Book Review - Lutz Eidam, Die strafprozessuale Selbstbelastungsfreiheit am Beginn des 21. Jahrhunderts [*The Privilege against Self-incrimination in Criminal Proceedings at the Beginning of the 21st Century*] (2007)

By Judith Hauer[*]

[Lutz Eidam, Die strafprozessuale Selbstbelastungsfreiheit am Beginn des 21. Jahrhunderts (Dissertation), Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien (Frankfurter kriminalwissenschaftliche Studien / Verlag Peter Lang), 2007 (*The Privilege against Self-incrimination in Criminal Proceedings at the Beginning of the 21st Century*, 2007) € 68,50]

A. Introduction

The privilege against self-incrimination in criminal proceedings is necessarily regarded as an inherent part of Germany's present-day code of criminal procedure, which was introduced in 1877. As incontrovertible as this statement may be, the issue as to the precise reach of the privilege against self-incrimination in criminal proceedings was both unclear and controversial and remains so today. Circumstances have changed and accordingly the questions concerning this principle have changed. Consequently they must, quite rightly, be analysed anew. This is the subject of Lutz Eidam's dissertation *Die strafprozessuale Selbstbelastungsfreiheit am Beginn des 21. Jahrhunderts* ("The Privilege against Self-incrimination in Criminal Proceedings at the Beginning of the 21st Century"), which was supervised by Professor Dr. Dr. h. c. mult. Winfried Hassemer, until 2008 vice-president of the Federal Constitutional Court in Karlsruhe. The dissertation deals primarily with topics, which have arisen recently, such as the application of the privilege against the self-incrimination of corporate entities. The stated purpose of the work is, by analysing primarily current problems, the discovery of criteria, which will also permit future questions to be answered (pages 1-3). Hence, Eidam analyses the following topics individually in six chapters: "The Protection of Corporate Entities and Associations against Self-incrimination", "The Interception of Communications and *Nemo Tenetur*", "The Administration of Emetics by Force

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for the Purpose of Preserving Evidence", "Collision with Disclosure Obligations in Administrative Proceedings (Particularly in Tax Proceedings) – Problems of a Derivative Effect of *Nemo Tenetur*", "Consensual Elements in Criminal Proceedings" and "*Nemo Tenetur* and the Deprivation of Liberty". In the end, the author draws together his observations in a seventh and final chapter.

B. The Protection of Corporate Entities and Associations against Self-incrimination

In the first chapter, Eidam devotes his attention to the question of whether corporate entities and associations must also be entitled to protection against compelled self-incrimination. That this question is entirely appropriate, even though – at least up until now – only individuals can commit crimes under German law, is demonstrated by the current discussion concerning the potential introduction of corporate criminal liability. Already today, fines, confiscation and forfeiture orders, namely orders requiring the payment of additional profits as well as – at least in theory – the dissolution of an association, can be imposed upon companies. These sanctions are punitive in nature. Eidam relies upon this similarity to further justify the relevance of the question (pages 5-19). As Eidam demonstrates, the case law of the Federal Constitutional Court, the European Court of Justice, the European Court of First Instance and the European Court of Human Rights concerning this problem is inconsistent and divergent (pages 20-25). Consequently, it cannot assist Eidam in resolving the question. Thereafter, Eidam deduces the applicability of the *nemo tenetur* principle for companies from a synopsis of different provisions of positive law (pages 25-39). Eidam's starting point is the indisputable constitutional status of the *nemo tenetur* principle. Its precise rank is, admittedly, controversial. However, Eidam agrees with those who do not attribute to it greater recognition in the determination of the principle's reach. *Nemo tenetur* is at the very least a "legal institution" that is similar to a "fundamental, legal right", which must also be applicable to corporate entities by virtue of Art. 19(3) of the Constitution, since, due to the risk of sanctions set out above, their risk is comparable to that of natural persons. The same arises out of Articles 6(1) and 34 of the European Convention on Human Rights. Additionally, s. 59(5) GWB and ss. 430 *et seq.* Criminal Procedure Code demonstrate that the current law presupposes the applicability of the *nemo tenetur* principle to companies. It is not appropriate to balance the interests of the prosecution against those of the company, or to deny it partially this protection because of its structure. Neither an appeal to human dignity, nor the argument that the predominant aim of the *nemo tenetur* principle is the protection of freedom, which companies did not need as such, could question this conclusion (pages 39-58). This point of view, which is entirely understandable, will throw up a wide range of questions in its concrete application, so that criticism is to be expected. However, according to Eidam, this criticism should be levelled at

the introduction of corporate criminal liability, rather than at the application of *nemo tenetur* as its consequence.

C. The Interception of Communications and *Nemo Tenetur*

The question of the admissibility of intercepted conversations was not first raised at the start of the 21st century, but rather had already been discussed in considerable depth prior to this. However, the more recent case law of the European Court of Human Rights gives Eidam reason to take it up once again, although he would restrict his discussions to the deliberate use of a private individual by the police with the goal of coaxing an incriminating statement from the suspect (page 64). According to the Federal Supreme Court – at least so far[1] – the *nemo tenetur* priciple only provides protection against compulsion; it does not do so against deception.

However, recent case law of the European Court of Human Rights points to the contrary, as Eidam initially sets out. In light of that recent case law Eidam is of the view that the Federal Supreme Court will be required to overturn its previous, inconsistent case law, which effectively held that such interceptions were only impermissible within a custodial setting (pages 65-82). Continuing on, Eidam sets out the reasons which have influenced many voices in the jurisprudential community to conclude that interceptions of the sort are necessarily a violation of the *nemo tenetur* principle, and he joins these voices. Only where the accused knows that he is in an interrogation situation will it be possible to say that he was able to decide freely whether he wished to make a statement or not. Such interceptions circumvent not only the need to caution but also the warrant requirement, which applies to undercover investigations. Such interceptions are unfair, in truth a method of inquisition, and must lead to the exclusion of the evidence obtained (pages 82- 103). Eidam counters the criticism that this point of view could lead to the conclusion that undercover investigations are *per se* impermissible. From his point of view, the *nemo tenetur* principle only prohibits the deliberate attempt to coax incriminating statements from a person by circumventing the formalities that apply to interviews. Furthermore, according to his point of view, undercover investigations in the vicinity of the offender are repressive, but may also be preventative. From all of the above, Eidam concludes that *nemo tenetur* must not be limited simply to the protection against compulsion and internal conflict, but must

[1] See German Federal Supreme Court Judgment of 26 July 2007, NStZ 2007, 714.

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also protect against mistaken self-incrimination where the mistake is deliberately caused by the authorities.

It should be pointed out at this stage that the more recent case law of the European Court of Human Rights is not unanimously interpreted as extensively[2] as Eidam does in his dissertation. However, it should also be noted that in its latest judgment concerning such interceptions (in July 2007) the Federal Supreme Court unquestionably drew on the case law of the European Court of Human Rights, and, in so doing, limited the availability of such interceptions more than it had previously.[3] Nevertheless, this judgment of the Federal Supreme Court apparently does not support Eidam's extensive understanding of the area of protection of the *nemo tenetur* principle, since it continues to be based on elements of coercion and at the same time makes the legality of such interception dependent upon an earlier invocation of the right to silence.

D. The Administration of Emetics by Force for the Purpose of Preserving Evidence

The legality of the administration of emetics by force has been discussed for a considerable time. The reasons for this are, in particular, that this method is extremely unpleasant and has already led to two deaths in Germany. Eidam quite rightly emphasises these reasons at the beginning of his deliberations (pages 123 *et seq*.). As Eidam further demonstrates, the regional appeal court of Frankfurt in 1997 spoke out clearly against the legality of this method and found it to be a violation of the right to passivity that is protected by the privilege against self-incrimination. On the other hand, the Federal Constitutional Court held *obiter dicta* – although without further explanation – that, generally, there is no objection to the administration of emetics insofar as the privilege against self-incrimination is concerned, and thereby provided a justification for the unrelenting continuation of the unpleasant practice (pages 126 *et seq*.). On the basis of a historic excursion on the establishment of the right to silence and the privilege against self-incrimination within the reformed criminal process, Eidam rejects the idea that the protection could be limited to verbal self-incrimination (pages 128 *et seq*.). Eidam also does not accept the argument that the administration of emetics simply entails a duty to tolerate an investigative method, which does not impinge upon the privilege against self-incrimination. Although – as Eidam continues – the correctness of the conventional distinction between actively doing and passively tolerating something in order to

[2] See Rogall, NStZ 2008, 112; Engländer, ZIS 2008, 165; Eser, JR 2004, 104.

[3] German Federal Supreme Court Judgment of 26 July 2007, NStZ 2007, 714.

define the area of protection of the privilege against self-incrimination has recently been questioned critically, he nevertheless advocates for the retention of these criteria (pages 135 *et seq*.). Because the privilege against self-incrimination is a rule of evidence, the administration of the emetics is not the relevant act, rather it is the act of vomiting, since the obtaining of evidence is only linked directly to that act. Even though the ensuing act of vomiting happens automatically, it must be categorised as an active doing. Because of the obvious need for protection even in cases of *vis absoluta*, the principle's application must not depend upon the exercise of will (pages 153 *et seq*.). Therefore, Eidam categorises the administration of emetics as a violation of *nemo tenetur*. This is confirmed by a recent judgment of the European Court of Human Rights, in a case in which Germany was the respondent.[4] However, the European Court of Human Rights held that a violation will depend upon a consideration of the particular circumstances in the individual case. Hence, those voices that wish to judge the administration of emetics against proportionality may well feel vindicated. What remains is the question of whether and under what circumstances the wait for the natural excretion of material is permissible or, in the alternative, whether the results of the administration of emetics for medical reasons – and, thus, not predominantly for the purpose of obtaining evidence – should be admissible.

E. Collision with Disclosure Obligations in Administrative Proceedings (Particularly in Tax Proceedings) – Problems of a Derivative Effect of *Nemo Tenetur*

In the fourth chapter, Eidam examines the derivative effect of the *nemo tenetur* principle upon duties to cooperate within the context of administrative proceedings. For this purpose, Eidam chooses, as an example, the disclosure obligation within tax proceedings, which, it is well known, also applies to criminal offences that are wholly related to tax law. He characterises the duty as a violation of the *nemo tenetur* principle that must be accepted in the interests of the taxation-system, but must at the same time be compensated for by way of an absolute prohibition on the use of such information in criminal proceedings (pages 175-190). Thus, Eidam holds an opinion which has, so far, not been able to prevail unanimously either in the case law or in jurisprudential literature. For Eidam, there must be a complete inability to transform the *nemo tenetur* principle in the context of the criminal process. For this reason, Eidam regards the use of information for the purpose of criminal prosecutions, as permitted by the second sentence of s. 393(2) Tax Code where there is "a paramount public interest", as unconstitutional (page 198). His hope that proceedings seeking a declaration on the constitutional validity

[4] Eur. Court H.R., Judgment of 11 July 2006, StV 2006, 617, 622.

of such laws – expressed at this point – recently came true in December 2007.[5] The result remains to be seen. Eidam then continues by explaining that additionally, in his opinion, the provision for the protection of the privilege against self-incrimination found in s. 393 of the Tax Code – especially as restrictively interpreted by the Federal Supreme Court – leaves unacceptable gaps in the protection of the *nemo tenetur* principle. For the most part, this is right. However, the suggestion that there should be an exclusionary rule in respect of general criminal offences, which are disclosed as part of a confession of liability pursuant to s. 371 of the Tax Code, goes too far. The same is true of the demand for a general prohibition on the use of any knowledge concerning forged documents that had been attached to a false tax return, as part of a prosecution in respect of those forged documents (pages 199-215). Eidam's demand, based upon the *nemo tenetur* principle, for a limitation on the reach of s. 370 of the Tax Code is consonant with the prevailing case law. Accordingly, where the relevant facts are the same, there is no offence in respect of the failure to file a correct tax return or the filing of an incorrect tax return, even though it becomes known that an investigation is afoot. Tax returns that relate to later events must be correct. However, they may not be used to prove the earlier act of tax evasion (pages 215-231). Finally, in light of the multiplicity of possible conflicts between the taxation system and the criminal process, Eidam advocates that generally, in the case of doubt, priority should be given to the protection of the *nemo tenetur* principle. He would also like to see this translated into other administrative arenas (pages 231-233).

F. Consensual Elements in Criminal Proceedings

Further potential for conflict with the *nemo tenetur* principle is to be found in the so-called "consensual elements of criminal procedure", of which Eidam initially singles out plea bargaining. Eidam focuses on the prototype of plea bargaining: a less severe sentence in exchange for a confession. Alone, the possibility of rewarding a confession by a reduction in the sentence places pressure upon the guilty as well as the innocent to confess. This is especially the case where there is a concrete offer of a lesser sentence as part of a plea bargain. Because the alternative can only be the imposition of a more severe sentence upon silence or denial, Eidam views the offer of a less severe sentence as an unlawful threat or impermissible promise, prohibited by s. 136a of the Criminal Code (pages 246-256). This point of view is correct. However, it has not prevailed in practice or in theory to date, since it would put a sudden end to the practice of plea bargaining, which is seen as necessary to avoid a breakdown of the criminal justice system. Eidam also regards

[5] "Vorlagebeschluss" of the regional court Göttingen of 11 December 2007, 8 KLs 1/07; BeckRS 03494.

the *nemo tenetur* principle as being violated by plea bargaining and, indeed, by the possibility of a reduction in sentence after a confession. Eidam further rejects all penological considerations as a justification for sentence discounts in return for confessions – *inter alia* because of the conflict with the *nemo tenetur* principle (pages 260-270). In this context, however, Eidam argues on the basis of game theory as the governing sentencing theory. Yet on the basis of a modern sentencing theory, which does not find itself constrained by the untenable premises of game theory, it is entirely understandable why a confession is rightly regarded as a reason for mitigation and always has been. A confession has positive effects and it is a positive act. It is – put simply – confirmation of the legal norm and an aid to resolution. In a criminal law which orientates itself on prevention, these are aspects which may be and should be taken into account. It is only at the second stage that one must ask what bounds the *nemo tenetur* principle imposes upon this result. It is self-evident that these bounds must be more narrowly drawn than before. However, Eidam's demand for the strict neutrality of confessions in sentencing should not be accepted, since there is no justification for giving the *nemo tenetur* principle, which is undoubtedly involved, primacy over justified sentencing considerations. Of course, so long as one is wedded to game theory as the basis for sentencing – properly referred to as the central instrument of coercion within the context of plea bargaining – Eidam's opinion that the various, proposed solutions for regulating plea bargaining, at the best lessen, but do not eliminate a violation of *nemo tenetur*, is correct (page 280). Thereafter, Eidam analyses further consensual elements of the criminal law and criminal procedure. Of these, only one need be mentioned here, namely the possibility, afforded by s. 153a of the Criminal Procedure Code, of achieving a dismissal of the charges upon an agreement to comply with a particular condition imposed, such as the payment of money to a charity. Here, Eidam does not regard the area of protection afforded by the *nemo tenetur* principle as being implicated, precisely because s. 153a of the Criminal Procedure Code does not lead to a finding of guilt. However, for this precise reason it is unclear why this aspect was not determinative where the applicability of the *nemo tenetur* principle to companies was concerned. Furthermore, the imposition of conditions pursuant to s. 153a Criminal Procedure Code is punitive, and practice has shown that s. 153a of the Criminal Procedure Code as well as sentence discounts, given in exchange for confessions, are employed as a practical instrument of coercion, used to bring proceedings to a conclusion.

G. *Nemo Tenetur* and the Deprivation of Liberty

In the last chapter, Eidam investigates the relationship between the *nemo tenetur* principle and imprisonment, both before and after conviction. It is no secret that in practice the denial of bail is also used as a means of obtaining a confession and is

successful (pages 304-308). Even though the obtaining of a confession should only be a secondary aim of pre-trial custody, according to Eidam this detention must be regarded as improper coercion within the meaning of the second sentence of s. 136a(1) Criminal Procedure Code, even though pre-trial detention itself cannot be criticised, having regard to the *nemo tenetur* principle (page 310). Eidam seeks to define situations in which it is plain that pre-trial detention was specifically employed in order to obtain a confession by having regard to objective criteria on a case by case basis. According to Eidam, there will, for example, be a *prima facie* violation of the second sentence of s. 136a(1) Criminal Procedure Code, where bail has been refused in cases in which the expected sentence is minimal, or if there is a close temporal connection between the release from custody and the making of the confession. At the same time, he says that those responsible should, in such cases, be held accountable under the offence of extorting evidence, contrary to s. 343 Criminal Code (pages 312-322). In this way, Eidam hopes to achieve a more responsible way of dealing with bail; something which is urgently necessary. Eidam completes this chapter with considerations concerning detention pursuant to ss. 81 and 126a Criminal Procedure Code. Here, he rightly demands that the accused be cautioned about his right to refuse to provide information to the doctors assessing him (page 328). In conclusion, Eidam justifies the need for the protection of the right against self-incrimination during the period of imprisonment. The need does not simply arise from the possibility that proceedings will be recommenced, but also directly from the fact that the offender's behaviour in custody may be determinative of the way in which the sentence is executed, as well as the manner in which parole is dealt with (pages 337-352). According to Eidam, notwithstanding that the generally accepted purpose of punishment is the rehabilitation of the offender, there must be a general right of the inmate to refuse to cooperate in achieving this goal, something which is to be protected by prohibitions on the admissibility of knowledge about the inmate gained during incarceration (pages 352-364).

H. Conclusion

At the end of his analysis, Eidam firstly determines that the historic roots must necessarily be respected when determining the exact scope of the right to silence and the privilege against self-incrimination. At the same time, ascertaining the definite location of those roots within the Constitution is neither necessary nor promising. This assertion is every bit as accurate as the recognition that there may well be violations of the right to silence and the privilege against self-incrimination which do not rise to the level set by s. 136a Criminal Procedure Code and that the right to silence and the privilege against self-incrimination are part of the core of fair procedure (pages 365-368). Eidam further finds that the right to silence and the privilege against self-incrimination may not transformed, that is, they may not be

limited or the subject of balancing, since otherwise the accused would be degraded to a mere object, as in the inquisition. Especially the comparison with the inquisition, the horrible practices of which were employed for extracting confessions and were ultimately abandoned because of the realisation that they were unable to assist in the discovery of the truth, demonstrates that this principle also promotes the finding of truth in criminal proceedings. Admittedly, Eidam refers to the *nemo tenetur* principle as a constitutive principle of the law of evidence, as set out in the Criminal Procedure Code. However, it remains unclear whether he also means this to be the pursuit of truth as well as the conclusions which may be drawn from it. Whether the principle should be limited is also a question of how broadly one wishes to define the area of protection. In this context, Eidam's attempt to deduce absolute criteria for the area of protection on the basis of current, but nevertheless selectively chosen, problems is not entirely persuasive. The fact that the fundamental considerations concerning *nemo tenetur* are distributed amongst the different chapters unnecessarily complicates the overview. It remains unclear why sanctions against companies should come within the protection of *nemo tenetur*, even though they do not involve a finding of guilt, while according to Eidam the absence of a finding of guilt in relation to s. 153a Criminal Procedure Code should exclude the use of the *nemo tenetur* principle. It seems entirely appropriate to consider enlarging the area of protection, while at the same time permitting encroachments subject to appropriate justification. The idea of shaping precise criteria for the *nemo tenetur* principle, which allow for an answer of all questions that may arise, without consideration of the circumstances of the particular case, does not seem to be practicable, since it would not permit any intermediate solution. However, as Eidam's dissertation demonstrates, there are countless constellations imaginable in which the *nemo tenetur* principle must at least be regarded as being touched upon. It is not satisfactory,in this context to provide either complete protection only or no protection whatsoever. Especially where one does not wish to completely disavow the value of concessions given in exchange for consensual behaviour – as Eidam apparently does not – then the idea of possible limitations within the area of encroachment appears to be more appropriate.

The fundamental principle behind the freedom not to incriminate oneself makes prosecution more difficult. Therefore, from the time it was first applied, there were concerns about overly broad interpretation or application being given to it, and, hence, its protection prevailed only arduously. So, for example, an exclusionary rule in cases in which there has been a failure to caution during the investigative stage was only recognised in 1992, that is, only 15 years ago. However, even today, there are still numerous and novel threats to the privilege against self-incrimination, especially because of the interest, in recent times, in optimal security, the protection of victims of crime, and efficiency. It is thanks to Eidam that this is clearly illustrated. Even if at some points a deeper analysis of the arguments of the

opposing view would have been desirable in order to make the views of the writer more convincing, his call to take the illustrated threats seriously and confront them can only be encouraged.