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Europäischen Strafrecht**

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European Criminal Law and Procedure**

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**Technological Surveillance  
of Communication in American, German  
and Chinese Criminal Procedure**

**Von**

**Jiahui Shi**



**Duncker & Humblot · Berlin**

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Studies in International and  
European Criminal Law and Procedure

Herausgegeben von / Edited by

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# Technological Surveillance of Communication in American, German and Chinese Criminal Procedure

Von

Jiahui Shi



Duncker & Humblot · Berlin

Unter Beteiligung des Göttinger Vereins zur Förderung der Strafrechtswissenschaft  
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*To My Parents*



## Foreword

My work on this comparative study started in 2014 and has been finalized in the summer of 2021. It was accepted as a doctoral dissertation by the Law Faculty of the University of Cologne in October 2021.

I would like to express my gratitude to many persons who contributed to my work and supported my studies in the past years. My greatest thanks are due to my supervisor, Prof. Dr. Thomas Weigend. He continuously supported this study with great patience. He read, word by word, sentence by sentence, five lengthy drafts before this final version, and each time made valuable comments. Some of these comments were quite critical, and I had to work hard to meet his demands. But all the work was worthwhile, and his professional comments and supervision guaranteed the quality of my work. Without his time spent on my work, this book could not have been published. An old saying in Chinese goes: “He who teaches me for one day is my father for life.” I have learned from him not only how to write a dissertation but also high academic standards and a serious attitude toward scholarship. I am sure that my experience with him will inspire me for the rest of my life when I work in the academic sphere. Moreover, he is a kind and considerate person, ever ready to help me with challenges I encountered in Germany, supporting me with visa matters as well as funding and job applications. The enjoyable time I had with his family for the Christmas and New Year holidays will remain unforgettable. I have been very lucky to have had him as my supervisor. I wish him “Alles Gute”!

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Since this work is written in English, which is not my mother language, my best friend, Dr. Jenny Sager from England, an expert on Shakespeare, did not hesitate to agree to do the proofreading of the manuscript. She could have rejected my request since the job was time-consuming and probably also boring for her. She did an excellent job and I owe her a big hug.

I owe great thanks to my teachers of the German language, my German friends and colleagues, who practiced German with me with great patience. This made it possible for me to learn to manage this difficult language from level zero within a short time. Without my ability to speak German, I could not have finished this comparative study.

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Cologne, February, 2022

*Jiahui SHI*

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# Introduction

“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”

(Benjamin Franklin, 1755)

## I. The Background of the Study

The speed of long-distance communication has dramatically increased since the invention of the telegraph, the telephone and, more recently, with the ascendancy of the mobile phone and the internet. For law enforcement to keep abreast with this massive rise in communication technologies, a sophisticated method of interceptive technology was required; hence wiretapping was born. The rise of organized crime and the rapid development of surveillance technologies have led to their widespread use for the purpose of criminal investigation. The interception of private telecommunication and conversations are covert measures. They are most valuable investigation tools because, given their covert nature, they can uncover information that the suspect does not intend to make public. On the other hand, the use of highly intrusive measures, such as online searches of private computers and covert surveillance of private property, can undermine society's trust in the police and an individual's right to privacy. It is therefore necessary to devise a legal framework that balances the need for efficient law enforcement with individuals' privacy rights.

Rules on technological investigative measures (including electronic surveillance) were introduced into *Chinese Criminal Procedure Law* (hereafter referred to as *CCPL*) only in 2012. It is an achievement, but far from satisfactory. It is well recognized that the rules on technological investigative measures in the *CCPL* need to be further improved and reformed. Given this background, a comparative study on this topic can be of importance to Chinese politicians or legislators interested in improving these rules and in solving problems caused by the current arrangement. Looking into foreign experience can broaden their horizons<sup>1</sup> and help them in identifying deficiencies in the Chinese legal system.<sup>2</sup>

Another practical reason for conducting a comparative study on electronic surveillance results from its characteristics. Modern communication technology easily

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<sup>1</sup> *Goldsworthy*, in: Rosenfeld/Sajó (eds.), *Handbook*, 2013, 689, 694.

<sup>2</sup> *Mack*, *Comparative Criminal Procedure*, 2008, ix.

transcends national boundaries and can connect with the whole world within a second. This facilitates our as well as criminals' communications. All countries must deal with the same problems and challenges. This makes comparison possible and necessary. Different solutions to the same problems can be interesting and inspiring to legal professionals in different jurisdictions.<sup>3</sup>

To conduct a comparative study is, however, not an easy task. A simple comparison between legal texts is far from enough and sometimes even misleading. Similar legal texts do not necessarily lead to the same practice. Moreover, approaches effective in one jurisdiction might not have the same effect in another jurisdiction, given each country's unique historical, cultural, political, and social circumstances.<sup>4</sup> The criminal justice system is closely related to these unique circumstances as well as to each country's legal system as a whole.<sup>5</sup> Components of the criminal procedure system are interrelated with other procedural arrangements and with the court system. For example, any discussion of the admissibility of evidence from surveillance must consider the general role of judges and the purpose of criminal procedure. Therefore, this study will not analyze rules on electronic surveillance independently but will strive to place them within the general constitutional and procedural context of each country.

## II. The Three Jurisdictions

For this comparative study, the author has selected the United States of America (the U.S.), Germany, and P.R. China. Each country represents a different legal tradition. The U.S. legal system represents the common law system, many legal principles of which have historically been created by judges through case law.<sup>6</sup> Germany typifies the civil law system which mainly relies on codes and statutes.<sup>7</sup> The Chinese legal system, including its criminal procedure, is basically organized like a civil law system, but the influence of the socialist ideology can be observed. On the other hand, both practice and theories of criminal procedure in China have, especially in recent years, been influenced by the U.S. system. For instance, the design of the Chinese plea bargaining system has been influenced by the U.S. system, and the American "fruit of the poisonous tree" doctrine is a popular topic among Chinese academics. Given this background, the ways of solving problems in Germany and the U.S. may have become more acceptable to Chinese jurists. In addition, the discussion

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<sup>3</sup> *Dubber/Hörnle*, Criminal Law, 2014, xx.

<sup>4</sup> *Goldsworthy*, in: Rosenfeld/Sajó (eds.), Handbook, 2013, 689, 694.

<sup>5</sup> *Mack*, Comparative Criminal Procedure, 2008, ix.

<sup>6</sup> *Keiler/Roef*, in: *Keiler/Roef* (ed.), Comparative Concepts of Criminal Law, 2019, 4.

<sup>7</sup> *Id.* at 5. For a general comparison of the two systems see *Mack*, Comparative Criminal Procedure, 2008, 1–20. For a historical introduction to inquisitorialism see *Dezza*, Geschichte des Strafprozessrechts in der Frühen Neuzeit, 2017, 15–24.

of technological surveillance in these two jurisdictions started much earlier than in China. Therefore, they both have developed relatively comprehensive and well-organized systems and approaches to soften the tension between surveillance and the right to privacy even though they rely on different values and procedural arrangements. Although problems exist in these two jurisdictions, it is of great value for Chinese reform efforts to examine how their different approaches work in practice.

Some might argue that when legal systems are very different from each other, it is less useful to compare them. This argument is not convincing. It is true that there are evident differences among the three jurisdictions due to their differing legal traditions. The distinction between the common law and civil law systems should, however, not be overstated.<sup>8</sup> Especially in recent years, the two models have approached each other. The U.S. has a growing body of statutes, which have become essential legal sources, such as U.S. Code chapter 18 *Title III* on the interception and disclosure of wire, oral, or electronic communications.<sup>9</sup> In Germany, the case law of higher courts is well recognized and generally followed by lower courts. The same tendency can be observed in China. The Chinese Supreme Court began to operate a nation-wide database of judgments several years ago and selects “guideline judgments” that are published.<sup>10</sup> These guideline judgments are normally followed by other courts. Moreover, more adversarial elements have been introduced into Chinese criminal procedure. For example, the role of the defense lawyer has been enhanced, and cross-examination of witnesses at trials is encouraged.

In light of these developments, this research on surveillance in the U.S., Germany and China focuses on specific and practical problems rather than entering into a general discussion of the two theoretical models.

### III. Presentation of Problems

In all three jurisdictions, the development of communication technology necessitates a closer analysis of the relation between the protection of the right to privacy and electronic surveillance in the criminal process. On the one hand, surveillance measures are effective in obtaining information in the fight against serious crime, especially organized crime. On the other hand, however, such measures may intrude deeply into the right to privacy. Therefore, defining the constitutional rights of criminal suspects has become an important topic for debate. In the U.S. and in Germany, different approaches have been taken to balance the need for crime investigation with the need to protect privacy. In the P.R. China, however, surveillance

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> Pub. L. No. 90–351, 82 Stat. 197 (codified at 18 U.S.C. §§ 2510–2520 (Supp. V 1965–1969), later at 18 U.S.C. §§ 2510–2522).

<sup>10</sup> All published “Guideline Judgements”: <http://www.court.gov.cn/fabu-gengduo-77.html>, visited at 22.02.2020.