

## Law and politics in the digital age

We are in Kiel, northern Germany, at a summer academy run by data protection expert Thilo Weichert. The conference aims to pit the idea of a “super-right” to security, a fundamental right taking precedence over all other fundamental rights, as suggested by former German Interior Minister Hans-Peter Friedrich (CSU Party), against the notion of digital human rights in the post-Snowden era. But there’s no real controversy emerging from the positions of the various speakers. Even the government representatives – the vice presidents of the German office for information security and the German domestic intelligence agency – aren’t calling for a super-right of this kind. Both see it as their role to uphold the constitution in their own way and consider data protection to be a constitutional element worth protecting. We can only hope that Friedrich’s departure signaled the death knell for the abstruse idea of holding up one right as superior to existent fundamental rights.

Trickier to navigate, however, is the persistent tension between domestic security and human and civil rights. This is the question I examine in my address to the conference. I begin by criticizing the overly narrow parameters of debate. No discussion on intelligence services and surveillance can be complete without mentioning the major corporations involved in data gathering. I cite Frank Schirmacher, the late co-publisher of the *Frankfurter Allgemeine Zeitung*, who pointed to a symbiosis of commercial and military rationality and saw intelligence services as being part of the centralized, globalized surveillance market. As such it does not make much sense to respond to a phenomenon born of globalization with blinkered nationalism, working on a patchwork approach and building a German internet, a French internet, and so on.

For Schirmacher, information and education were the best weapons. So far so good, but this approach also has its difficulties. We need to do more than uncover, examine and highlight illegal or precarious situations. We must also take action to bring them to an end. The revelations on mass surveillance made it clear that technology is advancing faster than society is developing. As of June 2013 we know that surveillance is being undertaken to the extent that available technology allows and that those involved are operating without any discernable political or legal controls. Both the law and politics urgently need to be updated for the digital age.

The track record of the thirteen years since 11<sup>th</sup> September 2001 is far from encouraging. Arbitrary arrests and torture in Guantánamo and Abu Ghraib, CIA rendition flights (including here in Europe), and targeted killings in Afghanistan and Pakistan; all of these violations were committed by democratic states under the banner of the fight against terrorism. Those responsible for these crimes are almost never brought to justice. Courts in the US are reluctant to take action and the international legal system has – with a few praiseworthy exceptions – proved ineffective. The only courts to criticize European states in this context have been a court in Milan, the European Court of Human Rights in Strasbourg in the case of rendition flights and a secret CIA prison in Poland and the European Court of Justice in Luxembourg on the issue of terrorism lists. While these decisions came too late to be of any use to the victims, they may at least have helped to delineate some limits to state action. It should be noted that all of the above violations were brought to light by whistleblowers, investigative journalists or human rights organizations. And yet instead of finding support, watchdogs such as Chelsea Manning, Edward Snowden, Glenn Greenwald and Laura Poitras must contend with consequences ranging from professional restrictions to draconian punishments and exile. That, of course, is another way to undermine the idea of democracy and rule of law.