

# Rechtspolitisches Forum

## Legal Policy Forum

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Volker Krey

The Public Prosecution's Role  
in Criminal Proceedings  
under the Rule of Law

Legal Situation in Germany  
with Comparative Law Remarks on UK and USA

Das Institut für Rechtspolitik an der Universität Trier hat die wissenschaftliche Forschung und Beratung auf Gebieten der Rechtspolitik sowie die systematische Erfassung wesentlicher rechtspolitischer Themen im In- und Ausland zur Aufgabe. Es wurde im Januar 2000 gegründet.

Das *Rechtspolitische Forum* veröffentlicht Ansätze und Ergebnisse national wie international orientierter rechtspolitischer Forschung und mag als Quelle für weitere Anregungen und Entwicklungen auf diesem Gebiet dienen. Die in den Beiträgen enthaltenen Darstellungen und Ansichten sind solche des Verfassers und entsprechen nicht notwendig Ansichten des Instituts für Rechtspolitik.

Analyzing the role of Germany as a law-exporting nation the essay deals with a very specific aspect of the Rule of Law principle in criminal proceedings.

The author describes the division of functions among police, public prosecution and criminal courts within criminal law enforcement in Germany adding some comparative law remarks. He furthermore provides an overview of structure and organization of the public prosecution in Germany.

He focuses on the relationship and interaction between public prosecution and police in preliminary proceedings emphasizing the importance of both being allocated in different ministries of the executive branch. Thus he points out yet another aspect of the constitutional principle of the Rule of Law: the role of public prosecution as guardian of the law towards the police in criminal proceedings.

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Beyond his continuous function as referee at the German Academy for the Advanced Education of Judges (Deutsche Richterakademie) in Trier and Wustrau, he has worked as a consultant for the German Federal Bureau of Criminal Investigation (Bundeskriminalamt) and the Police College (Polizei-Führungsakademie) in Münster-Hiltrup.

The list of countries to which the author has been invited as guest-speaker includes Japan, USA, Taiwan and Hong-Kong, Hungary and other European countries.

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# THE PUBLIC PROSECUTION'S ROLE IN CRIMINAL PROCEEDINGS UNDER THE RULE OF LAW

## LEGAL SITUATION IN GERMANY WITH COMPARATIVE LAW REMARKS ON UK AND USA \*

PROF. DR. VOLKER KREY

– with the assistance of Jan Stenger –\*\*

*Part One: The Division of Functions within Criminal Law  
Enforcement between Police, Public Prosecution and Criminal  
Courts*

– *A Worldwide Model of Success under the Rule of Law* –

For better comprehension, some remarks on legal history as to the establishment of the public prosecution in Germany shall be given at the beginning.

### *I. Creation of the Public Prosecution as a Guardian of the Law*

The old continental European inquisitorial trial, e.g. laid down in the *Constitutio Criminalis Carolina* (i.e. German criminal procedure code as well as criminal code under *Emperor Karl V*, dated from

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\* Manuscript of a lecture presented by the author in October 2008 at the University of Hong Kong, Faculty of Law. The manuscript has been extended, amended and completed by some footnotes.

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1532)<sup>1</sup>, prevailed in the centuries before the French Revolution in 1789. This kind of trial was particularly characterized by the **identity of accuser and judge**, additionally dominated by terrible judicial arbitrariness<sup>2</sup>. Being incompatible with the idea of the Rule of Law, the old inquisitorial trial had already been fought against in the legal thinking of the Enlightenment of the 18<sup>th</sup> century (Montesquieu, Voltaire, Beccaria). It was initially abolished in France thanks to the French Revolution and finally substituted by reformed criminal proceedings under the Criminal Procedure Code of the *Emperor Napoleon* in 1808<sup>3</sup>. Following the French example, the public prosecution was introduced in Germany in the middle of the 19<sup>th</sup> century<sup>4</sup>. In this context, the public prosecutor was intended to serve as **guardian of the law** against both police and criminal courts, aiming at the protection of the people who suffered from police and judicial arbitrariness at that time<sup>5</sup>.

Due to its role as guardian of the law, public prosecution – in contrast to the police – is not assigned to the ministry of the interior (home office). Rather, from the beginning, the public prosecution, like criminal courts, has been incorporated into the scope of responsibility of the ministry of justice. This holds for Germany and lots of other European countries as well.

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1 *Krey*, Strafverfahrensrecht Band (=Vol.) 1, 1988, side-note 51-53; *Roxin*, Strafverfahrensrecht, 25<sup>th</sup> ed. 1998, § 69, side-note 6, 10; *Rüping/Jerouschek*, Grundriss der Strafrechtsgeschichte, 4<sup>th</sup> ed. 2002, side-note 102, 103; *Wesel*, Geschichte des Rechts, 1997, side-note 237, 258.

2 *v. Hippel*, Deutsches Strafrecht, Band 1, 1925 (reprint 1971), p. 211, 229, 237-239; *Krey*, Keine Strafe ohne Gesetz, 1983, side-note 4, 11, 13, 15; *Krey* (see footnote 1), side-note 53.

3 *Krey* (see footnote 1), side-note 60; *Roxin* (see footnote 1), § 70 side-note 5, 6; *Rüping/Jerouschek* (see footnote 1), side-note 237, 238.

4 *Krey* (see footnote 1), side-note 61-63; *Roxin* (see footnote 1), § 70 side-note 7, 8; *Rüping/Jerouschek* (see footnote 1), side-note 237, 242, 243, 247, 252, 253; *Wesel* (see footnote 1), side-note 273.

5 From the Enlightenment of the 18<sup>th</sup> century up to the liberal German Constitution in 1848 (so called *Paulskirchenverfassung*, which unfortunately never came into force), unbearable **judicial** arbitrariness in criminal proceedings was complained about (see: *Krey*, Keine Strafe ohne Gesetz, 1983, side-note 13, 15, 17, 18; *Wesel*, Geschichte des Rechts, 1997, side-note 273) – not to mention **police** arbitrariness in criminal matters.

## II. *The Public Prosecution as Master of the Preliminary Proceedings from a Legal Standpoint*

Nowadays, the most important task of the public prosecution is its role as legal master of the preliminary proceedings<sup>6</sup>. In this context, the reference to the following two issues shall be sufficient:

Firstly, the legal **competence to terminate preliminary proceedings** lies in the hands of the public prosecution – not in the hands of the police<sup>7</sup>.

Secondly, in the field of criminal proceedings the public prosecution has the **right to give instructions towards the police**, whereas this right does not apply in the field of averting dangers<sup>8</sup>, the latter being the second task of the police beside its dominating role as part of the criminal prosecution authorities.

## III. *Division between Police, Public Prosecution and Criminal Courts: A Specific Kind of Separation of Powers in the Field of Criminal Law Enforcement*

The separation of powers<sup>9</sup> is of fundamental relevance for the Rule of Law. Concerning the field of criminal law, being the best indicator for a country's nature as state under the Rule of Law, there exists an **additional** kind of separation of powers in criminal proceedings aiming at the protection of the Rule of Law in general and the human and civil rights in particular:

Among the criminal law enforcement authorities, both police and public prosecution are part of the executive. This concentration of powers within the executive branch may result in the danger of the executive becoming predominant in the field of criminal proceedings compared to the courts. In order to fight such threatening predominance, the above mentioned public prosecution's role as part of the ministry of justice is of considerable relevance.

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<sup>6</sup> There to thoroughly and in detail *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 141, 166-172, 202-204, 205-212.

<sup>7</sup> *Krey* (see footnote 6), side-note 166-168, 202.

<sup>8</sup> *Krey* (see footnote 6), side-note 192, 202, 207, 209.

<sup>9</sup> *Montesquieu*, De l'Esprit des Lois, 1748, XI, 6; thereto: *Krey*, Keine Strafe ohne Gesetz, 1983, side-note 13; *Eb. Schmidt*, Einführung in die Geschichte der deutschen Strafrechtspflege, 1965, § 207; *Wesel* (see footnote 1), side-note 267.

So, there is an appropriate balance between the ministry of the interior on the one hand and the ministry of justice on the other hand: This division of responsibilities results in a special system of checks and balances within the executive branch. Accordingly it **avoids the factual superiority** of the executive against the judiciary power as well as the superiority of the ministry of the interior against the ministry of justice. Since public prosecution and criminal courts are part of the scope of the latter ministry, the public prosecution is to some extent part of the functional area of the judiciary<sup>10</sup>.

#### *IV. Comparative Law Remarks*

The explained role of the public prosecution in German criminal proceedings is in its core a worldwide model of success under the Rule of Law:

##### *1. Continental Europe*

In Continental Europe the mentioned public prosecution's role in Germany largely shapes the legal situation of many other countries. However, in some European countries (e.g. France) the public prosecution's power is reduced by the legal institution of an investigating judge (*Untersuchungsrichter*) with considerable competences in the preliminary proceedings; in such countries the function of the guardian of the law towards the police is distributed to both, the public prosecutor and the investigating judge. However, such investigating judges are, in principle, only competent in the scope of serious crimes (felonies).<sup>11</sup>

Furthermore, the German model is, even though in a diminished form, to be found in East Asia, particularly in Japan and South Korea.

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<sup>10</sup> BVerfG E (i.e. German Federal Constitutional Court – Official Reports of Cases –), Vol. 9, p. 223, 228; *Meyer-Goßner*, Strafprozessordnung, 51<sup>st</sup> ed. 2008, side-note 6, 7 *vor* (i.e. in front of) § 141 GVG.

<sup>11</sup> *Kühne*, Strafprozessrecht, Eine systematische Darstellung des deutschen und europäischen Strafrechts, 7<sup>th</sup> ed. 2007, side-note 1209 (at the end), 1210 – concerning **France**.

## 2. *Situation in England and Wales*

In contrast, the legal situation in **England and Wales** is absolutely different<sup>12</sup>:

Firstly, there is no public prosecution as master of the preliminary proceedings, neither from a legal standpoint nor from a factual one.

Secondly, there is no public prosecution serving as guardian of the law against the police. Rather, the existing Crown Prosecution Service only functions as accuser. After the completion of the preliminary proceedings by the police the Crown Prosecution Service has to decide whether to charge the accused or to drop the charge. Summing up, in England the police are master of the preliminary proceedings without being bound by directives of the public prosecution. Accordingly, the police have the power to terminate the preliminary proceedings independently from the Crown Prosecution Service. Nowadays, this predominance of the police is often criticized in England since it may cause endangerment to human and civil rights of the people.

Indeed, it may be conceded that the mentioned legal situation in England has long been accepted by the majority of the people because of the image of the English police officers (Bobbies) as »friend and helper«. However, times have changed.

## 3. *USA*

The legal situation in the **USA** may be characterized, in a way, as a model between the mentioned extremes represented by Germany and England<sup>13</sup>:

In US Federal criminal proceedings as well as in criminal proceedings under the respective State laws, there exists a public prosecution, which is involved to some extent in preliminary investigations. However, the public prosecution in the USA is, in principle, not the master of the preliminary proceedings towards the police, neither from a legal nor from a factual point of view:

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<sup>12</sup> Thereto with further references *Kühne* (see footnote 11), side-note 1154, 1155, 1169-1171.

<sup>13</sup> See *N. Schmid*, *Strafverfahren und Strafrecht in den Vereinigten Staaten*, 2<sup>nd</sup> ed. 1993, p. 38.

The public prosecution does not have the right to give instructions towards the police. Moreover, the competence to terminate preliminary proceedings does not exclusively lie in the hands of the public prosecution. Rather, the police, in principle, have the power to terminate preliminary proceedings on its own authority independently from the public prosecution: Both public prosecutor and police, act in criminal proceedings pursuant to the principle of discretionary prosecution.

To sum up, it can be stated: The public prosecution in the USA is no guardian of the law towards the police and not the master of preliminary proceedings, being a questionable legal situation under the Rule of Law and thus for other countries no good model to take over. This conclusion is of considerable relevance in the field of comparative law, since there is a worldwide »healthy competition« between the USA and Germany concerning the influence of their respective criminal procedure laws<sup>14</sup>. The mentioned competition is to be found particularly in Eastern Europe and East Asia (Japan, South Korea and Taiwan)<sup>15</sup>, additionally in parts of South America.

## *Part Two: The Public Prosecution's Position within the Executive Branch*

### *I. Structure and Organization of the Public Prosecution*

According to the German Judicature Act a department of public prosecution shall exist at every criminal court, meaning that for every court a certain public prosecution's office is competent:

Firstly, the office of the public prosecution at the Federal Supreme Court of Justice (*Bundesgerichtshof, BGH*) is held by the **Federal**

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<sup>14</sup> See *Krey*, Characteristic Features of German Criminal Proceedings – An Alternative to the Criminal Procedure Law of the United States?, in: *Loyola of Los Angeles, International & Comparative Law Journal* 1999 (Volume 21), p. 591, 592; *Krey*, The Rule of Law in German Criminal Proceedings – German Constitutional Law and the European Convention on Human Rights, in: *Rechtspolitisches Forum (Legal Policy Forum)* Vol. 43, 2008, edited by Institut für Rechtspolitik an der Universität Trier, p. 3.

<sup>15</sup> *Krey*, The Rule of Law (see footnote 14), pp. 3, 4.

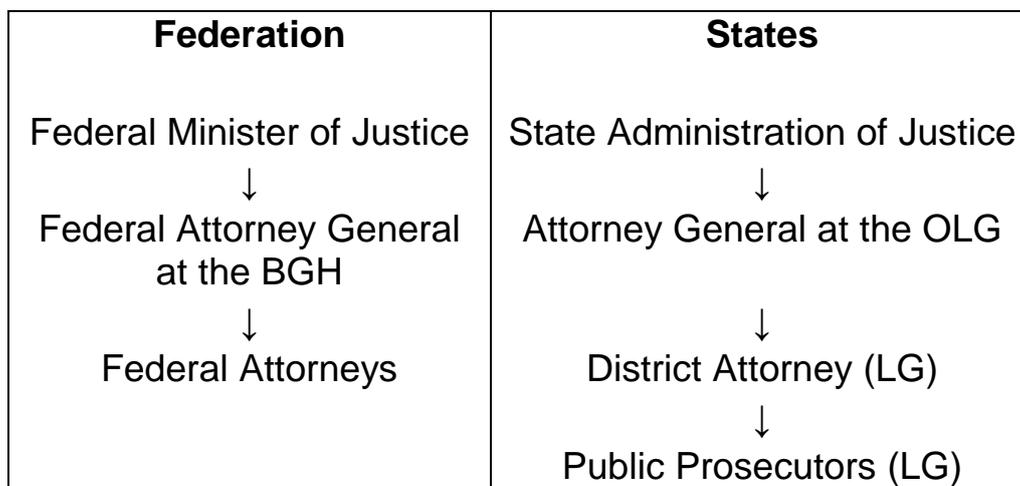
**Attorney General** (*Generalbundesanwalt*) who is assisted by associated Federal attorneys.

Secondly, the respective public prosecution's office at the State Courts of Appeals (*Oberlandesgericht, OLG*) is named Public Prosecution General, represented by the **Attorney General** (*Generalstaatsanwalt*).

Thirdly, at every higher district court (*Landgericht, LG*), there is a public prosecution, represented by the **District Attorney** (*Leitender Oberstaatsanwalt*) as head of office, being also competent for the lower district courts (*Amtsgericht, AG*).

Attorney Generals and District Attorneys are assisted by associated State public prosecutors.

The aforesaid hierarchic structure may be illustrated by the following diagram, additionally pointing out the official channels for instructions<sup>16</sup>:



<sup>16</sup> Taken from *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 159.

## *II. Monocratic and Hierarchic Structure of the Public Prosecution*

### *1. The Public Prosecution's Monocratic Organization*

a) The public prosecution is a monocratic authority, where every public prosecutor acts as representative of the respective head of office (Federal Attorney General or Attorney General or District Attorney). Nevertheless, the effectiveness of the acts of the public prosecutor as such representative is not affected by internal restrictions through superior's directives.

**Case example:** In spite of an interdicting official instruction by the head of office, the public prosecutor John Doe agrees with the termination of the proceedings by the court in trial (in the case at hand: termination after the defendant having paid a certain sum of money to the treasury). In other criminal proceedings John Doe waives the right to appeal contrary to such official instruction; as a result the respective judgment becomes final.

Both, waiver and approval, are effective in spite of John Doe's disobedience.

b) The following powers laid down in the German Judicature Act (§ 145 GVG) entitling the public prosecution's head of office are based on such a representative model:

– Right to take-over (*Devolution*), i.e. the power to execute in person all official acts of a public prosecutor. Thus, the »first official of the public prosecution«, e.g. the district attorney, is allowed to charge and to act in the main trial.

– Right of substitution, meaning the power to assign another public prosecutor instead of the up to now competent one.

### *2. Hierarchic Structure: Superior's Right to Give Instructions*

a) As aforesaid, the public prosecution is part of the executive branch. Hence, public prosecutors are civil servants bound by instructions: They do not enjoy the material independence of judges meaning freedom from instructions.

However, German public prosecutors are civil servants appointed for life. Thus, they enjoy to some extent a personal independence

because no economic fear for threatening loss of position can undermine their loyalty towards the law.

On the contrary, US State public prosecutors like district attorneys are, for the most part, not appointed for life. Rather, they are elected by the people for a specific period of time, e.g. four years. This fact reduces the personal independence to a great extent due to the necessity of the attorney's campaign, particularly in case of reelection. As a result, a district attorney e.g. in a county of the State of Texas, intending to be reelected, should never show a liberal attitude – and, moreover, he should never be »soft on crime«.

b) Regarding the superior's right to give instructions the following differentiation between German Federal and State public prosecution has to be made:

Firstly, the Federal Minister of Justice has the right to instruct the Federal Attorney General and the Federal attorneys.

Secondly, the State's administration of justice, e.g. the Minister of Justice of the State of Bavaria, has the right to give orders to every public prosecutor of this State. The attorney general as head of office of the public prosecution at the State court of appeals has the right to instruct all public prosecutors of this court's district; the same holds *mutatis mutandis* for the district attorney.

Thirdly, the State public prosecution is independent from the Federal public prosecution and *vice versa*: The Federal Minister of Justice and the Federal Attorney General have no right to supervise and to direct the State's administration of justice and the State's public prosecutors.

### *III. Limitations to the Right to Give Instructions*

Self-evidently the right to give instruction is limited under the Rule of Law:

Usually legal scholars state that the limitations to the right to give instructions resulted from the **principle of legality**<sup>17</sup> and criminal

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<sup>17</sup> German criminal procedure law is generally governed by the principle of legality (*Legalitätsprinzip*), meaning the duty to prosecute crimes (see § 163 German Criminal Procedure Code = *Strafprozessordnung, StPO*, regarding the police;

provisions serving its protection, furthermore from the prohibition to prosecute innocent people. In contrast the field of the **principle of discretionary prosecution**<sup>18</sup> is the real scope of the right to give instructions.

However, this standpoint is imprecise or even incorrect. Thus, the following clarifications are necessary:

1. In the scope of **discretionary prosecution**, where no duty to prosecute exists, statutes and laws have to be obeyed as well. Here, instructions are unlawful as far as they would lead to an exercise of discretion to be qualified as exceeding discretion or abuse of discretion, in particular due to violation of the principle of equality.

**Case example:** The State administration of justice instructs X, public prosecutor at the higher district court Trier, to terminate the criminal proceedings for a hit-and-run-offence against Y because the case at hand was only a less serious misdemeanor<sup>19</sup>. In fact, the decisive reason for the mentioned instruction is Y's function as a well known politician.

This case example points out a violation of the German Federal Constitution, Art. 3 (principle of equality), occurring casually from the author's experiences. Furthermore, a disregard of the usual practice concerning the official channels for instructions is given (see diagram, Part Two, I). Although the State administration of justice may be allowed to address its instructions directly to every State public prosecutor instead of going through the official channels, such disregard is absolutely dubious.

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§§ 152 subs. 2, 160 subs. 1, 170 subs. 1 StPO regarding the public prosecution).  
– As to exceptions see footnote 18. –

<sup>18</sup> In spite of the mentioned dominance of the principle of legality (see footnote 17), there are important exceptions where the principle of discretionary prosecution (*Opportunitätsprinzip*) holds, particularly in the field of misdemeanors. See §§ 153 - 154 c StPO; in addition: *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 162 with footnote 53.

<sup>19</sup> Under § 153 subs. 1 Criminal Procedure Code (StPO), the public prosecution is allowed to terminate the criminal proceedings in cases of less serious misdemeanors. This regulation is one of the most important exceptions from the aforesaid principle of legality, generally dominating German criminal procedure law (see footnote 17 and 18).

2. By exception, even in the field of the **principle of legality** instructions can be admissible. The public prosecution's head of office is, e.g., allowed to instruct his subordinate public prosecutors to abide with a certain supreme court's practice.

**Example** for an unlawful instruction: As to the public prosecutor's petitions in his closing speech (pleading), any instruction to plead for acquittal, respectively for conviction, regardless of the result of the evidence taking in the main hearing, would violate the law because not only the court but also the public prosecution is bound by this result.

3. As for the rest, special instructions for handling the case at hand are rare. Rather, the main relevance of the right to give instructions, particularly those by the minister of justice, inheres in **general** instructions like directives or guidelines on criminal procedures.

**Examples** for such general instructions:

- *Richtlinien für das Strafverfahren und das Bußgeldverfahren, RiStBV* (i.e. guidelines/directives on criminal proceedings and on summary proceedings concerning administrative offences);
- *Anordnung über Mitteilungen in Strafsachen, MiStra* (i.e. directives on reporting commitment in criminal matters).<sup>20</sup>

### *Part Three: Relation between Public Prosecution and Police*

#### *I. The Police as Master of the Preliminary Proceedings from a Factual Standpoint?*

As aforesaid, the public prosecution is master of the preliminary proceedings from a **legal** standpoint. However, legal scholars and police officials often state *that **factually** the police are master of*

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<sup>20</sup> There to: *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 165 and side-note 27 with further references. The mentioned guidelines are published in *Meyer-Göbner*, Strafprozessordnung, 51<sup>st</sup> ed. 2008, Anh 12, pp. 1981-2091 (*RiStBV*); Anh 13, pp. 2092-2127 (*MiStra*).

*the preliminary proceedings.* This statement is based on the following reasons<sup>21</sup>:

**Firstly**, the public prosecution is unable to carry out the preliminary proceedings on its own due to lack of sufficient equipment with personal and material resources.

This argument may be clarified by reference to the numerical relation between police officers and public prosecutors: There are about three thousand public prosecutors in Germany compared to circa two hundred and fifty thousand police officers.

**Secondly**, forensic science, the most important computer systems etc. are concentrated at the police.

**Thirdly**, most criminal proceedings are carried out by the police: The public prosecution is not involved until the police have completed their investigations. In such cases public prosecution only has the function of an accuser.

## *II. The Author's Differentiating Point of View*

In contrast, the following differentiating point of view seems to be more appropriate:

On the one hand, with respect to mass crime and, in principle, to cases of medium-serious crimes public prosecution does not act as investigating authority, yet still is the only one deciding about charge or dismissal.

On the other hand, concerning serious crimes the situation is different: In cases of capital crimes, severe business offences etc. the public prosecution plays a dominant part in preliminary proceedings from the beginning.

Furthermore, in comparison with the police the public prosecution has more comprehensive powers regarding the order to carry out criminal procedural interferences with civil rights.

This holds e.g. for telephone tapping where a court's order is necessary with the exception of the public prosecution's order in case of imminent danger (in exigent circumstances); on the contrary,

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<sup>21</sup> *Bundesverwaltungsgericht, BVerwG* (i.e. Federal Administrative Court), NJW 1975, 893 et seq.; *Hellmann*, Strafprozessrecht, 2<sup>nd</sup> ed. 2006, side-note 137; *Kühne* (see footnote 11 side-note 135; further references in: Krey (see footnote 29), side-note 203.

the order of police officers, even by the head of office, is never sufficient<sup>22</sup>. The same applies in cases of electronic surveillance outside of residential buildings such as monitoring the conversation of suspects sitting in a car<sup>23</sup>.

Finally, accused persons and witnesses are obliged to answer a summons by the public prosecution; additionally, witnesses have the duty to give evidence at the public prosecution. In contrast, there is no corresponding obligation/duty regarding summons and interrogations by the police<sup>24</sup>.

### *III. In Detail: The Public Prosecution's Right to Instruct the Police*

#### *1. Power to Instruct the Police in Criminal Proceedings: Not Entitled to the Federal Minister of Justice respectively to the State Ministers of Justice*

Indeed, as illustrated by the diagram above (Part Two, I), the German Federal Minister of Justice is the supreme authority against the Federal public prosecutors. *Mutatis mutandis* the same holds for the State Minister of Justice against the public prosecutors of the respective State. Nevertheless, such ministers have no power to directly instruct police officials. Rather, the public prosecution's right to give instructions towards the police is only entitled to such officials who are public prosecutors in person.

However, one has to concede that Ministers of Justice may order public prosecutors to give instructions towards police officials, e.g. to examine a certain witness in a particular criminal case. So to say, there is an indirect possibility for Federal and State administrations of justice to instruct the police.

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<sup>22</sup> See §§ 100 a, 100 b subs. 1 German Criminal Procedure Code (StPO).

<sup>23</sup> See § 100 f subs. 4 with § 100 b subs. 1 StPO.

– For clarification: The order to carry out an electronic surveillance of residential buildings requires the **court's order** without any exception for other prosecution authorities. –

<sup>24</sup> See §§ 161 a, 163 a subs. 3 StPO.

2. § 161 subs. 1 s. 2 Criminal Procedure Code and § 152 Judicature Act as Legal Basis of the Public Prosecution's Right to Give Instructions towards the Police

a) § 161 subs. 1 s. 2 German Criminal Procedure Code (*Strafprozessordnung, StPO*) lays down the public prosecution's power to instruct police officers. Such instructions should, in principle, be addressed to the official police authorities like police headquarters (*Polizeipräsidien*), not directly to individual police officers. Only in case of imminent danger it may be legal as well as appropriate to directly instruct police officers<sup>25</sup>.

b) In contrast, § 152 German Judicature Act (*Gerichtsverfassungsgesetz, GVG*) has the following function:

Firstly, *Ermittlungspersonen der Staatsanwaltschaft* (i.e. police officers specifically appointed by law for the task of assisting the public prosecution), in the sense of this provision may be instructed directly by the public prosecution without using official channels via the police authority's head of office.

Secondly, not only police officers but also **certain office holders not belonging to police authorities** are declared "*Ermittlungspersonen der Staatsanwaltschaft*" by statute law<sup>26</sup>.

**Examples:** Officials of the financial administration regarding tax fraud investigations under § 404 *Abgabenordnung* (i.e. tax code); gamekeepers/forest officers under § 25 subs. 2 *Bundesjagdgesetz* (i.e. hunting act).

3. *Collision between Criminal Prosecution and Averting Dangers*

With respect to the public prosecution's right to give instructions towards the police, problems may arise, where a collision between criminal prosecution on the one hand and averting dangers on the other hand is given.

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<sup>25</sup> Such cases are referred to, where it is utterly impossible to comply with official channels without endangering the criminal investigations by delay.

<sup>26</sup> Thereto *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 205, 206 with further references.

**Case Example:** In a case of hostage-taking, there is a dispute between the public prosecutor (P) and the head of the respective police operation (H), both being attendant at the scene of crime.

P claims that the purpose to guarantee the criminal prosecution against the hostage-taker (T) had to be overriding; therefore T's escape had to be avoided at any cost, if necessary even by using firearms. Against it, H claims, saving the life of the hostages was absolutely prior-ranking; using firearms was too dangerous for their lives, so it was imperative to let T leave the scene of crime with his hostages but chase him.<sup>27</sup>

a) The case at hand illustrates the above-mentioned collision resulting in a conflict between the public prosecutor's right to instruct the police as to the criminal prosecution on the one hand and the authority of the head of the respective police operation as to averting dangers on the other hand. In such a conflict, two questions have to be answered when public prosecution and police are unable to come to an agreement:

**Firstly**, who decides finally with binding effect? Since the concerned public responsibilities **criminal prosecution** and **averting dangers** are equal in their abstract ranking and since the same holds for the concerned governmental departments (ministry of justice and ministry of the interior), the respective German State's government has to decide ultimately.<sup>28</sup>

For clarification: In case of (attempted) coercion in order to free arrested terrorists by taking prominent persons as hostages, in Germany a crisis management group was always formed aiming to avoid legal conflicts of competence and to reach a politically reasonable solution.<sup>29</sup>

**Secondly**, which aspects are decisive for the solution of such conflicts from a substantive point of view? Insofar, the following weighing of the interests concerned is essential: Do *in casu* measures

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<sup>27</sup> This case has taken place in the city of Munich in 1971; thereto with further references: *Krey*, Zeitschrift für Rechtspolitik (ZRP), 1971, 224 et seq.; *Krey* (see footnote 1), side-note 501 et seq., 511, 514; *Krey/Meyer* ZRP 1973, 1 et seq.

<sup>28</sup> Thereto in detail: *Krey*, ZRP (see footnote 27), p. 226 et seq.; *Krey/Meyer* (see footnote 27), p. 2.

<sup>29</sup> See *Krey*, footnote 16, side-note 208 with further references.

of averting dangers claim priority at the cost of criminal prosecution or *vice versa*<sup>30</sup>.

b) With respect to the case at hand, the following standpoint seems to be appropriate: The public responsibility to save the hostages' life and limb obviously predominates against the public responsibility to prosecute crimes. Accordingly, the standpoint of the head of the police operation (H) was decisive.

In the real case which happened 1971 in the city of **Munich** (see footnote 27) an unteachable public prosecutor ordered the use of firearms against the hostage-taker aiming to avoid his escape. The police officers at the scene of the crime obeyed under vehement protest. Unfortunately, the use of firearms caused the death of one of the hostages whereas the offender survived. Anyway, his escape was avoided.

The public prosecutor's behavior at that time was ill-advised due to the following reasons<sup>31</sup>:

- In the light of the aforesaid predominance of measures to avert dangers in the case at hand, the public prosecutor was not allowed to give any instruction towards the police contradicting the task to save life and limb of the hostages.
- Furthermore, even if one accepted *in casu* the public prosecutor's right to give instructions in order to guarantee the criminal prosecution this right would be limited: Making use of firearms against persons is a genuine responsibility of the police; therefore only police officials are allowed to decide on such shooting. Accordingly, the public prosecutor never has the authority to order the use of firearms, not even against criminal offenders on the run<sup>32</sup>.

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30 *Beulke*, Strafprozessrecht, 10<sup>th</sup> ed., side-note 103, *Krey* and *Krey/Meyer* (see footnote 27).

31 Thereto with further references *Beulke* (see footnote 30); *Krey* and *Krey/Meyer* (see footnote 27); *Krey*, German Criminal Procedure Law, Vol. 1, 2009, side-note 207-210.

32 *Krey*, ZRP 1971 (see footnote 27), 224, 226; *Krey* (see footnote 1) side-note 508; *Kühne* (see footnote 11) side-note 150; *Meyer-Gößner* (see footnote 20), § 161 side-note 13.

c) Ordering the use of firearms by the public prosecution in the Munich case has seriously displeased police and German State ministers of the interior resulting in a diminution of the public prosecution's position towards the police by *common directives of the German Ministers of Justice and Ministers of the Interior*<sup>33</sup>: In the field of using direct force against delinquents such directives have seriously restricted the public prosecutor's right to instruct the police, even if the public responsibility to prosecute crimes is predominant.

Moreover, since then, time the public prosecution's role in cases of hostage-taking has factually become more and more irrelevant because here, the police usually do not consult the public prosecution from the beginning – resulting in an unlawful disregard of the public prosecution's role in criminal proceedings.

#### *Part Four: Constitutional Rank of the Public Prosecution's Role as Guardian of the Law towards the Police in Criminal Proceedings?*

Nowadays, the public prosecution's role in criminal proceedings is endangered by two alarming developments:

Firstly, there is an increasing tendency of the police to defy public prosecution's control.

Secondly, among the ministries of justice of the German States there is an increasing tendency to treat the public prosecution as their own dependant section.

Both tendencies contradict the **constitutional importance** of the public prosecution's role in criminal proceedings under the Rule of Law in a significant manner: From the author's standpoint the mentioned role of the public prosecution as a guardian of the law in criminal proceedings holds constitutional rank, more precisely: the rank of an unwritten constitutional principle, based on the Rule of Law (*Rechtsstaatsprinzip*).

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33 »*Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren des Bundes und der Länder über die Anwendung unmittelbaren Zwangs durch Polizeibeamte auf Anordnung des Staatsanwalts*« (i.e. common directives of the German ministers/senators of justice and ministers/senators of the interior on the use of direct force by police officers under order of the public prosecutor), B. III. Published in: *Meyer-Goßner*, Anhang A 12, Anlage A.

This also seems to be the standpoint of the Constitutional Court of the State of North Rhine-Westphalia (*Verfassungsgerichtshof Nordrhein-Westfalen*). In its judgement dated February 9<sup>th</sup> 1999<sup>34</sup> the court emphasized the antagonistic functions and interests of the ministry of justice on the one hand and the ministry of the interior on the other hand: From a constitutional standpoint, the ministry of interior should not be entrusted with the role as superior of the public prosecution; consequently, both ministries **must not be merged** since such fusion would contradict the Rule of Law.

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34 Neue Juristische Wochenschrift (NJW) 1999, 1243, 1247 concerning the political attempt to merge the ministry of justice and the ministry of the interior.

*Appendix: Relevant Provisions (Selection)*

*– Criminal Procedure Code, Judicature Act –*

*I. German Criminal Procedure Code (Strafprozessordnung, StPO)<sup>35</sup>*

**§ 152 StPO**

(1) The public prosecution shall have the authority to prefer public charges.

(2) Except as regulated otherwise by law, the public prosecution shall be obliged to take action in case of all criminal offences which may be prosecuted, provided there is an initial suspicion.

**§ 160 StPO**

(1) As soon as the public prosecution gets knowledge of the suspicion of a criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether or not to charge.

(2) The public prosecution shall not only investigate incriminating circumstances but also exonerating ones, and shall ensure that such evidence is taken the loss of which is to be feared.

**§ 161 StPO**

(1) For the purpose indicated in the aforesaid section the public prosecution may request information from all public authorities and may carry out investigations of any kind, either itself or with help from the police. Police authorities and police officers shall be obliged to comply with requests or orders of the public prosecution; in this case the police are authorized to request information from all public authorities.

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<sup>35</sup> Near translation into English, to a large extent based on a former semi-official translation by the German Federal Ministry of Justice; here, the author was supported by Thomas Roggenfelder, being member of his chair.

(2) [...]

### **§ 161 a StPO**

(1) Witnesses and experts shall be obliged to answer a summon by the public prosecution and to give evidence respectively to render their expert opinion. [...]

### **§ 163 StPO**

(1) The police shall investigate criminal offences and shall take all actions which bear no delay and shall avoid any suppression of evidence. [...]

(2) The police shall transmit their records etc. without delay to the public prosecution. [...]

### **§ 163 a StPO**

(1) [...]

(2) [...]

(3) The suspect shall be obliged to answer a summon by the public prosecution. [...]

### **§ 170 StPO**

(1) If the investigations offer sufficient suspicion for preferring public charges, the public prosecution shall charge by submitting the bill of indictment to the competent court.

(2) Otherwise the public prosecution shall terminate the proceedings. [...]

## *II. German Judicature Act (Gerichtsverfassungsgesetz, GVG)*

### **§ 144 GVG**

If the public prosecution at a court is composed of several public prosecutors, the public prosecutors assigned to the senior one will act on his behalf; when acting on his behalf, they are authorized to execute the function of the senior public prosecutor without any proof of a special mandate.

### **§ 145 GVG**

(1) The senior public prosecutors at the courts of appeals and the higher district courts are authorized to take over in person the functions of the public prosecution at all courts of their district or to assign these functions to another public prosecutor instead of the up-to-now competent one.

(2) [...]

### **§ 146 GVG**

Public prosecutors are obliged to comply with official instructions by their seniors.

### **§ 147 GVG**

The power of supervision and direction is entitled to:

1. the Federal Minister of Justice regarding the federal attorney general and the federal attorneys;
2. the State's administration of justice regarding all public prosecutors of the respective State;
3. the senior public prosecutor at the courts of appeals and the higher district courts regarding all public prosecutors of their respective district.

### **§ 150 GVG**

When executing its official functions, the public prosecution is independent from the courts.

### **§ 152 GVG**

(1) The police officers specifically appointed by law for the task to assist the public prosecution (*Ermittlungspersonen der Staatsanwaltschaft*) are, in this function, obliged to comply with instructions of the public prosecution of their district respectively with instructions of the senior of the superordinate public prosecution.

(2) The State governments are authorized to lay down by statutory regulation which groups of officials and employees are covered by this provision. [...]

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