INVOLUNTARY SELF-INCRIMINATION AND THE RIGHT TO PRIVACY IN CRIMINAL PROCEEDINGS

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I. *The Investigation of the Truth versus the Right to Privacy as the Key Antinomy in Criminal Proceedings. The Protection against State-Enforced Self-Incrimination and the Protection of Privacy as Overlapping Problems.*

In any rule-of-law system the law of criminal procedure is bound to weigh the intended investigation of the truth against the interest of the person charged with a criminal offence in protecting his privacy. The German law of criminal procedure is a typical example of the permanent struggle with these conflicting demands. While the majority of the courts are making an effort to reinforce the protection provided to the accused, the latest pieces of legislation reveal a tendency of allowing increasingly far-reaching invasion of privacy. I will try to map out the most important aspects of this development.

In doing so I will distinguish between state-enforced, involuntary self-incrimination and the right to privacy. These two problems overlap because enforced self-incrimination will often entail invasion of privacy and, conversely, because an invasion of privacy by the state will often result in involuntary self-incrimination. But although these problems are intertwined I will differentiate between them and I accept that there will be some overlapping. After all, there may be invasions of privacy without self-incrimination and there may be cases of self-incrimination which are not caused by an invasion of privacy. In addition, the two problems should also be treated separately because there is a difference in some of the rules applied to them by the German courts.

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II. *Nemo tenetur se ipsum accusare*

1. *The Accused's Privilege*

Section 136 of the German Code of Criminal Procedure contains the principle that in a trial nobody shall be bound to incriminate himself by stating that everybody shall have the right, at his discretion, "to answer the charge brought against him or not to make any statement regarding the subject matter". This embodies the right to remain silent which, however, provides a protection against self-incrimination only if and when the accused's silence cannot give rise to any prejudicial inferences. In the absence of this proviso the accused's silence would in turn be self-incriminatory.

Initially, the German courts held that the accused's silence could be taken as an indication of guilt (BGHSt = decisions by the Federal Court of Justice in criminal matters, vol. 1, p. 366). Today, however, it is justified to give preference to the view that according to the principle of fair trial the accused's silence must not be considered as any evidence whatsoever. This applies not only to cases where the accused remains totally silent[1] or only denies he committed the offence in question[2] but equally to a refusal to testify either to the police[3] or to testify up to a certain point in time.[4] The accused's silence cannot be considered incriminating evidence even though it may seem unlikely for a totally innocent person to remain silent in the given situation.[5]

The German courts accept only one exception to this rule: If someone does testify in general but remains silent on particular points or when he is asked particular questions, this may give rise to adverse inferences (BGHSt 20, 298[6]). I agree with this exception and do not think it

1 BGHSt 32, 140 (144) (decisions by the Federal Court of Justice in criminal matters, volume 32, from p. 140, quoted from p. 144); 34, 324 (326); OLG (Higher Regional Court) Düsseldorf, MDR (1988) 796; OLG Hamm, NJW (1974) 1880, includes further references.

2 BGHSt 34, 326.

3 BGHSt 20, 281.

4 BGH, StrV (1983) 321; dissenting opinion by OLG Oldenburg, NJW (1969) 806 and dissenting view by *Güldenpfennig*, NJW (1969) 1867.

5 BGH, StrV (1988) 239; (1989) 383; OLG Düsseldorf, MDR (1988) 796.

6 Concurring view e.g., by OLG Braunschweig, NJW (1966) 214; OLG Hamm, NJW (1974) 1880.

represents any forced self-incrimination because if you choose to give evidence you also choose to have your testimony evaluated. This means that the entire attitude of the accused must be evaluated, i.e., account must be taken of the things he said as well as of the things he did not say, all of which, taken together, must be the basis for conclusions to be drawn. Although some authors take the view that even partial silence must not be used against the accused,[7] I do not agree for the reasons given above.

2. *Instruction on the Right to Refuse to Give Evidence*

Section 136 of the German Code of Criminal Procedure also states that any official carrying out the examination must instruct the accused as to his right to refuse to give evidence. But there were long arguments as to the consequences if the required instruction was omitted.

In the early days, the German Federal Court of Justice took the mandatory instruction to be merely an administrative order (BGHSt 22, 170). As a result, evidence taken without an instruction could be used for judgment against the accused. These findings were apt to render the statutory requirement rather inefficient. An official taking evidence and hoping to get a confession was encouraged not to be too strict on the instruction since a failure to give any instruction at all did not have any consequences.

Facing substantial criticism, the Federal Court of Justice subsequently recognized (BGHSt 25, 325; 31, 395) that if a statement is made during a trial in which the judge failed to give the required instruction, such statement cannot be admitted as evidence. If the statement was admitted as evidence disregarding this rule, the judgment would be set aside on appeal. This meant there was some progress but it fell short of what was needed because it is rare for a judge to commit such a gross violation of the law in full view of the public. Moreover, when the accused goes to trial he will normally know about his privilege (his attorney may have told him or he may have been instructed at an earlier occasion) and, therefore, he cannot be prejudiced in the assertion of his rights if no instruction is given during the trial. The *nemo-tenetur*-principle is mostly threatened in the first examination by the police.

7 As stated among others by Kühl, JuS (1986) 120ff., and Schneider, Jura (1990) 578ff.

Here, the accused may easily be taken by surprise and, lacking legal expertise, he may be made to confess if he is not instructed that he has the right to remain silent. Therefore, the protection of the *nemo-tenetur*-principle remained inadequate.

It was only in February 1992 that another decision by the Federal Court of Justice (BGHSt 38, 214[8]) gave an entirely new direction to court decisions. The Court ruled that even statements made to the police cannot be used as evidence unless a proper instruction was given beforehand. The right to remain silent — i.e. the rule that nobody may be forced to incriminate himself — is now appreciated as one of the key principles of the law of criminal procedure and it is based on the International Covenant on Civil and Political Rights of 1966 (article 14, paragraph 3g), on human dignity, on the accused's right to privacy as well as on the principles of fair trial. The importance of this decision emerges also from the fact that, for the first time in criminal matters, the Federal Court of Justice included in its decision an extensive chapter on comparative law[9] which shows that by international standards Germany now provides very comprehensive protection for the *nemo-tenetur*-principle and that the decision was influenced by the Dutch law, in particular. This suggests some degree of internationalization of court decisions in future.

However, the decision does not say there can be no exception to the rule that testimonies will not be admitted unless an instruction was given. Notwithstanding a violation of the rule, admission of the testimony as evidence is permitted if the accused was aware of his right to remain silent or if, explicitly or by implication, he consented to his testimony being admitted.[10] But this exception cannot restrain the ban on admissibility since those are cases where the testimony is admitted at the free choice of the accused.

There is some concern at the assertion that the ban on admissibility cannot be invoked in cases where it remains doubtful whether or not an instruction was given.[11] The principle of giving the accused the benefit of the doubt cannot be applied directly, because here, it is not the accused's guilt that is in doubt but rather the possibility that a gross

8 With notes by Bohlander, NStZ (1992) 504; Fezer, JR (1992) 385; Roxin, JZ (1992) 923.

9 BGHSt 38, 228ff.

10 BGHSt 38, 224ff.

11 BGHSt 38, 224.

violation of the procedure may have occurred. But a doubt as to the compliance with the principles of human dignity and fair trial should not be given lesser importance than a doubt as to the accused's guilt. This is why I would advocate the principle of giving the accused the benefit of the doubt being applied *mutatis mutandis* to these cases. This approach will not give the accused the opportunity to do away with a voluntary confession made earlier by alleging that he had not been given an instruction at the time. The evidence is clear if a record on both the instruction and the examination is drawn up by the officer and signed by the accused.

3. *The Right to Consult a Defence Attorney*

In a subsequent judgment of October 1992 (BGHSt 38, 372[12]), the Federal Court of Justice stepped up the protection against self-incrimination caused by a lack of experience by reinforcing the right of defence. Again, the basis was the statutory provision of section 136 of the Code of Criminal Procedure which requires that instruction must also be given on another point. The accused must be cautioned that he is entitled "to consult with a defence attorney of his choice at any time, even before his examination". In the case quoted above this piece of information was given to the accused. But when the accused asked to speak to his attorney the police officer taking the evidence replied that the accused "must decide for himself whether or not he wants to testify because the defence attorney could not make that decision for him". Here, the accused was prevented from consulting his attorney. The accused thereupon gave evidence without such consultation and made a confession.

The Federal Court of Justice held that the right of defence (section 137, paragraph 1, sentence 1 of the Code of Criminal Procedure) had been violated and refused to admit the confession as evidence. The Court now thinks that not only the right to remain silent but also the right of defence is a basic element in the position of the accused in a trial. The right of defence is derived both from the Convention for the Protection of Human Rights (article 6, paragraph 3c) and from the concept that the accused must not be made a mere object of the proceedings but that he

12 Includes a note by Roxin, JZ (1993) 426.

must be given the opportunity to influence the proceedings as well as their results. Although the judgment mentioned above explicitly refers only to a denial of consultation with an attorney, it implies at the same time that a failure to caution the accused as to his consultation right would also render the ensuing testimony inadmissible as evidence. The reason is that even the failure to instruct the accused on this matter constitutes an obstruction of the consultation. This judgment is also closely linked to the principle of *nemo-tenetur*. The concept deals with the right of defence which is supposed to cater to various interests of the accused. There can be no doubt that its purpose must also be to protect the accused against hasty self-incrimination. In order for the accused to find the optimum solution to the problem whether or not he should give evidence at all or how he could do so most appropriately, it is essential that he must be given the opportunity to consult with his attorney before giving evidence.

4. *Protection Against Involuntary Self-Incrimination*

The German Criminal Law also provides a safeguard against enforced or surreptitious self-incrimination. To this effect, all examination techniques which prejudice the accused's own free will are banned by virtue of section 136a of the Code of Criminal Procedure which also states that any violation of this ban will make the evidence inadmissible. The act explicitly lists the following techniques as prohibited: abuse, fatigue, physical intervention, administration of drugs, torture, deception, hypnosis, unlawful compulsion, the promise of an illegal advantage as well as any measures which impair the accused's memory or intellectual capacity.

It should be noted that the courts have stretched the basic concept of section 136a beyond its wording. The lie-detector is inadmissible in any German trial (BGHSt 5, 332)[13] because this equipment records unconscious processes like a person's respiration and blood pressure and the conclusions drawn from these data would then be used as evidence and, therefore, the accused would be forced to supply evidence against his own free will.

13 Criticized by Undeutsch, ZStW 87 (1975), 650 and countercriticism by Peters, *ibid.*, at 663.

Although according to its wording, section 136a only applies to the giving of evidence, the courts have applied the rule to all types of involuntary self-incrimination made to criminal prosecutors. For instance, in the trial of a terrorist charged with the murder of Herr Schleyer, the former president of the employers' association, the court arranged for a secret recording of a conversation of the defendant and the director of the pre-trial detention center in which he was being held. The purpose of the experiment was to get a sample of the defendant's voice. Since the defendant did not say a word during the trial, the intention was to compare the secretly recorded voice sample with voice recordings of a kidnapper who had been involved in the murder and had called the authorities after the onset of the kidnapping. Eventually, the defendant's guilt was proved by means of the comparison of the voice samples. But the Federal Court of Justice set aside the judgment (BGHSt 34, 39) and held that the tape recording was inadmissible as evidence. The secret recording coerced the defendant to incriminate himself against his will and without knowing what he was doing. The Court held this to be an infringement of human dignity even though the recording did not contain a private conversation but a discussion with an official.

In practice, another important case is that of a police informer infiltrated into the prison cell of a pre-trial detainee. The informer then won the confidence of the prisoner, coaxed him to speak about the crime and passed on the information to the police. The Federal Court of Justice held that this was inadmissible and that the information gained could not be used (BGHSt 34, 362[14]). But if indirect evidence is gained through the accused's inadmissible statement, this apparently can be used against the accused. In the case described above, the prisoner had confided to the informer that he had had an accomplice in the criminal act. The accomplice was questioned as a witness and on the basis of that evidence the prisoner was convicted. The Federal Court of Justice accepted that this was admissible,[15] so the fruit-of-the-poisonous-tree-doctrine is not

14 With notes by Fezer, JZ (1987) 937; Grünwald, StrV (1987) 470; Seebode, JR (1988) 427; Wagner, NStZ (1989) 34.

15 Dissent by LG (Regional Court) Hannover, StrV (1986) 521; Fezer, JZ (1987) 938ff.; Grünwald, StrV (1987) 472ff.; Seebode, JR (1988) 430ff.; Wagner, NStZ (1989) 34ff.; Reichert-Hammer, JuS (1989) 446ff.; Neuhaus, NJW (1990) 1221ff.; Roxin in Jauernig/Roxin, *40 Jahre Bundesgerichtshof* (40th anniversary of the Federal Court of Justice), (1991) 95ff.

recognized by German courts. The reason given is that the police could have identified the witness by other means and that the use of indirect evidence is "necessary for effective crime control".[16]

I think this is a mistake. If indirect evidence is admitted, this may be a by-pass to the *nemo-tenetur*-principle. If a person is made to confess to a crime because he is misled by the state and if such confession cannot be used as evidence, whereas the accomplice's identity revealed in such confession may be used to convict the accused, the judgment ultimately relies on a self-incrimination caused by unlawful methods. The concept that this is necessary for effective crime control is unacceptable, since it could equally be used to abandon the *nemo-tenetur*-principle altogether. Even though it may theoretically be possible to get the relevant piece of evidence by other means, this should not be an excuse to ignore the fact that the evidence is not admissible. After all, such a theoretical possibility exists in most cases and it could, therefore, largely render the protective ban on admissibility invalid. If at all, the admissibility could only be accepted if, in the course of the investigation it seems highly likely that the piece of evidence can be found independently of the confession. I hope it will be possible to persuade our courts to accept the "remote effect" of the ban on admissibility of evidence as recommended by me.

5. *Self-Incrimination Made to Officials Outside the Pending Trial*

According to German law, any witness can refuse to answer any questions the reply to which would expose him to the risk of being prosecuted for a criminal act (section 55 of the Code of Criminal Procedure). This means that even before criminal proceedings have been instigated against a potentially criminal witness he is protected against enforced self-incrimination. This, of course, creates another problem: can the refusal to give evidence in the original trial be used as incriminating evidence against the witness once he has been charged and criminal proceedings have been opened against him? Criminal prosecutors might argue that the refusal to answer questions meant that the witness feared criminal consequences for himself if he told the truth in reply to those questions. Such fear could be held to be an important indication that he had actually committed a criminal act. The Federal

16 BGHSt 34, 364.

Court of Justice first confronted this problem in May 1992 (BGHSt 38, 302) and it ruled that the refusal to answer questions could not be used to draw any inferences to the disadvantage of the accused. This solution is correct. The right to refuse to give evidence is supposed to be a means of protection against self-incrimination but it would be turned upside down if the refusal to give evidence could be used as incriminating evidence. Such a risky right could not be relied upon and, therefore, the rule itself would be meaningless.

The problem is somewhat different where a statutory act, for reasons outside criminal law, forces an individual to disclose a criminal offence. For instance, a debtor in bankruptcy must inform his creditors and the receiver — or assignee — about his actions linked to the bankruptcy even though he may have commited a criminal offence (section 100 of the Bankruptcy Act). If public prosecutors could use such information as a basis for criminal proceedings, this would mean criminal offenders are forced to prove their own guilt outside criminal proceedings. Even the Federal Constitutional Court dealt with this problem (BVerfGE 56, 37) and held Solomonically that the debtor in bankruptcy does have to give information about his criminal offences but that such information cannot be used as incriminating evidence in trial.[17] This means that public prosecutors would have to ignore or forget about facts to which the debtor in bankruptcy had confessed. This is not very easy, so I think it would be better if, from the outset, the debtor in bankruptcy were granted a right to refuse to give evidence in respect of any criminal offence he may have committed.

With applicants for political asylum the courts take a different view (BHGSt 36, 328[18]). German law requires every applicant for asylum to make a statement as to how he entered the country. According to section 47, paragraph 1, number 1 of the Aliens Act such entry may have been a criminal offence if the applicant entered the country without a passport or a residence permit. If the asylum-seeker then makes a correct statement in the course of the asylum proceedings, such statement is held to be admissible as evidence in a trial. This is not a convincing solution. Although it is not a criminal offence for an applicant for asylum to refuse to give evidence as to how he entered the country, in doing so the applicant would be exposed to the unacceptable risk of prejudicing

17 Concurring view by BGH, NJW (1991) 2844 referring to the disclosure duty according to section 807 of the Code of Civil Procedure.

18 Dissenting opinion by Ventzke, StrV (1990) 279.

his own application. Moreover, it does not seem logical to punish an applicant for asylum because he dutifully disclosed incriminating facts (and did not remain silent about them, contrary to his duty).

6. *The Limits of the Protection Against Self-Incrimination*

So far, I have explained that in German law nobody is obligated to contribute to the proof of his guilt by making a confession. He must be instructed to this effect, he may consult with his attorney and he can remain silent and no negative inferences may be drawn. Any violation of these rules or the use of unfair methods to gain a confession will cause the testimony to be inadmissible. This protection does have its flaws, as for example the failure to accept that the ban of admission of evidence must have a remote effect, but it is a very comprehensive protection as shown by the basic judgments quoted above, most of which were handed down only a few years ago.

But the German law also provides for limits to the protection against self-incrimination. Let me briefly indicate four areas which are important for practical purposes.

a) *The accused as a target of investigation*

The accused does not have to assist public prosecutors actively but he must tolerate not only an investigation of his private life which will be explained below but also physical interference which may well furnish a decisive contribution in the proof of his guilt. For instance, section 81a of the Code of Criminal Procedure provides that for the purpose of investigating his criminal liability he may have to accept that a blood sample is taken which is usually the key element of the evidence for the offence of drunken driving (section 316 of the Criminal Code). Section 81e of the Code of Criminal Procedure now justifies a genetic analysis which can be used to establish with very high probability whether or not samples of blood or semen found at the scene of the crime originate from the accused. Although the reliability of this process has been contested by some authors,[19] public prosecutors do not hesitate to collect the

19 For the discussion see e.g. Keller, NJW (1989) 2289; Rademacher, StrV (1989) 546; Gössel, Meyer-GS, (1990) 121; Kimmich/Spyra/Steinke, NStZ (1990) 318; Oberlies, StrV (1990) 469; Wächtler, StrV (1990) 369; Simon, MDR (1991) 5; Lühs, MDR (1992) 929.

relevant genetic information about any person if it helps to investigate a criminal offence. Whenever the accused is only under a duty to tolerate certain activities, the desire to investigate the truth is clearly given preference over the interest of the accused to keep any information about his body secret and avoid its use as evidence.[20]

b) *Duty of presence for person who caused an accident*

I should like to mention a rule which has become common ground in Germany although in some cases it does amount to forced self-incrimination. Pursuant to section 142 of the Criminal Code a person involved in an accident must wait at the scene of the accident and allow for a determination of his identity, that of his vehicle and of the nature of his involvement. Anyone who fails to do so is liable to prosecution for unlawfully leaving the scene of an accident.

Of course the law does not require direct self-incrimination but it does require the person involved to be ready for an investigation of the facts which mostly results in self-incrimination. Just imagine a thief could be given a second sentence if he failed to remain at the scene of his offence with the stolen goods waiting for the owner or the police to arrive!

German courts are trying to avoid the criticism that this is forced self-incrimination by stating that this law does not aim at protecting the state's interest in prosecution but is intended to protect the claim for damages to be asserted by the injured party. Therefore, the party who caused the accident may leave the scene of the accident without being liable to prosecution if, prior to the arrival of the police, he reached an agreement with the injured party. Nevertheless, the waiting duty will in most cases result in punishment for the traffic offender as he is forced to surrender to the police. I do not deny that this is the intended result. But further clarification is needed as to whether or to what extent this is in agreement with the ban on self-incrimination.

20 According to BGH, NStZ (1991) 399 failure to carry out a DNS analysis which would have been adequate to prove the offender's guilt will result in the judgment being set aside for a violation of the court's duty to investigate pursuant to sec. 244, para. 2 of the Code of Criminal Procedure.

c) *Self-incrimination in the private sphere and in contacts with under-cover investigators*

In German trials, there is no limit to the use as evidence of any self-incrimination made in private conversation. Whatever a criminal may have told his friends or any other private person about his offences may be used to prove his guilt if and when the public prosecutor is aware of this information. The same applies to any information given by an inmate of a prison cell to any other person about the inmate's offences (BGH, NStZ 1989, 32). Even the results of private interviews carried out without proper instruction can be used without any problem (Higher Regional Court (OLG) Karlsruhe, NStZ 1989, 287[21]). So, where a company director interviews his employees because a theft has been committed, any self-incriminating statement may also be used by the public prosecutor.

With the new law of July 15, 1992, German legislation has moved another step forward admitting under-cover investigators in the field of organized crime and in other cases, where the investigation of a crime would otherwise be rendered considerably more difficult (sections 110 a to e of the Code of Criminal Procedure). An under-cover investigator is a policeman using a false identity in order to appear as a private person in the investigation. Here, the state uses the fiction of a private conversation to gain self-incriminating information which will be used to prove the guilt of the offender. Such an act is illegal when it is committed in the cell of a pre-trial detention center (see II.4 above) but the same act is supposed to be legal when it is committed by criminal underground circles.

There is no doubt that this situation is contrary to the principles of our law of criminal procedure. While a policeman acting in his official capacity cannot mislead another person and must instruct every suspect as to his right to refuse to give evidence, none of these rules would apply to the same policeman using a false identity to appear as a private person. Even before the new rule was enacted into law our courts have justified such practices simply by stating that this was the only way to fight organized crime. This means that the need for truth finding in the investigation of criminal acts is used to infer that the ways and means used for the purpose are admissible (in other words, the end justifies the means). In the light of strict legal thinking, that is a highly questionable

21 Includes a note by Rogall, NStZ (1989) 288.

conclusion indeed. The limits to the rule contained in the new law are evidence of the fact that not even legislators had a clear conscience. Summing up we must recognize that although the state cannot mislead a person to gain self-incriminating information, this prohibition has been set aside partly as far as organized crime is concerned.

d) Spontaneous statements and interviews for information only

Finally, there is no protection against self-incrimination in spontaneous statements. If outside of questioning by the police, a person charges himself with a crime this statement can be used against the person even though he had not been instructed[22] as to his rights. Also, if a policeman called to the scene of a crime asks questions merely in order to establish the sequence of events before anybody has been charged with the crime, these questions are no formal interview and do not require an instruction.[23] If a person gives incriminating answers to these general questions, these answers can be used. It is only when a witness is charged, that he must be instructed as to his rights and, failing that, any statement made will be inadmissible. The situation arises when a person is being questioned who is also under direct suspicion of having committed the act. There is no need for that person to be officially charged or for the term "accused" to be used.

III. *Protection of Privacy*

1. *Statutory Rights of Interference*

In the German law of criminal procedure a person's privacy is, as a rule, protected against interference by the state although this protection must be weighed against the state's interest in investigating the truth. Therefore, any intrusion on the privacy is admissible only to the extent explicitly permitted by the law. The law permits a variety of such intervention rights, above all the seizure (sections 94 and the following of the Code of Criminal Procedure), the search (sections 102 and the following) and telephone tappings (sections 100 a and b). However, these

22 BGH, NstZ (1990) 43 and dissenting opinion by Fezer, StrV (1990) 195; OLG Stuttgart, MDR (1977) 70.

23 BGHSt 38, 227ff.

interventions are not permitted in general but only under specific circumstances and this proviso gives effect to the process of weighing the interest in prosecuting a crime against a person's privacy. For example, an order to tap a telephone may be issued only where very serious offences are involved which are listed in the law. Such order must be made by a judge, or in urgent cases it can be issued by a public prosecutor but must be confirmed by a judge within three days.

The result of such a clear-cut demarcation of competences is that any such evidence gained cannot be used unless the statutory requirements have been met. So if the police have ordered a telephone to be tapped, the evidence cannot be used (BGHSt 31, 304). Furthermore, if the telephone tapping produces any evidence on offences for which a tapping would not be admissible then such evidence cannot be used provided that such other offences are not linked to the crime for which the tapping has been ordered in the first place.[24] For instance, if a telephone is tapped for serious drug offences and the only evidence produced by the monitoring is on acts of theft or fraud committed by the suspect then this material cannot be used against the suspect.

There were some cases where the criminal whose telephone was being legally tapped failed to replace the handset. Public prosecutors were then able to follow the conversation which the spouses had over dinner about their drug dealings. The Federal Court of Justice excluded this material from the evidence (BGHSt 31, 296[25]) because there is no law yet permitting the state to monitor conversations within private homes other than conversations on the telephone. In this manner German courts have developed an impressive series of precedents which strikes a reasonable balance between the interest in investigating the truth — that is the requirements of what is often called "the efficient administration of criminal justice" — and the privacy of the person concerned.

24 BGHSt 26, 298; 27, 355; however, see BGHSt 30, 317 and a dissenting note by Odenthal, NStZ (1982) 390.

25 Concurring notes by Geerds, NStZ (1983) 518 and Amelung, JR (1984) 256.

2. *Interventions in Privacy in the Absence of a Statutory Regulation*

a) *The two-stages-concept of the Federal Constitutional Court*

Major problems arise for the law of evidence where public prosecutors have gained possession of very private or even intimate and confidential pieces of evidence without violating any law in attaining them. Examples could be a privately recorded tape made available to the authorities where the accused makes a statement for which he is liable to prosecution or where he gives information about criminal acts he had committed earlier. The police may have the accused's diary which could have been sent to them by a third party. Such a diary may contain a description of the criminal acts committed or other pieces of incriminating evidence compiled by the accused himself. The police may also have found the diary among documents lawfully seized.

There are no explicit provisions for such cases in the German Code of Criminal Procedure and they are dealt with according to rules established by the Federal Constitutional Court by direct application of the basic constitutional rights of human dignity (article 1 of the German Basic Law) and the free development of the personality (article 2, paragraph 1 of the Basic Law). The decisive standard developed by the Federal Constitutional Court is the "two-stages-concept" (BVerfGE 34, 238). According to this concept, there is a difference between a "core area" of a personal lifestyle and a person's privacy. Any evidence resulting from the innermost ranges of a personality was held to be automatically inadmissible while in questions as to the admission of evidence which stems from the wider area of privacy the courts have to weigh the state's interest in criminal prosecution against the protection of privacy.

Let me quote the Federal Constitutional Court: The Basic Law, that is the German Constitution, guarantees to "every individual citizen an inalienable area of his personal lifestyle ..., which is exempt from any intrusion by public authorities ... This core area of private lifestyles is awarded unlimited protection and no interference can be justified by reference to overriding interests of the general public; no weighing of interests according to the test of reasonableness will be carried out" (BVerfGE 34, 245). However, unless the inalienable area of a personal lifestyle is concerned, the interest in investigating the truth is to be weighed against the accused's interest in his privacy.

b) *Court decisions on the core area of personality*

What does all this mean in practical terms? It should be noted that no intimate and confidential information is admissible. That would be information about illnesses, sexual experiences and also about thoughts and innermost conflicts recorded in private documents only. So, if a drug addict informs his doctor about his addiction in a letter that was never sent and if it could be concluded from that information that this person has committed drug-related offences, such information cannot be used in trial (BayObLG NStZ 1992, 556). If a young lady described an intimate relationship in her diary, this information cannot be used to prove that she is guilty of an act of perjury committed when she swore in the trial that this relationship never existed (BGHSt 19, 325). Private records made by a woman about her husband's criminal acts cannot be used to prove his guilt (LG Saarbrücken, StrV 1988, 480).

The trouble with this core-area-concept starts where the most serious crimes are concerned. In 1985, there was the case of a woman who was treacherously killed with an ax when she lay in a field to relax.[26] The accused was under the suspicion of having committed the crime and he was found guilty because, among other things, there were private documents which did not refer to this particular act but described his problems with women and his temptation to commit a sexually motivated crime although at the time he fought against this tendency.

There is no doubt in my mind that the written material in which the accused discussed his sexual problems and his criminal tendencies concerned the innermost area of his personality. Following the principles developed by the Federal Constitutional Court this material should not have been admitted as evidence. However, this result would have come at a very high price: the court would have had to acquit the accused although they were satisfied that he committed the murder. Our courts refused to pay this price. In its judgment handed down in July 1987 the Federal Court of Justice completely ignored the "core-area-concept" developed by the Federal Constitutional Court and weighed the different interests involved against each other although the Federal Constitutional Court had admitted the weighing of interests only with interventions in the wider area of privacy. The Court said that when weighing the accused's privacy against the interests of the administration of criminal justice the diary notes must be admitted as evidence

26 BGHSt 34, 397.

because murder was "among the most serious of crimes" (BGHSt 34, 401).

In 1989, the Federal Constitutional Court dealt with this case (BVerfGE 80, 367). Of the eight judges on the division of the Court four were in favour and four against admission of the diary notes. With a tie vote no act can be declared unconstitutional and, therefore, the conviction of the defendant was upheld. The four judges who advocated admission of the diary notes claimed that the notes "were not part of the area of the personal lifestyle which is awarded unlimited protection against any intrusion" because the defendant had written down his ideas "releasing them from the internal sphere of his control" and also because the contents of his notes "went beyond the legal sphere of the author and substantially affected the interests of the general public" (BVerfGE 80, 376).

To my mind, this is a piece of inappropriate reasoning because in practical terms it denies recognition to the innermost sphere of a human being which must be immune to interference by the state. There is no need for ideas which are not released from the internal sphere of a person's control and which do not substantially affect the interests of the general public to be protected against interference by the state because the state does not have access to such ideas in the first place and also because they are not relevant to the state.

The four "outvoted" judges registered their opposition and held that the admission of the notes was a violation of human dignity. They said the notes contained a "confidential soliloquy" which must be immune to any state interference. The four judges' dissenting opinion states: "As there is no restriction to a defendant's constitutional right to remain silent as to the criminal charges brought against him, there should be equally unrestricted protection against any attempts of confronting him in a trial and against his will with facts involving the most personal aspects of his privacy. Every human being must have the right of self-determination as this is the essence of human dignity" (BVerfGE 80, 382 and the following). In the scientific literature most authors disagreed with the decisions by the Federal Court of Justice and the Federal Constitutional Court allowing the admission of the notes.[27] The lively discussion of the matter proves that with respect to privacy the judg-

27 As stated, among others, by Wolter, Meyer-GS, (1990) 493; *ibid.*, StrV (1990) 175; Störmer, NStZ (1990) 397; Geis, JZ (1991) 112.

ment touches upon a vital problem the ultimate solution to which may not have been found by our courts as yet.

c) *Court decisions on general privacy outside the core area of the personality*

The admissibility of evidence from the wider area of privacy is subject to a weighing test which may be contained in the law or must otherwise be carried out by the courts. The courts have dealt with such weighing tests mostly in relation to tape recordings secretly done by private individuals where the tapes were supposed to serve as evidence of certain crimes. The courts' general approach is to give priority to the investigation of the truth when very serious crimes are involved while privacy is allowed to prevail with less serious crimes.

A decision of the Federal Court of Justice of 1989 dealt with a situation where two businessmen discussed an act of planned aggravated arson (section 306 of the Criminal Code). One of the businessmen secretly recorded the conversation and subsequently handed it over to the court as evidence. Although the secret tape recording of a private conversation is an offence under German law (section 201 of the Criminal Code) the Federal Court of Justice admitted the tape as evidence (BGHSt 36, 167[28]). The Court held that a discussion of two businessmen did not involve the absolutely inalienable sphere of the private lifestyle and that the weighing test must, therefore, be admissible. The interest in investigating the truth would take precedence over the privacy of the person concerned because aggravated arson is a highly criminal act for which the law provides a prison sentence of up to 15 years.

By contrast, privacy is given priority in less serious offences. For instance, a secretly produced tape recording which was to serve as evidence of an act of perjury was refused by the Federal Court of Justice (BGHSt 14, 358). Similarly, the Bavarian Supreme Court refused to admit a tape which was supposed to serve as evidence of an act of defamation and casting a false suspicion on somebody (BayObLG NStZ 1990, 101).

28 Dissenting note by Joerden, Jura (1990) 633, at 642ff.

3. *Comments on "Intensive Electronic Surveillance Operations"*

Heated discussions and arguments are currently being exchanged in Germany on the problem whether or not a new law should be passed permitting so-called intensive electronic surveillance operations. The point at issue is whether in the investigation of certain crimes, the state should be permitted to install hidden surveillance devices in the home of a suspect and to use the monitored private conversations to prove his guilt. The new law would permit an act carried out by the state while the same act carried out by a private individual would be a criminal offence. If the state were to be granted such authority this would amount to a drastic restriction to the basic rule that nobody shall be obliged by the state to incriminate himself against his own free will. At the same time most aspects of the protection of privacy would be abandoned because, of all places, a person's home is most important for the expression of his own lifestyle.

For these reasons, I doubt that the enactment of such surveillance operations would be compatible with the constitutional basis of the rule of law and human dignity. It may be argued that even telephone tappings held to be admissible only in very few specific cases can produce state-induced, involuntary self-incrimination but there is, of course, a vast difference between the monitoring of some telephone conversations and a scenario where every single word uttered in somebody's home will be relayed to the state supervising that person. Although existing laws permit certain types of interference with the immunity status of private homes e.g., seizure and search operations, these are limited impairments which can be tolerated whereas intensive electronic surveillance operations would completely invalidate the sphere of privacy in private homes.

So I do not recommend the enactment of this law. With respect to constitutional law the new law could be acceptable only for the most serious of crimes as in the investigation of a murder committed by terrorists but it would not be admissible to use this law to prove the guilt of offenders in small and medium scale drug offences.

IV. *Summary and Outlook*

This survey has shown that the laws and courts in Germany have so far provided to the accused a relatively comprehensive but certainly not

flawless protection against state-induced involuntary self-incrimination. By contrast, the core area of privacy is, in general and with some inconsistency, accepted as immune to any interference but all other aspects of privacy must be weighed against the state's interest in investigating the truth. The detailed application of the basic rules is sometimes contradictory. This is due to the fact that legislators are often influenced by rapid fluctuations in current political tendencies while the courts, in dealing with particular cases sometimes lose sight of the general perspective. Moreover, legislators and courts at times follow different tendencies.

However, except for the particular items criticized above, German courts have, in general, taken a reasonable approach although I am not sure the same could be said for legislators, and I have made comments to this effect about under-cover investigators and electronic surveillance operations. In all cases where applicable provisions are missing in the law giving rise to creative developments of the law by the courts they rely on two sources of information which I think are very productive. One is the basic rights of our constitution which are mostly identical to the human rights and rights of liberty recognized in most parts of the world. The second source is comparative law taking international standards as a guideline. The Anglo-American law of criminal procedure in particular has had a considerable influence on German court decisions after World War II and so the requirements of a fair trial have won recognition as predominant principles of German procedure. Both sources of information pave the way for a universal administration of the law and I think this would be a feasible concept for the subject matter covered by my paper.

As a consequence, in our future efforts in this field we should bear in mind the following aspects: Experts in criminal procedure from all countries should draw up a critical comparison of the solutions developed in the various legal systems to cover the problems that exist in this field. They should reach a general consensus on the tasks of criminal law and the inalienable basic human rights and then develop generally applicable guidelines for the protection against involuntary self-incrimination and for the right of privacy. The enforcement of a humane but efficient law of criminal procedure and the increasingly important uniformity of the law would take a major step forward if such guidelines were implemented in practice by the courts in the various countries and if court decisions were monitored by international courts of justice some of which exist already (e.g., the European Court of Human Rights) while others have yet to be established.