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OCCASIONAL PAPER SERIES

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ISSUE 1, DECEMBER 2015

The Legality Principle in German Criminal Investigation and Adjudication Procedures: An Overview of the Mandatory Prosecution Principle and its Exceptions

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1.

Is the principle of legality encoded into legislation?

1.1. The principle of legality or, more narrowly defined, the principle of mandatory prosecution, is encoded in several provisions of the German Code of Criminal Procedure (GCCP)[1] and in secs. 386 subs. (1), 399 subs. (1) of the German Fiscal Code (FC).[2]

Especially sec. 152 subs. (2) GCCP states that the public prosecution office, except as otherwise provided by law, shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications. According to sec. 160 subs. (1) GCCP the public prosecution office shall investigate the facts to decide whether public charges are to be preferred as soon as it obtains knowledge of a suspected criminal offence either through a direct report by a victim or via a police investigation or by other means.

[1] Code of Criminal Procedure [Strafprozessordnung] of 1876, in the version of 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 1074, 1319), most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I p. 410). The semi-official English version of the German Code of Criminal Procedure as authorized by the Federal Ministry of Justice and Consumer Protection is here: http://www.gesetze-im-internet.de/englisch_stpo/.

[2] Fiscal Code of Germany [Abgabenordnug] in the version promulgated on 1 October 2002 (Federal Law Gazette [Bundesgesetzblatt] I p. 3866; 2003 I p. 61), last amendment by Article 1 of the Ordinance of 22 December 2014 (Federal Law Gazette I p. 2417). The semi-official English version as authorized by the Federal Ministry of Finance is here: http://www.gesetze-im-internet.de/englisch_ao/.

It is important to mention, that the doctrinal deduction of the principle of legality resp. the principle of mandatory prosecution has been subject to considerable discord and is still not entirely clear. The more recent positions point to a constitutional basis. They refer to Art. 20 subs. 3 of the German Constitution, called "Basic Law" (Grundgesetz) and Art. 3 subs. (1) as constitutional *sedes materiae*. Under Art. 20 subs. 3 of the German Constitution the legislature shall be bound by the constitutional order, and the executive and the judiciary by law and justice.

Under Art. 3 subs. (1) of the German Constitution all persons shall be equal before the law. Government is called upon and authorized to protect vital interests of the citizens. This implies that government may penalize certain behavior and prosecute criminal offenses. The right to prosecute and indict criminal offenses is exclusively vested on the state.

As a consequence, government is to provide a forum to examine whether a criminal offense has occurred and, if so, what state action shall be taken in return. Yet, in particular criminal prosecution is subject to the rule of law which includes the presumption of innocence. In particular, when prosecuting criminal offenses and in imposing criminal sentences government bodies must not act arbitrarily.[3]

Under sec. 170 subs. (1) GCCP the public prosecution office shall, as general rule, prefer public charges by submitting a bill of indictment to the competent court, if the investigations provide sufficient reason for preferring them.

As police authorities and competent officers in the executive police forces are concerned, they shall investigate without unduly delay, under sec. 163 subs. (1) GCCP, all events implicating prima facie suspicion that an offence (felony or misdemeanor) may have been committed. In doing so, they shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end, they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind insofar as there are no other statutory provisions specifically regulating resp. restraining their powers. The police do not have the legal power to formally close a criminal investigation by whatever reason. Instead, they have to send all documents and other pieces of information to the competent public prosecution office in order to enable the prosecutor in charge to double-check the facts and then to decide what could or should be done further.

If the prosecutor in charge comes to a different conclusion than the police investigators, and holds that there is still enough prima facie suspicion, he/she may either investigate the case himself/herself or/and instruct the police about what measures they shall take for an eventual sufficient clearance. In all other cases of clear or reasonably cogent "lack of evidence", the prosecutor in charge is required by law, i. e. by sec. 170 subs. (2) GCCP, to dismiss the case formally.

The lack of evidence can be found in objective facts, in subjective errors of persons informing the police, in lay misinterpretations of the meaning of certain sections of the of the German Criminal Code

[3] See e.g. Decisions of the German Federal Constitutional Court (BVerfGE) Vol. 9 pp. 223, 228; Vol. 16 pp. 194, 202; Vol. 20 pp. 162, 222; Decisions of the German Federal Court of Justice (BGHSt) Vol. 15 pp. 156, 159; Beulke, in: Löwe/Rosenberg (Eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 5, 26th ed. (2008), § 152 margin number 12; *Kühne*, Strafprozessrecht, 9th ed. (2015), marginal number 306; *Hirsch*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW), Vol. 92 (1980) pp. 218, 229; *Kelker*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW), Vol. 118 (2006) pp. 389, 395.

(GCC)[4] in other circumstances of the "actus reus", or in any circumstance regarding the "mens rea" of the suspect (defendant). In addition to that, there is a widespread opinion among criminal justice practitioners, and among scholars of criminal procedure at universities, too, that a prosecutor can eventually dismiss a case

Where a tax crime is suspected, the Main Customs Office, and/or any Regional Tax Office, and/or the Federal Central Tax Office and/or the Child Benefits Disbursement Office are called upon to investigate the facts of the case under secs. 386 subs. (1), 399 subs. (1) FC.

1.2. The principle of legality is flanked by sec. 172 GCCP and of secs. 258, 258a GCC. If the public prosecution office decides to terminate criminal prosecution, sec. 172 GCCP provides that under certain circumstances public charges may be compelled. So, where the applicant is also the aggrieved person, he or she shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification (subs. (1)).

The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the official superior of the public prosecution office (subs. (2)). The application for a court decision must indicate the facts which are intended to substantiate preferment of public charges, as well as the evidence. The application must be signed by an attorney; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent to decide (subs. 3). According to subs. (4), the Higher Regional Court shall be competent to decide on the application.

According to secs. 258, 258a GCC, a public official involved in the criminal proceedings or the proceedings for a measure according to section 11 subs. (1) No 8,[5] who intentionally or knowingly obstructs in whole or in part the punishment of another in accordance with the criminal law because of an unlawful act or his being subjected to a measure (section 11 subs (1) No 8) shall be liable to imprisonment from six months to five years, in less serious cases imprisonment not exceeding three years or a fine.

2.

Are there any exceptions to the principle of mandatory prosecution?

2.1. German criminal law and procedure provide, starting already in a nutshell during the Weimar Republic[6], and considerably extended since the middle of the 1970ies, various statutory exceptions to

[4] German Criminal Code [Strafgesetzbuch] of 1871, in its latest version of 13 November 1998 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 3322, as amended by Art. 6(18) of the Law of 10.10.2013 (Federal Law Gazette I p 3799) = Strafgesetzbuch = StGB. For the semi-official English version of the German Criminal Code as authorized by the Federal Ministry of Justice and Consumer Protection turn here: http://www.gesetze-im-internet.de/englisch_stgb/.

[5] According to. sec. 11 subs. (1) No. 8 GCC 'measure' means the measures of rehabilitation and incapacitation, confiscation, deprivation and destruction.

[6] Emergency Decree of January 4, 1924, enacted by the Minister of Justice Erich Emminger: "Decree for Regulating the Constitution of the Courts and the Administration of Justice" (RGBL I, 1924, Pp. 11 et seq.), based on the "Ermächtigungsgesetz" ("Enabling Act" of December 8, 1923), and Art. 48 Weimar Constitution. These so-called "Emminger Rules" introduced, inter alia, the first explicit discretionary norms into the GPCC, enabling the public prosecution office to abandon further steps of investigation in cases of minor misdemeanors,

the principle of legality. In particular, exceptions are set forth in sec. 153 et seq. GCCP and in sec. 154 et seq. GCCP. Another exception is "private prosecution" according to sec. 374 et seq. GCCP. At last, sec. 45 of the German Youth Court Act[7] and secs. 31a and 37 of the German Narcotic Drugs Act[8] provide exceptions to principle of legality.

The set of statutory exceptions is exhaustive (see sec. 152 subs. (2) GCCP: "except as otherwise provided *by law*"). This means that public prosecution officers do not have any discretion whether to initiate a criminal investigation procedure. Later on, they may not discontinue an ongoing criminal prosecution but upon the grounds of the provisions above. If none of these exceptions proves to apply, the public prosecution offices must prosecute and indict the case under the principle of legality. This applies even if criminal prosecution seems to be unduly burdening for the accused. Proportionality is relevant only when considering what investigative measures may be taken.[9] It is important to note, that any exceptions to the principle of legality apply to the public prosecution offices but not to the police.

a) Under sec. 153 subs. (1) GCCP, the public prosecution office may discontinue the prosecution of *petty offenses*. This applies in cases of a misdemeanor (sec. 12 subs. (2) of the GCC),[10] if the presumed fault of the accused seems to be minor and if there is no public interest in the prosecution of the presumed offense. In order to dispense with prosecution, the public prosecution office regularly is required to ask for the consent of that court which would, in the event, be competent to order the opening of the main proceeding in the present case. The consent of the court is by law exceptionally not required in particular petty cases, i. e. misdemeanors not carrying an "increased minimum" penalty and where the consequences ensuing from the presumed offence are minimal.

b) Sec. 153a subs. (1) GCCP states that, in a case involving a misdemeanor, the public prosecution office may dispense with preferment of public charges and concurrently impose constraints and instructions upon the accused if these measures are apt to eliminate the public interest in criminal prosecution and if the presumed fault of the accused does not present an obstacle. In order to proceed this way, the public prosecution office is to ask the consent of the accused and of the court competent to order the opening of the main proceedings.

c) Under sec. 153b GCCP the public prosecution office may, with the consent of the court which would have jurisdiction over the main hearing, dispense with the preferment of public charges, if the same conditions apply under which the court may later on dispense with imposing a penalty. According to 153c subs. (1) – subs. (3) GCCP the public prosecution office may dispense with the prosecution of extraterritorial criminal offenses. Sec. 153d subs. (1) GCCP and sec. 153e subs. (1)

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provided the competent single sitting criminal judge of a local court, or a local or regional bench court would formally declare consent.

[7] Youth Courts Act of 1953, in the version of the promulgation of 11 December 1974 (Federal Law Gazette [BGBl.]) Part I p. 3427, most recently amended by Article 3 of the Act of 6 December 2011 (Federal Law Gazette Part I page 2554). Citation of sec. 45 Youths Court Act omitted. For the English version of the Act as authorized by the Federal Ministry of Justice and Consumer Protection turn here: http://www.gesetze-im-internet.de/englisch_jgg/englisch_jgg.html#p0226.

[8] Act on the Trade in Narcotic Drugs (Narcotic Drugs Act) Betäubungsmittelgesetz in the version of 1 March 1994 (Federal Law Gazette [Bundesgesetzblatt] Part I p. 358), as amended by
Article 1 of the ordinance of 11 November 2015 (Federal Law Gazette Patz I p. 1992). Citation of secs. 31a and 37 of the Narcotic Drugs Act omitted. An authorized English version of the current Act is not available.

[9] *Beulke*, In: Löwe/Rosenberg (Eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 5, 26th ed. (2008), § 152 marginal number 19.

[10] According to sec. 12 subs. 2 GCC *misdemeanors* are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.

GCCP authorize the Federal Prosecutor General to dispense with the prosecution of certain crimes against the state for political reasons and in cases of active repentance on the side of the suspect. Sec. 153f. GCCP provides exceptions to the legality principle in cases of criminal offenses under the Code of Crimes against International Law.

d) According to sec. 154 subs. (1) No. 1 GCCP, the public prosecution office may dispense with prosecuting an offence if the penalty or the measure of reform and prevention in which the prosecution might result is not particularly significant in addition to a penalty or measure of reform and prevention which has been already imposed earlier with binding effect upon the accused for another offence, or which the accused may have to expect for another offence. The same shall apply under sec. 154 subs. (1) No. 2 GCCP, if a judgment is not to be expected for such offence within a reasonable time, and if a penalty or measure of reform and prevention which was imposed with binding effect upon the accused, or which he may have to expect for another offence, appears sufficient to have an influence on the perpetrator and to defend the legal order.

e) If individual separable parts of an offence or some of several violations of law committed as a result of the same offence are not particularly significant for the penalty or measure of reform and prevention to be expected, or in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offence or which he may have to expect to be imposed for another offence, prosecution may under sec. 154a subs. (1) GCCP be limited to the other parts of the offence or the other violations of law.

f) Sec. 154b subs. (1) GCCP states that the preferment of public charges may be dispensed with if the accused is foreseen to get extradited to a foreign government because of the offence. If coercion or extortion (secs. 240 and 253 GCC) was committed by threats to reveal a criminal offence, the public prosecution office may under sec. 154c subs. (1) GCCP dispense with prosecuting the offence, the disclosure of which was threatened, unless expiation is imperative because of the seriousness of the offence. If the preferring of public charges for a misdemeanor depends on the evaluation of a question which must be determined according to civil law or administrative law, the public prosecution office may under sec. 154d 1st sentence GCCP set a time limit to decide the question in civil proceedings or in administrative court proceedings. According to sec. 154 3rd sentence GCCP the public prosecution office may terminate the proceeding after the time limit has expired without any result. According to sec. 154e subs. (1) GCCP, public charges shall not be preferred for an erroneous suspicion or insult (sections 164, 185 to 188 GCC) as long as criminal or disciplinary proceedings are pending for the reported or alleged offence. Sec. 154f GCCP states that if the absence of the accused or some other personal impediment prevents the opening or conduct of the main proceedings for a considerable time, and if public charges have not yet been preferred, the public prosecution office may provisionally terminate the proceedings after it has clarified the facts so far as possible and secured the evidence so far as necessary.

g) Private prosecution is governed by secs. 374 et seq. GCCP. According to sec. 374 subs. (1) GCCP an aggrieved person may bring a private prosecution in respect of certain in general by tendency minor offenses without to have recourse to the public prosecution office first. This applies for instance, according to sec. 374 subs. (1) No. 5a GCCP, in cases of taking or offering a bribe in business transactions (section 299 GCC) and, according to and No. 7 GCCP, in cases a criminal offence pursuant to sections 16 to 19 of the Act against Unfair Competition

In cases of criminal offenses that might be subject to private prosecution, the public prosecution office shall examine *ex officio* whether there is a public interest in criminal prosecution (Rules of procedure in criminal and sanctioning proceedings [Richtlinien für das Straf- und Bussgeldverfahren = RiStBV] No. 86 subs. (1)).[11] This demands in general that the present criminal offense causes an infringement of public concord that is exceeding the protected interests of the aggrieved person, and criminal prosecution *ex officio* must be a matter of public concern. This applies e.g. if the offender has acted unusually roughly, if the motive of the criminal offense has been racist, xenophobic or otherwise inhumane, or if the aggrieved person is prominent. If the present criminal offense does not cause an infringement of public concord exceeding the protected interests of the aggrieved person, criminal prosecution may nevertheless be a matter of public concern if the aggrieved person cannot be expected to bring a private prosecution due to a personal relationship with the offender (RiStBV No. 86 subs. (2)).

If criminal prosecution *ex officio* is undue under RiStBV No. 86, but private prosecution offences seem still to be relevant in substance, the public prosecution office shall, when discontinuing criminal prosecution according to sec. 170 subs. 2 GCCP, refer the aggrieved person to the possibility of entering a private prosecution before the lower local court (see sec. 376 GCCP with RiStBV No. 87 subs. 1).[12]

2.2. In criminal prosecutions against adult offenders the most important provisions for discretionary procedures and decisions are sec. 153 GCCP and sec. 153a GCCP.[13] Considering the rationale of these exceptions to the mandatory prosecution principle, two different aspects are pivotal.

The first aspect concerns the limited resources (also) for the German prosecution and judiciary to intensely, efficiently and effectively deal with each and every case of an alleged offence or a suspected person. If there were no exceptions to the state´s duty to prosecute and to indict any criminal offense, the immense day-to-day influx of primordially rather petty cases would draw much too much from extant human and financial resources. So it would be end in a gridlock situation, making it impossible for the police, the public prosecution offices and, to a lesser extent, also the courts to handle the bulk of extant cases in due course of time (a German catchphrase so far is "justice as a scarce resource"). Regarding the overload of the criminal justice system, limiting the mandatory prosecution principle in minor or petty cases would enable practitioners in the prosecution and adjudication to concentrate their efforts on serious crimes and heavy offenders.[14]

The second aspect regards the "policy rationale" of both rules, sec. 153 GCCP and of sec. 153a GCCP, namely to provide the criminal justice system with legally explicit and constitutionally sound, at least tolerable, informal ways to discontinue criminal prosecution and adjudication and, if appropriate, to impose "sanctions" not counting as genuine criminal penalties with inter alia criminal registry consequences. Seen from the perspective of suspects resp. defendants, formal criminal proceedings, in particular the main (public or even mass media presence instigating) hearing before the criminal court may often, already as such, cause serious long-term effects on reputation or even the whole life course. The psychosocial status diminution will rather surely occur when a defendant will be convicted and

[11] An official English version of the RiStBV is not available.
[12] RiStBV No. 87 subs. 2 ommitted.
[13] See *Beulke*, In: Löwe/Rosenberg (Eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 5, 26th ed. (2008), § 153 marginal number 3. For further details see *infra* Ad (3).
[14] See *Beulke*, In: Löwe/Rosenberg (Eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 5, 26th ed. (2008), § 153 marginal number 1.

sentenced. And the "damage" may last even when the case will eventually be considered differently by a higher court after appeal, and lead to a valid verdict of acquittal. So, the general idea behind all those detailed considerations is: for substantive reasons of justice, criminal prosecution (and in case later on criminal courts) shall refrain from exposing offenders charged with minor offenses to stigmatizing and criminalizing effects potentially always inherent to formal and publicly recognizable criminal proceedings.[15]

3.

Has there been any empirical work to demonstrate that the principle of mandatory prosecution is NOT applied in practice?

In this respect, it makes an important difference whether the principle is not applied at all or whether the one or the other statutory exception to the principle, as outlined above, is being administered.

a) If the public prosecution offices or the police fail to comply with the principle of mandatory prosecution, this constitutes a violation of statutory law, in particular of secs. 152 subs. (2), 160 subs. (1) GCCP or of sec. 163 subs. (1) GCCP (*supra*). The aggrieved person might bring a motion to compel public charges according to sec. 172 GCCP (*supra*). In serious cases, the omission to prosecute and indict criminal offenses may amount to criminal conduct according to secs. 258, 258a subs. (1) GCC (*supra*).

b) Regarding the application of statutory exceptions to the principle, the *Konstanz Repositories on Crime and Sanctioning*[16] provide a large set of thorough long-term analyses. The currently available data allow a well-grounded approximation to the scope to that practitioners apply the exceptions provided by sec. 153 GCCP and sec. 153a GCCP and sec. 153b GCCP. Based on those data, *Wolfgang Heinz* concluded, that diversion was widely and since long time accepted in German legal practice. Figures 7-10 of his report on the German penal system and its implementation indicate that the prosecution and adjudication institutions so to speak succeeded in compensating, by means of diversionary procedures, the increasing number of persons who could otherwise be subject to penal sentences.

On the national overall level, these "strategies" and "tactics" of limiting the structural overburdening of the whole criminal justice system led to the result that the total number of convicted persons remained almost constant. Currently, less than one-half of all persons who could be subject to penal sanctions under German criminal law and German juvenile criminal law is convicted by court.[17] Orders by the public prosecution offices to discontinue criminal prosecution represent by this time the major part of judicial diversion. At the beginning of the 1980s about two thirds (67.4 %) of all judicial orders to discontinue criminal prosecutions have been orders by the public prosecution offices according to sec. 153 subs. (1) GCCP and sec. 153a subs. (1) GCCP and sec. 153b subs. (1) GCCP. This part amounted to 85 % in 2012. Including the orders to discontinue criminal prosecution

[15] *Ibid*.
[16] *Heinz*, Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882-2012, Version 1/2014 (http://www.uni-konstanz.de/rtf/kis/Sanktionierungspraxis-in-Deutschland-Stand-2012.pdf).
[17] *Ibid*., at p. 61.

according to sec. 31a of the Narcotic Drugs Act and sec. 37 of the Narcotic Drugs Act, the percentage is 87.5 %.[18]

Figure 7[19] indicates the total numbers of judicial orders to discontinue criminal prosecution per year. Orders by the public prosecution offices to discontinue criminal prosecution are in light yellow. Orders by the public prosecution offices concurrently imposing certain restraints or instructions on the accused are in deep red.

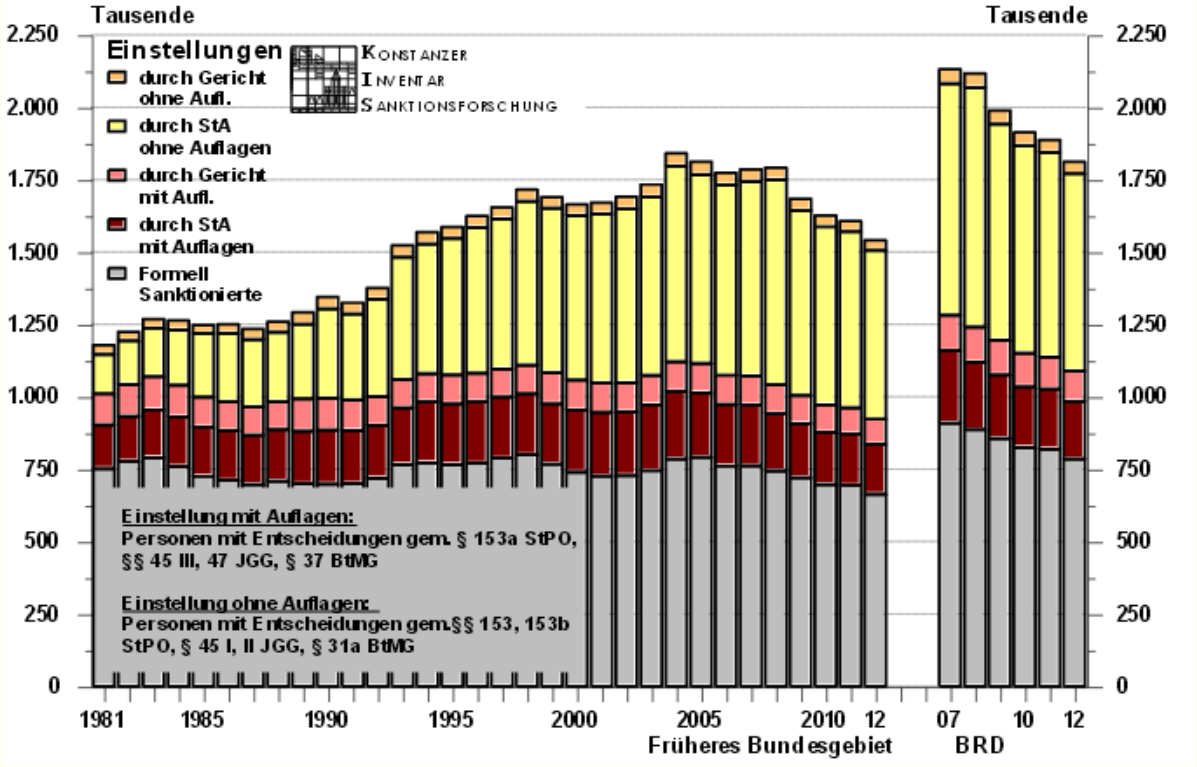

Schaubild 7: Entwicklung der informellen und formellen Sanktionierungspraxis im allgemeinen Strafrecht und im Jugendstrafrecht. Absolute Zahlen (informell Sanktionierte gem. StPO, JGG, BtMG). Früheres Bundesgebiet mit Westberlin, seit 1995 mit Gesamtberlin (FG), seit 2007 FG und Deutschland

Translation of terms:

- Früheres Bundesgebiet = Data for only the 11 States of the former Bundesrepublik Deutschland (BRD = Federal Republic of Germany (FRG)) before and after the unification that happened in 1990. The statistical offices were counting procedures / decisions until 1994 for the 11 States including West-Berlin, since 1995 including the City-State Berlin as a whole. From 2007 on the 5 new States succeeding the provines of the former German Democratic

[18] *Ibid*., at p. 62.
[19] *Ibid*., at p. 61.

Republic (GDR) were being included in the data-base. To show the "jump in cases" due to this development, Heinz is showing a separte BRD-Series on the right hand of the figure 7.

- Absolute Zahlen = absolute numbers of cases / decisions in thousands.
- Entwicklung der informellen und formellen Sanktionierungspraxis im allgemeinen Strafrecht und im Jugendstrafrecht = development of the pratice of informal vs. formal procedures resp. decisions along GCCP, Youhts Court Act and Narcotic Drugs Act.
- From top to bottom in different colors:
  - Einstellungen durch Gericht ohne Aufl. = Dismissal of adjudication by criminal courts, without imposing informal sanctions.
  - Einstellungen durch StA ohne Auflagen = Dismissal of prosecution by the public prosecution office , without imposing formal sanctions.
  - Einstellung durch Gericht mit Aufl. = Deferment of adjudication by criminal courts under imposition of informal sanctions.
  - Einstellung durch StA mit Auflagen = Deferment of prosection by the public prosecution office under imposition of informal sanctions.

Figure 8[20] portrays the full range of the judicial response to criminal offenses in percent per year. Orders by the public prosecution offices to discontinue criminal prosecution are in light grey. Orders by the public prosecution offices concurrently imposing certain restraints or instructions on the accused are in deep grey.

[20] *Ibid*., at p. 61.

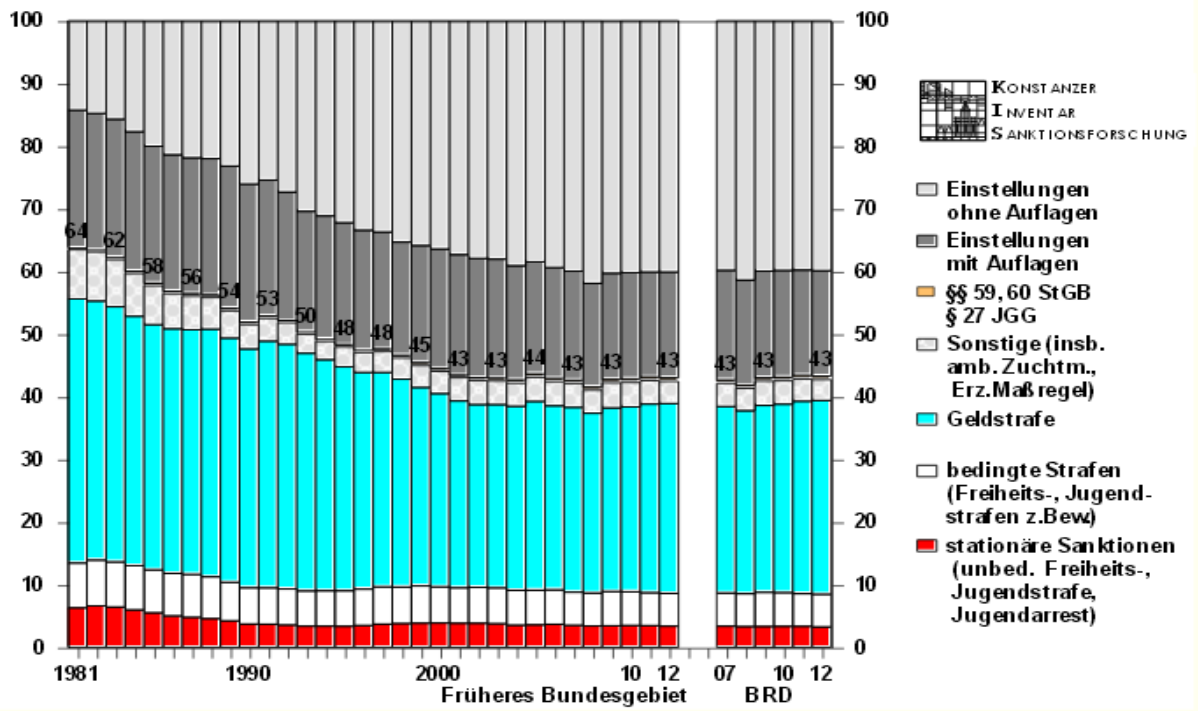

Schaubild 8: Entwicklung der informellen und formellen Sanktionierungspraxis im allgemeinen Strafrecht und im Jugendstrafrecht. Relative Zahlen (informell Sanktionierte gem. StPO, JGG, BtMG). Früheres Bundesgebiet mit Westberlin, seit 1995 mit Gesamtberlin (FG), seit 2007 FG und Deutschland

Translation of terms: See partially the translation above on figure 7. In addition:

- Relative Zahlen = Percentage points.
- From top to bottom:
  - Einstellungen ohne Auflagen = Dismissal of prosecution and adjudication (here combined) without imposition of informal sanctions.
  - Einstellungen mit Auflagen = Deferment of prosecution and adjudication (here combined) with imposition of informal sanctions.
  - § 59 StGB = Formal conviction along sec. 59 GCC with issuing a formal warning, where the eventually possible sentencing to a criminal fine will depend on the convicts demeanor during a probationary period.
  - § 60 StGB = Formal conviction along sec. 60 GCC with exemption from a formal sentece, if the convict can be considered as already substantially "punished" by the factual consequences of his deed, either directly (pain, harm and damages for himself/herself), or indirectly (pain, harm and damages suffered by family members or partners or relatives or close friends, having dire and perhaps lasting effects on himself/herself).
  - § 27 JGG = Formal conviction of a young defendant along sec. 27 YCA in case where the court sees indicators for the imposition of a youth imprisonment penalty, but

cannot reach a clear verdict so far after weighing the evidence. Then the court can defer the imposition of a youth imprisonment term for a probationary period of up to 2 years. The final decision depends on the young probationer´s demeanor, supervised by a probation officer. If his/her behavior in a retrospective weighing strongly and convincingly demonstrates that "harmful /dangerous tendencies" already existed at the time of the (rather serious) offence, the court imposes the appropriate amount of a youth imprisonment penalty. Otherwise the conviction as such (!) will totally annulled.

- Sonstige (insb. amb. Zuchtm., Erz.Maßregel) = Youth Court Law sanctions that do not imply any deprivation of liberty, like "disciplinary measures" along sec. 15 YCA or / and "educational measures" along sec. 10 and sec. 11 YCL.

- Geldstrafe = Fines along sec. 40 GCC (under adult criminal law).

- Bedingte Strafen (Freiheits-, Jugendstrafen z. Bew.) Criminal penalties carrying deprivation of liberty, where the execution is conditionally deferred for a definite probationary period, without or with subordination of the sentenced person under the care and supervision of a probation officer). Sec. 38 with sec. 56 GCC in adult cases, sec. 17, 18, with sec. 21 YCA in youth cases.

- Stationäre Sanktionen, unbed. Freiheits-, Jugendstrafe, Jugendarrest) = Unconditional sentences with deprivation of liberty. In adult law cases = Imprisonment either for a determined penalty or for life (sec. 38 GCC). In youth cases = the criminal penalty of youth imprisonment for a determined penalty (sec. 17, 18 YCA), or the special disciplinary measure of "short time detention" up to 4 weeks (sec. 16 YCA).

Figure 9[21] provides the absolute numbers of judicial orders (i.e. by the public prosecution offices *and* by the courts) to discontinue criminal prosecution and of formal sentences per year, *in cases of adult criminal law procedures only*. Judicial orders to discontinue criminal prosecution are listed under the heading "*Einstellungen*". Persons who have been subject to formal sentences are listed under the heading "*Formell Sanktionierte*".

[21] *Ibid*., at p. 66.

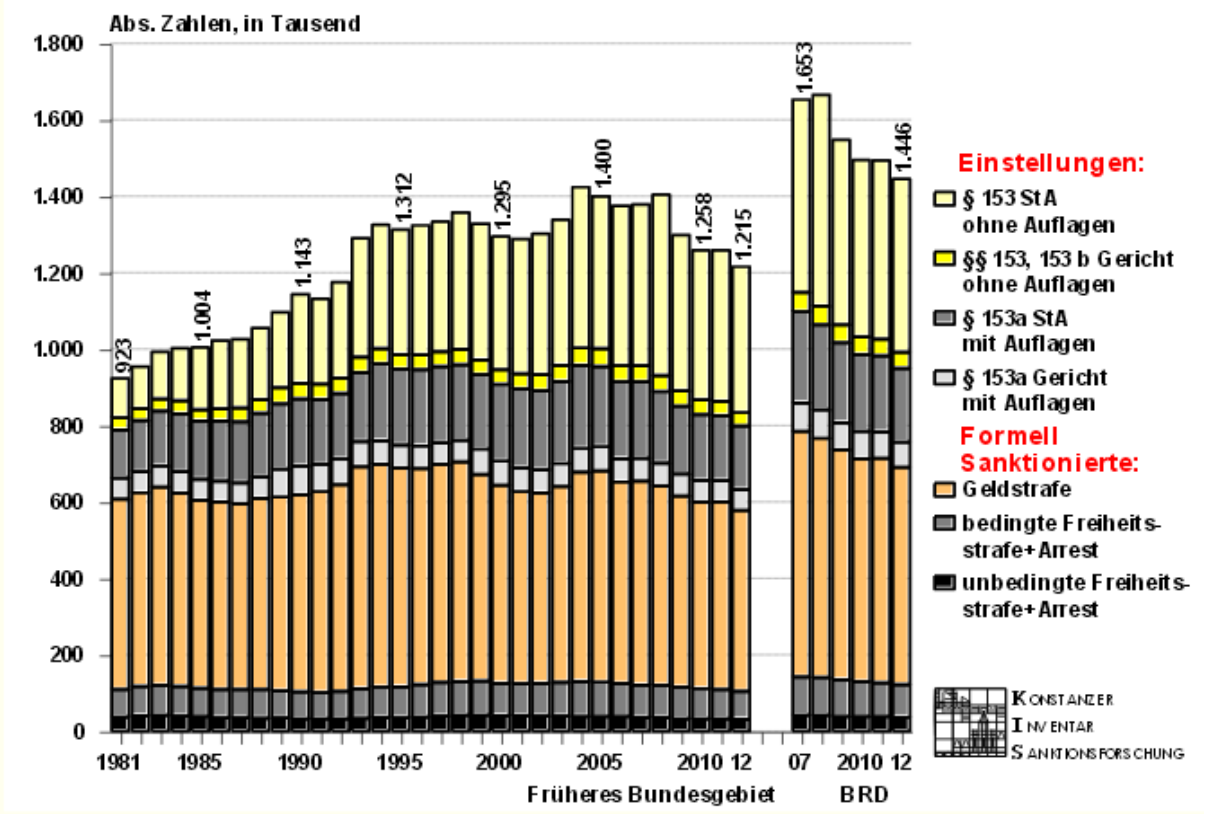

Schaubild 9: Nach allgemeinem Strafrecht informell und formell Sanktionierte. Früheres Bundesgebiet mit Westberlin, seit 1995 mit Gesamtberlin (FG), seit 2007 FG und Deutschland

Translation of terms: See partially the translation above on figure 7 and figure 8. In addition:

- § 153 StA ohne Auflagen. = Dismissal of prosection by the public prosecution office, without imposing informal sanctions.
- §§ 153, 153b Gericht ohne Auflagen = Dismissal of adjudicaton by criminal courts , without imposing formal sanctions.
- § 153a StA mit Auflagen = Deferment of prosection by the public prosecution office, under imposition of informal sanctions.
- § 153a Gericht mit Auflagen = Deferment of adjudication by criminal courts, under imposition of informal sanctions.
- Geldstrafe = Fine along adult criminal law.
- Bedingte Freiheitsstrafe + Arrest = Convicitons with deferment of the imposed imprisonment sentence for a probationary period in common GCC matters, but also in very rare cases of military offences (WStG = Wehrstrafgesetz).
- Unbedingte Freiheitststrafe + Arrest = Unconditional imprisonment sentences along GCC and WStG)

Figure 10[22] portrays the full range of formal and informal judicial responses to criminal offenses in percent per year, also along adult criminal law provisions. The red line indicates the total percentage of judicial orders to discontinue criminal prosecution. The percentage of orders by the public prosecution offices to discontinue criminal prosecution is in light grey. The percentage of court orders to discontinue criminal prosecution is in deep grey.[23] Fines are depicted in yellow. Conditional (probationary) penalties are depicted in green, and unconditional imprisonment sentences are depicted in blue.

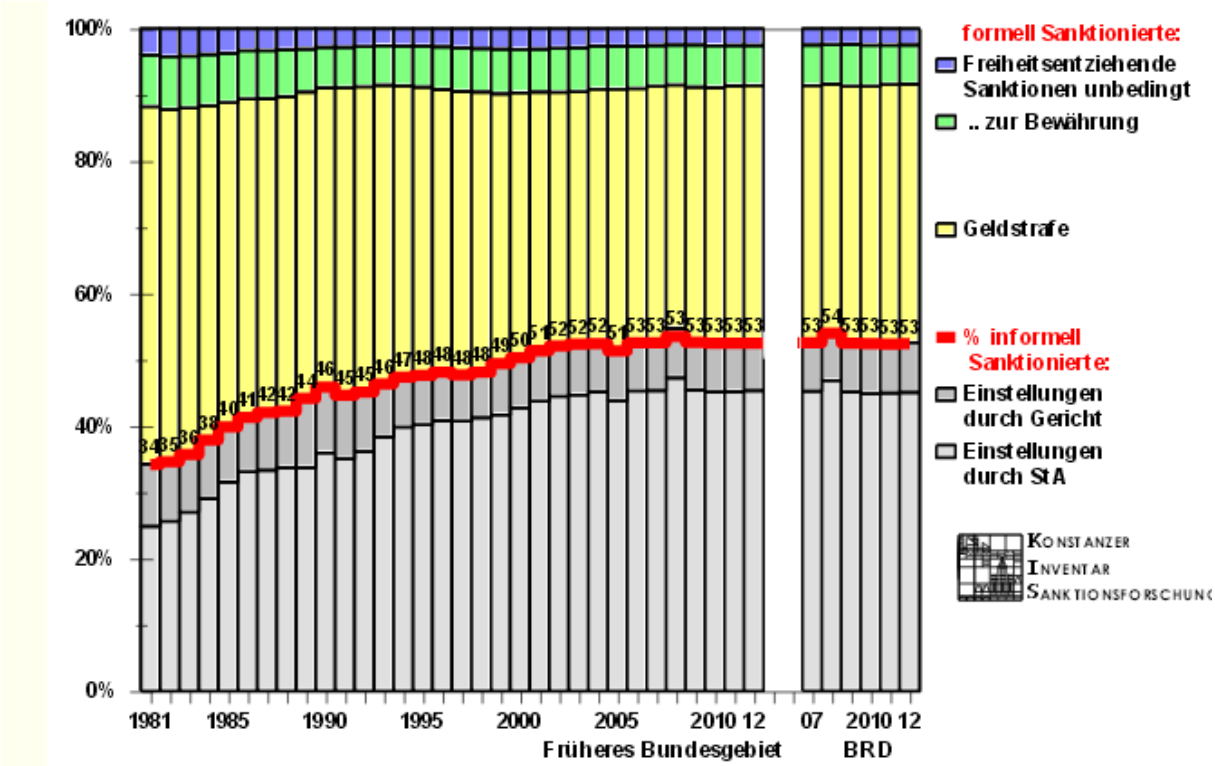

Schaubild 10: Nach allgemeinem Strafrecht informell und formell Sanktionierte.
Anteile, bezogen auf (informell und formell) Sanktionierte insgesamt (Diversionsraten).
Früheres Bundesgebiet mit Westberlin, seit 1995 mit Gesamtberlin (FG), seit 2007 FG und Deutschland

c) That means that in practice the competence to impose criminal sentences over time shifted from the side of the court to the side of the public prosecution offices. This development is subject to academic criticism.

[22] *Ibid*. at p. 67.
[23] For more and very detailed information refer to the most recent 6th Edition 2015 of the Federal Ministry of Justice´s Brochure on "Criminal Justice in Germany: Facts and Figures" as authored by Prof. Dr. Joerg Martin Jehle from the University of Goettingen. The electronic version of this document is here: http://www.bmjv.de/SharedDocs/Downloads/DE/Statistiken/Download/Criminal_Justice_Germany_Facts_Figures.html.

Some scholars observe that there might be a violation of the separation of powers (art. 20 subs. (2) and art. 92 of the German Constitution) and of the presumption of innocence.

Further concerns are expressed with regard to the comparatively vague formulation of the standards that public prosecution offices must meet to discontinue criminal prosecution in secs. 153 et seq. GCCP. Legislature was called upon to determine the standards to be met in order to discontinue criminal prosecution. They were not at the disposal of the executive branch of government.

Diversion provisions tended to promote an administrative type of criminal procedure, i.e. a special type of criminal procedure that is strongly influenced by orders and that could easily be adjusted to the current demands of the criminal justice system and to recent trends in crime policy. Parts of academic literature remind that diversion provisions might induce the criminal prosecution offices to discontinue criminal prosecution and concurrently impose certain orders and restraints on the accused even in cases in that they would formerly have had to discontinue criminal prosecution for lack of sufficient reason to prefer public charges (sec. 170 subs. (1) and subs. (2) GCCP). Other parts of academic literature argue that in particular the provisions of sec. 153a GCCP might result in a privilege that allowed wealthy and well-educated offenders to pay for their way to freedom.[24]

4.

On what basis do prosecutors or/and courts enter into a settlement of plea-bargaining type with prominent suspects or defendants?

Already for decades there have been legal policy and constitutional and criminal law related doctrinal discussions in Germany, sometimes rather heated ones, about whether at all and, if so, under what circumstances or conditions either the defense with the prosecution or, in later stages of procedure, the criminal court in arrangement with the prosecution and the defense, would be legally authorized to enter into settlements leading either to reduced penalties or, stronger, to convictions without sentencing or, in not so serious cases, even to a full abandonment of prosecution resp. adjudication.

The U.S. term “plea bargaining” related to the criminal charge as well as to conviction and sentencing was sometimes explicitly used, e. g. by social science scholars.[25] Other discussants, who were fundamentally opposed to this insidious trend to blur the historical and structural difference between the civil law tradition of inquisitorial procedures and the common law tradition of adversarial procedures, used the somehow derogatory term “deal”.[26]

However, even if in practice more and more “participants” in procedures/trials got used to various informal ways and means of settling a case with a friendly or at least in the event acceptable agreement, there was no statutory basis for a long time. Criminal law scholars engaged more and more

[24] See *Ibid.*, at p. 62; *Beulke*, In: Löwe/Rosenberg (Eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 5, 26th ed. (2008), § 153 marginal number 5 ff.

[25] For an early example see the book of a sociologist/criminologist who had inter alia studied in the U.S.A.: Karl F. Schumann: Der Handel mit Gerechtigkeit – Funktionsprobleme der Strafjustiz und ihre Lösungen – am Beispiel des amerikanischen plea bargaining. Frankfurt am Main: Suhrkamp 1977.

[26] For an early example see the debate stirring arcticle of a renowned and highly experienced defense lawyer, published under a pseudonym: Detlef Deal, Der strafprozessuale Vergleich, in: Strafverteidiger 10, 1990, Special Issue, Pp. 1-8.

in doctrinal refinement on the one hand, and in comparative doctrinal and implementation oriented studies on the other hand.[27]

On the part of the court judiciary, in particular at higher levels of state or federal appeal courts, above all the Federal Court of Justice was highly skeptical about this development. Yet, in the landmark decision of 28 August 1997 the 4th Senate in Criminal Matters of this court decided to press ahead the issue, and to develop a new line of acknowledging and restricting alike a widespread practice of (mainly) courts of first instance that hitherto had remained in the shadow of doubted legality. The Senate therefore recognized that negotiated agreements between the trial courts and the participants in a criminal proceeding were not a priori barred under the German Constitution.[28] In the same decision, the Court defined a series of standards the trial courts must observe to comply with constitutional law.

However, there was kind of silent but strong opposition on the "front level" of penal procedure. The local and regional criminal trial courts still quite often disregarded these standards. So in the event, the "Grand Criminal Panel" of the German Federal Court of Justice, composed of members of all the 5 Senates in Criminal Matters, had to be asked to deliberate with the aim to reach a set of principles and guidelines. One of the main results was, that the Grand Panel addressed the federal legislature to establish a statutory basis with nation-wide formal validity.[29].

In response to this demand, and after some controversial debate in the two "Houses" of the German Federal Parliament, the "Act on the Regulation of Negotiated Agreements in Criminal Proceedings of 29 July 2009" was passed.[30]

Under this act, several provisions of the German Code of Criminal procedure have been amended. The center piece of this ensemble is sec. 257c GCCP. Under this provision the trial courts are in suitable cases entitled to enter into an agreement concerning the further course and the possible result of the proceeding.

The subject matter of this agreement may according to sec. 257´s subs. (2) GCCP only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement.

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[27] See exemplary, under the perspective of guaranteeing domestic security, *Karioth*, Absprachen im Strafprozess mit rechtsvergleichendem Blick auf das plea bargaining im anglo-amerikanischen Strafprozess, in: Ooyen et al. (eds.), Oeffentliche Sicherheit am Ende des 20. Jahrhunderts, Luebeck 2000, Pp. 117-147. Under the perspective of a structural systems´ analysis, see exemplary the voluminous and „deeply digging" study of *Trueg*, Loesungskonverganzen trotz Systemdifferenzen im deutschen und US-amerikanischen Strafverfahren. Tuebingen: Mohr Siebeck 2002, XXIV and 534 Pp.

[28] Decision 4 StR 240/97, to be found under the collection of "Decisions of the German Federal Court of Justice in Criminal Matters" Entscheidungen des Bundesgerichtshofs in Strafsachen, Amtliche Sammlung (BGHSt), Vol. 43, p. 195 ff.).

[29] Decision of 3 March 2005, Decisions of the German Federal Court of Justice (BGHSt) Vol. 50, Pp. 40 et sequ.)

[30] Bundesgesetzblatt (BGBl. 2009, Teil I, 2353 f. = Federal Law Gazette, Part I, Year 2009, pages 2353 and 2354). The legislative motion is to be found in the BT-Drs. 16/11736 v. 27.1.2009 (Printed minutes of the Bundestag = Assembly of Elected Members of the German Federal Parliament, Issue 16/11,736 of January 27, 2009. This Bundestag is so to speak the First House, whereas in the Second House the Appointed Delegates of the 16 States of the Federation are deliberating and voting. To put a complicated matter a bit simply: In any case where the basic interests of the States of the Federation are affected, any law or act or government decree needs the formal unanimous or at least majority assent of the Second House. For a more detailed explication see inter alia https://www.bundestag.de/htdocs_e/bundestag/function/legislation/competencies/245700

However, the verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.

Under present German criminal law and procedure, there are in general two different ways for the criminal justice authorities to enter into a settlement with the person who is subject to criminal prosecution, and in particular with his/her defense attorney (resp. up to three defense lawyers). The same principle applies for any explicit agreement or tacit arrangement that the defense would abstain from entering an appeal.

The first way is to enter into a "negotiated agreement" according to sec. 257c GCCP. The German Federal Constitutional court lately confirmed that the statutory standards implemented by the Act on the Regulation of Negotiated Agreements in Criminal Proceedings were sufficient to guarantee that negotiated agreements between the trial courts and the participants in the criminal proceeding were consistent with constitutional law.[31]

The other way is to discontinue criminal prosecution and concurrently impose certain orders and restraints on the accused according to sec. 153a subs. (2) GCCP. Under this provision the trial court may, if public charges have already been preferred, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second phrases, on the indicted accused. Subsection (1), third to sixth and eighth phrases, shall apply mutatis mutandis. The decision pursuant to the first phrase shall be given in a ruling. The ruling shall not be contestable. The fourth phrase shall also apply to a finding that conditions and instructions imposed pursuant to the first phrase have been met.

In *Ecclestone*, the trial court, i. e. a criminal chamber of the Munic Regional Court (Landgericht Muenchen) discontinued criminal prosecution according to sec. 153a subs. 2 GCCP. Ecclestone was eventually issued with the instruction (Auflage) to pay 100 Million U.S. Dollars to the Bavarian State Treasury; and he followed that instruction in a remarkably swift pace.[32] This led to the res judicata effect, which means in such kind of discretionary decisions that the offence cannot any more prosecuted in the future, if only its substantive criminal law qualification would remain the same = "misdemeanor" instead of "felony".

[31] Decision of 19 March 2013– 2 BvR 2628/10, Decisions of the German Federal Constitutional Court (BVerfGE) Vol. 133, p. 168 ff.). For reading the (abbreviated) English version of the decision turn here: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/03/rs20130319_2bvr262810en.html. Regarding scholarly comments /critique see e.g. Werner Beulke and Hannah Stoffer, Bewaehrung fuer den Deal? Konsequenzen des BVerfG-Urteils vom 19. Maerz 2013 fuer die Verstaendigungspraxis in deutschen Gerichtssaelen, in: Juristenzeitung Vol. 68, Issue 13, 2013, Pp. 662-673.

[32] See e.g. the following two reports in the weekly magazine "Stern": a) http://www.stern.de/wirtschaft/news/ecclestone-prozess-an-diesem-deal-ist-nichts-verwerflich-3940182.html and b) http://www.stern.de/panorama/stern-crime/schmiergeld-prozess-ecclestone-ueberweist-100-millionen-dollar-puenktlich-3624326.html

5.

Is there any academic criticism of this court decision? Possible implications for "delicate" cases, like those with celebrities as recently the *Bernie Ecclestone* case

In general, there are two main positions: The first position dissents from the decision of the court. The reasoning is in substance the same as the criticism traced under 3 c).[33]

The second position concurs with the Ecclestone-Court in a criminal corruption case pertaining to the running of the Formula One motor racing contest business that stirred also international attention.

This position emphasizes that criminal proceedings may rationally be discontinued for reasons of effectiveness and that sec. 153a GCCP was in practice not only applied in criminal prosecutions against extraordinary wealthy offenders.[34] More often criminal prosecutions against petty criminals were discontinued according to sec. 153a GCCP and in these cases the sum to be paid was much lower.[35]

Considering both extreme positions, *Kudlich* identified a series of fundamental problems. The first aspect is that sec. 153a GCCP might mislead authorities to "economize" criminal prosecution.[36] Another concern is, that the wording of sec. 153a GCCP does not define what maximum payment authorities may impose on the accused or the indicted accused. As a consequence, the accused or the indicted accused may under sec. 153a GCCP be caused to pay a multiple of the sum that might be imposed as a *fine* according to secs. 40 et seq. GCC. The accused or the indicted accused might, as it was in *Ecclestone*, be caused to pay a sum of money that, if imposed as a fine, would under sec. 43 2nd sentence GCC be equivalent to several years of imprisonment. That means, in cases at which authorities estimate extraordinarily high payments necessary to discontinue criminal prosecution, may not be estimated petty offenses. As a consequence, criminal prosecution may not be discontinued according to sec. 153a GCCP. *Vice versa*, in cases in that criminal prosecution may reasonably discontinued according to sec. 153a GCCP, authorities must not impose extraordinarily high payments on the accused or the indicted accused.[37] At last, *Kudlich* observed, that negotiated agreements between the courts and the participants in the criminal proceeding under sec. 257c GCCP must satisfy high standards to be valid. In contrast, the criteria set forth in sec. 153a GCCP were comparatively vague. With this in mind, both provisions seemed to a certain extent inconsistent.[38]

In order to understand the basic GCC rules for imposing a fine instead of a prison term, it may be helpful in an additional consideration to provide at least a sketch of the two parts of the so-called "day-fine penalty" (sec. 40 GPC). It is following Scandinavian models, that were established in these countries and criminal law systems already much earlier.

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[33] Comp. e.g. *Gaede*, in: Legal Tribune Online, Ed. of 5 August 2014 (http://www.lto.de/recht/hintergruende/h/lg-muenchen-beschluss-5kls405js16174111-einstellung-bestechung-ecclestone/2/).

[34] For results of the first empirical study on the "reality of settlements" in local and regional courts see the following main report: Karsten Altenhain et al., Die Praxis der Absprachen in Strafverfahren, Baden-Baden, Nomos Verlag 2013.

[35] See e.g. *Kubiciel*, in: Legal Tribune Online, Ed. of 5 August 2014 (http://www.lto.de/recht/hintergruende/h/lg-muenchen-beschluss-5kls405js16174111-einstellung-bestechung-ecclestone/).

[36] *Kudlich*, in Zeitschrift für Rechtspolitik, 2015 p. 10.

[37] *Ibid*., at p. 11.

[38] *Ibid*., at p. 11 ff.

Along sec. 40 subs. (1) GPC, any fine is to be meted out in "Tagessaetzen" (literally = "day units"). The minimum number of those units is 5, and the maximum number is 360 units for a single offence committed during a so to speak "natural action", which can be distinquished from other actions in terms of space and time-windows. If, however, a culprit is to be convicted for multiple separate actions or even an offence series, sec. 53 subs. (1) GCC rules that the penalty has to be imposed as a "Gesamtstrafe" (literally = "compound sentence") encompassing the so to speak "integrated wrong and guilt" of all offences implied. The concrete consequence of this in cases of fine imposition is that the maximum may exceed 360 day units, and go to an upper limit of 720 day units, as regulated in sec. 54, subs. (2) GPC.

In dealing with the first part of sec. 46 subs. (1) GCC, the court has to determine the extent or quality of the "wrong" of the type of criminal act as caused by the culprit, and the amount of subjective "guilt" attributable to the convicted.[39] This procedure has to be guided by the general principles of sentencing as laid down in sec. 46 GCC. It implies the principle of equality of all people before the law (Art. 3 sec. (1) in conjunction with Art. 20 sec. (3) of the German Constitution); the overarching regulative idea is, put in a kind of condensed and simplified catchphrase: "same wrong and guilt = same number of day fine units"!

Seen from the doctrinal point of view, the judge or bench court does never really consider the individual situation of a convicted person in terms of his/her income and/ or fortune. The "wrong and guilt" (actus reus and mens rea) determine at first the decision of imposing an imprisonment vs. a fine, and at second the question of how many units of day fine are to be seen adequate if a fine was principally seen as "the" just and effective penalty for that offences and that offender. Only if the generalizable "day unit number" has been found, the judge or bench court is expected to deal with the personal "deservedness" of the convicted offender. Here the leading doctrinal idea is that each and every culprit should receive the "same" amount of economic "suffering" in terms of individual comparable loss of wealth and deterrence from further offending, considering his/her minimal needs for everyday living and, to name just one of more other considerations, for taking care of a spouse and/or the children.[40]

The level of money for a day unit to be meted out is wide: The minimum is 1 Euro, and the maximum is thirty thousand Euros (sec. 40 subs. (2) GCC).

So if we dare to assume that a court could exactly determine, that an extremely poor offender and an extremely rich offender did commit offences with exactly the same amount of wrongness and guilt, and do not need/deserve to receive a prison penalty: Than, doctrinal peculiarities left aside, in the case of the least thinkable little offence (petty misdemeanor), the minimum day fine for the extremely poor offender would be 5 day units at 1 Euro each = 5

[39] For details on this question and other issues of sec. 40 StGG / GCC see e.g. *Stree*/ *Kinzig* in Schoenke-Schroeder, Strafgesetzbuch, Commentary, 29th Edition 2014, Pp. 743-754.

[40] In a third part of sentencing, the judge or bench court is legally entitled to grant, if necessary in terms of avoiding bankruptcy or even desocialisation, the sentenced person either a deferred deadline for the payment of the fine or/and payment by exactly defined instalments (sec. 42 GCC).

Euros, whereas the minimum day fine for the extremely rich offender would also be 5 day units, but now at 30,000 Euros each = 150,000 Euros.

In the case of the maximal thinkable misdemeanor (still suitable for just a fine instead of imprisonment) the maximum day fine for the extremely poor offender would be 360 day units at 1 Euro each = 360 Euros, whereas the maximum day fine for the extremely rich offender would be 360 day units at 30,000 Euros each = 10, 800,000 (ten million and eight hundred thousand) Euros!

In the case of multiple counts of separate offences or a whole series of offences the maximum day fine for the extremely poor offender would be 720 day units at 1 Euro each = 720 Euros, whereas the maximum day fine for the extremely rich offender would be 720 day units at 30,000 Euros each = 21, 600,000 (twenty one million and six hundred thousand) Euros!

If we return to the, at first sight seemingly (in)famous Ecclestone case: Even some 22 million Euros remain remarkably under the actual poena of 100 Million he had to deliver to the State Treasury account. What about, then, the potential difference of some 78 million Euros? Here, in terms of doctrine one would at first like to think at a special legal regulation to be found in sec. 41 GCC. It says that a judge or bench court can, in addition to a prison penalty, impose a day fine of any legally allowed extent, even if the applicable substantive GCC section (like here active corruption) does not explicitly provide for such a solution. The condition for the extension is that the culprit is guilty of having committed an attempted unjust enrichment or of having succeeded in this endeavor.

However, even if the court would have chosen such a solution in the Ecclestone case, it would have been bound, apart from imposing a prison term, to the upper limit of some 22 Million Euros. There comes now the very delicate question, in terms of doctrine and of more fundamental issues of law and justice: Is a court of criminal jurisdiction entitled to impose via a discretionary decision a kind of "financial sanction" which is by far exceeding the upper limit of a fine that it could impose at the end of a public trial as an explicit "financial criminal penalty" that eventually would be entered into the federal criminal registry? In a sociology of law perspective and in a criminological perspective one could conceive of a manner of "calculation" among judges which would imply a kind of "weighing of painful vs. beneficiary consequences" the culprit will be faced with after different kinds of final decisions.

Obvious benefits for a culprit like Ecclestone, but by far not exclusive for the super-rich, in discretionary decisions along sec. 153a subs. (2) GCCP are: Avoidance of having to serve a prison sentence, and avoidance of getting a label as "criminal" because of an entry of that sentence (and, in case, of an additional fine) into the Federal Criminal Registry. The discussion of the "pros" and "cons" in those matters is not yet settled; eventually the (German) Federal Constitutional Court will have to decide in last resort, which than would open a human rights appeal way to the European Court of Human Rights in Strasburg, France.

The ILES is supported by a generous grant of the “Fritz Thyssen Stiftung für die Wissenschaftsfoerderung”. For the English Language Version of its Website “Fritz Thyssen Foundation for the Advancement of Science” see: http://www.fritz-thyssen-stiftung.de/home/?no_cache=1&L=1&cHash=117adf62f5979fb5992654769d2e7644

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Philipp A. Karnowski, The Legality Principle in German Criminal Investigation and Adjudication Procedures: An Overview of the Mandatory Prosecution Principle and its Exceptions. Tuebingen, ILES, Occasional Paper Series, Issue 1, December 2015.

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