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Privacy Crimes in Germany

**Criminalization of privacy intrusions by private parties in German
substantive criminal law**

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1. Introduction

This country report provides an overview of how privacy is protected in substantive criminal law in the Germany. Since criminal law is usually considered the *ultima ratio* of legal tools, it provides a particularly focused lens through which to study privacy protection: privacy violations as stipulated in criminal law can be considered the most serious infringements of privacy, and hence to be indicating particularly important elements of privacy that are considered protection-worthy by the legislator.

Since our aim is to better understand the concept of privacy, and to see how it can be protected in the 21st century in light of socio-technological developments, a broad conception of privacy is applied here, discussing criminal provisions that have something to do with protecting aspects of persons and their personal life, and the privacy expectations they have in their property, places, person and data. This potentially covers a large part of criminal law, so that not all privacy violations will be described in detail. Particular emphasis is given to aspects of private life where socio-technological developments raise particular challenges for preserving privacy protection, in light of the law being based on possibly outdated conceptions or assumptions. More detailed attention will be given to the following issues: How are people protected in relation to places? How are computers, data and stored documents protected? How are personal data and the image of people protected? How are people protected against tracking and tracing in public spaces?

Criminal provisions that are not related to one of these main areas of interest will be briefly mentioned, in order to contribute to a comprehensive overview of privacy protection in criminal law, but not detailed or analysed further, except where they contain particular elements relevant for improving our understanding of the concept of privacy as protected in criminal law.

The criminal provisions are described as relating to property (section 3.), places (section 4.), persons (section 5.) and data (section 6.).

2. Things

2.1 Property

Criminal offences related to property in general, other than computers and private documents, might have a less intensive connection to privacy. This connection is related to a person's interest in using property as a means to shield activity, facts, things or information from the view of others. For example, the content of a person's handbag may reveal much of their private life in the form of a personal diary, medications and other personal artifacts and these become known to anyone who misappropriates it. As most Criminal Codes, the German Code criminalizes the usual range of various forms of misappropriation, embezzlement, etc. From a privacy perspective, the most interesting criminal offences include Section 243 aggravated theft committed either by breaking into a building (see section 4.4.) or a theft of property which is especially protected by a sealed container or other protective equipment. The sealing of property

inside containers is intended to prevent others from getting access to the property.¹ A sealed container is a container specially secured by a lock or another technical closing device, or in another way, for instance gluing, nailing, against unauthorized access from outside.² The container can be mobile or immobile, it is however questionable whether stealing the whole container counts as aggravated theft under Section 243 at least until it is opened.³

Aggravated gang theft is criminalized in Section 244a and unlawful appropriation in Section 246. Section 247 stipulates that if a relative or the guardian of the thief is the victim of the theft or if the victim lives in the same household as the offender the offence may only be prosecuted upon request. Other special cases of theft are theft of objects of minor value and unlawful taking of motor vehicle or a bicycle. Damaging property of another is criminalized in Section 303.

2.2 Computers

Computers are not explicitly protected by the national constitutions. Naturally, constitutional protection of communications, homes, personal data and the general protection of privacy does cover various aspects of the private use of computers. In Germany, the *Bundesverfassungsgericht* interpreted the general personality right protected by Art. 2 of the Basic Law to include the basic right to the confidentiality and integrity of information-technological systems: "From the relevance of the use of information-technological systems for the expression of personality (Persönlichkeitsentfaltung) and from the dangers for personality that are connected to this use follows a need for protection that is significant for basic rights."⁴ The BVerG defined the information-technical systems as "systems which alone or in their technical networking can contain personal data of the person concerned to such a degree and in such a diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of the personality."⁵ It is the scope and multiplicity of personal data contained in an information system in comparison to other means of storing personal data that necessitates special protection of its integrity and confidentiality.

In the Criminal Code, the Chapter Fifteen entitled Violation of Privacy contains the most relevant provisions criminalizing computer trespass: Sections 202a Data Espionage, 202b Phishing and 202c Acts preparatory to data espionage and phishing. Computer trespass in Germany is grouped with violations of visual privacy, communicational privacy and exploitation of private secrets. The doctrine also makes analogies between the criminal law protection of homes and of computers, and even refers to the relevant computer trespass provision as the *elektronischen Hausfriedensbruch*⁶ (electronic violation of home peace). The provision does not explicitly mention computers or computer systems, but protects data that is stored or transmitted electronically, magnetically or otherwise in a manner not immediately perceivable:

"Section 202a: Data espionage

¹ BGH, 11.05.1951 - GSt 1/51.

² MünchKommStGB StGB (2012) § 243, Rn 33.

³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 243, Rn 24.

⁴ 1 BvR 370/07 and 1 BvR 595/07, 181.

⁵ 1 BvR 370/07 and 1 BvR 595/07, 203.

⁶ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 1.

(1) Whosoever unlawfully obtains data for himself or another that were not intended for him and were especially protected against unauthorised access, if he has circumvented the protection, shall be liable to imprisonment not exceeding three years or a fine.

(2) Within the meaning of subsection (1) above data shall only be those stored or transmitted electronically or magnetically or otherwise in a manner not immediately perceivable.”

The legal goods protected by the criminalisation of computer trespass are the usually the confidentiality, the integrity and the accessibility of systems, data and information. German doctrine somewhat downplays the role of confidentiality of information as a protected legal good in computer trespass. It is not the concrete information content that is protected and criminalisation does not require violation of a personal area of life or of secrecy. It is sufficient that the authorised person expresses dominion over the data by securing it against access. The protected interest is, therefore, the formal authority to dispose of the intellectual content of information.⁷

The German provision protects data not intended for the perpetrator. Criminal law understands data as the representation of information by means of certain codes. Section 202a(2) specifies the data that are protected as only those stored or transmitted electronically or magnetically or otherwise in a manner not immediately perceivable. While this excludes much of the data stored in an immediately perceptible way, it still keeps the term rather open for new developments in information technology.⁸ The imperceptibility of the data refers to the ability of people to sensually register the data. Imperceptible data can be sensually registered only by means of technical transformation. Data that can be sensibly perceived with average perceptibility even without the use of a technical device are excluded. Such technical devices do not include aids that compensate for the health problems of the person, such as glasses or hearing aids. However, the imperceptibility refers to the syntactic level and not its semantics, and therefore it is not a matter of intelligibility. If the codes can be visually detected, but only deciphered by means of a technical device, it still qualifies as data.⁹ The term data is further specified by the technical standards¹⁰ according to which data is represented by characters or continuous functions on the basis of known or implied agreements for the purposes of processing. Data processing programs themselves consist of data and are also protected. Protected data includes music files, video and film files as well as other media files.¹¹

Some authors claim that the wide breadth of the concept of data requires that only data which contain information where there is legitimate interest of the data owner to have exclusive use or knowledge¹² are to be protected. The requirement that the data is not meant for the perpetrator seems to support this conclusion. This would include personal data, text files, IP addresses, but not company logos on opening screens or a standard working surface of the usual operating system. This view is, however, not shared widely in the literature, since the protected legal good

⁷ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 3-3a.

⁸ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 4-4a.

⁹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 5.

¹⁰ DIN 44300.

¹¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 4.

¹² Heghmanns, Michael, ‘Strafbarkeit des „Phishing“ von Bankkontendaten und ihrer Verwertung, wistra 2007, 167; ders., Straftaten gegen die betriebliche Datenverarbeitung’, in: Achenbach/Ransiek (Eds.), *Handbuch Wirtschaftskriminalität*, 3. Edition., 2012, Chapter VI paragraph 1.

in Section 202a is the formal authority to dispose of the data and not the recognition of legitimate interests.¹³

The decisive factor whether access to data is authorised or not is whether, according to the will of the person who, at the time of the act, has the power to dispose of the data, the data should be available to the perpetrator.¹⁴ This will is often simply be implied by the security measures put in place to prevent access of others since putting such measures in place is a clear expression of the will of the authorized person that the data are not placed within the domination area of the perpetrator and are not intended for him.¹⁵ This makes it also possible to prosecute someone who is accessing her own data but stored by another. A person can also be permitted to use a program, but not the underlying data. For example, an owner of a credit card cannot become entitled to the program data stored on its magnetic stripe.¹⁶

Importantly, the obtain the data within the meaning of the provision, the perpetrator does not need to learn its content, but merely gain access to it by overcoming access security. This can be done either by obtaining actual authority over the data by storing the data carrier (hard drive, USB stick, etc.), copying the data on another carrier, by photographing the content of the visible on the screen of the device or actually learning the content of the data without storage. The provision also covers the installation or infection of the system with so-called Trojans, keyloggers, sniffers or backdoor programs.

Mere access while breaking security measures, without any further damage requirement, are the elements of the criminal offence. Nevertheless, literature raises doubts whether even this does not extend the criminalization too far. The provision formally protects against unauthorized access, where the authorized person has expressed interest through appropriate protective measures to make access to the data more difficult. It can concern a bagatelle area, for example a teenager secretly obtaining a password to override the parental controls to access content restricted to her,¹⁷ and doctrine questions whether further correctives should not be inserted to narrow the criminalization down.

The security measures are to be understood widely, however they do not include situations where accessibility is prevented due to the complexity or the hostility of the system itself.¹⁸ On the other hand, the security measures must be clearly intended to protect the computer system, and so locked doors of a residential house will not be considered as such, since they don't primarily protect the computer data.¹⁹ Prohibitions and instructions not to interfere with the system, for example stickers on the display, are not sufficient as security measures, nor are means of merely operational control such as video cameras or input of username.²⁰

¹³ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 4a.

¹⁴ Lackner / Kühl, *StGB* (2014) § 202a, Rn. 3.

¹⁵ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 7.

¹⁶ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 7.

¹⁷ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 3a.

¹⁸ Heghmanns, Michael, 'Strafbarkeit des „Phishing“ von Bankkontendaten und ihrer Verwertung, *wistra* 2007, 167; *ders.*, Straftaten gegen die betriebliche Datenverarbeitung', in: Achenbach/Ransiek (Hrsg.), *Handbuch Wirtschaftskriminalität*, 3. Edition., 2012, Chapter VI paragraph 1.

¹⁹ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 9.

²⁰ Kindhäuser/Neumann/Paeffgen, *Strafgesetzbuch* (2013) § 202a, Rn 9.

That said, the requirements for the effort to overcome the security must not be set too high. The following are recognized as security measures: shielding the entire data medium through a sealed container, the incorporation of fingerprint or voice recognition devices into the hardware, software measures, which are either integrated into the operating system of the computer or into the individual program software, e.g. passwords as well as the so-called list protection, which prevents the reading of program data on the operating system level, the firewall which is used to prevent unauthorized intrusion into the network from the outside at the connection point of networks to the internet, the secrecy of the file by means of hiding in the data storage by storing under false or inconspicuous designation, whereby the hiding place used may not be easily recognizable.²¹ Common computer programs are usually not particularly secured, so that making copies of such programs (software piracy) are not punishable here.²²

With respect to encryption during data transmission, there is the problem that the access protection does not block the access to the transmitted data, but merely prevents the perpetrator from learning its content. Since it is sufficient to gain the access to the data, there is less reason to believe that encryption, which is intended to exclude access to the original data, is to be regarded as a safeguard in the sense of § 202a. However, the mere storage of a file, for example on a magnetic strip (payment or credit card) does not yet constitute a special security measure, so that the reading of magnetic stripes by the so-called skinning does not fulfill the offence. On the other hand, encrypted data in wireless networks (WLAN) are considered to constitute special access security. In the absence of such encryption (with open WLAN access), the so-called "black surfing" does not fall under section 202a.²³

Generally, trivial cases are to be excluded. Only cases in which the perpetrator shows a particular criminal energy are justifiably criminalized. The overcoming of the access security thus requires a not inconsiderable temporal or technical effort.²⁴

In addition to Section 202a, data are protected from unlawful interceptions in Section 202b:

“Whosoever unlawfully intercepts data (section 202a(2)) not intended for him, for himself or another by technical means from a non-public data processing facility or from the electromagnetic broadcast of a data processing facility, shall be liable to imprisonment not exceeding two years or a fine, unless the offence incurs a more severe penalty under other provisions.”

As in Section 202a, this provision also protects the formal authority of the entitled person over the data. However, it is not required that the data are secured. Rather, the need is based on the fact that everyone should have a right to non-public communication, and connects to Art. 10 of the Basic Law protecting communications secrecy.²⁵

Section 202c criminalizes preparatory acts to commit the offences under Art. 202a and 202b. Specifically, it criminalizes production, acquisition, selling, supplying, disseminating or making

²¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 9-10.

²² Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 10.

²³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 202a, Rn 10.

²⁴ Bundestag Drucksache 16/3656, 30 November 2006 p. 17. Available at: <http://dip21.bundestag.de/dip21/btd/16/036/1603656.pdf>

²⁵ MünchKommStGB StGB (2012) §202b, Rn. 2.

otherwise accessible passwords or other security codes enabling access to data or software for the purpose of the commission of such as offence.

A number of corollary acts related to access to computers, or the use of computers are also criminalized in the Criminal Code's chapters on fraud and criminal damage. Computer fraud is criminalized in Section 263a. Here, damaging the property of another by influencing the result of a data processing operation through incorrect configuration of a program, use of incorrect or incomplete data, unauthorised use of data or other unauthorised influence on the course of the processing, with the intent of obtaining unlawful material benefit, is criminalized. Writing computer programs the purpose of which is to commit such an act is also a criminal offence under this provision. Data tampering, that is deleting, suppressing, rendering unusable or altering of data is criminalized in Section 303a. Sabotaging data processing operations which are of substantial importance to another is an offence under Section 303b.

2.3 Documents

Another type of things with special relevance to privacy are documents and other written materials. Destruction of such materials placed in someone's safekeeping is criminalized in Section 133. From a privacy perspective, Section 202 is of relevance:

"Section 202

Violation of the privacy of the written word

(1) Whosoever unlawfully

1. opens a sealed letter or another sealed document not intended for him;

or

2. obtains knowledge of the content of such a document without opening the seal by using technical means,

shall be liable to imprisonment not exceeding one year or a fine unless the act is punishable under section 206.

(2) Whosoever unlawfully obtains knowledge of the contents of a document not intended for him and which was specially protected by means of a sealed container after he has opened the container shall incur the same penalty.

(3) An illustration shall be equivalent to a document within the meaning of subsections (1) and (2) above."

The title of the provision indicates that it protects secrets. This however is still derived from an earlier version of the Code and no longer fully fits the purpose of the provision. The protection has been since more formalized, by protecting information that is to be prevented from access by unauthorised persons by means of enclosure, regardless of its content.²⁶ It protects the formally delimited sphere against indiscretion. The information that has been written down does not need to be secret. It is also not possible to rely entirely on the will of the author of the document, since for example the recipient of the letter can alter the group of people authorised to learn its content.

²⁶ MünchKommStGB StGB (2012) §202, Rn 1.

Therefore, the protection extends to any written statement or information as well as pictures which have been secured by enclosure in an envelope or a sealed container.²⁷ The document can be used for communication, but not necessarily, e.g. it can include a diary, notes, list of tasks. It is also not restricted to documents of private nature. The protection would apply even to otherwise publicly available material such as newspaper excerpts or flyers.²⁸

A document can be embodied in any carrier material and the characters can be of any language, numerical, abbreviation or imaginary. The content can be hand-written, type-written or expressed otherwise and does not need to be intelligible to others. The following shall be judged as documents: diaries, notes, lists and statements, statements, plans, plans, but also general contents of printed publications, brochures, instructions for use, books and novels or newspapers. Some of these have a public nature, nevertheless the presence of certain printing units or pornographic magazines may for example allow the owner to make undesirable conclusions as to whether or not information about illnesses or health problems can arise from leaflets of medicaments. These documents would usually lack enclosure, but if the person decides to obscure them in this way they enjoy the same protection as private documents would. However, money bills and similar objects fulfilling another purpose may be excluded.²⁹

Containers within the meaning of Section 202(2) are to be understood as objects which are not intended to be entered by human beings. This excludes rooms or buildings from the meaning of containers, even files and archive rooms, but includes safes, cassettes, cabinets, drawers, briefcases and trunks, provided that they are equipped with a lock or other similar securing device. Lockable document folders are included as well. If the containers are not secured by a lock, but by a zipper or a snap closure, it must be determined whether the security is to be ensured against the unauthorised obtaining of the content.³⁰

3. Places

The principal provisions protecting places from trespass are placed in Chapter Seven of the StGB entitled 'Offences Against Public Order'. The placement dates back to the original 1871 version of the StGB and seems to emphasize public interests rather than private ones. Considering the specific legal goods protected by the provisions it appears to be a rather odd fit with the other provisions of the chapter, which have a more public nature. These provisions are the home trespass, aggravated home trespass and carrying weapons, acting as a member of a gang; burglary of private homes:

Section 123 Home trespass

(1) Whosoever unlawfully enters into the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation, or whosoever remains therein without authorisation and does not leave

²⁷ MünchKommStGB StGB (2012) §202, Rn 2.

²⁸ MünchKommStGB StGB (2012) §202, Rn 3.

²⁹ MünchKommStGB StGB (2012) §202, Rn 9.

³⁰ MünchKommStGB StGB (2012) §202, Rn 16.

when requested to do so by the authorised person, shall be liable to imprisonment not exceeding one year or a fine.

(2) The offence may only be prosecuted upon request.

Section 124 Aggravated home trespass

If a crowd of people publicly gangs up with the intent to join forces to commit acts of violence against persons or objects and unlawfully intrudes into the dwelling, business premises, or other enclosed property of another, or into closed premises designated for public service, anyone taking part in these acts shall be liable to imprisonment not exceeding two years or a fine.

Section 125 Carrying weapons; acting as a member of a gang; burglary of private homes

(1) Whosoever (...)

3. commits a theft for the commission of which he breaks into or enters a dwelling or intrudes by using a false key or other tool not typically used for gaining access or hides in the dwelling

shall be liable to imprisonment from six months to ten years.

3.1 Legal Goods Protected by Home Trespass Provisions

In Germany, Section 123 on Home Trespass (*Hausfriedensbruch*) is placed in Chapter Seven of the StGB entitled ‘Offences Against Public Order’. The placement dates back to the original 1871 version of the StGB and seems to emphasize public interests rather than private ones. Considering the specific legal good protected by the provision it appears to be a rather odd fit with the other provisions of the chapter, which have a more public nature.

Doctrinal accounts discussing the object of protection of home trespass criminalisation make connection to the constitutional provisions protecting the inviolability of the home in Art. 13 of the Basic Law.

The protected legal good is expressed by the German term *Hausrecht* (home right). It is a legal good connected to personal liberty, but also a specific legal good in itself.³¹ In connection to dwellings, *Hausrecht* is an expression of individual freedom of citizens and a necessary precondition for preserving the privacy of individuals.³² It creates a spatially defined sphere of freedom for free development of individual’s personality.³³ This spatially defined freedom is achieved by encapsulation of the individual³⁴ in an area in which the individual has the freedom to do whatever she wishes, within boundaries of the law. Although this is barely mentioned in

³¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 4.

³² Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 4, 7.

³³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 7.

³⁴ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 7.

criminal law literature, such spatially defined secluded sphere is especially essential to enable the individual to enjoy intimacy and to allow making decisions about intimate life.³⁵

In Germany, the concept of *Hausfrieden* (home peace) has traditionally been considered a legal good protected by criminalisation of home trespass alongside *Hausrecht*. Home peace is a state of order in the protected place, which allows the occupants to be at peace – to allow free development of personality in the dwelling, to provide an undisturbed work process in workplace and business premises, to offer a place for regeneration and recreation for the family, children in pacified premises.³⁶ However, contemporary German doctrine considers home peace to be protected only indirectly. Since peace in the home depends on more factors than just the lack of presence of others, and more importantly, no actual disturbance of peace is required to trigger criminalisation, home peace is not considered to be the protected legal good in home trespass.³⁷

Nevertheless, the German doctrine brings a very valid point here. Since no disturbance is required by the criminal law provision itself, which only restricts access of others, in practice the primary legal good in all three jurisdictions is the freedom to decide who has access to the protected space and the terms of such access. Since the presence of unwanted others potentially disturbs home peace and prevents the individual from fully free agency inside the home, both the encapsulation enabling the development of individual's personality and the freedom from disturbance are only indirectly protected by the authorisation of the individual to control access to the protected space. The object of protection thus becomes formalised to the protected space itself and control over it, which provides a kind of container protection to the interests that justify it: free development of personality, right to intimacy, right to safety, freedom from disturbance.³⁸

An additional legal good, perhaps of greater importance in the past and pushed in the background in contemporary doctrine is the concept of *Hausehre* (dignity, or honour, of the home) present in the older German doctrine.³⁹

3.2 Protected Spaces

The provision of Section 123 protects not only the dwelling, but covers a broader list of protected spaces: the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation.

The dwelling (*Wohnung*) consists of at least one room which is used for private stays, but not necessary for sleeping. It must secure a spatially separated sphere of privacy against third parties, so empty dwellings are not covered. Attached spaces such as stairs or basements belong to the dwelling as well. The meaning includes hotel rooms since they correspond the protective purposes covered by the provision. It is not required to be immovable, so caravans, furnished camping tents, boats and other movable property can be covered, if used for residential purposes.

³⁵ Amelung, Knut, 'Der Hausfriedensbruch als Mißachtung physisch gesicherter Territorialität', ZStW 98 (1986), pp. 385, 388, 392.

³⁶ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 4, 8, 9.

³⁷ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 5.

³⁸ Amelung, Knut, 'Der Hausfriedensbruch als Mißachtung physisch gesicherter Territorialität', ZStW 98 (1986), pp. 365.

³⁹ Bojarski, 'Ochrona miru domowego', in Sakowicz, Andrzej, *Prawnokarne Gwarancje Prurywatności*, Wolters Kluwer (2006), p. 350.

Rooms in hospitals and care facilities are included as well, while the prison cell is questionable, although technically fulfills the definition. Dwelling does not include gardens and other open accessories, which are, however, protected as enclosed property.⁴⁰

The provisions also explicitly protect from trespass into fenced areas. The German term *befriedete Besitztum* literally translates as pacified property, however, since actual disturbance of peace is not required, the term pacified is to be understood as fenced off.⁴¹ The fence does not need to make the land inaccessible, but the borders of the property must be clear, though not necessarily without gaps. Prohibitive signs or notices informing about ownership of the property are not sufficient, if the borders of the land are not clearly delineated.⁴² A spatial connection to the house is not required, but it does reduce the requirement for fencing.

The provision also explicitly protects premises that are not private, namely business premises and closed premises designated for public service or transportation.

3.3 Unauthorised Access to Home

There are two basic forms of access: penetration and remaining in the protected space. Both forms require physical presence of the perpetrator in the protected place.

In the first form, access is objectively equated to penetration. This means that the access is gained from the moment of physically crossing the spatial boundary,⁴³ while the duration of such access is not relevant for the qualification of the criminal offence⁴⁴. The crossing of the area must be physical, mental harassment from the outside are not sufficient. Such physical crossing can also be only partial, for example placing a foot inside the door to prevent closing. However, physical contact with the protected space without at least a partial entry, for example detaching a padlock or grabbing the door handle to see, if it can be open, is not criminalized here.⁴⁵ Intrusion of the body of the perpetrator must be against the recognizable or presumed will of the authorized person.⁴⁶ Deceptive practices to gain entry, for example pretending to be a public official, however, would not constitute an offence under Section 123 of the German StGB. The principle of legal certainty prevents the prioritization of the internal attitudes over the expressed will, and therefore manipulation in the formation of the will is not punished here.⁴⁷

The authorization is based on two conditions: legal title and a factual state of living. The authorized person is the one who has a legal title over the protected area, not necessarily the owner of the place. There are often more persons than one who have equal authorization to control access to the protected home, especially in cases where more people share the same dwelling, which can lead to conflicts. In those situations, a consensual authorization of these persons is required for an entry to be authorized. All authorized persons have to agree before the

⁴⁰ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 21.

⁴¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 23.

⁴² Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 23.

⁴³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 26.

⁴⁴ Although it certainly is relevant in determining the penalty.

⁴⁵ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 26.

⁴⁶ Lackner/Kühl, StGB (2014), §123, Rn 5.

⁴⁷ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 32.

third-person can enter their home.⁴⁸ The authorization can also be extended to other people. This is implicit for family members, even for children, as long as they are able to clearly express their will.⁴⁹

In the second alternative, request of the authorized person and omission of the perpetrator are decisive. It request can be expressed and conclusively.

3.4 Breaking in

Another provision interesting from the perspective of spatial privacy, even though it primarily protects movable property is aggravated theft under Section 243 (1:1), which criminalizes theft when the perpetrator for the purpose of the commission of the offence breaks into or gets in a building, official or business premises or another enclosed space or intrudes by using a false key or other tool not typically used for gaining access or hides in the room. The injustice here is increased because the act increases the disturbance of peace compared to mere theft.⁵⁰

The enclosed space for the purposes of this provision is any space which is intended to be entered by humans and is surrounded by devices which are intended to ward off the intrusion of unauthorized persons.⁵¹ This does not include obstacles the purpose of which is primarily something else, such as pasture fences.⁵² It also excludes containers which are not typically entered by people, since those are covered by another provision (see 3.1.).

Buildings, offices or business premises are listed as examples of enclosed space. Even semi-finished, or half-demolished buildings are protected, if they have the necessary enclosure to prevent entry of other people.⁵³ Parts of buildings, such as rooms, are considered separate spaces.⁵⁴ Getting into these spaces means overcoming the obstacle of entry, either by dexterity or strength without breaking the obstacle, e.g. by climbing a high wall.⁵⁵ Breaking is consists of violent force or the corresponding use of tools that breaks the obstacle and creates access.⁵⁶ In the latter alternative, perpetrator's entry is not required, it is sufficient that they enter their hand to steal the object.⁵⁷

4. Person

⁴⁸ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 36.

⁴⁹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 123, Rn 35.

⁵⁰ MünchKommStGB StGB (2012) § 243, Rn 10.

⁵¹ BGHSt 1, 158 (164) = BGH NJW 1951, 669 f.

⁵² BGH NStZ 1983, 1687, SSW.

⁵³ BGHSt 1, 158 = BGH NJW 1951, 669 (670).

⁵⁴ Schönke / Schröder / Eser / Bosch StGB (2014) § 243, Rn 9

⁵⁵ MünchKommStGB StGB (2012) § 243, Rn 23.

⁵⁶ Schönke / Schröder / Eser / Bosch StGB (2014) § 243, Rn 11.

⁵⁷ RGSt 56, 48; BGH NStZ 1985, 217 (218).

4.1 Body

Protection of the person's interest in excluding access of others to his or her physical body is an important aspect of privacy protection. Perhaps the most important value protected by the criminal law from an individual standpoint is the protection of life, since life is practically a precondition of enjoying other individual rights. In this context, murder is criminalized under Section 212, and aggravated murder for pleasure, sexual gratification, greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence in Section 211. Other forms of murder include mitigating circumstances, for example under Section 213, if the perpetrator was provoked to rage by maltreatment inflicted on him or a relative, or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case, such act carries a lower sentence. Even lower sentence shall be handed for mercy killing done on the basis of an express and earnest request of the victim under Section 216. Negligent manslaughter is criminalized in Section 222.

The Criminal Code also contains extensive protections of the fetus and pregnant women. Abortion is criminal offence under Section 218, with the exception of cases specified in Section 218a. Abortion without medical certification, violation of medical duties in connection with an abortion, advertising services of an abortion and the distribution of substances for the purpose of abortion are also criminalized.

Different forms of causing bodily harm are also criminalized, including causing bodily harm, bodily harm by dangerous means, grievous bodily harm or causing bodily harm while exercising public power. From a privacy protection, the criminalization of female genital mutilation in Section 226a appears to be especially pertinent, considering its considerable cruelty, physical and no less psychological and social impairments. Such acts are not only an attack on the physical integrity as defined by Art. 2 of the Basic Law, but also on sexual self-determination.⁵⁸ Generally, bodily harm with the consent of the victim is not criminalized unless the act violates public policy.⁵⁹

4.2 Visual Observation and Recording

Individuals have a fundamental interest in being able to decide in what circumstances, and by whom, they are seen; that is to say, an interest in being shielded from undesired forms of forms of visual observation. In Germany, the Criminal Code reflects this in the recently amended Section 201a criminalizing the violation of intimate privacy by taking photographs:

- (1) A penalty of up to two years or a fine shall be imposed on whoever:*
- 1. unlawfully creates or transmits pictures of another person located in a dwelling or a room especially protected from view and thereby violates their intimate privacy,*
 - 2. unlawfully creates or transmits pictures that showcase another person's helplessness and thereby violates their intimate privacy,*
 - 3. uses or makes available to a third person a picture made by means of an act according to paragraphs 1 or 2;*
 - 4. makes an image of the type indicated in the numbers 1 or 2 obtained in an authorized*

⁵⁸ Fischer StGB, § 226a, No. 5

⁵⁹ Section 228 StGB.

way knowingly available to a third person without authorization, thereby infringing the highly personal life of the depicted person.

(2) The same penalty shall apply to anyone who without authorization of another person depicted in a picture that can seriously harm their reputation, makes this picture available to a third person.

The legal good protected by the provision is the highly personal area of life. This cannot be interpreted to have the same meaning as the concept of core area of private life used in procedural law⁶⁰, but comes close to it. It includes the core content of the general personality right, including the intimate and sexual sphere, illness and death,⁶¹ and in part also religion. Some authors express concern that the freedom of information and expression might become too restricted, if the protected area is interpreted more broadly.⁶²

The inclusion of Section 201a and its later extension fulfills a long-standing demand for strengthening criminal law protection of personality rights.⁶³ It creates a parallel protection to unlawful aural interceptions necessitated by the technical development of the last few years, such as mobile phone and spycams, and dissemination on the internet, which made a wider range of possible attacks on privacy possible.⁶⁴

The offence is committed in a number of alternative ways. The first alternative restricts the protected area to the dwelling and to rooms which are protected from view.⁶⁵ Dwelling, as the core protected area is protected as a highly personal retreat. Here, it is not a matter of property rights or ownership, so guests in other people's apartments or hotel rooms are also protected.⁶⁶ However, the concept is more narrow than in the criminalization of home trespass (see section 4.2.), since only rooms are included here, as containing the center of private life, but not spaces such as hallways, stairs or basements.⁶⁷ Spaces protected from view include areas such as toilets, locker rooms or medical treatment rooms. In some circumstances a garden surrounded by an opaque fence can also fulfill this function, but only if it is completely restricted from view, so if for instance it is visible from the second floor of the neighbor's house, it would not fulfill this function.⁶⁸ Places protected from view, but freely accessible to a large number of people, such as saunas in public pools, do not fulfill this function either.⁶⁹

Individuals are protected in these spaces only to the extent concerning their highly personal area of life. The intention to violate this area is not enough, the violation must really occur.⁷⁰ The highly personal area would mostly cover nudity, details of sexual life, disease, death and the

⁶⁰ Lackner / Kühl, StGB (2014) § 201a, Rn 1.

⁶¹ Lackner / Kühl, StGB (2014) § 201a, Rn 1.

⁶² Lackner / Kühl, StGB (2014) § 201a, Rn 1.

⁶³ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 4.

⁶⁴ Bundestag Drucksache 15/2466, p. 5.

⁶⁵ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 11-12.

⁶⁶ Bundestag Drucksache 15/2466, p. 5.

⁶⁷ Lackner / Kühl, StGB (2014) § 201a, Rn 2.

⁶⁸ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 12.

⁶⁹ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 12.

⁷⁰ OLG Koblenz Resolution v 11.11.2008 - 1 Ws 535/08 = NSStZ 2009, 268, 269.

inner world of thoughts, as long as it is manifested in external appearances.⁷¹

Creating the image means the production of the recording of the image with technical means including the storage of the image on a data carrier. It includes any chemical, electromagnetic, digital or other means of capturing the image. It must, however, be possible to make it visually perceptible again.⁷² Mere observation, which does not permanently capture the image is not sufficient, even when technical devices such as binoculars or night vision are used,⁷³ since the specific harm of the offence is the pictorial perpetuation of the transitory appearance of a person.⁷⁴ The offence does, however, cover real-time transmissions of visual image by means of webcams or spycams in which an intermediate storage, but not permanent fixation occur.⁷⁵ It is not necessary for the perpetrator to see the image before transmitting it.⁷⁶

Germany also introduced an additional offence in the 2014 reform of the provision, covering the unlawful creation or transmission of “pictures that showcase another person’s helplessness, and thereby violat[ing] their intimate privacy”. The concept of ‘helplessness’ (*Hilflosigkeit*), as a dignity-based boundary marker of visually recording people which supplemented the earlier place/space-based boundary. Due to its novelty, available case law and jurisprudence has yet to give the concept of helplessness in §201a StGB a clearly defined meaning. Generally, *Hilflosigkeit* has two different meanings: helplessness as a subjective feeling and helplessness as an objective state of being. The meaning of the concept in §201a StGB can be to some extent inferred from the use of term in related legal provisions and from the legislative history of the reform that introduced the concept in §201a StGB.

The concept of helplessness is used in §243(1)abs.6 of the StGB, where it is an aggravated circumstance of theft. Here, *Hilflosigkeit* is a state in which the victim cannot protect herself from the threat to her right. Sleep or old age by itself do not create helplessness. The duration of helplessness or the reason for it (e.g. self-induced helplessness) are not relevant.⁷⁷

In relation to photography, the concept of helplessness has been discussed in relation to artistic street photographs and the limits placed around artistic freedom to photograph people (§23 KUG). In this context, making of street photographs showing death or dying of people is not allowed as it is a deep intrusion into the intimate sphere. Helplessness is listed with concepts such as illness, distress, emotional outburst as situations where the right to artistic expression of the photographer needs to be balanced against personality rights of the photographed person⁷⁸ as no one shall be photographed in a way that deprives them of their dignity.⁷⁹

⁷¹ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 14.

⁷² Lackner / Kühl, StGB (2014) § 201a, Rn 4.

⁷³ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 16.

⁷⁴ Lackner / Kühl, StGB (2014) § 201a, Rn 4.

⁷⁵ Lackner / Kühl, StGB (2014) § 201a, Rn 5.

⁷⁶ Lackner / Kühl, StGB (2014) § 201a, Rn 4

⁷⁷ Kühl, K., Heger, M. (2014) *Strafgesetzbuch: Kommentar*, Beck-Online, StGB §243 Rn. 21.

⁷⁸ Hildebrand, A. (2016) ‘Abbildungen von Personen bei künstlerischer Street Photography’, *Zeitschrift für Urheber- und Medienrecht*, Vol. 60, iss. 4., p. 313.

⁷⁹ Hildebrand, A. (2016) ‘Abbildungen von Personen bei künstlerischer Street Photography’, *Zeitschrift für Urheber- und Medienrecht*, Vol. 60, iss. 4., p. 310.

The original bill spoke of images capable of inflicting considerable damage to someone's reputation or that show the person unclothed,⁸⁰ as with persons in embarrassing, degrading or unclothed situations, there is a likely interest in the picture not being made or transmitted to other parties.⁸¹ During the legislative process, the provision was restructured: protection against making images capable of harming reputation was moved and limited to dissemination of such images (§201a(2)), and the protection against making of photographs showing someone unclothed were also limited to dissemination and to under-age victims (§201a(3)). A provision protecting against making of images showing "the helplessness of another person" was inserted in §201a(1)(2).

Examples of helplessness include victims of traffic accidents,⁸² victims of violence lying bloodied on the ground, drunken people returning home,⁸³ and drunken teenagers.⁸⁴ People can suffer harm from such pictures, and they depict situations that the person could not control. Protection is considered especially important if it concerns situations that the persons did not cause through their own fault,⁸⁵ although the examples of drunkenness indicate that also self-caused helplessness can trigger protection. The emphasis, thus, seems to be on situations outside the depicted person's control. In that sense, also §201a(2) German CC might be understood as protecting people from harmful acts they cannot really control, namely others disseminating pictures of them that can seriously harm their reputation.

Section 201a(1:3) further criminalizes use or dissemination of images made by one of the two alternatives mentioned above. Use means any use, including storing, recording, copying. It indicated that the perpetrator receives the power of authority over the pictures, whereas it is not relevant who is the author of the image.⁸⁶ A new form of criminalization in Section 201a(1:4) extends the offence to dissemination of pictures that were not unlawfully created (e.g., because there was consent, or absence of criminal intent), but made in the manner indicated in the description, e.g. by family members within the home, holiday pictures or otherwise justified recordings. The technical development has shown that the dissemination of such recordings results in new forms of crime of such as Internet stalking or Internet bullying.⁸⁷ Moreover, Germany penalizes the dissemination of pictures that can seriously harm someone's reputation in Section 201a(2).

Importantly, there is an exception from criminalization of the acts penalized in Section 201a, which shall not apply to acts carried out in the exercise of predominantly legitimate interests, in particular art or science, research or teaching, the reporting of events or history or similar purposes. This exception, however, does not cover images made in the dwelling or spaces

⁸⁰ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines ... Gesetzes zur Änderung des Strafgesetzbuches – Umsetzung europäischer Vorgaben zum Sexualstrafrecht, 14.

⁸¹ *Ibid.*, 48-49.

⁸² Bundesrat, Stenografischer Bericht, 929. Sitzung, 19 December 2014, 25.

⁸³ Bundestag, Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz (6. Ausschuss), Drucksache 18/3202 (neu), 18. Wahlperiode, 12 November 2014, 28.

⁸⁴ Bundestag, Stenografischer Bericht, 67. Sitzung, 14 November 2014, 12.

⁸⁵ Bundestag (n 83), 28.

⁸⁶ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 18a.

⁸⁷ Beck'scher Online Kommentar StGB (2016), § 201a, Rn 18a.

protected from view.⁸⁸ Also according to Section 205, the offences in 201a are only prosecuted upon request of the victim or the relatives of the victim in case the victim dies.

4.3 Private Secrets

The Criminal Code also protects private secrets of people, which can relate to a variety of issues related to individual's action in semi-private or semi-public areas of life, and thus protect their behavioral privacy.

Who unlawfully exploits the secret of another, in particular a business or trade secret, which he is obliged to keep secret shall be penalized under Section 204. Under Section 203 whoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a physician, dentist, veterinarian, pharmacist or member of another healthcare profession which requires state-regulated education for engaging in the profession or to use the professional title, professional psychologist with a final scientific examination recognised by the State, attorney, patent attorney, notary, defence counsel in statutorily regulated proceedings, certified public accountant, sworn auditor, tax consultant, tax agent, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm in the form of a company, marriage, family, education or youth counsellor as well as addiction counsellor at a counselling agency which is recognised by a public authority or body, institution or foundation under public law, member or agent of a counselling agency recognised under section 3 and section 8 of the Act on Pregnancies in Conflict Situations, a state-recognised social worker or state-recognised social education worker, or member of a private health, accident or life insurance company or a private medical, tax consultant or attorney invoicing service shall be imprisoned for up to one year. Moreover, whoever unlawfully discloses a secret of another, in particular, a secret which belongs to the sphere of personal privacy or a business or trade secret, which was confided to or otherwise made known to him in his capacity as a public official, person entrusted with special public service functions, person who exercises duties or powers under the law on staff employment representation, member of an investigative committee working for a legislative body of the Federation or a state, another committee or council which is not itself part of the legislative body, or as an assistant for such a committee or council, publicly appointed expert who is formally obliged by law to conscientiously fulfil his duties, or a person who is formally obliged by law to conscientiously fulfil his duty of confidentiality in the course of scientific research project shall incur the same penalty.

The provision does not protect the undisturbed exercise of the professions listed, but the constitutionally guaranteed general personality right and the right to informational self-determination, the individual and highly personal secrecy of the individual, combined with their ability to decide which facts, if any, lying within the protected sphere shall be revealed about them.⁸⁹

⁸⁸ Section 201a(4) StGB.

⁸⁹ OLG Hamburg NStZ 1998, 3058.

More specific provision penalize the violation of tax secrets in the Section 355, the violation of the attorney-client relationship in Section 356 and the breach of official secrets and duties of confidentiality in Section 353b.

4.4 Mind and Thought

Thought is by some considered the last bastion of privacy that is yet to be conquered. Although technologies that enable other to learn the content of our thoughts may yet be in their infancy, the privacy of thought is not limited to mind-reading techniques. By privacy of thought we mean person's interest in the privacy of the mind, enabling development of opinions and beliefs, as well as freedom from unwanted attention. Acts that allow inferences of human thought, such as violation of the secrecy of elections which reveals the political preference of the victim, or torture in the exercise of public authority which may be utilized to force information out of people shall also be considered as acts against the privacy of thought. The privacy of thought also includes the ability to enjoy the peace of the mind, freedom from unwanted harassment and bothering.

4.4.1 Freedom from Fear and Incapacitation

The primary provision protecting people from fear and other negative feelings caused by constant harassment is the Section 238:

Stalking

(1) Whosoever unlawfully stalks a person by persistently

- 1. seeking his proximity,*
- 2. trying to establish contact with him by means of telecommunications or other means of communication or through third persons,*
- 3. abusing his personal data for the purpose of ordering goods or services for him or causing third persons to make contact with him,*
- 4. threatening him or a person close to him with loss of life or limb, damage to health or deprivation of freedom, or*
- 5. committing similar acts*

and thereby seriously infringes his lifestyle shall be liable to imprisonment not exceeding three years or a fine.

(2) The penalty shall be three months to five years if the offender places the victim, a relative of or another person close to the victim in danger of death or serious injury.

(3) If the offender causes the death of the victim, a relative of or another person close to the victim the penalty shall be imprisonment from one to ten years.

(4) Cases under subsection (1) above may only be prosecuted upon request unless the prosecuting authority considers *proprio motu* that prosecution is required because of special public interest.

Stalking concerns an offense where it be difficult to distinguish what is still considered appropriate behavior and when it should be punishable (necessity, suitability, appropriateness). The German criminalization contains many ambiguous terms such as "unauthorized", "persistent", "similar acts" and "serious" etc. and some doubts are raised in the literature whether it satisfies the constitutional requirement for determinateness (Art. 103 GG).⁹⁰ At the time of adoption, most opposition parties opposed the bill in its proposed form, especially the indeterminateness of the provision or the need to criminalize at all, as opposed to addressing the problem with non-criminal laws.⁹¹

The legal good protected is difficult to determine due to various indeterminate elements. Location of the offence in the chapter 'offences against personal freedom' is the first indication. Another legal good mentioned is 'being free from fear', also with reference to the general personality right. Right to peace of the individual is also mentioned as the legally protected good. Since more severe actions such as sexual harassment, house-break, and other are criminalised separately, this provision applies to the so-called mild-stalking. It is a protection from psychological terror by one of the five specified ways of conduct.⁹²

The provision has a two stage set-up: the perpetrator without authorisation and persistently fulfill one of the five forms of stalking and thus severely affect the life of the victim.⁹³ The German term *Nachstellung* is borrowed from hunting language, where every action of the perpetrator is aimed to capture, succumb and appropriate the 'game'.⁹⁴ The appearance of stalking is manifold and characterized by the so-called escalation spiral. If the initial attempts to make contact (eg telephone calls, e-mails) are unsuccessful, the stalker often escalated their actions (e.g. false accusations, disreputable statements, damage to property), in the final stages manifesting in threats, intrusions, assaults, and even the death of the victim.⁹⁵

The most common form of stalking, and therefore placed first in the provision, is the seeking of personal proximity of the victim. This covers physical approaches to the victim, with examples of chatting, pursuing, standing-by-the-house and also frequent presence near the home or workplace. The spatial proximity between the perpetrator and the victim has to be established. Evasion strategies are no longer necessary. The victim does not need to have noticed the perpetrator. Rather, the possibility of perception is sufficient. If the victim knows that the perpetrator is secretly in the surroundings or secretly observing, the lifestyle of the victim is impaired. The yardstick of spatial proximity is visibility. Random and unintended encounters are excluded.⁹⁶

Attempts to make contact through means of communication or third parties include so-called "Teleterror" and cyberstalking. Examples given by the legislator include letters, written

⁹⁰ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, Rn 3.

⁹¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, Rn 6-7.

⁹² Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, Rn 13-14.

⁹³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, Rn 29.

⁹⁴ Beck'scher Online Kommentar StGB (2016) § 238, Rn 4.

⁹⁵ Beck'scher Online Kommentar StGB (2016) § 238, Rn 4.

⁹⁶ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 31.

messages on the windshield, also indirect contacts through third-parties, stalking other persons connected to the victim. Also unsuitable attempts to establish contact are covered.⁹⁷ It is unclear whether sending unwanted gifts is covered here, perhaps the term communication should be expanded to include this.⁹⁸

Another manifestation of stalking behavior is the ordering of goods and services in victims name, for example offering sexual services using victim's phone number. It is debatable whether actual contact must be made. In any case, the perpetrator does not need to have contact with the victim.⁹⁹

In case of threats, the addressee of the threat is always the stalking victim himself. The content of the threat is the violation of highly personal rights, which are listed: life, physical integrity, health or freedom. While some authors maintain that the mental or psychological illness is not covered here as a violation of health, others point out that the "health" only makes sense, if it is something other than Physical, namely mental integrity. It probably means mental disturbance or traumatic, stressful experience. "Freedom" is to be understood here as exclusively the physical freedom of movement. § 238 goes beyond § 241 (threat), which demands the threat relate to a criminal offence.¹⁰⁰

The manifestations described above are only exemplary and another comparable act can fulfill the definition of stalking. Such open character of the norm is intended to take account of the typical multiplicity of the stalking phenomenon as well as future technical developments in order to react to new behavior. The comparable action must correspond to the four specifically described procedural modalities, which means both a quantitatively and qualitatively comparable severity, measured at the value of action and success. The four concretely named variants have in common that the stalking offender acts directly or indirectly on the conceptual image of the stalking victim and thus keeps the victim in mind. A purely accidental influence on the stalking victim is not sufficient in any of the variants. The four concrete terms of the offense are intended to make the stalker aware of the possibility of punishment, so that he imagines in layman terms: "If I do this now, the victim will notice that I am after him ". Examples include the publication of highly personal victim data, such as sexual preferences, libel and slander, false indications (such as a death notice), degrading interventions, monitoring of the victim's immediate social environment, and similar behaviors.¹⁰¹

Stalking is also defined by the persistence of the action. Persistent is meant not only to represent repeated or long-term behavior, but according to the will of the legislator a "special stubbornness and an increased indifference" as an indication for the danger of further stalking actions. The legislature correctly points out that the de facto variants of Section 238 (1) (1) and (2) are social-adequate behaviors. In the context of the limitation to criminality, the general freedom of action and freedom of expression and freedom of the press are to be taken into account. The legislature did not want to punish either the father who wants to make arrangements with his ex-wife for dealing with the common child, nor the creditor, who repeatedly calls for payments due. The

⁹⁷ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 33-34.

⁹⁸ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 36.

⁹⁹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 37.

¹⁰⁰ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 39.

¹⁰¹ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 40.

journalist, who persistently urges a politician to take a position on a definite accusation, is not to be "persevering" in the matter of § 238.¹⁰²

In juridical practice, LG Lübeck has decided a case of imprisonment that two acts of imprisonment suffice for the assumption of perseverance despite the time gap of five months. The Court of First Instance refers to the grounds that a "repeated" commission is a prerequisite, but leaves the second half-sentence "not enough in itself".¹⁰³ In the meantime, the Federal Supreme Court has comprehensively dealt with issues relating to the position of persistence. That "a (minimum) number of attacks by the perpetrator" which is valid in every individual case and is necessary to establish the perseverance "can not be determined". Perseverance results from an overall appraisal of the various actions, taking their temporal distance and their internal context into account.¹⁰⁴

Stalking is also defined by its consequences on the victim. These negative consequences must clearly be a result of the stalking behavior. There must be a causal relation, objectively attributable to the perpetrator's action. Impairment of the way of life is a forced change in the living conditions in the form that the victim can no longer live as before. The change in the form of life means a loss of the quality of life. This broad interpretation, based on the literature, can be understood as meaning that the persistent conduct of the individual variants of the offense is already an indication of the negative impairment of the way of life. Critical criterion is then the additional feature "serious". Serious impairments, which go beyond average, regularly acceptable and reasonable impairments are regarded as such. As examples, the change of work place, apartment or leaving the flat or the workplace only accompanied by someone are listed in the literature. On the other hand, the use of an answering machine, or the switching off of communication means is not regarded as serious.¹⁰⁵

In the judgment of 17 October 2008, Löbau, the defendant declared that the change of the telephone number, the temporary move into a holiday apartment and the restricted use of the weekend property as well as sleep disturbances after calls of the accused alone are not enough. It is only in the case of persistent psychosomatic disorders of the stalking victim that would be assessed differently. On the other hand, the Augsburg Court of First Instance condemned a defendant to imprisonment for a term of imprisonment of six months. The accused had repeatedly called the victim over eight hours a day, observed the entrance to the house, and, as soon as the injured person left the house, followed him on foot or by bicycle. Once he rang at night on the apartment door, opened the door, put his foot between the apartment door and pressed the door with his hands. When he had been pushed back and the apartment door was closed, he banged with full force against the door, and said, "This time you were lucky, but I'll still catch you."¹⁰⁶

In addition to stalking, the Criminal Code also penalizes threatening the commission of a felony in Section 241.

¹⁰² Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 42.

¹⁰³ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 43.

¹⁰⁴ BGH 3 StR 244/09, 19. November 2009.

¹⁰⁵ Kindhäuser/Neumann/Paeffgen, Strafgesetzbuch (2013) § 238, 45.

¹⁰⁶ 5 Ds 440 Js 16120/07, 17 April 2008.

4.4.2 Other Disturbances

Stalking and threats are acts where the perpetrator directs their actions towards specific victims, however, the peace of the mind of people is often disturbed by acts that are not necessarily aimed at them personally. The Criminal Code penalizes a number of actions in the public space that disturb public order in these spaces. Rioting is a criminal offence under Section 125, desecration of graves, burial sites or public memorials in Section 168, various forms of hate speech in Section 130, breach of public peace by threatening to commit offences in Section 126, dissemination of propaganda materials of unconstitutional organisations in Section 86, dissemination of depictions of violence in Section 131, disturbing the exercise of religion in Section 167, disturbing a funeral in Section 167a, causing public disturbance in Section 183a, distribution of pornography to minors in 184, distribution of pornography depicting violence in Section 184a, unlawful prostitution in Section 184e and prostitution near places frequented by juveniles in Section 184g. Interestingly, exhibitionism is only penalized if committed by a man who annoys another person by an exhibitionist act in Section 183.

4.4.3 Content of Thoughts

While direct forms of ‘reading’ people’s thoughts are not explicitly criminalized, perhaps owing to the infancy of such technical possibilities, there are certain acts that can reveal the content of people’s thoughts by their proxies or by forceful and deceitful action. Thus, forcing someone to make a statement by physically abusing them, or otherwise using force against them, threatening them or mentally abusing them is penalized in Section 343. Violations of the secrecy of elections can also reveal the political preferences and values of people that should be protected *erga omnes*. Such violation is penalized in Section 107c of the Criminal Code.

4.5 Reputation

The German Criminal Code contains quite extensive and complex protection of honour and reputation of individuals from (mostly) verbal attacks against these values. Thus, Section 185 criminalizes insult, protecting the honor, as a derivative of personal dignity¹⁰⁷. Honor is a concept that is very difficult to define and there is a large variety of approaches and theories on what it means, although those are usually not reflected in criminal law.¹⁰⁸ In jurisprudence, the so-called normative-factual concept of honor is preferred, which considers an insult to attack the inner honor, that is to say the human being as a bearer of spiritual and moral values, as well as the external honor founded on the reputation and good name of the person in a society.¹⁰⁹ Every person is given the same degree of inner honor by virtue of their personal dignity. In that sense, honor cannot be gained by virtue of special achievements or merits. The individual can only lose honor through their actions, for example through ethical or moral transgressions.¹¹⁰ In case of

¹⁰⁷ OLG Düsseldorf NJW 2001, 3562, 3563.

¹⁰⁸ Hilgendorf StGB, Before § 185, Rn 23.

¹⁰⁹ Beck'scher Online Kommentar StGB (2016) § 185, Rn 2.

¹¹⁰ BGHSt 36, 145, 150.

mutual insults, the court may order a discharge for one or both of the offenders under Section 199 of the Criminal Code. Insults are only prosecuted upon request.¹¹¹

The criminal codes also penalizes defamations in section 186. Whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine. In contrast to insult, which is a declaration of personal disregard of the victim by the perpetrator, criminalization of defamation protects against ambiguities which make it possible to disregard others.¹¹² The protected legal good is therefore equivalent to insult, but protected in a less direct way. Although defamation criminalizes only untruthful statements, the proof of truth does not preclude criminalization under Section 185 as insult. Special cases of defamation include, defamation of persons in the political arena penalized in Section 188, defamation of the president of the federation prosecuted only with the president's permission in Section 90, defamation of organs and representatives of foreign states in Section 103, defamation of religions, religious and ideological associations in Section 166 and violations of the memory of the dead in Section 166.

An exception from criminalization of defamation applies to fair comments and defences. Under Section 193, critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant, and similar cases shall only entail liability to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it was made.

Other criminal offences related to statements liable to harm the reputation of others include false testimony in Section 153 and false accusation in Section 164. Moreover, whoever through a criminal complaint or by informing on a person exposes him to the danger of being persecuted for political reasons and, in violation of the principles of the rule of law, to suffering harm to life and limb through violence or arbitrary measures, to be deprived of his freedom or to be seriously prejudiced in his professional or financial circumstances shall be held criminally liable under Section 241a of the Criminal Code.

4.6 Relations with People

4.6.1 Family Life

Criminal offences related to family life are mostly concentrated in the chapter on offences related to personal status registry, marriage and the family. Evading statutory maintenance obligation so that the necessities of the person entitled to maintenance are endangered or would be endangered without the assistance of others and withholding maintenance obliged to provide to a pregnant woman causing termination of the pregnancy is criminalized in Section 170. Neglecting the duty to provide care or education for a person under the age of sixteen and thereby creating a danger that the person's physical or mental development could be seriously damaged is penalized in Section 171. Bigamy is a criminal offence under Section 172, and sexual intercourse with a

¹¹¹ Section 194 StGB.

¹¹² Lackner / Kühl, StGB (2014) § 186, Rn 2.

consanguine descendant or with a consanguine relative in an ascending line or between consanguine siblings is penalized under Section 173.

Provisions related to family life are also part of other chapters. These offences mostly concern protection of children and proper care for children. Removing a child from the custody of one or both of their parents or guardian and denying them access to them, or taking them abroad is an offence under Section 235. Placing a child in a helpless situation is criminalized under Section 221. Whosoever tortures or seriously abuses or by maliciously neglecting his duty of care for a person damages the health of a person under eighteen years of age or a person who is defenceless due to frailty or illness and who is in his care or custody, belongs to his household, has been placed under his control by the person obliged to provide care or is subordinated to him within a relationship of employment shall be penalized under Section 225.

4.6.2 Communications

The freedom and secrecy of communications is protected largely in three provisions of the Criminal Code: Section 201 protects the privacy of the spoken word, section 202 protects the privacy of the written word and Section 206 protects against violations of postal and telecommunication secrets. Furthermore, Sections 202a and 202b are provisions relevant for protection of communications (for a more detailed discussion see section 3.2. of this report).

Section 201 protects against eavesdropping and recording of privately spoken words:

Section 201

Violation of the privacy of the spoken word

(1) Whosoever unlawfully

1. makes an audio recording of the privately spoken words of another; or

2. uses, or makes a recording thus produced accessible to a third party,

shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever unlawfully

1. overhears with an eavesdropping device the privately spoken words of another not intended for his attention; or

2. publicly communicates, verbatim or the essential content of, the privately spoken words of another recorded pursuant to subsection (1) No 1 above or overheard pursuant to subsection (2) No 1 above. shall incur the same penalty. The offence under the 1st sentence No 2 above, shall only entail liability if the public communication may interfere with the legitimate interests of another. It is not unlawful if the public communication was made for the purpose of safeguarding overriding public interests.

(3) Whosoever, as a public official or a person entrusted with special public service functions violates the privacy of the spoken word (subsections (1) and (2) above) shall be liable to imprisonment not exceeding five years or a fine.

(4) The attempt shall be punishable.

The provision is designated to protect privacy of individuals, constitutionally developed under the concept of the general personality right derived from Articles 1 and 2 of the Basic Law.¹¹³

The provision covers four distinct modes of action: recording of non-publicly spoken words, accessibility of such recording, interception of words that were not publicly spoken and intended for the perpetrator and public communication of the content of non-publicly spoken words.

The form of the spoken word does not matter as long as it is a direct, acoustically perceptible expression of the contents of thought by means of sounds. Therefore, expressions such as singing are covered, but the sounds accompanying yawning or sighing are not since they are not an articulation of thoughts. However, the spoken word does not need to be consciously expressed and for example utterances in sleep are also covered. Although technically mediated communications are protected elsewhere from interceptions, if eavesdropped upon, would enjoy equal protection in Art. 201.¹¹⁴

The statement is not public, if it is not intended for a larger group of indeterminate people or which are spoken without a personal or material relation.¹¹⁵ This excludes for instance announcements at the supermarket, at the railway station or airport, radio or television interviews (even, if they are never broadcasted).¹¹⁶ On the other hand, police interrogations are not public, even though there is a possibility of later reproduction of its content at a trial.¹¹⁷ The recording of the spoken word is defined by the possibility of later reproduction.¹¹⁸

The condition of the act being ‘unauthorised’ applies equally to all four types of action. It serves a double function: it indicates illegality of the action and lack of knowledge (and consent) of the person concerned.¹¹⁹ However, based on legislative history, where wording ‘without consent’ was proposed, but not inserted, some authors do not consider lack of consent to be required by the condition ‘unauthorised’.¹²⁰

The use of the recording means reproduction of the spoken word by playing or by making copies of the recording.¹²¹ It is irrelevant whether the offender takes cognizance of the content of the recording or makes the copies for other parties.¹²² Making the recording accessible others is defined by the physical possibility of transfer.¹²³

Overhearing spoken words with an eavesdropping device can mean direct listening by the perpetrator or listening by others, and only requires the words to be acoustically understandable. Eavesdropping devices are any technical devices which make spoken word directly perceptible

¹¹³ BVerfGE 34, 238, NJW 1992, 815.

¹¹⁴ Beck'scher Online Kommentar StGB (2016) § 201, Rn 3.

¹¹⁵ Fischer StGB § 201, Rn 2.

¹¹⁶ Beck'scher Online Kommentar StGB (2016) § 201, Rn 4.

¹¹⁷ OLG Frankfurt NJW 1977, 1547 mnm doctor JR 1978, 170.

¹¹⁸ Beck'scher Online Kommentar StGB (2016) § 201, Rn 4-6.

¹¹⁹ Schönke / Schröder StGB (2014) § 201, Rn 13.

¹²⁰ Beck'scher Online Kommentar StGB (2016) § 201, Rn 6.

¹²¹ Lackner / Kühl StGB (2014) § 201, Rn 4.

¹²² Schönke / Schröder StGB (2014) § 201, Rn 17.

¹²³ Beck'scher Online Kommentar StGB (2016) § 201, Rn 7.

beyond its normal sound range by amplification or transmission.¹²⁴ A second telephone connected to the same line is not considered to be an eavesdropping device.¹²⁵

As far as the last alternative of the criminal offence under Section 201 which covers public communication of the privately spoken words, the perpetrator can be both the listener or another person, irrespective of how the content was acquired by them.¹²⁶

Another provision relevant for the protection of communications is the violation of the privacy of written words in Section 202. This provision was discussed in more detail in section 3.3. as it relates to protection of documents in general. Naturally, it also protects sealed letters which are used as means of communication. Such letters are a sub-category of documents, which is generally used for communications, although this is not always the case, since people can send letters to themselves as well, for example from abroad, and these are protected as well. The methods of transport are not relevant, it can be a letter transported by the postal service or a messenger, as well as directly deposited letter, and letters before and after transport, as long as they remain sealed. The concept of letter does not require that the addressee is specified and there is also no need for a sender. However, certain packages are excluded from the concept of a 'letter', such as consignments of goods or books or mass prints thrown in the mail.

A provision more specific to communications is the violation of the postal and telecommunications secret in Section 206:

(1) Whosoever unlawfully discloses to another person facts which are subject to the postal or telecommunications secret and which became known to him as the owner or employee of an enterprise in the business of providing postal or telecommunications services, shall be liable to imprisonment not exceeding five years or a fine.

(2) Whosoever, as an owner or employee of an enterprise indicated in subsection (1) above unlawfully

1. opens a piece of sealed mail which has been entrusted to such an enterprise for delivery or gains knowledge of its content without breaking the seal by using technical means;

2. suppresses a piece of mail entrusted to such an enterprise for delivery; or

3. permits or encourages one of the offences indicated in subsection (1) or in Nos 1 or 2 above,

shall incur the same penalty.

(3) Subsections (1) and (2) above shall apply to persons who

1. perform tasks of supervision over an enterprise indicated in subsection (1) above;

2. are entrusted by such an enterprise or with its authorisation, to provide postal or telecommunications services; or

¹²⁴ Beck'scher Online Kommentar StGB (2016) § 201, Rn 11.

¹²⁵ BGHSt 39, 335.

¹²⁶ Beck'scher Online Kommentar StGB (2016) § 201, 13.

3. *are entrusted with the establishment of facilities serving the operation of such an enterprise or with performing work thereon.*

(4) *Whosoever unlawfully discloses to another person facts which became known to him as a public official outside the postal or telecommunications service on the basis of an authorised or unauthorised infringement of the postal or telecommunications secret shall be liable to imprisonment not exceeding two years or a fine.*

(5) *The immediate circumstances of the postal operations of particular persons as well as the content of pieces of mail are subject to the postal secret. The content of telecommunications and their immediate circumstances, especially the fact whether someone has participated in or is participating in a telecommunications event, are subject to the telecommunications secret. The telecommunications secret also extends to the immediate circumstances of unsuccessful attempts to make a connection.*

4.7 Autonomy

4.7.1 Liberty

Another aspect of privacy of the person is the autonomy of the person, or decisional privacy. Here we refer to intimate decisions primarily of sexual and procreative nature, but also including other decision making on sensitive topics within the context of intimate relationships. The following section will first briefly describe the general criminal offences against liberty and then present the criminal offences against sexual self-determination as an especially sensitive aspect of human autonomy.

In Section 233 of the Criminal Code exploiting another person's predicament or helplessness arising from being in a foreign country by subjecting them to slavery, servitude or bonded labour, or making them work for them or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity or subjecting a person under twenty-one years of age to slavery, servitude or bonded labour, is criminalized. Assisting in such actions is criminalized in Section 233a. Abduction for the purpose of abandonment or facilitating service in foreign military or para-military forces is a criminal offence under Section 234. Under section 234a whoever by deception, threat or force transports another into a territory outside the Federal Republic of Germany or causes them to go abroad, or prevents them from returning from abroad and thereby exposes them to the danger of being persecuted for political reasons and, in violation of the principles of the rule of law shall be penalized. Furthermore, child trafficking is penalized in Section 236, forced marriage in Section 237, unlawful imprisonment in Section 239, abduction for the purposes of blackmail in Section 239a, hostage taking in Section 239b, extortive threats in Section 240, blackmail of constitutional organs in Section 105, blackmail of the president and members of constitutional organs in Section 106, blackmail of voters in Section 108 and deceiving of voters in Section 108a. Moreover, robbery is penalized under Section 249, aggravated robbery in Section 250, blackmail in Section 253 and use of force or threats against life and limb in Section 255.

4.7.2 Sexual Freedom

Crimes in the sphere of sexuality are concentrated in chapter thirteen entitled offences against sexual self-determinations. These include abuse of position of trust in Section 174, sexual abuse of prisoners, patients and institutionalised persons in Section 174a, abuse of official position in Section 174b and abuse of a relationship of counselling, treatment or care in Section 174c. Engaging in sexual activity with a person under fourteen years of age (child) or allowing the child to engage in sexual activity with themselves is penalized in Section 176, with aggravated provision in Section 176a. Rape and forceful sexual assault is an offence under Section 177, abuse of people who are incapable of resistance because of a mental illness or disability including an addiction or because of a profound consciousness disorder or the physically incapable in 179, exploitation of prostitutes on a commercial basis in Section 180a and human trafficking for purposes of sexual exploitation in Section 232. Lastly, causing minors under sixteen years of age to engage in sexual activity is also a criminal offence under Section 180. whosoever encourages sexual acts of a third person on a person under sixteen years of age

5. Data

The provisions related to personal data of the people have already been discussed in more detail elsewhere. Sections 202a and 202b were discussed in section 3.2. These provisions only protect imperceptible data, which however do not necessarily be qualified as personal data, but rather data that are protected from access. Various violations of private secrets were discussed in section 5.3. Provisions related to personal data include protection of the image of people in section 5.2. and the protection of documents and letters in section 3.3.

Identity theft can be criminalized under a number of provisions depending on circumstances: stalking in Section 238, acquisitions of false identity documents in Section 276, forgery of data intended to provide proof in Section 269 and false accusations in Section 164.

6. Final Remarks

t.b.a.