

Germany's Party Finance Scandal "Ends" With Kohl's Plea Bargain and Too Many Unanswered Questions

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[1] Germany's sensational party finance scandal looks to have closed its last chapter on 2 March 2001, as former Chancellor Helmut Kohl entered a plea agreement in Bonn's *Landgericht* (Regional Criminal Court), requiring the legendary politician to pay a fine of DM 300,000 without having to answer the questions that lie at the heart of the 14 month criminal investigation into his acceptance of and failure to declare anonymous campaign donations. The Court resorted to an elegant procedural option that, when closely examined, raises a number of considerable concerns. In applying Section 153a of the *Strafprozessordnung* (German Federal Code of Criminal Procedure), the Court chose the tricky path between conviction and acquittal in a case that generated tremendous public interest and contained dramatic questions of fact and law. The reaction to the Court's decision ranges from relief to anger, from satisfaction to disillusionment. But no one seems enthusiastic about the resolution of the case and that is strange considering that it involved Germany's longest serving chancellor, a figure known and respected throughout the world and the head of one of Germany's biggest political parties. The decision, more than anything, has quietly brought the criminal side of the scandal to an end. It is not clear whether the absence of political debate regarding the plea bargain is a result of the obscurity that surrounds the legal procedure invoked or whether it is due to general Kohl-fatigue.

[2] The criminal investigation against Mr Kohl was initiated in 1999 in the context of what would become the Christian Democratic Union's (CDU) biggest crisis and one of Germany's most dramatic political funding scandals. It was accompanied by the smell of political and ethical deterioration, with yet unknown consequences for German political culture. The claim by one CDU figure implicated in the scandal, that the source of the illegitimate funds were "inherited funds of anonymous Jewish donors" surely figures among the most both bizarre and tasteless arising out of the criminal, political and media investigations. Mr. Kohl had been, it became clear, a party patriarch who ruled the party with a strong hand, creating and/or orchestrating the obscurity that continues to surround the party's finances. Repeatedly asked/ordered to reveal the names of the sources of the illegitimate funds as required by law, Kohl simply refused. Instead, he resorted to counterattacks on the investigators and critics who deigned to besmirch author of so much of the nation's present political assets, not the least of which being German reunification.

[3] The Regional Criminal Court charged with handling the criminal investigation of Mr. Kohl declared the file closed, under the condition that Mr. Kohl pay the sum of DM 300.000. The Court's decision finalizes the phase of criminal investigation, which could have ended either with indictment (leading to a trial and then conviction or acquittal) or a resolution for lack of proof or, instead, a resolution because of the diminishing weight of the accusation or the guilt. The governing German statute requires the prosecution to either collect enough evidence on which it then shall base its official indictment which would then be followed by the Court's opening of a criminal procedure, or to come to the finding that the existing evidence does not justify an indictment. In that latter case, the prosecution officially closes its investigation. The suspect, most notably, walks away without the stain of a legal indictment or conviction.

[4] As it is, German Criminal Procedural Law provides for yet another avenue that the prosecution, together with the Court, can take. With Section 153a of the Code of Criminal Procedure, the possibility exists to resign from the eventual indictment of the suspect while the Court will issue an order to oblige the suspect to fulfill some requirement, often a material payment, if that is understood as being apt to "do-away-with" or, in other words, to satisfy the "public interest" and if the "weight of guilt is not withstanding". It is not only in its application to the case of Mr. Kohl that this statute seems problematic. The combination of the material aspect that is confronted with the public's interest in the righting of the wrong, or the realization of justice is troubling. Whether justice be had through conviction or acquittal, the application of Section 153a of the Code of Criminal Procedure presents itself as working with an altogether unclear standard of measuring the presumed guilt. This, at the very least, makes this statute difficult to ascertain. Meanwhile, in the context of the surrounding rules governing the ending of the prosecution's investigations, Section 153a of the Code of Criminal Procedure fills the lacunae left by other provisions. These do establish the possibility for the prosecution with consent of the Court to forego prosecution in the cases that the offense constitutes a misdemeanor (*Vergehen*) and there is no public interest in the prosecution (Section 153 CCrimP), as well as the resignation of the indictment (by the prosecution with consent of the Court) when the Court would not be forced to issue a penalty (Section 153b CCrimP), e.g. in cases in which to punish the accused would compete with his natural punishment resolving already from his own loss incurred in the doing).

[5] The crux of the path taken by the Regional Criminal Court is that it leaves the widely interested public both disappointed and clueless as to the message that the Court actually wished to make. The bottom-line being that Mr. Kohl was neither indicted, convicted nor acquitted, but that the prosecution ended on the condition of a substantial payment, does indeed provoke questions as to the justification for the decision and especially the Court's underlying

standards of equality. As Frankfurt law professor, Wolfgang Naucke recently pointed out in an article published in the *Frankfurter Allgemeine Zeitung* on 10 March 2001, those startled by the *informality* of the procedural solution found by the Court and the prosecution, fail - presumably for lack of information - to understand the pragmatics of this mechanism. With section 153a, according to Professor Naucke, the parliament intended to have a large number of irrelevant criminal cases culled from the formal procedure but the process does not expel them from the grasp of criminal law altogether. As the decision to take this route is delegated to the discretion of prosecution and Court, there is room for concerns for reasons of equality, control and judicial review. At the same time, the practice of informal resolution of criminal investigations long existed. Section 153a itself dates from 1975, and opened up the avenue of combining informal resolution of criminal investigations with the possibility of sometimes sensible obligations imposed on the accused. Professor Naucke contends that while this might seem unproblematic from a pragmatist's perspective, those more concerned with the *rule-of-law* might be much more skeptical of the architecture and the scope of the procedure. The discretion left to the prosecution and the Court provokes the question as to a possible definition of the role of the *Beschuldigte* (accused) in this process.

[6] A suspicion, e.g. against an individual, is necessary if the procedure is to begin at all. With a suspicion the investigation by the prosecution will be triggered, and it will be within the course of this investigation that a decision might be possible for the prosecution to take as to whether it will pursue indictment or resolution. If, as in the case of Mr. Kohl, the prosecution decides to resolve the investigation and with it the accusation in connection with an obligation for the accused to pay an (enormous) fine, it will have to prove whether the public interest can be satisfied in this manner. It is obvious that this procedural stage involves great uncertainty, both for those directly involved and for the outside observers. For, it is the question in which manner the final obligation is to be handed out so that a clear line between informal resolution and formal punishment is still visible. In the case of Mr. Kohl, this line seems to have been blurred and, ultimately, it will remain difficult to discern all the reasons and considerations that went into that decision. In choosing the resolution through Section 153a of the Code of Criminal Procedure, the case was handled in a manner that will leave many questions unanswered, and it is precisely these questions that a public will be interested to see resolved in connection with a criminal procedure involving a celebrity such as Mr. Kohl. Were it not for the large amount of money that Mr. Kohl was ordered to pay, it could be considered that some might have taken this as an altogether too unsatisfactory end of the affair. The opposite might be true just as well. The affirmation of a public interest in the case of Mr Kohl is underlined by the prosecution and the Court's application of the named statute. But that the "doing away with" of the public interest, that the law demands, was justifiably executed through the imposition of a "fine" of this scale, remains irritating. But maybe to focus on the money might miss the point altogether. Instead, to consider the question whether the wrong-doings of Mr. Kohl in connection with the treatment of incoming donations for the party - which the prosecution qualified as a defalcation to the detriment of the party's property - merited an informal resolution or a formal conviction (or acquittal) might allow us to understand better the mixed reactions and, above all, the startledness of many towards the Court's decision. A wrong-doing must be understood as having been established by the prosecution and the Court. At the same time, we are forced to believe that the resolution of the procedure against payment of DM 300.000 actually contains the clear message that, at least, the prosecution and the Court held this device appropriate for dealing with or doing away with the public interest. To which degree the details resulted from an agreement with Mr Kohl (and his lawyers), will stay in the realm of speculation. But what remains irritating about the matter is that so many questions as to the concrete circumstances of the case will - presumably forever - remain undiscovered. While the informal resolution of a criminal procedure naturally seems to invite itself in cases where facts and law are clear, this is, after months of inquiry, hearings, testimony, not the case with Mr Kohl - and with a lot of the events surrounding the finance affair of the CDU as a whole.