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ARTICLE

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Legendierte Polizeikontrollen: Judgment from the German Federal Court of Justice (*Bundesgerichtshof*) of April 26, 2017, 2 StR 247/16

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Abstract
The German police stopped and searched a car crossing the border from the Netherlands and thereby detected large quantities of drugs. What sounds like a standard procedure is actually a very controversial case recently heard at the German Federal Court of Justice (*Bundesgerichtshof*; BGH), dealing with so called *legendierte Polizeikontrollen*. These are apparently random police checks that are, in reality, well prepared and specifically targeted at the subject of the police check due to ongoing investigations. This case raised the issue of lawful evidence gathering by the police when pursuing both preventive and repressive objectives, as well as the question of the subsequent exploitation in court of the evidence obtained. Addressing issues of the utmost significance, such as the circumvention of the rights of the accused, this BGH judgment was critically reviewed among legal scholars.

Keywords: German police law; double function of the police; stop and search; rights of the accused; effective enforcement of criminal justice

A. Facts of the Case

The German prosecution service was leading an investigation into a drug trafficking ring in Frankfurt-am-Main and was able to identify two suspects. One of the suspects had travelled to Morocco. During this time, the investigating authorities learned that a shipment of drugs from the Netherlands to Germany had been planned and organized by this suspect. The second suspect, the accused in the case before the BGH, was the person carrying out this shipment. Prior to the accused's travel to the Netherlands, his car was fitted with tracking devices, and the accused was placed under police observation. Cooperation with the Dutch authorities could not be established, however, and the observation had to be discontinued at the Dutch border. Via the tracking

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devices, German police received notification of when the accused re-entered German territory. The German police decided to stop and search the car. The authorities wanted to impede the introduction of a large quantity of drugs into Germany and simultaneously intended to secure evidence of the drug trafficking. Most importantly, the authorities did not want the other suspect, who at the time was still residing in Morocco, to learn of the ongoing investigation which might have induced him not to re-enter German territory.

In service of the German Police's desired outcome, the authorities decided to subject the accused to a so-called *legendierte Verkehrskontrolle*, an apparently random traffic check that was, in reality, well prepared and specifically targeted at the subject due to ongoing investigations. The traffic police were instructed to stop the accused's car, if possible, for a legitimate and substantial reason. Using the tracking device, the traffic police were able to locate the accused and observed him exceeding the speed limit by 10 km/h. During the following vehicle spot-check, drug dogs were deployed, and the police uncovered nine packets of cocaine. The accused was then arrested, as was the suspect in Morocco upon his re-entry into Germany.

The report from the traffic check contained no indication of the ongoing investigations, making it appear to be a random police check. Consequently, the arrest warrant was issued in ignorance of the previous investigation, and the defendant only received notice of the targeted character of the traffic check on October 26, 2015, over two months after the August 17 stop-and-search procedure.[1]

B. *Legendierte Polizeikontrollen*

The difficulty that arises from this case is that of *legendierte Polizeikontrollen*, which are apparently random but, in reality, targeted police controls. The word *legendiert* derives from the German word *Legende*, meaning legend. Like in common law jurisdictions, the police in Germany are able to conduct investigations undercover using an alias, or, as it is referred to in German, a *Legende*. The German Code of Criminal Procedure (*Strafprozessordnung*; StPO) provides this possibility in Section 110a.[2] The investigation authorities derived from this provision the notion that a *Legende* could be used by an entire operation rather than solely individuals. A *legendierte Polizeikontrolle* is thus a police check executed under false pretenses and with ulterior motives.

The problem with these *legendierte Polizeikontrollen* is that, contrary to the aliases and cover stories used by police officers, they are not provided for in the StPO. Thus, the question that arises is that of the appropriate legal basis for such a police action. While in England and Wales almost all police powers are regulated by one act—the Police and Criminal Evidence Act 1984 (PACE)[3]—the same is not true of Germany. In Germany, police powers are regulated in the StPO and in decentralized police codes of the individual federal states (*Bundesländer*). Whether federal law or the law of the *Länder* is applicable depends on the purpose of the police action.

C. Nature of the Police Action

I. Doppelfunktion *of the Police*

Under German law, the police are considered to have two duties regarding crime and security. First, they are there to prevent danger and to avert damage to public order and security.

[1] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 26, 2017, Neue Juristische Wochenschrift [NJW] 3173, paras. 3–11, 2017 (Ger.).

[2] Strafprozessordnung [StPO] [Code of Criminal Procedure], § 110(a), para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.) ("Undercover investigators may be used to investigate offences if there are sufficient factual indications showing that an offence of substantial significance has been committed

1. in the sphere of the illegal trade in drugs or weapons, of counterfeiting of money or official stamps,
2. in the sphere of state security (sections 74a and 120 of the Courts Constitution Act),
3. on a commercial or habitual basis or
4. by a member of a gang or in some other organized way.").

[3] *See* S.H. Bailey et al., Smith, Bailey & Gunn on The Modern English Legal System 789 (5th ed. 2007).

Second, they secure the prosecution of criminal offenses.[4] The investigation of crime, however, is not an inherent police task; it is the German prosecution service (*Staatsanwaltschaft*) that is the *Herrin des Ermittlungsverfahrens*—that is, the head of the investigation proceedings.[5] The prosecution service is obligated to intervene with regard to all prosecutable offenses and must investigate the cases.[6] They can conduct investigations themselves, however, they are usually unable to do so because they possess no enforcement officers of their own. They therefore typically rely upon the assistance of the police, pursuant to Section 161 (I) StPO, who in turn will conduct the investigations as auxiliary officers to the public prosecution (*Ermittlungspersonen*).[7] It is the prosecution service, however, that maintains control over the investigations and carries the responsibility for a fair execution thereof, even when led by the police.[8] This leads to what is called the *Doppelfunktion* (double function) of the police: The fact that they have to both prevent threats to public security and investigate crimes.[9]

II. Preventive and Repressive Police Action

As a consequence of this two-prong police role in Germany, German law differentiates between preventive and repressive police action. The former involves the prevention of risk and damage to public security and public order, while the latter comprises everything related to prosecution, such as the trial itself, and the criminal investigation of an offense.[10] In essence, the difference is that prevention deals with violations of legal interests that are expected, but have not yet taken place, while repression deals with damage that has already occurred or at least been attempted.[11]

Preventive police action can be defined as the preventative measures taken by the police to prevent and remove dangers to the public order and the public security.[12] In preventive police action, police forces react to dangers in order to prevent the realization of any harm.[13] The presence of such danger, whatever the degree, is thus the decisive criterion. This danger is defined as the presence, in individual circumstances, of a sufficient probability that damage will occur.[14] Police action is therefore always linked to the prevention of damage.

In repressive police action, the presence of a danger plays no role; this field of police action regards solely the investigation of crimes. Pursuant to Section 160 (I) and 163 (II) StPO, the prosecution and police are obligated to investigate criminal offenses once they obtain knowledge of the suspected commission of a criminal offense. The decisive criterion for the presence of repressive police action is consequently the presence of an *Anfangsverdacht* (initial suspicion). This initial suspicion is defined in Section 152 (II) StPO as the presence of sufficient factual indicators suggesting that a criminal offense has been committed. The threshold for an initial suspicion is extremely low; indeed, it suffices that pursuant to criminological experience, the commission of an offense appears possible.[15]

Pursuing different objectives, the nature of the two types of police action differs fundamentally. As the main aim in the first task—prevention—is to prevent the commission of crimes, effectiveness is the paramount objective in this category. The principal objective of the second

[4]*See* Erhard Denninger, *Polizeiaufgaben*, *in* Handbuch des Polizeirechts 184, 188 (5th ed. 2012).
[5]*See* Werner Beulke, Strafprozessrecht 57 (13th ed. 2016).
[6]*See id.* at 58.
[7]*See id.* at 69, 70.
[8]*See id.* at 58.
[9]*See id.* at 71.
[10]*See* Martin H.W. Möllers, Wörterbuch der Polizei 1332 (2001).
[11]*See* Denninger, *supra* note 4, at 253.
[12]*See* Möllers, *supra* note 10, at 1244.
[13]*See* Denninger, *supra* note 4, at 189.
[14]*See id.* at 203.
[15]*See* Möllers, *supra* note 10, at 1608.

task—repression—is achieving a just verdict, which includes respecting the rights of the accused.[16] Given that effectiveness is not a primary objective of repressive police action, conditions for police action in this field tend to be stricter.

The two fields of police action are governed by different laws. Legislation in the field of prevention has not been allotted to the catalogue of competences of the federal state, which is why the *Bundesländer* are competent for legislation[17] and have passed police laws. The matter of prosecution has been allotted to the legislative competences of the federal states by Article 74 I Number 1 of the German constitution (*Grundgesetz*, GG). Therefore, different laws are applicable to police measures according to the field in which the police operate.[18]

III. Stop and Search Powers in Preventive and Repressive Legislation

Regarding the stopping and searching of a vehicle, the difference between the two types of tasks becomes abundantly clear. Section 105 (I) StPO decrees the necessity of a search warrant issued by a judge. Pursuant to Section 107 StPO, this warrant is required to explain the reasons for the search, meaning that it would have to expose the ongoing investigations to the accused, precisely what the authorities wanted to avoid.

If, on the contrary, the action was based on preventive legislation, the Police Code of the *Bundesland Hessen* (*Hessisches Gesetz über die öffentliche Sicherheit und Ordnung*; (HSOG) would apply. This law gives the police the possibility to search cars without search warrants in Section 37. Here, neither the accused nor the other suspect in Morocco would be made aware of the ongoing investigations. The main problem that consequently arises is that two different laws foresee the same police measure—a stop and search procedure—but with vastly different procedural requirements.

Choosing the correct legal basis is of the utmost importance for a possible future trial. Indeed, an incorrect application of the StPO could lead to the exclusion of the evidence at trial. Contrary to common law systems, breach of law by the police is deemed a sufficient reason for the exclusion of evidence in German law, though the BGH adds that in each individual case, in order for the obtained evidence to be excluded, individual rights must prevail over public interests of prosecution.[19]

IV. Doppelfunktionale Maßnahmen *of the Police*

Determining the correct legal basis is not necessarily simple. Theoretically, one must look at whether the objective of the police action is of a preventive or of a repressive nature. In the present case, however, multiple objectives can be discerned: First, the objective of securing evidence for the trial, which is of a repressive nature; and second, the objective of preventing the proliferation of drugs which, in contrast, is of a preventive nature. Thus, this case illustrates the problem of *doppelfunktionale Maßnahmen*: Police actions that possess a dual function, serving both preventive and repressive purposes.[20] The resulting question is, of course, which objective will prevail and thereby dictate which law is applicable. This is precisely the field of law in which the present case introduces a jurisprudential innovation.

D. BGH Support and Academic Questioning of Preventive and Repressive Police Action

The significance of this jurisprudential innovation becomes apparent when examining the evolution of the German courts' jurisprudence on this issue. Simultaneously, different theories

[16] *See* Denninger, *supra* note 4, at 253.

[17] *See* Grundgesetz [GG] [Basic Law], art. 70(1), *translation at* https://www.gesetze-im-internet.de/gg/art_70.html.

[18] *See* Denninger, *supra* note 10, at 253, 254.

[19] *See* Kathrin Janicki, Beweisverbote im deutschen und englischen Strafprozess 67 (2002).

[20] *See* Denninger, *supra* note 4, at 261.

from various authors in legal literature have developed in order to determine the legislation applicable to *legendierte Polizeikontrollen*.[21]

I. BGH Decision of April 26, 2017: Juxtaposition of Preventive and Repressive Legislation

The BGH ruled in its decision of April 26, 2017, that preventive measures and repressive measures are simultaneously applicable.[22] Justifying their decision, the judges stated that repressive legislation does not prevail over preventive legislation, as German law does not stipulate any such supremacy. Acknowledging the risk that *doppelfunktionale Maßnahmen* could be misused in order to undermine repressive legislation that stresses respect of the accused's rights, the BGH argued that these concerns do not become relevant until evidence is considered, thus referring the question of the circumvention of StPO safeguards to the issue of the admissibility of evidence, rather than the legality of the police action.

According to the judges, the decision of April 26, 2017, is consistent with prior decisions made by the other criminal panels of the BGH. An *Anfangsverdacht* cannot exclude the application of preventive legislation whenever the police attempt to prevent the commission of crimes. The BGH pointed out that fluent boundaries between preventive and repressive action allow unpredictable, short-term changes between these two fundamentally different actions. Considering scenarios such as hostage situations or terrorist attacks, the BGH concluded that preventive and repressive objectives go hand in hand.[23] The main motive that has most likely driven the judges to abandon the widespread *Schwerpunkttheorie*—a theory referring to the main focus of a specific police measure—and to adopt an innovative approach is to facilitate criminal investigations. The BGH emphasized that the paramount significance for investigating authorities is to be able to react flexibly and adequately to different crises. Furthermore, as multiple objectives can often be discerned, an unambiguous distinction between a repressive or a preventive measure is not always feasible.[24]

This decision represents the third decision of the second criminal panel of the BGH, maintaining that preventive and repressive legislation apply equally and simultaneously and that the investigating authorities can lawfully carry out the *Legendierte Polizeikontrollen*.[25] Therefore, it has become settled case law that such police checks are legal under German law.

II. In Contrast: Schwerpunkttheorie, a Recognised Theory Established by Administrative Courts

Determining which legislation is applicable to *legendierte Polizeikontrollen* has been, to date, governed by the so-called *Schwerpunkttheorie*—a theory referring to the main focus of a specific police measure—which was introduced by the administrative courts (*Verwaltungsgerichte*) and applied for several decades.[26] In connection with a *doppelfunktionale Maßnahme*, administrative

[21] *See* 70 NJW 3173.

[22] *Id.*

[23] *Id.*; Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 14, 2009, Neue Juristische Wochenschrift [NJW] 3448, 2009 (Ger.).

[24] *See* 70 NJW 3173.

[25] *Id.*; BGH, Case No. II StR 437/16 (May 31, 2017), https://www.hrr-strafrecht.de/hrr/2/16/2-437-16.php; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 15, 2017, 38 Neue Zeitschrift Für Strafrecht [NStZ] 296, 2018 (Ger.).

[26] *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Dec. 3, 1974, Neue Juristische Wochenschrift [NJW] 1529, 1975 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Aug. 25, 2004, Neue Juristische Wochenschrift [NJW] 454, 2005 (Ger.); Oberverwaltungsgericht Berlin [OVG] [Higher Administrative Court] Nov 11, 1970, Neue Juristische Wochenschrift [NJW] 637, 1971 (Ger.); Verwaltungsgerichtshof Kassel [VGH] [Higher Administrative Court] May 18, 1999, Neue Juristische Wochenschrift [NJW] 3793, 1999 (Ger.); Verwaltungsgerichtshof Mannheim [VGH] [Higher Administrative Court] Sept. 27, 2004, 24 Neue Zeitschrift Für Verwaltungsrecht-Rechtsprechungs-Report [NVwZ-RR] 540, 2005 (Ger.); Verwaltungsgerichtshof München [VGH] [Higher Administrative Court] Jan 14,

courts determine whether the main focus of the police measure is to prevent the commission of crimes—or to achieve a conviction after a crime has been committed. In order to do so, the *Schwerpunkttheorie* is based on several criteria that are not uniformly applied. On occasions, the administrative judges attempt to identify the main focus of a police measure by taking as a basis the perspective of a reasonably observant and circumspect person,[27] whilst in other cases they resort to identifying the purpose of the action.[28] At times they even apply both criteria cumulatively.[29] If an administrative court arrives at the conclusion that the main focus of a police action is to prevent the commission of crimes, then an administrative court declares itself to be competent pursuant to Section 40 (I) of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*; VwGO. The applicable law in such situations would be that of preventive police action, which, in Germany, falls under administrative law. While the application of these criteria may not necessarily be simple, the *Schwerpunkttheorie* opts for an unambiguous solution to determining the applicable legislation. Because a police measure must either be mainly preventive or mainly repressive, the action must be based either on preventive or repressive legislation, thus excluding the simultaneous applicability of two different fields of law.[30]

As illustrated by the present judgment, the BGH no longer adheres to this strictly dyadic point of view, preferring to employ a more flexible approach to the relationship between preventive and repressive police legislation.

III. Comprehensive Critique of the BGH in Legal Literature

The new jurisprudence established by the BGH, abandoning the *Schwerpunkttheorie* and recognizing a juxtaposition of preventive and repressive legislation, diverges from the prevailing opinion found in much of the legal literature. Legal scholars opine that the recent judgment considerably restricts the rights of the accused guaranteed under the StPO.[31]

1. Circumvention of the Accused's Rights

The legal literature in this area elaborates on the accused's rights considering that the BGH circumvents the decisive necessity for a search warrant issued by a judge[32] in case the traffic control, or any other restrictive measure carried out by the police, is based on preventive legislation. In fact, preventive legislation that does not stipulate the necessity of such a warrant, even though an *Anfangsverdacht* can be discerned.

1986, 5 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 655, 1986 (Ger.); Verwaltungsgerichtshof München [VGH] Nov. 5, 2009, DIE ÖFFENTLICHE VERWALTUNG [DÖV] 239, 2010 (Ger.); Oberverwaltungsgericht Münster [OVG] [Higher Administrative Court] Sept. 13, 1979, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 855, 1980 (Ger.); Verwaltungsgericht [VG] München [Administrative Trial Court], Case No. M 7 K 16.570, M 7 E 16.795, (May 9, 2016), https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VG%20M%FCnchen&Datum=09.05.2016&Aktenzeichen=M%207%20K%2016.570.

[27]*See* 28 NJW 1529; 24 NVwZ-RR 540; 5 NVwZ 655.

[28]*See* 58 NJW 454.

[29]*See* Verwaltungsgerichtshof München, Case No. M 7 K 16.570, M 7 E 16.795.

[30]*See* FRANZ-LUDWIG KNEMEYER, POLIZEI- UND ORDNUNGSRECHT 124, 400, 402 (11th ed. 2007); BODO PIEROTH ET AL., POLIZEI- UND ORDNUNGSRECHT § 2, para. 15 (9th ed. 2016); FREDRIK ROGGAN & MARTIN KUTSCHA, HANDBUCH ZUM RECHT DER INNEREN SICHERHEIT 84 (2d ed. 2006); Maximilian Lenk, *Läutet der BGH das Ender der Schwerpunkttheorie ein?*, 37 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 38 (2018).

[31]*See* Nils Lange-Bertalot & Jörg Aßmann, *Zur Rechtmäßigkeit sogenannter Legendierter Verkehrskontrollen*, 30 NEUE ZEITSCHRIFT FÜR VERKEHRSRECHT [NZV] 566, 572 (2017); Maximilian Lenk, *Vertrauen ist gut, Legendierte Kontrollen sind besser*, 37 STRAFVERTEIDIGER [StV] 692, 696 (2017); Markus Löffelmann, *"Legendierte Polizeikontrollen" und verdeckte Ermittlungen – BtM-Einfuhr*, 2017 JURISTISCHE RUNDSCHAU [JR] 596, 597 (2017); Wolfgang Mitsch, *Strafverfolgung durch Legendierte Verkehrskontrollen*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3124 (2017); Anja Schiemann, *Legendierte Kontrollen*, 37 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 651, 657 (2017).

[32]Section 105 StPO.

The main criticism centers on the assertion that the present judgment circumvents the repressive legislation more extensively protecting the accused's rights.[33] Certainly, preventive legislation, too, justifies the police's search for drugs so as to prevent the danger of them appearing on the market in large quantities. The present situation met the requirements of Section 37(I) Numbers 1 and 3 HSOG—preventive legislation—as the police's goal was to prevent the illegal distribution of drugs. This aim, however, would have been achieved even if a search warrant had been issued by a judge under repressive legislation pursuant to Section 102 and 105 StPO. In order to assure the prevention of any disturbance to public security, a repressive check could enable the seizure of illegal substances just as a preventive one would. Critics therefore identify a risk of cherry-picking where the police are enabled to freely choose the legislation applicable for a specific police measure.[34] Predictably, this would encourage authorities to opt for preventive legislation.

In order to support the assertion that protective StPO provisions are being undermined, critics have also argued that the problem of *legendierte Polizeikontrollen* is not solely caused by the juxtaposition of preventive and repressive goals, but rather by the fact that they are based on a *Legende*, are well prepared, and are targeted at the individual concerned. This is considered unforeseeable to any potential subjects of the check.[35] As the police are not required to explain the reasons for their search, they effectively deceive the accused who presumes the measures are merely a random traffic check. Unaware of the background of the police check, the accused cannot defend themselves adequately. This is another reason why several authors consider the BGH decision to have disregarded the accused's rights.

2. Scope of the BGH Decision

Critics have elaborated on the broad scope of the BGH decision. They generally conclude that an extensive application of preventive legislation undermines the protective provisions under the StPO.[36] In practical terms, the BGH judgment justifies every police search for illegal arms or drugs under preventive legislation, provided that the police aim to prevent the commission of crimes, even when the focus of the measure is clearly repressive. Curtailing the significance of the accused's rights granted under the StPO, preventive legislation could even be applied in situations where only small amounts of drugs are being transported or, for instance, when authorities pursue recidivists.[37] Thus, the BGH undermines the strict framework of the StPO by applying preventive legislation that is broadly interpreted under a wide notion of danger.

3. Inconsistency of the BGH Jurisprudence

Critics also argue that the decision of the BGH does not comply with its previous jurisprudence, as former decisions on this matter were rather inconsistent.

On December 8, 2015, for the first time, the third criminal panel of the BGH decided that a police search for drugs could be carried out without a warrant pursuant to Section 105 StPO, deeming preventive legislation applicable.[38] In February 2016, the second criminal panel decided the exact opposite: It held that the police had to meet the requirements of repressive legislation

[33]*See* Andreas Mosbacher, *Aktuelles Strafprozessrecht*, 58 JURISTISCHE SCHULUNG [JuS] 129, 130 (2018); Löffelmann, *supra* note 31, at 597, 598; Schiemann, *supra* note 31, at 657.

[34]*See* Börner, *supra* note 31, at 3; Lenk, *supra* note 31, at 695; Löffelmann, *supra* note 31, at 599; Schiemann, *supra* note 31, at 657.

[35]*See* Löffelmann, *supra* note 31, at 598.

[36]*See* Wolfgang Müller & Sebastian Römer, *Legendierte Kontrollen-Die gezielte Suche nach dem Zufallsfund*, 32 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 543, 547 (2012).

[37]*See* Löffelmann, *supra* note 31, at 599; Mosbacher, *supra* note 33, at 708.

[38]*See* Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 8, 2015, 26 NEUE ZEITSCHRIFT FÜR STRAFRECHT-RR [NStZ-RR] 176, 2016 (Ger.).

and obtain a warrant.[39] Similarly, the second criminal panel of the BGH also held in a comparable case in March 2017 that repressive legislation should apply.[40] In the present decision and in a BGH decision of November 15, 2017,[41] the second panel opted again for preventive legislation. Therefore, critics are justifiably questioning the consistency of the BGH decisions given the fact that, in all cases, including the case at hand, the police could have just as easily based their measures on preventive or repressive legislation, and that no reason for a difference in treatment can therefore be discerned.[42]

Likewise, some jurisprudential literature commented on the BGH decision of

December 8, 2015,[43] in which judges referred to similar existing literature. According to the BGH, the December decision presumes a valid juxtaposition of preventive and repressive legislation as well. Legal literature, however, points out that there is a crucial difference between the two cases: In the former case, the BGH decision of December 8, 2015, the so-called *Anfangsverdacht* arose during the police check. In contrast, in the present case of 2017, the *Anfangsverdacht* had already been detected before the beginning of the police intervention. With regard to the aforementioned decisions, various authors now argue that the BGH has failed to develop a consistent jurisprudence regarding *doppelfunktionale Maßnahmen*.[44]

4. No Real Double Function of the Police Measures

Another critique raised in the legal literature concerns the *Doppelfunktionalität* (double objective) of the stop and search procedures. According to commentators, there was actually no realistic danger that the drugs could have been placed onto the market due to the well-prepared police intervention. At the very least, this danger could have been averted using repressive measures based on the StPO. The assumption of a *doppelfunktionale Maßnahme* has consequently been criticized by many voices in jurisprudential literature, as preventive aspects play only a subordinate role.[45] Recognizing the existence of situations where preventive and repressive elements are equally present, other voices in jurisprudential literature insist that police can base their control on both preventive and repressive legislation without excluding one or the other,[46] but only in situations in which both elements are deemed equally important. In the case at hand, most importantly, the authorities did not want the accused in Morocco to become aware of the ongoing investigation. Their focus therefore lays on repressive aspects; the prevention of the proliferation of a large quantity of drugs playing merely a secondary role. As there is no true double function of the police measures in this instance, critics say that preventive and repressive legislation cannot be simultaneously applicable.

IV. Juxtaposition Resulting from Literal Interpretation and Legislative Intent

Although the ample criticism might be justified to a certain extent—for example, because the BGH does not always provide sufficient grounds for its decision—jurisprudential literature

[39] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 2, 2016, 36 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 551, 2016 (Ger.).

[40] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 15, 2017, 37 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 713, 2017 (Ger.).

[41] *See* BGH, Case No. II StR 437/16.

[42] *See* Mosbacher, *supra* note 33, at 130.

[43] *See* 26 NStZ—RR 176.

[44] *See* Mosbacher, *supra* note 33, at 130.

[45] Löffelmann, *supra* note 31, at 598; Schiemann, *supra* note 31, at 657.

[46] *See* WILLIAM SCHMIDBAUER & UDO STEINER, BAYERISCHES POLIZEIAUFGABENGESETZ UND POLIZEIORGANISATIONSGESETZ, art. 12 para. 24 (3ded. 2011); MARKUS THIEL, DIE "ENTGRENZUNG" DER GEFAHRENABWEHR 96 (2011); Löffelmann, *supra* note 31, at 598.

overlooks or marginalizes several key aspects. In particular, critics focus mainly on the circumvention of the accused's rights, neglecting important elements that only a few authors then refer to.

First, with reference to the risk of cherry-picking by the police, this criticism is based on the claim that preventive and repressive legislation do not apply equally in the present situation, even though police aimed to prevent the danger from the drugs being placed onto the market. Because all requirements in Section 37(I) Numbers 1 and 3 HSOG—preventive legislation—are met, jurisprudential literature is not able to deliver any clear explanation as to why the HSOG would not apply. As discussed above, such an exclusion does not result in any way from German legislation. In this respect, the BGH rightly rejects any circumvention of StPO provisions with its decision.[47] Judges state that circumvention can be assumed when the measure does not pursue legitimate preventive goals, or when preventive measures were chosen solely because no repressive measures were justified. Noting the possibility of choosing the StPO as a valid legal basis for the police measure in question, the BGH rejects both categories of illegal circumvention.

Second, with respect to the criticism of the BGH's comparison in the present decision to its former decision of December 8, 2015,[48] it can be said that while the BGH presumes a juxtaposition of preventive and repressive legislation, jurisprudential literature underlines the aspect of the *Anfangsverdacht*: In the former case, the BGH decision of December 8, 2015, the Anfangsverdacht arose during the police check. In contrast, in the present case of 2017, the Anfangsverdacht had already been detected prior to the start of the police intervention. Certainly, this difference exists between the two cases; however, critics fail to state any grounds for its apparently crucial relevance. An *Anfangsverdacht* that had already been present prior to the police check does nothing to alter the fact that the police aim to prevent dangers and damage to public security and public order. In other words, the end goal was identical in both cases.

Considering all key aspects of the BGH's solution and the criticisms of legal literature, the BGH provided an adequate solution to the problem on the following grounds.

1. The Juxtaposition of Both Preventive and Repressive Legislation Avoiding Absurd Results

The solution supported by the majority of jurisprudential literature might lead to contradictory results. A repressive control in accordance with Section 105 and 107 StPO does not assure the same efficiency of prevention as a preventive control. As stated above, such a warrant would have to explain the reasons for the search meaning that it would automatically expose the ongoing investigations. The authorities would subsequently not be able to conduct further seizures of illegal substances because the suspected group would have time to reorganize their strategy.[49]

Most legal commentators agree that preventive legislation is inapplicable where *Anfangsverdacht* is detectable, thus ignoring potential absurd results. Their solution would favor so-called *Störer* (persons disrupting official activities) that are not only *Störer* pursuant to preventive legislation, but also are offenders whose actions cross the relevant threshold of an offense. In fact, a *Störer* that causes a disturbance threatening public security without committing a criminal offense pursuant to repressive legislation could be dealt with in accordance with preventive legislation. A *Störer* who is also an offender would, however, be protected under repressive legislation. It therefore appears absurd to restrict the powers of the investigating authority merely in case the breach of law becomes more serious.[50]

[47] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 26, 2017, 37 Neue Zeitschrift Für Strafrecht [NStZ] 651 (655), 2017 (Ger.).

[48] *See* 37 NStZ 651. *See also* 26 NStZ-RR 176.

[49] *See* Bijan Nowrousian, *Repression, Prävention und Rechtsstaat*, 23 Neue Zeitschrift Für Strafrecht [NStZ] 254, 254 (2018).

[50] *Id.* at 254.

2. Effective Enforcement of Criminal Justice

One of the main rationales behind the BGH's decision was to promote the effective enforcement of criminal justice. As the authorities did not want the second suspect to learn of the ongoing investigation, they had to opt for preventive legislation.

The concept of the effective enforcement of criminal justice was first recognized in a 1972 BVerfG decision.[51] Since then, German courts have continued to firmly maintain this principle.[52] According to the BverfG (*Bundesverfassungsgericht*), this principle is a peculiarity of the general *Rechtsstaatsprinzip* (rule of law) pursuant to Article 20(III) GG. The effective investigation of criminal offenses therefore constitutes a paramount objective for the investigating authorities and must be taken into consideration whenever the existing written and applicable law leaves room for interpretation. Since the 1980s, legal literature has increasingly agreed with the idea that such a principle is enshrined in Article 20(III) GG. Nevertheless, critics maintain certain reservations and continue to warn about excessive application of the principle.[53] In addition to being enshrined in the German Constitution, the principle in question is implied in provisions Section 152(II), 160(I), and 244(I) StPO that oblige the public prosecution office and the courts to investigate all prosecutable *Verbrechen* (the class of criminal offenses that are more serious).[54] This further illustrates that effective enforcement of criminal justice is a paramount objective in criminal procedure.[55]

Preventive legislation can enable more effective and strategic investigations than the repressive StPO. In fact, early intervention by the public prosecution office might jeopardize the success of a current investigation. It is, therefore, often strategically advantageous to postpone such an intervention. The legislature has recognized this fact and has therefore introduced various provisions that anticipate the possibility of simultaneous application of preventive and repressive legislation. Section 36(V) of the German Road Traffic Regulations (*Straßenverkehrsordnung*; StVO) is an example of this. This provision pertains to preventive legislation but remains applicable in the event of an *Anfangsverdacht*. Enabling traffic controls, the provision was not created to justify repressive police action. This does not, however, exclude Section 36(V) StVO's application to police measures which contribute to the investigation of already-committed offenses. Such a measure can thus be based on provisions of a preventive nature even if an *Anfangsverdacht* is present, meaning that the traffic control is carried out as a *doppelfunktionale Maßnahme*.[56] Other provisions in German preventive legislation that show similar characteristics to the aforementioned example also exist and could apply in the context of *doppelfunktionale Maßnahmen*.[57]

As a result, preventive legislation must remain applicable for police measures where preventive and repressive elements coexist. Furthermore, there is no provision under German law that

[51] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 7, 1972, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2214, 1972 (Ger.).

[52] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 9, 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2417 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 25, 1977, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1489, 1977 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 11, 1975, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1013, 1975 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1975, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 588, 1975 (Ger.).

[53] *See* Bijan Nowrousian, *Das Gebot der effektiven Strafverfolgung*, KRIMINALISTIK, Jan. 2016, at 45; Nowrousian, *supra* note 49, at 139.

[54] *See* ALFRED ROMAIN ET AL., DICTIONARY OF LEGAL AND COMMERCIAL TERMS, PART II GERMAN-ENGLISH 851 (4th ed. 2002).

[55] *See* Bijan Nowrousian, *Das Gebot der effektiven Strafverfolgung*, *supra* note 53 at 45.

[56] *See* Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN [BR] 75/92, at 73, http://dipbt.bundestag.de/extrakt/ba/WP12/1423/142330.html (Ger.).

[57] This includes, for instance, §§ 43 and 44 of the *Gesetz über die Bundespolizei* [BPolG] [German Federal Police Act] and § 10(III) of the *Zollverwaltungsgesetz* [ZollVG] [German Customs Administration Act].

establishes a prevalence of the repressive legislation over the preventive legislation.[58] Indeed, still, critics have not been able to demonstrate conclusively that repressive legislation prevails over preventive legislation on the sole ground that an *Anfangsverdacht* could be ascertained.[59]

E. The Secondary Level: The Utilization and Exploitation of Evidence Obtained During a *Legendierte Kontrolle*

After addressing the question of the legality of the police control on a primary level, the second stage judgment explores the use of the evidence gathered. This distinction constitutes an important systematic principle in German criminal law: It allows the lawfulness to be determined independently from whether evidence obtained by the measure can be utilized in trial. This decision reflects the key questions in criminal matters of whether, and when, the state's and society's interests in an effective criminal prosecution can prevail over the individually guaranteed rights of the accused. Consequently, the BGH had to determine the influence of the aforementioned measures on the exploitation of evidence in court.

I. Exclusion of Improperly Obtained Evidence

German evidentiary law differentiates between various forms of inadmissible evidence. Its system, as predominantly accepted by legal scholars, refers back to the two relevant levels of dealing with evidence.[60] The differentiation becomes clear when comparing the gathering of evidence (*Beweiserhebung*) and its exploitation during a trial (*Beweisverwertung*). The first category of exclusionary evidentiary rules becomes relevant while the investigations are underway on a fact-finding level. It is thus prohibited to obtain evidence on certain subjects, such as those concerning core areas of privacy and intimacy. Furtherly, certain methods of evidence collection and the collection of certain pieces of evidence is unlawful.[61]

The subsequent stage of Beweisverwertung addresses the prohibition on evaluating evidence with a procedural objective—in court and as grounds for reaching a verdict.[62] As generally recognized, this category is subdivided into codified and non-codified prohibitions on the exploitation of evidence (*Beweisverwertungsverbote*)—the latter section divided once again into autonomous and dependent proscriptions. The dependency of this latter division expresses a connection to a fault in the previous measures of evidence collection. An example of a codified *Beweisverwertungsverbot* is Section 136a sentence 3, part 2 StPO, which bans the exploitation of testimonies obtained through certain questioning techniques, such as duress, force, or deception.

The doctrine of the non-codified rules of evidence is less clear, because this category of exclusionary rules is subject to the judge's evaluation in each case. With regard to the category of dependent *Beweisverwertungsverbote*, some legal orders adhere to a strict interpretation of this link of dependency between the two stages and exclude the exploitation of evidence in court whenever any minor inconsistency should appear during the evidence gathering process.[63] One could argue that this conception has a disciplinary effect on police forces, as they will avoid even the slightest imprecision during investigations.[64] A rigorously connected legal relationship (*Konnexität*) in this field, however, neglects both the state's and society's interests in conducting

[58]*See* Bijan Nowrousian, *Das Gebot der effektiven Strafverfolgung*, *supra* note 53 at 255; Christopher Sievers, *"Legendierte Kontrollen,"* Die Kriminalpolizei, 1/2018, at 7, https://www.kriminalpolizei.de/downloads/Kripo_1_2018.pdf.

[59]*See* Sievers, *supra* note 58.

[60]*See* Ulrich Eisenberg, Beweisrecht der StPO 117, para. 335 (8th ed. 2013).

[61]*See* Florian Eder, Beweisverbote und Beweislast im Strafprozess 31, 32 (2015).

[62]*See* K.H. Gössel, *Introduction* to Löwe-Rosenberg- Strafprozessordnung (StPO), § L, para. 5 (1965).

[63]*See* H. Schneider, *Kein Beweisverwertungsverbot bei hypothetisch rechtmäßiger Beweiserlangung*, 36 Neue Zeitschrift Für Strafrecht [NStZ] 553, 2016.

[64]*See* F.C. Schroeder & T. Verrel: Strafprozessrecht para. 122 (7th ed. 2017).

a trial—a trial which would establish the situation and condemn the accused—and risks the paralyzation of the judiciary,[65] and could even encourage criminals.[66]

The founders of the German legal system did not adopt such a strict system of *Konnexität*, as has been confirmed by the BGH and the BVerfG on numerous occasions.[67] On the contrary, the German law of criminal procedure does not contain unequivocal rules as to whether a non-StPO complying method of evidence collection bars its use. Several theories have developed to determine the existence of inadmissible evidence; however, an exact method has not yet been developed. Some of these theories approach this question via the protective purpose of the provision concerned, while others promote a comprehensive balancing of the afflicted values, such as the societal and judicial interest in criminal prosecution and the individual's right not to be subordinated to unlawful measures disregarding these rights.

The independent rules of inadmissible evidence present another relevant category in the present judgment. This category's justification draws directly from the constitutional rights an individual is entitled to, without reference to any previously violated rules of procedure. One of the predominant rights concerned is the general right to privacy derived from the constitution by the BVerfG. Enshrined in Article 2(I) GG in connection with Article 1(I) GG, this right guarantees and confers upon the individual an inviolable sphere of private life that shall not be subject to public influence,[68] According to the BVerfG, the core sphere of privacy and intimacy shall never be subject to the exploitation of evidentiary use.[69] Therefore, an absolute prohibition on exploiting this type of evidence has been established,[70] whereas in all other cases affecting private life, the admissibility of a certain piece of evidence is a matter of proportionality. Consequently, it shall be determined by weighing up the intensity of the violation of fundamental rights and the interest in conducting a criminal prosecution against the accused.

II. The Solution Put Forward by the BGH and Criticized by Legal Scholars

In the second part of its decision, the BGH was confronted with the question of whether the evidence confiscated during the stop and search could lawfully be used in court. The judges responded to this problematic situation at different stages.

III. Admission of the Evidence Pursuant to Section 161 (II) (1) StPO

1. The Gateway Mechanism of Section 161 (II) (1) StPO

In order to substantiate the evidence secured by the authorities, the judges decided to base their solution on Section 161(II) StPO. This provision permits the introduction of evidence obtained by means stipulated by a law other than the StPO. In essence, this situation concerns information gathered by intelligence services or as a result of preventive police action.[71] As a gateway for other

[65] *See* EDER, *supra* note 61, at 34.

[66] *See* CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 66, 311 (Oxford Univ. Press ed. 2003).

[67] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 20, 2010, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2937, 2938, 2010 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 11, 1998, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 959, 1999 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 14, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3448, 2009 (Ger.).

[68] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 8, 1972, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1123, 1972 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 16, 1969, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1707, 1969 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 16, 1957, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 297, 1957 (Ger.).

[69] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 31, 1973, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 298, 1973 (Ger.).

[70] *See* EISENBERG, *supra* note 60, at para. 387.

[71] *See* R. Griesbaum, *§ 161*, *in* KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG [KK]: STPO § 161, para. 35 (7th ed., 2013).

types of evidence, this provision facilitates comprehensive examination of information in court while simultaneously taking into account the danger of circumventing the rules specified by the StPO. Due to the strengthening of the accused's rights, the analysis of danger constitutes a barrier for rapid and effective police action.

The legislature has been aware of this inherent danger of circumventing procedural guarantees, which is what led it to enshrine within the StPO a mechanism designed to uphold the principles of criminal prosecution.[72] The legal instrument of the hypothetical equivalent intervention will guarantee equality of treatment in court of two measures based on different laws without disadvantaging the accused's rights.[73] Regarding evidence that was not procured in compliance with StPO rules, this instrument paves the way for exploitation of the evidence by construing a hypothetical situation. This concept of a hypothetical event, however, has been extremely controversial since its conception by legal scholars in the 1950s.[74]

Section 161(II)(1) StPO stipulates that the suspicion in a specific case must concern a crime for which the measure used would also have been permitted pursuant to the StPO. In the given case, the equivalent legal basis for the stop and search is found in Section 105 StPO. Consequently, the BGH was charged with a hypothetical application of its conditions.

2. The Applicability of the Hypothetical Equivalent Intervention Fiercely Debated in Legal Literature

The BGH proceeded in two steps: First, the judges explained their vision of the so-called *Umwidmung*—the re-designing of a measure. Second, they examine the requirements in the present case for this redone measure. According to the court, the idea of the hypothetical equivalent intervention is restricted to the material legal basis. Consequently, the legal standard only concerns the question of whether the stop and search measure itself was lawfully executed.[75] Any formal requirements defined by the equivalent StPO provision—in this case, the previous judicial authorization—do not affect the possibility that evidence will be exploited, as these stipulations constitute the default to be overcome by the hypothetical equivalent intervention. Thus, the vital aspect is whether the investigating judge would indubitably have issued a judicial search warrant on criminal procedural grounds. In its second step, the court acquiesced in the present case, and having identified Section 100a Sentence 2, Number 7 StPO as a pertinent ground justifying the investigation, accepted the admission of the evidence secured by the police during the stop and search procedure.

This result has aroused much criticism amongst legal scholars. What is predominately debated is whether Section 161(II)(1) StPO, in conjunction with the hypothetical equivalent intervention, constitutes the correct applicable legal basis upon which to determine the admissibility of evidence. When scrutinizing the hypothetical intervention, one finds that according to the exact wording of Section 161(II) StPO, this subsection is applicable only when an investigative measure is authorized pursuant to the StPO and only for specific crimes—the so-called *Katalogstraftaten* (catalogued crimes).[76] In this case, evidence acquired through equivalent measures under other laws can only be utilized if the measure was applied to investigate one of the crimes specified in the StPO,[77] even if the other laws do not require any specific crimes.

The problem is that Section 105 StPO does not require suspicion of any specific crime. Legal commentators therefore agree that Section 161(II)(1) StPO cannot be applied to stop and search

[72] *See* Regierungsentwurf [Cabinet Draft], Bundestags Drucksachen [BT] 16/5846, 64 (Ger.).

[73] *Id.*

[74] *See* Svenja Schröder, Beweisverwertungsverbote und die Hypothese rechtmäßiger Beweiserlangung im Strafprozess 16 (1992).

[75] *See* 70 NJW 3173 (para. 38).

[76] *See* Nowrousian, *supra* note 49, at 254.

[77] *See* Bertram Schmitt & Lutz Meyer-Goßner, Strafprozessordnung [StPO] § 161, para. 18(b) (2016); Griesbaum, *supra* note 71.

procedures. Opinions vary significantly with regard to the consequences of these circumstances, however.

Several legal scholars propose that, in consequence, evidence exploitation is not subject to any prerequisite whatsoever. This means that measures adopted based on other laws that do not require a qualified suspicion of a catalogued crime may be utilized in court without further obstacles.[78] In particular, the hypothetical examination would thus not be necessary. This viewpoint defends the fact that the utilization of evidence for such measures must be based on Section 161(I) StPO, which provides the general power of the prosecution to cooperate with other authorities and to request information during investigations. The evidence obtained during a stop and search would thus be regarded as information requested from other authorities.

In contrast, other commentators insist that when the literal requirements of Section 161(II)(1) StPO have not been met, this provision is inapplicable and thus the obtained evidence must be excluded in Court.[79] Admittedly, this solution appears too strict for the scenario of evidence randomly discovered during a regular and preventive police check, because according to this opinion, no evidence secured on such an occasion could ever be used in court. This perspective is certainly convincing in the case of *Legendierte Polizeikontrollen*. The general clause of Section 161(I) StPO applies to information collected independently from criminal investigations. Even though the prosecution is entitled to demand the cooperation of other authorities during the collection process, this power does not extend to preventive police actions.[80] The judicial utilization of the evidence cannot, therefore, be based on this provision.

Additionally, the previously described second subsection of Section 161 StPO provides for an equality of treatment of police actions, requiring that measures not originating from the StPO must nonetheless comply with their equivalent measures of the StPO. Without this principle, any police measure—even if no corresponding basis was provided in the StPO[81]—could be applied by circumventing provisions of the StPO designed to protect the rights of the accused. Excluding a hypothetical examination for certain police measures therefore does not comply with the purpose of Section 161(II) StPO, nor does it provide for adequate protection of the accused's rights. Pursuant to this view, utilization of the material gathered in the present case cannot be based upon either Section 161(II) StPO or Section 161(I) StPO and should therefore be excluded.

3. The BGH's Interpretation of the Hypothetical Equivalent Intervention Fiercely Debated in Legal Literature

In addition to this, the BGH's assessment on the legal fiction of the hypothetical equivalent has been perceived critically. The preeminent part of legal literature maintains a strict interpretation of the hypothetical equivalent intervention, meaning that it necessarily extends to formal conditions. The present case concerns the requirement of prior judicial authorization of the measure. Consequently, according to this opinion, the consultation of a judge is an indispensable condition to construe the hypothetical equivalence.[82]

Before[83] and after[84] the decision in question, the Karlsruhe judges have shown a tendency to validate police measures requiring, though not having been preceded, by judicial authorization. Applied to the case of *Legendierte Polizeikontrollen*, two main arguments can be invoked in explanation.

[78] *See* SCHMITT & MEYER- GOßNER, *supra* note 77, at §161, para. 255.
[79] *See* Mitsch, *supra* note 31, at 3124.
[80] *See* SCHMITT & MEYER- GOßNER, *supra* note 77, at §161, para. 13.
[81] *See* Griesbaum, *supra* note 71, at § 161, para. 35.
[82] *See* Mitsch, *supra* note 31, at 3126.
[83] *See* Schneider, *supra* note 63.
[84] *See* 38 NStZ 296.

First, the retrospective validation of a measure cannot be deemed equivalent to previous analysis of the legal situation.[85] These approaches far from guarantee an equal protection level for the accused. The judge who is aware of all the facts would be forced to replace their ex-post perspective with a hypothetical ex-ante perspective, which would, in theory, protect all the guarantees of the StPO. In practice, however, this is nearly impossible. It cannot be guaranteed that the judge will not take into account the outcome of the police measures in their hypothetical ex-ante assessment of the situation, even if subconsciously. Resorting to a material interpretation of the hypothetical equivalent intervention would lessen the degree of judicial control and attenuate the compulsory nature of the provisions laid down in the StPO, as police forces could at any time divert to softer laws.

Second, German criminal procedural law knows the scenario of *Gefahr im Verzug* (exigent circumstances where time is of the essence)[86] which exempts police forces from awaiting judicial authorization. For instance, when time is of the essence, Section 105(I)(2) StPO requires an order from the prosecution service instead of a judicial search warrant. One could thus deduce that the legislature has already allowed for summary proceedings under certain circumstances. It cannot therefore be assumed that Section 161(II)(1) StPO provides an even broader power for the investigating authorities to stop and search without a warrant, without this having been expressly authorized.

In conclusion, an important view in academic legal literature claims that the interpretation adopted by the BGH is likely to facilitate an "escape to [preventive] police law."[87] The reproach of tolerating the circumvention of criminal procedural law and the erosion of the accused's rights cannot be neglected. Even if this argument does not appear justified at the stage of evidence gathering,[88] it becomes relevant with regard to the exploitation of the material gathered. Section 161(II)(1) StPO was presumably designed for chance discoveries, not for the phenomenon of *Legendierte Polizeikontrollen*; thus, the utilization of the evidence should be prohibited for the latter category.[89]

Nonetheless, practical rationale relating to the tenuous realities of investigations cannot be denied. In some circumstances, effective police work means that the accused needs to remain ignorant about the true situation in order not to endanger broader pre-existing investigations.[90] Alternatively, with awareness of the dangers created by this practice, some suggest dispensing of search warrants only with proper justifications, or instead issuing them only to the accused themselves.[91] Principally, though, it would be more sustainable and secure from a constitutional standpoint to demand legislative action on the point.

IV. The Potential Interference with the Fair Trial Principle as Grounds for Prohibiting the Exploitation of Evidence

1. The Obiter Dictum of the BGH

The BGH advances a further aspect in the obiter dictum, the part of a court decision confronting issues that are not directly related to the case but have arisen in its context. The judges briefly touch upon the fair trial principle, which could be the basis for inadmissible evidence in the case of *Legendierte Polizeikontrollen*. The right to a fair trial is enshrined in Article 6 of the European

[85] *See* Mitsch, *supra* note 31, at 3126.

[86] *See* Lange-Bertalot & Aßmann, *supra* note 31.

[87] *Id.*

[88] *See supra* Part D.III.1.

[89] *See* Mitsch, *supra* note 31, at 3126. *See also* Catharina Dose, Übermittlung und verfahrensübergreifende Verwendung von Zufallsfunden 271 (2013).

[90] *See* Wolfgang Müller & Sebastain Römer, *Legendierte Kontrollen - Die gezielte Suche nach dem Zufallsfund*, 32 Neue Zeitschrift Für Strafrecht [NStZ] 543 (2012).

[91] *Id.* at 547.

Convention on Human Rights (ECHR), and encompasses numerous facets, such as the principle of the equality of arms, the right to the inspection of files, the right to be heard by a court, and the right to substantial justification of decisions.[92]

German legal literature assumes that the violation of Article 6 ECHR in connection with the right to due process of law embedded in Article 20 (III) GG may result in the inadmissibility of evidence.[93] Accordingly, this exclusion is classified as a dependent one, as it is based on procedural error.[94]

The BGH had already established a potential connection between a rule of inadmissible evidence on fair trial grounds and *Legendierte Polizeikontrollen*, though without specifying the exact nature of the proscription. In the present decision, the judges further developed this connection.[95] More precisely, the key point is the doctrine of the *Aktenwahrheit und -vollständigkeit* (verity and integrity of the files).[96] In the context of *Legendierte Polizeikontrollen,* the problem that arises is that in accordance with the secrecy of such a police check, the true character of the stop and search measure is not recorded in the files. The prosecution service, however, as "mistress of the investigation proceedings"[97] must be made aware of all ongoing measures and methods so as to perform its role effectively. According to the constitutional judges, the prosecution is responsible for the lawful gathering of evidence[98] and for its application in court. Consequently, comprehensive and correct information from police forces is deemed indispensable to guarantee fair proceedings.[99]

In the present case, no fair trial principle violations were identified by the Court, simply because no violation was complained of by the defense. Nevertheless, this *obiter dictum* constitutes an interesting step by the BGH. First, it can be interpreted as an indication for future trials and judicial reviews. Second, the police are urged to act in compliance with the principles of verity and integrity of files.[100]

2. Legendierte Polizeikontrollen *in Light of* Nemo Tenetur se Ipsum Accusare

Another important aspect concerning the right to a fair trial, though not discussed by the BGH in its decision, is the possibility of actively deceiving a suspect and the implications that this has with regard to the principle of *nemo tenetur se ipsum accusare*, the right not to incriminate oneself. *Legendierte Polizeikontrollen* also refer to this issue, as the police actively deceive the suspect about the nature of the police check and the existence of ongoing investigations. The German StPO acquiesces to the possibility that the police may deceive suspects in some cases, as in Section 110a StPO, which provides authorization for employing undercover agents. But the StPO negates this possibility in other cases, such as in Section 136a (III) StPO, which states that a confession made under deceit must be excluded as evidence.[101] Some authors conclude from this dichotomy that German law generally permits the police to actively deceive suspects, even without specific authorization rules. Because German law specifically allows the greatest possible deceit—undercover agents—and only prohibits deceit in the most urgent cases—in an official interrogation—this would indicate that under the German law of criminal procedure, active

[92]Hans-Ulrich Paeffgen, *Art. 6 ECHR*, *in* Systematischer Kommentar, StPO Rn. 75 (4th ed. Verlag 2012).

[93]*See* Eisenberg, *supra* note 60, at para. 383(a).

[94]*See id.* at para. 363.

[95]*See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 11, 2010, 30 Neue Zeitschrift Für Strafrecht [NStZ] 294, 2010 (Ger.).

[96]*See* 70 NJW 3173 (para. 53).

[97]*Id.*

[98]*See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 14, 2016, Neue Juristische Wochenschrift-Spezial [NJW-S] 600, 2016 (Ger.).

[99]*See* 70 NJW 3173 (para. 53).

[100]*See* Schiemann, *supra* note 31, at 658.

[101]*See* Müller & Römer, *supra* note 90.

deceit is generally tolerated.[102] Other authors conclude the opposite, maintaining that the mere existence of exclusionary rules proves that the establishment of the truth is not the highest objective of a criminal investigation and that the right to a fair trial contradicts the possibility of deceiving a suspect, at least if not specifically permitted by some provision.[103] The BGH has not yet definitively positioned itself, though it does consider active deceit to be possibly problematic in regard to the right to a fair trial.[104]

The principle of *nemo tenetur* is seen under German law as a necessary component of a fair trial[105] and as one of the most fundamental consequences of the rule of law and of human dignity.[106] While there is unanimity concerning the importance of this right, the scope of it remains unclear.[107] A *legendierte Polizeikontrolle* could be contrary to *nemo tenetur*. As the result of a *legendierte Polizeikontrolle*, the suspect believes he was caught due to random police checks. This error, induced by the active deceit of the police, might lead the suspect to confess, which they might not have done if they had known of the true nature of the police check. Whether or not such an error falls under the protection of *nemo tenetur* depends on the scope of this principle.

According to the BGH, the principle of *nemo tenetur* signifies that no one may be forced to testify against themselves or to participate in their own conviction. This includes the prohibition of the use of force or direct compulsion to induce a confession. The suspect must be able to decide freely whether they want to contribute to their conviction by confessing or otherwise providing information. According to the BGH, however, only the freedom from force or compulsion is protected, not the freedom from error. Confessing as a consequence of an error induced by the police through active deceit is therefore not protected by the principle of *nemo tenetur*.[108] *Legendierte Polizeikontrollen* therefore do not violate *nemo tenetur* according to this interpretation. Others view the *nemo tenetur* principle as more extensive. According to these parts of legal literature, this right protects suspects from all state prompted self-incrimination, including incrimination resulting from any police induced errors.[109] Indeed, pursuant to this position, *nemo tenetur* protects the suspects from being used as a tool against themselves at trial. Deceit is equally as capable of achieving this as compulsion or force; therefore, suspects must be equally protected from police deceit.[110] Seeing as *legendierte Polizeikontrollen* are based on police deceit, they violate *nemo tenetur* according to this interpretation.

The decisive question in this context is how much weight should be given to free will.[111] The scholars' point of view discussed above is preferable to that of the BGH. The right not to self-incriminate protects the freedom of the suspect to choose whether to confess or not. This freedom is not guaranteed, however, if errors regarding the testimony are not pertinent. A free choice cannot be made unless all relevant circumstances are known to the suspect. For instance, in a case of *legendierte Polizeikontrollen*, knowing about possibly illegal investigation methods can have an impact on the choice of the suspect to confess. Such information should therefore be regarded as necessary for being able to freely decide on a confession. Interpreting *nemo tenetur*

[102] *See* Bijan Nowrousian, *Darf der Beschuldigte im Ermittlungsverfahren getäuscht werden? Zur grundsätzlichen Zulässigkeit aktiver Täuschung im Ermittlungsverfahren*, 35 Neue Zeitschrift Für Strafrecht [NStZ] 625, 627 (2015).

[103] *See* 70 NJW 3173 (para. 545).

[104] *See* 30 NStZ 294 (294).

[105] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 27, 1992, Neue Juristische Wochenschrift [NJW] 1463 (§ 15), 1992 (Ger.).

[106] *See* T. Fischer, *Aussagefreiheit*, *in* Karlsruher Kommentar, *supra* note 71, at 62.

[107] *See* R. Eschelbach et al., Kommentar zur Strafprozessordnung 903, 917 (2d ed. 2016).

[108] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 13, 1996, Neue Juristische Wochenschrift [NJW] 2940 (para. 62), 1996 (Ger.)

[109] *See* Claus Roxin, *Nemo tenetur: Die Rechtsprechung am Scheideweg*, 15 Neue Zeitschrift Für Strafrecht [NStZ] 465, 466 (1995).

[110] *See* Claus Roxin, *Zum Hörfallenbeschluss des Großen Senats für Strafsachen*, 17 Neue Zeitschrift Für Strafrecht [NStZ] 18, 18 (1997).

[111] *See* Safferling, *supra* note 66, at 297.

as only protecting from compulsion is consequently too narrow and cannot satisfy the teleological purpose of this right. *Legendierte Kontrollen* are therefore highly problematic in light of the right to a fair trial, both with respect to the verity of files and the principle of *nemo tenetur se ipsum accusare*.

F. Conclusion

With this judgment, the BGH extends police powers where their preventive powers are concerned. The court refuses to recognize a primacy of the law of criminal procedure over risk prevention or vice versa. It does, however, extend the field of preventive police action by replacing the previously widespread *Schwerpunkttheorie*. Now, the police can resort to softer laws whenever a preventive objective can be clearly ascertained, even if subsidiary. In line with this extension of preventive police powers, the BGH rejects an exclusion in court of the evidence obtained by *legendierte Polizeikontrollen*. According to the judges, resorting to preventive police legislation, even when the main focus of the measure is of a repressive nature, does not circumvent the necessity for a judicial warrant.

In particular, the BGH's view of the exploitation of evidence must be regarded critically. The legislature conceived the possibility of exploiting evidence from preventive police measures in order to admit evidence discovered independently from investigations; admitting evidence from measures deliberately planned without seeking a search warrant was not an intended result. Evidence obtained in such a manner must, contrary to the opinion of the BGH, be seen as circumventing the judicial guarantees of the StPO. The same argument, however, cannot be applied to the juxtaposition of preventive and repressive police laws. In the field of preventive police action, it remains paramount that dangers to public security be prevented effectively, which can be more adequately achieved using preventive legislation. Whenever an objective of risk prevention can be ascertained, the police measure should be lawful if based on preventive legislation. The question of circumventing procedural safeguards is not relevant to the question of which law must prevail; this issue is limited to the question of the exploitation of evidence, in which case the effectiveness of a measure no longer plays any role.

Even though this extension of preventive police action is to be regarded, at least partially, critically, the judiciary is not the only entity extending preventive police powers. The legislature is also acting accordingly. The *Bundesländer* continue to extend police powers in the field of preventing danger, the most recent examples being North-Rhine Westphalia and Bavaria.[112] In Bavaria in particular, police powers were drastically extended by the Bavarian Parliament, significantly lowering the threshold for interference with an individual's rights as well as granting police forces new powers such as preventive custody for a theoretically unlimited period of time.[113] This extension of preventive police action will cause yet greater discrepancy between the prerogatives of the police in accordance with the StPO and those pursuant to the police laws of the *Länder*,[114] a consequence of this being different procedural rules and guarantees for the same measures.[115]

Preventive police action is, however, not the only field of police law that is being extended. The same tendency can be observed within the repressive field. Indeed, there has been an inclination to create new criminal offenses and to intensify existing ones.[116] Since the eighth legislative period of

[112] *See* Mirjam Kid, *Vorbild Bayern: Auch NRW sucht ein neues Polizeigesetz*, DEUTSCHLANDFUNK (May 24, 2018), https://www.deutschlandfunk.de/vorbild-bayern-auch-nrw-sucht-ein-neues-polizeigesetz.862.de.html?dram:article_id=418668.

[113] *See* Lisa Schnell, *Polizeiaufgabengesetz. Fakten zum neuen Gesetz*, SÜDDEUTSCHE ZEITUNG (May 10, 2018), https://www.sueddeutsche.de/muenchen/polizeiaufgabengesetz-fakten-zum-neuen-gesetz-1.3974393.

[114] *See* Fredrik Roggan, *Über das Verschwimmen von Grenzen zwischen Polizei- und Strafprozessrecht*, 81 DIE KRITISCHE VIERTELJAHRESSCHIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 336, 351 (1998).

[115] *See* Dieter Kochheim, *Gemengelage und die Legendierte Kontr*olle, KRIMINALPOLITISCHE ZEITSCHRIFT [KRIPOZ] 316, 317 (2017).

[116] *See* J.M. SILVA SÀNCHEZ, DIE EXPANSION DES STRAFRECHTS 2 (2003).

the Federal Republic of Germany which began in 1976, out of 109 laws relating to the material reform of criminal law, only 15 represented a limitation or abolition of an offense, while the remainder tightened existing offenses or created new ones.[117] Another tendency besides the aggravation of existing criminal law is the forward displacement of criminal offenses.[118] Such developments have not remained uncriticized, as can be illustrated by the example of Section 89a of the German criminal code (*Strafgesetzbuch*, StGB). This criminal offense was created in 2009 and penalizes the preparation of serious acts of violent subversion.[119] This provision thus incriminates behavior at a very early stage, significantly predating even the attempt stage.[120] The BGH confirmed the constitutionality of this incrimination, thus ascertaining that an incrimination at the stage of preparation can be in conformity with the constitution—specifically the constitutional principle of *Verhältnismäßigkeit* (appropriateness).[121] Scholars nevertheless have continued to criticize such an extension of criminal law into the stages of the preparation of crimes.[122]

Constantly extending police laws nonetheless furthers the issue of guaranteeing the rights of the accused. Due to the growing discrepancy in procedural rules between preventive and repressive legislation, the issue of circumventing procedural safeguards of the StPO will gain in importance. In tandem with the extension of preventive police powers, a further question will likely gain in significance, namely whether the police may, as in the case of l*egendierte Polizeikontrollen,* resort to softer laws with fewer guarantees, and whether the evidence thereby obtained may be utilized in court. The main predicament, though, remains this: How far can a state lessen the degree of protection of the rights of the accused in the name of strengthening strategic criminal investigations?

[117] *Id.* at 88.

[118] *Id.* at 39.

[119] *See* Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten [Law Penalizing the Preparation of Serious Acts of Violent Subversion], July 30, 2009, BGBL I at 2437 (Ger.).

[120] *See* Christopher Ohnesorge et al., *The Constitutionality of Section 89a of the German Criminal Code and the Concept of a Serious Act of Violent Subversion: The German Federal Court of Justice, Judgment of 8th May 2014*, 18 GERMAN L.J. 631, 632 (2017).

[121] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 8, 2014, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2359, 2014 (Ger.).

[122] *See* Wolfgang Mitsch, *Vorbeugende Strafbarkeit zur Abwehr terroristischer Gewalttaten*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 209, 211 (2015); Mark Zöller, *Die Vorbereitung schwerer staatsgefährdender Gewalttaten nach Section 89a StGB – wirklich nicht verfassungswidrig?*, 35 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 373, 377 (2015).

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