DEVELOPMENTS

Data Screening of Muslim Sleepers Unconstitutional

By Gabriele Kett-Straub[*]

A. Introduction

Shocking news for police and intelligence agencies in Germany: the search for inland sleepers following the terrorist attacks in 2001 on the World Trade Centre in New York and the Pentagon was unconstitutional. *Preventive* data screening is incompatible with the fundamental right of informational self-determination according to Article 2 (I) in connection with Article 1 (I) of the *Grundgesetz* (GG - Basic Law). Since the ruling of the *Bundesverfassungsgericht* (BverfG - Federal Constitutional Court) of 4 April, 2006 (1 BvR 518/02), such numerous acquisition of data is not permitted unless a *concrete* threat to important objects of legal protection is existent.

B. A Student's Complaint of Unconstitutionality

The Federal Constitutional Court had to decide on a constitutional complaint filed by a 28-year old Muslim Moroccan. He was attending the university Duisburg-Essen when the so called dragnet investigations were conducted, and was therefore eyed by the investigators. The complainant challenged the dragnet investigation that had been arranged by the *Amtsgericht* (District Court) in Düsseldorf at the request of the police headquarters in Düsseldorf on October 2001.[1] The First Penal Senate asserted that the preconditions that could have permitted the action were not at hand: a *general threat*, as constantly existing since the dreadful attacks on

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[1] A comprehensive outline about the controversial estimation of the current measures of data screening by the courts is given in: Winfried Bausback, Rasterfahndung als Mittel der vorbeugenden Verbrechensbekämpfung – Notwendigkeit einer Vereinheitlichung der landesrechtlichen Regelung angesichts des internationalen Terrorismus?, 133 BAYRISCHE VERWALTUNGSBLÄTTER (BayVBl) 713, 714 (2002). See also Wilhelm Achelpöhler and Holger Niehaus, Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany, 5 GERMAN LAW JOURNAL 495, 504 (2004), http://www.germanlawjournal.com/pdf/Vol05No05/ PDF_Vol_05_No_05_495-513_special_issue_Achelpoehler_Niehaus.pdf.

September 11, should not be sufficient for the implementation of dragnet investigations by data screening methods.[2] Subsequent to the ruling, judge Evelyn Haas in her special vote criticized that those preconditions regarding data screening measures couched by the majority in the senate makes the nation *weitgehend wehrlos* (widely helpless) against impending terror attacks.[3]

C. The Process of Data Screening

I. The Concept

Data screening is a special method of profiling using electronic data processing. Police authorities acquire individual-related data sets from private or public places, which are collected *for completely different purposes*. The information is then screened automatically for certain criteria and compared (matching/screening).[4] The aim of the project is to detect a group of people to which a certain profile can be applied.[5]

II. History

Data screening in the Federal Republic of Germany, both as a repressive and preventive method, already shows a long tradition. It was delveloped in the 1970's to detect terrorists of the far-left *Rote Armee Fraktion* (RAF – Red Army Faction), who unsettled the country with bomb attacks on US military bases and, in the so called " *heißer Herbst*" (hot fall) of 1977 with the shooting of the attorney general and the abduction of the president of the employers' association.[6] At that time, it became obvious that the terrorists did not rent apartments under their own names, but availed themselves of a false identity to pay rent, telephone, and electricity.[7] To

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[2] Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939, 1947, 147 (2006). As the adjudication in the NJW is partly shortened, quotes are occasionally taken from the Federal Constitutional Court's homepage, where complete adjudications are published.

[3] Id. at 1947, 184. See also Winfried Bausback, Fesseln für die wehrhafte Demokratie?, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1922, 1924 (2006).

[4] See Hans Hilger, Neues Strafverfahrensrecht durch das OrgKG, 12 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 457, 460 (1992). See also STEFAN KLEVER, DIE RASTERFAHNDUNG NACH § 98 A STPO (2003); MICHAEL SIEBRECHT, RASTERFAHNDUNG (1997); and Achelpöhler & Niehaus, supra note 1, at 495-496.

[5] WERNER BEULKE, STRAFPROZESSRECHT, para. 262 (8th ed. 2005).

[6] The aim of the abduction was to extort the release of founder members of the RAF detained in Germany. Authorities did not concede to the pressure; Schleyer was murdered. See STEFAN AUST, DER BAADER-MEINHOF-KOMPLEX (1983); BUTZ PETERS, RAF (1994); BUTZ PETERS, TÖDLICHER IRRTUM (2004); WILLI WINKLER, DIE GESCHICHTE DER RAF (2005).

[7] SIEBRECHT, *supra* note 4, at 22.

avoid the risks of transferring money from account to account, these expenses were each paid in cash. With the aid of different institutions, data was first collected with this basic information: power companies put together the names of those consumers who had paid in cash. This information was then compared to that of registry offices, pension insurances, registries of deeds and others to filter out the names which were proved innocent.[8] Consequently, only persons with false identities remained, whose apartments could now be checked by conventional measures.[9] The only relevant data screening success derives from the end of the 1970's, where an RAF apartment was located and *one* member of the underground organisation was arrested.[10] Data screening methods, however, were not specifically regulated under the *Strafprozessordnung* (StPO - German Code of Criminal Procedure) until 1992 (cf. Sections 98a and 98b StPO).[11] According to the *Bundeskriminalamt* (BKA – Federal Criminal Police Office), no comparable measures were conducted over the years.[12]

D. The Revival of Data Screening

I. Federal Police Laws

At the Federal State level, most police laws envisaged data screening as a preventive profiling instrument even before the attacks in 2001.[13] Originally, the police required "a present threat to the constancy or the safety of the federal government or a federal state as well as for a person's physical condition, life, and freedom," in order for the authorities to use the instrument of data screening.[14] This

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[8] See Horst Herold, "Rasterfahndung" – eine computergeschützte Fahndungsform der Polizei, 84 RECHT UND POLITIK (RuP) 91 (1985).

[9] This method is called "negative data screening." as the intersection is brought to a manageable amount by erasing negative criteria of single groups of people. On the contrary, "positive data screening" implies the search for circumstances which apply to the perpetrator. See SIEBRECHT, supra note 4, at 22.

[10] At that time, the data screening measures were based on the following general regulations: Strafprozeβordnung [StPO] [Code of Criminal Procedure] §161, 163.

[11] Conducting a dragnet investigation as a measure of inquiry assumes that at least a primary suspicion concerning a committed offense is known, and which must be of great seriousness also. Strafprozeβordnung [StPO] [Code of Criminal Procedure] §98 a (catalog of offenses).

[12] Bundesverfassungsgericht (BVerfG – Federal Constitutioal Court), 1 BvR 518/02, para. 4, (April 4, 2006) http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

[13] Bausback, *supra* note 1 (good review of the different police laws).

[14] See MARTIN KOCH, DATENERHEBUNG UND –VERARBEITUNG IN DEN POLIZEIGESETZEN DER LÄNDER 187 (1999).

barrier of implementation has now been lowered considerably in most federal states; the requirement of a threat was partly abandoned.[15] Accordingly, data screening can now be initiated as necessary to prevent or combat certain offenses of considerable significance. Data screening has thus been transformed into a method applied by the police in advance resting merely upon the *assumption* of a future threat. Despite its unimpressive achievements so far, data screening has been considered an effective (if not the *only* effective) instrument in the search for sleepers, that is, persons who live an inconspicuous, law-abiding life for the sole purpose of being called to execute a terrorist plan as yet unforeseen.

II. Background

A possible foil for certain activism may be the fact that some of the 9/11 assassins had lawfully attended a university in Germany. To this day, it is entirely unclear whether they intentionally chose Germany as their temporary home.[16] It is a fact that Germany was harshly criticized by the world community after the attacks in New York and Washington in 2001, yet did not want to be regarded as a *terrorist sanctuary*. Since then, great efforts have been made to expose sleepers in time, even more so since the fear of a major assault on home soil has grown.

E. The Screened Data

> "Male, aged 18 to 40, (ex-)student, Islamic religious affiliation, native country or nationality of certain countries, named in detail, with predominantly Islamic population."[17]

According to these criteria, since October 2001 the federal police authorities conducted coordinated nationwide dragnet investigation for Islamic terrorists with

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[15] Bausback, *supra* note 1, at 715 (showing the connection of the different police laws in detail and the sources of all laws).

[16] See BGHSt 49, 112 (116) (For possible assault plans in Germany); Bundesgerichtshof, (BGH – Federal Court of Justice), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2322, 2324 (2006). See Christoph J.M. Safferling, Terror and Law – Is the German Legal System able to deal with Terrorism?, 5 GERMAN LAW JOURNAL 515 (2004), http://www.germanlawjournal.com/pdf/ Vol05No05/PDF_Vol_05_No_05_515-524_special_issue_Safferling.pdf; Loammi Blaauw-Wolf, The Hamburg Terror Trials – American Political Poker and German Legal Procedure: An Unlikely Combination to Fight International Terrorism, 5 GERMAN LAW JOURNAL 791 (2004), http://www.germanlawjournal.com/pdf/Vol05No07/PDF_Vol_05_No_07_791-828_Public_Wolf.pdf.

[17] See Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939 (2006), (for criteria in detail) and Amtsgericht Wiesbaden (AG – Regional Court), DATENSCHUTZ UND DATENSICHERHEIT (DuD) 752 (2001).

the collaboration of the Federal Criminal Police Office.[18] The data was collected at universities, colleges, registry offices, and the central register of immigrants, and was then forwarded to the Federal Criminal Police Office. With the obtained information, the nationwide "sleeper" file was instituted and aligned with files listing holders of flying licences. The vast majority of the 8 million pieces of information on up to 300,000 persons was collected.[19] Data screening, however, neither resulted in a sleeper's exposure, nor did it result in a charge due to membership in a terrorist organization according to Sections 129, 129b StGB (Strafgesetzbuch – German Criminal Code).[20]

F. Intensity of Infringement of Fundamental Right

Normally, the individual pieces of information affected by data screening have a comparatively little personal relevancy. However in the view of the Federal Constitutional Court the measure constituted a *serious* infringement of fundamental rights.[21] Moreover, the measure's sphere of actionability includes many people who did not induce the violation by their behaviour.[22] Assuming an unfounded large-scale infringement of fundamental rights if found, additional demands have to be made on the threshold of infringement. In addition, the *secrecy* of a governmental measure increases the intensity.[23] The court decided as well that especially the analyzed method of data screening could have a "*stigmatisierende Wirkung*" (stigmatizing impact) on those effected and thus "increase the risk of being discriminated against in working and everyday life."[24] After all, the measure was specifically aimed against immigrants of Muslim faith: reproducing prejudices is a

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[18] Lisken demured this cooperation. See Hans F. Lisken, Zur polizeilichen Rasterfahndung, 21 NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (NVwZ) 513, 514 (2002). To avoid such problems concerning competence, Bundeskriminalamtgesetz [BKAG] [Federal Criminal Police Office Law] § 7 was temporarily changed accordingly.

[19] Only 5.2 million pieces of information came from North Rhine-Westphalia. See Bundesverfassungsgericht (BVerfG – Federal Constitutioal Court), 1 BvR 518/02, para. 28, (April 4, 2006) http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

[20] See Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939, (2006).

[21] *Id.* at 1942. See also Achelpöhler & Niehaus, supra note 1, at 496-98 (further discussion of the background as regards constitutional law and basic rights).

[22] See Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939, 1944 (2006); BVerfGE 100, 313 (376); BVerfGE 107, 299 (320); BVerfGE 109, 279 (353); BVerfGE 113, 29 (53); BVerfGE 113, 348 (383).

[23] BVerfGE 107, 299 (321); BVerfG 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 976, 981 (2006).

[24] See BVerfG 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939, 1943 (2006).

side effect hardly avoidable when recording members of a religious community generally.[25]

G. Comparativeness

Infringing on fundamental rights in such an intensive manner is only possible if important constitutional subjects need protection. The principle of comparativeness, however, requires that the legislator must connect a dragnet investigation to certain narrow conditions, specifically certain threat levels. The notion of threat as a *Kernstück polizeilicher Befugnisse* (principle item of power by the police) thus takes centre stage regarding the order of the Federal Constitutional Court that[26] to justify a violation of fundamental rights in such a way, at least one *concrete* danger must be existent. That is, a circumstance must have "*einer hinreichenden Wahrscheinlichkeit des Schadenseintrittes*" (a sufficient probability of pending loss).[27] The disputed data screening is based on the prescription, as amended and promulgated on 24 February, 1990, which had been validated as per Section 31 of the police law of North Rhine-Westphalia. The prescription is even based on the existence of a *present threat*, which means even more than a concrete threat, which is the minimum demanded by the Federal Constitutional Court.

The federal prescriptions on data screening applied in the meantime have not been explicitly commented on by the Federal Constitutional Court. The necessary preconditions implementing this action have been loosened throughout, and the criterion of an existing threat has been partly abandoned altogether. Failing this minimum standard of a concrete threat, it can be concluded by the flipside of this decision that every single one of the current standards of the federal police laws is unconstitutional.

H. Order of the Controversial Data Screening

Not the law itself, but rather the order of data screening has already been determined to be unconstitutional, since it was based on too wide an interpretation of the notion of "threat."[28] Proceeding also from terrorist sleepers, a concrete threat

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[25] *Id.* at 1944.

[26] FRANZ-LUDWIG KNEMEYER, POLIZEI- UND ORDNUNGSRECHT, para. 87 (10th ed. 2004).

[27] KNEMEYER, POLIZEI- UND ORDNUNGSSRECHT para 87 (10th ed. 2004)

[28] Given that special courts (Fachgerichte) misjudged the importance and consequences of fundamental rights interpreting simple right, the case is no longer reversed to the Federal Constitutional Court for reexamination; see BVerfGE 7, 198; BVerfGE 101, 361 (388).

could basically be a *constant threat* as well, that is, when a sufficient probability of loss or damage is in existence at every time over a longer period. But still in this case, the demands on the probability of damage as well as the concrete factual basis of the prediction may not be loosened to actually accept such a threat.[29]

A general threat situation or external tensions in any case do not suffice as a sufficient assumption. After all, the possibility of terrorist actions affecting Germany or being prepared there can be "practically never ruled out." Rather it depends on the existence of *actual* indications of sleepers holding themselves ready in Germany and planning an assault here or elsewhere "in the foreseeable future."[30] The courts, however, had significantly taken into account the feared degree of damage when forecasting the probability of damage and renounced all concrete facts in the course of this line of argument. The rule of thumb of these courts is: the more serious the expected damage, the less stringent the requirements concerning the probability of occurrence.[31] In this context, it impressively referred to the number of dead in the terror attacks in New York, Washington, Madrid, and London. The Federal Constitutional Court correctly prevented the lowering of the threshold of probability to the mere *possibility* of a terrorist attack. After all, one has to live with this general threatening situation for years; evidence of its existence alone cannot permit a distinct infringement upon the important fundamental right of informational self-determination. Only the limitation to a concrete threat, which has to be constituted on a factual basis, and not on the reference to a diffuse international situation, may justify a measure against so many completely unsuspicious people.

I. Questioning the Suitability

Criticism of that adjudication culminated in the aforementioned internal accusation in the minority vote, in that the state becomes *wehrlos* (defenceless) to a large extent if one persists in one's viewpoint of a traditional notion of a concrete threat.[32]

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[29] See Bundesverfassungsgericht (BVerfG - Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1939, 1947 (2006).

[30] *Id.*

[31] *Id.*

[32] The traditional term of a present threat was abided by: Oberlandesgericht Frankfurt (OLG – Higher Regional Court), 21 NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (NVwZ) 626 (2002); Landesgericht Wiesbaden (LG – Regional Court), 26 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 240, 241 (2002); Landesgericht Berlin (LG – Regional Court), 26 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 175, 176 (2002). However, the requirements on probability of damage were lowered by: Oberlandesgericht Düsseldorf (OLG – Higher Regional Court), 26 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 241 (2002); Kammergericht Berlin (KG – Regional Court), 5 MULTIMEDIA UND RECHT (MMR) 616, 617 (2002);

Elsewhere, a "black day for the effective combat of terrorism in Germany," has been referred to. That implies a melancholic abdication of data screening as an efficient measure in the search for sleepers. It must also be noted that data screening, whose hallmark has never been success, did not serve its purpose in the first place. Even 20 years ago, the *Magerkeit der Ergebnisse* (meagerness of results) of data screening was discussed, even if that was the only time when data screening was met with success. Data screening makes sense when significant inspection features are produced on the basis of which a specific criminal profile can be developed, but when discovering sleepers who are characterized by an extremely adapted and inconspicuous way of life, specific characteristics are missing by which an effective pattern can be constructed. Possibly, the immense hoarding of insignificant data could have even been to the disadvantage of the security situation, in that labor needed elsewhere was withheld. In this respect, the *black day* for the security in Germany was not even a *gray* one; in fact, the Federal Constitutional Court should have shipwrecked the inquiry into the concrete data screening simply by its suitability. The precept of suitability asks for the employment of such measures that will aid in achieving the desired success. The very fact that no better measure for the search for sleepers was known, does not make the one measure automatically suitable. Yet, an applied measure does not have to be the best or most suitable one, as a contribution for the achievement of objectives suffices in principle. In hindsight, however, data screening was not even able to make a contribution.

J. The Fallacy

In times of collective fear of terrorism, much is politically enforceable and the Federal Constitutional Court has to constantly cut the wings of overeager politicians.[33] Most recently, the Court repealed the *Luftsicherheitsgesetz* (LuftSiG – Air Transport Security Act) for material as well as formal reasons, as questions of responsibility were also breached by the legislative.[34] Among other things, Section

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Oberverwaltungsgericht Koblenz (OVG – Higher Regional Administrative Court), 21 NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (NVwZ) 1528 (2002); Verwaltungsgerichtshof Mainz (VG – Administrative Court), 21 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 303, 305 (2002); Amtsgericht Wiesbaden (AG – District Court), 25 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 752, 753 (2001); Amtsgericht Tiergarten (AG – District Court), 25 DATENSCHUTZ UND DATENSICHERHEIT (DuD) 691, 692 (2001). The different requirements on the notion of damage are clearly laid out by MATTHIAS JAHN, DAS STRAFRECHT DES STAATSNOTSTANDES 87 (2004). See also Martin Kutscha, Rechtsschutzdefizite bei Grundrechtseingriffen von Sicherheitsbehörden, 22 NEUE ZEITSCHRIFT FUER VERWALTUNGSRECHT (NVwZ) 1296, 1299 (2003).

[33] See Oliver Lepsius, Liberty, Security and Terrorism: The Legal Position in Germany, 5 GERMAN LAW JOURNAL 435 (2004), http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_435-460_special_issue_Lepsius.pdf (concerning other counter-terrorist measures according to German law).

[34] See BVerfGE 30, 292 (316); BVerfGE 33, 171 (187); BVerfGE 67, 157 (173).

14 (III) requires under which conditions German Federal Armed Forces are allowed to concertedly bring down an aircraft and kill passengers on board. That was the first norm of permission at all in the history of the German Federal Republic that authorized the state to kill innocent individuals. Still, the norm infringed the fundamental right to live and the base law's guaranty of human dignity, as uninvolved people were abased to mere objects.

K. Conclusion

The U.S. terror attacks allegorize a break for the security law in Germany; it has today a different dimension. A changed state of threat may require going new ways. As a matter of course, the legislative has to enable an effective prevention of and method of fighting against crime, just as the constitution has to grant this scope for the preventing risks. People long for security, and politics suggest to the population that by more and stricter laws respectively, *total* security might be attained. The fallacy may be that this security - if it can be achieved at all – surely cannot be achieved by law.[35] The understandable desire for security is always in a precarious relationship with freedom. Restricting preventive data screening to circumstances when important legal objects are in concrete danger does not harm security, but avail freedom.[36]

[35] See Winfried Hassemer, Sicherheit durch Strafrecht – Eröffnungsvortrag Strafverteidigertag 24.3.2006, 26 DER STRAFVERTEIDIGER (StV) 321, 332 (2006) (discussing development of the criminal law regarding danger defense).

[36] Bausback, *supra* note 1, at 1922.