

Encomium by Prof. Dr. Wolfgang Wohlers (University of Zurich)

– on the occasion of the conferment of an honorary doctorate on Attorney Gerhard Strate, given in the Great Hall of the University of Rostock on 20 November 2003 –

It is a particular honour and pleasure for me to be permitted to speak to you today on this occasion. It is, of course, an honour for me already because it is the first such encomium that I have been able to give on such an occasion. And if the person to be honoured is not just someone whom one knows – or thinks one knows – more or less well from his publications; but when it is a friend, who was at the same time also one's former employer, then this is indeed – as one would say in Switzerland – a special occasion which one would not like to miss under any circumstances and which then also justifies a journey of more than 1000 km to be here.

If I see things correctly, there are essentially two subspecies of honorary doctorates: First of all, there is the honorary doctorate which is conferred on mainly somewhat older colleagues of outstanding merit and which, from my point of view, often has a somewhat inherently empty overtone about it. On the one hand because this honour – in this respect comparable with the more or less obligatory festschrift – represents an honour for what is an essentially fulfilled life's work. On the other hand, however, also because these honours – at least occasionally – are conferred on a basis of reciprocity. By comparison, with the other, the second kind of honorary doctorate, practitioners in a profession are honoured as being scholars active not as part of their main profession, but in their additional profession. With this honour – which from my point of view is to be rated very much more highly – achievements find acknowledgement which are of academic significance, but have been made outside of university activities. The honorary doctorate, which is being conferred here today, falls quite clearly into this second category. A practitioner is being honoured who has made significant achievements in many respects. He is not only one of the best known and most prominent defence counsels seen nationwide, what is more: he is – and this is in our connection undoubtedly of particular relevance – an author whose academic work has given important impulses to the dogmatics of criminal law and above all the law of criminal procedure.

I would first like to appraise the academic work produced by Gerhard Strate. In addition to that, I would then also like to show that, with its conferment of this

honorary doctorate, the Faculty of Law has not only pronounced a well-deserved honour, but has also done itself a favour. But we shall come back to that later; firstly let us turn to the appraisal of his academic work.

How can this be described in as few words as possible? Perhaps thus:

After a brief period straying into the law relating to bankruptcy, into which I do not wish to go any further here, already on account of my own lack of competence in the field, in the last 25 years, Gerhard Strate has commented continuously on questions relating to the law concerning foreign nationals, but above all also on questions of criminal law and the law on criminal procedure. The articles stand out without exception through the fact that solutions imbued with scholarship are found for questions of relevance for practice which may possibly appear to be for the most part too “friendly towards defendants” for one or the other lawyer involved in the administration of justice, but which are always committed to a constant leitmotif. An endeavour which consists in Gerhard Strate’s own words in – I quote – “defending our constitutional guarantees of liberty against their insidious erosion by the opportunism of day-to-day politics, both on the part of the judiciary and on the part of the legislators”.

The series of publications on criminal law and criminal procedure topics begins in 1978 with the article “On the notification of blood alcohol findings in a criminal court judgment” and ends at present – if I have not overlooked anything – with the paper “Free weighing of the evidence and binding weighing of evidence” in the festschrift for Peter Riess. Gerhard Strate’s main topics are first of all the legal position of the accused and the defence; in addition, questions of the rules concerning appeals on issues of law and the right of reopening an action come up again and again. It is only possible to appraise the in the meantime over 50 articles in an exemplary manner here. I would like to pick out three articles on the basis of which the specific qualities can be shown by means of examples.

Even if Gerhard Strate’s main interest belongs more to procedural law, I shall begin with substantive criminal law, and here with an article from the year 1987. This paper, published in the ‘*Zeitschrift für Rechtspolitik*’ under the title “With tactics towards finding out the truth”, is concerned with the problems which the defence has to combat in narcotics proceedings. In addition to some especially relevant procedural questions in this field, Gerhard Strate deals in particular also with the interpretation of the statutory definition of the criminal offence of trading in narcotics in accordance with § 29 I No. 1 Narcotics Act [BtMG]. According to the adjudication by the German Federal Supreme Court

[BGH], trading in the sense of this legal provision covers “every self-interested action promoting sales of the narcotic, without its having to have come to preparing the way for definite transactions”. In Gerhard Strate’s words, this adjudication “does not leave the narcotics offender any further latitude. If he has talked about narcotics, then the only thing still to be done is to confirm the seriousness of what he has said in order to classify him as a dealer. If he has stolen the narcotics, if he does not throw the narcotics away immediately after the theft, but keeps them in safe keeping himself, then he is a dealer. Because from the safe keeping it is possible to quickly draw the conclusion that he also wanted to turn it to account with other persons. The trading is not only penalised in the narrower, widely accepted sense; the criminal nature begins already with the ways of acting which are still far removed from the actual infringement of the object of legal protection. In adjudication, trading has long since been developed into a spurious offence of undertaking to commit a wrongful act that does not only include the attempt, but already any acts which would still be regarded as preparatory acts exempt from punishment in other fields of criminality.”

However, Strate does not leave it at this analysis. We read on: “Through this wide adjudication, devoid of any concrete relationship to the incriminated material, it is not, for example, the weight of the object of legal protection, that of public health, that is being affirmed; on the contrary: that vanishes into thin air. In keeping with Gustav Radbruch’s words that murder is not a wrong because it is punished, but it is punished because it is a wrong, not every talk about narcotics – even if it concerns heroin – must actually be a wrong. A wrong always also requires the putting into incipient concrete terms of a danger for the object of legal protection. Sight seems to have been lost of this in the adjudication of the BGH.” The consequence is – according to Strate – “that once defendants have been caught up in the substantive statutory rules of the law on narcotics, there is regularly no escape from them. However, something cannot be right with the criminal law rules if they present us with nothing but guilty persons in a self-contained field of criminality.”

The critical appraisal of the downright unrestrainedly expansive adjudication of the BGH initially remained not only without consequence, but also isolated. In a comment published five years later, Claus *Roxin* was still to remark that it was actually “astonishing” to what little extent literature had critically examined this questionable adjudication. Strate’s article is extolled as an exception. In the following period, the critical approach established by Strate then found increasing support in literature – the standpoint adopted by Strate is probably

today in accordance with the generally prevailing doctrine. In spring of this year – thus after a pause for thought of exactly 16 years – the 3rd Criminal Division now also wants to subject the term of trading to a restrictive interpretation, in particular to no longer classify every self-interested action directed towards turnover per se as dealing. As this would break a long-standing, constant adjudication by the BGH, it requires agreement between the various divisions. This agreement procedure is initiated by what is known as an inquiry ruling which is to be addressed to the other divisions. In the inquiry ruling by the 3rd Criminal Division, the article by Strate is referred to in a prominent position. Anyone who knows the quotation habits of the BGH can roughly estimate the significance that is attached to this article, also from the 3rd Criminal Division's point of view. Whether the other divisions of the BGH will also let themselves be convinced is not yet to be foreseen. But: However the matter ultimately turns out: already just the fact of having provoked an inquiry ruling in so central a question practically and dogmatically can and may probably fill every full-time or part-time criminal law scholar with pride and satisfaction.

Let us now leave the field of substantive criminal law and turn to the law of criminal procedure. From this field I have first selected a paper which Gerhard Strate wrote together with his law-office colleague Klaus-Ulrich Ventzke. In this article, published in 1986 in the periodical '*Strafverteidiger*' [StV], it is a question of the legal consequences of an offence against § 137 I 1 Penal Procedure Code [StPO]. This provision stipulates that the accused can take the services of a defence counsel at every stage of the proceedings – thus even at the time of the first questioning by the police. This rule is disregarded in practice in particular then when the investigating officers dealing with the matter have the impression that the accused is shortly before making a confession, or could be induced to do so by means of a certain "encouragement". The participation of a defence counsel in these cases is rated as being counterproductive and then in part even thwarted when the accused expressly utters the wish to speak to a defence lawyer.

In their article, Strate and Ventzke examine the adjudication of the BGH critically, according to which the findings obtained disregarding § 137 I 1 should be capable of being used. On the basis of a careful argumentation, taking into account the history of the origin of the rule and a legal comparison of the relevant adjudication of the US Supreme Court, Strate and Ventzke expound in detail that, correctly speaking, a ban on its utilisation must be assumed. This article, to which nobody other than Roxin accorded the rating "pioneering", then caused the Federal Supreme Court to make a change in its adjudication,

which was implemented with its ruling BGHSt 38, 372 and for which this time indeed we only had to wait for six years. The fact that the BGH named the article by Strate and Ventzke in this ruling, too, as the only literature opinion, fits into that now already familiar picture.

As a final example, I would now like to consider the article which Gerhard Strate wrote in 1990 for the commemorative festschrift for Karlheinz Meyer. It should be noted here, first of all, that in the table of contents of this work Gerhard Strate is listed as “Dr. jur., Attorney-at-Law, Hamburg”. This can, of course, be interpreted thus that the persons entrusted with the preparation of the table of contents had prophetic gifts; however, realistically one will have to assume rather that they simply could not imagine that a simple attorney, without a doctorate, could be among the illustrious circle of authors called upon to contribute to this commemorative festschrift. Whatever the case may be: The article entitled “Significance of the ban on anticipation of evidence” deals critically with the prevailing trend in the practice of reopening of a case in favour of indefeasibility in cases of doubt. Strate advocates the validity of the principle of determining the truth, even in the reopening of proceedings, a standpoint which the 2nd Chamber of the Second Division of the Federal Constitutional Court [BVerfG] has now also endorsed – within the scope of proceedings complaining about infringements of constitutional rights also instituted by Gerhard Strate.

I regret that I cannot consider some other articles in more detail which are also significant from my point of view. However, in order not to try your patience unduly and exceed the time scale of this function, I shall restrict myself to a personal comment: My first contact with Gerhard Strate was not the contact with the defence counsel Gerhard Strate, but the contact with the author Gerhard Strate, whose article published in the *‘Strafverteidiger’* in 1985 “On the system of competence in the main proceedings” was a not insignificant source of knowledge for the then candidate for a doctorate, Wolfgang Wohlers.

I would also like to take the liberty of remarking that, apart from the quality of its content, Gerhard Strate’s academic work is distinguished by its just as polished as clear and unpretentious style. As a trainee lawyer and also later as a colleague, this gift of formulating precisely and clearly, but at the same time also elegantly, was an ideal for me, which I try to emulate myself – at that time and today. Another gift presents itself as being somewhat more alarming: the ability to always open the draft of a text at that place where, with nearly 100% certainty, there is a typing error or a grammatical absurdity. The advice to all

future trainee lawyers can thus only be: Texts should not be handed over directly, but are better deposited in the signature folder.

And finally: Anyone, who still believes that a sound examination of problems of criminal law or the law of criminal procedure must necessarily be dry and vapid, should be referred in particular to the article “The defence counsel in the reopening of proceedings” published in 1999 in the periodical ‘*Strafverteidiger*’. The whole matter becomes even better, of course, when Gerhard Strate gives a lecture on this topic, as I have myself been able to experience many times in the case of classes given by both of us together within the scope of the training of specialised lawyers. In principle, it is not only advantageous for me if we give these courses together – at all events, the evaluation of my work by the participants always turns out significantly worse than in the case of the classes which I give alone. This is more than made up for by the pleasure of listening when Gerhard Strate lectures entertainingly, self-ironically and at the same time at a factually high level on the activity of defence counsel in the reopening of a case.

I hope that I have shown with my remarks that Gerhard Strate’s academic work justifies the conferment of an honorary doctorate. However, the appraisal of his academic life’s work would not go far enough if it were to only take his publications into consideration. In addition, his activity as the initiator and editor of publications has to be taken into account, which enjoy particular esteem both among practitioners and also legal scholars.

Here one should mention, on the one hand, the ‘*Informationsbrief Ausländerrecht*’, which Gerhard Strate together with the late Professor Helmut Rittstieg founded in 1978, and which he still edits down to the present day. The ‘*Informationsbrief Ausländerrecht*’ very quickly developed into one of the leading periodicals in the field of the law concerning foreign nationals and asylum. The same is also true of the periodical ‘*Strafverteidiger*’, of which Gerhard Strate was the editor in the first eighteen months of its existence and of the academic advisory board of which he is still a member today. This periodical has developed into an important, if not the most important forum in which criminal law scholars and defence lawyers exchange views. However, this periodical’s importance lies above all in the fact that it broke the criminal courts’ publication monopoly. Whereas before 1981 only relatively few, carefully selected rulings were published, since 1981 defence lawyers have the possibility of sending in the rulings handed down against them, or – to be more exact – against their clients, for publication, even if the courts would have

preferred not to have seen these rulings published. The ominous collection of forbidden publications, which is allegedly said to have existed in every appeal court, had thus essentially had its day.

The latest publication initiated by Gerhard Strate and of which he is the responsible editor goes in the same direction, but a consistent step further: the Internet periodical ‘*Höchstrichterliche Rechtsprechung Strafrecht*’ – in brief: hrr-strafrecht.de. The impetus for this project was the circumstance that Gerhard Strate discovered the computer and the Internet for himself a few years ago. Seen from a purely practical point of view, this had the advantage that at the beginning of a review it was possible to first watch the latest *Star Wars* trailer, or be supplied with new, interesting rulings by the US Supreme Court or the Constitutional Court of the Republic of South Africa. Precisely the circumstance that in other countries – particularly in the countries of the Anglo-American legal system – the practice of the supreme courts is already available in the Internet for downloading, topically and above all free of charge, then let the idea take shape of launching something corresponding in Germany, too. The idea was born and implemented of completely documenting the criminal law jurisdiction of the BGH and making it available to an interested public – provided with headwords, paragraph references and head notes – and thus, as Gerhard Strate put it, “democratising” access to this decision material. The collection of decisions includes the complete adjudication of the BGH from 1.1.1999 on; in addition, there are selected rulings of relevance for criminal law and the law of criminal procedure from other courts, in particular from the BVerfG and the ECHR. The fact that hrr-strafrecht.de (Höchstrichterliche Rechtsprechung Strafrecht.de) with monthly accessing figures of over 100,000 intensely annoys the specialist publishing houses interested in selling their completely over-expensive specialist periodicals does not require any further explanation.

The decision to launch the hrr.strafrecht project is not only to be very highly commended because Gerhard Strate – in the endeavour to remain independent of publishers – financed this project out of his own pocket; it is above all to be so highly commended because this project does not benefit his law office itself at all, at least it does not bring it any advantage: the Law Office Strate and Ventzke belongs namely to the circle of selected appeal specialists to whom the BGH has all its decisions sent anyway. The archive that has just come into being is a veritable treasure house to which I gladly go back when it is a question of digging out unpublished, older BGH decisions. The same is true, by the way, of the library. I shall never forget how, on the first day of my

traineeship, I stood in the library and let my eyes wander over the older works from the nineteenth and early twentieth centuries and then came straight away upon a book that I would have liked to have used for my dissertation but that was not available to me either in Hamburg or in Berlin.

If I draw an intermediate résumé here, then I can probably record: The University of Rostock has chosen the right man for the honour being conferred today. With this observation, I would now like to move on to my second thesis, already touched on at the beginning, according to which the Faculty of Law has done itself a favour with the conferment of this honorary doctorate. What do I mean by that?

In a time in which faculties of law must form priorities and show a distinctive image and in which – in my opinion in principle justifiably – a strengthening of the relationship to practice of university education, the conferment of an honorary doctorate on one of the country's most prominent defence lawyers sets an example. Strictly speaking, every law faculty, which would like to present itself outwardly and offer its students something going beyond the usual everyday academic life, should have an interest in tying academically proven practitioners to itself. This applies, of course, especially for a faculty which – like the Faculty of Law of the University of Rostock – has geared its image precisely towards the lawyer's work.

We know – either from the point of view of the listener or that of the teacher, or from both perspectives – that the special difficulty of giving classes on the law of procedure lies in presenting this material in such a manner that more is imparted to the students than the mere technique of the proceedings. The law on criminal procedure gives the criminal proceedings a form without which it can not manage. However, the function of the law of criminal procedure does not amount to nothing more than giving the proceedings “just any” form. The formulation of the law on procedure provides information on how a society deals with its citizens: Does it continue to treat a person suspected of a crime as a citizen, or – in misapprehension of the elementary standards of a state under the rule of law – as an enemy, who has to be fought and annihilated by whatever means?

If the lecturer lacks practical experience of his own, the lecture on the law on procedure very easily degenerates into an academic sand-table exercise that has hardly any affinity to what takes place in court rooms or around them. What in fact, for example, constitutes the work as defence counsel, that can not be

explained apart, but it must have been exemplified to a not inconsiderable part in one's own life. As, however, active or at least former defence lawyers are still a rarity in the teaching staff of our faculties, the solution must lie in fetching the appropriate experience from outside. And in this respect, too, in my estimation Gerhard Strate is exactly the right man.

Allow me now a few concluding remarks on what constitutes the defence lawyer's work. With these comments, I do not wish to either anticipate the academic lecture or hold such a one myself. As my conviction of what constitutes criminal defence, of what is – or what should be – essential for the defence lawyer's conception of himself was shaped decisively by the person and the model Gerhard Strate, these comments can perhaps reveal to us something about the person Gerhard Strate. They are based here, on the one hand, on publications by the person being honoured, on the other, and above all, however, on remarks made to me as well as especially on what I have observed and registered in the years in which I had the honour to work for and with Gerhard Strate.

The defence lawyers' image is good and bad at the same time. Defence lawyers, at least some of them, and Gerhard Strate is quite certainly among them, have a certain star status; on the other hand, defence lawyers have to combat the widely spread image of being tormenting spirits for the judiciary, professional obstructers of punishment, accomplices of the criminals. What is characteristic for this is the constantly recurring question, asked by students, in one's circle of friends and acquaintances and also among colleagues from academia and practice: How can one justify having "such a person" as a client? And "such a person" is then mostly a "murderer" or a "rapist", but in the last few years also, for example, a "child molester".

It has to be stated, first of all, that anyone wanting to rescue innocent persons should better not become a defence lawyer. The defence of an innocent person is the highlight in a defence lawyer's life, but on no account his everyday business. The defence lawyer's everyday business is the defence of the "guilty" client. Anyone, who cannot or does not want that, cannot practise this profession, and he should not even take it up. Anyone acting as a defence lawyer must be able to cope with the fact that through his work a guilty person also at times gets off too well, in an extreme case is perhaps even acquitted. Gerhard Strate has described this factual situation in the article already mentioned on the work of a defence counsel in the reopening of proceedings as follows: "First of all, every defence counsel must be aware that our

constitutional state does, it is true, have many shortcomings, however, in the majority of cases the outcome does hit the right person, even if the reasons given for judgments are from time to time full of gaps, sometimes even slipshod, and the sentence is occasionally excessive. Every other assessment would be fatal: a criminal justice system which sends one half innocent persons into prison only exists under the conditions of state terrorism.”

Against this background, what can, what should persuade someone to become a defence counsel? The immediate cause can be: scepticism towards the state’s right to the prosecution of criminal offences or also a general scepticism towards the state as such. There are such defence lawyers; however, I would maintain – and the passages just quoted would substantiate this assertion – Gerhard Strate is not one of them. What is decisive in his case is a deep-rooted scepticism towards the exercise of power, the need to stand on the side of those who have been marginalised or even cast out by the state, and, even more important, by society. This attitude can be illustrated by a scene from an American feature film, which takes its inspiration from a true case and which Gerhard Strate himself likes to quote. In this scene, a lawyer meets a potential client. For various reasons, the lawyer is not really inclined to take on the case – he does not like the potential client, he considers him to be guilty and the case to be practically lost. Then in the conversation between the lawyer and the client, the remark of relevance in our connection is made. The lawyer says there was in fact only one circumstance that spoke in favour of taking on the case: “They’re all against you.” The accused expects from his defence counsel, completely correctly, that the latter will support his cause. Defence must not be just a pro forma matter, but must take place effectively, of course within the limits of what is procedurally permissible. The will to take the side of the accused must therefore be linked with the preparedness to support the accused in fact and effectively.

This willingness is fed in the case of many defence lawyers, and here I would want to include Gerhard Strate, too, from an almost sporting need to want to “win”. In Gerhard Strate’s case, however, this willingness results also and above all from a capacity for enthusiasm for the matter which is based ultimately on a firm belief in the good in human beings and which has up to now protected him, so far as I am able to judge, and will, I hope, also protect him in future from what many other defence lawyers of many years standing have become: more or less melancholy cynics.

My dear Gerd, I congratulate you on this honour that is being done completely justifiably to you here and today. But I also congratulate the Faculty on the choice that it has made. For me, there is no question that the Faculty, but above all also the students, will benefit from a collaboration of Gerhard Strate – and I think that Professor Sowada, who has already held classes with Gerhard Strate, will be able to confirm this. The students need models, the students want models – and here they are now getting one. From many years of experience – as a trainee lawyer, as a colleague and as a fellow lecturer in the training of specialised lawyers – I would make just one reservation: Classes with Gerhard Strate should, as far as possible, not begin before 11 o'clock in the forenoon and they should make it possible to have one or the other coffee and cigarette break.