Legal Problems concerning the Introduction of Evidential Breath Alcohol Tests in Germany

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The German legislation and jurisdiction until today refer to blood alcohol limits in cases of suspected drunken driving. Since a few years the technical progress of the breath alcohol devices caused an increasing public discussion culminating in the claim to replace blood by breath tests. The promoters of this claim particularly appeal to the "Grundgesetz", the German Constitution, which guarantees in its article 2 the right to life and physical inviolability. It is contended that blood sampling without consent of the suspect violates the basic rights of the citizens.

In the first step I want to discuss the question whether this statement is valid. The same article 2 of the German Constitution defines that a law and only a law can encroach on these basic rights. Such a law is article 81a of the Code of Criminal Procedure which regularizes that it is permissible to take a blood sample from a suspect without his consent provided that the sampling is undertaken by a physician, lege artis, and that it is not detrimental to the health of the suspect. Insofar the argumentation of the proponents respecting the present laws is not discernible. However, laws can be modified, and the modification, indeed, of another article is recommended by the promoters of an evidential breath alcohol test.

But, let me ask, whether the introduction of evidential breath tests - which logically also must be permitted against the consent of the suspect - constitutes a less significant infringement of basic rights. In my opinion this is very doubtful, and the constitutionality has not been checked until today. My scruples are derived from a couple of decisions of our superior courts which pointed out that no suspect can be forced to contribute actively to his own conviction. But breath tests definitely presuppose the active cooperation of the suspect in contrast with blood sampling where only passive endurance is sufficient. In addition, from physical reasons it is unthinkable that active cooperation could be compelled.

Let us hold in our memory:
1. Compulsory blood sampling does not violate the German Constitution.
2. Whether this holds true also for a compulsory breath test is unclear.
3. Even if by analogy with blood sampling no infringement is to be stated, a compulsory breath test against the consent of the suspect is physically impossible.

This means that in cases of refusal as before blood samples must be drawn.
The same goes for persons who because of diseases or trauma or unconsciousness from the first cannot be subjected to a breath test. Hence it follows that a removal of blood samples and a total replacement by breath tests will be impossible. It is foreseeable that both will coexist in the future.

As already mentioned the German legislation and jurisdiction until today refers to blood alcohol values. Such the question is whether breath alcohol values can be converted to blood values. Many papers of this session deal with this problem and it is unnecessary to enter into this matter here. But what can be said is that also the promoters of the breath test agree that no reliable convertibility is given. Consequently a modification of the law (and the jurisdiction, of course) is exacted, which respects besides the BAC and equivalent to it the breath alcohol concentration in the dimension of mg/L. Let me emphasize: A legal modification is only and exclusively indispensable if the principle of the inconvertibility of breath and blood values is accepted. Otherwise the existing laws are sufficient.

But just this inconvertibility provokes further problems. They become obvious when taking a hard look at the recommended new text of article 24a of the German Road Traffic Code. It is recommended to alternatively refer to the old blood alcohol limit of .8 Pro-mille or a breath alcohol limit of .4 mg/l. What is the basis of this breath alcohol limit? No experimental findings are the basis. Instead of, this limit refers to the extensive blood alcohol research. This means that although it is confessed that blood values cannot be converted to breath values this principle was ignored in this connection; not totally ignored, because the conversion of the blood limit to the breath limit presupposes a partition factor of 1:2000 instead of 1:2100 or even 1:2300. This is explained by the intention to exclude a possible disadvantage for those tested for breath alcohol. Whether or not, at the same time this means that the legal modification aims at a disadvantage for all those who refuse (which might be accepted) or are physically unable to perform a breath test (which is not acceptable). This may provoke the reproach of a violation of article 3 of the German Constitution which guarantees that all citizens are equal before the law.

The inconvertibility of blood and breath alcohol values causes some more problems. One of the advantages of an evidential breath test is that the test can be taken in close temporary connection with the deed of violence. This means that the measured breath alcohol value approximately represents that of the time of the offence. But this is not true in cases where the suspect is controlled at a later time for example in cases of hit-and-run driving. As before in such cases a retrograde extrapolation from the time of the test to the time of the offence will be necessary as before. Until today there is only few knowledge about the kinetics of alcohol in breath. We are not able to define a time related minimum elimination which is necessary for such calculations.

A way out could be seen in the conversion breath to blood alcohol concentration, retrograde extrapolation on the time of the offence on the basis of a legally accepted minimum elimination, which is .1 Pro-mille per hour, and then reconversion into the corresponding breath alcohol value. But this is only permitted on the assumption that breath and blood values are convertible. Exactly this is not the case. Otherwise a modification of our laws and of the jurisdic-
Finally let me emphasize a delicate circumstance. Breath test devices meeting the requirements postulated by Dr. Schoknecht this morning are not available until today at least not in the necessary quantity to equip our police stations. As the supposed modification of the law defines a special breath alcohol limit which alone proves the offence this means that a law will be introduced that cannot be enforced. It seems necessary to remember a world wide experience. A law that is not enforceable is no law.