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## WITNESS PRIVILEGE AGAINST SELF-INCRIMINATION IN THE CIVIL LAW \*

MANFRED PIECK †

**A**LTHOUGH the historical origins of the maxim “*nemo tenetur (tenebatur) prodere seipsum*” (no one is bound to betray himself) are not very clear, there is some evidence that it was already known in ancient Greece and Israel.<sup>1</sup> In any event it is recognized today on both sides of the Atlantic.

The privilege against self-incrimination has received different consideration in different countries. By and large it has received less attention from either the public or the legal profession on the continent than in the United States or England. This accounts for the scarcity of material available on the privilege as it exists in the civil law.

This essay attempts to describe the privilege as it exists in varying degrees in certain civil law countries, and to contrast it with the protection afforded witnesses in other civil law countries. Germany, France, and the Netherlands have been selected as representative of different civil law approaches.

### I.

#### THE PRIVILEGE OF A WITNESS IN JUDICIAL PROCEEDINGS.

##### *Introduction.*

The term “privilege against self-incrimination” is used to describe both the accused’s right to remain silent and the privilege of a witness to refuse to answer an incriminating question. The privilege considered here is that of a non-party witness in judicial proceedings.

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1. See BONNER, *EVIDENCE IN ATHENIAN COURTS* 43-44 (1905); Mandelbaum, *The Privilege Against Self-Incrimination in Anglo-American and Jewish Law*, 5 AM. J. COMP. L. 115 (1956).

*Only the duty to testify is affected by the privilege.<sup>2</sup>*

With a few exceptions, everyone present in a given country is under a duty to testify in judicial proceedings when properly called upon to do so.<sup>3</sup> Historically, a witness was only obligated to testify when he had contracted with a litigant to do so.<sup>4</sup> Today the witness' duty to testify is generally recognized in civil law and common law countries.<sup>5</sup> It is considered the individual's contribution to the enforcement of law and order in exchange for which society affords him protection.<sup>6</sup>

In civil law countries the duty to testify does not include an obligation to produce documents, although such an obligation exists in common-law countries. In addition, the duty to testify does not include, and should not be confused with, the duty to submit to legally conducted searches, seizures, or physical examinations, nor with the duty to keep records and make oral reports.

In all phases of a civil law judicial proceeding the questioning of witnesses is performed by a judge. The judge may order the witness to answer his own questions or questions propounded by opposing counsel.<sup>7</sup> The obligation to testify does not arise until the witness is questioned by a judge or until he is directed by the judge to answer questions posed by counsel.<sup>8</sup>

2. The term "testify" is used whether or not the statements of the witness were made under oath.

3. The officials of foreign embassies are generally exempt from this duty; under certain circumstances high government officials are also exempt.

4. STALDER, *DIE AUSNAHMEN VON DER ZEUGNISPFICHT IM BERNISCHEN STRAFVERFAHREN* 1 and n. 1 (1937).

5. BROUCHOT, GAZIER, BROUCHOT, *ANALYSE ET COMMENTAIRE DU CODE DE PROCÉDURE PÉNALE* § 52 and Additif § 52 (1959); GARRAUD, *PRÉCIS DE DROIT CRIMINEL* 822 (15th ed. 1954); MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 396 (2d ed. France 1949); PETERS, *STRAFFPROZESS* 21 (1952); ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHT* 548-49 (6th ed. 1954); VOELLMAR, *INLEIDING NEDERLANDS BURGERLIJK RECHT* 649-50 (3d ed. 1952); 8 WIGMORE, *EVIDENCE* § 2192 (3d ed. 1940).

6. See 5 ASSER, *NEDERLANDS BURGERLIJK RECHT* 262-66 (5th ed. 1953); GARRAUD, note 5, *op. cit. supra* at 822; ROSENBERG, note 5, *op. cit. supra* at 548; 8 WIGMORE, *EVIDENCE* § 2192 (3d ed. 1940).

7. See BODINGTON, *FRENCH LAW OF EVIDENCE* 127-30 (1904); WILLIAMS, *THE PROOF OF GUILT* 28-32 (1955) for a comparison of the civil and common law method of examination of witnesses.

8. Note in this connection that a person is generally under no legal obligation to answer questions propounded by police or prosecuting authorities. Note further that art. 62, § 2 of the French Code of Criminal Procedure states that in cases of flagrant crimes persons summoned by officers of the Judicial Police are obligated to heed such summons and answer questions, and that in the event of their non-compliance notice thereof is given to the Procureur de la République who may compel them to appear (*comparaître*) by means of the police force. But there is no legal sanction to compel them to answer questions. LAMBERT, *PRÉCIS DE POLICE JUDICIAIRE* 85186 (1959). See also JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, *CODE DE PROCÉDURE PÉNALE* 470 (1959).

*Policy of the privilege.*<sup>9</sup>

The witness' interest in protecting himself, or those dear to him, may be in conflict with his duty to testify, and may induce him to commit perjury.<sup>10</sup> The privilege of the witness not to answer incriminating questions represents a compromise between the interest of society in the testimony of every one within its jurisdiction and the individual's natural reluctance to testify when his testimony would subject him to the danger of a criminal prosecution. This compromise is found in the law of many civil law countries, and forms part of a general policy not to compel testimony from those who for various reasons may be reluctant to give it, since compulsion invites unreliable testimony.<sup>11</sup>

*Express recognition of the privilege.*

In Germany the privilege of witnesses in both criminal and civil cases is expressly recognized.<sup>12</sup> The Netherlands limits the privilege to witnesses in criminal proceedings.<sup>13</sup> In France, witnesses do not have the privilege in either civil or criminal proceedings.<sup>14</sup>

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9. The term "privilege" has been retained even though the civil law speaks of a right to refuse to answer (*Zeugnisverweigerungsrecht*, *Verschonungsrecht*). When "privilege" is used without more in this article, it refers to the privilege of a witness in a judicial proceeding to refuse to answer incriminating questions, or, in the terminology of the civil law, to the right to refuse to answer questions the answering of which would subject the witness to the danger of a criminal prosecution. The privilege does not permit individuals to refuse to discharge other duties on the ground that by performing such duties they will furnish information which may be incriminatory. Such refusal may be based on a related right. It is not based on the privilege discussed here, and will not be treated in this article.

10. See STALDER, note 4, *op. cit. supra* at 40.

11. *Id.* at 40-48.

12. *Strafprozessordnung* § 55; *Zivilprozessordnung* § 384.

13. *Wetboek van Strafvordering*, arts. 219, 284.

14. See MOREL, note 5, *op. cit. supra* at 396, art. 109, § 3, 438 *Code de Procédure Pénale*. Note that article 104 of the Code of Criminal Procedure provides that a person named in the criminal complaint is to be apprised of the accusation and may refuse to be questioned as a witness. In the event of his refusal such person may be questioned only as an accused, and as an accused he has the privilege against self-incrimination of an accused or, as it is known in the civil law, the right to remain silent. See LAMBERT, *PRÉCIS DE POLICE JUDICIAIRE* 180-81 (1959). Note further that article 105 of the Code of Criminal Procedure provides that a person concerning whom "serious indications consistent with guilt" exist may not be questioned as a witness when such questioning would in effect evade his rights as an accused. Although there was some prior case law to this effect, article 105 represents a change from the old Code of Criminal Procedure (*Code D'Instruction Criminelle*). The change has been so recent that there is yet no authoritative answer to the question at which point serious indications of guilt exist against a person so that the questioning of that person as a witness would invade his rights as an accused. See BESSON, VOUIN, ARPAILLANCE, *CODE ANNOTÉ DE PROCÉDURE PÉNALE* 119-21 (1958); LAMBERT, *PRÉCIS DE POLICE JUDICIAIRE* 181-86 (1959); *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE, CODE DE PROCÉDURE PÉNALE* 500-01 (1959).

*The privilege in criminal cases.*<sup>15</sup>

In Germany the privilege is included in section 55 of the Strafprozessordnung which provides:

(1) Every witness may refuse to answer such questions the answering of which would subject him or the relatives enumerated in Section 52, paragraph (1) to the danger of criminal prosecution.

(2) The witness is to be apprised of his right to refuse to answer.<sup>16</sup>

Articles 219 and 284 (4) of the Dutch Wetboek van Strafvordering constitute the Dutch counterpart of the German rule.<sup>17</sup> However, the Dutch Code nowhere requires that witnesses be apprised of the privilege. Section 55 of the German Strafprozessordnung and article 219 of the Wetboek van Strafvordering embody the idea that society's interest in obtaining the truth is not greater than the interest of the individual in not being compelled to accuse himself.<sup>18</sup> To require a witness to answer questions the answering of which would expose him to the danger of a criminal prosecution is more than may be required of a human being, and will produce testimony having little probative value.<sup>19</sup> Section 55 of the German law and article 219 of the Dutch law protect the witness when his answer would subject him to the danger of a criminal prosecution, but not when the result of his answer might be a penalty or forfeiture, a financial loss or dishonor.<sup>20</sup>

15. See ROSKOTHEN, FRANZOESISCHES STRAFVERFAHRENSRECHT (1951); Keedy, *The Preliminary Investigation of Crime in France*, 88 U. Pa. L. REV. 385, 692, 915 (1940); PLOSCOWE, *The Investigating Magistrate (Juge d'Instruction) in European Criminal Procedure*, 33 MICH. L. REV. 1010 (1935); Vouin, *The Protection of the Accused in French Criminal Procedure*, 5 INT'L. & COMP. L. Q. 1, 157 (1956) for a more complete description of civil law criminal procedure.

16. Note that section 55 includes the privilege as well as the right to refuse to answer questions the answering of which may incriminate specified relatives.

17. Wetboek van Strafvordering, art. 284, § 4 applies Wetboek van Strafvordering, art. 219 (which pertains to pretrial investigation conducted by the investigating magistrate) to the trial and is not discussed separately.

18. See note 11 *supra*.

19. See BLOK & BESIER, HET NEDERLANDSCHE STRAFPROCES 544-45 (1925); SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG, Part II at 114 (1952).

20. See HENKEL, STRAFVERFAHRENSRECHT 257 (1953); SCHMIDT, note 19, *op. cit. supra* at 131; VAN BEMMELEN, STRAFVORDERING 167 (6th ed. 1957). Note that the Dutch commentators speak only of the danger of a criminal prosecution, and do not discuss the question of a possible distinction between a criminal prosecution and a proceeding for a penalty or forfeiture. Note further that the *danger* of a criminal prosecution suffices, but it must be the danger of a criminal prosecution in the country in which the witness is under a duty to testify. Cf. PHIPSON, ON THE LAW OF EVIDENCE 215 (9th ed. 1952) for the English rule which protects a witness from answering questions and producing documents as to crimes, penalties and forfeitures cognizable not only by English but by foreign law, provided the foreign law be clearly proved or admitted. The American rule is limited to crimes, penalties, and forfeitures under domestic law. 8 WIGMORE, EVIDENCE § 2258 (3d ed. 1940).

*Apprising the witness of the privilege.*

The privilege may only be claimed by the witness, but as a practical matter he cannot claim it if he is unaware of it. Such knowledge is not widespread in civil law countries, though it may be in the United States. Section 55 (2) of the German Strafprozessordnung, which requires that the witnesses be apprised of the privilege, was added to give effect to the policy that no one should be forced to be a witness against himself. As the privilege is intended to protect the witness, not serve the interests of the litigants, the omission of the required appraisal is not reversible error.<sup>21</sup> This duty to apprise the witness does not arise until in the discretion of the judge there arises the danger of criminal prosecution.<sup>22</sup>

The Dutch provision does not include a requirement that the witness be apprised. It is not clear why this is so. Van Bemmelen, a distinguished Dutch writer, feels that a witness should be apprised of the privilege, but is careful to point out that there is no agreement in Dutch legal circles on this point.<sup>23</sup> Unfortunately, neither he nor other Dutch commentators go into the question why article 219 of the Wetboek van Strafvordering does not include such a requirement. However, the deletion in 1937 of the requirement from article 29 of the Wetboek van Strafvordering (which gives a suspect the right to remain silent) sheds some light on its absence. The addition of the requirement to article 29 in the 1926 revision created quite a furor in Dutch legal circles.<sup>24</sup> Although the deletion may have been the result of a legislative compromise,<sup>25</sup> the fact remains that the requirement of article 29 has not been reinstated. This is at least some indication that the philosophy of those who opposed it prevailed. According to this philosophy, when a suspect is told he need not answer, he will interpret it to mean that he should not answer. Thus, a suspect who without knowledge of his privilege would confess may not do so when he is told he need not answer. On the other hand, the failure to apprise would make no difference to a suspect who would remain

21. Judgment of Bundesgerichtshofes (1. Strafsenat), Feb. 27, 1951, 1 BGH St. 39; LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND GERICHTSVERFASSUNGSGESETZ 182-83 (20th ed. 1953).

22. *Ibid.*

23. VAN BEMMELLEN, note 20, *op. cit. supra* at 167-68.

24. The arguments pro and con are listed and discussed in an article by Taverne, *Moet met het "fair play" van art. 29 Sv. gebroken worden? Opvoedende Waarde van het beginsel*, 12 NEDERLANDSCH JURISTENBLAD 245 (1937). See also Taverne, *Art. 29 W. v. Sv. in de Tweede Kamer, Enkele kantteekeningen. Sportiviteit en fair play. Strafvordering en Politiek*, 12 NEDERLANDSCH JURISTENBLAD 326 (1937); Van Gorkum, *Het wetsontwerp tot wijziging van art. 29 Sv.*, 12 NEDERLANDSCH JURISTENBLAD 331 (1937).

25. See Taverne, *Art. 29 W. v. Sv. in de Tweede Kamer Enkele kantteekeningen. Sportiviteit en fair play. Strafvordering en politiek*, 12 NEDERLANDSCH JURISTENBLAD 326, 327 (1937).

silent anyway (whether or not he knew of his right to remain silent).<sup>26</sup> In principle there is no great difference between a suspect and a witness who by answering might subject himself to the danger of a criminal prosecution, and it is not improbable that a similar philosophy accounts for the absence of an appraisal requirement from article 219 as well as from article 29.<sup>27</sup>

In view of the probable existence of such philosophy, it is not surprising that Dutch law permits incriminatory statements of the witness who is unaware of the privilege to be used in a later criminal proceeding against him.<sup>28</sup> In Germany also, incriminatory testimony of a witness who was unaware of the privilege may be used in a subsequent criminal proceeding against him.<sup>29</sup>

### *Procedure for establishing valid foundation for claim of privilege.*

#### *In Germany.*

When a witness is asked a question, he must claim the privilege, that is, state that he refuses to answer the question on the ground that

26. See De Gaay Fortman, *Het Nieuwe Gerechtelijk Vooronderzoek in de Praktijk*, VIII TIJDSCHRIFT VOOR STRAFRECHT 36, 43-47 (1928); Van Asch van Wijck, *Een Oude Wonde*, 12 NEDERLANDSCH JURISTENBLAD 985 (1937).

27. See Van Gorkum, *Art. 217 Sv.*, 17 NEDERLANDSCH JURISTENBLAD 185 (1942) for the view that apprising him might be regarded by the witness as an invitation to remain silent, whether the right to refuse to answer is based on relationship to the accused (art. 217) or on the type of question asked (art. 219).

28. In the Netherlands, the statements of a witness included in the report dictated by the investigating magistrate to his clerk, or in the report of the trial prepared by the clerk and one of the judges who was present at the trial, may be introduced in later criminal proceeding against the witness. Statements made by a person to a police or prosecuting official and included by the latter in his official report (process-verbaal) may also be used. In any event, anyone who heard the statements may testify as to their contents. See VAN BEMMELN, note 20, *op. cit. supra* at 166-67, 184, 301-04, 364-72. Note that no stenographic record is made of the testimony. This is generally the case in all civil law judicial proceedings.

29. In Germany, the statements (Erklärungen) of a witness included in the report of any judicial proceeding (richterliches Protokoll) may be used as documentary evidence (koennen verlesen werden), that is, may be read at the trial of a subsequent criminal proceeding against him, provided they have some bearing on the question of his guilt. In the event the statements of a person are only contained in a police report (Polizeiliches Protokoll), then they cannot be used at the trial of a subsequent criminal proceeding against him. The police report may, however, be used by the presiding judge to ask the accused whether or not he has made these statements, or its content may be read to establish that a report containing such statements exists. Besides, any official who questions a person may testify as to the statements made by him in a subsequent criminal proceeding against him. See Judgment of Bundesgerichtshofes (II. Ferienstrafsenat), Aug. 15, 1952, 3 BGH St. 149, 150; LOEWIG-ROSENBERG, note 21, *op. cit. supra* at 652-54; SCHMIDT, note 19, *op. cit. supra* at 727-29. Note that it is not clear whether the failure to apprise where it is required to be given affects the admissibility of such statements. But see section 157 of the Penal Code (Strafgesetzbuch), pursuant to which the judge may mitigate the sentence of one who committed perjury or is guilty of making a false statement in order to avert the danger of a criminal prosecution to himself or his relatives, or may impose no sentence on one who made a false statement for that purpose. Judgment of Bundesgerichtshofes (V. Strafsenat), Oct. 4, 1955, 8 BGH St. 186; KOHLRAUSCH-LANGE, STRAFGESETZBUCH 345-46 (41st ed. 1956).

an answer would subject him to the danger of a criminal prosecution.<sup>30</sup> The court may accept such refusal without more, or require the witness to make a plausible showing of the grounds on which it is based (*Glaubhaftmachung*), that is, require the witness to lay a foundation for his claim of the privilege.<sup>31</sup>

A witness is entitled to assert the privilege when one of several possible answers to the question asked would subject him to the danger of a criminal prosecution regardless of what his truthful answer would be.<sup>32</sup> If this were not so, the claim of the privilege would be tantamount to an admission that the witness' answer, if given, would subject him to the danger of a criminal prosecution, and the conflict the privilege was designed to avoid would still be there. In view of this rule the requirement for laying the foundation depends on the type of question asked.

It becomes important to distinguish between two general types of questions the answer to which may be refused: first, questions which indicate by their content that one of several possible answers would subject the witness to the danger of a criminal prosecution; second, questions which by their content do not show this danger.

When a witness is asked a question of the first type he need only point out to the court that the nature of the question is such that one of several possible answers would subject him to the danger of criminal prosecution.<sup>33</sup> For example, a witness is asked: "Did you participate in the assault on Jones?" It is obvious that because of the content of this question one of several possible answers would subject the witness to the danger of criminal prosecution. This being so, the foundation for claiming the privilege is sufficiently laid, that is, the claim of the privilege must be accepted by the court, when the witness calls the court's attention to the nature of the question.<sup>34</sup>

In order that he may lay the foundation for claiming the privilege to a question of the second type, it is not sufficient that the witness refer to the nature of the question. By definition, the content of the

30. See LOEWE-ROSENBERG, note 21, *op. cit. supra* at 182; SCHMIDT, note 19, *op. cit. supra* at 130-31.

31. See II FOREIGN OFFICE, *MANUAL OF GERMAN LAW* 150 (1952); SCHMIDT, note 19, *op. cit. supra* at 132-33; Kaplan, von Mehren, Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1239, (1958).

32. Judgment of Reichsgericht (IV Strafsenat) Feb. 24, 1903, 36 RG St. 114. For criticism of this doctrine see SCHMIDT, note 19, *op. cit. supra* at 131-32.

33. See LOEWE-ROSENBERG, note 21, *op. cit. supra* at 183; SCHMIDT, note 19, *op. cit. supra* at 133. See also Judgment of Reichsgericht (VII Zivilsenat) Dec. 6, 1932. 9 *Hochstrichterliche Rechtsprechung* no. 539 which deals with section 384 *Zivilprozessordnung*, the section which includes the privilege of a witness in a civil case.

34. *Ibid.*



question is of no help in laying the foundation for the claim of the privilege. Nevertheless, the witness may be in a position to refer to extrinsic facts or circumstances in the light of which one of several possible answers to the question asked would expose him to the danger of a criminal prosecution. When the witness supplies such facts or circumstances, the foundation for claiming the privilege is sufficiently laid, that is, the claim of the privilege to the question asked should be sustained by the court.<sup>35</sup> For example, a witness is asked whether he ever had sexual intercourse with a certain woman, not his wife (fornication is not a crime in Germany, adultery under certain circumstances is a crime). If nothing else were shown, the witness would have to answer the question. He nevertheless refuses to answer the question on the ground that a possible answer, since he was married, would subject him to the danger of criminal prosecution. In a decision involving substantially these facts the court sustained the witness' assertion of the privilege. In this case the extrinsic facts and circumstances with which he laid the foundation for his claim of the privilege were established by his testimony under oath.<sup>36</sup> The same result would be reached if the witness had not laid the foundation as part of his testimony under oath.<sup>37</sup>

In the event the witness is unable or unwilling to refer to the content of the question or to extrinsic facts or circumstances, he may lay the foundation for his claim of the privilege by taking a special oath.<sup>38</sup> The special oath is not the oath which the witness may be required to take before or after testifying, but an independent oath (to the effect that the answer to the question would subject him to the danger of a criminal prosecution) which must be accepted by the court as having sufficiently laid the foundation for the claim of the privilege.<sup>39</sup>

Recapitulating, the foundation for the claim of the privilege is sufficiently laid when the witness does the following: first, shows that because of the nature of the question one of several possible answers would subject him to the danger of a criminal prosecution; second, shows *why* one of several possible answers to a given question would have this result, whether or not such showing is under oath; and third, takes the special oath.

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35. *Ibid.*

36. See note 32 *supra*. Note that the statement of the extrinsic facts or circumstances on which the witness bases the reason for his refusal to answer is considered subject to the oath which he may be required to take before or after testifying. See LOEWE-ROSENBERG, note 21, *op. cit. supra* at 184; SCHMIDT, note 19, *op. cit. supra* at 132-33.

37. See note 33 *supra*.

38. See LOEWE-ROSENBERG, note 21, *op. cit. supra* at 183; SCHMIDT, note 19, *op. cit. supra* at 133.

39. *Ibid.*

*In the Netherlands.*

Though the Dutch Code of Criminal Procedure does not include a provision similar to section 56 of the German Strafprozessordnung (pursuant to which the court may require the witness to lay a foundation for his claim of the privilege), leading Dutch writers agree that difficulties may arise in the application of article 219. They distinguish between two kinds of questions: first, questions that "relate" to the conduct of the witness; second, questions which "relate" to other persons, identified or not. In the event the witness claims the privilege to a question of the first kind, they feel it will be generally clear enough whether by answering the danger of a criminal prosecution will arise. Unfortunately, they do not explain what makes this clear. If the question is of the second type, a witness, in their opinion, may not claim the privilege on the basis of his assertion that by answering the question he will expose himself to the danger of a criminal prosecution. Otherwise, every witness would be able to prevent his examination even though there is no danger of a criminal prosecution. They concede, though, that may be very difficult to lay the foundation for claiming the privilege without revealing the very facts or circumstances which create the danger of a criminal prosecution, and that high demands may not thus be made on the witness.<sup>40</sup>

Despite the relative dearth of information on the subject, this writer ventures the guess that, but for the special oath available in Germany, the Dutch practice of deciding whether the witness has validly claimed the privilege is similar to the German practice.

*Inferences from claiming the privilege.*

Once the claim of the privilege has been sustained, the problem arises whether an adverse inference may be drawn from such claim.

In Germany, no inference whatever may be drawn from the witness' claim of the privilege in a later judicial proceeding in which he may become a party.<sup>41</sup> This is true whichever way the witness has laid the foundation for his claim of the privilege.<sup>42</sup> Nevertheless, in one decision the Reichsgericht was of the opinion that a refusal to answer under

40. See BLOK & BESIER, *HET NEDERLANDSCHE STRAFPROCES* 544-45 (1925); MINKENHOF, *NEDERLANDSCHE STRAFVORDERING* 147-48 (1936); VAN BEMMEL, *STRAFVORDERING* 175 (6th ed. 1957).

41. See note 33 *supra*; Buchwald, *Die Berechtigte Zeugnisverweigerung als Gegenstand Freier Beweiswürdigung?*, 4 *SÜDDEUTSCHE JURISTEN-ZEITUNG* 360 (1949). See also HENKEL, *STRAFVERFAHRENSRECHT* 258 (1953); SCHMIDT, II *LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG* 116 (1952). Note that the authorities cited by Schmidt and Henkel in support of the opposing view involved section 52, not section 55, of the Strafprozessordnung.

42. See notes 32-33 *supra*; Buchwald, note 41 *supra* at 361.

circumstances of a particular case might be used as evidence.<sup>43</sup> In the Netherlands, it is not clear whether any inference may be drawn from the witness' assertion of the privilege. It is not improbable, however, that, as a practical matter, an adverse inference is drawn both in Germany and the Netherlands.

*Waiver of the privilege.*

In the event the witness does not assert the privilege with regard to a given question, the problem arises of how far he "opens the door."

In Germany, the witness must respond to a question with the pure truth (*reine Wahrheit*), and not conceal anything. This means that he must state all facts which he knows, or should know, which are inseparably connected with the issue (*Beweisthema*) about which he is questioned and which are material to the decision of the case, even though the question may not specifically have called for all these facts.<sup>44</sup> It is thus not surprising that a witness may, and should, claim the privilege to an apparently harmless question when the response required by the foregoing rule would reveal facts which would subject him to the danger of a criminal prosecution.

In the Netherlands, once a witness decides to answer a given question, he must state the whole truth and nothing but the truth (*de gehele waarheid en niets dan de waarheid*). The scope of his obligation to answer is undoubtedly similar to that of a German witness.<sup>45</sup>

In Germany, a witness has not lost the privilege if he claims it for the first time at the trial stage of the criminal case in which he is a witness. In that event, no testimony obtained in preliminary hearings and covered by the privilege may be introduced at the trial.<sup>46</sup> Nevertheless, if the witness testified during the preliminary stages after being apprised of the privilege by the judge who questioned him, that

43. See Judgment of Reichsgericht (VII Zivilsenat), 6 Dec. 6, 1932, 9 *Hochstrichterliche Rechtssprechung* no. 539. This being a civil case the refusal to answer was based on § 384 of the *Zivilprozessordnung* which permits a witness to refuse to answer a question which may subject him (or certain specified relatives) to dishonor, direct pecuniary loss, or to the danger of a criminal prosecution. The opinion fails to indicate clearly on which of these grounds the witness based his refusal.

44. See Judgment of Bundesgerichtshofes (Strafsenat), 9 Jan. 9, 1951, 1 BGH St. 22; Judgment of Bundesgerichtshofes (1. Strafsenat), Dec. 21, 1951, 2 BGH St. 90; Judgment of Bundesgerichtshofes (4. Strafsenat), Oct. 9, 1952, 3 BGH St. 221; Judgment of Bundesgerichtshofes (3. Strafsenat), Nov. 11, 1954, 7 BGH St. 127; KOHLRAUSCH-LANGE, *op. cit. supra* note 29, at 328-40.

45. See arts. 216 and 284, *Wetboek von Strafvordering*; BLOK & BESIER, note 40, *op. cit. supra* at 534-35.

46. Judgment of Reichsgericht (1 Strafsenat), Oct. 29, 1929, 63 RG St. 302; LOEWE-ROSENBERG, *DIE STRAFPROZESSORDNUNG UND GERICHTSVERFASSUNGSGESETZ* 169 (20th ed. 1953); SCHMIDT, note 41, *op. cit. supra* at 115.

judge at the trial stage is permitted to testify as to the statements made to him by the witness.<sup>47</sup>

In the Netherlands, a witness may similarly claim the privilege for the first time at the trial.<sup>48</sup> However, any testimony of the witness given before the trial may be introduced at the trial.<sup>49</sup>

*Protection of witnesses in a French criminal proceeding.*

In France, a witness in a criminal proceeding is sworn to tell the truth and nothing but the truth (de dire toute la verite, rien que la verite).<sup>50</sup> The oath is considered to guarantee the veracity of the witness' testimony by appealing to his moral and religious feelings as well as by subjecting him to the liability for perjury.<sup>51</sup> The French feel that a witness who has taken the oath may not on the basis of any personal considerations be excused from the sacred duty the oath imposes. Otherwise the veracity of testimony so essential to the administration of the criminal law would be seriously impaired. In accordance with this philosophy, a witness in a French criminal case is not granted the privilege.<sup>52</sup> A French accused has the right to remain silent, but, if he decides to say anything, he is not permitted to affirm his statement with the oath for the reason that his testimony basically is not considered trustworthy. For the same reason the accused's relatives are not permitted to testify under oath.<sup>53</sup> This is inconsistent with requiring a person who may happen to be a witness in a criminal case to accuse himself under oath. There is no good reason why the

47. Judgment of Bundesgerichtshofes (1 Strafsenat), Jan. 15, 1952, 2 BGH St. 99. KERN, STRAFVENFAHRENSRECHT 161 (3d ed. 1953); LOEWEN-ROSENBERG, note 46, *op. cit. supra* at 647-49; SCHMIDT, note 41, *op. cit. supra* at 719-22. Note that statements made outside the present criminal proceeding by one who is now a witness in this proceeding are unaffected by the assertion of the privilege, and such statements may be introduced at the trial. Judgment of Bundesgerichtshofes (1. Strafsenat), Oct. 30, 1951, 1 BGH St. 373; KERN, note 47, *op. cit. supra* at 161. Further note that hearsay is admissible. II FOREIGN OFFICE, MANUAL OF GERMAN LAW 25, 141 (1952).

48. See VAN BEMMELEN, note 40, *op. cit. supra* at 167-68.

49. See note 28 *supra*. Note that in the Netherlands hearsay is admissible. See PITLO, BEWIJS EN VERJARING 86-88 (3d ed. 1953); VAN BEMMELEN, note 40, *op. cit. supra* at 339-45.

50. Art. 103, Code de Procedure Penale. This Code was enacted December 31, 1957. See La Semaine Juridique, Jan. 15, 1958, 22846. Note that a witness may lie with impunity before the investigating magistrate, Keedy, note 15 *supra* at 713 and n. 615; but not at the trial; *id.* at 713 and n. 616. Note further that art. 103 supersedes art. 75, Code d'Instruction Criminelle.

51. See GARRAUD, PRÉCIS DE DROIT CRIMINEL 824 (15th ed. 1934).

52. See LALANDE, Cour de Cassation (Ch. Crim.), Feb. 6, 1863 [1863] Dalloz Jurisprudence (hereinafter D.) I 323; Dourisboure v. Garat, Cour de Cassation (Ch. crim.), Dec. 2, 1864, [1865] D. 317; Carbuccia, Cour de Cassation (Ch. crim.), March 15, 1866, [1866] D. 355; GARRAUD, *op. cit.* note 51 *supra* at 822-23; Keedy, note 15 *supra* at 714. The new Code de Procédure Pénale appears not to have changed this.

53. See GARRAUD, note 51, *op. cit. supra* at 818.

testimony of a witness who may not want to incriminate himself is any more trustworthy than that of an accused or his relatives.

When a witness does not state the whole truth and nothing but the truth he may be committing perjury.<sup>54</sup> However, his express refusal to answer questions regarding a given issue so as not to accuse himself does not amount to perjury. It does subject him to a penalty for failure to appear as a witness.<sup>55</sup> In addition, a fine of 40,000 to 100,000 francs may be imposed for a refusal to testify.<sup>56</sup>

*The privilege in civil cases.*

Neither France nor the Netherlands provides the privilege to witnesses in civil cases. Only Germany affords witnesses in civil cases the privilege against self-incrimination.

*The privilege in German civil cases.*<sup>57</sup>

The privilege is included in section 384 of the German Zivilprozessordnung which provides:

"Answers (Das Zeugnis) may be refused:

1. to questions, the answering of which may bring about a direct pecuniary loss to the witness or one of his relatives enumerated in Section 383 nos. 1 to 3;

54. *Id.* at 823 and n. 12.

55. BROUCHOT, GAZIER, BROUCHOT, ANALYSE ET COMMENTAIRE DU CODE DE PROCÉDURE PÉNALE (Additif) § 52 (1959). Note that anyone who has publicly charged that a crime has been committed, and publicly declared that he knows the offenders or their accomplices, and who refuses to answer questions put him by the investigating magistrate (juge d'instruction) is guilty of a *délit* and may be punished by imprisonment of eleven days to a year or a fine of 37,500 to 720,000 francs or both. Art. III Code de Procédure Pénale, formerly part of art. 80 Code d'Instruction Criminelle.

56. Art. 109 § 3, art. 438 Code de Procédure Pénale.

57. See II FOREIGN OFFICE, MANUAL OF GERMAN LAW 31-71 (1952) for a general description of German Civil Procedure. Note that in Germany a party in a civil case may not be sworn and testify as a witness. This rule is based on the notion that a party's evidence is not very reliable. However, a party may request the court to examine his opponents, or the court, on its own motion, may order the examination of parties. Parties are under no legal duty to submit to such examination, and for that reason are not granted the right to refuse to answer a given question. In the event a party refuses to submit to the examination, refuses to answer some questions, or refuses to swear to his deposition, such refusal is subject to the court's free appreciation of the evidence (*freie Beweiswuerdigung*). The examination of the parties for the purpose of obtaining evidence should not be confused with the power of the court to summon the parties for the purpose of clarifying their pleadings. The former procedure took the place in Germany of the party oath. Such oath is still found in the Netherlands and in France. A party may not refuse to take it on the ground that such oath would tend to incriminate him, and a refusal to take the party oath will have an adverse effect on the party's case. Besides the party oath, a Dutch or French court may call upon the parties to be examined, though the parties are under no legal obligation to submit to such examination. The court may, however, draw inferences from a refusal to

2. to questions, the answering of which may dishonor, or subject to the danger of a criminal prosecution, the witness or one of his relatives enumerated in Section 383 nos. 1 to 3;
3. to questions, which the witness could not answer without revealing trade secrets."

Section 55 of the Strafprozessordnung permits a witness to base his refusal to testify only on his interest in avoiding the danger of a criminal prosecution. In contrast, section 384 of the Zivilprozessordnung permits the witness to base his refusal to answer also on other grounds.

Section 384, unlike section 55, does not contain a requirement that witnesses be apprised of the privilege, or of other grounds on which they may base their refusal to testify.<sup>58</sup> In practice, however, such appraisal is often given.<sup>59</sup>

A witness in a German civil case must claim the privilege, and may be required to lay the foundation for his claim. As in criminal cases, the foundation for claiming the privilege is sufficiently laid when it appears from the content of the question on its face, or in the light of extrinsic information supplied by the witness, that one of several possible answers would subject the witness to the danger of criminal prosecution. The witness may also lay the foundation by a special affirmation in lieu of an oath (*Eidesstattliche Versicherung*) or by a declaration in writing to the effect that the answer to the question posed would subject him to a criminal prosecution.<sup>60</sup> No inference may be drawn from the witness' claim of the privilege in a later judicial

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appear, a refusal to answer certain questions, or a refusal to sign the deposition. Furthermore, in the Netherlands a party may examine his opponents concerning questions contained in written interrogatories submitted to them in advance (*verhoor op vraagpunten*). A refusal to answer may be considered by the court as an *ad-judicium* confession (*juge d'instruction*) is guilty of a *délit* and may be punished by imprisonment. See II FOREIGN OFFICE, *MANUAL OF GERMAN LAW* 60-61 (1952); MOREL, *TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE* 407-11 (2d ed. 1949); PITLO, *BEWIJS EN VERJARING* 89, 131-32 (3d ed. 1953); ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHT* 283-84, 560-62 (6th ed. 1954). For a discussion of the party oath see PITLO, *id.* at 131-60; MOREL, *id.* at 410-11. Note that in Germany the witnesses are nominated by the parties but summoned by the court. They are the court's witnesses rather than the witnesses of the party nominating them. This does not mean that they are always examined by the court trying the case, but may be examined by a "requested judge" (*ersuchter Richter*), especially where they live far from the place where the case is tried. See II FOREIGN OFFICE, *MANUAL OF GERMAN LAW* 61-62 (1952).

58. See STEIN-JONAS, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG* § 384 (18th ed. 1953). He deplores the fact that a witness who is asked an incriminating question is not apprised of the privilege. Note that section 384 of the *Zivilprozessordnung* indicates that society is less concerned with obtaining testimony in civil than in criminal cases, for section 384 imposes more restrictions on obtaining it than does section 55 of the *Strafprozessordnung*. Nevertheless, a witness in a civil case is not given the same safeguard as in a criminal case. This seems inconsistent.

59. WIECZOREK, *ZIVILPROZESSORDNUNG* 953 (1957).

60. STEIN-JONAS, note 58, *op. cit. supra* at § 386. See also § 294, *Zivilprozessordnung*.

proceeding whichever way he lays the foundation for his claim of the privilege.<sup>61</sup> Nevertheless, as was mentioned before, the Reichsgericht on one occasion indicated that in a civil case a refusal to answer based on section 384, Zivilprozessordnung, under the circumstances of the particular case could be taken into consideration by the court.<sup>62</sup>

When the witness decides to answer a question he must answer it fully, that is, state everything he knows is relevant to the issue on which he is examined and is material to the decision of the case.<sup>63</sup> Incriminatory statements made by a witness in the course of a civil case which are contained in a judicial report (richterliches Protokoll) may be used in a subsequent criminal proceeding brought against him.<sup>64</sup> The witness may claim the privilege at any time before his examination is considered closed.<sup>65</sup>

#### *Protection in Dutch civil cases.*

In the Netherlands, as in Germany, witnesses are under a legal obligation to testify in civil cases.<sup>66</sup> But in the Netherlands witnesses may not refuse to testify in civil cases on the ground that their testimony would subject them to the danger of a criminal prosecution.

#### *Protection in French civil cases.*

There is no question that witnesses in French civil cases are under a duty to appear and take oath, but whether there are any legal sanctions to compel them to answer questions is not clearly settled. There is some authority for the proposition that witnesses are under no legal obligation to answer any questions.<sup>67</sup> If this view is correct, witnesses who are aware of this principle may refuse to answer any question they consider incriminatory, or, for that matter, refuse to answer any question for any reason. There is other authority to the effect that the refusal to answer questions may subject the witness to a penalty for non-appearance.<sup>68</sup> A witness who knows that his express refusal to

61. See note 33 and 46 *supra*; Buchwald, note 41 *supra* at 360.

62. See note 43 *supra*; see also ROSENBERG, note 57, *op. cit.* at 550; WIECZOREK, note 59, *op. cit. supra* at 397, 952.

63. See note 47 *supra*. Note that a party who swears to his depositions also incurs this obligation; a party who does not swear to his deposition does not incur this obligation. KOHLRAUSCH-LANGE, note 29, *op. cit. supra* at 338. Cf. § 157 of the Penal Code; note 30 *supra*.

64. See note 30 *supra*.

65. See WIECZOREK, note 59, *op. cit. supra* at 968.

66. See §§ 380, 390 Zivilprozessordnung; ASSER, 5 NEDERLANDS BURGERLIJK RECHT 264-65 (5th ed. 1953).

67. DALLOZ, RÉPERTOIRE DE PROCÉDURE CIVILE ET COMMERCIALE, TOME II, 952 (1956).

68. See MOREL, note 57, *op. cit. supra* at 396.

answer an incriminating question subjects him to no more than a possible penalty for non-appearance at least has an alternative. If the witness decides to answer a given question he must answer it fully, and run the risk that anything he says may be used in a later criminal proceeding against him.<sup>69</sup>

### *Summary.*

The law of these three countries on this question may be summarized as follows: Germany extends the privileges to witnesses in civil and criminal cases, the Netherlands only in criminal cases, and France in neither criminal nor civil cases.

A witness in German criminal cases is afforded the best protection — in theory and practice — as he must be apprised of the privilege. The witness in German civil cases and in Dutch criminal cases has a privilege, but there is no legal requirement that he be apprised of it. In practice, however, the witness in German civil cases is apprised of the privilege. A witness in Dutch civil cases and in French civil and criminal cases does not have the privilege, although there is some question whether a witness in French civil cases is under a legal obligation to testify at all.

The European witness, unlike his Anglo-American counterpart, is generally ignorant of his legal rights, and therefore is not likely to exercise them. Moreover, he is easily intimidated by officials, especially by judicial officials.

Thus only in Germany has a witness a real opportunity to refuse to answer incriminating questions. In France and the Netherlands, a witness is equally susceptible to being intimidated into answering even incriminating questions.

## II.

### THE PRIVILEGE OF A WITNESS IN LEGISLATIVE INVESTIGATIONS.

#### *Introduction.*

In view of the wide attention given the responsibilities of witnesses in legislative investigations in the United States recently, some examination of the civil law experience of the problem seems warranted, although legislative investigations in civil law countries have been much less common than here. Many of the problems which have arisen in

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69. See LALANDE, *op. cit. supra* note 52 at 323 and nn. 1-2. Note that the express refusal to answer is not perjury. GARCON, CODE PÉNAL ANNOTÉ, TOME II 413, 415 (1956).



the United States do not seem to have been presented in the civil law countries examined. Subject to these limitations, this section of the article represents a comparison of the privilege granted a witness in German legislative proceedings with the protection afforded to his Dutch and French counterparts, who do not possess the privilege.<sup>70</sup>

*The investigative power of the legislature.*

In the Netherlands, article 105 of the present Constitution gives the two chambers of the legislature the rights to conduct investigations jointly or separately.<sup>71</sup> In France, the Constitution does not include an express grant of the right to investigate to the legislative branch of the government, but this right is considered inherent in its right to legislate.<sup>72</sup> In Germany, article 44 of the Constitution for the Federal Republic specifically gives the Bundestag the right to set up committees of investigation; upon motion of one-fourth of its members the Bundestag must establish such committees.<sup>73</sup>

*Scope of the right to investigate.*

The successive Constitutions of the Netherlands have, since 1848, provided for legislative investigations. It is well established that in principle the right to investigate extends to all matters within the legislative competency.<sup>74</sup> Article 1 of the law of 5 August 1850 provides that the resolution initiating an investigation must include a precise description of the subject matter of the investigation.<sup>75</sup>

The right of investigation in France is also as great as the legislative power of the chamber which institutes the investigation.<sup>76</sup> As in the Netherlands, the resolution which confers upon a committee the power to conduct an investigation must specify its task.<sup>77</sup>

The right of investigation possessed by a German committee of investigation (Untersuchungsausschusz) is no greater than the legisla-

70. For a definition of the term "privilege" see note 9 *supra*.

71. See KRANENBURG, *NEDERLANDSCH STAATSRECHT* 278-79 (7th ed. 1951); VAN DER POT, *HANDBOEK VAN HET NEDERLANDSE STAATSRECHT* 388-91 (6th ed. 1957). See also CAMPION & LIDDERDALE, *EUROPEAN PARLIAMENTARY PROCEDURE* 175-91 (1953) for a brief description in English of the Dutch legislature.

72. See ESMEIN, *DRIT CONSTITUTIONNEL FRANCAIS ET COMPARÉ* 509-10 (8th ed. 1927); HAURIU, *DRIT CONSTITUTIONNEL* 582-83 (1923).

73. See GIESE, *GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUTSCHLAND* 81-83 (4th ed. 1955).

74. See VAN DER POT, note 71, *op. cit. supra* at 389-91.

75. The law of 5 August 1850 is set forth in *Staatablad* 1849-50, No. 45. See KRANENBURG, note 71, *op. cit. supra* at 279; VAN DER POT, note 71, *op. cit. supra* at 389-90.

76. See ESMEIN, note 72, *op. cit. supra* at 509. See LIDDERDALE, *THE PARLIAMENT OF FRANCE* 45-47, 48-69, 206-65 (1951) for a description of the powers of the two chambers of the French legislature.

77. See VEDEL, *DRIT CONSTITUTIONNEL* 415 (1949).

tive competency of the Bundestag, and, in given cases, is further limited by the resolution creating the committee.<sup>78</sup>

*Committees generally exercise the right of investigation.*

In the Netherlands and France the right of investigation is usually delegated to and exercised by committees.<sup>79</sup> In Germany, the right of investigation may be exercised only by a standing or a special committee of the Bundestag.<sup>80</sup>

*The power to compel witnesses to testify.*

In the Netherlands, the law of 5 August 1850 authorizes properly constituted committees of investigation to summon witnesses and compel them to testify, even under oath. A properly summoned witness who does not appear or who refuses to testify may be held in contempt by courts having jurisdiction in civil cases. In the event a witness is prevented from appearing due to illness, the examination of that witness may be delegated to the appropriate district judge (*kantonrechter*).<sup>81</sup>

Under French practice, conferring the powers to conduct an investigation (*Pouvoirs d'Enquete*) on a committee of the legislature does not by itself authorize such committee to examine witnesses under oath. The power to examine witnesses may be delegated to the investigative committee by a special resolution (*decision speciale*). Clause 9 of Act No. 50 of 6 January 1950 (hereinafter clause 9) provides a penalty for non-appearance, for refusal to take the oath, and for perjury; further, it provides that an unwilling witness may be compelled to appear by force.<sup>82</sup>

78. See GIESE, note 73 *supra* at 81-82; KOMMENTAR ZUM GRUNDGESETZ, art. 44, p. 2 (1954). Note that the Bundesrat does not have the power to set up investigating committees, and that the competency of the Bundesrat is limited to federal matters. PLISCHKE, THE WEST GERMAN FEDERAL GOVERNMENT 27-31, 53 (1952). Only the privilege of a witness in federal (Bundes) legislative investigation is discussed here; the state (Land) practice will generally be the same.

79. See CAMPION & LIDDERDALE, note 71, *op. cit. supra* at 188; ESMEIN, note 72, *op. cit. supra* at 508; LIDDERDALE, note 76, *op. cit. supra* at 170-71.

80. See KOMMENTAR ZUM GRUNDGESETZ, art. 44, p. 2 (1954).

81. See note 75 *supra*.

82. "Toute personne dont une commission d'enquete de l'Assemblée nationale, du Conseil de la République a jugé l'audition utile est tenue de déférer a la citation qui lui est délivrée par un huissier ou un agent de la force publique, a la requête du président de la commission. En cas de non comparution, le témoin défaillant qui ne justifie pas d'une excuse légitime est puni d'une amende de 5.000 a 100.000 francs. Il peut, en outre, sur requête de la commission, être l'objet d'un mandat d'amener délivré par le Procureur de la République. Le refus de prestation de serment ainsi que le faux témoignage ou le subornation de témoin seront punis de peines prévues a l'article 363 du Code pénal. Les présentes dispositions ne s'appliquent aux enquêtes ci-dessus prévues qu'en vertu d'une décision spéciale de l'Assemblée qui les a ordonnées."

This statute substantially re-enacted the law of 23 March 1914. See LIDDERDALE, note 76, *op. cit. supra* at 170 and n. 5, 266-67; CAMPION & LIDDERDALE, note 71, *op. cit.*

The German Constitution has no provision which expressly provides committees of investigation with the power to summon witnesses and compel them to testify. However, article 44 (2) provides in part: "The provisions relating to criminal proceedings shall apply, as far as is suitable, to the taking of evidence [by investigative committees]." <sup>83</sup> As its legislative history shows, article 44 (2) was intended to impose the duty to appear and testify. <sup>84</sup> It is a substantial re-enactment of the last paragraph of article 34 of the Weimar Constitution. Pursuant to article 34 witnesses had been required to appear and testify before investigating committees. <sup>85</sup>

*Protection of witnesses against self-incrimination.*

*Limited immunity from prosecution in the Netherlands.*

A witness before a Dutch investigating committee may not refuse to answer any question which is within the scope of the investigation. However, article 24 of the law of 5 August 1850 provides: "Except in the case of Article 25, declarations made before a committee of investigation, or made pursuant to its demand, may never be legal proof against him or against third parties." <sup>86</sup> Article 25 provides that a false declaration may subject the witness to the penalties for perjury imposed on witnesses in civil cases.

Legislative investigations in the Netherlands have been infrequent. <sup>87</sup> As a result, the law of 5 August 1850 has received scant attention from Dutch courts or commentators. Accordingly, the scope of the witness' immunity from later criminal prosecution is not very clear. It is clear that his declaration may not be used in a civil or criminal proceeding against him or a third party. Whether all judicial or administrative proceedings against him or a third party involving matters contained in his declaration are prohibited is an open question.

*supra* at 127. See also Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 11 U. CHI. L. REV. 1, 3-15, 17-19, 21, 24-25 (1943-44) for a description of legislative investigations in France before World War II.

83. "Auf Beweiserhebungen finden die Vorschriften ueber den Strafprozess sinngemaesz Anwendung." For a discussion of legislative investigation in Germany before World War II see Ehrmann, note 82 *supra* at 117-30; after World War II, PLISCHKE, note 78, *op. cit. supra* at 53-54, 151-52.

84. See VON MANGOLDT, *DAS BONNER GRUNDGESTZ* 245-47 (1953).

85. See BIEDERMANN, *DIE UNTERSUCHUNGS AUSSCHUESSE IM DEUTSCHEN STAATSR ECHT* 96, 98-99 (1929); STEINHOF, *DIE RECHTLICHE STELLUNG DER PARLEMENTARISCHEN UNTERSUCHUNGS AUSSCHUESSE IN STRAFPROZESSUALER BEZIFHUNG* 30 (1929); Ehrmann, note 82 *supra* at 128.

86. "Behalve in het geval van art. 25, kunnen nimmer verklaringen voor eene commissie van onderzoek, of op hare vordering, als bewijs in regten gelden, hetzij tegen degene door wien zij afgelegd zijn, hetzij tegen derden."

87. See VAN DER POT, note 71, *op. cit. supra* at 388-91 for a description of legislative investigations in the Netherlands up to 1957.

Nothing on the face of this statute prevents prosecuting authorities from using all information contained in the witness' declaration to start an investigation which may culminate in a criminal proceeding against him. If this is so, a witness in a Dutch legislative investigation may be tempted to lie and face the possibility of a perjury prosecution rather than testify truthfully.

Regardless of what the scope is of the immunity granted a witness in Dutch legislative investigations, it is clear that he does not have the privilege, but an immunity of yet undetermined scope.

### *Protection in France.*

In France, clause 9 requires everyone properly summoned to appear and take the oath. It does not include any provision for the witness who after taking the oath refuses to answer a given question. Such conduct by a witness in a French civil or criminal case would subject him to no more than the penalties for non-appearance.<sup>88</sup> As this result is reached without any express provision in the French Code of Civil or Criminal Procedure it might be contended that a witness who refuses to answer a given question posed by an investigating committee is similarly subject to the penalty provided by clause 9 for non-appearance. Unfortunately no authority can be found on this specific point. Undoubtedly, a witness who after taking the oath refuses to answer a given question will incur some penalty, as, according to the French, witnesses who have taken the oath may not on the basis on any personal considerations be excused from the sacred duty the oath imposes.<sup>89</sup> On the other hand, a French accused may not be required to take the oath; he may remain silent, and is permitted to lie in his own defense.<sup>90</sup> A defendant in a pending criminal action may not be required by an investigating committee to take the oath and testify about facts connected with that criminal action.<sup>91</sup> This principle does not create a broad exemption, but only affords protection in a limited class of cases.<sup>92</sup> Thus, unless a person belongs to this category,

88. See notes 55, 67-68 *supra*.

89. See note 52 *supra*.

90. See VOIEN, *DROIT CRIMINEL* 320-21 (1949).

91. See Paradis, *Tribunal Correctionnel Seine*, March 16, 1931, [1931] *Gazette du Palais* I 853; Ehrmann note 82 *supra* at 12. But see BARTELEMY, *DROIT CONSTRUCTIONNEL* 696-97 (1933) who contends that when an investigation is directed against a known person, and that person may as a result thereof become subject to an indictment, he no longer is a witness in the sense of the law of 23 March 1914, the predecessor of clause 9.

92. But see Ehrmann, note 82 *supra* at 18-19 who thinks that the Paradis case created an exemption in a wide range of cases. This is not quite accurate in view of the fact that French courts tend to follow precedent. See Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law*, 18 *LA. L. REV.* 235, 255-59 (1958).

his failure to take the oath before a French investigating committee may subject him to the penalties provided by article 363 of the Penal Code.<sup>93</sup> In addition, a refusal to answer specific questions after taking the oath will undoubtedly subject the witness to some penalty.<sup>94</sup>

Ehrmann has made the statement that in pre-World War II France, "the parliamentary committees saw themselves flatly denied the right to question witnesses about facts incriminating them."<sup>95</sup> Taken by itself this statement is misleading. It should be read in connection with another of his statements to the effect that French courts have punished recalcitrant witnesses, but "only after the attorney general had expressed to the defendants his admiration for their refusal to testify before the committee, and his regret at being forced to ask for the application of the law."<sup>96</sup> Ehrmann undoubtedly means that, in view of the fact that French courts imposed only nominal sanctions, witnesses in French legislative investigations were under no real duty to take the oath under the old law.<sup>97</sup> This situation may have been changed by clause 9 which provides for the imposition of the penalties of article 363 of the Penal Code in the event of a refusal to take the oath.<sup>98</sup> Since the enactment of clause 9 in 1950, there appear to have been no prosecutions for refusal to take the oath before an investigating committee, and one can only speculate as to the present attitude of the French courts on that point. Another open question is what the French courts will do with a witness who after taking the oath expressly refuses to answer a specific question of an investigating committee.

In summary, it seems fair to say that a witness in French legislative investigations who refuses to take the oath or who refuses to answer some or all questions incurs the risk of some penalty. Witnesses in French legislative proceedings thus do not have the privilege. On the other hand, witnesses who are aware that an express refusal to answer an incriminatory question does not amount to perjury have at least the choice of not answering the question and facing whatever penalty may be imposed for such refusal.

### *The privilege in Germany.*

In Germany, article 44 (2) of the Constitution provides that as far as is suitable the provisions relating to criminal proceedings shall

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93. See note 82 *supra*.

94. See notes 55, 67-68 *supra*.

95. Ehrmann, note 82 *supra* at 20.

96. Ehrmann, note 82 *supra* at 18. See BARTELEMY, *op. cit. supra* note 91, at 697-98 for a criticism of this situation.

97. The law of 23 March 1914. See also note 82 *supra*.

98. See note 82 *supra*.

apply to the taking of evidence by investigating committees of the Bundestag.<sup>99</sup> Article 44 (2) as well as its predecessor — article 34 (last paragraph) of the Weimar Constitution — has been interpreted as extending the privilege to witnesses in German legislative investigations.<sup>100</sup>

Though there have been legislative investigations in Germany since the enactment of article 44 (2), contemporary legal literature has paid little attention to the privilege in legislative investigations or to problems connected with the privilege.<sup>101</sup> However, in view of the fact that article 44 was intended to incorporate the norms developed pursuant to article 34 of the Weimar Constitution, we may look to the practice under article 34 for answers to some of the problems surrounding the privilege of a witness in a present legislative investigation.<sup>102</sup>

*The witness has a privilege similar to the privilege of a witness in a criminal case.*

Some German writers have advocated the view that, when a witness is questioned by an investigative committee about facts on the basis of which he may be criminally prosecuted, his position is similar to that of an accused, and that he should not be required to testify at all.<sup>103</sup> This contention has been rejected for the reason that before a person is being questioned it may not be apparent what questions he will be asked, and that he may always assert the privilege to an incriminatory question.<sup>104</sup> In any event there is no disagreement that in principle a witness in German legislative investigations has a privilege similar to that of a witness in a criminal proceeding.

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99. See note 83 *supra*.

100. See BIEDERMAN, *op. cit. supra* note 85, at 96; KOMMENTAR ZUM GRUNDGESETZ, art. 44, pp. 4-5; STEINHOF, *op. cit. supra* note 85 at 37.

101. But see Fuss & Rogalla, *Zur Gewaehrleistung der eigenstaendigen Willensbildung des Gesetzgerbers in den USA*, 10 JURISTENZEITUNG 530 (1955); Loewestein, *Der Kommunismus und die Amerikanische Verfassung*, 7 JURISTENZEITUNG 2 (1952) for recent discussions of legislative investigations in the United States.

102. See VON MANGOLDT, DAS BONNER GRUNDGESETZ 248 (1953).

103. See HECK, DAS PARLEMENTARISCHE UNTERSUCHUNGSRECHT 65-66 (1925); STEINHOF, DIE RECHTLICHE STELLUNG DER PARLEMENTARISCHEN UNTERSUCHUNGS-AUSSCHUESSE IN STRAFPROZESSUALER BEZIEHUNG 37-38, 40-41 (1929); Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 11 U. CHI. L. REV. 1, 117, 129 and nn. 191-93 (1943-44). Note that a German court and a German investigating committee may, though with a different objective, deal simultaneously with the same subject matter, and this is not considered an interference with judicial independence. See KOMMENTAR ZUM GRUNDGESETZ, art. 44, p. 5.

104. See BIEDERMAN, DIE UNTERSUCHUNGS-AUSSCHUESSE IM DEUTSCHEN STAATSR-RECHT 91-96 (1929).

*Modification required by article 44 (2).*

Unfortunately, German legal literature does not provide answers to the problem of modification required by article 44 (2) of the German Constitution of the rules pertaining to the privilege of witness in a criminal proceeding before these rules may be applied to legislative investigations. Steinhof contends that witnesses in legislative investigations must be apprised of the privilege.<sup>105</sup> This is undoubtedly correct. However, no authority was found on the other rules. But this writer ventures the guess that all but one of the rules pertaining to the privilege of a witness in a criminal case apply to legislative investigations. The exception is the rule which generally prevents statements made during preliminary hearings from being used at the trial stage even when the privilege is not claimed until then. The rationale of this rule is that a witness at the trial stage is in a better position to determine whether or not to exercise the privilege than during the preliminary stages.<sup>106</sup> Since there is no distinction between preliminary and trial stages in legislative investigations, this rule does not suitably apply to such proceedings. This view finds support in Steinhof's contention that only the provisions pertaining to the trial stage of criminal proceedings apply suitably to the proceedings of investigating committees.<sup>107</sup> Authoritative answers to the entire modification problem will have to await further developments

*Person in charge of proceeding initially decides whether the privilege was validly asserted.*

When a witness is examined before the entire committee or its subcommittee, all committee members present may question the witness, but the committee member in charge of the hearing will initially rule whether the question asked is within the committee's competency (Zustaendigkeit) and whether or not the privilege was validly asserted. The examination of a witness may be delegated by the investigative committee to a court or other governmental agency (Behoerde). In that case the person in charge of the examination will make these rulings. However, if the adverse ruling is initially made by the presiding committee member, an appeal is possible to all of the committee members who are present.<sup>108</sup>

105. STEINHOFF, DIE RECHTLICHE STELLUNG DER PARLEMENTARISCHEN UNTERSUCHUNGS-AUSSCHUESSE IN STRAFPROZESSUALER BEZIEHUNG 37 (1929).

106. See SCHMIDT, II LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG 719 (1952).

107. STEINHOFF, note 105, *op. cit. supra* at 29-30.

108. See HECK, note 103, *op. cit. supra* at 72; STEINHOFF, note 105, *op. cit. supra* at 36.

*Measures against recalcitrant witnesses.*

As the legislative history of article 44 of the German Constitution shows, investigative committees now possess the power given courts, pursuant to sections 176-78 of the "Gerichtsverfassungsgesetz," to maintain order at its proceedings and punish persons for grossly disorderly conduct inconsistent with the dignity of such proceedings.<sup>109</sup> This power possessed by German courts and investigating committees is called the police power (Sitzungspolizei). In addition, German criminal courts have the power to impose the penalties provided by section 70 of the German Code of Criminal Procedure (hereinafter section 70) in the event they consider the privilege to have been invalidly asserted.<sup>110</sup> Pursuant to the first paragraph of section 70, a witness who without valid reasons refuses to testify may be taxed the costs resulting from such refusal and fined up to 1,000 marks or, in the event of non-payment of this fine, imprisoned up to six weeks. The second paragraph provides for an additional imprisonment not exceeding the duration of the criminal proceeding but in no event longer than six months, and in the case of minor offenses (Uebertretungen) in no event longer than six weeks. The fine or imprisonment in lieu thereof may only be imposed once during a given proceeding, but the additional imprisonment provided by the second paragraph of section 70 (Zwangshaft oder Beughaft) may be re-imposed up to the appropriate limit. The witness' decision to answer frees him from the imprisonment imposed pursuant to the second paragraph of section 70, but does not absolve him from paying the fine or discharge him from the imprisonment ordered in lieu thereof.<sup>111</sup> The suitable application of section 70 to legislative investigations would make a recalcitrant witness subject to a fine up to 1000 marks or imprisonment up to six weeks in lieu thereof, and possibly the additional imprisonment not exceeding

109. See II FOREIGN OFFICE, MANUAL OF GERMAN LAW 54-55 (1952); LOEWE-ROSENBERG, ZWEITE ABTEILUNG 282-93; KOMMENTAR ZUM GRUNDGESETZ, art. 44, p. 1; Sprenger, *Ordnungsstrafe im Untersuchungsausschuss des Bundestages?*, 8 DIE OEFFENTLICHE VERWALTUNG 461 (1955). See also Ehrmann, note 103 *supra* for a description of the disorder prevailing during the investigations conducted by committees of the Reichstag which did not possess the power to punish "Ungebuhr."

110. See HECK, note 103, *op. cit. supra* at 63; STEINHOF, note 105, *op. cit. supra* at 33-36; Ehrmann, note 103 *supra* at 128. Note that the concept of "contempt of court" is unknown in civil law countries including Germany. See II FOREIGN OFFICE, MANUAL OF GERMAN LAW 54-55 (1952); BOEHMERT, DIE STRAF-UND ZWANGSBEFUGNISSE DER NORDAMERIKANISCHEN GESETZGEBENDEN VERSAMMLUNGEN UND IHRER UNTERSUCHUNGS-AUSSCHUESSE 4-10 (1927).

111. See LOEWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND GERICHTSVERFASSUNGSGESETZ 208-12 (20th ed. 1953); PETERS, STRAFPROZESS 269-70 (1952); SCHMIDT, note 106, *op. cit. supra* at 167-70.



six months in the aggregate or the duration of the investigation whichever is shorter.<sup>112</sup>

The penalties which may be taken against a recalcitrant witness in legislative investigations have been set forth in detail to show the risk he takes in persisting in his refusal to answer when he thinks his claim of the privilege has been unjustly rejected. However, it must be kept in mind that investigative committees can do no more than order the imposition of any of these penalties. The German legislature, unlike its American counterpart, does not possess any inherent means to enforce a penalty it, or its committee, imposes.<sup>113</sup> For the enforcement of penalties the aid of courts and other governmental agencies must be enlisted. By law these are under an obligation to comply with such requests.<sup>114</sup>

*Review of ruling rejecting claim of privilege.*

After all committee members present have affirmed the ruling of the chair, there is no direct appeal from such determination.<sup>115</sup> Neither may the order imposing any penalty be collaterally attacked by a "formal complaint" (*Beschwerde*) which resembles our writ of certiorari. Whether this is also true of an order made by a court or other governmental agency to which the examination of a witness had been delegated is not clear.

In the days of the Weimar Republic, a committee of the Reichstag conducted an investigation into the responsibility of the German imperial authorities for World War I and its prolongation. In the course of its investigation a penalty was imposed on the former Secretary of State, Helfferich, for his refusal to answer a question posed by one of the committee members.<sup>116</sup> Helfferich thereupon filed a formal complaint collaterally attacking the validity of the committee's order and the validity of the service of the committee's order upon him. The court held that a "formal complaint" did not lie in this case for the reason that the committee's order was not subject to this type of review, and for the reason that the service of the order imposing the penalty does not repre-

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112. See STEINHOF, note 105, *op. cit. supra* at 35-36. Note that the investigation itself may be terminated by the end of the legislative session. But note that Steinhof thinks that any imprisonment imposed pursuant to the second paragraph of section 70 may not in any event exceed six weeks in the aggregate. *Ibid.*

113. See note 110 *supra*. For the inherent power of the United States Congress to punish for contempt see Note, 70 HARV. L.R. 671, 684-85 (1957).

114. See KOMMENTAR ZUM GRUNDGESETZ, art. 44, p. 5; Ehrmann, note 103 *supra* at 128.

115. See note 108 *supra*.

116. See Ehrmann, note 108 *supra* at 124-27.

sent an enforcement of the order, but only a prerequisite for enforcing the order.<sup>117</sup>

Under the Weimar Constitution, when investigating committees apply to courts or other governmental agencies for enforcement of its orders, the latter are only under an obligation to render official assistance (Amtshilfe) when required by a lawful order. If the official assistance applied for involves an interference with liberty or property, courts and other governmental agencies are always obligated to review the order's legality.<sup>118</sup> Moreover, if the witness resists the enforcement of the committee's order he will be criminally prosecuted pursuant to section 113 of the Penal Code which punishes resisting the enforcement of a lawful order. Since the material element of this crime is the legality of the order, the criminal prosecution necessarily includes a review of the order's legality.<sup>119</sup> Thus at the enforcement stage there will be a review of the ruling on the validity of the claim of the privilege, because the legality of the order ultimately depends on the legality of the ruling.

Presumably, the present possibilities for reviewing the ruling on the validity of the claim of the privilege are substantially the same as those prevailing under the Weimar Constitution. That there will be some opportunity to review the committee's ruling finds support in other articles of the present German Constitution. Article 104 provides:

"(1) The freedom of an individual may only be restricted on the basis of a formal law and subject to its provisions. Detained persons may not be subjected to mental or physical mistreatment.

(2) *Only a judge may decide on the legality and duration of a deprivation of liberty. In the case of every deprivation of liberty which is not based on a judicial order, a judicial decision must be obtained without delay.* The police may, on its own authority hold no one in its own custody beyond the end of the day following the arrest. Further details are to be regulated by law.

(3) Any person temporarily detained on suspicion of having committed a punishable act (*e.g.*, resisting an officer who enforces a "lawful" order) must, no later than the day following the detention be brought before a judge who shall inform him of the reason for the detention, interrogate him and give him the opportunity to raise objections. The judge must, without delay, either

117. Judgment of Kammergericht (Zivilsenat 1 a), March 19, 1920, 40 Rechtsprechung der Oberlandesgerichte auf dem Gebiet des Zivilrechts 172. But see Ehrmann, note 108 *supra* at 127 and n. 183 to the effect that this case reviewed the legality of the penalty. If it did, it did not do so *expressis verbis*.

118. See HECK, note 103, *op. cit. supra* at 72-73; STEINHOF, note 105, *op. cit. supra* at 22-24, 36.

119. See STEINHOF, note 105, *op. cit. supra* at 24.

issue a warrant of arrest, setting out the reasons thereof, or order the release.

(4) A relative of the detained person who enjoys his confidence must be notified without delay of any judicial decision ordering or continuing the deprivation of liberty." (Emphasis supplied.)<sup>120</sup>

Article 2(2) provides: "Everyone has the right to life and to bodily inviolability. The freedom of the individual is inviolable. These rights may only be interfered with on the basis of law."<sup>121</sup> Article 19 (4) provides: "In the event anyone is injured in his rights by the public authority, he shall have recourse to the courts. Insofar as no other agency is given jurisdiction, recourse shall be had to the ordinary courts."<sup>122</sup> In addition, section 90 of the "Gesetz ueber das Bundesverfassungsgericht" provides in part that anyone who contends that he has been injured by the public authority (oeffentliche Gewalt) in one of his basic rights contained in article 33, 38, 101, 103, and 104 may institute a "formal constitutional complaint" (Verfassungsbeschwerde) in the Federal Constitutional Court (Bundesverfassungsgericht); however, if the ordinary courts have jurisdiction to remedy the wrong, no "formal constitutional complaint" may be instituted until after the ordinary judicial remedies have been exhausted. Nevertheless, the Federal Constitutional Court may decide the issues raised by the complaint, even before the judicial remedies have been exhausted if questions of general importance are involved or if the complainant (Beschwerdefueher) would suffer serious and irreparable harm (schwerer und unabwendbarer Nachteil) should he be now referred to the ordinary courts (falls er zunaechst auf den Rechtsweg verwiesen wuerde).<sup>123</sup>

The combined effect of the above enumerated legal provisions undoubtedly secure some form of review at the enforcement stage to an individual whose claim of the privilege has been rejected by an investigating committee.

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120. OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.), DOCUMENTS ON THE CREATION OF THE GERMAN FEDERAL CONSTITUTION 19-20 (1949) (hereinafter cited as DOCUMENTS); HAMANN, DAS GRUNDGESETZ 355-59 (1956). Note that article 104 is the habeas corpus article of the German Constitution. *Id.* at 356.

121. See DOCUMENTS, note 120 *supra* at 9; HAMANN, note 120, *op. cit. supra* at 78-87.

122. See DOCUMENTS, note 120 *supra* at 10; HAMANN, note 120, *op. cit. supra* at 169-71, 174-77.

123. Section 90 may be found in SARTORIUS, VERFASSUNGS UND VERWALTUNGSGESETZE (loose-leaf). For a general discussion of the "Verfassungsbeschwerde" see MAURER, GRENZEN DER VERFASSUNGSBESCHWERDE (1953). Whether section 90 has changed the rule that a decision of an investigating committee is not subject to collateral attack is unclear.

*Legislature's power to affect the privilege.*

The privilege possessed by witnesses in German legislative investigations is not a constitutional right in the sense of the privilege contained in the fifth amendment of the United States Constitution. Only a constitutional amendment can repeal the latter; the former can be repealed by a statutory enactment repealing the privilege of a witness in legislative proceedings. Conceivably the German legislature could pass an immunity statute, but it is an open question whether it would do so.

The German legislature may not want to adopt either of these two alternatives, but may want, instead, to enact a statute providing its own enforcement machinery for penalties imposed by its investigating committees and providing further that neither committee resolutions imposing penalties nor their enforcement are subject to judicial review. Whether such a statute would be held invalid by the court, assuming they retained jurisdiction to pass on the question, or whether they retained jurisdiction in spite of this statute, is an intricate question of German constitutional law, especially in view of the fact that the German Constitutional Court (Bundesverfassungsgericht) considers itself competent to declare legislation unconstitutional when the court is convinced that the legislation transgresses the minimum requirements of material justice (materiale Gerechtigkeit), a notion similar to our notion of due process.<sup>124</sup> A definitive answer to this question, however, is outside the scope of this article dealing with the privilege as it exists in legislative investigations.

These three examples have been used to illustrate some of the ways in which the German legislature could affect the privilege of witnesses in legislative investigations, but they should not be read as a prediction of what the German legislature may do in the future. At the present, in any event, witnesses in German legislative investigations have the privilege, and, at the enforcement stage, are afforded the possibility to test the legality of a ruling rejecting their claim of the privilege.

*Summary.*

Germany, at least on paper, provides a witness in a legislative proceeding with the privilege. However, in view of the many unsettled

124. See Apelt, *Verfassung und richterliches prüfungsrecht*, 9 JURISTENZEITUNG 401 (1954); Nawiasky, *Positives und ueberpositives Recht*, 9 JURISTENZEITUNG 717 (1954). See also Judgment of Bundesverfassungsgericht (II. Senat) Oct. 23, 1951, 1 Entscheidungen des Bundesverfassungsgericht 14; Von Mehren, *Constitutionalism in Germany — The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70 (1952). See also HAMANN, note 120, *op. cit. supra* at 4-5, 86.

problems pertaining to legislative investigations in the Netherlands, France, and Germany it would not be meaningful at this time to evaluate which country, in fact, affords the best protection to witnesses called before investigating committees. Further developments will have to be awaited before such an evaluation can be made.

### III.

#### THE PRIVILEGE OF A WITNESS IN ADMINISTRATIVE PROCEEDINGS.

##### *Introduction.*

In the United States as well as in Europe, administrative officials and organs not only make decisions affecting particular individuals but also promulgate rules and regulations of general applicability.<sup>125</sup> However, the administrative structure found in most civil law countries is different from that in the United States. In the United States, administrative powers may be exercised by independent agencies or by officials within the executive branch. In most civil law countries administrative powers are found exclusively in the hands of officials of the executive branch. Such is the situation in the Netherlands and France. In Germany, though, there are administrative organs comparable to American administrative agencies.<sup>126</sup>

Unlike administrative proceedings in the United States which to a large extent depend on oral testimony taken at hearings, continental administrative procedure is by and large written. Nevertheless, the examination of witnesses is not entirely absent from civil law administrative proceedings. In this section of the article, the protection against self-incrimination which the privilege affords witnesses in certain types and stages of German administrative proceedings will be compared with the protection against self-incrimination afforded witnesses in Dutch and French administrative proceedings.<sup>127</sup>

With the exception of tax proceedings, parties in civil law administrative proceedings cannot legally be compelled to submit to questioning. The only risk a party incurs by refusing to answer questions is that his refusal may have an adverse effect on the granting of the requested administrative act or relief. In tax matters though, the legal obligation to file truthful declarations requires taxpayers to

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125. See SCHWARTZ, *LE DROIT ADMINISTRATIF AMERICAIN* 40 (1952).

126. See VON TUREGG, *LEHRBUCH DES VERWALTUNGSRECHT* 182-85 (3d ed. 1952).

127. For a definition of the term "privilege" see note 9 *supra*.

answer questions posed by tax authorities.<sup>128</sup> But whether taxpayers have any protection against self-incrimination is not clear.

Since parties generally cannot legally be compelled to answer incriminating questions, the balance of this section is limited to a discussion of the protection against self-incrimination afforded non-party witnesses.

*Power to compel testimony in proceedings of first instance.*

In the Netherlands and in France officials who in the first instance render administrative determinations do not possess the power to compel persons to appear and testify as witnesses. This is also true of German officials within the executive branch. However, in Germany there also are independent administrative organs which by special statute are given the power to require (by formal written demand) the county court (Amtsgericht) of the county in which a witness resides to examine him under oath. A witness summoned by the county court for this purpose must appear and testify.<sup>129</sup>

*Power to compel testimony in review proceedings.*

In France, there exists a system of administrative courts separate and apart from the ordinary law courts. Every administrative act is subject to challenge before an administrative court.<sup>130</sup> However, no French administrative court can compel persons to appear and testify as witnesses.<sup>131</sup>

In the Netherlands, there is no separate system of administrative courts such as exists in France. The review of administrative determina-

128. See 1 BUEHLER, *STEUERRECH* 352-54 (2d ed. 1953); LAFERRIERE & WALINE, *TRAITÉ ÉLÉMENTAIRE DE SCIENCE ET LÉGISLATION FINANCIÈRE* 482-91 (1952); SOEST & PEETERS, *BELASTINGEN* 162 (1951). Note that in German tax proceedings persons other than the taxpayer may also be compelled to testify even though the proceedings are conducted at the administrative level. BUEHLER, *op. cit. supra* at 357.

129. See for example Gesetz ueber den Lastenausgleich § 330 (3) (1952) Bundesgesetzblatt I 446, 520; Gesetz ueber die Feststellung von Vertreibungsschaeden und Kriegsschaeden § 34 (2) (1952) Bundesgesetzblatt I 535; Gesetz ueber die EntschaeDIGUNG ehemaliger deutscher Kriegsgefangener § 15 (2) (1956) Bundesgesetzblatt I 908. Note in the states (Laender comprising the former British zone in Germany there are also independent administrative organs known as the "Beschlussbehoerden," but they do not possess the power to compel witnesses to appear and testify. See VON TUREGG, note 126, *op. cit. supra* at 182-85.

130. See SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 42 (1954).

131. See MEJEAN, *LA PROCÉDURE DEVANT LE CONSEIL DE PRÉFECTURE* 146 (1949). Note that administrative courts in some French colonies may compel persons to appear and testify as witnesses. See Heurte, *L'Enquete devant les Jurisdictions Administratives*, (1952) *LA SEMAINE JURIDIQUE* 1037. But in view of the nominal fine (up to 100 francs) which may be imposed there is no effective way to enforce compliance. See [1881] *BULLETIN DES LOIS DE LA RÉPUBLIQUE FRANÇAISE*, 2e Semestre 1070, 1078-80.

tions is distributed among a variety of administrative organs and the ordinary courts having jurisdiction in civil cases.<sup>132</sup> In addition, the ordinary courts have exclusive jurisdiction over "controversies concerning property, rights derived from property, concerning recovery of debt or civil rights" (geschillen over eigendom, of daaruit, voortspruitende regten, over schuldvordering of burgerlijke regten).<sup>133</sup> Whenever governmental action infringes any of these rights, the ordinary courts in the exercise of this jurisdiction review the legality of such governmental action.<sup>134</sup>

Dutch courts which review administrative determinations can compel witnesses to testify.<sup>135</sup> In proceedings before the administrative organs set up under the Appeals Law (Beroepswet), the Civil Service Law (Ambtenarenwet), and the Labor Disputes Law (Arbeidsgeschillenwet), witnesses are under a legal obligation to appear and testify.<sup>136</sup> In Germany, administrative determinations may be reviewed by the administrative official or organ which made them, by a superior administrative official or organ, or by the administrative courts (Verwaltungsgerichte).<sup>137</sup> The administrative courts clearly have the power to compel witnesses to appear and testify.<sup>138</sup> However, administrative organs by and large do not have any power to compel witnesses to appear and testify, unless by statute they have been given the power to require a county court (Amtsgericht) to examine a designated witness.<sup>139</sup>

132. See KRANENBURG, INLEIDING IN HET NEDERLANDS ADMINISTRATIEFRECHT 211-38 (3d. ed. 1955); 2 VEGTING, HET ALIGEMEEN NEDERLANDS ADMINISTRATIEFRECHT 419-70 (1957).

133. See 2 VEGTING, note 132, *op. cit. supra* at 470.

134. See KRANENBURG, note 132, *op. cit. supra* at 211-13; 2 VEGTING, note 132, *op. cit. supra* at 470-87. Note that the principle of sovereign immunity is no longer recognized in most civil law countries. See SCHWARTZ, note 130, *op. cit. supra* at ch. 9.

135. See 5 ASSER, NEDERLANDS BURGERLIJK RECHT 264-65 (5th ed. 1953).

136. See STELLINGA, GRONDTREKKEN VAN HET NEDERLANDS ADMINISTRATIEFRECHT 281-82 (1951); 2 VEGTING, note 132, *op. cit. supra* at 464; article 47 of the Labor Disputes Law (Arbeidsgeschillenwet), (1923) STAATSBAD No. 182. A witness who unlawfully fails to appear is subject to the penalty of article 444 of the Penal Code (Wetboek van Strafrecht) which provides for a fine not exceeding sixty guilders (about sixteen dollars). But it is not clear whether a witness is subject to any sanction for refusing to testify.

137. See VON TUREGG, note 126, *op. cit. supra* at 186-93, 202-37.

138. See EYERMAN, FROEHLER, HOFMAN, VERWALTUNGSGERICHTSGESETZ 225-26 (2d ed. 1954); VON TUREGG, note 126, *op. cit. supra* at 226-27; ULE, GESETZ UEBER DAS BUNDESVERWALTUNGSGERICHT 153, 158 (1952).

139. See note 129 *supra*.

*Protection against self-incrimination.*

*In the Netherlands.*

In proceedings before the administrative organs set up under the Civil Service Law (*Ambtenarenwet*) a witness has the privilege.<sup>140</sup> In administrative proceedings within the jurisdiction of the ordinary courts, and in proceedings under the Appeals Law (*Beroepswet*) and the Labor Disputes Law (*Arbeidsgeschillenwet*), witnesses do not have the privilege, but are under a legal obligation to answer even incriminating questions. In all other administrative proceedings, witnesses are not legally obliged to answer incriminating or for that matter any questions. However, this is not widely known, and the average witness may be pressured into revealing incriminating information even where he has the privilege or has no legal obligation to testify.

*In France.*

The average Frenchman is unaware of the fact that he is under no legal obligation to appear and testify in proceedings before administrative officials and administrative courts. However, when he is notified to appear for questioning, he will usually comply, and, having appeared, he can easily be tricked by an unscrupulous examiner into revealing incriminating information.

*In Germany.*

It is a maxim of German law that when a person is under a legal obligation to testify he may claim the privilege.<sup>141</sup> A witness who may be compelled to testify by a county court (*Amtsgericht*) or administrative court is afforded the privilege.<sup>142</sup> In all other cases, a witness is under no legal obligation to appear and testify; nevertheless, the average German will usually respond to an official notification to appear for questioning. Being no more learned in the law than his French and Dutch counterpart, he is equally prone to answer incriminating questions when put under official pressure.

*Summary.*

Theoretically, Germany and France provide witnesses in administrative proceedings with approximately the same protection against

140. See art. 30 (2) of the Civil Service Law (1929) *STAATSBLED* No. 530. The privilege is like that of a witness in a Dutch criminal proceeding which is discussed *supra*.

141. See 1 BUEHLER, *STEUERRECHT* 357 (2d ed. 1953).

142. See EYERMAN, FROEHLER, HOFFMAN, *op. cit. supra* note 138 at 225; ULE, *op. cit. supra* note 138 at 153, 159. The privilege is like that of a witness in a German civil proceeding which is discussed *supra*.



self-incrimination. Germany gives protection by providing the privilege when testimony can be compelled; France gives protection by the absence of legal sanctions to compel witnesses to testify. In Dutch administrative proceedings, witnesses sometimes have no legal obligation to testify, sometimes have the privilege, and sometimes are under a "legal" duty (which may be unaccompanied by a legal sanction) to testify. In practice, however, a witness' protection against self-incrimination in all three countries depends to a large extent on his knowledge of his rights. A witness, who is unaware of his rights, is equally susceptible in all three countries to being pressured into answering incriminating questions.