Private investigations in criminal proceedings, a contribution to the concept of inadmissible evidence (in German)

The main questions of this book are whether private investigations are legally permitted and whether its eventual results are admissible as evidence in criminal proceedings. From a common law point of view the answers to these questions may be selfevident. The defence, as a party, may collect evidentiary material itself. In a civil law context, in which the collection of evidence is a prerogative of state authorities, the question is highly relevant.

The first part (Part A) of this book bears the title 'permissibility of criminal investigations by private persons'. Part B deals with the legal limits of private investigations. Part C bears an incomprehensible and untranslatable title 'Beweisverbote als dogmatischer Ort der Ermittlungen Privater' (Inadmissibility of evidence as the theoretical domain of investigations by private persons). Part C basically deals with the general concept of inadmissibility of evi-

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dence in German criminal procedural and constitutional law. Part D deals with the major question of whether the results of private investigations are admissible as evidence.

The author explains that there are many ways in which investigations, other than those conducted by the prosecution, may be admitted as evidence. He mentions undercover agents, informers, private investigation agencies, trial attorneys and last but not least the accused himself. He describes that there are various types of private investigations depending on the technique that was used. Unlike private persons, state authorities are bound by many rules related to investigation of crimes. This is important in the relationship state-accused. This also raises the question of whether the same standards apply in the relationship citizen (accused)-citizen.

The confusing way in which the author has structured his book leads to many instances in which he repeats itself. Especially in part B much information that has already been given in part A is repeated. The limits of the trial attorney who, under his professional code, may not raise the slightest suspicion that he has influenced a witness, as well as the opinion of the Federal Bar Association on that point is given to us twice (pp. 56 and 81). The appearance of the expression 'before' (pp. 73, 77, 80 and 89) is an indication that something is wrong with the structure. Internal references (e.g., footnote 220 on page 80: 'Vgl. oben Teil A I.1. b) bb. (2) c. ') could have been used in a much more useful way by page references: See page 28.

Although the author rightly starts with an attempt to determine what exactly private investigations are and what the difference is with prosecutorial investigations, this does not result in a clear definition. Implicitly he uses the definition that every investigation not conducted by the prosecution is a private investigation, but he thereby fails to deal with the question of what to do with the most interesting form in practice where prosecution and private persons co-operate. How much involvement of the prosecutor in asking for/making use of certain investigations by private persons is necessary to disqualify these as private investigations and to subsume them under prosecutorial investigations and thereby under complete responsibility of the prosecution? The importance of the latter question is demonstrated on page 19, where it is established that paragraph 136a of the German Code of Criminal Procedure prohibits circumvention of the Code (the prosecutor may not resort to private law), as well as by the many judicial decisions used by the author on the question whether diaries and letters confiscated by the prosecution are admissible as evidence (especially part C).

The implicit definition that all investigations not conducted by the prosecution are private, is further confused by a mixture of the position of various individuals in the criminal process. The question of whether the accused or his counsel may conduct private investigations is dealt with in the same way as whether the victim or witness or whether other interested persons may do so. The accused derives from his legal position many rights which cannot blindly be compared to the legal and procedural position of any other.

In my view, the book would have been much more accessible if it had had a clear structure according to the lines of the central questions; what are private investigations?; who is responsible for private investigations?; how much involvement of the prosecution is necessary to apply all legal rules concerning collection of evidence by the prosecution?; are the persons conducting the investigation authorised to do so?; which rights are competing here?; are the results of these investigations admissible as evidence?; and which rights are competing here? A structure according to which rights are involved would have given a much more interesting perspective. Where, for instance, does the right of the accused to use all means to conduct his defence overlap with the right of other individuals to protect their privacy? Five individual