

# HEARSAY EVIDENCE AND CRIMINAL PROCESS IN GERMANY AND AUSTRALIA

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## INTRODUCTION

In common law countries the rule against hearsay is regarded as the most important exclusionary rule in the law of evidence.<sup>1</sup> In Australia,<sup>2</sup> however, the hearsay rule is widely considered in need of major reform or even abolition.<sup>3</sup> The rule has been the centre of much academic debate,<sup>4</sup> and is the object of thorough appraisal by a number of legal bodies.<sup>5</sup> Of these instances the most comprehensive research hitherto appears to have been undertaken by the Law Reform Commission of New South Wales. In its working paper on the rule against hearsay there is also a good summary of the major points of criticism as to the present hearsay rule:

“Apart from the weaknesses of some arguments used to support the hearsay rule, there are serious disadvantages that flow from it. The most fundamental disadvantage is that the hearsay rule causes much reliable evidence to be excluded, particularly statements by a person who is now unavailable to testify. The exclusion of reliable evidence in this way carries the risk of injustice, a risk which may be most serious so far as an accused is concerned. But there are several other objections. The law is obscure, technical, complicated and anomalous, particularly so far as the maze of exceptions to the hearsay rule is concerned. A most important consideration is that the need to tender direct rather than hearsay evidence may substantially increase the costs of litigation and greatly inconvenience the individuals called as witnesses. Serious problems of jury discretion are raised. The rules against hearsay and against proof of a witness's prior statements prevent witnesses telling their story in their own way; they disturb the natural flow of testimony. Practitioners have had to resort to evasive devices which make the operation of the law harder to understand and bring it into contempt.”<sup>6</sup>

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<sup>1</sup> R. Eggleston, *Evidence, Proof and Probability* (London, Weidenfeld and Nicolson, 1978) p. 46.

<sup>2</sup> This term is used indiscriminately as referring to federal and state jurisdictions.

<sup>3</sup> R. Cross et al, *Evidence* (2nd Aust. ed., Sydney, Butterworths, 1980) p. 456.

<sup>4</sup> E.g. R. Cross, “What should be done about the Rule Against Hearsay?” (1965) *Crim. L.R.* 68.

<sup>5</sup> E.g. Law Reform Commission (N.S.W.); Law Reform Commission (Cth).

<sup>6</sup> (Sydney, 1976) p. 9. See also L.R.C. (N.S.W.) “Report on the Rule against Hearsay” (Sydney, 1978) p. 43.

By contrast, the German concept as to hearsay evidence is no longer a matter of dispute among its lawyers.<sup>7</sup> In view of the proposals for reform of the common law rules, there may therefore be some value<sup>8</sup> in looking at the different way the hearsay problem is dealt with in Germany.<sup>9</sup>

Accordingly, the principles governing the issue of hearsay evidence in both countries are outlined below, with their actual working viewed, in terms of their implications for the criminal trial and its goals. In portraying the approaches to hearsay evidence in both countries greater emphasis is given to the German concept. It is not attempted to paint a comprehensive picture of the complex hearsay rule as applied in Australia. The writer does not assume knowledge of the operation of criminal proceedings in Germany, and consequently the broader areas of proof-taking and the relevant general principles of German criminal procedure are outlined.

## HEARSAY EVIDENCE

### 1. The Notion

In Australia,<sup>10</sup> the rule against hearsay principally is designed to prohibit witnesses repeating "out-of-court statements" made by others in order to establish the truth of those statements. A judicial formulation of the rationale of that rule is contained in the advice of the Privy Council in *Subramaniam v. Public Prosecutor*:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."<sup>11</sup>

Hence, with regard to a third person's statement, the dividing line is drawn between testimony offered to prove the truth of what the maker of the statement had to tell about the fact in issue, and testimony where the fact at issue is that the statement was made. According to the Privy Council's definition, the latter testimony is original evidence and therefore admissible. The decision in *Subramaniam* itself gives an illustration of this important distinction: the defendant Subramaniam had been charged with

<sup>7</sup> However, at issue is the more recent problem of hearsay evidence by undercover agents (see p. 69). See e.g. K. Rebmann, "Der Zeug vom Hörensagen im Spannungsverhältnis zwischen gerichtlicher Aufklärungspflicht, Belangen der Exekutive und Verteidigungsinteressen", *Neue Zeitschrift für Strafrecht (NSiZ)* 1982, p. 315.

<sup>8</sup> See R. W. Fox, "Expediency and Truth-Finding in the Modern Law of Evidence" in E. Campbell and L. Waller (eds), *Well and Truly Tried, Essays on Evidence in Honour of Sir Richard Eggleston* (Sydney, Law Book Co., 1982) p. 140.

<sup>9</sup> Superficially Germany and Australia seem to be similar in their constitutional structure, both countries having federal constitutions containing the principle of division of governmental tasks and allocating certain legislative powers to the constituent States or *Bundesländer*. Yet the *Grundgesetz* enables the German Parliament to exercise a far greater law-making power in areas of criminal law than does the Australian Constitution. Hence virtually all fields of substantive and procedural criminal law are covered by federal laws.

<sup>10</sup> In areas covered by Australian State legislation, reference is made to Victoria only.

<sup>11</sup> [1956] 1 W.L.R. 965, 970.

unlawful possession of ammunition. His defence was that he had been captured by terrorists and was acting under duress. The trial judge refused to admit as evidence what had been said by the terrorists on the grounds that it was hearsay. The Privy Council, however, allowed the appeal, because the reported statements were tendered not to prove the truth of anything said by the terrorists but that threats were made.

The hearsay rule applies against the accused as well as in his favour;<sup>12</sup> to verbal statements and to documents.<sup>13</sup> The leading case relating to documents is *Myers v. Director of Public Prosecutions*<sup>14</sup> in which the accused had been charged with conspiracy and receiving stolen cars, which he allegedly had disguised. To prove that the cars sold were stolen the prosecution called an officer in charge of the records made by the manufacturers of the stolen cars. He produced microfilms of the cards filled in by workmen and showing the numbers cast into cylinder blocks of the stolen cars. These numbers coincided with the cylinder block numbers of the cars sold by the accused. Although strictly speaking this was evidence of what this witness said that the workmen had written, it was admitted by the trial judge.

Refusing expressly to create another exception to the hearsay rule,<sup>15</sup> the House of Lords took a formal stance and held on appeal that the evidence was wrongly admitted because it was hearsay:

“The entries on the cards were assertions by the unidentifiable men who made them that had entered numbers which they had seen on the cars.”

Their Lordships then went on to stress that:

“Counsel for the respondent were unable to argue that these records fell within any of the established exceptions.”<sup>16</sup>

Although the decision in this case has been negated by section 55 (2) of the *Evidence Act* 1958 (Vic.), the principle remains and its reasoning<sup>17</sup> has been relied on by other courts.<sup>18</sup>

By contrast, the German laws of procedure do not encompass a hearsay rule of exclusion. Rather, all logically relevant evidence is admissible in German courts.<sup>19</sup> It will not be excluded on the ground that its impact on the trier of facts may be stronger than its actual probative value. Consequently, as a general rule,<sup>20</sup> hearsay evidence is not excluded.

According to German legal doctrine, a “hearsay witness” (*Zeuge Vom Hörensagen*) is not regarded as a hearsay witness in the strict sense of

<sup>12</sup> *Sparks v. R.* [1964] A.C. 964.

<sup>13</sup> *Cross et al.*, op.cit. p. 446.

<sup>14</sup> [1965] A.C. 1001.

<sup>15</sup> See particularly the criticism of Lord Reid [1965] A.C. 1001, 1022.

<sup>16</sup> *Ibid.*

<sup>17</sup> For further comments on that decision, see R. Eggleston, op.cit. p. 47.

<sup>18</sup> *Cross et al.*, op.cit. p. 449.

<sup>19</sup> Per se, i.e. without any incidental proceedings such as the common law “*voir dire*”.

<sup>20</sup> Written hearsay however, is subject to certain exceptions, excluded as far as depositions are concerned. For details, see p. 63.

the term.<sup>21</sup> This position is premised on the basic distinction between main facts (*Haupttatsachen*) and indicating facts (*Indizien*).<sup>22</sup> Thus if the statement concerns a fact at issue, there is need to differentiate between the direct witness having heard the original statement and the hearsay witness who has been told the content of the statement at issue by the direct witness. For example, if an insulting oral statement is to be proved by someone who heard it, the position will be different according to whether it is sought to prove the insulting fact, or the fact that someone has been insulted.

As a result of these considerations the testimony of the hearsay witness bears a dual character. It is original evidence of the utterance of the direct witness and at the same time indirect evidence as to the fact at issue. To make it clear, though, the said hearsay testimony is direct evidence only of the fact that the utterance has been heard; the reported statement cannot be regarded as proof of the narrated fact.<sup>23</sup>

One may observe, therefore, that there is coincidence between the two legal systems being compared, in that hearsay testimony as such, cannot prove the truth of its content. The following example illustrates the differing approaches:

A in Hobart receives a telegram from Melbourne. Without opening it he clutches his forehead and exclaims: "My God, my factory has been burnt down." In fact, the factory was destroyed by fire an hour previously, and the telegram was sent by his partner.

This statement has some probative value at common law, if tendered to show that A knew of a plan to burn down the factory for the insurance. According to the Australian concept of hearsay evidence, the statement is excluded if tendered to prove that the factory has been burnt down. In Germany, on the other hand, the statement may be produced in court in any case. The proper value of this evidence is instead adjudicated at the concluding stage of the proceedings when the weight of all evidence gathered is evaluated.<sup>24</sup>

The general consideration lying behind such an approach is the assumption that the hearsay witness may have some information to provide<sup>25</sup> with regard to the fact in issue or the credibility of the accused or other material persons. To disregard hearsay evidence is generally considered as conflicting with the performance of one of the principal tasks of the

<sup>21</sup> See e.g. *Entscheidungen des Bundesgerichtshofs in Strafsachen* (Decisions of the Federal High Court in criminal cases) Vol. 17, pp. 382, 384 (German citation: *BGH St 17*; 382, 384).

<sup>22</sup> Collateral facts (*Hilfstatsachen*), e.g. a fact affecting the credibility of a witness, are the third group of points of evidence.

<sup>23</sup> See E. Schmidt, *Lehrkommentar zur Strafprozessordnung* (Göttingen, Vandenhoeck & Ruprecht, vol. 2, 1957) p. 708.

<sup>24</sup> As to the respective principles see p. 55.

<sup>25</sup> See generally U. Jacobson, "Hearsay Testimony in Sweden" (1973) 17 *Scand. Stud. in Law* 129.

criminal process, namely, to discover the truth of what happened.<sup>26</sup> Hence, hearsay evidence is accorded some value, although less than in the case of direct testimony. It is taken as a matter of course among German lawyers that the value attributed to hearsay evidence diminishes as the chain of evidence lengthens. The chain of evidence is intended to indicate the significance of each part of the evaluation process. Each piece then provides a *factum probans* or evidentiary fact for the subsequent, the *factum probandum* or principal fact.<sup>27</sup> The shortcoming of one of the links found in the evaluation process is thus likely to affect the testimony as a whole. Furthermore, when weighing hearsay evidence, the courts are required to consider that its value usually is impeded by the difficulty of assessing the perceptual and memorial abilities of the maker of the statement and other factors influencing his or her trustworthiness; for example, demeanour in court.<sup>28</sup> In addition, since the judge is the one who decides who will be called to testify, hearsay evidence often provides him with the means of ascertaining who has knowledge of the facts.

Hearsay evidence cannot replace original evidence where it is available. With regard to witnesses this principle is expressly<sup>29</sup> stated in section 250 *Strafprozessordnung (StPO)*<sup>30</sup> which in its first sentence provides:

“If evidence of a fact is based on the observation of a person, this person shall be examined in the main trial.”<sup>31</sup>

The rule that the better evidence shall always be adduced and therefore that original evidence cannot be substituted by derivative evidence, is also required by the principle of immediacy (*Grundsatz der Unmittelbarkeit und Mündlichkeit*), a basic rule of German procedural law. This means, furthermore, that all evidence has to be presented in court and a judgment is to be based exclusively on facts having been presented orally in court.

## 2. The Place of Hearsay within the Trial

Unlike Australia, where hearsay evidence is dealt with as a question of admissibility,<sup>32</sup> German procedural law regards these matters as an issue of evaluation, as has already briefly been indicated.

Historically, the German approach to hearsay evidence was somewhat different. In 1532, theory and the system of legal proof (*gesetzliche Beweis-theorie*) were incorporated in the *Constitution Criminalis Carolina*, and hearsay evidence was rejected as being insufficiently reliable. Never-

<sup>26</sup> *Bundesverfassungsgericht* (Federal Constitutional Court), *Neue Juristische Wochenschrift* (NJW) 1983, 1043.

<sup>27</sup> See Cross et al., *op.cit.* p. 8.

<sup>28</sup> *BGH St.* 17; 382, 385.

<sup>29</sup> Substitution of a direct witness by a hearsay witness would also violate the duty of judicial inquiry (see p. 56) and constitute a reversible error.

<sup>30</sup> German Criminal Procedure Code.

<sup>31</sup> Translations are from “The German Code of Criminal Procedure” 10 *American Series of Foreign Penal Codes*. The translated code states the law as valid in 1964. Due to more recent changes in the law, this translation of the *StPO* is thus somewhat outdated.

<sup>32</sup> See R. Eggleston, “The Relationship between Relevance and Admissibility in the Law of Evidence” in H.H. Glass (ed.), *Seminars on Evidence* (Sydney, Law Book Co., 1970) p. 69.

theless, if the testimony were received, it was not to be considered.<sup>33</sup> As long as the theory of legal proof prevailed courts were bound by rigid rules concerning quantity and quality of proof needed for a conviction. Mere circumstantial evidence did not suffice to prove guilt in ordinary cases.<sup>34</sup> The defendant could be convicted only upon the testimony of two fully trustworthy witnesses or a creditworthy, usually meaning corroborated, confession. Where the investigator gathered the required evidence, the court was legally bound to convict, irrespective of its subjective evaluation of that evidence. On the other hand, even if persuaded of the defendant's guilt on the basis of circumstantial or legally defective direct evidence, the court could not convict.<sup>35</sup> Influenced by similar provisions in the French *Code d'Instruction Criminelle* of 1808, the German states eventually replaced the system of legal proof by the principle of free evaluation of the evidence (*Grundsatz der freien Beweiswürdigung*) in the middle of the nineteenth century.<sup>36</sup>

This principle, also called the principle of full persuasion or of persuasion beyond a reasonable doubt, is now contained in section 261 *StPO*:

"With respect to the effect of the reception of the evidence, the court decides according to its free conviction obtained from the entire trial."

However, this freedom in evaluating the gathered evidence does not mean that the court resorts to unfettered discretion. This is safeguarded by requiring the court to set forth in its reasoning the relevant facts found in detail and their assumed interrelationship from which the final conclusion then follows as a rational inference. Although section 267 (1) *StPO* requires a detailed *Beweiswürdigung* only in the case of circumstantial evidence, in practice it is applied to most cases, particularly when the only appeal possible is an appeal for error of law (Revision). The procedure on such an appeal does not involve a re-trial; new evidence is therefore not taken. The *Beweiswürdigung* thus enables the respective appeal court, inter alia, to review<sup>37</sup> whether the judgment violates rules of logic, laws of nature, principles of probability or empirical rules.<sup>38</sup>

Within the evaluation process the burden of proof must also be considered. In this regard German criminal procedure imposes no onus of

<sup>33</sup> K. H. Kunert, "Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure" (1966) 16 *Buffalo L.Rev.* 122, 141.

<sup>34</sup> For details, see J. H. Langbein, *Torture and the Law of Proof* (Chicago, University of Chicago Press, 1976).

<sup>35</sup> M. Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972) 121 *U.Pa. L.R.* 506, 515.

<sup>36</sup> E.g. the State of Bavaria in 1848.

<sup>37</sup> For details, see E. W. Hanack, "Die Rechtsprechung des Bundesgerichtshofs zum Strafverfahrensrecht", *Juristenzeitung* (JZ) 1972, 488.

<sup>38</sup> An exceptional mandatory inference to be applied by courts states a blood-alcohol level of at least 0.13% results in an inability to drive, see *BGH St 21*; 157.

proof on the defendant, nor is there any presumption of his guilt.<sup>39</sup> On the contrary, it is the duty of the court to fully ascertain the truth.<sup>40</sup> In case of any remaining doubt concerning a material fact, the unwritten principle *in dubio pro reo* requires such doubt to be resolved in favour of the defendant. Moreover, the court has to examine the existence of the objective and the subjective elements of the alleged crime. The German concept of crime,<sup>41</sup> in broad terms, distinguishes between unlawfulness and blameworthiness. Therefore both the objective (the committed act as such), and the subjective requirements of the crime (the defendant's personal responsibility for his unlawful act), together constitute the guilt of the defendant and must be proved. In view of these probative requirements the admissibility of hearsay evidence constitutes an important element for the proper working of the persuasion process, particularly as to the proof of the subjective part of the crime. Furthermore, there is no burden of proof on the defendant for exculpatory circumstances like self defence or drunkenness. In practice, however, the accused will not remain passive but substantiate in some way his claim of extenuation. Moreover, no legal burden to prove lack of responsibility by insanity rests on the accused.<sup>42</sup> This, however, does not result in a duty upon the court to prove sanity in any single case. Rather such proof is necessary only if the circumstances of the case or the course of the trial indicate doubts.<sup>43</sup> Then the court must explore it on its own motion by way of expert evidence, as it is the court's obligation to establish all subjective requirements of the alleged crime. Again, if doubts remain, the maxim *in dubio pro reo* is to be applied.<sup>44</sup> Hence, the only burden which rests on the defendant in German courts is to assert the respective facts.<sup>45</sup>

### 3. The Rationale

In Australia, various factors are commonly named as the rationale of the rule against hearsay. Some of these justifications are stated by Lord Normand in *Teper v. The Queen*:

"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."<sup>46</sup>

<sup>39</sup> As to Australia, the Senate Standing Committee on Constitutional and Legal Affairs recently reported that a number of provisions in Commonwealth laws placed a persuasive burden on defendants to prove their innocence in court, see "The Age", 26 November, 1982, p. 3.

<sup>40</sup> Section 244 (2) *StPO*.

<sup>41</sup> For details, see A. Eser, "Justification and Excuse" (1976) 24 *Am.J.Comp.L.* 621.

<sup>42</sup> As to the presumption of sanity in Australia, see Cross et al, *op.cit.* p. 116.

<sup>43</sup> *BGH St.* 23; 176.

<sup>44</sup> *BGH St.* 8; 124.

<sup>45</sup> Professor Jeschek in his article, "Principles of German Criminal Procedure in Comparison with American Law" (1970) 56 *Va.L.Rev.* 239, 247, calls that burden "Darlegungslast".

<sup>46</sup> [1952] A.C. 480, 486.

Of these considerations, the absence of an opportunity to cross-examine the maker of the hearsay statement is now usually regarded as the principal reason for the hearsay rule.<sup>47</sup> Cross-examination is expected to expose:

- (1) faults in the perception and understanding of the witness;
- (2) faults in his memory;
- (3) flaws in his truthfulness and sincerity, particularly as reflected in his misuse of language; and
- (4) misunderstanding stemming from his language.<sup>48</sup>

An additional reason for the rule is often said to be the fear that juries will be incapable of evaluating the weight of hearsay statements.<sup>49</sup> Or, in the words of Mansfield C.J.:

"In England, where the jury are the sole judges of the facts, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."<sup>50</sup>

#### 4. Some Features of the German Trial

Neither of these two main rationales for the hearsay rule is of real importance in German procedural law which possesses its own distinctive features. The structure of the German criminal trial is determined by the duty of the court to further investigate the charge. This principle of instruction (*Untersuchungsgrundsatz*) is laid down in section 244(2) *StPO*:

"In order to explore the truth the court shall on its own motion extend the reception of the evidence to all facts and to all means of proof which are important for the decision."

In order to fulfil this clarifying task properly, the senior judge must have at least some conception of the case and some knowledge of the gathered evidence. Consequently, the senior judge is expected to be thoroughly familiar with the dossier before the trial.<sup>51</sup> Another result of this inherent conceptual search for the substantive truth (*Prinzip der materiellen Wahrheit*) is that a confession of the defendant does not lead to conviction *ipso facto*. The court is still required to satisfy itself at the trial that such confession is true. This duty of judicial inquiry, however, does not result in a restriction or replacement of the right and obligation of the parties to the proceeding to tender relevant evidence. Rather a motion by defence counsel or prosecutor to take particular evidence must, as a rule, be sustained provided the evidence is logically relevant. Exceptions to that rule are laid down in section 244(3) *StPO*. According to this provision a motion to receive particular evidence must be denied if the reception of the evidence *per se* is statutorily disallowed. An example of such

<sup>47</sup> Cross et al, *op.cit.* p. 463.

<sup>48</sup> D.E. Harding, "Modification of the Hearsay Rule" (1971) 45 A.L.J. 531, 533. See further E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 *Harv.L.R.* 177, 185, 189.

<sup>49</sup> E.g. J.D. Heydon, *Cases and Materials on Evidence*, (London Butterworths, 1975) p. 312.

<sup>50</sup> *Berkeley Peerage Case* (1811) 171 E.R. 128, 135.

<sup>51</sup> For details as to the dossier, see p. 64.



inadmissible evidence is the testimony of lawyers or physicians regarding information that has been confided or has become known to them in this capacity, unless they are released from the obligation of secrecy.<sup>52</sup> Apart from that, a motion may be denied only if the allegation to be proved concerns a matter of common knowledge, if the fact to be proved is of no importance for the decision or if it is completely unsuitable due to its inherent incapability to further the exploration of the truth. Verbal hearsay evidence in the form of rumour of indeterminate origin, e.g. where the hearsay witness will not be able to tell the name of the maker of the statement or of the person who perceived the fact in issue, will usually fall within those latter categories. Furthermore, such a motion may be denied if the proof is beyond reach, if the motion were merely brought to delay the proceedings improperly,<sup>53</sup> or if the fact intended to be proved in fact already has been proved. A motion contesting an exonerating fact may be denied on the ground that this fact is deemed true. This evidentiary device requires the fact to be obviously relevant. Such an assessment, however, cannot be made until the court has obtained a general view of the evidence at the trial. At this stage the other evidence may make it clear that the exonerating fact can be assumed in favour of the defendant. In appropriate situations, therefore, the decision whether to allow the motion or to deem the alleged fact true, is in practice deferred until most other evidence has been taken.<sup>54</sup>

(a) *The Role of the Court*

The responsibility for preparation and conduct of the trial is imposed on the senior judge. It is his task to summon all necessary witnesses and experts. He determines likewise the sequence in which these persons are called at the main trial. At the trial the senior judge<sup>55</sup> conducts the proceedings, examines the defendant and is responsible for taking all evidence required.<sup>56</sup> He is followed by the other members of the panel, the public prosecutor and the defence counsel.<sup>57</sup> It goes without saying that they may have differing conceptions of the case, and therefore may emphasise specific points when interrogating the accused, witness or expert, or may elaborate matters already dealt with by the examining court.<sup>58</sup>

<sup>52</sup> See s. 53 *StPO*.

<sup>53</sup> But belatedness of a proffer of evidence as such never constitutes a reason for its rejection; s. 246 *StPO*. Conversely, see *Crimes Act 1958* (Vic.), s. 399A.

<sup>54</sup> For further details, see Kunert, *op.cit.* p. 158.

<sup>55</sup> Section 238(1) *StPO*.

<sup>56</sup> As to court witnesses from an Australian point of view, see I.F. Sheppard, "Court Witnesses — A Desirable or Undesirable Encroachment on the Adversary System?" (1982) 56 *A.L.J.* 234.

<sup>57</sup> Section 240 *StPO*.

<sup>58</sup> Where there is a concurring motion of both counsel and prosecutor, the examination of the witnesses and of the experts may be left by the Court to the prosecutor and defence counsel, s. 239 *StPO*. In practice, however, this is almost unheard of, and the provision has always been regarded as a dead letter; see J.H. Langbein, *Comparative Criminal Procedure: Germany* (St Paul, West Publishing Co., 1977) p. 2.

In the course of receiving evidence, the defendant is first informed that he may, but need not, respond to the accusation,<sup>59</sup> and that at any time he is entitled to revoke either a preparedness or a refusal to make a statement.<sup>60</sup> Furthermore, the defendant has a right to be heard throughout the proceedings, after the reading of every document, after the testimony of every witness, expert or co-accused, but of course, he may remain silent if he wishes.<sup>61</sup> This privilege against self-incrimination means that the accused is under no obligation to contribute actively<sup>62</sup> to his conviction. From that stems the right to refuse to answer at all or to respond to particular questions only.<sup>63</sup> Whereas the court is not allowed to draw inferences adverse to the defendant from complete silence, it may draw such inferences in the case of partial silence.

The accused is to be examined before any other evidence has been tendered at the trial. However, although used as a source of evidence, the defendant is notionally not regarded as a witness. Neither will his statements ever be under oath. The prime reasons for that special position of the defendant are explained in an article by H.A. Hammelmann:

“Among the persons who inform a court of law of facts which can serve as a basis for a decision, the accused who gives evidence at his own trial occupies a peculiar position. Since he is under a serious suspicion, his evidence will be regarded with distrust: if guilty, he has an obvious interest in concealing the truth; even if innocent he may have overriding reasons for doing so. Neither oath, nor fear of punishment for false testimony, nor even moral reasons are likely to incline him to speak the truth, as they do normally in the case of witnesses.”<sup>64</sup>

Impliedly this position results in a “right” of the defendant to lie, since there exists no legal commitment for him to tell the truth. It should, however, be made clear that detected lies or inconsistencies certainly will impede the accused’s evidential credibility.

The same mode and sequence of interrogation applies during the entire trial. As regards the witness at the trial, he is at the outset asked by the senior judge to present a narrative account of what he knows about the facts of the case.<sup>65</sup> He may be interrupted by questions from the bench only to clarify a point, to bring him back to relevancy or to stop him from telling his opinion or from drawing inferences. The witness will not be subjected to questions by the court and the other parties to the proceedings until he terminates his narrative.

<sup>59</sup> Section 243 (4) *StPO*.

<sup>60</sup> *BGH St.* 5; 332, 334.

<sup>61</sup> Section 257 *StPO*.

<sup>62</sup> As distinct from maintaining a passive attitude concerning measures which are instrumental in his conviction, e.g. he has to tolerate the taking of fingerprints; see s. 81 (b) *StPO*.

<sup>63</sup> See T. Kleinknecht, *Strafprozessordnung* (München, Verlag, C.H. Beck, 36th ed., 1983) p. 727.

<sup>64</sup> “The Evidence of the Prisoner at his Trial: A Comparative Analysis” (1949) 27 *Can.B.Rev.* 652.

<sup>65</sup> With regard to the Australian position, see R. Eggleston, “What is Wrong with the Adversary System?” (1975) 49 *A.L.J.* 428, 432.

(b) *No Trial by Jury*

Unlike in Australia, trial by jury is not a feature of the German criminal process. In Germany, more serious criminal cases are usually tried before mixed tribunals. With the exception of the single judge at the *Amtsgericht*,<sup>66</sup> the *Oberlandesgericht*<sup>67</sup> and the *Bundesgerichtshof*, all other criminal courts are composed of professional judges and laymen (*Schöffen*).<sup>68</sup> The *Schoffengericht* of an *Amtsgericht* contains one professional and two lay judges; the chambers of the *Landgericht*<sup>69</sup> are composed of the senior judge, two associate judges and two laymen.<sup>70</sup> During the trial the lay members have the same rights and duties as the professional judges. All members of the mixed panel deliberate and decide, in common, questions of guilt and sentence. For most decisions unfavourable to the defendant a two-thirds majority of the tribunal is required.<sup>71</sup> Hence, in the *Schoffengericht* the lay judges can even outvote the professional judge and enforce any verdict.

Unlike the professional judges, the lay members of the bench do not have a prior knowledge of the case. In listening to the reading of the accusation by the prosecutor the lay judges for the first time get information about the facts of the offence. Under no circumstances and at no time are they allowed to look at the dossier.<sup>72</sup>

By way of an excursion into legal history it might be noted that the *Strafprozessordnung*, when going into effect in 1879, brought the jury system with twelve jurors to the whole of the German judiciary. However, by 1924, trials by jury had been abolished<sup>73</sup> and replaced by the *Schwurgericht* of the *Landgericht*, a mixed panel of three professional

<sup>66</sup> The lowest court in the hierarchy. Broadly speaking, a single judge cannot impose a sentence exceeding one year.

<sup>67</sup> State supreme court.

<sup>68</sup> In broad outline, decisions of the single judge or the *Schoffengericht* of an *Amtsgericht* may be reviewed by way of appeal *de novo* and subsequently by appeal on error in law or by the latter only. These appeals are dealt with by the *Landgericht* and the *Oberlandesgericht* respectively. Decisions of the *Landgericht* in the first instance are to be challenged only by way of appeal on error in law. This appeal is to be decided by the *Bundesgerichtshof*.

<sup>69</sup> County court. Apart from minor exceptions such as treason, the *Landgericht* has jurisdiction over all serious crimes; see s. 74 *Gerichtsverfassungsgesetz (GVG)*, the Statute on Judicial Organisation.

<sup>70</sup> To try specific types of crimes, e.g. white collar crime or culpable homicide, special chambers have been instituted at the *Landgericht*; ss. 74 (2), 74 c *CVG*. The professional judges in these chambers usually have special expertise required to adjudicate these matters properly.

<sup>71</sup> Section 263 *StPO*.

<sup>72</sup> The reason being that the lay judges may become biased by the evidentiary material contained in the dossier which technically does not constitute evidence.

<sup>73</sup> As to trial by jury in Germany the prevailing view is well summarised in the statement of Professor Jeschek in J.A. Coutts (ed.), *The Accused* (London, Stevens & Sons, 1966) p. 252:

“The mixed bench seems to enjoy certain advantages over the jury system. The separate treatment of the question of law and that of fact seems to us somewhat arbitrary, as the selecting and examining of the relevant facts depends upon a proper understanding of the law”.

and six lay judges. The present composition of the *Landgericht* was introduced in 1975.

### HEARSAY EXCEPTIONS

The common law rule against hearsay is subject to a considerable number of exceptions. It is not intended to deal comprehensively with all of them,<sup>74</sup> since this paper is concerned only with a narrow comparison of the two systems. Nevertheless, for the purposes of comparison and having in mind their practical importance in criminal cases, a few of these exceptions will be compared with the position under German law. They are to be treated under the following headings:

1. Statements of Deceased Persons;
2. Statements Forming Part of the "*res gestae*";
3. Statements of Persons not available at the Trial;
4. Statements in Public Documents;
5. Admissions and Confessions;
6. Statutory Exceptions.

#### 1. Statements of Deceased Persons

There are several categories of statements by deceased persons that are admissible at common law. Some of these, e.g. statements as to pedigree, as to the contents of lost testamentary dispositions or as to public and general rights, would rarely be of importance in criminal proceedings. However, "dying declarations", "declarations against interest", and "declarations in the course of duty" can be relevant.

Dying declarations are oral or written declarations of a deceased victim of a crime, admissible only in trials for murder or manslaughter of the maker of the statement.<sup>75</sup> The statement must have been made under a hopeless expectation of death, the declarant also being potentially a competent witness. Its rationale is based on the concept that a person in such circumstances is unlikely to fabricate an accusation against an innocent person.<sup>76</sup>

Declarations against the pecuniary interest of the person making the statement are also admissible, provided the declarant is dead. The presumption is that a person would not make a statement that could be used against him unless it were true. The rule however has become extremely technical. One would expect that an admission of crime might be thought even more trustworthy, but it has been decided that the rule was confined to statements against the pecuniary interest of the declarant.<sup>77</sup>

Statements made by a deceased person of matters which he was under a duty to record may also be admissible. However, this exception now

<sup>74</sup> The exceptions are fully treated in P.K. Waight and C.R. Williams, *Cases and Materials on Evidence* (Sydney, Law Book Co., 1980) pp. 588-745.

<sup>75</sup> See F. Bates, *Principles of Evidence* (2nd ed., Sydney, Law Book Co., 1980) p. 110.

<sup>76</sup> "Eighteenth century philosophy"; see R.W. Fox, *op.cit.* p. 148.

<sup>77</sup> *Sussex Peerage* case (1844) 11 Cl. & F. 85.

has less significance since the statutory exceptions have made business and other records admissible, as explained below.

## 2. Statements Forming Part of the "res gestae"

Hearsay evidence is admissible when the statements form part of the "res gestae". By and large this doctrine concerns collections of facts regarded as relevant due to their close connection by reason of contemporaneity with the matter in issue. Thus, one requirement is contemporaneity between the statement and the fact in issue.<sup>78</sup> Spontaneous utterances may be admissible, but as to the notion of transaction<sup>79</sup> the concepts applied still may be regarded as difficult to reconcile.<sup>80</sup>

## 3. Statements of Persons not available at the Trial

In general such statements are not admissible, but in certain cases they may be admitted,<sup>81</sup> e.g. when the person is dead, out of Victoria, too ill to travel, cannot be found, cannot be compelled to attend the trial, is mentally ill, or otherwise unable or unwilling to give evidence provided these statements are contained in depositions taken during the preliminary examination<sup>82</sup> and the accused was present and he, or his representative, had an opportunity to cross-examine the witness.<sup>83</sup>

Similarly, in Germany, the interrogation of the maker of the statement may principally not be replaced<sup>84</sup> by the reading of a deposition<sup>85</sup> taken at his examination during the pre-trial proceedings. The prime exception to that rule is section 251 subsections (1) and (2) *StPO*, which provide:

"(1) The examination of a witness, expert or co-accused may be replaced<sup>86</sup> by reading the transcript of his prior judicial examination if:<sup>87</sup>

- (a) the witness, expert or co-accused has died, has become insane, or if his whereabouts cannot be ascertained;
- (b) the appearance of the witness, expert or co-accused at the main trial is prevented for a long or indefinite time because of illness, infirmity, or other irremovable impediments;
- (c) the witness or expert cannot be expected to appear in the main trial because of the great distance involved, taking into consideration the importance of his testimony;

<sup>78</sup> See R. Eggleston, *Evidence*, op.cit. p. 53.

<sup>79</sup> See K.A. Ferguson, "Aspects of the Hearsay Evidence Rule" in Glass (ed.), op.cit. pp. 112, 116.

<sup>80</sup> See e.g. *O'Leary v. R.* (1946) 73 C.L.R. 566 and *R. v. Ciesielski* [1972] 1 N.S.W.L.R. 504.

<sup>81</sup> *Magistrates (Summary Proceedings) Act 1975* (Vic.), s. 163. See also *Crimes Act 1958* (Vic.), s. 413.

<sup>82</sup> *Magistrates (Summary Proceedings) Act 1975* (Vic.), ss. 53, 54.

<sup>83</sup> For details, see R.G. Fox, *Victorian Criminal Procedure* (Clayton, Monash Law Book Co-op., 1981), p. 64.

<sup>84</sup> The deposition may, however, in addition to the examination of the maker of the statement, be read as evidence of its content; see *BGH St 20*; 160, 162.

<sup>85</sup> See p. 55.

<sup>86</sup> As distinct from reading to a witness or expert his deposition made during the pre-trial proceedings in order to confront him with a contradiction or if his memory at the trial is at fault.

<sup>87</sup> If such a situation is anticipated, in practice, the prosecutor immediately requests a judicial examination of these persons.

(d) the prosecutor, defense counsel and the defendant agree to such reading.

(2) If a witness, an expert, or a co-accused has died or if he cannot be judicially examined within a reasonable time for some other reason, transcripts of other examinations and documents, which contain written expressions originating from him, may be read."

To explain the origin of these transcripts a short digression is necessary; these transcripts are taken during the pre-trial proceedings, the first stage of the German criminal prosecution.<sup>88</sup> In pre-trial proceedings the public prosecutor has control<sup>89</sup> over all aspects of the procedure.<sup>90</sup> In practice, however, usually the police initiate and develop investigations, although in more serious or complicated cases they are acting according to instructions by the prosecutor.

In the course of the investigation the defendant is to be interrogated,<sup>91</sup> usually by police. Pursuant to section 136(1) *StPO* the accused must be informed about his privileges at the beginning of the first examination. This requirement applies to any questioning irrespective of whether it is conducted by police, public prosecutor or judge. Section 136(1) *StPO* provides:

"At the commencement of the first examination the accused shall be informed of the act with which he is charged and of the applicable penal provisions. It shall be pointed out to him that the law grants him the right to respond to the accusation or not to answer regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice. In appropriate cases the accused shall be informed that he may respond in writing."

Apart from the accused, during that pre-trial stage witnesses are also examined and eventually experts asked for their opinions. Unless these persons fall under one of the numerous classes of non-compellable people, e.g. by reason of engagement, relationship by blood or marriage, clergy, lawyer, self-incrimination, they can be forced to answer.

The statements of all persons examined are recorded in a file, "the dossier". This dossier eventually contains the entire investigation file, i.e. all depositions and the other evidence gathered.<sup>92</sup> If at the end of the preliminary proceedings there is reason to suspect the accused of having committed a crime the public prosecutor must file a charge. The formal written charge (*Anklageschrift*) is required, inter alia, to specify the precise offence of which the accused is charged; to indicate the proof to be adduced and to contain also a brief result of the preliminary investigation. Together with the entire dossier, the *Anklageschrift* subsequently is submitted to the competent court with a request to open the main proceeding.

<sup>88</sup> The other two stages are the intermediate and the main proceeding.

<sup>89</sup> Sections 160, 161 *StPO*.

<sup>90</sup> The prosecutor need only call on an examining magistrate exceptionally, e.g. for the issue of an arrest or search warrant.

<sup>91</sup> Section 163 a *StPO*.

<sup>92</sup> Again, it is a basic principle of German legal doctrine that the evidentiary material contained in the dossier does not per se constitute evidence.

Upon completion of the pre-trial investigation the defence counsel is entitled<sup>93</sup> to inspect the entire dossier before it is submitted to the court. He may even take the dossier to his office and in practice he will copy the complete dossier.

In an intermediate proceeding the same court then has to decide whether it will open the main proceeding by admitting the Anklageschrift and issuing an appropriate order.<sup>94</sup> This decision is based on an evaluation of the evidentiary material gathered in the preliminary proceeding. Only if a conviction appears probable will the main trial be opened.

#### 4. Statements in Public Documents

Another common law hearsay exception concerns "statements in public documents". A public document coming from the proper place or a certified copy of it is admissible evidence of every fact stated in it.<sup>95</sup> The nature of a public document was described by Lord Blackburn in *Sturla v. Preccia*<sup>96</sup> as being "a document that is made for the purpose of the public making use of it" and being one made by a public officer. Examples of such documents are registers of births, deaths and marriages, and public surveys, reports and returns.<sup>97</sup>

Similarly, under German law there exists that class of document serving as proof of any event related therein and thus principally replacing the examination of the maker of the statement. This applies,<sup>98</sup> inter alia, to judgments previously passed in criminal matters, to records of previous convictions, to extracts from parochial records and from public registers containing data as to birth, marriage or death. Likewise, medical certificates concerning bodily injuries of a less serious nature may be read as evidence.<sup>99</sup>

#### 5. Admissions and Confessions

In terms of their practical implications, the most important exceptions to the hearsay rule in criminal trials are admissions and confessions. An admission made either by words or conduct is, subject to certain conditions, admissible at common law as evidence of the truth of its contents.<sup>100</sup> There is another very broad principle, namely that a statement made in the presence of an accused is admissible evidence of its truth to the extent that it is expressly or implicitly admitted by the accused's words or conduct.<sup>101</sup> One application of this rule may be found in *Woon v. R.*<sup>102</sup> In that case the accused partly answered and partly refused to answer questions

<sup>93</sup> Section 147 *StPO*.

<sup>94</sup> Section 207 (1) *StPO*.

<sup>95</sup> Cross et al, op.cit. p. 495.

<sup>96</sup> (1880) 5 App.Cas. 623, 643, cited in Bates, op.cit. p. 112.

<sup>97</sup> Heydon, op.cit. p. 330.

<sup>98</sup> Section 249 *StPO*.

<sup>99</sup> Section 256 (1) *StPO*.

<sup>100</sup> P.K. Waigh and C.R. Williams, op.cit. p. 657.

<sup>101</sup> Cross et al, op.cit. p. 507.

<sup>102</sup> (1964) 109 C.L.R. 529.

put to him by policemen, but had not admitted guilt. The High Court held that it was open to the jury to infer from these statements and conduct that the accused had revealed his guilt. The extent of this rule has been somewhat confined by later decisions, holding that a mere denial by the accused cannot be used as a confession or admission.<sup>103</sup> Similarly, silence<sup>104</sup> of the accused in response to police questioning<sup>105</sup> cannot constitute an admission.<sup>106</sup>

When considering the admissibility of confessions there are three steps to bear in mind:

a. If the confession is involuntary or oppressively obtained, it is strictly inadmissible as a matter of law. This common law principle was enunciated by Dixon J. in *McDermott v. R.*:

"If he [the accused] speaks because he is overborne his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement was made."<sup>107</sup>

In respect of such confessions and such methods of interrogation, the German position is stated in section 136 (a) *StPO*, which provides:

"(1) The freedom of the accused to determine and to exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis. Force may only be applied so far as is permitted by the law of criminal procedure. Threatening with a measure not permitted by the provisions of such law and promising an advantage not provided by law are prohibited.

(2) Measures which impair the accused person's ability to remember or to comprehend are not permitted.

(3) The prohibitions of subsections (1) and (2) apply irrespective of the accused person's consent. Statements which were obtained in violation of these prohibitions may not be used even if the accused agrees to said use."

It has been held<sup>108</sup> that section 136 (a) (3) *StPO* is confined to statements obtained by improper methods of interrogation. The provision is not to be extended to proof received indirectly by means of an extorted statement. Hence, the doctrine of the "fruit of the poisonous tree" is not part of German law.

<sup>103</sup> E.g. *Barca v. R.* (1975) 133 C.L.R. 82, 106.

<sup>104</sup> For details see H.D. Heydon, "Silence as Evidence" (1974) 1 *Mon.L.R.* 53.

<sup>105</sup> But for attempts, particularly in Queensland, to statutorily abolish the right of silence, see "The Australian" 25 October 1982, p. 3, and "The Age" 7 January 1983, p. 11. The proposals of the U.K. Criminal Law Revision Committee in this regard also aroused considerable discussion — see R. Cross, "The Evidence Report: Sense or Nonsense?" (1973) *Crim.L.Rev.* 329.

<sup>106</sup> *Hall v. R.* [1971] 1 All E.R. 322.

<sup>107</sup> (1948) 76 C.L.R. 501, 511.

<sup>108</sup> *BGH St* 22; 129.



It appears that so far Australian law corresponds with the German position. The better view seems to be that at least the fact discovered in consequence of an inadmissible confession is admissible as evidence, but in Australia there is much uncertainty as to whether the courts would go even as far as this.<sup>109</sup>

The requirement of voluntariness of a confession has been subject to a statutory modification. Section 149 of the *Evidence Act* 1958 (Vic.) saves a confession from rejection as non-voluntary on the ground that a promise or threat has been held out to the person confessing, if the inducement was not really calculated to cause an untrue admission of guilt.

b. If the confession infringes what are known as the Police Regulations in Victoria, or in England, the Judges' Rules, it may be excluded at the discretion of the court. On the other hand, the judge has no discretion to admit what is excluded by the rule requiring that the confession be voluntary.<sup>110</sup> But breaches of the police regulations do not automatically result in exclusion, and in fact the discretion is usually exercised in favour of admission rather than rejection.<sup>111</sup>

In that context it has been held<sup>112</sup> that failure of the police to caution before questioning the accused detained at a police station does not legally prevent his statements from being voluntary or mean that it would be unjust to admit them. Similarly in Germany, a violation of section 136 *StPO*<sup>113</sup> generally does not render inadmissible the proof obtained.<sup>114</sup>

c. Incriminating evidence obtained by interception<sup>115</sup> of a telephone conversation has also been held admissible. The test<sup>116</sup> whether to apply the discretion to reject admissible evidence which has been unlawfully received, requires the balancing of two competing interests: the public need to bring to conviction those who commit criminal offences and the public interest in the protection of the individual from unlawful treatment. In Germany, a similar test is applied as regards the admission of incriminating evidence obtained by illegal tape-recording.<sup>117</sup> As to illegal interception of telephone communications it appears, although the point is not settled,<sup>118</sup> that such evidence is inadmissible on constitutional grounds.<sup>119</sup>

Another judicial rule of discretion provides for the exclusion of unsigned records of interview. As to records of interview, the law is set out in the following passage from *R. v. Kerr* (No. 1):

<sup>109</sup> See Cross et al, *op.cit.* p. 306.

<sup>110</sup> R.R. Kidston, "Confessions to Police" (1960) 33 A.L.J. 369, 372.

<sup>111</sup> Heydon, *Evidence*, *op.cit.* p. 206.

<sup>112</sup> *R. v. Lee* (1950) 82 C.L.R. 133, 155. See also Note in (1982) 56 A.L.J. 247.

<sup>113</sup> See p. 66.

<sup>114</sup> *BGH St 22*; 129.

<sup>115</sup> *R. v. Padman* (1979) 25 A.L.R. 36.

<sup>116</sup> *Bunning v. Cross* (1978) 19 A.L.R. 641, 657.

<sup>117</sup> Kleinknecht, *op.cit.* p. 572.

<sup>118</sup> See G. Weber, Case note, *N.J.W.* 1973, 1056.

<sup>119</sup> Art. 10 *Grundgesetz* provides that secrecy of mail, post and telecommunication shall be inviolable, unless there is a statutory exception for specific circumstances.

"If the confession is taken down in writing and signed by the defendant or its truth acknowledged by parol or if it be written by him, then that is put in as an ordinary document and read as a document to the Court, but if it be taken down by a person who is present when the confession is made and not signed or acknowledged by the defendant, the document is not of itself evidence but may be used by the person who made it to refresh his memory."<sup>120</sup>

In Germany, a confession obtained and recorded by a judge during the pre-trial proceedings can be used at the trial as evidence of the truth of its content.<sup>121</sup> As a result, even if the accused at the main trial withdraws his confession the judge is not required to be examined as a witness to that confession. It follows that confessions recorded in a non-judicial examination cannot be read for direct evidentiary purposes. Thus, if at the main trial the accused<sup>122</sup> disputes having made the confession recorded by an interrogating police officer or withdraws the confession, then this confession has lost its actual evidentiary value. Instead, the interrogating policeman must be called to testify to the content of the confession. If necessary the court may read the record to this witness in order to refresh his memory.<sup>123</sup> It is to be stressed that only what this witness narrates regarding the content of the confession may be used in the evaluation process.<sup>124</sup> If this witness is unable to recall<sup>125</sup> the content of the interrogation in detail, the confession is not proved. Again, the mere fact that the accused had confessed to that police officer is not a sufficient basis for a conviction.<sup>126</sup>

## 6. Statutory Exceptions

In criminal proceedings the most important statutory exceptions<sup>127</sup> are related to business records<sup>128</sup> and computer evidence.<sup>129</sup> They provide an additional means of admitting documentary hearsay as proof of the facts recorded.

In Germany, there are no settled rules in that regard. It may be recalled that the examination of a witness who observed the fact to be proved, in principle, cannot be replaced by reading the record of his previous interrogation.<sup>130</sup> This requirement is based on the apprehension that in the

<sup>120</sup> [1951] V.L.R. 211, 213.

<sup>121</sup> Section 254 *StPO*.

<sup>122</sup> The same principles apply in the case of witnesses. However, if for example, the maker of the statement invokes the privilege of being a relative of the accused, then hearsay evidence is inadmissible by virtue of s. 252 *StPO*.

<sup>123</sup> As to "refreshing memory" in Australian law, see Cross et al, op.cit. p. 219.

<sup>124</sup> *BGH St.* 14; 310, 313.

<sup>125</sup> It should be noted that in Germany no witness is provided with a copy of his deposition taken during the pre-trial phase. In practice, however, it can be observed that police witnesses sometimes refresh their memory prior to the main hearing, at least in cases where their office has conducted the interrogation.

<sup>126</sup> Silence of the accused in response to police questioning is of no evidential value. As to that conduct in the main trial, see p. 60.

<sup>127</sup> For details, see Cross et al, op.cit. p. 574.

<sup>128</sup> E.g. *Evidence Act 1958* (Vic.), s. 55 (2).

<sup>129</sup> E.g. *Evidence Act 1958* (Vic.) s. 55 B.

<sup>130</sup> Section 250 *StPO*. See also p. 55.

course of the witness' interrogation, owing to various possible causes, an improper picture of his statements has been recorded.<sup>131</sup> In addition, it is self-evident that only the in-court examination provides the proper basis on which to assess the evidentiary value of the witness. These considerations do, however, usually apply only to documentary records which depend on any special capacity of the observer who recorded them. In the case of business records or mechanically stored or processed information, if the accuracy of the recorded fact is related to the capacity of the person recording it to observe accurately what he has recorded, this means the examination of this witness is not replaceable.<sup>132</sup> As a matter of practice though, the manual or mechanical recording of information is usually of a kind that can be performed by any person endowed with the requisite skills. In that case where the recording of the facts does not depend on the capacity of the particular observer, the documentary evidence may be read as proof of the facts recorded. The person recording such material will not usually be examined in court. However, if there is any doubt as to the correctness of the recorded facts, a competent witness or, for example, an auditor, must be called or the inspection of the mechanical device may be arranged.<sup>133</sup> For example, if the situation in *Myers v. Director of Public Prosecutions*<sup>134</sup> had arisen in a German court, the factory records would have been accepted, subject possibly to some evidence being given as to how the records were kept and as to the absence of any reason to suppose they were inaccurate.

#### HEARSAY EVIDENCE AND MODERN TYPES OF CRIME

A phenomenon of more recent years of concern to security authorities in both countries is the increasing emergence of modern and sophisticated types of crime such as drug-trafficking, organised crime or terrorist activities.

To combat these crimes by uncovering their group structure, German security authorities have developed a practice which already has been sanctioned by the highest German courts. The cases dealt with by the courts mainly involved drug crimes solved by assigning undercover agents. In each of the criminal proceedings the identity of the agent concerned (a so-called "*V-Mann*") had not been disclosed by the authorities at any stage. In addition, they as the makers of the statements did not give testimony at the trial. Instead, in-court testimony was given by a police officer who had interrogated the *V-Mann* during the pre-trial investigation. If required, the court may even formulate a questionnaire to be answered by the *V-Mann*, his identity remaining undisclosed.<sup>135</sup> Although aware of

<sup>131</sup> See *BGH St.* 15; 253.

<sup>132</sup> See *BGH, NStZ* 1983, 86.

<sup>133</sup> See *BGH St.* 27; 135, 138.

<sup>134</sup> [1965] A.C. 1001. See also p. 53.

<sup>135</sup> See also W. Zeidler, "Court Practice and Procedure under Strain: A Comparison" (1982) 8 *Adelaide L.Rev.* 150, 157.

the problem that without knowing the identity of the declarant it was quite impossible to evaluate his credibility, the courts<sup>136</sup> constantly refused suggestions not to admit such hearsay testimony but rather regarded it as a matter of careful evaluation. In addition, the courts emphasized that the probative effect of such evidence considered by itself would not provide an ample basis for conviction. In order to safeguard the interests of the accused they required further circumstantial evidence of uncontested probative value.

Similar considerations are to be found in a decision of the European Commission of Human Rights concerning the same evidentiary problems with regard to undercover agents.<sup>137</sup> The petitioner had alleged a violation of article 6(3) (d)<sup>138</sup> of the *European Convention on Human Rights* in an Austrian criminal trial. The Austrian court obviously applied similar principles to the German courts. Since, however, the Austrian court had also assessed the hearsay evidence with proper care and had based its findings not solely on that hearsay testimony, the Commission dismissed the petition.

The sanctioned practice has recently been challenged by a defendant on constitutional grounds. The underlying case involved a conviction for conspiring with a foreign intelligence service.<sup>139</sup> In the end the *Bundesverfassungsgericht* endorsed this practice and dismissed the constitutional complaint unanimously<sup>140</sup>. The Court, however, stressed the exceptional nature of such handling of the problems, and at the same time laid down some additional requirements for its acceptability:

- “(1) The executive decision to declare the prospective witness non-available in court must be taken at the highest executive level, normally by a department directly headed by a member of the government.
- (2) Reasons must be given for this decision so as to enable the court to make an independent evaluation of its plausibility; the reasons must be as full as they can be without disclosing the secret to be protected.
- (3) There must be corroborating evidence confirming the hearsay evidence.”<sup>141</sup>

<sup>136</sup> E.g. *Oberlandesgericht (OLG) Stuttgart NJW 1972, 66*; *OLG Frankfurt NJW 1976, 985*; *Bundesgerichtshof NJW 1975, 1470*.

<sup>137</sup> Cited in T. Vogler, “*Straf – und Strafverfahrensrechtliche Fragen in der Spruchpraxis der Europäischen Kommission und des Europäischen Gerichtshofs für Menschenrechte*” (1977) 89 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 761, 788.

<sup>138</sup> (3) Everyone charged with a criminal offence has the following minimum rights:  
 (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

<sup>139</sup> Section 99 (1) *Strafgesetzbuch* (Criminal Code).

<sup>140</sup> *JZ* 1981, 741.

<sup>141</sup> From the summary of this decision in Zeidler, op.cit. p. 158.

Although the sanctioned practice thus appears to be legally impeccable, uneasiness remains.<sup>142</sup> The prime point of concern regarding that practice is its implication on the constitutional separation of power. It is part of the adjudicative task entrusted to the courts to decide autonomously the evidence necessary to inquire into the substantive truth in a criminal case. In its handling of the evidence, however, the executive branch determines the manner in which the evidence is to be furnished.<sup>143</sup> In order to mitigate these shortcomings, a solution on the basis of an out-of-court examination of the *V-Mann* by a delegated or requested judge seems preferable,<sup>144</sup> the result of this interrogation subsequently being produced during the trial hearing. After all, the judiciary represents the impartial organ in the administration of justice.

Even less satisfying, however, is the way the problem concerning undercover agents as an evidentiary source is dealt with in Australia. The handling of their evidence apparently is not mentioned in the Australian textbooks on evidence. Nor can one find relevant legal articles. Moreover, none of the exceptions to the hearsay rule can be applied to avoid their giving direct evidence. On the other hand, for investigative reasons it was plain that no drug force or other special squad could sacrifice their undercover agents, usually known as the "dog squad", by presenting them in every single case as witnesses for the Crown, without seriously impeding their future detection abilities.

The resolution of that dilemma, as ascertained by a personal survey among some barristers and other legal practitioners, however, does not inspire confidence in the security force in the efficacy of the hearsay doctrine. According to these reports police witnesses in fact informed by undercover agents do not disclose at the trial, their actual status as hearsay witnesses, but pretend to give direct evidence. It is asserted that this practice encompasses cases of some significance where the undercover agent's status has been difficult to infiltrate and he has remained in a useful position in spite of the trial of the particular offender.

### CONCLUSION

Having scrutinised the rule against hearsay and its statutory modifications the inevitable conclusion is that in terms of its practical implications, the exceptions to the rule constitute the basic rule.

This practical working of the rule when compared with the German hearsay concept in its procedural context reveals similar results; indeed in some situations the hearsay exceptions are more generous in admitting

<sup>142</sup> A distinguished civil rights advocate, the then M.P. A. Arndt, in his article "*Umwelt und Recht*", *N.J.W.* 1963; 433, consoled himself that a classical hearsay witness at least could be asked to give account as to the maker of the statement.

<sup>143</sup> However, stressing the notion of a fair trial, recent decisions indicate that the judicature is increasingly less prepared to accept conditions of the executive branch concerning the availability of an undercover agent as a witness, e.g. *BGH, N.J.W.* 1983, 1005.

<sup>144</sup> See also *BGH, NSiZ* 1982, 79.

hearsay evidence than under the German position. In practice, therefore, the probative value of hearsay statements appears to be approximately the same under both legal systems. The Australian approach to hearsay evidence differs from the German concept probably only to the extent that it tends towards acquittal of a guilty accused.<sup>145</sup> On the other hand, although the German non-adversary system of criminal procedure seems to be more committed to the search for the material truth than the Australian version of the adversary system, it is doubtful whether this results in a diminution of other values such as human dignity, privacy and a preservation of a general atmosphere of freedom.

In addition to being more pragmatic, and having advantages as to time and expense, the German approach to hearsay evidence appears to be more flexible in coping with the evidentiary requirements of modern crime.

<sup>145</sup> See also R. Eggleston, "Beyond Reasonable Doubt" (1977) 4 *Mon.L.R.* 1, 22.