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CRIMINAL LAW CASE NOTES AND COMMENTS

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Warren L. Swanson, *Editor*

Roger Eichmeier, *Assistant Editor*

LIE-DETECTOR TESTS AND "FREEDOM OF THE WILL" IN GERMANY*

An accountant employed by a finance company in Germany was accused by his employer of having embezzled 5760 *Deutsche Mark* (about \$1500) and of faking a burglary in an attempt to conceal the theft. The accused denied the accusations, and to prove his innocence he offered to take a lie-detector test if one could be arranged. A test was given by the American military at the request of the local public prosecutor, and the results apparently indicated that the accused was guilty of the offenses. Principally on the basis of those results, the employee was convicted of embezzlement and the "simulation of a criminal offense." Upon appeal, the conviction was reversed by the *Bundesgerichtshof*, the highest court of West Germany.¹ According to the Supreme Court, basic principles of German criminal law prohibit the use of lie-detector tests because they encroach upon the freedom of the defendant to form a decision and to act according to his own will.

The Supreme Court, although admitting that the first duty of a court in a criminal proceeding is to determine the truth, held that the search for the truth must be conducted in accordance

* The article also appears in volume 51 of the *Northwestern University Law Review* at page 446. That article contains additional discussion of the historical and philosophical aspects of the German attitude towards the use of lie-detector tests.

¹ West German Supreme Court, February 16, 1954, 5 *Entscheidungen des Bundesgerichtshofes in Strafsachen* (hereinafter B.G.H. St.) 533.

with established legal principles.² The accused is a party to, rather than the object of, a criminal proceeding, and he cannot be subjected to any searches or other limitations which are not provided for by law.³ Moreover, law enforcement agencies have no greater liberty than the courts in examining an accused because he has an inviolable right at every stage of the proceedings to make his own decision with respect to his answer to the criminal charge.⁴ The accused cannot be forced to cooperate with officials in their search for the truth.⁵ This freedom of an accused is based upon principles of constitutional law and criminal procedure, as well as upon the concept that an individual is a self-accountable moral personality. Infringements upon this freedom of the will are prohibited *regardless of the accused's consent to the violation*. It was this right of the accused to decide whether and how to answer every question that the Supreme Court held to be irreconcilable with the application of a lie-detector test.

² *Contra*, SAUER. *Grenzen des richterlichen Beweises*, JURISTISCHE RUNDSCHAU, 3: 500-501, Germany, 1949.

³ RADBRUCH. *Grenzen der Kriminalpolizei*, *Festschrift fuer Wilhelm Sauer*, 1949.

⁴ WUERTENBERGER. *Ist die Anwendung des Luegendetektors im deutschen Strafverfahren zulässig?*, JURISTEN ZEITUNG, 6: 772-773, Germany, 1951.

⁵ 1 B.G.H. St. 342.

The reasoning behind the decision is this: During a lie-detector test, the accused may voluntarily give answers to the questions presented; however, at the same time, his "true" answers—and thus the fact of his "guilt"—are actually obtained against his will. Such insight into the soul of the accused violates his freedom of decision and action. It must be prohibited in criminal proceedings because each individual has the right to retain an important and unre-nounceable psychic sphere which is necessary for the maintenance and development of his personality.

THE BASIC CONCEPT

"Freedom of the will" is an important concept in German criminal law and procedure. It signifies the notion of human dignity and respect for human rights. The basic explanation of the individual's relation to society is that human rights are not regarded as a privilege granted by society; rather, the individual is an integral part of a social order which is subservient to, and not the regulator of, the individual's rights, his position and his purpose in that society. German lawyers believe that an intimate understanding of the concepts of freedom of the will, freedom of the personality and the physical freedom of the individual is a prerequisite to understanding the German judicial system itself. Although the law is regarded as an ever-growing body which changes to reflect the intellectual progress or stagnation of a particular generation, the concept of a free will is recognized as a permanent and basic principle of the criminal law.⁶

Apart from the historical, philosophical and dogmatical aspects of the concept of freedom of the will, the primary sources of the protection afforded the human personality are the Constitution of the Federal Republic of Germany and the present Code of Criminal Procedure.

The Constitution guarantees the dignity of the individual, the right to free development of his personality and the physical safety of his person, and these rights can be limited only

as provided by law.⁷ The broad constitutional safeguards reaffirm principles which governed the German legal system prior to 1933, but which were completely disregarded by the Nazi regime.⁸

A more specific provision concerning the examination of an accused is set forth in Section 136 of the Code of Criminal Procedure which, literally translated, provides:

1. At the beginning of the examination the accused must be informed as to the nature of the punishable act of which he is accused. The accused must be asked whether he wants to answer anything with respect to the accusations.

As interpreted by the courts and most authorities on criminal procedure, this provision of the Code adequately expresses the broad scope of the protection which is to be given to the freedom of the will and personality of the accused. However, this once terror stricken nation preferred to leave no possible doubt with respect to limitations in examining detained persons; therefore, the legislature enacted Section 136a of the Code to prohibit specifically methods of interrogation which, under more general provisions of the Constitution and Code, were considered unlawful. Section 136a of the Code, literally translated, provides:

⁷ The relevant articles of the German Constitution, literally translated, are:

Article 1. The dignity of man shall be inviolable. To respect and to protect it shall be the duty of all state authority.

Article 2. Everyone shall have the right to free development of his personality insofar as he does not infringe rights of others or offend against the constitutional order or the moral code.

Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only in accordance with the law.

Article 104. The freedom of the individual may be restricted only on the basis of a formal law and only with due regard for the forms prescribed therein. Detained persons may not be subjected either to physical or mental ill-treatment.

⁸ Whether the guaranty of freedom of the personality now expressed in the Constitution affords more protection than the 80-year-old Code of

⁶ MEZGER, STRAFRECHT 85, 1949.

1. The freedom of the accused to form a decision and the freedom to act according to his own will shall not be impaired by ill-treatment, fatigue, bodily invasion, use of drugs, torture, deception, or hypnosis. Force can be used only to the extent permitted by the law of criminal procedure. The threat of measures not provided for by the law of criminal procedure, and the promise of a non-legally provided advantage are prohibited.

2. Measures which impair the memory and judgment of the accused are not allowed.

3. The prohibitions of paragraph 1 and paragraph 2 shall be in force without regard to the consent of the accused. Testimony received by offending against these prohibitions shall not be utilized even in the case where the accused consents to its use.

LIE-DETECTOR TESTS AS INFRINGEMENTS UPON "FREEDOM OF THE WILL"

The broad scope of the laws protecting the dignity and free will of the individual obviously raises many doubts as to the legality of the application of lie-detector tests. However, the problem was not discussed by German legal writers until "truth-serum tests" and lie-detector techniques were made available to the regular law enforcement agencies after World War II.

Both practices were discussed with reference to the questions of whether and to what extent the body of the accused could be utilized to elicit facts within his knowledge and thereby ascertain the truth and arrive at a just verdict regarding the case at hand. The conclusions reached concerning the legality of administering truth-serum tests were considered to be equally applicable with respect to the legality of lie-detector tests.⁹ Both means of interrogating an accused, in the opinion of most German authorities, represented illegal attempts to circumvent the right of the accused not to

express himself with respect to the criminal charge.¹⁰

The advocates of lie-detector testing, on the other hand, advanced the argument that such "silent communications" may lawfully be evaluated as evidence. Their reasoning was that lie-detector recordings are observations of the *external appearances* of the accused which are noticeable in a more exact form than when the accused is observed without an instrumental aid.¹¹ Section 81a of the Code,¹² which authorizes an examination of the body of the accused to establish facts which are relevant to the proceedings, was cited as the legal basis for lie-detector tests even when the accused objects to the test.¹³ Since the questioning during the test was thought not to impair the accused's freedom to act according to his own will, Sections 136 and 136a of the Code were not viewed as prohibitions against lie-detector tests.¹⁴

The argument that lie-detector test recordings are only a new method of observing involuntary external expressions was met with the argument that the recordings disclose the otherwise concealed psychic structure of the accused and that they are an actual attempt to discover what might be present only in the unconsciousness of the accused.¹⁵ Most authorities adopted this latter view and disapproved of any method of obtaining expressions which are not noticeable to the examiner himself. Under

¹⁰ See, e.g., KOHLHAAS. *Zur Anwendung des Luegendetektors*, JURISTISCHE RUNDSCHAU, 7: 450, Germany, 1953.

¹¹ LESS. *Zur Anwendung experimental-psychologischer Methoden by Zeugen*, DEUTSCHE RECHTSZEITSCHRIFT, 5: 322, Germany, 1950.

¹² Section 81a, literally translated, provides:

An examination of the body of the accused can be ordered in order to establish facts which are relevant to the proceeding. Other persons can be examined without their consent only for the purpose of ascertaining whether there exist on their body positive signs or effects of a criminal act.

¹³ LESS, *supra* note 11, at 322; ERBS. *Unzu-laessige Vernehmungsmethoden*, NEUE JURISTISCHE WOCHENSCHRIFT, 4: 386, Germany, 1951.

¹⁴ SEELIG. *LEHRBUCH DER KRIMINOLOGIE*, p. 242, 1951. ERBS, *supra* note 13, at 387.

¹⁵ WUERTENBERGER, *supra* note 4, at 772-773.

Criminal Procedure presents an interesting problem more from the point of view of practical usefulness against the techniques of a police state than as an abstract exercise in constitutional law.

⁹ See, e.g., the opinion of the highest state court in Rheinland-Westphalen, March 23, 1950. DEUTSCHE RECHTSZEITSCHRIFT, 5: 212, 1950.

this view, the lie-detector disclosure of secret physiological reactions, followed by the examiner's evaluation, becomes the equivalent of an involuntary communication.¹⁶ And obtaining communications regardless of whether the accused is willing to make them violates his right to decide whether he wants to answer the criminal charge.¹⁷ The opponents of lie-detector testing have several grounds for refuting the argument that the tests are authorized under Section 81a of the Code as an "examination of the body of the accused." Thus, one group argued that the intent of the legislature in enacting section 81a was to allow only proof of the physical condition of the body of the accused.¹⁸ Another group argued that section 136a controls to prohibit the use of lie-detector tests inasmuch as the prohibitions of that section were meant to be illustrative of unlawful practices rather than an all inclusive listing.¹⁹ A third group opposing the use of lie-detector tests argued that even if sections 136 and 136a were not directly controlling, the application of lie-detector tests would be prohibited by the fundamental principles of criminal law which recognize the right of an accused to remain silent without fear of thereby incurring legal disadvantages.²⁰

The prevailing view which considers the use of lie-detector tests to be unlawful is in harmony with Article One of the Federal Constitu-

tion and the statutory provisions which protect the individual's free will.²¹ This regard for the dignity and freedom of decision of the human being as a moral person does not leave any room for the use of devices which explore his inner life.²²

Furthermore, most authorities agree with the decision of the Supreme Court that the constitutional prohibition of the use of lie-detector tests cannot be waived by the accused.²³ The state has an affirmative duty under Article One of the Constitution to safeguard the human dignity and free will. Thus, these rights are of super-individual concern and must be protected against infringements by the individual himself as well as against encroachments by the state authority.²⁴ The right of an accused to decide whether and how to answer a criminal charge must not be renounceable if the smallest degree of moral freedom is to be preserved in the criminal procedure.

Practical considerations, as well as general principles, support the exclusion of lie-detector tests regardless of the accused's consent. A refusal to submit to the test, or even a lack of a spontaneous offer to take it, may result in an unfavorable reflection on the accused.²⁵ Furthermore, an option to take the test would appear to be a type of indirect coercion which is expressly prohibited by Section 136a (3) of the Code.²⁶

A separate aspect of the problem under consideration concerns the use of lie-detector tests in the interrogation of witnesses. The authorities who are opposed to the use of lie-detector tests have little, if any, difficulty in determining that such examinations are unlawful inasmuch as the safeguards provided by Section 136a of the Code have been made applicable to the

¹⁶ NOWAKOWSKI. *Sind Verfahren zur Erzielung unwillkuerlicher Aeusserungen des Beschuldigten zulaessig?*, JURISTISCHE BLAETTER 71: 4, 7, Austria, 1949.

¹⁷ KOHLHAAS, *supra* note 10, at 451; NOWAKOWSKI, *supra* note 16, at 6; WUERTENBERGER, *supra* note 4, at 773.

¹⁸ NIESE. *Narkoanalyse als doppelfunktionelle Prozesshandlung*, ZEITSCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 63: 199, 224, Germany, 1951; EBERHARD SCHMIDT. *Zur Frage der Fumarkon-Versuche in der gerichtlichen Praxis*, SUEDE-DEUTSCHE JURISTEN-ZEITUNG, 4: 450-452, Germany, 1949; WUERTENBERGER, *supra* note 4, at 774.

¹⁹ METZ. *Zur Frage der Zulaessigkeit der Anwendung des "Lugendetelektors" im Strafverfahren*, NEUE JURISTISCHE WOCHENSCHRIFT, 4: 752, Germany, 1951.

²⁰ WUERTENBERGER, *supra* note 4, at 773

²¹ KARL PETERS. *Narkoanalyse?*, JURISTISCHE RUNDschau, 4: 47, Germany, 1950; SCHMIDT *supra* note 18 at 456; SCHOENKE. *Grenzen des Sachverstaendigenbeweises*, DEUTSCHE RECHTSZEITSCHRIFT, 5: 145, Germany, 1950.

²² NIESE, *supra* note 18, at 226.

²³ See notes 18, 21, *supra*.

²⁴ NIESE, *supra* note 18, at 226.

²⁵ KOHLHAAS, *supra* note 10, at 450.

²⁶ METZ, *supra* note 19, at 752.