Special Issue: *Plea Bargaining in Germany*

Foreword: Plea Bargaining in Germany after the Decision of the Federal Constitutional Court

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Criminal procedure is most critical for the rights of the accused. It does not surprise that criminal procedural issues often give rise to constitutional complaints by convicted persons. Yet far beyond the ordinary cases, the latest opinion of the Federal Constitutional Justices on the constitutionality of the so-called deal-proceedings according to § 257c of the German Criminal Procedure Code (StPO) has caused much attention. The constitutional complaints, which kicked off the proceedings in Karlsruhe, forced the Justices to address the very basis of criminal procedure, its structure and traditional foundations. The decision of 19 March 2013, however, testifies the disunity amongst the justices and their anxiety not to trigger a stampede in the criminal justice system. Even if the outcome is rather unspectacular, the decision is nevertheless one of the most important and fundamental judicial documents concerning criminal procedure of the last years. Because of the centrality of the issue and its relevance also for comparative criminal law, we have decided to provide this topic with the broad room it deserves and put together a special issue on the "deal-decision" of the German Federal Constitutional Court.

German criminal procedure is in its most severe crisis since the adoption of the Reich's StPO on 1 February 1877. For a long time it could be seen as a model of the enlightened and reformed criminal procedural structure in Continental Europe. The Prosecution service (*Staatsanwaltschaft*) was founded as a separate institution from the court that would be the "master of the pre-trial inquiry" (*Herrin des Vorverfahrens*). Yet in the Continental tradition, which was influenced heavily by Roman Law, the trial itself was based on the idea of an inquisitorial judge, who would not only manage the trial but would also inquire into the case and thereby try to unfold the truth. The public prosecutor and the defendant would thus not be "parties" before the bench. Their means to influence the proceedings were limited. The judge calls the witnesses and experts, and requests the production of

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documents. The judge even returns the verdict. Only in capital cases a jury would pronounce the sentence. Yet, one of the most dramatic novelties was the abolition of rules of evidence as a consequence of the abolition of torture. The principle of "free evaluation of evidence" was introduced and still is to be found in § 261 StPO. This paragraph reads as: "The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole."

After the revolution of 1918/1919, the criminal process urged for reconstruction according to the new political and constitutional premises of the Weimar Republic. Yet new democratic proposals of a total re-invention of the criminal trial did not prevail in the legislative process. Even a partial liberalization initiated by the famous Reichsminister of Justice, Gustav Radbruch, did not enter into force. Indeed the further developments, mostly driven by the urge to reduce the costs of criminal trials, led to further bureaucracy and strengthening of inquisitorial elements. In this context upon a proposal of the Reichsminister Erich Emminger the jury was abolished in favor of a reduced numbers of lay judges in 1924.

The judge as the dominant factor of the criminal trial conformed well to the national-socialist "Führerprinzip." The Nazi regime failed to introduce a new procedural order so that the StPO of 1877 was applicable to the ordinary judiciary throughout the twelve years of legal terror. The Nazis however managed to establish alternative, extra-ordinary courts (*Sondergerichte*) and the notorious People's Court (*Volksgerichtshof*), which would be responsible for political crimes and felonies and would be driven by the maxim of highest efficiency. Rights of the accused were almost entirely abolished in these courts. The Nazi government in Berlin also closely monitored the trials before these *Sondergerichte*.

The Federal Republic of Germany adhered to the StPO of 1877 and reintroduced it in 1950 in the form it had in 1924. In the following decades, the StPO was amended several times. Whereas the inquisitorial structure of the trial and the key position of the judge were upheld, the discretionary powers of the public prosecutor were widened and his investigative methods and means extended. Defense counsels were given more rights and the possibilities for victim participation were expanded. As the investigations and trials became more complicated—in particular in the field of economy crime or so-called white-collar crime—the StPO proves to provide a procedure that is too cumbersome. Defense counsel could give the judges a really hard time and provoke the nearby collapse of the trial.

Under these circumstances the professional participants in a trial, i.e. counsel, prosecutor, and judge, started to do something what was not foreseen in the Procedure Code: To trade a confession for a lenient sentence. The advantages which were connected to this "deal" for each of the participants are obvious: Judge and prosecutor do not need to present a full set of evidence against the accused, the judge can issue an abridged version of the written judgment, defense counsel can offer to his client a minimum amount of security regarding

the outcome of the trial. At the same time, the "deal" conflicts with almost every trial principle of the reformed German criminal procedure. Only two should be mentioned here in this brief introduction: First, the "deal" equals the return to a secret procedure of a pre-enlightenment kind. It takes place in a back room and, most noticeably, without the accused being present. Secondly, the "deal" is not a power-free dispute in the sense of a Habermasian discourse. The judge still has the authority and the power. The pressure on the accused to confess could be enormous and could seriously damage the integrity of the trial.

No need at this stage to go into further detail of how the German Federal Court of Justice and finally the German Parliament reacted to this development. The amendment of the StPO in § 257c is the subject of the judgment of the German Federal Constitutional Court handed down on 19 March 2013, which is the cause after all for this special issue. Therefore, more is to read on these issues in the following submissions. At this point just some sparse remarks on the "deal" in criminal trials should be allowed from the side of the editors of this special issue.

It is unclear, how the "deal" in the German reality of criminal prosecution is connected to the common law, in particular the U.S. practice. The party-driven procedure that prevails there gives to the parties the right to dispose of the evidence and the material brought before judge and jury. The parties can make (informal) arrangements before the (formal) opening of the trial. This is the most obvious difference to the inquisitorial German trial structure. As the judge is responsible for the taking of evidence and the unfolding of the truth in its material sense, there are strictly speaking no parties and neither the accused nor the prosecutor is allowed to dispose of anything during the trial. This is the reason why—in a German "deal"—the judge needs to be involved, indeed often they take the initiative to craft a deal in order to save a confession of the accused.

Formality of the procedure is often experienced as a hindrance to come to a swift and efficient solution. The "deal" as a performative act took place outside of the StPO and still does today despite § 257c. It is quite understandable that a lean procedure is easier to handle—in particular for the inquisitorial judge. However we must bear in mind that the strict formality of the criminal trial has one aim: The protection of the accused, who after all is presumed to be innocent until proven guilty beyond reasonable doubt. To cut back on formality means at the same time to sacrifice the rights of the accused.

Finally, we are convinced that communication is a good way to solve problems. Indeed, the criminal trial is nothing else than a communicative act, which is set in place in order to answer the one question of the guilt of the accused. However, this communicative act is organized in a rather formal and traditional way. It is indeed questionable whether the form of communication, which the StPO foresees, is still acceptable and still mirrors the social reality in Germany. Two examples to underline this question: The human need for security has risen as the parameters of a Western risk society point to a much higher sense

of insecurity and uprooting. It is understandable, though, that the defendant wants to be relieved of the insecurity of a trial and know his fate as soon as possible. If this is true, every defense counsel will try to contact prosecutor and judge in advance of the trial in order to find out what his client has to expect.

Our sense of and respect for authority has changed dramatically over the last ten or so years. This shows in the courtroom, where the judge is no longer seen as the natural authority. These modifications in the social life should also be visible in a criminal procedure.

For these reasons, which could only be adumbrated in this context here, the StPO is desperately in need of a general reform. In addition the German Code is under immense pressure of the European Court of Human Rights, whether or not we like it. Also, recent prosecution of international crimes in German courts have shown that the StPO is not up to deal with situations where the crime took place abroad and both witnesses and documentary evidence needs to be "imported." Of course, such a reform could not be done overnight, but the longer the Government waits, the more difficult it becomes. The Federal Constitutional Court has not requested a general reform; yet it has stated quite clearly that the practice and the law must conform with one another. If these drift too far apart, and it is the task of the government to monitor closely exactly this, the law has to be amended. We would thus urge the government to get active sooner rather than later.

We have been able to collect contributions from renowned representatives of different legal professions. Andreas Mosbacher is federal judge at the Federal Court of Justice in the 1st penal senate. Folker Bittmann is a public prosecutor and chief of the prosecution office in Dessau. The authors Alexander Schemmel and Christian Corell are defense lawyers in the well-known Law Firm Roxin Rechtsanwälte focusing mainly on economic crime; Natalie Richter is currently a post-graduate legal trainee at the Tübingen Regional Court. Stefan König is a defense lawyer in Berlin and has published frequently on German criminal procedure law. Stefan Harrendorf is a senior researcher at the University of Göttingen with a focus on criminal law and criminal procedure law. Finally, Thomas Weigend of Cologne University is well known on both sides of the Atlantic as one of the leading scholars in the field of comparative criminal procedure. His co-author, Jenia Turner, is a professor at SMU Dedman School of Law, where she teaches criminal procedure and comparative criminal procedure.

By bringing together various legal professions, we hope to present different interests and aspects and thereby stimulate further discussion on the fundaments and structures of criminal procedure.

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