

SECRECY vs. PUBLICITY

in MODERN DEMOCRACIES –
Netzpolitik.org in CONTEXT

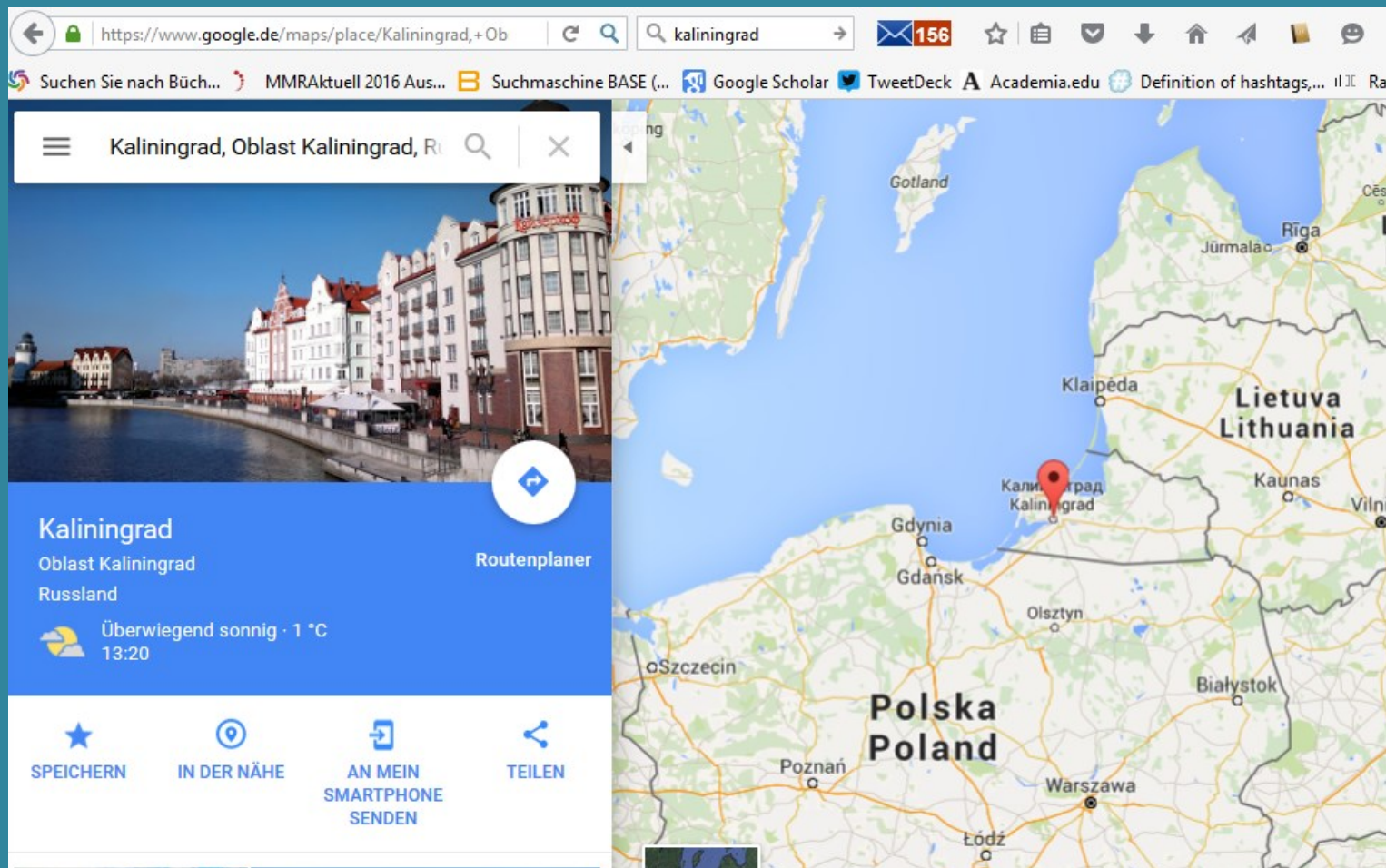
(#publicness #transparency #digital)



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1. Königsberg. Kant and the publicity of public law



#Overview

- Conceptual Sightseeing
- What happened: Netzpolitik.org Case
- German (Case) Law (FCJ/FCC): Wallraf; Pätsch; Spiegel
- Hypothetical Case Study
- ECHR Basics: Article 10; Proportionality/Margin of Appreciation
- ECHR Case Law and Secrets: Spycatcher; Stoll
- ECHR Case Law and Blogs
- Conclusion

#conceptional tour

- Kaliningrad
- Berlin
- Karlsruhe
- Strasbourg
- Pretoria

#publicity (publicness)

- In the second appendix of his writing “Zum ewigen Frieden” (Perpetual Peace) Kant underlined the “transcendental principle of the publicity of public law”.
- Kant argued that "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity."
- Human rights dimension

#national security and the duty to protect

- In 2010, Amnesty International called on the whistleblower website WikiLeaks to expunge the names of Afghans mentioned in the war logs because of the fear of being targeted by insurgents.
- In November 2009, WikiLeaks published the '9/11 messages', a massive archive including thousands of text messages sent on September 2001 in the wake of the terrorist attacks on New York and Washington.

#Pätsch (whistleblowing)

- FCJ: Article 5 of the German Constitution provides the right to reveal serious irregularities in agencies in order to remedy abuses. If this information concerns state or official secrets, the person disclosing it must limit the information to that which is strictly essential to end the abuse. Furthermore, prior to communicating with the public, superiors within the agency must be contacted. In exceptional cases where the constitutional order is seriously infringed, the public may be directly informed.

#Wallraff

- The FCC made clear that the propagation of unlawfully acquired information falls within the protective scope of the freedom of the press. The Court also turned to potential limits and the significance of the concerned knowledge in informing the public and for the formation of public opinion.

#Spiegel

- FCC: “the significance of the published facts, etc. are to be taken into consideration both for the potential opponent and for the formation of political opinion on a case-by-case basis; the threats to the security of the nation that might arise from publication are to be balanced against the need to be informed of important events, including in the area of defense policy”
- “the uncovering of fundamental weaknesses in defense readiness may in the long term be more important than secrecy, despite the military detriment to the good of the Federal Republic that this might initially entail; the public's reaction normally will prompt the responsible State organs to initiate the required remedial measures.”

#proportionality #margin of appreciation

- The doctrine of proportionality marks the heart of the Court's investigation into the reasonableness of restrictions but there is a complex interaction with the principle of judicial restraint.
- In general, the Court does not deny that member states have some discretion in assessing what is necessary ("margin of appreciation"). On the other side, this cannot mean that there is no supranational review. Hence, the exact scope (wide or narrow) of the margin of appreciation is subject to academic discussion and manifold case law.

#Stoll

- The Court noted that it was important to ascertain whether the disclosure of the report and/or the impugned articles were, at the time of publication, capable of causing “considerable damage” to the country’s interests. In that context the Court attached some importance whether the documents were classified as “confidential” or “secret”.
- According to the Court’s reasoning, the time of the publication may also heighten the risk of a potential threat.
- The Court also examined the way in which the articles had been edited.

#Freedom of expression (press?) and the internet

- Delfi: “In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.”
 - But, the Court also made clear that the risk of harm posed by content and communications on the Internet is potentially higher than that posed by the press.
- Stoll: “in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.”

#social watchdog #whistleblowing

- Steel&Morris: “in a democratic society even small and informal campaign groups, must be able to carry on their activities effectively. Individuals outside the mainstream also contribute to the public debate.”
- Guja: “In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.”

State secrets and the protection of individuals

https://www.wikileaks.org/afg/event/2007/03/AFI

wikileaks war logs

Suchen Sie nach Büch... MMRaktuell 2016 Aus... Suchmaschine BASE (... Google Scholar TweetDeck Academia.edu Definition of hashtags,... Raumbelugung - Hoc... easely | cre

WikiLeaks Leaks News About Partners Search Shop

080920Z TF SPARTAN IVO DALAT SHAW (LAUGHMAN) DETAIN INDIVIDUALS (mod)

To understand what you are seeing here, please see the [Afghan War Diary Reading Guide](#) and the [Field Structure Description](#)

Afghan War Diary - Reading guide

The *Afghan War Diary* (AWD for short) consists of messages from several important US military communications systems. The messages have changed over time, as such reporting standards and message format have changed as well. This reading guide tries to provide some interpretation and understanding of the messages contained in the AWD.

Most of the messages follow a pre-set structure that is designed to make automated processing of the contents easier. It is best to think of the messages in the terms of an overall collective logbook of the Afghan war. The AWD contains the relevant events, occurrences and intelligence of the military, shared among many recipients. The basic idea is that all the messages taken together should provide a full picture of a day's events, intelligence, warnings, and other statistics. Each unit, outpost, convoy, or other military action generates a report about relevant details. The range of topics is rather wide: Improvised Explosives Devices encountered, offensive operations, taking enemy fire, engagement with police forces, talking with village elders, numbers of wounded, dead, and detained, kidnappings, broader intelligence information and explicit threats, intercepted radio communications, local informers or the Afghan police. It also includes day to day complaints about lack of equipment.

The description of events in the messages is often rather short and terse. To grasp the reporting style, it is helpful to understand the context in which the messages are composed and sent. Often they come from field units who have been under fire or under other stressful conditions. Think of the report-writing as nasty paperwork, that needs to be completed with little apparent benefit to expect. So the reporting is kept to the minimum with as little type-work as possible. The field units also need to expect questions from higher up or disciplinary measures for events reported in the messages, so they will tend to gloss over violations of rules of engagement and other problematic behavior; the reports are often detailed actions or interactions by enemy forces. Once it is in the AWD messages, it is officially part of the record - it is subject to analysis and scrutiny. Truthfulness and completeness especially of descriptions of events must always be carefully considered. Circumstances that complete the meaning of an reported event may have been omitted.

Browse by Type

- air mission (431)
- counter insurgency (4)
- counter-insurgency (39)
- criminal event (480)
- detainee operations (1208)
- enemy (13)
- enemy action (27078)
- explosive hazard (23082)
- friendly action (13734)
- friendly fire (148)
- non-combat event (7719)

2. Berlin. The Netzpolitik.org case

The image is a screenshot of a Google Maps web interface. At the top, the browser address bar shows the URL <https://www.google.de/maps/place/Berlin/@51.9012!>. Below the address bar, there are several tabs and search results, including "Suchen Sie nach Büch...", "MMRAktuell 2016 Aus...", "Suchmaschine BASE (...)", "Google Scholar", "TweetDeck", "Academia.edu", and "Definition of hashtags,...".

The main interface features a search bar with the text "berlin" and a magnifying glass icon. Below the search bar is a large photograph of the Brandenburg Gate in Berlin. Underneath the photo, the text "Berlin" is displayed, followed by weather information: "Überwiegend sonnig - 4 °C" and the time "12:22". A "Routenplaner" (Route Planner) icon is also visible.

At the bottom of the interface, there are four icons with corresponding text: "SPEICHERN" (Save), "IN DER NÄHE" (Nearby), "AN MEIN SMARTPHONE SENDEN" (Send to my smartphone), and "TEILEN" (Share).

The map on the right shows a portion of Germany and neighboring countries like Denmark and the Czech Republic. Major cities like Hamburg, Berlin, and Frankfurt are labeled. A red pin is placed on Berlin, and a blue location pin is visible on the map near Frankfurt.

Bloggers: A. Meister & M. Beckedahl



[Source: www.zeit.de](http://www.zeit.de)

Articles: „Secret moneyrain“ and „secret unit group“

https://netzpolitik.org/2015/secret-department-w idesanwalt beckedal 156

Suchen Sie nach Büch... MMRAktuell 2016 Aus... Suchmaschine BASE (... Google Scholar TweetDeck Academia.edu Definition of hashtags...

 NETZPOLITIK.ORG

START DATENSCHUTZ DIGITALKULTUR NETZNEUTRALITÄT ÜBERWACHUNG URHEBERRECHT

Classified Department: We Unveil the New Unit of the German Domestic Secret Service to Extend Internet Surveillance

von [Andre Meister](#) am 15. April 2015, 20:10 in [Überwachung](#) / 1 Kommentar

The German domestic secret service is setting up a new department to improve and extend its internet surveillance capabilities, investing several million Euros. We hereby publish the secret description for the new unit named „Extended Specialist Support Internet“. More than 75 spies are designated to monitor online chats and Facebook, create movement patterns and social network graphs and covertly „collect hidden information.“

This is an English translation of the [original German article](#).



Now with a new internet surveillance department: Federal Office for the Protection of the Constitution in Cologne. Image: [Stefan Kühn](#). License: Creative Commons BY-SA 3.0.

You've got mail



DER GENERALBUNDESANWALT
BEIM BUNDESGERICHTSHOF

Der Generalbundesanwalt • Postfach 27 20 • 76014 Karlsruhe

Herrn
Markus Beckedahl

Aktenzeichen	Bearbeiter/in	☎ (0721)	Datum
3 BJs 13/15-1 (bei Antwort bitte angeben)	OSIA b. BGH Greven	81 91 - 127	24. Juli 2015

Betrifft: Ermittlungsverfahren gegen
1. André **Meister**
2. Markus **Beckedahl**
3. **Unbekannt**
wegen Verdachts des Landesverrats;
hier: Bekanntgabe der Einleitung des Ermittlungsverfahrens

Sehr geehrter Herr Beckedahl,

im Hinblick auf die Bestimmung des § 78c Abs. 1 Nr. 1 Variante 2 StGB in Verbindung mit § 22 Abs. 1 Alt. 2 Berliner Pressegesetz gebe ich Ihnen Kenntnis davon, dass ich aufgrund von Strafanzeigen des Bundesamtes für Verfassungsschutz gegen Sie ein Ermittlungsverfahren wegen des Verdachts des Landesverrats gemäß §§ 94 Abs. 1 Nr. 2, 25 Abs. 2, 53 StGB eingeleitet habe. Gegenstand des Ermittlungsverfahrens ist die Veröffentlichung der beiden nachgenannten Artikel im Internetblog „Netzpolitik.org“. Sie sind Verantwortlicher des Blogs. Am 25. Februar 2015 um 10:40 Uhr wurde der Artikel mit der Überschrift „Geheimer Geldregen: Verfassungsschutz arbeitet an „Massenauswertung von Internetinhalten“ (Updates)“ veröffentlicht. Anschließend erschien am 15. April 2015 um 9:05 Uhr ein Beitrag mit dem Titel „Geheime Referatsgruppe: Wir präsentieren die neue Verfassungsschutz-Einheit zum Ausbau der Internet-Überwachung“, der seit dem 15. April 2015 um 20:10 Uhr auch in englischer Sprache abrufbar ist.

Mit freundlichen Grüßen

Im Auftrag


(Georg)

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Public debate: #landesverrat.



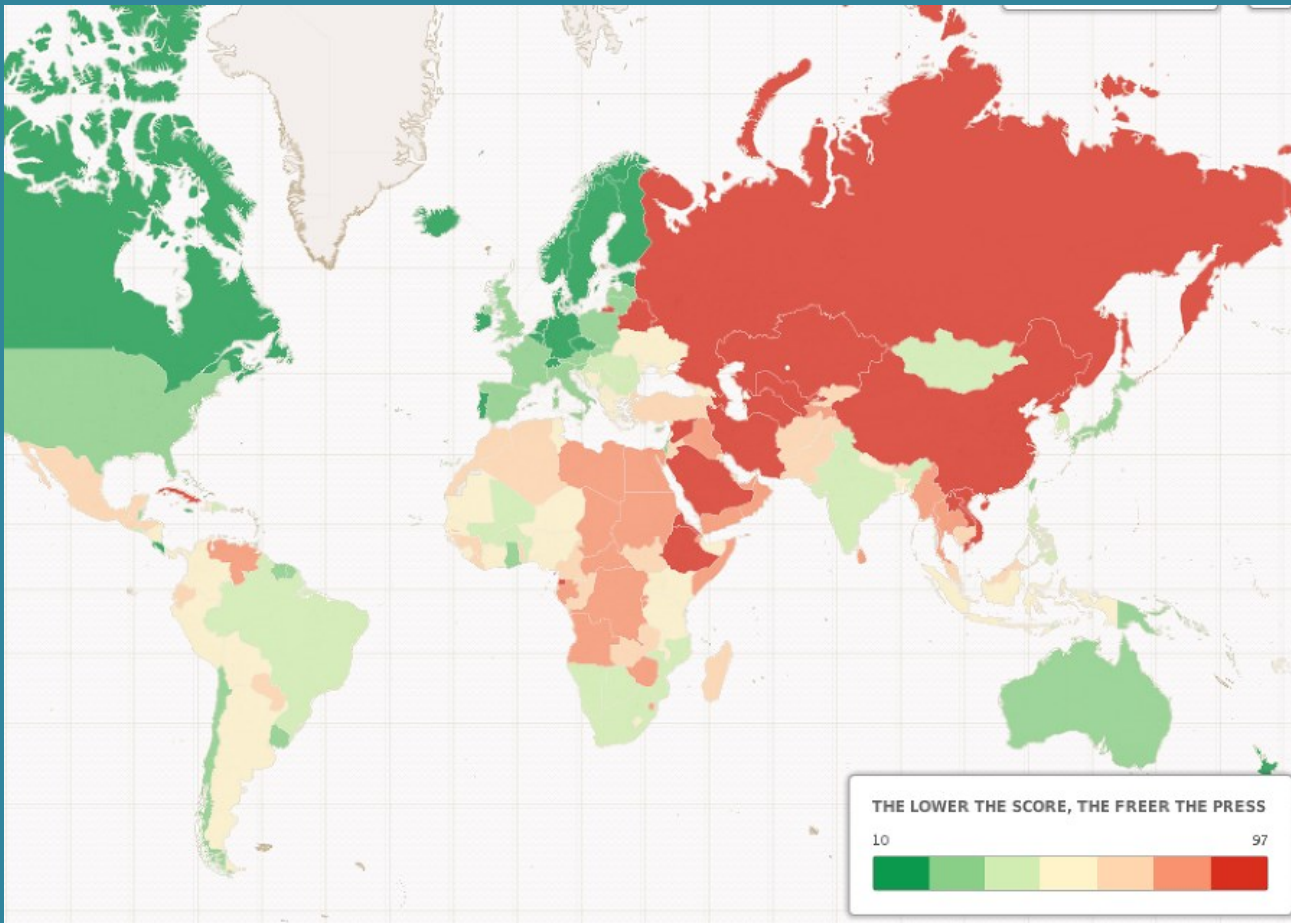
Sources: www.ccc.de and netzpolitik.org

#landesverrat. They even sold T-shirts

The screenshot shows the website of the Chaos Computer Club (CCC) at <https://www.ccc.de/de/updates/2015/ccc-verrats>. The page features the CCC logo, the text "Chaos Computer Club", and a search bar. The main article is titled "Nach Strafanzeige gegen netzpolitik.org: CCC lobt Preis für Verratsdatenspeicherung aus" and is dated "2015-07-31 01:22:00, erdgeist". The article text reads: "Nach nur kurzer Prüfung einer Strafanzeige des Verfassungsschutzes ermittelt der Generalbundesanwalt gegen die Redaktion von netzpolitik.org. Der Chaos Computer Club (CCC) gratuliert der Redaktion zu dieser seltenen journalistischen Auszeichnung und sichert tatkräftige sowie finanzielle Unterstützung zu. Wir rufen dazu auf, Generalbundesanwalt Harald Range weitere Anlässe für Einschüchterungskampagnen gegen Journalisten zu liefern." Below the article is a photograph of a person wearing a dark T-shirt with the text "EIN ABGRUND VON Landesverrat!" and "NETZPOLITIK.ORG" printed on it. The website also includes a navigation menu on the left, a "Tags" section with "update" and "pressemitteilung", a "Featured" section with a rocket icon, and social media links for "CHAOSRADIO", "ds.", and "follow us".

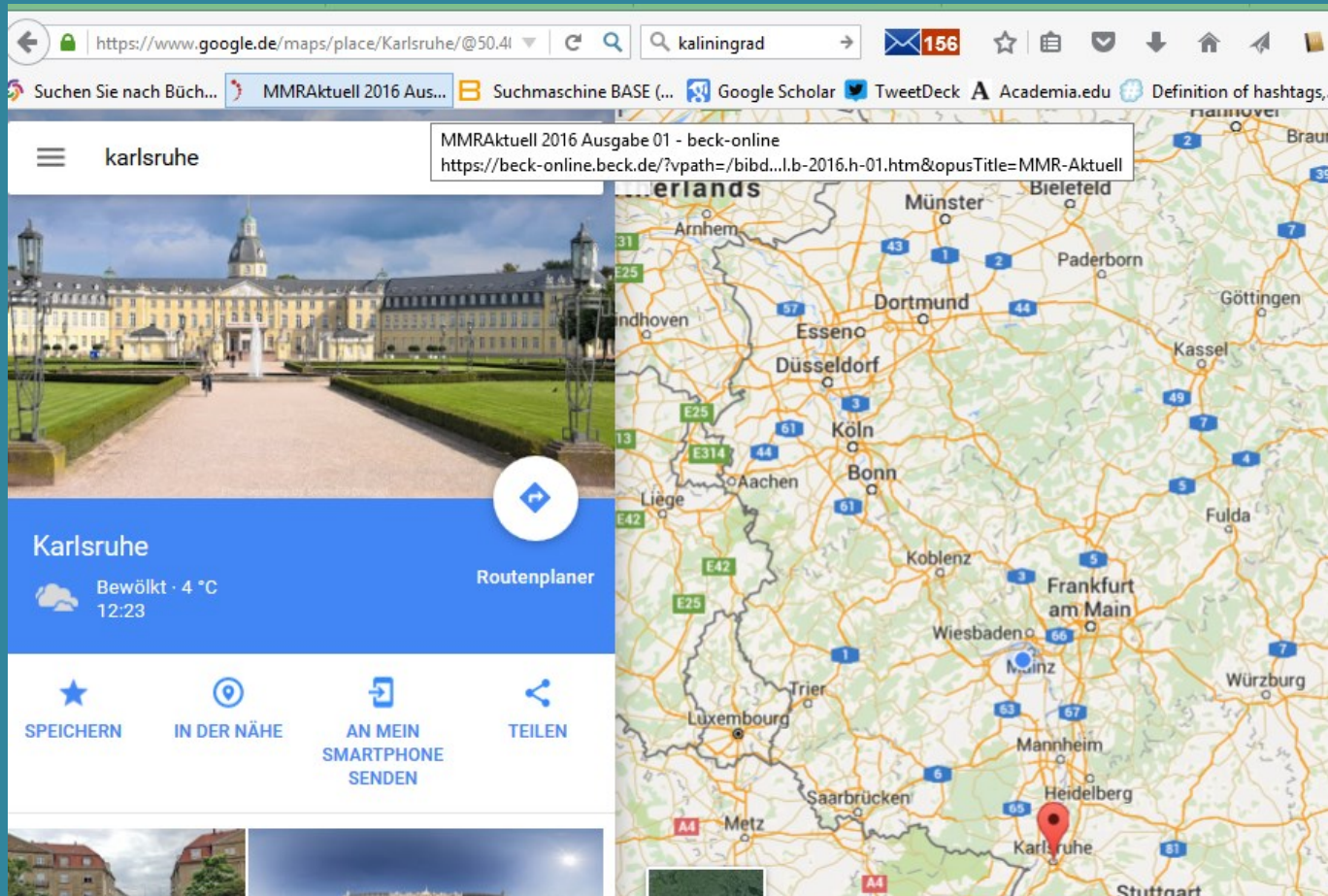
Sources: www.ccc.de and netzpolitik.org

World press freedom index and Germany: declining?



CC BY-NC-ND 2.0, via Freedom of the Press report

3. Karlsruhe. State secrets and German (case) law



Section 93 GCC

- *(1) State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany.*

Section 94 GCC

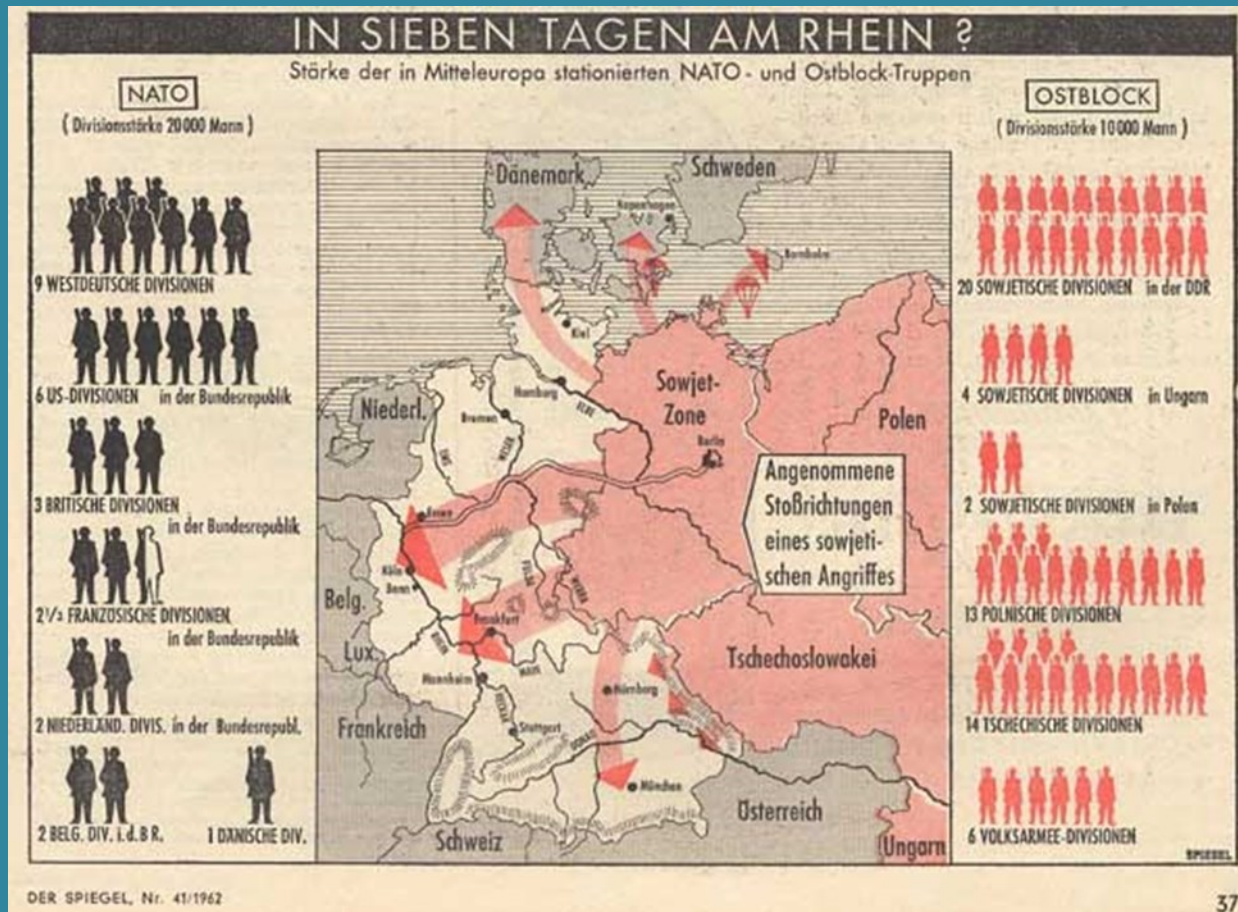
- (1) Whosoever
- 1. communicates a state secret to a foreign power or one of its intermediaries; or
- 2. otherwise allows a state secret to come to the attention of an unauthorised person or to become known to the public in order to prejudice the Federal Republic of Germany or benefit a foreign power
- and thereby creates a danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment of not less than one year.

FCJ and FCC

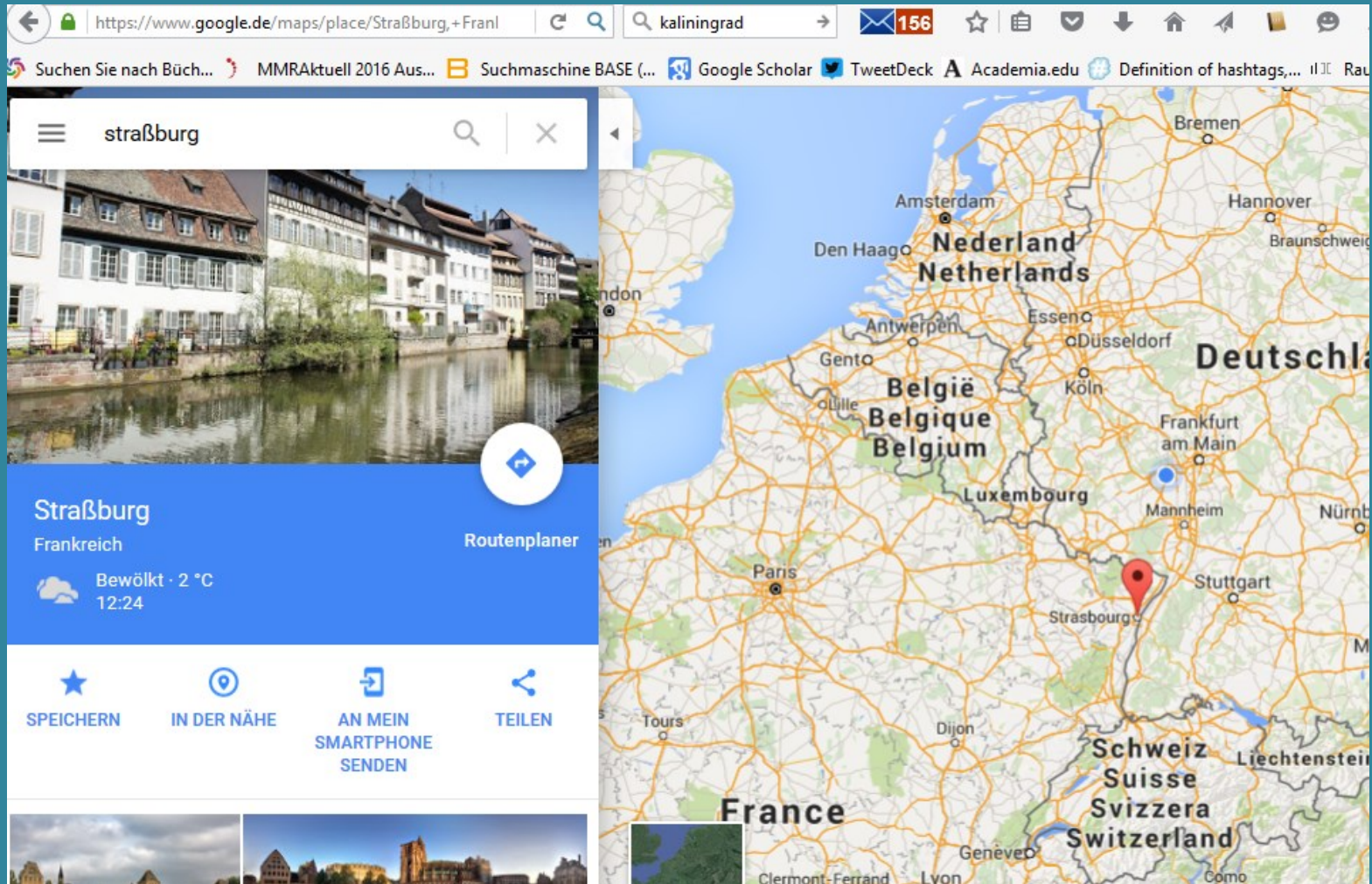


Source: bundesverfassungsgericht.de (stephan baumann)

The „Spiegel-case“



4. Strasbourg. ECtHR and Art. 10 case law



ECtHR

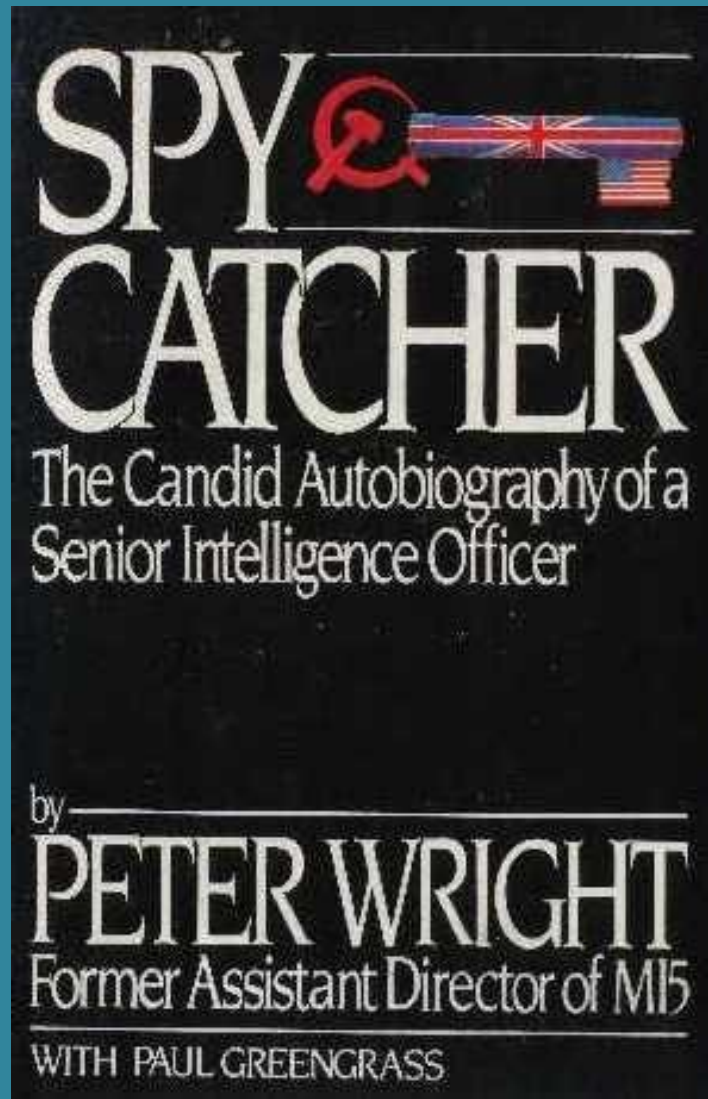


Source: coe.int

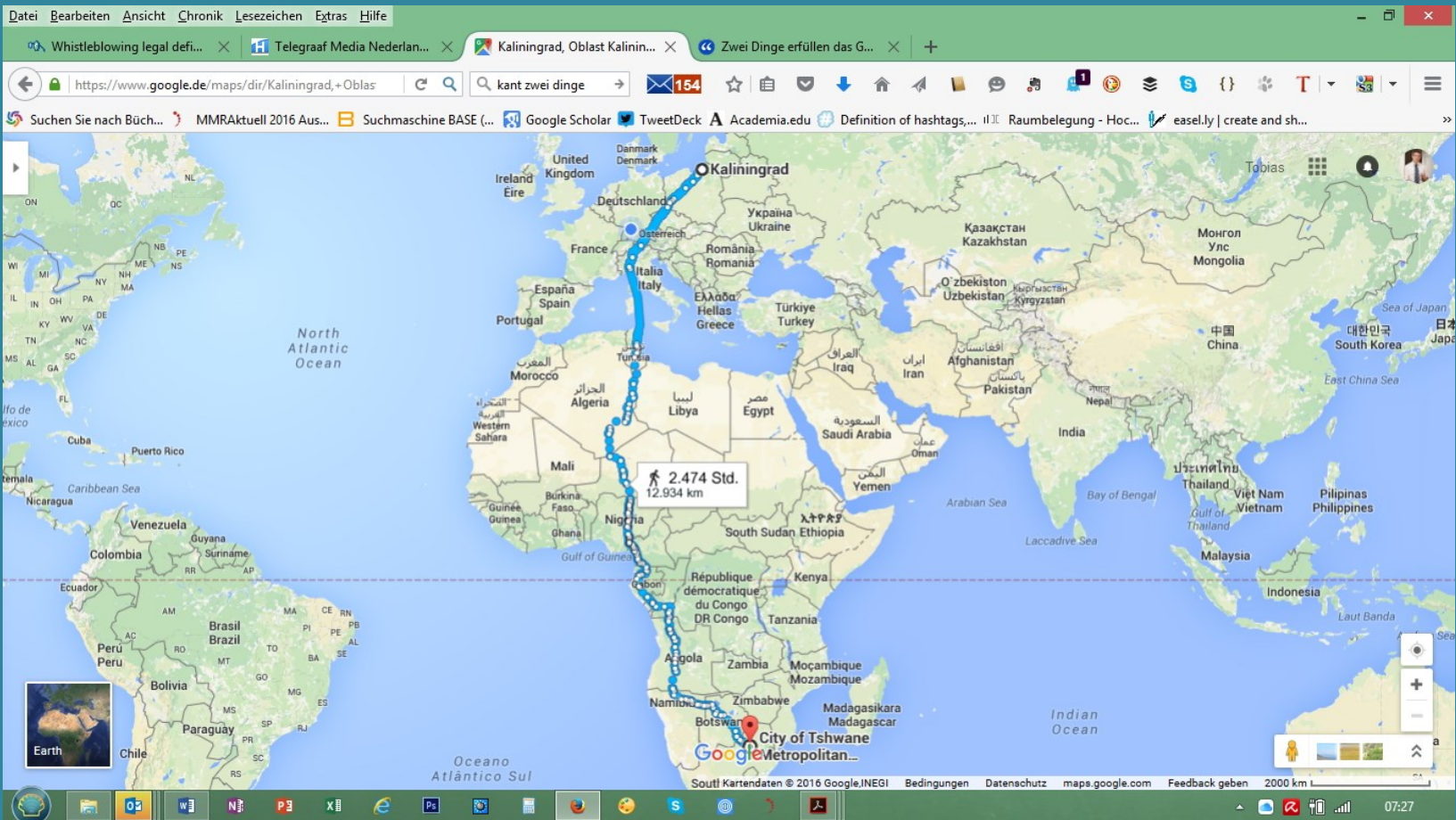
Article 10 ECHR

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Spycatcher and Stoll cases



5. Pretoria. European and international standards



The Tshwane Principles

PART VI: PUBLIC INTEREST DISCLOSURES BY PUBLIC PERSONNEL

Principle 37: Categories of Wrongdoing

Disclosure by public personnel of information, regardless of its classification, which shows wrongdoing that falls into one of the following categories should be considered to be a “protected disclosure” if it complies with the conditions set forth in Principles 38-40. A protected disclosure may pertain to wrongdoing that has occurred, is occurring, or is likely to occur.

- (a) criminal offenses;
- (b) human rights violations;
- (c) international humanitarian law violations;
- (d) corruption;
- (e) dangers to public health and safety;
- (f) dangers to the environment;

The Tshwane Principles

Principle 3: Requirements for Restricting the Right to Information on National Security Grounds

No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.

The Tshwane Principles

Principle 10: Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure

Some categories of information, including those listed below, are of particularly high public interest given their special significance to the process of democratic oversight and the rule of

law. Accordingly, there is a very strong presumption, and in some cases an overriding imperative, that such information should be public and proactively disclosed.

Information in the following categories should enjoy at least a high presumption in favor of disclosure, and may be withheld on national security grounds only in the most exceptional circumstances and in a manner consistent with the other principles, only for a strictly limited period of time, only pursuant to law and only if there is no reasonable means by which to limit the harm that would be associated with disclosure. For certain subcategories of information, specified below as inherently subject to an overriding public interest in disclosure, withholding on grounds of national security can never be justified.

E. Surveillance

- (1) The overall legal framework concerning surveillance of all kinds, as well as the procedures to be followed for authorizing surveillance, selecting targets of surveillance, and using, sharing, storing, and destroying intercepted material, should be accessible to the public.

Conclusion

- Netzpolitik.org's (hypothetical) individual complaint before the ECtHR would have been successful:
- The articles contained political speech (strong protection; narrow margin of appreciation) .
- After the Snowden disclosures, surveillance issues trigger the highest public interest.
- Netzpolitik.org functioned as public (social) watchdog
- Chilling effects (?)
- The potential threat for the Federal Republic of Germany was minimal.
- Time and circumstances of the disclosure were not extraordinary sensitive
- The presentation of the articles was not excessive / sensational.

Questions?!



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