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## **Implementation of Judgments of the ECtHR in the Area of Criminal Law and Criminal Procedure Law from a German Perspective**

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*The jurisprudence of the European Court of Human Rights (ECtHR) has become more and more important – especially in criminal matters. In order to illustrate the implementation of the ECtHR’s jurisprudence in the area of German criminal and criminal procedure law, the present article aims to shed a light on recent judgments and developments.*

*The first example concerns the provocation of unlawful acts by public authorities which raises serious issues with regard to Article 6 para. 1 ECHR (right to a fair trial). According to the ECtHR, the mere passive investigation of criminal activities does not violate Article 6 para. 1 ECHR. On the other hand, public authorities are not entitled to “incite” a person to commit a crime. In these cases, meaning if the suspect has been under an illicit influence amounting to an unfair trial, it is necessary to analyse the concrete legal consequences. In *Furcht v. Germany*, only a few years ago, the ECtHR rejected the so-called “sentencing solution” (*Vollstreckungslösung*) which had been common practice in Germany until then. In the following, the implementation of the Court’s guidelines led to a controversy between the criminal divisions of the German Federal Court of Justice (*Bundesgerichtshof – BGH*) which shall be outlined in further detail.*

*Moreover, the jurisprudence of the ECtHR gave rise to several amendments of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*). For example, the judgment of the ECtHR in *Neziraj v. Germany* led to a modification of Section 329 StPO which allowed the rejection of an appeal (*Berufung*) if the defendant was absent at the beginning of the main hearing. Another example concerns the access of the suspect and the defence counsel to procedural documents (Section 147 StPO).*

*Finally, the author will examine the impact of the ECHR – notably the presumption of innocence (Article 6 para. 2 ECHR) – on substantive criminal law.*

*As a conclusion, all these cases illustrate that German criminal courts have repeatedly struggled with the implementation of the ECtHR jurisdiction in the past few years. However, the author points out that there seems to be a slightly changing tendency towards a rather proactive adaption of human rights standards as established by the ECtHR.*

*Keywords: access to procedural documents (Section 147 StPO), case of *Furcht v. Germany*, case of *Neziraj v. Germany*, presumption of innocence (Article 6 para. 2 ECHR), provocation of unlawful acts (incitement), right to a fair trial (Article 6 para. 1 ECHR), right to be represented by a counsel in the appellate hearing (Section 329 StPO).*

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## A. Provocation of an unlawful/ criminal act/Incitement

### I. Topicality of the issue

On 22<sup>nd</sup> July 2016 a rampage occurred in Munich resulting in the death of 9 victims in total and the homicidal maniac committing suicide in the end. In the course of the criminal investigations suspicion arose that the offender may have obtained the weapon that he used for the criminal act in the so-called “darknet”, the part of the internet that is not freely accessible. Thereupon the police supposedly deployed an undercover agent who assumed the identity of a known weapon dealer in the “darknet” in order to get into contact with another person operating in the “darknet” who was suspected to have supplied the weapon to the perpetrator of the rampage in Munich. Apparently, this person in turn assumed the undercover agent to be a potential purchaser and then manifested interest in an arms deal. Whilst the fictitious deal was being carried out, the suspect was arrested. His co-liability for the rampage in Munich is currently being investigated.

Back in 2015, in a completely different case in the state of Rhineland-Palatinate, the police set up a fake rocker unit consisting of police officers that was especially designed for the purpose of adopting provocative behaviour vis-à-vis a local group of the *Bandidos* rocker gang in order to make them commit acts of violence. This measure aimed at arresting those members of the *Bandidos* involved in the acts of violence and submit them to criminal prosecution.

Having regard to the concrete course of the police operations the question whether the public authorities exercised an illegitimate provocation contrary to essential principles of the rule of law will have to be addressed in both criminal proceedings, possibly entailing considerable procedural consequences for the further development of the trial.

## II. European human rights framework

On the subject matter of unlawful provocation (incitement) of a criminal act the European Court of Human Rights (ECtHR) in Strasbourg has delivered judgments repeatedly during the last few years in cases against Russia (*Vanyan, Bannikova*) as well as against Germany (*Furcht, Scholer*).

In doing so, the Court has made it clear that – from a human rights perspective – covert investigation of police officers (which the ECtHR refers to as *undercover agents*) admissible under the rule of law only amounts to a mere passive investigation of existing criminal activity.

In contrast, the ECtHR considers the use of so-called inciting agents (*agents provocateurs*) that is to be distinguished strictly from the abovementioned investigation to be incompatible with principles of the rule of law and therefore as contrary to human rights. In the Court’s view such a provocation is defined as the incitement (by the police or, more generally, by public authorities) of a person to commit a criminal offence which otherwise would not have been committed.

This dogmatically plausible separation between permissible covert investigations on the one hand and provocations to criminal acts inadmissible under the rule of law on the other hand makes it necessary to develop practical criteria for the demarcation of these two procedural measures.

Approaching the issue on the human rights level in detail, there are essentially three distinct problems:

Article 1 ECHR holds the Contracting Parties accountable only for actions attributable to public authorities within their jurisdiction. As a *first step* it is therefore necessary to determine whether the state is responsible for a covertly operating person and him or her getting into contact with the later accused.

In addition to the direct use of state agencies, such as undercover agents, the actions of a private person can also be attributed to the state where such acts are essentially carried out in accordance with state instructions or under effective state control.

If a person on the other hand clandestinely acts on one's *own initiative* in the criminal environment or requests criminal acts in one's private sphere (*private capacity*), the ECtHR denies the state's responsibility for these actions and for the potential subsequent commission of crimes.

It is to note, however, that the ECtHR has considered the possibility that an originally exclusively privately motivated act is subsequently approved of by public authorities (*legitimised*).<sup>1</sup>

As already mentioned in the outset, the *second problem* in the context of the provocation of an unlawful act is to elaborate the criteria and conditions for assessing a behaviour provoking criminal offences and, correspondingly, for establishing a breach of the right to a fair trial guaranteed by Article 6 para. 1 ECHR.

The *third problem* eventually concerns the question related to the concrete legal consequence in the law of procedure or to the sanctions such a breach of the principle of procedural fairness entails. At this point various schemes of how to react are being discussed. In the legal doctrine they range from a ban on the exploitation of evidence to a procedural impediment. The German criminal courts, though, and in particular the Federal Court of Justice (*Bundesgerichtshof*–*BGH*), have largely agreed on a “sentencing solution” (mitigation of punishment)<sup>2</sup> that is more “flexible” for their interests, but also recently show basic approaches of deviating reaction mechanisms under the pressure of judgments of the ECtHR against Germany (*Furcht, Scholer*), see below.

### III. General outline of essential judgments of the ECtHR as to the criteria of the provocation of an unlawful act/incitement<sup>3</sup>

1. The Court's judgment *Teixeira de Castro v. Portugal* from 1998 which stands as a starting point for a whole chain of judgments concerning provocation of unlawful acts still deserves particular attention today.<sup>4</sup> The applicant T was asked by four undercover agents and one further person to provide them with 20 grams of heroin. T purchased this quantity from a supplier. The transaction was to be carried out in the flat of a third party. There, T was arrested. 20 grams of heroin and a larger amount of cash were found with T.

The ECtHR concluded that the applicant had – ab initio and irrevocably – been deprived of his right to a fair trial (Article 6 para. 1 ECHR) by the influence of the undercover agents. The Court did not assume a later compensation for this shortcoming (anymore).

The criteria the ECtHR applied already at that time arouse interest. An essential aspect was that the use of covert investigators had occurred without judicial order in the first place as well as without subsequent independent monitoring of the operation. Furthermore, the ECtHR emphasized that *no good reasons for suspecting* the later accused (*predisposition*) were at hand at the beginning of the deployment of the undercover agent. The fact that the applicant had *potentially been predisposed* was not considered to be sufficient as an argument against incitement.

An additional argument which underlines the concrete case to amount to incitement and which can regularly be found in judgments of the ECtHR is the fact that, at the time of the establishment of contact with the undercover agent, the suspect had had no previous criminal record in the field of the crime in which the allegedly provoked action later took place. Like this, the *Teixeira* judgment already insinuated

that potential previous criminal convictions, if brought forward as evidence in order to prove that the concerned person had already been predisposed to commit the later crime at the point of time of getting into contact with the undercover agent, need to be corresponding, that is they need to operate in the same field of crime or at least need to show a certain substantive connection with the offence committed later.<sup>5</sup>

2. In *Vanyan v. Russia* 2005<sup>6</sup> the ECtHR reaffirmed its considerations laid down in *Teixeira de Castro*. In the specific case, a friend (B) of the applicant was influenced by an undercover agent as to ask V to supply her with heroin she urgently needed due to severe withdrawal symptoms. With the money of his friend V subsequently purchased a small amount of heroin that was found with V in the following searching carried out by covert investigators.

Again, the ECtHR found a breach of the right to a fair trial (Article 6 para. 1 ECHR). Previous to the deployment of the undercover agent there had been no reasonable grounds at hand for suspecting the applicant. A central criterion for the assumption of incitement which can also repeatedly be found in subsequent jurisprudence<sup>7</sup> was that without B's actions the offence would not have been committed (causation).

3. Later, the judgment in *Ramanauskas v. Lithuania* was taken note of more intensely, also by German academics.<sup>8</sup> The peculiarity of this case was that the applicant was a former prosecutor who was accused of corruption. According to the Court's finding an undercover agent had offered him \$ 3,000 for the acquittal of a third party which the applicant was asked to support. The applicant accepted this offer only after the covert investigator (member of an anti-corruption unit) had insisted several times.

As criteria for the assumption of incitement the Court took into account on whose initiative the offence had eventually been committed.

Criminal records were taken into account, as well as whether there had been objective indications for a criminal activity on the part of the applicant. Mere *rumours*, however, were not considered being sufficient for this purpose.<sup>9</sup> Once again, the ECtHR sought the argument of the causality of the intervention, that is the question whether the act would also have been committed if the state had not proactively acted upon the person concerned.

A revolutionary element in the procedural assertion of an alleged incitement was the burden of proof issue<sup>10</sup> also raised by the ECtHR. If there is plausible evidence indicating that there has been an incitement, it is up to the state, i.e. its law enforcement authorities and courts, to disprove this assumption. As a factual consequence this forces law enforcement authorities to carry out comprehensive monitoring and documentation of covert investigations.

The Court also commented on the question if evidence may be barred in a possible subsequent trial.<sup>11</sup> As a rule, undercover agents ought to be heard in the public trial. If the procedure is passed on without them being interrogated comprehensible and *detailed reasons* for this need to be provided.

In *Ramanauskas* the ECtHR emphasized a state's obligation to carry out thorough investigations as soon as there are mere indications for an incitement, including in particular the examination of central witnesses for the prosecution.

4. In *Bannikova v. Russia* in 2010<sup>12</sup> the ECtHR set out for the first time the so-called "two step test" for examining a presumed incitement which in the meantime has been established as a standard model in the Court's jurisdiction. In the concrete case telephone calls of the applicant were being audio-monitored. B discussed several transactions concerning narcotics. Thereupon, the undercover agents purchased marijuana from

B and arrested her when the intoxicants were supposed to be handed over. Although the ECtHR eventually did not find a violation of Article 6 para. 1 ECHR since a suspicion for B committing drug-related crimes was already present at the very beginning of the covert investigators' operation on the basis of the audio-monitoring, the judgment is nevertheless of high relevance for the judiciary and the criminal defence.

It underlines the need for a separation between the examination of the substantive requirements of an incitement (first step) and the procedure carried out to establish a possible provocation (second step).

The applicant has to be given the possibility to verify an incitement in an adversarial procedure that is thoroughly conducted and ultimately directed at the existence of a provocation.

In doing so, the national courts must submit the reasons of the covert investigation to an exhaustive examination. A guilty plea of the defendant does not render such an enquiry dispensable.

#### **IV. Summary: Entrapment v. Investigation**

The use of liaison men and undercover agents is not *per se* considered to be contrary to the ECHR by the ECtHR. As the Court has already highlighted in *Lüdi*<sup>13</sup> and *Teixeira*<sup>14</sup> there are areas of crime that make the use of *undercover techniques (infiltration)* appear to be necessary and therefore also *legitimate*.

In a dogmatically convincing way the Court distinguishes between a permissible *undercover work* and *incitement (entrapment)* that is not admissible under a human rights perspective. An central criterion developed by the Court for this purpose was whether *criminal activity* was *investigated in an essentially passive manner* or an *ongoing offence merely joined* ("investigate the offence") or whether *influence* was *exerted as to incite* a person to commit a crime.

Whether criminal activity that was merely accompanied by public authorities was already existing at the time of the getting into contact with the suspect is assessed on the basis of indications.

For this purpose, it is of major importance to establish whether the offence would not have been committed without the state's contribution. Here, the Court stresses the idea of causation. However, the ECtHR's jurisprudence does not provide exact guidelines on how to assess the particular "state contribution" regarding its impact or relevance.

Another criterion for a ("*non-passive*") *incitement* is the lack of "*verifiable*" suspicious facts ("*good reasons*"/"*predisposition*") as well as a lack of information about the existence of a criminal offence.

A further indication for incitement is whether *pressure*, if only mental pressure, was exercised upon the suspect. The decisive factor is whom the initiative originates from. Repeated insisting, downright praising or a kind of call for help by the undercover agent may also indicate impermissible compulsion.

A possible sign for a provocation can be a lack of previous, in particular factually relevant, criminal convictions, whereas on the other hand a corresponding criminal record does not necessarily entail the conclusion that no incitement was carried out.<sup>15</sup>

In the area of drug-related crime it is of further relevance whether the person concerned is familiar with the prices of narcotics, disposes of opportunities to procure them and displays a certain profit seeking.<sup>16</sup>

#### **V. Binding effect of ECtHR's judgments for the German prosecution authorities and criminal courts**

In the German legal system the ECHR possesses neither the status of constitutional law nor of a general rule of international law (which

would outrank ordinary non-constitutional law as provided by Article 25 of the German Constitution). The Convention though holds the rank of simple federal law (Article 59 para. 2 of the German Constitution – Basic Law or *Grundgesetz* – GG). Its provisions thus constitute directly applicable German law. They bind the executive power as well as the judiciary (Article 20 para. 3 GG).

Moreover, the German Federal Constitutional Court (*Bundesverfassungsgericht* – *BVerfG*) emphasized in its *Görgülü* decision of 14<sup>th</sup> October 2004<sup>17</sup> that the entire ECtHR jurisdiction lies – by means of the Act of Parliament which legislates the ratification of the ECHR (Article 59 para. 2 of the German Constitution) – within the domestic binding force of the ECHR.

Additionally, by interpretation of Article 1 ECHR it can be derived that the Federal Republic of Germany is in terms of international law bound by the transferable content of the *entire* ECtHR jurisdiction.

Thus, all national public authorities, above all the German courts, are legally tied to the ECtHR's jurisdiction, if not by *international*, certainly though in terms of national law.<sup>18</sup> The Convention is to be taken into account and to be applied just like other German national law within the scope of *methodically justifiable construction* and in compliance with the entire jurisdiction of the ECtHR.<sup>19</sup>

The German Federal Constitutional Court (*BVerfG*), however, subjects this principle to a constitutional caveat ("*inasmuch as this does not lead to a limitation or restriction of the protection of basic human rights according to the Constitution*")<sup>20</sup>, the substantive ambit of which has not yet definitely been clarified.<sup>21</sup>

The criminal courts are to construe the laws and further regulations relevant in criminal proceedings in compliance with the German obligations under international law since –

according to the German Federal Constitutional Court (*BVerfG*) – it cannot be presumed that the legislator wished to deviate from these international commitments or to allow their infringement unless this was expressly stated.<sup>22</sup>

The guarantees of the ECHR and the ECtHR's jurisdiction for this purpose need to be given effect to "within the scope of methodically justifiable construction of laws".<sup>23</sup>

As a limitation to interpretation of national law according to the ECHR the German Federal Constitutional Court (*BVerfG*) though determines no less – but also no more – than "unequivocally contradicting German law or German constitutional law"<sup>24</sup>.

By means of the guideline to construe national law in accordance with international law the ECHR and the entirety of the ECtHR's jurisdiction obtain an extensive clarifying and substantiating function for the German criminal procedure law, particularly concerning guarantees that are not expressly contained in the German Constitution (e.g. the right to a fair trial) and can therefore only be derived from the abstract rule of law principle (Article 20 para. 3 of the German Constitution).

## **VI. The legal consequences of incitement: infringement of the right to a fair trial**

If an incitement contrary to human rights is determined according to the above mentioned criteria, this has effects both on the course of obtaining evidence and on the exploitation of such evidence.

In *Teixeira de Castro* (1998)<sup>25</sup> the Court already stated clearly that in the case of inadmissible incitement a defendant is deprived of his right to a fair trial (Article 6 para. 1 ECHR) from the outset. If, nevertheless, evidence is obtained unlawfully in that way the criminal court ought to thoroughly examine the material in the file at the stage of the use of evidence since

it is imperative that “*all evidence obtained as a result of police incitement must be excluded*”.<sup>26</sup>

However, the ECtHR itself can only ascertain the respective infringement of the Convention and, if appropriate, award a compensation to be paid by the Contracting State concerned (Article 41 ECHR). It does not, in principle, fall within the competence of the Court to precisely propose which legal consequences the state shall implement as a reaction to the deficiency detected by the ECtHR.

The wording that a defendant is by means of an unlawful incitement deprived of his right to a fair trial from the outset and definitely (*Teixeira de Castro / Malininas*) suggests to demand as a legal consequence an initial procedural impediment.<sup>27</sup> However, no *explicit* guidelines can be found for this approach in the ECtHR case law, resulting though from the above mentioned mere declaratory effect of its judgments.

Contrarily, the demand for inadmissibility of evidence obtained by means of incitement is put into more express terms by the Court. Like this it was already stated in *Khudobin* in 2006 that “*domestic law should not tolerate the use of evidence obtained as a result of incitement by State agents. If it does, domestic law does not ... comply with the fair trial principle*”.<sup>28</sup>

This assertion can certainly be understood as such that barring the use of evidence is *the least* that is demanded by the Strasbourg jurisprudence in response to an act of incitement,<sup>29</sup> but that other procedural paths are conceivable as well.

However, it is not discernible, leave alone comprehensible, why the applicant ought still to be subject to extensive (investigation) procedures although proceedings based on incitement are initially marked with the blemish of a lack of procedural fairness. This is particularly striking where the circumstances of the case would give way to pre-trial detention.

After all, there is a particular risk for the defendant that a confession he made under the impact of the incitement will be used to his disadvantage in the trial.<sup>30</sup>

## VII. Implementation of these human rights guidelines in German legal practice in the light of the ECtHR’s judgments *Furcht* and *Scholer*

Initially, the implementation of the provisions of the ECtHR on the prohibition of incitement was evidently difficult for German courts.<sup>31</sup> This may have also been due to the fact that, for a long time, there had been no judgment against Germany concerning the issue of entrapment.

The German Federal Court of Justice (*BGH*) had certainly incorporated the dogmatic guidelines and criteria of the ECtHR of how to establish unlawful incitement in its jurisprudence since the 1990s, but had always in terms of legal consequences opted for a flexible “sentencing solution” (mitigation of punishment) an approach that was not taken in the ECtHR jurisprudence.<sup>32</sup>

The difficulties of the concrete implementation are reflected both *on the first step*, that is concerning the substantive criteria for establishing an incitement, as well as – and in particular (*second step*) – with regard to the selection of a legal consequence that is in accordance with the Convention.

Concerning the first step, German criminal courts were for a long time sceptical vis-à-vis the differentiation between an active and a passive behaviour of covertly operating public authorities. Up until recently, even the highest German criminal court, the Federal Court of Justice (*BGH*), adhered to the “*sentencing solution*” – supported by the German Federal Constitutional Court (*BVerfG*).

The subject matter was only given a new impetus on 23<sup>rd</sup> October 2014 by means of a judgment of the ECtHR on a German case: *Furcht*

v. *Germany*. The ECtHR took advantage of this opportunity to transfer its jurisprudence from the past few decades to the German legal system. Given the ECtHR's case-law on this matter the actual outcome of the first German case can hardly be called a surprise. The predominant impact of the *Furcht* judgment which should solicit our interest is, however, that the ECtHR explicitly rejected the so-called "sentencing solution" (i.e. an intended mitigation of punishment), that the German Federal Court of Justice (*BGH*) had up until then favoured for decades as a "procedural" reaction to incitement.

Instead, it was argued that an appropriate response thereto would either be the exclusion of all evidence obtained by means of the entrapment or a "procedure with similar consequences".<sup>33</sup> The essential issue of the current discussion in Germany therefore revolves around the question of what exactly such a *procedure with similar consequences* might be.<sup>34</sup>

The German Federal Constitutional Court (*BVerfG*), which on 18<sup>th</sup> December 2014 had the opportunity to react to the *Furcht* judgment, reproached the ECtHR for exceeding its competences ("ultra vires") more or less openly, but noted anyway that in cases comparable with *Furcht* a criminal procedure impediment ought to be considered by the relevant public authorities.<sup>35</sup>

The essence of the dispute now concerns the issue whether it lies within the competences of the ECtHR to direct such concrete provisions to a national jurisdiction as it did in the *Furcht* case vis-à-vis Germany.

At the level of the German Federal Court of Justice (*BGH*) there are now three decisions dealing more closely with the *Furcht* judgment.

The *first criminal division* responded very restrictively to the Strasbourg requirements and adhered to the approach of the Federal Constitutional Court (*BVerfG*) that a procedural impediment in the area of incitement ought only

to be assumed in extremely exceptional cases. In a case decided on 19<sup>th</sup> May 2015 the first criminal division rejected such an impediment though.<sup>36</sup>

The *second criminal division*, however, went far beyond that in its judgment of 10<sup>th</sup> June 2015 – in an admittedly quite extraordinary case. With regard to the considerable amount of pressure borne by the defendant, the division established a procedural impediment.<sup>37</sup>

The *fourth criminal division*, reacting both to the jurisprudence of the ECtHR on the one hand as well as to the previous decisions of the German Federal Constitutional Court (*BVerfG*) and the first and second criminal division of the *BGH* on the other hand, chose to follow a rather equalized approach, but also rejecting to establish a procedural impediment in the concrete case.<sup>38</sup>

Summarizing the three decisions of the Federal Court of Justice (*BGH*) and the reaction of the Federal Constitutional Court (*BVerfG*) to the ECtHR judgment in *Furcht*, it can be observed that every single jurisprudence seeks to obtain a distinct position vis-à-vis the other ones, in particular regarding jurisdictions higher up in the hierarchy, pursuing a certain kind of self-preservation. Such methods are comprehensible both in terms of judicial tactics as well as from a human behavioural perspective, but clearly anything but conducive to the dogmatics of the concrete legal question.

An internal coordination of the different approaches within the divisions of the German Federal Court of Justice (*BGH*) is urgently required and ought not to be long in coming.

### **B. Rejection of the appeal as a legal remedy in the case of the absence of the defendant at the beginning of the main hearing, Section 329 StPO**

In the recent past, the German criminal courts were – besides the issue of incitement – also largely preoccupied with the question



whether the defendant – in the appellate body – had a right to be represented in the main hearing. The discussion revolved around a provision in the German Code of Criminal Procedure (StPO), according to which the appeal as a legal remedy ought mandatorily to be rejected, if the defendant had not appeared at the main hearing without excuse (Section 329 para. 1 StPO former version).

The fact that a defence lawyer who had appeared in the defendant's place might have been willing to plead for the defendant was, according to the old regulation and the judicial practice resting thereupon, no valid reason for the court to refrain from rejecting the legal remedy.

In spite of numerous judgments of the ECtHR from the 1980s and 1990s against, inter alia, France and the Netherlands which addressed this issue, it was only after a ruling against Germany (ECtHR *Neziraj v. Germany*, 8<sup>th</sup> November 2012)<sup>39</sup> and a subsequent amendment to the law that the German legal practice was brought into conformity with the Convention.

The previous version of Section 329 para. 1 StPO (“in cases in which this is permissible”) could, at least according to some views among academics, possibly have been construed as to be in compliance with the ECHR by allowing the defendant to be represented by a defence lawyer in the main hearing before the court of appeal in those cases where the latter showed the relevant willingness to act in representation of the absent defendant and could act legitimately as being equipped with an appropriate power of attorney.

This approach took into account basic human rights considerations but was nonetheless encountered by a large number of Higher Regional Courts with considerable legal concerns. Some of these courts stated that such an interpretation of Section 329 para. 1 StPO exceeded the possible limits of its wording.<sup>40</sup> Others referred to the “internal system” of the German Code of Criminal Procedure and rather emphasized this

argument.<sup>41</sup> Within these courts' jurisprudence there are even statements which completely deny the ECtHR to have the required understanding of the structure of the German legal system.<sup>42</sup>

This discussion about the construction of Section 329 para. 1 StPO (former version) is only one example for how a supreme national jurisdiction deals with imperative requirements of the ECHR in a virtually dismissive, even partly relentless way. Often, up onto the last instance “judicial resistance” is put up in order to hold onto national “systems” and sensitivities, but above all to hold onto law that has been “cultivated” and one has been familiar with (!) for years.

The possibility to submit the provision of the StPO to concrete judicial review (Article 100 para. 1 of the German Constitution) before the German Federal Constitutional Court (*BVerfG*) to overcome an “unambiguously contradictory wording” has hitherto not seriously been considered by German criminal courts.

Eventually, it was up to the German legislator to bring about the required correction of Section 329 para. 1 StPO initiating a reform accordingly,<sup>43</sup> also to prevent Germany from permanently violating international law in future proceedings.

### **C. Access of the suspect to procedural documents, Section 147 StPO**

Let us then take a look at a provision of the German Code of Criminal Procedure regulating the defence counsel's as well as the suspect's access to procedural documents: Section 147 StPO. The file documenting the proceedings is of high importance in the German prosecution. Therein, the entire investigative results from the preliminary proceedings are collected chronologically by the public prosecution service and then, if necessary, are directed to the responsible court conjointly with the indictment.

Thus, it is of essential relevance for the defence counsel and for the defendant himself when they are granted access to this file to be able to prepare for an effective defence strategy (Article 5 para. 4 ECHR / Article 6 para. 3 (b) and (c) ECHR), and, if so, whether the permitted insight is substantively and temporarily extended or only relates to single relevant parts of the documents and whether the insight is allowed at certain times in the building of the court or the public prosecutor's office.

The basic model of Section 147 StPO stipulates that access to the file can be refused until the entire investigations are concluded. A significant exception had been permitted already since the 1990s by means of the German Federal Constitutional Court's (*BVerfG*) jurisdiction demanding at least partial access to the files in cases of an executed pre-trial custody in order to ensure preparation for the review of detention ("habeas corpus"). This jurisdiction was, however, initially only to some extent implemented in the statutory version of Section 147 StPO – up until 2010.

When, in 2001, the Federal Republic of Germany had in three cases been condemned by the ECtHR for deprivation of access to procedural documents contrary to the Convention,<sup>44</sup> the German legislator once again was forced to bring about a new regulation in the Code of Criminal Procedure.

It was only in the course of a fundamental reform of the German regulations concerning the execution of pre-trial detention in 2010 that far-reaching changes and clarifications were implemented in the regulations of Section 147 StPO. At present, subsection 2 entitles the defence counsel to a comprehensive access to procedural documents in the cases of an executed pre-trial custody, i.e. for the purpose of preparing for the review of detention. The weighing criteria that are now stated in the provision are, of course,

still quite vague, but after all aiming at the implementation of human rights.

Undeniably, however, once again only the pressure of several condemnations in Strasbourg eventually triggered off the political action necessary for a corresponding amendment to the Code of Criminal Procedure.

Similarly, Section 147 para. 7 StPO which indeed does not grant a suspect undetained and without defence counsel full access to the file, but at least entitles the defendant to obtain disclosure and transcripts of the documents as far as it is necessary for a reasonable defence, is due to Strasbourg's jurisdiction.<sup>45</sup>

#### **D. Relevance of the ECHR in the field of substantive criminal law – Presumption of innocence (Article 6 para. 2 ECHR)**

In German substantive criminal law the difficulties concerning the implementation of provisions of the ECHR are not as easily perceptible as it is the case in criminal procedure law.

Regarding substantive criminal law strongly influenced by human rights considerations the issue especially revolves around the law of criminal sanctions or around the drafting of the grounds of the verdict, less around dogmatic questions in the categories of the factual elements of the crime, constituting the *actus reus* and the *mens rea*, the unlawfulness of the offence and the individual blameworthiness, apart from the almost outdated seeming question as to how far self-defence as to material goods can be justified against the background of the right to life under Article 2 ECHR.

At the level of the individual blameworthiness, however, the essential guarantee of the presumption of innocence (Article 6 para. 2 ECHR) deriving from the rule of law closely interlinks substantive and procedural criminal law. In the area of the law

of sanctions that is to be allocated to substantive law German criminal courts had to deal with the subject matter more intensely and in various constellations over the past few years.

As early as in the 1990s the question appeared regularly as to what extent it was permissible to expand in the grounds of the judgment or decision on a possible conviction of the court on the individual blameworthiness of the defendant or impressions allowing conclusions of this sort yet after an acquittal or closing of the proceedings.

With regard to this problem the ECtHR had already established the well-consolidated jurisdiction that only an assessment as to a criminal charge or suspicion, but not as to a possible blameworthiness, ought to be made.

Notwithstanding, it is surprising against this background that in 2014 three cases had to be decided by a Chamber of the ECtHR, and one of which (*Cleve*) led to a condemnation of Germany.

First, the case of *Karaman v. Germany* of 27<sup>th</sup> February 2014 is to be discussed.<sup>46</sup> In this case separated proceedings were conducted against several defendants and the question arose as to which extent the presumption of innocence ought to be preserved regarding an accused that was no (longer) party to the proceedings in the (first) procedure to be decided. The background to the problem is that in practice it is frequently required to refer to contributions of other suspects who are not at all, not yet or not anymore party to these first proceedings – in order to be able to establish complicity (Section 25 para. 2 of the German Criminal Code – StGB) or other less formal consolidations to jointly committed crimes. In *Karaman* the concrete issue was raised in how far the presumption of innocence was to be upheld with regard to the initially procedurally “detached” co-defendant as early as and particularly during the first proceedings.

Another decision to be mentioned in this context, the case of *Bezek v. Germany* of 21<sup>st</sup> April

2015,<sup>47</sup> revolves more deeply around the issue of impartiality of the decision making body in the “second proceedings” if the latter is identical to the one which has already delivered a judgment on a co-defendant in the first trial.

From both cases the general rule can be deducted that the ECtHR will accept it if absolutely indispensable assessments are made about the contribution of a person non-party to the proceedings in the relevant trial. Nevertheless, the court is always required to keep in mind not to attribute individual blameworthiness to the non-party concerned, but to make an effort in the formulation of the judgment to express a certain distance regarding his or her potential culpability. The decision in *Bezek* consistently pursues this approach by clarifying that partially referring to the “first” decision in the “second” trial that determines the co-defendants criminal liability does not necessarily challenge the impartiality of the later court.

Both judgments, however, are situated in a “grey area as to human rights considerations”. It is indeed possible that the ECtHR is going to intensify the requirements on the presumption of innocence in the course of the next few years.

The case *Müller v. Germany* of 27<sup>th</sup> March 2014<sup>48</sup> concerned an acquittal from a criminal charge (a sexual offence) on factual grounds. In its reasoning the court had chosen the wording “[...] the criminal offence that the applicant had committed to the detriment of Ms. J. showed [...]”. This, according to the ECtHR, did not result in an infringement of the presumption of innocence since that wording was actually based on statements of an expert whom the Court had consulted. Thus, the ECtHR still assumed a certain distance of the Court as to the expert’s wording, which, however, hardly seems convincing in the outcome.

In the judgment in *Cleve v. Germany* of 15<sup>th</sup> January 2015<sup>49</sup> that resulted in the establishment

of a breach of the ECHR the chamber of a regional court had much more clearly expressed still existing doubts as to the (non-) blameworthiness of the defendant in an acquittal. The ECtHR considered this as going way too far (linguistically) with respect to the presumption of innocence.

Last but not least, another issue lying at the intersection between criminal procedure law and sanctions law is the taking into account of the presumption of innocence when withdrawing parole by reason of a freshly committed offence also required by Article 6 para. 2 ECHR. The concrete point of discussion here resides in the question whether a court can revoke a sentence suspended by parole yet if there are – mere – reasonable grounds of suspicion concerning the (freshly committed) offence, rather than a (final) judgment or an admittance of guilt (expressed before a court).

Since the ECtHR had already set out in *Böhmer v. Germany* on 3<sup>rd</sup> October 2002 that the “withdrawing court” ought not to assume the competence to establish culpability for the “new” offence actually lying within the responsibility of the accordingly competent court,<sup>50</sup> it seems surprising that the ECtHR had to condemn Germany again for infringement of the presumption of innocence in its judgment in *El Kaada* of 12<sup>th</sup> November 2015.<sup>51</sup> This shows that the German legal framework – Section 56 (f) of the Criminal Code (*StGB*) on the one hand and Section 26 of the Code of Juvenile Courts (*Jugendgerichtsgesetz – JGG*) on the other hand – obviously does not enable German courts to adequately put into effect the relevant international parameters deriving from the ECHR. In the end, the German legislator will be required to amend these provisions, too.

### E. Résumé

The above mentioned examples clearly illustrate that German criminal courts have

repeatedly come into conflict with the ECtHR jurisdiction in the past few years. They have in substance reacted very differently to the guidelines set out by the Strasbourg Court, but – significantly – almost always with initial scepticism and reluctance.

In some cases, indeed, the courts succeeded in implementing the Strasbourg ruling at least partially into national law. Looking at legal changes in the area of granting access to procedural documents or in the field of the admissibility of representation of a defendant when absent at the beginning of the main hearing in the appellate trial (Section 329 StPO) it becomes apparent that ultimately the legislator was required to act, taking over a harmonising function in order to remediate the conflicts of national law with the guidelines of the ECHR. And this was because the national criminal courts had, until the very end, vehemently refused to assume Strasbourg’s jurisdiction.

On the contrary, concerning the issue of incitement *one* division of the highest German criminal court (i.e. the Federal Court of Justice – *BGH*) reacted to the Strasbourg provisions in a way that is compatible with human rights. This shows once again that, of course, the implementation of international standards is highly dependent upon the distinct decision making bodies, the individuals operating within the judiciary and their affinity for international legal thinking.

The German legislator, on the other hand, lately recognizes more and more frequently that a behaviour contrary to international law, thus a compensation-relevant behaviour of the national judiciary (be it because of a misleading wording of the law or be it based on a hardly comprehensible insistence on national legal theory) needs to be overcome by adapting the national law to the international legal framework through means of respective legislative amendments.

“Human rights in criminal proceedings” Perceiving a deficiency as to human rights in therefore certainly seem to constitute a decent one’s own well cultivated, familiar political and sounding dogma, if used to remind or reproach legal sphere and reacting thereto in a consistent political co-players, maybe even to assess them. way, however, appears to be considerably harder.

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- <sup>1</sup> *ECtHR (GC)*, Case of Ramanauskas v. Lithuania, Judgment of 5 February 2008, No. 74420/01, NJW 2009, 3565, §§ 63-65.
- <sup>2</sup> Compare BGHSt 45, 321 = NJW 2000, 1123 = JZ 2000, 363 = NStZ 2000, 269 = StV 2000, 114; BGHSt 47, 44 = NJW 2001, 2981 = NStZ 2001, 554 = StV 2001, 492.
- <sup>3</sup> The following presentation does not comprehensively retrace the ECtHR’s jurisdiction on the issue of incitement, but is merely bound to serve as a basic outline of essential guidelines developed by the Court between 1998 and 2010.
- <sup>4</sup> *ECtHR*, Case of Teixeira de Castro v. Portugal, Judgment of 9 June 1998, No. 25829/94, NStZ 1999, 47 = StV 1999, 127.
- <sup>5</sup> Compare also *ECtHR*, Case of Malininas v. Lithuania, Judgment of 1 July 2008, No. 10071/04.
- <sup>6</sup> *ECtHR*, Case of Vanyan v. Russia, Judgment of 15 December 2005, No. 53203/99.
- <sup>7</sup> Compare also *ECtHR*, Case of Pyrgiotakis v. Greece, Judgment of 21 February 2008, No. 15100/06.
- <sup>8</sup> *ECtHR*, Case of Ramanauskas v. Lithuania (Fn. 1).
- <sup>9</sup> *ECtHR*, Case of Malininas v. Lithuania (Fn. 5).
- <sup>10</sup> Compare *Gaede/Buermeyer*, HRRS 2008, 279 (280 f.).
- <sup>11</sup> *ECtHR*, Case of Lalas v. Lithuania, Judgment of 1 March 2011, No. 13109/04.
- <sup>12</sup> *ECtHR*, Case of Bannikova v. Russia, Judgment of 4 November 2010, No. 18757/06.
- <sup>13</sup> *ECtHR*, Case of Lüdi v. Switzerland, Judgment of 15 June 1992, No. 12433/86 = NJW 1992, 3088 = StV 1992, 499.
- <sup>14</sup> *ECtHR*, Case of Teixeira de Castro v. Portugal (Fn. 4).
- <sup>15</sup> *ECtHR*, Case of Constantin u. Stoian v. Romania, Judgment of 29 September 2009, No. 23782/06 u. 46629/06, § 55; Case of Malininas v. Lithuania (Fn. 5), § 36.
- <sup>16</sup> Compare: *ECtHR*, Case of Scholer v. Germany, Judgment of 18 December 2014, No. 14212/10.
- <sup>17</sup> BVerfGE 111, 307 = NJW 2004, 3407 (Görgülü) = JZ 2004, 1171.
- <sup>18</sup> Another securing mechanism for this is that an infringement of this obligation can be brought before the German Federal Constitutional Court as a breach of the corresponding (parallel) basic right conjointly with the rule of law principle (Article 20 para. 3 of the German Constitution).
- <sup>19</sup> BVerfGE 74, 358, 370; 111, 307, 321, 323 f. = NJW 2004, 3407 (Görgülü); BVerfG NJW 2009, 1133, 1134; NJW 2015, 1083, 1085. See also: BGH NJW 2001, 309, 311.
- <sup>20</sup> Compare BVerfGE 111, 307, 317; 128, 326, 371; BVerfG NJW 2008, 2978, 2981; EuGRZ 2016, 311, 313 f.
- <sup>21</sup> Compare BVerfGE 112, 1, 25 f.
- <sup>22</sup> Compare BVerfGE 74, 358, 370; 82, 106, 115; 83, 119, 128; NJW 2001, 2245, 2246; BGHSt 45, 321, 329; 46, 93 = NJW 2000, 3505, 3507.
- <sup>23</sup> BVerfGE 111, 307, 323.
- <sup>24</sup> BVerfGE 111, 307, 329.
- <sup>25</sup> *ECtHR*, Case of Teixeira de Castro v. Portugal (Fn. 4).
- <sup>26</sup> *ECtHR*, Case of Teixeira de Castro v. Portugal (Fn. 4), § 36.
- <sup>27</sup> See *Sinner/Kreuzer*, StV 2000, 114; *Lesch*, JR 2000, 434; *Kudlich*, JuS 2000, 951; *Conen*, StRR 2009, 84.
- <sup>28</sup> *ECtHR*, Case of Khudobin v. Russia, Judgment of 26 October 2006, No. 59696/00, § 133.
- <sup>29</sup> See *Ambos*, NStZ 2002, 628 (632); *Kinzig*, StV 1999, 288.
- <sup>30</sup> See BayObLG NStZ 1999, 527 = StV 1999, 631 = JR 2000, 256.
- <sup>31</sup> For more information please refer to: Esser (2012). Lockspitzel und V-Leute in der Rechtsprechung des EGMR: Strafrechtliche Ermittlungen jenseits der StPO – außerhalb des Gesetzes? in *Strafverteidigervereinigungen (Hrsg.)*, Abschied von der Wahrheitssuche, p. 197; *Jahn, Kudlich* (2016). JR, 54; *Meyer, Wohlers* (2016). JZ, 761; *Ellbogen* (2016). Kriminalistik, 237; *Eschelbach* (2015). GA, 545.
- <sup>32</sup> The ECHR is quite clear on this in the case of Furcht v. Germany, Judgment of 23 October 2014, No. 54648/09, §§ 68-69.
- <sup>33</sup> *ECtHR*, Case of Furcht v. Germany (Fn. 32), § 64.
- <sup>34</sup> Contrarily, in the Case of Scholer (Fn. 16) the ECtHR did not even establish the substantive prerequisites of an incitement.
- <sup>35</sup> BVerfG, Decision of 18 December 2014, NJW 2015, 1083 = StRR 2015, 221 with a note by *Tsambikakis*.
- <sup>36</sup> BGH (1st Criminal Division), Decision of 19 May 2015, BGHSt 60, 238 = NStZ 2015, 541.
- <sup>37</sup> BGH (2nd Criminal Division), Judgment of 10 June 2015, BGHSt 60, 276 = NJW 2016, 91 with a note by *Eisenberg*.
- <sup>38</sup> BGH (4th Criminal Division), Decision of 19 January 2016, NStZ 2016, 232.
- <sup>39</sup> *ECtHR*, Case of Neziraj v. Germany, Judgment of 8 November 2012, No. 30804/07, StraFo 2012, 15 with a note by *Püschel* = NStZ 2013, 350 = StV 2013, 289; for further reading: *Esser* (2013). StV, 331.
- <sup>40</sup> OLG München, Decision of 17 January 2013, 4 StRR (A) 18/12 – StraFo 2013, 252 = StV 2013, 301 with a note by *Esser*, StraFo 2013, 253; OLG Celle, Decision of 19 March 2013 – 32 Ss 29/13, NStZ 2013, 615.
- <sup>41</sup> OLG Bremen, Decision of 10 June 2013 – 2 Ss 11/13 with a note by *Burhoff*, StRR 2013, 388; OLG Hamburg, Decision of 3 December 2013 – 1 – 25/13 (REV), 1 – 25/13 (REV) – 1 Ss 68/13.
- <sup>42</sup> OLG München (Fn. 40).

- <sup>43</sup> Gesetz zur Stärkung des Rechts des Angeklagten auf Vertretung in der Berufungsverhandlung und über die Anerkennung von Abwesenheitsentscheidungen in der Rechtshilfe of 17 July 2015 (BGBl. I S. 1332).
- <sup>44</sup> ECtHR, Cases of Garcia Alva v. Germany, No. 23541/94; Lietzow v. Germany, No. 24479/94; Schöps v. Germany, No. 25116/94; Judgments of 13 February 2001, StV 2001, 201 ff. (access to the case file in case of pre-trial detention) with a note by Kempf and Kühne, Esser (2002). StV, 383, 390 ff.
- <sup>45</sup> ECtHR, Case of Foucher v. France, Judgment of 18 March 1997, No. 22209/93.
- <sup>46</sup> ECtHR, Case of Karaman v. Germany, Judgment of 27 February 2014, No. 17103/10; see: Esser (2015). Festschrift für Hans-Ullrich Paeffgen, 503; Isfen (2009) StV, 611 f.
- <sup>47</sup> ECtHR, Case of Bezek v. Germany, Decision of 21 April 2015, No. 4211/12 and 5850/12.
- <sup>48</sup> ECtHR, Case of Müller v. Germany, Judgment of 10 February 2015, No. 264/13 with partly dissenting opinion by the judges De Gaetano and Yudkivska.
- <sup>49</sup> ECtHR, Case of Cleve v. Germany, Judgment of 15. January 2015, No. 48144/09 = StV 2016, 1.
- <sup>50</sup> ECtHR, Case of Böhmer v. Germany, Judgment of 3 October 2002, No. 37568/97, NJW 2004, 43 = StV 2003, 82 = NStZ 2004, 159 (§ 56f StGB).
- <sup>51</sup> ECtHR, Case of El Kaada v. Germany, Judgment of 12 November 2015, No. 2130/10.

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## **Осуществление решений ЕСПЧ в области уголовного и уголовно-процессуального права с точки зрения Германии**

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*Судебная практика Европейского суда по правам человека (ЕСПЧ) приобретает все большее значение, особенно в части уголовного права. Чтобы проиллюстрировать осуществление судебной практики ЕСПЧ в области уголовного и уголовно-процессуального права Германии, в данной статье рассматриваются недавние решения и события.*

*Первый пример касается провокации незаконных действий государственными органами, что вызывает серьезные проблемы в отношении п. 6 ст. 6.1 ЕКПЧ (право на справедливое судебное*

разбирательство). Согласно ЕСПЧ простое пассивное расследование преступной деятельности не нарушает п. 1 ст. 6.1 ЕКПЧ. С другой стороны, государственные органы не имеют права «подстрекать» человека к совершению преступления. В этих случаях, имея в виду, что подозреваемый подвергался незаконному влиянию в результате несправедливого судебного разбирательства, необходимо проанализировать конкретные правовые последствия. В деле *Фурхта против Германии* (*Furcht v. Germany*) всего несколько лет назад ЕСПЧ отклонил так называемое решение о вынесении приговора (*Voll-streckungslösung*), которое до этого было обычной практикой в Германии. В дальнейшем осуществление рекомендаций Суда привело к противоречию между уголовными подразделениями Федерального суда Германии (*Bundesgerichtshof – BGH*), которые будут изложены более подробно.

Кроме того, судебная практика ЕСПЧ породила несколько поправок в Уголовно-процессуальном кодексе Германии (*Strafprozessordnung – StPO*). Например, судебный процесс ЕСПЧ по делу *Незирај против Германии* (*Neziraj v. Germany*) привел к изменению ст. 329 УПК Германии, которое позволило отклонять апелляцию (*Berufung*), если ответчик отсутствовал в начале главного слушания. Другой пример касается доступа подозреваемого и защитника к процессуальным документам (ст. 147 УПК Германии).

Далее автор исследует влияние ЕКПЧ – в основном в отношении презумпции невиновности (п. 2 ст. 6 ЕКПЧ) – на материальное уголовное право.

Все данные дела демонстрируют, что в последние несколько лет уголовные суды Германии неоднократно противодействовали осуществлению решений ЕСПЧ. Тем не менее автор считает, что наблюдается некоторая тенденция к достаточно активной адаптации норм в области прав человека, установленных ЕСПЧ.

*Ключевые слова:* доступ к процессуальным документам (ст. 147 УПК Германии), дело *Фурхта против Германии* (*Furcht v. Germany*), дело *Незирај против Германии* (*Neziraj v. Germany*), презумпция невиновности (ст. 6, п. 2 ЕКПЧ), провокация незаконных действий (подстрекательство), право на справедливое судебное разбирательство (п. 1 ст. 6 ЕКПЧ), право быть представленным адвокатом на апелляционном слушании (ст. 329 УПК Германии).

*Научная специальность:* 12.00.00 – юридические науки.

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