Developments

Prosecuting Terrorism Financing in Germany: *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08

By Christoph Safferling and Timo Ide[*]

Abstract

The German *Bundesgerichtshof* (Federal Court of Justice) has to frequently adjudicate cases related to terrorism. The "War on Terror" has reached the German judiciary shortly after its proclamation as a reaction to the 9/11-attacks. Ever since, German criminal law is grappling with the question of how to harmonize security interests on the one hand with individual rights and liberties on the other. The expansion of the criminal law is a real threat for the previously liberty-oriented criminal law. The court decision discussed in this case addresses a specific aspect of terrorism: the financing of terrorist activities. As there is no special law prohibiting such kind of behavior, the judges had to apply section 263 of the German Criminal Code, which deals with fraud, and combine this with sections 129 a and b of the German Criminal Code, which makes being merely a member of a criminal organization into a criminal offence. A highly sensitive field of law that is put under scrutiny by anti-terrorism measures is procedural law. As secret investigation measures through electronic surveillance become more prevalent and sophisticated, the admissibility of the evidence, which was gained mainly by intelligence, becomes more and more questionable. The court decision discussed in this paper proves the willingness of the Federal Judges in Germany to reduce individual liberty rights in order to enhance the effectiveness of criminal prosecution.

A. Introduction

Ever since the terror attacks of 11 September 2001, the German judiciary has to constantly deal with "Jihad" and terrorists involved therein.[1] These events, which started off the so-

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called "War on Terror," were not without influence on legislation, judiciary and scholars in Germany or in any other country. These attacks certainly fueled the expansion of criminal law[2] and an erosion of basic rights in the field of procedural law.[3] As past court decisions have shown, national security tends to prevail over the protection of individual liberty.[4] Criminal law is often denaturalized into symbolic legislation, attempting to prove political strengths and power to the general public.[5] Even the use of legislative language has changed, as it became tighter and started utilizing a war-like vocabulary.[6] Scholars have taken up these issues and have discussed the phenomenon of a *Feindstrafrecht* (a criminal law for enemies) and a *Bürgerstrafrecht* (a criminal law for citizens).[7] Prosecutors and judges are affected by these developments and implications no less than the public in general. It might therefore not be surprising that the *Bundesgerichtshof* (Federal Court of Justice) is ready to submit to the concept of a more preventive criminal law and a more repressive criminal procedure, as well as to blur the previously strict differentiation between preventive police measures on the one hand and repressive prosecutorial means on the other. The case at hand supports this general tendency. It is concerned not with actual acts of terror, like killings and bombings, but with activity supporting and preparing terrorist attacks, namely the financing of terrorism.

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[1] See most prominent the case against the 9/11-supporter *El Motassadeq* in BGHSt 49, 112 and BGHSt 51, 144; see also C. Safferling, *Terror and Law – Is the German Legal System able to deal with Terrorism?,* 5 GERMAN LAW JOURNAL 515 (2004). In the general context see also C. Safferling, *Terror and Law – German Responses to 9/11*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1152 (2006).

[2] See H. Radtke & M. Steinsiek, *Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen*, 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 383 (2008); K. Gierhake, *Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten*, 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 397 (2008).

[3] See B. Weißer, *Der "Kampf gegen den Terrorismus" – Prävention durch Strafrecht?*, 63 JURISTENZEITUNG 388 (2008).

[4] See P.A. ALBRECHT, KRIMINOLOGIE, 132, 3rd ed. 2005.

[5] See *e.g.* H. Satzger in H. Satzger, B. Schmitt & G. Widmaier, STGB – STRAFGESETZBUCH, 2009, Vor §§ 1 et subs. MN 9.

[6] See with a view to economic crimes: R. Hefendehl, *Außerstrafrechtlich und strafrechtliche Instrumentarien zur Eindämmung der Wirtschaftskriminalität*, 119 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 816, 817 (2007).

[7] The term '*Feindstrafrecht*' was crafted by G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', in: HÖCHSTRICHTERLICHE RECHTSPRECHUNG STRAFRECHT - HRRS 2004, 88 (online at http://www.hrr-strafrecht.de/hrr/archiv/04-03/hrrs-3-04.pdf, last accessed, 19 November 2010); the same, *Terroristen als Personen im Recht*, 117 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 839 (2005); a thorough analysis of this concept can be found in TH. UWER (ed.), "BITTE BEWAHREN SIE RUHE" LEBEN IM FEINDSTRAFRECHT (2006). For a summary see P.A. ALBRECHT, KRIMINOLOGIE, 3rd ed. 2005, 70 et subs.

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The prosecutorial activities of the General Federal Public Prosecutor (*Generalbundesanwaltschaft*), who is the authority in cases of national security,[8] do not only pertain to terrorist bombings which were planned or attempted on German soil, but also comprise other forms of terrorist activities which stretch beyond German borders. German intelligence and police forces are on alert observing the Muslim community in order to avoid giving the impression that terrorists would find a safe haven in Germany while making plans for attacks. The *Bundesgerichtshof* and its Third Penal Senate, which adjudicates in matters of national security, is in constant stress to mediate between the "War on Terror" and the requirements of the rule of law, such as procedural fair trial-requirements. One of the most important of its recent decisions in this regard was handed down on 14 August 2009.[9] The case is concerned with the financing of terrorism and Al Qaida as an international terrorist group in particular. It highlights severe difficulties, with regards to basic rights, in prosecuting terrorism financing.

After a short introduction into the factual background of the case (section B.), this paper presents two separate legal issues that were discussed by the *Bundesgerichtshof* in this matter (section C.). The first question is one of substantive criminal law (section C.I): according to German criminal law, the mere membership in a terrorist organization is a criminal act and thus a punishable behavior. In the case at hand it was, however, questionable, whether Al Qaida can be seen as a terrorist organization within the meaning of section 129 a of the German Criminal Code. A second question that arose in the proceedings is one of procedural law (section C.II): secret investigative methods, and telephone surveillance in particular, create a severe infringement of privacy rights. The use of methods of that kind needs to be within the boundaries of the law, which is often rather ambiguous as it was in the case discussed here. In the conclusion (section D.) it is argued that the decision fits well into the overall tendency of the German judiciary to enhance police surveillance powers and thus satisfy the call of the general public and politicians for more security. Yet the growing threat of terrorist attacks should not lead to a subtle abolition of the accomplishments of a liberal criminal law.

B. Circumstances of the Decision

The accused K had received a terrorist education in 2000 and 2001 in Al Qaida training camps in the Afghan-Pakistan border region. Ever since the training, he regarded the Jihad against the "unbelievers" as his personal call. After a short stay in Germany, he traveled back to Afghanistan at the end of 2001, where he participated in armed hostilities on the

[8] See §§ 142 a, 120 of the Organization of the Courts Act (Gerichtsverfassungsgesetz)

[9] BGH, Judgement of 14 August 2009 – 3 StR 552/08 – reprinted in 54 BGHST 69 = 62 NEUE JURISTISCHE WOCHENSCHRIFT 3448 (2009).

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side of Al Qaida. During this time, he had contact with Osama Bin Laden and was integrated into the hierarchy of the Al Qaida organization.

In mid-July 2002, K returned to Germany to continue working for Al Qaida in Western Europe. He moved into Rhineland-Palatinia, where he undertook extensive activities, such as recruiting and canvassing others for Jihad. In the course of these activities, he became acquainted with the second accused, Y, who shared the same enthusiasm for the fight of the Muslims. K´s flat became the meeting place for him, Y and other like-minded people.

In order to gain financial assets to support further terrorist activities, Y came up with the following plan: within the next several months, he was to take out life insurance policies with various insurance companies. Following that, he would travel to Egypt and send back documents which would prove his own death in a traffic accident. These official documents were to be obtained by bribing Egyptian state officials. K would then claim the insured sum from the deceived companies.

In fact, Y made a total of 28 applications for life insurance. In nine cases, the contract was concluded with a guaranteed insured sum, in the event of death, of 1,264.092 €. In 19 cases, the completion of the contract failed.

The *Oberlandesgericht* (Higher Regional Court) of Düsseldorf convicted K to a term of seven years of imprisonment, and Y to six years for membership in a foreign terrorist group as per section 129 b of the German Criminal Code. Y was also convicted for 28 cases of attempted fraud as per section 263 and sections 22 and 23 I of the German Criminal Code.[10] The Court based its conviction mainly on information that had been gained by electronic surveillance of K's flat.

The defendants appealed against this decision, claiming, first, that Al Qaida, after 9/11, would no longer qualify as a "foreign terrorist group" and thus not fall within the ambit of section 129 b German Criminal Code, and, second, that the living space surveillance was unlawful and thus inadmissible as evidence at trial.

C. Decision of the Federal Court of Justice

The Federal Court of Justice had to address the following two questions: (1) the characterization of a terrorist group and (2) the admissibility of evidence. In the end, it upheld the verdict of the Higher Regional Court. Both questions are of utmost importance

[10] An English version of the German Criminal Code can be found at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGB_000P129b (last accessed 28 December 2009). The translation is provided by Prof. Dr. M. Bohlander.

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for the further "fight against terrorism" and the prosecution of alleged terrorists in Germany. It is therefore not surprising that the decision is rather lengthy. A third question, which will not be discussed here in detail, pertains to the issue of fraud and taking out of fake life insurance policies, which is punishable under section 263 of the German Criminal Code. In this decision, the Federal Court of Justice followed a way of reasoning which can be criticized, yet is in conformity with the recent jurisprudence.[11] The judges identified the harm for the insurance companies, which is necessary as a result of the fraudulent behaviour on the part of the culprit, involved in the "significant increase in the likelihood" (*signifikante Erhöhung der Wahrscheinlichkeit*) to disburse the insurance sum. Thus, the harm is not to be seen in a negative accounting balance on the side of the insurance companies at the time the contract is being concluded, but in the risk of such a negative balance in the future.[12]

I. Membership in a Foreign Terrorist Organization

1. Al Qaida as a Terrorist Group

As mentioned, the Higher Regional Court of Düsseldorf convicted both K and Y of being a member of a foreign terrorist group and for 28 cases of attempted fraud. The German Criminal Code does not entail a list of acts that would qualify as acts of terrorism even if such a list is warranted by European Law. Art. 1 of the Council Framework Decision of 13 June 2002 on combating terrorism defines and lists terrorist acts that should be made punishable by national criminal law according to Art. 5 of the said Framework Decision.[13] Yet German criminal law traditionally follows a different line of punishing terrorists. The actual conduct, like manslaughter, hostage taking, destruction of property and, as in the case at hand, fraud and deception, remains an "ordinary crime". One can be convicted as a terrorist only by being a member of a terrorist organization, as per sections 129 a and 129 b of the German Criminal Code. Germany has been criticized for not fulfilling the

[11] As to the former jurisprudence in this regard, see T. FISCHER, STRAFGESETZBUCH, 56th ed. Munich 2009, § 263 MN 94-104.

[12] Critical in this regard: W. Joecks, *Anmerkung zu BGH Urteil v. 14. August 2009*, 29 wistra 179 et subs. (2010), and J. Thielmann, A. Groß-Bölting & J. Strauß, *Die "signifikante Erhöhung der Leistungswahrscheinlichkeit" als Vermögensschaden i.S.d. § 263 StGB*, in HRR-STRAFRECHT 2010, 38 et subs.

[13] OJ L 164, 3 of 22 June 2002; see C. Kress, *Das Strafrecht in der Europäischen Union vor der Herausforderung durch organisierte Kriminalität und Terrorismus*, JURISTISCHE ARBEITSBLÄTTER 220 (2005).

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Framework Decision's specifications, but there has been no resulting parliamentary activity to date.[14]

In order to widen the scope of anti-terrorist mechanisms, however, section 129 b of the German Criminal Code was introduced in 2002 so that both European and international terrorist groups come within the ambit of the definition of "terrorist organization" as per section 129 a of the German Criminal Code.[15] Such a membership in a foreign terrorist organization is, however, only punishable if there is a certain link to Germany, *i.e.* if, at the very least, the alleged member has his permanent residence in Germany.[16]

Section 129 a of the German Criminal Code defines the term "terrorist organization" in a rather complex and lengthy way. An organization is considered terrorist if: (1) it aims at hostage taking,[17] abducting persons for the purpose of blackmail,[18] or at committing murder,[19] genocide, crimes against humanity, and war crimes;[20] or (2) it aims at committing serious physical or mental harm,[21] endangering the general public by arson or by disrupting rail, ship and air traffic, but only if these acts are "intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organization through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organization, and which, given the nature or consequences of such offences, may seriously damage a state or an international organization".

This definition is applied to a terrorist organization abroad, i.e. outside the European Union, according to section 129 b of the German Criminal Code but only if the offence was committed by way of an activity exercised within the Federal Republic of Germany or if the

[14] See Note 1. Bericht der Kommission auf der Grundlage von Artikel 11 des Rahmenbeschlusses des Rates vom 13.06.2002 zur Terrorismusbekämpfung, KOM (2004) 409 endgültig, vom 08.06.2004; and 2. Bericht vom 06.11.2007, KOM 681 (2007) endgültig.

[15] See 34th Strafrechtsänderungsgesetz, 22 August 2002, BUNDESGESETZBLATT I, 3390-3392 (2002); see U. Stein, *Kriminelle und terroristische Vereinigungen mit Auslandsbezug seit der Einführung von § 129 b StGB*, 23 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 433 (2005); G. Altvater, *Das 34. Strafrechtsänderungsgesetz - § 129 b StGB*, in: 23 NEUE ZEITSCHRIFT FÜR STRAFRECHT 179 (2003).

[16] See BGH 3 StB 52/09, 15 Dec. 2009 = STRAFVERTEIDIGER FORUM 2010, 207. See also K. Miebach & J. Schäfer, § 129b MN 9, in: MÜNCHENER KOMMENTAR ZUM STGB, Vol. 2/2, Wolfgang Joecks & Klaus Miebach, eds. (1st ed. 2005).

[17] Punishable under § 239 b of the German Criminal Code.

[18] Punishabe under § 239 a of the German Criminal Code.

[19] Punishable under §§ 211 and 212 of the German Criminal Code.

[20] Punishable under §§ 6, 7, 8-11 of the German Code of International Criminal Law.

[21] Punishable under § 226 of the German Criminal Code.

offender or the victim is a German or is found within Germany, and under the condition that the Federal Ministry of Justice authorizes prosecution. Prosecution of terrorist abroad is thus under strict surveillance of the government.

The crucial question in the case at hand is whether or not Al Qaida can be seen as an "organization" and thus be brought under the scope of sections 129 a and b of the German Criminal Code at all.[22] The defendants alleged that Al Qaida ceased to be an organization ever since the massive pursuit of Al Qaida members after 9/11 by the USA and their allies in the "War on Terror." The Court in Düsseldorf was of the opinion that Al Qaida was and still is a terrorist organization. The Federal Judges concurred.

The Federal Court of Justice referred to national jurisprudence and "common opinion" of scholars in defining an "organization" in the sense of the German Criminal Code. According to these sources, an organization is established by at least three persons who have gathered voluntarily and established a minimum of organizational structure in order to pursue a common goal which prevails over the will of the individual, and who are interrelated in such a way that they feel as a uniform group amongst themselves.[23] An organization is therefore in need of a "group-identity" in order to qualify as one under section 129 of the German Criminal Code.[24] This rather complex definition is composed of several objective and also mental elements.

From the material side, the basic requirement for such an "organization" in that sense is an organizational structure that establishes mutual obligations for the members. Up until the autumn of 2001, Al Qaida met this condition without a doubt. It was a strong organization, where its members co-operated for a common purpose with distributed roles and had a coordinated allocation of duties. Despite the defendant's complaint that since the massive international pressure and persecution of Al Qaida members after 9/11 the firm structure has been lost, the Federal Supreme Court held that the organizational structure was merely adapted to the new situation, but never ceased to exist.[25] Although Al Qaida has suffered losses, the core of the organization is still being capable of concerted acting. A bare relaxation of the organizational structures does not lead to the loss of the status as an organization.

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[22] As to the relationship between §§ 129 a and b StGB most recently BGH 3 StB 5/10, decision of 4 April 2010.

[23] There are numerous decision establishing these criteria one of the most recent is BGH 61 NEUE JURISTISCHE WOCHENSCHRIFT 1012 (2008); see also T. Fischer, STRAFGESETZBUCH § 129 MN 6 (56th ed. 2009); Klaus Miebach & Jürgen Schäfer, § 129a MN 21 et subs., in: MÜNCHENER KOMMENTAR ZUM STGB, Vol. 2/2, Wolfgang Joecks & Klaus Miebach, eds. (1st ed. 2005).

[24] T. Fischer, STRAFGESETZBUCH, § 129 MN 7.

[25] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 117.

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A further criterion for an "organization" is the subjective integration of the members in the aims of the organization and in their decision-making process by the deferment of individual interests. The precise way of the decision-making process does not matter to the characterization of a group as an "organization." It is sufficient that the decision is carried by the will of the members of the organization. Nevertheless, this subjective element is ruled out if the members of a group submit to authority only on a case-by-case basis, without there being a genuine will of the group.

In the opinion of the Federal Court of Justice, this subjective element was also fulfilled in the period in which the criminal conduct was planned and executed. The members of Al Qaida also shared the basic common political-ideological position of extremist Islamism during that period. All members furthermore supported the overall objective of the organization, namely the Jihad against Jews and unbelievers as well as the destruction of the USA and their allies. The individual interests of group members coincided with the communal interest. Osama Bin Laden and Aiman Al Zawahiri claimed to lead the organization, as was manifested by the publication of numerous video and audio messages. All members of Al Qaida recognized this leadership.[26]

2. Membership in a Foreign Terrorist Organization

For the individual member it is necessary that he does not only support the aims of the organization but that he integrates into its organizational structure and shares its goals. Such engagement is possible only if the member takes part in the organization on a continuing basis.[27]

As K was in Afghanistan for a longer time where he worked for Al Qaida, and continued this alliance after he returned to Germany with the aim of going back to Afghanistan to take an active part in hostilities, he fulfills the requirements of being seen as a member of Al Qaida. In contrast, Y, in the view of the Federal Court of Justice, was not a member of Al Qaida. One of the decisive reasons for this perhaps surprising result is due to the fact that Al Qaida is a foreign terrorist organization and Y has never been in a place where Al Qaida has a strong organizational structure, such as in Afghanistan. His only contact to Al Qaida was through K. Y himself was never exposed to the group. To identify with the aims of an organization and actively support the group does not suffice to qualify as a member of this group. A member must be clearly distinguishable from a non-member and must be

[26] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 118 et seq.

[27] See *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 124 et seq.

integrated into the group's structure. As a consequence, only those individuals who have visited Afghanistan, Pakistan or Iraq, for example, and have been in contact with the leadership of the organization can be seen as members of Al Qaida.

Even if Y is not a member of Al Qaida, he is still criminally liable for supporting a terrorist organization abroad, as is punishable according to sections 129 a I No. 1, V 1, 129 b I 1 of the German Criminal Code. An individual can support a terrorist organization by promoting its activities and criminal conduct directly, or by supporting the activities of one of her members without being a member himself. In addition, the support can be directed at the internal structure of the organization and its cohesion, at single criminal offences, and also at activities generally strengthening its criminal objective. It is not necessary that a measurable effect originate from such supporting actions. Rather, it is sufficient for the support to generate a general advantage for the organization and make it more dangerous, without necessarily aiding a concrete criminal offence that is committed by members of the organization.

Y's planning and execution of life insurance fraud supported the accused K and his goals within Al Qaida. Therefore, Al Qaida also benefited from Y's conduct. It then follows that Y supported a foreign terrorist organization, which is punishable under section 129 b I 1 and section 129 a I No. 1 of the German Criminal Code.

II. Admissibility of Evidence Gained by Electronic Surveillance of K's Premises

1. General Structure of German Criminal Procedural Law

The Federal Court of Justice also had to rule on the admissibility of evidence gained by electronic surveillance of K´s flat. As mentioned, the Higher Regional Court (*Oberlandesgericht*) based its conviction mainly on evidence that was gained by long-term electronic surveillance of K's living space. In order to understand the complexity of the decision, one has to understand the uniqueness of German law in this regard. There exists a fundamental divide between security laws, which are of a preventive character aiming at avoiding dangers, and criminal prosecution laws, which are repressive in character and give legal authority to criminal investigators.[28] This separation originates in German history, when during the Nazi regime the population was terrorized by secret police (*Gestapo*) and

[28] See R. Hefendehl, *Die neue Ermittlungsgeneralklausel der §§ 161, 163 StPO: Segen oder Fluch?*, 21 STRAFVERTEIDIGER 700, 705 (2001); F. Roggan, *Das neue BKA-Gesetz - Zur weiteren Zentralisierung der deutschen Sicherheitsarchitektur*, 62 NEUE JURISTISCHE WOCHENSCHRIFT 257 (2009).

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by a security oriented prosecution system.[29] The institutional division between (preventive) police law and (repressive) criminal law is incorporated in the German Constitution (*Grundgesetz* – Basic Law). It is buttressed by the fact that police laws are within the jurisdiction of federal states, whereas criminal procedure is a matter for the federal legislator.[30]

2. Admissibility of Evidence Gained by Police Surveillance

In the case at hand, the legal basis for this surveillance was section 29 I of the Rhineland Palatine police and ordinal authority law. Therefore, it was a preventive police measure. The question then was if data gained by such a preventive police measure can be also used as evidence at a criminal trial and comply with the rules of criminal procedure.

The admissibility of such evidence is regulated by section 100 d V No. 3 of the German Code of Criminal Procedure.[31] This section states that such data may only be used for criminal prosecution if the alleged criminal offence is mentioned in the list of grave offences according to § 100 c II of the German Code of Criminal Procedure. The section also states that the data can be used to determine the whereabouts of a person accused of such a criminal offence. In German terminology, section 100 d V No. 3 of the German Code of Criminal Procedure is a so-called "*Verwendungsregel*."[32] It determines under which circumstances evidence can be used for prosecution purposes. In order to be admissible at trial, the criminal charge must be part of a list of serious offences that are specified in section 100 c of the German Code of Criminal Procedure.[33] Since in the case at hand the charge was the accused's membership in or support of a foreign terrorist organization (sections 129 a I No. 1, V 1, 129 b I of the German Criminal Code, respectively), the requirement was fulfilled, as these offences are mentioned in section 100 c I No. 1, II No. 1 lit. b of the German Code of Criminal Procedure. Thus, the defense did not even argue against the admissibility of the surveillance protocols in this regard.

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[29] H.-H. Kühne, *in*: LÖWE-ROSENBERG STPO, Einl. Abschn. C MN 12, Einl. Abschn. F MN 46. (R. Esser, U. Franke & V. Erb et al. eds., 26th ed. 2006).

[30] BVerfGE 113, 348, 368; Degenhart, in: GRUNDGESETZ - KOMMENTAR, Art. 74 MN 27 (M. Sachs ed. 5th ed. 2009); H.-H. Kühne, in: LÖWE-ROSENBERG STPO, Einl. Abschn. C MN 1 (R. Esser, U. Franke & V. Erb et al. eds., 26th ed. 2006).

[31] An English version of the German Code of Criminal Procedure can be found at: http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#StPO_000P100d (last accessed: 22 February 2010).

[32] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 31.

[33] L. Meyer-Goßner, STRAFPROZESSORDNUNG, § 100 c (53rd ed. 2009); H.-H. Kühne, STRAFPROZESSRECHT, § 30 MN 530 (7th ed. 2007)

3. The Fraud Charge

The conviction of the defendants was nevertheless critical because of the fraud charge that was brought forward against the two accused. However, fraud and deception are not mentioned in section 100 c I No. 1, II of the German Code of Criminal Procedure, which is why the admissibility of evidence gained by the police to the criminal prosecution was problematic in this regard.

Nevertheless, the Federal Court of Justice also declared this evidence to be admissible with regard to the fraud-charges. The judges stated that the fraud committed by the defendants stands in direct relationship to membership in a foreign terrorist organization or its support. These actions coincide and can thus not be dealt with differently at trial.[34]
Here the Court draws a parallel to comparable measures of telecommunication surveillance. In this context, the jurisprudence of the Federal Court of Justice says that evidence obtained by preventive police measures can also be used as evidence to prove the commission of an offence that is not listed in section 100 c I No. 1, II of the German Code of Criminal Procedure as long as there is a direct relationship to one of the listed crimes. The Federal judges applied this jurisprudence to measures of living space supervision.

However, section 100 d V No. 3 of the German Code of Criminal Procedure requires that the data gained by preventive police measures is gained in a lawful way. Therefore, not only the execution of the law but the authorizing of the law itself – in this case, section 29 I of what was then the valid version of the Rhineland Palatine police and ordinal authority law – must conform with the constitution.

In 2004, the Federal Constitutional Court decided that there must be sufficient guaranteed protection for people affected by living space surveillance.[35] This means that a law authorizing surveillance of a living space must contain regulations that guarantee this protection of the right to privacy. One way of guaranteeing this protection is to ensure that police officers have permanent control of the surveillance, so that they can suspend the recording if the surveillance touches upon the sphere of intimacy. As a consequence of this jurisprudence, an automatic recording of any conversation is unlawful.

Section 29 I of what was then the valid version of the Rhineland Palatine police and ordinal authority law contained no such regulation, which means that the standard practice of surveillance was unconstitutional and the electronic surveillance of K´s flat was consequently illegal. Nevertheless, the Federal Court of Justice was of the view that the use of the evidence that

[34] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 27 et seq.

[35] BVerfG 109, 279, 57 NEUE JURISTISCHE WOCHENSCHRIFT 999 (2004); see J. Stender-Vorwachs, *The Decision of the Federal Constitutional Court of 3 March 2004 on Acoustic Supervision of Housing Space*, 5 GERMAN LAW JOURNAL 1337 (2004).

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was gained on the basis of section 29 I of the Rhineland Palatine police law is admissible.[36] One might suspect a self-contradiction in this result, yet the Court based its findings on the above-mentioned twofold test that is to be applied when ruling on the admissibility of evidence.[37]

As a first step, it must be examined whether there exists a general prohibition to collect the evidence in the given way. This indeed was the case here as the legal basis for the evidence taking was unconstitutional. Yet, according to German law, there is no general exclusionary rule in the case of a violation of a procedural rule. Only a case of torture or inhuman treatment will be followed by an automatic exclusion of all the evidence directly gained by the infliction of the prohibited measure as per section 136 a of the German Procedural Code.[38] As there is no general cogent exclusionary rule, the admissibility of the evidence collected in an illegal way depends on a second step.

In the second step, the Court evaluates whether the violation of the law was such that the exclusion of the evidence is warranted at trial. In doing this, the Court takes a broad view and considers the individual circumstances of the case and the conflicting interests. Amongst these, the Court takes into account the gravity of the violation of the procedural law that was identified under step one and balances the interest of the state in the criminal prosecution on the one hand and the interest of the individual in his right to privacy and respect for his private sphere on the other. However, the finding of truth is a predominant interest in a criminal procedure, which is why there is a general tendency to admit evidence unless there are more pressing reasons in particular cases.

In the case at hand, the prosecutor was saved by the fact that despite the violation of a basic right (Article 13 of the German Basic Law) by the implementation of surveillance measures which were based on an unconstitutional legal norm, the time period between the judgment of the Federal Constitutional Court and the execution of the measure under scrutiny in this case was only four months. In such short a period of time, the parliament of Rhineland Palatine did not stand a chance of bringing the state's police law in conformity with the guidelines of the Federal Constitutional Court at that time. A certain transitional period must be allowed for the legislator, says the Federal Court of Justice.[39] In addition, K and Y, whose right to privacy was put in jeopardy by the surveillance measures, were free to claim an unconstitutional violation of their basic rights according to Article 13 IV of the Basic Law.

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[36] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 23 et seq.

[37] See BGHSt 44, 243; L. Meyer-Goßner, STRAFPROZESSORDNUNG, Einl MN 55 (53rd ed. 2009); H.-H. Kühne, STRAFPROZESSRECHT, MN 907 (7th ed. 2007).

[38] L. Meyer-Goßner, STRAFPROZESSORDNUNG, § 136 a MN 27 (53rd ed. 2009); K. Peters, STRAFPROZEß, 337 (4th ed. 1985).

[39] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 57.

Therefore, they were not defenseless against the police surveillance. The Federal Court of Justice even looked at the way the surveillance was performed in this individual case in order to weigh the infringement of the right to privacy with the interest of public security. It was thus noted that the surveillance was not conducted in the way of an automatic recording but was administered by hand; i.e. the police officers were always in a position to discontinue the observation as soon as the sphere of intimacy was touched upon.[40] As the surveillance was authorized by judges and as there was, indeed, a persistent danger to the public, the partial incompatibility of section 29 of what was then the valid version of the Rhineland Palatine police and ordinal authority law with constitutional demands would not be of such importance as to necessitate inadmissibility of the evidence attained by the living space surveillance.

D. Conclusion

This decision fits well into the overall development concerning issues of admissibility of evidence in criminal proceedings. The jurisprudence of both the Federal Court of Justice and the Federal Constitutional Court show a clear tendency to strengthen the powers of the prosecution and thus sustain the efficiency of the criminal justice system (*effektive Strafrechtspflege*).[41] Difficulties with the law or in the execution of the law are solved to the detriment of the defendant on a regular basis.[42] In the balancing of the conflicting interests, the prosecutorial interests usually prevail. This, of course, aligns with the need for security, which can be observed throughout the German and arguably also the European society. In this regard, the court's decision was not surprising. The case at hand is of particular importance as it pertains to the separation of police law and criminal procedural law. By bridging preventive and repressive measures, individual liberties in particular are jeopardized.[43] This is even more true with regard to inchoate offences, as seen in the case here, where the criminal law itself connects to a rather early stage of preparation or to a mere membership in a criminal or terrorist organization. These crimes do resemble the concept of conspiracy according to common law, although the structure of attributing criminal liability is rather different.[44] They certainly fulfill a comparable

[40] *Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, MN 76.

[41] H. Landau, *Die Pflicht des Staates zum Erhalt einer funktionstüchtigen Strafrechtspflege*, 27 NEUE ZEITSCHRIFT FÜR STRAFRECHT 121 (2007).

[42] Critically as regards this rule-exception mechanism also C. Gusy, *Verfassungsverwirklichung durch Verwendung und Nichtverwendung von Informationen im Strafprozess*, HRR-STRAFRECHT 2009, 489, 491.

[43] Critically in this regard also S. Beukelmann, *„Verwendungsbeschränkter" Persönlichkeitsschutz*, *in*: NJW-SPEZIAL 2009, 712.

[44] See in general C. Safferling, *Die Strafbarkeit wegen „Conspiracy" in Nürnberg und ihre Bedeutung für die Gegenwart*, 93 KRITISCHE VIERTELJAHRESSCHRIFT 87 (2010).

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function in their aim to prevent an actual harm from happening. It should however be kept in mind that criminal law is the most severe and therefore the last resort for society to react to harm.[45] Criminal law should not be used as a social response to any potentially dangerous behavior.[46]

[45] See W. Hassemer/U. Neumann, in: NOMOS KOMMENTAR STGB, Vor § 1 MN 157 (U. Kindhäuser, U. Neumann & H-U Paeffgen eds. 3rd ed. 2010).

[46] See also W. Joecks, in: MÜNCHENER KOMMENTAR STGB, Vor § 1 MN 107 (W. Joecks & K. Miebach eds 2003).

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