Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial

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I. The General Theory of Admissibility of Illegally Gathered Evidence

Theories of admissibility of evidence give insights into the concepts that ensure the reconstruction of facts, reliability of proof, fair trial and respect for individual rights in a nutshell. Often such theories have been developed gradually over many years, and – as a consequence – are not entirely coherent. The general theory of admissibility of illegally gathered evidence in German law, however, strives for this very coherence, being at the same time also complex for the reasons mentioned before, sometimes even confusing, since it tries to serve both the establishment of truth and the commitment to due process.

It is often said that the German doctrine on exclusionary rules has its origins in a lecture given by Ernst Beling in 1903: "Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess" ([Exclusionary Rules – Limits for the Truth-Finding Process in Criminal Proceeding]).[1] Advocating a doctrine on the exclusion of certain evidence, Beling, a visionary of his time, focused on how important it was that law enforcement was

[1] *Beling*, Die Beweisverbote als Grenzen der Wahrheitserforschung im Strafprozess, Breslau 1903.

exercised in accordance with the Code of Criminal Procedure introduced in 1871 (Strafprozessordnung, StPO); furthermore he touched on issues concerning the due process with regard to a general respect for the rights of individuals.[2] After more than a century of political, economic and social upheavals as well as a technological revolution in (secret) surveillance, the German theory on admissibility of evidence is, on the one hand, still committed to Beling's teachings, on the other hand, the post-war constitution (Basic Law/Grundgesetz, GG), implemented by an alert and ambitious Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), offers a new basis with another reference system more concerned with human rights in general. Lately new influences and concepts, especially the idea of a fair trial and the watching eye of the European Court of Human Rights, have started to influence the theory on exclusionary rules as well. Today the different frameworks form a rather complex system for monitoring the use of illegally gathered evidence. Overall, however, two patterns recur constantly: (1) An allusion to Beling's vision of staying clean-handed while adhering to the rule of law, which mingles with the more modern concept of "fair trial", and (2) a focus on the protection of the individual's right to privacy – may it concern a suspect, a victim or a witness.

When it comes to the violations of statutes ruling on evidence collection and use, the "clean-handed"-approach and "fair trial"-test both follow the doctrine on exclusionary rules (Beweisverwertungsverbote) handed down from the early twentieth century. Although they might form the basis for a coherent modern theory of admissibility of evidence considering due process in the future, for the moment the traditional doctrine prevails. The reasons for this are manifold: First of all, as is well known, jurisprudence naturally holds on to traditional concepts and absorbs more modern approaches only reluctantly. Second, in the German system the question of admissibility is confronted with the fact that professional judges of a criminal court themselves in delivering the final judgment resolve, whether a piece of evidence presented before the court may be used as such or not.[3] Third, the question whether certain evidence illegally obtained is used for the fact-finding process is traditionally confronted with the inherent paradox that you have the choice of either including potentially valuable information or to fuel the doubt about this very evidence as it might be unreliable or unfair information and thus not suitable to support the establishment of truth.

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[2] See also: *Beling*, Deutsches Reichsstrafprozessrecht (1928) p. 284.

[3] *Weigend*, in: Craig. M. Bradley (ed.), Criminal Procedure. A Worldwide Study, 2nd ed., Carolina Academic Press 2007, p. 254.

1. Constitutional or Statutory Rules

German law knows no constitutional provisions and only few statutes which explicitly state exclusionary rules. Furthermore there is no general exclusionary rule which, for example, would render illegally obtained evidence inadmissible as such.

One of the few provisions in the Code of Criminal Procedure, which explicitly asks for exclusion under certain circumstances (*statutory exclusionary rules* – "gesetzliche Beweisverwertungsverbote") is § 136 (1) 2 StPO.[4] According to this provision the accused "shall be advised that the law grants him/her the right to respond to the accusation, or not to make any statements on the charges and, even prior to his/her examination, to consult with [a] defense counsel of his/her choice". A violation of this duty to instruct the suspect adequately leads to an exclusion of evidence.[5] Thus, in most cases, the courts have to decide without statutory instruction whether illegally gathered evidence triggers an exclusionary rule or not (*non-standardised exclusionary rules* – "nicht normierte Beweisverwertungsverbote"); they do so mainly if a breach of rights is too eminent and thus taints the evidence (*exclusionary rules on the basis of grave breach*, see *infra* I.2.b). Such cases form the main body on which the German doctrine on admissibility based an approach for exclusionary rules which are triggered by violations of rules, generally laid down in statutes on evidence collection. The pertinent rules, however, are not only to be found in provisions on criminal procedure, but also originate from superior principles, such as constitutional law.

The most prominent example for a violation of constitutional right entailing the exclusion of evidence – according to case law and not to statutory order – is the infringement of the right to privacy based on a broad concept of personal rights including the right to the free development of personality (allgemeines Persönlichkeitsrecht, Article 2 (1) and Article1 (1) GG).[6]

a) General Exclusionary Rules/Rules Relating to Procedural "Nullities"

German law does not know the concept of nullity. It lacks a conclusive rule either in a constitutional or in a statutory provision for prohibitions on the use of evidence. However, German scholars and courts have developed numerous approaches in order to decide on the exclusion of a certain kind of illegal evidence.

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[4] All StPO quotations in English are available on <www.iuscomp.org/gla/statutes/StPO.htm>.

[5] BGHSt 38, 214 (27 *February* 1992).

[6] See *infra* II.1.a).

In order to understand the German doctrine it may help to know some of the basic terminology in this context. Apart from distinguishing between those exclusionary rules explicitly laid down in statutes (*statutory exclusionary rules*) and those not expressly stated therein (*non-standardised exclusionary rules*), jurisprudence and legal scholars use different – partly overlapping – categories:

(1) *independent exclusionary rules* ("selbständige Beweisverwertungsverbote") – in general they lead to a strict exclusion of evidence: *obligatory exclusionary rules* ("absolute Verwertungsverbote");
(2) *dependent exclusionary rules* ("unselbständige Beweisverwertungsverbote") based on a grave breach of an evidence collection rule – included are cases of strict or absolute, so-called *obligatory exclusionary rules*, which always lead to a ban of evidence, as well as cases of *relative exclusionary rules*, in which the judges weigh the pros and cons for an exclusion ("relative Verwertungsverbote").[7]

The first category excludes evidence irrespective of the activities of agencies concerned with law enforcement or rather regardless of misconduct, i.e. the violation of provisions on evidence collection. A typical example for an "independent exclusionary rule" is the prohibition directly deducted from the guarantee of privacy, which is part of a constitutional more general "right to free development of [one's] personality" based mainly on Article 2 (1) and Article 1 GG, including even more specified rights, such as the "Privacy of correspondence, posts, and telecommunications" in Article 10 GG as well as the "Inviolability of the home" in Article 13 GG[8] etc. Both, the Federal Court of Justice (Bundesgerichtshof, BGH) early in the Recording Tape Case[9] and in the first Diary Cases[10] as well as recently in the Hospital Room Case[11] and the Constitutional Court, BVerfG, in the

[7] See *Koriath*, Über Beweisverbote im Strafprozess, Lang Frankfurt/Main 1994, pp. 15–16. Theoretically obligatory exclusionary rules can be both, dependent or independent. The obligatory aspect refers to the *effect*, i.e. legal consequence, that an exclusion of evidence entails; whereas the *cause* of the obligatory exclusionary rules can be either called "dependent" when the violation of a rule is not considered due to overriding aspects like privacy etc or regarded as "independent" as soon as rules on evidence gathering get violated.

[8] All GG quotations in English based on <www.iuscomp.org/gla/statutes/GG.htm> or <www.geocities.com/iturks/html/documents12.html>.

[9] BGHSt 14, 358 (14 June 1960), (Recording Tape Case).

[10] BGHSt 19, 325 (21 February 1964), (First Diary Case); other diary case: BGHSt 34, 397 (9 July 1987), in which a murderer elaborates his wish to kill in his diary.

[11] BGH NJW 2005, 3295 (10 August 2005).

decision on electronic bugging of homes[12] and online searches[13] excluded evidence on the grounds that privacy might be violated.

Thus it is mainly the second category, the "dependent exclusionary rules", which relates to the exclusion of evidence because of its illegal collection or rather due to the violation of an evidence collection statute by law enforcement agencies or even by private citizens.

Furthermore, jurisprudence controls, mainly as a sort of last resort, whether an investigation measure is used arbitrarily against somebody[14] and applies the "principle of proportionality" ("Grundsatz der Verhältnismäßigkeit")[15] to balance an individual's constitutional right of privacy and the state's interest in fighting crimes.[16] The BVerfG, for example, declared the search for and seizure of the client documentation of a drug counselling agency unconstitutional, because in that case the intrusiveness of the search would have been out of proportion with the legitimate interests of law enforcement.[17]

Only recently courts have discussed the question whether the accused may waive an exclusionary rule, if he/she wants to introduce exonerating evidence while a statutory rule asks for the exclusion of that piece of evidence.[18] The question is not resolved yet.

b) General Duty to Determine the Truth

German courts, traditionally, are obliged to make out the truth. Thus a justification for the exclusion of evidence is necessary, because a court must consult all relevant evidence in order to search out the truth.[19] § 244 (2) StPO explicitly commits the deciding court to unearth substantive truth: "In order to establish the truth, the court shall, *proprio motu* [of its own accord], extend the taking of evidence to all facts and means of proof relevant to the decision." The statute points at the inquisitorial origin of the

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[12] BVerfGE 109, 279 (3 March 2004).

[13] BVerfGE (27 February 2008) (1 BvR 370/07 -1 BvR 595/07).

[14] BGHSt 41, 30 at 34 (16 February 1995); BGHSt 47, 362 (1 August 2002).

[15] The German Federal Constitutional Court established this principle of proportionality for cases dealing with compulsory measures in criminal processes. See BVerfGE 209, 7 (15 January 1958); BVerfG, NJW 1962, 2243 (9 November 1962); BVerfG NJW 1963, 147 (18 December 1962).

[16] BGHSt 19, 325 at 332 (21 February 1964).

[17] BVerfGE 44, 353 (24 May 1977).

[18] See: BGH NStZ 2008, 706; *Rogall,* JZ 1996, 944, *Godenzi,* GA 2008, 500.

[19] For the traditional approach see: BVerfGE 57, 275 (predominant principle of German law); *Spencer*, in: Delmas Marty/Spencer (2002), pp. 25 et seq. as well as pp. 624 et seqq.; for a further analysis see: *Gless*, Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung, pp. 84–89; *Weigend,* Harv.J.L. Pub.Pol'y 2003, 157 at 159.

German criminal procedure:[20] The duty for and the trust in the judge – and law enforcement agencies[21] – to find the truth has been an essential feature for centuries. The duty to establish the truth is not absolute, however, or – as the Federal Court of Justice (BGH) puts it in a famous dictum: "It is not a principle of criminal procedure to arrive at the truth at any cost."[22] The duty to search out the truth, thus, has its limits, in particular as soon as human and constitutional rights of individuals are derogated.[23] The BGH justified the exclusion of evidence balancing constitutional principles: Although the task of solving and punishing crimes is extremely important, it must be stressed that the purpose thereof is not and cannot always be the predominant interest of a state. Rather such an important public interest has to fit the overall context of the broader more general interests. The provisions of the basic law express its *corrective effect* in the sphere of the existing laws, so also in criminal procedure law, which is understood as *applied constitutional law*.[24]

In German law the decision to limit the pool of information available, i.e. to exclude evidence, is left to the professional judges of a court.[25] This fact accounts for a special situation: By establishing the facts with the method of "free consideration of evidence" ("freie Beweiswürdigung"), the professional judges[26] must erase their knowledge gained from excluded evidence and therefore also reject proof that might support the reasons for the judgment. This dilemma brings about a strong risk to dilute the impact of exclusionary rules.[27]

At large, however, the mission to establish truth in a criminal proceeding has been modified in recent years. Especially the practice of and eventually legal provisions for "plea bargaining" ("Absprachen") intro-

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[20] For further information on the "accusatorial" and "inquisitorial" model see *Spencer*, in: Delmas Marty/Spencer (2002), pp. 20–21.

[21] § 160 (2) StPO obliges the prosecution also to "ascertain not only incriminating but also exonerating circumstances, and shall ensure that such evidence is taken the loss of which is to be feared".

[22] BGHSt 14, 361, at 364–365 (14 June 1960), translated paraphrase of German original.

[23] "Keine Wahrheitserforschung um jeden Preis", BGHSt 14, 358 at 365 (14 June 1960); *Beulke*, Strafprozessrecht, 9th ed., C.F. Müller Heidelberg 2006, marginal number 454; *Weigend,* Harv.J.L. & Pub. Pol'y 2003, 157 at 162.

[24] BGHSt 19, 325 at 329–330 (21 February 1964), emphasis added and translated summary of German original; see also: BGHSt 38, 214 (27 February 1992).

[25] The non-admission of evidence is not a discretionary decision, but a question of applying the law, which may be challenged with an appeal to a higher court.

[26] The situation is different for lay judges ("Schöffen") who sit in judgement on special cases of severe criminality and have no knowledge of investigation files.

[27] *Frase/Weigend,* B.C. Int'l & Comp. L. Rev. 1995, 317, 323 at 334.

duced a paradigm shift with regard to the traditional assignment of a court to find out the true facts of a case.

2. General Rules of Admissibility/Exclusion of Illegally Gathered Evidence in High Court Jurisprudence

a) Statutory Exclusionary Rules

As already explained, jurisprudence distinguishes between the exclusion of evidence, because a statute expressly states so (statutory exclusionary rules, see *supra* I.1.a), and the judges' non-consideration of evidence, because it is gained by a breach of rule which is sufficiently grave to justify this exclusion (non-standardised exclusionary rules, see *supra* I.1.a).

It had taken the German legislator roughly 50 years after Beling's famous lecture before the first statutory exclusionary rule banning illegally gathered evidence was introduced. § 136a StPO requires a court to exclude coerced confessions. The statute, which will be discussed below,[28] expressly forbids the use of statements obtained in questionings of suspects or witnesses by improper methods such as ill-treatment, fatigue, physical violence, forced drugs application, deception, hypnosis, unlawful threats and the use of measures which interfere with the accused's memory or his/her ability to understand. The provision is seen as a tribute to Article 1 of the Constitution, which protects human dignity and signals a renunciation of the law enforcement common during the Nazi regime.[29]

The application of such statutory exclusionary rules appears to be rather easy at first view. However, numerous questions regarding the scope of the provisions have to be considered, for example, it has to be discussed how tainted derivative evidence should be handled.

b) Non-Standardised Exclusionary Rules: Exclusionary Rules because of Grave Breach

Apart from an explicit statutory rule, irregularities during the collection of evidence or other encroachments may trigger a ban of evidence. In general, the infringement of a right or the breach of a statute which is too important to ignore brings about the non-admission of information. Since no statute deals with this kind of non-standardised exclusionary rules (because of grave breach etc.), courts and academia have developed various approaches to guide such exclusion.[30] Two disparate concepts of exclusion

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[28] See *infra* III.2.b) and c).

[29] BGHSt 1, 387 (30 October 1951).

[30] BGHSt 42, 170 at 172 (21 May 1996); BGHSt 47, 172 at 179 (22 November 2001); for a critical analysis see: *Roxin*, StV 2007, 450 at 452; see also: BVerfG NVwZ 2005, 1175 (30 June 2005): "Aus dem Prozessgrundrecht auf ein faires, rechtsstaatliches Ver-

are relevant in prevailing case law:[31] (1) a doctrine of "clean hands", which relates to the "rule of law" in criminal proceedings and basically focuses on the illegal gathering of evidence – according to this doctrine the violation of a rule in order to safeguard the defendant's basic procedural rights leads to the exclusion of evidence (see *infra* aa); (2) a constitutional approach basically protecting the right of privacy so that any infringement of the sacrosanct private sphere leads to an exclusion of evidence (see *infra* bb).

aa) Theory: Exclusion due to illegal gathering of evidence

Without a statutory exclusionary rule it is always difficult to decide whether the violation of a *rule for gathering of evidence* triggers an exclusionary rule, i.e. brings about the ban of the evidence collected. In Germany, three predominant theories about exclusionary rules have to be considered in this context:

(1) The "balancing approach" ("Abwägungstheorie"): a doctrine applied by courts and supported by some academics.[32] Whenever procedural rules are violated by law enforcement agencies, the courts, in determining the truth, weigh the seriousness of the violation against the public interest as well as against the legal interests of the injured party.[33] Illegally obtained evidence shall be excluded only, if the interests of law enforcement cannot outweigh those of the defendant, i.e. if the severity of the offence investigated significantly outweighs the seriousness of the violation.[34] Circumstances considered include the severity of police misconduct, the importance of the violated legal interest, the seriousness of the crime committed by the defendant and the relevance of the piece of evidence for the resolution of the case. Although jurisprudence has refused to establish strict rules on the exclusion of illegally obtained evidence so far, it emphasizes that the violation of a rule securing the defendant's basic procedural rights normally leads to the exclusion of the evidence obtained. Thus, according to case law, if, for example, the suspect is not informed of his/her right to "respond to the accusation, or not to make any statements on the charges and, even prior to his/her examination, to consult with a

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fahren ergibt sich *nicht*, dass die Verwertung fehlerhaft gewonnener Beweise stets unzulässig ist".

[31] There are, however, many other theories and approaches that justify the exclusion of evidence.

[32] BGHSt 42, 170 at 172, 179 (21 May 1996); for a critical view see: *Grünwald,* Beweisrecht der Strafprozessordnung, p. 143.

[33] See e.g. BGHSt 47, 172 at 179–180 (22 November 2001); BGH NJW 2003, 2034.

[34] For a comparison with US Law see: *Thaman*, St. Louis U.L. Rev. 2001, 581 at 608, Fn. 166.

defense counsel of his/her choice", this default leads to an exclusion of any statement the suspect makes during this interrogation[35] – only if the accused knew about his/her right, but made a statement nevertheless, it may be admitted given the circumstances.

(2) The "theory of protective purpose" ("Schutzzwecktheorie"): in its pure version it refuses to balance the competing interests of state and defendant, and instead advocates a uniform framework for exclusionary rules.[36] This theory maintains that, since a balance has already been made in the legislation of the violated legal norm, the courts are not allowed to balance again, but must exclude evidence obtained against the legal rule. Today the doctrine, however, is diluted due to many modifications.

(3) The "theory of the rights to information control" ("Lehre von den Informationsbeherrschungsrechten"): this theory developed in academia focuses on the protection of the right to privacy, to secrecy and the protection of this private secrecy in public.[37] A defendant being the victim of illegal police misconduct whose rights to retain information concerning him- or herself are thus violated may request the exclusion or removal of illegally obtained evidence.[38]

Despite their differences all three theories agree that the primary tasks of exclusionary rules in Germany – in contrast to the US doctrine – are not to have a disciplinary effect on law enforcement authorities.

Jurisprudence often works with a combination of elements from both, the balancing approach as well as with some variations of the theory of protective purpose.[39]

bb) Theory: Exclusion because of the protection of privacy

A doctrine *not* predominantly focusing on the issue of *illegally collected evidence* is the approach of German High Courts which aims to protect the privacy of individuals involved in a criminal proceeding, i.e. suspects. Basically it differentiates three spheres with regard to information gathering. According to the "three-sphere-approach" ("Drei-Sphärentheorie")[40] law enforcement agencies may gather information about a person and his/her private life

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[35] BGHSt 38, 372 (29 October 1992).

[36] See *Grünwald* (*supra* note 32), p. 155; *Rudolphi*, MDR 1970, 93 at 97.

[37] *Amelung*, Informationsbeherrschungsrechte im Strafprozess (1990), pp. 24 and 30.

[38] *Amelung* (*supra* note 37), p. 52.

[39] BGHSt 46, 189 at 195 (3 November 2000).

[40] BVerfGE 34, 238 at 245–247 (31 January 1973); BVerfGE 109, 279 (3 March 2004) (electronic tapping of private residences, "großer Lauschangriff").

(1) in a public social context, where e.g. photographs may be taken and visual recordings made, movements observed, speeches in front of an audience like a business club etc. be recorded – such material may be used as evidence;[41] whereas information gathered secretly *without meeting the legal requirements* may most probably not be used;[42]
(2) in a private context, however exposed in public – e.g. an overheard private conversation in a restaurant – such information may only be used if law enforcement interests outweigh privacy interests, taking into account the severity of the accusation, the prominence of the privacy right, the relevance of the evidence etc;[43]
(3) in the sacrosanct private sphere, e.g. a diary entry never meant for other eyes or a soliloquy uttered in a hospital room – such strictly off the record information may not be seized nor used as evidence in a criminal proceeding,[44] since it violates the human dignity.[45]

Although the "three-sphere-approach" has been criticized from the beginning,[46] it is still a relevant evaluation guideline today.[47]

c) Restrictions on the Enforcement of Exclusionary Rules

In spite of the development towards a rather broad application of inadmissibility principles, German jurisprudence introduced three important restrictions on the enforcement of exclusionary rules.

aa) Violation of the Legally Protected Sphere – "Rechtskreistheorie"

According to established case law a person may only challenge the admissibility of illegally obtained evidence, if the violated rule on evidence gathering protects his or her acknowledged interests and thus forms part of his or her legally protected rights ("Rechtskreistheorie"). This approach

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[41] *Beulke* (*supra* note 23), marginal number 471.

[42] BGHSt 31, 304 (17 March 1983); BGHSt 31, 309 (6 April 1983); BGHSt 32, 68 at 70 (24 August 1983); *Beulke* (*supra* note 23), marginal number 471.

[43] See BGH JR 1994, 430; see also "Abwägungslehre" *supra* I.2.b)aa).

[44] See e.g. BVerfGE 80, 367 (14 September 1990) (Diary Case of 1990); BVerfG 109, 279 at 281 (3 March 2004) (electronic bugging of homes); BGHSt 50, 206 (10 August 2005), BGH NStZ 2005, 700 (Hospital Room Case); *Baldus,* JZ 2008, 218 at 219; *Baum/Schantz,* ZRP 2008, 137.

[45] As protected by article 1 (1) GG, see BVerfGE 109, 279 (3 March 2004) as well as BVerfGE 80, 367 (14 September 1990) (Diary Case of 1990); BGH NStZ 2005, 700 (Hospital Room Case); *Jahn,* NStZ 2004, 383 at 384.

[46] See e.g. *Wolter,* NStZ 1993, 1; *Lindemann,* JR 2006, 191.

[47] See BGHSt 33, 217 (9 May 1985) and § 100f StPO as an example of corresponding legislation; furthermore: *Hohmann-Dennhardt,* NJW 2006, 545; *Beulke* (*supra* note 23), marginal number 471.

creates a general obstacle with regard to the enforcement of an exclusionary rule according to which illegally obtained evidence in a criminal proceeding is banned. The Federal Court of Justice introduced it first when deciding on evidence exclusion in a case where the privilege to refuse to give evidence was violated in so far as the police had disregarded a witness' privilege against self-incrimination.[48] The witness' statement was evaluated to be admissible – although to the defendant's disadvantage –, because the violation had not infringed upon the defendant's legally protected rights.

bb) Veto against the Admission of Evidence – "Widerspruchslösung"

Only recently the German courts introduced another requirement for the exclusion of evidence: Only if the person whose rights have been violated during the gathering of evidence explicitly vetoes the admission of the illegally obtained evidence in time, the exclusionary rule will be enforced.[49] If, for example, a defendant is not cautioned properly, she or her defence counsel must oppose the use of such evidence as soon as possible, otherwise the claim is lost. This "Widerspruchslösung" is heavily criticized by various scholars.[50]

cc) Hypothetical clean path

In some cases courts apply the "hypothetical clean path" analysis ("hypothetischer Ermittlungsverlauf") to justify the admission of evidence *directly* obtained by illegal means. The courts argue that relevant evidence should not be excluded because of a mere "technical fault", if otherwise the evidence could have been obtained by legal means.[51]

For example, in the case of an illegal, i.e. unauthorised, search of the suspect's apartment the BGH argued that the evidence found in the apartment should not be excluded, since under different circumstances a judicial authorisation could have been granted and thus would have turned the seized objects into admissible evidence.

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[48] BGHSt 11, 213 (21 January 1958); see also: BGHSt 38, 214 at 220 (27 February 1992).

[49] BGHSt 38, 214 at 225 (27 February 1992); BGHSt 39, 349 at 352 (12 October 1993); BGH NStZ 1997, 502; BGH JR 2005, 385, 386, in favour: *Basdorf,* StV 1997 491; *Hamm,* NJW 1996, 2185 at 2188. "Widerspruchslösung" does not apply in cases of § 136a StPO, see BGH StV 1996, 360.

[50] See L/R-*Gless*, Kommentar zur StPO, § 136 nos. 82–84; *Grünwald* (*supra* note 32), p. 149 et seq.; *Wohlers,* NStZ 1995, 45 at 46.

[51] BGHSt 24, 125 (17 March 1971); BGH NStZ 1989, 375 (15 February 1989); *Roxin*, NStZ 1989, 376 et seqq.; *Meurer*, JR 1990, 388 et seqq.; for a comparative perspective see: *Thaman,* St. Louis U.L. Rev 2001, 581 at 611–12.

In another case, the Federal Court of Justice, although confronted with the fact that a car is reckoned to belong to the protected private sphere, still considered admissible the tape of a "live" conversation in a suspect's car which was accidentally recorded on a tape that was meant to record telephone conversations on the suspect's cell phone only. The court argued that the installation of a hidden microphone in the suspect's car could have been granted legally on the basis of another provision of the Code of Criminal Procedure. According to its view the use of the wrong legal statute alone was no reason to exclude the evidence.

In a case decided more recently by the Higher Regional Court of Celle / Lower Saxony (Oberlandesgericht, OLG), a police officer acquired a blood sample of a suspect from a nurse after the suspect had undergone emergency surgery. Despite the fact that the police officer had acted illegally, the court admitted the blood sample, arguing that it would be formalistic to exclude it, since the officer could have obtained *another* blood sample by immediately ordering a physical examination of the suspect in accordance with § 81a StPO.[52]

Although the "hypothetical clean path"-approach has been criticized from the beginning, it is still predominant[53] in case law.[54]

3. Effect of International Human Rights Jurisprudence

After a period of reluctance the German Courts have over the years (finally) acknowledged the requirements of the European Convention of Human Rights (hereinafter: Convention) and its impact on or rather primacy over the German criminal justice systems. Meanwhile German jurisprudence has absorbed several concepts introduced by the European Court of Human Rights, especially the test of a "fair trial" which guarantees an examination whether proceedings have been fair in an "overall approach".[55]

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[52] OLG Celle NStZ 1989 (14 March 1989). If, however, the police *deliberately* circumvents legal proceedings, the evidence will be excluded, see OLG Dresden NJW 2009, 2149 (11 May 2009).

[53] In some cases the Federal Court of Justice refrained from applying a "hypothetical clean path doctrine", see BGHSt 25, 168 (28 March 1973).

[54] BGH NJW 2003, 2034, for a critical analysis see: *Rogall*, NStZ 1988, 385; *Wesslau*, StV 2003, 483; *Jahn/Dallmeyer*, NStZ 2005, 297 at 304.

[55] For further information see *Gaede*, Fairness als Teilhabe – Das Recht auf konkrete und wirksame Verteidigung gemäß Art. 6 EMRK, Duncker & Humblot Berlin 2007; *Simon*, Die Beschuldigtenrechte nach Art. 6 Abs. 3 EMRK, Köhler-Druck Tübingen 1998.

II. Rules of Admissibility/Exclusion in Relation to Violations of the Right to Privacy

1. General Provisions Protecting the Right to Privacy and Personality Development

German law does not provide an explicit provision protecting the right to privacy. But after the Second World War German courts have – after the experience of a totalitarian regime – invented a manifold privacy approach. This approach is chiefly based on constitutional provisions, in particular Article 2 (1) GG which grants the "right to free development of [one's] personality".

In 1954, roughly fifty years after Beling's lecture on the exclusion of certain evidence, the Federal Court of Justice, for the first time, embarked on a new doctrine for exclusionary rules that pronounces against the use of a polygraph, declaring it an infringement of an individual's personality. In the sixties, two landmark decisions were set with the Recording Tape Case (Tonbandentscheidung)[56] and the First Diary Case (Erste Tagebuchentscheidung),[57] and thus the concept of excluding evidence primarily for privacy reasons got introduced. Before these precedents, the courts had refrained from the suppression of illegally obtained, but reliable evidence.

Especially High Courts deducted from a synopsis of these provisions several constitutional rights of personality, among them the individual's right to the spoken word.[58]

Different from US case law German jurisprudence grants suspects privacy rights not only in private locations, but also in public. The issue of privacy is not attached to location alone, but to the private nature of the information.[59] It is an aspect of the right to personality and human dignity, which includes the right to "informational self-determination", rather than to the expectation "to be left alone".[60] In the Hospital Room Case, for example, a murder suspect was admitted to a rehabilitation hospital, where police bugged his room by leave of the competent authorities. Talking to himself he muttered: "... very aggressive! I should have shot him in his

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[56] BGHSt 14, 358 (14 June 1960), (Recording Tape Case).

[57] BGHSt 19, 325 (21 February 1964), (First Diary Case).

[58] See also right to privacy of correspondence, posts and telecommunications as protected by Art. 10 Basic Law.

[59] For a comparative perspective see *Ross*, Germany's Federal Constitutional Court and the Regulation of GPS surveillance, German Law Journal, Vol. 6 No. 12 (1 December 2005).

[60] See BVerfGE 65, 1 (15 December 1983); *Amelung,* NJW 1990, 1755; *Kutscha,* NJW 2007, 1169.

head ..." The Federal Court of Justice (BGH) excluded the evidence, since it detected an infringement of the suspect's private sphere.[61]

a) Constitutional Provisions

The German constitution guarantees in its Article 2 (1) GG the "right to the free development of personality" as long as a person does not violate the rights of others or offend against the constitutional order or the moral code. The right of free self-determination of personality is acknowledged as a basic value of the German legal order which, as a consequence, protects the (sacrosanct) private sphere from investigations by law enforcement agencies.

Various other constitutional provisions protect the right to privacy, too. For example, Article 13 GG guarantees the sanctity of the home, Article 10 secures the secrecy of the post and phone, thus protecting the individual's right to be left alone; and Article 104 GG ensures the right of free movement.[62]

b) Statutory Provisions

There is no explicit statute in the StPO protecting the "right to privacy" as such. However, the StPO retains the right to privacy in various provisions safeguarding traditional civil rights and liberties, partly confirming constitutional rights and regulating special situations differently. The right of free movement, for example, which is also guaranteed in Article 104 GG, is implicitly secured in §§ 112–13 StPO.

Many statutory provisions relate to privacy, among them various ones related to the right to the own spoken word. For example, § 477 (2) 2 StPO covers the use of chance finds that arise from telephone tapping ("Zufallsfunde bei Telefonüberwachungen"), § 100c (5) 3 StPO handles records of intimate communication during electronic eavesdropping operations in private residences ("Intimaufzeichnungen beim großen Lauschangriff"), § 100d (5) 1 StPO deals with chance finds during electronic bugging operations of private residences ("Zufallsfunde beim großen Lauschangriff") or § 100h (2) 2 StPO deal with recordings of private conversations in public ("Zufallsfunde beim Einsatz technischer Hilfsmittel und beim kleinen Lauschangriff").

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[61] For example: BGH NStZ 2005, 700 (Hospital Room Case).
[62] See e.g. BVerfGE 32, 54 (13 October 1971).

c) The Federal Court of Justice Interprets the Constitutions/Basic Law

Quite early German courts focused on the right to privacy in their judgments:

Prominent for the exclusion of evidence in order to protect privacy is the Federal Court of Justice's First Diary Case of 1964.[63] This judgment did not only focus on privacy rights, but prepared the ground for a new important doctrine. It had to decide whether the defendant's diary was admissible as evidence in a perjury trial. The defendant was called to be a witness in the adultery trial of her former lover. She denied any involvement with him. The wife of another former lover of the defendant found the defendant's diary in her home and handed it over to the police. The trial court admitted the diary as evidence and convicted the defendant for perjury. Though, the BGH reversed the defendant's conviction on the ground that the use of the defendant's private diary against her in court decisively violated her "right of free self-determination of personality" under Articles 1 and 2 of the GG.[64] Even before this diary decision, the BGH considered the admissibility of privately recorded tapes in a criminal case, in the so-called 1960 Recording Tape Case.[65] The defendant, an attorney of a rape victim, proceeded with negotiations with a female friend of the rape offender in the phase of the trial. The female friend secretly tape-recorded the conversation between herself and the attorney who was accused of attempting to press his client to perjure herself. The Federal Court of Justice eventually excluded the tape on the basis that tape-recording of words without the speaker's consent violates his sphere of personality and right to his words – as a consequence the defendant was acquitted.[66] The court not only confirmed the theory subsequently, but also refined the concept.

It was, however, the Federal Constitutional Court that – instead of an interpretation – elaborated the right to privacy further; in so far as it protects individual autonomy and "informational self-determination" as aspects of privacy and dignity.[67] In the census case[68] it stresses that it is "a right of every citizen to know what information the government has collected about him and to limit the government's use, storage, and transmis-

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[63] BGHSt 19, 325 (21 February 1964), (First Diary Case).

[64] BGHSt 19, 32, at 326–327 (21 February 1964); BGHSt 19, 329 at 330 (21 February 1964) (emphasis added).

[65] BGHSt 14, 358 (14 June 1960), (Recording Tape Case).

[66] BGHSt 14, 358 at 359 (14 June 1960).

[67] BVerfGE 65, 1 (15 December 1983); for further information see: *Ross*, German Law Journal, Vol. 6 No. 12 (1 December 2005).

[68] BVerfGE 65, 1 (15 December 1983) ("Volkszählungsurteil").

sion of the data."[69] More recently the court has developed this reasoning further in the GPS case and argues that – given the progress in surveillance technology – the German piecemeal regulation on secret information gathering eventually will not be able to protect privacy as established by case law. One reason for this failure is the fact that rules on information gathering only cover one law enforcement tool at a time, but never the whole picture that might, for instance, include a combination of telephone tapping, data mining in financial matters, GPS surveillance etc.[70]

2. Protection of Privacy in Private Residences and Other Private Buildings

a) Constitutional Provisions

Naturally, in their homes (including any accommodation), people are entitled to privacy and enjoy the sanctity of the home. Article 13 declares that "(1) The home is inviolable. (2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed."

Intimate information uttered inside one's home belongs to the taboo of the private sphere immune to any government interference;[71] however, other information gained by tapping in a legally implemented investigation may be used.

b) Statutory Provisions

Following-up Article 13 GG several provisions of the StPO establish a system of exceptions in order to gather information in peoples' homes: According to §§ 102, 105 StPO, a judge may order a search of a defendant's private and other premises if an offense is "suspected [...and] it may be presumed that the search will lead to the discovery of evidence". However, in a "danger in delay" situation, also the prosecutor and its auxiliary police officials are authorised to order such searches according to §§ 98, 105 StPO. A "danger in delay" exists whenever the delay involved in acquiring a judicial warrant endangers the success of the search, because the object in question could be destroyed or concealed.[72] In 1998 the parliament introduced the law that allows electronic tapping of private residences (großer Lauschangriff) in cases of severe crimes. In doing so it was – inevitably – faced with records of intimate communication. As a consequence of the judicial doctrine on protection of privacy, § 100c (5) 3 StPO

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[69] BVerfGE 65, 1 (15 December 1983).
[70] BVerfGE 112, 304 (12 April 2005).
[71] See exclusionary rule in § 100c StPO.
[72] See *Frase/Weigend*, B.C. Int'l & Comp. L. Rev. 1995, 317, 323 at 332.

rules that such tapping has to be stopped as soon as statements belonging to the core area of privacy are recorded. Accidental recordings of such material have to be deleted immediately and potential insight gained from such recordings in the meantime must not be used as evidence.

c) High Court Jurisprudence Interpreting Effect of Violations of Above Provisions on Admissibility of Illegally Seized Evidence

German case law considering admissibility of information gathered in a suspect's home deplores both, the law enforcement agents' adherence to criminal procedure rules on evidence gathering and the legitimacy and legality of surveillance or rather secret surveillance in a private sphere. For example, German courts had to decide whether information gathered by law enforcement agencies by means of bugging operations inside an apartment may still be used as evidence when originally only an operation outside the home had been allowed for. The Federal Court of Justice (BGH) excluded this type of evidence.[73]

However, in another case in which the legal restrictions on the length of electronic eavesdropping was neglected by the law enforcement agencies, the court admitted the seized information as evidence nevertheless.[74] These few examples show that the exclusionary rules which protect privacy still lack a doctrine that makes the outcome of such particular cases more predictable.

d) Admissibility of Indirect Evidence (Fruits of the Poisonous Tree)

According to case law and the predominant view in literature the inadmissibility of illegally obtained evidence does not extend to derivative evidence.[75] Jurisprudence and a majority of scholars[76] do not acknowledge a fruit of the poisonous "tree doctrine". Therefore the Federal Court of Justice, for example, regarded the following material admissible as evidence: statements by witnesses obtained by means of an illegal wiretap[77] and even an entrapment[78] or a confession by the defendant to an expert witness a few days after he had been confronted with an illegally recorded tape

[73] BGHSt 42, 372 at 377 (15 January 1997).

[74] BGHSt 44, 243 at 248 (11 November 1998) (Verletzung der Dreimonatsfrist); *Wolters*, JR 1999, 524.

[75] See e.g. BGHSt 29, 244 at 247 (18 April 1980); BGHSt 32, 68 (24 August 1983); BGHSt 34, 362 (28 April 1987); BGHSt 35, 32 (6 August 1987).

[76] However there are strong voices of critique, see e.g. *Roxin/Achenbach*, Strafprozessrecht 16th ed., C.H. Beck München 2006, § 24 marginal number 47; *Otto,* GA 1970, 289 at 284.

[77] BGHSt 32, 68 (24 August 1983).

[78] BGHSt 34, 362 (28 April 1987).

revealing his self-incriminating remarks.[79] Thus, the fruits of illegal searches are usually also reckoned to be admissible.[80]

However, in one instance the Federal Court of Justice excluded derivative evidence gained by violating provisions on telephone tapping.[81] In this particular case the court argued that the police had disregarded statutory requirements according to which this kind of licit infringement of privacy – in this particular case of the freedom of press – tainted the indirect evidence.

A majority group of academics, however, is of the opinion that at least in case of default to advise the accused of his/her rights, as required by § 136 StPO, must always lead to the exclusion of leads gathered on the basis of inadmissible statements.[82]

However, even if information may not be used as evidence, case law still allows the use as lead ("Spurenansatz").[83] Thus – critics say – even tainted evidence may turn into untainted evidence.[84]

The rejection of any "fruit of the poisonous tree-doctrine" and instead the acceptance of the "hypothetical clean path"[85] is probably best explained by the fact that in Germany evidence is not excluded in order to deter police misconduct, but basically on a "clean hands" rationale.[86] Indirect evidence itself is not tainted by the violation of procedural rules so that the interests of justice outweigh any remaining reservations with regard to possible defects in the process of seizure.

III. Rules of Admissibility/Exclusion in Relation to Illegal Interrogations

Broadly speaking German law does not know an incidence such as "illegal interrogation", which most probably taints all, even subsequently gathered evidence. Compared with the English PACE or the US law on exclusionary rules, the German StPO has a less detailed system when it comes to the regulations with regard to the limits of investigative power by the police, the safeguard of the individual's procedural rights in each step of the in-

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[79] BGHSt 35, 32 (6 August 1987).

[80] BVerfGE 2 BvR 2225/08 (2 July 2009); BGHSt 27, 355 at 358 (22 February 1978); BGHSt 32, 68 at 71 (24 August 1983).

[81] BGHSt 29, 244 at 247 (18 April 1980) "Spiegel case".

[82] L/R-*Gless,* § 136 no. 107; *Roxin/Achenbach* (*supra* note 76), § 24 marginal number 47; *Grünwald,* JZ 1966, 489.

[83] See BGHSt 27, 355 at 358 (22 February 1978).

[84] See *Beulke* (*supra* note 23), marginal number 476.

[85] See *supra* II.2.c)cc).

[86] See *Weigend*, in: Craig. M. Bradley (*supra* note 3), 243 at 253.

vestigation, and the sanctions against police misconduct. Particularly, the guarantee for procedural rights in pre-trial interrogation is treated less extensively. However, § 136 StPO and § 136 a StPO cover illegal interrogation techniques and the consequences for evidence collected by such means.

1. The General Right to Remain Silent/Privilege Against Self-Incrimination

a) Constitutional Provisions

No constitutional provision does explicitly grant the right to remain silent. However, emphasising human dignity as a basic value of the German legal system and a principle of criminal procedure based on the rule of law, the German Federal Court of Justice stated in a famous obiter dictum:[87]

"The instructions [of § 136 (1) and 136 a StPO] are not isolated rules for their own sake, but rather they express the constitutional stance of the criminal procedure that does not permit degrading proceedings against the defendant...Under the same circumstances it must not be allowed that the defendant's utterances illegally obtained by tape recordings can be used against him/her...This interpretation entails that important or even the only evidence available in order to solve a crime has to be discarded. However, this dilemma has to be accepted. Besides, it is not a principle of criminal procedure to arrive at the truth at any cost."[88]

b) Statutory Provisions

The defendant's right to silence derives from the nemo tenetur-principle introduced by the Code Napoleon.[89] However, this principle is not explicitly stated in a special provision of a German Code, but acknowledged as a basic maxim in order to protect an individual from being forced to accuse him-/herself.[90]

c) High Court interpretation of scope, protected interests, etc. covered by general right

In addition to the exclusion of evidence on the grounds that a provision got violated, case law has attached manifold other implications to nemo tene-

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[87] BGHSt 14, 358 at 361 (14 June 1960).

[88] BGHSt 14, 358 at 361, at 364–365 (14 June 1960).

[89] See *J. Spencer*, in: Delmas Marty/Spencer (2002), pp. 610–611.

[90] Vgl. etwa BVerfGE 38, 105 at 113 (8 October 1974); BVerfGE 56, 37 at 43 (13 January 1981); BGHSt 37, 340 at 343 (19 March 1991); BGHSt 38, 214 at 220 (27 February 1992) and BGHSt 38, 302 at 305 (26 May 1992); SK/Rogall, Vor § 133, 73, 130 et seqq.; *Bosch*, Aspekte des nemo tenetur-Grundsatzes aus verfassungsrechtlicher und strafprozessualer Sicht (1998), 24 et seqq.

tur:[91] Each accused has the right to refuse to answer questions and may not be punished for exercising this right in any way.[92] According to the nemo tenetur-principle the court must not regard or treat silence as an inferior strategy of defence.[93] As a consequence an accused who remains silent in all respects and during the whole trial must not be regarded as worse off compared to the one who testifies.[94] The silent defendant, however, risks paying a (high) price, since confessions might lead to a mitigation of punishment.[95]

2. The Protection Against Involuntary Self-Incrimination: Torture, Coercion, Threats, Promises, etc.

a) Constitutional Provisions

The German constitution does not contain an explicit provision banning torture or comparable mistreatment. However, according to Article 1 GG "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.", and thus it condemns any kind of ill-treatment. Article 104 (1) GG states with regard to the rights of persons in detention: "Persons in custody may not be subjected to mental or physical mistreatment."

The decision of the Federal Court of Justice in the Tape Recording case illustrates post-war reasoning when it stresses that the instructions of § 136a StPO are not isolated rules, but have to be seen in the constitutional context of the criminal procedure based on the rule of law that protects the human dignity.[96]

Nevertheless, the Gäfgen Case in Germany, at the beginning of this millennium, launched a discussion about the legitimacy of "torture for res-

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[91] See *Grünwald* JZ 1981, 428; *Rogall* NStZ 1998, 67 et seq.; *Weßlau* StV 1997, 343 on the one hand, and *Hackethal,* Der Einsatz von Vomitivmitteln zur Beweissicherung im Strafverfahren (2005), 137; *Neumann,* FS E.A. Wolff, 376; *Verrel,* Die Selbstbelastungsfreiheit im Strafverfahren (2001), 223 on the other hand.

[92] BGHSt 38, 214 at 218 (27 February 1992); *Beulke* (*supra* note 23), marginal number 467; *Böse*, GA 2002, 99 et seqq.; *Weßlau*, ZStW 110 (1998), 1 et seqq.

[93] *Torka,* Nachtatverhalten und Nemo tenetur (2000), p. 74; *Böse,* GA 2002, 119.

[94] BGHSt 32, 140 at 144 (26 October 1983); BGH StV 1989, 90; *Miebach,* NStZ 2000, 235.

[95] See *Bosch* (*supra* note 90), 197 et seqq.; *Hönig,* Die strafmildernden Wirkung eines Geständnisses im Lichte der Strafzwecke (2004), 78 et seqq. Insofar one could claim, that it is possible in Germany that from the accused's silence a legal inference of guilt is drawn. Because a court may use a stubborn denial by the accused as evidence of the fact that the accused is lacking in remorse and may justify imposing a more severe sentence.

[96] BGHSt 14, 358, at 365 (14 June 1960).

cue" ("Rettungsfolter").[97] Gäfgen had abducted a boy and killed him. Subsequently he deposited a letter at the parents' place asking for money. The police secretly observed him picking up the ransom and arrested him. Not reckoning the victim to be dead already, the police officers dutifully informed the defendant that he was suspected of being a kidnapper, that he had the right to remain silent and that he may consult a lawyer. The following interrogation was conducted with a view to find out about the boy's whereabouts, but this undertaking was of no avail. The next day a police officer – attending the deputy chief's orders – threatened the defendant to provoke a considerably painful treatment (by a specially trained person) by not disclosing the child's fate, whereupon the defendant revealed the truth. The police found the corpse. In subsequent interviews the defendant reiterated his confession. Furthermore the police confirmed that the defendant had left other tracks, e.g. DNA traces on the ransom and corpse. After lower courts decided to admit this indirect evidence, the Constitutional Court – in answer to a constitutional complaint – turned down this (constitutional) complaint that also included the applicant's complains referring to the refusal by the Regional Court to exclude the use of all evidence obtained as a result of the confession extorted from him by threats.[98]

b) Statutory Provisions

§ 136a StPO explicitly prohibits confessions obtained by improper measures which impair the capability to decide freely whether to give evidence or not:

"(1) The accused's freedom to make up his/her mind and to manifest his/her will shall not be impaired by ill-treatment, induced fatigue, physical interference, forced administration of drugs, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
(2) Measures which impair the accused's memory or his/her ability to understand shall not be permitted.
(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent [to the proposed measure]. Statements which were obtained in breach of this prohibition shall not be used [as evidence], even if the accused agrees to their use."

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[97] *Hamm*, NJW 2003 946; *Hecker*, KJ 2003 210; *Jerouscheck/Kölbel*, JZ 2003 613; *Kinzig*, ZStW 115 (2004) 799 et seq.; *Saliger*, ZStW 116 (2004) 48 et seq.: *Hilgendorf*, JZ 2004 331 et seqq.

[98] BVerfGE NJW 2005, 656. The applicant had failed to raise this issue in the proceedings before the Federal Court of Justice.

c) High Court Jurisprudence Interpreting Effect of Violations of Above Provisions on Admissibility of Illegally Seized Evidence or Articulating Them in Case Law

Case law discusses extensively the question under which circumstances a confession or rather a statement must be excluded according to § 136a StPO which prohibits improper interrogation methods. The answer is based on a doctrine that regards any interrogation techniques which improperly affect the suspect's free will as illegal. For instance, fatigue must be avoided by granting any suspect sufficient sleep. However, if the suspect cannot find sleep because of restlessness, he/she may be questioned nevertheless.[99] To give analeptics may qualify as (forced) drugs application, whereas coffee may be served.[100] To administer emetics is prohibited according to § 136a StPO, even in cases in which drug dealers swallow drug packages during a police bust in order to suppress evidence.[101] We speak of illegal deception (and not a mere ruse) if the police tells a person bone-crushing evidence for prosecution is at hand, when, in fact, law enforcement agencies are in the dark.[102] To give a warning of arrest to a person who refuses to cooperate is illegal,[103] if this threat with imprisonment is actually only meant to interfere with the person's refusal to corporate, as is the promise of exemption from punishment as soon as a suspect incriminates an accomplice.[104]

A breach of § 136a StPO brings about an absolute exclusion of evidence, which is applied without any restrictions to all suspects involved in the case – may they have been subjected to coercion or not (e.g. as co-defendants).[105]

Cases of ill-treatment have led to controversial discussions lately in Germany in two situations: (a) refers to the admissibility of indirect evidence obtained by illegal questioning (Gäfgen case); (b) alludes to the admissibility of evidence received from a third country where "rough inter-

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[99] BGH NStZ 1999, 630.

[100] BGHSt 11, 211 (4 March 1958).

[101] EGMR Urt. v. 11 July 2006 – 54810/00, NJW 2006, 3117 "Jalloh/Deutschland"; BVerfG StV 2000, 1; KG Berlin NStZ-RR 2001 204; *Eisenberg,* Beweisrecht, no. 1638.

[102] BGHSt 35, 328 (24 August 1988).

[103] BGH GA 1955, 246; StV 2005, 201; see also: BGH StV 1996, 76; *Roxin/Achenbach* (*supra* note 76), § 25, 24.

[104] OLG Hamm StV 1984, 456.

[105] The Regional Court (9 April 2003), although dismissing the application for the criminal proceedings to be discontinued in a separate decision, held that the threat to cause the applicant pain had been illegal pursuant to § 136a StPO (and also pursuant to Article 1 and Article 104 (1) GG and Article 3 ECHR), and triggered exclusion of evidence; BGH bei *Dallinger,* MDR 1971 18; see furthermore: LG Stuttgart NStZ 1985 569; *Eisenberg*, Beweisrecht, 712; but also: OLG Köln NJW 1979 1218.

rogation" (or rather torture) was – and still is – regarded a legal method to question a suspect (Motassadeq case).[106]

The admissibility of evidence in the Gäfgen case has been discussed above.[107]

The Motassadeq case has not been discussed as intensely by academics, although it raises important questions with regard to international law enforcement: May a court use statements which have been allegedly obtained under torture in a third country? Although German courts acknowledge the exclusionary rule of Article 15 UN-Torture Convention in general (and would ban such (tainted) evidence consequently),[108] they take up a reluctant stance on cases of (alleged) torture abroad and exclude coerced evidence in this context only if inhuman ill-treatment during the interrogation (abroad) has actually been proven.[109]

d) Admissibility of Indirect Evidence (Fruits of the Poisonous Tree)

Whether indirect evidence gained by forbidden treatment of a suspect is admissible is subject to a highly controversial discussion in Germany.[110] Three positions can be distinguished: (1) Case law refers to the wording of § 136a according to which the use of a coerced statement is prohibited; but otherwise the paragraph remains mute (about the rest).[111] Thus indirect evidence may be admitted, in particular if law enforcement agencies can get hold of the evidence by way of the "hypothetical clean path".[112] However, not all courts follow this doctrine.[113] (2) The opposite standpoint[114] asks for the adoption of a "fruit of the poisonous tree doctrine" which bans the use of indirect evidence,[115] in the hope such an approach may deter

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[106] OLG Hamburg NJW 2005, 2326; *Salditt*, FS Hamm, p. 595.

[107] See *supra* III.2.a).

[108] BVerfGE EuGRZ 1996, 328; BVerfG NJW 2004, 1858; OLG Hamburg NJW 2005, 2328; Schomburg/Lagodny/Gleß/*Hackner-Lagodny* § 73 IRG, marginal number 90a.

[109] OLG Hamburg NJW 2005, 2326 (14. June 2005); BGH NStZ 2004, 343 (4 March 2004); BGH NStZ 2008, at 643–644.

[110] See L/R-Gless, § 136a, marginal number 75; *Eisenberg*, Beweisrecht, 714 et seqq.; *Müssig*, GA 1999 136 et seq.

[111] BGHSt 34, 362 (28 April 1987), considering the hypothetical clean path OLG Hamburg MDR 1976, 601; OLG Stuttgart NJW 1973, 1941.

[112] See *supra* I.2.c)cc).

[113] See for example, LG Hannover StV 1986, 522.

[114] *Eisenberg,* Beweisrecht, 714 et seqq.; *Grünwald* (*supra* note 32), 158; *Beulke,* ZStW 103 (1991) 669.

[115] Aus U.S.Perspektive und rechtsvergleichender Sicht: *Thaman*, 45 St. Louis Law Journal 581 (2001); zur U.S. Doktrin see also *Forbes,* 55 Fordham L. Rev. 1221 (1987).

police from using illegal questioning techniques.[116] (3) A conciliating approach in jurisprudence and literature[117] votes for a balancing approach in each particular case.

In the Gäfgen Case[118] the question was whether the continuous effect of the threat of violence against the defendant as well as the finding of the corpse, which had become known to the investigation authorities because of the statements extracted from Magnus Gäfgen ("the applicant"), tainted all further statements and made them inadmissible in the on-going criminal proceedings. The Frankfurt am Main/ Hesse Regional Court took the conciliatory approach according to which, in the particular circumstances of the case, a balance of interests had to be carried out, taking into account, in particular, whether there had been a flagrant violation of the legal order, notably of provisions on fundamental rights, and also considering the seriousness of the offence investigated.[119] Thus the Court admitted the statements made at the later hearing, since the applicant had been instructed anew about his right as a defendant to remain silent and nevertheless had made again the same confessions.

e) Effect of International Human Rights Jurisprudence

Article 3 of the European Convention on Human Rights states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Whether and when this provision triggers an exclusion of evidence in German criminal proceedings has been discusses recently in the Gäfgen Case.[120] Gäfgen submitted his case to the ECHR, claiming "his right to a fair trial as guaranteed by Article 6 of the Convention, comprising [among other] a right not to incriminate himself".[121]

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[116] For a comparative view (from a German perspective) see: *Harris*, StV 1991 313; *Salditt*, GA 1992 59; zur Berücksichtigung hypothetischer Ermittlungsverläufe im deutschen Strafverfahrensrecht: *Jahn/Dallmeyer,* NStZ 2005 297 et seqq. with further references.

[117] BGHSt 27, 329 (21 December 1977); BGHSt 29, 244, at 249 (18 April 1980); BGHSt 34, 362 at 364 (28 April 1987); OLG Stuttgart NJW 1973, 1942.

[118] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05.

[119] LG Frankfurt StV 2003, 325: "Balancing the severity of the interference with the defendant's fundamental rights – in the present case the threat of physical violence – and the seriousness of the offence he was charged with and which had to be investigated – the completed murder of a child – makes the exclusion of evidence which has become known as a result of the defendant's statement – in particular the discovery of the dead child and the results of the autopsy – appear disproportionate".

[120] See *supra* note 118 as well as *supra* III.2.a).

[121] See *supra* note 118.

In its judgment[122] the ECHR stresses that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. The said article does not make any provision for exceptions and prohibits inhuman treatment such as Gäfgen was subjected to.

Consistent with previous case law the ECHR, however, conceded that it would not decide on the admissibility of a particular type of evidence, but only whether the proceedings as a whole, including the way in which the evidence was obtained, had been fair.[123]

It pointed out that evidence recovered by measures found to be in breach of Article 3 of the Convention, such as Gäfgen's confessions obtained by means of torture or other ill-treatment, always raises serious questions as to the fairness of the proceedings[124] and most probably renders the proceedings as a whole unfair, irrespective of whether the admission of the evidence is decisive in securing the applicant's conviction.[125]

Nevertheless, dissecting the details of the case, the Court eventually concluded that the use of the specific items of indirect evidence in the Gäfgen Case does not fall within the category of cases in which such use automatically renders the trial unfair under all circumstances, because the national courts had excluded not only the extracted statements as such, but also all other statements that might have been made as a result of the continuous effect of the ill-treatment in breach of Article 3. However, there were enough "reliable" items of evidence left in order to uphold Gäfgen's conviction, like DNA tracks on the ransom and where the corpse was located.[126]

3. The Protection Against Unknowing Self-Incrimination: the Miranda paradigm

a) Constitutional Provisions on Admonition of Right to Silence/Counsel

The constitution does not offer an explicit provision protecting the defendant from unknowing self-incrimination. But the Federal Court of Justice

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[122] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05.

[123] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05 no. 97.

[124] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05 no. 98 with reference to İçöz v. Turkey (dec.), no. 54919/00, 9 January 2003; Jalloh, cited above, §§ 99, 104; Göçmen v. Turkey, no. 72000/01, § 73, (17 October 2006); and Harutyunyan v. Armenia, no. 36549/03, § 63, ECHR 2007).

[125] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05 no. 99 with reference to Harutyunyan, cited above, §§ 63, 66 and *Göçmen*, cited above, §§ 74–75.

[126] ECHR judgment (30 June 2008) Gäfgen v. Germany, Application no. 22978/05 no. 108.

decided in an early judgment that the Miranda-type[127] warning of § 136 (1) StPO expresses the basic position with regard to criminal procedure based on rule of law, according to which human dignity must be respected.[128]

b) Statutory Provisions on Admonition of Right to Silence/Counsel

§ 136 (1) StPO and § 163 a (3) and (4) oblige all law enforcement agencies to instruct a defendant:[129] "At the commencement of the first examination the accused shall be informed of the offense with which he[/she] is charged and of the applicable penal provisions. He[/she] shall be advised that the law grants him[/her] the right to respond to the accusation", or to remain silent, and at all times, "to consult with a defense counsel of his/her choice".

c) High Court Jurisprudence Interpreting Effect of Violations of Above Provisions on Admissibility of Illegally Seized Evidence or Articulating Them in Case Law

Whereas in previous case law, according to § 136 (1) StPO, advising the accused of his/her rights were not mandatory, but "advisory" and in case of default did not automatically result in the exclusion of confessions or self-incriminating statements,[130] recent jurisprudence has established a different doctrine: Today the Federal Court of Justice sanctions violations of such qualified instruction duties. In principle evidence is excluded, if law enforcement agencies interrogate a person without giving prior and adequate information about his/her right to remain silent or to consult with a defense attorney.[131] In 1993 the Federal Court of Justice finally dismissed strong features coming from the inquisitorial model, emphasising that the defendant was a party not an object of criminal proceedings. Legal scholars have embraced this decision.[132] Unlike in US or UK law, there is no formal charging in Germany. The instructions asked for by § 136 (1) StPO must be given "when the suspicion already present at the beginning of the interrogation has so thickened that the suspect can seriously be considered a

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[127] Unlike Miranda, however, this warning does not require the suspect to be in custody. For further information see: *Thaman*, 45 St. Louis L.J. 581 at 584.

[128] BGHSt 14, 361 at 364–365 (14 June 1960); see *supra* I.1.

[129] The duty to caution was introduced in 1964, albeit in a different mode; *Gless,* in: Jung/Leblois-Happe, to be published in 2009.

[130] See Judgement BGHSt 22, 129 (30 April 1968). See also Judgement BGHSt 22, 170 (31 May 1968); BGHSt 31, 395 (7 June 1983). In 1974, the BGH held that the administration of the required warning in the judicial phase was mandatory.

[131] BGHSt 39, 349 at 352 (12 October 1993).

[132] *Rieß* JR 1993, 334.

perpetrator of the investigated crime".[133] The duty to instruct arises regardless of who is conducting the interview, be it the police, the prosecution service or a judge. If the extraction of information, however, is not exercised during a *formal* interview, the question of advising about rights is answered differently.

aa) Official Interview of Defendant by Law Enforcement Agencies

German courts oblige law enforcement agencies to give qualified instructions to the suspect before official interviews are conducted. It is essential that the suspect's right to remain silent is not endangered and that the accused is aware of this privilege. The instruction has to be repeated should there be any doubts about comprehensibility on the suspect's side.[134] Or, if an interrogator only learns during the questioning that a person examined as a witness actually turns out to be a suspect, he/she must not only inform the person of his/her right to have the privilege to refuse to give evidence, but also of the fact that nothing which had been said so far may be used as evidence in the subsequent proceedings ("qualifizierte Belehrung").[135]

Although case law has been rather defendant-friendly, courts do grant exceptions to the exclusionary rule and admit statements gained during an interview without proper cautioning, if the accused knew his rights (e.g. from earlier proceedings).[136]

bb) Inofficial/Undercover Extraction of Information from the Defendant

Case law struggles to handle information gathered during *informal* interview situations, in particular in the context of secret surveillance and undercover investigations. In those instances qualified instruction duties may be neglected, and thus the suspect is exposed to undue conduct. For example, must a placement of an undercover agent in the cell of an incarcerated suspect lead to the exclusion of evidence? German law does not accept this kind of information as formal evidence, but grants the option to use such material as a lead to find further untainted evidence.[137]

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[133] BGH NStZ 2007, 653 at 654; BGHSt 37, 48 (31 May 1990); BGHSt 38, 214 at 228 (27 February 1992); BGHSt 40, 211 (21 July 1994).

[134] BGHSt 39, 349 (12 October 1993).

[135] BGH Urteil vom 18 December 2008 – 4 StR 455/08 mit Anmerkung *Gless/Wennekers*, to be published in Juristische Rundschau 2009; BGHSt 51, 367 (3 July 2007).

[136] BGHSt 47, 172 (22 November 2001) (Pizzeria Murder): defendant knew from other criminal proceedings about his right to consult a lawyer and asked for one.

[137] BGHSt 34, 362 (28 April 1987); *Schneider*, Verdeckte Ermittlungen in Haftanstalten, NStZ 2001, 8.

In general the courts tend to admit information gathered by undercover police officers following roughly the rules governing evidence admission in cases of telephone tapping. Said rules render evidence inadmissible should a measure have been illegal from the beginning, but admit evidence if only minor formal regulations have been violated.[138] Admissibility of evidence is rejected, if an undercover agent purposely questions a defendant in order to circumvent the privilege against self-incrimination.[139] In doing so he dirties his hands and taints the evidence.

The admission of information obtained by private persons, including police informants, follows different rules, the focus being on the protection of privacy and a minimum standard of "fair trial" rather than on a clean hands approach. An illustrative example offers the case law on phone entrapments ("Hörfallen"), during which a private person induces a defendant to talk on the phone while police officers overhear the conversation.[140] Such information is admissible as evidence, if it serves to prosecute a severe crime, and if otherwise the investigation would be probably less successful or significantly more difficult.[141] However, information gathered with the help of private persons may be used as evidence in criminal proceedings, although with restrictions which guarantee a minimum of "fair trial" and privacy.[142] If, for example, the police places a person into the cell of an incarcerated person, who cannot retreat into an own sphere of privacy, the information obtained may not be used as evidence, because law enforcement agents circumvent a formal interview including an advise on the defendants' rights etc on purpose.[143]

The courts justify the different rules of handling evidence gained in informal undercover police questionings on the one hand, and formal questionings on the other hand, on the grounds that only during official interrogations the accused is confronted with the authority of law enforcement and thus has to react to a charge.[144] Whereas during informal interviews – or rather private conversations – he/she is free to reveal some knowledge

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[138] For further information see: *Beulke* (*supra* note 23) marginal number 481a.

[139] BGHSt 31, 304 (17 March 1983); BGH NJW 2007, 3138; see also BGHSt 33, 217 (9 May 1985).

[140] BGHSt 39, 335 at 348 (8 October 1993); BGH NStZ 1995, 410 und 1996, 200 with further references; see further: BVerfG NStZ 2000, 489.

[141] BGHSt 42, at 139–145 (13 May 1996): "zur Aufklärung einer Straftat von erheblicher Bedeutung, wenn die Erforschung des Sachverhalts unter Einsatz anderer Ermittlungsmethoden erheblich weniger erfolgversprechend und wesentlich erschwert gewesen wäre".

[142] BGHSt 44, 129 (21 July 1998).

[143] BGHSt 34, 362 (28 April 1987).

[144] BGHSt 42 at 139–145 (13 May 1996); BGHSt 44, 129 (21 July 1998); *Lesch,* ZStW 111 (1999) 638; *Müssig,* GA 1999, 126 et seq. see also BVerfG NStZ 2000, 489.

or keep silent. Such a formalistic approach, however, is criticized, because it fails to take into consideration that both situations – formal and informal interrogations – serve law enforcement and thus must trigger the defendants' rights.[145]

d) Admissibility of Indirect Evidence (Fruits of the Poisonous Tree)[146]

As explained above, according to a prevailing view neither the fruit-of-the-poisonous-tree-doctrine nor a strict rule against hearsay is accepted in Germany. Information gathered by actions of an undercover agent may, in principle, be funneled into the trial by questioning the contact officer, since hearsay evidence is admissible under certain circumstances and may be used as a lead.[147]

IV. Conclusion

Summing up the report on German law and its use of illegally obtained evidence in criminal proceedings it must be emphasized that the doctrine aspires toward a coherent concept which fits into the general legal framework, but does not present a clear-cut image. Until today the theories of admissibility of illegally gathered evidence rather give the impression of an emerging mosaic – although without a plan for completion. However, two basic patterns constantly recur:

The first one forms Beling's clean hands-doctrine, which more recently is often combined with a "fair trial"-approach.

Following this doctrine, the courts exclude evidence obtained in breach of procedural rules, not only if statutes like § 136a StPO ask for it explicitly, but also in other cases of grave breach – for example – of defendants' rights. In the latter cases, for instance, statements obtained by questioning suspects are excluded should qualified instructions prior to an official interview have been neglected. However, in certain situations German courts waive a claim and constantly weigh the interests of the defendant against broader law enforcement interests. This "balancing theory" has been constantly criticized in academia. Nevertheless it has to be noted that

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[145] LR-*Gless,* § 136 marginal number 12; *Roxin,* NStZ 1995 18; *Wesslau,* ZStW 110 (1998) 20 et seq.

[146] As with coerced or involuntary confessions, here the question is whether physical evidence found (weapon, drugs, etc.) may be used, even where the statement itself is non-usable. More sophisticated questions are whether a subsequent confession preceded by the proper admonitions, may be used following a confession taken without the proper admonitions.

[147] BGHSt 34, 362 (28 April 1987).

the approach of German jurisprudence is rather similar to the reasoning of French or English judges when it comes to the decision whether to exercise discretion to exclude evidence. The following aspects are considered: the severity of the breach versus the gravity of the offence imposed; the effect of the breach on the credibility of the evidence; the "technical" nature of the breach, following the assumption that the application of the correct procedure leads to lawfully obtained evidence.

The second constant pattern concerns the protection of privacy.

Following this doctrine, courts exclude evidence obtained or used involving a breach of the defendant's basic right to privacy pursuant to the constitution deducted from the "universal personality rights" ("allgemeines Persönlichkeitsrecht"). The underlying theory is that, in view of the constitution, there is an absolute sphere of privacy which bans the use of evidence obviously stemming from a person's private life, such as diaries, tape-recordings of conversations in intimate/private surroundings etc.

There are different possible explanations for the on-going development as well as for the lack of a master plan: (a) in a changing society with ever new technological inventions we constantly face new questions and challenges in this area; and (b) different legal frameworks have to be considered. Like other European jurisdictions, today's German criminal justice system is shaped by a code of criminal procedure dating from the nineteenth century, while, at the same time, based on a rather modern constitution, interpreted by ambitious courts. The German doctrine on exclusionary rules reflects the patchwork combining those two basic regimes, and German jurisprudence strives to reconcile law enforcement interests with basic rights.

German courts have handed down a complex and complicated body of case law with regard to the acceptance or refusal of illegally obtained evidence. In spite of some struggle and – warranted – critique from academia, it is important to acknowledge that German jurisprudence has achieved a high standard when it comes to guarantee "due process" for which the pool of information that could lead to the establishment of gets restricted in order to protect the rights of the defendants. Thus, while it was traditionally assumed that exclusionary rules are more prevalent in systems adhering to the adversarial system,[148] Germany, coming from an inquisitorial regime, has moved towards the protection of the criminal suspects' right to a fair trial as well as the right to privacy by enforcing exclusionary rules.

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[148] *Weigend,* 26 Harv.J.L. Pub.Pol'y, 157 at 168–9.

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Abbrevations/Glossary

BGH	Bundesgerichtshof, Federal Court of Appeal/German High Court
BVerfG	Bundesverfassungsgericht, German Constitutional Court
BVerfGE	Entscheidungssammlung des Bundesverfassungsgerichts, Decisions of the Constitutional Court (volumes)

Convention	European Convention on Human Rights
ECJR	European Court of Human Rights
GG	Grundgesetz, German Constitution
L/R	Löwe/Rosenberg, Kommentar zur StPO, 26. Auflage, Band 4, De Gruyter Recht, Berlin 2007.
SK	Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, Rudolphi Hans J/Frisch Wolfgang/Rogall Klaus/Schlüchter Ellen/Wolter Jürgen/Paeffgen, Hans U. (Hrsg.) Loseblattsammlung 54. Ergänzungslieferung 2008
StPO	Strafprozessordnung, German Code of Criminal Procedure