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The Untenable Situation of German Criminal Law

– Against Quantitative Overloading, Qualitative Overcharging and the Overexpansion of Criminal Justice –

Institut für Rechtspolitik
an der Universität Trier

IRP

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The article deals with the untenable overloading of German criminal trial court judges presenting the overloading in detail and analyzing its reasons and consequences. In this context, serious failures by the German federal and state executive and legislative organs as well as undesirable developments of the Federal Constitutional Court's (BVerfG) and the Federal Supreme Court of Justice's (BGH) case law.

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

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Krey and Windgätter have already published as co-authors inter alia a paper on “Financial Crisis and German Criminal Law” in this series (Volume 49, 2009).

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– AGAINST QUANTITATIVE OVERLOADING, QUALITATIVE OVERCHARGING AND THE OVEREXPANSION OF CRIMINAL JUSTICE –[*]

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WITH ASSISTANCE BY
*THOMAS ROGGENFELDER AND ARASH FAGHIH NASSIRI***

Introduction

– Findings: Quantitative Overloading, Qualitative Overcharging and the Overexpansion of Criminal Justice in Germany –

There is a well established fact that the German criminal trial courts are unacceptably and unreasonably overloaded. The German Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)* and the Federal Supreme Court of Justice *(Bundesgerichtshof, BGH)* frankly admit this fact.[1] Even those legal scholars

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[*] This article is in its core the translation of the authors' manuscript, published in Festschrift for Hans Achenbach, University of Osnabrück (October 2011, p. 233 et seq.).

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[1] See *BGH St* 50, 40, 53, 54 (GS, i.e. Joint Panel in criminal cases); *BVerfG* (1. Kammer des Zweiten Senats, i.e. 1st Chamber [three justices] of the Second Senate [panel consisting of eight justices]), 2 BvR 1610/03; *BVerfG* (3rd Chamber of the Second Senate), in Neue Juristische Wochenschrift (NJW, i.e. a German law journal) 2006, 668, 670. For legal literature see inter alia: *Krey*, German Criminal Procedure Law, Volume 1, 2009, side note 66; *Krey*, Deutsches Strafverfahrensrecht, Volume 2, 2007, side notes 1040, 1069; *Kudlich,* Erfordert das Beschleunigungsge-

being critical towards trial courts emphasize such overloading.[2] It is being aggravated in the context of austerity measures which seem to be based on a system that can briefly be described as follows: In principle, the *BGH* is not (if ever slightly) affected, the State Courts of Appeals *(Oberlandesgerichte, OLG)* not in an extensive manner. In contrast, the trial courts fare differently: The Higher District Courts *(Landgerichte, LG)* typically are severely affected by such austerity measures, the Lower District Courts *(Amtsgerichte, AG)* brutally. Pursuant to the authors' view, this practice demonstrates an evident disregard for the trial courts. However, their speedy as well as convincing settlement of criminal cases is of utmost importance for the law in action, furthermore a constitutive element of criminal proceedings under the rule of law. Hence, the guarantee of an effective criminal justice *(Gewährleistung einer effektiven Strafrechtspflege)* is rightly recognized as a fundamental element of the rule of law.[3]

Regarding the qualitative overcharging, a preliminary reference to the following two legal institutions shall be sufficient here:

Firstly, the so called *Adhäsionsverfahren*[4] which has recently been overexpanded by statute law.[5]

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bot eine Umgestaltung des Strafverfahrens?, Gutachten zum 68. Deutschen Juristentag, 2010, inter alia C 19.

2 See inter alia *Kühne*, Juristenzeitung (JZ, i.e. a German law journal) 2010, 821, 822, 828 (partially following *Kudlich*, supra note 1); also *Hettinger*, JZ 2011, 292, 293, 296.

3 *BGH St* 38, 214, 220; *BGH*, in JZ 2005, 1010, 1012 (with remarks by *Dutge*); *BVerfG* E 33, 367, 383; E 34, 238, 248 et seq.; E 74, 257, 262; *BVerfG*, in NJW 2002, 51, 52; *BVerfG*, in Strafverteidiger (StV, i.e. a German law journal) 2009, 673; *Beulke*, Strafprozessrecht, 11th ed. 2010, side note 3; *Hellmann*, Strafprozessrecht, 2nd ed. 2006, side note 5; *Krey*, German Criminal Procedure Law (supra note 1), side note 16; *Krey*, Deutsches Strafverfahrensrecht, Volume 1, 2006, side notes 478 et seq.; *Landau*, Neue Zeitschrift für Strafrecht (NStZ, i.e. a German law journal) 2007, 121 et seq.; *Meyer-Goßner*, StPO (i.e. a commentary on the German Criminal Procedure Code), 54th ed. 2011, *Einl.* side note 18. Dissenting inter alia: *Hassemer*, StV 1982, 275 et seq., 279 et seq.; *Kühne* (supra note 2), 822, 823; also critical *Roxin/Schünemann*, Strafverfahrensrecht, 26th ed. 2009, 1/7.

4 Proceedings in which **claims for damages** resulting from crimes are decided within the criminal procedure by criminal trial courts instead of by civil courts.

Secondly, the so called *Richtervorbehalt* in State police laws, meaning the requirement of a **court order** in case of police interference with civil rights in order to avert dangers (in contrast to interference with civil rights when prosecuting criminal offences). Despite police law being a part of administrative law with its own administrative courts, criminal trial courts are burdened with deciding these matters.[6]

The overexpansion of German criminal justice results from the disproportional overstretching of substantive criminal law: Regarding the law in action in Germany, there is a permanent extension of criminal law by the federal legislator enacting new criminal statutes.[7] This development contradicts the *ultima ratio*-nature of criminal law, being an important element of the rule of law.

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5 Lastly by the federal Opferrechtsreformgesetz, dated 24 June 2004, Bundesgesetzblatt (BGBl., i.e. German Federal Law Gazette), I, p. 1354. Thereto in detail and very critical: *Krey/Wilhelmi*, Ausbau des Adhäsionsverfahrens: Holzweg oder Königsweg? Kritische Analyse mit rechtshistorischen und rechtsvergleichenden Hinweisen, in: Festschrift for Harro Otto 2007, 933-953 with further references.

6 See infra, Part Two.

7 Convincing inter alia *Kühne* (supra note 2), 822, 828, here following *Kudlich* (supra note 1). **Furthermore, the criminal procedure law becomes more and more complex due to the permanent flood of statutes reforming/amending the criminal procedure code.** With regard to those erroneous developments, see infra, Part Three.

PART ONE: The Quantitative Overloading

*I. Permanent Exceedance of the so called "Pensenschlüssel"[8]; Concealment of the Trial Courts' Serious Overload by the Justice Ministries of the 16 German States Replacing the "Pensenschlüssel" by Enacting **"PEBB§Y"***[9]

The *Pensenschlüssel,* which was used for decades (until 2005) as scale for determining the civil and criminal judges' workload, demonstrated a permanent and significant overstretching of criminal justice at the Higher and Lower District Courts for a very long time. Such overloading amounted up to 40 % (or even more) at the Lower District Courts in criminal cases; the Higher District Courts' overload was significant as well, however typically less, compared to the Lower District Courts.

Thus, it proved to be a good idea from the German State Justice Ministries' point of view to replace the *Pensenschlüssel,* since it illustrated the criminal trial courts' serious overloading all too obviously. This replacement was carried out by enacting PEBB§Y in 2005, resulting in a calculational cover-up of the respective overload. However, the trial judges concerned easily saw through this ploy and criticized it a lot. By the way, in the meantime even PEBB§Y proves an overloading of the trial courts, albeit less evidently.

II. Typical Causes for the Trial Courts' Overloading

1. Insufficient Budgets for Courts and Judges; Austerity Measures in this Area Typically Affecting Trial Courts for the Worst

There is a well established fact that German criminal trial courts have been personally and materially under-equipped for decades.

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8 See the following text.

9 ***PEBB§Y** (**Pe**rsonal-**b**edarfs-**b**erechnungs-**sy**stem, i.e. a calculation system on the judges' workload)* enacted in 2005. See PEBB§Y – Leitfaden für Gerichte und Staatsanwaltschaften, Baden-Württemberg, Justizministerium: http://www.bdr-online.de/base/bin/download.php?ID=228 and additionally the explanation on Wikipedia: http://de.wikipedia.org/wiki/PEBB%C2%A7Y.

This is particularly true for established judge positions and the equipment of registries and offices. Furthermore, the inventory of the Lower and Higher District Courts' libraries is for the most part wanting. In the final analysis, this results from the fact that the Justice Ministries typically are among the politically weakest ministries of the 16 German States.

– This political weakness became highly obvious in attempts by some of the German States to merge the respective Ministry of Justice with the Ministry of the Interior or to incorporate the former into the State Chancellery of the State's prime minister. Fortunately, such attempts failed since they were highly dubious from a constitutional standpoint.[10] –

The poor equipment of the German trial courts, at least concerning the criminal courts, as well as the additional circumstance that the justice budgets of the German States are only a very marginal part of the States' budgets, ought to lead to the following self-evident insight: Austerity measures in the Justice Ministries' field of responsibility must not concern the criminal trial courts (at least not considerably). However, regarding States' budgetary policies, there is a strange lack of this insight.

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[10] Regarding the former, merging both the Ministry of Justice and the Ministry of Interior (State of North Rhine-Westphalia, NRW), see: *Verfassungsgerichtshof NRW* (i.e. State Constitutional Court) JZ 1999, 1243, 1247; *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, in: Rechtspolitisches Forum (Legal Policy Forum), Vol. 46, *Institut für Rechtspolitik an der Universität Trier* (Ed.), 2009, p. 19, 20; *Oppong*, Zeitschrift für Rechtspolitik (ZRP, i.e. a German law journal) 2009, 22, 23. Regarding the latter, incorporation into the State Chancellery (among others Mecklenburg-Western Pomerania) see: *Oppong*, 23; *Roggenfelder*, Staatsanwalt und Richter als Wächter des Gesetzes gegenüber der Polizei im strafprozessualen Ermittlungsverfahren, Kapitel 1, § 2, II, III, upcoming Ph.D. thesis, Trier University.

2. Permanent Stress Caused by Specific Features of German Criminal Procedure Law

– Short-time Deadlines for the Completion of Written Judgments (§ 275 StPO[11]); Strict Time Limit for Pre-trial Custody Exceeding a Period of Six Months (§§ 121, 122 StPO) –

a) Based on the constitutional principles of **speedy trial** and **concentration of the main hearing,** as well as on the principle of **immediacy** for evidence-taking, § 275 of the German Criminal Procedure Code (StPO)[12] sets strict time limits for the completion of written judgments[13].

Exceeding these deadlines causes a so called *"absoluter Revisionsgrund"*, i.e. a fundamental error the claiming of which automatically results in a successful appeal on law (§ 338 no. 7 StPO)[14]. Thus, §§ 275, 338 no. 7 StPO form an effective instrument for keeping the trial court judges "on their toes". The same holds for the "mercilessly" strict case law on § 275 StPO by the German final appeal courts (Federal Supreme Court of Justice, State Courts of Appeals).[15]

In view of large-scale criminal cases, the authors would appreciate the following change in case law respectively in statute law with the intention to reasonably reduce the overloading of criminal trial courts:

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11 *Strafprozessordnung* (StPO), i.e. the German Criminal Procedure Code.

12 Concerning the text of § 275 subs. 1 StPO, see the **Appendix** of this publication (Relevant Provisions).

13 As to the mentioned principles as basis for § 275 StPO see inter alia: *Krey,* German Criminal Procedure Law (supra note 1), side note 66; *Krey,* Deutsches Strafverfahrensrecht, Volume 1 (supra note 3), side note 66, 466; *Krey*, Deutsches Strafverfahrensrecht, Volume 2 (supra note 1), side note 1160; *Kühne* in: *Löwe-Rosenberg* (LR, i.e. a commentary on the German StPO [supra note 11]), 26th ed., Volume 1, 2006, *Einl*. *Abschn. I*, side note 67.

14 Concerning the text of this provision, see the **Appendix** of this publication (Relevant Provisions).

15 *Krey* (supra note 13).
– Regarding the German system of criminal trial courts and appellate instances see diagrams 1 and 2 in: *Krey*, German Criminal Procedure Law (supra note 1), side note 69, 70. **–**

Firstly, when deciding whether or not there is a violation of the mentioned deadlines pursuant to § 275 subs. 1 s. 4 StPO, the German final appeal courts ought to be more understanding of the trial judges by way of a more generous application of the aforesaid rule, since the latter allows to exceed the time limit due to an "unavoidable and unforeseeable circumstance".[16] This holds particularly if the judge who has to complete the written judgment suffers from a protracted illness.[17]

Secondly, the legislator ought to reasonably and adequately extend the time limits under § 275 subs. 1 s. 2 StPO (statutory exception enacting extensions of deadlines due to the main trial's duration).

Both demands are based on the following reasons:

– More time to complete the written judgment at hand allows for its **higher quality**. This quality is a considerable requirement for public acceptance of the court's decision. Moreover, it reduces the risk of a successful appeal based on insufficient reasoning as ground of appeal. To clarify the latter: The assignment of error concerning substantive criminal law is successful where the judgment's reasoning is evidently incomplete since there is no sufficient fact-finding, no sufficient explanation of the evidence-taking, and/or no plausible weighing of the evidence.[18]
– In general, German criminal trial courts deal with many cases simultaneously. Therefore, the judges who are obliged to complete the written judgment within the statutory deadline (§ 275 StPO), usually have to write several judgments at the same time. Unfortunately, final appeal courts' decisions on

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[16] Concerning the text of this rule, see the **Appendix** of the publication at hand (Relevant Provisions).

[17] Regarding the respective case law see (with further references): *Engelhardt* in: Karlsruher Kommentar (KK, i.e. a commentary on the German StPO), 5th ed., 2003, § 275 side note 49; *Julius* in: Heidelberger Kommentar (i.e. a commentary on the German StPO, edited by Julius/Gercke/Zöller and others), StPO, 4th ed., 2009, § 275 side note 6; *Meyer-Goßner* (supra note 3), § 275 side note 13, 15.

[18] See: *Krey,* Deutsches Strafverfahrensrecht, Volume 2 (supra note 1), side note 1148-1150, 1246; *Meyer-Goßner* (supra note 3), § 267 side note 42-44 with references to case law.

§ 275 StPO do not always give the impression that those trivial insights have been taken into deeper consideration.

– Legal scholars on comparative criminal law know that Germany is, so to say, "European Champion" in writing voluminous criminal judgments. In large scale trials written judgments may come up to 100 pages, sometimes even many more. Such oftentimes grotesque extensiveness is primarily based on disproportionate as well as unreasonable demands on the written judgment under § 267 StPO by the final appeal courts.[19] However, the authors frankly concede that trial judges sometimes complete the written judgment in an unnecessarily extensive manner for an exaggerated fear of the final appeal courts. Occasionally, though, professional incompetence may be the reason for disproportionately extensive written judgments, since short and concise judgments are typically more difficult to write down than circumlocutory ones.

b) Under § 121 StPO, pre-trial custody for one and the same offence exceeding a period of six months shall not be executed. A statutory exception to this deadline is only given where "the particular difficulty or the unusual extent of the investigation or **some other important reason** do not yet admit pronouncement of judgment and justify continuation of pre-trial custody" (§ 121 subs. 1 StPO). *Per se*, this strict rule is acceptable in light of the constitutional principle of a speedy trial, which is also guaranteed by Art. 6 subs. 1 s. 1 European Convention on Human Rights (ECHR).[20] Nevertheless, the authors call on the State Courts of Appeals (*Oberlandesgerichte*) as well as the Federal Constitution-

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[19] This holds particularly for the *BGH*-requirements on the judgment's explanations concerning the **defendant's personal data** like parents, childhood, debt, criminal record, etc. although not at all expressively required by statute law (§ 267 StPO – see *Krey* [supra note 1], Deutsches Strafverfahrensrecht, Volume 2, side note 1148), furthermore for the *BGH*-requirements concerning the explanation of **evidence taking** and **weighing of the evidence** as well as **the sentencing**.

[20] Thereto: *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), Volume 43, *Institut für Rechtspolitik an der Universität Trier* (Ed.), 2008, p. 12-14. Concerning the text of the aforesaid provision see **Appendix** of this publication (Relevant Provisions).

al Court (*BVerfG*) to consider the following aspects more adequately/reasonably when interpreting the mentioned legal elements ("particular difficulty or the unusual extent of the investigation or some other important reason") of § 121 subs. 1 StPO[21]; this is for the following reasons:

Firstly, the State Courts of Appeals in many cases apparently do not take into deeper consideration that the numerous criminal trials against **foreigners** usually last significantly longer than other criminal trials. This excessive duration results inter alia from the following circumstances:

– in such trials, confessions are rather rare;
– the constant need for translation is very time-consuming;
– very often, it is hard to make foreign witnesses „come straight to the point" during their hearing since in many parts of the world, the willingness to simply answer „yes" or „no" instead of answering in an unnecessarily **circumlocutory manner** or even **beside the point** is less common.

Therefore, criminal proceedings against foreign defendants typically last not only about twice as long as otherwise, but are even more time-consuming.

Secondly, the authors would like to recall the aforesaid commonplace that the trial judges have to deal with several criminal cases at the same time. Regarding the Higher District Courts *(Landgerichte),* in most of such simultaneous trials the accused is under remand.

Thirdly, defense counsels not residing in the court's district may cause loss of time and thus delay the proceedings, particularly in case of significant distance between their offices and the court.[22]

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[21] Regarding the competence of the *Oberlandesgericht* for prolonging the mentioned six month-deadline under § 121 subs. 1 StPO, see § 122 StPO. Concerning the constitutional complaint before the *BVerfG* alleging that the respective *Oberlandesgericht* has violated constitutional rights of the arrested, see Art. 93 subs. 1 no. 4 a *Grundgesetz* (GG, i.e. the German Federal Constitution); thereto *Krey* (supra note 20), p. 10, 11. As to the text of the mentioned provisions see **Appendix** of this publication (Relevant Provisions).

[22] Setting down days for trial by the presiding judge as well as speedy fulfillment of the defense counsel's functions under §§ 147, 148, 168 c StPO are made more difficult in case of significant distance between the defense

Fourthly, by now, it should be known even to the State Courts of Appeals and the Federal Constitutional Court to what extent many defense counsels are prepared to severely obstruct the criminal trial's progress, which shall be explained hereafter.[23]

3. Typical Obstacles to the Speedy Progress of the Main Trial

A few aspects, some of which have been referred to already, shall be sufficient here. They allow for the following statement: In too many cases, the accomplishment of the main trial in criminal cases within adequate time (principle of speedy trial) is unreasonably made harder for the trial judges. This fact has led to the well-known advance of the informal arrangements *(Absprachen)* in German criminal proceedings.[24]

a) Delaying the Criminal Proceedings by Defense Counsels

Firstly: *Motions for Challenge of a Judge as Means to Delay the Proceedings*

Among German trial judges and public prosecutors there is a widespread opinion that the legal concept of challenging judges for fear of bias was extensively abused: In too many cases, such motions by the defendant (more precisely: in his name by his defense counsel) were filed with the intention to delay the proceedings or with other "intentions irrelevant to the proceedings".[25] Even though there may not be sufficient empirical proof for this criticism[26], it is exceptionally true-to-life. In fact, there are many "black sheep" among defense counsels, whose behaviour in criminal proceed-

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counsel's office and the seat of the court – not to mention the increasing costs of the proceeding.

23 Such defense counsels in Germany are frequently characterized as *Konfliktverteidiger*.

24 Supplementary see infra: Part One, III., 4.

25 Thereto e.g.: *Dierlamm*, Ausschließung und Ablehnung von Tatrichtern nach Zurückverweisung durch das Revisionsgericht, 1993, side note 6 et seq.; *Krey,* German Criminal Procedure Law (supra note 1), side note 107, 122, 123.

26 Insofar correct: *Kühne*, Strafprozessrecht, 8th. ed. 2010, side note 732. – Nevertheless: *Dierlamm* (supra note 25) and the authors, cited by *Dierlamm* in footnotes 6-15, illustrate the mentioned abuse convincingly.

ings may justify such reproval. § 26 a subs. 1 no. 3 StPO, which allows to dismiss motions of challenge as inadmissible, has been enacted due to the mentioned abuse.[27]

***Secondly:** Motions to Take Evidence as Additional Means to Delay the Proceedings*

There is a well established fact that motions to take evidence may be effective instruments to delay the criminal proceedings.[28] The legislator has recognized this risk of abuse as well and thus enacted a statutory ground for rejecting such motions "if they are made to protract the proceedings" (§ 244 subs. 3 s. 2 StPO)[29]. However, the case law established by the final appeal courts has mitigated this instrument to a large extent by imposing exceptionally strict requirements for its application.[30]

The following spectacular and highly controversial decisions by the German Federal Supreme Court of Justice *(BGH)* may illustrate to what extent some defense counsels and defendants are prepared to sabotage criminal proceedings. Furthermore, the presentation of those decisions shall demonstrate new legal instruments enacted by the Court to fight such sabotage.

(a) Judgment Dated 07 November 1991

The *Große Strafkammer des LG* (i.e. a panel consisting of two, respectively three, professional judges and two lay judges at the

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27 Unfortunately, this provision is not of great relevance in courts' practice, since it is very difficult for the trial judges to substantiate the legal requirements of the mentioned provision in a way not being subject to a successful appeal on law. Thereto: *Krey* (supra note 25) side note 122 with further references.

28 See: *BGH*, *Urteil* (judgment), dated 07.11.1991; *Beschluss* (ruling), dated 14.06.2005 and 23.09.2008 (thereto the following text of this paper, below, **(a)** to **(c)** with further references); *Krey,* Deutsches Strafverfahrensrecht (supra note 1) side note 1081, 1082 with further references to the *BGH's* case law.

29 As to the mentioned provision's text, see the **Appendix** of this publication (Relevant Provisions).

30 Thereto with references to case law: *Herdegen* in: KK (supra note 17), § 244 side note 86 et seq.; *Krey* (supra note 28); *Meyer-Goßner* (supra note 3), § 244 side note 67 et seq.

Higher District Court) had examined and subsequently rejected 106 motions to take evidence by the defendant. After a detailed analysis of those motions, the court decided on 18 May 1990:

An assessment of the motions in their entirety regarding content, character and sequence illustrates that the defendant's sole intention was to sabotage the proceedings. Therefore he was barred from filing such motions in person. From now on, he was only allowed to file motions to take evidence through his defense counsel.

The *BGH* has approved this decision.[31] Despite widespread criticism by legal scholars[32], the authors **agree** with the Court's standpoint; this may be explained as follows:

The prohibition of **abuse of rights** (convincingly emphasized by the Court), the principle of **speedy trial** as well as the German principle that carrying out criminal proceedings by the court must not depend on **arbitrariness of the defendant and/or his counsel,** are good reasons for the Higher District Court's decision.

This legal point of view may also be based on the already mentioned principle of ensuring an effective criminal justice[33], moreover on the following additional arguments:

(1) The opposing view among legal scholars results in intolerable consequences and thus disregards the *argumentum ad absurdum* (an unwritten, but important aspect of legal interpretation).

(2) The widespread reasoning that the **prohibition of abuse of rights** was an alien element to German criminal proceedings and never could restrict procedural rights of defendants and their counsels, is not convincing. Rather, such reasoning is solely a *petitio principii* (begging the question) being contrary to the principle of uniformity of the legal system.[34]

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31 *BGH St* 38, 111.

32 See inter alia: *Beulke* (supra note 3), side note 150 with footnote 16 with further references; *Kühne*, JZ 2010, 821, 826 et seq. Consenting with the *BGH* inter alia: *Hellmann* (supra note 3), side notes 773, 774; *Krey*, Deutsches Strafverfahrensrecht (supra note 3), side notes 480, 481; *Krey*, Deutsches Strafverfahrensrecht (supra note 1), side notes 1066, 1067 with further references; *Meyer-Goßner* (supra note 3), § 244 side note 69 a with further references pro and contra.

33 Concerning this principle, see supra: Introduction with footnote 3.

34 Opposing the recourse to the **prohibition of abusing rights** as basis for

(3) Finally, some legal scholars argue that the Court has decided *contra legem*. This view is mistaken: The respective motions to take evidence could be **rejected as inadmissible** pursuant to § 244 subs. 3 s. 1 StPO[35] without violating the law, because they evidently were never meant to establish the truth.

(b) Ruling Dated 14 June 2005

The criminal proceedings at the Higher District Court had ended after three and a half years on the 291st day of the main hearing. During this absurdly long trial, the defense counsel's tactics in its entirety was abusing the law, particularly by means of:

– successively filing a total of 320 motions to take evidence without any discernable legitimate interest;
– answering the court's rejections of these motions by voluminous motions for reconsideration *(Gegenvorstellung)* and by mostly inadmissible motions for challenge[36];
– announcing numerous further motions to take evidence.

In reaction to such tactics, the Higher District Court had stated in its rulings dated 28 November and 05 December 2002 as well as 07 January 2003:

The Court was not willing to decide on motions to take evidence filed after 09 January 2003, noon. Only *Hilfsbeweisanträge*[37]

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restricting defendant's and defense counsel's rights inter alia: *Kühne* (supra note 32), 826, 827 with further references; *Roxin/Schünemann* (supra note 3), 19/13. However, allowing such recourse: The Supreme Court's practice (see supra note 28) and the leading opinion among legal scholars, see inter alia: *Beulke* (supra note 3), side note 126 a; *Krey,* German Criminal Procedure Law (supra note 1), side note 26; *Krey,* Deutsches Strafverfahrensrecht Vol. 1 (supra note 3), side notes 233, 480, 481 with further references; *Krey,* Deutsches Strafverfahrensrecht Volume 2 (supra note 1), side notes 1010, 1066 et seq., 1070, 1242 with further references; *Kudlich* (supra note 1), C 89, 90; *Meyer-Goßner* (supra note 3), *Einl.* side note 111 with further references.

35 Concerning the text of this provision, see the **Appendix** of this publication (Relevant Provisions).

36 As to such motions see supra (Part One, II., 3., a, **Firstly**).

37 *Hilfsbeweisantrag* is a motion to take evidence, only filed e.g. for the eventuality of the defendant's conviction. Thereto inter alia: *Meyer-Goßner* (supra note 3), § 244 side note 22, 22 a; *Julius* (supra note 17), § 244 side note 19, 58.

(which are to be decided by the court not until the written judgment's reasoning) were exempted. § 244 subs. 2 StPO[38] remained unaffected.

In light of the case's characteristic features, the *BGH* accepted the trial court's proceeding for the following reasons:

– prohibition of abuse of rights;
– principle of speedy trial;
– principle of ensuring an effective criminal justice.[39]

In this context, the Court has summed up his standpoint in the following *Leitsatz* (headnote):

Where a main hearing was delayed to an extreme extent, namely by motions to take evidence intended to protract the proceedings, the following procedural measure to fight such abuse may be taken into consideration: **Setting a deadline** after which motions to take evidence will no longer be decided each by a separate court ruling, but only later on in the written judgment's reasoning.

The authors agree with this legal standpoint, since the – at times excessive – criticism among legal scholars is mistaken for the same reasons as given supra **(a)**.[40]

(c) Ruling Dated 23 September 2008

Under § 246 subs. 1 StPO, a motion to take evidence may not be refused solely on the grounds "that the evidence or the fact which is to be proven was submitted too late". This provision often serves defense counsels as animation for delaying the proceedings by filing such motions after the taking of evidence has been concluded. According to case law and the prevailing scholarly opi-

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[38] This provision reads: „In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision."

[39] *BGH* JZ 2005, 1010 et seq. (with critical remarks by *Duttge*) = NJW 2005, 2466 et seq.

[40] Accepting the Court's statement e.g.: *Krey*, Deutsches Strafverfahrensrecht, Volume 1 (supra note 3), side note 480, 481; *Krey,* Deutsches Strafverfahrensrecht, Volume 2 (supra note 1), side note 1068, 1069; for further references see: *Meyer-Goßner* (supra note 3), § 244 side note 69 b. However **dissenting** the prevailing opinion among legal scholars, see inter alia: *Beulke* (supra note 3), side note 452 with further references; *Duttge*, JZ 2005, 1012 et seq.; apparently also *Meyer-Goßner* (supra).

nion, these belated motions may be filed until the beginning of the pronouncement of judgment.[41] In order to fight cases of intolerable misuse of the mentioned possibility to sabotage the proceedings, the *BGH* has permitted the trial courts to proceed as follows:[42]

Because of the presiding judge's right and obligation to conduct the hearing, he was authorized to set a deadline for motions to take evidence filed by the parties of the proceedings (particularly the defendant and his counsel). This authorization was not opposed to the aforesaid § 246 subs. 1 StPO.

In case of filing motions to take evidence after the set deadline, this violation of limit might be a serious indication for the intention to delay the proceedings, unless the applicant gave plausible and substantiated reasons for his motion's delay. However, where the respective evidence taking was required by § 244 subs. 2 StPO (*Aufklärungspflicht des Richters*, i.e. the duty of judicial inquiry)[43], such indication was inapplicable.

This third decision of the *BGH* is subject to very heavy criticism among legal scholars[44], but accepted as constitutional by the German Constitutional Court (*BVerfG*, chamber ruling)[45]: The latter has neither found an unconstitutional interference with constitutional rights of the defendant and/or his counsel nor reproved that the *BGH* had decided *contra legem* by disregarding § 246 subs. 1 StPO.

The authors tend towards consenting to the *BGH* ruling and thereby to the *BVerfG* chamber ruling as well, this for the following reasons:

(1) In doing so, one should not simply make recourse to § 31 subs. 1 Federal Constitutional Court's Act (*BVerfGG*). Indeed, this provision sets down a binding force (in the sense of *stare decisis*) of the *BVerfG*'s decisions for all other courts. However, such binding force holds (predominantly) for judgments of the Court's

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41 Thereto: *Meyer-Goßner* (supra note 3), § 244 side note 33, § 246 side note 1, each with further references.

42 *BGH St* 52, 355 = JZ 2009, 316 et seq. (with critical remarks by *Eidam*).

43 See supra note 38.

44 Inter alia: *Beulke* (supra note 40); *Kühne* (supra note 2), 826 (left column); also critical *Meyer-Goßner* (supra note 40) with further references.

45 *BVerfG* NJW 2010, 592 (concerning the difference between **Senates** and their **chambers**, see supra note 1).

Senates, not for their chambers since the First and Second Senate of the *BVerfG* and not their chambers are entrusted with the genuine development of constitutional law. Whether or not even chamber rulings **generally** have binding force under § 31 subs. 1 *BVerfGG* is in dispute[46]; yet this question can be set aside here. For at least in case of such chamber rulings only decreeing the non-acceptance of a constitutional complaint, the respective binding force would be inadequate because no unsettled issues of constitutional law are being decided[47].

Therefore, other reasons than the simple recourse to the binding force of *BVerfG's* decisions are necessary, if one wants to follow *BGH* and *BVerfG* despite the criticism among legal scholars.

(2) These reasons are largely those which the authors have already made recourse to while discussing the above-mentioned first and second decision of the *BGH*, supra, **(a)** and **(b).**

Summing up, the Court has not disregarded § 246 StPO; rather, it has solely reduced the possibility to delay the proceedings by defendant's and/or his counsel's abuse of this rule. More precisely: The *BGH* has not decided *contra legem*, but only carried out a so called *teleogische Reduktion* (i.e. a limitation pursuing to sense and purpose of the law) of the statute's scope of application.

b) Problems for Presiding Judges in Setting Down Days for the Hearing

An additional fact oftentimes causing difficulties for the speedy accomplishment of the proceedings, particularly in case of large scale trials, concerns the **setting down days** for the main trial, the number of which is estimated by the presiding judge. The same holds for setting down days for continuing the hearing *(Fortsetzungstermine)* when the trial lasts longer than initially expected – which happens quite frequently. Nowadays, Germany ironically is being characterized as "leisure park" and the typical German as "world champion in travelling." This, in its core correct, diagnosis

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[46] Thereto: *Umbach/Clemens/Dollinger (eds.)*, BVerfGG, 2nd ed. 2005, § 31 side note 55 with further references; lately *BGH,* ruling dated 18 February 2010, case no. 4 ARs 16/09.

[47] *Umbach/Clemens/Dollinger,* supra note 46.

results in negative consequences for setting down hearing days, especially days for continuing the hearing:

Here, cases of absence due to already booked vacation of

– the respective judges and lay judges,
– defense counsels,
– experts like coroners,
– essential witnesses, etc.

are to be taken into consideration.

In this context, the statutory limitation for cases of the hearing's interruption has to be observed as well: Under § 229 subs. 1 StPO, a main hearing may be interrupted only for a period of up to three weeks.[48]

The presiding judge's setting down days for the hearing is additionally aggravated by the fact that defense counsels and experts typically have to appear in simultaneous trials. A reasonable cooperation between the presiding judge and defense counsels is therefore desirable, however not always ensured with *Konfliktverteidigern*[49]. This is unfortunate, since the State Courts of Appeals and the *BGH* trend towards requiring such cooperation.[50]

4. Ever Increasing Complexity of German Criminal Procedure Law, in particular its Law of Evidence, by a Net of BGH and BVerfG Decisions Becoming Constantly More Close-Meshed

a) Germany is part of the continental European legal system (Civil Law system) in contrast to the Common Law system. Hence, one could assume that the legal regulation of criminal proceedings was primarily carried out by statute law, more precisely by the German Criminal Procedure Code *(StPO)* and Judicature Act *(Gerichtsverfassungsgesetz, GVG)*. However, the law in action in Germany is quite different:

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[48] Yet, § 229 subs. 2-4 StPO allows for longer periods of interruption in a limited number of enumerated cases.

[49] See supra Part One, II., 2., b), Fourthly with footnote 23.

[50] Apparently in this direction with references to case law: *Hellmann*, (supra note 3), side note 617; *Tolksdorf* in: KK (supra note 17), § 213 side notes 4-4 b; intermediary: *Krey,* Deutsches Strafverfahrensrecht, Vol. 1 (supra note 3), side note 299 with footnote 200; *Meyer-Goßner* (supra note 3), § 213 side note 6.

Indeed, the *StPO* as comprehensive codification, supplemented by the *GVG*, forms the core of German criminal procedure law. Nevertheless, in today's legal reality, criminal proceedings are predominantly regulated by case law. Since the founding of the Federal Republic of Germany in 1949, *BGH*, State Courts of Appeals and ultimately the Federal Constitutional Court *(BVerfG)* have severely restricted the trial courts' scope of decision-making by a **net of precedents** becoming constantly more close-meshed, overly complex and covering nearly every imaginable question of detail.

This particularly holds for the law of evidence. Therefore *Kühne* rightly names "the increasing complexity ... caused by ever stricter procedural requirements on evidence taking and weighing"[51] as an important reason for the trial courts' overloading. Such view is shared by most trial judges and corresponds to the impression the co-author *Krey* has gained during his 20 years as judge at the State Court of Appeals *(Oberlandesgericht Koblenz)*.

The mentioned "constriction of trial courts" by the German final appeal courts, additionally by the *BVerfG*, is unique in the world and in the end unreasonable, counterproductive as well as demotivating for the trial court judges. Moreover, their situation is further aggravated by the fact that the *BGH's* case law is to a large extent neither consistent nor free from surprising changes.

Example:

The *BGH's* case law regarding whether or not the examination of witnesses in the main trial is admissible even though they are protected by optical and acoustical shielding **(mummery and distortion of voice)** – in the past answering in the negative the Court's Joint Panel in Criminal Cases (GS), yet new Court decisions answering in the positive in context with simultaneous audio-visual transmission of a witness's testimony from another place into the courtroom under § 247 a StPO –[52], as well as regarding whether or not such interrogation by way of simultaneous audio-visual transmission takes priority over maintaining the secrecy of the witness' identity in criminal proceedings under § 110 b subs. 3 s. 3 StPO.

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[51] *Kühne* (supra note 2), 822 and 828.

[52] See on the one hand *BGH St* 32, 115, 124 (GS), on the other hand: *BGH* NJW 2003, 74; *BGH* NStZ 2005, 43.

Such audio-visual presentation of witnesses "without face und voice" at court instead of maintaining the secrecy of their identity in the main trial is nowadays accepted by some decisions of the BGH[53], however, stated as questionable by other Court's decisions due to lack of sufficient protection of endangered undercover agents (*Verdeckter Ermittler*) respectively police informers (*Vertrauenspersonen der Polizei*).[54]

The witness' examination under visual and acoustical shielding is questionable due to the following reasons:[55]

– Firstly, the aspect of the witness' human dignity as well as the court's dignity.
– Secondly, the fact that such method of interrogation rather **pretends** than guarantees the possibility for the defendant and/or his counsel to confront the prosecution witness.
– Thirdly, the oftentimes insufficient protection from unmasking in spite of mummery and distortion of voice.

Hence, the courts ought to refrain from such an "audio-visual masquerade", or at least not abuse it as substitute for maintaining the secrecy of a seriously endangered witness' identity in the main trial.

Anyhow, the *BGH* has caused new trouble for trial judges, especially at the Higher District Courts. Such troubles are difficult to solve due to the inconsistency between the *BGH's* newer decisions and its above-mentioned prior decision by the Joint Panel in Criminal Cases (GS), as well as due to the contradictoriness between different panels of the Court.

b) The aforesaid constriction of trial courts by the German final appeal courts is further aggravated by the *BVerfG's* sweeping case law, primarily consisting of rulings of the Court's chambers:

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53 *BGH* NStZ 2005, 43.

54 *BGH* NStZ 2004, 345 et seq. – The *BVerfG* (infra note 55) acknowledges that danger in side note 23, 24. –

55 Thereto: *Krey*, Deutsches Strafverfahrensrecht, Vol. 2 (supra note 1), side note 919 et seq., 923.
– Unfortunately, the *BVerfG* (chamber ruling decreeing the non-acceptance of a constitutional complaint, dated 08 October 2009, case no. 2 BvR 547/08) has accepted this "audio-visual masquerade" as not being unconstitutional. However, this ruling is neither binding (see supra, Part One, II., 3., a), **(c)**, (1) with footnote 47), nor viably reasoned. –

Senates and particularly chambers of the *BVerfG* (supra note 1) have shaped the German criminal procedure law by an almost countless number of decisions, forming an additional close-meshed net. This development has led to the phrase *"criminal procedure law as applied constitutional law"*.[56] It well describes the *BVerfG's* practice, but at the same time illustrates a highly questionable aberration of the Court's function from the German Federal Constitutional Court to a *de facto* ***super-appellate court in criminal matters***.

Example:

The *BVerfG's* decisions regarding the stand-by duty of trial court judges in preliminary proceedings in case of search and seizure measures, arrest warrants, and other serious procedural interference with civil rights. Those, by now nearly innumerable, decisions were enacted in order to protect the requirement of a court order (reservation of judicial authority) for such interference against erosion via extensive recourse to public prosecution's and police's subsidiary powers in exigent circumstances.[57] The respective case law of the *BVerfG* has been established since the beginning of the new century, and from that time on has caused **numerous new legal issues**, the solving of which is a problem for the trial courts.

Prior to instancing these issues, the content of such stand-by duty and its extension of the judges' concerned workload shall initially be explained:

During the last decades of the 20th century, there only existed a stand-by duty for judges at lower district courts solely regarding arrest warrants, and restricted to weekends and public holidays **during midday**. This lack of a more comprehensive stand-by ser-

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[56] So e.g.: *BVerfG* E 32, 373, 383; *BGH St* 19, 325, 330; both with further references. Criticism by *Krey*, German Criminal Procedure Law (supra note 1), side note 28.

[57] *BVerfG* E 103, 142 et seq.; E 105, 239; both being decisions of the Court's Second Senate. For references to the innumerous further Court decisions (chamber rulings) see *Trück*, JZ 2010, 1106 et seq. (footnote 16 *et passim*). – As to such **subsidiary powers** in exigent circumstances see infra note 58. –

vice at the trial courts led to an overextensive use of subsidiary powers by public prosecution (and police).[58]

To counter that undesirable development, the *BVerfG* has created a duty to establish an **additional**, much wider-ranging stand-by service beyond the jugdes' regular working hours, covering all working days, weekends as well as public holidays.[59] The trial courts for civil and criminal cases have been burdened with this duty, causing a further extension of their workload.[60]

The latter may be explained by presenting the stand-by duty's scope within the Higher District Court Trier's circuit, being typical for German trial courts:

The judges at every Lower District Court *(Amtsgericht, AG)* within the mentioned circuit, excepting the Lower District Court Trier[61], and the judges at the Higher District Court *(Landgericht, LG)* are

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[58] The mentioned phrase "susidiary powers in exigent circumstances" means the public prosecution's (and oftentimes also the police's) power **to order** interference with civil rights like seizure in preliminary proceedings instead of waiting for a **court order** which is in principle being required by law. Such subsidiary powers are laid down in numerous provisions of the *StPO* (supra note 11), e.g.:
– § 98 subs. 1 s. 1 *StPO* (order of seizure).
– § 105 subs. 1 s. 1 *StPO* with Art. 13 subs. 2 *GG* (order of house search).
In this context, the following formulation of the law is usual: The respective measure *"may be ordered only by the court and, in exigent circumstances, by the public prosecution's office . . ."*

However, there exist some corresponding regulations conform in content but different in wording, e.g. § 81 a subs. 2 *StPO* (physical examination; blood test) which reads: *"The authority to give such order shall be vested in the judge and, if a delay would endanger the success of the examination, also in the public prosecution office including the officials assisting it (§ 152 of the Federal Judicature Act)."*

[59] *BVerfG* E 103, 142; E 105, 239; *Meyer-Goßner* (supra note 3), § 22 c GVG side note 2, 3.

[60] Convincing *inter alia*: *Herrmann*, Deutsche Richterzeitung (DRiZ, i.e. a German law journal), 2004, 319, 321; *Rabe von Kühlewein*, Juristische Rundschau (JR, i.e. a German law journal), 2007, 516, 519; *Bundestag* printed paper (BT-Drs.) 14/9166; disagreeing: *Krehl*, Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra, i.e. a German law journal), 2002, 294, 296 (his optimistic outlook has been refuted by legal reality).

[61] This is because the *AG Trier* has to carry out the still existing, aforementioned stand-by duty on weekends and public holidays **during midday**.

saddled with the stand-by duty, each judge concerned for one week per year during the following hours:

Monday until Friday from 6 to 8 AM, and Monday until Thursday from 5 to 9 PM, as well as Friday from 1 to 9 PM, additionally on weekends and public holidays from 6 AM to 9 PM.[62]

This additional burden was imposed without any compensation, e.g. day release.

Due to the *BVerfG* establishing such comprehensive stand-by service, particularly the following **legal issues** have arisen:

– Firstly, the question of equal treatment between statutory reservations of judicial authority without constitutional rank (e.g. § 81 a subs. 2 and § 163 f subs. 3 *StPO*[63]) on the one hand, and reservations of judicial authority explicitly laid down in the German Federal Constitution (e.g. Art. 13 subs. 2, subs. 3-5, Art. 104 subs. 2 *GG*[64]) on the other hand. The *BVerfG's* case law on this question is rather inconsistent.[65]

In the meantime, *Tolksdorf*, President of the *BGH*, has plausibly declared the stand-by duty in case of solely trivial measures in

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[62] In Festschrift for Achenbach (supra note 1), the authors unfortunately described this additional stand-by duty on weekends and public holidays as lasting from **8 AM** (instead of 6 AM) to 9 PM due to a typing error.

[63] Concerning physical examination/blood test, § 81 a, and longer-term observation, § 163 f *StPO*.

[64] Regarding the Inviolability of the Home, more precisely: house searches, Art. 13 subs. 2, as well as electronic surveillance of private homes ("bugging operations"), Art. 13 subs. 3-5, and Deprivation of Liberty, Art. 104 subs. 2 *GG*.

– Whether, and if so in which cases, there are reservations of judicial authority **with constitutional rank** despite lack of expressive regulation in the German Federal Constitution *(GG)* shall not be discussed here. Nevertheless, it should be emphasized that the *BVerfG* accepts such unwritten constitutional reservations where the respective interference with civil rights is very serious (so inter alia *BVerfG* chamber ruling dated 24 February 2011, case no. 2 BvR 1596/10 and 2 BvR 2346/10, in its side note 17). –

[65] In principle including even cases of simple blood tests within the scope of the stand-by duty: *BVerfG* chamber ruling, NJW 2007, 1345, 1346; further references in *Meyer-Goßner* (see supra note 3), § 105 side note 2, 3, § 81 a side note 25 a, 25 b, and *Trück* (supra note 57), 1108. More restrictive lately *BVerfG*, chamber ruling, supra note 64, emphasizing that the reservation of judicial authority in § 81 a *StPO* has no constitutional rank.

preliminary proceedings like **blood tests** as unnecessary from a factual and a legal standpoint.[66] Insofar, the reservation of judicial authority should be abolished. Corresponding in content, the German State of Lower Saxony has introduced a draft bill[67] in order to limit the detriments caused by an overexpansion of the mentioned stand-by duty.

– Secondly, the problem whether, and if so to what extent, the stand-by judge's order by telephone instead of a written ruling may be sufficient.[68]
– Thirdly, the issue whether or not a hearing of the person concerned has to be carried out in the presence of the judge.[69]
– Fourthly, the question whether or not a **24 hour** stand-by duty is demanded by law.[70]

How far the daily stand-by duty at the trial courts should be extended, regarding its time frame as well as its applicability on reservations of judicial authority without constitutional rank, shall not be decided here. Yet, some remarks may be allowed:

– The relevant **Senate decisions** of the *BVerfG*[71] are only concerned with reservations of judicial authority expressively laid down in the German Federal Constitution (Art. 13 subs. 2,

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66 Spiegel Online dated 05 February 2010, <http://www.spiegel.de/auto/aktuell/0,1518,676185,00.html>.

67 *Bundesrat* printed paper (BR-Drs.) 615/10; 615/1/10. In the meantime accepted by the *Bundesrat* and passed on to the *Bundestag*, see 615/10(B).

68 In principle allowing orders by telephone e.g.: *BGH St* 51, 285, 295; *BVerfG* (chamber) dated 23 July 2007, case no. 2 BvR 2267/06, side note 4 (juris); *Meyer-Goßner* (supra note 65) and *Trück* (supra note 65), 1108-1115, both with further references.

69 The judicial practice is inconsistent. However, the authors agree with the legal standpoint that at least in case of ordering preventive detention against mentally ill persons due to their dangerousness for themselves and/or third persons, a judge's personal interrogation is necessary.

70 Answering in the positive e.g.: *OLG Hamm* (3. Strafsenat, i.e. the Third Panel in Criminal Cases), NJW 2009, 3109, even in case of § 81 a *StPO*, blood test; *Meyer-Goßner* (supra note 3), § 105 side note 2 with further references. Answering in the negative e.g.: *OLG Hamm* (4. Strafsenat), case no. 4 Ss 316/09 and other panels of the court. Vague: *BVerfG* (chamber) NJW 2004, 1442; left undecided: *BVerfG* (chamber) dated 24 February 2011 (supra note 64); rightly, the **Senate** decisions (supra note 57) did not demand for a 24 hour stand-by duty.

71 See supra note 57.

Art. 104 subs. 2 GG[72]). This fact alone illustrates that the extensive application of stand-by duties regarding reservations of judicial authority without any constitutional rank by chamber rulings of the Court and by State Courts of Appeals decisions is questionable.

– Such rulings and decisions are insofar inadequate and unreasonable as they, *de facto,* bluntly express: Ordering criminal procedural interferences with civil rights by the public prosecution (and all the more the police) is undesired. This standpoint seems to be somewhat one-sided, at least in case of reservations of judicial authority without constitutional rank, because it contradicts the German public prosecution's role as "master of the preliminary proceedings" and as "guardian of the law"[73].

– A **24 hour** stand-by service for trial judges is at best adequate and reasonable where reservations of judicial authority with constitutional rank are concerned.

c) The demonstrated close-meshed net of judicial control over the trial courts by the final courts of appeals and the *BVerfG,* criticized by the authors, is globally unique. It results in unnecessary work for trial judges, has a demotivating effect and contradicts the constitutional principle of speedy trial.

This is reflected in the number of appeals on law in criminal matters filed at the *BGH* (nearly 4,000 cases per year), as well as the number of constitutional complaints filed before the *BVerfG* (more than 6,000 per year, predominantly in matters of criminal justice): Both Courts' **inappropriately extensive supervision**, covering nearly every imaginable question of detail, virtually provokes the filing of those legal remedies.

From a comparative law perspective, such intensity of supervision is in any case grotesque: In comparison, the Supreme Court of the United States, despite being the Federal Supreme Court of Justice **and** at the same time Federal Constitutional Court, hears less than 100 cases per year, covering not only criminal matters. The multitude of appeals to the twelve US Federal Courts of Appeals are no

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[72] See supra note 64.

[73] Thereto: *Krey* (supra note 10); *Krey*, German Criminal Procedure Law (supra note 1), side note 143-145, 154, 166-172.

counter-argument, since the authors do not even refer to the nearly innumerable appeals on law to the German State Courts of Appeals (*Oberlandesgerichte, OLG*); not to mention the fact, that even German State Constitutional Courts concern themselves with criminal cases.[74]

Admittedly, it shall be conceded that the mentioned US legal situation is a counter extreme to German law. However, the intensity of supervision by final appeal courts and constitutional courts in other Western countries is also far from the situation in Germany.

III. Consequences of the Trial Courts' Mentioned Overloading

Here, some short remarks shall be sufficient:

1. The German States, under public law employers of the State judges, violate their duty of care as also owed to trial judges.
2. This overloading necessarily leads to considerable delays in criminal proceedings and/or to loss of quality in the trial courts' completion of criminal cases. Of late, the former may result in **detriments** for the respective trial judges: Where *OLG* or *BVerfG* has reprimanded a trial court for violations of § 121 subs. 1 StPO[75], increasingly the respective State ministry of justice initiates disciplinary measures of supervision (e.g. censure) against the judge concerned, even if the reason for that violation lay in the judge's serious overloading. Such a reaction may be more convenient than creating new trial judge positions.[76]

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74 For instance see the Honecker case, Constitutional Court of the State of Berlin *(BerlVerfGH)* NJW 1993, 515 et seq.; thereto inter alia *Krey,* German Criminal Procedure Law (supra note 1), side note 31, 32 with further references.

75 See above Part One, II., 2. b).

76 Some decades ago, State ministries of justice (e.g. in Rhineland-Palatinate) created new judge positions in cases where the State Courts of Appeals had to set free remand prisoners under § 122 *StPO* and in that context had emphasized the trial courts' permanent overload. This was back when co-author *Krey* was judge at the State Court of Appeals Koblenz. At that time, nobody would even have imagined that State ministries of Justice would intimidate overloaded trial judges by disciplinary measures of supervision instead of unburdening them.

3. Where the trial judges' overload does not allow for speedy as well as thorough completion of criminal trials, the independence of judges is endangered.[77]
4. Since decades, there is an increasing "escape into the **deal**" *(Flucht in die Absprache)* in German criminal trials as response to such overload. Despite heavy criticism of this development, in the meantime even the legislator has accepted it by enacting a legal regulation of the so called *Absprachen in Strafsachen* (deal in criminal proceedings) by amending the German Criminal Procedure Code *(StPO)* in 2009.[78]

Before and after this expressive acceptance by law, the deal in criminal proceedings was severely criticized by many legal scholars[79], and even by some judges of the *BGH*.

In contrast, the authors consider the deal to be acceptable in its core.[80] Insofar, only some short remarks shall be presented,[81] since a thorough reasoning would demand for an own paper:

– *BVerfG* and *BGH*, even its Joint Panel in Criminal Cases *(GS)*, have accepted the deal for a long time.[82]
– The necessity to reduce the trial judges' overload by informal agreements (deals) is widely accepted.
– An unreserved and comprehensive confession at an early stage has always been recognized as a legitimate ground for mitigation of punishment as long as such mitigation is not disproportionate.

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77 See the convincing as well as blistering criticism by *Heribert Prantl*, Süddeutsche Zeitung (i.e. a German daily newspaper) dated 10/11 December 2005; likewise: *Krey* (supra note 74), side note 66; *Kühne* (see supra note 26), side note 110.

78 See §§ 257 c, 273 subs. 1 a s. 2 *StPO*.

79 Critically inter alia: *Altenhain/Hainerl*, JZ 2010, 327 et seq.; extremely harsh criticism by *Hettinger*, JZ 2011, 292 et seq.; *Kühne* (supra note 2), 824, 825; *Meyer-Goßner* (supra note 3), § 257 c side note 3; *Roxin/Schünemannn* (supra note 3), 44/64, 65 with 17/19 et seq. Regarding the statutory regulation of the deal (supra note 78) see in detail inter alia: *Beulke* (supra note 3), side note 394-396 with further references.

80 Likewise inter alia *Kudlich* (supra note 1), C 65. By the way, most German defense counsels favour the deal.

81 See in detail *Krey*, Deutsches Strafverfahrensrecht, Vol. 2 (supra note 1), side note 776, 987, 1040-1055 with further references.

82 *BVerfG* (chamber ruling), NStZ 1987, 420; *BGH St* 50, 40 ff (GS).

– Deals do serve the principle of speedy trial.
– Furthermore, they serve the protection of witnesses.

As to opposing arguments typically being presented by legal scholars fighting the deal, the authors refer to earlier reasoning of co-author *Krey*.[83]

PART TWO: Qualitative Overcharging

This term refers to the burden of judges at the trial courts, *Amtsgerichte* and *Landgerichte*, particularly of criminal judges, that is unconnected with their genuine subject. More precisely, it refers to cases which by their very nature should fall into the jurisdiction of another court, be it an administrative court, be it a civil law court.

I. Considerable Burdening with Matters of Police Law (Averting of Dangers)

Surprisingly, under the German State Police Acts the requirement of a court order in case of police interference with civil rights *(Richtervorbehalt)* is not entrusted to the administrative courts. Rather, despite the cases concerned being police law by their nature (averting of dangers) they are entrusted to the trial courts for civil and criminal law.[84]

In the State of Rhineland-Palatinate, this avoidance of the administrative courts' general jurisdiction in matters of police law has been enacted by the State Police Act *(Polizei- und Ordnungsbehördengesetz, POG)*[85] for the following preventive police measures:

– Checking in order to verify a person's identity, § 10 subs. 2 s. 3 with § 15 POG.
– Enforcement of a summons by force, § 12 subs. 3 with § 15 POG.

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[83] See *Krey* (supra note 81), side note 1040 et seq.

[84] This by application of the exception rule in § 40 subs. 1 s. 2 *Verwaltungsgerichtsordnung* (*VwGO*, i.e. Administrative Courts Act).

[85] Dated 10 November 1993, last amended by act of 25 July 2005 (State Law Gazette p. 320). Also published in: *Hufen/Jutzi/Westenberger*, Landesrecht Rheinland-Pfalz, 19th ed., 2010, no. 40.

– Preventive police detention (in order to avert concrete dangers), § 14 with § 15 POG.
– Molecular-genetic analysis, § 11 a subs. 3 POG.
– Search of homes, § 21 subs. 1 POG.
– Special means of secret data acquisition, e.g. use of undercover agents (*Verdeckte Ermittler*), police informers, secret use of technical means for recording pictures and conversations, and electronic surveillance, § 28 subs. 5 s. 4 POG.
– Data acquisition by secret use of technical means against homes („bugging operation"), § 29 subs. 7 POG.

In this context, the jurisdiction lies with the *Amtsgericht*, usually exercised by the investigating judge/examining magistrate *(Ermittlungsrichter)*, beyond the judges' regular working hours by the respective stand-by judge.[86]

Here, the question suggests itself: Why are criminal judges (and in case of stand-by duty even civil judges) entrusted with such matters of police law in spite of their nature as administrative law and the existence of a comprehensive system of administrative courts?

Questions of professional competence presumably might not be playing a decisive role for this avoidance. The more obvious question, which courts in principle decide more speedily, shall not be discussed here. Rather, the mentioned avoidance of administrative courts simply may result from the existence of an established and, despite all overloading, functioning stand-by duty at the Lower and the Higher District Courts – which reflects a widespread principle in public service: *"He, who completes his duties speedily, shall receive more duties."*

II. Extension of the "Adhäsionsverfahren"[87] Intended by the Legislator as an Additional Burden on Criminal Judges

The expansion of the victims' criminal procedural rights since 1986 is an expression of the zeitgeist, and in principle to be welcomed. However, the recently (2004) enacted overexpansion of the

[86] §§ 11 a subs. 3; 15 subs. 2; 21 subs. 1; 28 subs. 5 s. 5; 29 subs. 10 POG. – Regarding the stand-by duty see above, Part One, II, 4, b).
[87] See supra note 4.

Adhäsionsverfahren in the German Criminal Procedure Code *(StPO)*[88] is inappropriate:

Krey and *Wilhelmi* have emphasized in detail and with comments on legal history as well as comparative law that this overexpansion simply means "being on the wrong track".[89] This is for the following reason: A strict enforcement of the 2004 amended *Adhäsionsverfahren* would burden the criminal judges severely with additional matters not sufficiently connected with criminal law. Fortunately, the criminal courts' practice mostly has abstained from applying this overexpanded instrument until this day.

PART THREE: The Overexpansion of Criminal Justice

I. Constant Expansion of Criminal Law against its Nature as ultima ratio

As already mentioned initially, legal scholars like *Kudlich* and *Kühne* name the constant extension of criminal law by incessantly enacting new criminal offences as an important reason for the criminal courts' overloading.[90] This expansion particularly takes place in the field of **supplementary criminal law** (meaning criminal law regulated outside the Criminal Code)[91]; to exemplify the latter the authors refer to the following facts:

– The flood of blanket statutes in the field of criminal law which refer to EU Ordinances, e.g. in wine law, and often are hardly comprehensible due to strings of references *(Verweisungsketten)* to other EU Ordinances.[92] Here, additional problems arise when the object of reference is being substituted.[93]

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88 See supra note 5.

89 See supra, Introduction with footnote 5.

90 See supra note 7.

91 Thereto in detail: *Kühne*, Das Nebenstrafrecht der Bundesrepublik Deutschland, Seoul 2008, Korean Institute of Criminology (bilingual).

92 *Hecker*, Europäisches Strafrecht, 3rd ed., 2010, 7/76-104 with further references; *Krey*, Zur Verweisung auf EWG-Verordnungen in Blankettstrafgesetzen..., in: EWR, Schriftenreihe zum europäischen Weinrecht, 1981, p. 109-201; *Moll*, Europäisches Strafrecht durch nationale Blankettstrafgesetzgebung, 1998.

93 *Hecker* (supra note 92), 7/88-92.

– The ever increasing extension of criminal offences' scope by including cases of committing negligently, covering even slight negligence, whereas the requirement of intent still dominates in the Special Part of the German Criminal Code *(StGB)*.

But even in the so called ***„Kernstrafrecht"*** (i.e. the mentioned Special Part of the *StGB*) a massive expansion occurs, e.g. by including gross negligent/reckless forms of committing offences against property (§§ 261 subs. 5, 264 subs. 4 *StGB*), furthermore by increasing inclusion of any form of negligence (in particular in environmental criminal law). Finally, there is an incremental number of criminal offences the necessity of which is not obvious from a criminal policy standpoint (e.g. § 265 b *StGB*, Obtaining Credit by Deception).[94]

The aforesaid development contradicts an unwritten constitutional principle expressed in the term "subsidiary nature of criminal law" *(ultima ratio)*.[95]

This undesirable development is complemented by another one: There is an increasing number of criminal offences like § 261 *StGB* (Money Laundering), being almost incomprehensible due to their unbelievable extensiveness and complexity.

II. Growing Complexity of Criminal Procedure Law because of Permanent Amendments

The latter insight concerning criminal law leads to a concluding remark on an additional nuisance giving criminal trial court judges "a hard time": The increasing complexity also of the criminal procedure law by permanent amendments[96], oftentimes insufficiently thought-out. In this context the following examples may be given:

– Today's version of § 68 *StPO* as amended by the *Gesetz zur Bekämpfung ... der Organisierten Kriminalität* (*OrgKG,* i.e. Act on Fighting Organized Crime of 1992), which partially has left

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94 See for instance *Fischer,* StGB, 57th ed. 2010, § 265 b side note 4, 5 with further references: This criminal offence was unnecessary.

95 Regarding the Criminal Law as *ultima ratio* among the instruments of the legislator see e.g.: *Krey*, Deutsches Strafrecht, Allgemeiner Teil/German Criminal Law, General Part, Textbook in German and English, Vol. 1, 2002 side note 1 et seq., 16 et seq., 28.

96 See *Kühne* in: LR (supra note 13), *Einl. F*, side note 151-163.

open previous controversies, furthermore has de facto made possible the unmasking of endangered witnesses (particularly of undercover agents and police informers).[97]

– § 247 *StPO* (removal of the defendant from the courtroom, e.g. due to serious endangerment of witnesses), the application of which often leads to successful appeals on law, since in context with the hearing of the respective witness during the defendant's absence other evidence taking has been carried out at the same time.[98]
– The already mentioned § 247 a *StPO* (simultaneous audio-visual transmission of a witness' testimony from another place into the courtroom).[99]

[97] Thereto in detail: *Krey*, Deutsches Strafverfahrensrecht, Vol. 2 (supra note 1), side note 913.
[98] See: *Meyer-Goßner* (supra note 3), § 247 side note 7, 20 b.
[99] See supra, Part One, II, 4 a (with footnote 52-54).

APPENDIX

INTERNET SOURCES ON RELEVANT GERMAN CODIFICATIONS

ENGLISH VERSIONS

I. Grundgesetz (GG) – German Federal Constitution (Basic Law)

http://www.gesetze-im-internet.de/englisch_gg/index.html

II. Gerichtsverfassungsgesetz (GVG) – Judicature Act

http://www.gesetze-im-internet.de/englisch_gvg/index.html

III. Strafgesetzbuch (StGB) – Criminal Code

http://www.gesetze-im-internet.de/englisch_stgb/index.html

IV. Strafprozessordnung (StPO) – Criminal Procedure Code

http://www.gesetze-im-internet.de/englisch_stpo/index.html

V. Verwaltungsgerichtsordnung (VwGO) – Administrative Courts Act

http://www.gesetze-im-internet.de/englisch_vwgo/index.html

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