

German constitutional court justifies state use of agents provocateurs

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24 February 2015

Last year, on December 18, the Federal Constitutional Court in Karlsruhe rejected the appeal of three men who were enticed by undercover police agents into drug trafficking and then sentenced to long prison terms. The court recently announced the reasons for its decision, a ruling that has far-reaching implications.

The official press release of the court bore the title: “There are no compulsory grounds against sentencing in the case of illegal provocation to commit a crime”. The words “no compulsory” attempt to euphemise this blatantly prejudiced ruling, because the “extremely exceptional case” dreamed up by the judges—involving the “illegal” use of police stoolpigeons and provocateurs and ending in prosecution—is unlikely to ever occur in practice.

The Berlin Regional Court sentenced all three defendants to prison terms of around four years, although it also concluded they had been victims of “unlawful provocation” and the police had violated the principle of “a fair trial” as defined by the European Convention on Human Rights.

In the event, the regional court was only willing to concede the defendants a reduced sentence. Had they acted on their own initiative, the sentence would have been seven to ten years.

The Constitutional Court has now given its backing to this ruling. Stating grounds for the verdict, it provides details about how the undercover agents worked on their victims for months, sparing neither effort nor expense to overcome their initial resistance to provocation and lure them into a trap.

The statement of grounds mentions that certain persons from the criminal milieu have testified that since September 2009 the “main culprit” had been “dealing in heroin on a large scale from a café”. This

accusation remained unconfirmed, however.

From November 2009, a “state accomplice” (i.e., an undercover agent, used by the police and usually coming from the same milieu as the person under suspicion) was tasked with making investigations. The accomplice was well paid for his services. He “was said to have been paid for each of his days of work and received a bonus on a scale commensurate with the degree of success of his operation.

The accomplice spent some time looking for the café in question in order to make contact with the victim. According to the Constitutional Court, his plan was to “pretend he himself dealt in heroin that was imported in containers through Bremerhaven and smuggled through customs and out of the port area by a dockworker contact—who, in fact, was also an undercover agent”.

But the person who was later convicted was unwilling to get involved, and told the agent provocateur instead that he didn’t want to “have anything to do with any ‘filthy heroin’.” He let it be known, however, that “hashish and cocaine were in his view something else”.

The police then changed their tactics and tried to lure the victim into their trap with these particular drugs. “After almost nine months without any evidence of cocaine or—as originally suspected—heroin trafficking on the part of the claimant, the stoolpigeon continued to press the claimant to engage in the Bremen drug import scheme, devised by the police.”

In August, an undercover police agent intervened in the guise of a drug trafficker, who also emboldened the “main culprit” to participate in the affair. After about a year and a half of continual coaxing and persuasion, he was finally induced to commit the actual crime, a deal involving almost 100 kg of cocaine.

The Constitutional Court did criticize the police and the public prosecutor. It cautions that investigators

should “solve crimes, not cause them themselves”. In the court’s view, if the prosecution fails sufficiently to comply with its statutory supervisory role or the police deliberately ignore such restraints, the rule of law and due process are no longer assured. This is demonstrated by the present case, according to the court. It claims the prosecution “failed” in its supervision of the police.

Nevertheless, the Constitutional Court rejected the appeal of the man who had been lured into a trap in precisely this way. It argued that the case did not involve an innocent citizen, he was not considered above suspicion prior to entrapment, the police undercover agents did not threaten him, and he “gave indications” of a “criminal inclination” towards trafficking in cocaine and hashish.

According to the Constitutional Court, it is lawful for the state to imprison a person following that person’s subjection to “unlawful provocation (to commit a felony)”. This ruling is upheld, moreover, despite the person’s misfortune of becoming a police suspect due to false accusations from a criminal milieu and then, after “a very long period of time”, succumbing to “considerable pressure and coaxing” from undercover agents of the police.

This is justified—in a way typical of German jurisprudence—by citing the obligations of the “rule of law”, whose precedence rank higher than the democratic rights of the individual. The Constitutional Court’s verdict literally states:

“The rule of law can only be effected if adequate precautions have been taken to ensure that offenders are prosecuted under existing laws, convicted and awarded a just punishment. Procedural modifications, serving the needs of effective criminal justice, do not therefore violate the fundamental right to a fair trial, if the accused’s or defendant’s procedural positions [i.e., rights], as assessed under preceding conditions, are thereby disregarded for the sake of a more effective criminal justice system.”

In less pompous and pretentious language, this means: If the law wants to put someone in jail, it must be allowed to do so, and the principles of a fair trial have to take a back seat.

The verdict of the Constitutional Court opens the floodgates to each and every form of state provocation. If undercover agents, recruited among narcotics racketeers, are permitted “contrary to the rule of law”

to provoke and entrap as long as it takes to corrupt a person and have him convicted of a “criminal offense”, why can’t the same legal fraud justify the use of political provocateurs? An agent provocateur, who enticed a member of a political organisation to commit a criminal offense, or committed such an offense himself as a member of that organisation, would be all that was needed to have it decreed a “terrorist organisation” and banned.



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