

# Rechtspolitisches Forum

## Legal Policy Forum

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Volker Krey

The Rule of Law in  
German Criminal Proceedings  
German Constitutional Law and  
the European Convention on Human Rights

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.

Germany as law-exporting nation is a worldwide role model especially for its criminal law and criminal procedure law which has influenced several East Asian countries.

The author offers a short historical overview on the establishment of the rule of law in Germany.

He describes the role of the German Federal Constitution as source of criminal procedure law by referring to fundamental constitutional principles as well as giving specific case examples.

The second part of the essay focuses on the relevance and application of the European Convention on Human Rights. The author points out basic principles of the European Convention on Human Rights and illustrates its influence on German legal practice.

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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 RULE OF LAW IN GERMAN CRIMINAL PROCEEDINGS

## German Constitutional Law and the European Convention on Human Rights\*

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– with assistance by Jan Stenger –\*\*

### *Introduction*

#### *I. The Significance of Comparative Law in Criminal Proceedings: The United States and Germany as Law-Exporting Nations*

Germany, like the USA, is a »law-exporting nation«: both gain great influence on the legal orders of many other countries. They »export« legal ideas and even whole fields of law. The influence of German **criminal law**, especially its general part, in East Asia is dominant in Japan, South Korea and Taiwan. However, with regard to **criminal proceedings**, there exists worldwide a »healthy competition« between the USA and Germany concerning the influence of their respective criminal procedure laws<sup>1</sup>. In East Asia, this is true for Japan, South Korea and Taiwan. Furthermore, Chinese lawyers, visiting the Academy of European Law in the City of

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\* Manuscript of a lecture presented by the author in November 2007 at University of Hong Kong, Faculty of Law. The manuscript has been extended, amended and completed by some footnotes.

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1 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.

Trier, told the author on several occasions that the same held for China.

II. *The Rule of Law: Highly Imprinting Today's German Criminal Proceedings Against the Background of German History – Hitler-Dictatorship; Followed by the Stalinistic Dictatorship in the Former German Democratic Republic –*

The German criminal procedure law has a long tradition in the rule of law: Under the influence of the French Revolution of 1789, German criminal proceedings became more and more liberal and fair, particularly since the mid-19<sup>th</sup> century. However, during the Hitler-Dictatorship (1933 until 1945), an awful break with this tradition occurred, leading to totalitarian criminal proceedings<sup>2</sup>. The same happened during the Stalinistic Dictatorship in Eastern Germany as from 1945. Against the background of these experiences and under the influence of the American and British occupying powers in Western Germany, the rule of law was restored in German criminal procedure law after the end of the Second World War. In this respect, the German Federal Constitution of 1949<sup>3</sup> exerted great influence.

Furthermore, in 1950, the European Council created the *European Convention on Human Rights*<sup>4</sup>, acting against the background of the former fascistic and then actual stalinistic dictatorships in Europe. Subsequently, this convention came into force in most of the Western European countries, e. g. in France, UK, Western Germany (in 1953) etc.

In the following, this Convention gained great influence on the criminal proceedings in Europe, intensifying the importance of the rule of law. By now, the Council of Europe consists of more than 40 member states in which the European Convention on Human Rights is applicable.

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2 Thereto: *Rüping/Jerouscheck*, Grundriß der Strafrechtsgeschichte, 4<sup>th</sup> ed., 2002, Rn (i. e. side note) 273-302; *Wesel*, Geschichte des Rechts, p. 467-474, 478-484.

3 See below, Part One.

4 See below, Part Two.

## *Part One: Criminal Procedure Law and the German Federal Constitution*

This constitution<sup>5</sup>, dated 1949, has been subject to lots of amendments. However, its liberal and permissive character, shaped by the rule of law, has not been reduced. Rather, according to art. 79 subs. 3 of the German Constitution, constitutional amendments reducing the rule of law in a significant manner would be inadmissible. The mentioned provision holds the character of a so-called »guarantee for eternity«, ruling that *constitutional amendments which affect fundamental principles, particularly the inviolability of the human dignity or the principles of a republican, democratic and social state governed by the rule of law, shall be inadmissible.*

### *I. German Federal Constitution as Legal Source for Criminal Procedure Law*

1. Our constitution contains several provisions for criminal procedure law, e. g.:

- a) Immunity for members of the German Federal Parliament, art. 46 subs. 2, 4.
- b) Right of such members to refuse to give evidence, art. 47.

**Case example 1:** In strict confidence a civil servant informs a member of the Federal Parliament about serious environmental crimes tolerated by corrupt public officers. The public prosecution plans to examine the parliamentarian as witness in order to get to know the identity of the mentioned informer. However, art. 47 prevents that parliamentarians have to give evidence on the identity of informers. This privilege of witnesses ensures the efficiency of Parliament as guardian of the executive by protecting the confidentiality of the informer's identity as well as the confidentiality of the respective information.

- c) Independence of judges, art. 97 subs. 1, 2<sup>6</sup>.

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5 Named »Basic Law for the Federal Republic of Germany« (*Grundgesetz für die Bundesrepublik Deutschland*), 23 May 1949.

6 Thereto: Krey, *Deutsches Strafverfahrensrecht*, Band (i. e. Vol.) 1, 2006 = Krey, *German Criminal Procedure Law, Volume I*, to be published in 2009, each with Rn (i. e. side note) 60-66 providing further references.

Material independence means freedom from instructions while exercising judicial power. Personal independence ensures the protection of material independence: Economic fears due to threatening loss of position could undermine the legally granted freedom from instructions. Therefore, German judges are, in principle, appointed for life pursuant to statute law.

By contrast, state judges in the USA like County Court Judges are in principle not appointed for life. Rather, they are elected for a specific period<sup>7</sup>, e. g. five years. Thus real personal independence is not given, compared to judges being appointed for life, such as federal judges in the USA.

Furthermore, there are fundamental civil rights concerning court proceedings, e. g.:

- d) Prohibition of ad hoc tribunals; guarantee of one's legally competent judge, art. 101 subs. 1 of the German Federal Constitution.
- e) Right of audience in court, art. 103 subs. 1.
- f) *ne bis in idem* (prohibition of double jeopardy), art. 103 subs. 38.
- g) Constitutional guarantees regarding deprivation of liberty, art. 104.

The most important examples of such guarantees are the following: Firstly, the so-called legal reservation, meaning that the freedom of the person may be restricted only pursuant to statute law<sup>9</sup>. Secondly, the so-called requirement of judicial authority, meaning that the freedom of the person may be restricted only by order of a judge (or, in case of detention by police or public prosecution requiring the court's subsequent approval, not later than at the end of the day following the arrest).

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<sup>7</sup> N. Schmid, *Strafverfahren und Strafrecht in den Vereinigten Staaten*, 2<sup>nd</sup> ed. 1993, p. 45 with further references.

<sup>8</sup> See Krey, *Deutsches Strafverfahrensrecht*, Band 2, 2007, Rn 1180 - 1200. with further references.

<sup>9</sup> See: Krey, *Characteristic Features...* (footnote 1), p. 593, 594; Krey, *Deutsches Strafrecht, Allgemeiner Teil*, Band 1, 3<sup>rd</sup> ed., 2008, Rn 105 with footnote 127, 128 = *German Criminal Law, General Part, Volume I* (Textbook in German and English), 2002, Rn 105 with footnote 127, 128; Krey, (see footnote 6), each with Rn 6, 7.



Furthermore, the **human rights** laid down in art. 1-19 of the German Federal Constitution are important for criminal procedure law; this holds in particular for: human dignity, right to life and physical integrity, freedom of the person, inviolability of the home.

2. Moreover, the **constitutional principle of proportionality** is of utmost relevance to criminal procedure law and implies the following three sub-principles<sup>10</sup>:

Firstly, interference with fundamental rights has to be suitable for achieving the purpose intended by that interference (principle of suitability).

Secondly, such interference has to be necessary, i. e. a more lenient means of equal effectiveness must not be available (principle of necessity).

Thirdly, the damage prospectively brought about by the intrusion must not be disproportionate compared to the intrusion's intended use (in the words of the German Federal Constitutional Court: The intrusion has to be reasonable according to the relation between means and purpose). In a colorful manner, this is also transcribed as follows: »You shall not shoot sparrows with cannons«.

The principle of proportionality may be illustrated by the following case:

**Case 2:** The accused B is held in pre-trial custody. He requests to set aside the arrest warrant because it violates the constitutional principle of proportionality.

**Alternative (1):** B is charged with serious economic crimes. As he denies all charges, public prosecution and court rightly expect criminal proceedings to last at least one year. However, B is very old, critically ill and has only a few weeks left to live, which is known to the prosecution authorities. Nevertheless, B is still held in pre-trial custody.

This alternative of the case illustrates a violation of the principle of suitability. The purpose of pre-trial custody is to ensure both, carrying out the criminal proceedings and punishing the perpetrator. Carrying out the criminal proceedings against B is, with the utmost

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<sup>10</sup> Krey, *Characteristic Features* (see footnote 1), p. 594; Krey, *Deutsches Strafverfahrensrecht = German Criminal Procedure Law* (see footnote 6), each with Rn 30-34; Krey, *Deutsches Strafrecht, Allgemeiner Teil* (see footnote 9) = *German Criminal Law, General Part* (see footnote 9), each with Rn 16.

probability, not possible anymore as the accused is fatally ill. Thus, pre-trial custody is not suitable to achieve the purpose of ensuring the procedure. So, continuation of the pre-trial custody is a breach of the principle of proportionality<sup>11</sup>.

Moreover, keeping an accused, who has a terminal disease and is close to death, in pre-trial custody may constitute a violation of art. 1 subs. 1 German Federal Constitution (guarantee of human dignity)<sup>12</sup>.

**Alternative 2:** The arrest warrant is based on risk of escape. However, obviously there is the expectation that risk of escape will cease if B provides a high bail. Even though B would consent in this more lenient means, the custodial judge refuses to suspend the execution of the arrest warrant.

In alternative 2, the judge violates the **constitutional principle of necessity** (principle of the most lenient intrusion) and, additionally, a corresponding special rule for pre-trial custody laid down in the Criminal Procedure Code, § (i. e. sec.) 116<sup>13</sup>.

**Alternative 3:** B is charged with shoplifting. He has no criminal record and the value of the loot is only 50 €. The arrest warrant is based on risk of escape because B is a tramp.

This case illustrates an infringement of the principle of proportionality. Pre-trial custody for such a petty case is unreasonable: Balancing between the intended benefit of ensuring the criminal proceedings and the massive intrusion into the arrested person's freedom, the arrest warrant seems inappropriate<sup>14</sup>.

## *II. Superiority of the Constitution to Ordinary Statutes, and the Constitutional Review before the German Federal Constitutional Court*

Provisions of the criminal procedure code which contradict the German Constitution are to be declared void. Concerning the

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11 *Krey*, (see footnote 6), each with Rn 31, 32.

12 *Constitutional Court of the State of Berlin*, in: *Neue Juristische Wochenschrift* (i. e. a law journal), 1993, p. 515 et seq. – Honecker case –; *Krey* (see footnote 6), Rn 32 with further references pro and contra.

13 BVerfGE (i. e. decisions of the German Federal Constitutional Court – Official Reports of Cases –) Vol. 19, p. 342, 351.

14 There to, more thoroughly, *Krey* (see footnote 6), Rn 34.

courts' competence of reviewing and dismissal, the following applies: Every judge has the competence to check the constitutionality of statute law being relevant for his decision. However, the competence to declare unconstitutional statutes void lies, in principle, exclusively with the German Federal Constitutional Court.

Thus, a German criminal court, considering statute law, on whose validity its decision depends, as being **unconstitutional**, is obliged to act as follows: The court has to suspend proceedings and to obtain a decision from the German Federal Constitutional Court (so-called *konkrete Normenkontrolle*, i. e. specific constitutional review, pursuant to art. 100 German Federal Constitution, via referral to the constitutional court)<sup>15</sup>.

### III. Interpretation of Statutes in Conformity with the Constitution

#### 1. Interpretation in Conformity with the Constitution as Law Preserving Principle

Concerning constitutional review procedures, the German Federal Constitutional Court has stated on countless occasions: »Acts are not unconstitutional if an interpretation in conformity with the Federal Constitution is possible«<sup>16</sup>.

**Example:** Pre-trial custody demands both, a strong suspicion and a **statutory ground for arrest based on certain facts**. The latter requirement results from the principle of proportionality. Grounds for arrest are escape, risk of escape and risk of suppression of evidence. Yet, pursuant to the criminal procedure code, in cases of serious felonies like murder and terrorism no ground for arrest is required. Since this exception is highly questionable under the rule of law, the German Constitutional Court has stated that the mentioned exception was in need of a restrictive interpretation in conformity with the constitution as follows: Such serious felonies require a ground for arrest as well. However, »risk of escape or

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<sup>15</sup> In other words: Specific constitutional review under art. 100 means that the Federal Constitutional Court tests the constitutionality of statute law upon referral by a lower court. See with further details: BVerfGE (see footnote 13) Vol. 1, p. 184, 189 et seq.; Vol. 18, p. 216, 219 et seq.; Vol. 63, p. 181, 187; Krey (see footnote 6), Rn (side note) 35, 36.

<sup>16</sup> BVerfGE (see footnote 13) Vol. 2, p. 266, 282.

suppression of evidence, which cannot be ruled out« in the case at hand, are sufficient; here, such risk does not have to be substantiated by »**certain facts**«<sup>17</sup>.

## 2. *Interpretation in Conformity with the Constitution as General Principle of Statutory Interpretation*

Statutory interpretation in the light of the constitution is not restricted to constitutional review procedures. Rather, the judicial legal finding as such is to be orientated to the value standards of the constitution. This insight is relevant especially for cases of the **concretization of general clauses** in conformity with the constitution.

**Example:** Continuation of pre-trial custody exceeding a period of six months shall only be ordered »if the particular difficulty or the unusual extent of the investigation or another important reason does not yet admit passing the judgement...« (§ 121 sub. 1 Criminal Procedure Code). The general clause »other important reason« has been interpreted in conformity to the German constitution by the Federal Constitutional Court as follows:

In the light of the constitutional guarantee of personal freedom, the overload of the court must not give reason to prolonging pre-trial custody if such overload is not only short termed. Such overload of courts falls within the sphere of the state's responsibility and, thus, must not result in disadvantages for the arrested person.<sup>18</sup>

## IV. *Constitutional Complaint before the German Federal Constitutional Court*

Pursuant to the German Constitution and the Federal Constitutional Court's Act, any person may file a constitutional complaint before this court, alleging that one of his constitutional rights has

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17 BVerfGE (see footnote 13) Vol. 19, p. 342, 347 et seq., 350 et seq.; *Krey* (see footnote 6), Rn 37, 38 with further references.

18 BVerfGE (see footnote 13) Vol. 36, p. 264, 271 et seq.; *Krey* (see footnote 1), p. 596, 597.

been infringed by public authority<sup>19</sup>. In criminal proceedings the following acts of the public authority may be concerned:

- Criminal procedural intrusions into civil rights by police or public prosecution.
- Intrusions into civil rights by criminal courts.
- Criminal procedural statutes violating the rule of law.

One requirement for the admissibility of a constitutional complaint is the exhaustion of all other legal remedies, as far as they are admissible against the claimed infringement. In Germany, most constitutional complaints concern criminal proceedings. Despite the fact that only about 2 percent of such constitutional complaints are successful, it can be stated: The constitutional court has declared criminal procedural acts of public authority unconstitutional in numerous cases. Thereby the court has

- set aside compulsory measures by police and public prosecution as well as
- criminal courts' decisions up to judgements of the Federal High Court of Justice
- and declared statutes void or interpreted them in conformity with the constitution.

As a result, criminal procedure law is often denoted as »applied constitutional law«.

Moreover, in the light of the flood of constitutional complaints filed before the German Federal Constitutional Court every year (more than 5000 complaints), this court has *de facto* developed into a »super court of appeals«, which is contrary to the German constitutional system<sup>20</sup>.

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19 Art. 93 subs. 1 no 4 a German Federal Constitution, additionally §§ 90-95 BVerfGG (i. e. Federal Constitutional Court's Act).

20 See *Krey*, in: *Juristische Rundschau* (i. e. a law journal) 1995 p. 221, 223-227 with further references.

## Part Two: The European Convention on Human Rights

### 1. *European Convention for the Protection of Human Rights and Fundamental Freedoms, Signed in 1950 (hereafter: European Convention on Human Rights)*

In its core, this convention is a legally binding declaration. In Germany it holds the rank of a Federal Statute, but no constitutional rank<sup>21</sup>.

Relevant to criminal proceedings are especially the following guarantees of human rights and fundamental freedoms:

#### 1. *Right to life, art. 2 of the Convention on Human Rights:*

This human right is limited »in order to effect a lawful arrest«, allowing the use of firearms to prevent a perpetrator's escape. Such use of firearms is permitted by German State Police Codes respectively Federal Police Law. However, this permission only holds in cases of serious crimes and requires a more lenient means of equal effectiveness (e. g. warning shot) not being available.

#### 2. *Prohibition of torture and inhuman or degrading treatment, art. 3:*

**Case example 3:** Interrogation of arrested persons under combined application of strange »techniques« such as

- a) putting a dark bag over the head of the arrested person which is only removed for interrogations (»hooding«);
- b) using a continuous loud, whistling noise (»subjection to noise«);
- c) »deprivation of sleep« before interrogations.

*In casu* the European Court of Human Rights (*Ireland versus UK*) has affirmed an »inhuman and degrading treatment«<sup>22</sup>.

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<sup>21</sup> *German Federal Constitutional Court*, in *Juristenzeitung* (i. e. a law journal) 2004, p. 1171 et seq.; *Kühne*, *Strafprozessrecht*, 7<sup>th</sup> ed. 2007, Rn (side note) 29 et seq.

The same holds in cases of fake executions.

A current, explosive and controversial example is the so-called **life-saving torture**: Police officers threaten a kidnapper that he will suffer considerable pain if he does not disclose the victim's whereabouts. This threatening aims at saving the victim being in an imminent mortal danger due to the circumstances of the kidnapping<sup>23</sup>.

In a comparable case (*Gäfgen v. Federal Republic of Germany*<sup>24</sup>) the European Court of Human Rights, **ECHR**, held an inhuman treatment as being given; additionally the court stated<sup>25</sup>: The European Convention on Human Rights laid down an absolute prohibition of treatment contrary to art. 3, irrespective of the conduct of the person concerned and even in the case of aiming at saving a human being's life or »the life of the nation« – being an extremely strict, but consequent standpoint –.

### 3. *Right to liberty and security, art. 5:*

For cases of arrest this provision enumerates, amongst others, the following requirements under the rule of law:

Firstly, a legal basis by statute law (regarding the UK: common law is sufficient). Secondly, the arrested person has to be informed promptly, in a language he understands, of the reasons for his arrest and of any charge against him.

Thirdly, the arrested has to be brought before a judge promptly.

Fourthly, the arrested has the right to a speedy trial.

### 4. *Right to a fair trial; right to a speedy trial, art. 6 subs. 1:*

a) In the author's opinion, the Anglo-American term »fair trial« does not mean anything else than »proceedings under the rule of

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22 *ECHR*, *Ireland v. UK*, series A no. 25; thereto *Esser*, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, 2002, p. 385 et seq.

23 Example being based on: *ECHR*, *Gäfgen v. Federal Republic of Germany*, 22978/05 dated 30 June 2008. In reality, the threatening by the police was not successful because the victim had been killed by the kidnapper shortly after the kidnapping – a fact not being known to the police when threatening the kidnapper with pain.

24 See footnote 23.

25 *ECHR* (see footnote 23), no. 63-70.

law«. However, even the German Federal Constitutional Court nowadays uses the term **fair trial-principle**<sup>26</sup>, although it only holds declaratory relevance as against the rule of law-principle<sup>27</sup>: Only criminal proceedings under the rule of law can be denoted as fair trial, and vice versa.

b) The right to public hearing within a reasonable time is of considerable relevance to criminal proceedings under the rule of law; this right is violated very often in legal reality all over Europe.

5. *Free legal assistance by a defense counsel if the accused is moneyless, additionally free assistance of an interpreter if necessary, art. 6 subs. 3:*

These guarantees are based on the rule of law-principle (*Rechtsstaatsprinzip*) and additionally on the welfare state-principle (*Sozialstaatsprinzip*).

6. *Right to respect for private and family life, art. 8:*

Due to this guarantee, which includes everyone's right to respect for his home and his correspondence, the European Court of Human Rights (**ECHR**) demands that police wiretapping and electronic surveillance of private homes must be regulated by law expressively (not only by home office guidelines).

Thus the **ECHR** has stated in convictions of UK that home office guidelines are no sufficient legal basis for police wiretapping and electronic surveillance of private homes; as a result, meanwhile UK has enacted statute law allowing those interferences<sup>28</sup>.

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<sup>26</sup> So e. g. BVerfGE (see footnote 13) Vol. 26, p. 66, 71.

<sup>27</sup> Thereto with further references *Krey*, Deutsches Strafverfahrensrecht, Band 1 (see footnote 6), Rn 474.

<sup>28</sup> Thereto *Esser* (see footnote 22), p. 150 et seq.; *Kühne* (see footnote 21), Rn (side note) 1203, 1204. As to electronic surveillance of private homes: *ECHR*, *Khan v. UK*, 35394/97 dated 12 May 2000, in: *Juristenzeitung* (i. e. a law journal) 2000, p. 993 et seq. (with remarks *Kühne*).



## II. *Interpretation of German Statute Law in Conformity with the Convention*

As aforesaid, the European Convention does not hold constitutional rank but merely the rank of German Federal Statutes. Yet, in the light of the friendliness towards international law, the German courts are obliged to interpret the national law accordance to the convention. Pursuant to the German Constitutional Court, this applies even to the interpretation of our Constitution<sup>29</sup>.

## III. *The Case Law of the European Court of Human Rights as Driving Force for the »Harmonization of Criminal Procedure Laws« in Europe*

As far as the protection of human rights and the guarantee of the rule of law are concerned, the convention is of central importance for the harmonization of the national criminal procedure laws in Europe. Thereby the European Court of Human Rights in Strasbourg (France) has become the driving force of this harmonization<sup>30</sup>:

1. Since 1998, this Court is a permanent court, ensuring that the member states of the Council of Europe observe the rights and freedoms guaranteed in the European Convention. The number of the Court's judges corresponds with the number of the member states (by now more than 40). The Court decides by different panels, in particular: Chambers (7 judges), Grand Chamber (17 judges)<sup>31</sup>.

2. The central importance of the Convention and the European Court of Human Rights is based on the institution of the **individual application to the court**:

Pursuant to art. 34 of the Convention, any person claiming a violation of his rights under the Convention by one of the member states can file an application to the European Court. Yet, this individual application is only admissible after »exhaustion« of all domestic remedies”. In Germany, part of those domestic legal reme-

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29 BVerfGE (see footnote 13) Vol. 74, p. 358, 370; German Federal Constitutional Court (BVerfG), in: *Juristenzeitung* (i. e. a law journal) 2008, p. 627, 629.

30 Fundamentally: *Esser* (see footnote 22), p. 51 et seq., 817 et seq.

31 European Convention on Human Rights, art. 17 et seq.

dies is the constitutional complaint before the Constitutional Court as well<sup>32</sup>.

On the basis of such individual applications, the European Court has interpreted the convention in countless judgements all over Europe. Thus, as aforesaid, the Court has become a driving force for European harmonization of domestic criminal proceedings under the rule of law.

#### IV. *Binding Force of the Court's Judgements on the Convicted Member State?*

Under art. 46 of the European Convention on Human Rights, the European Council's member states have undertaken to abide by the final judgement of the court in any case to which they are parties. Nevertheless, the legal binding force of convictions of member states (e. g. Germany) is limited:

1. In contrast to judgements of the German Constitutional Court<sup>33</sup>, judgements of the European Court of Human Rights have neither legal force nor any other direct binding effect like precedents in Common Law. When the European Court convicts Germany e. g. declaring that an act of the German public authority is incompatible with the convention, this declaration does not mean a revocation of the act concerned:

- The court's judgement that the European Convention is infringed by a German Federal or State statute does not lead to its voidness.
- Measures of police and public prosecution as well as convictions by criminal courts whose violation of the convention is declared by the European Court of Human Rights are not quashed but stay in force.<sup>34</sup>

2. However, the lacking quashing effect of judgements of the European Court does not devalue their influence. Rather, the convic-

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<sup>32</sup> *Krey* (see footnote 6), Rn (i. e. side note) 45 with further references.

<sup>33</sup> Pursuant to § 31 subs. 1, 2 and § 95 subs. 2, 3 BVerfGG (i. e. Federal Constitutional Court's Act), the reasons for deciding/*ratio decidendi* of judgements/decisions of the Federal Constitutional Court have binding force.

<sup>34</sup> *Esser* (see footnote 22) p. 834 et seq.; *Krey* (see footnote 6), Rn (i. e. side note) 48, 49; *Kühl*, in: *Zeitschrift für die gesamte Strafrechtswissenschaft* (i. e. a law journal), 1988, p. 406, 423.

tion of a member state constitutes an improvement of the citizen's rights whose individual application has been successful:

Firstly, the reopening of the criminal proceedings is admissible if the sentence concerned is based on a violation of the European Convention, § 359 no. 6 German Criminal Procedure Code.

Secondly, under art. 41 European Convention on Human Rights, the European Court of Human Rights is allowed to award a just monetary compensation to the person concerned.

Thirdly, the German Constitutional Court (*Zweiter Senat*, i. e. 2<sup>nd</sup> court's division) has decided in 2004<sup>35</sup> that the case law of the European Court holds the following authority: German courts were obliged to take that case law into serious consideration; otherwise they would violate the respective German constitutionally guaranteed civil right and the rule of law. The 1<sup>st</sup> court's division of the German Constitutional Court has followed this standpoint recently<sup>36</sup>.

In other words: Only by way of exception, German courts may digress from case law established by the European Court of Human Rights, provided that a thorough discussion and good reasons are given in the case at hand.

#### V. *Execution of the Court's Decisions: The Role of the Committee of Ministers*

Pursuant to art. 46 subs. 2 European Convention on Human Rights, any final judgement of the court shall be transmitted to the European Council's Committee of Ministers, which shall supervise the execution of the judgement<sup>37</sup>.

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35 *German Constitutional Court*, dated 14 October 2004, in: *Juristenzeitung* (i. e. a law journal) 2004, p. 1171 et seq.

36 *German Federal Constitutional Court*, dated 26 February 2008, in: *Juristenzeitung* 2008, p. 627, 629 et seq. (with remarks by *Starck*).

37 Thereto fundamentally: *Werwie-Haas*, *Die Umsetzung der strafrechtlichen Entscheidungen des Europäischen Gerichtshofs für Menschenrechte in Deutschland, Österreich, der Schweiz und im Vereinigten Königreich*, 2008, p. 86 et seq.



## *Appendix: Relevant Provisions (Selection)*

### *1. German Federal Constitution (Basic Law)<sup>38</sup>*

#### **Article 1 . [Human dignity]**

- 1 Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- 2 The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- 3 The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

#### **Article 46 . [Immunities]**

- 1 At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.
- 2 A Member may not be called to account or arrested for a punishable offense without permission of the Bundestag, unless he is apprehended while committing the offense or in the course of the following day.
- 3 The permission of the Bundestag shall also be required for any other restriction of a Member's freedom of the person or for the initiation of proceedings against a Member under Article 18.
- 4 Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the Bundestag.

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38 Official translation, available here:  
[http://www.bundestag.de/htdocs\\_e/parliament/function/legal/germanbasiclaw.pdf](http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf).

**Article 47 . [Right not to give evidence]**

Members may refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the Bundestag, or to whom they have confided information in this capacity, as well as evidence concerning this information itself. To the extent that this right of refusal to give evidence applies, no seizure of documents shall be permissible.

**Article 79 . [Amendment of the Basic Law]**

- 1 This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
- 2 Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
- 3 Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

**Article 93 . [Federal Constitutional Court: jurisdiction]**

- 1 The Federal Constitutional Court shall rule:
  1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;
  2. in the event of disagreements or doubts respecting the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Gov-

- ernment, of a Land government, or of one third of the Members of the Bundestag;
- 2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a Land;
  3. in the event of disagreements respecting the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;
  4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;
  - 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority;
- [...]

#### **Article 97 . [Independence of judges]**

- 1 Judges shall be independent and subject only to the law.
- 2 Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

#### **Article 100 . [Compatibility of laws with the Basic Law]**

- 1 If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of

a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.

- 2 If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.

[...]

#### **Article 101 . [Ban on extraordinary courts]**

- 1 Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.
- 2 Courts for particular fields of law may be established only by a law.

#### **Article 103 . [Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment]**

- 1 In the courts every person shall be entitled to a hearing in accordance with law.
- 2 An act may be punished only if it was defined by a law as a criminal offense before the act was committed.
- 3 No person may be punished for the same act more than once under the general criminal laws.

#### **Article 104 . [Legal guarantees in the event of detention]**

- 1 Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.
- 2 Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.



- 3 Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.
- 4 A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom.

*II. European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>39</sup>

**Article 2 . Right to life**

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

**Article 3 . Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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39 Available here:  
<http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

**Article 5 . Right to liberty and security**

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness

of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

### **Article 6 . Right to a fair trial**

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

**Article 8 . Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 34 . Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

**Article 41 . Just satisfaction**

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

**Article 46 . Binding force and execution of judgments**

- 1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
- 2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

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