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Entrapment & Evidence
The Impact of the ECtHR's Judgment in the Case of *Furcht v. Germany* on the Jurisprudence of the German Federal Court of Justice

Abstract

The issue of police incitement or entrapment has long been the subject of vivid controversies. The central dilemma is a police investigation that legitimately requires the use of undercover agents, informers and/or other covert practices but is not conducted in an essentially passive manner. This kind of influence on an individual that is cumulating in the commission of an offence that would otherwise (maybe) not have been committed has been considered unfair and a breach of Art. 6 (1) ECHR (right to a fair trial) throughout the jurisprudence of the European Court of Human Rights (ECtHR) since Teixeira de Castro v. Portugal[1] *– a point of view generally shared in the jurisprudence of German courts.*

However, there is still no consensus about the parameters that are to be included in the decision as to whether the undercover action was legitimate and conducted in an essentially passive manner; and there is almost no consensus regarding the question if the fairness of the procedure can be restored at all after an illegitimate police entrapment. Furthermore, there is now a serious disagreement over the legal consequences that the acknowledgment of an infringement of the fairness principle should have.

Until most recently, the German approach to the topic consisted of a mitigation of the sentence ("Strafzumessungslösung" or "fixing of penalty approach"). This notion was severly challenged when the ECtHR, in its decision in Furcht v. Germany, addressed the question of whether or not the German criminal courts had provided an individual who had become the subject of entrapment with sufficient redress. The ECtHR found clearly that in order to comply with the fair trial principle, all evidence obtained in such a way had to be excluded, or that a procedure with similar consequences had to be ap-

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1 *Teixeira de Castro v. Portugal*, Application no. 25829/94, Judgment 9 June 1998; *Ramanauskas v. Lithuania*, Application no. 74420/01, Judgment 5 February 2008.

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plied. Nonetheless, the German Federal Constitutional Court (Bundesverfassungsgericht) ruled in a decision[2] handed down two months after Furcht v. Germany that even in the case of an undercover measure that had gone beyond the mere passive investigation of criminal activity, criminal proceedings as a whole could be considered fair if there had been a considerable mitigation of the criminal penalty. The First Criminal Division of the Federal Court of Justice, the highest court of appeal in criminal matters, followed the latter approach.[3] However, the Second Criminal Division of the Federal Court of Justice changed[4] its previously established jurisprudence fundamentally, following the ECtHR's reasoning in Furcht v. Germany. The Second Criminal Division not only held that the evidence obtained by police entrapment must be excluded, but terminated the criminal proceedings in the challenged case of entrapment, even though it concerned serious allegations.

This paper focuses on the reception of the ECtHR's principles, as well as key arguments made by the German Federal Constitutional Court and the criminal divisions of the Federal Supreme Court and analyses the scope of the current dissent and its meaning for the evolution of domestic criminal law.

I. From investigating to manufacturing a crime?

Undercover operations are precarious law enforcement techniques.[5] Used foremost in the field of organized crime, they are particularly controversial since the police (and/or other law enforcement agencies) participate in the very crime for which the offender is later convicted.

Undercover operations range from the subtle setting up of a decoy – such as a police agent posing as a potential victim – to the careful orchestration of a crime by the police posing as a participant in an unlawful activity. The state uses persuasion, and sometimes even pressure or coercion, to facilitate the commission of the offence. Designed to expose a pre-existing criminal intent, undercover operations often do more than merely create an opportunity for someone already engaged in criminal activity.

Consequently, those operations raise a lot of questions. In this article, the author will focus on the legitimacy of influencing a person who might be predisposed to some

2 *BVerfG* (*2. Kammer* des *2. Senats*), (Nichtannahme-)Beschluss v. 18.12.2014 – 2 BvR 209/14 u.a.

3 *BGH*, Beschluss v. 19.5.2015 – 1 StR 128/15.

4 *BGH*, Urteil v. 10.6.2015 – 2 StR 97/14.

5 See *B. Hay*, Sting operations, undercover agents, and entrapment, Discussion Paper N° 441, 2003, Harvard Law School, *passim*. From a German perspective: *F. Dencker*, Über Heimlichkeit, Offenheit und Täuschung bei der Beweisgewinnung im Strafverfahren, StV 1994, p. 667 (678); *K. Bernsmann/K. Jansen,* Heimliche Ermittlungen und ihre Kontrolle – Ein systematischer Überblick, StV 1998, p. 217 et seqq.; *R. Eschelbach*, Staatliche Selbstbelastungs-, Fremdbelastungs- und Tatprovokation, GA 2015, p. 545 (548); *R. Esser*, https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Anlage_1_StPO_Kommission.pdf;jsessionid=6123A770A491DBE14B9582B5EC493849.1_cid324?__blob=publicationFile&v=4, Anlagenband I, p. 45 ff.; *Maluga*, Tatprovokation Unverdächtiger durch V-Leute, 2006.

degree to commit an offence. What are the advantages and disadvantages of this method? When does the covert investigation of existing criminal activity turn into the incitement of a certain behavior or even the manufacturing of criminal offences? And finally – and most importantly – what is the approach of the European Court of Human Rights (ECtHR) and its impact on German jurisprudence?

1. Purpose, legitimacy and disadvantages of undercover operations

The purpose of these methods is – on the most basic level – to have the crime on tape, meaning: to eliminate many difficulties faced in ordinary law enforcement. In comparison with "pure" surveillance methods (as it were), it seems to be easier, less expensive in terms of conserving scarce law enforcement resources and possibly even less invasive in a general sense to catch specific offenders with a trap. As *Hay* says, "it's no different from catching mice, if they are lurking behind the walls of a house: it is easier to catch them by putting out baited traps than by dismantling the walls to search for them".[6]

Methods of *ex post enforcement* – which essentially means to wait for a crime to happen first before arresting and punishing the perpetrators – do in fact have side effects: One might come too late; irreparable harm may already have been done, which is especially the case in scenarios revolving around terrorism and sexual offences. Or there might be subsequent obstacles to collect evidence, because witnesses may remain silent and other evidentiary material might be insufficient evidence to convict a suspect. From this perspective, the approach of "testing" a person's resolve to actually commit a criminal offence with a trap might solve the mentioned problem of lack of evidence and because of this might serve a legitimate *informational* purpose.[7] Furthermore, undercover operations might serve a *behavioural* purpose – or at least this is an argument made by those who defend these techniques: They argue that would-be criminals can be deterred from seizing genuine criminal opportunities by generating an environment of fear of being caught in an undercover operation. But of course, as *Hay* argues,[8] this deterring purpose is not really plausible since states tend to keep the existence and scope of undercover operations a well-guarded secret. The general idea is to get the suspects to trust the undercover agent so that he will commit his crime in "plain view". If the purpose were to create an environment of fear to be caught in an entrapment operation, the authorities would have to spread the word on this strategy, which they, in actual fact, rarely do. In fact, undercover operations are mostly conducted *because* of their secret nature and are thus to be considered as mostly investigative techniques. Their legitimacy is derived from their preventive nature, which itself is linked to the identification of individuals who are or might be engaged in criminal activity.

6 See *Hay*, Discussion Paper N° 441, 2003, Harvard Law School, p. 13.
7 Cf. *Hay's* analysis in Discussion Paper N° 441, 2003, Harvard Law School, pp. 3, 8 et seqq.
8 *Hay,* Discussion Paper N° 441, 2003, Harvard Law School, p. 10.

Aside from the question whether the aim of crime prevention can justify the means,[9] there is – obviously – the problematic involvement of the authorities in the manifestation of the crime, even though their actual task is to prevent crimes. Furthermore, there is the difficult question of the limits of the involvement. When does inspiration become incitement? How many times can a person be provided with the means and conditions for the commission of a criminal offence? How much money can they be given? How much pressure can be exerted? What is the proverbial "offer one can't refuse"?

And even if one finds convincing parameters, the core dilemma remains that individuals would only be convicted for falling into government traps. There is no certain answer to the question, if they were, in some sense, ready or likely to commit crimes without government encouragement, which raises the next question whether to punish the target of a successful undercover operation.

Of course, one can argue, that the target of entrapment should be punished like any other offender, because what matters is that he broke the law. It would not make a difference if, instead of a state agent, a friend had persuaded him to do it.[10] On the other hand, it seems that there is already more than enough crime in almost any society without the police adding to it. And what kind of law enforcement is this anyway – to set traps for individuals who would maybe comply with the law, if only they were let alone by the authorities? What theory of criminal justice could argue that punishing them or threatening them with punishment would improve their behavior? It seems even counterproductive, because resources are dissipated on harmless individuals instead of being concentrated on those who pose a genuine criminal threat by intrinsic motivation to commit a crime. Furthermore, great potential for abuse of governmental power is generated.

To summarise, the issue of police incitement or entrapment raises a lot of fundamental questions and has therefor been the subject of vivid controversies in the European and German discussion about fairness in criminal procedures. Whatever the opinion one has on the topic, the challenge is – in the words of the US Supreme Court – to draw "a line […] between the trap for the unwary innocent and the trap for the unwary criminal."[11] One possible line to follow is the one drawn by the European Court of Human Rights and especially the argumentation in *Furcht v. Germany*, because it represents the typical version of the problem addressed.

9 See for a detailed approach infra I. 2. b) and II.

10 See *Hay*, Discussion Paper N° 441, 2003, Harvard Law School, p. 15 with reference to *People v. Mills*, 178 N.Y. 274, 289 (1904) ["the courts do not look to see who held out the bait, but to see who took it."] and *Board of Commissioners v. Backus*, 29 How. Pr. 33 (N.Y. Sup. 1864) ["the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defence was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian [sic] ethics, it never will."].

11 *Sherman v. United States*, 356 U.S. 369 (1958).

2. The case Furcht v. Germany[12] as a typical case of the ECtHR's approach to entrapment?

a) The facts

Mr Furcht was approached by undercover police officers in November 2007. He had no previous criminal record at all, nor was he suspected of any involvement in drug trafficking; he just had – if one may say so – really bad taste in friends. He was approached in the context of criminal investigations against six other people suspected of drug trafficking. The main purpose of contacting Furcht was to establish a connection to these individuals and especially to one of his friends, his business partner S., who was a key suspect. The authorities initially pretended to be interested in buying real estate and later in smuggling cigarettes.[13] They offered a sizeable share for transporting the cigarettes abroad. Communication with S. was established, but S. chose to only communicate via Furcht and never directly with undercover agent P. Subsequently, another undercover agent named D. disclosed to Furcht in 2008 that he considered the risk of being caught smuggling cigarettes too high compared to the potential profits. Furcht replied that he, S. and others would also consider trafficking cocaine and similar drugs. He stated that he did not want to be involved in the drug trafficking itself, but that he would draw commissions.

However, Furcht later explained to one of the undercover agents that he was no longer interested in participating in a drug deal or in any business other than the restaurant he ran. Nonetheless, a few days after Furcht had declined the offer by the undercover agents, one of them dispersed Furcht's fears and eventually, Furcht arranged for two purchases of drugs for them in February and March 2008. In the meantime, a district court had authorised criminal investigations concerning Furcht, himself. Following the second transaction, Furcht was arrested and convicted of two counts of drug trafficking and sentenced to five years' imprisonment. In fixing the sentence, the first-instance court noted that Furcht had been incited by a state authority to commit the offences. The court found that this was a weighty mitigating factor, leading to a "relatively mild sentence".

12 *Furcht v. Germany,* Application no. 54648/09, Judgment of 23 October 2014. For further details from a german point of view see JR 2015, 81 [84] mit Anm. *A. Petzsche* = StraFo 2014, 504 [506] mit Anm. *J. Pauly* = StV 2015, 411. See also *F. Meyer/W. Wohlers*, Tatprovokation quo vadis – zur Verbindlichkeit der Rechtsprechung des EGMR (auch) für das deutsche Strafprozessrecht, JZ 2015, 761; *A. Sinn/S. Maly*, Zu den strafprozessualen Folgen einer rechtsstaatswidrigen Tatprovokation – Zugleich Besprechung von EGMR, Urt. v. 23.10.2014 – 54648/09 (Furcht v. Germany), NStZ 2015, 379; *M. Jahn/H. Kudlich*, Rechtsstaatswidrige Tatprovokation als Verfahrenshindernis: Spaltprozesse in Strafsachen beim Bundesgerichtshof, JR 2016, 54.

13 Cf. the press release issued by the Registrar of the Court: ECHR 312 (2014), 23 October 2014.

b) The general approach of the ECtHR in matters of undercover operations

The ECtHR analyses undercover operations mainly under the scope of Article 6 (1) ECHR. There is no doubt that often the right of privacy (Art. 8 ECHR) is infringed as well, but the most important and problematic aspect of entrapment cases is the use of evidence obtained as a result and by this, whether the right to a fair trial is infringed. However, in this case, the use of evidence was discussed in the context of the question of whether or not the applicant could still claim to be the victim of the alleged violation of the Convention, having regard to the fact that the German courts had already mitigated his sentence.[14] Those aspects are linked due to the German approach to police incitement, which will be discussed below.[15]

The case *Furcht v. Germany* finds its place in a line of "key judgments" like *Teixeira de Castro*[16], *Vanyan v. Russia*[17], *Ramanauskas v. Lithuania*[18], *Pyrgiotakis v. Greece*[19], *Malininas v. Lithuania*[20], *Bannikova v. Russia*[21] and *Ali v. Russia*[22]. On the basis of this jurisprudence, it seems that from the ECtHR's general point of view,[23] undercover operations do not generally infringe upon the right to a fair trial. However, on account of the risks of police incitement, their use must be kept within clear limits and requires adequate safeguards against abuse, since the public interest cannot justify the use of evidence obtained as a result of police incitement.

The ECtHR makes a major distinction between *undercover operations* and *police incitement.*[24] The decisive criterion for the ECtHR is whether the undercover agent's activity confines to gathering information or actually incites people to commit a criminal act.[25] This approach was developed in *Teixeira de Castro v. Portugal*, when the ECtHR stated that police incitement occurs where the officers involved did not "confine themselves to investigating a criminal activity in an essentially passive manner, but ex-

14 *Furcht v. Germany*, (fn. 12), margin no 60 et seq.
15 See I. 3; II., III.
16 *Teixeira de Castro v. Portugal* (fn. 1).
17 *Vanyan v. Russia*, Application no. 53203/99, Judgment 15 December 2005.
18 *Ramanauskas v. Lithuania* (fn. 1).
19 *Pyrgiotakis v. Greece*, Application no. 15100/06, Judgment 21 February 2008.
20 *Malininas v. Lithuania*, Application no. 10071/04, Judgment 1 July 2008.
21 *Bannikova v. Russia*, Application no. 18757/06, Judgment 4 April 2010.
22 *Ali v. Romania*, Application no. 20307/02, Judgment 9 November 2010.
23 See the first landmark cases *Lüdi v. Switzerland*, Application no. 12433/86, Judgment 15 June 1992; *Teixeira de Castro v. Portugal* (fn. 1). margin nos. 35-36; *Ramanauskas v. Lithuania* (fn. 1), margin nos. 51, 54; basic details *R. Esser*, Lockspitzel und V-Leute in der Rechtsprechung des EGMR: Strafrechtliche Ermittlungen jenseits der StPO – außerhalb des Gesetzes? in: Abschied von der Wahrheitssuche? Texte und Ergebnisse des 35. Strafverteidigertages Berlin, 2012, p. 197-212.
24 In the parlance of the ECtHR, the terms "entrapment", "police incitement" and "agent provocateurs" are used interchangeably. Also, the term "undercover agent" applies to all persons investigating on behalf of the state in a "not-open manner". This is different from the German approach, where further differentiations between a state agent and recruited private individuals acting on behalf of the state are made.
25 *Teixeira de Castro v. Portugal* (fn. 1), margin no. 27.

ercised an influence such as to incite the commission of the offence."[26] Ever since that judgment, the first and most critical parameter in order to discern a legitimate undercover operation from police incitement has been whether or not the investigation was conducted "in an *essentially passive manner*". Following on from this, the ECtHR mapped out a more specific approach in its case-law: First of all, the reasons underlying the covert operation are relevant in order to examine whether there were *objective* suspicions that the individual had been involved in criminal activity or was predisposed to commit a criminal offence.[27] These suspicions on the part of the authorities are to be based on reasonable grounds.[28] In contrast, the mere assumption that an individual might be "potentially predisposed" is not enough. Furthermore, the fact that the applicant had no criminal record or that no investigation concerning him had been opened, is a strong indicator for an essentially non-passive manner and therefore a police entrapment.[29] On these grounds, the ECtHR went on to elaborate on differentiating factors, stating for example in *Vanyan v. Russia* that the causality of the police's involvement is a further aspect to be taken into consideration. Especially if "there is nothing to suggest that the crime would have been committed without their intervention",[30] there is a good chance that the crime was incited. Moreover, since *Vanyan v. Russia*, the mere claim that the police possessed information concerning the person's involvement is not enough anymore.[31] Moreover, the next landmark case, *Ramanauskas v. Lithuania*[32], shifted the burden of proof concerning the reasonable grounds of a suspicion onto the authorities. The ECtHR noted that a suspicion cannot be based solely on hearsay.[33]

26 *Teixeira de Castro v. Portugal* (fn. 1), margin no. 38; similar in *Furcht v.* Germany (fn. 12), margin no. 48; *Ramanauskas v. Lithuania* (fn. 1), margin no. 55 with further references; *Bannikova v. Russia* (fn. 21), margin no. 37; cf. also *Pyrgiotakis v. Greece* (fn. 19), margin no. 20.

27 *Bannikova v. Russia* (fn. 21), margin no. 38. See also *CoE*, Guide on Article 6. Right to a fair trial, 2014, pp. 26 et seq.

28 *Teixeira de Castro v. Portugal* (fn. 1), margin no. 38; *Ramanauskas v. Lithuania* (fn. 1), margin no. 67, *Malininas v. Lithuania* (fn. 20), margin no. 36.

29 *L. Stariene*, The Limits of the use of undercover agents and the right to a fair trial under Article 6 (1) of the European Convention on Human Rights, JURISPRUDENCE 2009, 3 (117), p. 263–284 (268 et seq.).

30 *Vanyan v. Russia* (fn. 17), margin no. 47: "there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement".

31 *Vanyan v. Russia* (fn. 17), margin no. 49.

32 *Ramanauskas v. Lithuania* (fn. 1).

33 *Ramanauskas v. Lithuania* (fn. 1), margin no. 67. See for further details concerning the question that the information regarding the person's previous involvement in a similar criminal activity is presented by only one source: *Khudobin v. Russia*, Application no. 59696/00, Judgment 26 January 2007, margin no. 134.; *V. v. Finland*, Application no. 40412/98, Judgment 24 July 2007, margin no. 70.

In this way, the fairly abstract issue of a suspect's predisposition to commit an offence[34] was further outlined with each case, adding the aspect that "a previous criminal record is not by itself indicative of a predisposition"[35], or that the applicant's "familiarity with the current price of drugs and his ability to obtain drugs at short notice" could be an indicator for a predisposition, as well as the suspect's "failure to withdraw from the deal despite a number of opportunities".[36] Beside the causality of the police's involvement, it was stated more and more that any form of pressure is an indication of police incitement, *in concreto*: taking the initiative in contacting the applicant without any objective suspicions of a predisposition[37]; reiterating the offer and insisting despite an initial refusal[38]; or raising the price beyond the average level.[39]

Finally, the ECtHR's case-law built up to a *substantive test of incitement*, as mentioned for the first time as such in *Bannikova v. Russia*[40], to distinguish entrapment from permissible conduct. According to this test, the familiarity with the current prices for drugs, the ability to obtain drugs at short notice and the pecuniary gain from the transaction can be an indication for the suspect's predisposition to commit the crime in question. On the other hand, the fact that there was no prior involvement in drug trafficking, no criminal record, no preliminary investigations, but that there was some pressure (such as reiterating the offer; insisting on the transaction; raising the price) emanating from the authorities' side might point towards incitement.

c) The case Furcht v. Germany in the context of the ECtHR's jurisprudence

In *Furcht v. Germany*, the German government submitted that *Furcht* had not been incited to commit the drug offences in question, since he was already predisposed to commit these offences. The assumption of a predisposition was mainly based on the fact that *Furcht* himself had raised the possibility of delivering cocaine and that he had described himself as part of a group around S. and because "he had been able to initiate drug deals quickly via his contacts".[41]

Referring to the *substantive test of incitement*, the ECtHR clarified with regard to this main argument that the relevant time in determining whether there is a good reason to suspect a person of prior involvement is the time when the person was (first)

34 *Stariene*, The Limits of the use of undercover agents and the right to a fair trial under Article 6 (1) of the European Convention on Human Rights, JURISPRUDENCE 2009, 3 (117), p. 263–284 (272).
35 *Constantin and Stoian v. Romania*, Application nos. 23782/06 and 46629/06, Judgment 29 September 2009, margin no. 55.
36 *Shannon v. the United Kingdom*, Application no. 6563/03, Judgement 4 October 2005; see also *CoE*, Guide on Article 6. Right to a fair trial, 2014, p. 26, § 149.
37 *Burak Hun v. Turkey*, Application No. 17570/04, Judgment 15 December 2009, margin no. 44.
38 *Ramanauskas v. Lithuania* (fn. 1), margin no. 67.
39 *Malininas v. Lithuania* (fn. 20), margin no. 37.
40 *Bannikova v. Russia* (fn. 21), margin no. 36 et seq.
41 *Furcht v. Germany* (fn. 12), margin no. 42.

approached by the police.[42] However, in November 2007, there were no objective suspicions that *Furcht* was involved in drug trafficking and no criminal investigations were instituted against him. Secondly, the Court noted in view of the pressure that the applicant had been subjected to that at one point (1 February 2008) he had explained clearly that he was no longer interested in participating in a drug deal. Despite this, the undercover agent contacted him again and persuaded him to continue arranging the sale of drugs. By that, the authorities clearly abandoned a passive attitude and *caused* the applicant to commit the offences. The ECtHR concluded that the undercover measure at issue went beyond the mere passive investigation of pre-existing criminal activity and amounted to police incitement.[43]

Since the evidence obtained by police incitement was further used in the ensuing criminal proceedings against the applicant, the ECtHR raised the question whether the trial against the applicant was fair within the meaning of Article 6 (1) ECHR. The answer to this question could be based on case law as clear as the one concerning the limits of undercover techniques, because the admissibility and use of evidence in the proceedings is – as a general rule according to Art. 19 ECHR – primarily a matter of national legislation.[44] Concerning these procedural issues, the Court is confined to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.[45] However, there are concrete aspects that can be determined throughout

42 *Furcht v. Germany* (fn. 12), margin no. 56.

43 *Furcht v. Germany* (fn. 12), margin no. 59. If the result of the *substantive test of incitement* had been that no police incitement occured, the legitimacy of the undercover operation would still depend on the legality of the undercover agents' activity (see inter alia *Teixeira de Castro v. Portugal* (fn. 1), margin no. 38; *Ramanauskas v. Lithuania* (fn. 1), margin no. 63-64; *Miliniené v. Lithuania*, margin no. 37. It does not comply with the requirements of Art. 6 (1) ECHR to use undercover methods first and authorize the use of these methods later; see *Ramanauskas v. Lithuania* (fn. 1), margin no. 63. However, the use of undercover techniques *per se* does not infringe the right to a fair trial, if it is kept within clear limits with adequate safeguards against abuse. The national law must be precise as to under which circumstances authorities can fall back on covert investigative methods. Moreover, the state is under a positive obligation to ensure that its legal acts would provide guarantees to avoid abuse and misuse of power while secretly following persons (see *Kopp v. Switzerland*, Application no. 13/1997/797/1000, Judgment 25 March 1998, margin no. 64 = Reports 1998-II.

44 See *Asch v. Austria*, Application no. 12398/86, Judgment 26 April 1991, margin no. 26 = Series A no. 203: "The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them." See as well *Schenk v. Switzerland*, Application no. 10862/84, Judgment 12 July 1988, margin no. 45-49 = Series A no. 140; *Khan v. United Kingdom,* Application no. 35394/97, margin no. 34; *Allan v. United Kingdom*, Application no. 48539/99, Judgment 5 November 2002, margin no. 42 = ECHR 2002-IX; *Teixeira de Castro v. Portugal* (fn. 1), margin no. 34; *Ramanauskas v. Lithuania* (fn. 1), margin no. 52; *Gäfgen v. Germany*, Application no. 22978/05, Judgment 1 June 2010, margin nos. 95-98; *Lüdi v. Switzerland* (fn. 22), margin no. 43; *Bykov v. Russia* [GC], Application no. 4378/02, Judgment 10 March 2009, margin no. 88-89.

45 *Teixeira de Castro v. Portugal* (fn. 1), margin no. 34, *Ramanauskas v. Lithuania* (fn. 1), margin no. 52; *Vanyan v. Russia* (fn. 17), margin no. 45.

the case law and the ECtHR referred to them[46]: Firstly, it is settled case law that the public interest in the fight against serious crimes – such as drug trafficking – cannot justify the use of evidence obtained as a result of police incitement.[47] Secondly, the ECtHR stated in *Teixeira de Castro v. Portugal* that the use of evidence obtained by the incitement in the impugned criminal proceedings "meant that, right from the outset, the applicant was definitively deprived of a fair trial". Finally, the ECtHR stated even more clearly in *Lagutin v. Russia* that "for the trial to be fair within the meaning of Article 6 (1) ECHR, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply".[48] Although the last half-sentence – that at least "a procedure with similar consequences must apply" – was quite clear in its meaning, it left room for interpretation, and the German jurisprudence went on to fill this space with the so-called *fixing of penalty approach* (Strafzumessungslösung)[49] that had always been applied in police incitement cases – at least for 30 years.[50] As such, until most recently, police incitement neither constituted a bar to criminal proceedings nor was the evidence, obtained by the illegitimate undercover operation, excluded. The incitement was only taken into consideration in the process of fixing the sentence, which means that at the end of proceedings, when the court considers aggravating factors (like the number of victims, the quantities of drugs) and mitigating factors (first time offender etc.) the sentence had to be reduced in a considerable way due to the incitement. The main argument for this approach is that under the German law even a massive breach of the rules of investigation only leads to the exclusion of evidence obtained by the prohibited measure itself. Excluding all evidence in this case would fundamentally change the system. Furthermore, it is argued that applying a bar to the criminal proceedings would disregard the rights of the victims of an offence.[51]

However, in *Furcht v. Germany*, the ECtHR made it clear that it does not share this approach. The Court underlined that it is well-established case law that Article 6 (1) ECHR does not permit the use of evidence obtained as a result of police incitement. In view of this case law, the Court concluded that any measure short of excluding such evidence at trial or leading to similar consequences must also be considered insuffi-

46 As of the use of undercover agents as witnesses, the Convention does not preclude reliance at the preliminary investigation stage; however, the subsequent use of such sources as evidence in a trial is a different matter, see *Teixeira de Castro v. Portugal* (fn. 1), margin no. 35; *Kostovski v. Netherlands*, Application no. 11454/85, Judgment 20 November 1989, margin no. 44 (= Series A no. 166).

47 *Furcht v.* Germany (fn. 12), margin no. 47, 64.

48 *Lagutin and Others v. Russia*, Application nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, Judgment 24 April 2014, margin no. 117 with further references.

49 BGHSt 32, 345; 45, 321 = NStZ 2000, 269 mit Anm. *H. Lesch* JR 2000, 432; *S. Sinner/ A. Kreuzer*, Kein Verfahrenshindernis bei Anstiftung durch Lockspitzel, StV 2000, pp. 114 et seqq; *BGH,* NStZ 2014, pp. 277 et seqq.

50 First in *BGH*, Urteil v. 23.9.1983, NStZ 1984, 78; followed in BGHSt 32, 34; BGHSt 45, 321, margin nos. 13, 18; confirmed in BGH 5 StR 240/13, NStZ 2014, 277-281, margin no. 37.

51 BGHSt 45, 321, margin nos. 43-44; and file no. 5 StR 240/13, NStZ 2014, 277-281, margin no. 37.

cient. Finally, the ECtHR stated explicitly that it was not "convinced that even a considerable mitigation of the applicant's sentence can be considered as a procedure with similar consequences as an exclusion of the impugned evidence. It follows that the applicant has not been afforded sufficient redress for the breach of Article 6 § 1".[52]

3. The dilemma in the German jurisprudence after Furcht v. Germany

Less than two months after the ECtHR's judgment in *Furcht v. Germany*, the Federal Constitutional Court (Bundesverfassungsgericht) ruled in the *Bremerhaven Cocaine Case*[53] that even in the case of an undercover measure that had gone beyond the mere passive investigation, criminal proceedings as a whole could be considered fair if there had been a considerable mitigation of the sentence.

The facts of this case are similar to those underlying *Furcht v. Germany*: On information from the criminal milieu, the applicant was suspected of dealing with heroin on a large scale. A police informant was hired – and offered a performance-based salary – to build a relationship with the applicant and provide further information. Asked specifically about heroin, the applicant replied that he did not want anything to do with heroin, but that he would be more open to cannabis and cocaine. After nine months without finding any evidence – neither of a cocaine nor heroin business – the authorities continued the covert investigation with another focus: an import option. Over the course of two years, the agents influenced the applicant by offering immense rewards and by simultaneously building pressure. Nonetheless, the applicant turned down two further offers in a phase of indecision. Finally, after almost 2 years (!), the applicant made a connection with experienced drug smugglers and helped import 97 kg (or just under 214 lb) of cocaine, for which he was sentenced. The Berlin Regional Court as the court of first instance in the matter took into account this incitement, leaving him nevertheless with almost 4 years of imprisonment, which was about 4 years less time that he could have served – but still a lot of time for a crime that could have *not* happened, if the police had just stayed out of it.

The Federal Constitutional Court rejected the complaint of the applicant on vague and insufficiant grounds. Although the Constitutional Court raised the question of whether the state's right to punish had become obsolete because of the entrapment, it did not answer it – yet again. The Court only stated that it might in some cases be required to discontinue the proceedings, but that this could only apply in "extremely exceptional cases". And although the Constitutional Court itself admitted that "it seems obvious" (sic!)[54], that the present case was an exceptional case, because the public prosecutor's office had failed to exercise its oversight over the police and the rule of

52 *Furcht v.* Germany (fn. 12), margin nos. 68, 69.

53 *BVerfG*, Beschluss v. 18.12.2014 – 2 BvR 209/14 u.a. See *M. Jahn*, JuS 2015, 659, 660 f.; *C. Jäger*, Polizeilich initiierter Tatendrang, JA 2015, p. 473; *F. Meyer/W. Wohlers*, JZ 2015, p. 761-770; *M. Jahn/H. Kudlich*, JR 2016, p. 54-64.

54 *BVerfG*, Beschluss. v. 18.12.2014 – 2 BvR 209/14 et al., margin no. 35.

law had been seriously violated due to – for example – the pressure that had been applied, the sentencing courts were permitted within their scope of appreciation under the Constitution not to assume that such an extremely exceptional case was given. There is no further explanation on what criteria would have to be fulfilled in an "exceptional case". The Federal Constitutional Court confined itself to stating that "the question could remain unanswered", not least because one "must also take into account the requirements of a functioning criminal justice system" and because the crime was not entirely instigated by state authorities and the applicant remained – to some extent – free in his decision-making, despite the continued pressure exerted by the police informant. The Court emphasised that the defendant was neither threatened nor was any particular situation of distress exploited, leading the Court to conclude that he was pressured *indirectly* at most.

In spite of the vagueness of these phrases, it seems obvious that the Constitutional Court implies that the public interest *can* justify the use of evidence obtained as a result of police incitement, which clearly contradicts *Furcht v. Germany*, where the ECtHR held that "the right to a fair administration of justice holds such a prominent place that it cannot be sacrificed for the sake of expedience […] the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement […] as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset".[55]

This clear opposition to the ECtHR's approach is hidden behind the assertion that the Constitutional Court and the ECtHR follow different dogmatic concepts in this regard[56] and that this is acceptable "as long as in an overall view the substantive requirements for a fair trial under Art. 6 sec. 1 sentence 1 ECHR are met" – which implies the questionable premise that they can be met at all, using this approach.

As a result of these "mixed messages" between the ECtHR and the German Constitutional Court, the jurisprudence of the German Federal Court of Justice (Bundesgerichtshof) split up: The First Criminal Division of the Federal Court of Justice[57] followed the approach of the Constitutional Court in May 2015. However, – one month later – the Second Criminal Division[58] deviated from settled case law to discontinue the criminal proceedings in the case of entrapment that formed the subject of an appeal, even though it concerned serious criminal allegations against the appellant. In other words: The Second Criminal Division changed its jurisprudence drastically in order to be in accordance with the ECtHR judgment in *Furcht v. Germany* and stated

55 *Furcht v.* Germany (fn. 12), margin no. 47; see, inter alia, *Teixeira de Castro v. Portugal* (fn. 1), margin no. 35-36; *Edwards and Lewis v. the United Kingdom* [GC], Application nos. 39647/98 and 40461/98, Judgment 27 October 2004, margin nos. 46 and 48.

56 *BVerfG*, Beschluss. v. 18.12.2014 – 2 BvR 209/14 et al., "Orientierungssatz" 2b) and margin no. 42.

57 *BGH* Beschluss v. 19.5.2015 – 1 StR 128/15.

58 *BGH*, Urteil v. 10.6.2015 – 2 StR 97/14. Since the non-acceptance order of the Chamber of the Constitutional Court was a so called "procedural decision" without any binding effect according to § 31 Abs. 1 BVerfGG, the Second Criminal Division of the Federal Court could deviate; see for further details *Jahn/Kudlich*, JR 2016, p. 54 (59).

in this new landmark case that police incitement in general constitutes a bar to criminal proceedings.[59] In conclusion: At present, two of the five Criminal Divisions of the Federal Supreme Court state the exact opposite in answering the question, whether the so-called "fixing of penalty approach" matches the requirements of Art. 6 ECHR and can remain the answer to police incitement after *Furcht v. Germany*.

II. Evaluation

It seems highly overdue that all divisions of the Federal Court of Justice jointly revisited their traditional approach to the consequences of police incitement. Even though the ECtHR left room for interpretation during the last 15 years, statements like "the public interest in the fight against serious crimes […] cannot justify the use of evidence obtained as a result of police incitement" made already in *Teixeira de Castro,* sent a strong message that could have led to a new dogmatic approach as early as 15 years ago. And even though this and the subsequent judgments may have lacked what could be regarded as a clear and determinate *ratio decidendi*, the ECtHR emphasised many times that the lack of fairness was linked to the use of evidence gained due to the incitement. The approach of the ECtHR, stating only either compliance with or a breach of the Convention, is due to a general self-restraint leaving the contracting states free to elaborate a national system in accordance with the Convention. It does, however, not give them *carte blanche* for a "spirit of minimalism" – as *Ashworth*[60] puts it – in order to wait until the ECtHR has rejected every single dogmatic aspect as in breach of the Convention. On the contrary, it is rather the state's responsibility to implement the Convention in the most effective way and ensure the well-known subsidiary role of the ECtHR.

Nonetheless, the ECtHR clarified its case law in *Lagutin and Others v. Russia* and in *Furcht v. Germany,* adding the phrase "[f]or the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply." The Constitutional Court clearly ignored this in the *Bremerhaven Cocaine Case*, arguing that in doing so, it just "did not follow the ECtHR's dogmatic path".

Of course, there are no compelling reasons against adopting an alternative approach that is more compatible with the German law of criminal procedure, as long as the basic requirements of the Convention are fulfilled. However, the German "fixing of penalty approach" (*Strafzumessungslösung*) can (and could) never match these requirements, because even a significant mitigation of the sentence is not able to counterbal-

59 „Die rechtsstaatswidrige Provokation einer Straftat durch Angehörige von Strafverfolgungsbehörden oder von ihnen gelenkte Dritte hat regelmäßig ein Verfahrenshindernis zur Folge"; *BGH*, Urteil v. 10.6.2015 – 2 StR 97/14, Leitsatz.

60 *A. Ashworth*, Human Rights, Serious Crimes and Criminal Procedure, 2002, pp. 4 et seq., 94 et seqq.: "avoiding human rights"; *K. Gaede/U. Buermeyer*, Beweisverwertungsverbote und 'Beweislastumkehr' bei unzulässigen Tatprovokationen nach der jüngsten Rechtsprechung des EGMR, HRRS 2008, p. 279-287 (283).

ance a violation of fairness of the procedure – a procedure that in itself has to legitimate the sentence.[61]

Finally, the argument that it would be a massive change in the system of criminal procedure to introduce a bar to criminal proceedings or a new concept of exclusion of evidence, does not seem convincing either. In doing so, the Constitutional Court seems to use the concept of *margin of appreciation* to implement a lower protection standard as the minimum standard guaranteed by the Convention,[62] arguing that this would be the smoothest way to implement the requirements of Art. 6 (1) ECHR. But of course, this means twisting the very meaning of the concept of *margin of appreciation*, which is the manoeuvring space that the Strasbourg institutions grant national authorities in fulfilling their obligations under the Convention. It is based on the idea that the priority should be the effective protection of human rights within the system.[63] However, this principle is not to be read in the way that the ECHR's provisions should be interpreted in a restrictive manner out of deference to national dogmatic concepts. Regarding police incitement, it was already established that using the evidence at all would not suffice to fulfill the obligations under the Convention; the German dogmatic concepts have to take this as a lowest common denominator.[64]

The remaining alternative, then, is the brand new approach advanced by the Second Division of the Federal Court of Justice to discontinue proceedings as soon as police incitement is acknowledged. The main argument held against this approach is that a bar would not allow the sentencing court to have regard in a reasonable manner to all the circumstances which have led to the offence.[65] However, I do not see the severity of this alleged problem since the *substantive test of incitement* sorts out constellations where the suspect was indeed predisposed. Once the line of entrapment is crossed, criminal procedures seem as a farce since it is the state that manufactured the offence. As such, in this case, it does not seem necessary to have additional differentiating features.

61 The argument, that the Constitutional Court is simply adopting "a different dogmatic approach", stating that the present case was not "exceptional" anyway and thus adopting a sort of "overall evaluation" in which the public interest in the fight against crime is taken into consideration, trangresses clearly the ECtHR's ruling and seems astonishing, because the ECtHR's jurisprudence is described within the Constitutional Court's own case law since 2004 as "a significant aid in interpreting national law". See *BVerfGE* 111, 307 (319); *M. Jahn*, Fair trial als strafprozessuales Leitprinzip im Mehrebenensystem, ZStW 127 (2015), p. 549, 600 with further references.

62 *Jahn*, ZStW 127 (2015), pp. 549, 603, 614.

63 See also Art. 52 ECHR "[...] any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention".

64 Sceptical towards the perpetuation oft he "fixing of penalty approach" (Strafzumessungslösung): *F. Meyer/W. Wohlers,* JZ 2015, 761, 769; *W. Mitsch*, Tatprovokation als Verfahrenshindernis, NStZ 2016, p. 52 (56); *J. Pauly,* StV 2015, p. 411 et seq.; *A. Petzsche,* JR 2015, p. 88 (89); *A. Sinn/S. Maly* NStZ 2015, p. 379 (381 et seq.).

65 BGHSt 45, 321.

As to the alternatives to a bar: The complete exclusion of evidence, as provided for under the fruit of the poisonous tree doctrine[66], would be in fact unusual under the German law of criminal procedure. Even a massive breach of the rules of investigation only leads to the exclusion of the concrete evidence obtained by the prohibited measure itself. But, a singular exclusion would neither solve the problem nor match the requirements of the ECtHR: firstly, because in incitement cases there is no singular prohibited measure. The criminal act itself is a consequence of the incitement and that is precisely the problem.[67] Secondly, there is no way to distinguish direct from indirect evidence-relations because of the very nature of entrapment: Excluding the testimony of the undercover agents or the confession would not change all that much, because – as explained before – in most cases the crime is on tape which means that there were police witnesses keeping the suspect under surveillance and drugs carrying his fingerprints were confiscated. As such, there has to be a complete exclusion of all evidence related to the situation of entrapment, which would be as much a bar to punishment as a regular bar to criminal proceedings due to the incitement itself.[68]

Another alternative is the new proposal of a modified fixing of penalty approach[69] that would lead to an automatic reduction of the sentence to zero on the grounds of police incitement. Obviously, this leads to the same result: no punishment. Nonetheless, it would seem that a core contradiction remains: the mitigation of the sentence is not able to counterbalance a violation of fairness of the procedure – a procedure (again[70]) that itself has to legitimate the sentence.

In conclusion, a bar to criminal proceedings seems to be an adequate consequence to police incitement and has two further advantages:[71] Firstly, the subject of incitement will not be subjected to further preliminary proceedings with additional risks.[72] Secondly, it has a disciplinary effect. It is not in the public interest to incite people who were not predisposed to commit a crime but it is very much in the interest of the rule of law to discourage behaviour of the authorities to do so; viewed from this perspec-

66 In favor of the exclusion of evidence: *A. Petzsche,* JR 2015, p. 88.

67 See *W. Mitsch*, NStZ 2016, p. 52 (56); *G. Tyszkiewicz,* Tatprovokation als Ermittlungsmaßnahme, 2014, p. 223 seqq.; *K. Gaede/U. Buermeyer* HRRS 2008, p. 279 (286).

68 *F. Meyer/W. Wohlers*, JZ 2015, 761, 769; *K. Gaede/U. Buermeyer,* HRRS 2008, p. 279 (286); *Tyszkiewicz* (fn. 67), p. 223.

69 *A. Sinn/S. Maly*, NStZ 2015, p. 379 (382 et seq.).

70 See *supra* II.

71 See *I. Roxin*, Die Rechtsfolgen schwerwiegender Rechtsstaatsverstöße in der Strafrechtspflege, 19995, p. 195 et seqq.; *C. Roxin*, Strafverfahrensrecht, 1998, § 10, margin no. 28. In favor of this – from the perspective of the ECtHR *R. Esser*, Auf dem Weg zu einem europäischen Strafverfahrensrecht, Berlin 2002, p. 177; *E. Kempf* StV 1999, p. 128 (130); *S. Sinner/A. Kreuzer* StV 2000, p. 114, 116 seq.; *K. Gaede/U. Buermeyer,* HRRS 2008, p. 279 (286).

72 *R. Esser*, Auf dem Weg zu einem europäischen Strafverfahrensrecht, Berlin 2002, p. 175 ff.; *R. Esser*, Lockspitzel und V-Leute in der Rechtsprechung des EGMR: Strafrechtliche Ermittlungen jenseits der StPO – außerhalb des Gesetzes?, p. 206 with further references.

tive, the fact that proceedings will be discontinued even after a long investigation seems effective. [73]

III. Open questions and possible answers

The case *Furcht v. Germany* seems to have finally changed the conversation about police entrapment in Germany; at least the fundamentally changed jurisprudence of the Second Criminal Division of the Federal Supreme Court has brought the discussion to a whole new level. The legislator is now, more than ever, challenged to consolidate this new accordance with the ECtHR and to base these precarious law enforcement methods, which also were always highly questionable from a constitutional point of view, on solid legislative ground.[74]

Nevertheless, it is to be expected that the core dilemma will stay the same, because the problem could be relocated to the question of whether or not there has been a real incitement, rather than a legitimate undercover operation. Considering that the ECtHR emphasises the causality of the state's implication in asking whether the offence would otherwise have been committed, whereas the German approach focuses mainly on the level of pressure excerted on the suspect, there is plenty of room for disagreement in the future.

In view of these possible disagreements, consideration should be given to a slight readjustment of the *substantive test of incitement.* The ECtHR's test seems to reflect quite a subjective approach, because the main question is if the individual that becomes the subject of an entrapment was "predisposed" to commit a crime.[75] But how can one know this for sure? As *Hay* demonstrates, there is no real "sting diagnosticity":[76] Apparent reluctance is not necessarily exonerating. Professional criminals often feign reluctance when approached to do a "job" (precisely in order to ward off entrapments) before finally accepting the offer. On the other hand, statements that the defendant makes to the police or third parties are often made in distress, against the background of the police incitement. And, furthermore, what kind of factor is "predisposition" really? Is it in fact a valid indicator of criminals? Not everyone branded a "criminal" seizes every genuine opportunity to commit an offence. And not everyone branded a "non-criminal" or "ordinary person" always refrains from committing a genuine offence. Even a (normally) law-abiding citizen may sometimes succumb to the temptations of criminal activity.

73 See for further details *M. Jahn/H. Kudlich*, JR 2016, p. 54, 60, also raising the interesting question if the bar to proceedings could imply a negative value judgement.

74 Cf. *M. Jahn/H. Kudlich*, JR 2016, p. 54, 63; *Esser*, Gutachten „Erforderlichkeit einer gesetzlichen Regelung für den Einsatz von V-Personen", https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Anlage_1_StPO_Kommission.pdf;jsessionid=6123A770A491DBE14B9582B5EC493849.1_cid324?__blob=publicationFile&v=4, Anlagenband I, p. 45 ff.; *Gercke*, StV 2017, pp. 615, 623, 626.

75 *Hay,* Discussion Paper N° 441, 2003, Harvard Law School, p. 21 et seqq.

76 *Hay,* Discussion Paper N° 441, 2003, Harvard Law School, p. 25.

It may therefore be worth considering whether a more objective approach would be useful, focussing mainly on the bait put out by the police and asking whether this bait is likely, in general, to lure ordinary law-abiding people into committing crimes. Furthermore, it might be beneficial to carry out a deeper analysis of those methods of persuasion which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.[77]

On the still remaining "subjective side", it should be stressed furthermore that a legitimate undercover operation requires rational and concrete suspicion against the subject of incitement. Someone may intend to commit a crime, but it is not a crime until the *actus reus* occurs. Predispositions are therefore situated in a very grey, very precarious area of law enforcement. Citizens, even if they may seem suspicious for any reason, even if they make questionable choices with regards to social "scenes" or friends, even if they have experiences as a drug consumer or have previously been convicted, do not lose the protection of fundamental rights in any way.

In conclusion, the case of *Furcht v. Germany* can be used as a reminder that the rule of law – both in the European and in the German legal tradition – forbids the notion that social hygiene concepts or crime prevention could be pursued at any cost. Maybe the German jurisprudence was in need of such a reminder to remember that punishing an individual for a crime encouraged or orchestrated by the state is a deeply self-contradictory law enforcement strategy, if perhaps also one that the society already got used to. And as the German poet *Bertolt Brecht* once said, "Injustice often gains legal character simply because it happens a lot"[78] – it is time to change that.

77 *Hay*, Discussion Paper N° 441, 2003, Harvard Law School, p. 18 referring to American Law Institute, Model Penal Code § 2.13.

78 "Unrecht gewinnt oft Rechtscharakter einfach dadurch, daß es häufig vorkommt"; *B. Brecht*, Geschichten vom Herrn Keuner, Rechtsprechung, Zürcher Fassung, 2004, p. 33.