ARTICLES

The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany[1]

By Dr. Christian Fahl[*]

A. The right of counsel

The right of counsel in criminal proceedings is granted by section 137 (1) of the *Strafprozessordnung* (Criminal Procedure Code), which gives a person the right to obtain legal advice in criminal proceedings whenever he or she wishes, or as the law states: "*in jeder Lage des Verfahrens*" (at any stage of the proceedings). There are different stages of criminal proceedings, which are to be distinguished under German Law, but section 137 governs the whole process and is not limited, for instance, to the pre-trial or the trial itself.

This guarantee has been unchanged since the beginning of the *StPO* in 1877.[2] There has been a change, however, relating to the number of advocates that one person may have. The second sentence of section 137 (1) states that one person may not have more than three counsel. Germany experienced difficulties in the 1970s with accused criminal proceedings being obstructed by too many people in the courtroom. Consequently a rule was introduced limiting the number of counsel each accused could choose to three by the *ErgänzungsG zum 1. StVRG* from 20 December 1974.[3]

It can, of course, be debated – and has been debated in Germany prior to this legislation – as to whether three is an adequate number or not. The *Deutscher Anwaltsverein* (German Advocates Association) favoured the number of five, but it

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[*] Dr. Christian Fahl is Professor of Criminal Law, Criminal Procedure Law and Philosophy of Law at the University of Rostock (www.uni-rostock.de/fakult/jurfak/fahl). E-mail: christian.fahl@uni-rostock.de.

[2] Reichs Law Gazette 253 (1877).

[3] Federal Law Gazette I 3686 (1974).

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was agreed at the time that some limitation was necessary.[4] On the other hand, it has been argued that there is no limitation to the number of public prosecutors, which renders the limitation unfair for the accused. However, that is not completely true. The accused may have as many people working for him as is necessary or as he is willing to pay, but only three of them have the right to speak before court and take advantage of the other rights granted to counsel. The *Bundesverfassungsgericht* (Federal Constitutional Court) has therefore decided that the limitation does not conflict with constitutional rights.[5]

In rare circumstances, however, it is possible that there may be more than three counsel engaged on the side of the accused: under section 137(2) the legal representative may also "engage defence counsel independently." It is not clear, however, that this means that one person may have up to six counsel or if it means, that (at least) one of the three counsel can be chosen by the legal representative, which is the interpretation that I favour. In addition, the number of counsel one accused has (be it up to three or even up to six) can be doubled by the court under special conditions. Two potential dangers are that the accused will dismiss his legal counsel or that his counsel will fail to attend the proceedings, thus rendering it impossible for the court to carry on and come to an end (because of section 338 No. 5 of the *StPO*, which *StPO* section 140 says includes defence counsel). The *Bundesgerichtshof* (Federal Court of Justice) responded to these concerns when it ruled on 24 January 1961 that a court is allowed to take precautions to ensure that the accused is not left unassisted by defence counsel in court.[6] It has also been accepted by the Federal Court of Justice that if there are multiple accused parties, their counsel may split the work among themselves and work together up to a certain point. Details are still being discussed.[7]

In cases where the Court only appoints counsel to guarantee that the proceedings can be carried on (as above), controversy arises over who has to pay the extra counsel. Some say that the accused has to pay for it, but the general opinion among the authors who have dealt with the question is that the State should have to pay for it, since it is the party that benefits the most from this institution. As far as costs are concerned: section 465(1) states that the convict has to bear the costs if he is found guilty, otherwise the State does including the cost of counsel (section 464a (2) No. 2).

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[4] See AnwBl 17 (1975).

[5] 39 BVerfG 156 = also published in NJW 1013 (1975).

[6] 15 BGHSt 306 = NJW 740 (1961).

[7] See for instance Sandra PELLKOFER, SOCKELVERTEIDIGUNG UND STRAFVEREITELUNG (1999).

The assistance of counsel under German law can be mandatory in certain cases listed in section 140, if the main hearing is held at first instance at the Higher Regional Court or at the Regional Court – manslaughter and murder and other serious offences – or if serious criminal offences are brought before a lower court (see section 140(1) No. 2). Special attention has to be paid to section 140(2) concerning the lower courts, under which the presiding judge must appoint defence counsel, if the assistance appears necessary because of the seriousness of the charge, or because of the difficult factual or legal situation, or if the accused simply cannot defend himself.

The "seriousness of the charge" is not determined by the crime committed but the sort of sanction that may follow the crime. Whereas the Higher Regional Courts think that the seriousness requires that a penalty of at least a year of imprisonment or more is expected,[8] others think that a charge is "serious" when the accused has to face any other sanction than payment.[9]

If the assistance of counsel is mandatory (and not voluntary) the accused has to have a legal counsel. That means that he or she can either choose an attorney-at-law or a professor of law at a German university as counsel (section 138(1)). If he or she fails to choose at least one, section 141(1) states that the court will subsequently choose one for the accused from the number of attorneys-at-law admitted to practice before a court within the court district (section 142(1) sentence 1). The accused shall be given the opportunity of naming an attorney-at-law within a time limit to be specified and the presiding judge must appoint the counsel named by the accused unless there are significant reasons not to do so (section 142 (1) Sentences 2 and 3). There is a lot of case law concerning these reasons – especially since the same reasons entitle the presiding judge in the opinion of most authors to revoke appointment apart from section 143, where the revocation of appointment is mentioned in the *Strafprozessordnung* only for a rather rare and special case – but in principle this section shows that both forms of counsel are equal in that the accused gets to choose.

The main difference between counsel engaged by the accused and counsel appointed by the judge is the method of appointment. Another difference is the payment source. Whereas the accused has to pay the lawyers he or she engages, where a judge appoints defence counsel the State has to pay the bill. The financial

[8] For example: OLG Brandenburg, NJW 521 (2005); OLG Karlsruhe, StV 586 (2004); OLG Hamm, StV 586 (2004).

[9] WERNER BEULKE, STRAFPROZESSRECHT, 102 (9th ed., 2006).

resources of the accused, however, do not play a role in determining whether the assistance of counsel is mandatory or not and only this is decisive for the question as to whether the presiding judge appoints counsel or not. It also does not make any difference to the question of who has to bear the costs in the end. If the accused is found guilty, he or she assumes the costs; if not, the State does (see section 465(1)). In theory it does not make a difference for the lawyer whether he is paid by the State or by the accused. Some prefer to be paid by the State because if the accused does not have much money it may be uncertain if he or she will be able to pay the bill, whereas the State is always able to pay the bill. Therefore many attorneys accept the mandate first and then tell the presiding judge that they will put down the mandate as soon as appointed defence counsel under sections 140-142 (thus subverting the order proscribed in section 143).

On the other hand, although some beginners are fond of it, because it allows them to make a living even if they do not have many mandates, it is an open secret that there is not much money to be earned here. The attorney can certainly earn more money if paid by the accused. That is the reason why famous attorneys or famous law firms generally avoid being selected by the presiding judge. They have, however, in theory, the duty to accept the appointment and become defence counsel (see section 49 of the *Bundesrechtsanwaltsordnung* (Federal Code of Attorneys-at-law)). But in practice it does not happen that the judge appoints lawyers who do not want to be appointed (as long as there are more than enough lawyers in Germany). In theory, there is no difference between the two sorts of defence counsel in quality. The appointed counsel is, as the *Bundesgerichtshof* (Federal Court of Justice) has stated in 2001, not of second-best quality or counsel of a lower class.[10]

Certain rules, however, only apply to counsel engaged by the accused and do not apply to counsel appointed by the judge. These are the rules concerning the exclusion of counsel under sections 138a-d of the *Strafprozessordnung*, but there are other opinions, which apply the same set of rules both to counsel engaged by the accused as well as to counsel appointed by the judge. Aside from this, It is beyond any doubt that both sorts of counsel have the exact same rights, including the right to speak before court (section 257(2)), to ask questions (section 240(2)), to hold a closing speech (section 258 of the *Strafprozessordnung*), to introduce evidence (section 244 of the *Strafprozessordnung*) and so forth.

Most of these rights are granted to the defendant, as well – see for instance section 240(1) for the right to ask the witnesses questions – but some rights are exclusively

[10] See for instance 47 BGHSt 68 (2001).

granted to counsel – see section 147 for the inspection of the files, for example. Although another subsection, subsection (7), has been added recently that allows an accused who does not have counsel to be informed about the content of the prosecution's files, it is still true that only defence counsel are entitled to full inspection. This section shows that defence counsel do not derive their rights only from the defendant but are true "organs of justice," as it is stated in section 1 of the *Bundesrechtsanwaltsordnung*.

It is interesting in this respect to notice that when this phrase was invented in the 19th century, it was aimed against free advocacy. In the German Democratic Republic, which has ceased to exist, this phrase was a source of pride for attorneys who willing to defend against the courts of the state, as it rendered them equal to the public prosecution.[11] Today courts and public prosecution accept defence counsel as members of the profession and independent "organ of justice." However, many attorneys disapprove of the term and deny the so-called organ-theory in fear that it might be used to discipline attorneys again. They correctly argue that defence counsel need not be attorneys-at-law (see section 138(1)). In my opinion, however, and in the opinion of other authors, taking part in a trial as an "organ of justice" does not affect the role of counsel in criminal proceedings. Put differently, if the public prosecutor is an organ of jurisdiction, the defence counsel is an organ as well. In my eyes and from the standpoint of the "organ theory" counsel owes two things. Firstly, he owes an effective defence to the client as well as to the public, who share an interest in the effectiveness of defence. This is clear from sections 140-141, which require that the accused be defended, even if it is against his or her will. Secondly, defence counsel owes to the public as much loyalty as is needed not to obstruct the proceedings. That is meant by the term "effectivity of (criminal) justice" which the courts use to define the role of defence counsel in the process. It is for this reason that the courts have never accepted the "right to lie", that is to for counsel to invent lies for the accused or to lie to the Court. This reflects the majority of opinions expressed in the German literature on criminal law; however, there is some dissent.

Among the rights of counsel one is worth a special mention: section 148 states that defence counsel and clients are entitled to uncontrolled communication "in writing as well as orally." The right exists even before the client instructs counsel and allows attorneys to visit imprisoned persons in correctional centers, jail houses, prisons and so forth without being instructed. It therefore allows for a first contact in which it will be determined whether the accused will retain an attorney or not. It

[11] See FRIEDRICH WOLFF, VERLORENE PROZESSE 1953-1998, 23 (2nd ed., 1999).

also exists during the main hearing and may therefore withstand the possibility of dividing the defendant from his or her counsel by windows and other devices.[12]

There are, however, restrictions: section 176 of the *Gerichtsverfassungsgesetz* (the Constitution of Courts Act) allows the presiding judge for require everybody present at the trial to be searched for weapons or other things upon entering the court or courtroom. The Constitutional Court held this to be lawful as long as there was no exception for the public prosecutor either – an exception was made only for members of the court.[13] For the same reasons, it is lawful for counsel to undergo certain procedures before entering the prison or a prison cell.[14] Where charges include the crime of terrorism under section 129a of the German Penal Code sections 31-38 of the *Einfuehrungsgesetz zum Gerichtsverfassungsgesetz* (Introductory Provisions to the Constitution of Courts Act) allow contact between defence counsel and an accused to be interrupted. This legislation was made only two days after the *Bundesgerichtshof* had held it necessary to interrupt such contact[15] after the kidnapping and murder of high representatives of the Federal Republic of Germany in 1977 by terrorists. However, it has never been enforced since. The terrorism that struck the Federal Republic of Germany is an episode that is over fortunately, but it has unfortunately left traces throughout the law.

Under section 94 of the *Strafprozessordnung*, objects which may have importance as evidence for an investigation may be seized or secured in another manner. But under section 97 certain objects may not be seized, for instance: (No. 1) written communications between the accused and the persons who, according to section 52 or section 53(1), may refuse to testify. Among these are defence counsel of the accused (concerning the information that was entrusted to them or became known to them in this capacity). Although under section 97(2) these restrictions "apply only if these objects are in the custody of a person entitled to refuse to testify," the *Bundesgerichtshof* has decided that these rules apply also when the objects are in the custody of the mail office.[16]

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[12] As was the case in the decision 1 BvR 873/96, NStZ 35 (1997).

[13] BGH StV 241 (1998).

[14] See for instance the decision of the Higher Regional Court in Nuremburg, which I commented on in JA 368 (2003).

[15] See 27 BGHSt 260.

[16] See 38 BGHSt 46.

On the other hand, the Court has stated that these rules shall not apply to attorneys who are suspected "of incitement or accessory-ship" to the crime in question, which is laid down in section 97(2) sentence 3.[17] However, that would mean that the public prosecutor could easily put defence counsel under suspicion and thus undermine the rule of law. Therefore, in the literature on the topic the opinion is wide spread that this section does not apply to defence counsel.[18] Of course, that does not mean that he is entitled to give asylum to objects that have nothing to do with the purpose of defence, for instance objects that shall be used to commit another crime or even love letters.[19]

Although the suspect has the right to "have the assistance of defence counsel at any stage of the proceedings" under section 137(1) and the right "to communicate with defence counsel in writing as well as orally" under section 148(1), as has been stated above, and although section 136 states that he has to be informed about the right "to consult with defence counsel of his choice" upon first examination by the police (see section 163a(4) Sentence 2), there is no law that allows defence counsel to be present during the first examination of the accused by the police. Section 168c(1) gives defence counsel a right of presence during a judicial examination of the accused and section 163a(3) sentence 2 grants the same right to defence counsel during an examination conducted by the public prosecutor.

It has been thought that this right could have simply been forgotten (which would allow us to apply the rights of section 168c(1) and section 163a(3) sentence 2 to examinations by the police as well). On the other hand, the suspect has no duty to appear before the police, whereas he or she is obliged to appear before the public prosecution office upon being summoned under section 163(3) sentence 1 of the *Strafprozessordnung*. Therefore, the suspect can simply stay away if the police do not allow defence counsel to be present at the examination of the accused. If he or she has been arrested by the police and the police are hesitant to allow the presence of defence counsel, every attorney in Germany knows what to do: he or she will advise the client not to talk to the police until the police permit the attorney's presence during the examination.

Section 136 (First Examination), which has been mentioned above, is vital to the guarantee of defence. Under section 136 of the *Strafprozessordnung*, a suspect must be informed of his right to "counsel of his choice" and that he or she is allowed to talk to his counsel, if he or she wishes "even prior to his examination." Unlike in

[17] BGH NStZ 85 (1983).

[18] See Beulke (note 9), 95.

[19] See CHRISTIAN FAHL, RECHTSMISSBRAUCH IM STRAFPROZESS, 190 (2004).

other countries, this does not include information about who has to pay for the legal assistance, because the financial resources of the accused are irrelevant to the question whether or not the assistance of counsel is mandatory (if it is, counsel will be paid by the State, which can try to get the money back upon finding the accused guilty). It would be preferable, however, that the accused be informed that if counsel is mandatory, the State will pay. Otherwise the accused may think that he or she must pay his or her counsel and therefore refrain from consultation. The law does not say anything about the problem and I do not know of any precedents that have dealt with that question, although there may be some. There is case law, however, that states that even if it is clear that the accused knows about his or her rights because of experiences in the past or because he or she has been informed about them before, he or she has to be informed again.[20]

In 1996 the *Bundesgerichtshof* had to decide the following case: the accused was suspicious of having committed a murder in St. Pauli, Hamburg. The police informed him of his right to consult counsel – in accordance with section 163a(4) and section 136(1) sentence 2 – and the suspect expressed his wish to do so. However, since he was an Italian from Sicily, he did not know any lawyers in Hamburg and told the police so. He was then given the telephone directory of Hamburg, one of the biggest cities in Germany, with hundreds of telephone numbers of attorneys-at-law. After he tried several numbers without finding one who could speak Italian in the middle of the night, he gave up and made a full confession. It was determined that the police knew a telephone number where accused persons could get legal aid 24 hours a day in any language, but did not point that out to the suspect in order to get the confession. The *Bundesgerichtshof* held that it was not enough to inform an accused of his rights and provide the telephone directory and a telephone to make use of them, but that the police are obliged to help the suspect effectively if help is needed and thus give actual "first aid".[21]

B. Exclusionary Rules on Evidence in Criminal Proceedings

There is no rule in German Law that evidence that has been obtained unlawfully cannot be used in court. There are many reasons why evidence may be excluded. It may be forbidden to use special methods of proof (*Beweismethodenverbote*). It is, for instance, forbidden to torture the accused or use force against him under section

[20] BGH NJW 975 (2002).

[21] BGH NStZ 261 (1996); see comment by Werner Beulke, NStZ 257 (1996) and comment by Christian Fahl, JA 747 (1996).

138(1) sentence 1 of the *Strafprozessordnung*. It may be forbidden to use certain *sources* of proof (*Beweismittelverbote*), for example when the witness is entitled to refuse to testify on personal or professional grounds under sections 52-53a of the *Strafprozessordnung* or for instance if he or she is the fiancé(e) of the accused (section 53(1) No. 1). It may also be forbidden to enquire into special topics at all (*Beweisthemenverbote*). Under section 51 of the the *Bundeszentralregistergesetz* (Federal Central Register Act), it is forbidden to use against a convict the fact that he or she has been sentenced in the past if the sentence is deleted from the register. In all three cases the evidence, although it is there, is no longer available to the public prosecutor or to the police.

Although it does not make much sense that there are rules governing the collection of evidence that may be disobeyed without consequences, this is the predominant opinion in Germany among the courts and in books on criminal law. The courts fear that otherwise too much evidence will be lost. For instance, section 81a(1) of the *Strafprozessordnung* allows the police to take blood samples without an accused's consent, provided no detriment to his or her health is to be expected, if doing so is necessary "for the establishment of facts which are of importance for the proceedings." However, the blood has to be taken in accordance with the rules of medical science and it has to be taken "by a physician."

In an early decision by the *Bundesgerichtshof* the Court determined that even though the blood was not taken by a physician but by an assistant doctor who was not yet a legally qualified physician, which the police did not know, the blood samples could be used in court. The Court concluded that the hazards to the health of the accused – which the law was aimed at – were over and that the sample was as good as any sample taken by a physician.[22]

Section 104 (1) provides that private premises may not be searched during night hours; nevertheless, evidence that is gathered during such searches may be used in court.

In 1989 it was held that even though under section 105 (1) of the *Strafprozessordnung*, searches may only be ordered by a judge and only in extreme circumstances by the public prosecution or the police, the evidence gathered without a judge's permission or such circumstances could be used in court, because the objects of proof were as good as others and the danger that the law is aimed at was over.[23] When visiting the *Bundesgerichtshof* recently I heard from the Vice

[22] 24 BGHSt 125.

[23] BGH NStZ 375 (1989).

President of the Court, however, that the Court will give up this opinion soon and decide differently. The police may have taken too much advantage of it, and, indeed, it is not good if the law can be disobeyed without consequences for too long.

Sometimes the written law itself contains exclusionary rules for evidence. However, these cases are rare, for instance section 81a(3), section 81c(3) sentence 5, section 98b(3) sentence 3, section 100b(5), section 100c(5) sentence 3, section 100f(5), section 108(2) and other sections as well. The most famous is section 136a(3) sentence 2 which states in regard of subsection (1) that "statements which were obtained in breach of this prohibition shall not be used" in court. If, for instance, an accused has been mistreated during his examination, his confession cannot be used against him. If there is no other evidence against him, he has to be set free. That is the possible consequence of any exclusionary rule. In general, the police know what they are allowed to do and obey the law. Torture, for instance, is not very likely to take place in Germany.[24]

However, section 136a(1) lists other methods: "ill-treatment," "induced fatigue," "administration of drugs," "torment," "deception" and so forth. Sometimes it is difficult to draw the line between what is legal and illegal under section 136a of the *Strafprozessordnung*. For instance: can a confession be used in court if the police obtained it at the end of an examination that lasted from 9 p.m. until early the next morning? The *Bundesgerichtshof* said yes.[25] Where an accused had been awoken from sleep and than examined by the police from 2 a.m. until 4 a.m. in the morning, the *Bundesgerichtshof* found no mistake, but have my doubts about this finding.[26] On the other hand it does not matter whether or not the police prevented the accused from sleeping or if the accused himself is responsible for his lack of sleep. In Volume 13, page 60, the *Bundesgerichtshof* held that it was a violation of section 136a(1) sentence 1 ("induced fatigue") that the suspect was examined after not having slept for 30 hours prior to the examination.[27]

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[24] In one case, the Vice President of the Police Department of Frankfurt, Daschner, ordered that an accused was forced to tell the police where he buried his victim, a fourteen year old son of a bank manger. This was different in the respect that the threat of violence was not used in order to make the accused make a confession, but was employed to try to save the victim's life. The case has proven very controversial, ending with a conviction of the police officer and his dismissal from the police; see Regional Court of Frankfurt, NJW 692 (2005); for further details see Christian Fahl, JR 182 (2004).

[25] 12 BGHSt 332.

[26] 1 BGHSt 337.

[27] 13 BGHSt 60, 61.

Does the giving of "drugs" include cigarettes? The authors of books on criminal law say that it does not, but does that also apply where the police keep a heavy smoker away from cigarettes? A commentary written by a former judge of the *Bundesgerichtshof*, Lutz Meyer-Goßner, says that this does not fulfil section 136a(1).[28] There are a lot of precedents on the question of "deception", which can be summed up as follows: the police need not tell everything they know, but everything they tell must be true. For example, they are not allowed to tell a suspect that they found his fingerprints, if they did not. They are not allowed to tell an accused that he was seen by a witness, if that is not true. However, the police need not tell an accused that they found his fingerprints before asking him if he was present at the scene of a crime.

Under section 136a(3) sentence 1 of the *Strafprozessordnung*, evidence cannot be used in court "even if the accused agrees" to the use. In Germany, we have a debate as to whether or not a suspect should be allowed to prove his or her innocence with the help of a lie detector. At first, the *Bundesgerichtshof* held that it conflicts with the constitutional rights of the accused, particularly with human dignity.[29] However, if it is the only way to prove his innocence, that would mean that for the sake of his or her dignity, he or she would have to put up with a sentence of life imprisonment (in the worst case) which may, at least in the eyes of the *Bundesverfassungsgericht*, conflict with human dignity, as well. Meanwhile, the *Bundesgerichtshof* has changed its opinion on the question of human dignity. Nowadays it stresses that this kind of evidence is "wholly inappropriate" under section 244(3) of the *Strafprozessordnung*.[30]

As far as section 136(1) is concerned, which contains the duty of the police to inform the accused about his or her constitutional rights and to give actual "first aid," the *Bundesgerichtshof* has changed its opinion, as well. At first it ruled that the duty to inform the suspect about his or her rights properly could be disobeyed by the police without any consequences.[31] After having been criticised for this decision for years it has determined that statements which have been obtained in violation of this section may not be used in court.[32]

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[28] See LUTZ MEYER-GOßNER, STRAFPROZESSORDNUNG 514 (46th ed., 2003).

[29] 5 BGHSt 332.

[30] 44 BGHSt 308.

[31] 22 BGHSt 170.

[32] 38 BGHSt 214.

It is unclear, however, what this means. If, for instance, a suspect made a confession as a result of a breach of law, this confession may not be used in court as evidence against the suspect. One can discuss whether it may be heard in favour of the accused. At least under section 136a(3) sentence one, that is not possible either. However, can the court hear the police officer as a witness of hearsay to find out what the confession was about? It is the opinion of the courts that – although in general the courts accept witnesses of hearsay – the public prosecution may not profit from its breach of law in this manner and may not make indirect use of the evidence, either.

It has been debated whether this means that the police may not, for instance, use a knife that was found as a result of a statement of an accused that was obtained illegally. We know that in other countries there is a doctrine that "fruits of the poisonous tree" may not be used in court. According to this doctrine neither the knife nor the fingerprints on it may be used in court as evidence. Some authors believe that this should be true in Germany, as well. However, the *Bundesgerichtshof* has stated that it could not be the goal of exclusionary rules that criminal proceedings must come to an end.[33] The *Bundesgerichtshof* ignores, however, that this is the possible consequence of the law itself, including the exclusionary rule laid down in section 136a (3) of the *Strafprozessordnung*. If there is no other evidence than the evidence excluded, the suspect cannot be convicted and has to be set free.

In the 1950s, Werner Sarstedt expressed concerns about what will happen if secondary evidence is not excluded as well. In a statement that still rings true today, he said, "it is not enough to torture the suspect until he confesses; those police officers who the prohibition is aimed at, must now go on torturing until he names witnesses, tells the police where stolen goods are hidden or, in other words: until he leads the police to further evidence."[34] The *Bundesgerichtshof*, however, argues that exclusionary rules are not meant to discipline the police. Even if that were true, however, that does not mean that it could not have that effect on the police; if the police know that the evidence cannot be heard in court, they may refrain from collecting such evidence at all.

Another problem we face in German Law is that the person who decides about whether the evidence can be heard is the same person who has to decide the case later on. The judge or the judges have to ignore what they already know. It is easy to imagine, however, from a practical standpoint that a judge will be more easily

[33] 27 BGHSt 358; 31 BGHSt 71; 34 BGHSt 364.

[34] Werner Sarstedt, in: LÖWE / ROSENBERG, STRAFPROZESSORDNUNG, section 136a / 7 (22nd ed.).

convinced by other evidence that has nothing to do with the excluded evidence if he or she is already convinced because of the excluded evidence that he or she must ignore. In countries that have juries that problem is solved by letting the judge decide if the evidence can be presented to the jury or not. If not, the person who has to decide whether the accused is guilty or not never has awareness of the excluded evidence and his or her decision cannot be affected by it in any way.

In very rare and dramatic cases, where it is not enough to ignore single pieces of evidence and go on – in other words, where exclusionary rules do not help to make up for the violation of the law by the police – the proceedings must come to an end. Provisions for that case are made in section 260(3): termination of the proceedings shall be pronounced in the judgement if there is a procedural impediment. The *Bundesgerichtshof* is very reluctant to accept "procedural impediments" of that kind, and sometimes the European Court of Human Rights in Strasbourg has a different view. Whereas, for instance, the European Court of Human Rights has decided that if a person has been talked into a crime by a confidential agent of the police, the proceedings against him are illegal and has granted that person monetary compensation, the *Bundesgerichtshof* rules that the people of Germany are also entitled to due process of law and that therefore proceedings shall not be terminated, but that it is enough to lower the sentence for the crime.[35]

In all of the above cases, there is a breach of the law by the police involved. However, there need not be a violation of the *Strafprozessordnung* to exclude a piece of evidence from the trial. Exclusionary rules may be derived from the Constitution itself. There need not be a violation of the law prior to the presentation of evidence in court if the presentation itself would be illegal under the Constitution. For instance, in 1964 the *Bundesgerichtshof* had to decide whether of not a diary could be used in court. This contained the confessions of a young teacher who did not tell the truth in court – punishable under section 154 of the Penal Code – during the trial against her lover and employer. She denied having had an affair with him. However, it was clear from the diary that they did have an affair. The *Bundesgerichtshof* ruled that the diary had to be excluded as evidence because of the constitutional rights of the young teacher, even though it may have been seized legally or may have been given to the court in a legal way.[36]

[35] See 45 BGHSt 321 – as opposed to the decision of the European Court of Human Rights published in NStZ 47 (1999).

[36] 19 BGHSt 325.

A few years later the Court had to reconsider this issue in a case of homicide. This time, the Court ruled that the diary could be used in court as evidence.[37] The *Bundesverfassungsgericht*, which consists of two chambers of eight judges each, decided that this was not against the Constitution.[38] Half of the deciding chamber, four judges out of eight, had a different opinion however. In that case under the Federal Constitutional Court Act, a breach of the constitution could not be established.

Considering both cases one has to distinguish three different spheres of privacy. Under the first sphere, the most intimate feelings of the suspect may not be enquired into by the police or judge. They are taboo. In the second sphere, which is called the private sphere, we have to take into consideration the weight of the crime on the one side and the weight of the penetration of privacy on the other and balance the two against one another. And there is a third sphere of privacy, called the social sphere, where it is not a problem to enquire into if there is a suspicion that a person has committed a criminal offence by consulting simple listings, time-tables, itineraries and so forth.

In 1998 the Regional Labour Court of Duesseldorf decided as a court of appeal that video-tapes could not be played in court that the employer had made in secret in order to prove that his employee stole money from the cash-register during the hours when she was alone in the super-market. Although it was settled that this was indeed the only way for him to prove the manipulations of the cash-register that were necessary to commit the crime, the Court ruled that the tape could not be used in court as evidence against the employee. Although this was not a criminal procedure, there was a criminal offence committed. According to what was said above, the tapes could not have been excluded. For they only stem from the third sphere of privacy since they were made in a supermarket, where people come and go all the time. Even if they had stemmed from the second sphere, however, they could have been used because there was no other way to prove the crime and prevent the employee from committing further crimes against the employer.[39]

To sum it up, the written law itself may contain exclusionary rules. If not, evidence is excluded either as a consequence of a breach of law or even without a breach of law because of rights of the accused withstanding its presentation in court. In the first case one has to ask, what the law that has been violated was aimed at to decide whether or not the evidence can be heard in court. In the second case one has to

[37] 34 BGHSt 397.

[38] 80 BGHSt 267.

[39] For further details see Christian Fahl / Johannes Roeckl, NZA 1035 (1998).

balance the rights of the accused against the interest of the public in the prosecution of crimes.

In the case mentioned above, where the police should have helped the accused effectively to consult with counsel prior to the examination instead of simply offering him a telephone directory, the *Bundesgerichtshof* held that the statements could nevertheless be used in court against him because his counsel did not protest against the evidence in court before it was used. This so-called "protest-solution" is wrong because it is the responsibility of the court that the due process of law is not violated and the court's responsibility, not counsel's, to reject rotten evidence.[40] However, the *Bundesgerichtshof* decides differently.

[40] See Werner Beulke, NStZ 257 (1996) and Christian Fahl, JA 747 (1996).