Experience with the Protection of Fundamental Rights in the Administration of Criminal Justice in Germany

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I hope you don't expect me to be full of praise. When we compare fundamental rights on paper and fundamental rights in practice, there is often a large gap, sometimes even an abyss. In their everyday practice under the German justice system and in their front-line work and drudgery, defence lawyers are often faced with a certain mindset among judges. This mindset is more than vaguely reminiscent of a confession which was once ascribed to the German petty bourgeois mind by Heinrich Heine – a mentality that delights in one's own preconceived ideas: "I have acquired my own ignorance!"

Again and again, searches are conducted, arrest warrants are issued and assets are seized even though suspicion has not yet reached a level of clarity that might in fact justify such steps. Sometimes judicial authorities even forget to maintain the outward trappings of constitutionally correct procedures. For example, in a case which is currently pending in Leipzig[1], the prison cell of a pre-trial detainee was searched, but the relevant search warrant was issued by the public prosecutor upon no more than verbal instruction from the investigating magistrate. The prosecutor sent the magistrate a basic yet incomplete file memo, but was kind enough to keep the letterhead of the local court available for use in his computer, so that the draft decision – once the file had been emailed – could easily be completed by adding the relevant document number, date and signature. The exclusive responsibility of the judge, as specified in the German Constitution, is actually a matter of substance. Its purpose is to ensure that the defendant receives, as it were, preventative legal protection[2] through a separate investigation of the suspicion and of the investigative objective. Yet in the above-mentioned case this principle had apparently not had any impact on daily practice[3].

As defence lawyers we are clearly supported by the fundamental tenets of constitutional principles – and indeed despite all adverse tendencies in daily practice. Moreover, there is always the prospect – even if it involves a bit of an effort at times – that such principles will find their channels. This being so, we can thank above all one particular constitution: the German Federal Constitutional Court.

Apart from the US Supreme Court, there is probably no other court that is so far-reaching and permanently prominent in moulding the constitutional structure of the body politic in all its facets as the German Federal Constitutional Court. This also includes criminal justice procedures which invariably involve intervention with a person's fundamental rights, especially their right to freedom. From the very beginning, therefore, such procedures have always been subject to ongoing constitutional considerations and decisions.

This has not always been welcomed by academic circles or indeed in ordinary judicial practice. The principles developed by the Constitutional Court for the handling of criminal procedures legislation have often been seen as a burden rather than an asset and as something that might crush a long tradition – a strictly formal, finely attuned system of establishing the truth:

Until the day he died one of the Nestors of German criminal procedures, *Eberhard Schmidt*, never grew tired of rebuking an age in which the principle of proportionality has "established itself in a rule of tyranny"[4]. A leading commentator in the 1970s, *Karlheinz Meyer*, stated that the German Federal Constitutional Court had "superimposed a tight-knit and sometime doubly secured network of constitutional principles upon criminal procedures", so that the law had "in many areas become unpredictable"[5]. Even the Federal High Court, he said, had been rather reticent, only rarely basing the reasoning in its decisions on constitutional standards and principles and indeed only in order to confirm conclusions which it had already obtained under ordinary law. Moreover, whenever a decision did differ for once[6], says Karlheinz Meyer, the Federal High Court immediately attracted vehement criticism from conservative quarters. In such cases the Court was told that it should not, for goodness' sake, succumb to the temptation of replacing criminal procedures with legal principles which – in the case of the "fair trial" principle – "eludes any detailed specification and cannot even be translated into German"[7].

In some cases, the occasional reticence of ordinary courts towards the guidelines provided by the German Federal Constitutional Court even took the form of open rebellion. Quite recently, for instance, the Third Criminal Panel of the German Federal High Court declared that the decisions of the chambers of the Constitutional Court – each time involving three persons – should be considered non-binding unless the question underlying their verdict has previously been subject to a Constitutional Court Panel decision involving eight persons[8]. However, this view did not meet with any wider enthusiasm[9].

This repeated reluctance to accept the jurisdiction of the Constitutional Court – despite a declared belief in the merits of the Court to ensure the constitutionality of criminal procedures – is not the result of arrogance but of an understanding that the rules for criminal procedures in themselves are already "legal regulations in implementation of the German Constitution"[10]. It is an understanding that has prevailed since the early beginnings and which has become second nature since then. As a result, procedural law has been elevated almost to the same level as the Constitution itself. This understanding is based on historical experience whereby "protective forms"[11] are seen as being of direct value to ensuring freedom, while believing that any extra-procedural considerations of expediency must lead to tendencies of arbitrariness and lack of freedom[12].

Nevertheless, although it is understandable that there should have been this reticence towards and partial criticism of the concepts and principles developed by the Constitutional Court, especially in academic literature, it did not cause any destabilisation of the system of standards applied under ordinary law. On the contrary, one of the lasting merits of the German Constitutional Court is that it created a direct constitutional basis for the fundamental principles of criminal law and criminal procedures and that it ensured recognition for those principles. In substantive criminal law this is particularly true for the presumption of innocence, and in criminal procedures it is true for the principle of establishing the truth of a person's culpability as the central element in criminal justice.

This is not the place to explain the full bandwidth of Constitutional Court rulings on criminal law and procedures. Suffice it here to mention several examples of fundamental decisions taken by the Constitutional Court over the last few years which have served to strengthen the rights of the defence and to protect fundamental rights in criminal proceedings.

During the investigative stage of criminal proceedings in Germany, the Public Prosecutor has a strong position which almost exceeds all others[13]. This can be seen, particularly, in the use of investigative records. Although the defence lawyer is, in principle, entitled to review all records (including all evidence), as expressly specified in the German Code of Criminal Procedure (StPO section 147.2), there is one exception which was treated as a rule for many decades and which can be found in the next subsection: If the conclusion of investigations has not yet been noted in the investigative records, then the defence lawyer can be refused access to documents "if access might jeopardise the purpose of investigations" (StPO section 147.2).

What this meant in practice was that Public Prosecutors could exercise discretion (one might also call it arbitrariness) in handling the right of access to investigative records. Any defence lawyer wanting to act in a professional capacity was therefore condemned to a fairly long period of inactivity. After all, who could advise a client to make a certain statement if they did not know the results of the investigations, so that their client might then seriously jeopardise their own position? Any proactive defence was rendered impossible by Public Prosecutors keeping the relevant records to themselves.

A change was effected pursuant to a decision taken by the Second Panel of the German Federal Constitutional Court on 4 August 1994[14]: It was recognised that there are indeed constitutional considerations under which access to records may need to be restricted in cases where access could jeopardise the success of investigations. If, however, the defendant is in prison, he or she may under certain circumstances have an interest in accessing their records, and this interest must not permit postponement until the conclusion of investigations. After all, while investigations as such do not regularly interfere directly with the rights of a

defendant, this instance nevertheless constitutes interference with the defendant's right to personal freedom under the German Constitution, Article 2.2.2, which seeks to safeguard personal freedom and must also be respected as a guarantee of this right by procedural law. This fundamental right apparently gives more weight to the defendant's interest in information than to the need to establish the truth through criminal procedures. The decisive sentence is: "It follows from the defendant's right to a fair trial, to constitutional proceedings and to a fair hearing that he or she, being imprisoned, must also be entitled to their defence lawyer's access to the relevant records if and to the extent that the information contained therein is required by the lawyer for an effective impact on the court's judgement and if it is not sufficient for the lawyer to be verbally instructed concerning the facts and evidence on which the court intends to base its decision."

The decision is respected in practice. Another way in which the decision may be a blessing is that Public Prosecutors often hesitate now before applying for an arrest warrant, as the delay prevents them from prematurely having to disclose their working methods. Since then the German Constitutional Court has expanded this jurisdiction to cases where the defendant has not been imprisoned but nevertheless faces seizure in rem of his or her assets[15]. This is justified with the beautiful words: "In criminal proceedings an interest in confidentiality works in dubio pro reo". It is generally explained by saying: "The principle of the rule of law demands that a defendant who is affected by criminal procedures must be enabled to defend themselves against those procedures and against the underlying accusation; they are enabled by receiving the relevant knowledge of the decision-making criteria; moreover, they must receive the information no later than at the subsequent stage, but definitely while judicial proceedings are still in progress."[16]

The German Federal Constitutional Court has also repeatedly provided ground-breaking legal decisions in the area of pre-trial custody. In particular, it is worth highlighting the decision of the Second Panel of 7 October 1981. Here it was expressly stated for the first time that the formal guarantee of freedom, as specified in the German Constitution, Article 104.1[17], effectively elevates observance of formal regulations under a freedom-limiting act of law to the level of a constitutional requirement: "Any violations of the requirements and forms for freedom-limiting acts of law, as warranted by the German Constitution, Article 104.1, are therefore also violations of personal freedom."

"In Article 104.1 the German Constitution elevates the freedom-protecting forms derived from a given act of law to the level of a constitutional duty, and observance of this duty is safeguarded by the legal remedy of a constitutional appeal."[18]

This decision meant that the provisions of the German Code of Criminal Procedure (StPO) – and indeed of other freedom-limiting acts – were directly given the importance of constitutional regulations where they concern the requirements and procedures for enacting an arrest warrant.

Since then affected individuals and their lawyers have frequently made use of their right – after exhausting all other appeal options – to use the legal remedy of a constitutional appeal against procedural violations in issuing or maintaining arrest warrants. The Constitutional Court has made extensive and at times even vehement use of its self-claimed right to scrutinise an arrest warrant for its formal correctness and – while upholding the warrant – for strict compliance with the principle of urgency. According to the cases consistently settled by the Court, the constitutional principle of urgency demands that law enforcement authorities and criminal courts must take all possible and reasonable measures to conclude the necessary investigations with the required urgency and to help towards a court decision on the criminal acts of which the defendant is accused. Pre-trial custody beyond a duration of one year can thus only be justified under extremely exceptional circumstances[19].

In this respect it was not just the higher regional courts that received rebukes from the Constitutional Court. Even the German Federal High Court was not spared harsh criticism concerning the processing periods of appeals. In one case, for instance, a person had been imprisoned for several years, and his appeal was repeatedly successful. The relevant regional court and higher regional court decided to uphold the imprisonment, and the Constitutional Court therefore criticised those courts for not taking into account that the further handling of

the matter by the Federal High Court was going to cause further delays. The Chairman of the Third Criminal Division of the High Court was criticised as follows:

"In view of the exorbitantly long procedure of five and a half years at that time, it is simply incomprehensible that the appeal, presented on 20 February 2003, led to a hearing being scheduled as late as 26 June 2003. The chairman tried to justify this delay of over four months with the Division's schedule and above all with the fact that the fundamental legal issue raised by the appeal required in-depth preparations of the decision, including scrutiny of the wide-ranging relevant literature. However, he did not specify what other cases were pending which were even more pressing than the appellant's case and were therefore making it impossible to schedule the hearing any earlier. Neither did he say why, after a preparation period of over three months (one month for writing the preliminary opinion, over two months for its assessment and for the divisional dossier being read by the rapporteur and the chairman until the final divisional consultation) it should be necessary to have another in-depth period of preparation lasting for as long as four months. Another reason why this requires justification is that the result and the reasons for the decision of 24 July 2003 seem to be largely predetermined by a judgement that had already been given by the Federal High Court on 11 May 1976 (1 StR 166/76, BGHSt 26, 332 (335)), when a general policy decision was made concerning the legal reasons for section 168c.5.1 of the German Code of Criminal Procedure (StPO), and of course also because the defendant has important rights which are based on major values: these are his right to a fair trial and due process, the right to be heard (German

Constitution, Article 103.1) and the right to procedural 'equality of arms' in criminal proceedings.

Although it would be very difficult to specify any rigid time limits for conducting criminal proceedings, this cannot mean that a court of appeal should be free in the handling of its proceedings (see Krehl, StV 2005, p. 561 <562>). This is particularly true if – as in this case – the preceding stages of the procedure involved substantial delays. In such cases the legally stipulated demand for urgency regularly requires the court of appeal to give special attention to the matter in hand and to ensure that the appeal is dealt with swiftly (see Krehl, StV 2005, p. 561 <562>). This applies, in particular, if – as in this case – one possible outcome may well be the annulment of the judgement and remittal of the case for a renewed hearing and decision, occasioned by a procedural error attributable to the judiciary."[20]

The peremptory wording of this decision seems out of character with the style that can usually be found in the rebukes and exhortations presented by the German Federal Constitutional Court. Nevertheless, it seems appropriate to quote this passage at some length, as it illustrates the sometimes trenchant authority of the Court when dealing with its colleagues in the ordinary judiciary.

These two examples among the cases dealt with by the German Federal Constitutional Court should illustrate the matter sufficiently well in this context. However, despite the author's undeniable sympathy for the Constitutional Court, we must not forget that this court is faced with 4,000 to 5,000 constitutional appeals per year. There is never any certainty concerning the acceptance of an appeal, and the vast majority are rejected. The overall success rate is about 2%. For instance, a case is currently pending in Hamburg for which I wrote a frustratingly large number of constitutional appeals – eight in total. Six appeals – all of them extremely well substantiated – were rejected. The seventh appeal at least met with support from one of the constitutional judges, so that the entire panel had to pass a decision on the rejection of the appeal, which it did at a ratio of 7:1. The eighth constitutional appeal eventually brought about an annulment of a decision for an arrest[21] and subsequently the successful rejection of two appellate judges on the grounds of possible partiality.

Finally, contact with the German Constitutional Court can sometimes lead to endearingly absurd occurrences. One of them is the story of Michael Jauernik[22], a Bavarian who had moved to Hamburg and had then twice robbed the Deutsche Bank branch on Jungfernstieg.

During his many years in prison he developed into a knowledgeable amateur lawyer. He made over 300 submissions to the judicial authority of the Free Hanseatic City of Hamburg, wrote numerous applications to the Penal Execution Chamber of the Regional Court and complaints to the Administrative Court (because some facilities at Fuhlsbüttel Prison contravened local building regulations), thus getting on the

nerves of professional lawyers. (He certainly annoyed his local judicial authority, whereas 10% of his submissions to the Regional Court turned out to be successful.) The authority eventually wanted to get rid of him and discovered that he was a Bavarian. Following consultations with the Bavarian State Ministry of Justice, Jauernik was therefore transferred to Straubing in Bavaria from one day to the next. The Bavarians were confident that they would be better at dealing with their fellow countryman[23]. Jauernik then objected to this transfer through a constitutional appeal, whereupon the Constitutional Court signalled at an early stage that it would in fact consider the appeal. Unfortunately, however, the decision dragged on, as the Constitutional Court had problems agreeing whether the matter should be decided by the Panel or a Chamber. During the waiting period, when Jauernik was repeatedly put under special arrest at Straubing Prison due to various instances of unruly behaviour, I contacted Dr. Wolf, the academic assistant of the rapporteur (then Mahrenholz, Vice President of the Constitutional Court). To bridge the waiting period, Dr. Wolf[24] spontaneously suggested that it might perhaps be possible to convince Mahrenholz to talk to Jauernik on the phone, in Straubing, and to have a short chat with him. So this is what happened. In December 1992 the Straubing Prison office received a phone called from "Mahrenholz, Federal Constitutional Court", who requested to talk to Mr. Jauernik. The officer's reply was brief and to the point: "Anyone can claim that, mate!" He asked the caller to provide his phone number, so that he could ring him back and ensure that he was really dealing with a constitutional judge. The caller turned out to be genuine. Mahrenholz then talked to Jauernik for nearly half an hour, whereupon the prisoner was treated with kid gloves at Straubing. On 28 February 1993 a positive decision was taken by the Constitutional Court[25] and Jauernik was transferred back to Hamburg. The judicial authority gave up and placed him in the open prison section straight away. From this moment it was spared any further submissions, and Jauernik was released after one and a half years.

A constitutional court is a great blessing to the republic it serves if it does not merely provide broad guidelines but if it also has its ears close enough to the ground and is therefore open to the needs of the citizens.

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[1] Constitutional complaint proceedings are currently pending against this search warrant.

[2] Decisions of the German Federal Constitutional Court (BVerfGE) 103, 142, 151.

[3] After German reunification the structures of the justice system in the Free State of Saxony were modelled on those in Bavaria.

[4] JZ 1968, 682; NJW 1969, 1141.

[5] *Karlheinz Meyer* , in: Festschrift für Kleinknecht, Munich 1985, 268/269.

[6] BGHSt 32, 44 ff.

[7] *Karlheinz Meyer*, JR 1984, 184.

[8] German Federal High Court (BGH) in Neue Juristische Wochenschrift 2006, 1529 ff.

[9] *Strate* in NJW 2006, 1480; *Niemöller* in DRiZ 2006, 229 ff.; *Krehl* in StV 2006, 408 ff.

[10] This beautiful wording has been attributed to various authors. For example, it can be found in *Sax*: Bettermann/Nipperdey/Scheuner, Grundrechte, Vol. III/2, Berlin 1959, p. 867; see also BGHSt 19, 325, 330; BVerfGE 32, 373, 383: "Konkretisiertes Verfassungsrecht".

[11] *Zachariae* ; Handbuch des deutschen Strafprozesses, Vol. I, Göttingen 1860, pp. 144 ff.

[12] This danger is particularly reflected in the topos of the "functional capability of the administration of criminal justice", a term used frequently by the Constitutional Court in the 1970s and 1980s when it was seen as a major principle that must be upheld. For a critical view, see *Hassemer* in StV 1982, 275 ff. (*Hassemer* himself has been a judge at the German Federal Constitutional Court since 1996 and its Vice President since 2002).

[13] Pre-trial investigations were abolished in Germany under the First Act on the Reform of German Criminal Procedures (German Federal Gazette BGBl. I, 1974, 3393) which became effective on 1 January 1975.

[14] Decisions of the German Federal Constitutional Court (BVerfG), Second Chamber of the Second Panel, in NStZ 1994, 553.

[15] Decisions of the German Federal Constitutional Court (BVerfG), Third Chamber of the Second Panel, in NStZ 2006, 1048.

[16] Ibid. 1049.

[17] "Personal freedom may only be limited through a formal act of law and only in observation of the forms specified therein."

[18] Decisions of the German Federal Constitutional Court (BVerfGE) 58, 208, 220.

[19] Case law: Decisions of the German Federal Constitutional Court (BVerfG), Third Chamber of the Second Panel, in NStZ 2000, 153.

[20] Decisions of the German Federal Constitutional Court (BVerfG), Third Chamber of the Second Panel, in NJW 2006, 672, 675.

[21] Decisions of the German Federal Constitutional Court (BVerfG), Third Chamber of the Second Panel, in StV 2004, 409.

[22] I have Michael Jauernik's consent for mentioning his name.

[23] They had of course hoped in vain. During his time at Straubing, Jauernik inundated the prison administration with a massive number of submissions and also supported other prisoners in their presentations of grievances. During his one and a half years at Straubing, eight constitutional appeals from Michael Jauernik were given positive decisions by the Constitutional Court (the rapporteur at the time was Constitutional Judge Kruis, who had been a high-ranking official in the Bavarian State Ministry of Justice before entering the Constitutional Court).

[24] He is now Chairman of the Marburg Regional Court and author of the definitive commentary on the German Penal Execution Code.

[25] Decisions of the German Federal Constitutional Court (BVerfG), Second Chamber of the Second Panel, in NJW 1993, 3191 f.