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Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France

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3. Anti-Terror Legislation in Germany

Der Staat darf und muss terroristischen Bestrebungen (…) mit den erforderlichen rechtsstaatlichen Mitteln wirksam entgegentreten. Auf die rechtsstaatlichen Mittel hat sich der Staat unter dem Grundgesetz jedoch auch zu beschränken. Das Grundgesetz enthält einen Auftrag zur Abwehr von Beeinträchtigungen der Grundlagen einer freiheitlichen demokratischen Ordnung unter Einhaltung der Regeln des Rechtsstaats. Daran, dass er auch den Umgang mit seinen Gegnern den allgemein geltenden Grundsätzen unterwirft, zeigt sich gerade die Kraft dieses Rechtsstaats.[1]

(The State may and must efficiently counter terrorist tendencies with the necessary measures that are conforming to the rule of law. However, under the Basic Law, the State has to limit itself to these measures that are conforming to the rule of law. The Basic Law contains the mandate to defend the State against curtailing the fundaments of a free and democratic order, in observation of the rule of law. It is this conduct by which the State governed by the rule of law shows its particular strength: that it also subjects the interactions with its enemies to the generally applicable principles.)

[1] German Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 4 April 2006 (case no. 1 BvR 518/02).

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3.1. Introduction

After the downfall of Hitler and the victory of the Allies in 1945, Germany underwent extensive legal reform. The criminal procedure was significantly modernised in 1964. For example, a provision governing the prohibition of torture (§ 136a of the German Code on Criminal Procedure, *Strafprozessordnung, StPO*) was introduced, improvements in the rules on detention on remand[2] as well as the reiteration of the fair trial principle took place.[3]

During the 1970s, this progressive tendency was partially reversed. In the attempt to fight the left-wing terrorism of the RAF, the criminal procedure in particular was amended. The rights of the defence and accused were continuously reduced, whilst the powers of police and prosecution were extended. As a result, the principles of equality of arms and fair trial which had previously been promoted once lost again importance. Stefan Aust and Helmar Büchel of the German magazine SPIEGEL compared the mark the RAF experience left in the "collective memory of Western Germans" with the one experienced by Americans during and after the events of 11 September 2001.[4] Although terrorism diminished in Germany considerably in the 1980s,[5] the great bulk of the laws that targeted this particular delinquency has remained in force until today.

In the 1990s, organised crime dominated political debate. Acts which focused on combating organised crime were adopted throughout this period. However, many of these provisions were also meant to cover terrorism; similar measures were adopted for both types of delinquency.

A turning point in German legislation resulted after the events of September 11th 2001. Following this and in quick succession, two highly debated "security packages" were adopted, both of which encountered substantial criticism from legal scholars. In 2005, the Air Security Act (*Luftsicherheitsgesetz*) was adopted to try and improve the combat against terrorist hijackers. Shortly after its adoption, the Act was declared unconstitutional and thus null and void by the German Constitutional Court.[6]

While the anti-terrorism laws of the 1970s had mostly concerned criminal procedure, the recent anti-terror Acts have influenced a large variety of legal fields,

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[2] The principle of proportionality was introduced in the regime on pre-trial detention, see § 112(2) *StPO*. Moreover, the grounds for detaining were objectified and amended. Thus, the 'apocryphic' ground that the danger for flight be presumed in the case of major crimes (*Verbrechen*, defined pursuant to § 12(1) of the German Criminal Code [*Strafgesetzbuch*, StGB], as major crimes punished with at least one year of imprisonment) was abolished and replaced by the ground of "danger of recurrence" (*Wiederholungsgefahr*) and "gravity of the deed" (*Tatschwere*). The grounds for detaining were objectified and amended. A detailed and critical analysis of these amendments can be found by Schmidt-Leichner (1961).

[3] For instance, an unlimited access to records for the defence was introduced (§ 147 *StPO*), and communication between the accused person and his defence counsel could no longer be subject to any restrictions (§ 148 *StPO*).

[4] DER SPIEGEL (2007a): *Der letzte Akt der Rebellion*.

[5] However, the movement continued its combat, but much less obtrusively, until the 1990s. In March 1998, the RAF was officially dissolved. Their declaration is published at the site RAF info, http://www.rafinfo.de/archiv/raf/raf-20-4-98.php (visited on 10/04/07).

[6] See below at 3.4.6.

particularly administrative law (e.g. police law, foreigner's law, the law of associations), as well as the law governing the police, military and secret services.

3.2. Relevant legal sources

The most important German legal instrument adopted in the aftermath of the *Third Reich* of 1933-1945 was the German Constitution of 1949, the so-called Basic or Fundamental Law (*Grundgesetz, GG*).[7] The Constitution is especially significant for the criminal procedure as it guarantees and protects fundamental rights, including the rights of the accused. The compliance with these rights of the individual has the highest hierarchical position of all principles established by the Constitution, occupying the first part of the Law (Arts. 1 to 19). Moreover, the dignity of the human being is regarded as the most significant value of the state and therefore protected by Art. 1.[8]

All German laws rank hierarchically below the Constitution and have to be interpreted in conformity with this. Of these laws, the Criminal Code (*Strafgesetzbuch, StGB*) and the Code of Criminal Procedure (*Strafprozessordnung, StPO*) will be of special relevance for the present study. §§[9] 129a and 129b of the Criminal Code are the relevant provisions with respect to substantive law and with regards to the Criminal Procedure, a number of Articles regulating coercive measures make reference to terrorism (e.g. §§ 100c, 103, 111, 112, 138a, 148 *StPO*).[10]

Germany ratified the ECHR relatively early on 5 December 1952. The ECHR forms, as part of international law, an integral part of the law of the Federal Republic of Germany (see Art. 25 *GG).* However, Germany is a dualist country, which means that international treaties must be transposed into national law in order to become binding in Germany. The ECHR has been implemented this way and therefore ranks as federal law within the national legal system.[11]

3.3. Anti-terror legislation prior to September 11th

3.3.1. Significant Acts adopted against the RAF

The terrorist attacks committed or attributed to the RAF were responded to by the legislator with a series of so-called Anti-Terror-Laws which have led to multiple

[7] This legal instrument was a product of both the lessons learnt under the Hitler dictatorship, which had been unintendedly facilitated by the previous Constitution of the Weimar Republic, and of the influence of the Allies – mainly the USA – on Germany after 1945, obliging German politicians to draft a constitution in accordance with democratic principles.

[8] The subsequent 18 Articles protect other fundamental rights and freedoms, and further fundamental rights regarding the justice system (so-called *Justizgrundrechte*) are placed in Arts. 101 to 103 *GG.*

[9] In most German legal statutes, the different provisions are numbered by the following sign: "§" (or, for the plural: §§) (*Paragraph*). This may be compared to "Article" or "Section" in English. In the Constitution, however, the provisions are called "*Artikel*" and will therefore be directly translated by "Article" (Art.).

[10] Most German laws can be retrieved online at http://dejure.org/ and at the official web site of the federal ministry of justice http://www.gesetze-im-internet.de/ (both last visited 1 October 2008)

[11] Burkens, van Schagen and Starsmore (2004), at 319.

controversial discussions. The most important Acts in reaction to particular events are the following:

3.3.1.1. Eavesdropping Act (*Abhörgesetz*)

In response to the assassination of Rudi Dutschke and the ensuing riots, the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications,[12] also known as the '**Eaves Dropping Act'** (*Abhörgesetz*) or **G 10 Act** (*G-10-Gesetz*), due to its implications on Art. 10 of the German Constitution, was adopted.[13] This Act authorised extensive telephone tapping, including the tapping of conversations of non-suspect third persons (§100a and § 100 b of the *StPO*), as well as the interception and reading of mail and post.[14] The Act was by no means limited to terrorist offences, although its adoption had been triggered by a terrorist incident. In order to ensure its constitutionality, the relevant Article of the German Constitution, protecting the secrecy of mail, Art. 10, was amended. However, the constitutionality of §§ 100a and 100b *StPO* was still doubted. It was disputed whether the fact that an individual could be the subject of surveillance measures without being informed about it, not even *ex post*, complied with the essence of Art. 10(1) *GG*. Further, the absence of any legal means against the decision seemed to be contrary to the guarantee of a legal remedy as provided by Art. 19(4) *GG*. Finally, it was questioned whether these amendments were admissible under Art. 79(3) *GG*, which puts certain limits to the possibilities to amend the constitution.[15] A constitutional complaint (*Verfassungsbeschwerde*) was thus lodged to the *Bundesverfassungsgericht*. In the Judgment of 15 December 1970, the Constitutional Court held that Art. 1(5)(5) of the Eaves Dropping Act was void for being incompatible with the second sentence of Art. 10(2) of the *Grundgesetz*. This was in so far as the Eaves Dropping Act did not require that the concerned person be notified of the measures of surveillance even when such notification could be given without jeopardising the purpose of the measure.[16] The Act was consequently amended and was to be interpreted in accordance with the findings of the *Bundesverfassungsgericht.*[17]

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[12] *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*, or, *Artikel-10-Gesetz*, G-10-G.

[13] For more details on the origins of the legislation and the particular provisions, see also the considerations in the Judgment of the ECtHR, *Klass and others v Germany* (application no. 5029/71), at para. 14 to 25. For a discussion of the constitutionality, see also Dürig (Juni 2006), at 24 et seqq.

[14] The amended Article read as follows:
"(1) Secrecy of the mail, post and telecommunications shall be inviolable.
(2) Restrictions may be ordered only pursuant to a statute. Where such restrictions are intended to protect the free democratic constitutional order or the existence or security of the Federation or of a Land, the statute may provide that the person concerned shall not be notified of the restriction and that legal remedy through the courts shall be replaced by a system of scrutiny by agencies and auxiliary agencies appointed by the people's elected representatives." (Translation taken from the Judgment of the ECHR, Case of *Klass and others v Germany*, at para. 16).

[15] Welp (1970).

[16] Judgment of 15 December 1970, Collected Decisions of the Federal Constitutional Court (*Gesammelte Entscheidungen des Bundesverfassungsgerichts*, *BVerfGE*) (Vol.) 30, at 1 et seq; online available at www.oefre.unibe.ch/law/dfr/bv030001.html (*Abhörurteil*, last visited on 1 October 2008).

[17] This meant concretely that the executive was only allowed to abstain from notifying the individual if such notification would jeopardise the purpose of the restriction.

The same applicants, *Klass and others*, also lodged an application with the European Commission of Human Rights on 11 June 1971 against the legislation as amended and interpreted by the Federal Constitutional Court. In their application, they argued that this legislation was still contrary to Art. 6 (right to a fair hearing), Art. 8 (right to respect for correspondence) and Art. 13 (effective remedy before a national authority in respect of breaches of the Convention) of the ECHR. This was based on the grounds that the law contained no absolute requirement to notify the persons once surveillance of their mail etc. had ceased, and further that no legal remedy was available against the order and implementation of the measure.[18] The Commission expressed the opinion that none of the named Articles were violated. The absence of notification was a justified exception under Art. 8(2) of the Convention, and the supervisory system provided by the Act, including the possibility to ultimately challenge the decision before the *Bundesverfassungsgericht*, fulfilled the requirements of a legal remedy under Art. 13 ECHR.[19] When the matter was later discussed by the ECtHR,[20] the Strasbourg Court confirmed the Commission's assessment. However, in its judgment, the ECtHR also provided an interesting *obiter dictum* in that "the Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate".

In a later case, initially before the Federal Constitutional Court and subsequently the European Commission, the tapping of the telephone conversations between journalists of the German magazine Stern and their lawyers were recorded by police. It was believed that one of the observed persons had been involved in the setting up and running of an information centre which served to exchange information between detainees who were convicted or suspected of terrorist activities as well as between these inmates and their defence counsels. The applicants came to know of the surveillance and requested that the Federal Attorney-General destroyed all recordings and documents relating to telephone conversations they had had with the concerned law firm. When their application was rejected by the Hanseatic Court, the applicants lodged a constitutional complaint with the *Bundesverfassungsgericht*.[21] However, the latter also rejected their appeal, holding that the Hanseatic Court's decision had not violated any constitutional rights, as its assessment that the documents might still be of importance at a later stage and that an immediate deletion would only prolong the criminal proceedings was considered justified. The European Commission confirmed this Decision of the German Federal Constitutional Court.[22]

[18] ECHR, *Klass and others v FRG*, Judgment of 6 September 1978 (application no. 5029/71), at para. 2.
[19] As to Art. 6(1) ECHR, the Commission considered that the provision did not apply to the facts of the case.
[20] ECHR, *Klass and others v FRG*, Judgment of 6 September 1978 (application no. 5029/71).
[21] Decision of February 1978, cited by the EComHR in case *A., B., C. and D. v FRG*, Decision of 13 December 1979 (application no. 8290/78).
[22] Ibid.

3.3.1.2.Decree on the Employment of Extremists

On 28 January 1972, the notion of "duty of loyalty to the constitution" (*Pflicht zur Verfassungstreue*) was introduced by the Federal Chancellor and the Prime Ministers of the *Länder*, obliging public servants to swear an oath positively recognising the "free democratic constitutional system" (*freiheitlich-demokratische Grundordnung*) and upholding its preservation (*Radikalen- oder Extremistenerlass*). In the case that reasonable doubts existed for a candidate to comply with these requirements, such doubts justified a refusal to employ them or, in case the person was already employed, a dismissal was justified. The Act was largely criticised as being contrary to deomcratic principles.[23] However, the *Bundesverfassungsgericht* accepted the provisions, in the Judgment of 22 May 1975.[24] In the case where a school teacher was dismissed from office for being a member of the German Communist Party (*Deutsche Kommunistische Partei, DKP*), the ECtHR held that her rights under Arts. 10 and 11 of the ECHR were violated.[25]

3.3.1.3. Exclusion of defence counsels

One of the first executive actions taken by the state to combat terrorism was the exclusion of the RAF defence lawyer, and later Home Secretary,[26] Otto Schily. He was excluded as a defence counsel for the RAF member Gudrun Ensslin when he was suspected of collaboration with the terrorist movement.[27]

After Schily's exclusion in 1972, the Constitutional Court quashed the exclusion as it lacked any legal basis and presented an inadmissible restriction of the freedom of profession (Art. 12 GG).[28] The legislator was assigned to "restore a legal situation", i.e. it was given time to enact an Act to legalise the exclusion of defence lawyers.[29] This was done through the Act of 20 December 1974, the so-called ***Anti-Terror-Act*** *(Anti-Terror Gesetz)*.[30] During the legislative process, another radical left-wing group, the so-called Movement 2nd June (*Bewegung 2. Juni*) killed the President of the Regional Court of Berlin, Günther von Drenckmann. The Act of 20 December was clearly adopted under the impression of this event.[31] With the introduction of §§ 138a, 138b

[23] The constitutional implications are further examined by Battis (1972).
[24] *BVerfGE* 39, 334.
[25] ECtHR, *Vogt v Germany*, Judgment of 25 February and 2 September 1995 (application no. 7/1994/454/535).
[26] *Schily* was German home secretary from 1998 to 2005 and thus the “creator” of the Anti-Terrorism legislation adopted during this period.
[27] The suspicion that defence lawyers collaborated and conspired with the RAF became a characteristic feature of the German anti-terror legislation. The political defence counsels had a particularly difficult role: they were, on the one hand, a judicial organ (§ 1 of the German Federal Lawyer’s Rules, *Bundesrechtsanwaltsordnung*), who contributed to justice just as much as the judge or the public prosecutor. On the other hand, they were put under great pressure by their clients who wanted them to go far beyond their professional duties. A comprehensive, possibly subjective doctoral thesis on the problems of political defence was written by the Dutch former RAF defence counsel: Bakker Schut (1986). Regarding the position of the defence, see also Berlit and Dreier (1984), at 253; Augstein (1981); Generalstaatsanwälte and Generalbundesanwalt (1991); Brunn and Kirn (2004); Ellinger (1991).
[28] *BVerfGE* 34, 293, Judgment of 14 February 1973, = *NJW* 1973, 696.
[29] The legal interests at stake and their balancing was examined by Gross (1974). See also the Statement of Lampe (1974).
[30] See the comment of the former Attorney General Dünnebier (1976).
[31] Vogel (1978), at 1219; Berlit and Dreier (1984), at 256.

StPO, the exclusion of defence lawyers was put on a legal basis. The exclusion of a defence lawyer was hence allowed when they were suspected of participating in the criminal activity of the accused or of abusing their contact with the accused in order to commit criminal acts or jeopardise the security of the prison.[32]

The Act encountered severe criticism mostly for unduly restricting the defence's rights.[33] Thus, it was criticised as it was seen that the exclusion applied to all defence lawyers, hence also to *ex officio* lawyers, in which case a suspicion of collaboration seemed not really justified.[34] Since for the exclusion of defence lawyers only a simple level of suspicion is necessary, theoretically any undesired lawyer can be excluded.[35] Notwithstanding, the then Federal Minister of Justice, Hans-Jochen Vogel, stated that the Constitutional Court later *incidentally* accepted the new provisions as constitutional.[36]

Other new provisions in the ***Anti-Terror Act*** were occasioned by RAF defendants who tried to hamper proceedings by having a great number of defence counsels. For example, in the *Stammheim*[37] trial, some accused initially had between ten and fourteen defence lawyers each chosen by the client, who were representing different defendants conjunctively. As this large amount of defence lawyers seemed to obstruct the trial and as the defence of several accused persons by the same lawyer seemed to facilitate information exchange between these accused, the legislator adopted two new provisions: a rule precluding the defence by more than three defence counsels chosen by the defendant[38] and another one impeding a lawyer to defend more than one person accused of the same deed.[39]

The provision limiting the number of defence counsels to three was scrutinised by the Constitutional Court. It could conflict with the right to an effective defence or infringe the right of fair trial as guaranteed by Art. 6 ECHR and inherent in the general *Rechtsstaatsprinzip*[40] (as enshrined in Art. 20(3) *GG)*.[41] However, the *Bundesverfassungsgericht* regarded it as constitutional.[42] The purpose of the regulation was to impede the accused from delaying the proceedings, by using several defence lawyers, so that it served the objective to ensure a due procedure and to maintain the functioning of the criminal justice system as required by the rule of law. The Court held that even in extraordinary heavy and protracted proceedings, the fair trial principle could be observed with up to three defence counsels. However, whether the adopted

[32] It is interesting to note that the exclusion of defence attorneys had already been discussed in Germany as early as 1925, but needed apparently the Constitutional Court's pressure to trigger legislative action. (See the references of Ulsenheimer (1975), at 103, Note 2).
[33] Ibid.; Groß (1975); Dahs (1975); Dünnebier (1976).
[34] Ulsenheimer (1975), at 110.
[35] Kühne (2006), at 141.
[36] Vogel (1978), referring to *BVerfGE* 39, 238 (245).
[37] *Stammheim* refers to a place in Southern Germany, Stuttgart-Stammheim, where the High Security Prison was located in which the ringleaders of the RAF were held, and where they also were tried.
[38] § 137(1) second sentence, *StPO.*
[39] § 146, *StPO.*
[40] This may be known to international lawyers as the *état de droit.* There is no direct equivalent in English. However, the concept is quite similar and comparable to the English principle of the *rule of law* and will therefore be subsequently translated by this expression.
[41] See Kühne (2006), at 174.
[42] *BVerfGE* 39, 156.

provisions really ensure a balanced trial may be doubted. The Attorney General can rely on the support of a team of about ninety lawyers, while the accused shall not have more than three defence councils. This is regardless of how complex the case and how weighted the evidence may be.[43] A considerable imbalance is therefore very well imaginable. Dünnebier's[44] assumption that in practice, the public prosecution, for the sake of fairness, will voluntarily restrict itself to no more than three prosecutors as well, offers little consolation. It is hard to believe, at least in the case of serious crimes, that the prosecution, just like the defence, will not make use of all instruments legally available to them.

The application of the same provision was also scrutinised by the European Commission and the Strasbourg Court in the case of *Croissant*.[45] In this case, the former RAF defence lawyer Klaus Croissant was, against his will, represented not only by two counsels of his choice, but also by one appointed *ex officio* lawyer. His requests to replace the *ex officio* lawyer or to appoint a fourth lawyer of his choice were rejected by the Court, on the basis of § 137(1) *StPO*. The applicant contended before both the European Commission and the Strasbourg Court that charging him with the costs and expenses of the *ex officio* lawyer violated his right to free legal assistance under Art. 6(3) ECHR. However, both the Commission and the Strasbourg Court agreed that the charging did not amount to a violation of Art. 6(3) ECHR.

As far as the prohibition for the defence counsel to defend more than one person accused of the same criminal act[46] was concerned (the so-called conjunctive defence - *gemeinschaftliche Verteidigung*), the Constitutional Court considered this provision as justified in view of the risk that the lawyer could otherwise incur a potential conflict of interests when, for instance, one of his clients could only be effectively defended by incriminating the other.[47]

Another provision introduced in the context of trials of RAF members concerned their right to attend trial. Apparently, the RAF members not only tried to use their lawyers to continue their illegal activities, but they also took advantage of their right of presence during the entire trial by provoking their own absence. This was done by either not appearing before the court, or by putting themselves deliberately into a state of health where they were unable to follow the proceedings (in particular, through hunger strikes). Alternatively, they insulted the justice system, the court, and the judges, until the latter ordered their removal from the court room. As trials *in absentia* were not permitted at that time, these actions considerably delayed criminal proceedings, so that the legislator decided to introduce an exception to the general prohibition of trials *in*

[43] With the same argumentation: Krekeler (1979).
[44] Dünnebier (1976), at 1.
[45] *Croissant v Germany*, see EComHR, EComHR Report of 7 March 1991 (application no. 13611/88), ECtHR, Judgment of 25 September 1992(application no. 13611/88).
[46] § 146 *StPO*.
[47] See *BVerfGE* 43, 79, with respect to the admissibility of conjunctive defence of several accused persons by several defence counsels of one law firm; BVerfG *NJW* 1977, 800 with respect to the inadmissibility of consecutive conjunctive defence; and BVerfG *NJW* 1977, 1767 with respect to the inadmissibility of conjunctive defence of several persons accused of different criminal acts, but charged during the same trial.

absentia. Thus, under the new § 231(2) *StPO*, trial proceedings may continue even in the absence of the accused if the court deems his presence "not necessary". Further, the trial proceedings also may continue if the accused has intentionally put himself into a situation that disables him to follow the proceedings (§ 231a *StPO*), or if he has been removed from the court room for improper behaviour (§ 231b *StPO*).[48] The constitutionality of § 231a *StPO* was confirmed by the *Bundesverfassungsgericht*.[49] It mainly argued that the fundamental rights of the accused, who by own choice waived his right to be present instead of using it, were not violated by the fact that the trial was then held in his absence.[50]

3.3.1.4.Second Act against Terrorism

Through the ***Act of 18 August 1976***[51] a special terrorist offence was introduced: § 129a *StGB*. This so-called "organisational offence" (*Organisationsdelikt*) received wide criticism as it criminalised, for the first time in Germany, the mere membership of a terrorist organisation.[52] It applies to any organisation of which the objectives or activity are directed towards the commission of the crimes enumerated in paragraph 1 of the norm.[53] The offence has a considerably wide scope of application, especially since it includes any support (*Unterstützung*) to a terrorist organisation and even unsuccessful advertising for such, as well as attempted instigation or assistance to it. Further, the criminal conduct of "support" lacks any further concretisation and can thereby amount to any kind of support, such as providing food to terrorists. Similarly, "support" might also include support of the defence lawyer; such support might, under different circumstances, be completely legal. To avoid such undesirable results, § 129a *StGB*

[48] For a thorough discussion of the new provisions, see Riess (1975).

[49] *Bundesverfassungsgericht*, Decision of 21 January 1976 – 2 BvR 941/75, *BVerfGE* 41, 246 = *NJW* 78, 413 = *JZ* 76, 763-767.

[50] "*Wenn aber der Angeklagte, statt von seinem Recht auf Anwesenheit Gebrauch zu machen, sich selbst der Möglichkeit seiner persönlichen Teilnahme an der Hauptverhandlung begibt, so wird er in seinen Grundrechten nicht dadurch verletzt, daß die Hauptverhandlung in seiner Abwesenheit stattfindet*." (Ibid. at para. 13).The Judgment was criticised by Grünwald (in *JZ* 76, 766-773, Anmerkung zu BVerGE 41, 246), because the judges claimed that the maintenance of a functioning criminal justice was an element of the rule of law (*Rechtsstaatsprinzip*) (ibid. at 772). Grünwald found that the rule of law was perverted if it was instrumentalised to legitimate the execution of state power in the interest of criminal prosecution (ibid. at 773). However, it should also be noted that the German Federal Court of Justice (*Bundesgerichtshof, BGH*) interpreted the provision of § 231b *StPO* restrictively, in view of Art. 103(1) *GG*, by deducing that the norm only allowed to continue the trial with disregard to the defendant's capacity to follow the proceedings, but that it did not empower the authorities to keep the accused away from trial against his will in case he was potentially or certainly unable to follow proceedings. (Collection of the Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungssammlung des Bundesgerichtshofs in Strafsachen*, in the following: *BGHSt)* (Vol.) 26, 288 = *NJW* 1976, 116 = *JZ* 1976, 763) Vogel deduces from this interpretation that the general duty to attend the trial is reduced to a mere right of presence. He therefore argues that it is not at all appropriate to speak of depriving the accused of his right to be present. (Vogel (1978), at 1225).

[51] *Gesetz zur Änderung des Strafgesetzbuches, der Strafprozessordnung, des Gerichtsverfassungsgesetzes, der Bundesrechtsanwaltsordnung und des Strafvollzugsgesetzes vom 18. August 1976*, Official Gazette (*Bundesgesetzblatt, BGBl.*) I, at 2181 (also referred to as the Anti-Terror Act (*Anti-Terror-Gesetz*), the Anti-Terrorists Act (*Anti-Terroristen-Gesetz*) or the Anti-Terrrorism Act (*Anti-Terrorismus-Gesetz*). A very critical and frequently cited comment on the Act, as well as on previous anti terrorism legislation, is given by Dahs (1976) ("The Anti-Terrorists Act – a Defeat for the State governed by the Rule of Law").

[52] See Cobler (1984); Giehring (1983); Rebmann (1981).

[53] Rau (2004), at 347, 348.

should be interpreted very restrictive in all cases.[54] Besides the issue of lack of certainty of the provision, it has been criticised for being primarily symbolic.[55]

However, the most problematic issue of this new provision is that it has considerable side effects on the law governing criminal procedure. Many special procedures are now directly linked to § 129a *StGB*. Thus restrictions to the defence are facilitated in cases where the concerned person is suspected of being involved in a criminal activity related to § 129a *StGB*.[56] E.g. when an offence under § 129a *StGB* is concerned, the written communication between the accused and his defence lawyer becomes subject to judicial control, §§ 148(2), 148a *StPO*.[57] With these regulations, the the fundamental right of the accused to effective defence is substantially undermined, as open correspondence is indispensable for the necessary relationship of trust between the accused and his solicitor.[58] Additionally, in the framework of the second Act against terrorism, the exclusion of defence lawyers was further extended.[59] The legislative motive for the extension was to try and comprehensively prevent conspiring behaviour of defence lawyers. Dahs states that the new regulations are close to a breach of the Constitution,[60] while lacking, at the same time, both consistency and effectiveness.[61] Although the regulations aim to target the conspiring defence lawyer, they harm especially the truthful lawyer and the accused.[62]

The application of § 148(2) *StPO,* which allows for the control of correspondence during detention on remand, was challenged before the ECtHR in the case of *Erdem v Germany.*[63] The applicant, Selahattin Erdem, was arrested on the German border on suspicion of being a member of the Kurdistan Workers' Party (PKK) (§ 129a *StGB)* and falsifying documents. In Strasbourg he complained of the length of his detention (five years and eleven months) relying on Art. 5(3) ECHR (right to be brought promptly before a judge) and Art. 6(2) (presumption of innocence) of the Convention. Relying on Art. 8 (right to respect for correspondence), he further complained about the interception of his correspondence with his lawyer. The Strasbourg Court considered that the grounds cited by the German courts in their decisions to justify the prolonged detention had not been sufficient. The Court held that there had been a violation of Art. 5(3). However, with respect to Art. 8, the Court dismissed the application. The Court held that the interference complained of was not disproportionate in relation to the legitimate aims pursued, with regard being given to the threat presented by terrorism in

[54] Ibid.
[55] See Plottnitz (2002); Cobler (1984); Rebmann (1981).
[56] Ibid.
[57] These restrictions also apply to convicted prisoners, cf. § 29 of the German Penitentiary Act (*Strafvollzugsgesetz, StVollzG*).
[58] Drawn by the fear that the disclosure of certain facts to the authorities might jeopardize the accused's chances during trial, the accused will omit to inform his lawyer of vital facts which might be crucial for an effective defence. (Dahs (1976), at 2150).
[59] The exclusion is extended also to other trials concerning an accusation of § 129a *StGB*, cf. § 138a (5) *StPO*.
[60] Art. 12 of the German Constitution protects freedom of profession (*Berufsfreiheit*).
[61] Dahs (1976), at 2149.
[62] Ibid. at 2151.
[63] Judgment of 5 July 2001 (application no. 38321/97).

all its forms, to the safeguards attending the interception of correspondence in the instant case and to the margin of appreciation left to the state. In consequence, the Court found that Art. 8 ECHR had not been violated.

3.3.1.5. "German Autumn" (*Deutscher Herbst*) and Culmination of the Fight against the RAF: the Act Governing Incommunicado Detention

When the RAF abducted Hanns-Martin Schleyer in the autumn of 1977, the atmosphere became very tense in Germany. Politicians were under significant public pressure to act. The life of the President of the Employer's Association was at stake. With the previous killings of Siegfried Buback[64] and Jürgen Ponto[65] the same year, the RAF had sufficiently shown their readiness to sacrifice human lives. There existed suspicion that the detained RAF members were directing and controlling the abduction. As a consequence, the imprisoned members were completely isolated from the outside world in order to prevent communication with any potential collaborator. In the absence of any legal basis, the legality of this measure was extremely questionable. When the Higher Regional Court (*Oberlandesgericht*) of Frankfurt allowed applications of prisoners against the measure,[66] the Government saw the necessity to rapidly enact a legal basis for the on-going practice.[67] It should be noted that the German Federal Court of Justice, the *Bundesgerichtshof,* considered that the measure was justified under § 34 *StGB* (necessity as a ground for justification or excuse).[68] This was not the first time § 34 *StGB* served to justify otherwise unlawful governmental actions.[69] It remains highly questionable whether § 34 *StGB* in fact even applied in the case of isolation detention.[70]

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[64] Attorney General Buback was killed by the RAF in April 1977.

[65] The banker and chairman of the Dresdner Bank board of directors, Jürgen Ponto, was killed in a kidnapping attempt carried out by the RAF on 30 July 1977.

[66] This was argued on the grounds that concrete indications for a collaboration of the defence lawyers with their clients were missing, see *Oberlandesgericht* Frankfurt, Decision of 16 September 1977, *NJW* 1977, at 2177.

[67] The Government gave three main reasons for the necessity of this law: (1) The use of the underlying principle of the justifying state of emergency under § 34 *StGB* should not be of longer duration than absolutely necessary, (2) a uniform application of the measure within the Federal Republic of Germany was only possible by legislative act, and (3) The situation where in particular cases judicial decisions and the actions of the executive branch were not in conformity had to be terminated as soon as possible. (Böttcher (2003) EGGVG, Vor § 31, para. 6).

[68] *BGHSt* 27, 260.

[69] Other examples are the so-called eaves-dropping affair on the nuclear physicist Traube (see Der Spiegel (1977): *Verfassungsschutz bricht Verfassung – Lauschangriff auf Bürger T.*, as well as the secret recordings of conversations between prisoners and their defence lawyers in the prison of Stuttgart-Stammheim, see Rudolphi (1979), at 4.

[70] The application of this justifying norm requires an imminent danger for a number of enumerated strong legal interests (like life and limb, physical integrity…) and that, when balancing the interest at risk against the interest which will be restricted by the relevant action, that the first one will substantially (*wesentlich*) prevail. When weighing the interest in the given case, life and limb of the abducted person, against the interests of the detainees, right to free communication with the defence, to effective defence, to physical and psychological integrity, a substantial prevailing of the one over the other is not at all evident. Further, there is an (on-going) academic debate whether § 34 *StGB* can serve at all to justify encroachments from the public authorities, or whether it is only applicable to private persons. (See Böttcher (2003), margin no. 10, with further references (critically: Amelung (1978),). However, the *Bundesgerichtshof* held in its decision of 23.9.1977 that in the present case, the human life, the highest interest of our justice system, was at stake. Balanced against the only temporarily restricted right to free defence, the latter one was much less important (*BGHSt* 27, 260, 262). Similarly, the Federal Constitutional Court dismissed applications for injunctive relief that had been lodged by detainees in pre-

The very legislator seems to have doubted this since in extremely little time the measure was legalised. The so-called ***Blockage of Contact Act*** *("Kontaktsperre-Gesetz",*[71] §§ 31 et seqq. of the German Introductory Act to the Judicature Act - *Einführungsgesetz zum Gerichtsverfassungsgesetz, EGGVG)* was adopted in the record time of only three days.[72] The Act allows for the temporary complete isolation of prisoners, including isolation from their lawyers, for a period of up thirty days, prolongable as often as desired as long as the legal conditions are still met.

The Professional Group of Judges and Prosecutors of the Department of Justice of the German Trade Union for Public Services, Transport and Traffic (*Gewerkschaft öffentliche Dienste, Transport und Verkehr, ÖTV*) declared several objections to this new Act primarily for undermining the rule of law.[73] Thus, it was argued that the legally guaranteed right to a defence lawyer in every moment of the procedure[74] was completely undermined, especially since the law also applied to remand detention.[75] The judges and prosecutors further found that the Act contradicted the case-law of the *Bundesverfassungsgericht*, which had reiterated in its Decision of 8 October 1974 that the accused could call his defence attorney at any time of the procedure.[76] Further, the Law undermined the authority of judges who were in principle exclusively in charge of any issues concerning prolonged deprivation of liberty of those non-convicted. Under the new regime, executive authorities, not judges, were competent to order isolation detention and make decisions related thereto. In addition, the right to be heard as guaranteed under Art. 103(2) *GG* was violated, since legal remedies against the isolation measures were extensively carried out without the detainee's or his lawyer's participation. Thereby, the guarantee of effective legal protection (*effektiver Rechtsschutz*, Art. 19(4) *GG*) was also undermined. Finally, the judges and prosecutors doubted that the new law was compatible with human dignity (Art. 1 *GG*).[77] Besides these constitutional doubts, the Act reflects a strong mistrust towards the profession of defence lawyers. This is regrettable as the misconduct of a small number of defence

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trial detention, on the grounds that the negative consequences of suspending the contact blockage (that the terrorist kidnappers would receive additional indications and orders from the imprisoned *RAF* members that would present an additional threat to the life of the abducted persons and that would considerable hamper the authorities' efforts to free the abducted person) would prevail over the temporary restrictions of the rights of the defence. The fact that this general measure concerned indiscriminately all defence lawyers was considered as unavoidable and had to be temporarily accepted (Judgment of 4.10.1977, *BVerfGE* 46, 1).

[71] Literally: Act relating to the blockage of contact.

[72] A bill was presented by the factions of the political parties represented in the Federal Parliament, the *Bundestag* (CDU/CSU, SPD, FDP), on 28th September 1977. The bill was discussed by the *Bundestag* the very same day (in first reading). The next day, the committee on legal affairs (*Rechtsausschluss*) read and modified the draft. Their version was adopted by second and third parliamentary reading on 29th September with high majority. The Federal Council of Germany, the *Bundesrat (*this organ serves the purpose of representing the different *Länder* governments, thus the interests of the federal states [as opposed to the interests of the federation attended by the *Bundestag*]) gave its consent one day later. The Act was promulgated on 1 October and entered into force the following day.

[72] Böttcher (2003), paras. 7-9.

[73] Fachgruppe Richter und Staatsanwälte (ÖTV Berlin) (1978).

[74] § 137(1)(1) *StPO*.

[75] The situation was improved however in December 1985 when legal aid was granted to the prisoner by assigning him or her a contact person to attend his or her legal interests, cf. now § 34a *EGGVG*.

[76] *BVerfGE* 38, 105, 111.

[77] For details on these arguments, cf. Fachgruppe Richter und Staatsanwälte (ÖTV Berlin) (1978).

lawyers during the times of the RAF caused a general suspicion towards the profession of defence lawyers as a whole.[78]

The Act has only been applied once: in the case of the Schleyer-abduction, the very case for which it had been created. Nonetheless, it has never been repealed. In December 1985, a new provision was added, § 34a *EGGVG*, which allows a contact person (a lawyer) to be assigned to the detainee, thus considerably strengthening the right to effective defence. Although the *Kontaktsperre* regime was of almost no practical application, it was further extended in 2006, through the Act of 19 April, and since then can not only be applied to terrorist suspects and convicts, but also to members of a criminal organisation (§ 129 *StGB*), cf. the new § 38a *EGGVG*.[79]

With account of the exceptional situation, the *Bundesverfassungsgericht* dismissed constitutional complaints against the *Kontaktsperregesetz* declaring it compatible with the German Constitution.[80] Similarly, the European Commission for Human Rights dismissed the applications of some concerned prisoners as being manifestly ill-founded.[81]

3.3.1.6. Other amendments to increase effectiveness of investigations

With the ***Act for the Amendment of the Code of Criminal Procedure of 14 April 1978[82] (the Raid Act or Razzia-Gesetz)***, the legislator further extended the competences with regards to raids carried out by both the prosecution and police authorities. The Act was based on an emergency catalogue adopted in the Committee on Legal Affairs (*Rechtsausschuss*) on 19 October 1977. It was designed as a preliminary Act for the realisation of particularly urgent legislative measures, after the experiences of the terrorist incidents concerning Buback, Ponto and Schleyer.[83] Previous events related to terrorism had indeed come thick and fast: Hanns-Martin Schleyer had been abducted and killed by the RAF one day before, and the German Lufthansa aircraft "*Landshut*" had been hijacked by Palestinian terrorists who were overthrown by German special police units (*GSG 9*) in Mogadischu, Somalia. In the very same night as the above events, the three RAF prisoners held in the prison of *Stuttgart-Stammheim*, Andreas Baader, Gudrun Ensslin, and Jan-Carl Raspe, committed a collective suicide,[84] while

[78] Kühne (2006), at 130.
[79] Concerning the conditions, the further historical and political circumstances of the Law, as well as its compatibility with the ECHR and with German constitutional law, see Oehmichen (2008).
[80] Decision of 1 August 1978, *BVerfGE supra* (note 20). A recent commentary on this Decision ("which showed how the Court accepted a partial state of exception") was presented by: Henne (2007).
[81] *G.Ensslin, A.Baader & J.Raspe v FRG*, Commission, Decision of 8 July 1978 (joint application nos. 7572/76, 7586/76 and 7587/76) at 112.
[82] *BGBl.* I, at 497.
[83] Vogel (1978), at 1221.
[84] The theory of a collective suicide has been confirmed later by other RAF members, e.g. Peter Jürgen Boock. Also, other evidence goes in this direction (for instance, in previous communications, the prisoners discussed already the possibility of collective suicide, as the ultimate terrorist act). However, some radical leftists (among them Irmgard Möller who still claims that she was stabbed by an unknown person in the very night) still defend the theory that the terrorists did not kill themselves, but were murdered instead. In its documentary on the RAF of Autumn 2007 (Aust and Büchel (2007b), and Aust and Büchel (2007c)), the authors of the German magazine SPIEGEL, Aust and Büchel, found new facts which support the assumption that the prisoners were in fact eavesdropped by German secret services in

the remaining RAF prisoner Irmgard Möller was found in her cell severely injured with four stabbings in her chest. As a result of these events, the urge to adopt new anti-terror laws was once again prevalent: Thus, new investigative competences were created for the police and the rights of the defence were further restricted.[85]

3.3.2. The 1980's: Privacy constraints and leniency

3.3.2.1. Restraints of privacy and the Bundesverfassungsgericht

In 1983 an Act was passed concerning a population census (the ***Population Census Act*** - *Volkszählungsgesetz*)[86] which was subsequently subjected to constitutional review.

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the very night in which they were killed. If this assumption should prove true, it would be probable that German secret services were aware of the suicide plans, but did not intervene in the crucial moment.

[85] The following amendments took place (and are still in force):
By virtue of the new § 103 (1)(2) *StPO*, police can search not only suspicious apartments (i.e. apartments of suspects or apartments where suspicion exists that suspects are hiding there), but searches may be extended to the whole building, provided that there are facts supporting the suspicion that the accused stays in this building (See also § 105 and 108(1)(3) *StPO*, related to this new provision). Further, the new § 111 *StPO* has created new competences for the police: the installation of control checks (*Kontrollstellen*), in the case of crimes of § 129a *StGB*, one of the crimes enlisted in that provision, or a crime under § 250(1)(1) *StGB*. At these control checks, everybody is obliged to reveal his or her identity to the authorities and to be searched. The identity check has been further regulated in § 163b *StPO* (As to systematic and constitutional problems connected to this new provision, see Sangenstedt (1985)). As Rudolphi points out, these amendments might be justified in singular cases where the suspects were under the strong suspicion of having been directly involved in terror acts. They are however hardly sustainable and contravene the (constitutional) principle of proportionality when these coercive measures are applied in cases where the accused is suspected of mere support or propaganda activities of a terrorist organisation (Rudolphi (1979), at 3). The reform has also introduced more restrictions on the defence. The level of suspicion has been reduced, for terrorist lawyers, in the case of § 138a *StPO*: While in a "regular" exclusion of the defence lawyer, an increased level of suspicion is necessary (strong suspicion or *dringender Tatverdacht*), thus a level stronger (either "*dringender Tatverdacht*" [strong suspicion], or at least "*hinreichender Tatverdacht*" [sufficient suspicion] were required by § 138a(1) *StPO*, while "*einfacher Tatverdacht*" [simple suspicion] was required by § 138a(2) *StPO*) or equal to the one necessary for issuing an indictment (for an indictment, only "sufficient suspicion" [*hinreichender Tatverdacht*] is required, § 203 *StPO*), a lower level of suspicion is required in terrorist cases: in the situation where the accused is suspected of committing a terrorist offence as criminalised under § 129a *StGB*, it suffices if "certain facts motivated the suspicion" (*bestimmte Tatsachen begründeten den Verdach*t) that the lawyer had collaborated with the accused, thus a simple level of suspicion (*einfacher Tatverdacht*) sufficed, cf. § 138a (2) *StPO* (See Weitere Maßnahmen des Gesetzgebers zur Bekämpfung des Terrorismus (1978)). Further, the norm was no longer limited to a certain gravity of the offence in question (before, a certain minimum punishment was required). Moreover, the new § 148(2) third sentence, *StPO*, now regulates that in the case of imprisoned terrorist suspects on remand (*Untersuchungshaft*), special barriers (separating glass panels) are to be provided when suspected terrorists talk with their defence lawyers, so that items cannot be handed over. Finally, the written communication with the defence lawyer, which was already to be controlled by the judge in cases of remand detention (*Untersuchungshaft*), see § 148 (2), second sentence, *StPO*, is now also subject to judicial control in the case of terrorist convicts, cf. § 29 *StVollzG*. This means that in all cases where a prisoner has been convicted under § 129a *StGB* (now, also: § 129b *StGB*), or where investigations have been instituted against him for suspicion of this offence, his mail with his defence lawyer will be controlled by the competent judge. However, during preliminary investigations, the control must be ordered by the judge (Calliess and Müller-Dietz (2005), at 287 (= § 29, margin no. 6). By the Act Amending the Criminal Procedure of 27 January 1987, both oral and written communication control has been abolished in those cases where the prisoner is granted certain privileges ("*Vollzugslockerungen"*, § 11 *StVollzG*), i. e. when he is authorised to leave the prison for certain periods of time, or when he is in an open penitentiary facility ("*offener Vollzug*") (Calliess and Müller-Dietz (2005), at 287 (= § 29, margin no. 6).

[86] *Gesetz über eine Volks-, Berufs-, Wohnungs- und Arbeitsstättenzählung, 1983, of 25 March 1982, BGBl.* I, at 369.

The Decision by the *Bundesverfassungsgericht* of 15 December 1983, declaring several provisions of the Act as unconstitutional, would become a milestone for German legal history (the constitutional 'Sermon of the Mount of data protection'),[87] and be remembered as "the Census Decision" (*Volkszählungsurteil*).[88] In this decision, the Court reiterated the right to privacy which it specified as the so-called right to 'informative auto-determination' (*Recht auf informationelle Selbstbestimmung*), as enshrined in the general 'personality right' (*allgemeines Persönlichkeitsrecht*) deriving from Art. 1, read in conjunction with Art. 2, of the German Constitution. The Court held that any limitation of the right to privacy was only constitutional when a legal basis for this limitation existed in which the concrete purposes of the limitation were explicitly indicated. As we shall see, the Decision had far-reaching consequences for criminal investigations and led to important legislative changes.[89]

The terrorist activity of the mid-1980s[90] led to the adoption of three new Acts against terrorism; the ***Act Amending the Criminal Code and the Act on Assemblies*** (*Gesetz zur Änderung des Strafgesetzbuches und des Versammlungsgesetzes*) of 18 July 1985,[91] the ***Passport Act*** and ***Act amending the Code of Criminal Procedure*** (*Paßgesetz und Gesetz zur Änderung der Strafprozessordnung*) of 19 April 1986,[92] and the ***Act for the Fight against Terrorism*** (*Gesetz zur Bekämpfung des Terrorismus*)[93] of the same year.

The first Act served to tighten the applicable criminal law during demonstrations by criminalising the carrying of defensive arms or the wearing of items which impeded identification (e.g. mummery) in the context of violent mass meetings. Criticisms of the Act were numerous as it restricted the constitutionally guaranteed freedom of assembly. Also, the offences were criticised for not meeting the requirements of the principle of certainty (e.g. 'defensive arms', *Schutzwaffen*, were not further defined).[94] Further, there were dogmatic objections against the provisions.[95]

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[87] Schneider (1984).
[88] *BVerfGE* 65,1 (1 BvR 209, 269, 362, 420, 440, 484/83).
[89] See, in particular: Rogall (1985).
[90] On 1 February 1985, the chef of the German *Motoren- und Turbinen Union* (Motor and Turbines Union), Dr. Ernst Zimmermann was killed by the RAF in Gauting; several bomb attacks took place in 1985 (on 22 April 1985 at the company Siemens in Düsseldorf, 27 April 85 at a building of the International Monetary Fund in Paris, and 29 April 85 at the Deutsche Bank in Düsseldorf, at the *Gesamtverband der Metallindustrie* (Association of Metal Industry) in Cologne, and at the company Höchst in Cologne, on 5 May 1985 at a NATO pipeline in the Federal State of Hesse); on 8 August 1985, the US soldier Pimental was assassinated; in the night of 4/5 April 1986, the Berlin Discotheque La Belle was bombed; on 9 July 1986, Professor Karl Heinz Beckurts and his driver were assassinated; on 25 July 1986 the company Dornier at the Lake Constance was attacked; on 10 October 1986, the assistant secretary of State, Gerold von Braunmühl, was assassinated in Bonn.
[91] *BGBl.* I, at 1511.
[92] *BGBl.* I, at 537 et seqq.
[93] *BGBl.* I, at 2566.
[94] See Verschärfung des Demonstrationsstrafrechts (1985); Kühl (1985).
[95] Mummery as such (which may be necessary in the case of people suffering from AIDS or cancer who demonstrate against being generally registered), or defensive weapons as such (which may include, for instance, protection helmets of mining union demonstrators) do not imply the use of violence, they may however encourage *others* to resort to violence. In that sense, it is however only an act of aiding or assisting (*Beihilfe)*, which will not even qualify as a criminal act unless there is an intention (mens rea) to assist others in using violence, which in most cases will not be established. Further objections can be found at Amelung, Hassemer, Rudolphi and Scheerer (1989).

The ***Passport Act*** was adopted in response to the Census Decision of the Constitutional Court reported above. This Act, by introducing § 163d *StPO,* offered police and prosecution services another tool for the investigations of terrorism.[96] Besides the introduction of automatically readable European passports, the Passport Act authorised police to store personal data for prosecution purposes (in order to permit computerised searches). In response to the Census Decision of the German Constitutional Court, the storage of personal data was thus put on a legal basis. The provision of § 163d *StPO* is called dragnet search (*Schleppnetzfahndung*), indicating that the concerned person is caught like a fish in a dragnet spread out by the police over control posts and border controls. In order to localise the searched person, police could take and store personal data of all passing people at control posts and border controls.

The ***Act for the Fight against Terrorism of 19 December 1986*** was triggered by the series of terrorist attacks that had taken place in 1985/1986,[97] in particular the murder of the ministerial officer Braunmühl. It was adopted in a rush as the tenth legislative period was coming to an end.[98] In the bill proposed by the political parties CDU/CSU and FDP, a leniency programme, the so-called "*Kronzeugenregelung*"[99] was planned, which provided for the reduction of sentences or even impunity of offenders who showed willingness to collaborate with the justice and share their insider information. However, the proposal was rejected by the vast majority, including judges, lawyers, and prosecutors (except for the General Attorney who considered the leniency as a good tool in the fight against terrorism). Notwithstanding, it would be accepted in 1989.[100]

3.3.2.2. Leniency policy

The concept of a leniency programme had entered discussions already with the emergence of the RAF in the beginning of the 1970s. German legislation did not provide for general sentence reductions or exclusions for collaborating offenders,[101] but the issue had been raised in several legislative projects[102] as well as in academic writings,[103] where authors were often inspired by common law which has, in various

[96] For further details on the new provision, see Kühl (1987); Baumann (1986); Kühne (2006), at 312 et seq.
[97] See above note 89.
[98] Kühl (1987), at 743 et seq.; Dencker (1987b).
[99] Literally: 'crown witness regulation'. The notion described an informer or 'grass', a witness turning Queen's evidence.
[100] See below, 3.3.2.2.
[101] However, under German procedural law, § 153e(1)(2) *StPO* provides since over thirty years for the possibility to close proceedings of offenders who have committed the most serious offences against state security, if they reveal themselves and their environment, after their act has been discovered. See Kühne (2006), at 463.
[102] Three draft bills of the Land North Rhine-Westphalia (Prints of the *Bundestag* [*Bundestag-Drucksachen, BT-Dr]* 7/3734), of the Federal Government (*BT-Dr 7/4005*) and of the factions of the political parties SPD and FDP (*BT-Dr 7/3729*) were introduced in the legislative process in 1975, all providing for a leniency program in the case of especially dangerous criminal organizations, i.e. terrorist organizations.
[103] Baumann (1975)Jung (1974); Meyer (1976)

forms, a longer tradition of leniency.[104] In practice, however, it seems that leniency already took place: Thus, after the RAF member Ruhland pleaded guilty and had comprehensively confessed, he received a comparably mild punishment and subsequently acted as a witness in a series of trials.[105] It is true that the German criminal law already offered covert possibilities to apply leniency *de facto*. For instance, § 129 (6) (1) *StGB*[106] allows the judges to decide not to punish or to mitigate the sentence if the actor voluntarily and seriously tried to prevent the continuation of a criminal or terrorist organisation or to prevent the commission of criminal acts.[107] However, the principle of legality reigning in German law generally seemed to preclude at least explicit mitigation of punishment in exchange for collaboration with the justice system.[108] In spite of this legal restraint, the so-called 'small leniency programme' (*Kleine Kronzeugenregelung*) was introduced through the Act of 28 July 1981,[109] which provided for the possibility to mitigate or even exclude punishment for drug-related offences if the offender contributed to further clarification of fact or assisted in preventing further criminal acts.[110]

After a series of terror attacks in 1985 and 1986[111] and ensuing debates, another leniency programme (so-called 'big leniency programme' - *große Kronzeugenregelung*) was adopted in 1989, this time for offences related to terrorism, through the ***Act of 9 June***.[112]

Before, a number of criminal lawyers had raised their voice against the leniency programme proposed by the legislation of 1986, for the following reasons:

- Constitutional reasons: the impunity or mitigating punishment contravenes the rule of law (*Rechtsstaatsprinzip*) and the principle of equality
- Procedural reasons: the principle of legality and of publicity were violated
- Criminal theoretical reasons: the destabilisation of the legal order and shattering of the legal conscience
- Legal-ethical reasons: a state collaborating with severest delinquents is immoral
- Pragmatic reasons: not efficient as evidence obtained is of questionable reliability[113]

[104] See, for example, Jung (1974); Oehler (1987); Middendorff (1973).
[105] Middendorff (1973), at 1117.
[106] See also, for terrorist cases, § 129a(5) *StGB*, read in conjunction with § 129 (6) (1) *StGB*.
[107] For this and more examples of possibilities of leniency under German law as of 1988, see Bernsmann (1988).
[108] cf. § 152(2) *StPO*.
[109] *Gesetz vom 28.7.1981* (in force since 1.1.82) (*BGBl.* I, at 681).
[110] See § 31 of the German Act on Narcotics (*Betäubungsmittelgesetz, BtMG*).
[111] See above, note 89.
[112] So-called *Artikelgesetz zur inneren Sicherheit vom 9. Juni 1989, BGBl.* I, at 1059 or *Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und des Versammlungsgesetzes und der Einführung einer Kronzeugenregelung bei terroristischen Gewalttaten* (Act Amending the Criminal Code, the Code of Criminal Procedure, the Act on Assemblies, and the Introduction of a leniency programme for terrorist offences); for an overview on the Act and the leniency programme, see Hilger (1989); Jung (1989).
[113] See Amelung, Hassemer, Rudolphi and Scheerer (1989), at 79 et seq. See also the references given by Kühl (1987), at 744.

The leniency programme received considerable attention during the legislative discussions. Due to its focus on one single issue, the other regulations proposed by the Bill were insufficiently discussed and have therefore remained unknown to the public.[114] Dencker compares this situation with the Athenian statesman Alcibiades who cut off the tail of his dog so that the Athenians '*would have something to talk about…, so that they would not talk of worse things done by me'*.[115] The 'worse things' in this case were that many amendments in substantive criminal law were not discussed; for example, § 129a *StGB* was extended and its punishment was raised. New offences were created, such as § 130a *StGB* "Instruction for Criminal Offences" (*Anleitung zu Straftaten*), § 140 *StGB* "Rewarding and Approving of offences" (*Belohnung und Billigung von Straftaten*), and § 305a *StGB* "Destruction of important working tools" (*Zerstörung wichtiger Arbeitsmittel*).[116] These changes in substantive criminal law also have had large effects on the criminal procedure, as a suspicion of an offence of § 129a *StGB*, for example, is often one of the requirements to be met for the adoption of intrusive measures.[117]

It was as a result of all these debates that the adopted provision of 1989 were only of a temporary duration, initially lasting from 9 June 1989 to 31 December 1989. It was then extended until 31 December 1995 and once more until 31 December 1999. After this date it was no longer extended, because until then not a single RAF terrorist had made use of the provision.[118] In 1994 the leniency programme was further extended to organised crime.[119] The programme posed multiple problems. First, it was contrary to the principle of legality (see above).[120] In addition, it was hardly compatible with the principle of equality, as guaranteed under Art. 3 of the German Constitution, since it treated the offender who gave information differently from the one who remained silent. Moreover, the right of the accused not to give information,[121] as well as his right not to incriminate himself (*nemo tenetur se ipso accusare*) were at stake. Likewise, the principle of equality of arms could be hampered, as the programme clearly favoured the prosecution to the detriment of the defence.[122] It was even suggested that the method of motivating a witness by promising sentence reductions amounted to an abusive and therefore prohibited interrogation method (as prescribed by § 136a *StPO*).[123] Further, practical arguments spoke against this. It was doubtful whether a person would be willing to speak out against their accomplices, since this person could be exposed to life threats (in particular in the area of organised crime and terrorism).[124] To minimise the

[114] Kühl (1987), at 744; Achenbach (1987), at 299.
[115] Dencker (1987a), at 117.
[116] For more details, see Kühl (1987) at 744 et seqq., and Das Anti-Terrorgesetz (1987); Achenbach (1987)
[117] See Dencker (1987a), at 119 et seq.
[118] Mehrens and Mühlhoff (1999).
[119] This took place in the framework of the Act for the Fight against Crime (*Verbrechensbekämpfungsgesetz*) of 28 October 1994, *BGBl*. I, at 3186, by including a new section (§ 5) into the German Leniency Act (*Kronzeugengesetz, KronzG*). For a discussion on further potential extensions, as well as on arguments brought against the provisions, see Schlüchter (1997).
[120] Meyer (1976), at 27.
[121] § 55 *StPO*.
[122] Ibid.
[123] Meyer (1976), at 27.
[124] Kühne (2006), at 464.

risk, the witness needed extensive, long-term protection after giving testimony[125] which the state was not always able to provide.[126] Further, it was questionable whether a witness turning Queen's evidence was still credible and reliable. Such a witness was highly motivated to lie, in order to enjoy the privileges offered by the programme, and the motivation to incriminate his former accomplices was even greater since this was the outcome expected by the authorities.[127] To minimise such risks, the information provided by the witness turning queen's evidence should be limited to objectively controllable information.[128] Finally, the lenience programme was said to be inefficient, and by 1997 there had indeed been very few cases of its application.[129] Since 1999, the provisions have not been renewed, but offence-specific rules on witnesses turning Queen's evidence still apply. More recently, under the impression of the September 11th attacks, and the continuing lobby for the leniency programme, the Minister of Justice has presented a draft bill regulating leniency as a general rule, embedded in the sentencing statutes (§ 46 *StGB*).[130]

3.3.3. *Fin de siècle* of privacy? Combat of organised crime and terrorism combined

At the beginning of the 1990s, after the re-unification of Germany, criminal law politics also started to focus on organised crime and right-wing extremism, but terrorism remained an issue at this time. On 27 June 1993, the special anti-terror unit *GSG-9* had persecuted two suspected terrorists of the RAF, Wolfgang Grams and Birgit Hogefeld, in *Bad Kleinen*, Northern Germany. One police officer, Michael Newrzella, and Grams were shot and killed in circumstances that were less than clear.[131] The incident became a scandal as considerable defects overshadowed the securing of evidence. Grams' parents went to Court suing the German Government for the killing of their son, but neither the German Constitutional Court, nor the European Court of Human Rights confirmed their allegations that their son had been deliberately killed by the police officers.[132] On 20 April 1998, the RAF officially declared their dissolution.

Acts for the combat of organised crime were adopted in 1992,[133] 1994,[134] and 1998.[135] During this time, police observation powers were extended. A highly controversial

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[125] Ibid.

[126] The problems are discussed in more detail by Lammer (1989).

[127] See Kühne (2006), at 464. For example, in the Italian case *Brusca*,[127] several witnesses contradicted each other by blaming the other one, and thus eventually undermined completely the truth finding process. (Schlüchter (1997), at 67).

[128] Kühne (2006) ibid.

[129] For both arguments with further references, see Schlüchter (1997), at 66 et seq.

[130] Albrecht (2006). A critical comment on the proposed bill (and on the newly introduced § 129b *StGB*) is given by Maurer (2001).

[131] As the bullet entered Grams' head from very short distance, it remained unclear whether he had committed suicide, or had been illegally executed, maybe in revenge to the death of *Newrzella*.

[132] ECtHR, *Grams v Germany* Decision of 5 October 1999; *Bundesverfassungsgericht*, Decision of 17 July 1996, case 2 BvR 981/96. See also the Commentary of Wassermann (1993); DER SPIEGEL (1993): *Bad Kleinen: "Das gehört zu den Todsünden". Über Fehler in der Spurensicherung*.

[133] The first and most bulky Act introducing these measures was the ***Act for the Fight Against Illegal Drug Trafficking and other Manifestations of Organised Crime***, of 15 July 1992 (*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten*

issue was the electronic acoustic observation within homes, labelled as the 'big bugging operation' (*großer Lauschangriff),*[136] which eventually led to an amendment of the German Constitution.

Also of constitutional impact was the amendment to the Eaves Dropping Act of 1968. In June 2001 Art. 10 of the German Constitution (privacy of correspondence, posts and telecommunications) was further restricted through the amendment. At the same time, secret services procured more observation powers. Of the several intrusive measures adopted during the 1990s, only the most controversial ones, i.e. the grid search (*Rasterfahndung*), the bugging operations (*Lauschangriffe*), and the use of undercover agents and private informers, will be discussed.

*3.3.3.1. Grid search (*Rasterfahndung*)*

Grid search[137] means that police and prosecution services search certain databases containing the personal data of a large proportion of the population (mainly non suspects), by applying specific criteria that suspects typically meet. These criteria are indiscriminately applied to all personal data, and, in a second step, those persons who

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Kriminalität, *BGBl* I, at 1302. For a brief overview, see Weis (1993)). The Act was mainly directed against organised drug trafficking, as this crime had increased in recent years. Among the new investigation measures were the so-called grid search, § 98a and § 98b *StPO (Rasterfahndung*), the request for observation, § 163e *StPO* (*Ausschreibung zur Beobachtung*), the long-term observation by the police (§ 163f *StPO*), the use of technical devices (e.g. for the intervention of telecommunication) (§§ 100a-c *StPO*), as well as the use of under-cover agents (§ 110a *StPO*). These measures are discussed, from a comparative perspective, by Gropp (1993). Again, the need to provide legal bases for these intrusive measures goes back to the Census Decision of the *Bundesverfassungsgericht* of the 1980s (Gropp (1993), at 406). All these measures were particularly controversial as they constituted encroachments of the people's privacy. They had already been used in practice for some years, lacking any legal basis, and were now considered as unconstitutional, unless legally regulated. Thus not the use of these methods, but rather its legislative manifestation, setting out requirements and limitations, were new.

[134] The second Act was the Fight against Crime Act amending the G10 Act (*Verbrechensbekämpfungsgesetz*) of 28 October 1994 (*BGBl.* I, at 3186), for which the acoustic observation within private premises was again discussed, but eventually rejected (see below at 3.3.3.2.), and the leniency programme was extended to secret services. Moreover, the powers of the Federal Intelligence Service (*Bundesnachrichtendienst*) were extended, with regard to the recording of telecommunications in the course of the so-called strategic monitoring of international telecommunications, i.e. automatic monitoring independent of any suspicion (described by Kühne (2006), at 229, as "electronic vacuum cleaner") as well as the use of personal data obtained thereby and their transmission to the authorities. In this context, Kühne (ibid) remarks the apparent inefficiency of the measure, referring to a number of 13.419 faxes / telexes between July 1997 and April 1998, out of which only four were further used.

[135] *Act for the Improvement of the Fight against Organised Crime*, of 4 May 1998 (*Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität*, *BGBl.* I, at 845, in force since 8 May 1998). By this Act, the heavily discussed bugging operation within private premises (*großer Lauschangriff*) was finally adopted.

[136] See below at 3.3.3.2.

[137] A thorough overview on this instrument including a legal discussion, in English language, is given by Achelpöhler and Niehaus (2004). (The article presents actually a translation of their earlier article Achelpöhler and Niehaus (2003)). The German term "*Rasterfahndung*" was translated in Achelpöhler's / Niehaus' article as "data screening". Nonetheless, in the present study, I preferred the translation of "grid search", as this translation comes closer to the literal meaning of the word. 'Grid search' may be less intelligible, but so is '*Rasterfahndung'* for Germans unfamiliar with the concept. By translating "*Rasterfahndung*" with 'grid search', I followed the translation of Rau (2004)). "*Rasterfahndung*": a :"rastrum" (lat.) is a rake, by which disordered things can be sorted or separated. Achelpöhler and Niehaus (2003), at 49, note 1. For details on the grid search, see Kühne (2006), at 312.

meet the criteria are selected and thereby become suspects. From the perspective of the rule of law, it is problematic that, by this measure, a large number of non-suspects are investigated.[138] The measure had already been used during the times of the RAF, but only obtained an explicit legal basis in 1990, when the respective regulations were introduced into the police laws of the different federal states (thus, concerning preventive police law).[139] In 1992 a similar regulation was also introduced into the law of the federation (thus for repressive, not preventive purposes), by adding § 98a and § 98b to the Code of Criminal Procedure.

The grid search had been successfully used in the 1970s as an instrument to identify apartments and other locations used or frequented by suspected members of the RAF.[140] In the aftermath of the Census Decision of the *Bundesverfassungsgericht* a clear legal basis now became indispensable. The Constitutional Court held that the collection of data already, but also further data processing, constituted an encroachment of the right to privacy (right to auto-determination of personal data, Art. 2 *GG*) and hence need a concrete legal basis, outlining the requirements and the scope of the encroachment. As §§ 94, 160, 161, and 163 *StPO* did not meet this criteria, the use of the grid search was in fact for many years, namely until the adoption of these specific regulations, unconstitutional.[141]

The provisions adopted in the regional police laws of the *Länder* in the 1990s[142] allowed police and prosecution services to access information systems from private or public institutions[143] in order to search their databases.

Through the Act of 1992, similar provisions were included in the Code of Criminal Procedure (§ 98a, b *StPO*)[144] governing the repressive use of grid search. The grid search under this provision requires the commission of an offence of 'considerable

[138] Bäumler (2001), at 780.

[139] See, for instance, § 31 of the Police Law of North Rhine Westphalia of 1990. Until the specific provisions were adopted, police and prosecution services based the grid search on § 163 (1), § 161, § 160(1) *StPO* (regulating the prosecution's general obligation to investigate, and conferring powers to prosecution and police facilitating these investigations, including the request for information from public authorities), interpreting these provisions as a general authorisation clause.[139] If the data was not voluntarily provided, the police confiscated it, invoking § 94(1) *StPO* (providing for the confiscation of items that may be relevant evidence). Both legal bases - § 160, 161, 163 *StPO* as well as § 94 *StPO* – were insufficient to allow such an intrusive measure as the grid search. It was especially doubtful whether § 94 *StPO* sufficed as a legal basis, as the relevance of the evidence obtained by grid search was not at all certain. (Baumann (1986), at 496).

[140] Police knew that clandestine RAF members rented apartments for certain periods of time, and that they paid the bills, including electricity bills, either in cash, or not at all. Therefore, the Federal Office of Criminal Investigation (*Bundeskriminalamt, BKA*) decided to search customer data of the Hamburg Electricity Works (*Hamburgische Elektrizitätswerke*), applying the "grid" of bills paid either in cash or by the respective landlord. These data were then matched with the names registered at the town hall, in order to remove from the data the names of persons who really existed. The remaining data consisted then of 'wrong names', under which certain apartments were registered. These apartments could now be monitored with the ordinary observation methods.

[141] Rogall (1985), at 20 et seq.

[142] Except for the police laws of Lower Saxony and Schleswig-Holstein, the regional police laws provided for the possibility of a grid search. A good overview on the individual police laws is provided by Bausback (2002).

[143] E.g. credit card companies, telephone companies, social service administration, housing agencies, etc.

[144] See also the so-called *Datenabgleich* (data matching), § 98 c *StPO*, which differs from the grid search in that the source of information is not an external database, but an internal one, thus an information system based on data collected by the police or the prosecution itself.

significance' (*von erheblicher Bedeutung*) that belongs to one of certain enumerated areas of criminal law (e.g. state security, organised crime, etc.). It needs to be ordered by the judge, or, in the case of imminent danger, by the prosecutor.

The measure, which is still in force, has been criticised for violating the principle of proportionality, as the privacy of a large number of innocent people is infringed, for the sake of identifying a few suspects.[145] Moreover, the presumption of innocence is undermined if the police are authorised to carry out intrusive measures on innocent people who have not given any reason to be suspected.[146] In addition, the practical necessity of the measure is doubted: In spite of the seeming need of this legislative measure, the grid search was in fact not implemented during the years prior to September 11th 2001.[147] Nonetheless, the grid search was revived in Germany in 2001.[148]

3.3.3.2. Bugging operations

With the Act of 1992 the new §§ 100c, 100d *StPO* offered the possibility of technical (optical and acoustical) observation to fight organised crime, but only in public[149] places. These provisions were known as the 'small bugging operation' (*der kleine Lauschangriff;* literally: 'the small eavesdrop attack'), while the 'big bugging operation' (*der große Lauschangriff*), which included the possibility also to record the words spoken within private rooms, was discussed, but finally rejected. Only two years later, the 'big bugging operation' was discussed again during the negotiations for the ***Act for the Fight against Crime*** (*Verbrechensbekämpfungsgesetz*), of 28 October 1994,[150] but eventually collapsed due to constitutional obstacles.[151] The planned extension of the intelligence services' powers in this field was subject of a constitutional complaint lodged in November 1995 with the Federal Constitutional Court. The applicants alleged that certain provisions of the Fight against Crime Act went against their fundamental rights, notably the right to secrecy of telecommunications (Art. 10 of the German Constitution), the right to self-determination in the sphere of information (Art. 2(1) and Art. 1(1) *GG*), freedom of the press (Art. 5(1) *GG*) and the right to effective recourse to the courts (Art. 19(4) *GG*). In its judgment of 14 July 1999, the Federal Constitutional Court partly allowed the first applicant's constitutional complaint, holding that certain provisions of the Fight against Crime Act were incompatible or only partially compatible with the principles laid down in the German Constitution.[152] It fixed a

[145] Schäfer (2003a), at 271 et seq; Albrecht (2006), at 16.
[146] A thorough analysis as to the legality of one type of these measures, § 98c *StPO* (Datenabgleich), where the collection of personal data to be searched is not provided by (external) public or private institutions, but by the police itself, is offered by Siebrecht (1996).
[147] See the Decision of the *Bundesverfassungsgericht*, case 1 BvR 518/02, at 4; see also Lisken (2002), at 515.
[148] See below 3.4.3.
[149] Private rooms were then protected under Art. 13 of the German Constitution, which precluded any intervention within private premises.
[150] Act for the Fight Against Crime, *BGBl*. I, at 3186, in force since 1 December 1994.
[151] See, in particular, Art. 13 of the *GG*, which protects the inviolability of the home. For a discussion on the constitutional objections, see Raum and Palm (1994).
[152] The Federal Constitutional Court found that in its present version, § 3(4) of the Act was incompatible with Art. 10 and Art. 5(1), second sentence, of the Constitution. It found that the provision did not contain sufficient safeguards to guarantee that personal data which were not destroyed or deleted as being

deadline of 30 June 2001 for the legislature to bring the situation into line with the Constitution. On 29 June 2001 a new version of the G-10-Act entered into force[153] and the G 10 Act in its version as amended by the Fight against Crime Act of 28 October 1994 ceased to apply. However, whether the amended G-10-Act was constitutional has again been subject to dispute, since besides the amendments required by the Constitutional Court, other provisions have been added, which allow for the interception of international telecommunications in situations not considered under the previous regulation.[154]

The Fight against Crime Act of 1994, as interpreted by the *Bundesverfassungsgericht*, was challenged before the European Court of Human Rights in *Weber & Saravia v Germany*.[155] The applicants claimed that certain provisions of the Act violated their right to respect for their private life and their correspondence as protected by Art. 8 of the Convention. They also relied on Arts. 10, 13, ECHR. The Strasbourg Court dismissed all applications, as it considered the interferences with Arts. 8, 10 and 13 were justified.

The legislator eventually allowed the technical optical or acoustical observation inside private houses in 1998. The amending Act to the *StPO* was called the ***Act for the Improvement of the Fight against Organised Crime*** of 4 May 1998.[156] In order to be able to adopt such a provision, the legislator not only amended provisions of the Code of Criminal Procedure (§§ 100c, d *StPO*), but it also changed Art. 13 of the German Constitution, which guarantees the inviolability of the home.[157] The severity of this change becomes clear in view of Art. 79 of the Constitution, under which amendments of the Constitution require the majority of two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. The German Constitution is therefore very rarely amended. In spite of this foresighted amendment, the Constitutional Court still found in its Judgments of 3 March 2004 that the respective provisions (§§100c, d *StPO*)

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unnecessary for the purposes of the Federal Intelligence Service would be used only for the purposes which had justified their collection. Furthermore, the provision also failed to comply with the identification requirements flowing from Art. 10 *GG*. In addition, there were insufficient safeguards to guarantee that the Federal Intelligence Service would only use such data as were relevant for the dangers listed in § 3(1). Such safeguards should also ensure that the Federal Intelligence Service would take into account the important concerns of non-disclosure of sources and confidentiality of editorial work as protected by the freedom of the press under Art. 5(1) of the Basic Law. The court ruled that, pending the entry into force of legislation in compliance with the Constitution, § 3(4) was to be applied only if the data were specially marked and were not used for purposes other than those listed in § 3(1). (cited from the Judgment of the ECtHR, *Weber & Saravia against Germany*, Decision of 29 June 2006 (application no. 54934/00), at para. 23).

[153] *Gesetz zur Neuregelung von Beschränkungen des Brief-, Post- und Fernmeldegeheimnisses*, of 26 June 2001, *BGBl.* I, at 1254, 2298, amended by the Act for the Combat of Terrorism (*Terrorismusbekämpfungsgesetz*) of 9 January 2002 (*BGBl.* I, at 361).

[154] Gusy (2005), at 1017, with further references.

[155] *Weber & Saravia against Germany*, Decision of 29 June 2006 (application no. 54934/00).

[156] *Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität (VerbBekOrgKG*), *BGBl.* I, at 845, in force since 8 May 1998.

[157] This was done by the Act Amending Art. 13 *GG* (*BGBl.* I, No. 19), which came into force on 26 March 1998.

were unconstitutional,[158] and that the legislator had to restore the constitutional situation by 30 June 2005, at the latest.[159] The Court held that eavesdropping on private premises complied, in principle, with constitutional requirements, but that statutory requirements needed to ensure absolute protection of the core of private communication, which the respective provisions failed to guarantee. The German legislator reacted and amended the respective provisions, taking the requirements set out by the Constitutional Court into account.[160] Besides the constitutional issue, it is still controversially being discussed whether the bugging operations can be considered as useful and reasonable also from a criminalistic perspective.[161] Kühne[162] raises several doubts. In practice, mafia bosses will evade the measure of eavesdropping, by simply discussing sensitive information outside their homes. Moreover, the association with eavesdropping practices of totalitarian states does not particularly advertise an extensive application of the measure.

*3.3.3.3. Undercover agents (*Verdeckte Ermittler*)*

Undercover agents are police officers who investigate under a different identity, cf. § 110a (2) *StPO*.[163] Their false identity should enable them to infiltrate criminal gangs and organised criminal networks in order to procure evidence that would not be obtainable with traditional methods. The undercover agent is authorised to approach other people and to enter private premises under disguise. He may deceive others as to his true identity. As in the case of the grid search, an offence of 'considerable significance' must have been committed to warrant the use of an undercover agent. The use of the undercover agent requires, in principle, only the consent of the public prosecutor.[164] The disputable question whether the agent shall be allowed to commit certain 'typical' crimes of the milieu, in order to remain unsuspicious, has deliberately not been regulated by the legislator, with the consequence that the commission of crimes remains illegal for the agent.[165] The use of undercover agents encounters several legal problems, such as the circumvention or neutralisation of the basic rights of suspects (e.g. the right to remain silent, the right not to incriminate oneself).[166] § 110c *StPO* allows the undercover agent to enter private premises, provided that the owner of

[158] *Bundesverfassungsgericht*, Judgments of 3 March 2004, 1 BvR 2378/98 and 1 BvR 1084/99, NJW 2004, 999.
[159] Potential consequences of this Judgment are contemplated by Warntjen (2005).
[160] See Act of 24 June 2005, *BGBl*. I, at 1841. See also Kühne (2006), at 302 et seq.
[161] Ibid. at 305, with further references.
[162] Ibid.
[163] They are to be distinguished from private infomers (*V-Personen)*, i.e. private persons who can also act under a different identity for the purpose of helping the police, by provoking crimes or infiltrating criminal groups. Their use is not regulated by statute, and § 110a(2) *StPO* cannot be applied in analogy (*BGHSt* 41, 42). Nonetheless, the German Federal Court of Justice accepted the use of private informers (*BGHSt* 41, 42). This is worrisome, since police men also can act as private informers, and thereby evade the restrictions provided under § 110a(2) *StPO* (Kühne (2006), at 307).
[164] However, if the undercover agent investigates against a certain determined suspect, or if he needs to enter private premises, the judge also needs to consent to the measure.
[165] Gropp (1993), at 421.
[166] Albrecht (2006), at 19.

the home consents. This provision is also problematic with respect to Art. 13 of the German Constitution (inviolability of the home).[167]

The necessity of legislating for the use of under cover agents was discussed by the European Court of Human Rights in the Case of *Lüdi*.[168] While the European Commission considered the actions of the under cover agent as interfering with the right to privacy and thus required a special justification, pursuant to Art. 8(2) ECHR, the Court did not consider the right of Art. 8 to be violated.[169] Notwithstanding, in *Teixeira de Castro*, the Court found that the use of undercover agents as *agents provocateurs* constituted a violation of Art. 6(1) ECHR.[170] However, the German Federal Court of Justice was of the opinion that these principles did not apply to German law, since the European Court left it up to the discretion of the Member States how to avoid a violation of the Convention.[171] Yet this logic cannot be applied here: In the case of *Teixeira*, the Strasbourg Court held that the violation of a provision under the Convention brought about a concrete legal consequence, and this legal consequence directly derived from the Convention and not from national law. Therefore, if Germany had been the respondent, the Strasbourg Court would have deduced the same legal consequence.[172] In addition, the inadmissibility of *agents provocateurs* was also stated in *Vanyan v Russia,*[173] where the Court held that "such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined."[174]

One of the reasons why other countries reject the idea of undercover agents is the high risk for the agent himself. Hence, Denmark did not want to expose their police men to such an extreme risk, which, in some cases, can amount to risking one's own life.[175]

3.4. Post September 11th Anti-Terror Legislation

The events of September 11th had a great effect on the German legislator. Within the subsequent six months, two large legislation packages were passed, which were

[167] If it does not encroach Art. 13 *GG* at all, the provision may be considered as constitutional. However, if it does encroach Art. 13 *GG*, such encroachment is not constitutionally justified, for it does not comply with the requisites of Art. 13(2) *GG*. Moreover, the obligation to cite affected fundamental rights, enshrined in Art. 19 GG, is then violated, since § 110c *StPO* makes no reference to a potential effect on Art. 13 *GG* (Schäfer (2003b), at 666 et seqq.)

[168] ECtHR, Judgment of 25 June 1992, *Lüdi v Switzerland*, application no. 12433/86.

[169] Gropp (1993)at 422.

[170] In this case, two undercover agents had asked the applicant, *Teixeira de Castro*, to sell them 20 grams of heroin. When the applicant obtained the heroin and was about to sell it to them, they revealed their identity as police officers and arrested him. The Strasbourg Court held that *"the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of Article 6 § 1"* (ECHR, Judgment of 9 June 1998, *Teixeira de Castro v Portugal*, application no. 44/1997/828/1034, at 39).

[171] Decision of 18 November 1999, case no. 1 StR 221/99.

[172] Kühne (2006), at 309.

[173] Judgment of 15 December 2005 (application no. 53203/99).

[174] Ibid. at 47.

[175] Gropp (1993) at 429.

labelled as Anti-Terror-Packet or Security Package (*Sicherheitspaket*).[176] Unlike previous anti-terror laws, these legislative undertakings were no longer restricted to criminal law and the criminal procedure, but covered several branches of law, such as the law governing private associations, asylum and aliens law, secret services' statutes, laws governing identity cards and passports, *inter alia*. In total, seventeen different statutes and six statutory orders were changed.[177] Moreover, the grid search was again applied. Other changes concerned, once more, the interception of telecommunication, substantive criminal law, air security, and issues related to data protection.

3.4.1. Security Package I

On 19 September 2001, only eight days after the attacks on the Twin Towers in New York, the German Government approved the ***first anti-terrorism package***. The package abolished the so-called 'religious privilege' *(Religionsprivileg)*, and criminalises the formation of terrorist organisations based abroad.

The religious privilege was until then stipulated under § 2(2)(3) of the Act Governing Private Associations (*Vereinsgesetz, VereinsG*). The privilege basically meant that religious or ideological associations were exempted from being prohibited,[178] even when they conflicted with criminal laws or with the constitutional order, or concepts of international understanding (as guaranteed under Art. 9(2) *GG*). Religious and ideological associations were exempted from this prohibition because they enjoyed special protection in the light of their constitutionally guaranteed freedom of religion and conscience (cf. Art. 4 *GG*). By abolishing this principle, religious or ideological associations can now also be prohibited. The abolition of the religious privilege came into force on 8 December 2001.[179] Immediately afterwards, the German Minister of the Interior banned the Turkish Islamic group *Kalifatstaat* (Caliphate State) and a Dutch sister foundation, the *Dienaar aan Islam* (servants of Islam).[180]

The criminalisation of terrorist organisations based abroad was brought about via a new § 129b *StGB,*[181] which extends the application of §129 *StGB* (formation and membership to a criminal organisation) and § 129a *StGB* (formation and membership to a terrorist organisation) to those groups located abroad.[182] Interestingly enough, while coevals now welcomed the amendment, in 1986 such a provision had already been considered, but rejected for constitutional, practical and legal reasons, by the former Attorney General Kurt Rebmann.[183]

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[176] The packages were also called "Otto-Katalog", referring ironically to the Minister of Interior Affairs responsible for the Acts, Otto Schily.
[177] A yet more thorough overview in English language is provided by Rau (2004).
[178] Cf. § 3 *VereinsG*.
[179] *Erstes Gesetz zur Änderung des Vereinsgesetzes vom 4. Dezember 2001, BGBl.* I, at 3319.
[180] Rau (2004), at 327.
[181] *Vierunddreißigstes Strafrechtsänderungsgesetz - § 129b StGB vom 22. August 2002, BGBl.* I, at 3390.
[182] This amendment was only partially based on the terror attacks of September 11th; it also implemented European law requisites. In December 1998, the Council of the European Union had adopted a Joint Action to ensure that involvement in a criminal organisation based in a EU country or carrying out illegal activities there could be prosecuted in any EU Member State (Joint Action 98/733/JHA of 21 December 1998, adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organization in the Member States of the European Union, OJ 1998 L 351/1).
[183] Rebmann (1986), at 291.

In addition, § 129a *StGB* (foundation and membership of a terrorist organisation) was modified. The criminal act of 'advertising' (*werben*) is now restricted to the advertising of other members or supporters (*Mitglieder oder Unterstützer*). The declared purpose of this amendment was to take account of the freedom of expression and limit criminal liability of advertising acts, in particular, to exclude advertising for the mere purpose of engaging sympathies (*Sympathiewerbung*).[184]

3.4.2. Security Package II

The second security package was also called ***Act for the Fight against International Terrorism***.[185] It came into force on 1 January 2002, with the first draft having been presented on 2 November 2001. Considering the amount of legal changes this package includes, the time needed to adopt the changes was shockingly short. The limited time for drafting the Act, in combination with the amount of changes it involved, suggest that the legal amendments had already been prepared before the attacks of September 11th, however, they were not proposed earlier as they would not have found the requisite parliamentary majority without the 'aggravated circumstances' of a terrorist attack. The Act was adopted in direct response to the attacks of 11 September 2001. It aimed to improve and support the work of the security authorities, in order to ensure that terrorist activities could be detected before any harm could be done. By means of this Act, the competences of the intelligence services and the federal police agencies were broadened. They have been conferred with greater powers to request information on various issues (movement of finances, telecommunication, post and air traffic…) from a number of public or private institutions.[186] The extension of the powers of the

[184] Cf. also the Decision of the German Federal Court of Justice (*Bundesgerichtshof*), of 16 May 2007, case no. AK 6/07 and StB 3/07, where the Court reiterated that since this legislative amendment, the advertising for terrorist organisations such as Al Qaida, the justification of their goals and the glorification of criminal acts committed by them can no longer be considered as 'support' to a terrorist organisation, and can only be considered as 'advertising' if it can be proven that the advertising was aimed at recruiting new members or supporters.

[185] *Gesetz zur Bekämpfung des Internationalen Terrorismus, Terrorismusbekämpfungsgesetz*, of 9 January 2002, *BGBl.* I, at 361.

[186] The tasks of the authorities for the Protection of the Constitution (*Bundesverfassungschutzbehörden*) have been extended, by including now also the duty to gather and evaluate information on 'endeavours that are directed against the idea of international understanding' (Art. 9(2) *GG*; see new § 3(1)(4) of the Federal Constitution Protection Act - *Bundesverfassungschutzgesetz*). This new duty goes along with new conferred powers: under certain conditions, the authorities are now authorised to request information from a number of public or private institutions (i.e. credit institutes, financial service institutions, finance companies, postal service providers, aviation companies, and companies providing telecommunications services and teleservices) on bank accounts, accountholders and other authorised persons, monetary transactions and investments, circumstances in regard to post and air traffic, and data relating to the use of telecommunications services and teleservices (see new § 8(5) to (8), *Bundesverfassungsschutzgesetz*). Furthermore, the authorities for the Protection of the Constitution may also use so-called 'IMSI-Catchers', which facilitate the localisation of mobile phones, as well as the determination of the respective phone numbers and phone card numbers (Rau (2004), at 329). Similarly, the tasks and powers of the Military Counterintelligence Service (*Militärischer Abschirmdienst, MAD*) have been enlarged. Additionally, the Military Counterintelligence Service may also request companies providing telecommunications services and teleservices to pass on information on data relating to the use of telecommunications services and teleservices (see new § 10(3) of the Military Counterintelligence Service *Act (Gesetz über den Militärischen Abschirmdienst, MADG).* Under certain conditions, the Military Counterintelligence Service may transmit personal data to other agencies or institutions (New § 11(1) *MADG*). Similar powers have also been granted to the third German intelligence service, the Federal Intelligence Service

German intelligence services has been criticised in academic writings for further blurring the constitutional distinction between police agencies and intelligence services, known in Germany as "*Trennungsprinzip*" (principle of separation).[187] This principle is based on historical experience: Both under Hitler's regime in the *Third Reich* and in the Totalitarian Regime of the former Eastern Germany, the state obtained total control of its citizens precisely by combining the forces of secret services and police. To avoid such a situation, the principle of separation provides a fair control of state power.[188]

Additionally, legal changes were introduced in the laws governing the prevention of sabotage by personnel, the area of computer-assisted identifications of persons, and civil aviation and energy law. Modifications to the respective Acts on Passports (*Passgesetz)* and Personal ID Cards (*Personalausweisgesetz*) have led to the inclusion of biometric features in identity documents.[189] Since 2007 passports additionally contain digital fingerprints of their owner.[190] These amendments seem to actually target illegal immigration rather than terrorism. Forged passports present a serious problem in the fight against illegal immigration; unconspicuous terrorist sleepers with no criminal records will have little reason to forge their identity papers. Moreover, a large proportion of the second Security Package contains amendments to the law governing asylum and aliens. Of special significance are the new grounds for refusal of residence approvals[191] and expulsion[192] introduced into the Aliens Act (*Ausländergesetz*). Also,

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(*Bundesnachrichtendienst, BND*), see new §§ 2(1a), 8(3a) of the Federal Intelligence Service Act (*Bundesnachrichtendienstgesetz, BNDG*). Further, the responsibilities and powers of the Federal Border Guard (*Bundesgrenzschutz, BGS*) are extended. For instance, the BGS is now allowed to carry out identity checks (cf. § 22(1)(3) of the Federal Border Guard Act - *Bundesgrenzschutzgesetz, BGSG).* However, the control is limited to documents the respective person is carrying on him/her. With respect to this power, it is important to know that in Germany, there is no general obligation to carry identification documents. (Rau (2004), at 333, note 111.) Again, this measure may conflict with the right to privacy reiterated by the *Bundesverfassungsgericht* since 1983. The duties and powers of the Federal Office of Criminal Investigation (*Bundeskriminalamt, BKA*) have also been expanded. For example, the BKA is now empowered to collect autonomously data (cf. § 7(2) of the Act of the Federal Office of Criminal Investigation - *Bundeskriminalamtsgesetz, BKAG*), but only for the purpose of 'complementing existing factual findings' (*zur Ergänzung vorhandener Sachverhalte*).

[187] See Roggan and Bergemann (2007), at 876 et seq., and the references cited by Rau (2004), at 330. Whether this principle of separation is enshrined in the Constitution (either deriving form Arts. 73(1), 87(1), (2) *GG*, or deriving from the separation of powers established under Art. 20(2) *GG*, see Gusy (1987), at 45) is a matter of controversy. Historically, it can be derived from the Allies' "police letter" (*Polizeibrief der Alliierten),* which established the separation between police and secret services. However, the letter itself enjoys no constitutional status. Some argue that, *implicitly*, its contents were included in the German Constitution, since Art. 87(1)(2) of the Constitution distinguishes between the Federal Border Service (*BGS*) and the Federal Criminal Office (*BKA),* on the one hand, and the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) on the other. While the police forces have certain executive tasks, the secret service is restricted to the "collection of documents" (Roggan and Bergemann (2007)). The Federal Constitutional Court refers to the police letter, invoking as a possible constitutional basis the principle of the rule of law (*Rechtsstaatsprinzip*), the principle that Germany is a federal state (*Bundesstaatsprinzip*), and the fundamental rights (*Grundrechte*), cf. *BVerfGE* 97, 198 (217) = *NVwZ* 1998, 495 (497). In any case, the principle of separation is of great importance in German legal policy (Walter (2007), at 5).

[188] Kühne (2006), at 223, with further references.

[189] See the new § 4(3) of the Passport Act; the new § 1(4) of the Personal ID Card Act.

[190] See Amending Act to the Passport Act, of 20 July 2007 (*Gesetz zur Änderung des Passgesetzes und weiterer Vorschriften*, *BGBl*. I, at 1566). For details see Hornung (2007).

[191] Under the new § 8(1)(5) of the Aliens Act, the granting of a residence approval (*Aufenthaltsgenehmigung*) can be refused on the ground that the concerned person 'endangers the free

the possibilities for protection from deportation have been reduced.[193] Other provisions concern the collection, storage and processing of personal data of foreigners. In this context, registers of foreigners require the latter to 'voluntarily disclose indications concerning their religion'.[194] Such a provision has direct effects on the freedom of religion, including the freedom not to disclose one's religious believes.[195] Finally, the possibility to prohibit aliens' associations, which had already been opened by the First Security Package, has been further extended through the second package.[196]

The Security Package II contains a sun-set clause in its Art. 22. According to section 2 of this provision, the amendments of the Acts concerning the three German intelligence services[197] as well as other provisions regarding security services and federal police should only be effective until 11 January 2007. The parliamentarian control panel of the German *Bundestag* (*Parlamentarisches Kontrollgremium des Deutschen Bundestages)* evaluated them before the elapse of this time period.[198] The evaluation report resulted in the general approval of most measures.[199] However, the evaluation itself encountered

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democratic basic order or the security of the Federal Republic of Germany […]'. The ground is formulated in a rather blurry manner. It is left unclear *which* concrete indications may manifest that the free democratic basic order is at stake.

[192] Thus under the new § 47(2)(5) of the Aliens Act, an alien shall regularly be expulsed 'if he or she […] in the course of an interview which serves to clarify reservations regarding entry or continued residence, fails to reveal previous stays in Germany […] or furnishes false or incomplete information on key points regarding links with persons or organisations who or which are suspected of supporting international terrorism.' As Rau notes, given that contacts to international terrorism do not need to be proven, the proportionality of the provision may be doubted. (Rau (2004), at 355.)

[193] Thus the protection against deportation (*Abschiebung*) has been reduced in the situation where there are 'justifiable grounds to assume' that the alien has committed a certain (serious) crime (see new § 51(3)(2) of the Aliens Act). Before, the protection against deportation was only suspended if the foreigner was convicted by a Court, and sentenced with at least three years of imprisonment. By virtue of the amended provision, the protection can already be suspended if the *assumption* is justified (on serious reasons) that the foreigner has committed a crime against the peace, a war crime or a crime against humanity, (…) within the meaning of the respective international treaties. In the situation where the deportation of an alien implies a deadly peril for him or her, the suspension of the protection against deportation could violate the protective obligations of the State under Art. 1 *GG*, Art. 3 ECHR, as well as the human rights prohibition of refoulment (Art. 33 Geneva Convention) (Nolte (2002) at 577 (citing Denninger's Opinion for the Hearing before the Inner Committee of the Parliament, of 30 November 2001, at 5 (*Stellungnahme zur Anhörung vor dem Innenausschuss des BT*)).

[194] See, for instance, § 3 No. 5 of the Foreigners' Central Registration Act (*Ausländerzentralregistergesetz, AZRG*) (read in conjunction with section I, no. 4, column A (h) of the annex to the *AZRG*-implementing regulation.

[195] A profound analysis of this freedom in the light of recent counter terror legislation in Germany is given by Globig (2002).

[196] Cf. the amended § 14, *VereinsG*. This has been done by adding more grounds justifying the ban, inter alia when the public order may be affected by the association. Only foreigners from outside the European Union fall within the scope of this provision (cf. § 14(1)(2)). Under Art. 14(1), *VereinsG*, associations, whose members or leaders are entirely or predominantly aliens (aliens' associations), can also be banned under the preconditions set out under paragraph 2, in addition to those grounds enumerated in Art. 9(2), Grundgesetz. Associations of which the members or leaders are exclusively or predominantly citizens of a Member State of the European Union, do not qualify as aliens' associations.

[197] *Bundesverfassungschutzgesetz, MAD-Gesetz,* and *BND-Gesetz*.

[198] Art. 22(3) of the Act for the Fight Against Terrorism of 9 January 2002 (see above note 184).

[199] The report concludes: 'The evaluation has mainly confirmed the legislative decisions; in single issues, further possibilities of improvement were shown.[…]' (Die Evaluierung hat die gesetzgeberischen Entscheidungen ganz überwiegend bestätigt, zu einzelnen Punkten aber auch weitere Verbesserungsmöglichkeiten aufgezeigt.[…]). The report is online available at: http://www.cilip.de/terror/eval_tbg_11052005.pdf (retrieved on http://www.cilip.de/terror/gesetze.htm, last visited on 1 October 2008).

some criticism both in the expert hearings in Parliament[200] and in literature.[201] In spite of the critics, the sunset-clause was removed six days before the time period expired, by means of the ***Act Complementing the Act for the Fight against Terrorism***, of 5 January 2007.[202] In addition, the Complementing Act has once more extended the powers of the Security authorities, in particular with respect to the gathering of information.

3.4.3. More grid search and "forefront investigations" under police law

The attacks of 11 September 2001 also triggered the revival of the grid search. New legislative bases for this old measure were introduced, which allowed for both its preventive and repressive application. The method seemed at first useful to identify so-called 'sleepers', i.e. unidentified members of terrorist organisations who had not been engaged in any criminal activity until now, but who were ready to commit a terrorist attack anytime. Whilst before 2001, under police law, the preventive grid search had only been possible in the situation of 'imminent danger' (*gegenwärtige Gefahr*), many federal states relaxed this requirement. For instance, in the state of Thuringia, the requirement of 'imminent danger' was replaced by the requirement that the use of the grid search was 'necessary for the preventive fight against crimes of considerable significance' (§ 44(1) of the Police Tasks Law – *Polizeiaufgabengesetz*). Similar changes took place in the States of Baden-Wuerttemberg[203], Bavaria,[204] and Saxony.[205] It was further introduced in those states which previously had not allowed the preventive grid search.[206] However, many of these provisions[207] were considered unconstitutional, for not being proportional considering the effects on the right to privacy.[208]

In light of a recent Decision of the *Bundesverfassungsgericht*, the federal provisions allowing for the grid search without the existence of a concrete danger must be considered as unconstitutional. Thus the Constitutional Court held, in its Decision of

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[200] See Walter (2007), at 5, with further references. Statement by *Prof. Dr. Hans Jörg Geiger* (available at: http://www.bundestag.de/ausschuesse/a04/anhoerungen/Anhoerung03/Stellungnahmen/Stellungnahme_10.pdf ; Statement by *Mr. S. Hilbrans* (available at http://www.bundestag.de/ausschuesse/a04/anhoerungen/Anhoerung03/Stellungnahmen/Stellungnahme_12.pdf , both visited on 1 October 2008).

[201] See Ibid. at 5, with further references. Roggan and Bergemann (2007), at 879.

[202] *Gesetz zur Ergänzung des Terrorismusbekämpfungsgesetzes vom 5.1.2007*, *BGBl* I, at 2, see Art. 2 to this Act.

[203] § 40(1)(1) of the Police Law (*Polizeigesetz*).

[204] § 44(1)(1) of the Police Tasks Law (*Polizeiaufgabengesetz*).

[205] § 47(1) of the Police Law (*Polizeigesetz*).

[206] Schleswig-Holstein, and Lower Saxony. In Bremen, the provision was reintroduced shortly after it had been abolished. (Kett-Straub (2006), at 448.

[207] An exception presents the Police and Order Law (*Polizei- und Ordnungsgesetz*) of Rhineland-Palatinate, which requires for the grid search still an "imminent significant danger" ("*gegenwärtige erhebliche Gefahr*"), see § 25d(1) of the Police and Order Law. This provision was declared constitutional by the Higher Administrative Court of Rhineland-Palatinate (*Oberverwaltungsgericht Rheinland-Pfalz*), by Decision of 22 March 2002, case no. 12 B 10331/02..OVG (online as pdf-document available at http://www.cilip.de/terror/ovg-rlp-220302.pdf (visited on 1 October 2008).

[208] Achelpöhler and Niehaus (2003)

4 April 2006,[209] that a preventive police grid search (as stipulated under § 31 of the Police Law (*Polizeigesetz*) of North Rhine Westphalia of 1990) was only compatible with the fundamental right of informative auto-determination, (*Recht auf informationelle Selbstbestimmung)* i.e. the right that a person may decide autonomously which of his or her personal information and to which extent it is shared with others,[210] if there was a concrete danger for strong legal interests such as the Constitution, or for the security of the Federation or of a Federal State, or the life, limb or freedom of a person. It further held that a general situation of threat, such as the one existing after the attacks of September 11th 2001 does not suffice to justify the grid search.[211]

However, even supposing that an imminent danger persisted, there would still be serious objections against the preventive use of the grid search. As *Hoffmann-Riem* notes, the discrimination of certain groups of the population is unavoidable.[212] Moreover, the efficiency of this method is rather questionable, especially with respect to the so-called sleepers, who are by definition deliberately inconspicuous and resemble ordinary citizens in most ways.[213] In addition, experience has shown that the preventive grid search carried out in Germany in the aftermath of September 11th 2001 had little if any success. The 'grid' applied to the searched databases was indeed too large to promise the identification of real suspects: criteria such as "Male, aged 18 to 40, (ex-) student, Islamic religious affiliation, native country or nationality of certain countries, named in detail, with predominantly Islamic population"[214] probably apply to hundreds of thousands of people in Germany and there is no way to consider all these as terrorist suspects.

The grid search is just one of many examples in which police law, previously only applicable for preventive purposes, has been extended after September 11th to measures of an essentially repressive nature, i.e. investigation measures concerning not yet committed (!) crimes. The respective measures are called "*Vorfeldermittlungen*" (forefront investigations). Unfortunately, this implies that police must either have a clear knowledge of what crimes the suspected person is going to commit, or that they consider principally any person as a potential criminal. While the first is a rather idealistic assumption, the alternative gives rise to great worries.[215] Other new

[209] 1 BvR 518/02. The Decision was commented by Volkmann (2006), and Bausback (2006), Kett-Straub (2006).

[210] The right to informative auto-determination forms part of the right to privacy. Under German constitutional law, this is deduced from Art. 2(1), read in conjunction with Art. 1(1), *GG*.

[211] The head notes of the decision read as follows:

(1) Eine präventive polizeiliche Rasterfahndung der in § 31 PolG NW 1990 geregelten Art ist mit dem Grundrecht auf informationelle Selbstbestimmung (Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG) nur vereinbar, wenn eine konkrete Gefahr für hochrangige Rechtsgüter wie den Bestand oder die Sicherheit des Bundes oder eines Landes oder für Leib, Leben oder Freiheit einer Person gegeben ist. Im Vorfeld der Gefahrenabwehr scheidet eine solche Rasterfahndung aus.

(2) Eine allgemeine Bedrohungslage, wie sie im Hinblick auf terroristische Anschläge seit dem 11. September 2001 durchgehend bestanden hat, oder außenpolitische Spannungslagen reichen für die Anordnung der Rasterfahndung nicht aus. Vorausgesetzt ist vielmehr das Vorliegen weiterer Tatsachen, aus denen sich eine konkrete Gefahr, etwa für die Vorbereitung oder Durchführung terroristischer Anschläge, ergibt.

[212] Hoffmann-Riem (2002), at 500.

[213] Lisken (2002), at 516.

[214] See the Decision of the *Bundesverfassungsgericht*, of 4 April 2006, 1 BvR 518/02, at para. 8.

[215] Kühne (2006), at 220 et seq.

competencies of the police in the stage of forefront investigations include identity checks and searches that no longer require a concrete suspicion, bugging operations etc.[216]

3.4.4. More telecommunication interception

Since August 2002, the prosecution authorities are also allowed to use the IMSI-Catcher[217] to intercept mobile phone calls (see the new § 100i *StPO)*. Interestingly enough, this provision, clearly motivated by the attacks of September 11th 2001, is of general character, and not limited to terrorist offences. Like the provision allowing the use of the IMSI-Catcher by the authorities for the Protection of the Constitution,[218] § 100i *StPO* is problematic with respect to the privacy of third parties.[219] Besides, allegations have been made that the provision does not comply with the constitutional requirement of Art. 19(1)(1), *GG* (the obligation to cite the concrete fundamental right that is restricted, *Zitiergebot*).[220] The view that § 100i *StPO* interferes with the right to informative auto-determination was later indirectly confirmed by the German Constitutional Court.[221] Moreover, in 2004, § 111 of the Act on Telecommunication (*Telekommunikationsgesetz, TKG*) was introduced, by which owners of fixed or mobile telephones are obliged to identify themselves. A constitutional complaint lodged against this decision was dismissed on grounds of inadmissibility.[222]

3.4.5. Implementations of European law

The two European Framework Decisions of 13 June 2002, on combating terrorism and on the European arrest warrant, were respectively implemented into German law in 2003 and 2004. In addition, the EC Directive 2006/24/EC concerning the retention of communication data[223] was transposed into German law in 2006.

Through the Act of 22 December 2003,[224] the European Council Framework Decision of 13 June 2002 on combating terrorism was transposed into German law.[225]

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[216] For details on these provisions, see Ibid. at 224 et seq.
[217] See above, 3.4.2. (note 199).
[218] See above, 3.4.2. (note 199).
[219] Rau (2004), at 349.
[220] Pursuant to Art. 19(1)(1) *GG*, any law that allows for a restriction of a fundamental right shall cite the affected right and the pertinent Article of the German Constitution. As § 100i *StPO* affects the right to privacy or informative auto-determination, guaranteed under Arts. 1, 2 GG, without stating that this right shall be restricted, apparently it does not comply with this constitutional obligation (see Ibid. at 349, with further references).
[221] In its Decision of 22 August 2006 (2 BvR 1345/03), the Court decided not to rule on the matter whether § 100i *StPO* complied with Art. 10 *GG* (privacy of letters, posts, and telecommunications) as it claimed that § 100i *StPO* did not even touch the right of Art. 10 GG. The Court did not exclude that the § 100i *StPO* might affect indeed the right to informative auto-determination, enshrined in Arts. 2(1), 1(1) *GG*. However, as the applicants had not argued that their right to informative auto-determination was violated, the Court did not assess this issue. A critical analysis of the Decision is provided by Nachbaur (2007).
[222] Decision of 21 June 2006, Case no. 1 BvR 1299/05.
[223] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
[224] *Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung und zur Änderung anderer Gesetze, BGBl.* I, at 2836.

Amendments included the extension of the catalogue of criminal offences enlisted in § 129a *StGB*, higher sentences in some cases (e.g. the maximum sentence for supporting a terrorist organisation is raised to ten years), and modifications as to the elements of the crime. According to the European requirements, acts shall be included which may seriously damage a country or an international organisation. A new criminal element introduced by the law is the notion of 'terrorist intention' (*terroristische Absicht*). This element is worryingly obscure, especially considering that terrorism itself is not defined by the German law.

In 2004 Germany adopted the ***Act on the European Arrest Warrant*** (*Europäisches Haftbefehlsgesetz)*, in order to implement the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.[226] However, the Federal Constitutional Court declared the Act void in 2005.[227] The Court found that the German legislator did not make sufficient use of the discretionary possibilities provided by the Framework Decision to regulate the European Arrest Warrant in a manner least harmful to fundamental rights. Subsequent to this decision, Parliament passed a new ***Act on the European Arrest Warrant***, taking into consideration the constitutional requirements set out by the *Bundesverfassungsgericht.*[228] Criticisms have been uttered against the use of very broad legal terms in the law.[229]

The Directive 2006/24/EC on the retention of communication data was adopted on 15 March 2006.[230] This Directive requires Member States to ensure that communications providers retain, for a period of between six months and two years, telecommunications data (i.e. communication data of telephones, mobile phones, emails and internet, but not the contents of these communications). The topic received particular attention on account of an expertise concerning the 'admissibility of telecommunications data retention under European and German law',[231] submitted by the Scientific Service of the German Parliament (*Wissenschaftlicher Dienst des Bundestages*), on 3 August 2006. The outcome of the expertise was that the compatibility of the Directive, both with European law and with German law, met serious doubts. It was questioned

[225] See Ausweitung: Gesetzentwurf zum Terrorismusparagraphen 129a StGB (2003)
[226] *BGBl.* (2004) I, at 1748.
[227] Judgment of 18 July 2005, Case no. 2 BvR 2236/04. A comment in Spanish language on this judgment is provided by Ormazábal Sánchez (5 January 2006).
[228] *BGBl.* (2006) I, at 1721. The new Act generally assured that prison terms can be served in Germany if a German national is surrendered under a European Arrest Warrant. Moreover, it is required that the offence in question has no 'relevant internal connection' (*maßgeblicher Inlandsbezug*) to Germany, and, additionally, either has a relevant connection to the state which asks for the extradition, or is punishable under both legal orders. Further, a balancing of the conflicting interests must lead to the conclusion that there are no reasons to assume that the person to be extradited could reasonably rely on non-extradition. See Walter (2007).
[229] Hackner, Schomburg, Lagodny and Gleß (2006), at 666 et seq., Rosenthal (2006), 107 et seq.
[230] For an analysis of the Directive and its implications on German and European law, see Breyer (2007); Gitter and Schnabel (2007)Glauben (2007).
[231] Document can be retrieved online at: http://www.bundestag.de/bic/analysen/2006/zulaessigkeit_der_vorratsdatenspeicherung_nach_europaeischem_und_deutschem_recht.pdf (visited on 23-10-07).

whether the law complied with the formal (e.g. competence of the third pillar)[232] and with the material (e.g. European fundamental rights) requirements established under European law. Moreover, the Directive risks conflict with several German constitutional rights (right to informational auto-determination, Arts. 10, 12 and 14 of the Constitution). In addition, the former German Minister for Justice, Sabine Leutheusser-Schnarrenberger, warned that the implementation of the Directive into German law might contravene the case-law of the German Federal Constitutional Court, leading to a serious conflict between the European Court of Justice's case-law and Germany's national case-law.[233] In July 2007, the German Constitutional Court declared a similar provision in a regional statute (§ 33a(1)(2) and (3) of the Act on Public Security and Order of Lower Saxony)[234] as incompatible with Art. 10 *GG* and thus void.[235]

Despite all these concerns, on 9 November 2007 Germany adopted the ***Act for the Readjustment of Telecommunication Control and other Covert Investigation Measures, as well as for the Implementation of Directive 2006/24/EC***, which came into force on 1 January 2008.[236] The Act introduced two new provisions into the *Telekommunikationsgesetz* (*TKG*).[237] Pursuant to § 113a *TKG*, telecommunication services are obliged to store telecommunication data for six months. § 113b *TKG* regulates the use of the stored data for the purpose of the prosecution of crimes, the prevention of considerable danger for public safety (*erhebliche Gefahren für die öffentliche Sicherheit*) and to fulfill tasks of secret services. The *Arbeitskreis Vorratsdatenspeicherung* ('Working Group Mass Data Storing')[238] filed a constitutional complaint (*Verfassungsbeschwerde)* against these provisions, and in parallel, an injunction to suspend §§ 113a, 113b *TKG*, until the Decision on the constitutional complaint could be adopted.[239] The Federal Constitutional Court partially allowed the

[232] Similarly, Ireland brought an action to the European Court of Justice, arguing that the Directive was not adopted on an appropriate legal basis (Action brought on 6 July 2006 — *Ireland v Council of the European Union, European Parliament*, Case C-301/06, 2006/C 237/09).
[233] Leutheusser-Schnarrenberger (2007).
[234] The provision (§ 33a Abs. 1 Nr. 2 und 3 des Niedersächsischen Gesetzes über die öffentliche Sicherheit und Ordnung) reads as follows:
„Die Polizei kann personenbezogene Daten durch Überwachung und Aufzeichnung der Telekommunikation erheben (…)
2. über Personen, bei denen Tatsachen die Annahme rechtfertigen, dass sie Straftaten von erheblicher Bedeutung begehen werden, wenn die Vorsorge für die Verfolgung oder die Verhütung dieser Straftaten auf andere Weise nicht möglich erscheint, sowie
3. über Kontakt- und Begleitpersonen der in Nummer 2 genannten Personen, wenn dies zur Vorsorge für die Verfolgung oder zur Verhütung einer Straftat nach Nummer 2 unerlässlich ist.“
[235] *Bundesverfassungsgericht*, Judgment of 27 July 2005, Case no. 1 BvR 668/04.
[236] *Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG vom 21. Dezember 2007* (*BGBl* I, at 3198).
[237] Telecommunication Act, see above at 3.4.4.
[238] The Working Group also provides a web site where further information, including references to literature, legislation, and the current state of the proceedings before the *Bundesverfassungsgericht*, are available: http://www.vorratsdatenspeicherung.de/component/option,com_frontpage/Itemid,1/lang,de/ (visited on 1 October 2008).
[239] *Bundesverfassungsgericht*, Decision of 11 March 2008, Case no. 1 BvR 256/08.

injunction. It stated that data must indeed be stored, but that a request under § 113b *TKG* is subject to certain additional conditions which it defined.[240]

3.4.6. Air Security Act

In January 2005, another hotly debated Act came into force in Germany: the ***Act for the Readjustment of Air Security Tasks (the Air Security Act - Luftsicherheitsgesetz)***.[241]

The law, particularly § 14(3), was mainly[242] occasioned as a result of the pilot Franz-Stephan Strambach entering the sky over Frankfurt without permission on 5 January 2003. He was circulating above the Frankfurt Bank Quarter and threatened to crash into the building of the European Central Bank. He was arrested before any harm was done.[243] However, the case made politicians aware of the risks existing in air security and soon initiated the legislative process concerning the Air Security Act, followed by highly controversial debates. In particular, § 14(3) of the new Act encountered severe criticism.[244] This provision authorised the armed forces to deliberately shoot down a passenger aircraft, provided that under the given circumstances it was assumed that the aircraft would be used to kill human life, and that the danger could only be prevented by resorting to weapons. The constitutionality of the Act was publicly doubted, *inter alia*, by the German Federal President, Horst Köhler. This occasioned the *Länder* governed by the *CDU/CSU*-party to follow the President's recommendation and lodge a constitutional complaint with the Federal Constitutional Court. It was argued that a law which permitted the killing of innocent bystanders (i.e.: the passengers of a hijacked airplane) violated the right to life, as protected by Art. 2(1) *GG*. Through the Judgment of 15 February 2006 the *Bundesverfassungsgericht* held that § 14(3) of the Air Security Act was unconstitutional and thus null and void. It was neither compatible with the right to life (Art. 2(1) *GG*), nor with human dignity (Art. 1 *GG*), as far as third parties were affected.[245]

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[240] The court ruled that, until the Decision concerning the constitutional complaint will be adopted, data can only be requested if the investigations concern a crime listed under § 100a(2) *StPO* [i.e.: a serious offence], and if the requirements of § 100a(1) *StPO* are met. This means that the investigated crime must have a certain minimum degree of seriousness (however, it should be noted that the catalogue of § 100a(2) *StPO* is rather wide, ranging from murder to property crimes such as bankruptcy, economic subsidy fraud, and others). § 100a(1) *StPO* requires that the investigated crime is, in the concrete case, serious, that certain indications justify the suspicion of the crime, and that the clarification of facts by other means would be significantly impeded or futile (see ibid.).

[241] *Gesetz zur Neuregelung von Luftsicherheitsaufgaben*, *BGBl*. I, at 78 (in force since 15.1.2005).

[242] Naturally, the memories of September 11th were still fresh and surely also contributed to its creation. Moreover, the law served the purpose to implement Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security.

[243] See BBC News (online edition) (6 January 2003): *Frankfurt flier 'has astronaut fixation'*.

[244] See, for instance, Hartleb (2005).

[245] *Bundesverfassungsgericht*, Case no. 1 BvR 357/05.The Court argued that the disputed provision degraded the passengers of the targeted plane to mere objects, since the State would use them only as a means to save other people's lives. They were thus deprived of the value inherent in human dignity.

3.4.7. Anti-Terror-Database and Completion of the Act for the Combat of Terrorism

On 31 July 2006, in regional trains in the German cities of Koblenz and Dortmund police found two suitcase bombs that, as a result of technical difficulties, had not by chance exploded. The attempted attack had apparently been carried out by Islamic fundamentalists. The events led to a conference of the German Ministers of the Interior of the Federal States on 4 September 2006. At this conference, the Ministers decided to establish a central anti-terror-database that should be used by all German secret services and the German federal police. The legal basis of this database, the ***Act on Joint Databases*** (*Gemeinsame-Dateien-Gesetz*)[246] was adopted, together with another Act complementing the existing Act to Fight Terrorism (*Terrorismusbekämpfungsergänzungsgesetz*), on 1 December 2006.[247]

The complementing Act served to extend the existing competencies of secret services with regards to the gathering of information. The Federal Service for the Protection of the Constitution (*Bundesverfassungsschutz*) was also enabled to request information concerning "militant tendencies". Thereby, the scope of application was extended to fields other than terrorism.[248] In addition, the complementing Act authorises secret services to search for persons within the Schengen Information System (SIS). Again, this goes against the German principle of separation (*Trennungsprinzip*),[249] since the SIS was originally only a tool for *police investigations*.[250]

The purpose of the Act on Joint Databases was to promote the collaboration of the intelligence services and police, and to improve the exchange of information. The database contains personal data of members or supporters of a terrorist organisation and their contacts, suspected members or supporters of a group that supports a terrorist association, extremists who are ready to or tend to use violence and their contacts.[251]

Some authors have raised doubts as to its constitutionality. It is seriously doubted whether its wide legal formulations comply with the constitutional requirements of clarity and precision of norms.[252] Further, it is argued that the constitutional requirements, to define object and purpose of any interference with the right to privacy (right to informative auto-determination) are not met, since the Act allows for the creation of so-called "project-related databases" with common access for intelligence services. This goes without further specification as to the scope of these projects so that it is left up to the authorities to decide about the purpose and scope of the project as well as the scope of exchangeable data.[253] With this database, the principle of the separation of police and intelligence services, the German

[246] *Gesetz zur Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder (Gemeinsame-Dateien-Gesetz)* Vom 22. Dezember 2006, *BGBl*. I, at 3409; a thorough discussion of the law is provided by Roggan and Bergemann (2007).
[247] See Ibid. at 876, with further references.
[248] Ibid. at 880.
[249] See above at 3.4.2.
[250] Ibid.
[251] § 2 first sentence, sub-paragraphs (1a) - (3).
[252] Roggan and Bergemann (2007), at 878.
[253] Ibid. at 879.

Trennungsprinzip,[254] is further weakened. Intelligence and police forces now share the same data. Moreover, it seems problematic that even mere "contact persons" are included in this database, that is, persons for whom "actual indications" (*tatsächliche Anhaltspunkte*) exist that their contacts to a suspected terrorist – i.e. a person for whom "actual indications" exist that they are engaged in terrorism – are more than just coincidental.[255]

3.4.8. Rulings of the German Federal Court of Justice concerning the "Hamburg Cell"

Two members of the so-called "Hamburg Cell", the Islamist group presumed responsible for the attacks of September 11th, were charged for abetting to murder and the membership of a terrorist organisation. While Abdelghani Mzoudi was eventually acquitted of all charges,[256] Mounir El Motassadeq was convicted to fifteen years of imprisonment.[257]

The Hamburg Hanseatic Court (*hanseatisches Oberlandesgericht)* acquitted Mzoudi of all charges, on the grounds of lack of evidence of his involvement in the September 11th attacks. The appeal before the *Bundesgerichtshof* was dismissed on 9 June 2005,[258] as the *Bundesgerichtshof,* which can re-assess the lower court's decision solely on points of law, saw no legal errors.

Motassadeq had originally been convicted to fifteen years by the Hanseatic Court, having been charged with abetting to murder 3,066 persons and the membership of a terrorist organisation. His first appeal to the *Bundesgerichtshof* was successful.[259] The court had to reassess the evidence. In the second proceedings against him before the Hamburg Court, Motassadeq was convicted of charges for membership of a terrorist organisation and sentenced to seven years imprisonment. Both the defence and prosecution appealed against this decision. The *Bundesgerichtshof* repealed the previous decision on 16 November 2006, finding Motassadeq guilty for abetting to

[254] See above, at 3.4.2.
[255] Roggan & Bergemann (2007), at 878.
[256] The Hamburg Higher Regional Court (*hanseatisches Oberlandesgericht)* acquitted him from all charges, on the grounds of lack of evidence of his involvement in the September 11th attacks. The appeal against this decision before the *Bundesgerichtshof* was dismissed on 9 June 2005 (case no. 3 StR 269/04), as the *Bundesgerichtshof*, which can only re-assess the former court's decision on points of law, saw no legal mistakes.
[257] He had been originally convicted to fifteen years by the Hamburg Higher Regional Court (*hanseatisches Oberlandesgericht*), charged for abetting to murder of 3,066 persons and membership in a terrorist organisation. His first appeal to the *Bundesgerichtshof* was successful (Judgment of 4 March 2004, case no. 3 StR 218/03). The court had to reassess the evidence. In the second proceedings against him before the Hamburg court, Motassadeq was convicted only on charges for membership to a terrorist organisation, and sentenced to seven years of imprisonment. Both parties appealed against this decision. The *Bundesgerichtshof* repealed the previous decision on 16 November 2006, finding Motassadeq guilty also for abetting to murder of now "only" 246 persons (case no. 3 StR 139/06). This assessment was confirmed by the Hamburg court on 8 January 2007. A constitutional complaint against his arrest before the *Bundesverfassungsgericht* remained unsuccessful (*BVerfG*, case no. 2 BvR 2557/06, Decision of 10 January 2007*).* His last complaint to the *Bundesgerichtshof* against the former decision has been rejected (case 3 StR 145/07*).* See also the comment by Kost (2007).
[258] Case no. 3 StR 269/04.
[259] Judgment of 4 March 2004, case no. 3 StR 218/03.

murder "only" 246 persons.[260] This assessment was confirmed by the Hamburg court on 8 January 2007. A constitutional complaint against his arrest before the *Bundesverfassungsgericht* remained unsuccessful.[261] His last complaint to the *Bundesgerichtshof* against the former decision has been rejected.[262]

These judgments are worthy to be mentioned as they show the relative independence and immunity of judges from political and public pressure. The judges strictly applied the law, and thereby demonstrated that basic rule of law principles, such as the need of convincing evidence beyond reasonable doubt for a conviction, apply to everybody irrespective of the gravity of the acts in question.

3.5. Current developments

In recent times, the regional and federal ministers of the interior have proposed a collection of legislative changes to improve the fight against terrorism, most of which are discussed controversially in the public arena. Some of these laws have already been implemented on a regional level, but as of yet not on state level. The regional laws have partially been quashed or their application has been reduced through judgments of the *Bundesverfassungsgericht.* Some of these new measures are:

- online search (*Online Durchsuchung*)
- automised recording of licence plates
- generalised leniency provisions
- further criminalisations of preparatory acts

The **online search**[263] has been included in the bill for the Federal Office of Investigation's prevention of risks from international terrorism.[264] This search method means that special programmes are installed on the home computer of the suspect (they may be sent to him as an email attachment or they may be installed directly by secretly breaking into the suspect's home). The programmes are designed to search the hard disc of the computer for certain data and the results of these searches would be transmitted to the prosecution services, without the suspect's knowledge, as soon as the latter connects his computer to the internet.[265] Recently the German Federal Court of Justice had to decide upon the admissibility of these secret online searches without any explicit legal basis.[266] The Attorney General lodged an application to the Court to confiscate files, sent or received emails, texts or other files. The Court rejected the application, as the requested confiscation constituted a severe encroachment on the

[260] Case no. 3 StR 139/06.
[261] *Bundesverfassungsgericht*, Judgment of 10.1.2007, case no. 2 BvR 2557/06.
[262] Case no. 3 StR 145/07. See also the comment by Kost (2007).
[263] See also Kemper (2007). Further references on the subject are available at *Bundestag* (2007).
[264] *Entwurf eines Gesetzes zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt*, state of June 2008 online available at the site of the German Ministry of the Interior: http://www.bmi.bund.de/cln_028/nn_121566/Internet/Navigation/DE/Gesetze/Gesetzesentwuerfe.html__nnn=true (last visited on 21 September 2008).
[265] Kudlich (2007), at 1.
[266] *Bundesgerichtshof*, Decision of 31 January 2007, case no. StB 18/06. The decision was commented by Cornelius (2007). See also the Decisions of 25 November – 1 BGs 184/2006, and of 28 November 2006 – 1 BGs 186/2006. In both Decisions, the *Bundesgerichtshof* declared the online search as inadmissible, on the grounds that there was no legal basis for this grave encroachment in the informational right to auto-determination (printed in *Juristische Rundschau* 2007, at 77, 78, commented by Jahn and Kudlich (2007)).

accused person's right to informative auto-determination, for which a legal basis was missing. In particular, § 102 *StPO* (regulating the search of private premises of suspects) did not suffice as a legal basis. Other empowering provisions which were invoked, such as §§ 100a, 161(1), 163(1) *StPO*, directly or analogically. also do not cover the online search, so that there is currently[267] no applicable national legal authorisation for the measure.[268] Besides the right to privacy, the guaranteed inviolability of the home (Art. 13 of the German Constitution) is also at stake, at least when the suspect's personal computer is located within the suspect's premises.[269]

Subsequent to the Attorney General's failed application, the German Minister of the Interior, *Wolfgang Schäuble*, reiterated the need for such a legal basis on a national level. In an interview he even admitted indirectly that the online search was already being done in practice, although there was no law permitting this. He stated that "we need a legal basis; until now, it [the online search] has been carried out without such a legal basis (…)".[270]Admittedly, if one has to choose between the two practical alternatives: online search with or without legal basis, it indeed seems preferable to legalise the search in order to be able to control its scope and set out clear limitations as to its requirements and fields of use. However, the fact that the online search has already been carried out before such a legal basis existed means nothing less in fact than that the responsible officials have consciously broken the law.

On the regional level,[271] the online search has already been regulated for one federal State: North Rhine Westphalia, through the Act of 20 December 2006.[272] The

[267] As of 21 September 2008.

[268] The application of these norms is further examined and eventually rejected by Kudlich (2007).

[269] Ibid. at 5 et seq.; Kutscha (2007); different view: Hofmann (2005); Perrey, Gefahrenabwehr und Internet (2003), at 128; see also the Decision of the German Federal Court of Justice, BGH, Decision of 21 February 2006, case 3 BGs 31/06, and the commentary by Beulke and Meininghaus (2007).

[270] Wolfgang Schäuble in: Al Kaida in Deutschland? (2007). An excerpt of the interview:
[Interviewer:] *Herr Schäuble, dieser Fahndungserfolg ist auf der Grundlage der bestehenden Gesetze erfolgt. Warum bestehen Sie weiter auf Online-Durchsuchungen?*
(Mister Schäuble, this investigation success has taken place on basis of the existing laws. Why do you still insist to legalise the online-search?)
[Schäuble:] Alle diejenigen, die verantwortlich für diese Arbeit sind, die Präsidenten von Bundeskriminalamt wie Bundesamt für Verfassungsschutz, die Generalbundesanwälte, alle Fachleute sagen, die Terroristen kommunizieren immer stärker mit Hilfe des Internet, und auch dadurch, dass man auf Computer Zugriff hat, es geht ja gar nicht mehr mit Emails, wie man sich das so vorstellt, und dass man deswegen diese Möglichkeit braucht, in eng begründeten Ausnahmefällen auch auf den Computer Zugriff zu haben. Dafür braucht man eine Rechtsgrundlage, bisher hat man's ohne gemacht, und ich glaube, dass es schon richtig ist, dass wir auf diejenigen hören, die die Arbeit machen, und die ja heute auch zeigen, dass sie gute Arbeit machen.
(All those who are responsible for this work, the presidents of the Federal Office of Criminal Investigation, the Federal Office for the Protection of the Constitution, the Attorney Generals, all professionals say that terrorists communicate more and more via the internet, and also, by having access to the Computer, it does not concern only emails anymore, as one may imagine, and that for this reason we need the possibility to access also the computer, in narrowly justified exceptional cases. For this we need a legal basis, until now, it has been done without such legal basis, and I think that it is indeed right to listen to them who do the work, and who show today that they do their work well.)

[271] I.e. in the field of preventive police law (regulated by the legislator of the respective federal state in Germany), as opposed to repressive police law (regulated by legislator of the federation).

[272] § 5(2)(11) (first sentence), read in conjunction with § 7 of the Act Governing the Protection of the Constitution in North Rhine Westphalia, of 20 December 2006 provides for "the secret observation and other kinds of investigations on the internet, in particular the covert participation to communication

Bundesverfassungsgericht ruled on this law in February 2008.[273] The Court held that online searches of suspects were only allowed if there was a concrete and imminent danger (*konkrete Gefährdung*) for 'pre-eminent important legally protected interest' (*überragend wichtige Rechtsgüter*), such as the life, limb or freedom of a person or the foundations or existence of the state (*Grundlagen oder Bestand des Staates*) or the foundations of human existence. The law of North Rhine Westphalia did not meet these requirements and was therefore deemed unconstitutional.

In recent times, the police law or, respectively, the administrative law of two *Länder* (Hesse and Schleswig-Holstein)[274] allowed police to use **installations by which they could automatically read the licence plates** of cars, in order to compare these with their investigation data. Several car drivers filed constitutional complaints against these provisions. The Federal Constitutional Court allowed these complaints in its Decision of 11 March 2008.[275] The challenged provisions did not comply with the required principle of legal certainty and clarity, since they did not even mention the purpose of the investigations for which the measure should be adopted. Moreover, the Constitutional Court considered them as disproportional.

Moreover, the German government plans to again introduce a **general provision allowing the reductions or remissions of sentences for delinquents who contribute to the detection or to the prevention of a crime** listed under § 100a (2) *StPO*.[276] The regulation shall be of a general character, i.e. no longer be restricted to certain types of offenders with only petty offences excluded. Moreover, there is no longer a link required between the crime that the informer committed and the crime which he has helped to detect or prevent. Just like the former proposals in this direction, the present proposition again is confronted with the same criticism.[277]

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installations, or, alternatively, the search for them, as well as the secret access to IT-based systems, including the use of technical devices. As far as such measures constitute an encroachment to Art. 10 *GG* (privacy of letters, posts, and telecommunications), or, respectively, are equal to such an encroachment, in account of their mode and intensity, the encroachment may only take place within the limits of Art. 10 *GG*."

[273] Judgment of 27 February 2008, Case nos. 1 BvR 370/07, 595/07.

[274] §14(5) of the Public Security and Order Act of Hesse (*Hessisches Gesetz über die öffentliche Sicherheit und Ordnung*); § 184 (5) of the General Administration Act of Schleswig-Holstein (*Allgemeines Verwaltungsgesetz für das Land Schleswig-Holstein)*.

[275] Case nos. 1 BvR 2074/05; 1 BvR 1254/07.

[276] See the proposed bill of 24 August 2007, BT-Dr. 16/6268 (online available at http://dip21.bundestag.de/dip21/btd/16/062/1606268.pdf, visited on 1 October 2008).

[277] Representatives of all legal professions raised their voices against this Bill, adducing the highly questionable reliability of the gained information. It was argued that there was no proven necessity to offer leniency for all types of criminal offenders. Punishment was deprived of its main function (to counterbalance guilt), as not even a connection between the committed crime by the informer and the crime about which he gives information is needed. This was, moreover, not fair towards the victim of the informer's crime. It was also unfair towards those participants to a crime who only played a secondary role in a criminal organisation (aidors and abettors), and who, because of this smaller role, were unable to provide as valuable information as those heavily involved in the crime, who would, because of their collaboration with the authorities, enjoy sentence reductions or remissions. (Dombek, Arenhövel, Kilger and Schlieffen (2006)).

With respect to substantive criminal law, the German minister of Justice has proposed the **introduction of two new criminal offences**: the preparation of terrorist offences (*Vorbereitung von terroristischen Straftaten* - the draft § 89a *StGB*) and instruction to terrorist offences (*Anleitung zu terroristischen Straftaten* - draft § 91 *StGB*).[278]

In addition, the Federal State of Hesse has applied for a new law criminalising **the stay in a terrorist training camp**.[279] In the application the *Land* of Hesse also proposed to criminalise advertising for the purpose of engaging sympathy ("*Sympathiewerbung"*). This proposal was occasioned by the arrest of three men in South East North Rhine-Westphalia, who had planned heavy attacks on US institutions in Germany. Twelve barrels of hydrogene peroxide were found in their country house, sufficient material to build bombs of higher impact than the ones in Madrid and London. All three suspects had been trained in a terrorist camp in Pakistan.[280]

3.6. Summary

3.6.1. Main developments

The end of the 1960s and the 1970s in Germany were marked by gradual extensions of police powers, to the detriment of both the accused and his defence lawyer.

In 1968 eavesdropping powers of the police were extended to allow the eavesdropping of unrelated third parties. The Constitutional Court limited the new law by requiring that the concerned person had to be notified of the intrusive measure. The law was amended and subsequent applications (such as *Klass and Others*) to the European Commission of Human Rights and to the Strasbourg Court failed.

In 1972 civil servants became obliged to pledge loyalty to the constitution and the free, democratic basic order of the Federation. While the German Constitutional Court declared the provision in accordance with the *Grundgesetz*, the ECtHR found in the case of *Vogt* that the applicant's rights of Art. 10 and 11 ECHR were violated.

The subsequent anti-terror legislation of the 1970s, responding to the emerging RAF terror, particularly targeted and limited the rights of the defence. First, the exclusion of defence lawyers was ordered, in practice, without any legal basis and subsequently, having been declared unconstitutional by the *Bundesverfassungsgericht*, regulated by law (§§ 138a, 138b *StPO*). Second, the number of defence counsels was limited to three and defence lawyers became precluded from defending more than one person accused of the same act. Both regulations were found to be constitutional by the Federal Constitutional Court. Third, a provision was introduced to allow trials to continue in the absence of the accused, if he had wilfully provoked his absence. This provision was also considered constitutional by the *Bundesverfassungsgericht.* Fourth, written communication between the accused and his lawyer could be subjected to

[278] See Bundesministerium des Inneren (2007).
[279] Land Hessen (2007); the proposed bill is online available at: http://dip21.bundestag.de/dip21/btd/16/079/1607958.pdf (last visited on 21 September 2008).
[280] . Die Zeit (online edition) (5 September 2007): *Schlimmer als London und Madrid*.

judicial control (§§ 148(2), 148a *StPO*). In *Erdem v Germany*, the ECtHR held that this provision did not violate Article 8, ECHR. On the occasion of the abduction of Hanns-Martin Schleyer, the notion of incommunicado detention was introduced into German law. This presented the most severe interference with the rights of the defendant. He was not allowed to communicate with his lawyer in privacy for a period of anything up to thirty days, a period that could in theory be prolonged indefinitely, as long as the legal requirements were met. In view of the very exceptional situation in which the law had been adopted, both the *Bundesverfassungsgericht* and the European Commission sanctioned the measure.

In 1976 the terrorist offence of the membership to or foundation of a terrorist organisation, § 129a *StGB*, was introduced into German law. Since then, several special coercive measures of criminal procedural law targeting terrorism make reference to this provision. Until the September 11th bombings, this was the only explicit terrorist offence in German criminal law. After September 11th, § 129b *StGB* was introduced, extending the application of the former provision also to international terrorism committed abroad. The provision was criticised for several reasons, one of them being that the term "terrorist organisation" was not actually defined by the law.

Due to the Census Decision of the Federal Constitutional Court in December 1983, in which the need for a legal basis (in the form of a parliamentary law) for all intrusive measures limiting the right to privacy was established, in the following years many new laws were adopted that regulated measures which had already been applied in practice before, but which had hitherto lacked any legal basis. In the following years, anti-terror laws concerning police powers to search and control were further extended, targeting incrementally broader parts of the population and, in particular, limiting their right to privacy. Thus, control posts (§ 111 *StPO*) could be located on public streets, controlling all people who passed. Computer-supported searching tools were invented which scanned through the personal data of large swathes of the population, with the goal of identifying new suspects (*Schleppnetzfahndung*, § 163d *StPO*, and *Rasterfahndung*, §§ 98a, 98b StPO, see also respective police laws of the *Länder*).

In the 1990s the fight against terrorism and against organised crime and drug-trafficking was combined. Measures in these fields include the hotly debated adoption of a legal provision allowing for the reduction or even remission of sentences for offenders willing to cooperate with justice (*Kronzeugenregelung*), bugging operations in public places and later also in private homes, and the use of undercover agents and informers. All of these measures were criticised for many reasons. The *Kronzeugenregelung* proved of little effect with respect to the RAF. None of its members made use of this possibility. The provisions regulating electronic acoustic observation in private houses were considered only partially compatible with the German Constitution by the *Bundesverfassungsgericht.* Although the legislator changed the law following the Constitutional Court's recommendations, in 2004 the Constitutional Court declared that some of the respective provisions were still unconstitutional. Subsequently the respective legislation was further amended.

The use of undercover agents and private informers was considered as problematic regarding both constitutional and European human rights aspects,

particularly with respect to the inviolability of the home (Art. 13 *GG*), and the right to privacy (Art. 8, ECHR). In two cases before the ECtHR, the use of *agents provocateurs*, a special form of undercover agents, was assessed as violating Art. 6(1) of the ECHR.

After the attacks of September 11th, the German legislators have been particularly proactive in adopting new, far-reaching laws. Two "security packages" were speedily adopted. The first package mainly facilitated the prohibition of religious associations and the criminalisation of terrorist organisations based abroad. The second introduced a number of changes in different branches of law, including the law governing secret services, the federal police agency, identity documents, asylum and aliens. These amendments are criticised from three different viewpoints: first, an important principle of German law which developed in the aftermath of the experience under Hitler, the *principle of separation* of police and secret services, was gradually weakened. Second, the right to privacy is increasingly undermined, by granting step-by-step more investigation tools to the police and secret services not only with respect to suspects, but also with respect to the general population. Finally, when it comes to the prevention of terrorism, in the field of asylum and aliens law, the principle of non-discrimination (Art. 3 *GG*, Art. 14 ECHR) is in some cases disregarded.

In addition to these security packages, the grid search was again applied with the objective to identify sleepers in Germany, but to no avail. Respective provisions on the level of federal states were declared unconstitutional by the *Bundesverfassungsgericht*.

Telecommunication interception, including of mobile phones, was further extended and no longer limited just to terrorism (§ 100i *StPO*).

Following developments at the level of the European Union, the two Framework Decisions of June 2002 were implemented, with regards to the combat of terrorism and to the European arrest warrant. The implementing Act introducing the European arrest warrant into German law was declared null and void by the *Bundesverfassungsgericht* in 2005. Subsequently a new implementing Act was adopted. Also, Directive 2006/24/EC on the retention of communication data was transposed into German law, allowing for the storing of electronic communication data for up to six months. Its constitutionality and compatibility also with respect to European human rights was seriously doubted. The Constitutional Court declared a similar provision included in a regional statute from Lower Saxony as unconstitutional and thus void. Despite these concerns, the Directive was implemented through the Act of 9 November 2007, which came into force on 1 January 2008. Constitutional injunctions against the Act were partially allowed by the *Bundesverfassungsgericht.* The Court established additional conditions that need to be fulfilled.

With the Constitutional Court's quashing of the Air Security Act in 2005, which was meant to legalise the shooting down of hijacked airplanes, the Constitutional Court set an important limit to the state's powers to fight terrorism. In the Court's view, the killing of innocent passenger's for the purpose of saving other people's lives degraded the passengers to mere objects and therefore violated their human dignity.

After two suitcase bombs were found on German regional trains, in 2006 the legislator again introduced new measures, which included an anti-terror database allowing the information exchange between the intelligence services and the police with respect to terrorist suspects and their "contact persons". The database is problematic in view of the principle of legal certainty and with respect to the mentioned principle of separation.

By the Act complementing the existing Act to fight terrorism, the provisions introduced by the second Security Package of 2002 were further extended, in particular with respect to the competencies of the secret services. Further, the sunset clause limiting the duration of some of the provisions of 2002 (concerning mainly the powers of secret services and police) has been abolished by this Act, so that these provisions have become permanent.

The principle of separation has been further weakened by conferring investigation powers also for preventive purposes now to the Federal Office of Investigation (*Bundeskriminalamt*), which traditionally only administrated measures in the repression of crime.

Finally, the court rulings in the cases of Mzoudi and El Motassadeq, the first being acquitted on the basis of lack of evidence and the second being eventually convicted for the abetting to murder of 246 individuals, were mentioned. They demonstrate that basic rule of law principles must apply to everybody indiscriminately, regardless of the gravity of the deeds of which he is being accused.

The current developments show that a number of new anti-terror measures are planned, of which the debated "online search" is probably the most questionable measure. Also, the introduction of two new offences are being discussed: preparation of and instruction to terrorist offences, as well as the participation in a terrorist training camp. Further, the question of introducing a general provision to permit sentence reductions or remissions for offenders in exchange of information is again being discussed, in spite of the critics already mentioned earlier. Furthermore, the reading of licence plates, which has already been introduced on the regional level in some federal states, has been declared in these cases as unconstitutional, for not complying with the requirements of legal certainty and clarity and for being disproportional.

3.6.2. General observations

It is apparent that German anti-terror legislation has led to concessions in different fields. The rights of the accused and his defence lawyer have been considerably limited, the rights to privacy are subject to more and more limitations, including the privacy of uninvolved third parties. In addition, one can observe a general tendency of recent laws to increasingly affect more parts of the civil population. In view of the presumption of innocence, this is particularly worrying. More and more people are being checked and controlled by the authorities without having given any reasons to be suspected. A special feature of German anti-terror legislation is that the German *Trennungsprinzip*,

the principle to separate competences of the police and secret services, is less and less taken into account when mixing the powers of the two and allowing information exchange.

Moreover, we can observe that some very far-reaching laws were adopted in extremely little time (e.g. the *Kontaktsperregesetz* in only 3 days, the Security Package II in little more than a month). Similarly as in the UK, it is observed that those provisions initially of a temporary nature, which may have only encountered parliamentary consent because of its limited duration, became *ex post* permanent (e.g. see the provisions of Security Package II, which were subjected to a sunset clause, Art. 22, which was abolished six days before its expiration).

The role played by the Constitutional Court in the development of anti-terror legislation has been relatively strong. The Court quashed a number of laws which were subsequently amended, when taking the constitutional requirements into account. The Constitutional Court not only declared laws null and void, but in many cases reshaped the law, by giving a restrictive and clearly defined interpretation which needed to be taken into account when subsequently applying the law. The legislators mostly reacted by changing the respective law accordingly. In few cases the Constitution was changed, in order to avoid reproval from the *Bundesverfassungsgericht*. Thus Arts. 10 and 13 of the *Grundgesetz* were changed, to facilitate the adoption of laws restricting these rights to a greater extent.[281] Despite this, at least in one case the legislators were not able to change the law in a fashion that complied with constitutional requirements, so that the Court had to quash the same provision again.[282] In most cases, the ECtHR agreed with the Constitutional Court's judgment.[283]

[281] G10 Act, amendment to G10 Act, and Act for the Improvement of the Fight against Organised Crime (of 4 May 1998), changing Art. 13.
[282] See above at 3.3.3.2.
[283] E.g. case *Klass and others* (above at 3.3.1.1.); "*Stern*" case (above at 3.3.1.1.); Case of *Croissant* (above at 3.3.1.4.); *Grams* (above at 3.3.3.); the applications concerning the *Verbrechensbekämpfungsgesetz* 1994 (above at 3.3.3.2.). Only in the case of *Vogt* (above at 3.6.1.), the opinion of the ECtHR and of the Federal Constitutional Court differed.