden. [...] Dem Staat ist es im Hinblick auf dieses Verhältnis untersagt, durch eigene Maßnahmen unter Verstoß gegen das Verbot der Missachtung der menschlichen Würde in das Grundrecht auf Leben einzugreifen.

<sup>12</sup> Lepsius, *supra* note 1, at 771.

<sup>13</sup> Bundesverfassungsgericht (BVerfG), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 751, 757 (2006).

down the aircraft. Also, it should not be ignored that the Court has asserted a violation of human dignity only in case of a non-war deployment ("*nichtkriegerischer Einsatz*").<sup>14</sup> This raises the following question: Would the killing of innocent people be permitted in the case of war? If this question was negated, the Armed Forces would factually not be able to defend Germany effectively. If it was affirmed, human dignity would be less protected in war; this would hardly be accordable with the inviolability (*Unantastbarkeit*) and preeminence of human dignity as guaranteed in Article 1 (1) of the Basic Law.<sup>15</sup>

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<sup>14</sup> *Id.* at 759.

<sup>15</sup> See MANUEL LADIGES, DIE BEKÄMPFUNG NICHT-STAATLICHER ANGREIFER IM LUFTRAUM UNTER BESONDERER BERÜCKSICHTIGUNG DES § 14 ABS. 3 LUFtSiG UND DER STRAFRECHTLICHEN BEWERTUNG DER TÖTUNG VON UNBETEILIGTEN (forthcoming in the summer of 2007) 3. Teil D. II. 6. a).