

〈강연〉

Remarks on the Fair Balance between Liberty and Security of a Person in Criminal Procedure in Germany*

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I would like to start my lecture with a case study:

A man is under suspicion of having committed a murder. There is a lack of evidence; there is no dead body, no witnesses, no other evidence. The suspect falls ill and he is hospitalized. While he is staying in the hospital the public prosecution wiretaps his mobile and intercepts his room in the hospital with the intention to record any conversation about his crime. In the night the suspect is talking to himself: “I killed her, oh no, forgive me, I killed her”.

May we use this statement in trial?

The criminal procedure as a whole and every individual order affects the basic liberties of the individual. Criminal proceedings typically affect the basic rights of the individual, the suspect, the accused, the witness, and the victim. By respecting the basic rights, the public authority and the prosecuting bodies indicate that the suspect or the accused is a person with rights in the criminal case. The accused is not just an object in a criminal case. The public authority and the criminal justice institutions which do not respect the fundamental rights of the suspect or the accused pursue a degrading criminal prosecution policy.

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On the other side, there is the interest of the public authority and of the society to maintain an effective system of criminal justice, to solve every crime and to judge every criminal in a fair trial. A liberal and constitutional government has the duty to establish a fair balance between the civil rights of a person and an effective criminal justice system. In recent years, a trend has been observed in the legal system and in society to install more and more surveillance measures and to increase public observation. The technical progress enforces the installation of more technical means of surveillance in the code of criminal procedure: interception of telecommunications, interception of computers and communication by the internet, interception and recording of words spoken on private and other premises, surveillance by visual observation. These investigation measures deeply affect the fundamental rights of the individual. The fundamental rights have to be respected in a criminal case. Also, the suspect and the accused have civil rights and their dignity is to be respected in a criminal procedure. The investigation measures affect these civil rights. There is no legitimation to do everything that is possible to solve a crime and to judge a criminal. This limitation is part of the self-conception of a constitutional state. The code of criminal procedure does not demand finding out the truth “at all costs”.

The conflict between the fundamental rights of a person on the one hand and the interest in an effective criminal justice system on the other hand appears in every society and in every legal system. The legislative and the legal system have to find an answer to it. In the legal system of Germany, a new law term was introduced some years ago. This law term imposes an absolute restriction on criminal justice and the legal practice. No investigative measure is allowed to affect this private area of a person. Statements concerning this area may not be used in a criminal case. There is an absolute exclusion of evidence. This law concept relates to the core area of private conduct of life, the privacy issue.

But, what is the meaning of this new and important law term?

Section 100c StPO

[Measures Implemented Without the Knowledge of the Person Concerned]

- (1) Private speech on private premises may be intercepted and recorded using technical means also without the knowledge of the person concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a particularly serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. on the basis of factual indications it may be assumed that the surveillance will result in the recording of statements by the accused which would be of significance in establishing the facts or determining the whereabouts of a co-accused; and
4. other means of establishing the facts or determining a co-accused's whereabouts would be disproportionately more difficult or offer no prospect of success.

[...]

(4) The measure may be ordered only if on the basis of factual indications, in particular concerning the type of premises to be kept under surveillance and the relationship between the persons to be kept under surveillance, it may be assumed that statements concerning the core area of the private conduct of life will not be covered by the surveillance. Conversations on operational or commercial premises are not generally to be considered part of the core area of the private conduct of life. The same shall apply to conversations concerning criminal offences which have been committed and statements by means of which a criminal offence is committed.

The Federal Constitutional Court¹⁾ devised this law term of the core area of the private conduct of life in its jurisdiction. This was an important reform established by the Federal Constitutional Court. In my opinion, the establishment of the law term of the privacy issue is the most important restriction in criminal procedure ever issued by the Federal Constitutional Court. The civil rights of a person in a criminal case are substantially promoted. The human dignity is promoted. The individual person has an area of intimacy and privacy where he or she is not subject to coercive measures of the public authority and of the criminal justice system. This is a very important signal for the legislative and legal practice to respect and to protect the

¹⁾ BVerfG 109, 279 = NStZ 2004, 270.

fundamental rights of a person and her or his privacy in these times of safety thinking and increased surveillance measures to avert acute dangers for the public safety. The legal practice is not allowed to do everything to solve a crime. The suspect and the accused have a right to privacy and intimacy and to be free from force and surveillance by the government. The core area of private conduct of life must not be covered by any surveillance.

Section 100c

(5) The interception and recording is to be interrupted without delay if during the surveillance indications arise that statements concerning the core area of the private conduct of life are being recorded. Recordings of such statements are to be deleted without delay. Information acquired by means of such statements may not be used. The fact that the data was obtained and deleted is to be documented. If a measure pursuant to the first sentence has been interrupted, it may be re-continued subject to the conditions set out in subsection.

If any investigation measure affects the core area of private conduct of life and if there are any statements concerning the core area of private conduct of life, such information may not be used in the trial. There is an absolute exclusion of evidence in every direction. There is no balancing of clashing interests. This is important. You may not use any statement concerning the core area of private conduct of life even to judge a serious criminal offence like murder or terrorism. If there is no other evidence for the crime the suspect has to be released from custody and there has to be a verdict of not guilty.

What is the meaning and what is the extent of the area of the private conduct of life? Which areas of privacy are part of it? Who defines the meaning: the legislative, the legal practice, the jurisdiction, the jurisprudence?

Or is it our duty here and now?

Due to the verdict of the Federal Constitutional Court establishing the core area of private conduct of life as a restriction for the criminal justice system, the legislative has included this law term in many codes, especially in the code of criminal procedure and also in the police law.

Section 100a

[Conditions Regarding Interception of Telecommunications]

(1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.

[...]

(4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they were obtained and deleted shall be documented.

But, the legislator has not defined the concept. Every investigation measure affects the civil rights and the fundamental liberties of the suspect. Especially, the imprisonment on remand deprives a person of liberty. The right to free and private conversation is violated by the interception of telecommunications, the right to privacy is affected by it. The DNA analysis affects the right of self-determination. All these investigation measures are allowed in accordance with a procedure prescribed by law. But when is the core area of the private conduct of life affected? When is such an order absolutely prohibited in a criminal case? When may information not be used in a trial because of the privacy issue?

The legislator is silent on this matter. It is the duty of the jurisdiction, of the legal practice and of the jurisprudence to find an answer.

The Federal Constitutional Court²⁾ rules: "It is part of the self-determination con-

cerning the core area of private conduct of life to express one's own feelings, emotions, thoughts, beliefs, without any fear to be watched by the government.” The court³⁾ also rules: “The individual has the right to an area free from any force and free from any observation by the government, the right to loneliness and reclusion.”

Prima facie, the place where this happens is our home. Our home is the area where the human dignity is to be respected. Art. 13 of the German constitution states: “The home is inviolable”

Here is another case example⁴⁾: Is it allowed to wiretap a room in a hospital? Is a room in a hospital your home — yes or no?

The Federal Court of Justice rules: “yes”. The room in a hospital is under protection of Article 13 of the constitution. The core area of private conduct of life is affected by wiretapping this area. A room in a hospital is like home, typically the area where the individual has a right to intimacy and privacy.

The legislative indicates in the code of criminal procedure under section 100c that not every taking place and every conversation in the home are part of the core area of private conduct of life. The home is not inviolable. It is not absolutely free from any surveillance. The individual and also the suspect live in social relationships. Communication is part of our self-determination. The protection depends on who is our conversational partner and what is our topic.

Section 100c

(4) The measure may be ordered only if on the basis of factual indications, in particular concerning the type of premises to be kept under surveillance and the relationship between the persons to be kept under surveillance, it may be assumed that statements concerning the core area of the private conduct of life will not be covered by the surveillance. Conversations on operational or commercial premises are not generally to be considered part of the core area of the private conduct of life. The same shall apply to conversations concerning criminal offences which have been committed and statements by means of which a criminal offence is

2) BVerfG 109, 279 (313).

3) BVerfG 27, 1 (6).

4) BGH NStZ 2005, 700; Ellbogen, NStZ 2006, 179.

committed.

A conversation with close friends or family members is more private than a business talk. The private conversation deserves more protection by law. The privacy is affected to a greater extent. Also, a conversation with a clergyman, the defense counsel or a doctor can be part of the core area of private conduct of life. The conversations are confidential under law. The privacy issue has two aspects, a private and a social side.

However, there is also a change in society and also in social life. People are talking in public, in a train, in the metro. They are talking about intimate and personal subjects in public, and everyone can hear what they are saying. Personal and intimate information and photos are published on facebook or in the internet. The social behavior especially of young people is changing. The lack of popular outrage in Germany and other countries about the bugging operations of the NSA or other intelligence services indicate the change in public opinion. People say: "It is not so bad", or "I have nothing to hide".

The law and the criminal system provide a high standard of protection for our fundamental liberties by protecting the core area of private conduct of life. Many people don't care about this restriction with regard to criminal procedure. Is it really the duty of the law to dictate the society and the individual how to protect their privacy?

It is not the legislative who defines the core area of private conduct of life. The jurisdiction is looking for an answer as far as this is possible. The legal practice, in particular, has to work with this restriction in everyday practice. Does the public prosecution, do the police accept this absolute restriction in their investigations?

The public prosecution and the police have to solve a crime and they have to find evidence to put the criminal on trial. This is the interest of an effective criminal justice system. The society believes in it. However, there is also the danger that the law enforcement authorities do not respect the fundamental liberties of the suspect in order to solve the crime. Especially, they have reservations regarding the core area of private conduct of life as an area free from any force and observation.

A case example⁵⁾:

The suspect was under suspicion of having committed a murder. He was supposed to have killed his wife. There was no evidence. The public prosecutor couldn't solve the crime. The dead body couldn't be found. What would you do now?

Section 100f

[Use of Technical Means]

(1) Words spoken in a non-public context outside private premises may be intercepted and recorded by technical means also without the knowledge of the persons concerned if certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a criminal offence referred to in Section 100a subsection (2), being a criminal offence of particular gravity in the individual case as well, or, in cases where there is criminal liability for attempt, has attempted to commit such an offence, and other means of establishing the facts or determining the accused's whereabouts would offer no prospect of success or be much more difficult.

The public prosecutor ordered the interception by technical means outside private premises hoping to record a conversation about the crime. The car of the suspect was bugged. One day the suspect was talking to himself in the car. The following statement was recorded: "Lola is dead, oh, I killed, oh no, I killed her".

The criminal court sentenced the accused to life using the intercepted and recorded statement in trial as a confession. The court did not consider the statement to be part of the core area of private conduct of life.

What do you think? Let us vote.

The Federal Court of Justice rules:

"Talking to yourself in a non-public context outside private premises is equivalent to a thought; it lacks social context, even if it takes place outside home."

The consequence is evident. The Federal Court of Justice claims an exclusion of evidence for statements relating to the core area of private conduct of life.

What has happened is this: The law enforcement authorities, the police, the public

⁵⁾ BGH NStZ 2012, 277; Warg, NStZ 2012, 237.

prosecution and even the criminal court violate the core area of private conduct of life. They observe and wiretap the suspect to solve a crime and the court uses a statement concerning the core area of private conduct of life to judge a criminal. The legal practice disregards the absolute restriction provided by the law. I assume that the public has no sympathy with the verdict of the Federal Court of Justice. The accused who is supposed to have killed his wife is acquitted for want of evidence. "Scandal!", shouts the public. Merely we, the criminal jurisprudence, have sympathy with this ruling. Or don't we?

Article 1 GG

[Human dignity - Human rights - Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

There has to be an area where the individual is free from any force and any observation by the government. There has to be an area where the individual can be alone with his feelings and thoughts and where the individual is unwatched in his social life and in his communication. We need this to preserve human dignity.

This restriction of public power has to be defended against two acute trends and changes in law and society. Firstly, there is the general tendency of government and legal system to extend investigation measures in the code of criminal procedure and in the police law in order to handle dangers for public safety from international terrorism and organized crime. Also, the technical progress makes the extension of surveillance measures easy. This is supposed to happen for the public benefit and for an effective criminal justice system. Orwell's "Big brother is watching you". Secondly, there is the lack of interest about this in society. People publish intimate information on internet platforms, and use their mobile phones in public, showing that they do not care about privacy.

Is it the duty of the legal system to defend the individual from him/herself? Is it the duty of the law system to dictate the protection of privacy? The question is wrongly phrased. The respect for human dignity and for fundamental liberties restricts the absolute public power. The government is restricted in its power by the

fundamental rights. Safety is not an absolute value. Freedom, our freedom restricts safety. There has to be a fair balance.

The protection of the core area of private conduct of life is absolute. The human dignity is inviolable. This is a restriction for secret surveillance measures and also for open investigations measures. Is it allowed to confiscate a diary? Is it allowed to use a statement from a diary in trial? The protection of the core area of private conduct of life applies to the criminal procedure and also to the police law.

My presentation just provided a glimpse into the conflict between the interest in an effective criminal justice system and the respect for the fundamental liberties of the individual. Generally speaking, the issue is the fair balance between liberty and security in law and in society. A former judge at the Federal Constitutional Court *Hoffmann-Riem* has complained that “there are too many interventions at the expense of freedom”. Total observation destroys liberty. The respect for civil rights and for human dignity has to be defended against all tendencies of the government and the public.

Let us struggle for these fundamental liberties!